OPTIONS PAPER (APPROVED)
This document was provided to the Commission and decided upon (decisions recorded).

Options for reform – Review of decisions

Note to the Commissioners:

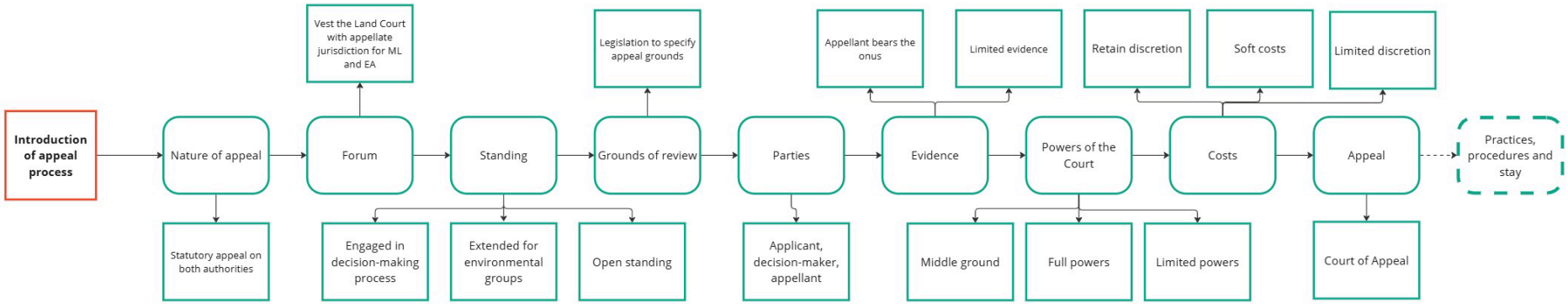
The purpose of this options paper is to provide the Commission with relevant information on reform options for review of decisions about mining lease and associated environmental authorities to support the Commission's decision-making on this part of the review.

This paper begins with a threshold question critical to the consideration of subsequent options and proposals. It then identifies and discusses key topics, proposed as the subject of recommendations.

For some key topics, a proposal for a draft recommendation (coloured blue) is presented. For others, multiple options (coloured orange) are presented. Where multiple viable options are identified, the preferred option is listed first. Where relevant considerations, risks or opportunities are identified by stakeholders, they are noted accordingly.

Given the nature of this review, there is a strong connection between the different parts of the process. Accordingly, options for reform are interdependent. For example, the introduction of post-decision review is dependent on the removal of the pre-decision Land Court objections hearing. Should the Commission decide not to recommend removal of the objections hearing, the consideration of options for review of decisions would necessarily change.

Key decision points



Threshold decision: Should we recommend introducing appeals of decisions on mining leases and associated environmental authorities?
• A key proposal we consulted on was to move from pre-decision merits assessment by the Land Court to post-decision review. • Our consultation proposal had two core elements: - remove the Land Court objections hearing pre-decision - introduce review of decisions on the mining lease and associated environmental authority. • The rationale for this proposal, informed by the guiding principles for our review, is to: - improve the efficiency and effectiveness of the process by aligning the Land Court's function with the traditional role of a court - implement a fair process that supports access to justice by ensuring decisions are subject to appropriate merits review - increase efficiency by streamlining review rights by creating a single appeal pathway. • There was strong support for this proposal from most stakeholders, for reasons consistent with this rationale (this feedback is summarised in Background paper 4). Key stakeholders provided helpful feedback on detailed aspects of the proposal, which is drawn out below. While industry opposed this proposal in their written submissions (see submissions by Queensland Resources Council and Association of Mining and Exploration Companies), this is not wholly consistent with the position industry has communicated in consultations, nor with their expressed concerns about the current mining lease objections hearing process (which they have noted can involve lengthy and complex objection cases which create ongoing uncertainty and high costs, which delays progress and runs contrary to all stakeholder interests: see, for example, submission by Queensland Resources Council). • Given the above, this options paper has been developed on the basis that the decision to introduce appeals of decisions is a threshold decision, below which all other decision points (which pertain to the nature and procedural aspects of the appeal) lie. • Some aspects of this proposal, such as the nature of the appeal, have been developed in response to consultation received on the proposal. These aspects are discussed as part of the relevant topic, below.
The Commission agreed that there should be the introduction of appeals of decisions on mining leases and associated environmental authorities.

Key topics

1. The nature of the appeal

Draft recommendation: Statutory appeal of final decisions on both authorities as a rehearing on the evidence before the primary decision-makers
Key considerations (and relevant implications)

- In our consultation papers, we described the proposed model as a 'combined (merits and judicial) review'. Following further research and consultation, we consider that it is more appropriately framed as a 'statutory appeal' that may entail a review of decisions on errors of fact, law or policy/discretion.
- This is a legal innovation that raises some novel ideas, including the nature of the statutory appeal and the desirability of factual review of Ministerial decisions. We have sought independent peer review from Narelle Bedford, an academic and administrative law expert, who has acknowledged the novel issues raised. In her advice, Ms Bedford concluded that 'the advantages outweigh the disadvantages, the complexities are controllable and this proposal is sound… The fact that a combined statutory appeal power is not common in Australian administrative law should not be considered fatal'. Her advice is threaded throughout this options paper. In summary, in terms of fundamental legal concepts, Ms Bedford advises that this proposal:
  - is consistent with the concept of accountability, notably, the pursuit of transparency, policing the boundaries of public power, correcting the outcomes flowing from an unlawful exercise of power, punishing abuse of power, or initiating systemic reform
  - will have a positive normative effect on government decision-making, providing a timely and consistent mechanism for feedback to decision-makers (this is discussed further below)
  - is consistent with the principle of access to justice (see, for example, the Law Council of Australia's Access to Justice Scorecard, which explains that access to justice must be delivered by a system that is fair, just, accessible, responsive and properly resourced.
- It is possible that the proposal may initially be construed as blurring the functions of judicial and merits review. Judicial review focuses on the legality of a decision, ensuring it complies with the law, while merits review assesses the decision's substance and correctness. This concern is based on a traditional, historical conception which has not been adjusted to take account of the differing constitutional foundations of state courts and tribunals, as compared to the entrenched and strict separation of powers required at the federal level due to the Constitution. There are relevant state examples that are helpful to consider:
  - The Queensland Civil and Administrative Tribunal (QCAT) has been conferred with power to exercise both original and review (appellate) jurisdiction. While these powers are not exercised simultaneously in the same proceeding, it is an example of a state legal institution exercising different types of jurisdiction which in a federal setting may infringe the separation of powers and lead to a blurring of the distinction between judicial and merits review. The designation of QCAT, a tribunal, as a court of record (s 164 of the QCAT Act 2009) is not a common approach and yet this innovation remains in force and effective.
  - The NSW Land and Environment Court exercises both merits review and judicial review powers. These powers are conferred by the Land and Environment Court Act 1979 (NSW). Merits review powers are conferred over separate and distinct classes of decision, while judicial review powers are conferred over separate classes. Judicial review is conducted by Judges of the NSW Land and Environment Court, while merits review is conducted by Commissioners. This structural separation in the legislation is similar to the approach adopted by the Queensland Planning and Environment Court.
- It is possible that the proposal may result in proceedings which are perceived to have an increased complexity. Handling both types of review simultaneously could complicate proceedings, making them more time-consuming and expensive to conduct. This might deter individuals from seeking review due to the increased burden. Material will need to publicly available which addresses this issue, and which explain the efficiency gained from having both types of review conducted concurrently, rather than the added expense and potential delay from two separate proceedings. Particular care and attention will be required by the Land Court where one of the parties is a self-represented litigant. Consideration should also be given to the accrued knowledge gained by regular users of the review system and the inequalities that can arise between repeat parties and one-time users.
- In his 2020 Report following his review of the Environmental Protection and Biodiversity Conservation (EPBC) Act, Professor Graeme Samuel AC expressed the view that, in a mature regulatory framework, judicial review and merits review mechanisms are complementary and operate in concert to test and refine decision-making over time.
- There are two matters that require particular consideration as part of this proposal:
  - the decision-maker for the mining lease application

- the decision under review.

