EDO Qld.
Environmental Defenders Office
Using the law to protect our environment.

30 Hardgrave Rd WEST END, QLD 4101
tel +61 7 3211 4466 ***fax*** +61 7 3211 4655
edoqld@edo.org.au www.edo.org.au/edoqld

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MQRA Project Team, DNRM
By email only: mqra@dnrm.qld.gov.au

Dear MQRA Project Team,

Mining lease notification and objection initiative discussion paper

Thank you for the opportunity to provide a submission on the *mining lease notification and objection initiative discussion paper* (the **discussion paper**).

Who we are

The Environmental Defenders Office, Queensland (**EDO Qld**) is a not-for-profit, non-government, community legal centre specialising in public interest environmental law. We provide legal representation, advice and information to individuals and communities, in both urban and rural areas, regarding environmental law matters of public interest.

Summary of our submission

We ***strongly oppose*** the following proposed changes in the discussion paper:

1. Limiting the right to object to a mining lease (**ML**) application to directly affected landholders and local government.
2. Limiting the right to make a submission on (and appeal against) an environmental authority (**EA**) application to site-specific projects only.
3. Restricting the matters which the Land Court can consider for a ML objection.
4. Removing the requirement to re-notify an EA application when an Environmental Impact Statement (**EIS**) has been conducted under the *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWO Act**).
5. Removing restricted land status in situations where a miner is granted exclusive surface rights to access land.

We are, however, in support of moving to a 'post grant' appeal process for EA applications.

EDO Qld supports the current and long-established laws for open standing, for any person or group to be entitled to object to any mining proposal (both ML and EA) in open court to have evidence scrutinised about the benefits and detriments of a proposed mine.

Further detail on our views on the discussion paper follows. If you have any further queries relating to this submission, please contact Evan Hamman at EDO Qld on (07) 3211 4466.

Yours faithfully,

Jo-Anne Bragg
Principal Solicitor
Environmental Defenders Office (Qld) Inc

Contents

1. Limiting the right to object to a mining lease (ML) application to directly affected landholders and local government.

We ***strongly oppose*** this proposal for the reasons set out below.

1.1 There is no evidence of delay or vexatious proceedings

We are very concerned with the proposal to remove long standing objection rights where there is absolutely no evidence to justify those changes. References by the current State Government to vexatious objectors in "Melbourne and California"[1] are absurd and not based on any factual data.

At page 8 of the discussion paper, the Department highlights a 'concern' it has about individuals or groups lodging objections simply to delay or obstruct mining projects.

In order to have a proper informed view, two points need to be made clear:

1. In the Land Court case cited on page 8 - *Xstrata Coal Queensland v. Friends of the Earth*[2] - the Court did not accept the objector had a mere 'philosophical' concern about the impacts of the mine. Instead, the President of the Land Court found that, despite the mine being entitled to proceed, the objector had acted in the public interest in bringing their action:

   > "*[The objector] adopted a public interest stance in bringing the objection… their only interest was in the protection of the environment and the community generally*"

   The President of the Court went on to highlight that:

   > "*[the] objector conducted their case in a reasonable manner and did not cause any unnecessary lengthening of the case.*"[3]

2. The second point to make is that the "Funding Proposal" referred to at page 8 of the discussion paper was produced by Hancock Coal who attempted to file it in the Land Court to suggest improper motives on the part of a Queensland-based environmental objector. Importantly, the Land Court rejected Hancock's assertions as ***not being relevant to the proceedings*** concluding:

   > "*all parties, when they come before the Court at first instance… should be seen as coming before the Court with clean hands. That is the presumption until proven otherwise, or until conduct suggests otherwise.*"[4]

Furthermore, the Productivity Commission - Australia's independent research advisory body on economic, social and environmental issues - directly contradicts the discussion paper on this issue. In its final report on Major Project Development Assessment Processes (November 2013), the Commission concluded:

> *"Under the [Commonwealth's] EPBC Act, there are no examples of summary dismissal for vexatious litigation (Edgar 2011),* ***and no data has been provided for other jurisdictions.*** *Courts can also award legal costs against vexatious applicants,*

> *which can help discourage vexatious applications (PC 2011c)…* ***Thus, it does not appear that the existing protections against vexatious litigation need to be strengthened."***[5]

This is contrary to what is represented in the discussion paper which cites a 'May 2013 draft' of the Commission's same report as evidence for 'concerns' about vexatious litigants.[6] It is misleading to base significant policy changes on a draft report which is contradicted by the final form of that same report.

