

# 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

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**Australian Government**  
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## CSIRO Northern Australia Water Resource Assessment acknowledgements

This report was prepared for the Department of Infrastructure, Regional Development and Cities. The Northern Australia Water Resource Assessment is an initiative of the Australian Government's White Paper on Developing Northern Australia and the Agricultural Competitiveness White Paper, the government's plan for stronger farmers and a stronger economy. Aspects of the Assessment have been undertaken in conjunction with the Northern Territory Government, the Western Australian Government, and the Queensland Government.

The Assessment was guided by three committees:

- (i) The Assessment's Governance Committee: Consolidated Pastoral Company, CSIRO, DAWR, DIIS, DoIRDC, Northern Australia Development Office, Northern Land Council, Office of Northern Australia, Queensland DNRME, Regional Development Australia - Far North Queensland and Torres Strait, Regional Development Australian Northern Alliance, WA DWER
- (ii) The Assessment's Darwin Catchments Steering Committee: CSIRO, Northern Australia Development Office, Northern Land Council, NT DENR, NT DPIR, NT Farmers Association, Power and Water Corporation, Regional Development Australia (NT), NT Cattlemen's Association
- (iii) The Assessment's Mitchell Catchment Steering Committee: AgForce, Carpentaria Shire, Cook Shire Council, CSIRO, DoIRDC, Kowanyama Shire, Mareeba Shire, Mitchell Watershed Management Group, Northern Gulf Resource Management Group, NPF Industry Pty Ltd, Office of Northern Australia, Queensland DAFF, Queensland DSD, Queensland DEWS, Queensland DNRME, Queensland DES, Regional Development Australia - Far North Queensland and Torres Strait

Note: Following consultation with the Western Australian Government, separate steering committee arrangements were not adopted for the Darwin catchment, but operational activities were guided by a wide range of contributors.

## Photo

Mitchell River, Queensland. Source: CSIRO

## Director's foreword

Sustainable regional development is a priority for the Australian, Western Australian, Northern Territory and Queensland governments. In 2015 the Australian Government released the 'Our North, Our Future: White Paper on Developing Northern Australia' and the Agricultural Competitiveness White Paper, both of which highlighted the opportunity for northern Australia's land and water resources to enable regional development.

Sustainable regional development requires knowledge of the scale, nature, location and distribution of the likely environmental, social and economic opportunities and risks of any proposed development. Especially where resource use is contested, this knowledge informs the consultation and planning that underpins the resource security required to unlock investment.

The Australian Government commissioned CSIRO to complete the Northern Australia Water Resource Assessment (the Assessment). In collaboration with the governments of Western Australia, Northern Territory and Queensland, they respectively identified three priority areas for investigation: the Fitzroy, Darwin and Mitchell catchments.

In response, CSIRO accessed expertise from across Australia to provide data and insight to support consideration of the use of land and water resources for development in each of these regions. While the Assessment focuses mainly on the potential for agriculture and aquaculture, the detailed information provided on land and water resources, their potential uses and the impacts of those uses are relevant to a wider range of development and other interests.



Chris Chilcott

Project Director

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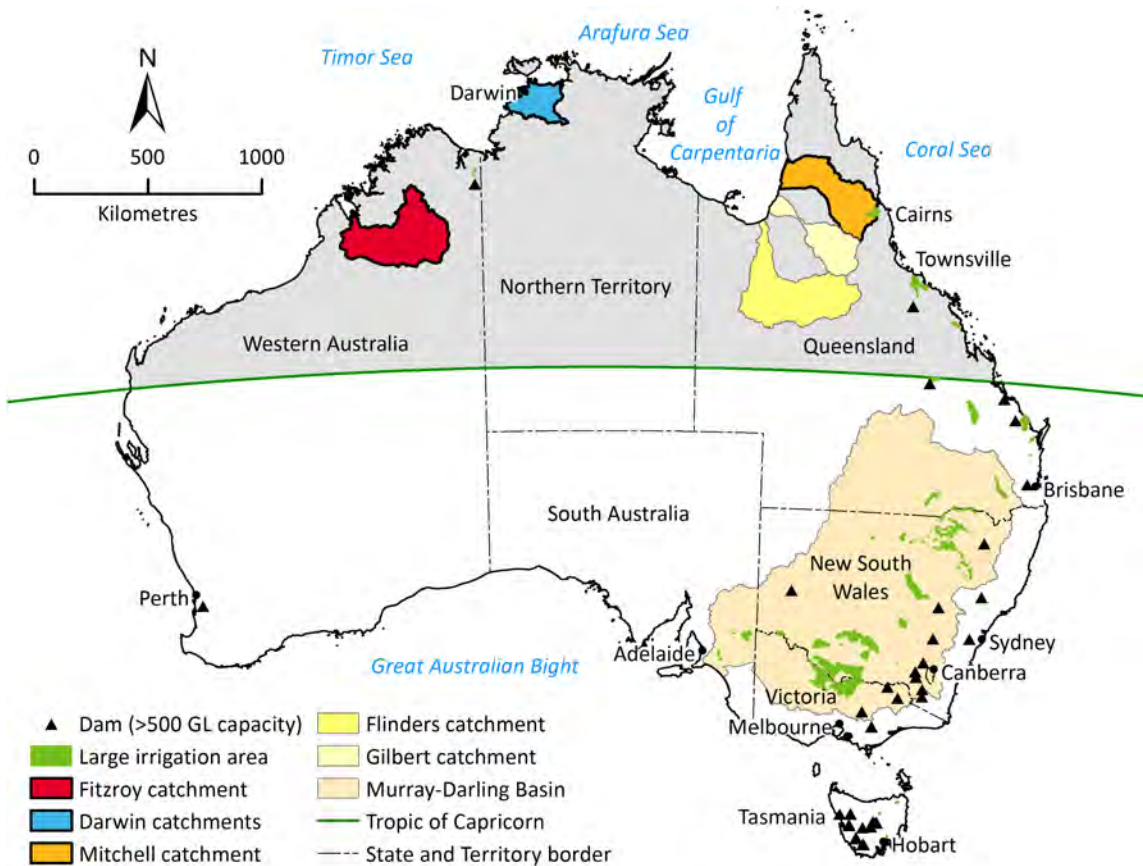
# Preface

The Northern Australia Water Resource Assessment (the Assessment) provides a comprehensive and integrated evaluation of the feasibility, economic viability and sustainability of water and agricultural development in three priority regions shown in Preface Figure 1:

- Fitzroy catchment in Western Australia
- Darwin catchments (Adelaide, Finnis, Mary and Wildman) in the Northern Territory
- Mitchell catchment in Queensland.

For each of the three regions, the Assessment:

- evaluates the soil and water resources
- identifies and evaluates water capture and storage options
- identifies and tests the commercial viability of irrigated agricultural and aquaculture opportunities
- assesses potential environmental, social and economic impacts and risks of water resource and irrigation development.



**Preface Figure 1 Map of Australia showing three Assessment areas**

Northern Australia defined as that part of Australia north of the Tropic of Capricorn. Murray Darling Basin and major irrigation areas and large dams (> 500 GL capacity) in Australia shown for context.

While agricultural and aquacultural developments are the primary focus of the Assessment it also considers opportunities for and intersections between other types of water-dependent development. For example, the Assessment explores the nature, scale, location and impacts of developments relating to industrial and urban development and aquaculture, in relevant locations.

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

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

### *Assessment reporting structure*

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

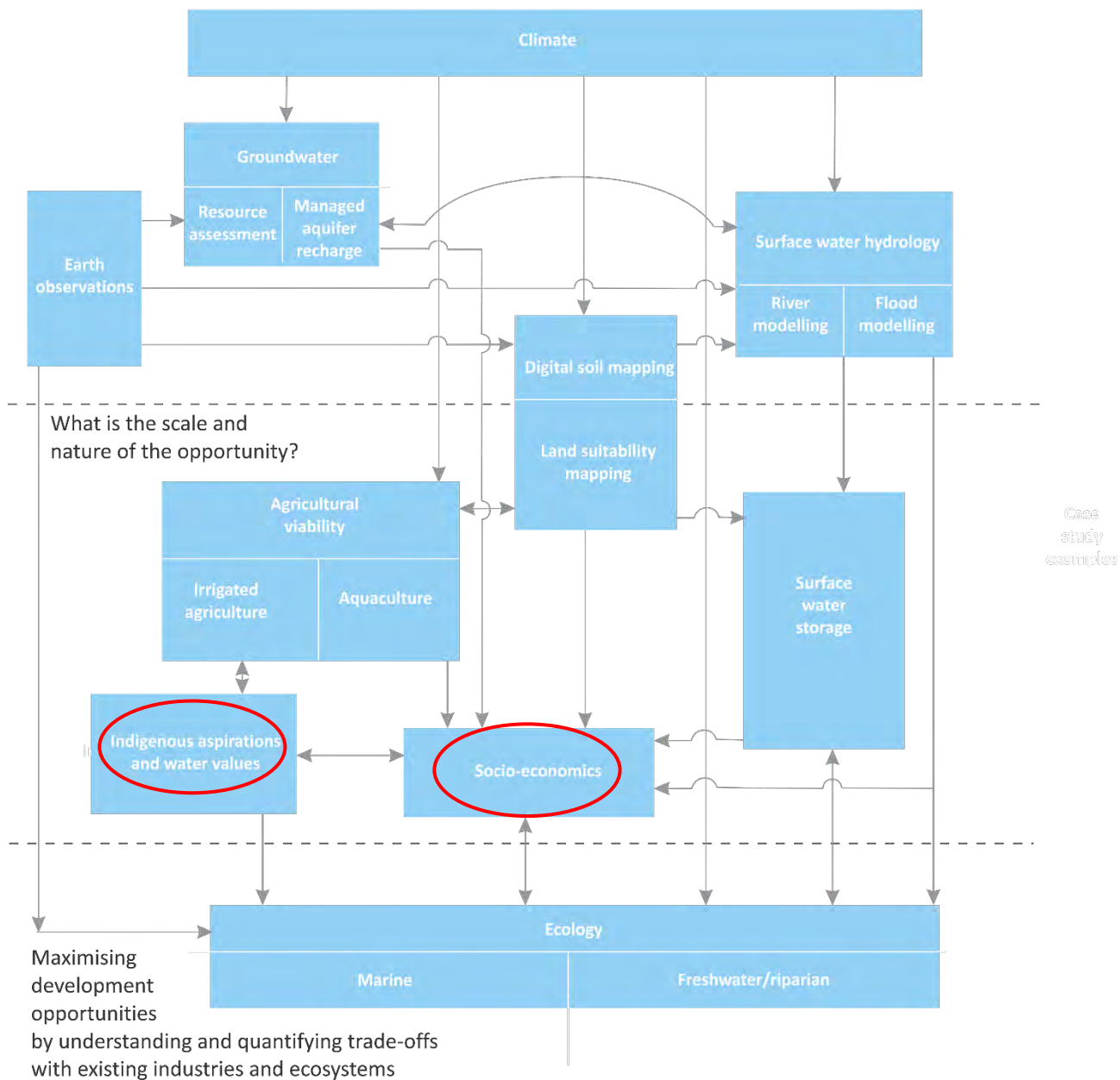
The Assessment has produced a series of cascading reports and information products:

- Technical reports; that present scientific work at a level of detail sufficient for technical and scientific experts to reproduce the work. Each of the ten activities (outlined below) has one or more corresponding technical reports.
- Catchment reports; that for each catchment synthesise key material from the technical reports, providing well-informed (but not necessarily-scientifically trained) readers with the information required to make decisions about the opportunities, costs and benefits associated with irrigated agriculture and other development options.
- Summary reports; that for each catchment provide a summary and narrative for a general public audience in plain English.
- Factsheets; that for each catchment provide key findings for a general public audience in the shortest possible format.

The Assessment has also developed online information products to enable the reader to better access information that is not readily available in a static form. All of these reports, information tools and data products are available online at <http://www.csiro.au/NAWRA>. The website provides readers with a communications suite including factsheets, multimedia content, FAQs, reports and links to other related sites, particularly about other research in northern Australia.

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

What water and soil resources are available to enable regional development?



**Preface Figure 2 Schematic diagram illustrating high-level linkages between the ten activities (blue boxes)** Activity boxes that contain multiple compartments indicate key sub-activities. This report is a technical report. The red oval indicates the primary activity (or activities) that contributed to this report.



# Overview

This report provides an analysis of the institutions relevant to water-related development in three regions in northern Australia: the Fitzroy catchment in Western Australia; Finniss, Adelaide, Mary and Wildman River catchments in Northern Territory (Darwin catchments); and Mitchell catchment in Queensland (collectively ‘the Catchments’). The term institutions is used here to refer to the rules and norms that govern water-related development that stem from international law, common law, statute and government policies.

The report is structured around four themes: the **legal and policy context** surrounding water-related development in northern Australia; the **interests in land** necessary to undertake, and that could be affected by, water-related development; the **interests in water** necessary to support, and that could be affected by, water-related development; and the **government approval** processes concerning planning, environment and heritage issues that manage the positive and negative externalities (spillover effects) associated with development.

The institutional requirements relevant to specific water-related developments will depend on the characteristics and location of the developments, and their likely impacts on the environment. Noting this, the following summary points can be made about the main institutions relevant to water-related development in the Catchments.

**Interests in land.** Proponents of water-related developments will require entitlements to access and use the subject land. In most cases, relevant land in the Catchments will be government owned land (Crown land) held under a lease (Crown lease) by a private party. While Crown leases dominate, there are a range of other tenure types in the Catchments, including standard freehold and Aboriginal freehold. Proponents interested in water-related development will need to obtain an entitlement to access the land from the relevant landowner. To undertake any material development, a formal freehold or leasehold interest in the land will usually be necessary. In addition, any water-related development must be consistent with relevant native title arrangements. 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 Australian Government plays only a limited direct role in water governance in the Catchments. The Western Australian, 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. 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. 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 areas owned or leased by the Australian Government, may require assessment and approval under the federal EPBC Act.

# Report summary

This report provides an analysis of the institutions relevant to water-related development in three regions in northern Australia: the Fitzroy catchment in Western Australia; Finniss, Adelaide, Mary and Wildman River catchments in Northern Territory (Darwin catchments); and Mitchell catchment in Queensland (collectively ‘the Catchments’). The term institutions is used here to refer to the rules and norms that govern water-related development that stem from international law, common law, statute, delegated legislation, and government policies. By analysing these institutions, the report sheds light on the nature of the rights and interests that are necessary to undertake, and could be affected by, water-related development, and the institutional risks faced by prospective investors and other affected parties. The phrase ‘water-related development’ is used here to refer to a range of development that is dependent on, or related to, water resources; from large dams and pipelines, onshore aquaculture developments, through to small-scale irrigated agriculture projects involving the use of bore water.

The report is not meant to be comprehensive. It is intended to provide an overview of the main institutions relevant to water-related development in the Catchments. The institutional requirements relevant to specific water-related developments will depend on the characteristics and location of the developments, and their likely impacts on the environment. Proponents and other stakeholders interested in specific projects will need to obtain tailored advice on the institutional issues relevant to the projects.

The report is structured around four themes: the **legal and policy context** surrounding water-related development in northern Australia; the **interests in land** necessary to undertake, and that could be affected by, water-related development; the **interests in water** necessary to support, and that could be affected by, water-related development; and the **government approval** processes concerning planning, environment and heritage issues that manage the positive and negative externalities (spillover effects) associated with development. These themes are briefly described below.

## Legal and policy context

Government powers and responsibilities concerning the management of land and water resources in the Catchments are shared between the Australian Government, state and territory governments and local councils. While there is a degree of overlap between the powers and responsibilities of these three levels of government, each perform discrete functions.

Australian Government. The Australian Government performs three key functions: oversight of native title; oversight of Aboriginal freehold land in the Darwin catchments; and the implementation of Australia’s obligations under international law. Unlike other types of interests in land, native title is a federal responsibility and is managed under the *Native Title Act 1993* (Cth). In the Northern Territory, the Australian Government is also responsible for overseeing the system of Aboriginal freehold land created under the federal *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In relation to international law, the Australian Government is responsible for

ensuring Australia meets its international obligations. Under Australian law, international legal obligations have no *direct* effect on domestic law until and unless they are incorporated into it by an act of parliament. The most relevant federal statutes that give effect to international obligations and responsibilities are the *Racial Discrimination Act 1975* (Cth) and *Australian Human Rights Commission Act 1986* (Cth), which prohibit discriminatory behaviour, and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), which regulates activities that adversely affect ‘matters of national environmental significance’.

State and Territory Governments. The state and territory governments are primarily responsible for the management of the Catchment’s land and water resources. They are the ultimate ‘owner’ of almost all land in their respective jurisdictions, are responsible for the system of land title in their jurisdictions, manage Crown lands and reserves, regulate access to and the use of surface and groundwater, and manage the positive and negative externalities associated with development through planning, environmental and heritage regulations.

Local councils. Local councils have no status under the Australian Constitution. Formally, they are government agencies established under the local government legislation of the relevant state or territory. The most important functions local councils perform in the current context relate to land-use planning. Local councils are responsible for preparing and administering local planning schemes, which guide and regulate land use and development within their municipalities. The exception is in the Northern Territory, where local councils play only a minor advisory role in the planning regime. In the Territory, the planning system is administered by the Northern Territory Government, through the planning minister, Department of Infrastructure, Planning and Logistics, Northern Territory Planning Commission and Development Consent Authority.

## Interests in land

Proponents of water-related developments will require legal entitlements to access and use the subject land. This could involve the grant or acquisition of a freehold or leasehold interest in the land or the issuance of a licence (or permit) for a period of time. Freehold and leasehold interests 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. For proponents of water-related developments, licences will typically be used for initial exploratory purposes only. To undertake any material development, proponents will usually need to acquire a freehold or leasehold interest in the land from the current landholder, or have a freehold or leasehold interest granted by the state or territory government. 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 development and use.

The main types of land tenure in the Catchments differs. Details of these tenure types are provided in Table 1-1 below.

**Table 1-1 Main types of land tenure in the Catchments**

TENURE	COMMENT
<b>Fitzroy catchment</b>	
<b>Crown leasehold land</b>	Government owned land held under a lease, typically by a private party. The management of Crown land in Western Australia is governed by the <i>Land Administration Act 1997</i> (WA). The legislation provides for the issuance of five main types of leasehold interests in Crown land: general leases; conditional purchase leases; Aboriginal leases; government leases; and pastoral leases. These leases can be subject to restrictions on the use, development and transfer of land.
<b>Crown reserves</b>	Government owned land reserved for specific purposes such as nature conservation. Crown 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 lease to do so.
<b>Unallocated Crown land</b>	Government owned land not reserved for any purpose and in which no interest has been granted. To occupy or use unallocated Crown land, it is necessary to obtain a licence under the <i>Land Administration Act</i> . Freehold and leasehold estates can also be issued in relation to unallocated Crown land.
<b>Freehold land</b>	Land in which a freehold estate has been granted. Freehold estates are the most complete legal interest in land under Australian law. While close to absolute ownership, freehold estates do not give the landholder the right to use the land as they please. Use and development of the land is regulated under planning, environment and other statutes.
<b>Darwin catchments</b>	
<b>Crown leasehold land</b>	See above. The applicable legislation is the <i>Crown Lands Act</i> (NT), <i>Pastoral Land Act</i> (NT) and <i>Special Purposes Leases Act</i> (NT), which provide for four main types of Crown leases: fixed term leases; perpetual leases; pastoral leases; and special purpose leases.
<b>Crown reserves</b>	See above.
<b>Vacant Crown land</b>	The equivalent of unallocated Crown land in Western Australia and Queensland. To occupy or use vacant Crown land, it is necessary to obtain a licence under the <i>Crown Lands Act</i> .
<b>Freehold land</b>	See above.
<b>Parks and reserves</b>	Land declared a park or reserve under the <i>Territory Parks and Wildlife Conservation Act</i> (NT) (e.g. Litchfield National Park) or federal EPBC Act (e.g. Kakadu National Park). Parks and reserves are required to be managed for particular purposes in accordance with management plans. There are joint management arrangements for parks and reserves on Aboriginal land. The use and development of parks and reserves is subject to restrictions designed to protect relevant natural and cultural heritage values.
<b>Mitchell catchment</b>	
<b>Crown leasehold land</b>	See above. The applicable legislation is the <i>Land Act 1994</i> (Qld), which provides for three main types of Crown leases: term leases; perpetual leases; and freeholding leases. Most of the Crown leases in the Mitchell catchment are 'rolling term leases' (leases for a fixed term that can be extended at any time).
<b>National parks</b>	Government owned land or Aboriginal land declared a national park under the <i>Nature Conservation Act 1992</i> (Qld). National parks are required to be managed for conservation purposes in accordance with statutory management principles. When located on Aboriginal land, they must also be managed in a manner consistent with Aboriginal tradition. Generally, people wanting to use a national park must obtain a lease, licence or other authority under the <i>Nature Conservation Act 1992</i> to do so.
<b>Freehold land</b>	See above.
<b>Aboriginal land</b>	Freehold land held on trust by Aboriginal land trusts and 'CATSI corporations' (corporations registered under the federal <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)) for Indigenous groups under the <i>Aboriginal Land Act 1991</i> (Qld). Aboriginal land is subject to special restrictions, including that trustees cannot sell or mortgage it. Use and development of Aboriginal land can be facilitated through leases, which are subject to specific rules under the <i>Aboriginal Land Act</i> .

In addition to the need for a freehold or leasehold interest, or a licence, any water-related development must be consistent with the **native title arrangements** that apply to the land. A significant proportion of the Catchments is subject to native title and registered native title claims. 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. Reflecting its unique status, native title has its own system of determination (through the Federal Court of Australia), registration (at the National Native Title Registry, maintained by the National Native Title Tribunal) and protection (under the *Native Title Act*).

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

Importantly, water-related development in the catchments 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 a number of ways of avoiding invalidity of future acts, one of the most notable being entry into Indigenous land use agreements (ILUAs) with traditional owners. 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.

## 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 Catchments.

The Western Australian, Northern Territory and Queensland water statutes contain processes for water planning, the regulation of 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). In Queensland, the regulation of the construction and operation of water infrastructure is done through the *Planning Act 2016* (Qld) and *Water Act*. The nature of the water governance regimes in each jurisdiction is different. Table ES2 provides an overview of the main elements, as they apply to the Catchments.

**Table ES 2 Main elements of the water governance regimes in the Catchments**

ELEMENT	COMMENT
<b>Fitzroy catchment</b>	
<b>Main statute</b>	<i>Rights in Water and Irrigation Act 1914 (WA)</i> (RiWI Act)
<b>Water planning</b>	Non-mandatory water resource management plans can be prepared at the regional, sub-regional and local scales where they are considered necessary. There are currently no sub-regional or local management plans for the Fitzroy, and no water allocation plan.
<b>Approvals for taking water</b>	The RiWI Act allows for water resources to be proclaimed, which results in the application of specific requirements concerning taking water and works. Both the surface waters and groundwaters of the Fitzroy Catchment are proclaimed areas. Under the RiWI Act, activities involving taking water are divided into two broad categories: those that can occur without authorisation; and those that can only occur with authorisation. Where authorisation is required to take water, proponents will generally be required to obtain a licence under section 5C of the Act.



ELEMENT	COMMENT
<b>Water-related works approvals</b>	A licence or a permit under the RiWI Act is usually required to interfere with a watercourse, wetland or underground waters. There are four main types of relevant approvals: section 26D licences (construction or alteration of a well or bore); section 11 permits (construction of works to take water where access is via a public road or reserve in a proclaimed area); section 17 permits (construction of works to take water in a proclaimed area); and section 21A permits (construction of works to take water via access from a public road or reserve in an unproclaimed area).
<b>Darwin catchments</b>	
<b>Main statute</b>	<i>Water Act</i> (NT)
<b>Water planning</b>	Two main mechanisms to support water planning: water control district declarations; and water allocation plans. In declared water control districts, the priority water uses are identified and sustaining these uses forms the basis for the preparation of water allocation plans. Water allocation plans describe the sustainable yield for the area and water allocation for beneficial uses. The 'Darwin Rural Water Control District' lies within the Darwin catchments, and there are two relevant water allocation plans: Berry Springs Water Allocation Plan; and Howard Water Allocation Plan (currently under development).
<b>Approvals for taking water</b>	Activities involving taking water are divided into two broad categories: those that can occur without a water licence; and those that can only occur with a water licence. Most water-related developments will require a licence. The amount of water taken under a licence can be limited by an Annual Announced Allocations. Annual Announced Allocations are guided by water allocation plans or default rules.
<b>Water-related works approvals</b>	Permits or licences under the <i>Water Act</i> are generally required to undertake water-related works. Specifically: (i) a permit is required to construct a water storage in a waterway, or in such a way as to affect the flow of water in a waterway; (ii) a permit is required to construct works to take groundwater; and (iii) a licence is required to recharge groundwater.
<b>Mitchell catchment</b>	
<b>Main statute</b>	<i>Water Act 2000</i> (Qld)
<b>Water planning</b>	The <i>Water Act's</i> planning process involves the preparation of statutory water plans, which provide the basis for 'water entitlements' (water allocations, interim water allocations and water licenses). The <i>Water Plan (Mitchell) 2007</i> is the primary water plan for the Mitchell catchment. The Plan deals with: water in a watercourse or lake; springs not connected to Great Artesian Basin (GAB) water; underground water that is not GAB water; and overland flow water, other than GAB spring water. The <i>Water Plan (Great Artesian Basin and Other Regional Aquifers) 2017</i> regulates access to and use of GAB water. The <i>Water Plan (Barron) 2002</i> is also of relevance as there is an inter-basin transfer of water from the Barron River into the Walsh River (in the upper Mitchell catchment).
<b>Approvals for taking water</b>	Activities involving the taking or interference with water are divided into two categories: those that can occur without an authorisation; and those that can only occur under an authorisation. The Act provides for six main types of authorisations: water licences; water allocations; water permits; resource operations licences; distribution operations licences; and operations licences.
<b>Water-related works approvals</b>	Generally, the construction of water-related facilities require development approval under the <i>Planning Act</i> , as well as authorisations under the <i>Water Act</i> to engage in the actual taking or interference. The details of the development approval requirements are spread across the <i>Planning Act</i> and <i>Planning Regulation 2017</i> (Qld), and the <i>Water Act</i> and <i>Water Regulation 2016</i> (Qld). A riverine protection permit may also be required under the <i>Water Act</i> to excavate or place fill in a watercourse, lake or spring.

In principle, native title applies to water in the same way as it does to land. A notable aspect of water-related native title is that the law will not recognise native title rights involving the *exclusive possession* of water. However, non-exclusive possession native title rights that entitle the holder to access and use water can exist. 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. Like all native title, the precise nature of the native title rights in water 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 relevant waters is claimed or has been

determined to exist, proponents will be required to engage with traditional owners and the federal native title process.

## 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 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. The most relevant government regulations are those imposed under federal and state planning, environment and heritage statutes.

### Australian Government regulations

The Australian Government does not have planning legislation that applies to the Catchments. However, it does have both environmental and heritage regulations that could apply to water-related development. The principal federal environmental statute is the EPBC Act, which regulates actions that have significant impacts on '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. Water-related development that could have significant adverse impacts on these matters must be referred under the EPBC Act for assessment and approval. Guidelines have been published by the federal environment department to help proponents determine when projects are likely to have significant impacts on matters protected under the Act. Due to the ambiguity associated with determining the significance of potential impacts, proponents should consult with the federal environment department about the need for referrals before undertaking water-related developments.

To help proponents of **major projects** navigate federal regulatory processes, including the EPBC Act, the Australian Government has established the 'Major Project Facilitation Programme'. The program is run by the Australian Department of Industry, Innovation and Science.

In addition to the regulatory requirements under the EPBC Act, stakeholders interested in water-related development should be aware of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act). Declarations can be issued under the ATSIHP Act to protect significant Aboriginal areas and objects from injury or desecration. These declarations are rarely made but they can be powerful, forcing the cessation of projects affecting the relevant area.

There are a number of other federal regulatory regimes that could apply to proponents involved in water-related development. Foreign investors should take particular note of the federal regulation of foreign investment under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth). Under this regulatory regime, the federal Treasurer can impose conditions and even block foreign investment proposals in Australia. Foreign interests in agricultural land are also required to be registered with the Australian Taxation Office under the *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth).

## State and territory planning, environment and heritage regulations

### Western Australia

**Land-use planning** in Western Australia is governed by the *Planning and Development Act 2005* (WA). In the Fitzroy catchment, most water-related developments are likely to require planning approval under the two main planning instruments: Shire of Derby-West Kimberley Interim Development Order No 8; and Interim Development Order; and Shire of Halls Creek Interim Development Order No 8. However, these instruments are likely to change over coming years, which will alter the requirements.

The main **environment protection** statute in Western Australia is the *Environmental Protection Act 1986* (WA). Projects that could have significant environmental impacts will usually require assessment and approval under the Act. In addition to this, a person who carries out an activity that causes material or serious environmental harm, or pollution, must have an environmental approval, works approval or license under the Act. Environmental harm is defined broadly for these purposes and includes the clearing of native vegetation.

The two main **heritage** statutes in Western Australia are the *Heritage of Western Australia Act 1990* (WA) and *Aboriginal Heritage Act 1972* (WA). The *Heritage of Western Australia Act 1990* (WA) protects places of state cultural heritage significance and works in conjunction with the *Planning and Development Act*. The *Aboriginal Heritage Act 1972* (WA) contains a regulatory regime for the protection and conservation of sites and objects of Indigenous heritage significance. Under the regime, it is an offence to damage or alter an Indigenous heritage site or object. Prior to carrying out development, proponents are required to take reasonable measures to assess whether the subject land contains sites or objects of Indigenous heritage significance. Approvals can be issued under the Act to allow proponents to undertake development activities on an Indigenous heritage site if it cannot feasibly be avoided.

The Western Australian Government has a policy—the Lead Agency Framework—that is intended to help proponents of **major projects** to navigate state government approval requirements. The framework applies to all resource, infrastructure, transport, large-scale land and housing proposals and developments.

### Northern Territory

**Land-use planning** in the Territory is governed by the *Planning Act* (NT). Whether a development permit will be required for water-related development will depend on the zoning that applies to the land under the Northern Territory Planning Scheme. The Northern Territory Planning Scheme applies across most of the Territory but not all land is zoned. Where land is unzoned, planning restrictions can still apply to the site. For example, planning restrictions apply to the clearing of native vegetation on unzoned land.

The main **environment protection** statute in the Territory is the *Environmental Assessment Act* (NT). Projects that could have significant environmental impacts will usually require assessment by the Environmental Protection Authority (EPA) under the Act. The EPA and the Territory environment minister are not responsible for approving projects; their role is advisory. The environment minister provides the EPA's assessment report to the 'responsible minister' for decision, with additional comments if they consider they are necessary. In this context, the responsible minister is another minister with statutory decision-making responsibilities in relation

to the project (e.g. the planning minister). In addition to the requirements under the *Environmental Assessment Act*, the *Waste Management and Pollution Control Act (NT)* regulates polluting and waste generating activities. Certain types of water-related developments could require approval under this Act.

The Territory's two main **heritage** statutes are the *Heritage Act (NT)* and *Northern Territory Aboriginal Sacred Sites Act (NT)*. 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. Under the Act, 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. The *Northern Territory Aboriginal Sacred Sites Act* protects sites that are sacred to Indigenous people or of significance according to Indigenous 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.

The Northern Territory Government has a policy—the Major Project Status Policy Framework—that is intended to help **major project** proponents navigate government approval requirements.

## Queensland

**Land-use planning** in Queensland is mainly governed by the *Planning Act 2016 (Qld)*. There are four local planning schemes that apply in the Mitchell catchment: Kowanyama Aboriginal Shire Planning Scheme; Shire of Carpentaria Planning Scheme; Cook Shire Planning Scheme; and Mareeba Shire Planning Scheme. The local planning schemes divide development into three categories: prohibited development (the type of development cannot be carried out on the subject land); assessable development (the type of development can only be carried out with development approval); and accepted development (the type of development can be carried out without approval). Where a development is assessable, the relevant planning scheme will designate whether the assessment must be 'code assessment' (less intensive) or 'impact assessment' (more comprehensive and involves public notification and comment).

There are two other important planning-related statutes in Queensland: *State Development and Public Works Organisation Act 1971 (Qld)*; and *Regional Planning Interests Act 2014 (Qld)*. The *State Development and Public Works Organisation Act* provides for the coordinated planning, assessment and approval of projects of economic, social and/or environmental significance to the state. Projects declared to be 'coordinated projects' by the Queensland Coordinator-General must undergo an Environment Impact Statement (EIS) or Impact Assessment Report (IAR). Under the *Regional Planning Interests Act*, regional interests development approvals are required for particular types of projects affecting issues of regional significance. Water-related developments

in the Mitchell catchment involving broadacre cropping or water storage activities may require a regional interests development approval under the Act.

The main **environment protection** statute in Queensland is the Environmental Protection Act 1994 (Qld). Under the Act, it is an offence to carry out an 'environmentally relevant activity', or to 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 that are prescribed under the regulations. Schedule 2 of the Environmental Protection Regulation 2008 (Qld) contains a list of prescribed environmentally relevant activities, which includes aquaculture facilities, intensive animal feedlots, poultry farming, piggeries, food processing and beverage production, and waste and water treatment services. Where an environmental authorisation is required, it triggers off a four-stage assessment and approval process.

There are two main **heritage** statutes that apply in the Mitchell catchment: one governing non-Indigenous cultural heritage, the Queensland Heritage Act 1992 (Qld); and one governing Indigenous cultural heritage, the Aboriginal Cultural Heritage Act 2003 (Qld). The Queensland Heritage Act 1992 (Qld) establishes the Queensland Heritage Register to record places of state cultural heritage significance, with the exception of places of Indigenous heritage significance. Protection of places of state and local heritage significance is afforded through the Planning Act. The Aboriginal Cultural Heritage Act 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'. 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, or entering into a Cultural Heritage Management Plan or ILUA (under the Native Title Act) with relevant traditional owners.

There are two processes for **major projects** in Queensland: the State Development and Public Works Organisation Act process for coordinated projects; and the State Assessment and Referral Agency (SARA) (which forms part of the Queensland Department of Infrastructure, Local Government and Planning) process for projects requiring assessment under the Planning Act that affect state interests. Both of these processes are intended to lower transaction costs for major project proponents by streamlining state government approval requirements.

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# Part I Main report

# 1 Introduction

## 1.1 NAWRA context

The Australian Government's 2015 *Northern Australia White Paper* (Australian Government, 2015) sets out a broad vision and framework to promote sustainable development in Northern Australia. The primary role of government in this framework is to act as an enabler for private sector development. Amongst other things, the enabling functions the government envisages playing include funding basic research to identify potential business opportunities and impediments to investment in the north.

Over the past decade, the Australian Government has invested in a series of research initiatives to deepen the knowledge base about land and water resources in northern Australia, with the aim of providing a platform for future development. In 2007, the Northern Australia Land and Water Taskforce was established to evaluate the potential for new sustainable economic developments in the region. To inform its deliberations, the Taskforce commissioned CSIRO to undertake the Northern Australia Sustainable Yields project and Northern Australia Land and Water Science Review. These projects evaluated historical, recent and likely future water availability in parts of northern Australia, and assessed the implications of a range of water-related development options across the north.

One of the main findings from the work of the Taskforce was there were critical gaps in information and knowledge about the land and water resources of northern Australia that were obstructing policy development and investment. To partially address this, in 2013, the Australian Government commissioned CSIRO to undertake the Flinders and Gilbert Agricultural Resource Assessment. This project mapped the nature and state of soil and water resources in the Flinders and Gilbert catchments in north Queensland, and evaluated the feasibility and sustainability of irrigated agricultural development in these areas.

Building on these past research projects, the Northern Australia White Paper committed \$15 million for the Northern Australia Water Resource Assessment (NAWRA), which seeks to evaluate the development opportunities and constraints in three areas across the north: the Fitzroy catchment in Western Australia; Finniss, Adelaide, Mary and Wildman River catchments in Northern Territory (Darwin catchments); and Mitchell catchment in Queensland (collectively 'the Catchments'). NAWRA aims to evaluate the soil and water resources in the Catchments, identify and evaluate water capture and storage options, test the commercial viability of agricultural opportunities, and assess the potential environmental, social and economic impacts of development.

This report forms part of NAWRA. It provides an analysis of the institutions relevant to water-related development in the Catchments. In the social sciences, the term 'institutions' is typically defined as the formal and informal rules and norms that structure human behaviour and social interactions (Hodgson, 2006). In the current context, it is used to refer



to the rules and norms that govern water-related development in the Catchments, which stem from international law, common law, statute, delegated legislation, and government policies. By analysing these institutions, the report sheds light on the nature of the rights and interests that are necessary to undertake, and could be affected by, water-related development, and the institutional risks faced by prospective investors and other affected parties.

The phrase ‘water-related development’ is used as shorthand throughout this report to refer to a range of development that is dependent on, or related to, water resources. It covers large-scale water infrastructure like large dams and pipelines, onshore aquaculture developments, through to small-scale irrigated agriculture projects involving the use of bore water. It is also intended to capture projects that are ancillary to water-related developments like the provision of energy and transport infrastructure.

## 1.2 Nature of interests in property

In order to undertake water-related development, or use land and water resources for particular purposes, the proponent of the activity must hold the requisite rights and interests that authorise it. These rights and interests are commonly referred to as ‘property rights’. Although widely used, the phrase ‘property rights’ is ambiguous, having different meanings in different contexts. Before undertaking any development, it is important for proponents and other stakeholders to understand the precise nature of the property rights in relevant land and water resources, particularly the interests, freedoms and securities provided to the holders of the requisite property rights.

In public discourse, and amongst economists, the phrase ‘property rights’ is typically used to refer to a broad collection of legal and social arrangements that govern access and use of a tangible or intangible thing. In this vein, Schlager and Ostrom (1992, p. 250) define property rights as ‘the authority to undertake particular actions related to a specific domain’.

