CSIRO Water Resource Assessments: Indigenous rights and interests in Queensland and the Northern Territory

A report from Barraband Consulting to CSIRO to inform the CSIRO Victoria, Roper and Southern Gulf Water Resource Assessments

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Citation

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NOTE: A significant proportion of this report is based on work previously undertaken by the authors for the Northern Australia Water Resource Assessment (NAWRA) and published in the report Macintosh, A., Waschka, M., Jones, J., and Wood, A. (2018) Legal, Regulatory and Policy Environment for Development of Water Resources in Northern Australia: A technical report to the Australian Government from the CSIRO Northern Australian Water Resource Assessment, part of the National Water Infrastructure Development Fund: Water Resource Assessments. CSIRO, Australia. This report updates, revises and adds to that work where appropriate with a specific focus on matters of relevance to the Roper, Victoria and Southern Gulf Catchments.

CSIRO Roper, Victoria and Southern Gulf Water Resource Assessments acknowledgements

This report was funded through the National Water Grid's Science Program, which sits within the Australian Government's Department of Climate Change, Energy, the Environment and Water.

Aspects of the Assessments have been undertaken in conjunction with the Northern Territory and Queensland governments.

The Assessments were guided by three committees:

i. The Governance Committee: CRC for Northern Australia/James Cook University; CSIRO; National Water Grid (Department of Climate Change, Energy, the Environment and Water); Northern Land Council; NT Department of Environment, Parks and Water Security; NT Department of Industry, Tourism and Trade; Office of Northern Australia; Queensland Department of Agriculture and Fisheries; Queensland Department of Regional Development, Manufacturing and Water

ii. The joint Roper and Victoria River catchments Steering Committee: Amateur Fishermen's Association of the NT; Austrade; Centrefarm; CSIRO; National Water Grid (Department of Climate Change, Energy, the Environment and Water); Northern Land Council; NT Cattlemen's Association; NT Department of Environment, Parks and Water Security; NT Department of Industry, Tourism and Trade; NT Farmers; NT Seafood Council; Office of Northern Australia; Parks Australia; Regional Development Australia; Roper Gulf Regional Council Shire; Watertrust

iii. The Southern Gulf catchments Steering Committee: Amateur Fishermen's Association of the NT; Austral Fisheries; Burketown Shire; Carpentaria Land Council Aboriginal Corporation; Health and Wellbeing Queensland; National Water Grid (Department of Climate Change, Energy, the Environment and Water); Northern Prawn Fisheries; Queensland Department of Agriculture and Fisheries; NT Department of Environment, Parks and Water Security; NT Department of Industry, Tourism and Trade; Office of Northern Australia; Queensland Department of Regional Development, Manufacturing and Water; Southern Gulf NRM

Responsibility for the Assessments' content lies with CSIRO. The Assessments' committees did not have an opportunity to review the Assessments' results or outputs prior to their release.

Acknowledgement of Country

CSIRO acknowledges the Traditional Owners of the lands, seas and waters of the area that we live and work on across Australia. We acknowledge their continuing connection to their culture and pay our respects to their Elders past and present.

Director's foreword

Sustainable development and regional economic prosperity are priorities for the Australian, Queensland and Northern Territory (NT) governments. However, more comprehensive information on land and water resources across northern Australia is required to complement local information held by Indigenous Peoples and other landholders.

Knowledge of the scale, nature, location and distribution of likely environmental, social, cultural and economic opportunities and the risks of any proposed developments is critical to sustainable development. Especially where resource use is contested, this knowledge informs the consultation and planning that underpin the resource security required to unlock investment, while at the same time protecting the environment and cultural values.

In 2021, the Australian Government commissioned CSIRO to complete the Victoria River Water Resource Assessment and the Southern Gulf Water Resource Assessment. In response, CSIRO accessed expertise and collaborations from across Australia to generate data and provide insight to support consideration of the use of land and water resources in the Victoria and Southern Gulf catchments. The Assessments focus mainly on the potential for agricultural development, and the opportunities and constraints that development could experience. They also consider climate change impacts and a range of future development pathways without being prescriptive of what they might be. The detailed information provided on land and water resources, their potential uses and the consequences of those uses are carefully designed to be relevant to a wide range of regional-scale planning considerations by Indigenous Peoples, landholders, citizens, investors, local government, and the Australian, Queensland and NT governments. By fostering shared understanding of the opportunities and the risks among this wide array of stakeholders and decision makers, better informed conversations about future options will be possible.

Importantly, the Assessments do not recommend one development over another, nor assume any particular development pathway, nor even assume that water resource development will occur. They provide a range of possibilities and the information required to interpret them (including risks that may attend any opportunities), consistent with regional values and aspirations.

All data and reports produced by the Assessments will be publicly available.

C. Chilcott

Chris Chilcott

Project Director

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Note: Assessment team as at September, 2024. All contributors are affiliated with CSIRO unless indicated otherwise. Activity Leaders are underlined. For the Indigenous water values, rights, interests and development goals activity (Victoria catchment), Marcus Barber was Activity Leader for the project duration except August 2022 – July 2023 when Kirsty Wissing (a CSIRO employee at the time) undertook this role.

[1]James Cook University; [2]DBP Consulting; [3]Badu Advisory Pty Ltd; [4]Independent contractor; [5] Centre for Tropical Water and Aquatic Ecosystem Research. James Cook University; [6]CloudGMS; [7]NT Department of Environment, Parks and Water Security; [8]Rider Levett Bucknall; [9]Baynes Geologic; [10]QG Department of Environment, Science and Innovation; [11]Entura

Preface

Sustainable development and regional economic prosperity are priorities for the Australian, NT and Queensland governments. In the Queensland Water Strategy, for example, the Queensland Government (2023) looks to enable regional economic prosperity through a vision which states 'Sustainable and secure water resources are central to Queensland's economic transformation and the legacy we pass on to future generations.' Acknowledging the need for continued research, the NT Government (2023) announced a Territory Water Plan priority action to accelerate the existing water science program 'to support best practice water resource management and sustainable development.'

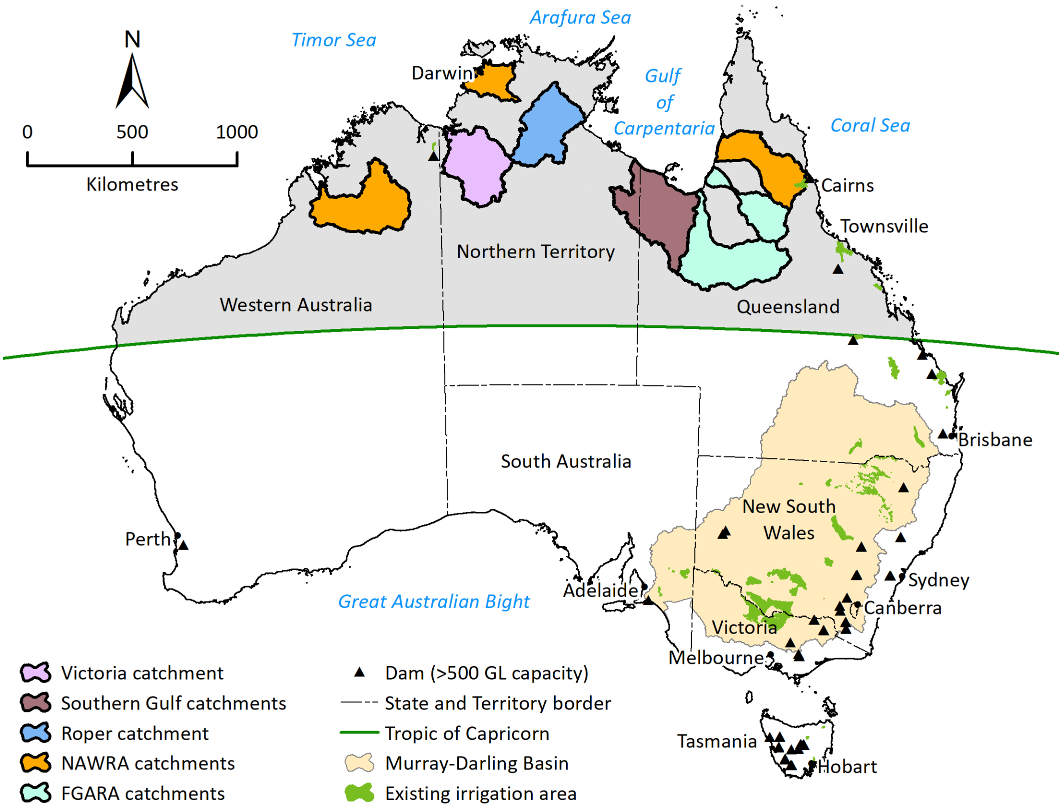
Governments are actively seeking to diversify regional economies, considering a range of factors, including Australia's energy transformation. The Queensland Government's economic diversification strategy for north west Queensland (Department of State Development, Manufacturing, Infrastructure and Planning, 2019) includes mining and mineral processing; beef cattle production, cropping and commercial fishing; tourism with an outback focus; and small business, supply chains and emerging industry sectors. In its 2024–25 Budget, the Australian Government announced large investment in renewable hydrogen, low-carbon liquid fuels, critical minerals processing and clean energy processing (Budget Strategy and Outlook, 2024). This includes investing in regions that have 'traditionally powered Australia' – as the North West Minerals Province, situated mostly within the Southern Gulf catchments, has done.

For very remote areas like the Victoria and Southern Gulf catchments, the land (Preface Figure 1-1), water and other environmental resources or assets will be key in determining how sustainable regional development might occur. Primary questions in any consideration of sustainable regional development relate to the nature and the scale of opportunities, and their risks.

How people perceive those risks is critical, especially in the context of areas such as the Victoria and Southern Gulf catchments, where approximately 75% and 27% of the population (respectively) is Indigenous (compared to 3.2% for Australia as a whole) and where many Indigenous Peoples still live on the same lands they have inhabited for tens of thousands of years. About 31% of the Victoria catchment and 12% of the Southern Gulf catchments are owned by Indigenous Peoples as inalienable freehold.

Access to reliable information about resources enables informed discussion and good decision making. Such information includes the amount and type of a resource or asset, where it is found (including in relation to complementary resources), what commercial uses it might have, how the resource changes within a year and across years, the underlying socio-economic context and the possible impacts of development.

Most of northern Australia's land and water resources have not been mapped in sufficient detail to provide the level of information required for reliable resource allocation, to mitigate investment or environmental risks, or to build policy settings that can support good judgments. The Victoria and Southern Gulf Water Resource Assessments aim to partly address this gap by providing data to better inform decisions on private investment and government expenditure, to account for intersections between existing and potential resource users, and to ensure that net development benefits are maximised.



Preface Figure 1-1 Map of Australia showing Assessment areas (Victoria and Southern Gulf catchments) and other recent CSIRO Assessments

FGARA = Flinders and Gilbert Agricultural Resource Assessment; NAWRA = Northern Australia Water Resource Assessment.

The Assessments differ somewhat from many resource assessments in that they consider a wide range of resources or assets, rather than being single mapping exercises of, say, soils. They provide a lot of contextual information about the socio-economic profile of the catchments, and the economic possibilities and environmental impacts of development. Further, they consider many of the different resource and asset types in an integrated way, rather than separately.

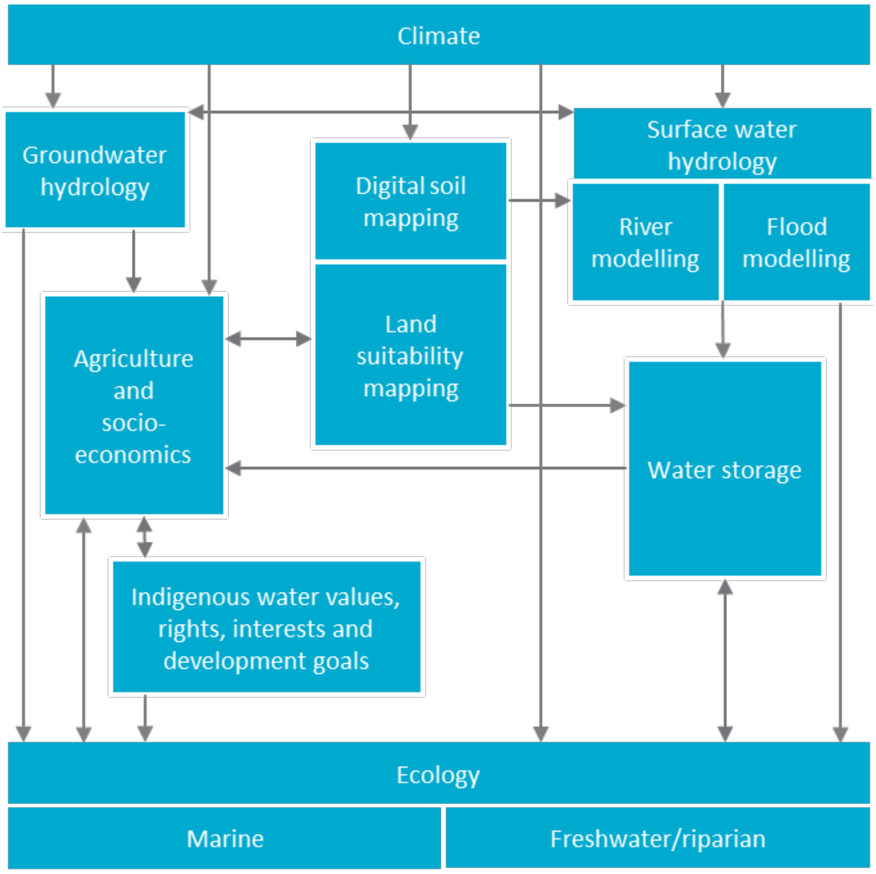
The Assessments have agricultural developments as their primary focus, but they also consider opportunities for and intersections between other types of water-dependent development. For example, the Assessments explore the nature, scale, location and impacts of developments relating to industrial, urban and aquaculture development, in relevant locations. The outcome of no change in land use or water resource development is also valid.

The Assessments were designed to inform consideration of development, not to enable any particular development to occur. As such, the Assessments inform – but do not seek to replace – existing planning, regulatory or approval processes. Importantly, the Assessments do not assume a given policy or regulatory environment. Policy and regulations can change, so this flexibility enables the results to be applied to the widest range of uses for the longest possible time frame.

It was not the intention of – and nor was it possible for – the Assessments to generate new information on all topics related to water and irrigation development in northern Australia. Topics not directly examined in the Assessments are discussed with reference to and in the context of the existing literature.

CSIRO has strong organisational commitments to Indigenous reconciliation and to conducting ethical research with the free, prior and informed consent of human participants. The Assessments allocated significant time to consulting with Indigenous representative organisations and Traditional Owner groups from the catchments to aid their understanding and potential engagement with their requirements. The Assessments did not conduct significant fieldwork without the consent of Traditional Owners.

Functionally, the Assessments adopted an activities-based approach (reflected in the content and structure of the outputs and products), comprising activity groups, each contributing its part to create a cohesive picture of regional development opportunities, costs and benefits, but also risks. Preface Figure 1-2 illustrates the high-level links between the activities and the general flow of information in the Assessments.



Preface Figure 1-2 Schematic of the high-level linkages between the eight activity groups and the general flow of information in the Assessments

Assessment reporting structure

Development opportunities and their impacts are frequently highly interdependent and, consequently, so is the research undertaken through these Assessments. While each report may be read as a stand-alone document, the suite of reports for each Assessment most reliably informs discussion and decisions concerning regional development when read as a whole.

The Assessments have produced a series of cascading reports and information products:

- Technical reports present scientific work with sufficient detail for technical and scientific experts to reproduce the work. Each of the activities (Preface Figure 1-2) has one or more corresponding technical reports.
- Catchment reports, one for each of the Victoria and Southern Gulf catchments, synthesise key material from the technical reports, providing well-informed (but not necessarily scientifically trained) users with the information required to inform decisions about the opportunities, costs and benefits associated with irrigated agriculture and other development options.
- Summary reports, one for each of the Victoria and Southern Gulf catchments, provide a shorter summary and narrative for a general public audience in plain English.
- Summary fact sheets, one for each of the Victoria and Southern Gulf catchments, provide key findings for a general public audience in the shortest possible format.

The Assessments have also developed online information products to enable users to better access information that is not readily available in print format. All of these reports, information tools and data products are available online at https://www.csiro.au/victoriariver and https://www.csiro.au/southerngulf. The webpages give users access to a communications suite including fact sheets, multimedia content, FAQs, reports and links to related sites, particularly about other research in northern Australia.

Executive summary

This report provides a review of the legislative, regulatory and policy environment relevant to the assessment of Indigenous rights to, and interests in, water in the Victoria River, Roper River and Southern Gulf Catchment areas (the 'Catchment Areas'). This work does not constitute legal advice. It is intended to be read in conjunction with the completed reports on the Water Resource Assessments undertaken by CSIRO. It will inform related discussions for these catchments.

The objectives of this report are to:

- Describe and comment on relevant laws and key policies from Queensland, the Northern Territory and the Commonwealth.
- Identify legal and policy matters of relevance to Indigenous peoples' rights and interests in water, and their engagement with, and participation in, water resource development and investment in the Catchment Areas.

This work revisits and updates work previously completed by the authors for the Northern Australian Water Resource Assessment[1]. This report therefore draws heavily on work previously undertaken by the authors.

This report focuses on water planning and allocation in the Northern Territory and Queensland, it does not include a review of legislative and policy frameworks related to water quality, urban water (including remote community water supply) or water delivery. A range of other legislative and non-legislative mechanisms beyond water planning have direct implications for Indigenous water interests – for example, those relating to cultural heritage, healthy country planning, fisheries, catchment management and soil conservation. While noting that the holistic approach to country characteristic of Indigenous cultures in Australia means 'strategic water issues' may encompass a range of matters beyond water planning, these are not within the scope of this review.

This report provides an analysis of the institutions relevant to water-related development in the Catchment Areas. In this context, the term 'institutions' is used to refer to the rules and norms that govern water-related development in the Catchment Areas, which stem from international law, common law, statute, delegated legislation, and government policies. An analysis of these institutions provides insight into the nature of Indigenous rights to, and interests in, water-related development in the Catchment Areas, and institutional risks faced by prospective investors and other affected parties.

When considering rights to, and interests in, water related development, it is useful to understand the legal and policy context that provides the overarching context for development in the region.

[1] In particular, Macintosh, A., Waschka, M., Jones, J., and Wood, A. (2018) *Legal, Regulatory and Policy Environment for Development of Water Resources in Northern Australia: Full Technical Report.* CSIRO, Australia; and, Waschka, M., Macintosh, A., Simpson, A., Jones, J., and Barber, M. (2020) *Indigenous Strategic Issues in Water Planning for Australia: Technical Report*. CSIRO, Australia.

The Northern Territory and Queensland governments have primary responsibility for the management of land and water in the catchment areas, regulating access to, and the use of, surface and groundwater. However, the responsibility for managing the potential positive and negative economic, social and environmental externalities associated with water-related development in the catchment areas is split between the federal, Queensland and Northern Territory governments.

The first step towards considering Indigenous rights to, and interests in, water-related development in the catchment areas is understanding the nature of their interests in property. In order to undertake a development on land, or use land or water for a particular purpose, the proponent of an activity must hold the requisite rights and interests that authorise that use. These rights and interests are commonly referred to as 'property rights'.[2] The term 'property rights' has different meanings in different contexts. This report adopts a 'Hohfeldian approach' which distinguishes between rights and privileges: that is, for there to be a legal right, there must be a correlative duty on at least one other person not to interfere with the interest claimed. A privilege exists where a person is free to do something in relation to a resource, but there is no correlative duty. The correlative duty associated with most legal property rights is for the world at large not to access the relevant resource without the permission of the owner, that is, the essence of most legal property is about the ability to control *access* to the resource.

Using this conceptualisation of property rights and interests, and the policy and legal context for water-related development (outlined in further detail in sections 1 and 2) this report then analyses the following:

1. **Interests in land (Section 3):** Proponents of water-related developments will require entitlements to access the subject land. There are a range of tenure types in the Catchment Areas: government owned land (Crown land) held under lease (Crown lease) by a private party (including pastoral, term and perpetual leases); standard freehold; Aboriginal freehold; unallocated Crown land; Crown land reserved for particular purposes; and, national parks. Land tenure types can co-exist (for example Aboriginal freehold and national parks). Proponents interested in water-related development will need to obtain an entitlement to access the land from the relevant landowner (unless they are the landowner). For initial exploratory purposes, this could take the form of a licence, which would provide the holder with personal rights to access the land but no formal legal interest in it. To undertake any material development, a formal freehold or leasehold interest in the land will usually be necessary. Freehold and leasehold interests provide greater security and control than licences, and enable the holder to exclude most third parties from the land and the benefits that stem from its use and development. However, proponents should be aware that leasehold interests can be subject to restrictions that limit the use and development of land. For example, pastoral leases typically can only be used for pastoral purposes unless otherwise authorised. In addition to the need for a freehold or leasehold interest, or a licence, any water-related development must be consistent with the relevant native title arrangements. A significant proportion of the land in the Catchment Areas is subject to native title and native title claims.

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[2] A more detailed overview of the 'Nature of interests in property' is provided in Macintosh, A., Waschka, M., Jones, J., and Wood, A. (2018) *Legal, Regulatory and Policy Environment for Development of Water Resources in Northern Australia: Full Technical Report.* CSIRO, Australia pp. 3-7

Where native title, or a native title claim, exists over an area of land, proponents will be required to engage with relevant traditional owners and the federal native title process.

2. **Interests in water (Section 4):** To undertake developments involving the extraction and use of water, proponents will require entitlements under state and territory water statutes. The state and territory water statutes control access to, interference with and use of ground and surface water. The Australian Government plays only a limited direct role in water governance in the Catchment Areas. The Northern Territory and Queensland water governance regimes have a number of common elements, including: water planning processes that can impose restrictions on the amount of water taken for consumptive uses and how it is used; entitlements and regulations concerning taking water for consumptive purposes, with and without government authorisation; and statutory requirements to obtain government approval for works related to water infrastructure (e.g. dams, bores, levies and pipes). The specifics of what entitlements and authorisations are needed to facilitate water-related development will depend on the location and nature of the development.

In addition to holding the requisite rights and interests to access the land, and to take water, proponents of water-related development must have the necessary privileges to undertake the development. Some of these privileges will come with proponents' interests in land. However, ownership of an estate or other interest in land does not provide the holder with the legal ability to use and develop the land or water as they please. Government regulations can restrict how land and water resources are used and developed. The Queensland and Northern Territory governments have regulatory processes concerning planning, environmental and heritage issues that proponents are required to comply with in relation to the use and development of land and water resources. Compliance with these regulatory processes often involves applying for and obtaining approvals from relevant state or territory government agencies, including local councils. Depending on the nature and location of the proposed development, an environmental assessment may be required prior to the issuance of state and territory approvals. The state and territory regulatory processes are overlain with the Australian Government's environmental and heritage approval processes.

Section 5 of this report provides an overview of the regulatory processes required under federal, state and territory planning, environment and heritage regimes that are likely to apply to water-related development in the Catchment Areas.

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Tables

1 Introduction

1.1 Background and context

This report provides a review of the legislative, regulatory and policy environment relevant to the assessment of Indigenous rights to, and interests in, water in the Victoria River, Roper River and Southern Gulf Catchment areas (the 'Catchment Areas').

The objectives of this report are to:

- Describe and comment on relevant laws and key policies from Queensland, the Northern Territory and the Commonwealth governments.
- Identify legal and policy matters of relevance to Indigenous peoples' rights and interests in water, and their engagement with, and participation in, water resource development and investment in the Catchment Areas.

The brief for this work was to revisit work previously completed by the authors for NAWRA[3], consider its relevance to the Catchment Areas, and update the work where required. This report therefore draws heavily on work previously undertaken by the authors, particularly:

> Macintosh, A., Waschka, M., Jones, J., and Wood, A. (2018) *Legal, Regulatory and Policy Environment for Development of Water Resources in Northern Australia: A technical report to the Australian Government from the CSIRO Northern Australian Water Resource Assessment, part of the National Water Infrastructure Development Fund: Water Resource Assessments.* CSIRO, Australia.

It also draws on work prepared by the authors published in:

> Waschka, M., Macintosh, A., Simpson, A., Jones, J., and Barber, M. (2020) *Indigenous Strategic Issues in Water Planning for Australia: Technical Report*. CSIRO, Australia.

This report focuses on water planning and allocation in the Northern Territory and Queensland, it does not include a review of legislative and policy frameworks related to water quality, urban water (including remote community water supply) or water delivery. A range of other legislative and non-legislative mechanisms beyond water planning have direct implications for Indigenous water interests – for example, those relating to cultural heritage, healthy country planning, fisheries, catchment management and soil conservation. While noting that the holistic approach to country characteristic of Indigenous cultures in Australia means 'strategic water issues' may encompass a range of matters beyond water planning, these are not within the scope of this review.

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[3] In particular, Macintosh, A., Waschka, M., Jones, J., and Wood, A. (2018) *Legal, Regulatory and Policy Environment for Development of Water Resources in Northern Australia: Full Technical Report.* CSIRO, Australia; and, Waschka, M., Macintosh, A., Simpson, A., Jones, J., and Barber, M. (2020) *Indigenous Strategic Issues in Water Planning for Australia: Technical Report*. CSIRO, Australia.