Conclusion: The State Government has not produced any evidence of delay or obstruction using the Land Court process which would justify removing long standing community objection rights. In fact the evidence all suggests that there is no problem with delay or obstruction.

1.2 The Court already has significant powers to deal with vexatious litigants

The Land Court already has a broad variety of powers to deal with vexatious objections filed with no merit. Again, as the Productivity Commission concluded in its November 2013 report, there is no evidence of vexatious delays and:

> *"The courts already have the ability to summarily dismiss an action due to it being frivolous, vexatious, or an abuse of process."*[7]

In Queensland, the Land Court can punish an objector who has acted unreasonably or vexatiously by making them pay legal and associated costs of the miner and State Government from the proceedings.

Under section 34 of the *Land Court Act 2000* (Qld), the Court may order costs for a proceeding in the court as it considers appropriate. Under section 268(9) of the MRA, the Land Court may award costs against any objector who withdraws their objection or does not pursue their objection at a hearing. Under section 268(2) of the MRA, the Land Court can hear any evidence to inform itself in any way it considers appropriate to determine the relative merits of an objections and is not restricted by any rule or practice.

More to the point, the Court has highlighted its ***willingness to use adverse cost orders*** to penalise unreasonable objections in the Court:

> *"If it is found at the end of the day that the objection has been one that is spurious or vindictive … then that is a matter that can be addressed by an award for costs."*[8]

As mentioned in paragraph 1.1, there has not been a history of vexatious litigants in the Land Court so these powers simply have not been used.

Further still, any party to a Land Court proceedings in Queensland (e.g. a mining company or the State Government) could at any time apply to have vexatious objections 'struck out' or removed from the Court process altogether before a hearing takes place for lack of merit.

Based on our experience representing public interest litigants in the Land Court, this has never occurred. Even in the "Funding Proposal" raised in the discussion paper[9] produced by Hancock Coal in a recent Land Court case, no application was made by Hancock Coal to strike out the objectors' claim for being unreasonable or vexatious, and indeed the Court found the issue of the "Funding Proposal" to be irrelevant to the proper hearing of the

proceedings. (One could easily conclude that Hancock Coal did not make an application to strike out the objectors' claim as the company knew such an application had no merit and would not succeed.) The Government should not move to alter long standing public rights when the mining interests they seek to protect have not even attempted to avail themselves of the existing remedies.

One occurrence (the only occurrence we could find) of a 'vexatious' application in the Land Court, was the case of *Ralph DeLacey v Kagara Pty Ltd*,[10] where Mr De Lacey, who was a competitor in the mining industry[11] - tried to strike out the objection of a **rival** mining company - Kagara Pty Ltd:

> *"We wish to make application to the Court to have this matter struck out on the grounds that the objection by Kagara Pty Ltd is spurious and vindictive and is intended to mislead and waste the Court's time."*[12]

In the end, the Court refused to strike out the objection. On this basis, the vexatious abuse of Court process tactics are in fact more likely to be used by rival industry participants wasting taxpayer money in the Court, rather than community groups legitimately challenging the impacts of a proposed mine.

As a final point, Queensland's *Vexatious Proceedings Act 2005* (Qld) allows the Attorney-General or a person against whom another person has already instituted a vexatious proceeding (e.g. a mining company) to apply to the Court for a vexatious proceedings order to stop them from ever litigating again.[13]

A recent search of the vexatious proceedings register reveals that in over 30 years of the register, to the best of our knowledge, there are no persons or groups associated with objecting to mining projects in the Land Court in Queensland.

Conclusion: We affirm the finding of the Productivity Commission (2013) that significant judicial powers already exist to deal with vexatious or unreasonable objectors to strike out cases from unreasonable objectors upon application by the miner. These powers have not been exercised due to an absence of vexatious community litigants in the Land Court.

1.3 All minerals are held for the public interest

According to the MRA, with a few narrow exceptions, minerals are the property of the Crown.[14] However, these minerals are not ultimately held in a *private property* capacity to merely exploit without any consideration of the public interest in those resources.

