Synopsis of the Queensland Environmental Legal System

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

Using this book: This book is available for no charge at http://www.envlaw.com.au/sqels5.pdf. It is primarily intended to be used electronically and with access to the internet. The electronic version of this book is bookmarked and hyperlinked for ease of navigation and linking to relevant websites for further information.

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LIST OF ACRONYMS

AFMA	Australian Fisheries Management Authority
CCS	carbon capture and storage
CITES	*Convention on the International Trade in Endangered Species of Wild Fauna and Flora* 1973
DEEDI	[Queensland Government] Department of Employment, Economic Development and Industry
DERM	[Queensland Government] Department of Environment & Resource Management
DIP	[Queensland Government] Department of Infrastructure and Planning
DRET	[Australian Government] Department of Resources, Energy and Tourism
DSEWPC	[Australian Government] Department of Sustainability, Environment, Water, Population and Communities
EIA / EIS	environment impact assessment / environmental impact statement
EP Act	*Environmental Protection Act* 1994 (Qld)
EPBC Act	*Environment Protection and Biodiversity Conservation Act* 1999 (Cth)
EPP	Environmental Protection Policy
ERA	environmentally relevant activity
GATT	*General Agreement on Tariffs and Trade* 1947
GBR / GBRMPA	Great Barrier Reef / Great Barrier Reef Marine Park Authority
GHG	greenhouse gas
IDAS	Integrated Development Assessment System
IMO	International Maritime Organization
IPA	*Integrated Planning Act* 1997 (Qld)
LRET	Large-scale Renewable Energy Target
MARPOL 73/78	*International Convention for the Prevention of Pollution from Ships* 1973, as modified by the Protocol of 1978
n	number [of footnote cross-referenced to]
p / pp	page / pages
P&E Court	Planning and Environment Court
PMAV	property map of assessable vegetation
QPWS	Queensland Parks and Wildlife Service
RE	regional ecosystem
RET / MRET	Renewable Energy Target / Mandatory Renewable Energy Target
s / ss	section / sections [of a piece of legislation]
SPA	*Sustainable Planning Act* 2009 (Qld)
SP Regulation	*Sustainable Planning Regulation* 2009 (Qld)
SRES	Small-scale Renewable Energy Scheme
UNCLOS	*United Nations Convention on the Law of the Sea* 1982
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	*United Nations Framework Convention on Climate Change* 1992
VMA	*Vegetation Management Act* 1999 (Qld)

Introduction

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

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

This book provides a summary of the major pieces of Queensland environmental legal system and who administers them.[1] It is deliberately short. Its aim is to provide a simple explanation of the legal system protecting the environment[2] in a logical, coherent way with links to the best available websites for more information.

While traditional categories such as "pollution" and "town planning" can be useful for explaining and understanding environmental law at a simplistic level, this book's structure is not based on such categories because modern environmental laws defy them.[3] The approach taken here is to treat the environmental legal system as a jigsaw comprised of many different pieces that must be understood and brought together when solving problems. Different pieces of the jigsaw will be relevant for different activities and different places. The task of anyone working within the environmental legal system is to identify the relevant pieces and apply them to solve the problem at hand. This book is intended to help this problem-solving.

Only legislation of general application is considered. Special development or "franchise" Acts that have been passed for individual developments are not considered because of their isolated operation.[4] Policy and political issues are also not considered.[5]

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

The environmental legal system

An "environmental legal system" is the suite of laws and administrative structures regulating the impacts of humans on the natural environment and quality of life in a particular jurisdiction or geographic area such as Queensland, Australia, or the United States of America.[6]

The central paradigm for the environmental legal system in Australia is ecologically sustainable development. It is drawn from the concept of "sustainable development" advanced internationally by the seminal Brundtland report.[7] The *National*

[1] Summarised as at 21 February 2011.

[2] The pressures on, and condition of, the State's environment are described in Queensland's State of Environment reports at http://www.derm.qld.gov.au/environmental_management/state_of_the_environment/.

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

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

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

[6] See McGrath, n 3, pp 10-12. In relation to the Australian environmental legal system, see Fisher DE, *Australian Environmental Law* (2nd ed, Lawbook Co, Sydney, 2010); Bates GM, *Environmental Law in Australia* (7th ed, Butterworths, Sydney, 2010).

[7] World Commission on Environment & Development, *Our Common Future* (Oxford University Press, Oxford, 1987), http://www.un-documents.net/wced-ocf.htm.

Strategy for Ecologically Sustainable Development defined it as:[8]

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

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

As illustrated in Figure 1, the environmental legal system in Queensland is structured in four levels:

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

This structure reflects the international context of the system, Australia's federal system of government,[9] and the Common Law tradition it inherited from England. Each of these levels will be analysed in turn in this book. All levels play an important role but State legislation is of the most relevance to normal, day-to-day activities. Local governments operate under State law and provide an important subset of plans and laws applying within their areas.

The Queensland environmental legal system is administered principally by Commonwealth,[10] State and local governments and the courts. The Commonwealth and Queensland governments divide administration of the different parts of the system among large departments. They frequently re-organise and rename these departments but information about them can be found easily on the internet.[11]

Legal disputes about Commonwealth, Queensland and local government environmental laws are heard by different courts and tribunals in the State and Federal court systems. Appendixes 1 and 2 summarise the hierarchy and jurisdiction of these courts and tribunals.[12]

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

- obtain and comply with any necessary licence or government approval;
- comply with any relevant standard imposed by the law, including taking all reasonable and practicable measures to prevent or minimise environmental harm; and
- if unlawful material or serious environmental harm occurs or may occur, notify the Queensland government.[13]

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

International law

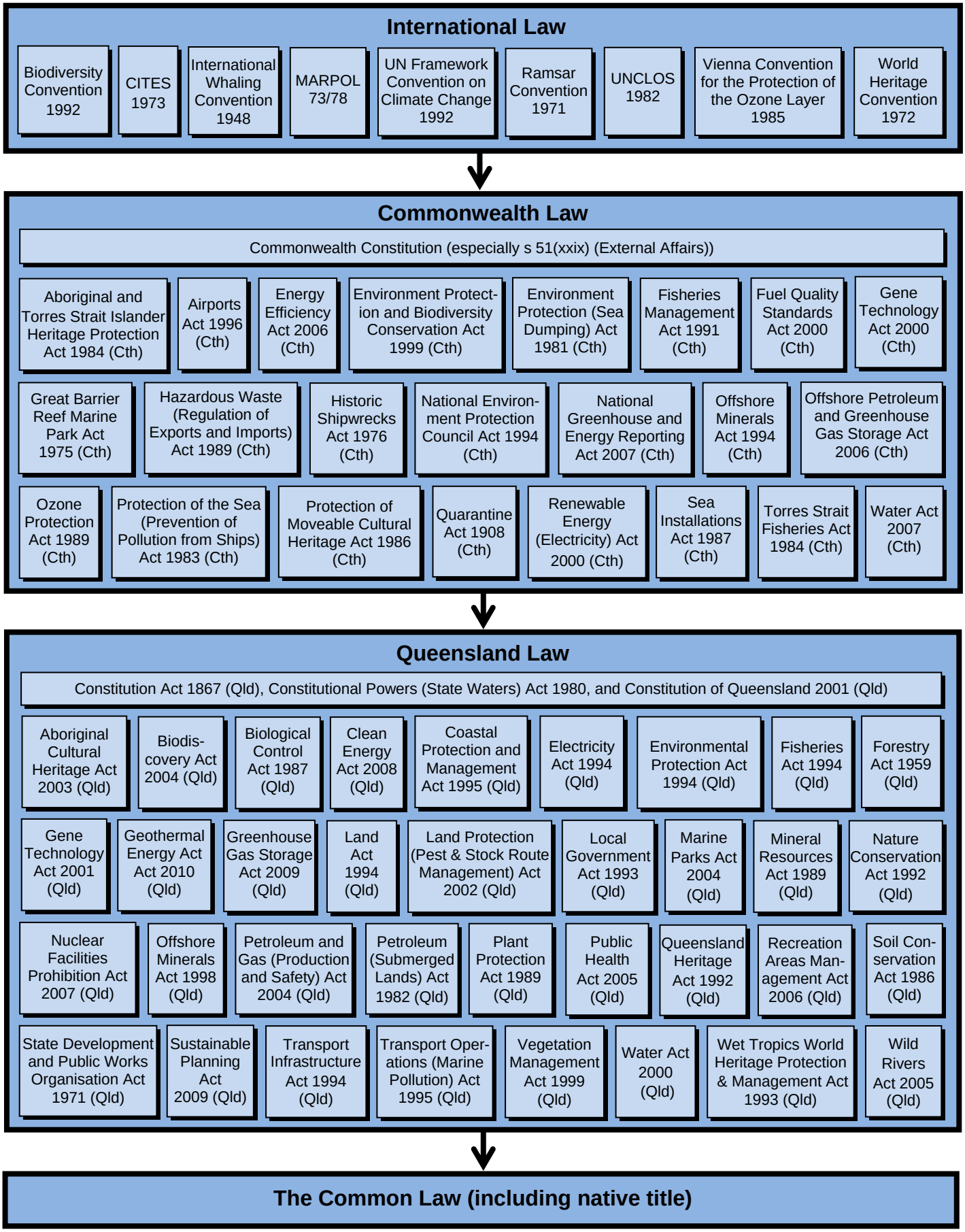
International law is the law between nations. Australia's international legal obligations are enforceable only by other nations, not by members of the public unless they are incorporated into domestic law.

International law is created by the collective actions of nearly 200 individual nations around the globe and no international body or institution unilaterally governs the world. The United Nations[14] is an assembly of most these nations but, with limited exceptions for maintaining international peace, it does not have power to unilaterally impose or enforce rules upon individual nations.

International law is founded on the idea of the sovereignty and equality of nation states.[15] Sovereignty is the power and right of a nation to govern a defined part of the globe.[16] The state is the

[8] ESD Steering Committee, *National Strategy for Ecologically Sustainable Development* (AGPS, Canberra, 1992), http://www.environment.gov.au/about/esd/index.html.
[9] See http://australia.gov.au/about-australia/our-government/australias-federation.
[10] The terms "Commonwealth", "Federal" or "Australian" Government are used interchangeably to refer to Australia's national level of government.
[11] See www.australia.gov.au and www.qld.gov.au.
[12] Case studies of environmental litigation in these courts are available at http://www.envlaw.com.au/case.html.
[13] This third duty arises under the *Environmental Protection Act* 1994 (Qld), s 320.
[14] See http://www.un.org.
[15] See Triggs G, *International Law: Contemporary Principles and Practices* (LexisNexis, Sydney, 2006), p 3.
[16] See *NSW v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case) at 479; *Commonwealth v Yamirr* (2001) 208 CLR 1 at [52].

Figure 1: Major pieces of the Queensland environmental legal system



political institution in which sovereignty is embodied.[17]

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

The protection of the environment has become a major part of international law.[18] Doug Fisher outlined four stages in the development of international environmental obligations:[19]

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 (e.g. ocean dumping of wastes);
3. Restrictions on activities within states which have a detrimental environmental effect beyond their boundaries (e.g. ozone depleting substances);
4. Restrictions on activities within states which have a detrimental environmental effect within their boundaries (e.g. the protection of World Heritage).

However, there is considerable overlap and no clear transition between these stages, so they may be better understood as themes. What is clear is the general trend toward imposing stronger obligations on states and thereby restricting the doctrine of absolute state sovereignty.

Article 38 of the *Statute of the International Court of Justice* recognises four sources of international law[20] of which the two principal ones are:

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

Customary international law provides limited protection of the environment. The *Trail Smelter* principle creating liability for cross-border pollution[21] is one of the few significant obligations to protect the environment created under customary international law.

By far the greater source of international legal obligations is treaty law.[22] Australia has wide-ranging treaty obligations including in relation to Antarctica, biodiversity, climate change, marine pollution, migratory species, and World Heritage.[23] The following are the major environmental treaties relevant to Queensland.

Biodiversity Convention

The *Convention on Biological Diversity* 1992[24] imposes extremely wide and important obligations on Australia. Article 8 imposes a general obligation on Australia to conserve biodiversity in both terrestrial and marine ecosystems:

> **Article 8**
> ***In-situ* conservation**
> Each Contracting Party shall, as far as possible and as appropriate:
> (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; …
> (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas with a view to ensuring their conservation and sustainable use;
> (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
> (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas; …
> (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations; …

The Convention is administered by a secretariat in Montreal, Canada.[25]

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

[18] Cf. Kurukulasuriya L and Robinson N (eds), *Training Manual on International Environmental Law* (UNEP, Nairobi, 2006), http://www.unep.org/law/PDF/law_training_Manual.pdf.

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

[20] Article 38 provides that the Court is to apply: (a) international conventions; (b) international custom, as evidence of general practise accepted as law; (c) the general principles of law recognised by civilised nations and; (d) judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

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

[22] See the Ecolex database at http://www.ecolex.org/

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

[24] Entry in to force generally 29/12/93. ATS 1993 No 32.

[25] See http://www.cbd.int/

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

CITES

As its name suggests, the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora* 1973 (CITES)[26] provides a framework for controlling international trade in endangered species. It accords varying degrees of protection to more than 30,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs. It is administered by a secretariat within the United Nations Environment Program (UNEP) in Geneva, Switzerland.[27]

International Whaling Convention

The *International Convention for the Regulation of Whaling* 1946, commonly called simply the "International Whaling Convention",[28] provides a loose framework for the regulation of whaling, including of the Humpback whales that migrate annually along the Queensland coastline. A moratorium on all commercial whaling was declared in 1982. Japan continues to conduct whaling under Article VIII of the Convention for "scientific purposes". Part of this occurs in Australia's Antarctic waters in contravention of Australia's domestic laws.[29] The Convention is administered by the International Whaling Commission.[30]

GATT

International trade has important implications for environmental protection. The *General Agreement on Tariffs and Trade* 1947 (GATT)[31] is an international agreement that principally aims to promote free trade around the globe. Article XX of GATT permits trade restrictions to meet environmental objectives so long as they are not arbitrary or discriminatory.[32] Australia is a member of the World Trade Organization, which was created in 1995 to administer GATT and related trade agreements.[33]

MARPOL 73/78

The *International Convention for the Prevention of Pollution from Ships* 1973, as modified by the Protocol of 1978 (MARPOL 73/78)[34] is the main international convention regulating pollution of the marine environment by ships from operational or accidental causes. It is administered by the International Maritime Organisation (IMO).[35]

A related treaty is the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* 1972 and 1996 Protocol (London Convention) which limits the discharge of wastes that are generated on land and disposed of at sea. It is also administered by the IMO.[36]

United Nations Framework Convention on Climate Change

The *United Nation Framework Convention on Climate Change* 1992 (UNFCCC)[37] provides an international framework for regulating

[26] Entry into force 27/10/76. ATS 1976 No 29.
[27] See the CITES website at http://www.cites.org/
[28] Entry into force 10/11/48. ATS 1948 No 18.
[29] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510 (Allsop J).
[30] See the IWC website at http://www.iwcoffice.org/
[31] Entry into force for Australia 25/2/49. ATS 1948 No 23.
[32] See Triggs, n 15, p 752.
[33] See http://www.wto.org.
[34] ATS 1988 No 29; 1990 No 34; 1995 No 4. Entry into force for Australia completed 1 July 1992.
[35] See IMO website http://www.imo.org
[36] See http://www.londonconvention.imo.org
[37] Entry into force generally 21/3/94. ATS 1994 No 2.

anthropogenic climate change.[38] As a contracting party, Australia is obliged to take climate change into account and cooperate in avoiding dangerous climate change.

The UNFCCC provides a broad framework but more detailed obligations were intended to be specified in the protocols under it. The first (and at this stage the only) of these is the Kyoto Protocol, named after the Japanese city in which it was signed in 1997.[39] The Kyoto Protocol provides specific obligations for developed countries such as Australia to limit greenhouse gas emissions during a commitment period from 2008 to 2012. It also created a framework for developed countries to meet their commitments to reduce emissions by undertaking, financing or purchasing emissions reductions generated in other countries. These mechanisms are Joint Implementation, the Clean Development Mechanism, and emissions trading.[40]

The parties to the UNFCCC and Kyoto Protocol met in Copenhagen in December 2009 to negotiate the post-2012 regime but failed to reach a binding agreement. There are ongoing, difficult negotiations on this issue.

