Laws Affecting the Environment

CHAPTER CONTENTS

Introduction

Many laws exist to protect our environment by controlling urban development, mining, pollution and other activities. The environmental legal system is the system of laws and administrative structures that regulate the impact of humans on the natural environment, aim to preserve quality of life and protect cultural heritage.

The different parts of the Queensland environmental legal system are linked, forming a safety net to protect the environment and to acknowledge the interconnectedness of environmental problems. For example, expansion of agriculture in an area may involve clearing of vegetation and increased demand for water, causing reduced flows of freshwater to coastal wetlands and fish habitats, which then impacts on fisheries. The idea that many parts of the environment are interconnected is an important aspect of the environmental legal system and requires good environmental planning and management.

The legal system attempts to deal with this interconnectedness through integrated planning and development approval systems. This can mean the system and laws within it become very complex. The heart of this complexity is not necessarily poor law making but the complexity of the problem that the laws are grappling with.

While the legal system attempts to deal with environmental problems in integrated ways, it often fails to succeed and there are gaps, overlaps and inconsistencies within it. Politics can also greatly influence the decision-making process of environmental issues.

A central objective of the environmental legal system for decades has been ecologically sustainable development. This was defined in the National Strategy for Ecologically Sustainable Development as 'using, conserving and enhancing the community's resources so that ecological processes … are maintained, and the total quality of life, now and in the future, can be increased'. This is intended to integrate economic, social and environmental considerations but, in reality, economic issues typically still dominate decision making at all levels of government.

Environmental Law in Queensland

There are four levels to the Queensland environmental legal system:

- international law
- Commonwealth law
- Queensland (state) law
- common law.

Local governments operate under state law and provide an important subset of plans and laws that apply within their areas. In practice, state legislation provides the major laws protecting the environment, but all levels have an important role.

Every level of government in Australia—Commonwealth, state and local—have powers to protect the environment in different and often overlapping ways. Their responsibilities are messy and not clear cut. This can be confusing, especially where multiple government departments are involved in assessing a large project.

International law

Australia has important obligations under international law for many environmental issues including World Heritage protection, biodiversity conservation, international wildlife, trade, marine pollution and climate change.

Detailed information on all of the major environmental treaties that Australia is a party to is available on websites devoted to the treaties such as the:

- World Heritage Convention
- Biodiversity Convention
- Ramsar Convention
- United Nations Framework Convention on Climate Change.

With rare exceptions, international bodies such as the United Nations do not have power to control activities in Australia other than through agreement and implementation by the Australian Government.

The United Nations Sustainable Development Goals are now an important policy objective internationally but are not binding on Australia. Non-binding international policies that set standards and goals such as these are often called ‘soft law’.

Commonwealth law

The main Commonwealth environmental legislation is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). It regulates, amongst other things, actions that may impact on matters of national environmental significance such as World Heritage areas, international (Ramsar) wetlands and threatened species.

The *Great Barrier Reef Marine Park Act 1975* (Cth) is also important in Queensland in regulating activities in the Great Barrier Reef.

Queensland law

Particularly important state laws include the *Planning Act 2016* (Qld) (Planning Act), the *Environmental Protection Act 1994* (Qld) (Environmental Protection Act), the *Nature Conservation Act 1992* (Qld) (Nature Conservation Act) and the *Fisheries Act 1994* (Qld) (Fisheries Act).

Common law

Common law involves the decisions of courts that form binding precedents and rules of law.

Common law traditionally protected people and property only and largely did not recognise obligations to protect the environment. Partly for this reason, modern environmental law is largely based on legislation.

However, common law still permeates many aspects of our legal system. It creates concepts and obligations that may be relevant to protecting the environment, such as the concept of standing (i.e. the right to sue in court) and the tort of public nuisance.

Who administers environmental law?

The Queensland environmental legal system is administered principally by the Commonwealth, the state and 77 local governments, and the courts.

The major Commonwealth department and agency responsible for environmental issues in Queensland are the:

- Department of Climate Change, Energy, the Environment and Water
- Department of Agriculture, Forestry and Fisheries
- Great Barrier Reef Marine Park Authority.

The main Queensland Government departments responsible for environmental issues are the:

- Department of Agriculture and Fisheries
- Department of Environment and Science
- Department of Resources
- Department of State Development, Infrastructure, Local Government and Planning (including the Coordinator-General).

The local governments have a very important role in regulating where and how development occurs and are the principal point of contact for most planning and development issues.

Courts

The Queensland Planning and Environment Court is the most important court for environmental disputes and hears several hundred appeals each year about planning matters under the Planning Act and related legislation.

The Land Court of Queensland hears objections to mining leases and petroleum leases.

The state-level Magistrates Court and District Court hear criminal prosecutions for both state and federal environmental offences.

The Federal Court has jurisdiction for the EPBC Act.

The High Court of Australia is the highest appellate court for both state and federal courts but rarely hears cases involving environmental issues.

Summary of obligations

The environmental legal system in Queensland is complex but, as a broad summary, all people conducting activities that affect the environment in Queensland should:

- obtain and comply with any necessary licence or government approval
- comply with any relevant standard imposed by the law, including taking all reasonable and practicable measures to prevent or minimise environmental harm
- notify the Queensland Department of Environment and Science if unlawful material or serious environmental harm (as defined in the Environmental Protection Act) occurs or may occur.

Land ownership

Land ownership is a fundamental issue underlying the environmental legal system. The different forms of land ownership are known as tenures, which are quite complex.

In Queensland:

- around 70% of land is owned by the state but leased to private individuals and companies in a land tenure known as leasehold land
- around 20% of Queensland has been sold by the state to private owners and held as freehold land
- around 5% of state-owned land in Queensland is set aside for nature conservation as national parks.

Freehold land is still subject to many environmental laws such as local government planning controls.

Mining leases are a form of tenure that can be granted by the state government over other tenures including freehold land, to allow mining of minerals from the land. Similarly, petroleum leases are a form of tenure that can be granted to allow extraction of petroleum (including coal seam gas).

Native title is a form of land tenure recognising Aboriginal and Torres Strait Islanders' traditional land tenure rules. Native title has been extinguished on all freehold land but may still exist on other forms of tenure.

All of these different tenures fundamentally affect legal rights to use and develop land.

Where to find the law

Commonwealth legislation is available on the Federal Register of Legislation and each Commonwealth department has a website for the major laws it administers, such as the EPBC Act.

Queensland legislation is available on the Queensland Legislation website and each state government department has a website for the major laws it administers, such as the Planning Act.

Local governments, especially the large ones like Brisbane City Council, have their own websites providing access to their planning schemes.

How to interpret the law

Modern environmental laws are often long and complex, with numerous related documents to cross-reference to such as regulations, ministerial guidelines and planning schemes.

To find and interpret the law requires the ability and willingness to:

- locate and read often large documents
- follow cross-references within them
- think logically about what they say.

The lecture 'A quick roadmap for Qld's planning laws' from a workshop on *A guide through the maze of planning law in Queensland* gives practical guidance on finding and interpreting environmental laws in Queensland.

Quiz yourself

Test your knowledge of the basics of environmental law with this quiz.

Planning and Development

The Planning Act

The Planning Act is the principal law regulating planning and development in two main ways:

- It provides a framework for local governments to prepare planning schemes and for the state government to prepare regional and statewide planning instruments.
- It provides a process by which development applications are assessed on their merits, usually by reference to a planning scheme and other planning instruments such as state planning policies. This process is known as the development assessment process.

What is a planning scheme?

Planning schemes are documents prepared by local governments to plan for the future development of their local government areas. They allocate land for different uses (e.g. housing, industry and agriculture), provide for infrastructure (e.g. roads and sewerage) and protect the natural environment and quality of life in those areas. They are legally binding documents that affect private rights to use land.

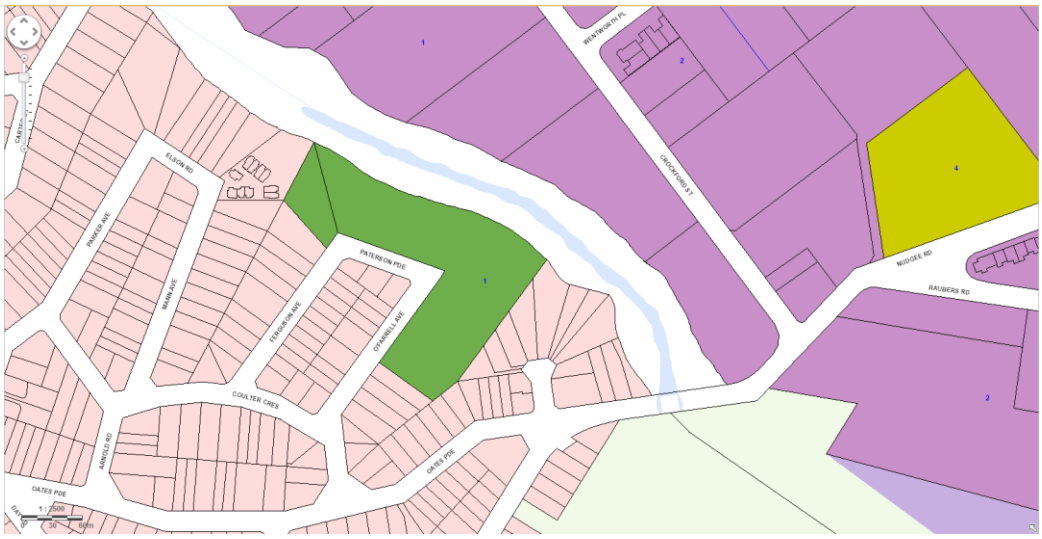
While statewide and regional planning documents provide important layers of planning above local government planning schemes and can override them in some cases, the bulk

of detailed planning controls are found at the local level. For this reason, local government planning schemes contain the bulk of rules and other measures that affect the use and development of land at a day-to-day level.

Local government planning schemes can be very complex. They typically include:

- a strategic plan that sets out the broad objectives and future planning intent of the local government area
- tables of assessment that identify the categories of development, the category of assessment and the assessment benchmarks for assessable development within the planning scheme area
- zoning plans that apply to the whole local government area and describe the purpose, location and other planning provisions for specific areas such as a low-density residential zone, a conservation zone or an industry zone
- local or neighbourhood plans, which indicate the purpose, location and other planning provisions for areas such as the town centre or a particular suburb where a special character or integrity is to be developed or maintained
- overlays that identify areas with particular issues such as bushfire or flooding risk
- development codes that identify the assessment benchmarks and other requirements for particular planning issues such as landscaping, storm water management or biodiversity
- planning scheme policies that set out the policies that the local government will adopt in addressing particular issues such as cultural heritage protection
- a local government infrastructure plan that sets out future planning for public infrastructure for matters such as sewerage, water supply and parklands, and the calculation of infrastructure charges associated with them.

The following images from the Brisbane City Council's website show an aerial image for an area in Brisbane and the corresponding map of zones under the planning scheme for the area and extracts from the key to this map. Note how the development of the area (residential below the creek line and industrial above it) corresponds with its zoning.



The planning scheme typically reflects the historical reality of development in an area as well as constraining future development to be consistent with what is permitted by the planning scheme.

It is common to find statements in different parts of a planning scheme that appear to conflict (e.g. support for economic development and protection of the environment). A sensible, practical approach should be adopted when interpreting a planning scheme, and it should not be read too narrowly or pedantically.

An example of the relevant principles to be applied when interpreting a planning scheme and exercising the discretion for approval of impact assessable development under the Planning Act is *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 19.

A lecture explaining how planning schemes regulate development in Queensland is available from a workshop on *A guide through the maze of planning law in Queensland*.

Preparation of planning schemes

A local government must prepare and amend its planning scheme by following the process established in the *Minister's Guidelines and Rules* made under the Planning Act. Adoption of a new planning scheme or major amendments to an existing planning scheme require, amongst other things:

- state interest review
- public consultation.

Submission about a planning scheme

During public consultation about a new planning scheme or major amendments to an existing planning scheme, any person can make a submission to the local government.

A fundamental principle of planning law in Queensland is that development should be consistent with the relevant planning scheme and any other relevant layer of government planning (e.g. a regional plan and state planning policies).

If a person wishes to have a particular local area protected, they should ensure it is recognised in the preparation of any planning scheme for the area. If environmental values are not recognised or protected in the relevant planning scheme, it is generally too late in the process to fight against a development proposal that is otherwise consistent with a planning scheme in force for the area.

Therefore, it is important to make a public submission during the preparation or review of any planning scheme to protect the environmental values of the local area. Reviews of planning schemes are advertised by local governments on their websites and in local news outlets.

The focus of a submission

Submissions about draft planning schemes will be most persuasive if they are clear, logical and based on evidence. There should be a focus on the particular things sought to be changed in the draft planning scheme, and the submission should be as specific as possible. As a general checklist, ask a few questions:

- Is the draft planning scheme clear and able to be understood by members of the general public? If it is not easily understood, the lack of clarity may allow unwanted development to occur.

