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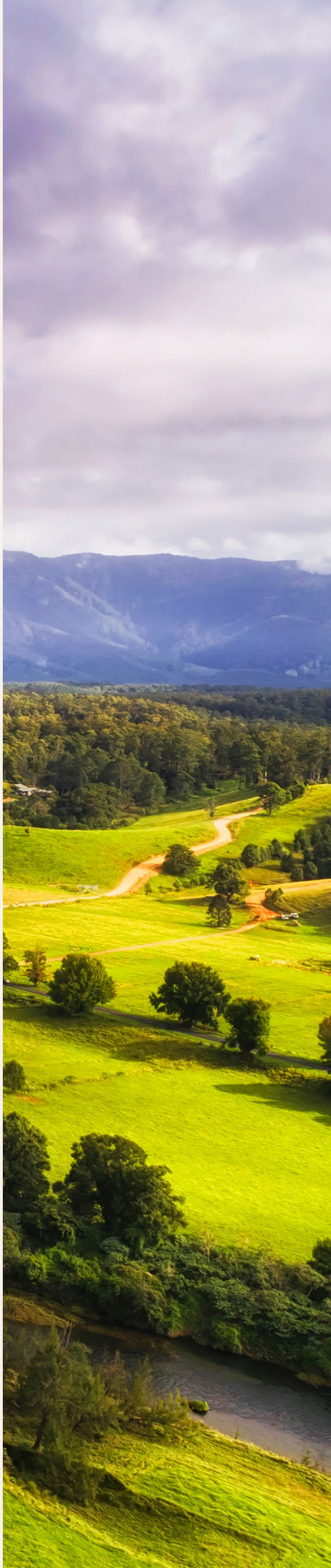
Queensland land access and resource approvals

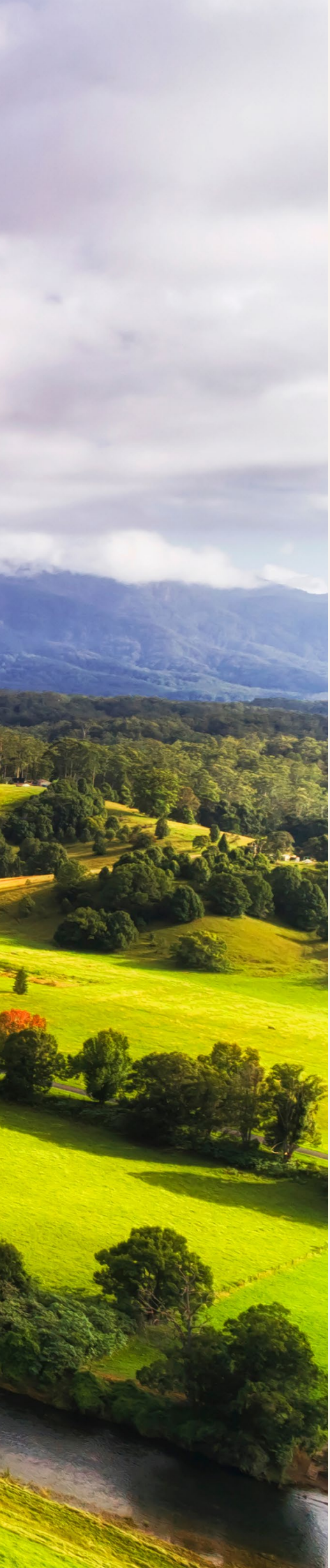
Year in review 2023

December 2023

Outpacing change

Contents





Foreword

Welcome to the 2023 Queensland land access and resource approvals year in review

In this publication, we highlight the key legislative, policy and judicial developments relating to land access and resource approvals in Queensland.

This year the Government has conducted a number of reviews and released a raft of discussion papers relating to potential legislative reform, arising largely from the Government's promises in the *Queensland Resources Industry Development Plan*. It has now been almost a decade since the last round of significant legislative reforms in the land access space contained in the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld). Since then, although we have seen a maturing of the industry and approach to land access negotiations generally, the rapid growth in renewable energy projects has led to further co-existence pressures. It appears as though 2024 will mark the next phase in land access reform in Queensland.

This year also saw the appointment of President Kingham of the Land Court as Chair of the Queensland Law Reform Commission on a full-time basis from 1 April 2023. The Commission is undertaking a review of the legislative process to decide contested applications for mining leases in Queensland under the *Mineral Resources Act 1989* (Qld). This significant review is expected to conclude in mid-2025 when a final report will be issued to the Attorney-General.

We have also seen the increasing prominence of the *Human Rights Act 2019* (Qld) in resource authority approval processes, following the Land Court's landmark decision in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21*.

We expect to also see a significant shake up in the next 12 months to the scope and functions of the key land access institutions including the GasFields Commission Queensland, the Department of Resources, the Land Access Ombudsman and the Office of Groundwater Impact Assessment. We have for many years described the regulation of the land access space as "crowded", and the Government has now indicated that these institutional arrangements are likely to be the subject of reform.