The UNFCCC and Kyoto Protocol are administered by secretariats in Bonn, Germany.[41]

Ramsar Convention

The *Convention on Wetlands of International Importance especially as Waterfowl Habitat* 1971[42] provides an international framework for the protection of wetlands. It was signed in the Iranian city of Ramsar in 1971 and is commonly referred to as "the Ramsar Convention." It provides for listing of wetlands, particularly large wetlands of critical importance for migratory birds. There are currently 65 Ramsar wetlands in Australia, with five in Queensland, including Moreton Bay adjacent to Brisbane.[43] The Convention is administered by a secretariat in Gland, Switzerland.[44]

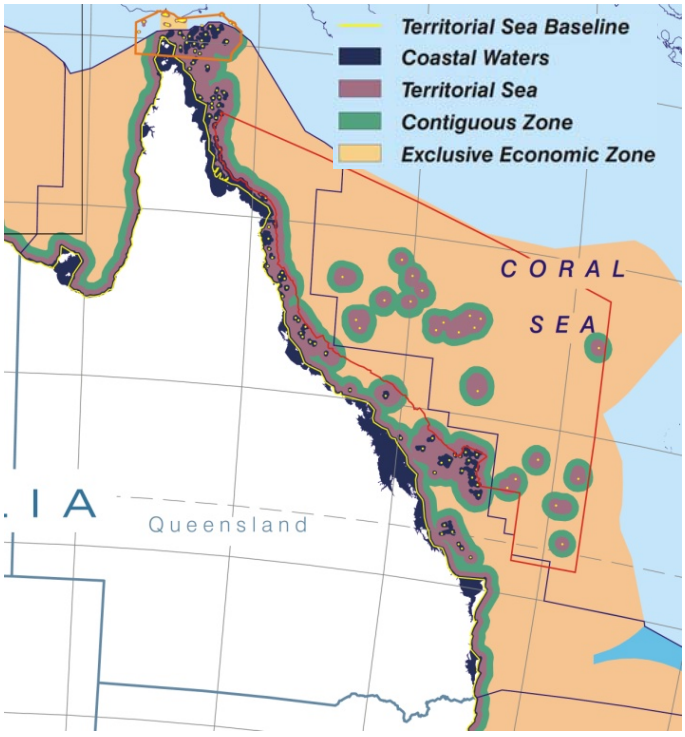
UNCLOS

The *United Nations Convention on the Law of the Sea* 1982 (UNCLOS)[45] provides a major framework regulating use of the world's oceans. It places important obligations on Australia to protect the marine environment, such as:

> **Article 192**
> States have the obligation to protect the marine environment.
>
> **Article 194**
> States shall take … all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable measures at their disposal …

UNCLOS established a major reform of maritime jurisdictions. Figure 2 shows a map of maritime zones adjacent to Queensland.

Figure 2: Australia's maritime zones adjacent to the Queensland coast[46]



Jurisdictional limits over the sea are measured from a standard reference point known as the "baseline". This is generally the lowest astronomical tide or a straight line drawn across bays. Under UNCLOS the principal territorial limits extend to:

- coastal waters (3 nautical miles);
- territorial waters (12 nautical miles);

[38] See generally, Yamin F and Depledge J, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press, Cambridge, 2004).
[39] Done at Kyoto 11 December 1997. Signed for Australia 24 April 1998. Ratified by Australia 12 December 2007. Entered into force generally 16 February 2005. Entered into force for Australia 11 March 2008. [2008] ATS 2.
[40] See Yamin and Depledge, n 38, Ch 6, p 136.
[41] See the UNFCCC website at http://unfccc.int/
[42] Entry into force 21/12/75. ATS 1975 No 48.
[43] See www.environment.gov.au/epbc/protect/wetlands.html
[44] See the Secretariat website at http://www.ramsar.org
[45] Entry into force generally 16/11/94. ATS 1994 No 31.
[46] Source: http://www.ga.gov.au/image_cache/GA3746.pdf.

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

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

The UNCLOS secretariat is part of the United Nations.[47]

Vienna Convention for the Protection of the Ozone Layer

The *Vienna Convention for the Protection of the Ozone Layer* 1985[48] is a treaty for reducing and eliminating the manufacture and use of gases that destroy ozone in the Earth's atmosphere. The *Montreal Protocol on Substances that Deplete the Ozone Layer* 1987[49] was negotiated under it and stipulates phase-out periods for the production and consumption of ozone-depleting substances such as chlorofluorocarbons.

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

The Vienna Convention and Montreal Protocol are administered by the Ozone Secretariat in Nairobi, Kenya.[50]

World Heritage Convention

The *Convention concerning the Protection of the World Cultural and Natural Heritage* 1972,[51] commonly called simply the "World Heritage Convention", is a pillar of the international environmental legal system. It is concerned with the identification, protection and preservation of cultural and natural heritage considered to be of outstanding universal value. A World Heritage List is established under the Convention. Australia has 18 World Heritage sites including the Great Barrier Reef.[52] The Convention is administered by the United Nations Educational, Scientific and Cultural Organization (UNESCO).[53]

Relationship between international law and Australian domestic law

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

International law may also be relevant in interpreting Australian domestic law. Where a statute or regulation is ambiguous, the courts favour an interpretation which accords with international law, at least where the legislation was enacted after, or in contemplation of, the relevant international instrument.[54]

In summary, international law impacts upon the Queensland environmental legal system in three major ways by:[55]

- placing legal obligations on Australia to protect the environment;
- creating legislative power for the Commonwealth Government to fulfil Australia's international legal obligations; and
- sometimes assisting in the interpretation of ambiguity in domestic legislation.

International considerations may also influence the Queensland environmental legal system through international debate and policy documents

[47] See http://www.un.org/Depts/los/index.htm
[48] Entry into force 22/9/88. ATS 1988 No 26.
[49] Entry into force 1/1/89. ATS 1989 No 18.
[50] See http://www.unep.org/ozone/index.asp
[51] Entry into force 17/12/75. ATS 1975 No 47.
[52] See http://whc.unesco.org/en/list
[53] See http://whc.unesco.org
[54] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287. See also s 15AB(2)(d) of the *Acts Interpretation Act* 1901 (Cth).
[55] 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, is rejected by Federal and State Governments.

(sometimes called "soft law") such as *Agenda 21*[56] and *The Earth Charter*[57] forming the basis for government policy.

Commonwealth law

Commonwealth law is the legislation enacted and administered by the Australian Government.[58] It also includes statutory instruments such as subordinate legislation (typically called "regulations") and plans created under such laws. The centrepiece of Commonwealth environmental law is the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act). The Commonwealth also plays a particularly important role in customs and export controls for international trade in endangered species as well as for fisheries, ozone and greenhouse issues. The Great Barrier Reef Marine Park Authority is also a Commonwealth agency and is responsible for the protection and management of the Great Barrier Reef under the *Great Barrier Reef Marine Park Act* 1975 (Cth). The limits of the Commonwealth 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 Constitution.[59] Section 51 of the Constitution is the principal statement of these heads of power. James Crawford has summarised other basic rules for determining Commonwealth legislative powers as follows:[60]

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.

The External Affairs power in s 51(xxix) of the Constitution provides an important link between international law and Australian domestic law. Under it the Commonwealth Government has power to enact legislation that is reasonably capable of being considered appropriate and adapted to fulfil Australia's international legal obligations.[61] This is a very wide and important head of legislative power. Given the width of the obligations imposed by Article 8 of the *Biodiversity Convention* in particular, it is difficult to think of any real environmental issue (at least with respect to the natural environment) that the Commonwealth does not have legislative power over. Simply stated, the Commonwealth has virtually a plenary power to make laws with respect to the environment (or at least biodiversity).

Section 51(xxix) also allows the Commonwealth to regulate places physically external to Australia, such as the marine environment seaward of the low water mark.[62] However, in 1979 the Commonwealth gave proprietary rights and legislative jurisdiction to the States and Northern Territory for coastal waters (three nautical miles from the low water mark) under the Offshore Constitutional Settlement.[63] Subsequent cooperative arrangements also provide for State fisheries legislation to extend beyond coastal waters, as summarised in Appendix 3.

[56] See http://www.un.org/esa/sustdev/documents/agenda21/
[57] See http://www.earthcharter.org/
[58] Commonwealth legislation and statutory instruments are available at http://www.comlaw.gov.au/
[59] *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129 (the Engineers' Case).
[60] Crawford J, "The Constitution and the Environment" (1991) 13 *Sydney Law Review* 11 at pp 14-16.
[61] *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.
[62] *New South Wales v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case).
[63] *Coastal Waters (State Powers) Act 1980* (Cth); *Coastal Waters (State Title) Act 1980* (Cth). See generally s3 *Offshore Minerals Act 1998* (Qld); Fowler R, "Environmental Law and Its Administration in Australia" (1984) 1 EPLJ 10 at 13. This See also *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340.

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

Significant Aboriginal areas and objects, as declared by the Minister, an authorised officer or an inspector are protected under this Act. The Australian Government Department of Sustainability, Environment, Water, Population and Communities (DSEWPC) administers it.[64]

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

Airports Act 1996 (Cth)

Major airports located on Commonwealth land are regulated under this Act. In Queensland these are Brisbane, Coolangatta, Archerfield, Townsville and Mt Isa airports. At these airports the *Airports (Environment Protection) Regulations* 1997 (Cth) regulate noise pollution and impose a general environmental duty on operators to take all reasonable and practicable measures to prevent pollution, adverse impacts to ecosystems and cultural heritage, and to prevent offensive noise. For other airports, development approval and environmental management is regulated under Queensland legislation such as the *Sustainable Planning Act* 2009 (Qld) and *Environmental Protection Act* 1994 (Qld). The Airports Division of the Australian Government Department of Infrastructure, Transport, Regional Development and Local Government administers the Commonwealth Act.[65]

Australian Heritage Council Act 2003 (Cth)

This Act integrated national heritage assessment into the EPBC Act after the repeal of the earlier *Australian Heritage Commission Act* 1975 (Cth). The Register of the National Estate is established under s 21. DSEWPC administers it.[66]

[64] See http://www.environment.gov.au
[65] See http://www.infrastructure.gov.au/
[66] See http://www.environment.gov.au/heritage

Australian Radiation Protection and Nuclear Safety Act 1998 (Cth)

The Commonwealth is prohibited from operating nuclear facilities such as a nuclear reactor unless authorised under this Act. No such facilities exist in Queensland. The only nuclear reactor in Australia is operated at Lucas Heights in Sydney to produce medical and industrial products.[67] The Act is administered by the Australian Radiation Protection and Nuclear Safety Authority.[68]

The EPBC Act also regulates nuclear actions, including uranium mining. There is no Federal law that prohibits a person other than the Commonwealth from mining uranium or operating a nuclear power plant in Queensland. However, at a State level the *Nuclear Facilities Prohibition Act* 2007 (Qld) prohibits any person constructing or operating a nuclear facility, including a nuclear power plant, in Queensland.

Energy Efficiency Opportunities Act 2006 (Cth)

Large energy using businesses (those using more than 0.5 petajoules in a financial year) are required by this Act to undertake and report publicly an assessment of their energy efficiency opportunities. One of its objects is to reduce greenhouse gas emissions. It is administered by the Department of Resources, Energy & Tourism (DRET).[69]

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The EPBC Act is the centrepiece of Commonwealth environmental laws.[70] 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 matters of national environmental significance are:

- the world heritage values of a declared World Heritage property;

[67] See http://www.ansto.gov.au
[68] See http://www.arpansa.gov.au
[69] See http://www.energyefficiencyopportunities.gov.au
[70] See McGrath C, "Key concepts of the EPBC Act" (2005) 22 EPLJ 20.

- the National Heritage values of a declared National Heritage place;
- the ecological character of a declared Ramsar wetland;
- listed threatened species and ecological communities;
- listed migratory species;
- nuclear actions;
- Commonwealth marine areas; and
- the Great Barrier Reef Marine Park.

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. Along with actions by the Commonwealth or involving Commonwealth land with a significant impact on the environment, these are termed "controlled actions" and require approval under the Act.

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

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

Under the Act a "significant impact" is impact that is important, notable or of consequence having regard to its context or intensity.[71] A wide approach must be taken when assessing the scope of impacts of actions under the EPBC Act. All likely impacts must be considered, including direct and indirect impacts.[72]

The EPBC Act and its regulations create important obligations for environmental impact assessment (EIA). Sections 489-491 of the EPBC Act create offences for providing false or misleading information during the assessment process.[73]

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

Bilateral agreements are important variations to the normal assessment or approval stages of the EPBC Act. These allow State and Territory assessment and approval processes to be accredited to fulfil similar processes under the EPBC Act, thereby avoiding duplication. There are two types: assessment bilaterals (in which State EIA processes are accredited but the Commonwealth makes the final decision); and approval bilaterals (in which both assessment and approval are devolved to the State). An assessment bilateral has been signed for Queensland involving EIA processes in the *State Development and Public Works Organisation Act* 1971 (Qld) for "significant projects", the *Environmental Protection Act* 1994 (Qld) for

[71] *Booth v Bosworth* (2001) 114 FCR 39 at 64.

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

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

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

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

DSEWPC administers the EPBC Act[74] but, importantly, it provides widened standing in ss 475 and 487 for public interest litigation to restrain offences and for judicial review.

Environment Protection (Sea Dumping) Act 1981 (Cth)

Dumping or incineration at sea of radioactive material, wastes and other material is prohibited under this Act. Section 15 provides a defence for dumping conducted to save human life or a vessel in distress. The Act was made pursuant to the London Convention. It applies to all vessels in Australian waters and to Australian vessels in international waters. The Australian Maritime Safety Authority administers it.[75]

Fisheries Management Act 1991 (Cth)

This Act operates in conjunction with the *Fisheries Act* 1994 (Qld) to regulate fisheries along the Queensland coast under complex arrangements summarised in Appendix 3. It declares the Australian fishing zone over Australia's exclusive economic zone (EEZ) other than State coastal waters and some excluded waters. The EEZ extends 200 nautical miles seaward of the coastline as shown in Figure 2. For some fisheries the Act applies to Australian citizens and Australian flagged vessels fishing in international waters. Appendix 3 summarises the jurisdictional network in place for Queensland fisheries. In Queensland waters the Act regulates, for example, the Eastern Tuna and Billfish Fishery, which extends from Cape York, Queensland, to the South Australian/Victorian border.[76] It is administered by the Australian Fisheries Management Authority (AFMA).[77]

Fuel Quality Standards Act 2000 (Cth)

The quality of fuel supplied in Australia is regulated under this Act. The standards it creates reduce the level of atmospheric pollutants such as lead and sulphur. DSEWPC administers it.[78]

Gene Technology Act 2000 (Cth)

A national framework for research, production and release of genetically modified organisms (GMOs) and genetically modified crops and products was established by this Act. The *Gene Technology Act* 2001 (Qld) provides complementary State legislation. The Federal Act is administered by the Office of the Gene Technology Regulator.[79]

Great Barrier Reef Marine Park Act 1975 (Cth)

The Great Barrier Reef (GBR) is an iconic Queensland ecosystem that supports immensely valuable fishing and tourism industries. The *Great Barrier Reef Marine Park Act* 1975 (Cth) was established in response to public concern in the 1970s over proposals to drill for oil within the GBR. The Act establishes a framework for the protection and management of the GBR as a Marine Park in which mining and petroleum exploration and extraction are banned but other activities such as fishing are permitted in specified areas.

The *Great Barrier Reef Marine Park Regulations* 1975 (Cth) establish a zoning plan for the GBR based on the concept of multiple-use management. Figure 3 shows an extract of the zoning plan and the key to the map showing the major restrictions on activities in different zones. In 2004, fully protected areas were increased from 4% to 33% of the Marine Park. The Act and Regulations also provide a range of specific management tools such as plans of management[80] 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,[81] although day-to-day management is conducted in conjunction with the Queensland Parks and Wildlife Service.