The decision-maker

- The decision on the mining lease application is made by the Minister (cf the decision on the environmental authority application, which is made by the chief executive).
- The issue of whether Ministerial decisions should be subject to a statutory appeal that includes a power for the Land Court to review a Minister's decision on a factual basis is contestable. There are examples of Ministerial powers in other jurisdictions being not subject to merits review (such as migration and the existence of call-in powers in environmental disputes). Legal commentary on decision-making and accountability is instructive. Professor Andrew Edgar has demonstrated that an old distinction about high and low ranked decision-makers has been subsequently abandoned in favour of a commitment to accountability regardless of the status of the decision-maker. Administrative law scholar Ellen Rock, who has written about who should be accountable, similarly raises these types of issues (and others).
- There could be political resistance to the proposal that a decision of an elected Minister could be overturned on a factual matter. The principle of political accountability via elections is the traditional method to uphold Ministerial responsibility.
- An alternative framing is that merits review powers are a legislative creation and therefore could be conferred on a body such as the Land Court if that is the Parliament of Queensland's intent. Other examples exist where a body designated as a court holds merits review powers; this is uncontroversial. The point of distinction here, however, is the concurrent exercise of judicial and merit review powers. Again, the differing constitutional frameworks applicable at the state level provide the crucial distinction to federal bodies. This point may also explain why Administrative Review Council (ARC) consideration of this issue is not entirely helpful, as the ARC is concerned solely with federal administrative law.
- There are case authorities which permit examination of policy in a merits review proceeding to check that the policy is consistent with governing legislation and to ensure that the policy does not have intended consequences that result in an injustice. This is a more limited form of merits review than a revisiting of factual determinations on complex issues such as the public interest. There is a growing acceptance that a court can test evidence, including expert evidence, in climate related litigation (see, for example, Becoming a Climate Conscious Lawyer: Climate and the Australian Legal System).
- The Administrative Review Council (Eighth annual report, Eleventh annual report 1999 booklet) has said that decisions concerning certain major political issues, or of 'high' government policy, may not be appropriate for merits review. Argument in support of this position is that Ministers are subject to the scrutiny of Parliament. The ARC has said, however, that the mere fact the Minister was the decision-maker does not in itself mean the decision should not be subject to merits review (Eight annual report).
- One way to balance concerns raised by stakeholders, and in some of the literature, is to place limitations on the Land Court's powers upon review (discussed in 'Powers' below) to avoid encroaching on the Minister's powers. This is a solution that was identified by the Bar Association of Queensland in their submission.
- Further, jurisprudence from the High Court of Australia has indicated that the Court's jurisdiction in reviewing administrative actions does not 'go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power' (Attorney-General (NSW) v Quin [1990] HCA 21). However, the Court noted that if 'in doing so, the Court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error' (Attorney-General (NSW) v Quin [1990] HCA 21). This position is, however, at a federal jurisdiction requiring a strict separation of powers under the Commonwealth Constitution.

The decision under review

- A key consideration is the characterisation of the Government's decision to grant, grant with conditions, or refuse an application for a mining lease. There are conflicting views as to whether this is an ordinary decision to grant a specific interest in land and resources in a specific location, on specified terms and conditions, or whether this is a political decision.
- Some submitters have expressed the view that the granting of an interest in land and the right to exploit the resources owned by the State based on the public interest is a political decision (see, for example, submissions by Energy Resources Law; Bar Association of Queensland).

- Generally, courts have recognised that the power to consider a wide breadth of factors and decide on public interest is best placed in the hands of a decision maker in a 'political officer' (The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379 [42] (French CJ, Gummow, Hayne, Crennan, Kiefel, and Bell JJ)). This enables a decision maker to exercise their power 'according to government policy' (Plaintiff S297/2013 v Minister for Immigration and Border Protection (2015) 255 CLR 231 [8] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ)).
- Examples provided by the ARC of decisions that should not be subject to merits review have included certain Ministerial decisions related to the cancelation of an exploration licence under the Aboriginal Land Rights Act (Northern Territory) Act 1976 (Cth) (Eleventh annual report). Current Member of the Administrative Review Tribunal, Jason Cabarrús, has previously described matters concerning the environment to be 'inherently political' and that decisions on such matters should be made by elected representatives (Cabarrús, 2009). Professor Andrew Edgar has described the potential differences between 'high' and 'low' policy as those made at the Ministerial level and those made at the departmental level, respectively (Edgar, 2009).
- The purpose of Draft Recommendation 1 is to streamline review and appeal pathways and to reduce multiple avenues to challenge the decisions which causes delay and uncertainty. It is intended that streamlining will be facilitated through the operation of s 12 of the Judicial Review Act 1991, which authorises the Supreme Court to dismiss an application for statutory order for review where there are other review avenues available to a judicial review applicant.
- Due to the supervisory jurisdiction of the Supreme Court as a Chapter III court, however, there is a residual theoretical risk that the Supreme Court could still entertain an application for review (Kirk v Industrial Court of NSW [2010] HCA 1).
- As noted below in 'Forum', bringing together administrative and judicial functions has the potential to create uncertainty about the Land Court's status as a 'public entity' under the Human Rights Act 2019, when conducting a statutory appeal. This could be clarified legislatively. Generally, courts and tribunals will not be categorised as 'public entities' unless they are acting in an administrative capacity (s 9(4) of the Human Rights Act 2019). Generally, 'judicial power' involves the consideration and application of the law and facts of a dispute in order to make a determination of the law and facts (R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd [1970] HCA 8). As noted in PIM v Director-General, Department of Justice and Attorney-General [2020] QCAT 188 (citing Bell J in PJB v Melbourne Health & Anor (Patrick's Case) [2011] VCS 327), however, administrative decisions made by decision-makers 'required to act judicially' may still remain 'administrative in character'. Justice Bell, in Patricks' Case and citing his Honour's decision in Re Kracke v Mental Health Review Board [2009] VCAT 646, provided the following general principles that may be used in considering the character of powers exercised. These include:
  - determining the capacity in which the court is acting when exercising a power
  - judicial functions generally involve making binding determinations of existing legal rights, while administrative functions include the exercise of discretionary authority to make orders creating new rights and obligations
  - the use of precedent and 'legal tradition' characterise judicial power
  - much will depend on whether it is a court of tribunal exercising the power, as well as its purpose, enforcement mechanisms and orders or determinations.

Arguments in support	**Counter-arguments**
• Having a statutory appeal for both authorities will simplify and streamline the process for reviewing decisions, creating a single pathway from the multiple avenues that exist in the current process, with clear efficiency gains. • It will reduce complexities and inconsistencies in engaging in a review.	• A statutory appeal considering errors of fact and law has the potential to create procedural and participatory (standing) challenges. • It may be viewed as the Land Court conducting a merits review function and has the potential to blur the lines between merits and judicial review (Bar Association of Queensland).

• Depending on the Land Court's status in conducting the appeal, it may have greater opportunity to consider how human rights were applied by the original decision-maker.	

Alternatives not proposed

- Separate the appeal pathways for both authority decisions.
- The environmental authority be subject to statutory appeal and the mining lease be subject only to judicial review.
- Change the decision-maker for the mining lease, so that the decision on the mining lease application is made by the chief executive, rather than the Minister, or to separate the decision to grant with the grant itself.

The Commission approved of the draft recommendation as proposed.

