EDO Qld.
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Using the law to protect
our environment.

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9 July 2014

Agriculture, Resources and Environment Committee
Parliament House, Queensland Parliament
By email only: AREC@parliament.qld.gov.au

Dear Committee,

Submission on Mineral and Energy Resources (Common Provisions) Bill 2014

Thank you for the opportunity to make a submission on the *Mineral and Energy Resources (Common Provisions) Bill 2014* (**the Bill**).

Who we are

The Environmental Defenders Office (Qld) (**EDO Qld**) is a non-profit, non-government community legal centre with expertise in environmental law. For over twenty years we have assisted both urban and rural clients in understanding and accessing their legal rights to protect the environment.

Key points for the Committee

- Restricting community objection rights to 'site specific' mines will effectively remove all existing public notification rights and public rights to lodge formal objections to the Land Court in up to 90% of mining projects.
- Mines are very environmentally risky whether large open cut mines or smaller mines and often operate for years. So public objections leading to an independent hearing of the costs and benefits of proposed mines in the Land Court is essential for good decision-making.
- Keeping the existing law when any person or any group may object to the Land Court on any mining project is a valuable safeguard against corruption.
- Changing land tenure without proper public debate will mean some communities are locked into 30-40 years of mining without being able to debate other land use options.
- Suggestions by State Government Ministers that objectors lodge frivolous or vexatious cases are entirely untrue, rather the opposite is true: there are no examples of such cases and objectors are very responsible.
- Removal of restricted land status when the miner is granted exclusive surface rights to access land removes one of the few rights of vulnerable landholders. No-one should have the land surrounding their house destroyed by an open-cut mine.

Overview of our submission

The removal of fundamental community rights proposed in this Bill is, in our view, based on false information. There is no evidence of vexatious litigation in the Land Court and one would be hard-pressed to find anyone in Queensland (except industry) who considers the current framework to be 'inequitable to miners.'[1] With significant support from the community, we raised these concerns with the Department of Natural Resources and Mines (**DNRM**), but in the end we were ignored. We attach a copy of our submissions to DNRM for the Committee's consideration in the context of this Bill (**Annex 1**).

If this Bill is passed, almost all mining decisions in Queensland will be made behind closed doors. The changes will mean that communities will be shut out of all but the riskiest mines which are, in any event, likely to avoid any real scrutiny as they often fall within the unfettered discretion of Queensland's most powerful unelected public servant, the Coordinator-General.

The changes to community objection rights will ensure a favourable outcome for private interest (mining companies and the odd landholder who stands to gain from a mine on their land) but will inevitably encourage social division around land use on a regional scale. The changes can also facilitate a culture of secrecy and non-transparency in decision-making about all of our public resources.

We have six main points for the Committee to consider on this Bill:

1. The community consultation process was misleading.
2. There is no evidence of vexatious objectors in Queensland.
3. Restricting objection rights is a breach of fundamental legislative principles.
4. Proper debate on this Bill is impossible without seeing the 'eligibility criteria'.
5. Removing 'restricted land' status for open cut mines is a substantial reduction in existing rights.
6. Extending the EIS/EA notification exception to Coordinated Projects further erodes community rights and reduces transparency.

Further detail of these concerns is provided hereunder. We would welcome the opportunity to present further to the Committee to explain our concerns.

For further information on this submission please contact Evan Hamman or Jo Bragg of EDO Qld on (07) 3211 4466.

Yours faithfully,

Jo-Anne Bragg.

Jo-Anne Bragg
Principal Solicitor

[1] Explanatory notes to bill, page 36

1. The community consultation process was misleading

At the outset, we urge the Committee to note the woefully inadequate consultation undertaken in relation to these changes.

The February 2014 discussion paper on the objection/notification process[2] was only published after EDO Qld wrote to the Premier on 5 August 2013 (**Annex 2**) questioning the approach of proposing significant changes to the entire mining framework in the middle of a document titled: *'Reducing Red Tape for Small Scale Alluvial Mining.'*[3]

We were only made aware of that document and the 'new initiative' to remove third party objection rights when someone brought it to our attention informally.

The explanatory notes to this Bill confirm the small scale alluvial paper was the first time the idea of removing objection rights was 'floated'. The department says:

> *"the Minister for Natural Resources and Mines noted that the [small scale alluvial] discussion paper applied to the mining sector generally and not just to the small scale alluvial mining sector."*

The 'note' to which DNRM refer appears to be a media release from 15 July 2013, entitled: *'Proposed reforms to support small scale gold miners'* (**Annex 4**).[4]

Take home point

We invite the Committee to read **Annex 4** and consider whether a reasonable member of the public would be mislead by the release from the Minister and the small scale alluvial paper. We urge the Committee to enquire further with the Minister and his Department whether they have been entirely forthcoming in this regard.

On 9 September 2013, the Premier replied to our letter about misleading consultation (**Annex 3**) stating:

> *"a preferred option [on reforming mining objection rights] will be developed on the basis of submissions received [on the small scale alluvial paper] and refined through further consultation"*[5]

How can a 'preferred option' be developed on the basis of a 2 page document when no one knew about it and Minister Cripps said it was all about 'small scale gold miners'?

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[2] http://mines.industry.qld.gov.au/assets/legislation-pdf/mining-lease-notification-and-objection-discussion-paper.pdf

[3] http://mines.industry.qld.gov.au/assets/mines-pdf/alluvial-mining-discussion-paper.pdf pages 6-8

[4] http://statements.qld.gov.au/Statement/2013/7/15/proposed-reforms-to-support-small-scale-gold-miners

[5] Annex 3, page 1.