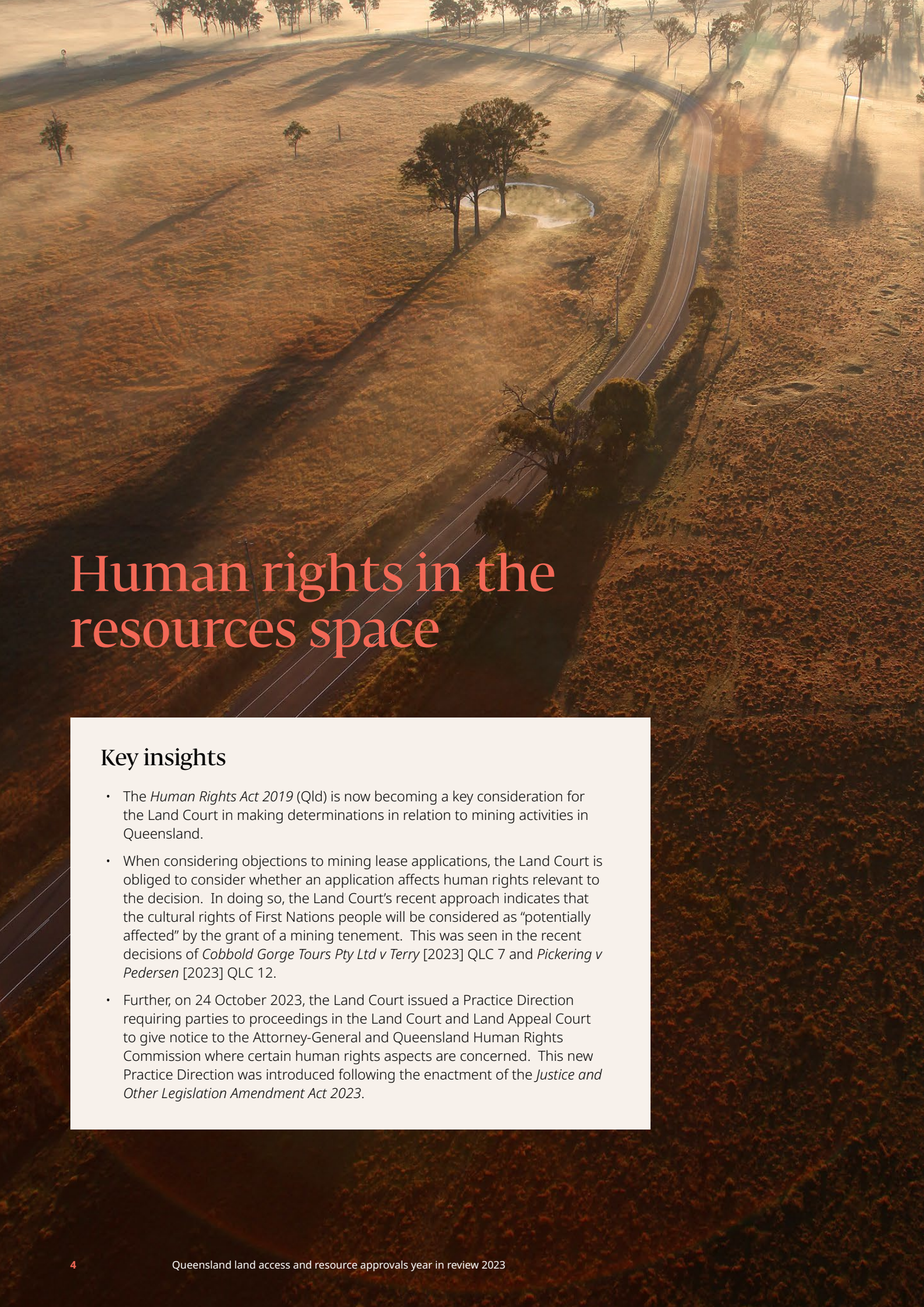
We encourage you to reach out to us if you would like to discuss any aspect of this publication.

The articles in this publication are current as at 1 December 2023.

Tony Denholder
Partner
T +61 7 3259 7026
tony.denholder
@ashurst.com

Paul Wilson
Partner
T +61 7 3259 7193
paul.wilson
@ashurst.com

Libby McKillop
Counsel
T +61 7 3259 7529
libby.mckillop
@ashurst.com



Human rights in the resources space

Key insights

- The *Human Rights Act 2019* (Qld) is now becoming a key consideration for the Land Court in making determinations in relation to mining activities in Queensland.
- When considering objections to mining lease applications, the Land Court is obliged to consider whether an application affects human rights relevant to the decision. In doing so, the Land Court's recent approach indicates that the cultural rights of First Nations people will be considered as "potentially affected" by the grant of a mining tenement. This was seen in the recent decisions of *Cobbold Gorge Tours Pty Ltd v Terry* [2023] QLC 7 and *Pickering v Pedersen* [2023] QLC 12.
- Further, on 24 October 2023, the Land Court issued a Practice Direction requiring parties to proceedings in the Land Court and Land Appeal Court to give notice to the Attorney-General and Queensland Human Rights Commission where certain human rights aspects are concerned. This new Practice Direction was introduced following the enactment of the *Justice and Other Legislation Amendment Act 2023*.

Human rights in Queensland

The *Human Rights Act 2019* (Qld) fully commenced on 1 January 2020 with the objective to build a culture in Queensland where human rights are understood, respected and protected. Broadly, the Act aims to protect and promote human rights, build a human rights culture and promote dialogue about human rights in Queensland.

Public service entities, such as ministers, courts, tribunals and local governments must make decisions and act in ways that are compatible with human rights. Under section 58(1), it is unlawful for a public service entity to act or make a decision that is not compatible with human rights or make a decision without giving proper consideration to a human right relevant to the decision.

Relevance of the Human Rights Act for mining lease applications

In late 2022, the Land Court handed down a landmark decision recommending the refusal of mining and environmental approvals for a coal mine in part due to impacts on First Nations human rights. *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 established that when exercising its administrative function, the Land Court must have regard to the Human Rights Act. For more information on this decision, see our *Native Title Year in Review 2022–2023* article, "Refusing mining approvals on human rights grounds – the Queensland Land Court and the Human Rights Act 2019".

A recent example: Cobbold Gorge Tours Pty Ltd v Terry [2023] QLC 7

In *Cobbold Gorge Tours Pty Ltd v Terry* [2023] QLC 7, Cobbold Gorge Tours Pty Ltd lodged a mining lease application for the mining of gold, tin and mineral sands in North Queensland. In response, a neighbouring landholder lodged an objection against the grant of the mining lease. The matter was subsequently referred to the Land Court.

The objector raised the following grounds: insufficient notice, no compensation agreement, applicant's lack of mining experience and impact on a nature refuge, roads and flora and fauna.

In light of *Waratah Coal*, Member McNamara concluded that the impact of the mining lease grant on human rights must be considered. Member McNamara identified cultural rights as potentially affected human rights in the matter, even though the objections were unrelated to native title, cultural heritage or cultural rights. Section 28 of the Human Rights Act provides for the protection of cultural rights including the right to enjoy, maintain, control, protect and develop identity and cultural heritage.

In this case, the Ewamian people had non-exclusive native title rights over the area of the proposed mining lease. During evidence, the applicant was asked whether it had commenced, or intended to commence, the right to negotiate process under the *Native Title Act 1993* (Cth) with the Ewamian people. Member McNamara was satisfied that cultural rights were adequately protected on the basis that the applicant's evidence demonstrated it was aware of its role and responsibility in the right to negotiate process and the cultural heritage duty of care under the *Aboriginal Cultural Heritage Act 2003* (Qld).

