



Synopsis of the Queensland Environmental Legal System

Dr Chris McGrath
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About this book: This book aims to help everyone involved in the environmental legal system in Queensland to understand it better. It provides a short, plain language summary of the main laws regulating human impacts on the natural environment and quality of life in Queensland.

Using this book: This book is available for no charge at <http://www.envlaw.com.au>. It is primarily intended to be used electronically and with access to the internet. The electronic version of this book is bookmarked & hyperlinked for ease of navigation & linked to relevant websites for further information.

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LIST OF ACRONYMS

AFMA	Australian Fisheries Management Authority
AMSA	Australian Maritime Safety Authority
APVMA	Australian Pesticides and Veterinary Medicines Authority
CCS	carbon capture & storage
CITES	<i>Convention on the International Trade in Endangered Species of Wild Fauna & Flora</i> 1973
DAF	[Queensland Government] Department of Agriculture & Fisheries
DAWR	[Australian Government] Department of Agriculture & Water Resources
DEE	[Australian Government] Department of the Environment & Energy
DES	[Queensland Government] Department of Environment & Science
DNRME	[Queensland Government] Department of Natural Resources, Mines & Energy
DSDMIP	[Queensland Government] Department of State Development, Manufacturing, Infrastructure and Planning
EIA / EIS	environment impact assessment / environmental impact statement
EPA	<i>Environmental Protection Act</i> 1994 (Qld)
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act</i> 1999 (Cth)
EPP	Environmental Protection Policy
ERA	environmentally relevant activity
ERF	Emissions Reduction Fund
GATT	<i>General Agreement on Tariffs and Trade</i> 1947
GBR/GBRMPA	Great Barrier Reef / Great Barrier Reef Marine Park Authority
GHG	greenhouse gas
GMO	genetically modified organism
IMO	International Maritime Organization
LRET	Large-scale Renewable Energy Target
MARPOL 73/78	<i>International Convention for the Prevention of Pollution from Ships</i> 1973, as modified by the Protocol of 1978
n	number [of footnote cross-referenced to]
NDC	Nationally Determined Contribution [under the <i>Paris Agreement</i> 2015 to the UNFCCC]
NEPC	National Environment Protection Council
NEPM	National Environment Protection Measure
NOPTA	National Offshore Petroleum Titles Administrator
p / pp	page / pages
Planning Act	<i>Planning Act</i> 2016 (Qld)
P&E Court	Planning and Environment Court
QBFP	Queensland Boating & Fisheries Patrol
QPWS	Queensland Parks and Wildlife Service
RE	regional ecosystem
RET / MRET	Renewable Energy Target / Mandatory Renewable Energy Target
s / ss	section / sections [of a piece of legislation]
SPA	<i>Sustainable Planning Act</i> 2009 (Qld)
SRES	Small-scale Renewable Energy Scheme
UNCLOS	<i>United Nations Convention on the Law of the Sea</i> 1982
UN / UNEP	United Nations / United Nations Environment Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	<i>United Nations Framework Convention on Climate Change</i> 1992
VMA	<i>Vegetation Management Act</i> 1999 (Qld)

Introduction

The environmental legal system in the State of Queensland, Australia, is comprised of many parts that can be complex and confusing. No single part of the system or single level of government regulates all activities. Instead, the many parts of the system and different levels of government are interlinked, forming a safety net protecting the environment.



Queensland, Australia (inset). Image: GoogleEarth (2011)

This book provides a summary of the major pieces of the Queensland environmental legal system and who administers them.¹ It is deliberately short. Its aim is to provide a simple explanation – a map – of the legal system protecting the environment² in a logical, coherent way with links to the best available websites for more information.

While traditional categories such as “pollution” and “town planning” can be useful for explaining and understanding environmental law at a simplistic

level, this book’s structure is not based on such categories because modern environmental laws defy them.³ What laws apply to any activity depends, not on simple categories, but on many issues, including:

- what is the nature of the activity (e.g. mining, clearing native vegetation, or fishing);
- the level of impact (e.g. more than negligible);
- what is impacted (e.g. threatened species);
- where it is done or its impacts occur (e.g. mining is prohibited in national parks); and
- who is doing it (e.g. many laws apply differently to governments).

The approach taken here is to treat the environmental legal system as a jigsaw comprised of many different pieces that must be understood and brought together when solving problems. Different pieces of the jigsaw will be relevant for different activities and different places. The task of anyone working within the environmental legal system is to identify the relevant pieces and apply them to solve the problem at hand. This book is intended to help this problem-solving by providing a simple overview of the major pieces of this puzzle.

Only laws of general application in Queensland are considered, along with several Acts for limited geographic areas such as Cape York, Stradbroke Island and the Wet Tropics.⁴ Special development or “franchise” Acts that have been passed for individual developments are not considered because of their isolated operation.⁵ Policy and political issues are also not considered.⁶

The book begins by defining an environmental legal system and explaining its basic structure, concepts, institutions and obligations in Queensland. The Queensland system is then explained layer by layer with laws summarised in alphabetical order.

The environmental legal system

An “environmental legal system” is the suite of laws and administrative structures regulating the impacts of humans on the natural environment and quality of life in a particular jurisdiction or geographic area

¹ The system is summarised as at 1 November 2018.

² The pressures on, and condition of, the State’s environment are described in Queensland’s State of Environment reports at <https://www.stateoftheenvironment.des.qld.gov.au/>.

³ See McGrath C, *Does Environmental Law Work?* (Lambert Academic Publishing, Saarbrücken, 2010), Ch 3, pp 60-69, <http://www.envlaw.com.au/delw.pdf>.

⁴ e.g. *Cape York Peninsula Heritage Act* 2007 (Qld); & *North Stradbroke Island Protection & Sustainability Act* 2011 (Qld).

⁵ e.g. the *Townsville Zinc Refinery Act* 1996 (Qld), which imposes a special zoning for one refinery.

⁶ For environmental policy, see Dovers S and Hussy K, *Environment & Sustainability: A Policy Handbook* (2nd ed, Federation Press, Sydney, 2013).

such as Queensland, Australia, or the United States of America.⁷

The central paradigm for the environmental legal system in Australia, at least on paper, is ecologically sustainable development. It is drawn from the concept of “sustainable development” advanced internationally by the seminal Brundtland report.⁸ The *National Strategy for Ecologically Sustainable Development* defined it as:⁹

Using, conserving and enhancing the community’s resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.

This objective reflects in an environmental context the principal purpose of the law – to protect people, including their quality of life. The environmental legal system contributes to meeting this overall objective just as other areas of law, such as the criminal law and workplace health and safety laws, play their roles.

While sustainable development is the central aim of environmental law and plays a role in government decision-making, its importance should not be naïvely overstated. In practice, political and economic issues still generally dominate government decision-making and policy in Australia.

The environmental legal system in Queensland is structured in four levels (Figure 1):

- international law;
- Commonwealth (Federal or Australian) law;
- Queensland (State) law; and
- the Common Law.

This structure reflects the international context of the system, Australia’s federal system of government,¹⁰ and the Common Law tradition it inherited from England. Each of these levels will be analysed in turn in this book. All levels play an important role but

State legislation is of the most relevance to normal, day-to-day activities. Local governments operate under State law and provide an important subset of plans and laws applying within their areas.

The Queensland environmental legal system is administered principally by Commonwealth,¹¹ State and local governments and the courts. The Commonwealth and Queensland governments divide administration of the different parts of the system among large departments. They frequently re-organise and rename these departments but information about them can be found easily on the internet.¹²

Legal disputes about Commonwealth, Queensland and local government environmental laws are heard by different courts and tribunals in the State and Federal court systems. Appendixes 1 and 2 summarise the hierarchy and jurisdiction of these courts and tribunals.¹³

Broadly, the environmental legal system requires all people conducting activities that affect the Queensland environment to do three things:

- obtain and comply with any necessary licence or government approval;
- comply with any relevant standard imposed by the law, including taking all reasonable and practicable measures to prevent or minimise environmental harm; and
- if unlawful material or serious environmental harm occurs or may occur, notify the Queensland government.¹⁴

To understand how the law protects the environment in specific cases requires comprehending the details of the approval systems and standards it creates. This book is a map to help you navigate this system.

⁷ See McGrath, n 3, pp 10-12. In relation to the Australian environmental legal system, see Fisher DE, *Australian Environmental Law* (3rd ed, Thomson Reuters: Lawbook Co, Sydney, 2014); Bates GM, *Environmental Law in Australia* (9th ed, LexisNexis Butterworths, Sydney, 2016).

⁸ World Commission on Environment & Development, *Our Common Future* (Oxford University Press, Oxford, 1987), <http://www.un-documents.net/wced-ocf.htm>. Internationally, the UN Sustainable Development Goals are now an important policy objective: see <https://www.un.org/sustainabledevelopment/>

⁹ ESD Steering Committee, *National Strategy for Ecologically Sustainable Development* (AGPS, Canberra, 1992), <http://www.environment.gov.au/about-us/esd>.

¹⁰ See <https://www.australia.gov.au/about-government/how-government-works>.

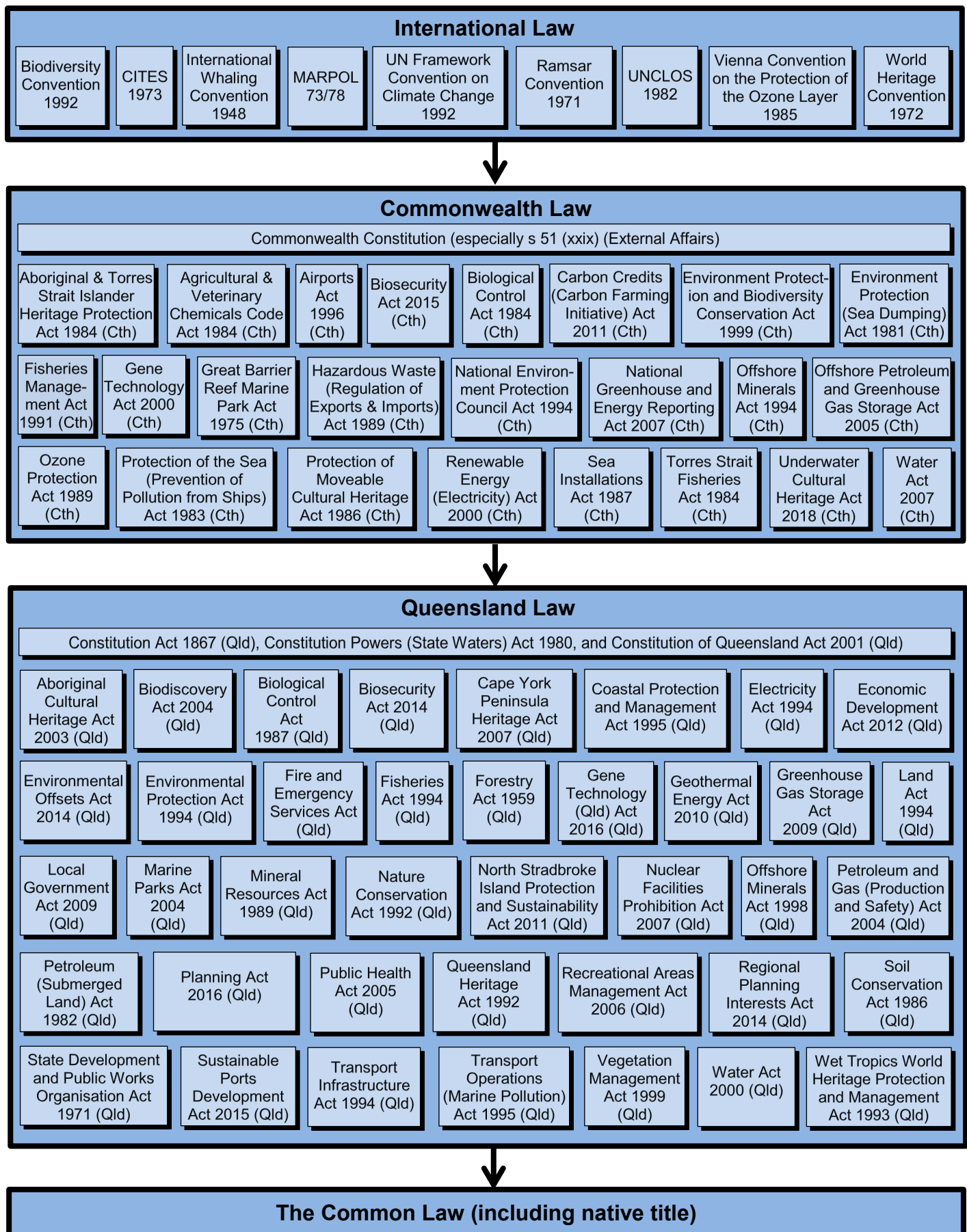
¹¹ The terms “Commonwealth”, “Federal” or “Australian” Government are used interchangeably to refer to Australia’s national level of government.

¹² See www.australia.gov.au and www.qld.gov.au.

¹³ Case studies of environmental litigation in these courts are available at <http://www.envlaw.com.au/case.html>.

¹⁴ This third duty arises under the *Environmental Protection Act* 1994 (Qld), s 320.

Figure 1: Major pieces of the Queensland environmental legal system



International law

International law is the law between nations. Australia's international legal obligations are enforceable only by other nations, not by members of the public unless they are incorporated into domestic law.

International law is created by the collective actions of nearly 200 individual nations around the globe and no international body or institution unilaterally governs the world. The United Nations (UN),¹⁵ created by the *Charter of the United Nations*,¹⁶ is an assembly of most these nations but, with limited exceptions for maintaining international peace, it does not have power to unilaterally impose or enforce rules upon individual nations. Resolutions of the UN General Assembly are non-binding.

International law is founded on the idea of the sovereignty and equality of nation states.¹⁷ Sovereignty is the power and right of a nation to govern a defined part of the globe.¹⁸ The state is the political institution in which sovereignty is embodied.¹⁹

There is a constant tension between the sovereignty of nations and their international obligations. National self-interest is often paramount in international affairs and enforcement of international law is difficult against recalcitrant nations.

Article 38 of the *Statute of the International Court of Justice* recognises four sources of international law²⁰ of which the two principal ones are:

- custom (the general practice of nations based on a belief of being legally bound); and
- treaties / conventions (formal agreements between nations).

Customary international law provides some important principles governing the actions of states. For instance, under the no-harm rule of customary international law, a state is “obligated to use all the means at its disposal in order to avoid activities which take place in its territory, or any other area under its jurisdiction, causing significant damage to the environment of another State”.²¹

While customary international law is important, by far the greater source of international legal obligations is treaty law.²² Since the 1960s, many, major international treaties have been agreed and international law has progressively imposed stronger obligations on states, thereby restricting the doctrine of absolute state sovereignty.²³

Australia has wide-ranging treaty obligations including in relation to Antarctica, biodiversity, climate change, marine pollution, migratory species, and World Heritage.²⁴ The following are the major environmental treaties relevant to Queensland.²⁵

Biodiversity Convention

The *Convention on Biological Diversity* 1992²⁶ imposes extremely wide and important obligations on Australia. Article 8 imposes a general obligation on Australia to conserve biodiversity in both terrestrial and marine ecosystems:

Article 8

In-situ conservation

Each Contracting Party shall, as far as possible and as appropriate:

- Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; ...
- Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas with a view to ensuring their conservation and sustainable use;
- Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

practise accepted as law; (c) the general principles of law recognised by civilised nations and; (d) judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

²¹ *Pulp Mills on the River Uruguay* (Argentina v Uruguay) (Merits) [2010] ICJ Rep 135, 101.

²² See the Ecollex database at <http://www.ecollex.org/>

²³ See Kurukulasuriya L and Robinson N (eds), *Training Manual on International Environmental Law* (UNEP, Nairobi, 2006), <https://www.unenvironment.org/resources/report/unep-training-manual-international-environmental-law>.

²⁴ See Fisher DE, “The Impacts of International Law Upon the Australian Environmental Legal System” (1999) 16 EPLJ 372.

²⁵ Available generally at <http://www.austlii.edu.au/dfat/>

²⁶ Entry into force generally 29/12/93. ATS 1993 No 32.

¹⁵ See <http://www.un.org>.

¹⁶ Signed 26/7/45; entry into force for Australia and generally 24/10/45. 1 UNTS XVI; [1945] ATS 1.

¹⁷ See Triggs G, *International Law: Contemporary Principles and Practices* (LexisNexis, Sydney, 2006), p 3.

¹⁸ See *NSW v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case) at 479; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [52].

¹⁹ In an international context the term, “state”, is used as a synonym for “nation”. It is important not to confuse the use of this term as referring to the States and Territories of the Australian federal system of government. The Commonwealth is the only level of government in Australia recognised in the international arena.

²⁰ Article 38 provides that the Court is to apply: (a) international conventions; (b) international custom, as evidence of general

- (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas; ...
- (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations; ...

The Convention is administered by a secretariat in Montreal, Canada.²⁷



Australia is obliged to protect endangered species such as Queensland's Southern Cassowary under the Biodiversity Convention. Photo: QPWS (2001)

CITES

As its name suggests, the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora* 1973 (CITES)²⁸ provides a framework for controlling international trade in

endangered species. It accords varying degrees of protection to more than 30,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs. It is administered by a secretariat within the United Nations Environment Program (UNEP) in Geneva, Switzerland.²⁹

International Whaling Convention

The *International Convention for the Regulation of Whaling* 1946, commonly called simply the "International Whaling Convention",³⁰ provides a loose framework for the regulation of whaling, including of the Humpback whales that migrate annually along the Queensland coastline. A moratorium on all commercial whaling was declared in 1982. Japan continues to conduct whaling under Article VIII of the Convention for "scientific purposes".³¹ Part of this occurs in Australia's Antarctic waters in contravention of Australia's domestic laws.³² The Convention is administered by the International Whaling Commission.³³

GATT

International trade has important implications for environmental protection. The *General Agreement on Tariffs and Trade* 1947 (GATT)³⁴ is an international agreement that principally aims to promote free trade around the globe. Article XX of GATT permits trade restrictions to meet environmental objectives so long as they are not arbitrary or discriminatory.³⁵ Australia is a member of the World Trade Organization, which was created in 1995 to administer GATT and related trade agreements.³⁶

MARPOL 73/78

The *International Convention for the Prevention of Pollution from Ships* 1973, as modified by the Protocol of 1978 (MARPOL 73/78)³⁷ is the main international convention regulating pollution of the marine environment by ships from operational or accidental causes. It is administered by the International Maritime Organisation (IMO).³⁸

A related treaty is the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* 1972 and 1996 Protocol

²⁷ See <http://www.cbd.int/>

²⁸ Entry into force 27/10/76. ATS 1976 No 29.

