EDOs of Australia

Productivity Commission Inquiry into Resources Sector Regulation

EDOs of Australia
8 November 2019

The Environmental Defenders Office (**EDO**) of Australia consists of eight independently constituted and managed community legal centres located across the States and Territories.

Each EDO is dedicated to protecting the environment in the public interest. EDOs:

- provide legal representation and advice,
- take an active role in environmental law reform and policy formulation, and
- offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

EDOs of Australia (**EDOA**) is a network of community legal centres that specialise in public interest environmental law and policy. Our offices have advised and written extensively on the resources sector and environmental law reform at the national level and in each Australian jurisdiction.

We therefore welcome the opportunity to provide a submission to the Productivity Commission's (**Commission**) inquiry into Resources Sector Regulation, which aims to identify 'effective regulatory approaches to the resources sector' and highlight 'examples of best-practice regulation across Australia and internationally'.[1] Thank you for the extension granted to us in providing this submission.

Below we set out recommendations in summary and then in more detail, for improving national and subnational resource regulation in ways that will encourage investment by good operators in Australia and strengthen our economy overall, while maintaining or enhancing good governance, community wellbeing and the protection of environmental values.

Executive summary

Protecting Australia's unique environment and our communities' health and wellbeing through effective assessment and regulation processes is essential to ensure that the health and quality of life we enjoy in this country is ecologically sustainable and continues long into the future for generations to come.

We support the provision of efficient, clear and consistent laws which achieve their purpose. The theme pursued in the Terms of Reference for this inquiry, that regulation in general and particularly the speed of current regulatory frameworks for the resource sector is an impediment and burdensome to business investment in the resource sector, must be put under scrutiny. We note a 2012 Senate Inquiry that examined related issues, including whether the financial burden of environmental laws on private developers was unreasonable, found very little evidence to demonstrate this claim, and warned of a 'race to the bottom' on environmental standards.[2]

Efficient, effective and well-designed environmental laws are essential, underpin a healthy economy, and are of benefit to all Australians. Our current environmental and development regulations are in need of examination for their effectiveness and efficiency but, given the demise of our environmental assets in Australia, such as biodiversity, water and air quality,[3] the focus should be: are current regulations achieving the goal of environmental and community protection

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[1] Productivity Commission, *Resources Sector Regulation*, Issues Paper (September 2019) iii <www.pc.gov.au/inquiries/current/resources/issues/resources-issues.pdf>.

[2] See: Senate Environment and Communications Legislation Committee, Parliament of Australia, *Report on the Environment Protection and Biodiversity Amendment (Retaining Federal Powers) Bill 2012* (Report, March 2013).

[3] See submissions to the ongoing Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Australia's Faunal Extinction Crisis* <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalextinction2019>; and Commonwealth of Australia, *Australia State of the Environment 2016* (Report, 2017-2018) <www.soe.environment.gov.au/>.

for current and future generations and species – the public interest.

The concept of 'green-tape' which has been coined for environmental regulation ignores the utility and necessity of regulation for protecting the environment and society from inappropriate and risky projects. Environmental regulation is also necessary to maximise economic welfare where a lack of property rights and price signals leads to costs being borne by the community rather than the producers or consumers of goods (i.e. negative externalities). Acts such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) and state and local level environment and development legislation provide a system of checks and balances, to assist governments and communities to transparently and accountability assess project proposals and impact assessments in support of projects. Consistent reports are demonstrating that our environmental values are reducing in health and resilience, species populations are declining rapidly across Australia and impacts are being approved and allowed to continue where they jeopardise our international obligations to protect biodiversity and do not meet our emissions reductions commitments. Given the demise of our environmental values, these laws must be strengthened as they are currently not adequately protecting our environmental values.

Happily, reducing duplication and improving efficiency in resource assessment need not diminish, and may enhance, community rights, the protection of environmental values and business profitability in the short and long term. We refer the Commission to a report commissioned by the Organisation for Economic Co-operation and Development (**OECD**) evidencing the fact that environmental regulation does not inhibit productivity. In fact, the report found that more technologically advanced industries actually benefit from more stringent environmental policies and, further, that environmental policies have no long-term effects on productivity growth.[4] Regulation has also been found to act to assist projects by encouraging early planning in their designs to avoid environmental impacts occurring later and therefore alleviate the financial burden of overcoming these environmental issues. It has also been found to encourage development, rather than to act as an impediment to development.[5]

Effective and robust assessment also assists in internalising negative externality costs of resource extraction to ensure that their exploitation, being a public resource, has a net benefit to society. Where a company is not required to avoid, mitigate or remediate environmental or community impacts, the costs of addressing this impact inevitably is pushed to the government for community taxes to address, or directly to communities. Regulatory frameworks that require companies to internalise the costs of their impacts through properly predicting and costing their impacts, have been found to more effectively reduce human health impacts and reduce environmental impacts.[6] Without the costs of environmental impacts being imposed on the emitter, there is significantly less incentive for the emitter to reduce the emissions. Contrastingly, internalising externalities

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[4] Silvia Albrizio, Enrico Botta, Tomasz Koźluk and Vera Zipperer, *Do Environmental Policies Matter for Productivity Growth? Insights from New Cross-Country Measures of Environmental Policies* (Working Paper No 1176, Organisation for Economic Co-operation and Development Economics Department, 3 December 2017) <www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP%282014%2972&docLanguage=En>.

[5] David Annandale and Ross Taplin, 'Is environmental impact assessment regulation a "burden" to private firms?' (2003) 23(3) *Environmental Impact Assessment Review* 383 <www.sciencedirect.com/science/article/abs/pii/S0195925503000027>.

[6] Diego García-Gusano, I. Robert Istrate and Diego Iribarren, 'Life-cycle consequences of internalising socio-environmental externalities of power generation' (2018) 625 *The Science of the Total Environmen*t 386.

assists in directing investment and consumption away from polluting activities.[7]

Ensuring the assessment process is transparent and accountable to the public through meaningful community rights improves the company's social licence to operate, gives the public confidence in the assessment process and reduces opportunities for corruption.[8] It is also a fundamental principle of natural justice that individuals should have the power to have a say in decisions which affect them, and decisions surrounding the exploitation of our state owned resources and consequent impacts on our shared environment affect us all.

A key recommendation provided here, that we consider will aid in resolving many of the current issues with our resource regulations, is the introduction of a National independent Environmental Protection Agency (**EPA**). A new National EPA can greatly assist in effectively addressing challenges through acting as a trusted institution capable of undertaking independent assessment and enforcement, as well as providing independent advice to decision-makers on, and oversight of, national resource regulation outcomes. An independent National EPA can operate at arm's-length from government to remove the risks of corruption or conflicts of interest and to ensure regulations are implemented efficiently, in a non-biased, non-political way. The EPA would ideally be coupled with strong amendments to our environmental laws to remove existing discretions and provide more certainty and clarity as to what is required through decision making. In order to fulfill this role and to provide more efficiency and clarity to resource regulation, the EPA must be sufficiently resourced to undertake this job.

Summary of recommendations:

Recommendation 1:

The Report from the Productivity Commission should clearly stipulate the essential role of regulation for all stakeholders, for example in providing clear and certain processes that are accountable and transparent to achieve the purpose of protecting community wellbeing and environmental assets for current and future generations. Further environmental laws should be recognised as a necessary cost of doing business responsibly, and for the benefits they bring in encouraging good quality proponents who understand the benefits of a transparent, accountable and robust regulatory framework.

Recommendations 2:

(a) The Inquiry should involve close consideration of the recommendations for improvements to our resource regulations already provided through numerous robust studies over the last 10 years, including the outcomes of the Hawke EPBC Act Review, the findings and recommendations of APEEL, and the Wentworth Group of Concerned Scientists Statement on Changes to Commonwealth powers to protect Australia's environment and Blueprint for a Healthy Environment and a Productive Economy.

(b) The Inquiry should avoid using words such as 'red tape' or 'green tape' in referring to environmental and resource laws, with a view to avoiding further erosion of respect and

[7] Alexandre Gajevic Sayegh, 'Justice in a non-ideal world: The case of climate change' (2018) 21(4) *Critical Review of International Social and Political Philosophy* 407.

[8] Independent Commission Against Corruption NSW, *Anti-corruption safeguards and the NSW planning system* (Report, February 2012).

appreciation for the essential role of our regulatory frameworks and good governance processes in regulating the resource sector.

Recommendations 3:

(a) The definition of best practice regulation should be broadened to better reflect the role of regulation by government - to protect the public interest

(b) Recognise that prescription in regulations and conditions can provide more efficient, enforceable and clear regulations for all stakeholders compared to broad, ambiguous laws subject to decision maker discretion

(c) The Inquiry focus into 'regulator conduct' should focus on reducing risks of corruption or perceived corruption/ bias as an essential element of regulator conduct.

(d) Transparency and access to information are key elements of best-practice regulation and good governance that should be recognised and supported.

Recommendations 4:

Support best practice community engagement in resource regulation by recommending the introduction of:

(a) meaningful third-party submission and post-approval merits appeal rights across all jurisdictions in Australia and nationally;

(b) tailored community engagement for First Nations people with interests of any kind in the land;

(c) open standing for submission, appeal and third-party enforcement of resource regulations; and

(d) consistent reporting on public participation methods, statistics and outcomes; and

(e) meaningful free, prior and informed consent requirements for all landholders, particularly for First Nations people, across all Australian jurisdictions, to similar or better standard as that provided under the Aboriginal Land Rights (Northern Territory) Act 1976 (NT).

Recommendation 5:

The Commission should support the following elements of best practice regulatory design:

(a) Meaningful early stakeholder and community input into regulatory design is essential as part of best practice regulatory design;

(b) Regulatory objectives must be clearly defined and articulated, and conflicting objectives are minimised or managed across different regulations;

(c) Claims of 'regulatory creep' should be used with care - consideration of scope 3 emissions is not regulatory creep;

(d) Regulations are not currently overly complex or prescriptive - regulations across Australia are generally too ambiguous and provide excessively broad or unguided discretion - work must be done to provide more certainty and enforceability in resource regulation;

(e) Regulations must be subject to rigorous assessment to evaluate how effective they are at achieving their aims;

(f) Consequences of poor regulatory design for regulatory outcomes, investment in the sector and broader community outcomes should be noted.

Recommendations 6:

(a) Introduce an independent EPA nationally and in each state and territory to act as an independent assessment, approval and enforcement body for activities that affect environmental assets and community health and wellbeing. Each EPA could also develop and oversee environmental goals, strategies, plans and standards to achieve ecologically sustainable development in the relevant jurisdiction; and gather evidence on environmental conditions and trends to inform decisions and improve outcomes over time.

(b) The Commission should note the risks in implementing a One-Stop-Shop framework and recommend against the implementation of bilateral approval powers to ensure that regulatory frameworks are robustly delivered and conflicts of interest held by state and territory governments are guarded against in assessment.

(c) Recommend the dissolving of excessive powers given to the Queensland Coordinator-General and any similar role in Australian resource regulatory frameworks, which is affecting efficiency, accountability and certainty in resource regulation. Particularly the power to override the power of the Land Court and other Departments through mandatory conditions should be removed.

(d) Regulator resourcing and capacity must be sufficient to ensure good functioning of the regulatory framework.

(e) Compliance and enforcement must be upheld through auditing current authorities and model conditions used in new authorities to ensure conditions are enforceable, which rely on requiring baseline assessments and clear, sufficiently prescriptive conditions to define legal and illegal activities.

Recommendations 7:

(a) Suitable operator / fit and proper person tests should be required of all operators in all jurisdictions prior to being granted authorities to undertake environmental impacts, including an assessment of whether the company, a related company or any of the board members have been prosecuted for an environmental offence in any other jurisdiction in Australia or internationally.

(b) Require strong and consistent laws providing for meaningful, timely access to information of any documents relevant to understanding existing or proposed or potential impacts on community wellbeing or environmental assets. These laws should include requirements to proactively release documents and should provide a narrow definition as to what is exempt from disclosure on the basis of ‘commercial-in-confidence’.

(c) Reduce broad discretions in decision making processes as much as possible, to provide certainty, accountability and transparency in processes.

(d) Require stronger laws surrounding political donations, lobbying and the movement of staff between government and industry.

(e) Require stronger protection of whistleblowers across all jurisdictions.

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Additional helpful resources annexed:

We have annexed to this submission the following previously drafted submissions which may also be of use to your inquiry:

Annexure 1: Submission to the House of Representatives Inquiry into streamlining environmental regulation, ‘green tape’ and ‘one stop shops’ for environmental assessments and approvals in April 2014.

Annexure 2: Australia’s obligations under International Law to Consult with, and to Ensure the Free, Prior and Informed Consent of, Indigenous Communities.

Annexure 3: Qld resource approval efficiency submission.

Submissions in detail

1. The benefits of environmental and development regulations for industry, communities, the environment and future generations needs to be recognised in the scope of this inquiry

Effective regulation is necessary to ensure that:

- project proposals are scrutinised prior to being allowed to go ahead, to determine whether the environmental, social and economic impacts are sufficiently negligible and the project is overall in the public interest;
- the information provided by proponents to describe their project is put under scrutiny to determine whether it is correct and robust;
- the public can provide their informed opinion as to whether the project is in the public interest and to assist in scrutinising the material that is put before government to support the project and describe its expected impacts;
- all stakeholders understand how decisions are made and processes undertaken for resource assessment and approval; and
- processes are transparent and accountable to the public, reducing or removing risks of corruption and ensuring decisions are made consistently and in the public interest.

The number of environmental Acts and regulations that currently exist are evidence of the importance and complexity of environmental impact management. We agree that the body of environmental law in Australia has grown, and that our legislation and regulations could be drafted more clearly and succinctly; the same could be said for many areas of law. However, assessing the role of environmental law is not about the number of pages of legislation, it is about the purpose of the laws – that is, to ensure decisions about activities and impacts are transparent and informed by objective evidence, community input and equality before the law; and to ensure outcomes that protect the environment, community wellbeing and natural resources for present and future generations.

As our knowledge of the importance of environmental health for underpinning growing communities and economies has increased, it has been necessary to build a body of environmental regulations to ensure that development is ecologically sustainable. As the then Environment Minister, The Hon Robert Hill, explained 18 years ago:

> *'A new wave of thinking now acknowledges that to achieve ongoing economic growth we must respect and properly manage our natural resource base. We must move toward planning for and achieving sustainable economic growth. To achieve this we need to make the environment a key consideration in all our economic decision making processes. We must acknowledge that respecting and protecting the environment is not an add-on to economic growth.'*[9]

The public benefit of environmental laws and the economic benefit of a healthy environment have

[9] Senator The Honourable Robert Hill, Minister for the Environment and Heritage, *Statement of the Senator the Honourable Robert Hill, Minister for the Environment and Heritage: Investing in our cultural and natural heritage* (Commonwealth Environment Expenditure 2001-02, 22 May 2001); Inquiry into the Definition of Charities and Related Organisations, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) 186.

been recognised in Australia and overseas. For example:

> *'The environment is a public good. The benefits that flow from protecting the environment cannot be appropriated by any person or persons for their own private benefit. For example, improving the air quality in Sydney or the water quality in Adelaide is for the benefit of all people who live in those cities, whether they contributed directly to that improvement or not.'*[10]

The Sustainable Australia Report 2013 of the National Sustainability Council noted:

> '*Running down our natural capital risks serious economic and social implications and would undercut the wellbeing of future generations of Australians. A healthy natural environment with functioning ecosystem processes is therefore an economic and social imperative*.[11]

These issues are discussed in our previous Submission to the House of Representatives Inquiry into streamlining environmental regulation, 'green tape' and 'one stop shops' for environmental assessments and approvals in April 2014 at **Annexure 1.**

As found in The Scientific Inquiry into Hydraulic Fracturing in the Northern Territory '...companies are more likely to invest in jurisdictions where the legal framework is certain and where they can be confident that they will get a return on their investment'.[12] Good quality regulation attracts the best quality operators who understand the benefit of working in a clear, transparent, accountable framework under a government free of corruption and significant discretions. This is the kind of investment we should be encouraging through our resource regulations. Strong, effective regulation of the resource sector and accountable, transparent governance, that protects communities and the environment, should be something Australia can be proud of, and should not be risked for the sake of private profit.

Recommendation 1:

The Report from the Productivity Commission should clearly stipulate the essential role of regulation for all stakeholders, for example in providing clear and certain processes that are accountable and transparent to achieve the purpose of protecting community wellbeing and environmental assets for current and future generations. Further environmental laws should be recognised as a necessary cost of doing business responsibly, and for the benefits they bring in encouraging good quality proponents who understand the benefits of a transparent, accountable and robust regulatory framework.

[10] Inquiry into the Definition of Charities and Related Organisations, above n 9, 15 and 186-187. See also the Wentworth Group of Concerned Scientists, *Blueprint for a healthy environment and a productive economy* (2014) <www.wentworthgroup.org>.

[11] Australian Government National Sustainability Council, *Sustainable Australia Report 2013*, 81 <www.environment.gov.au/resource/sustainable-australia-report-2013-conversations-future>.

[12] The Hon Justice Rachel Pepper, *The Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (April 2018) 372 <www.frackinginquiry.nt.gov.au/inquiry-reports?a=494286>.

2. Any review of resource sector regulation must focus on whether the regulation is meeting its aims, and not just cutting regulation

There has been a consistent focus in recent years, which seems to be growing under the current Federal Government, on the need to reduce 'green tape' or 'red-tape' for the resource sector;[13] in this case with a view to reducing impacts on business investment in Australia's resource sector. Proposals to reduce regulations around the assessment and decision-making powers for resource projects are not an appropriate and most likely not an effective way to achieve sought after improvements to business investment in this sector. The rhetoric suggesting that regulation is a hindrance without benefit is enormously unhelpful in promoting respect for our laws and the role of government in upholding these laws and protecting the public interest of environmental and community wellbeing.

There are several alternative ways that could bring about multiple benefits of improving the operation and efficiencies of environmental laws for all stakeholders while also improving the likelihood of quality investment in Australia's resource sector and improving business-environment relationships. These should focus on effectiveness rather than reducing environmental protections. We provide various examples below of steps that could be taken in this nature.

The Australian Panel of Experts on Environmental Law (**APEEL**) has undertaken significant analysis of our environmental laws and developed a blueprint for the next generation of Australian environmental laws, to improve the effectiveness of their operation with the aim of ensuring a healthy, functioning and resilient environment for generations to come. APEEL development an overarching Blueprint as well as a Technical Paper series. We recommend that the Productivity Commission reviews these Technical Papers, or at least the recommendations that have been provided in summary of the findings of each Technical Paper, available here: http://apeel.org.au/. This provides guidance from Australia's experts as to how our regulatory framework could be improved.

The EDO NSW has also produced a report with Humane Society International which details what the 'Next Generation Biodiversity Laws' should ideally consist of to resolve the deficiencies with our current frameworks, which would prove fruitful for consideration in this Inquiry.[14]

We note that in response to former Australian Government proposals to amend environmental laws, the Wentworth Group of Concerned Scientists developed a Statement on Changes to Commonwealth powers to protect Australia's environment. This Statement, and a subsequent Blueprint for a Healthy Environment and a Productive Economy, provides a better balance between business and environmental outcomes while maintaining the Australian Government's important approval and oversight roles.[15]

Also, there are a range of administrative efficiencies recommended in the 2009 independent

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[13] For example, see Matthew Killoran, 'Cut green tape to get projects moving: Treasurer', *The Courier Mail* (online, 11 October 2019) <www.couriermail.com.au/news/queensland/cut-green-tape-to-get-projects-moving-treasurer/news-story/59b340831f317fe1a061071d291e3564>.

[14] EDO NSW and Humane Society International Australia, *Next Generation Biodiversity Laws – Best practice elements for a new Commonwealth Environment Act* (2018).

[15] Wentworth Group of Concerned Scientists, *Statement on changes to Commonwealth powers to protect Australia's environment* (2012) 1; above n 10.

Hawke Review of the EPBC Act, and other inquiries.[16] The Hawke Review was a major, consultative, evidence-based inquiry to strengthen and improve the EPBC Act after 10 years of operation.[17] A range of important and beneficial recommendations are yet to be implemented, and were effectively derailed in 2012. These include:

- completion of a single, harmonised threatened species list based on robust scientific criteria (we note that similar work is underway);
- methods to assess and avoid cumulative impacts of multiple projects;[18]
- establishing a statutory National Environment Commission to provide strategic advice and oversight of environmental regulation and emerging issues;[19]
- an interim 'greenhouse trigger' to require federal approval of major polluting projects, in the absence of a national carbon price;[20]
- strategic assessment processes that can accredit other approval systems that genuinely 'maintain or improve' environmental outcomes, and that consider cost-effective climate change mitigation options;[21] and
- a range of enforcement, accountability and transparency mechanisms to improve decision-making and community access to justice.[22]

We note that the second ten year review of the EPBC Act has commenced as of 29 October 2019, with the media release from the Environment Minister advising of this review noting in the first sentence the intention to 'tackle green tape' through this review.[23]

[16] Including the Senate Environment and Communications Legislation Committee, above n 2; Environment and Communications References Committee, Parliament of Australia, *Report on effectiveness of threatened species and ecological communities' protection in Australia* (Report, 2013); House of Representatives Standing Committee on Climate Change, Environment and the Arts, Parliament of Australia, *Final report of the inquiry into Australia's biodiversity in a changing climate: Managing Australia's biodiversity in a changing climate the way forward* (2013).

[17] Unlike the 2012 COAG 'green tape' announcements, which came from one stakeholder group, the Hawke Review's public consultation process sought and analysed specific feedback on the operation of the Act. This included 220 submissions, 119 supplementary submissions, and face-to-face consultations in each state and territory with industry, NGOs, the community, individuals, research groups, academics, individual corporations, and agencies from every level of government. See Allan Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) ('Hawke Review Report') <www.environment.gov.au/legislation/environment-protection-andbiodiversity-conservation-act/epbc-review-2008>.

[18] Ibid 3.3-3.6, 7.31, 7.60; see also Department of Sustainability, Water, Population, and Communities, *Australian Government response to the report of the independent review of the EPBC Act* (2011), responses to recommendations 6 and 8.

[19] Hawke Review Report, above n 17, recommendation 71. For further discussion of a national environmental body see the Australian Panel of Experts in Environmental Law ('APEEL'), *Environmental Governance* (Technical Paper, 2017) <www.apeel.org.au/papers>.

[20] Hawke Review Report, above n 17, recommendation 10(1).

[21] Ibid recommendations 6(2)(b)(ii) and 10(2).

[22] See, for example, ibid recommendations 43-44, 46 and 48-53.

[23] The Hon Sussan Ley MP, Minister for the Environment, 'Graeme Samuel to lead Environment Review' (Media Release, Department of the Environment and Energy, 29 October 2019) <www.minister.environment.gov.au/ley/news/2019/graeme-samuel-lead-environment-review>.

Recommendations 2:

(a) The Inquiry should involve close consideration of the recommendations for improvements to our resource regulations already provided through numerous robust studies over the last 10 years, including the outcomes of the Hawke EPBC Act Review, the findings and recommendations of APEEL, and the Wentworth Group of Concerned Scientists Statement on Changes to Commonwealth powers to protect Australia's environment and Blueprint for a Healthy Environment and a Productive Economy.

(b) The Inquiry should avoid using words such as 'red tape' or 'green tape' in referring to environmental and resource laws, with a view to avoiding further erosion of respect and appreciation for the essential role of our regulatory frameworks and good governance processes in regulating the resource sector.

3. Overview of comments on components of best practice regulation of resource sector

The Issues Paper suggests the following components for assessing best practice regulation:

1. Regulatory design: How laws are made, consultation processes, clear objectives, consistency across regulations, simple and not overly prescriptive.

2. Regulator governance: clear objectives for governance, accountable and independent decision makers, adequate resourcing and capabilities - produce community benefits and confidence.

3. Regulator conduct: clear, predictable, open and transparent processes, minimising administrative costs and providing outcomes consistent with the objectives of the reg.

We generally support the components of best practice regulation provided on page 8 of the Issues Paper in providing a holistic guide to the various elements that make up best practice regulation. However we note the following suggested amendments and additions to this overview:

(a) The definition of best practice regulation should be broadened to better reflect the role of regulation by government - to protect the public interest

The Issues Paper provides a definition of best practice regulatory approaches that states it should: "require governments and regulators to take the course of action that imposes the least burden on business, subject to achieving policy goals" (p7). This definition does not provide a balanced definition of best practice regulation, in that it favours a focus on imposing the least burden on business with no reflection of the other roles of regulation, namely the protection of the public interest through community and environmental protection. The Commission should therefore amend the definition and add to Table 1 that any reforms must maintain or improve upon current standard of environmental and community protection, as the general shared purpose of our environmental laws. This would better reflect the fact that business interests are one (but not the only) factor relevant to best-practice regulation.

(b) Recognise that prescription in regulations and conditions can provide more efficient, enforceable and clear regulations for all stakeholders compared to broad, ambiguous laws subject to decision maker discretion

Prescription is often framed negatively but there are benefits to a reasonable level of prescription as preferable to vague, general regulations that can provide a high level of discretion to the decision maker and create confusion and uncertainty as to how the decision will be made. Prescription in regulation can provide more certainty, clarity and efficiency in allowing all stakeholders a level understanding of what is expected of the proponent and project. Prescriptive laws therefore greatly assist in providing accountability around decision making.

A good example of the inefficiencies from lack of prescription can be seen in the move toward 'performance based' planning laws in many jurisdictions in Australia. This form of planning law puts the focus on the outcome of the laws and avoiding prescription, with a view to encouraging creativity and flexibility in design and the achievement of the outcomes. There has been significant criticism of the level of uncertainty, erosion of public confidence and high level of discretion now evident in performance based planning frameworks, particularly in Queensland.[24] Leading Queensland planning firm Buckley Vann provided a review of how performance based planning is operating in Queensland in March 2016, where this form of planning has been in place since 1997.[25] Their review found that this focus has led to uncertain, inefficient laws which have eroded community confidence, led to inconsistent decision making and confusion and uncertainty for all stakeholders. These issues arise from performance outcomes being vaguely expressed and capable of multiple interpretations, setting low and meaningless bars for development applications to be assessed against.[26]

Further, the Productivity Commission has previously found that caution is required in utilising outcome focused laws, stating this caution is particularly needed:[27] *'...where the desired environmental outcome is not well defined or easily measured (for example, visual amenity or biodiversity), or where there is significant uncertainty about the nature and severity of project impacts. In these circumstances more prescriptive conditions may be warranted, but should be regularly reviewed and updated if necessary.'*[28] In this inquiry into major project assessment, concern was also raised around the unenforceability noted as a result of outcome based conditions, exposing all stakeholders disagreements as to what the obligations of the proponent are, and whether the steps taken by the proponent are sufficient.[29] The use of vague conditions which leave impact assessment to a point after approval, through conditions that require only the subsequent development of management plans that will determine how an impact will be avoided or mitigated, are a growing concerning feature of resource activity authorities.[30] While adaptive management is a useful and necessary feature of resource assessment, it is only used effectively

[24] Amy McInerney and Philippa England, 'Anything goes? Performance-based planning and the slippery slope in Queensland planning law' (2017) 34(3) *Environmental and Planning Law Journal* 238.

[25] Jennifer Roughan, Buckley Vann Planning + Development, *Performance based planning in Queensland* (March 2016) <www.planning.org.au/documents/item/7429>.

[26] Ibid, see 9-17.

[27] Productivity Commission, *Major Project Development Assessment Processes* (Research Report, November 2013) 223.

[28] Ibid.

[29] Ibid 224.

[30] Alison Rose and Revel Pointon, 'Earning a licence to mine: rethinking the use of adaptive management in light of recent mining land court outcomes' (2018) 32 *Australian Environment Review.*

when based on solid understanding of the potential impacts prior to approval and development of the adaptive management plan.[31]

(c) Regulator conduct should focus on reducing risks of corruption or perceived corruption/ bias

'Regulator conduct' should be amended to focus on reducing risks of corruption or perceived corruption within the regulator. The issues currently listed under 'regulatory conduct' could rather fit into the other two headings. For example, regulator conduct could perhaps be better defined as ensuring equal access and treatment between industry and the community with government and the regulator, and generally reducing risks of bias or perceived bias in favour of industry. On this basis we have framed our discussion below of regulator conduct around the need to reduce actual or perceived risks of corruption and conflicts of interest.

(d) Transparency and access to information are key elements of best-practice regulation and good governance that should be recognised and supported

While transparent processes are listed currently as a factor under regulator conduct, transparency must be ingrained throughout all areas, through the regulatory design and regulator governance. Transparency is an essential ingredient in ensuring good process and reducing the risks of corruption and decisions being made that are not in the public interest. Transparency must be provided through laws which provide clear community rights to access information in a fast, affordable way, and government processes which proactively 'push out' information, as reflected in laws in Queensland, NSW and ACT.[32]

Recommendations 3:

(a) The definition of best practice regulation should be broadened to better reflect the role of regulation by government - to protect the public interest.

(b) Recognise that prescription in regulations and conditions can provide more efficient, enforceable and clear regulations for all stakeholders compared to broad, ambiguous laws subject to decision maker discretion.

(c) The Inquiry focus into 'regulator conduct' should focus on reducing risks of corruption or perceived corruption/ bias as an essential element of regulator conduct.

(d) Transparency and access to information are key elements of best-practice regulation and good governance that should be recognised and supported.

4. Best practice community engagement is an essential component of resource sector regulation

Community engagement is critical to the underlying integrity of the resource assessment process. Public confidence in government is at an all-time low[33] and the risk of actual or perceived corruption in the process dealing with the disposal of high value state assets held in the public

[31] Ibid.

[32] See, for example: *Right to Information Act 2009* (Qld), Preamble; *Government Information (Public Access) Act 2009* (NSW) ss 6 and 7; *Freedom of Information Act 2016* (ACT), s6(e).

[33] Democracy 2025, *Trust and democracy in Australia: democratic decline and renewal* (Report No 1, December 2018).

interest, being our mineral resources, is very high.[34] Community information, submission and appeal rights help reduce the risk of corruption and improve the decision making process, laying the foundations for the 'social licence' for resource project. A particularly important element of community involvement in decision making is the ability to seek independent review through third party appeal rights, as mentioned below. Not all jurisdictions provide for this essential right; a factor that must be rectified in those states and territories where third party appeal rights for resource activities do not exist, to ensure that project assessment is robust.

In **Annexure 2** we have provided an overview of Australia's obligations under International Law to Consult with, and to Ensure the Free, Prior and Informed Consent of, Indigenous Communities which should form an integral part of implementing best practice community engagement with First Nations people.