2. Forum

Draft recommendation: The Land Court is vested with jurisdiction for appeals of decisions on mining lease and associated environmental authority applications

Key considerations (and relevant implications)

- Our consultation proposal was to retain the Land Court as the relevant forum for merits assessment, recast in an appellate rather than recommendatory role. In consultations and submissions, there was strong support for retaining the Land Court as the forum, with its deep specialist experience acknowledged. Stakeholders did not suggest alternative forums or provide justification for this exploration. We have therefore proceeded to develop our draft recommendations on this basis.
- Draft Recommendation 2 will change the Land Court's role from a recommendatory to appellate function, which will necessitate the consideration of consequential amendments.
- The Land Court's status in conducting a statutory appeal may create some uncertainty as to whether it is a 'public entity' acting in an administrative capacity bound by the obligations under the Human Rights Act 2019 (ss 9 and 58 of the Human Rights Act 2019) or if it is acting judicially depending on the nature of the appeal (this is discussed further below in 'Nature of the appeal').
- Draft Recommendation 2 would streamline the Land Court's role (Environmental Defenders Office; Lock the Fate Alliance; Queensland Law Society) and allow for parties to determine when a review should commence, rather than commencing a hearing upon the making of an objection to an application (Bar Association of Queensland).
- The Land Court may face resource constraints, as simultaneous combined statutory appeals could require more judicial time and expertise, potentially straining the judicial system. This impact would need to be addressed by the Government. However, any potential resource constraints may be off-set by Draft Recommendation 6, to limit evidence upon appeal, as discussed below in 'Onus of proof and evidence', which may arguably reduce appeal hearing times.

Arguments in support	Counter-arguments

• The Land Court is currently conducting assessments in the mining lease assessment process and has the existing knowledge, practices, procedures and infrastructure in place to support Draft Recommendation 2. • Provides the Land Court with a role that is more conventional for a court or tribunal (Bar Association of Queensland) and aligns the process to those in similar jurisdictions. • The Land Court has a specialist expertise that should remain and be utilised in this process (Australian Energy Producers; Bar Association of Queensland). • The use of a specialist court, like the Land Court, would continue the development of environmental law jurisprudence. • Due to the Land Court's current operation and provisions within its enabling Act, it would improve access to justice – without legal formalities, compared to other courts, while maintaining the powers and enforcement of the Supreme Court (ss 7 and 7B of the Land Court Act 2000).	• Other mining associated decisions, such as regional interests decisions, are appealed to the Planning and Environment Court.
Alternatives not proposed	
• Appeal to the Planning and Environment Court. • The establishment of a specialist tribunal. • Retaining the Supreme Court of Queensland as a forum of judicial review (cannot legislate to remove this, but can limit its application by operation of s 12 of the Judicial Review Act 1991, discussed further below in 'Nature of the appeal') .	
The Commission approved of the draft recommendation as proposed.	

3. Standing

Key considerations (and relevant implications) for all options
• Our terms of reference ask us to consider the basis of standing, including for community members and relevant Government entities. In our consultation papers, we described three options for standing, which are reflected in this options paper. • Our recommendation must encourage participation in the process before a decision is made and ensure the correct decision is made in the first instance. A balance must be struck between the need to ensure participation and access to justice and the need to ensure fairness, efficiency and certainty for all parties. • A key matters for consideration, in relation to Options 1 and 2, is whether the Land Court should have discretion to grant leave to appeal outside of the prescribed rules if, for example: - a denial of natural justice would occur (see Productivity Commission Report, Recommendation 9.2) - where a party establishes an appropriate connection to the decision - when it is in the public interest - if there was a reasonable excuse for not participating (Queensland Law Society).
Option 1: Standing for those who formally engaged in the decision-making process before the final decision was made
Key considerations (and relevant implications)
• Under Option 1, prior participation in the mining lease application or associated environmental authority process prior to the decision being made (for example, by making a submission to a decision-maker's assessment report) would be sufficient to trigger standing in the appeals process. • Concerns were expressed by industry that this may not be sufficient enough to establish the appellant's connection to the decision (Energy Resources Law). • There is a risk that parties will make a submission for the sole purpose of securing standing. One way to address this concern is to consider the requirements for the original submission (see, for example, the definition of 'properly made submission' in sch 2 of the Planning Act 2016). • If making a submission to one process alone is deemed insufficient to confer standing, an additional test or tests could be imposed. For example: - the appellant must establish a 'special interest' - the appellant must demonstrate that they are directly affected - If the appellant is not directly affected, they must establish a prima facie case before an appeal can proceed - the appellant must have participated in both the mining lease and the environmental approval application processes.
Arguments in support

- Consistent with current requirement to trigger a merits assessment of an environmental authority by the Land Court, that being, that any person who has made a prior submission on an application, or relevant environmental impact statement, may object to an environmental authority application.
- Ensures that all parties have a genuine interest in the matter and have contributed to the discourse surrounding the mining lease application (Dale Forrester).
- Has the benefits of the current open standing model, only at a more favourable point in the process (Bar Association of Queensland).
- Encourages early participation (Bar Association of Queensland) which improves communication and transparency, meaning parties will be less likely to resort to challenge (see, Samuel Review of EPBC Act).
- Clarifies and simplifies appeal rights.
- Provides certainty for third parties.

Option 2: Standing is extended to environmental groups or organisations formed to protect the environment

Key considerations (and relevant implications)

- Option 2 is modelled on s 487 of the EPBC Act which provides for extended standing in a judicial review, which may apply to environmental groups or organisations.
- Section s 487 of the EPBC Act sets out a clear test which an environmental group or organisation must meet to seek a declaration about the lawfulness of a decision.
- Extended standing under the s 487 of the EPBC Act has been heavily criticised and debated at a federal level. Industry has argued that environmental groups rely on this provision, specifically, to disrupt and delay projects.
- Contrary to concerns expressed by industry, extended standing under the s 487 of the EPBC Act has not resulted in lawfare (for example, see 2020 study by Reynold, Ray and O'Conner). It is unlikely that extending standing at a state level would result in a deluge of cases, especially considering Queensland's current open standing model.
- There is a separate question of whether environmental bodies that have not participated in the process should be able to seek merits review of the final decision (cf s 27 AAT Act).
- Key matters for consideration in relation to Option 2 are whether:
  - environmental organisations who rely on the extended standing provisions should have to demonstrate an arguable case, or that the case is of considerable public importance, before the appeal can proceed
  - standing should be extended to other groups, (for example, associations representing Aboriginal peoples and Torres Strait Islander peoples potentially affected by the project). If so, it would need to be decided whether these groups should be able to seek merits review or only a declaration about the lawfulness of a decision.
- We have heard from Aboriginal peoples and organisations that there have been instances where environmental organisations have made objections on grounds that the application will impact Aboriginal rights and interests, without speaking with the particular group and having their authority, often when it is against their interests. If standing is extended to environmental groups or organisations, it may be beneficial for there to be a requirement that such entity establishes that they have authority from those they purport to represent, to instigate or participate in a statutory appeal.

Arguments in support

- Environmental groups and organisations often represent common interests.
- If standing is uncertain or narrowed for environmental groups, it is unlikely individual parties will challenge decisions on public interest grounds. Environmental parties, rather than individuals, often pool resources, have the ability to represent a wide-range of interests and shoulder risk (Queensland Human Rights Commission).
- Section 487 of the EPBC Act provides certainty by setting clear criteria which the organisation must establish to seek a declaration about the lawfulness of a decision. The common law 'special interest' test is confusing, difficult to establish and inconsistently applied by courts in environmental judicial review matters.
- More efficient than the general law for judicial review. Environmental groups would not need to waste time and money to establish standing in the Land Court.

Option 3: Open standing

Key considerations (and relevant implications)

- Open standing, under Option 3, would be achieved by legislating that 'any person' can seek to appeal a decision made by the Minister or chief executive in relation to mining lease application or associated environmental approval.
- An open standing model could lead to lengthy delays in decision-making because anyone can appeal without prior participation.
- It may not be appropriate for any person to appeal a decision on factual matters or legal error.