- Does the draft planning scheme clearly identify and protect areas and places that should be protected through clear assessment benchmarks and mapping? This is a critical issue.
- Is the development, that may be contentious and that the public should be notified of and able to make submissions on, made 'impact assessable'?
- Are the development codes clear, specific and understandable? Do they control development appropriately?

Formal requirements for a submission

Only a properly made submission must be considered by a local government in making or amending its planning scheme. Such a submission must:

- be in writing
- be signed by every person making the submission
- be received on or before the last day of the consultation period
- state the name and address of every person making the submission
- state the grounds of the submission and the facts and circumstances relied on in support of the grounds
- be made to the relevant local government.

A useful factsheet on making effective submissions on a planning scheme is available from the Environmental Defenders Office (EDO).

Regional planning

While local government planning schemes continue to provide the bulk of detailed regulation of land use and development, regional plans provide an additional layer of planning that can be important in some cases, particularly where development is proposed outside existing urban areas.

Regional plans are quite broad, but they override local government planning schemes to the extent that they are inconsistent.

Importantly, the *South-East Queensland Regional Plan 2017* provides a footprint within which urban development must be contained to address concerns about urban sprawl.

Further information about regional plans is available on the Queensland's Planning Framework website.

State planning policy

The Planning Act allows state planning policies to be made about matters of state interest. These policies have a legally binding effect and must be appropriately reflected in any subsequent planning schemes. They may also need to be considered when individual applications for development approval are being decided.

A single state planning policy 2017 deals with 17 state interests grouped in five themes:

- liveable communities and housing
- economic growth
- environment and heritage
- safety
- resilience to hazards.

State plans for large residential and industrial areas

While relatively rare, some state-level plans override local government planning schemes for large residential and industrial developments.

One such process is the declaration of a priority development area under the *Economic Development Act 2012* (Qld) to fast-track the development of land for residential or industrial purposes.

Special state-level planning also applies to state development areas declared under the *State Development and Public Works Organisation Act 1971* (Qld) (SDPWO Act), such as the Gladstone State Development Area.

Some large projects even have their own legislation providing special planning arrangements, such as the *Townsville Zinc Refinery Act 1996* (Qld).

Development Assessment

Development assessment process

Development applications are made through the development assessment process and are assessed against the relevant planning scheme and, where state-level assessment is triggered, the State Development Assessment Provisions. It is designed to integrate state and local government approval processes.

Chapter 3 of the Planning Act provides the overall framework for the development assessment process, but much of the detail for the process is fleshed out in a subsidiary document, the Development Assessment Rules.

The overall process is shown in the following flowchart, but not all parts necessarily apply to each development application.

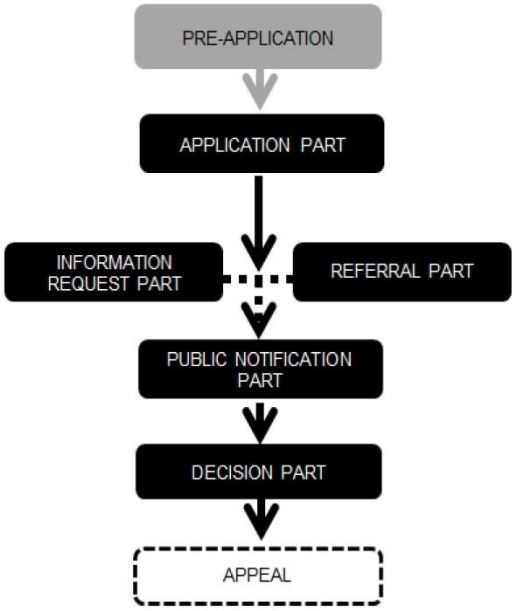


Figure 1: Development application process. This flowchart is adapted from a Queensland Government publication.

The parts of the development assessment process

- **Pre-application**: is not mandatory but allows applicants to meet with the assessment manager and any referral agency to gauge their views on the application and improve it.
- **Application**: involves lodging an application that meets the requirements for it to be 'properly made' and, therefore, commence the development application process.
- **Information request**: provides a formal opportunity for the assessment manager and any referral agency to request further information about the application or its impacts.
- **Referral**: if an application triggers referral to a referral agency, this part allows for the referral to occur, for the application to be assessed by the referral agency and for its response to be given.
- **Public notification**: if an application requires impact assessment, it must be publicly notified in accordance with the Development Assessment Rules. Any person can make a submission during the notification period.
- **Decision**: after all other parts have been completed, the assessment manager makes its decision on the application and what conditions to impose on any approval.

- **Appeal**: after the application has been decided, an applicant who is dissatisfied with a decision may appeal it to the Planning and Environment Court. Submitters who made a properly made submission can also appeal against decisions involving impact assessment.

Three preliminary questions

In order to determine whether a development application must be made and, if so, which parts of development assessment process apply, it is necessary to answer three preliminary questions:

- Does the proposal involve 'development' as defined in the Planning Act?
- What category of development is it (accepted development, assessable development (code assessable or impact assessable) or prohibited development)?
- Which levels of government (or private certifier) are involved in the assessment process?

Answering these three questions allows the development assessment requirements to be determined including the strict timelines for each of the parts.

Meaning of development

'Development' is defined in the dictionary (sch 2) of the Planning Act as:

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

The different forms of development under the Planning Act are further defined in sch 2 of the Planning Act as:

- building work—building, repairing, altering, moving or demolishing a building or structure and some other forms of related work such as excavating or filling that is incidental to building. For a building listed on the Heritage Register under the *Queensland Heritage Act 1992* (Qld), building work even includes any painting or plastering that substantially alters the appearance of the place
- plumbing or drainage work—installing, changing and maintaining an apparatus or fitting a pipe for the supply or removal of water, sewage or greywater
- operational work—this is a very wide term that, in practice, includes activities such as excavating or filling, clearing vegetation, road works and other work that materially affects premises or their use (other than building work, plumbing or drainage)

- reconfiguring a lot—subdividing a large lot into smaller lots, amalgamating several lots together or rearranging the boundaries of a lot
- material change of use—start of a new use, re-establishment of a use that has been abandoned or a material change in the intensity or scale of a use of premises.

To understand what a 'material change of use' means requires understanding what a 'use' of land is. A 'use' of land is the purpose for which activities are conducted on the land as understood in ordinary terminology in a town planning context. Examples of different uses of land include a dwelling house, hospital, hotel, office, shopping centre, multiple dwelling and park. Planning schemes normally include a dictionary to define common uses of land, as do schs 3, 4 and 24 of the *Planning Regulation 2017* (Qld) (Planning Regulation).

The term 'development' creates a broad umbrella definition into which virtually any proposal can be brought within the planning and development assessment framework. However, not all development is required to be assessed under the development assessment process.

Categories of development

The Planning Act uses a horribly abstract term, 'categorising instruments', for state and local-level planning documents that can (s 43):

- identify development in the three categories of accepted, assessable or prohibited
- specify the categories of assessment required for different types of assessable developments (i.e. state whether code or impact assessment applies)
- set out the matters (the assessment benchmarks) that an assessment manager must assess assessable developments against.

State-level categories of development are identified in the schedules of the Planning Regulation.

Local-level categories of development are identified in:

- a planning scheme
- a temporary local planning instrument
- a variation approval (i.e. part of a preliminary approval for premises that varies the effect of any local planning instrument in effect for the premises).

In practice, planning schemes are the most important for identifying local-level categories of assessment.

There are three categories of development (s 44):

- accepted development, which means that development approval is not required (although it may still be required to comply with design and construction standards, e.g. the building code)

- assessable development, which means that assessment is required under the development assessment process by any relevant government body (unless an exemption certificate applies under s 46 of the Planning Act)
- prohibited development, which means the development is prohibited and cannot be applied for. If prohibited development is applied for, it need not be assessed.

Assessable development has two subcategories (s 45):

- code assessment, which is a more limited form of assessment that is not publicly notified and no submission or appeal rights exist
- impact assessment, which is assessed more widely than code assessment, must be publicly notified and the public gains a right to make submissions and appeal a decision to approve the development.

If no categorising instrument categorises a particular development, it is an accepted development (s 44(6)).

Most planning schemes identify assessable development in a part called a 'Table of Assessment' or 'Table of Development'.

Some development that cannot be made assessable under a local government planning scheme is specified in sch 6 of the Planning Regulation, and this development becomes accepted development by default.

Accepted development may still require assessment under other laws. For example, sch 6 provides that mining is not able to be made assessable development, but it requires assessment under the *Mineral Resources Act 1989* (Qld) (Mineral Resources Act) and the Environmental Protection Act.

The state government and local governments may designate premises for development of infrastructure under sch 3, pt 5 of the Planning Act. Schedule 5 of the Planning Regulation lists the infrastructure that may be designated including airports, bus ways, dams, prisons, schools and sewage treatment plants, which are accepted development under a planning scheme. Once designated, the premises are not subject to the local government planning scheme, and there are no public submission or appeal rights under the Planning Act.

A super short (10-minute) explanation of the development assessment process is available on Youtube.

A longer (90-minute) lecture explaining the development assessment system in more detail is also available on Youtube.

A short quiz on basic concepts for development in Queensland, including understanding what is 'development' and when development approval may be required, is available online for you to test your understanding.

Development offences

It is a development offence under the Planning Act to:

- carry out prohibited development (s 162)
- carry out assessable development unless all necessary development permits are in effect (s 163), or there is an exemption certificate for the development (s 46)
- contravene a development permit (s 164)
- use premises unlawfully (s 165).

Exemptions apply for development or use of premises in an emergency to prevent danger to life or to ensure the structural adequacy of a building (s 166).

The Planning Act provides several enforcement mechanisms:

- Show cause notice—may be given where an assessing authority reasonably believes a person has committed or is committing a development offence.
- Enforcement notice—tells a person to stop committing an offence or to remedy the commission of an offence, with fines for failing to comply.
- Prosecutions in the Magistrates Court— may occur where local governments and state regulators prosecute offences in the Magistrates Court seeking a monetary penalty and related orders (e.g. a clean-up order).
- Civil enforcement proceedings in the Planning and Environment Court—may occur. Anyone (including members of the public) may bring proceedings in the Planning and Environment Court to stop the commission of an offence but no fines can be imposed by this court.

Government agencies and private certifiers

The government entities involved in the development assessment process are referred to as the 'assessment manager' and 'referral agencies' and are listed in sch 8 of the Planning Regulation and the Development Assessment Rules.

The assessment manager is normally the relevant local government. An application is made to this entity, which then manages the development assessment process and makes the final decision whether to approve or refuse an application and whether to impose conditions.

Referral agencies are other government bodies to which an application is referred to for consideration.

A referral agency may be:

- a concurrence agency with the power to direct the assessment manager to refuse the application or to impose mandatory conditions
- an advice agency, which may offer advice to the assessment manager but cannot direct refusal of the application or impose mandatory conditions.

The State Assessment and Referral Agency (SARA) is the single lodgement and assessment point for virtually all development applications where the state has a jurisdiction.

The State Development Assessment Provisions set out the criteria and codes for state assessment of development under SARA.

Private certifiers are also commonly the assessment manager where a development application is for building work only. Private certifiers are individuals certified under the *Building Act 1975* (Qld) to, amongst other things, assess and approve plans relating to new or altered buildings and certify the construction of buildings complies with approved plans.

Ministerial powers

The Planning Minister, as well as the minister who administers the SDPWO Act, has a broad discretion to call in and assess and decide, or reassess and re-decide, an application if, in the minister's opinion, it involves a state interest (ch 3, pt 3 Planning Act).

Ministerial call ins are rare.

All applications that have been called in, as well as applications for which a proposed call-in notice has been given, can be viewed on the Queensland Planning website.

This power is in addition to other avenues for the state government to bypass local governments and the court appeal process such as designating land for community infrastructure or declaring a priority development area.

Approving or refusing a development application

The basic rule for assessing an application in the development assessment process is that it is likely to be approved if it is consistent with relevant planning scheme and other planning layers. Conversely, the more a development application conflicts with any relevant planning scheme or other planning layer, the less likely it is to be approved.

Section 60 of the Planning Act states the statutory tests for deciding code assessment and impact assessment:

- For code assessment, there is a presumption of approval for any application that complies with relevant assessment benchmarks or can be conditioned in such a way that it complies. The assessment manager can only refuse a code assessable application if the development cannot be conditioned to meet the assessment benchmarks.
- For impact assessment, there is no presumption of approval expressly stated but a similar approach is generally taken in practice.

The Planning and Environment Court explained the test for deciding whether to approve impact assessable development that does not comply with all assessment benchmarks in *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16.

This emphasises the importance of public submissions to local governments when they are preparing or amending their planning schemes in order to identify and protect important areas and environmental values. It is generally too late to protect important areas when a

development application is lodged, if the planning scheme does not protect the area and allows it to be developed.

Conditions

Approval of a development can be (and virtually always is) subject to conditions that control how the development will occur. Conditions are the basic mechanism for minimising adverse impacts and for providing public infrastructure (e.g. parklands).

Conditions are required to be relevant and reasonable (s 65 Planning Act).