This report provides an analysis of the institutions relevant to water-related development in the Catchment Areas. In this context, the term 'institutions' is used to refer to the rules and norms that govern water-related development in the Catchment Areas, which stem from international law, common law, statute, delegated legislation, and government policies. An analysis of these institutions provides insight into the nature of Indigenous rights to, and interests in, water-related development in the Catchment Areas, and institutional risks faced by prospective investors and other affected parties.

1.2 Project terminology

Aboriginal and Torres Strait Islander people in Australia use a range of terms to refer to themselves, and there is also diversity in how they are referred to in relevant water legislation and policy. Common terms include Indigenous, Aboriginal and Torres Strait Islander, First Nations, and First Peoples. Traditional Owner is used to refer to the subset of Indigenous people in a given context or area who exercise recognised ownership, management, and custodial rights in that area. Consistent with the terms of the project brief, project reporting will use 'Indigenous' as the default term. However, the legislation and policy reviewed here frequently uses other terms, notably 'Aboriginal'. The distinction between Indigenous Traditional Owners and Indigenous residents of a given area may also be either prioritised or elided in such contexts. To ensure the accuracy of content, discussion about particular jurisdictional arrangements will adopt the term used in those arrangements.

1.3 Nature of interests in property

When considering the legislative, regulatory and policy environment relevant to water-related development in the Catchment Areas, it is necessary to understand the nature of interests in property. To undertake a development on land, or use land or water for a particular purpose, the proponent of the activity must hold the requisite rights and interests that authorise that use. These rights and interests are commonly referred to as 'property rights'.[4]

The term 'property rights' has different meanings in different contexts. This report adopts a 'Hohfeldian approach' to defining rights and interests in property. Hohfeld (1913; 1917)[5] distinguishes between rights and privileges: for there to be a legal right, there must be a correlative duty on at least one other person not to interfere with the interest claimed. A

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[4] A more detailed overview of the 'Nature of interests in property' is provided in Macintosh, A., Waschka, M., Jones, J., and Wood, A. (2018) *Legal, Regulatory and Policy Environment for Development of Water Resources in Northern Australia: Full Technical Report.* CSIRO, Australia pp. 3-7

[5] Wesley Newcomb Hohfeld (1913) 'Some fundamental legal conceptions as applied in judicial reasoning' *Yale Law Journal,* 23(1):16-59, Nov 1913; Wesley Newcomb Hohfeld (1917) 'Fundamental legal conceptions as applied in judicial reasoning' *Yale Law Journal,* 26(8):710-770, 1917.

privilege exists where a person is free to do something in relation to a resource, but there is no correlative duty. Defining rights and privileges in this way narrows the scope of what is qualified as a legal property right. The correlative duty associated with most legal property rights is for the world at large not to access the relevant resource without the permission of the owner, that is, the essence of most legal property is about the ability to control *access* to a resource. These rights and privileges, conceptualised in this way, are illustrated in Figure 1-1, Figure 1-2 and Figure 1-3 below. [6]

In Figure 1-1, a land owner's unfettered right to control access—their property right—is represented by the solid red line around the boundary of the land. No other person can cross the red line to enter the property without the owner's permission. The eight green circles represent the full range of *potential* activities.

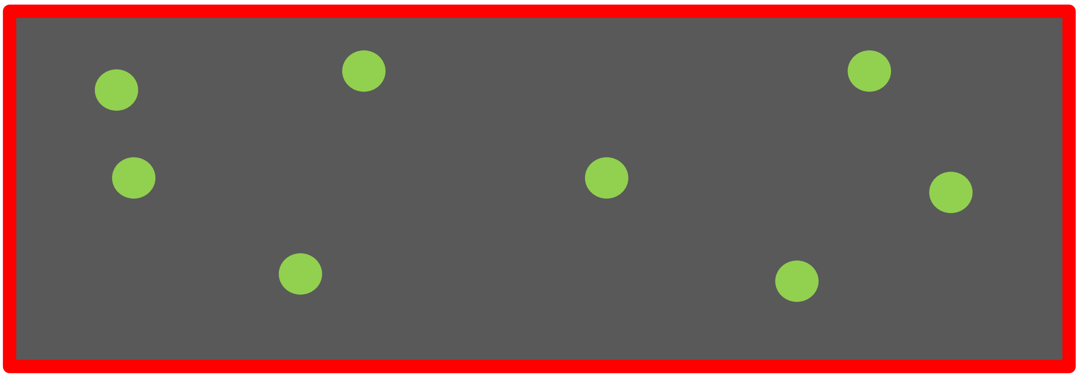

Figure 1-1 Rights and privileges of an owner of land, full range of potential privileges

This scenario is rare, in reality there are usually a range of restrictions that affect the owner's right to control access and curtail the privileges associated with ownership. These restrictions stem from three main sources: the title held by the landholder; property rights that are attached to the title; and government regulations.

Under Australian property law, all interests in land, except native title, are held 'of the Crown'. For legal purposes, the Crown (the state or territory government) is taken to be the ultimate owner of all land; it holds what is known as 'radical title'. From this title, the Crown grants interests in land, which enable the holders to hold the land as tenants 'of the Crown'. There are two main forms of interests in land granted by the Crown: freehold and leasehold. While both forms of title give the landholder the right to control access to the land, they do not confer absolute ownership in the sense of leaving the landholders with the ability to use and develop the land as they please. Both freehold and leasehold interests can come with restrictions. These restrictions are outlined in more detail in Section 3.

The practical impact of these types of proprietary rights on the interests of the landowner—the holder of the freehold or leasehold interest—is to curtail their right to control access and extinguish potential privileges. The impact of restrictions inherent in the title and

[6] Adapted from Macintosh, A., Waschka, M., Jones, J., and Wood, A. (2018) *Legal, Regulatory and Policy Environment for Development of Water Resources in Northern Australia: Full Technical Report.* CSIRO, Australia pp. 3-7

stemming from property rights attaching to the title is represented in Figure 1-2 in two ways. First, by the limitation of the land use options (privileges) available to the owner. Where there were previously eight potential activities that could be undertaken, there are now only six. Secondly, the solid red line that represents the landholder's right to control access is now dashed on account of the fact that it is no longer absolute. The holder of the freehold or leasehold interest will not be able to exclude those with a legal property right that entitles them to access the land.

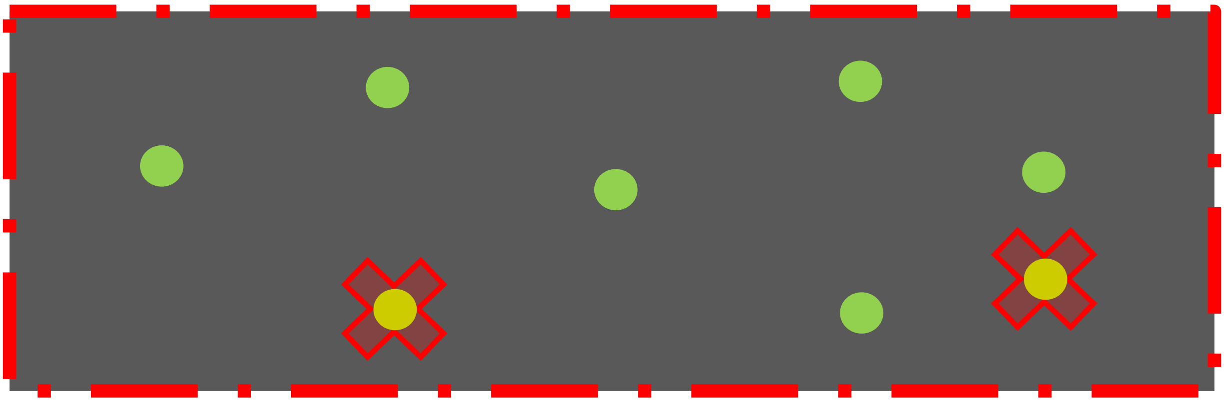

Figure 1-2 Rights and privileges of an owner of land, restrictions inherent in title and attaching to title

The other main source of restrictions on the rights and privileges of landholders is government regulations. Again, they can interfere with both the ability to control access and extinguish or limit privileges. An example of the former is regulations that give specific people the statutory (rather than a proprietary) right to enter onto land for specific purposes (e.g. to inspect or maintain electricity, gas or water infrastructure). An example of the latter is environmental, planning and heritage regulations that prohibit certain types of activities, or activities that have certain types of impacts, without government approval. In Figure 1-3, the impact of these government regulations is represented by the change in the right to control access (the red line) and the reduction in the available land use options (privileges) from eight to three.

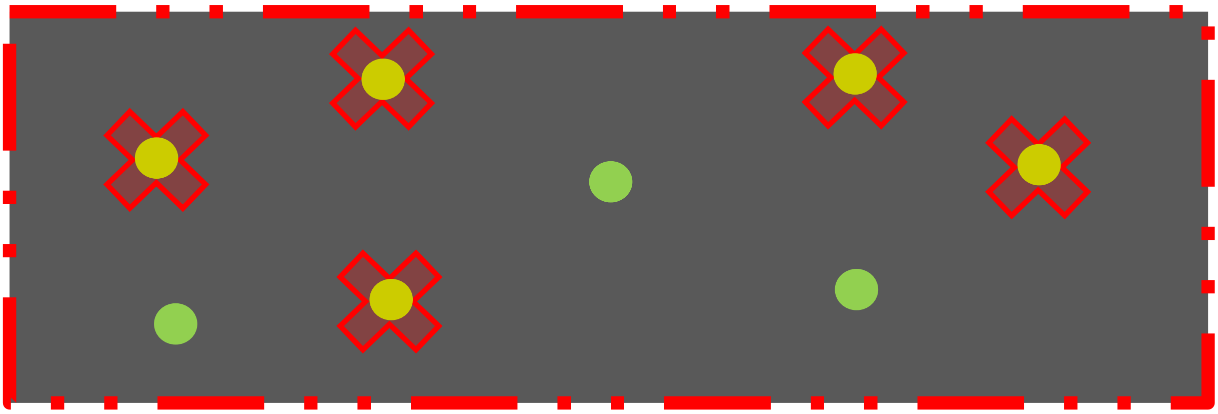

Figure 1-3 Rights and privileges of an owner of land, government regulations

The remainder of the report utilises this conceptualisation of property interests and is built around four themes: legal and policy context; interests in land; interests in water; and government approval requirements. The report is structured as follows.

1.4 Report structure

The remainder of this report is structured as follows:

Section 2 provides an overview of the macro legal and policy context surrounding water-related development by looking at relevant national and state and territory institutions that provide the overarching context for development in the Catchment Areas.

Section 3 analyses relevant interests in land, by which we refer to the rights and privileges necessary to undertake, and that could be affected by, water-related development in the Catchment Areas. The focus here is on the rights and privileges inherent in the title held by the owner and possessor of the land, and the bundle of rights inherent in native title.

Section 4 looks at interests in water, covering the ownership and control of surface and groundwater resources, and the nature of interests in water that are necessary to support, and could be affected by, water-related development. The treatment of water is complicated by the fact that water is common property until reduced to possession. The Queensland, and Northern Territory Governments control access to surface and ground water through legislation. However, as is explained in greater depth in Section 4, the state does not have any proprietary interest in the water. Further, the interests that water users obtain through water legislation, while generally referred to as property and often having the traditional proprietary characteristics (i.e. the interests are definable, identifiable, stable and assignable), are arguably more akin to statutory privileges.

Section 5 provides an overview of the government approval processes concerning planning, environment and heritage issues that are designed to manage the positive and negative externalities (spillover effects) associated with water-related development in the Catchment Areas. These government approval processes rely on regulatory restrictions that curtail the privileges associated with interests in land and water. The approvals granted under these regulatory processes do not involve the issuance of property rights; they merely make acts lawful which would otherwise be unlawful.

Section 6 provides a conclusion and summary points on what stakeholders need to know about the institutions governing water-related development relevant to the Catchment Areas.

The report is not meant to be comprehensive, and it does not constitute legal advice. It is intended to provide an overview of the main institutions that could affect, and be affected by, water-related developments in the Catchment Areas[7]. The institutional requirements relevant to specific water-related developments in the Catchment Area will depend on the characteristics and location of the developments, and their likely impacts on the environment.

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[7] Noting that this work builds upon existing work by the authors, particularly drawing heavily from Macintosh, A., Waschka, M., Jones, J., and Wood, A. (2018) *Legal, Regulatory and Policy Environment for Development of Water Resources in Northern Australia: Full Technical Report.* CSIRO, Australia which provides a more comprehensive overview of concepts such as property rights.

2 Legal and policy context

This section provides an overview of the macro legal and policy context surrounding water-related development in the Northern Territory and Queensland as it relates to the Roper River, Victoria River and South Gulf Catchments (the ‘Catchment Areas’). It looks at relevant national and state and territory institutions that provide the overarching context for development in the region.

While an analysis of international law of relevance to Indigenous rights to water is outside the scope of this review, it is worth noting that there are a number of international laws of relevance that have an indirect impact on Indigenous rights to, and interests in, water-related development in the Catchment Areas. For example, Australia is a signatory to the *UN Declaration on the Rights of Indigenous Peoples of 2007* which consists of a series of principles and minimum standards concerning the rights, freedoms, interests and treatment of Indigenous peoples. One of the central principles underpinning the Declaration is the need for free, prior and informed consent of Indigenous people before actions are taken that affect their interests. This principle is reflected, to varying degrees, in domestic legal institutions, including under the federal *Native Title Act 1993* (Cth) and government approval processes.

There are also examples of international environmental law that promote and protect Indigenous interests. The most relevant are the protections afforded to Indigenous heritage sites and values through the *Convention for the Protection of the World Cultural and Natural Heritage of 1972* (World Heritage Convention), and the obligations concerning Indigenous knowledge and involvement under treaties like the *Convention on Biological Diversity of 1992* (CBD) and *Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971* (Ramsar Convention).[8]

2.1 Commonwealth powers in relation to water management and planning

The *Australian Constitution* gives the Commonwealth the power to make laws with respect to a wide range of issues, including international and inter-state trade and commerce, corporations, and external affairs. Despite the breadth of its powers, the Constitution does not give the Commonwealth an express head of power to make laws with respect to water. The only express reference to water management in the Constitution is found in Section 100, which provides that ‘the Commonwealth shall not, by any law or regulation of trade or

[8] Macintosh A, Waschka M, Jones J, Wood A (2018) *Legal, Regulatory and Policy Environment for the Development of Water Resources in Northern Australia. A technical report to the Australian Government from the CSIRO Northern Australia Water Resource Assessment*, part of the National Water Infrastructure Development Fund: Water Resource Assessments. CSIRO, Australia. provides a more detailed overview of international law relevant to Indigenous interests in water.

commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation'.

The absence of an express power in relation to water management has meant that, historically, the states have had primary responsibility for the management of water.[9] The Commonwealth's main role has been as a facilitator and enabler of state water management in the Murray-Darling Basin through the Murray Waters Agreement 1914 and, later, the Murray-Darling Basin Agreement 1992 (not relevant to the Catchment Areas). The Commonwealth also has powers under the E*nvironment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), to protect 'matters of national environmental significance'.

Under the EPBC Act, actions that will have, or are likely to have, a significant impact on any of the matters of national environmental significance must be referred to the federal environment Minister for assessment and approval. Actions carried out by Commonwealth agencies that are likely to have a significant impact on the environment, or that could have a significant impact on the environment on Commonwealth land, are also required to be referred under the Act for approval.

These regulatory requirements have given the Commonwealth a role, both directly and indirectly, in the regulation of matters affecting water resources, particularly mining, oil and gas, and large water storage developments. When approving these types of activities, conditions can be imposed on developments to mitigate and compensate for impacts on the matters of national environmental significance.

While the EPBC Act has provided the Australian Government with some limited scope of regulatory functions related to water management, to date, these powers have been used reactively to regulate development proposals rather than proactively to influence water resource planning. Further analyses of approvals required under the EPBC Act is provided in Section 5.

2.3 State and territory responsibilities in relation to water management and planning

The Northern Territory and Queensland governments continue to have primary responsibility for the management of land and water in the Catchment Areas. This can be illustrated by looking at the source of the main institutions that govern relevant interests in land and water, and government approvals in the Catchment Areas.

Proponents of water-related developments will require an entitlement to access and use the subject land. This will usually consist of a formal legal interest in the land (legal title) or a

[9] Macintosh, A., Waschka, M., Jones, J., Wood, A. (2018) Legal, regulatory and policy environment for the development of water resources in northern Australia: A technical report from the CSIRO Northern Australia Water Resource Assessment to the Government of Australia. CSIRO, Brisbane. p 10

personal entitlement or authorisation to access it (a licence). Where land in the Catchment Areas is 'Crown land' the land is owned by the federal, state or territory government (the 'Crown' refers to the government in all its capacities in the relevant jurisdiction), and proponents of water-related development will usually need to obtain relevant interests in land from the state or territory government, or acquire Crown leases from private landholders. Similarly, proponents wanting to undertake a development on Commonwealth land—areas owned or leased by the Commonwealth or a Commonwealth agency, including for defence purposes—need to obtain relevant interests in the land from the Australian Government.

Where the land in the Catchment Areas is not Crown land (i.e. it is privately held freehold land), relevant interests will generally need to be acquired or otherwise obtained from the private landholder (unless the landholder themselves is the proponent). However, in these circumstances, state and territory institutions will still be relevant because the state and territory governments are the ultimate owners of most land in their jurisdictions and are responsible for the relevant systems of land title. There are two main exceptions to the general rule that the state and territory governments dominate land issues: native title and Commonwealth land.

Native title is an interest in land, but it is largely a federal responsibility managed under the *Native Title Act 1993* (Cth). Where native title (or a native title claim) exists over an area of land, proponents will be required to engage with relevant traditional owners and the federal native title process.

The Northern Territory and Queensland Governments are responsible for water planning and regulating access to, and the use of, surface and groundwater in their jurisdictions. State and territory water legislation vests the 'rights' to control and use ground and surface water in the state and territory governments. It also establishes the statutory frameworks for water planning, it requires those wanting to take ground and surface water to hold appropriate state and territory licences and associated water entitlements, and requires those undertaking works related to water infrastructure to obtain government approvals. The Australian Government's role in water planning and the issuance of interests in water in the Catchment Areas is limited. There is federal water legislation, the *Water Act 2007* (Cth), but its scope is confined to waters in the Murray-Darling Basin (not relevant to the Catchment Areas).

Responsibility for managing the potential positive and negative economic, social and environmental externalities associated with water-related development in the Catchment Areas is split between the federal, state and territory governments. The Northern Territory and Queensland Governments have regulatory processes concerning planning, environment and heritage issues that proponents are required to comply with in relation to the use and development of land and water resources. Compliance with these regulatory processes often involves applying for and obtaining approvals from relevant state or territory government agencies, including local councils. Depending on the nature and location of the proposed development, an environmental assessment may be required prior to the issuance of state and territory approvals. The relevant state and territory processes are overlain with the Australian Government's EPBC Act assessment and approval processes.

Interests in land, interests in water and government approvals are discussed in detail in sections 3, 4 and 5.

2.3.1 Regional NRM bodies

Australia has a network of 54 regional natural resource management (NRM) bodies (largely funded by federal and state governments) that work with communities, land managers and farmers, governments and other partners to manage their local environment in a sustainable and integrated manner.

While not government entities, these regional NRM groups perform important planning and service delivery functions related to publicly funded NRM activities. Amongst other things, they are responsible for preparing NRM plans that identify the goals and priorities for NRM in their regions, and work with a range of government and non-government stakeholders to realise these goals.

Catchment Areas covered in this study are covered by two regional NRM organisations: Territory Natural Resource Management, and the Southern Gulf Natural Resource Management. While they are not regulators, or responsible for approving water-related developments and have no formal part in relevant government approval processes or the issuance or transfer of interests in land or water, they are involved in water resource planning through the provision of information and other resources, and coordinating community input.

2.3.2 Local government

Local councils are state/territory agencies created and regulated under state/territory legislation. However, unlike most other government agencies, local councils are elected bodies and have a significant degree of autonomy in the conduct of their affairs.

Local councils perform a range of different functions. Most relevant for current purposes is the responsibilities they have in relation to land-use planning. In Queensland, the state governments play a central role in land-use planning but many planning functions are devolved to local councils. In particular, local councils are responsible for preparing and administering local planning schemes, which guide and regulate land use and development within their municipalities. Depending on the nature and scale of the development, local councils can be responsible for assessing and approving development applications under local planning schemes.

In the Northern Territory, the role of local councils is more limited. The Territory planning legislation is administered exclusively by the Territory government, through the Planning Minister, Department of Lands, Planning and Environment, Northern Territory Planning Commission and Development Consent Authority. Local councils play only a minor advisory role.

3 Interests in land

Proponents of water-related developments in the Catchment Areas will require legal entitlements to access and use the subject land. This could involve the grant or acquisition of legal title to the land or the issuance of a licence (or permit) for a period of time. Legal titles to land give the holder a legal interest in the land. In contrast, the holder of a licence obtains no property rights in relation to the land. Depending on the nature of the licence, the licensee will either have personal rights of access that are enforceable under contract or the licence will simply make an act lawful that would otherwise be unlawful.

Under modern Australian property law, which combines traditional Anglo-derived law and native title (as incorporated through the common law and statute), land can now be held in three general forms:

- estates held by private parties, where the interests can be traced to a grant from the Crown;
- land held by the government, either as unallocated Crown land, Crown land reserved for public purposes or in the form of a freehold or leasehold estate; and
- land subject to native title.

Each of these three forms are discussed in the following subsections, as they are relevant to water-related development in the Catchment Areas. While Indigenous Protected Areas (IPAs) don't involve a separate interest in land, it is important that proponents of water related development be aware of them.

3.1 Private interests traceable to grants from the Crown

Privately held estates in land in the Catchment Areas come in two main forms: freehold, with most being fee simple estates; and leasehold, with most being leases of Crown land by the state or territory government (Crown leases). Land is also used under licences, the most common form being grazing licences. These licences authorise entry onto, and use of, Crown land for grazing purposes only.

3.1.1 Freehold estates

Freehold estates come in three main forms: fee simple, fee tail and a life estate. Of the three, fee simple estates are the most relevant to water-related development in the Catchment Areas. Typically, in this context, fee simple estates are referred to as freehold estates (the other potential types of freehold estates are largely irrelevant in this context).

Legislative arrangements governing the creation of, and dealings with, freehold estates in the Northern Territory and Queensland are reasonably similar. These jurisdictions have three main statutes governing freehold estates: one that governs the grant of freehold estates in Crown land and the conversion of leasehold interests in Crown land to freehold estates; one that governs the transfer and registration of estates under the system of land title registration; and one that provides for general rules relating to interests in, and dealings with, property (Table 3-1).

Table 3-1 Main statutes in the Northern Territory and Queensland governing freehold estates

	NORTHERN TERRITORY	QUEENSLAND
Creation of freehold estates	*Crown Lands Act 1992* (NT)	*Land Act 1994* (Qld)
Land title registration	*Land Title Act 2000* (NT)	*Land Title Act 1994* (Qld)
General property rules	*Law of Property Act 2000* (NT)	*Property Law Act 1974* (Qld)

These three main statutes are complemented by legislation containing special provisions for the creation of, and dealings with, estates relating to Indigenous communities. The main statutes apply equally to Indigenous and non-Indigenous people but the special purpose legislation concerning Indigenous interests is intended to address specific issues relating to Indigenous communities, particularly the issuance of freehold and leasehold estates to Aboriginal land trusts (often referred to as 'Aboriginal freehold land' or 'Aboriginal land'). Section 3.1.3 provides an overview of the institutions concerning Aboriginal land trusts and Aboriginal land.

3.1.2 Leasehold estates

Types of leasehold interests in the Catchment Areas

Leasehold is a common form of estate across northern Australia. Leases essentially involve the hire of land for a price for a certain term (or a term that is capable of being rendered certain). Leases can be granted over Crown land (Crown lease), freehold land or leasehold land as a sub-lease. In the Catchment Areas, land is commonly held under Crown leases, which come in a variety of forms, including term, perpetual and pastoral leases.

The issuance of leasehold interests in Crown land in the Northern Territory is governed by the *Crown Lands Act* (NT) (CL Act), *Pastoral Land Act* (NT) (PL Act) and *Special Purposes Leases Act* (NT) (SPL Act). There are four main types of Crown leasehold interests that can be issued under these statutes: fixed term leases; perpetual leases; pastoral leases; and special purpose leases. Details of these leases are provided in Table 3-2.