(a) Current community rights do not delay assessment, they are part of it

The development and resources industry often point to community rights as an alleged source of 'delay' in obtaining their approvals. The truth is that community engagement adds little to the average assessment time of resource projects and there is no evidence these rights are being abused. The points raised below support this claim.

Further, we note that social impact statements are not a community engagement or benefit sharing method, as framed on page 18 of the Issues Paper, but are an integral part of an environmental impact assessment that should be undertaken to properly understand the potential impacts and benefits to a community from a resource activity proposed.

(b) Submissions and court process do not add significantly to average application and assessment times

Major projects often have corresponding large impacts which can take considerable time to properly describe and assess. For example, a review of the Queensland Coordinated Projects website shows that the average time between the lodgement of an Initial Advice Statement by a proponent, and the delivery of a Coordinator-General report, is 4-5 years. Of those 4-5 years, approximately 1-2 years is taken by proponents on average, preparing an EIS and 2-3 years is taken by the Coordinator-General preparing terms of reference, seeking and reviewing further information from the proponent, and preparing the CG evaluation report. Less than 5% of the 5 year average assessment time (i.e. less than 3 months) is time the community has to consider and comment on draft terms of reference and EIS documentation.

Any reduction in assessment times would be best focused on the 95% of the assessment time used up by the proponent or Coordinator-General. Any reduction in assessment times by the proponent and Coordinator-General could be partially re-allocated to grant the badly needed extension to public consultation times, thereby enhancing community participation while reducing overall assessment times; a win-win.

In Queensland alone roughly 100 mines are approved each year and a handful of community objections to mines are referred to the Land Court. In our experience and from a brief review of published decisions, Queensland Land Court referrals typically proceed to hearing in about six

[34] Transparency International Australia, *Corruption Risks: Mining approvals in Australia* (October 2017).

months on average, with decisions within a further six months on average. The Queensland Land Court assessment is considerably quicker than the average time taken by the Coordinator-General to assess the EIS and to prepare the Coordinator-General Report and, as it only applies to the small number of projects challenged, does not significantly increase average assessment times for resource projects.

Further, just because processes are slower, does not mean that they are inefficient. "…a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome".[35]

(c) Third party merits review improves decision making

The role of public consultation and independent arbitration by a court in improving decision making is well accepted.[36]

Merits review of decisions through an independent court improves the consistency, quality and accountability of decision-making in environmental matters. For example, the ability for the public to be involved in decision making and challenge a project in the courts:

- 'facilitates the rigorous analysis that is fundamental to the making of sound decisions (whether by testing the evidence and material advanced by proponents by advancing evidence and material informed by particular and sometimes local knowledge)';[37]
- 'gives a level of confidence to members of the public that the decision has been reached through a process which has openly examined and scrutinised all of the available evidence - whether or not the result is universally accepted.';[38]
- ensures the process of environmental planning and assessment is effective;[39]
- safeguards against corruption;[40]
- provides a forum which allows for and encourages greater public debate on development issues;
- improves, encourages and aids public participation in land-use decision making;
- allows multiple views and concerns to be expressed and 'provide[s] a forum where collective rights and concerns can be weighed against the rights and concerns of the

[35] EDO NSW, Nature Conservation Council of NSW, Total Environment Centre, *Our Environment Our Communities: Integrating environmental outcomes and community engagement in the NSW planning system* (2012) <www.d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/287/attachments/original/1380667224/120824Our_Environment_Our_Communities.pdf?1380667224>.

[36] Brenton Holmes, 'Citizens' engagement in policymaking and the design of public services' (Research Paper No 1, Parliamentary Library, Parliament of Australia, 2011-2012). <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1112/12rp01>; Independent Commission Against Corruption NSW, above n 8, 22; Productivity Commission, above n 27, 274.

[37] Adrian Finanzio, 'Public Participation, Transparency and Accountability – Essential Ingredients of good Decision Making' (2015) 2(1) *Australian Environmental Law Digest* 3, 3.

[38] Ibid.

[39] Brian Preston, 'Third Party Appeals in Environmental Law Matters in New South Wales' (1986) 60 *Australian Law Journal* 215, 221.

[40] Independent Commission Against Corruption NSW, above n 8, 22.

individual';[41]

- recognises that third parties can bring detailed local or specialist knowledge, not necessarily held by the designated decision maker;[42]
- allows for the development of environmental jurisprudence, clarifying the meaning of legislation;[43]
- enhances the quality of decision-making, including the quality of reasons for decisions;[44]
- ensures adherence to legislative principles and objects by administrative decision makers;
- fosters the development of environmental jurisprudence;
- fosters natural justice and procedural fairness;
- focuses attention on the accuracy and quality of policy documents, guidelines and legislative instruments and highlight problems that should be addressed by law and policy reform;[45]
- ensures greater transparency and accountability within the decision-making process; and[46]
- preservation of the rule of law.[47]

The NSW Independent Commission Against Corruption (**ICAC**) has identified third party merits appeals as of vital importance to a transparent and accountable planning system, and has recommended to the NSW government that the scope of merits appeals be extended as an anti-corruption measure. ICAC found,

> '[t]*he limited availability of third party appeal rights under the Environmental Planning & Assessment Act 1979 (NSW) means that an important check on executive government is absent… The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system*.'[48]

While the references cited above were focused on planning merits appeals, they are equally as relevant for third party review rights for resource project applications. Very similar concerns are brought up between planning and development applications and resource applications, with respect to environmental and community impacts, and equal benefits are provided through third party merits appeals for resource application decisions.

In essence, the mere existence of the right to challenge decisions before an independent arbiter

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[41] Judge Christine Trenorden, 'Third-Party Appeal Rights: Past and Future' (Speech, Town Planning Law Conference, Western Australia, 16 November 2009) <www.sat.justice.wa.gov.au/_files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf>.

[42] Ibid.

[43] Brian Preston and J Smith, 'Legislation needed for an effective Court' in *Promises, Perception, Problems and Remedies: The Land and Environment Court and Environmental Law 1979-1999* (Nature Conservation Council of NSW, 1999) 107.

[44] Ibid.

[45] Ibid.

[46] Judge Christine Trenorden, above n 41; Stephen Willey, 'Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia' (2006) 24(3) *Urban Policy and Research* 369–389; Brian Preston and J Smith, above n 43, 107.

[47] Justice Rachel Pepper and Rachel Chick, 'Ms Onus and Mr Neal: Agitators in an age of "green lawfare"' (2017) 35(2) *Environmental and Planning Law Journal* 177.

[48] Independent Commission Against Corruption NSW, above n 8.

gives the public confidence that the decision-making process has integrity rather than taking place behind closed doors. There is also an additional benefit that application material is likely to be of a higher quality due to the potential that it may be under scrutiny by objectors, experts and the Court.

These rights to access justice are fundamental to the rule of law which underpin our stable democracy and is essential for investment and economic growth.[49]

(d) Third party review is essential for decisions as to the alienation of shared resources and shared environment

Under most legal frameworks in Australia, minerals are the property of the Crown, making them a public asset to be managed on behalf of the citizens of the jurisdiction.[50] It is therefore appropriate that there be broad public consultation as to whether, and if so, how, particular resources should be mined.

Similarly, most environmental laws seek to some extent to protect the environment while allowing for development that improves the total quality of life (ecologically sustainable development). As our environment is shared and valued differently by all who reside or visit this country, it is appropriate that there be broad public consultation about proposals that could cause harm to that environment.

Researchers from Queensland University of Technology have shown that complex socio-economic issues follow mining activities and can have serious impacts on the provision of social services and recreational activities, housing, community safety, crime, lifestyle and overall community wellbeing.[51] Further, impacts such as dust, noise, traffic and fugitive emissions can have impacts from a mine, along each of the often various and lengthy transportation routes to the final destination for the product. Greenhouse gases produced at every stage of production to combustion can also have impacts on climate change globally.

Resource projects can have broad-reaching impacts on the local area (such as through noise and dust), district (such as through groundwater) and State (such as through economics and transport networks), as well as nationally and internationally (such as through economics and climatic impacts). It is only fair that all those who have an interest in those impacts are able to have those concerns heard by an independent arbiter.

Accordingly, regimes providing merits review, open to members of the public, are appropriate to the alienation of public owned resource assets and consideration of broad environmental impacts on the community.

(e) No systemic 'frivolous or vexatious' litigation in court proceedings

Those with a financial interest in building a project as quickly as possible are prone to view any assessment or court review as a 'delay' and 'frivolous or vexatious'. The term 'frivolous or vexatious' is a well-established legal term that is relevant across all court jurisdictions. There is therefore a myriad of case law and legislation which one can turn to in defining this term and

[49] Justice Rachel Pepper and Rachel Chick, above n 47.

[50] See, for example, Mick Peel, Submission No 8 to Select Committee on Certain Aspects of Queensland Government Administration related to Commonwealth Government Affairs (14 November 2014) 3.

[51] Kerry Carrington and Margaret Pereira, *Social Impact of Mining Survey: Aggregate Results Queensland Communities* (Final Report, 2011) <www.eprints.qut.edu.au/42056/>.

applying it to a particular matter.

For example, in Queensland, which is subject to numerous resource activity applications each year, the Land Court of Queensland has held that the term 'frivolous or vexatious' should be given its ordinary meaning, being that the case is 'of little weight', 'carried on without sufficient grounds, serving only to cause annoyance', or 'unmeritorious'. The *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 prohibit them from continuing or instituting proceedings of a particular type. In September 2014 the report by the Agriculture, Resources and Environment Parliamentary Committee on the Mineral and Energy Resources (Common Provisions) Bill 2014, stated that:

> *"The Land Court further confirmed that, in its experience, there was no evidence to suggest that the courts processes were being used to delay project approvals:*
>
> *In the court's experience, there have not really been a lot of stalling tactics. If there is, it generally comes from both sides. It is not just landowners or objectors who generally are not ready to proceed; it is also often the mining companies that are not ready. Having said that, the main tool that the court has to deal with delays and putting parties to unreasonable expense and delay is the power to award costs. A party can agree to seek costs against the other party if that is something they perceive as happening. (Farrell, L., 2014, Draft public hearing transcript, 27 August, p. 2.)"*

This position was also supported by the Infrastructure, Planning and Natural Resources Parliamentary Committee recently when considering the Mineral and Other Legislation Amendment Bill 2016, who noted in their committee report that:

> *'the majority of the committee notes that only a small number of appeals against mining leases are lodged in the Land Court each year by environmental groups, and the Minister is not bound by a recommendation of the Court.*
>
> *Despite mining stakeholders' claims that frivolous or vexatious cases are extensively used by landholders and other groups, the majority of the committee was unable to find evidence to support this view.'*

Full weight must therefore be given to the established finding that the Land Court has not found any community objections brought to the Land Court in mining objections hearings to have been frivolous or vexatious, as confirmed by research by the Australian Productivity Commission, and the Queensland Parliamentary Library.

On the contrary, the Land Court has found objectors to be acting in the public interest, motivated solely by environmental or community concerns and clarifying important principles of law.

(f) <u>'Lawfare' is only claimed where civil society uses legal rights successfully - it is not a legitimate concern and has no evidence in support</u>

'Lawfare' is a term coined to be used against community groups exercising their rights to challenge decisions, particularly where these challenges are successful. There is a claim that these community groups are using their legal rights to delay approvals and that the challenges are frivolous or vexatious. There has been no determination that any of the recent actions that have been brought by community groups with respect to resource activities were frivolous or

vexatious, as dealt with above in part 3 of the submission.

Less than 0.5% of projects referred to the Minister under the EPBC Act have been subject to legal challenge.[52] Former Federal Court judge, the Hon Murray Wilcox AO QC, observed in his submission to the Senate Inquiry on the EPBC Standing Bill:

> *"I know something about litigation instigated by environmental bodies. I spent 22 years at the Bar before my appointment to the Federal Court in 1984. Over almost six of those years I was President of the Australian Conservation Foundation. Either in that role or as counsel, I participated in many meetings during which some enthusiast raised the possibility of legal action against a particular unwanted development. I had to point out the sober facts. If the action failed, the applicant would be ordered to pay the legal costs incurred by the other parties, the amount of which might be devastating. It was my often-expressed view that environmental organisations should not bring a legal action unless first advised, by a specialist lawyer, that they had a strong legal case. Having recently (2007-2013) served as Chair of the NSW Environmental Defender's Office, I am aware this advice continues to be given. That is why section 487 is so sparingly used."*[53]

(g) Standing should be kept as broad as possible to protect the public interest

There is a strong public policy rationale for retaining broad standing provisions that allow conservation groups and individuals ('third parties') to seek to review decisions through court processes. Reasons include:

- there is a general public interest in ensuring that decision-makers lawfully comply with legislative procedures – this is the role of judicial review;
- the potential for additional scrutiny promotes better decision-making, accountability and public confidence that the law will be upheld;[54]
- where third party rights do exist, they are very rarely exercised. The argument that 'open standing' provisions opens the litigation floodgates has been described as 'wholly discredited.'[55] For decades, Queensland and NSW have had 'open standing' for any

[52] Justice Rachel Pepper and Rachel Chick, above n 47.

[53] The Hon Murray Wilcox AO QC, submission 19 to the Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 2.

[54] For example, NSW planning laws provide 'open standing' for judicial review and civil enforcement. This has widespread support including from an independent review panel (Tim Moore and Ron Dyer, *The way forward for planning in NSW: Recommendations of the NSW Planning System Review* (2012)). Further, 'expanding third party merit appeals' was one of six key safeguards in Independent Commission Against Corruption, above n 8. See also, Brenton Holmes, above n 36.

[55] Justice Jerrold Cripps, "People v The Offenders" (Speech, Dispute Resolution Seminar, Brisbane, 6 July 1990): it was said when the legislation was passed in 1980 that the presence of section 123 [in the NSW planning law] would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited. See also, Queensland Agriculture, Resources and Environment Committee, Parliament of Queensland, *Inquiry into the Mineral and Energy Resources (Common Provisions) Bill 2014* (Report, September 2014). This report stated that "The Land Court further confirmed that, in its experience, there was no evidence to suggest that the courts processes were being used to delay project approvals"; Infrastructure, Planning and Natural Resources Committee, Parliament of Queensland, *Inquiry into the Mineral and Other Legislation Amendment Bill 2016* (Report No 26, May 2016) 17: 'the majority of the committee notes that only a small number of appeals against mining leases are lodged in the Land Court each year by environmental groups, and the Minister is not bound by a recommendation of the Court. Despite mining stakeholders' claims that frivolous or vexatious cases are

person to bring civil proceedings in court where legal procedures aren't followed, or planning and environmental laws are breached, with widespread acceptance of these rights;[56]

- all Australians have an interest in seeing our unique natural heritage is protected. Broad standing means that 'directly affected' landholders don't bear the entire burden of protecting the nation's environmental icons – such as threatened species or World Heritage Areas like the Great Barrier Reef;
- there are effective procedural court rules in place to prevent frivolous and vexatious litigation;[57]
- various laws across Australia enable developers to appeal against a refusal of development consent, or conditions imposed (including 'merits review' in some cases). Focusing on third party appeal rights ignores the fact that an overwhelming majority of court appeals are brought by developers;[58]
- broad standing reflects Australia's commitment to international laws and principles including the International Covenant on Civil and Political Rights (**ICCPR**), the Rio Declaration on Environment and Development (1992) and related UNEP Guidelines (2010);[59]and
- extended standing saves resources of the community and government in fighting over whether an interested party is 'aggrieved' for the purposes of demonstrated standing under some laws, such as the *Judicial Review Act 1991* (Qld).

These, and other benefits, have been recognised in a number of independent reviews that make recommendations supporting legal standing at least as broad as the current EPBC Act provisions. These include the Independent Review of the EPBC Act (2009) (**Hawke Review**), the NSW ICAC Report: Anti-Corruption Safeguards and the NSW Planning System (2012); the Administrative Review Council, Federal Judicial Review in Australia, (2012); and the Productivity Commission: Major Project Development Assessment Processes (2013).

(h) Partnerships with communities, including First Nations communities, must be on free prior and informed consent – this is not currently the case under Australian laws

Nearly all jurisdictions in Australia prevent a landholder from refusing entry of a resource activity on their land. This limitation automatically puts the power in the hands of the resource sector and regulator over communities. Further, there are very few examples of meaningful free prior and

extensively used by landholders and other groups, the majority of the committee was unable to find evidence to support this view.'

[56] See for example *Planning Act 2016* (Qld) s 53(6); *Environmental Protection Act 1994* (Qld) s 52(1)(d); *Environmental Planning and Assessment Act 1979* (NSW) s 123; *Protection of the Environment Operations Act 1992* (NSW) s 252. Other examples include local government and biodiversity laws.

[57] See, for example, s 37AO of the *Federal Court Act 1976* (Cth), Division 6.1 of the Federal Court Rules 2011, and ss 8(8) and 12, *Vexatious Proceedings Act 2008*.

[58] For example in NSW, of the merit appeals against local council development decisions, determined by the Land and Environment Court from 2012-13 to 2014-15, between 96% and 99% of appeals were brought by developers. This reflects the fact that developers have much broader appeal rights, and much more resources, than third parties. Sources: NSW Department of Planning, *Local Development Performance Monitoring 2012-13*; *Local Development Performance Monitoring 2013-14* and *Local Development Performance Monitoring 2014-15*.

[59] United Nations Environment Programme, *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (2010) <www.unep.org>. In Europe, environmental rights of transparency, participation and 'the right to review procedures to challenge public decisions' ('access to justice') are specifically protected under the Aarhus convention: <www.ec.europa.eu/environment/aarhus/>.

informed consent being a requirement to achieve from Traditional Owners, as required under the United Nations Declaration on the Rights of Indigenous Peoples. As mentioned above, in Annexure 2 we have provided an overview of Australia's obligations under International Law to Consult with, and to Ensure the Free, Prior and Informed Consent of, Indigenous Communities which should form an integral part of implementing best practice community engagement with First Nations people.

The Northern Territory provides the only exception, where First Nations people may hold inalienable freehold title through the *Aboriginal Land Rights (Northern Territory) Act 1976* (NT).[60] Under this Act a mining company must provide details of its plan to undertake exploration and consultation must be undertaken by a Land Council with the Traditional land owners on the plan.[61] Traditional Owners have approximately two years to make a decision, which may be extended if the company agrees.[62] If the Traditional Owners say no, the mining company and any other company will not be able to reapply to undertake exploration on the land for five years, unless the Land Council applies to remove this block.[63] If Traditional Owners say "yes", the mining company must enter into an agreement with them as to how the exploration activities can be undertaken.[64] Once the Traditional Owners consent to exploration on their land they may not block mining activities onwards from the exploration. This is the only example where meaningful attempt has been made to provide free, prior and informed consent in Australian jurisdictions. It is also the only example where the otherwise imbalance in power of the resource activity over the landholders is sought to be rectified.

While protracted negotiations may impede resource investment in some way, meaningful negotiations in good faith are essential to protect the rights and interests of other landholders, including Traditional Owners, as well as for the investment potential of other industries such as agricultural businesses.

(i) Native Title – Future Acts

The *Native Title Act 1993* (Cth) (**NTA**) affords protections to Aboriginal and Torres Strait Islander peoples against 'future acts' affecting their native title rights. The NTA allows native title holders to, among other things, commence right to negotiate processes or negotiate an Indigenous Land Use Agreement (**ILUA**). Such procedures can provide a legitimate form of benefit sharing. However, a recent report by Transparency International Australia has identified three key problems with the future acts negotiations under the NTA:[65]

(i) Poor representation of native title parties in negotiations

The concern is that native title holders appoint negotiators who fail to act in their best interests:

'Poor representation may occur due to unprofessional behaviour, self-interest or corruption. The sometimes divisive nature of group representation and the tensions that can occur between family

[60] *Aboriginal Land Rights (Northern Territory) Act 1976* (NT), s 42(6).
[61] Ibid 41.
[62] Ibid 42(13).
[63] Ibid 48.
[64] Ibid ss 45 and 46.
[65] Transparency International Australia, *Main Report – Corruption Risks: Mining Approvals in Australia* (Report, October 2017) 39 <www.transparency.org.au/tia/wp-content/uploads/2017/09/M4SD-Australia-Report_Final_Web.pdf>.

groups and sub-groups, creates an opportunity for manipulation by either mining companies or representatives.'[66]

(ii) Low level of transparency of the agreement making process

The concern is that the implementation of the terms of agreements are not monitored and there is limited transparency in negotiations, meaning that there is a risk the benefits negotiated in ILUAs or right to negotiate processes are not always distributed to the community.

(iii) Imbalance of resources between parties

The imbalance of knowledge, skills and power between native title holders and mining companies means that they do not enter negotiations on a truly equal playing field.

Transparency International Australia gives the example of negotiations between a mining company and the Yindjibarndi Aboriginal Corporation, in which a 'breakaway group' of elders consented to non-exclusive native title. The report notes that the Federal Court later found that none of the elders 'had any understanding whatsoever' of the implications of this consent, which significantly reduced the amount of compensation they were entitled to.[67]

Recommendations 4: **Support best practice community engagement in resource regulation by recommending the introduction of:**

(a) meaningful third-party submission and post-approval merits appeal rights across all jurisdictions in Australia and nationally;

(b) tailored community engagement for First Nations people with interests of any kind in the land;

(c) open standing for submission, appeal and third-party enforcement of resource regulations;

(d) consistent reporting on public participation methods, statistics and outcomes; and

(e) meaningful free, prior and informed consent requirements for all landholders, particularly for First Nations people, across all Australian jurisdictions, to similar or better standard as that provided under the *Aboriginal Land Rights (Northern Territory) Act 1976* (NT).

5. Current deficiencies with our regulatory frameworks that are leading to inefficiencies

There are multiple deficiencies with the regulatory frameworks for resource projects nationally and through state and territory legislation in Australia that prevent us from achieving best practice regulatory frameworks and reduce the quality of outcomes from our regulations. In addition to the potential sources of unnecessary regulatory costs listed in Box 3 of Issues Paper, the following sources should be added to provide a more robust and accurate perspective of unnecessary regulatory costs:

- inadequate regulation of standards of impact assessment provided by proponents - this wastes the time of government, proponent and community in having to scrutinise and seek

[66] Ibid 13.

[67] Ibid 15.

more information to ensure a robust application is provided to detail potential impacts;

- inadequate scrutiny of project application and impact assessment documents which exposes risks of inappropriate impacts to environmental assets and communities, due to poor standards around impact assessment and inadequate resourcing of regulatory and government assessment and decision-making processes;
- significant discretion of decision makers - risking both the quality of decision and ability for meaningful accountability and third-party scrutiny due to unclear or non-transparent criteria for decision making;
- inadequate third-party involvement as a check and balance on impact assessment, including through pressure to expedite community involvement – when comparatively small and more important part of assessment process. Currently essential elements of the assessment framework – third party scrutiny through submission and Court review rights - are expedited in such a way that they are not effective at achieving the purpose of providing thorough scrutiny and accountability to the public;
- data is not collected centrally and transparent – to aid in efficiency of understanding species trends and potential impacts and cumulative impacts, along with general environmental understanding in Australia;
- offsets frameworks are leading to inappropriate impacts occurring that are justified through offsets which may not be affected - this wastes proponent money, government and community resourcing and significantly jeopardises environmental values;
- regulatory frameworks and governance at all levels are not adequately reflecting our international obligations (for example, the Paris Agreement), and inadequate reflection of international obligations through state and local laws;
- all levels and jurisdictions of governments are not sufficiently resourcing environmental assessment and enforcement activities to undertake proper environmental assessment and to ensure compliance with conditions provided to reduce and avoid impacts to environments and communities – this is inefficient and places the burden and risk on the communities and other species impacted;
- conditions are often not enforceable or targeted at actual activity – e.g. condition is to make a plan to avoid the impact;
- inadequate third party enforcement powers;
- rehabilitation and relinquishment frameworks are not adequate to remove risk of governments being left with clean-up costs; and
- confusing and complex court processes - for example in Queensland laws under the *Environmental Protection Act 1994* (Qld) the provision of a court process mid-assessment that makes only a recommendation to government means that a full merits assessment and court determination can be ignored by the government decision makers, and government decisions can each be judicially reviewed but no merits appeal is available post-decision. Post-government decision court merits appeal rights provider a clearer, more certain path for all stakeholders.

Below we have provided submissions with respect to the various areas of resource regulatory frameworks noted in the Issues Paper.

6. Issues with regulatory design

(a) Meaningful early stakeholder and community input into regulatory design is essential

Best practice regulatory design must involve meaningful community consultation to ensure the regulation protects the public interest and provides for an accountable, transparent process, providing certainty to all stakeholders and reducing the risks of corruption arising through decision making processes. It also ensures that the stakeholders most experienced in or affected by the regulations are able to ensure that the regulations will operate effectively to achieve their aims.

Draft laws and amendments should be developed in coordination with stakeholders with sufficient time to provide meaningful feedback prior to the laws being introduced into Parliament. Consultation undertaken after the proposed laws have been finalised by government is too late to gain the benefit of the expertise and knowledge of the target stakeholders relevant to the laws and becomes inefficient and wasteful of the resources of all involved.

The consultation by the Northern Territory (**NT**) Government on the Environmental Protection Bill and associated Regulation has been used as an example of best practice consultation on a regulation in the Issues Paper, page 9. The EDO NSW office noted in their submission on these draft instruments to the NT Government their concerns that the government only sought contributions from key stakeholders on the laws and not from the broader public. Steps to genuinely engage with the wider community (such as through public seminars or information sessions, including with remote and Aboriginal communities), must also be taken when developing regulations, particularly of such broad public impact. Consulting only with key stakeholders means the government does not have the benefit of actually hearing from those impacted by their proposals. These concerns were exacerbated by a last minute 'backflip' on third party appeal rights, communicated by government media release, notified prior to the closure of the public exhibition period of these draft laws, losing the benefit of the range of community views. This change appeared to have come largely as a response to industry pressure alone.

Special legislation introduced with no public consultation at all, such as the NSW Environmental Planning & Assessment (Territorial Limits) Bill 2019 that proposes to prohibit conditions relating to scope 3 emissions, is the opposite of best practice regulatory design.

(b) Regulatory objectives must be clearly defined and articulated, and conflicting objectives are minimised or managed across different regulations

We agree that best practice regulation requires that objectives are clearly defined and articulated, but also that the regulation and governance frameworks around it are designed in such a way that they achieve the objective effectively. Conflicting objectives should ideally be minimised or managed across regulations to ensure that each regulation can achieve its objective without hindrance.

There is a role for multiple regulatory instruments to properly regulate the multiple impacts of resource activities

However, we note that there is a role for multiple regulatory instruments and entities to consider activities where the point of focus is on differing matters of the same activity. Multiple approval requirements typically stand together and operate cumulatively where each Act has a distinct

purpose, different from the other.[68] Resource activities by nature often involve multiple impacts with distinct but interrelated considerations relevant to different regulatory frameworks. For example, impacts to water resources related to quantity of water taken or impacted are relevant to regulatory frameworks which consider water planning for a region, which is a distinct but related consideration as to environmental impacts to both quantity and quality and which may be considered under separate laws.[69]

Western Australian removal of ban on unconventional gas is premature and not a good example of best practice regulation

The Issues Paper refers to the Western Australian Government's removal of the ban on unconventional gas as an example of 'inadequate articulation of the problem and assessment of how regulation might address it', and states that 'following an inquiry that environmental and community risks could be sufficiently managed through infrastructure and regulatory design' (p10). We understand that the intention in referencing this example is to query whether the ban may have been prevented had there been a better understanding of how the activity could be regulated.

The moratorium on fracking in WA was lifted in September. While the WA Government published its Implementation Plan in July 2019 which outlines its response to the WA Fracking Inquiry and the recommendations contained in the Final Report relating to the regulation of fracking (including through amendments and reforms to legislation and policy), we note that these are not in place yet. Therefore, the moratorium is being lifted where regulatory frameworks do not exist that are capable of implementing the Fracking Inquiry's recommendations or providing protection from the risks of fracking. The action of lifting the ban appears to be premature where further work is needed to determine whether the regulations recommended by the Inquiry are capable of being introduced.

(c) <u>Claims of 'regulatory creep' should be used with care - consideration of scope 3 emissions is not regulatory creep</u>

We are not aware of instances of 'regulatory creep' and raise concern that this term may be being used inappropriately and in a way that doesn't recognise the evolving nature of our regulatory framework. 'Regulatory creep' seems to be claimed by industry groups were laws are strengthened in a way that some industry groups do not like. For example, we are aware that there is a claim that the recent consideration of scope 3 emissions in the NSW case of *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (**Rocky Hill**) and the refusal of the Bylong Coal Project by the Independent Planning Commission in September 2019[70] have been considered to be potentially regulatory creep. In response to the recent calls to prevent scope 3 emissions from being assessed in NSW, Minerals Council of Australia Chief Executive Tania Constable has been reported as saying: *"Regulatory creep and overreach — including the use of regulation by unelected bodies to block mining projects and the jobs and prosperity they bring to regional communities — is a serious concern in the regulation of the minerals sector across*

[68] *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 2 NSWLR 681, 686 (Privy Council) ('Wyong'); and *South Australia v Tanner* (1988-89) 161 CLR 166 ('Tanner'), 170-171.

[69] See, for example, *Water Act 2000* (Qld) compared with *Environmental Protection Act 1994* (Qld) considerations.

[70] Statement of reasons for decision (18 September 2019) <www.ipcn.nsw.gov.au/projects/2018/10/bylong-coal-project>.

Australia,"[71] This statement fundamentally disregards and devalues the integral role played by communities in the assessment process when exercising their legal rights to provide submissions and to appeal or seek review of decisions, as detailed above. Further, the concept that consideration of scope 3 emissions in resource assessment is regulatory creep is fundamentally incorrect.