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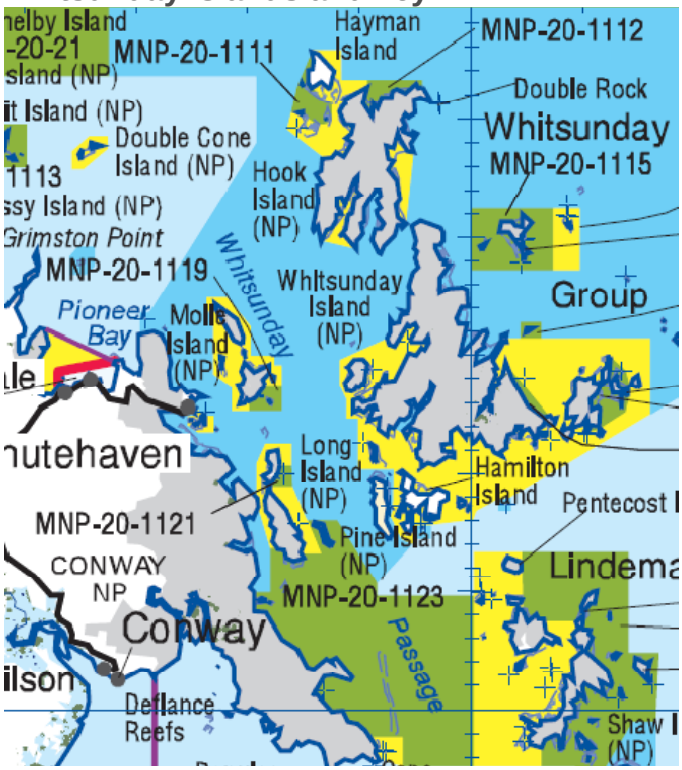
[74] See http://www.environment.gov.au/epbc.
[75] See AMSA homepage http://www.amsa.gov.au.
[76] See http://www.afma.gov.au/managing-our-fisheries/fisheries-a-to-z-index/eastern-tuna-and-billfish-fishery/
[77] See AFMA homepage http://www.afma.gov.au. The Australian Coastal Atlas provides management boundaries at http://www.environment.gov.au/coasts/atlas/index.html.
[78] See http://www.environment.gov.au.
[79] See http://www.ogtr.gov.au.
[80] E.g. the *Whitsundays Plan of Management* 1998 (Cth).
[81] See http://www.gbrmpa.gov.au

Figure 3: Extract of GBR zoning plan for the Whitsunday Islands and key[82]



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

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

The export and import of hazardous waste is regulated under this Act. Hazardous waste is defined with reference to a schedule of categories and characteristics of hazardous waste and includes, for example, wastes containing arsenic, mercury or lead at sufficient concentrations to be acutely poisonous or chronically toxic (including carcinogenic). The Act implements the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal*[83] and is administered by DSEWPC.[84]

Historic Shipwrecks Act 1976 (Cth)

Shipwrecks are an important part of Australia's history. This Act provides a regime for protecting historic shipwrecks and relics in Australian waters that are at least 75 years old. Upon a historic shipwreck or protected zone being declared under the Act, authority is needed to access it or to remove relics from it. In waters adjacent to Queensland there are 18 declared historic shipwrecks and 10 protected zones from 200 located shipwrecks, including the *SS Yongala* located 50km off Townsville. DSEWPC administers the Act.[85]

National Environment Protection Council Act 1994 (Cth)

This Act is part of reciprocal legislation between the Commonwealth and all States and Territories to establish the National Environment Protection Council, which now operates under the umbrella of the Environment Protection and Heritage Council. National Environment Protection Measures (NEPMs) developed by the EPHC set national objectives for protecting or managing particular aspects of the environment. There are currently seven NEPMs: Ambient Air Quality; Assessment of Site Contamination; Diesel Vehicle Emissions; Movement of Controlled Wastes Between States and Territories; National Pollutant Inventory; Used Packaging Materials; and Air Toxics. DSEWPC administers the Act.[86]

National Greenhouse and Energy Reporting Act 2007 (Cth)

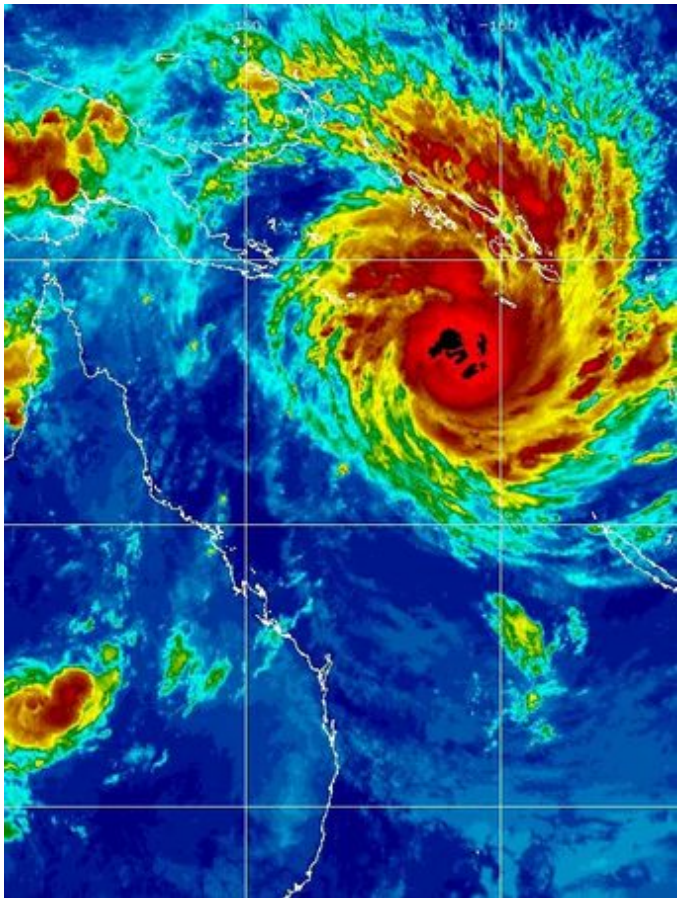
A national system for reporting large greenhouse gas (GHG) emissions, abatement actions, and energy consumption and production by corporations established by this Act lays the foundation for future responses to climate change. Companies with GHG emissions, energy use, or energy consumption greater than specified thresholds are obliged to report their emissions, energy use and energy

[82] Obtained from the GBRMPA website http://www.gbrmpa.gov.au

[83] ATS 1992 No 7. In force generally 5 May 1992.
[84] See http://www.environment.gov.au.
[85] See http://www.environment.gov.au/heritage.
[86] See EPHC at http://www.ephc.gov.au/ and NPI Database at http://www.npi.gov.au.

production. The reporting system is complex and technical.[87] The Greenhouse and Energy Reporting Office of the Department of Climate Change and Energy Efficiency administers it.[88]

The Act established a reporting framework only and does not impose a cost for greenhouse pollution. It was intended as a preliminary step towards a national greenhouse gas emissions trading scheme but this scheme was rejected by the Senate and future climate change regulation remains in doubt. A multi-party committee established by the Australian Government following the 2010 federal election is due to report in late 2011 on options for the implementation of a carbon price.[89] Any future regulatory regime for carbon in Australia, however, is likely to build upon the reporting framework created by the Act.



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

Native Title Act 1993 (Cth)

Land tenure is fundamental to controlling activities that affect the environment and the traditional laws and customs of Aboriginal and Torres Strait Islanders regarding land tenure, known as "native title", have important implications for land management. This Act 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 it 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[90] but determinations of native title are made by the Federal Court.

Natural Heritage Trust of Australia Act 1997 (Cth)

The Natural Heritage Trust, a large funding program of a previous government to provide for environmental protection, was created under this Act.[91] A *National Action Plan for Salinity and Water Quality* provided a related federal program for improved land and water management. Under it Natural Resource Management plans were developed to attempt to provide a framework of regional planning across Australia.[92] Considerable effort and resources went into the development of these plans but they are now rarely referred to and have little or no influence on planning. The National Heritage Trust has been integrated into a consolidated funding program announced by the Australian Government in early 2008, Caring for Our Country. It provides $2.25 billion in funding over five years from 1 July 2008 to June 2013 for natural resource management projects and is administered by DSEWPC.[93]

Offshore Minerals Act 1994 (Cth)

Mining of the seabed within Australian waters (excluding State and Northern Territory coastal waters) is regulated under this Act. It adopts a traditional exploration and licensing regime. DRET administers it.[94]

[87] See McGrath C, "Australia's draft climate laws" (2009) 26 (4) EPLJ 267.
[88] See http://www.climatechange.gov.au
[89] See http://www.climatechange.gov.au.
[90] See http://www.nntt.gov.au.
[91] See http://www.nht.gov.au/index.html
[92] See http://www.napswq.gov.au/index.html
[93] See http://www.nrm.gov.au/
[94] See http://www.ret.gov.au.

Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)

A regime for licensing petroleum and gas extraction from the seabed and pipelines within Australian waters excluding State and Territory coastal waters was established by this Act, which replaced the *Petroleum (Submerged Lands) Act* 1967 (Cth). It also created a regime for licensing greenhouse gas storage in Australian waters. It has little application in Queensland, however, as petroleum and gas extraction is prohibited within the GBR Marine Park, which covers most of Queensland's east coast. DRET administers it.[95]

Ozone Protection & Synthetic Greenhouse Management Act 1989 (Cth)

The manufacture, use, import, export, recycling and disposal of ozone depleting substances such as chlorofluorocarbons are controlled by a system of licences and staged quotas under this Act. It implements the *Vienna Convention for the Protection of the Ozone Layer* 1985 and *Montreal Protocol on Substances that Deplete the Ozone Layer* 1987. DSEWPC administers it.[96]

Chinese bulk carrier Shen Neng 1 aground on the Great Barrier Reef and leaking oil in 2010. Photo: ABC / AFP / Queensland Government.

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

The discharge into the ocean of oil, noxious substances, packaged harmful substances, sewage and garbage from ships (including aircraft) is prohibited by this Act. It implements MARPOL 73/78 and applies to all vessels within Australian waters but allows State and Territory legislation to be accredited for coastal waters. In Queensland the relevant State legislation is the *Transport Operations (Marine Pollution) Act* 1995 (Qld). The Commonwealth Act is administered by the Australian Maritime Safety Authority.[97]

Protection of Moveable Cultural Heritage Act 1986 (Cth)

The import and export of protected objects of national importance for archaeological, artistic, ethnological, historical, literary, scientific or technological reasons is regulated under this Act. It established the National Cultural Heritage Control List, which lists categories of protected objects that are subject to export control. Examples of items on the Control List are: Victoria Cross medals awarded to Australian service personnel; and each piece of the suit of metal armour worn by Ned Kelly at the siege of Glenrowan in Victoria in 1880. The Act implements the UNESCO *Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970. DSEWPC administers it.[98]

Quarantine Act 1908 (Cth)

The entry of infectious disease organisms and exotic plants and animals into Australia is regulated under this Act. Ballast water from ships, an important source of marine pests, is regulated under the *Quarantine Regulations* 2000 (Cth). It is administered by the Australian Quarantine and Inspection Service within the Biosecurity Services Group of the Australian Government Department of Agriculture, Fisheries and Forestry.[99]

Renewable Energy (Electricity) Act 2000 (Cth)

A large part of the Australian Government's response to climate change has been increasing targets for renewable energy production under is Act. Originally termed the Mandatory Renewable Energy Target (MRET), with revised targets and frameworks it has became the enhanced Renewable Energy Target (RET). Under it, the federal government aims to generate 20% of Australia's

[95] See http://www.ret.gov.au.
[96] See http://www.environment.gov.au
[97] See http://www.amsa.gov.au and White M, *Australasian Marine Pollution Laws* (2nd ed, Federation Press, 2007).
[98] See http://www.environment.gov.au/heritage/movable/
[99] See http://daff.gov.au/aqis and http://www.daff.gov.au/ba

energy requirements from renewable sources such as wind, hydro and solar by 2020.

In 2011 the RET was split into the Large-scale Renewable Energy Target (LRET) and the Small-scale Renewable Energy Scheme (SRES). The LRET creates a financial requirement for large electricity retailers to purchase a percentage of their electricity from renewable sources such as wind, hydro and solar. The SRES creates a financial incentive for people such as homeowners to install solar water heaters, air sourced heat pumps and other small generation units such as rooftop solar panels. Eligible systems are entitled to small-scale technology certificates based on the amount of renewable electricity the system produces or displaces. These can be sold (usually to large electricity generators). The RET is administered by the Office of the Renewable Energy Regulator.[100]

Sea Installations Act 1987 (Cth)

The construction, operation and decommissioning of offshore installations in Australian waters outside State coastal waters is regulated under this Act. It applies to any human-made structure attached to the seabed other than those used to exploring for or exploit natural mineral resources (including petroleum). DSEWPC administers it.[101]

Torres Strait Fisheries Act 1984 (Cth)

Fishing within the Australian section of the Torres Strait Protected Zone located between Cape York and Papua New Guinea is regulated under this Act and a reciprocal State Act, the *Torres Strait Fisheries Act* 1984 (Qld). It is based upon the *Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as Torres Strait, and Related Matters*.[102] It is administered jointly by the AFMA and the Queensland department responsible for fisheries.[103] The complex jurisdictions over fisheries are summarised in Appendix 3.

Water Act 2007 (Cth)

Joint Commonwealth and State control of the Murray-Darling River Basin is established under this Act. Several river systems in southern Queensland form part of this catchment: the Condamine-Balonne, Warrego, and MacIntyre Rivers. The Act is intended to operate concurrently with State water laws, including the *Water Act* 2000 (Qld). The Act establishes a framework for water charges, water trading and a water market within the Basin. It aims, in particular, to address over-allocation of water to irrigation. A draft plan for the Murray-Darling was released under the Act in late 2010 but has been severely criticised by irrigators for having too great an emphasis on restoring environmental flows.[104] The Act is administered by DSEWPC, the National Water Commission, and the Murray Darling Basin Commission.[105]

Queensland law

Queensland law is the legislation and subordinate legislation enacted and administered by the Queensland Government and local governments (which may cover a city, town, shire, or, since March 2008, a region).[106] Local governments perform a central role in the environmental legal system by preparing and administering planning schemes to control land development within their areas. Several courts have jurisdiction under Queensland environmental laws, as summarised in Appendixes 1 and 2, but the Planning and Environment Court has the major role.

Constitution Act 1867 (Qld)

The *Constitution Act* 1867 (Qld) provides the basis for the Queensland Parliament to make laws, including laws regulating human impacts on the environment. Section 2 provides power for the Parliament "to make laws for the peace welfare and good government of the [State] in all cases whatsoever." This is a plenary law-making power, subject only to the constraints of the *Commonwealth Constitution*.[107] Sections 30 and 40 of the Act provide the Parliament with power to make laws regulating the sale, letting, disposal, occupation and

[100] See http://www.orer.gov.au
[101] See http://www.environment.gov.au/coasts/pollution/dumping/installation.html.
[102] ATS 1985 No 4.
[103] See http://www.afma.gov.au.
[104] See http://www.thebasinplan.mdba.gov.au.
[105] See http://www.environment.gov.au/water/index.html, http://www.nwc.gov.au and http://www.mdbc.gov.au.
[106] Queensland legislation is available on the internet at http://www.legislation.qld.gov.au/OQPChome.htm
[107] For example, s 109 of the *Commonwealth Constitution* provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

management of land in Queensland.[108] The *Constitution of Queensland Act* 2001 (Qld) consolidates the constitution of the State, but the origin of the power to do this is the 1867 Act. The *Constitutional Powers (State Waters) Act* 1980 (Qld) provides additional powers to the State over coastal waters reflecting the Offshore Constitutional Settlement referred to previously.

The Queensland Government (the Executive Government or "the Crown"), is now generally required to comply with laws protecting the environment. Historically, under a principle known as "Crown immunity", the Crown was not bound by legislation unless expressly stated to be or by necessary implication.[109]

The Queensland Parliament has enacted over 30 pieces of legislation that directly regulate activities impacting on the environment. The major pieces are summarised in alphabetical order in the following pages. The *Sustainable Planning Act* 2009 (Qld) (SPA) is the mainstay of the system regulating planning and development other than for mining and petroleum (including gas extraction), which have separate regimes.

