

**A GUIDE TO AUSTRALIAN
LEGISLATION RELEVANT TO
NATIVE TITLE**



Native Title Research Series

**A GUIDE TO AUSTRALIAN
LEGISLATION RELEVANT TO
NATIVE TITLE**

VOLUME TWO

**WESTERN AUSTRALIA, TASMANIA,
AUSTRALIAN CAPITAL TERRITORY, NORTHERN
TERRITORY AND THE COMMONWEALTH**

Native Title Research Unit
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PREFACE

The historic judgement of the High Court of Australia, handed down on 2 June 1993, in the case of *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, marked the first judicial recognition of native title under the common law across all of Australia. It resulted in the enactment of a wide range of legislation at Commonwealth, State and Territory level, to come to terms with the changed legal environment. Legal practitioners, academics and policy makers became involved in the process of formulating a response to the decision.

On 24 December 1993 the Commonwealth Government's response to the *Mabo* decision, the *Native Title Act 1993*, became law.¹ As recognised in the Preamble to the Act, however, while the common law of Australia recognised a form of native title, it also recognised that native title may be extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or certain leasehold estates.

The concept of extinguishment was subjected to judicial examination in the case of *Wik Peoples and Others v State of Queensland and Others* (1996) 141 ALR 129. On 23 December 1996 the High Court decided that the grant of pastoral leases, in that case under Queensland legislation, did not necessarily extinguish native title. Given that pastoral leases cover over 40 per cent of Australia, this decision had significant implications. The High Court determined that in the absence of a clear and plain legislative intention to extinguish native title and where native title can co-exist with other rights and interests, native title continues to exist. If native title is inconsistent with other validly created rights and interests, then it must give way.

The onus of establishing a clear and plain intention to extinguish native title lies with the party asserting extinguishment. Support for this can be found in *Western Australia v Commonwealth* (1995) 183 CLR 373, where the Court ruled that:

...although an acquiring sovereign can extinguish such rights and interests in the course of the act of the State acquiring the territory, the presumption is that no extinguishment is intended. To discharge the onus, it is necessary to show at least that the Crown has manifested clearly and plainly an intention to extinguish all native title. So much is required of any statute which is said to extinguish native title, which has survived

¹ The *Native Title Act 1993* (Cth) ('the NTA') received Royal Assent and ss.1 and 2 of the Act commenced on that day. Sections 3 to 200 and 202 to 253 of the NTA commenced on 1 January 1994 and s.201 on 1 July 1994.

acquisition of a territory by the Crown, and there is no reason why a lesser standard should be applied in ascertaining the Crown's intention when exercising the prerogative power to acquire new territory.

Australian Governments must understand the implications of native title and the principles established in the *Mabo* and *Wik* decisions and they must develop a coherent policy and legislative framework to respond to those implications. The Liberal and National Parties Commonwealth Government drafted its response in the form of the *Native Title Amendment Act 1998*. Part 9.6 in Volume 2 of the Guide contains a summary and explanation of the new provisions.

The recognition of native title has altered the established legal assumption that Australia was *terra nullius*, or empty land, at the time of the arrival of the first European settlers in 1788, an assumption that had underpinned Australia's land law until 1992. However, various jurisdictions across Australia had attempted to address Indigenous peoples' land and other rights in some legislative form or another before the recognition of native title. In this context, it is important to understand the difference between native title and other land rights legislation. Land rights legislation provided for statutory rights over land, created by governments. In contrast, native title is a pre-existing right, that derives from Indigenous peoples' law and customs. It existed before the European settlement of Australia began in 1788. Native title is not a grant or right created by Government.

Nevertheless, native title is now part of the patchwork of legislation concerning land and Indigenous peoples' rights over land. This Guide provides an overview of the broad array of legislation of relevance to native title, from specific native title and land rights legislation, through to legislation with more indirect implications for the operation of native title.

The guide does not purport to evaluate the effectiveness or otherwise of the legislation covered and, while employing our best endeavours, it is possible that, given the scope of the work, minor omissions or errors may have occurred. The Guide is divided by jurisdiction (the States, Territories and the Commonwealth) and then further divided into subject areas, including land and environment, heritage, local government, marine, minerals and native title. The title of each Act is found in the margin accompanying an outline of the provisions of the Act. Legislation is listed alphabetically under the subject headings. Lists of Acts accompany each of the respective jurisdictions and are compiled for the complete work at the end.

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RELEVANT TO NATIVE TITLE**

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WESTERN AUSTRALIA

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WESTERN AUSTRALIA

5.1 LAND AND ENVIRONMENT

The objectives of the *Aboriginal Affairs Planning Authority Act 1972* are to establish the Aboriginal Affairs Planning Authority (AAPA), appoint a Commissioner for Aboriginal Planning and an Aboriginal Affairs Planning Advisory Council to provide consultative and other services for the economic, social and cultural development of Aboriginal people in Western Australia. *Aboriginal Affairs Planning Authority Act 1972*

The Act defines 'Aboriginal' as an original inhabitant of Australia and their descendants (s.4). A 'person of Aboriginal descent' is defined as any person living in Western Australia who is wholly or partly descended from the original inhabitants of Australia, identifies as Aboriginal and is accepted as such in the community in which they live.

Lands set apart for Aboriginal people in the State were, and remain, fundamentally Crown reserves as provided for under this Act, the repealed *Land Act 1933* and the *Land Administration Act 1997* (for details concerning both Acts, see below). The provisions of the Act assume that lands are set apart under the two land Acts, since there is no administrative regime provided for under the Act beyond the appointment of a Commissioner for Aboriginal Planning (s.10), who deals with staffing and related matters.

The Act also provides for the reservation and transfer of Crown land, which was previously reserved for the use and benefit of the Aboriginal inhabitants under the lands Acts, to the AAPA for the benefit of Aboriginal communities. They become subject to this Act and are held on what is probably no more than a governmental trust by the AAPA (ss.26-32).

The Act (s.27) ensures that lands reserved under both this Act and the lands Acts vest in the AAPA, with the exception of town reserves (see under the *Land Act 1933* in 5.3 below), and (s.30) lands subject to the provisions of the *Mining Act 1978*, the *Petroleum Act 1967* or any other Act relating to minerals or petroleum (see 5.5 below).

The Act also ensures that no application for the grant of any interest, licence, right, estate or title under any Act, which

would operate in relation to any reserved lands to which the Act applies, can be refused without the prior consent of, or processed without consultation with, the AAPA (s.30).

Aboriginal Affairs Planning Authority

The Act establishes the Aboriginal Affairs Planning Authority (AAPA), which is constituted as a corporation by the Minister for Aboriginal Affairs (s.8). The AAPA seeks to foster involvement of Aboriginal people in their own enterprises, including agriculture, and promotes the economic, social and cultural advancement of Aboriginal people in the State.

The AAPA is charged with the duty of promoting the well-being of Aboriginal people in Western Australia and must take into account the views of such people as expressed by their representatives (see ss.12-13). The AAPA has all such powers, rights and privileges as may be reasonably necessary for it to carry out its duties and functions (s.14). It is subject to the directions of the Minister, but, while the Minister must have regard to its recommendations, they are not bound to give effect to such recommendations (s.7).

The Governor may also place the care and control of relevant lands under the control and management of, and the AAPA may delegate its powers and functions to, the Aboriginal lands trust established under the Act (s.20). The members of the trust are appointed by the Minister, must be people of Aboriginal descent, and are subject to the direction of the Minister (s.21). The functions of the trust include acquiring and holding land in fee simple or otherwise for the benefit of Aboriginal people. It also must seek to ensure that the use and management of the land is in accordance with the wishes of the Aboriginal inhabitants of the area (see ss.23-24).

The Governor may declare any Crown lands to be reserved for Aboriginal people upon the recommendation of the Minister; this power includes altering the boundaries of such reserved land and ending such a reservation (s.25). The Governor is the only one who has the power to dispose of reserved lands under the Act (s.25); the AAPA and the trust have no such powers.

Aboriginal Affairs Advisory Council

The Aboriginal Affairs Advisory Council is established under the Act for the provision of consultative and other services for the economic, social and cultural advancement of Aboriginal

people in Western Australia (s.18). It consists of Aboriginal people chosen by, and from, Aboriginal people living in the State. Its role is purely advisory and it advises the AAPA on matters relating to the interests and well-being of Aboriginal people. While the Minister is required to have regard to its recommendations, they are not required to give effect to them (s.7).

Proclamation of Reserved Lands

The Act gives the Governor the power to proclaim reserved land to be for the exclusive use of the Aboriginal inhabitants normally resident in the area, and their descendants (s.32).

Right of entry onto reserved lands is confined to officers of the AAPA, members of the State police force, public health officials and officers of public authorities in the performance of their duties. Members of the State and Commonwealth Parliament, or people acting under this Act or a duty imposed by law, or people of Aboriginal descent, may enter such lands without committing an offence (s.31).

A civil right to enter and to remain on the land may only be granted to people by the AAPA if, in the opinion of the Minister, it would be of benefit to the Aboriginal inhabitants (s.28(b)). The Minister may grant or refuse permission to enter or remain on such land, but must consult with the Aboriginal lands trust (s.31). Generally, the trust seeks the approval of the community (see also Aboriginal Affairs Planning Regulations 1972). The Governor is empowered to regulate entry onto reserved lands by specified people for specified purposes (s.51).

The Act makes provisions for dealing with estates and interests of Aboriginal people that, in effect, give control over these and any dealings in them to the AAPA or make them subject to the approval of the AAPA (ss.33-37).

The *Aboriginal Communities Act 1979* provides for certain Aboriginal communities to manage and control their community lands. It applies only to communities specified or declared as such under the Act. See further under 5.3 below.

*Aboriginal
Communities
Act 1979*

Agriculture and Related Resources Protection Act 1976 The *Agriculture and Related Resources Protection Act 1976* empowers the chairman of the Agriculture Protection Board (APB, established under the *Agriculture Protection Board Act 1950*), or the chief agriculture protection officer appointed under the Act (s.9), to authorise people to take all measures and do all things necessary or reasonably convenient to control and prevent the introduction and spread of declared plants and animals (s.11).

The APB also has the power to declare any portion of the State as a zone (s.13), for which a zone control authority is then established. The authority has powers, functions and duties that include ensuring that: the provisions of the Act are effectively carried out; policies and schemes are formulated to effect the provisions of the Act in the zone; officers authorised under the Act are providing efficient control of declared animals and plants in the zone; and the APB is advised on related matters (ss.14-26).

Declarations of specified classes of animals or plants are made by the APB and these may cover the entire State or specified part(s) of the State. These declarations may be general or specific (s.35). They include the prohibition by the APB of: the introduction or movement, eradication, reduction, containment or particular action of plants; the introduction, eradication of non-native species; and the keeping, restriction of the introduction, reduction, conditional keeping and management of animals.

The Act also deals with the control of declared plants and animals on local government land (ss.42-45). They require local government councils to comply with notices issued by inspectors or people authorised under this Act. They also create offences and penalties for non-compliance and empower such inspectors or people authorised to enter onto land where a notice is not being complied with to carry out any or all of such requirements and to charge the council for doing so. The Act empowers local governments and the APB to enter into an agreement to ensure compliance (s.46).

The Act requires the owners of private land to notify the APB, an inspector or authorised person if they find declared animals or plants on their land (ss.47-54). It also enables inspectors or authorised people to serve notice on the owner or occupier of the land directing that person to control the declared animal(s) or plant(s) on the land.

Offences and penalties are created for non-compliance. Inspectors or other authorised people are given rights of entry to ensure and effect compliance at the land owner's or occupier's expense. They also have the power to do all things necessary to effect control and it is an offence for an owner or occupier to obstruct them when doing so. Owners or occupiers are entitled to enter into an agreement with the APB to ensure compliance and be given assistance in kind by the APB.

Enforcement Provisions

The Act provides inspectors and other authorised people with wide powers to enter onto land and premises for the purposes of this Act, as well as to deal with prohibited materials and packaging relating to declared animals or plants, including seizure, destruction and disposal (ss.71-87). Obstruction of an inspector or other authorised person is an offence punishable by a penalty of \$2,000. The Act allows for the making of regulations giving further powers in relation to entry onto, and movement on, land on which declared animals or plants are, or are suspected of being, present (s.105(a)(ia)).

The *Conservation and Land Management Act 1984* makes provision for the use, protection and management of certain public lands and waters, and for the fauna and flora on them, to establish authorities to be responsible for this, and for connected purposes. There is no mention of the role of Aboriginal people in conservation and land management in the Act.

*Conservation
and Land
Management
Act 1984*

The Act (ss.5 and 6) applies to land and waters in the State, comprising: state forests; timber reserves; national parks; conservation parks; nature reserves; marine parks; nature reserves and management areas; and any other land reserved under the *Land Act 1933* or the *Land Administration Act 1997* (see below). The Act (s.7) vests state forests and timber reserves in the Lands and Forest Commission (established under s.18). National and conservation parks and nature reserves, created under Part 1 of the Land Act or Part 4 of the Land Administration Act, vest in the National Parks and Nature Conservation Authority (established under s.21). The exception is if these lands are vested in some other person or people. All marine nature reserves, parks and management areas vest in the Marine Parks and Reserves Authority (s.6)

(see *Conservation and Land Management Act 1984* in 5.4 below).

The Governor is empowered to authorise the Minister responsible for the *Land Administration Act 1997* to acquire compulsorily or by agreement any land that may be required, in the Governor's opinion, for the purposes of the Act (s.15). Such acquisition is subject to the provisions of Part 9 of the *Land Administration Act*.

The functions of the Authority include: developing policies for the preservation of the natural environment of the State; promoting the appreciation of flora and fauna and the natural environment and a number of matters relating to the preparation and administration of management plans (s.22). One of the 11 members of the Authority nominated by the Minister must be a representative of Aboriginal interests (s.23(1)(b)).

Establishment of Department

The Act establishes the Department of Conservation and Land Management (CALM) to manage the land to which this Act applies and, amongst other things, to assist the Authority in the performance of its functions (ss.32-33). The Act (s.33(2)) enables Crown land, and land reserved but not vested in any person or authority under statute, that comes under the *Land Administration Act 1997* to be placed under the management of CALM on the recommendation of the Minister and the Minister responsible for the *Land Administration Act*. The Act empowers the executive director of CALM to do all things necessary or convenient for the performance of the department's functions (s.34).

The Act requires the relevant controlling body (as specified under ss.5-7) to prepare, review and update a management plan for any reserved area under its control (s.54). Provision is made for the consideration of public submissions before a plan may be approved by the Minister and any other Minister with an interest in the relevant land (ss.57-60).

A management plan must contain a statement of policies, guidelines to be followed, and a summary of operations to be undertaken for its duration (s.55). The time limit for such a plan must not exceed 10 years. The objectives include: achieving or promoting the purposes for which the land was vested in the controlling body; and for the care, control and

management of the land placed with that body. In the case of national or nature conservation parks and nature reserves, this includes the preservation of any features of archaeological, historical or scientific interest (s.56).

Declaration of Prohibited or Limited Access Areas

Subject to conformity with the management plan, the Minister may, by notice in the *Gazette* and on the recommendation of the controlling body, declare the whole or any part of land or waters as a prohibited or limited access area, or any other class of area the Minister, on the recommendation of the controlling body, thinks necessary to give effect to the objects of the Act (s.62).

The executive director of CALM may also grant a licence in writing to any person to enter and use any land except State forest and timber reserves, wilderness areas or land placed under the management of CALM. Part 8 also restricts activities on land under the Act without the relevant permit, licence, or other instrument (for example, a lease or agreement) issued or made under the Act.

The Act prohibits the lighting of any fires on land to which the Act applies or within 20 metres of such land (s.104) and also makes it illegal to hunt, shoot or set snares for the purpose of capturing any indigenous fauna on such land without the relevant permit, licence or lease or other authority from the Crown (s.106). There are no specific exemptions for Aboriginal people under the Act.

Enforcement Provisions

Rangers and conservation and land management officers appointed under the Act (s.45) are empowered to enter, carry out investigations and undertake related activities on land for the purposes of the Act (s.120). These officials may also: stop, detain and search any vehicle or conveyance on, and remove any vehicle, vessel or other thing from, the relevant land or waters; require a person to give their name and address; and, where that person is found committing an offence or there are reasonable grounds for suspecting that an offence has been or is about to be committed, request that the offender leave the land or waters (s.124). In addition, a ranger may enter and search without a warrant any hut, tent, caravan or other structure that is not a permanent residence. The Act does require the rangers and officers to give the person who

owns, or is in charge of, the relevant land, vessel, animal, or other, reasonable notice of the intention to take such action (s.124(5)).

Country Areas Water Supply Act 1947 The *Country Areas Water Supply Act 1947* applies to all parts of the State except those parts covered by the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (see below) (s.6). The Act empowers the Governor to declare water and catchment areas and water reserves (ss.8 and 9). The Act authorises the Water Corporation (established under s.4 of the *Water Corporation Act 1995*, subject to the *Rights in Water and Irrigation Act 1914*, see below) to divert, intercept and store all water coming from the watercourses and other sources within the boundaries of a catchment area or water reserve, as well as taking any water found on or under land situated within such area or reserve (s.11).

These reserves and catchment areas are listed in Schedule 2 and are limited to the Wellington and Harris River Dams, Mundaring Weir and Denmark River Catchment Areas and the Kent and Warren Rivers Water Reserves. In these, officers of and people authorised by the Waters and Rivers Commission (established under the *Waters and Rivers Commission Act 1995*, see below) have extensive powers of entry (subject to giving due notice to the relevant owner or occupier of the land) to conduct tests on, and take samples from, the land (see s.12ED).

The Water Corporation is further empowered (s.14) to construct, extend, alter, improve or repair any waterworks, subject to the approval of the Minister where specified in the *Water Agencies (Powers) Act 1984* (see below) and in addition to any powers in the *Public Works Act 1902* (see below). The Act entitles the owner of land for which a water rate has been made under the Water Agencies Act to have water supplied to the land and the Corporation must, as soon as practicable, install, to the nearest point on the boundary of that land, the necessary waterworks (pipes, fittings, and so on) (s.28).

Any officer of the Corporation may enter such land to ascertain: the quantity of water consumed; to check if there has been any misuse, fouling or contamination of water; and to ascertain whether all fittings comply with by-laws and are in proper order or repair (s.42). If not, the officer may remove and substitute them at the owner/occupier's cost. The

construction of buildings, walls, fences or obstructions over or across water mains is prohibited without the approval of the Corporation (penalty: \$2,000 and \$200 if a continuing offence); the Corporation has the power to remove such offending structures (s.43B). People authorised by the Corporation are empowered to enter land at all reasonable times to install fittings, as well as to examine, repair, alter or replace them (s.44). Damaging or wilfully draining water off them is an offence under the Act (s.45).

Under the *Environmental Protection Act 1986*, 'environment' is defined as being living things, their physical, biological and social surroundings, and the interaction between all of these (s.3(1)). Additionally, the term 'social surroundings of man' is defined as the aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect, or are affected by, the person's physical or biological surroundings (s.3(2)).

*Environmental
Protection Act
1986*

Environmental Protection Authority

The Act provides for the continuation of the Environmental Protection Authority (EPA) (s.7) and its objectives, which include using its best endeavours to protect the environment and to prevent, control and abate pollution (s.15). Among the many functions of the EPA specified in the Act are: to consider and initiate the means of achieving its objectives; to prepare and seek approval for environmental protection policies to promote environmental awareness within the community; and to encourage understanding by the community of the environment (s.16). The powers of the Authority are broadly defined and include having all such powers as are reasonably necessary to enable it to perform its functions, including undertaking inspections and investigations (s.17).

The EPA must prepare and exhibit environmental protection policies, which are subject to a rigorous regime of public consultation, tabling and disallowance (s.26). Once approved, the policies provide the basis on which the portion of the environment to which they relate is to be protected and the pollution prevented, controlled or abated. They may also delineate programs for such protection, or such prevention, control or abatement, as the case requires (s.35).

Environmental Impact Assessment

Part 4 provides for an environmental impact assessment for proposals that appear likely to have a significant impact on the environment or that are in a prescribed class. These are all handled by the EPA (see s.38).

Part 5 creates offences for causing or allowing pollution, or emitting or causing to be emitted from any premises noise, odour or electromagnetic radiation which interferes with the health, welfare, convenience, comfort or amenity of any person (s.49), or causing or allowing waste in circumstances in which it is likely to cause pollution (s.50). The Act also provides a requirement for a works approval, licence or compliance with a pollution abatement notice in respect of the authorisation of emissions and pollution from specified premises (s.53).

Under the Act (s.73), inspectors and authorised people (appointed under ss.88 and 87) may, with the approval of the chief executive officer of the EPA, give written directions to remove, disperse, destroy, dispose of or otherwise deal with waste that has been, or is being, discharged, prevent pollution from arising, or control or abate that condition if it does arise.

Inspectors have extensive powers of entry onto premises to do such things as they consider necessary for the prescription of any matter under the Act or for the purposes of the preparation of a draft policy; the assessment of a proposal, or for determining whether there has been compliance with, or a breach of, the Act or any instrument made under it (s.89).

The Act empowers inspectors to require, by written notice, the production of a wide range of documents (s.90) and provides them with additional powers of entry to inspect vehicles and vessels (s.91). It is an offence to obstruct or delay an inspector or authorised person in the exercise of their powers under the Act (s.93). Penalties are provided for in Schedule 1.

The provisions of this Act override any inconsistent written laws of the State except those ratifying or approving State agreements or that received Royal Assent before 1 January 1972 (s.5). Therefore, this Act is, and will be, binding on all people on any land or premises in the State unless they are subject to laws that received Royal Assent on 31 December 1971 or earlier.

The objective of the *Exotic Diseases of Animals Act 1993* is to provide for the detection, containment and eradication of exotic diseases (as defined in s.4) of animals, and related matters. These include mandatory reporting of outbreaks, making provision for quarantine and disinfection (s.3) and special conditions regarding entry to, and exit from, land in areas declared 'infected' or 'restricted, as well as activities in these or areas declared as 'controlled' (ss.29-41).

Exotic Diseases of Animals Act 1993

The Act applies to all land in the State (s.6). The definition of 'land' includes any land whatsoever, whether held by a person under any form of tenure, and expressly includes any Aboriginal reserve or land to which the *Conservation and Land Management Act 1984* applies (see above), as well as any body of water within, or forming part of, the boundary of any land (s.4(1)).

The definition of 'wildlife' is expressed to include specifically animals that were introduced into Australia, whether directly or indirectly, by Aboriginal people or other people, before the year 1788.

The Act provides officers (including inspectors appointed under the *Stock Diseases (Regulations) Act 1968*, see below, veterinary officers and inspectors and other officers appointed under this Act, and police officers as defined in s.4), with powers to enter and search land (s.13). This includes inspecting, examining, testing, fumigating or taking samples from any land, and searching for, tracking, marking for identification, testing, treating, vaccinating or destroying any 'free-living' animal, including wildlife.

The *Land Act 1933* was repealed by the *Land Administration Act 1997* (see next) upon its commencement on 30 March 1998. Whereas the 1997 Act introduces major changes to the system of Crown land administration in the State, the 1933 Act also makes extensive provision in Schedule 2 for the saving and validation of actions under it, ensuring that its repeal does not invalidate actions taken, or rights or obligations created, under it.

Land Act 1933

The 1933 Act generally dealt with Crown lands in Western Australia. About 93 per cent of the State's area of 2,527,600 square kilometres comprises Crown estate, that is, land administered under the Act by the Minister and not alienated in fee simple to private parties. The majority of this land is

potentially subject to native title. The Governor granted or leased Crown land to Aboriginal people if they were otherwise disadvantaged with respect to the acquisition of land through the normal channels under the Act (s.9).

Classification of Aboriginal Reserves

Under the Act, the Governor declared Class A (perpetual unless changed by an Act of Parliament), B (reserved from alienation until cancelled by Governor's proclamation) or C (all other; Governor could cancel at any time and publish notice in the *Gazette*) Aboriginal Reserves (s.31). The Governor could direct that the land must vest or be held by any person for the purpose for which the land is reserved and any purpose ancillary and beneficial to that purpose (s.33). These provisions were used to vest or grant interests in the lands to Aboriginal organisations and communities; for example, Reserve Nos 40784 and 49787 have been granted to the Aboriginal lands trust (see *Western Australian Gazette*, 11/11/1988).

The provisions of the *Aboriginal Affairs Planning Authority Act 1972* (AAPA Act; see above) assumed that lands set apart under the AAPA Act would also be set apart under the Land Act, otherwise there would not have been provision for an administrative regime for such land. Lands reserved for Aboriginal inhabitants under both Acts fell under Part 3 of the AAPA Act and were vested by operation of statute in the Aboriginal Affairs Planning Authority (ss.8 and 27).

The vesting of such lands in the Aboriginal Affairs Planning Authority conferred only such powers of control and management and proprietary interest as were necessary to enable that body to discharge its public functions effectively.

The Authority may grant control and management to the Aboriginal land trust established under the AAPA Act and the Aboriginal lands trust may then grant a lease to the Aboriginal inhabitants or community (ss.20 and 23). No interest in the land (except under the *Mining Act 1978* and the *Petroleum Act 1967*) may be granted or refused except with the approval or consent of the AAPA.

Special Conditions of Pastoral and Other Leases

The *Land Act 1933* imposed several reservations on a pastoral lease, one of which was to preserve the right of the Minister to

declare the right of any person to pass over unenclosed or enclosed but otherwise unimproved land, with or without horses, stock or vehicles, on all necessary occasions (s.106(1)). It also provided that Aboriginal people may, at all times, enter upon unenclosed and unimproved parts of the land that are the subject of a pastoral lease to seek their sustenance in their accustomed manner (traditional usage) (s.106(2)).

The Act further empowered the Minister to grant special leases of Crown land for 50 years to Aboriginal communities for the use and benefit of the Aboriginal inhabitants as approved by the Governor by way of a notice in the *State Gazette* (s.116). An example of where this provision could have been used is in the case of land where a reservation is not possible because of the existence of a mining tenement.

The purpose of the *Land Administration Act 1997* is to consolidate and reform the law relating to Crown land and the compulsory acquisition of land generally, to repeal the *Land Act 1933* (see above) and to provide for related matters.

*Land
Administration
Act 1997*

The authorship and work of the Western Australian Department of Land Administration (DOLA) in the preparation of this synopsis is hereby acknowledged.

Parts 1 and 2 of the Act deal with preliminary and general administration issues. Part 1 includes definitions for the Act. Part 2 sets out the general powers of the Minister, provides for delegations, Ministerial orders and positive and restrictive covenants and establishes the framework for the single registration system.

Significantly, the definition of 'Crown land' is much wider than that provided in the *Land Act 1933* (s.3 of this Act). Crown land is now defined to mean all land other than freehold land, and has been defined specifically to include land within the limits of the State that form the airspace, seabed and subsoil of its coastal waters as defined by the *Coastal Waters (State Powers) Act 1980* (Cth) (see Chapter 9.4).

The definition of 'adjoining' has been widened so that adjoining land can now be separated by a reserve or unallocated Crown land.

The term 'manage/managed', as it applies to a reserve, body or order, now replaces the term 'vest/vested' under the *Land*

Act 1933, and has the same practical meaning. This term had to be changed because Crown land will now be registered under the *Transfer of Land Act 1893* (see below), where the term ‘vest’ can mean the transfer of ownership of land. This is contrary to the meaning that was used for ‘vest’ under the *Land Act 1933*, which is the placing of care, control and management of the Crown land (that is, the delegation of rights and responsibility).

The term ‘unallocated Crown land’ has now been defined in the Act and recognises that native title may exist on that land.

Subdivision and Development

The Minister is now empowered to subdivide and develop Crown land intended for sale into freehold, or for lease as Crown land (s.27). Where Crown land is subdivided for sale into freehold, such Crown land will now be subject to the normal processes under the *Town Planning and Development Act 1928* (see 5.3 below), as is the case for a private developer of freehold land. Provision is made for private developers to be encouraged further to participate in the development and subdivision of Crown land, while still ensuring that the release of land for sale or lease, is subject to development conditions.

Part 3 deals with appeals to the Governor. As an interim measure, the right of appeal to the Governor from a decision of the Minister in the *Land Act 1933* (s.27) has been carried forward in a limited manner. There is now a more structured right of appeal to the Governor against a decision of the Minister. This right of appeal will now be available in five cases: forfeiture provisions; abandonment of a pastoral lease; cancellation of easements; setting of purchase price on surplus acquired land being disposed of; and, removal of squatters (ss.37, 35(2), 133(2), 145(2), 190(10) and 272(1)). Certain appeals have been omitted, such as objections to the taking of land for a public work.

In Part 4 all Crown land reserved under this Act will be placed, by a management order, under the care, control and management of management bodies. The Act now uses the term ‘management orders’ to replace ‘vesting orders’ provided in the *Land Act 1933*.

Classification of Reserves

Reserves created after the commencement of the Act will only have one specific classification: Class 'A' reserves (s.42). Where Class 'A' classification is not specified, reserves will be simply known as reserved land.

In the transition from the *Land Act 1933* to the *Land Administration Act 1997*, existing Class 'B' reserves created under the *Land Act 1933* have been saved and retained. These reserves can only be cancelled or amended by tabling a report in both Houses of Parliament under the provisions of the repealed *Land Act 1933*. Class 'C' reserves under the *Land Act 1933* are, under the new Act, simply known as reserve land, and no classification is necessary.

Part 5 deals with roads. The majority of roads are created by freehold or Crown subdivision under the *Local Government (Miscellaneous Provisions) Act 1960* (see 5.3 below) and the *Town Planning and Development Act 1928* (see 5.3 below). The administration of roads in this Act involves widenings, truncations and extensions over adjoining Crown land and freehold land.

There is provision for the Minister to declare public access routes over Crown land (often the subject of a pastoral lease) for access to remote tourism and recreation spots, reflecting the public demand, where local government is not prepared to dedicate a road (s.64). Where a public access route crosses Crown land held subject to an interest, the consent of that interest-holder will be required and a public consultation process will be followed.

Dealings with Crown Land

In Part 6 the powers of the Minister to deal with Crown land have been expanded and are now more flexible than was the case under the *Land Act 1933*. These powers include normal commercial alternatives to the powers to sell or lease Crown land. This part radically changes the former system of releasing Crown land by means of an application by the public, to the normal commercial practice of selling Crown land by offer and acceptance. An advisory panel may be appointed to advise the Minister in the administration of this part of the Act (s.73).

The Minister is now able to sell Crown land by auction, public tender or private treaty, arrange ballots, call for expressions of

interest, sell Crown land through agents, subdivide and sell Crown land, and enter into joint venture developments (ss.74 and 78). Provisions for the granting of freehold land under the *Land Act 1933* for either no consideration or at a reduced purchase price to community groups for a particular purpose (more commonly known at present as a 'Crown Grant in Trust') have been updated in the Act (s.75). Title is a form of conditional tenure land.

The Minister's ability to grant leases and transfer Crown land into freehold for the benefit of Aboriginal people under the *Land Act 1933* (s.9) has been retained and carried forward into this part of the Act (s.83). There is clear provision in the new Act that leases and easements proposed under it may co-exist with mining tenements where the approval of the Minister for Mines has been obtained (s.90). The rights of the mining lessee will be suspended for the period of the lease or easement granted under the Act.

Pastoral Land

In Part 7 pastoral land tenure reform has been drafted into the new Act to conform with the requirements of the *Native Title Act 1993* (Cth) (NTA) (see Chapter 9.6). Contrary to earlier proposals for the reform of pastoral lease tenure, the Act does not provide for perpetual tenure. Legally, a grant of perpetual leases to replace existing leases, which all expire in the year 2015, may be an impermissible future act under the NTA. New pastoral leases in this Act will be limited to a term no greater than that granted under the existing lease (s.105). This restriction, based on the provisions of the NTA, will result in extensions of leases for terms varying between 21 and 49 years.

The Pastoral Board under the *Land Act 1933* has been replaced by the Pastoral Lands Board (s.94). The functions of the Pastoral Lands Board emphasises conservation, to enable the board to develop policies for the prevention of range-land degradation (s.95). The board now has an increased membership structure that was further amended in the Legislative Council. It comprises a chairperson, three pastoral industry members, the director general of agriculture, the chief executive of the Department of Land Administration, a person with expertise in flora, fauna or land conservation management, and an Aboriginal person with experience in pastoral leases (s.97).