²⁹ See the CITES website at <http://www.cites.org/>

³⁰ Entry into force 10/11/48. ATS 1948 No 18.

³¹ Circumventing the decision in Whaling in the Antarctic (*Australia v Japan: New Zealand intervening*) [2014] ICJ Rep 228, where the ICJ ruled Japan's whaling contravened Art VIII.

³² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510 (Allsop J).

³³ See the IWC website at <http://www.iwcoffice.org/>

³⁴ Entry into force for Australia 25/2/49. ATS 1948 No 23.

³⁵ See Triggs, n 17, p 752.

³⁶ See <http://www.wto.org>.

³⁷ ATS 1988 No 29; 1990 No 34; 1995 No 4. Entry into force for Australia completed 1 July 1992.

³⁸ See IMO website <http://www.imo.org>

(London Convention) which limits the discharge of wastes that are generated on land and disposed of at sea. It is also administered by the IMO.³⁹

United Nations Framework Convention on Climate Change

The *United Nations Framework Convention on Climate Change* 1992 (UNFCCC)⁴⁰ provides an international framework for regulating anthropogenic climate change. As a contracting party, Australia is obliged to take action to avoid dangerous climate change.

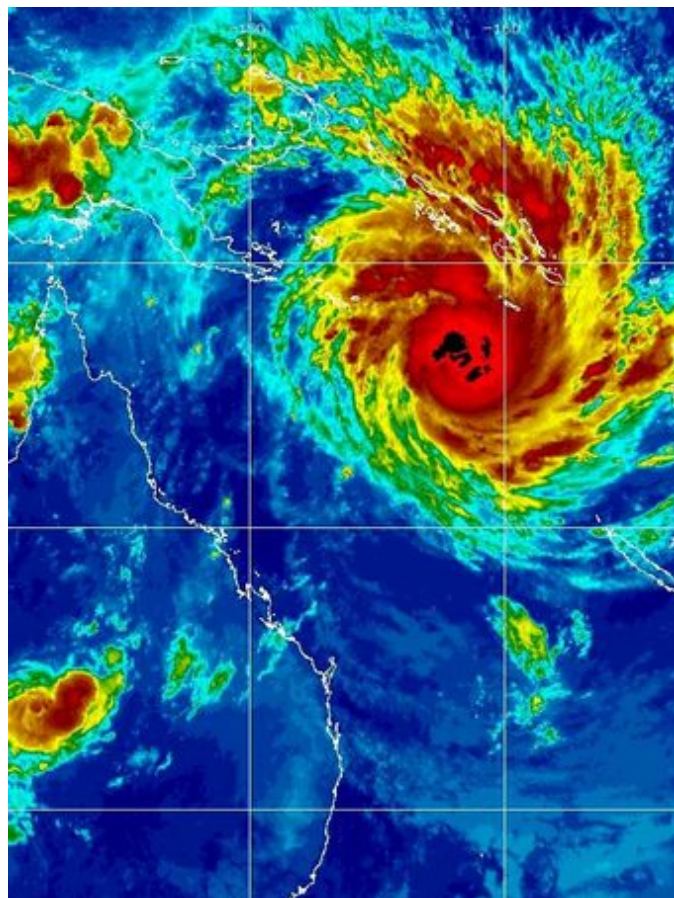
The UNFCCC provides a broad framework but more detailed obligations were intended to be specified in the protocols and other instruments created under it. The first of these was the *Kyoto Protocol*, named after the Japanese city in which it was signed in 1997.⁴¹ The *Kyoto Protocol* provided specific obligations for developed countries such as Australia to limit greenhouse gas emissions during a first commitment period from 2008 to 2012. A second commitment period covers 2013-2020. The *Kyoto Protocol* also created a framework for developed countries to meet their commitments to reduce emissions by undertaking, financing or purchasing emissions reductions generated in other countries. These mechanisms were the Clean Development Mechanism, Joint Implementation, and emissions trading.

In 2015 the parties to the UNFCCC agreed in the *Paris Agreement*⁴² to a goal of:

Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

The *Paris Agreement* is built on non-binding pledges known as “nationally determined contributions” (NDCs), which are proposed to be regularly reviewed and strengthened.⁴³ Australia’s current NDC pledges to reduce emissions to 26-28% on 2005 levels by 2030.⁴⁴

The UNFCCC, *Kyoto Protocol* and *Paris Agreement* are administered by a secretariat in Bonn, Germany.⁴⁵



Warmer ocean waters due to climate change are expected to lead to increased severity of major storms such as Cyclone Yasi in February 2011. Photo: ABC News / NOAA

Ramsar Convention

The *Convention on Wetlands of International Importance especially as Waterfowl Habitat* 1971⁴⁶ provides an international framework for the protection of wetlands. It was signed in the Iranian city of Ramsar in 1971 and is commonly referred to as “the Ramsar Convention.” It provides for listing of wetlands, particularly large wetlands of critical importance for migratory birds. There are currently 65 Ramsar wetlands in Australia, with five in Queensland, including Moreton Bay adjacent to Brisbane.⁴⁷ The Convention is administered by a secretariat in Gland, Switzerland.⁴⁸

³⁹ See <http://www.londonconvention.imo.org>

⁴⁰ Entry into force generally 21/3/94. ATS 1994 No 2.

⁴¹ Done at Kyoto 11/12/1997. Signed for Australia 24/4/1998. Entered into force generally 16/2/2005. Entered into force for Australia 11/3/2008. ATS 2008 No 2.

⁴² Agreed in Paris on 12 December 2015, entered into force for Australia on 9/12/16. ATS 2016 No 24.

⁴³ See Christoff P, “The promissory note: COP 21 and the Paris Climate Agreement” (2016) 25(5) *Environmental Politics* 765.

⁴⁴ See <http://www.environment.gov.au/climate-change>

⁴⁵ See the UNFCCC website at <http://unfccc.int/>

⁴⁶ Entry into force 21/12/75. ATS 1975 No 48.

⁴⁷ See <http://www.environment.gov.au/epbc/what-is-protected/wetlands>

⁴⁸ See the Secretariat website at <http://www.ramsar.org>

UNCLOS

The *United Nations Convention on the Law of the Sea* 1982 (UNCLOS)⁴⁹ provides a major framework regulating use of the world's oceans. It places important obligations on Australia to protect the marine environment, such as:

Article 192

States have the obligation to protect the marine environment.

Article 194

States shall take ... all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable measures at their disposal ...

UNCLOS established a major reform of maritime jurisdictions. Jurisdictional limits over the sea are measured from a standard reference point known as the “baseline”. This is generally the lowest astronomical tide or a straight line drawn across bays. Under UNCLOS the principal territorial limits extend to:

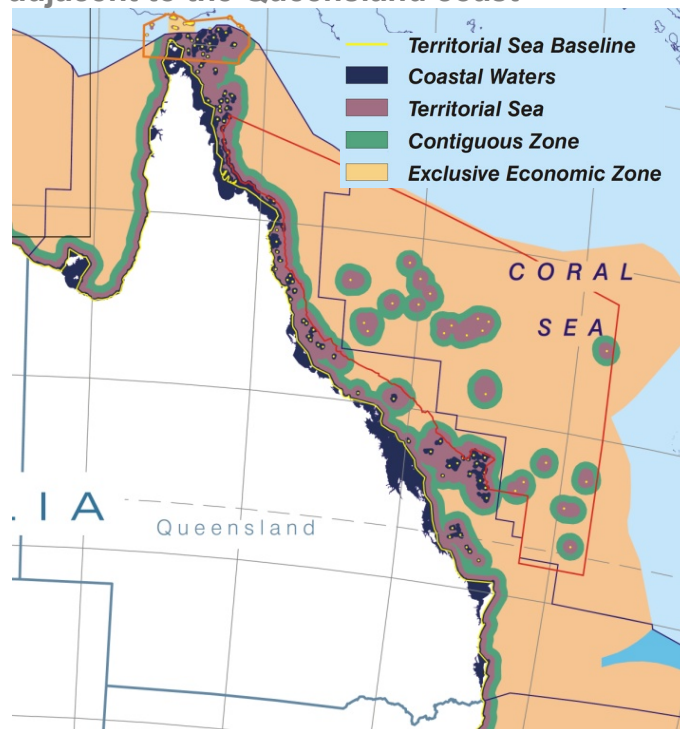
- coastal waters (3 nautical miles);
- territorial waters (12 nautical miles);
- contiguous zone (24 nautical miles);
- the exclusive economic zone (200 nautical miles) (EEZ); and
- the continental shelf (variable extent).

Figure 2 shows a map of maritime zones adjacent to Queensland.

Different rights attach to the different territorial limits under UNCLOS but in an environmental context the most important right established by this regime is that a coastal state such as Australia can regulate all fishing within its EEZ. Outside of these limits, what are known as “the high seas” or international waters, ships and people are generally regulated by the country in which they are registered or their nationality.

The UNCLOS secretariat is part of the UN.⁵⁰

Figure 2: Australia's maritime zones adjacent to the Queensland coast⁵¹



Vienna Convention for the Protection of the Ozone Layer

The *Vienna Convention for the Protection of the Ozone Layer* 1985⁵² is a treaty for reducing and eliminating the manufacture and use of gases that destroy ozone in the Earth's atmosphere. The *Montreal Protocol on Substances that Deplete the Ozone Layer* 1987⁵³ was negotiated under it and stipulates phase-out periods for the production and consumption of ozone depleting substances such as chlorofluorocarbons.

The loss of ozone and the “hole in the ozone layer” are often confused with global warming. Ozone is an atmospheric gas that is critical in reducing ultraviolet light reaching the Earth. Global warming involves the build-up of greenhouse gases such as carbon dioxide in the atmosphere due to human activities causing increased surface temperatures and climate change. Some greenhouse gases are also ozone depleting substances but the phenomena are different.

The *Vienna Convention* and *Montreal Protocol* are administered by the Ozone Secretariat in Nairobi, Kenya.⁵⁴

⁴⁹ Entry into force generally 16/11/94. ATS 1994 No 31.

⁵⁰ See <http://www.un.org/Depts/los/index.htm>

⁵¹ Source: Geoscience Australia <http://www.ga.gov.au>

⁵² Entry into force 22/9/88. ATS 1988 No 26.

⁵³ Entry into force 1/1/89. ATS 1989 No 18.

⁵⁴ See <http://ozone.unep.org/>

World Heritage Convention

The *Convention concerning the Protection of the World Cultural and Natural Heritage* 1972,⁵⁵ commonly called simply the “World Heritage Convention”, is a pillar of the international environmental legal system. It is concerned with the identification, protection and preservation of cultural and natural heritage considered to be of outstanding universal value. A World Heritage List is established under the Convention. Australia has 18 World Heritage sites including the Great Barrier Reef.⁵⁶ The Convention is administered by the United Nations Educational, Scientific and Cultural Organization (UNESCO).⁵⁷

Relationship between international law and Australian domestic law

International legal obligations have important constitutional ramifications for the Australian federal system of government, which divides legislative power between the Commonwealth and State/Territory governments. As explained in the next section, the Commonwealth Government has a constitutional power to implement Australia’s international legal obligations. Since the Commonwealth Government negotiates what Australia’s international legal obligations will be, this gives it virtually a “blank cheque” to enlarge its legislative power within the Australian federation.

International law may also be relevant in interpreting Australian domestic law. Occasionally, Australian laws expressly incorporate international law,⁵⁸ in which case international law is directly relevant to interpreting the statute. Where there is no express reference to international law and a domestic statute is ambiguous, the courts favour an interpretation which accords with international law, at least where the legislation was enacted after, or in contemplation of, the relevant international instrument.⁵⁹ In practice, both situations are rare.

In summary, international law impacts upon the Queensland environmental legal system in three major ways by:

- placing legal obligations on Australia to protect the environment;

- creating legislative power for the Commonwealth Government to fulfil Australia’s international legal obligations; and
- sometimes being relevant to the interpretation of domestic legislation.

International considerations may also influence the Queensland environmental legal system through international debate and non-binding policy documents that set goals and standards (often called “soft law”) forming the basis for government policy. For instance, the UN Sustainable Development Goals, agreed in 2015, now set important, non-binding policy objectives internationally.⁶⁰

Commonwealth law

Commonwealth law is the legislation enacted and administered by the Australian Government.⁶¹ It also includes statutory instruments such as subordinate legislation (typically called “regulations”) and plans created under such laws. The centrepiece of Commonwealth environmental law is the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act). The Commonwealth also plays a particularly important role in customs and export controls for international trade in endangered species as well as for fisheries, ozone and greenhouse issues. The Great Barrier Reef Marine Park Authority is also a Commonwealth agency and is responsible for the protection and management of the Great Barrier Reef under the *Great Barrier Reef Marine Park Act* 1975 (Cth). The limits of the Commonwealth’s law-making power are set out in the *Commonwealth Constitution*.

Commonwealth Constitution

While there is little reference to “the environment” or “natural resources” in the *Commonwealth Constitution*, interpretation of it by the High Court has led to recognition that the Commonwealth has extensive legislative powers with respect to the environment. The primary rule of Australian

⁵⁵ Entry into force 17/12/75. ATS 1975 No 47.

⁵⁶ See <http://whc.unesco.org/en/list>

⁵⁷ See <http://whc.unesco.org>

⁵⁸ e.g. the EPBC Act, s16(3), defines “ecological character” as having the same meaning as in the Ramsar Convention.

⁵⁹ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995)

183 CLR 273 at 287. See also s 15AB(2)(d) of the *Acts Interpretation Act* 1901 (Cth).

⁶⁰ See <https://www.un.org/sustainabledevelopment/>

⁶¹ Commonwealth legislation and statutory instruments are available at <https://www.legislation.gov.au/>

constitutional law is that, to be valid, Commonwealth legislation must be based on a head of legislative power contained in the Constitution.⁶² Section 51 of the Constitution is the principal statement of these heads of power. Other basic rules for determining Commonwealth legislative powers are:⁶³

1. Subject to certain exceptions, the heads of power in section 51 of the Constitution are to be interpreted separately and disjunctively, without any particular attempt being made to avoid overlap between them.
2. The powers conferred by section 51 are to be construed liberally in accordance with their terms, and without any assumption that particular matters were intended to be excluded from federal authority or “reserved” to the States.
3. There is no requirement that Commonwealth legislation be exclusively about one of the granted heads of power. The purpose of the law & its practical effect are irrelevant provided its legal operation is with respect to a head of power.

The External Affairs power in s 51(xxix) of the Constitution provides an important link between international law and Australian domestic law. Under it the Commonwealth Government has power to enact legislation that is reasonably capable of being considered appropriate and adapted to fulfil Australia’s international legal obligations.⁶⁴ This is a very wide and important head of legislative power. Given the width of the obligations imposed by Article 8 of the *Biodiversity Convention* in particular, it is difficult to think of any real environmental issue (at least with respect to the natural environment) that the Commonwealth does not have legislative power over. Simply stated, the Commonwealth has virtually a plenary power to make laws with respect to the environment (or at least biodiversity).

Section 51(xxix) also allows the Commonwealth to regulate places physically external to Australia, such as the marine environment seaward of the low water mark.⁶⁵ However, in 1979 the Commonwealth gave proprietary rights and legislative jurisdiction to the States and Northern Territory for coastal waters (three nautical miles from the low water mark) under the Offshore Constitutional Settlement.⁶⁶

Subsequent cooperative arrangements also provide for State fisheries legislation to extend beyond coastal waters, as summarised in Appendix 3.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Significant Aboriginal areas and objects, as declared by the Minister, an authorised officer or an inspector are protected under this Act. The Australian Government Department of Environment & Energy (DEE) administers it.⁶⁷



Aboriginal rock paintings are protected under Commonwealth and State laws. Photo: EPA (2007)

Agricultural and Veterinary Chemicals Code Act 1994 (Cth)

The Agvet Code, provided as a schedule to this Act, is the central part of a national registration scheme for agricultural and veterinary chemicals. The Code applies as a law of Queensland⁶⁸ and regulates the use of agricultural chemicals such as herbicides according to their labels. For example, under the Agvet Code sugarcane farmers in the Wet Tropics are prohibited from using the herbicide diuron during the “no spray” periods in the wet season to limit run-off affecting the Great Barrier Reef.⁶⁹

The Australian Pesticides and Veterinary Medicines Authority (APVMA) administers the registration of chemicals under the Agvet Code and considers unintended harm to the environment during

⁶² *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129 (the Engineers’ Case).

⁶³ Crawford J, “The Constitution and the Environment” (1991) 13 *Sydney Law Review* 11 at pp 14-16.

⁶⁴ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *The Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dam Case); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232 (the Wet Tropics Case); *Victoria v Commonwealth* (1996) 187 CLR 416 (the Industrial Relations Act Case) at 487-488.

⁶⁵ *New South Wales v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case).

⁶⁶ *Coastal Waters (State Powers) Act 1980* (Cth); *Coastal Waters (State Title) Act 1980* (Cth). See generally s3 *Offshore Minerals Act 1998* (Qld); Fowler R, “Environmental Law and Its Administration in Australia” (1984) 1 *EPLJ* 10 at 13. This See also *Port MacDonnell Professional Fishermen’s Association Inc v South Australia* (1989) 168 CLR 340.

⁶⁷ See <http://www.environment.gov.au/heritage>

⁶⁸ Under the *Agricultural and Veterinary Chemicals (Queensland) Act 1994* (Qld), s 5.

⁶⁹ See <https://apvma.gov.au/node/12511>

this process⁷⁰ but enforcement of restrictions on use of agricultural chemicals rests with the Queensland Department of Agriculture and Fisheries (DAF).⁷¹

Airports Act 1996 (Cth)

Major airports located on Commonwealth land are regulated under this Act. In Queensland these are Brisbane, Coolangatta, Archerfield, Townsville and Mt Isa airports. At these airports the *Airports (Environment Protection) Regulations 1997* (Cth) regulate noise pollution and impose a general environmental duty on operators to take all reasonable and practicable measures to prevent pollution, adverse impacts to ecosystems and cultural heritage, and to prevent offensive noise. For other airports, development approval and environmental management is regulated under Queensland legislation such as the *Planning Act 2016* (Qld) and *Environmental Protection Act 1994* (Qld). The Airports Division of the Australian Government Department of Infrastructure, Regional Development and Cities administers the Commonwealth Act.⁷²

Australian Heritage Council Act 2003 (Cth)

This Act integrated national heritage assessment into the EPBC Act after the repeal of the earlier *Australian Heritage Commission Act 1975* (Cth). The Register of the National Estate is established under s 21. DEE administers it.⁷³

Australian Radiation Protection and Nuclear Safety Act 1998 (Cth)

The Commonwealth is prohibited from operating nuclear facilities such as a nuclear reactor unless authorised under this Act. No such facilities exist in Queensland. The only nuclear reactor in Australia is operated at Lucas Heights in Sydney to produce medical and industrial products.⁷⁴ The Act is administered by the Australian Radiation Protection and Nuclear Safety Authority.⁷⁵

The EPBC Act also regulates nuclear actions, including uranium mining. There is no Federal law that prohibits a person other than the Commonwealth from mining uranium or operating a nuclear power plant in Queensland. However, at a State level the

Nuclear Facilities Prohibition Act 2007 (Qld) prohibits any person constructing or operating a nuclear facility, including a nuclear power plant, in Queensland.