Removing public objection rights concerning the tenure will deny all Queenslanders the opportunity to participate in decisions which influence our common resources.

Minerals can be categorised as public/state property reserved for the common good of the people. In the High Court case of *Yanner v Eaton*,[15] the High Court considered the ownership of fauna (which in Queensland is vested in the State[16]) and their Honours cited esteemed legal scholar Roscoe Pound:

> *"the so-called state ownership [of public resources] is only a sort of guardianship for social purposes…The state as a corporation does not own a river as it owns the furniture in the state house….What is meant is that conservation of important social*

> *resources requires regulation … to eliminate friction and prevent waste, and requires limitation …in order to prevent their extermination."*[17]

The case of *Yanner v Eaton* concerned the Crown's property in fauna, but the same applies to any public 'resource' owned by the State in a public capacity. In the second reading speech on the 1924 Bill which first vested property in fauna in the Crown: The Minister said:

> *"It [the fur industry] is an industry that really belongs to the people, and although the Bill, amongst other things, makes it quite clear that the native animals of the State belong to the people of the State, I do not think there is any doubt in the minds of any one regarding that question already. The native animals belong to the people in just the same way as the timber and the minerals belong to the people, and they cannot be sold without permission."* [18]

The current MRA, section 269(4) requires the Land Court to consider the 'public interest' when deciding an objection to a mining lease.

Whilst 'public interest' is not defined in the MRA, past cases considered that it might include analysis of things such as:

- Public utilities such as railways, roads, parklands and other forms of public infrastructure in or near the proposed lease area;
- Identified sites of historical interest; and
- Identified sites of aboriginal significance.[19]

The High Court in *Sinclair v Mining Warden*[20] has said the Public Interest in Mining necessarily involves weighing of benefits and detriments.

> *"In relation to the Mining Warden (now the Department of Natural Resources and Mines) In this task a warden will not be required to pursue his own inquiries; he may confine himself to the material placed before him by the parties. Whether or not he may in addition have recourse to his own knowledge of relevant matters, gained perhaps in his capacity as a* ***mining warden****, need not now be resolved; there is in this case nothing to suggest that the warden did in this case rely on any such knowledge."*[21]

It determining public interest it is highly relevant for the Government to consider the views of the public.

It has been a long standing right for the Land Court to consider - quite separate from the requirement to consider environmental impacts - whether the public interest or right will be prejudicially affected by the granting of an application for a mining lease.

Conclusion: Queensland minerals belong to all Queenslanders. This necessarily requires consideration of the public interest and whether mining is an appropriate land use when making a decision on:

1. What minerals should be extracted (if any);
2. Who should extract those minerals;
3. How those minerals should be extracted and for how long; and
4. Where exactly that extraction should occur (if at all).

Therefore any person or group should be able to object to a proposed ML as well as an EA.

1.4 The Land Court is the best forum to debate whether mining is appropriate

The discussion paper argues that it is inappropriate to argue in the Land Court about whether mining is an appropriate land use. The paper says:

> *"it is not reasonable to expect individual miners to carry the burden of philosophical debate on whether mining is an appropriate land use…"*[22]

On the contrary, it is entirely reasonable to consider this at the ML application stage. In fact, the MRA has for many years explicitly acknowledged this is required to be considered. Section 269(4)(m) requires the Land Court to consider:

> *"the current and prospective uses of that land, the proposed mining operation is an appropriate land use."*[23]

In fact, two of the long standing principal objectives of the MRA (section 2) include:

- minimising land use conflict with respect to prospecting, exploring and mining; and
- encouraging responsible land care management in prospecting, exploring and mining.

How does the Government expect to achieve effective stewardship of land without debating whether mining is an appropriate land use for that area? This must be considered in the context of resource companies making considerable profits from extracting resources and the onus naturally falls to a proponent to establish that such activities are an appropriate land use.

1.5 Broad public interest objection rights are fundamental to democracy

It is internationally recognised that open standing to act in the public interest helps to inform our society of the best way forward.[24] Those groups act without private interests in the outcome of the case.

It is up to the Court to decide whether, in accordance with the legislation properly made by Parliament, their concern is in the public interest, not for the Parliament to deny participation rights on the basis of some vague mandate to grow the economy.