Aboriginal Cultural Heritage Act 2003 (Qld)

Aboriginal and Torres Strait Islander cultural heritage is protected under this Act and the *Torres Strait Islander Cultural Heritage Act* 2003 (Qld). The main mechanism through which each Act operates is a list of places and artefacts of heritage significance. The Acts are administered by the Cultural Heritage Coordination Unit of the Department of Environment and Resource Management (DERM).[110]

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

Biodiscovery Act 2004 (Qld)

Licensing and royalties for the investigation of biological resources in Queensland are regulated under this Act. Permits issued under it over-ride the *Nature Conservation Act* 1992 (Qld) and allow investigation in National Parks. It separates the conflicting functions of commercialising and protecting biological resources. The Department of Employment, Economic Development and Innovation (DEEDI) administers commercial aspects through contractual benefit sharing agreements. DERM administers a separate regime, known as "collection authorities", regulating access to biological resources.[111]

Biological Control Act 1987 (Qld)

The testing and release of biological agents to control pest infestations in Queensland are regulated under this Act. The most infamous failure of a biological control agent in Queensland was the deliberate introduction from Hawaii of the cane toad (*Bufo marinus*) in 1935 to control scarab beetles, a pest afflicting sugar cane in north Queensland.[112] The toad's voracious appetite, poisonous skin glands and massive reproductive ability have been catastrophic for Queensland wildlife. The toads have now spread into the Kakadu National Park and World Heritage Area of the Northern Territory. The Act is administered by Biosecurity Queensland within DEEDI.[113]

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

Clean Energy Act 2008 (Qld)

Medium-sized business energy users in Queensland are required by this Act to identify measures to reduce energy consumption (energy conservation) and promote energy efficiency. It mainly applies to businesses that use 10 – 500 terajoules of energy per

[108] See *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520.
[109] See *Bropho v Western Australia* (1990) 171 CLR 1.
[110] See http://www.derm.qld.gov.au/cultural_heritage/.
[111] See http://www.industry.qld.gov.au/key-industries/590.htm
[112] See http://australianmuseum.net.au/Cane-Toad.
[113] See http://www.dpi.qld.gov.au/4790_13149.htm

year.[114] DEEDI administers it[115] and contains an Office of Clean Energy responsible for promoting energy conservation and energy efficiency.[116]

Coastal Protection and Management Act 1995 (Qld)

State and regional planning processes for coastal development are established under this Act. The *State Coastal Management Plan – Queensland's Coastal Policy*, prepared under the Act, provides a vision, principles and policies for coastal development.[117] The Act required Regional Coastal Management Plans (RCMPs) to be developed to provide regional planning for coastal development. Four RCMPs were prepared for the Curtis Coast, Cardwell-Hinchinbrook, Wet Tropical Coast, and South-East Queensland.[118]

A 2009 review of the Act concluded that RCMPs were an unnecessary additional regulatory layer that will be redundant due to remote mapping technology and the regional planning process under the *Integrated Planning Act* 1997 (Qld) (since replaced by SPA). As a result, the requirement to prepare RCMPs is to be removed from the Act.[119]

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

Electricity Act 1994 (Qld)

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

Power generation in Queensland is overwhelmingly provided by coal-fired power stations, a major source of greenhouse gas emissions. Under the *Queensland Energy Policy: A Cleaner Energy Policy* 2000[120] and subsequent policies such as *Climatesmart 2050*[121] and *ClimateQ: towards a greener Queensland*,[122] the use of gas, renewable energy (wind, solar and biomass), and energy efficiency measures are increasing in an effort to reduce emissions. The Act also regulates the construction and maintenance of power lines, which are a significant source of vegetation clearing and habitat fragmentation. DEEDI administers it.[123]

Environmental Protection Act 1994 (Qld)

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

- environmental protection policies (EPPs);
- an environmental impact statement process for mining and petroleum activities;
- a system for development approvals integrated into the *Sustainable Planning Act* 2009 (Qld) for environmentally relevant activities (ERAs);
- special measures to reduce water pollution from "agricultural ERAs", namely commercial sugar cane growing and cattle grazing in certain catchments of the Great Barrier Reef;
- environmental authorities for mining activities;
- environmental authorities for greenhouse gas storage and petroleum exploration, extraction and pipelines (this includes petroleum in both liquid and gas forms);
- a general environmental duty and a duty to notify of environmental harm;
- environmental evaluations and audits;
- transitional environmental programs;
- environmental protection orders;
- financial assurances;
- a system for managing contaminated land;
- environmental offences and executive officer liability;
- investigative powers of authorised officers including power to give an emergency direction;
- civil enforcement provisions to restrain breaches of the Act and widened standing for public interest litigants; and

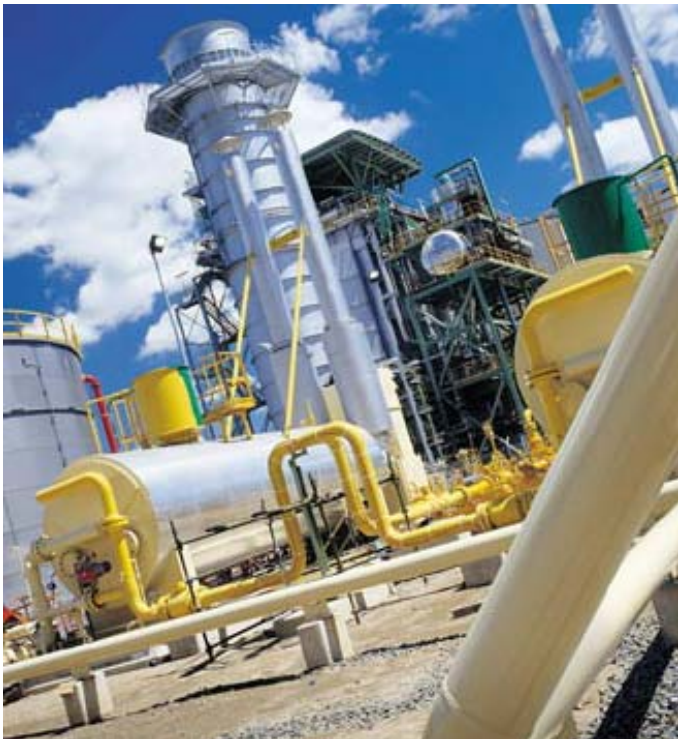
[114] The upper threshold of 500 terajoules is equivalent to 0.5 petajoules to exclude businesses required to report under the *Energy Efficiency Opportunities Act* 2006 (Cth).
[115] See http://www.dme.qld.gov.au/Energy/index.cfm.
[116] See http://www.cleanenergy.qld.gov.au/.
[117] See http://www.derm.qld.gov.au/environmental_management/coast_and_oceans/coastal_management/state_coastal_management_plan/.
[118] See http://www.derm.qld.gov.au/environmental_management/coast_and_oceans/coastal_management/regional_coastal_management_plans/index.html.
[119] See www.derm.qld.gov.au/coastalplan/index.html
[120] See www.dme.qld.gov.au/Energy/energy_policy.cfm
[121] www.energyfutures.qld.gov.au/climatesmart_2050.cfm
[122] See http://www.dme.qld.gov.au/Energy/climateq.cfm
[123] See http://www.dme.qld.gov.au/Energy/

- public reporting of information on the environment.

Four EPPs have been gazetted under the Act:

- *Environmental Protection (Water) Policy* 2009;
- *Environmental Protection (Air) Policy* 2008;
- *Environmental Protection (Noise) Policy* 2008;
- *Environmental Protection (Waste Management) Policy* 2000.

The *Environmental Protection Regulation* 2008 (Qld) lists 64 ERAs in Schedule 2, including: aquaculture; chemical manufacturing; oil refining; waste disposal; and sewage treatment. The regulations also provide a regulatory regime for minor issues involving environmental nuisance as well as for implementing National Environment Protection Measures for the National Pollutant Inventory and Used Packaging Material.[124]



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

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

[124] 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/

The Act defines many terms but five definitions are particular important to understand:[125]

> ***Environment*** includes:
> (a) ecosystems and their constituent parts, including people and communities;
> (b) all natural and physical resources;
> (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
> (d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).
>
> ***Environmental value*** is … a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety … [or stated under an EPP].
>
> ***Environmental harm*** is any adverse effect … on an environmental value ... .
>
> ***Material environmental harm*** is environmental harm:
> (a) that is not trivial or negligible in nature, extent or context; or
> (b) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than [$5000] but less than [$50,000];
> (c) that results in costs of more than [$5000] but less than [$50,000] being incurred in taking appropriate action to—
> (i) prevent or minimise the harm; and
> (ii) rehabilitate or restore the environment to its condition before the harm.
>
> ***Serious environmental harm*** is environmental harm:
> (a) that causes actual or potential harm to environmental values that is irreversible, of a high impact or widespread; or
> (b) that causes actual or potential harm to environmental values of an area of high conservation value or special significance; or
> (c) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than [$50,000]; or
> (d) that results in costs of more than the threshold amount being incurred in taking appropriate action to—
> (i) prevent or minimise the harm; and
> (ii) rehabilitate or restore the environment to its condition before the harm.

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

- an environmental value is not a physical thing but a quality or physical characteristic

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

represented by a physical part of the environment. For example, a tree, a forest or an endangered species is not an environmental value but each of these things may represent environmental values such as biological diversity, conservation value and ecological integrity. Similarly, water is not an environmental value but the suitability of water for drinking is an environmental value.

- environmental harm *is any adverse effect* on an environmental value. The source or type of harm is irrelevant. Environmental harm is, therefore, not limited to pollution or the release of contaminants, but includes all forms of harm to environmental values such as land clearing and soil erosion.[126] The Act can, therefore, potentially regulate any activity impacting on the environment.

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

> **319 General environmental duty**
>
> (1) A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the ***general environmental duty***).
>
> (2) In deciding the measures required to be taken under subsection (1), regard must be had to, for example-
>
> (a) the nature of the harm or potential harm; and
> (b) the sensitivity of the receiving environment; and
> (c) the current state of technical knowledge for the activity; and
> (d) the likelihood of successful application of the different measures that might be taken; and
> (e) the financial implications of the different measures as they would relate to the type of activity.

Section 493A provides, in effect, that an activity that causes serious or material environmental harm or environmental nuisance is unlawful unless it is approved under the EP Act or the general environmental duty is complied with. Relatively few activities are specifically approved under the EP Act but by taking all reasonable and practicable measures to prevent or minimise environmental harm the people carrying them out avoid potential liability under the Act.

The concept of taking "reasonable care" is drawn from the well-known *Donoghue v Stevenson* principle[127] of negligence at Common Law. The general environmental duty in s 319 of the EP Act widens the Common Law concept of "neighbour" to include the environment.

DERM is the lead agency for the administration of the Act;[128] however, relatively minor environmental matters such as some water pollution offences and minor ERAs have been devolved to local governments.[129]

Fire and Rescue Services Act 1990 (Qld)

Fire has a major role in the Australian ecosystem promoting regeneration and maintaining species diversity. However, outside of protected areas such as national parks, fire management in Queensland rarely considers this role. Instead, fire management is principally concerned with preventing fire entirely or controlled burning to reduce the fire hazard to property and livestock. The *Fire and Rescue Service Act* 1990 (Qld) regulates fire safety and the use of fire. It prohibits the lighting of fires unless the fire is: authorised by a fire permit; less than 2m in length, width or height; in a fireplace; or for burning the carcass of a beast. It also provides for the declaration of local fire bans when there is a high fire risk. The Queensland Fire Service administers it and a volunteer network of 2,400 Local Fire Wardens issue permits for controlled burning.[130]

Fisheries Act 1994 (Qld)

The major regime regulating fishing, development in fisheries habitat areas, and damage to marine plants in Queensland is created by this Act. The complex network of Federal and State laws regulating fisheries and protecting marine organisms such as turtles are summarised in Appendix 3.

The *Fisheries Regulation* 1995 (Qld) provides technical and geographic detail for the wide range of mechanisms created by the Act aimed at the sustainable management of fisheries. These include:

- **size limits** – minimum and maximum legal size limits for many species of fish and other marine organisms such as crabs and crayfish;
- **bag limits** – restrictions on the total number of fish of a species that a person may possess at any one time;

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

[127] *Donoghue v Stevenson* [1932] AC 562 at 580.
[128] See http://www.derm.qld.gov.au.
[129] See Ch 7, ss 98-108 of the EP Regulation.
[130] See http://www.ruralfire.qld.gov.au.

- **closed seasons** – prohibitions on taking or possessing some species (e.g. barramundi) during certain times (e.g. a breeding season);
- **closed waters and protected areas** – areas closed to fishing for conservation purposes or to protect fish stocks or fish habitat (e.g. "Green Zones" in the GBR Marine Park are no-take zones where both commercial and recreational fishing are prohibited);
- **gear restrictions** – restrictions on certain gear types such as maximum net lengths and prohibitions on the highly damaging fishing methods such as the use of explosives and poisons to catch fish;
- **noxious fish** – it is illegal to possess or keep, hatch, rear, sell, consign or place in any container any declared noxious fish such as Tilapia, carp and gambusia;
- **protected species** – some marine species (e.g. dugongs) are fully protected and must not be taken; and
- **protected sexes** – some sexes of certain species, notably female mud crabs and sand (blue-swimmer) crabs, are fully protected and may not be deliberately killed or kept.

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

Commercial fishing requires a licence under the Act and is subject to special controls on fishing effort and equipment. For instance, under the *Fisheries (East Coast Trawl) Management Plan* 1999 (Qld) created under the Act, trawl nets must be fitted with specified turtle-excluder devices and other by-catch reduction devices.

The Act also regulates land-based activities that damage declared fish habitat areas and marine plants such as mangroves. These parts of the Act are now integrated into the IDAS system under the *Sustainable Planning Act* 2009 (Qld).

The Act is administered by Fisheries Queensland and the Queensland Boating and Fisheries Patrol within DEEDI. A great deal of information about fisheries regulation is available on its website.[131]

Forestry Act 1959 (Qld)

The removal of timber, other forest products and quarry material from State land is regulated under this Act. State land includes State forests, leasehold land and unallocated State land. It covers 80% of the State. "Forest products" includes all vegetable growth and material of vegetable origin. For designated timber producing areas such as State forests, "forest products" also include honey, native animals, fossils and quarry material. Section 45 vests 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. DERM Forest Products now manages commercial native forest production on State-controlled lands.[132]

The Act was amended in 1999, to accord with the *South East Queensland Forests Agreement* to allow for 25 year agreements about forest practices.[133] Under this agreement logging in native forests will be phased-out over 25 years. Because of this phase-out, the Commonwealth Government refused to accredit it as a Regional Forestry Agreement.[134]

Gene Technology Act 2001 (Qld)

This Act complements the *Gene Technology Act* 2000 (Cth) to regulate research, production and release of genetically modified organisms and genetically modified crops and products. The *Code of Ethical Practice for Biotechnology in Queensland*

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[131] See http://www.dpi.qld.gov.au/28.htm

[132] See http://www.derm.qld.gov.au/forests/saleable_products/forest_industry.html

[133] See http://www.derm.qld.gov.au and search for "SEQFA"; 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.

[134] For this reason the *Regional Forest Agreements Act* 2002 (Cth) is not included in this book.

declares an ethical framework for the development of biotechnology in Queensland. DEEDI administers it.[135]

Geothermal Energy Act 2010 (Qld)

The exploration and production of geothermal energy in Queensland is regulated under this Act. Geothermal energy is heat energy derived from the earth's natural (subsurface) heat. There is currently very little use of this energy source in Queensland. However, the Eromanga Basin in South-West Queensland contains abnormally hot geological formations ("hot dry rocks") and is being investigated for geothermal energy production. The Act provides for the granting of authorities known as "geothermal tenures" to explore for or produce geothermal energy. DEEDI administers it.[136]

Greenhouse Gas Storage Act 2009 (Qld)

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

This Act provides a framework for the granting of "GHG authorities" to explore for or use underground geological formations or structures to store carbon dioxide. It provides for the creation and registration of GHG authorities, ownership of the GHGs stored in a GHG reservoir and powers if the reservoir leaks GHGs to the atmosphere or contaminates groundwater. It applies to storage on land and in coastal waters. Outside coastal waters the *Offshore Petroleum and Greenhouse Gas Storage Act* 2008 (Cth) applies.

This Act is principally concerned with tenure and access issues for GHG storage. As for mining and petroleum production, the environmental protection aspects of GHG storage are regulated under the *Environmental Protection Act* 1994 (Qld). GHG storage requires an environmental authority under Chapter 5A of that Act.