Scope 3 emissions have been relevant to environmental assessment in many jurisdictions for some time. In 2004 Full Federal Court of Australia held in *Minister for Environment and Heritage v Queensland Conservation Council*,[72] the impact of an action includes not only the direct but also the indirect influences or effects of the action, including "each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether the consequences are within the control of the proponent or not."[73] The principles of ecologically sustainable development (**ESD**), particularly the precautionary principle and the principle of intergenerational equity, have also been held to require consideration of the impact of a development on climate change and the impact of climate change on a development. The decision of Chief Justice Preston in *Gloucester Resources Limited v Minister for Planning*[74] helpfully sets out the many court decisions throughout Australian jurisdictions, and internationally, which have considered scope 3 emissions to be relevant to the assessment of the mine against the principles of ESD.[75]

For example, in Queensland the Court of Appeal determined that in making a decision under s 223 of the *Environmental Protection Act 1994* (Qld), the Land Court is either required to consider (per McMurdo P at [11]) or is not precluded from considering (per Fraser JA at [45] and Morrison JA at [51]) scope 3 emissions when making a decision as to whether to recommend the granting of an environmental approval for a coal mine.[76] The Land Court has also determined, and the Supreme Court has confirmed, that in considering the factor in s 269(4)(k) of the *Mineral Resources Act 1989* (Qld), as to whether "public rights and interests will be prejudiced" by the granting of the mining lease, the Land Court is empowered to consider scope 3 emissions.[77]

The consideration of scope 3 emissions in the cases of 'Rocky Hill' and 'Bylong' are therefore not examples of regulatory creep. Courts have held that indirect, downstream GHG emissions are a relevant consideration to take into account in determining applications for activities involving fossil fuel extraction or combustion or electricity generated by fossil fuel combustion. The difference in these decisions is that they have been made post the Paris Agreement, which has meant that the scope 3 emissions can be contextualised against our commitments to reduce emissions in line

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[71] Comments of Minerals Council of Australia chief executive Tania Constable published in Perry Williams, 'NSW law to shield coal mine projects from emissions concerns' *The Australian Business Review* (online, 23 October 2019) <www.theaustralian.com.au/business/mining-energy/nsw-law-to-shield-coal-mine-projects-from-emissions-concerns/news-story/0beb826b240f598a225eac1243425ba5>.

[72] *Minister for Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24; [2004] FCAFC 190, [53].

[73] Ibid [57].

[74] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [499]-[513].

[75] See, for example, *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720; *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1; [2007] NSWLEC 59; *Aldous v Greater Taree City Council* (2009) 167 LGERA 13; [2009] NSWLEC 17; and *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221; *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth* [2012] QLC 13; *Hancock Coal Pty Ltd v Kelly* (No. 4) [2014] QLC 12; *Coast and Country Association of Qld v Smith* [2016] QCA 242.

[76] *Coast and Country Association Queensland Inc v Smith* [2016] QCA 242.

[77] *Hancock Coal Pty Ltd v Kelly (No 4)* (2004) 35 QLCR 56; [2014] QLC 12, [218] (Land Court) and *Coast and Country Association of Queensland v Smith* [2015] QSC 260, [39] (Queensland Supreme Court).

with this agreement. This is a reflection of the ever-evolving nature of our legal system and not regulatory creep.

(d) Regulations are not currently overly complex or prescriptive - regulations across Australia are generally too ambiguous and provide significant, dangerous discretion

Rather than regulations being 'overly complex' or 'prescriptive' in Australia, attention needs to be placed on the chronic ambiguity and discretion that is provided under resource laws throughout all jurisdictions in Australia. Vague regulation can hinder investment in Australia through affecting the certainty as to how it will be interpreted for each project and what is expected of a proponent, as mentioned above.

For example, in WA, the *Petroleum and Geothermal Energy Resources Act 1967* (WA) (**PAGER Act**) does not contain any specific environmental requirements to guide regulation of the petroleum and geothermal energy industries. The Minister's powers to approve or refuse an application are not expressed as being subject to any constraints such as mandatory considerations or standards. This contrasts with other jurisdictions that require consideration of, for example, an objects clause that covers well-established principles such as ecologically sustainable development.[78] There are some potentially relevant provisions relating to activities being carried out in a "proper and workmanlike manner and in accordance with good oil field practice".[79] "Good oil-field practice" is defined as "all those things that are generally accepted as good and safe in the carrying on of [petroleum exploration]".[80] This vague, outdated, and industry-oriented concept is entirely unacceptable as a mechanism for ensuring that best environmental practices are used in fracking activities. It is broad, vague, lacking in detail and unable to be measured or enforced. Further, given the significant variation in oil-field practices globally, this lacks any type of certainty. The lack of environmental provisions in the PAGER Act, coupled with its apparent exemption from the *Environmental Protection Act 1986* (WA), means that environmental protection is largely relegated to an industry controlled, flexible environment plan.

Legislation in the Northern Territory has been extremely minimal to date, allowing significant discretions to be exercised by decision makers with regard to resource activities. The current *Environmental Assessment Act 1982* (NT) (**EA Act**) is only 6 pages. The EA Act, which hasn't been amended in any meaningful way since it was introduced in 1982, fails to meet modern environmental regulatory standards and community expectations, particularly due to:

- excessively high discretion and very limited levels of legislative prescription (leading to inconsistent application, poor outcomes, and unaccountable/unenforceable decision-making);
- limited opportunities for public participation;
- minimal accountability and transparency checks and balances; and
- an absence of compliance and enforcement powers, reflecting the lack of any substantive power held by the Northern Territory Environmental Protection Agency or Environment Minister.

Another example is the failure to clearly integrate criteria in our resource assessment decision

[78] See, for example, *Natural Resources Management Act 2004* (SA), s 8; *Environmental Protection Act 1994* (Qld), s 3; *Environmental Planning and Assessment Act 1979* (NSW), s 1.3.

[79] PAGER Act, s 91(1).

[80] PAGER Act, s 5(1) 'good oil-field practice'.

making that reflect the need to reduce contributions from Australia that may increase the risks of dangerous climate change. Environmental laws around Australia generally provide a duty to prevent or mitigate environmental damage. Climate change and its related impacts, increasing rapidly through greenhouse gas emissions, are the biggest threat to our environment at present,[81] and our economy.[82] However, due to vague environmental laws which frequently do not require decision makers to avoid or mitigate activities which may increase greenhouse gas emissions, either directly or through downstream impacts, various courts hearing objections on the basis of climate change impacts have interpreted the duty to consider this environmental impact in inconsistent ways.[83] This lack of guidance as to how decision makers should address climate change impacts further increases the need for this matter to be addressed through court review. Resource sector regulatory frameworks would benefit from clear stipulation of the need for decision makers to consider the direct and downstream greenhouse gas emissions of an activity, with a view to ensuring we meet the internationally agreed 1.5°C limit on warming.[84]

(e) Regulations must be subject to rigorous assessment to evaluate how effective they are at achieving their aims

We agree that regulations and any policy development should be subject to review of how effective current laws have been operating, where they have failed to achieve the desired outcome and how they may be best amended to provide for the desired outcome. Review processes such as that being undertaken for the EPBC Act as part of the ten year review provide an important opportunity to obtain vital feedback from a broad range of voices on how the legislation is operating. Too frequently extensive reviews of this nature lead to very little change to address the issues that have been demonstrated through submissions on the review, as occurred through the Hawke Review in 2009.[85] Review processes waste the resources of stakeholders and government if they do not lead to changes being made to address the agreed issues that have been highlighted through the review.

(f) Consequences of poor regulatory design for regulatory outcomes, investment in the sector and broader community outcomes should be noted

As stated above, the consequences of poor regulatory design for investment and community outcomes include:

- the costs of negative externalities being pushed on to the community and / or government

[81] Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in (Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)) *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018).

[82] António Guterres, 'Climate Change Is Biggest Threat to Global Economy' *UN Climate Change News* (25 January 2019, online <www.unfccc.int/news/antonio-guterres-climate-change-is-biggest-threat-to-global-economy>.

[83] As set out in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [499]-[513]; and relevant to Queensland case law in: Justine Bell-James and Sean Ryan, 'Climate change litigation in Queensland: a case study in incrementalism' (2016) 33(6) *Environmental and Planning Law Journal*, 515-537.

[84] *Paris Agreement under the United Nations Framework Convention on Climate Change*, opened for signature 13 December 2015), CN 63 [2016], (entered into force 4 November 2016) and UNFCCC, *Report No 21 of the Conference of Parties*, UN Doc FCCC/CP/2015/10/Add (29 January 2016) 21.

[85] See Hawke Review, above 17.

to pay for, for example through managing the impacts of pollution on community health or the impacts on environmental values;

- reduced incentive to undertake best practice impact assessment and design to reduce or avoid impacts from activities, creating a greater reliance on compliance activities by government or third-party oversight and enforcement where this is possible;
- a higher chance that poorer performing companies may be induced to undertake activities in a weaker regulatory framework due to standards of performance and oversight being lower, as opposed to encouraging companies who understand the utility for all stakeholders in a regulatory framework that is clear, certain and functional in achieving the outcomes it sets;
- encouraging poor performance even by responsible operators where laws are weak and a competitive disadvantage arises in complying with the law where others are not;[86] and
- overall greater risk of inappropriate and unnecessary environmental and community impacts.

Recommendation 5: The Commission should support the following elements of best practice regulatory design:

(a) Meaningful early stakeholder and community input into regulatory design is essential as part of best practice regulatory design;

(b) Regulatory objectives must be clearly defined and articulated, and conflicting objectives are minimised or managed across different regulations;

(c) Claims of 'regulatory creep' should be used with care - consideration of scope 3 emissions is not regulatory creep;

(d) Regulations are not currently overly complex or prescriptive - regulations across Australia are generally too ambiguous and provide excessively broad or unguided discretion - work must be done to provide more certainty and enforceability in resource regulation;

(e) Regulations must be subject to rigorous assessment to evaluate how effective they are at achieving their aims; and

(f) Consequences of poor regulatory design for regulatory outcomes, investment in the sector and broader community outcomes should be noted.

7. Issues with efficiency, transparency and accountability of decision-making

Efficient, transparent and accountable decision making requires clear laws and governance that recognise and provides meaningful community involvement in decision making processes and are designed in a way that achieve protection of the public interest.

Unfortunately, there is significant variation in the standard of regulation between jurisdictions across Australia. For example, whereas some states require a 'fit and proper person' (or 'suitable operator') test to be fulfilled before a proponent can obtain an authorisation to undertake resource activities,[87] jurisdictions such as the Northern Territory and Western Australia, do not have this

[86] S Shapiro and R Rabinowitz, 'Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA' (1997) 14 *Administrative Law Review* 713.

[87] For example, *Environmental Protection Act 1994* (Qld) Ch 5A, Pt 4; *Mining Act 1992* (NSW) s 380A; *Petroleum*

test. Equally there are some weak elements of resource regulations which are common to most jurisdictions, such as inadequacies in upfront risk assessment, lack of resourcing for the regulator such that assessment and compliance processes are jeopardised and inadequate accountability and transparency measures.

Jurisdictions such as the NT have particularly retrograde regulations, but we note the reform processes that have been in train since the independent Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs in the Northern Territory handed down its Final Report. Just some of the elements weakening the effectiveness of the NT laws include for example:

- no adequate process that ensures environmental impacts and risks of project are appropriately assessed and considered by an objective technical agency and decision maker, including no separate environmental approval issued by Environment Minister;
- the Department responsible for promoting mining is also the regulator, creating a high risk of perceived/actual conflict of interest or corruption;
- no obligation for Minister under *Mining Management Act 2001* (NT) (**MM Act**) to adopt recommendations made by NT EPA;
- no appropriate criteria guiding Ministerial decision-making under the MM Act;
- no transparency around Authorisations and Mining Management Plans (**MMPs**);
- no public participation in Authorisation or MMP decision-making under MM Act;
- MM Act authorisation used inappropriately (i.e. conditions seem to be in MMPs), although difficult to fully understand given lack of transparency around these documents;
- no requirement for 'fit and proper person' test for all proponents prior to granting authorisation/MMP;
- exemptions for some resource activities from the Water Act;
- no third party merits appeal rights, undermining accountable, evidence-based and robust decision-making;
- no open standing for judicial review or enforcement of breaches, which also undermines accountable, robust, lawful decision-making and proper enforcement;
- no public access to information/ no transparency over how regulated which significantly undermines accountability and access to justice;
- security bond provisions are inadequate, with lack of transparency about method; ongoing concern about adequacy of quantum, representing high risk for potential abandonment of mine sites; and
- no policy or regulations relating to mine closure and rehabilitation and no ability to hold corporate entities liable in the event they abandon a mine site (chain of responsibility).

(a) Importance of federal and state involvement and risks of the One-Stop-Shop

We do not support any proposal to delegate federal responsibilities for matters of national environmental significance (under the EPBC Act) to states and territories. While most environmental decision-making happens at the state level, there are a number of crucial reasons why the Australian Government must retain a leadership and approval role in environmental assessments and approvals of matters of national environmental significance. These include:

- only the Australian Government can provide national leadership on national environmental issues, strategic priorities and increased consistency;

(Onshore) Act 1991 (NSW), s 24A.

- the Australian Government is responsible for our international obligations, which the EPBC Act implements;
- State and Territory environmental laws and enforcement processes are not always up to standard, and do not consider cross-border, cumulative impacts of decisions;
- States and Territories are not mandated to act (and do not act) in the national interest; and
- State and Territory governments often have conflicting interests – as a proponent, sponsor or beneficiary of the projects they assess.

Further, two pillars of the 'green tape' agenda – bilateral accreditation of State assessment and approval processes, and 'streamlining' State and Territory major project assessments – are internally contradictory. If State processes seek to uphold EPBC Act requirements, they will need to increase environmental standards. On the other hand, if States seek to further fast-track major projects (by reducing assessment processes, public participation or judicial scrutiny), they will need to lower environmental standards.

The Commonwealth role in environmental regulation does not 'duplicate' State roles. Rather, the EPBC Act specifically regulates impacts on nine Matters of National Environmental Significance which are not given special consideration in state assessment or approval processes, as the EPBC Act requires. This is demonstrated by the list of important additional requirements set out in appendices to bilateral assessment agreements to date. To the limited extent that state and federal functions do overlap (assessing the same project, if not the same impacts), this should not be addressed by hastily devolving federal powers. There are a range of other efficiency options noted below.

State processes are overseen by Planning Ministers and departments, whereas the EPBC Act is overseen by the Commonwealth Environment Minister and department. Matters of national environmental significance should continue to be protected by ministers and agencies that have the clear mandate and expertise to do so. Although the Productivity Commission has supported bilateral agreements in a previous report, it did not support the consolidation of assessment, approval and enforcement functions in State planning agencies – as occurs for major projects in various State jurisdictions now being accredited:

> *'In the Commission's view, there is a strong 'in principle' rationale for embedding more independence in major project assessment arrangements by assigning this responsibility to an independent regulator. … Similarly, there is merit in (related) monitoring and enforcement activities (chapter 10) residing with an independent regulator.'*[88]

The rationale for arms-length assessment, monitoring and enforcement by a federal agency is even stronger where the major project is backed by a state authority.

The existing delegations of project assessments to states and territories have been in place for 14 years under the EPBC Act. However, the Commonwealth has never audited their environmental effectiveness, or whether States and Territories are complying. This review should be undertaken to determine how effectively states and territories are implementing the bilateral assessment that is currently in place.

(b) Coordinating assessment between jurisdictions or regulations - Queensland Coordinator-

[88] Productivity Commission, above n 27, recommendation 6.5.

General powers hinder accountability, certainty and efficiency

Coordination of regulatory frameworks can greatly assist the efficiency of processes for project approvals, and can provide more clarity to all stakeholders around the process and timeline for the various regulatory approvals. However, it's important that this coordination does not undermine the quality of the various assessments and decisions required to be made for a project through removing the powers of specialist agencies.

In Queensland the Coordinator-General undertakes a 'lead agency' role in coordinating the major project regulatory processes across state and federal government. However, contrary to the definition of this model in Box 4 of the Issues Paper, the Coordinator-General does override the responsibility of other agencies. This undermines the powers of the Department of Environment and Science (**DES**) as well as the Land Court, in that they cannot provide for conditions which are inconsistent with the conditions provided by the Coordinator-General in the EIS Evaluation Report.[89] This is of concern because the specialist roles of these entities - being the specialist environmental regulatory role provided by DES and the independent oversight and scrutiny provided by the Land Court - are seriously undermined by this rule. The Queensland Land Court undertakes a full merits review with expert assistance to analysis the application material before it, often leading to better understanding of the likely impacts, after the Coordinator-General provides these conditions. The rules also restrain specialist experts in the Department of Environment and Science in providing conditions.

Recently the Queensland Land Court commented about the situation of being prohibited from recommending conditions inconsistent with the Coordinator-General as follows:

> *"I find this a most unsatisfactory position to be placed in, but the legislation leaves me no option. One could be forgiven for thinking the position that I find myself in is absurd, given that this Court has heard in such extensive detail from two highly regarded experts in the acoustic field, as well as all of the material that was before the CG. In simple terms, this Court has had the benefit of much more information placed before it than the CG, and that information and evidence has been subject to intense scrutiny, yet I am precluded from recommending the result of that evidence to either the MRA Minister or the administering authority for the EPA."*[90]

Transparency International Australia recently rated the risk of industry influence in the assessment of coordinated projects by the Queensland Coordinator-General as high.[91] This framework significantly limits the submissions that may be raised by the community, and the applicant's ability to suggest alternative conditions to address objector concerns or unfavourable evidence. It also significantly limits the Court in providing positive solutions through amended conditions as a result of the outcomes of an objection hearing. This is a highly inefficient, inappropriate and ineffective power that should be repealed.

Similarly in NSW, coordination is done by the planning department and for some categories of major projects there are constraints on what conditions can be proposed by expert agencies – i.e., they must be consistent with the approval. This is not an effective concurrence mechanism

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[89] *Environmental Protection Act 1994* section 205.

[90] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24, [787].

[91] Transparency International Australia, *Corruption Risks: Mining approvals in Australia* (October 2017) <www.transparency.org.au/tia/wp-content/uploads/2017/09/M4SD-Australia-Report_Final_Web.pdf>.

for agencies with relevant expertise.[92]

(c) Regulatory accountability and independence are integral to best practice regulation

Independent review mechanisms, where they exist, are currently unnecessarily complex and frequently limit the important role of independent arbiters, such as courts and tribunals, in the regulatory framework, limiting the accountability of decision makers. The current complexity of review processes provides uncertainty and high resource burdens for all stakeholders, not just proponents as listed on page 12 of the Issues Paper. Best practice processes for review involve the independent court review occurring after government and the regulator have made their decision, to provide certainty as to the outcome.

For example, unlike other matters within the Queensland Land Court's jurisdiction, such as CSG approvals or water licences, the Land Court does not make a final decision on referred mining objections, but rather makes a recommendation to the ultimate decision makers. The Queensland Land Court review is mid-assessment and the recommendation to the decision makers must be considered but can be disregarded. This undermines the benefit of an independent assessment free from politics that would normally be provided by a court merits review power accessible by the public.

This limitation on the Land Court's power in mining objection hearings has hampered the Court's ability to conduct matters fairly and efficiently, and increases the time, complexity and costs for all parties. This is contrary to how development assessment processes are provided for most other development activities, meaning a shopping center can be subject to more accountable, quality regulation than a large resource activity. This is disproportionate and inappropriate given the extent of impacts posed by large resource activities to communities and environmental values. See the submission from EDO Queensland to the Queensland Government's review of resource approval efficiency at **Annexure 3**, particularly from page 20, for more information.

Similarly, merits review of major resource projects is significantly restricted for third parties, and explicitly excluded where the Minister has referred a project to a public hearing by the NSW Independent Planning Commission (**IPC**). The IPC public hearing process is not equivalent to a court merit review process, so this restriction is reducing accountability of the NSW planning in terms of thorough review of major resource projects.

Many states and territories otherwise don't have the benefit of rights for third parties to seek meaningful independent review by a court or tribunal, severely limiting the quality and robustness of critique of environmental impact assessments.

(d) Conflicts of interest held by state governments in project assessment must be acknowledged and safeguarded against where possible

We must be cognisant of the high likelihood that competing interests of state governments will hinder the objective environmental assessment of projects which may be seen to also hold financial or political interests for that government. Too often the same departments that are charged with promoting resource exploitation are the departments which are part of the

[92] See EDO NSW fact sheet on State Significant Development and State Significant Infrastructure at https://www.edonsw.org.au/planning_development_heritage.

assessment as to whether the resource activity should be allowed to go ahead.

For example, the Department of Mines, Industry Regulation and Safety (**DMIRS**) in WA has responsibilities as "watchdog" (i.e. charged with being the "lead agency" to assess, approve and enforce compliance with the WA PAGER Act), associated regulations and tenure) while at the same time being required to promote the petroleum and gas industry. The WA framework makes DMIRS the lead regulator,[93] implicitly structuring the regulatory regime to focus on industry and development. In comparison, in other jurisdictions such as NSW, the Environmental Protection Agency is designated as the lead regulator,[94] having responsibility for the management of the potential environmental impacts of resource activities.

The Queensland Department of Natural Resources, Mines and Energy is charged under the *Mineral Resources Act 1989* (Qld) with, amongst other things, encouraging and facilitating prospecting and exploring for and mining of minerals; encouraging environmental responsibility in prospecting, exploring and mining; ensuring an appropriate financial return to the State from mining; and provide an administrative framework to expedite and regulate prospecting and exploring for and mining of minerals.[95] These are conflicting duties that may lead to bias in assessment of the environmental and community impacts of a project proposal. This is a key reason why it is inappropriate to give state and territory jurisdictions bilateral approval powers under the EPBC Act, as stated above.

For this reason, independent EPAs should be brought in not only nationally but for all states and territories, to ensure that the environmental assessment and compliance entity is free from potential conflicts of interest in undertaking its role. This role must be sufficiently resourced to be undertaken robustly.

(e) Correcting "Box 5"- Adani mine legal challenges are unique for a unique, globally significant mine, not an example of normal process, but good example of weaknesses of our regulatory framework

Box 5 of the Issues Paper seeks to use the Carmichael coal mine as an example of the legal processes that have been involved in assessment of this mine. This coal mine as applied for is the largest coal mine posed in the Southern Hemisphere and one of the largest mines globally. It is fitting and 'best practice' therefore that it be subject to extensive, robust scrutiny and assessment with meaningful community involvement to ensure the public interest is properly reflected and protected in the assessment and final decisions around this mine.

This mine is not a normal example of the scrutiny and court processes surrounding a resource activity in Australia. For example, the Byerwen mine which is located in Queensland's Bowen Basin and would produce up to 10 million tonnes of hard coking coal per year, was approved and constructed during the time the Carmichael coal mine has been going through assessment. The Carmichael coal mine is, however, an excellent case study of how poorly our regulatory frameworks and governance processes are operating in demonstrating their weakness in protecting our threatened species and considering climate change impacts from activities. These

[93] *Memorandum of Understanding for Collaborative Arrangements between the Office of The Environmental Protection Authority and The Department of Mines and Petroleum*, signed 10 February 2016 <www.dmp.wa.gov.au/Documents/Environment/ENV-MEB-016.pdf>.

[94] NSW Department of Planning and Environment, *NSW Gas Plan* (November 2014) 11.

[95] *Mineral Resources Act 1989* (Qld), s 2.

flaws were documented in the joint report by EDOA and the Australian Conservation Foundation 'Licence to Kill: Commonwealth environmental approval for Adani's Carmichael coal project'.[96]

Unfortunately the Issues Paper does not detail the myriad beneficial outcomes of each of the legal challenges that the mine has been subject to; such as key findings demonstrating that the environmental impact assessment provided for this significant mine was not accurate in many instances, particularly as to the economic benefit of the mine (including finding that the mine would produce only 1,464 jobs and not 10,000 claimed, and up to $4.8bn in royalties rather than the $22bn claimed) and the impacts posed to threatened species on the site,[97] as well as ensuring the government and regulator undertook proper process in accordance with the law by considering the conservation advice provided by the advising department.[98] Nor does it mention that none of the processes were found to be an abuse of the court process. Further, there is unfortunately no mention of how much inappropriate pressure has reportedly been placed on various levels of government and decision makers in the assessment and determinations around this mine.[99]

In this instance under the Queensland system, the number of legal cases would have been reduced had there been a court review processes after, and not prior, to the government's decision on the environmental authority and mining lease. Additionally, piecemeal applications which allow for key infrastructure, like the North Galilee Water Scheme for the Carmichael coal mine, create more complex processes. Ensuring that projects cannot be subject to piecemeal applications and must involve the whole project in one application would reduce the complexity and number of processes for an activity. This inefficiency could be reduced by providing the Land Court with a post-approval merits review role and the final decision.

Another example of merits review improving assessment is the matter of Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited, a third party merits review in respect of a proposed extension of the Warkworth open cut coal mine.[100] In that decision, the Chief Judge of the Land and Environment Court of NSW found that the economic modelling relied on by the proponent and by the Minister to give approval for the expansion contained so many deficiencies it was of "limited value". These errors included that the input-output analysis used deficient data and that the cost-benefit analysis relied on a highly flawed survey. As a consequence, Preston J concluded that the social and environmental costs outweighed any economic benefits, and the application to extend the mine was rejected. The decision was upheld on appeal.

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[96] Australian Conservation Foundation and EDOs of Australia, *Licence to Kill: Commonwealth environmental approval for Adani's Carmichael coal mine project* (September 2016) <www.d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/3133/attachments/original/1473288998/Licence_to_kill_Commonwealth_environmental_approval_for_Adani%E2%80%99s_Carmichael_coal_mine_project_EDOA_ACF_discussion_Sep_2016.pdf?1473288998>.

[97] *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48.

[98] *Mackay Conservation Group v Commonwealth of Australia* NSD33/2015.

[99] Michael Slezack, 'Adani water plan ticked off within hours despite lack of detail, internal CSIRO email reveals' *ABC News* (online, 14 May 2019) <www.abc.net.au/news/2019-05-14/adani-csiro-emails-foi-melissa-price/11107276; Michael slezack and Stephen Long, 'Inside Melissa Price's decision to approve Adani's groundwater plan' *ABC News* (online, 11 April 2019) <www.abc.net.au/news/2019-04-11/adani-damning-assessment-turned-into-approval/10990288>.

[100] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48.

(f) Regulator resourcing and capacity must be sufficient to ensure good functioning of the regulatory framework

It is of vital importance that assessment and enforcement activities are properly resourced to ensure they are undertaken in an effective, efficient and robust manner to ensure the significant resources of all stakeholders involved are used well. Qualified specialists are needed to undertake these duties. This would assist in ensuring that assessment is thorough, provides adequate scrutiny of project EIAs and leads to meaningful conditions rather than conditions that are vague and put off approval for later management plans. The assessors and regulator must remain independent of the resource sector; it is inappropriate and dangerous to outsource assessment as important regulations to ensure quality of assessment and to avoid conflicts of interest in regulation may be harder to enforce.

Under-resourcing regulators means slower, poorer-quality assessment. Poor quality EIAs also cause significant delays, for example through the need for information requests and responses via more information and improved modelling; the need for public scrutiny and critique through court processes etc.

(g) Conditions must be clear and enforceable in an efficient, functioning regulatory system

Unenforceable conditions, or conditions that leave doubt for all stakeholders as to the activities expected of a proponent, have become a chronic issue in resource approvals. The enforceability of mine site rehabilitation-related conditions was identified in the Productivity Commission's inquiry into major project assessment as a particular area of concern,[101] as discussed below, but this issue extends far beyond just rehabilitation.

As found in the Productivity Commission's inquiry into major project assessment:

> *'Practical and measurable conditions can also be encouraged through greater use of 'model' conditions, and by establishing a formal 'feedback loop' from compliance monitoring activities (chapter 10) to condition-setting processes. These experiences provide important insights about the achievability and measurability of conditions, thereby facilitating a process of continuous improvement. The Commission's proposal for environmental assessment and enforcement functions to be consolidated in a single independent environment regulator (chapter 6) would facilitate this information sharing.*
>
> *Governments should ensure that all major project regulators only set conditions that are realistic, possible to comply with and readily measurable and enforceable. For outcome-based conditions, this includes consideration of whether the desired outcome is within the proponent's control, and how other factors potentially contribute to the outcome.'*[102]

A key issue in the mineral and resources sector is inadequate or inappropriate rehabilitation of project sites. In April 2017, the EDOA made a number of submissions in relation to the Inquiry into the rehabilitation of mining and resources projects as it relates to Commonwealth responsibilities.[103] In considering the responsibilities of the Commonwealth in relation to the

[101] Productivity Commission, above n 27, 225.

[102] Ibid.

[103] EDOs of Australia, Submission to the Senate Environment and Communications References Committee, *Inquiry into the rehabilitation of mining and resources projects as it relates to Commonwealth responsibilities* (13 April 2017)

regulatory framework that underpins Australia's mining rehabilitation regime, we noted that enforcement of mine rehabilitation obligations has been an area of concern in every state and territory across Australia. Best practice in the development of future resources legislation requires that operators of mineral and resources sites are incentivized to comply with their regulatory obligations and requirements for rehabilitation are determined as part of the original assessment of the project application.

(h) Enforceability relies on baseline data

One key element of enforceability, apart from well drafted conditions, is a requirement to obtain baseline data to determine compliance with environmental conditions. Baseline setting is the foundation for both identifying risks and monitoring impacts of resource activities on the environment.[104] Without comprehensive data at the outset of operations, impacts cannot be properly measured. This is frequently not provided for in environmental assessment programs, wasting the resources of community groups and government in seeking to assess whether conditions are being complied with. For example, the WA PAGER Act regime does not provide for adequate regulatory requirements that provide for the collection of baseline data against which impacts could be measured. Best practice requires an independent third party to undertake baseline testing, against which further monitoring by the proponent and third party inspections can be compared.

Recommendations 6:

(a) Introduce an independent EPA nationally and in each state and territory to act as an independent assessment, approval and enforcement body for activities that affect environmental assets and community health and wellbeing. Each EPA could also develop and oversee environmental goals, strategies, plans and standards to achieve ecologically sustainable development in the relevant jurisdiction; and gather evidence on environmental conditions and trends to inform decisions and improve outcomes over time.

(b) The Commission should note the risks in implementing a One-Stop-Shop framework and recommend against the implementation of bilateral approval powers to ensure that regulatory frameworks are robustly delivered and conflicts of interest held by state and territory governments are guarded against in assessment.

(c) Recommend the dissolving of excessive powers given to the Queensland Coordinator-General and any similar role in Australian resource regulatory frameworks, which is affecting efficiency, accountability and certainty in resource regulation. Particularly the power to override the power of the Land Court and other Departments through mandatory conditions should be removed.

(d) Regulator resourcing and capacity must be sufficient to ensure good functioning of the regulatory framework.

(e) Compliance and enforcement must be upheld through auditing current authorities and model conditions used in new authorities to ensure conditions are enforceable, which rely on requiring baseline assessments and clear, sufficiently prescriptive conditions

<www.edonsw.org.au/inquiry_into_the_rehabilitation_of_mining_and_resources_projects_as_it_relates_to_commonwealth_responsibilities>.

[104] See, for example, APEEL, above n 19, 41.

to define legal and illegal activities.