Biological Control Act 1984 (Cth)

This Act regulates the release of biological control agents in conjunction with the *Biosecurity Act 2015* (Cth) and related State laws. A biological control agent is an organism, such as an insect or plant disease, that is used to control a pest species. It is administered by the Australian Government Department of Agriculture and Water Resources (DAWR).⁷⁶

Biosecurity Act 2015 (Cth)

This Act regulates the entry into Australia of diseases and pests that pose a risk to human, animal or plant health or the environment. The Act implements, amongst other international conventions, the *International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004* to control invasive aquatic species present in water ballast and sediment released from ships in Australian waters. DAWR administers the Act.⁷⁷



A national program seeks to eradicate outbreaks of red imported fire ants (*Solenopsis invicta*).⁷⁸ Photo: Qld Govt.

Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)

This Act provides for Australian carbon credits units and, in 2015, was amended to establish the Emissions

⁷⁰ See the APVMA homepage at <http://www.apvma.gov.au/>

⁷¹ See <https://www.daf.qld.gov.au/business-priorities/plants/agvet-chemicals-and-residues/chemical-use>

⁷² See <http://www.infrastructure.gov.au/>

⁷³ See <http://www.environment.gov.au/heritage>

⁷⁴ See <http://www.ansto.gov.au>

⁷⁵ See <http://www.arpansa.gov.au>

⁷⁶ See <http://www.agriculture.gov.au/biosecurity/risk-analysis/biological-control-agents>

⁷⁷ See <http://www.agriculture.gov.au/biosecurity>

⁷⁸ See <http://www.outbreak.gov.au/current-responses-to-outbreaks/red-imported-fire-ants>

Reduction Fund (ERF) after Australia's GHG emissions trading scheme⁷⁹ was repealed. It uses the carbon accounting framework in the *National Greenhouse and Energy Reporting Act 2007* (Cth) as the basis for calculating carbon credits.

The ERF contributes to Australia's 2020 GHG emissions reduction target of 5% below 2000 levels by 2020 and 26-28% below 2005 emissions by 2030 (which is Australia's nationally determined contribution under the *Paris Agreement* to the UNFCCC). The ERF was allocated \$2.55 billion to purchase voluntary emission reductions through carbon abatement contracts. The Clean Energy Regulator, within DEE, administers the Act, the ERF and the safeguard mechanism.⁸⁰

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The EPBC Act is the centrepiece of Commonwealth environmental laws.⁸¹ Broadly, it regulates:

- impacts on matters of national environmental significance;
- impacts on the environment involving the Commonwealth or Commonwealth land;
- killing or interfering with listed marine species and cetaceans (e.g. whales);
- Australian marine parks; and
- international trade in wildlife.

The nine matters of national environmental significance are:

- the world heritage values of a declared World Heritage property;
- the National Heritage values of a declared National Heritage place;
- the ecological character of a declared Ramsar wetland;
- listed threatened species and ecological communities;
- listed migratory species;
- nuclear actions;
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park; and
- a water resource, in relation to coal seam gas development and large coal mining development.

Actions that have, will have or are likely to have a significant impact on matters of national environmental significance, and actions by the Commonwealth or involving Commonwealth land with a significant impact on the environment, are called "controlled actions" and require approval under the Act.

The process of assessing and approving a controlled action under the Act potentially involves three stages: referral, assessment and approval. At the first stage a person refers a proposed action under the Act for determination of whether it is a controlled action. If the proposed action is determined to involve a controlled action it is then assessed in accordance with the Act before the Minister (or a delegate of the Minister) determines whether or not it can proceed and any conditions that should apply.

An "action" under the Act is a physical activity or series of activities such as the construction and operation of a mine, dam or factory. Sections 43A and 43B exempt actions that were existing lawful uses or fully approved when the Act commenced on 16 July 2000.

Under the Act a "significant impact" is an impact that is important, notable or of consequence having regard to its context or intensity.⁸² A wide approach must be taken when assessing the scope of impacts of actions under the Act. All likely impacts must be considered, including direct and indirect impacts.⁸³

The Act and its regulations create important obligations for environmental impact assessment (EIA). Sections 489-491 of the Act create offences for providing false or misleading information during the assessment process.⁸⁴

Bilateral agreements are important variations to the normal assessment or approval stages of the Act. These allow State and Territory assessment and approval processes to be accredited to fulfil similar processes under the Act, thereby avoiding duplication. There are two types: assessment bilaterals (in which State EIA processes are accredited but the Commonwealth makes the final decision); and approval bilaterals (in which both assessment and approval are devolved to the State). An assessment bilateral has been signed for Queensland involving EIA processes in the *State Development and Public Works Organisation Act 1971* (Qld) for "significant projects", the

⁷⁹ *Clean Energy Act 2011* (Cth).

⁸⁰ See <http://www.environment.gov.au/climate-change/government/emissions-reduction-fund>

⁸¹ See McGrath C, "Key concepts of the EPBC Act" (2005) 22 EPLJ 20.

⁸² *Booth v Bosworth* (2001) 114 FCR 39 at 64.

⁸³ *Minister for the Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24, which led to a definition of "impact" being inserted in s 527E of the Act.

⁸⁴ Note *Mees v Roads Corporation* (2003) 128 FCR 418 in relation to misleading referrals under the EPBC Act.

Environmental Protection Act 1994 (Qld) for mining and the *Sustainable Planning Act* 2009 (Qld) for other assessable development. Appendix 4 summarises these EIA processes.



Biodiversity forming part of the World Heritage values of a declared World Heritage Property, such as the Spectacled Flying Fox (*Pteropus conspicillatus*), is protected under the EPBC Act. Photo: Mike Trenerry

In 2013 the Commonwealth attempted to accredit approval bilaterals with the States (euphemistically called a “One-Stop Shop”⁸⁵); however, this process stalled and has not proceeded. No approval bilaterals are in force under the Act.

The Act also contains a range of mechanisms in Chapter 5 for protecting biodiversity such as the Australian Whale Sanctuary. Generally these are limited to Commonwealth areas or attach no penalty for non-compliance, which limits their effect.

Exceptions to this general rule include international trade in wildlife and the protection of heritage places listed on the National Heritage List.

Over 50 Australian Marine Parks have been declared under the EPBC Act, including the Coral Sea Marine Park, West Cape York Marine Park and Gulf of Carpentaria Marine Park.⁸⁶ The Great Barrier Reef Marine Park is established and managed separately, under the *Great Barrier Reef Marine Park Act* 1975 (Cth).

The Act provides widened standing in ss 475 and 487 for public interest litigation to restrain offences and for judicial review. DEE administers the Act.⁸⁷

Environment Protection (Sea Dumping) Act 1981 (Cth)

Dumping or incineration at sea of radioactive material, wastes and other material is prohibited under this Act. Section 15 provides a defence for dumping conducted to save human life or a vessel in distress. The Act was made pursuant to the *London Convention and Protocol*.⁸⁸ It applies to all vessels in Australian waters and to Australian vessels in international waters. DEE administers it.⁸⁹

Fisheries Management Act 1991 (Cth)

This Act operates in conjunction with the *Fisheries Act* 1994 (Qld) to regulate fisheries along the Queensland coast under complex arrangements summarised in Appendix 3. It declares the Australian fishing zone over Australia’s exclusive economic zone (EEZ) other than State coastal waters and some excluded waters. The EEZ extends 200 nautical miles seaward of the coastline as shown in Figure 2. For some fisheries the Act applies to Australian citizens and Australian flagged vessels fishing in international waters. Appendix 3 summarises the jurisdictional network in place for Queensland fisheries. In Queensland waters the Act regulates, for example, the Eastern Tuna and Billfish Fishery, which extends from Cape York, Queensland, to the South Australian/Victorian border.⁹⁰ The Australian Fisheries Management Authority (AFMA) administers it.⁹¹

⁸⁵ See <http://www.environment.gov.au/epbc/one-stop-shop> and McGrath C, “One stop shop for environmental approvals a messy backward step for Australia” (2014) 31 EPLJ 164.

⁸⁶ See <https://parksaustralia.gov.au/marine/parks/>

⁸⁷ See <http://www.environment.gov.au/epbc>.

⁸⁸ See <http://www.imo.org/>

⁸⁹ See <http://www.environment.gov.au/topics/marine/marine-pollution/sea-dumping/sea-dumping-act>

⁹⁰ See <https://www.afma.gov.au/fisheries/eastern-tuna-and-billfish-fishery-page>

⁹¹ See AFMA homepage <http://www.afma.gov.au>

Fuel Quality Standards Act 2000 (Cth)

The quality of fuel supplied in Australia is regulated under this Act. The standards it creates reduce the level of atmospheric pollutants such as lead and sulphur. DEE administers it.⁹²

Gene Technology Act 2000 (Cth)

A national framework for research, production and release of genetically modified organisms (GMOs) and genetically modified crops and products was established by this Act. The *Gene Technology (Queensland) Act* 2016 (Qld) provides complementary State legislation. The Act is administered by the Office of the Gene Technology Regulator.⁹³

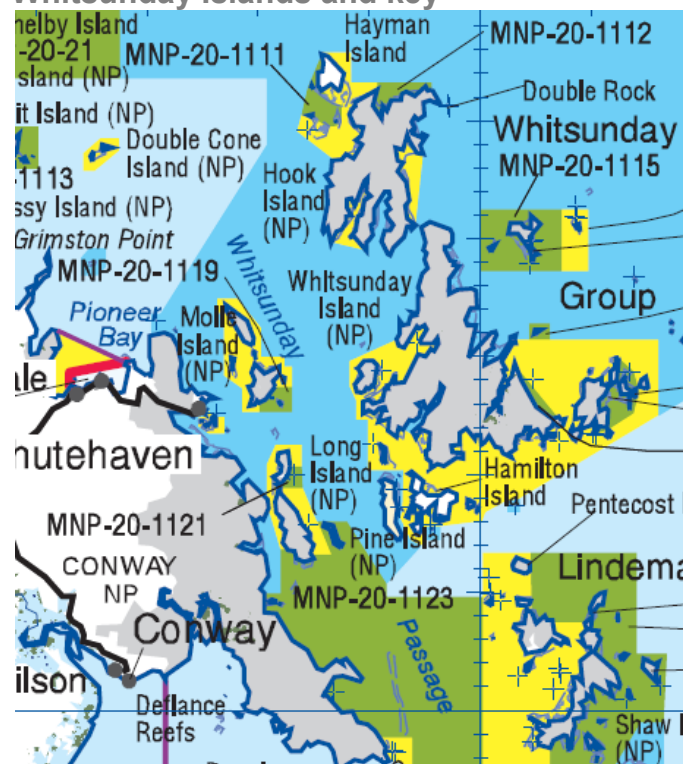
Great Barrier Reef Marine Park Act 1975 (Cth)

The Act establishes a framework for the protection and management of the Great Barrier Reef (GBR) as a Marine Park in which mining and petroleum exploration and extraction are banned but other activities such as fishing are permitted in specified areas.

The *Great Barrier Reef Marine Park Regulations* 1983 (Cth) and *Great Barrier Reef Marine Park Zoning Plan* 2003 (Cth) establish a zoning plan for the GBR based on the concept of multiple-use management. Figure 3 shows an extract of the zoning plan and the key to the map showing the major restrictions on activities in different zones. In 2004, fully protected areas were increased from 4% to 33% of the Marine Park. The Act and regulations also provide a range of specific management tools such as plans of management⁹⁴ and compulsory pilotage areas for shipping.

The Great Barrier Reef Marine Park Authority (GBRMPA) administers the Act,⁹⁵ but day-to-day management is conducted in conjunction with the Queensland Parks and Wildlife Service (QPWS) and the Queensland Boating and Fisheries Patrol (QBFP).

Figure 3: Extract of GBR zoning plan for the Whitsunday Islands and key⁹⁶



ACTIVITIES GUIDE (see relevant Zoning Plans and Regulations for details)	General Use Zone					
	General Use Zone	Habitat Protection Zone	Conservation Park Zone	Buffer Zone	Scientific Research Zone	Marine National Park Zone
Aquaculture	Permit	Permit	Permit ¹	×	×	×
Bait netting	✓	✓	✓	×	×	×
Boating, diving, photography	✓	✓	✓	✓	✓ ²	✓
Crabbing (trapping)	✓	✓	✓ ³	×	×	×
Harvest fishing for aquarium fish, coral and beachworm	Permit	Permit	Permit ¹	×	×	×
Harvest fishing for sea cucumber, trochus, tropical rock lobster	Permit	Permit	×	×	×	×
Limited collecting	✓ ⁴	✓ ⁴	✓ ⁴	×	×	×
Limited spearfishing (snorkel only)	✓	✓	✓ ¹	×	×	×
Line fishing	✓ ⁵	✓ ⁵	✓ ⁶	×	×	×
Netting (other than bait netting)	✓	✓	×	×	×	×
Research (other than limited impact research)	Permit	Permit	Permit	Permit	Permit	Permit
Shipping (other than in a designated shipping area)	✓	Permit	Permit	Permit	Permit	Permit
Tourism programme	Permit	Permit	Permit	Permit	Permit	Permit
Traditional use of marine resources	✓ ⁷	✓ ⁷	✓ ⁷	✓ ⁷	✓ ⁷	✓ ⁷
Trawling	✓	×	×	×	×	×
Trolling	✓ ⁵	✓ ⁵	✓ ⁵	✓ ^{5,8}	×	×

⁹² See <http://www.environment.gov.au/protection/fuel-quality>

⁹³ See <http://www.ogtr.gov.au>

⁹⁴ E.g. the *Whitsundays Plan of Management* 1998 (Cth).

⁹⁵ See <http://www.gbrmpa.gov.au>

⁹⁶ Obtained from the GBRMPA website <http://www.gbrmpa.gov.au>

Greenhouse and Energy Minimum Standards Act 2012 (Cth)

The GEMS Act established a national system for energy efficiency and labelling standards for products, including the star rating system now commonly seen on electrical equipment. The GEMS Regulator, based in DEE, administers the Act.⁹⁷



Hazardous Waste (Regulation of Exports and Imports) Act 1989 (Cth)

The export and import of hazardous waste is regulated under this Act. Hazardous waste is defined with reference to a schedule of categories and characteristics of hazardous waste and includes, for example, wastes containing arsenic, mercury or lead at sufficient concentrations to be acutely poisonous or chronically toxic (including carcinogenic). The Act implements the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal*⁹⁸ and is administered by DEE.⁹⁹

Illegal Logging Prohibition Act 2012 (Cth)

This Act prohibits the importation of illegally logged timber and timber products (such as paper) and the processing of illegally logged Australian raw logs. It also requires importers of regulated timber products and processors of Australian raw logs to conduct due diligence in order to reduce the risk that illegally logged timber is imported or processed. Importers of regulated timber products must provide declarations about the due diligence that they have undertaken. The regulations provide a number of exemptions (such as for recycled timber products) and country specific guidelines (e.g. for Indonesia and Malaysia). DAWR administers the Act.¹⁰⁰

Protection of Moveable Cultural Heritage Act 1986 (Cth)

The import and export of protected objects of national importance for archaeological, artistic, ethnological, historical, literary, scientific or technological reasons is regulated under this Act. It

established the National Cultural Heritage Control List, which lists categories of protected objects that are subject to export control. Examples of items on the Control List are: Victoria Cross medals awarded to Australian service personnel; and each piece of the suit of metal armour worn by Ned Kelly at the siege of Glenrowan in Victoria in 1880. The Act implements the *UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970. The Australian Government Department of Communication and the Arts administers it.¹⁰¹

Renewable Energy (Electricity) Act 2000 (Cth)

A large part of the Australian Government's response to climate change has been increasing targets for renewable energy production under this Act. Originally termed the Mandatory Renewable Energy Target (MRET), with revised targets and frameworks it has become the enhanced Renewable Energy Target (RET). Currently, the RET has two schemes:

- The Large-scale Renewable Energy Target (LRET), which creates a financial requirement for large electricity retailers to purchase a percentage of their electricity from renewable sources such as wind, hydro and solar to achieve 33,000 gigawatt hours of additional renewable electricity generation by 2020; and
- The Small-scale Renewable Energy Scheme (SRES), creates a financial incentive for people such as homeowners to install solar water heaters, air sourced heat pumps and other small generation units such as rooftop solar panels. Eligible systems are entitled to small-scale technology certificates based on the amount of renewable electricity the system produces or displaces. These can be sold (usually to large electricity generators).

The Clean Energy Regulator administers the RET.¹⁰²

Sea Installations Act 1987 (Cth)

The construction, operation and decommissioning of offshore installations in Australian waters outside State coastal waters is regulated under this Act. It applies to any human-made structure attached to the seabed other than those used to exploring for or

⁹⁷ See <http://energyrating.gov.au/>

⁹⁸ ATS 1992 No 7. In force generally 5 May 1992.

⁹⁹ See <http://www.environment.gov.au/protection/waste-resource-recovery>

¹⁰⁰ See [http://www.agriculture.gov.au/forestry/policies/illegal-](http://www.agriculture.gov.au/forestry/policies/illegal-logging)

[logging](#)

¹⁰¹ See <https://www.arts.gov.au/what-we-do/cultural-heritage/movable-cultural-heritage>

¹⁰² See <http://www.cleanenergyregulator.gov.au/RET/>

exploit natural mineral resources (including petroleum). DEE administers it.¹⁰³

Torres Strait Fisheries Act 1984 (Cth)

Fishing within the Australian section of the Torres Strait Protected Zone located between Cape York and Papua New Guinea is regulated under this Act and a reciprocal State Act, the *Torres Strait Fisheries Act* 1984 (Qld). It is based upon the *Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as Torres Strait, and Related Matters*.¹⁰⁴ It is administered jointly by the AFMA and the Queensland department responsible for fisheries.¹⁰⁵ The complex jurisdictions over fisheries are summarised in Appendix 3.

