

# Synopsis of the Queensland Environmental Legal System

Third edition

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## **Introduction**

The aim of this book is to provide a synopsis of the environmental legal system in the State of Queensland, Australia, as at 1 September 2004.<sup>1</sup> The diagram in Appendix 1 provides a basic reference point for this. The book begins by defining the environmental legal system and explaining its basic concepts, institutions and obligations. It then examines each structural layer of the Queensland environmental legal system within the four layers of the Australian legal system. As the importance of rules and legislation varies depending on the issues and facts involved in any situation, legislation is listed alphabetically following an explanation of the constitutional or conceptual basis of each.

## **The environmental legal system**

The “environmental legal system” is the system of laws and administrative structures that regulate the impact of humans on the natural environment and quality of life.<sup>2</sup> It is a subset of the general legal system for Australia, which has four distinct layers: international law; Commonwealth law; State & Territory law; and the common law (including native title).

The environmental legal system is a relatively new area of law and policy. 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”). Bates has suggested:<sup>3</sup>

“Ecologically sustainable development (ESD) is fast becoming the central pivot around which all environmental law will ultimately revolve. Its

importance to the development of environmental law therefore can hardly be overstated.”

The concept of ESD is drawn from the concept of “sustainable development” which evolved in international law and policy and which Fisher recognises as “the foundation of Australia’s environmental legal system”.<sup>4</sup> The central definition for ESD in Australia is found in the *National Strategy for Ecologically Sustainable Development* (see Appendix 2):<sup>5</sup>

“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.”

A second central concept of the environmental legal system in Australia is “Cooperative Federalism”. This means that within the federal system of government in Australia<sup>6</sup> all levels of government will work together to achieve desired outcomes. In the context of the environment, the seminal statement of this policy is the *Intergovernmental Agreement on the Environment*<sup>7</sup> and the outcome sought to be achieved is ESD.

Consistent with the principle of Cooperative Federalism, the environmental legal system in Queensland is administered by Commonwealth and State Government departments as well as local governments. Government departments administering specific pieces of legislation are listed in the text below.<sup>8</sup> State and Federal courts also perform a vital judicial role.

As a very broad summary, the environmental legal system in Queensland requires all people (including corporations and governments)

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<sup>4</sup> Fisher, n2, p363.

<sup>5</sup> Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development*, AGPS, Canberra, 1992. The full text is available on the internet at <http://www.environment.gov.au/psg/igu/nsesd/index.html>.

<sup>6</sup> Australia is a constitutional monarchy in which the legislative power is divided between the Commonwealth (i.e. Federal) and 6 State (and 2 Territory) governments in a written constitution. Local governments have also been created under State and Territory legislation.

<sup>7</sup> Council of Australian Governments, *Intergovernmental Agreement on the Environment*, AGPS, Canberra, 1992. Provided as a schedule in the *National Environment Protection Council (Queensland) Act 1994* (Qld).

<sup>8</sup> See generally Stirling E (ed), *The Australian Environment Directory* (3<sup>rd</sup> ed, Hallmark Editions, Sydney, 2003) and <http://www.environment.gov.au/>.

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<sup>1</sup> A recommended companion to this book is Chapter 23, “The Environment and the Law” in Lawler M and Smith M (eds), *The Queensland Law Handbook* (7<sup>th</sup> ed, Caxton Legal Centre Inc, Brisbane, 2002).

<sup>2</sup> See Fisher DE, *Australian Environmental Law* (LBC, Sydney, 2002); Bates GM, *Environmental Law in Australia* (5<sup>th</sup> ed, Butterworths, Sydney, 2002).

<sup>3</sup> Bates GM, *Environmental Law in Australia* (4<sup>th</sup> ed, Butterworths, Sydney, 1995), p24.

conducting activities that affect the Queensland environment to do three things:

- Obtain and comply with any necessary licence or government approval.<sup>9</sup>
- 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.

Within this framework of basic concepts, institutions and obligations it is possible to analyse the Queensland environmental legal system. As a subset of the Australian legal system it also has four distinct layers: international law; Commonwealth law; Queensland law (which here is taken to include planning schemes and local laws made by local governments); and the common law. Each of these levels will be analysed in turn.

## **International law**

International law is the law between nations. That is to say, its content is the rules that are recognised as forming binding rights and obligations between nations.<sup>10</sup> 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 or justification for international law rests on sovereignty and comity. Sovereignty is the independence of a state, that is, freedom from external interference in the conduct of a state's affairs. A "state" or "statehood" in international terms means a recognised and effective system of government exercising control of a defined territory and permanent population with the ability to enter into international relations.<sup>11</sup> Comity means the

<sup>9</sup> See generally the Queensland *SmartLicence* website at <http://www.sd.qld.gov.au/dsdweb/htdocs/slol>.

<sup>10</sup> See generally Reicher H (ed), *Australian International Law: Cases and Materials* (LBC, Sydney, 1995).

<sup>11</sup> 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

mutual respect and recognition of national interests, laws and customs by 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 and operating within the international legal system. On this basis it is clear that international law, including the rapidly developing area of international environmental law,<sup>12</sup> is an advanced study in legal and political debate.

Fisher has suggested that there have been four recognisable stages in the ongoing development of international environmental obligations 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):<sup>13</sup>

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 substances);
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*

Commonwealth is the only level of government in Australia recognised in the international arena.

<sup>12</sup> See Birnie PW and Boyle AE, *International Law and the Environment* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2002) and the environmental law database at <http://www.ecolex.org/>.

<sup>13</sup> Fisher DE, "The Impacts of International Law Upon the Australian Environmental Legal System" (1999) 16 (5) EPLJ 372 at pp 373-374.

recognises four sources of international law<sup>14</sup> 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.<sup>15</sup> 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 and uranium use.<sup>16</sup>

An important example of the obligations imposed on Australia by international treaty law is found in Article 8 of the *Convention on Biological Diversity* 1992 (“the Biodiversity Convention”).<sup>17</sup> This Article 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; ...

<sup>14</sup> Article 38 provides that the Court is to apply: (a) international conventions; (b) international custom, as evidence of general practice 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.

<sup>15</sup> *United States of America v Canada* (1941) 9 Annual Digest and Reports of Public International Law Cases 315 (“the Trail Smelter arbitration”).

<sup>16</sup> See generally the Australian Treaties Library on the internet at <http://www.austlii.edu.au/dfat/>.

<sup>17</sup> Signed for Australia 5 June 1992. Instrument of ratification deposited for Australia 18 June 1993. Entry in to force generally 29 December 1993. ATS 1993 No 32.

- (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; ...

A second important example of the international legal obligations placed on Australia is provided by Articles 192 and 194 of the *United Nations Convention on the Law of the Sea* 1982:<sup>18</sup>

#### 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 ...

The existence of international legal obligations to protect the environment has important constitutional ramifications for the Australian federal system of government where the legislative competence is divided between the Commonwealth (or Federal) Government and State/Territory governments. The existence of international legal obligations for Australia provides the Commonwealth Government with the constitutional competence 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.<sup>19</sup> Within the Australian federal system of government international obligations

<sup>18</sup> Signed for Australia 10 December 1982. Instrument of ratification deposited 5 October 1994. Entry into force generally 16 November 1994. ATS 1994 No 31.

<sup>19</sup> *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.



may be met by the combined efforts of both levels of government.

International law may also be relevant in interpreting Australian domestic law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument.<sup>20</sup>

In summary, international law impacts upon the Queensland environmental legal system in three major ways by:<sup>21</sup>

- placing legal obligations on Australia to protect the environment;
- creating legislative power for the Commonwealth 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*<sup>22</sup> and *The Earth Charter*<sup>23</sup> forming the basis for government policy.

Before turning to Australian domestic law, Australia's international boundaries may be noted for reference. International law measures territorial limits from a standard reference point known as the "baseline". This is generally the

lowest astronomical tide or a straight line drawn across bays. From the baseline Australia's 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.

## **Commonwealth law**

Commonwealth law is the legislation enacted and administered by the Australian Government.<sup>24</sup> 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 contained in the *Commonwealth Constitution*.<sup>25</sup> 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:<sup>26</sup>

<sup>20</sup> *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).

<sup>21</sup> 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 and would appear likely to be overturned by the High Court in near future: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6.

<sup>22</sup> See NA Robinson (ed), *Agenda 21 & the UNCED Proceedings*, Vols 1-6, Oceana Publications Inc, London, 1992.