Similarly, Aretino, Holland, Matysek and Peterson (2001, p. 11) define property rights as:

... the bundle of ownership, use and entitlement rights that a user has over a good or resource such as land, and include any responsibilities that the user may have to others. Entitlements may include the right to grow crops and develop land. Responsibilities may include using the land in a specified way (such as grazing on pastoral lease land) or refraining from activities or practices that interfere with the activities or enjoyment of others. As such, property rights govern access to resources and reflect the community’s expectations about what resources uses are acceptable.

In law, property rights are generally defined more restrictively. Historically, the traditional approach to defining legal property rights has been to ask whether the relevant interests are definable, identifiable, stable and assignable.<sup>1</sup> The difficulty with this approach is it is

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<sup>1</sup> *National Provincial Bank Ltd v Ainsworth* [1965] UKHL 1 at [19]; *R v Toohey: Ex parte Meneling Station Pty Ltd* [1982] HCA 69.

ambiguous and circular (Gray, 1991). It is also now widely accepted that assignability is not an essential characteristic of legal property.<sup>2</sup>

A more accurate description of the essence of most legal property is it provides the holder with the ability to control access to a resource. As Gray (1991, p. 294) states:

... 'property' resides not in consumption of benefits but in control over benefits.  
'Property' is not about *enjoyment of access* but about *control over access*.

Writing in the late 19th century, eminent US jurist Oliver Wendell Holmes Jr (1991, p. 220) sought to capture a similar idea when he stated:

The law does not enable me to use or abuse this book which lies before me. That is a physical power which I have without the aid of the law. What the law does is simply to prevent other men to a greater or less extent from interfering with my use or abuse.

To fully understand this approach to defining property rights, it is necessary to start with the distinction between rights and privileges drawn by Wesley Newcomb Hohfeld (1913; 1917; Ostrom 1976). According to Hohfeld, 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. To use Holmes' example of a book, the owner of the book holds a legal right to *exclude* other parties from accessing the book, and there is a correlative duty on other parties not to access the book without the permission of the owner.

Under Hohfeld's system of jural relations, a privilege exists where a person is free to do something in relation to a resource but there is no correlative duty. For example, as Holmes suggests, the owner of a book does not have a legal right to *use* it; this is a privilege that stems from ownership. The absence of a right in this instance is attributable to the fact there is no duty on the owner to 'use or abuse' the book and no legal capacity for third parties to prevent the owner from doing so.

Defining rights and privileges in this way narrows the scope of what qualifies as a legal property right. For example, the freedom that a property owner enjoys to 'grow crops and develop land', to borrow the phrase used by Aretino et al. (2001), is not a legal property right. As with the case of the book, the ability to grow crops and develop land will usually instead be a privilege that stems from ownership.

The need for a right to be matched by a correlative duty is the reason why the essence of most legal property is the ability to control *access* to a resource. Typically, there is no correlative duty to the freedom to use a resource or otherwise enjoy its benefits. 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.

Figure 1-1 provides a stylised representation of this notion of property in relation to a piece of land; represented by the aqua area. In the figure, the owner's unfettered right to control

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<sup>2</sup> *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; *Georgiadis v Australian & Overseas Telecommunications Corporation* [1994] HCA 6.

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 10 green circles represent the full range of *potential* activities (developments and uses) that could occur on the land (in Hohfeld’s language, the potential range of privileges).

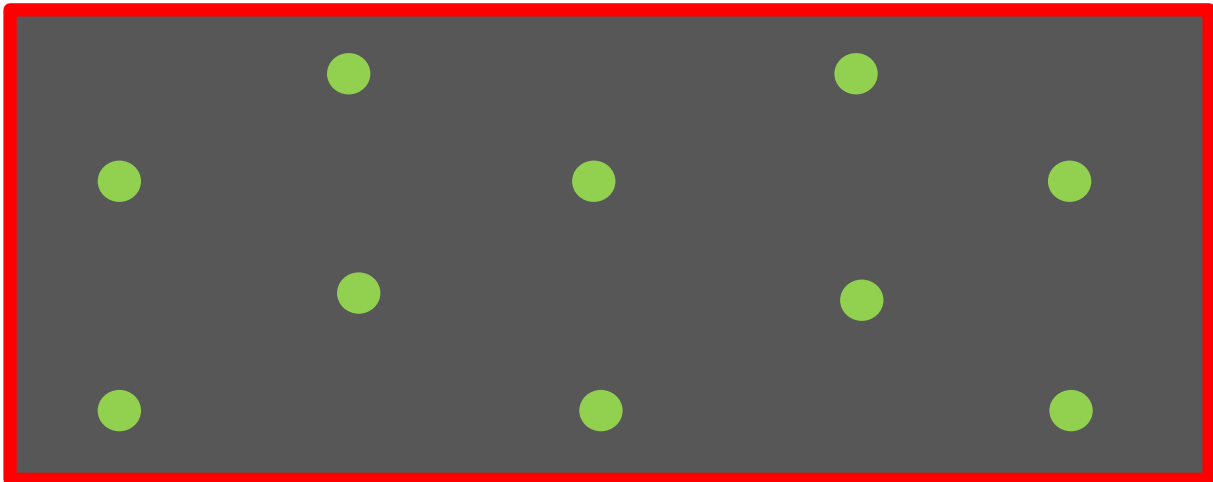


Figure 1-1 Rights and privileges of an owner of land, full range of potential privileges<sup>[JS1]</sup>

In practice, landholders rarely have an unfettered, or absolute, right to control access or complete freedom to do as they wish on their land. There are a range of restrictions that affect their 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. For example, grants of freehold do not include the minerals that lie in or under the land; these are reserved to the Crown. As a consequence, holders of a freehold interest in land are not free to extract minerals under ‘their’ land. Similarly, leasehold interests granted by the Crown are often subject to restrictions, requiring land to be used for particular purposes or prohibiting or limiting the types of activities that can occur on the land without the permission of the government.<sup>3</sup>

In addition to the restrictions inherent in the title, there are a number of species of legal property rights that can be attached to title at the time of or after the grant that will also

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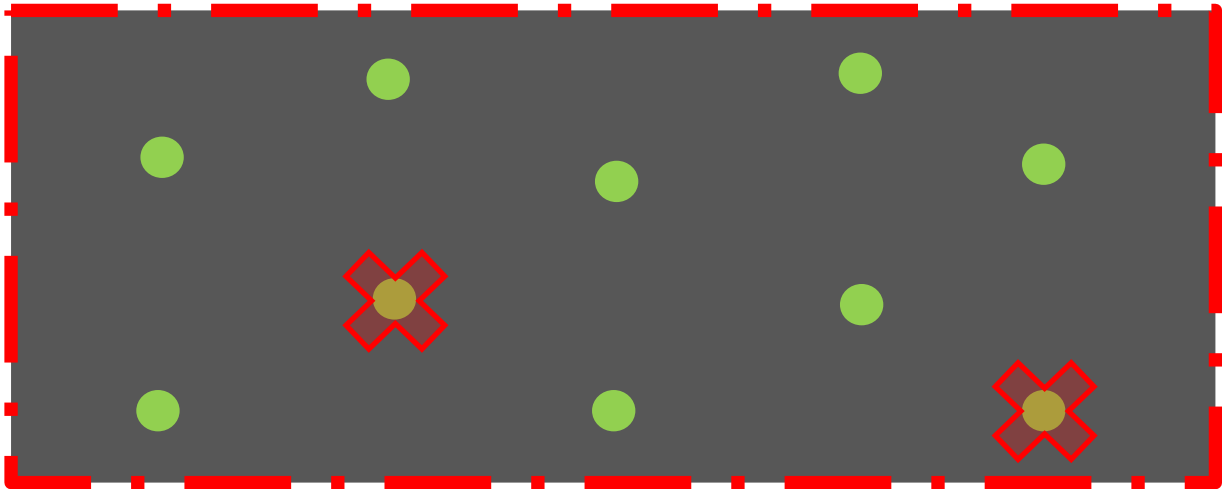
<sup>3</sup> Similar restrictions can be imposed under the terms of private leases (i.e. those not issued by the Crown). The nature of interests in land is discussed further in Section 3 and in the Technical Report.

impact upon the ways in which the landowner may use the land. Generally, these types of property rights do not provide the holder with the ability to control access to the land (they are exceptions to the general rule that the essence of property is control). They co-exist with the landholder's freehold or leasehold interest but affect the scope of their rights and privileges. The best examples are:

- easements, which entail a non-possessory right to use or otherwise access another person's land (the right is the ability to use or access the land and the correlative duty is for the possessor of the burdened land and everybody else not to interfere with the enjoyment of the use or access);
- profits à prendre, which are a non-possessory right to access another person's land and take specific natural resources (e.g. timber, minerals, fruit) (the right is the ability to access the land and take the resources and the correlative duty is for the possessor of the burdened land and everybody else not to interfere with the enjoyment of the right to access and take);
- covenants, which consist of a property right held by one landholder to restrict the use of land held by another (a restrictive covenant), or even compel another landholder to undertake certain actions that benefit the land (the right is the ability to get the holder of the burdened land to do/not do something over their land and the correlative duty is for the other landholder to do/not do the relevant actions); and
- non-exclusive possession native title, which gives the holders a 'bundle of rights' that stem from traditional Indigenous laws and customs but not the right to control access.

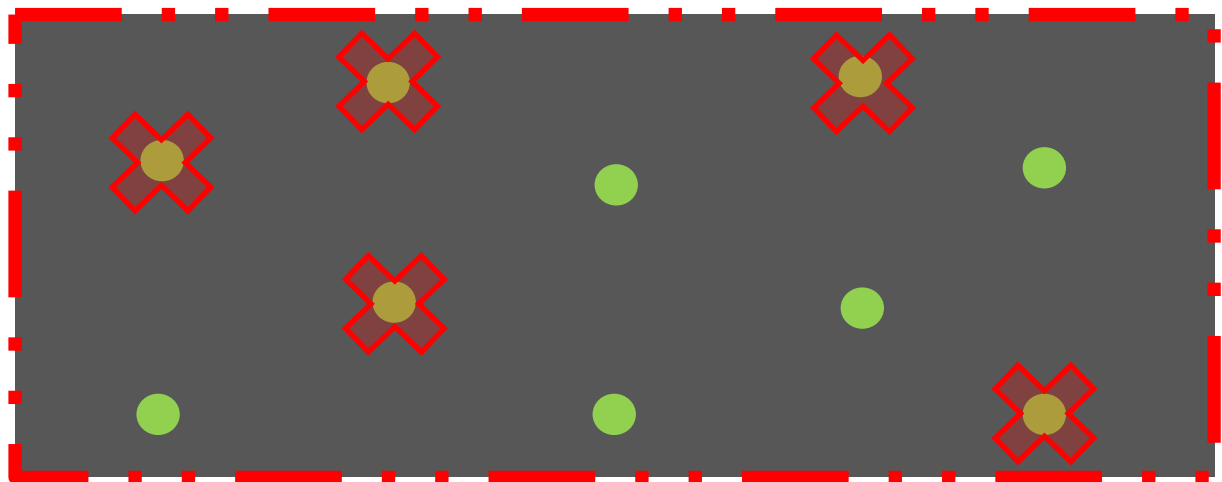
The practical impact of these types of proprietary rights on the interests of the landowner—the holder of the freehold or leasehold interest—is to curtail their right to control access and extinguish potential privileges. For example, in the case of an easement, the landholder cannot exclude the easement holder from accessing the area subject to the easement. They also cannot use or develop the area in a way that interferes with the easement holder's use or access.

The impact of restrictions inherent in the title and 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 10 potential activities that could be undertaken, there are now only eight. 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. In Hohfeld's language, the landholder will be subject to a countervailing duty not to interfere with the interests of the right holder.



**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 five.



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

This report adopts this Hohfeldian approach to defining rights and interests in property because it provides greater clarity about the nature of the interests needed to undertake, and that could be affected by, water-related development in northern Australia.

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.

**Section 2** provides an overview of the macro legal and policy context surrounding water-related development in northern Australia. It looks at relevant international, national and state and territory institutions that provide the overarching context for development in the region.

**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 northern Australia. 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 water is common property until reduced to possession. The Queensland, Northern Territory and Western Australian Governments control access to surface and groundwater 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 Catchments. 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 in northern Australia. It also contains suggestions on further areas of research.

The report is not meant to be comprehensive. It is intended to provide an overview of the main institutions that could affect, and be affected by, water-related developments in the Catchments. The institutional requirements relevant to specific water-related developments in the Catchments will depend on the characteristics and location of the developments, and their likely impacts on the environment. To illustrate this, three case studies are provided in Appendix A.1, concerning major projects in Western Australia, Northern Territory and Queensland. Proponents and other stakeholders interested in specific projects will need to obtain tailored advice and assistance in relation to each of the themes identified above.

## 2 Legal and policy context

This subsection provides an overview of the macro legal and policy context surrounding water-related development in northern Australia. It looks at relevant international, national and state and territory institutions that provide the overarching context for development in the region. The following issues are covered:

- foundational issues on the nature of the Australian federation, including the division of powers and responsibilities between federal, state, territory and local government;
- relevant international law that may influence the domestic institutions governing water-related development in the Catchments; and
- security of property interests and compensation for the acquisition of property and regulatory takings.

### 2.1 Overview of Australian land and water governance

#### 2.1.1 DIVISION OF POWERS IN THE FEDERATION

Australia is a federal constitutional monarchy, consisting of a federal government (Australian Government), six state governments (the Governments of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and two self-governing territories (Governments of the Australian Capital Territory and Northern Territory). The states and the Northern Territory also have local governments, which are formally agencies of the states and territory.

The Commonwealth of Australia was established by, and is governed under, the Australian Constitution, which forms part of the *Commonwealth of Australia Constitution Act 1900*; an Act of the British Parliament. Under the Australian Constitution, government powers and responsibilities are shared between the federal, state and territory governments. Local government has no status under the Australian Constitution.

The Constitution provides the Australian Government with various ‘heads of power’ to make laws on specific topics. For example, the Australian Government has the power to make laws with respect to taxation (s 51(ii)), international and interstate trade and commerce (s 51(i)), quarantine (s 51(ix)), corporations (s 51(xx)), race (s 51(xxvi)) and external affairs (s. 51(xxix)). If the Constitution does not provide the Australian Government with a head of power in relation to an issue, it cannot make laws in respect of it.

The states have their own constitutions, which are also Acts of the British Parliament, but they do not impose significant constraints on the ability of state parliaments to make laws. Under the state constitutions, the states are empowered to ‘make laws for the peace, welfare and good government in all cases whatsoever’, a phrase that has been interpreted

as ‘ample and plenary as the power possessed by the Imperial Parliament itself’.<sup>4</sup> The only substantive restriction in state constitutions is that there must be some nexus between the subject matter of the legislation and the state; a broad test that is intended to be ‘liberally applied’.<sup>5</sup> This leaves the Australian Constitution as the primary source of legal constraints on state law-making, particularly section 109, which invalidates any state law that is inconsistent with a law of the Commonwealth. The practical effect of this provision is to give the Australian Government the ability to oust state laws where it has a head of power to make laws in relation to an issue.

The Australian Government’s heads of power to make laws with respect to taxation, trade and commerce, and corporations enables it to manage the economy. Through the exercise of these powers, it is able to shape the policy environment concerning water-related development in northern Australia. However, the Constitution does not give the Australian Government an express head of power to make laws with respect to the environment. Due to this, and historical factors, environmental issues, including land and water management, are primarily the domain of the states and territories, who delegate some of their functions to local councils (and, in some cases, to regional natural resource management (NRM) bodies). Land tenure issues are the exclusive domain of the states and territories except where it involves formal Commonwealth land.

### **2.1.2 AUSTRALIAN GOVERNMENT INVOLVEMENT IN LAND AND WATER MANAGEMENT**

Historically, the Australian Government’s involvement in land and water management was relatively marginal, being confined largely to fisheries management in Commonwealth waters, land management on Commonwealth lands, and the regulation of international wildlife trade. Starting in the 1970s, three factors have contributed to the Australian Government playing a more prominent role:

- more expansive judicial interpretations of the Australian Government’s constitutional powers, particularly the external affairs power but also the corporations, trade and commerce and race powers;
- the increasing number and breadth of Australia’s obligations under international environmental treaties; and
- societal pressure associated with specific environmental issues.

After protracted disputes over the Australian Government’s involvement in environmental matters in the 1970s and 1980s, in the early 1990s, the federal, state and territory governments sought to formalise a more stable division of roles and responsibilities. The initial outcome of these efforts was the Intergovernmental Agreement on the Environment (IGAE), which was signed by the federal, state and territory governments, and the Australian Local Government Association, in 1992. This was followed by the Council of Australian

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<sup>4</sup> *Union Steamship Co of Australia Pty Ltd v King* [1988] HCA 55 at [16].

<sup>5</sup> *Pearce v Florenca* [1976] HCA 26 at [6] per Gibbs J.



Government's (COAG) *Agreement on Commonwealth/State Roles and Responsibilities for the Environment* in 1997 (COAG environment agreement).

The COAG environment agreement sought to focus the role of the Australian Government on defined 'matters of national environmental significance'. Amongst other things, the agreement proposed the federal environmental assessment and approval process only apply to proposals affecting matters of national environmental significance and matters involving the Commonwealth. This framework provided the basis for the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), which commenced in July 2000. The EPBC Act is the main federal environmental statute that is of relevance to water-related development in northern Australia.

### 2.1.3 PROMINENCE OF STATE AND TERRITORY INSTITUTIONS

While the Australian Government's role in land and water management has increased over the past 40 years, the states and territories still dominate the field. 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 Catchments.

**Interests in land.** 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 personal entitlement or authorisation to access it (a licence). A substantial proportion of the land in the Catchments is 'Crown land'; or land owned by the federal, state or territory government (the 'Crown' refers to the government in all its capacities in the relevant jurisdiction). Most of this is state and territory Crown land. Federal Crown land (Commonwealth land) in relevant parts of the Catchments is limited and confined largely to the Darwin catchments. Typically, the Crown land in the Catchments is leased to private landholders for pastoral purposes under a Crown lease or managed for public purposes as either a Crown reserve or unallocated Crown land. This means proponents of water-related development will often need to obtain relevant interests in land from the state or territory government, or acquire Crown leases from private landholders. Where the land is not Crown land (i.e. it is freehold land held privately), relevant interests will need to be acquired or otherwise obtained from the private landholder. 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. Similarly, proponents wanting to undertake a development on Commonwealth land—areas owned or leased by the Australian Government, including for defence purposes—need to obtain relevant interests in the land from the Australian Government.

**Interests in water.** The Western Australia, Northern Territory and Queensland Governments are responsible for water planning and regulating access to, and the use of, surface and groundwater in their jurisdictions. Under common law, landholders adjoining a watercourse have what are known as ‘riparian rights’ that entitle them to make reasonable use of the water in a stream. The common law also entitles landholders to intercept groundwater largely without regard to the consequences for neighbouring landholders or the broader community. The potential for these common law rules to give rise to conflict and inefficiency led to their abolishment through state and territory legislation in the late 1800s through to the mid-1900s. State and territory water legislation now 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, 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 Catchments is limited. There is federal water legislation, the *Water Act 2007* (Cth), but its scope is confined to waters in the Murray-Darling Basin.

**Government approvals.** Responsibility for managing the potential positive and negative economic, social and environmental externalities associated with water-related development in the Catchments is split between the federal, state and territory governments. The Western Australia, 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. The concurrent operation of federal, state and territory government approval processes creates a risk of overlap and duplication. To address this issue, the EPBC Act provides for the Australian Government to accredit state and territory assessment and approval processes under ‘bilateral agreements’ (see Section 5.1.1 below for further details).

#### **2.1.4 REGIONAL NRM BODIES**

Since the 1970s, there has been increased efforts by Australian governments to reverse the degradation of land and water resources that has occurred as a consequence of inappropriate land use and management practices (Hajkowicz, 2009; Clayton et al., 2011). A large part of this has involved the investment of public funds in NRM programs, which have sought to incentivise changes in management practices and the restoration of degraded ecosystems. The Australian Government has played a substantial role in NRM programs, providing a significant proportion of the funding that underpins them, particularly since the mid-1990s.

In 2003, a regional model was formally adopted to the delivery of federally funded NRM programs (Hajkovicz, 2009). Under this model, planning and coordination of publicly funded NRM activities was undertaken at a regional (rather than state or local) scale, through regional NRM bodies. There are now 56 regional NRM bodies across Australia. The Catchments covered in this study are covered by three regional NRM organisations: Northern Gulf Resource Management Group (Mitchell catchment); Territory Natural Resource Management (Darwin catchments); and Rangelands NRM Coordinating Group (Fitzroy catchment).

Unlike some NRM bodies, these three organisations are not statutory organisations nor do they have formal statutory responsibilities under state or territory legislation. Territory Natural Resource Management and Rangelands NRM Coordinating Group are independent not-for-profit organisations established under the territory and state community associations statutes.<sup>6</sup> The Northern Gulf Resource Management Group is a company limited by guarantee established under the *Corporations Act 2001* (Cth). 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 working with a range of government and non-government stakeholders to realise these goals.

While regional NRM bodies perform important functions, the three that cover the Catchments are not regulators. They are not 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. However, these organisations can be an important source of information and collaboration in planning developments and NRM-related activities.

### **2.1.5 LOCAL GOVERNMENT**

There are over 500 local councils in Australia. These 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 Western Australia and 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.

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<sup>6</sup> *Associations Act* (NT); *Associations Incorporation Act 2015* (WA).

In the Fitzroy catchment in Western Australia, there are two relevant councils that perform these functions: Derby-West Kimberley Shire Council; and Hall's Creek Shire Council. In the Mitchell catchment in Queensland, there are four: Kowanyama Aboriginal Shire Council; Carpentaria Shire Council; Mareeba Shire Council; and Cook Shire Council.

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 Infrastructure, Planning and Logistics, Northern Territory Planning Commission and Development Consent Authority. Local councils play only a minor advisory role.

## 2.2 International law

Under Australian law, international legal obligations have no *direct* effect on domestic law, whether at the federal, state or local government level. Hence, Australia's ratification of an international treaty, and the entry into force of the treaty, does not lead to the automatic incorporation of the treaty obligations into the law of Australia. For international legal obligations to become part of Australian municipal law, there must be an act of parliament. For those interested in water-related developments in the Catchments, this means the influence of international law on their rights, duties, powers and immunities is indirect, in the sense that it shapes domestic institutions.

The primary means by which international law influences domestic institutions is via federal law. The states, territories and local governments have no standing under international law. The Australian Government represents Australia in international fora and is solely responsible for ensuring Australia meets its international obligations. To match this responsibility, the Australian Constitution gives the Australian Government the power to make laws to give effect to Australia's obligations under international law. While the states and territories are not international actors, and their laws rarely directly incorporate international environmental obligations, they play an important role in the implementation of Australia's international obligations in collaboration with the Australian Government.

For current purposes, the most relevant international obligations are those associated with the *UN Declaration on the Rights of Indigenous Peoples of 2007* and those imposed under international environmental law.

### 2.2.1 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES OF 2007

The *UN Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations (UN) General Assembly in September 2007. Initially, Australia was one of four nations (joined by Canada, New Zealand and the United States) who voted against the Declaration. In 2009, the Australian Government endorsed the Declaration, thereby reversing its previous position.

The substantive elements of the Declaration consist of a series of principles and minimum standards concerning the rights, freedoms, interests and treatment of Indigenous peoples. The overarching rights and freedoms articulated in the Declaration include the right to the full enjoyment of all human rights and fundamental freedoms recognised under international law and the UN Charter, freedom from discrimination, the right to self-determination and autonomy in local affairs, the right to maintain distinct political, legal, economic, social and cultural institutions, the right to nationhood, and the rights to life, liberty and security of person. Beyond these foundational rights and freedoms, the Declaration includes a number of rights and freedoms that are of direct relevance to water-related development in northern Australia (Table 1).

As Table 1 suggests, 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* and government approval processes.

As a resolution of the UN, the Declaration does not have direct legal effect under international law. The rights, freedoms and obligations are only binding on nations to the extent they reflect customary international law. There is legal debate about the extent to which this is the case (Xanthaki, 2010; Montes and Cisneros, 2011; Davis, 2012). Yet, regardless of the legal status of its rights, freedoms and obligations, the Declaration provides, at the very least, the aspired standard of treatment for Indigenous people and their rights and interests. Due to this, one of the first steps in any water-related development in the Catchments should be consultation with relevant Indigenous communities to ensure they are fully informed of the nature of the proposed activity, to obtain information on potential impacts on Indigenous interests, and to seek their free and informed consent.

**Table 2-1 Main rights and freedoms relevant to water-related development**

ARTICLE REF.	COMMENT
<b>8 and 10</b>	Obligation on states to protect Indigenous people from dispossession of their lands and resources, and from removal from their lands without free, prior and informed consent.
<b>11 and 31</b>	Right to maintain and protect sites and objects of Indigenous heritage significance.
<b>8, 11 and 28</b>	Obligation on states to provide redress for property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
<b>17</b>	Right to equal treatment in employment and to not be subject to discrimination.
<b>18</b>	Right to participate in decision-making in matters affecting their rights, through representatives chosen by themselves in accordance with their own procedures.
<b>19</b>	Obligation on states to consult and cooperate in good faith with the Indigenous peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting legislative or administrative measures that affect them.
<b>21, 23 and 32</b>	Right, without discrimination, to the improvement of their economic and social conditions, and to determine and develop priorities and strategies for (i) exercising their right to development; and (ii) for the development and use of their lands and resources.

26	Right to own, use, develop and control the lands and resources they possess by reason of traditional ownership, occupation or use, and an obligation on states to give legal recognition and protection to these lands and resources.
28	Right to compensation where their traditional lands and resources are occupied or used without free, prior and informed consent.
29	Right to the conservation and protection of the environment and the productive capacity of their lands and resources.
32	Obligation on states to consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands and resources.

## 2.2.2 INTERNATIONAL ENVIRONMENTAL LAW

### Overview

Australia is now a party to a significant number of international agreements that contain environmental obligations. Details of the most relevant international environmental agreements are summarised in Table 2-1 below.

**Table 2-2 Main international environmental treaties to which Australia is a party**

TREATY	COMMENT
<i>Convention for the Protection of the World Cultural and Natural Heritage of 1972 (World Heritage Convention)*</i>	The World Heritage Convention provides for the creation of the World Heritage List. Parties to the Convention have an obligation to do all that they can to ensure the 'identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage' located within their jurisdiction that is of outstanding universal value. There is one World Heritage area in the Catchments, Kakadu National Park World Heritage Area.
<i>Convention on Biological Diversity of 1992 (CBD)</i>	The CBD has three overarching objectives: the conservation of biodiversity; the sustainable use of biodiversity; and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources. These objectives are intended to be realised through a cooperative governance structure framed around obligations to, amongst other things, establish a system of protected areas for the conservation of biodiversity and to maintain legislation for the protection of threatened species and populations.
<i>Convention on the Conservation of Migratory Species of Wild Animals of 1979 (Bonn Convention)</i>	The Bonn Convention includes broad commitments concerning all migratory species but imposes specific obligations concerning those threatened with extinction. Two lists are maintained under the Agreement: Appendix I, which lists endangered migratory species; and Appendix II, which lists migratory species with an 'unfavourable conservation status'. Parties that are range states of Appendix I species must protect them. Parties that are range states of Appendix II species are required to 'endeavour to conclude agreements where these should benefit the species and should give priority to those species in an unfavourable conservation status'.
<b>JAMBA, CAMBA and ROKAMBA**</b>	These three agreements are intended to conserve birds that migrate between Australia and Asia (the so-called 'East Asian – Australasian Flyway'). All three include an Annex of bird species that migrate between Australia and the relevant Asian country, and impose various obligations concerning the conservation of these species, including taking appropriate measures to preserve and enhance the environment of migratory birds.
<i>Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES)</i>	CITES seeks to manage the potential adverse impacts of trade on threatened species. It does this by restricting international trade of wildlife products derived from threatened species, with the degree of restriction determined by three lists: Appendix I, Appendix II and Appendix III.

TREATY	COMMENT
<b><i>Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971 (Ramsar Convention)</i></b>	The Ramsar Convention aims to conserve wetlands by promoting their wise use and management. It provides for the creation of the 'List of Wetlands of International Importance' (Ramsar wetlands). Parties are required to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory. Kakadu National Park is the only Ramsar wetland in the Catchments.

\* The Wet Tropics of Queensland World Heritage Area adjoins the Mitchell catchment. Purnululu National Park World Heritage Area is also near the Fitzroy catchment.

\*\* *Japan-Australia Migratory Birds Agreement of 1974 (JAMBA)*, *China-Australia Migratory Birds Agreement of 1986 (CAMBA)* and *Republic of Korea-Australia Migratory Birds Agreement of 2007 (ROKAMBA)*.

The federal *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) is intended to give effect to Australia's obligations under these environmental treaties. This is most evident in the scope of the 'matters of national environmental significance' protected under the Act's environmental impact assessment and approval (EIAA) regime (see Section 5.1). Most of the matters of national environmental significance directly mirror the nature of the obligations under the treaties.<sup>7</sup>

### Indigenous elements of international environmental law

International environmental law contains a number of institutions that are intended to promote and protect Indigenous interests. The two 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).

#### World Heritage Convention

As its title suggests, the World Heritage Convention aims to identify, protect and conserve cultural and natural places of global heritage significance. To do this, it provides for the creation of the World Heritage List and imposes obligations on parties to identify and delineate areas that warrant inclusion on the list on the basis they possess 'outstanding universal values'.<sup>8</sup> The Convention divides heritage into two categories for these purposes: cultural and natural. Parties to the Convention have an obligation to do all that they can to ensure the 'identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage' located within their jurisdiction that is of outstanding universal value.<sup>9</sup>

<sup>7</sup> There are two anomalies: national heritage places; and coal seam gas and large coal mine developments (the coverage of coal seam gas and coal mines is limited to projects that could adversely affect a water resource). While the protection afforded to national heritage places does not reflect an international legal obligation, it aligns with the assignment of responsibility under Australia's hierarchical system of heritage protection, where places of local significance are protected by local government, places of state significance are protected by state governments, and places of national and universal (world) significance are protected by the federal government. In contrast, the protections associated with coal seam gas and coal mine projects were added in 2013 in response to concerns raised by rural constituencies about the impacts of these projects on water resources.

<sup>8</sup> World Heritage Convention, Articles 1 and 2.

<sup>9</sup> World Heritage Convention, Article 4.

There are four Australian World Heritage sites that were included on the World Heritage List on the basis of their Indigenous heritage values: Willandra Lakes; Tasmanian Wilderness; Uluru-Kata Tjuta National Park; and Kakadu National Park. Of the four, Kakadu National Park is the only one located in the Catchments (it is also the only World Heritage site in the Catchments). The Indigenous heritage values associated with Kakadu that were recognised as being of outstanding universal value by the World Heritage Committee were:

- Kakadu's art sites, which were found to represent a masterpiece of human creative genius (World Heritage listing criteria (i)) because of the wide range of styles used, the large number and density of sites and the delicate and detailed depiction of a wide range of human figures and identifiable animal species, including animals long-extinct; and
- Kakadu's art and archaeological record, which were found to be of outstanding universal significance because they are an exceptional source of evidence for social and ritual activities associated with hunting and gathering traditions of Aboriginal people from the Pleistocene era until the present day (World Heritage listing criteria (vi)) (UNESCO, 2017).

In relation to the Kakadu's recognised natural heritage values, specifically its universal values as an outstanding example of significant on-going ecological and biological processes (World Heritage listing criteria (ix)), the World Heritage Committee has also noted:

Kakadu's indigenous communities and their myriad rock art and archaeological sites represent an outstanding example of humankind's interaction with the natural environment (UNESCO, 2017).

The universal significance of Kakadu National Park, both for its Indigenous cultural heritage values and natural heritage values, means any water-related development in or affecting the Park will be subject to extensive scrutiny. To proceed, the development would have to demonstrate minimal or no impact on the World Heritage values of the Park.

For decades, there have been discussions about the inclusion of parts of Cape York on the World Heritage List. The most extensive proposals have included most or all of the Mitchell catchment (Figgis et al., 1993). Advocates for the listing have argued the inclusion of Cape York on the World Heritage List is in keeping with Australia's obligations under the Convention to protect, conserve and transmit places of outstanding universal value to future generations (Figgis et al., 1993).

Before any such listing occurred, the Australian Government would have to undertake consultation with the Queensland Government and Indigenous communities in the area. This consultation is required under Part 15 (section 314) of the federal EPBC Act. Specifically, in relation to Indigenous people who occupy or own land, section 314 of the EPBC Act requires that, before a property owned or occupied by another person is submitted for inclusion on the World Heritage List, the federal environment minister must be satisfied 'the Commonwealth has used its best endeavours to reach agreement with the other person on: the proposed submission of the property ... ; and management arrangements for the property'. Native title will constitute a form of ownership for these purposes, necessitating consultation with relevant native title holders. In addition to the



consultation requirements under the EPBC Act, in order to be consistent with the *UN Declaration on the Rights of Indigenous Peoples* and paragraphs 40 and 123 of the *World Heritage Convention's Operational Guidelines* (UNESCO, 2016), consultation would have to be carried out with affected Indigenous communities, even when they do not hold native title recognised under Australian common law.<sup>10</sup>

### **Indigenous knowledge and involvement under environmental treaties**

Over the past two to three decades, there has been growing recognition in international environmental fora of the importance of Indigenous involvement in environmental management and the conservation benefits that can stem from the utilisation of Indigenous knowledge and practices. This has led to efforts to establish institutions to encourage the incorporation of Indigenous knowledge and practices into management decisions, and to promote Indigenous participation in decision-making. This is typified by the recent efforts of the World Heritage Committee and the United Nations Educational, Scientific and Cultural Organization (UNESCO) to incorporate greater recognition and protection of Indigenous interests in the processes concerning the implementation of the World Heritage Convention (WHC, 2015; UNESCO, 2016). Similar institutions are a feature of other international environmental treaties, particularly the *Convention on Biological Diversity of 1992* (CBD) and *Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971* (Ramsar Convention).

The CBD aims to conserve biodiversity, and to promote the sustainable use of biodiversity and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. These objectives are intended to be realised through a cooperative governance structure framed around obligations to, amongst other things, establish a system of protected areas for the conservation of biodiversity, identify components of biodiversity, identify processes that are likely to have significant adverse impacts on the conservation and sustainable use of biodiversity, and to 'regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use'.<sup>11</sup> The CBD also requires parties to maintain necessary legislation for the protection of threatened species and populations; an obligation that Australia meets through the EPBC Act.<sup>12</sup> To give effect to the CBD obligations, the EPBC Act contains lists of threatened species and ecological communities. Species and communities included on these lists in particular classes are protected as matters of national environmental significance under the EPBC Act's environmental impact assessment and approval regime.

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<sup>10</sup> Paragraphs 40 and 123 were included in the *Convention's Operational Guidelines* in 2015 to ensure consistency with the *UN Declaration on the Rights of Indigenous Peoples* (WHC, 2015).

<sup>11</sup> CBD, Article 8(c).

<sup>12</sup> CBD, Article 8(k).

In addition to the general biodiversity conservation obligations, the CBD explicitly requires parties to:

... respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.<sup>13</sup>

The conference of the parties to the CBD has made more than 10 decisions and initiated an ongoing program of work in order to give effect to the terms and spirit of this obligation. The activities undertaken as part of this program have included efforts to increase the capacity of Indigenous communities to be involved in decision-making related to the use of their traditional knowledge, innovations and practices, to protect Indigenous knowledge, innovations and practices, to promote the effective participation of Indigenous and local communities in decision-making processes, and to strengthen Indigenous access to biodiversity and genetic resources.

A tangible example of the outputs from the program of work is the Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities, adopted by the 10<sup>th</sup> conference of the parties to the CBD in 2010 (CBD Secretariat, 2011). The Code is a voluntary code of ethical conduct that seeks to ensure the effective participation and prior informed consent of Indigenous communities in biodiversity-related activities concerning their lands, resources and knowledge. The substantive components of the Code are framed around a series of general and specific ethical principles, which are complemented with principles regarding methods (or processes). Relevant principles from the Code include:

- non-discrimination;
- the need for prior informed consent or approval for activities related to traditional knowledge associated with the conservation and sustainable use of biological diversity, which are on or affect traditional lands or water resources;
- the fair and equitable sharing of benefits arising from activities related to biodiversity and traditional knowledge; and
- the need for relevant negotiations to be undertaken in good faith.

Similar measures to promote Indigenous involvement in the wise use of wetlands have been adopted under the Ramsar Convention. The Ramsar Convention aims to conserve wetlands by promoting their wise use and management. The obligations under the Convention are framed around the 'List of Wetlands of International Importance'. Wetlands included on the list are known as 'Ramsar wetlands'. Parties are required to 'formulate and implement their

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<sup>13</sup> CBD, Article 8(j).

planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory'.<sup>14</sup> 'Wise use' is defined for these purposes as 'the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development' (Annex A, p. 6 in Ramsar COP, 2005).

Starting in the late 1980s, the conference of the parties to the Ramsar Convention has made a series of decisions and recommendations aimed at encouraging Indigenous participation and involvement in the identification and management of Ramsar wetlands. These include Recommendation 6.3 from the 6<sup>th</sup> Conference of the Parties in Brisbane in 1996, which called on the parties to 'make specific efforts to encourage active and informed participation of local and indigenous people at Ramsar listed sites and other wetlands and their catchments, and their direct involvement, through appropriate mechanisms, in wetland management' (para. 9 in Ramsar COP, 1996). It also called upon the parties to:

... recognize the value of the knowledge and skills of local and indigenous people, in relation to wetland management, and to make special efforts to encourage and facilitate from the outset their participation in the development and implementation of wetland policies and programmes (para. 11 in Ramsar COP, 1996).

Similarly, in 1999, at the 7<sup>th</sup> Conference of Parties in Costa Rica, the parties adopted subject-specific guidelines to promote local and Indigenous community participation in Ramsar wetland management and called on contracting parties to:

... apply these Guidelines so as to encourage active and informed participation, and the assumption of responsibility, by local communities and indigenous people in the management of Ramsar-listed sites and other wetlands and the implementation of the wise use principles at the local, watershed, and national levels (para. 12 in Ramsar COP, 1999).