Arguments in support

- The right to challenge a decision on a mining application should be available to anyone, because decisions affect the rights of broad classes of Queenslanders (Environmental Defenders Office).
- Since there are other legitimately interested parties, other than those who are directly affected, it may be difficult to define fair, clear and unambiguous standing criteria (AgForce).
- Rather than narrowing standing, the Land Court should have the power to strike out objections for being frivolous or vexatious. We should trust that the Court will exercise its discretion appropriately in distinguishing illegitimate claims brought without a proper basis (AgForce).
- There is no apparent reason why standing for environmental groups should be narrowed. The need for such groups to focus scant resources on meritorious and public interest matters addresses any concerns about 'lawfare' and increased litigation (Queensland Human Rights Commission).
- Open standing is consistent with the rule of law (see, for example, Argos Pty Ltd v Corbell [2014] HCA 50).
- Open standing is consistent with Australia's international obligations. For example, Principle 10 of the Rio Declaration on Environment and Development (1992) requires, inter alia, 'effective access to judicial and administrative proceedings'.
- Limiting oversight of executive action erodes public accountability of the executive arm of government, transparency in decision-making and public trust.
- There are already filtering mechanisms that exist and often limit access to justice (for example, the risk of an adverse costs order).
- If all persons have standing in a Land Court statutory appeal, it may, hypothetically, reduce appeals heard by the Supreme Court.

The Commission agreed with option 1 with the caveat that any person directly affected is still able to apply for leave to join or commence an appeal.

4. Grounds

Draft recommendation: The legislation should specify the grounds on which an appeal could be brought and appellants must specify their grounds of appeal, with grounds not confined by or limited to their submission

Key considerations (and relevant implications)

- The purpose behind Draft Recommendation 1, 'Nature of the appeal' (above) is to streamline and limit the review avenues to provide greater certainty for all parties. To do this, Draft Recommendation 4 seeks to comprehensively provide for the grounds of appeal/review found in the two standard forms of review: merits review (fact and policy) and judicial review (errors of law including jurisdictional error). The grounds must be specified in a way that is broad enough to capture all potential errors, while providing for specificity in any challenge.
- In his 2020 report, Professor Graeme Samuel AC proposed that the grounds for 'limited merits review' should be where the 'exercise of a discretion was incorrect in the circumstances' or where the 'decision was unreasonable in the circumstances' (p. 94).
- An example of an extensive list of grounds of review can be found within s 20 of the Judicial Review Act 1991.
- Other legislation frames grounds for review simple. For example, appeals are to be 'on the ground of error or mistake in law or jurisdictional error' (see, for example, s 63 of the Planning and Environment Court Act 2016). According to Creyke et al (2003), the use of the term 'error of law' reflects most, if not all, grounds for judicial review contained in s 5 of the Administrative Decision (Judicial Review) Act 1977 (Cth) (which are reflected s 20 of the Judicial Review Act 1991).
- Under Draft Recommendation 4, the proposed grounds for appeal could be that:
  - the decision could not be made lawfully
  - the wrong decision was made
  - the decision was not the correct and preferrable decision.
- A concern related to procedural fairness of the current process is that active objectors to an objections hearing are bound by the objections made to the original authority application (s 268(3) of the Mineral Resources Act 1989), while an applicant may produce further material to their application which cannot be challenged. While parties to an appeal will be required to limit their arguments and evidence to that which was before the original decision-maker (see discussion on 'Evidence' below), the appeal would be of a Government decision, and not an objection pre-decision, as the process currently operates.
- We did not address this topic in our consultation paper and note, as stated above in 'Nature of the appeal', that the appeal structure has since changed from a 'combined merits and judicial review' to a 'statutory appeal'.

Arguments in support	**Counter-arguments**

• Requiring parties to specify their grounds for appeal will assist the parties and the Land Court to understand the real issues in dispute, whereas currently, objectors may make 'wide-ranging unparticularised objections' that have the potential to draw out proceedings (Bar Association of Queensland). • Requiring parties to specify their grounds for appeal will put all parties on an equal footing in running their arguments. Currently objectors cannot amend their objections (which is similar to grounds of appeal in an objections hearing) while the applicant can change their mining proposal, which may raise new grounds of objection.	• As it is proposed that the statutory appeal provide for errors of law and fact on the one appeal mechanism, there is the potential for conflation between the grounds of appeal and outcomes sought.
Alternatives not proposed	
• Appellants may only appeal on grounds related to those raise in the participation process (for example, on submissions made). • The legislation does not specify the grounds of appeal, rather, provides that a decision may be appealed and it is up to the appellant to raise grounds of appeal.	
The Commission approved of the draft recommendation as proposed.	

5. Parties

Draft recommendation: The applicant, original decision-makers and appellant/s are all mandatory parties to an appeal
Key considerations (and relevant implications)
• Draft Recommendation 5 is somewhat reflective of what is currently provided for in objections hearings, with necessary changes (s 186 Environmental Protection Act 1994) and other administrative appeals (s 40 of the Queensland Civil and Administrative Tribunal Act 2009; Planning Act 2016 sch 1). The decision-maker for the mining lease application under the Mineral Resources Act 1989 is not a mandatory party under that Act. The Land Court's Practice Direction 4 of 2018 (amended 2020) provides further commentary on how people and entities can become 'active parties' to an objections hearing. • Consideration will need to be given to how to address circumstances where: - only one authority application is appealed, but the other decision-maker may have an interest in the proceeding or could assist in the appeal (and this will not cause the other application to be appealed) - the mining project is a coordinated or prescribed project, where the Coordinator-General will be involved, under the State Development and Public Works Organisation Act 1971 - there may be other implications in the outcome of the appeal, such as under the Regional Planning Interests Act 2014. • The ability of additional parties to be heard or for interveners to be joined is another consideration. It would need to be clarified in legislation if the Land Court was to be afforded discretion in this regard.

- If there are multiple grounds and parties to the appeal, and where it may make the outcome of other parties and grounds void, the Land Court should develop into its practices and procedures (discussed further below) the sequence according to which parties and issues should be heard (for example, where one party is appealing on an error of law only).
- In our consultation papers, we identified, as it relates to the then proposal for merits review, that we would need to consider the extent to which other parties are to be involved in a review.

Arguments in support	**Counter-arguments**
• The applicant is the party most directly affected by the decision's outcome and should be involved in any appeal of that decision. • On the basis that the original decision-maker's decision is subject to appeal, the original decision-maker should be party to the appeal and make submissions on their position and their interpretation of the law and evidence before the Land Court. A similar argument may be made for additional parties, such as the Coordinator-General, who may be impacted by the outcome of an appeal. • Involvement of the Departments administering both Acts, which hold specialist expertise, would assist the Land Court in its review.	• Only persons or entities with a substantial interest or who are directly affected by the decision should have the ability to participate in the appeal (for example, some appellants may not be directly affected outside of engaging in the participation process, see discussion in 'Standing' above).

Alternatives not proposed

- Only the applicant and decision-maker should be parties to the appeal.
- Only the appellant (if not the applicant) and decision-maker be parties to the appeal.

The Commission approved of the draft recommendation as proposed.

6. Onus of proof and evidence

Draft recommendation: The appellant bears the onus of proof

Key considerations (and relevant implications)

- Currently, no party to a mining lease objections hearing bears the onus of proof as the Land Court is assessing the material referred to it and making its recommendation to the decision-makers on the relevant application (Hail Creek Coal Holding Pty Ltd v Michelmore [2021] QLC 19; Practice Direction 4 of 2018 (amended 2020).
- As it is proposed that the Land Court, in conducting a statutory appeal, hear the matter based on the material before the original decision-maker, it is likely to be classified as a 'rehearing' (rather than a 'de novo' appeal or appeal of the matter 'afresh', where the appeal body is not limited to the evidence before the original decision-maker (J R

S Forces, 2024). In appeals that are by way of a rehearing, the standard position requires the appellant to demonstrate that, having regard to all the evidence before the court, the decision 'is the result of some legal, factual or discretionary error' (Kostas v HIA Insurance Services Pty Limited [2010] HCA 32).