<sup>23</sup> Available at <http://www.earthcharter.org/>.

<sup>24</sup> Available on the internet at <http://scaleplus.law.gov.au/> and <http://www.austlii.edu.au/>.

<sup>25</sup> *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129 (the Engineers' Case).

<sup>26</sup> Crawford J, "The Constitution and the Environment" (1991) 13 *Sydney Law Review* 11 at pp 14-16.



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.<sup>27</sup> 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”.<sup>28</sup> Subsequent cooperative arrangements also provide for State fisheries legislation

<sup>27</sup> *New South Wales v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case).

<sup>28</sup> *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.

to extend beyond coastal waters as summarised in Appendix 7.

### **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”).<sup>29</sup>

### **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 Airports Division of the Australian Government Department of Transport and Regional Services.<sup>30</sup>

### **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 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.<sup>31</sup>

<sup>29</sup> See DEH homepage at <http://www.deh.gov.au/>.

<sup>30</sup> See DTRS homepage at <http://www.dotars.gov.au/>.

<sup>31</sup> See DEH homepage at <http://www.deh.gov.au/heritage>.

## **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.<sup>32</sup> A diagram of the structure of the Act is provided in Appendix 3. 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

<sup>32</sup> See generally C McGrath, “Key concepts of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)” (2004) EPLJ (accepted for publication).

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”).<sup>33</sup> 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.<sup>34</sup> All likely impacts must be considered, including direct and indirect impacts. Impacts of an action may include the impacts of acts done by persons other than the proponent of the proposed action (i.e. 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.

In addition to the wide jurisdiction and strong regulatory mechanisms, another important legal aspect of the EPBC Act is the very strong deliberative obligation created by the Act and the *Environment Protection and*

<sup>33</sup> See C McGrath, “Casenote: Booth v Bosworth” (2001) 18 (1) EPLJ 23; C McGrath, “The Flying Fox Case” (2001) 18 (6) EPLJ 540.

<sup>34</sup> See *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190.

*Biodiversity Conservation Regulations 2000* (Cth) for environmental impact assessment (“EIA”) and approval of controlled actions.<sup>35</sup> The Act and Regulations impose minimum standards of information as well as offences for providing false or misleading information during the assessment process.<sup>36</sup> Australia’s international legal obligations, such as to protect World Heritage, are principal considerations in deciding whether or not to grant approval of a proposed action.

Bilateral agreements are important variations to the normal assessment or approval stages of the EPBC Act. These are a relatively novel arrangement allowing 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 8 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.

The administrative provisions of the EPBC Act contain few surprises; however, there are exceptions including widened standing provided to public interest litigants, executive officer

<sup>35</sup> See C McGrath, “Applying the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): A case study of the Naturelink Cableway” (2001/2002) 7 (33) QEPR 123.

<sup>36</sup> Note *Mees v Roads Corporation* (2003) 128 FCR 418 in relation to misleading referrals under the EPBC Act.

liability and offences for providing false or misleading information under the Act.

The EPBC Act is administered by DEH.<sup>37</sup>

### **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).<sup>38</sup> The Act applies to all Australian waters including the coastal waters of the States and Northern Territory. While s9 allows State or Territory laws to be accredited for coastal waters there is currently no such legislation for Queensland. The Act is administered by the Australian Maritime Safety Authority (“AMSA”).<sup>39</sup>

### **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 7 summarises legislative and administrative arrangements for Queensland fisheries planning and management. The legislation is administered by the Australian Fisheries Management Authority (“AFMA”).<sup>40</sup>

### **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 complimentary State

<sup>37</sup> See DEH homepage at <http://www.deh.gov.au/epbc>.

<sup>38</sup> ATS 1985 No 16. Entry into force for Australia 20 September 2000. Annexed as Sch 1 to the EPSC Act.

<sup>39</sup> See AMSA homepage <http://www.amsa.gov.au/>.

<sup>40</sup> 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>.

legislation. The Act is administered by the Office of the Gene Technology Regulator.<sup>41</sup>

### **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<sup>42</sup> 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”),<sup>43</sup> 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*<sup>44</sup> and is administered by DEH.<sup>45</sup>

### **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.<sup>46</sup>

### **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 six NEPMs: Ambient Air Quality, Assessment of Site Contamination, Diesel Vehicle Emissions, Movement of Controlled Wastes Between States and Territories, National Pollutant Inventory and Used Packaging Materials. The Act is administered by DEH.<sup>47</sup>

### **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,<sup>48</sup> however, determinations of native title interests are made by the Federal Court.

<sup>41</sup> See OGTR at <http://www.health.gov.au/ogtr/>.

<sup>42</sup> Eg. the *Whitsundays Plan of Management 1998* (Cth).

<sup>43</sup> See GBRMPA at <http://www.gbrmpa.gov.au/>.

<sup>44</sup> ATS 1992 No 7. In force generally 5 May 1992.

<sup>45</sup> See DEH homepage at <http://www.deh.gov.au/>.

<sup>46</sup> See <http://www.deh.gov.au/heritage/shipwrecks/>.

<sup>47</sup> 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/mpi/>.

<sup>48</sup> See NNTT homepage at <http://www.nntt.gov.au/>.



### **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 of federal money administered to provide for environmental protection and conservation at local, regional, State and national levels. The Act is administered by DEH.<sup>49</sup>

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.<sup>50</sup>

### **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.<sup>51</sup>

### **Ozone Protection Act 1989 (Cth)**

The *Ozone Protection 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 chlorofluorocarbons (“CFCs”). The Act implements the *Vienna Convention for the Protection of the Ozone Layer*<sup>52</sup> and *Montreal Protocol on Substances that Deplete the Ozone Layer*.<sup>53</sup> The Act is administered by DEH.<sup>54</sup>

### **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.<sup>55</sup>

### **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 the *International Convention for the Prevention of Pollution from Ships 1973* and the 1978 Protocols to the Convention (“MARPOL 73/78”).<sup>56</sup> The Act allows State and Northern 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.<sup>57</sup>

### **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”), part of the Australian Government Department of Agriculture, Fisheries and Forestry.<sup>58</sup>

### **Renewable Energy (Electricity) Act 2000 (Cth)**

The *Renewable Energy (Electricity) Act 2000 (Cth)* aims to reduce greenhouse gas emissions by encouraging electricity providers to source a small percentage of their energy from renewable sources. A tax penalty is imposed for failing to achieve this target by the *Renewable Energy (Electricity) (Charge) Act 2000 (Cth)*. The Act

<sup>49</sup> See <http://www.nht.gov.au/index.html>.

<sup>50</sup> See <http://www.napswq.gov.au/index.html>.

<sup>51</sup> See DISR homepage at <http://www.isr.gov.au/> and the Australian Geologic Survey Organisation (“AGSO”) homepage at <http://www.agso.gov.au/>.

<sup>52</sup> ATS 1988 No 26. In force generally 22 Sept 1988.

<sup>53</sup> ATS 1989 No 18. In force generally 1 January 1989.

<sup>54</sup> See DEH homepage at <http://www.deh.gov.au/>.

<sup>55</sup> See DISR homepage at <http://www.isr.gov.au/>.

<sup>56</sup> ATS 1988 No 29; 1990 No 34; 1995 No 4. Entry into force for Australia completed 1 July 1992.

<sup>57</sup> See AMSA homepage at <http://www.amsa.gov.au/>.

<sup>58</sup> See AFFA homepage at <http://www.affa.gov.au/>.

is part of the *National Greenhouse Strategy* administered by the Australian Greenhouse Office.<sup>59</sup>

### **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 seabed, 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.<sup>60</sup>

### **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*.<sup>61</sup> The Act is administered jointly by the AFMA and the Queensland Department of Primary Industries (Fisheries).<sup>62</sup> The complex situation for fisheries jurisdiction is summarised in Appendix 7.

## **Queensland law**

Queensland law is the legislation and/or subordinate legislation enacted and administered by the Queensland Government and local governments.<sup>63</sup> 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 (although soon to be replaced by the Land and Environment Court).