Underwater Cultural Heritage Act 2018 (Cth)

Shipwrecks are an important part of Australia's history. This Act replaced the *Historic Shipwrecks Act* 1976 (Cth) in 2018 to modernise Australia's protection of underwater cultural heritage and implement the UNESCO *Convention on the Protection of the Underwater Cultural Heritage* 2001.¹⁰⁶ It provides a regime for protecting historic shipwrecks and relics in Australian waters such as the *SS Yongala* located 50km off Townsville. DEE administers the Act.¹⁰⁷

Water Act 2007 (Cth)

Joint Commonwealth and State control of the Murray-Darling River Basin is established under this Act. Several river systems in southern Queensland form part of this catchment: the Condamine-Balonne, Warrego, and MacIntyre Rivers. The Act is intended to operate concurrently with State water laws, including the *Water Act* 2000 (Qld). The Act establishes a framework for water charges, water trading and a water market within the Basin. It aims, in particular, to address over-allocation of water to irrigation. The Act established the Murray Darling Basin Authority (MDBA) and a Murray-Darling Basin Plan was approved under it in 2012.¹⁰⁸ The

MDBA and the DAWR administer the Act, though governance of the basin and implementation of the basin plan is very complex and involves State regulators.¹⁰⁹ For instance, problems with enforcement of water licences in NSW prompted the NSW Government to establish an independent regulator in 2018.¹¹⁰

Queensland law

Queensland law is the legislation and subordinate legislation enacted and administered by the Queensland Government and local governments (which may cover a city, town, shire, or, since March 2008, a region).¹¹¹ Local governments perform a central role in the environmental legal system by preparing and administering planning schemes to control land development within their areas. Several courts have jurisdiction under Queensland environmental laws, as summarised in Appendixes 1 and 2, but the Planning and Environment Court has the major role.

Constitution Act 1867 (Qld)

The *Constitution Act* 1867 (Qld) provides the basis for the Queensland Parliament to make laws, including laws regulating human impacts on the environment. Section 2 provides power for the Parliament “to make laws for the peace welfare and good government of the [State] in all cases whatsoever.” This is a plenary law-making power, subject only to the constraints of the *Commonwealth Constitution*.¹¹² Sections 30 and 40 of the Act provide the Parliament with power to make laws regulating the sale, letting, disposal, occupation and management of land in Queensland.¹¹³ The *Constitution of Queensland Act* 2001 (Qld) consolidates the constitution of the State, but the origin of the power to do this is the 1867 Act. The *Constitutional Powers (State Waters) Act* 1980 (Qld) provides additional powers to the State over coastal

¹⁰³ See <http://www.environment.gov.au/topics/marine/marine-pollution/sea-dumping/sea-installations>

¹⁰⁴ ATS 1985 No 4.

¹⁰⁵ See <http://www.afma.gov.au>

¹⁰⁶ See <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/>

¹⁰⁷ See <http://www.environment.gov.au/heritage/historic-shipwrecks>

¹⁰⁸ See <https://www.mdba.gov.au/basin-plan/plan-murray-darling-basin>

¹⁰⁹ See <https://www.mdba.gov.au/about-us/governance>

¹¹⁰ See <https://www.industry.nsw.gov.au/natural-resources-access-regulator>

¹¹¹ Queensland legislation is available at <https://www.legislation.qld.gov.au/>

¹¹² For example, s 109 of the *Commonwealth Constitution* provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

¹¹³ See *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520.

waters reflecting the Offshore Constitutional Settlement referred to previously.

The Queensland Government (the Executive Government or “the Crown”), is now generally required to comply with laws protecting the environment. Historically, under a principle known as “Crown immunity”, the Crown was not bound by legislation unless expressly stated to be or by necessary implication.¹¹⁴

The Queensland Parliament has enacted over 30 pieces of legislation that directly regulate activities impacting on the environment. The major pieces are summarised in alphabetical order in the following pages. The *Planning Act* 2016 (Qld) is the mainstay of the system regulating planning and development other than for mining and petroleum (including gas extraction), which have separate regimes.

Aboriginal Cultural Heritage Act 2003 (Qld)

Aboriginal and Torres Strait Islander cultural heritage is protected under this Act and the *Torres Strait Islander Cultural Heritage Act* 2003 (Qld). The main mechanism through which each Act operates is a list of places and artefacts of heritage significance. The Cultural Heritage Unit in the Department of Aboriginal and Torres Strait Islander Partnerships administers the Acts.¹¹⁵

These Acts operate in conjunction with the *Cape York Peninsula Heritage Act* 2007 (Qld), which provides a special, cooperative arrangement for protecting natural and cultural heritage in Cape York and the *Queensland Heritage Act* 1992 (Qld), which protects non-indigenous heritage.

Biodiscovery Act 2004 (Qld)

Licensing and royalties for the investigation of biological resources in Queensland are regulated under this Act. Permits issued under it over-ride the *Nature Conservation Act* 1992 (Qld) and allow investigation in National Parks. DES administers a regime, known as “collection authorities”, regulating access to biological resources under the Act.¹¹⁶

Biological Control Act 1987 (Qld)

The testing and release of biological agents to control pest infestations in Queensland are regulated under

this Act as well as the *Biosecurity Act* 2014 (Qld). The most infamous failure of a biological control agent in Queensland was the deliberate introduction from Hawaii of the cane toad (*Bufo marinus*) in 1935 to control scarab beetles, a pest afflicting sugar cane in north Queensland.¹¹⁷ The toad’s voracious appetite, poisonous skin glands and massive reproductive ability have been catastrophic for Queensland wildlife. The toads have now spread into the Kakadu National Park and World Heritage Area of the Northern Territory. The Department of Agriculture and Fisheries (DAF) administers the Act.¹¹⁸

Biosecurity Act 2014 (Qld)

This Act provides biosecurity measures regulating pests (e.g. wild dogs and weeds), diseases (e.g. foot-and-mouth disease), and contaminants (e.g. lead on grazing land) that pose a biosecurity risk. DAF administers it.¹¹⁹



The release of the cane toad (*Bufo marinus*) in Queensland as a biological control agent has caused severe damage to Australia’s native wildlife. Photo: Dylan O'Donnell (2004)

Coastal Protection and Management Act 1995 (Qld)

This Act operates in conjunction with the *Planning Act* 2016 (Qld) to manage coastal development. The Planning Act sets out the State’s interests for protection of the coastal environment and management of coastal hazards (such as erosion and storm tide inundation) through the State Planning Policy, which are to be incorporated into local government planning schemes.

¹¹⁴ See *Bropho v Western Australia* (1990) 171 CLR 1.

¹¹⁵ See <https://www.datsip.qld.gov.au/people-communities/aboriginal-torres-strait-islander-cultural-heritage>

¹¹⁶ See <https://environment.des.qld.gov.au/licences-permits/plants-animals/biodiscovery.html>

¹¹⁷ See <http://australianmuseum.net.au/Cane-Toad>.

¹¹⁸ See <https://www.daf.qld.gov.au/business-priorities/biosecurity>

¹¹⁹ See <https://www.daf.qld.gov.au/business-priorities/biosecurity>

The Coastal Act supports the protection of the coast and coastal resources through the provision of technical information to inform planning decisions. This includes the declaration of erosion prone areas and coastal management districts and the setting of development assessment codes for the Planning Act.

Key coastal management initiatives, which support the objectives of the Coastal Act, include:¹²⁰

- the **Coastal Management Plan 2013**, which provides non-binding guidance on coastal development;
- **Shoreline management plans**, which provide local governments and communities with erosion management information and strategies; and
- **QCoast2100**, which provides funding for projects to address storm tide, coastal erosion and rising sea levels resulting from climate change.¹²¹

The Act is integrated into the Planning Act and provides for the regulation of dredging, quarrying, canal construction, tidal works and other activities in the coastal zone, in particular in coastal management districts and erosion prone areas. DES administers it.¹²²

Economic Development Act 2012 (Qld)

The State Government directly plans and manages development in priority development areas (PDAs) and development schemes declared under this Act. PDAs and development schemes override local government planning schemes created under the *Planning Act 2016* (Qld). There are over 30 PDAs declared around Queensland for a mix of large urban and industrial development.¹²³ Economic Development Queensland, a commercial unit within the within the Department of State Development, Manufacturing, Infrastructure and Planning (DSDMIP), administers the Act.¹²⁴

Electricity Act 1994 (Qld)

The generation, transmission and supply of electricity in Queensland as part of the national electricity market are regulated under this Act. Generation of over 10 megawatts of electricity is also regulated as an environmentally relevant activity under the *Environmental Protection Act 1994* (Qld) (EPA).

Power generation in Queensland is overwhelmingly provided by coal-fired power stations, a major source of GHG emissions, but a range of programs are in place promoting the use of renewable energy (wind, solar and biomass) to reduce GHG emissions.¹²⁵ The Act also regulates the construction and maintenance of power lines, which are a significant source of vegetation clearing and habitat fragmentation. The Department of Natural Resources, Mines and Energy (DNRME) administers it.¹²⁶

Environmental Offsets Act 2014 (Qld)

This Act provides for environmental offsets to compensate for unavoidable impacts on significant environmental matters, (e.g. valuable species and ecosystems) on one site, by securing land at another site, and managing that land over a period of time, to replace those significant environmental matters which were lost. It is integrated into a number of State approval systems, including the development assessment system in the *Planning Act 2016* (Qld). DES administers it.¹²⁷

Environmental Protection Act 1994 (Qld)

The EPA is a major component of the Queensland environmental legal system. Its object is environmental protection within the context of ecologically sustainable development. To help achieve this the Act provides a wide range of tools. These include:

- environmental protection policies (EPPs);
- an environmental impact statement process for mining and petroleum activities;
- a system for development approvals integrated into the *Planning Act 2016* (Qld) for environmentally relevant activities (ERAs);
- special measures to reduce water pollution from “agricultural ERAs”, namely commercial sugar cane growing and cattle grazing in certain catchments of the Great Barrier Reef;
- environmental authorities for mining; petroleum extraction (this includes petroleum in both liquid and gas forms); and greenhouse gas storage.

¹²⁰ Links are available to these documents at <https://www.qld.gov.au/environment/coasts-waterways/plans/coastal-management/about-coastal-management>

¹²¹ See <http://www.qcoast2100.com.au/>

¹²² See <https://environment.des.qld.gov.au/coastal/development/>

¹²³ See <https://www.dsdmip.qld.gov.au/edq/priority-development-areas.html>

¹²⁴ See <https://www.statedevelopment.qld.gov.au/edq/economic-development.html>

¹²⁵ See <https://www.business.qld.gov.au/industries/mining-energy-water/energy>

¹²⁶ See <https://www.dnrme.qld.gov.au/energy>

¹²⁷ See <https://www.qld.gov.au/environment/pollution/management/offsets>

- a general environmental duty and a duty to notify of environmental harm;
- environmental evaluations and audits;
- transitional environmental programs;
- environmental protection orders;
- financial assurances;
- a system for managing contaminated land;
- environmental offences and executive officer liability;
- investigative powers of authorised officers including power to give an emergency direction;
- civil enforcement provisions to restrain breaches of the Act and widened standing for public interest litigants; and
- public reporting of information on the environment.

Three EPPs are currently in force under the Act:

- *Environmental Protection (Air) Policy* 2008;
- *Environmental Protection (Noise) Policy* 2008;
- *Environmental Protection (Water) Policy* 2009.



The EPA regulates ERAs such as power generation at the Swanbank E gas-fired power station near Brisbane. Photo: CS Energy (2010)

The *Environmental Protection Regulation* 2008 (Qld) lists 64 ERAs in Schedule 2, including: aquaculture; chemical manufacturing; oil refining; waste disposal; and sewage treatment. The

regulations also provide a regulatory regime for minor issues involving environmental nuisance as well as for implementing National Environment Protection Measures for the National Pollutant Inventory and Used Packaging Material.¹²⁸

The Act defines many terms but five definitions are particularly important to understand.¹²⁹

Environment includes:

- (a) ecosystems and their constituent parts, including people and communities;
- (b) all natural and physical resources;
- (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
- (d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).

Environmental value is ... a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety ... [or stated under an EPP].

Environmental harm is any adverse effect ... on an environmental value ...

Material environmental harm is environmental harm:

- (a) that is not trivial or negligible in nature, extent or context; or
- (b) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than [\$5000] but less than [\$50,000];
- (c) that results in costs of more than [\$5000] but less than [\$50,000] being incurred in taking appropriate action to—
 - (i) prevent or minimise the harm; and
 - (ii) rehabilitate or restore the environment to its condition before the harm.

Serious environmental harm is environmental harm:

- (a) that causes actual or potential harm to environmental values that is irreversible, of a high impact or widespread; or
- (b) that causes actual or potential harm to environmental values of an area of high conservation value or special significance; or
- (c) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than [\$50,000]; or
- (d) that results in costs of more than the threshold amount being incurred in taking appropriate action to—
 - (i) prevent or minimise the harm; and
 - (ii) rehabilitate or restore the environment to its condition before the harm.

¹²⁸ The *National Environment Protection Council (Queensland) Act* 1994 (Qld) is not listed here as the EP Regulation provides

for the practical implementation of NEPMs. See NEPC at <http://www.nepc.gov.au/>

¹²⁹ Defined in ss 8, 9, 14, 16 and 17 of the EPA.

These concepts are critical for understanding the application of the Act because they define the scope of liability created by the major offences in ss 437 and 438 of unlawfully causing serious or material environmental harm. Two points about them should be noted in particular:

- an environmental value is not a physical thing but a quality or physical characteristic represented by a physical part of the environment. For example, a tree, a forest or an endangered species is not an environmental value but each of these things may represent environmental values such as biological diversity, conservation value and ecological integrity. Similarly, water is not an environmental value but the suitability of water for drinking is an environmental value.
- environmental harm *is any adverse effect* on an environmental value. The source or type of harm is irrelevant. Environmental harm is, therefore, not limited to pollution or the release of contaminants, but includes all forms of harm to environmental values such as land clearing and soil erosion.¹³⁰ The Act can, therefore, potentially regulate any activity impacting on the environment.

Within the wide jurisdiction created for the prevention of environmental harm, the conceptual fulcrum of the Act is the relationship between ss 319 and 493A. Section 319 states the general environmental duty:

319 General environmental duty

- (1) A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the *general environmental duty*).
- (2) In deciding the measures required to be taken under subsection (1), regard must be had to, for example-
 - (a) the nature of the harm or potential harm; and
 - (b) the sensitivity of the receiving environment; and
 - (c) the current state of technical knowledge for the activity; and
 - (d) the likelihood of successful application of the different measures that might be taken; and
 - (e) the financial implications of the different measures as they would relate to the type of activity.

Section 493A provides, in effect, that an activity that causes serious or material environmental harm or environmental nuisance is unlawful unless it is approved under the EPA or the general

environmental duty is complied with. Relatively few activities are specifically approved under the EPA but by taking all reasonable and practicable measures to prevent or minimise environmental harm the people carrying them out avoid potential liability under the Act.

The concept of taking “reasonable care” is drawn from the well-known *Donoghue v Stevenson* principle¹³¹ of negligence at Common Law. The general environmental duty in s 319 of the EPA widens the Common Law concept of “neighbour” to include the environment.

DES is the lead agency for the administration of the Act;¹³² however, relatively minor environmental matters such as some water pollution offences and minor ERAs have been devolved to local governments.¹³³

Fire and Rescue Services Act 1990 (Qld)

Fire has a major role in the Australian ecosystem promoting regeneration and maintaining species diversity. However, outside of protected areas such as national parks, fire management in Queensland rarely considers this role. Instead, fire management is principally concerned with preventing fire entirely or controlled burning to reduce the fire hazard to property and livestock. The *Fire and Rescue Service Act 1990* (Qld) regulates fire safety and the use of fire. It prohibits the lighting of fires unless the fire is: authorised by a fire permit; less than 2m in length, width or height; in a fireplace; or for burning the carcass of a beast. It also provides for the declaration of local fire bans when there is a high fire risk. The Queensland Fire Service administers it and a volunteer network of 2,400 Local Fire Wardens issue permits for controlled burning.¹³⁴

Fisheries Act 1994 (Qld)

This Act creates the major regime regulating fishing, development in fisheries habitat areas, and damage to marine plants in Queensland. The complex network of federal and State laws regulating fisheries and protecting marine organisms such as turtles are listed in Appendix 3. The wide range of restrictions under the Act and *Fisheries Regulation 2008* (Qld) operate in conjunction with zoning plans for marine parks made under the *Great Barrier Reef Marine Park Act 1975* (Cth), EPBC Act and the *Marine Parks Act*

¹³⁰ See, e.g., *Maroochy Shire Council v Barns* [2001] QPEC 031; [2001] QCA 273, where logging for a forestry operation was held to cause unlawful material environmental harm.

¹³¹ *Donoghue v Stevenson* [1932] AC 562 at 580.

¹³² See <https://www.des.qld.gov.au/>

¹³³ See Ch 7, ss 98-108 of the EP Regulation.

¹³⁴ See <http://www.ruralfire.qld.gov.au>.

2004 (Qld). Some areas and fisheries are also regulated under the *Fisheries Management Act* 1991 (Cth) (e.g. tuna) and fishing in the Torres Strait is regulated under the *Torres Strait Fisheries Act* 1984 (Cth). Some marine species (e.g. dugong and turtles) are protected wildlife under the *Nature Conservation Act* 1992 (Qld) or protected under the EPBC Act (e.g. whales and dolphins).

Collectively, the main laws regulating fisheries in Queensland can be summarised as:

- **commercial fishing** requires a licence and is subject to special controls on fishing effort and equipment (e.g., under the *Fisheries (East Coast Trawl) Management Plan* 2010 (Qld), trawl nets must be fitted with specified turtle-excluder devices and other by-catch reduction devices);
- **zoning plans in marine parks** restrict fishing and other activities in areas such as the Great Barrier Reef Marine Park and the Moreton Bay Marine Park (e.g. fishing is prohibited in a “Green Zone”);¹³⁵
- **regulated waters** are declared¹³⁶ both inside and outside marine parks and restrict fishing for conservation purposes (e.g. dugong protection areas) or to protect fish stocks;
- **size limits** prescribe minimum and maximum legal size limits for many species of fish and other marine organisms such as crabs and crayfish;
- **bag limits** restrict the total number of fish of a species that a person may possess at any one time;
- **closed seasons** prohibit taking or possessing some species (e.g. barramundi) during certain times (e.g. a breeding season);
- **gear restrictions** apply to certain gear types such as maximum net lengths and prohibitions on the highly damaging fishing methods such as the use of explosives and poisons to catch fish;
- **noxious fish** (e.g. tilapia, carp and gambusia) are illegal to possess or keep, hatch, rear, sell, consign or place in any container;
- **protected sexes** of certain species (e.g. female mud crabs and sand (blue-swimmer) crabs) are fully protected and may not be deliberately killed or kept;

- **protected species** (e.g. dugongs, whales, dolphins and turtles) are fully protected and must not be taken;
- **traditional hunting rights** permit Aboriginal and Torres Strait Islanders to take otherwise protected species (e.g. dugong) for use traditional or customary use (but not to sell commercially and subject to animal cruelty laws); and
- **marine plants** (e.g. mangroves) and **fish habitat areas** are protected, including on inter-tidal land.¹³⁷

The *Fisheries Act* 1994 (Qld) is administered by Fisheries Queensland and the Queensland Boating and Fisheries Patrol (QBFP) within the Queensland Department of Agriculture and Fisheries (DAF). A great deal of information about fisheries regulation is available on its website.¹³⁸



Recreational fishermen holding mackerel and a coral trout caught by spearfishing in the Whitsunday Islands. Photo: Bill McGrath (1988)

Forestry Act 1959 (Qld)

The removal of timber, other forest products and quarry material from State land is regulated under this Act. State land includes State forests, leasehold land and unallocated State land. It covers 80% of the State. “Forest products” includes all vegetable growth and material of vegetable origin. For designated timber producing areas such as State forests, “forest products” also include honey, native animals, fossils and quarry material. Section 45 vests

¹³⁵ See GBRMPA, <http://www.gbrmpa.gov.au/zoning-permits-and-plans/zoning/zoning-maps> and QPWS, <https://www.qld.gov.au/environment/coasts-waterways/marine-parks/>

¹³⁶ Under the *Fisheries Regulation* 2008 (Qld), Sch 1.

