1 October 2007

The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Sir / Madam,

Members of the East End Mine Action Group Inc (EEMAG) wish to commend the Legal, Constitutional and Administrative Review Committee for undertaking this consideration of the need for an administrative justice and merits review process.

As Secretary of EEMAG I wish to lodge a submission on the Accessibility of Administrative Justice, supporting the need to include merits review of administrative decisions and actions. The lodgement of this submission is supported and approved by the members of EEMAG.

It is our experience that gross inequities in Queensland administrative processes flow into and are approved under Federal administration of COAG Agreements on Water Reform, National Competition Policy and the National Water Initiative because there is no process for a merits review at either a State or Federal level. (Full details of the alleged "gross inequities" are provided in EEMAG's primary submission, to be lodged with LCARC when it is completed.)

From EEMAG members' perspective, the Queensland regulating agencies have failed in their duty of care to landholders affected by the East End mine and have failed to provide "administrative justice" to landholders in their role of evaluating the mine's impacts and administering the mine's Special Conditions and Environmental Approvals; and in determining the scope of the Calliope River Water Resources Plan under Water Reforms.

Legal advice of 10 November 2004 is that "there is no basis either under the Mining Lease, statute or common law by which you can obtain a merits review of the decision of the Chief Executive" [of DNR&M].

Despite generating an enormous amount of dissenting data since 1995, EEMAG has been denied a properly constituted forum in which to present our practical and technical evidence, **and have it accorded due regard** in a truly independent, impartial and problem solving process. DNR&W customarily dismiss dissenting evidence from EEMAG's experts and disregard the local knowledge of long-term landholders.

In 2003 I was verbally informed by an officer of the National Competition Council (NCP) that they could not help EEMAG because the Queensland Ombudsman's letter of 27 September 2002 provided "clearance" to Queensland regulating agencies of any failings on the way they had progressed the EEMAG dispute. He stated that the Ombudsman's "clearance" was automatically accepted by the NCP as a matter of process. EEMAG had supplied substantial evidence to the NCP that the science DNR&M used for the proposed

Calliope River Water Resources Plan (WRP) was falsely benchmarked, and that the Calliope River WRP does not comply with the principles and objectives of Water Reform, e.g. protection of groundwater, halting of widespread degradation of our natural resources and to minimise unsustainable use of our precious water resources.

EEMAG subsequently lobbied various parties (e.g. the National Competition Council, Productivity Commission, National Water Commission, the Queensland Attorney General, and various State and Federal politicians) for an independent (and affordable) merits review and appeals process to be established under COAG Agreements on Water Reform (National Competition Policy) and the National Water Initiative so that the rights / water entitlements of weak parties are framed on the best available science and are properly protected against the greater bargaining power of multinational companies etc.

Shortcomings in administrative processes that we consider serve to deny us "administrative justice" and that flow into administration of Water Reform and the National Water Initiative are listed below:

1. In our view the principal cause of gross inequities in Queensland administrative processes is that the Regulating Agencies remain bound by their 1977 "deep structure commitment" to a "minimum compliance strategy" for the East End mine project. The "deep structure commitment" is identified in the Doctoral Thesis "Industry/Community Relationships in Critical Industrial Developments" (Hoppe 2005) which was undertaken under the strict protocols of Griffith University.

A Barrister's verbal advice is that he considers the "deep structure commitment" to the East End mine is very likely to be illegal.

Page 9.23 of the Doctoral Thesis states that integration of new and progressive socio-environmental government legislations into the EEM case is highly unlikely because of the earlier specific deep structure commitments which exclude many contingency options and include only those that are mutually agreed upon and are consistent with the earlier deep structure choices. It states that government stakeholders have little choice but to live with the legacy of earlier decision-making; and that it is necessary for these stakeholders, therefore, to defend earlier EEM specific deep structure decision-making because it controls socio-environmental community demands and equally important, minimises legal exposure. It documents an interview with a public servant recognising that decision-makers in the EEM case "try to defend some of their old decisions, realising that earlier decisions were not as good as they should have been."