In February this year, DNRM finally released a discussion paper dealing specifically with significant changes to the mining lease objection and notification process.[6] This document was confusing and unbalanced. It was also poorly researched. There was very little objective 'discussion' involved but appeared mainly to echo concerns raised by industry representatives such the Queensland Resources Council (QRC).[7]

Such a poor and one-sided discussion paper disrespects our communities, our landholders, our environment and the fundamental principle of procedural fairness and community consultation in good faith. Nevertheless, in the spirit of consultation, EDO Qld took the time to write a lengthy submission to the department pointing out inconsistencies in their policy approach (**Annex 1**).

Examples of rushed research and short-sighted policy from the department included:

- Citing a *draft report* of Australia's Productivity Commission, even though a Final Report by the Commission from November 2013 (available to DNRM when formulating the discussion paper) instead found the direct opposite – that is, there is no evidence of vexatious litigation in relation to major projects and the Courts already have sufficient powers.[8]

- Comparing Queensland's mining industry with Alberta and New Zealand and arguing 'neither of those jurisdictions has a general requirement to publicly notify' (see **Annex 1, page 10**).

- Basing a reduction of community rights on a 'funding proposal' raised by a mining company's lawyers at a Court hearing which was ultimately dismissed by the Court as 'irrelevant' to the proceedings (see **Annex 1, page 4**).

We urge the committee to please read our entire submission at **Annex 1** in order to get a feel for the real facts in this debate.

Despite our best efforts, our arguments appear to have been totally ignored in the development of this Bill. Yet it is just not us who has been ignored. EDO Qld is aware that 176 submissions were sent to DNRM in response to the public notification of the discussion paper. We received copies of over 100 of those submissions and observed that they opposed the proposed reduction in community rights. To the best of our knowledge, no summary of public submissions was ever released.

The only statement we get is in the explanatory notes to this Bill:

> *"Although **some submitters** either did not support amendments to the notification and objection provisions or only provided limited support, it is considered that the*

[6] Mining lease notification and objection initiative discussion paper, February 2014
[7] https://www.qrc.org.au/01_cms/details.asp?ID=3115 see also https://www.qrc.org.au/01_cms/details.asp?ID=3482
[8] Productivity Commission Research Report, Major Project Development Assessment Processes http://www.pc.gov.au/__data/assets/pdf_file/0015/130353/major-projects.pdf November 2013 page 277

proposed amendments continue to maintain pathways to consider and address a broad range of views and issues taking into account the level of intensity and scale of the proposed mining operation and the environmental impacts. Additionally, it is also considered that the amendments will continue to ensure that environmental impacts will be appropriately managed and mitigated."[9]

We object to the term 'some submitters'. This is far from the true picture on the results of the consultation and misleads the public and the Committee when it comes to analysing the results of consultation leading up to this Bill.

Take home point

In our view, the Minister for Natural Resources and Mines and DNRM have only paid 'lip service' to the consultation process during the development of this Bill. We ask the Committee to actively engage with the depth and breadth of issues raised by us and the community in relation to the discussion paper released in February 2014.

It is clear that the Mining Minister and the department have not afforded us that respect during the consultation process and chosen to ignore the facts.

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2. There is no evidence of vexatious objectors in Queensland

The Committee must seriously question the basis for the Queensland Government introducing these reforms. The Government has openly stated that they believe there is a serious problem with vexatious litigants in Queensland.

The fact of the matter is that there is no problem with vexatious litigants in Australia, let alone Queensland (see **Annex 1, pages 4-5**).

The Courts in Queensland already have significant powers to deal with individuals who use the Court process for improper motives (see **Annex 1, pages 5-6**).

The table below summarises who has commented and what they have said about vexatious litigants in this 'debate'.

[9] Explanatory Notes to Bill, page 48

Person/organisation	Position on vexatious objections
Minister Seeney	*"it's obvious that the current process allows individuals or groups who are fundamentally opposed to the coal industry - for whatever reason - to use the objection process to frustrate and delay those projects."*[10]
Minister Cripps	*"The proposed reforms will allow us to hear from those who are directly impacted by the development rather than extreme green groups in Melbourne or California whose life goal is to create a road block for economic development. These individuals or groups have little or no interest in our state and submit vexatious objections to tie up economically beneficial projects."*[11]
Department of Environment and Heritage Protection (EHP)	*"There is no evidence of vexatious litigation in relation to those low level, what we call standard applications. In fact, we undertook an analysis of all the submissions that we had received on those types of applications back to 2009 and we did not receive one objection from anyone who was not a landholder directly affected by the mine. So it is not an area of broad community concern, those low-impact mines. Of course, we have received a lot of objections for the larger-impact mines and we are not affecting the notification and objection rights in relation to those."*[12]
Department of Natural Resources and Mines (DNRM)	*"Approximately 70% of mining lease applications progress without objection. Of the objections received, the majority are made by the landholder and are generally regarding compensation."*[13]
The Productivity Commission November 2013	*"The courts already have the ability to summarily dismiss an action due to it being frivolous, vexatious, or an abuse of process. Under the EPBC Act, there are no examples of summary dismissal for vexatious litigation (Edgar 2011), and no data has been provided for other jurisdictions. Courts can also award legal costs against vexatious applicants, which can help discourage vexatious applications (PC 2011c)...Thus, it does not appear that the existing protections against vexatious litigation need to be strengthened."*[14]
Queensland Land Court	*"all parties, when they come before the Court ... should be seen as coming before the Court with clean hands. That is the presumption until proven otherwise, or until conduct suggests otherwise."*[15]

[10] http://www.miningaustralia.com.au/news/conservation-groups-slams-qld-mining-approvals-obj
[11] http://statements.qld.gov.au/Statement/2014/3/4/greater-certainty-delivered-for-industry-and-landholders
[12] Public Briefing—Inquiry into the Mineral and Energy Resources (Common Provisions) Bill 2014 (25 June, 2014) http://www.parliament.qld.gov.au/documents/committees/AREC/2014/24-MinEngResBill/Trns-25Jun2014-MERCPPB.pdf at page 8.
[13] Small scale alluvial mining discussion paper: http://mines.industry.qld.gov.au/assets/mines-pdf/alluvial-mining-discussion-paper.pdf at page 8.
[14] Productivity Commission Research Report, Major Project Development Assessment Processes http://www.pc.gov.au/__data/assets/pdf_file/0015/130353/major-projects.pdf November 2013 page 277
[15] http://www.landcourt.qld.gov.au/documents/decisions/MRA82-13-etc-9.pdf

The arguments (above) are clearly conflicting. It appears that the government wants to have a bet each way. On the one hand, the Ministers insinuate that there is a serious problem with vexatious litigation in Queensland so we need to remove third party objection rights altogether, yet on the other, the departments say that virtually no one objects to small mines so we can remove all those rights, and the vast majority of all other objections are made by landholders about compensation anyway!