¹³⁷ The *Planning Act* 2016 (Qld) provides the main approval system for damaging marine plants or fish habitat areas.

¹³⁸ See <https://www.daf.qld.gov.au/business-priorities/fisheries>

ownership of all forest products in the Crown. Sections 53-54 prohibit interference with forest products on State land other than under a permit granted under the Act or another Act. DAF administers it.¹³⁹

Gene Technology (Queensland) Act 2016 (Qld)

This Act automatically applies the *Gene Technology Act* 2000 (Cth) as laws of Queensland to regulate research, production and release of genetically modified organisms and genetically modified crops and products. It is administered by the (national) Office of Gene Technology Regulator.¹⁴⁰

Geothermal Energy Act 2010 (Qld)

The exploration and production of geothermal energy in Queensland is regulated under this Act. Geothermal energy is heat energy derived from the earth's natural (subsurface) heat. There is currently very little use of this energy source in Queensland. However, the Eromanga Basin in South-West Queensland contains abnormally hot geological formations ("hot dry rocks") and is being investigated for geothermal energy production. The Act provides for the granting of authorities known as "geothermal tenures" to explore for or produce geothermal energy. DNRME administers it.¹⁴¹

Greenhouse Gas Storage Act 2009 (Qld)

Long-term underground storage of greenhouse gases (GHG) in Queensland is regulated under this Act. Carbon capture and storage (CCS) of carbon dioxide from coal-fired power stations and other large emitters is considered an important technology to address climate change but is still in the research and development stage. No industrial scale CCS plants are yet in operation or shown to be economically feasible.

This Act provides a framework for the granting of "GHG authorities" to explore for or use underground geological formations or structures to store carbon dioxide. It provides for the creation and registration of GHG authorities, ownership of the GHGs stored in a GHG reservoir and powers if the reservoir leaks GHGs to the atmosphere or contaminates groundwater. It applies to storage on land and in

coastal waters. Outside coastal waters the *Offshore Petroleum and Greenhouse Gas Storage Act* 2008 (Cth) applies.

This Act is principally concerned with tenure and access issues for GHG storage. As for mining and petroleum production, the environmental protection aspects of GHG storage are regulated under the EPA. GHG storage requires an environmental authority under that Act.

DNRME administers GHG storage tenures under the *GHG Storage Act*¹⁴² while DES administers the environmental aspects under the EPA.¹⁴³

Integrated Resort Development Act 1987 (Qld)

This is a legacy piece of legislation and applies to only a few areas along the Queensland coast such as Hope Island at the Gold Coast.¹⁴⁴ It allowed for schemes approved by the State Government to override local government planning schemes for large resort developments along the coast. It has generally been replaced by the *Planning Act* 2016 (Qld) and the *Body Corporate and Community Management Act* 1997 (Qld). No further approved schemes can be gazetted under it¹⁴⁵ but it has not been repealed. DSDMIP administers it.¹⁴⁶

Land Act 1994 (Qld)

Land ownership is a fundamental control on the use and development land. This Act provides for the Queensland Government to create different forms of land ownership known as "tenures". Around 70% of land in Queensland is owned by the State but leased to private individuals and companies in a tenure known as "leasehold land". Around 5% of land in Queensland is owned by the State and set aside for nature conservation as national parks. Around 20% of Queensland has been sold by the State to private owners and held in a tenure known as "freehold land". Even though it is privately owned, freehold land is still subject to environmental laws such as local government planning controls.¹⁴⁷

The decision to lease land, sell land as freehold, dedicate it as national park or other tenure will have an immense effect on the use of the land. This creates the fabric of tenures, which then in practice heavily constrain the environmental legal system due to the property rights associated with each tenure and a

¹³⁹ See <https://www.daf.qld.gov.au/business-priorities/forestry>

¹⁴⁰ See <https://www.business.qld.gov.au/industries/science-it-creative/science/scientific-research/regulation-ethics> and <http://www.ogtr.gov.au/>

¹⁴¹ See <https://www.dnrme.qld.gov.au/energy>

¹⁴² See <https://www.dnrme.qld.gov.au/energy>

¹⁴³ See <http://www.des.qld.gov.au>

¹⁴⁴ See *Hope Island Resort Holdings v Bridge Investment Holdings Pty Ltd* [2004] QPEC 003; [2004] QCA 235.

¹⁴⁵ See section 4(1A) of the IRDA.

¹⁴⁶ There is no useful website for this Act.

¹⁴⁷ *Bone v Mothershaw* [2003] 2 Qd R 600.

reluctance to interfere with those rights without paying compensation. This reluctance is a political rather than legal matter as there is no right of compensation at Common Law for the acquisition of property by State governments.¹⁴⁸

The *Land Act* is not the only piece of legislation under which different land tenures can be created. Mining and petroleum leases are important forms of tenure created under other pieces of legislation.¹⁴⁹ They can be granted by the State government over other tenures, including freehold land, to allow mining of minerals or extraction of petroleum or gas. Native title is another form of land tenure, which recognises Aboriginal and Torres Strait Islanders traditional land tenure rules. It has been extinguished on all freehold land but may still exist on other forms of tenure. All of these different tenures affect legal rights to use and develop land.

DNRME administers the *Land Act*.¹⁵⁰

Local Government Act 2009 (Qld)

Local governments are established under this Act to govern a city, shire or region.¹⁵¹ The number of local governments was reduced from 157 to 73 in 2008 by amalgamating many small councils and creating regional councils. There are currently 77 local governments. Somewhat confusingly, “regional councils” are termed “local governments” under the Act. “Regional councils” do not represent an intermediate tier between local government and the State Government as their name might suggest.

Local governments are granted planning and regulatory powers under the *Planning Act* 2016 (Qld) and a variety of other laws. Brisbane City Council has its own Act, the *City of Brisbane Act* 2010 (Qld). The *Local Government Act* also contains power for local governments to pass local laws, which apply within a local government area to a range of relatively minor environmental issues such as dog licences. In some areas they are also used to regulate more serious environmental issues such as vegetation clearing. The Department of Local Government, Racing and Multicultural Affairs administers the Act¹⁵² and maintains a database of local laws.¹⁵³ Local governments publish detailed

planning and regulatory information on their own websites.¹⁵⁴

Marine Parks Act 2004 (Qld)

This Act is the marine equivalent of the *Nature Conservation Act* 1992 (Qld). It provides a framework for the creation of marine parks and the protection of marine species. Three marine parks have been created under it: Great Barrier Reef (GBR) Coast Marine Park; Great Sandy Marine Park; and Moreton Bay Marine Park. The GBR Coast Marine Park complements (in adjacent State waters) the GBR Marine Park created under the *Great Barrier Reef Marine Park Act* 1975 (Cth). The Act creates zoning plans for multiple-use management and a permit system for activities within marine parks such as collecting marine products or commercial whale watching. The Queensland Parks & Wildlife Service (QPWS), part of DES, administers it.¹⁵⁵

Mineral Resources Act 1989 (Qld)

The MRA provides a framework to regulate mining tenures and royalties. Extraction of petroleum and gas, also major industries, are regulated separately under the *Petroleum and Gas (Production and Safety) Act* 2004 (Qld). The *Mineral and Energy Resources (Common Provisions) Act* 2014 (Qld) contains administrative provisions that are common to resource acts, including the MRA.¹⁵⁶

The MRA vests ownership of minerals, with limited exceptions, in the Crown (i.e. the State Government). A royalty is payable to the Crown for the right to extract minerals.

The MRA creates different tenures for different mining activities such as prospecting, exploring and mining. A mining lease is the most important tenure as it allows the extraction of minerals. Exploration permits and mining leases may be granted over private land without the owner’s consent but are subject to compensation for loss of the use of the land. In effect, mining may occur at virtually any location where there are sufficient mineral reserves and where the public interest (including any deleterious environmental effects) warrants the grant of the mining lease. The only exception is that mining

¹⁴⁸ See *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399.

¹⁴⁹ E.g., the *Mineral Resources Act* 1989 (Qld).

¹⁵⁰ See <https://www.dnrme.qld.gov.au/land-water>

¹⁵¹ For a list of local governments see <http://www.lgaq.asn.au/> and <http://www.localgovernment.qld.gov.au/>.

¹⁵² See <http://www.dlgrma.qld.gov.au/>

¹⁵³ See <http://www.dlgrma.qld.gov.au/local-government/laws.html>

¹⁵⁴ See, e.g., <http://www.brisbane.qld.gov.au/>.

¹⁵⁵ See <https://www.qld.gov.au/environment/coasts-waterways/marine-parks>

¹⁵⁶ Note also the *Strong and Sustainable Resource Communities Act* 2017 (Qld), which aims to alleviate social impacts of large resource projects, particularly due to fly-in-fly-out workforces.

is prohibited in a national park or conservation park.¹⁵⁷

In an attempt to separate the promotion of mining from the regulation of its adverse impacts, the environmental impacts of mining are regulated separately under the EPA. Mines require an environmental authority under that Act to operate.



Queensland produced over 200 million tonnes of black, saleable coal in 2010.¹⁵⁸ Photo: Tony Nielsen (2008).

Mining is accepted development under the *Planning Act 2016* (Qld), as is petroleum extraction. This means that the regulation of mining and petroleum extraction operates separately from the development assessment system that regulates all other forms of development in Queensland. This is a fundamental division in the regulation of onshore activities in Queensland (Appendix 5).

A separate licensing system is provided under the *Fossicking Act 1994* (Qld) for anyone who searches for gemstones, alluvial gold and other fossicking materials on the ground's surface or by digging with a hand tool.

DNRME is responsible for promoting mining development and administers the MRA.¹⁵⁹ DES regulates the environmental aspects of mining under the EPA. Any person has a right to object to the grant of a mining lease in the Land Court.¹⁶⁰

Native Title (Queensland) Act 1993 (Qld)

Past acts attributable to the Queensland Government that may have affected or extinguished native title are declared to be valid by this Act, which was enacted after the recognition of native title by the High Court in 1992. Importantly for environmental law, s 17 declares that the State Government owns all natural resources and has the right to use, regulate and control the flow of waters and fishing access rights. DNRME is the lead agency for native title issues.¹⁶¹

Nature Conservation Act 1992 (Qld)

A framework is established by this Act for the creation and management of protected areas (such as national parks) and the protection of native flora and fauna (protected wildlife). Protected areas cover 4.6% of the State.¹⁶²

It is unlawful to take, use, keep or interfere with a cultural or natural resource of a protected area (s 62). Outside of protected areas, it is unlawful to kill, injure or otherwise take protected wildlife without approval, unless the taking was accidental (ss 88-89). Many species of native plants and almost all vertebrate native animals in Queensland are protected wildlife under the Act, including birds, reptiles and mammals (other than dingoes).

The Act allows for protected animals to be taken in accordance with conservation plans and several such plans have been created to allow, for example, for kangaroo culling and management of problem crocodiles. A complex system of regulations has also been created under the Act with permit systems for activities such as camping in national parks and keeping native wildlife.

QPWS administers the Act within DES.¹⁶³ Members of the public can also seek to enforce the Act in the Planning and Environment Court (s 173D).¹⁶⁴

The Queensland Auditor-General recently released an important report examining difficulties with

¹⁵⁷ Under s 27 of the *Nature Conservation Act 1992* (Qld).

¹⁵⁸ Data from ABARES at <http://www.abares.gov.au>.

¹⁵⁹ See <https://www.dnrme.qld.gov.au/mining-resources>

¹⁶⁰ See <http://www.landcourt.qld.gov.au>.

¹⁶¹ See <https://www.qld.gov.au/atsi/environment-land-use-native-title>.

¹⁶² Environmental Protection Agency, *State of the Environment Queensland 2007* (EPA, Brisbane, 1999), p 249.

¹⁶³ See <https://www.npsr.qld.gov.au/>

¹⁶⁴ See, e.g., <http://www.envlaw.com.au/frippery.html>.

conserving threatened species under the Act and making recommendations to improve it.¹⁶⁵

Nuclear Facilities Prohibition Act 2007 (Qld)

The construction and operation of nuclear facilities such as nuclear power plants are prohibited by this Act (with the exception of nuclear powered warships). It allows for the storage and disposal of waste radioactive material from research or medical uses. It does not prohibit exploration or mining of uranium but the current Queensland Government has a policy opposing such mines. DSDMIP administers it.¹⁶⁶

Offshore Minerals Act 1998 (Qld)

A little-used framework for regulating the exploration and mining of minerals (defined not to include petroleum) in Queensland coastal waters is established under this Act. It reflects the Offshore Constitutional Settlement of 1979. It mirrors the *Offshore Minerals Act 1994* (Cth) in establishing a system for exploration permits, mining leases, other tenures and the payment of royalties. DNRME administers it.¹⁶⁷

Petroleum and Gas (Production and Safety) Act 2004 (Qld)

The tenure, royalty and safety aspects of petroleum exploration, production and pipelines are regulated under this Act. The *Petroleum Act 1923* (Qld) continues to regulate some petroleum licences granted prior to 1993 due to native title issues.

A petroleum lease under the Act is required for the extraction of petroleum. “Petroleum” is defined in s 10 of the Act, in effect, as any hydrocarbon in gas or liquid form, including products extracted from solids such as coal or oil shale. This means that, in addition to liquid petroleum products such as oil, the Act regulates gas production, including of liquefied natural gas and coal seam gas (CSG).

As for mining, environmental protection aspects of petroleum extraction are regulated under the EPA. Petroleum production requires an environmental authority under that Act.

DNRME administers petroleum tenures and royalties under this Act¹⁶⁸ while DES regulates the

environmental aspects of petroleum extraction under the EPA.¹⁶⁹



Petroleum exploration and extraction are prohibited in Queensland's iconic GBR. Photo: Ove Hoegh-Guldberg

Petroleum (Submerged Lands) Act 1982 (Qld)

The tenure and royalty aspects of exploration and production of petroleum from Queensland waters are regulated under this Act. It operates under the Offshore Constitutional Settlement of 1979 and in conjunction with the *Offshore Petroleum and Greenhouse Gas Storage Act 2008* (Cth).

As for mining and petroleum production on land, environmental protection aspects of petroleum extraction in coastal waters are regulated under the *Environmental Protection Act 1994* (Qld). Petroleum production in coastal waters requires an environmental authority under that Act.

¹⁶⁵ See Queensland Audit Office, *Conserving Threatened Species* (Report 7: 2018-19 (QAO, Brisbane, 2018), <https://www.qao.qld.gov.au/reports-parliament/conserving-threatened-species>

¹⁶⁶ There is no useful website for this Act.

¹⁶⁷ See <https://www.dnrme.qld.gov.au/mining-resources>

¹⁶⁸ See <https://www.dnrme.qld.gov.au/mining-resources>

¹⁶⁹ See Ch 5 of the EPA.

As exploration and production of petroleum and gas are banned within the Great Barrier Reef Marine Park under the *Great Barrier Reef Marine Park Act* 1975 (Cth), most of the Queensland coast is unavailable for petroleum development.

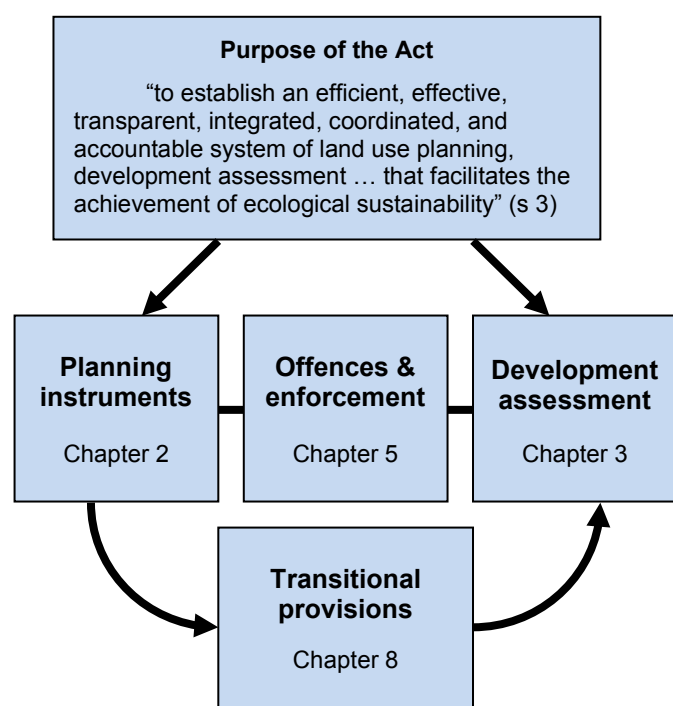
DNRME administers the offshore petroleum legislation¹⁷⁰ while DES administers the environmental legislation.

Planning Act 2016 (Qld)

The *Planning Act* 2016 (Qld) (Planning Act) recently replaced the *Sustainable Planning Act* 2009 (Qld) (SPA) as Queensland's principal planning legislation.¹⁷¹ Many planning schemes and other planning documents still refer to past categories under SPA, therefore, it is necessary to be aware of the past categories and apply transitional provisions.

A conceptual structure of the Planning Act is shown in Figure 4.

Figure 4: Conceptual structure of major parts of the Planning Act



The Act's overarching purpose is “ecological sustainability” and it has two major limbs: planning instruments and the development assessment system. Offences for carrying out unlawful development and enforcement provisions are central to implementing the Act and ensuring that planning instruments and development assessment system are not “toothless

tigers”. Transitional provisions in Chapter 8 link planning schemes prepared under previous legislation, including schemes based on different concepts prior to Act, with the new development assessment process.

The Act recognises two state planning instruments:

- the State Planning Policy (SPP); and
- the regional plans.