Under Division 5 of this Part, permits to use pastoral lease land for related pastoral and non-pastoral purposes may be granted by the Pastoral Lands Board to permit diversity of use of pastoral lease land. Such permits may only be granted over pastoral lease land that is both improved and enclosed (s.122). In addition, the non-pastoral lease activity must comply with all the requirements of environmental and conservation legislation in Western Australia (s.117). Where there are major non-pastoral projects proposed on pastoral lease land, that portion of the pastoral lease land affected by that project will be excised from the pastoral lease. A new lease for that non-pastoral project will be granted, subject to any native title considerations.

Permits will also be granted for non-pastoral activities, such as in the case of pastoral-based tourist activities where the Pastoral Lands Board is satisfied that those activities are purely supplementary to the pastoral activities on the land (s.121). Pastoralists will be required to provide annual returns in respect of stock numbers.

The Act provides a reservation in favour of Aboriginal people to enter at all times any unenclosed and unimproved parts of the land under a pastoral lease to seek sustenance in their accustomed manner (s.104).

In Part 8 the Minister may grant easements over Crown land with the consent of any interest holder.

Compulsory Acquisition and Compensation

The former provisions in the *Public Works Act 1902* that dealt with the compulsory acquisition of land and compensation have been incorporated, with minor changes, into this Act in Parts 9 and 10. These provisions require that a more detailed explanation now be given to the affected landowner of the taking process and their rights at the first point of contact (s.170).

In keeping with the proposals to devolve the administrative responsibilities of the Governor in relation to Crown land to the Minister for Lands, and to create a single registration system to replace the gazettal process, land or interests in land in the Act will now be 'taken' on the registration of a taking order with the Registrar of Titles under the *Transfer of Land Act 1893*. The land, or such interests in land, specified in the

taking order will extinguish the interest that will then become subject to a claim for compensation.

Following public consultation requests, and also to bring the time frames in line with the requirements of the NTA, the period for objection to notices of intention to take land and the period to claim compensation in relation to the taking, following the annulment or amendment of a taking order, has been extended from 30 to 60 days. This can be further extended at the discretion of the Minister.

Native Title Provisions

Where the taking of land under Parts 9 and 10 of this Act (s.152) affects native title, in terms of the NTA (s.227) this taking is a valid future act under ss.24MB(1)(b) and 24MD(1) of the NTA and the Act is consistent with the procedural requirements of the NTA.

A reference in the Act to 'interest' includes native title rights and interests (s.151). Section 153 provides that where the Act requires to give notice of any thing, the native title holders are to be treated as having an interest in the land for the purposes of the NTA (s.23(7)).

The Act (s.154) also makes provision for notice to be given to native title holders if an interest is to be granted to another person for the purposes of the NTA. If any native title rights or interest is taken under Part 9, the right or interest is extinguished to the extent permitted by the NTA (s.155).

The Act provides for compensation where native title rights or interests are taken. The claim for compensation is to be determined as if these rights or interests had been extinguished by the taking and at that time converted into a claim for compensation (s.156). It bars any further claims for compensation once compensation has been paid under the Act, and in any payment of compensation account will be taken of compensation paid under the NTA or any other Act.

If the taking of the land is reversed or cancelled, the Crown is entitled to recover the relevant amount paid by way of compensation for the loss of native title rights and interests, but not if a period of three years has passed since the interest in the land was taken (s.158).

The operation of the *Metropolitan Region Town Planning Scheme Act 1959* is limited to the metropolitan region, which includes the greater Perth and Fremantle area (s.5).

*Metropolitan
Region Town
Planning
Scheme Act
1959*

The Act empowers the Western Australian Planning Commission ('the Commission'), established under the *Western Australian Planning Commission Act 1985*, with the permission of the Minister, to declare any land in the metropolitan region to be a planning control area, consistent with one or more of the purposes specified in the Second Schedule, for a period of up to five years (s.35C). These include civic and cultural amenities, special uses and cultural heritage conservation. Restrictions on development are imposed in these areas (ss.35D-F).

The Act provides the Governor with power to acquire land in the metropolitan region (on the recommendation of the Commission and subject to the acceptance by the Minister of the recommendation) for the purposes of advancing the planning, development and use of that land for residential, commercial, industrial, public, recreational, institutional, religious, charitable or other uses (s.37A). Such acquisition is a compulsory acquisition and is subject to Parts 9 and 10 of the *Land Administration Act 1997* (see above). Hence, if any native title rights or interests are affected, the latter Act would give rise to an entitlement for a compensation claim under that Act.

The *Metropolitan Water Supply, Sewerage and Drainage Act 1909* empowers the Governor to proclaim water reserves or catchment areas anywhere in the metropolitan water sewerage and drainage area as defined in the Act (s.13). These are any areas constituted as such under the Act (s.5(1)).

*Metropolitan
Water Supply,
Sewerage and
Drainage Act
1909*

The Water Corporation (established under the *Water Corporation Act 1995*) has extensive powers to deal with water coming from the watercourse and other sources in any such reserve or catchment area (s.14). This is subject to the provisions of the *Rights in Water and Irrigation Act 1914*, if applicable (see below).

The Corporation and the Water and Rivers Commission (established under s.4 of the *Waters and Rivers Commission Act 1995*) have power to take any alienated land within the boundaries of any such reserve or catchment area under, and subject to, the provisions of the *Public Works Act 1902* (see

below) and the *Land Administration Act 1997* (see above). Hence, if any native title rights or interests are affected, the latter Act would give rise to an entitlement for a compensation claim under that Act.

An officer of the Corporation may enter any land to which water is supplied under this Act at all reasonable times to ascertain: quantities of water being consumed; whether there is or has been any waste, misuse, fouling or contamination of water; and whether all fittings and incidental items are in accordance with the by-laws and in proper order and repair (s.49). If the Corporation needs to repair or replace a fitting not up to standard, it is entitled to charge the owner or occupier of the land for doing so.

The Act also entitles a person authorised by the Corporation to enter, at all reasonable times, land to which water is intended to be supplied to attach the required fittings (s.51).

The Governor is empowered, on the recommendation of the Commission, to declare any part of the metropolitan water, sewerage and drainage area constituted under the Act as a public water supply area (s.57E).

The Corporation may take any water found under land in that area (s.57EA), but any other person is prohibited from building a well to draw such water without a licence issued under the Act (s.57G). This declaration does not give rise to a claim for compensation and is subject to disallowance by the Western Australian Parliament.

Parks and Reserves Act 1895 The *Parks and Reserves Act 1895* covers land reserved under Part 4 of the *Land Administration Act 1997* (see above) and provides for the appointment of a board of parks and reserves (s.3(1)). The Act (s.3(6)) also preserves any rights that the board was given under the *Land Act 1933* (s.33) (see above). The board is empowered to appoint a secretary, rangers, park-keepers and other officers or servants (s.7). Any member of the board or a ranger who finds a person committing, or about to commit, or suspects that the person has or is about to commit, an offence against a by-law made under the Act, is empowered to take a wide variety of actions (s.7A).

These actions include removing any vehicle, animal or thing from a park or reserve; stopping, detaining and searching any vehicle, vessel or conveyance; entering and searching any hut,

tent, caravan or other erection which is not a permanent residence; and requiring any person to give their name and address. However, any person against whom these powers are to be exercised has the right to be told of that fact and the reasons why these powers are to be exercised in relation to them (s.7A).

The board is empowered to make, alter or repeal by-laws with the approval of the Governor in relation to (among other things): the management and conservation of the park lands and reserves; the conduct of people frequenting these; preventing or regulating the admission of vehicles and animals to these; preventing or regulating shooting over, on or in these; and prohibiting damage or injury to and destruction of trees, shrubs, plants and flowers in these (s.8). These by-laws are binding on all people unless specifically excluded, and potentially impact on native title hunting and gathering rights and interests.

The *Petroleum Pipelines Act 1969* empowers the Minister to authorise anyone who is proposing to apply for a licence to construct a pipeline to enter onto the land where the pipeline is proposed to be constructed and to make preliminary investigations and surveys in connection with this (s.7). This is subject to giving reasonable notice to the owner/occupier of the land and to repairing any damage in this process. Obstructing the person so authorised or illegally interfering with anything done or used by the person is an offence that attracts a \$1,000 penalty.

*Petroleum
Pipelines Act
1969*

The Act provides formalities for the application for a licence to construct a pipeline (ss.8-11), which include a requirement for the applicant to lodge a security with the Minister for compensation that may be payable in respect of any easement or land taken under the licence by way of compulsory acquisition (s.10(1)). The applicant must acquire all lands and register all easements before beginning the relevant construction works (s.12).

The Minister is authorised to acquire compulsorily any lands or easements necessary for the purposes of the licence, at the expense of the licensee (s.19). Such acquisition is treated as if the land was being taken for a public work under the *Public Works Act 1902* (see below) and is subject to Parts 9 and 10 of the *Land Administration Act 1997* (see above). The land then

vests in the licensee and the latter is liable in respect of any compensation entitlements arising under that Act, including those relating to native title holders.

The Act (Part 3) deals with the construction and operation of a pipeline (ss.33-42) and (Part 4) with the registration and renewal of licences, permits and other instruments granted under the Act (ss.43-56). Offences and penalties are also created for things done without the necessary written authorisation.

Property Law Act 1969 The definition of 'land' under the *Property Law Act 1969* includes a right, privilege or benefit in, over or derived from the land (s.7). The Act enables a person to take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property (s.11). This is so even though that person may not be named as a party to the conveyance or other instrument that relates to the land or property.

Public Works Act 1902 The 'public works' referred to in the *Public Works Act 1902* include any works of the Crown intended:

- for the supply of water and sewerage and for drainage in a city, town, or district;
- for public wells or the conservation of water;
- for quarries and for procuring from most lands of timber, stone, gravel, earth or any other material required by the State for any industrial or other undertaking or activity;
- for the protection or preservation of indigenous flora or fauna; and
- for the protection and preservation of any cave or place of scientific or historical interest (s.2).

The Act empowers the Minister, the Minister responsible for the *Land Administration Act 1997* (see above) or any local authority, or any person authorised by any of them, to enter land for specified purposes (s.8). These include making any survey, setting up survey equipment and markers, digging or boring into the land to ascertain the nature of the soil, and

setting out the lines for any works. This is subject to giving any owner or occupier of the land 48 hours' notice of the intention to do so.

The taking of land is authorised for the Crown, the Governor, any Minister of the Crown, or local government to undertake, construct or provide any public works, whether under this or any other Act (s.10). 'Crown land' is defined as including all land of the Crown, whether or not it has been dedicated to a public purpose (s.2). This does not include land reserved as Class A reserves under the *Land Administration Act 1997*, any national park referred to under the *Conservation and Land Management Act 1984* (s.6(3)(b)) (see above) or land in respect of which native title exists.

Power to Take Water and Land

The Act empowers the Minister to take water and/or land for the purpose of supplying water for the use of, or in connection with, any public work, as well as to enter on any land for the purpose of laying, erecting, examining or repairing the relevant waterworks (ss.13(1)-13(3)). The Act requires the Minister to cause as little damage as possible in the exercise of the powers under it (s.13(4)), and entitles the owner or occupier of the land to compensation in respect of water impounded or diverted or taken, or for damage caused.

The Act includes native title holders as owners and occupiers of land for its purposes (s.13(6)). The acquisition and compensation provisions of Parts 9 and 10 of the *Land Administration Act 1997* apply (see above).

The right to use, the flow and the control of water in any watercourse, lake, lagoon, swamp, marsh or spring, unless appropriated or otherwise subject to the *Rights in Water and Irrigation Act 1914*, vests in the Crown (s.8). However, the owner/occupier of the relevant land is entitled to drain the land or make a dam or tank on the land, as long as this does not sensibly diminish the flow of a watercourse or the volume of water in a lake, lagoon, swamp or marsh.

*Rights in Water
and Irrigation
Act 1914*

The Act also allows the taking of water for domestic purposes, including watering a small garden or stock (ss.9 and 10). The Act (s.11) provides that other taking has to be done under a licence granted by the Water and Rivers Commission,

established under the *Water and Rivers Commission Act 1995* (see below).

The beds of all waters covered by the provisions of the Act remain the property of the Crown, even if all the relevant waters and surrounding land have been alienated by the Crown, unless it is being cultivated. The owner's right of access to the bed and to treat others on it without the owner's consent as trespassers is preserved, unless they are carrying out works with the authority of the Commission (s.16). Rights to all underground waters are vested in the Crown (s.26) and the owner/occupier is only allowed to construct works to draw such waters via artesian and non-artesian wells with a permit issued by the Commission (s.26A).

The Commission has power of entry onto land to exercise the powers of the Crown in relation to the control of watercourses or waters under the Act, as well as to inspect the land, and any dam, well or other works on the land (s.26H). The Commission may also take any steps or measures necessary for the purposes of the Act, including: the conservation and regulation of water; the prevention of pollution; protection of the relevant beds; clearing water channels; and preventing undue, excessive or illegal diversion, drawing, use or pollution of water, or interference with the bed.

The Act empowers the Governor to constitute an irrigation district (s.28) and empowers the Water Corporation to construct and maintain irrigation works in the district (s.33). It also provides for rights to compensation for riparian owners due to flooding caused by water from these works, with such claims to be lodged with either the Commission or the Corporation (ss.35 and 36). Additionally, the Act provides for principles in awarding compensation and the resolution of disputes (ss.37 and 38).

*Soil and Land
Conservation
Act 1945*

The *Soil and Land Conservation Act 1945* provides for the appointment of the Commissioner of Soil and Land Conservation (s.7), whose functions include the prevention and mitigation of land degradation, the promotion of soil conservation, and the encouragement of land-holders and the public generally to utilise land accordingly (s.13). The Act empowers the Crown to dispose of any of its land where the Commissioner considers this appropriate in view of land degradation or soil conservation (ss.19 and 19A).

If the Commissioner is of the view that compliance with matters specified under a lease issued under the *Land Administration Act 1997* (see above) or a mining tenement issued under the *Mining Act 1978* (see 5.5 below) may cause land degradation, the Commissioner may inform the responsible Minister of this. That Minister may then make the appropriate variations, modifications, revocations or additions to the lease or mining tenement.

The Commissioner or any appropriate officer or employee is empowered to enter onto any land to make surveys, place marks and carry out investigations (including taking soil specimens) necessary for the purposes of this Act (s.21). This is subject to the requirement that that person gives the owner or occupier of the land at least seven days' notice of an intention to do so. It is an offence to obstruct or interfere with a person entering land for these purposes.

The Act provides the Governor with power to declare any portion of the State as a land conservation district on the recommendation of the Minister (s.22). The Governor may make regulations dealing with such matters as: the lighting of fires; the clearing or destruction of, or interference with, trees, shrubs, plants or grasses; the restriction or regulation of the use of any land for agricultural or pastoral leases; and the doing on the land of anything to prevent or mitigate land degradation or promote soil conservation.

The Commissioner may recommend to the Minister that any Crown or private lands be reserved as a soil conservation reserve (s.26). In the case of Crown land, it becomes such a reserve upon the Governor's proclamation. In the case of private land, it may be taken as if for a public work under the *Land Administration Act 1997* (see above). The provisions of Part 9 and 10 of that Act apply and the land then becomes a soil conservation reserve. If such a reserve is subsequently abolished, it then becomes Crown land for the purposes of the *Land Administration Act 1997*.

The Act creates an offence and penalty of \$2,000 for anyone who, without the Minister's consent, lights any fire in, removes soil or the whole of any tree, shrub, grass or any other plant from, injures or destroys any tree, shrub, grass or other plant in, or in any way allows any cattle, horses or other animals to be in such a reserve (s.28).

Stock Diseases (Regulations) Act 1968 The provisions of the *Stock Diseases (Regulations) Act 1968* have now been largely overtaken by the *Exotic Diseases of Animals Act 1993* (see above), but the latter Act, which repealed Part 3 (Eradication and Control of Exotic Diseases), specifically ensures that regulations and orders made under Part 3 of this Act, provided they are not inconsistent with the 1993 Act, remain in force and operate in conjunction with the earlier Act (s.59 of that Act).

The effect of this is that any regulations that have been, or are made by, the Governor under this Act (s.10), apply to the eradication and control of enzootic diseases. These are diseases of stock that are not exotic diseases (which are defined in s.6 in terms very similar to the 1993 Act and are now covered by that Act), and, for the purposes of this Act, are still valid. These regulations may cover matters similar to those provided for under the 1993 Act (s.13), including penalties for offences against such regulations.

Swan River Planning Act 1995 The *Swan River Planning Act 1995* provides special planning objectives for the Swan Valley, which are the encouragement of traditional agricultural and other productive uses of the area, the protection of the environment and the character of the area, the reduction of nutrient levels in the River and the promotion of tourism (s.6). The Act divides the valley into four areas (ss.7-10), with slightly different planning objectives for each area, but basically consistent with the provisions of the Act (s.6).

The Act establishes the Swan Valley Planning Committee (s.11(1)), members of which are to include the President of Swan Shire, as well as representatives from the Midlands Chamber of Commerce, relevant vintners' associations and tourism bodies. The Act makes specific provision for inclusion of a person who, in the opinion of the Minister, is suitable to represent Aboriginal interests in the area (s.11(2)(e)).

The functions of the Committee include the provision of advice under specified provisions of the *Metropolitan Region Town Planning Scheme Act 1959* (see above), the *Town Planning and Development Act 1928* and the *Swan River Trust Act 1988* (see 5.3 below), as well as to any relevant public authorities, concerning the special planning objectives and related matters under this Act (s.13).

The *Transfer of Land Act 1893* consolidates the law relating to the simplification of the title to and the dealing with estates in land.

*Transfer of
Land Act
1893*

All laws concerning land that are inconsistent with this Act shall not apply to land under it. This Act does not apply to the registration of rights over land in respect of minerals or petroleum; or prevent or otherwise affect the system of registration under other Acts of mining or petroleum rights in respect of land whether Crown, freehold or leasehold (s.3). Mining or petroleum rights have the same meaning as in the *Land Administration Act 1997* (see above).

The Act applies to Crown land in the same way as it applies to freehold land, excepting certain provisions (ss.29, 48B, 70, 71B, 86, 222, 223 and 223A do not apply to Crown land) (s.4A).

The owner of freehold title has an absolute and hereditary right to title in the land (s.70). This provision would appear to make it unlikely that a residual interest would accrue to the holder of a native title interest after the expiry of a lease over the land.

The Act provides for the lodgment of a caveat by any beneficiary or other person claiming an estate or interest in land under the Act, or in any lease preventing dealing with the land in any way, until the issue concerning that estate or interest is resolved and the caveat is withdrawn by the person lodging it (s.137). This raises the issue, as yet untested, as to whether native title holders could prove the interest to lodge a caveat over land covered under this Act to prevent dealings with that land until issues of native title rights and interests, including compensation, have been determined.

The Act has provisions which establish a registration system for Crown land (Part 3B and 3A). Every Crown lease issued after the commencement of the *Transfer of Land Act Amendment Act 1909* shall be issued in duplicate under seal and forwarded by the Minister for Lands direct to the Registrar for registration under s.53. No Crown lease shall be issued after the commencement of the *Acts Amendment (Land Administration) Act 1997* (s.81A).

Water Agencies (Powers) Act 1984 The *Water Agencies (Powers) Act 1984* specifies a number of functions and makes provision for the necessary powers and incidental matters for the Water and Rivers Commission established under the *Water and Rivers Commission Act 1995*, the Coordinator of Water Services appointed under the *Water Services Coordination Act 1995* and the Water Corporation established under the *Water Corporation Act 1995*.

The Act (s.34) provides the Minister with wide powers to make by-laws for the inspection of premises provided with, or used for, water services (which are defined in s.3 as being water supply, sewerage, drainage or irrigation).

The Commission and/or the Corporation have extensive powers of entry onto land for rating purposes and to acquire information or carry out primary or remedial works related to water services (ss.68-72). Except in the case of entry onto land to get information on which to base rates and charges, they must serve the owner or occupier with written notice of their intention to do so, either under this, or, if applicable, under the *Land Administration Act 1997* (see above) or any other relevant Act. The Act provides an exception in the case of certain emergencies (s.73).

The Act also empowers these statutory authorities to acquire land, or an interest in land, for its purposes (ss.74-80), subject to Parts 9 and 10 of the *Land Administration Act 1997*.

The Commission or Corporation are empowered to carry out works and no claim for compensation lies against them if these works cause a loss of enjoyment or amenity or value in the land, or a change to the aesthetic environment ('land' being defined in s.74 as all the subsoil, surface and airspace of, and any legal or equitable title, right estate, easement, licence, lease, privilege or other interest in, over, under, affecting or in conjunction with that land) (ss.81-84). If acquisition is necessary for or incidental to the works, or in the case of compulsory acquisition, the provisions of the *Land Administration Act* will apply.

Water and Rivers Commission Act 1995 The *Water and Rivers Commission Act 1995* establishes the Waters and Rivers Commission (s.4) and establishes a board of management comprising seven people that performs the functions of the Commission (s.6). The Act (s.10) provides that these are licensing and giving directions as to the use of surface waters, artesian wells and non-artesian wells under the

Country Areas Water Supply Act 1947 and the *Rights in Water and Irrigation Act 1914* (both Acts referred to above) and conservation functions and associated powers under the *Waterways Conservation Act 1976* (see below).

Authorised staff (s.17) are empowered to enter onto land to make an assessment of water resources, or to carry out, maintain or inspect investigative works (to investigate water resources such as boreholes, gauging weirs and making excavations), but must give the owner or occupier at least 48 hours' notice of an intention to do so (s.16).

The Governor is empowered under the *Water Boards Act 1904* to constitute water areas (s.4), the effect of which (s.5) is to vest all lands and waterworks constructed in such areas in the Minister on behalf of the Crown, unless and until the land and waterworks are vested by the Governor under the Act (s.36) in a water board constituted for the area (s.6). *Water Boards Act 1904*

The board may construct all necessary waterworks for the purposes of this Act (s.40) and is given the status of a local authority for the purposes of the *Public Works Act 1902* (see above). It is required to give notice of such works and require the Minister's authorisation (ss.41-45).

The board may enter onto the land delineated on its plans for the required works, including the necessary earthworks, pipe works, sinking and acquiring wells, and taking lands without the owner/occupier's consent (s.46), but subject to Parts 9 and 10 of the *Land Administration Act 1997* (see above).

An officer of the board may enter land to determine the quantity of water consumed, whether there has been any waste, misuse, fouling or contamination of water, and to check on the compliance of fittings with the relevant by-laws and to effect minor repairs or replacement of such fittings (s.68). People authorised by the board may enter land at all reasonable times to place and attach fittings on the land and to examine, remove, repair, alter or replace any or all such fittings (s.70). The penalty for obstruction is \$500 (s.151).

The *Water Services Coordination Act 1995* provides for the establishment of the Coordinator of Water Services (s.4), which is responsible for administering the licensing of the Water Providers' Scheme (Part 3, ss.10-46), assisting the *Water Services Coordination Act 1995*

Minister in the planning and coordination of water services (defined in s.3 as being supply of water, sewerage, irrigation and drainage), and advising the Minister on all aspects of policy relating to water services, including needs, access, efficiency and charges (s.5).

Under the Act (ss.10 and 11), the Governor declares controlled areas in respect of water services and prohibits anyone from providing water services without an operating licence issued under this Act (ss.15-18) (penalty: \$100,000 and \$5,000 for each day if continuing). The holder of such a licence is required to provide water services and to undertake, operate and maintain the necessary works (s.32).

The Coordinator has the power to appoint inspectors who may (s.49), without notice, enter onto any land, premises or thing that the inspector has reason to believe is being provided with water services under this Act (s.47). This includes making inspections and examinations, taking samples, or conducting an inquiry or test, in relation to the observance of any orders, conditions, restrictions or limitations as regards the matters that are the subject of the licence. This also applies to finding the cause, results or other aspects of any failure of any water service works, including damage resulting from such failure. There is a penalty of \$5,000 for people and \$20,000 for corporations obstructing an inspector or failing to comply with requirements of inspectors (s.55).

*Waterways
Conservation
Act 1976*

The *Waterways Conservation Act 1976* empowers the Governor, on the recommendation of the Environmental Protection Authority (EPA), to declare a management area in any area in the State containing one or more rivers, inlets or estuaries, and to constitute a management authority for the area (s.10). This is limited to such land as is required for the conservation and management of the waters concerned. The authority may manage the area under its control and make relevant recommendations to the Minister, the EPA and the Water and Rivers Commission relating to the efficient implementation of the provisions of the Act (s.28).

The EPA or the Commission is empowered to appoint inspectors (s.61). Statutory officers under the *Conservation and Land Management Act 1984* (see above), fisheries officers under the *Fish Resources Management Act 1994* (see 5.4 below), wildlife officers under the *Wildlife Conservation Act*

1950 (see below) and police officers are inspectors for the purposes of this Act.

The Act gives inspectors powers to enter any premises, with the consent of the owner or occupier, to examine or inspect industrial plant, equipment or process, make inquiries, tests and examinations and request information as required to confirm compliance with the Act, while causing the least possible disruption or obstruction (s.63).

If an inspector finds someone committing an offence, or suspects on reasonable grounds that the person is about to commit an offence against this Act, they may stop, detain and search any vehicle, vessel or conveyance, remove any vehicle, animal or other thing from the relevant waters or land (s.63).

The inspector may also enter and search any non-permanent structures such as tents or caravans, ask a person to give the inspector their name and address and detain a person who refuses to do so under the Act (ss.63-64). It is an offence punishable by a penalty of \$500 to obstruct an inspector (s.65).

The *Western Australian Land Authority Act 1992* establishes the Western Australian Land Authority and provides for the Authority to have a board of directors of between five and seven members appointed in writing by the Minister (ss.5 and 6).

*Western
Australian
Land Authority
Act 1992*

One of the functions of the Authority is to be the agency through which the government provides or promotes the provision of land for the social and economic needs of the State (s.16). These needs are aimed at the lower end to middle range of the market to ensure a competitive element and, specifically, to provide subdivided land for the social needs of people who would otherwise be unable to afford to acquire a home.

The Act (s.20) empowers the Authority to acquire compulsorily land for the matters set out in it (s.16) or industrial purposes, but subject to the provisions of Parts 9 and 10 of the *Land Administration Act 1997*. The Governor is empowered to dedicate any Crown land for the purposes of this Act (s.21), but subject to consulting with the Ministers responsible for the *Land Administration Act 1997* (see above) and the *Mining Act 1978* (see 5.5 below).

Western Australian Planning Commission Act 1985 The *Western Australian Planning Commission Act 1985* establishes the Commission (s.4) and specifies that it is to comprise of a chairperson and five other members (s.5). Of these five, one is to be nominated by the Minister from local government in the metropolitan area, another the mayor of Perth, another from a non-metropolitan local government region, and two others nominated by the Minister with experience in such fields as urban and regional planning, business management, property development, housing, financial management, engineering, surveying, valuation, transport, heritage, local government or community affairs. There are also to be another six members, including the corporate executive officer of the Water and Rivers Commission and of the Environmental Protection Authority.

The functions of the Commission include advising the Minister on the coordination and promotion of urban, rural and regional land use planning and land development in the State (s.18). It must also prepare a planning strategy for the State as a basis for coordinating and promoting regional land use planning and land development, and for the guidance of government departments and instrumentalities and local governments on those matters.

Wildlife Conservation Act 1950 The *Wildlife Conservation Act 1950* provides for the conservation and protection of wildlife. It empowers the Minister to declare any animal or class of animal to be fauna for the purposes of this Act (s.6(2)) and to do likewise in relation to certain types of flora (s.6(4)) (but subject to the *Agriculture and Related Resources Protection Act 1976*, see above).

The Act create offences for the unauthorised possession or taking of, or interference with, protected fauna (ss.16 and 17), and makes similar provision in relation to protected flora (s.23B). To 'take' for the purposes of the Act includes to kill, capture, disturb or molest any fauna (s.6(1)).

The Act defines Crown land as being any land other than private land (s.6(1)). Private land is defined as being any land that has been alienated from the Crown in freehold.

Notwithstanding the other provisions of the Act to the contrary, Aboriginal people may take any fauna or flora on Crown land, and on any other land (but not a nature reserve or wildlife sanctuary as defined under ss.6 and 16 of the

Conservation and Land Management Act 1984, see above) with the consent of the owner of that land, to provide food for themselves and their family (s.23(1)). The Act empowers the Governor to make regulations to suspend or restrict the operation of this provision (s.23(1)) if satisfied that they are being abused or that any species of fauna or flora which is being taken under the Act is likely to become unduly depleted (s.23(2)).

WESTERN AUSTRALIA

5.2 HERITAGE

The *Aboriginal Heritage Act 1972* applies to places or objects of sacred, ritual, spiritual or ceremonial significance to people of Aboriginal descent, or made or used for any purpose connected with traditional cultural life (ss.5 and 6). *Aboriginal Heritage Act 1972*

This is the first statutory provision in Australia to provide specifically for traditional Aboriginal use of places and to recognise Aboriginal custodians of cultural sites and objects, and to protect this use and custodianship, except where the Minister considers it to be detrimental to the purposes of the Act. Details of the regime under which this recognition is provided are contained in the Act (ss.7 and 8).

Protection of Sites

Responsibility for the proper care and protection of places under the Act lies with the Minister who, for the purposes of this Act, is a body corporate (ss.10-11). The Minister is required to have regard to the recommendations of the Aboriginal Cultural Materials Committee ('the Committee') and the Registrar of Aboriginal Sites ('the Registrar'), but is not bound by such recommendations unless explicitly provided for in the Act (s.11A). Subject to the Committee being satisfied that a representative body of Aboriginal people has special traditional and current interest in a place, the Minister may delegate powers and duties in relation to that place (s.9).

The Act establishes the Committee (s.28), whose role it is to advise the Minister. Its executive officer, the Registrar, is also an officer of the department (s.37). The Registrar is required to maintain a register of all protected sites and Aboriginal cultural material, as well as all other places to which this Act applies (s.18).

The Act makes it illegal to excavate, destroy, damage, conceal or alter a site, to remove an object from a site, or to deal with an object in a manner not sanctioned by relevant custom (s.17), or to assume the possession, custody or control of an object, without the written authorisation of the Registrar or the

consent of the Minister (s.18) or the Committee's consent to an archaeological excavation or removal of material (s.16).

These provisions also require the owners of land and holders of mining tenements to notify the Committee of any intended use likely to have a deleterious effect on an Aboriginal site or place. In any proceedings against a person for a breach of this Act it is deemed that the property which is the subject of the proceedings is the property of the Minister (s.53).

Protected Areas

The Minister may, on the recommendation of the Committee, but subject to giving written notice, declare any Aboriginal site, regardless of whether it is on public or private land, as a protected area, if the Committee considers it to be a site of outstanding importance (s.19). The Minister's decision must be made with regard to the general interests of the community (s.21). The decision of the State's Supreme Court in *Western Australia v Bropho* (1991) 5 WAR 75 centred on the meaning and implications of this provision. In that case the Court held that it was not the case that a member of a group of people with a particular subjective concern to protect or preserve a particular site, whether for its perceived environmental, spiritual, cultural or heritage qualities, obtains standing merely by virtue of that concern, however profound that concern might be. The interpretation was that the Act exists for the benefit of all Western Australians, with a view to preserving objects and places regarded by the community as being of significance in the context of the traditional cultural life of Aboriginal people, rather than the protection of heritage as perceived by living Aboriginal people themselves.

The Governor may also make regulations prohibiting or imposing restrictions on people entering or remaining in a protected area, as well as a wide range of other regulations, to ensure that the places and objects to which this Act applies (and the immediate environment necessary to maintain the nature and significance attached to them) are protected from damage, disturbance or adverse influence (s.26).

A person who holds an interest in land on which an Aboriginal site is located may enter into an agreement with the Minister that all or part of the land be held, subject to a covenant in favour of the Minister, that would prohibit or impose conditions on any development or use of the land that would be deleterious to the preservation of that site (s.27). The

agreement may be for a specified or indefinite period of time and may include a provision that requires or prohibits the Minister from doing any thing specified under the Act.

The Act makes provision for compensation to the person who, immediately prior to the vesting of the land in the Minister as a result of a declaration, was the holder of an interest in or relating to that land. Compensation is also payable to those whose land is compulsorily acquired by the Governor under the Act (ss.22 and 24). The right to such compensation is confined to the provisions of this, and no other, Act or other operation of the law (s.14).