- A relevant condition is one that properly relates to the legislation under which it is imposed (e.g. for a local government, to maintain standards in local development).
- A reasonable condition is one that is a reasonable response to the changes that the development will cause (e.g. increased traffic to a road or bridge).

For example, a relevant and reasonable condition for a development adjacent to a watercourse may be that no development is to occur within 20 metres of the high bank of any watercourse. Whether a condition is relevant and reasonable will depend on the facts of each individual case.

For more information on conditions, listen to the recording of a workshop on writing conditions (and see the associated workshop paper) available on the Environmental Law Australia website.

A short quiz on condition-making powers is available online for you to test your understanding.

Making a Development Application

Large property developers will typically engage town planning consultants and lawyers specialising in planning law to lodge development applications on their behalf. The following explanation is aimed at small developers who wish to understand the basic process for lodging a development application.

The Queensland's Planning System website also provides useful resources, and an online summary of *Five steps for making good project applications* provides some useful, practical advice too.

Pre-lodgement meetings

While not a legal requirement, arranging a pre-lodgement meeting with the planning staff of the local government is very common. It is a useful way of ironing out any concerns that the council may have regarding the development application and ensuring that all of the information required by council is included.

Lodging a properly made application

If a proposed development is an assessable development, then a properly made application must be made to the relevant assessment manager in accordance with the Development Assessment Rules. It must be in the approved form and accompanied by the relevant application fee.

The applicant must also give a copy of the development application to any referral agency (s 54 Planning Act).

Advertising requirements

Code assessable development generally does not require public notification, but impact-assessable development is required to be notified in accordance with the Development Assessment Rules by:

- publishing at least one notice in a local newspaper where the development is proposed
- placing a notice on the land in the way prescribed under the Development Assessment Rules
- giving a notice to the owners of all land adjoining the land.

An example of a notice placed on the land is shown in the following image.

Notices on land must remain in place for at least 15 business days for normal applications (not including any business days from 20 December to 5 January) (s 53 Planning Act).

Amongst other things, the public notices must outline the nature of the proposal, where the application can be viewed and the date by which submissions must be made.

At present, there is no central website where development applications are notified but a local government may notify impact assessable applications on their website.

Information request

The assessment manager and any referral agency may request further information about the proposed development and its likely impacts. This procedure applies to both impact and code assessable development.

The decision notice

The decision stage commences once any notification period has ended, and the assessment manager has received the response to any information request and the response of any referral agency. At this stage, the assessment manager decides whether or not to approve the development application and what conditions to impose (if any). The assessment manager must issue a decision notice within five business days of their decision in accordance with the Development Assessment Rules.

Opposing a Development Application

The Development Assessment Rules provide a formal procedure for objecting to an impact-assessable development by making a submission during the notification period.

Code-assessable development does not allow formal objection rights, but members of the public can still write to the local government and lobby their councillors.

Has a development application been submitted?

Sometimes, people only become aware that a particular development is proposed when bulldozers arrive at the land and start clearing it or demolishing buildings on it. It is difficult to stop development at this late stage, and the damage may be done before there is time to react. It is therefore important to know when a public notice of a proposed development is required and how to find out about a proposed development if public notice is not required.

A proposal to carry out impact-assessable development must be publicly notified (see Advertising requirements). The notice that is placed on the land must explain the type of development that is proposed and where to find out more information about it.

Code-assessable development generally does not require notification, so it is harder to know about it before the development actually begins. A person should contact the relevant local government if they suspect that a code-assessable development has been made.

Right to make a submission

Any person can oppose an impact-assessable development application by making a submission to the relevant assessment manager and appealing against a decision to approve the development to the Planning and Environment Court. The assessment manager should be able to advise if a specific development application is impact assessable.

Although the community has no formal rights to make submissions or appeal approvals of developments that are not impact assessable, an informal submission can be made to the

relevant assessment manager and referral agencies. Although this does not give any rights to appeal the decision, it at least makes it possible for the public's views to be considered.

How to make a submission

Only a properly made submission for an impact assessable development gives a submitter a right to appeal against a decision.

For a submission to be a 'properly made submission' about a development application (as defined in the dictionary sch 2 of the Planning Act) it must:

- be signed by each person who made the submission
- be received during the notification period (i.e. the public advertising period)
- state the name and residential or business address of each person who made the submission
- state the grounds of the submission and the facts and circumstances relied on in support of the grounds
- state one postal or electronic address for service relating to the submission for all submission makers
- be made to the assessment manager.

Generally, a clear and rational submission based on valid planning and environmental issues and supported by evidence of likely adverse impacts is more persuasive than an emotional or irrational submission against the proposed development.

Petitions and form letters (i.e. identical submissions signed by different people) are less persuasive than individually tailored submissions made by people who show that they have looked at the application, considered its consequences and made reasonable criticisms.

Before making a submission, you should inspect:

- the development application held by the assessment manager for public inspection
- any reports or supporting information that accompany the development application (these may deal with planning issues, environmental impacts, traffic or other relevant issues)
- the relevant parts of the local government planning scheme.

Many local governments now make development applications, supporting reports and their planning scheme available on their websites. Alternatively, these documents should be available for inspection at the local government offices during the public notification period.

After carefully reviewing these documents, a person intending to make a submission should consider the extent to which the development application complies with the provisions of the planning documents, and how much it takes into account any issues raised in relevant

studies. A submission should focus on the issues that must be considered when deciding the application, such as:

- inconsistency with the planning scheme and other planning documents (e.g. a regional plan)
- impact on residential amenity, urban design and character
- traffic (e.g. insufficient road capacity, traffic hazards)
- environmental impacts (air, noise and water pollution, ecology, conservation and cultural heritage values of the site)
- need and economic factors.

If sufficient funds are available, professional experts can be hired to advise about these issues and to help write a submission (see 'Taking Action to Protect the Environment' for more ideas about how to successfully oppose a proposed development).

The Environmental Defenders Office has published a useful factsheet on *Community Rights to be Involved in Development Assessment in Queensland* that provides further information and tips for making effective submissions.

Notification of the decision

If a properly made submission on an impact-assessable development application is lodged, the assessment manager must notify any submitter of the decision about the development application.

Information about how to appeal the decision (i.e. the relevant appeal provisions) must be provided with the notice.

The applicant for the development approval has 20 days (although this may be extended) from the decision to negotiate conditions or appeal the decision.

If the applicant chooses to appeal, they must inform all submitters within 10 business days of starting the appeal. The development cannot lawfully be started before the appeal period ends or any appeal is decided.

Appeals to the court

The applicant for a development approval (whether code or impact assessable) can appeal to the Planning and Environment Court against any decision by the assessment manager rejecting an application or imposing conditions on an approval (sch 1 Planning Act).

Applicants also have appeal rights identified in sch 1 of the Planning Act to the Development Tribunal established under s 235 of the Act.

In contrast, members of the public can only appeal against approval of a development application if it is impact assessable and they have lodged a properly made submission about it (sch 1 Planning Act).

The procedure for making an appeal is set out in ch 6 of the Planning Act, the *Planning and Environment Court Act 2016* (Qld) (Planning and Environment Court Act) and the *Planning and Environment Court Rules 2018* (Qld). Important steps for making an appeal include:

- lodge a Notice of Appeal in the approved form in the court registry within 20 business days of being given the decision notice
- give a copy of the Notice of Appeal to the assessment manager, the applicant, any referral agency and others listed in s 230 of the Planning Act.

If the applicant for the proposed development appeals the decision of the assessment manager, each principal submitter must be notified of the appeal. Each submitter may then join the appeal by lodging a Notice of Election with the court to become a co-respondent within 10 business days of being given the Notice of Appeal (s 230(6) Planning Act).

Even if a proposed development has been refused by local government, it may be important to become a co-respondent to the appeal to protect the rights to oppose the development in case the council back-flips during the appeal process.

It is strongly advised that applicants and submitters seek legal advice if contemplating an appeal to the court. Many community members and groups represent themselves in appeals to the court because they lack the funds to pay for lawyers. Being a self-represented litigant can be daunting, time consuming and confusing. While parties to an appeal in the Planning and Environment Court generally bare their own legal costs, on rare occasions costs of the other parties to an appeal can be awarded against unsuccessful litigants in the court (e.g. if an appeal is frivolous or vexatious).

The appeal procedures in the court are complex, and *The Community Litigants Handbook* published by the EDO should be referred to when contemplating self-representation in court.

Role of the court

The primary role of the court is to decide any appeal according to law and independent of local political pressures. The law is contained in the Planning Act and the relevant planning scheme, planning scheme policies and other relevant planning instruments.

When hearing an appeal, the court re-hears the matter anew and makes a new decision on the merits of the application (s 43 Planning and Environment Court Act). In this way, the court acts as the assessment manager for the appealed application.

Any person may also apply to the court for a declaration about a planning dispute under s 11 of the Planning and Environment Court Act. This includes disputes about code assessable development.

Any person may apply to the court for an enforcement order to remedy a development offence under s 180 of the Planning Act.

The court will generally only protect environmental values that are recognised in a planning scheme or other planning instrument. This emphasises the importance of community involvement in the preparation of the planning scheme for a local area. If a person or group

wants a wetland or other environmentally important area to be protected, the basic rule is that they must ensure that it is recognised and protected in the planning scheme.

Environmentally Relevant Activities

While the Planning Act provides the main planning laws for Queensland, some important environmental protection laws are provided in the Environmental Protection Act. One of the major tools in the Environmental Protection Act is a system for regulating environmentally relevant activities (ERAs).

Most ERAs are listed in sch 2 of the Environmental Protection Regulation and include activities such as aquaculture, chemical manufacturing, chemical storage, oil refining, sewage treatment, electricity generation, extractive activities (e.g. dredging and quarrying), cement manufacture and waste disposal. These are referred to as 'prescribed ERAs' in the Act and Regulation.

A material change of use of premises for these activities requires development approval under the Planning Act and is assessed under ch 5 of the Environmental Protection Act as part of the development assessment process explained above.

A second small group of agricultural ERAs is also created in ch 4A of the Environmental Protection Act to regulate commercial sugar cane growing or cattle grazing in some catchments of the Great Barrier Reef.

A third group of resource ERAs requires approval under ch 5 of the Environmental Protection Act for geothermal energy production, greenhouse gas storage, mining or petroleum extraction (including coal seam gas production). These activities are not subject to the Planning Act system.

The Environment Protection and Biodiversity Conservation Act

Controlled actions

The EPBC Act is the centrepiece of Commonwealth environmental legislation. The most important mechanism created by this Act for regulating development across Australia is a regime regulating controlled actions (chs 1–4).

An 'action' is a physical activity or series of activities other than a government decision or grant of funding (s 523 EPBC Act).

Controlled actions are actions:

- that have, will have or are likely to have a significant impact on a matter of national environmental significance
- by the Commonwealth that have, will have or are likely to have a significant impact on the environment

- involving Commonwealth land that have, will have or are likely to have a significant impact on the environment.

A lecture explaining the Commonwealth's constitutional powers to protect the environment and the EPBC Act is available online.

Matters of national environmental significance

Matters of national environmental significance listed under the EPBC Act currently include:

- the world heritage values of a declared world heritage property
- the national heritage values of a national heritage place
- the ecological character of a declared Ramsar wetland (wetlands of international importance)
- listed threatened species and listed threatened ecological communities
- listed migratory species
- nuclear actions (including uranium mines)
- Commonwealth marine areas
- the Great Barrier Reef Marine Park
- a water resource in relation to coal seam gas development and large coal mining development.

Referral, assessment and approval

A person proposing to carry out a controlled action must refer the proposed action for approval under the EPBC Act. The process of assessing and approving an action potentially involves three stages: referral, assessment and approval. There are a number of opportunities for public submissions in these stages.

Once an action is referred under s 68 or 69 of the EPBC Act, the Commonwealth Environment Minister decides whether the action is a controlled action. If the proponent believes it is not a controlled action, the proposal is publicly advertised online for 10 business days, and the public may make submissions about whether the proposal is a controlled action.

If the minister decides that the proposal is a controlled action, it must be assessed under the EPBC Act or under state environmental laws if there is a bilateral agreement in place. The EPBC Act gives five options for the assessment of environmental impacts of controlled actions, including environmental impact statements. There are further opportunities for public submissions in the assessment process.

Once the proposal has been assessed, the minister decides whether to approve or refuse it. This involves assessment of the potential impacts of the action against relevant provisions of

the EPBC Act and international legal obligations (e.g. protecting World Heritage areas). Economic and social considerations are also relevant (ss 136–140A EPBC Act).

Bilateral agreements

The EPBC Act provides a potential mechanism to link Commonwealth and state assessment and approval processes known as bilateral agreements. These accredit state and territory assessment and approval processes as assessment and approval processes under the EPBC Act thus avoiding duplication.

An assessment bilateral agreement is in place for Queensland. It allows the SDPWO Act, the Planning Act or the Environmental Protection Act to be substituted for environmental impact assessment. Under this agreement the Commonwealth Environment Minister retains the final decision-making power.

