Synopsis of the Queensland Environmental Legal System

4th edition

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INTRODUCTION

The aim of this book is to provide a synopsis of the major parts of the environmental legal system in the State of Queensland, Australia, as at 1 July 2006.[1] The diagram in Appendix 1 provides a basic reference point for this. Special development or "franchise" Acts that have been passed for individual developments are not considered because of their isolated operation.[2]

The book begins by defining the environmental legal system and explaining its basic concepts, institutions and obligations. The Queensland environmental legal system is then explained within its four structural layers listing legislation in alphabetical order. Traditional categories such as "pollution control" and "town planning" are not used as the structure of the text because modern environmental laws defy such categories and they are liable to mislead rather than clarify the operation of the law.

THE ENVIRONMENTAL LEGAL SYSTEM

The "environmental legal system" is the system of laws and administrative structures that regulate the impacts of humans on the natural environment and quality of life. It can be identified by reference to a jurisdiction or geographic area such as Australia or Queensland.[3]

The environmental legal system is a relatively new area of law and policy.[4] What has made it a discrete area of law has been its rapid development and expansion during the past thirty years and the development of central norms, policies and structures for the system.

The central concept or paradigm through which the environmental legal system in Australia is now operating is ecologically sustainable development ("ESD"). It is drawn from the concept of "sustainable development" in international law and policy. All levels of government in Australia adopted ESD as a major policy objective in the *Intergovernmental Agreement on the Environment*.[5]

The central definition for ESD in Australia is found in the *National Strategy for Ecologically Sustainable Development* (see Appendix 2):[6]

> "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."

The Queensland environmental legal system is administered by Commonwealth and State Government departments, local governments, and various courts and tribunals. Government departments administering specific pieces of legislation are listed in the text below. The jurisdiction of State and Federal courts is summarised in Appendix 3.

As a very broad summary, the Queensland environmental legal system requires all people (including corporations and governments) conducting activities that affect the Queensland environment to do three things:

- Obtain and comply with any necessary licence or government approval.[7]
- Comply with any relevant standard imposed by the law, including taking all reasonable and practicable measures to prevent or minimise environmental harm (the general environmental duty).
- If unlawful material or serious environmental harm occurs or may occur, notify the Environmental Protection Agency.

The Queensland environmental legal system has four major layers: international law; Commonwealth law; Queensland law[8]; and the common law. Each of these levels will be analysed in turn in this book.

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[1] A recommended companion to this book is Chapter 24, "Laws affecting the environment" in Hodge M and Oosthuisen D (eds), *The Queensland Law Handbook* (8th ed, Caxton Legal Centre Inc, Brisbane, 2005).

[2] For example, the *Townsville Zinc Refinery Act* 1996 (Qld), which imposes a special zoning for one refinery.

[3] In relation to the Australian environmental legal system, see Fisher DE, *Australian Environmental Law* (LBC, Sydney, 2003); Bates GM, *Environmental Law in Australia* (5th ed, Butterworths, Sydney, 2002).

[4] For environmental policy, see Dovers S, *Environment & Sustainability Policy: Creation, Implementation, Evaluation* (Federation Press, Sydney, 2005).

[5] Council of Australian Governments, *Intergovernmental Agreement on the Environment* (AGPS, Canberra, 1992).

[6] Commonwealth of Australia, *National Strategy for ESD* (AGPS, Canberra, 1992). Available at http://www.environment.gov.au/psg/igu/nsesd/index.html

[7] See generally the Queensland *Smart*Licence website at http://www.sd.qld.gov.au/dsdweb/htdocs/slol

[8] Queensland law is taken to include planning schemes and local laws made by local governments.

INTERNATIONAL LAW

What is international law?

International law is the law between nations.[9] Australia's international legal obligations are enforceable only by other nations and are not enforceable by members of the public unless incorporated into domestic law.

The fundamental basis for international law rests on sovereignty and comity. Sovereignty is the exclusive right to exercise supreme authority over a geographic region and group of people. The state is the political institution in which sovereignty is embodied.[10] Comity means the mutual respect and recognition of the laws and executive acts of other states.

However, there is a constant tension between the sovereignty of individual nations and international obligations. Recognition of the "Realpolitik" of international law, that national self-interest is paramount and that enforcement is difficult against recalcitrant nations is central to understanding the international legal system.

Fisher has suggested that there have been four recognisable stages in the ongoing development of international environmental obligations[11] to the present position where the obligations of states to protect the environment are becoming in practice more important than the rights of states to independence within their territory (i.e. sovereignty):[12]

1. Permissive Stage: No restrictions on states based upon the doctrine of the permanent sovereignty of states over their natural resources and their environment;
2. Restrictions on activities outside the territory of states harming the marine environment (eg. ocean dumping of wastes);
3. Restrictions on activities within states which have a detrimental environmental effect beyond their boundaries (eg. ozone depleting sub-stances);
4. Restrictions on activities within states which have a detrimental environmental effect within their boundaries (eg. the protection of World Heritage).

These might alternatively be referred to as "themes" as there is considerable overlap and no clear transition between them. What is clear is the general trend toward imposing stronger obligations on states and thereby restricting the doctrine of absolute state sovereignty.

In relation to the sources of international law giving rise to these obligations, Article 38 of the *Statute of the International Court of Justice* recognises four sources of international law[13] of which the two principal sources 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, while limited in terms of the environment, does impose important environmental obligations such as the *Trail Smelter* principle imposing liability for cross-border pollution.[14] The extensive recognition of, and action on, environmental issues by nations over the past three decades and in the future will cause customary international law to continue to develop.

However, by far the greater source of international legal obligations is treaty law. The areas of international environmental law within which Australia has treaty obligations include World Heritage protection, biodiversity conservation, atmospheric protection, marine pollution, uranium use and Australia has treaty obligations include World Heritage protection, biodiversity conservation, atmospheric protection Antarctica.[15] The following are the

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[9] See Triggs G, *International Law: Contemporary Principles and Practices* (LexisNexis, Sydney, 2006).

[10] In international law 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.

[11] See Birnie P and Boyle A, *International Law and the Environment* (2nd ed, Oxford Uni Press, Oxford, 2002); Sands P, *Principles of International Environmental Law* (2nd ed, Cambridge Uni Press, Cambridge, 2003); and the environmental law database at http://www.ecolex.org/

[12] Fisher DE, "The Impacts of International Law Upon the Australian Environmental Legal System" (1999) 16 (5) EPLJ 372 at pp 373-374.

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

[14] *United States of America v Canada* (1941) 9 Annual Digest and Reports of Public International Law Cases 315 ("the Trail Smelter arbitration").

[15] See generally http://www.austlii.edu.au/dfat/

major environmental treaties relevant to Queensland.

Biodiversity Convention 1992

The *Convention on Biological Diversity* 1992 ("the Biodiversity Convention")[16] 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:
> (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; …
> (c) 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;
> (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
> (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 *Biodiversity Convention* is administered by a secretariat located in Montreal, Canada.[17]

CITES 1973

As its name suggests, the *Convention on the International Trade in Endangered Species* 1973 ("CITES")[18] 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") located in Geneva, Switzerland.[19]

International Whaling Convention 1946

The *International Convention for the Regulation of Whaling* 1946 ("ICRW" or "International Whaling Convention")[20] provides a loose framework for the regulation of whaling. A moratorium on all commercial whaling was declared in 1982. Japan continues to conduct whaling for "scientific purposes", part of which is conducted in Australia's Antarctic waters.[21] The Convention is administered by the International Whaling Commission.[22]

MARPOL 73/78

The *International Convention for the Prevention of Pollution from Ships* 1973, as modified by the Protocol of 1978 ("MARPOL 73/78")[23] 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").[24]

A related treaty is the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* 1972 and 1996 Protocol ("London Convention") which limits the discharge of wastes that are generated on land and disposed of at sea. The London Convention is administered by the IMO.[25]

UN Framework Convention on Climate Change 1992

The *United Nations Framework Convention on Climate Change* 1992 ("UNFCCC")[26] provides an international framework for regulating human-influenced climate change. As a contracting party, Australia is obliged to take climate change into account and cooperate in avoiding dangerous climate change. The Convention is administered by a secretariat in Bonn, Germany.[27]

Australia has controversially signed but refused to ratify a protocol created under the UNFCCC, the *Kyoto Protocol to the UNFCCC* 1997 ("the Kyoto Protocol").[28]

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[16] Entry in to force generally 29/12/93. ATS 1993 No 32.
[17] See http://www.biodiv.org/
[18] Entry into force 27/10/76. ATS 1976 No 29.
[19] See the CITES website at http://www.cites.org/
[20] Entry into force 10/11/48. ATS 1948 No 18.
[21] See McGrath C, "The Japanese Whaling Case" (2005) 22 EPLJ 250; and http://www.envlaw.com.au/whale.html
[22] See the IWC website at http://www.iwcoffice.org/
[23] ATS 1988 No 29; 1990 No 34; 1995 No 4. Entry into force for Australia completed 1 July 1992.
[24] See IMO website http://www.imo.org
[25] See http://www.londonconvention.org/
[26] Entry into force generally 21/3/94. ATS 1994 No 2.
[27] See the UNFCCC website at http://unfccc.int/
[28] Done at Kyoto on 11 December 1997. Signed for Australia at New York, 24 April 1998. Entry into force

To address climate change issues outside the binding targets in the Kyoto Protocol, Australia has recently entered into the *Asia-Pacific Partnership on Clean Development and Climate* ("AP6") with the India, Japan, South Korea, and the United States. The AP6 focuses on expanding investment and trade in cleaner energy technologies, goods and services in key market sectors without setting binding targets for reductions of greenhouse gases.[29]

Ramsar Convention 1971

The *Convention on Wetlands of International Importance especially as Waterfowl Habitat* 1971[30] 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 64 Ramsar wetlands in Australia and 5 in Queensland, including Moreton Bay adjacent to Brisbane.[31] The Convention is administered by a secretariat located in Gland, Switzerland.[32]

UNCLOS 1982

The *United Nations Convention on the Law of the Sea* 1982 ("UNCLOS")[33] provides a major framework controlling shipping and the use of resources in 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, depending on the subject matter in question, to territorial waters (12 nautical miles from the baseline), the exclusive economic zone (200 nautical miles from the baseline) and the continental shelf. 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 United Nations.[34]

Vienna Convention for the Protection of the Ozone Layer 1985

The *Vienna Convention for the Protection of the Ozone Layer* 1985[35] is a major international treaty for reducing and eliminating ozone-depleting substances such as chlorofluoro-carbons (CFCs). The *Montreal Protocol on Substances that Deplete the Ozone Layer* 1987[36] was negotiated under the convention and stipulates that the production and consumption of specified ozone-depleting substances are to be phased out by 2000-2005.

The loss of ozone and the "hole in the ozone layer" is often confused with global warming. Ozone is an atmospheric gas that is critical in reducing ultra-violet light reaching the Earth. Global warming involves the build-up of greenhouse gases such as carbon dioxide in the atmosphere from 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.[37]

World Heritage Convention

The *Convention concerning the Protection of the World Cultural and Natural Heritage* 1972 ("World Heritage Convention")[38] is a pillar of the international environmental legal system. It

generally on 16 February 2005. Not yet in force for Australia. Reported in [2005] ATNIF 1.

[29] See http://www.asiapacificpartnership.org/

[30] Entry into force 21/12/75. ATS 1975 No 48.

[31] See generally http://www.deh.gov.au/water/wetlands/

[32] See the Secretariat website at http://www.ramsar.org

[33] Entry into force generally 16/11/94. ATS 1994 No 31.

[34] See http://www.un.org/Depts/los/index.htm

[35] Entry into force 22/9/88. ATS 1988 No 26.

[36] Entry into force 1/1/89. ATS 1989 No 18.

[37] See http://www.unep.org/ozone/index.asp

[38] Entry into force 17/12/75. ATS 1975 No 47.

is concerned with the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding universal value. A World Heritage List is established under the Convention. Australia currently has 16 World Heritage sites including the Great Barrier Reef.[39] The Convention is administered by the United Nations Educational, Scientific and Cultural Organization (UNESCO).[40]

Relationship between international law and Australian domestic law

International legal obligations have important constitutional ramifications for the Australian federal system of government where legislative power is divided between the Commonwealth (or Federal) and State/Territory governments. The existence of international legal obligations for Australia provides the Commonwealth Government with constitutional power under section ("s") 51(xxix) (External Affairs) of the Constitution to enact legislation that is reasonably capable of being considered appropriate and adapted to implementing those obligations.[41]

International law may also be relevant in interpreting Australian domestic law. Where a statute or regulation is ambiguous, the courts favour a construction which accords with international law, at least where the legislation is enacted after, or in contemplation of, the relevant international instrument.[42]

In summary, international law impacts upon the Queensland environmental legal system in three major ways by:[43]

- 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 assisting in the interpretation of ambiguity in domestic legislation.

International considerations may also impact upon the Queensland environmental legal system through international debate and policy documents (sometimes called "soft-law") such as *Agenda 21*[44] and *The Earth Charter*[45] forming the basis for government policy.

COMMONWEALTH LAW

Commonwealth law is the legislation enacted and administered by the Australian Government.[46] The central piece of Commonwealth environmental law is the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth). 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 ("GBRMPA") 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 Government'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 constitutional law is that, to be valid, Commonwealth legislation must be based on a head of legislative power

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[39] See http://www.deh.gov.au/heritage/worldheritage/

[40] See http://whc.unesco.org

[41] *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.

[42] *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 s15AB(2)(d) of the *Acts Interpretation Act* 1901 (Cth).

[43] In *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 a majority of the High Court held that a convention ratified by Australia, but not incorporated into Australian municipal law, could, absent statutory or executive indications to the contrary, found a legitimate expectation that administrative decision-makers would act in conformity with it. However, this doctrine has been rejected by Federal and State Governments.

[44] See http://www.un.org/esa/sustdev/documents/agenda21/

[45] See http://www.earthcharter.org/

[46] Available at http://www.comlaw.gov.au/

contained in the *Commonwealth Constitution*.[47] Section 51 of the *Commonwealth Constitution* is the principal statement of these heads of power. Crawford has summarised other basic rules for determining Commonwealth legislative powers as follows:[48]

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 and its practical effect are irrelevant provided its legal operation is with respect to a head of power.