### **Constitution Act 1867 (Qld)**

Although rarely referred to, the *Constitution Act* 1867 (Qld) provides the basis for the Queensland Parliament to make laws regulating the environment and for the Queensland Government (ie. the Crown in right of the State of Queensland) to enforce those laws and manage the environment on a day-to-day level. Sections 30 and 40 of the Act are particularly important.<sup>64</sup> These sections provide Parliament with the power to make laws regulating the sale, letting, disposal, occupation and management of land in Queensland. It is a fundamental constitutional principle that the Crown may only dispose of land and other property of the State in accordance with a law of the Parliament.<sup>65</sup> The Crown itself is now generally required to comply with laws protecting the environment although at common law the Crown was not bound by legislation unless expressly stated to be or by necessary implication.<sup>66</sup> The *Constitution Act* 1867 (Qld), together with the common law (for instance in determining issues of sovereignty<sup>67</sup>), is the bedrock upon which the following legislation is based.

### **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

<sup>59</sup> See AGO at <http://www.greenhouse.gov.au/index.html>.

<sup>60</sup> See DEH homepage at <http://www.deh.gov.au/>.

<sup>61</sup> ATS 1985 No 4.

<sup>62</sup> See AFMA homepage at <http://www.afma.gov.au/>.

<sup>63</sup> Queensland legislation is available on the internet at <http://www.legislation.qld.gov.au/OQPCHome.htm>.

<sup>64</sup> Continued by s69 of the *Constitution of Queensland* 2001 (Qld). See generally *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520 at 533.

<sup>65</sup> *O'Keef v Williams* (1907) 5 CLR 217 at 225.

<sup>66</sup> *Bropho v Western Australia* (1990) 171 CLR 1.

<sup>67</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1.



Heritage Coordination Unit of the Department of Natural Resources & Mines (“NR&M”).<sup>68</sup>

### **Biodiscovery Act 2003 (Qld)**

The *Biodiscovery Act 2003* (Qld) provides a framework for licensing and payment of royalties for the investigation of biological resources of 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.<sup>69</sup>

### **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”).<sup>70</sup>

### **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 Statewide 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.<sup>71</sup>

### **Electricity Act 1994 (Qld)**

The *Electricity Act 1994* (Qld) regulates the generation, transmission and supply of electricity in Queensland. Apart from greenhouse gas emissions (on which the Act is silent), the Act’s importance for the environmental legal system is as a component of the planning framework through the control of 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.<sup>72</sup>

### **Environmental Protection Act 1994 (Qld)**

The *Environmental Protection Act 1994* (Qld) (“EP Act”) is a central component of the Queensland environmental legal system.<sup>73</sup> A conceptual diagram of the structure of the Act is provided in Appendix 4. 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);

<sup>71</sup> See the EPA’s Coastal Management website at [http://www.epa.qld.gov.au/environmental\\_management/coast\\_and\\_oceans/coastal\\_management/](http://www.epa.qld.gov.au/environmental_management/coast_and_oceans/coastal_management/).

<sup>72</sup> See <http://www.nrm.qld.gov.au/energy/>.

<sup>73</sup> See generally Fisher DE and Walton M, *Environmental Law Queensland* (LBC, Sydney, 1996).

<sup>68</sup> See [http://www.nrm.gov.au/cultural\\_heritage](http://www.nrm.gov.au/cultural_heritage).

<sup>69</sup> See DSDI homepage at

<http://www.sdi.qld.gov.au/innovation/biotechnology>.

<sup>70</sup> See DPI&F homepage at <http://www.dpi.qld.gov.au/>.

- 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<sup>74</sup> 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.<sup>75</sup>

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

While the EP Act is generally administered to regulate only contaminant release / pollution control 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. 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:

#### General environmental duty

**319.(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”, drawn from the *Donoghue v Stevenson* principle<sup>76</sup> of negligence at common law, on which the general environmental duty is clearly based, is familiar both to lawyers and lay-people. This marks one of the most outstanding features of the Act and Queensland environmental legal system.

The lead agency for the administration of the EP Act is the EPA;<sup>77</sup> however, minor ERAs have been devolved to local governments.<sup>78</sup> In

<sup>74</sup> 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.

<sup>75</sup> 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/>.

<sup>76</sup> *Donoghue v Stevenson* [1932] AC 562 at 580 per Lord Atkin. Conceptually and theoretically what the general environmental duty has done is to widen the common law concept of “neighbour” to include the environment. This marks a fundamental development in environmental jurisprudence.

<sup>77</sup> See EPA homepage at <http://www.epa.qld.gov.au/>.

<sup>78</sup> See s39 and Sch 1 of the EP Regulation.

addition two agricultural ERAs have been delegated to DPI&F.<sup>79</sup>

### **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 7. 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.<sup>80</sup>

### **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 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.<sup>81</sup> The SEQFA contemplates the phasing out of logging in native forests within 25 years. Originally driven by the Regional Forestry Agreement ("RFA")

<sup>79</sup> This is not shown in Schedule 1 of the EP Regulation but includes ERAs 2 (Cattle feeding) and 3 (Pig farming).

<sup>80</sup> See DPI&F at <http://www.dpi.qld.gov.au/fishweb>.

<sup>81</sup> 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.

process (a funding pool created by the Commonwealth government to enable it to indirectly regulate forestry practices in the States), the Commonwealth Government has refused (for political reasons) to accept the SEQFA for accreditation as an RFA.

The Act is jointly administered by DPI&F,<sup>82</sup> the NR&M<sup>83</sup> 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.<sup>84</sup>

### **Health Act 1937 (Qld)**

The *Health Act* 1937 (Qld) provides a framework for the protection of public health. Of particular relevance to the environmental 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) provide for the prevention and destruction of mosquitos and vermin control. The Act is administered by local government and Queensland Health.<sup>85</sup>

### **Integrated Planning Act 1997 (Qld)**

The *Integrated Planning Act* 1997 (Qld) ("IPA") is Queensland's principal planning legislation.<sup>86</sup> 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

<sup>82</sup> See DPI&F at <http://www.dpi.qld.gov.au/forestry/>.

<sup>83</sup> See NR&M at <http://www.nrm.qld.gov.au/>. See also <http://www.forests.qld.gov.au/>.

<sup>84</sup> See biotechnology homepage at

<http://www.sdi.qld.gov.au/innovation/biotechnology>.

<sup>85</sup> See QH homepage at <http://www.health.qld.gov.au/>.

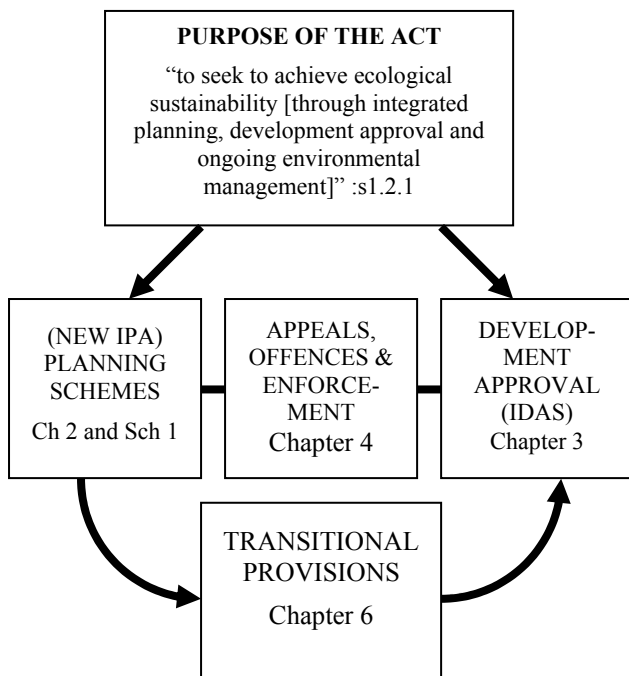
<sup>86</sup> See generally Fogg A, Meurling R and Hodgetts I, *Planning and Development Queensland* (LBC, Sydney, 2001) and the IPA website at <http://www.ipa.qld.gov.au/>.

in this book as well as a range of non-legislative regional planning processes.<sup>87</sup>

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. It 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”).

At a conceptual level, the over-arching purpose of the IPA is “ecological sustainability”. Within this purpose, 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 also provide an important practical 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. This conceptual structure is shown in the following diagram.

**The conceptual structure of IPA**



As with previous legislation, local government planning schemes are the heart and soul of planning and development approval under IPA.

<sup>87</sup> Information on a number of non-legislative regional planning projects, such as WHAM 2015, Wide Bay 2020 and SEQ 2021, is provided at <http://www.lgp.qld.gov.au/>.