The Act also recognises three statutory local planning instruments:

- planning schemes;
- temporary local planning instruments; and
- planning scheme policies.

The Act also provides for supporting statutory instruments to promote consistent planning and development processes:

- Minister's Guidelines and Rules;
- Development Assessment Rules; and
- State Development Assessment Provisions.

Together, these instruments guide local governments in creating their local planning instruments and the assessment process.

Regional plans are quite broad scale but override local government planning schemes to the extent that they are inconsistent. Importantly, the SEQ regional plan provides a “footprint” within which urban development must be contained to address concerns about urban sprawl. There are several other forms of regional planning for specific issues or areas under other legislation however the regional planning processes under the Planning Act have become paramount.¹⁷²

While regional plans and other State-level plans are important to consider, local government planning schemes provide the bulk of detailed land-use and development regulation at the level of an individual parcel of land.¹⁷³

The basic rule for assessing a development application under the Planning Act is that it is likely to be approved if it is consistent with relevant planning instruments. Conversely, the more a development application conflicts with any relevant planning instruments, the less likely it is to be approved. This relationship is the core of virtually

¹⁷⁰ See <https://www.dnrme.qld.gov.au/mining-resources>

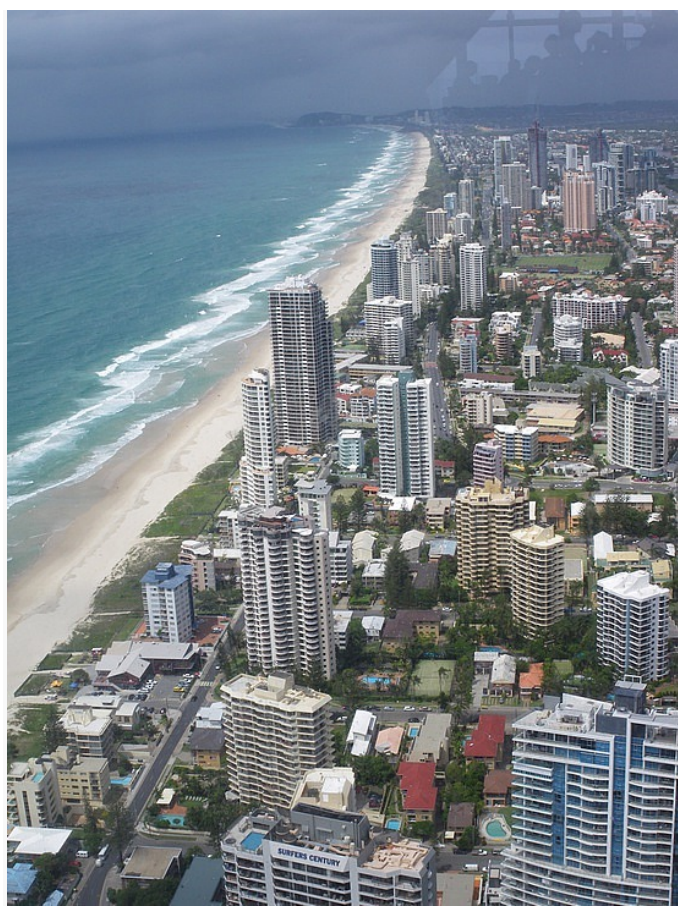
¹⁷¹ See generally <https://planning.dsdmip.qld.gov.au/>

¹⁷² See <https://planning.dsdmip.qld.gov.au/planning/better-planning/state-planning/regional-plans>

¹⁷³ See, e.g., the *Brisbane City Plan* 2014 at <https://www.brisbane.qld.gov.au/>

any planning system, including under the Planning Act.

If the local government (or other assessment manager) decides to approve the development application, it may impose conditions that are relevant or reasonable.¹⁷⁴ A “relevant” condition is one that properly relates to the legislation under which it is imposed (e.g. for a local government, to maintain standards in local development or in some other legitimate sense).¹⁷⁵ A “reasonable” condition is one that is a reasonable response to the changes the development will cause (e.g. increased traffic to a road or bridge).¹⁷⁶ For example, in response to a development application to build a house on the banks of a river, a relevant and reasonable condition could be that “No vegetation is to be damaged or removed within 20 m of the riverbank”.



Planning controls have increased dramatically in response to intense development pressure. Photo: Travelpod.

Conditions are the basic mechanism for minimising adverse impacts and for requiring public infrastructure such as parklands. They can be highly contentious where they impose significant costs on a development, such as conditions to upgrade adjoining roads or traffic intersections.

The development assessment process normally ends when a decision is made by the assessment manager but where the applicant disagrees with the decision they may appeal to the Planning and Environment (P&E) Court. A third party submitter may also appeal against a decision to approve impact assessable development.¹⁷⁷ The P&E Court considers the development application again from the beginning and normally hears expert witnesses on the issues in dispute. The Court is not bound by the assessment manager’s decision in any way.

The primary role of the P&E Court is to decide any appeal that comes before it according to law and not political considerations. For this purpose, the law is essentially contained in the Planning Act and any relevant planning instruments. A good example of the approach taken by the Court is the decision in *Luke v Maroochy Shire Council* [2003] QPELR 447; [2003] QPEC 5.¹⁷⁸

Two principles emerge from decisions of the P&E Court for the assessment of environmental issues. The first is that environmental values not recognised in a planning scheme or other planning instrument will generally not be protected:

The Court has no plenary power to do whatever may be seen to be of environmental advantage to the community. It must exercise the jurisdiction which it is given pursuant to the relevant provisions of the Act. The subject land is privately owned. That its owners should expect to be able to develop it in accordance with the relevant instruments of statutory planning control is fundamental to proper and fair town planning.¹⁷⁹

The second principle is that the preparation of an environmental management plan or similar plan is a powerful tool for persuading the Court that environmental issues have been adequately addressed:

¹⁷⁴ Planning Act, s 65; *Maroochy SC v Wise* (1998) 100 LGERA 311; *Proctor v BCC* (1993) 81 LGERA 398.

¹⁷⁵ *Lloyd v Robinson* (1962) 107 CLR 142; *Proctor*.

¹⁷⁶ *Cardwell Shire Council v King Ranch Australia PL* (1984) 54 LGERA 110, 113; *Proctor v BCC* (1993) 81 LGERA 398.

¹⁷⁷ O’Hart A, *The Community Litigants Handbook* (3rd ed, Environmental Defenders Office, Brisbane, 2018 (forthcoming) gives a practical explanation of planning appeals. See also <http://www.edo.org.au> and <http://www.envlaw.com.au>.

¹⁷⁸ See <https://www.sclqld.org.au/caselaw/QPEC/2003/5> (other P&E Court decisions are also available on the Court’s website).

¹⁷⁹ *Hollingsworth v BCC* (1975) Planner LGC 92; *Sheeziel & White v Noosa SC* (1980) Planner LGC 130; *Liongrain PL v Albert SC* (1995) QPLR 353, 355; *Stradbroke Island Management Organisation Inc v Redland SC* [2002] QCA 277; *Edgarange PL v BCC* [2001] QPEC 62 at [98]; *Luke v Maroochy SC* [2003] QPEC 5 at [45]–[48].

... the existence of potential problems, however serious, is not in itself sufficient to rule out a proposal provided that evidence is given to demonstrate, on the balance of probabilities, that there are ways and means (that can be adopted feasibly) of guarding against such problems.¹⁸⁰

Thus, while the P&E Court provides an important check on decision-making, the protection that it can give to genuine environmental considerations is largely dependent on the relevant planning scheme.

The Planning Act is administered largely by local governments together with State Government agencies responsible for the planning processes linked to it. DSDMIP is the lead agency for it¹⁸¹ and provides the (single) State Assessment and Referral Agency (SARA).¹⁸²

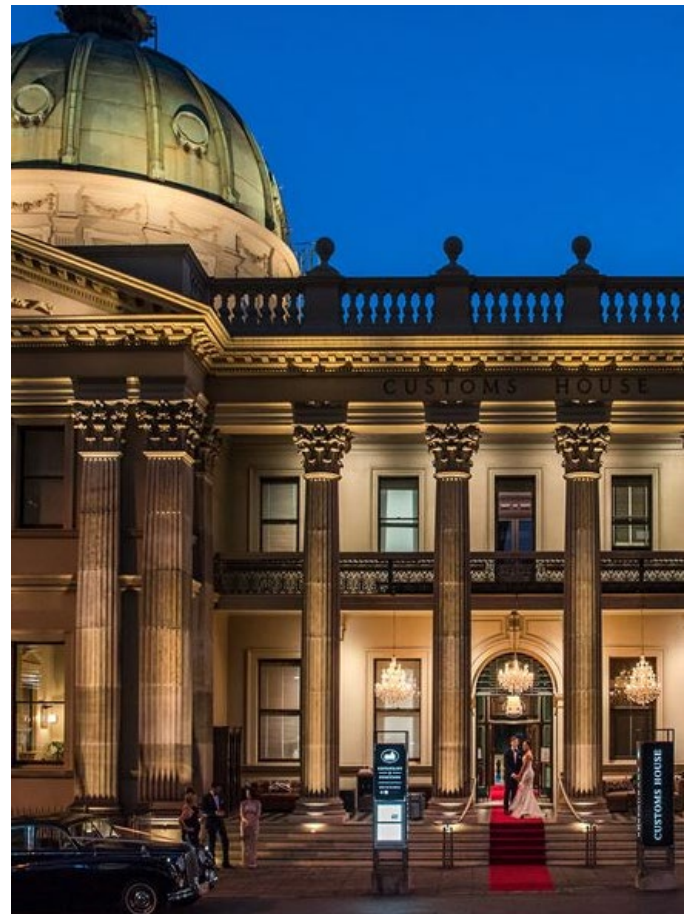
Public Health Act 2005 (Qld)

A framework for the protection of public health is provided by this Act. For example, it prohibits the use of lead in parts of buildings which are likely to be easily accessible to children and provides for the regulation of health-related nuisances. It also establishes a system for the control of vermin and disease vectors such as rats and mosquitoes. It provides extensive emergency powers to address outbreaks of infectious diseases such as Severe Acute Respiratory Syndrome (SARS). The *Public Health Regulation 2005* (Qld) regulates removal, cutting and disposal of asbestos containing material in non-workplace areas.¹⁸³ The regulations also provide controls on things and places that may harbour mosquitos, rats and mice. The Act is administered by local government and Queensland Health.¹⁸⁴

Queensland Heritage Act 1992 (Qld)

This Act operates in tandem with the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) to protect Queensland's cultural heritage. The Act creates a framework to protect places or objects of cultural heritage significance for aesthetic, architectural, historic, scientific, social or technological reasons. The principal mechanism through which the Act operates is the Heritage Register. Development of places listed on the register is assessed under the *Planning Act 2016*

(Qld). The Act is administered by the Queensland Heritage Council and the Cultural Heritage Unit of DES.¹⁸⁵



Customs House is listed on the Queensland Heritage Register. Photo: Customs House

Recreation Areas Management Act 2006 (Qld)

A framework for a statutory board to manage declared recreation areas is created by this Act. There are six declared areas: Fraser Island, Moreton Island; Inskip Peninsula; Green Island; Bribie Island; and Cooloola. QPWS administers it on behalf of the Queensland Recreational Areas Management Board.¹⁸⁶

Regional Planning Interests Act 2014 (Qld)

This Act was a response to rural community concerns about mining and coal seam gas (CSG) development encroaching on high value agricultural land. Plans

¹⁸⁰ *Davjan v Noosa SC* (1981) QPLR 69; *Lane v Gatton SC* (1988) QPLR 49; *Esteedog PL v Maroochy SC* (1991) QPLR 7 at 9; *GFW Gelatine International Ltd v Beaudesert SC* (1993) QPLR 342 at 352; *Pinjarra Hills v BCC* (1995) QPLR 334 at 349.

¹⁸¹ See <http://www.dsdmip.qld.gov.au/planning/planning.html>

¹⁸² See <https://planning.dsdmip.qld.gov.au/planning/spa-system/development-under-spa/development-assessment-under-spa/state-assessment-and-referral-agency>

¹⁸³ The *Work Health and Safety Act 2011* (Qld) regulates activities involving asbestos in a workplace.

¹⁸⁴ See <http://www.health.qld.gov.au/publichealthact/default.asp>

¹⁸⁵ See <https://www.qld.gov.au/environment/land/heritage>

¹⁸⁶ See <http://www.derm.qld.gov.au>.

created under it identify and provide some protection from mining and CSG for:

- living areas in regional communities;
- high-quality agricultural areas;
- strategic cropping land; and
- regionally important environmental areas.

DSDMIP administers it.¹⁸⁷

Soil Conservation Act 1986 (Qld)

A little used framework for the management of soil erosion from agricultural land is created by this Act. Farmers may voluntarily enter Property Management Plans to provide for soil conservation. Project Areas may be declared to manage soil erosion in a specified area. Project Areas have been declared around Toowoomba, Bundaberg and Kingaroy. DNRME administers the Act.¹⁸⁸

State Development and Public Works Organisation Act 1971 (Qld)

This is a nebulous Act drawing together a range of powers and functions used by the State Government to facilitate large projects. It provides a formal environmental impact statement process for coordinated projects (previously called “significant projects”). It provides a range of mechanisms to facilitate large development projects including declarations of prescribed development of State significance, State development areas and a power to compulsorily acquire land for large infrastructure facilities by private companies. It is administered by the Coordinator-General.¹⁸⁹

Transport Infrastructure Act 1994 (Qld)

The planning, construction and operation of State roads, railways and ports are facilitated under this Act and the *Transport Planning and Coordination Act* 1994 (Qld). The construction of these facilities has major direct and indirect effects on the environment due to physical destruction, disturbance and subsequent increased use of the environment. This Act therefore forms an important component of the environmental planning regime for Queensland. Note that strategic port land is not subject to local government planning schemes (s 172). The Act is

administered by the Department of Transport and Main Roads¹⁹⁰ and various port authorities.¹⁹¹

Related transport legislation and regulations, such as the *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation* 2010 (Qld), provide important standards limiting noise and emissions from vehicles.

Transport Operations (Marine Pollution) Act 1995 (Qld)

Marine pollution from ships in Queensland’s coastal waters is regulated under this Act. It was enacted pursuant to the mechanism provided in the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) for the accreditation of State laws implementing MARPOL 73/78. Maritime Safety Queensland administers it.¹⁹²

Vegetation Management Act 1999 (Qld)

Vegetation management laws in Queensland have been very controversial. Prior to the 1990s, there was little regulation of clearing. In late 1997, a system to control vegetation clearing on the 70% of Queensland held as leasehold and other State lands commenced under the *Land Act* 1994 (Qld). In late 2000, using a new mapping and classification system, a separate regime commenced in the *Vegetation Management Act* 1999 (Qld) (VMA) and *Integrated Planning Act* 1997 (Qld) (IPA) to regulate clearing on the 30% of Queensland held as freehold land and freeholding leases.

Faced with ongoing controversy and high levels of clearing, in 2004 the State Government introduced major reforms to phase out broadscale land clearing for agriculture by 31 December 2006. The reforms collapsed the system of clearing laws for State lands in the *Lands Act* 1994 (Qld) into the VMA/IPA system. The IPA component of that system is now contained in the *Planning Act* 2016 (Qld).

Vegetation management on approximately 95% of Queensland is now regulated primarily under the VMA/Planning Act system.

The VMA does not itself regulate vegetation management. Instead, the trigger and process for assessment, together with the offence for clearing without approval, are contained in the Planning Act.

¹⁸⁷ See <https://planning.dsdmip.qld.gov.au/planning/regional-planning-interests-act>

¹⁸⁸ See <https://www.dnrme.qld.gov.au/land-water>. See, e.g., *Morrissy v Department of Natural Resources & Mines* [2003] QLC 0012.

¹⁸⁹ See <https://www.statedevelopment.qld.gov.au/coordinator-general/>

¹⁹⁰ See <http://www.tmr.qld.gov.au>.

¹⁹¹ E.g. Port of Brisbane at <http://www.portbris.com.au/>

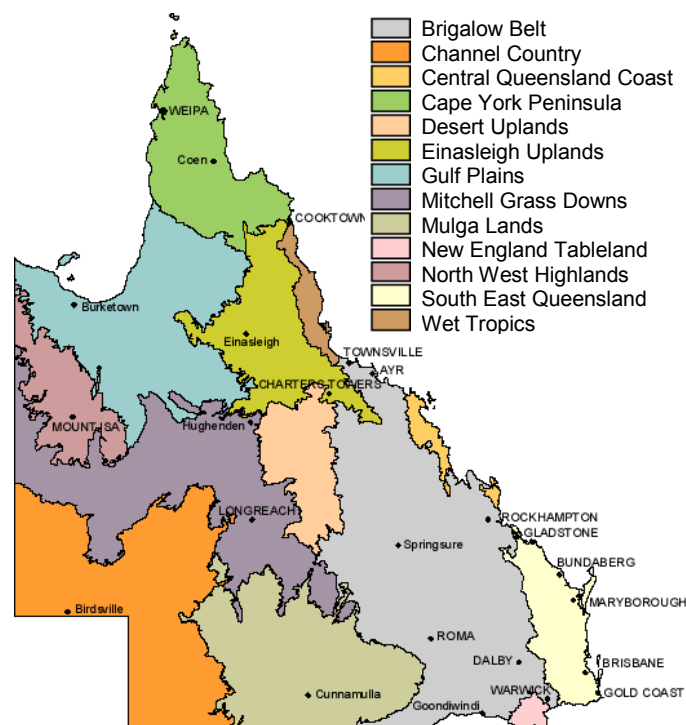
¹⁹² See <http://www.msq.qld.gov.au/>.

The VMA provides for the preparation of maps to identify areas of high conservation value, areas vulnerable to land degradation and remnant vegetation. The VMA also provides for policies against which applications for clearing vegetation are assessed.

A system for classifying vegetation in “regional ecosystems” (REs) provides the basis for vegetation management in Queensland.¹⁹³ Under this system, the State is divided into 13 bioregions (shown in Figure 6) based on broad landscape patterns that reflect the geology, climate patterns, and broad groupings of plants and animals.

Figure 6: Bioregions under the VMA

Source: DERM



REs are vegetation communities associated with particular landforms within each bioregion. REs are assigned a unique three digit code reflecting its bioregion, land zone, and dominant vegetation. For example, *Melaleuca quinquenervia* open forest on coastal alluvial plains is classified as “RE 12.3.5”.