Table 3-2 Types of leasehold interest in Crown land in the Northern Territory

INTEREST TYPE	COMMENT
Fixed-term lease (CL Act, Pt 3, Div 3)	Under Part 3, Division 3 of the CL Act, the Minister may issue fixed-term leases, which are subject to conditions and reservations specified in the Act. The Minister can also impose any other conditions or reservations considered necessary in the circumstances. Lessees must obtain Ministerial approval for a number of dealings with the leases, including transfers, mortgages, subdivisions, sub-letting and the creation of easements and covenants. The leases can contain provisions relating to the exchange of the leasehold interest for a fee simple estate.
Perpetual lease (CL Act, Pt 3, Div 3)	Under Part 3, Division 3 of the CL Act, the Minister may issue leases in perpetuity (for an indefinite term). Perpetual leases are subject to similar statutory conditions as those applying to term leases, including in relation to the need to obtain Ministerial approval for various dealings and the capacity for leases to include conditions in relation to their surrender in exchange for fee simple estates.
Pastoral lease (PL Act, Pt 4)	Section 31 of the PL Act gives the Minister the power to issue pastoral leases, being leases for 'pastoral purposes'. Pastoral purposes are defined as 'pasturing of stock for sustainable commercial use of the land on which they are pastured or agricultural or other non-dominant uses essential to, carried out in conjunction with, or inseparable from, the pastoral enterprise, including the production of agricultural products for use in stock feeding and pastoral based tourist activities such as farm holidays'. Pastoral leases do not confer an absolute right to exclusive possession; they must contain a mandatory reservation 'in favour of the Aboriginal inhabitants of the Territory' (s 38). This reservation entitles the Indigenous people of the area to occupy the land, take water from natural water bodies and springs on the land, hunt wild animals and take food and vegetable matter grown naturally on the land. Fee simple estates can also be excised out of pastoral leasehold land on the application of Indigenous people for community living areas. In addition, the Pastoral Land Board is entitled to establish monitoring stations on pastoral lease land and enter onto the land to investigate compliance with the conditions of the lease. Generally, pastoral leasehold land can only be used for pastoral purposes unless a permit authorising a non-pastoral use has been issued by the Pastoral Land Board. Permits can be issued for up to 30 years and, once issued, become attached to the lease and must be registered under the Land Title Act (NT). Hence, if the pastoral leasehold interest is transferred to another party, the permit passes with the lease. Pastoral leases are subject to a number of other mandatory statutory reservations and conditions, including that the lessee take all reasonable measures to conserve and protect features of environmental, cultural, heritage or ecological significance, and that vegetation cannot be removed without the consent of the Pastoral Land Board, or in accordance with clearing guidelines issued by the Board. The Minister can also impose such other conditions as he or she thinks fit, and the Pastoral Land Board can issue notices directing lessees to take measures to address land management issues, including feral animals. Pastoral leases can be issued for a fixed term of not more than 25 years or in perpetuity.
Special purpose lease (SPL Act, s 4)	Section 4 of the SPL Act gives the responsible Minister the power to grant special purpose leases over any unleased Crown land. Special purposes are defined as any purpose other than residential, pastoral, agricultural or mining. 'Agricultural' does not include horticultural for these purposes. Special purpose leases can be granted over areas reserved for other purposes. However, special purpose leases can only be granted if the proposed use or development is consistent with the development provisions of the Planning Act (NT). Further, foreign companies cannot hold a special purpose lease, a sub-lease of a special purpose lease, or be a mortgagee over a special purpose lease without the approval of the Minister. Special purpose leases can be subject to a wide range of terms and conditions, and be for a term of years or in perpetuity. The SPL Act contains specific provisions concerning the resumption of special purpose lease land, and the payment of compensation in these circumstances.

The management of, and issuance of leasehold interests in, Crown land in Queensland is governed by the *Land Act 1994* (Qld). There are three main types of Crown leasehold interests that can be issued under this Act: term leases; perpetual leases; and freeholding leases. Details of these leases are provided in Table 3-3).

Table 3-3 Types of leasehold interest in Crown land in Queensland

INTEREST TYPE	COMMENT
Term leases (s 15, Chpt 4, Pt 3 & Chpt 8, Pt 4)	Section 15, and Chapter 4, Part 3, of the Act give the Minister the power to issue fixed-term leases for specific purposes for up to 100 years. Generally, the term will be limited to a maximum of 50 years but longer terms can be issued for significant developments, timber plantations and projects involving a high level of investment (s 155). Leases over state reserves are limited to a maximum of 30 years (s 32). Term leases can only be used for the specific purposes identified in the lease, although there is the capacity for the Minister to approve additional purposes. Term leases are also subject to a range of mandatory conditions relating to the management of the land, including a general duty of care. For agricultural, grazing and pastoral purpose term leases, the duty of care explicitly includes the obligation to take all reasonable steps to, amongst other things, avoid causing dryland salinity, conserve soil, protect riparian vegetation, maintain native grassland free of encroachment from woody vegetation, manage declared pests and conserve biodiversity (s 199). Term leases can be subject to other conditions at the discretion of the Minister. In addition, term leases cannot be transferred, sublet, subdivided or amalgamated without government approval (ss 322, 332, 175 and 176J). In addition to allowing for the creation of new term leases, the *Land Act* provides for the continuation of four types of pastoral leases that existed under the previous regime (pastoral holdings, pastoral development holdings, preferential pastoral holdings and the stud holdings) as term leases. Term leases can be rolling term leases, in which case the term of the lease can be extended at any time for the same length as the original term. Leases for agriculture, grazing or pastoral purposes covering more than 100 hectares are treated as rolling term leases. There is also scope for leaseholders to apply to the Minister for their lease to be declared a rolling term lease.
Perpetual leases (s 15, Chpt 4, Pt 3 & Chpt 8, Pt 3)	Section 15, and Chapter 4, Part 3, of the Act give the Minister the power to lease unallocated Crown land for specific purposes in perpetuity. With the exception of their term, perpetual leases are subject to similar statutory reservations and conditions as those applying to term leases. Like term leases, they must be for a specific purpose and the lessee can only use the land for that purpose. Perpetual leases are also subject to mandatory statutory conditions, can be subject to other conditions imposed by the Minister, and they cannot be transferred, sublet, subdivided or amalgamated without government approval. The fact perpetual leases do not expire makes them similar to a freehold estate, only they are subject to more reservations and conditions, a requirement to pay rent, and, like all leases, they can be terminated on account of failing to pay rent or non-compliance with conditions. Several types of leases that existed under the previous regime are continued as perpetual leases, including grazing homestead perpetual leases.
Freeholding leases (s 15, s 166, and Chpt 8, Pt 2)	Sections 15 and 166 allow for the Governor in Council to issue freeholding leases; leases that convert to freehold after the satisfaction of conditions and the payment of the purchase price over a term of years. In addition, under Chapter 8, Part 2, several types of leases that existed under the previous regime are continued as freeholding leases, including grazing homestead freeholding leases. Freeholding leases are subject to similar statutory reservations and conditions as those applying to term and perpetual leases, including in relation to use, management, transfer, subletting, subdivision and amalgamation.

Indigenous rights and freedoms to access Crown leasehold land

In the 19th and 20th centuries, in order to prevent the complete displacement of Indigenous communities, many Crown leases in agricultural areas explicitly provided for Indigenous people to continue to access and use the subject land for hunting, gathering and other traditional purposes.[10] It is important to emphasise that, even in areas where leases were subject to these terms, Indigenous people were still subject to injustices and displacement. However, the terms imposed on leasehold interests sought to mitigate these impacts to some extent.

Today, many types of Crown leasehold estates in northern Australia are still subject to express terms that enable Indigenous people to access the land for traditional purposes. In the Northern Territory, pastoral leases issued under the *Pastoral Land Act* (NT) must be subject to 'a reservation in favor of the Aboriginal inhabitants of the Territory', which entitles Indigenous people of the area to access and use the land for sustenance and traditional purposes.[11] Fixed-term and perpetual leases granted under the *Crown Lands Act* (NT) can be subject to requirements for the same reservation.[12]

The other notable aspect of the *Pastoral Land Act* (NT) is that it allows for the excision of fee simple estates from pastoral leasehold land for the purposes of Indigenous community living areas.[13] Applications are made to, and determined by, the Minister responsible for the administration of the *Pastoral Land Act* (NT), although applications can be referred to the Territory Civil and Administrative Tribunal for advice. Where such grants are made, the fee simple estate must be held by an incorporated association consisting of the relevant Indigenous people. Similar to other Aboriginal freehold land, fee simple estates granted for community living areas cannot be disposed of, or dealt with, without the consent of the responsible Territory Minister.[14]

In Queensland, the *Land Act 1994* (Qld) does not require the inclusion of reservations in Crown leases in favor of Indigenous people. Up until the early 1900s, pastoral leases were routinely subject to express reservations of this nature (Dalziel, 1999). However, this practice ceased after this time. The absence of an express reservation does not necessarily mean Indigenous people are not entitled to access and use leasehold land, particularly since the recognition of native title.[15] Further, the *Land Act* provides for the making of Indigenous access and use agreements between lessees and Indigenous people about the conduct of traditional activities on the lease land.[16] Indigenous access and use agreements, and Indigenous land use agreements made under the *Native Title Act 1993* (Cth) (see below), that satisfy specific requirements and are approved by the state lands Minister, can create

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[10] *Wik Peoples v Queensland* [1996] HCA 40.
[11] *Pastoral Land Act* (NT), s 38.
[12] *Crown Lands Act* (NT), s 37. The *Crown Lands Act* (NT) (s 88) also prohibits the issuance of grazing licences over Crown lands reserved for the use and benefit of Indigenous people.
[13] *Pastoral Land Act* (NT), Part 8; *Lands Acquisition Act* (NT), s 46(1A); *Crown Lands Act* (NT), s 20.
[14] *Associations Act* (NT), s 110.
[15] *Wik Peoples v Queensland* [1996] HCA 40.
[16] *Land Act 1994* (Qld), Part 4, Div 8D.

'Indigenous cultural interests' that are registrable on title. These interests consist of the right to access and use the land under an approved agreement for the interest.

3.1.3 Aboriginal land traceable to grants from the Crown

Prior to the advent of native title, Australian governments created institutions for the granting of freehold and leasehold estates to Aboriginal land trusts on behalf of Indigenous communities. Through these processes, substantial areas have been transferred back to Indigenous people. Special governance arrangements apply to these Indigenous estates under the relevant statutes to reflect the communal nature of Indigenous land ownership and their special connection with country. These arrangements can restrict the ability for water-related development to occur on Aboriginal land. They can also require consultation and other prescribed processes to be followed prior to proponents receiving relevant interests in land and being entitled to proceed with water-related developments. An overview of the institutions governing 'Aboriginal land' in the Northern Territory and Queensland are provided below.

Northern Territory

The two main statutes concerning Aboriginal land in the Northern Territory are the federal *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and Territory *Aboriginal Land Act 1978* (NT).

The *Aboriginal Land Rights (Northern Territory) Act* provides for the establishment of Aboriginal Land Councils and Aboriginal Land Trusts to govern a system of freehold estates that are held on behalf of Indigenous traditional owners.[17] The Aboriginal Land Councils are required to represent and protect the interests of traditional owners,[18] while Aboriginal Land Trusts are the legal body that formally holds the estates.

Aboriginal freehold land held under the *Aboriginal Land Rights (Northern Territory) Act* makes up 45% of the Roper River Catchment Area[19], and 31% of the Victoria River Catchment Area[20].

There are restrictions on dealings with Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act*. Most significantly, the freehold estate cannot be sold or transferred.[21] Further, while the Act allows for Land Trusts to grant estates and interests in

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[17] While there are differences between ordinary fee simple estates and the fee simple estates created under the *Aboriginal Land Rights (Northern Territory) Act*, the High Court has expressly held that, 'for almost all practical purposes, [the estates issued under the *Aboriginal Land Rights (Northern Territory) Act* are] the equivalent of full ownership'. *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 at [50]. Leasehold estates can also be granted under the Act to Aboriginal Land Trusts in certain circumstances.

[18] The *Aboriginal Land Rights (Northern Territory) Act* sets out the functions and powers of Land Councils but, as corporate Commonwealth entities, the *Public Governance, Performance and Accountability Act 2013* (Cth) also applies to their activities.

[19] CSIRO (2023) Water resource assessment for the Roper Catchment. An overview report from the CSIRO Roper River Water Resource Assessment for the National Water Grid. CSIRO, Australia. Pp. 12.

[20] CSIRO (2024) The Victoria River Water Resource Assessment. A summary report from the CSIRO Victoria River Water Resource Assessment for the National Water Grid. CSIRO, Australia. Pp. 14.

[21] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19.

its land to third parties, it can only do so at the direction of the Land Council and, if the term of the interest exceeds 40 years, with the written consent of the federal Minister for Indigenous affairs.[22] Prior to making a direction concerning the grant of an estate or interest, the Land Council must consult with the traditional owners, ensure they understand the nature of the proposal and give them an opportunity to be heard. Notably, if an estate or interest in Aboriginal land is granted, it cannot be transferred without the consent of the Land Council (and the Minister if their consent was required for the original grant).[23]

The other critical aspect of the governance of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act* are the restrictions on access that arise from the Territory *Aboriginal Land Act* (NT). The *Aboriginal Land Act* (NT) makes it an offence for a person to enter onto or remain on Aboriginal land, unless they hold a permit from the Land Council or are an Aboriginal person who is entitled to do so in accordance with Aboriginal tradition.[24] Prosecutions for entering or remaining on Aboriginal land can only occur with the consent of the Land Council.

Queensland

In Queensland, there are two main statutes that establish special rules concerning Indigenous people and communities in relation to freehold and leasehold interests: *Aboriginal Land Act 1991* (Qld); and *Torres Strait Islander Land Act 1991* (Qld).[25]

The *Aboriginal Land Act* provides for the grant of freehold estates to Aboriginal land trusts and so-called 'CATSI corporations' (corporations registered under the federal *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)), who are required to hold the land on trust for the relevant Indigenous group or community. How grants are made depends on the nature of the land. If land is 'transferrable land' (generally, land reserved for Aboriginal people under the *Land Act 1994* (Qld) or held on trust for Aboriginal people), a freehold estate can be granted on an expression of interest from 'Aboriginal people particularly concerned with [the] land'.[26] If the land is 'claimable land' (generally, Crown land declared to be claimable and land transferred to a Aboriginal entity before 22 December 2006), a freehold estate can only be granted after a claim is duly made by a group of Aboriginal people on the basis of traditional affiliation or historical association and the claim has been heard by the Aboriginal Land Tribunal (the Tribunal provides advice to the responsible Minister on the claim rather than determining it).[27] In addition to providing for the grant of Aboriginal freehold estates, following reforms in 2015, the Act now also allows for individual

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[22] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19.
[23] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19(8). The Act contains provisions for the grant of 99 year community leases. While important, they are unlikely to be of significance to most water-related development in the Roper and Victoria River catchments. See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19A.
[24] Similar restrictions apply to the seas adjoining Aboriginal land. See *Aboriginal Land Act* (NT), Part III.
[25] There is also the *Aboriginal and Torres Strait Islander Land Holding Act 2013* (Qld), which is designed to resolve issues associated with residential and commercial lease applications (so-called 'Katter leases') made under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Qld)*. The leases primarily relate to former Indigenous reserve and mission areas. Further information on these leases is available at: https://www.qld.gov.au/atsi/environment-land-use-native-title/background-land-holding-act.
[26] *Aboriginal Land Act 1991* (Qld), s 35.
[27] *Aboriginal Land Act 1991* (Qld), Part 5.

freehold estates to be granted to Aboriginal and Torres Strait Islander people in particular areas for residential purposes from land held by Aboriginal land trusts and CATSI corporations.[28]

Land held by Aboriginal land trusts and CATSI corporations cannot be sold or mortgaged.[29] Transfers to other Aboriginal land trusts and CATSI corporations is allowed but only with the approval of the responsible Minister and after prescribed procedures have been followed.[30] Aboriginal land held by these entities can be leased, and the leases can be mortgaged.[31] However, there are specific rules governing the exercise of mortgagee's rights to enter into possession under the Act.[32] Some particular types of Aboriginal land are also subject to additional rules, including requirements to obtain ministerial approval (e.g. in relation to township leases).

3.1.4 Covenants and other restrictions on land

In addition to freehold and leasehold estates, there are a number of other types of legal property interests that attach to land, which can influence the scope for water-related development. The three main types are covenants, easements and profits à prendre.

Covenants consist of a right held by one landholder to restrict the use of land held by another (a restrictive covenant), or to compel another landholder to undertake certain actions that benefit the first landholder's land (a positive covenant). Covenants can be imposed as a condition of a grant or in the transfer of title. They can also arise through agreement between landholders and be imposed through statutory processes. Where covenants arise by agreement, the rights will be enforceable in contract against the other party. However, as a property right, covenants are also enforceable against successors in title, although there are restrictions on the extent to which positive covenants can 'run with the land' (i.e. be enforceable against future landholders) (Butt, 2010; Gray et al., 2017).

Federal, state and territory planning and environment legislation provide for creation of a number of different types of statutory covenants that are binding on future landholders and others who obtain an interest in the subject land. For example, under Part 14 of the federal EPBC Act, landholders can enter into conservation agreements with the Minister for the protection and conservation of matters of national environmental significance, including biodiversity, World, National and Commonwealth heritage values, and the environment on Commonwealth land. These agreements can contain both positive and negative covenants, and can require the Australian Government to provide financial and other support for the landholder. The legislation explicitly provides that conservation agreements are binding on the Australian Government, the landholder who entered into the agreement, and 'anyone

[28] *Aboriginal Land Act 1991* (Qld), Part 2A.
[29] *Aboriginal Land Act 1991* (Qld), s 100.
[30] *Aboriginal Land Act 1991* (Qld), ss 104 and 109.
[31] *Aboriginal Land Act 1991* (Qld), Part 10.
[32] *Aboriginal Land Act 1991* (Qld), s 182.

else who is a successor to the whole or any part of any interest that [the original landholder] had, when the agreement was entered into, in any place covered by the agreement'. The Northern Territory and Queensland both have similar statutory provisions for the creation of conservation covenants.[33]

Easements consist of a proprietary right to use or otherwise access another person's land. They typically involve rights of way or easements for the provision of essential services (e.g. electricity, water and sewage). Like covenants, easements can arise under the terms of original grants of title, they can be imposed by statute, and they can be the product of agreement between landholders. As property rights, easements are enforceable against successors in title.

Profits à prendre are a proprietary right to access another person's land and take specific natural resources (e.g. timber, minerals, fruit).

In addition to covenants, easements and profits à prendre, there are now **carbon interests** that can impose restriction or obligations on the current and future use of land. The property laws in Queensland now include provisions for the creation and registration of carbon interests in land. In Queensland, the relevant interest is described as a 'carbon abatement interest', defined as 'an interest in the land consisting of the exclusive right to the economic benefits associated with carbon sequestration on the land'.[34] The Northern Territory currently does not have an equivalent legislative framework for the recognition and registration of carbon interests in land.

In addition to the statutory processes in Queensland, at the federal level, the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (CFI Act) provides incentives for undertaking carbon offset projects on private and public land, including through the sequestration of carbon in biomass (live and dead vegetation and debris) and soils. Where a sequestration project is undertaken on land, the carbon stocks developed through the project are generally required to be maintained for either 25 or 100 years. Proponents of a sequestration project who wish to withdraw from the project must surrender the same number of credits (known as 'Australian carbon credit units' (ACCUs)) as they have previously received from the project. Failing that, the carbon stocks must be maintained for the 25 or 100-year permanence period. If the carbon stocks built through the project are lost during the permanence period, a carbon maintenance obligation can be imposed on the property. A carbon maintenance obligation requires the carbon stocks on the land at the date the obligation is imposed to be maintained. There are a significant number of carbon offset projects currently being undertaken across northern Australia, a number of which are, or are likely to become, sequestration projects. Prior to acquiring an interest in land in the Catchment Areas, proponents should ascertain whether the land is subject to any registered sequestration projects or carbon maintenance obligations.

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[33] Northern Territory: *Territory Parks and Wildlife Conservation Act* (NT) and *Land Title Act* (NT). Queensland: *National Conservation Act 1992* (Qld) and *Land Act 1994* (Qld).
[34] *Land Act 1994* (Qld), s 373R.

Similarly, *Nature Repair Act 2023* (Cth) (the 'Nature Repair Act'), sets out rules for projects under the 'Nature Repair Market' that aim to encourage land management practices that restore and improve biodiversity. There is currently (as of August 2025) only one method approved under the Act, the *Replanting native forest and woodland ecosystems method*, with additional methods expected to be approved in early 2026. Under the Nature Repair Act, a project's permanence period starts once a project is approved and can be for either 25 or 100 years, or for a period specified in a project's method. Projects must be run in accordance with the Act, the *Nature Repair Rules 2024*, and the particular method that the project has been approved in accordance with. Projects approved under the Nature Repair Act will be administered by the Clean Energy Regulator in a similar manner to projects approved under the ACCU scheme. Before acquiring an interest in land, project proponents should check the Clean Energy Regulator's Biodiversity Market Register to determine whether the land is subject to any obligations under approved nature repair market projects.

3.1.5 Equitable (beneficial) interests

Australian law allows for the recognition of equitable interests in land separately from the legal interest. The simplest way in which equitable interests arise is through the creation of express trusts, where, by deed, a trustee holds the legal title on trust (for the benefit of another) for one or more beneficiaries. In this instance, the trustee is the formal owner of the property and the beneficiaries obtain an equitable interest in it. Similar formal trusts can arise through the operation of statute. For example, Aboriginal Land Trusts in Northern Territory and Queensland hold legal estates (freehold or leasehold) on trust for specified Indigenous communities. Beyond formal trusts, it is possible for equitable interests to arise by the operation of law and statutes. For example, an equitable interest can be created when a person seeks to acquire a legal estate in land from another but the transfer fails because the necessary processes were not followed (e.g. it was done orally rather than in writing). Similarly, equitable interests can arise when a contract has been signed for the transfer of an interest in property and the vendor fails to take the necessary steps to transfer the interest.

The relevance of equitable interests for those contemplating undertaking water-related developments in the Catchment Areas is that they can impede dealings with property. The holders of equitable interests in property can, in certain instances, compel the holder(s) of the legal title to undertake or cease certain activities. Equitable interests can also prevail over legal interests in priority disputes, with the consequence that the legal title holder can lose their interest entirely. In addition to the need to be aware of the existence of equitable interests applying to land in this context, trusts can be used by proponents to structure business relations. Trust structures can provide material operational and taxation benefits.

3.1.6 Establishing title, identifying interests and land registration

In Queensland and the Northern Territory, Torrens title is the system of land registration. Registration vests title in the registered holder of the relevant interest and the title so registered is indefeasible; or unable to be defeated by claims of prior defects in the title. There are three core principles behind the system:

- the mirror principle – the notion that the Register provides a complete record of interests in land ('the Register is everything');[35]
- the curtain principle – the notion that the Register is the sole source of information those dealing with registered interests need to concern themselves with (it is not necessary to go behind the register to test the validity of registered interests); and
- the insurance principle – the notion that, if due to error the register does not provide a true and complete record, the government will compensate those who innocently suffer loss as a consequence (Gray et al., 2017).

The mirror principle means those undertaking water-related developments in the Catchment Areas should only need to deal with register when seeking to identify relevant interests in land. All legal property interests—freehold estates, leasehold estates, covenants etc.—should be included on the register and those dealing with the land are entitled to treat the register as containing a complete record.[36]

The main exception to this principle relates to equitable interests. Equitable interests are not formal legal titles. Due to this, they are protected in the Torrens system through caveats. Holders of equitable interests are able to register caveats, which can prevent the registration of other inconsistent interests. Despite the processes for caveats to be recorded, there are instances where an equitable interest can prevail over a registered legal interest; for example, where there has been fraud on behalf of the purchaser or they gave a personal undertaking to recognise the equitable interest.

3.2 Crown land

Government land comes in three forms:

- unallocated Crown land;
- Crown land reserved for a public purposes; and
- government land held as a freehold or leasehold estate.

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[35] *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101 at 106.

[36] Land registries generally do not include details of regulatory restrictions applying to the land (e.g. planning, environmental or heritage approval requirements) or taxes imposed under other statutes (e.g. local government property taxes) (Gray et al., 2017). They usually only record *legal property* interests in land.

3.2.1 Unallocated Crown land

As its name suggests, unallocated Crown land (generally referred to as 'vacant Crown land' in the Northern Territory) is land that has not been reserved for a particular purpose and from which an estate has not been issued to another party. While unallocated, the land is not freely available for the public to use. Any use or occupation of unallocated Crown land associated with water-related development must be authorised under relevant Crown lands statutes.

Freehold and leasehold estates can be issued under the Crown lands statutes in relation to unallocated Crown land. However, prior to the issuance of an estate in the land, in order to occupy and use unallocated Crown land, proponents of water-related development must obtain a licence (or permit) to do so.[37] These licences do not confer any legal interest in the land; they merely make the occupancy and use lawful. Consistent with this, these licences can generally be readily amended or cancelled, usually without a need for the government to pay compensation. Special rules apply to Indigenous peoples' use of unallocated Crown land, particularly where the land is subject to native title.