However, while the traditional model for planning schemes aimed to separate incompatible activities by prescribing permitted, permissible and prohibited uses for zones, the approach adopted under IPA is different. It aims to promote an outcome-orientated approach to planning by stating “desired environmental outcomes” for areas against which development applications may be judged.<sup>88</sup>

An important process change envisaged by IPA is to “roll in” the majority of State planning and licensing approval processes into one process (a development application) and one document (a development approval) in the IDAS process. This integration is not yet complete. One major process integrated into IDAS at this stage is the licensing system for ERAs under the EP Act.<sup>89</sup>

The IDAS process is commonly described as involving four stages:

- **Application Stage**, in which the applicant applies to the relevant government entity (normally local government);
- **Information and Referral Stage**, in which the application is referred to any relevant government agency and an “information request” is made for further information 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.

However, such an approach to resolving IDAS issues misses a number of fundamental preliminary issues.

Instead, it is useful to consider IDAS issues as involving two broad steps. The first step involves answering three preliminary questions: does the proposal involve “development”; what type of development is it; and does the proposal

<sup>88</sup> See Fisher DE, “Planning for the Environment under the Integrated Planning Act” (1998) 4 (19) QEPR 121.

<sup>89</sup> For strong criticism of the effect of the integration of the EP Act into IPA see Homel B, “Just a Process Change? The Impact of IDAS on Environmental Protection in Queensland” (1999) 16 (1) EPLJ 75.



involve referral coordination, a referral agency or a significant project? This allows the second step of the IDAS process requirements, including the strict timelines for each of the four IDAS stages, to be determined. A flowchart for this method is provided in Appendix 5.

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:

- 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.

These terms are further defined in s1.3.5.<sup>90</sup> 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 Schedule 8 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

<sup>90</sup> 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 86.

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 whereby government agencies assessing the application may request further information. This process has been criticised.<sup>91</sup> A formal EIS process has been inserted as Part 7A of Chapter 5 of IPA to fulfil the requirements of an assessment bilateral under the EPBC Act.<sup>92</sup>

“**Referral coordination**” is a variation of the normal IDAS process (but not a formal EIA process) in which the Department of Local Government and Planning coordinates the responses of State Government agencies.

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. There are two levels of status for referral agencies:

<sup>91</sup> 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.

<sup>92</sup> Sections 5.7A.1-5.7A.15 IPA.

- **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:<sup>93</sup>

- 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.<sup>94</sup> 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).<sup>95</sup> 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).<sup>96</sup> 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

<sup>93</sup> 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.

<sup>94</sup> Section 3.5.30 IPA; *Maroochy Shire Council v Wise* (1998) 100 LGERA 311; *Proctor v BCC* (1993) 81 LGERA 398. Note also that there are other minor tests for the validity of conditions as outlined by Fogg *et al*, n 86 at pp 3692-3710.

<sup>95</sup> *Lloyd v Robinson* (1962) 107 CLR 142; *Proctor*.

<sup>96</sup> *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 at 113; *Proctor*.

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 Court provides *de novo* (complete) merits review of the decisions of assessment managers for parties applying for development approval. A third party submitter may also appeal impact assessable development.

The primary role of the Planning and Environment 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. The two major questions that must be answered by the Planning and Environment Court are the same as for local governments.<sup>97</sup> Based upon these there are two fundamental principles for the assessment of environmental issues evident in decisions of the Planning and Environment Court.<sup>98</sup>

The first fundamental principle for the assessment of environmental issues in the Planning and Environment Court is that environmental values not recognised in a planning scheme 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.”<sup>99</sup>

“[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

<sup>97</sup> In relation the court’s obligation to follow the planning scheme, see *Stradbroke Island Management Organisation Inc v Redland Shire Council* [2002] QCA 277.

<sup>98</sup> See generally Tranter M, “The Treatment of Environmental Issues in the Queensland Planning Courts” (1995) 1 (5) QEPR 152.

<sup>99</sup> *Indooroopilly Golf Club v Brisbane City Council & Ors* (1982) QPLR 13 at 32; *Sabdoen Pty Ltd v Redland Shire Council* (1989) QPLR 149 at 152.



instruments of statutory planning control is fundamental to proper and fair town planning.”<sup>100</sup>

The second fundamental principle for the assessment of environmental issues by the Planning and Environment 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.”<sup>101</sup>

The Planning and Environment 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 dependant on the relevant planning scheme.

Note that the Queensland Government currently proposes to combine the Planning and Environment Court with the Land and Resources Tribunal and the Land Court. The combined court will be renamed the “Land and Environment Court of Queensland” and is expected to commence operation in 2005.

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, Planning, Sport and Recreation (“DLGPSR”) is the lead agency for the Act.<sup>102</sup>

### **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

<sup>100</sup> *Hollingsworth v Brisbane City Council* (1975) Planner LGC 92; *Sheezel & White v Noosa Shire Council* (1980) Planner LGC 130; *Liongrain Pty Ltd v Council of Shire of Albert & Ors* (1995) QPLR 353 at 355.

<sup>101</sup> *Davjan v Noosa Shire Council* (1981) QPLR 69; *Lane v Gatton Shire Council* (1988) QPLR 49; *Esteedog Pty Ltd v Maroochy Shire Council* (1991) QPLR 7 at 9; *GFW Gelatine International Limited v Beaudesert Shire Council & Ors* (1993) QPLR 342 at 352; *Pinjarra Hills & Ors v Brisbane City Council* (1995) QPLR 334 at 349.

<sup>102</sup> See <http://www.lgp.qld.gov.au/>.

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 constrains the environmental legal system, politically if not legally.<sup>103</sup> Previously, 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 *Integrated Planning Act* 1997 (Qld) system. The Act is administered by NR&M.<sup>104</sup>

### **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 NR&M.<sup>105</sup>

### **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

<sup>103</sup> There is no right of compensation at common law for the acquisition of property by State governments: *Durham Holdings PL v New South Wales* (2001) 205 CLR 399.

<sup>104</sup> See NR&M at <http://www.nrm.qld.gov.au/>.

<sup>105</sup> See NR&M at <http://www.nrm.qld.gov.au/>.

local laws.<sup>106</sup> 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.<sup>107</sup>

### **Marine Parks Act 1981 (Qld)**

The *Marine Parks Act* 1981 (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 and *Marine Parks Regulations* 1990 (Qld) adopt 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.<sup>108</sup>

### **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 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.

NR&M administers mining tenure issues under the MRA.<sup>109</sup> The EPA regulates environmental aspects of mining under the EP Act.

### **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 NR&M.<sup>110</sup>

### **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.<sup>111</sup> The Queensland Government has now adopted a systematic approach to conservation planning using bioregional ecosystems.<sup>112</sup> The NCA is administered by QPWS, part of the EPA.<sup>113</sup>

<sup>106</sup> For information on local governments generally and links to numerous homepages of Queensland local governments see <http://www.lgaq.asn.au/>.

<sup>107</sup> In this regard note in particular *Bone v Mothershaw* [2002] QCA 120; (2002) 121 LGERA 75.

<sup>108</sup> See EPA homepage at <http://www.epa.qld.gov.au/>.

<sup>109</sup> See NRM&E at <http://www.nrm.qld.gov.au/>.

<sup>110</sup> See [www.nrm.qld.gov.au/nativetitle](http://www.nrm.qld.gov.au/nativetitle).

<sup>111</sup> Environmental Protection Agency, *State of the Environment Queensland 1999*, EPA, Brisbane, 1999, Table 3-4 at p 3.10 and p 7.4.

<sup>112</sup> See the discussion in the *Vegetation Management Act* 1999 (Qld) section of this book.

<sup>113</sup> See EPA homepage at <http://www.epa.qld.gov.au/>.

### **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. Section 3 of the Act refers to and explains the “Offshore Constitutional Settlement” of 1979. The Act mirrors the *Offshore Minerals Act 1994 (Cth)* in establishing a system for exploration permits, mining leases, other tenures and the payment of royalties. The Act is administered by NR&M.<sup>114</sup>

### **Petroleum Act 1923 (Qld)**

The *Petroleum Act 1923 (Qld)* establishes a framework for regulating the exploration and extraction of petroleum (including natural gas) from land in Queensland. The Act is administered by NR&M.<sup>115</sup>

### **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. This Act operates, pursuant to the “Offshore Constitutional Settlement” of 1979, in conjunction with the *Petroleum (Submerged Lands) Act 1967 (Cth)*. The Act is administered by NR&M.<sup>116</sup>

### **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. This includes the recent infestation of fire ants in Brisbane, for which a major eradication program is currently underway.<sup>117</sup>

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.