Human rights considerations extend to mining claim applications: Pickering v Pedersen [2023] QLC 12

Pickering v Pedersen [2023] QLC 12 concerned objections to applications for two mining claims in the Mitchell River in Far North Queensland. The objections were made by landowners and related to potential impacts on their small-scale tourism operation due to dredging activities associated with the mining claims.

Like *Cobbold Gorge Tours Pty Ltd v Terry*, Member McNamara noted that the Land Court must have regard to human rights impacts when deciding whether to grant the two mining claims.

Notwithstanding the absence of any human rights related objections, Member McNamara identified cultural rights as potentially affected by the decision. Member McNamara had regard to the native title history of the land, and was ultimately satisfied that the cultural rights of First Nations peoples to maintain their identity and cultural heritage would be adequately protected through use of the future acts regime in the *Native Title Act 1993* (Cth) and the *Aboriginal Cultural Heritage Act 2003* (Qld).

The Land Court recommended that the mining claims be granted, subject to conditions and protective measures to uphold the rights and operations of affected landholders.

What does this mean for mining tenement applications going forward?

The decisions in both *Cobbold Gorge Tours Pty Ltd v Terry* and *Pickering v Pedersen* indicate that the Land Court is likely to identify First Nations cultural rights as potentially affected by its decision in any future mining tenure objection matters, even if this issue is not raised by an objector. In order to consider the impact on cultural rights, the Court will look at the native title and cultural heritage context of the application.

This raises issues about the evidentiary basis upon which the Land Court can be satisfied about the protection of cultural rights, particularly in circumstances (such as in *Cobbold Gorge Tours Pty Ltd v Terry*) where the evidence before the Land Court is provided by the resource authority applicant and the relevant native title party is not otherwise involved.

Proponents cannot ignore the impact of the Human Rights Act on decision-making for key approvals for new projects.

New Land Court Practice Direction further increases human rights considerations

Further emphasising the centrality of human rights considerations to mining projects, on 24 October 2023 the Land Court issued *Practice Direction 4 of 2023* requiring parties to proceedings in the Land Court and Land Appeal Court to give notice to the Attorney-General and Queensland Human Rights Commission where:

- a question of law arises that relates to the application of the *Human Rights Act 2019*; and/or
- a question arises in relation to the interpretation of a statutory provision in accordance with the *Human Rights Act 2019*.

This reform was part of the Justice and Other Legislation Amendment Act 2023, which amended section 52 of the Human Rights Act 2019.

To fulfil its notification requirement, a party to a proceeding must complete a Form 28 – Human Rights Act Notice. This notice must be filed in the Land Court Registry, and be served on the other parties to the proceedings as well as the Attorney-General and Queensland Human Rights Commission.

What happens next?

Under sections 50 and 51 of the Human Rights Act, the Attorney-General and the Human Rights Commission have an existing power to become a party to a proceeding before a Court or Tribunal where there is a question of law in relation to the application of the Act or the interpretation of a statutory provision in accordance with the Act.

It is not yet known whether the extension of section 52 notice requirements to the Attorney-General or Human Rights Commission under this reform will result in increased intervention by these bodies in Land Court matters, or whether intervention will be restricted to matters where substantive questions of law in relation to the Act arise.

Authors: Libby McKillop, Counsel; Dillon Mahly, Graduate; Lydia O'Neill, Paralegal

Review of coexistence institutions and other proposed land access reform

Key insights

- The Queensland Government has consulted on legislative changes that would expand and clarify the scope and functions of its key coexistence institutions including the GasFields Commission Queensland and the Land Access Ombudsman.
- The consultation process proposes the introduction of a new "risk assessment" framework for the classification of activities as either "preliminary activities" or "advanced activities" under the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld).

Coexistence institutions

In November 2022, the Department of Resources released its Discussion Paper *A review of coexistence principles and coexistence institutions*. The Discussion Paper progresses actions 23 and 24 of the *Queensland Resources Industry Development Plan*.

The Discussion Paper addresses the government's planned review of institutions responsible for assisting with and regulating coexistence between resources companies and landholders, and notes the lack of clarity about each institution's role. Some roles also overlap which has resulted in an overly (and unnecessarily) complex institutional framework for land access matters. The government's regulatory and compliance roles, and the Land Court's role as the final arbiter of disputes, did not form part of the scope of the review.

Prior to the release of the Discussion Paper, the Department undertook targeted engagement with internal and external stakeholders to identify key issues to address as part of this review. The following concerns were raised:

- institutional arrangements need to provide support across all land access negotiations, including during the negotiation process for compensation and conduct agreements and make good agreements;
- landholders do not feel empowered to engage in negotiations on land access;
- institutional arrangements need to capture the entire resource sector and could be expanded to include renewable energy projects and other emerging industries;
- independence and branding are particularly important and there is a risk of perceived bias if dispute resolution services and broader industry engagement or advocacy roles are combined; and
- the land access space is crowded, with each entity performing slightly different (yet sometimes overlapping) roles and functions.

Based on the feedback received on the Discussion Paper, in September 2023 the Department of Resources released its Consultation Paper *Coexistence institutions & CSG-induced subsidence management framework*.

The Consultation Paper sought feedback on legislative changes to expand and clarify the scope and functions of the GasFields Commission Queensland, the Land Access Ombudsman and the Office of Groundwater Impact Assessment.

The Consultation Paper proposes that:

- **GasFields Commission:** to be renamed "Coexistence Queensland", and refocus its existing functions on matters related to coexistence and land access. Coexistence Queensland would provide education and information to both the resources and renewable energy sectors; and
- **Land Access Ombudsman:** its functions to be expanded to include a broader range of land access disputes through an alternative dispute resolution process and to be given a determinative role in certain disputes. The proposals intend to provide stakeholders with an independent dispute resolution process to reduce reliance on the Land Court to resolve land access matters.

Land access risk assessment framework

The Consultation Paper also proposes the introduction of a new "land access risk assessment framework" for preliminary and advanced activities. It is proposed that:

- resource authority holders have to complete a "risk assessment" in relation to whether activities are "preliminary activities" or "advanced activities" under the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (**MERCP Act**);
- resource authority holders will provide this assessment to owners and occupiers at least 20 business days prior to commencement of the proposed activities; and
- disputes regarding the categorisation of activities can be referred to the Land Access Ombudsman to make a binding decision on the matter. It is proposed that the specific requirements for this risk assessment will be prescribed in the *Mineral and Energy Resources (Common Provisions) Regulation 2016* (Qld).