A different type of bilateral agreement known as an 'approval bilateral' allows the Commonwealth to delegate the final decision-making power to the state government. No approval bilaterals are currently in force under the Act.

When to make a referral

If a person is proposing to carry out an action that was not fully approved at 16 July 2000 and that has, will have or is likely to have a significant impact on a matter of national environmental significance or a Commonwealth area, they must refer it to the Commonwealth Environment Minister (see the public notices for information about referrals).

How to prevent an offence against the EPBC Act

If a person believes that a development proposed by another person (including a government agency) may have a significant impact on a matter of national environmental significance, they can contact the Commonwealth Department of Climate Change, Energy, the Environment and Water, which will then investigate the matter and may request the proponent to refer the proposed action under the EPBC Act. Members of the public also have a right to seek an injunction under s 475 of the EPBC Act to restrain an offence against the Act.

Miscellaneous Development

Airports

The *Airports Act 1996* (Cth) regulates major airports. At these airports, the *Airports (Environment Protection) Regulations 1997* (Cth) regulate noise pollution and impose a general environmental duty on operators to take all reasonable and practicable measures to prevent pollution, offensive noise and adverse impacts to ecosystems and cultural heritage.

For other airports, Queensland laws such as the Planning Act and the Environmental Protection Act apply.

Aquaculture

Aquaculture development is regulated at a state level by local government under the Planning Act. Environmental impacts of aquaculture as an environmentally relevant activity is regulated by the Department of Environment and Science under the Environmental Protection Act and Planning Act, and disease and escape of aquaculture product issues are regulated by the Department of Agriculture and Fisheries under the *Fisheries Act 1994* (Qld).

Aquaculture development adjacent to the Great Barrier Reef World Heritage Area is regulated at a Commonwealth level by the Great Barrier Reef Marine Park Authority under the *Great Barrier Reef Marine Park Regulations 2019* (Cth), and if the proposed development is a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) it is regulated under that Act.

Ports

Major ports are managed by port authorities and are largely exempt from local government planning schemes. Port authorities control development on strategic port land under a land use plan prepared under the *Transport Infrastructure Act 1994* (Qld) and integrated into the development assessment under the Planning Act. Noise, dust, odour and other forms of environmental harm and environmental nuisance are regulated under the Environmental Protection Act.

The *Sustainable Ports Development Act 2015* (Qld) restricts port expansions, dredging and disposal of dredge spoil.

Pollution from ships in ports is regulated under the *Transport Operations (Marine Pollution) Act 1995* (Qld), which is administered by the Department of Transport and Main Roads.

Roads

The Department of Transport and Main Roads plans, constructs and manages main roads and highways under the *Transport Infrastructure Act 1994* (Qld) and the *Transport Planning and Coordination Act 1994* (Qld).

Local governments control and maintain local roads. Noise, dust, odour and other forms of environmental nuisance from road construction are regulated under the Environmental Protection Act.

Coordinated projects

The SDPWO Act provides a general power to the state government's Coordinator-General to facilitate development projects and to require an environmental impact statement (EIS). This is the main environmental impact assessment process in Queensland used for the largest and most damaging projects.

The EIS process begins when the Coordinator-General declares a project to be a 'coordinated project' (s 26 SDPWO Act). Public notice must be given of the draft terms of reference for the EIS, and during this time the public may make submissions. The proponent

must then prepare the EIS to address the terms of reference. The public is given a further opportunity to make comments on the draft EIS before it is finalised. The Coordinator-General must then prepare a report evaluating the EIS, the submissions and any other additional information from the proponent and give a copy of the report to the proponent. This EIS process does not itself mean approval or refusal of the development, but is used in other assessment processes such as the Planning Act.

Mining

Mining and petroleum (including coal seam gas) development in Queensland is regulated separately from other forms of land development and are not subject to the Planning Act.

Since 2000, there has been an attempt to separate the promotion and regulation of mining within the state government. Issues associated with:

- ownership, access to and use of land (tenure), and payments to the state government for extraction of minerals (royalties) are regulated under the Mineral Resources Act by the Department of Resources
- environmental protection associated with mining is regulated under the Environmental Protection Act by the Department of Environment and Science.

The Coordinator-General has a dual role of facilitating and assessing large mines as coordinated projects under the SDPWO Act.

A regional interests development approval (RIDA) may be required under the *Regional Planning Interests Act 2014* (Qld) when a resource or regulated activity is proposed to be located in an area of regional interest such as areas mapped as high-quality agricultural areas or strategic cropping lands.

Overarching the state system to some extent, the Commonwealth regulates mining and petroleum activities that have, will have or are likely to have a significant impact on a matter of national environmental significance under the EPBC Act (see the 'Environment Protection and Biodiversity Conservation Act' page).

For more information see the Environmental Defenders Office's *Mining and Coal Seam Gas Law in Queensland: A guide for the community*.

Mines and quarries

The legal system in Queensland distinguishes between activities done for the purpose of winning a mineral from the ground and activities that merely involve extracting things from the ground for their non-mineral properties.

'Minerals' are defined broadly under the Mineral Resources Act (s 6). Any activity done for the purpose of winning a mineral from the ground is regarded as mining and regulated under the mining regime. Seeking to extract minerals such as gold, silver and coal is regarded as 'mining' and regulated under the Mineral Resources Act.

In contrast, activities that involve extracting soil, sand, gravel or rock not for the purpose of obtaining minerals are regulated under the Planning Act.

Such activities are commonly called quarries or extractive industries. Rock, gravel and sand quarries are regulated by local governments under the Planning Act and by the Department of Environment and Science under the Environmental Protection Act.

Mining tenement

Miners must hold an appropriate form of authority or tenement under the Mineral Resources Act for exploration and mining. These provide the miner with access rights (even if the owner of the land does not agree to grant access) and other rights to use land in accordance with the tenement.

There are five types of mining tenement provided in s 6D of the Mineral Resources Act:

- prospecting permit
- mining claim
- exploration permit
- mineral development licence
- mining lease.

Prospecting permits and mining claims generally (though not always) apply to relatively small-scale mining projects such as mining by hand or with limited machinery.

Large-scale mining typically involves long-term projects that proceed from exploration to extraction, and the regulatory regime reflects these stages.

An exploration permit allows a mining company to access a large area to explore for minerals. The environmental impacts at this stage are relatively minor. If minerals are located that cannot be economically recovered, the mining company may apply for a mineral development licence to protect its rights to develop the mineral in the future and to prevent others from applying for a mining lease for the same area. Once the miner believes it is economical to begin mining, an application for a mining lease can be made.

Operating in parallel to the mining tenure and royalty system, the Environmental Protection Act provides a system for assessing and regulating the environmental impacts of mining. Under this Act mining is regulated as an environmentally relevant activity (ERA) and an environmental authority is required for each of the five mining tenements identified above.

For a full-scale mining project to occur, a mining lease must be granted under the Mineral Resources Act and an environmental authority must be granted under the Environmental Protection Act.

Standard, variation and site-specific applications

Applications for an environmental authority for a mining or petroleum activity are divided into three different types:

- standard applications—when an applicant can meet the eligibility criteria and all the standard conditions associated with an ERA. This application type is generally restricted to low-risk activities and are not publicly notified except for applications involving a mining lease (s 149 Environmental Protection Act)
- variation applications—when an applicant can meet the eligibility criteria but needs to change one or more of the standard conditions for an ERA
- site-specific applications—when an applicant does not meet the eligibility criteria for the ERA, where there are no eligibility criteria in existence or the activity is part of a coordinated project being assessed by the Coordinator-General. These applications are subject to a whole-of-project assessment and include public notification. Standard conditions may be used in these approvals, however, it is likely that site-specific conditions will also be imposed.

The eligibility criteria and standard conditions are available online from the Department of Environment and Science.

There are potentially four stages for applications for an environmental authority for a mining or petroleum activity. These are set out in ch 5 of the Environmental Protection Act:

- application stage
- information stage
- notification stage
- decision stage.

The information stage only applies to variation applications and site-specific applications (s 138).

The notification stage does not apply to a standard application except if it involves a mining lease (s 149).

The notification stage applies to site-specific applications for a mining lease, geothermal activity, greenhouse gas storage or petroleum activity (s 149).

Environmental impact statement requirements for mining activities

Not all mining activities undergo a formal Environmental Impact Statement (EIS) process, but large mines generally will during the application process for a mining lease.

Mines that are declared by the Coordinator-General to be coordinated projects under the SDPWO Act undergo an EIS under that Act. The EIS is then used in assessing the application for a mining lease under the Mineral Resources Act and the application for an environmental authority under the Environmental Protection Act.

Mines that are not declared to be coordinated projects but involve variation applications and site-specific applications may also undergo an EIS under ch 3 of the Environmental Protection Act (s 143) but rarely do in practice.

Generally, the EIS process involves draft terms of reference for the project being publicly notified, the preparation of the draft EIS, public notification of the draft EIS and preparation of a supplementary EIS in light of the public comments received.

Public notice

There are a variety of requirements for notifying landholders, whose land is subject to a mining application, and the general public about such applications and any objection rights.

Exploration for minerals and mining can occur on virtually any land in Queensland without the consent of the owner or leaseholder. However, landholders and others have certain rights to object to mining activities. Landholders affected by a mine generally also have a right to compensation for the loss of use of their land.

The process for public notification and objection to a mining lease and environmental authority involves several interrelated steps. When an application for a mining lease is lodged with the Mining Registrar under the Mineral Resources Act and found to comply with the Act, a certificate of application is issued and given to each owner of the land that is the subject of the proposed mining lease and any land necessary for access to it (s 252 Mineral Resources Act). It may not be publicly notified at this stage. If the mine is required to undergo an EIS, it will generally be publicly notified at the stage of preparing the draft terms of reference and when the EIS is on public display.

Notification of landholders and the public of a mining lease application, the stages of an EIS, a draft environmental authority for a mining lease, technical reports about the mine or prepared as part of the EIS, and objection rights can occur in one or more of the following ways:

- posting a notice on a post (known as the ‘datum post’) on the land that is the subject of the mining lease
- giving a notice directly to the owner of the land, other parties holding mining tenures over the land and the local government
- advertising in an approved newspaper circulating in the area of the land for a specified period such as at least 21 days before the last objection day
- advertising on the Coordinator-General’s website
- advertising on the Department of Environment and Science website
- providing access to relevant documents on a public website created by the miner.

Public searches of resource authorities under the minerals Resources Act can be made at the MyMinesOnline website.

Objections

Any person may object to an application for a mining lease under the Mineral Resources Act and to an application for an environmental authority under the Environmental Protection Act.

To provide a right of appeal to the Land Court, an objection or submission must be properly made during the objection period or the submission period. If a mining lease application undergoes an EIS, the objection period will generally occur immediately following the completion of the EIS. At this point the relevant Mining Registrar issues a certificate of public notice under s 252A of the Mineral Resources Act, which fixes the last objection day for lodging objections to the application.

During the objection period, copies of the application documents are available for inspection at the relevant Mining Registry and the Department of Environment and Science offices. To be properly made, an objection to the grant of a mining lease under the Mineral Resources Act must:

- be made on or before the last objection day to the chief executive administering the Act (this is normally done by lodging the objection at the relevant Mining Registry and departmental office)
- be in the approved form (this is available from the Mining Registrar or from the Department of Resources)
- state the grounds of the objection and the facts and circumstances relied on by the objector in support of those grounds
- be served on the applicant for the mining lease by providing a copy of the objection on or before the last objection day (s 260 Mineral Resources Act).

The grounds of an objection to a mining lease should be framed around the considerations specified in s 269(4) of the Mineral Resources Act. These include whether the land is mineralised, whether the mining will conform with sound land use management, whether any adverse environmental impact will be caused by the mine, and whether the public right and interest will be prejudiced.

A submission on the grant of an environmental authority for a mining lease under the Environmental Protection Act is a prelude to obtaining a right of objection. A submission must:

- be in writing or made electronically
- state the name and address of each submitter
- be made to the Department of Environment and Heritage Protection
- be received on or before the last day of the submission period

- state the grounds of the submission and the facts and circumstances relied on in support of the grounds (s 161 Environmental Protection Act).

If the Department of Environment and Science decides to approve the application to an environmental authority for a mine, it must notify the applicant and any submitter and provide a copy of the draft environmental authority (s 181 Environmental Protection Act).

A submitter may, by written notice (the objection notice) to the department, request that its submission be taken to be an objection to the application. The objection notice must:

- be given to the department within 20 business days after the notice under s 181(1) is given
- state the grounds for the objection (s 182 Environmental Protection Act).

The grounds of the objection may simply repeat the grounds stated in the earlier submission or they may include other grounds.

The grounds of a submission or an objection to an application for an environmental authority should be framed around the considerations specified in the Environmental Protection Act and its objects. The considerations are contained in ss 175, 176 and 191 of the Environmental Protection Act. The considerations for the grant of an environmental authority include the 'standard criteria' listed in the dictionary under environmental protection such as the character, resilience and values of the receiving environment, and the public interest. While the environmental harm that the mine will cause is not listed in the criteria, this matter is inherent in the scheme of the Act and should be addressed in any submission.