Former High Court Judge Michael Kirby has written of the need to include civil society in decisions which affect us all:

> *"The notion that only economic interests help to refine and sharpen advocacy before courts is highly dismissive of the role of civil society organisations in a democratic polity."*[25]

In almost all cases, the proceedings will affect the development of our laws and society more generally and ***actually reduce the need for further litigation***.

Courts and parties in the Court have often identified that there is significant merit in hearing arguments which test new matters of law. In the Land Court case of *De Lacey*, the Court refused to strike out the objections. In the course of the decision, the Court stated:

> *"…there are substantial matters of public policy and statutory interpretation of the Mineral Resources Act which have significant flow-on effects to mining lease applicants throughout the State and to the very workings of the legislation."* [26]

Former High Court Judge Michael Kirby has spoken at length about the benefits of public interest litigation to our society. He states that it is a totally false premise to argue that business will grind to a halt by allowing communities to engage with Court processes:

> *"… the spectre of hordes of troublesome litigants, willing, without justification, to devote the time, money and energy required by public interest litigation is unconvincing."*[27]

Conclusion: Consideration of a wide variety of views in Government decision making is vital to a functioning democracy. Stifling debate about resources which belong to everyone in society is never acceptable. Broad public objection rights for any person or group to object to mining lease applications must remain in the legislation.

2. Limiting the right to make a submission on (and appeal against) an environmental authority (EA) application to site-specific projects only.

We ***strongly oppose*** this proposal in the paper. Limiting the right to make a submission and appeal against an environmental authority (EA) will be devastating for our communities and our environment.

This will effectively remove community submission and appeal rights in up to 90% of applications per year.[28]

Many hundreds of groups and individuals right across Queensland take an active interest in the health of our state and have considerable expertise in understanding and managing environmental impacts including impacts on our air, national parks, threatened species, groundwater the Great Barrier Reef and many other issues.

Why is the Government excluding these people and groups from considering the impacts of up to 90% of mining projects applied for each year?

The paper says that this reduction in rights is justified on the basis that "the broad right to lodge objections for standard applications and variation applications is disproportionate to the risk and impact of projects that qualify for these types of EA and places unnecessary costs and uncertainty on industry."[29]

You would be hard pressed to find any ecologist to agree that there are definite criteria upon which we can agree what is high risk and low risk. It depends on so many factors such as:

- Location of mining;
- Type of mineral mined;

- The process used for mining;
- Scale and intensity of mining;
- Cumulative impacts from other mines;
- Cumulative impacts from other activities; and
- Impacts of variables (climate change, migratory species and changing nature of surrounding land uses).

All of these require a site-specific analysis of the impacts on that particular area ***at the time the mine is applied for***.

Surely a mine which will be approved for 20-30 years or more, can reasonably be expected to go through a 30 day public notification period?

Queensland, New Zealand and Alberta - debunking myths in the discussion paper on Rights to publicly notify

The discussion paper compares Queensland to Alberta and New Zealand:

"Neither New Zealand nor Alberta Canada, jurisdictions with a similar industry to Queensland, has a general requirement to publicly notify." [30]

These comparisons are spurious at best.

According to the World Coal Association, Australia produces over 420 million tonnes of coal a year,[31] 200 million of which comes from Queensland.[32] We are the world's largest supplier of coking coal, accounting for roughly 50% of world exports.[33] Queensland is a significant producer of coking coal.

In comparison, 80% of New Zealand's coal - around 4 million tonnes - is produced Solid Energy New Zealand Ltd a state-owned enterprise, with only one shareholder, the New Zealand Government.[34]

There are currently several large mines proposed for the Galilee basin with 30-40 megatons of coal to be produced each per year. There are approximately 52 coal mines in Queensland - 41 in Central, 4 in Northern and 7 in Southern Region, over 20 mineral mines and many medium to large (>50 000 tonnes/year) extractive quarries operating in Central Queensland.

One coal mine alone in the Galilee basin – the Carmichael Coal mine - is proposed to produce 60 million tonnes per year.[35] This one mine would produce more coal than the whole of New Zealand and Alberta (and many hundreds of other countries) combined.