A new offence provision is also proposed to be included in the MERCP Act regarding compliance with these requirements.

Consultation closed on 8 December 2023. The Government is in the process of reviewing the feedback which will inform the drafting of the proposed legislative amendments.

Authors: Libby McKillop, Counsel; Leanne Mahly, Lawyer; Martin Doyle, Lawyer

New legislation paving the way for hydrogen projects in Queensland

Key insights

- The Queensland Government has passed the *Gas Supply and Other Legislation (Hydrogen Industry Development) Amendment Bill 2023*.
- This new legislation enables hydrogen to be transported under a pipeline licence granted in accordance with the *Petroleum and Gas (Production and Safety) Act 2004* (Qld).
- This is an important first step in the regulatory reform required to enable the development of renewable hydrogen projects in Queensland.

Hydrogen pipelines now regulated under the P&G Act

On 10 October 2023, the *Gas Supply and Other Legislation (Hydrogen Industry Development) Amendment Bill 2023* was passed. The key amendments introduced by this Act relate to an expansion of the existing pipeline licence provisions in the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (**P&G Act**) to enable hydrogen to be transported under a pipeline licence. This provides a clear regulatory pathway for the licensing and operation of transmission pipelines to transport hydrogen and hydrogen carriers such as ammonia and methanol.

The P&G Act regime will apply in totality to these pipelines. This means that "pipeline land" must be secured before the pipeline can be constructed and operated. "Pipeline land" is generally obtained by way of an easement or written permission from the owner. Similarly, native title consents and cultural heritage agreements may be required, and an environmental authority will be necessary.

The new legislation does not deal with the authorisations for hydrogen processing or storage facilities. Presently, it is contemplated that these facilities will be largely regulated through the planning framework in Queensland.

However, a broad regulatory assessment for these projects is currently underway, led by the Department of Energy & Public Works. We understand that the Department is currently preparing a consultation paper which will deal with issues, opportunities and potential options regarding the broader regulatory settings relevant to hydrogen industry development. We expect to see the consultation paper released in the next few months.

The new legislation also included amendments to the *Gas Supply Act 2003* (Qld) to expand its remit from processed natural gas to "covered gases", which include hydrogen, hydrogen blends, biomethane and certain other gas products. The amendments align with changes being progressed nationally to the National Gas Law and the National Energy Retail Law.

This regulatory review is consistent with the actions identified in the Government's *Queensland Energy and Jobs Plan* and the *Queensland Resources Industry Development Plan*.

First step in reform process needed to support development of renewable hydrogen projects in Queensland

The new legislation is an important first step in the regulatory reform required to enable the development of hydrogen projects in Queensland, and we expect to see further reform in the coming years.

Author: Libby McKillop (Counsel)

Other Land Court decisions

Key insights

- In *MacMines Austasia Pty Ltd v Chief Executive, Department of Environment and Science* [2023] QLC 4, the Land Court adopted the approach used by courts exercising civil jurisdiction to determine whether to grant an order of stay on the effect of an administrative decision, pending its determination of an appeal.
- In *Pembroke Olive Downs Pty Ltd v Namrog Investments Pty Ltd* [2023] QLC 6, the Land Court confirmed it will not generally grant an order for confidentiality arrangements owing to the operation of the implied undertaking in Australian litigation. It will only do so where an applicant can demonstrate a risk that the implied undertaking affords insufficient protection.

MacMines Austasia Pty Ltd v Chief Executive, Department of Environment and Science

In *MacMines Austasia Pty Ltd v Chief Executive, Department of Environment and Science* [2023] QLC 4, MacMines Austasia Pty Ltd sought to stay the Department of Environment and Science's decision that its application for an environmental authority (**EA**) was not properly made. The Department had, by notice, set a deadline by which MacMines must take specified steps to remedy perceived deficiencies in the EA application, the most significant of which was to further assess underground water impacts.

MacMines appealed that decision to the Land Court, and pending the outcome of the proceeding, sought a stay to secure the effectiveness of the appeal. MacMines' application for a stay was uncontested by the Department.

Despite the administrative nature of the decision, President Kingham took guidance from the principles that apply to staying an order of a court exercising civil jurisdiction. They are:

- special or exceptional circumstances are not necessary to warrant the grant of a stay;
- the fundamental purpose of granting a stay is to ensure orders that might be made on appeal are fully effective;
- as long as the appeal is not frivolous or unarguable, the court will not undertake a detailed assessment of the prospects; and
- the court will consider the risk of irreparable prejudice to the applicant if the stay is not granted.

MacMines submitted that the EA application would lapse if it did not comply with the notice by the imminent deadline and, in those circumstances, orders eventually granted by the Court on appeal would be ineffective without a stay. MacMines led uncontested evidence that the steps requested by the Department would take some six years to complete and could not be completed by the deadline.

President Kingham expressed reservations about that submission, and noted that the Court had not heard argument about, or been referred to case law on, the relevant provisions of the *Environmental Protection Act 1994* (Qld) under which the Department had issued its notice. Nonetheless, President Kingham held for MacMines on the basis that a stay may be required to secure the effectiveness of the appeal.

While a detailed assessment of MacMines' prospects of success was not required, President Kingham was satisfied that the grounds of appeal raised matters of substance and could not be considered frivolous or unarguable.

Further, President Kingham found that if a stay was not granted, MacMines would be irreparably prejudiced. This is because it would, acting prudently, do all it could to comply with the Department's notice, thereby incurring considerable time and expense that may be wasted and which could distract it from fully prosecuting its appeal.

The Court concluded the Department's decision should be stayed pending the outcome of the appeal.

Pembroke Olive Downs Pty Ltd v Namrog Investments Pty Ltd

In *Pembroke Olive Downs Pty Ltd v Namrog Investments Pty Ltd* [2023] QLC 6, Namrog Investments Pty Ltd sought an order from the Land Court imposing a confidentiality regime for material disclosed in the matter, despite the operation of the implied undertaking (also known as the Harman undertaking). Namrog Investments was concerned that without the imposition of a confidentiality regime, Pembroke Olive Downs Pty Ltd would share confidential financial information with a trade rival of Namrog Investments.

The implied undertaking applies to all parties to litigation in all Australian courts and tribunals. It operates to prohibit the use of documents obtained through compulsory court processes for any purpose collateral or ancillary to the proceeding. The Land Court held that it has the power to make an order imposing a confidentiality regime if two criteria are satisfied, namely where documents have a character of confidentiality, and an applicant can demonstrate a risk that the implied undertaking affords insufficient protection.