The international institutions established to promote Indigenous involvement in environmental management (including those identified above) are typically general in nature and not strictly enforceable. Consistent with the cooperative governance structures embodied in the treaties themselves, the intent of the institutions is to encourage rather than compel nations to respect Indigenous rights, interests and knowledge. Even if the institutions were strictly enforceable at the international level, they would not be directly enforceable on domestic actors. As discussed, for international law to have legal effect under Australian municipal law, there must be an act of parliament that gives effect to them.

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<sup>14</sup> Ramsar Convention, Article 3.

## 2.3 Security of property interests and compensation for the acquisition of property and regulatory takings

Investment in water-related developments in northern Australia depends, to a significant extent, on the security of property interests held by investors. One of the most important issues related to the security of property interests is whether compensation is payable by government when interests are adversely affected by government action. Three relevant circumstances can be distinguished.

**1. A government expropriates the full and formal legal property rights of a landholder or temporarily takes possession of land.** Generally, regardless of which government is involved, compensation will be payable in these circumstances in accordance with land acquisition statutes.<sup>15</sup> However, governments can make new laws that override these statutes, thereby potentially exposing property owners to uncompensated expropriation or dispossession. At the federal level, section 51(xxxi) of the Australian Constitution requires any acquisition of property to be on 'just terms'. This constitutional guarantee will ensure property owners receive compensation if federal laws, or laws of the Northern Territory, affect the relevant acquisition. The state governments are not bound by section 51(xxxi) of the Australian Constitution and their constitutions provide no equivalent guarantee. Consequently, there is a risk compensation will not be provided. Two factors mitigate against this risk. First, the denial of compensation in these circumstances would be contrary to established social and political norms, and is likely to be looked upon unfavourably by the general public. Secondly, the Australian Government is party to a number of trade agreements that contain 'investor-state dispute settlement' (ISDS) provisions, which give foreign investors rights to international arbitration and compensation in the event a host state breaches its investment obligations. The investment obligations generally cover the expropriation of property and fair and equitable treatment (non-discrimination) in policy processes. Depending on whose property is affected, ISDS provisions could potentially be used by foreign investors to seek compensation for the impact of state laws.

**2. A government does not take the formal legal property of a landholder but it regulates land use and development in a way that materially reduces the value of the relevant property interest (known as 'regulatory takings').** Whether compensation is payable for regulatory takings depends on which government is involved, the severity of the interference with the rights and privileges of ownership and the nature of the regulations. At the federal level, and in the Northern Territory, compensation will only be payable for regulatory takings under section 51(xxxi) if: (i) the regulations effectively sterilise the property holder's interest (i.e. the landholder is left with no material privileges concerning the use and development of the land); and (ii) the Australian Government or a third party obtains a benefit of a proprietary nature that is the correlative of what was lost. In the states, there is no constitutional requirement to provide compensation for the impacts of

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<sup>15</sup> *Lands Acquisition Act 1987* (Cth); *Land Administration Act 1997* (WA); *Lands Acquisition Act* (NT); *Lands Acquisition (Pastoral Leases) Act 1992* (NT); *Acquisition of Land Act 1967* (QLD). Other federal, state and territory legislation also provides acquisition powers to specific government agencies for specific purposes.

regulations on interests in property, irrespective of how substantial they are. However, there are legislative measures designed to provide protection against regulatory takings. The most important of these is the system of 'existing use rights' that applies under planning and environmental laws. Existing use rights are entitlements to continue to use land for a particular purpose that was lawful prior to the introduction of regulations that prohibit the use. Beyond the system of existing use rights, there are legislative provisions in several jurisdictions that provide for compensation to be paid for the impacts of some planning restrictions. Relevantly, in both Western Australia and Queensland, compensation is payable where land is set aside under planning regulations for public purposes. Foreign investors whose interests are adversely affected by regulatory takings may also be able to seek compensation from the Australian Government under ISDS provisions of trade agreements to which Australia is a party.

**3. A government unilaterally terminates a contract, or intervenes in private contractual relations, so as to relieve a party to a contract of a liability to another party.** The High Court has held that personal rights under contract and common law will be treated as property for the purposes of section 51(xxxi) of the Australian Constitution.<sup>16</sup> Due to this, neither the Australian Government, nor the Northern Territory Government, can unilaterally terminate or alter a contract so as to relieve a party of a liability to another party, without providing just terms compensation. State parliaments can make laws that terminate or alter contracts without the constitutional need to provide compensation. The constraints on the exercise of these powers are the same as those identified above: community expectations and, in certain circumstances, foreign investors may be able to seek compensation from the Australian Government for contracted-related takings via the ISDS provisions of trade agreements.

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<sup>16</sup> *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9; *Georgiadis v Australian & Overseas Telecommunications Corporation* [1994] HCA 6; *Commonwealth v Mewett* [1997] HCA 29.

## 3 Interests in land

Proponents of water-related developments 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.

This section considers the interests in land that are necessary to support, and could be affected by, water-related development in the Catchments. The analysis is broken into four parts: fundamentals of Australian property law; interests in land; Crown land; and native title.

### 3.1 Fundamentals of Australian property law

The foundations of Australian property law were imported from England through the process of colonisation.<sup>17</sup> One of the central tenants of this system of property law is the feudal notion of the doctrine of tenure. Under this doctrine, it is assumed that, upon acquiring sovereignty over Australia, the Crown obtained a form of legal interest in all land, known as radical title. From this radical (or paramount) title, it has carved out interests in land and granted them to other parties, such that all landholders hold their interests ‘of the Crown’. As Justice Brennan stated in *Mabo v Queensland (No.2)*:<sup>18</sup>

By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes.

The doctrine of tenure means landholders do not hold their land as absolute owners. Indeed, they do not own the land itself. They hold a legal proprietary interest in land ‘of the Crown’. In simple terms, the doctrine of tenure implies the Crown is the true owner of all land and all other interests in land are acquired through the Crown. While this is a convenient way to conceptualise the doctrine of tenure, it is an oversimplification because the Crown’s radical title is not the same as absolute beneficial ownership. Radical title is a

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<sup>17</sup> This section draws on Gray et al. (2017) and Butt (2010).

<sup>18</sup> [1992] HCA 23 at [51].

unique interest that supports the grant of interests in land to other parties and enables the Crown to grant itself beneficial ownership over lands for public purposes. In addition, not all interests in land are held of the Crown; native title is a form of property interest that sits apart from the doctrine of tenure.

The doctrine of tenure is accompanied in Australian property law by another feudal concept: the doctrine of estates. Estates are the legal interest landholders receive from the Crown. Historically, the doctrines of tenure and estates defined the nature of the interests in land held of the Crown. The tenure set the terms of the interest (what services had to be provided to the Crown in return for the interest) and the estate set its duration (for how long could the holder of the interest remain on the land). As the King's Bench stated in *Walsingham's Case* in 1573:

... the land itself is one thing, and the estate in the land is another thing, for an estate is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time ...<sup>19</sup>

Today, the doctrine of tenure can be thought of as facilitating the spatial division of rights in land, while the doctrine of estates allows for the temporal division of rights in land.

Reflecting this, the estates issued in Australia fall into two broad categories: freehold, being an estate of an uncertain duration; and leasehold, being an estate with a certain duration.

Freehold is the most common form of estate in urban areas in Australia. It comes in three 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 Catchments. A fee simple estate is the most complete legal interest in land under Australian law. The estate is generally held in perpetuity and without conditions on title concerning the use and development of the land.<sup>20</sup> As the King's Bench described it in the 16<sup>th</sup> century, 'he who has a fee-simple in land has a time in the land without end, or the land for the time without end'.<sup>21</sup> While close to absolute ownership, fee simple estates do not confer absolute ownership in the sense of giving the holder the right to use the land as they please. The estates are almost always subject to reservations (e.g. the Crown reserves the rights to minerals and petroleum in the land), and the privileges inherent in ownership concerning the use and development of the land are usually curtailed through planning, environment and other similar regulations.

Leasehold is the main form of estate in northern Australia, and in Western Australia, Northern Territory and Queensland. Leases essentially involve the hire of land for a price for a certain term (or a term that is capable of being rendered certain). Under common law, to constitute a lease, the interest must provide the tenant (or lessee) with a right to exclusive possession, subject only to the landlord's (lessor's) rights under law or the terms of the lease to enter in specific circumstances and for specific purposes. If a person is allowed to occupy land, or given a right to occupy land, but not the right to exclude others, the interest

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<sup>19</sup> [1573] EWHC KB J99.

<sup>20</sup> Fee simple estates can be limited in the sense they will terminate, or be determinable, if a specified event occurs. These estates are known as determinable and conditional fees.

<sup>21</sup> *Walsingham's Case* [1573] EWHC KB J99.

will generally be a licence. The rights of a licensee are personal not proprietary. In contrast, leases give lessees property rights, or a true legal interest in the land.

Under common law, leasehold interests are generally distinguishable from freehold estates on the basis of duration. Unlike freehold estates, the length of leasehold estates are certain, meaning they have a fixed (or fixable) duration. Two other practical indicators of a lease are:

- covenants — unlike most freehold estates, leases are usually subject to conditions concerning the use and development of land known as covenants, which are contained in the written lease (the contract between the lessor and lessee) or can be implied by law; and
- rent — unlike most freehold estates, leases usually require the lessee to pay rent to the lessor.

While these three indicators are a useful guide, they are not definitive. While covenants and rents are suggestive of a leasehold estate, both can be part of a freehold estate. The law allows for freehold estates to be bound by covenants, both positive and negative in nature, and rent-charges (an obligation for landholders to pay a periodic charge to another person). Similarly, even in relation to duration, it is not always the case that leases have definite lengths.

Part of the difficulty in Australian property law is the diverse range of interests provided for and created under statute. In the early colonial period in Australia, land grants were done using the prerogative power of the Crown. Later, the prerogative power was replaced with powers under statute.<sup>22</sup> The interests created under statute do not necessarily conform to the common law notions of freehold and leasehold estates. For example, perpetual leases—where the term is indefinite—can be, and have been, issued in Western Australia, Northern Territory and Queensland, even though at common law there is ‘no such thing as a lease in perpetuity’.<sup>23</sup> Similarly, pastoral leases, which are the most common form of interest in land in northern Australia, do not necessarily confer the right to exclusive possession, in the sense that the lessee is not entitled to exclude all ‘strangers’. They are unique creatures of statute whose character and incidents are derived from legislation rather than the common law.

Native title adds a further layer of complexity to Australian property law. 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.

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<sup>22</sup> *Wik Peoples v Queensland* [1996] HCA 40.

<sup>23</sup> Fry (1946, p. 167) cited in *Wik Peoples v Queensland* [1996] HCA 40.



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 inherited from England, including the doctrine of tenure and doctrine of estates. The law recognises and protects the traditional rights but, what the bundle of rights consists of is determined by reference to traditional Indigenous laws and customs.

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 Catchments.

## 3.2 Private interests traceable to grants from the Crown

Privately held estates in land in northern Australia 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.

### 3.2.1 FREEHOLD ESTATES

The largest areas of freehold land in the study area are found in the Darwin catchments. There are also significant areas under freehold in the Mitchell catchment in Queensland. In both cases, a substantial proportion of the freehold land is Indigenous freehold held by Aboriginal land trusts on behalf of Indigenous communities.

As noted above, 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 Catchments. Typically, in this context, fee simple estates are referred to as freehold estates (the other potential types of freehold estates are largely irrelevant).

Legislative arrangements governing the creation of, and dealings with, freehold estates in Western Australia, Northern Territory and Queensland are reasonably similar. The three 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 governing freehold estates**

	<b>WESTERN AUSTRALIA</b>	<b>NORTHERN TERRITORY</b>	<b>QUEENSLAND</b>
<b>Creation of freehold estates</b>	<i>Land Administration Act 1997 (WA)</i>	<i>Crown Lands Act (NT)</i>	<i>Land Act 1994 (Qld)</i>
<b>Land title registration</b>	<i>Transfer of Land Act 1893 (WA)</i>	<i>Land Title Act (NT)</i>	<i>Land Title Act 1994 (Qld)</i>
<b>General property rules</b>	<i>Property Law Act 1969 (WA)</i>	<i>Law of Property Act (NT)</i>	<i>Property Law Act 1974 (Qld)</i>

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 3.3.3 provides an overview of the institutions concerning Aboriginal land trusts and Aboriginal land.

### **3.2.2 LEASEHOLD ESTATES**

#### **Types of leasehold interests in the Catchments**

Leasehold is the main form of estate across northern Australia. As discussed, 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 Catchments, most of the land is held under Crown leases, which come in a variety of forms, including term, perpetual and pastoral leases.

The management of, and issuance of leasehold interests in, Crown land in Western Australia is governed by the *Land Administration Act 1997 (WA)*. The legislation provides for the issuance of five main types of leasehold interests in Crown land: general leases; conditional purchase leases; Aboriginal leases; government leases; and pastoral leases. These leases can be subject to restrictions on the use, development and transfer of land, detailed in Table 3-2.

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 3-3.

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 3-4.

**Table 3-2 Types of leasehold interest in Crown land in Western Australia**

INTEREST TYPE	COMMENT
<i>General leases (Pt 6)</i>	Under s 79, the Minister for Lands has broad powers to grant leases for any purpose and any term, and may impose whatever conditions are deemed appropriate. These general leases may give the lessee the option of converting the estate to freehold if specified conditions are satisfied.
<i>Conditional purchase leases (Pt 6)</i>	Under s 80, the Minister is given the power to grant conditional purchase leases of any Crown land, under which the lessee is able to convert the leasehold interest to a fee simple estate when specified conditions are met and the purchase price paid.
<i>Aboriginal leases (Pt 6)</i>	Under s 83, the Minister has the power to grant leases of Crown land, for a fixed term or in perpetuity, 'for the purposes of advancing the interests of any Aboriginal person or persons'. These leases can be granted to an individual, group of people, or an approved body corporate, on such conditions as the Minister believes are appropriate.
<i>Government leases (Pt 6)</i>	Section 86 gives the Minister the power to lease Crown land to the Australian Government, Australian Government agencies, state agencies and local governments.
<i>Pastoral leases (Pt 7)</i>	Under s 101, the Minister has the power to grant pastoral leases, provided the Pastoral Lands Board (a statutory committee established under the Act) is satisfied the land, when fully developed, will be able to carry 'sufficient authorised stock to enable it to be worked as an economically viable and ecologically sustainable pastoral business unit'. Pastoral leases issued under Pt 7 do not necessarily confer an absolute right to exclusive possession; Indigenous people are entitled to enter unenclosed and unimproved parts of all pastoral lease land 'to seek their sustenance in their accustomed manner' (s 104). Conditions can also be imposed that give other parties the capacity to occupy the land for specific purposes. Pastoral leases can be subject to a range of conditions, including as to what activities can be undertaken on the land and what products can be sold from the land. Generally, unless authorised by the Pastoral Lands Board, pastoral lease land can only be used for 'pastoral purposes' (the commercial grazing of authorised stock and ancillary activities), no native vegetation can be cleared on the land, and no non-indigenous pasture can be sown or cultivated on the land. Pastoral leases are also subject to other restrictions imposed under the Act, including relating to minimum and maximum stock numbers, the distribution of stock, management of pests, and the management of native vegetation. The Pastoral Lands Board is empowered to enter onto pastoral lease land to investigate compliance with the conditions of the lease, and can authorise others to do the same.

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

INTEREST TYPE	COMMENT
<i>Fixed-term lease (CL Act, Pt 3, Div 3)</i>	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.
<i>Perpetual lease (CL Act, Pt 3, Div 3)</i>	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.
<i>Pastoral lease (PL Act, Pt 4)</i>	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 on the land to investigate compliance with the conditions of the lease.

INTEREST TYPE	COMMENT
	<p>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 <i>Land Title Act</i> (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.</p>
<p><i>Special purpose lease (SPL Act, s 4)</i></p>	<p>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 <i>Planning Act</i> (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.</p>

**Table 3-4 Types of leasehold interest in Crown land in Queensland**

INTEREST TYPE	COMMENT
<p><i>Term leases (s 15, Chpt 4, Pt 3 &amp; Chpt 8, Pt 4)</i></p>	<p>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 <i>Land Act</i> 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.</p>
<p><i>Perpetual leases (s 15, Chpt 4, Pt 3 &amp; Chpt 8, Pt 3)</i></p>	<p>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.</p>

INTEREST TYPE	COMMENT
<i>Freeholding leases (s 15, s 166, and Chpt 8, Pt 2)</i>	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.<sup>24</sup> 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 Western Australia, under section 104 of the *Lands Administration Act*, Aboriginal people are entitled to enter onto 'any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner'. Similarly, in the Northern Territory, pastoral leases issued under the *Pastoral Land Act (NT)* must be subject to 'a reservation in favour 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.<sup>25</sup> Fixed-term and perpetual leases granted under the *Crown Lands Act (NT)* can be subject to the same reservation.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup>

In Queensland, the *Land Act 1994 (Qld)* does not require the inclusion of reservations in Crown leases in favour of Indigenous people. Up until the early 1900s, pastoral leases were routinely subject to express reservations of this nature (Dalziel, 1999). However, this

<sup>24</sup> *Wik Peoples v Queensland* [1996] HCA 40.

<sup>25</sup> *Pastoral Land Act (NT)*, s 38.

<sup>26</sup> *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.

<sup>27</sup> *Pastoral Land Act (NT)*, Part 8; *Lands Acquisition Act (NT)*, s 46(1A); *Crown Lands Act (NT)*, s 20.

<sup>28</sup> *Associations Act (NT)*, s 110.

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.<sup>29</sup> 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.<sup>30</sup> 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 '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.

### 3.2.3 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 Western Australia, Northern Territory and Queensland are provided below.

#### Western Australia

In Western Australia, the *Aboriginal Affairs Planning Authority Act 1972* (WA) provides for the establishment of the Aboriginal Affairs Planning Authority and Aboriginal Land Trust to '[promote] the well-being of persons of Aboriginal descent in Western Australia'.<sup>31</sup> A significant area of land previously held by the Western Australia Native Welfare Department and a number of other state agencies was vested in the Aboriginal Land Trust (via the Authority) under this statute. The Trust can also obtain land by other means. In particular, it can acquire land for the benefit of Aboriginal people under the *Aboriginal Affairs Planning Authority Act*. Further, if Crown land is reserved for the use and benefit of the Aboriginal people under Part 4 of the *Land Administration Act 1997* (WA), and is subject to a proclamation under section 25 of the *Aboriginal Affairs Planning Authority Act*, it automatically vests in the Authority, which, as a matter of practice, then transfers it to the Trust. In addition, the Crown land minister can assign responsibility for the care, control and management of an Aboriginal reserve to the Trust under Part 4 of the *Land Administration Act*.

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<sup>29</sup> *Wik Peoples v Queensland* [1996] HCA 40.

<sup>30</sup> *Land Act 1994* (Qld), Part 4, Div 8D.

<sup>31</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA), s 12.

The Aboriginal Land Trust currently holds 27 million hectares (11% of Western Australian land) in a variety of tenures. A summary of the Aboriginal Land Trust estate in the Kimberley region, which covers the Fitzroy catchment, is provided in Table 3-5.

**Table 3-5 Aboriginal Land Trust estate in Kimberley region, area (hectares), Western Australia, November 2015**

REGION	EAST KIMBERLEY (ha)	WEST KIMBERLEY (ha)
Freehold	405	6,006
Pastoral lease	859,645	0
Special lease	1,699	657
Aboriginal reserve	3,591,424	1,445,744
Total	<b>4,453,173</b>	<b>1,452,406</b>

Source: WADPLH (2015).

Aboriginal Land Trust land subject to Part III of the *Aboriginal Affairs Planning Authority Act* ('Part III land') is governed by special regulations concerning the granting of interests in, and access to, the land. Relevantly, no interest in Part III land (other than mining and oil and gas interests) can be granted or refused under the *Land Administration Act*, or any other Act, without the approval of the Authority (or Trust). People who are not of Aboriginal descent are also not allowed to enter onto Part III land without permission from the minister under the *Aboriginal Affairs Planning Authority Regulations 1972* (WA).

Dealings with all land within the Aboriginal Land Trust estate is subject to restrictions to ensure it is used for the benefit of the relevant Indigenous community or communities. The Trust itself is bound to hold and use the land for the 'benefit of persons of Aboriginal descent' and to ensure the use and management of the land accords with the wishes 'of the Aboriginal inhabitants of the area so far as that can be ascertained and is practicable'.<sup>32</sup> Ministerial approval is also required before the Trust sells, transfers, mortgages or charges Trust land.<sup>33</sup> The Trust can grant leases over its land, including Part III land and other Aboriginal reserves, including for agricultural and other commercial purposes.<sup>34</sup> To date, more than 270 of these leases have been issued to individuals and organisations, including Aboriginal corporations. However, the leases must be for the use and benefit of Aboriginal people. The Trust has issued guidelines on when, how and on what terms it is willing to grant leases over land in its estate (WA Aboriginal Land Trust, 2017).

The other main 'special' statutory process concerning Indigenous freehold and leasehold interests under Western Australian law is found in section 83 of the *Land Administration Act*. This provision enables the Crown lands minister to grant freehold and leasehold estates over Crown land 'for the purposes of advancing the interests of any Aboriginal person or persons'. These grants must be to the relevant Aboriginal person or persons whose interests are sought to be advanced, or to an approved body corporate, and can be subject to

<sup>32</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA), s 23.

<sup>33</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA), s 20.

<sup>34</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA), ss 20 and 33A.



whatever conditions the minister thinks are relevant. Approved body corporates are usually Aboriginal corporations. Where the interest is granted to an approved body corporate, the minister must be satisfied it will be held on trust for the relevant Indigenous people or the membership of the corporation must be made up wholly of the Aboriginal people concerned.<sup>35</sup>

## 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* (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.<sup>36</sup> The Aboriginal Land Councils represent and protect the interests of traditional owners,<sup>37</sup> while Aboriginal Land Trusts are the legal body that formally holds the estates. There are four Land Councils in the Territory: Northern, Central, Tiwi and Anindilyakwa. The Northern Land Council covers the Darwin catchments. Like the other Land Councils, the Northern Land Council oversees dealings with the land held by the land trusts in its region. While approximately 50% of the land in the Northern Territory is freehold Aboriginal land held under the *Aboriginal Land Rights (Northern Territory) Act*, only a relatively small proportion of this is in the Darwin catchments. The largest area of contiguous Aboriginal land in the region is the land held by the Delissaville/Wagait/Larrakia Aboriginal Land Trust, to the south west of Darwin near Dundee Beach.

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.<sup>38</sup> Further, while the Act allows for Land Trusts to grant estates and interests in 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.<sup>39</sup> 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

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<sup>35</sup> *Land Administration Act 1997* (WA), s 83(3).

<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19.

<sup>39</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19.



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).<sup>40</sup>

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.<sup>41</sup> 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).<sup>42</sup> For the Mitchell catchment, only the *Aboriginal Land Act* is relevant.

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 'transferable 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'.<sup>43</sup> 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).<sup>44</sup> In addition to providing for the grant of Aboriginal freehold estates, following reforms in 2015, the Act now also allows for individual 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.<sup>45</sup>

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<sup>40</sup> *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 Darwin catchment. See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19A.

<sup>41</sup> Similar restrictions apply to the seas adjoining Aboriginal land. See *Aboriginal Land Act* (NT), Part III.

<sup>42</sup> 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>.

<sup>43</sup> *Aboriginal Land Act* (Qld), s 35.

<sup>44</sup> *Aboriginal Land Act 1991* (Qld), Part 5.

<sup>45</sup> *Aboriginal Land Act 1991* (Qld), Part 2A.

Land held by Aboriginal land trusts and CATSI corporations cannot be sold or mortgaged.<sup>46</sup> 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.<sup>47</sup> Aboriginal land held by these entities can be leased, and the leases can be mortgaged.<sup>48</sup> However, there are specific rules governing the exercise of mortgagee's rights to enter into possession under the Act.<sup>49</sup> 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).

### 3.2.4 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 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'.

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<sup>46</sup> *Aboriginal Land Act 1991* (Qld), s 100.

<sup>47</sup> *Aboriginal Land Act 1991* (Qld), ss 104 and 109.

<sup>48</sup> *Aboriginal Land Act 1991* (Qld), Part 10.

<sup>49</sup> *Aboriginal Land Act 1991* (Qld), s 182.

Western Australia, Northern Territory and Queensland all have similar statutory provisions for the creation of conservation covenants.<sup>50</sup>

**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). For example, under section 34B of the *Conservation and Land Management Act 1984* (WA), the chief executive officer of the Department of Biodiversity, Conservation and Attractions can enter into a timber sharefarming agreement with a private landholder, under which the CEO obtains rights to enter onto the land to establish, maintain and harvest commercial timber plantations. The legislation provides that the rights under the agreement are 'a *profit à prendre* and an interest in the land to which the right relates', meaning they are not merely contractual. The rights run with the land and are assignable to other parties, even without the consent of the landholder.

In addition to covenants, easements and profits à prendre, there are now **carbon interests** that can restrict the current and future use of land. The property laws in Western Australia and 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'.<sup>51</sup> In Western Australia, they are called 'carbon rights', with the holder of the right having the 'legal and commercial benefits and risks arising from changes to the atmosphere that are caused by carbon sequestration and carbon release occurring in or on land in respect of which the carbon right is registered'.<sup>52</sup> 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 and Western Australia, 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

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<sup>50</sup> Western Australia: *Biodiversity Conservation Act 2016* (WA), *Soil and Land Conservation Act 1945* (WA), *National Trust of Australia* (WA) *Act 1964* (WA), *Transfer of Land Act 1893* (WA) and *Land Administration Act 1997* (WA). 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).

<sup>51</sup> *Land Act 1994* (Qld), s 373R.

<sup>52</sup> *Carbon Rights Act 1993* (WA), ss 3 and 6.

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 Catchments, proponents should ascertain whether the land is subject to any registered sequestration projects or carbon maintenance obligations.

### **3.2.5 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 Western Australia, 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 Catchments 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.

### **3.2.6 ESTABLISHING TITLE, IDENTIFYING INTERESTS AND LAND REGISTRATION**

In Australia, there are two systems governing proof of title for interests in land other than native title: old system title and Torrens title. Under old system title, ownership of an estate in land can only be proven by establishing a chain of ownership that traces to the original grant from the Crown (or as far back as is necessary to bar all other possible claimants). The same applies to other types of legal property interest; it is necessary to trace it back to the original grantor. Hence, establishing current ownership of any legal interest involves

obtaining documentary evidence of how the relevant interest was passed through the chain of previous owners. Old system title no longer exists in Queensland and the Northern Territory, and it is rare in Western Australia.

Torrens title is a system of land registration first established in South Australia and now found in all Australian jurisdictions. It was designed to overcome the inconveniences and costs associated with old system title. At the heart of the Torrens system is the notion that title, or ownership, is established through 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');<sup>53</sup>
- 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 Catchments 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.<sup>54</sup>

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.

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<sup>53</sup> *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101 at 106.

<sup>54</sup> 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.

## 3.3 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.

### 3.3.1 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.<sup>55</sup> 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.

### 3.3.2 CROWN LAND RESERVED FOR A PUBLIC PURPOSE

The Crown land statutes in Western Australia, 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).<sup>56</sup>

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.<sup>57</sup> In Western Australia, national parks and nature reserves are declared under the *Land Administration Act 1997* (WA) (the Crown land

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<sup>55</sup> The term ‘licence’ is used in Western Australia and 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.

<sup>56</sup> *Land Administration Act 1997* (WA), ss 46, 48 and 91; *Crown Lands Act* (NT), Pt 7; *Land Act 1994* (Qld), ss 60 and 177.

<sup>57</sup> *Territory Parks and Wildlife Conservation Act* (NT); *Nature Conservation Act 1992* (Qld).

statute), then transferred to the Western Australia Conservation and Parks Commission under the *Conservation and Land Management Act 1984 (WA)*, which is responsible for their management. 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 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.<sup>58</sup>

### 3.3.3 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.

## 3.4 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'.<sup>59</sup>

The law recognises and protects the traditional rights but, what the bundle of rights consists of is determined by reference to traditional Indigenous laws and customs. As Justice Brennan stated in *Mabo v Queensland (No. 2)*:

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<sup>58</sup> 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.

<sup>59</sup> *Fejo v Northern Territory* [1998] HCA 58 at [46].

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>60</sup>

The same sentiment is found in the *Native Title Act 1993* (Cth), which 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:

- (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.<sup>61</sup>

This link to traditional laws and customs, and the need for connection with land or waters, has proven a double edged sword for Indigenous claimants. On the one hand it provides scope for recognition of a wide variety of interests foreign to Anglo-Australian property law concepts. On the other, it has proven a significant burden, as native title is extinguished where an Indigenous community loses connection with its traditional laws and customs and connection with land (Gray et al., 2017). While the law allows for Indigenous laws, customs and connection to evolve to some extent, the claimants must establish continuity through time.<sup>62</sup> There must be a continuous link between the laws and customs observed prior to European invasion and those observed today.<sup>63</sup> For many Indigenous groups, the impacts of colonisation have prevented the maintenance of this link.

Following the High Court's decision in *Mabo v Queensland (No.2)*, the Australian Government passed the *Native Title Act*. The *Native Title Act* did 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).

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<sup>60</sup> [1992] HCA 23 at 64.

<sup>61</sup> *Native Title Act 1993* (Cth), s 223.

<sup>62</sup> *Bodney v Bennell* [2008] FCAFC 63.

<sup>63</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.



### 3.4.1 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 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.

### 3.4.2 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 Western Australia, Northern Territory and Queensland are provided in Table 3-6.

**Table 3-6 Determined native title applications, as at 30 September 2017**

	STATE TOTAL	RELEVANT LOCAL GOVERNMENT AREAS	
<b>Western Australia</b>			
<b>Local government</b>		<b>Derby-West Kimberley</b>	<b>Halls Creek</b>
Native title across entire determination area	25	4	4
Native title across part of determination area	39	10	4
Native title does not exist	2	0	0
Active applications	84	11	10
<b>Northern Territory</b>			
Native title across entire determination area	6		
Native title across part of determination area	90		
Native title does not exist	2		
Active applications	64		

Queensland	STATE TOTAL	RELEVANT LOCAL GOVERNMENT AREAS			
		Kowanyama	Mareeba	Carpentaria	Cook
<b>Local government</b>					
Native title across entire determination area	98	3	19	2	17
Native title across part of determination area	32	0	3	4	1
Native title does not exist	14	0	0	0	0
<b>Active applications</b>	79	1	13	4	6

Source: National Native Title Tribunal (2017).

### 3.4.3 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.<sup>64</sup> 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’.<sup>65</sup>

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.<sup>66</sup> ‘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).<sup>67</sup> ‘Future acts’ are legislative acts that occurred or occur after 1 July 1993 and non-legislative acts that occurred or occur after 1 January 1994, other than intermediate period acts.<sup>68</sup>

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*

<sup>64</sup> *Native Title Act 1993* (Cth), s 227.

<sup>65</sup> *Native Title Act 1993* (Cth), s 226.

<sup>66</sup> 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.

<sup>67</sup> 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.

<sup>68</sup> 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.

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.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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*,<sup>72</sup> where it held native title could survive the grant of pastoral leases.<sup>73</sup> 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 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, the main rules concerning the payment of compensation for these acts are:

1. no compensation is payable in relation to acts that occurred prior to 31 October 1975;
2. but compensation is payable for:
  - a. past legislative (1 July 1993) and non-legislative acts (1 January 1994);

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<sup>69</sup> *Western Australia v Ward* (2002) 213 CLR 1.

<sup>70</sup> 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).

<sup>71</sup> *Native Title Act 1993* (Cth), s 240A.

<sup>72</sup> *Wik Peoples v Queensland* [1996] HCA 40.

<sup>73</sup> Amendments were made to the *Native Title Act* on 30 September 1998 to account for the *Wik* decision.

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

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.

#### **3.4.4 FUTURE ACTS REGIME**

Water-related development in the Catchments 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 3-7. 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.<sup>74</sup> If a future act does not satisfy one of these grounds, it will be invalid to the extent it affects native title.<sup>75</sup>
- **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 3-7.

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<sup>74</sup> *Native Title Act 1993* (Cth), s 24AB(2).

<sup>75</sup> *Native Title Act 1993* (Cth), s 24OA.

- 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.

**Table 3-7 Grounds for validity of future acts affecting native title under the *Native Title Act***

LEGISLATIVE REFERENCE (PT 2, DIV 3)	GROUNDS FOR VALIDITY	COMMENT
<b>Subdiv B-E</b>	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).
<b>Subdiv F</b>	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.
<b>Subdiv G</b>	Acts related to primary production on non-exclusive leases	<p>Subdivision G ensures the validity of future acts involving primary production in three circumstances.</p> <ul style="list-style-type: none"> <li>• 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.</li> <li>• 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.</li> <li>• 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.</li> </ul>
<b>Subdiv H</b>	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
<b>Subdiv I</b>	Pre-existing rights and renewals and extensions of leases, licenses and permits	<p>Subdivision I ensures the validity of two types of future acts.</p> <ul style="list-style-type: none"> <li>• 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.</li> <li>• 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).</li> </ul> <p>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.</p>
<b>Subdiv JA</b>	Public housing and other facilities for the benefit of Indigenous people	<p>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.</p>
<b>Subdiv J</b>	Future acts arising on lands reserved for public purposes prior to 23 December 1996	<p>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.</p>



LEGISLATIVE REFERENCE (PT 2, DIV 3)	GROUNDS FOR VALIDITY	COMMENT
<b>Subdiv K</b>	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.
<b>Subdiv L</b>	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.
<b>Subdiv M</b>	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. 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. 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).
<b>Subdiv N</b>	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.

**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 minister 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.

### 3.4.5 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'.<sup>76</sup>
- **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

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<sup>76</sup> *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’.<sup>77</sup>

- 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 Western Australia, Northern Territory and Queensland are provided in Table 10.

**Table 3-8 ILUAs in Western Australia, Northern Territory and Queensland**

	WESTERN AUSTRALIA	NORTHERN TERRITORY	QUEENSLAND
Body corporate	97	8	172
Area	36	102	598
Alternative procedure	0	0	0
<b>Total</b>	<b>133</b>	<b>110</b>	<b>770</b>

Source: National Native Title Tribunal (2017).

### 3.5 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 the assignment of the reserve to an IUCN Protected Area Management Category (typically V and

<sup>77</sup> *Native Title Act 1993* (Cth), s 24CB(f).

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 early 2017, there were 75 IPAs in Australia, covering an area of 67 million hectares; almost 45% of the total terrestrial protected area estate in the National Reserve System (DPM&C, 2017). There are currently no IPAs in the Catchments (Australian Government, 2017). However, 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.

## 4 Interests in Water

The 'rights' to the use, flow and control of all water in Western Australia, 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 starts with a brief overview of common law rights and interests in water. It then reviews the existing water governance arrangements in Western Australia, Northern Territory and Queensland, and how they apply in the Catchments.

### 4.1 Water regulation and the common law

Under the common law, the owners of land adjacent to a waterway held 'riparian rights' to access unlimited water for stock and domestic use, and to the reasonable use of water (without sensible diminishment of quantity or quality) for other purposes. There was an expectation that the water resource was shared equitably among riparian landholders, with the riparian doctrine based on the 'principle of mutuality' where landholders held both rights and obligations shared by all other riparian landholders (Fisher, 2000).

Water flowing outside of a defined watercourse, either under or above ground, was treated differently. For groundwater, the 'rule of capture' applied, where a landholder was able to capture and use water under their land without limitation. Similarly, landholders were entitled to use, collect, and control water flowing over the surface of the land. These unlimited rights to capture and use water flowing outside of a defined watercourse were held by landholders on which the water was captured and used. However, these rights offered no protection against the actions of others (e.g. a landholder had no right of recourse against a neighbouring landholder who exhausted a shared groundwater resource) (Gardner, 2009).

These common law principles proved unworkable in the Australian context, prompting the introduction of state and territory water statutes. However, some aspects of the common law arrangements were carried over into, and remain in, the statutory regimes.

### 4.2 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 and 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, the Northern Territory and Western Australia, and this reform is ongoing. The Productivity Commission is currently undertaking a review of the policy frameworks for water management, and it suggests legislative water reform in the Northern Territory and Western Australia is ‘unfinished business’ (p.7 in Productivity Commission, 2017a). Its draft report urges these jurisdictions to ‘modernise their entitlement regimes’, specifically to ensure statutory water rights are clearly defined, secure, separate from land, and tradeable (p.9 in Productivity Commission, 2017b). The Productivity Commission considers this to be especially important to support new developments in northern Australia.

In the following sections, we provide an overview of the water governance arrangements in Western Australia, 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.

## 4.3 Water regulation in Western Australia

### 4.3.1 INTRODUCTION

The primary water statute in Western Australia is the *Rights in Water and Irrigation Act 1914* (RiWI Act). However, there are six other statutes that relate to water management (Table 4-1). Substantial reform of water resources law in Western Australia is currently underway to consolidate most of these statutes into one water resources management act.<sup>78</sup> This reform is intended to streamline what is now considered, after multiple amendments, to be outdated, complicated and convoluted legislation (Western Australia Government, 2017a). Readers should be mindful of this reform process and the likelihood of material changes in the institutional

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<sup>78</sup> The *Water Services Act 2012* (WA) is not part of the reforms.

arrangements for water management over the coming years. Drafting of a *Water Resources Management Bill* is currently underway, informed by the 2013 government position paper titled ‘Securing Western Australia’s Water Future’ and it is expected that new water management legislation will be consistent with the principles outlined in the NWI.