DEEDI administers GHG storage tenures under the *Greenhouse Gas Storage Act*[137] while DERM administers the environmental aspects under the *Environmental Protection Act*.[138]

Iconic Queensland Places Act 2008 (Qld)

This is an odd piece of legislation that provides special constraints on development in areas declared to be "iconic places", meaning they have qualities that contribute substantially to define Queensland's character. Two areas were declared iconic in the legislation itself: the former Douglas Shire and Noosa Shire. Both shires were amalgamated into regional councils in March 2008. No further iconic places may be declared after 30 June 2008. The Act provides for an independent panel to assess all development applications in iconic places. It appears to have been enacted largely to quieten dissent against amalgamation of Douglas Shire and Noosa Shire.[139] The Department of Infrastructure and Planning (DIP) administers it.[140]

Integrated Resort Development Act 1987 (Qld)

This is another peculiar piece of legislation and applies to only a few areas along the Queensland coast such as Hope Island at the Gold Coast.[141] It allowed for schemes approved by the State Government to over-ride local government planning schemes for large resort developments along the coast. It has generally been replaced by the *Sustainable Planning Act* 2009 (Qld) and the *Body Corporate and Community Management Act* 1997 (Qld). No further approved schemes can be gazetted under it[142] but it has not been repealed. DIP administers it.[143]

Land Act 1994 (Qld)

Land ownership is a fundamental control on the use and development land. This Act provides for the Queensland Government to create different forms of land ownership know as "tenures". Around 70% of land in Queensland is owned by the State but leased to private individuals and companies in a tenure know as "leasehold land". Around 5% of land in Queensland is owned by the State and set aside for

[135] See http://www.industry.qld.gov.au/key-industries/575.htm
[136] See http://www.deedi.qld.gov.au.
[137] See http://www.deedi.qld.gov.au.
[138] See http://www.derm.qld.gov.au.
[139] A useful, scathing critique is provided by Davis A, "Iconic Queensland Places", seminar paper delivered to the Queensland Environmental Law Association, 17/3/08.
[140] See http://www.dip.qld.gov.au.
[141] See *Hope Island Resort Holdings v Bridge Investment Holdings Pty Ltd* [2004] QPEC 003; [2004] QCA 235.
[142] See section 4(1A) of the IRDA.
[143] There is no useful website for this Act.

nature conservation as national parks. Around 20% of Queensland has been sold by the State to private owners and held in a tenure known as "freehold land". Even though it is privately owned, freehold land is still subject to environmental laws such as local government planning controls.[144]

The decision to lease land, sell land as freehold, dedicate it as national park or other tenure will have an immense effect on the use of the land. This creates the fabric of tenures, which then in practice heavily constrain the environmental legal system due to the property rights associated with each tenure and a reluctance to interfere with those rights without paying compensation. This reluctance is a political rather than legal matter as there is no right of compensation at Common Law for the acquisition of property by State governments.[145]

The *Land Act* is not the only piece of legislation under which different land tenures can be created. Mining and petroleum leases are important forms of tenure created under other pieces of legislation.[146] They can be granted by the State government over other tenures, including freehold land, to allow mining of minerals or extraction of petroleum or gas. Native title is another form of land tenure, which recognises Aboriginal and Torres Strait Islanders traditional land tenure rules. It has been extinguished on all freehold land but may still exist on other forms of tenure. All of these different tenures affect legal rights to use and develop land.

DERM administers the *Land Act*.[147]

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

A framework for the control of declared pests such as foxes, feral pigs and groundsel is created by this Act. Schedule 2 of the *Land Protection (Pest & Stock Route Management) Regulations* 2003 (Qld) lists declared pests in three classes based on their current or potential economic, environmental or social impact. 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. 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. Biosecurity Queensland, part of DEEDI, administers the pest control parts of the Act.[148]

Local Government Act 1993 (Qld)

Local governments are established under this Act to govern a city, shire or region.[149] The number of local governments was reduced from 157 to 73 in 2008 by amalgamating many small councils and creating regional councils. Somewhat confusingly, "regional councils" are termed "local governments" under the Act. "Regional councils" do not represent an intermediate tier between local government and the State Government as their name might suggest.

Local governments are granted planning and regulatory powers under the *Sustainable Planning Act* 2009 (Qld) and a variety of other laws. The *Local Government Act* also contains power for local governments to pass local laws, which apply within a local government area to a range of relatively minor environmental issues such as dog licences. In some areas they are also used to regulate more serious environmental issues such as vegetation clearing. DIP administers the Act and maintains a database of local laws.[150] Local governments publish detailed planning and regulatory information on their own websites.[151]

Marine Parks Act 2004 (Qld)

This Act is the marine equivalent of the *Nature Conservation Act* 1992 (Qld). It provides a framework for the creation of marine parks and the protection of marine species. Three marine parks have been created under it: Great Barrier Reef (GBR) Coast Marine Park; Great Sandy Marine Park; and Moreton Bay Marine Park. The GBR Coast Marine Park complements (in adjacent State waters) the GBR Marine Park created under the *Great Barrier Reef Marine Park Act* 1975 (Cth).

The Act creates zoning plans for multiple-use management and a permit system for activities within marine parks such as collecting marine products or commercial whale watching. The Queensland Parks & Wildlife Service (QPWS), part of DERM, administers it.[152]

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[144] *Bone v Mothershaw* [2003] 2 Qd R 600.
[145] See *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399.
[146] E.g., the *Mineral Resources Act* 1989 (Qld).
[147] See http://www.derm.qld.gov.au.
[148] See http://www.dpi.qld.gov.au/4790.htm.
[149] For a list of local governments see http://www.lgaq.asn.au/ and http://www.localgovernment.qld.gov.au/.
[150] See http://www.dip.qld.gov.au/localgovernment
[151] See, e.g., http://www.brisbane.qld.gov.au/.
[152] See www.derm.qld.gov.au/parks_and_forests/marine_parks

Mineral Resources Act 1989 (Qld)

Mining for coal, iron ore and other mineral resources is the largest industry in Queensland and this Act provides a framework to regulate mining tenures and royalties. Extraction of petroleum and gas, also major industries, are regulated separately under the *Petroleum and Gas (Production and Safety) Act* 2004 (Qld).

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

The Act creates different tenures for different mining activities such as prospecting, exploring and mining. A mining lease is the most important tenure as it allows the extraction of minerals. Exploration permits and mining leases may be granted over private land without the owner's consent but are subject to compensation for loss of the use of the land. In effect, mining may occur at virtually any location where there are sufficient mineral reserves and where the public interest (including any deleterious environmental effects) warrants the grant of the mining lease. The only exception is that mining is prohibited in a national park or conservation park.[153]

In an attempt to separate the promotion of mining from the regulation of its adverse impacts, the environmental impacts of mining are regulated separately under the *Environmental Protection Act* 1994 (Qld). Mines require an environmental authority (mining lease) under that Act to operate.

Mining is exempt development under the *Sustainable Planning Act* 2009 (Qld), as is petroleum extraction. This means that the regulation of mining and petroleum extraction operates separately from the IDAS system that regulates all other forms of development in Queensland.

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

DEEDI is responsible for promoting mining development and administers the Act.[154] DERM regulates the environmental aspects of mining under the EP Act. Any person has a right to object to the grant of a mining lease or environmental authority (mining activities) in the Land Court.[155]

[153] Under s 27 of the *Nature Conservation Act* 1992 (Qld).
[154] See http://www.dme.qld.gov.au/mines/.
[155] See http://www.landcourt.qld.gov.au.

Queensland produced over 200 million tonnes of black, saleable coal in 2010.[156] Photo: Business News (2010).

Native Title (Queensland) Act 1993 (Qld)

Past acts attributable to the Queensland Government that may have affected or extinguished native title are declared to be valid by this Act, which was enacted after the recognition of native title by the High Court in 1992. Importantly for environmental law, s 17 declares that the State Government owns all natural resources and has the right to use, regulate and control the flow of waters and fishing access rights. DERM is the lead agency for native title issues.[157]

Nature Conservation Act 1992 (Qld)

A framework is created under this Act for the creation and management of protected areas (such as national parks) and the protection of native flora and fauna (protected wildlife). Protected areas cover 4.6% of the State.[158]

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

[156] Data from ABARES at http://www.abares.gov.au.
[157] See http://www.derm.qld.gov.au/nativetitle.
[158] Environmental Protection Agency, *State of the Environment Queensland 2007* (EPA, Brisbane, 1999), p 249.

protected wildlife under the Act, including birds, reptiles and mammals (other than dingoes).

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

QPWS administers the Act.[159] Members of the public can also seek to enforce the Act in the Planning and Environment Court (s 173D).[160]

Nuclear Facilities Prohibition Act 2007 (Qld)

The construction and operation of nuclear facilities such as nuclear power plants are prohibited by this Act (with the exception of nuclear powered warships). It allows for the storage and disposal of waste radioactive material from research or medical uses. It does not prohibit exploration or mining of uranium but the current Queensland Government has a policy opposing such mines. DEEDI administers it.[161]

Offshore Minerals Act 1998 (Qld)

A little-used framework for regulating the exploration and mining of minerals (defined not to include petroleum) in Queensland coastal waters is established under this Act. It reflects the Offshore Constitutional Settlement of 1979. It mirrors the *Offshore Minerals Act* 1994 (Cth) in establishing a system for exploration permits, mining leases, other tenures and the payment of royalties. DEEDI administers it.[162]

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

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

A petroleum lease under the Act is required for the extraction of petroleum. "Petroleum" is defined in s 10 of the Act, in effect, as any hydrocarbon in gas or liquid form, including products extracted from solids such as coal or oil shale. This means that, in addition to liquid petroleum products such as oil, the Act regulates gas production, including of liquefied natural gas and coal seam gas. Gas production and pipelines are undergoing major expansion in Queensland inland from Gladstone.

As for mining, environmental protection aspects of petroleum extraction are regulated under the *Environmental Protection Act* 1994 (Qld). Petroleum production requires an environmental authority under Chapter 5A of that Act.

DEEDI administers petroleum tenures and royalties under this Act[163] while DERM regulates the environmental aspects under the EP Act.[164]

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

Petroleum (Submerged Lands) Act 1982 (Qld)

The tenure and royalty aspects of exploration and production of petroleum from Queensland waters

[159] See http://www.derm.qld.gov.au/
[160] See, e.g., http://www.envlaw.com.au/frippery.html.
[161] There is no useful website for this Act.
[162] See http://www.dme.qld.gov.au/mines/
[163] See http://www.dme.qld.gov.au/mines/
[164] See Chapter 4A, ss77-145V, of the EP Act.

are regulated under this Act. It operates under the Offshore Constitutional Settlement of 1979 and in conjunction with the *Offshore Petroleum and Greenhouse Gas Storage Act* 2008 (Cth).

As for mining and petroleum production on land, environmental protection aspects of petroleum extraction in coastal waters are regulated under the *Environmental Protection Act* 1994 (Qld). Petroleum production in coastal waters requires an environmental authority under Chapter 5A of that Act.

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

DEEDI administers the offshore petroleum legislation[165] while DERM administers the environmental legislation.

Plant Protection Act 1989 (Qld)

The control and eradication of pest plants, invertebrate animals, fungi, viruses and diseases that are harmful to crop plants in Queensland are regulated under this Act. This includes an infestation of red imported fire ants (*Solenopsis invicta*) in Southeast Queensland, which has been subject to a major eradication program.[166]

The Act operates in an illogical union with the *Land Protection (Pest & Stock Route Management) Act* 2002 (Qld), which provides a framework for the control of declared pests such as foxes, feral pigs and groundsel. Special legislation also provides for the control of diseases in timber[167] and exotic diseases in animals (such as foot-and-mouth disease and rabies).[168] Biosecurity Queensland, part of DEEDI, administers the Act and is currently preparing new biosecurity laws.[169]

Public Health Act 2005 (Qld)

A framework for the protection of public health is provided by this Act. For example, it prohibits the use of lead in parts of buildings which are likely to be easily accessible to children and provides for the regulation of health-related nuisances. It also establishes a system for the control of vermin and disease vectors such as rats and mosquitoes. It provides extensive emergency powers to address outbreaks of infectious diseases such as Severe Acute Respiratory Syndrome (SARS). The *Public Health Regulation* 2005 (Qld) regulates removal, cutting and disposal of asbestos containing material in non-workplace areas.[170] The regulations also provide controls on things and places that may harbour mosquitos, rats and mice. The Act is administered by local government and Queensland Health.[171]

Queensland Heritage Act 1992 (Qld)

This Act operates in tandem with the *Aboriginal Cultural Heritage Act* 2003 (Qld) and the *Torres Strait Islander Cultural Heritage Act* 2003 (Qld) to protect Queensland's cultural heritage. The Act creates a framework to protect places or objects of cultural heritage significance for aesthetic, architectural, historic, scientific, social or technological reasons. The principal mechanism through which the Act operates is the Heritage Register. The Act is administered by the Queensland Heritage Council and the Cultural Heritage Unit of DERM.[172]

Recreation Areas Management Act 2006 (Qld)

A framework for a statutory board to manage declared recreation areas is created by this Act. There are six declared areas: Fraser Island, Moreton Island; Inskip Peninsula; Green Island; Bribie Island; and Cooloola. QPWS administers it on behalf of the Queensland Recreational Areas Management Board.[173]

Soil Conservation Act 1986 (Qld)

A little used framework for the management of soil erosion from agricultural land is created by this Act. Farmers may voluntarily enter Property Management Plans to provide for soil conservation. Project Areas may be declared to manage soil erosion in a specified area. Project Areas have been declared around Toowoomba, Bundaberg and Kingaroy. DERM administers the Act.[174]

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[165] See http://www.dme.qld.gov.au/mines/
[166] See http://www.dpi.qld.gov.au/fireants
[167] *Diseases in Timber Act* 1975 (Qld).
[168] *Exotic Diseases in Animals Act* 1981 (Qld).
[169] See http://www.dpi.qld.gov.au/4790_4823.htm.

[170] The *Workplace Health and Safety Act* 1995 (Qld) regulates activities involving asbestos in a workplace.
[171] See http://www.health.qld.gov.au/publichealthact/default.asp
[172] See http://www.derm.qld.gov.au/heritage/index.html
[173] See http://www.derm.qld.gov.au.
[174] See http://www.derm.qld.gov.au/land/management. See, e.g., *Morrissy v Department of Natural Resources & Mines* [2003] QLC 0012.

State Development and Public Works Organisation Act 1971 (Qld)

This is a nebulous Act drawing together a range of powers and functions used by the State Government to facilitate large projects. It provides a formal environmental impact statement process in ss 26-35 for significant projects. It provides a range of mechanisms to facilitate large development projects including declarations of prescribed development of State significance, State development areas and a power to compulsorily acquire land for large infrastructure facilities by private companies (s 125(1)(f)). It is administered by the Coordinator-General (i.e. the Director-General of DIP).[175]

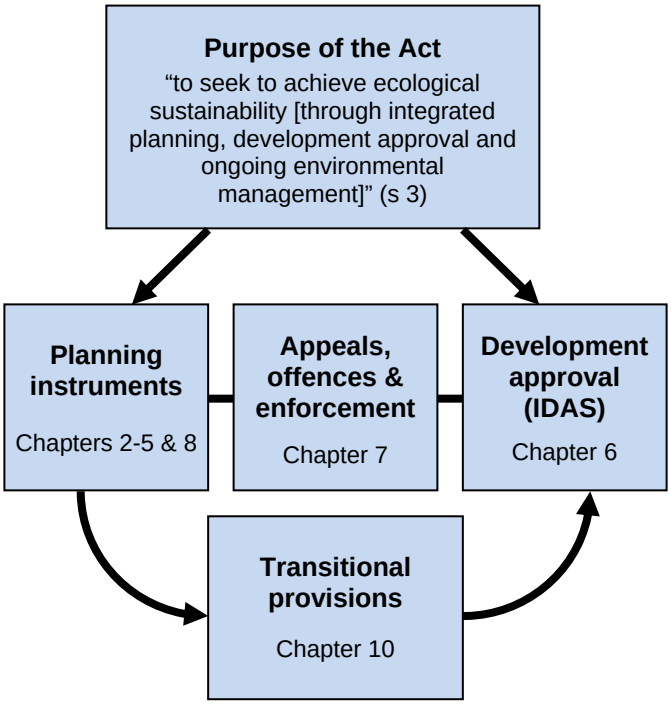
Sustainable Planning Act 2009 (Qld)

The *Sustainable Planning Act* 2009 (Qld) (SPA) recently replaced the *Integrated Planning Act* 1997 (Qld) (IPA) as Queensland's principal planning legislation.[176] While IPA had been heavily criticised for its complexity – "the hazy IPA maze of smoke and mirrors"[177] – the changes in Queensland's planning system brought about by SPA are quite limited. John Brannock wryly notes, "SPA feels like IPA; looks like IPA; and works like IPA."[178]

SPA is a complex piece of legislation but a conceptual structure of it is shown in Figure 4. Its overarching purpose is "ecological sustainability" and it has two major limbs: planning instruments and the integrated development assessment system (IDAS). Rights of appeal, offences for carrying out unlawful development and enforcement provisions are central to implementing the Act and ensuring that planning instruments and IDAS are not "toothless tigers". Transitional provisions in Chapter 10 link planning schemes prepared under previous legislation, including schemes based on different concepts prior to IPA, with the IDAS process.

The planning instruments recognised in SPA include State planning policies, regional plans and planning schemes. State planning policies cover a disparate list of issues, including acid sulfate soil management and protection of good quality agricultural land.[179]

Figure 4: Conceptual structure of SPA



Regional plans are now in force under SPA for South East Queensland (SEQ), Far North Queensland, South West, Central West, North West and Maranoa-Balonne regions.[180] These plans are quite broad scale but override local government planning schemes to the extent that they are inconsistent. Importantly, the SEQ regional plan provides a "footprint" within which urban development must be contained to address concerns about urban sprawl. There are several other forms of regional planning for specific issues or areas under other legislation however the regional planning processes under SPA are becoming paramount.