President Kingham concluded that while the material did have the requisite character of confidentiality, Namrog Investments did not establish to President Kingham's satisfaction that there was a risk Pembroke would breach its implied undertaking. While confidentiality regimes going beyond the implied undertaking may be appropriate in cases of direct trade rivals, President Kingham noted that a direct trade rivalry was absent in this proceeding, as Pembroke merely had a business relationship with a trade rival of Namrog Investments, not with Namrog Investments itself.

The Court dismissed the application and ordered costs in favour of Pembroke. However, President Kingham noted that if the financial information forming the subject matter of the dispute was sought to be put into evidence by either party, there may be a basis for some additional protection such as a non-publication order. This is because the Harman undertaking does not apply to material adduced as evidence.

Authors: Connor Davies, Senior Associate; Lydia O'Neill, Paralegal

Timeline released for review of mining lease objections process

Key insights

- The Queensland Law Reform Commission has commenced its long-awaited review into mining lease objections processes.
- The focus of the Commission will be on processes to decide contested applications for mining leases under the *Mineral Resources Act 1989* (Qld) and associated environmental authorities under the *Environmental Protection Act 1994* (Qld).
- Final recommendations are expected by 30 June 2025. A consultation paper will be released by May 2024, with submissions open until July 2024.

Queensland Law Reform Commission's review of mining lease objections processes

The Queensland Law Reform Commission has commenced its long-awaited review into mining lease objections processes. The Commission received its *Terms of Reference* from the Attorney-General in April 2023, following the appointment of the current President of the Land Court of Queensland Fleur Kingham as Chair of the Commission.

The focus of the Commission will be on processes to decide contested applications for mining leases under the *Mineral Resources Act 1989* (Qld) (**MRA**) and associated environmental authorities under the *Environmental Protection Act 1994* (Qld). However, it will also consider whether any recommendations should apply to production tenures for resource activities that fall outside the scope of the MRA (for example, petroleum leases granted under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld)), as well as the implications of the *Human Rights Act 2019* (Qld) and the *Judicial Review Act 1991* (Qld) in objections processes.

The Commission recognises the many interests that must be considered in making recommendations for future reform, including facilitating sustainable growth in resource projects, protecting the environment, cultural heritage, agricultural, community and landowner interests. The review comes in the wake of last year's landmark decision by President Kingham in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 that applications for both a mining lease and environmental authority be refused on environmental, climate change and human rights grounds. We discuss the impact of that case in the context of mining lease objections processes in our *Queensland Land Access and Resource Approvals Year in Review 2023* article "Human rights in the resources space".

The timeline released by the Commission indicates its final recommendations will be given to the Government by 30 June 2025. So far, two background papers have been released which provide information on relevant topics to the review. A consultation paper will be released by May 2024, with submissions open until July 2024.

Authors: Libby McKillop, Counsel; Lydia O'Neill, Paralegal

Government releases consultation paper in response to regulatory review of coal seam gas-induced subsidence

Key insights

- The Department of Resources has consulted on legislative changes that would implement a risk-based management framework for the regulation of coal seam gas-induced subsidence.
- The proposals include requiring tenure holders and landholders to enter into subsidence management agreements, expanding and clarifying the scope and functions of the Office of Groundwater Impact Assessment, as well as creating clear alternative dispute resolution pathways to follow before disputes are escalated to the Land Court.
- The Government is in the process of reviewing the feedback which will inform the drafting of the proposed legislative amendments.

The need for reform

In September 2023, the Department of Resources released its Consultation Paper *Coexistence institutions & CSG-induced subsidence management framework*. The Paper proposes legislative reform to enhance the regulatory framework as it relates to coal seam gas-induced subsidence (**CSG-induced subsidence**). The Paper is informed by the GasFields Commission Queensland's *Regulatory review of coal seam gas-induced subsidence: report* released in November 2022.

We explained the issue of CSG-induced subsidence in our *Queensland Land Access and Resource Approvals Year in Review 2022* article "Coal seam gas-induced subsidence flagged for further regulatory attention".

What proposals have been made?

The Consultation Paper proposes a raft of changes to the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (**MERCP Act**) and the *Mineral and Energy Resources (Common Provisions) Regulation 2016* (Qld) that aim to:

- provide a statutory framework that ensures appropriate protection for landholders;
- provide clear roles and responsibilities to various entities involved in monitoring these impacts; and
- provide a pathway to impact assessment and dispute resolution, including alternative dispute resolution, with an ultimate determination in the Land Court as a last resort only.

The proposed amendments will expand the role of the Office of Groundwater Impact Assessment (**OGIA**) and introduce a subsidence management statutory framework. The framework will require OGIA to assess cumulative CSG-induced subsidence and develop management strategies, while tenure holders will be required to provide mitigation and management strategies through agreement with landholders.

The proposed framework will only apply to areas declared by the Chief Executive of the MERCP Act.

Broadly, the proposed framework requires OGIA to carry out a cumulative assessment of CSG-induced subsidence, including modelling, monitoring and a risk-assessment, and based on this, prepare a management strategy that identifies requirements for tenure holders to carry out baseline data collection and farm assessments. These two steps will need to be carried out periodically to develop a Subsidence Impact Report which will be subject to public consultation and independent review prior to its submission to the Department of Resources.

The OGIA will direct tenure holders to carry out baseline data collection about the current status of farm field drainage and slope. This baseline data collection will inform any further farm-field and inter-farm drainage assessments required by OGIA that will aim to identify pre-existing and anticipated CSG-induced subsidence as well as consequences of subsidence from inter-farm drainage.

If tenure holders are required to undertake further farm-field and inter-farm drainage assessments, these will inform the development of subsidence management action plans in consultation with landholders. The subsequent agreement process will be informed by the management plans, and will incorporate proactive remedial, mitigation and compensation clauses. These agreements may be standalone, or incorporated into conduct and compensation agreements.

The Paper also proposed the incorporation of independent dispute resolution processes at various stages of the framework. These include conferences with an authorised officer under the MERCP Act and alternative dispute resolution processes. An application to the Land Court to resolve a dispute is available where alternative pathways have been exhausted.

Next steps

OGIA has developed a new interactive web-based LiDAR tool which assists users to assess the impact of CSG-induced subsidence on relevant land by drawing from data obtained from LiDAR in affected areas.