**Table 4-1 Main water management legislation in Western Australia**

STATUTE	COMMENT
<i>Rights in Water and Irrigation Act 1914</i>	The principal legislation for the allocation and management of water resources
<i>Country Areas Water Supply Act 1947</i>	Provides for the protection of public drinking water source areas in rural areas and the regulation of clearing control areas
<i>Metropolitan Water Authority Act 1982</i>	Authorises the provision of certain drainage works and coordinates drainage services
<i>Metropolitan Water Supply, Sewerage and Drainage Act 1909</i>	Provides for the protection of public drinking water source areas in the metropolitan area
<i>Water Agencies (Powers) Act 1984</i>	Provides many of the works and other powers of the Minister for Water and the Department of Water
<i>Waterways Conservation Act 1976</i>	Provides for the conservation and management of certain waters and associated land and environment
<i>Water Services Act 2012</i>	Regulates the provision of water services (water supply, sewerage, irrigation or drainage service) by water service providers

### 4.3.2 WATER PLANNING

There is no mandatory water planning requirement under the RiWI Act. However, the Act allows for the development of water resource management plans at regional, sub-regional and local scales where they are considered necessary. Regional plans are intended to define water resources for a specified region, including environmental values, the use of water resources and the integration of water and land use planning and management. Sub-regional plans are intended to guide the water minister on water resource management issues for a specified sub-region, including the allocation of water between competing uses. Local area management plans are more detailed, and are intended to guide the management of water resources at a local level, including water allocations, how water can be taken and used, and matters that should be taken into consideration when deciding licence applications. Local area management plans also detail any powers that may be delegated to relevant water resources management committees. In some regions (such as the Kimberley), water allocation plans have been developed for certain water resources as either surface water allocation plans, or separate groundwater allocation plans (e.g. the Ord River Water Allocation Plan and the La Grange Groundwater Allocation Plan).

### 4.3.3 APPROVALS FOR TAKING WATER

Under the RiWI Act’s regulatory regime, activities involving taking water are divided into two broad categories: those that can occur without authorisation; and those that can only occur with authorisation. Details of the activities that can be carried out with and without authorisation are provided in Table 4-2. Broadly, the RiWI Act utilises a proclamation process to define the nature and scope of the approval requirements concerning taking water, and the construction of water-related works. Proclamations can be made for a watercourse, wetland, underground waters or an



area in any part of the State. Once proclaimed, the water resource becomes subject to specific requirements. Both the surface waters and groundwaters of the Fitzroy Catchment are proclaimed areas. Where authorisation is required to take water from a watercourse, wetland or underground water source, proponents will generally be required to obtain a licence under section 5C of the Act.<sup>79</sup>

**Table 4-2 Statutory water privileges and authorisation requirements concerning taking and interfering with water under the RiWI Act, Western Australia**

TYPE OF WATER	STATUTORY PRIVILEGE OR AUTHORISATION REQUIREMENT
<b>Proclaimed surface water in a watercourse or wetland</b>	<p>A licence is required to take water from a watercourse or wetland unless: (i) the water is taken by a riparian landholder who is taking the water for stock, domestic use or to irrigate a garden of up to 2ha that is connected to a dwelling and from which no produce is sold; or (ii) the water is taken from a watercourse or wetland for stock (kept under non-intensive conditions) or domestic use from any watercourse or wetland accessible by a public road or reserve at the point at which the water is taken.</p> <p>A permit is required to undertake any activity that may result in the obstruction, destruction or interference with a watercourse, drain, dam or reservoir, or in the case of Crown land, any waters, bed or banks of any watercourse flowing through or over, or wetlands that fall wholly or in part on Crown land. Authorisation is also required if accessing water from a public road or reserve results in obstruction or disturbance of that road or reserve.</p> <p>A person can drain their land, or build a tank on their land without a licence as long as: (i) the development is consistent with relevant local by-laws made by the minister; (ii) it is not on a watercourse or wetland; (iii) there is no sensible diminishment of volume or flow of water in a watercourse or wetland; and (iv) there are no significant impacts on water quality or on an ecosystem, watercourse or wetland.</p> <p>Local by-laws made by the minister may prescribe specifications for the construction or alteration of dams, and limit the privileges described here where water is augmented by water from works constructed for that purpose.</p>
<b>Other surface waters that are not proclaimed</b>	<p>A riparian landholder can take water from an adjoining watercourse or wetland for domestic use, to water stock, or to irrigate a garden of up to 2ha that is part of the land, connected to a dwelling and from which no produce is sold. Water can also be taken for any other purpose by a riparian landholder, as long as no sensible diminishment of the flow or volume of water in a watercourse or wetland is caused (this freedom can be limited by local by-laws).</p> <p>A person may take water from any watercourse or wetland that is vested in the Crown that can be accessed by a public road or reserve at the point where water is taken for domestic use, watering cattle (other than those raised under intensive conditions), firefighting or any other purpose as long as the flow and volume of water in a watercourse or wetland is not sensibly diminished (this freedom can be limited by local by-laws).</p> <p>Where access to water is via a public road or reserve, a permit is required by any person undertaking any works or activity that will obstruct a watercourse or wetland, or its beds or banks, or that causes obstruction or disturbance to a public road or reserve.</p> <p>A permit is not required to construct works for taking water from a watercourse or wetland accessed by a landholder or occupier of private land in an area that is not proclaimed.</p> <p>Local by-laws and regulations may limit rights described here where water is augmented by water from works constructed for that purpose.</p> <p>A person can drain their land, or build a tank on their land without a licence as long as: (i) the development is consistent with relevant local by-laws; (ii) it is not on a watercourse or wetland; (iii) there is no sensible diminishment of volume or flow of water in a watercourse or wetland; and (iv) there are no significant impact on water quality or on an ecosystem, watercourse or wetland.</p>

<sup>79</sup> Licences, and the water entitlements embodied in them, are tradable in certain circumstances. There is a state policy to support water entitlement transactions: *Operational Policy 5.13 Water entitlement transactions for Western Australia*.

#### **4.3.4 WATER-RELATED WORKS APPROVALS**

A licence or a permit is usually required to interfere with, or obstruct, a watercourse, wetland or underground waters. Details of the licence and permit requirements are provided in Table 4-2. Four main types of licences and permits are used for these purposes:

- Section 26D licences authorise the construction or alteration of a well or bore;
- Section 11 permits authorise the construction of works to take water, where access is via a public road or reserve in a proclaimed area;
- Section 17 permits authorises the construction of works to take water in a proclaimed area; and
- Section 21A permits authorises the construction of works to take water via access from a public road or reserve in an unproclaimed area.

In addition to the standard licence and permit requirements, the RiWI Act provides the state water minister with the power to make 'local by-laws', which can impose regulatory restrictions on the taking of water and the construction and operation of water infrastructure in specific localities.

#### **4.3.5 FITZROY CATCHMENT**

There are currently no sub-regional or local management plans available for the Fitzroy,<sup>80</sup> and there is no water allocation plan for this Catchment Area. A 2010 draft water plan for the Fitzroy Catchment Area exists at a regional scale (the Kimberley Regional Water Plan). However, there is no clear process or timeline for finalising the plan, and it does not appear to currently have a role in guiding water resource management in the catchment.

### **4.4 Water regulation in the Northern Territory**

#### **4.4.1 INTRODUCTION**

In the Northern Territory, the primary piece of legislation regulating the management and use of water is the *Water Act*. Implementation of the *Water Act* is supported by the *Water Regulations 2002*, and under the Act, the water minister is able to delegate authority to a 'Controller' of water resources who assumes responsibilities for the administration of the *Water Act*. In 2015, the Northern Territory Government released a discussion paper titled 'Our Water Future', which sought public input into the development of a strategic plan for the management of water for the Territory (Northern Territory Government, 2015). This strategic plan is yet to be finalised.

#### **4.4.2 WATER PLANNING**

Under the *Water Act*, two main legislative mechanisms are used to support water management and planning. The first is the declaration of 'water control districts'. Typically, these districts are in areas where there is a demand for water such that additional controls are required. For declared water control districts, the priority water uses (referred to as 'beneficial uses' under the *Water*

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<sup>80</sup> Although there is a document titled 'Fitzroy Catchment Management Plan', which was published in 2010 by the Rangelands NRM Group.

Act) are identified and sustaining the beneficial uses for a particular area forms the basis for water allocation plans for that district. Under the Act, the beneficial uses must be one of: agriculture; aquaculture; public water supply; environment; cultural; industry; and stock and domestic.

The second mechanism is water allocation plans. These plans typically describe the total available water resources for an area, current and projected demand and the sustainable yield and allocation of water to beneficial uses, and strategies for achieving its stated objectives. They also include rules for managing licences and permits, including water trading rules if applicable. The specific statutory requirements for water allocation plans under the *Water Act* are that they must ensure:

- water is allocated within the estimated sustainable yield to beneficial uses;
- the total water use for all beneficial uses is less than the sum of the allocations to each beneficial use;
- the freedom to take or use water under a licence is able to be traded; and
- 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.

Currently, there are eight declared Water Control Districts in the Northern Territory, and four declared water allocation plans, one of which is under review. Five water allocation plans are currently being developed.

#### 4.4.3 APPROVALS FOR TAKING WATER

Under the *Water Act*, licences will usually be required to take water from a watercourse, aquifer or other waterbody. However, there are a number of instances where taking water is covered by statutory privileges, meaning licences are not required. Table 4-3 summarises the nature of the privileges and licence requirements that apply to taking water under the *Water Act*.

**Table 4-3 Statutory privilege and licence requirements to take water under the *Water Act*, Northern Territory**

TYPE OF WATER	STATUTORY PRIVILEGE OR LICENCE REQUIREMENT
<b>Water in a waterway</b>	A licence is required to take water from a waterway except for: <ul style="list-style-type: none"> <li>• 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 0.5 ha</li> <li>• 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</li> </ul>
<b>Groundwater</b>	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 0.5ha that is connected to a dwelling.

Licences to take water are typically granted on a ‘first-in-first-serve’ basis, and for a period of up to 10 years. They are not attached to land but specify the land on which the water is to be taken and used.<sup>81</sup> Importantly, the amount of water taken under a licence in any particular year can be limited by an Annual Announced Allocation.<sup>82</sup> Annual Announced Allocations, announced in May

<sup>81</sup> Water trading is only allowed in water control districts, where a water allocation plan is in place.

<sup>82</sup> Some licenses outside of water allocation plan areas cannot be subject to annual allocation limits.

each year by the Water Controller, are guided by water allocation plans in some areas, but the default allocation 'rules' for annual allocation decisions are set out in a brief policy document titled, 'Northern Territory Water Allocation Planning Framework'. This document contains rules for water allocation decisions rather than providing an overarching framework for water allocation in particular areas, which is done by water allocation plans. This policy contains two rules: one for the top end (northern one third of the NT); and another for the Arid Zone (southern two-thirds of the NT). In the top end, a '80:20 rule' applies, under which at least 80% of the flow in rivers is meant to be allocated to the environment and other public benefit, and extraction or diversion for consumptive use is not meant to exceed the threshold limit equivalent to 20% of flow at any time in any part of the river. A similar 80:20 rule applies to groundwater with 80% of recharge allocation to environmental and other public use, and 20% to consumptive uses. In the Arid Zone, a '95:5 rule' is used to determine the allocation between environmental and social benefit, and consumptive uses. For groundwater in the Arid Zone, the policy aims to ensure water allocations have no deleterious impact on groundwater dependent ecosystems, and over the long-term (at least 100 years), total extraction is not meant to exceed 80% of the total initial aquifer storage (i.e. storage at the time of initial extraction).

#### **4.4.4 WATER-RELATED WORKS APPROVALS**

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

- a permit is required 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 is required to construct works to take water from groundwater (including the drilling, construction, alternation, lugging, backfilling or sealing of a bore);<sup>83</sup> 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.

#### **4.4.5 THE DARWIN CATCHMENTS**

The 'Darwin Rural Water Control District' lies within the Darwin catchments, and there are two relevant water allocation plans within this area: the Berry Springs Water Allocation Plan; and the Howard Water Allocation Plan (which is currently being developed). The Berry Springs Water Allocation Plan has been developed to address allocation of groundwater resources that exceed the '80:20 rule' under the Water Allocation Planning Framework. Surface and groundwater resources are interconnected in this area and are managed within the plan as a total resource. However, extraction is mainly from groundwater for the purposes of irrigated horticulture, aquaculture and rural residential use. The water allocation plan states that for the plan area, no new bores will be approved until there is further scientific information available about the impacts

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<sup>83</sup> Bores can also only be constructed, altered, or sealed by a suitable qualified bore driller licensed under the *Water Act*.

of extraction on natural spring flows, water quality and ecosystems. All existing surface and groundwater licences are now subject to annual announced allocations.

The Howard Water Allocation Plan currently in development will focus on all water (surface and groundwater) that is contained in, and originates from, the Howard Groundwater System, including groundwater that discharges to surface water systems. The Howard Groundwater Systems lies under a large portion of the Darwin Rural Area and its water resources have been under increasing pressure from a number of users, including irrigated agriculture, industrial use, rural domestic water supply, and to augment the reticulated water supply.

## 4.5 Water regulation in Queensland

### 4.5.1 INTRODUCTION

The *Water Act 2000* (Qld) and supporting subordinate legislation (most notably the *Water Regulation 2016* and water plans) provide the framework for the sustainable management of water in Queensland by establishing a system for the planning, allocation and use of water. Under the Act, the unauthorised taking of, or interference with water is prohibited. The enactment of the *Water Act* marked significant reform in the way that access to water is regulated in Queensland, most notably by introducing the requirement for statutory water planning, and allowing for water entitlements separate from land.

### 4.5.2 WATER PLANNING

The *Water Act's* water planning process involves the preparation of water plans that become subordinate legislation once approved. These water plans provide the basis for water entitlements,<sup>84</sup> as well as for the allocation of water for environmental and other public purposes. The implementation of each water plan may be supported by a 'water management protocol' that outlines, for the plan area, volumes, purpose and location of unallocated water and processes for releasing unallocated water, and rules for allocating water as well as rules for assigning seasonal allocations. 'Water entitlement notices' also support the implementation of a water plan by providing rules governing the grant, amendment and cancellation of water entitlements such as water licences or allocations for the plan area.

### 4.5.3 APPROVALS FOR TAKING WATER

Under the *Water Act's* regulatory regime, activities involving the taking or interference with water are divided into two categories: those that can occur without an authorisation; and those that can only occur under an authorisation. Table 4-4 summarises the instances where a statutory privilege (freedom to take or interfere with water without an authorisation issued under the Act) to take or interfere with water exists under the *Water Act*, divided into those that cannot be (Column 1), and can be (Column 2), limited by a water plan, regulation or moratorium notice.

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<sup>84</sup> Under the *Water Act*, 'water entitlements' are water allocations, interim water allocations and water licenses.

**Table 4-4 Overview of activities that do not require authorisations under the *Water Act*, Queensland**

STATUTORY PRIVILEGES NOT ABLE TO BE LIMITED BY A WATER PLAN OR REGULATION	STATUTORY PRIVILEGES THAT MAY BE LIMITED BY A WATER PLAN, REGULATION OR MORATORIUM NOTICE
<ul style="list-style-type: none"> <li>• Take water for a public purpose in an emergency situation, for fighting fires and undertaking testing of fire fighting equipment.</li> <li>• Take water for camping purposes and watering travelling stock.</li> <li>• Interfere with water in a watercourse for monitoring purposes under certain conditions.</li> <li>• ‘Interfere’ (e.g. divert) with overland flow.</li> <li>• Aboriginal and Torres Strait Islander parties can take or interfere with water for traditional activities or cultural purposes.</li> <li>• Landholders adjoining a watercourse can take water for watering stock.</li> <li>• Landholders can take water from dams on their property for stock and domestic purposes.</li> <li>• A person may take water to meet the requirements of an environmental authority or a development permit for carrying out an environmentally relevant activity.</li> <li>• Approved resource activities can divert a watercourse for the activity.</li> <li>• 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.</li> </ul>	<ul style="list-style-type: none"> <li>• Take water for the purposes of carrying out an activity prescribed by regulation (<i>Water Regulation 2016</i>, Sch 3).</li> <li>• Take overland flow for any purpose.</li> <li>• Landholders adjoining a watercourse taking water for domestic purposes.</li> <li>• Take or interfere with underground water for any purpose.</li> <li>• Take water collected in a dam for any purpose, unless that dam is across a watercourse or lake.</li> <li>• 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.</li> <li>• 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.</li> </ul>

Activities involving the taking or interference with water that are not covered by the general statutory privileges require an authorisation. These authorisations can be in the form of a water licence, water allocation, water permit, resource operations licence, distribution operations licence, or operations licence (Table 4-5). Rules for issuing and managing these authorisations are detailed in the *Water Act 2000*, *Water Regulation 2016*, and water management protocols for a particular water plan area.

**Table 4-5 Water authorisations under the *Water Act*, Queensland**

AUTHORISATION	COMMENT
Water licence	Similar to ‘traditional’ water entitlements as they are typically attached to land, unless the licensee is a prescribed entity. Water taken under licences attached to land can only be used on that land. Water licences can be issued for taking or interfering with water in a watercourse, underground water, or overland flow. Water licences can be converted to water allocations under a water entitlement notice. The amount of water that can be taken under a licence can be set under seasonal water assignment rules and notices, and water management protocols for a water plan area.
Water allocation	Resemble the water entitlements envisaged under the NWI. They can be issued to any authorised person, have a title separate from land, and can be leased or sold. Water trading rules are set out in the <i>Water Regulation 2016</i> , 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 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.

AUTHORISATION	COMMENT
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 either 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.

#### 4.5.4 WATER-RELATED WORKS APPROVALS

The regulation of the construction of water-related facilities and infrastructure (e.g. dams, levees and bores) is done through the *Planning Act 2016* (Qld) and *Water Act*. Generally, the construction of water-related facilities and infrastructure require development approval under the *Planning Act* (see Section 5 for details of the *Planning Act*), as well as authorisations under the *Water Act* to engage in the actual taking or interference. The details of the development approval requirements are spread across the *Planning Act* and Parts 19 and 20 of the *Planning Regulation 2017* (Qld), and the *Water Act* 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 Part 4 of the *Water Act*. It is an offence under Part 3 of the *Water Act* 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.

#### 4.5.5 THE MITCHELL CATCHMENT

The *Water Plan (Mitchell) 2007* is the primary water plan for the Mitchell Catchment. It identifies available water in the Mitchell Catchment water plan area and provides a framework for regulating the taking and interference with water in the region. It also identifies priorities and mechanisms for dealing with future water requirements and provides a framework for addressing the degradation of natural systems. The Plan deals with water in a watercourse or lake, springs not connected to Great Artesian Basin (GAB) water, underground water that is not GAB water, and overland flow water, other than GAB spring water. The *Water Plan (Great Artesian Basin and Other Regional Aquifers) 2017* regulates access to and use of GAB water either underground or in springs in the Mitchell Catchment area. The *Water Plan (Barron) 2002* is also of relevance to the Mitchell Catchment as there is an inter-basin transfer of water from the Barron River into the Walsh River (in the upper Mitchell River Catchment Area) to support part of the Mareeba-Dimbulah Water Supply Scheme. The *Water Plan (Mitchell) 2007* emphasises the need to ‘allocate and manage water in the upper Walsh River and the upper Mitchell River in a way that is compatible with the outcomes of the Water Resource (Barron) Plan 2002 to the greatest practicable extent’.

The *Water Plan (Mitchell) 2007* identifies existing water entitlements and authorisations for the plan area, and then sets out an allocation process for unallocated water. The current total of water allocations in the Mitchell Catchment is considered low (just over 7000ML), and there are also very low utilisation rates for existing entitlements (Marshall, 2016). This suggests there is scope for increased utilisation of available water in the Mitchell Catchment. The *Water Plan* sets out

categories of available (unallocated) water (general reserve, strategic reserve and Indigenous reserve) and the processes for making this water available. There is also provision in the Plan for making water available for ‘projects of regional significance’. Table 4-6 summarises the available water categories and volumetric limits for each category.

**Table 4-6 Unallocated water categories and annual volumetric limits under the *Water Plan (Mitchell) 2007***

CATEGORY OF WATER	OUTLINE	ANNUAL VOLUMETRIC LIMITS
<b>General Reserve</b>	Unallocated water under general reserve can be authorised to be taken for any purpose	Under the <i>Water Plan (Mitchell) 2007</i> , the plan area map identifies nodes along the Mitchell River. Upstream of node 1 on the Mitchell River (which includes Lake Mitchell), the total annual volumetric limit is 20,000 ML. The total annual volumetric limit for all other areas other than upstream of node 1 is 35,000 ML.
<b>Indigenous Reserve</b>	This water may only be allocated for assisting Indigenous communities in achieving their economic and social aspirations	5000 ML Note: this volumetric limit applies to the entire Cape York Peninsula Region, not just the Mitchell Catchment
<b>Strategic Reserve</b>	For projects considered to be of state or regional significance. Water is only allocated for the life of the project	10,000 ML

The *Water Plan (Mitchell) 2007* sets out the nature of authorisations required to take or interfere with water in the plan area. For example, it details requirements for: water licences, maximum rates for taking of water (including rate limits for various pump capacities) and other conditions for taking surface water; regulating the taking or interference with overland flow; and limitations on taking or interfering with groundwater in the Chillagoe groundwater management area identified in the water plan. Table 4-7 summarises these requirements, broken down into the following categories: water in a watercourse lake or spring (not GAB water), overland flow, underground water, and GAB water (underground or spring).

**Table 4-7 Statutory privileges or authorisations to take or interfere with water in the Mitchell catchment specified by the *Water Plan (Mitchell)*\***

TYPE OF WATER	STATUTORY PRIVILEGE OR REQUIRED AUTHORISATION
<b>Water in a watercourse, lake or spring</b>	Riparian landholders are able to take water from an adjoining watercourse, lake or spring for stock or domestic purposes. An authorisation is required to take or interfere with surface water in a watercourse, lake or spring for all other purposes, unless it is a prescribed activity ( <i>Water Regulation 2016</i> , Sch 3).
<b>Overland flow</b>	A water licence is required to take overland flow unless it is for stock or domestic purposes, or for works that allow the taking of overland flow with a capacity of no more than 250 ML. A water licence is not required if water is taken to satisfy the requirements of an environmental authority issued under the <i>Environmental Protection Act 1994</i> , or a development permit for carrying out an environmentally relevant activity (other than a mining or petroleum activity) under the <i>Environmental Protection Act</i> .
<b>Underground water (other than GAB water)</b>	In the Chillagoe groundwater management area, a water licence or permit is required to take or interfere with water other than for stock or domestic purposes, or for monitoring purposes or controlling water salinity. In all other areas, users are entitled to access underground water for any purpose, unless limited by a moratorium notice



TYPE OF WATER	STATUTORY PRIVILEGE OR REQUIRED AUTHORISATION
<b>Great Artesian Basin Water (underground or in springs)</b>	<p>Water may be taken for domestic purposes, and for stock purposes in certain areas. However, this authorisation is only valid if the water is taken in a way that meets prescribed criteria protecting water pressure.</p> <p>Water may be taken for monitoring purposes within prescribed limits and conditions</p> <p>Water may be taken for a project of economic or social benefit to Aboriginal peoples or Torres Strait Islanders within prescribed limits and conditions</p> <p>Water may be taken for an activity prescribed under the <i>Water Regulation 2016</i> within prescribed limits and conditions</p> <p>For all other purposes, a water licence, water permit or seasonal water assignment notice is required to take or interfere with GAB water.</p>

\* Table 4-7 should be read in conjunction with Table 4-4. In particular, proponents of water-related development in the Mitchell catchment have access to the statutory privileges specified in Table 4-4, Column 1.

## 4.6 Indigenous rights to water

### 4.6.1 INTRODUCTION

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. The following subsections provide an overview of how these institutions recognise and protect the interests of Indigenous people in water.

### 4.6.2 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.<sup>85</sup> 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 the 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.<sup>86</sup> A threshold question for native title in water is whether the vesting of the 'rights' to the use, flow

<sup>85</sup> *Commonwealth v Yarmirr* [2001] HCA 56; *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29; *Griffiths v Northern Territory* [2007] FCAFC 178; *Rumburriya Borroloola Claim Group v Northern Territory* [2016] FCA 776.

<sup>86</sup> *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.

and control of water in the Crown under water statutes extinguished native title.<sup>87</sup> 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].<sup>88</sup> This, and several subsequent judicial decisions, have confirmed that native title rights involving the *exclusive possession* of water will not be recognised.<sup>89</sup> 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.<sup>90</sup> As Justice Mansfield held in relation to the Northern Territory *Water Act* (NT) and its predecessor:

... 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*.<sup>91</sup>

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.<sup>92</sup> 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 Section 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.<sup>93</sup> 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.<sup>94</sup>

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<sup>87</sup> The effect and consequences of extinguishment will depend on when it occurred. See Section 3.4 for further details on the native title regime.

<sup>88</sup> *Western Australia v Ward* [2002] HCA 28 at [263].

<sup>89</sup> *Griffiths v Northern Territory* [2007] FCAFC 178; *Rrumburriya Borroloola Claim Group v Northern Territory* [2016] FCA 776.

<sup>90</sup> *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.

<sup>91</sup> *Rrumburriya Borroloola Claim Group v Northern Territory* [2016] FCA 776 at [469].

<sup>92</sup> *Gumana v Northern Territory* [2007] FCAFC 23.

<sup>93</sup> *Native Title Act 1993* (Cth), s 238.

<sup>94</sup> 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.

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

### **4.6.3 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, the Northern Territory and Western Australia are signatories. Relevantly, the NWI emphasises that water access entitlements and planning frameworks should ‘recognise Indigenous needs in relation to water access management’.<sup>95</sup> 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:

- inclusion of indigenous representation in water planning wherever possible; and
- water plans will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.<sup>96</sup>

In relation to the preparation of water plans, the NWI states that the plans should take into the 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.

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

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<sup>95</sup> *National Water Initiative*, para 25(ix).

<sup>96</sup> *National Water Initiative*, para 52.

## Western Australia

Under Western Australia's principal water statute, the *Rights in Water and Irrigation Act 1915* (WA) (RiWI Act), Indigenous cultural and economic interests can be considered in water planning processes. However, there is no explicit requirement for this to occur, and no guarantee water plans will include water allocation and access arrangements that protect and advance Indigenous interests. State agencies are also not required to specifically engage with, or seek approval from, Indigenous people in relation to the development of water plans. Consistent with the desire to eliminate racial discrimination articulated in federal and state discrimination laws, the procedural requirements concerning consultation and participation apply equally to Indigenous and non-Indigenous people.

The only statutory provisions that explicitly facilitate consideration of Indigenous interests in the water planning process are sections 26GL and 26GZ of the RiWI Act. Section 26GL requires local water resources management committees to have knowledge and experience relating to the water needs and practices of local communities, including Aboriginal communities. Section 26GZ requires local water resources management committees to be consulted prior to the making or amendment of a water plan. The combination of these provisions provides an (albeit weak) institutional mechanism for the consideration of Indigenous interests.

In a similar vein, there are no additional rights extended to Indigenous people to access or take water beyond the rights that exist for non-Indigenous people. The purposes of Part III of the RiWI Act, which covers water planning and the issuance of licences and permits to take water and undertake works, include to provide for sustainable use and development of water resources. Use and development is defined for these purposes as including 'use and development for domestic, commercial, recreational, cultural and navigational purposes'.<sup>97</sup> Beyond this high level reference to cultural purposes, no mention is made of Indigenous cultural uses of water, and there are no special processes for the issuance of water approvals for 'Indigenous purposes' (i.e. traditional purposes or for economic development).

While the RiWI Act contains no special provisions for the taking of water for Indigenous traditional uses, Indigenous people who hold native title, or freehold or leasehold titles, may be able to take water for cultural purposes under the general provisions that allow landholders to take water for 'ordinary uses' (see Section 4.3.3).

The Productivity Commission in its recent inquiry into the reform of Australia's water resources sector singled out Western Australia for not yet having established mechanisms for engaging Indigenous people in water planning, or providing Indigenous communities with access to water to assist them to realise their social and economic aspirations (Productivity Commission, 2017). The Western Australian Government's 2013 Position Paper 'Securing Western Australia's water future', which is intended to inform water reform underway in the state, is silent on Indigenous rights to access water and makes only minor mention of Indigenous cultural values, other than those afforded to native title holders (Western Australia, 2013).

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<sup>97</sup> RiWI Act, s 4(2).

## Northern Territory

In the Northern Territory, the main water statute, the *Water Act* (NT), provides for cultural factors to be considered in decisions concerning water planning and the provision of licences for the extraction of surface and ground water. The relevant provisions of the Act hinge on the statutory definition of 'beneficial uses of water', which, amongst other things, includes 'cultural' uses: 'to provide water to meet aesthetic, recreational and cultural need'. Beneficial uses of water can be declared for water control districts. Water allocation plans for water control districts must ensure water is allocated within the estimated sustainable yield to beneficial uses. Further, in making decisions regarding the issuance of licences and permits to take water and undertake water-related works, consideration must be given to the designated beneficial uses of water for the district.

These statutory provisions ensure cultural factors can be considered in water planning and water approval processes. However, there is no explicit requirement to consider Indigenous cultural interests, or Indigenous interests more broadly. Most importantly, there is currently no guarantee water allocations and access arrangements made under water plans will protect and advance Indigenous interests. Consistent with this, under the Northern Territory's policy regarding annual allocation decisions,<sup>98</sup> which set the amount of water that can be taken under a licence in an area, a stated percentage of water is preserved for 'environmental and other public benefit' purposes, which could (but does not necessarily) include Indigenous cultural purposes.

In 2015, the Northern Territory Government published a discussion paper on water reform, titled 'Our Water Future', which raised the concept of strategic water reserves for Indigenous economic development (Northern Territory Government, 2015). Following a public consultation process, in October 2017, the Northern Territory Government adopted a formal policy on the establishment of 'Strategic Aboriginal Water Reserves' (Northern Territory Government, 2017). Strategic Aboriginal Water Reserves are defined for these purposes 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' (p. 3 in Northern Territory Government, 2017). The policy commits the Government to include Strategic Aboriginal Water Reserves in all new and revised water allocation plans for water plan areas, and to manage the reserves for future economic development by and for the benefit of eligible Aboriginal people. Under the policy, there are only two circumstances where Strategic Aboriginal Water Reserves will not be included in water allocation plans:

- where relevant Indigenous landholders (i.e. those with rights to take water resources for consumptive beneficial uses, including under exclusive possession native title) hold all land that could conceivably access water for beneficial consumptive uses in the plan area (the reserve should be unnecessary in this instance as the Indigenous landholders will have exclusive access to the water resource); and
- where relevant Indigenous landholders do not hold any rights that enable them to access and use water in the plan area for consumptive beneficial uses.

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<sup>98</sup> Northern Territory Water Allocation Planning Framework.

At the time of writing, the Northern Territory Government was in the process of making the necessary legislative and administrative changes to bring the Strategic Aboriginal Water Reserves policy into effect.

## Queensland

Under the main Queensland water statute, the *Water Act 2000* (Qld), water plans may be prepared for any part of the state. There is no statutory requirement for engaging with, or seeking approval from Indigenous people as part of this planning process beyond general discretionary public consultation. There is also no explicit statutory requirement for water plans to include water allocation and access arrangements to protect and advance Indigenous interests. However, the purposes of the *Water Act* are specified as including the sustainable management of Queensland's water resources, with sustainable management defined for these purposes as management that:

... recognises the interests of Aboriginal people and Torres Strait Islanders and their connection with water resources.<sup>99</sup>

Consistent with this, the *Water Plan (Mitchell) 2007* makes particular provision for water for assisting Indigenous communities in the Cape York Peninsula Region area to achieve their economic and social aspirations. It does this by creating an 'Indigenous Reserve' for unallocated water specifically for this purpose.<sup>100</sup> This allocation recognises that the value of water to Indigenous communities extends beyond the cultural and traditional uses.

In addition to this, the *Water Act* explicitly provides a statutory right for Indigenous people to take and interfere with water for traditional purposes. Section 95 of the Act states:

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.

This statutory right to take water is in addition to any rights embodied in native title, and is not limited in its application to Indigenous groups holding native title. See Table 4-4 (Section 4.5.3) for details of the statutory privileges provided under the *Water Act*.

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<sup>99</sup> *Water Act 2000* (Qld), s 2(2).

<sup>100</sup> Under the *Water Plan (Mitchell) 2007*, the total of the annual volumetric limits for all water licences to take Indigenous unallocated water from the Cape York Peninsula region is 5000ML.

## 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.

Proponents of water-related developments should obtain appropriate advice in relation to ancillary activities. Foreign investors should take particular note of the federal regulation of foreign investment under the *Foreign Acquisitions and Takeovers Act 1975 (Cth)*, *Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth)* and Australia's Foreign Investment Policy (Australian Treasurer, 2015). Under this regulatory regime, the federal Treasurer can impose conditions and even block foreign investment proposals by foreign persons and foreign governments in Australia, including the acquisition of agricultural land and direct interests in agribusinesses. Foreign interests in agricultural land are also required to be registered with the Australian Taxation Office under the *Register of Foreign Ownership of Agricultural Land Act 2015 (Cth)*.

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 Catchments, 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 Catchments. 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, pest and weed

management, and soil conservation laws.<sup>101</sup> 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 Western Australia, Northern Territory or Queensland. However, it does have both environmental and heritage regulations that could apply to water-related development in northern Australia. The principal federal environmental statute is the EPBC Act, which consists of four largely separate regulatory regimes: the 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 in the following subsections.

### 5.1.1 EPBC ACT'S EIAA REGIME

EIAA is a process involving 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). As this definition suggests, 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.

#### Project-based 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 now nine matters of national environmental significance: world heritage values of World Heritage Areas (e.g. Kakadu National Park in the Darwin catchments); national heritage values of National Heritage places (e.g. West Kimberley National Heritage Place in the Fitzroy catchment, Ngarrabullgan National Heritage Place in the Mitchell catchment and Kakadu National Park);<sup>102</sup> ecological character of Ramsar wetlands (Kakadu National Park); listed threatened species and ecological communities; listed migratory species; the impacts of nuclear

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<sup>101</sup> 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). For soil conservation laws, see *Soil and Land Conservation Act 1945* (WA); *Soil Conservation and Land Utilisation Act* (NT); and *Soil Conservation Act 1986* (Qld).

<sup>102</sup> The EPBC Act contains a Commonwealth Heritage List for places of heritage significance in Commonwealth areas, which are protected through the Commonwealth areas provisions of the EIAA regime and Part 15 (the Commonwealth reserves regime).



actions on the environment; the environment in Commonwealth marine areas and Commonwealth managed fisheries; the environment in the Great Barrier Reef Marine Park; and coal seam gas and large coal mine developments.<sup>103</sup>

The format of the EIAA process is relatively straight-forward and has four components (prohibited conduct, screening, assessment and approval), summarised in Table 5-1. 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 under ‘bilateral agreements’. Where a state/territory assessment or approval process has been accredited, projects assessed or approved under it do not require separate assessment or approval under the EPBC Act. Despite the Australian Government seeking to promote the making of ‘approval’ bilateral agreements—that accredit state and territory *approval* processes—only one has been reached, and it was confined in its scope to the Sydney Opera House. In contrast, there are broad ‘assessment’ bilateral agreements in all states and territories, which accredit assessment processes for the purposes of the EPBC Act. The existence of these agreements means a significant number of the assessments under the EPBC Act are now done under state and territory processes.

**Table 5-1 Main elements of EPBC Act project-based EIAA regime**

COMPONENT	REF.	COMMENT
<b>Prohibited conduct</b>	Pt 3	Part 3 of the Act prohibits the taking of an action that is likely to have a significant impact on one of the protected matters, unless the action has been approved or is otherwise exempt. Unlawfully taking an action that has, or is likely to have, a significant impact on a protected matter carries civil and criminal penalties.
<b>Screening</b>	Pt 7	Part 7 contains the screening provisions, under which proponents are required to refer actions that could have a significant impact on a protected matter to the federal environment minister, who then makes a determination on whether significant impacts are likely (known as the ‘controlled action decision’). At this stage, the Minister has four options: (i) the action is clearly unacceptable – the action cannot proceed; (ii) not a controlled action – the action can proceed without further assessment under the EPBC Act; (iii) not a controlled action if it is carried out in a particular manner – the action can proceed without further assessment under the EPBC Act, provided it is undertaken in the prescribed way; and (iv) controlled action – the action must proceed to formal assessment and approval. If the minister determines an action is a controlled action, ‘controlling provisions’ must be set for the action. The controlling provisions are the sections of Part 3 that protect the matters that are likely to be significantly affected by the action. The controlling provisions are important because they determine the scope of the EPBC Act assessment and the matters the minister can consider when deciding whether to approve the action.
<b>Assessment</b>	Pt 8	Assessments can be carried out under Part 8 of the EPBC Act or via an accredited process. There are five assessment options: assessment on referral information; assessment on preliminary documentation; public environment report; environmental impact statement; and public inquiry. There are two avenues by which EPBC Act assessments can occur under accredited state and territory processes: (i) one-off accreditations, where the federal minister accredits a state or territory process for the purposes of a single project assessment; and (ii) assessment bilateral agreements, where the federal minister accredits a state or territory process for a period for the purposes of a class or classes of projects. Assessment bilateral agreements are agreements between the Australian Government and a state or territory government under which the federal minister accredits the state/territory environmental assessment process for the purpose of assessments under the EPBC Act. There are now assessment bilateral agreements covering all states and territories. The coverage of these agreements is not complete, meaning assessments are still carried out under EPBC Act processes. The scope of the assessments conducted for these purposes are confined to the impacts on the matters protected by the controlling provisions.

<sup>103</sup> Coal seam gas and coal mine projects are only a matter of national environmental significance if they could have material adverse impacts on a water resource.

COMPONENT	REF.	COMMENT
Approval	Pt 9	After the assessment has been completed, the minister must decide under Part 9 whether to approve the action and what conditions should be imposed, unless these approval powers have been delegated to the states and territories under an approval bilateral agreement. At the time of writing, no approval bilateral agreements were in force. As a consequence, all approval decisions must currently be made by the minister or the minister's delegate. In making the approval decision, the matters the minister can consider is confined to the impacts the action could have on the matters protected by the controlling provisions, social and economic matters, and the suitability of the proponent to hold an approval having regard to their environmental history. The minister has broad powers to impose conditions on approvals, including conditions requiring financial contributions, bonds, guarantees and environmental offsets.