- This is consistent with the ordinary approach that a party asserting a conclusion 'must prove the facts that lead to that conclusion' (Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union [2022] QCA 94). This common law position applies in the absence of any clear legislative shift (The Uniting Church in Australia Property Trust v Queensland Heritage Council [2024] QPEC 25).
- An example of this legislative shift in onus can be seen in the two forms of review available under the Planning and Environment Court Act 2016. The first form or review is the Planning and Environment Court's 'declaratory proceedings', which provide that 'any person' may commence such a proceeding (s 11 of the Planning and Environment Court Act 2016).
- The second form of review is the Court's 'Planning Act appeals', which are akin to a merits review and reverse the onus by providing that the applicant 'must establish the appeal should be dismissed' (s 45 Planning and Environment Court Act 2016). The Act's explanatory note clarifies that the basis for this reversed onus is due to there being 'no particular disadvantage to an applicant in bearing the onus of proof; and by allowing the applicant to state their case first' (Planning and Environment Court Bill 2015 explanatory note). As discussed in 'Grounds' (above), however, Draft Recommendation 4, is to establish a statutory appeal containing grounds of error of fact and law. The Planning and Environment Court's two forms of review separate challenges that are purely on questions of law (declaratory proceedings) and those on questions of fact, law and policy (Planning Act appeals).
- We did not address the matter of the onus of proof in our consultation papers.

Arguments in support	**Counter-arguments**
• This approach is consistent with common law and standard positions in proceedings. • Providing a consistent approach reduces procedural ambiguity for parties.	• Often, the mining lease applicant will be the better resourced out of the parties to a proceeding, being able to afford greater access to legal advice and representation in a proceeding.

Alternatives not proposed

- The applicant (proponent) bears the onus, regardless of who commenced the appeal (section 45 Planning and Environment Court Act 2016).

The Commission approved of the draft recommendation as proposed.

Draft recommendation: An appeal is a rehearing on the evidence before the primary decision-makers, with opportunity to lead further evidence in defined circumstances

Key considerations (and relevant implications)

- In our consultation papers, we proposed that the review model would limit the evidence before the Land Court to that which is before the original decision-maker, subject to the Court's discretion to admit new evidence 'in exceptional circumstances'.

- The primary objective behind Draft Recommendation 6 is to promote good decision-making that is underpinned by an effective participatory community process. By requiring the appeal to be conducted on the material before the original decision-maker, it is hoped that all the best material related to the application will be before the original decision-maker so as to withstand any later challenge.
- Professor Graeme Samuel AC suggests that allowing new material to be included in an appeal or review causes delay to the outcome, without necessarily improving it (p. 93). Professor Samuel suggested that limiting the evidence on review to that before the original decision-maker has the two following benefits (p. 94):
  - it ensures decisions are 'reasonable' at the time they were made
  - it contributes to ensuring high-quality decisions that are transparent and consistent.
- During the consultation process, a range of stakeholders raised points about the scope and application of this proposal to limit evidence upon appeal, these matters included:
  - the proposed discretion to allow further evidence in 'exceptional circumstances' is too high of a threshold. It instead should be in the 'interests of justice' (Queensland Environmental Law Association)
  - the exception should include fresh evidence related to the rights and interests of Aboriginal peoples and Torres Strait Islander peoples when it arises during or after the original decision, for example, where it arises from a native title proceeding (Parallax Legal)
  - fresh evidence should be admissible to consider human rights where there are evidential gaps in the original decision or if new evidence arises (QHRC)
  - the Land Court should have the general power to seek out evidence if it is not led by the parties (QHRC).
- In the context of industrial action commenced outside the legislatively prescribed timeframe, the term 'exceptional circumstances' has been given its ordinary meaning and 'requires consideration of all the circumstances' that must be 'out of the ordinary', 'unusual', 'special' or 'uncommon', but need not be unique. Exceptional circumstances may also be a single matter or a combination of factors (Naidoo v Scenic Rim Regional Council, citing Nulty v Blue Star Group).
- In Queensland legislation, the term 'interests of justice' appears to primarily be used when it relates to the court's discretion to dismiss an application or discontinue a proceeding (see for example, ss 13 and 14 of the Judicial Review Act 1991 and s 103K of the Civil Proceedings Act 2011). However, Applegarth J in Conias Hotels Pty Ltd v Murphy [2112] QSC 297 explained that in 'considering where the interests of justice lie, one has to consider the sense of legitimate grievance that a party may have if, on one hand an order of the present kind [an order to appoint an additional expert] is refused and, on the other hand, the sense of grievance a party may have if an order of the current kind is allowed'. His Honour continued to state that 'obviously, there are other considerations, including the costs implications for parties, separately and collectively, and whether ordering a further expert will delay the trial'.
- Under the Uniform Civil Procedure Rules 1999, when conducting an appeal, the Court of Appeal may only receive further evidence where there are 'special grounds' (r 766). The Court of Appeal in Singleton v Lockyer Valley Regional Council [2024] QCA 103, citing Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, has said that the following three conditions must be fulfilled for circumstances to amount to 'special grounds':
  - it must be shown that the evidence could not have been obtained 'with reasonable diligence'
  - if given, the evidence would 'probably have an important influence' on the outcome, but 'need not be decisive'
  - the evidence 'must be such as is presumably to be believed', that is, 'it must be apparently credible, though it need not be incontrovertible'.
- There may be challenges in ensuring the Land Court is able to receive all the evidence it needs to properly decide an appeal if the threshold is too high. For example, if the appellant is seeking the inclusion of additional conditions which were not considered and supported by an evidentiary base before the original decision-maker.

Arguments in support	**Counter-arguments**

• The proposal supports good decision-making by incentivising an applicant to provide their best and complete evidence in support of their application. • Limiting the evidence to that before the original decision-maker has the potential to make the process more efficient (Bar Association of Queensland), while allowing the Land Court to exercise a discretion to admit further evidence where needed. • The proposal places all parties in an equal position related to evidence, while currently there are limitations on the evidence that objectors can produce in an objections hearing.	• Limiting evidence may create an unfairness to parties where there is a delay between the decision on one application (the mining lease after the environmental authority application has been decided) and fresh evidence arises following the decision and before appeal (Bar Association of Queensland). • It may be detrimental to the efficiency of the Land Court statutory appeal to limit material to that which was before the original decision-maker (Bar Association of Queensland). • Depending on the Land Court's powers, limiting evidence may not result in the best decision being made on the best available evidence or may restrict the scope of variations to conditions.

Alternatives not proposed

- New evidence that was not before the original decision-maker can be admitted upon appeal.
- No new evidence can be admitted and the appeal is to be determined purely by that before the original decision-maker ('on the papers').

The Commission approved of the draft recommendation that appeals should be by way of rehearing on the evidence before the primary decision-makers, with opportunity to lead further evidence in defined circumstances. The Commission referenced section 56 of the Land Court Act 2000, but did not consider 'exceptional circumstances' or 'grave injustice' appropriate as a test.

7. Powers of the court

Option 1: Middle ground (affirm, affirm with varied conditions or sent matter back to the original decision-maker)

Key considerations (and relevant implications)

- In our consultation papers, we put forward the following three options as potential outcomes for consideration without indicating a preference.
- As noted in 'Nature of the appeal' (above), there may be concerns about the Land Court's ability to review a Minister's decisions. This option seeks to address those concerns and is more consistent with the typical functions of a court or tribunal in reviewing administrative decisions. That is, the Land Court, on appeal, may affirm (including by varying any conditions) or remit the matter to the original decision-maker and not substitute its own decision in place of the Minister's (or the chief executive's, as the case may be for environmental authority applications).
- This option was identified as a potential circuit breaker for a possible 'feedback loop' of decisions, where the matters are remitted to the original decision-maker and appealed again (Bar Association of Queensland). However, the concept of a 'feedback loop' may still arise if the decision is remitted. Narelle Bedford's view of this issue is that it 'can be addressed by internal public service measures and professional education about the nature of merits review and instruction that all decision-makers subject to merits review should adopt a strategic and learning-based approach'. Narelle views a 'feedback loop' as having potential advantages in enhancing broader decision-making processes, referring to the Commonwealth Ombudsman report (Learning From Merits Review, noting this is developed for the federal context). A similar resource could be developed for Queensland decision-makers subject to factual reviews.