Take home point

In deliberating on this Bill, the Committee must concentrate on objective facts, not hyperbole. It is a fact that there is no evidence of vexatious litigation in mining cases in Queensland. It is a fact that the Productivity Commission reported in November 2013 that there are no major instances of vexatious litigation in relation to major projects in Australia. It is a fact that Queensland Courts (including the Land Court) already have significant powers to strike out vexatious litigation and award costs against improper litigants. We urge the Committee to consider only the facts when considering whether a reduction in community rights is justified.

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3. Restricting objection rights is a breach of fundamental legislative principles.

Mining Leases - restricting who can object

Clause 420 of the Bill amends the *Mineral Resources Act 1989* (Qld) (**MRA**) to remove third party objection rights to the lease application process. It is proposed that the only persons who can object to a mining lease application be:

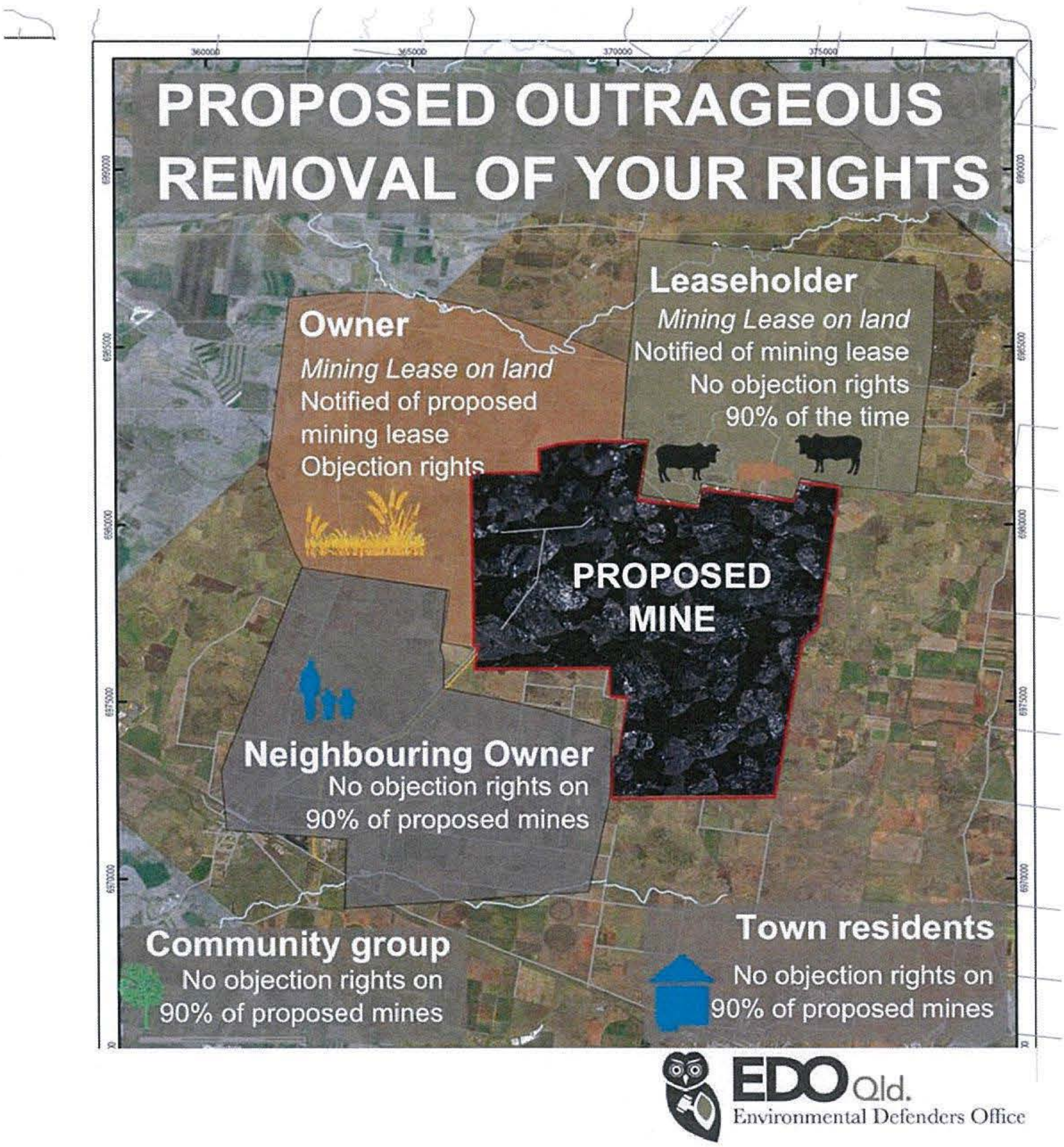
- An owner of land;
- An owner of access land; and
- A Local Government.

Such a change will ensure all of the following matters (which concern the lease application) will be discussed behind closed doors:

- The corporate identity of the miner, including their past performance and any parent company/subsidiary including overseas investors;
- The type of mineral being mined;
- The size of the mining lease area;
- The past performance of the mining company;
- The financial and technical resources of the miner;
- How the long the lease is proposed for;
- Whether the land is mineralised, and if so, to what extent;
- Other issues relating to the public interest.