Protection of Objects

The Act also contains provisions enabling the Governor to declare an object, or class of objects, as Aboriginal cultural material on the recommendation of the Committee (ss.41 and 42) as well as provisions enabling acquisition by the Minister of such Aboriginal cultural material, including compulsory acquisition if the Minister is of the opinion that the acquisition would be in the public interest of the community (ss.43-47, also s.14 regarding compensation).

On the basis of a perception that the provisions of the Act were not always succeeding in achieving desired outcomes, an Inquiry was set up by the State Government to examine this among other land issues. The Western Australian Land Inquiry Report referred to an example, where approval had been given to an oil company to do seismic tests (ss.8.25-8.27). The company was permitted to proceed without reference to the affected Aboriginal people (the Ngaanyatjarra). In the end the protection of the site came down to an agreement between the Ngaanyatjarra people and the oil company, the effect of which was to guide the company away from the more sacred sites.

The *Aboriginal Heritage (Marandoo) Act 1992* specifically excludes the places that are on the land identified in Part 1 of Schedules 1, 2 and 3, including any object on or under any of that land, from the provisions of the *Aboriginal Heritage Act 1972* (see above). The places concerned are the Thoongarie Burial Site Complex and land surrounding Barndayn (Bunjima Pool) (Schedule 1), a portion of the Mount Bruce Aboriginal Site (Schedule 2) and a rock art complex situated on a part of a

*Aboriginal
Heritage
(Marandoo)
Act 1992*

power line route granted in respect of the area under a licence issued under the *Mining Act 1978* (Schedule 3).

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) is the preservation and protection from injury or desecration of areas and objects in Australia and Australian waters, being areas (including sites) and objects that are of particular significance to Aboriginal people in accordance with their traditions (ss.3 and 4).

The Act is expressed to bind the Crown specifically in right of the Commonwealth, but does not exclude or limit any State law that can operate concurrently with it and the Minister is required to consult with the State about the adequacy of its legislation before making a declaration to protect an area or object in the State or Territory (ss.7 and 13). The Federal Court has ruled that it is not a requirement to assess the application and effectiveness of the relevant legislation (*Tickner v Bropho* (1993) 40 FCR 183, pp 195-199).

Where there is a serious or immediate threat of injury or desecration to an area, the Commonwealth Minister for Aboriginal Affairs may, upon receiving an application from or on behalf of an Aboriginal person or a group of Aboriginal people, make an emergency declaration under the Act (s.9) that contains provisions for and in relation to the protection and preservation of the area from injury or desecration (s.11). An emergency declaration is initially for up to 30 days, but the Minister may extend it for up to another 60 days if necessary (s.9(2)).

Applications under the Act for more comprehensive and longer lasting declarations may be made by, or on behalf of, an Aboriginal person or a group of Aboriginal people, seeking the protection of a specified area (s.10). As with an emergency declaration application (s.9), the Minister must be satisfied that the area is a significant Aboriginal area (as defined in s.3) and that it is under threat of injury or desecration. But, in addition, before making a declaration, the Minister must first have received and considered a report on matters relating to the significance of the area, the risk of injury or desecration, the nature and extent of the protection and restrictions required, the proprietary and financial impacts on other people, and other matters (s.10(4)).

It is important to note that the Act does not require the Minister to make protective declarations under the Act (ss.9, 10 or 12), the power having been defined by the Federal Court as being ‘facultative, not imperative’ (per Lockhart J in *Wamba Wamba Local Aboriginal Land Council v Minister* (1989) 23 FCR 239, p.247). Having received an application made in good faith for a protective declaration, however, the Minister must make a decision and cannot choose not to decide; in other words, the Minister is required to exercise the discretion (see *Tickner v Bropho*, cited above).

For a detailed synopsis of the *Conservation and Land Management Act 1984* see 5.1 above.

*Conservation
and Land
Management
Act 1984*

The Act creates a regime for the management of land and waters comprising a variety of parks and reserves (ss.5-6) and vesting these in either the Lands and Forests Commission or the National Parks and Nature Conservation Authority (s.7). The potential to protect or preserve areas of interest or significance to Aboriginal people is primarily in the provisions relating to national parks (ss.6-7).

The Authority is responsible for the preparation of management plans for such parks to be used by the public consistent with, amongst other things, the preservation of any feature of archaeological, historical or scientific interest (ss.54-61).

There is a potential avenue for the protection of Aboriginal heritage through the provisions of the Act (s.62). These enable the Minister, on the recommendation of the Authority, to classify the whole or any part of land or waters in a national or marine park, or a nature or marine nature reserve, as a prohibited, restricted or limited access area, or such other class of area as the Minister, on the recommendation of the Authority, thinks necessary to give effect to the objects of the Act.

One of the purposes of the *Environmental Protection Act 1986* is to provide for the ‘conservation, preservation, protection, enhancement and management of the environment’ (specified in the long title). ‘Environment’ is defined in the Act as including ‘living things, their physical, biological and social surroundings, and interactions between all these’ (s.3(1)).

*Environmental
Protection Act
1986*

The 'social surroundings of man' [*sic*] are defined in the Act as being the 'aesthetic, cultural, social and economic surroundings, to the extent that those surroundings directly affect, or are affected by, his [*sic*] physical or biological surroundings' (s.3(2)). This could include such things as sites of current significance to Aboriginal people as well as any other archaeological sites.

Heritage of Western Australia Act 1990 The *Heritage of Western Australia Act 1990* establishes the Heritage Council of Western Australia (s.5). Its functions include advising the Minister on matters relating to, or associated with, places that have, or may have, cultural heritage significance or possess special interest related to, or associated with, the cultural heritage of the State; and matters regarding the use, presentation and conservation of those places (s.7).

Amongst the many and wide powers given to the Council under the Act (s.8(2)) is the power to enter into, implement and enforce heritage agreements, with an owner or occupier of land or a building if that land or building is registered, the Council advises that it should be registered, or the Minister directs it should be made the subject of such an agreement, because of the special interest relevant to the cultural heritage of that place, the relationship of that place to a registered place, or the nature of, or the potential relationship of, the place to, and its effect or potential effect on, a particular environment meriting conservation (s.29).

The Act provides for the establishment of a Register of heritage places, which is compiled and maintained by the Council (s.46). If the Minister is satisfied that a place is of cultural heritage significance, or that it possesses special interest related to, or associated with, cultural heritage, and is of value for the present community and future generations, and they are satisfied that the protection afforded by the Act is appropriate, notwithstanding that the place may be afforded protection under some other written law, the Minister may direct the Council to enter that place on the Register (ss.47, 51 and 52).

Regardless of whether a place is on the Register or not, the Act empowers the Minister to make a conservation order, if necessary or desirable, to provide special protection to that place, including consent orders or stop work orders in cases of

imminent damage (s.59). The matters specified in a conservation order may include limiting or prohibiting entry and prohibiting any activity that, in the opinion of the Minister, is likely to affect the heritage characteristics or conservation of the place detrimentally.

The Act makes provision for the compulsory acquisition of a place having cultural heritage significance where it appears to the Minister that its continued existence in a condition suitable to effect the conservation of its heritage value is in jeopardy (s.73). Parts 9 and 10 of the *Land Administration Act 1997* (see 5.1 above) apply to any such acquisitions and related actions.

There is no specific mention of Aboriginal sites in the Act and objects are not mentioned at all. This reflects the concern of the Act with the conservation (defined in s.3 as including the ‘preservation, protection, stabilisation, restoration, reconstruction, adaptation and maintenance of that place to enable retention of the cultural heritage significance of that place’) of places (defined in s.3 as being ‘land, land adjacent to and under tidal waters, estuaries, watercourse or lakes, and buildings on such land’), rather than objects. Cultural heritage significance is defined as meaning, in relation to a place, ‘the relative value that the place has in terms of its aesthetic, historical, scientific or social significance, for the present community and future generations’ (s.3).

This concept of significance for the present community and future generations imposes a more rigorous test than the one applied in the *Aboriginal Heritage Act 1972* (see above) for Aboriginal sites and makes the Aboriginal Heritage Act the more obvious choice of recourse for Aboriginal people seeking protection of places of value.

However, for example, given that all planning control areas declared under the *Metropolitan Region Town Planning Scheme Act 1959* (ss.35B-35E) (see 5.1 above) are made specifically subject to application of the relevant provisions of this Act, it could be to the advantage of Aboriginal people to seek registration of, or a conservation order over, the land under this Act.

WESTERN AUSTRALIA

5.3 LOCAL GOVERNMENT

The purpose of the *Aboriginal Communities Act 1979* is to provide for communities, wholly or principally composed of Aboriginal people, to manage and control their community lands under the Act. The Act applies to communities specified or declared to be communities under the Act by the Governor on the recommendation of the Minister.

*Aboriginal
Communities
Act 1979*

Once declared or specified, a council of the community will be established that will require consultation with the members of the community (s.3). The communities specified are the Bidyadanga Aboriginal Community La Grange Inc and the Bardi Aborigines Association Inc (s.4). Community lands do not need to be reserve lands, and are simply any lands declared and subject to amendment by the Governor under this Act (s.6).

The Council of a community may make by-laws, subject to the Minister's consent, Governor's approval and disallowance by the State Parliament. These may deal with such matters as access by people or animals to community land, use of vehicles, preservation of buildings and plants, prohibition of certain behaviour, regulation of alcohol and firearms, and rubbish.

While these by-laws may create a wide range of offences, penalties and other sanctions and provide police with powers of enforcement, they cannot remove, restrict or override the provisions of any statutory or common law that applies in the State (ss.6-8 and 13). Valid by-laws do apply to all people within the boundaries of the community.

For more detail on the *Land Act 1933* see 5.1 above.

Land Act 1933

On 30 June 1972, a new community welfare purpose 'for the use and benefit of the Aboriginal inhabitants' was gazetted under the *Land Act 1933* (see *Gazette* of 30/6/72, p.2100) with respect to town reserves. The effect of this is to deny the application of the *Aboriginal Affairs Planning Authority Act 1972* (see 5.1 above) and, accordingly, town reserves do not

vest in the Authority established under that Act. They are administered by the Department of Community Welfare. In 1985, a program was begun transferring and vesting the town reserves created under this Act in the Aboriginal land trust provided for under the *Aboriginal Affairs Planning Authority Act 1972* (see 5.1 above).

As outlined in 5.1, the Land Act was repealed by the *Land Administration Act 1997*. However, matters undertaken under the repealed Act are preserved by the 1997 Act, which also creates a system for the reservation of Crown land for the use and benefit of Aboriginal people (as provided under Part 6 of the 1997 Act).

Local Government Act 1995 Apart from the limited operation of the *Aboriginal Communities Act 1979* referred to above, Aboriginal councils or groups generally cannot act with regard to local government, public order, policing or liquor on reserved lands. The *Local Government Act 1995* does not exclude Aboriginal reserves and they may constitute or be part of a local government area.

The Governor, on the recommendation of the Minister, may make an order dividing any area of the State into a district and, once the area has become a district, the Act then establishes a local government for that district (ss.2.1-2.5).

As specified under the Act, local governments have extensive powers to do things on any land in their districts even if that land is not their property (s.3.27 and Schedule 3.2). This includes: works to drain land and prevent or reduce flooding; removing growing or dead timber; earth, stone or gravel required for making or repairing a thoroughfare, bridge, culvert, fence or gate; placing signs on the land to indicate the names of public thoroughfares; and making safe a tree that represents serious danger without notice to the owner/occupier (but at the local government's expense).

The Act (s.3.28) also authorises a local government to enter onto land for any purpose associated with its functions, which are to do all things necessary to provide good government for its district (s.3.1). It must either give the owner/occupier of the relevant land notice of its intention to do so and specify the purpose of entry or obtain the owner/occupier's consent (ss.3.31 and 3.32).

The Act (s.3.31(3)) provides that if these requirements have been met, local governments then have the power to enter without needing to comply with any further requirements that they would have been otherwise required to under the *Public Works Act 1902* (see 5.1 above). This right is subject to the rights of Aboriginal land owners under the *Aboriginal Affairs Planning Authority Act 1972* (see 5.1 above) to restrict access to lands administered by a land trust set up under that Act.

Vesting of Land Reserved Under the Lands Act

Land reserved under the *Land Act 1933* (see previous Act) may also be vested in a local government, in which case the local government may do anything that a board would be entitled to do under the *Parks and Reserves Act 1895* (s.5) (see 5.1 above) for the purposes of controlling and managing that land (s.3.54). Generally, a local government can only take land for the purposes of the *Public Works Act 1902* if that land is in its own district (s.3.55).

The *Local Government (Miscellaneous Provisions) Act 1960* was the State's principal local government statute until most of its provisions were replaced by the *Local Government Act 1995* (see previous).

*Local
Government
(Miscellaneous
Provisions) Act
1960*

The Act deems local government to be the owner and occupier of all streets, ways, reserves, bridges, ferries, foreshores, jetties, wharves or other public places, as well as of unenclosed lands abutting them, for the purposes of the unauthorised presence of cattle (s.447). The Act provides that any cattle driven along or onto such areas without the consent of the relevant local government are trespassing and may be impounded (s.448).

The effect of the Minister declaring a planning control area (PCA) under the *Metropolitan Region Town Planning Scheme Act 1959* (s.35C) is that the provisions relating to a PCA prevail over any planning schemes and by-laws made by the responsible local government in the metropolitan area under this or the *Town Planning and Development Act 1928* (see below).

*Metropolitan
Region Town
Planning
Scheme Act
1959*

Part 4A of this Act, dealing with PCAs, operates subject to any conservation order made under the *Heritage of Western*

Australia Act 1990 (see 5.2 above) and, in any event, subject to making the required disclosures to, and having the required consultations with, the Heritage Council established under that Act (see ss.35B and 35C of this Act).

The Act also ensures that appeals in respect of any conditions imposed as a result of advice furnished by the Council (s.35F) or because of a conservation order must be referred back to the Council for advice, and the Town Planning Act (s.52) applies to any such appeal.

Swan River Trust Act 1988 The *Swan River Trust Act 1988* establishes the Swan River Trust (s.6), which has planning, protection and management functions in respect of the Swan and Canning Rivers and certain adjoining lands (s.7).

The Act requires the trust to consult with local government and the trust is required to have regard to any submission made by the relevant local government (s.9). The trust must also ensure that a nominee of that local government is given a written invitation to any meeting of the trust where a matter is to be considered that is of relevance to the local government.

The trust is required to prepare a management program for the area covered by the Act and the trust must consult with public authorities and local governments that are likely to be affected by the management program, and also the State's Local Government Association (s.33). The program must contain a statement of the guidelines or policies proposed to be followed and a summary of the operations proposed to be undertaken (s.36).

The Act impose restrictions and controls on developments in any area it covers (ss.49 and 50), and requires the trust to consult with interested public authorities and local governments on the nature of any proposed development (s.53).

Town Planning and Development Act 1928 The *Town Planning and Development Act 1928* (TPD) empowers the Minister to make town planning schemes and implement them by way of regulations made under this Act in respect of any local government district once it has been approved by the relevant local government (ss.6-8). The Act applies to the planning and development of land for urban, suburban and rural purposes.

Town planning schemes are also required for Crown lands that have been set aside under the *Land Act 1933* (see 5.1 above) as town, suburban or village land that are intended to be sold, leased or disposed of (s.19).

These purposes are set out in Schedule 1 of the Act and include the classification or zoning of the scheme area for various types, kinds or classes of cultural heritage conservation and including areas for the protection of the environment or landscape (cl.10), as well as for the preservation of particular trees (cl.11A) and of places and objects of cultural heritage significance (cl.12). The Act (s.18C) imposes restrictions on activities on or near places on the Register maintained by the Heritage Council under the *Heritage of Western Australia Act 1990* (see 5.2 above).

Payment of compensation to people whose land is injuriously affected by the making of a town planning scheme is provided under the Act (s.11), but this specifically excludes land or property to which the *Heritage of Western Australia Act 1990* applies from these provisions (s.12).

Any leases, options, sales, subdivisions and licences of land are subject to, where applicable, advice received from the Heritage Council and any conservation orders made under the *Heritage of Western Australia Act* (s.20 of the TPD Act). If the place is on the Register maintained by the Council under that Act, any approval given will be treated as having been revoked under that Act (s.78(3)).

The Act gives the responsible local government the power to acquire land either with the consent of the owner or compulsorily (s.13). In the case of the latter, the Governor must give consent and the provisions of Part 9 of the *Land Administration Act 1997* apply. However, the *Land Administration Act* (ss.170-175 and 184), which deals with notices of intent to acquire an interest in land, and Ministerial approval and objections to a proposal to acquire an interest in land, are excluded by the TPD Act (s.13). These matters are covered under Part 1 of this Act.

WESTERN AUSTRALIA

5.4 MARINE

Following extensive amendments to the *Conservation and Land Management Act 1984* (CALM Act) by the *Acts Amendment (Marine Reserves) Act 1997*, marine nature reserves, marine parks and marine management areas reserved by the Governor of the State under the CALM Act (s.13), are now administered by the Marine Parks and Reserves Authority with the advice and assistance of the Marine Parks and Reserves Scientific Advisory Committee as established and provided for under the Act (ss.26A-26H). However, unlike the provisions of the Act that require a representative of Aboriginal interests to be included as a member of the National Parks and Nature Conservation Authority (s.23(1)(b)), which the Act establishes, there is no such provision for the Marine Authority or Committee.

Conservation and Land Management Act 1984

None of the new provisions contain any specific reference to Aboriginal people or matters of their direct relevance. The Act provides that the reservation of a marine nature reserve shall be for (amongst other things) the preservation of any feature of archaeological, historical or scientific interest (s.13A(1))

The Act provides that the reservation of a marine park shall be for the purpose of allowing only that level of recreational and commercial activity that is consistent with (amongst others) the preservation of any feature of archaeological, historical or scientific interest (s.13B(1)). These are the only provisions in the Act that enable officers of the Authority to give some consideration to matters of interest to Aboriginal people in marine parks and marine nature reserves.

The effect of the Act (ss.13B(3) and 13B(7)) is to prohibit recreational fishing in sanctuary, recreation and special purpose areas in marine parks declared as such under it (s.62). This includes recreational fishing licences issued under the *Fish Resources Management Act 1994* (FRM Act) (see below). However, the CALM Act preserves the rights arising under a licence issued under the FRM Act prior to its coming into effect (s.13D).

It could be argued that the exemption from the licensing requirement for recreational fishing under the FRM Act (s.6) (see below) for Aboriginal people engaged in traditional, non-commercial fishing is also a licence that arose prior to this Act, and hence does not bar such fishing by Aboriginal people in sanctuary, recreation and special purpose areas. In all other areas of a marine park recreational fishing is permitted and the exemption of the FRM Act (s.6) applies.

The CALM Act makes it clear that any form of fishing in a marine nature reserve is illegal (s.13A(2)). Likewise, the Act leaves little doubt that it is illegal to carry out fishing activities in marine management areas (s.13C(3)) and that, as regards any commercial or recreational fishing, the provisions of the FRM Act apply in favour of any inconsistent provisions in this Act.

Therefore it would appear that Aboriginal people, like all other people, cannot fish in marine nature reserves under any circumstances. However, they may engage in recreational fishing without a licence, in accordance with continuing Aboriginal tradition, for themselves and their families on a non-commercial basis in marine management areas as provided under the FRM Act (s.6).

*Fish Resources
Management
Act 1994*

The purpose of the *Fish Resources Management Act 1994* is to provide for the management of the State's fish resources. 'Fish' is defined as including an aquatic organism of any species, whether alive or dead, including eggs, shells, and so on, but excluding marine mammals, aquatic reptiles, aquatic birds, amphibians or pearl oysters.

Exemptions of Aboriginal People

The Act exempts an Aboriginal person from the requirement to hold a recreational fishing licence to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition, provided that the fish are taken for the purposes of that person or their family and not for a commercial purpose (s.6). The Act defines 'recreational fishing' as the taking of fish for a purpose that is not commercial; 'take' in relation to fish includes to catch, capture, entrap, enclose, gather, remove, poison, stun, kill or destroy fish by any means (s.4).

Notices may be issued under the Act (s.43(1)) prohibiting fishing activity in specified areas. Fishing activity is defined as ‘searching for, attempting to take or taking fish, or engaging in any other activity that can reasonably be expected to result in the taking of fish’ (s.4).

Recreational Fishing Advisory Committee

The Act provides for the appointment by the Minister of an Aboriginal person who, in the opinion of the Minister, represents the interests of Aboriginal people to the Recreational Fishing Advisory Committee, the peak body for this interest group (s.33). The department administering the Act also maintains a position of senior policy officer for native title, and has a policy to consult with Aboriginal people where relevant and to attempt to attract Aboriginal representation to advisory committees whenever possible.

Departmental Policy - Aboriginal Communities

The department also has policy guidelines for special commercial fishing licences for Aboriginal communities. These include special non-transferable commercial licences being issued to such communities as well as giving special consideration to applications for any licences in respect of fishing areas that are located in areas where another community may have traditional fishing rights.

The guidelines also provide that Aboriginal communities be permitted to fish commercially for mud crabs and *beche-de-mer* in waters adjacent to traditional lands on which they live, or waters adjacent to adjoining land, with the permission of the community with tribal rights over the area. Any such licences are issued under the exemptions provisions of the Act, however alternative licensing arrangements under the Act are currently being considered.

Management Plans and Management and Protection Areas

The Act empowers the Minister to determine a management plan for a fishery (s.54). Such a plan may prohibit anyone from engaging in any fishing or fishing activity of a specified class in the fishery (s.58) as well as prohibiting all fishing in a fishery for a specified period (s.61). This would include Aboriginal people engaged in non-traditional fishing and

could be expressed to include boats and fishing gear used for traditional fishing under the Act (s.62).

The Governor may prescribe an area (not in a marine nature reserve, marine park or marine management area) of waters, or an area of the seashore up to the high water mark, and any waters adjacent to that area, as a designated fishing zone if the area contains a fishery of particular social or economic importance and the fishery is particularly susceptible to disturbance by human activity (s.109).

Therefore, it is possible for regulations to be made under the Act prohibiting the entry into, and the taking of fish in, a designated zone by any person other than an Aboriginal person or group in accordance with rights of traditional usage (s.113).

The Act empowers the Minister to set aside any area of the State's waters, except marine nature reserves, marine parks or marine management areas, as a fish habitat protection area for the purposes of protection and conservation of fish, fish breeding areas, fish fossils or the aquatic ecosystem, or the management of fish and other related matters (s.115).

Regulations may be made under the Act prohibiting or regulating entry into such area by all people, boats, aircraft, and others, and any fishing or other activity that may affect the area. This could have the effect of excluding Aboriginal people and groups from entering and taking fish in the areas, even if in accordance with rights of traditional usage, where this Act applies to the exclusion of Commonwealth law.

The Act allows for objections to the grant of an aquaculture lease or exclusive licence (ss.64-169). 'Aquaculture' is defined in the Act as being the keeping, breeding, hatching or culturing of fish (s.4). An aquaculture lease is granted under the Act (s.97). Exclusive licences may be granted for up to 14 years to any person, conferring on that person sole rights to take specified fish in specified coastal waters and foreshore areas using specified fishing gear (s.251).

It also empowers the Minister to make regulations excluding all others from doing those things that the holder of the exclusive licence is entitled to do. These aquaculture leases and special licences will be referred to as 'such leases or licences' in the next three paragraphs.

Application for Such Leases and Licences - Indigenous Issues

The Act (s.164) requires the Minister responsible for the Act to give written notice of the receipt of an application for such leases or licences to the Commissioner for Aboriginal Planning appointed under the *Aboriginal Affairs Planning Authority Act 1972* (see 5.1 above). The Act requires the Commissioner to send a copy of the application to any Aboriginal group that the Commissioner considers may have rights of traditional usage in relation to the area within 14 days of the receipt of the notice (s.165).

Any Aboriginal group may lodge an objection to the grant of such leases or licences, on grounds relating to rights of traditional usage, within 42 days of the sending of the notice (s.166). The notice of objection must include a detailed description of the Aboriginal group, a map of the relevant area, particulars of the rights of traditional usage and how such lease or licence may interfere with these, details of representatives of the group and any other particulars that may be specified in regulations made under the Act (s.167).

If an objection has been lodged, the Minister for Aboriginal Affairs must consider if the claim has been lodged in good faith and, if so, to consult with the group and give such weight to whatever information is provided as the Minister sees fit (s.168(1)). The Minister then has the discretion to either advise the Minister for Fisheries to grant such leases or licences with or without conditions specified by the Aboriginal Affairs Minister, or to recommend to the Fisheries Minister against the grant of such leases or licences (s.168(2)).

The Act bars any legal appeal against any advice or recommendation made by the Aboriginal Affairs Minister (s.168(3)), but enables an applicant to make submissions on a proposal by the Minister for Fisheries to refuse to grant such leases or licences, or to attach any conditions to such grant (s.169).

Powers of Fisheries Officers

Part 16 of the Act provides for the appointment of fisheries officers (s.11) with extensive powers of entry, search, seizure, acquiring of information, direction of boats and vehicles, examination, taking samples, inspection and arrest without

warrant for the purposes of, and as specified under, the Act (ss.177-195).

The Act provides for heavy penalties for interference with property seized by fisheries officers under the Act, for failing to give assistance to such officers, obstructing them and/or providing them with deliberately false or misleading information (ss.196-200). The only general limitation imposed on these officers is that they must try, as far as is practicable, to minimise damage to any property in the exercise of these powers.

Jetties Act 1926 The *Jetties Act 1926* empowers the Governor to authorise the Minister to acquire a jetty for its purposes (s.6(1)). The Act (s.6(2)) applies the provisions of Part 9 of the *Land Administration Act 1997* (see 5.1 above) to such acquisition as if it were for the acquisition of land for a public work, including the right to compensation as provided under the Land Administration Act. Part 9 of the Land Administration Act has detailed provisions concerning native title rights.

Marine and Harbours Act 1981 The purposes of the *Marine and Harbours Act 1981* include the advancement of efficient and safe shipping and effective boating and port administration through the provision of certain facilities and services, and related matters. Where land is required for the purposes of this Act, that land may be entered onto, surveyed and taken as provided under Part 9 of the *Land Administration Act 1997* (see 5.1 above) (s.10).

Mining Act 1978 For a detailed synopsis of the *Mining Act 1978* see 5.5 below. The Act extends to offshore mining in the State's coastal waters to within three miles of the low water mark (s.25). Mining beyond that range is covered by the *Offshore Minerals Act 1994* (Cth) (see Chapter 9.5).

Off-shore (Application of Laws) Act 1982 The effect of the *Off-shore (Application of Laws) Act 1982* is to apply the laws of the State in its coastal waters and to bring into operation the provisions of the *Coastal Waters (State Powers) Act 1980* (Cth), the *Petroleum (Submerged Lands) Act 1967* (Cth) and the *Seas and Submerged Lands Act 1973* (Cth) (see Chapter 9.4).

The combined effect of this regime is to leave the State with powers over the waters and the submerged lands of its coastal waters to a breadth of three nautical miles, extending into adjacent waters in respect of subterranean mining, and ports, harbours and other shipping facilities, including installations and dredging and other works, and relevant fishing laws.

The *Petroleum (Submerged Lands) Act 1967* (Cth) (s.127), which was inserted by the *Native Title Act 1993* (Cth), ensures that property in any petroleum that is recovered by the holder of a valid licence, permit or lease becomes the property of the holder of such an instrument and does not become subject to the rights of any other person(s) unless such rights have been legally transferred to such person(s). That means that while the *Native Title Act* continues to apply in the territorial sea of Australia, which are susceptible to native title claims, no such claims can be made over the petroleum in submerged land subject to a valid licence, permit or lease.

The *Pearling Act 1990* makes extensive provision regulating pearling and pearl oyster hatchery activities, and for the conservation and management of pearl oyster fisheries and related matters in the State.

*Pearling
Act 1990*

The Minister is empowered to declare areas of waters as zones (s.5). There are currently four pearl fishing zones that extend along the Western Australian coast from Northwest Cape to the border with the Northern Territory. Dampier, Broome and Port Hedland are all located adjacent to these zones.

The Act (s.7) prohibits anyone from carrying out pearling, including pearl diving (s.13) or hatchery activities without the relevant licence or permit issued under it (s.23). Pearl oyster farm leases are also issued under the Act and require the lessee to hold a hatchery licence or a pearling licence that authorises the holder to carry out pearl culture techniques (as defined in s.3).

The Act (s.23A(1)) prohibits the granting of licences, permits or leases (under s.23) in respect of marine nature reserves or an area of marine park from which pearling is excluded under the *Conservation and Land Management Act 1984* (CALM Act) (s.13B) (see above).

The Act (s.23A(2)) also prohibits the issuing of such statutory instruments in marine parks, other than those from which

pearling has been excluded (under s.13B of the CALM Act), and marine management areas unless the Minister responsible for the CALM Act approves the granting of such instruments. Limitations are imposed on the renewals of such instruments (ss.27A and 27B).

Pearling Industry Advisory Committee

The Act establishes the Pearling Industry Advisory Committee (s.38) which advises the Minister and Executive Director of Fisheries on the management, control, protection, regulation or development of pearling or hatchery activities and other matters relating to pearl oysters, and pearl oyster hatcheries and fisheries.

Members of the committee are appointed by the Minister; it currently comprises an independent chair, the executive director, industry members and members with relevant business and marketing experience (s.39).

Petroleum (Submerged Lands) Act 1982

Under Part 3 of the *Petroleum (Submerged Lands) Act 1982*, title in offshore petroleum falls into three categories: exploration (exploration permits and retention leases: Divisions 2 and 2A), production (licences: Part 3 Division 3) and pipelines (licenses: Division 4). The Act also provides for special prospecting and access authorities (ss.111 and 112).

Under the regime of legislation governing mining and pipelines for offshore petroleum, the laws of the State apply in the coastal sea and the adjacent area (see *Off-shore (Application of Laws) Act 1982* above and the *Coastal Waters (State Powers) Act 1980* (Cth) (in Chapter 9.4) (s.8).

The Commonwealth-Western Australia Off-shore Petroleum Joint Authority has jurisdiction in the adjacent area. The adjacent area may extend anywhere from the territorial sea to the outer limits of the continental shelf of Western Australia (see *Seas and Submerged Lands Act 1973* (Cth), ss.3 and 7, and *Petroleum (Submerged Lands) Act 1967* (Cth), ss.5, 5A, 7, 8A and 9). The State Minister may exercise any such powers as the *Seas and Submerged Lands Act 1973* (Cth) permits them to exercise as a member of the Joint Authority (s.12 of this Act).

The Act (s.18A) provides that before granting or renewing any statutory instrument under it in respect of any marine reserve,

the Minister responsible for this Act must notify the Minister responsible for the *Conservation and Land Management Act 1984*. Article 5(1) of the *Convention on the Continental Shelf*, which comprises Schedule 1 of this Act, also provides that the exploration of the continental shelf and the exploitation of its resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.

The effect of this is to apply the Convention to all waters of the State, which potentially has important consequences in that matters relating to the implementation of treaties generally fall under the jurisdiction of the Commonwealth. It is therefore possible that the combined operation of State and Commonwealth law is to make all waters of the State the subject of Commonwealth law in respect of offshore petroleum matters and hence possibly attract the provisions of the *Native Title Act 1993* (Cth). See the decision of Justice Olney in *Yarmirr v Northern Territory* (1998) 156 ALR 370, that has also become known as the *Croker Island case* (see also *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426).

The *Shipping and Pilotage Act 1967* does not have any exemptions from its provisions. All vessels are subject to the powers of a harbour master appointed under this Act (s.4), who may control the entry and departure of vessels into and from ports, as well as the berthing, mooring and movement of vessels within ports (s.5). Areas declared as fishing boat harbours or mooring control areas under the Act also make all vessels in them subject to it (s.10).

*Shipping and
Pilotage Act
1967*

The *Western Australian Marine Act 1982* applies to vessels, including most fishing vessels (s.6). 'Fishing vessel' is defined as any vessel used, or intended to be used, for catching fish, whales, seals, walrus or other living resources of the sea or seabed for trading or manufacturing purposes, but excluding any vessel engaged in the harvesting or transportation of algae or aquatic plants.