Great care should be taken when writing the grounds of the objection, and the facts and circumstances relied upon. Once the objection period ends, no changes to the grounds of the objection are allowed, and if the objection proceeds to a hearing in the Land Court, a strict approach is taken to this so that changes cannot be made to an objection even if further information comes to light.

A person who has lodged a properly made objection may elect to be heard and to call expert evidence in an objections hearing in the Land Court. The court hears the application and considers any objections to it before making recommendations to:

- the Minister for Mines regarding the application for a mining lease (s 269 Mineral Resources Act)
- the Administering Authority (the Chief Executive of the Department of Environment and Heritage) for the Environmental Protection Act regarding the environmental authority (s 191 Environmental Protection Act).

The Minister for Mines and the Administering Authority are not bound by the recommendations of the Land Court, but its recommendations are normally accepted.

The final decisions to grant a mining lease or an environmental authority are subject to judicial review under the *Judicial Review Act 1991* (Qld) only. There is no appeal of the

merits of these decisions to a court (note that this is different to the process for non-mining development under the Planning Act which allows appeal to the Planning and Environment Court).

A case study of an objection to a mining lease under the Mineral Resources Act and a submission and later objection under the new Environmental Protection Act process and an objection hearing in the Land Court is available online for the Carmichael Coal Mine.

Further guidance on objecting to a mine and appealing to the Land Court is provided in the Environmental Defenders Office handbook *Mining and Coal Seam Gas Law in Queensland: A guide for the community*.

Petroleum (Including Coal Seam Gas)

The *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (Petroleum and Gas Act) regulates the tenure, royalty and safety aspects of petroleum exploration, extraction and pipelines. The *Petroleum Act 1923* (Qld) continues to regulate some petroleum licences granted prior to 1993 due to native title issues.

Petroleum is defined to include any hydrocarbon in gas or liquid form, including products extracted from solids such as coal or oil shale. Therefore, in addition to liquid petroleum products such as oil, this regime regulates gas production, including coal seam gas (CSG).

There are two main tenements that provide rights to access land to explore for petroleum and to produce petroleum. An authority to prospect (ATP) provides rights of access to land for the purpose of exploring for petroleum such as by exploratory drilling. A petroleum lease is required for production of petroleum.

As for mining, the environmental protection aspects of petroleum extraction are regulated under the Environmental Protection Act. Exploration and production of petroleum requires an environmental authority under ch 5 of the Environmental Protection Act. There are three different types of application: standard application, variation application and site-specific application (see Standard, variation and site-specific applications). The eligibility criteria and standard conditions are available online at the Department of Environment and Science.

Making submissions on a petroleum application

There are no submission rights regarding the grant of an authority to prospect or a petroleum lease under the Petroleum and Gas Act.

Opportunities for landholders and members of the public to make submissions are generally limited to site-specific applications for an environmental authority under the Environmental Protection Act. There are few rights to make submissions for standard applications. Submissions can be made during any environmental impact statement (EIS) process when the draft terms of reference and EIS are publicly notified.

Applications for site-specific applications for environmental authorities for a petroleum lease and any associated EIS can be publicly notified in a variety of ways, including:

- advertising in a newspaper circulating generally in the area where the activity is proposed to be carried out for a specified period
- advertising on the Coordinator-General's website
- advertising on the Department of Environment and Science website
- providing access to relevant documents on a public website created by the applicant.

A submission on the grant of an environmental authority for a petroleum activity must:

- be in writing or made electronically
- state the name and address of each submitter
- be made to the Department of Environment and Heritage Protection
- be received on or before the last day of the submission period
- state the grounds of the submission and the facts and circumstances relied on in support of the grounds (s 161 Environmental Protection Act).

If an EIS for the mine was prepared under ch 3 of the Environmental Protection Act, a properly made submission about the EIS is taken to be a properly made submission about the application (s 150 Environmental Protection Act).

Review and appeals

Under the Environmental Protection Act, a submitter on an application for a site-specific application for an environmental authority for a petroleum activity has a right to seek internal review by the department and appeal to the Land Court as a dissatisfied person if the application is approved (s 520(2)).

An internal review must be made in the approved form within 10 business days after notice of the original decision is given (s 521).

A submitter can also appeal to the Land Court (s 524).

The appeal must be made within 22 business days after the appellant receives notice of the decision, unless the court allows a longer time (s 525).

The appeal is by way of rehearing, unaffected by the review decision (s 527) and the appellant may call expert evidence to support the appeal.

Costs may be awarded if the appeal is unsuccessful.

Entry requirements and compensation

Before entering private land to carry out authorised activities, resource companies must comply with land access laws and follow set procedures to gain access.

Land access and conduct requirements are set out in the:

- *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld)

- *Mineral and Energy Resources (Common Provisions) Regulation 2016* (Qld)
- Land Access Code
- *A Guide to Land Access in Queensland* published by the former Department of Natural Resources, Mines and Energy (now Department of Resources).

The requirements vary depending on whether the activities being carried out are preliminary activities that have no impact or only a minor impact on the land, or more advanced activities. They can also vary depending on whether the landholder is the owner or occupier of the land.

There are also special requirements that restrict access around certain buildings, structures and areas.

Access for resource activities, including CSG, are classified in three phases:

1. preliminary activities such as walking the area, taking soil samples or survey pegging (with minimal impact on landholders)
2. advanced activities such as infrastructure construction (with longer-term and/or extensive impact on landholders)
3. decommissioning activities such as rehabilitation of wells or pipelines.

An onshore gas operator accessing private land to undertake 'advanced activities', must first notify the landowner and enter into one of the following land access agreements with them:

- a conduct and compensation agreement (CCA). This relates to the proposed advanced activities, conduct for the proposed activities to be undertaken and, where there is impact on the landholder, compensation arrangements for those activities
- deferral agreement. This allows for a CCA to be entered into at a later date and after the resource company has accessed the land to undertake advanced activities
- opt-out agreement. This provides a legally binding agreement between a landholder and a resource company where the landholder is agreeing to opt out of negotiating a CCA or a deferral agreement.

As at 31 March 2019, a total of 4746 CCAs had been negotiated between landholders and gas companies.

Many landholders have also negotiated in-kind outcomes such as new fencing, roads, grids, sale of gravel and water, and have also gained access to treated CSG water for agriculture in some areas.

The Queensland Gasfields Commission has further explanations of access and compensation laws and policies. The commission publishes a comprehensive guide to access and conduct requirements in *The Gas Guide*.

Further guidance on making submissions and appealing against a petroleum activity is provided in the Environmental Defenders Office's handbook *Mining and Coal Seam Gas Law in Queensland: A guide for the community*.

Offshore Minerals and Petroleum

Offshore mineral and petroleum exploration and mining are regulated under a range of state and Commonwealth Acts including the:

- *Offshore Minerals Act 1998* (Qld)
- *Petroleum (Submerged Lands) Act 1982* (Qld)
- *Offshore Minerals Act 1994* (Cth)
- *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

Petroleum and gas exploration and extraction is prohibited in the Great Barrier Reef Marine Park and therefore excludes most of the eastern Queensland coastline from such development.

Vegetation Management

Major vegetation management laws

The regulatory framework for vegetation management is provided by the *Vegetation Management Act 1999* (Qld) (Vegetation Management Act) and the Planning Act.

A system for classifying vegetation known as regional ecosystems (REs) is the basis for vegetation management in Queensland under the Vegetation Management Act. Under this system, the state is divided into 13 bioregions based on broad landscape patterns that reflect the major underlying geology, climate patterns and broad groupings of plants and animals. Regional ecosystems are vegetation communities associated with particular landforms within each bioregion. An RE is assigned a unique three-digit code reflecting its bioregion, land zone and dominant vegetation.

The Queensland Herbarium has mapped REs using satellite imagery, aerial photography and on-ground studies. Regulated vegetation management maps show what remnant vegetation remains throughout the state.

The conservation status of each RE is based on its current extent in a bioregion and is classified under the *Vegetation Management Regulation 2012* (Qld) as:

- endangered—if less than 10% or 10 to 30% of the pre-clearing extent remains (if the area of remnant vegetation is less than 10 000 hectares)
- of concern—if 10 to 30% or more than 30% of the pre-clearing extent remains (if the area of remnant vegetation is less than 10 000 hectares)

- least concern—if more than 30% of the pre-clearing extent remains (if the area of remnant vegetation is more than 10 000 hectares).

A wide range of operational works that is clearing of native vegetation is made prohibited development and assessable development under sch 10, pt 3 of the Planning Regulation. Exceptions exist to cover clearing necessary to build a single residence, for essential management (e.g. establishing a fire break) or to protect people or property (sch 21). Unless it is allowed by one of these exceptions, clearing of native vegetation on freehold and leasehold land without a development permit under the Planning Act is a development offence.

Forestry

The *Forestry Act 1959* (Qld) establishes a system of management for forest resources on Crown land such as state forests, timber reserves and forest entitlement areas, to ensure a continuous supply of timber and associated products, and to protect watersheds.

Marine plants

The *Fisheries Act 1994* (Qld) prohibits the removal, destruction or damage of plants in tidal areas (marine plants) such as mangroves or vegetation in a fisheries habitat area without a permit or approval under the Act (ss 122–123).

Removing, destroying or damaging marine plants may also be assessable development under the Planning Act.

Vegetation subject to local law

Many local governments have passed local laws to regulate vegetation management under the *Local Government Act 2009* (Qld). Vegetation subject to local law cannot be destroyed or interfered with without approval of the council. Information on local laws regulating vegetation management is available from local councils and online.

Matters of national environmental significance

A person must not clear vegetation that has, will have or is likely to have a significant impact on a matter of national environmental significance unless approved under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

Matters of national environmental significance include World Heritage areas, internationally important (Ramsar) wetlands, listed threatened species, ecological communities and migratory species that can be found on any land including private property.

Fire

The *Fire and Emergency Services Act 1990* (Qld) regulates the lighting and control of fires, which is an important component of vegetation management and nature conservation. Generally, an open fire that is greater than two metres in any direction requires a permit from the Queensland Fire Service or a local fire warden.

An occupier of land also has an obligation to take reasonable steps to put out or control fires on that land (regardless of what caused the fire) and notify the fire brigade or police of the fire. Local fire bans may also be issued.

Nature Conservation

In reality, the entire framework of laws for planning and development, vegetation management, mining, water, fisheries and environmental harm are critical for nature conservation.

Protected areas and protected wildlife

The Nature Conservation Act provides the framework for the creation and management of protected areas including national parks, conservation parks, resources reserves, nature refuges, coordinated conservation areas, wilderness areas, world heritage management areas, international agreement areas and protection of native species.

The Regulations under this Act provide detailed rules regulating activities in protected areas and a permit and licensing system for the taking or keeping of native wildlife. These regulations include the *Nature Conservation (Protected Areas Management) Regulation 2017* (Qld) and the *Nature Conservation (Animals) Regulation 2020* Qld).

Nature conservation plans, such as the Nature Conservation (Dugong) Conservation Plan 1999 (Qld), regulate the conservation and harvesting of particular species or groups of protected wildlife (for more threatened species information see the Department of Environment and Science website).

National parks and other protected areas

National parks cover only around 8% of Queensland but provide the most comprehensive and important system of terrestrial protected areas in the state.

National parks and other protected areas are protected under the Nature Conservation Act and associated Regulations. National parks are owned by the state government and managed for nature conservation. They are managed by the Queensland Parks and Wildlife Service within the Department of Environment and Science.

There are some basic rules for national parks:

- All animals and plants (both alive and dead) in national parks are protected and may not be killed, harmed or removed.
- All cultural features in national parks are protected.
- Camping or carrying on any commercial activities in any national park or protected area without a permit is not allowed.
- Animals cannot be taken into a national park or any other protected area (there are some limited exceptions to this such as guide dogs).

- Feeding of native animals in a national park or other protected area is not allowed.
- Mining is prohibited in national parks.
- The economic use of parks for activities like grazing and beekeeping is controlled by permits.

Marine parks

The most famous marine park in Queensland is the Great Barrier Reef (GBR) Marine Park, which was created by the Commonwealth Government under the *Great Barrier Reef Marine Park Act 1975* (Cth).

The Great Barrier Reef Marine Park Authority is responsible for the GBR Marine Park in conjunction with numerous state departments such as the Queensland Boating and Fisheries Patrol within the Department of Agriculture and Fisheries.

Other marine parks in Queensland are created under the *Marine Parks Act 2004* (Qld) including the Moreton Bay Marine Park.

Protection of native wildlife and threatened species

There are special rules imposed by the Nature Conservation Act to protect native wildlife outside national parks and other protected areas:

- All native mammals (except dingoes), reptiles, amphibians, birds, some butterflies and some native plants are protected wildlife. It is unlawful to take, kill, injure or trap protected wildlife unless authorised (s 88).
- A permit or licence is required for the harvesting, taking, keeping or display of protected wildlife.
- A special licensing system for native birds applies.
- Licences are required to take, keep or sell a limited number of protected plants.