Other State-level planning processes may also affect land development. For example, housing development is promoted in urban development areas declared under the *Urban Land Development Authority Act* 2007 (Qld). Development schemes declared under the *Queensland Reconstruction Authority Act* 2011 (Qld) apply alongside planning schemes to manage reconstruction following natural disasters such as the 2011 Brisbane Floods.

While regional plans and other State-level plans are important to consider, local government planning schemes provide the bulk of detailed land-

[175] See http://www.dip.qld.gov.au/coordinator-general/index.php.
[176] 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/
[177] *Sevmere Ply Ltd v Cairns Regional Council* [2009] QCA 232 at [1] per McMurdo P.
[178] Brannock J, "Where has SPA come from? A retrospective on Queensland's town planning framework" (2009) 49(4) *Queensland Planner* 13 at 15.
[179] See http://www.dip.qld.gov.au/policies/state-planning-policies.html.
[180] See www.dip.qld.gov.au/regional-planning.html

use and development regulation at the level of an individual parcel of land. Although there is considerable variation between planning schemes, they are typically a physical document with maps and text divided into a number of sections.[181] For example, the *Brisbane City Plan 2000* has the following major sections:

- A **strategic plan** which sets out the broad objectives, desired environmental outcomes and future planning intent;
- **Area plans** (previously called "zoning plans"[182]) which set out the purpose, location, and other planning provisions for specific areas such as residential and industrial areas;
- **Local plans** (previously called "development control plans") which set out the purpose, location, and other planning provisions for areas such as the town center or a particular suburb where a special character or integrity is desired to be developed or maintained;
- **Codes** which set out requirements and planning provisions for particular planning issues (rather than geographic areas) such as landscaping, stormwater management or biodiversity;
- **Infrastructure charges** which set out methods for calculating developer contributions (payments) for infrastructure provided by the local government such as water supply and sewerage headworks; and
- **Planning scheme policies** which set out policies to address particular issues such as the environmental impact assessment of particular types of development (i.e. policies that guide the exercise of the local government's discretion on particular issues).

To help explain how planning schemes relate to the real world, Figure 5 provides an extract from a planning scheme at Brisbane in South East Queensland and a satellite image of the same area.[183] The map and satellite image cover a residential area on the left and an industrial area on the right separated by a creek. Note how the map reflects many of the major features of the land. Further development of the land is restricted by the planning scheme. For example, expansion of the industrial area is not allowed into the area designated for residential purposes.

In the planning scheme extracted in Figure 5 the land is designated in "areas" such as "Low Density Residential" (i.e. detached housing). Other planning schemes use "zones" or "precincts" instead of "areas". SPA attempts to create more consistency in the structure and terminology used in local government planning schemes across Queensland. For this reason a template for new planning schemes has been released in the "Queensland Planning Provisions" under SPA.[184] However, it will be several years before all planning schemes are amended to conform to the new uniform approach. In the interim the current highly varied approach will remain.

Planning schemes provide the principal planning documents against which individual development proposals are assessed in the IDAS. The IDAS process has up to five stages (not all may apply):

- **Application Stage**, in which the applicant makes a development application to the assessment manager (normally the local government for the area in which the development will occur).
- **Information and Referral Stage**, in which the development application is referred to any relevant government agency (called "referral agencies") and an "information request" is made of the applicant if further information is necessary to assess it.
- **Notification Stage**, which applies only for "impact assessable" development (explained below) and in which there is public notification of the application.
- **Decision Stage**, in which the decision is made whether to approve or refuse the proposed development. The principal consideration for this decision is whether the proposed development is consistent with the planning scheme and other planning instruments. If a proposed development is approved, the approval is normally granted subject to conditions about how the development is to be carried out.
- **Compliance Stage**, which may follow the previous stages (if required by a condition of a development approval) or be a separate process. Development, documents or works are assessed for compliance with a matter prescribed under a regulation, a condition of a development approval or some other matter (s 393).

[181] Many planning schemes are available on local government websites. E.g. the *Gold Coast Planning Scheme 2003* at http://www.goldcoast.qld.gov.au/.

[182] Revised planning schemes prepared under SPA must return to using the term "zones". See the Queensland Planning Provisions at http://www.dip.qld.gov.au/qpp.

[183] Sources: map from the *Brisbane City Plan 2000* at http://pdonline.brisbane.qld.gov.au/ and satellite image from GoogleEarth.

[184] See http://www.dip.qld.gov.au/qpp.

Figure 5: An example of part of a planning scheme overlaying land: area classifications under the Brisbane City Plan 2000 in the suburbs of Northgate & Banyo showing a mixture of residential and industrial areas with a satellite image of the same area.

Key for area classifications and other map layers

- Conservation
- Character Residential
- Community Use Area
- Emerging Community Area
- Extractive Industry Area
- Environmental Protection Area
- Future Industry Area
- General Industry Area
- Heavy Industry Area
- High Density Residential Area
- Investigation Area
- Light Industry Area
- Low-Medium Density Residential Area
- Low Density Residential Area
- Multi Purpose Centre City Centre MPI
- Multi Purpose Centre Major Centre MP2
- Multi Purpose Centre Suburban Centre MP3
- Multi Purpose Centre Convenience Centre MP4
- Medium Density Residential Area
- Park Land Area
- Rural Area
- Special Purpose Centre
- Sport and Recreation Area
- Waterways

The five stages of IDAS do not apply to all development applications. To determine whether approval is required under IDAS and, if so, which stages apply to the assessment, it is necessary to first consider three preliminary questions:

- Does the proposal involve "development"?
- What category of development is it?
- Which levels of government and departments are involved in the assessment process?

Appendix 5 shows these three questions as the first step in resolving IDAS issues. The IDAS process itself is shown as a second step and, as appeals to the Planning and Environment Court can be made, the appeals process is shown as an optional third step.

The first step requires understanding the terms "development" and "assessable development". Development is defined in s 7 of SPA 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.

With one exception,[185] these terms are defined in s 10 of SPA as follows:[186]

- **Building work** means building, repairing, altering, moving or demolishing a building or structure, and some other forms of related work. For a place listed on the Heritage Register under the *Queensland Heritage Act* 1992 (Qld), building work even includes painting or plastering that substantially alters the appearance of the place.
- **Plumbing or drainage work** includes installing, changing, and maintaining an apparatus, fitting or pipe for the supply or removal of water, sewage or greywater.
- **Operational work** is a very wide term that includes activities such as excavating or filing, clearing vegetation or "undertaking work … that materially affects premises or their use."
- **Reconfiguring a lot** means subdividing a large lot into smaller lots, amalgamating several lots together, or rearranging the boundaries of a lot.
- **Material change of use** generally means the start of a new use, re-establishment of a use that has been abandoned or a material change in the intensity or scale of a use of premises. A "use" of land is the purpose for which activities are conducted on the land as understood in ordinary terminology in a town planning context.[187] Examples of different uses include, "residential housing", "hotel", "commercial premises", "garage", "shopping centre" and "restaurant". Planning schemes normally include a dictionary to define common uses of land.

The term "development" creates a broad umbrella under which virtually any proposal can be brought within the planning and assessment framework. Development is then categorised as:

- **exempt** (e.g. mining), which means that SPA does not apply to it; or
- **self-assessable**, which means that no formal approval is required but 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; or
- **development requiring compliance assessment**, which means that development, documents or works must be assessed for compliance with a matter prescribed under a regulation, a condition of a development approval or some other matter (s 393); or
- **prohibited development**, which means the development is prohibited and cannot be applied for. If prohibited development is applied for it need not be assessed.

The relevant category is usually determined by whether the particular type of development is listed in:

- Schedule 1 (prohibited development) of SPA; or
- Schedule 3 (assessable and self assessable development) of the *Sustainable Planning Regulation* 2009 (Qld) (SP Regulation); or
- Schedule 4 (exempt development) of the SP Regulation; or
- a relevant planning scheme as requiring assessment or otherwise having applicable development codes.

This is a complicated and technical system that often requires careful consideration.

[185] Plumbing and drainage work is defined in the *Plumbing and Drainage Act* 2002 (Qld).
[186] See Fogg *et al*, n 176, for more detailed discussion.
[187] *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493 at 515; *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 535.

If a proposal involves assessable development, it must also be characterised as either:

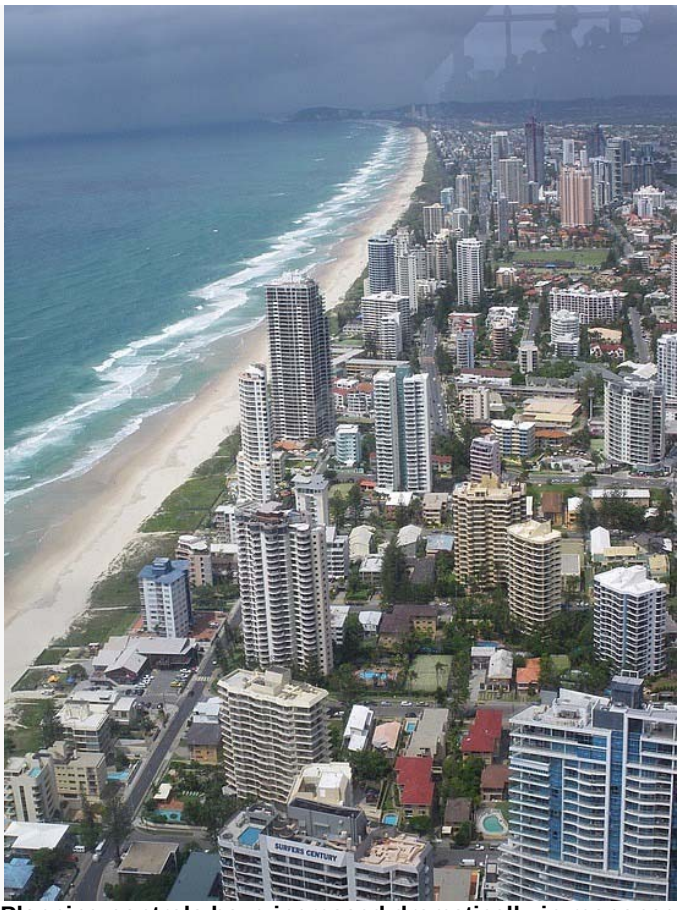
- **impact assessable**, which means that the application is assessed against the whole of the planning scheme, must be publicly notified, and the public gains a right to make submissions and appeal a decision to approve the development; or
- **code assessable**, which means that the application is assessed only against any relevant technical code (e.g. 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 the relevant planning scheme and Schedule 3 of the SP Regulation. Large-scale development in sensitive areas is not necessarily impact assessable.

Note that the term "impact assessable" does not connote a traditional environmental impact statement document or process. SPA uses a system of "information requests" for both impact assessment and code assessment whereby government agencies assessing the application may request further information. The same process under IPA was criticised.[188] A formal EIS process has been inserted into Chapter 9 of SPA but only applies if development requires assessment under the EPBC Act.[189] The formal EIS process in SPA is, therefore, rarely available and rarely used.

The government entities involved in the IDAS process are referred to as the "**assessment manager**" and "**referral agencies**". These are listed in Schedules 6 and 7 of the SP Regulation. 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:

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



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

Just as concurrence and advice agencies must assess development applications according to the legislation they administer, local governments have a specific framework for their decision-making under SPA. The two major questions that must be answered by a local government and any referral agency in determining whether or not to approve a development application are:[190]

- Is the proposed development consistent with relevant planning instruments?
- Are there sufficient grounds[191] to justify any inconsistency with the relevant planning instruments?

[188] See Leong M, "Comparative Analysis of Environ-mental 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.

[189] See s 688 of SPA and s 32 of the SP Regulation.

[190] Section 326 of SPA. Cf. *Weightman v Gold Coast CC* [2002] QCA 234 at [35] and subsequent cases.

[191] "Grounds" are defined in the SPA dictionary to mean matters of public interest. Protection of the environment is a matter of public interest: *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 477-482 and 486-487. However, a question about "the public interest" will seldom have only one dimension and will normally require consideration of a number of competing arguments about, or

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

If the local government (or other assessment manager) decides to approve the development application, it may impose conditions that are relevant or reasonable.[192] A "relevant" condition is one that properly relates to the legislation under which it is imposed (e.g. for a local government, to maintain standards in local development or in some other legitimate sense).[193] A "reasonable" condition is one that is a reasonable response to the changes the development will cause (e.g. increased traffic to a road or bridge).[194] For example, in response to a development application to build a house on the banks of a river, a relevant and reasonable condition could be that "No vegetation is to be damaged or removed within 20 m of the riverbank".

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

The IDAS process normally ends when a decision is made by the assessment manager but where the applicant disagrees with the decision they may appeal to the Planning and Environment (P&E) Court. A third party submitter may also appeal against a decision to approve impact assessable development.[195] The P&E Court considers the development application again from the beginning and normally hears expert witnesses on the issues in dispute. The Court is not bound by the assessment manager's decision in any way.

The primary role of the P&E Court is to decide any appeal that comes before it according to law and not political considerations. For this purpose, the law is essentially contained in the SPA and any relevant planning instruments. A good example of the approach taken by the Court is the decision in *Luke v Maroochy Shire Council* [2003] QPELR 447; [2003] QPEC 5.[196]

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

> The Court has no plenary power to do whatever may be seen to be of environmental advantage to the community. It must exercise the jurisdiction which it is given pursuant to the relevant provisions of the Act. The subject land is privately owned. That its owners should expect to be able to develop it in accordance with the relevant instruments of statutory planning control is fundamental to proper and fair town planning.[197]

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

> ... 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.[198]

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

SPA is administered largely by local governments together with State Government agencies responsible for the planning processes linked to SPA. DIP is the lead agency for it.[199]

Transport Infrastructure Act 1994 (Qld)

The planning, construction and operation of State roads, railways and ports are facilitated under this

features or "facets" of, the public interest: *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [55]-[56] (Hayne J).

[192] Section 345 SPA; *Maroochy SC v Wise* (1998) 100 LGERA 311; *Proctor v BCC* (1993) 81 LGERA 398. Note also other minor tests for the validity of conditions as outlined by Fogg *et al*, n 176 at pp 3692-3710.

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

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

[195] O'Hart A, *The Community Litigants Handbook* (2nd ed, Environmental Defenders Office, Brisbane, 2010) gives a practical explanation of planning appeals. See also http://www.edo.org.au and http://www.envlaw.com.au.

[196] Decisions of the P&E Court are available online. See http://www.sclqld.org.au/qjudgment/2003/QPEC/005

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

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

[199] See http://www.dip.qld.gov.au/spa.

Act and the *Transport Planning and Coordination Act* 1994 (Qld). The construction of these facilities has major direct and indirect effects on the environment due to physical destruction, disturbance and subsequent increased use of the environment. This Act therefore forms an important component of the environmental planning regime for Queensland. Note that strategic port land is not subject to local government planning schemes (s 172). The Act is administered by DERM, the Department of Transport and Main Roads[200] and various port authorities.[201]

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

Transport Operations (Marine Pollution) Act 1995 (Qld)

Marine pollution from ships in Queensland's coastal waters is regulated under this Act. It was enacted pursuant to the mechanism provided in the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) for the accreditation of State laws implementing MARPOL 73/78. Maritime Safety Queensland administers it.[202]

Vegetation Management Act 1999 (Qld)

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

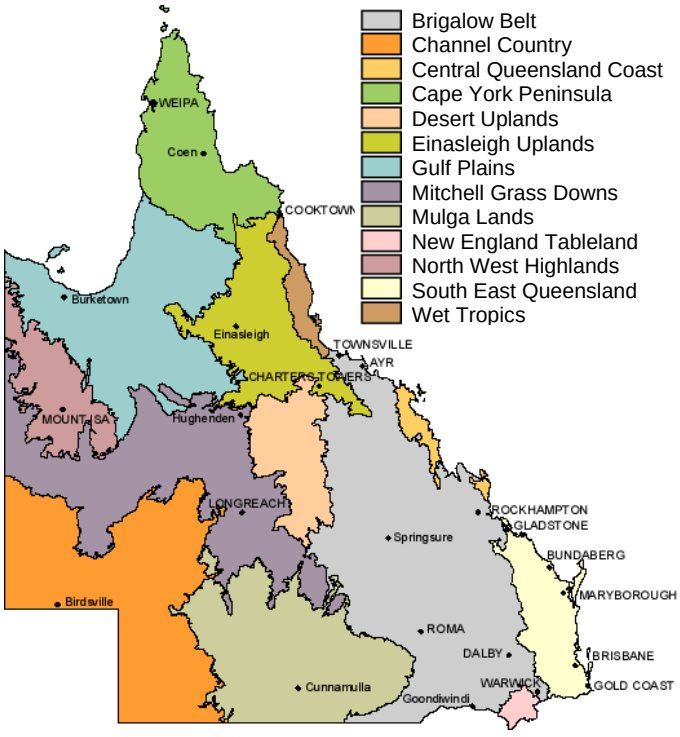
Faced with ongoing controversy and high levels of clearing, in 2004 the State Government introduced major reforms to phase out broadscale land clearing for agriculture by 31 December 2006. The reforms collapsed the system of clearing laws for State lands in the *Lands Act* 1994 (Qld) into the VMA/IPA system. The IPA component of that system is now contained in the *Sustainable Planning Act* 2009 (Qld) (SPA).