It was noted above that s51(xxix) (External Affairs) provides an important link between international law and Australian domestic law by providing the Commonwealth with legislative power to enact laws that are reasonably capable of being considered appropriate and adapted to fulfil Australia's international legal obligations. This is a very wide head of legislative power for the Commonwealth. 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 that the Commonwealth does not have legislative power over, other than human health and cultural heritage. Simply stated, the Commonwealth now has virtually a plenary power to make laws with respect to the environment (or at least biodiversity).

In addition, s51(xxix) also allows the Commonwealth to regulate places physically external to Australia, such as the marine environment seaward of the low water mark.[49] However, in 1979 the Commonwealth gave proprietary rights and legislative jurisdiction to the States and Northern Territory for coastal waters (3 nautical miles from the low water mark) under the "Offshore Constitutional Settlement".[50] Subsequent cooperative arrangements also provide for State fisheries legislation to extend beyond coastal waters as summarised in Appendix 8.

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

The *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) provides for the protection of significant Aboriginal areas and objects, as declared under the Act by the Minister, an authorised officer or inspector. The Act is administered by the Australian Government Department of the Environment and Heritage ("DEH").[51]

Airports Act 1996 (Cth)

The *Airports Act* 1996 (Cth) regulates major airports located on Commonwealth land. 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 *Integrated Planning Act* 1997 (Qld) and *Environmental Protection Act* 1994 (Qld). The Act is administered by the Airports Division of the Australian Government Department of Transport and Regional Services.[52]

Australian Heritage Council Act 2003 (Cth)

The *Australian Heritage Council Act* 2003 (Cth) established the Australian Heritage Council after the repeal of the earlier *Australian Heritage Commission Act* 1975 (Cth). The new

[47] *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129 (the Engineers' Case).
[48] Crawford J, "The Constitution and the Environment" (1991) 13 *Sydney Law Review* 11 at pp 14-16.
[49] *New South Wales v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case).
[50] *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 arrangement was upheld in *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 88 ALR 12.
[51] See DEH homepage at http://www.deh.gov.au/
[52] See DOTARS homepage at http://www.dotars.gov.au/

Act integrates national heritage assessment into the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth). The Register of the National Estate is established under s21. The Act is administered by DEH.[53]

Energy Efficiency Opportunities Act 2006 (Cth)

The *Energy Efficiency Opportunities Act* 2006 (Cth) requires large energy using businesses to undertake and report publicly an assessment of their energy efficiency opportunities. The threshold for reporting is use of more than 0.5 petajoules in a financial year. One of the objects of the Act is to reduce greenhouse emissions. The Act is administered by the Department of Industry, Tourism and Resources.[54]

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("EPBC Act") is the centrepiece of Commonwealth environmental laws and represents a major expansion of direct Commonwealth involvement in environmental decision-making.[55] A diagram of the simplified structure of the Act is provided in Appendix 4. 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); and
- International trade in wildlife.

The current list of matters of national environmental significance is:

- 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; and
- Commonwealth marine areas.

By far the most important regulatory mechanism created by the Act is the approval system for actions with a significant impact on matters of national environmental significance. Together with actions by the Commonwealth or involving Commonwealth land with a significant impact on the environment, these are termed "controlled actions".

The process of assessing and approving a controlled action under the Act potentially involves 3 stages: referral, assessment and approval. At the first stage a person (or a State or Federal government body) refers a proposed action to the Federal Environment Minister for determination whether the proposal involves a controlled action. If the proposed action is determined to involve a controlled action it is then assessed in accordance with the EPBC Act before the final stage where the Minister determines whether or not the action should proceed and any conditions that should apply.

A crucial term for the application of the EPBC Act is "action" which can be summarised to mean a physical activity or series of physical activities not being a government decision or grant of funding. Sections 43A and 43B exempt from the operation of the EPBC Act actions that were existing lawful uses or fully approved under State and Commonwealth laws at the commencement of the Act on 16 July 2000.

The threshold test of "significant impact" was held to mean an impact that is important, notable or of consequence having regard to its context or intensity in *Booth v Bosworth* (2001) 114 FCR 39 ("the Flying Fox Case").[56] In that case the Federal Court granted an injunction to restrain the mass electrocution of flying foxes on a fruit farm adjacent to the Wet Tropics World Heritage Area.

A wide approach must be taken when assessing the scope of impacts of actions under the EPBC Act.[57] All likely impacts must be considered, including direct and indirect impacts. Impacts of an action may include the

[53] See DEH homepage at http://www.deh.gov.au/heritage
[54] See DITR homepage at http://www.industry.gov.au/
[55] See generally McGrath C, "Key concepts of the EPBC Act" (2005) 22 EPLJ 20.
[56] See McGrath C, "Casenote: Booth v Bosworth" (2001) 18 EPLJ 23; McGrath C, "The Flying Fox Case" (2001) 18 EPLJ 540.
[57] See *Minister for the Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24.

impacts of acts done by persons other than the proponent (third party impacts) and activities that are not proposed as part of the action. Impacts of an action include each consequence that is reasonably within the contemplation of the proponent, whether those consequences are within the control of the proponent or not. The width of the enquiry in each case will depend on the facts and on what may be inferred from the description of the "action" which the Minister is required to consider.

The EPBC Act and the *Environment Protection and Biodiversity Conservation Regulations* 2000 (Cth) create important obligations for environmental impact assessment ("EIA").[58] Sections 489-491 of the EPBC Act create offences for providing false or misleading information during the assessment process.[59]

Bilateral agreements are important variations to the normal assessment or approval stages of the EPBC Act. These allow State and Territory assessment and approval processes to be accredited to fulfil similar processes under the EPBC 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 *Environmental Protection Act* 1994 (Qld) for mining and the *Integrated Planning Act* 1994 (Qld) for other assessable development. Appendix 9 summarises these EIA processes.

The EPBC Act also contains a range of mechanisms in Chapter 5 for protecting biodiversity, for example the Australian Whale Sanctuary. However, generally these are limited to Commonwealth areas or attach no penalty for non-compliance, which limits their practical importance and effect. Exceptions to this general rule include international trade in wildlife and the protection of heritage places listed on the National Heritage List.

DEH administers the Act[60] but, importantly, it provides widened standing in ss 475 and 487 for public interest litigation to restrain offences and for judicial review.

Environment Protection (Sea Dumping) Act 1981 (Cth)

The *Environment Protection (Sea Dumping) Act* 1981 (Cth) prohibits the dumping or incineration at sea of radioactive material, wastes and other material without a permit. Section 15 provides a defence for dumping conducted to save human life or a vessel in distress. The Act was made pursuant to the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* 1972 (the London Convention). The Act applies to all vessels in Australian waters and to Australian vessels in international waters. The Act is administered by the Australian Maritime Safety Authority ("AMSA").[61]

Fisheries Management Act 1991 (Cth)

The *Fisheries Management Act* 1991 (Cth) operates together with the *Fisheries Act* 1994 (Qld) to regulate fisheries within the Australian fishing zone (other than in Torres Strait) under complex arrangements made following the Offshore Constitutional Settlement. Appendix 8 summarises the legislative and administrative arrangements for Queensland fisheries. The Act is administered by the Australian Fisheries Management Authority ("AFMA").[62]

Gene Technology Act 2000 (Cth)

The *Gene Technology Act* 2000 (Cth) provides a framework for regulating research, production and release of genetically modified organisms (GMOs) and genetically modified (GM) crops and products. The *Gene Technology Act* 2001 (Qld) provides complementary State legislation. The Act is administered by the Office of the Gene Technology Regulator.[63]

[58] See McGrath C, "Applying the EPBC Act: A case study of the Naturelink Cableway" (2001/2002) 7(33) QEPR 123.

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

[60] See DEH homepage at http://www.deh.gov.au/epbc and the EPBC Project at http://www.epbc.com.au.

[61] See AMSA homepage http://www.amsa.gov.au/.

[62] See AFMA homepage http://www.afma.gov.au/. The Australian Coastal Atlas provides management boundaries as well as environmental mapping information at http://www.ea.gov.au/coasts/atlas/index.html.

[63] See OGTR at http://www.health.gov.au/ogtr/

Great Barrier Reef Marine Park Act 1975 (Cth)

The *Great Barrier Reef Marine Park Act* 1975 (Cth) establishes a framework for the protection and management of the Great Barrier Reef ("GBR") Marine Park. The *Great Barrier Reef Marine Park Regulations* 1975 (Cth) establish a zoning plan for the GBR based on the concept of multiple-use management. In 2004, fully protected areas in the GBR were increased from 4% to 33%. The Act and Regulations also provide a range of specific management tools such as plans of management[64] and compulsory pilotage areas for shipping. The *Great Barrier Reef Marine Park (Aquaculture) Regulations* 2000 (Cth) prescribe a licensing system to regulate aquaculture discharges into the GBR. The Act and Regulations are administered by the Great Barrier Reef Marine Park Authority ("GBRMPA"),[65] although day-to-day management is conducted largely in conjunction with the Queensland Parks and Wildlife Service.

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

The *Hazardous Waste (Regulation of Exports and Imports) Act* 1989 (Cth) regulates the export and import of hazardous waste from or into Australia. 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*[66] and is administered by DEH.[67]

Historic Shipwrecks Act 1976 (Cth)

The *Historic Shipwrecks Act* 1976 (Cth) provides a regime for protecting historic shipwrecks and relics that are at least 75 years old in Australian waters. The regime is based upon a declaration being made by the Commonwealth Environment Minister and prohibits access to declared areas or sites and the removal of relics without authority under the Act. There are 18 declared historic shipwrecks and 5 protected zones from 200 located shipwrecks in waters adjacent to Queensland, such as the *SS Yongala* located 50km off Townsville. The Act is administered by DEH.[68]

National Environment Protection Council Act 1994 (Cth)

The *National Environment Protection Council Act* 1994 (Cth) forms the Commonwealth's part of reciprocal legislation with all States and Territories to establish the National Environment Protection Council ("NEPC"), which now operates under the umbrella of the Environment Protection and Heritage Council ("EPHC"). National Environment Protection Measures ("NEPMs") developed by the EPHC set national objectives for protecting or managing particular aspects of the environment. There are currently seven NEPMs: Ambient Air Quality; Assessment of Site Contamination; Diesel Vehicle Emissions; Movement of Controlled Wastes Between States and Territories; National Pollutant Inventory; Used Packaging Materials; and Air Toxics. DEH administers the Act.[69]

Native Title Act 1993 (Cth)

The *Native Title Act* 1993 (Cth) is the Commonwealth Government's legislative response to the recognition of native title by the Common Law in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Broadly the Act does three things: it validates past acts of governments that affected native title; it provides statutory recognition of native title and a system for registering native title rights; and it establishes a Future Acts Regime to allow native title to be incorporated into government decision-making. The National Native Title Tribunal administers the native title register[70] but determinations of native title are made by the Federal Court.

Natural Heritage Trust of Australia Act 1997 (Cth)

The *Natural Heritage Trust of Australia Act* 1997 (Cth) provides a framework for the establishment and administration of the Natural Heritage Trust ("NHT"), which is a large fund

[64] Eg. the *Whitsundays Plan of Management* 1998 (Cth).
[65] See GBRMPA at http://www.gbrmpa.gov.au/
[66] ATS 1992 No 7. In force generally 5 May 1992.
[67] See DEH homepage at http://www.deh.gov.au/
[68] See http://www.deh.gov.au/heritage/shipwrecks/
[69] See DEH at http://www.deh.gov.au/; EPHC at http://www.ephc.gov.au/ and National Pollutant Inventory Database at http://www.environment.gov.au/epg/npi/
[70] See NNTT homepage at http://www.nntt.gov.au/

of federal money administered to provide for environmental protection and conservation at local, regional, State and national levels. The Act is administered by DEH.[71]

In conjunction with NHT, a *National Action Plan for Salinity and Water Quality* ("NAP") provides a federal program for improved land and water management. Under the NAP, Natural Resource Management ("NRM") plans are being developed to attempt to provide a framework of regional planning across Australia. The NAP is administered by DEH in conjunction with State and Territory Governments.[72]

Offshore Minerals Act 1994 (Cth)

The *Offshore Minerals Act* 1994 (Cth) provides a framework for the regulation of mining of the seabed within Australian waters but excluding State and Northern Territory coastal waters. The Act adopts a traditional exploration and licensing regime. It is administered by the Department of Industry, Science & Resources.[73]

Ozone Protection & Synthetic Greenhouse Management Act 1989 (Cth)

The *Ozone Protection & Synthetic Greenhouse Management Act* 1989 (Cth) provides a system of licences and staged quotas to control the manufacture, use, import, export, recycling and disposal of ozone depleting substances such as CFCs. The Act implements the *Vienna Convention for the Protection of the Ozone Layer* 1985 and *Montreal Protocol on Substances that Deplete the Ozone Layer* 1987. The Act is administered by DEH.[74]

Petroleum (Submerged Lands) Act 1967 (Cth)

The *Petroleum (Submerged Lands) Act* 1967 (Cth) establishes a framework for the regulation of petroleum extraction in Australian waters through a traditional system of exploration permits and licensing. Section 9 of the Act allows State legislation to replace the operation of the Act within State coastal waters. The Act is administered by the Commonwealth Department of Industry, Science and Resources.[75]

Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth)

The *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) prohibits the discharge of oil, noxious substances, packaged harmful substances, sewage and garbage from ships (including aircraft) into the ocean. The Act implements MARPOL 73/78. The Act allows State and Territory legislation to be accredited for coastal waters. In Queensland the relevant legislation is the *Transport Operations (Marine Pollution) Act* 1995 (Qld). The Commonwealth Act is administered by the Australian Maritime Safety Authority.[76]

Protection of Moveable Cultural Heritage Act 1986 (Cth)

The *Protection of Moveable Cultural Heritage Act* 1986 (Cth) regulates the import and export of protected objects of national importance for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons. The Act establishes the National Cultural Heritage Control List. The list is divided into two 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. It is administered by DEH.[77]