Why is the Government narrowing the land use debate to private landholders who own the land at this point in time? What about future land holders? What about the broader community? This is a poor community outcome. Researchers from Queensland University 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]

There should be open standing for the public to comment on all mining lease applications. Communities, particularly those in the region the mine is proposed, should be entitled to raise issues with whether mining is an appropriate land use for the area or in the public interest. Ultimately, this could lead to the absurd situation where up to 90% of mines can go ahead without any transparency or accountability whatsoever.



[16] http://eprints.qut.edu.au/42056/1/42056.pdf

Mining Leases - Restricting what 'affected persons' can object about

The Bill ensures that those persons (above) are severely restricted in the types of objections they can raise. Currently anyone has a right to raise any issue whatsoever with respect to the proposed lease, including whether it is in the public interest or whether mining is an appropriate land use. Those rights will be severely restricted to narrow issues depending on what class of 'affected person' you are.

Clauses 420 and 423 essentially propose the following:

Type of affected person	Matters that can be objected to about mining lease
Local Government	• whether the provisions of the Act have been complied with • whether the extent, type, purpose, intensity, timing and location of the activities proposed to be carried out under the lease are appropriate
Owners of affected land	• whether the provisions of the Act have been complied with • whether the proposed mining operations are an appropriate land use and will conform with sound land use management
Owners of access land	• whether the provisions of the Act have been complied with • whether the proposed access to the land is reasonable.
Everyone else (including non-access neighbors, community groups and concerned individuals)	• No rights to object to the mining lease application at all

Local Governments are a very weak option for the protection of the 'public interest' in mining matters. Will a local government be able to take a mining company to Court over a proposed mining lease that the majority of the community opposes? Often they are under resourced and flat out regulating their own land use considerations.

It must also be remembered that minerals are public resources held for the common good. **(Refer to page 6 of Annex 1.)** The allocation process necessarily requires public disclosure, transparency and debate. Where is the government's justification for removing these long held rights to debate the allocation of valuable public resources?

This is a clear breach of section 4(3) *Legislative Standards Act 1992* (Qld) **(LSA)** - the Committee must consider that there is a balance within legislation "...between individual and community interests."[17] There is no balance here as community rights are being totally removed altogether.

Environmental Authorities (EA) – restricting what mines are open to 'environmental' challenge

Clause 245 removes the requirement under the *Environmental Protection Act 1994* (Qld) (**EP Act**) for public notification for any other application than a high risk ('site-specific') activity. This effectively means that there will be no requirement under the EP Act for public notification of *standard applications* or *variation applications* for an EA for a mining activity.

By the department's own figures, this will effectively remove community submission and appeal rights in up to 90% of applications per year (**Annex 1, page 9**). This is a severe reduction in community rights to object to mining projects which might affect their land or the environment. It also totally ignores the cumulative impacts of many 'lower risk' mines in the same place (**Annex 1, page 16**).

The department argues that such an approach is necessary as it is 'inequitable to miners' to have public notification and an opportunity to challenge all EAs associated with mining leases.[18] Again, it is a breach of the LSA.

At the public hearing for the Bill, Ms Trad hit the nail on the head:

> ***Ms TRAD:*** *Ms Ditchfield, I do have to express some concern about the extinguishment of basic statute rights in relation to the public's right to object. I am just trying to understand the rationale for removing this public right which is currently there. Page 36 of the explanatory notes says that the current situation which allows the public to have a say in terms of applications is 'inequitable to miners'. How is it inequitable to miners? I thought that these were public resources that miners were actually extracting for their own profitable means, so how is it inequitable to miners for the public to have a say on mining lease applications?*
>
> ***Mr Beare:*** *This is referring to the broader public right to object to a mining lease for a low-risk environmental authority. The current situation is inequitable to miners because other low-risk developments do not have similar requirements to be notified. For something like a development assessment under the Sustainable Planning Act, low-risk development under that legislation is not required to be notified, so the requirement for low-risk development to mining to be notified is considered to be inequitable."* [19]

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[17] http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/fund-principles/rights-and-freedoms.aspx
[18] Explanatory notes to bill, page 36
[19] Public Briefing—Inquiry into the Mineral and Energy Resources (Common Provisions) Bill 2014, transcript available: http://www.parliament.qld.gov.au/documents/committees/AREC/2014/24-MinEngResBill/Trns-25Jun2014-MERCPPB.pdf at page 14

There are four flaws in the department's reasoning. Firstly, we are dealing with public resources (minerals) which are owned by all of us (see **Annex 1, pages 6-7**) not a private development like a block of flats or a new Bunnings.

Secondly, the 'high-low' risk approach does not take into account cumulative impacts of many 'low-medium risk' mines. It totally ignores the precautionary approach to environmental management which is a principle of international environmental law.

Thirdly, whilst the high-risk approach is used under the Coal Seam Gas framework, that position is inherently flawed to begin with (see reasons one and two above), and thus provides no serious justification to amend the mining framework. In other words, just because something is broken, why break something else? Is there such thing as a 'low risk' coal seam gas project?

And fourthly, why is 'equity' for a mining company being compared to equity of a developer? It is like comparing apples and oranges. Indeed, what about the 'equity' for landholders, community and the environment?

Take home point

The Committee is required to scrutinise the fundamental legislative principles. The Bill significantly erodes community rights by denying communities the right to challenge the mining lease (tenure) process. This removes all public transparency from the mining tenure allocation process and encourages a 'closed door' approach to dealing with public resources. Removing rights to 90% of EA applications ignores all the cumulative impacts that mines can have on communities, not to mention the 'eligibility criteria' haven't even been seen yet.