- The Land Court's power to affirm and vary conditions raises at least three points:
  - Evidence will be limited to that before the original decision-maker (see above in 'Onus of proof and evidence'). There is a potential for further evidence to be required to assist the Land Court in varying any conditions upon appeal. This will need to be considered as part of the evidence recommendation.
  - Stakeholders have raised concerns about the impact of conditions being varied, requiring amendment to their project plan (Energy Resources Law).
  - Following from this, the option to vary conditions creates an issue related to the separation of powers where the Land Court is empowered to vary conditions, as this may, at times, significantly change the application to that originally made and determined. However, in instances where the variation is limited, it may create further delay and duplication in sending the matter back to the original decision-maker to remake, which may then be subject to another challenge. A way to address this may be to require the Land Court, when considering any changes to conditions, to do so with input or consent of the original decision-maker. This will seek to ensure the conditions are appropriate and implementable and reduce possible challenges.

Arguments in support

- This option provides a balanced approach to dealing with the Land Court's powers upon appeal by placing parameters around its ability to 'stand in the shoes' of the original decision-maker while limiting the requirement for remittal for minor variations.

Option 2: Full powers with discretion to exercise as the court sees fit

Key considerations (and relevant implications)

- As noted above in 'Nature of the appeal', the Minister's decision to grant or refuse a mining lease application may be considered to be a political decision and one not suitable for review by a court (other than on an error of law, like judicial review). Empowering the Land Court with non-exhaustive powers and discretions to make an order it sees fit, which may include substituting the original decision for its own, may be considered inappropriate and a blurred line between judicial and administrative/political power (Energy and Resources Law).
- While this approach occurs in other jurisdictions, such as proceedings under the Planning Act 2016, where the Planning and Environment Court can 'change' or set aside a decision and replace it (s 47 Planning and Environment Court Act 2016), these types of decisions are often made by a local government, and not the Minister, negating any concern of a court's encroachment on political or government power. Further, the Planning Act 2016 confers upon the Minister a power to 'call in' an application, which has the effect of discontinuing any appeal (s 104 of the Planning Act 2016). This was a matter raised by the Bar Association of Queensland. Another approach to removing the merits review pathway is taken in New South Wales where, in certain circumstances, the relevant application is referred to a 'public hearing' (see p. 25 of Background paper 3).
- Similar to the above option, if the matter is remitted to the original decision-maker, there is a potential for a 'feedback loop' of decisions (Bar Association of Queensland).

Arguments in support

- The Land Court is an impartial, specialised and credible arbiter that can make good decisions free from political influence or risk of corruption (Consultation paper 1, p. 44).
- This option is consistent with the powers of the Planning and Environment Court (Consultation paper 1, p. 44).
- This option may assist in achieving an objective of reducing delay, by allowing the Land Court to substitute its own decision, rather than remitting it to the original decision-maker to remake in accordance with any direction or guidance from the Land Court.

- Following a hearing, the Land Court would have heard all material required to make an assessment and outcome in the shoes of the original decision-maker, achieving efficiency.

Option 3: Limited powers to affirm the decision or remit the decision to the original decision-maker

Key considerations (and relevant implications)

- In his 2020 report, Professor Graeme Samuel AC proposed that the outcome of a 'limited merits review' should result in the decision being affirmed or remitted to the original decision-maker with recommendations on remaking or varying the decision (p. 94).
- In our consultation papers, we identified a downfall of this option is that it lacks certainty and finality. This option leaves open the possibility for further information to be provided to the decision-maker following the review, which is a problem with the current system.
- As discussed in the two options above, efficiency can be achieved by empowering the Land Court with the power to vary an authority's conditions where the fundamental basis of the decision to approve is not in error. However, as also noted, there may be circumstances where significant variations to conditions are determined to be necessary, which may have considerable impact on the nature of the applicant's project and other implementation issues. Further, providing the Land Court with full power to make the decision in place of the original Government decision-maker may raise concerns of the appropriateness of the judiciary making Government decisions.
- Similar to the above option, if the matter is remitted to the original decision-maker, there is a potential for a 'feedback loop' of decisions (Bar Association of Queensland).

Arguments in support

- This option respects the political nature of mining decisions and places final responsibility and accountability with Government (Consultation paper 1, p. 44).

The Commission agreed with option 2.

8. Costs

Key considerations (and relevant implications) for all options

Issue of costs in a combined statutory appeal

- The issue of costs in a combined statutory appeal to the Land Court may need to be addressed explicitly in the Land Court Act 2000, noting that different rules traditionally apply to the awarding of costs in merits and judicial reviews.
- Traditionally, in a merits review proceeding, each party bears their own costs (see, for example, s 100 of the QCAT Act 2009). This rule is currently a default rule if the Land Court, or Land Appeals Court does not order costs for a proceeding as it considers appropriate (see below).
- In judicial review proceedings, costs typically follow the event (see, for example, s 46(4) of the Judicial Review Act 1991; Alpine Pty Ltd v Brisbane City Council [2024] QSC 93 [4]; Attorney-General (Qld) v Barnes [2014] QCA 152 [44]–[47] (Atkinson J); Anghel v Minister for Transport (No 2) [1994] QCA 232; [1995] 2 Qd R 454 (McPherson JA).). The Judicial Review Act 1991, however, is singular across all judicial review statute in having costs provisions, particularly for specific matters.

- In correspondence with the QLRC, Ms Bedford advised that it may be preferrable that if each party is to bear their own costs following a Land Court statutory appeal, the Land Court Act 2000 should contain an explicit provision applying this rule. She advised that it may also be preferable that legislation contains a power for the Land Court to order otherwise in certain circumstances, including in the interests of justice, or in frivolous/vexatious proceedings.
- Complexities with the combined statutory appeal will need to be considered when deciding the most preferrable option to progress to a recommendation.

Land Court's discretion as to costs

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

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

Key considerations (and relevant implications)

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

Arguments in support	**Counter arguments**
• Promotes consistency in how costs would be approached (for example, power and discretion to apply different cost rules) by the Land Court. This includes consistency between a Land Court statutory appeal and ordinary proceedings and appeal proceeding before the Land Appeal Court.	• Where there is a broad discretion as to costs, this can be deterrent for parties that are not well resourced and are apprehensive of an adverse costs order. • Most submissions prefer a form of costs protection (protection from adverse cost orders) and certainty at the outset. • Option 1 is inconsistent with approaches taken in other Acts:

• Provides flexibility in which cost rules could be applied. For instance, permits the possibility of costs following the event which could support applicants, with some reasonable prospect of success, to obtain legal representation. • The Land Court's discretion is not limited more than is already the case. • Preserves jurisprudence and guidance. • Does not require reform, but for the repeal of s 52C.	- Judicial Review Act 1991: gives the possibility of prospective costs protective orders - Planning and Environment Court Act 2016 and QCAT Act 2009: adopt a 'soft cost' protective model (see Option 2) - Land and Environment Court Act 1979: affords express discretion to not awards costs against an unsuccessful public interest applicant. • The power and discretion afforded to the Land Court in s 27A to apply different cost rules presents some confusion. While McNamara in MacMines affirmed that there is no general rule that party bears their own costs, he observed that case law may suggest that the Land Court tends to favour that party bears their own costs. An applicant cannot, however, rely on the application of this rule. • There is no list of express factors that the Land Court may (or must) consider when awarding costs. For example, the Land Court is not required to consider (but may consider of its own volition) the position of the parties, public interest motivations of the applicant, or if the applicant is an Aboriginal or Torres Strait Islander person/landholder (these factors have been identified in submissions). • Case law about a court's discretion as to costs, and when to depart from the ordinary rule, already recognises established principles and factors. For example, the position of the parties, public interest features of the applicant, who may benefit from the applicant's success, or if the applicant is an Aboriginal or Torres Strait Islander person/landholder. These could be codified without much controversy.