Quarantine Act 1908 (Cth)

The *Quarantine Act* 1908 (Cth) provides a framework to regulate the entry of infectious diseases and exotic plants and animals into Australia. Ballast water from ships, an important source of marine pests, is regulated under the *Quarantine Regulations* 2000 (Cth). The Act is administered by the Australian Quarantine and Inspection Service ("AQIS"),

[71] See http://www.nht.gov.au/index.html
[72] See http://www.napswq.gov.au/index.html
[73] See DISR homepage at http://www.isr.gov.au/ and the Australian Geologic Survey Organisation ("AGSO") homepage at http://www.agso.gov.au/
[74] See DEH homepage at http://www.deh.gov.au/
[75] See DISR homepage at http://www.isr.gov.au/
[76] See AMSA homepage at http://www.amsa.gov.au/
[77] See http://www.deh.gov.au/heritage/movable/

part of the Australian Government Department of Agriculture, Fisheries and Forestry.[78]

Renewable Energy (Electricity) Act 2000 (Cth)

The *Renewable Energy (Electricity) Act* 2000 (Cth) aims to reduce greenhouse gas emissions by, amongst other measures, requiring electricity providers to source roughly 2% of their energy from renewable sources. This is known as the Mandatory Renewable Energy Target ("MRET"). A tax penalty is imposed for failing to achieve this target by the *Renewable Energy (Electricity) (Charge) Act* 2000 (Cth). The Act is administered by the Office of the Renewable Energy Regulator.[79]

Sea Installations Act 1987 (Cth)

The *Sea Installations Act* 1987 (Cth) provides a regulatory regime for the construction, operation and de-commissioning of offshore installations in Australian waters outside of State coastal waters. The Act applies to any man-made structure, including ships, attached to the sea-bed, in the case of Australian vessels, for 14 days or greater and for foreign vessels, for 30 days or greater, used for any environment related activity including tourism, recreation or fishing. However the Act does not apply to structures used for exploring for or exploiting natural mineral resources (including petroleum). The Act is administered by DEH.[80]

Torres Strait Fisheries Act 1984 (Cth)

The *Torres Strait Fisheries Act* 1984 (Cth) (and the reciprocal *Torres Strait Fisheries Act* 1984 (Qld)) regulates fishing within the Australian section of the Torres Strait Protected Zone, which is located north of Cape York between Australia and Papua New Guinea. The Act 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*.[81] The Act is administered jointly by the AFMA and the Queensland Department of Primary Industries (Fisheries).[82] The complex jurisdictions over fisheries are summarised in Appendix 8.

QUEENSLAND LAW

Queensland law is the legislation and subordinate legislation enacted and administered by the Queensland Government and local governments.[83] The 125 local governments in Queensland perform a central role in the environmental legal system by preparing and administering planning schemes to control land development within their local government areas. While a number of courts exercise jurisdiction under Queensland law, the Planning and Environment Court has a central role in hearing planning appeals.

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*.[84] 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.[85] The *Constitution of Queensland Act* 2001 (Qld) consolidates the constitution of the State, but the origin of the power to do this is based on the 1867 Act. The *Constitutional Powers (State Waters) Act* 1980 (Qld) provides additional powers to the State over coastal waters reflecting the Offshore Constitutional Settlement referred to above.

The Queensland Government (the Executive Government or "the Crown"), is now generally required to comply with laws protecting the environment. Historically the Crown was not bound by legislation unless expressly stated to

[78] See http://www.affa.gov.au/
[79] See http://www.orer.gov.au/index.html.
[80] See http://www.deh.gov.au/
[81] ATS 1985 No 4.
[82] See http://www.afma.gov.au/
[83] Queensland legislation is available on the internet at http://www.legislation.qld.gov.au/OQPChome.htm
[84] For example, s109 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.
[85] See *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520.

be or by necessary implication.[86] This principle was known as "Crown immunity".

Aboriginal Cultural Heritage Act 2003 (Qld)

The *Aboriginal Cultural Heritage Act* 2003 (Qld) and the *Torres Strait Islander Cultural Heritage Act* 2003 (Qld) provide a framework for the protection of Aboriginal and Torres Strait Islander cultural heritage. The *Queensland Heritage Act* 1992 (Qld) protects non-indigenous heritage. The main mechanism through which each Act operates is a list of places and artefacts of heritage significance. The Acts are administered by the Cultural Heritage Coordination Unit of the Department of Natural Resources, Mines and Water ("NRMW").[87]

Biodiscovery Act 2003 (Qld)

The *Biodiscovery Act* 2003 (Qld) provides a framework for licensing and payment of royalties for the investigation of biological resources in Queensland. Permits issued under the Act over-ride the *Nature Conservation Act* 1992 (Qld) and allow investigation in National Parks. The Department of State Development and Innovation ("DSDI") administers the Act.[88]

Biological Control Act 1987 (Qld)

The *Biological Control Act* 1987 (Qld) regulates the testing and release of biological agents to control pest infestations in Queensland. The most infamous failure of a biological control agent in Queensland history was the release of the cane toad. This species was released in the 1960s to control cane beetles in northern Queensland. The toad's voracious appetite, poisonous skin glands and massive reproductive ability have caused a catastrophe for Queensland wildlife. The toads have now spread into the Kakadu National Park and World Heritage Area of the Northern Territory.

The Act is administered by the Department of Primary Industries & Fisheries ("DPI&F").[89]

Coastal Protection and Management Act 1995 (Qld)

The *Coastal Protection and Management Act* 1995 (Qld) provides for the development of State and regional planning and integrated approval processes in relation to coast development. The *State Coastal Management Plan – Queensland's Coastal Policy*, prepared under the Act, provides a vision, principles and policies for coastal development. Regional Coastal Management Plans (RCMPs) have been and are being developed to provide regional planning for coastal development. At the time of writing, three RCMPs were in force for the Curtis Coast, Cardwell-Hinchinbrook and Wet Tropical Coast regions. The Act also 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. The Environmental Protection Agency ("EPA") administers the Act and intends to have RCMPs in place for the whole east coast of Queensland by 2010.[90]

Electricity Act 1994 (Qld)

The *Electricity Act* 1994 (Qld) regulates the generation, transmission and supply of electricity in Queensland. Power generation in Queensland is overwhelmingly provided by coal-fired power stations. These are a major source of greenhouse gas emissions contributing to climate change. Under the *Queensland Energy Policy: A Cleaner Energy Policy* 2000, *Queensland Greenhouse Policy Framework: A Climate of Change* 2001, and *Queensland Greenhouse Strategy* 2004, the use of gas, renewable energy (wind, solar and biomass), and energy efficiency measures are increasing in an effort to reduce emissions.[91] The Act also regulates the construction and maintenance of power lines, which are a significant source of vegetation clearing and habitat fragmentation. The Act is administered by the Department of Energy.[92]

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[86] *Bropho v Western Australia* (1990) 171 CLR 1.
[87] See http://www.nrm.gov.au/cultural_heritage
[88] See http://www.sdi.qld.gov.au/innovation/biotechnology
[89] See DPI&F homepage at http://www.dpi.qld.gov.au/
[90] See the EPA's Coastal Management website at http://www.epa.qld.gov.au/environmental_management/coast_and_oceans/coastal_management/
[91] See the Qld Govt Climate & Greenhouse website at http://www.epa.qld.gov.au/environmental_management/sustainability/climate_change_and_greenhouse/
[92] See http://www.energy.qld.gov.au/

Environmental Protection Act 1994 (Qld)

The *Environmental Protection Act* 1994 (Qld) ("EP Act") is a central component of the Queensland environmental legal system.[93] A conceptual diagram of the structure of the Act is provided in Appendix 5. The object of the Act is environmental protection within the context of ecologically sustainable development. To achieve this object the Act provides the following wide range of tools:

- Environmental Protection Policies (EPPs) (ss26-36);
- An Environmental Impact Statement (EIS) process for mining activities (ss37-72);
- A licensing system for "environmentally relevant activities" (ERAs) (ss18-20), including development not associated with mining activities (ss73-145) and for mining activities (ss146-310);
- Establishment of the general environmental duty and duty to notify of environmental harm (ss319-320);
- A system for environmental evaluations and audits (ss321-329);
- Environmental Management Programs (EMPs) (ss330-357);
- Environmental Protection Orders (EPOs) (ss358-363);
- Financial Assurances (ss364-367);
- A system for the management of "contaminated land" (ss370-425); and
- Environmental Offences (ss426-444) and executive officer liability (s493);
- Investigative powers of authorised officers including power to give an emergency direction (ss445-489);
- Civil enforcement provisions to restrain breaches of the Act with widened standing for public interest litigants (ss504-513);
- Public reporting of information on the environment (ss540-547).

Four EPPs have been gazetted: the *Environmental Protection (Water) Policy* 1997; *Environmental Protection (Air) Policy* 1997; *Environmental Protection (Noise) Policy* 1997 and *Environmental Protection (Waste Management) Policy* 2000.

In addition, the *Environmental Protection Regulation* 1998 (Qld) lists 85 ERAs in Schedule 1[94] and provides a regulatory regime for minor issues involving environmental nuisance as well as implementing National Environment Protection Measures ("NEPMs") for the National Pollutant Inventory and Used Packaging Material.[95]

The *Environmental Protection (Waste Management) Regulation* 2000 (Qld) provides offences for littering, waste dumping, receiving waste, and waste disposal. Special provisions are also provided for waste tracking, management of clinical and other wastes and materials containing PCBs.

There are many terms used in the EP Act but five key definitions are critical to understand the operation of the Act, what activities are regulated by it, and when offences may be committed against it. These are:[96]

> ***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];

[93] See generally Fisher DE and Walton M, *Environmental Law Queensland* (LBC, Sydney, 1996).

[94] Including aquaculture, chemical manufacturing, chemical storage, petroleum product storage, oil refining, sewage treatment, power station, dredging, extractive industry, mining, concrete batching, marina operation and waste disposal.

[95] 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 EPHC at http://www.ephc.gov.au/

[96] Defined in ss 8, 9, 14, 16 and 17 of the EP Act.

(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.

These concepts are particularly important for understanding the general offence provisions in ss426-444. Two points about these definitions should be noted in particular.

The first point to note about the key definitions is that an environmental value is not a physical thing but qualities or physical characteristics that the physical parts of the environment represent. For example, "a tree", "a forest" or "an endangered species" is not an environ-mental 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. A complete list of potential environmental values is shown in the "total quality of life" in Appendix 2.

The second point to note about the key definitions is that 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. The EP Act can, therefore, potentially regulate any activity impacting on the environment.

The second of these points does not, however, reflect the actual operation of the EP Act because the EPA administers the Act to only regulate contaminants / pollution rather than wider environmental harm issues such as land clearing. The decision in *Maroochy Shire Council v Barnes* [2001] QPELR 475; [2002] QPELR 6 puts beyond doubt that there is no basis for such a limitation to the Act. In that case the Planning and Environment Court and Court of Appeal approved the application of the EP Act to regulate the cutting down of trees in a forestry operation.

Within the wide jurisdiction created for the prevention of environmental harm, the conceptual fulcrum of the Act is the relationship between ss319 and 436. 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.

The general environmental duty forms a central tenor for liability under the EP Act by forming the general defence to unlawful environmental harm contained in s436, which is then used as an element in the offences of causing serious or material environmental harm contained in ss437 and 438.

The concept of "reasonable care" is drawn from the *Donoghue v Stevenson* principle[97] of negligence at common law. Conceptually and theoretically what the general environmental duty does is to widen the common law concept of "neighbour" to include the environment. This marks a fundamental development in environ-mental jurisprudence. It is one of the most

[97] *Donoghue v Stevenson* [1932] AC 562 at 580 per Lord Atkin.

outstanding features of the EP Act and Queensland environmental legal system.

The lead agency for the administration of the EP Act is the EPA;[98] however, minor ERAs have been devolved to local governments.[99] In addition two agricultural ERAs have been delegated to DPI&F.[100]

Fisheries Act 1994 (Qld)

The *Fisheries Act* 1994 (Qld) provides the State's legislative framework for the regulation of fisheries, coastal areas important as fisheries habitat, and marine plants. The complex situation for fisheries jurisdiction is summarised in Appendix 8. The Act provides a range of mechanisms aimed at the sustainable management of fisheries including management plans, quotas, offences, licences and declarations of closed seasons, closed waters and fisheries habitat areas. The *Fisheries Regulation* 1995 (Qld) provides technical and geographic detail for these mechanisms. Management plans are gazetted as subordinate legislation such as the *Fisheries (East Coast Trawl) Management Plan* 1999 (Qld). The Act is administered by DPI&F.[101]

Forestry Act 1959 (Qld)

The *Forestry Act* 1959 (Qld) regulates the use of forest products such as timber on all State land including State forests, leasehold land and unallocated State land (in total approximately 80% of the State). A central definition of the Act is "forest products" which means all vegetable growth and material of vegetable origin (s5). For designated timber producing areas such as State forests, "forest products" also include honey, native animals, fossils and quarry material. Section 45 vests the 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. The *Forestry Plantations Queensland Act* 2006 (Qld) provides for the commercial management of State-owned forestry plantations.

The Act was amended in 1999, pursuant to the *South East Queensland Forests Agreement* ("SEQFA"), to allow for 25 year agreements in relation to forest practices.[102] The SEQFA contemplates the phasing out of logging in native forests within 25 years. The Commonwealth Government apparently refused to accredit the SEQFA as a Regional Forestry Agreement ("RFA") because of the phase-out of native forest logging.[103]

The Act is jointly administered by DPI&F,[104] the NRMW[105] and the EPA.