Page 8.21 refers to the attitudes of Queensland government authorities in relation to local wisdom and experiences quote: "If information is not collected, analysed and interpreted by the agency or by its approved external experts, such data cannot be recognized by the department as scientifically legitimate and can therefore no be considered in the final decision-making process".

- There is evidence that the regulating agencies have competing interests that make it impossible for them to accord "administrative justice" to landholders adversely affected by the East End mine, to accord due regard to dissenting technical findings and long-term local knowledge or to make meritorious decisions when evaluating and regulating the mine's adverse impacts. The "deep structure commitment" does not seem to have a "sunset clause"

When EEMAG received the Doctoral Thesis in early 2006, we could well understand that our principal problem is the 1977 departmental "deep structure commitment" and that we were suffering from minimisation of the East End mine's compliance. In our view this "commitment" systemically influences ALL decisions relating to management of the East End mine's environmental and negative socio-economic impacts and should be dissolved.

We are alleging that the "deep structure commitment" (reinforced by the Cabinet support package of 14 August 1995 so as to encompass QCL's Gladstone Expansion Project's tripling of production) is prejudiced against the interests of landholders adversely affected by the mine, that it overrides Special Conditions legislated in 1976 and denies us our right to an effective remedy.

- Unless the "deep structure commitment" is dissolved, we consider that the scope of the "minimum compliance strategy" will continue to expand as the mine expands. (The Gladstone Nickel Project if it proceeds will require approx 1.6 million tonnes of limestone product per year, which could trigger the mine to almost double its current production.)

The backlog of issues that are the cause of the dispute were not fairly and justly resolved under 1996 IAS/EIS requirements during / after their Gladstone Expansion Project's trebling of production, were not required to be redressed for the mine's Lease Renewal in March 2003, nor dealt with in the granting of a new mining lease in 2006 and many of them have not been properly resolved since.

2. The administrative process for "natural justice" does NOT require "administrative justice"

For a long time EEMAG members laboured under the layperson misapprehension that the administrative process for "Natural Justice" would safeguard our welfare. We believed that "natural justice" would deliver what the term portrays.

It was not until we obtained a barrister's advice on 20 September 2004 that we learned that "natural justice" does not require a public servant to provide a proper and honest evaluation (i.e. a meritorious report of all the relevant information/reports) when undertaking an assessment of the mine's impacts on a landholder's water supply – only that the Officer comply with the correct administrative procedures and accept the submitted reports – but not necessarily consider or act on all the reports. In our experience this allows public servants to disregard dissenting evidence or any evidence they do not wish to take into account and still claim they have provided "natural justice".

The Barrister in his advice stated "It is important to note that judicial review is not a merits review. In other words, a public official may make an erroneous decision or a decision that is not the best decision in the circumstances, and, provided all the required legal procedures were followed, the court will not set that decision aside under the JR Act."

- In our view the administrative term "natural justice" is a misnomer.

3. The role of the Queensland Ombudsman.

- The Ombudsman, by his own admission in various letters to EEMAG, cannot provide a merits review on technical decision-making since his Office does not possess the expertise necessary to assess the merit of the various technical reports or the validity of discretionary decisions by Departmental officers.

A serious problem for EEMAG members is that on 27 September 2002 the Ombudsman provided a letter of "clearance" to DNR&M (and EPA) of any failings on the way they had progressed the EEMAG dispute, and stated that in the light of his refusal to investigate EEMAG's complaint, the Ombudsman had no jurisdiction to request that the mine lease renewal process be further deferred.

We interpret that, the Ombudsman gave this "clearance" on the basis that the regulating agencies had accorded EEMAG "Natural Justice" (i.e. accepted all our reports/information) and set side the weight of evidence provided by EEMAG there were serious irregularities and inconsistencies in the Regulating Agencies' technical/discretionary decisions.