*Western
Australian
Marine Act
1982*

An inspector appointed under the Act (s.117) is empowered to stop, board, inspect and search vessels and detain them for as long as necessary in respect of matters relating to navigation

and shipping (s.57), and, where relevant, to order them back to the nearest port (s.63).

The chief executive officer of the department is empowered to direct the closure of any of the State's navigable marine waters for safety reasons or in the event of an emergency (s.66). The closure may apply to all vessels or specified class of vessels. The directive must state the duration and extent of the closure.

The chief executive officer may exempt any vessel or classes of vessel from the operation of the Act if they are satisfied that compliance with the provisions of this Act is unreasonable or impractical (s.115A).

The Act creates offences and penalties for any wilful obstruction, assault or intimidation of a person authorised to take actions for its purposes (s.119).

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5.5 MINERALS

The *Aboriginal Affairs Planning Authority Act 1972* (s.27) provides that title to all minerals on reserves in the State also vest in the Aboriginal Affairs Planning Authority (AAPA). The AAPA may (subject to the approval of the Treasurer) receive, for the benefit of Aboriginal people, any rental, royalty, share of profit or other revenue that may be negotiated or prescribed in relation to the use of the land or the natural resources (s.28). *Aboriginal Affairs Planning Authority Act 1972*

This power has been delegated to the Aboriginal lands trust under the Act (s.24(2)). The *Mining Act 1978* (ss.108-109) and the *Petroleum Act 1967* (ss.137-149) require payment of rentals, fees and royalties to the Crown in respect of the exploration for, and production of, minerals under those Acts.

Entry onto and use of Land

The AAPA has broad powers to determine the use of land under its control and who may enter upon it. An entry permit is required under the Act (ss.31 and 51(2)) to exercise tenements under the Mining Act (s.24(7)) and the Petroleum Act. Generally, the Government has not issued an entry permit unless the AAPA is in agreement. A negotiated payment for disruption of community lands may also be required before an entry permit is granted (s.28(a)).

For a detailed synopsis of the *Aboriginal Affairs Planning Authority Act 1972* see 5.1 above.

The *Aboriginal Heritage Act 1972* requires the holder of a mining tenement or other statutory right over an Aboriginal site to obtain permission from the Minister if that person wishes to use the land; the Minister may refuse permission or grant it, subject to conditions (s.18). For a detailed synopsis of the *Aboriginal Heritage Act 1972* see 5.2 above. *Aboriginal Heritage Act 1972*

Goldfields Gas Pipeline Agreement Act 1994 The *Goldfields Gas Pipeline Agreement Act 1994* ratifies and gives effect to an agreement between the State and Wesminco Oil Pty Ltd and others (referred to in the Agreement as ‘the Joint Venturers’) in relation to the development of a gas pipeline from the north-west of the State through the inland Pilbara region to the Goldfields region.

Ratification of the Agreement (which is in Schedule 1) is authorised under the Act (s.4) and takes effect despite any other Act or law, but without limiting, or otherwise affecting, the application of the *Government Agreements Act 1979* (see below).

The Agreement includes, among the initial obligations of the Joint Venturers, the need to comply with, and make applications with respect to, land under the *Aboriginal Heritage Act 1972* and also to take account of laws relating to the adequate protection of the environment (including flora and fauna) and to traditional usage (Clause 6(4)). Laws relating to traditional usage are defined as ‘laws applicable from time to time in Western Australia in respect of rights or entitlements to or interests in land or waters, which rights, entitlements or interests are acknowledged, observed or exercisable by Aboriginal people (whether communally or individually) in accordance with Aboriginal traditions, observances, customs or beliefs’ (cl.1)

After the Minister responsible for the *Petroleum Pipelines Act 1969* (see 5.1 above) has approved the route for the proposed pipeline for the purposes of this Agreement, that Minister must advise the Minister responsible for this Act of any condition or variation that they would attach to the relevant licence on grounds relating to traditional usage (cl.7(3)).

The Agreement empowers the State to acquire land compulsorily for its purposes (cl.26(1)), subject to the *Land Administration Act 1997* (see 5.1 above) and the Joint Venturers are required to pay the State for any costs of, and incidental to, such acquisitions, except those that are made under laws relating to traditional usage. The State would remain liable in respect of those under the Land Administration Act, which includes provisions specifically dealing with native title that are summarised in 5.1 above.

The Agreement imposes various requirements on the Joint Venturers in relation to the protection, management and rehabilitation of the environment affected by the project that is

the subject of this Act (cls.9(1)(o), 14 and 34), and includes a requirement to comply with the provisions of the *Environmental Protection Act 1986* (see 5.1 above).

The effect of the *Government Agreements Act 1979* (s.3) is to ensure that the provisions of any agreement that forms part of an Act that is administered by the Minister for Resources Development operate in accordance with the terms and conditions specified for and in them. This applies even if the result is to exclude other Acts or laws of the State. The definition is sufficiently broad to ensure that all of the minerals agreements Acts referred to in this section are included.

*Government
Agreements
Act 1979*

The owner/occupier of any land that is the subject of such an agreement has the sole right to remain on that land; the Act makes it an offence for any person, other than a person authorised or a member of the Police Force, to remain on that land (s.4).

The *Iron and Steel (Mid West) Agreement Act 1997* includes the ratifying and authorising of the implementation of an Agreement between the State and An Feng (Australia) Pty Ltd and Kingstream Resources NL (the proponents) for the establishment and operation of mines, plant and ancillary facilities in the mid-west region of the State to mine and process iron ore into steel and other value added products.

*Iron and Steel
(Mid West)
Agreement Act
1997*

The Agreement specifically provides that nothing in it exempts the State or the proponents from, or allows or requires them doing anything contrary to, the laws relating to native title (cl.2(2)), which are defined to mean laws applicable from time to time in the State in respect of native title (cl.1).

The proponents are required to undertake all studies, including those relating to environment and heritage (cl.4(1)), to satisfy the initial obligations imposed on them (under this clause and cl.5). The Agreement (cl.4(4)) gives the proponents the power, subject to making provision for the adequate protection of the environment (including flora and fauna), to enter onto land to ensure (amongst other matters) compliance with, and making applications with respect to, land under the *Aboriginal Heritage Act 1972* (see 5.2 above). The proponents are

deemed (by this clause) to be ‘the owners of any land’ for the purposes of that Act (s.18). The proponents are also required to submit to the Minister, by 31 December 1998, a proposal with respect to the project that includes an environmental management program on measures to be taken for rehabilitation, and the protection and management of the environment (cl.5(k)).

The Agreement (cl.12(1)) provides for the grant to the proponents of the relevant leases, licences and easements within specified time-frames, but only if permitted by the laws relating to native title. Under the Agreement (cl.13(1)), the State may resume any land, and transfer any interest in that land to the proponents, if necessary for the project (but subject to the Minister’s consent) and the proponents must compensate the State for doing so, including compensation payable to any holder of native title or of native title rights and interests in the land. For the purposes of the Agreement (cl.13(2)) a reference to ‘land’ includes land or any portion of any land and any estate, right, title, easement, lease, license, privilege or native title right or interest or other interest in, over, under, affecting or in connection with that land.

Iron Ore Beneficiation (BHP) Act 1996 The *Iron Ore Beneficiation (BHP) Act 1996* ratifies and authorises the implementation of the Agreement between the State and BHP Reduced Iron Pty Limited, which enables the company to establish and operate materials handling facilities and a plant for beneficiating iron ore at Port Hedland in the State’s north-west. The Agreement was made on 16 October 1995 and has a term of 60 years from the commencement of the Act.

This Act is one of many iron ore agreement Acts which apply in the State. Most of the ones which follow the implementation in the State of a regime of laws relating to native title do make provision for such laws along the lines of this Act. Included in this group are the *Iron Ore (Processing) (BHP Minerals) Agreement Act 1994* (that Act refers to laws relating to traditional usage), the *Iron and Steel (Mid West) Agreement Act 1997* and the *Iron Ore (Yandicoogina) Act 1996*. Most of the other iron ore agreement Acts do not contain any references to Aboriginal people or their lands at all. Some, such as the *Iron Ore (Channar Joint Venture) Agreement Act 1987*, contain extensive and detailed provision

relating to environmental protection and adopting the State's environmental protection regime (see 5.1 above). This does leave some scope for the protection of Aboriginal sites and places, but generally not in relation to native title rights and interests. For a discussion of the application of environmental protection legislation in this context, see *Determination on 19 June 1998 by the National Native Title Tribunal in Matter Nos. WF 96/1, 96/5 and 96/11 (Koara People, Native Title Party)* referred to under the synopsis of the *Mining Act 1978* (see below).

The Agreement under the *Iron Ore Beneficiation (BHP) Act 1996* makes a number of provisions concerning native title rights and interests and (in cl.1) adopts the definition of these as set out in the *Native Title Act 1993* (Cth) (see Chapter 9.6). Nothing in the Agreement will exempt the parties from compliance with, or enable or require them to do anything contrary to, any law relating to native title (cl.2(2)).

The Agreement (cl.5(1)) requires the company to give notice to the Minister concerning its proposals for the purposes of the Agreement. Where the proposal involves the taking of native title rights and interests, the Minister is required to suspend giving notice of the decision to allow such proposal to go ahead for up to two months, to enable the process of the taking of such native title rights and interests to be completed (cl.6(2)(b)).

The Agreement (cl.6(9)) also ensures that any time frames specified in it for the consideration and approval of such proposals will be extended, to enable the parties to comply with the laws relating to native title (as defined in cl.1).

Either party may terminate the Agreement at any time before the commissioning of the beneficiation plant (as defined in cl.1) if either of them is of the view that the project should not proceed, having regard to matters arising out of the laws relating to native title or by reason of claims or objections lodged under such laws (cl.6(10)). In such case, neither party will have any claim against the other with respect to any matter or thing arising out of, performed, done or omitted to be done or performed under the Agreement.

The company is entitled, under the Agreement (cl.8(1)) to be granted the necessary land by the State, as well as leases, easements and other rights to use land as it requires for the project, after approval of the relevant proposals. The

necessary modifications, for the purposes of the Agreement, to the *Land Act 1933* (see 5.1 above and also below) are outlined in the Agreement (cl.8(4)). However, it specifies that all grants may only be made insofar as they are permitted by the laws relating to native title (cl.8(1)).

Under the Agreement (cl.4(4)), the company is the owner of any land that it requires for the purposes of any survey and other works required to carry out the project; this ensures that it acquires the status of applicant under the *Aboriginal Heritage Act 1972* (s.18) (see 5.2 above). However, provided that the company takes adequate steps for the protection of the environment and the affected land, the State cannot prevent the company from entering the land for those purposes.

Land Act 1933 For a detailed synopsis of the provisions of the *Land Act 1933*, in particular as they relate to Aboriginal reserves, see 5.1 above. Part 7 of this Act makes specific provision of the leasing of land for mining purposes.

Land Administration Act 1997 Part 4 of the *Land Administration Act 1997* dealing with reserves ensures that any changes made and projects approved under the Act are made subject to the relevant mining tenements and clearances.

A new provision enables leases and easements granted under the Act to co-exist with mining tenements when the approval of the Minister for Mines has been obtained (s.90). The rights of the mining lessee will be suspended for the period of the lease or easement granted by the Minister responsible for this Act.

A detailed synopsis of the *Land Administration Act 1997* is in 5.1 above.

Mineral Sands (Beenup Agreement) Act 1995 The *Mineral Sands (Beenup Agreement) Act 1995* ratifies and authorises the implementation of the Agreement between the State and Mineral Deposits Pty Limited for a mining operation of not less than 500,000 tonnes per year of heavy mineral products at Beenup in the Augusta/Margaret River area (s.4).

Under the heading 'Protection and Management of the Environment', the Agreement (cl.7(7)) requires the company to implement a decision or comply with an award following

arbitration subject to, and in accordance with, laws relating to traditional usage.

‘Laws relating to traditional usage’ are defined in the Agreement (cl.1) as laws applicable from time to time in the State in respect of rights or entitlements to, or interests in, land or waters, which rights, entitlements or interests are acknowledged, observed or exercisable by Aboriginal people (whether communally or individually) in accordance with Aboriginal traditions, observances, customs or beliefs.

The *Mineral Sands (Cooljarloo) Mining and Processing Agreement Act 1988* (s.4) ratifies and authorises the implementation of an Agreement for the mining of mineral sands near Muchea between the State and two companies as Joint Venturers. The term of the mining lease was initially for 21 years, but may be extended for five to 10 years by the Minister for Mines. At the end of the extended term, the Joint Venturers have a further option to apply for and be granted a mining lease under Part 4 Division 3 of the *Mining Act 1978* (see next).

Mineral Sands (Cooljarloo) Mining and Processing Agreement Act 1988

Under the *Mining Act* (s.78), such leases are granted and renewable in indefinitely succeeding periods of up to 21 years each. Given that this lease would be regarded as a valid act under the *Native Title Act 1993* (Cth), and of the unlikelihood of a reversion, it is unlikely that a native title claim would arise or succeed in respect of the land that is the subject of this Act.

‘Mining’ is defined in the *Mining Act 1978* (s.8(1)) as including the prospecting, fossicking and exploring for minerals, and mining operations.

Mining Act 1978

In Western Australia, all Crown land in the State that is not already subject to a mining tenement is open for mining and exploration. ‘Crown land’ is defined to mean the whole of Western Australia except land granted by the Crown in freehold or leasehold and land reserved for a town-site or for any public purpose. Pastoral leases, leases for grazing purposes only, timber leases and leases for the use and benefit of Aboriginal ‘inhabitants’ are specifically designated as Crown land, as are reserves for mining, commons and public utility.

Crown land may be subject to native title (*Mabo v Queensland (No. 2)* (1992) 175 CLR 1, pp.36 (Brennan J) and 69 (Deane and Gaudron JJ)). The Act (s.20) provides some protection, in that no holder of a mining tenement or miner's right is entitled to prospect or fossick on, or explore or mine on or under, or otherwise interfere with Crown land that is the site of, or situated within 100 metres of, a cemetery or burial ground or a dwelling. However, the holder of such tenement or right is entitled to pass over such Crown land to gain access to land that is the subject of such tenement or right.

In most cases gold, silver, precious metals and other minerals in their natural condition on or below the surface of the land are the property of the Crown (s.9). Leases reserve the Crown's rights to minerals and grant rights to take minerals from land, subject to pastoral leases in accordance with rights granted under the Act.

Mining Titles

There are two types of exploratory titles. A prospecting licence is for the prospecting of minerals on a comparatively small scale. An exploration licence permits exploration over a very large area of land.

A prospecting licence allows prospecting for minerals and related works such as digging pits, sinking bores, tunnelling and excavation (s.48) over an area of not more than 200 hectares (s.40). It remains in force for a period of four years from the date it was granted (s.45) and gives the holder a right to be granted mining lease(s) in the area (s.49).

An exploration licence confers similar rights to those conferred by a prospecting licence (s.66) for a term of five years, which the Minister may extend for a further period or periods of one year in exceptional circumstances (s.61). The area over which such licences could be granted was 200 square kilometres up to 1990, but since have been confined to from one to 70 blocks, the size of which depends on the existence of other mining blocks in the area (s.57).

The holder of an exploration licence has the right to apply for one or more mining leases over any land that is the subject of the licence if exploration shows mineralisation in economical quantities, subject to any conditions that are imposed under the Act and were contained in the exploration title (ss.67 and 67A).

The Minister also has the option of granting a retention licence where an identified mineral resource has been located but is impractical to mine at present. It entitles the holder to enter onto subject land for further exploration, the area of land being such as, in the opinion of the Minister, would be sufficient to include the land on which the identified mineral resource has been located, plus any additional land that may be required for future mining operations (ss.70B and 70J).

The maximum term is five years and may be renewed for a period of up to five years (s.70E). The holder has the right to apply for, and be granted, one or more mining leases over the relevant land, subject to any applicable conditions and the provisions of this Act (s.70C).

However, it is not necessary to hold any of the above tenements before applying for a mining lease; any person may apply (s.71). A mining lease is issued for a period of 21 years with an option to renew for a further 21 years, with further renewals thereafter for periods of up to 21 years (s.78). The area must not exceed 10 square kilometres (s.73) and the lease gives the holder exclusive possession (s.85).

Provisions Relating to Legislation Relevant to Aboriginal People

Under the Act (s.26), mining may be carried out on any land to which Part 3 of the *Aboriginal Affairs Planning Authority Act 1972* applies (the 'AAPA Act', see 5.1 above) (see also s.29 of the *Land Act 1933*), with the consent of the Minister. Before giving such consent (whether conditionally or unconditionally), the Minister must consult with the Minister for Aboriginal Affairs and obtain their recommendation (s.24(7)). For the purposes of s.24, the responsible Minister is the one charged with the administration of the land or the enactment to which the land is subject, and if in any case a question arises as to who is the responsible Minister under this section, the question shall be determined by the Governor (s.24(8)).

However, the Act confirms that the trespass provisions of the AAPA Act continue to apply (s.31 of that Act) (s.24(7)(c)). Thus, the holder of a mining tenement must apply for a permit to enter physically any part of the land that is the subject of the mining tenement that includes an Aboriginal reserve to which Part 3 of that Act applies. These would be Aboriginal reserves

created under the Land Act (s.29(1)) or the AAPA Act (s.25(1)), or a combination of both.

Conditions imposed under the Mining Act (s.26(1)) may include those relating to the restoration of the land, the depth to which mining must be confined and compensation for loss or damage to the person having control or management of the land.

The Act provides the holder of a mining tenement with a right of entry and re-entry, and prohibits a person from obstructing or hindering, without lawful excuse, the holder of such a tenement from doing what the tenement authorises that person to do.

The Minister responsible for that Act may grant or refuse an entry permit after consultation with the Aboriginal lands trust. The trust, in practice, consults with, and seeks the approval of, the affected Aboriginal community. Such approval may be granted, subject to conditions (such as the holder of the tenement undertaking a survey of the land) to ensure compliance with the *Aboriginal Heritage Act 1972* (see 5.2 below) and is usually obtained in the form of an agreement between the applicant and the community, which may make provision for training, sacred sites and payment for disruption.

However, there are many other Aboriginal reserves to which Part 3 of the AAPA Act does not apply, and for which therefore there is no requirement for an entry permit at either the marking out stage or in respect of any mining activities, including prospecting or exploration.

The holder of any land held as Crown land and leased for the benefit of the Aboriginal inhabitants, and in respect of which a mining tenement has been granted, is entitled to be compensated by the holder of the tenement for improvements on the land caused by the holder of the tenement, as well as for any loss suffered by the lessee resulting from that damage, and for any substantial loss of earnings suffered by the lessee resulting from mining by the tenement holder (s.123). The Act (s.125) states that it does not provide for compensation in respect of such matters as deprivation of possession and damage to the surface of land or surface rights of way or easements unless the parties sign an agreement in respect of these and other matters.

If compensation is payable to native title holders for or in respect of the grant of a mining tenement, the person liable to

pay the compensation is the applicant for the grant of, or the holder of, the mining tenement at the time the amount is required to be paid; or otherwise, the applicant for the grant of, or the holder of, the mining tenement at the time a determination of compensation is made (s.125A(1)). Native title holders has the same meaning as in the *Native Title Act 1993* (Cth).

The objective of the *Nuclear Activities Regulation Act 1978* is to protect the health and safety of the people and the environment of the State from possible harmful effects associated with nuclear activities (s.2). It ensures that this Act prevails over any other Act in relation to the matters covered under its main objectives, except for the operation of the *Nuclear Waste Storage (Prohibition) Act 1999* (s.5).

*Nuclear Activities
Regulation Act
1978*

The Act (s.6) empowers the Minister to arrange for the formulation of codes of practice that may vary from those made under the *Environment Protection (Nuclear Codes) Act 1978* ('Nuclear Codes Act') if they do not make adequate provision or do not have regard to special conditions.

The Governor General may approve the establishment of codes of practice with respect to nuclear activities for a State if the Governor of a State requests this under the Nuclear Codes Act (s.12(10)). There are currently codes of practice covering the mining and milling of radioactive ores, transport of radioactive substances and management of radioactive wastes.

The Act (s.12) empowers the Governor to prescribe all things necessary or convenient to be prescribed under this Act, which includes adopting either wholly or in part any code formulated under the Nuclear Codes or any other Act.

Commonwealth law covers most aspects of uranium mining, with the *Environment Protection (Impact of Proposals) Act 1974*, the *Atomic Energy Act 1953* and the *Environment Protection (Nuclear Codes) Act 1978* all being relevant. Uranium is included in the definition of 'minerals' in the *Mining Act 1980* (s.8) (see above).

The Nuclear Activities Act will become relevant with the proposal by Rio Tinto to develop a uranium mine at Kintyre in the remote north-west of the State, on the edge of the Great Sandy Desert. However, the project has been delayed because of a drop in world uranium prices. The project is also still

subject to environmental approvals, which are on hold awaiting native title resolution.

Petroleum Act 1967 Under the *Petroleum Act 1967*, petroleum titles fall into four categories, namely those permitting exploration (Part 3 Division 2), those permitting production (Part 3 Division 3), retention titles (Part 3 Division 2A) and special prospecting operations (ss.43A-F, 105 and 106).

The Petroleum Act (s.5(1)) includes pastoral leases, leases granted for grazing purposes, timber leases and leases granted for the use and benefit of Aboriginal 'inhabitants', as Crown land for the purposes of the Act. All petroleum is the property of the Crown (s.9), including that found under Crown land (s.10); the Act provides right of access to search for and obtain petroleum from the land (s.11). However, the Act (s.7(2)) provides that in the case of land to which Part 3 of the *Aboriginal Affairs Planning Authority Act 1972* (AAPA Act) (see 5.1 above) applies, entry rights are subject to the restrictions imposed under that Act (s.31). Thus, the holder of a title granted under this Act must apply for a permit to enter physically that part of the land that is the subject of such title that includes an Aboriginal reserve to which Part 3 of the AAPA Act applies.

The lands affected by these provisions would be Aboriginal reserves created under either the *Land Act 1933* (s.29(1)) (see 5.1 above) or the AAPA Act (s.25(1)), or a combination of both.

The Minister responsible for the AAPA Act may grant or refuse an entry permit after consultation with the Aboriginal lands trust. The trust consults with and seeks the approval of the affected Aboriginal community. Such approval may be granted, subject to conditions such as the holder of the tenement undertaking a survey of the land to ensure compliance with the *Aboriginal Heritage Act 1972* (see 5.2 above) and is usually obtained in the form of an agreement between the applicant and the community, which may make provision for training, sacred sites and payment for disruption.

However, there are many other Aboriginal reserves to which Part 3 of the AAPA Act does not apply. Under the Petroleum Act (s.11), the Minister, through people acting with authority, may enter onto and occupy any vacant Crown land or any other land, either on a temporary basis or permanently, to

obtain, refine and dispose of petroleum. If this is done on land that is not vacant Crown land, the occupier or person who has an estate or interest in that land is entitled to compensation, as provided for in, and subject to, the provisions of the *Land Acquisition and Public Works Act 1902* (see 5.1 above). Subject to the latter, the Governor is also empowered to acquire land compulsorily for the purposes of this Act.

Compensation is also payable to the lessee of a lease for the use and benefit of the land for Aboriginal 'inhabitants' and for damage to improvements and any consequential damage. If the parties are unable to agree on compensation, the compensable lessee is entitled to commence action in the nearest local court for a declaration of entitlement (s.21). But compensation is not payable for deprivation of possession of the surface of, or damage to, the land or surface rights of way or easements, nor for any gold, minerals or petroleum known or supposed to be under the land (s.24).

If compensation is payable to native title holders for or in respect of the grant of an authorisation, the person liable to pay the compensation is the applicant for the grant of, or the holder of, the authorisation at the time the amount is required to be paid; or otherwise, the applicant for the grant of, or the holder of, the authorisation at the time a determination of compensation is made (s.24A). In this section authorisation means a permit, drilling reservation, lease, licence, special prospecting authority or access authority; and native title holders has the same meaning as in the *Native Title Act 1993* (Cth).

The *Property Law Act 1969* covers virtually all land in the State and provides the current regime of real property law for the State.

Property Law Act 1969

It is relevant to this section because the definition of land provided in it (s.7) includes 'land of any tenure, and mines and minerals, whether or not they are held apart from the surface of the land...'. 'Mines and minerals' are defined to include 'any strata or stream of minerals or substances in or under any land and the right to work and get the minerals and substances'.

WESTERN AUSTRALIA

5.6 NATIVE TITLE

The *Acts Amendment and Repeal (Native Title) Act 1995* changed the name of the *Public Works Act 1902* (see 5.1 above) to the *Land Acquisition and Public Works Act 1902* (LAPWA) and inserted a number of new provisions into the Act dealing with native title holders, rights and interests. However, these provisions have now been written into the *Land Administration Act 1997* (see 5.1 above) and the LAPWA has reverted back to being just the *Public Works Act 1902*. *Acts Amendment and Repeal (Native Title) Act 1995*

The Act also repeals the *Land (Titles and Traditional Usage) Act 1993*, which was ruled unconstitutional by the High Court in the case of the *State of Western Australia v Commonwealth* (1995) 183 CLR 373. The High Court found that the entire Act was inconsistent with the *Racial Discrimination Act 1975* (s.10) (see Chapter 9.2) and was therefore invalid under the Constitution. Amendments (s.109) to other Acts made under that Act were also repealed.

The *Native Title (State Provisions) Act 1999* is the State Government's response to the new state provisions of the Native Title Act 1993, as amended in 1998 (see Chapter 9.6). At the time of writing, April 2000, most of provisions of the *Native Title (State Provisions) Act 1999* were yet to be proclaimed. The Act can only become operative when approved by both Houses of Federal Parliament, as provided for under the *Native Title Act 1993* (Cth) (s.43A of that act). The provisions of this Act that became operative on assent, that is on 10 January 2000, deal with preliminary matters (see Part 1 and ss.2.2, 3.1, 7.1, 7.2 and 7.4). *Native Title (State Provisions) Act 1999*

The *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* is an Act to make provision in relation to native title as permitted by the *Native Title Act 1993* (Cth) (NTA) (see Chapter 9.6). Namely: *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995*

- under ss.19 and 22F of that Act, to validate past acts and intermediate period acts attributable to the State and to provide for the effects of the validation;
- under ss.23E and 23I of that Act, to confirm the effect on native title of acts attributable to the State done on or before 23 December 1996; and
- under s.212 of that Act, to confirm certain rights relating to natural resources and public access.

Unless the contrary intention appears, a word or expression used in this Act has the same meaning as it has in the NTA (s.4).

Part 2 validates past acts. Every past act attributable to the State is valid and is taken always to have been valid (s.5). The extinguishment effected by this Act does not by itself confer any right to eject or remove any Aboriginal people who reside on or who exercise access over land or waters covered by a pastoral lease the grant, re-grant or extension of which is validated by this Act (s.10).

In Part 2A, every intermediate period act attributable to the State is valid and is taken always to have been valid (s.12A, 12B, 12C, 12D or 12E). Intermediate period acts are certain acts that took place between 1 January 1994 and 23 December 1996, as defined by the amendments to the NTA (s.232A). These provisions relating to intermediate period acts allow for the validation of land dealings which did not comply with the NTA or with the common law and *Racial Discrimination Act 1975* prior to the passing of the original Act in 1993.

If a past act or intermediate period act attributable to the State contains a reservation or condition for the benefit of Aboriginal people; or the doing of the act would affect rights or interests (other than native title rights and interests) of Aboriginal people (whether arising under legislation, at common law or in equity and whether or not rights of usage), in regards to past acts nothing in this Act affects that reservation or condition or those rights or interests (s.11); and for intermediate acts nothing in ss.12B, 12C, 12D or 12E affects that reservation or condition or those rights or interests (s.12F).

Under ss.20 and 22G of the NTA native title holders are entitled to compensation because of the validation by this Act of a past act or an intermediate period act attributable to the

State (ss.12G and 12H). The compensation is payable by the State. Compensation is to be determined in accordance with the principles contained in Division 5 of Part 2 of the NTA.

Future acts of the State may be validated if details are on the Register of Indigenous Land Use Agreements of an agreement that includes a statement to the effect that the parties agree to the validating of particular future act/s, whether or not subject to conditions, so long as: the future act/s are attributable to the State; the State is a party to the agreement; and where a person may become liable to pay compensation in relation to the act/s, that person is a party to the agreement (ss.12Q and 12R).

Section 13 confirms the existing ownership of all natural resources by the Crown. Under s.212(3) of the NTA, this confirmation does not extinguish native title rights and interests and does not affect a conferral of land or waters, or an interest in land or waters, under a law that confers benefits only on Aboriginal people.

**A GUIDE TO AUSTRALIAN LEGISLATION
RELEVANT TO NATIVE TITLE**

6. TASMANIA

TASMANIA

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TASMANIA

6.1 LAND AND ENVIRONMENT

The *Aboriginal Lands Act 1995* grants to Aboriginal people certain parcels of land of historical or cultural significance to promote reconciliation with the Tasmanian Aboriginal community. *Aboriginal Lands Act 1995*

There are 13 parcels of land referred to in the Act. They are vested in the Aboriginal Land Council of Tasmania in trust for Aboriginal people in perpetuity (see ss.27, 38 and 39), and Schedules 3 and 4). The areas are located at Oyster Cove, Mount Cameron West, Mount Chappell Island, Steep (Head) Island, Kutikina Cave, Wargata Mina Cave, Ballawinne Cave, Badger Island, Babel Island, Great (Big) Dog Island, Risdon Cove, part of Cape Barren Island, and Wybalenna.

Vesting of Land in Aboriginal Land Council

The parcels of land are vested in the Aboriginal Land Council of Tasmania ('the Council') (s.27(1)) to a depth of 50 metres and include minerals other than oil, atomic substances and geothermal substances and helium (ss.27(2) and (3)). A right is reserved to the Crown to make and construct any necessary drains, sewers and waterways on Aboriginal land, as well as the right to alter, amend, cleanse or repair them (s.27(4)). Certain specified and limited rights of access are also reserved to the public over some nominated parcels of land (ss.27(5-8)). A number of other Crown reservations are specified in the Act (ss.27(9) and (10)).

The Council is a body corporate established under the Act (s.5). It consists of eight Aboriginal people elected by eligible electors (as defined under ss.3, 9 and 13) for a region or island group to represent that region or group (see ss.3 and 6, and Schedules 1 and 2). In using and managing this land, the Council must act for the benefit of all Aboriginal people and in the interests of reconciliation with the broader Aboriginal community, and must also have regard to the interests of local Aboriginal communities (s.18). The Act deals with leases and licences over Aboriginal land (s.28), and prohibits the mortgaging of such land (s.30).

The Council is required to involve a local Aboriginal group or a local Aboriginal person in the management of Aboriginal land (s.31(1)). The factors which the Council must consider in deciding which group or person to involve relate to the extent to which they have an association or connection with the land, the extent to which they have a desire and capacity to do so, and the importance of the land to all Aboriginal people (s.31(2)). The Council or a local Aboriginal group must prepare, and the Council must approve and administer, management plans for Aboriginal land (s.32).

Restrictions on Dealings in Aboriginal Lands

The *Mineral Resources Development Act 1995* (s.179) (see 6.5 below) provides that a mining lease or licence may not be granted under that Act over Aboriginal land without the agreement of the Council. Under the *Lands Acquisition Act 1993* (s.5A) (see below), Aboriginal land cannot be acquired. Nothing in the *National Parks and Wildlife Act 1970* (see below and 6.2) precludes an Aboriginal cultural activity by an Aboriginal person on Aboriginal land as long as that activity does not, in the opinion of the Minister, have a detrimental effect on fauna and flora and is consistent with that Act (NPW Act, s.49A).

Closer Settlement Act 1957

The purpose of the *Closer Settlement Act 1957* is to consolidate the law relating to closer settlement. The Act empowers Tasmania Development and Resources (TDR, see *Tasmanian Development Act 1983* below) to purchase any land that is suitable for the purposes of this Act, with the consent of the Minister (s.14). The Act allows TDR to do all things (subject to any direction of the Minister) that appear just and equitable to settle eligible people on the land and enable them to become independent landowners (s.21). ‘Eligible persons’ are those people and their spouses, aged 18 years or older, who own rural land that, in the opinion of TDR, is not sufficient to provide them and their family with a reasonable living ‘when farmed in a good and husbandlike manner’ (s.25).