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

Key considerations (and relevant implications)

'Soft costs' model

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

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

- Soft cost provisions tend to be accompanied by a list of (exhaustive and non-exhaustive) statutory factors a court/tribunal must consider when exercising its discretion in awarding costs. These factors can include:
  - conduct during proceedings
  - the nature and complexity of the dispute
  - relative financial position of the parties
  - case management principles.
- The prescribed circumstances listed under s 52C(3) Land Court Act 2000 may have utility in a soft cost model. These factors include that an objection is outside the Court's jurisdiction, frivolous or vexatious, or an abuse of the Court's process. Land Court Practice Direction 4 of 2018, which applies to procedure for mining objections hearings, also sets out, at [84], matters that the Court will take into account in deciding whether to make a costs order. These matters could also inform the factors considered by the Court in a statutory appeal (with modification) as part of a soft costs model and include:
  - whether the application or an objection was made primarily for an improper purpose
  - whether the application or an objection was frivolous or vexatious
  - whether a party has introduced, or sought to introduce, new material at the hearing
  - whether a party has defaulted in the Court's procedural requirements
  - whether the applicant for a mining claim, mining lease, or environmental authority did not give all the information reasonably required to assess the application
  - whether the applicant or an objector abandoned or did not pursue their application or objection at the hearing
  - any other relevant factor.
- Factors codified under s 60(1) of the Planning and Environment Act 2016 are similar and may also have utility.
- In certain matters (which includes judicial review of administrative decisions), the Land and Environment Court may exercise discretion to not order costs against an unsuccessful applicant, if satisfied the proceedings were bought in the public interest (reg 4.2 of the Land and Environment Court Rules 2007). In decisions where a court's discretion as to costs is unfettered, they have expressed that public interest applicants ought not to be granted a 'free kick at litigation' (Oshlack v Richmond River Council [1998] HCA 11, [6] (Kirby J)).

Implementation

- The soft costs model could be implemented by:
  - **Relying upon and amending s 27A**: unless the soft costs model to be applied to statutory appeals was inserted as a separate/discrete sub-section, this reform would affect the cost model applied to all Land Court general proceedings, which would in turn, curtail the discretion of the Court which enables it to order costs for a proceeding as it considers appropriate as the default rule. The amendment could include a list of exhaustive or non-exhaustive factors the Land Court must consider when it exercises its discretion to deviate from the general rule that each party bears their own costs.
  - **Introducing a new provision**: this would apply to statutory appeals only. It could include a list of exhaustive or non-exhaustive factors the Land Court must consider when it exercises its discretion to deviate from the general rule that each party bears their own costs.

- Including public interest as a factor to consider could be achieved by:
  - Listing a range of factors that may feature in a public interest application for example: 'whether the applicant will make a personal, or financial gain from a successful outcome'; 'where the applicant is an association, whether its objects have a public character and the application was pursued in accordance with those objectives'; 'whether numerous people would benefit from the applicant's success' or
  - Referring simply to 'whether the proceedings are brought in the public interest' and allow the Land Court to decide if it is a public interest application.

Arguments in support	**Counter arguments**
• Consistency with current cost provisions in the Land Court Act 2000: - s 52C (the current costs provision for recommendatory matters) is a soft costs provision with factors the court may consider - s 27A(1)(b) refers to a soft costs approach albeit the costs discretion of the court is the default rule (i.e. s 27A is 'almost' costs protective). • A soft costs approach appears to be favoured by stakeholders in submissions, particularly if it allows the Court to consider public interest factors. • There is some precedence for a soft costs approach in other legislation (Planning and Environment Court Act 2016; Land and Environment Court Rules 2007; QCAT Act 2009). • Could better support certain applicants to access a statutory appeal, for example Aboriginal or Torres Strait Islander applicants or public interest applicants. • The possibility of costs being ordered in the applicant's favour remains open at the Court's discretion, as exercisable under a statutory list of considerations. • A soft costs provision with listed factors can include a range of relevant considerations already identified in case law or reflected in comparative provisions.	• While Option 2 aligns with a traditional cost model for merit reviews, it does not reflect the traditional approach to costs for judicial review. The discretion afforded to the Land Court to award costs differently where circumstances warrant deviation might, however, create enough flexibility to apply a different cost rule where the statutory appeal is, in effect, judicial in nature. This may need to be accounted for expressly in the list of factors to be considered by the Court when exercising its discretion. • Fetters the Land Court's discretion when compared to Option 1. • Does not 'go as far' as an asymmetrical approach (see Option 3). Some submissions supported an asymmetrical model, particularly when the applicant is an Aboriginal or Torres Strait Islander person or landholder. • Bearing one's own legal costs still presents access issue for some applicant groups. • A soft costs approach may prevent accessing legal representation. • Costs protective provisions are designed assuming the applicant experiences access to justice barriers, this is not the case for some applicants.

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

Key considerations (and relevant implications)

- This limited discretion model is modelled on s 49 of the Judicial Review Act 1991, which applies to judicial reviews, and follows substantive equity principles.
- Option 3 would introduce a new provision to the Land Court Act 2000 that enables an applicant, or other party in a statutory appeal proceeding to the Land Court, to make an application as to costs.
- Under Option 3, the Land Court's discretion would be limited to making an order that:
  - an applicant's costs be paid by another party (for example, the respondent) or

- each party bear its own costs.

- This approach would require a prospective decision as to costs, potentially at a directions hearing.
- In considering a cost application, the Land Court would have regard to a list of factors, either those factors provided in sub-ss (2) and (3) of s 49 of the Judicial Review Act 1991, or alternative factors (see above). As is the case with s 49(2)(b) of the Judicial Review Act 1991, public interest could be listed as a factor to be considered. If this is done, it would be beneficial to define 'public interest' in the Land Court Act 2000 or in a practice direction.
- If an application as to costs is not made, the ordinary costs rule of 'costs follow the event' would apply. This rule is traditionally applied in judicial review proceedings; it is not typically applied to merit review proceedings. This would have bearing on a combined statutory appeal that, in effect, is a merits review.
- A new provision modelled on s 49 of the Judicial Review Act 1991 would be inconsistent with the power and discretion afforded to the Land Court in s 27A of the Land Court Act 2000 and the Land Appeal Court in s 57A. This inconsistency would need to be justified with clear policy.

Arguments in support	**Counter arguments**
• The Judicial Review Act 1991 is the only judicial review statute with a costs provision that directs/limits the court's discretion. The costs provision in the Judicial Review Act 1991 is historically linked to access to justice and improving government accountability (see, Fitzgerald Inquiry; Narelle Bedford, 'The Winner Takes It All: Legal Costs as a Mechanism of Control in Public Law' (2018) 30(1) *Bond Law Review* 128). • Follows a costs protective approach (favoured by most submissions) but enables the Land Court to decide costs orders based on the nature of the proceeding and the characteristics of the applicant (for example, a proponent applicant or an individual applicant). • Retains some (albeit limited) discretion of the Land Court to vary the original costs decision. • Already in effect. The Land Court may be able to draw on jurisprudence and guidance notes. • Section 49(1)(d) of the Judicial Review Act 1991 is reflected in reg 4.2, Land and Environment Court Rules 2007 with deals with review proceedings bought in the public interest.	• Fetters the Land Court's discretion when compared to Options 1 and 2. • In exercising discretion to decide on the appropriate costs model, previous decisions have drawn on public interest cases jurisprudence which establishes it is exceptionally rare for courts to decide favourably on costs because of the circumstances of a public interest applicant. Consequently, courts have not tended to utilise s 49(1)(d) of the Judicial Review Act 1991, despite cases with arguably strong public interest features. • While s 49(1)(d) of the Judicial Review Act 1991 follows substantive equity principles, well-resourced proponent applicants would argue a formal equality approach (same rules for all) is fairer. • Requires the applicant to make an application as to costs. This may disadvantage any self-represented applicants.