Gene Technology Act 2001 (Qld)

The *Gene Technology Act* 2001 (Qld) compliments the *Gene Technology Act* 2000 (Cth) to regulate research, production and release of genetically modified organisms ("GMOs") and genetically modified ("GM") crops and products. The *Code of Ethical Practice for Biotechnology in Queensland* declares an ethical framework for the development of biotechnology in Queensland. The Act is administered by DSDI.[106]

Geothermal Exploration Act 2004 (Qld)

As its name suggests, the *Geothermal Exploration Act* 2004 (Qld) regulates geothermal exploration. Geothermal energy is energy derived from natural geological processes. There is very little use of this energy source currently 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 is administered by NRMW.[107]

Health Act 1937 (Qld)

The *Health Act* 1937 (Qld) provides a framework for the protection of public health. Of particular relevance to the environmental

[98] See EPA homepage at http://www.epa.qld.gov.au/
[99] See s39 and Sch 1 of the EP Regulation.
[100] This is not shown in Schedule 1 of the EP Regulation but includes ERAs 2 (Cattle feeding) and 3 (Pig farming).
[101] See DPI&F at http://www.dpi.qld.gov.au/fishweb
[102] See Brown AJ, "Beyond Public Native Forest Logging: National Forest Policy and Regional Forest Agreements after South East Queensland" (2001) 18 (1) EPLJ 71; (2001) 18 (2) EPLJ 189.
[103] For this reason the *Regional Forest Agreements Act* 2002 (Cth) is not included in this book.
[104] See DPI&F at http://www.dpi.qld.gov.au/forestry/
[105] See NRMW website at http://www.nrm.qld.gov.au/ and http://www.forests.qld.gov.au/
[106] See http://www.sdi.qld.gov.au/innovation/biotechnology
[107] See http://www.nrm.qld.gov.au/mines/geothermal/index.html

legal system is provision for the regulation of nuisances and offensive trades in ss77-92. The Act also provides for licensing of pest control operators and inspection of agricultural and hazardous chemicals. The *Health Regulation* 1996 (Qld) provides for the prevention and destruction of mosquitos and vermin control. The Act is administered by local government and Queensland Health.[108]

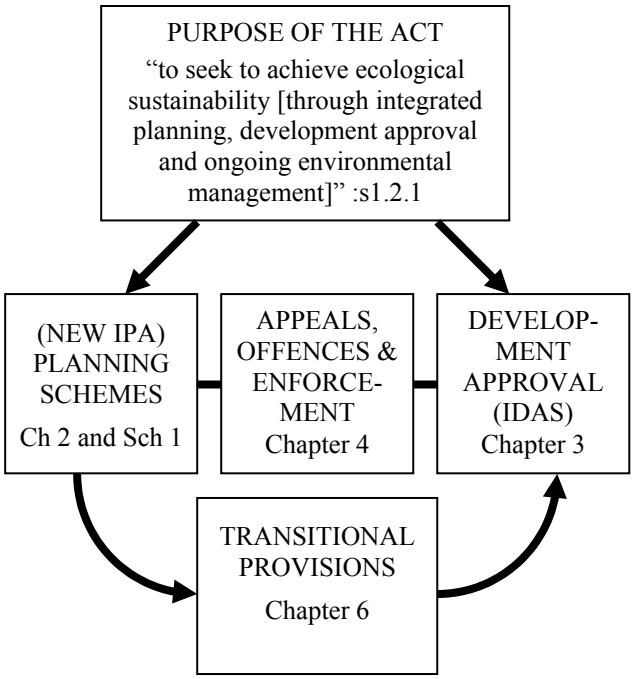
Integrated Planning Act 1997 (Qld)

The *Integrated Planning Act* 1997 (Qld) ("IPA") is Queensland's principal planning legislation.[109] However, it should be seen in the context of an environmental planning system that is comprised of many layers. International, national, State and regional planning is carried out under other pieces of legislation summarised in this book as well as a range of non-legislative regional planning processes.[110]

The IPA is largely concerned with planning and regulating land-use at the local scale although regional, State and wider issues may also be incorporated. The IPA establishes a framework for the creation of planning schemes by local governments and a development approval system known as the Integrated Development Assessment System ("IDAS"). In South-East Queensland ("SEQ") the *SEQ Regional Plan 2005* has now been incorporated into IPA to limit urban expansion within a defined "urban footprint".[111]

A conceptual structure of the IPA is shown in the following diagram. The overarching purpose of the IPA is "ecological sustainability". The two major limbs of IPA are planning schemes and development approval. The mechanistic provisions of appeals, offences and enforcement bind these limbs. Transitional provisions in Chapter 6 provide an important link to planning schemes prepared under the previous *Local Government (Planning and Environment) Act* 1990 (Qld), pending the preparation of the new IPA planning schemes by local governments.

Conceptual structure of IPA



Planning schemes are the heart and soul of planning and development approval under IPA. Planning schemes are prepared by local governments to plan for the future orderly development of its local government area, provide for infrastructure such as roads and sewerage and to protect the natural environment and quality of life in that area.

An important new concept of IPA planning schemes is "desired environmental outcomes" (DEOs), which state objectives to be achieved under a planning scheme or within a particular area. An example of a DEO is: to maintain and restore biodiversity.

Local governments are not allowed under the IPA to simply prohibit a development type or use of land.[112] The approach adopted under IPA aims to promote an outcome-orientated approach to planning and development by stating DEOs for areas against which development applications may be judged. This represents an important shift from the traditional approach to planning based on separating incompatible activities such as heavy industry and residential areas by prescribing through zoning plans permitted, permissible and prohibited uses for particular zones.[113]

[108] See QH homepage at http://www.health.qld.gov.au/

[109] See generally Fogg A, Meurling R and Hodgetts I, *Planning and Development Queensland* (LBC, Sydney, 2001) and the IPA website at http://www.ipa.qld.gov.au/

[110] For information on non-legislative regional planning, such as SEQ 2021, see http://www.lgp.qld.gov.au/

[111] See http://www.oum.qld.gov.au/?id=241

[112] Section 2.1.23(2) of IPA.

[113] A "zone" was a technical term traditionally used in town planning to designate an area in which particular development was permitted, permissible or prohibited.

Although there is considerable variability between local government planning schemes, they are typically a physical document with maps and text divided into a number of sections.[114] For example, the *Brisbane City Plan 2000* has the following major sections:

- A **strategic plan** which sets out the broad objectives, DEOs and future planning intent of the local government area;
- **Area plans** (previously called "zoning plans") which set out the purpose, location, DEOs and other planning provisions for specific areas such as residential and industrial areas across the local government area;
- **Local plans** (previously called "development control plans") which set out the purpose, location, DEOs and other planning provisions for areas such as the town center or a particular suburb where a special character or integrity is desired to be developed or maintained;
- **Codes** which set out requirements and planning provisions for particular planning issues (rather than geographic areas) such as landscaping, stormwater management or biodiversity;
- **Infrastructure charges** which set out methods for calculating developer contributions (payments) for infrastructure provided by the local government such as water supply and sewerage headworks; and
- **Planning scheme policies** which set out the policies that the local government will adopt in addressing particular issues such as the environmental impact assessment (EIA) of particular types of development (i.e. policies that guide the exercise of the local government's discretion on particular issues).

Planning schemes provide the principal planning documents against which individual development proposals are assessed in the IDAS. The IDAS process is commonly described as involving four stages:

- **Application Stage**, in which the applicant makes a development application to the assessment manager (normally the local government responsible for the area in which the development will occur);
- **Information and Referral Stage,** in which the development application is referred to any relevant government agency (called "referral agencies") and an "information request" is made if further information is necessary to assess it;
- **Notification Stage**, which applies only for "impact assessable" development (explained below) and in which public notification of the application is made;
- **Decision Stage**, in which the decision is made whether to approve, refuse or approve the application subject to reasonable and relevant conditions. Whether the proposed development is consistent with the planning scheme is a principal consideration in deciding whether to approve or refuse it.

However, the requirements of the IDAS process for individual development applications cannot be understood by merely reference to the four stages of the IDAS. In order to determine the requirements of the IDAS for individual development applications, such as whether the Notification Stage applies, it is first necessary to consider three preliminary questions: does the proposal involve "development"; what type of development is it; and does the proposal involve referral coordination, a referral agency or a significant project? Answering these three questions allows the IDAS requirements to be determined, including the strict timelines for each of the four IDAS stages.

Determining the IDAS requirements of individual development applications, therefore, involves a two-step process. A flowchart for this two-step method is provided in Appendix 6.

The first step of resolving IDAS preliminary questions hinges on an understanding of the terms "development" and "assessable development". Development is defined in s1.3.2 as:

For example, "Residential A Zones" were typically zones for detached urban housing of 1-3 storeys. "Rural Zones" allowed agriculture. "Industrial Zone" allowed industrial development. IPA planning scheme have replaced this term with other words such as "Areas" or "Precincts".

[114] Many planning schemes are available on the internet. For example, *Mackay City Planning Scheme 2006* at http://www.mackay.qld.gov.au/; *Maroochy Plan 2000* at http://www.maroochy.qld.gov.au/site/; *Johnstone Shire Planning Scheme 2005* at http://www.jsc.qld.gov.au/; and *Gold Coast Planning Scheme 2003* at http://www.goldcoast.qld.gov.au/gcplanningscheme/

- carrying out building work;
- carrying out plumbing or drainage work;
- carrying out operational work;
- reconfiguring a lot; or
- making a material change of use of premises.

With one exception,[115] these terms are defined in s1.3.5 of the IPA as follows:[116]

- **Building work** means building, repairing, altering, moving or demolishing a building or structure, and some other forms of related work. For a place listed on the Heritage Register under the *Queensland Heritage Act* 1992 (Qld), building work even includes painting or plastering that substantially alters the appearance of the place.
- **Plumbing or drainage work** includes installing, changing, and maintaining an apparatus, fitting or pipe for the supply or removal of water, sewage or greywater.
- **Operational work** is a very wide term that includes activities such as excavating or filing, clearing vegetation or "undertaking work … that materially affects premises or their use."
- **Reconfiguring a lot** means subdividing a large lot into smaller lots, amalgamating several lots together, or rearranging the boundaries of a lot.
- **Material change of use** generally means the start of a new use, re-establishment of a use that has been abandoned or a material change in the intensity or scale of a use of premises. A "use" of land is the purpose for which activities are conducted on the land as understood in ordinary terminology in a town planning context.[117] Planning schemes normally include a dictionary to define common uses of land. Examples of a different uses of land include, "residential housing", "hotel", "commercial premises", "garage", "shopping centre" and "restaurant".

The term "development" creates a broad umbrella definition into which virtually any proposal can be brought within the planning and assessment framework. Development may be either:

- **exempt** (e.g. mining activities), which means that IPA does not apply to it;
- **self-assessable**, which means that no formal approval is required; however, the development must comply with any relevant codes (e.g. a cyclone building standard in cyclone prone areas); or
- **assessable development**, which means that assessment is required under IDAS by any relevant government body.

Characterisation of development into these three categories generally depends upon the type of development in question being listed in Schedules 8 or 9 of IPA or a relevant planning scheme as requiring assessment or otherwise having applicable development codes.

If development is assessable development, it must also be characterised as either:

- **impact assessable**, which means that the application is assessed against the whole of the planning scheme, must be publicly notified, and the public gains a right to make submissions and appeal a decision to approve the development; or
- **code assessable**, which means that the application is assessed only against any relevant technical code (eg. a building code), is not publicly notified and no submission or appeal rights exist.

Characterisation as either impact assessable or code assessable development will depend upon any relevant planning scheme and Schedule 1 of the *Integrated Planning Regulation* 1998 (Qld). Large-scale development or development in sensitive areas will not necessarily be impact assessable.

Note that the term "impact assessable" does not connote a traditional environmental impact statement ("EIS") document or process. IPA uses a system of "information requests" for both impact assessment and code assessment

[115] Plumbing and drainage work is defined in the *Plumbing and Drainage Act* 2002 (Qld).

[116] See also Walton M, Smith P and Job B, "The Concept of 'Development' under the Integrated Planning Act 1997" (2000) 6 (26) QEPR 17; Jacks S, "The Integrated Planning Act 1997 (Qld) – Material Change of Use" (1999) 5 (22) QEPR 78; Fogg *et al*, n 106.

[117] *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493 at 515; *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 535.

whereby government agencies assessing the application may request further information. This process has been criticised.[118] A formal EIS process has been inserted as Part 8 of Chapter 5 of IPA to fulfil the requirements of an assessment bilateral under the EPBC Act.[119]

"**Referral coordination**" was a variation of the normal IDAS process (but not a formal EIA process) in which the Department of Local Government and Planning coordinated the responses of State Government agencies. It is to be removed from the IPA but the amendments had not commenced at the time of writing.[120]

The government entities involved in the IDAS process are referred to as the "**assessment manager**" and "**referral agencies**". The assessment manager is normally the relevant local government. An application is made to this entity, which then manages the IDAS process and makes the final decision whether to approve or refuse an application and whether to impose conditions. Referral agencies are other government bodies to which an application is referred. Referral agencies and their jurisdictions are set out in Schedule 2 of the *Integrated Planning Regulations* 1998 (Qld). There are two levels of status for referral agencies:

- **Concurrence agency**, which means the entity has the power to refuse the application and to impose mandatory conditions; or
- **Advice agency**, which means that the entity may offer advice to the assessment manager, but not refuse the application or impose mandatory conditions.

Just as concurrence and advice agencies must assess development applications within the legislation that they are responsible for administering and respond accordingly, local governments also have a specific framework for their decision-making under IPA. The two major questions that must be answered by a local government in determining whether or not to approve a development application are:[121]

- Is the proposed development consistent with the planning scheme?
- Are there sufficient planning reasons (eg. need) to justify any inconsistency with the planning scheme?

If the local government (or other assessment manager) decides to approve the development application, it may impose conditions that are relevant or reasonable.[122] A "relevant" condition is one that properly relates to the legislation under which it is imposed (eg. for a local government, to maintain standards in local development or in some other legitimate sense).[123] A "reasonable" condition is one that is a reasonable response to the changes that the development will cause (eg. increased traffic to a road or bridge).[124] For example, in response to a development application to build a marina in a coastal area subject to acid sulfate soils, a relevant and reasonable condition may be "to test for and manage acid sulphate soils in accordance with State Planning Policy 2/02 (Planning and Management Development Involving Acid Sulfate Soils)." Conditions are the basic mechanism for minimising adverse impacts and for providing public infrastructure such as parklands.