Consultation closed on 8 December 2023. The Government is in the process of reviewing the feedback which will inform the drafting of the proposed legislative amendments.

Authors:
Leanne Mahly, Lawyer;
Sophie Pruim, Graduate;
Lydia O'Neill, Paralegal

Supreme Court clarifies process for ATP renewal applications under the P&G Act

Key insights

- When considering whether to accept a renewal application under the P&G Act, the Supreme Court in *Icon Energy Limited v Chief Executive, Department of Resources* [2023] QSC 227 clarified that the Department of Resources is not to assess the quality of information provided by the applicant, merely whether the information addresses statutory criteria. The assessment of the information is left to the Minister in deciding whether to grant the renewal.
- Further, the Court indicated that to satisfy capability as to financial resources requirements, information provided need not be limited to "funds readily available" and can encompass broader types of financial information.

JR challenge to decision not to accept renewal application

Icon Energy Limited v Chief Executive, Department of Resources [2023] QSC 227 concerned an application by Icon Energy Limited to set aside a decision of a delegate of the Department of Resources to refuse to accept an application for renewal of an authority to prospect (**ATP**) permit under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (**P&G Act**).

Icon, together with its joint venture partners, had spent approximately $165 million pursuant to an ATP permit. Icon applied for a renewal of the ATP, supported by various documents, including a Financial Capability Statement. A delegate of the Chief Executive, Department of Resources, refused to accept the application for renewal.

The primary issue before the Court was whether the decision-maker erred in law in refusing to accept the application under section 842 of the P&G Act by misconstruing:

- the meaning of "address" in section 82(1)(e) of the P&G Act in determining that the application did not "address the capability criteria" in proceeding on the basis that it involved an assessment of the quality of the information as to financial resources to carry out authorised activities;
- the meaning of "capability" as to financial resources by proceeding on the basis that all the funds required to carry out the authorised activities for the authority be "readily available", when there was no such requirement in the P&G Act; and
- the question to which he had to direct himself in determining whether the requirement under section 82(1)(e) of the P&G Act had been met, which required the decision-maker to inquire whether information had been provided which was directed to the financial resources available to Icon to carry out authorised activities, not whether the Minister could be satisfied that Icon had sufficient financial resources.

Decision set aside

To determine whether the decision-maker had erred, the Court considered the nature of the decision-making under section 842 of the Act and the meaning of the words used in section 82(1)(e). The Court was satisfied that Icon's proposed construction accorded with the purpose of section 842 that would best achieve the objective of the Act to create an effective and efficient regulatory system for carrying out petroleum activities.

In considering whether the requirement under section 82(1)(e) has been addressed, the Chief Executive is not required to evaluate the quality of the information. Instead, they must determine whether information has been provided addressing those criteria. The assessment of the information is left to the Minister in deciding whether to grant the renewal.

Further, the Court clarified that capability as to financial resources is not limited to funds readily available to the applicant. Financial capability could be evidenced by historical information as to past performance as well as future fundraising agreements (even if conditional).

The Court found in favour of Icon's application to set aside the decision. Her Honour found that both errors of law were jurisdictional errors which had a material effect on the original decision. Her Honour found that Icon's application did address the capability criteria as required by the P&G Act.

Authors: Libby McKillop, Counsel; Lydia O'Neill, Paralegal

Seizing the opportunities: Australian and Queensland critical minerals strategies

Key insights

- In mid-2023, the Federal and Queensland Governments both released Critical Minerals Strategies.
- Global demand for critical minerals is growing rapidly. The Strategies are key to positioning Australia as a renewable energy superpower, focussing on growing the critical minerals sector and working towards Australian and Queensland renewable energy and net zero targets.
- In October 2023, Federal Resources Minister Madeline King indicated the Albanese Government will adopt a new definition of critical minerals that focuses on resources that are of geostrategic importance for Australia and trading partners.

Australian Critical Minerals Strategy

Overview

On 20 June 2023 the Federal Government released its *Critical Minerals Strategy 2023-2030*.

The Strategy defines critical minerals as materials that are essential to the economy, national security and technology, and whose supply chains are vulnerable to disruption. There are currently 26 minerals classified as "critical minerals" in Australia.

However, in October 2023, the Federal Resources Minister Madeline King indicated the Albanese Government will adopt a new definition of critical minerals that focuses on resources that are of geostrategic importance for Australia and trading partners (AFR, 10 October 2023). While many countries have made a similar move to expand the list, the Minister indicated Australia would diverge from international counterparts in recognition that domestic scarcity is not a large issue in the Australian context.

Objectives

Developed through industry and community consultation, the Strategy aims to seize the opportunities of the clean energy transition presented by Australia's geological reserves, mineral extraction expertise and renewables track record. It contains a number of objectives, including:

- creating diverse and sustainable supply chains through strong and secure international partnerships;
- building sovereign capability in critical minerals processing;
- using critical minerals to help Australia become a renewable energy superpower; and
- extracting more value onshore from Australia's resources.

Six focus areas

The Strategy sets out priorities across six focus areas to achieve its 2030 vision:

- Developing strategically important objectives – providing Australian Government support to reduce the risk of critical minerals projects, ensuring Australian processing and manufacturing projects are able to access Australian minerals and attract private finance.
- Attracting investment and building international partnerships –encouraging investment and collaboration with partners to improve Australia's downstream processing capability and building diverse and sustainable global supply chains.
- First Nations engagement and benefit sharing – genuine engagement and collaboration with First Nations Peoples, promoting benefit sharing and supporting outcomes under the National Agreement on Closing the Gap.
- Promoting Australia as a world leader in ESG performance – balancing the strategic advantage brought about by best practice ESG credentials against industry calls to reduce the duplication of and delays in obtaining environmental and planning approvals.
- Unlocking investment in enabling infrastructure and services –working with state and territory governments, strategically planning enabling infrastructure and services to link the critical minerals sector to the domestic and international markets to reduce costs, lower project risk and attract large-scale investment.
- Growing a skilled work force – to develop the critical minerals sector in Australia, particularly as we move to downstream processing.

Queensland Critical Mineral Strategy

Overview

The Queensland Government announced the *Queensland Critical Mineral Strategy* only a week after its Federal counterpart. This is the Queensland Government's most recent step in promoting critical mineral projects. We wrote about the Government's rent deferral reforms for critical mineral projects in our *Queensland Land Access and Resource Approvals Year in Review 2022* article "Amendments proposed to Queensland's Resources Acts to promote new economy minerals".