An eligible person may apply to TDR, either generally or in a particular area, and, after ascertaining that the applicant is an eligible person and can prove that they could be a successful settler, TDR can register them as an applicant for settlement (s.26). As holdings become available TDR must offer them to

registered applicants, who can then choose to accept them, subject either to a development lease (see s.28) or a settlement lease (see ss.29-31) (s.27). The Act (ss.41 and 42) also enable TDR to provide financial assistance to these lessees by way of either a loan or remission of rent, paid from a loan fund established under the *Public Account Act 1957* (s.6).

The *Crown Lands Act 1976* applies to the management, sale and disposal of Crown lands.

Crown Lands Act 1976

‘Crown land’ is defined in the Act to mean land vested in the Crown, which is not contracted to be granted in fee simple but includes land granted in fee simple which has vested in the Crown by way of purchase or otherwise (s.2).

Crown land may be disposed of only in accordance with the Act (s.6). The Minister may reserve any Crown land for a range of public purposes (s.8), including: public roads or streets; different types of public buildings (like hospitals and libraries); preservation of water supply; land conservation; a variety of water works; and any other public purpose as determined by the Minister. Land reserved under the Act (s.8) may be leased for any of the public purposes for which it is reserved for up to 99 years (s.9).

Crown land, including any estate or interest therein, may be sold in such a manner, to such people, and on such terms and conditions, as the Minister thinks fit (s.13). Every grant, deed or transfer of Crown land shall contain a reservation to the Crown to make, or construct, in or on the land, drains, sewers or waterways, and minerals, including coal and oil, are also reserved, under the Act (s.16).

Part 4 sets out the procedure for the lease of Crown land and deals with the lease of land for rural purposes (s.31). The Minister may grant to the lessee, upon the expiration of the time of a lease for rural purposes, an option to purchase the land (s.35).

The following are unlawful uses of Crown land if not authorised under the Act (s.46):

- grazing of sheep, cattle or other stock on the land;
- dealings with timber, wood, gravel, stone, limestone, guano, shells, sand, loam, brick earth, or any other natural substances whatsoever;

- cutting, removing or damaging any vegetation;
- lighting of fires (except for cooking food, but always subject to the *Fire Service Act 1979*, see 6.3 below); and
- depositing and leaving litter on the land.

Environmental Management and Pollution Control Act 1994

The *Environmental Management and Pollution Control Act 1994* establishes the Board of Environmental Management and Pollution Control (s.12). The functions of the Board are set out in the Act and include advancing the objectives specified in Schedule 1 (see paragraph following the next), prevention of pollution and the protection of the environment of Tasmania from harm (s.14). The Board is subject to the direction of the Minister (s.16).

‘The environment’ is defined in the Act as being the components of the earth, including land, air and water, any organic or inorganic matter and any living organism, and human made or modified structures (s.3(1)).

‘Environmental harm’ is defined in the Act to mean any adverse effect on the environment (of whatever degree or duration), including an environmental nuisance (s.3(1)); ‘environmental nuisance’ is also defined and provided for in the Act (ss.5 and 53).

The objectives specified in clause 1 of Schedule 1 for the resources management and planning scheme of Tasmania include:

- promoting sustainable development (as defined in clause 2 of Schedule 1, see next paragraph) and maintaining ecological processes and genetic diversity;
- encouraging public involvement in resource management and planning; and
- promoting the sharing of responsibility for resource management between the different spheres of government, the community and industry in the State.

Clause 2 of Schedule 1 defines sustainable development as: managing the use, development and protection of natural and physical resources in such a way or at a rate which enables people and communities to provide for their social, economic and cultural well-being, while sustaining the potential of

natural and physical resources to meet the reasonably foreseeable needs of future generations; safeguarding the life-supporting capacity of air, water, soil and ecosystems; and avoiding, removing or mitigating any adverse effects of activities on the environment.

This includes concepts such as inter-generational equity and the precautionary principle, developed under international conventions (such as the UNEP *Convention on Biological Diversity*). The Convention also makes specific provision for the recognition of the role of Indigenous people in the protection of the environment and ensures that the environment is conserved by and for the benefit of Indigenous peoples.

The Act empowers the Board to enter into environmental agreements in respect of premises, areas or regions, and these may also apply to specific industries or groups (s.28). The agreements must specify any management, investment and monitoring functions that the parties consider necessary to ensure compliance with the Act, including matters relating to the objectives specified in Schedule 1.

The Director of Environmental Management (appointed under s.18 of the Act) is empowered to issue environment protection notices when environmental harm is, or is likely to be, caused, or has occurred and remediation is required, or for other purposes of the Act (s.44). The Act creates offences and penalties and exceptions in relation to compliance with these notices, as well as appeals mechanisms (ss.47-49). Further offences and penalties for causing environmental harm are set out in the Act (ss.50-54) and include defences (ss.55-57) and the service of, compliance with, and penalties under, environmental infringement notices (ss.67-72). Powers of entry, inspection and related matters are covered in Division 1 of Part 7, and apply to any place or vehicle specified in the required notice or warrant.

The *Forest Practices Act 1985* establishes the Forest Practices Board (under Part 1A), the objective of which is to advance the objectives of the State's forest practices system, as set out in the Act (Schedule 7). The Act sets out the Board's functions and powers, which include advising the Minister on forest practices policy in respect of both Crown land and

Forest Practices Act 1985

private land and issuing and maintaining the Forest Practices Code (see below) (ss.4C and 4D)

Part 2 allows a person to apply to the Board, subject to giving notice of intent, to have land owned by that person declared as a private timber reserve. A prescribed person may object to this proposal, such person being either a local or State authority, a person who has a legal or equitable interest in the land or a neighbour (s.7). The Board may approve or reject the proposal and impose conditions; an appeal may be made against the Board's decision.

Once the Governor declares a private timber reserve, it must only be used for establishing forests, growing or harvesting timber in accordance with the Code, and related activities as considered appropriate by the Board.

Part 4 provides details concerning the Code. The Board is obliged to issue the Code and it must prescribe the manner in which the specified forest practices must be conducted to provide reasonable protection for the environment.

This relates to matters such as the harvesting and restocking of land with trees, construction of roads and other works connected with the establishment of forests or the growing or harvesting of timber. Also included are landscape management and control of soil erosion. A Code may apply generally or in specific areas, and differently, depending on circumstances. The Board may also amend the Code; there is a right to object to any proposed change.

Part 5 provides for the establishment of a Forest Practices Tribunal that may be constituted at any time and place in Tasmania to deal with appeals or other issues in dispute under the Act.

Forestry Act 1920 The *Forestry Act 1920* establishes a Forestry Corporation (s.6) and provides for the management and protection of forests.

The Act sets out the functions of the Corporation, which include the exclusive management and control of all State forests and the management and control of all forest products from State forests (s.8). The Act (s.8(1)(d)) specifically requires the Corporation to use multiple use forest land for purposes that include the conservation of flora and fauna, landforms and cultural heritage (which is not defined, but could include Aboriginal heritage). The Corporation has

additional powers and functions to promote and encourage the use of State forests for other purposes, including the conservation of cultural heritage (s.10).

Land may be acquired by the Minister (under s.12B of the Act) in accordance with the *Lands Acquisition Act 1993* (see below). The Governor is empowered to dedicate any Crown land as State forests (s.14), other than reserves under the *National Parks and Wildlife Act 1970* (see below) and may also may revoke the dedication of land as State forest (s.15). If a dedication is revoked, the land becomes subject to the *Crown Lands Act 1976* (see above). A reference may be made (s.15(3)(b)(iii)) to the Public Land Use Commission (see *Public Land (Administration and Forests) Act 1991* below) concerning a decision to revoke a dedication on the basis of the discovery of an area, object or physical characteristic of particular significance to Aboriginal people that may suffer substantial adverse effects. The Act (s.17(3)(b)) makes similar provision in relation to proposals for the deletion of land from the Register of Multiple Use Forest Land.

The *Irrigation Clauses Act 1973* empowers any people, authorised under an Act to construct the relevant waterworks to be used for irrigation purposes, to purchase, take on lease or otherwise acquire any land, goods, interest or right they need for those purposes, and to dispose of them if no longer required (s.4). The Act (s.5) allows compulsory acquisition of lands or any interest in them as required, but such acquisition must be consistent with the *Lands Acquisition Act 1993* (see below).

*Irrigation
Clauses Act
1973*

The Act (s.7) gives the undertakers of irrigation works extensive power to enter onto land to construct works required, incidental to the provision of the required supplies of water, and to take such water as they require. Part 3 provides details of water rights for irrigation purposes.

The Act also empowers the undertakers to use any natural watercourse as a channel for the supply of water required under the Act, but, if they do so, they must modify or replace any bridges, crossings, fences and the like affected by this to ensure that they remain useable by the owners, occupiers and users (s.16). The undertakers have restricted access to private lands to carry out required surveys and dig out channels and the like for the purposes of the Act, but before doing so must

give the owner and occupier of the land notice of their intention (s.17). They must cause as little damage as possible when carrying out works (s.19) and compensate any person with a lawful interest in the land for any damage done (s.20).

*Land Use
Planning and
Approvals Act
1993*

The *Land Use Planning and Approvals Act 1993* states that it is the obligation of any person, on whom a function or power is conferred under this Act, to do so in the advancement of the objectives set out in Schedule 1, which underpin the land use planning and approvals process of Tasmania (s.5). These are similar to those set out in Schedule 1 of the *Environmental Management and Pollution Control Act 1994* (see above).

The function of the Resource Planning and Development Commission (established under the *Resource Planning and Development Commission Act 1997* see below) is to certify and approve planning schemes, any changes to them, and carry out any other functions imposed on it by this Act (s.8). A planning scheme must be prepared in accordance with a State Policy, as provided under the *State Policies and Projects Act 1993* (see below) and seek to further the objectives set out in Schedule 1 (s.20). It may make any provision relating to the use, development, protection or conservation of any land in the area in which the scheme is to apply.

*Lands
Acquisition
Act 1993*

The *Lands Acquisition Act 1993* makes provision for the acquisition of land by the Crown, public and local authorities and authorises the acquisition of land for undertakings of a public nature. Part 2 Division 2 provides for land to be acquired by agreement and, in Division 3, by compulsory process. Parts 3 and 4 deal with the right to, claims for and determination of compensation.

The Act gives the acquiring authority the right to authorise a person to enter onto land to determine whether the land is suitable for the purpose for which it is to be acquired (s.54). It also enables the authorised person to undertake a wide range of related activities, such as marking, carrying out surveys, taking levels and testing the soil. But the land owner/occupier is entitled to four days' notice prior to such entry.

The Act (s.75) has the effect of converting land acquired by the Crown under it into reserved Crown land under the *Crown Lands Act 1976* (s.8) (see above), unless the land was acquired

for purposes associated with the *Forestry Act 1920* (see above) or the *National Parks and Wildlife Act 1970* (s.14(1)) (see below).

Aboriginal land under the *Aboriginal Lands Act 1995* (see above) cannot be acquired under this Act (s.5A).

Land may be set aside for a variety of conservation purposes specified under the *National Parks and Wildlife Act 1970*.

National Parks and Wildlife Act 1970

The Act empowers the Governor to make a proclamation that declares land be set aside for a conservation purpose (s.14(1)), but no such declaration may be made without the consent of the owner of the land (s.14A(3)). Land may also be acquired if, in the opinion of the Governor, it should be acquired for conservation purposes; any land so acquired becomes a conservation area (s.14C(1)).

On the recommendation of the Director of Parks and Wildlife (who is appointed by the Governor and is responsible to the Minister for the administration of this Act under ss.5 and 6) that land be temporarily set aside for conservation purposes, the Minister is empowered to take the lease of land, on behalf of the Crown, on such terms and conditions as approved by the Minister for Crown Lands; as long as the land is held on such lease, the land is a conservation area for the purposes of the Act (s.14D).

All draft proclamations must be tabled in, and receive the approval of, both Houses of the Tasmanian Parliament (s.15B).

Plans for the use, development and management of any reserved lands (that is, any land within a conservation area) may be approved by the Governor, subject to certain conditions (s.19). A management plan may declare any part of the reserved land a restricted area, with no right of public access, and the owner of a private reserve may enter into a covenant with the Minister which restricts the use of the land (ss.25 and 25A).

Regulations may be made relating to the land as follows: the prevention of damage or injury; the preservation or protection of the property or other things; the prohibition or control of the removal of any property or other things; and the conduct of people (s.29(1)). Regulations have been made under this Act that relate to the preservation and protection of items of

Aboriginal heritage in conservation areas (discussed in detail in 6.2, below).

The National Parks and Wildlife Advisory Committee (established under s.9), keeps under review, and advises the Minister on, the administration of the Act. The Committee comprises not more than 12 people nominated by the Minister and appointed by the Governor, who must, in the opinion of the Minister, have an interest in, and the ability to contribute to, the objectives of the Act, and have the capacity to offer independent advice, taking into account community views and expectations (s.10). Special advisory committees may be established to advise the Minister on matters relating to the administration of the Act or to advise the Director or any managing authority on any matters relating to their functions under this Act (s.12). There is no provision mandating Indigenous representation on any of these committees.

Public Land (Administration and Forests) Act 1991 The *Public Land (Administration and Forests) Act 1991* (s.5) outlines the jurisdiction of the Resource Planning and Development Commission (established under the *Resource Planning and Development Commission Act 1997*, see next Act below). This is to further the objectives outlined in Schedule 1 (these are the same as in Schedule 1 of the *Environmental Management and Pollution Control Act 1994*, see above). The functions of the Commission are to inquire into, and make recommendations on, the use of public land.

‘Public land’ is defined to include land in the State vested in the Crown, or a body or authority established for a public purpose by, or under a law of, the State, or a body corporate incorporated under a law of Tasmania or any other State or Territory of the Commonwealth in which the Crown has a controlling interest (s.4). Land included in this definition includes land covered by water or the sea, and anything on, over or under such land, and any residual interests of the Crown in such land.

The Act requires the Commission to identify the nature and extent of the resources of the land and the environmental, cultural, social, industrial, economic and other values of those resources before making a recommendation regarding the land (s.8).

Part 6 makes further special provision in relation to national parks and world heritage areas, in particular to forest issues.

The Commission is authorised to establish a reference panel to assist it in performing its functions (s.18). Members of the panel must be chosen from people with experience in fields such as land protection and rehabilitation, and conservation of natural and cultural resources

The *Resource Planning and Development Commission Act 1997* (s.4) establishes the Commission as a body corporate that is part of the State's resource management and planning system outlined in Schedule 1 (see details under the synopsis of Schedule 1 of the *Environmental Management and Pollution Control Act 1994* above). The Commission has the powers and functions given to it under other Acts and may do all things necessary or convenient or in connection with, and incidental to, the performance of these functions (s.6). It must do so in a manner consistent with the objectives set out in Schedule 1.

*Resource
Planning and
Development
Commission
Act 1997*

The Minister may give written direction to the Commission (s.7), but not in relation to public hearings, which the Commission may hold for the purpose of informing itself about anything related to its functions (s.10). A person may have evidence taken in private if it is of a confidential nature and overrides the public interest (s.11). The Commission is empowered to issue a notice to obtain documents and information relevant to a hearing (s.14) and creates offences and penalties for failing to comply with a notice (s.16).

The *Rivers and Water Supply Commission Act 1999* provides for the continuance of the Rivers and Water Supply Commission after the repeal of the *Water Act 1957* (see below). Section 5 provides that the right of the Commission to take water under the *Water Act 1957* continues in force on the same terms and conditions, and is taken to be conferred by a licence granted under the *Water Management Act 1999* (see below). A water district formerly administered by the Commission continues to be administered as such, although subject to the *Water Management Act 1999* as if the Commission were appointed as the water entity responsible for the administration of that district (s.5(2)).

*Rivers and Water
Supply
Commission Act
1999.*

State Policies and Projects Act 1993 The *State Policies and Projects Act 1993* (s.5) provides that a Tasmanian sustainable development policy must seek to further the objectives of the resource management and planning system of the State set out in Schedule 1 (see synopsis of Schedule 1 under the *Environmental Management and Pollution Control Act 1994* above). This policy should only be on matters that the Minister considers of State significance (ss.16-28 specify what this entails) and should maintain a consistent and co-ordinated approach to such matters.

The Act (s.5A) outlines what is to be contained in such a policy, which must be one or more of the following:

- sustainable development of natural and physical resources;
- land use planning;
- land management;
- environmental management;
- environmental protection; or
- any other matter prescribed.

The Minister is empowered to direct the Resource Planning and Development Commission (see previous Act above and s.30 of this Act) to review a draft policy that has been accepted (s.6).

Any person may make representations to the Commission in relation to such a draft sustainable development policy (s.8); the Commission must consider these (s.9) and modify the draft to incorporate such considerations, if necessary (s.10). Once this process is completed, the Commission submits a report on the draft to the Minister and, if the Minister accepts it, may recommend to the Governor that a policy be made on the basis of the report (s.11). The effects and requirements of such policies are provided under the Act (ss.13 and 13B-14). The Act mandates a review of these policies every five years from the date it came into effect (s.15).

The effect of the Act is to provide a mechanism for sustainable development policies to be approved, which are then incorporated into planning schemes. The first such policy, the State Coastal Policy, includes a reference to the protection of Aboriginal heritage. This has resulted in greater consideration

by local government of Aboriginal heritage issues when processing development applications in the coastal zone.

The object of the *Tasmanian Development Act 1983* is to provide for the balanced economic development of Tasmania, for the establishment and operation of an authority for that purpose, and related matters. The Act establishes the relevant authority (s.4), Tasmania Development and Resources (TDR), the affairs of which are conducted by an eight member board (s.8).

*Tasmanian
Development
Act 1983*

The policies of TDR include: encouraging and promoting the balanced economic development of the State; ensuring its policies are directed to the greatest advantage of the people of Tasmania; and ensuring it exercises its powers to best contribute to the prosperity and welfare of the people of Tasmania (s.7).

TDR's functions include: developing and carrying out measures that promote, encourage and monitor employment; promoting investment and co-operation between the public and private sectors; and supporting and expanding business undertakings and opportunities (s.8).

The powers of TDR (s.9) include: acquiring, developing and disposing of (including leasing) lands (details provided in ss.12-14); and providing financial assistance in the furtherance of its policies, functions and powers (including funds from the Commonwealth).

The *Threatened Species Protection Act 1995* provides for the protection and management of threatened native flora and fauna, and to enable and promote their conservation.

*Threatened
Species
Protection
Act 1995*

The Act vests in the Director of National Parks and Wildlife a range of functions, including the mandatory preparation of a threatened species strategy (Part 3 Division 1); the preparation and implementation of recovery plans (Part 3 Division 5) and of land management plans and agreements (Part 3 Division 7) for the protection and conservation of native flora and fauna and their habitats (Part 3 Division 4).

An authorised officer is empowered to enter any conveyance, land or building that is not a residence (or a residence under a warrant) to carry out an inspection and seize any related items,

if the officer reasonably believes that there has been a contravention of the Act or of an interim protection order made under Part 4 of the Act, or a term or condition of a permit or a land management agreement (s.48).

The provisions of the Act make it an offence to trade in, keep, possess or disturb any listed (for provisions relating to listing, see Part 3, Divisions 2 and 3, and Schedules 2-5) flora or fauna without a permit granted under it or any other Act (s.51).

Water Act 1957 The *Water Act 1957* has been repealed, but is included because the terms and conditions of the Act are still applicable for the *Rivers and Water Supply Commission Act 1999*.

The Act establishes the Rivers and Water Supply Commission as the relevant authority (s.4(1)), the duties of which include establishing and maintaining waterworks for domestic, industrial, agricultural and other purposes (s.16(1)). This includes allowing a person(s) to take water from rivers or lakes, and prohibiting the unlawful taking, use or pollution of those waters. The Commission may also take all proper steps to maintain the natural drainage systems of the State and to prevent or reduce flooding, silting up or erosion of river beds, and the blocking of river channels by vegetation, fallen trees, illegal weirs and other causes. The Commission must ensure that damage to improved lands, forests, fisheries (see also Part 4 Division 3) and the natural beauty of the countryside is avoided (s.16(4)).

The Act (s.21A) empowers the Governor, on the recommendation of the Commission, to proclaim any place as the source of water supply and for the placement of necessary waterworks and related infrastructure, subject to certain powers and restrictions (specified in s.22). The Governor may also, on the recommendation of the Commission, appoint, name and define any water, irrigation water, protected catchment or river improvement districts (s.26). The Act specifies special flood mitigation, water, sewerage and drainage works, and municipal and irrigation works, that State and Crown instrumentalities may undertake (ss.27-54).

Part 4 covers rights in rivers and lakes in Tasmania. Division 1 deals with the beds and banks of rivers and lakes and Division 2 with the use and flow of water. Subject to the

Act's provisions, the Commission may take the water of every river and lake (s.83) and the Crown may do the same, notwithstanding the right of the Commission or any other person, if it is for a public purpose (s.85). The Act (s.85(5)) provides for every person whose land is injuriously affected by the operation of its provisions to be entitled to compensation, to be determined in the same manner as a disputed claim under the *Lands Acquisition Act 1993* (see above).

Part 5 contains special provisions relating to dams and Part 6 relates to drainage areas as proclaimed by the Governor on the recommendation of the Commission.

The *Water Management Act 1999* provides for the management of Tasmania's water resources.

*Water
Management
Act 1999*

The objective of the Act is to further the resource management and planning system of Tasmania (s.6(1)). The planning system is specified in Schedule 1, in particular it emphasises the sustainable use of water for social and economic benefit, including fair water allocation, and to maintain ecological processes.

This Act prevails over any other Act which confers a right to take water unless the other Act is expressed to apply notwithstanding this Act (s.5(1)). All rights existing at common law to the flow of, or taking of, naturally occurring water are abolished by the Act, and these rights are vested in the Crown (s.7(1-2)). Certain rights listed in Part 5 remain. These rights include: owner occupiers may take surface water, well water, and water from a watercourse or lake; and a person or their stock on land which they are using for recreational, travelling, or camping purposes may take water for domestic, stock watering, and other purposes (s.48).

Part 4 specifies water management plans which can be made in respect to a particular water resource, as the Minister determines (s.13). The plans must take into account effects on the ecosystem and, where relevant, on the allocation of water (s.14(2) and (15)). In the preparation of a water management plan, the department Secretary must notify the public through the local newspaper, and consult with the Director of Environmental Management, any relevant water entity, relevant licensees, any people as directed by the Minister, and may also consult with other people generally (ss.8 and 9).

Draft management plans are to be publicly exhibited, and written representations are to be considered (ss.25 and 26). Divisions 3 and 4 of Part 4 provide provisions for the adoption and implementation of water management plans.

Part 6 details the licensing and allocation of water. Wells and dams, including the construction of dams, are covered in Parts 7 and 8. Water districts are provided for in Part 9.

TASMANIA

6.2 HERITAGE

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) may protect some areas or objects of significance to Aboriginal people in Tasmania, and area or objects which are otherwise evidence of Aboriginal history or culture. The Minister responsible for the Act may make a declaration to protect an area of land or water of significance to Aboriginal people. The provisions of the Act enabling declarations to be made can only be used as a last resort, after all other heritage protection measures at State level have been exhausted (see Chapter 9.2 for more details on this and the other Commonwealth Acts that make provision for the recording or protection of areas of significance to Aboriginal people).

*Aboriginal and
Torres Strait
Islander
Heritage
Protection Act
1984*

The *Aboriginal Relics Act 1975* provides for the preservation of Aboriginal relics and the land on which such relics are located.

*Aboriginal
Relics Act
1975*

This Act (s.2) defines Aboriginal relics more restrictively than does the *National Parks and Wildlife Act 1970* (see below). A 'relic' is broadly defined to include any artefact, painting, carving, engraving, arrangement of stones, midden, or other object made or created by any original inhabitant of Australia or their descendants. It includes any object, site or place that bears signs of the activities of any such people, as well as the remains of the body of any such person who died before 1876 and is not interred in a burial ground or cemetery. No object made or created after 1876 is to be treated as a relic for the purposes of the Act and, similarly, no activity taking place after that year is to be regarded as capable of being defined under the term 'relic'.

The Act establishes a five-member Aboriginal Relics Advisory Council (ss.3 and 4), of which one member must be nominated by the Minister from a list of people submitted by a body which, in the opinion of the Minister, represents people of Aboriginal descent.

The Act provides for the Minister to declare an area of land on, or in, which a relic is located as a protected site and charges the Minister with the management, maintenance and protection of the site; if the land is not Crown land, no such declaration may be made without the agreement of the owner (ss.8, 9 and 14). The Act empowers the Director of National Parks and Wildlife to cause an object to be removed from a site and to make arrangements for its safe custody, or for it to be otherwise dealt with if satisfied that the object on a protected site is likely to be damaged, destroyed or lost if it remains there (s.8(6)). As a general rule, the Act (s.8(10)) requires the Director to inform the Minister before causing an object to be removed from a protected site, authorising entry onto land, or causing examinations to be made (under s.8(8) and (11)).

The Act makes provision for compensation to a person who has an estate or interest in any land, including: for loss or injury (either to the land or an object on the land); or for any decrease in the value of the land arising from any actions required under the Act by the Director to manage and maintain a protected site or to protect objects on or in that site (ss.8(12-14)). Compensation is to be agreed between the claimant and the Director, with disputes to be heard and determined by a magistrate. Compensation may be recovered as a debt due to the person from the Crown.

The Act creates offences for: destroying, damaging, disfiguring, concealing, uncovering, exposing, excavating or otherwise interfering with, or removing, a protected object; carrying out an act that is likely to endanger such an object; or destroying, damaging, defacing or otherwise interfering with any fencing or notice erected or any other work carried out, in respect of a protected site under this Act, without a permit issued by the Director (s.9). Further offences are also created for unauthorised dealings with relics, including taking, or causing the taking of, a relic out of the State (s.14). There is a defence to any proceedings for an offence under this Act if the accused can prove that they did not know, or could not reasonably be expected to have known, that the object in question was a relic (s.21).

Ownership of Relics

Relics found or abandoned on Crown land are deemed to be property of the Crown (s.11). In addition, the Minister may

serve a notice on the owner of any relic to acquire that relic for the Crown, but any person who can prove that they are of Aboriginal descent, or that the relic has been in that person's family for more than 50 years, can apply to a magistrate for that notice to be cancelled (s.12).

Where a relic becomes the property of the Crown under the Act, the Director may cause scientific and other investigations to be made of the relic; in deciding on what investigations are necessary or desirable, the Director must have regard to the recommendations of the Advisory Council. If, after investigations have been made, the Crown decides it does not wish to retain ownership of the relic, the Director must cause the relic to be returned to the person from whom it was acquired or accepted, and that relic then becomes the property of that person or that person's estate if the person has since died (s.13).

The *Historic Cultural Heritage Act 1995* provides for the promotion of the identification, assessment, protection and conservation of places having historic cultural heritage significance and to establish the Tasmanian Heritage Council. 'Historic cultural heritage significance' is defined to mean, in relation to a place, significance to any group or community in relation to the archaeological, architectural, cultural, historical, scientific, social or technical value of the place (s.3).

*Historic
Cultural
Heritage
Act 1995*

The Act establishes the 15-member Council (s.6), which includes the Chair, the Director of National Parks and Wildlife, four members with expertise in architecture, archaeology, history and planning, one representing heritage conservation interests, and one representing community interests. The Act requires the Council to work within the planning system to achieve the proper protection of Tasmania's historic cultural heritage and to encourage and assist in the proper management of places of historic cultural heritage significance (s.7).

The Act also requires the Council to maintain the Tasmanian Heritage Register (s.15(1)). Among the places of historic cultural heritage significance that the Council must enter in the Register are those that: demonstrate the evolution or pattern of Tasmania's history and endangered aspects of Tasmanian heritage; or have strong or special meaning for any group or community because of social, cultural or spiritual association

with the life or work of a person, a group or an organisation that was important in Tasmania's history (s.15(3)).

The Act sets out the criteria a place must meet in order for it to be eligible for entry on the Register (s.16) (these are similar to the matters set out in s.15(3)). Any person may object to the entry of a place on the Register and set out the grounds for objection (s.19); similarly, the Act provides the right and grounds for objecting to proposed removals from the Register (ss.23 and 24).

The Minister may declare an area as an heritage area, if it contains a place of historic cultural heritage significance, on the advice of the Council and after consulting with the relevant planning authority and any other responsible body (s.29).

The carrying out of any works within a heritage area which may affect the historic cultural significance of the area is prohibited unless the Heritage Council has granted an exemption or works have been approved under Part 6 of the Act (s.30).

Other relevant provisions concerning the interaction between works and heritage issues are in Part 7 (which provide for heritage agreements), Part 8 (which allow for the making of stonework orders and the giving of repair notices) and Part 10 (which allow the making of other orders).

The Act does not apply to a place that is of historic cultural heritage significance only on the grounds of its association with Aboriginal history or tradition or traditional use (s.98). However, with the emphasis of Tasmanian legislation on the preservation of Aboriginal relics and objects, as opposed to places, there may be some advantage to be gained by relying on the broad definition of historic cultural heritage significance to seek protection of Aboriginal sites in conjunction with the criteria specified for other places in the Act.

The Act (s.100) states that a notice or order under it does not affect the carrying out of any mining operations under an exploration licence under the *Mining Act 1929* (see 6.5 below).

The *Museums (Aboriginal Remains) Act 1984* (ss.3 and 6(1)) vests in the Crown the remains of the bodies of the original inhabitants of Tasmania and of their descendants that were, as of the date of commencement of this Act (22 November 1984), in the possession of the Board of Trustees of the Tasmanian Museum (established under the *Tasmanian Museum Act 1950*) or the Queen Victoria Museum and Art Gallery (provided for under the *Launceston Corporation Act 1963*).

*Museums
(Aboriginal
Remains)
Act 1984*

The Minister is required, as soon as practicable after that date, to serve notice on the Trustee and the Corporation of the City of Launceston respectively, requesting them to deliver those remains to those elders of the Tasmanian Aboriginal community as the Minister directs (s.4).

The Act requires that the Trustee and the Corporation comply with this notice (s.6(2)). Upon delivery, ownership of the remains is vested in the elders as trustees of the remains for the Aboriginal community (s.4(2)-(4)).

The Act specifies that no legal action lies against the Board of Trustees or the Corporation in respect of any obligation or liability in relation to their possession of any of the remains, or in relation to anything done to, or in respect of, those remains by the Board or the Corporation before the remains are delivered to the nominated elders (ss.5 and 7).

For a detailed synopsis of the *National Parks and Wildlife Act 1970*, see 6.1 above.

*National Parks
and Wildlife
Act 1970*

The Act provides for land to be set aside, by proclamation by the Governor, for a number of conservation purposes (s.14(1)). These may include the protection and maintenance of cultural values of an area, and the protection and maintenance of sites, objects or places of significance to Aboriginal people (Schedule 3). Management objectives are listed in Schedule 2 and include: to conserve sites or areas of cultural significance; and, to encourage cooperative management programs with Aboriginal people in areas of significance to them in a manner consistent with the purpose of reservation and the other management objectives.

‘Aboriginal relics’ are defined to include any artefact, painting, carving, midden or other object made, or created by,

or any object, site or place that bears signs of any of the Aboriginal inhabitants of the State (s.3).

No proclamation may be made in respect of land that is not Crown land without the consent of the owner (s.14A(3)). The Governor may acquire any land that the Governor considers necessary for any conservation purpose (s.14C(1)), subject to the provisions of the *Lands Acquisition Act 1993* (see 6.1 above).

The Governor may approve a management plan for any reserved area that has been prepared as provided in the Act (s.19). A plan may provide for a number of matters (see Part 4), including restriction of public access to specified areas on the reserved land; these areas are referred to as restricted areas (s.25).

Nothing in the Act precludes Aboriginal cultural activities by an Aboriginal person on Aboriginal land within the meaning of the *Aboriginal Lands Act 1995* (see 6.1 above), so long as the activity is, in the opinion of the Minister, not likely to have a detrimental effect on flora and fauna and is consistent with the provisions of this Act (s.49A(1)). ‘Aboriginal cultural activity’ is defined to mean hunting, fishing or gathering undertaken by an Aboriginal person (as defined in the *Aboriginal Lands Act 1995*) for their own personal use, based on Aboriginal customs of Tasmania as handed down to that Aboriginal person (s.49A(2)).