3.2.2 Crown land reserved for a public purpose

The Crown land statutes in the Northern Territory and Queensland provide for unallocated Crown land to be reserved for public purposes. Through these provisions, public land can be set aside for such things as conservation, community infrastructure, and the welfare of Indigenous people. Reserves are required to be managed in a manner consistent with the purposes for which they are declared. Generally, people wanting to use a reserve must obtain a licence (or permit) to do so and there are restrictions on the purposes for which licences can be issued and the developments that can be undertaken on the land (again, special rules apply to Indigenous peoples' use of Crown land).[38]

In addition to the powers to declare reserves under the Crown lands statutes, the national parks legislation in the Northern Territory and Queensland provide for land to be declared a national park or other nature reserve.[39] There are two main differences between Crown land reserves and reserves managed for conservation purposes under national parks legislation. First, the use and development of declared national parks and nature reserves is subject to more stringent regulatory restrictions than Crown land reserves. Secondly, more stringent processes apply to the revocation of national parks and nature reserves compared to those that apply to Crown land reserves. With reserves declared and managed under Crown land statutes, revocation is effected by the responsible Minister with few restrictions. Conservation reserves managed under national parks legislation generally can only be

[37] The term 'licence' is used in the Northern Territory, while 'permit' is used in Queensland. See *Land Administration Act 1997* (WA), ss 46, 48 and 91; *Crown Lands Act* (NT), Pt 7; *Land Act 1994* (Qld), ss 60 and 177.
[38] *Land Administration Act 1997* (WA), ss 46, 48 and 91; *Crown Lands Act* (NT), Pt 7; *Land Act 1994* (Qld), ss 60 and 177.
[39] *Territory Parks and Wildlife Conservation Act* (NT); *Nature Conservation Act 1992* (Qld).

revoked or reduced after a proposal to do so has been considered by parliament. Parliament can usually veto the proposal by passing a resolution to that effect.[40]

3.2.3 Government freehold and leasehold estates

The federal, state and territory governments can hold freehold, leasehold estates and other interests in land) in their own right, even where they hold the underlying radical title. Government agencies can do the same. There is no formal difference between a freehold, leasehold or other formal legal interest when it is held by a government or government agency, and when the same interest is held by a private party. The only relevance of when such an interest is held by a government or government agency is that it can simplify the property dealings related to any proposed water-related development.

3.3 Native title

Prior to 1992, Australian law did not recognise the traditional title, or ownership, of Indigenous people in land. The High Court's decision in *Mabo v Queensland (No.2)* overturned this, establishing native title as a unique form of property interest under Australian law. Following the decision, the Australian Government passed the *Native Title Act 1993* (Cth), which established a mechanism for determining native title claims, and a national system for the recognition and protection of native title.

Native title is a unique form of property interest under Australian law consisting of a bundle of rights defined by the laws and customs of the relevant Indigenous community. Unlike other forms of interest in land, native title is not obtained or held 'of the Crown'. It sits outside of the system of land law derived from England, including the doctrine of tenure and doctrine of estates. This is a product of the fact native title is not 'of the common law'; rather it is the common law's way of recognising Indigenous laws and customs concerning land. As the High Court stated in *Fejo v Northern Territory*, '[n]ative title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law'.[41]

Following the High Court's decision in *Mabo v Queensland (No.2)*, the Australian Government passed the *Native Title Act*. The *Native Title Act 1993* (Cth) defines native title, and native title rights and interests, as:

> … the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

[40] Under state and territory planning laws, areas of land, including Crown land, can be zoned for public purposes under relevant planning schemes. The impact of planning laws on the privileges associated with landholdings is dealt with in Section 5.2.
[41] *Fejo v Northern Territory* [1998] HCA 58 at [46].

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.[42]

The *Native Title Act* does not replace or codify the common law established through *Mabo v Queensland (No.2)*. It established a statutory scheme for determining native title claims, and a national system for the recognition and protection of native title. The following subsections provide an overview of the five main elements of the regime established under the Act: native title applications and determinations; registration of native title; compensation for acts affecting native title; the future acts regime, which governs acts that affect native title; and Indigenous land use agreements (ILUAs).

3.3.1 Applications and determinations

Applications for the determination of native title claims are made to the Federal Court. There are two main types of applications: claimant and non-claimant. Claimant applications are made by persons from, and authorised by, the Indigenous group who, according to their traditional laws and customs, hold the claimed native title. Non-claimant applications can be made by the Australian Government, the relevant state or territory government, or a person who holds a non-native title interest in the area over which the determination is sought. Once an application is made, other parties are or can be joined as parties to the proceedings. This includes the relevant state or territory government (represented through a responsible Minister), Indigenous groups with overlapping claims, and people whose interests could be affected by the determination.

Once an application is lodged, the Federal Court must notify the National Native Title Tribunal (NNTT), an administrative agency of the Australian Government established under the *Native Title Act*. The NNTT is required to notify specified parties of the application and, if particular conditions are satisfied (known as the ‘registration test’), the Registrar of the NNTT must register the application on the Register of Native Title Claims. While registration does not determine claim, it confers on the claimant group the status of a ‘registered native title claimant’, meaning they obtain procedural rights, including the right to negotiate on proposed future acts that could adversely affect their claimed native title (e.g. compulsory acquisition or the grant of an inconsistent interest in the land).

In addition to notifying the NNTT, prior to determining a native title application, the Federal Court will usually refer the matter to an appropriate body for mediation. The NNTT conducts

[42] *Native Title Act 1993* (Cth), s 223.

native title mediations referred by the Court. The Federal Court also maintains a list of other appropriately qualified mediators. If agreement is reached through the mediation process, the parties will typically seek a consent determination before the Federal Court. Where an application is unopposed, the Court can bypass the mediation step and determine the application without a hearing. Where an application is opposed, and agreement is unable to be reached through mediation, the Court will determine the application after contested hearings, unless the applicant discontinues the proceedings or they are otherwise struck out as an abuse of process.

Applications are determined by the Federal Court through the making of orders. These orders will determine whether the native title is recognised, the nature of the native title rights, and the geographic boundaries within which the title applies. Two types of native title are recognised:

- exclusive possession, which gives the holders a bundle of rights that stem from traditional Indigenous laws and customs, including the right to control access so as to exclude all others; and
- non-exclusive possession, which gives the holders a bundle of rights that stem from traditional Indigenous laws and customs but not the right to control access.

Registration

Where a native title determination is made, its details must be recorded on the National Native Title Register. The register serves a similar purpose to the land title registries maintained for other interests in land. However, the National Native Title Registry is broader than the state and territory land title registries as it contains details of all native title determinations, not merely those that find native title exists. The National Native Title Registry is also maintained by the Australian Government through the NNTT rather than being the responsibility of the state and territory governments.

The details that must be recorded on the National Native Title Register in relation to each determination include its date, the area it covers, and whether native title is recognised. Where native title is recognised, the entry on the register must include details of who the common law holders of the native title are, a description of the nature and extent of the native title rights and interests, and the name and address of the prescribed body corporate assigned to hold or manage the title for the traditional owners. As part of the determination process, the native title group must nominate a prescribed body corporate to hold the native title on trust for, or manage the native title as an agent of, the group. After the determination is made, and the prescribed body corporate is recorded on the National Native Title Register, it becomes known as the ‘registered native title body corporate’.

Summary statistics on determined native title applications in Northern Territory and Queensland are provided in Table 3-4.

Table 3-4 Determined native title applications, as at 30 June 2025

DETERMINATION OUTCOME	STATE TOTAL
Northern Territory	
Native title across entire determination area	7
Native title across part of determination area	115
Native title does not exist	2
Active applications	32
Queensland	
Native title across entire determination area	160
Native title across part of determination area	38
Native title does not exist	41
Active applications	61

Source: National Native Title Tribunal (2025).

3.3.2 Compensation

In addition to applications for the determination of native title, the *Native Title Act* creates a regime for the payment of compensation to native title holders for acts that affect their native title. For these purposes, acts that affect native title are those that extinguish the native title rights and interests or are wholly or partly inconsistent with their continued existence, enjoyment or exercise.[43] These acts can include the making or amendment of legislation, the grant of property interests, the issuance of government approvals, the reservation of land for public purposes and 'the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation'.[44]

The operation of the compensation regime hinges on a distinction between past acts, intermediate past acts and future acts. 'Past acts' are acts involving the making, amendment or repeal of legislation (legislative acts) that occurred before 1 July 1993 and any other acts (non-legislative acts) that occurred before 1 January 1994.[45] 'Intermediate period acts' are particular non-legislative acts that occurred between 1 January 1994 and 23 December 1996, consisting of such things as the grant of property interests and conduct of public works that were carried out on the assumption native title had been extinguished by the issuance of prior interests (especially leases).[46] 'Future acts' are legislative acts that

[43] *Native Title Act 1993* (Cth), s 227.
[44] *Native Title Act 1993* (Cth), s 226.
[45] To be a past act, the act must also have been invalid (i.e. by virtue of the *Racial Discrimination Act*) but would have been valid but for the existence of the native title.
[46] To be an intermediate period act, amongst other things, the act must have been invalid (i.e. by virtue of the *Native Title Act* or *Racial Discrimination Act*) but would have been valid but for the existence of the native title.

occurred or occur after 1 July 1993 and non-legislative acts that occurred or occur after 1 January 1994, other than intermediate period acts.[47]

The division of relevant acts into these three categories reflects a number of historical events, which turn on four key dates: 31 October 1975; 1 July 1993; 1 January 1994; and 23 December 1996. The first of these, 31 October 1975, is the commencement date of the *Racial Discrimination Act 1975* (Cth). As discussed above, the *Racial Discrimination Act* requires native title to be treated in a manner consistent with other property interests. Discriminatory treatment of native title, involving an act that extinguishes or impairs the rights and interests inherent in the native title but leaves other property interests intact, will result in the relevant acts being invalid.[48] One of the purposes of the *Native Title Act* was to validate 'past acts' that would otherwise be invalid by reason of the operation of the *Racial Discrimination Act*. At the same time as validating these past acts, the *Native Title Act* provides compensation for affected native title holders.[49] If the relevant act occurred before the commencement of the *Racial Discrimination Act*, no compensation is payable.

The relevance of 1 July 1993 and 1 January 1994 is that they were the dates originally selected for the commencement of the new statutory regime. 1 July 1993 was settled on as the start date for a new approach to 'legislative acts' affecting native title. 1 January 1994, the date the *Native Title Act* was enacted, was selected as the start date for 'non-legislative acts' affecting native title. Originally, it was intended that the new 'future acts regime' in the *Native Title Act* would turn on these two dates. Under this regime, all future acts must satisfy one of 11 grounds for validity specified in Part 2, Division 3 of the Act (discussed below). Future acts that do not satisfy one of these grounds are rendered invalid to the extent they affect native title.[50] Where future acts are valid, or validated, under the regime, compensation is provided to affected native title holders.

23 December 1996 was the date the High Court handed down its decision in *Wik Peoples v Queensland*,[51] where it held native title could survive the grant of pastoral leases.[52] Between 1 January 1994 when the *Native Title Act* commenced and the *Wik* decision, governments had been acting on the assumption native title had been extinguished by the issuance of particular property interests, particularly leases. The *Wik* decision cast doubt over the validity of acts that occurred in this period, prompting a need for the creation of the intermediate period acts provisions. Similar to past acts, the intermediate period acts provisions validate the relevant acts, while providing native title holders with a right to

[47] To be a future act, the act must not be a past act and, apart for the *Native Title Act*, it must either: (i) validly affect native title in relation to land or waters; or (ii) be invalid but for the existence of native title (i.e. by virtue of the *Racial Discrimination Act*) and, if it were valid, it would affect the native title.
[48] *Western Australia v Ward* (2002) 213 CLR 1.
[49] Where a past act discriminates against native title holders by denying them a benefit enjoyed by others—for example, where an act extinguishes all property interests affecting an area but provides compensation for only non-native title interest holders—the act will be valid but the *Racial Discrimination Act* extends a right to compensation to native title holders. In these circumstances, compensation must be provided in accordance with the *Native Title Act* (see ss 45 and 50).
[50] *Native Title Act 1993* (Cth), s 24OA.
[51] *Wik Peoples v Queensland* [1996] HCA 40.
[52] Amendments were made to the *Native Title Act* on 30 September 1998 to account for the *Wik* decision.

compensation. The resulting division of the regime into past acts, intermediate period acts and future acts complicates the operation of the compensation provisions.

At a high level, compensation is payable for:

i. past legislative (1 July 1993) and non-legislative acts (1 January 1994);
ii. intermediate period acts (particular acts that occurred between 1 January 1994 and 23 December 1996); and
iii. future legislative (after (1 July 1993) and non-legislative (after 1 January 1994) acts.

Until recently, no compensation was payable for acts occurring before 31 October 1975, however a recent landmark decision by the High Court in *Commonwealth v Yunupingu* [2025] HCA 6 (*Cth v Yunupingu)* marks an expansion in the circumstances under which compensation may be payable.

In *Cth v Yunupingu,* the High Court held that:

> *(i) the power in s122 of the Constitution to make laws for the government of a territory does not extend and has never extended to making a law with respect to the acquisition of property otherwise than on just terms within the meaning of s51 (xxxi) of the Constitution; and*
>
> *(ii) a law is properly characterised as a law with respect to the acquisition of property within the meaning of s 51(xxxi) if and to the extent that the law purported before the commencement of the Native Title Act to appropriate or grant an interest in land which was inconsistent with a native title right or interest in relation to that land then recognised at common law.* [53]

On its face, Section 51A(1) of the *Native Title Act* purports to limit the amount of compensation payable to native title holders to the amount that 'would be payable if the act were instead a compulsory acquisition of a freehold estate'. However, the Australian Constitution guarantees the provision of 'just terms' to those whose property is acquired by the Australian Government. This just terms guarantee is explicitly enshrined in the legislation through sections 51A(2) and 53, meaning native title holders whose rights are extinguished or nullified through the operation of the *Native Title Act* are guaranteed 'just terms' compensation. The legislation provides for the assignment of liability to either the Australian Government, or the relevant state or territory government, on the basis of who is responsible for the act that affects the native title. If the act is attributable to a state or territory, the state or territory government is liable; otherwise the Australian Government is liable.

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[53] *COMMONWEALTH OF AUSTRALIA v YUNUPINGU (ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP) & ORS [2025] HCA 6*

3.3.3 Future acts regime

Water-related development in the Catchment Areas could involve 'future acts' that could be rendered invalid by the operation of the *Native Title Act*, or trigger a right to compensation. In this context, relevant 'future acts' could consist of special legislation (or legislative amendments) made to facilitate the development, the issuance of property interests and approvals to support or authorise the development, and the conduct of related public works. There are three aspects of the *Native Title Act* that are critical to the conduct of such future acts concerning water-related development.

- ***Validity***. Part 2, Division 3 of the *Native Title Act* contains 11 grounds that ensure the validity of certain future acts, summarised in Table 3-5. These grounds are intended to operate as a cascade, meaning the validity of a future act will be governed by the first applicable ground. For example, if a future act is validated by the operation of an Indigenous land use agreement (ILUA), it cannot be validated by any subsequent provision.[54] If a future act does not satisfy one of these grounds, it will be invalid to the extent it affects native title.[55]
- ***Procedural requirements and rights***. The *Native Title Act* requires certain procedures to be followed when conducting valid future acts. It also confers procedural rights on representative Indigenous bodies, registered native title bodies corporate and registered native title claimants in relation to the conduct of valid future acts. These include rights to notice, comment, consultation and negotiation. Details of these procedural requirements and rights are provided in Table 3-5.
- ***Compensation***. While Part 2, Division 3 of the *Native Title Act* ensures the validity of certain future acts, it also provides rights to compensation for affected traditional owners. Generally, liability for compensation formally attaches to the government responsible for the future act. However, private parties can be liable to pay compensation, particularly via governments wholly or partially passing liabilities onto private entities undertaking developments through contracts or other legal means.

[54] *Native Title Act 1993* (Cth), s 24AB(2).
[55] *Native Title Act 1993* (Cth), s 24OA.

Table 3-5 Grounds for validity of future acts affecting native title

LEGISLATIVE REFERENCE (PT 2, DIV 3)	GROUNDS FOR VALIDITY	COMMENT
Subdiv B-E	Indigenous land use agreements (ILUAs)	Future acts will be valid if done in accordance with a registered ILUA. ILUAs are agreements between native title holders or claimants and other interested parties concerning the use of land and management of native title. The agreements are voluntary and can provide for a wide range of terms (see Section 3.3.5 for more details).
Subdiv F	Non-claimant application	Future acts will be valid if done in an area covered by a non-claimant application (native title application by a government or a person who holds a non-native title interest in the area) so long as, at the time the act occurs: (i) the notice period for the application has ended; (ii) no native title claim was made covering the area during the notice period; and (iii) no entry has been made on the National Native Title Register that native title exists in relation to the area.
Subdiv G	Acts related to primary production on non-exclusive leases	Subdivision G ensures the validity of future acts involving primary production in three circumstances. A. Where the future act authorises or requires the conduct of a primary production activity, or an activity incidental to a primary production activity, on an area subject to a non-exclusive agricultural or pastoral lease granted before 24 December 1996. However, this does not apply where: (i) the future act has the effect of allowing or requiring the majority of the area of greater than 5,000 ha to be used for purposes other than pastoral purposes; or (ii) the future act involves the conversion of the non-exclusive possession lease into a freehold estate or exclusive possession lease. Further, where the primary production activity involves forestry, horticulture or aquaculture, or an agriculture activity on a non-exclusive pastoral lease, relevant representative Indigenous bodies, registered native title bodies corporate and registered native title claimants must be notified and given an opportunity to comment. B. Where the future act permits or requires the carrying on of grazing, or an activity relating to gaining access to water for primary production, that takes place in an area adjoining or near the area covered by a freehold estate, agricultural lease or pastoral lease that is used for primary production that was granted on or before 23 December 1996. Provided the act does not prevent native title holders having reasonable access to the area, then the future act will be valid. Prior to the future act being undertaken, relevant representative Indigenous bodies, registered native title bodies corporate and registered native title claimants must be notified and given an opportunity to comment. C. Where the future act, not involving the grant of a lease, confers on a person a right to cut timber or to engage in mining activities from an area covered by a non-exclusive agricultural or pastoral lease granted on or before 23 December 1996. The future act will be valid, provided notice has been given to representative Indigenous bodies, registered native title bodies corporate and registered native title claimants and they have been provided an opportunity to comment on the act.
Subdiv H	Management and regulation of water and airspace	Future acts consisting of the making, amendment or repeal of legislation, or grant of a lease, licence or permit, in relation to the management or regulation of surface and subterranean water, living aquatic resources or airspace will be valid. The management or regulation of water includes granting access to water and taking water. Prior to the future act being undertaken, relevant representative Indigenous bodies, registered native title bodies corporate and registered native title claimants must be notified and given an opportunity to comment.

LEGISLATIVE REFERENCE (PT 2, DIV 3)	GROUNDS FOR VALIDITY	COMMENT
Subdiv I	Pre-existing rights and renewals and extensions of leases, licenses and permits	Subdivision I ensures the validity of two types of future acts. A. Pre-existing right-based acts, being acts done (i) in exercise of a legally enforceable right created by an act done on or before 23 December 1996; or (ii) in good faith in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996. If the future act consists of the grant of a freehold estate, or the conferral of a right of exclusive possession, over particular land or waters, relevant representative Indigenous bodies, registered native title bodies corporate and registered native title claimants must be notified and given an opportunity to comment. B. Permissible renewals and extensions, being the renewal or extension of a lease, license or permit that satisfies particular requirements in Section 24IC, including that it does not confer a right of exclusive possession, does not enlarge a pre-existing proprietary interest, and (if the area is greater than 5,000 ha and the original interest was a non-exclusive pastoral lease) does not have the effect of allowing the majority of the area to be used for purposes other than pastoral purposes. If the original interest contained a reservation for the benefit of Indigenous people, the renewal or extension must be subject to the same reservation. If the act is done by the Australian Government, or a state or territory government, and it creates a right to mine, it will give rise to a Subdivision P ‘right to negotiate’ (see below). If the future act involves the renewal of a non-exclusive agricultural or pastoral lease, and the term of the lease is longer than the original or the new lease is a perpetual lease, the relevant representative Indigenous bodies, registered native title bodies corporate and registered native title claimants must be notified. If a claimant or body corporate objects to the act, the government or third party must consult with them and, if they request, ensure the matter is heard by an independent person.
Subdiv JA	Public housing and other facilities for the benefit of Indigenous people	Future acts involving the provision of public housing and other public services by a government entity for the benefit of Indigenous people on land held for the benefit of the Indigenous people conducted within a prescribed period will be valid, provided there are laws in place for the protection and preservation of places of Indigenous significance on the site. Relevant representative Indigenous bodies, registered native title bodies corporate and registered native title claimants must be notified and given an opportunity to comment by the responsible government entity. If a registered native title claimant or registered native title body corporate requests it, the government entity must also consult them about ways of minimising impacts on the native title rights and interests, access to the land or waters, and the way the activities authorised by the act are done.
Subdiv J	Future acts arising on lands reserved for public purposes prior to 23 December 1996	Subdivision J ensures the validity of future acts done on land reserved or leased for particular purposes on or prior to 23 December 1996. Where legislation was made, amended or revoked on or prior to 23 December 1996, and the legislative change conferred a reservation, condition, permission or authority under which the whole or part of the land or waters was to be used for a particular purpose, a future act taken under or in accordance with the reservation, condition, permission or authority will be valid. Examples given in the Act of what the future acts might consist of include the making of a management plan for a national park reserved prior to 23 December 1996, and the issuance of a forestry license on land reserved for forestry purposes prior to 23 December 1996. The lease provisions provide that, where a lease was granted by the Australian Government, or a state or territory government, to a statutory authority for a particular purpose on or prior to 23 December 1996, a future act consisting of the use of the land or waters for the specified purpose will be valid. There are notification requirements that apply to public works and the creation of management plans for conservation reserves. In both instances, relevant representative Indigenous bodies, registered native title bodies corporate and registered native title claimants must be notified and given an opportunity to comment.

LEGISLATIVE REFERENCE (PT 2, DIV 3)	GROUNDS FOR VALIDITY	COMMENT
Subdiv K	Acts involving facilities for services for the general public	Future acts involving the authorisation of the construction, operation, maintenance or use of facilities for services for the general public, or the construction, operation, maintenance or use of these facilities by a government entity, will be valid, provided there are laws in place for the protection and preservation of places of Indigenous significance on the site and the future act does not prevent native title holders from having reasonable access to the area. Native title holders and registered native title claimants have the same procedural rights (e.g. to be notified and have the chance to comment) as they would have if they instead held ordinary title to the land or, if the land is subject to a non-exclusive agricultural or pastoral lease, a lease of the same kind.
Subdiv L	Low impact future acts	Subdivision L ensures the validity of low impact future acts, being acts that: take place before, and do not continue after, native title is determined to exist in relation to the relevant area; the act does not involve the grant of a freehold or leasehold estate, conferral of a right of exclusive possession, excavation or clearing of the area (other than for public health, public safety, environmental assessment and other specified purposes), mining, construction of a fixture (something affixed to the land), or waste disposal.
Subdiv M	Legislative and non-legislative acts passing the ‘freehold test’	Subdivision M ensures the validity of future acts that pass the ‘freehold test’, which in broad terms requires native title interests to be treated the same as other property interests. There are two tests: one for legislative acts, one for non-legislative acts. A. For legislative acts (making, amending or repeal of legislation) to be valid, the act must apply in the same way to the native title holders as it would if they held ordinary title to the land and the effect of the act on the native title must not cause the native title holders to be in a more disadvantageous position at law than they would be if they held ordinary title to the land. B. For non-legislative acts, the act will be valid if the act could be done if the native title holders instead held ordinary title to the area and there are laws in place for the protection and preservation of places of Indigenous significance on the site. Native title holders and registered native title claimants have the same procedural rights (e.g. to be notified and have the chance to comment) as they would have if they instead held ordinary title to the land or land adjoining the area concerned. If the act involves the compulsory acquisition of native title so as to enable a government to confer rights and interests on a third party, or the creation or variation of a right to mine to facilitate the construction of mining infrastructure, relevant representative Indigenous bodies, registered native title bodies corporate and registered native title claimants must be notified. If a claimant or body corporate objects to the act, the government or third party must consult with them and, if they request, ensure the matter is heard by an independent person. In addition, if the future act is done by the Australian Government, or a state or territory government, and it creates or varies a right to mine (except one created for the sole purpose of the construction of an infrastructure facility associated with mining) or involves the compulsory acquisition of native title rights and interests (unless the acquisition is to confer rights on the government or is for the purpose of an infrastructure facility), it will give rise to a Subdivision P ‘right to negotiate’ (see below).
Subdiv N	Acts affecting offshore places	Future acts involving offshore places will be valid. Native title holders and registered native title claimants have the same procedural rights (e.g. to be notified and have the chance to comment) as they would have if they instead held any other corresponding non-native title rights and interests.

LEGISLATIVE REFERENCE (PT 2, DIV 3)	GROUNDS FOR VALIDITY	COMMENT

Subdivision P 'right to negotiate'

In specified instances, including where a future act involving the compulsory acquisition of native title rights and interests passes the freehold test (Subdiv M), native title parties are given a Subdivision P 'right to negotiate'. Where this applies, the future act will be invalid to the extent it affects native title unless specified procedures are followed. Native title parties are defined for these purposes as registered native title bodies corporate, registered native title claimants and relevant representative Indigenous bodies. Where the right applies, the government party must provide public notice of the proposed act and give potential claimants 3 months to become native title parties. The government party also must give existing native title parties notice of the proposed act and provide them with an opportunity to make submissions on it. After satisfying the notice requirements, the government party must negotiate with the native title parties in good faith with a view to obtaining agreement to the doing of the future act. During the course of the negotiations, any of the parties can request mediation from the relevant arbitral body (e.g. NNTT or other specified state/territory bodies). Further, after 6 months from the notification day specified in the public notice, any negotiating party can make a future act determination application to the relevant arbitral body. Where an application is made, the arbitral body is empowered to make a determination, as soon as practicable, having regard to the statutory criteria contained in Section 39. Decisions of the arbitral bodies can be overruled by relevant federal, state or territory Ministers (the federal minster can overrule if the arbitral body is the NNTT and a state/territory Minister can overrule where the arbitral body is a state/territory body).