8. Issues with regulator conduct

As stated above, we consider this component of the review would more helpfully be focused on reducing the risks of corruption or perceived corruption in the regulator or government. For example, ensuring outcomes are consistent with objectives is arguably better considered within the other two elements, by ensuring regulations are drafted and governance processes provided for so that they lead to decisions which meet the objects of the regulations. Another element cited in the Issues paper, rehabilitation laws, equally fit perhaps more appropriately in the other two elements with a view to reviewing whether the process for creating these new regulations and the governance processes created around them have been effective. For this reason we have instead focused rather on how regulations and governance frameworks can be improved to reduce the risks of actual or perceived corruption that may hinder the effectiveness of regulation and processes in achieving protection of the public interest. Our key recommendation, to introduce a new independent national EPA would greatly assist in improving the conduct and governance around Australian resource regulation.

(a) Ensuring accountability and transparency in decision making to remove risk of corruption or perceived corruption

In its report entitled, Corruption Risks: Mining Approvals in Australia (**the Report**), Transparency International Australia (**TAI**) identified numerous elements of regulation of the mining sector in Australia that expose risks of real or perceived corruption around relevant decision making processes.[105] The Report highlighted vulnerabilities particularly prevalent in the regulatory and governance frameworks of Western Australia (**WA**) and Queensland, such as:

- Inadequate due diligence investigation into the character and integrity of applicants for mining approvals;
- a lack of investigation into beneficial ownership;
- a high risk of industry influence and state and policy capture in the awarding of mining approvals through poor regulation of political donations, lobbying, the culture of mateship and the movement of staff between government and industry;
- a very high risk from poor transparency around negotiation processes and agreements, including for native title parties;
- a very high risk that representatives negotiating with a mining company on behalf of a native title party will not represent community member's interests, compounded by the power and resource imbalance between mining companies and native title parties in the negotiation process;
- Ministerial discretion around the exploration licence and mining lease approval process, particularly in WA;
- inadequate protection of whistleblowers in the mining industry; and
- lower levels of transparency and accountability measures around large mining infrastructure approvals than general mining lease approvals, particularly as a result of higher levels of discretion around these approvals and lack of transparency around the negotiation process.

Case studies are provided in the report demonstrating examples in WA and Queensland on pages

[105] Transparency International Australia, *Corruption Risks: Mining approvals in Australia* (October 2017).

18, 19, 24, 31, 34-35, 42, 48, 51. The Adani Carmichael coal mine is of focus from multiple angles in the Report due to flaws demonstrable in the regulatory frameworks applied to this mine. The report found that the aggregation of significant risks of corruption throughout the assessment process compound to create a real potential for corruption to occur and threaten to cause adverse impacts on government, the environment and communities. For example, allowing companies to operate without sufficient due diligence being carried out on their business record was found by TAI to risk increasing the severity of the impacts of other risk factors, such as regulatory capture by industry, industry influence in the assessment process including impeding the quality and independence of the assessment of the EIS. It was further found to increase the potential for negative impacts to native title parties, reducing transparency in agreement making and increasing likelihood of manipulation of native title parties which can lead to serious impact on First Nations communities and their land.

The report concludes that in order to reduce the risks surrounding the regulatory frameworks of the resource sector, accountability of the approvals processes, particularly in WA and Queensland, must be increased, along with increasing public interest and public activity surrounding the approvals process for large mining projects, a robust media and a competitive and entrepreneurial mining industry.

Good resource operators will be attracted to regulatory frameworks that are robust, certain and have integrity; these are the kind of operators we should be encouraging to invest in Australia's resource sector. Reducing the strength of our regulations not only exposes us to higher risk of significant impacts to the environment and community, it will also encourage poorer operators to invest in our sector who are more likely to exploit the weaknesses and susceptibility of the regulatory framework.

(b) Access to information is an integral part of an accountable, transparent governance and decision making

Effective access to information is globally recognised as an essential element of a functioning democracy, quality decision making and ensuring natural justice. Access to justice is in many cases inhibited by controls on access to environmental documents held by government or by an operator. Timely and efficient public access to documents and information on the environment is essential so that members of the Queensland public may:

- exercise their rights to participate in planning and development decisions that affect themselves, our air, our water, the Great Barrier Reef and nature itself;
- play a valuable watchdog role on compliance with the law by private industry and government and, if necessary, exercise public third party enforcement rights; and
- engage in public debate and shaping public opinion about improving laws and policies on the environment.

Timely and efficient access to documents requires:

- easily accessible guidance is provided to the public on community rights to access documents, so they know what they are entitled to access;
- policies and procedures on community access to documents are public, clear and prominent, so the fastest and best pathway of the three referred to above is clear to the public;
- the provision of documents is efficient and timely from the perspective of the public so that

documents are supplied within a few days if not on the internet, with longer times for historic projects; and

- priority is given to procedural, policy and legislative reforms required to improve access to information. At its most basic, we need an actual public register to be kept starting now, with relevant public register documents linked to that register so that when a request is made the document can be speedily located and sent.

Too often access to information processes are hindering the ability of the public to obtain documents that will assist them in understanding the impacts posed or being undertaken by proponents or government, or to bring transparency to decision making processes and possible influences that may have occurred around decisions. For example, in WA under the PAGER Act, the proponent is required to keep particular documents and records[106] and make them available to the Minister or an inspector.[107] However there is no provision for public access to this information. In fact, the Minister is prohibited from publishing information or even making information available to any person other than Government Ministers.[108] There is no qualification that this confidential information be commercially sensitive. Rather, it applies to all "documentary information",[109] being information contained in an "applicable document",[110] which is in turn defined as an application, accompanying documents and any report or other document relating to PAGER Act tenure.[111] The prohibition also extends to mining samples.[112]

The Queensland Government has an obligation to release information administratively via the 'push model', which is a proactive requirement for the release information to the public, where appropriate, to avoid the need for formal requests. This commitment was enshrined in the Preamble to the *Right to Information Act 2009* (Qld). The Office of the Information Commissioner guidelines on proactive disclosure and publication schemes.[113] However, the Queensland DES has a policy of only releasing information administratively where approval has been given by the Executive Management Team members (i.e. Directors and Executive Directors). Requests are treated with skepticism, no clear procedure or time frames are published by DES for obtaining this approval, and long and indefinite wait times currently provide an impediment to efficient access to information.

There is a significant and concerning overuse of exemptions to rights to access information on the basis that it is 'commercial-in-confidence', which is being very broadly defined in a way that is frequently not in the public interest across most jurisdictions in Australia. A Queensland Audit Office (**QAO**) Report in 2017-2018 found that commercial contracts have been unreasonably being hindered from being disclosed. Of the 90 contracts they examined, the Queensland Government:

- 'appropriately disclosed only 25 per cent;
- did not disclose 21 per cent at all; and

[106] See, eg, Petroleum and Geothermal Energy Resources (Environment) Regulations 2012 (WA), r 31.

[107] Petroleum and Geothermal Energy Resources (Environment) Regulations 2012 (WA), r32.

[108] PAGER Act, s150B.

[109] Ibid.

[110] Ibid, s150A.

[111] Ibid.

[112] Ibid, s150C.

[113] Available here: https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/proactive-disclosure/proactive-disclosure-and -publication-schemes.

- partially disclosed the remaining 54 per cent.'[114]

This was found to be mainly due to 'incomplete records, multiple systems and, in some cases, a lack of awareness or misinterpretation of disclosure requirements.'[115] The QAO further found that 'this, 'and a lack of data validation, has led to both duplicate and missing disclosures, resulting in unreliable publicly reported data. This is exacerbated by confusion in the disclosure guidelines about how and where agencies must disclose contract information. Also, the departments' ambiguous processes and systems are not fully effective and prevent them from fully meeting disclosure requirements. They are not delivering on the government's commitment to be open and transparent about awarded contracts.'[116]

Recommendations 7:

(a) Suitable operator / fit and proper person tests should be required of all operators in all jurisdictions prior to being granted authorities to undertake environmental impacts, including an assessment of whether the company, a related company or any of the board members have been prosecuted for an environmental offence in any other jurisdiction in Australia or internationally.

(b) Require strong and consistent laws providing for meaningful, timely access to information of any documents relevant to understanding existing or proposed or potential impacts on community wellbeing or environmental assets. These laws should include requirements to proactively release documents and should provide a narrow definition as to what is exempt from disclosure on the basis of 'commercial-in-confidence'.

(c) Reduce broad discretions in decision making processes as much as possible, to provide certainty, accountability and transparency in processes.

(d) Require stronger laws surrounding political donations, lobbying and the movement of staff between government and industry.

(e) Require stronger protection of whistleblowers across all jurisdictions.

[114] Queensland Audit Office, *Confidentiality and disclosure of government contracts,* Report 8: 2017–18, 5.

[115] Ibid.

[116] Ibid.

ANNEXURE 1

Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

House of Representatives inquiry into streamlining environmental regulation, 'green tape' and 'one stop shops' for environmental assessments and approvals

April 2014

The Australian Network of Environmental Defender's Offices (**ANEDO**) is a network of independently constituted and managed community legal centres across Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, an expert role in environmental law reform and policy formulation, and a significant community legal education program designed to facilitate public participation in environmental decision making.

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Executive Summary

The House Environment Committee has been asked to *inquire into and report on the impact of 'green tape' and issues related to environmental regulation and deregulation.* It is disappointing that the focus of this inquiry appears to be 'the potential for deregulation' – that is, the rollback of environmental legislation as a priority. This is despite a recent Senate Committee finding that federal-state duplication is minimal and that environmental standards would be put at risk if federal approval powers were delegated to the states.

ANEDO strongly opposes moves to reduce environmental regulation merely to ease perceived pressure on business and fast-track major development. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest. It is striking that the two regulatory sectors that the community perceives as being 'too lax' in a 2012 NSW government survey – property development and mining – are the same sectors that Council of Australian Governments (COAG) 's Business Advisory forum is seeking to 'streamline.'

Two pillars of the 'green tape' agenda – delegating approval powers to the states, and 'streamlining' State and Territory major project assessments – are internally contradictory. If State processes seek to uphold the requirements of the main federal environmental law, the *Environmental Protection and Biodiversity Conservation Act* (EPBC Act), they will need to *increase* environmental standards. On the other hand, if States seek to further fast-track major projects (by reducing assessment processes, public participation or judicial scrutiny), this will *lower* environmental standards.

ANEDO also makes the important point that the current Commonwealth role in environmental regulation does not 'duplicate' State roles. Rather, the EPBC Act specifically regulates impacts on nine Matters of National Environmental Significance which are *not* given special consideration in state assessment or approval processes, as the EPBC Act requires.

Hasty bilateral agreements to delegate Commonwealth government powers to State and Territories, as proposed by the Federal government's 'one stop shop' approach, may, in fact, create complexity and fragmentation with a confusing "eight stop shop" of different state and territory systems as Commonwealth requirements are 'bolted on' to the different state legislative structures.

In December 2012, ANEDO was commissioned to undertake an audit of threatened species and planning laws in all Australian jurisdictions. The key finding of this report is that **"***no State or Territory biodiversity or planning laws currently meet the suite of federal environmental standards necessary to effectively and efficiently protect biodiversity."* The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to 'fast-tracking' of environmental impact assessment for major projects. These provisions effectively override threatened species laws in all jurisdictions. Project refusals on the basis of threatened species are extremely rare.

The existing delegations of project assessments to States and Territories have been in place for nine years under the EPBC Act. However, the Commonwealth has never audited their environmental effectiveness, or whether States and Territories are complying. It is unclear exactly how the Commonwealth will ensure that federal environment protection standards will be maintained under the delegation of approval powers to the states under 'one stop shop' model.

A similar risk arises for enforcement where environmental conditions are breached. In the three years to 2012, ANEDO understands that the Commonwealth Environment Department

conducted around 980 EPBC Act investigations, as well as 40 prosecutions resulting in fines and enforceable undertakings totalling almost $4 million. If the Commonwealth vacates the field by signing approval bilateral agreements, the community currently has no guarantee that States and Territories will fill the breach.

The delegation of approval powers from the Commonwealth government to the states also ignores serious conflict of interest issues where the State (or a State-owned corporation) is the development's proponent and also responsible for assessing the development for approval. Such situations reasonably cast doubt on the state's ability to objectively and credibly pass judgment on proposed development. Obvious examples are mining and major infrastructure projects, where states stand to gain large royalty payments if mines are approved.

Instead of looking at the rollback of environmental regulation and the lowering environmental standards, ANEDO would welcome a mature examination of how our environmental laws can best respond to pressing 21st century challenges. These include increasing climate impacts, more intense development pressures on the environment, especially from mining and coal seam gas projects, and the loss of threatened species at an unprecedented rate. In developing a way forward, ANEDO recommends a number of steps to improve the administration and effectiveness of Australia's environmental laws. In summary:

- The Commonwealth Government should reverse its intention to pursue *approval* bilateral agreements, as their use is not necessary, justified or beneficial. The Commonwealth must retain final approval powers for matters of national environmental significance.
- Instead, the Government should improve the efficiency and effectiveness of the EPBC Act, and work with States and Territories to improve their environmental assessment and approval processes and standards.
- Administrative arrangements should include a 'highest environmental denominator' approach to promoting consistent standards across jurisdictions.
- Before pursuing accreditation of state *assessment* systems, the Commonwealth should further consult on a uniform set of national environmental standards that state assessments must comply with to be accredited.
- Any reform process must be predicated on States and Territories having the necessary, comprehensive suite of legislated process and outcomes standards in place and operative before accreditation of assessment systems can occur.

Introduction

Thank you for the opportunity to comment on this inquiry.[1] The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) is a network of independently constituted and managed community legal centres across Australia. Each EDO is dedicated to protecting the environment in the public interest. For the last 30 years, EDOs have provided legal representation and advice; taken an expert role in environmental law reform and policy formulation; and offered a public outreach program to help urban and rural communities understand and participate in environmental impact assessment and decision making. Notwithstanding recent funding cuts,[2] EDOs aim to continue to be a voice for the protection of the environment, and the laws that make this happen. ANEDO has released several briefing notes, submissions and reports responding to calls to cut so-called 'green tape' since 2012.

The resources outlined briefly below and **attached** may assist the Committee in understanding a different perspective on the 'green tape' agenda. In particular, effective environmental protection needs robust environmental laws. ANEDO therefore supports a clear Commonwealth role in the protection of Australia's unique biodiversity and heritage, over and above State and Territory laws. This submission deals with:

- *Terms of reference – increased environmental effectiveness, not deregulation*
- *Communities expect strong national environmental protection and legal safeguards*
- *Contradictions in the 'green tape' playbook*
- *An alternative vision to the 'green tape' and 'one stop shop' agenda*
- *Recommendations for a way forward*
- *Overview and links to attachments and other resources.*

1. Terms of reference – increased environmental effectiveness, not deregulation

The House Environment Committee has been asked to *inquire into and report on the impact of 'green tape' and issues related to environmental regulation and deregulation.*[3] It is disappointing that the focus of this inquiry appears to be 'the potential for deregulation' – that is, the rollback of environmental legislation as a priority. This is despite a recent Senate Committee finding that federal-state duplication is minimal, and further findings that environmental standards would be put at risk if federal approval powers were delegated.[4]

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[1] *The inquiry will have particular regard to:*
• jurisdictional arrangements, regulatory requirements and the potential for deregulation;
• the balance between regulatory burdens and environmental benefits;
• areas for improved efficiency and effectiveness of the regulatory framework; and
• legislation governing environmental regulation, and the potential for deregulation. See:
http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=environment/index.htm, accessed March 2014.

[2] The unanticipated withdrawal of all federal funding from EDO offices, announced by the Attorney-General in December 2013, has placed very significant strain on our offices' capacity to assist the community on public interest environmental law matters and participate in parliamentary inquiries such as this one. To date, many EDOs relied almost exclusively on federal funding to assist communities across Australia. The sudden withdrawal of almost $10 million over four years, as well as annual Community Legal Service Provision funding, raises the real prospect of imminent closure for some offices and staff. As EDOs provide unique services not covered by Legal Aid, this would leave several States and Territories without any independent community legal centres who can advise on planning and environmental issues that affect people's homes, communities and livelihoods.

[3] See further terms of reference at:
http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=environment/index.htm, accessed March 2014.

[4] Senate Environment and Communications Committee, Report on the *EPBC Amendment (Retaining Federal Powers) Bill 2013.*

We would instead welcome a mature examination of how our environmental laws can best respond to pressing 21st century challenges (such as biodiversity loss, land use change and climate change responses), and fulfil our national and international obligations,[5] while maintaining Australians' high quality of life. We hope that the Committee is cognisant of the need to ensure that hard-won environmental protections, which all Australians enjoy, are not eroded or abandoned in the interest of short-term gain, as dictated by a narrow subset of interests.

We submit that strong environmental protections are essential to Australians' quality of life, now and in the future; and to what the Treasury Secretary has called *sustainable wellbeing*.[6] While our work constantly highlights room for improvement, environmental laws have helped to keep our air clean, our water potable, our land and forests productive and fertile, and our life expectancy long. As the *Sustainable Australia Report 2013* from the National Sustainability Council notes:

> *Running down our natural capital risks serious economic and social implications and would undercut the wellbeing of future generations of Australians. A healthy natural environment with functioning ecosystem processes is therefore an economic and social imperative.*[7]

Environmental laws seek to safeguard these important values, assets and opportunities for future generations. Australian governments at all levels have agreed that this is embodied, and should be implemented, in the concept of ecologically sustainable development (**ESD**). ESD means 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.[8] ESD involves integrating environmental, social and economic factors in decision-making, guided by legal principles designed to ensure this balancing act. These include the precautionary principle, intergenerational equity, biodiversity and ecological integrity, and the polluter pays principle.[9]

Consistent with ESD principles, the National Sustainability Council's report reiterates the need to reduce the environmental impact of economic growth, via 'the integration of environmental considerations into business and public policy decision making.'[10] While this integration requires more than regulation, environmental laws and ESD are a vital part of it. Removing existing safeguards from environmental laws actively *hinders* this integration, when experts are making clear that it is more important than ever.

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[5] The *EPBC Act 1999* is the main vehicle under which the Australian Government fulfils its international environmental obligations. These include the Ramsar Convention on Wetlands of International Importance; the Convention on Biological Diversity; and the World Heritage Convention.

[6] The federal Treasury Secretary has put forward this concept as a benchmark for guiding Australia's economic future. To maintain 'sustainable wellbeing', Dr Parkinson emphasises the need to balance *environmental* and *social capital*, in addition to traditional notions of physical, financial and human capital, noting: 'Running down the stock of capital in aggregate diminishes the opportunities for future generations. Parkinson, M., '*Sustainable Wellbeing - An Economic Future for Australia'*, Address for the Shann Memorial Lecture Series (August 2011), available at www.treasury.gov.au.

[7] Australian Government National Sustainability Council, *Sustainable Australia Report 2013*, p 81, at http://www.environment.gov.au/resource/sustainable-australia-report-2013-conversations-future.

[8] Australian Government, *National Strategy for Ecologically Sustainable Development* (1992), at http://www.environment.gov.au/node/13029.

[9] See for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3-3A; Environmental Planning and Assessment Act 1979 (NSW), s 5(a)(vii); *Protection of the Environment Administration Act 1991* (NSW), s 6; *Sustainable Planning Act 2009* (Qld), ss 3-5.

[10] Australian Government National Sustainability Council, *Sustainable Australia Report 2013*, pp 79-86.

2. Communities expect strong national environmental protection and legal safeguards

The Australian community expects the Commonwealth government to safeguard our environment for present and future generations.[11] It is striking that the two regulatory sectors that the community perceives as being 'too lax' in a 2012 NSW government survey[12] – property development and mining – are the same sectors that COAG's Business Advisory forum is seeking to 'streamline'.[13]

Ongoing challenges such as salinity, water quality, resource industry expansion, biodiversity loss and climate change can only be resolved with proper land-use planning, natural resource management and environment protection regulations as a major part of the regulatory toolkit. Similarly, public trust in government decisions can only be maintained where there is proper community engagement and legal scrutiny. An ANEDO briefing note (**Attachment B**) provides the Committee with further explanation as to 'why environmental laws matter'.

Yet it is these same important regulatory and governance processes which are the target of pejorative 'green tape' labels. Claims that 'environmental standards will be maintained' are often made, but with very little focus or evidence as to what this means, how high standards will be achieved, and importantly, how this will be measured. These commitments to high environmental standards should be a key focus of this inquiry.

For example, bilateral assessment agreements with States and Territories have been in place for nine years under the EPBC Act. However, the Commonwealth has never undertaken a comprehensive audit or systemic review of their environmental effectiveness, or of States' and Territories' compliance.[14] It remains unclear how the Commonwealth will ensure that federal environment protection standards will be maintained under the 'one stop shops' model. For example, there is no proposed independent expert body will assess this. ANEDO submits that it would be appropriate for such an assurance role to be performed by an independent environment commission.

A similar risk arises for enforcement where environmental conditions are breached. In the three years to 2012, we understand the federal Environment Department conducted around 980 EPBC Act investigations, as well as 40 prosecutions resulting in fines and enforceable undertakings totalling almost $4 million.[15] It is unclear from discussions to date with the Commonwealth, exactly what their ongoing role will be in terms of compliance and

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[11] For example, in one 2012 survey 85% of Australians surveyed agreed that the federal government should be able to block or require changes to major projects that could damage the environment (Lonergan Research on behalf of the Places You Love Alliance of environmental NGOs, Oct. 2012).

[12] See NSW Office of Environment & Heritage, *Who Cares About the Environment in 2012?* (2013), pp 41-42. By far the most common response on 'mining' and 'property development/ construction' was that regulation is 'too lax' (49% and 46%, respectively). Only 10% and 13% of respondents thought mining and property development regulation was 'too strict' (respectively). For almost all other sectors mentioned, the most prevalent response was that regulatory strictness is 'about right' (fishing, farming, individuals, tourism, retail and forestry).

[13] See BAF communique 12/4/2012: http://www.finance.gov.au/deregulation/communique-12--april-12.html.

[14] Reports of inadequate compliance do exist however. See, for example, NT EPA, *The Redbank Copper Mine – Environmental Quality Report* and *Recommendations on the Environmental Assessment and Regulation of Mine Sites* (2014):

> *"For Northern Territory projects that are assessed under the bilateral agreement…, the Commonwealth Government reports that NT assessment reports do not generally contain sufficient information for the Commonwealth Environment Minister to make an informed approval decision under the [EPBC] Act 1999. … [T]he Commonwealth has had to seek further information from the proponent after the NT assessment … on 75% of occasions (Department of Sustainability, Environment, Water, Population and Communities, Northern Territory Environment Protection Authority 2013)".*

Available at http://www.ntepa.nt.gov.au/news/2014/redbank-report-released.

[15] Figures compiled from federal Environment Department annual reports 2009-10, 2010-11, 2011-12.

enforcement. If the Commonwealth vacates the field by signing approval bilateral agreements, the community currently has no guarantee that States and Territories will fill the breach.[16] In this context, a recent Senate Inquiry called for a priority COAG review of 'reduced resources in state environment departments and the dominance of state planning departments, and its implications for protecting matters of environmental significance.'[17]

Even if commitments to *maintain* existing environmental standards were accepted at face value, this is effectively 'lowering the bar' at a time when *improvement* in environmental outcomes is clearly needed – as the *State of the Environment 2011* headlines show.[18]

3. Contradictions in the 'green tape' playbook

Two pillars of the 'green tape' agenda – bilateral accreditation of State *assessment* and *approval* processes, and 'streamlining' State and Territory major project assessments – are internally contradictory. If State processes seek to uphold EPBC Act requirements, they will need to *increase* environmental standards. On the other hand, if States seek to further fast-track major projects (by reducing assessment processes, public participation or judicial scrutiny), they will need to *lower* environmental standards.

We also make the important point that the Commonwealth role in environmental regulation does not 'duplicate' State roles. Rather, the EPBC Act specifically regulates impacts on nine Matters of National Environmental Significance (**MNES**) which are *not* given special consideration in state assessment or approval processes, as the EPBC Act requires. This is demonstrated by the list of important additional requirements set out in appendices to recent bilateral assessment agreements.[19] To the limited extent that state and federal functions do overlap (assessing the same project, if not the same impacts), this should not be addressed by hastily devolving federal powers. There are a range of other efficiency options noted below.

A further important point is that State processes are overseen by Planning Ministers and departments, whereas the EPBC Act is overseen by the Commonwealth Environment Minister and department. Matters of national environmental significance should continue to be protected by ministers and agencies that have the clear mandate and expertise to do so. Although the Productivity Commission supported bilateral agreements, it did *not* support the consolidation of assessment, approval and enforcement functions in State planning agencies – as occurs for major projects in various State jurisdictions now being accredited:

> *In the Commission's view, there is a strong 'in principle' rationale for embedding more independence in major project assessment arrangements by assigning this responsibility to an independent regulator. … Similarly, there is merit in (related) monitoring and enforcement activities (chapter 10) residing with an independent regulator.*[20]

The rationale for arms-length assessment, monitoring and enforcement by a federal agency is even stronger where the major project is backed by a state authority.

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[16] One deliverable in the 2009-10 federal Environment Department budget was that the Department investigate 100% of reported EPBC compliance incidents in accordance with its published compliance and enforcement policy (and this target was achieved). See DEWHA annual report, 2009-10, p 68.

[17] Senate Environment and Communications Committee, Report on the EPBC Amendment (Retaining Federal Powers) Bill 2013, recommendation 5.

[18] See: http://www.environment.gov.au/topics/science-and-research/state-environment-reporting.

[19] Agreements available at: http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop.

[20] Productivity Commission, *Major Project Development Assessment Processes* (2013), p 166, recommendation 6.5.

4. An alternative vision to the 'green tape' and 'one stop shops' agenda

ANEDO remains unconvinced that rushing to 'deregulate and delegate' project assessment and approval powers is an appropriate way to achieve sought-after improvements to planning regulation, productivity and environmental outcomes.

There are several alternative ways to improve the operation of environmental laws, the business-environment relationship, and federal-state interaction on major projects without focusing on 'streamlining' (reducing) environmental protections. We give three examples below, followed by recommendations for a way forward.

First, ANEDO has published 10 best practice principles for environmental and planning laws (**Attachment A**). The Committee can use these principles as a basis to assess the effectiveness of the current regulatory framework at state and federal levels.

Second, we note that the Wentworth Group of Concerned Scientists has put forward an alternative model that provides a better balance between business and environmental outcomes, while maintaining the Australian Government's important approval and oversight roles.[21]

Third, there are a range of administrative efficiencies recommended in the independent Hawke Review of the EPBC Act, and other inquiries.[22] The Hawke Review was a major, consultative, evidence-based inquiry to strengthen and improve the EPBC Act after 10 years of operation.[23] Dr Hawke and his expert panel made clear that its 71 recommendations should be implemented as an 'integrated package of reforms'.[24]

In 2011, the then Government's response cherry-picked aspects of the Hawke Review, but a range of important recommendations were rejected, or are yet to be implemented five years on from the Review. These include:

- a single, harmonised threatened species list based on robust scientific criteria;[25]
- methods to assess and avoid cumulative impacts of multiple projects;[26]
- establishing a statutory National Environment Commission and Commissioner;[27]
- an interim 'greenhouse trigger' to require federal approval of major polluting projects, in the absence of a national carbon price;[28]
- strategic assessment processes that must 'maintain or improve' environmental outcomes, and that consider cost-effective climate change mitigation options;[29]

[21] Wentworth Group of Concerned Scientists, *Statement on Changes to Commonwealth powers to protect Australia's environment* (2012), p 1, available at: www.wentworthgroup.org.
[22] Including the Senate Environment and Communications Committee inquiry into the EPBC Amendment (Retaining Federal Powers) Bill 2013; Environment and Communications References Committee report on *Effectiveness of threatened species and ecological communities' protection in Australia*; House of Representatives Standing Committee report on *Managing Australia's Biodiversity in a Changing Climate* (2013).
[23] Unlike the 2012 COAG 'green tape' announcements, which came from one stakeholder group, the Hawke Review's public consultation process sought and analysed specific feedback on the operation of the Act. This included 220 submissions, 119 supplementary submissions, and face-to-face consultations in each state and territory with industry, NGOs, the community, individuals, research groups, academics, individual corporations, and agencies from every level of government. See Hawke, A., et al., *Report of the Independent Review of the EPBC Act* (2009) (**Hawke Review Report**), at http://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008, accessed March 2014.
[24] Hawke Review Report (2009), iii, letter to then Environment Minister, The Hon Peter Garrett MP.
[25] Hawke Review Report (2009). See also Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia* (2013), rec's 1 and 7.
[26] See Hawke Review Report at 3.3-3.6, 7.31, 7.60; see also Government Response (2011) rec's 6, 8.
[27] Hawke Review Report, rec 71; see also EDO Victoria (2013), http://www.edovic.org.au/law-reform/major-reports/proposal-national-environment-commission.
[28] Hawke Review Report, rec. 10(1).

- a range of enforcement, accountability and transparency mechanisms to improve decision-making and community access to justice.[30]

The planned (partial) implementation of Hawke Review recommendations was itself swept aside by the 'green tape' agenda in 2012. In contrast to the Hawke Review, the overnight acceptance of the 'green tape' agenda was marked by sectoral imbalance, minimal evidence and no public consultation.

5. Recommendations for a way forward

In developing a way forward, ANEDO recommends a number of steps to improve the administration and effectiveness of Australia's environmental laws. In summary:

- The Commonwealth Government should reverse its intention to pursue *approval* bilateral agreements, as their use is not necessary, justified or beneficial.
- Instead, the Government should improve the efficiency and effectiveness of the EPBC Act, and work with States and Territories to improve their environmental assessment and approval processes and standards.
- This should include revisiting implementation of the Hawke Review package; and developing better administrative arrangements with the States under *assessment* bilateral agreements (once State processes are improved).
- Administrative arrangements should include a 'highest environmental denominator' approach to promoting consistent standards across jurisdictions; and strengthening state and federal regulatory skills and resourcing.[31]
- Before pursuing accreditation of state assessment systems, the Commonwealth should further consult on a uniform set of national environmental standards that state assessments must comply with to be accredited.[32]
- Any reform process must be predicated on States and Territories having the necessary, comprehensive suite of legislated process and outcomes standards *in place and operative before* accreditation of assessment systems can occur.
- This should include requirements in State and Territory planning laws such as:
  - laws that aim to promote and achieve ecologically sustainable development (**ESD**);
  - improved assessment standards, including cumulative and climate impacts;
  - more accountable governance arrangements for assessors and decision-makers;
  - greater transparency and public participation before decisions are made;
  - increased access to justice for communities, including court appeal rights;[33]
  - leading practice monitoring, enforcement and reporting; and
  - renewed focus on implementing and strengthening threatened species laws.[34]
- The Government should also review all current bilateral assessment agreements against the national environmental standards and revoke any that do not comply. This could be done on the expert advice of a new National Environment Commissioner.