## Strategic assessments

At their simplest, strategic assessments involve the evaluation and mitigation of the environmental impacts of higher order decision making. The environmental attraction of strategic assessments is that they can potentially capture the cumulative impacts of multiple actions and ensure the alignment of the policy objectives. For proponents, the benefits of effective strategic assessments include reduced uncertainty and lower assessment and approval costs.

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. 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 Catchments 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

Soon after the EPBC Act commenced in 2000, the federal environment department adopted the 'mitigation hierarchy' as a guiding principle in the administration of the EIA regime. The mitigation hierarchy is based on the notion projects should not have a significant net negative

impact on the environment. To achieve this, decision-makers are required to step through at least three stages in regulating the adverse environmental impacts of projects: avoid adverse impacts, minimise adverse impacts and compensate for adverse impacts.<sup>104</sup> In 2012, the mitigation hierarchy was formally adopted through the Australian Government's *Environmental Offsets Policy* (Australian Government 2012). 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 (Scheonbaum 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.<sup>105</sup> 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 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 development of compensatory mitigation packages under the *Environmental Offsets Policy* is guided by an Excel-based Offsets Assessment Guide, which seeks to convert residual impacts into desired compensatory mitigation components. The Guide is built around eight principles, which reflect the main risks associated with offsets of any description (details of the principles are provided in Appendix A.2).

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

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<sup>104</sup> Restoring the environment is often included as a fourth stage.

<sup>105</sup> EPBC Act, ss 75(2)(b) and 77A. See also Australia Government 2012, pp 11 and 55.

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.

### Appeals from controlled action, assessment approach and approval decisions

There are two general types of appeals: merits review and judicial review. Merits review involves the review of the substantive merits of an administrative decision by an appeal body (i.e. a tribunal or a court exercising non-judicial powers). In merits review proceedings, the appeal body effectively ‘stands in the shoes’ of the original decision-maker and confirms or re-makes the decision on the basis of what it regards as the preferable outcome. Judicial review involves challenges to the legality of purported exercises of power by administrative decision-makers before a court of law. In judicial review proceedings, the only issue of relevance is whether the original decision-maker’s decision was lawful; were the required legal procedures adhered to and was the decision made with the legal boundaries set by the law. The merits of the decision, and whether it was the preferable decision, are largely irrelevant.

The EPBC Act provides for both merits and judicial review. However, only judicial review is available in relation to decisions made concerning the EIAA regime. Proponents who believe a controlled action, assessment approach or approval decision has been made unlawfully can initiate judicial review proceedings to quash the decision. Appeals from these decisions are usually made to the Federal Court or Federal Magistrates Court. If the Court upholds the appeal, it will not remake the decision. Typically, the decision will be rendered invalid and the decision will have to be remade by the original decision-maker (the minister or minister’s delegate) in accordance with the law.

Third parties are entitled to seek judicial review of controlled action, assessment approach or approval decisions. The EPBC Act even contains expanded standing provisions to facilitate third party appeals. Generally, in order for a third party to appeal against an administrative decision, they must be a ‘person aggrieved’ or have a ‘special interest’ in the decision.<sup>106</sup> The EPBC Act broadens this by allowing individuals and organisations to initiate proceedings provided they have ‘engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before’ the conduct or proposed conduct.<sup>107</sup> In addition to allowing third parties to appeal against controlled action, assessment approach or approval decisions, the Act also allows them to initiate civil enforcement proceedings to prevent alleged infringements of the law. For example, if a proponent breaches a condition of its approval, a third party can seek an injunction to prevent the continuation of the offending conduct.

### Major Project Facilitation Programme

Although not a formal part of the EPBC Act EIAA regime nor exclusively about EPBC Act approvals, the Australian Government has established a ‘Major Project Facilitation Programme’ to provide a

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<sup>106</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493. *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516; *Alliance to Save Hinchinbrook v Environmental Protection Agency* (2006) 145 LGERA 32; *Animals’ Angels e.V. v Secretary, Department of Agriculture* (2014) 228 FCR 35. See also Brian Preston, ‘Standing to sue at common law in Australia’, paper presented at the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, National Judges College and the Administrative Trial Division of the Supreme People’s Court, Xian, People’s Republic of China, 11-13 April 2006; Gerry Bates, *Environmental Law in Australia* (LexisNexis, 2010) 627-653; Edgar above n 6.

<sup>107</sup> In the case of an organisation, the Act also requires the applicant’s objects to include ‘the protection or conservation of, or research into, the environment’. EPBC Act, ss 475 and 487.

single point of entry for federal government regulatory processes. The program is run by the Australian Department of Industry, Innovation and Science and its primary function is to reduce proponents' transaction costs associated with obtaining federal regulatory approvals for major projects. To be eligible for assistance under the program, the project must satisfy three criteria: be of strategic significance to Australia (investment of more than \$50m or have significant net economic benefit for regional Australia); require federal government approvals to proceed (e.g. EPBC Act EIAA approval, foreign investment approval) or significant government involvement (e.g. through government assistance, migration or employment programs); and have sufficient financial resources and support to complete the Australian Government approval processes and have reasonable commercial viability. Applications for the program are made to the Minister for Industry, Innovation and Science and those who are approved receive free government assistance to meeting federal government requirements for a period of up to three years. At the time of writing, 15 projects had received assistance under the program, including Project Sea Dragon.<sup>108</sup> Project Sea Dragon is a large aquaculture proposal in the Northern Territory and is one of the case studies detailed in Appendix A.1.

### 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.<sup>109</sup> World and National Heritage places can be located anywhere in Australia. Commonwealth Heritage places must be located in a Commonwealth area. There are three World and National Heritage places in the Catchments: Kakadu National Park (World and National Heritage place) in the Darwin catchments; West Kimberley National Heritage Place in the Fitzroy catchment, and Ngarrabullgan National Heritage Place in the Mitchell catchment. There are also several Commonwealth heritage places in the Darwin catchments.

The EPBC Act provides protection for the heritage values associated with World, National and Commonwealth Heritage places through the following four main mechanisms.<sup>110</sup>

- *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

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<sup>108</sup> Details of the program and the projects that have received assistance are available at: <http://mpaa.gov.au>.

<sup>109</sup> '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.

<sup>110</sup> 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).

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.<sup>111</sup> All World Heritage places are also National Heritage places.

- *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 place, the contract of sale or lease includes a covenant to protect the relevant heritage values (unless it is deemed unreasonable or impracticable).<sup>112</sup>
- *Management planning.* Conservation and management of National and Commonwealth Heritage places is provided for through a management planning process.<sup>113</sup> 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.

### ATSIHP Act

The ATSIHP Act was initially made as a stop-gap measure while national Indigenous land rights laws were made and was only intended to be used as a last resort where state and territory laws failed to protect places and objects of ‘particular significance to Aboriginals in accordance with Aboriginal tradition’ (DEWHA, 2009; DoE 2014).<sup>114</sup> When the national land rights laws were abandoned in the mid-1980s, a 2 year sunset clause in the Act was repealed, ensuring its continuance. In the words of the Minister for Aboriginal Affairs at the time, Clyde Holding, the ATSIHP Act was retained as a ‘reserve power’ to protect Indigenous heritage sites and objects (cited on p. 17 in DEWHA, 2009).

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.<sup>115</sup> 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 desecration. 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. In the history of the legislation, more than 380 valid applications have been made for declarations but only 22 have been issued (DEWHA, 2009; Mackay, 2017). Since 2011, 61 applications have been made but no declarations have been made (Mackay, 2017). The last known time a declaration was made under the Act was in 2002.

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<sup>111</sup> EPBC Act, s 341ZC.

<sup>112</sup> EPBC Act, ss 324ZA and 341ZE.

<sup>113</sup> EPBC Act, ss 316-322, 324S-324Y, and 341S-341X.

<sup>114</sup> ATSHIP Act, s 3.

<sup>115</sup> ATSHIP Act, ss 9, 10 and 12.



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.

Reform of the ATSIHP Act has been on the agenda since the late 1990s, early 2000s. A formal discussion paper on federal Indigenous heritage law reform was published by the Australian Government in 2009 (DEWHA, 2009). More recently, the *Northern Australia White Paper* notes the Government's intention to consult with 'key Indigenous groups on options to improve protections and cut red tape around Indigenous cultural heritage through amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth)' (p. 12 in Australian Government, 2015). The focus of the most recent proposed ATSIHP Act reforms is on the creation of a system of accreditation of state and territory laws that meet certain standards, similar to the approval bilateral agreement process under the EPBC Act (see Socio-economic Report). Whether the Australian Government remains committed to these changes is currently unclear.

### PMCH Act

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'.<sup>116</sup> Relevantly for the Catchments, 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'.<sup>117</sup> 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* (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.

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<sup>116</sup> PMCH Act, s 7.

<sup>117</sup> PMCH Act, s 7.

## 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 Western Australia, Northern Territory and Queensland. Subsections 5.2.2, 5.2.3 and 5.2.4 provide specifics of the regimes in each jurisdiction, and details of how they could apply to water-related development in the Catchments. The analysis in Subsections 5.2.2, 5.2.3 and 5.2.4 is arranged thematically around five fields: planning; environment protection; heritage; native vegetation clearing; and major project facilitation and coordination. The three case studies in Appendix A.1 provide insights on how the approval requirements apply to specific projects.

#### Planning

State and territory governments generally use land-use planning regulations as the primary mechanism for controlling the use and development of land within their jurisdictions. In Western Australia, Northern Territory and Queensland, the main planning statutes are the *Planning and Development Act 2005* (WA), *Planning Act* (NT) and *Planning Act 2016* (Qld). Not unlike the water regimes discussed in Section 4, these planning statutes have two main components: processes for the preparation of policies and plans, which set the policy and regulatory framework governing the use and development of land; and development approval processes, which govern the issuance of approvals for specific projects.

Under the planning statutes, there is a hierarchy of planning instruments that cascade down from state, to regional, then local. These instruments contain relevant planning objectives and strategies, as well as detailed and often spatially-based planning regulations that specify the range of land uses and development allowed or prohibited in certain areas. Local planning schemes are usually the principal planning instrument that regulate land use and development. They contain regulations that control the use and development of land, and high level objectives, strategies and principles to guide the exercise of approval powers and performance of strategic planning functions. The regulations are usually based on spatially-explicit zoning, which specifies the permissible uses of the land and restrictions on development. In Queensland, overlays are also used to control development. Through zones and overlays, local planning schemes generally divide development (where development is defined as including changes in uses) into three categories: prohibited development (the type of development cannot be carried out on the subject land); assessable development (the type of development can only be carried out with planning



approval);<sup>118</sup> and accepted or permitted development (the type of development can be carried out without approval).<sup>119</sup>

Where a development is assessable, an application must be made to the relevant consent authority. Depending on the nature and location of the development, the consent authority for these purposes can be the local government, a government agency or the planning minister. State agencies and ministers also often play a role in decision-making as a referral authority, either providing advice or direction to the consent authority on the determination of the development application.<sup>120</sup>

## Environment protection

The environment protection regimes in Western Australia, Northern Territory and Queensland have a number of similar features. In particular, they all contain two main elements: an EIAA regime for assessing and regulating projects that could have material impacts on the environment;<sup>121</sup> and a regulatory regime that controls activities that could cause pollution or other significant environmental harm.

### EIAA regimes

In Western Australia and the Northern Territory, the EIAA processes work through the *Environmental Protection Act 1986* (WA) and *Environmental Assessment Act* (NT). In these two jurisdictions, the EIAA regimes follow the standard EIAA format, containing referral, screening, assessment and approval phases. Proposals likely to have a significant effect on the environment are required to be referred to the relevant Environmental Protection Authority (EPA) for assessment. Having received a referral, the EPA must decide whether to assess the proposal (the screening decision) and, if so, what level of assessment applies and the scope of the assessment. The assessment document is generally prepared by the proponent in accordance with guidelines set by the EPA, after which it is published for public comment. After the public comment period has ended, the assessment documentation is finalised and the EPA prepares an assessment report.

In Western Australia, after the EPA assessment is complete, and it has made its recommendation on whether the proposal should be allowed to proceed, the responsibility for approving the project passes to the environment minister. The environment minister is required to consult with the other ministers or government agencies that have decision-making responsibilities in relation to the proposal to determine whether the proposal should be allowed to proceed, and if so, on what conditions. In the Northern Territory, the EPA's assessment report is provided to the environment minister but their role is advisory. The environment minister is required to pass the EPA's assessment report to the 'responsible minister' for decision, with additional comments if they consider they are necessary. In this context, the responsible minister is another minister with statutory decision-making responsibilities in relation to the project (e.g. the planning minister).

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<sup>118</sup> In the Northern Territory, assessable development is called 'discretionary development'.

<sup>119</sup> In order to be accepted or permitted development, the activity may have to comply with a specified self-assessable code. In the Northern Territory, four categories of land use regulations are used to capture the distinction between accepted development and self-assessable development: prohibited, discretionary (requiring approval), self-assessable (allowed without approval if carried out in accordance with a specified code) and permitted (allowed without approval).

<sup>120</sup> In the Northern Territory, local government has only a minimal advisory role in land use planning.

<sup>121</sup> The EIAA regimes in Western Australia, Northern Territory and Queensland are linked to the federal EPBC Act through assessment bilateral agreements. Assessment bilateral agreements allow state/territory assessments to substitute for federal assessments under the EPBC Act's EIAA regime.

In Queensland, the EIAA requirements are contained in three main statutes: *Planning Act 2016*; *State Development and Public Works Organisation Act 1971* (Qld); and the *Environmental Protection Act 1994* (Qld). Most environmental assessments conducted in relation to water-related developments are likely to be carried out under the *Planning Act* or *State Development and Public Works Organisation Act*. These is also the prospect of environmental assessments being triggered by an ‘environmentally relevant activity’ that could cause significant environmental harm within the terms of the *Environmental Protection Act* (see below).

### **Activities causing significant environmental harm**

The environmental protection statutes in all three jurisdictions require environmental approvals to be obtained for activities that could cause serious or material environmental harm. However, the scope of these differs. In Western Australia, environmental harm is defined broadly, and includes the removal of, or damage to, native vegetation or the habitat of native vegetation or indigenous aquatic or terrestrial animals, alteration of the environment to its detriment or degradation or potential detriment or degradation, and alteration of the environment to the detriment or potential detriment of an environmental value.

In the Northern Territory, the equivalent statutory provisions are found in the *Waste Management and Pollution Control Act*. However, the scope of the environmental harm obligations is narrower, being confined largely to activities ‘likely to cause pollution resulting in environmental harm’ or that ‘is likely to generate waste’. Proponents of ‘Schedule 2 activities’ are also required to obtain environmental approvals or licenses under the Act. However, the listed Schedule 2 activities mainly relate to waste facilities, the burial of waste and the processing and storage of petrol and other hydrocarbons.

In Queensland, under the *Environmental Protection Act 1994* (Qld), it is an offence to carry out an ‘environmentally relevant activity’, or to 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 that are prescribed under the regulations. The *Environmental Protection Regulation 2008* (Qld) contains a list of prescribed environmentally relevant activities, which includes aquaculture facilities and intensive animal feedlots.

### **Heritage**

The institutions governing the protection of heritage values and places in Western Australia, Northern Territory and Queensland are spread across a number of statutes, including those concerning land-use planning, environment protection and national parks and reserves. However, each jurisdiction has heritage specific statutes. In all three jurisdictions, the heritage protection regimes under these statutes have two components: a general heritage regime; and a regime specifically for places and objects of Indigenous heritage significance.

In Western Australia, the general heritage regime is contained in the *Heritage of Western Australia Act 1990* (WA). The centerpiece of the regime is the State Register of Heritage Places. Protection of places on the Register from the impacts of development activities is provided through the *Planning and Development Act*. Western Australia’s Indigenous heritage protection regime is governed by the *Aboriginal Heritage Act 1972* (WA). Prior to carrying out any development,

proponents are legally obliged to take reasonable measures to assess whether the subject land is, or contains, sites or objects of Indigenous heritage significance.

There are two specific heritage statutes in the Northern Territory: *Heritage Act* (NT); and *Northern Territory Aboriginal Sacred Sites Act* (NT). The *Heritage Act* protects three classes of places and objects: places and objects declared to be heritage places and objects under Part 2.2 of the Act; places and objects declared to be protected classes of places and objects of heritage significance under Part 2.3; and Aboriginal and Macassan archaeological places and objects. Parts 2.2 and 2.3 of the Act contain the Territory's 'general heritage regime'. The Territory's Indigenous heritage protection regime is contained in the *Heritage Act* and *Northern Territory Aboriginal Sacred Sites Act*. The *Heritage Act* protects Aboriginal *archaeological* places and objects, while the *Northern Territory Aboriginal Sacred Sites Act* protects sites that are sacred to Indigenous people or of significance according to Indigenous tradition. Generally, in order to carry out development on a heritage place covered by the *Heritage Act*, including Aboriginal archaeological places, it is necessary to obtain a work approval, or enter into a heritage agreement, under the Act. Under the *Northern Territory Aboriginal Sacred Sites Act*, in order to enter onto, carrying out of work on or use a sacred site, it is necessary to have a certificate under the Act from the Aboriginal Areas Protection Authority or responsible minister.

In Queensland, there are three main heritage statutes: one governing non-Indigenous cultural heritage, the *Queensland Heritage Act 1992* (Qld) (the general heritage regime); and two governing Indigenous cultural heritage, the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld). The *Queensland Heritage Act* establishes the Queensland Heritage Register to record places of state cultural heritage significance, with the exception of places of Indigenous heritage significance.<sup>122</sup> The Act also requires local governments to identify and record places of local heritage significance, either through local heritage registers or their local planning schemes. Protection of places of state or local heritage significance is afforded through the *Planning Act*. The two Indigenous heritage statutes establish a regime for the protection and conservation of Aboriginal and Torres Strait Islander cultural heritage across Queensland. Amongst other things, they impose a general 'cultural heritage duty of care' not to harm Aboriginal or Torres Strait Islander 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'.<sup>123</sup>

## 5.2.2 WESTERN AUSTRALIA

### Planning

#### Governance

The principal land use planning statute in Western Australia is the *Planning and Development Act 2005* (WA). It is complemented by a number of other pieces of legislation and subordinate legislation, including the *Environmental Protection Act 1986* (WA), *Town Planning Regulations*

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<sup>122</sup> *Queensland Heritage Act*, s 3.

<sup>123</sup> *Aboriginal Cultural Heritage Act 2003* (Qld), s 23.

*1967 (WA), Planning and Development Regulations 2009 (WA) and Planning and Development (Local Planning Schemes) Regulations 2015 (WA).*

Responsibilities for strategic and statutory functions under the *Planning and Development Act* are divided between the state planning minister, Western Australia Planning Commission (WAPC), local government and Development Assessment Panels. The Minister oversees the planning system and, amongst other things, is responsible for giving final approval to state planning policies and regional and local planning schemes.

The WAPC is responsible for the preparation, review and amendment of the state planning strategy, state planning policies, development control policies, regional planning schemes, determines all subdivision (and some strata subdivision) applications in the state, has development control powers under regional schemes (which are usually delegated to local government), and has advisory functions concerning the preparation and amendment of local planning schemes.

Local governments develop local planning schemes, prepare and use planning policies and structure plans, and have responsibility for determining development applications under their local planning schemes and regional schemes (where WAPC has delegated approval powers). There are two relevant local governments in the Fitzroy: the Shire of Derby-West Kimberley; and the Shire of Halls Creek.

Development Assessment Panels are independent bodies that have the responsibility of determining particular types of development applications. In the Shire of Derby-West Kimberley and the Shire of Halls Creek, all developments with an estimated value of greater than \$10m must be determined by the Kimberley/Pilbara/Gascoyne (Northern) Joint Development Assessment Panel. Proponents of developments valued at between \$2m and \$10 m can elect to have their application determined by the Joint Development Assessment Panel. Development Assessment Panels were introduced in 2011 as a way of ensuring greater independence and expertise in the determination of development applications.

Several other agencies play important functions in the planning system, including the Environmental Protection Authority (EPA) and state environment minister. The EPA reviews proposals to prepare regional and local planning schemes and determines whether they require an environmental assessment. Where an assessment is required, it is prepared and released for public comment concurrently with the proposed scheme. At the completion of the public comment period, the assessment and submissions are sent to the EPA, after which the Environment Minister may require the scheme to be amended to incorporate environmental conditions. The EPA can also perform referral authority functions in development application processes, similar to a number of other agencies.

Another agency of importance in Western Australia's planning system is the State Administrative Tribunal. Applicants for development approvals who are dissatisfied with the decision of the consent authority (local government or Development Assessment Panel) can appeal the decision to the Tribunal.<sup>124</sup> Generally, appeals to the Tribunal are on the merits, meaning the Tribunal

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<sup>124</sup> *State Administrative Tribunal Act 2004 (WA); Planning and Development Act 2005 (WA), Part 14.*

‘stands in the shoes’ of the original decision maker and remakes the decision having regard to the factual materials before it.

## Planning instruments

The *Planning and Development Act* provides for the development of state, regional and local planning instruments, with several strategic and statutory planning instruments prepared at each level. The principal planning instruments relevant to the conduct of water-related development in the Fitzroy catchment are summarised in Table 5-2.

**Table 5-2 Principal planning instruments for water-related development in the Fitzroy catchment, Western Australia**

LEVEL	INSTRUMENT	COMMENT
State	State Planning Strategy	Provides a strategic framework, principles, goals and directions for planning and development in the state.
State	State Planning Policies (SPP)	Provide high level requirements intended to guide and control the performance of strategic and statutory planning functions, including deciding development applications. The most relevant SPPs are SPP 2 (Environment and Natural Resources Policy), SPP 2.5 (Rural Planning) and 2.9 (Water Resources).
State	Development control (DC) and operation policies	Provide general principles that guide decision-making by the WAPC in relation to specific issues. The most relevant of these are DC 1.1 (Subdivision of land) and DC 3.4 (Subdivision of rural land), which apply to the subdivision of Crown land for the purpose of development and sale.
Regional	Kimberley Regional Planning and Infrastructure Framework	Provides strategic direction for future development in the Kimberley region to 2040. It sets out high level regional objectives and initiatives to facilitate sustainable development. The framework is guided by six principles derived from the State Planning Strategy and it is intended to inform local planning strategies and schemes.
Local	Shire of Derby-West Kimberley Local Planning Strategy	Sets objectives and direction for planning and development in the Shire and provides the strategic basis for the applicable local planning schemes (see below). It also provides guidance for decision-making in relation to subdivision, development and zoning matters.
Local	Shire of Derby-West Kimberley Local Planning Schemes	There are two applicable of local planning schemes in operation in the Shire of Derby-West Kimberley: Shire of Derby-West Kimberley Town Planning Schemes No 5 and No 7. No 5 controls the use and development of land within the town of Derby. No 7 controls the use and development of land within the Birdwood Rise subdivision. At the time of writing, a whole of district Local Planning Scheme (Shire of Derby-West Kimberley Local Planning Scheme No.8) was being prepared that will replace both existing planning schemes and Interim Development Order No 8.
Local	Shire of Derby-West Kimberley, Interim Development Order No 8	Controls the use and development of land in the parts of the Shire of Derby-West Kimberley not covered by Town Planning Schemes Nos. 5 and 7. The Order requires all development other than ‘permitted development’ to be approved by the local government. Permitted development includes buildings and land uses associated with the pastoral industry.
Local	Shire of Halls Creek Local Planning Strategy	Sets objectives and direction for planning and development in the Shire and provides the strategic basis for the applicable local planning schemes (see below). It also provides guidance for decision-making in relation to subdivision, development and zoning matters.
Local	Shire of Halls Creek Town Planning Scheme No 1	Controls the use and development of land within the town of Halls Creek and its surrounds.

LEVEL	INSTRUMENT	COMMENT
Local	Shire of Halls Creek, Interim Development Order No 8	Controls the use and development of land in the parts of the Shire of Halls Creek not covered by Town Planning Scheme No 1. The Order requires all development other than 'permitted development' to be approved by the local government. Permitted development includes 'construction, extension or alteration of any land use or development for Pastoral Station or rural purposes, with the exception of land uses and development associated with diversification permits' (s 6(d)).

In addition to the requirements under these planning instruments, the *Planning and Development (Local Planning Schemes) Regulations 2015* contain regulatory provisions that are deemed to apply to all local planning schemes in the state. These deemed provisions include section 60, which provides that a 'person must not commence or carry out any works on, or use, land in the Scheme area unless ... the person has obtained the development approval of the local government' or the development is exempt under section 61 of the Regulations. The types of development covered by the exemptions in section 61 are relatively limited, although it does include works and uses specified in relevant local planning policies and local development plans as not requiring approval. These deemed provisions can result in projects requiring development approval where they otherwise appear not too according to the terms of the local planning instruments.

### Development approvals

Whether water-related developments will require planning approval will depend on the nature of the development, its location and the proponent. At present, in the Fitzroy, there is a reasonable likelihood water-related developments will require planning approval because of the breadth of the regulations that apply under the applicable Interim Development Orders (Table 5-2). However, whether this will be the case will depend on the circumstances. Moreover, as their title suggests, Interim Development Orders are intended to be temporary. Ultimately, local planning schemes are intended to replace the orders. When they do so, the zoning arrangements are likely to change, altering the approval requirements.

Where development approval is required, the assessment will be conducted by the relevant Shire Council. However, the approval decision could be made by either the Shire Council or Joint Development Assessment Panel, depending on its estimated value and the preferences of the proponent. Where the development, and or any related development, is carried out by a public authority, alternative procedures apply. If the development involves the subdivision of land, it will require approval by WAPC under the *Planning and Development Act*. The requirements for WAPC approval will apply to instances where Crown land is subdivided and sold for the purposes of water-related development.

Generally, once approval is granted for a development, the privileges inherent in the approval will usually be protected by existing use rights, unless the approval is lawfully revoked. This means the land will continue to be able to be used and developed for the approved purpose even if the planning laws are subsequently changed. Under the *Planning and Development Act*, compensation is payable for 'injurious affection' arising from the making or amendment of certain planning instruments, including local and regional planning schemes. This protection applies where: (i) the planning scheme reserves the land for a public purpose; (ii) the scheme permits development on that land for no purpose other than a public purpose, or (iii) the scheme prohibits the continuance of any non-conforming use of that land or the erection, alteration or extension on the land of any building in connection with or in furtherance of, any non-conforming use of the land.

In addition to the approvals required under the *Planning and Development Act*, proponents of the water-related developments in the Fitzroy catchment should be mindful of the restrictions applying to pastoral leases under the *Land Administration Act 1997 (WA)*. As noted in Section 3, unless authorised by the Pastoral Lands Board, pastoral lease land can only be used for ‘pastoral purposes’ (the commercial grazing of authorised stock and ancillary activities), no native vegetation can be cleared on the land, and no non-indigenous pasture can be sown or cultivated on the land.

## Environment protection

### EIAA regime

The primary environmental protection statute in Western Australia is the *Environmental Protection Act 1986 (WA)*. Amongst other things, this statute establishes the EPA, provides for the preparation of environmental protection policies by the EPA and their approval by the state environment minister, and establishes a project-based and strategic EIAA regime for development proposals, planning schemes, and other policies, plans and programs.

The body of the *Environmental Protection Act’s* EIAA regime follows the standard EIAA format, containing screening, assessment and approval phases. The screening phase starts with the referral of proposals. Under Part IV of the *Environmental Protection Act*, proposals likely to have a significant effect on the environment are required to be referred to the EPA for assessment. Typically, this is done by ministers or government agencies that have decision-making responsibilities in relation to the proposal, or the proponent of the proposal. In the case of water-related development proposals in the Fitzroy, the referral could be made by the Crown lands or water ministers, Pastoral Lands Board, WAPC or one of the Shire Councils. Where development proposals that pose a threat to the environment are not referred, the EPA can call them in.

Having received a referral, the EPA must decide whether to assess the proposal. This decision is made on the basis of the information in the referral, information provided in response to requests for information from the EPA, information derived through the EPA’s own investigations (including information received from the public on the referral), and the EPA’s assessment of the significance of the proposal. A decision by the EPA that a proposal will not be assessed is appealable to the Office of the Appeals Convenor under the *Environmental Protection Act* unless the decision includes a recommendation the proposal be dealt with as a native vegetation clearing proposal under Part V of the Act (see below). If the EPA decides to assess a proposal, the decision is not appealable.

If the EPA decides to assess a proposal, it must decide what level of assessment applies. The levels of assessment are not prescribed in the legislation or accompanying regulations. Under the *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2016*, the level of assessment is defined as ‘the proposal-specific requirements that the EPA determines are necessary to assess the proposal’. Generally, in making the level of assessment decision, the EPA decides whether it has enough information to assess the proposal from the referral information or whether additional information is required. If additional information is required, the proponent may be required to prepare an environmental review document (which may or may not be required to be published for public comment). At times, the EPA also uses an assessment

approach involving technical report and an independent peer review of the report (with and without public review).

The assessment process has five stages, three of which are optional: scoping of proponents environmental review (optional); preparing by proponent of additional assessment information (optional); public review of additional information (optional); preparation of the EPA's draft assessment report; and completion of the EPA's assessment (finalisation of EPA assessment report, agreement on recommendation on whether proposal should proceed and submission of the report to the environment minister). Through the information provided, the proponent is required to demonstrate evidence of the application of the mitigation hierarchy (avoid impacts, minimise impacts, rehabilitate impacts and offset residual impacts). The development of offsets is guided by the *WA Environmental Offsets Policy* and *WA Environmental Offsets Guidelines*.

After the EPA has completed its assessment, and made its recommendation on whether the proposal should be allowed to proceed, the responsibility for approving the project passes to the environment minister. The environment minister is required to consult with the other ministers or government agencies that have decision-making responsibilities in relation to the proposal to determine with the proposal should be allowed to proceed, and if so, on what conditions. If the other decision-maker is a minister and no agreement can be reached, the decision must be referred to the Governor for decision (and the decision is not appealable). If the other decision-maker is a state agency, and agreement cannot be reached, the decision must be referred to the Office of the Appeals Convenor and treated as an appeal from a decision of the minister.

If the environment minister determines a proposal may be implemented, a ministerial approval statement is issued under section 45(5) of the *Environmental Protection Act*. The statement sets out the conditions and procedures that must be followed in implementing the project. Failure to adhere to the terms of the statement is an offence. Compliance and enforcement actions can also be initiated against proponents for failing to comply with the terms of a statement.

Appeals to the Office of the Appeals Convenor are on the merits and are determined by appeals committees. However, the appeals committees do not determine the outcome. Appeals committees report to the minister, who, after considering their report, makes the final decision.

In addition to the project-based EIA process, the *Environmental Protection Act* contains a strategic assessment process comprised of two elements: the assessment of planning schemes and assessment of 'strategic proposals'. Strategic proposals are proposals that identify future developments that individually or cumulatively are likely to have a significant impact on the environment. The assessment process of strategic proposals is similar to the project-based EIA process, as is the approval phase. As with referred developments, the minister can impose conditions and procedures on activities falling within the scope of the strategic proposal. Further, future developments falling within the scope of the strategic proposal can be referred to the EPA as 'derived' proposals, and be subject to the terms of the approval statement. However, the EPA may not approve a derived proposal if it believes it fails to meet specific requirements or new environmental issues are identified that were not addressed in the strategic assessment.<sup>125</sup>

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<sup>125</sup> Further details of the EIA regime are available in the *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2016*, *Environmental Impact Assessment (Part IV Divisions 1 and 2) Procedures Manual* (2016), and the EPA's *Statement of Environmental Principles, Factors and Objectives* (2016). Subject-specific guidelines relating to the EPA assessments are also available on a number of issues, including hydrological processes, water quality, flora, fauna, and landforms.



## Regulation of activities causing significant environmental harm

The other important element of the *Environmental Protection Act* for those interested in water-related development is Part V, which contains environmental regulations relating to activities that cause material and serious environmental harm, or that involve the clearing of native vegetation. It is an offence under Part V of the Act to cause material or serious environmental harm, or allow or cause pollution. Environmental harm is defined broadly for these purposes, and includes the removal of, or damage to, native vegetation or the habitat of native vegetation or indigenous aquatic or terrestrial animals, alteration of the environment to its detriment or degradation or potential detriment or degradation, and alteration of the environment to the detriment or potential detriment of an environmental value. To lawfully carry out an activity that causes material or serious environmental harm, or pollution, it is necessary for the responsible person to have an approval under the Act's EIAA, or a works approval or license under Part V, Division 3.

## Heritage

In Western Australia, the two main heritage statutes are the *Heritage of Western Australia Act 1990 (WA)* and *Aboriginal Heritage Act 1972 (WA)*. The *Heritage of Western Australia Act* governs the recording, conservation and protection of places of state cultural heritage significance. The centerpiece of the regime is the State Register of Heritage Places. The Register records places of state, as opposed to regional or local, cultural significance, including buildings, structures, landscapes and archaeological sites. It is maintained by the Heritage Council of Western Australia and Department of Planning, Lands and Heritage, with listings controlled by the state heritage minister.

Where a development application is made under the *Planning and Development Act* in relation to a place on the State Register, the decision-making authority must refer the application to the Heritage Council for advice. The decision-making authority is not required to adhere to the advice of the Council. However, under section 11 of the *Heritage of Western Australia Act*, the minister with responsibility for the decision-making authority (e.g. the planning minister) must do everything possible to ensure they do not authorise the taking of an action that is likely to adversely affect a registered place unless they are satisfied there is 'no feasible and prudent alternative to the taking of that action and that all measures which can reasonably be taken to minimize any adverse effect will be taken'. In practice, the presence of this power means decision-making authorities adhere to the advice of the Council unless they think there is no feasible and prudent alternative to the taking of the action.

In 2011, a review of the *Heritage of Western Australia Act* was initiated by the Western Australian Government. This review led to the tabling of a Bill (*Heritage Bill 2016*) to overhaul the state's cultural heritage regime in 2016. The Bill lapsed when the parliament was dissolved prior to the 2017 state election. The current Western Australian Government has not given a clear indication of its intentions in relation to the heritage reform process.

The *Aboriginal Heritage Act 1972 (WA)*, and the accompanying *Aboriginal Heritage Regulations 1974 (WA)*, contain a regulatory regime for the protection and conservation of sites and objects of Indigenous heritage significance. The regime is administered by the state heritage minister, Department of Planning, Lands and Heritage, Registrar of Aboriginal Sites and the Aboriginal Cultural Material Committee.

Under the Aboriginal heritage protection regime, it is an offence to damage, conceal or alter any Aboriginal site or Aboriginal cultural material. In addition, a person who discovers, or otherwise has knowledge of the existence of Aboriginal site or Aboriginal cultural material (e.g. Aboriginal burial grounds, symbols or sacred objects) must report its existence to the Registrar or the police, unless they reasonably believe the existence of the thing or place is already known to the Registrar.

Aboriginal sites are defined broadly for these purposes and include places containing historic objects, sacred, ritual or ceremonial sites of importance and special significance to Indigenous people. To facilitate both protection and compliance, the Registrar must maintain a register of the areas and objects to which the Act applies, including areas declared protected areas on the basis of their Indigenous heritage significance under section 19 of the Act (WADPLH, 2017). However, the regulatory restrictions are not confined in their application to places on the register.

Prior to carrying out a water-related development, proponents are legally obliged to take reasonable measures to assess whether the subject land is, or contains, sites or objects of Indigenous heritage significance. Ignorance of the presence of the Indigenous heritage sites and objects will not shield a proponent from liability under the regime unless they have taken reasonable measures to assess the site. Consistent with this, section 62 of the Act provides a due diligence defense against prosecution for offences under the Act. For this defense to be available, the person charged must prove they 'did not know and could not reasonably be expected to have known, that the place or object to which the charge relates was a place or object to which this Act applies'.<sup>126</sup> Due Diligence Guidelines have been issued by the Government to help landholders and proponents comply with their obligations under the regime (WADAA & WADPC, 2013).

Where it is not feasible to avoid an identified Aboriginal site, proponents can seek authorisation or consent to undertake development activities on the site from either the Registrar of Aboriginal Sites or the heritage minister. Applications from landowners for ministerial consents are made to the Aboriginal Cultural Material Committee, who determines whether there is an Aboriginal site on the land and makes a recommendation to the minister on whether consent should be granted. Upon receiving the recommendation, the minister is required to decide whether to grant consent and on what conditions. Landowners aggrieved by the minister's decision can appeal on the merits to the State Administrative Tribunal.

### Native vegetation clearing

Agriculture-related native vegetation clearing in Western Australia is primarily regulated under Part V, Division 2 of the *Environmental Protection Act*. Under section 51C, it is an offence to clear native vegetation without a clearing permit under the *Environmental Protection Act* or other 'prescribed approval',<sup>127</sup> unless it is low impact clearing authorised under the *Environment Protection (Clearing of Native Vegetation) Regulations 2004 (WA)*. Broadly, the low impact clearing exemptions allow landholders to clear up to 5 hectares per year for specified purposes (e.g. to facilitate the construction of a building, to reduce fire hazards, for fencing, vehicle and walking tracks and to clear regrowth for agricultural purposes) or under a code of practice, providing the clearing is not in an environmentally sensitive area. The native vegetation clearing provisions of

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<sup>126</sup> *Aboriginal Heritage Act 1972 (WA)*, s 62.

<sup>127</sup> Prescribed approvals are listed in Schedule 6 of the EP Act and include an approval, works approval or licence under the EP Act.

the *Environmental Protection Act* are administered by the Department of Environment Regulation. In addition to the restrictions that apply under the *Environmental Protection Act*, native vegetation clearing on pastoral land is generally prohibited, unless it is done under a permit issued under the *Land Administration Act 1997* (WA).