Regulations for Aboriginal Relics and Objects

The National Parks and Reserves Regulations 1971 make separate provisions for conservation areas. Under Regulation 5G it is an offence in any reserved land to remove, damage, deface or disturb any Aboriginal relic or any object of archaeological, historical or scientific interest unless permitted to do so under this Act. Specific provision along these lines is made in respect of those parts of the Cape Portland Wildlife Sanctuary that is not Crown land (Regulation 5I).

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6.3 LOCAL GOVERNMENT

The provisions of the *Fire Service Act 1979* relating to contributions payable by local councils towards the operating costs of fire brigades do not apply to Aboriginal land under the *Aboriginal Lands Act 1995* (see 6.1 above), which is unoccupied or occupied primarily for Aboriginal purposes (s.78(ba)).

*Fire Service
Act 1979*

The purpose of the *Local Government Act 1993* is to provide for local government and establish councils to plan for, develop and manage municipal areas in the interests of their communities.

*Local
Government
Act 1993*

The Act establishes the Local Government Board, which carries out reviews and advises the Minister on relevant matters (s.4). The Board is required to carry out a general review of a council at least every eight years.

Exemption of Aboriginal Land from Council Rates

Part 3 of the Act causes the State to be divided into municipal areas and electoral districts. It establishes a council in each municipal area (s.18), whose functions and powers are set out in the Act (s.20). Aboriginal land under the *Aboriginal Lands Act 1995* (see 6.1 above), which is used primarily for Aboriginal cultural purposes, is exempt from general and separate rates and other specified types of rates levied by councils under this Act (s.87(1)(da)).

Under the provisions of Part 12 of the Act, a council may purchase land for any purpose which it considers to be of benefit to the council or the community. The Act (s.176) empowers a council to acquire land in accordance with the *Lands Acquisition Act 1993* (see 6.1 above). A council may also sell, exchange or lease public land.

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6.4 MARINE

The *Coastal and Other Waters (Application of State Laws) Act 1982* ensures that the laws of the State apply to coastal waters and the adjacent area (s.3). The effect of the definition (s.2) of coastal waters and the adjacent area is to ensure that the State's laws apply in the territorial sea and adjacent areas in accordance with the *Petroleum (Submerged Lands) Act 1967* (Cth) (s.5A) and of the *Coastal Waters (State Powers) Act 1980* (Cth) (s.4(2)) (both Commonwealth Acts discussed in detail in Chapter 9.4).

Coastal and Other Waters (Application of State Laws) Act 1982

For details of the provisions of the *Crown Lands Act 1976* see 6.1 above.

Crown Lands Act 1976

The Act (s.29) provides that the 99-year Crown leases (which may be granted under ss.8 and 9) may not be granted in respect of waters (as defined in the *Living Marine Resources Management Act 1995*) for any of the purposes specified under the *Marine Farming Planning Act 1995* (details of both Acts below).

The Minister is empowered to grant a marine plant licence for the taking of marine plants that are cast by the sea on Crown land or land controlled by the Minister (s.41). The licence must specify the area, rents and royalties, as well as the term, subject to the conditions of the licence granted. A 'marine plant' is defined as any plant that normally lives throughout its life in the sea.

The purpose of the *Living Marine Resources Management Act 1995* is to achieve sustainable development of living marine resources; the purpose is achieved primarily through management plans.

Living Marine Resources Management Act 1995

The ownership of all living marine resources present in the coastal waters of the State and in the tidal waters of the State landward of those coastal waters is vested in the State (ss.5(1) and 9(1)). 'Living marine resources' are defined in the Act as being fish (as defined in s.4) and their environment (s.3).

The Minister may make rules in relation to management plans (s.33). The rules must identify the fishery to which they relate and may be made on a range of matters, including fishing licences, fishing capacity, entitlements under a licence, prohibition of fishing, matters relating to vessels and apparatus, and other matters relating to fish and fishing.

Aboriginal Fishing Rights

An authorisation under the Act takes precedence over any other public or private fishing rights, but only to the extent that it does not extinguish or impair any native title rights and interests, or preclude any Aboriginal cultural activity not likely to have a detrimental effect on living marine resources (s.10(2)).

‘Aboriginal cultural activity’ is defined as ‘activity of fishing or gathering undertaken by an Aboriginal person for personal use based on Aboriginal custom of Tasmania as passed down to that Aborigine’ (s.3); ‘native title rights and interests’ are defined as native title rights and interests recognised under the *Native Title Act 1993* (Cth) (see Chapter 9.6).

The Act exempts Aboriginal people engaged in an Aboriginal cultural activity from the need to obtain a fishing licence provided that the activity is not likely to have a detrimental effect on living marine resources (s.60(2)(c)).

Marine and Safety Authority Act 1997

The *Marine and Safety Authority Act 1997* establishes the Authority (s.4), which is given jurisdiction over coastal waters and any vessel and any marine facility placed under its control. A ‘vessel’ is defined as being any ship, boat or other vessel used, or capable of being used, in navigation; a ‘marine facility’ is any structure, facility or equipment used in relation to navigation (s.3).

The functions and powers of the Authority include ensuring the safe navigation of vessels, providing and managing marine facilities, and managing environmental issues relating to vessels (s.6). The Governor is empowered to make Regulations specifying offences and penalties under the Act (s.39), as well as matters such as safety (s.40) and environmental matters in respect of vessels, including related fees and charges (s.41).

The Governor may also make by-laws under the Act, covering matters such as motorboats, licences, sailing vessels, limits of operational areas of vessels, movement and mooring of vessels and associated matters, and marine facilities (s.42). The Act provides for the entering into contracts and agreements in relation to the Authority's functions and the enforcement of Regulations and by-laws (s.53).

The purposes of the *Marine Farming Planning Act 1995* (long title and s.4) are to provide for the planning of marine waters for marine farming and the allocation of marine farming licences, consistent with the resources planning objectives and sustainable development outlined in Schedule 1 (for details, see the *Environmental Management and Pollution Control Act 1994*, 6.1 above). 'Marine farming' is defined in the Act to mean the farming, culturing, enhancement, ranching and breeding of fish or marine life for trade, business or research (s.3).

*Marine Farming
Planning Act
1995*

The Act establishes the Marine Farming Planning Review Panel (s.8), and empowers the Panel to seek expert advice on the adequacy or otherwise of environmental controls and related matters (s.10) and allows the Minister to give directions to the Panel, with which it must comply (s.11).

The Act provides for the preparation of a marine farming development plan, either by employees of the department or by a consultant acting on the department's behalf (s.15). The application for approval of the plan must be forwarded to the Minister, who has the option to approve or reject it; the Secretary of the department must notify the Panel of approval (s.16). The Panel may specify the extent and nature of the process of consultation that must follow Ministerial approval (s.18).

A draft plan must further the objectives of resources management set out in Schedule 1, designate the area to be covered as a marine farming zone, be coordinated with any other plan operating in an adjoining area and have regard to the use and development of the region as an entity in environmental, economic, social and recreational terms (s.21).

The Act provides for a mandatory process of publication and submission of draft plans by the Secretary of the department (ss.25-30). The Panel must submit the draft plan to the Minister, who has the option of approving or rejecting it

(s.31); the provision for further amendments and approval procedures by the Minister and related matters are dealt with in the Act (ss.32-43). The Act also makes provision for emergency orders where there is an imminent risk to marine farming (ss.43-47).

The Act establishes a three-person board of administration appointed by the Minister (s.49). The board is to advise on any matters referred by the Minister (s.50), in particular on the process of allocation of leases for marine farming zones (ss.52-53) and other matters concerning such leases (ss.54-63). The Act imparts terms of up to 30 years for such leases (s.65) and specifies special conditions to which leases must be subject (ss.64 and 65).

The Act authorises fisheries officers appointed under the *Living Marine Resources Management Act 1995* (see above) to enter and pass through land, enter into and pass along by means of any waters or the banks or borders of any State waters; or enter and inspect any land or premises, at any time, for the purposes of the Act, to ascertain if the Act or conditions of any leases are being complied with (s.125(1)).

Petroleum (Submerged Lands) Act 1982 The *Petroleum (Submerged Lands) Act 1982* relates to the exploration for, and the exploitation of, petroleum and certain other resources, in submerged lands adjacent to Tasmania. The scheme of the Act and its legislative and constitutional basis is outlined in its preamble.

The Act is a response to the establishment of a joint Commonwealth-State scheme relating to the mineral and petroleum resources of the Australian territorial sea. More details of this scheme are in Chapter 9.4.

TASMANIA

6.5 MINERALS

The *Mineral Resources Development Act 1995* provides that any minerals in Tasmania not held in private ownership vest in the Crown; subject to the provisions of the Act (s.5), it applies to all land and minerals in Tasmania (including petroleum, which is regulated by this, and not separate petroleum, legislation) (s.5(1)).

*Mineral
Resources
Development
Act 1995*

Under its provisions (s.5(2), subject to s.5(3)), the Act does not apply to the surface (or within 15 metres below) of any land in any public reserve or land set aside or dedicated for any public purpose, other than as a State forest which is not a forest reserve under the *Forestry Act 1920* (see 6.1 above). The Minister may declare that the Act applies to a public reserve or land set aside for a public purpose and may also declare any specified land or specified mineral to be exempt from the Act.

Native Title Issues

The Act does not extinguish or impair any native title rights and interests recognised under the *Native Title Act 1993* (Cth) (s.5(8)).

Mining Tenements

The Act sets out the rights of the holder of an exploration or a retention licence to enter, or pass over, both Crown land or private land for the purposes respectively of exploring for minerals or for evaluating the potential for mining (ss.23 and 58). 'Private land' is defined as all land other than Crown land.

A prospecting licence granted under the Act empowers the licensee to prospect on any Crown land which is not subject to a mineral tenement or any other land where the consent of the owner, occupier or tenement holder is first obtained (s.112). 'Prospect' is defined as meaning to explore for minerals to a depth of less than two metres below the surface by means of hand held instruments.

Mining may only be carried out subject to a mining lease, issued pursuant to the provisions of Part 4 of the Act.

Compensation may be paid to the owner or occupier of land for any compensable loss suffered as a consequence of exploration or mining under a licence or lease (s.144).

A mining lease or licence may not be granted, under the Act, over Aboriginal land under the *Aboriginal Lands Act 1995* (see 6.1 above) without the agreement of the Aboriginal land council established under that Act (s.179).

TASMANIA

6.6 NATIVE TITLE

The *Native Title (Tasmania) Act 1994* was assented to on 16 December 1994 and commenced by proclamation (made under s.2) on 29 December 1994. The Act does not make provision for claims to native title, or the establishment of a tribunal to determine native title claims, with the Commonwealth Administrative Appeals Tribunal (AAT) operating Registry services on behalf of the National Native Title Tribunal (NNTT). (The Commonwealth's AAT is established under the *Administrative Appeals Tribunal Act 1975* (Cth). The NNTT is established under the *Native Title Act 1993* (Cth).) *Native Title (Tasmania) Act 1994*

The Act validates, for the purposes of the *Native Title Act 1993* (Cth) (s.19) (see Chapter 9.6), past acts invalid because of the existence of native title and deems them to always have been valid (s.5). Sections 6 to 9 relate to the Category A to D past act provisions of s.229 of the NTA and apply them for the purposes of this Act. The Act confirms that extinguishment under these provisions does not entitle anyone to eject or remove an Aboriginal person who resides on, or who exercises access over, land or water under a pastoral lease, the grant, re-grant or extension of which is validated by these provisions (s.10). It ensures the preservation of beneficial reservations or conditions for the benefit of Aboriginal people (s.11).

The Act confirms State ownership of its natural resources and rights in relation to water, existing fishing rights and existing public access to waterways, coastal waters, beaches and areas that were public places as at 31 December 1993 (ss.13 and 14).

**A GUIDE TO AUSTRALIAN LEGISLATION
RELEVANT TO NATIVE TITLE**

**7. AUSTRALIAN CAPITAL
TERRITORY**

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AUSTRALIAN CAPITAL TERRITORY

7.1 LAND AND ENVIRONMENT

The *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) provides for the development of the National Capital Plan, the object of which is to ensure that Canberra and the Australian Capital Territory are developed in accordance with their national significance. The Territory Plan, which must not be inconsistent with the National Capital Plan, is created under the *Land (Planning and Environment) Act 1991* ('the Land Act') (see below).

*Australian
Capital Territory
(Planning and
Land
Management)
Act 1988 (Cth)*

The National Capital Plan may declare areas that have the special characteristics of the national capital to be 'designated areas' (s.10). The Plan must define planning principles and policies and set standards for the national capital. It must also set out general principles throughout the Australian Capital Territory with respect to land use and the planning of national and arterial road systems. It may detail conditions and priorities in the planning, design and development of designated areas. The National Capital Authority (NCA), established under the Act, is responsible for the preparation and administration of the National Capital Plan.

The Act authorises the Ministers responsible for the various provisions of the Act to declare specified areas within the Australian Capital Territory, which are used, or intended to be used, by or on behalf of the Commonwealth, as 'national land' (s.27). National land may be administered by the Australian Capital Territory on behalf of the Commonwealth under the National Land Ordinance 1989 (s.6).

National land in the Parliamentary triangle is managed entirely by the NCA, which has entered into service agreements with agencies of the ACT Government for the provision of a number of services. The Aboriginal Embassy on the lawns in front of Old Parliament House is on national land administered by the NCA. Other tracts of national land are administered by other departments, such as Defence in the case of the Russell Defence complex. The National Native Title Tribunal has determined that the construction of major public works, such

as the High Court and Parliament House, has extinguished native title on national land (Matter No AC98/1).

The Act specifies that land that is neither ‘designated land’ nor ‘national land’ is ‘territory land’, which is managed and controlled by the Australian Capital Territory executive on behalf of the Commonwealth (s.29). The administration of territory land is provided for under the Land Act (see below). The Acts listed in this synopsis operate on Territory land; they also operate on national land unless this would be inconsistent with Acts and ordinances made by the Commonwealth. Where such ordinances have been made, reference will be made to them, but no synopsis will be provided in that their provisions mirror those of the parallel ACT enactments.

*Commissioner
for the
Environment
Act 1993*

The *Commissioner for the Environment Act 1993* provides for the appointment of the Commissioner for the Environment by the Minister (s.4). The office performs the functions of an ‘environmental ombudsman’, in that any person may make a complaint to the Commissioner concerning the management of the environment of the Territory by the Territory or an authority of the Territory (s.13).

The other functions of the Commissioner are set out in the Act and include investigating complaints (made under s.13), or conducting, on the Commissioner’s own initiative, investigations into the actions of an agency where these actions have, or would have, a substantial impact on the environment of the Territory (s.12(1)). However, this does not authorise the Commissioner to investigate any action taken by, among others, a panel conducting an inquiry under the *Land (Planning and Environment) Act 1991* (see below).

The Commissioner is authorised to enter the premises of an authority at any reasonable time of the day to investigate those premises, and any documents on those premises, for the purposes of the Act (s.16).

*Enclosed
Lands
Protection
Act 1943*

The purpose of the *Enclosed Lands Protection Act 1943* is to protect enclosed lands from intrusion and trespass. ‘Enclosed lands’ are defined as any public or private lands that are enclosed or surrounded by any fence, wall or other erection, or partly by a canal or some natural feature such as a river or a

cliff, but do not include a road which is lawfully enclosed within the relevant land (s.3).

The Act makes it an offence for a person, without lawful excuse, to enter any enclosed land of any other person (s.4). ‘Lawful excuse’ is defined as being a drover, or a person in charge of stock, driving stock along a road entering land for the purposes of preventing the stock from straying, or regaining control of stock that has strayed from the road (s.3).

The objects of the *Environment Protection Act 1997* include: protecting and enhancing the quality of the Territory’s environment; achieving effective integration of environmental, economic and social considerations in decision-making processes; and providing for the monitoring and reporting of environmental quality on a regular basis to the Commissioner for the Environment (s.3).

*Environment
Protection
Act 1997*

Under Section 4 the definition of ‘areas of high conservation values’ is the same as defined under the Territory Plan drawn up under the *Land (Planning and Environment) Act 1991* (‘the Land Act’) (see next Act). Areas of high conservation value include: wilderness areas, national parks and nature reserves, and also places (other than structures) identified in the Heritage Register as provided for under the Land Act (see below and also 7.2 below).

‘Environment’ is defined to include: ecosystems and their constituent parts, including people and communities, and social, aesthetic, economic and cultural conditions that affect, and are affected by, the physical environment.

The Environment Management Authority (EMA) is established under the Act (s.11) and its powers and functions set out (s.12). These include administering the Act and performing such other functions as are conferred on it by any other Act, consistent with the objectives outlined in it (s.3). The powers of the EMA include entering premises to carry out investigations for the purposes of the Act (ss.19-21).

The Act (s.22) imposes a duty on a person carrying out any activity to take all reasonable or practicable steps to prevent, or minimise, environmental harm or environmental nuisance (as defined in s.4). In determining whether this duty has been discharged, one needs to first look at the risk of environmental harm/nuisance in conducting the activity. Then one needs to

look at other issues, such as the nature and sensitivity of the receiving environment, knowledge about the activity, financial considerations and the likelihood of success of any remedial steps. Legal liability in relation to these matters is limited.

The Act also imposes a duty on a person to notify the EMA if the activity that the person is doing has caused environmental harm, unless the person has been authorised under the Act to carry out the activity (s.23).

The Act empowers the EMA to prepare environment protection policies (EPPs) (s.24). These may contain guidelines for the administration of the Act, for effective environment protections and management within a particular industry or the community in general, or any matter that the EMA may take into account in the making of a decision when exercising its discretion under the Act. The Act provides for public notice and consultation on the release of draft EPPs, with the Conservation Council of the South-East Region and Canberra Inc and the Canberra Business Council Inc identified as the two key stake-holders (ss.25-27).

Parts V and VI make provision for Accredited Codes of Practice and Economic Measures. Part 7 enables a person conducting, or proposing to conduct, an activity that may cause environmental harm, or in respect of which an authorisation under Part 8 may be required, to enter into an agreement with the EMA. The agreement must identify the activity and where it is proposed that it be carried out. Notice must be given of the making of such an agreement. Part 8 empowers the EMA to give Environmental Authorisations in respect of a variety of activities, listed as Class A or Class B Activities in Schedule 1.

Part 9 makes provision for environment improvement plans, which must contain details of issues to be addressed, and ways in which the conduct of the specified activity will be altered to reduce or minimise the adverse environmental impact of the activity and of ensuring that it complies with the Act. The plan must include a proposed timetable for achieving its objective(s) and also specify a process for monitoring and testing to assess the environmental impact of the activity concerned. Provision is made for a formal process of submission and approval of EPPs. The EMA may require a person to submit an EPP.

Part 12 gives officers authorised under this Part extensive powers of entry and inspection in respect of, and incidental to, the purposes of the Act, which may be carried even further under a warrant. Part 15 makes provision for offences and penalties for those responsible for causing environmental harm, placing a pollutant where it could cause harm, obstructing authorised officers and other matters set out in Schedule 2.

Part 12 contains a number of enforcement provisions. These include on the spot fines and infringement notices for what are classed as 'minor environmental offences'. In the case of more serious offences, such as breaches of matters specified under Environmental Authorisations, environmental orders may be made. Injunctive orders may be applied for to stop an activity if the EMA has failed to act if requested or required under the Act to do so, and if it is in the public interest that these proceedings be brought.

The *Land (Planning and Environment) Act 1991* delineates the land use and planning regime for Territory land (as defined under s.29 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) (see above) in the Australian Capital Territory, based on the Territory Plan.

Land (Planning and Environment) Act 1991

The object of the Plan is to ensure that the planning and development of the Territory provides the people of the Territory with an 'attractive, safe and efficient environment in which to live, work and have their recreation' (s.7). No act, or approval to do any act, shall be undertaken by the Executive, a Minister or a Territory authority, which is inconsistent with the Plan (s.8). The Act provides for the establishment, functions and powers of the Australian Capital Territory Planning Authority, which include responsibility for the administration of the Territory Plan (ss.33-38).

Part 3 of this Act contains extensive provisions dealing with heritage sites, including sites of significant Aboriginal heritage. These are discussed in more detail under 7.2 below.

Part 4 is concerned with procedures for environmental assessments and inquiries necessitated by certain decisions in respect to the Territory Plan and for environmental impact statements and public environment reports in relation to areas affected, or likely to be affected, by specified proposals

(ss.113-120). The Act (s.111) defines ‘environmental impact’ as including:

- the potential effects of a proposal on the community;
- the physical, biological or cultural transformation of the area;
- the environmental effect on the social system or the ecosystem(s) of the area;
- the environmental effect on premises or land, or the surroundings of such premises or land, that has heritage significance; and
- changes in the values or lifestyles of particular groups and communities, or to existing social relationships.

Extensive provision for public consultation and inspection, and tabling in, and review by, the ACT Legislative Assembly is also made under the Act (ss.120-135).

The scheme for the management of public land is set out in Part 5 Division 5. Public land may be reserved for a wilderness area, a national park, a nature reserve, a special purpose reserve, an urban open space, a cemetery or burial ground, a lake or a sport or recreation reserve (s.193) (for more details on this see the *Nature Conservation Act 1980* below).

An area of public land must be managed in accordance with the management objectives applying to the area and a plan of management, where applicable (s.194). These management objectives are defined as being those set out in Schedule 1 and any others specified by the Conservator of Flora and Fauna (appointed under the *Nature Conservation Act 1980*, s.7) for the area.

Where a plan of management is drawn up for an area it must include a description of it (s.196) and the way in which the objectives (specified under s.195 and Schedule 1) are to be implemented or promoted in the area. Provision is also made in the Act for a process of public consultation and tabling in the Legislative Assembly of these plans, including their review and deferral (ss.197-207).

The Act empowers the Executive, on the written recommendation of the Conservator, to grant a lease or licence over any public area except a wilderness reserve (ss.208-210).

The *Land Titles Act 1925* provides for the registration of title to land and for Crown lease land to be brought under this Act. Most title to land in the Australian Capital Territory is held under 99-year Crown leases. 'Land' is defined in the Act as including any interest in land, together with all paths, passages, ways, watercourses, liberties, privileges, easements, gardens, quarries or mines, and trees or timber whether on, over or under the land (s.6).

*Land Titles
Act 1925*

Any person claiming an interest in land has the right to lodge a caveat over it to prevent further dealings in it for the duration of the time (which does not need to be specified in the caveat) that the caveat remains on the certificate of title (s.104). In the absence of a definition of 'interest in land' for the purposes of this section, there is a possibility that people claiming native title rights and interests in the land could lodge a caveat over land, preventing dealing in that land until a determination of the native title claim.

The *Lands Acquisition Act 1994* sets out the procedures for the acquisition of interests in land by the Executive and certain other authorities. For the purposes of the Act, any authorised person may enter any land to determine whether it is, or may be, suitable for a public purpose.

*Lands
Acquisition
Act 1994*

The 'public purpose' for which an interest in land may be purchased is a purpose in respect of which the Legislative Assembly or the Parliament of the Commonwealth has power to make laws (ss.8 and 9).

The Act (s.13) provides for the acquisition of an interest in land either by agreement (for details, see ss.16 and 32; this agreement would need to include matters relating to compensation) or by compulsory process (as specified under ss.17 and 33). The interest that may be acquired will comprise either a legal or equitable estate or interest in land, as well as any other right, including a right under an option, or a charge, power or privilege over or in connection with land, or an interest in land (s.14).

Any person from whom land is acquired under compulsory process is entitled to compensation (s.42); the Act specifies how such compensation is to be worked out (s.45). Matters such as market value of the interest to be acquired, the reduction in the value of the land if it is severed from other land, and the costs of and incidental to the process of

acquisition (such as legal fees) are all required to be taken into account, as well as other matters under the Act (ss.46-51).

The regulations may prohibit or regulate the exploration for, or mining of minerals on or from, land in the Territory that is vested in a Territory authority after having been acquired by the authority under the Act (s.104).

*Nature
Conservation
Act 1980*

The *Nature Conservation Act 1980* makes detailed provision for the protection and conservation of native animals, native fish and native plants. Generally speaking, the Act prohibits unauthorised acts or activities that threaten, endanger or damage native fauna or flora, details of which are provided in the Act (ss.24-45AC). The Act does not make provision for the exercise of native title hunting, gathering or fishing rights in areas covered by it.

The Act establishes the Conservator of Flora and Fauna, which is an office of the Australian Capital Territory Government (s.7). Among the Conservator's duties is the preparation of the draft nature conservation strategy for the protection, management and conservation of flora and fauna in the Territory (s.15S).

The Act also provides for the appointment of a conservation officer (s.8). Such an officer may enter land to carry out such investigations and examinations in relation to native animals or plants as they consider necessary to ensure their protection and conservation, including the making of conservation directions (Part 5 and s.77).

The Act establishes the Australian Capital Territory Parks and Conservation Service, which consists of the various conservation officers (s.15). Its function is to assist the Conservator in the performance and exercise of their powers and functions under the Act.

The Act makes provision for the establishment of a Flora and Fauna Conservation Committee (s.15A), with functions to advise the Minister in relation to nature conservation issues. The Committee is also empowered to do all things necessary and convenient in relation to its functions (s.15D). The Committee comprises seven members (two of whom must not be public servants), who must have expertise in biodiversity or ecology.

Part 6 provides that access may be restricted or prohibited by the Conservator to a reserved area where the management of the area would be interfered with by public access to the area. A 'reserved area' is defined as any area of public land reserved under a plan of management as a wilderness area, a national park or a nature reserve for the purposes of the Act (s.5). Part 6A of the Act provides for a management agreement to be entered into between the Conservator and an agency in respect of controlled land. This part does not explicitly contemplate a management agreement with any person with native title rights or interests in the land.

The purpose of the *Noxious Weeds Act 1921* relates to the control and eradication of noxious weeds, which are defined as being those declared as such by notice in the *ACT Gazette* (s.2). The Minister is empowered to enter lands to destroy noxious weeds if the owner fails to comply with a notice to destroy or eradicate noxious weeds growing on the land (s.6).

Noxious Weeds Act 1921

The Minister is empowered, if the owner of land is unknown or does not reside in the Territory and cannot be located, to sell or lease the land to pay the expenses of carrying out the requirements of a notice to destroy or eradicate noxious weeds (s.7).

The *Protection of Lands Act 1937* provides for the protection of Territory land.

Protection of Lands Act 1937

It is an offence to take from any lands any stone, shell, sand, gravel, clay or earth, without a permit issued under the Act (ss.3-6). It is also an offence to deposit on any unleased land any substance, material or thing without the permission of the Minister (s.17) or the Protection of Lands Officer (appointed under s.2B). There is a parallel Protection of Lands Ordinance 1937 that applies to national land.

The *Public Parks Act 1928* is concerned with the protection and regulation, as public parks, of land at Hall and at Williamsdale in the Australian Capital Territory.

Public Parks Act 1928

Last century, under New South Wales legislation, these lands had been reserved from sale for public recreation. This Act

ends the NSW trusts and leases (s.10) and provides for these to be administered by the Australian Capital Territory (ss.11, 11B and 12 and Schedule). The Act also provides for rangers to be appointed to control these lands (s.5).

Recovery of Lands Act 1929 The *Recovery of Lands Act 1929* provides for the recovery of possession of 'Territory Land' upon the determination of leases. This involves the forced ending of a lease due to some form of non-compliance with a provision of the lease or a law applying to the lease and the parties to it.

The Act sets out the procedure for the determination of a lease on the basis of the operation of any law or provision of a lease, or where there is a right of re-entry or forfeiture under any provision or stipulation in a lease, for a breach of any covenant or condition in a lease (s.3).

This procedure is elaborated on in the Schedule and involves the issuing of a warrant by the Australian Capital Territory Magistrate's Court. A parallel Ordinance applies similar provisions in relation to national land.

Roads and Public Places Act 1937 The *Roads and Public Places Act 1937* relates to 'roads' and other 'public places'. A 'public place' is any place that is Territory land, that the public is entitled to use or which is open to, or used by, the public and includes every public road. 'Public road' means any street, road, lane, thoroughfare, footpath or place that is Territory land open to, or used by, the public (s.2).

The Act makes provision for the temporary closure of roads and for the declaration of temporary roads (ss.4 and 5).

It also allows for the construction of roads and ancillary works such as excavations, drains and culverts (ss.6-10). Certain acts in a public place, such as the placing of any advertisement or of any object by a person, are prohibited except under, and in accordance with, the terms and conditions of a permit issued by the Minister (ss.15-15R). There is a parallel Ordinance in relation to roads and public places on national land.

The *Trespass on Territory Land Act 1932* prohibits a person, without reasonable excuse, from trespassing or entering unleased Territory land, or land occupied by the Territory on which there is a notice prohibiting trespassing, or on which there is a dwelling house; or any garden, plantation or afforestation area, or unleased Territory land or land occupied by the Territory (s.4).

*Trespass on
Territory Land
Act 1932*

The Act provides for the issue of a permit to a person wishing to occupy unleased Territory land or land occupied by the Territory in the city area for the purpose of conducting a festival, circus, show, fair or carnival; such permit is subject to such terms and conditions as are imposed on it by the issuing authority (s.8B). There is a parallel Ordinance that applies to national land.

The *Water Pollution Act 1984* controls pollution of the waters of the Territory. 'Waters' is defined as a river, stream, lake, lagoon, pond, reservoir or dam, artesian or underground water, a drainage system for conveying stormwater, and tidal waters (s.5).

*Water
Pollution
Act 1984*

Part 4 provides a scheme for controlling the discharge of waste into waters through a requirement for a person to do so only in compliance with the terms and conditions of licences granted under this Act, and for the abatement of pollution in compliance with notices issued to a person under this Act. Not complying with these exposes the person to being charged with offences and penalties provided under this Part.

AUSTRALIAN CAPITAL TERRITORY

7.2 HERITAGE

With one exception, there is no legislation specifically covering places of Aboriginal cultural heritage in the Australian Capital Territory; accordingly the ACT has been covered by the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (see Chapters 8.2 and 9.2 for a detailed discussion of the provisions of that Act), although the legislation has yet to be specifically applied in the Territory.

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) is the one exception; it declares that certain land in the Jervis Bay Territory (which is a part of the ACT) is to become Aboriginal land and be vested, apparently as freehold, in the Wreck Bay Aboriginal Community Council. The Minister may not permit access in relation to a site that has been declared to be of special significance to Aboriginal members of the community (s.48(1)).

In that case the Community may display signs at or near the place stating that entry into it by people other than Aboriginal members of the Community is prohibited (s.48(2)). Penalties are prescribed for the offence of entering or remaining in any such place, or for disturbing or damaging any such place (ss.48(3) and (4)).

The Minister may not permit access to a site which has been declared to be of special significance to Aboriginal members of the community (s.48). Entry to such an area may be prohibited to people other than members of the Wreck Bay community and it is an offence to otherwise enter or remain in any such place.

The *Heritage Objects Act 1991* provides for the conservation of the heritage significance of objects. An 'Aboriginal object' is defined to mean a natural or manufactured object, or human remains not buried in accordance with modern law, which are of significance in Aboriginal tradition (s.4). An object has heritage significance if it has archaeological, historical, aesthetic, architectural, scientific, natural or social significance for the present community, and for future generations.

Heritage Objects Act 1991

Division 4 provides a scheme specifically for the conservation of Aboriginal heritage in the Territory. Unregistered Aboriginal objects are protected from disturbance, damage or destruction except on the basis of an order of the Minister (s.38).

In making an order under the Act, the Minister must seek a report from the Heritage Council (which is established under Part 3 Division 8 of the *Land (Planning and Environment) Act 1991* (see below) about the significance of the relevant object. The Heritage Council, in preparing the report, must consider the views of any relevant Aboriginal organisation (ss.41-43).

The Act establishes a heritage objects Register (s.44), which must identify all heritage objects, specifying any that are Aboriginal objects. It must also specify the location of these objects, and provide a statement of their heritage significance and conservation requirements. There are also restrictions on the publication of information about an Aboriginal object which would have an adverse effect on Aboriginal tradition or the object's heritage significance.

The Minister must, on behalf of the Territory, keep, or cause to be kept, each Aboriginal object owned by the Territory in a repository declared as such by the Minister by notice in the *ACT Gazette* (s.48). The Minister must be satisfied that the place so declared is suitable for the conservation of Aboriginal objects owned by the Territory and must consult with, and consider the view of, the Heritage Council and any relevant Aboriginal organisation (as defined in s.4 and provided for in s.25) before making any such declaration.