While the normal procedure requires adherence to the good faith negotiation process, there is an expedited procedure that bypasses these requirements (see sections 32 and 237). For the expedited process to apply, the act must be unlikely to: (i) interfere directly with the carrying on of the community or social activities of the native title holders; (ii) interfere with areas or sites of particular Indigenous heritage significance; (iii) involve major disturbance to any land or waters concerned; and (iv) create rights whose exercise is likely to involve major disturbance to any land or waters concerned. In addition, the government party must include a statement in the notice of the future act to the effect that it considers the act attracts the expedited procedure. Native title parties can object to the application of the expedited procedure to a relevant arbitral body, who can determine whether or not it applies.

3.3.4 Indigenous land use agreements (ILUAs)

ILUAs are agreements between native title parties and others about the use of land and waters subject to native title, or over which native title is claimed. Where a determination is made that native title exists, ILUAs can be used to settle arrangements concerning the area and the treatment of native title. Separately from native title determinations, ILUAs can be used to proactively determine arrangements for native title and the use and development of an area. Consistent with this, ILUAs can cover a wide range of native title-related matters, including: coexistence of native title with other interests; agreement of native title parties to proposed development; extinguishment or suspension of native title; compensation for the adverse effects of past acts, intermediate period acts and future acts on native title; conservation of sites of Indigenous heritage significance; and sharing of benefits of development with native title parties.

There are a number of benefits associated with ILUAs. Most notably, when registered, ILUAs are binding on all parties to the agreement and any person who holds native title in the area who is not a party to the agreement. The binding nature of ILUAs on all existing and potential native title parties means they provide certainty about native title rights and interests over the term of the agreement. For native title holders and claimants, ILUAs can also provide certainty about the sharing of benefits of developments affecting native title. In addition, ILUAs ensure the validity of agreed future acts, including those already done.

There are three types of ILUAs: body corporate agreements; area agreements; and alternative procedure agreements.

- **Body corporate agreements**. Body corporate agreements can only be made where native title has been determined and registered over the entire agreement area and they must include the registered native title bodies corporate for the area. In addition, where the ILUA provides for the extinguishment of native title rights and interests by surrender to the Australian Government, or a state or territory, the relevant government must be a party to the agreement. Body corporate agreements must cover at least one of a number of specified matters, which include: the doing of future acts or classes of future acts; the relationship between native title rights and interests and other rights and interests; the manner of exercise of native title rights and interests or other rights and interests in relation to the area; extinguishment of native title rights and interests by surrender to the Australian Government or a state or territory government; compensation for past acts, intermediate period acts or future acts; and 'any other matter concerning native title rights and interests in relation to the area'.[56]
- **Area agreements**. If native title has not been registered over all of the relevant area, and registered native title bodies corporate do not cover all of the area, an area agreement can be made in relation to it. Because area agreements include areas over which native title has not been determined and registered, they must include all registered native title *claimants* and registered native title bodies corporate. If there is neither a registered native title claimant nor a registered native title body corporate in relation to any part of the area, the agreement must also include any person who claims native title in the area or a relevant representative

[56] *Native Title Act 1993* (Cth), s 24BB(f).

Indigenous body for the unclaimed area. Like body corporate agreements, area agreements must cover at least one of a number of specified acts, which include the catch all 'any other matter concerning native title rights and interests in relation to the area'.[57]

- **Alternative procedure agreements**. Like area agreements, alternative procedure agreements can only be made where native title has not been registered over all of the relevant area, and registered native title bodies corporate do not cover all of the area. However, unlike area agreements, alternative procedure agreements cannot provide for the extinguishment of native title rights and interests. The parties to alternative procedure agreements must include all registered native title bodies corporate and representative Indigenous bodies for the area, and all relevant governments (the states and territories where the area is located or, if the area covers areas falling outside of the jurisdiction of the states and territories, the Australian Government). The agreements can also include other parties, including people claiming native title to the area and other landholders.

Summary statistics on ILUAs made in the Northern Territory and Queensland are provided in Table 3-6.

Table 3-6 ILUAs in the Northern Territory and Queensland

	NORTHERN TERRITORY	QUEENSLAND
Body corporate	18	265
Area	120	656
Alternative procedure	0	0
Total	138	921

Source: National Native Title Tribunal (2025).

3.4 Indigenous Protected Areas

Indigenous Protected Areas (IPA) are areas managed for conservation purposes under agreements between Indigenous traditional owners and the Australian Government. They do not involve a separate type of interest in land and are not generally declared under statute. However, the declaration of an IPA is an important statement of Indigenous traditional owners' land management intentions. Accordingly, external proponents of water-related development should be aware of IPAs and the IPA program more generally.

The IPA program was established by the Australian Government in 1997 as a way of recognising the work Indigenous communities do in looking after their country and supporting them to continue and expand these activities (Hill et al., 2011). Under the program, areas are declared as IPAs under voluntary agreements between the Indigenous traditional owners and the Australian Government. Prior to the making of the agreement, a management plan must be prepared that specifies how the area will be managed over the term of the agreement (Hill et al., 2011). The management plans effectively take the place of a statutory instrument as they evidence the traditional owners' intent to manage the land as a conservation reserve and provide the basis for

[57] *Native Title Act 1993* (Cth), s 24CB(f).

the assignment of the reserve to an IUCN Protected Area Management Category (typically V and VI, which provide for a balance between conservation and sustainable use). IPAs form part of Australia's National Reserve System; the Australia-wide system of terrestrial and marine protected areas for conservation purposes.

As of 2025, there were 91 IPAs in Australia, covering an area of 90 million hectares, making up over 50% of Australia's National Reserve System[58] (DCCEEW, 2025). There are another 30 IPAs in development. Indigenous communities may wish to use IPAs as part of their efforts to balance development and conservation values in areas targeted for water-related development. There are a number of IPAs in the Catchment Areas:

- **Southern Gulf Catchment:** (1) Ganalanga-Mindibirrina IPA; (2) Thuwathu-Bujimulla IPA; (3) Nijinda Durlga IPA
- **Victoria River Catchment:** Wardaman IPA
- **Roper River Catchment**: South East Arnhem Land IPA; and, another proposed IPA in the Roper River Catchment, led by Mimal Land Management, is in development.

[58] DCCEEW (2025) 'Indigenous Protected Areas' https://www.dcceew.gov.au/environment/land/indigenous-protected-areas#toc_0 accessed June 2025.

4 Interests in Water

The ‘rights’ to the use, flow and control of all water in the Northern Territory and Queensland are vested in the Crown under state and territory water legislation. These statutes govern the access to water by authorised users. At a high level, the current water governance regimes have a number of common elements including: key definitions related to water resources that set the scope of the regime; processes for water planning; entitlements and regulations concerning taking water, with and without government authorisation; and statutory requirements to obtain government approval for works related to water infrastructure (e.g. dams, bores, levies and pipes).

This section outlines the existing water governance arrangements in the Northern Territory and Queensland, and how they apply in the catchment areas.

4.1 Basis of contemporary water legislation

Water law and policy has evolved considerably since the introduction of the first water statutes in the late 19th century. For the majority of the 20th century, the object of water policy was to facilitate water-related agricultural development. There was substantial government investment in water infrastructure in southern Australia to meet growing demand for water but rights and interests in water remained tied to land. However, rapid growth and over-allocation of available water in southern states led to conflict as regulators sought to balance the interests of users and the need to sustain natural ecosystems. The over-allocation of many systems hindered development by undermining the security of water entitlements.

These issues, compounded by the Millennium Drought (1997-2009), led to a comprehensive national approach to water reform in the early 2000s agreed to by all states and territories under the *2004 National Water Initiative* (NWI). One of the key objectives of the NWI was to separate rights to water from land, and to establish nationally consistent, secure statutory water access entitlements. The NWI specifies the characteristics that these water access entitlements should have, and the need for rights and obligations of entitlement holders to be clearly specified. The NWI envisaged these water entitlements would be similar to property rights in that they would be exclusive, tradable, and enforceable, and be backed by a system of registration similar to Torrens title land. However, unlike ownership of property, water entitlements authorise access to water, rather than ownership of it. This key distinction is reflected in all state water legislation, with states having no proprietary interest in water, only the sovereign right to control its use. The NWI also outlines, amongst other things, the need for statutory-based water planning that reflects regional variability in water supply, and the importance of recognising Indigenous needs in relation to water access and management.

Since the early 2000s, there has been significant reform of water law in Australia, including in Queensland, and the Northern Territory. In the following sections, we consider Indigenous rights to water and then provide an overview of the water governance arrangements in the Northern Territory and Queensland. For each jurisdiction, the discussion is framed around the three main parts of the governance structures: (i) water planning; (ii) approvals for taking water; and (iii) water-related works approvals.

4.2 Indigenous Rights to Water

Up until the 1990s, the interests of Indigenous people in Australia's water resources were largely ignored. The original water legislation passed in the states and territories was designed to promote water-related development, without regard to Indigenous peoples' connection to and interests in water. Australian property law also provided no recognition of native title in water or land. Moreover, the dispossession of traditional lands meant Indigenous people were often unable to engage in their customary activities concerning water.

Institutional changes since the early 1990s have resulted in greater recognition and protection of Indigenous interests in water. The two main vehicles for this have been native title and reforms to the water statutes.

4.2.1 Native title and water

In principle, native title applies to water in the same way as it does to land. This is reflected in the *Native Title Act 1993* (Cth), including its definition of native title (see Section 3.3 above), and in the case law concerning the scope and nature of native title rights.[59] However, the efficacy of native title as a means of protecting Indigenous interests in water will depend on the nature of the traditional rights in water (the recognised 'bundle' of rights) and scope of the water legislation and interests issued under it.

As in the case of native title in land, native title in water can be extinguished by legislation, and by the issuance of interests inherently inconsistent with the continued existence of native title.[60] A threshold question for native title in water is whether the vesting of the 'rights' to the use, flow and control of water in the Crown under water statutes extinguished native title.[61] In *Western Australia v Ward*, the High Court stated in relation to the Western Australian *Rights in Water and Irrigation Act 1914* (WA) that the vesting in the Crown of the 'right to the use and flow and to the control of the water', subject to specified restrictions, 'was inconsistent with any native title right to possession of those waters *to the exclusion of all others*' [emphasis added].[62] This, and several subsequent judicial decisions, have confirmed that native title rights involving the *exclusive possession* of water will not be recognised.[63] However, non-exclusive possession native title rights that entitle the holder to access and use water can exist, and it is possible for these rights to have survived the vesting of control of water in the Crown.[64] As Justice Mansfield held in relation to the Northern Territory *Water Act* (NT) and its predecessor:

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[59] *Commonwealth v Yarmirr* [2001] HCA 56; *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29; *Griffiths v Northern Territory* [2007] FCAFC 178; *Rrumburriya Borroloola Claim Group v Northern Territory* [2016] FCA 776.
[60] *Mabo v Queensland (No.2)* [1992] HCA 23; *Wik Peoples v Queensland* [1996] HCA 40; *Fejo v Northern Territory* [1998] HCA 58; *Western Australia v Ward* [2002] HCA 28; *Wilson v Anderson* [2002] HCA 29.
[61] The effect and consequences of extinguishment will depend on when it occurred. See Section 3.4 for further details on the native title regime.
[62] *Western Australia v Ward* [2002] HCA 28 at [263].
[63] *Griffiths v Northern Territory* [2007] FCAFC 178; *Rrumburriya Borroloola Claim Group v Northern Territory* [2016] FCA 776.
[64] *Attorney-General (NT) v Ward* [2003] FCAFC 283; *Griffiths v Northern Territory* [2007] FCAFC 178; *Rrumburriya Borroloola Claim Group v Northern Territory* [2016] FCA 776.

> … in the present circumstances, the right to access the resources of the claim area, where that right has not already been extinguished for other reasons, has not been extinguished or partially extinguished by the [*Control of Waters Ordinance 1938* (NT)] or the successor legislation in the *Water Act*.[65]

A similar situation exists in relation to tidal waters. The common law does not recognise exclusive possession native title rights and interests in relation to these waters but there can be non-exclusive possession native title.[66] Like all native title, the precise nature of the native title rights in water (tidal or otherwise) will depend on the traditional Indigenous laws and customs of the community involved, and whether the laws, and relevant connection to water and land, have been sustained.

Where native title in water has not been previously extinguished, the *Native Title Act*'s future acts regime described in subsection 3.3.4 will apply to acts associated with water-related development that affect the relevant native title rights. Of particular note in this context is Part 2, Division 3, Subdivision H of the *Native Title Act*, which validates future acts consisting of the making, amendment or repeal of legislation, or grant of a lease, licence or permit, in relation to the management or regulation of surface and ground water, and living aquatic resources. The non-extinguishment principle applies to future acts falling within the scope of Subdivision H, meaning that, where there is an inconsistency between the rights and interests embodied in the native title and those associated with the relevant future act, the native title will not be extinguished but the rights and interests associated with the future act will prevail until they are terminated or otherwise removed.[67] In essence, the non-extinguishment principle results in the suppression of the native title for the duration of the future act. As a consequence of this suppression, the *Native Title Act* provides for affected native title holders to be compensated for the adverse impacts of the future acts on their native title. Prior to the future acts being undertaken, relevant representative Indigenous bodies, registered native title bodies corporate and registered native title claimants must also be notified and given an opportunity to comment.[68]

For native title holders wanting to undertake water-related development, it is important to note that any native title rights to take water are subject to the regulatory restrictions under the applicable water statutes. As outlined earlier in this section, there are legislative entitlements to take water without approval for certain purposes. However, most larger-scale water developments will require explicit approval and entitlements covering the taking of the relevant quantities of water.

Another important element associated with native title concerns the rights of native title holders to exclude access to water resources. As discussed, native title cannot include rights to exclusive possession of water. However, exclusive possession native title can exist over lands containing surface and ground water resources, which can enable native title holders to restrict access to

[65] *Rrumburriya Borroloola Claim Group v Northern Territory* [2016] FCA 776 at [469].
[66] *Gumana v Northern Territory* [2007] FCAFC 23.
[67] *Native Title Act 1993* (Cth), s 238.
[68] Failure to comply with these procedural requirements will not result in the invalidity of the relevant future acts. *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [1999] FCA 1633.

water. People wanting access to water resources on exclusive possession native title land must obtain consent from the native title holders.

4.2.2 Statutory recognition of Indigenous interests in water

There have been attempts to reform state and territory water statutes in recent decades to recognise and protect Indigenous interests in water resources. These attempts have been guided by the *2004 National Water Initiative* (NWI), to which Queensland, and the Northern Territory are signatories. Relevantly, the NWI emphasises that water access entitlements and planning frameworks should 'recognise Indigenous needs in relation to water access management'.[69] It also includes the following undertaking in relation to Indigenous access to water.

> The Parties will provide for indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, through planning processes that ensure:
>
> (i) inclusion of indigenous representation in water planning wherever possible; and
> (ii) water plans will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.[70]

In relation to the preparation of water plans, the NWI states that the plans should take into account the possible existence of native title rights to water in the catchment or aquifer area, and that water plans must account for water allocated to native title holders for traditional cultural purposes.

There is currently a commitment from the Australian, state and territory governments to work together to renew the National Water Initiative, considering recommendations from Productivity Commission inquiries held in 2017, 2020 and 2024. These recommendations included increasing Indigenous Australians' involvement and influence in water resource management.[71]

The extent to which these principles have been reflected in state and territory water statutes varies. The following sections provide an overview of the extent to which the water statutes in the Northern Territory and Queensland provide for Indigenous involvement in water planning and protect Indigenous interests through the provision of special rights and privileges.

4.3 Water regulation in the Northern Territory

In the Northern Territory, the primary piece of legislation governing water planning and management is the *Water Act 1992* (NT) (Water Act (NT)). The administration of the Act is the responsibility of the Minister for Environment and the Controller of Water Resources, who is appointed by the Minister. Amendments to the Water Act made under the *Water Amendment*

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[69] *National Water Initiative*, para 25(ix).
[70] *National Water Initiative*, para 52.
[71] Australian Government Department of Climate Change, Energy, the Environment and Water (2023) 'National Water Initiative' https://www.dcceew.gov.au/water/policy/policy/nwi accessed 15 September 2023.

(Aboriginal Water Reserves) Act 2025 (NT) aim to 'activate Aboriginal Water Reserves for the economic benefit of Aboriginal people and the Northern Territory'[72].

The Water Act (NT) contains legislative tools that can be used to control the extraction and use of water, including:

- a power to declare 'Water Control Districts';
- a power to declare the 'Beneficial Uses' of water in a Water Control District (beneficial uses are the environment and Aboriginal economic development);
- a power to declare 'Water Allocation Plans' for Water Control Districts;
- a power to declare a 'Restricted Water Extraction Area'; and
- a requirement for the extraction of surface and groundwater, other than for domestic and stocking purposes, to be licensed under the Act.[73]

The water allocation planning framework established by the Water Act (NT) aims to ensure water allocation within sustainable limits. The two principal processes in this framework are the creation of water control districts and water allocation plans, both of which are done on a regional basis.

4.3.1 Declared Water Control Districts

Section 22 of the Water Act (NT) gives the Minister the power to declare a part of the Territory to be a Water Control District and allocate a name to the district. Typically, these districts are declared in areas where there is a demand for water such that additional controls are required. At the time of writing, there were eight Water Control Districts:

- Alice Springs (declared in 2007);
- Daly Roper Beetaloo (declared in 2022);
- Darwin Rural Adelaide River (declared in 2024);
- Gove (declared in 2022);
- Great Artesian Basin (declared in 2010);
- Tennant Creek (declared in 2009);
- Ti Tree (declared in 2009); and
- Western Davenport (declared 2009).[74]

When a Water Control District is declared, the Administrator of the Territory can declare the 'beneficial uses' of water in the district to guide water planning decisions.[75] The declaration of beneficial uses identifies the water uses for the region, water resource or management area,

[72] Explanatory Statement. Water Amendment (Aboriginal Water Reserves) Bill 2025.

[73] Under the Water Act 1992, the Administrator of the Territory, on the recommendation of the water minister, can make declarations exempting specified actions involving the extraction of surface or groundwater from the requirements to obtain a licence. See Water Act 1992, ss 44(7) & (8) and 47(1).

[74] The declaration dates refer to the most recent declarations. In most cases, these declarations replaced earlier declarations.

[75] Water Act (NT), s 22A. Under s 73 of the Water Act (NT), the Administrator can also declare beneficial uses relating to water quality, which apply generally or in relation to a specific area. Where this occurs, all licences and other consents issued under the Act become subject to a condition that nothing is to be done or permitted to be done that prejudices the beneficial use in the area to which the declaration applies.

which then inform the water planning process and water allocations. There are currently ten categories of beneficial uses:

- Aboriginal economic development – to provide water for Aboriginal economic development.
- agriculture – to provide irrigation water for primary production;
- aquaculture – to provide water for commercial production of fish and other aquatic animals;
- cultural – to provide water to meet aesthetic, recreational and cultural needs;
- environment – to provide water to maintain the health of aquatic ecosystems;
- industry – to provide water for other industry uses; and
- mining – to provide water for a mining activity;
- petroleum activity – to provide water for a petroleum activity;
- public water supply – to provide source water for drinking purposes delivered through community water supply systems;
- rural stock and domestic – to provide water for stock and domestic purposes.

Aboriginal economic development was added in 2020 with the commencement of the *Water Further Amendment Act 2019* (NT). It is defined for these purposes as 'economic development by or for the benefit of eligible Aboriginal people'.

4.3.2 Water Allocation Plans

Function of Water Allocation Plans

Water Allocation Plans guide the allocation and management of water in Water Control Districts and set rules for trading water entitlements between licensees. To facilitate this, the plans describe the water resource subject to the Water Allocation Plan, identify the water requirements of key environmental and cultural values and determine the sustainable yield for diversions and allocations to beneficial uses.[76] Water Allocation Plans can also create management zones and protection areas to help better manage the resource.

The specific statutory requirements for Water Allocation Plans under the Water Act (NT) are that they must ensure:

- water is allocated within the estimated sustainable yield to beneficial uses, and this must include an allocation to the environment and where there is eligible land with access to the water resource there is an allocation to an Aboriginal water reserve that can be used for Aboriginal economic development;
- the total water use for all beneficial uses is less than the sum of the allocations to each beneficial use;
- the right to take water under a licence is able to be traded; and

[76] 'Sustainable yield' generally refers to a level of water extraction that protects relevant environmental, social and economic values. For example, the NWI defines 'environmentally sustainable level of extraction' as 'the level of water extraction from a particular system which, if exceeded would compromise key environmental assets, or ecosystem functions and the productive base of the resource'. Although informed by science, the process of determining the sustainable yield involves normative judgments concerning what environmental, social and economic values should be protected.

- as far as possible, the full cost for water resources management is to be recovered through administrative charges to licensees and operational contributions from licensees.[77]

Notably, a Water Allocation Plan area can comprise all or part of the Water Control District. This means there can be multiple Water Allocation Plans in a Water Control District.

Processes for the preparation of Water Allocation Plans

Under the Water Act (NT), water resource management in water control districts must be in accordance with declared Water Allocation Plans.[78] The Controller of Water Resources is explicitly required to have regard to Water Allocation Plans, including the allocations to beneficial uses, in granting water extraction licences.[79]

The *Northern Territory Water Allocation Planning Framework*, establishes rules for the making of contingent allocations between non-consumptive and consumptive beneficial uses.[80] These contingent allocation rules are supposed to guide allocation decisions both inside and outside Water Allocation Plan areas where there is inadequate scientific information available about environmental and non-consumptive water requirements. Allocations made using these rules are supposed to be 'contingent' in the sense that, if reliable scientific information becomes available, alternative allocations can be made.

Under the above Framework, there are two sets of contingent allocation rules: one for the top end (northern 1/3rd of the Territory); and another for the Arid Zone (southern 2/3^{rds} of the Territory). In the top end, the default rules require at least 80% of the flow in rivers to be allocated to 'environmental and other public benefit water provision' as the first priority, with diversions for consumptive uses made after this and limited to the equivalent of 20% of flow at any time in any part of the river.[81] If current or projected consumptive use exceeds 20%, no new surface water extraction licences are meant to be granted, 'unless supported by directly related scientific research into environmental other public benefit requirements'.[82]

A similar 80:20 contingent allocation rule applies to groundwater in the Top End. At least 80% of annual recharge is meant be allocated to environmental and other public benefit water provision as the first priority, with up to 20% for consumptive uses. Like the surface water rules, if current or projected consumptive use exceeds the 20% threshold, no new groundwater extraction licences are meant to be granted, unless supported by either directly related scientific research into groundwater dependent ecosystem/cultural requirements, or hydrological modelling confirming that total groundwater discharge will not be reduced by more than 20%.

In the Arid Zone, a 95:5 contingent allocation rule applies to water allocations from surface water resources, the terms of which are the same of those in the top end, only 95% of flows are reserved

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[77] Water Act (NT), s 22B(5).

[78] Water Act (NT), s 22B(4).

[79] Water Act (NT), s 90.

[80] Department of Environment and Natural Resources (2000) *Northern Territory Water Allocation Planning Framework*. Northern Territory Government, Darwin.

[81] Ibid, p. 1-2.

[82] Ibid, p. 1.

for environmental and other public benefit water provision. In relation to groundwater in the Arid Zone, the rules require:

- extractions for consumptive purposes to not have any deleterious impact on groundwater discharges to dependent ecosystems; and
- total extractions over a period of at least 100 years to not exceed 80% of the total initial aquifer storage (i.e. storage at the time of initial extraction).

Vanderbyl (2024) provides more comprehensive overview of the Northern Territory's water planning arrangements and provisions that apply to the allocation, licensing and management of surface and groundwater resources within the Victoria and Roper river catchments.[83]

Aboriginal water reserves

The *Northern Territory Strategic Aboriginal Water Reserves Policy* establishes a formal framework for the creation and management of 'Strategic Aboriginal Water Reserves'.[84] These Reserves are defined in the policy as:

> … a reserved percentage of water from the consumptive pool within a Water Allocation Plan area exclusively accessible to eligible Aboriginal people to use, or trade.[85]

The policy commits the Territory Government to create Strategic Aboriginal Water Reserves in all Water Control Districts in which Indigenous people hold rights in land that enable them to access and use of water for consumptive beneficial uses. The only exception to this is where Indigenous people hold all land in a district that could conceivably be used to access water. In these instances, the Indigenous rights holders will have exclusive access to the water resources, meaning there is no need for a Strategic Aboriginal Water Reserve.

Recent amendments to the Water Act (June, 2025) aim to 'activate Aboriginal Water Reserves for the economic benefit of Aboriginal people and the Northern Territory'[86] by simplifying processes and removing the requirement to 'consult specifically with land councils regarding the designation of eligible land'[87]. Specifically, amendments have been made to section 22C of the Water Act specifying that:

> A water allocation plan may designate eligible land as land in respect of which an Aboriginal water reserve applies if:
>
> (a) the land is of more than 1 hectare; and
> (b) there are water resources:
> (i) for surface water – on or immediately adjacent to the land; or

[83] Vanderbyl T (2024) The Northern Territory's water planning arrangements. A technical report from the Victoria River Water Resource Assessment for the National Water Grid. CSIRO, Australia.