Possible Solution

For all EA applications, the government could consider narrowing objectors to groups and individuals who *live and reside* in Queensland and can raise legitimate environmental and social issues with the proposed mine. Secondly, narrow the scope of those who can object to the mining lease application. Suggested wording could be:

"any person or group who is a resident of, or conducts relevant activities from, within the boundaries of the region where the mining lease is proposed."

or;

"any person or group who can demonstrate a particular interest in, expertise or commitment to land use activities in the region…"

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4. Debate on this Bill is pointless without first seeing the 'eligibility criteria'.

If this Bill is passed, the only mines that will be publicly advertised will be classed as 'site specific.' DNRM estimates this is about 10 out of every 100 mines approved per year.[20] Yet, no information has been released during public during consultation on exactly what site specific would involve. How many 'small scale' mines are there or will there be in Queensland or what they will look like?

It is fair to say that the community (and the Government) have no clear idea about what mines will be publicly notified and those that won't. In other words, they have no plan for what will be high risk and what won't be except to suggest that: *"something like coal would always be site specific."*[21]

The explanatory notes to the Bill state:

> *The eligibility criteria and standard conditions for mining activities are currently being reviewed by the Department of Environment and Heritage Protection...this review must be completed by 31 March 2016. The review provides the community with the opportunity to have standard conditions and eligibility criteria which better address issues of concern to them.*[22]

Why not release the draft criteria and standard conditions for consultation at the same time that it proposes a reduction in community rights?

There is simply nothing further that can be said on this point, except to say that this is undemocratic and a breach of procedural fairness for those trying to engage a proper policy debate. Sadly, this appears to be representative of recent approach by the State Government to introduce 'skeleton legislation' and leave key detail to non-parliamentary regulatory processes, such as policy documents or subordinate legislation.

Take home point

It is undemocratic and a breach of proper process to propose changes to rights without first flagging the extent of reduction of those rights. We urge the Committee to delay debate of this aspect of the Bill until the proposed eligibility criteria have been released and subject to proper consultation. This is particularly important as the eligibility criteria is subordinate legislation and likely not to go through any parliamentary scrutiny process.

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[20] http://www.edo.org.au/edoqld/wp-content/uploads/2014/03/mining-lease-notification-and-objection-discussion-paper.pdf page 7
[21] Public Briefing—Inquiry into the Mineral and Energy Resources (Common Provisions) Bill 2014, transcript available: http://www.parliament.qld.gov.au/documents/committees/AREC/2014/24-MinEngResBill/Trns-25Jun2014-MERCPPB.pdf at page 8
[22] Explanatory Notes to Bill, page 36-37

5. Removing 'restricted land' status for open cut mines is a substantial reduction in existing rights for landholders

Clause 71 of the Bill states that landholder consent is no longer required for entry on particular land to carry out prescribed activities for mining lease. Clause 413 removes section 238 from the MRA so restricted land can now be included in the mining lease area. The effect of these clauses is that it essentially allows a mining company to open cut mine without the consent of the owner even where there is restricted land. The Minister has discretion to determine whether activities can 'co-exist' but only compensation will be available (but there is no right to say 'no').

The State Government argues this policy is all about 'preventing resource sterilisation.'[23] In doing so, it is is caving to the short term demands of the open cut mining industry. Such a policy represents a significant reduction of rights for landholders.

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

We reiterate our concerns about restricted lands flagged in our submission to DNRM in March 2014 (**Annex 1, pages 13-14**).

Take home point

Restricted Land rights should remain even where open cut-mining is proposed. These are people's livelihoods we are talking about, it should not simply be a matter of whether resources will be 'sterilised' or not.

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6. Extending the EIS/EA notification exception to Coordinated Projects further erodes community rights and reduces transparency.

Clause 246 of the Bill proposes to amend section 150 of the EP Act so that the section also applies to an EIS which has been completed under the *State Development and Public Works Organisation Act* 1971 (Qld).

In the public briefing of the Bill on 25 June 2014, the Department of Environment and Heritage Protection (**EHP**) summarised why the changes were needed:

> ***"Ms TRAD:*** *Yes, I understand. Ms Nichols, just in relation to the amendments to the Environmental Protection Act, can you please give us a rundown on what amendments are being proposed through this bill?*

[23] Explanatory Notes to Bill, page 11

Ms Nichols: We have two main sets of amendments. The first relate to the duplication of notification where an EIS has been undertaken under the State Development and Public Works Organisation Act. When the green tape reduction act went through, which you will no doubt recall, we removed a duplication of notification where an EIS had been notified and submissions had been carried out under the Environmental Protection Act. ***That same recognition of process is now being done for the State Development and Public Works Act.*** *So if there has been public notification and then it goes to an environmental authority, there does not need to be further public notification* ***unless the environmental impacts are substantially changed.*** *However, anyone who has put a submission in as part of the EIS process will then be entitled to lodge an objection to the Land Court should it come to that, if and when a draft environmental authority is issued. So it is* ***identical to a green tape reduction process;*** *it is just expanding it to a different EIS."*

This position does not reflect the significant differences between Coordinated Projects and those that require an EIS under the EP Act.

We reiterate our concerns already made to DNRM about this short-sighted attempt to 'reduce red tape' (**see Annex 1, page 12**) and summarise again hereunder:

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

- There is no requirement for the Coordinator General to publicly notify the draft Terms of Reference (**TOR**) for the project. This means the community could effectively be left with no say on what the EIS covers (the contents of the terms of reference), and therefore will be limited to the types of submissions that can be raised about the project when an EIS is released. Contrast this with the EP Act process where the draft terms of reference must be publicly advertised.

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

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

Take home point

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

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ANNEX 1

28 March 2014

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

Dear MQRA Project Team,

Mining lease notification and objection initiative discussion paper

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

Who we are

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

Summary of our submission

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

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

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

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

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

Yours faithfully,

Jo-Anne Bragg.