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[29] Hawke Review Report, rec's 6(2)(b)(ii) and 10(2).
[30] See for example, Hawke Review Report, rec's 43-44 and 46; and 48-53 ('Not agreed').
[31] See also Senate Environment and Communications Committee report on the EPBC Amendment (Retaining Federal Powers) Bill, recommendation 5.
[32] As per the Hawke Review Report, recommendation 4(4). We note the Commonwealth Government has recently released *Standards for Accreditation of Environmental Approvals under the EPBC Act 1999*, available at: http://www.environment.gov.au/system/files/resources/40e7000f-4d52-47fe-9a61-ff2b321aec3b/files/standards-accreditation-2014_0.pdf
[33] See for example, ICAC, *Anti-corruption safeguards in the NSW Planning System* (2012), rec. 16.
[34] See report, **Attachment D**; also Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia* (2013).

6. Overview and links to attachments and other resources

Below is a brief overview of the attachments to this submission, and their relevance to the present inquiry.

A. ANEDO Briefing Note - *Best practice standards for planning and environmental regulation* (2012)

Following COAG announcements in April 2012 to streamline environmental assessment and approvals at federal and state levels, ANEDO released a briefing paper on *Best practice standards for environmental regulation* (June 2012). This sets out 10 high-level elements that should form the basis for effective environmental and planning laws (federal and state):

1. *Clear objects that prioritise ecologically sustainable development (ESD)*
2. *Objective test for good environmental outcomes ('maintain or improve' test)*
3. *Independent assessment and quality assurance*
4. *Comprehensive assessment based on best information available*
5. *Projects must minimise environmental impacts (impact hierarchy)*
6. *Best practice standards for strategic environmental assessment (SEA)*
7. *Oversight and independent review of decisions*
8. *Public participation, engagement and third party appeal rights*
9. *Compliance and enforcement tools, penalties, resources and 'open standing'.*
10. *Monitoring and review of laws, policies and implementation.*

These standards are set out **in full** further below (after the overview of attachments).

B. ANEDO Briefing note - Objections to the proposal for an environmental 'one stop shop' (2013)

This briefing note argues that we need a strong Commonwealth role, not State delegations and a series of 'one stop shops', to ensure the efficient and effective implementation of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), and the protection of matters of national environmental significance (**MNES**) in perpetuity.

It also notes that hasty bilateral agreements may cause complexity and fragmentation by 'bolting on' important EPBC Act requirements to inadequate and under-resourced State systems and processes. If the additional requirements only apply to projects that affect MNES, this will lead to a confusing variety of assessment pathways and effectiveness.

Instead, State and Territory environmental impact assessment processes should *only* be accredited when they achieve the objectives of the EPBC Act, and enshrine best practice environmental standards (see for example, **Attachment A**). These standards should be applied across the board, to *all* environmental impact assessment in each State and Territory, not just to Commonwealth-accredited assessments. Developments that pose conflicts of interests (as a proponent or beneficiary) must be excluded from State delegations.[35] Powers to call in projects on other environmental grounds are also needed.

[35] The Hawke Review (rec. 4) called for, at a minimum, establishing joint State-Commonwealth panels to assess projects where the proponent is either the State or Territory or Australian Government.

C. ANEDO Briefing note – *In defence of environmental laws* (2012)

This briefing note provides an overview of:

- COAG's decision to accept the green tape agenda in place of evidence-based reforms;
- why environmental laws matter to Australian values and ways of life;
- why Commonwealth involvement in environmental regulation is vital; and
- how environmental laws should work in Australia.

In summary, environmental laws matter because they:

- protect the public's right to be informed of, and participate in, decision-making processes that affect the environment and communities;
- can ensure the rigorous, science-based assessment of environmental impacts;
- promote decisions that integrate environmental, social and economic factors in accordance with the principles of ecologically sustainable development (**ESD**);
- provide enforcement mechanisms where environmental laws are breached; and
- provide community assurances of government accountability and 'access to justice'.

Commonwealth oversight of Matters of National Environmental Significance (**MNES**) is vital because:

- only the Commonwealth Government can provide national leadership on national environmental issues;
- the Commonwealth must ensure that we meet our international obligations;[36]
- State and Territory environmental laws and enforcement are not up to standard;
- States are not mandated to act (and do not act) in the national interest; and
- States often have conflicting interests, where they propose or benefit directly from the projects they are assessing.

D. ANEDO Report - An Assessment of the Adequacy of Threatened Species and Planning Laws in all Jurisdictions of Australia (2012)

In December 2012, ANEDO was commissioned to undertake an audit of threatened species and planning laws in all Australian jurisdictions.[37] This report outlines the legal framework for managing threatened species in each jurisdiction. It identifies strengths and weaknesses of the relevant laws; assesses whether the laws are effectively implemented and enforced; and analyses some of the interactions between threatened species laws and planning legislation.

The key finding of this report is that *no State or Territory biodiversity or planning laws currently meet the suite of federal environmental standards necessary to effectively and efficiently protect biodiversity.* While the laws in some jurisdictions look good 'on paper', they are not effectively implemented. We give some examples below.

A number of important legislative tools available for managing and protecting threatened species are simply not used.[38] Key provisions are often discretionary.[39] The quality of

[36] For example, the Ramsar Convention on International Wetlands; the Convention on Biological Diversity; the World Heritage Convention; and the Declaration on the Rights of Indigenous Peoples.
[37] This report was commissioned by the Places You Love Alliance of more than 35 environment groups. It is available at http://www.edonsw.org.au/planning_development_heritage_policy.
[38] For example, in Victoria, interim conservation orders and management plans are not utilised; in South Australia, no native plants have been declared prescribed species on private land; in Tasmania, no critical

different levels of species impact assessment is highly variable across local and state jurisdictions, and rarely audited. Effective implementation is further hampered by a lack of data and knowledge about the range and status of biodiversity across Australia.

Threatened species laws do not *prevent* developments that have unacceptable impacts on threatened species from going ahead. Project refusals on the basis of threatened species are extremely rare (for example, a handful of refusals under the EPBC Act), or are the result of third party litigation.[40]

The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to 'fast-tracking' of environmental impact assessment for major projects. These provisions effectively override threatened species laws in all jurisdictions.[41]

Since completing this report, many States and Territories have in fact *lowered* environmental legislative standards relevant to the protection of MNES – *increasing* the need for Commonwealth protection of the environment.[42]

As the State of the Environment 2011 reported, 'Our unique biodiversity is in decline, and new approaches will be needed to prevent the accelerating decline in many species'.[43] Given the decline in biodiversity, combined with increasing population pressures, land clearing, invasive species and climate change, now is *not* the time to be streamlining and minimising legal requirements in relation to biodiversity assessment. Rather, the list of common failings make clear that threatened species laws in all jurisdictions need to be reviewed, strengthened, and fully resourced and implemented.

E. Submissions on draft Commonwealth-State bilateral assessment agreements (2013)

While not formal attachments to this inquiry submission, ANEDO has made submissions on each draft bilateral *assessment* agreement proposed by the Commonwealth to date – to accredit development assessment laws and processes in Queensland (December 2013), NSW (December 2013) and South Australia (March 2013).[44] The NSW and Queensland agreements were signed within a few days of the submission period closing, suggesting very limited consideration of community feedback.

ANEDO has noted the following broad concerns with accreditation and 'one stop shops':

- The protection of Australia's environment depends on how seriously the federal government takes its role – including by retaining EPBC Act approval powers;
- Relinquishing federal approvals will not improve efficiency or effectiveness;

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habitats have been listed and no interim protection orders have been declared; and in the Northern Territory, no essential habitat declarations have been made.

[39] For example, critical tools such as recovery plans and threat abatement plans are not mandatory. Timeframes for action and performance indicators are largely absent.

[40] However, in many jurisdictions, threatened species laws are further subjugated by the absence of third party rights that enable communities to enforce threatened species laws.

[41] Required levels of impact assessment tend to be discretionary, and projects can be approved even where they are found to have a significant impact on critical habitat, for example.

[42] For example, Queensland has relaxed requirements to permit clearing of previously protected regrowth and riparian native vegetation. NSW and Victoria are also in the processes of winding back native vegetation protection laws. Planning laws in Queensland and NSW are also being 'streamlined' in ways that are unlikely to satisfy EPBC Act protections. Laws that relate to national parks are also being amended to allow hunting, grazing and increased commercial uses.

[43] Australian Government, *State of the Environment 2011*, summary, p 4.

[44] ANEDO submissions are available at www.edo.org.au.

- Accrediting planning laws in a state of flux creates uncertainty and fragmentation;
- Commonwealth must retain control where States have a conflict of interest;
- State threatened species laws do not meet high environmental standards;
- Fast-tracking major projects contradicts 'risk-based' assessment (the principle that projects with the most significant impacts deserve the most rigorous scrutiny);
- Commonwealth must retain robust compliance, enforcement, reporting and assurance mechanisms in legislation.

Draft *assessment* bilateral agreements are in train with all other jurisdictions, and the Government proposes these will be followed by *approval* bilateral agreements by September 2014.

Approval agreements will effectively abdicate federal responsibility for project approval and compliance oversight of development projects which may have *significant impacts* on the nine Matters of National Environmental Significance – matters declared by the Australian Parliament as worthy of national and protection and oversight under the *EPBC Act 1999*.

ANEDO analysis over the past two years make clear that *no* existing State or Territory major project assessment process meets the standards necessary for federal accreditation (notwithstanding some have been accredited). Nor do these processes meet best practice standards for environmental assessment (such as ANEDO's 10 principles at **Attachment A**, and a range of recommendations made by the Hawke Review of the EPBC Act).

ANEDO remains opposed in-principle to *approval* bilateral agreements in their entirety. Only the federal government, backed by strong federal environmental laws, can properly uphold Australia's national and international environmental obligations. As the federal State of the Environment 2011 Report concluded:

> *Our environment is a national issue that requires national leadership and action at all levels…. The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.*[45]

F. Submissions to Productivity Commission inquiry on Major Project assessment (2013)

While not formal attachments to this inquiry submission, ANEDO's contribution to the Productivity Commission inquiry into *Major Project Development Assessment Processes* detailed concerns, and provided recommendations, in response to the 'streamlining, green tape and one stop shops' agenda. Notwithstanding our concerns about this referral, ANEDO made comprehensive submissions to the two stages of the Commission's inquiry.[46]

ANEDO's five key areas for reform in our follow-up submission were as follows:

- Embed ecologically sustainable development (**ESD**) in objects and decision criteria;
- Provide equitable rights for public participation and engagement at each stage in the development assessment and approval process;
- Robust, independent assessment of all environmental impacts;
- Projects with the greatest impacts deserve the greatest scrutiny (not streamlining);
- Improved compliance, monitoring, enforcement tools and resourcing.

[45] State of the Environment Committee, *State of the Environment Report 2011*, available at http://www.environment.gov.au/topics/science-and-research/state-environment-reporting/soe-2011.
[46] Submissions to Productivity Commission inquiry on Major Project assessment, March 2013 and September 2013, available at www.edo.org.au.

ANEDO also noted three broad concerns with the Productivity Commission's Draft Report.

First, that it did not sufficiently emphasise the inadequacies of existing state assessment and approval systems, and their lack of readiness for *assessment* bilateral agreements.

Second, we opposed the Commission's proposals to progress *approval* bilateral agreements under the EPBC Act – noting that recent attempts to do so were abandoned due to complexity and uncertainty of any actual benefits; and Senate Committee findings that federal-state 'duplication' is minimal, and further findings that environmental standards would be put at risk if federal approval powers were delegated.

Third, we recommended that the Commission's final report should clarify that any recommendations for 'streamlining' or 'reducing duplication' are *contingent upon* implementing other recommendations to strengthen assessment and approval processes – through improved State and Territory assessment standards; greater transparency and public participation; better governance arrangements; leading practice monitoring, enforcement and reporting; and increased access to justice to restore community faith in decision making.

Attachment A – ANEDO, Best practice standards for planning and environmental regulation (June 2012)

Following COAG announcements in April 2012 to streamline environmental assessment and approvals at the federal and state levels, ANEDO released a briefing paper on *Best practice standards for environmental regulation* (June 2012).[47] Below is an excerpt of this paper.

For the purposes of this paper, "best practice standards" is taken to mean those elements/provisions that must be clearly articulated in legislation (state and federal) to enshrine best practice environmental planning and assessment processes.

This section sets out 10 high-level elements that should form the basis for effective environmental and planning laws, state and federal:

1. *Clear objects that prioritise ecologically sustainable development (ESD)*
2. *Objective test for good environmental outcomes*
3. *Independent assessment*
4. *Comprehensive assessment based on best information available*
5. *Projects must minimise environmental impacts (impact hierarchy)*
6. *Best practice standards for strategic environmental assessment processes*
7. *Oversight and review*
8. *Public participation*
9. *Compliance and enforcement*
10. *Monitoring and review*

These principles aim to ensure that our natural capital is sustained for the benefit and appreciation of present and future Australians. In giving effect to these elements, governments and communities will also protect the social and economic benefits of a healthy environment, which all of us rely upon.

1. Clear objects that prioritise ecologically sustainable development (ESD)

Environment protection and planning legislation must set out clear objectives, which prioritise ecologically sustainable development (ESD) as the overarching aim.[48] These objectives must then be consistently and rigorously applied to all decisions and actions to implement the legislation.

2. Objective test for good environmental outcomes

All projects must be assessed against an objective and consistent test, such as whether the project will 'maintain or improve environmental outcomes'.[49] Robust, science-based

[47] Australian Network of Environmental Defenders Offices, *Background Briefing Paper: Environmental Standards & Their Implementation In Law* (June 2012), at http://www.edo.org.au/policy/policy.html.

[48] See for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), sections 3 and 3A; see also *Protection of the Environment Administration Act 1991* (NSW), s 6. The aim of ESD is to achieve a level of development that meets the needs of the present without compromising the ability of future generations to meet their own needs. See World Commission on Environment and Development, *Our Common Future* (1987), at 43. Principles of ESD include: the precautionary principle; intergenerational and intra-generational equity; conservation of biological diversity and ecological integrity as a fundamental consideration; improved environmental valuation, pricing and incentive mechanisms (for example, internalising environmental costs and adopting the 'polluter pays' principle).

[49] For example, the Hawke review recommended a robust, scientific 'improve or maintain' test (with regard to environment and heritage) be adopted when approving a class of action under an endorsed policy, plan or practice. See Report of the Independent Review of the EPBC Act (2009), recommendation 6(2)(b)(ii). Several NSW environmental assessment processes adopt a test that actions cannot be approved unless they 'improve or maintain' environmental outcomes. This includes the Biobanking offsets scheme under the *Threatened Species*

methodologies and assessment tools should be developed to objectively and consistently apply the test to development proposals. Such a test will help ensure Australia develops in an ecologically sustainable way.

3. Independent assessment

Environmental assessment must be done by independent accredited experts, rather than by someone appointed and paid by the proponent. To increase transparency and remove any perceptions of bias, the experts should be assigned to a project by an independent body.

4. Comprehensive assessment based on best information available

Projects with the largest potential impacts should attract the greatest scrutiny. In addition to assessing the direct environmental impacts of a proposal, environmental assessment must be expanded to include:

- assessment of cumulative impacts of multiple projects
- assessment of climate change impacts (including mitigation and adaptation requirements), and
- assessment of the potential impacts of feasible alternatives.

Independent assessors and decision-makers must be provided with the best information available. Best practice assessment must therefore by underpinned by comprehensive baseline data and current environmental accounts, with resource and time allowances to address data gaps.

5. Projects must minimise environmental impacts (impact hierarchy)

Development proposals must demonstrate that they comply with an 'impact hierarchy':

- first that environmental impacts have been avoided wherever practicable
- second, that unavoidable impacts been mitigated to the extent practicable, and
- third, if necessary, how offsetting may be used to offset eligible impacts.

Any proposed biodiversity offsetting must comply with clear legal requirements including:

- avoidance of 'red-flag' environmental values that cannot be offset
- equivalency of values that may be offset ('like for like'), and
- ensuring that any offsets are protected in perpetuity (including from future development).

Offsetting schemes that do not meet these criteria must not be accredited.

6. Best practice standards for strategic environmental assessment processes

Strategic assessment of larger areas and multiple projects must be undertaken according to rigorous, objective and transparent legislative requirements. Strategic assessment must:

- be based on comprehensive and accurate mapping and data
- be undertaken at the earliest possible stage
- assess alternative scenarios and cumulative impacts
- involve ground-truthing of impact assessment
- involve extensive public consultation, and
- complement, but not replace, site-level impact assessment.

Conservation Act 1995 (NSW), and the *Native Vegetation Act 2003* (NSW) which regulates land clearing. Similarly, a standard of "net environmental benefit" has been put forward in Western Australia and Victoria in the context of biodiversity offsetting. See eg, EPA Victoria, *Discussion Paper: Environmental Offsets* (2008).

Any Commonwealth accreditation framework must ensure that the relevant strategic assessment meets strict, best practice criteria in terms of process, outcome and ongoing implementation. Accreditation can only occur when all criteria are met and it is demonstrated that the assessment will ensure ongoing maintenance or improvement of environmental values.

7. Oversight and review

Consistent with Australia's international obligations, and in order to accommodate new and emerging information, the Australian Government must retain a review or 'call-in' power over state-based projects, including those done under a strategic assessment or bilateral agreement. An expert 'Environment Commission' should be established to undertake an independent review role[…].

8. Public participation

Environmental assessment and planning laws must clearly prescribe mandatory public participation at each stage – in relation to strategic planning, strategic assessment and individual development assessment. All information relating to environmental assessment and decision-making must be publicly available. Sufficient timeframes must be set out in legislation to allow active, iterative, and considered participation from local communities. Involving the community should go beyond traditional 'inform and consult' models, and encourage best practice engagement that delivers more widely acceptable outcomes. Specific requirements must be made for consultation with Indigenous Australians wherever a proposal or assessment involves cultural heritage.

9. Compliance and enforcement

A range of regulatory tools and penalties should be available to address breaches of legislation. To ensure transparency and accountability, all legislation should include 'open standing' to bring proceedings for breaches. Statistics on compliance and enforcement should be published regularly, in a consistent and comparable form.

10. Monitoring and review

The efficacy of all environmental assessment and planning laws must be periodically and independently reviewed – to assess whether the relevant processes, implementation and decision-making are improving or maintaining environmental values, and whether the legislation is achieving ecologically sustainable development. There must also be specific legislative requirements for regular review of any accredited plan or policy.

ANNEXURE 2

Australia's obligations under International Law to Consult with, and to Ensure the Free, Prior and Informed Consent of, Indigenous Communities

1. Legal Requirements for Consultation with Affected Indigenous Communities

States have an obligation to consult with indigenous communities prior to approving projects or developments that may affect those communities. This obligation derives from a range of sources, including human rights treaties to which Australia is a party. Such consultations serve not only to protect indigenous communities' ownership or title to land, but also to protect their cultural and other rights, and to ensure that traditional knowledge of the land and ecosystems are incorporated into decision-making.

Consultation must be carried out in good faith, allowing affected indigenous communities to present their views prior to any decision and with the objective of obtaining the consent of indigenous communities to the development. Indeed, the legal requirement for consultations with indigenous communities finds its fullest expression in the principle of free, prior and informed consent. And while obtaining the consent of the affected indigenous communities must be the good-faith objective of any consultation, that consent is a legal requirement for certain projects or developments that have substantial impacts on an indigenous community, its traditional lands, or its relationship with those lands.

a. The Obligation to Consult Indigenous Communities under International Law

Under international law, states have a duty to consult with indigenous peoples in good faith about matters that affect them, in particular those that affect their traditional lands and relationship with those lands. This duty is "firmly rooted in international human rights law", and is grounded in core United Nations human rights treaties to which Australia is a party, such as the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). The UN bodies established to monitor the implementation of these binding international legal treaties have clarified that consultation with indigenous peoples on matters that affect them is required in accordance with state obligations under those treaties. The duty to consult with indigenous peoples about matters that affect them has also been recognised and reinforced in a series of other conventions and human rights bodies, which are further "evidence of contemporary international opinion concerning matters relating to indigenous peoples."

The duty to consult finds prominent expression in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP" or "the Declaration"), including:

Art 19: "States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them";

Art 32(2): "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources".

This principle, often referred to as free, prior and informed consent, is not a new right or obligation. Rather, it is "a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources."

Although UNDRIP is not in itself a legally binding instrument, it "is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are in widely ratified human rights treaties", and reflects international law enshrined in binding international agreements (such as the ICESCR, ICERD and ICCPR). The Declaration, and the principle of free, prior and informed consent that it contains, thus "do[es] not create new rights for indigenous peoples, but rather provide[s] a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples". Given that the Declaration articulates the content of pre-existing human rights obligations, the UN Special Rapporteur on the Rights of Indigenous Peoples explained that "[i]mplementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification".

The UN Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP") recently addressed the obligation to consult in the specific context of environmental impact procedures, clarifying that "States should ensure that indigenous peoples have the opportunity to participate in impact assessment processes (human rights, environmental, cultural and social)".

b. Australia Recognises the Importance of Consultation

In addition to the Northern Territory Government's statements above, Australia has repeatedly recognised the importance of consultation with affected indigenous communities, in particular in the context of environmental protection, cultural heritage, and related impact assessments. Since April 2009, the federal government has expressed its support for the UNDRIP. In 2016, it reiterated that support in the context of "recognis[ing] the importance of consulting with Indigenous peoples on decisions affecting them and that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment."

Just this year, in its Submission to EMRIP's Study on Free, Prior and Informed Consent, the Australian government "recognise[d] the importance of engaging in good faith with Aboriginal and Torres Strait Islander peoples in relation to decisions that affect them. We cannot overcome indigenous disadvantage or build on the strength of indigenous communities if governments do not consult effectively."

c. Scope of the Obligation to Consult

The duty to consult derives from the overarching right of indigenous peoples to self-determination, and the obligation of non-discrimination. It is "indivisible from and interrelated with other rights of indigenous peoples, such as their right to self-determination and their rights to their lands, territories and resources". This applies to "any project affecting their lands or territories and other resources".

The obligation to consult and the participation of indigenous peoples in all aspects of decisions

affecting them is central to realising and protecting the full spectrum of substantive indigenous rights, including rights to cultural integrity and equality (as well as property). The obligation to consult is thus not limited to specific or proprietary interests in land – the Australian Human Rights Commission has recognised that there are "a range of circumstances where States have an obligation to obtain the free, prior and informed consent of those affected". Other human rights bodies have agreed that "[c]onsultation and consent are not limited to matters affecting indigenous property rights, but are also applicable to other state administrative … activity that has an impact on the rights or interests of indigenous peoples." This full range of circumstances in which the requirement for consultation will be engaged is reflected in the three rationales identified by EMRIP for the principle of free, prior and informed consent: restoring "control over lands"; "cultural integrity"; and redressing "the power imbalance between indigenous peoples and States".

The draft Bill and Regulations recognise that projects may have cultural impacts, and that these must be assessed. This is particularly important for indigenous communities, as their cultural rights are often closely dependent on their relationship with and uses of traditional lands. The duty to consult when cultural resources, integrity, or rights of an indigenous people may be affected must therefore be implemented in full. Moreover, because the cultural value, expression and use of traditional lands may be affected by activities that do not affect a community's title to that land, consultation cannot be limited to activities that affect title.

Similarly, projects or activities may affect land (including its use and its cultural value and resources) beyond the particular site where they are located, for example where activities affecting water flows affect downstream communities. Consultation thus also cannot be limited only to activities taking place on traditional lands. The importance of cultural rights means that the indigenous communities that are affected may extend beyond the traditional owners of particular land to other indigenous communities that have an interest in or cultural connection with particular land. But the only way to know this, and to make a fully informed decision, is to consult with all potentially affected communities.

d. Consultation and Consent

Any consultation must be conducted in good faith, and with the objective of obtaining the consent of the indigenous communities, in order to "reverse historical patterns of imposed decisions." Consultation is thus not a single event or moment, a formalistic right to be heard, or notification of decisions that have effectively been made. Rather, consultation should be a process by which indigenous communities can engage "to influence the outcome of decision-making processes affecting them"; and should be directed "towards mutually acceptable arrangements prior to decisions on proposed measures".

While all consultations must be conducted with the objective of obtaining the consent of the community, certain circumstances require states to secure the affirmative consent of affected indigenous peoples. These include activities that have a significant and direct impact on the community or on traditional indigenous lands. International law establishes a presumption or general rule that extractive activities that take place on traditional lands or that have direct bearing on areas of cultural significance have a significant and direct impact requiring affirmative consent of the affected peoples. Certain other categories, such as activities that require the relocation of indigenous peoples or that require storage or disposal of hazardous materials, are recognised as necessarily having such an impact and requiring affirmative consent. However, determining whether the impact on an indigenous community of other proposed activities is significant or direct enough to require obtaining their affirmative prior consent cannot be done without consulting that

community.

If consent is required to be given, as opposed to simply being the objective of good faith consultations, then it must be provided on a free and informed basis prior to the decision being made or the project being commenced. These requirements are closely linked to the nature of the consultations that lead to any consent. Without respecting the principles for effective consultations with indigenous communities set out below, it is unlikely that any consent would qualify as free, prior and informed.

2. Good Practices for Consultations with Indigenous Communities

Full, appropriate and good faith consultation with indigenous communities is essential to safeguarding those communities' fundamental human rights. It is also a way to make better decisions by ensuring that all relevant information and perspectives are incorporated early in the process and by identifying and addressing disagreements before projects begin. It is not, and should not be treated as, a burden on decision-making.

The federal government recognises this, defining "good Indigenous engagement" as "involv[ing] the Aboriginal and Torres Strait Islander peoples in problem solving or decision making, and us[ing] community input to make better decisions" The Northern Territory Government has similarly recognised, in the context of the environmental regulatory reforms, the importance of traditional environmental knowledge, and of assessing cultural impacts. This necessarily requires input from consultations with indigenous communities, who can contribute this traditional knowledge and are best placed to speak to cultural impacts on them, including the "living aspects that define the values of current Aboriginal society."

The general processes that many governments have developed for obtaining information and providing input – for example, statutory notice and comment processes – often do not accommodate the realities of indigenous peoples' lives and decision-making processes, the distinctive characteristics of their culture and history, and their historic and current political marginalisation. As a result, these processes are not effective or appropriate methods of gathering indigenous wisdom or becoming informed about the effects of decisions on indigenous communities, as the federal government has recognised. Consultations must therefore be structured and implemented to take these realities into account. This process should not be left to policy or discretion, which has proven ineffective in the past. Instead it "should be formal and carried out with mutual respect."

The following is an overview of key principles for consultations with indigenous communities drawn from international standards, federal government guidance, Australian Human Rights Commission recommendations, and submissions from Northern Territory indigenous groups.

1. Identify all potentially affected indigenous stakeholders and communities. As noted above, this should not be limited only to the traditional owners of the land on which the project will take place, and may include both other indigenous communities with cultural or traditional connections with that land, and communities whose traditional use or cultural value of other lands will be affected by the project (such as downstream communities).

2. The objective of the consultations must be to achieve consensus or obtain consent from the indigenous community. The process must give the community a real opportunity to have

input into and to influence the decision. They should not present the community with a fait accompli on which they are asked to comment, or provide an opportunity to influence only peripheral details after the core substantive decisions have already been taken. A project with significant or direct impacts on indigenous peoples or lands must not go forward without the affirmative consent of the affected indigenous people.

3. Establish the method and process for consultation in consensus with potentially affected indigenous communities. All consultations, including those on the process for future communications or negotiation, must be conducted in a culturally sensitive manner and respect indigenous protocols for communication and decision-making.

4. Respect and work through traditional and contemporary forms of Indigenous peoples' governance, including collective decision-making structures and practices. This will require identifying any existing representative bodies of the potentially affected indigenous communities, and conducting consultations through the indigenous peoples' own representative organisations and/or processes where possible. Consultations should avoid creating divisions within the community. Consultations should consider the impacts on all members of the community, and should make a point of encouraging and incorporating the views of women, children, youth and persons with disabilities.

5. Establish and respect culturally appropriate timeframes that ensure full and effective participation. Conduct consultations early in the project planning or approval process, to allow indigenous communities to engage in discussion, consultation, consensus or decision-making according to their own social and cultural practices. Depending on the nature of the project or the impact on the community, the consultations may need to remain ongoing beyond the approval and through the duration of the project and beyond.

6. Provide affected indigenous communities full information on the nature of the project and its projected impacts. This information should include the nature or scope of the project, its duration and pace, reversibility, reasons for the project, areas to be affected, preliminary impact assessments (including social, cultural and environmental), and benefit sharing or offset proposals. All necessary information must be provided at an early stage, in sufficient time for the communities to consider it. Providing crucial data late in the process undermines the effectiveness of the consultation and the opportunity for the community to influence the decision. Information must also be provided in a form that is accessible to the community, which may require translation into local languages.

7. Provide affected indigenous communities adequate resources and support to participate in a full and effective manner, including any technical resources – such as expert support – necessary to guarantee informed participation. Ensure that consultations do not impose additional burdens or reinforce disparities of resources and power. While consultations should

often be conducted on the community's land, rather than governments or project developers expecting the communities to come to them, if it is agreed that some portion of the consultations should be conducted elsewhere then the community or its representatives should be provided with financial support to enable their participation.

8. Minimise the burden on indigenous communities. In addition to providing adequate financial and technical resources, consultation timeframes must take account of the resource constraints under which indigenous communities frequently operate, and the fact that the project or consultation may not be the only issue that they are dealing with or their highest priority. Consultations should take place in the time, place and manner chosen by the affected indigenous communities. Authorities or others involved in the consultations should endeavour to minimise the number of consultation processes that are involved in each project or measure, which may require coordination across government departments.

ANNEXURE 3

EDO Qld.
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Using the law to protect our environment.

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Mineral and Energy Resources Policy
Department of Natural Resources, Mines and Energy
Sent via email only: ResourcesPolicy@dnrme.qld.gov.au

4 October 2018

Dear Mineral and Energy Resources Policy Unit,

EDO Qld submission on DNRME consultation: Improving resource approval efficiency consultation

Thank you for the opportunity to submit our thoughts on issues relating to the efficiency and timeliness of resource assessment processes.

EDO Qld helps people understand and access their legal rights to protect our environment. We have over 10,000 direct supporters and act for clients with hundreds of thousands of supporters.

We strongly support increasing efficiency and reducing duplication but, as stated in the invitation to this consultation, "**not at the risk of impacting on the rights of our community or environmental values**".

Protecting Australia's unique environment and our communities' health and wellbeing through effective assessment and regulation processes ensures we all have a country we are proud to call home. Effective and robust assessment also internalises externality costs of resource extraction to ensure that their exploitation, being a public resource, is a net benefit to society.