[84] Northern Territory Government (2017) *Strategic Aboriginal Water Reserve: Policy Framework*. Northern Territory Government, Darwin.

[85] Ibid, p. 3.

[86] Explanatory Statement. Water Amendment (Aboriginal Water Reserves) Bill 2025.

[87] Ibid.

(ii) for groundwater – beneath the land.[88]

Under section 4B of the Water Act, eligible land is defined as including:

(a) Aboriginal land as defined in section 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth);*

(b) Land in relation to which, under the *Native Title Act 1993* (Cth), a determination of native title was made that native title rights and interests to possess, occupy, use and enjoy land and waters to the exclusion of all others exist on the land and those rights and interests were not subsequently extinguished.

(c) Freehold land, land held under a lease in perpetuity or land held under a lease for a term that expires on or after the expiry of the water allocation plan:

    (i) if the title holder of the land or lease is one of the following:

        (A) an incorporated association under the *Associations Act 2004;*

        (B) an Aboriginal and Torres Strait Islander Corporation established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth);

        (C) a trust established under a land of the Territory; and

    (ii) to which at least one of the following applies:

        (A) the land or lease is granted under a law of the Territory as part of the settlement of a land claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth);

        (B) the title to the land or lease is expressly held by or for the benefit of Aboriginal people and a law of the Territory or a law of the Commonwealth imposes a restriction on the use, occupation or any dealing with the land for the purpose of ensuring the title to the land or lease is held by or for the benefit of Aboriginal people.

Also of relevance are amendments to section 71B of the Water Act, which states that:

> The Controller must not grant a water extraction licence in relation to an Aboriginal water reserve unless the Controller is satisfied that:
>
> (a) the applicant for the licence is an eligible Aboriginal person for the eligible land in respect of which the Aboriginal water reserve applies; or
>
> (b) the applicant for the licence has obtained the agreement of the eligible Aboriginal people for the eligible land in respect of which the Aboriginal water reserve applies to apply for the licence.

[88] Except for residential land

The percentage of the available consumptive pool that is allocated to Strategic Aboriginal Water Reserves is meant to be set in proportion to the area of eligible Aboriginal land in the Water Allocation Plan area (or applicable management zone within the plan area). Table 4-1 summarises the allocation rules set out in the Strategic Aboriginal Water Reserve Policy Framework.

Table 4-1 Allocation rules for Strategic Aboriginal Water Reserves

AREA OF ELIGIBLE ABORIGINAL LAND WITH DIRECT ACCESS TO WATER RESOURCE AS A PERCENTAGE OF ALL LAND WITH ACCESS TO THE WATER RESOURCE IN WAP AREA (OR APPLICABLE ZONE)	PERCENTAGE OF AVAILABLE CONSUMPTIVE POOL RESERVED IN SWR
0%	No Strategic Aboriginal Water Reserve
More than 0% less than 10%	10%
Between 10% and 30%	Corresponding with actual percentage of eligible land
30% or greater	Capped at 30%
100%	No Strategic Aboriginal Water Reserve

Where there is more than one eligible Aboriginal entity that holds rights to access water in a Water Allocation Plan area, the policy suggests that each entity will have control over a designated proportion of the Strategic Aboriginal Water Reserve. The designated proportion controlled by each entity will be determined on the basis of their proportion of the total eligible land area. For example, if Aboriginal Land Trust 'A' holds 15% of the eligible Aboriginal land, it will control 15% of the Reserve.[89]

4.3.3 Approvals for taking water

Under the Water Act (NT), water extraction licences are required to take water from a waterway or a bore, unless it is for stock or domestic purposes or is covered by an exemption issued by the Administrator of the Territory.[90] The licence requirements are summarised in Table 4-2.

Table 4-2 Licence requirements to take water under the Water Act (NT)

TYPE OF WATER	STATUTORY PRIVILEGE OR LICENCE REQUIREMENT
Water in a waterway	A water extraction licence is required to take water from a waterway except for: • riparian landholders who may take water from a waterway on or immediately adjacent to their land for stock and domestic use, and to water a garden connected to a dwelling of up to 0.5ha • any person may take water from a waterway for domestic use, or for watering travelling stock, as long as they have lawful access to the water
Groundwater	Water extraction licences are required to take groundwater except landholders can take water underneath their land for stock and domestic use, and to water a garden up to 0.5 ha that is connected to a dwelling.

[89] It is worth noting here that this approach is easier to apply to regional scale groundwater than surface water. The issue for surface water is that the amount of water at any location in a river is proportional to the upstream catchment area. This upstream area may not necessarily correlate to the area of land held by Indigenous people that is the basis for the allocation from the reserve.

[90] Exemption declarations can be made by the Administrator under sections 44(7) & (8), and Section 47(1), of the Water Act (NT).

Licences to take water tend to be granted on a ‘first-in-first-serve’ basis, however the Controller may consider a number of measures such as water availability, volume of water needed, and impacts of extraction[91]. Licences are typically issued for a period not exceeding 10 years. They are not attached to land but specify the land on which the water is to be taken and used.[92] Generally, licences are subject to conditions imposing a minimum and maximum amount of water that can be taken by the licence holder. The standard licence conditions also require licence holders to report their water usage on a monthly basis to ensure ongoing compliance with extraction requirements.

Most water extraction licences in the Northern Territory are subject to ‘Annual Announced Allocation’ licence conditions that can limit the amount of water taken in any particular year based on water availability and environmental water requirements.[93] The Water Controller announces Annual Announced Allocations in May each year. These Annual Announced Allocation decisions are guided either by the provisions of an applicable Water Allocation Plan or, in their absence, the contingent allocation rules in the *Northern Territory Water Allocation Planning Framework*.

The Northern Territory Government has a policy to recover unused water entitlements that is intended to encourage water-related development and prevent the speculative accumulation of entitlements.[94] The policy requires licence holders to extract the minimum amount of water required under the licence conditions or face having their entitlements reduced by the Controller. The policy is given effect by powers to unilaterally amend licences under Section 93 of the Water Act (NT), which provides that:

> the Controller may, during the currency of a licence, by notice served on the holder of the licence, amend or modify its terms and conditions in such manner as is specified in the notice.

All licences issued since 2013 have also contained conditions that specify that:

- underutilisation of the water entitlements conferred under the licence may result in the amendment or revocation of the licence by the Controller of Water Resources; and
- licence holders who use less than 90% of their maximum water entitlement for three consecutive 12-month periods must provide a written report to the Controller that explains why the extraction limits were not reached and provides a projection of water use for the following three years (or the remaining term of the licence).[95]

Where the Controller identifies that a licence holder has not met their minimum extraction requirements, the policy requires the Controller to issue a notice to the licence holder specifying the extent of the underuse, how the Controller is proposing to respond and providing the licence

[91] Northern Territory Government (2020) *Processing water extraction licence applications policy*. Northern Territory Government, Darwin.

[92] Water trading is only allowed in water control districts, where a water allocation plan is in place.

[93] Some licenses outside of water allocation plan areas cannot be subject to annual allocation limits.

[94] Northern Territory Government (2020) *Recovery of Unused Licensed Water Entitlements Policy*. Northern Territory Government, Darwin.

[95] Dyson, M., Davison, A. (2017) *Independent Review of Water Extraction Licences (Northern Territory)*. Northern Territory Government, Darwin.

holder with a period within which to respond to the notice, and the Controller will subsequently make a decision on the basis of this response.[96]

4.3.4 Water-related works approvals

Permits or licences are generally required under the Water Act (NT) to undertake water-related works involving waterways and groundwater. Specifically:

- a permit is required to interfere with a waterway including to construct or alter a dam, water storage or other water control structure in a waterway, or in such a way as to affect the flow or likely flow of water in a waterway;
- a permit (known as a 'bore construction permit') is required to construct works to take water from groundwater (including the drilling, construction, alternation, lugging, backfilling or sealing of a bore);[97] and
- a licence is required to recharge groundwater.

Landholders are able to drain their land and capture overland flows by constructing farm dams and other water storages without approval but only if: (i) the works are not in a waterway; and (ii) the works do not sensibly diminish or increase the flow or likely flow of water in, or into, a waterway.

4.4 Water regulation in Queensland

The *Water Act 2000* (Qld) (Water Act (Qld)) is the primary water management statute in Queensland and, under the Act, 'all rights to the use, flow and control of all water in Queensland are vested in the State'.[98] The purpose of the Act is to provide a framework for the sustainable management of Queensland's water resources, including the planning, allocation and use of water.[99] The Act defines 'sustainable management' as management that:

- incorporates the principles of ecologically sustainable development;
- allows for the allocation and use of water resources and quarry material for the economic, physical and social wellbeing of the people of Queensland, within limits that can be sustained indefinitely;
- sustains the health of ecosystems, water quality, water-dependent ecological processes and biological diversity associated with watercourses, lakes, springs, aquifers and other natural water systems, including, where practicable, reversing degradation that has occurred;
- recognises the interests of Aboriginal people and Torres Strait Islanders and their connection with water resources;

[96] Northern Territory Government (2020) *Recovery of Unused Licensed Water Entitlements Policy*. Northern Territory Government, Darwin, p 4.

[97] Under the Water Act (NT), bores can only be constructed, altered, or sealed by a suitable qualified bore driller licensed.

[98] Water Act (Qld), s 26.

[99] Water Act (Qld), s 2.

- enables water resources and quarry material to be obtained through fair, transparent and orderly processes to support the economic development of Queensland;
- builds confidence regarding the availability, security and value of water entitlements and other authorisations; and
- promotes the efficient use of water through—
  - the establishment and operation of water markets; or
  - the initial allocation of water; or
  - the regulation of water use if there is a risk of land or water degradation; or
  - increasing community understanding of the need to use and manage water in a sustainable way; and
- facilitates the community taking an active part in planning for the management and allocation of water.[100]

The implementation of the Act is supported by:

- the *Water Regulation 2016*, which contains rules for various matters, including water entitlements and for reserving or releasing unallocated water;
- statutory water plans that provide a framework for the sustainable management of water; and
- authorisations used to implement a water plan, including resource operations licences, distribution operations licences and operations manuals, as well as statutory instruments in the form of water entitlement notices and water management protocols.

4.4.1 Statutory water plans

Water planning is central to the Act's governance arrangements. The Act provides for two types of plans: water plans and water use plans.

Water plans

Water plans are defined as 'a plan that applies to a part of the State and advances the sustainable management of Queensland's water'.[101] Amongst other things, they prescribe the amount of 'unallocated water' that is reserved under the plan, measures for providing water for the environment, rules for taking water (with and without an entitlement) and rules for issuing water licences. They are made as legislative instruments, meaning they are enforceable under the Act. Water plans expire after 10 years, however they can be repealed, amended or replaced at any time if the Minister is satisfied that the plan is no longer advancing the sustainable management of water. The expiry of a plan can also be postponed meaning a plan can remain in force for up to a maximum of 20 years. The Minister responsible for administering the Water Act (Qld) can also amend or replace a water plan at any time if they are satisfied it is no longer advancing the sustainable management of water.

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[100] Water Act (Qld), s 2.

[101] Water Act (Qld), s 41.

The Water Act (Qld) requires water plans to contain a number of elements, including:

- details of the water to which they apply;
- their desired water plan outcomes, being the 'desired economic outcomes, social outcomes, cultural outcomes and environmental outcomes of the management and allocation of water to which the plan applies';
- the volume of unallocated water reserved under the plan;
- arrangements for providing water for the environment, including the measures, strategies or objectives for environmental flows; and
- if a plan includes a framework for managing water allocations, details of the trading zones for the allocations and the water allocation security objectives.[102]

There are also a number of items that water plans can include, for example: limitations on taking or interfering with water; rules governing when water can be taken or interfered with in the plan area without a water entitlement; the purpose of unallocated water reserves and a process for releasing water from these reserves; and, criteria and processes for making water licencing decisions.[103]

'Unallocated water' is water reserved for a particular use without threatening the security of existing users' entitlements or the environmental and other public good values in the water plan area. There are generally four types of unallocated water reserved in water plans in Queensland (each water plan is different and may reserve water under one or more of these categories):

- strategic or state reserves – water reserved for projects considered to be of state or regional importance. In some water plans, an Indigenous reserve has been made under this category;
- strategic infrastructure – water reserved to facilitate specified water infrastructure projects in the plan area;
- Indigenous reserve – water reserved to help advance the social and economic aspirations of Indigenous people;[104] and
- general reserve – any other purpose.

In Queensland, there is no set 'formula' under the Act or Regulation for determining unallocated water or how it is reserved. Instead, decisions about sustainable flow regimes and water available for allocation are made for individual water plan areas, based on the hydrology of the surface and groundwater within that area, and associated environmental and social values.[105] Water plans detail how unallocated water may be authorised for use within that water plan area.

The Water Act (Qld) sets down a number of procedural steps that must be followed in making a water plan, summarised in Table 4-3. A notable element of the process is that, in making draft

[102] Water Act (Qld), s 43.

[103] See Water Act (Qld), s 43 for a full list of the other items that may be included in water plans.

[104] In Cape York, there is a special reserve known as the 'Cape York Peninsula Heritage Area reserve', which has the same purpose as an Indigenous reserve. See below for further details.

[105] Note that the Queensland Government is currently working towards a framework where flow requirements to support cultural values are understood.

plans, the responsible Minister must give real and proper consideration to the interests any Aboriginal or Torres Strait Islander people may have in the water resources in the plan area. In addition to these requirements under the Water Act (Qld), the *Human Rights Act 2019* (Qld) imposes an obligation on state government entities and public service employees to act in a manner that is compatible with human rights, and to give proper consideration to human rights, when making administrative decisions, including the preparation of water plans.[106] One of the 23 categories of human rights protected by the *Human Rights Act 2019* is the cultural rights of Aboriginal and Torres Strait Islander peoples. These Indigenous cultural rights include the rights to:

- enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings
- maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
- conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.[107]

Table 4-3 Overview of statutory process for preparing water plans in Queensland

STEP	REQUIREMENT AND COMMENT
1	Preliminary public consultation (this stage is discretionary)
2	Preparation of draft plan, having regard to: • relevant regional plans made under the *Planning Act 2016*; • environmental values stated in the *Environmental Protection (Water and Wetland Biodiversity) Policy 2019*; • the Murray-Darling Basin plan (only in water plans areas within the Queensland Murray-Darling Basin); • the public interest. • the results from any preliminary public consultation undertaken; • the impact of climate change on water availability; and • the water related interests of any Aboriginal or Torres Strait Islander parties.
3	Public consultation on the draft plan, which must be a minimum of 30 business days.
4	Consideration of public submissions on the draft plan – as a matter of practice, a report is generally prepared that responds to the issues raised in submissions.
5	Ministerial decision on whether to finalise the plan – the Minister can decide either to finalise or not finalise the draft plan. If the Minister decides not to finalise a draft plan, they must publish a notice advising of the decision and the reasons for the decision.
6	If the Minister decides to finalise the plan, it must be submitted for approval by the Governor in Council.
7	If the water plan is approved by the Governor in Council, the Minister must publish a report stating the considerations made in finalising the plan and providing details of how the issues raised in public submissions were addressed.

Source: *Water Act 2000* (Qld), ss 44-48.

[106] *Human Rights Act 2019* (Qld), s 58.

[107] *Human Rights Act 2019* (Qld), s 28.

The implementation of water plans can be supported by 'water management protocols'.[108] Water management protocols are operational documents made under the Act that set out processes and rules for releasing or allocating water as provided for in a water plan. The matters covered in water management protocols include details of the volumes of unallocated water reserved for particular purposes or in particular locations, water allocation and water sharing rules, and rules governing the assignment of allocations for all or part of year (known as 'seasonal water assignments').[109] The implementation of water plans is also supported by other authorisations such as resource operations licences, distribution operations licences and operations manuals.

There are 23 water plan areas in Queensland.

Water use plans

Water use plans are used to regulate water use where there is a risk of land and water degradation, including salinity, erosion, a deterioration of water quality and waterlogging.[110] Like water plans, they are required to contain a number of mandatory elements. These include a statement of their purpose, a map of the plan area to which they apply, details of the water uses regulated under the plan and standards for water use practices. When made, water use plans become legislative instruments and the use of water in a water use plan area contrary to a water use plan is an offence carrying a maximum fine of over $220,000.[111]

4.4.2 Authority to take water

Under the Water Act (Qld) the taking of, or interference with, water is divided into: (i) authorisations that may not be limited by a water planning instrument; and (ii) authorisations that may be limited by a water planning instrument or mechanism. Details of this division are provided in Table 4-4.

An authorisation to take water can be made through legislation or statutory instruments, or through one of the following authorisations under the Act: water allocations; water licences; water permits; seasonal water assignment notices; resource operations licences; distribution operations licences; and operations licences.[112] A brief explanation of each of these authorisations is provided in Table 4-5 below. Note that, under the Act, a 'water entitlement' means a water allocation, interim water allocation, or a water licence.

[108] Water Act (Qld), ss 67-69.

[109] Water entitlement notices are another instrument that can be used under the Act to assist in the implementation of water plans. These notices can be issued for a number of purposes, including to covert water licences to water allocations, to grant a water allocation as a result of an unallocated water release, and to amend water licences to implement the plan. See Water Act (Qld), ss 70-78.

[110] Water Act (Qld), ss 57-66.

[111] Water Act (Qld), s 809.

[112] Water Act (Qld), s 27.

Table 4-4 Statutory authorisation to take or interfere with water: activities that are, and are not, able to be limited by a water planning instrument or mechanism

ACTIVITIES NOT ABLE TO BE LIMITED BY A WATER PLANNING INSTRUMENT	ACTIVITIES THAT MAY BE LIMITED BY A WATER PLANNING INSTRUMENT OR REGULATION
• Take water for a public purpose in an emergency situation, for fighting fires and undertaking routine testing of firefighting equipment. • Take water for camping purposes and watering travelling stock. • Interfere with water in a watercourse, lake or spring by impoundment for structures used by the State or Commonwealth to collect monitoring data • 'Interfere' (e.g. divert) with overland flow. • Aboriginal and Torres Strait Islander parties can take or interfere with water for traditional activities or cultural purposes. • Land owners adjoining a watercourse can take water for watering stock. • Land owners can take water from dams on their property for stock and domestic purposes. • Water can be taken under specific circumstances and conditions to satisfy the requirements of an environmental authority or environmentally relevant activity. • Approved resource activities can divert a watercourse for the activity. • Constructing authorities and water service providers can take water to operate public showers and toilets, and to construct or maintain infrastructure subject to specified conditions.	• Take water for the purpose of carrying out an activity prescribed by regulation. • Take overland flow for any purpose. • Landholders adjoining a watercourse taking water for domestic purposes. • Take or interfere with underground water for any purpose. • Take water collected in a dam for any purpose, unless that dam is across a watercourse or lake. • Subject to limitations imposed by a moratorium notice, a person in a water plan area may: (i) take water up to a volume stated in a water plan; (ii) take water to carry out an activity specified in a water plan, and (iii) interfere with water to the extent stated in a water plan. • Where a water plan is in place, landholders may take water from a watercourse, lake or spring for stock or domestic purposes, as long as it is from the location and in the way stated in the plan or, if there is no plan, from the location and in the way prescribed by regulation.

Source: Water Act (Qld), s. 95, Part 3, Subdiv. 1 and 2. Adapted from Macintosh et al. (2018)[113].

[113] Macintosh, A., Waschka, M., Jones, J., Wood, A. (2018) Legal, regulatory and policy environment for the development of water resources in northern Australia: A technical report from the CSIRO Northern Australia Water Resource Assessment to the Government of Australia. CSIRO, Brisbane. Table 14, pp 91

Table 4-5 Authorisations to take, or interfere with, water under the *Water Act 2000* (Qld)

AUTHORISATION	COMMENT
Water licence	Water licences are similar to 'traditional' water entitlements as they are attached to land, unless the licensee is a prescribed entity (as defined in the Act) or the licence is an associated water licence granted under Chapter 9, Part 8, Division 2 of the Act. Associated water licences relate to the taking of underground water in the area of a mining tenure, associated with an authorised activity for the tenure. Water licences may authorise the taking of, or interference with, water (in a watercourse, underground water, or overland flow) at a specified location. Water taken under a licence that is attached to land can only be used on that land, except underground water taken under licence for stock or domestic purposes or water taken under licence that is attached to land that is the subject of a water facility agreement. Water licences must state the term of the licence, the water to which it relates, the location from which the water may be taken or interfered with, and any relevant conditions. Unless otherwise stated in a water plan or water management protocol, water licences in Queensland expire on 30 June 2111.
Water allocation	Water allocations can be issued to any authorised person, have a title separate from land, and can be leased or sold. They set a nominal volume, maximum rate and volumetric limit for taking water. Conditions of water allocations will include the location that water can be taken from, the purpose for which water can be taken, and flow conditions under which water can be taken. Water trading rules are set out in the *Water Regulation 2016*, and in water management protocols for each water plan area. The amount of water that can be taken under a water allocation can be set under seasonal water assignment rules and notices, and water management protocols for a water plan area. Water management protocols include water allocation dealing rules (trading rules) for supplemented and unsupplemented water allocations, and seasonal water assignment rules (temporary trading) for unsupplemented water allocations only. These trading rules are different to water sharing rules included in the water management protocol, which outline when an unsupplemented water allocation can take water. Operations manuals include seasonal water assignment rules for supplemented water allocations only. Water sharing rules included in an operations manual state when a supplemented water allocation can take water.
Seasonal water assignment notices	Allows for the reassignment of water (authorised under an existing water licence or water allocation) for a specific period of time, usually within a set water accounting period. Seasonal water assignment notices (or temporary trades) are approved: (a) for water licences – in accordance with processes in the Act, water regulation and in some cases in accordance with the rules in the relevant water management protocol; (b) for unsupplemented water allocations – in accordance with the processes in the Act, water regulation and the rules in the relevant water management protocol; and (c) for supplemented water allocations – in accordance with the processes in the Act, water regulation and rules in the relevant operations manual.
Water permit	Temporary and for specific activities only. They cannot be traded.
Resource operations licence	Authorise interference with water in order to operate water infrastructure (e.g. dams and weirs) and distribute allocated water. These licences can only be held by the owner of the water infrastructure to which the licence relates or the parent company of a subsidiary company that is the owner of the infrastructure. Resource operations licences can only be issued in areas where a water plan exists.
Distribution operations licence	Authorise the holder to take water or interfere with the flow of water to distribute water under water allocations. These licences can be held by the owner of the infrastructure, or an approved entity, and they can be issued whether or not a water plan exists for a particular area.
Operations licence	Authorise taking of water by a person acting as an agent for two or more entitlement holders. This is only allowed for water entitlements that are not managed under a resource operations licence.

Source: Adapted from Macintosh et al. (2018)[114]

[114] Macintosh, A., Waschka, M., Jones, J., Wood, A. (2018) Legal, regulatory and policy environment for the development of water resources in northern Australia: A technical report from the CSIRO Northern Australia Water Resource Assessment to the Government of Australia. CSIRO, Brisbane. Table 15, pp. 92.

The Water Act (Qld) explicitly states that sustainable water management must recognise the connection that Aboriginal and Torres Strait Islander people have with water.[115] Consistent with this, the Act provides that:

> an Aboriginal party or Torres Strait Islander party may, in the area of the State for which the person is an Aboriginal or Torres Strait Islander party, take or interfere with water for traditional activities or cultural purposes.[116]

In this context, 'traditional activities' refer to the following activities carried out in accordance with Aboriginal or Island custom: hunting, fishing, gathering, camping, performing rites or other ceremonies, and visiting sites of significance.[117] 'Cultural purposes' are defined for these purposes as activities, other than commercial activities, that support the maintenance or protection of Aboriginal or Torres Strait Islander cultural heritage (as defined under the *Aboriginal and Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) respectively).

4.4.3 Water-related works approvals

In Queensland, the regulation of the construction of water-related infrastructure (e.g. dams, levees and bores) is done through both the *Planning Act 2016* (Qld) ('Planning Act (Qld)') and the Water Act (Qld). Generally, the construction of water-related infrastructure requires development approval under the Planning Act (Qld), as well as authorisations under the Water Act (Qld) to engage in the actual taking or interference. The details of the development approval requirements are spread across the Planning Act (Qld) and Parts 19 and 20 of the *Planning Regulation 2017* (Qld), and the Water Act (Qld) and Part 10 and Schedule 9 of the *Water Regulation 2016* (Qld).

Where a water-related development involves excavating or placing fill in a watercourse, lake or spring, and any development approval or water licence issued in relation to the project does not authorise that aspect of the development, a riverine protection permit will also be required under the Water Act (Qld). It is an offence under the Water Act (Qld) to excavate or place fill in a watercourse, lake or spring without a development approval, water licence or riverine protection permit that authorises the activity.[118]

4.4.4 Indigenous rights to water and Indigenous water reserves

Indigenous rights to water in Queensland

As outlined above, under the Water Act (Qld), Aboriginal and Torres Strait Islander people are able to take or interfere with water in Queensland for traditional activities or cultural purposes without obtaining a water entitlement or licence. A significant change was made to the Water Act (Qld) in October 2018 that formally recognised the importance of water resources to Aboriginal and Torres Strait Islander people, by requiring all new and replacement water plans to explicitly state 'cultural

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[115] Water Act (Qld), s 2(2)(d).