*Land (Planning
and Environment)
Act 1991*

For a detailed synopsis of the *Land (Planning and Environment) Act 1991* see 7.1 above.

Part 3 deals with heritage issues for the purposes of the Act. It provides, among other things, for the establishment of a heritage places Register and the procedures applying to its operation, including identifying and specifying heritage places that are Aboriginal places.

'Aboriginal place' means a place which is of significance in Aboriginal tradition (s.52(1)). 'Aboriginal tradition' is defined as being those traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs or

beliefs that have developed since European colonisation. 'Aboriginal objects' are defined as in the *Heritage Objects Act 1991* (s.4) (see above).

Division 5 of Part 3 of the Act deals specifically with Aboriginal heritage. The Act provides for the establishment of interim and heritage places Registers, and for public notification and consultation in relation to these (ss.52-63). The heritage places Register must identify heritage places, specifying any that are Aboriginal places (s.54(1)(a)). The Act also requires the Register to specify any restricted information in relation to an Aboriginal place referred to in it (s.54(1)(e)).

The Register must identify each object, or group of objects, specifying that they are Aboriginal objects for the purposes of the Act (s.54(1)(b)(ii)).

Provision is also made for the reporting of discoveries of unregistered places, Ministerial declarations and directions in relation to them (ss.67 and 68), as well as their protection (ss.70 and 71), and the payment of compensation for loss otherwise attributable to the registration of an Aboriginal place (ss.75-78).

The Act also empowers the Executive, on behalf of the Territory, to acquire a place listed on the Heritage Places Register where it is satisfied that the place has substantial heritage significance, including any objects in that place (ss.64 and 65). No such acquisition shall be made without notice being given of the intended acquisition, considering the views of the occupier or lessee of the place, the Heritage Council and any relevant Aboriginal organisation.

The Act protects from publication particular information about the location or nature of an Aboriginal place where the publication would be likely to have a significantly adverse effect on Aboriginal tradition or the heritage significance of the place (ss.82-85). The Heritage Council shall, however, provide to an occupier or lessee of land, or a person contemplating purchasing an interest in land, any restricted information relevant to the conservation of that land.

AUSTRALIAN CAPITAL TERRITORY

7.3 LOCAL GOVERNMENT

For a detailed synopsis of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) see Chapters 9.1 and 9.3.

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)

The Act commenced operation on 15 January 1987 and provides for the vesting of land listed in the Schedule, and any land declared at a later point in time, that is of significance to the Aboriginal people who are members of the Wreck Bay Aboriginal community in the Wreck Bay Aboriginal Community Council (ss.9 and 10).

The Council performs all functions relating to local government in relation to those lands. It is empowered to make by-laws for, or with respect to, matters on Aboriginal land such as: economic enterprise and cultural activities; the management, access, conservation, fire protection, development and use of the land; the declaration of sacred or significant sites or other areas of significance to Aboriginal people; activities to be permitted; the protection of flora and fauna, hunting, shooting and fishing; control of visitors; charging of fees; regulation of motor traffic and parking; and enforcement of these by-laws (s.52A).

The *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides for the Government of the Australian Capital Territory (ACT), establishes the ACT as a body politic under the Crown (s.7) and the Legislative Assembly (s.8). The Act vests in the ACT Legislative Assembly the power, subject to the Act, to make laws for the peace, order and good government of the Territory (s.22).

Australian Capital Territory (Self-Government) Act 1988 (Cth)

In respect of all matters beyond the statutory powers of the Legislative Assembly, the laws of the Commonwealth apply and the Constitution (s.128) gives the Commonwealth overriding powers in respect of Australian Territories such as the ACT and Jervis Bay. On national land the laws of the Commonwealth, such as the *Australian Capital Territory (Planning and Land Management) Act 1988* (see 7.1 above) apply, as do a number of ordinances made by the Commonwealth.

The effect of this is to provide the Commonwealth National Capital Authority (NCA) with the powers and functions that to all intents and purposes equate to 'local government'. The NCA has entered into numerous agreements with the ACT Government and other agencies to assist it in the provision of relevant goods and services.

AUSTRALIAN CAPITAL TERRITORY

7.4 MARINE AND WATER MANAGEMENT

For more details on the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) see 7.1, 7.2 and 7.3 above and also Chapter 9.

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)

The Australian Capital Territory, being entirely landlocked, had no access to the sea at the time when it was selected as the site for the seat of government. In order to provide the seat of government with access to the sea, the Jervis Bay Territory was excised from New South Wales under the *Jervis Bay Territory Acceptance Act 1915* (Cth). That Act (s.4A) applies the laws of the ACT to the Jervis Bay Territory, unless the Commonwealth has made separate ordinances that are inconsistent with ACT law.

Among the matters that the Wreck Bay Aboriginal Council may make by-laws for is fishing on Aboriginal land vested in the Council (ss.9, 10 and 52A). Further provisions in relation to fishing in the Jervis Bay Territory are contained in the *Fishing Act 1967* (see below).

The *Cotter River Act 1914* prohibits any person from fishing in the Cotter River Reservoir (s.2). Nothing in the Act shall be deemed to restrict the rights of any person holding land within a certain area, generally the Cotter River catchment area, under Crown grant, conditional purchase, lease, licence or permissive occupancy (s.4).

Cotter River Act 1914

Part 3 of the *Fishing Act 1967* controls fishing in rivers, streams and dams in the Australian Capital Territory and in the fresh waters of the Jervis Bay Territory. The Act specifically prohibits the taking of trout or fresh water bass in those waters during the closed season (being between the first day of October and the 30th day of April of every year) (s.10). The Act makes no explicit provision for the exercise of native title fishing rights.

Fishing Act 1967

The Act allows for fishing in open waters, but imposes restrictions on the type of equipment that may be used (s.13).

It also creates offences in relation to unlawful fresh water fishing in the ACT, unlawful fishing in the fresh waters of Jervis Bay Territory and unlawful sea fishing in the Jervis Bay Territory (s.15). Included are such things as the taking of more than 10 fish per day, hindering the passage of fish and using spear guns or stones or missiles for fishing.

Part 4 deals specifically with the waters and territorial waters of Jervis Bay, prohibiting professional fishermen from operating in these waters without a licence, regulating the movement of trawlers in these waters, and prohibiting the taking of undersized fish, using spears or spear guns, and strictly controlling the use of nets and related gear.

Lakes Act 1976 The *Lakes Act 1976* provides for the administration, control and use of certain lakes in the Australian Capital Territory; its application is restricted to 'Territory land' (s.4A). The Minister may declare an area to be a lake for the purposes of the Act (s.5). The consequence of this is that the Act applies primarily to Lakes Ginninderra and Tuggeranong. Lake Burley Griffin was declared as national land under the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) (see 7.1 above) and is administered by the National Capital Authority under the *Lakes Ordinance 1976*.

Part 4 regulates the use of lakes, including the prohibition of the use of motorised and other boats (s.16), the prohibition of swimming except in areas marked for that purpose (s.17), the need for approval for the placing of buoys, wharves and jetties (s.19), and closing off lake areas or parts of lakes for special events, including regattas and power boat races (ss.21-25). The use of houseboats on lakes is prohibited (s.31).

Water Resources Act 1998 The object of the *Water Resources Act 1998* is to ensure that the use and management of the water resources of the Territory sustain the physical, economic and social well being of the people of the Territory while protecting the ecosystems that depend on those resources. It is also to protect waterways and aquifers from damage, and to ensure that the water resources are able to meet the reasonably foreseeable needs of future generations (s.3).

The Environment Management Authority established under s.11 of the *Environment Protection Act 1997* shall prepare draft guidelines for finding out the flow necessary to maintain aquatic ecosystems (ss.4 and 5). Flow is defined in relation to surface water and ground water as the discharge, release, escape or passage of the water (s.4).

Subject to this Act, the right to the use, flow and control of all water of the Territory (other than ground water under land the subject of a lease of Territory land granted before the commencement of this section) is vested in the Territory and, subject to any other Act, those rights are exercisable by the Minister in the name of and on behalf of the Territory (s.13).

The Authority shall prepare a draft management plan for the water resources of the Territory (s.20.(1)). A management plan shall include:

- a description of the water resources of the Territory including the flows required to meet the environmental needs of individual waterways or aquifers or parts of individual waterways or aquifers;
- the proposed water allocations for the next succeeding 10 years;
- water allocations to be created for urban water supply, industry and other uses; and
- action to be taken by the Authority to manage the water resources of the Territory (s.19.).

AUSTRALIAN CAPITAL TERRITORY

7.5 MINERALS

Under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth), the Commonwealth retains title in all minerals existing in their natural condition on or below the surface of the land (s.14). Minerals are defined to include gold, silver, tin and other metals, coal, shale, petroleum and valuable earths and substances, mineral substances, gems and precious stones, and ores and other substances containing minerals, whether suspended in water or not (but excluding water) (s.2(1)).

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)

However, any law authorising mining or exploration for minerals in the Territory does not apply to Aboriginal land (s.43). No mining may be carried out on Aboriginal land without an agreement between the prospective mining parties, the Commonwealth and the Wreck Bay Aboriginal Community Council (s.44).

The *Land (Planning and Environment) Act 1991* reserves ownership of minerals in the Territory and the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) (s.31A) (see 7.1 above) vests in the Australian Capital Territory all rights to minerals on land classed as Territory land (s.218). 'Territory Land' is defined in the Act (s.159) as having the same meaning as in the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth). A person may be granted the right to extract minerals from specified Territory land (s.219).

Land (Planning and Environment) Act 1991

The granting of a miner's right in respect of public land is prohibited (s.211). Section 7(2)(b) provides for the reservation of an area of public land for purposes set out in the Act (s.193); the Conservator appointed under the *Nature Conservation Act 1980* (see 7.1 above) may recommend that the Territory Plan be varied to provide for the identification of land as public land (s.192).

Part 6 of the Act sets out the procedures for making an application for approval to undertake a development. It is an offence to undertake a development other than in accordance with an approval (s.225). 'Development' is defined in the Act

to include a use of the land that is not authorised by a current licence or permit granted in respect of the land under an Act or regulations (s.222).

AUSTRALIAN CAPITAL TERRITORY

7.6 NATIVE TITLE

The *Native Title Act 1994* commenced operation on 1 November 1994 and is intended to give effect in the Australian Capital Territory to the national scheme for the protection and recognition of native title introduced by the Commonwealth Parliament (preamble, cl.7). The objectives of the Act are to allow for the validation of past acts invalidated because of the existence of native title and to confirm existing rights to natural resources and access to public places and waterways (ss.3(a), 3(b), 11 and 12). *Native Title Act 1994*

The Act provides, in accordance with the *Native Title Act 1993* (Cth) (s.19) and in terms that are the same as contained in that Act (ss.15 and 16), for the validation of past acts that are invalid because of the existence of native title (ss.6-8). The Act makes it clear that a confirmation under it does not extinguish or impair any native title rights or interests, or affect a conferral of land or waters, or an interest in land or waters, under a law that confers benefits only on indigenous people (s.13). This relates to the provisions of the *Native Title Act 1993* (Cth) (s.212(3)).

Despite the fact that the *Native Title Act 1993* (Cth) (s.251) provides for the establishment of a recognised state/territory body to make determinations of native title, there is no provision in this Act for the establishment of a mechanism in the Australian Capital Territory for determining claims to native title.

**A GUIDE TO AUSTRALIAN LEGISLATION
RELEVANT TO NATIVE TITLE**

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NORTHERN TERRITORY

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NORTHERN TERRITORY

8.1 LAND AND ENVIRONMENT

Under the *Aboriginal Land Act 1978*, entry onto Aboriginal Land as defined under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see next entry) may only be by people issued with a permit by the relevant land council or the traditional Aboriginal owners (ss.4 and 5). The Act authorises the Administrator of the Northern Territory to issue a permit to use roads in certain circumstances (s.5A) and certain members of the Northern Territory Parliament to enter and issue permits to staff to enter Aboriginal land in the performance of their duties (ss.6 and 16). Additionally, members of, and candidates for, the Legislative Assembly of the Northern Territory, as well as others authorised or issued with permits under this Act, may enter Aboriginal land (ss.7 and 17).

Aboriginal Land Act 1978

The Act creates a defence to a charge of unauthorised entry if the person charged can prove that the entry was beyond that person's control, it was impractical in the circumstances for that person to apply for a permit and, in any event, that person left the area as soon as practicable (s.9). The Administrator is empowered to declare an area of Aboriginal land to be an open area, which entitles any person to enter and remain in the area (s.11). Before making such a declaration, the Administrator must have received a recommendation by the relevant land council to do so and have published a notice in the *Territory Gazette*.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which is referred to as the 'Aboriginal Land Rights Act', put into place Australia's first process for land claims outside town areas on unalienated Crown land and on land already owned by Aboriginal interests (for example, pastoral leases). It resulted in the immediate transfer of all reserves (about 15 per cent of the Territory) as inalienable freehold land to Aboriginal people.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

The Act creates a scheme, in operation in the Territory, under which Aboriginal people can acquire land to be held by Aboriginal land trusts under the Act. The kind of title granted

under the Act is a freehold-style title. In legal terms, this unique form of title has been called ‘an inalienable fee simple, subject to various controls and prohibitions on dealing’ (see, for example, judgement of the Federal Court in *Northern Territory Planning Authority v Murray Meats (NT) Pty Limited* (1983) 48 ALR 188). That is, the title is equivalent to a freehold title but cannot be sold.

Only interests less than freehold can be given in respect of Aboriginal land, which is defined as land held in freehold by a land trust or the subject of a deed of grant held by a land council (s.3) (see below for details).

The Act makes detailed provision for the granting of leasehold and other interests (ss.19 and 20), but direction by the relevant land council (see below), in consultation with and subject to the consent of the traditional owners, is required. As is (in most cases) the written consent of the Minister (ss.19(5) and 19(6)).

The Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that such law is capable of operating concurrently with this Act (see s.74 of this Act and decision in the *Murray Meats case*). The Legislative Assembly has powers (under s.73(1)(a)) to make laws providing for the protection of sacred sites (see *Northern Territory Aboriginal Sacred Sites Act 1989* below). The Act (s.73(1)(c)) also empowers the Legislative Assembly to make laws for the protection and conservation of wildlife (see *Territory Parks and Wildlife Conservation Act 1978* and *Parks and Wildlife Commission Act 1980* below).

The Legislative Assembly has further powers to make laws regulating or authorising entry on Aboriginal land (s.73(1)(b)), which it has done in respect of fighting bush fires (*Bushfires Act 1980*, s.56A), repairing fences (*Fences Act 1972*, s.22), the control of stock diseases (*Stock Diseases Act 1954*, s.42A), the erection, inspection or maintenance of a lighthouse or other aid, lamp or light (*Marine Act 1981*, s.151; see below), and in respect of counter disaster operations (*Disasters Act 1982*, s.43).

Furthermore, this Act allows for the evacuation from, or denial of entry to, Aboriginal land during a state of disaster (s.37(2)). It may also make laws regulating or prohibiting entry into the waters of the sea within two kilometres of Aboriginal land (s.73(1)(d)).

Any such law of the Northern Territory has effect only to the extent that it can operate concurrently with laws of the Commonwealth, such as this Act and the *National Parks and Wildlife Conservation Act 1975*, and any regulations made, schemes or programs formulated, or things done under such an Act (s.73).

Dealings in Aboriginal Land

The resumption, compulsory acquisition or forfeiture of Aboriginal land under any law of the Northern Territory is not permitted (s.67). There are also prohibitions on the construction of a road over Aboriginal land without the consent of the relevant Aboriginal land council (s.68), people entering or remaining on land that is a sacred site (with some exceptions—see s.69), and a person entering or remaining on Aboriginal land except in specified circumstances (ss.70 and 71).

Applications may also be made to an Aboriginal land commissioner by, or on behalf of, people claiming to have a ‘traditional land claim’ to an area of Crown land; the Land Commissioner is then required to ascertain whether the claim and claimants comply with the requirements of the Act (ss.3 and 50, see also decision in *Northern Land Council v Olney* (1992) 34 FCR 470). The Land Commissioner reports the findings to the Minister and to the Administrator (s.50(1)(a)(ii)).

The Minister may accept the Land Commissioner’s recommendation, establish a land trust and recommend to the Governor General that a grant be made (s.11). The Governor General, on receiving the Minister’s recommendation, executes a deed of grant and delivers it to the land trust, as of which date it then takes effect (s.12). Section 50(2A), inserted in 1987, has the effect of barring all land claim applications as of 5 June 1997. On 4 June 1997 some 35 claims were lodged by the Northern Land Council, which include Litchfield and Gregory National Parks, as well as land held by the Land Corporation Fund, which includes land set aside for the development of the second stage of the Ord River Irrigation Scheme on the Northern Territory-Western Australian border. Claims have also been made on beds and banks of rivers and areas between the high and low water marks, as well as on seabeds in gulfs and bays, which could impact on mining agreements.

Aboriginal Land can also be granted if the Minister responsible for this Act recommends to the Governor General that land (specified in Schedule 1) be granted to freehold where no party holds an interest or estate in that land. Where a third party does hold an estate or interest in an area of land described in Schedule 1, a recommendation may be made to the Governor General that a deed of grant of freehold is made to the relevant land trust, to be held by the land council for the area until all estates or interests come to an end (see ss.4, 10 and 12). A land trust may not grant an estate or interest in land other than at the direction of the relevant land council (ss.19 and 20).

Land Councils

The land councils are responsible for the management of Aboriginal land, but must not carry out their functions unless the Aboriginal owners, as a group, consent to the proposed action (ss.21-23). The Territory has been divided into four land council areas: Central and Northern Land Councils (established January 1977, covering the mainland areas), the Tiwi Land Council (established July 1978, covering Bathurst and Melville Islands) and the Anindilyakwo Land Council (established July 1991, covering Grruk and Bickerton Islands).

A land council has an obligation to use its best endeavours to conciliate for the settlement or the prevention of a dispute with respect to land in its area involving Aboriginal people, land trusts, Aboriginal Councils and incorporated Aboriginal Associations established under the *Aboriginal Councils and Associations Act 1976* (Cth) (see Chapter 9.3) or any other incorporated Aboriginal groups (s.25).

Aboriginal land is held by the Aboriginal land trusts, established under the Act (s.4) for the benefit of Aboriginal people entitled by Aboriginal tradition to the use or occupation of the land concerned, whether or not the traditional entitlement is qualified as to circumstance, time, place, purpose or permission (ss.4(1) and 11(4)).

All members of the trust must be Aboriginal people living in the area or as otherwise recognised under the Act (s.24) and are subject to direction (and therefore do not exercise any direct functions in relation to the land independent from the relevant land council (s.5). Schedule 1 to the Act lists lands (being mainly former reserves) which are vested directly in the land trusts.

Schedule 2 lists the other lands in respect of which land trusts have been established to hold title, being mainly unalienated Crown land recommended for grant by an Aboriginal land commissioner.

Access to Aboriginal Land

As a general rule it is an offence to enter or remain on Aboriginal land, except for people performing lawful functions under this or any other law of the Territory, those entitled by this Act to the use or enjoyment of an estate in the land, or those exercising a legal right of way (s.70). The traditional Aboriginal owners control access to, activities on and dealings with Aboriginal land (ss.3, 19, 23, 28, 42, 43, 46, 48A, 68, 71 and 73; see also *Pareroultja v Tickner* (1993) 42 FCR 32, especially at pp 44-45).

However, roads over which the public has a right of way, such as the Arnhem and Kakadu highways, are excluded from the deed of grant (s.11). No roads may be constructed over Aboriginal Land without the consent of the relevant land council (s.68).

If land that is vested in a land trust is occupied or used by the Crown in right of the Territory or the Commonwealth at that date, the Crown may continue that occupation or use for the period that it continues to require the land (s.14).

Where occupation or use is for a purpose that is not a community one, the Crown must pay rent to the relevant land council at a rate fixed by the Minister (s.15). 'Community purpose' means a purpose that is calculated to benefit primarily the members of a particular group or community (s.3(1)); see also *Attorney-General v Hand* (1991) 172 CLR 185, where the High Court held that a cattle research station falls outside this category.

'Forestry purposes' are specifically excluded from the definition of community purpose by the Act (s.15(2)). An important feature of the Act is the protection of pre-existing rights of use and occupation, for example by the Director of National Parks and Wildlife (s.12A), the Crown or a public authority (s.14), missions (s.18) and the company operating the Ranger mine (s.18A).

The identity of the traditional Aboriginal owners of land may change over time. The Act (s.24) provides that when the land becomes Aboriginal land (whether following a land claim or a

grant made under the Act), the relevant land council has the power to determine who the traditional owners (if any) of the land are, and the land council is also entitled to compile and maintain a register of the traditional owners in its area (see also *Tapgnuk v Northern Land Council* (1996) 108 NTR 1).

Traditional Land Claims

A traditional land claim may be made in relation to (i) unalienated Crown land not being in a town (ss.3(1) and 3(6)) and (ii) alienated Crown land in which all estates and interests not held by the Crown are held by or on behalf of Aboriginal people (s.3 and s.50(1)(a)).

The types of land that are available for a claim include:

- land that is subject to a grazing licence (see decision of High Court in *R v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327) or an occupation or other licence granted under the *Crown Lands Act 1992* (see below);
- certain stock routes and reserves (but ss.50(2D) and (2E) and Schedule 1, Parts 2 and 3, limit these claims);
- the bed and banks of a river (but compare this with s.12 of the *Water Act 1992* (see below), which vests ownership of these beds and banks in the Territory);
- certain public roads (see *Banibi Pty Ltd v Aboriginal Land Commissioner* (1987) 76 ALR 655; but under ss.11 and 12 stock routes are not roads for the purposes of this Act; and the effect of ss.11(3), 12(3) and 12(3A), and ss.12AA to 12 AC, is to preclude land that is a public road, or that has been declared by the Northern Territory Supreme Court as being a road over which the public has a right of way, from becoming Aboriginal land);
- land which is subject to a mining interest, such as a mining lease or an exploration licence, because mining interests do not constitute an estate or interest in land for the purposes of determining the status of land available for a claim (see ss.3(1)-3(4) and decision of the Federal Court in *Attorney-General (NT) v Kenney* (1990) 94 ALR 488);
- pastoral leases held by, or on behalf of, Aboriginal people (the High Court has found that a lease may be

held by an appropriate corporation ‘on behalf of’ Aboriginal people even though it is not held on trust: *R v Toohey; ex parte Attorney-General* (NT) (1980) 145 CLR 374), irrespective of whether those Aboriginal people are the claimants (although the Aboriginal land commissioner may not deal with a traditional land claim to such land unless the Aboriginal people who hold the estate or interest in the land have, or the body which holds that estate or interest on their behalf has, given written consent to the application being made: s.50(2C)); and

- land which is set apart for, or dedicated to, a public purpose under a law of the Territory (see decision of High Court in *R v Kearney; ex parte Japanangka* (1984) 158 CLR 395), or any law, other than a law of the Commonwealth, which applies in the Territory (for example a forest reserve which was reserved by the Governor of South Australia under the *South Australian Woods and Forests Act 1882* (repealed), when the Northern Territory was annexed to South Australia: see Aboriginal land commissioner (Toohey J) in *Kenbi (Cox Peninsula) Land Claim* (1984) AGPS Canberra, p.29).

Land which is not available for a claim includes land that is:

- held for an estate in fee simple;
- set apart for, or dedicated to, a public purpose under an Act of the Commonwealth (see *R v Kearney, ex parte Japanangka* (1984) 158 CLR 395);
- subject to a deed of grant held in *escrow* by a land council;
- in a town (‘town’ is defined in s.3(1); see also *R v Kearney; ex parte Northern Land Council* (1984) 158 CLR 365);
- held as an estate or interest otherwise than by, or on behalf of, Aboriginal people, such as land that is held by a statutory corporation that is not the Crown (*R v Kearney, ex parte Japanangka* (see above)).

Once an application is made to an Aboriginal land commissioner by Aboriginal people claiming to have a traditional land claim to an area of land, any purported grant of an estate or interest in that land before the claim is fully

disposed of has no effect (s.67A). The effect of that provision is to preserve the status quo until an application under the Act has been resolved (see also *Roberts v Minister for Aboriginal Affairs* (1991) 29 FCR 345).

Aboriginal Land Commissioners

The Act provides for Aboriginal land commissioners (s.49). A Commissioner must be a judge appointed by the Governor General (ss.52 and 53). The powers of a Commissioner, specified under the Act (s.51), are to do all things necessary for, and incidental to, the performance of the functions as set out (in s.50). These include hearing and determining land claim applications over unalienated Crown land or alienated Crown land, in which all estates or interests are held by, or on behalf of, Aboriginal people. A Commissioner is also required to establish and maintain a register of these traditional land claims and to advise the Minister and Administrator of the Northern Territory on matters relating to the Act and land to be brought under it.

Native Title

It is unlikely that native title is extinguished by the grant of title to a land trust, because such grants are not inconsistent with the continued existence of native title, particularly as a grant in fee simple would usually be made for the benefit of the Aboriginal people who have native title to the land. Arguably, such grants presuppose the existence of native title and protect its continued enjoyment.

Anti-Discrimination Act 1992

Under the *Anti-Discrimination Act 1992*, a person may restrict access to land, a building or a place of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction (a) is in accordance with the culture or doctrine of the religion and (b) is necessary to avoid offending the cultural or religious sensitivities of the people of the culture or religion (s.43). This includes Aboriginal spiritual beliefs or activity in the context of religious beliefs or activities (s.4(4)).

The *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981* is administered by the Minister for Parks and Wildlife and the Parks and Wildlife Commission of the Northern Territory established under the *Parks and Wildlife Commission Act*.

Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981

The Cobourg Peninsula Act acknowledges the right of Aboriginal people to occupy, use and control land on the Cobourg Peninsula under Aboriginal tradition, but it is not Aboriginal land granted under the Aboriginal Land Rights Act. It provides for approximately 1,916 square kilometres of land above the low-water mark (including various islands - see Schedule to the Act), to be granted to the Cobourg Peninsula Sanctuary land trust on trust for the traditional owners and other Aboriginal people. In the Act, the term 'group' means all the traditional Aboriginal owners and the Aboriginal people entitled to use or occupy the sanctuary.

All estates and interests held by the Crown are also transferred to, and held in perpetuity by, the trust. Additional areas may be granted in certain circumstances (ss.3, 5, 6, 13 and 14, and Schedule), but there is no provision in the Act for land claims.

The Sanctuary is established in perpetuity as a national park, called Gurig National Park, and title is inalienable (s.16). It cannot be sold, transferred, mortgaged or otherwise dealt with except by way of lease or licence under the plan of management (see, for example, s.39, under which the land trust was required to grant a lease of certain land to Paspaley Pearling Company Limited).

The Northern Territory Crown may acquire, for a public but not for a mining purpose, any part of or interest in the Sanctuary, but needs to satisfy a number of special conditions, including a resolution by the Legislative Assembly (s.17).

Members of the group are entitled to the use and occupancy of the sanctuary, except as prohibited, restricted or regulated under this or any other law in force in the Territory. With the establishment of the Sanctuary as a national park for the benefit and enjoyment of all people, any person may enter and remain on the sanctuary (ss.12 and 30), but subject to rights of access as determined by the Cobourg Peninsula Sanctuary and Marine Park Board.

The board may prohibit or restrict access by people other than members of the group, and may make by-laws to that effect (ss.24(c), 30(2)-(3) and 35(2)(k)).

The Act establishes the board (s.7), which comprises four Aboriginal members and four others appointed by the Minister; the trust must perform its functions as directed by the board. The board's functions include the preparation of a plan of management for the sanctuary that must make provision for its management and control, for the protection of the rights of the group, and for the protection of sites of importance in Aboriginal tradition (s.24).

The control and management of the sanctuary is carried out by the board and the Conservation Commission of the Northern Territory (ss.3, 25 and 26). The Legislative Assembly has a power of veto over the plan of management.

The Act also makes provision for the felling and taking of timber in the sanctuary (s.31(1)(d)).

Crown Lands Act 1992 The *Crown Lands Act 1992* is the second legislative scheme by which Aboriginal people can acquire land in the Territory (the primary one being under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see above).

All alienation of title in Crown land is subject to the provisions of the Act (s.4(1)), with exceptions (listed in s.4(2)), which includes the granting of an estate in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The Act provides for the grant of Crown leases either for a term or in perpetuity (s.26).

Reservation for Traditional Use, Licences and Travelling Stock Routes

The Act contains a reservation in favour of Aboriginal people to reside on, use and occupy leased land in accordance with their tradition (s.37(2)). This includes the right to: take and use the water from any natural source on the land; take or kill for food for ceremonial purposes any native animals occurring naturally on the leased land; and, likewise, take any vegetable matter growing naturally on such land. However, Aboriginal people are not permitted to erect or use a structure on the land that would serve as a permanent shelter for human occupation, other than a place on the land where they ordinarily reside. It is an offence to interfere with Aboriginal people in the exercise of these rights without just cause (s.37(3)). 'Just cause' is defined to mean any reasonable acts taken by, or on

behalf of, the lessee to ensure the proper management of the lease for the purposes for which it was granted.

The Act provides for the issuing of grazing licences (s.88) and licences to take live or dead timber or wood, stone, shell, gravel, sand, clay, non-metalliferous earth, salt, seaweed, bark or any other substance (s.91), on Crown land. However, both provisions specifically exclude lands reserved for the benefit of the Aboriginal inhabitants of the Territory from lands in respect of which such licences may be granted. But no lands are exempt from the Minister's power to declare stock routes of up to 1,610 metres (1 mile) in width through any Crown lands or lands that are the subject of a reservation, declaration or any other interest created under the Act (s.96).

Community Living Areas

The Community Living Areas Tribunal, established under the *Pastoral Land Act 1992* (see below), may also make a recommendation to the Minister to excise an Aboriginal community living area from leased Crown land (s.20 of this Act). If it does so, the Tribunal must consider provisions that may need to be made to ensure reasonable access to the areas to be excised and the cost of providing such access and services.

Once the process required by the Act for the excision of Aboriginal community living areas has been completed and a decision made to issue title, the Minister acquires the land under the procedures laid down in the *Lands Acquisition Act 1978* (s.46(1A)) (see below). Once acquisition has been formalised, an estate in fee simple is granted to an Aboriginal association (required to be formed by the applicant under either the *Associations Incorporation Act* (NT) or the *Aboriginal Councils and Associations Act 1976* (Cth)).

Grants of an estate in fee simple for an Aboriginal community living area, are, however, subject to reservations and easements in favour of the Northern Territory, as specified in the Act (ss.20 and 21). The Act also does not confer upon the owner any property in, or the right to the use or flow or control of, the water in any lake, spring or watercourse on, in or under the land (s.22; see also *Lands Acquisition Act 1978* below). But, otherwise, the land is free from all other interests, trusts, restrictions, dedications, reservations, obligations, encumbrances, contracts, licences, charges or rates of any kind.

The term 'enhanced freehold title' has been adopted to describe this protected title. Since the commencement of Part 8 of the *Pastoral Land Act 1992* (see below) on 1 December 1992, grants of land for Aboriginal community living areas have been transferred to the provisions of that Act.

Resumption of Land for Use and Benefit of Aboriginal People

The Administrator may (by proclamation) resume any Crown land that is the subject of lease (except a lease granted under the *Mining Act 1980* or the *Pastoral Land Act 1992*) for the use and benefit of Aboriginal people, and may reserve land so resumed for a nominated purpose (ss.76, 80-82). Land may be reserved for the use by Aboriginal people of the natural waters and springs on unleased land within the reserved land and for the taking or killing for food of native and wild birds, fish and animals and vegetable matter growing naturally there (s.76(4)).

Energy Pipelines Act 1981

The *Energy Pipelines Act 1981* provides for (i) access permits to conduct surveys and preliminary investigations (Part 2) and (ii) pipeline licences, permitting construction and operation of a pipeline (Part 3).

The Act applies to Aboriginal land within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see above) to the extent that it is capable (s.4). The Act allows an applicant for an access permit to enter land for the purposes of determining the route of the proposed pipeline, the situation of related apparatus and works, and the land required for access to these (s.5). The applicant must give notice of the application to the relevant councils, owner and occupiers, and holders of rights of way, easements, and so on (s.6). The Minister must also take into account any possible interference with features of archaeological, historical or geological interest (s.7(2)).