### Major projects

In Western Australia, there is no standalone legislation for major projects, at least not those involving water-related developments. Like the Major Projects Facilitation Programme at the federal government level, the Western Australian Government has a policy known as the 'Lead Agency Framework' that is intended to help project proponents navigate state government approval requirements. The framework applies to all resource, infrastructure, transport, large-scale land and housing proposals and developments.<sup>128</sup>

Under the framework, proposals are assigned to one of five government departments (lead agencies) on the basis of the nature of the development. For example, transport developments are the responsibility of the transport department and urban developments are handled by the planning department. For water-related developments, depending on the specifics of the proposal, the lead agency could be the Department of Jobs, Tourism, Science and Innovation, Department of Planning, Lands and Heritage, Department of Primary Industries and Regional Development or the Department of Transport. When these lead agencies receive proposals within their portfolios, they are required to categorise them as Level 1, 2 or 3 using specified criteria. Under the policy, Level 1 projects are 'small to moderate in scale and capable of being accommodated through existing environmental, social and economic assessment processes'. Level 2 projects are 'non-standard moderate to large-scale or complex proposals ... [that] have a significant capital investment and employ a large number of people for an extensive period of time'. Level 3 projects are 'very large or complex proposals, those that have significant investment or have potential to create significant employment'. Additional criteria have been developed by individual lead agencies to help categorise projects. The amount of assistance projects receive from the lead agency is a function of the level they are classified under. Level 1 projects receive the least assistance (basic advice and guidance), Level 2 projects receive a moderate amount of assistance (a designated case manager to assist with project scoping, approval planning and agency coordination) and Level 3 projects receive comprehensive case management (assigned senior project officer and project team to manage the government approval process). Some Level 3 projects of 'critical strategic importance' to Western Australia or Australia are referred to the Western Australian Cabinet for consideration for 'state significant status'. Projects deemed by Cabinet to be of 'state significance' are given the greatest amount of assistance.

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<sup>128</sup> For further details of the policy, see *Lead Agency Framework: A Guidance Note for Implementation* (WADPC, 2009).

## 5.2.3 NORTHERN TERRITORY

### Planning

#### Governance

The *Planning Act* (NT), in conjunction with the *Planning Regulations* and *Northern Territory Planning Scheme* (Territory Planning Scheme), 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 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 planning minister 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 Territory Plan. It also has development assessment functions, in that it is responsible for preparing significant development reports on 'significant development proposals' (developments requiring a development permit under the Territory Planning Scheme or other applicable planning scheme that may be significant to future land use and development in the Territory). Local governments, where they exist, only have advisory functions under the Territory planning regime: they may comment on development applications referred to them under the Act.

#### Planning instruments

The Territory Planning Scheme applies across the Darwin catchments. Under the scheme, 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 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* 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, Litchfield, Palmerston and Tennant Creek. Four of these areas lie within the Darwin catchments (Batchelor, Darwin, Litchfield and Palmerston) but the areas are predominantly urban and peri-urban. Hence, for most water-related developments in the Darwin catchments, the consent authority will be the planning minister.

Where a development is a 'significant development proposal', the planning minister may ask the Territory Planning Commission to prepare a significant development report.<sup>129</sup> 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 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 planning scheme. The Territory Planning Scheme 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.<sup>130</sup> Unlike the case in Western Australia and Queensland, 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 (see Section 2 for more details on acquisition of property).

As noted in Section 3, 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.

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<sup>129</sup> 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.

<sup>130</sup> *Planning Act*, s 142.

## Environment protection

### EIAA regime

There are two relevant environmental protection statutes in the Northern Territory: the *Environmental Assessment Act* (NT); and the *Waste Management and Pollution Control Act* (NT). The *Environmental Assessment Act* governs the EIAA process in the Territory. Under the Act, and the *Environmental Assessment Administrative Procedures* (a legislative instrument made under the Act), matters capable of having a significant effect on the environment are required to be referred to the Northern Territory Environment Protection Authority (EPA). The referral of proposals is generally done by the 'responsible minister'; a minister exercising an approval power under other Territory legislation (e.g. the *Water Act* or *Planning Act*). The EPA can also call in a proposal where it is not referred.

Upon receiving a referral, the EPA must decide whether a public environmental report or environmental impact statement is required, and notify 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 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* contains the 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'. The duty requires proponents to take all reasonable 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. The regime also requires proponents to notify the EPA where an incidence causes, or threatens to cause, pollution resulting in material or serious environmental harm. Unlike the general environmental duty, the failure to notify is an offence.

The other noteworthy aspect of the regulatory regime under the *Waste Management and Pollution Control Act* is the requirement for proponents of Schedule 2 activities to obtain environmental approvals or licences under the Act. The listed Schedule 2 activities mainly relate to waste facilities, the burial of waste and the processing and storage of petrol and other hydrocarbons. These approvals/licences are issued by the EPA on application from the proponent.

## Heritage

There are two main heritage statutes in the Northern Territory: *Heritage Act* (NT); and *Northern Territory Aboriginal Sacred Sites Act* (NT). 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 Lands, Planning and the Environment 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 (NT), at which point it has effect as it was a covenant on the land enforceable by the 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 Lands, Planning and the Environment. Failure to notify is an offence under the Act.

The Northern Territory Aboriginal Sacred Sites Act protects sites that are sacred to Indigenous people or of significance according to Indigenous 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 Indigenous person who, by Indigenous 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. The benefit of being issued an Authority Certificate is it 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* and *Pastoral Land Act*. Which statute applies depends on the tenure of the land. If the land is freehold, 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**

There is no standalone statutory process in the Northern Territory governing the coordination of major projects. However, there is a policy, the 'Major Project Status Policy Framework', under which developments can be awarded major project status. In determining whether to award major project status to a development, the Territory government has regard to six main criteria:



project significance (e.g. capital expenditure, employment); strategic impact (e.g. flow on benefits to other industries); complexity (government approval requirements and environmental, economic and social impacts beyond the project footprint); project feasibility; proponent's capacity to deliver the project; and ancillary (covering the need for government support and local industry participation, local workforce development and social impacts on the community). If major project status is awarded, the proponent receives assistance with the identification of relevant government approval processes, whole of government coordination and facilitation of the project and project related government approvals, and a dedicated government project case manager who works as a single point of contact on the project.

## 5.2.4 QUEENSLAND

### Planning

#### Governance

The primary land-use planning statute is the *Planning Act 2016* (Qld), which replaced the *Sustainable Planning Act 2009* (Qld) on 3 July 2017. The *Planning Act* controls the use and development of land across Queensland. Like the planning systems in Australia's other states and territories, it does this 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), *Regional Planning Interests Act 2014* (Qld), *Water Act 2000* (Qld), *Environmental Protection Act 1994* (Qld), *Queensland Heritage Act 1992* (Qld), *Environmental Offsets Act 2014* (Qld), *Vegetation Management Act 1999* (Qld) 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 planning department (currently the Department of Infrastructure, Local Government 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,<sup>131</sup> 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 planning department 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*.

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

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<sup>131</sup> Ministerial approval of local planning instruments is not necessarily required. *Planning Act*, s 18.

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.

To reduce the transaction costs associated with applications involving state departments and agencies, the Queensland Government established the State Assessment and Referral Agency (SARA) in 2013. SARA is part of the planning department and it 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.<sup>132</sup>

### Planning instruments

The *Planning Act* provides for the development of planning instruments at the state, regional and local level. In the language of the Act, 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.

The principal planning instruments relevant to the conduct of water-related development in the Mitchell catchment are summarised in Table 5-3.

**Table 5-3 Principal planning instruments for water-related development in the Mitchell catchment, Queensland**

LEVEL	INSTRUMENT	COMMENT
State	State Planning Policy	Provides a strategic framework, principles, goals and directions for planning and development in the state.
Regional*	Cape York Regional Plan 2014	Provides a strategic regional framework to facilitate sustainable economic development on the Cape by: <ul style="list-style-type: none"> <li>(i) specifying seven regional policies to guide planning and development activities; and</li> <li>(ii) mapping strategic environmental areas (areas containing significant environmental attributes), national parks (areas dedicated as national parks under the <i>Nature Conservation Act 1992</i> (Qld)), priority agriculture areas (areas available for highly productive agricultural land uses) and priority living areas (urban areas and surrounding areas necessary for future growth or buffers). The area covered by the plan includes northern sections of the Mitchell catchment in the Kowanyama Aboriginal and Cook Shires. The policies in the plan must be taken into account by local governments in making local planning schemes and deciding development applications, and by decision-makers evaluating proposals under the <i>State Development and Public Works Organisation Act</i>. The plan can also trigger approval requirements under the <i>Regional Planning Interests Act</i>. Relevantly, broadacre cropping and the storage of water using a dam (other than for domestic and stock purposes) in strategic environmental areas require regional interests development approvals under that Act.</li> </ul>

<sup>132</sup> For further information on SARA, see: <http://www.dilgp.qld.gov.au/planning/development-assessment/state-assessment-and-referral-agency.html>.

LEVEL	INSTRUMENT	COMMENT
<b>Regional*</b>	Far North Queensland Regional Plan 2009	Provides a vision, strategic directions, desired regional land use pattern and regional policies for development and planning in the Far North Queensland region, which, for these purposes, includes the Mareeba Shire in the Mitchell catchment. The Statutory Planning Regulatory Provisions (FNQ Regulatory Provisions), which were made in conjunction with the plan and contained land use regulations for the region, were repealed in 2012. The plan can guide the Mareeba Shire in its strategic and statutory planning functions.
<b>Regional</b>	Gulf Regional Development Plan (2000)	A non-statutory, government-community regional planning policy intended to guide sustainable development of the Gulf region over the period 2000-2020. Contains aims and strategies to achieve the vision articulated in the policy. The area covered by the plan includes parts of the Mitchell catchment in the Carpentaria Shire.
<b>Local</b>	Kowanyama Aboriginal Shire Planning Scheme 2015	Controls the use and development of land within the Kowanyama Aboriginal Shire. There is a mix of zones within the shire.
<b>Local</b>	Shire of Carpentaria Planning Scheme 2006	Controls the use and development of land within the Carpentaria Shire. Most of the relevant parts of the Shire are zoned Rural. There are also Good Quality Agricultural Land and Acid Sulfate Soils overlays that apply in the northern areas of the Shire.
<b>Local</b>	Cook Shire Planning Scheme 2017	Controls the use and development of land within the Cook Shire. Most of the relevant parts of the Shire in the northern Mitchell catchment are zoned Rural or Environmental Management and Conservation. A range of overlays also apply to the area, including Biodiversity, Rural Land Use, Wetlands and Watercourses, and Bushfire Hazard.
<b>Local</b>	Mareeba Shire Planning Scheme 2016	Controls the use and development of land within the Mareeba Shire. Most of the relevant parts of the Shire are zoned Rural or Conservation. Overlays also apply across the area, including Agricultural Land, Bushfire Hazard and Environmental Significance-Waterways.

\* Under the *Planning Act*, regional plans are state planning instruments.

## Development approvals

There are three main statutes relevant to the development approval process in Queensland: *Planning Act*; *State Development and Public Works Organisation Act*; and *Regional Planning Interests Act*.

The *Planning Act* is the primary statute and it 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 in the Mitchell catchment, particularly larger developments involving water storages, the assessment manager will be the chief executive of the planning department. 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.

As is the case in Western Australia and the Northern Territory, existing use rights protect the privileges inherent in the approval once it is granted. Compensation is also 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.<sup>133</sup>

Appeals against decisions concerning development applications can be made to Development Tribunals on the merits, 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.<sup>134</sup>

The *State Development and Public Works Organisation Act* operates alongside the *Planning Act* and *Environmental Protection Act*, and provides for the coordinated planning, assessment and

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<sup>133</sup> *Planning Act*, s 30.

<sup>134</sup> 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).

approval of projects of economic, social and/or environmental significance to the state.<sup>135</sup> The person responsible for the administration of the Act is the Coordinator-General in the Department of State Development. Under section 26 of the Act, the Coordinator-General can declare a project to be a 'coordinated project'. This can be done on the Coordinator-General's own initiative or at the request of the applicant. Before making such a declaration, the Coordinator-General must be satisfied 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.<sup>136</sup>

When deciding whether to make a coordinated project declaration, the Coordinator-General must have 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, which is submitted to the Coordinator-General. Depending on the nature of the assessment, the draft assessment document may be required to be published for public comment, after which the Coordinator-General must decide to accept the draft or request amendment. At the completion of the assessment, the Coordinator-General prepares 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.<sup>137</sup>

The fact a project has been declared a coordinated project and undergone assessment under the *State Development and Public Works Organisation Act* does not relieve it of the need to obtain other state and local government approvals, including under the *Planning Act* and *Environmental Protection Act*. However, it will typically reduce the procedural requirements that apply under these other Acts. Moreover, the Coordinator-General's report can direct the assessment manager under the *Planning Act* not to approve the application, and can require any approval to be subject to specified conditions.<sup>138</sup> Similarly, the report can also specify conditions for inclusion in an environmental authority issued under the *Environmental Protection Act*,<sup>139</sup> and contain recommendations for consideration by a decision-maker required to grant an approval under any other Act.<sup>140</sup> These conditions can include the imposition of environmental offsets in accordance

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<sup>135</sup> There are two other aspects of the *State Development and Public Works Organisation Act* that could be relevant to water-related development in the Mitchell catchment: 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.

<sup>136</sup> *State Development and Public Works Organisation Act*, s 27.

<sup>137</sup> *State Development and Public Works Organisation Act*, s 34D and 34L.

<sup>138</sup> *State Development and Public Works Organisation Act*, s 39.

<sup>139</sup> *State Development and Public Works Organisation Act*, s 47C.

<sup>140</sup> *State Development and Public Works Organisation Act*, ss 52 and 54.

with the *Environmental Offsets*. In addition, under Part 4, Division 8, the Coordinator-General can impose conditions on projects where they cannot be applied through approvals granted under other legislation.

The *Regional Planning Interests Act* contains an 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. To constitute a regulated activity, the activity must be likely to have a widespread and irreversible impact on the 'area of regional interest' and be prescribed in the regulations. A strategic environmental area is one of four types of 'areas of regional interest', the others being priority agricultural areas, priority living areas and strategic cropping areas. Relevantly, under the *Regional Planning Interests Regulation 2014* (Qld), activities prescribed as regulated activities include broadacre cropping and the storage of water using a dam (other than for domestic and stock purposes) in 'strategic environmental areas'. As indicated in Table 5-3 above, the Cape York Regional Plan 2014 maps strategic environmental areas, meaning water-related developments in these areas involving broadacre cropping and water storage activities are likely to require a regional interests development approval under the Act. Applications for these approvals are made to the chief executive of the state planning department. The applications may be assessed by another agency, including the relevant local government, but the approval decision is made by the chief executive.

## Environment protection

### EIAA regime

As noted in Section 5.2.1, in Queensland, most environmental assessments conducted in relation to water-related developments in the Mitchell catchment are likely to be carried out under the *Planning Act 2016* or *State Development and Public Works Organisation Act 1971* (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*. Environmentally relevant activities are discussed below.

### Regulation of activities causing significant environmental harm

Queensland's main environmental protection statute is the *Environmental Protection Act*. The centrepiece of the statute is a regulatory regime concerning 'environmentally relevant activities'. Section 426 of the Act makes it an offence to 'carry out an environmentally relevant activity unless the person holds, or is acting under, an environmental authority for the activity'. Environmentally relevant activities are defined for these purposes as activities that could contaminate and harm the environment that are prescribed under the regulations. Schedule 2 of the *Environmental Protection Regulation 2008* (Qld) contains a list of prescribed environmentally relevant activities, which includes aquaculture facilities, intensive animal feedlots, poultry farming, piggeries, food processing and beverage production, and waste and water treatment services. These prescribed activities require an environmental authorisation under the Act.

The assessment and approval process for environmental authorisations has four stages: application, information, notification and decision. The application stage provisions set down rules for who can apply for an environmental authorisation, the administering authority that the

application must be made to, and the form the application must take. For most water-related developments in the Mitchell catchment for which an environmental authority is required, the administering authority is likely to be the chief executive of the Department of Environmental and Heritage Protection, or the chief executive of the Department of Agriculture and Fisheries. There are three types of applications that can be made that determine the processes by which the activity is assessed: standard applications, variation applications and site-specific applications. Standard applications can be made in relation to low-risk activities that meet specific criteria and conditions.<sup>141</sup> Variation applications can be made when the activity satisfies the eligibility criteria for a standard application but the applicant wants to change one or more of the standard conditions. Site-specific applications must be made when the activity does not satisfy the eligibility criteria or conditions (i.e. it cannot be made as a standard or variation application). Importantly, where an application must be made as a variation or site-specific application, the application must include an assessment of the likely impact of each relevant activity on the environmental values.

The information stage involves requests for further information by the administering authority, if it believes more information is required. Where the activity is considered high-risk, this can involve a request for an Environmental Impact Statement (EIS). If so, the request triggers the EIS processes contained in Chapter 3 of the Act. Generally, EISs are only required for significant mining and resource activities.

The notification stage involves public notification of the application and the provision of an opportunity to the public to make public submissions. Again, this generally only applies to mining and resource activities.

The final stage is the decision stage, where the administering authority must determine the application. There are specified criteria for this decision and, depending on the nature of the application, different powers. If the application is a standard application that meets the eligibility criteria and conditions, the administering authority must approve the activity subject to the standard conditions. If the application is a variation application, it must be approved subject to the standard conditions or varied conditions. If the application is a site-specific application, the administering authority can refuse the application or approve it subject to conditions.

In addition to the environmental authorisation process, the *Environmental Protection 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.<sup>142</sup> Activities carried out in accordance with an environmental authorisation or other approval under the Act are shielded from liability under these provisions.

Applicants who are dissatisfied with the decision of an administering authority can apply for internal review of the decision.<sup>143</sup> The *Environmental Protection Act* also allows for merits review appeals to be made to the Queensland Land Court in certain circumstances, including for the refusal of site-specific applications and the imposition of conditions on variation applications.

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<sup>141</sup> Details of these are available at: <https://www.business.qld.gov.au/running-business/environment/licences-permits/applying/activities-suitable>.

<sup>142</sup> *Environmental Protection Act*, ss 437, 438 and 440.

<sup>143</sup> *Environmental Protection Act*, s 521.

## Heritage

In Queensland, there are three main heritage statutes: one governing non-Indigenous cultural heritage, the *Queensland Heritage Act 1992* (Qld); and two governing Indigenous cultural heritage, the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld).

Queensland's general heritage regime is contained in the *Queensland 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.<sup>144</sup> The Register is maintained by the Department of Environment and Heritage Protection, with decisions about the inclusion and removal of places being the responsibility of the independent Queensland Heritage Council. In addition to the provisions concerning the establishment and maintenance of the Register and Council, the Act also requires local governments to identify and record places of local heritage significance, either through local heritage registers or their local planning schemes.

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. In the Mitchell catchment, only the *Aboriginal Cultural Heritage Act 2003* (Qld) is relevant. Amongst other things, the *Aboriginal Cultural Heritage Act* establishes a 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'.<sup>145</sup> Causing harm to Aboriginal cultural heritage in breach of the duty of care is an offence, carrying penalties of up to 10,000 penalty units (currently \$1.26m). 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.<sup>146</sup>

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<sup>144</sup> *Queensland Heritage Act*, s 3.

<sup>145</sup> *Aboriginal Cultural Heritage Act 2003* (Qld), s 23.

<sup>146</sup> *Aboriginal Cultural Heritage Act 2003* (Qld), ss 8, 9 and 10.



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 (QDATSIP, 2004).<sup>147</sup> 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 Plan (CHMP) made under the Act and ILUAs, 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 Aboriginal communities and seek their agreement on how to manage sites and objects of Indigenous heritage significance (clause 4.7 in QDATSIP, 2004).

### 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*,<sup>148</sup> and the 'protected plants' regime, which applies under the *Nature Conservation Act*.

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 follow 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).<sup>149</sup> 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.<sup>150</sup>

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

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<sup>147</sup> *Aboriginal Cultural Heritage Act 2003* (Qld), s 23(3). At the time of writing, new guidelines were being prepared.

<sup>148</sup> See also the *Vegetation Management Regulation 2012* (Qld), particularly Schedule 10, Part 3.

<sup>149</sup> *Vegetation Management Act*, s 22A(2)(l).

<sup>150</sup> *Vegetation Management Act*, Part 2, Div 6, Subdiv 1A; *Vegetation Management Regulation 2012*, Schedule 10, Part 3; *SDAP State Code 16: Native Vegetation Clearing*.

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.<sup>151</sup> 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.<sup>152</sup> Where the subject land is within a high risk area, the proponent must undertake a flora survey in accordance with the Flora Survey Guidelines.<sup>153</sup> 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.<sup>154</sup> If endangered, vulnerable or near threatened plants are detected, the clearing can only occur under a clearing permit.

## 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. Details of the approval process for coordinated projects and the SARA process are provided in Section 5.2.1. The Queensland Government also maintains a website containing information to help proponents of projects to meet their statutory environmental approval requirements.<sup>155</sup>

## 5.3 Length of government assessment processes

Proponents of water-related developments should be aware that government assessment and approval processes can be resource-intensive and time consuming. To illustrate this, an analysis was undertaken of the length of environmental assessment and approval processes under the Western Australian *Environmental Protection Act 1986*, Northern Territory *Environmental Assessment Act*, Queensland *State Development and Public Works Organisation Act 1971* (SDPWO Act) and federal EPBC Act. The Western Australian *Environmental Protection Act* analysis was confined to projects in the regional areas north of Perth over the period 2009 to March 2018.<sup>156</sup> The Northern Territory analysis covered all completed assessments under the *Environmental Assessment Act* between June 2006 and March 2018. The Queensland analysis covered all projects assessed under the SDPWO Act between January 2004 and March 2018. The EPBC Act analysis covered all projects located in Western Australia, Northern Territory and Queensland that were approved under the Act over the period January 2010 to March 2018.

Figure 5-1 shows the median length of each stage of the environmental assessment process (excluding approvals) for the sampled projects under the Western Australian *Environmental Protection Act*, Northern Territory *Environmental Assessment Act* and Queensland SDPWO Act.

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<sup>151</sup> *Nature Conservation Act*, s 89; *Nature Conservation (Wildlife Management) Regulation 2006* (Qld), s 261Z.

<sup>152</sup> *Nature Conservation (Wildlife Management) Regulation 2006* (Qld), s 254.

<sup>153</sup> *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>.

<sup>154</sup> *Nature Conservation (Wildlife Management) Regulation 2006*, s 259.

<sup>155</sup> <https://www.business.qld.gov.au/running-business/environment>.

<sup>156</sup> The covered regions in Western Australia were South West, Mid West, Wheatbelt, Goldfields Esperence, Gascoyne, Pilbara and Kimberley.

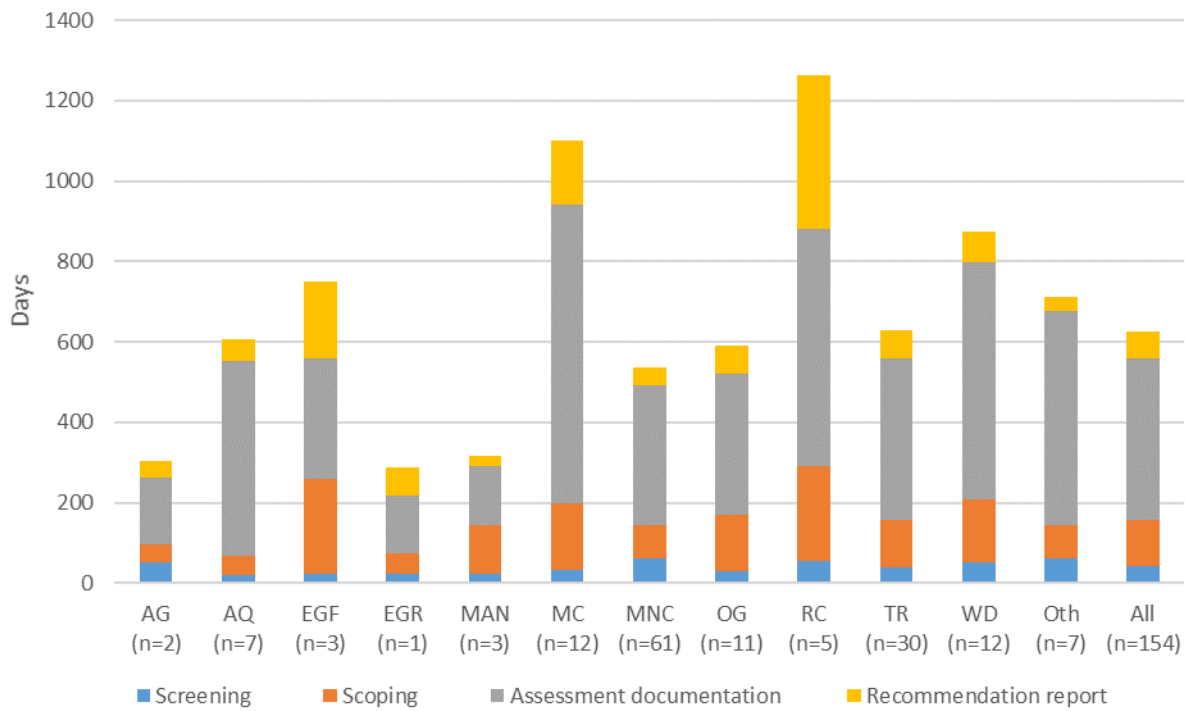
The results are presented by industry and for the entire sample of 154 projects: 53 from Western Australia; 36 from the Northern Territory; and 65 from Queensland. Appendix A.3 presents the results by jurisdiction.<sup>157</sup> There are four main stages in the assessment process (not all of which are mandatory for all projects):

- screening, where the responsible government agency (WA EPA, NT EPA or Queensland Coordinator-General) determines whether the project requires formal assessment;
- scoping, where the responsible government agency determines the scope of, or the terms of reference for, the environmental assessment;
- assessment documentation, where the proponent prepares the assessment documentation; and
- recommendation report, where the responsible government agency prepares its advice on whether the project should be allowed to proceed and on what conditions.

The aggregate of the median lengths of each stage was 625 days, with the longest part of the process being the preparation of the assessment documentation (404 days). The median total assessment time was 740 days, with an average of 893 days. While these results are noteworthy, the length of the process varied considerably between projects and project types. For example, 18 per cent of assessments took under 365 days, while 32 per cent took longer than 1000 days (Figure 5-1). The variability in assessment times reflects the flexibility of the relevant statutory processes and the nature of the factors that influence their length, including the size and complexity of the proposals, the nature, magnitude and likelihood of relevant economic, social and environmental impacts, resource constraints within relevant government agencies, and the speed with which proponents are able to produce relevant assessment information.

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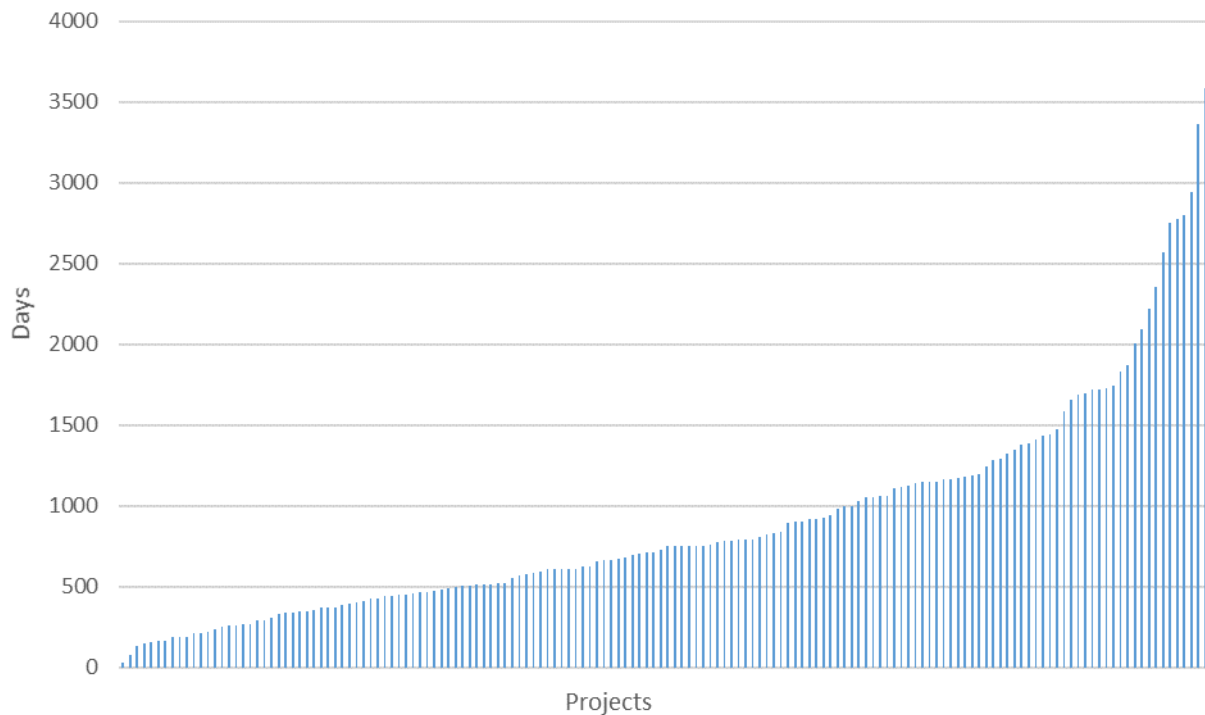
<sup>157</sup> There are material differences in the state and territory environmental assessment and approval processes. For example, in Western Australia, the environmental assessment process is fully integrated with the environmental approval process under the *Environmental Protection Act*. In the Northern Territory (under the *Environmental Assessment Act*) and Queensland (under the SDPWO Act), the assessment and approval processes are structurally separated: the assessments are performed by the NT EPA and Queensland Coordinator-General, while relevant approvals are issued under separate (but linked) statutory processes (see Section 5.2 for further details). The state and territory analysis presented here is confined to the environmental assessment processes; it does not cover the time associated with the issuance of approvals after the completion of assessments. The jurisdictional analysis provided in Appendix A.3 includes details of the time associated with the issuance of approvals in Western Australia under the *Environmental Protection Act*.



**Figure 5-1 Median length of each stage of environmental assessments for sampled projects in Western Australia, Northern Territory and Queensland**

Industry codes: AG = agriculture; AQ = aquaculture; EGF = energy generation (fossil fuels); EGR = energy generation (renewables); MAN = manufacturing; MC = mining (coal); MNC = mining (non-coal); OG = oil and gas; RC = residential and commercial; TR = transport; WD = water resource development; Oth = other. The number of projects in each industry code is provided in parentheses.

Source: Western Australia EPA, Environmental Assessments Public Database, available at: <http://www.epa.wa.gov.au/proposal-search> (12 April 2018); Queensland Department of State Development, Manufacturing, Infrastructure and Planning, Completed Projects Database, available at: <https://www.statedevelopment.qld.gov.au/assessments-and-approvals/completed-eis-projects.html> (12 April 2018); Northern Territory EPA, Completed Assessments Database, available at: <https://ntepa.nt.gov.au/environmental-assessments/projects-completed> (12 April 2018).

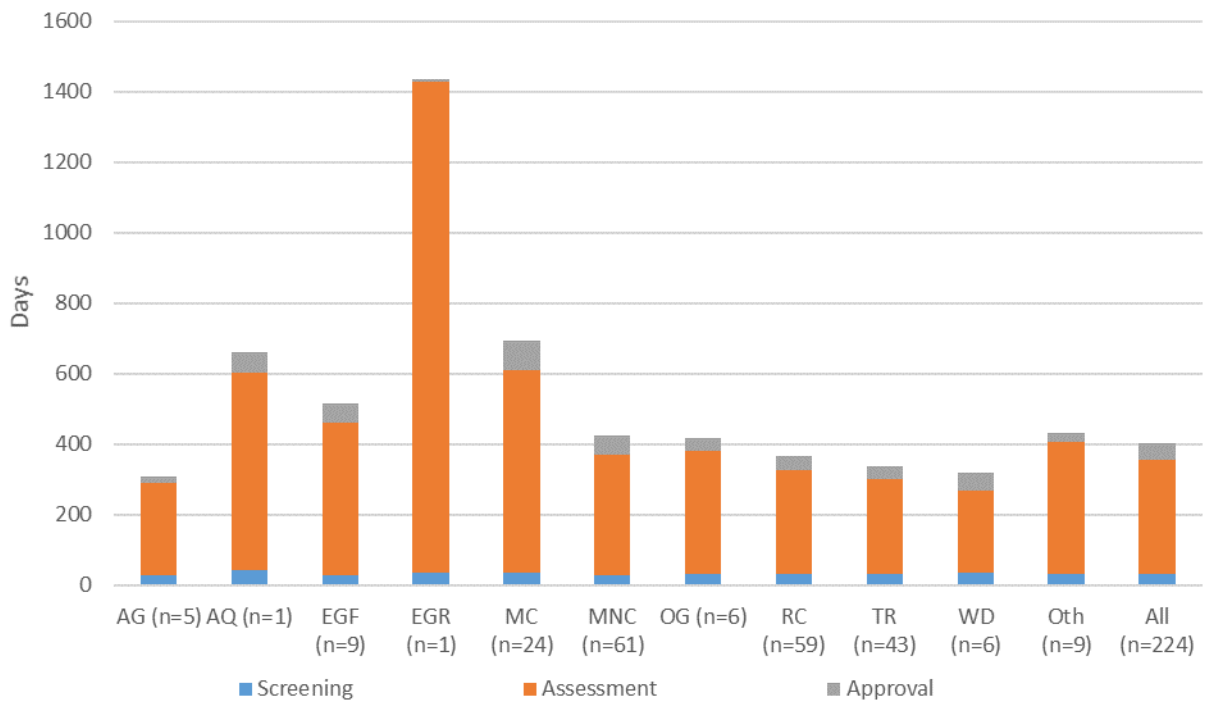


**Figure 5-2 Total length of environmental assessments for sampled projects in Western Australia, Northern Territory and Queensland**

Source: Western Australia EPA, Environmental Assessments Public Database, available at: <http://www.epa.wa.gov.au/proposal-search> (12 April 2018); Queensland Department of State Development, Manufacturing, Infrastructure and Planning, Completed Projects Database, available at: <https://www.statedevelopment.qld.gov.au/assessments-and-approvals/completed-eis-projects.html> (12 April 2018); Northern Territory EPA, Completed Assessments Database, available at: <https://ntepa.nt.gov.au/environmental-assessments/projects-completed> (12 April 2018).

The federal EPBC Act assessment and approval process often runs in parallel with state and territory processes, meaning it does not necessarily add to project delays. Further, under the EPBC Act, assessments are frequently undertaken through relevant state and territory process. For example, where a project in a state requires state government approval under state environmental legislation and federal approval under the EPBC Act, the assessment conducted for the purpose of the state process will often also cover, and be used for, the federal approval process. While the EPBC Act process has been designed to minimise duplication and delays, it can still be time consuming, particularly where state/territory and federal approvals are sought sequentially.

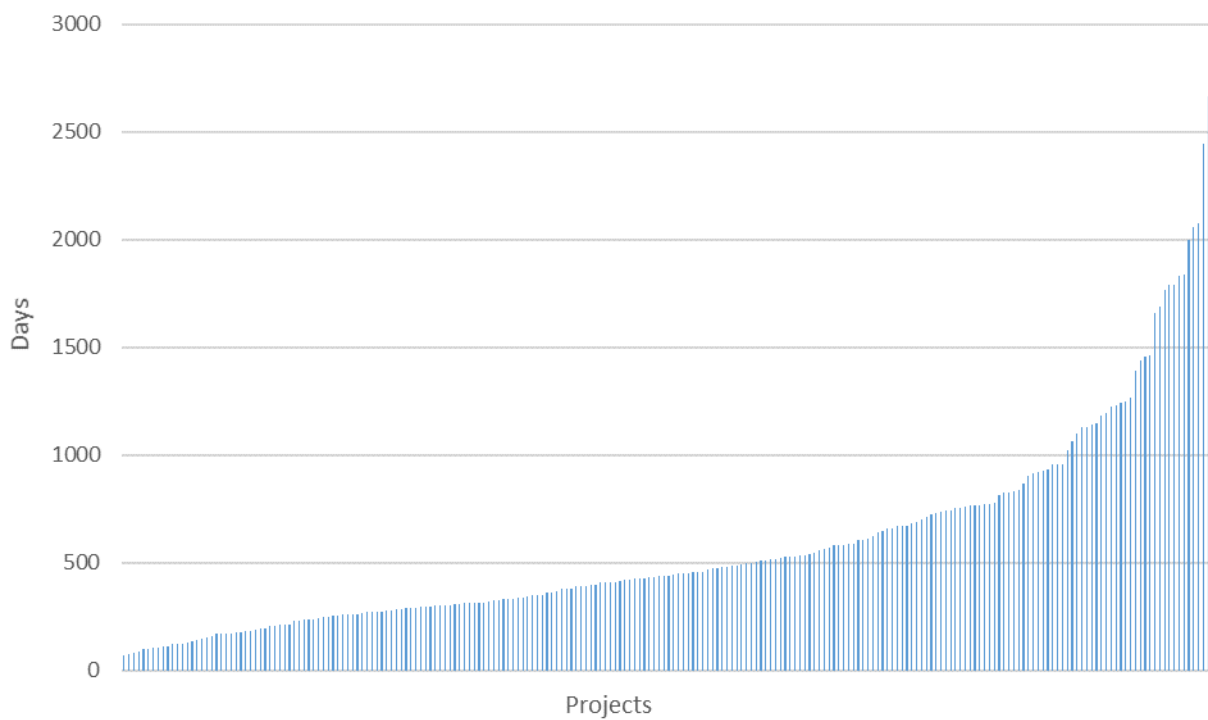
Figure 5-2 shows the median length of the three main stages of the EPBC Act assessment and approval process (screening, assessment and approval) for the 224 projects in Western Australia, Northern Territory and Queensland that were approved over the period January 2010 to March 2018. The approval phase here includes both the time taken by the federal environment department to prepare its recommendation report on the project, and the time it takes for the minister to consider the report and make the final approval decision. Again, the results are presented by industry and for the entire sample.



**Figure 5-3 Median length of each stage of the assessment and approval process under the federal EPBC Act, all projects in Western Australia, Northern Territory and Queensland over the period January 2010 to March 2018**

Source: Department of the Environment and Energy, unpublished data (April 2018).

The aggregate of the median lengths of each stage was 404 days. The assessment phase accounted for 80 per cent of that time, highlighting the importance of proponents ensuring assessment information is provided in a timely manner. Similar to the results from the state and territory analysis, the length of the EPBC Act assessment and approval process was variable, ranging from 71 to 2662 days. Almost 40 per cent of approvals took less than 365 days, while 13 per cent took more than 1000 days (Figure 5-3).