However in the absence of any merits review process, the Ombudsman's 27 September 2002 letter became "clearance" on the **merit and validity of the DNR&M's and EPA's technical /discretionary decisions** in relation to the East End mine's lease renewal process, for example:-

- EPA's 22 October 2001 decision (FOI) that the East End mine's March 2002 EMOS and April 2002 Environmental Authority for lease renewal would remain framed on 1996 IAS findings that mine-induced water depletion extended approx 500 metres from the mine pit (i.e. that water depletion had not migrated off-lease) with no significant increase in environmental harm - despite the Company's (2000) publicly released findings of the 33 square kilometre mine impacted zone outside of the East End working lease (accepted by the Departments/ company); and despite the 60 – 100 sq km area of mine impact evaluated by independent experts (1997/1998).

Because the mine's Environmental Authority does not recognise that there are off-lease impacts affecting at least 33 sq km of the aquifer system, it does not contain any conditions requiring the mine to minimize or repair its impacts on the water table in accordance with the Water Act 2000 (e.g. Section 10) or to remedy alleged serious environmental harm under the EP Act. Instead the April 2002 Environmental Authority actually allowed the mine to increase its discharge from a maximum of 6 megalitres per day to a maximum of 10 megalitres per day – apparently on the (erroneous) basis that discharges of up to 6 megalitres per day since 1979 had caused no off-lease impacts / environmental harm.

There was/is no process for EEMAG to challenge the merit of EPA's October 2001 decision to frame the East End mine's March 2002 EMOS and April 2002 Environmental Authority on 1996 IAS findings (that the zone of depletion does not extend outside East End working lease 3631) since EPA's decision <u>exempted</u> the East End mine from having to undertake a new EIS and EMOS with a public objection process with hearings by the Land & Resources Tribunal, and <u>exempted</u> the EMOS and EA from consideration of "standard criteria" as defined under the Environmental Protection Act 1994 - some examples of "standard criteria" are listed below;

- applicable Commonwealth, State or Local government plans, standards, agreements or requirements e.g.;
    - the Queensland *Water Act 2000* that requires water extraction to be managed in an environmentally sustainable way (COAG Agreement on Water Reform);
    - the COAG Agreement on the principles of Ecologically Sustainable Development e.g. the Precautionary Principle of *"where there are threats of serious or irreversible environmental damage, lack of full scientific certainty*

should not be used as a reason for postponing measures to prevent environmental degradation";

- best practice environmental management; - i.e. ongoing minimisation of environmental harm e.g. minimisation of mine-caused cumulative depletion of the water table in the (2000) 33 sq km mine impacted zone as accepted by the Company/regulating agencies;
- the public interest - the impacts and need for environmental protection and compensation for landholders within the (2000) 33 sq km zone are not recognized under EPA regulation of the mine since affected landholders are outside the zone of mine-induced water depletion on which the mine's 2002 EMOS and EA are framed. Thus there is no recognition of the decreased land values and economic loss (i.e. serious environmental harm) in this zone allegedly caused by mine-induced water loss, and no conditions requiring the mine to remedy the economic loss of affected landholders. (Some landholders in the 33 sq km zone had unmet entitlements to an alternative water supply and to compensation under the term of "injurious affection" in Special Conditions 11 - which DNR&M did not require the mine to comply with prior to lease renewal in March 2003.) (Public interest would include noise issues for the thoroughbred horse spelling yards adjacent to rail loader constructed after the mine expanded in 1996.)

4. National Competition Policy: EEMAG is alleging that the 1977 departmental "deep structure commitment" to a "minimum compliance strategy" for the East End mine equates to an involuntary subsidy being levied on landholders adversely affected by the mine's operations.

EPA's 2001 decision to frame the mine's 2002 EMOS and Environmental Authority on 1996 IAS findings that mine induced water depletion extends only approx 500 metres from the pit instead of using the Company's 2000 findings of a mine impacted area of 33 sq km, apparently acted in accord with the departmental "deep structure commitment" to a "minimum compliance strategy".