Ensuring the assessment process is transparent and accountable to the public through meaningful community rights gives the public confidence in the assessment process and reduces opportunities for corruption. It is also a fundamental principle of natural justice that individuals should have the power to have a say in decisions which affect them, and decisions surrounding the exploitation of our state owned resources and consequent impacts on our shared environment affect us all.

Happily, reducing duplication and improving efficiency in resource assessment need not diminish, and may enhance, community rights and protecting environmental values.

Further, we refer you to a report commissioned by the Organisation for Economic Co-operation and Development (**OECD**) evidencing the fact that environmental regulation does not inhibit productivity. The report - *Do Environmental Policies Matter for Productivity Growth? Insights from New Cross-Country Measures of Environmental Policies* - found that more technologically advanced industries can actually benefit from more stringent environmental policies and that environmental policies have no long-term effects on

productivity growth.[1] The report concludes overall that '*to support both economic and environmental outcomes, stringent environmental policies can and should be implemented with minimum barriers to entry and competition.'*

In the **enclosed** annexure we set out 14 proposals for reducing duplication and improving efficiency which maintain or enhance community rights and the protection of environmental values. We have provided this suggestions in summary below.

We would encourage you to also undertake a complimentary forthcoming opportunity to comment on improving the effectiveness and transparency of the resource assessment process to better protect our community and the environment.

We look forward to the opportunity to provide comments on how the resource assessment process can be more effective in ways that can benefit all stakeholders, and particularly in delivering public interest outcomes as a public interest resource.

Summary of submissions:

Recommendation 1: Provide for clear and certain 'no go areas' to protect agricultural land, water catchments, biodiversity and townships

Recommendation 2: Provide clear requirements and sufficient resourcing for quality assessment to help remove uncertainty for all stakeholders and greatly increase efficiency

Recommendation 3: Improve efficiencies in public access to information

Recommendation 4: Repeal the extensive powers of the Coordinator-General to overrule all other departments and the Land Court – hindering decision making and wasting resources of all stakeholders

Recommendation 5:Provide extended standing in EP Act, as provided in the N*ature Conservation Act 1992* (Qld) and *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

Recommendation 6: Make mining application court appeals post-approval and determinative, as provided for most other development applications including site specific gas applications

Recommendation 7: Land Court power to heal errors could be extended to further reduce technical complexity

Recommendation 8: Improve access to justice and efficiency through more fairness in transcript costs and timeliness

Recommendation 9: Evidentiary procedures should be adjusted to even playing field

Recommendation 10: Prevent further submissions to government following the Land Court decision to ensure natural justice and due process for other stakeholders

[1] Silvia Albrizio, Enrico Botta, Tomasz Koźluk, Vera Zipperer *Do Environmental Policies Matter for Productivity Growth? Insights from New Cross-Country Measures of Environmental Policies,*: 1: OECD, France, No.: 1176.

Recommendation 11: Remove restraint on recommendations being inconsistent with CG conditions as it increases inefficiencies, prevents positive solutions and causes complications

Recommendation 12: Set maximum time periods for EIS with limited extensions and lapsing applications

Recommendation 13:Set maximum time periods for currency of CG report with limited extensions

Recommendation 14: Set mandatory rest periods between applications

We would be happy to meet with the Department and/ or the Minister to discuss these recommendations.

Many of these recommendations were provided in EDO Qld's '**Seven key reforms to Qld environmental laws'** policy recommendations document prepared at the time of the last Queensland election and provided to all parties. We received 1,613 signatures from the community supporting these key reform recommendations.

Kind regards

Sean Ryan
Principal Solicitor
Environmental Defenders Office Qld

ANNEXURE

Contents

PART 1: SCOPE OF CONSULTATION

We note that the invitation is to provide thoughts on "issues relating to the efficiency and timeliness of resource **approval** processes" (our emphasis).

We are assuming the processes referred to are primarily:

- The environmental coordination process under Part 4 of *the State Development Public Works and Organisation Act 1971 (Qld)* (**SDPWOA**) including EIS and CG Report;
- The process for applying for, assessing and deciding mineral tenures under Chapters 2 to 8 of the *Mineral Resources Act 1989 (Qld)* (**MRA**);
- The process for applying for, assessing and deciding petroleum and gas tenures under the *Petroleum and Gas (Production and Safety) Act 2004 (Qld)*; and
- The process for applying for, assessing and deciding environmental authorities for resources activities under the *Environmental Protection Act 1994 (Qld)* (**EPA**).

All of these process are for *assessing* and *deciding* applications for resource extraction, of which *approval* is only one possible outcome.

To describe these processes as 'approval' processes risks creating the impression in the mind of the public that the outcome is predetermined before regard is had to the particular circumstances of any case, ie that the matter is prejudged and biased in favour of approval. A more neutral and less risky description of these processes is "resource **assessment** processes". This is the language we will use throughout this submission and which we would recommend be adopted by the Department and government representatives to avoid any impression of bias.

PART 2: VALUE OF COMMUNITY RIGHTS IN RESOURCE ASSESSMENT

Before turning to timeliness and efficiency measures which do not reduce the "rights of our community" it is worth reflecting on just how critical community engagement is to the underlying integrity of the resource assessment process.

Public confidence in government is at an all-time low and the risk of actual or perceived corruption in the process dealing with the disposal of high value state assets held in the public interest (our mineral resources) is very high.

Community information, submission and appeal rights help reduce the risk of corruption and improve the decision making process, laying the foundations for the 'social licence' for resource project.

(a) Third party merits review improves decision making

The role of public consultation and independent arbitration by a court in improving decision making is well accepted.[2]

Merits review of decisions through an independent court improves the consistency, quality and accountability of decision-making in environmental matters. For example, the ability for the public to be involved in decision making and challenge a project in the courts:

a) 'facilitates the rigorous analysis that is fundamental to the making of sound decisions (whether by testing the evidence and material advanced by proponents by advancing evidence and material informed by particular and sometimes local knowledge)';[3]

b) 'gives a level of confidence to members of the public that the decision has been reached through a process which has openly examined and scrutinised all of the available evidence - whether or not the result is universally accepted.';[4]

c) ensures the process of environmental planning and assessment is effective;[5]

d) safeguards against corruption;[6]

e) provides a forum which allows for and encourages greater public debate on development issues;

f) improves, encourages and aids public participation in land-use decision making;

g) allows multiple views and concerns to be expressed and 'provide[s] a forum where collective rights and concerns can be weighed against the rights and concerns of the individual';[7]

h) recognises that third parties can bring detailed local or specialist knowledge, not necessarily held by the designated decision maker;[8]

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[2] Parliament of Australia, 'Citizens' engagement in policymaking and the design of public services', Research Paper No. 1, 2011-2012. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1112/12rp01; NSW Independent Commission Against Corruption report, Anti-corruption safeguards and the NSW planning system (February 2012), p 22 http://www.icac.nsw.gov.au/media-centre/media-releases/article/4023; Productivity Commission NSW, Major Project Development Assessment Processes (2013), p 274, http://www.pc.gov.au/inquiries/completed/major-projects/report/major-projects.pdf.

[3] A. Finanzio, 'Public Participation, Transparency and Accountability – Essential Ingredients of good Decision Making' (2015) 2(1) Australian Environmental Law Digest 3, 3.

[4] A. Finanzio, 'Public Participation, Transparency and Accountability – Essential Ingredients of good Decision Making' (2015) 2(1) Australian Environmental Law Digest 3, 3.

[5] B.J. Preston, 'Third Party Appeals in Environmental Law Matters in New South Wales' (1986) 60 Australian Law Journal 215, 221.

[6] Independent Commission Against Corruption, Anti-Corruption Safeguards and the NSW Planning System, Report (2012) 22.

[7] Judge Christine Trenorden, 'Third-Party Appeal Rights: Past and Future' (Paper presented at Town Planning Law Conference, Western Australia, 16 November 2009) http://www.sat.justice.wa.gov.au/_files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf.

[8] Ibid.

i) allows for the development of environmental jurisprudence, clarifying the meaning of legislation;[9]

j) enhances the quality of decision-making, including the quality of reasons for decisions;[10]

k) ensures adherence to legislative principles and objects by administrative decision makers;

l) fosters the development of environmental jurisprudence;

m) fosters natural justice and procedural fairness;

n) focuses attention on the accuracy and quality of policy documents, guidelines and legislative instruments and highlight problems that should be addressed by law and policy reform;[11] and

o) ensures greater transparency and accountability within the decision-making process.[12]

The NSW Independent Commission Against Corruption (ICAC) has identified third party merits appeals as of vital importance to a transparent and accountable planning system, and has recommended to the NSW government that the scope of merits appeals be extended as an anti-corruption measure. ICAC found, '[t]*he limited availability of third party appeal rights under the Environmental Planning & Assessment Act 1979 (NSW) means that an important check on executive government is absent… The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system*.'[13]

While the references cited above were focused on planning merits appeals, they are equally as relevant for Land Court objection hearings for resource project applications. Very similar concerns are brought up between planning and development applications and resource applications, with respect to environmental and community impacts, and equal benefits are provided through third party merits appeals for resource application decisions.

In essence, the mere existence of the right to challenge decisions before an independent arbiter gives the public confidence that the decision-making process has integrity rather than taking place behind closed doors. There is also an additional benefit that application material is likely

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[9] Preston B and Smith J, "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*, Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.
[10] Ibid.
[11] Ibid.
[12] Judge Christine Trenorden, 'Third-Party Appeal Rights: Past and Future' (Paper presented at Town Planning Law Conference, Western Australia, 16 November 2009) http://www.sat.justice.wa.gov.au/_files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf ; Stephen Willey, 'Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia' (September 2006) 24(3) Urban Policy and Research 369–389; Preston B and Smith J, "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*, Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.
[13] NSW Independent Commission Against Corruption Report, February 2012, *Anti-Corruption Safeguards and the NSW Planning System*, available here: http://www.icac.nsw.gov.au/documents/doc_download/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012.

to be of a higher quality due to the potential that it may be under scrutiny by objectors, experts and the Court.

(b) The Land Court is the main merits review of primary approvals of mining projects

Despite the importance of third-party appeal rights in underpinning the integrity of, and public confidence in, the assessment of mining activities, there is no merits review available under the *Environmental Protection Biodiversity Conservation Act 1999* (Cth) or *State Development Public Works Organisation Act 1979* (Qld).

Some projects may also require water licenses under the *Water Act 2000* (Qld)[14] or approval under the *Regional Planning Interests Act 2014* (Qld) which may be subject to merits review as far as relevant to those approvals, but all mining projects will require a mining lease and environmental authority. While limited merits review may be available regarding other approvals, it does not encompass the breadth or overarching consideration of a proposal's impacts as a whole.

This statutory framework makes the Land Court objection process the main merits review of the primary approvals required for mining projects and elevates its importance as the first, and sometimes only, opportunity the public or affected landholders have to question the mining application before an independent arbiter.

Any diminution of the community mining objection rights or powers of the Land Court to hear these objections would therefore erode the integrity of the assessment process as a whole.

(c) Third party review is essential for decisions as to the alienation of shared resources and shared environment

Under the MRA most minerals are the property of the Crown, making them a public asset to be managed on behalf of the people of Queensland.[15] It is therefore appropriate that there be broad public consultation as to whether, and if so, how, particular resources should be mined.

Similarly, the EPA seeks to protect Queensland's environment while allowing for development that improves total quality of life (ecologically sustainable development). As Queensland's environment is shared and valued differently by all who reside or visit here, it

[14] We note that the *Water Act 2000* (Qld) is expected to shortly be amended by the *Water Reform and Other Legislation Amendment Act 2014* (Qld) (WROLAA) such that mines will no longer be required to obtain a water licence for take or interference with associated water. This amendment will also remove a public submission and appeal right which would normally be provided through the applicable water licence assessment process as far as it would have applied to any mining activity. If the Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill 2016 (Qld) is passed, mines advanced in their assessment at the time of commencement of WROLAA may be required to obtain associated water licences as far as they would have currently been required to obtain water licences under the *Water Act 2000* (Qld) for take or interference with associated water. While this provides consequent public submission and appeal rights equal to the water licence framework, the criteria by which the associated water licence will be assessed is not required to be assessed with regard to the principles of ecologically sustainable development, unlike the normal water licence assessment process under chapter 2 of the *Water Act 2000* (Qld). The associated water licence therefore provides a weaker assessment of environmental impacts than the current water licence assessment process.

[15] See, for example, Mick Peel, Submission No 8 to Select Committee on Certain Aspects of Queensland Government Administration related to Commonwealth Government Affairs, 14 November 2014, 3.

is appropriate that there be broad public consultation about proposals that could cause harm to that environment.

Researchers from Queensland University of Technology have shown that complex socio-economic issues follow mining activities and can have serious impacts on the provision of social services and recreational activities, housing, community safety, crime, lifestyle and overall community wellbeing.[16] Further, impacts such as dust, noise, traffic and fugitive emissions can have impacts from a mine, along each of the often various and lengthy transportation routes to the final destination for the product. Greenhouse gases produced at every stage of production to combustion can also have impacts on climate change globally.

Resource projects can have broad-reaching impacts on the local area (such as through noise and dust), district (such as through groundwater) and State (such as through economics and transport networks), as well as nationally and internationally (such as through economics and climatic impacts). It is only fair that all those who have an interest in those impacts are able to have those concerns heard by an independent arbiter.

Accordingly, the current regime of a merits review, open to members of the public, is appropriate to the alienation of public owned resource assets and consideration of broad environmental impacts on the community.

(d) Review of environmental authority alone is insufficient

A discussion paper produced by the Queensland Government has previously stated that '*The MRA does not recognise the EIS under either the SDPWO Act or the EP Act so public notification is duplicated for the tenure application despite there being no identifiable benefit to either industry or stakeholders. It is proposed any amendment to the notification and objection process recognise the risk of environmental impact and notification requirements under other legislation when determining the extent of notification that is required*.'[17]

The subsequent removal of objection rights to mining matters attracted broad community opposition and was subsequently reversed to restore objection rights.[18]

The proposal to remove objection rights to the mining lease was incorrect in its foundational assumption that there is '*no identifiable benefit to either industry or stakeholders*' in notifying a mining lease. There are fundamental differences between the criteria open for the consideration of the Land Court under an objection hearing relating to the environmental authority, compared to an objection hearing relating to the mining lease.

The environmental authority decision criteria concern environmental impacts, which are undoubtedly of public interest and appropriate for third party involvement in providing submissions and referral of objections to the Land Court.[19]

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[16] Carrington, Kerry & Pereira, Margaret (2011) Social Impact of Mining Survey: Aggregate Results Queensland Communities. Available online: http://eprints.qut.edu.au/42056/

[17] Department of Natural Resources and Mines, *Mining lease notification and objection initiative: Decision Regulatory Impact Statement*, (March 2014) 7.

[18] *State Development and Public Works Organisation and Other Legislation Amendment Act 2015* (Qld), s 5; *Mineral and Other Legislation Amendment Act 2016* (Qld),

[19] *Environmental Protection Act 1994* (Qld), s191.

In an objection hearing regarding the mining lease, the Land Court may consider such matters as whether:

(a) if the land applied for is mineralised, there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and

(b) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and

(c) the past performance of the applicant has been satisfactory; and

(d) the public right and interest will be prejudiced; and

(e) the term sought is appropriate.[20]

These matters are not specifically made available for the Land Court to consider in an objection hearing regarding the environmental authority. As with the environmental authority criteria, the considerations for the mining lease are broad and concern impacts to far more than simply those landholders within and directly adjacent to the mining lease footprint.

(e) Financial and technical capabilities and past performance of the proponent are all of community concern

The financial and technical capabilities of an applicant, as well as their past performance, are considerations that can impact all Queenslanders. Where an applicant is not sufficiently financially sound to meet its obligations in undertaking activities, or is not a responsible operator, it is frequently the case that the Queensland or Australian Governments will foot the bills to ameliorate impacts caused by these operators. This may be done through providing subsidies to the proponent, or through being left with the responsibility of mitigating or avoiding environmental impacts from an abandoned mining site left by a bankrupt proponent.

The reality of this concern has become most clearly apparent through the recent bipartisan passing of the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld). It aims to ensure that operators cannot escape liability for environmental harm posed by their activities, even where a proponent company is suffering financial hardship.

The Queensland Audit Office has reported that there are 15,000 abandoned mine sites in Queensland, which has left an estimated financial burden on the Queensland Government of $1 billion if these sites were actually rehabilitated by the Government.[21] This is money the community pays in taxes. Also, any environmental harm left by poor operators impacts the broader community, such as the recent concerns that the Murray Darling Basin could be polluted with toxic contaminants from an overflow of the storage ponds of the abandoned Texas Silver Mine.[22]

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[20] *Mineral Resources Act 1989* (Qld), s269.

[21] Queensland Audit Office, Environmental regulation of the resources and waste industries, Report 15: 2013-2014, p.1 https://www.qao.qld.gov.au/files/file/Reports%20and%20publications/Reports%20to%20Parliament%202013-14/RtP15Environmentalregulationoftheresourcesandwasteindustries.pdf.

[22] https://www.ehp.qld.gov.au/management/texas.html.

It is therefore a community concern that operators are financially and technically capable of meeting their responsibilities when undertaking the activities they are applying to undertake, and that they have not proven themselves as incapable of appropriately operating a mining lease due to poor past performance.

Accordingly, it is not sufficient for merits review to be limited to the environmental authority.

(f) Current community rights do not delay assessment, they are part of it

The resources industry often point to community rights as an alleged source of 'delay' in obtaining their approvals. The truth is that community engagement adds little to the average assessment time of resource projects and there is no evidence these rights are being abused. The points raised below support this claim.

(g) No systemic 'frivolous or vexatious' litigation in Land Court proceedings

Those with a financial interest in building a project as quickly as possible are prone to view any assessment or court review as a 'delay' and 'frivolous or vexatious'. The term 'frivolous or vexatious' is a well-established legal term that is relevant across all court jurisdictions.[23] There is therefore a myriad of case law and legislation which one can turn to in defining this term and applying it to a particular matter.

The Land Court of Queensland has held that the term 'frivolous or vexatious' should be given its ordinary meaning, being that the case is 'of little weight', 'carried on without sufficient grounds, serving only to cause annoyance', or 'unmeritorious'.[24]

The *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 prohibit them from continuing or instituting proceedings of a particular type.[25] This Act defines 'vexatious proceedings' to include:

(a) a proceeding that is an abuse of the process of a court or tribunal; and

(b) a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and

(c) a proceeding instituted or pursued without reasonable ground; and

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[23] For example, the *Uniform Civil Procedure Rules 1999* (Qld), applicable to the Supreme, District and Magistrates Courts, rule 15 provides that the registrar may refer an originating process to the court before issuing it if the registrar considers the process to be frivolous or vexatious; rule 162 provides the courts with the power to strike out particulars that are frivolous or vexatious; rule 171 provide the courts with the power to strike out pleadings if they are frivolous or vexatious; rule 389A restricts applications that are frivolous, vexatious or abuse of court's process.

[24] *Reed v Department of Natural Resources and Mines & Ors (No. 3)* [2014] QLC 13, 10-11. Cf: *Reed v QCoal Sonoma Pty Ltd & Ors* [2014] QLAC 8. See also *Burtenshaw & Ors v Dunn* [2010] QLC 70 in respect of 'unreasonable conduct' during the hearing by an objector recovering from brain injuries.

[25] *Vexatious Proceedings Act 2005* (Qld), s5.

(d) a proceeding conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

There does not appear to be any instance where a community objector to the Land Court has been either:

a) found by the Land Court to be 'frivolous or vexatious'; or

b) the subject of an order under the *Vexatious Proceedings Act 2005*.

It appears the only objector found to be vexatious in the Land Court was a commercial competitor.[26]

In September 2014 the report by the Agriculture, Resources and Environment Parliamentary Committee on the Mineral and Energy Resources (Common Provisions) Bill 2014, stated that:[27]

> "The Land Court further confirmed that, in its experience, there was no evidence to suggest that the courts processes were being used to delay project approvals:
>
> > In the court's experience, there have not really been a lot of stalling tactics. If there is, it generally comes from both sides. It is not just landowners or objectors who generally are not ready to proceed; it is also often the mining companies that are not ready. Having said that, the main tool that the court has to deal with delays and putting parties to unreasonable expense and delay is the power to award costs. A party can agree to seek costs against the other party if that is something they perceive as happening. (Farrell, L., 2014, Draft public hearing transcript, 27 August, p. 2.)"

This position was also supported by the Infrastructure, Planning and Natural Resources parliamentary committee recently when considering the Mineral and Other Legislation Amendment Bill 2016, who noted in their committee report that:

> '*the majority of the committee notes that only a small number of appeals against mining leases are lodged in the Land Court each year by environmental groups, and the Minister is not bound by a recommendation of the Court.*
>
> *Despite mining stakeholders' claims that frivolous or vexatious cases are extensively used by landholders and other groups, the majority of the committee was unable to find evidence to support this view.'*[28]

Full weight must therefore be given to the established finding that the Land Court has not found any community objections brought to the Land Court in mining objections hearings to have

[26] *Ralph DeLacey & Anor v Kagara Pty Ltd* [2007] QLC 0137.
[27] Agriculture, Resources and Environment Committee, Mineral and Energy Resources (Common Provisions) Bill 2014, Report No. 46, September 2014, 15, http://www.parliament.qld.gov.au/documents/committees/AREC/2014/24-MinEngResBill/rpt-main.pdf.
[28] Infrastructure, Planning and Natural Resources Committee, *Mineral and Other Legislation Amendment Bill 2016*, Report No. 26, 55th Parliament (May 2016), 17.

been frivolous or vexatious, as confirmed by research by the Australian Productivity Commission,[29] and the Queensland Parliamentary Library.[30]

On the contrary, the Land Court has found objectors to be acting in the public interest, motivated solely by environmental or community concerns and clarifying important principles of law.[31] No costs have ever been awarded by the Land Court against a client represented by EDO Qld. In contrast, costs have been awarded against a mining company in favour of an objector in one of the cases in which EDO Qld provided representation to a different objector.[32]

(h) Submissions and Land Court process does not add significantly to average application and assessment times

Major projects often have corresponding large impacts which can take considerable time to properly describe and assess. A review of the Coordinated Projects website shows that the average time between the lodgement of an Initial Advice Statement by a proponent, and the delivery of a Coordinator-General report, is 4-5 years.[33] Of those 4-5 years, approximately 1-2 years is taken by proponents on average, preparing an EIS and 2-3 years is taken by the Coordinator-General preparing terms of reference, seeking and reviewing further information from the proponent, and preparing the CG evaluation report. Less than 5% of the 5 year average assessment time (i.e. less than 3 months) is time the community has to consider and comment on draft terms of reference and EIS documentation. Any reduction in assessment times would be best focused on the 95% of the assessment time used up by the proponent or coordinator general. Any reduction in assessment times by the proponent and coordinator general could be partially re-allocated to grant the badly needed extension to public consultation times, thereby enhancing community participation while reducing overall assessment times; a win-win.

Roughly 100 mines are approved each year and a handful of community objections to mines are referred to the Land Court.[34]

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[29] Productivity Commission Research Report, Major Project Development Assessment Processes, November 2013, 277.

[30] On request of the former Agriculture, Resources and Environment Committee in their inquiry into the Mineral and Energy Resources (Common Provisions) Bill 2014. As referred to by then Member for South Brisbane Ms Jackie Trad in the transcript to the second reading speech of the Mineral and Energy Resources (Common Provisions) Bill 2014, Record of Proceedings, First Session of the Fifty-Fourth Parliament, 9 September 2014, 3024, available online here: https://www.parliament.qld.gov.au/documents/hansard/2014/2014_09_09_WEEKLY.pdf.

[31] *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth - Brisbane Co-Op Ltd (No 2) [2012] QLC 67*, [39]-[42].

[32] *Hancock Coal Pty Ltd v Cassoni (No. 5)* [2014] QLC 33.

[33] http://www.statedevelopment.qld.gov.au/assessments-and-approvals/coordinated-projects.html

[34] The Land Court Annual Report 2014-15 indicates that in 2013-14 26 objections or appeals were lodged under the *Environmental Protection Act 1994* in relation to mining, petroleum and gas tenures. The breakdown for community mining objections was not available. As search of Land Court decisions reveal only 20 cases considering the standard criteria under the EPA.

In the experience of EDO Qld and from a brief review of published decisions, Land Court referrals typically proceed to hearing in about six months on average, with decisions within a further six months on average.

The Land Court assessment is considerably quicker than the average time taken by the Coordinator-General to assess the EIS and to prepare the Coordinator-General Report and, as it only applies to the small number of projects challenged, does not significantly increase average assessment times for resource projects.

PART 3: MEASURES TO REDUCE ASSESSMENT TIME WHILE ENHANCING COMMUNITY RIGHTS

Recommendation 1: Provide for clear and certain 'no go areas' to protect agricultural land, water catchments, biodiversity and townships

At present in Queensland there are very few areas that resource activities are strictly not allowed. Clearly inappropriate areas like our good quality agricultural land, areas of high biodiversity and conservation value and areas close to communities are all open to potential exploitation for resources. This wastes the resources of government, community and industry in creating uncertainty and lengthy assessments where a clear 'no' should be given from the start. Existing legislation, such as the *Regional Planning Interests Act 2014* (Qld) (**RPI Act**) and the resource tenure legislation could specifically provide for 'no go' areas to prevent the possibility that applications will be made to undertake resource activities in inappropriate areas.

Currently the key protections of our good quality agricultural land and protected environmental areas are provided through the RPI Act framework, however this framework does not provide for clear prohibitions on resource activities in inappropriate areas, but instead provides significant discretion to decision makers to grant Regional Interest Development Approvals (**RIDAs**) for regulated activities in areas of 'regional interest' intended to be protected under the Act.

On reviewing the applications for RIDAs that have been decided under the RPI Act framework, it appears that no applications have been rejected. This demonstrates that the RPI Act framework is not functioning to effectively protect our best agricultural land and strategic environmental areas from regulated activities.

The RPI Act and/or resource tenure legislation should be amended to provide clear 'no go' areas. This will reduce the resources of all stakeholders in drafting and responding to application in inappropriate areas and ensure that applications in more appropriate areas are able to be processed more quickly.

For example, the farmers around the township of Acland are still fighting to protect some of the best 1.5% of agricultural land in Queensland despite the application to expand the Acland mine being rejected in 2012 by the then Premier as it "was 'inappropriate' to expand the mine in the State's southern food bowl", rejected (in its revised form) by the Land Court in 2017 and DES in 2018. Strong protections of agricultural land would prevent the inefficient waste of resources by all parties in inappropriate development applications over prime agricultural land.

Recommendation 2: Provide clear requirements and sufficient resourcing for quality assessment and regulation to help remove uncertainty for all stakeholders and greatly increase efficiency

Big improvements could be made in environmental impact assessment to ensure proponents provide the necessary information of a sufficiently high quality from the start of the assessment process. This would prevent the need for repeated requests for more information from the government. We recommend as a start:

- mandatory minimum terms of reference for more consistency and certainty in what is required in an EIS;
- stricter rules for provision of well-supported applications and fully completed impact assessments up front, rather than approvals being given without all impact assessment having been undertaken prior to a decision being made on the application. This would save the many information requests and back and forth between the applicant and the assessor in chasing needed information and ensure they have the most time to properly assess the proposal and likely impacts posed;
- more resourcing for assessment units to ensure they have the time and expertise to robustly assess application materials; and
- a central database where all proponent and government developed impact assessment data is stored by government – for the benefit of growing scientific and community knowledge of our environment, understanding better our cumulative impacts on species and regions and to reduce the inefficiencies in each proponent creating from scratch data surrounding their potential impact on a specific site without reference to existing data or data on surrounding sites.

Further, inadequacies in upfront assessment and conditioning of rehabilitation requirements and requirements around financial assurance have greatly increased inefficiencies and risk around mining and gas activities in Queensland and left our state with significant debt in the billions of dollars. This was pointed out by the Queensland Audit Office in their report: Environmental regulation of the resources and waste industries (Report 15: 2013-14), as well as the Queensland Treasury Corporation in their review of the financial assurance framework in April 2017. The Queensland Government has been undertaking a proposed reform agenda to improve the failures of these regulatory frameworks, however the currently proposed Mineral and Energy Resources (Financial Provisioning) Bill 2018 before Parliament still allows for existing mines to continue with plans to leave non-rehabilitated areas and risks not requiring sufficient financial assurance from the sector to adequately ensure that Queensland limits its exposure to risk of failed operators. We will gladly provide information surrounding these concerns to the reader upon request. We hope these concerns will be alleviated through amendments to the Bill prior to its passing.

Recommendation 3: Improve efficiencies in public access to information

Undoubtedly one of the most cost effective ways of reducing delay, duplication and inefficiency is by timely access to relevant information.

Improving the ability of the community to access timely information on resource applications will improve the timeliness and quality of submissions and reduce timeframes for preparing for any appeals.

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

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

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

To this end, we recommend a new statutory obligation to maintain public registers under the SDPWOA and MRA of applications in progress and approval documents.

We have written to the Department of Environment and Science (**DES**) separately about the failings of the public register under the EPA and can provide a copy of those submissions on request.

Clarity is also needed under the Water Act 2000 (Qld) (**Water Act**) section 112 to ensure appropriate access to information is provided for all those concerned with water licence applications in Queensland. Water Act section 112 '**Public notice of application for water licence'** provides that:

> *'(3) The chief executive must give the applicant a notice requiring the applicant—*
>
> *(a) to publish the information mentioned in subsection (4), for the period and in the way, stated in the notice given by the chief executive; or*
>
> *(b) to publish a notice that states the application has been made and refers to the information mentioned in subsection (4) and published on the department's website, for the period and in the way, stated in the notice given by the chief executive.*
>
> *(4) The information to be published must include at least the following—*
>
> *...*
>
> *(b)where copies of the application may be inspected;'* (our emphasis)

On behalf of a regionally remote client, EDO Qld recently contacted DNRME on numerous occasions to obtain a copy of a water licence application during the public notification period. This subsection was interpreted by Departmental officers as only permitting the public to inspect water licence applications as specified in the notice. On inspecting the application in the regional Departmental

office stated on the notice, our client was not provided with a copy, nor permitted to take copies such as photos. Our request for electronic copies on behalf of our client was denied. Subsequently, our client was forced to rely on their memory in order to participate in the public submission process.

We understand from communications with various departmental officers, that an internal decision has been made to ensure that the interpretation of s 112(4) excludes the provision of copies of water licence applications during the public submission process. This is illogical and is significantly hampering the public's ability to access, and consequently exercise their legal rights to comment upon, water licence applications. It is concerning that DNRME would choose to take a policy stance that reduces procedural fairness for impacted parties such as landholders.

We note that this unfortunate drafting has also been provided in Water Act s1009(1)(k) for applications for marine licences.