**Figure 5-4 Total length of EPBC Act assessment and approval process, Western Australian, Northern Territory and Queensland projects from January 2010 to March 2018, by length of process**

Source: Department of the Environment and Energy, unpublished data (April 2018).

The jurisdictional analysis provided in Appendix A.3 includes case studies on the assessment of individual projects and the steps taken in some jurisdictions to reduce assessment-related delays. Proponents should seek advice on the approvals required for their projects well in advance of commencement, including on the likely cost and duration of the processes, and the measures that can be taken to reduce assessment and approval times.

## 6 Conclusion

### 6.1 Overview of findings

The institutional requirements relevant to specific water-related developments in the Catchments 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 Catchments, 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 and use the subject land. In most cases, relevant land in the Catchments will be government owned land (Crown land) held under a lease (Crown lease) by a private party. There are several different types of Crown leases held over land in the Catchments, including pastoral, term and perpetual leases, though most of them require the land to be used for pastoral purposes. While Crown leases dominate, there are a range of other tenure types in the Catchments, including standard freehold, Aboriginal freehold, unallocated Crown land, Crown lands 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. 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 Catchments 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 Catchments. The Western Australian, 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.

## 6.2 Further information needs

The object of this report was to analyse the institutions necessary to undertake, and could be affected by, water-related development in the Catchments. In doing so, the aim was to shed light on the institutional risks faced by prospective investors and other affected parties.

Further research is warranted to gain an understanding of the extent to which institutional issues are obstructing water-related development in northern Australia, including projects involving Indigenous communities. The complex nature of the institutional arrangements, and the transaction costs associated with satisfying the necessary institutional requirements, may be a deterrent for prospective proponents and investors. However, at present, there is little empirical information on the extent to which this is the case. To help inform policy responses, research on this issue should evaluate the nature of the main institutional barriers, and the causes of relevant transaction costs. In undertaking this research, particular attention should be placed on the needs and interests of Indigenous communities.

In a similar vein, further research on the costs associated with assessment and approval processes would be beneficial. Concerns about assessment-related costs, particularly those associated with project delays and stoppages, have been raised repeatedly by business groups in recent years. Some governments have responded by making streamlining reforms. For example, since 2010, material changes have been made to the Western Australian EIAA regime in an effort to improve its cost-effectiveness. The Australian Government has also taken steps to improve the cost-effectiveness of the EPBC Act's EIAA regime, including through the increased use of strategic assessments. Globally, there is limited published empirical research on the costs associated with assessment and approval processes. Additional research on this issue, including the causes of delays and stoppages, would help the refinement of regulatory systems. Ideally, this research would look at the impacts of the streamlining reforms made over the past decade in Australia and elsewhere, and whether lessons can be learned that are applicable to the institutional arrangements in northern Australia.

Of specific relevance to water-related development is the cost-effectiveness of strategic assessments. As noted in Section 5, strategic assessments could be used as a way of assessing and managing the cumulative impacts of water-related development in northern Australia. This could help balance economic, social and environmental objectives by steering investments away from highly sensitive environments, streamlining project-level assessment and approval requirements, and providing greater upfront certainty about institutional requirements. The NAWRA could provide an important information input to any such process.

While strategic assessments offer many benefits, little empirical research has been undertaken on the extent to which they realise their potential in practice. At the federal and state levels, multiple strategic assessments have been undertaken over the past decade. Now would be an opportune time for research to be done on how effective these processes were in reducing transaction costs, and striking an appropriate balance in economic, social and environmental objectives.

The effectiveness of state and territory heritage regimes is another recommended area for research. Water-related development in northern Australia has the potential to adversely affect areas of considerable Indigenous and natural heritage significance. The ability to balance development objectives with cultural and natural heritage values hinges, to a large extent, on the effectiveness of state and territory heritage protection regimes. The Australian Government's role in heritage protection, beyond listed World and National Heritage places is relatively limited, increasing the importance of the state and territory processes. Research on the effectiveness of these regimes, and stakeholder perceptions of their effectiveness, could help improve the institutional arrangements concerning water-related development.

# Part II Appendices

# Appendix A Case studies, EPBC Act offset policy principles, analysis of the length of environmental assessments and references

## A.1 Case studies

### Western Australia: Goomig irrigation development

The Goomig irrigation development is located 30-35 km northeast of Kununurra in the East Kimberly region of Western Australia. The project involves the development of 10,300 ha land for irrigated agriculture, between 7,340 ha and 7,760 ha of which will ultimately be farmland. It forms part of what is widely known as the Ord River Irrigation Area Stage 2, or simply Ord Stage 2. Other names for the wider development include the Ord East Kimberley Expansion Project. The Expansion project received financial support from the Australian and Western Australian Governments.

The Expansion project is led and owned by the Western Australian Government. However, to undertake the Goomig project, the state government entered into a development agreement with a preferred proponent following a competitive bidding process; the Kimberley Agriculture Investment Pty Ltd (KAI), a wholly-owned subsidiary of Shanghai Zhongfu (Group) Co Ltd.

**Interests in land.** The project is mostly located on Western Australian Crown land, which was previously grazed under pastoral leases and licences. These pastoral leases and licences were, or will be, acquired or otherwise rescinded by the Western Australian Government prior to commencement of the project (farming on some of the Goomig farm lands commenced in 2015). The removal of the pastoral interests means that, other than native title, the main party KAI needs to deal with in relation to its interests in land is the Western Australian Government.

KAI was initially granted development licences to the Goomig area by the state government, which allowed it to enter on the site to undertake preliminary works and evaluation. Upon satisfaction of specific conditions, the Western Australian Government will grant long-term leases to KAI to complete the development. The leases will give KAI a formal proprietary interest in the land, meaning it has not only the freedom to use the site for various purposes but also the ability to control other peoples' access. While the leases will give KAI a range of privileges associated with the use of land, they will be restricted. Due to this, KAI will not be free to use the land as it pleases. Its ability to use and develop the land will be limited by the terms of the leases, and relevant planning, environment and heritage regulations.

Like the rest of the Expansion project, the Goomig project is located on the traditional lands of the Miriwung and Gajerrong people. In September 2005, an Indigenous Land Use

Agreement (ILUA) (known as the 'Ord Final Agreement') was signed by the Western Australian Government, state government agencies, Miriuwung Gajerrong Traditional Owners and private sector developer interests. Under the ILUA, the Miriuwung and Gajerrong people agreed to surrender their native title rights in exchange for a range of benefits, including estates in land, and options to purchase land, in the Ord irrigation areas. The existence of the ILUA removes the need for KAI to negotiate a separate arrangement with the Miriuwung and Gajerrong people concerning native title. KAI's responsibilities concerning native title are prescribed in the ILUA. As the proponent of the developments, KAI must undertake the project in accordance with the terms of the ILUA in order to protect the cultural heritage and other interests of the traditional owners.

**Interests in water.** The water for irrigation associated with the project will be derived from Lake Argyle, via Lake Kununurra and the M2 Channel. Under the current Ord Surface Water Allocation Plan, which is made under the *Rights in Water and Irrigation Act*, a water allocation limit of 750 gegalitres (GL) per year is set for the main Ord area. Of the 750 GL, 350 GL has been granted to the Stage 1 area, leaving 400 GL for the remaining area, including Goomig. The Ord Irrigation Cooperative will be the water service provider for the Expansion area. To perform this function, it is required to hold a water services licence under the *Water Services Act 2012* (WA), and a water licence under the *Rights in Water and Irrigation Act 1914* (WA) to take water from the M2 Channel.

**Government approvals.** The project was (and continues to be) subject to regulatory restrictions under both state and federal legislation. At the federal level, the project required approval under the federal EPBC Act on account of potential adverse impacts on matters of national environmental significance (nearby wetlands of international significance, listed migratory species and listed threatened species). EPBC Act approval for the project was granted in 2011. The approval is subject to conditions to mitigate and/or offset the impacts of the development on the matters of national environmental significance. This includes restrictions on the clearance of native vegetation, limitations on water use, retention and management of buffer zones around the farmland, and the preparation and implementation of various management plans.

At the state level, the most significant regulatory restrictions are those imposed under the *Environmental Protection Act 1986* (WA) and *Planning and Development Act 2005* (WA). The primary approval under the *Environmental Protection Act* was obtained prior to KAI's involvement in the project. In the early 2000s, a syndicate known as Wesfarmers-Marabeni proposed to develop 30,500 ha in the East Kimberley region for irrigated agriculture. This original Wesfarmers-Marabeni proposal was abandoned but not before it received approval under the *Environmental Protection Act*. When Wesfarmers-Marabeni withdrew, the Western Australian Government took over the proposal, transferring the environmental approval to the state development minister.

In 2012, the Department of State Development, on behalf of the minister, applied for amendments to the approval under the *Environmental Protection Act*. This application was approved and an amended approval was issued in June 2013. Under the revised approval,

multiple management plans are required to be prepared and implemented to address environmental issues. The development agreement requires KAI to satisfy the conditions of the revised approval under the oversight of the responsible minister.

In addition to the *Environmental Protection Act* requirements, the Goomig project is subject to planning restrictions under the *Planning and Development Act*. The Goomig farm area is located in a Rural Agriculture 1 zone, and the buffer areas are located in a Conservation/environmental protection zone, under the Shire of Wyndham East Kimberley Town Planning Scheme No 7. Intensive agriculture is a permitted use within a Rural agriculture 1 zone under the planning scheme. However, at the time of writing, a new local planning scheme was being prepared, which will cover the entire shire. The new scheme is expected to commence in 2018. Works and uses that commence after the new scheme takes effect may require development approval.

A heritage assessment was conducted across the larger M2 area in 2005. Through this assessment, a number of Aboriginal heritage sites were identified. These sites have been protected by their inclusion in buffer areas and conservation parks, the parameters of which are delineated in the ILUA. If unrecorded sites are identified during development, authorisation or consents will be required under the *Aboriginal Heritage Act 1972* (WA).

### **Northern Territory: Project Sea Dragon**

Project Sea Dragon is a proposed large-scale, integrated prawn aquaculture project involving several facilities located across the Northern Territory and Western Australia. This project has been given 'Major Project Facilitation' status through the Australian Government Department of Infrastructure and Regional Development, providing a single entry point into the Australian government for the purpose of seeking regulatory approvals. The project also has 'Major Project Status' under the Northern Territory *Major Project Status Policy Framework*. This has enabled the proponent to receive assistance from the Northern Territory Department of the Chief Minister to navigate Territory approval processes, and to engage with the Australian Government.

The first major element of the project is the Stage 1 Grow-out Facility on Legune Station in the Northern Territory. The Stage 1 Facility consists of three farms and associated infrastructure, with each farm comprising 36-40 production ponds, for a total of 1120 ha of grow-out ponds. The project will impact on a further area of approximately 7,500 ha for associated infrastructure including water storage, recirculation ponds, water access channels, an intake channel, an environmental protection zone, and roads. The site is located on the Legune Coastal Floodplain; an area listed as a site of conservation significance by the Northern Territory Government. Estuarine and freshwater will be required for the operation of the facility, with the construction of channels and pipes required to deliver freshwater from a large existing dam. The project will involve broad-scale vegetation clearing, and may impact on the habitat of threatened and migratory species. There are also a number of Aboriginal sacred sites located on the station.

Details of the main interests in land, interests in water, and government approvals concerning the Stage 1 Legune Grow-out Facility are provided below.

**Interests in land.** The project is located on Legune Station, which is held under a perpetual pastoral lease governed by the *Pastoral Land Act* (NT). The station is currently used for pastoral (grazing) purposes, mainly Brahman cattle for domestic slaughter and live export. To facilitate the project, the proponent, Project Sea Dragon Pty Ltd (a wholly owned subsidiary of Seafarms Group Ltd), acquired an option to purchase the lease from the lessee. It also applied for, and was granted (in November 2017), a non-pastoral use permit from the Pastoral Lands Board under Part 7 of the *Pastoral Land Act* (NT). In the absence of the permit, the land could only be used for pastoral purposes in accordance with the terms of the lease.

Legune Station is subject to non-exclusive Native Title. To address the rights and interests of the traditional owners, an Indigenous Land Use Agreement (ILUA) was reached between the proponents and native title holders. The ILUA covers all future stages of the project, and includes a compensation package. The terms of the ILUA are commercial-in-confidence between the parties.

**Interests in water.** A water licence currently exists to take a maximum of 50,000 ML per year from the private Forsyth Creek Dam located on Legune Station. This allocation is sufficient to meet the needs of Stage 1 of the project from the dam (additional water may be needed during later stages). However, the existing licence under the *Water Act* (NT) may require amendment depending on existing licence conditions. Further, the licence expires in September 2018, and an application will need to be made to renew it. In addition to the water from Forsyth Creek Dam, the project will involve taking estuarine water from the tidal part of Forsyth Creek. The taking of this water requires a licence under Part 5 of the *Water Act* (a surface water extraction licence).

**Government approvals.** The project is subject to both territory and federal assessment and approval requirements. At the federal level, the project was referred under the EPBC Act in mid-2015 and declared to be a controlled action on the basis of its likely impacts on listed threatened species and ecological communities, and listed migratory species. The EPBC Act assessment was done under the terms of the bilateral assessment agreement between the Australian and Northern Territory Governments. This meant the Environmental Impact Statement (EIS) prepared under the Territory *Environmental Assessment Act* (NT) served the purposes of the EPBC Act and the Territory approval processes. The project was approved under the EPBC Act in May 2017. The conditions attached to the approval included a requirement for threatened species habitat protection, and the preparation and implementation of a Water Quality Monitoring and Management Program and a Waterbird Monitoring and Impact Mitigation Program. The waterbird monitoring program must be developed under advice from a Scientific Advisory Group convened specifically for the purpose of advising on matters relating to the environmental impacts of the proposal.

At the Territory level, as noted, the project required an EIS under the *Environmental Assessment Act* because of the potential impact on (amongst other things) threatened and

migratory species, and the potential impact on the Legune coastal floodplain. The EIS assessment report was published in March 2017. In addition to its functions under the EPBC Act, the EIS has been, and will be, used to inform decisions on the grant of other required Territory approvals. These include an aquaculture licence under the *Fisheries Act* (NT), a native vegetation clearing permit under the *Pastoral Land Act* (NT), and an environmental protection approval and environmental protection licence under the *Waste Management and Pollution Control Act* (NT). The *Waste Management and Pollution Control Act* applies because the project involves the storage, treatment and disposal of 'listed wastes';<sup>158</sup> namely, 'animal effluent and residues'.<sup>159</sup>

As noted, Legune Station contains a number of Aboriginal sacred sites. Due to this, Authority Certificates are required for the project from the Aboriginal Areas Protection Authority under the *Northern Territory Aboriginal Sacred Sites Act* (NT). The proponent has committed to preparing a cultural heritage management plan that incorporates the requirements of any Authority Certificates issued in relation to the project.

### Queensland: Nathan Dam and Pipelines Project

The proposed Nathan Dam and Pipelines Project involves the construction and operation of a 888,312 megalitre (ML) dam on the Dawson River in central Queensland, and the construction of associated pipelines for water distribution. The primary purpose of the dam is to meet the long term water demands of coal mines and power generators in the Surat and southern Bowen Basin coal fields. The project is located in two local government areas (Banana Shire and Western Downs Regional Council) and lies within the *Water Plan (Fitzroy Basin) 2011* area. The project proponent is SunWater Ltd, a government owned corporation.

An earlier version of the dam, involving the construction and operation of a similar size dam for primarily agricultural purposes, was proposed in the early 2000s. The proposal was restructured following financial and approval complications, particularly associated with the operation of the federal EPBC Act. The proposal was referred under the EPBC Act in 2002 and declared a controlled action. However, the designated 'controlling provisions' for the project did not include the World Heritage provisions. The federal minister decided the indirect impacts of the dam on the Great Barrier Reef World Heritage Area through the use of dam water for irrigation purposes were not relevant to his decision. The implication of the decision was the EPBC Act would not regulate impacts of the proposal on the World Heritage values of the Reef.

Queensland Conservation Council applied to the Federal Court for judicial review of the decision. The Federal Court held the minister had committed an error of law by excluding the indirect impacts of the construction and operation of the dam from his decision making.<sup>160</sup> His original decision was quashed and he was directed to remake the decision in accordance with the law. In remaking the decision, the minister included the World Heritage

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<sup>158</sup> *Waste Management and Pollution Control Act*, s 30 and Sch 2, Pts 1 and 2.

<sup>159</sup> *Waste Management and Pollution Control (Administration) Regulations*, Sch 2.

<sup>160</sup> *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190.



provisions as controlling provisions for the project. Later, the development was recast as being primarily for mining and energy purposes. Excluding irrigated agriculture from the objects of the dam reduced the potential impacts on the World Heritage values of the Great Barrier Reef.

**Interests in land:** The conduct of the project requires the acquisition of a large number of freehold and leasehold interests and/or easements. The dam inundation area is estimated at 13,824 hectares (at full supply), which will affect approximately 74 parcels of land. There are also almost 150 km of pipelines that will affect 137 parcels of land. The acquisition of these interests in land can be done by negotiation, or the state government could potentially compulsorily acquire them under the *State Development and Public Works Organisation Act* and *Acquisition of Land Act 1967* (Qld). In addition to this, the project area is subject to native title and native title claims. An ILUA concerning the project between SunWater Ltd, traditional owners of the Iman People #2, traditional owners of the Wulli Wulli People, and the Queensland Government was registered 2013.

**Interests in water:** Under the *Water Act*, the proponent requires a resource operations licence in order to lawfully interfere with water to operate water infrastructure and distribute allocated water. The project also requires water entitlement to take water, which could be in the form of a water licence or water allocation, and a riverine protection permit to excavate in a watercourse. The issuance of these authorities, and exercise of the interests under them, is governed by *Water Plan (Fitzroy Basin) 2011*.

**Government approvals:** The dam project triggered two major assessment and approval processes at the federal and state levels: the EPBC Act; and *State Development and Public Works Organisation Act*. The project was declared a 'coordinated project' under the *State Development and Public Works Organisation Act* in early 2008 and the proponent was subsequently required to prepare an Environmental Impact Statement (EIS) under the Act on account of its size and potential impacts. Later in the same year, the project was referred under the EPBC Act and declared a 'controlled action' due to its potential impacts on six matters of national environmental significance: World Heritage values; National Heritage values; Ramsar wetlands; listed threatened species; listed migratory species; and the Commonwealth marine area. The EPBC Act assessment was done under the bilateral assessment agreement between the Australian and Queensland Governments, meaning the EIS prepared for the purposes of the *State Development and Public Works Organisation Act* also covered EPBC Act requirements.

In May 2017, nine years after being declared a coordinated project, the Queensland Coordinator-General accepted the EIS and published an evaluation report on the project, which recommended it should proceed subject to conditions. Consistent with the terms of the federal-state assessment bilateral agreement, the Coordinator-General's evaluation report included 20 recommended conditions for inclusion in the EPBC Act approval.

The federal EPBC Act approval for the project was granted in July 2017, subject to 34 conditions, including several offset requirements, a number of which reflected the recommendations of the Queensland Coordinator-General. The offset requirements include

a mechanism for the provision of water quality offsets in the event of ‘residual significant impacts’ on the Great Barrier Reef. These water quality offsets can be satisfied through the payment of funds to the Australian Government’s Reef Trust; a fund established by the government to support the implementation of the *Reef 2050 Long-Term Sustainability Plan*.

At the state level, the Coordinator-General’s acceptance of the EIS does not constitute an approval in its own right. The report informs and guides the exercise of approval powers under other legislation, including the *Planning Act*. Several development approvals are required for the project under the *Planning Act*, including for the dam, pipelines, reconfiguration of lots, development on heritage sites and clearance of native vegetation. The Coordinator-General’s evaluation report includes ‘stated conditions’ that must be included in development approvals issued under the *Planning Act* for the project. These conditions require environmental offsets to be undertaken to compensate for the impacts of the project on native vegetation communities.

In addition to the conditions required in development approvals, the Coordinator-General’s evaluation report includes ‘imposed conditions’ concerning social impacts, stakeholder engagement, commencement of construction and impacts on native species and breeding habitat. Imposed conditions are those imposed on projects under the *State Development and Public Works Organisation Act* where they cannot be applied through approvals granted under other legislation. The report also contains non-binding recommendations for the proponent and other governmental decisions-makers exercising assessment and approval powers under other relevant legislation, including under the *Fisheries Act 1994* (Qld) (construction and operation of a fishway for the dam), *Nature Conservation Act* (impacts on threatened species and protected plants) and the *Queensland Heritage Act* (management of heritage sites in the project area).

Under the *Queensland Aboriginal Cultural Heritage Act*, SunWater Ltd is subject to a cultural heritage duty of care not to harm Aboriginal cultural heritage. To satisfy this duty of care, and minimise impacts on Aboriginal cultural heritage, the proponent has prepared (or is in the process of preparing) cultural heritage management plans in consultation with relevant traditional owners (Wullli Wullli People, Iman People #2, Western Wakka Wakka People and the Barunggam People). These plans are made under the *Aboriginal Cultural Heritage Act* and protect the proponent from liability.

A notable aspect of the state approval process relates to the application of the *Regional Planning Interests Act 2014*. The project is located within the Central Queensland Regional Plan and Darling Downs Regional Plan areas. The plans specify priority agricultural areas that will be affected by the project. Despite this, a regional interests development approval—which would have specifically considered impacts on the priority agricultural areas—is not required because the project is neither a ‘resource activity’ nor ‘regulated activity’ within the terms of the Act.

## A.2 EPBC Act offset policy principles

PRINCIPLE	COMMENT
<b><i>Improve or maintain</i></b>	Offsets are intended to deliver an overall conservation outcome that improves or maintains the viability of the protected matter (i.e. relative to what would have occurred if neither the action nor the offset had taken place). The policy states that offsets should be tailored specifically to the attribute of the protected matter that is impacted. This is intended to ensure equivalence between the loss associated with the action and the gain associated with the offset. The policy explicitly provides for flexibility in the implementation of this rule, stating that compliance with it is not necessarily if a better conservation outcome can be achieved by an alternative approach. However, the policy states that ‘in no instances will trading offsets across different protected matters be considered as a suitable offset’.
<b><i>Direct and indirect offsets</i></b>	The Policy differentiates between two different types of offsets: direct and indirect. Direct offsets are actions that provide a measurable conservation gain for an impacted protected matter. Indirect offsets are actions that do not directly offset the impacts on the protected matter but are anticipated to lead to benefits for the impacted protected matter (e.g. research or education programs) (strictly, indirect offsets are not offsets; they are a form of compensatory mitigation). The policy requires offsets to be built around direct offsets. A minimum of 90% of the offset requirements for any given impact are meant to be met through direct offsets unless: (i) a greater benefit can be obtained by increasing the proportion of other compensatory measures in the offsets package; or (ii) the level of scientific uncertainty is so high it is not possible to determine a direct offset that is likely to benefit the protected matter.
<b><i>Proportionate to level of statutory protection</i></b>	The policy requires the compensatory mitigation to be in proportion to the level of statutory protection that applies to the protected matter (i.e. the higher the conservation status of the protected matter, the greater the required offset). This is intended to reflect the increased risk associated with higher conservation status protected matters.
<b><i>Proportionate to residual impacts</i></b>	The policy requires the compensatory mitigation to be proportionate to the size and scale of the residual impacts arising from the action, having regard to: (i) the level of statutory protection for the protected matter; (ii) the specific attributes of the protected matter impacted; (iii) the quality or importance of the attributes being impacted; (iv) the permanent or temporary nature of the impacts; (v) the level of threat (risk of loss) that a proposed offset site is under; (vi) the time it will take an offset to yield a conservation gain; and (vii) the risk the conservation gain will not be realised.
<b><i>Risk of failure</i></b>	The policy differentiates between three failure risks: the residual impact risk being too big to offset; the compensatory mitigation package failing to compensate for the residential impacts of the action (i.e. it does not produce the anticipated conservation benefit); and perverse impacts (the compensatory mitigation package has unintended adverse environmental, social or economic impacts). The policy states the first risk is managed through the assessment process, with the latter two risks addresses in the design of the compensatory mitigation package. Specifically, these risks are considered in assessing the residual impact to be compensated, the type of offsets required, the size of the compensatory mitigation package and its location, and measures to manage perverse impacts.
<b><i>Additionality</i></b>	Technically, additionality in an offset program requires that the conservation gain achieved through the offset activity must not have been likely to occur in the absence of the incentive provided by the scheme. Under the policy, the additionality requirement is expressed in the following terms: ‘offsets must deliver a conservation gain for the impacted protected matter, and that conservation gain must be new, or additional to what is already required by a duty of care or to any environmental planning laws at any level of government’ (Australian Government 2012, p. 22). This prevents the inclusion of old activities, activities required by other laws, and activities paid for under other government programs. However, it does not exclude the inclusion of compensatory mitigation activities required under state or territory processes for the same action (i.e. the policy does not require residual impacts to be offset twice).

PRINCIPLE	COMMENT
<i>Efficient, effective, timely, and scientifically robust</i>	This catchall principle has four parts: efficiency (the package should involve an efficient allocation of resources); effectiveness (the package should deliver the projected conservation gain); timely (the gain from the package should arise before or at the same time as the impacts of the action); and scientifically robust (the package should be based on scientifically robust and transparent information that sufficiently analyses and documents the benefit to a protected matter).
<i>Transparent governance arrangements</i>	The policy requires compensatory mitigation to be delivered within appropriate and transparent governance arrangements. This requires setting appropriate performance benchmarks, creation of suitable monitoring frameworks, and annual reporting on the performance of the package, with the reports made publicly available where possible.

## A.3 Length of environmental assessment and approval processes: jurisdictional analysis and case studies

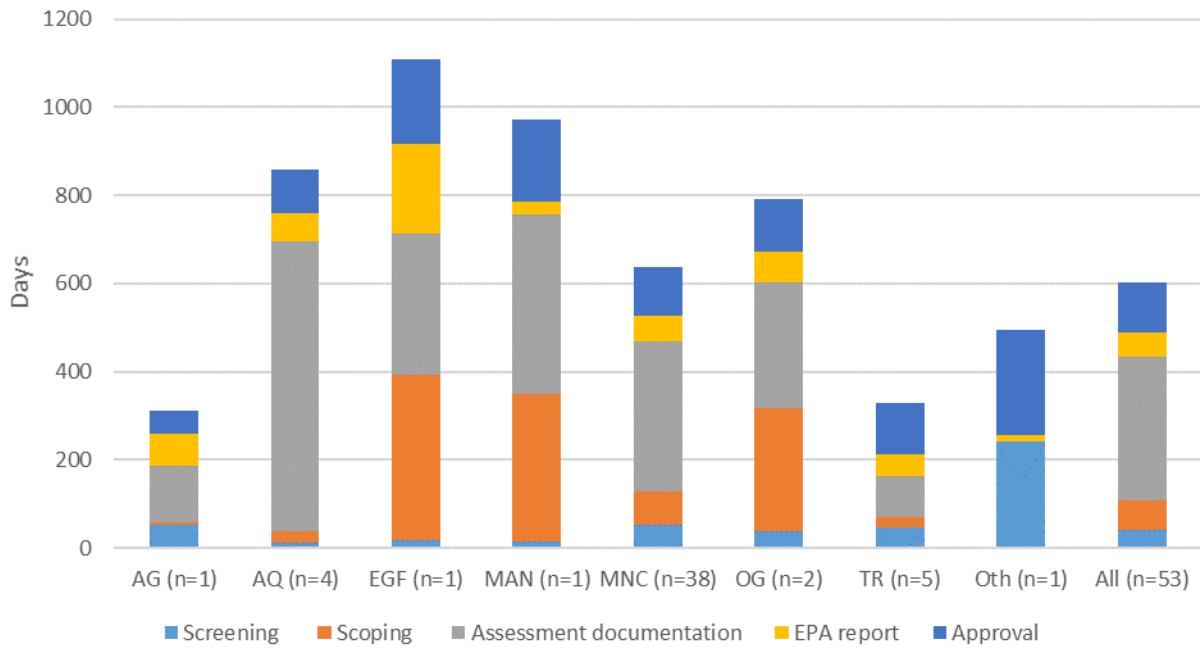
### Western Australia

The analysis of the length of the environmental assessment and approval processes for projects in Western Australia covered:

- projects assessed under the *Environmental Protection Act 1986* (WA) over the period January 2009 to March 2018 that were located in the regional areas north of Perth (South West, Mid West, Wheatbelt, Goldfields Esperance, Gascoyne, Pilbara and Kimberley); and
- projects located in Western Australia that were approved under the EPBC Act over the period January 2010 to March 2018.

Apx Figure A-1 shows the median length of each stage of the environmental assessment and approval process for the sampled projects under the Western Australian *Environmental Protection Act*. The results are presented by industry and for the entire sample of 53 projects. There are five main stages in the *Environmental Protection Act* process (not all of which are mandatory for all projects): screening (where the state Environmental Protection Authority (EPA) determines whether the project requires formal assessment); scoping (where the EPA determines the scope of, or the terms of reference for, the environmental assessment); assessment documentation (where the proponent prepares the assessment documentation); EPA report (where the EPA prepares its advice on the project); and approval (where the state environment minister decides whether to approve the project and on what conditions).

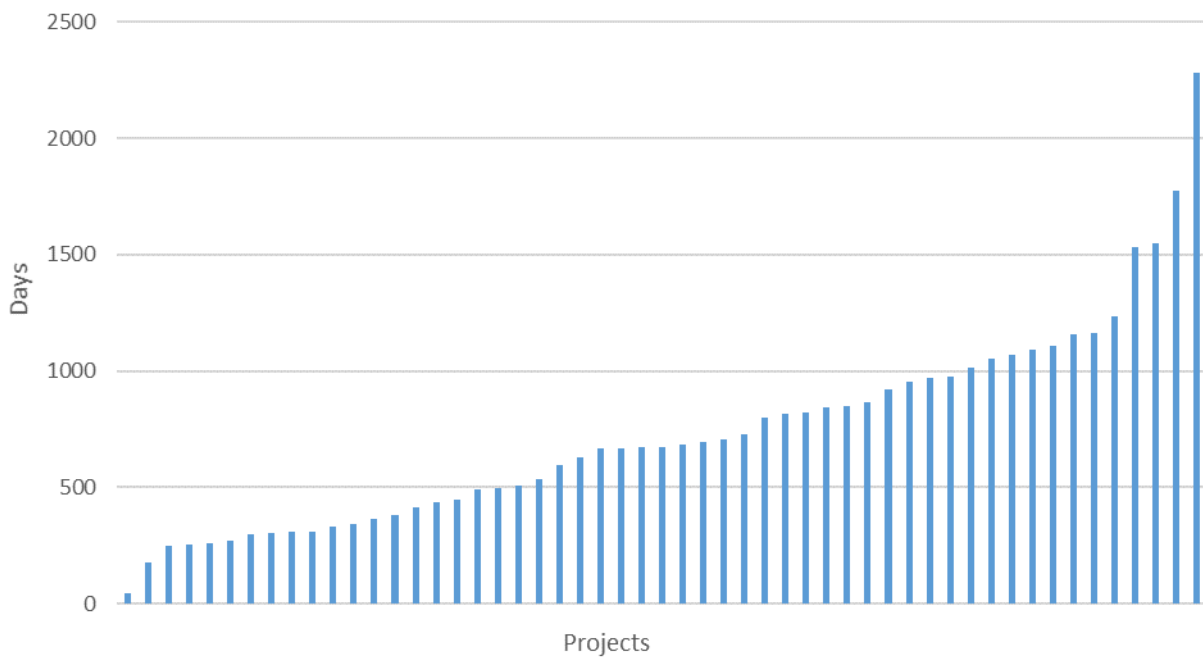
The aggregate of the median lengths of each stage was 603 days, with the longest part of the process being the preparation of the assessment documentation (326 days). The median total assessment and approval time was 672 days, with an average of 732 days. The length of the process varied considerably between projects and project types. For example, 23 per cent of assessment and approvals took under 365 days, while 23 per cent took longer than 1000 days (Apx Figure A-2). The variability in assessment and approval times reflects the flexibility of the process and the nature of the factors that influence its length.



**Apx Figure A-1 Median length of each stage of the assessment and approval process under the Western Australia Environmental Protection Act, January 2009 to March 2018**

Industry codes: AG = agriculture; AQ = aquaculture; EGF = energy generation (fossil fuels); MAN = manufacturing; MNC = mining (non-coal); OG = oil and gas; TR = transport; Oth = other. The number of projects in each industry code is provided in parentheses.

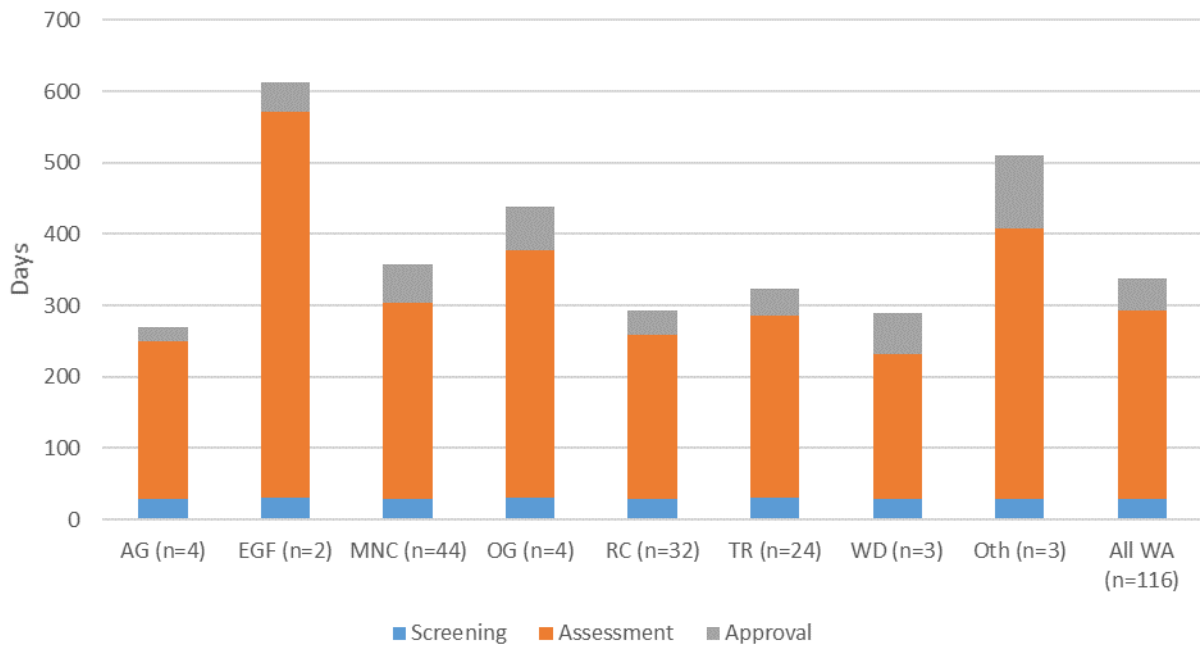
Source: Western Australia EPA, Environmental Assessments Public Database, available at: <http://www.epa.wa.gov.au/proposal-search> (12 April 2018).



**Apx Figure A-2 Total length of the environmental assessment and approval process for sampled projects under the Western Australia Environmental Protection Act, January 2009 to March 2018**

Source: Western Australia EPA, Environmental Assessments Public Database, available at: <http://www.epa.wa.gov.au/proposal-search> (12 April 2018).

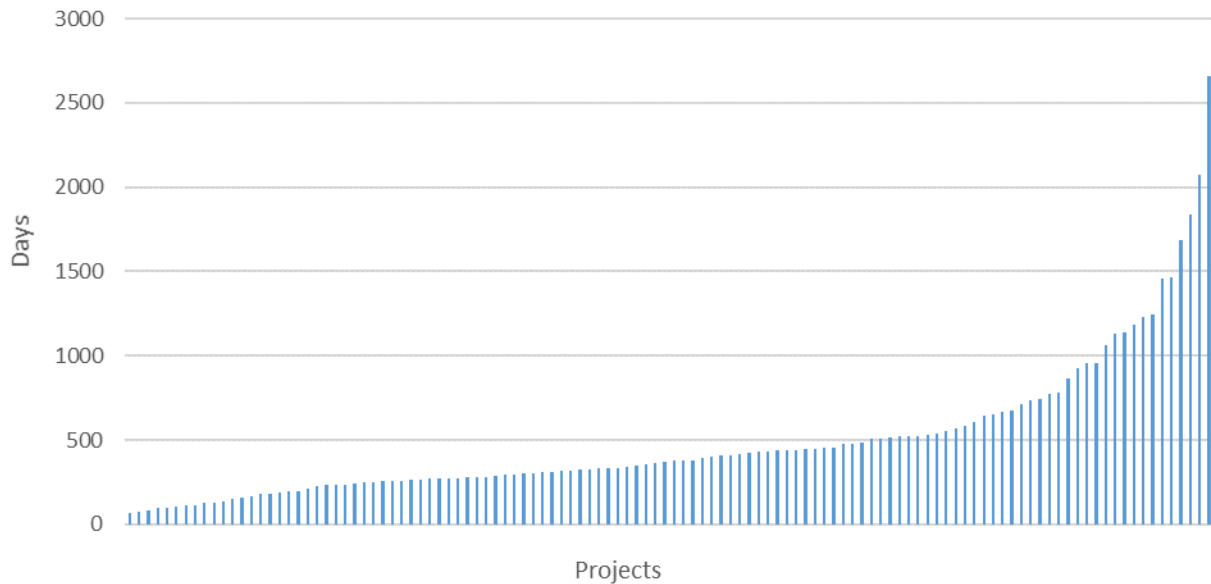
Apx Figure A-3 shows the median length of the three main stages of the EPBC Act assessment and approval process (screening, assessment and approval) for the 116 Western Australian projects approved over the period January 2010 to March 2018. The approval phase here includes both the time taken by the federal environment department to prepare its recommendation report on the project, and the time it takes for the minister to consider the report and make the final approval decision.