While local governments are generally the assessment manager in the IDAS process and therefore make the final government decision, they are political bodies and often political reasons will be at the true heart of their decisions. To provide a check to this the Planning and Environment ("P&E") Court provides *de novo*[125] merits review of the decisions of assessment managers for parties

[118] See Leong M, "Comparative Analysis of Environmental Impact Assessment under the Integrated Planning Act 1997 and the Local Government (Planning and Environment) Act 1990" (1998) 4(18) QEPR 74; Brown AL and Nitz T, "Where Have All the EIAs Gone?" (2000) 17 (2) EPLJ 89.

[119] Sections 5.8.1-5.8.15 IPA. These sections had not commenced at the time of writing.

[120] See the *Integrated Planning and Other Legislation Amendment Act* 2006 (Qld).

[121] See ss3.5.13 and 3.5.14 of IPA. Note that other planning instruments, such as State Planning Policies, may also be relevant and involve similar questions.

[122] Section 3.5.30 IPA; *Maroochy SC v Wise* (1998) 100 LGERA 311; *Proctor v BCC* (1993) 81 LGERA 398. Note also other minor tests for the validity of conditions as outlined by Fogg *et al*, n 106 at pp 3692-3710.

[123] *Lloyd v Robinson* (1962) 107 CLR 142; *Proctor*.

[124] *Cardwell SC v King Ranch Australia PL* (1984) 54 LGRA 110, 113; *Proctor v BCC* (1993) 81 LGERA 398.

[125] That is, the development application is considered again from the beginning and the P&E Court is not bound by the assessment manager's decision in any way.

applying for development approval. A third party submitter may also appeal impact assessable development.[126]

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 IPA and the relevant planning scheme. An excellent explanation and example of the approach taken by the Court is the decision in *Luke v Maroochy Shire Council* ("*SC*") [2003] QPELR 447; [2003] QPEC 5.

Two principles emerge from decisions of the P&E Court for the assessment of environmental issues.[127] The first principle for the assessment of environmental issues in the P&E Court is that environmental values not recognised in a planning scheme[128] or other planning instrument will generally not be protected by the Court:

> "ordinarily an owner is entitled to use their land as they wish and is under no obligation to consider the desirability of conserving the existing environment."[129]

> "[The Planning and Environment] 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."[130]

The second principle for the assessment of environmental issues by the P&E Court is that the preparation of an Environmental Management Plan ("EMP") or similar plan is a powerful tool for persuading the Court that environmental issues have been adequately addressed:

> "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."[131]

The P&E Court provides an important check to political decision-making; however, it is clear from the principles by which the Court operates that the protection that it can and will give to genuine environmental considerations is largely dependent on the relevant planning scheme.

The IPA is administered largely by local governments together with other State Government agencies responsible for the planning processes linked to the IPA. The Department of Local Government and Planning, Sport and Recreation ("DLGPSR") is the lead agency for the Act.[132]

Integrated Resort Development Act 1987 (Qld)

The *Integrated Resort Development Act* 1987 (Qld) ("IRDA") is a peculiar piece of legislation and applies to only a few areas along the Queensland coast such as Hope Island at the Gold Coast.[133] It allowed for schemes approved by the State Government to over-ride local government planning schemes and local laws for large resort developments along the Queensland coast. It has generally been replaced by the IPA and the *Body Corporate and Community Management Act* 1997 (Qld). No further approved schemes can be gazetted under it[134] but it has not been repealed. It is administered by the DLGPSR.[135]

Land Act 1994 (Qld)

The *Land Act* 1994 (Qld) provides a framework for the allocation of State land either as leasehold, freehold or other tenure. The

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[126] O'Hart A, *The Community Litigants Handbook* (Environmental Defenders Office, Brisbane, 2006) gives a practical explanation of planning appeals. See also http://www.edo.org.au and http://www.envlaw.com.au.

[127] See generally Tranter M, "The Treatment of Environmental Issues in the Queensland Planning Courts" (1995) 1 (5) QEPR 152.

[128] For the approach to interpreting planning schemes, see *Sinnamon v Miriam Vale SC* [2002] QPEC 51 at [47]; *Luke v Maroochy SC* [2003] QPEC 5 at [41]-[50].

[129] *Indooroopilly Golf Club v BCC* [1982] QPLR 13 at 32; *Sabdoen PL v Redland SC* [1989] QPLR 149 at 152

[130] *Hollingsworth v BCC* (1975) Planner LGC 92; *Sheezel & 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].

[131] *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.

[132] See the IPA website at http://www.lgp.qld.gov.au/.

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

[134] See section 4(1A) of the IRDA.

[135] There is no useful website for the IRDA.

importance of the allocation of land to the environmental legal system should not be underestimated. 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, politically if not legally.[136] From late 1997 the Act also provided a regulatory regime for vegetation management on State lands; however, in early 2004 this was transferred into the *Vegetation Management Act* 1999 (Qld) and IPA. The Act is administered by NRMW.[137]

Land Protection (Pest & Stock Route Management) Act 2002 (Qld)

The *Land Protection (Pest & Stock Route Management) Act* 2002 (Qld) provides a framework for the control of declared pests such as foxes, feral pigs and groundsel. Schedule 2 of the *Land Protection (Pest & Stock Route Management) Regulations* 2003 (Qld) lists declared pests in 3 classes.

The Act operates in conjunction with the *Plant Protection Act* 1989 (Qld), which provides for the control and eradication of pest plants, invertebrate animals, fungi, viruses and diseases that are harmful to crop plants in Queensland. However, the separation between these Acts is quite illogical.

In addition to pests, the Act also provides a framework for managing Queensland's 72,000km of stock routes, which remain of considerable importance in rural areas for the movement and agistment of cattle and sheep.

The Act is administered by NRMW.[138]

Local Government Act 1993 (Qld)

The *Local Government Act* 1993 (Qld) is concerned primarily with the establishment and functioning of local governments (of which there are 125 in Queensland); however, it also contains power for local governments to pass local laws.[139] Local laws apply within a local government area to a range of relatively minor environmental issues such as dog licences; however, due to the absence until recently of vegetation management laws at a State level, they have also been used to regulate vegetation clearing.[140]

Marine Parks Act 2004 (Qld)

The *Marine Parks Act* 2004 (Qld) is the marine equivalent of the *Nature Conservation Act* 1992 (Qld) and establishes a framework for the identification, gazettal and management of protected areas as Marine Parks and the protection of marine species. The Act recently replaced the *Marine Parks Act* 1981 (Qld). It adopts a planning and management approach of establishing zoning plans for multiple-use management and a permit system for activities within marine parks such as collecting marine products or commercial whale watching. This system is closely associated with the zoning scheme established under the *Great Barrier Reef Marine Park Act* 1975 (Cth). The Act is administered by the Queensland Parks and Wildlife Service ("QPWS"), part of the EPA.[141]

Mineral Resources Act 1989 (Qld)

The *Mineral Resources Act* 1989 (Qld) ("MRA") provides a framework to regulate tenure and royalty issues associated with exploration and mining for minerals (defined not to include petroleum) on land in Queensland; however, the environmental impacts of mining are now regulated under the EP Act. Mining is exempt development under the IPA and it is not intended to integrate the approval processes for mining into the IDAS.

The MRA vests property to minerals, with limited exceptions, in the Crown. This is possibly subject to native title interests in minerals but it appears unlikely that such interests will be established. Under the Act a royalty is payable to the Crown for the right to extract minerals. Exploration permits and mining leases may be granted over private land without the owner's consent but are subject to compensation for the loss of the use of the land. In effect mining may occur at any location where sufficient mineral reserves are established

[136] There is no right of compensation at common law for the acquisition of property by State governments: *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399.
[137] See NRMW at http://www.nrm.qld.gov.au/
[138] See NRMW at http://www.nrm.qld.gov.au/
[139] For information on local governments generally and links to numerous homepages of Queensland local governments see http://www.lgaq.asn.au/
[140] In this regard note in particular *Bone v Mothershaw* [2002] QCA 120; (2002) 121 LGERA 75.
[141] See EPA homepage at http://www.epa.qld.gov.au/

and the public interest (including any deleterious environmental effects) warrants the grant of the mining lease. Section 27 of the *Nature Conservation Act 1992 (Qld)* provides the only exception to this rule by prohibiting the grant of a mining lease in a national park or conservation park.

NRMW administers mining tenure issues under the MRA[142] and the EPA regulates the environmental aspects of mining under the EP Act. Objections to mining leases under the MRA and environmental authorities for mining under the EP Act are heard by the Land and Resources Tribunal.[143]

Native Title (Queensland) Act 1993 (Qld)

The *Native Title (Queensland) Act* 1993 (Qld) validates past acts attributable to the Queensland Government that may have affected native title and purports to confirm that certain acts have extinguished native title. Importantly for environmental law, s17 purports to confirm the existing ownership of the State Government to all natural resources, the right to use, regulate and control the flow of waters and fishing access rights. Whether native title has been extinguished for these matters remains uncertain. The lead agency for native title issues is the NRMW.[144]

Nature Conservation Act 1992 (Qld)

The *Nature Conservation Act* 1992 (Qld) ("NCA") establishes a framework for the identification, gazettal and management of protected areas (such as national parks) and the protection of native flora and fauna (protected wildlife). Protected areas represent 4% of the total area of the State.[145] The Queensland Government has now adopted a systematic approach to conservation planning using bioregional ecosystems.[146] The NCA is administered by QPWS, part of the EPA.[147]

Offshore Minerals Act 1998 (Qld)

The *Offshore Minerals Act* 1998 (Qld) establishes a framework for regulating the exploration and mining of minerals (defined not to include petroleum) in Queensland coastal waters. The Act 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. NRMW administer the Act.[148]

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

The *Petroleum and Gas (Production and Safety) Act* 2004 (Qld) regulates petroleum exploration, extraction (including coal seam gas) and pipeline licensing for tenures granted after 2004. Due to native title complications, the *Petroleum Act* 1923 (Qld) continues to regulate the exploration and extraction of petroleum (including natural gas) for licences granted prior to 2004. The Acts are administered by NRMW.[149] As for mining, environmental protection aspects of petroleum extraction are regulated under the EP Act by the EPA.[150]

Petroleum (Submerged Lands) Act 1982 (Qld)

The *Petroleum (Submerged Lands) Act* 1982 (Qld) establishes a framework for regulating the exploration and extraction of petroleum from Queensland waters. It operates pursuant to the "Offshore Constitutional Settlement" of 1979 and in conjunction with the *Petroleum (Submerged Lands) Act* 1967 (Cth). The Act is administered by NRMW.[151]

Plant Protection Act 1989 (Qld)

The *Plant Protection Act* 1989 (Qld) provides for the control and eradication of pest plants, invertebrate animals, fungi, viruses and diseases that are harmful to crop plants in Queensland.

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[142] See NRMW at http://www.nrm.qld.gov.au/

[143] See LRT at http://www.lrt.qld.gov.au (viewed 1/3/05). For examples of judgments by the Land & Resources Tribunal for mining leases involving environmental issues, see *Salmon v Armstrong* [2001] QLRT 72; and *Papillon Mining and Exploration Pty Ltd & Anor v Maddock & Ors* [2003] QLRT 62.

[144] See www.nrm.qld.gov.au/nativetitle

[145] Environmental Protection Agency, *State of the Environment Queensland 1999*, EPA, Brisbane, 1999, Table 3-4 at p 3.10 and p 7.4.

[146] See the discussion in the *Vegetation Management Act* 1999 (Qld) section of this book.

[147] See the EPA homepage at http://www.epa.qld.gov.au/

[148] See NRMW at http://www.nrm.qld.gov.au/

[149] See http://www.nrm.qld.gov.au/mines/

[150] See Chapter 4A, ss77-145V, of the EP Act.

[151] See http://www.nrm.qld.gov.au/mines/

This includes the recent infestation of fire ants in Brisbane, for which a major eradication program is currently underway.[152]

The Act operates in a quite illogical union with the *Land Protection (Pest & Stock Route Management) Act* 2002 (Qld), which provides a framework for the control of declared pests such as foxes, feral pigs and groundsel. Special legislation also provides for the control of pests in bananas,[153] diseases in timber,[154] and exotic diseases in animals (such as foot-and-mouth disease and rabies).[155] The Act is administered by DPI&F.[156]

Queensland Heritage Act 1992 (Qld)

The *Queensland Heritage Act* 1992 (Qld) 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. The Act is administered by the Queensland Heritage Council and the Cultural Heritage Unit of the EPA.[157]

Recreation Areas Management Act 2006 (Qld)

The *Recreation Areas Management Act* 2006 (Qld) replaces a 1988 Act of the same name. It provides a framework for a statutory board to manage declared recreation areas. There are five declared areas: Fraser Island, Moreton Island; Inskip Peninsula; Green Island; and Bribie Island. The Act is administered by the QPWS on behalf of the Queensland Recreational Areas Management Board.[158]

Soil Conservation Act 1986 (Qld)

The *Soil Conservation Act* 1986 (Qld) provides a little used framework for the management of soil erosion from agricultural land. 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 under the Act for some areas at Toowoomba, Bundaberg and Kingaroy. NRMW administers the Act.[159]

State Development and Public Works Organisation Act 1971 (Qld)

The *State Development and Public Works Organisation Act* 1971 (Qld) is a nebulous Act drawing together a range of powers and functions which are used by the State Government to promote and facilitate large projects in Queensland. The Act provides a formal environmental impact statement process in ss26-35 for significant projects. The Act 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 (s125(1)(f)). The latter provision aims to facilitate large infrastructure projects such as dam construction by private companies. The Act is administered by the Coordinator-General (i.e. the Director-General of DSDI).[160]

Transport Infrastructure Act 1994 (Qld)

The *Transport Infrastructure Act* 1994 (Qld) operates in conjunction with the *Transport Planning and Coordination Act* 1994 (Qld) to facilitate the planning, construction and operation of State roads, railways and ports. The construction of these facilities has major direct and indirect effects on the environment due to physical destruction, disturbance and subsequent increased use. 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 (s172). The Act is administered by the EPA, Queensland Transport,[161] the Department of Main Roads ("DMR")[162] and various port authorities.[163]

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[152] See http://www.dpi.qld.gov.au/fireants
[153] *Banana Industry Protection Act* 1989 (Qld).
[154] *Diseases in Timber Act* 1975 (Qld).
[155] *Exotic Diseases in Animals Act* 1981 (Qld).
[156] See DPI&F at http://www.dpi.qld.gov.au/
[157] See EPA homepage at http://www.epa.qld.gov.au/
[158] There is no useful website for this legislation.
[159] See http://www.nrm.qld.gov.au/land/management/. For an example of the operation of the Act, see *Morrissy v Department of Natural Resources & Mines* [2003] QLC 0012.
[160] See DSDI homepage at http://www.sdi.qld.gov.au/
[161] See QT at http://www.transport.qld.gov.au/home.nsf
[162] See DMR at http://www.mainroads.qld.gov.au/
[163] E.g. Port of Brisbane at http://www.portbris.com.au/

Related transport legislation and regulations, such as the *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation* 1999 (Qld), provide important standards limiting noise and emissions from vehicles.