Some plant and animal species are declining in numbers and are at risk of extinction due to a range of threatening processes. These species may be listed as threatened species at state, national and international levels.

At a state level in Queensland, as at 31 August 2020, there were 1000 species (230 animals and 770 plants) listed as threatened under the Nature Conservation Act.

Of these species, about 400 are listed as threatened nationally under the EPBC Act. The EPBC Act also provides for the listing and protection of threatened ecological communities and migratory species at a national level.

World heritage areas

World heritage areas are recognised places of outstanding universal value listed at an international level under the World Heritage Convention. Queensland has five world heritage areas:

- Great Barrier Reef World Heritage Area
- Wet Tropics World Heritage Area
- Australian Fossil Mammal Sites (Riversleigh) (located north-west of Mt Isa)
- Fraser Island World Heritage Area
- Gondwana Rainforest Reserves of Australia World Heritage Area (rainforests in south-eastern Queensland and northern New South Wales, including Lamington National Park).

Virtually all world heritage areas are also protected as national parks or marine parks, so the status as a world heritage area is an additional level of protection to an already highly protected area.

Nature refuges and conservation agreements

People who wish to conserve biodiversity or cultural heritage on their private land can volunteer their land to be nature refuges under the Nature Conservation Act and enter into conservation agreements under the EPBC Act.

These agreements bind future owners of the land to the conservation agreements' terms. Landowners entering into such an agreement may obtain assistance from local, state or Commonwealth governments in managing the land.

Biosecurity, Weeds, Pests and Invasive Species

The *Biosecurity Act 2014* (Qld) (Biosecurity Act) and the *Biosecurity Regulation 2016* (Qld) (Biosecurity Regulation) protect Queensland from biosecurity threats such as weeds, pests and other invasive species that can harm biodiversity, crops, livestock and human health.

Two concepts underpin the new system:

- biosecurity matter
- carriers.

A 'biosecurity matter' includes things that may pose a risk to the biosecurity of Queensland. Biosecurity matter includes plants, pests and pathogens, invasive animals, animal diseases and contaminants.

The Biosecurity Act defines two types of biosecurity matter:

- prohibited matter
- restricted matter.

Prohibited matter does not occur in Queensland, and restricted matter may occur in Queensland but is subject to strict controls.

Prohibited matter can be diseases, viruses or parasites, invasive animals and plants (e.g. pest animal or weed), exotic marine animals, plants or diseases, noxious fish or insect pests.

Schedule 1 of the Biosecurity Act provides long lists of prohibited matters such as highly pathogenic avian influenza.

There are seven categories of restricted matter. Each category places restrictions on the dealings with the biosecurity matter or requires actions to be taken to minimise the spread and adverse impact of the biosecurity matter.

Category 1 and 2 restricted matters have specific urgent reporting requirements. These categories must be reported if the restricted matter is in or on a carrier, in your possession or under your control, or at a place where you are the occupier and you are not aware that an appropriately authorised officer has been advised or you do not possess a permit for the restricted matter.

An example of a category 1 restricted matter is red imported fire ants, an invasive species from South America that was detected in Brisbane in 2001 and has been the subject of a large eradication program.

A 'carrier' is a thing that can carry prohibited or restricted biosecurity matter (s 17 Biosecurity Act).

For instance, soil and garden mulch can be a carrier for restricted matters such as red imported fire ants and restrictions apply to movement of these items within or out of biosecurity zones declared under the Biosecurity Act. Fire ant biosecurity zones have been declared in South East Queensland.

There is a general biosecurity obligation to take all reasonable and practical measures to prevent or minimise the biosecurity risk (s 23 Biosecurity Act).

It is illegal to deal with anything classified as prohibited matter, and conditions apply to dealings with restricted matter.

Biosecurity Queensland has published a Biosecurity Manual explaining it.

The Australian Government Department of Agriculture, Forestry and Fisheries is responsible for quarantine and other biosecurity management at a federal level.

Water

Water planning and use

The *Water Act 2000* (Qld) (Water Act) provides a framework for the planning, allocation and use of surface water and groundwater in Queensland, including regulating major water impoundments (e.g. dams and weirs) and extraction through pumping for irrigation and other uses.

In the south-western part of Queensland in the Murray-Darling Basin, the *Water Act 2007* (Cth) provides an additional layer of Commonwealth regulation for the management of the water resources.

The Water Act provides a system of interrelated plans, licences and permits for the regulation of in-stream (watercourses, lakes and springs), overland water flow and groundwater. These include:

- water plans—the most important plans for water management in Queensland. They are prepared through a consultative process generally on a catchment-by-catchment basis. Water plan areas exist for many catchments in the state including the Fitzroy River and Burnett River
- water-use plans—prepared for areas at risk of land or water degradation (s 60)
- water licences—authorise the taking of water from a location or the interference with water at a location (s 106).

The Water Act also controls water use and activities that may impact on water resources and:

- prohibits quarrying or placing fill in a watercourse, lake or spring without a permit (ss 218, 814)
- regulates special works (e.g. watercourse diversion or reclamation works), dams, creation and management of irrigation areas, and water supply and drainage
- prohibits diversion of water and construction of facilities for supply, drainage or flood mitigation
- regulates development in declared catchment areas that may impact on water quality in major water storages, in particular subdivision of land and sewage disposal
- regulates development of referable dams
- provides for the regulation of water and sewerage services and the establishment of water authorities.

The Water Act is partially integrated into the development assessment process under the Planning Act. For extraction of water from a watercourse and other matters regulated under the Water Act, a person requires:

- a water licence granted under the Water Act
- a development permit for use of water that is assessable development under sch 10, pt 19 of the Planning Regulation.

Schedule 10, pt 19 makes some development involving taking or interfering with water assessable development. This includes:

- all work in a watercourse, lake or spring that involves taking or interfering with water (e.g. a pump, gravity diversion, stream redirection, weir or dam)
- artesian and sub-artesian bores.

An owner of land adjoining a watercourse, lake or spring may take water for stock or domestic purposes but this is subject to self-assessment under the Planning Act and the Water Act.

Further information about controls under the Water Act is available from the Department of Resources.

Use of surface and groundwater for mining, and petroleum and coal seam gas extraction is exempt development under the Planning Act. These activities are regulated by the Mineral Resources Act, the Petroleum and Gas Act and the Environmental Protection Act. Coal seam gas and mining companies have unlimited rights to extract groundwater.

Basic water rights

Government approval is required for most things constructed or installed to capture or extract surface or ground water, except in limited situations. In contrast, taking water by hand is not generally regulated. No government approval is required to take water from any natural stream, river or lake:

- for personal use (e.g. drinking) if taken without pumps or construction of facilities
- in an emergency situation such as for fighting a fire that threatens to destroy a house
- for camping purposes if taken without pumps or construction of facilities
- for watering travelling stock if taken without pumps or construction of facilities.

However, these basic water rights may be limited by notice of a water supply emergency or moratorium during water shortages. Water use may also be restricted if the water is polluted.

Water use and supply for drinking, household and industrial uses in areas connected to the town water supply is largely controlled by local governments and may be subject to water restrictions and charges.

Drought restrictions

Water restrictions can be imposed under the Water Act in times of water shortage. Moratorium notices are available from the Department of Resources.

Water pollution

Water pollution is controlled under the Environmental Protection Act.

Fisheries

The Fisheries Act provides the state's legislative framework for the regulation of commercial fishing, recreational fishing, indigenous fishing, coastal areas that are important as fisheries habitat and marine plants.

The Fisheries Act provides a range of mechanisms aimed at the sustainable management of fisheries including management plans, quotas, offences, licences and declarations of closed seasons, closed waters and fisheries habitat areas.

The *Fisheries (General) Regulation 2019* (Qld) and the *Fisheries (Commercial Fisheries) Regulation 2019* (Qld) provide technical and geographic detail for these mechanisms.

Management plans such as the *Fisheries (East Coast Trawl) Management Plan 2010* (Qld) (Fisheries Management Plan) are subordinate legislation.

The Department of Agriculture and Fisheries administers the Fisheries Act and provides detailed information about fisheries regulations.

Some areas and fisheries are also regulated under the *Fisheries Management Act 1991* (Cth) (e.g. tuna), and fishing in the Torres Strait is regulated under the *Torres Strait Fisheries Act 1984* (Cth).

Commercial fishing

Commercial fishing is searching for or taking fish, shellfish, crabs, lobsters, prawns, molluscs and other marine or freshwater organisms for the purpose of sale.

Commercial fishing requires a licence and is subject to special controls on fishing effort and equipment. For instance, under the Fisheries Management Plan, closed seasons are specified and trawl nets must be fitted with specified turtle-excluder devices and other by-catch reduction devices.

Detailed information on commercial fishing rules are available from the Department of Agriculture and Fisheries.

Recreational fishing

Recreational fishing is searching for or taking fish, shellfish, crabs, lobsters, prawns, molluscs and other marine or freshwater organisms not for the purpose of sale or Indigenous use.

No licence is required for recreational fishing in Queensland tidal waters, but recreational fishers may have to obtain permits to fish in some dams. Recreational fishing is subject to a number of restrictions, including:

- size limits—minimum and/or maximum legal size limits apply for certain species
- bag limits—the total number of fish of a species that a person may possess at any one time
- closed seasons—no-one can take or possess some species during a closed season for the species
- closed waters and protected areas—some waters and areas are closed for conservation purposes, to protect fish stocks or fish habitat (e.g. green zones in the

Great Barrier Reef Marine Park are no-take zones where both commercial and recreational fishing is prohibited). Rivers and lakes may also have closed areas

- gear restrictions—restrictions on certain gear types (e.g. maximum net lengths)
- leaving skin on fish—to combat illegal fishing and to assist inspections by Boating and Fisheries officers, skin must not be removed from any fish (or fillets) on board a boat. Once fish are brought ashore, the skin may be removed, but the fish must not be taken back on board a boat
- crab meat—to combat illegal fishing, a person must not possess mud crabs or blue swimmer crabs with the carapace (shell) missing, unless for immediate consumption
- noxious fish—it is illegal to possess or keep, hatch, rear, sell, consign or place in any container any noxious fish. Tilapia, carp and gambusia are some of the declared noxious fish. They must not be used as bait, either live or dead. All noxious fish when caught should be destroyed and must not be returned to the water
- protected species—some marine species (e.g. dugongs) are fully protected and must not be taken
- protected sexes—some sexes of certain species, notably female mud crabs and sand (blue swimmer) crabs, are fully protected by law and may not be deliberately killed or kept
- miscellaneous prohibitions—there are also a range of miscellaneous activities that are illegal throughout Queensland, for instance jagging or foul-hooking fish, using explosives, poisons or electrical devices to take fish, and collecting of coral without lawful authority.

Environmental Harm

The Environmental Protection Act provides a general system of offences for causing unlawful, serious or material environmental harm or an environmental nuisance. To understand these offences, it is necessary to understand a number of key definitions in the Act:

- An environmental value is a quality or physical characteristic of the environment that is conducive to ecological health, or public amenity or safety (or declared under an environmental protection policy) (s 9).
- Environmental harm is any adverse effect on an environmental value (s 14).
- Environmental nuisance is any unreasonable interference or likely interference with an environmental value caused by (s 15):
- noise, dust, odour or light
- an unhealthy, offensive or unsightly condition because of contamination

- another way prescribed by the Environmental Protection Regulation.
- Material environmental harm is environmental harm that:
    - is not trivial or negligible in nature, extent or context
    - causes $5000 to $50 000 damage to property
    - costs $5000 to $50 000 to prevent or minimise, and to rehabilitate or restore the environment (s 16).
- Serious environmental harm is environmental harm that causes actual or potential harm to environmental values that:
    - is irreversible, of high impact or widespread
    - causes actual or potential harm to environmental values of an area of high conservation value or special significance
    - causes greater than $50 000 damage to property
    - costs more than $50 000 to prevent or minimise, and to rehabilitate or restore the environment (s 17).

Environmental harm is a very wide concept. It can be caused by things such as tree clearing, fishing, pollution, mining, damming rivers, killing native animals, soil erosion and aircraft noise. However, the administration of the Environmental Protection Act is generally limited to regulating only contaminants and pollution rather than wider environmental harm issues (e.g. land clearing), which are regulated under other legislation.

A lecture explaining the core concepts of the Environmental Protection Act is available on Youtube.

The general environmental duty

Section 319 of the Environmental Protection Act states the general environmental duty that a person must not carry out any activity that causes or is likely to cause environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm. In deciding the measures required to be taken to comply with this duty, regard must be had to:

- the nature of the harm or potential harm
- the sensitivity of the receiving environment
- the current state of technical knowledge for the activity
- the likelihood of successful application of the different measures that might be taken
- the financial implications of the different measures as they would relate to the type of activity.

There is no positive or enforceable duty to comply with the general environmental duty in the Environmental Protection Act, but it provides a defence to liability under the Act if an activity causes an environmental nuisance or causes material or serious environmental harm.