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

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

1.1 There is no evidence of delay or vexatious proceedings

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

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

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

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

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

   The President of the Court went on to highlight that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Based on our experience representing public interest litigants in the Land Court, this has never occurred. Even in the "Funding Proposal" raised in the discussion paper[9] produced by Hancock Coal in a recent Land Court case, no application was made by Hancock Coal to strike out the objectors' claim for being unreasonable or vexatious, and indeed the Court found the issue of the "Funding Proposal" to be irrelevant to the proper hearing of the proceedings. (One could easily conclude that Hancock Coal did not make an application to strike out the objectors' claim as the company knew such an application had no merit and would not succeed.) The Government should not move to alter long standing public rights when the mining interests they seek to protect have not even attempted to avail themselves of the existing remedies.

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

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

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

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

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

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

1.3 All minerals are held for the public interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.5 Broad public interest objection rights are fundamental to democracy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Location of mining;
- Type of mineral mined;

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

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

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

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

The discussion paper compares Queensland to Alberta and New Zealand:

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

These comparisons are spurious at best.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion: We strongly oppose removing restricted land status where open cut mines are proposed. These are traditionally the largest and most damaging projects because they disturb the entirety of the surface of the land. Under no circumstances should mandatory distances be exempted from important private and public infrastructure.

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

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

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

Conclusion

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

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

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

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

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

Example 1 – Impact of changes on Individual Rights

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

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

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

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

Example 2 – Impact of changes on Community Rights

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

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

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

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

Example 3 - Cumulative Impact of changes

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

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

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

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

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

ENDNOTES

[1] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Evidence of the Deputy Premier at 52-53 available here: http://www.parliament.qld.gov.au/documents/committees/SDIIC/2013/14-RegPlanInterests/14-trns-ph12Feb12.pdf
[2] *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd & Ors, and Department of Environment and Resource Management* [2012] QLC 013
[3] *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd* (No 2) [2012] QLC 67. See paragraphs [29] to [31] and [40].
[4] *Hancock Coal Pty Ltd v Kelly & Ors* [2013] QLC 9
[5] http://www.pc.gov.au/__data/assets/pdf_file/0015/130353/major-projects.pdf see page 276 onwards.
[6] Discussion paper, page 8, footnote 3.
[7] http://www.pc.gov.au/__data/assets/pdf_file/0015/130353/major-projects.pdf see page 276 onwards.
[8] http://www.landcourt.qld.gov.au/documents/decisions/AML195-2007etc.pdf at [10]
[9] Discussion paper page 8
[10] [2007] QLC 0137
[11] See http://www.landcourt.qld.gov.au/documents/decisions/AML00195-2007etc2.pdf
[12] http://www.landcourt.qld.gov.au/documents/decisions/AML195-2007etc.pdf at [5]
[13] *Vexatious Proceedings Act 2005*, section 5.
[14] MRA, section 8.
[15] *Yanner v Eaton* [1999] HCA 53
[16] See for instance, the *Nature Conservation Act 1992* (Qld) section 61, 83 and 84
[17] http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1999/53.html?stem=0&synonyms=0&query=title(yanner%20and%20eaton%20)#fnB46 at [29]
[18] Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 September 1924 at 825 taken from Yanner v Eaton at [28]
[19] See this Land Court case: *McKay, Re* [2006] QLRT 54 (2 June 2006) at paragraph [15]. For a further more general discussion on 'the public interest' with respect to Mining Leases, see this High Court case: *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 (28 May 1975).
[20] *Sinclair v Maryborough Mining Warden* [1975] HCA 17
[21] *Sinclair v Maryborough Mining Warden* [1975] HCA 17 per Stephen J at [6]
[22] Discussion paper, page 34
[23] MRA section 269(4)(m)
[24] See for example, the Rio Declaration Principle 10 available here http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163 and Agenda 36.10(a), available here: http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf
[25] http://www.michaelkirby.com.au/images/stories/speeches/2000s/2011/2529-ARTICLE-LAW-QUARTERLY-REVIEW-PUBLIC-INTEREST-LITIGATION.pdf at 43
[26] http://www.landcourt.qld.gov.au/documents/decisions/AML195-2007etc.pdf at [14]
[27] http://www.michaelkirby.com.au/images/stories/speeches/2000s/2011/2529-ARTICLE-LAW-QUARTERLY-REVIEW-PUBLIC-INTEREST-LITIGATION.pdf at 41
[28] Discussion paper, page 7
[29] Discussion paper at page 34
[30] Discussion paper at page 5
[31] http://www.worldcoal.org/resources/coal-statistics/
[32] http://mines.industry.qld.gov.au/assets/coal-stats/12-month-reports/coal-stats-fin-year-2012-2013.pdf
[33] http://www.worldcoal.org/coal/market-amp-transportation/
[34] http://www.coalnz.com/about/index.html
[35] http://www.dsdip.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html
[36] http://www.energy.alberta.ca/coal/coal.asp
[37] http://www.nzpam.govt.nz/cms/pdf-library/coal-1/Introduction%20to%20New%20Zealands%20Coal%20Resources.pdf
[38] https://www.wilderness.org.au/articles/australias-biodiversity-summary
[39] https://www.wilderness.org.au/articles/australias-biodiversity-summary
[40] [2012] QLC 13 (27 March 2012)
[41] *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd & Ors, and Department of*

Environment and Resource Management [2012] QLC 013 at [621]-[622]

[42] SDPWO Act s 29(1)(b)

[43] SDPWO Act s 29(1)(b)(iii)

[44] Economic Development Bill 2012 s 292

[45] EP Act ss 42, 43

[46] SDPWO Act s 27AD

[47] SDPWO Act s33(1)(d)

[48] EP Act s 52

ANNEX 2

From: EDO QLD Admin
Sent: Monday, 5 August 2013 9:44 AM
To: Premier@ministerial.qld.gov.au
Subject: Small Scale Alluvial Mining Discussion Paper

Dear Premier Newman,

Small Scale Alluvial Mining Discussion Paper
Major changes proposed to the whole mining application process

Environmental Defenders Office (Qld) Inc ('EDO Qld') is a non-profit, non-government community legal centre which helps people understand their legal rights to protect the environment in the public interest. We assist both urban and rural clients. A large number of our clients and stakeholders are concerned about the impacts of mining on land and our environment and hence our submission on these issues. In July 2013 we launched a comprehensive publication; 'Mining and Coal Seam Gas Law in Queensland - a guide for the community' which has so far been well received by landholders and the community as an independent and impartial guide to the mining and gas law.