The Queensland Herbarium has mapped REs using satellite imagery, aerial photography, and on-ground studies. These maps show the extent of remnant vegetation in each RE across the State. REs are assigned a conservation status under the

Vegetation Management Regulations 2000 (Qld) based on their current extent in a bioregion:

- **Endangered** if less than 10% of the pre-clearing extent remains, or if 10-30% of the pre-clearing extent remains and the area of remnant vegetation is less than 10,000 ha.
- **Of concern** if 10-30% of the pre-clearing extent remains, or if more than 30% of the pre-clearing extent remains but the area of remnant vegetation is less than 10,000 ha.
- **Least concern** if more than 30% of the pre-clearing extent remains, and the area of remnant vegetation is more than 10,000 ha.¹⁹⁴

The main trigger requiring development approval for vegetation clearing is in the *Planning Regulation* 2017 (Qld). This is linked to a large list of exemptions in the regulation for clearing that does not require approval such as clearing to establish a necessary firebreak or to maintain a garden or orchard. DNRME administers the VMA.¹⁹⁵

Water Act 2000 (Qld)

This Act provides a framework for the planning and regulation of the use and control of water in Queensland. This includes regulating both major water impoundments (dams, weirs, and barrages) and extraction by pumping for irrigation and other uses. The Act provides a wide range of tools for the regulation of in-stream (i.e. watercourses, lakes and springs) and overland water flow and groundwater within the context of “sustainable management and efficient use” of water.¹⁹⁶

The Act provides for Water Resource Plans, generally on a catchment-by-catchment basis, to be prepared through a consultative process. These plans are meant to balance water allocations (i.e. human use) with environmental flows (i.e. leaving water in a watercourse to maintain natural processes) (s 46). The highly variable nature of most Queensland catchments makes this a very difficult task. Complex computer models known as Integrated Quantity and Quality Models (IQQM) are used to create these plans based on available historic records for each catchment.

Other important planning tools in the Act operate within the parameters established by the IQQM modeling of each catchment. Water Use Plans may be prepared for areas at risk of land or water

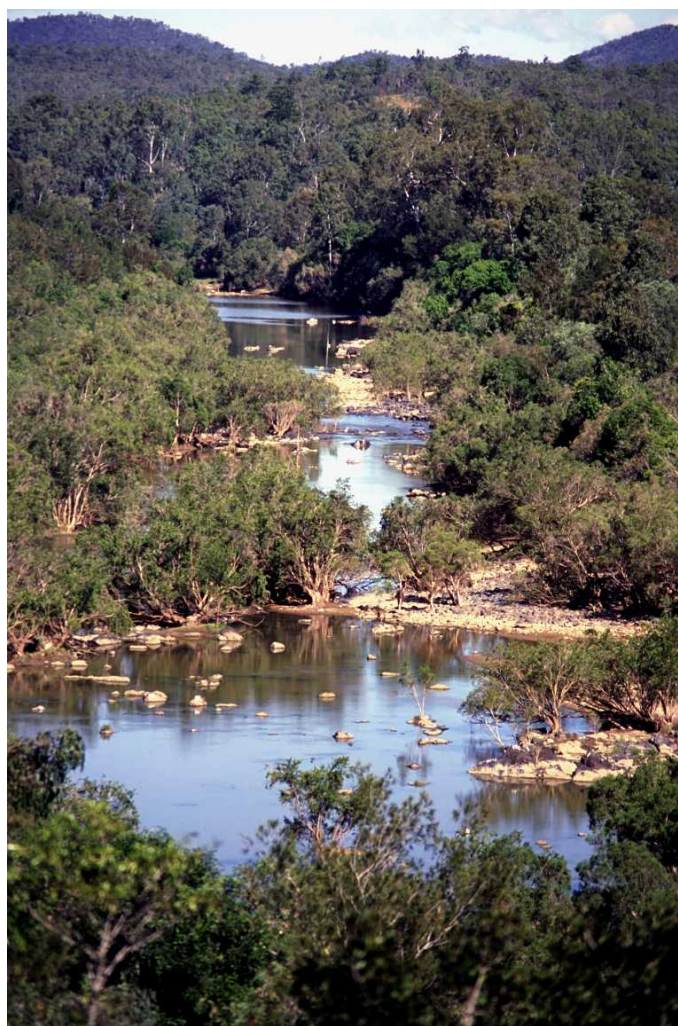
¹⁹³ See Sattler P and Williams R (eds), *The Conservation Status of Queensland's Bioregional Ecosystems* (EPA, Brisbane, 1999).

¹⁹⁴ Until recently, “Least concern” REs were referred to as “Not of concern”.

¹⁹⁵ See <https://www.dnrme.qld.gov.au/land-water>.

¹⁹⁶ Water efficiency standards & labelling are regulated under the *Water Efficiency Labelling and Standards Act* 2005 (Qld).

degradation, for example, due to rising underground water levels, salinisation, deteriorating water quality, water logging of soils, destabilisation of the bed and banks of watercourses, damage to the riverine environment or increasing soil erosion (s 60). Land and Water Management Plans may also be submitted by individual landowners applying to irrigate their land (s 73). Resource Operations Plans provide practical operational details of the implementation of a Water Resource Plan (s 95) under which Resource Operations Licences (s 108) and Water Allocations (s 122), Water Licences (s 206) and Water Permits (s 237) may be granted.



A reach of the Burnett River prior to being flooded by the Paradise Dam. Photo: Carl Moller (2003)

The Act is integrated into the *Planning Act* 2016 (Qld). Two approvals are now required for extraction of water from a watercourse and other matters regulated under the Act:

- A **resource entitlement** or allocation (for water this may be referred to as a water entitlement, water allocation or water licence), which provides permission to extract or use a water resource. Applications for resource entitlements are assessed against criteria in the Act and any relevant Water Resource Plan and Resource Operations Plan.
- A **development permit**, which provides permission for development associated with the use of water that is accepted or assessable development under the *Planning Regulation* 2017 (Qld). Assessable development includes all work in a watercourse, lake or spring that involves taking or interfering with water (e.g. a pump, stream re-direction, weir or dam) and all artesian bores, no matter what their use.

The Act also provides for trade waste agreements (i.e. release of industrial waste into local government sewerage systems).

The Act is principally concerned with managing the capture and use of water but several other pieces of legislation are directly relevant to water issues. The *Environmental Protection Act* 1994 (Qld) regulates water pollution. The *River Improvement Trust Act* 1940 (Qld) provides for the establishment of statutory bodies concerned with flood control, riverbank stability and similar matters in specified catchments.

DNRME administers the *Water Act* in conjunction with other authorities, and local governments.¹⁹⁷

Waste Reduction and Recycling Act 2011 (Qld)

This Act contains a suite of measures to reduce waste generation and landfill disposal and encourage recycling. DES administers it.¹⁹⁸

On 20 March 2018, the Queensland Government announced it is developing a comprehensive new waste strategy underpinned by a waste disposal levy.¹⁹⁹

Wet Tropics World Heritage Protection and Management Act 1993 (Qld)

A regional plan regulating land-use within the Wet Tropics World Heritage Area of North Queensland was created under this Act. The *Wet Tropics*

¹⁹⁷ See <https://www.business.qld.gov.au/industries/mining-energy-water/water>

¹⁹⁸ See <https://environment.des.qld.gov.au/waste/>

¹⁹⁹ See <https://www.qld.gov.au/environment/pollution/management/waste/recovery/strategy>

Management Plan 1998 (Qld) provides a zoning plan to control development and activities within the Wet Tropics. The Wet Tropics Management Authority²⁰⁰ administers it in conjunction with QPWS.

Water Supply (Safety and Reliability) Act 2008 (Qld)

The supply of recycled water and drinking water is regulated under this Act. It applies to recycled water from sewage, greywater and industrial wastewater. Household use of greywater (e.g. shower water used to water a garden) is regulated under the *Plumbing and Drainage Act* 2018 (Qld). DNRME administers it.²⁰¹

Common Law

The Common Law is the law created by decisions of judges, which act as binding precedents for later decisions.²⁰² It is a system that applies in many countries that inherited their legal system from England. Countries that inherited their legal system from France, which has a system known as “Civil Law” dating from Napoleonic times, place much less weight on previous decisions of their courts.

Although now largely superseded by legislation at Commonwealth and State levels, the Common Law continues to provide important principles that directly impact upon and shape the Queensland environmental legal system.

The main grounds for why a person can sue another in a court, what lawyers call “causes of action”, at Common Law relevant to environmental issues are:²⁰³

- **Private nuisance** (unreasonable interference with the use of property, including due to smoke, noise or vibration from a neighbour’s property);
- **Public nuisance** (unreasonable interference with a public right, including due to pollution, where the person affected has suffered some special damage greater than the public generally);

- **Riparian user rights** (rights of a person owning property adjoining a watercourse to use water and to prevent other users from unreasonably interfering with the quantity or quality of the water);²⁰⁴
- **Negligence** (breach of a duty to take reasonable care to avoid damage to people or property, for example, manufacturing goods that cause cancer);²⁰⁵
- **Trespass** (a direct interference with or invasion of private land, including by pollution).

Other general principles of the Common Law permeate the environmental legal system. For example the concept of **standing** (the legal right to commence court action) has often been a major constraint on public interest litigation to protect the environment.²⁰⁶ Environmental legislation now often provides widened standing to protect the environment²⁰⁷ but where it does not the Common Law rules remain an obstacle.

Native title, recognised by the High Court as part of the Common Law in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, also has immensely important implications for the environmental legal system.²⁰⁸ In *Mabo*, Brennan J defined the content of “native title”:

The term ‘native title’ conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.

As a practical example, the Federal Court found in the Croker Island Case that the native title and interests of the claimant group were:²⁰⁹

- to fish, hunt and gather within the claimed area for the purpose of satisfying their personal, domestic or non-commercial communal needs including observing traditional, cultural, ritual and spiritual laws and customs; and
- to have access to the sea and seabed within the claimed area:
 - to exercise the above rights;
 - to travel through, or within, the claimed area;
 - to visit and protect places within the claimed area which were of cultural or spiritual importance; &
 - to safeguard the cultural and spiritual knowledge of the claimants.

²⁰⁰ See <http://www.wettropics.gov.au/>.

²⁰¹ See <https://www.dnrme.qld.gov.au/land-water>

²⁰² See generally Bates, n 7.

²⁰³ See generally Bates, n 7.

²⁰⁴ See Fisher DE, *Water Law* (LBC, Sydney, 2000).

²⁰⁵ In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 the rule of strict liability in *Rylands v Fletcher* was abandoned in favour of general negligence principles. See also *Graham Barclay Oysters PL v Ryan* (2002) 211 CLR 540.

²⁰⁶ See, e.g., *Central Queensland Speleological Society v Queensland Cement and Lime Pty Ltd* [1989] 2 Qd R 512 (the Mt Etna Bat Caves Case); and Bates, n 7.

²⁰⁷ See, e.g., s 475 of the EPBC Act.

²⁰⁸ See generally, Bartlett RH, *Native Title in Australia* (3rd ed, Butterworths, Sydney, 2014).

²⁰⁹ *Yarmirr v Northern Territory* (1998) 82 FCR 533. Upheld in *Commonwealth v Yarmirr* (2001) 208 CLR 1.

As the recognition of native title by the High Court and later application by other courts show, the Common Law provides important foundational principles for the Queensland environmental legal system.

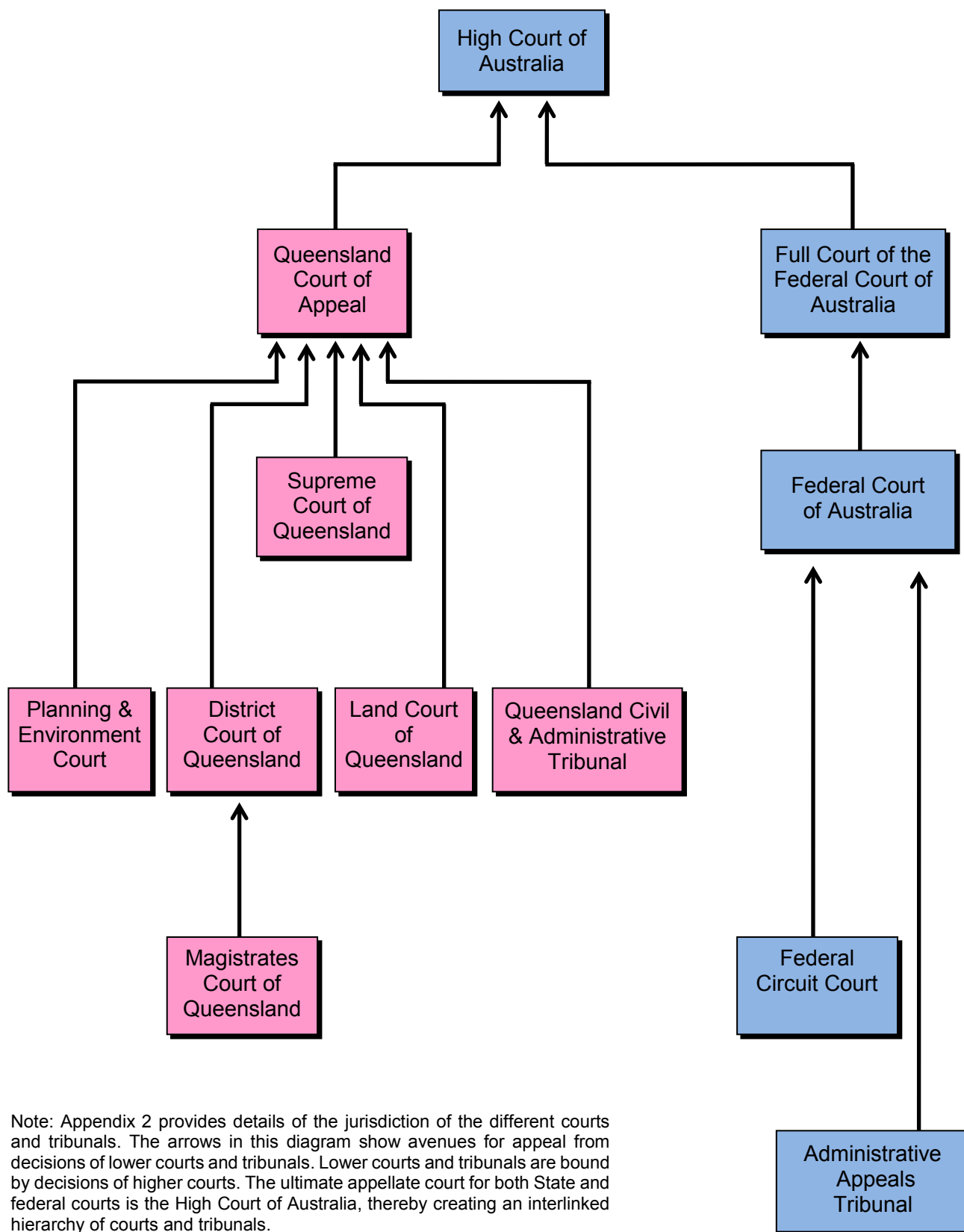
Conclusion

The Queensland environmental legal system has developed rapidly over the past few decades. In the future, it will continue to develop rapidly as it grapples with perennial difficulties such as population growth and the high rate of coastal development, and as it confronts new challenges due to global warming. In short, the future of the Queensland environmental legal system will be dynamic in pursuit of its objective of ecologically sustainable development.



The world we leave our children is the ultimate test of our environmental legal system. Photo: Brooke Walters (2009)

Appendix 1: Hierarchy of State and Federal courts and tribunals for environmental law in Queensland



Note: Appendix 2 provides details of the jurisdiction of the different courts and tribunals. The arrows in this diagram show avenues for appeal from decisions of lower courts and tribunals. Lower courts and tribunals are bound by decisions of higher courts. The ultimate appellate court for both State and federal courts is the High Court of Australia, thereby creating an interlinked hierarchy of courts and tribunals.

Appendix 2: Jurisdiction of State and Federal main courts & tribunals relevant to environmental law in Queensland

Subject area / jurisdiction	Relevant court or tribunal
1. Planning appeals, development offences and declarations under the <i>Planning Act</i> 2016 (Qld)	Planning and Environment Court (see Ch 6 of the <i>Planning Act</i> & the <i>Planning and Environment Court Act</i> 2016 (Qld)) **
2. Applications to restrain offences against the <i>Environmental Protection Act</i> 1994 (Qld) (EPA)	Planning and Environment Court (see ss505 & 507 of the EPA) **
3. Applications for declarations and enforcement orders for offences under the <i>Nature Conservation Act</i> 1992 (Qld)	Planning and Environment Court (see ss 173B and 173D of the <i>Nature Conservation Act</i> 1992 (Qld)) **
4. Objections to an environmental authorities under the EPA and a mining lease under the <i>Mineral Resources Act</i> 1989 (Qld) (MRA)	Land Court (see ss 185-191 of the EPA, ss 260-269 of the MRA and <i>Land Court Act</i> 2000 (Qld)) ***
5. Appeals by applicants and, for petroleum activities, by submitters against environmental authorities for petroleum activities under EPA.	Land Court (see ss 520-539 of the EPA and <i>Land Court Act</i> 2000 (Qld)) ***
6. Appeals against certain decisions under the <i>Fisheries Act</i> 1994 (Qld)	Queensland Civil & Administrative Tribunal (QCAT) (ss 185-186 of the <i>Fisheries Act</i> 1995 (Qld)) **
7. Appeals against various decisions under the <i>Water Act</i> 2000 (Qld)	Magistrates Court of Queensland, Land Court or Planning and Environment Court (see s 877 of the <i>Water Act</i> 2000 (Qld)) **
8. Appeals against permit and licence decisions under the <i>Nature Conservation (Administration) Regulation</i> 2006 (Qld)	Queensland Civil & Administrative Tribunal (QCAT) (see s 103 of the <i>Nature Conservation (Administration) Regulation</i> 2006 (Qld))**
9. Applications for an injunction to restrain a public nuisance, private nuisance or interference with riparian use rights at Common Law	District Court of Queensland (if unimproved value of property affected is less than \$750,000) or Supreme Court of Queensland (if greater value) *
10. Judicial review of Queensland government administrative decisions (other than planning decisions under the <i>Planning Act</i> 2016 (Qld))	Supreme Court of Queensland (see <i>Judicial Review Act</i> 1991 (Qld)) *
11. Applications for injunctions under the EPBC Act	Federal Court of Australia (s 475 of the EPBC Act) *
12. Merits appeals against certain decisions under the <i>Great Barrier Reef Marine Park Act</i> 1975 (Cth) and specified other Commonwealth administrative decisions	Administrative Appeals Tribunal ** (jurisdiction provided under various legislation)
13. Judicial review of Commonwealth government administrative decisions	Federal Court of Australia or Federal Circuit Court (see the <i>Administrative Decisions (Judicial Review) Act</i> 1977 (Cth)) *
14. Criminal prosecutions under all Queensland or Commonwealth environmental legislation	Magistrates Court of Queensland (for summary offences) or District Court of Queensland (if prosecuted on indictment) **
15. Appeals from Queensland courts and tribunals	Queensland Court of Appeal * (Civil) ** (Criminal)
16. Appeals from Federal Court	Full Court of the Federal Court *
17. Constitutional issues & final appellate court	High Court of Australia * (Civil appeals) ** (Criminal appeals)

* Normal costs rule applies (i.e. the losing party pays winning party's legal costs).