The Commission's decision on costs has been reserved and a memo for further consideration has been provided.

9. Appeals of Land Court decisions

Draft recommendation: A party to the Land Court statutory appeal can appeal that decision to the Court of Appeal on the ground of error or mistake in law or jurisdictional error
Key considerations (and relevant implications)
In our consultation papers, we identified an avenue of appeal directly to the Court of Appeal, avoiding appeal to the Land Appeal Court. *Standing* • Currently, a party to a Land Court proceeding has standing to apply to have a matter reheard (s 12 of the Land Court Act 2000) or a right of appeal to the Land Appeal Court (s 64 of the Land Court Act 2000). • Draft Recommendation 9 is consistent with current standing rules and would allow a party to a Land Court statutory appeal to appeal that decision to the Court of Appeal. It is also consistent with standing given to parties to a Planning and Environment Court proceeding who may appeal a decision to the Court of Appeal (s 63 of the Planning and Environment Court Act 2016). *Availability and pathway of appeal* • At present, a party to a Land Court proceeding may: - **Apply to have a matter reheard**: section 12 of the Land Court Act 2000 provides that a party to a Land Court proceeding who is dissatisfied with a decision may apply to the Land Court for leave to have the matter reheard. The Land Court must not grant leave unless it is satisfied that the decision is based wholly or partly on a mistake of fact. If granted and practicable to do so, the matter must be reheard by the same member. - **Exercise a right of appeal to the Land Appeal Court**: section 64 of the Land Court Act 2000 provides that a party to a Land Court proceeding may appeal a decision of the Land Court, in full or part, to the Land Appeal Court. • Additionally, pursuant to s 64 of the Land Court Act 2000, a party to a Land Appeal Court proceeding may appeal that decision to the Court of Appeal, with the leave of the Court of Appeal. • The appeals pathway reflected in Draft Recommendation 9 is the standard process for most appeals from other courts and tribunals. For instance, this includes appeals from the Planning and Environment Court to the Court of Appeal (s 63 of the Planning and Environment Court Act), and appeals from Victorian Civil and Administrative Tribunal (VCAT) to the Court of Appeal (with leave; s 148, VCAT Act 1998). • Under Draft Recommendation 9, a party to a Land Court proceeding would require leave from the Court of Appeal to make an appeal to the Court of Appeal. This is consistent with section 74(2) of the Land Court Act 2000, which applies to appeals to the Court of Appeal from the Land Appeals Court, and s 63(2) of the Planning and Environment Court Act 2016 which applies to appeals from the Planning and Environment Court to the Court of Appeal. *Grounds of appeal* • Pursuant to s 74(1) of the Land Court Act 2000, a party to a Land Appeal Court proceeding may appeal that decision to the Court of Appeal on the ground: - of error or mistake in law on the part of the Land Appeal Court - the Land Appeal Court had no jurisdiction to make the decision

- the Land Appeal Court exceeded its jurisdiction in making the decision.

- The grounds of appeal stated under s 74(1) of the Land Court Act 2000 are reflected in s 63(1) of the Planning and Environment Court Act 2016.The scope of the grounds of appeal in Draft Recommendation 9 would be consistent with these grounds.

Powers of the Court of Appeal in relation to an appeal

- Pursuant to s 76 of the Land Court Act 2000, the Court of Appeal holds the power to do one or more of the following when hearing an appeal from the Land Court of Appeal:
  - return the matter to the Land Appeal Court for decision in accordance with the Court of Appeal's decision
  - affirm, amend, or revoke and substitute another order or decision for the Land Appeal Court's order or decision
  - make an order the Court of Appeal considers appropriate.
- Note, however, that this is inconsistent with the powers proposed to be provided by the Land Court discussed preferred option 1 above in 'powers of the court'.
- Under Draft Recommendation 9, the Court of Appeal would hold the same powers as it does under s 76 of the Land Court Act 2000, with the exception of the power to substitute another order or decision for the Land Court's order or decision. This constraint on the Court's power respects the political nature of decisions about mining projects and places final responsibility and accountability with Government (Consultation paper 1 [237]). It also reflects the powers afforded to the Land Court in relation to a statutory appeal (see 'powers of the court').

Arguments in support	**Counter-arguments**
• Promotes consistency with other appeal processes, including in relation to: - existing standing rules for appeals from the Land Appeals Court, and the Planning and Environment Court, to the Court of Appeal - other appeal pathways, including appeals from the Land Appeals Court and the Planning and Environment Court to the Court of Appeal - the requirement to have leave from the Court of Appeal, which applies to appeals from the Land Appeal Court and Planning and Environment Court to the Court of Appeal. • Reduces delay by removing a Land Appeal Court appeal, which could in turn, be appealed to the Court of Appeal. • This streamlined appeal pathway benefits efficiency without removing appeal rights (Consultation paper 1 [205]). • Limiting the power of the Court of Appeal to exclude the power to substitute respects and affirms the separation of powers doctrine.	• Removes a level of appeal (from the Land Court to the Land Appeals Court) which inheres a broad ground for appeal: 'A party to a proceeding in the Land Court may appeal to the Land Appeal Court against all or part of the decision of the Land Court' (s 64 of the Land Court Act 2000). • Limiting the power of the Court of Appeal to exclude the power to substitute: - means the appeal lacks certainty and finality - may create a 'feedback loop' of decisions being made, reviewed, quashes and remitted to be remade, from which the process is repeated (Bar Association of Queensland). This could in turn, create delay.
Alternatives not proposed	

- *A party to a Land Court appeal can appeal that decision to the Land Appeal Court*: we do not consider this intermediate appeal to the Land Appeal Court appropriate for decisions on mining projects (Consultation paper 1 [205]).

The Commission approved of the draft recommendation as proposed.

10. Practices, procedures and stay

Draft recommendation: Amendments should be made to the Land Court's current practices and procedures to accommodate for the appellate jurisdiction

Key considerations (and relevant implications)

- Depending on the approval of the recommendations, a further draft recommendation will be to amend existing practices and procedures to accommodate for the shift in the Land Court's role in conducting a pre-decision hearing to a post-decision appeal. As part of developing this draft recommendation, we have been consulting with the Land Court, on a confidential basis, as to the potential impacts of our recommendations and have sought the Court's detailed feedback on the recommendations and consequential amendments. We are having a further meeting with the Land Court at the end of February 2025 to receive its feedback.
- In addition to consultation with the Land Court, we are holding another legal professionals' workshop mid-February, where these matters will also be considered and discussed.
- The requirements of fairness and justice must apply to combined statutory appeals. The Land Court will need to ensure its procedures and powers are clearly explained to the parties. This should provide a counter measure to any concerns of potential bias, which may be raised if the Land Court is involved in both assessing both the legality and the factual basis of a decision.
- At a high level, however, some key practices and procedures have been identified for consideration:
  - practice direction on the application of s 27B (preliminary conference) and s 27C (ADR process) of the Land Court Act 2000 in a mining lease and environmental authority statutory appeal
  - if costs do not change (see discussion above) the application of s 27A of the Land Court Act's considerations would apply
  - the requirement to provide reasons and the development of appeal books
  - time frames for applying for a statutory appeal, taking into account the relationship between the mining lease application being dependent on an approved environmental authority
  - whether the Land Court should have the power to strike out frivolous or vexatious appeals (similar to those in s 188A of the Environmental Protection Act 1994 and s 267A of the Mineral Resources Act 1989)
  - if approved, the application of limited evidence in a Land Court proceeding is unique and procedures will need to be developed to approach this, in particular, as it relates to expert evidence
  - whether there should be an automatic stay upon an appeal being lodged.

This recommendation is being further developed.