Section 493A of the Environmental Protection Act defines unlawful environmental harm as material or serious environmental harm, or an environmental nuisance that is not specifically approved under the Environmental Protection Act (e.g. by an environmental authority) or where the general environmental duty is breached.

Duty to notify

Chapter 7, pt 1, div 2 of the Environmental Protection Act imposes a duty on people to notify the relevant administering authority as soon as they become aware that any activity causes unlawful serious or material harm. Normally this will mean notifying the Department of Environment and Science, but where a local government or other government department administers an activity, that entity should be notified. Employees who become aware of unlawful environmental harm are required to notify their employer, who is then required to notify the relevant government administrator.

Pollution

Contaminated land

Chapter 7, pt 8 of the Environmental Protection Act creates a process for identifying, recording and managing land that is affected by contaminants (i.e. natural or artificial impurities) that are likely to cause serious or material environmental harm if improperly treated, stored, disposed of or otherwise managed (i.e. land affected by hazardous contaminant). An example of a hazardous contaminant is industrial waste from a shipyard that is contaminated with heavy metals such as lead, zinc or mercury.

Schedule 3 of the Environmental Protection Act also lists certain activities that may result in land becoming contaminated by a hazardous contaminant as notifiable activities (e.g. abrasive blasting, asbestos manufacture or disposal, and tannery).

The basic obligation imposed by the contaminated land provisions in the Environmental Protection Act is that an owner or occupier of land who becomes aware that the land has been or is being contaminated with a hazardous contaminant, or on which a notifiable activity is being carried out, must notify the Department of Environment and Science.

After considering any submission made by the landowner, the department decides whether the land is contaminated by a hazardous contaminant or is being used for a notifiable activity. If either of these applies, the details of the land are entered onto the Environmental Management Register.

The department may then require a site investigation to find out the level of contamination. After the site investigation, the department may either leave the land on the register or enter the details of the land on the Contaminated Land Register, which is reserved for severely

contaminated sites that must be cleaned up (remediated) to prevent serious environmental harm occurring. The public may search both registers.

Once land is entered onto one of the registers, the owner or occupier can clean it up to have the land removed from the register (this is routinely done before sale of the land). In certain cases, the department may also require remediation of the land to be carried out by the person who released the hazardous contaminant, the owner or the relevant local government.

The department may also require a site management plan to be prepared to avoid or minimise environmental harm occurring because of the hazardous contaminant. No-one may remove, treat or dispose of contaminated soil from land recorded on the registers unless authorised under a permit issued by the department.

The owner of land that is entered on either of the registers or when certain notices have been issued under the Environmental Protection Act (e.g. a notice to prepare a site management plan) must notify a person proposing to occupy the land or to purchase the land of those contaminated land issues. Failure to do so means the occupancy agreement or contract of sale may be rescinded within certain time periods.

Contaminated land and land that is potentially contaminated is also regulated through development assessment process under the Planning Act. More information about contaminated land is available from the Department of Environment and Science.

Water pollution

Water pollution causing serious environmental harm and other specific offences for water contamination, other than pollution from ships in coastal waters, are regulated under the Environmental Protection Act.

Supporting those provisions, the *Environmental Protection (Water and Wetland Biodiversity) Policy 2019* (Qld) states that the environmental values of water include biological integrity, suitability for recreational use, suitability for minimal treatment before supply as drinking water and suitability for agricultural or industrial use. Specific offences for water contamination are stated in ch 8, pt 3C of the Environmental Protection Act and include:

- depositing a prescribed water contaminant (e.g. oil) into a water, roadside gutter or storm water drainage
- release of oil and noxious liquid substances from ships into non-coastal waters
- release of sewage from boats that have a sewage holding tank (or are required by law to have such a tank) into non-coastal waters
- disposal of rubbish from boats into non-coastal waters.

Schedule 10 of the Environmental Protection Regulation lists prescribed contaminants (e.g. oil, paint, vehicles parts or sewage) that are prohibited from being released into waters, roadside gutters or storm water drainage.

Pollution from ships

Pollution from ships is prohibited under the *Transport Operations (Marine Pollution) Act 1995* (Qld), the *Transport Infrastructure Act 1994* (Qld) and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth).

Complaints or reports about polluting activities should be made to Maritime Safety Queensland.

Air pollution

Air pollution is regulated under the Environmental Protection Act as environmental nuisance and the *Environmental Protection (Air) Policy 2019* (Qld) contains detailed air quality objectives.

Noise pollution

Unreasonable noise constitutes an environmental nuisance under the Environmental Protection Act.

The Environmental Protection Act, the Environmental Protection Regulation and the *Environmental Protection (Noise) Policy 2019* (Qld) introduced a number of specific statutory provisions for noise nuisance.

Chapter 8, pt 3B of the Environmental Protection Act creates specific offences for environmental noise. These provisions specify conditions, hours of operation and noise levels for a number of activities such as:

- building works—not to be conducted on a Sunday or public holiday, or before 6.30 am or after 6.30 pm on any other day
- lawn mowers or leaf blowers—not to be used before 8 am or after 7 pm on a Sunday or public holiday, or before 7 am or after 7 pm on any other day
- refrigeration plant—not to be operated before 7 am or after 10 pm if the noise emitted exceeds 3 dB(A) above the background levels
- indoor venues—not to create audible noise from midnight to 7 am on any day; specified limits apply for other times
- open-air events—not to create audible noise before 7 am, from 7 am to 10 pm if the noise emitted exceeds 70 dB(A) or after 10 pm if the noise exceeds 50 dB(A) or is 10 dB(A) above the background noise
- amplified devices—not to be used on a day other than a business day before 8 am or after 6 pm and before 7 am or after 10 pm on a business day
- swimming pool pumps—not to be used before 7 am or after 10 pm if the pump emits an audible noise. Exceptions apply to school pools. Limits of 5 dB(A) apply between 7 am and 7 pm, and 3 db(A) between 7 pm and 10 pm on any day.

Nuisance laws

The Environmental Protection Act provides a series of low-level offences for noise, dust, odour, fumes, ash, light and smoke nuisances. Not all nuisances will be covered, and there are specified exemptions.

For example, noise coming from music and parties continues to be governed by the Queensland Police Service.

For more information on neighbourhood nuisance problems see the Neighbourhood Disputes chapter in the *Queensland Law Handbook*.

Soil erosion

The Environmental Protection Act has also been used extensively to impose sediment and erosion controls on building sites. It requires all reasonable and practicable measures (e.g. sediment fencing and sediment basins) to be taken to prevent sediment moving into gutters, storm water drains and natural watercourses.

On-the-spot fines (penalty infringement notices) may be issued for failing to install proper sediment control measures.

Many local governments now require storm water management mechanisms (e.g. construction of artificial wetlands) as part of the development approval process under the Planning Act for new housing estates and other development.

While technically the Environmental Protection Act applies to agricultural activities, it is generally not used to control soil erosion from farms. The *Soil Conservation Act 1986* (Qld) provides a little-used framework for the management of soil erosion from agricultural land. Individual farms may voluntarily enter property management plans to provide for soil conservation, while project areas may be declared to manage soil erosion in a specified area.

Waste

The Environmental Protection Act defines waste as anything that is left over, an unwanted by-product from an industrial, commercial, domestic or other activity, or that is surplus to the industrial, commercial, domestic or other activity generating the waste (s 13). Waste may be valuable and can be a gas, liquid, solid or energy, or a combination of any of these.

Waste management in Queensland is regulated under the *Waste Reduction and Recycling Act 2011* (Qld) (WRR Act) and uses multiple strategies, concentrating on minimising waste as the first option through to recycling and waste disposal as the final option. The types of waste managed by the WRR Act include litter, domestic waste, industrial waste, medical waste and hazardous waste.

Littering

The WRR Act provides offences for littering (s 104), waste dumping (s 105) and related matters. For more information about waste and to report a personally witnessed littering or illegal dumping incident see the Department of Environment and Science website.

Hazardous waste

At a state level, the Environmental Protection Act distinguishes between two broad types of waste: general waste and regulated waste.

General waste, such as normal household rubbish and garden clippings, is disposed of through normal waste collection services (e.g. a council rubbish truck), unless it is diverted into a recycling program.

Regulated waste is defined in reg 42 of the Environmental Protection Regulation to mean commercial or industrial waste that is mentioned in sch 9.

Schedule 9 contains a long list of substances including abattoir effluent, acids and acid solutions, arsenic, asbestos, lead and tyres.

Commercially transporting regulated waste (of any amount) or transporting quantities of regulated waste of more than a certain quantity is an environmentally relevant activity and requires assessment and approval under the Environmental Protection Act.

Operating a facility for receiving and storing more than 500 tyres or other regulated waste, or for receiving and treating regulated wastes (subject to stated limited exceptions) are environmentally relevant activities. These activities require approval under the Environmental Protection Act and the Planning Act and compliance with any conditions of an approval.

The *Radiation Safety Act 1999* (Qld) deals with radioactive waste. It does not contain any provisions about the disposal of waste but regulates the possession, use, sale or transport of radioactive substances. The *Radiation Safety Regulation 2010* (Qld) deals, amongst other things, with disposal of radioactive waste.

International trade in hazardous waste both into and out of Queensland is regulated under the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth). This Act provides that the import or export of waste must be made under a permit issued by the Commonwealth and provides for large penalties for contravention of the Act, particularly when a party knowingly or recklessly trades in hazardous waste without a permit.

Ozone protection

Ozone is an atmospheric gas that is critical in reducing ultraviolet light reaching earth.

The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) provides a national system of licences and quotas to control the manufacture, use, import, export, recycling and disposal of ozone-depleting substances such as chlorofluorocarbons.

National pollutant inventory

The *National Environment Protection Council Act 1994* (Cth) is the Commonwealth limb of reciprocal legislation with all states and territories to establish the National Environment Protection Council. The council's principal function is to establish National Environment Protection Measures, which set national objectives for protecting or managing particular aspects of the environment.

These measures have already been made for ambient air quality, the National Pollutant Inventory, movement of controlled waste, used packaging materials, assessment of site contamination, diesel vehicle emissions and air toxics.

In Queensland, ch 7 (National Pollutant Inventory) of the Environmental Protection Regulation imposes requirements for certain industries and facilities to report their emissions to the National Pollutant Inventory, which is a nationwide online database on pollution emissions.

Climate Change

Climate change (or global warming) due to human activities, particularly the burning of fossil fuels producing greenhouse gases, is now recognised as a major environmental threat by all levels of government.

The United Nations Framework Convention on Climate Change 1992 provides a broad framework for international action to combat climate change.

The Kyoto Protocol was created under the convention to provide a more detailed agreement on reductions in greenhouse gases during 2008–2012.

The Paris Agreement was signed in 2015 with the objective of keeping global temperature rise well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.

Australia has responded to the need to reduce its emissions with a number of laws and many programs.

The *National Greenhouse and Energy Reporting Act* 2007 (Cth) provides a national framework for large greenhouse gas emitters, energy producers and energy consumers to report their emissions, energy production and energy consumption. However, there is no charge imposed on emissions by that Act.

The carbon price, imposed on domestic carbon emissions under the *Clean Energy Act 2011* (Cth) (no longer in force) was repealed and replaced in 2014 by the Emissions Reduction Fund, which pays polluters to reduce their emissions but does not impose a price on carbon pollution.

The Queensland Government had a wide range of policies and initiatives to respond to climate change, however, most of these been wound back in recent years such as by removing the feed-in tariff for solar power from homes.

Cultural Heritage

Queensland Heritage Register

The *Queensland Heritage Act 1992* (Qld) creates a framework to protect places or objects of cultural heritage significance for aesthetic, architectural, historic, scientific, social or technological reasons. In practice, the Act mainly protects built European heritage such as historic buildings. It does not generally protect Indigenous cultural heritage.

The principal mechanism in the Act is the Queensland Heritage Register, which is a list of places, trees, natural formations and buildings of cultural heritage significance. Each entry in the register includes information about the place's history, its physical fabric, statements of its significance and location details.

The principal prohibitions imposed by the Act are not to:

- carry out development affecting a place on the Queensland Heritage Register without approval
- enter a designated landscape area except with permission
- take, destroy, damage, deface, excavate, expose, conceal or interfere with an item of Queensland heritage.

Development involving a place listed on the Queensland Heritage Register is assessable development that generally requires approval under the Planning Act.

More information about the Act is available from the Department of Environment and Science.

Local heritage

Local heritage may be protected at a local government level. For instance, some local government planning schemes (e.g. the Brisbane City Plan 2014) specifically recognise heritage places and establish character residential areas to protect historic buildings and the traditional character of towns. Development such as demolition or building work involving these places may require approval from the council under the Planning Act.

Aboriginal and Torres Strait Islander heritage

The *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) provide a framework for the protection of Aboriginal and Torres Strait Islander cultural heritage. The main mechanism through which each Act operates is a list of places and artefacts of heritage significance. The Acts also create offences such as breach of the cultural heritage duty of care. This duty of care requires a person carrying out an activity to take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) provides for the protection of significant Aboriginal areas and objects as declared under the Act by the Commonwealth Environment Minister, an authorised officer or inspector.