The Queensland Strategy builds on the *Queensland Resources Industry Development Plan*, which is a 30-year plan designed to ensure Queensland capitalises on local critical mineral projects.

"Critical Minerals Queensland" will be established as a dedicated office to oversee the Queensland Strategy, leading government action in the sector and being the point of contact for investors, proponents and stakeholders.

Key objectives and action items

The Strategy sets out the following key objectives:

- Move faster, smarter – capitalising on the benefits presented by critical minerals by improving government processes, fostering strategic partnerships and domestic innovation and investing in exploration and infrastructure.
- Maximise investment – establishing a market, regulatory environment and workforce with the capability of attracting long-term investments to promote growth and certainty in the mining sector and advanced manufacturing industries.
- Build value chains – investing in industries and onshore processing and manufacturing capabilities which diversify the Queensland economy and boost business opportunity.
- Foster research and ESG excellence – setting Queensland apart through partnerships with industry and research organisations to assist in reducing business costs and increasing production value.

The Queensland Strategy also identifies international investment as a key aspect in attaining Queensland's position as a key global supplier of critical minerals.

The objectives are supported by actions worth $245 million, including:

- establishing critical minerals zones, for projects co-located in one regional area ($75 million);
- exploring remaining mineralisation in mine waste ($5 million);
- delivering the "Critical Minerals and Battery Technology Fund" which will provide local industry with access to domestic and international supply chains ($100 million);
- rent reduction for exploration ($55 million in foregone revenue);
- promoting Queensland to overseas investors ($1 million);
- partnering with industry to promote ESG excellence ($1 million); and
- research and development in circular economy and mining ($8 million).

Where to from here?

The critical minerals strategies highlight the State and Federal Governments' respective commitments to strengthening the critical minerals sector and positioning Queensland and Australia to mine and process the minerals and manufacture the renewable technologies required for the energy transition.

Renewables companies and investors should familiarise themselves with the strategies and watch out for further policy and legislative reform. The resource sector should monitor for the expected change to the definition of critical minerals and consider how to harness the opportunities that are supported by the strategies.

Authors: Brigid Horneman-Wren, Lawyer; Dillon Mahly, Graduate

Proposed amendments to the *Regional Planning Interests Act*

Key insights

- The Queensland Government have released proposed amendments to the *Regional Planning Interests Act 2014* (Qld) that aim to better manage coexistence between resource activities and agricultural interests.
- In particular, it proposes to replace parts of the current section 22 exemption with a compliance assessment process against prescribed "eligibility criteria", require notification on a public register of the use of the exemption and introduce new landowner consultations obligations.

Review of the *Regional Planning Interests Act*

The Department of State Development, Infrastructure, Local Government and Planning has released its Discussion Paper *Proposed amendments to the Regional Planning Interests Act 2014*. The proposed amendments are in response to some of the recommendations made by the GasFields Commission Queensland in its 2021 *Review of Regional Planning Interests Act 2014 Assessment Process Report*. The review was undertaken in response to stakeholder concerns about the effectiveness of the *Regional Planning Interests Act 2014* (Qld).

We wrote about the Commission's recommendations in our *Queensland Land Access and Resource Approvals Year in Review 2022* article "Queensland Government backs Regional Planning Interests Act reform".

What amendments have been proposed?

The proposed amendments seek to replace the "agreement with landowner" exemption that applies to resource activities in a priority agricultural area (**PAA**) or a strategic cropping area (**SCA**) and promote the consistent and transparent utilisation of exemptions.

Currently, section 22 of the Act makes a resource activity in a PAA or SCA exempt from the need to hold or act under a Regional Interests Development Approval, where there is voluntary landholder agreement and the activity is not likely to have significant impact on a PAA, SCA or land owned by another person. Stakeholders identified the exemption in its current form makes it impossible to ascertain the extent of activities being undertaken in areas of regional interest, and whether the exemption requirements had been met.

The proposed changes will require resource authority holders to compliance-assess their proposed activity against new statutory eligibility criteria. This replaces the "significant impact" part of the section 22 exemption. The changes would also require a holder to register the use of an exemption on a public register.

Further, authority holders will be required to consult landholders and adjoining landholders prior to carrying out activities under an exemption, as well as provide a declaration to the State that appropriate consultation has occurred.

These proposed reforms will be accompanied by compliance and enforcement provisions. Under the proposed amendments, notification requirements of applications would be expanded to include adjoining land owners.

The Department has actioned other Commission recommendations through reviewing regional plans with a view to developing guidance material for stakeholders. The Department of Agriculture and Fisheries has commenced a review of agricultural land use classifications.

What's next?

Consultation on the proposed amendments closed on 8 December 2023. The proposed reform is part of the broader joint consultation process with the Department of Resources on coexistence related initiatives. This is discussed in greater detail in our *Queensland Land Access and Resource Approvals Year in Review 2023* article, "Review of coexistence institutions and other proposed land access reform".

Authors: Mark Cowan, Senior Associate; Lydia O'Neill, Paralegal

Potentially significant changes to Queensland environmental legislation released for public consultation

Key insights

- The Queensland Government have sought feedback on proposed amendments to the *Environmental Protection Act 1994* (Qld) that aim to promote proactive environmental management and facilitate the timely regulatory response to environmental harm.
- Potentially significant proposals include the expansion of enforcement tools to authorised activities, establishing a new offence provision and amending the existing duty to notify.
- The Government is in the process of reviewing the feedback which will inform the drafting of the proposed legislative amendments.

Consultation Paper

In September 2023, the Queensland Government released its Consultation Paper *Improving the powers and penalties provisions of the Environmental Protection Act 1994*. The paper sought feedback on proposed amendments to the *Environmental Protection Act 1994* (Qld) which seek to implement the recommendations made by the *Independent Review of the Environmental Protection Act 1994 (Qld) Report*.

According to the Consultation Paper, the proposed changes aim to facilitate "a more proactive approach to environmental risk management" and to "remove barriers to the timely regulatory response to manage and correct harm". As a result, a number of the proposed amendments are likely to expand statutory obligations and potential regulatory exposure for industry.

Some of the key proposals are summarised below.