Vegetation management on approximately 95% of Queensland is now regulated under the VMA/SPA system. The complex matrix of other vegetation clearing laws in Queensland is summarised in Appendix 6.

The VMA does not itself regulate vegetation management. Instead, the trigger and process for assessment, together with the offence for clearing without approval, are contained in the SPA. The VMA provides for the preparation of maps to identify areas of high conservation value, areas vulnerable to land degradation and remnant vegetation. The VMA also provides for policies against which applications for clearing vegetation are assessed.

A system for classifying vegetation in "regional ecosystems" (REs) provides the basis for vegetation management in Queensland.[203] Under this system, the State is divided into 13 bioregions (shown in Figure 6) based on broad landscape patterns that reflect the geology, climate patterns, and broad groupings of plants and animals.

Figure 6: Bioregions under the VMA
Source: DERM



[200] See http://www.tmr.qld.gov.au.
[201] E.g. Port of Brisbane at http://www.portbris.com.au/
[202] See http://www.msq.qld.gov.au/; and White, n 97.

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

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

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

REs are assigned a conservation status under the *Vegetation Management Regulations* 2000 (Qld) based on their current extent in a bioregion:

- **Endangered** if less than 10% of the pre-clearing extent remains, or if 10-30% of the pre-clearing extent remains and the area of remnant vegetation is less than 10,000 ha.
- **Of concern** if 10-30% of the pre-clearing extent remains, or if more than 30% of the pre-clearing extent remains but the area of remnant vegetation is less than 10,000 ha.
- **Least concern** if more than 30% of the pre-clearing extent remains, and the area of remnant vegetation is more than 10,000 ha.[204]

Figure 7 provides an example of an RE map and an on-the-ground photograph of a section of the vegetation shown in the map. The saplings and grass in the foreground of the photograph is non-remnant vegetation that was cleared six years prior to the photograph being taken but has since regrown. This area is shown as white on the map. The tall trees in the background of the photograph is remnant vegetation in RE 12.3.5 (*Melaleuca quinquenervia* open forest on coastal alluvial plains), which is a least concern RE.

The main trigger requiring development approval for vegetation clearing is in Schedule 3 of the *Sustainable Planning Regulation* 2009 (Qld) (SP Regulation). This is linked to a large list of exemptions in Schedule 24 of the SP Regulation for clearing that does not require approval such as clearing to establish a necessary firebreak or to maintain a garden or orchard. Additional triggers for approval of material change of use or reconfiguration of a lot are found in Schedule 7 of the SP Regulation. If development approval is required the application is assessed against one of four regional vegetation management codes.[205]

Figure 7: Extract from an RE map and on-the-ground photograph of the vegetation in the centre of the map. Photo: C McGrath

[204] Until recently, "Least concern" REs were referred to as "Not of concern".

[205] Available on the DERM website at http://www.derm.qld.gov.au/vegetation/regional_codes.html

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

- **Declared areas** are areas declared under ss 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.
- **RE Maps** and **Remnant Maps** show remnant vegetation and classify REs according to conservation status as Endangered, Of Concern or Least Concern.
- **Regrowth Maps** show high value regrowth according to its conservation status of Endangered, Of Concern or Least Concern.
- **Property Vegetation Management Plans** are maps that must accompany a clearing application, showing the location and extent of the proposed clearing and other matters prescribed in s 3 of the *Vegetation Management Regulations* 2000.
- **Property Maps of Assessable Vegetation** (PMAVs) are property scale (1:15,000 or 1:10,000) maps that can be prepared by landholders and submitted for approval to "lock in" non-remnant areas.

A benefit of PMAVs for landholders is to prevent regrowth vegetation being re-mapped as remnant vegetation in the future. PMAVs show vegetation in several different categories.[206] Category X areas depict vegetation that is non-regrowth at the time the PMAV is created. Once a PMAV is approved areas shown as a Category X area can only be re-mapped as remnant vegetation in limited circumstances.[207] This gives a landholder certainty that they can continue to clear those areas and means they do not need to regularly clear the areas to prevent them being re-mapped as remnant vegetation and therefore protected.

DERM administers the VMA.[208]

Water Act 2000 (Qld)

This Act provides a framework for the planning and regulation of the use and control of water in Queensland. This includes regulating both major water impoundments (dams, weirs, and barrages) and extraction by pumping for irrigation and other uses. The Act provides a wide range of tools for the regulation of in-stream (i.e. watercourses, lakes and springs) and overland water flow and groundwater within the context of "sustainable management and efficient use" of water.[209]

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

Other important planning tools in the Act operate within the parameters established by the IQQM modeling of each catchment. Water Use Plans may be prepared for areas at risk of land or water degradation, for example, due to rising underground water levels, salinisation, deteriorating water quality, water logging of soils, destabilisation of the bed and banks of watercourses, damage to the riverine environment or increasing soil erosion (s 60). Land and Water Management Plans may also be submitted by individual landowners applying to irrigate their land (s 73). Resource Operations Plans provide practical operational details of the implementation of a Water Resource Plan (s 95) under which Resource Operations Licenses (s 108) and Water Allocations (s 122), Water Licences (s 206) and Water Permits (s 237) may be granted.

The Act is integrated into the *Sustainable Planning Act* 2009 (Qld). Two approvals are now required for extraction of water from a watercourse and other matters regulated under the Act:

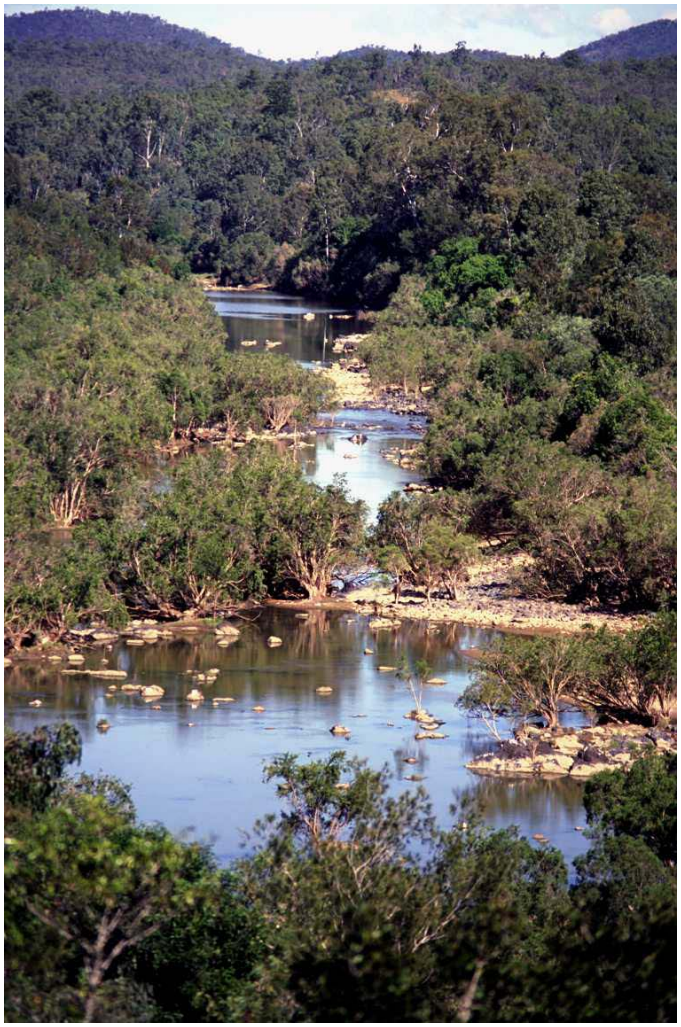
- A **resource entitlement** or allocation (for water this may be referred to as a water entitlement, water allocation or water licence), which provides permission to extract or use a water resource. Applications for resource entitlements are assessed against criteria in the Act and any relevant Water Resource Plan and Resource Operations Plan.
- A **development permit**, which provides permission for development associated with the use of water that is assessable development under Schedule 3 of the *Sustainable Planning*

[206] See ss 20AK-20AO of the VMA.
[207] See ss 20B and 20D of the VMA.
[208] See http://www.derm.qld.gov.au/vegetation/index.html The *State Policy for Vegetation Management* and other useful information is also available at this website.

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

Regulation 2009 (Qld). Schedule 3 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, 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 s 814.



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

Due to severe drought in South-East Queensland (SEQ) in 2006 the Act was amended by inserting a new Chapter 2A to establish the Queensland Water Commission. This consolidated water management and water security planning previously undertaken by local governments in SEQ under one body.[210]

The Act is principally concerned with managing the capture and use of water but several other pieces of legislation are directly relevant to water issues. The *Environmental Protection Act* 1994 (Qld) regulates water pollution. The *River Improvement Trust Act* 1940 (Qld) provides for the establishment of statutory bodies concerned with flood control, riverbank stability and similar matters in specified catchments. The *Water Supply (Safety and Reliability) Act* 2008 (Qld) provides a framework for supply of drinking water, recycled water and sewage services, including trade waste. Household use of greywater (i.e. wastewater from a bath, basin, kitchen, laundry or shower) is regulated under the *Plumbing and Drainage Act* 2002 (Qld).

DERM administers the *Water Act* in conjunction with the Queensland Water Commission, water authorities, and local governments.[211]

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

A regional plan regulating land-use within the Wet Tropics World Heritage Area of North Queensland was created under this Act. The *Wet Tropics Management Plan* 1998 (Qld) provides a zoning plan to control development and activities within the Wet Tropics. The Wet Tropics Management Authority[212] administers it in conjunction with QPWS.

Wild Rivers Act 2005 (Qld)

An additional layer of protection for undeveloped river systems in Queensland is provided by this Act. Wild River Declarations made under the Act restrict further water extraction and development within the declared area. Ten declarations have made under the Act, including several rivers on Cape York and on Fraser Island and Hinchinbrook Island. DERM administers it.[213]

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

The supply of recycled water and drinking water is regulated under this Act. It applies to recycled water from sewage, greywater and industrial wastewater. Household use of greywater (e.g. shower water used to water a garden) is regulated under the *Plumbing and Drainage Act* 2002 (Qld). DERM administers it.[214]

[210] See http://www.qwc.qld.gov.au.

[211] See http://www.derm.qld.gov.au/water/index.html.
[212] See http://www.wettropics.gov.au/.
[213] See http://www.derm.qld.gov.au/wildrivers/index.html
[214] See http://www.derm.qld.gov.au/water/index.html

Common Law

The Common Law is the law created by decisions of judges, which act as binding precedents for later decisions.[215] It is a system that applies in many countries that inherited their legal system from England. Countries that inherited their legal system from France, which has a system known as "Civil Law" dating from Napoleonic times, place much less weight on previous decisions of their courts.

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

The main grounds for why a person can sue another in a court, what lawyers call "causes of action", at Common Law relevant to environmental issues are:[216]

- **Private nuisance** (unreasonable interference with the use of property, including due to smoke, noise or vibration from a neighbour's property);
- **Public nuisance** (unreasonable interference with a public right, including due to pollution, where the person affected has suffered some special damage greater than the public generally);
- **Riparian user rights** (rights of a person owning property adjoining a watercourse to use water and to prevent other users from unreasonably interfering with the quantity or quality of the water);[217]
- **Negligence** (breach of a duty to take reasonable care to avoid damage to people or property, for example, manufacturing goods that cause cancer);[218]
- **Trespass** (a direct interference with or invasion of private land, including by pollution).

Other general principles of the Common Law permeate the environmental legal system. For example the concept of **standing** (the legal right to commence court action) has often been a major constraint on public interest litigation to protect the environment.[219] Environmental legislation now often provides widened standing to protect the environment[220] but where it does not the Common Law rules remain an obstacle.

Native title, recognised by the High Court as part of the Common Law in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, also has immensely important implications for the environmental legal system.[221] In *Mabo*, Brennan J defined the content of "native title":

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

As a practical example, the Federal Court found in the Croker Island Case that the native title and interests of the claimant group were:[222]

> (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 seabed 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; &
> (iv) to safeguard the cultural and spiritual knowledge of the claimants.

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

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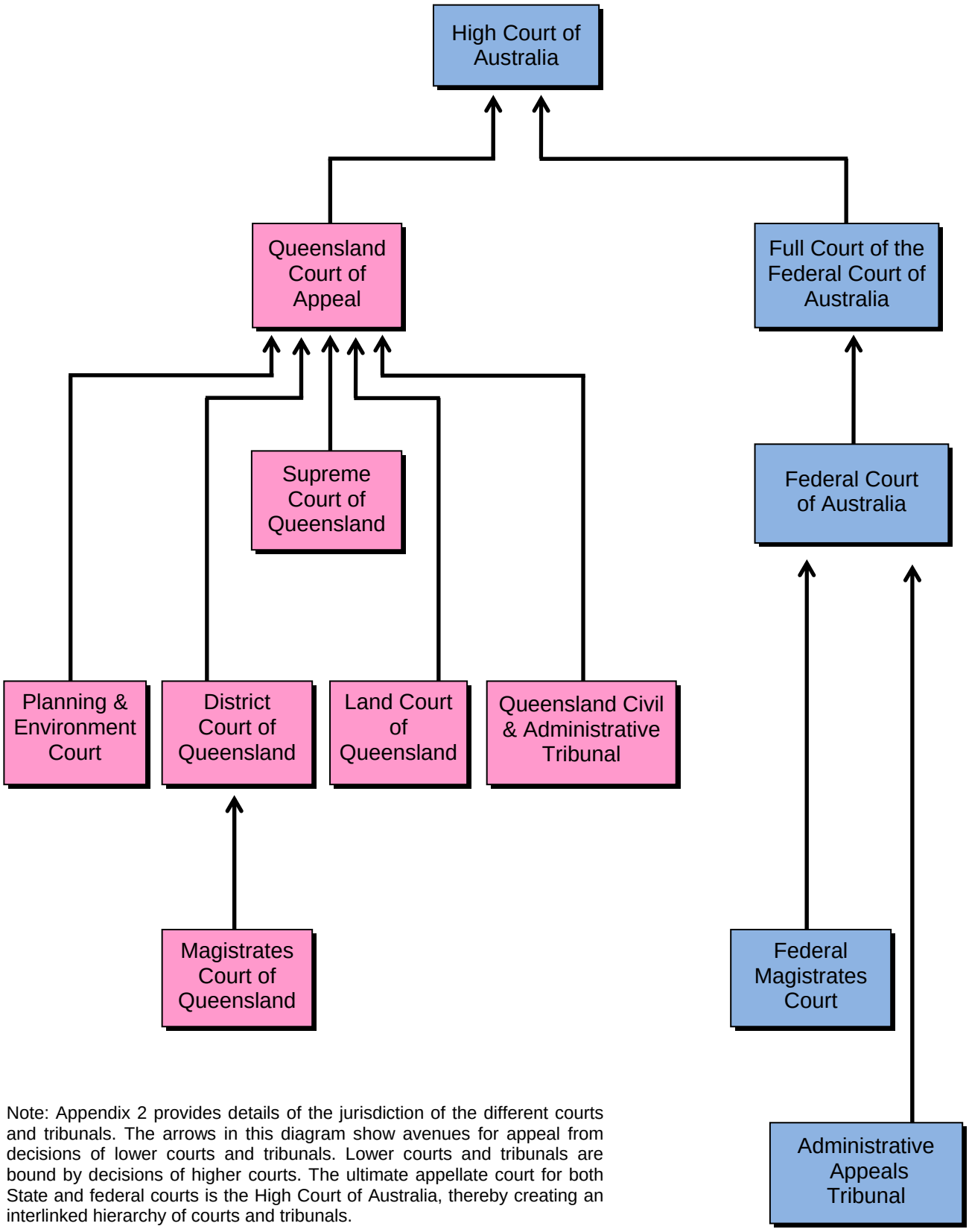
[215] See generally Bates, n 6.
[216] See generally Bates, n 6.
[217] See Fisher DE, *Water Law* (LBC, Sydney, 2000).
[218] In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 the rule of strict liability in *Rylands v Fletcher* was abandoned in favour of general negligence principles. See also *Graham Barclay Oysters PL v Ryan* (2002) 211 CLR 540.
[219] See, e.g., *Central Queensland Speleological Society v Queensland Cement and Lime Pty Ltd* [1989] 2 Qd R 512 (the Mt Etna Bat Caves Case); and Bates, n 6.
[220] See, e.g., s 475 of the EPBC Act.
[221] See generally, Bartlett RH, *Native Title in Australia* (2nd ed, Butterworths, Sydney, 2004).
[222] *Yarmirr v Northern Territory* (1998) 82 FCR 533. Upheld in *Commonwealth v Yamirr* (2001) 208 CLR 1.