The Act is administered by DPI&F.<sup>118</sup>

### **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.<sup>119</sup>

### **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).<sup>120</sup>

### **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

<sup>114</sup> See NR&M at <http://www.nrm.qld.gov.au/>.

<sup>115</sup> See NR&M at <http://www.nrm.qld.gov.au/>.

<sup>116</sup> See NR&M at <http://www.nrm.qld.gov.au/>.

<sup>117</sup> See <http://www.dpi.qld.gov.au/fireants>.

<sup>118</sup> See DPI&F at <http://www.dpi.qld.gov.au/>.

<sup>119</sup> See EPA homepage at <http://www.epa.qld.gov.au/>.

<sup>120</sup> See DSDI homepage at <http://www.sdi.qld.gov.au/>.

government planning schemes (s172). The Act is administered by the EPA, Queensland Transport,<sup>121</sup> the Department of Main Roads (“DMR”)<sup>122</sup> and various port authorities.<sup>123</sup>

### **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 *International Convention for the Prevention of Pollution from Ships 1973* and the 1978 Protocols to the Convention (“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.<sup>124</sup>

### **Vegetation Management Act 1999 (Qld)**

The recent history of vegetation management in Queensland has been very controversial. Prior to the 1990s, there was little 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. During this period, many local governments also introduced bylaws or local laws under the *Local Government Act 1993 (Qld)* to protect significant local vegetation.

Faced with ongoing controversy and high levels of vegetation clearing across the State, in early 2004 major reforms to the vegetation management regime in Queensland were introduced. A major part of the reform package is a policy commitment to phase out broadscale land clearing by 31 December 2006. The reforms also aim to provide certainty to

landholders, particularly for freehold land, that cleared land (or “regrowth”) will be able to be cleared again in the future. The reforms have also removed the system of vegetation clearing laws for State lands in the *Lands Act 1994 (Qld)*, and placed the control of vegetation management of most State lands in the VMA and IPA system. Vegetation management on approximately 95% of land in Queensland is now regulated under this system. Vegetation management 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)*. The complex matrix of vegetation clearing laws in Queensland is summarised in Appendix 6.

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 the power to create the policy under which applications for clearing vegetation are assessed.

A system of mapping and classifying vegetation known as “regional ecosystems” (“REs”) provides the basis of the vegetation management system in Queensland.<sup>125</sup> Under this system, Queensland 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, the vegetation communities in a bioregion, classify biodiversity at the landscape level. REs are each assigned a unique 3 digit code reflecting 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 for much of the State using a combination of satellite imagery, aerial

<sup>121</sup> See QT at <http://www.transport.qld.gov.au/home.nsf>.

<sup>122</sup> See DMR at <http://www.mainroads.qld.gov.au/>.

<sup>123</sup> E.g. Port of Brisbane at <http://www.portbris.com.au/>.

<sup>124</sup> See <http://www.transport.qld.gov.au/maritime>.

<sup>125</sup> See Sattler P and Williams R (eds), *The Conservation Status of Queensland’s Bioregional Ecosystems* (EPA, Brisbane, 1999).



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 as under the *Vegetation Management Regulations* 2000 (Qld) as:

- **Endangered** if less than 10% of the preclearing extent remains, or 10-30% of the 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 trigger for whether development approval is required for vegetation clearing is found in Schedule 8 of IPA. If development assessment is required, the *State Policy for Vegetation Management* (May 2004)<sup>126</sup> provides the policy framework for 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. This status can change over time due to clearing and regrowth.
- **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 mapping system that are intended to be prepared by landholders and submitted for approval to NRM&E to provide property scale (1:15,000 or 1:10,000) maps of vegetation that may and may not be cleared. 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.

PMAVs are a new component of the vegetation management regime in Queensland and have been introduced for two main reasons. The first reason why PMAVs have been introduced is because of landholder complaints about errors in RE Mapping. The second reason is to alleviate a concern of landholders that regrowth vegetation in cleared areas might become “remnant” vegetation over time as the vegetation community matured. PMAVs seek to avoid the need for ongoing clearing to maintain vegetation as regrowth.

While it is not essential for landholders to prepare a PMAV and RE Maps apply in default, the importance of PMAVs for landholders is that they are produced for individual properties at a property scale and, once approved under the VMA, the landholder has greater certainty over what they can and cannot clear on their land (PMAVs may only be replaced or revoked as set

<sup>126</sup> See <http://www.nrm.qld.gov.au/vegetation/legislation>

out in s20D and 20E of the VMA). This means that a land shown as a Category X Area (Cleared) can be cleared again in the future without the need to make a development application (even if the vegetation community matures to the extent that it meets the criteria for “remnant” vegetation).

Note that while “Regional Vegetation Management Plans” (RVMPs), were produced prior to the 2004 reforms, they have not been incorporated into the new regulatory framework other than through the new RVM Codes.

The VMA is administered by NR&M.<sup>127</sup>

### **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 context of “sustainable management and efficient use” of water.

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 Licences** (s108) and **Water Allocations** (s122), **Water Licences** (s206) and **Water Permits** (s237) may be granted.

As with other planning and development legislation, the *Water Act* is (at least partially) 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

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<sup>127</sup> 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.



*Environmental Protection Act 1994* (Qld). The Act is administered by NR&M.<sup>128</sup>

### **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<sup>129</sup> in conjunction with the QPWS and NR&M.

### **The Common Law (including Native Title)**

The common law (or “judge-made law”) is the law developed by judges in courts.<sup>130</sup> 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 for environmental issues are:<sup>131</sup>

- **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);<sup>132</sup>

- **Negligence** (a duty to take reasonable care to avoid damage to a people or property, including, for example, manufacturing goods that cause cancer);<sup>133</sup>
- **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** (i.e. the legal right to commence court action) has often been a major constraint on public interest litigation to protect the environment.<sup>134</sup>

**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.<sup>135</sup> 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:<sup>136</sup>

- (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.

<sup>133</sup> 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.

<sup>134</sup> See generally *ACF v Commonwealth* (1980) 146 CLR 493 and Bates, n 2, pp 461-516.

<sup>135</sup> See generally, Bartlett RH, *Native Title in Australia* (2<sup>nd</sup> ed, Butterworths, Sydney, 2003).

<sup>136</sup> Upheld by the High Court on appeal: *Commonwealth v Yarmirr* (2001) 208 CLR 1.

<sup>128</sup> See NR&M homepage at <http://www.nrm.qld.gov.au/>.

<sup>129</sup> See WTMA homepage <http://www.wettropics.gov.au/>.

<sup>130</sup> See generally Bates, n 2, pp 20-47.

<sup>131</sup> See generally Bates, n 2, pp 27-30.

<sup>132</sup> See DE Fisher, *Water Law* (LBC, Sydney, 2000).

Important implications of native title for environmental law remain uncertain. Despite these difficulties the recognition in *Mabo* and subsequent cases of native title interests being established presents opportunities for joint management arrangements with traditional owners incorporating their wisdom and skill in managing the environment sustainably.

The common law, including native title, will remain an important component of the Queensland environmental legal system in the future. However, the principal development of this system will be due to legislative reform and in this area the Queensland environmental legal system will continue to experience considerable ongoing change.

## **Conclusion**

The Queensland environmental legal system summarised in this book has developed dramatically over the last 30 years and continues to develop rapidly. In mid-2004 major changes were made to the regime for vegetation management, substantially alleviating the single most significant threat to terrestrial biodiversity.<sup>137</sup> Of no less magnitude, in mid-2004 fully protected areas within the Great Barrier Reef World Heritage Area were increased from 4% to 33%. Southeast Queensland is currently undergoing a regional planning exercise overseen by the Office of Urban Management, which aims to control urban development on a regional level.

In the future, it should be expected that the Queensland environmental legal system 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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<sup>137</sup> In relation to the impact of land clearing on biodiversity, see the Australian State of the Environment Committee, *Australia State of the Environment 2001* (CSIRO Publishing, Melbourne, 2001) at p73 (available at <http://www.ea.gov.au/soe/>) and Environmental Protection Agency, *State of the Environment Queensland 2003* (EPA, Brisbane, 2003) at p7.3 (available at <http://www.epa.qld.gov.au/soe/>).