[116] Water Act (Qld), s 95.

[117] Ibid.

[118] Water Act (Qld), s 814.

outcomes' separately from social, economic and environmental outcomes.[119] Strategies for achieving, monitoring and reporting on these cultural outcomes may also be included in water plans.[120]

In addition to these general provisions in the Water Act (Qld), there is a requirement under the *Cape York Peninsula Heritage Act 2007* (Qld) (CYP Heritage Act (Qld)) that, if a water plan is prepared for an area in the Cape York Peninsula region, it must:

> provide for a reserve of water in the area to which the plan relates for the purpose of helping Indigenous communities in the area achieve their economic and social aspirations.[121]

Indigenous water reserves

There are currently 23 water plan areas in Queensland. All 23 plans include the objective of supporting water-related cultural values (a small number of these refer to cultural values in a general way rather than the more common reference specifically to Indigenous cultural values). Twelve of these plans also reserve water (in some form) specifically for Indigenous use, eleven of these twelve plans state that this water is to support the economic aspirations of Indigenous people, including the Water Plan (Gulf) 2007 and the Water Plan (Great Artesian Basin and Other Regional Aquifers) 2017 which are relevant to the Southern Gulf Catchment Area. There is 30,550 ML of unallocated water currently held in Indigenous reserve under the Water Plan (Gulf) 2007, and 880ML of unallocated water in an Indigenous economic reserve under the Water Plan (Great Artesian Basin and Other Regional Aquifers) 2017.

Indigenous engagement

In drafting a water plan, the Minister must consider the interests that an Indigenous party may have in the water resources for the plan area.[122] Indigenous consultation in the preparation and implementation of water plans varies across water plan areas. Typically, the consultation includes community meetings, and meetings with Aboriginal and Torres Strait Islander Land Trusts and corporations, and Traditional Owners. Engagement efforts are tailored to specific water plan areas.

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[119] *Mineral, Water and Other Legislation Act 2018* (Qld).

[120] This requirement came into effect in October 2018, so there are some plans developed prior to this time that are yet to fully consider all Indigenous interests, and currently only include cultural interests.

[121] Cape York Peninsula Heritage Act, s 27.

[122] Water Act (Qld), s 45.

5 Government approvals

In addition to holding the requisite rights and interests to access the land (Section 3), and to take water (Section 4), proponents of water-related development must have the necessary privileges to undertake the development. Some of these privileges will come with proponents' interests in land. However, ownership of an estate or other interest in land does not provide the holder with the legal ability to use and develop the land as they please. Government regulations can control the use and development of land and water resources. Compliance with these regulations often requires obtaining government approvals.

There are two forms of government regulation relevant to water-related development: regulations governing activities associated with the physical construction and operation of the development; and regulations governing ancillary activities such as financing, establishment of corporate structures and corporate governance. This section of the report focuses on the former.

Apart from the regulations under land and water statutes, the most important regulatory restrictions concerning the physical construction and operation of water-related development are those found in planning, environment and heritage statutes. These statutes are designed to manage the potential positive and negative economic, social and environmental externalities associated with development. In the Catchment Areas, and across Australia, the responsibility for managing these impacts is split between the Australian Government, and state and territory governments.

This section provides an overview of the federal, state and territory planning, environment and heritage regimes that are likely to apply to water-related development in the Catchment Areas. The coverage of regulatory requirements is not comprehensive. Amongst other things, it does not cover the regulatory requirements that apply to development in national parks and reserves under national park statutes, the requirements relating to fisheries and forestry developments under fisheries and forestry statutes, or the obligations imposed under biosecurity and pest and weed management laws.[123] Proponents should seek advice on these matters prior to initiating any water-related development.

5.1 Federal environmental and heritage approvals

The Australian Government does not have planning legislation that applies in the Northern Territory or Queensland. However, it does have both environmental and heritage regulations that could apply to water-related development in the Catchment Areas. The principal federal environmental statute is the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), which consists of four largely separate regulatory regimes: the Environmental

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[123] For parks regulations, see EPBC Act, Part 15; *Conservation and Land Management Act 1984* (WA); *Territory Parks and Wildlife Conservation Act* (NT); and *Nature Conservation Act 1992* (Qld). For fisheries and forestry regulations, see *Fish Resources Management Act 1994* (WA); *Forest Products Act 2000* (WA); *Fisheries Act* (NT); *Fisheries Act 1994* (Qld); and *Forestry Act 1959* (Qld). For biosecurity regulations, see *Biosecurity and Agriculture Management Act 2007* (WA); *Weeds Management Act* (NT); *Biosecurity Act 2014* (Qld).

Impact Assessment and Approval (EIAA) regime; Commonwealth areas biodiversity and cetacean regime; wildlife trade regime; and the Commonwealth reserves regime. Federal heritage regulation is mainly done under the EPBC Act and *Protection of Movable Cultural Heritage Act 1986* (Cth). However, regulatory requirements can also arise in relation to Indigenous heritage under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). Details of these regulatory regimes is provided below.

5.1.1 Federal environmental approvals

As outlined in Section 2.1, the Commonwealth has powers under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), to protect 'matters of national environmental significance'. Actions that will have, or are likely to have, a significant impact on any of the matters of national environmental significance must be referred to the federal environment Minister for assessment and approval. The EPBC Act's Environmental Impact Assessment and Approval (EIAA) process involves the identification, prediction, evaluation and mitigation of the environmental and other impacts associated with development proposals and policies, plans and programmes (Elliott and Thomas, 2009; Macintosh, 2010). There are two forms of EIAA: project-based; and strategic assessments. Project-based EIAA involves the identification, prediction, evaluation and mitigation of the environmental and other impacts associated with specific development proposals. Strategic assessments involve the identification, prediction, evaluation and mitigation of government policies, plans and programs. The EPBC Act provides for both forms of EIAA.

EPBC Act's EIAA regime

The EIAA regime is the centrepiece of the legislation and is designed to regulate actions that pose a threat to particular aspects of the environment: the 'matters of national environmental significance'; the environment on Commonwealth land; and the environment generally where the relevant action is carried out by a Commonwealth agency or on Commonwealth land (the protected matters).

There are currently nine matters of national environmental significance:

- World Heritage properties
- National heritage places
- Wetlands of international importance (Ramsar Wetlands)
- Nationally threatened species and ecological communities
- Migratory species
- Commonwealth marine areas
- The Great Barrier Reef Marine Park
- Nuclear actions (including uranium mining)
- A water resource, in relation to coal seam gas development and large coal mining development.

The protections afforded to World and National Heritage include places of Indigenous heritage significance and their associated values.

In the Catchment Areas, matters of national environmental significance that would be of relevance to a water-related development include:

Southern Gulf Catchments

- World Heritage listed Australian Fossil Mammal Sites (Riversleigh)
- Habitat for migratory shore bird species listed under the EPBC Act
- Protected species listed under the EPBC Act
- Gulf of Carpentaria Marine Park

Victoria Catchment

- Habitat for migratory bird species listed under the EPBC Act
- Protected species listed under the EPBC Act

Roper Catchment

- Limmen Marine Park in Commonwealth waters
- Protected species listed under the EPBC Act
- Habitat for migratory shore bird species listed under the EPBC Act.

The format of the EIAA process is relatively straight-forward and has four components (prohibited conduct, screening, assessment and approval). To minimise duplication between federal and state/territory processes, the EPBC Act provides for the Australian Government to accredit state and territory assessment and approval processes through 'bilateral agreements'. These agreements allow a significant number of the assessments under the EPBC Act to be completed under state and territory processes.

Under Part 10 of the EPBC Act, strategic assessments of policies, plans and programs can be carried out under agreements with the relevant states and territories. The statutory provisions concerning strategic assessments merely require the preparation and publication of draft terms of reference and a draft report (both for public comment). At the completion of the assessment, the Minister can make recommendations about the relevant policy, plan and program, and if the Minister is satisfied the recommendations are acted on, the policy, plan and program can be endorsed.

The benefits of strategic assessments for proponents stem from the consequences of endorsement. Projects taken in accordance with an endorsed policy, plan or program that are declared to be controlled actions can be subject to less onerous assessment requirements under Part 8 of the EPBC Act. More significantly, under Section 146B, the Minister can also grant approval for actions taken in accordance with an endorsed policy, plan or program. Projects approved under Section 146B are exempt from the standard project-based referral, assessment and approval requirements.

In areas where there are high concentrations of prospective water-related developments in the Catchment Areas that could adversely affect matters protected under Part 3, strategic assessments could be a cost-effective way of assessing cumulative impacts and balancing economic, social and environmental objectives. Prior to proponents expending significant resources on project development, strategic assessments could be conducted to identify areas of conservation significance on a regional basis and set down appropriate processes to protect matters of national environmental significance while promoting sustainable development. In the absence of strategic assessments, each project will need to undergo assessment and approval separately, increasing costs and reducing the capacity to effectively manage cumulative impacts.

Compensatory mitigation and offsets under the EPBC Act

The Australian Government's *Environmental Offsets Policy* (Australian Government 2012) supports the implementation of the EIAA, outlining the Australian Government's approach to the use of environmental offsets, defined as 'measures that compensate for the residual adverse impacts of an action on the environment'.[124] This policy 'mitigation hierarchy' to guide decision-makers through at least three sequential stages when assessing the adverse environmental impacts of projects: avoid adverse impacts, minimise adverse impacts and compensate for adverse impacts.[125] Relevantly, the policy states:

> Avoidance and mitigation measures are the primary strategies for managing the potential significant impact of a proposed action. They directly reduce the scale and intensity of the potential impacts of a proposed action. Offsets do not reduce the likely impacts of a proposed action, but instead compensate for any residual significant impact. … Offsets will not be considered until all reasonable avoidance and mitigation measures are considered, or acceptable reasons are provided as to why avoidance or mitigation of impacts is not reasonably achievable (Australian Government 2012: 7).

In this context, the term 'compensate' and phrase 'compensatory mitigation' are often used interchangeably with 'offsets' (McGillivray 2011a; 2011b). However, technically, to qualify as an offset, there must be equivalence between what is lost and gained (Salzman and Ruhl, 2000; Ten Kate et al., 2004; McKenny and Kiesecker, 2010). Compensatory mitigation is a broader concept, referring to any activity that has a beneficial impact on the environment that is intended to wholly or partially compensate for the adverse impacts of a project (Schoenbaum and Stewart, 2000; McGillivray 2011a; 2011b).

Under the EPBC Act, compensatory mitigation is excluded from the controlled action (screening) phrase (Australian Government 2011; 2012). Proponents can, and ideally should, design projects in a manner consistent with the mitigation hierarchy so as to include all reasonable measures to avoid and minimise adverse impacts, and compensate for residual significant adverse impacts. However, the EPBC Act prevents the Minister from considering any compensatory mitigation when making controlled action decisions.[126] For these purposes, when the Minister must decide whether an action is likely to have a significant impact on a Part 3 matter, they can only consider its gross environmental impacts (total adverse impacts after avoidance and mitigation measures), not its net environmental impacts after compensatory mitigation.

At the final approval phase, the Minister is free to consider compensatory mitigation and can impose conditions on approvals to give effect to it. The Australian Government's *Environmental Offsets Policy* (Australian Government 2012) is intended to guide the development of

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[124] Australian Government (2012) *Environment Protection and Biodiversity Conservation Act 1999* Environmental Offsets Policy. October 2012. Accessed at https://www.dcceew.gov.au/sites/default/files/documents/offsets-policy_2.pdf June 2025

[125] Restoring the environment is often included as a four stage.

[126] EPBC Act, ss 75(2)(b) and 77A. See also Australia Government 2012, pp 11 and 55.

compensatory mitigation for approved projects. While the policy uses offsets in its title, it is more accurately described as a compensatory mitigation policy because it does not necessarily require equivalence between what is lost and gained.

The introduction of the offset policy has had a profound impact on the implementation of the EPBC Act's EIAA. The incorporation of compensatory mitigation packages into EPBC Act approvals is now an integral part of the process. Much of the negotiation between proponents and the federal environmental department now centres on the details of the compensatory mitigation package.

5.1.2 Federal heritage protection regime

The federal heritage protection regime is contained in three main statutes: the EPBC Act; *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act); and *Protection of Movable Cultural Heritage Act 1986* (Cth) (PMCH Act).

EPBC Act

The EPBC Act establishes a hierarchical federal system of heritage protection that covers places of World, National and Commonwealth heritage significance, including places having Indigenous heritage values.[127] World and National Heritage places can be located anywhere in Australia. Commonwealth Heritage places must be located in a Commonwealth area. There is one World Heritage Area in the Catchment Areas: the Riversleigh World Heritage Area in the Southern Gulf Catchments Area.

The EPBC Act provides protection for the heritage values associated with World, National and Commonwealth Heritage places through the following four main mechanisms.[128]

- *EIAA regime*. Under the EPBC Act's EIAA regime, projects that are likely to have a significant impact on World, National or Commonwealth heritage values are prohibited unless they are approved by the federal environment Minister (or covered by a relevant exemption).
- *Commonwealth agency 'feasible and prudent' restriction.* Commonwealth agencies are prohibited from taking actions that are likely to have an adverse impact on the national heritage values of a National Heritage place or Commonwealth heritage values of a Commonwealth Heritage place unless 'there is no feasible and prudent alternative to taking the action' and all reasonable measures are taken to mitigate the impacts of the action on those values.[129] Most World Heritage places are also included on the National Heritage List.
- *Commonwealth agency sale and lease restrictions*. Commonwealth agencies must ensure that, where they are selling or leasing an area that includes a National or Commonwealth Heritage

[127] 'Indigenous heritage values' are defined for these purposes as 'a heritage value of the place that is of significance to Indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history'. EPBC Act, s 528.
[128] The legislation contains a number of other protection and conservation mechanisms that are not discussed here, including powers to make conservation agreements with owners of heritage places (Part 14) and to provide financial assistance to help identify, protect and conserve heritage values (s 324, 324ZB and 341ZG). The heritage minister is also required to ensure that a report is prepared and published on the condition of NHPs every five years (s 324ZC and 341ZH).
[129] EPBC Act, s 341ZC.

place, the contract of sale or lease includes a covenant to protect the relevant heritage values (unless it is deemed unreasonable or impracticable).[130]

- *Management planning*. Conservation and management of National and Commonwealth Heritage places is provided for through a management planning process.[131] Generally, management plans must be prepared for World, National and Commonwealth Heritage places, and Commonwealth agencies are required to take all reasonable steps to ensure they exercise their powers and perform their functions in a way that is not inconsistent with these plans and relevant heritage management principles.

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

The protections afforded through the ATSIHP Act stem from the responsible Minister's powers to make declarations to protect significant Aboriginal areas and objects from injury or desecration.[132] These declarations can only be made following an application by or on behalf of an Indigenous person or group of Indigenous people and, before making a declaration, the Minister must be satisfied the place or object is a significant Aboriginal area or object, and it is under threat of injury or discretion. Importantly, the Minister is not required to make declarations, even when she/he is satisfied of these matters. The satisfaction of the criteria merely provides the Minister with the power to make a declaration; it does not impose an obligation on the Minister to do so.

The reserve nature of the ATSIHP Act, and the discretionary nature of the declaration powers, has meant it has rarely been used. Between 1984 and 2009, more than 380 valid applications have been made for declarations but only 22 have been issued (DEWHA, 2009; Mackay, 2017). A further 61 applications have been made between 2011 and 2017, but no new declarations were issued as a result of those applications (Mackay, 2017). There has since been one new declaration, the 'Kings Plains declaration' made in 2024 to protect a culturally significant area in NSW.

While ATSIHP Act declarations are rarely made, they can be powerful, forcing the cessation of projects affecting the relevant area or object. An ATSIHP Act declaration will override other government approvals issued in relation to a project, including any approvals provided under the EPBC Act.

Protection of Movable Cultural Heritage Act 1986 (Cth)

The PMCH Act is designed to protect Australia's movable cultural heritage; 'objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons'.[133] Relevantly for the Catchment Areas, the statutory definition of movable cultural heritage explicitly includes 'objects relating to members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands' and 'objects of ethnographic art or ethnography'.[134] Protection for movable cultural heritage is provided for by banning the export of objects included on the National Cultural Heritage Control List (contained in the *Protection of Movable Cultural Heritage Regulations 1987*

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[130] EPBC Act, ss 324ZA and 341ZE.
[131] EPBC Act, ss 316-322, 324S-324Y, and 341S-341X.
[132] ATSHIP Act, ss 9, 10 and 12.
[133] PMCH Act, s 7.
[134] PMCH Act, s 7.

(Cth)) without a permit or certificate of exemption under the Act. The National Cultural Heritage Control List contains a range of heritage items, including sacred and secret ritual objects, bark and log coffins used as traditional burial objects, human remains, rock art and dendroglyphs.

Most water-related development will not involve the export of objects on the National Cultural Heritage Control List. However, there is the prospect of heritage objects being discovered during development, particularly Indigenous heritage items. Where this occurs, there will usually be obligations to notify relevant authorities of the discovery under state and territory heritage laws and, if there is a desire to export the object, proponents will need to obtain relevant approvals under the PMCH Act. Prior to any dealing with an Indigenous heritage object, proponents should consult with the relevant traditional owners or Indigenous community.

5.2 State and territory planning, environment and heritage approvals

5.2.1 Introduction

All Australian states and territories have planning, environment and heritage regulations that seek to manage the externalities associated with the use and development of land and water resources. These regulatory regimes share some common features but there are material differences in their structure, when and how they apply, and the nature of their assessment and approval processes. The remainder of this subsection provides a brief overview of the planning, environment and heritage regimes in the Northern Territory and Queensland.

5.2.2 Northern Territory

Planning

Governance

The *Planning Act 1999* (NT), in conjunction with the *Planning Regulations 2000* and *Northern Territory Planning Scheme 2020* (NTPS), regulate land use and development in the Northern Territory. The performance of strategic and statutory planning functions under the planning regime are distributed across four main government bodies: the Northern Territory planning Minister, planning department (Department of Infrastructure, Planning and Logistics), Northern Territory Planning Commission and the Development Consent Authority.

Unlike other jurisdictions, there is a single dominant planning scheme, the Northern Territory Planning Scheme, which applies across the jurisdiction, except where an area is subject to a specific planning scheme (there is currently only one specific scheme, the Jabiru Town Plan). The Minister responsible for planning (currently the Minister for Lands, Planning and Environment) is responsible for preparing amendments to the Territory Planning Scheme, and specific planning schemes. The Minister, aided by the planning department, is also responsible for assessing and approving particular types of development applications, and for carrying out the compliance and enforcement functions associated with the administration of the regime.

As its name suggests, the Development Consent Authority has responsibility for determining applications for development permits not determined by the Minister. It can also prosecute people for breaches of the Act.

The Northern Territory Planning Commission's primary functions relate to the preparation of integrated strategic plans (plans for essential facilities and public infrastructure), guidelines and assessment criteria for inclusion in the plan. It is also responsible for preparing significant development reports on 'significant development proposals' (developments requiring a development permit under the NTPS or other applicable planning scheme that may be significant to future land use and development in the Northern Territory). Local governments, where they exist, only have advisory functions under the Northern Territory planning regime: they may comment on development applications referred to them under the Planning Act.

Planning instruments

Under the NTPS zoning is used to regulate land use and development. Where land is zoned under the applicable zoning maps, the terms of the zone (32 zones are used under the scheme) dictate whether particular types of development are prohibited, discretionary (requiring approval), self-assessable (allowed without approval if carried out in accordance with a specified code) or permitted (allowed without approval).

Not all land is zoned in the Northern Territory. Where land is unzoned, land use regulations still apply to the clearing of native vegetation (clearing in excess of 1 ha requires a development permit) and subdivision of land. However, subdivision of pastoral land subject to the *Pastoral Land Act 1992* (NT) does not require approval under the Planning Act, except where it is done to facilitate a non-pastoral land use. For example, subdivision of pastoral land to facilitate the development of a water-related cropping project would require approval under the Planning Act.

Development approvals

Section 75 of the Planning Act makes it an offence to use or develop land in contravention of the planning scheme that applies to the land, or a development permit issued in relation to a development. Depending on the nature and location of the development, applications for development permits must be made either to the planning Minister or the Development Consent Authority.

Subject to specific exemptions, and the power of the Minister to assume responsibility for the approval of a project, the Development Consent Authority is the consent authority for applications concerning developments within seven areas: Alice Springs, Batchelor, Darwin, Katherine (within the Victoria River Catchment), Litchfield, Palmerston and Tennant Creek.

Where a development is a 'significant development proposal', the planning Minister may ask the Northern Territory Planning Commission to prepare a significant development report.[135] Significant development proposals are defined for these purposes as developments that may have a significant impact on, amongst other things: (i) strategic planning for sustainable resource use; (ii) strategic planning of public infrastructure; and (iii) the natural environment or existing amenity of the land or adjoining land or other areas of land. After the Commission prepares its report, it is

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[135] If the consent authority is the Development Consent Authority, it must refer the significant development proposal to the minister for consideration of whether a significant development report is required. The minister can then assume responsibility for the approval or direct the Commission to prepare a report and pass it to the Development Consent Authority for a decision. See *Planning Act*, s 50C.

passed to the Minister for consideration in making the final approval decision. In making the approval decision, the Minister may alter the proposal and impose conditions.

In addition to the ability to issue standard development permits for discretionary development, the Minister can also issue 'exceptional development permits' for projects that would otherwise be unlawful under the NTPS. The NTPS can also be amended to facilitate developments. Proponents can make joint applications (known as 'concurrent applications') for planning scheme amendments and development permits.

Land uses and developments permitted under a development permit will generally be protected by existing use rights, unless the approval is lawfully revoked or modified. The Planning Minister has reasonably broad powers to revoke and modify development permits under the Planning Act. However, compensation is payable for wasted expenditure incurred in reliance on a development permit that is revoked or modified.[136] Compensation is not payable for the adverse impact of planning scheme changes that curb the development opportunities associated with the land, unless they amount to an acquisition of property.

In addition to the regulations that apply under the Planning Act, special restrictions apply to pastoral land under the *Pastoral Land Act*. In particular, pastoral land can only usually be used for pastoral purposes. In order to use pastoral land for an alternative purpose, the landholder will require a permit from the Pastoral Land Board.

Environment protection

EIAA regime

There are two relevant environmental protection statutes in the Northern Territory: the *Environmental Protection Act 2019* (NT) (EP Act); and the *Waste Management and Pollution Control Act* (NT). The EP Act, together with the *Environmental Protections Regulations 2020,* governs the EIAA process in the Northern Territory. The stated purpose of the EIAA process is 'to ensure there is no unacceptable impact on the environment resulting from proposals, now or in the future.' [137] The EIAA process contain pre-referral, referral, environmental impact assessment, approval and post-approval monitoring and compliance phases.[138] The responsible Minister makes decisions on environmental approvals after considering the advice of the NT Environmental Protection Authority. Applications must address Aboriginal values and rights and interests of Aboriginal communities in relation to the area impacted by a proposal.

Upon receiving a referral, the EPA must decide whether an environmental impact assessment is required, and notifies the proponent and responsible Minister of its decision. If the EPA decides neither is warranted, the process comes to an end. If the EPA decides a public environmental report or environmental impact statement is required, it must prepare guidelines on the scope of

[136] *Planning Act*, s 142.

[137] Northern Territory Environment Protection Authority (2025) 'Environmental impact assessment and environmental approval under the Environmental Protection Act 2019'pp. 4, accessed at https://environment.nt.gov.au/__data/assets/pdf_file/0003/816906/environmental-impact-assessment-and-approval-in-the-nt.pdf June 2025

[138] Northern Territory Environment Protection Authority (2025) 'Environmental impact assessment and environmental approval under the Environmental Protection Act 2019' accessed at https://environment.nt.gov.au/__data/assets/pdf_file/0003/816906/environmental-impact-assessment-and-approval-in-the-nt.pdf June 2025

the assessment and direct the proponent to prepare the relevant report. A report is required to be released for public comment, after which an assessment report is prepared by the EPA. The assessment report is provided to the Environment Minister, who then passes it to the responsible Minister for decision (with additional comments if they consider they are necessary).

Regulation of activities causing significant environmental harm

The *Waste Management and Pollution Control Act 1998* (NT) contains the Northern Territory's pollution control regime. It imposes a general environmental duty on people carrying out activities 'likely to cause pollution resulting in environmental harm' or that 'is likely to generate waste'. This duty requires proponents to take all reasonable and practicable measures to minimise pollution, environmental harm and waste. Failure to adhere to the general environmental duty is not an offence but it can lead to the issuance of pollution abatement notices, requiring proponents to take remedial actions to minimise adverse environmental impacts.

Heritage

There are two main heritage statutes in the Northern Territory: the *Heritage Act 2011* (NT) which protects Aboriginal and Macassan archaeological places and objects, and declared heritage places; and, the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (Sacred Sites Act), which protect sites that are sacred to Aboriginal people or are of significance according to Aboriginal tradition.

The Heritage Act protects three classes of places and objects: Aboriginal and Macassan archaeological places and objects; places and objects declared to be heritage places and objects under Part 2.2 of the Act; and places and objects declared to be protected classes of places and objects of heritage significance under Part 2.3.