Conclusion

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

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

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



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

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

Subject area / jurisdiction	Relevant court or tribunal
1. Planning appeals, development offences and declarations under the *Sustainable Planning Act* 2009 (Qld) (SPA)	Planning and Environment Court (see Chapter 7 of SPA) **
2. Applications to restrain offences against the *Environmental Protection Act* 1994 (Qld) (EP Act)	Planning and Environment Court (see ss505 & 507 of the EP Act) **
3. Applications for declarations and enforcement orders for offences under the *Nature Conservation Act* 1992 (Qld)	Planning and Environment Court (see ss 173B and 173D of the *Nature Conservation Act* 1992 (Qld) **
4. Objections to an environmental authority (mining lease) under the EP Act and a mining lease under the *Mineral Resources Act* 1989 (Qld)	Land Court (see ss 219-228 of the EP Act, ss 260-269 of the *Mineral Resources Act* 1989 (Qld) and *Land Court Act* 2000 (Qld)) ***
5. Appeals by applicants and, for level 1 petroleum activities, by submitters against environmental authorities for petroleum activities under EP Act.	Land Court (see ss 520-539 of the EP Act and *Land Court Act* 2000 (Qld)) ***
6. Appeals against certain decisions under the *Fisheries Act* 1994 (Qld)	Queensland Civil & Administrative Tribunal (QCAT) (ss 185-186 of the *Fisheries Act* 1995 (Qld)) **
7. Appeals against various decisions under the *Water Act* 2000 (Qld)	Magistrates Court of Queensland, Land Court or Planning and Environment Court (see s 877 of the *Water Act* 2000 (Qld)) **
8. Appeals against permit and licence decisions under the *Nature Conservation (Administration) Regulation* 2006 (Qld)	Queensland Civil & Administrative Tribunal (QCAT) (see s 103 of the *Nature Conservation (Administration) Regulation* 2006 (Qld))**
9. Applications for an injunction to restrain a public nuisance, private nuisance or interference with riparian use rights at Common Law	District Court of Queensland (if unimproved value of property affected is less than $250,000) or Supreme Court of Queensland (if greater value) *
10. Judicial review of Queensland government administrative decisions (other than planning decisions under SPA)	Supreme Court of Queensland (see *Judicial Review Act* 1991 (Qld) and s 575 of the SPA) *
11. Applications for injunctions under the EPBC Act	Federal Court of Australia (s 475 of the EPBC Act) *
12. Merits appeals against certain decisions under the *Great Barrier Reef Marine Park Act* 1975 (Cth) and specified other Commonwealth administrative decisions	Administrative Appeals Tribunal ** (jurisdiction provided under various legislation)
13. Judicial review of Commonwealth government administrative decisions	Federal Court of Australia or Federal Magistrates Court (see the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)) *
14. Criminal prosecutions under all Queensland or Commonwealth environmental legislation	Magistrates Court of Queensland (for summary offences) or District Court of Queensland (if prosecuted on indictment) **
15. Appeals from Queensland courts and tribunals	Queensland Court of Appeal * (Civil) ** (Criminal)
16. Appeals from Federal Court	Full Court of the Federal Court *
17. Constitutional issues & final appellate court	High Court of Australia * (Civil appeals) ** (Criminal appeals)

* Normal costs rule applies (i.e. the losing party pays winning party's legal costs).
** Own costs rule applies (i.e. subject to limited exceptions, each party bears their own legal costs).
*** Neither normal costs rule or own rule applies (see *Anson Holdings Pty Ltd v Wallace & Anor* [2010] QLAC 0002).

Appendix 3: Queensland fisheries laws

Subject area	Relevant legislation
1. Fisheries other than prawns, tuna and billfish on the east coast of Queensland (from the New South Wales border to the tip of Cape York)	*Fisheries Act* 1994 (Qld) from land within the limits of the State and Queensland waters to the outer edge of the Great Barrier Reef Marine Park and thereafter the *Fisheries Management Act* 1991 (Cth) to the limit of the Australian fishing zone.[223]
2. Fisheries other than tuna and billfish in Torres Strait (within the Australian section of the Torres Strait Protected Zone)	*Torres Strait Fisheries Act* 1984 (Cth) and the *Torres Strait Fisheries Act* 1984 (Qld).
3. Fisheries other than prawns, tuna and billfish in the Gulf of Carpentaria (from Cape York to the Northern Territory border)	*Fisheries Act* 1994 (Qld) from land within the limits of the State and Queensland waters to the limit of the Australian fishing zone.
4. Prawn fisheries on the east coast of Queensland (from the New South Wales border to the tip of Cape York)	*Fisheries Act* 1994 (Qld) from land within the limits of the State and Queensland waters to the outer edge of the Great Barrier Reef Marine Park (seaward of this point no prawn fishery exists).
5. Prawn fisheries in the Gulf of Carpentaria (from Cape York to the Northern Territory border)	*Fisheries Management Act* 1991 (Cth) from the inner boundary of coastal waters to the limit of the Australian fishing zone. *Fisheries Act 1994 (Qld)* landward of the inner boundary of coastal waters.
6. Tuna and billfish fisheries in all waters in the Australian fishing zone	*Fisheries Management Act* 1991 (Cth).
7. Great Barrier Reef Marine Park	*Great Barrier Reef Marine Park Act* 1975 (Cth) and associated regulations, zoning plans and plans of management.
8. Queensland Marine Park	*Marine Parks Act* 1982 (Qld) and associated regulations and zoning plans.
9. Fisheries habitat area or damage to marine plants (e.g. mangroves)	*Fisheries Act* 1994 (Qld) and associated regulations and zoning plans.
10. Actions causing a significant impact on a matter of national environmental significance (including Commonwealth marine areas and Commonwealth managed fisheries)	*Environment Protection and Biodiversity Conservation Act* 1999 (Cth), ss 12-28.
11. Whales and other cetaceans and listed marine species in Australian waters	*Environment Protection and Biodiversity Conservation Act* 1999 (Cth), ss 224-266.
12. Protected wildlife (e.g. dugong) in Queensland coastal waters	*Nature Conservation Act* 1992 (Qld) and regulations and relevant conservation plans.

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

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

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

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

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

Statute	Summary of EIA provisions
1. *Sustainable Planning Act* 2009 (Qld) (SPA) ss 270-293 and 294-307.	Contains a general procedure of "information requests" for any development application and public notification for any "impact assessable" development application. A special EIS process for assessing controlled actions under a bilateral agreement for the EPBC Act is provided in Part 2 of Ch 9 (ss 688-701) but is rarely used.
2. *Environmental Protection Act* 1994 (Qld) (EP Act) ss 37-72.	Contains an EIS process generally limited to assessing applications for an environmental authority (mining lease) and petroleum extraction (including natural gas extraction). Linked to the EPBC Act through a bilateral agreement.
3. *State Development and Public Works Organisation Act* 1971 (Qld) ss 26-35.	General power to declare a "significant project" and require an EIS involving public notification. Procedure over-rides EIA processes under SPA and EP Act. Linked to the EPBC Act through a bilateral agreement.
4. *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act) ss 80-129.	Contains five major EIA procedures for assessing impacts of controlled actions: • Accredited assessment process; • Assessment on preliminary documentation; • Public Environment Report; • Environmental Impact Statement; • Public Inquiry. Alternatively, a State EIA procedure may be substituted under a bilateral agreement.

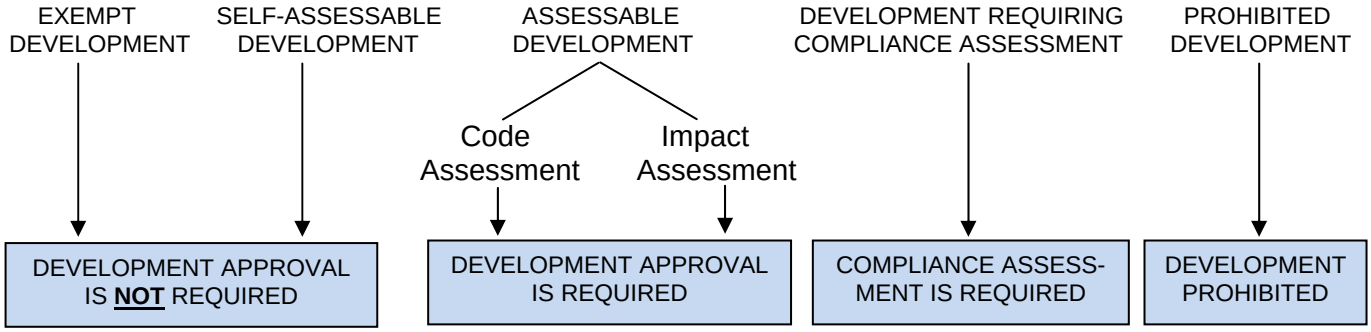
EIA is an important aspect of good decision-making on the environment and development. However, its ability to prevent unsustainable development should not be overstated. Decision-makers are generally only required to consider the recommendations of any EIA rather than being bound to follow them.

Appendix 5: Integrated development assessment system (IDAS) flowchart

STEP 1. PRELIMINARY QUESTIONS

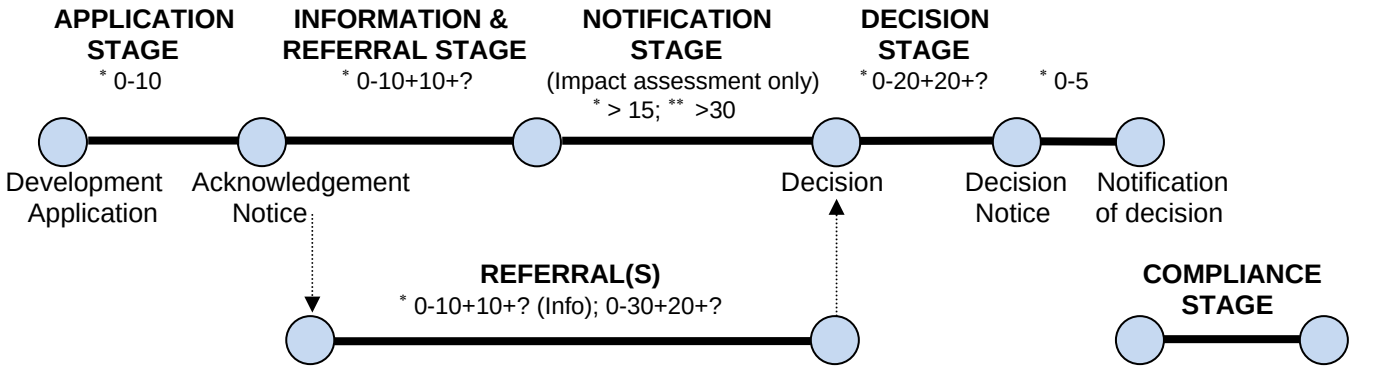
1. **Does the proposal involve "development"?** (ss 7 & 10, *Sustainable Planning Act* 2009 (Qld) (SPA))

2. **What category of development is it?** (s 231 and Schedule 1 (Prohibited development) of SPA, plus Schedules 3 & 4 of the *Sustainable Planning Regulation* 2009 (Qld) (SP Reg), the relevant planning scheme and any other relevant planning instrument).



3. **Which levels of government and departments are involved in the assessment process?**
   - Who is the **assessment manager** listed in Schedule 6 of the SP Reg?
   - Is any **referral agency** listed in Schedule 7 of the SP Reg?

STEP 2. PROCESS REQUIREMENTS OF IDAS (see Chapter 6 of SPA)



* Numbers refer to time limitations for normal IDAS application in business days.
** Time limit for public notification for certain IDAS applications specified in s 298.
? Unlimited time if applicant agrees.

STEP 3. APPEAL AGAINST A DECISION

Following a decision, the applicant and any submitters (for impact assessable development), have 20 business days to appeal to the Planning & Environment Court (ss 461-480 of SPA). Appeals are, however, relatively rare with less than 5% of approximately 20,000 decisions under SPA each year appealed. If a decision is appealed, the application is considered "anew" by the Court (s 495 SPA). This means that the Court decides the appeal on its merits according to the planning scheme, other relevant planning instruments, and expert evidence from town planners, ecologists, engineers, etc. Appeals that do not settle normally take around 6 months to resolve. A further appeal against a decision of the Planning and Environment Court can be made to the Court of Appeal for errors of law or jurisdiction only (s 498 SPA).

Appendix 6: Laws controlling vegetation clearing in Queensland

Subject area	Relevant legislation
1. Operational work that is clearing of native vegetation (other than on protected areas under the *Nature Conservation Act* 1992, State forests, forestry reserves, timber reserves or forest entitlement areas).	*Vegetation Management Act* 1999 (Qld) (VMA), *Sustainable Planning Act* 2009 (Qld) (SPA), Ch 6 (IDAS) and s 578, and the *Sustainable Planning Regulation* 2009 (Qld) (SP Regulation), Sch 3, Part 1, Table 4, item 1 and Sch 24. Assessment codes are provided under the VMA.
2. Material change of use or reconfiguration of a lot on lot sizes 2 ha or greater containing remnant vegetation.	VMA, SPA, Ch 6, s 578, and the SP Regulation, Sch 7, Table 2, item 4 and Sch 7, Table 7, item 10. Assessment codes are provided under the VMA.
3. Vegetation protected through general planning controls restricting development of land (e.g. vegetation: on land outside an "urban footprint" in a regional plan; on land designated as "open space" in a planning scheme; on land outside a "building location envelope" imposed as a condition of a development approval).	SPA, Ch 6 and ss 578 and 580, any relevant regional plan, planning scheme, planning scheme policy, code, State planning policy, other planning instrument, or condition on a development approval.
4. Clearing and rehabilitation for mining and petroleum activities and pipelines.	*Environmental Protection Act* 1994 (Qld), Parts 5 and 5A, and ss 319, 426-440 and 493A.
5. Vegetation subject to a local law.	*Local Government Act* 1993 (Qld), ss 25-26 & relevant local law passed by a local government.
6. Protected areas such as National Parks (4% of Queensland) and taking protected wildlife.	*Nature Conservation Act* 1992 (Qld), ss 62, 88 & 89.
7. Forestry practices and forest products on State land.	*Forestry Act* 1959 (Qld), ss 53 and 54.
8. Riparian vegetation (in watercourse)	*Water Act* 2000 (Qld), s 814
9. Clearing causing serious or material environmental harm	*Environmental Protection Act* 1994 (Qld) ss 319, 426-440 and 493A.
10. Marine plants and fish habitat areas.	*Fisheries Act* 1994 (Qld) ss122 and 123 and SPA Ch 6, s 578, and SP Regulation.
11. Serious environmental harm in a marine park.	*Marine Parks Act* 2004 (Qld), s 50.
12. Vegetation declared to be controlled vegetation in an urban development area	*Urban Land Development Authority (Vegetation Management) By-law 2009* created under the *Urban Land Development Authority Act 2007* (Qld).
13. Matter of national environmental significance; Commonwealth entity or area.	*Environment Protection and Biodiversity Conservation Act* 1999 (Cth), ss 12-28.
14. Wet tropics World Heritage Area	*Wet Tropics World Heritage Protection and Management Act* 1995 (Qld), s 56.
15. Land subject to a coastal protection notice (e.g. not to damage vegetation)	*Coastal Protection and Management Act* 1995 (Qld), s 59.
16. Fire hazard reduction (e.g. burning-off)	*Fire and Rescue Service Act* 1990 (Qld).
17. Soil erosion	*Soil Conservation Act* 1986 (Qld).
18. Weed / declared pest control	*Land Protection (Pest & Stock Route Management) Act* 2002 (Qld).

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

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

ABOUT THE AUTHOR

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Photo: Erika Fish / QUT Links (2008)