Proposal	Comments
Expansion of enforcement tools to authorised activities	
One of the key changes is the proposed expansion of the environmental protection order and environmental evaluation provisions, to allow these enforcement tools to be issued "even if there is a condition of an EA appearing to authorise the relevant harm". The Consultation Paper confirms that the issue of such notices would then provide grounds for amending relevant environmental authority conditions.	This is a significant change that would not only allow the Department of Environment and Science to issue statutory notices in respect of lawful activities, but would also allow it to use those notices as a basis for triggering the process to unilaterally amend relevant environmental authority conditions. This appears to go beyond the recommendations of the Independent Review, which simply referred to taking swift action in response to a lack of appropriate mitigation or avoidance of environmental harm. More importantly, it presents a potentially significant risk to the certainty and stability of existing approved projects.
A new offence for breaching the general environmental duty	
The general environmental duty in section 319 of the Act requires all persons carrying out activities that will, or are likely to, cause environmental harm to take all reasonable and practicable measures to mitigate the harm. However, there is currently no offence under the Act for failure to comply with the duty, so the duty is not separately enforceable. The Consultation Paper proposes the introduction of an offence for contravention of the general environmental duty.	This would bring Queensland in line with other jurisdictions such as Victoria. Guidance about meeting the duty may be provided in the offence provisions and through external materials such as EPPs and codes of practice. The Paper notes that whether harm actually occurs "is not an element of the GED offence". Instead, the focus will be the failure to manage an activity in a way that prevents or minimises material or serious environmental harm. This is consistent with the Victorian approach.
Amendment of the duty to notify	
Under the proposals, the current duty to notify will be expanded beyond when the person "becomes aware" to when the person "reasonably believes" or "should in the circumstances reasonably believe" that a notifiable event under section 320A of the Act has occurred.	This would not only expand the scope of the statutory notification provisions, but would also introduce potentially significant uncertainty about when notification is required.
Human health, safety and wellbeing	
Proposed amendments would include the concept of "human health, wellbeing and safety" in the definitions of "environment" and "environmental value" under sections 8 and 9 of the Act.	Currently, human health is regulated indirectly under the Act. As a consequence of the proposed definitional changes, the reach of environmental harm offences will also expand to circumstances where an activity has caused adverse effects on human health, safety and wellbeing. This change will be particularly relevant for those with operations in or close to residential or commercial areas, as it will increase potential exposure to harm offences under the Act.

Other proposals

Other proposed changes include:

- enshrining the polluter pays, proportionality, primacy of prevention and the precautionary principles into the Act;
- combining existing statutory enforcement tools of environmental protection orders, direction notices and clean-up notices into one Environmental Enforcement Order; and
- establishing a duty to restore environmental harm.

Consultation on the proposed reforms closed on 10 November 2023. The Government is in the process of reviewing the feedback which will inform the drafting of the proposed legislative amendments. At this stage, no timetable has been set for release of the proposed amending legislation.

Authors: Paul Wilson, Partner; Lydia O'Neill, Paralegal

New Land Access Code – besides coexistence principles, not much has changed

Key insights

- The new *Land Access Code 2023* was released in June 2023. The most substantial change was the introduction of the coexistence principles.
- However, a number of minor changes have been made to update the Code with recent developments and otherwise make it more user-friendly. These include the removal of references to initial property visits, the inclusion of a definition of conduct and compensation agreements, and an explanation of the mandatory conditions.

New Land Access Code

In June 2023, the Department of Resources released the *Land Access Code 2023*, made under section 36 of the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld). This is the first update to the *Land Access Code* since 2016.

Primarily, the revised version of the Land Access Code incorporates the new coexistence principles in accordance with Action 23 of the *Queensland Resources Industry Development Plan*. These are discussed in greater detail in the *Queensland Land Access and Resource Approvals Year in Review 2023* article.

Corresponding changes have also been made to the supporting document, *A guide to land access in Queensland*, also published by the Department of Resources.

The *Land Access Code 2023* has removed the reference to early contact and arranging a property visit from the section on general communication. While early contact remains part of the *Code* under the new coexistence principles, visits appear to have been removed.

The *Land Access Code 2023* has removed reference to a requirement for landholder sign-off for rehabilitation under the *Environmental Protection Act 1994* (Qld). This is because of the substantial changes to rehabilitation and financial provisioning laws since the previous version of the Code in 2016.

No changes were made to the mandatory conditions. However, an explanation of the mandatory conditions has been included in the *Land Access Code 2023* to assist both resource authority holders and landholders in understanding the importance of the mandatory conditions where they apply.

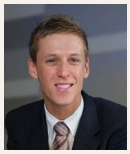
The *Land Access Code 2023* now clarifies that resource authority holders must provide a copy of the key contact list to landholders when they provide them with a copy of the Code. The Department has also removed the key contact list from the Code, instead linking to an informational webpage.

Other than the above, the majority of the changes between the 2016 and 2023 versions of the *Land Access Code* are to make the document more user-friendly. For example, many of the references to legislation have been removed.

Author: Martin Doyle, Lawyer

Key contacts

Tony Denholder
Partner
T +61 7 3259 7026
tony.denholder
@ashurst.com

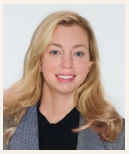


Paul Wilson
Partner
T +61 7 3259 7193
paul.wilson
@ashurst.com

Libby McKillop
Counsel
T +61 7 3259 7529
libby.mckillop
@ashurst.com

John Briggs
Consultant
T T: +61 7 3259 7102
john.briggs
@ashurst.com

Mark Cowan
Senior Associate
T +61 7 3259 7091
mark.cowan
@ashurst.com



Amaya Fernandez
Senior Associate
T +61 7 3259 7120
amaya.fernandez
@ashurst.com

Connor Davies
Senior Associate
T +61 7 3259 7289
connor.davies
@ashurst.com

Roxane Read
Senior Associate
T +61 7 3259 7456
roxane.read
@ashurst.com

Alex Buck
Senior Associate
T T: +61 7 3259 7511
alex.buck
@ashurst.com

Leanne Mahly
Lawyer
T T: +61 7 3259 7323
leanne.mahly
@ashurst.com

Brigid Horneman-Wren
Lawyer
T T: +61 7 3259 7384
brigid.horneman-wren
@ashurst.com

Martin Doyle
Lawyer
T T: +61 7 3259 7172
martin.doyle
@ashurst.com

Leonie Flynn
Expertise Counsel
T T: +61 7 3259 7253
leonie.flynn
@ashurst.com

Ashurst

ashurst.com

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