Aboriginal and Macassan archaeological places are defined as places that relate to the past human occupation of the Territory by Aboriginal or Macassan people and have been modified by those people. In a similar vein, Aboriginal and Macassan archaeological objects are defined as relics relating to the past human occupation of the Territory by Aboriginal or Macassan people that are located in archaeological places or stored in a place in accordance with Aboriginal tradition.

Parts 2.2 and 2.3 of the Heritage Act contain the Territory's general heritage regime. These Parts of the legislation provide for the declaration of heritage places and objects, and protected classes of places and objects of heritage significance. Generally, this process involves the assessment of the places and objects heritage significance by the Northern Territory Heritage Council, after which it makes a recommendation to the Heritage Minister. In the case of heritage places and objects, if the Minister believes the place or object is of 'heritage significance and should be conserved', the Minister must declare it to be a heritage place or object. In the case of protected classes of places and objects, if the Minister is satisfied they are of heritage significance, she/he must declare them to be a protected class of places or objects.

The significance of falling into one of these three classes is it brings the place or object within the scope of the protection provisions contained in Part 5.5 of the Heritage Act. Under these provisions, it is an offence to knowingly damage a heritage place, to remove something from a heritage place or damage or remove a heritage object, unless one of the exemptions applies. Most relevantly, these exemptions include when the activity is carried out under a work approval issued, or heritage agreement made, under the Act.

Applications for work approvals are made to the Department of Infrastructure, Planning and Logistics and determined by the Minister, on the advice of the Heritage Council. Heritage agreements are agreements between the Minister and the owner of a heritage place or object about the conservation, use and management of the place or object. These agreements can include provisions that restrict uses, and the carrying out of works, on a place. They can also include clauses concerning the provision of financial, technical and professional help to the owner. Once made, the agreement binds the occupier of a heritage place and can be registered under the *Land Title Act 2000* (NT), at which point it has effect as if it were a covenant on the land enforceable by the Northern Territory government. Prior to making a heritage agreement, it is necessary to obtain the consent of any person with a registered interest, or resource interest, in the land.

Another notable requirement under the Heritage Act is for people who discover an Aboriginal or Macassan archaeological place or object to notify the chief executive of the Department of Infrastructure, Planning and Logistics. Failure to notify is an offence under the Act.

The Sacred Sites Act protects sites that are sacred to Aboriginal people or of significance according to Aboriginal tradition. The Act prohibits entry onto sacred sites, the carrying out of work on or use of sacred sites and the desecration of sacred sites, other than in accordance with certificates issued under the Act by the Aboriginal Areas Protection Authority or responsible Minister. It is a defence to prosecution if the defendant can prove there were no reasonable grounds for suspecting the site was a sacred site. On Aboriginal land, this defence can only be used if the defendant can also prove they had authority to be on the land and had taken reasonable steps to ascertain the location and extent of sacred sites on the land.

To help development proponents and others identify sacred sites, the Aboriginal Areas Protection Authority maintains a Register of Sacred Sites. The registration process can only be initiated by custodians of the relevant sacred site, being an Aboriginal person who, by Aboriginal tradition, has responsibility for the site. Prior to registration, the Authority must notify the owners of the land and give them an opportunity to make submissions on the application. After considering the information from the custodians, submissions, and any other relevant information, if the Authority is satisfied the site is a sacred site, it must include it on the register.

Proponents of water-related development in the Northern Territory should inspect the Register of Sacred Sites prior to entering onto, using or undertaking works on any land. However, the absence of an entry on the register does not prove the absence of a sacred site. Many sacred sites are not registered and the prohibitions on entering and impacting sacred sites apply regardless of whether they are registered. Before initiating a development, proponents should consult with the Aboriginal Areas Protection Authority and relevant traditional owners to evaluate the presence of sacred sites and compatibility between the proposed project and the site’s values.

Irrespective of whether a sacred site has been identified on or near the subject land, proponents can apply to the Aboriginal Areas Protection Authority for an Authority Certificate to enter onto and undertake works on land. An Authority Certificate shields proponents from subsequent legal liability for entering onto or damaging a sacred site.

Upon receiving an Authority Certificate application, the Aboriginal Areas Protection Authority must consult with custodians on or in the vicinity of the subject land. To facilitate negotiations, the applicant for a certificate can ask the Authority to arrange a conference with relevant custodians.

After the consultations and conference (if any), the Authority must decide whether to issue the certificate. The Authority can only issue a certificate if it is satisfied:

- the work or use of the land can proceed without a substantive risk of damage or interference with relevant sacred sites; or
- an agreement has been reached between the custodians and the applicant.

Applicants aggrieved by the decision of the Authority can apply to the responsible Minister for a review of the decision. At the completion of the review process, the Minister can either uphold the Authority's decision or issue a Minister's Certificate authorising the activity. To the extent of any inconsistency, a Minister's Certificate will override an Authority Certificate. The Minister has broader discretion to issue Minister's Certificates but they must be laid before the Northern Territory Legislative Assembly, along with reasons for the decision.

Native vegetation clearing

Native vegetation clearing in the Northern Territory is regulated through the *Planning Act 1999* (NT) and *Pastoral Land Act 1992* (NT). If the land is freehold, Aboriginal or Crown land, the Planning Act will apply, and a development permit will generally be required to be obtained, either from the Planning Minister or Development Consent Authority. If the land is on pastoral leasehold, approval is required under the Pastoral Land Act from the Pastoral Land Board.

Major projects

Developments can be awarded major project status under the 'NT Major Project Status Policy Framework'. Factors such as project significance, strategic impact, complexity, project feasibility and capacity for the proponent to deliver the project are all factors taken into consideration when determining major project status. Major project status attracts assistance with the coordination of government approvals and facilitation of the project. The Major Project Status Policy Framework is now integrated into and influenced by the new *Territory Coordinator Act 2025* (NT). This Act provides for the appointment of a 'Territory Coordinator' to *facilitate the undertaking of significant projects and works, to provide for the designation of infrastructure coordination areas and Territory development areas, to expediate certain statutory processes and decisions and for related purposes.*

5.2.3 Queensland

Planning

Governance

The primary land-use planning statute is the *Planning Act 2016* (Qld) (Planning Act). The Planning Act controls the use and development of land across Queensland through a collection of non-statutory strategic policies, statutory planning instruments, and other subordinate legislation and statutory instruments, including the *Planning Regulation 2017* (Qld), Development Assessment Rules and Ministerial Guidelines and Rules. The Planning Act also has linkages to a number of other related statutory schemes, including the *State Development and Public Works Organisation Act 1971* (Qld) (SDPWO Act), *Regional Planning Interests Act 2014* (Qld), *Water Act 2000* (Qld) Water Act), *Environmental Protection Act 1994* (Qld) (EP Act), *Queensland Heritage Act 1992* (Qld)

(Heritage Act), *Environmental Offsets Act 2014* (Qld), *Vegetation Management Act 1999* (Qld) (Vegetation Management Act) and the *Planning and Environment Court Act 2016* (Qld).

Responsibilities for strategic and statutory functions under the Planning Act are mainly divided between the state planning Minister, local government and the chief executive of the Department of State Development, Infrastructure and Planning. The Minister oversees the planning system and has a range of strategic and statutory responsibilities and powers, including making state planning instruments, making ministerial guidelines and rules concerning the preparation of planning schemes, approving local planning instruments,[139] and making development assessment rules. Local governments are responsible for the preparation of local planning instruments and the assessment and determination of most development applications under local planning schemes. The chief executive of the Department of State Development, Infrastructure and Planning oversees the preparation of local planning schemes and performs assessment and approval functions in relation to particular types of development. The chief executive is also responsible for the handling and determining regional interests development approvals under the *Regional Planning Interests Act 2014* (Qld).

In the conduct of development assessments and approvals, local councils are supported by 'referral agencies', which are usually state government Ministers, departments and agencies. There are two main types of referral agencies: concurrence agencies, which can direct the local council in the determination of the application; and advice agencies, which can only provide advice on the determination of the application. The formal role of referral agencies usually involves representing state interests in the approval process or bringing agency expertise to the process.

The State Assessment and Referral Agency (SARA) coordinates state agency involvement in the planning process. Where applications are made to a local council, and the assessment manager or referral agency is a state agency, including the chief executive of the planning department, the application must be sent to SARA.[140]

Planning instruments

The Planning Act provides for the development of planning instruments at the state, regional and local level. There are 'state planning instruments', which comprise state planning policies and regional plans, and 'local planning instruments', which comprise local planning schemes, temporary local planning instruments and planning scheme policies. State planning instruments are made by the state planning Minister to give effect to state interests, while local planning instruments are made by local governments. Similar to other states and territories, these planning instruments are arranged in a hierarchy and the higher order policies are intended to inform the creation of lower order policies. If there is any inconsistency between the policies, state planning policies prevail over regional plans, which prevail over local planning instruments.

[139] Ministerial approval of local planning instruments is not necessarily required. *Planning Act*, s 18.
[140] For further information on SARA, see: http://www.dilgp.qld.gov.au/planning/development-assessment/state-assessment-and-referral-agency.html.

Development approvals

The Planning Act provides the central framework for the assessment and determination of development applications. The Act divides development into three categories: prohibited (development not allowed); assessable (permitted with approval); and accepted (no approval required). Whether a development is permitted or assessable will usually be set out in the applicable local planning scheme.

Where a development is assessable, the relevant planning scheme will designate whether the assessment must be ‘code assessment’ or ‘impact assessment’. Code assessment is a less intensive form of assessment, which is done against particular codes specified in the planning scheme. Impact assessment is more comprehensive and involves public notification and opportunities for public comment on the proposal.

The Planning Act’s process specifies two types of decision-makers: the assessment manager and referral agencies. The assessment manager is the body formally responsible for the management and determination of the application. As noted above, referral agencies are other government Ministers, departments or agencies who must advise, and can direct, the assessment manager in the performance of its functions.

The *Planning Regulation 2017* specifies who the assessment manager is in relation to different types of development. Local governments are the assessment manager for most types of development. However, for many types of water-related development, particularly larger developments involving water storages, the assessment manager will be the chief executive of the planning department (currently the Department of State Development, Infrastructure and Planning). Where the assessment manager for a water-related development is not the chief executive, they will usually be a concurrence referral agency for the purposes of the assessment.

When assessing water-related developments, either as the assessment manager or a referral agency, the chief executive will assess applications against the State Development Assessment Provisions, a statutory document prescribed under the *Planning Regulation 2017* for these purposes.

After completing the assessment, and receiving advice from relevant referral agencies, the assessment manager must determine the application by either approving or rejecting all or part of it (with or without conditions). The conditions imposed on the project can include environmental offsets under the *Environmental Offsets Act 2014* (Qld). The *Environmental Offsets Act* and accompanying *Environmental Offsets Regulation 2014* (Qld) and Environmental Offsets Policy (Queensland Government 2014), establish a framework for the design and imposition of environmental offsets for the residual impacts of development activities on ‘prescribed environmental matters’. These matters are divided into three categories: matters of national, state and local environmental significance. The matters of national environmental significance are the matters specified under the EPBC Act. Matters of state environmental significance are prescribed under the *Environmental Offsets Regulation* and include particular regional ecosystems, precincts and waterways that provide passage for fish. Matters of local environmental significance are those identified in local planning schemes. The offset framework incorporates the mitigation hierarchy (avoid, mitigate, offset) and allows for various types of compensatory mitigation.

Existing use rights protect the privileges inherent in the approval once it is granted. Compensation is payable for certain 'adverse planning changes'; being changes in planning restrictions that limit the purpose for which the subject land can be used to a public purpose or the purpose for which it was lawfully being used when the change was made.[141]

Appeals against decisions concerning development applications can be made to Development Tribunals, and/or the Queensland Planning and Environment Court. Generally, the jurisdiction of Development Tribunals is limited to low-risk matters. The Planning and Environment Court has broad merits and judicial review functions and, in certain cases, can hear appeals from decisions of Development Tribunals.[142]

The *State Development and Public Works Organisation Act* (SDPWO Act) operates alongside the Planning Act and EP Act, and provides for the coordinated planning, assessment and approval of projects of economic, social and/or environmental significance to the state.[143] Under Section 26 of the Act, a project can be declared a 'coordinated project' if the project has at least one of the following characteristics:

- complex approval requirements imposed by a local government, the state or the Australian Government;
- strategic significance to a locality, region or the state, including for the infrastructure, economic and social benefits, capital investment or employment opportunities it may provide;
- significant environmental effects; and
- significant infrastructure requirements.[144]

Coordinated project declaration decisions give regard to a number of other factors, including the relevant planning context, the feasibility of the project and the capacity of the proponent to undertake the required assessments for the project.

Once declared, a coordinated project must undergo an assessment, either via an Environment Impact Statement (EIS) or the more streamlined Impact Assessment Report (IAR) process. The proponent is responsible for preparing a draft EIS or IAR. Depending on the nature of the assessment, the draft assessment document may be required to be published for public comment. Project decisions will then be made based on an evaluation report on the project and assessment, which can make recommendations about whether the project should proceed and the conditions that should be imposed on it.[145]

The fact a project has been declared a coordinated project and undergone assessment under the SDPWO Act does not relieve it of the need to obtain other state and local government approvals, including under the Planning Act and EP Act.

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[141] *Planning Act*, s 30.
[142] The scope for appeals, and jurisdiction of Development Tribunals and the Court, are detailed in Schedule 1 of the Planning Act and the *Planning and Environment Court Act 2016* (Qld).
[143] There are two other aspects of the *State Development and Public Works Organisation Act* that could be relevant to water-related development in the Southern Gulf Catchments: the State Development Areas (SDAs) and private infrastructure facilities processes. Under the legislation, the Coordinator-General can declare areas to be SDAs. Once declared, a development scheme must be prepared for the SDA, which regulates land use and development in the area, including requirements for approvals. The legislation also contains provisions for the approval of projects as 'private infrastructure facilities'. This facilitates the acquisition of land for the infrastructure.
[144] *State Development and Public Works Organisation Act*, s 27.
[145] *State Development and Public Works Organisation Act*, s 34D and 34L.

The *Regional Planning Interests Act 2014* (Qld) contains approval processes for 'regulated activities' and 'resource activities' in areas of regional interest identified in regional plans. Section 19 of the Act prohibits the conduct of regulated activities in an area of regional interest without a regional interests development approval.

Environment protection

EIAA regime

In Queensland, most environmental assessments conducted in relation to water-related developments are likely to be carried out under the *Planning Act 2016* (Qld) or *State Development and Public Works Organisation Act 1971* (Qld) (see above). In some circumstances, environmental assessments could be triggered for water-related developments by an 'environmentally relevant activity' that could cause significant environmental harm within the terms of the *Environmental Protection Act 1994* (Qld). Environmentally relevant activities are discussed below.

Regulation of activities causing significant environmental harm

Under Queensland's EP Act, it is an offence to carry out an 'environmentally relevant activity', or cause material or serious environmental harm, without an environmental authority. Environmentally relevant activities are defined for these purposes as activities that could contaminate and harm the environment as prescribed under the *Environmental Protection Regulation 2008* (Qld). The assessment and approval process for environmental authorisations has four stages: application, information, notification and decision.

In addition to the environmental authorisation process, the EP Act makes it an offence to cause various types of environmental harm and pollution. These include general offences of causing material or serious environmental harm, and causing an environmental nuisance.[146] Activities carried out in accordance with an environmental authorisation or other approval under the EP Act are shielded from liability under these provisions.

Heritage

In Queensland, there are three main heritage statutes: one governing non-Indigenous cultural heritage, the *Queensland Heritage Act 1992* (Qld) (Heritage Act); and two governing Indigenous cultural heritage, the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld). Protection of places of state or local heritage significance under the Heritage Act is afforded through the Planning Act.

Queensland's general heritage regime is contained in the Heritage Act. This statute establishes the Queensland Heritage Register to record places of state cultural heritage significance, with the exception of places of Indigenous heritage significance.[147] The independent Queensland Heritage Council makes decisions about the inclusion and removal of place on the Register. The Heritage Act also requires local governments to identify and record places of local heritage significance, either through local heritage registers or their local planning schemes.

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[146] *Environmental Protection Act*, ss 437, 438 and 440.
[147] *Queensland Heritage Act*, s 3.

Protection of places of state or local heritage significance is afforded through the Planning Act. Generally, development in a heritage place will be assessable development requiring development approval under the Planning Act. Carrying out assessable development on a heritage place is an offence under the Planning Act. Where development approval is required for a project on a local heritage place, the assessment manager will be the local government. If the place is a Queensland heritage place, it will be assessed by the chief executive of the planning department (via SARA) against the state development assessment provisions.

The Aboriginal Cultural Heritage Act and Torres Strait Islander Cultural Heritage Act establish a regime for the protection and conservation of Aboriginal and Torres Strait Islander cultural heritage across Queensland. Amongst other things, the Aboriginal Cultural Heritage Act establishes an Aboriginal Cultural Heritage Database to provide a repository of information on Aboriginal cultural heritage sites and objects, and imposes a general 'cultural heritage duty of care' not to harm Aboriginal cultural heritage. This duty of care requires a person who carries out an activity to take 'all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage'.[148] Causing harm to Aboriginal cultural heritage in breach of the duty of care is an offence. Aboriginal cultural heritage is defined for these purposes as:

- a significant Aboriginal area in Queensland, being an area of particular significance to Aboriginal people because of tradition or the history of any Aboriginal party for the area;
- a significant Aboriginal object, being object of particular significance to Aboriginal people because of tradition or the history of any Aboriginal party for the area; or
- evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland.[149]

There are a number of ways proponents can satisfy their cultural heritage duty of care, including by ensuring they carry out the development in accordance with the cultural heritage duty of care guidelines issued under the Act.[150] An alternative method is for proponents to reach agreement with traditional owners on the management of cultural heritage in the area. These agreements can take a number of different forms, including Cultural Heritage Management Plans (CHMP) made under the Act and Indigenous Land Use Agreements, made under the *Native Title Act 1993* (Cth). The general principle in relation to the cultural heritage duty of care is that proponents of material developments involving land-use changes, construction and other similar activities should consult with the relevant local Indigenous communities and seek their agreement on how to manage sites and objects of Indigenous heritage significance (clause 4.7 in Aboriginal Cultural Heritage Act Duty of Care Guidelines).

Native vegetation laws

Native vegetation clearing in Queensland is regulated through two largely separate regimes: the planning-based system, which involves the Planning Act and Vegetation Management Act;[151] and the 'protected plants' regime, which applies under the *Nature Conservation Act 1992* (Qld).

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[148] *Aboriginal Cultural Heritage Act 2003* (Qld), s 23.
[149] *Aboriginal Cultural Heritage Act 2003* (Qld), ss 8, 9 and 10.
[150] *Aboriginal Cultural Heritage Act 2003* (Qld), s 23(3). Queensland Government (2003) 'Aboriginal Cultural Heritage Act: Duty of Care Guidelines'
[151] See also the *Vegetation Management Regulation 2012* (Qld), particularly Schedule 10, Part 3.

Under the planning-based regime, agriculture-related clearing can currently occur via one of four avenues:

- exempt clearing work (does not require approval or notification);
- clearing under an accepted development vegetation clearing code (requires notification and adherence with applicable code);
- clearing under an area management plan (requires notification and adherence with plan); and
- clearing under a development approval.

Like other parts of the planning system, the operation of the regime is based on spatially-based restrictions, which, in this case, are articulated through vegetation maps. Through these maps, land is assigned to one of five categories: Category A (areas subject to compliance notices, offsets and voluntary declarations); Category B (remnant vegetation); Category C (high-value regrowth); Category R (regrowth within 50m of watercourses in priority reef catchment areas); and Category X (areas exempt from regulation under the Act). Which avenue a proposed clearing development must follows depends on what category of land is involved, as expressed in the applicable vegetation maps.

Where water-related developments involving native vegetation clearing require development approval, they may qualify as 'irrigated high value agriculture clearing' (cropping and grazing with irrigation).[152] Various regulations apply to these types of clearing applications, including that they be assessed by the chief executive of the planning department through the SARA process in accordance with the state development assessment provisions.[153]

The protected plants regime under the Nature Conservation Act is intended to protect particular native plants from taking or clearing. Broadly stated, the general rule under this regime is that it is an offence to clear endangered, vulnerable or near threatened plants in a high risk area, other than in accordance with a clearing permit issued by the Department of Environment and Heritage Protection.[154] High risk areas are identified in so-called 'trigger maps'. Prior to carrying out clearing, proponents must check the flora survey trigger map to determine if any part of the subject land is within a high risk area.[155] Where the subject land is within a high risk area, the proponent must undertake a flora survey in accordance with the Flora Survey Guidelines.[156] If the survey does not detect endangered, vulnerable or near threatened plants, the clearing can occur, provided notice is provided to the department at least one week prior to commencement and the proponent does not otherwise become aware of the presence of endangered, vulnerable or near threatened plants.[157] If endangered, vulnerable or near threatened plants are detected, the clearing can only occur under a clearing permit.

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[152] *Vegetation Management Act*, s 22A(2)(l).
[153] *Vegetation Management Act*, Part 2, Div 6, Subdiv 1A; *Vegetation Management Regulation 2012*, Schedule 10, Part 3; *SDAP State Code 16: Native Vegetation Clearing*.
[154] *Nature Conservation Act*, s 89; *Nature Conservation (Wildlife Management) Regulation 2006* (Qld), s 261Z.
[155] *Nature Conservation (Wildlife Management) Regulation 2006* (Qld), s 254.
[156] *Nature Conservation (Wildlife Management) Regulation 2006* (Qld), s 256. The Guidelines are available at: https://www.ehp.qld.gov.au/licences-permits/plants-animals/documents/gl-wl-pp-flora-survey.pdf.
[157] *Nature Conservation (Wildlife Management) Regulation 2006*, s 259.

Major projects

In Queensland, there are two processes for major projects: the *State Development and Public Works Organisation Act* process for coordinated projects; and the SARA process for projects requiring assessment under the Planning Act that effecting state interests and require assessment by state agencies against the state development assessment provisions. The Queensland Government also maintains a website containing information to help proponents of projects to meet their statutory environmental approval requirements.[158]

[158] https://www.business.qld.gov.au/running-business/environment

6 Conclusion

The institutional requirements relevant to specific water-related developments in the Catchment Areas will depend on the characteristics and location of the developments, and their likely impacts on the environment. Having said this, the following summary points can be made about the nature of the institutions relevant to water-related development in the Catchment Areas, grouped around the themes of ‘interests in land’, ‘interests in water’, and ‘government approvals’.

Interests in land. Proponents of water-related developments will require entitlements to access the subject land. There are a range of tenure types in the Catchment Areas: government owned land (Crown land) held under lease (Crown lease) by a private party (including pastoral, term and perpetual leases); standard freehold; Aboriginal freehold; unallocated Crown land; Crown land reserved for particular purposes; and, national parks. Proponents interested in water-related development will need to obtain an entitlement to access the land from the relevant landowner (unless they are the landowner). For initial exploratory purposes, this could take the form of a licence, which would provide the holder with personal rights to access the land but no formal legal interest in it. To undertake any material development, a formal freehold or leasehold interest in the land will usually be necessary. Freehold and leasehold interests provide greater security and control than licences, and enable the holder to exclude most third parties from the land and the benefits that stem from its use and development. However, proponents should be aware that leasehold interests can be subject to restrictions that limit the use and development of land. For example, pastoral leases typically can only be used for pastoral purposes unless otherwise authorised. In addition to the need for a freehold or leasehold interest, or a licence, any water-related development must be consistent with the relevant native title arrangements. A significant proportion of the land in the Catchment Areas is subject to native title and native title claims. Where native title, or a native title claim, exists over an area of land, proponents will be required to engage with relevant traditional owners and the federal native title process.

Interests in water. To undertake developments involving the extraction and use of water, proponents will require entitlements under state and territory water statutes. The state and territory water statutes control access to, interference with and use of ground and surface water. The Australian Government plays only a limited direct role in water governance in the Catchment Areas. The Northern Territory and Queensland water governance regimes have a number of common elements, including: water planning processes that can impose restrictions on the amount of water taken for consumptive uses and how it is used; entitlements and regulations concerning taking water for consumptive purposes, with and without government authorisation; and statutory requirements to obtain government approval for works related to water infrastructure (e.g. dams, bores, levies and pipes). The specifics of what entitlements and authorisations are needed to facilitate water-related development will depend on the location and nature of the development.

Government approvals. In addition to holding the requisite rights and interests to access the land, and to take water, proponents of water-related development must have the necessary privileges to undertake the development. Some of these privileges will come with proponents’ interests in land. However, ownership of an estate or other interest in land does not provide the holder with the legal ability to use and develop the land as they please. Government regulations can restrict how land and water resources are used and developed. The most relevant government regulations are those imposed under state and territory planning, environmental and heritage statutes. Compliance with these regulatory requirements will often require approvals to be obtained from relevant state/territory agencies, including local councils. Depending on the nature of the proposed development, an environmental assessment may be required prior to the issuance of state and territory approvals. The state and territory regulatory processes are overlain with the Australian Government's environmental and heritage approval processes. Developments that could adversely affect the 'matters of national environmental significance', or the environment in Commonwealth areas, may require assessment and approval under the federal EPBC Act.

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