We conclude that because the mine's EMOS and Environmental Authority do not recognise the 33 sq km mine impacted area, the costs of decreased land values and economic loss (i.e. serious environmental harm) allegedly caused by mine dewatering in the 33 sq km zone (and in 1 case from noise effects), and the unmet provision of some alternative water supplies were NOT required to be redressed prior to lease renewal in March 2003 despite being covered by Condition 11 under the term *"affect injuriously"*.

- Since damages to the properties/livelihoods of affected landholders are not recognised and not redressed by the Company, they are not factored into the Company's production costs. By default, this cost is imposed on the various small landholders adversely affected by the mine's operations, contrary to the principles and objectives of National Competition Policy.

The only option landholders have for redress from the Company is to take their case to the Land & Resources Tribunal. Legal Advice in November 2004 is that to take a case against the company would cost in the realms of $500,000.00 which is out of the reach of local landholders. It is well recognised that small landholders cannot compete with the legal power of mining companies.

In early 2006 EEMAG lodged objections in the Land & Resources Tribunal against Cement Australia being granted a new mining lease, and against the alleged inadequacy and

inappropriateness of the mine's EMOS and Environmental Authority, initially representing ourselves. Since the Objections were drawn up by laypersons, although a lot of thought and care was invested in drafting them errors were made in the way they were worded. These errors sounded a death knell on our case.

Our Objections under the EP Act were carefully drafted by EEMAG executive to try and circumvent Section 251 (4) of the EPAct that forbids objections against an existing operation when an amendment is made to the Environmental Authority. However legal opinion held that EEMAG's objections on the EMOS and Environmental Authority were inadmissible and recommended their withdrawal.

5. EEMAG's objections against DNR&M's May 2006 Draft "Review of Groundwater Issues at East End" that evaluated the mine's impacts on the water table, and ongoing objections on the process for technical discussions with DNR&W on determining the findings in their final report.

(EEMAG detailed and documented evidence that DNR&M's Review contained serious errors and that is was framed to defend previous (inaccurate) findings in our dissenting Report provided to DNRM&W in June 2006; and in our Submission on the First Biennial Assessment of the National Water Initiative dated 12 February 2007 on the need for a merits review and appeals process under the COAG Agreements on Water Reforms.)

On 28 August 2006 EEMAG lodged complaints with the Ombudsman against DNR&M's May 2006 Draft Review of the East End mine's cumulative impacts on the water table.

We have provided evidence of reasonable apprehension of bias, defamation of EEMAG and competing interests on the part of Regulating agencies (i.e. that the Departments are bound by a 1977 "deep structure commitment" to a "minimum compliance strategy" for the East End mine) and alleged omission and selective interpretation of the science. We requested the DNR&M report and its author be stood down and for "hot tubbing" of all experts (including practical) as a mechanism to evaluate the science. The Ombudsman responded that he would not investigate our complaint.

However, the Ombudsman's Office did set in place a process to monitor the Department's process to scope DNR&W's Final report. We interpret that the Ombudsman is supervising the process of "natural justice".

EEMAG feels extremely insecure about the Ombudsman supervising a process for DNR&W to finalise the disputed Draft Review, since the Ombudsman's Office does not have the expertise to evaluate the merit and validity of DNR&W's technical / discretionary decisions.

- On 15 January 2007 we requested the Ombudsman to withdraw his sanction of the DNR&W's scoping process for their final report as we are fearful that if the Ombudsman endorses DNR&W's process (natural justice), it will again be interpreted as a "clearance" on the merit of their technical and discretionary decisions. The Ombudsman did not respond to our letter

EEMAG has been participating in technical discussions at Mt Larcom with DNR&W. EEMAG delegates and our experts are not empowered in the process since DNR&W (a party to the dispute) retains editorial control of the findings (i.e. discretion to veto any dissenting science etc). This system does not provide scope for a merits review of the science, for dispute resolution or for a consensus outcome. In our view it serves to legitimize the fact that the Department customarily dismisses the views of EEMAG's

Consultants in their role of "Arbiter". The Department is so disinclined to listen that errors detected on the basis of local knowledge don't get corrected. A Departmental peer review of the findings from this process does not constitute an accountable merits review either.