## Appendix 1: Major pieces of the Queensland environmental legal system

### International Law

For Example:

- *Convention for the Protection of the World Cultural and Natural Heritage* ATS 1975 No. 47 (In force generally 17/12/1975)
- *Convention on Biological Diversity* ATS 1993 No. 32 (In force generally 29/12/1993)
- *United Nations Convention on the Law of the Sea* ATS 1994 No. 31 (In force generally 16/11/1994)

### Commonwealth Law

Commonwealth Constitution (especially s51(xxix) (External Affairs))

|   |   |  |   |  |   |   |
|---|---|--|---|--|---|---|
| <i>Aboriginal and Torres Strait Islander Heritage Protection Act</i> 1984 (Cth) | <i>Airports Act</i> 1996 (Cth)  | <i>Environment Protection and Biodiversity Conservation Act</i> 1999 (Cth)       | <i>Environment Protection (Sea Dumping) Act</i> 1981 (Cth)    | <i>Fisheries Management Act</i> 1991 (Cth)           | <i>Gene Technology Act</i> 2000 (Cth)                     |   |
| <i>Great Barrier Reef Marine Park Act</i> 1975 (Cth)                            | <i>Hazardous Waste (Regulation of Exports and Imports) Act</i> 1989 (Cth) | <i>Historic Shipwrecks Act</i> 1976 (Cth)  | <i>National Environment Protection Council Act</i> 1994 (Cth) | <i>Native Title Act</i> 1993 (Cth)                   | <i>Natural Heritage Trust of Australia Act</i> 1997 (Cth) | <i>Offshore Minerals Act</i> 1994 (Cth)       |
| <i>Ozone Protection Act</i> 1989 (Cth)  | <i>Petroleum (Submerged Lands) Act</i> 1967 (Cth)                         | <i>Protection of the Sea (Prevention of Pollution from Ships) Act</i> 1983 (Cth) | <i>Quarantine Act</i> 1908 (Cth)                              | <i>Renewable Energy (Electricity) Act</i> 2000 (Cth) | <i>Sea Installations Act</i> 1987 (Cth)                   | <i>Torres Strait Fisheries Act</i> 1984 (Cth) |

### Queensland Law

*Constitution Act 1867 (Qld)* (especially ss30 and 40 (Waste lands of the Crown))

|   |   |   |   |                                   |  |  |   |
|---|---|---|---|-----------------------------------|--|--|---|
| <i>Aboriginal Cultural Heritage Act</i> 2003 (Qld)                    | <i>Biodiscovery Act</i> 2003 (Qld)              | <i>Biological Control Act</i> 1987 (Qld)                      | <i>Coastal Protection and Management Act</i> 1995 (Qld) | <i>Electricity Act</i> 1994 (Qld) | <i>Environmental Protection Act</i> 1994 (Qld)                             | <i>Fisheries Act</i> 1994 (Qld)        |   |
| <i>Forestry Act</i> 1959 (Qld)  | <i>Gene Technology Act</i> 2001 (Qld)           | <i>Health Act</i> 1937 (Qld)                                  | <i>Integrated Planning Act</i> 1997 (Qld)               | <i>Land Act</i> 1994 (Qld)        | <i>Land Protection (Pest &amp; Stock Route Management) Act</i> 2002 (Qld)  | <i>Local Government Act</i> 1993 (Qld) | <i>Marine Parks Act</i> 1981 (Qld)        |
| <i>Mineral Resources Act</i> 1989 (Qld)                               | <i>Native Title (Queensland) Act</i> 1993 (Qld) | <i>Nature Conservation Act</i> 1992 (Qld)                     | <i>Offshore Minerals Act</i> 1998 (Qld)                 | <i>Petroleum Act</i> 1923 (Qld)   | <i>Petroleum (Submerged Lands) Act</i> 1982 (Qld)                          | <i>Plant Protection Act</i> 1989 (Qld) | <i>Queensland Heritage Act</i> 1992 (Qld) |
| <i>State Development and Public Works Organisation Act</i> 1971 (Qld) | <i>Transport Infrastructure Act</i> 1994 (Qld)  | <i>Transport Operations (Marine Pollution) Act</i> 1995 (Qld) | <i>Vegetation Management Act</i> 1999 (Qld)             | <i>Water Act</i> 2000 (Qld)       | <i>Wet Tropics World Heritage Protection and Management Act</i> 1993 (Qld) |  |   |

**The Common Law (including native title)**

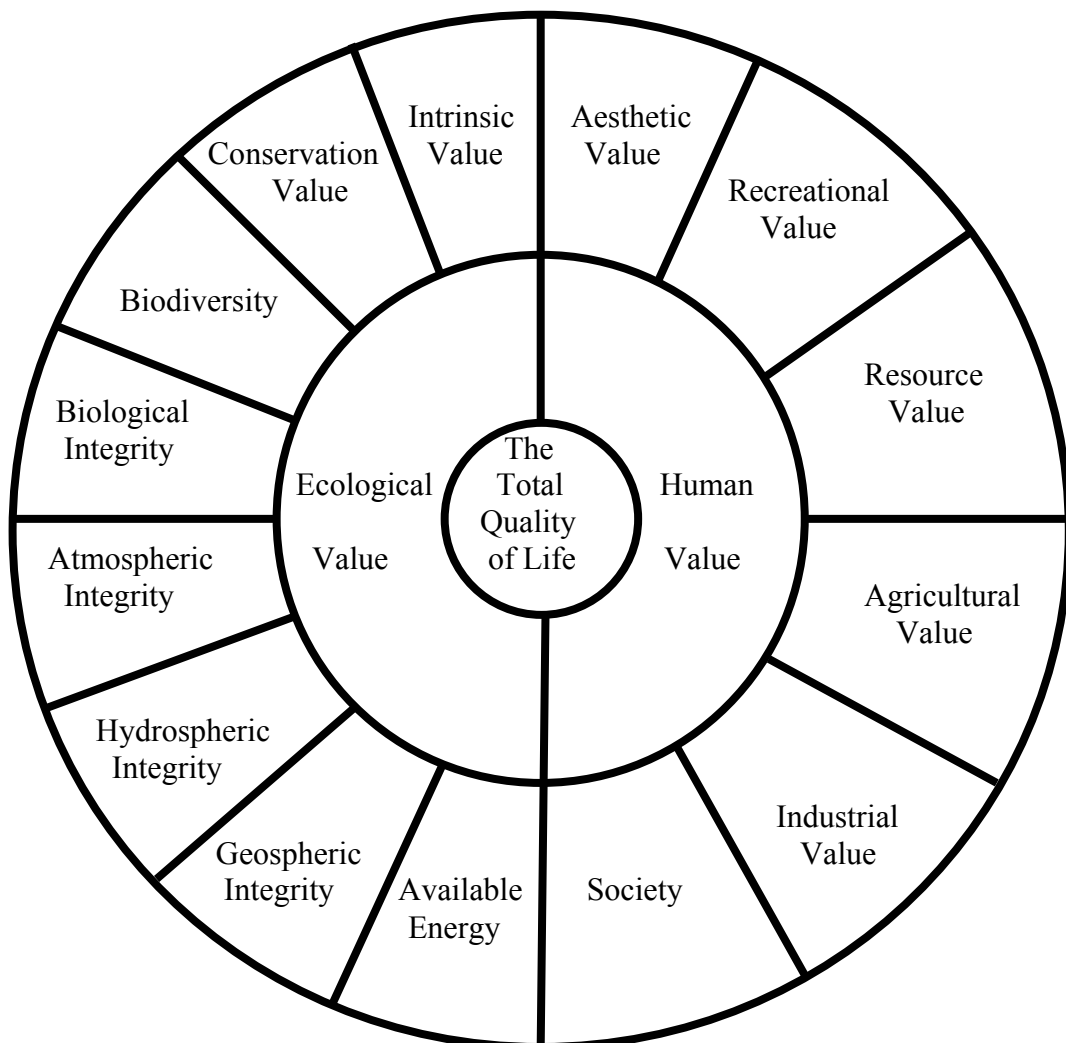
## **Appendix 2: Ecologically sustainable development**

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: 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

|   |   |
|---|---|
| <p><u>Matters of “national environmental significance”</u></p> <p>Actions that have, will have or are likely to have a significant impact on:</p> <ol style="list-style-type: none"> <li>1. The world heritage values of a declared World Heritage property (ss12-15A)</li> <li>2. The National Heritage values of a National Heritage Place (ss15B-15C)</li> <li>3. The ecological character of a declared Ramsar wetland (ss16-17B)</li> <li>4. Threatened species and ecological communities (ss18-19)</li> <li>5. Migratory species (ss20-20A)</li> <li>6. The environment if the action is a nuclear action (ss21-22A)</li> <li>7. Commonwealth marine areas (ss23-24A)</li> </ol> | <p><u>Commonwealth land and actions</u></p> <ol style="list-style-type: none"> <li>1. Actions taken on Commonwealth land that have, will have or are likely to have a significant impact on the environment (s26(1))</li> <li>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))</li> <li>3. Actions taken by the Commonwealth that have, will have or are likely to have a significant impact on the environment (s28)</li> </ol> |
|---|---|

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

**Referral**  
ss67-79  
Part 7

Will the proposed action cause a significant impact?