**Apx Figure A-3 Median length of each stage of the assessment and approval process under the federal EPBC Act, all projects in Western Australia, January 2010 to March 2018**

Source: Department of the Environment and Energy, unpublished data (April 2018).

The aggregate of the median lengths of each stage was 337 days, with the assessment phase accounting for almost 80 per cent of that time. Similar to the results from the state analysis, the length of the EPBC Act assessment and approval process was variable, ranging from 71 to 2662 days. Almost 50 per cent of approvals took less than 365 days, while 17 per cent took more than 730 days (Apx Figure A-4).



**Apx Figure A-4 Total length of EPBC Act assessment and approval process, Western Australian projects from January 2010 to March 2018, by length of process**

Source: Department of the Environment and Energy, unpublished data (April 2018).

The potential for government assessment and approval processes to cause project delays, and the measures available to reduce regulatory timelines and uncertainty, are illustrated by the four aquaculture projects subject to assessment under the Western Australian *Environmental Protection Act* over the period 2009 to 2018: the Cone Bay Barramundi project; Transitional Cone Bay Aquaculture project; Kimberley Aquaculture Development Zone; and the Mid West Aquaculture Zone.

The Cone Bay Barramundi project involved the expansion of the capacity of a small, 150 tonne per annum barramundi farm in Cone Bay, in the Buccaneer Archipelago, 215 km north east of Broome. The farm was originally established in the early 2000s under an aquaculture licence issued under the *Fish Resources Management Act 1994 (WA)*. In 2006, the licensee, Maxima Pearling Company Pty Ltd, sought to increase the production capacity under the licence to 1,000 tonnes per annum. Because of the farm’s location in an area of environmental and historical significance, which had previously been identified as being suitable for inclusion in a marine park, the proposal was referred to the EPA, who required it to be assessed by way of a public environmental review. The EPA assessment took two and a half years and the final approval under the *Environmental Protection Act* was not issued by the state environment minister for a further 255 days.

The Transitional Cone Bay Aquaculture project involved an additional expansion of the capacity of the barramundi farm in Cone Bay from 1,000 to 2,000 tonnes per annum, which was submitted to the EPA in 2011. As the previous expansion project had been subject to a thorough EPA assessment, in this instance, the EPA only required the project to be assessed by way of



‘proponent information’, a relatively low level of assessment. The EPA also accepted a revised environmental monitoring and management plan as the proponent information document rather than requiring the preparation of a separate assessment document. In sharp contrast to the previous assessment, the EPA assessment of Transitional Cone Bay Aquaculture project was completed in 28 days, and the ministerial approval followed 16 days later.

The difficulties in the siting and assessment of the Cone Bay barramundi farm and other aquaculture developments raised awareness within the Western Australian Government of the potential for delays and regulatory uncertainty to deter investment. In response to this, the Western Australia Department of Fisheries established a program involving the creation of designated aquaculture zones. The zones are ‘investment ready platforms’, where strategic assessments and approvals are put in place, which minimise the need for individual project assessments and approvals. The aim of the zones program is to promote investment in aquaculture by reducing regulatory uncertainty and delays, while simultaneously channelling aquaculture investments to suitable environmental locations. An additional benefit of the program is that, by facilitating the strategic assessment and approval of development zones, it allows for better management of the cumulative environmental impacts of aquaculture developments.

The first aquaculture zone to be created was the Kimberley Aquaculture Development Zone in Cone Bay, which encompasses the previously established barramundi farm. The zone was formally established in August 2014 and covers 2,000 ha. Prior to the zone’s creation, the proposal was subject to a strategic assessment and approval under the *Environmental Protection Act*, which took almost two years. However, after the creation of the zone, three expedited ‘derived proposal’ approvals have been granted to individual projects on the basis they fall within the scope of the strategic assessment and approval. Two of these, granted in 2014 and 2016, concern the expansion of the pre-existing barramundi farm now owned and operated by Marine Produce Australia Limited. The derived approvals have enabled the farm to be increased from 700 to 1,344 ha, for species other than barramundi to be farmed, and for total production to be increased from 2,000 to 15,000 tonnes per annum. The third derived approval was granted to Aarli Mayi Aquaculture Project to allow it to establish a 367 ha, 5,000 tonne per annum multi-species fish farm.

The Mid West Aquaculture Zone was Western Australia’s second aquaculture development zone. It is located in the waters surrounding the Abrolhos Islands, 75 kms west of Geraldton and was established in September 2017. The zone covers 3,000 ha and is split into two parts: a 2,200 ha northern area and 800 ha southern area. The proposal to establish the zone was subject to a strategic assessment and approval process that lasted over four years, running from April 2013 until July 2017. While long, as in the case of the Kimberley Aquaculture Development Zone, now the Mid West Aquaculture Zone has been strategically assessed and approved, future projects in the area are able to be approved through the derived proposal process without detailed individual assessment by the EPA, unless the proposal raises issues that were not adequately covered in the strategic assessment.

The Western Australian *Environmental Protection Act* and federal EPBC Act will not apply to all water-related developments in the Fitzroy catchment. Proponents should seek advice on the government approvals required for their projects well in advance of commencement, including on the likely cost and duration of the processes.

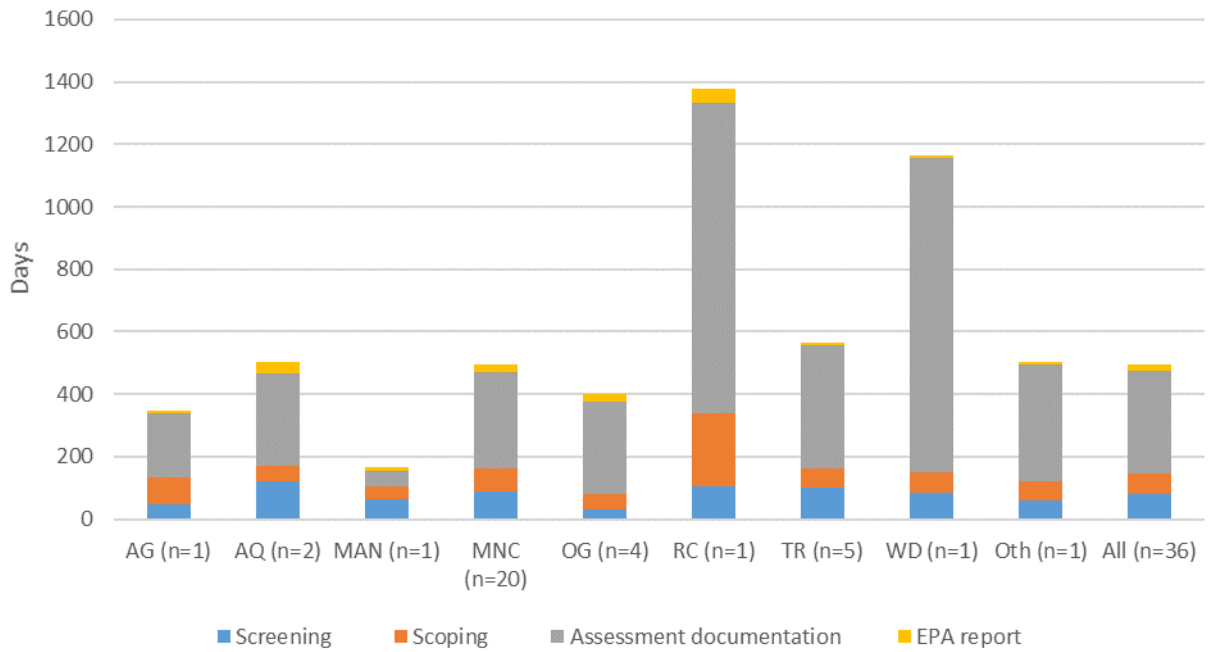
## Northern Territory

The analysis of the length of the environmental assessment processes for projects in the Northern Territory covered:

- all completed assessments under the Environmental Assessment Act (NT) between June 2006 and March 2018; and
- projects located in the Northern Territory that were approved under the EPBC Act over the period January 2010 to March 2018.

shows the median length of each stage of the environmental assessment process for the sampled projects under the *Environmental Assessment Act*. The results are presented by industry and for the entire sample of 36 projects. There are four main stages in the process (not all of which are mandatory for all projects): screening (where the Environment Protection Authority (EPA) determines whether the project requires formal assessment); scoping (where the EPA determines the scope of, or terms of reference for, the environmental assessment); assessment documentation (where the proponent prepares the assessment documentation); and EPA report (where the EPA prepares its advice on the project).

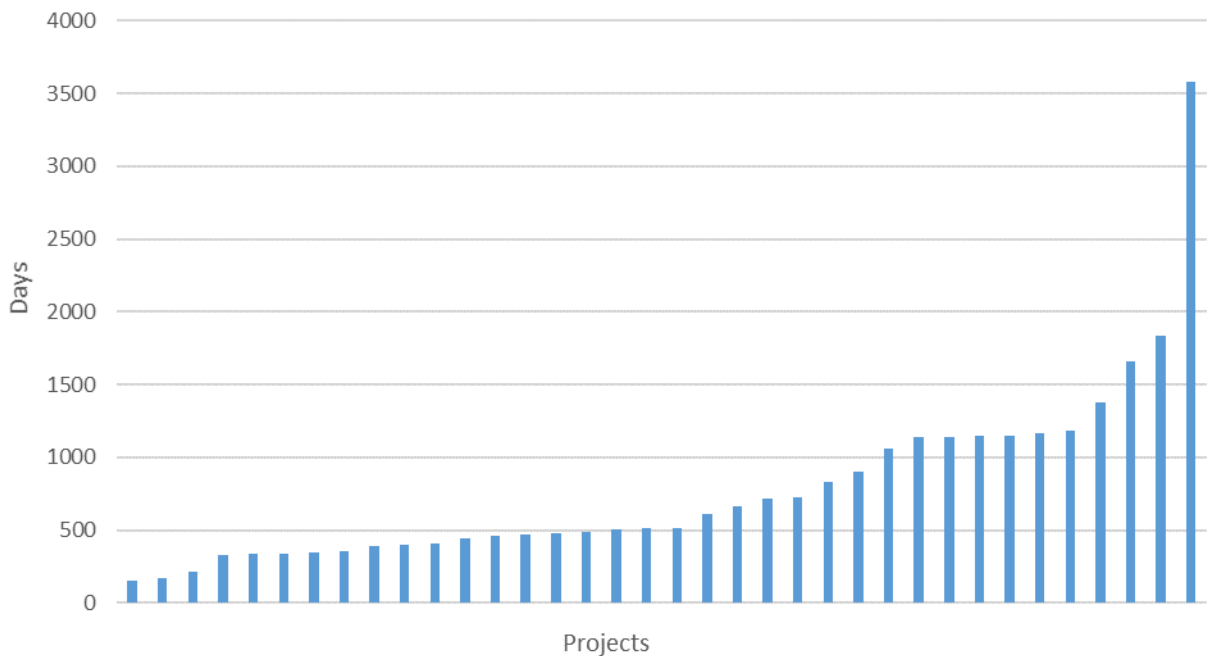
The aggregate of the median lengths of each stage was 494 days, with the longest part of the process being the preparation of the assessment documentation (328 days). The median total assessment time was 517 days, with an average of 784 days. The length of the process varied considerably between projects and project types. For example, 22 per cent of assessments took under 365 days, while 36 per cent took longer than 730 days (Apx Figure A-6). The variability in assessment times reflects the flexibility of the process and the nature of the factors that influence its length.



**Apx Figure A-5 Median length of each stage of the assessment process under the Northern Territory *Environmental Assessment Act*, June 2006 to March 2018**

Industry codes: AG = agriculture; AQ = aquaculture; MAN = manufacturing; MNC = mining (non-coal); OG = oil and gas; RC = residential and commercial; TR = transport; WD = water resource development; Oth = other. The number of projects in each industry code is provided in parentheses.

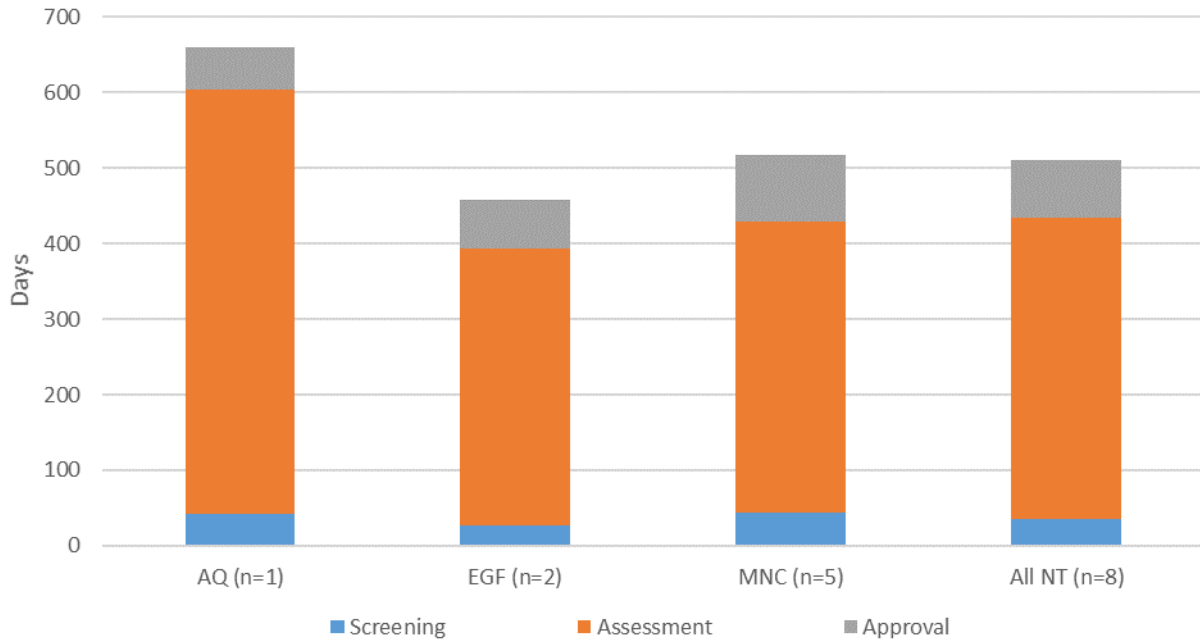
Source: Northern Territory EPA, Completed Assessments Database, available at: <https://ntepa.nt.gov.au/environmental-assessments/projects-completed> (12 April 2018).



**Apx Figure A-6 Total length of the environmental assessment process for sampled projects under the Northern Territory *Environmental Assessment Act*, June 2006 to March 2018**

Source: Northern Territory EPA, Completed Assessments Database, available at: <https://ntepa.nt.gov.au/environmental-assessments/projects-completed> (12 April 2018).

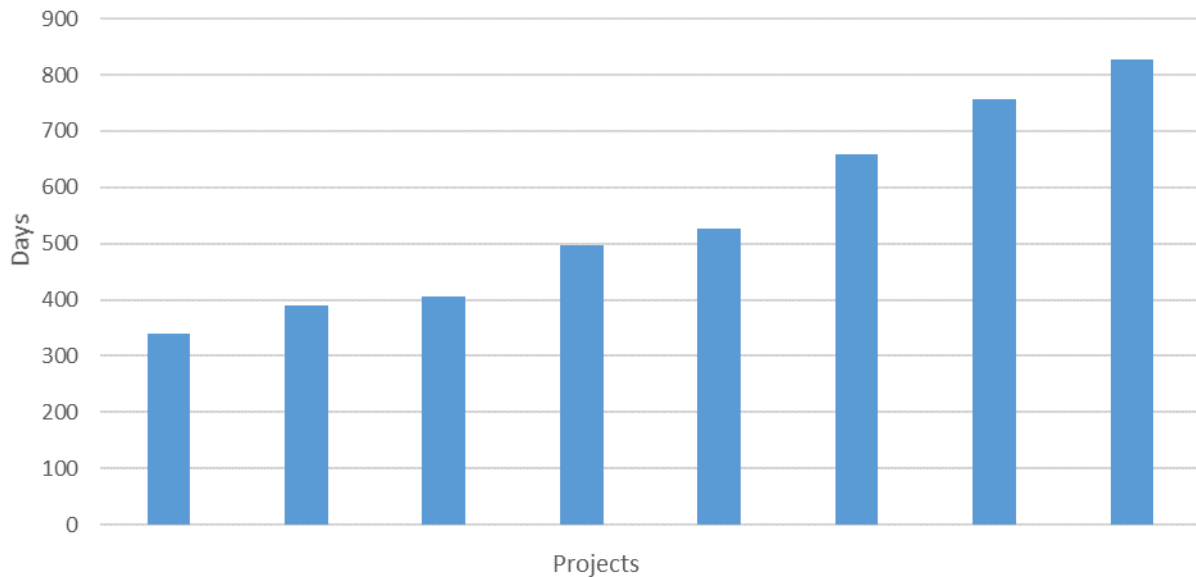
Apx Figure A-7 shows the median length of the three main stages of the EPBC Act assessment and approval process (screening, assessment and approval) for the 8 Northern Territory projects approved over the period 2010 to 2018. The approval phase here includes both the time taken by the federal environment department to prepare its recommendation report on the project, and the time it takes for the minister to consider the report and make the final approval decision.



**Apx Figure A-7 Median length of each stage of the assessment and approval process under the federal EPBC Act, all projects in the Northern Territory, January 2010 to March 2018**

Source: Department of the Environment and Energy, unpublished data (April 2018).

The aggregate of the median lengths of each stage was 511 days. The assessment phase accounted for almost 80 per cent of that time, highlighting the importance of proponents ensuring assessment information is provided in a timely manner. Similar to the results from the *Environmental Assessment Act* analysis, the length of the EPBC Act assessment and approval process was variable, ranging from 340 to 826 days (Apx Figure A-8).



**Apx Figure A-8 Total length of EPBC Act assessment and approval process, Northern Territory projects from January 2010 to March 2018, by length of process**

Source: Department of the Environment and Energy, unpublished data (April 2018).

The potential for government assessment and approval processes to cause delays, and the measures available to reduce regulatory timelines and uncertainty, are illustrated by the two aquaculture projects assessed under the *Environmental Assessment Act* over the period 2006 to March 2018. Both of these projects concerned Project Sea Dragon, a proposed large-scale, integrated prawn aquaculture project involving six major components located across the Northern Territory and Western Australia.

The first major component of the project is a Stage 1 Grow-out Facility on Legune Station in the Northern Territory. The Stage 1 Facility consists of three farms and associated infrastructure, with each farm comprising 36-40 production ponds, for a total of 1120 ha of grow-out ponds. The project will impact on a further area of approximately 7,500 ha for associated infrastructure including water storage, recirculation ponds, water access channels, an intake channel, an environmental protection zone, and roads. The site is located on the Legune Coastal Floodplain; an area of conservation significance. The project will involve broad-scale vegetation clearing, and may impact on the habitat of threatened and migratory species. There are also a number of Aboriginal sacred sites located on the station.

Because of the regional economic significance of the project, and its potential environmental and heritage impacts, the project was given 'Major Project Status' under the Northern Territory *Major Project Status Policy Framework*. This enabled the proponent to receive assistance from the Northern Territory Department of the Chief Minister to navigate Territory approval processes, and to engage with the Australian Government. The project was also granted 'Major Project

Facilitation' status through the Australian Government Department of Infrastructure and Regional Development, which provided it with a single entry point for all necessary federal approvals.

A notice of intent concerning the Stage 1 Facility was submitted to the EPA in July 2015. Simultaneously, the proponent also referred the project under the EPBC Act. In late August 2015, the federal environment minister determined that the project was a controlled action due to its potential impacts on matters of national environmental significance (listed threatened species and ecological communities, and listed migratory species), meaning it would require formal assessment and approval under the Act. Soon after, on 14 September, the Northern Territory EPA determined the project would be assessed under the *Environmental Assessment Act* by way of an Environmental Impact Statement (EIS).

To reduce duplication, the EPBC Act assessment was done under the terms of the bilateral assessment agreement between the Australian and Northern Territory Governments. This meant the EIS prepared under the Territory *Environmental Assessment Act* served the purposes of the EPBC Act and the Territory approval processes.

The EPA assessment took a total of 609 days, with the final EPA assessment report issued in March 2017. At the Territory level, the EPA assessment report does not constitute an approval in its own right. The EIS and EPA assessment report are used to inform decisions on the grant of required Territory approvals, including an aquaculture licence under the *Fisheries Act* (NT), a native vegetation clearing permit under the *Pastoral Land Act* (NT), and an environmental protection approval and environmental protection licence under the *Waste Management and Pollution Control Act* (NT).

At the federal level, the EIS was used to inform the grant of the EPBC Act approval, which was provided in May 2017. While the EPBC Act assessment and approval process took 659 days, much of that time overlapped with the *Environmental Assessment Act* assessment, meaning the additional delays associated with the EPBC Act were negligible. This demonstrates how regulatory delays and costs can be reduced by ensuring federal, state and territory approvals are sought in parallel and allowing assessments to serve dual purposes.

The second major component of Project Sea Dragon is a core breeding centre and broodstock maturation centre proposed to be located at Point Ceylon, on the southern side of Bynoe Harbour. At the core breeding centre, high performing prawn stock will be developed and produced, and the best performing individuals will then be transferred to the broodstock maturation centre. In the broodstock maturation centre, the selected prawns are grown and bred to produce commercial numbers of broodstock for use in a hatchery. The combined site area of the two centres at completion is 152 ha.

A notice of intent for the project was sent to the EPA in February 2016. Due to the potential impacts of the discharge of prawn farm effluent into a local waterway (Wheatley Creek), the management requirements concerning solid and liquid wastes, the risks associated with securing fresh water for the project and the high level of public interest in the project, the EPA decided to assess it by way of another EIS. However, this decision was not made until August, six months after the submission of the notice of intent. Part of the reason for the delay was the EPA required further information from the proponent to inform its approach. In total, the assessment took 402 days, with the final EPA assessment report issued in late March 2017.

In contrast to the assessment of the project under the Territory's *Environmental Assessment Act*, the EPBC Act process was short. The project was referred on 10 June 2016 and, in mid-September, it was declared not to be a controlled action, meaning it was allowed to proceed without further assessment and approval under the EPBC Act.

The *Environmental Assessment Act* and federal EPBC Act will not apply to all water-related developments in the Darwin catchments. Proponents should seek advice on the government approvals required for their projects well in advance of commencement, including on the likely cost and duration of the processes.

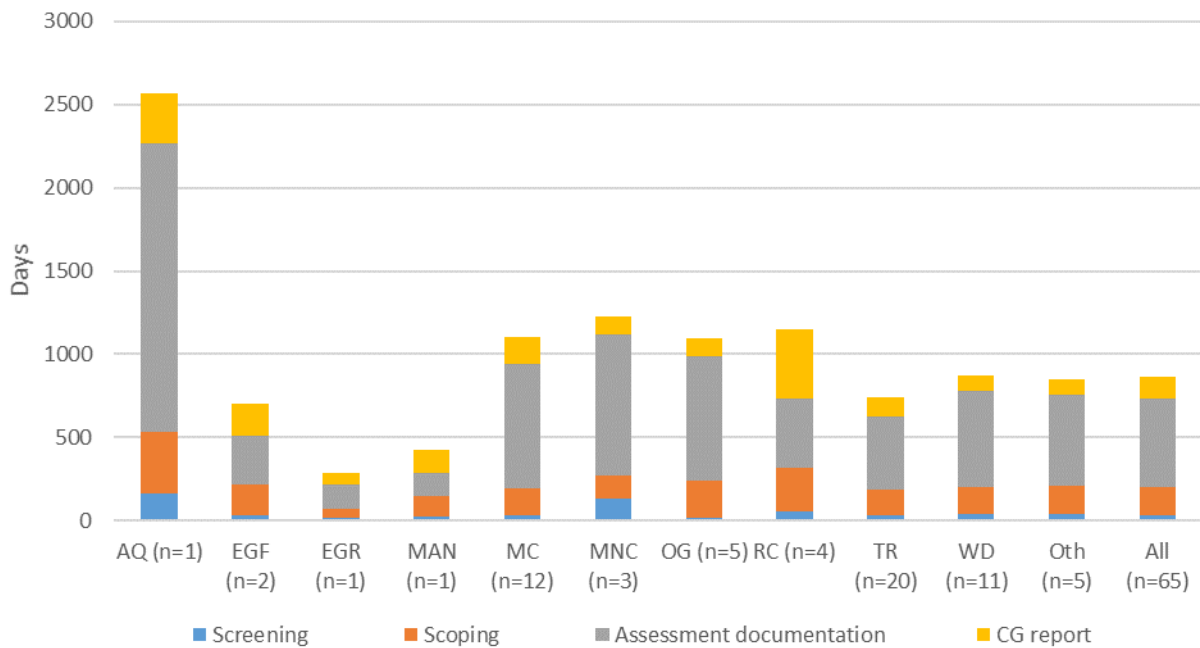
## Queensland

The analysis of the length of the environmental assessment processes for projects in Queensland covered:

- all projects assessed under the *State Development and Public Works Organisation Act 1971* (SDPWO Act) between January 2004 and March 2018; and
- projects located in Queensland that were approved under the EPBC Act over the period January 2010 to March 2018.

Apx Figure A-9 shows the median length of each stage of the environmental assessment process for the sampled projects under the SDPWO Act. The results are presented by industry and for the entire sample of 65 projects. There are four main stages in the process (not all of which are mandatory for all projects): screening (where the Coordinator-General determines whether the project requires formal assessment); scoping (where the Coordinator-General determines the terms of reference for the environmental assessment); assessment documentation (where the proponent prepares the assessment documentation); and Coordinator-General report (where the Coordinator-General prepares its advice on the project).

The aggregate of the median lengths of each stage was 867 days, with the longest part of the process being the preparation of the assessment documentation (532 days). The median total assessment time was 1049 days, with an average of 1185 days. The length of the process varied considerably between projects and project types. For example, 20 per cent of assessments took under 550 days, while 25 per cent took longer than 1500 days (Apx Figure A-10). The variability in assessment times reflects the flexibility of the process and the nature of the factors that influence its length.

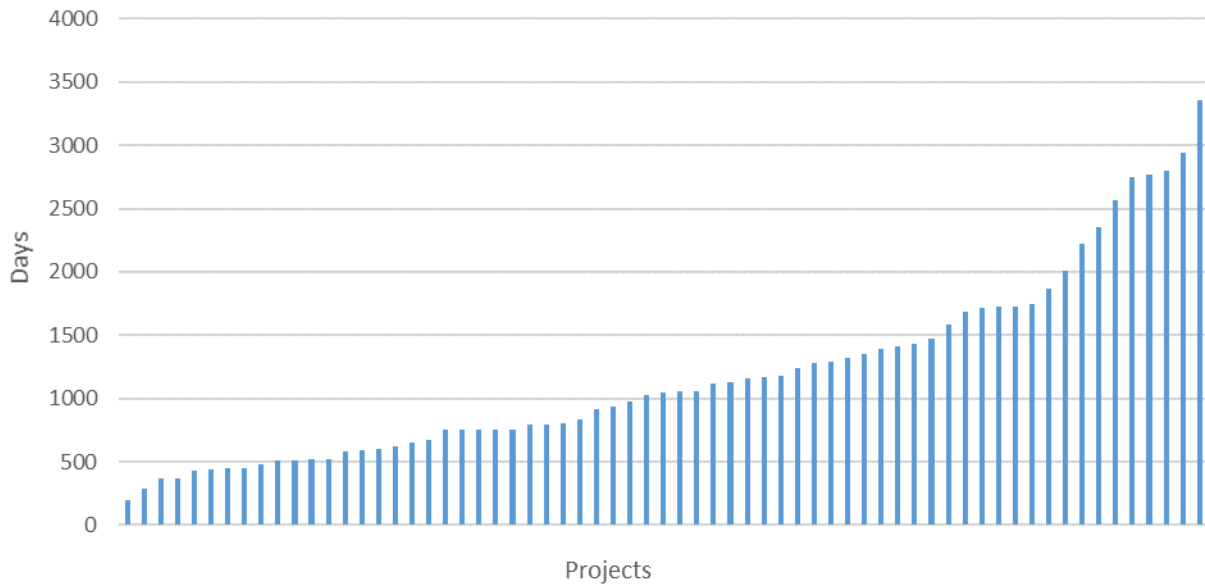


**Apx Figure A-9 Median length of each stage of the assessment process under the Queensland SDPWO Act, January 2004 to March 2018**

Industry codes: AQ = aquaculture; EGF = energy generation (fossil fuels); EGR = energy generation (renewables); MAN = manufacturing; MC = mining (coal); MNC = mining (non-coal); OG = oil and gas; RC = residential and commercial; TR = transport; WD = water resource development; Oth = other. The number of projects in each industry code is provided in parentheses.

Source: Queensland Department of State Development, Manufacturing, Infrastructure and Planning, Completed Projects Database, available at: <https://www.statedevelopment.qld.gov.au/assessments-and-approvals/completed-eis-projects.html> (12 April 2018).

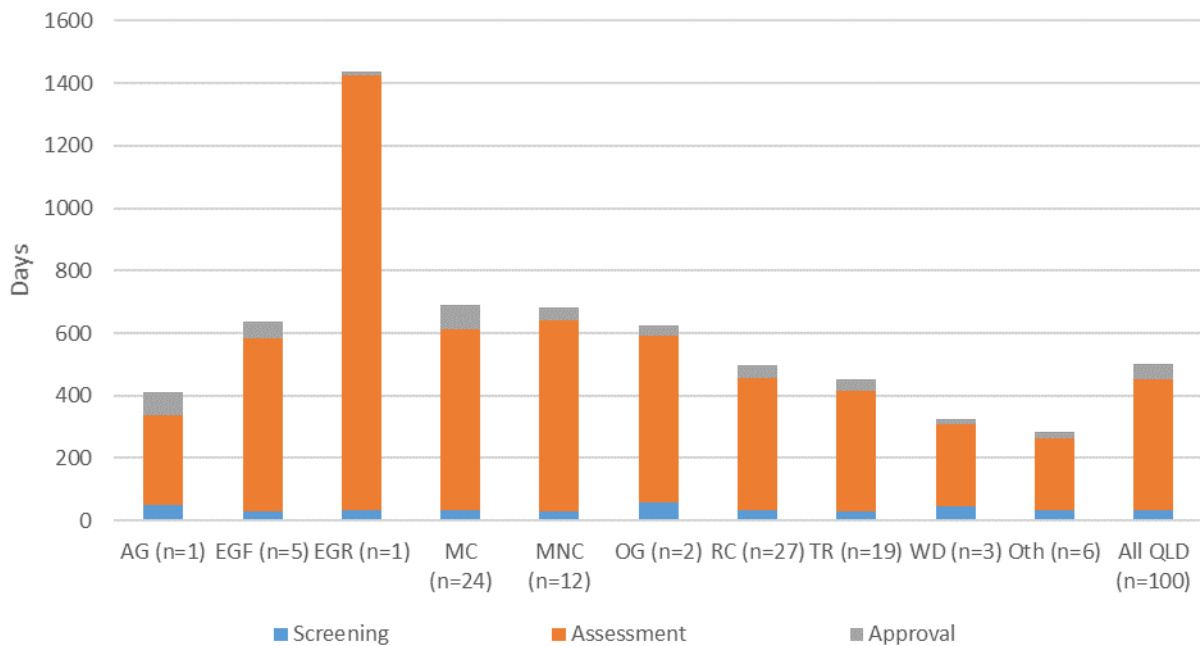




**Apx Figure A-10 Total length of the environmental assessment process for sampled projects under the Queensland SDPWO Act, January 2004 to March 2018**

Source: Queensland Department of State Development, Manufacturing, Infrastructure and Planning, Completed Projects Database, available at: <https://www.statedevelopment.qld.gov.au/assessments-and-approvals/completed-eis-projects.html> (12 April 2018).

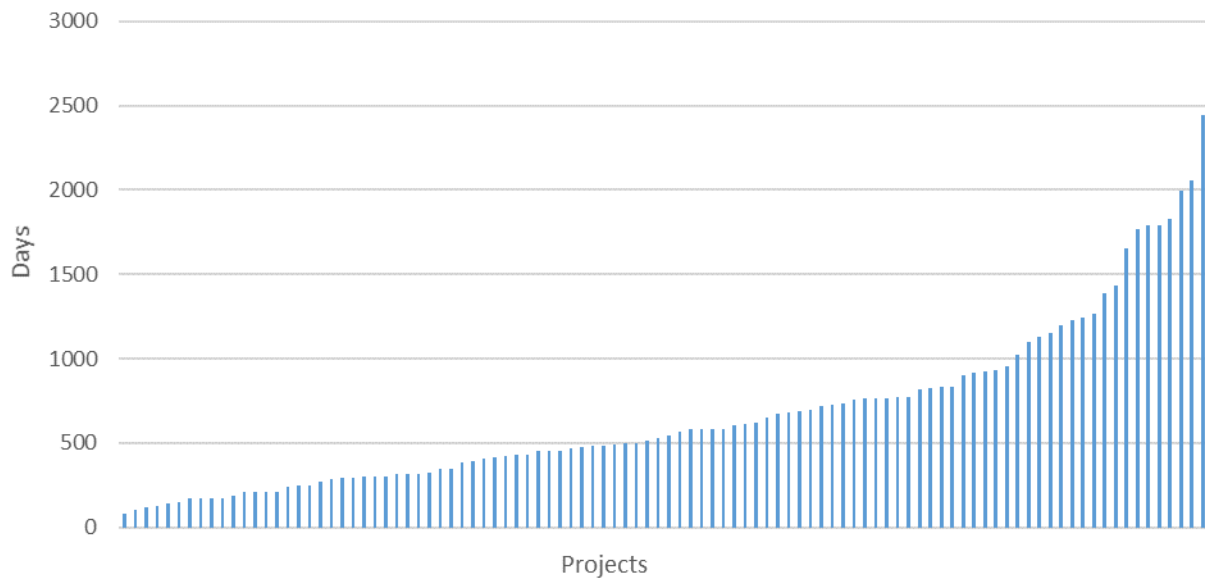
Apx Figure A-11 shows the median length of the three main stages of the EPBC Act assessment and approval process (screening, assessment and approval) for the 100 Queensland projects referred and approved over the period July 2010 to March 2018. The approval phase here includes both the time taken by the federal environment department to prepare its recommendation report on the project, and the time it takes for the minister to consider the report and make the final approval decision.



**Apx Figure A-11 Median length of each stage of the assessment and approval process under the federal EPBC Act, all projects in Queensland, July 2010 to March 2018**

Source: Department of the Environment and Energy, unpublished data (April 2018).

The aggregate of the median lengths of each stage was 500 days. The assessment phase accounted for almost 84 per cent of that time, highlighting the importance of proponents ensuring assessment information is provided in a timely manner. Similar to the results from the state analysis, the length of the EPBC Act assessment and approval process was highly variable, ranging from 78 to 2447 days. Thirty one per cent of approvals took less than 365 days, while 34 per cent took more than 730 days (Apx Figure A-12).



**Apx Figure A-12 Total length of EPBC Act assessment and approval process, Queensland projects from July 2010 to March 2018, by length of process**

Source: Department of the Environment and Energy, unpublished data (April 2018).

The potential for government assessment and approval processes to cause delays, and the factors that contribute to them, are illustrated by the two aquaculture and agriculture developments in the SDPWO Act and EPBC Act samples.

The aquaculture development was a prawn farm project at Guthalungra, 40 km north of Bowen in Queensland. The project involved the construction of 259, one hectare, 1.5 m deep ponds, which are intended to produce approximately 1,600 tonnes of black tiger prawns (*Penaeus monodon*) per annum for domestic and international markets. The main environmental concerns associated with the project centred on its potential impacts on water quality and the natural heritage values of the Great Barrier Reef. The project site is located near the coast and adjacent to the Elliot River, which flows into the reef.

The original proponent of the project, Pacific Reef Fisheries Pty Ltd, submitted an Initial Advice Statement to the Queensland Coordinator-General under the SDPWO Act in January 2001 and referred the project under the EPBC Act in the same month. To reduce duplication, the Australian Government accredited the SDPWO Act assessment process for the purposes of the EPBC Act, meaning the state assessment was used for the final federal approval decision. The assessment was extensive, lasting seven years and ending on 11 January 2008. The EPBC Act approval took a further two years, being finally granted on 4 March 2010.

The length of the state and federal processes highlights the delay risks associated with government approvals. However, it also demonstrates the importance of site selection in project

development. The environmental acceptability of aquaculture developments are a function of a number of factors, one of the most important of which is the sensitivity and values associated with the surrounding environment. In this instance, the project site had a number of characteristics that made it appealing from a commercial and production perspective. Yet the site was adjacent to, and would discharge production wastes into, the high profile and highly protected World and National Heritage Listed Great Barrier Reef. Siting the project in this location was one of the main contributing factors to the length of the assessment and approval process.

The agriculture development in the EPBC Act sample was a cropping development on the 21,500 ha Meadowbank Station, west of Ravenshoe in north Queensland. The project involves the clearing of 1,365 ha of native vegetation for forage cropping associated with cattle production. Originally, the proposal involved the clearing of over 6,000 ha. This was initially scaled back to 1,470 ha, and later to the final 1,365 ha. The project received state approval under the now repealed *Sustainable Planning Act 2009* (Qld) in November 2016 on the basis of being a high value agriculture development. However, due to potential impacts of the clearing on nationally listed threatened species, including the black-throated finch, the proposal was referred under the EPBC Act in December 2016, after the state approval had been granted. The project was assessed by way of 'preliminary documentation', a low level of assessment that is typically relatively short. Despite this, the EPBC Act approval still took over a year, with final approval granted in early February 2018.

The Meadowbank Station case illustrates the importance of considering government approval timelines when designing projects. By applying for state and federal approvals sequentially, the proponent potentially extended the delays associated with these processes. Where multiple state and federal approvals are required, delays can often be avoided, and costs reduced, by applying for them in parallel.

The Queensland SDPWO Act and federal EPBC Act will not apply to all water-related developments in the Mitchell catchment. Proponents should seek advice on the government approvals required for their projects well in advance of commencement, including on the likely cost and duration of the processes.

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