Transport Operations (Marine Pollution) Act 1995 (Qld)

The *Transport Operations (Marine Pollution) Act* 1995 (Qld) regulates marine pollution from ships in Queensland's coastal waters. It implements the MARPOL 73/78. The Act is made 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 the MARPOL 73/78. It is administered by the Maritime Division of Queensland Transport.[164]

Vegetation Management Act 1999 (Qld)

The recent history of vegetation management in Queensland has been very controversial. Prior to the 1990s, there was little effective regulation of landholders clearing vegetation. 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 vegetation management on the 30% of Queensland held as freehold land and freeholding leases.

Faced with ongoing controversy and high levels of vegetation clearing across the State, in 2004 major reforms to vegetation management laws were introduced. A major part of the reforms is to phase out broadscale land clearing by 31 December 2006. The reforms have also removed the system of vegetation clearing laws for State lands in the *Lands Act* 1994 (Qld).

Vegetation management on approximately 95% of land in Queensland is now regulated under the VMA/IPA system. The VMA itself does not regulate vegetation management. Instead the trigger and process for assessment, together with the offence for clearing vegetation without approval, are contained in the IPA. However, the VMA provides for the preparation of mapping 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.

There are, however, many other laws that regulate vegetation clearing in Queensland. Vegetation on the 5% of Queensland in protected areas, such as National Parks, and State forests is regulated under the *Nature Conservation Act* 1992 (Qld) and *Forestry Act* 1959 (Qld), as well as some minor interests in State land still being regulated under the *Lands Act* 1994 (Qld). Local government planning schemes and local laws provide additional protection of vegetation in some cases.[165] The complex matrix of vegetation clearing laws in Queensland is summarised in Appendix 7.

A system for classifying vegetation known as "regional ecosystems" ("REs") provides a common basis for vegetation management in Queensland.[166] Under this system, the State is divided into 13 bioregions based on broad landscape patterns that reflect the major underlying geology, climate patterns, and broad groupings of plants and animals. REs are vegetation communities associated with particular landforms within each bioregion. REs are assigned a unique 3 digit code reflecting its bioregion, land zone, and dominant vegetation. For example, *Eucalyptus tereticornis* woodlands on coastal plains in southeast Queensland are classified as "RE 12.3.3". The Queensland Herbarium has mapped REs using satellite imagery, aerial photography, and on-ground studies. RE maps show what remnant vegetation remains in REs throughout the State.

The conservation status of each RE is based on its current extent in a bioregion. REs are classified under the *Vegetation Management Regulations* 2000 (Qld) as:

- **Endangered** if less than 10% of the preclearing extent remains, or 10-30% of the

[164] See http://www.transport.qld.gov.au/maritime

[165] See, for example, the interesting case of *Caloundra City Council v Pelican Links Pty Ltd* [2004] QPEC 52.

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

pre-clearing extent remains (if the area of remnant vegetation is less than 10 000 ha).

- **Of concern** if 10-30% of the preclearing extent remains, or more than 30% of the preclearing extent remains (if the area of remnant vegetation is less than 10 000 ha).
- **Not of concern** if more than 30% of the preclearing extent remains, and the area of remnant vegetation is more than 10 000 ha.

The main trigger for whether development approval is required for vegetation clearing is found in Schedule 8 of IPA. Additional triggers for approval of material change of use (MCU) or reconfiguration of a lot (RaL) potentially leading to vegetation clearing are found in Schedule 2 of the *Integrated Planning Regulations* 1998 (Qld). If development approval is required, the *State Policy for Vegetation Management* (May 2004)[167] and associated policies guide the assessment of the application.

Other major components of the VMA/IPA regime include the following:

- **Declared areas** are areas declared under sections 17 or 18 of the VMA to be of high nature conservation value or vulnerable to land degradation. Clearing within these areas is subject to strict controls.
- **Regional Ecosystem Maps** ("RE Maps") and **Remnant Maps** have been produced by the Queensland Herbarium at a scale of 1:100,000. These maps show remnant vegetation and classify REs according to conservation status as Endangered, Of Concern or Not of Concern.
- **Regional Vegetation Management Codes** ("RVM Codes") for 24 regions across the State are part of the new vegetation management framework. There are twenty four regional codes that will be used to assess applications for broadscale clearing prior to 31 December 2006 and applications for ongoing clearing purposes. "Ongoing clearing purposes" including thinning regrowth, to remove encroachment, fodder harvesting, weed control, to establish necessary infrastructure, and to clear non-remnant vegetation on leasehold land.
- **Property Vegetation Management Plans** ("PVMPs") are maps that must accompany a clearing application, showing the location and extent of the proposed clearing and other matters prescribed in section 3 of the Vegetation Management Regulations 2000.
- **Property Maps of Assessable Vegetation** ("PMAVs") are a new component of the VMA system that are intended to give greater certainty to landholders about vegetation management. PMAVs can be prepared by landholders and submitted for approval to provide property scale (1:15,000 or 1:10,000) maps. There are five categories of vegetation on a PMAV:
  - **Category 1 area**: Endangered RE; unlawfully cleared area; area declared to be of high nature conservation value or vulnerable to land degradation
  - **Category 2 area**: Of Concern RE
  - **Category 3 area**: Not of Concern RE
  - **Category 4 area**: Agricultural or grazing lease cleared before 31 December 1989
  - **Category X area**: Cleared areas / regrowth.

A major benefit of PMAVs for landholders is to prevent regrowth vegetation being re-mapped as remnant vegetation. Once a PMAV is approved a landholder does not need to regularly clear regrowth shown in a Category X area to prevent it being re-mapped as remnant vegetation and therefore protected.

The VMA is administered by NRMW.[168]

Water Act 2000 (Qld)

The *Water Act* 2000 (Qld) is a lengthy piece of legislation that 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, etc.) and extraction through 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

[167] See http://www.nrm.qld.gov.au/vegetation/legislation

[168] See generally http://www.nrm.qld.gov.au/vegetation. The *State Policy for Vegetation Management* and other useful information is also available at this website.

context of "sustainable management and efficient use" of water.[169]

The most important planning instruments under the Act are Water Resource Plans, which are prepared through a consultative process generally on a catchment-by-catchment basis. An important aspect of the preparation of Water Resource Plans is balancing water allocations (i.e. human use) with environmental flows (i.e. leaving water in a watercourse to maintain natural processes) (s46). Water Resource Plans therefore form the "baseline" plan for what water can be taken out of catchments and represent a limit or "cap" to water use.

There are a number of other important planning tools in the Act. Water Use Plans may be prepared for areas at risk of land or water degradation due to such things as rising underground water levels, increasing salinisation, deteriorating water quality, water logging of soils, destabilization of bed and banks of watercourses, damage to the riverine environment or increasing soil erosion (s60). Land and Water Management Plans may also be submitted by individual landowners applying to irrigate their land (s73). Resource Operations Plans provide practical operational details of the implementation of a Water Resource Plan in an area (s95) under which Resource Operations Licenses (s108) and Water Allocations (s122), Water Licences (s206) and Water Permits (s237) may be granted.

The *Water Act* is integrated into the Integrated Development Assessment System (IDAS) of the *Integrated Planning Act* 1997 (Qld) (IPA). Two approvals are now required for extraction of water from a watercourse and other matters regulated under the *Water Act*:

- **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 relevant criteria in the Act and relevant Water Resource Plan and Resource Operations Plan (if any).
- **Development permit** provides permission for development associated with the use of water that is assessable development under Sch 8 of IPA. Sch 8 defines a number of types of water related development as assessable or self-assessable development. 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 anywhere in the State, no matter what their use.

In addition to these planning controls, the destruction of vegetation, excavation or placing fill in a watercourse, lake or spring is regulated under s814. The Act also makes provision for trade waste agreements (i.e. release of industrial waste into local government sewerage systems), although water pollution is regulated under the *Environmental Protection Act* 1994 (Qld).

The Act is administered by NRMW.[170] In relation to catchment management, note also the *River Improvement Trust Act* 1940 (Qld), which provides for the establishment of statutory bodies concerned with flood control, riverbank stability and similar matters in specified catchments around the State.

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

The *Wet Tropics World Heritage Protection and Management Act* 1993 (Qld) establishes a framework for regulating land-use development and management within the Wet Tropics World Heritage Area ("WTWHA") of North Queensland through a regional plan for the area. The *Wet Tropics Management Plan* 1998 (Qld) is the regional plan created under the Act. It provides a zoning plan to control development and activities within the WTWHA. The Act and Plan are administered by the Wet Tropics Management Authority[171] in conjunction with the QPWS and NRMW.

Wild Rivers Act 2005 (Qld)

The *Wild Rivers Act* 2005 (Qld) provides an additional layer of protection to undeveloped river systems in Queensland. Wild River Declarations made under the Act restrict further

[169] Note that water efficiency standards and labelling are regulated under the *Water Efficiency Labelling and Standards Act* 2005 (Qld).

[170] See NRMW homepage at http://www.nrm.qld.gov.au/

[171] See WTMA homepage http://www.wettropics.gov.au/

water extraction within the declared area. 19 declarations have been proposed under the Act, but are mostly limited to rivers in Cape York and adjacent to the Gulf of Carpentaria. Declarations for Fraser Island and Hinchinbrook Island are also proposed. The Act is administered by NRMW.[172]

THE COMMON LAW

The common law (or "judge-made law") is the law developed by judges in courts.[173] Although now largely superseded by legislation at Commonwealth and State levels, the common law continues to provide important background of principles that directly impact upon and shape the environmental legal system.

The main causes of action at common law relevant to environmental issues are:[174]

- **Private nuisance** (unreasonable interference with the use of property, including due to smoke, noise or vibration arising from a neighbour's property);
- **Public nuisance** (unreasonable interference with a public right, including due to pollution, where the plaintiff 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);[175]
- **Negligence** (a duty to take reasonable care to avoid damage to people or property, including, for example, manufacturing goods that cause cancer);[176]
- **Trespass** (a direct interference 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.[177]

Native title, recognised as part of the common law in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, also contains immensely important implications for the environmental legal system.[178] In *Mabo*, Brennan J defined the content of "native title" as:

> "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, in *Yarmirr v Northern Territory* (1998) 82 FCR 533 (the Croker Island Case), Olney J found the native title and interests of the claimant group were:[179]

> (a) 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
> (b) to have access to the sea and sea-bed within the claimed area:
> (i) to exercise the above rights;
> (ii) to travel through, or within, the claimed area;
> (iii) to visit and protect places within the claimed area which were of cultural or spiritual importance; and
> (iv) to safeguard the cultural and spiritual knowledge of the claimants.

CONCLUSION

The Queensland environmental legal system has developed dramatically over the last 30 years. In the future, it will continue to develop rapidly as it grapples with perennial difficulties such as population growth and the rapid 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.

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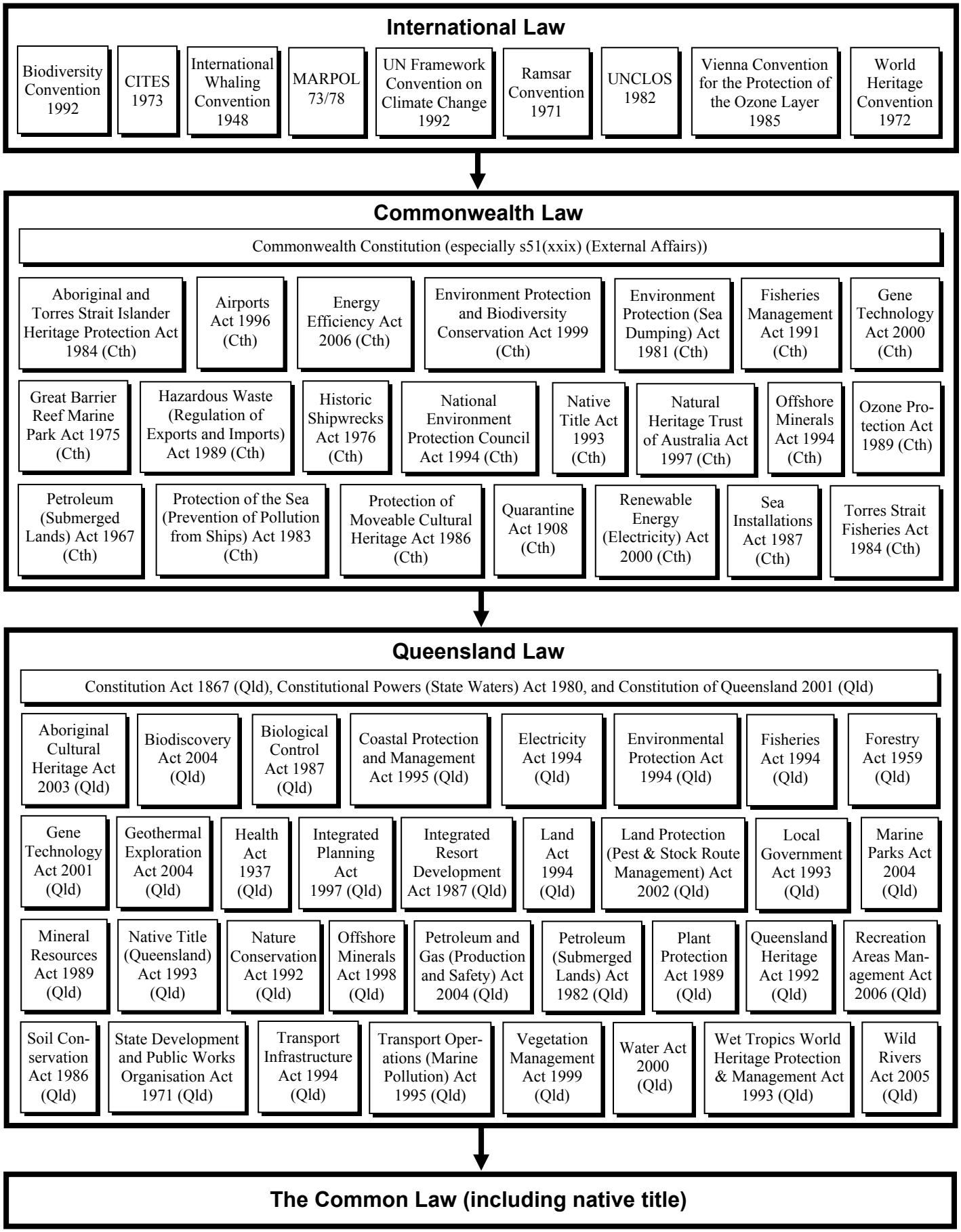
[172] See http://www.nrm.qld.gov.au/wildrivers/
[173] See generally Bates, n 3, pp 20-47.
[174] See generally Bates, n 3, pp 27-30.
[175] See Fisher DE, *Water Law* (LBC, Sydney, 2000).
[176] In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 the rule of strict liability in *Rylands v Fletcher* was abandoned in favour of general negligence principles. See also *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.
[177] See generally *ACF v Commonwealth* (1980) 146 CLR 493 and Bates, n 3, pp 461-516.
[178] See generally, Bartlett RH, *Native Title in Australia* (2nd ed, Butterworths, Sydney, 2003).
[179] Upheld by the High Court on appeal: *Commonwealth v Yamirr* (2001) 208 CLR 1.