Similarly, direct comparisons with Alberta, Canada are misleading. Alberta's total coal production is around 37 million tonnes[36] - about half of the Carmichael mine proposed for the Galilee Basin.

Further, most of our largest mines are foreign owned and operated (or are proposed to be) including Swiss, Japanese and Indian companies: Xstrata, Mitsui Coal Holdings, Sumisho Coal Australia Pty Ltd, and Adani Mining. In comparison, in New Zealand, 80% of their coal is produced by a State Owned Government entity.[37]

Compared to other countries, Australia has a very high numbers of mammals, birds, amphibians, reptiles. [38] In Queensland, we have two and a half times as many vascular plants than all of Canada combined. [39] Why weren't these facts dealt with in the discussion paper? The quality of analysis of the discussion paper is not well-balanced.

We also have the Great Barrier Reef, the Great Artesian Basin, the Great Dividing Range.

Australia is in the unenviable top 10 countries in the world with the highest number of endangered species (Canada and New Zealand are not).

Comparisons to frameworks in Alberta and New Zealand are irrelevant and do not provide a meaningful comparison in this regard.

3. Restricting the matters which the Land Court can consider for a ML objection.

Restricting the matters which the Land Court can consider on an objection is a totally unjustified response to a non-existent problem. In fact, it is counterproductive from an efficiency point of view as it restricts the Court from finding a workable solution to the issues presented to it in an objection.

The mining company should be under an obligation to prove to the public that its past performance is satisfactory and that it has the necessary technical and financial capabilities to carry out the project. Why is the Government worried if this will be too 'technical' for the Land Court and objectors to consider? There has been no issue in the past.

In fact most of that information will be provided in document by the mining company anyway so there is no extra burden. In the recent case of *Xstrata Coal Qld Pty Ltd & Ors v Friends of the Earth, Brisbane Co-Op Ltd & Ors*[40] the Land Court was satisfied that the applicants had the financial and technical capabilities to carry on the proposed mining operations based on the fact that the company's EIS described their financial and technical capabilities to undertake the mining.[41]

Furthermore, a reduction in powers of Land Court to consider matters with respect to the ML inevitably increases the discretion of the Minister and the Department to make administrative decisions without proper review. This is particularly the case for Coordinated Projects where the Coordinator General's decisions on impact assessment are not open to statutory judicial review.

Where is the transparency and accountability in Government decision making if these important considerations are removed from an independent objection process?

Conclusion: Restricting the matters the Land Court can consider effectively 'handcuffs' the Court in its decision making process and denies the considerable expertise and understanding of a breadth of issues in our communities. It also increases the discretion of the Minister/ Department and is not transparent if as a society we are unaware of who is applying for mining and whether they have the capabilities to satisfy the project's conditions.

4. Removing the requirement to re-notify an EA application when an Environmental Impact Statement (EIS) under the *State Development and Public Works Organisation Act 1971* (Qld) (SDPWO Act) has been conducted.

It is already incredibly difficult for community groups and landholders to effectively participate in the submission process for large scale projects. Why make it even more difficult by denying them key information or a second opportunity to clarify their views?

It is not simply enough to rely on a condition that 'if the risks of the project haven't changed' then they can make another submission, as there are **no set criteria for this decision** and it gives the public no certainty or confidence in the regulatory process.

More to the point, the Environmental Impact Statement (**EIS**) process for Coordinated Projects is significantly different from the EIS process under the *Environmental Protection Act 1994* (Qld) (**EP Act**) because the Coordinator General can impose any conditions he sees fit – rather than be guided by environmental criteria and purposes - and his decisions cannot be challenged by statutory judicial review under the legislation. There are four points worth making:

1. unlike an EIS under the EP Act, although the Coordinator General must advise the proponent an EIS is required, he is **under no obligation** to notify the public that an EIS will be required for a Coordinated Project.[42] This means that the community may have no idea that an EIS is required for the project until a final draft is advertised for submissions some 18 months later.