** Own costs rule applies (i.e. subject to limited exceptions, each party bears their own legal costs).

*** Neither normal costs rule or own rule applies (see *Anson Holdings Pty Ltd v Wallace & Anor* [2010] QLAC 0002).

Appendix 3: Queensland fisheries laws

Subject area	Relevant legislation
1. Fisheries other than prawns, tuna and billfish on the east coast of Queensland (from the New South Wales border to the tip of Cape York)	<i>Fisheries Act 1994 (Qld)</i> from land within the limits of the State and Queensland waters to the outer edge of the Great Barrier Reef Marine Park and thereafter the <i>Fisheries Management Act 1991 (Cth)</i> to the limit of the Australian fishing zone. ²¹⁰
2. Fisheries other than tuna and billfish in Torres Strait (within the Australian section of the Torres Strait Protected Zone)	<i>Torres Strait Fisheries Act 1984 (Cth)</i> and the <i>Torres Strait Fisheries Act 1984 (Qld)</i> .
3. Fisheries other than prawns, tuna and billfish in the Gulf of Carpentaria (from Cape York to the Northern Territory border)	<i>Fisheries Act 1994 (Qld)</i> from land within the limits of the State and Queensland waters to the limit of the Australian fishing zone.
4. Prawn fisheries on the east coast of Queensland (from the New South Wales border to the tip of Cape York)	<i>Fisheries Act 1994 (Qld)</i> from land within the limits of the State and Queensland waters to the outer edge of the Great Barrier Reef Marine Park (seaward of this point no prawn fishery exists).
5. Prawn fisheries in the Gulf of Carpentaria (from Cape York to the Northern Territory border)	<i>Fisheries Management Act 1991 (Cth)</i> from the inner boundary of coastal waters to the limit of the Australian fishing zone. <i>Fisheries Act 1994 (Qld)</i> landward of the inner boundary of coastal waters.
6. Tuna and billfish fisheries in all waters in the Australian fishing zone	<i>Fisheries Management Act 1991 (Cth)</i> .
7. Great Barrier Reef Marine Park	<i>Great Barrier Reef Marine Park Act 1975 (Cth)</i> and associated regulations, zoning plans and plans of management.
8. Queensland Marine Park	<i>Marine Parks Act 1982 (Qld)</i> and associated regulations and zoning plans.
9. Australian Marine Park (including the Coral Sea Marine Park, West Cape York Marine Park and Gulf of Carpentaria Marine Park)	<i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i>
10. Fisheries habitat area or damage to marine plants (e.g. mangroves)	<i>Fisheries Act 1994 (Qld)</i> and associated regulations and zoning plans.
11. Actions causing a significant impact on a matter of national environmental significance (including Commonwealth marine areas and Commonwealth managed fisheries)	<i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i> , ss 12-28.
12. Whales and other cetaceans and listed marine species in Australian waters	<i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i> , ss 224-266.
13. Protected wildlife (e.g. dugong) in Queensland coastal waters	<i>Nature Conservation Act 1992 (Qld)</i> and regulations and relevant conservation plans.

²¹⁰ The Australian fishing zone extends over waters within Australia's exclusive economic zone (EEZ) other than State coastal waters and some exclude waters. The Australian EEZ extends 200 nautical miles seaward from Australia's coastline and islands. Figure 1 on page 11 shows the Australian EEZ adjacent to Queensland.

Appendix 4: Major environmental impact assessment (EIA) processes in Queensland

Environmental impact assessment (EIA) is the term used to describe a variety of processes used to assess the environmental impacts of a proposal and the ways of mitigating those impacts. One form of EIA is the preparation of an Environmental Impact Statement (EIS), which is a document that generally describes:

- the proposed development;
- the relevant environment;
- potential impacts of the development on the environment;
- ways of mitigating impacts to the environment; and
- alternatives to the proposed development.

The purpose of EIA is normally to inform the relevant decision-maker of potential environmental impacts and mitigation measures to enable them to decide whether to allow the development to proceed and what conditions, if any, should be placed upon it. Under Queensland law there are a range of EIA processes that may potentially be triggered or required by government decision-makers. The major ones are as follows:

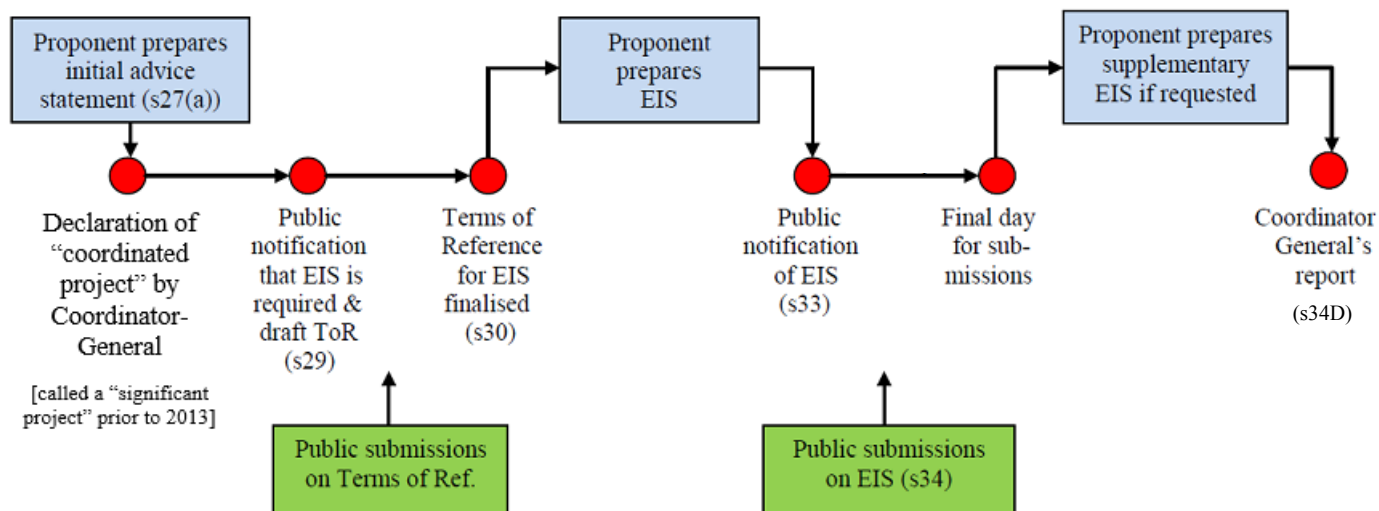
Statute	Summary of EIA provisions
1. <i>Planning Act 2016</i> (Qld) (SPA) s 68 and Pts 3 and 4 of the Development Assessment Rules.	Contains a general procedure of “information requests” for any development application and public notification for any “impact assessable” development application.
2. <i>Environmental Protection Act 1994</i> (Qld) (EPA) ss 37-72.	Contains an EIS process generally limited to assessing applications for an environmental authority. Linked to the EPBC Act through a bilateral agreement.
3. <i>State Development and Public Works Organisation Act 1971</i> (Qld) (SDPWOA) ss 26-35.	General power to declare a “coordinated project” and require an EIS involving public notification. Procedure over-rides EIA processes under Planning Act and EPA. Linked to the EPBC Act through a bilateral agreement.
4. <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth) (EPBC Act) ss 80-129.	<p>Contains five major EIA procedures for assessing impacts of controlled actions:</p> <ul style="list-style-type: none"> • Accredited assessment process; • Assessment on preliminary documentation; • Public Environment Report; • Environmental Impact Statement; • Public Inquiry. <p>Alternatively, a State EIA procedure may be substituted under the Queensland Bilateral Agreement (if the Queensland Bilateral Agreement is used, typically the EIS process in the SDPWOA is used).</p>

EIA is an important aspect of good decision-making on the environment and development. However, its ability to prevent unsustainable development should not be overstated. Decision-makers are generally only required to consider the recommendations of any EIA rather than being bound to follow them.

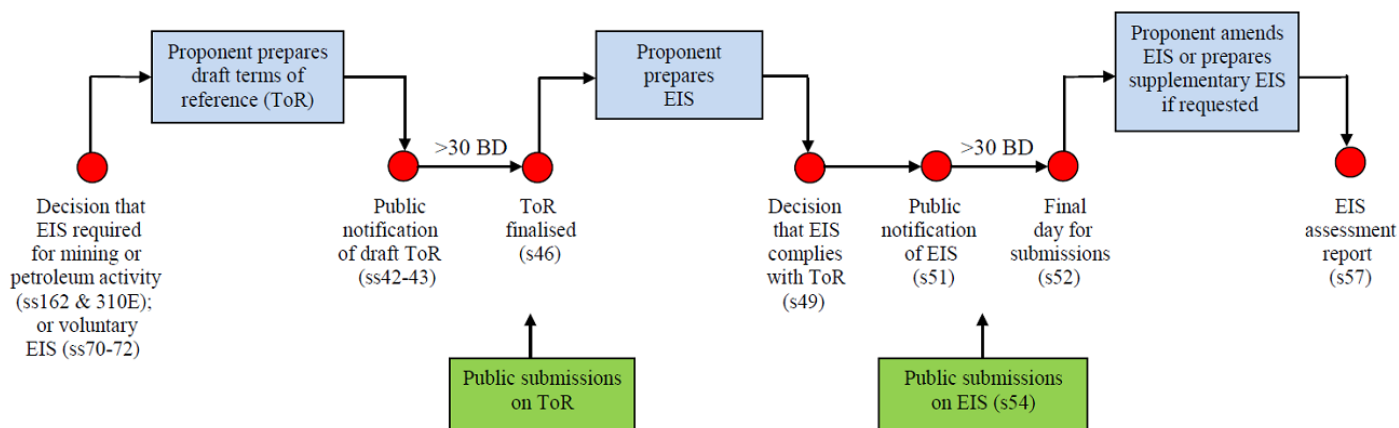
Flowcharts showing the major steps and stages in the EIS processes under the EPA, SDPWOA and EPBC Act are provided on the following pages. These flowcharts do not include further EIA which may occur during court proceedings regarding the approval processes.

Appendix 4: Major EIA processes in Queensland (continued)

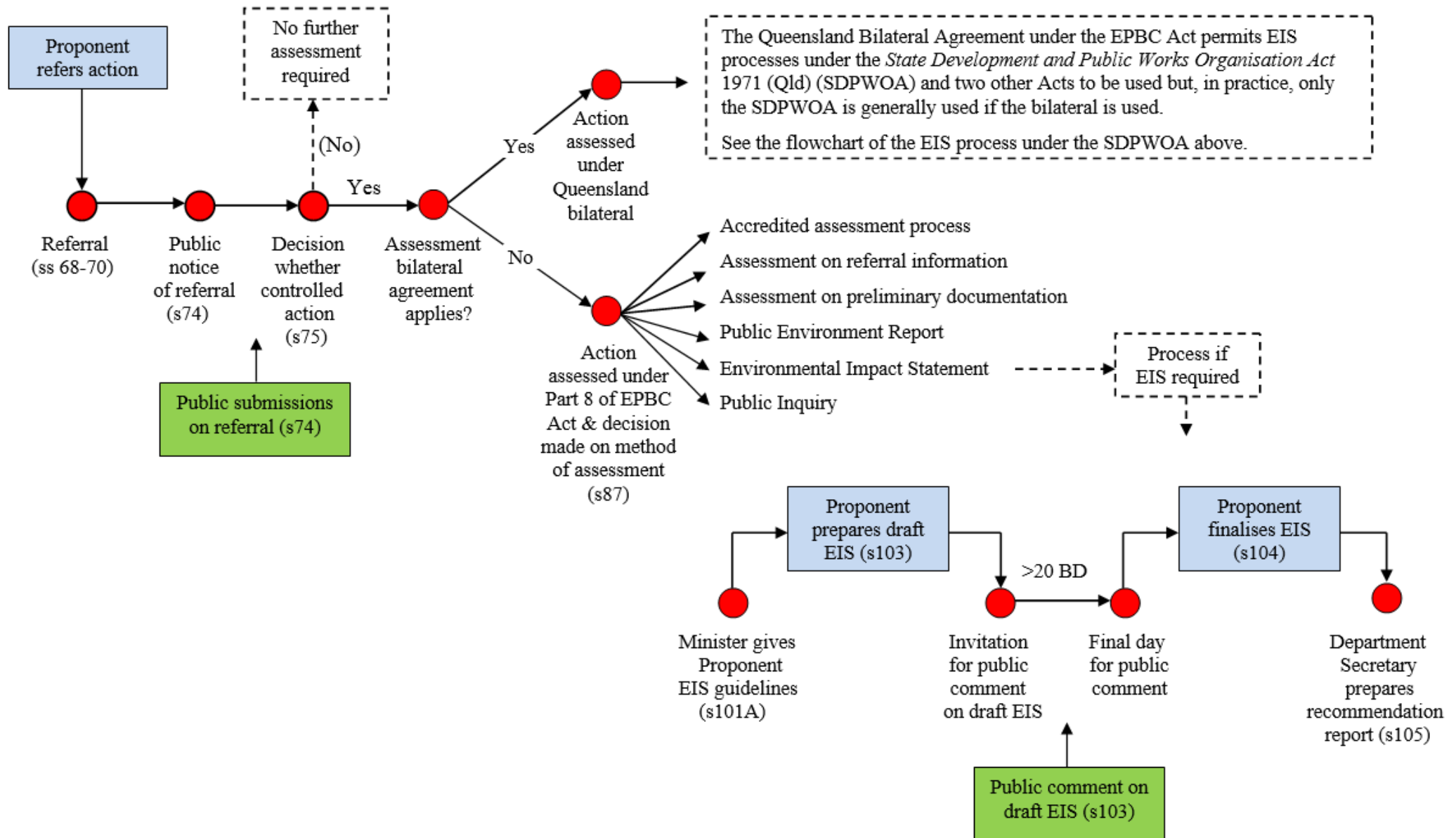
Flowchart of EIS process under the *State Development and Public Works Organisation Act 1971* (Qld)



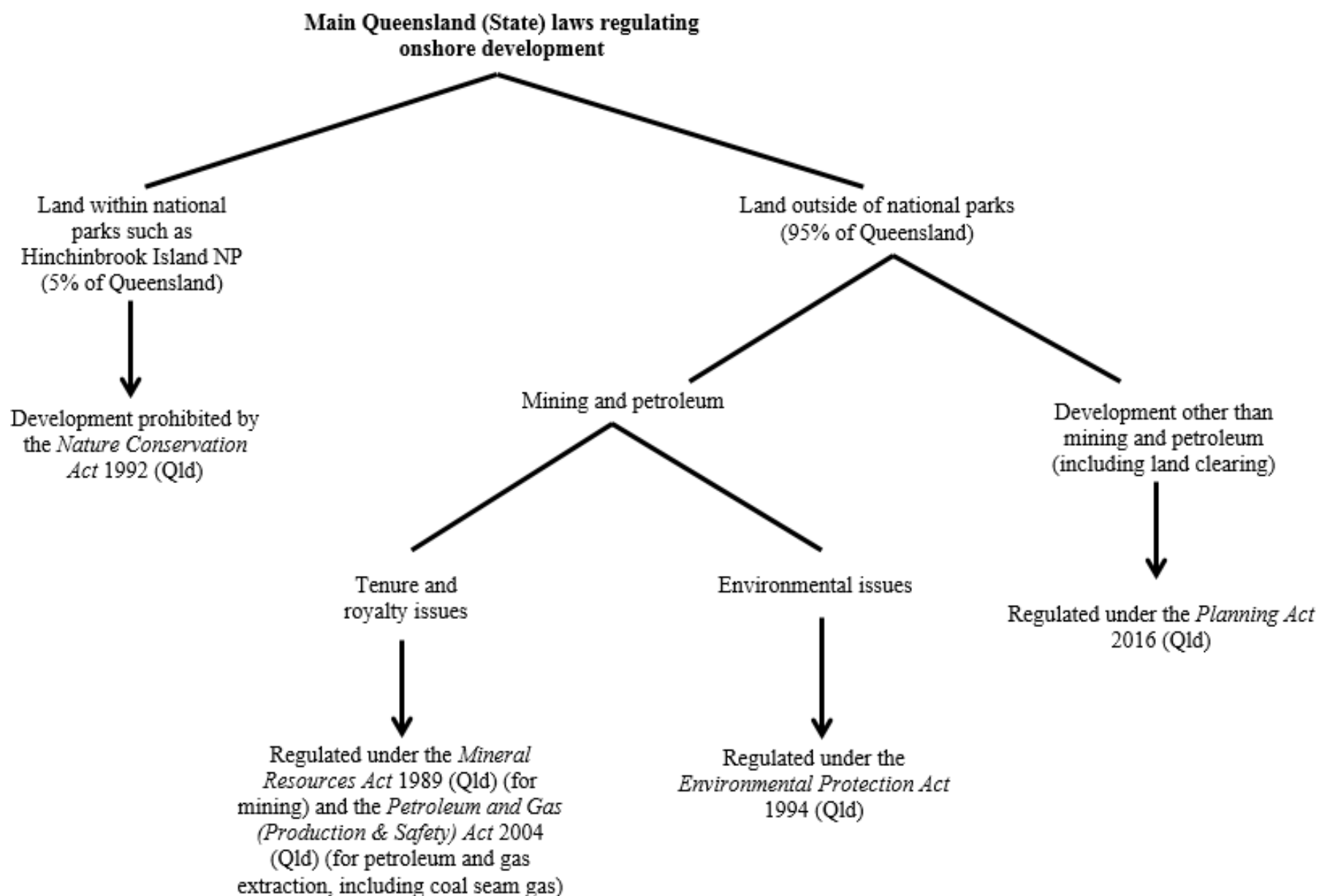
Flowchart of EIS process under the *Environmental Protection Act* 1994 (Qld)



Flowchart of EIA processes under the EPBC Act



Appendix 5: Major division in State laws regulating onshore development in Queensland



This book aims to help everyone involved in the environmental legal system in Queensland to understand it better.

It provides a short, plain language summary of the main laws regulating human impacts on the natural environment and quality of life in Queensland.



Photo: Alan Victor (2010)

ABOUT THE AUTHOR

Dr Chris McGrath is a Brisbane barrister specialising in environmental law and an Adjunct Associate Professor at the Global Change Institute, University of Queensland (UQ). He taught environmental regulation at UQ from 2010-2016. He holds an LLB (Hons), BSc in ecology, LLM (Environmental Law) and a PhD.