Appendix 1: Major pieces of the Queensland environmental legal system



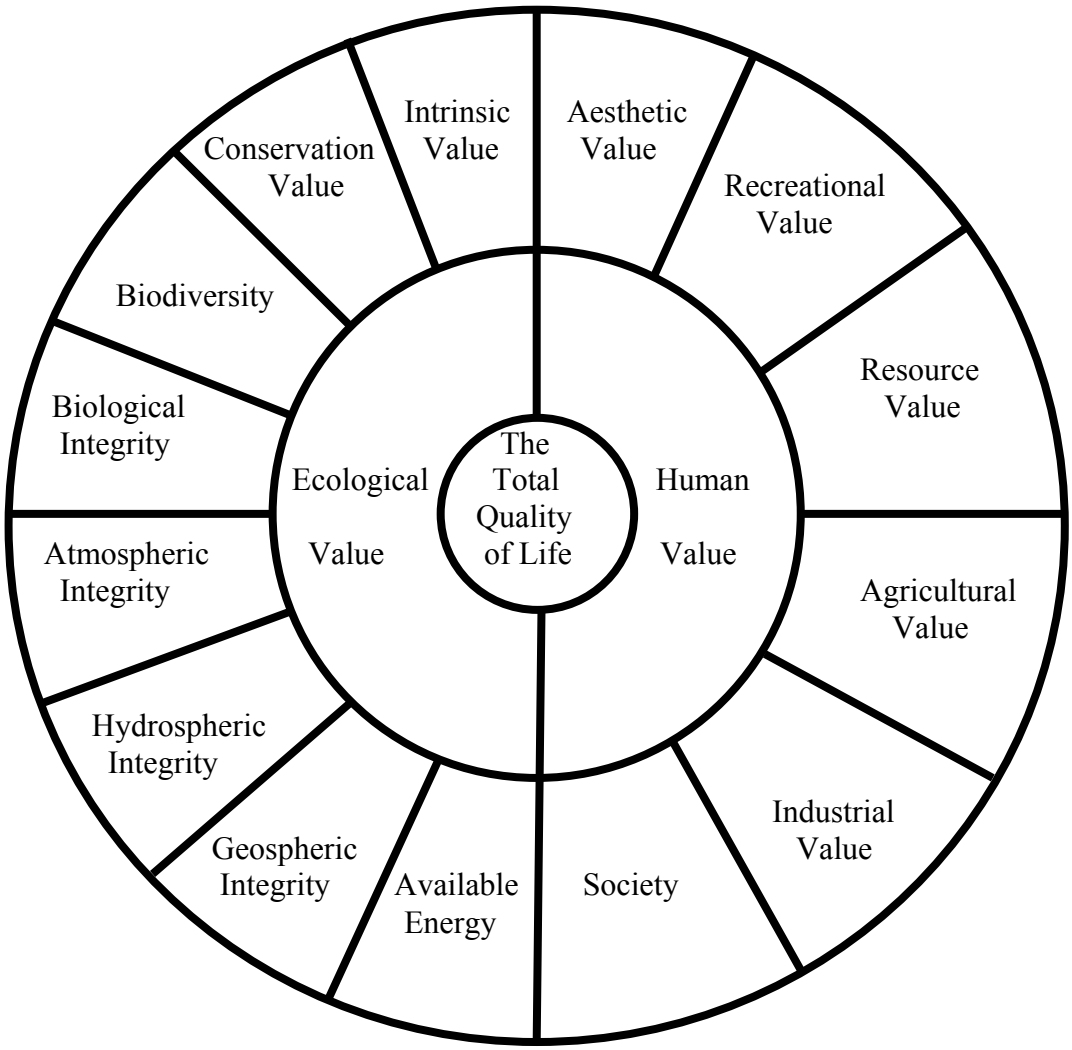
Appendix 2: Ecologically sustainable development

The *Nation Strategy for Ecologically Sustainable Development* defined ecologically sustainable development ("ESD") as "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." The first aspect of this definition involves a threshold question, the second involves a balance.

The ecological processes on which life depends

1. The Water Cycle (including biological components);
2. Atmospheric homeostasis processes:
   (i) Photosynthesis (oxygen production) and respiration;
   (ii) Removal of contaminants;
   (iii) Climate control processes;
3. Photosynthesis (energy production) and energy flow;
4. Nutrient cycling, soil fertility and water nutrient processes;
5. Reproduction; and
6. Evolution.

The "total quality of life"



Appendix 3: Major courts & tribunals relevant for environmental law in Queensland

* 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)

Subject area / jurisdiction	Relevant court or tribunal
1. Planning appeals, development offences and declarations under the *Integrated Planning Act* 1997 (Qld) ("IPA")	Planning and Environment Court (see Chapter 4 of the IPA) **
2. Applications to restrain offences against the *Environmental Protection Act* 1994 (Qld)	Planning and Environment Court (see ss505 & 507 of the *Environmental Protection Act* 1994 (Qld)) **
3. Applications for declarations and enforcement orders for offences under the *Nature Conservation Act* 1992 (Qld)	Planning and Environment Court (see ss173B and 173D of the *Nature Conservation Act* 1992 (Qld))**
4. Objections to an environmental authority (mining lease) under the *Environmental Protection Act* 1994 (Qld) and a mining lease under the *Mineral Resources Act* 1989 (Qld)	Land and Resources Tribunal (see ss219-228 of the *Environmental Protection Act* 1994 (Qld), ss260-269 of the *Mineral Resources Act* 1989 (Qld), & *Land and Resources Tribunal Act* 1999 (Qld)) **
5. Appeals against certain decisions under the *Fisheries Act* 1994 (Qld)	Fisheries Tribunal (see ss 185-199 of the *Fisheries Act* 1995 (Qld))**
6. Appeals against decisions regarding development applications that only involve clearing of native vegetation under the IPA	Building and Development Tribunal (see Chapter 4, Part 2 of the IPA) **
7. Appeals against various decisions under the *Water Act* 2000 (Qld)	Magistrates Court of Qld, Land Court of Qld* or Planning and Environment Court ** (see s 877 of the *Water Act* 2000 (Qld))
8. Appeals against various Ministerial decisions concerning State land under the *Land Act* 1994 (Qld) including pre-2004 vegetation clearing.	Land Court of Queensland * (see *Land Court of Queensland Act* 2000 (Qld) and *Land Act* 1994 (Qld), s 427).
9. Appeals against permit & licence decisions under the *Nature Conservation Regulation* 1994 (Qld)	Magistrates Court of Queensland (see ss17-22 of the *Nature Conservation Regulation* 1994 (Qld)) *
10. 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 $250,000) or Supreme Court of Queensland (if greater value) *
11. Judicial review of Queensland government administrative decisions (other than planning decisions under IPA)	Supreme Court of Queensland (see *Judicial Review Act* 1991 (Qld) and s5.9.5 of the IPA) *
12. Applications for injunctions under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth)	Federal Court of Australia (see s475 of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) *
13. Merits appeals against certain decisions under the *Great Barrier Reef Marine Park Act* 1975 (Cth) and specified other Commonwealth laws	Administrative Appeals Tribunal (AAT) ** (jurisdiction provided under various legislation)
14. Judicial review of Commonwealth government administrative decisions	Federal Court of Australia (see the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)) *
15. 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) **
16. Appeals from Queensland courts and tribunals	Queensland Court of Appeal * (Civil) ** (Criminal)
17. Appeals from the Federal Court	Full Court of the Federal Court *
18. Constitutional issues & final appellate court	High Court of Australia * (Civil appeals) ** (Criminal appeals)

Appendix 4: Simplified structure of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBC Act")

PRELIMINARY Ch 1, Part 1, ss1-10

Object (s3): Protection of the environment, conservation of biodiversity and ecologically sustainable development.

ENVIRONMENT PROTECTION – Ch 2, 3 & 4

Controlled actions Ch 2, Part 3, ss12-28

Matters of "national environmental significance"

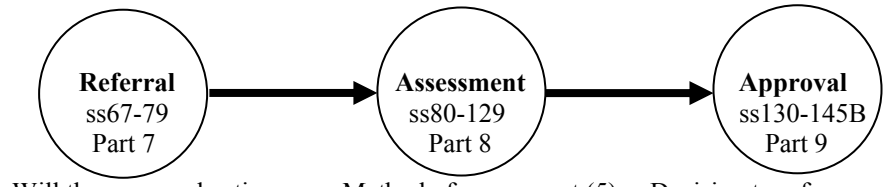
Actions that have, will have or are likely to have a significant impact on:

1. The world heritage values of a declared World Heritage property (ss12-15A)
2. The National Heritage values of a National Heritage Place (ss15B-15C)
3. The ecological character of a declared Ramsar wetland (ss16-17B)
4. Threatened species and ecological communities (ss18-19)
5. Migratory species (ss20-20A)
6. The environment if the action is a nuclear action (ss21-22A)
7. Commonwealth marine areas (ss23-24A)

Commonwealth land and actions

1. Actions taken on Commonwealth land that have, will have or are likely to have a significant impact on the environment (s26(1))
2. Actions taken outside Commonwealth land that have, will have or are likely to have a significant impact on the environment on Commonwealth land (s26(2))
3. Actions taken by the Commonwealth that have, will have or are likely to have a significant impact on the environment (s28)

Referral process for controlled actions Ch 4, Parts 6-9, ss67-145B



Will the proposed action cause a significant impact?

Method of assessment (5)

Decision to refuse or approve the proposed action

Bilateral Agreements – Ch 3, Part 5, ss44-65A

Agreements between the Commonwealth and State/Territory governments accrediting State or Territory development assessment processes for the assessment stage ("Assessment Bilaterals") or alternatively the assessment and approval stages ("Approval Bilaterals") of the referral process for controlled actions.

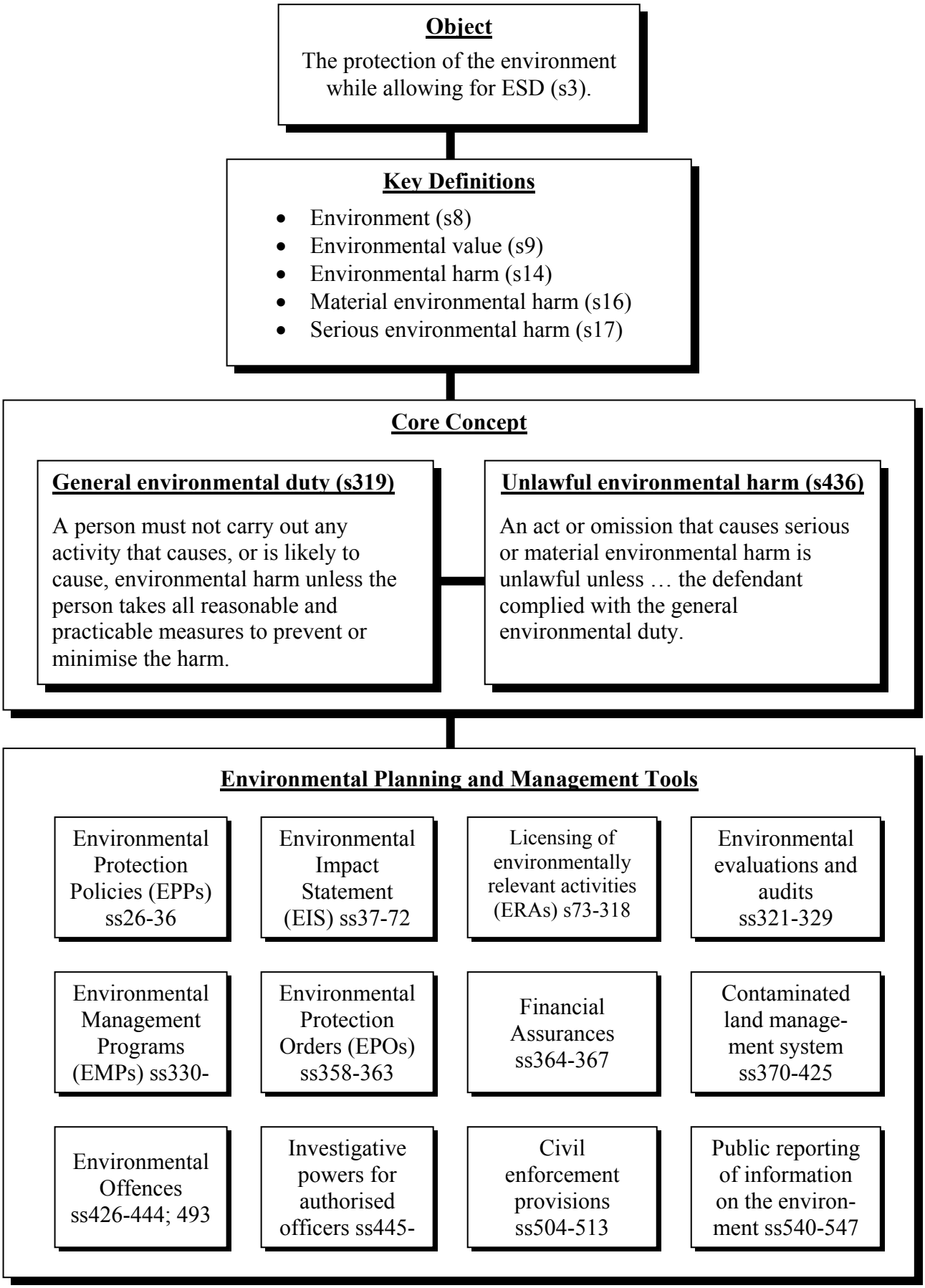
BIODIVERSITY CONSERVATION – Ch 5, Parts 12-15, ss171-390J