2. there is **no requirement** for the Coordinator General to publicly notify the draft Terms of Reference (TOR) for the project.[43] In the past, there used to be a requirement to publicly notify, however, the State Government changed this recently through the of the Economic Development Bill 2012.[44] This means the community could effectively be left with no say on what the EIS covers (the contents of the terms of reference), and therefore will be limited to the types of submissions that can be raised about the project when an EIS is released. Contrast this with the EP Act process where the draft terms of reference must be publicly advertised.[45]

3. **statutory judicial review rights are not available** for the EIS process for Coordinated Projects as are available for the EP Act process.[46] This removes a key check and balance in our democratic system. There are no opportunities to statutorily review the Coordinator General's decisions throughout the EIS process, even if he acts improperly, or illegally or otherwise outside of his power. This means that the Coordinator General is effectively immune from challenges on the statutory grounds set out in section 20(2) of the *Judicial Review Act 1992* (Qld). Under the EP Act, EHP is not immune from this important check on executive action.

4. **there is no set period for submissions for an EIS for Coordinated Projects**. The period for making submissions is at the discretion of the Coordinator General.[47] There is no requirement for this to be a 'reasonable period' and there is no minimum period set. Contrast this with the EP Act EIS process which must be at least 30 business days.[48]

Conclusion: The Government should not remove the requirement to re-notify an EA application when an EIS is undertaken under the SDPWO Act. There are very significant differences between the EP Act and the SDPWO Act process which disadvantage landholders and communities trying to come to terms with complex information.

5. Removing restricted land status in situations where a miner is granted exclusive surface rights to access land.

We totally reject the proposal to remove restricted land status where a miner is granted exclusive surface rights, which will mean those mines could come close to schools, residences and community facilities without the owner's consent.

Firstly, it is misleading to place these views in one discussion paper about notification and objection rights, whilst the other paper currently open for comment seeks more detailed changes to the restricted land provisions. That other paper should have clearly highlighted to its readers that restricted area rights will be **entirely removed when surface rights** are granted.

What is the point of having restricted areas for large scale open cut projects if they can simply be removed by open cut mines?

This effectively means that for open cut mines, no school or residence or place of business or cemetery ***will be guaranteed*** a buffer zone between the property and the mining.

Rather, in order to protect 'infrastructure' (including schools, halls and other community infrastructure) landholders will be required to go to Land Court, at their own cost, and participate in the objection process.

This is incredibly concerning when viewed in the context of the proposal to remove community objection rights to the mining lease application and restrict community rights to the EA application for all but the State's largest mines. We note that this will hurt rural people the most as they would not be subject to any buffer zones under the *Regional Planning Interests Act 2014*.

Open cut mines, as seen with the example of the New Hope Mine, have very serious impacts on citizens and communities so they need substantial buffer zones or restricted areas/land between landholders or community facilities and the mines to minimise some of those impacts.

Citizens and community groups need some certainty their health and amenity will be given some protection by basic buffer zones. They do not have the time or resources to go to the Land Court- as is suggested- to argue with rich companies for such basic buffer zones from open cut mines.

Who will protect cemeteries if not the owner of land? Who will seek to protect schools and other 'businesses' such as scout halls, community spaces if not the owner of the land (likely to be the State Government)?

Conclusion: We strongly oppose removing restricted land status where open cut mines are proposed. These are traditionally the largest and most damaging projects because they disturb

the entirety of the surface of the land. Under no circumstances should mandatory distances be exempted from important private and public infrastructure.

6. Support for a 'post grant' appeal process for EA applications

In principle, we support the introduction of a *post grant* appeal process for mining projects provided that:

- The Land Court has the widest possible power to hear all the issues with respect to the mine *de novo* and must consider all submissions made by landholders and the community;
- The Land Court has the final decision (subject to further Court appeal) on both the grant of the lease and Environmental Authority ('EA') and no further 'recommendation' is required;
- An automatic 'stay' on the operation of the mine takes place at the time an appeal is filed;
- The Land Court has the power to amend any condition of the EA, and/or terms of the mining lease, in order to satisfy the issues raised in an appeal, irrespective of whether objections are raised in relation to the lease/EA;
- The Land Court is not restricted to comply with conditions imposed by the Coordinator General in relation to an EA or lease.

Conclusion

The bulk of the proposed changes will only benefit the mining company and cause a further 'rift' between landholders, communities and industry.

The State Government is proposing to strip away public objection rights without any proper basis for policy change. Comparisons to Alberta and New Zealand are without any merit and the Productivity Commission's findings in 2013 directly contradict the discussion paper.