**Assessment**  
ss80-129  
Part 8

Method of assessment (5)

**Approval**  
ss130-145B  
Part 9

Decision to refuse or approve the proposed action

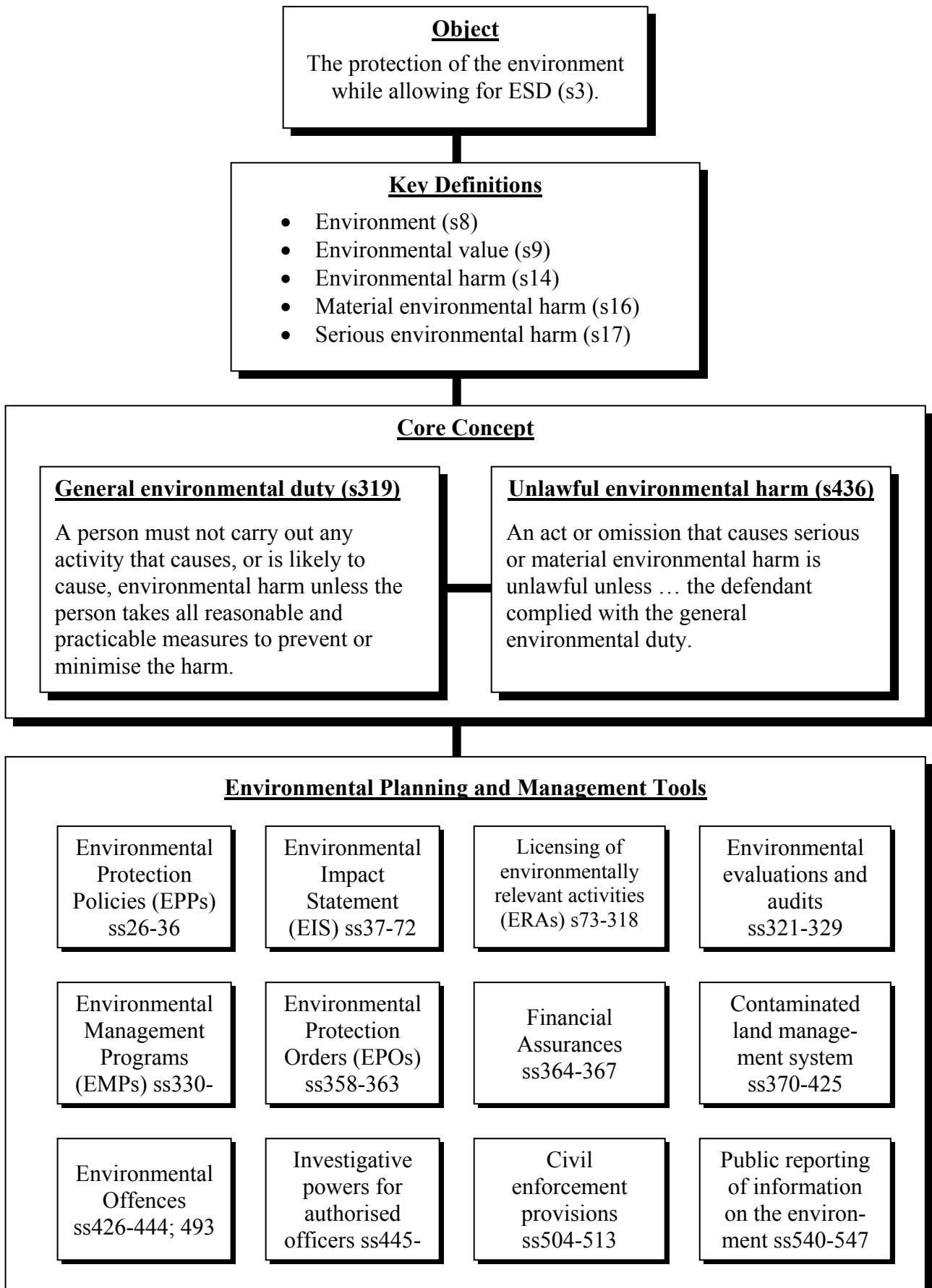
**Bilateral Agreements** – Ch 3, Part 5, ss44-65A

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
- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Identification &amp; monitoring (ss171-175)</li> <li>2. Bioregional Plans (s176)</li> <li>3. Listing of threatened species &amp; ecological communities (ss178-194; 248-252)</li> <li>4. Species offences &amp; permits (ss195-264)</li> <li>5. Register of critical habitat (ss207A-207C)</li> </ol> | <ol style="list-style-type: none"> <li>6. Australian Whale Sanctuary (s225)</li> <li>7. Recovery &amp; Threat Abatement Plans (s267)</li> <li>8. Wildlife Conservation Plans (ss285-300A)</li> <li>9. International trade in wildlife (Part 13A)</li> <li>10. Conservation Agreements (ss304-312)</li> <li>11. Biosphere and Cth Reserves (ss337-390A)</li> </ol> |
|---|---|

- 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 4: Simplified structure of the Environmental Protection Act 1994 (Qld)**



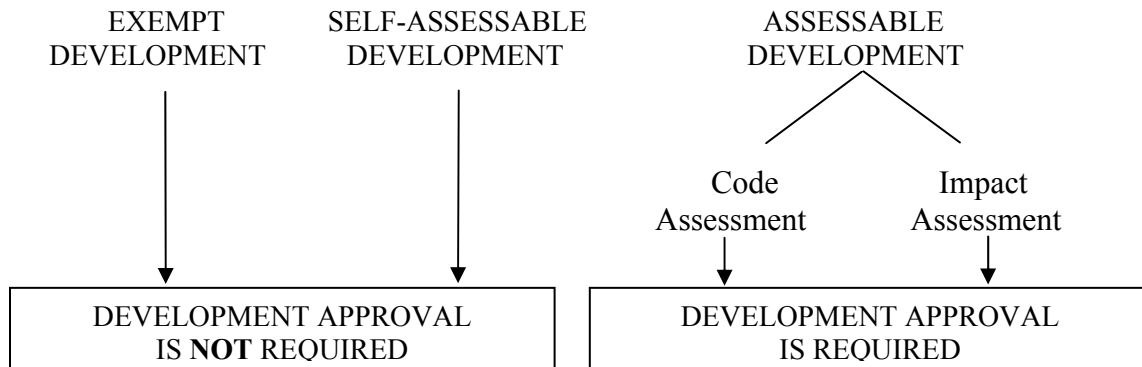


**Appendix 5: Flowchart for the Integrated Development Assessment System (“IDAS”) of the Integrated Planning Act 1997 (Qld) (“IPA”)**