1. Identification & monitoring (ss171-175)
2. Bioregional Plans (s176)
3. Listing of threatened species & ecological communities (ss178-194; 248-252)
4. Species offences & permits (ss195-264)
5. Register of critical habitat (ss207A-207C)
6. Australian Whale Sanctuary (s225)
7. Recovery &Threat Abatement Plans (s267)
8. Wildlife Conservation Plans (ss285-300A)
9. International trade in wildlife (Part 13A)
10. Conservation Agreements (ss304-312)
11. Biosphere and Cth Reserves (ss337-390A)

ADMINISTRATION – Ch 6, Parts 16-21, ss391-516B

1. Precautionary principle to be considered when making decisions under Act (s391).
2. Wardens, rangers and inspectors; search powers etc (ss392-462); Conservation Orders (ss464-474); Ministerial orders to remedy environmental damage (s499).
3. Injunctions (ss475-480); Widened standing for public interest litigation (s475; ss487-488) and no undertaking as to damages required if applying for interim injunction (s478).
4. Executive officer liability (s493-5); due diligence (s496); false and misleading information (s489-91).
5. Committees (ss502-14); Annual Cth reports (s516A); 5 yearly State of Environment Reports (s516B).

Appendix 5: Simplified structure of the Environmental Protection Act 1994 (Qld)

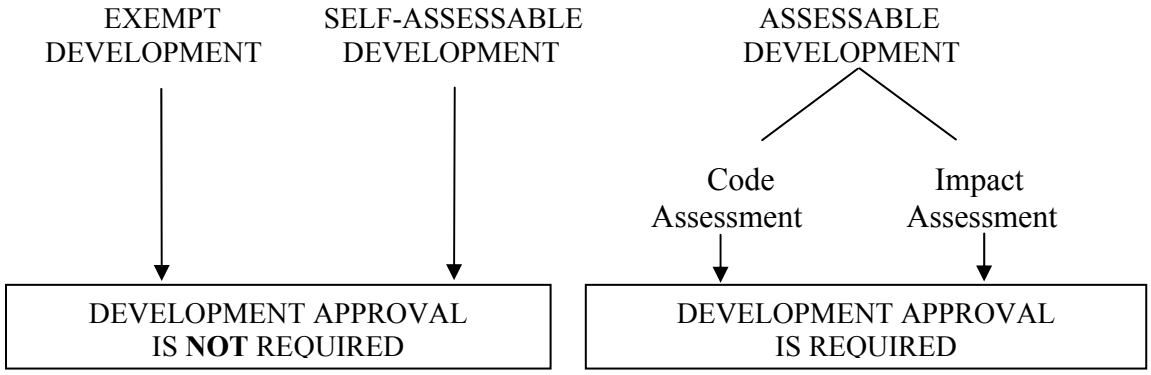


Appendix 6: Flowchart for the Integrated Development Assessment System ("IDAS") of the Integrated Planning Act 1997 (Qld) ("IPA")

STEP 1. PRELIMINARY QUESTIONS

1. Does the proposal involve "development"? (see ss1.3.2 and 1.3.5 IPA)

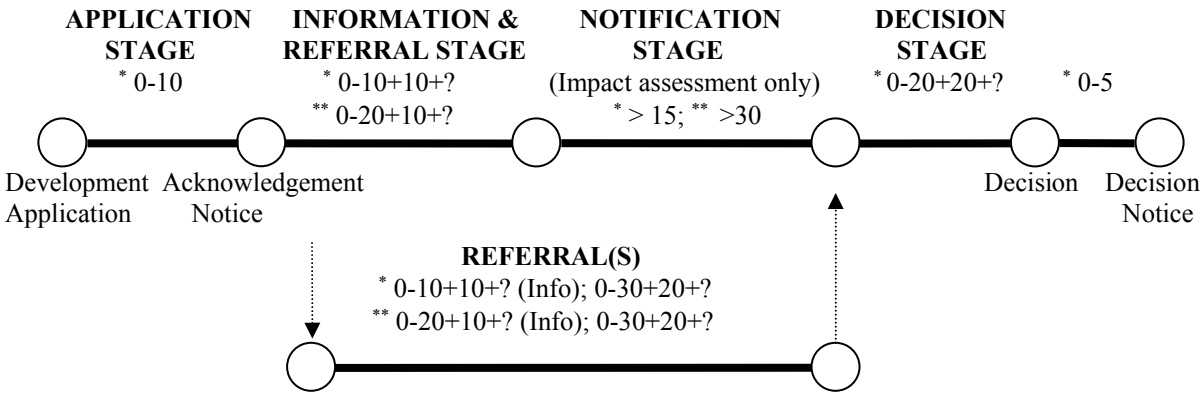
2. What type of development is it? (see Schedules 8 or 9 plus either a new IPA planning scheme prepared under Sch 1 or a transitional planning scheme interpreted through ss6.1.1 and 6.1.28 IPA).



3. Which levels of government and departments are involved in the assessment process?

- Who is the **assessment manager** listed in Schedule 8A of the IPA?
- Does the application involve **referral coordination** under s3.3.5 or s6.1.35C ("designated developments") of IPA and Sch 6 and 7 of the *Integrated Planning Regulation* 1998 (Qld)?
- Is there any **referral agency** listed in Schedule 2 of the *Integrated Planning Regulation* 1998 (Qld) (e.g. for development involving an environmentally relevant activity)?
- Is the proposal a "**controlled action**" to be assessed under Part 7A of Ch 5 of the IPA and by the Commonwealth under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth)?

STEP 2. PROCESS REQUIREMENTS OF IDAS (see Chapter 3 IPA)



* Numbers refer to time limitations for normal IDAS application in Business Days.
** Time limitations for Referral Coordination application in Business Days.
? Unlimited time if applicant agrees.

Appendix 7: Summary of vegetation management laws in Queensland

Subject area	Relevant legislation
1. Operational work that is clearing of native vegetation (other than on protected areas under the *Nature Conservation Act* 1992, State forests, forestry reserves, timber reserves or forest entitlement areas)	*Vegetation Management Act* 1999 (Qld) (VMA) and *Integrated Planning Act* 1997 (Qld) Sch 8, item 3A; s 4.3.1. Assessment codes provided under the VMA.
2. Material change of use (MCU) or reconfiguration of a lot (RaL) on lot sizes 2ha or greater containing remnant vegetation.	*Integrated Planning Regulations* 1998 (Qld), Sch 2, Table 2, item 4 and Table 3, item 11. Assessment codes provided under the VMA.
3. Vegetation protected through controls in a planning scheme (e.g. land designated as "open space") or a development approval (e.g. a "building location envelope" imposed as a condition of a development approval).	*Integrated Planning Act* 1997 (Qld) Sch 8, ss4.3.1-4.3.2, any relevant local government planning scheme, planning scheme policies, codes, State planning policies and other legislation integrated into IDAS
4. Vegetation subject to a local law	*Local Government Act* 1993 (Qld) ss25-26 & relevant local law passed by a local government
5. Protected areas such as National Parks (4% of Queensland) and protected wildlife	*Nature Conservation Act* 1992 (Qld) ss62, 88 & 89
6. Forestry practices and forest products on State land	*Forestry Act* 1959 (Qld) ss53 and 54
7. Riparian vegetation (in watercourse)	*Water Act* 2000 (Qld) s814
8. Clearing causing serious or material environmental harm, unless the clearing is otherwise lawful and all reasonable and practicable measures are taken to prevent or minimise the harm (e.g. by retaining a reasonable riparian buffer).	*Environmental Protection Act* 1994 (Qld) ss319, 436-438
9. Marine plants and fish habitat areas	*Fisheries Act* 1994 (Qld) ss122 and 123
10. Matter of national environmental significance; Commonwealth entity or area.	*Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ss12-28
11. Marine parks	*Marine Parks Act* 1982 (Qld) s16 and *Marine Parks Regulation* 1990 (Qld) s19
12. Environmentally relevant activity (including mining) involving clearing of vegetation	*Environmental Protection Act* 1994 (Qld) ss18-20 and 73-310.
13. Petroleum exploration, leases and pipelines	*Petroleum Act* 1923 (Qld)
14. Vegetation management for roads, railway lines, ports and other transport infrastructure	*Transport Infrastructure Act* 1994 (Qld)
15. Vegetation management for electricity infrastructure (e.g. along power lines)	*Electricity Act* 1994 (Qld)
16. Wet tropics World Heritage Area	*Wet Tropics World Heritage Protection and Management Act* 1995 (Qld) s56
17. Operational works in a coastal management district or in State coastal land	*Coastal Protection and Management Act* 1995 (Qld) s61A
18. Fire hazard reduction (e.g. burning-off)	*Fire and Rescue Service Act* 1990 (Qld)
19. Soil erosion	*Soil Conservation Act* 1986 (Qld)
20. Weed / declared pest control	*Land Protection (Pest & Stock Route Management) Act* 2002 (Qld)

Appendix 8: Queensland fisheries laws

Subject area	Relevant legislation
1. Fisheries other than prawns and tuna on the east coast of Queensland (from the NSW border to the tip of Cape York)	*Fisheries Act* 1994 (Qld) 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 *Fisheries Management Act* 1991 (Cth) to the limit of the Australian fishing zone
2. Fisheries other than tuna in Torres Strait (within the Australian section of the Torres Strait Protected Zone)	*Torres Strait Fisheries Act* 1984 (Cth) and the *Torres Strait Fisheries Act* 1984 (Qld)
3. Fisheries other than prawns and tuna in the Gulf of Carpentaria (from Cape York to the Northern Territory border)	*Fisheries Act* 1994 (Qld) 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 NSW border to the tip of Cape York)	*Fisheries Act* 1994 (Qld) 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)	*Fisheries Management Act* 1991 (Cth) from the inner boundary of coastal waters to the limit of the Australian fishing zone. *Fisheries Act 1994 (Qld)* landward of the inner boundary of coastal waters
6. Tuna fisheries in all waters in the Australian fishing zone	*Fisheries Management Act* 1991 (Cth)
7. Great Barrier Reef Marine Park	*Great Barrier Reef Marine Park Act* 1975 (Cth) and associated regulations, zoning plans and plans of management
8. Queensland Marine Park	*Marine Parks Act* 1982 (Qld) and associated regulations and zoning plans
9. Fisheries habitat area	*Fisheries Act* 1994 (Qld) and associated regulations and zoning plans
10. Actions causing a significant impact on a matter of national environmental significance (including Commonwealth marine areas and Commonwealth managed fisheries)	*Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ss12-28
11. Whales and other cetaceans and listed marine species in Australian waters	*Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ss224-266
12. Protected wildlife (eg. dugong) in Queensland coastal waters	*Nature Conservation Act* 1992 (Qld) and regulations and relevant conservation plans

Appendix 9: Major environmental impact assessment (EIA) processes in Queensland

Environmental impact assessment ("EIA") is the general 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 the 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 the development. 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. *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ss85-129 and *Environment Protection and Biodiversity Regulations* 2000 (Cth) rr5.01-5.04 and schedules 2-4.	Contains 5 major EIA procedures for assessing impacts of controlled actions linked to State EIA procedures under a bilateral agreement: • Accredited assessment process; • Assessment on preliminary documentation; • Public Environment Report; • Environmental Impact Statement; • Public Inquiry.
2. *Integrated Planning Act* 1997 (Qld) ss3.3.1-3.4.10, 5.8.1-5.8.15 and 6.1.35C; and *Integrated Planning Regulation* 1998 (Qld) s12 and sch 6 & 7.	Contains a general procedure of "information requests" for any development application and public notification for any "impact assessable" development application. A special EIS process for assessing controlled actions under a bilateral agreement for the EPBC Act is provided in Part 8 of Ch 5 (ss5.8.1-5.8.15).
3. *Environmental Protection Act* 1994 (Qld) ss37-72.	Contains EIS process generally limited to assessing applications for an environmental authority (mining lease). Linked to the EPBC Act through a bilateral agreement.
4. *State Development and Public Works Organisation Act* 1971 (Qld) ss26-35.	General power to declare a "significant project" and require an EIS involving public notification. Procedure over-rides EIA processes under IPA and EP Act. Linked to the EPBC Act through a bilateral agreement.

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. Note also the new offences in the EPBC Act for providing false or misleading information to the Commonwealth (ss489-491) (see *Mees v Roads Corporation* (2003) 128 FCR 418).

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