DNR&W funded EEMAG $5000.00 for the participation of Associate Professor Brian Finlayson and Dingle Smith in technical discussions on 13/14 September 2007.

EEMAG's three independent experts have conjointly written and signed a letter to the Minister for Natural Resources & Water regarding their participation on 13 and 14 September. I will forward a copy when we receive it and request that it be included in support of the need for merits review of administrative decisions and actions.

7. The Calliope River WRP mirrors the East End mine's EMOS and Environmental Authority since it does not acknowledge the (2000) 33 sq km zone of mine-induced depletion (as recognized by the Company and DNR&W) in the Larcom Creek subcatchment and does not recommend any remedial action to protect the East End / Bracewell aquifer systems in accordance with Water Reform and National Water Initiative objectives. The 2005 Ecological Assessment for Calliope River Catchment WRP does not reference any of the numerous reports (evaluated from 30 years of water monitoring) showing that 60-100 sq km of agricultural land upstream of the East End mine is suffering serious and entrenched water depletion with loss of approx 30 km of perennial creek flows.

- The conversion of licences to allocations through the Water Resources Plans and Resource Operations Plan under the Act means that the East End mine's license to discharge up to 10 megalitres per day may ultimately become a water allocation to the mine.

The East End mine's Special Conditions legislated in 1976 were enacted to safeguard landholders' water entitlements to their original volume and quality of supply. When the East End mine's leases were renewed in March 2003 the Special Conditions were weakened, but still entitle landholders to their water supplies.

We are alleging that the bulk of local landholders' water supplies have been inappropriately re-allocated to the East End mine to discharge downstream as waste by way of false benchmarking of the science on which the mine is environmentally regulated, and by failure to properly enforce the mine's Special Conditions (minimum compliance). We are alleging that this inappropriate re-allocation (which disenfranchises landholders into the future) is legitimized under Water Reform because the false benchmarking of the science has been approved under Water Reforms and there is no legal or administrative avenue for merits review or appeals process available to challenge DNR&W decisions.

In 2001 a list comparing irrigation users in 1980 and 2000/01 was documented by EEMAG. This document shows that in 1980 there were $20^1/_2$ small scale irrigators whose supplies were safeguarded under the 1976 Special Conditions, but that in 2001 only $6^1/_2$ irrigators remained. (There are numerous other stock/household supplies included in the 1977 Water Monitoring Programme).

- In closing I wish to state that the failure of the process for "natural justice" to protect landholders rights and entitlements in the East End mine project area (in a system which flows into Federal administration of COAG Agreements on Water Reforms etc)

warrants establishment of an affordable, truly independent process for a merits review of Departmental decisions so that "administrative justice" is assured for ALL small parties that are reliant on the merit of Departmental decisions.

EEMAG members wish to thank you for accepting our submission. Should you require any supporting documentation, we would be happy to provide it.

Yours sincerely,

Heather Lucke,
Secretary, East End Mine Action Group Inc

ATTACHMENTS TO BE POSTED WITH SIGNED HARD COPY:

1. Extracts from Doctoral Thesis ""Industry/Community Relationships in Critical Industrial Developments" Hoppe 2005. This is available in full on the Internet
2. An EEMAG letter to Cement Australia's CEO, Chris Leon dated 22 March 2007 with a list of affected landholders whose problems are not resolved and may date back to 1996. (This will be updated.)
3. FOI of Ombudsman's letter to DNR&M dated 27 September 2002
4. FOI of EPA Memorandum dated 22 October 2001
5. Extract from 1976 Special Conditions for East End Mine
6. Letter conjointly written and signed by David Ingle Smith (Canberra now semi-retired from the Australian National University), Associate Professor Brian Finlayson (Melbourne University) and Dr Peter James (Consultant Brisbane and Tasmania). May have to be posted separately or faxed after we have received it.