**STEP 1. PRELIMINARY QUESTIONS**

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

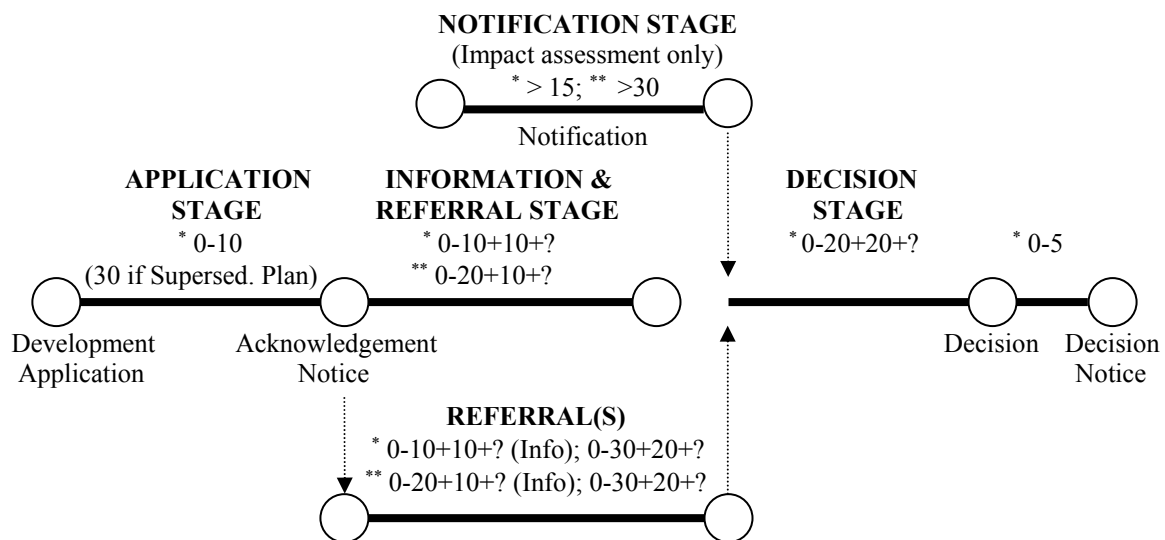
**2. What type of development is it?** (see Schedule 8 plus either a new IPA planning scheme prepared under Schedule 1 or a transitional planning scheme interpreted through ss6.1.1 and 6.1.28 IPA).



**3. Does the proposal involve referral coordination, a referral agency or a controlled action?**

- **Referral Coordination** under s3.3.5 or s6.1.35C (“designated developments”) of IPA and Schedules 6 and 7 of the *Integrated Planning Regulation 1998* (Qld).
- Referral to any **referral agency** under Schedule 2 of the *Integrated Planning Regulation 1998* (Qld) (e.g. for development involving an environmentally relevant activity (“ERA”); contaminated land; fire safety approval; workplace health and safety approval; or a main roads approval).
- A “**controlled action**” to be assessed under Part 7A of Ch 5 of the IPA pursuant to the bilateral agreement 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 6: 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 <i>Nature Conservation Act 1992</i> , State forests, forestry reserves, timber reserves or forest entitlement areas)                     | <i>Vegetation Management Act 1999</i> (Qld) and <i>Integrated Planning Act 1997</i> (Qld) Sch 8, item 3A; s4.3.1. Assessment code provided by the <i>State Policy for Vegetation Management</i> .                  |
| 2. 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).                      | <i>Integrated Planning Act 1997</i> (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 |
| 3. Vegetation subject to a local law  | <i>Local Government Act 1993</i> (Qld) ss25-26 & any relevant local law passed by a local government   |
| 4. Protected areas such as National Parks (4% of Queensland) and protected wildlife   | <i>Nature Conservation Act 1992</i> (Qld) ss62, 88 & 89  |
| 5. Forestry practices and forest products on State land   | <i>Forestry Act 1959</i> (Qld) ss53 and 54   |
| 6. Riparian vegetation (in watercourse)   | <i>Water Act 2000</i> (Qld) s814   |
| 7. 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). | <i>Environmental Protection Act 1994</i> (Qld) ss319, 436-438  |
| 8. Marine plants and fish habitat areas   | <i>Fisheries Act 1994</i> (Qld) ss122 and 123  |
| 9. Matter of national environmental significance; Commonwealth entity or area.  | <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth) ss12-28   |
| 10. Marine parks  | <i>Marine Parks Act 1982</i> (Qld) s16 and <i>Marine Parks Regulation 1990</i> (Qld) s19   |
| 11. Environmentally relevant activity (including mining) involving clearing of vegetation   | <i>Environmental Protection Act 1994</i> (Qld) ss18-20 and 73-310.   |
| 12. Petroleum exploration, leases and pipelines   | <i>Petroleum Act 1923</i> (Qld)  |
| 13. Vegetation management for roads, railway lines, ports and other transport infrastructure  | <i>Transport Infrastructure Act 1994</i> (Qld)   |
| 14. Vegetation management for electricity infrastructure (e.g. along power lines)   | <i>Electricity Act 1994</i> (Qld)  |
| 15. Wet tropics World Heritage Area   | <i>Wet Tropics World Heritage Protection and Management Act 1995</i> (Qld) s56   |
| 16. Operational works in a coastal management district or in State coastal land   | <i>Coastal Protection and Management Act 1995</i> (Qld) s61A   |
| 17. Fire hazard reduction (e.g. burning-off)  | <i>Fire and Rescue Service Act 1990</i> (Qld)  |
| 18. Soil erosion  | <i>Soil Conservation Act 1986</i> (Qld)  |
| 19. Weed / declared pest control  | <i>Land Protection (Pest &amp; Stock Route Management) Act 2002</i> (Qld)  |

## Appendix 7: 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)  | <i>Fisheries Act 1994 (Qld)</i> from land within the limits of the State and Queensland waters to the outer edge of the Great Barrier Reef Marine Park and thereafter the <i>Fisheries Management Act 1991 (Cth)</i> to the limit of the Australian fishing zone |
| 2. Fisheries other than tuna in Torres Strait (within the Australian section of the Torres Strait Protected Zone)  | <i>Torres Strait Fisheries Act 1984 (Cth)</i> and the <i>Torres Strait Fisheries Act 1984 (Qld)</i>  |
| 3. Fisheries other than prawns and tuna in the Gulf of Carpentaria (from Cape York to the Northern Territory border)   | <i>Fisheries Act 1994 (Qld)</i> from land within the limits of the State and Queensland waters to the limit of the Australian fishing zone   |
| 4. Prawn fisheries on the east coast of Queensland (from the NSW border to the tip of Cape York)   | <i>Fisheries Act 1994 (Qld)</i> from land within the limits of the State and Queensland waters to the outer edge of the Great Barrier Reef Marine Park (seaward of this point no prawn fishery exists)   |
| 5. Prawn fisheries in the Gulf of Carpentaria (from Cape York to the Northern Territory border)  | <i>Fisheries Management Act 1991 (Cth)</i> from the inner boundary of coastal waters to the limit of the Australian fishing zone.<br><i>Fisheries Act 1994 (Qld)</i> landward of the inner boundary of coastal waters  |
| 6. Tuna fisheries in all waters in the Australian fishing zone   | <i>Fisheries Management Act 1991 (Cth)</i>   |
| 7. Great Barrier Reef Marine Park  | <i>Great Barrier Reef Marine Park Act 1975 (Cth)</i> and associated regulations, zoning plans and plans of management  |
| 8. Queensland Marine Park  | <i>Marine Parks Act 1982 (Qld)</i> and associated regulations and zoning plans   |
| 9. Fisheries habitat area  | <i>Fisheries Act 1994 (Qld)</i> 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) | <i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i> ss12-28   |
| 11. Whales and other cetaceans and listed marine species in Australian waters  | <i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i> ss224-266   |
| 12. Protected wildlife (eg. dugong) in Queensland coastal waters   | <i>Nature Conservation Act 1992 (Qld)</i> and regulations and relevant conservation plans  |

## **Appendix 8: 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:

| <b>Statute</b>  | <b>Summary of EIA provisions</b>   |
|---|--|
| 1. <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth) ss85-129 and <i>Environment Protection and Biodiversity Regulations 2000</i> (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: <ul style="list-style-type: none"> <li>• Accredited assessment process;</li> <li>• Assessment on preliminary documentation;</li> <li>• Public Environment Report;</li> <li>• Environmental Impact Statement;</li> <li>• Public Inquiry.</li> </ul> |
| 2. <i>Integrated Planning Act 1997</i> (Qld) ss3.3.1-3.4.10, 5.7A.1-5.7A.15 (Ch 5, Part 7A) and 6.1.35C and <i>Integrated Planning Regulation 1998</i> (Qld) s12 and sch 6 & 7.                 | Contains 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 7A of Ch 5.  |
| 3. <i>Environmental Protection Act 1994</i> (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. <i>State Development and Public Works Organisation Act 1971</i> (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] FCA 306).