We welcome the opportunity to provide a submission. Thank you for allowing an extra week. Due to our limited resources, we are only able to respond to one initiative in the paper at pages 6-8: 'greater certainty in notification and objection process.'

Need for a specific discussion paper and consultation process on the proposed notification and objection changes

The initiative, 'greater certainty in notification and objection process' at pages 6-8 proposes major changes to the entire mining lease application process. We are very concerned why it is contained in a discussion paper with a narrow title - 'small scale alluvial mining'? This is misleading to the public, even if it is not intended to be misleading. As a community centre actively engaged with these processes, we did not know these changes were proposed until we looked further into the paper after alerted by a contact.

Changing the mining lease objection process is a major reform which requires more structured consultation with the community and landholders who are currently entitled to object, specifically addressing the details of the initiatives, for instance:

- Who is an 'affected landowner'?
- What should be appropriate and effective public notification?
- How would a *post grant* 'appeal' process work in practice?
- What powers would the Land Court have in an appeal process?

There are also many other questions that need to be addressed. A specific discussion paper with an appropriate title is needed that provides evidence and pros and cons of the changes considered. A process is needed that adequately publicises the nature of the proposed changes and which both informs the community, giving the community an opportunity for debate and comment and which brings together key stakeholders including industry, community, local government and landholders in the one place for a detailed discussion.

See more detail in the submission. We are happy to discuss.

Jo-Anne Bragg
Principal Solicitor

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

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2 August 2013

MQRA Program Team
Department of Natural Resources and Mines
Level 7, 61 Mary Street, Brisbane
By email: mqra@dnrm.qld.gov.au

Dear Sir/Madam,

Small Scale Alluvial Mining Discussion Paper
Major changes proposed to the whole mining application process

We welcome the opportunity to provide a submission. Due to our limited resources, we are only able to respond to one initiative in the paper at pages 6-8: 'greater certainty in notification and objection process.'

Who we are

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ANNEX 2 - 3

process is needed that adequately publicises the nature of the proposed changes and which both informs the community, giving the community an opportunity for debate and comment and which brings together key stakeholders including industry, community, local government and landholders in the one place for a detailed discussion.

Our preliminary views on proposed notification and objection changes

1. Moving to a post grant appeal process

In principle, EDO Qld is not opposed to the introduction of a *post grant* appeal process for mining projects provided that:

a. The Land Court has wide power to hear all the issues with respect to the mine *de novo* and must consider all submissions made by landholders and the community;
b. The Land Court has the final decision (subject to further Court appeal) on the grant of the lease and Environmental Authority ('EA') and no further 'recommendation' is required;
c. An automatic 'stay' on the operation of the mine takes place at the time an appeal is filed;
d. The Land Court has the power to amend any condition of the EA, and/or terms of the mining lease, in order to satisfy the issues raised in an appeal, irrespective of whether objections are raised in relation to the lease/EA;
e. The Government consider the introduction of an 'objector status' as is currently available for Land Court objections to a mine (level 1, 2, or 3 objectors).

2. Aligning the EA notification process with other resource permit types under the EP Act.

EDO Qld has serious concerns with aligning the EA notification process for mining lease applications with other resource activities (CSG etc).

There are a wide variety of impacts that different mining activities can have on community and the environment, whether it be a large coal mine or smaller alluvial mines. It is too simplistic to separate them into 'eligible' and 'ineligible' and deny public objection rights on that basis, particularly when:

a. broad community rights to object to the lease application are proposed to be removed; and
b. when you compare what is 'impact assessable' under Planning Schemes to what is an 'eligible' application under the EP Act it is totally unrealistic. For example, a small block of flats will go through a public notification process with appeal rights to the Planning and Environment Court, but a mining activity of several hectares in an alluvial area may automatically receive standard conditions without public engagement at all.

The notification process for mining leases should not be brought into line with other resource activities under the EP Act, unless the eligibility criteria for mining leases in the *Environmental Protection Regulation 2008* (Qld) is re-advertised for proper public scrutiny and comment with a view to reducing the number of mines that escape public notification.

3. Public notification requirements

Easy public access to information should be the key priority with respect to mining projects. In principle, EDO Qld is not opposed to removing the 'datum post' requirements, provided notification of the application for the mine is placed:

ANNEX 2-4

a. on the applicant's website and that of the State Government as well;
b. in State newspapers as well as small regional newspapers; and
c. In large print on the land itself to mirror the *Sustainable Planning Act 2009* (Qld) ('SPA') processes for impact assessable development.

In other words, EDO Qld is generally in favour of modifying the notification process so public notification reaches as many people concerned as possible. The last thing our communities need is for mining projects to go ahead without adequate public knowledge or engagement.