National heritage

The EPBC Act provides for listing and management of places with national heritage values on the National Heritage List. Any person may nominate a place for inclusion on this list. Some actions that are likely to have a significant impact on the national heritage values of a national heritage place require approval under the Act (s 15B). A Commonwealth Heritage List is also created under the Act for heritage in a Commonwealth area.

The *Protection of Moveable Cultural Heritage Act 1986* (Cth) regulates the import and export of protected objects of national importance for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons. The Act established the National Cultural Heritage Control List. The list is divided into two categories of protected objects that are subject to export control.

Historic shipwrecks

The *Underwater Cultural Heritage Act 2018* (Cth) provides a regime for protecting historic shipwrecks and relics in Australian waters.

The regime is based upon a declaration made by the Commonwealth Environment Minister and prohibits access to declared areas or sites and the removal of relics without authority under the Act. There are 18 declared historic shipwrecks and five protected zones from 200 located shipwrecks in waters adjacent to Queensland.

Taking Action to Protect the Environment

Political action

Many decisions affecting the environment are based on relatively broad discretionary decisions of government officers, local governments, ministers or cabinet.

Effective political campaigns have been responsible for many environmental victories, such as the successful campaign to stop the damming of the Franklin River in Tasmania at the beginning of the 1980s. In Queensland, the campaign during the 1970s to protect Fraser Island from sand mining and logging eventually led to the island being declared a national park and World Heritage area.

Effective political campaigns to protect the environment generally involve great tenacity and determination from an individual or a small group. Financial, legal and scientific resources are often very limited, whereas the opposition (e.g. a large developer) may have all of these readily available.

Tips for political campaigns:

- determine a clear, rational and achievable objective

- know who the relevant decision makers are (e.g. the local government, a government official, local member or minister) and individually target them according to their role or ability to influence the process
- maintain a rational, factual basis for the argument being advanced
- avoid purely emotional arguments, instead, gather the facts and base your argument on them
- be reasonable (developers have rights and legitimate expectations too)
- contact others who may be concerned with the proposal (e.g. neighbours, community and conservation groups) and gather opposition to the proposal
- use media effectively to publicise the issues, particularly the community interests at stake.

Because local government planning schemes provide the principal guide to where different types of development should occur, it is very important to lobby local governments and their staff for sound environmental protection and biodiversity conservation whenever a planning scheme is made or reviewed (see Submission about a Planning Scheme section).

Legal action

The legal system provides avenues to enforce environmental laws and to challenge government approval of development affecting the environment.

Public interest litigation under a variety of legislation to protect the environment involves three main types of proceedings in courts or tribunals:

- challenge the merits of government decisions about the environment (i.e. whether the decision was right or wrong based on the facts of the case)
- challenge the legality of government decisions about the environment (i.e. judicial review to examine whether the decision maker followed the correct legal procedures and considerations but not directly whether the decision was right or wrong)
- enforce the law by civil action or criminal prosecution where government regulators fail to do so (e.g. by seeking an injunction to restrain an activity impacting on the environment).

Litigation against development or government decisions about the environment is typically difficult, emotionally and financially draining, and it is best viewed as a last option. Lobbying relevant government decision makers, including local governments making planning schemes, is generally preferable and much less costly. Negotiations with developers may also achieve better environmental outcomes for a proposed development and avoid the need for litigation.

If political campaigns and negotiation with the developer fail to achieve a satisfactory outcome, litigation may be the only option to protect the environment. However, litigation

does not guarantee this result. In particular, appeals against approval of development that is consistent with a planning scheme will generally fail. Litigation typically takes time, money and a great deal of commitment. You should carefully weigh up these issues and the realistic prospects of success before deciding to litigate. Seeking legal advice and representation is highly recommended if you do decide to litigate.

Which court?

Taking legal action to protect the environment depends on having a claim recognised by law (a cause of action) and a court or tribunal to bring the claim in.

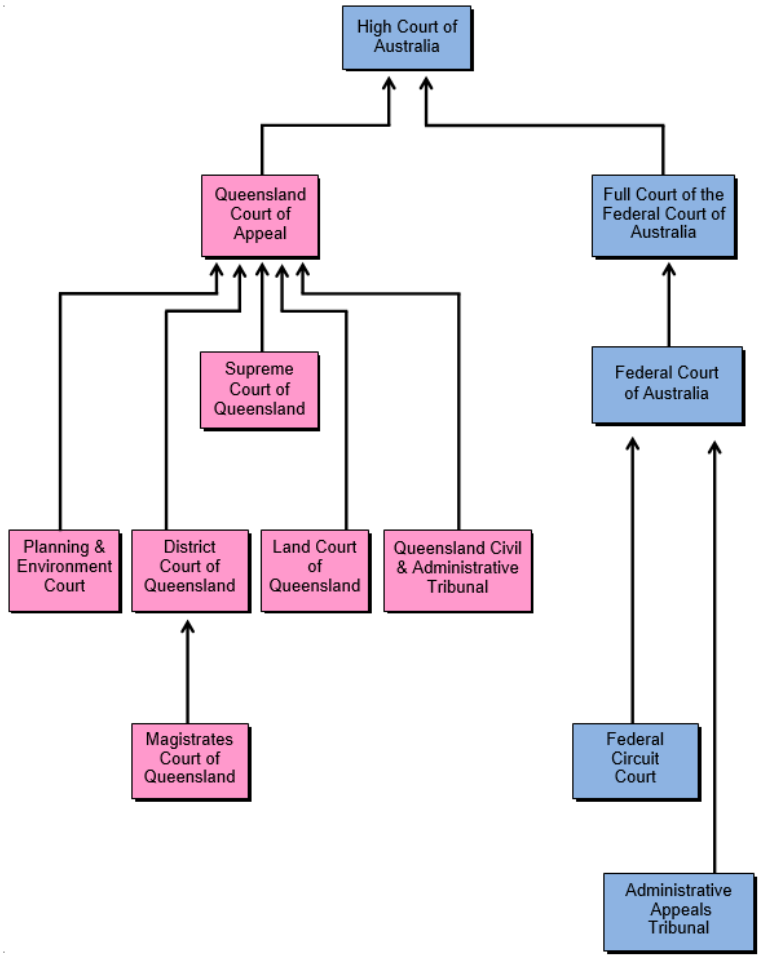
The Queensland Planning and Environment Court is the most important court for environmental disputes and hears several hundred appeals each year about planning matters under the Planning Act and related legislation.

The Land Court of Queensland hears objections to mining leases and petroleum leases.

The Magistrates Court and District Court hear criminal prosecutions for both state and federal environmental offences.

The Federal Court has jurisdiction for the EPBC Act, including injunctions to restrain offences against the Act (s 475).

The following Figure shows the hierarchy of the main courts and tribunals relevant to environmental disputes in Queensland.



Standing

Standing is the legal right to bring and maintain an action in a court. If a person or organisation seeking a remedy does not have standing, a court will not allow the case to be heard.

In civil proceedings, common law traditionally required some personal or proprietary interest to have been affected rather than an emotional or intellectual concern (e.g. concern for the environment generally). That is, a court required a special interest in the subject matter of the proceeding.

However, courts increasingly adopt a liberal interpretation of this test to grant standing for organisations working to protect the public interest in cases challenging the lawfulness of the exercise of executive power.

Many statutes now widen standing for environmental issues:

- Any person who makes a properly made submission on an impact assessable development application under the Planning Act has standing to appeal a decision to approve the application or join an appeal by another person about the development.

- Any person may seek a declaration from the Planning and Environment Court under s 11 of the Planning and Environment Court Act if the correct procedures are not followed in assessing a development application (e.g. if an impact-assessable development is treated as code assessable). This is a limited process akin to judicial review that cannot challenge the merits of the decision (see *Eschenko v Cummins & Ors* [2000] QPEC 37 at [20]-[22]).
- If development occurs without the correct approvals in place or the conditions are breached, any person may also apply to the court under s 180 of the Planning Act for an enforcement order to stop the commission of a development offence.
- A public interest litigant may apply to the court under s 505 Environmental Protection Act remedy or restrain an offence against that Act.
- Any person may apply to the court under s 173D of the Nature Conservation Act to restrain an offence against that Act.
- Any conservationist or conservation group may apply to the Federal Court under s 475 of the EPBC Act for an injunction to remedy or restrain an offence or other contravention of that Act.

Costs

Costs mean the legal expenses of bringing or defending an action in a court. It does not include payment for a litigant's own time in conducting the litigation. The normal costs rule refers to the situation in most court actions where the losing side must pay the legal expenses of the other side (as well as its own legal expenses). The own costs rule refers to the situation in some courts (including the Planning and Environment Court) where each party bears only their own legal expenses. Most courts apply the normal costs rule.

The Planning and Environment Court has an own costs rule under s 59 of the Planning and Environment Court Act. This means that parties generally bare their own costs irrespective of the outcome of the proceedings. There are limited exceptions to this rule, such as where proceedings are considered by the court to be frivolous or vexatious or a party defaults on the court's procedural requirements.

Security for costs

Security for costs is the provision of security (whether by payment of money into a nominated bank account or otherwise) to ensure that the plaintiff can pay the costs of the defendant should the plaintiff's case fail. Failure to provide security for costs can lead to a case being stayed (halted) or dismissed. It can amount to a considerable amount of money and be a significant barrier to public interest litigation to protect the environment.

Security for costs may be an issue where an incorporated association seeks an injunction to restrain a proposed development. Courts are wary of $2 companies shielding litigants from liability for costs.

Private individuals will not generally be required to provide security for costs, as it is a well-established principle that poverty should not be a barrier to litigation. However, that person will need standing and will bear the risk of an adverse costs order that may result in bankruptcy, which is a strong disincentive.

Chapter 17 of the *Uniform Civil Procedure Rules 1999* (Qld) limit the grounds upon which security for costs will be required, including considering the genuineness of the proceeding and whether it involves a matter of public importance.

Undertakings as to damages

Getting a case heard by a court will normally involve a delay of two to six months from the time the action is started until the court hearing. If the development sought to be stopped will occur within that time, it may be necessary to seek an interim (also interlocutory) injunction to halt it.

Subject to limited exceptions, courts will normally require any person seeking an interim injunction to provide an undertaking as to damages, which is a promise (backed by proof) to pay the costs incurred to the developer because of the delay, should the final action fail. For a large development, this may be a considerable sum of money.

Support for Taking Action to Protect the Environment

Legal aid

Legal aid (i.e. government-funded legal assistance and representation) is not available for public interest litigation to protect the environment in Queensland. Therefore, apart from the risk of an adverse costs order to pay the legal expenses of the other side if the case is lost, the individual or community group taking the action must meet all of their own expenses associated with litigation.

Environmental Defenders Office

The EDO is a community legal centre for environmental law. In some cases the EDO can act as the solicitor for no fee. Some other law firms and barristers are willing to work for reduced or no fees for public interest cases. In some cases, expert witnesses provide their services on a similar basis.

Strategic Lawsuits Against Public Participation Writs

Strategic lawsuits against public participation (SLAPP) writs refer to litigation by developers and others for the purpose of silencing public opponents.

Defamation proceedings by the developer against key vocal community opponents to a major development are a classic SLAPP technique. Community members involved in

environmental disputes should be aware of this tactic and be careful to avoid public comments that can be construed as defamation. Stating or implying that the developer has lied or that the development is fraudulent or corrupt are examples of defamatory statements. To avoid defamatory statements, stick to the environmental or policy reasons why the development should not proceed. The EDO has published a factsheet on avoiding defamation for community groups and environmental activists.

Direct action (e.g. a person chaining themselves to a tree to stop a bulldozer) has been a media tool for many environmental campaigns in Australia and internationally. Be aware that such action invariably involves a trespass, which is an offence. If a court grants an injunction to restrain such a trespass, breach of the injunction constitutes a contempt of court for which imprisonment may result. Public rallies and protests may also require a police permit, and failure to obey police directions may result in fines or imprisonment. Violence and damage to property, in addition to generating a negative public reaction, are criminal offences and should be strictly avoided. The EDO has published a factsheet on peaceful protests.

Legal Notices

Disclaimer

The Queensland Law Handbook is produced by Caxton Legal Centre with the assistance of volunteers with legal experience in Queensland. The Handbook is intended to give general information about the law in Queensland as at the date stated on each page. The content of the Queensland Law Handbook does not constitute legal advice, and if you have a specific legal problem, you should consult a professional legal advisor.

External links

The Queensland Law Handbook provides links to a number of other websites which are not under the control of Caxton Legal Centre. These links have been provided for convenience only and may be subject to updates, revisions or other changes by the entities controlling or owning those sites. The inclusion of the link does not imply that Caxton Legal Centre endorses the content, the site owner or has any relationship with the site owner.

Limitation of liability

To the maximum extent permitted by law, Caxton Legal Centre and the contributors to the Queensland Law Handbook are not responsible for, and do not accept any liability for, any loss, damage or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from the Queensland Law Handbook.

Copyright