It is absolutely crucial that existing public submission, appeal and objection rights remain in legislation to ensure accountability of decisions. Likewise, it is crucial that the Land Court, an independent entity with no vested interest in the outcome of the process, except to ensure that proper democratic rights and processes are upheld, is given the widest possible ambit to make decisions on proposed mining activities.

In the end, it is a long standing right in Queensland to object to a mining lease and environmental authority (whatever the size of the mine). It is this right which enables our communities to engage in practical decisions which impact on their lives and those of future generations. The government's narrow view on this issue is disturbing and one which we cannot support, particularly given it lacks any proper evidentiary basis.

Appendix – Examples of injustice if the changes proposed in the discussion paper were adopted

Example 1 – Impact of changes on Individual Rights

Anne lives on a 20 hectare property west of Toowoomba. The area is well known for deposits of *benotite* (clay). The State Government says clay mining poses a 'low risk' to the environment if it's less than 10 hectares of disturbance and outside of national parks.

Lotsa Clay Mining Company seeks to develop a mine 5km away from Anne's land. To do so, they require two approvals – a *Mining Lease* under the *Mineral Resources Act 1989* and an *Environmental Authority* under the *Environmental Protection Act 1994*. Lotsa Clay Mining Company applies for both approvals.

Anne hears about the proposed mine through a friend of a friend who is a landholder directly impacted by the mine. The friend is concerned about the indirect impacts on groundwater on her property and Anne starts to think about whether it would impact on the aquifers that underpin the entire region. Under the *Environmental Protection Act*, the company's application is deemed 'low risk' and there is no requirement to notify Anne (or the wider community) exactly what is being proposed.

Lotsa Clay Mining Company obtains its approvals for both the Mining Lease and Environmental Authority and proceed to develop their mine. Anne has no idea when the mining might start or what the repercussions might be for the aquifers, her community or future generations in the area. She has had no formal chance to consider or comment on the impacts of the mine and its indirect effects on her property and livelihood, resulting in an unfair and unjust outcome.

Example 2 – Impact of changes on Community Rights

XYZ Mining Company seeks to develop a 10 hectare mine on the border of a small rural town in Queensland. They require two approvals – a *Mining Lease* under the *Mineral Resources Act 1989* and an *Environmental Authority* under the *Environmental Protection Act 1994*. XYZ Mining Company applies for both approvals.

Concerned about the potential social and environmental impacts of the proposed mine on their town, the *Best Interests of the Community Action Group* (BICAG) form to consider the mining proposal. They are made up of local landholders including farmers and people who have just moved to the area.

Recent changes to the *Mineral Resources Act* only require the applicant to notify the direct land owner and the Local Government of the application for a Mining Lease. While BICAG express concerns in regards to the proposed mine (e.g. the mineral being mined, the size and the potential impacts), they, as a group are not considered to have a 'direct interest' in the land and are not notified or have a right to comment or object on either the ML and EA as the mine was considered 'low impact', which the group disagrees with. The lease application is successful and, whilst BICAG are unsatisfied with this outcome, they have no legal avenue to appeal the decision.

Despite legitimate social and environmental concerns over the impacts of the mine, the BICAG are unable to participate in the approvals process for the mine.

Example 3 – Cumulative Impact of changes

Over a period of four years, a small pastoral community located in the Galilee Basin in Central Queensland has witnessed the approval and subsequent development of six 'small scale' mine projects. All six mine projects were considered by the State to be 'low risk' due to their size and the mineral mined. The community as a whole, despite not being happy with the increasing risks involved with more and more smaller mines, had no avenue to object or scrutinise the impacts.

Applications for an additional two mines have recently been submitted. There are also another three more that they are aware of for a variety of different minerals. Taken one by one, all of those mines are likely to be considered 'low risk' in nature.

The community is very concerned about the cumulative impacts of all this mining particular the compounding social and environmental impacts that many mining activities might bring to the area.

However, as the *Mineral Resources Act* and *Environmental Protection Act* do not provide for public notification of the projects or provide the community with appeal rights, it is likely the mines will be approved.

Without a legal avenue to challenge the approvals, the cumulative impacts on the environmental values of the area will never be independently scrutinised.