Currently the relevant sections only specify a right to 'inspection'. In comparison, other sections providing for community access to information make specific reference to the ability to obtain copies of documents, for example:

- Water Act s 1009(2) confers the chief executive with discretion as to whether to publish a copy of the document on the department's website,
- Water Act s 1009(3) and (4) indicates that, upon payment of a fee (which is to be no more than the reasonable cost of publishing the copy), a member of the public may purchase a copy of the relevant water licence application.
- *Environmental Protection Act 1994* (Qld), section 542 'Inspection of Register':

  '(1) The relevant entity must, for a register mentioned in section 540 (1) or 540A…

  (b) permit a person to take extracts from the register or, on payment of the appropriate fee by a person, give the person a copy of the register, or part of it.' (our emphasis)

- *Planning Regulation 2017* (Qld) schedule 22 sets out the various different forms by which documents must be made publically accessible under that framework; demonstrating further the need for the exact method of public accessibility to be specified in the framework to provide clarity and certainty for all stakeholders.

To ensure Departmental officers and all stakeholders understand the obligation to provide a copy of the water licence application and to prevent further resource expenditure in arguing for the right to view a water licence application with Departmental officers, we ask that you please undertake to amend s 112(4)(b) to make explicit reference to the public's ability to obtain copies of the relevant document.

Ideally the applications would be required to also be published on the Department's website.

Applications are published for most other public notification periods for other applications; for example applications for environmental authorities on the Department of Environment and Science website; and applications for planning approvals on local or state government websites etc.

These are simple amendments that could be made to resource related Acts to greatly increase efficiencies for stakeholders in resource assessment and the Departments concerned.

Recommendation 4: Repeal the extensive powers of the Coordinator-General to overrule all other departments and the Land Court – hindering decision making and wasting resources of all stakeholders

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

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

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

Recently the Land Court commented about the situation of being prohibited from recommending conditions inconsistent with the Coordinator General as follows:

> *"I find this a most unsatisfactory position to be placed in, but the legislation leaves me no option. One could be forgiven for thinking the position that I find myself in is absurd, given that this Court has heard in such extensive detail from two highly regarded experts in the acoustic field, as well as all of the material that was before the CG. In simple terms, this Court has had the benefit of much more information placed before it than the CG, and that information and evidence has been subject to intense scrutiny, yet I am precluded from recommending the result of that evidence to either the MRA Minister or the administering authority for the EPA."*[35]

Recommendation 5: Provide extended standing in EP Act, as provided in the *Nature Conservation Act 1992 (*Qld) and *Environment Protection and Biodiversity Conservation Act 1999 (*Cth)

Extended standing should be provided to guarantee those working in environment or community related areas the right to request reasons for decisions and judicially review decisions under the *Environmental Protection Act 1994* (Qld) (**EP Act).** This would save resources of the community and government in fighting over whether an interested party is 'aggrieved' for the purposes of the *Judicial Review Act 1991* (Qld) (**JR Act**). It would also improve accountability and transparency of government decisions in resource assessment, and avoid time and resources wasted through the need around defending challenges to standing raised in Court.

[35] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24 at [787].

Recent court decisions[36] have unfortunately greatly curtailed the ability of key stakeholders to obtain reasons for decisions that they would clearly normally be considered to have a sufficient interest in were extended standing provided under the EP Act. In these decisions, Lock the Gate Alliance, a key stakeholder through the Queensland Government's reforms around mine rehabilitation and financial assurance regulation, was denied reasons under the JR Act for decisions under the EP Act concerning financial assurance and mine rehabilitation related matters for the Blair Athol mine. These decisions have now formed unfortunate precedent for future requests for reasons by key stakeholder groups that are not considered to be personally 'aggrieved' for the purposes of the JR Act.

This must be amended if we are to achieve adequate transparency and accountability around decisions under the EP Act, which are always of a public interest nature given the scope and purpose of this Act.

Recommendation 6: Make mining application court appeals post-approval and determinative, as provided for most other development applications including site specific gas applications

(a) Lack of final decision in mining referrals has increased complexity and assessment times and reduced Court's power to control proceedings

Unlike other matters within the Land Court's jurisdiction, such as CSG approvals or water licences, the Land Court does not make a final decision on referred objections, but rather makes a recommendation to the ultimate decision makers. In this respect, the mining assessment and Court objection hearing process is an anomaly when compared to the typical assessment process and court involvement in other development approvals processes, which generally involve a final decision by the government and then a post-approval merits appeal process.

This limitation on the Land Court's power in mining objection hearings has hampered the Court's ability to conduct matters fairly and efficiently, and increases the time, complexity and costs for all parties.

(b) Lack of final decision has denied appeal to the Land Appeal Court, creating recourse to complex judicial review processes

The *Land Court Act 2000* (Qld) provides for decisions of the Land Court to be appealed to the Land Appeal Court.[37] However, in the case of *Dunn v Burtenshaw* (2010) 31 QLCR 156 the Land Appeal Court found that, as the Land Court only made recommendations in respect of mining leases rather than final decisions, it was considered an administrative function rather than a judicial proceeding. Consequently, the Land Court recommendation could not be appealed in those matters.

This leaves the Land Court recommendations to be judicially reviewed in the Supreme Court, rather than appealed.

[36] *Lock the Gate Alliance Ltd v The Minister for Natural Resources and Mines* [2018] QSC 21; *Lock the Gate Alliance Ltd v Chief Executive under the Environmental Protection Act 1994* [2018] QSC 22.
[37] *Land Court Act 2000* (Qld), s58.

The final decisions by the Minister on the mining lease and the Director-General (DG) on the environmental authority follow the Land Court recommendation, therefore these can also be judicially reviewed.

This is an unnecessarily complicated process, which may lead to up to three parallel judicial review appeals (see Figure 1 below). These separate appeals can also interfere with each other, prolonging each hearing.

For example, the Alpha Land Court decision was made on 8 April 2014 and the judicial review application in respect of the decision was filed on 6 May 2014. The environmental authority for the Alpha mine was granted on 23 September 2014 and subject to a judicial review application which was filed on 7 October 2014. The joining of the two judicial review applications prolonged the hearing of the first judicial review. The ML has not been granted but may be subject to a further judicial review long after the first judicial review applications have been concluded.

Significant time and resources are spent by all parties and the Court in undertaking a mining objection hearing. This resource expenditure is then potentially tripled through the three methods of judicial review, which effectively have taken the place of a normal court appeal process, and increase the complexity of the decision making process for all parties.

A single appeal from a Land Court final decision on the EA and ML could be more integrated, efficient and expeditious (see Figure 2 below). If submissions are permitted in both the EA and ML prior to approval then these submissions could form one of the matters to which the Court has regard, thereby removing the need for the distinction between Level 1 and Level 2 objectors, which currently complicates referral objections. It is also possible that the list of considerations under the EA could be expanded to cover the additional matters in the ML, thereby removing the need for any merits appeal of the ML.

This would reduce complexity, duplication and assessment times while maintaining and enhancing community objection rights. It would also bring mining appeals into consistency with CSG appeals, further streamlining legislative complexity.

Figure 1: Current – Pre-Approval Land Court Process (mining lease matters) where objector or applicant refer the application to the Land Court

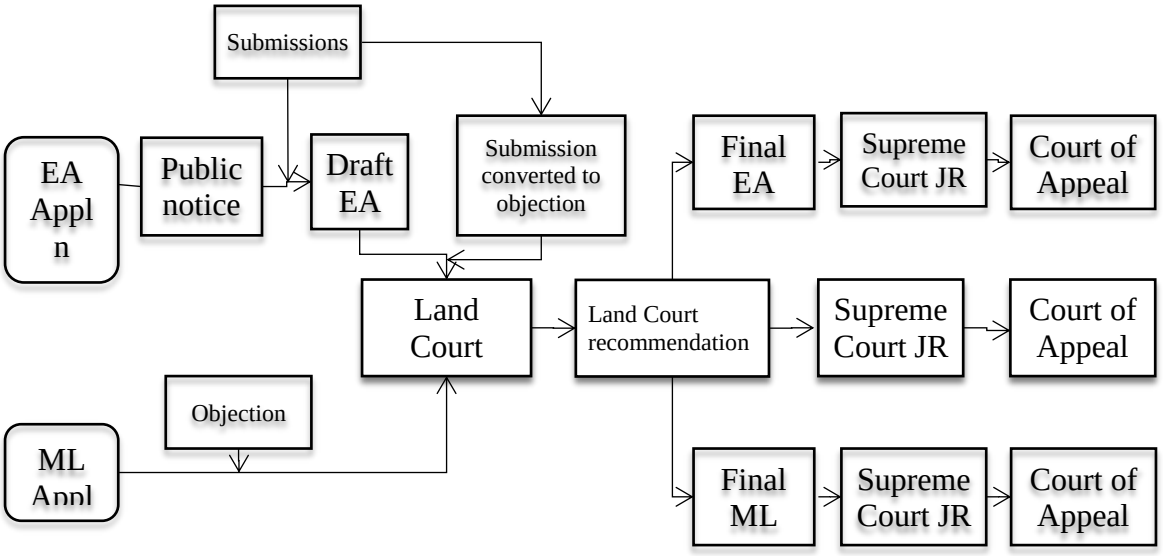
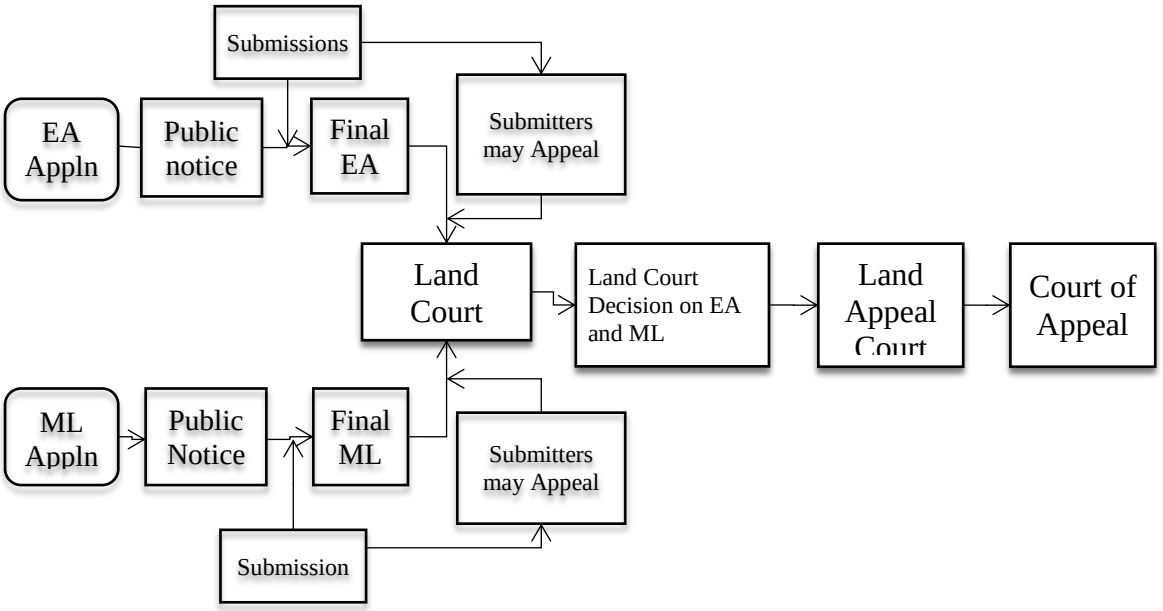


Figure 2: Possible future – Post-Approval Land Court Process (mining lease matters)



We note that the approach of providing the Land Court with post-approval merits review appeal jurisdiction was previously suggested in the Queensland Government discussion paper published for public comment in March 2014, entitled '*Mining lease notification and objection initiative: Decision regulatory impact statement'.* The policy objective guiding that discussion paper was '*to reduce regulatory burden, cut red tape and regulation for the mining industry to support resources sector growth by speeding up project approvals to stimulate Queensland's economy and create jobs*'.[38]

The consideration of this discussion paper of a post-approval appeal power for the Land Court is therefore similarly framed, proposing that '[*i]n circumstances that the Land Court's decision is final (and not appealed to a higher jurisdiction), the administering authority's consideration of the Land Court's recommendations and associated administrative requirements can be avoided, reducing cost and unnecessary delays in granting approvals*.'[39]

While we agree that a final decision would reduce delay and complexity, this would be true regardless of any appeal to a higher jurisdiction, so there is no basis for curtailing appeal rights from the Land Court if it were given the final decision.

(c) Final decision would be consistent with coal seam gas assessment process

As stated above, there is currently a lack of consistency in how environmental authorities for mining activities and environmental authorities for petroleum and gas activities are assessed.

Both 'mining activity' and 'petroleum activity' are within the definition of 'resources activity' under the EPA.[40] Petroleum activities include activities authorised under the *Petroleum and Gas Production and Safety Act 2009* (**P&GA**).[41] These activities include exploring for and producing CSG.

A person may apply for an environmental authority for a resource activity under Chapter 5 of the EPA. If the application is non-standard (ie large or complex) the application is considered a 'site specific application'.[42]

Like applications for mining activities, site specific applications for petroleum activities must be publicly notified,[43] unless an EIS has satisfied that step.[44]

After public notification, the administering authority must decide that the application be refused, or approved subject to conditions.[45] This step applies to both mining activities and petroleum activities.

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[38] Department of Natural Resources and Mines, *Mining lease notification and objection initiative: Decision Regulatory Impact Statement,* (March 2014), 21.
[39] Department of Natural Resources and Mines, *Mining lease notification and objection initiative: Decision Regulatory Impact Statement,* (March 2014), 19.
[40] EPA, s107.
[41] EPA, s111.
[42] EPA, s124.
[43] EPA, s149(b).
[44] EPA, s150.
[45] EPA, s172.

Division 3 of Chapter 5 of the EPA then deals with the objection process to the Land Court for mining activities[46] but does not apply to petroleum activities.

The decision to approve a petroleum activity is instead considered an 'original decision' under Schedule 2, Part 1 (Original decisions for Land Court appeals) of the EPA.[47]

A 'dissatisfied person' for an 'original decision' includes a submitter for a site-specific application for an environmental authority for a petroleum activity.[48]

A 'dissatisfied person' may seek internal review of the decision, which results in a 'review decision'.[49] A dissatisfied person who is dissatisfied with the decision may appeal against the review decision to the Land Court.[50]

Any party to the appeal can ask the Court to conduct or provide mediation.[51]

The appeal is by way of hearing anew, with the same powers as the original decision maker.[52] In deciding the matter the Land Court may:[53]

(a) confirm the decision; or

(b) set aside the decision and substitute another decision; or

(c) set aside the decision and return the matter to the administering authority who made the decision, with directions the Land Court considers appropriate.

A party to the Land Court proceeding may appeal to the Land Appeal Court against the decision.[54] A party to the Land Appeal Court may appeal to the Court of Appeal on legal errors only.[55]

This process for petroleum activities is similar to the assessment and court appeal process provided for other environmentally relevant activities under the EPA, as well as development applications under the *Sustainable Planning Act 2009* (Qld).

Accordingly, giving the Land Court final decision on mining activities would bring it into line with petroleum activities, and other environmental and development assessment processes.

Similarly, a process whereby any party to the appeal can seek for the parties to put submissions to the Court with respect to undertaking an alternative dispute resolution process. This may not be appropriate in all instances, and should therefore be voluntary and not mandatory, but it may assist some objectors to resolve disputes with the applicant outside of a more formal court process.

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[46] EPA, s180.
[47] EPA, s519.
[48] EPA, s520(2)(a).
[49] EPA, s521.
[50] EPA, ss523-524.
[51] EPA, s526.
[52] EPA, ss527-528.
[53] EPA, s530.
[54] Land Court Act 2000, s64.
[55] Land Court Act 2000, s74.

(d) Lack of finality limits Court's power to order disclosure, disadvantaging community and impeding proper Court function

The decision in *Dunn v Burtenshaw* has had far reaching ramifications.

In 2014, objectors to a mining lease and environmental authority sought by BHP Billiton Mitsui Pty Ltd (BHP) sought disclosure of relevant documents from BHP.[56] The Land Court ordered such disclosure and BHP sought judicial review of the decision in the Supreme Court (recalling that appeals to the Land Appeal Court had become unavailable following the decision in *Dunn v Burtenshaw*).

Consistent with the decision in *Dunn v Burtenshaw*, the Supreme Court found that a mining objection was not a 'proceeding' and as such the power in sections 4 and 13 of *the Land Court Rules 2000* (Qld) to order disclosure in a 'proceeding' was not available in a mining referral.

The Land Court made some attempt to remedy this situation through *Practice Direction 1 of 2015* (Practice Direction) which sought to apply the same procedures to "referred matters" (objections to mining leases and environmental authorities) as other matters before the Land Court.[57]

The effectiveness of this remedy was tested in the decision of *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* [2016] QLC 29 when objectors sought disclosure of noise and dust data held by New Acland Coal Pty Ltd (NAC).

The Land Court found that the Practice Direction was not sufficient to extend the Land Courts jurisdiction in referred matters to include the power to award disclosure.

Consequently, the Land Court is currently without the power to order disclosure of relevant documents in referred matters. This is a grave impediment on the fairness of objection proceedings as the mining proponent will typically hold most of the relevant data and information, putting the objectors (and the statutory party) at an extreme disadvantage in reviewing the factual claims of the proponent.

If the Land Court is given the final decision, as outlined in 6(a) above, then the hearing would be considered a proceedings and the disclosure power would be restored without further amendments to the *Land Court Rules 2000*.

(e) Lack of finality limits Court's power to award cost – own costs would be more appropriate for the public interest jurisdiction

The decision in *Dunn v Burtenshaw* has also affected the costs power of the Land Court.

As power to award costs under section 34 of the *Land Court Act 2000* (Qld) applies only to proceedings, the President of the Land Court found in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* (No. 2) [2016] QLC 22 that the costs power did not apply to

[56] *BHP Billiton Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107
[57] Available here: http://www.courts.qld.gov.au/__data/assets/pdf_file/0020/431462/lc-pd-1of2015.pdf.

mining referrals. Consequently, the Court did not have the power to award the costs sought by Adani against an environmental objector.

On the same day the President applied the same reasoning to deny an application by a successful indigenous objector for costs in *Legend International Holdings Inc v Taylor Aly Awaditijia & Anor* (No. 4) [2016] QLC 23.

While there is no formal rule of precedent in the Land Court objection hearings, the decisions by the President of the Land Court in *Adani* and *Legend* have been followed by other members of the Land Court in *Baralaba Coal Pty Ltd & Anor (administrators appointed) v Paul Stephenson and Chief Executive, Department of Environment and Heritage Protection (No. 2) [2016] QLC 25* and *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* (unpublished decision by Member Smith, 18 May 2016).

This means that effectively the Land Court is unable to make orders as to costs in objection hearing proceedings. As a public interest jurisdiction, the most appropriate rules as to costs orders for Land Court objection hearings is that there is a general rule each party pays their own costs for participation in the proceeding, except where it can be demonstrated that a party is pursuing frivolous or vexatious grounds under the normal legal definition of this term as described above.

There have been further amendments which may have restored the Court's costs powers but these have not yet been tested to our knowledge.

If the Land Court is given the final decision, as outlined in 6(a) above, then the hearing would be considered a proceedings and the current costs power would be restored without further amendments to the *Land Court Act 2000*.

The current discretion as to costs orders does however create significant uncertainty and fear amongst community objectors who potentially risk hundreds of thousands of dollars in cost orders against them if they challenge a mining approval in the Land Court.[58]

It is not possible to quantify how many community members do not participate in a Court process where there is a notional fear that costs may be awarded against them. This fear cannot be overstated – the remote possibility of receiving an adverse costs order is a significant disincentive to community groups who are not well resourced to stand up for their concerns in court.

A more appropriate costs regime for matters which concern the public interest, such as the development of our shared resources, is the regime being implemented in the Planning and Environment Court (essentially restoring the position that persisted under the former *Integrated Planning Act 1997*).[59] These cost rules provide that generally parties bear their own costs but may have costs awarded against them if they are obstructive, frivolous of vexatious, or otherwise unreasonably default in procedural requirements.

[58] See for example T77-11.
[59] *Planning and Environment Court Act 2016* (uncommenced), s 60.

Recommendation 7: Land Court power to heal errors could be extended to further reduce technical complexity

As discussed above, the Land Court generally acts with flexibility to reduce the complexity for community litigants. However, the law does not always provide sufficient flexibility to allow the Court to act without undue technicality and formality.

For example, in the case of *McAvoy & Anor v Adani Mining Pty Ltd & Ors,*[60] the Court found it was not within its discretion to allow two objectors, the ability to join as normal objectors to the Land Court objection proceedings due to their submission being five hours outside of the time period defined in the *Mineral Resources Regulation 2013* (Qld).

The Court pointed out the difficulties in the complex drafting and interaction of the EPA and MRA and reiterated the comments of Justice Davies in *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation*[61] that:

> "Relevant provisions of the Mineral Resources Act 1989 are poorly drafted and by no means clear in their meaning. This is particularly unfortunate when jurisdictional expedition, simplicity and in formality of procedure should be important aims."

The Court found that discretion under MRA section 392 to allow substantial compliance did not extend to filing of a submission on the same day, but outside the allotted time, for properly made submissions. The parties were allowed to participate in the hearing as parties pursuant to EPA section 186(d) per another Court discretion.

The Court's power to remedy defects in applications or submissions that are before it could be sensibly extended in a manner similar to section 440 of the *Sustainable Planning Act 2009* which was amended to remedy a similar limitation on the discretion in that jurisdiction.[62]

This would allow the Court to use a sensible degree of discretion in allowing, for example, objections filed slightly out of time without prejudice to the parties to be valid, or to revive lapsed applications where just and appropriate in the circumstances.

Recommendation 8: Improve access to justice and efficiency through more fairness in transcript costs and timeliness

(a) Lack of access to timely transcript disadvantages and delays proceedings

Significant disadvantages and delays to all parties involved in the Acland case have been caused by difficulties in accessing transcripts in a timely fashion, particularly with regard to

[60] [2014] QLC 32
[61] (2002) 1 Qd.R 347.
[62] See for example s4.1.5A of the *Integrated Planning Act 1997* (Superseded) and *Hamill v Brisbane CC* [2005] QPELR 23.

closed court session.[63] Through the numerous times in which objectors have received transcripts after an extensive delay, including delays which extended past the maximum 10 day period, the objectors have had little time to prepare their submissions on citing the transcript.[64] These delays have then caused further delays to the entire proceedings, such as the time allowed for closing submissions.

(b) The role of transcripts in the justice system

Transcripts offer efficiency and transparency in the legal field,[65] and transcript technology can make the courts more accountable.[66] According to the Western Australian Government, and equally relevant to all judicial systems, court records, including transcripts, provide 'a unique source of information on the social, political and economic development' of a state and its legal system.[67] Furthermore, transcripts serve to reduce the confusion of courtroom testimonies,[68] and are an invaluable source of information and evidence in appeals.[69] This is particularly the case for self-represented litigants, and for highly technical litigation, as most environmental litigation is.

(c) Who provides transcripts in Queensland

Presently, Auscript is the exclusive provider of court transcript services to Queensland Courts.[70] Auscript strictly enforces the 'No Transcript Sharing Arrangements',[71] and this effectively means that Auscript has a monopoly as the sole transcript provider in Queensland. It has been tabled in parliament that since this contract has been awarded to Auscript, the cost of court transcripts have reportedly increased by 73%.[72]

From 1926 until 2013 transcription services were provided by the government owned State Reporting Bureau (**SRB**). The SRB provided written records in the Supreme, District and

[63] T11-36 to T11-43; T11-53; T12-4 to T12-10.
[64] T18-42.
[65] Auscript, *The Auscript Difference* (2013) Auscript < http://www.auscript.com/about/the-auscript-difference/#Vision>.
[66] National Association for Court Management, *Information Technology Management* (7 March 2003) National Association for Court Management < https://nacmnet.org/sites/default/files/images/4IT.doc>.
[67] State Records of Western Australia, *Court Records* Government of Western Australia < http://www.sro.wa.gov.au/archive-collection/collection/court-records>.
[68] 'The Importance of Court Reporting' on my Criminal Justice Degree, my Criminal Justice Degree < http://career.myonlinecriminaljusticedegree.com/2011/05/importance-of-court-reporting.html>.
[69] Anne Wallace, 'The Challenge of information Technology in Australian Courts' (1998) 9(1) Journal of Judicial Administration, 8.
[70] Auscript, *Queensland Courts* (2013) Auscript < http://www.auscript.com/justice/courts-and-tribunals/queensland-courts/>.
[71] Ibid.
[72] Joshua Robertson, 'Chief Justice Criticises 'Often Poor' Court Transcriptions Since Outsourcing', *The Guardian (Australian Edition)* (online) 2 January 2015 < http://www.theguardian.com/australia-news/2015/jan/02/chief-justice-criticises-often-poor-court-transcriptions-since-outsourcing>.

Magistrates Courts.[73] The Queensland Audit Office reports that during this period prior to 2013:[74]

- the costs were shared between the State and parties on an equal basis (50:50);[75]
- copying and sharing was common practice, although it was prohibited;[76]
- price to parties was about $200/hr or $516 per 100 pages (or $1031 total cost to parties and State);[77] and
- there was a power held by the judiciary to order in special circumstances, which include matters of major public significance and interest, that transcripts could be provided at no charge or at a lesser charge. [78]

On 11 September 2012, the former Attorney-General announced the decision to outsource these services. The former Attorney-General, stated that '[a] *number of questions have been raised in the District Court 2010-2011 annual report about the general efficiency of the current system.*' There were reports that the SRB had also suffered from technological 'glitches'.

In the period between 22 April 2013 and 1 July 2013, Auscript took over as the monopoly provider of transcript services to Queensland's courts and tribunals.[79] Auscript won a major contract with the Queensland Department of Justice and Attorney-General (**DJAG**), commencing in 2013 for a period of six years with an option to extend it for another four years thereafter.[80] Auscript CEO Peter Wyatt stated that this contract followed an '*exhaustive and challenging tender process*' over the 2012 Christmas period.[81]

However, this tender process has been publicly criticised.[82]

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[73] Daniel Hurst, 'Court record work will be outsourced as a result of budget cuts', *Brisbane Times* (online) 12 September 2012 <http://www.brisbanetimes.com.au/queensland/court-record-work-will-be-outsourced-as-a-result-of-budget-cuts-20120912-25rqj.html>.
[74] Queensland Audit Office (QAO), December 2015, "Provision of court recording and transcription services - Report 9: 2015–16", 9, available at <https://www.qao.qld.gov.au/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.qao.qld.gov.au%2Fsites%2Fqao%2Ffiles%2Freports%2Frtp_court_recording_and_transcription_services.pdf>.
[75] Ibid, 15.
[76] Ibid, 16.
[77] Ibid, 48.
[78] Queensland Land Court, 9 November 2015, per Member Smith. Presumably under section 8 of the superseded *Recording of Evidence Act 1962* (14 October 2010) which made recorders officers of the Court.
[79] Auscript, *Official Transcripts of Queensland Courts and Tribunals* (2013) Auscript < http://www.auscript.com/justice/courts-and-tribunals/queensland-courts/>.
[80] Auscript, 'Auscript wins exclusive Queensland DJAG Recording and Transcription contract' on Auscript blog, Auscript Blog (22 February 2013) < http://www.auscript.com/auscript-wins-exclusive-queensland-djag-recording-and-transcription-contract/>.
[81] Ibid.
[82] Joshua Robertson, 'Chief Justice Criticises 'Often Poor' Court Transcriptions Since Outsourcing', *The Guardian (Australian Edition)* (online) 2 January 2015 < http://www.theguardian.com/australia-news/2015/jan/02/chief-justice-criticises-often-poor-court-transcriptions-since-outsourcing>; Alex McKean, 'Qld LNP's dodgy donations for deals: Move on, nothing to see here', *Independent Australia* (online) 20 August 2014 <https://independentaustralia.net/politics/politics-display/qld-lnps-donations-for-deals-move-on-nothing-to-see-here,6794>.

(d) Critique of Auscript services

In December 2015 the Queensland Audit Office released a report, finding that:

> *"The procurement process undertaken by DJAG did not comply fully with the government's state procurement policy. It was not well planned or executed by DJAG, meaning the department cannot reliably demonstrate the best value for money outcome was achieved."*[83]
>
> *"DJAG cannot reliably demonstrate whether its present outsourcing model for court recording and transcription services represents the best overall value for money that it could have obtained, in terms of either cost or quality and timeliness"*[84]
>
> *"The savings realised by the state have also come at a cost to court users in terms of the prices they pay for their transcripts and the levels of service they receive. Costs, inaccuracies and delays can have a profound impact on people's ability to prepare their case and access justice."*[85]
>
> *"The outsourced model DJAG implemented has shifted some of the costs associated with producing recording and transcription services to end users. We estimate this has resulted in a 119 percent cost increase, at a minimum, for users in the civil court jurisdiction…"*[86]
>
> *"The rushed process continues to hinder DJAG and Auscript—being the root cause of user concerns and their on-going contract management problems."* [87]

Queensland's Chief Justice has noted that '[s*]ometimes matters are transcribed incorrectly or not at all*' since outsourcing transcripts to Auscript.[88] In the Supreme Court of Queensland Annual Report for 2013-2014, it was noted that:

> *'It is pleasing to note that, unlike last year, there have been no major delays in the receipt of Auscript transcripts for the preparation of appeal record books. The quality of the transcripts, however, remains variable, and like last year is often poor. Sometimes matters are transcribed incorrectly or not at all. Inappropriate paragraphing is common. When the accuracy of a portion of transcript is critical to a ground of appeal, it is often necessary for the judges to check the transcript against the original recording. Transcripts of appeal hearings are sometimes delivered outside the timelines time set by Auscript. These manifest transcript problems can delay the timely delivery of judgments.*[89] '

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[83] QAO, p24.
[84] QAO p8.
[85] QAO, 7.
[86] QAO, 3.
[87] QAO p8.
[88] Joshua Robertson, 'Chief Justice Criticises 'Often Poor' Court Transcriptions Since Outsourcing', *The Guardian (Australian Edition)* (online) 2 January 2015 < http://www.theguardian.com/australia-news/2015/jan/02/chief-justice-criticises-often-poor-court-transcriptions-since-outsourcing>.
[89] Supreme Court of Queensland, Supreme Court of Queensland Annual Report 2013-2014, (31 October 2014).

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

Correct judicial decisions require timely, complete and accurate information.[90] Transcripts form an important part of the information that assists courts in making their decisions, along with the role they play in assisting parties while the litigation is on foot. This timely, easily-accessible information is also important for accountability.