4. Removing community objection rights with respect to the lease application

In relation to this issue, EDO Qld wishes to raise a few main points:

a. Any proposed changes to the MRA should not remove the kinds of issues that the community can raise respect of mining projects (environmental, social and economic).
b. Any community member or landowner (including neighbouring landowners) should be entitled to raise an objection to the size, shape, duration, intensity and location of mining activities - issues which are typically dealt with under the MRA.[1] If objection rights are removed from the lease application process, then these issues should be permitted in an objection to the EA application under the EP Act.
c. More detailed is needed on who is an 'affected landowner'. Does it include neighbours or nearby owners who may be many kilometres from a large mine site but still 'affected' by the mine? This creates problems so it is fairer to allow anyone to object.
d. It is a long standing right in Queensland to object to a mining lease and enables individual landholders to have their say either as individuals or as part of incorporated groups without having to prove they are 'affected.' The reality is that very few people want to go to the Land Court, but for accountability and transparency, it's important that right remains available - particularly if only 'eligible' projects are publicly notified.

Conclusion

EDO Qld welcomes ongoing discussion about public submission rights in relation to mining projects, and about modernising the current objection process. Please publish a detailed discussion paper on proposed changes to the MRA objection process and engage widely with the community as such an important issue requires this at the very least.

Yours faithfully

Jo-Anne Bragg.

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

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[1] See factors in MRA s 269(4).

ANNEX 2-

ANNEX 3

Queensland Government

Premier of Queensland

For reply please quote: *DNRM/ERP – TF/13/17536 – DOC/13/158007*

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9.9.13 1st BB

Ms Jo-Anne Bragg
Principal Solicitor
Environmental Defenders Office
30 Hardgrave Road
WEST END QLD 4101

Dear ~~Ms Bragg~~ Jo-Anne.

Thank you for your email of 5 August 2013 about the stakeholder discussion paper titled: *Reducing Red Tape for Small Scale Alluvial Mining.*

I understand that you also wrote to my Cabinet colleague, the Honourable Andrew Cripps, Minister for Natural Resources and made a submission to the Department of Natural Resources and Mines (DNRM). I welcome your input into the debate on this important matter on behalf of your stakeholders.

The discussion paper seeks to achieve a more appropriate balance to regulation of mining with an emphasis on the small-scale, alluvial mining sector. While some of the initiatives in the discussion paper have application to the mining sector more generally, none of the proposals will reduce the level of protection afforded to the environment when considering mining applications.

Rather than propose major changes to the entire mining lease application process, the discussion paper canvassed views on whether changes were necessary to the existing processes by which mining lease applications are notified and appeal rights are accrued. The discussion paper also points out the anomaly between the processes for mining leases and other resource tenures and identifies some ways in which reform may be achieved.

No preferred option was put forward to implement changes to the notification and objection elements of the mining lease application process. A preferred option will be developed on the basis of submissions received and refined through further consultation.

In regard to your concern about the discussion paper extending to mining generally, I note that Minister Cripps's press release made the statement 'while this particular program has been developed with a focus on small-scale alluvial mining, the benefits will flow to the broader mining sector'. This was also expressed on the *Get Involved* and DNRM websites and in the discussion paper itself.

Consultation was not targeted at industry generally or at the alluvial mining sector, rather the discussion was released for public comment and the request for feedback was not limited to industry or any particular industry sector. Submissions have been received from miners, resource companies, peak bodies and associations representing miners, landholders, local government and the community, and organisations like yours.

This breadth of feedback ensures a range of perspectives can be considered when refining the proposals and informing a preferred option for the notification and objection process for mining leases. The discussion paper is still available on DNRM's website with advice that further submissions will be accepted and considered and will, ultimately, inform the drafting of the legislation.

Your concerns have been noted and will be considered alongside other submissions received. Ultimately DNRM will make recommendations to Minister Cripps who will seek the Government's endorsement of the final proposals. I believe we can have development and protect the environment and this Government will seek to balance the needs of industry, other stakeholders, and the environment.

You may wish to remain involved in the ongoing policy development process through the DNRM *Modernising Queensland Resource Acts* program webpage at www.dnrm.qld.gov.au. You can also contact the program team by email at mqra@dnrm.qld.gov.au.

Again, thank you for taking the time to provide a submission.

Yours sincerely

CAMPBELL NEWMAN

ANNEX 3

Queensland Government

Media release

ANNEX 4

Minister for Natural Resources and Mines
The Honourable Andrew Cripps

Proposed reforms to support small scale gold miners

Small scale gold miners will benefit from easier tenure applications, quicker assessments and lower costs under proposed changes announced by the Newman Government today.

Minister for Natural Resources and Mines Andrew Cripps released a discussion paper titled *Reducing Red Tape for Small Scale Alluvial Mining*, which outlines the proposals.

Mr Cripps said the reforms honoured a commitment included in the Newman Government's Six-Month Action Plan and complemented earlier moves to modernise legislation that applies to the resources sector.

"These small gold operators are important for commercial business in remote communities, particularly in North Queensland, as they make a significant contribution to regional economies, and support hundreds of local jobs," Mr Cripps said.

"Research has shown that in view of Queensland's geological diversity, there's potential for the discovery of new gold deposits, so it's important to upgrade and streamline our services.

"While this particular program has been developed with a focus on small-scale alluvial mining, the benefits will flow to the broader mining sector.

"Small scale gold miners will now be able to use mapping and satellite imagery to mark out the area of their proposed operations rather than using the traditional practice of physically pegging out their claims.

"We're also proposing to increase the size of leases that can be applied for during the two-month moratorium on land released from an exploration permit."

Mr Cripps said the Newman Government is also looking at facilitating compensation agreements specific to particular properties, making the notification and objection process more efficient.

"The alluvial gold industry has demonstrated that small operations can turn a profit in areas where larger mining companies don't consider projects to be economically viable," he said.

"This latest package of reforms comes out of DNRM's Streamlining Project, and continues the program of work eliminating cumbersome, time-consuming and often complex and costly processes."

The discussion paper is available at http://mines.industry.qld.gov.au/mining/775.htm (http://mines.industry.qld.gov.au/mining/775.htm). Submissions close on **Friday 26 July 2013**.

[ENDS] 15 July 2013

Media contact: Jane Paterson 0417 281 754 or Paul Sutherland 0428 868 237

ANNEX 4