ENDNOTES

[1] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Evidence of the Deputy Premier at 52-53 available here: http://www.parliament.qld.gov.au/documents/committees/SDIIC/2013/14-RegPlanInterests/14-trns-ph12Feb12.pdf

[2] *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd & Ors, and Department of Environment and Resource Management* [2012] QLC 013

[3] *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd* (No 2) [2012] QLC 67. See paragraphs [29] to [31] and [40].

[4] *Hancock Coal Pty Ltd v Kelly & Ors* [2013] QLC 9

[5] http://www.pc.gov.au/__data/assets/pdf_file/0015/130353/major-projects.pdf see page 276 onwards.

[6] Discussion paper, page 8, footnote 3.

[7] http://www.pc.gov.au/__data/assets/pdf_file/0015/130353/major-projects.pdf see page 276 onwards.

[8] http://www.landcourt.qld.gov.au/documents/decisions/AML195-2007etc.pdf at [10]

[9] Discussion paper page 8

[10] [2007] QLC 0137

[11] See http://www.landcourt.qld.gov.au/documents/decisions/AML00195-2007etc2.pdf

[12] http://www.landcourt.qld.gov.au/documents/decisions/AML195-2007etc.pdf at [5]

[13] *Vexatious Proceedings Act 2005*, section 5.

[14] MRA, section 8.

[15] *Yanner v Eaton* [1999] HCA 53

[16] See for instance, the *Nature Conservation Act 1992* (Qld) section 61, 83 and 84

[17] http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1999/53.html?stem=0&synonyms=0&query=title(yanner%20and%20eaton%20)#fnB46 at [29]

[18] Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 September 1924 at 825 taken from Yanner v Eaton at [28]

[19] See this Land Court case: *McKay, Re* [2006] QLRT 54 (2 June 2006) at paragraph [15]. For a further more general discussion on 'the public interest' with respect to Mining Leases, see this High Court case: *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 (28 May 1975).

[20] *Sinclair v Maryborough Mining Warden* [1975] HCA 17

[21] *Sinclair v Maryborough Mining Warden* [1975] HCA 17 per Stephen J at [6]

[22] Discussion paper, page 34

[23] MRA section 269(4)(m)

[24] See for example, the Rio Declaration Principle 10 available here http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163 and Agenda 36.10(a), available here: http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf

[25] http://www.michaelkirby.com.au/images/stories/speeches/2000s/2011/2529-ARTICLE-LAW-QUARTERLY-REVIEW-PUBLIC-INTEREST-LITIGATION.pdf at 43

[26] http://www.landcourt.qld.gov.au/documents/decisions/AML195-2007etc.pdf at [14]

[27] http://www.michaelkirby.com.au/images/stories/speeches/2000s/2011/2529-ARTICLE-LAW-QUARTERLY-REVIEW-PUBLIC-INTEREST-LITIGATION.pdf at 41

[28] Discussion paper, page 7

[29] Discussion paper at page 34

[30] Discussion paper at page 5

[31] http://www.worldcoal.org/resources/coal-statistics/

[32] http://mines.industry.qld.gov.au/assets/coal-stats/12-month-reports/coal-stats-fin-year-2012-2013.pdf

[33] http://www.worldcoal.org/coal/market-amp-transportation/

[34] http://www.coalnz.com/about/index.html

[35] http://www.dsdip.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html

[36] http://www.energy.alberta.ca/coal/coal.asp

[37] http://www.nzpam.govt.nz/cms/pdf-library/coal-1/Introduction%20to%20New%20Zealands%20Coal%20Resources.pdf

[38] https://www.wilderness.org.au/articles/australias-biodiversity-summary

[39] https://www.wilderness.org.au/articles/australias-biodiversity-summary

[40] [2012] QLC 13 (27 March 2012)

[41] *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd & Ors, and Department of*

Environment and Resource Management [2012] QLC 013 at [621]-[622]
[42] SDPWO Act s 29(1)(b)
[43] SDPWO Act s 29(1)(b)(iii)
[44] Economic Development Bill 2012 s 292
[45] EP Act ss 42, 43
[46] SDPWO Act s 27AD
[47] SDPWO Act s33(1)(d)
[48] EP Act s 52