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

Presently, Auscript provides fee waivers 'on the grounds of financial hardship' in Queensland and at the federal level.[91] However, this process is clearly aimed at individuals, with the form only asking for individual details, concessions cards, household income and household expenditure.[92] This wording is problematic for incorporated associations, and there is currently no recognition of the financial hardship an association may experience in conducting public interest litigation in the interests of the community. There is a need for this waiver to be extended to better include incorporated associations, or for a public interest exemption of fees to be introduced, in order to facilitate open justice, transparency, accountability and to support public interest litigants.[93]

(f) Issues and problems with the current transcript system

Auscript has responded to allegations of rising costs of transcripts by pointing to the 'reality' that '*for over 95% of the criminal hearings recorded and transcribed by Auscript as part of the Queensland Courts contract, parties receive the transcript for free*'.[94] However, providing a financial hardship fee waiver for individuals and in criminal proceedings is not enough. Access to justice issues must be viewed in a broader context than only criminal proceedings.

As noted in the Queensland Audit Office report, '*[c]ost and timeliness of delivering court reporting and transcription services can affect accessibility and equity of the justice system.*

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[90] National Association for Court Management, *Information Technology Management* (7 March 2003) National Association for Court Management < https://nacmnet.org/sites/default/files/images/4IT.doc>

[91] Hearsay, *Court Recording and Transcript Production – New Service Provision Arrangements* (February 2013) The Journal of the Bar Association of Queensland http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1596&Itemid=48.

[92] SRB, *SRB Fee Waiver Form* Auscript <www.**auscript**.com/wp-content/.../JAG-2151414-v1-**Fee_waiver**_form.>. A copy of which is Exhibit SPR4 to the Affidavit of Sean Ryan dated 15 December 2015.

[93] EDO Qld, *Attorney General: Qld Needs Fairer, Affordable, Genuine Access to Justice* (March 2015) EDO Qld <http://edoqld.nationbuilder.com/>.

[94] Auscript, 'QLD Criminal Transcript Costs Addressed' on Auscript blog, Auscript Blog (8 August 2014) < http://www.auscript.com/qld-criminal-transcript-costs-addressed/>.

This is particularly so under a user pays model, which shifts these costs to users of the courts.'[95]

The EDO Qld and their clients have noted many issues with the current monopoly on transcription services and lack of a public interest exemption.

(g) Previous case examples

In 2014 the EDO Qld represented the Coast and Country Association of Qld in *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)*.[96] In this matter, an attempt was made to use the Auscript Fee Waiver form on the grounds of financial hardship, but it soon became clear that even if this application was successful, it would be ineffective to use this avenue due to the mandatory 10 day delay for free transcripts.

Auscript advised the EDO Qld that there would be a 10 day turnaround to deliver the transcript from the day that the application for a fee waiver was lodged.[97] The fee waiver application had to be lodged with the transcript request, which cannot be done until the day of the trial. Therefore, the objector would not be able to receive the transcripts until 10 days after the first day of the hearing, which for a large and fast-paced case is unworkable. Therefore, the only option was to pay the full cost of the transcript and receive them on the day. It is also not possible to apply for a fee waiver refund retrospectively.[98]

EDO Qld also represented the Land Services of Coast and Country (**LSCC**) in a five week hearing for *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors*.[99] LSCC objected to Adani, a well-resourced corporation, building what would be the largest coal mine in Australia, due to its environmental impacts. The transcription costs were in excess of $40,000. Sums like these are daunting for public interest cases and impede accountability and open access to justice.

This is concerning from an access to justice perspective, as it essentially means that all litigants that experience financial hardship are unable to properly present their case even if a fee waiver is applied, due to the 10-day delay in its provision. They will be at a significant disadvantage to a well-resourced opponent who will be able to refer precisely to the previous day's proceeding with the benefit of a transcript.[100]

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[95] Queensland Audit Office (QAO), December 2015, "Provision of court recording and transcription services - Report 9: 2015–16", at p48, available at <https://www.qao.qld.gov.au/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.qao.qld.gov.au%2Fsites%2Fqao%2Ffiles%2Freports%2Frtp_court_recording_and_transcription_services.pdf>

[96] [2014] QLC 12.

[97] Email from Auscript to EDO, 1 October 2014..

[98] Ibid.

[99] [2015] QLC 48.

[100] Email from Juanita Williams of EDO to Caitlin Manners of Auscript, 1 October 2014. A copy of which is in Exhibit SPR2 to the Affidavit of Sean Ryan dated 15 December 2015.

Proceeding without access to the transcript no only disadvantages the objector, but also the Court which would have to consider the matter without the benefit of submissions accurately referenced to the evidence from the objectors.

(h) Transcripts process should be amended to provide Courts power to control provision

The Queensland Audit Office recommended that Department of Justice and Attorney-General undertake the following steps to rectify the issues that arose through the outsourcing of the provision of transcripts to Auscript:

1. *'resolves known contract issues with Auscript as a matter of priority, and vary the contract as needed;*
2. *ensures all contractual rights are appropriately exercised and obligations met, including as a priority:*
    - *approval of a suitable transition-out plan as required under the contract;*
    - *independently verifying Auscript's performance and billing information, as provided for under the contract;*
3. *assesses the effectiveness of existing contract performance measures and change as needed, including introducing incentives and penalties that will better drive performance and high quality service delivery;*
4. *conducts a cost benefit analysis, while considering full lifecycle costs, to determine if current services are cost effective and providing value for money, with a view to revisiting costs and how services are delivered where they are not*
5. *immediately conducts a detailed assessment of service delivery requirements, user needs and market capability to identify future service delivery options*
6. *evaluates feasible alternative service delivery options to determine the best value for money option in terms of cost, timeliness and quality*
7. *develops a strategy and plan to progress to the best value for money option at the end of the current contract.*'

We are not aware whether DJAG have acted upon any of these recommendations as yet.

Community access to transcripts and a fair trial could be enhanced by:

(a) amending the Fee Waiver form to accommodate circumstances for community groups and drought affected landholders experiencing financial hardship (ie not just welfare recipients);

(b) allowing fee waivers for same day transcripts;

(c) renegotiating the contract with Auscript such that where a transcript has been prepared and provided to one party in a proceedings it may be provided without charge (to the State or any party) where so ordered by a Court;

(d) amending the Recording of Evidence Act to:

(i) include public interest as well as financial hardship as a basis for fee waiver; and

(ii) restoring the power of the Courts to control the provision of transcripts.

Due to the pivotal importance for transcripts in the administration of justice and conduct of proceedings, courts should have the power to control the provision of transcripts.

This should include the power of the Court to order that a transcript be provided to a party on the basis of financial hardship, public interest, or it is otherwise in the interest of justice. This may be possible by making transcription recorders officers of the Court, which appears to be the mechanism by which Courts previously had control, although consideration of this mechanism may be warranted.
The Court is in the best position to determine when transcripts should be provided free of charge due to hardship or public interest nature of proceedings, as well as to dictate appropriate time periods by which transcripts should be provided.

Recommendation 9: Evidentiary procedures should be adjusted to even playing field

The limitation under the MRA which prevents the Land Court from hearing evidence in relation to any ground not contained in the objection as lodged,[101] results in some objectors lodging very broad grounds for fear that issues may be raised by expert evidence that fall outside of any grounds narrowly drafted and therefore be prevented from being heard.

There is also a potential asymmetry of this restraint which may lead to unfairness on objectors. The Applicant may seek to lead new evidence in the objection proceeding which was not in the EIS, and therefore not addressed in the grounds of objection, and then prevent the objector from responding to that evidence on the basis that it was not within the objectors grounds. For example:

a) an economic chapter of an EIS may be entirely based on economic I/O Modelling;

b) the objector prepares grounds and evidence of the deficiencies in that approach;

c) the Applicant responds with entirely new economic evidence based on a different form of analysis and also contends that the objector cannot lead evidence in response to this new form of modelling as it was not raised in the objectors grounds (drafted prior to the new modelling being disclosed).

A fairer approach would be that either:

a) the Applicant is not strictly bound to the EIS and the objector is not strictly bound to the grounds drafted in response to the EIS (the grounds could still be particularised in response to a request or amended with the leave of the Court); or

[101] MRA, s77(3).

b) the objector is strictly bound to the grounds drafted on the basis of the EIS and the Applicant cannot lead evidence on any matter that is not fairly disclosed in the Application or EIS.

The latter of these approaches would have the advantage of accelerating the Land Court hearing process as the Applicant would not be permitted to deliver, for example, substantially new economic modelling within the expert meeting process.

Recommendation 10: Prevent further submissions following the Land Court decision to ensure natural justice and due process for other stakeholders

The administering authority must decide the EA application within 10 business days of receiving the Land Court decision, but can effectively give itself unlimited extensions while awaiting advice from the MRA Minister or State Development Minister.[102]

In our experience this can lead to final decisions on EAs following Land Court decisions by six months or more. This not only can lead to overlapping appeal periods if the Land Court decision is reviewed (see above) but can also lead to a further non-statutory submission period by the applicant following the Land Court decision, as occurred in relation to the Acland Mine.
It is considerable duplication of resources for all parties to embark on essentially a repeat of the arguments before the Land Court in a submission process to DES immediately following the Land Court decision.

To avoid this inefficiency the EPA should be amended to limit the further time to receive advice from the MRA Minister or State Development Minister to 20 business days after the MRA Minister or State Development Minister is given a copy of the objection decision.

Also, to prevent further submissions, s194(4) should be amended to say the
"(4)In making the decision, the administering authority must <u>only</u>—
(a)have regard to—
(i)the objections decision, if any; and
(ii)all advice, if any, given by the MRA Minister or the State Development Minister to the administering authority under section 193; and
(iii)if a draft environmental authority was given for the application—the draft environmental authority;
<u>(iv) the standard criteria;</u> and…"

[102] EPA, s194(3).

Recommendation 11: Remove restraint on recommendations being inconsistent with CG conditions increases inefficiencies, prevents positive solutions and causes complications

The Coordinator-General has discretion to determine which projects get 'coordinated project' status under the *State Development and Public Works Organisation Act 1971* (Qld). Where a proposal is designated as a coordinated project the Coordinator-General becomes a coordinating decision maker for the project, and provides a preliminary decision recommending whether the project should proceed or not. A proponent may apply for a declaration, or a declaration can be made by the Coordinator General under his own initiative.[103] If an application is made, the Coordinator-General needs to be satisfied that the project has at least one of the following:

- complex approval requirements;
- strategic significance to an area, including for the infrastructure, economic and social benefits, capital investment or employment opportunities it may provide;
- significant environmental effects; or
- significant infrastructure requirements.[104]

Most large-scale, high impact mines are designated as coordinated projects.

In the Coordinator-General's report, conditions may be required or recommended for the project. Under the EPA the administering authority for the environmental authority or draft environmental authority must adopt the conditions proposed by the Coordinator-General, and cannot make any other conditions which are inconsistent with a Coordinator-General's condition.[105] The Land Court also may not make recommendations which are inconsistent with a Coordinator-General's condition in its objection decision.[106]

Frequently the Coordinator-General provides conditions with respect to environmental matters in the Coordinator-General Report.

(a) Inconsistency restriction prevents positive solutions arising from the new evidence heard by the Land Court

The restrictions on inconsistency with Coordinator-General conditions means that there are significant limitations on the submissions that may be raised by the community with respect to the coordinated project, as well as limiting the applicant's ability to offer suggestions of amended or additional conditions to address objector concerns or unfavourable evidence. This restriction also significantly limits the Court in providing positive solutions through amended conditions as a result of the outcomes of an objection hearing. This is particularly the case where new evidence regularly arises during the hearing that the Coordinator-General

[103] *State Development and Public Works Organisation Act 1971* (Qld), s.27AA.
[104] *State Development and Public Works Organisation Act 1971* (Qld), s.27(2)(b).
[105] *Environmental Protection Act 1994* (Qld), s.205.
[106] *Environmental Protection Act 1994* (Qld), s190.

did not, and could not, have considered as part of the evaluation report and for imposing conditions.

(b) Inconsistency restriction causes additional complicated legal argument over the extent of inconsistency

The restriction on inconsistency creates the need for parties to embark upon complex legal arguments with respect to whether submissions raised by themselves or other parties are in fact inconsistent with a Coordinator-General condition or not.

It also creates a difficult task for the Land Court in determining whether conditions are inconsistent. There have been no definitive principles about inconsistency determined in a binding court decision, and the Land Court decisions on the issue do not, at this point, provide clear guidance. This uncertainty has led to further litigation. For example the extent of inconsistency has been the subject of several court cases,[107] most recently in the Acland series of cases where it was considered by the Land Court,[108] in the mining companies judicial review application to the Supreme Court,[109] the appeal to the Court of Appeal and the rehearing of the Land Court case.[110]

Removing the prohibition on inconsistency would reduce complexity for all parties and the considerable time and expense spent on legal battles over the extend of inconsistency.

(c) Inconsistency restriction forces landholders into arguing refusal where reasonable conditions are incompatible

Further, the restrictions around inconsistency create complications in the legal arguments that are able to be submitted to the Court. For instance, objectors may be forced to argue that a project should be rejected outright, where rejection of the project is not considered to be inconsistent with the Coordinator-General conditions, where in some instances the enabling of the amendment of Coordinator-General conditions may solve the issue in dispute. For example, a lower noise level limit may satisfy an objector but be unavailable as an option due to inconsistency with the Coordinator-General's conditions, thus the objector may have no choice but to seek refusal, because the reasonable condition is unavailable.

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[107] *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth-Brisbane Co-Op Ltd & Ors* (2012) 33 QLCR 79, [32] to [47]; *Hancock Coal Pty Ltd v Kelley & Ors and Department of Environment and Heritage Protection* (No. 4), (2014) 35 QLCR 56; *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48.1

[108] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24 [173] – [191].

[109] *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 [307] – [347].

[110] At the time of writing the Court of Appeal and Land Court rehearing matters were undecided.

Recommendation 12: Set maximum time periods for EIS with limited extensions and lapsing applications

The SDPWOA provides that a coordinated project declaration lapses if the final EIS is not accepted within 18 months, but the Coordinator General can grant unlimited extensions.[111] In practice these extensions are regularly granted.[112]

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

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

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

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

Recommendation 13: Set maximum time periods for currency of CG report with limited extensions

The CG report lapses three years from the date of the report, or such longer period as stated in the report.[113] The period can be extended indefinitely by applying for other relevant approvals,[114] or by written notice of the Coordinator General.[115] There is no obligation in the act to inform the community, for example by placing it on a website, that the report period has been extended.

There are many resource projects, particularly in the Galilee Basin, that have benefited from long lapse times and multiple extensions.

For example the Alpha Coal Project first sought approval in 2008, completed notification of its EIS in 2011 and was issues a CG Report in 2012. The currency period of the CG Report

[111] SDPWOA, s27A.
[112] See for example the extensions granted to the China Stone Coal Project on 1 July 2016, 3 February 2017 and 5 July 2017. We note that the project was first applied for in 2012 and is still undergoing assessment six years later.
[113] SDPWOA, s35A(1).
[114] SDPWOA, s35A(2)-(3).
[115] SDPWOA, s35A(4)-(5).

was apparently extended to May 2018[116] although it is now unclear if the report is current as extensions may be hidden from public view. As the EA and ML have not been notified for public consultation, the mine is likely to be years away from construction, over seven years from consultation on the EIS and over a decade from the date of first application.

An example outside the Galilee Basin is the Wandoan Coal Project first sought approval in 2007, completed notification of its EIS in 2009 and was issues a CG Report in 2010. The currency period of the CG Report was extended three times, finally to November 2017 (a decade from the first application and 8 years from the EIS). The mine is likely to be years away from construction, over a decade from consultation on the EIS.

This is a very long time for local landholders to have a significant project hanging over their heads. Certainly any assessment by the State in 2012 will be stale by the time the project is build.

To ensure CG assessment remains current the CG reports should be limited to 3 years (without the ability to specify a longer timeframe) and should be limited to extensions up to a maximum of 40 months from the date the report was issued.

Recommendation 14: Set mandatory rest periods between applications

Nothing in the current framework prevents back to back and overlapping applications for subsequent stages of resource developments.

Consequently communities may be subject to a continual barrage of applications requiring attention to engage in, to preserve their rights. This diverts residents from the families, farms and other productive work.

For example since 2000 there has been no rest period for local residents between the applications for Stages 1, 2 and 3 of the New Acland Coal Mine.[117] Fresh applications came within months of the final decisions of the preceding application. The last application was assessed for over a decade before the refusal in 2018, and is still working through the Courts. Even if this is resolved in the objectors favour, there is nothing in the legislation preventing a fresh application a day later, starting what might be another 10 year battle.

If the recommendations outlined herein are accepted then years could be shaved off the assessment times. This should be used to grant some mandatory rest periods between applications to allow local communities to rest. It will also encourage developer to avoid piecemeal applications and seek multiple intended stages of their development in one application, reducing multiple government assessment processes.

Set maximum time periods to grant mining leases with limited extensions.

[116] http://statedevelopment.qld.gov.au/assessments-and-approvals/alpha-coal-project.html
[117] See paragraphs [106] – [150] of the Closing Submissions of OCAA available here: http://envlaw.com.au/wp-content/uploads/acland100.pdf

There is no maximum time period for the Mining Minister to grant a mining lease following the assessment process in the MRA.[118]

This can lead to multiple overlapping judicial review application periods as outlined above, as the ML decision often follows the EA decision by many months.

For example the Wandoan Coal Project was first applied for in 2007 and Land Court decisions were made in 2012[119] however the final ML was not issued until 2017, five years later. Resulting in considerable uncertainty for local land holders.

This framework can allow the government to effectively support the banking of resource approvals rather than encouraging their timely exploitation.

The period to make a final decision on Mining Leases should be 10 days, with a deemed refusal to apply if no decision is made.

PART 4: MEASURES THAT WILL NOT IMPROVE EFFICIENCY

(a) Tribunal process no improvement on current process

One alternative to the current process, which has been suggested by others, is returning to mining application hearings being undertaken by a specialist tribunal. The suggestion appears to assume that the tribunal would be 'speedier and less complex' than the current Land Court objection hearing process.[120]

The *Land Court and Other Legislation Amendment Act 2007* (Qld) abolished the Land and Resources Tribunal which had previously heard mining objections under the MRA and EPA, among other matters, and provided the Land Court with jurisdiction to hear these matters. Particularly given the limitations that have been established in the Land Court's ability to hear mining objections, there is very little difference in the speed and formality by which a matter may be heard in a tribunal compared to the Land Court currently.

The Land Court states itself, '[t]*he more important and substantial the case, where the parties are legally represented, the stricter the Court tends to be when requiring the parties to comply with formal procedures*'.[121] The Planning and Environment Court is comparable in that it frequently hears matters where parties are unrepresented and has the flexibility to strengthen or soften the level of formality and process around the sophistication of the parties to the legal process.

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[118] MRA, s271.
[119] https://archive.sclqld.org.au/qjudgment/2012/QLC12-013.pdf
[120] John McCarthy, Mining opponents gain more powers to prevent projects going ahead in Queensland, *Courier Mail*, (online) 24 February 2016 < http://www.couriermail.com.au/news/queensland/mining-opponents-gain-more-powers-to-prevent-projects-going-ahead-in-queensland/news-story/2127169496b39aa6a67a89d1698037ed>.
[121] CAC MacDonald, BR O'Connor, LA Marshalll, 'Land Court Jurisdiction – Recent Legislation and Case Law Update', *Queensland Law Society Symposium Property Law Stream*, (2012), 3.

This trend towards more formality for matters which may be of greater public interest and where legal representation is used by parties is likely to be so whether the matter is before a tribunal or a court, and is an appropriate response by an independent arbiter hearing matters of import to the broader community with the benefit of legal professionals to assist it.

When the Land and Resources Tribunal was hearing ML mining objections, an analysis of the Annual Reports from the Tribunal demonstrates that some matters still took over 6 months to be heard by the Tribunal.

With more resources, the Land Court may be able to undertake the hearing and deciding of matters with more expedition. For example, adding more members to the Court may assist in distributing the case load, and reduce the pressures the few existing members face in hearing matters under the multiple jurisdictions in which the Land Court operates.

However, we dispute any claim that the Land Court currently takes an excessive amount of time to hear and determine matters. Mining applications, particularly for the large scale mines recently being heard by the Land Court,[122] frequently involve highly complex matters in dispute, for example around groundwater modelling or economic modelling, with extensive environmental impact statements being examined. It would be highly inappropriate to put even greater time pressures on the Court to hear and decide these complex matters than currently exist, as this will only compromise the quality of decision that can be made by the Court.

Proponents have already been seeking expeditious hearing timeframes, which have put enormous pressure on the parties, including inexperienced self-represented objectors and the limited resources of EDO Qld, as well as the Court. The New Acland Stage 3 mine expansion Land Court objection hearing for which these comments have been provided, has involved approximately:

a) 40 individual objectors;

b) 28 expert witnesses (eight of which were called by objectors);

c) 38 lay witnesses;

d) 14 active parties;

e) 99 hearing days;

f) two site inspections;

g) 2,000 pages of submissions;

h) 2,000 Exhibits; and

i) Almost 8,000 pages of transcript.[123]

[122] Such as for Carmichael, Kevin's Corner and Alpha coal mines in the Galilee Basin.

[123] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24, [19], [36], [87], [97], [107], [202] and [203].

It was the largest ever Land Court objection hearing[124] and possibly the largest community objection hearing in Australia's history.

The most recent comparison would be the Adani case, which was referred to the Land Court in September 2014 and preceded rapidly to a 20 day hearing commencing approximately five months later on 31 March 2015. The Acland case, which was at least four times larger on any metric, particularly due to the number of parties involved and experts called, was referred in October 2015 and commenced hearing approximately five months later on 7 March 2016. Delays were created by the mining company reopening the evidence to introduce new ground water evidence such that hearings finally concluded on 20 April 2017 with a final judgment of 463 pages delivered less than one month after the conclusion of evidence.

The extremely accelerated timetable has place extraordinary pressure on the poorly-resourced objector litigants and caused further disruption to the proceedings, for example:

a) not all expert reports were able to be completed prior to opening statements, requiring the evidence to be opened without it being fully known; [125]

b) the applicant and assessing department were still providing large amounts of documents and data during the proceedings, resulting in objectors having to deal with it whilst other evidence was continuing, and also in expert witnesses having to prepare supplementary statements once the data was available, this was evident in particular with the groundwater,[126] noise, [127]and economics evidence;[128]

c) new data and analysis was disclosed by both sides in examination in chief of witnesses, causing further disruption while it was considered;[129]

d) a new witness, Mr Barnett, was introduced during the hearing of evidence, causing further disruption to the proceedings; [130] and

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[124] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24, [202].

[125] See for example T1-3, Lines 38-45 where Welshman SoE was filed on 11 March 2016 after openings commenced and Elkin SoE was not complete prior to openings and was not filed until 18 March 2016.

[126] See for example T17-2, Lines 6-8, affidavit of Mr Durick's sworn and filed on 11 March 2016 attaching new report from Mr Barnett (28 pages); T22-79, Lines 8-10, affidavit of Mr Barnett attaching memorandum sworn on 20 April 2016 (46 pages) and second affidavit of Mr Durick sworn on 20 April 2016 (211 pages). These reports and affidavit's resulted in supplementary reports from both Prof. Werner on 5 May 2016 (T27-4, Lines 1-4) and Dr Currell on 6 May 2016 (T25-90, Lines 42-44). This process resulted in a 'relatively hastily convened expert conclave' with the groundwater experts, which resulted in a supplementary joint expert report (see T25-91, Lines 38-45); Mr Barnett provided a supplementary memorandum in response to Prof. Werner and Dr Currell's supplementary reports (T57-5, Lines 7-35); Second supplementary statement of Prof. Werner and Dr Currell tendered on 2 June 2016 (T61-6, Lines 36-39).

[127] After a substantial amount of new data was received (including new modelling files at 12:10am on 1 June 2016) over a period of two weeks, this lead to Mr Savery providing a supplementary report on 1 June 2016 (see T39-3, Line 41 to T39-4, Line 3). This lead to Mr Elkin's evidence being postponed and the matter adjourned for 1 day to enable Mr Elkin to consider the report (T39-2, Lines 16-20).

[128] See Fahrer Supplementary SoE filed on 17 June 2016 resulting in OCAA filing Campbell Supplementary SoE on 5 July 2016 (T61-2, Lines 39-42).

[129] See for example Exhibit 751, Coal Markets Forecast Table that was introduced into evidence during Mr Williams evidence-in-chief (T15-73, Line 1 to T15-76, Line 6).

[130] See T22-79, Lines 8-10. On 10 May 2016 leave was granted by the Land Court for Mr Barnett to be an expert witness in the proceedings.

e) expert witnesses made various statements through independent and joint reports which expressed an inability to properly consider all necessary issues or material due to time constraints placed on them in the proceedings.[131]

While these disruptions may not have been entirely absent if a longer lead period had been allowed, they certainly would have been reduced, minimising the hearing days required and potentially leading to a more well-informed outcome.

In addition, there was inadequate time provided during proceedings to allow consideration of possible amendments to conditions which may have assisted in resolving some issues raised by objectors.[132] The first time this was raised was in annexures provided in the Applicant's written submissions provided 26 August 2016. This meant significant time was lost that could have been spent meaningfully considering the adequacy of the conditions and any amendments that may have otherwise addressed the concerns raised by the objectors or as a result of evidence heard by the Court.

If any greater pressure were put on the Court and the parties to hear a matter such as recent Land Court objection hearings for mines more expeditiously, the quality of the participation by the parties and the Court's decision can only be greatly reduced. This would then sacrifice the benefit provided to the community for holding third party merits review processes, wasting the resources of all involved. It would, from a proponent's perspective, also result in less scrutiny of its application material and the evidence base for an appropriate decision.

There is no room for mining objection hearings to be heard more expeditiously than they are currently conducted in the Court without compromising objector's rights, or reducing the quality of the decisions produced by the Court. The timeframe of the Land Court objection hearing process needs to be viewed in context of the need to properly assess this and other coal mines and to make the correct decision on whether or not it should be approved.

No degree of accelerated Land Court proceedings will ever satisfy the desires of the mining industry for instantaneous approvals. Despite the extra-ordinary lengths the Land Court and objectors went to expedite the Acland proceedings at the demand of the mining company,[133] the company was not satisfied with the final decision and commenced years of appeals. Despite the Land Court expressly curtailing the length of its decision to 464 pages to satisfy the

[131] Adrian Dean Werner, 2016, Individual Expert Witness Report- Groundwater Modelling, Page 2, Paragraph 2; John Quiggin & Jerome Fahrer, 2016, Joint Expert Report to the Land Court of Queensland, Page 3; John Quiggin, 2016, Individual Expert Witness Report-Economic Assessment: Input-output Modelling & Computable General Equilibrium modelling, Page 21; John Quiggin, 2016, Individual Expert Witness Report-Economic Assessment: Input-output Modelling & Computable General Equilibrium modelling, Page 30 Supplementary Joint Export Report- Air Qulaity, Page 3, Issue 2.1(a); Supplementary Joint Export Report- Air Qulaity, Page 5, Issue 2.1(b).

[132] Paragraph 31 of OCAA Reply Submissions to Statutory Party Submissions, p. 7.

[133] See paragraphs [214] to [233] of OCAA's Supreme Court submissions available here: http://envlaw.com.au/wp-content/uploads/acland133.pdf

demands for expedition from the mining company,[134] the company appealed on the basis of 'insufficient reasons' for the Land Court decision.

(b) Removing legal representation will not speed hearing

Decisions from the High Court and now federal legislation recognise that individuals have the right to self-represent in court proceedings and individuals are free to exercise that right in all Australian courts.[135] This is an important right that assists in providing access to justice to those who cannot afford legal representation. Nevertheless, the legal system is complex and it is rare that a self-represented litigant will hold the necessary expertise and experience to navigate that system effectively. It is argued that the right to self-represent sits alongside a right equally to legal representation or the right to be meaningfully heard; the latter including the right to access legal services and alternatives to representation.[136]

Cases commenced by self-represented litigants in the Supreme and County Courts are reported to be more likely to be dismissed, discontinued, abandoned or struck-out. [137] The low level of success of self-represented litigants in court is reported to occur regardless of the merits of their case.[138] This demonstrates that there may be inherent flaws in how the right to self-representation is operating in Australian courts.

This failure of the system to deliver positive responses can create difficulties for the courts; for example the Supreme Court of Queensland Annual Report notes that self-represented litigants have been a burden on court resources through their additional need for support in navigating the legal system. [139] While the court or registry office is not able to provide self-represented litigants with legal advice, this does not always deter those litigants from seeking this advice, generally out of desperation and confusion.

However, this failure also leads to frustration and disillusionment for members of the community who often invest considerable amounts of time and resources into litigation but with little chance of obtaining a result in their favour. The court process can be incredibly daunting for self-represented litigants, with many procedures not being written down in easily accessible and understandable locations, and even procedural rules being often found in multiple locations due to the way our courts have evolved. Even the most flexible and compassionate of courts can be an intimidating experience for community members who have never had to engage with the legal system previously.

Where this burden on self-represented litigants is coupled with the small chance of the proceedings resulting in an outcome in their favour, there is little incentive for community members to undertake self-represented litigation. This means that many, but not all, of the

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[134] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24 [36], [38] and [210]
[135] *Collins v Hass* (1975) 133 CLR 120; *Cachia v Hanes* (1994) 179 CLR 403; s 78 *Judiciary Act 1903* (Cth).
[136] Family Law Council, *Litigants in Person: A Report to the Attorney-General prepared by the Family Law Council*. (Canberra, August 2000), 15
[137] Elizabeth Richardson, Tania Sourdin & Nerida Wallace *Self-Represented Litigants, Literature Review*. Australian Centre for Court and Justice System Innovation (2012) 27, 30.
[138] Rabeea Assy 'Revisiting the Right to Self-representation' (2011) 30 *Civil Justice Quarterly* 267, 268.
[139] Supreme Court of Queensland, Supreme Court of Queensland Annual Report 2013-2014, (31 October 2014), 10.

benefits provided through third party merits appeal rights (see above for further discussion) and through the provision of the right to self-represent, are effectively lost through the ineffectiveness of the system in supporting these rights to lead to proportionally positive outcomes.

Legal representation undeniably greatly assists the court and self-represented litigants through providing the ability to understand and engage with the court through typical court process and through professional legalese. This assists the court to operate efficiently, increases community confidence and comfort in engaging in the process, and also assists community litigants in increasing their chances of obtaining a result that meets their needs or desires. Further, providing legal representation to all parties also assists the broader society through the improved quality, accountability and transparency in decision making, community awareness and community confidence that results from effective third party merits reviews.