An access permit issued under the Act permits the holder to take samples from the land specified in the permit for examination and testing (s.11). This access permit then gives rise to an entitlement to apply for a pipeline licence, which entitles the holder to enter the land to commence or continue the construction of a pipeline, to alter or reconstruct it, and operate, maintain and inspect it (ss.12 and 13). However, the

application must specify, in relation to each part of the proposed pipeline, which parts of the proposed route runs on or across Aboriginal land within the meaning of the Aboriginal Land Rights Act or on or across other land held by the Commonwealth (s.13(2)(e)).

When considering an application, the Minister is required to have regard to whether the construction of the proposed pipeline, apparatus or work would be likely to interfere with features of archaeological, historical or geological interest on or in the vicinity of the land (s.15(2)(d)). Similarly, one of the conditions that may be imposed on the holder of a pipeline licence is to take measures in respect of the conservation and protection of various environmental matters (s.17(2)).

Non-compliance with the terms and conditions imposed on a pipeline licence may result in its cancellation (s.25). The licence holder must also avoid pollution of waters (s.36).

Inspectors are appointed under the Act and authorised to enter land for which a permit or licence has been issued to inspect the pipeline, apparatus and works to ensure no breaches are occurring (s.64(1)). A penalty of up to \$1,000 is charged for failing to provide assistance to an inspector (s.64(3)).

The purpose of the *Environmental Assessment Act 1982* is to provide for the assessment of the environmental effects of development proposals and for the protection of the environment. It is possible that Part 4 of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (see above), because of its comprehensive nature, in fact covers the field in relation to the environmental impact of proposals for exploration and mining on Aboriginal Land, leaving no room for the concurrent operation of this Act.

*Environmental
Assessment Act
1982*

The *Jabiru Town Development Act 1978* establishes the Jabiru Town Development Authority (s.4(1)) and requires it to act in accordance with the provisions of the *National Parks and Wildlife Conservation Act 1975 (Cth)* (see below) in so far as they apply to Jabiru (s.4(4)). The functions of the Authority include: developing, maintaining, administering and controlling the town of Jabiru; and protecting the environment in so far as it is affected by the construction and operation of the town (s.15). The Authority is empowered to determine the

*Jabiru Town
Development
Act 1978*

use to which land is to be put, and to acquire, hold and dispose of any interest or right in relation to real and personal property (s.16).

The National Parks and Wildlife Conservation Act (ss.8D(1) and (2)) makes special provision for those parts of Jabiru which are located in Kakadu National Park, prior to a plan of management drawn up under that Act coming into force.

Where the Director with responsibility for Kakadu under the National Parks and Wildlife Act grants a licence to the Authority, authorising it to do such things within the Park as are specified in the licence, they are required to consult with, and have regard to, the views of the Chairperson of the relevant land council (s.8D(3)(b)).

Recent changes in leasing arrangements have seen responsibility transferred from the Director of Parks and Wildlife to the Jabiru Authority, the effect of which has been to make the area open to native title claims.

Lands Acquisition Act 1978 The *Lands Acquisition Act 1978* relates to the acquisition of land by the Territory on just terms (long title; s.5). A compulsory acquisition of native title rights and interests is only valid if the procedures of Part 4 of the Act are complied with. A notice of the proposal to acquire land must be served on each person affected and the relevant native title bodies (s.32). An invitation to negotiate with the Minister the conditions of the acquisition is also sent and includes advice that in the absence of agreement the land will be compulsorily acquired, whether by agreement or compulsorily, only after all objections lodged have been dealt with (s.33). Only registered native title claimants, or a person who has a claim for registration pending within four months, may lodge an objection in relation to the effect of the acquisition on their native title rights and interests (s.34). Subject to conditions, compensation is payable to a person whose interest in land is acquired under this part, whether or not the person lodged an objection to the acquisition (s.34(4)).

The Minister may acquire land with native title rights or interests by agreement through an Indigenous Land Use Agreement (s.31(a)).

Acquisition of Land for Aboriginal Community Living Areas

Where a notice of acquisition under the Act provides for the setting aside of Aboriginal community living areas under the *Crown Lands Act 1992* or the *Pastoral Land Act 1992*, an estate in fee simple is granted to the association formed or approved for the purpose under each of those two Acts (s.46(1A)).

The land is granted subject to ss.20, 21 and 22 of the Crown Lands Act. Those provisions state that the Minister responsible for this act has interest in the land for the provision of essential services such as power, water, sewerage, road or communication services to or cross the land, or access thereto. The Minister can compulsorily acquire land for the provision of these services.

The land granted is also subject to any mining tenement, exploration licence, exploration retention licence, reserve, occupation or other right under the *Mining Act 1980* (see 8.5 below) and a mining interest is not acquired under this Act unless the notice of acquisition specifically provides that this is so (s.46(1-2)).

Any dispute about these provisions is required to be referred to the Community Living Areas Tribunal by the Minister under the *Pastoral Land Act 1992* (s.28A).

The *Lands and Mining Tribunal Act* establishes the Lands and Mining Tribunal (s.4). The main functions of the Tribunal (s.5) are to hear, make recommendations, determine claims, dismiss, and/or determine disputes about a number of matters relating to the *Lands Acquisition Act 1978* (see below), the *Mining Act 1980* (see 8.5 below), the *Petroleum Act 1984* (see 8.5 below), the *Pastoral Land Act 1992* (see below), and the *Energy Pipelines Act*. For example:

*Lands and
Mining
Tribunal Act*

- to hear and determine claims for compensation under s.51(b) or Part 8 of the *Lands Acquisition Act 1978*. This includes claims for compensation for the effect of an acquisition of land on native title rights and interests; and,
- to hear and make recommendations about objections by registered native title claimants and registered native title bodies corporate to the doing of prescribed

mining acts to which Part 11A of the *Mining Act* applies, or the doing of prescribed petroleum acts to which Part 2A of the *Petroleum Act 1984* applies.

The Tribunal can be constituted by just one member (s.7). A person is not eligible for appointment as a member unless the person is enrolled as a legal practitioner of the High Court, the Supreme Court, or a Supreme Court of a State or another Territory of the Commonwealth, and has been so enrolled for at least 5 years (s.28).

In performing a function or exercising a power, the Tribunal is not subject to the direction of the Minister (s.8). The hearing of a proceeding is to be open to the public unless the Tribunal orders otherwise (s.13). The Tribunal is not bound by the rules of evidence but may inform itself of a matter relevant to a proceeding in the manner it thinks appropriate (s.14).

Part 3 has provisions for the Tribunal's proceedings - Division 1 lists general provisions, Division 2 lists objection proceedings, and Division 3 lists compensation proceedings.

Subject to any other Act, after hearing a dispute about compensation the Tribunal must determine whether compensation is payable to the claimant and, if so, the amount of compensation that is payable (s.24). The total amount of compensation determined by the Tribunal to be payable for an act that extinguishes all native title in relation to particular land or waters is not to exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters. This is subject to the requirement that the compensation is to be on just terms (s.26A.).

Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989

The *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* inserts provisions dealing with Aboriginal Community Living Areas (CLA) into a number of relevant laws of the Northern Territory.

Specifically, this Act (s.8) inserts a new provision into the *Associations Incorporation Act* (NT) (s.26A), which restricts the power of the Minister to alienate Aboriginal CLA land. The exceptions are the registration of interests, such as easements, as authorised under the *Real Property Act 1995* (NT) or to give effect to a recommendation of the Community Living Areas Tribunal made under the *Crown Lands Act 1992*

(see above) in relation to an abandoned Aboriginal CLA (see also the *Pastoral Land Act 1992*, s.114, below).

Under the Act (s.16(1)), an Aboriginal association may be incorporated into the *Associations Incorporation Act* (NT) or the Commonwealth's *Aboriginal Councils and Associations Act 1976* (for more details on the latter see Chapter 9.3).

Where an incorporated association of Aboriginal people is the registered proprietor of fee simple and the lessee of land under the Northern Territory *Special Purposes Leases Act 1953* (see below) and the *Crown Lands Act 1992* (see above) (other than for pastoral purposes), that association may apply to the Minister to have its interest in the land converted to an estate in fee simple for the purposes of an Aboriginal CLA.

The Minister may accept or reject an application; if it is accepted, title to the land is granted and held on the same terms and conditions, and subject to the same reservations and restrictions that would apply if it were an excision from a pastoral lease (s.16). These provisions are complementary to the relevant provisions of the Northern Territory's *Pastoral Land Act 1992* (see below).

The lessee of a pastoral lease may, with the Minister's consent, sublet part of the lessee's pastoral lease for Aboriginal community living purposes to an incorporated body set up for the management of the Aboriginal community by whom the area is to be used. 'Aboriginal community living purposes' include such matters as residential, educational and medical purposes, and the keeping of livestock and poultry and the growing of fruit and vegetables for use by the Aboriginal people in the community (s.70).

The *National Environment Protection Council (Northern Territory) Act 1994* provides that the Legislative Assembly of the Northern Territory intends, in compliance with its obligations under the Inter-governmental Agreement on the Environment (IGAE), to implement national environment protection measures in respect of activities that are subject to Territory law, including the activities of the Territory and its instrumentalities (s.7). All other States and Territories have enacted parallel laws that give effect to the IGAE.

*National
Environment
Protection
Council
(Northern
Territory) Act
1994*

Under Schedule 2 Clause 3 of the IGAE (which forms part of this Act; see Schedule) the parties agree that policy, legislative and administrative frameworks to determine the permissibility of land and resource use, and development proposals, should provide for consultation with affected individuals, groups and organisations. This provision could be applied by Indigenous groups and authorities, who could become involved in discussions about proposals that affect the environment on their lands.

National Parks and Wildlife Conservation Act 1975 (Cth) The *National Parks and Wildlife Conservation Act 1975* will be repealed on the commencement of Schedule 4 of the *Environmental Reform (Consequential Provisions) Act 1999*. Under the repeal provisions of Schedule 4 of the *Environmental Reform (Consequential Provisions) Act 1999* (see Chapter 9.1), provision is made for the continuation of: parks and reserves, and any boards of these parks and reserves; plans of management and their preparation; town plans; conservation zones; and, the appointment of wardens, rangers and wildlife inspectors. The provisions of the Environmental Reform Act were not yet commenced at the time of writing, April 2000.

For more details on the *National Parks and Wildlife Conservation Act 1975* see Chapter 9.1.

Land Management Arrangements: Uluru – Kata Tjuta and Kakadu National Parks

Both Kakadu National Park and Uluru – Kata Tjuta (Ayers Rock – Mount Olga) National Parks are perpetual freehold title Aboriginal land granted to various Aboriginal land trusts under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (see above).

In the case of Uluru, the Uluru – Kata Tjuta land trust leases the land back to the Director of Parks Australia North under a 99-year lease. Under this leasing arrangement, the trust assists the Director in the performance of functions under the *National Parks and Wildlife Conservation Act 1975 (Cth)* (NPWC Act), including management of the Park. The lease contains a clause that deems certain amendments to the NPWC Act to be a breach of the lease and triggers an obligation to meet and discuss whether to vary the provisions. The failure to agree only brings into operation the arbitration

mechanisms of the Act; it does not give rise to a right of termination.

An original land claim for Uluru under the Aboriginal Land Rights Act (see above) was unsuccessful, because the land had been set aside for public purposes under Commonwealth legislation. However, later, the merits of the substantial traditional claim to the area were recognised and it was added to Schedule 1 of the Aboriginal Land Rights Act.

In the case of Kakadu, the title to the Aboriginal land is freehold, with a statutory lease-back arrangement negotiated and put in place under the NPWC Act. Kakadu Stage I is also included in Schedule 1 of the Aboriginal Land Rights Act. The current leases (through the Jabiluka Aboriginal land trust) of Aboriginal land in Kakadu Stages I and II are for 99 years from the grant of the first leases in 1979.

Provision is made in the leases (cl.12) for termination should the Commonwealth enact an Act or make regulations that are inconsistent with the terms of the lease or substantially detrimental to the interests of the lessor or relevant Aboriginal people. Traditional rights to use the Park for hunting, food gathering and ceremonial purposes are protected and the lease requires the Director of Parks and Wildlife to promote and protect the interests of the Aboriginal owners of the Park (cl.9).

Acquisition of Land by the Commonwealth

Under the NPWC Act land in the Northern Territory, other than land in the Uluru National Park or in the Alligator Rivers region, as defined in the *Environment Protection (Alligator Rivers Region) Act 1978* (Cth) (see 8.5 below), may not be acquired by the Commonwealth without the consent of the Territory if it is land that is dedicated, or reserved under a law of the Territory, for purposes related to nature conservation, or the protection of areas of historical, archaeological or geological importance or having special significance in relation to Aboriginal people (s.6). No land in the Territory has been acquired by the Commonwealth under this provision.

Powers and Functions of Director

Under the NPWC Act, the Director of Parks Australia North must, from time to time, consult with, and have regard to the views of, the Territory Parks and Wildlife Commission in

relation to the performance of their functions and the exercise of powers with respect to a park, reserve or conservation zone wholly or partly in the Territory (s.16(4)). If the park, reserve or conservation zone is also wholly or partly within an area for which an Aboriginal land council has been established under the Aboriginal Land Rights Act, the Director is also required to consult with the chairperson of that Council.

The Director may assist and cooperate with Aboriginal people in managing land for the protection and conservation of wildlife in, and the protection of the natural features of, that land (s.18(1)). This applies to land vested in an Aboriginal person or Aboriginal people, or in a body corporate that is wholly owned by Aboriginal people, land held in trust for the benefit of Aboriginal people, or any other land occupied by Aboriginal people (s.18(4)).

While the day to day care and management of the Parks is undertaken by Parks Australia North, the Director must not take any such action in relation to land that is not land within a park, reserve or conservation zone except after consultation with the Aboriginal people, if any, whom the Minister is satisfied have the traditional rights in relation to the land, and the relevant Minister or person or body in whom the land is vested (s.18(2)).

Plans of Management

Among the duties of the Director is to prepare a plan of management for any park or reserve declared under the Act (s.11). Opportunity must be provided for any interested person to make a submission, including any Aboriginal land council in the relevant area. Among the matters that a plan must specify is a description of the manner in which the park or reserve is to be managed.

In the preparation of the plan, consideration must be given to the preservation of the park or reserve in its natural condition and the protection of its special features, including objects and sites of biological, historical, archaeological, palaeontological, geological and geographical interest. In respect of any plan proposed to be drawn up in the Alligator Rivers region (covered under the *Environment Protection (Alligator Rivers Region) Act 1978* (Cth) (see 8.5 below), but excluding the Arnhem Land Aboriginal Reserve, the Mt Bundy and Eva Valley Pastoral Leaseholdings, and Uluru, as set out in Schedule 1 of the Aboriginal Land Rights Act), regard must be

had to the interests of the traditional Aboriginal owners of, and any Aboriginal people interested in, any part of the park or reserve that is in the Region.

Approval of plans of management and major management decisions regarding Aboriginal land that is situated wholly or in part in a park or reserve are made in conjunction with a Board, established under the Act (s.14C), on which Aboriginal people have a majority vote. The Board operates even in relation to those parts of a park or reserve that are not yet, or never will be, Aboriginal land.

Provisions Relating to Traditional Hunting and Gathering Rights

Under the Act, Aboriginal people are exempted from legislation regulating hunting and gathering rights, provided that the hunting and gathering is done in accordance with Aboriginal tradition and for non-commercial purposes (s.70 (1)). The exemption is subject to any regulations made for the purposes of conserving wildlife in any area and expressly affecting the traditional use of the area by Aboriginal people (s.70(2)).

Plans of management for Commonwealth national parks may also make provision for traditional hunting and gathering (see, for example, paragraph 10 of the Kakadu National Park Plan of Management).

The Uluru area is also subject to the *Ayers Rock Resort Corporation Act 1992* (NT) to and the *Yulara Tourist Village Management Act 1984* (NT).

The *Nitmiluk (Katherine Gorge) National Park Act 1989* is administered by the Minister and the Parks and Wildlife Commission established under the *Parks and Wildlife Commission Act 1980* (see below).

*Nitmiluk
(Katherine
Gorge) National
Park Act 1989*

It establishes a national park under Territory law on land which became Aboriginal land under the Commonwealth's Aboriginal Land Rights Act (see above), for the benefit and enjoyment of all people, subject to a lease, the provisions of the Act and a plan of management. The land was granted to the Jawoyn Aboriginal land trust, which has leased the land to the Commission (see ss.5 and 6 and Schedule 1 of this Act). As with the Kakadu lease, this lease contains a provision that

deems that an amendment to this Act may constitute a breach of the lease, which may give rise to the right of termination.

The functions of the Commission are to facilitate the preparation of plans of management and to control and manage the park in accordance with the Act and the plans of management on behalf of, and subject to, the directions of the Nitmiluk (Katherine Gorge) National Park Board (s.17). The Act establishes the Board (s.9), which comprises 13 members appointed by the Minister, of whom eight are to be traditional Aboriginal owners of the park appointed on the nomination of the Jawoyn Association, four are to be members of the permanent staff of the Jawoyn Association and the other a resident of the Katherine area nominated by the Mayor of Katherine Municipality (s.10).

The functions of the Board are to prepare a plan of management, to protect and enforce the rights of Aboriginal people entitled by Aboriginal tradition to occupy and use the land, and to ensure adequate protection of sites of spiritual or other importance in accordance with Aboriginal tradition in the Park (s.16). With some significant exceptions, the Board is subject to such general directions as are given to it in writing by the Chief Minister; these directions must be tabled in the Legislative Assembly within six sitting days of the Assembly after that direction was given (ss.17 and 19).

The access provisions of the Aboriginal Land Rights Act do not apply to the Park, so any person may enter and remain in the Park except as prohibited, restricted or regulated by, or under, this Act, the plan of management or any other law in force in the Territory (s.23). The Act enables the Commission to set aside land for the construction or development of an Aboriginal Cultural Centre, upon application, by the Northern Land Council (s.33).

*Northern Territory
Aboriginal Sacred
Sites Act 1989*

The *Northern Territory Aboriginal Sacred Sites Act 1989* is administered by the Aboriginal Areas Protection Authority (AAPA), which is established under the Act (s.5). The Act provides for the registration of areas of spiritual and cultural significance as sacred sites, and the areas are not limited to unalienated or reserve lands (s.27). Applicants are not required to be traditional owners and can be custodians who have the responsibility for protecting a sacred site in accordance with Aboriginal tradition. The AAPA acts as

mediator between custodians of sacred sites and potential developers or users of the land in the vicinity of the sacred site in order to agree on its protection. The custodians may apply to have a site registered with a description, so far as that can be disclosed, and the restrictions according to Aboriginal tradition on activities that can be carried out on or near the site (ss.28 and 42).

The AAPA may decide or refuse to issue an 'Authority Certificate' to allow work on land in the vicinity of a site (s.22); before issuing such a Certificate, however, the Authority must consult with the custodians of sacred sites on, or in the vicinity of, the land that is likely to be affected by the proposed use or work (s.20). A person aggrieved by a decision of the Authority may apply to the Minister for a review of the decision.

The Minister may uphold its decision, or issue the applicant with a certificate setting out the terms and conditions under which it has been granted; these Minister's Certificates are issued under the Act (ss.30-32). The Minister is required to take into account the wishes of the relevant Aboriginal people in relation to the protection of any sacred sites (s.42).

The Act (s.33) makes it an offence to enter or remain on a sacred site except in the performance of a function under, or in accordance with, this Act or the Aboriginal Land Rights Act (see above); however, Aboriginal people have right of access to sacred sites in accordance with Aboriginal tradition (s.46) and it is an offence to obstruct or prevent a person from exercising this right of access (s.47).

It is also an offence to cause damage to a sacred site or distress to the custodian of such a site by contravening, or failing to comply with, a condition of an Authority or a Minister's certificate (s.37).

The Administrator of the Northern Territory is empowered under the Act to acquire land on which there is a site, reserve the land if it is Crown land, or vest it in the AAPA, in order to protect sacred sites on the land (s.41)

The purpose of the *Noxious Weeds Act 1962* is to provide for the eradication or control of noxious weeds. The Minister may declare a plant to be a noxious weed that requires eradication

Noxious Weeds Act 1962

(Class A), control of growing or spreading (Class B), or control of introduction (Class C) (s.5).

The Act applies to any land in the Territory and the relevant notices to eradicate or control noxious weeds may be served on the 'appropriate person', being the owner, lessee, licensee, mortgagee in possession, occupier, or the manager or other person managing or controlling the use of that land (ss.4 and 7). It is an offence under the Act, and penalties apply, not to comply with a notice (s.7(4)), but the Minister, or a person authorised by the Minister, may provide assistance in kind to a person served with such a notice (s.9).

The Minister may also authorise someone else to undertake the work required under the notice and charge the person on whom the notice was served for doing so (s.10). Obstructing a person so authorised (including Inspectors of Noxious Weeds appointed under s.6) from doing this work is prohibited (s.11). The Act creates a statutory charge over the land under the Territory's *Real Property Act 1995* in respect of the cost of carrying out the work done (s.10(4)).

The ultimate sanction under the Real Property Act is the sale of the land that is the subject of this charge if the costs remain unpaid. However, land set aside as Aboriginal land under the Aboriginal Land Rights Act discussed above is inalienable freehold title, thus this avenue of enforcement is not available in respect of those tracts of land.

Parks and Wildlife Commission Act 1980 The *Parks and Wildlife Commission Act 1980* is administered by the Minister for Parks and Wildlife and the Parks and Wildlife Commission of the Northern Territory, which the Act establishes (s.9).

The Commission comprises of the Director of Parks and Wildlife (see ss.4-8), the chief executive officer of the Northern Territory Tourist Commission or nominee, and no fewer than three other members appointed by the Minister (s.10(1)(d)).

The functions of the Commission are to promote the conservation and protection of the natural environment of the Territory by managing or participating in the management of parks, reserves or sanctuaries established under the *Territory Parks and Wildlife Conservation Act 1978* (see below) or any other Act of the Territory or the Commonwealth (s.19).

The Commission may also perform these functions in respect of other land as agreed with its owners or occupiers (s.19(a)(i)(B)), as well as any other functions conferred on it by, or under, this or any other Act (s.19).

The Commission generally has the power to do all things necessary or convenient for, or in connection with, or incidental to, the performance of its functions (s.20) and, in so doing, is subject to the directions of the Minister (s.22).

The *Pastoral Land Act 1992* deals with a wide range of matters concerning the regulation of pastoral leases.

Pastoral Land Act 1992

Its objects include: providing a form of tenure of Crown land that facilitates the sustainable use of land for pastoral purposes; preventing or minimising the degradation of, or other damage to, the land and its indigenous animal and plant life; recognising the right of Aboriginal people to follow traditional pursuits on the land; and providing for a procedure to establish Aboriginal Community Living Areas on the land (s.4).

‘Pastoral purposes’ are defined in the Act to mean the pasturing of stock for the sustainable commercial use of the land on which they are pastured, or agricultural or other non-dominant uses essential to, carried out in conjunction with, or inseparable from, the pastoral enterprise (s.3). Included in this definition are also tourist activities, such as farm holidays.

Pastoral Leases

The Act (s.31) empowers the Minister to grant a lease of Crown land for pastoral purposes, which generally should not exceed an area of 13,000 square kilometres (s.34). Pastoral leases are subject to a reservation in favour of the Aboriginal inhabitants of the Northern Territory (s.38(2)).

This reservation permits entry to the leased land by Aboriginal people who: ordinarily reside on the land; ordinarily reside on an area that, at any time since 1 January 1979, was within the boundaries that then comprised the land and which has since then been excised as a Community Living Area for them; or are, by Aboriginal tradition, entitled to use or occupy the leased land. It also entitles the Aboriginal people to enter and be on the leased land, to take and use water from the natural waters and springs, to take and kill for food or ceremonial

purposes non-domestic animals, and to take for food or ceremonial purposes vegetable matter growing naturally on the leased land.

This does not, however, entitle them to use or erect a structure on the land that would serve as a permanent shelter for human occupation, other than the place where they would ordinarily reside. Generally speaking, the reservation does not apply to parts of the leased land within two kilometres of a homestead (except for those living there prior to 1 January 79) (s.38(3)).

The provisions of the Act make it an offence to interfere, without just cause, with the full and free exercise of the rights reserved to the Aboriginal inhabitants of the Territory (s.38(5)). 'Just cause' includes reasonable acts taken by, or on behalf of, the lessee or another person having an interest in the lease, to ensure the proper management of the lease for the purpose for which it was granted (s.38(6)).

A pastoral leaseholder must not use or stock the land other than as permitted by, or under, the Act or the lease, and must take all reasonable measures to conserve and protect features of cultural, heritage, environmental or ecological significance (s.39).

Division 4 (ss.72A, 72B and 72C) in Part 4 of the Act was added to the Act in 1998. These provisions apply in relation to an extension of the term of a pastoral lease, and the grant of a perpetual or new pastoral lease, where the extension or grant will affect native title rights and interests (to which s.24MD(6B) of the *Native Title Act 1993* (Cth) is applicable). An extension or grant to which this division applies is treated as if the extension or grant were a compulsory acquisition of native title rights and interests, and is subject to Divisions 1 and 2 of Part 4 and ss.45 and 45A of the *Lands Acquisition Act 1978*. Compensation is payable to a native title holder or registered native title claimants who must make a claim within three years after the lease is extended or granted.

Access to Pastoral Land

A public right of access to pastoral land is preserved under the Act, subject to some limitations (Part 6): for example, some pastoral leaseholders must ensure that gates on the land are not locked in a way that prevents passage through the land (s.81) while others may lock a gate or gates temporarily for reasons

associated with the reasonable management of their land (s.82).

Aboriginal Community Living Areas

A pastoral lessee may sublet part of the lease, for Aboriginal community living purposes, to an Aboriginal corporation which manages the community and is using, or wishes to use, the area (Part 8).

An application for the above purpose may be made to the Community Living Areas Tribunal under the Act (ss.92 and 93). The application would be for the excision of an area of land from a pastoral lease and may be made where the applicants were ordinarily resident, at any time since 1 January 1968, on land which is part of a pastoral leasehold and where the applicants have the written consent of the pastoral lessee to make an application.

An application can also be made where the applicants have a historical residential association with the pastoral leasehold land and can demonstrate a present need for a community living area (ss.92 and 101). The Aboriginal people may request the pastoralist to negotiate for the surrender of the area of land and, if the pastoralist has not within three months agreed to negotiate, the Minister may consider the application or refer it to the Tribunal (ss.101(4) and 104(1); for provisions covering the Tribunal, see further ss.93-98 and 134).

The Act also enables Aboriginal people to apply to the Minister for the excision of an area of land from a pastoral lease and the grant of freehold for a community living area (ss.102 and 103) (these provisions are similar to those in the repealed *Crown Lands Act 1992*). Land so excised is granted or transferred in fee simple as a community living area for the benefit of the applicant or the Aboriginal people for whose benefit the application was made (ss.98 and 108-111; see also the *Lands Acquisition Act 1978* above (s.46(1A))). The Tribunal must consider an application referred to it by the Minister (s.105).

An application will not be granted by the Tribunal if it finds that an excision will unreasonably reduce the viability of the pastoral lease (s.92) or if it is dissatisfied with matters relating to other provisions in the Act. These application criteria appear to have created a perception that the process is too lengthy and complex, as witnessed by the relatively few titles

granted in the period of operation since 1990. The Act does entitle an applicant to enlist the aid of, and be represented by, the responsible land council (s.100).

The Minister may accept (in whole or in part) a recommendation of the Tribunal (s.110). Where the Minister approves an application or accepts a recommendation, the successful applicant(s) are required to form an incorporated association of Aboriginal people, having the power to hold the land, or to approve an existing association for this purpose (s.111; also see *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* above).

Where there is no practical way of gaining access to Aboriginal land described in Part 2 or 3 of Schedule 1 of the Aboriginal Land Rights Act other than by crossing over a pastoral lease, a person is entitled to cross over the pastoral lease for the purpose of gaining access to that area. Such access must be by a route that has been agreed on between each lessee and the relevant land council, or as decided by the Tribunal. Such a route of access must not be considered a public right of way (s.113). There are, however, no general provisions regulating access to Aboriginal community living areas.

The holder of an adjoining pastoral lease or other Crown lease may apply to the Minister for the land to be resumed and the community title to be extinguished (s.114). The Minister must be satisfied that the land had not been used for the purposes of Part 6 for a continuous period of no less than five years before granting such an application.

Planning Act 1994 The *Planning Act 1994* is to provide for appropriate and orderly planning and control of the use and development of land (preamble). It establishes the Northern Territory Planning Authority and the Planning Appeals Tribunal (ss.67 and 89).

A person authorised by the Minister or the Planning Authority can enter land where reasonable notice has been given, and there are reasonable grounds for doing so (s.5). However, since this is a Territory law and the restrictions of entry under the Aboriginal Land Rights Act are under a Commonwealth Act, it is most likely that the traditional Aboriginal owners or relevant land council could prevent access to Aboriginal land to someone acting under a statutory authority created under the Act.

Part 3 gives the Minister the power to declare a land use objective in relation to a specific area, after undertaking consultation and notification procedures (s.8). The Minister may make an interim development control order over land to which a land use objective is proposed to apply (s.10).

Part 4 has provisions for land use control plans. Where a control plan or interim development control order applies to land the subject of the lease, a provision or covenant in the lease which permits or obligates the use of the leased land for purposes inconsistent with the plan or order is, to the extent of the inconsistency, of no effect (s.14).

Where the Minister or Planning Authority is considering preparing a draft control plan amendment, among the issues to be considered are: land use objectives, if any; the merits of the proposal; the physical characteristics of the land and its suitability for particular uses; the potential impact on the existing and future amenity of the area; the public interest; and, the social, cultural or environmental impact of the proposal (s.16).

Part 5 provides for the enforcement of control plans. Part 6 covers the protection of existing land uses after a control plan has commenced. In Part 7 procedures for development applications are listed for when a control plan permits the subdivision or consolidation of freehold or leasehold land, where the consent of the Minister or Planning Authority is required (s.48).

Part 8 establishes the Planning Authority which is subject to the directions of the Minister, except for any reports or recommendations which this Act requires (s.67(2)). The functions of the Planning Authority include the determining of policy in respect of the implementation of the control plan or interim development control order; and, to advise or make recommendations to the Minister on the administration of this Act (s.68).

The *Plant Diseases Control Act 1979* provides the Minister for Primary Industry and Fisheries with powers to prohibit or impose conditions on the importation, or introduction into, or the possession in the Territory of, all or parts of fruit or plants declared by the Minister in writing to be affected by disease or a pest (s.8). The Minister may specify affected places and declare them quarantine areas (ss.9 and 10).

*Plant Diseases
Control Act
1979*

Inspectors appointed under the Act (s.7) are empowered to enter any land, premises, conveyance, carriage, vehicle, train, aircraft or vessel on which there is, or the inspector suspects that there is, any fruit, plant or packaging that is affected by pest or disease (s.14(1)(a)).

In order to give effect to the Act, the powers of the Minister and inspectors would be interpreted widely to include all land in the Territory, including Aboriginal land, given the potential for economic and financial disaster if large tracts of land were not able to be subject to the provisions of the Act.

Soil Conservation and Land Utilisation Act 1992 The definitions of 'land' and 'land holder' in the *Soil Conservation and Land Utilisation Act 1992* have been altered by the *Native Title (Consequential Amendments) Act 1994* (s.3) to include provisions relating to native title rights and interests (s.3(1)). 'Land' is defined as meaning all land in the Territory of whatever title and tenure, including native title rights and interests in land as defined in the *Native Title Act 1993* (Cth), and 'land holder' includes a native title holder as defined in the NTA.

Under the Act, a Soil Conservation Officer may enter upon any land where they have reasonable cause to suspect that soil erosion is occurring, or is in danger of occurring, because of the use to which the land has been put (s.9B(1)). The Officer may enter on the land with any other people, animals, equipment, machinery and plant to dig or bore into the land, make surveys, place marks and carry out investigations. The Officer is required to provide the occupier of the land with 28 days' written notice of the intention to enter the land, unless the occupier has waived this requirement (s.9B(2)).

The Commissioner for Soil Conservation may enter into agreements with the land holder to carry out treatment (being soil conservation and land reclamation works) on the land or provide assistance to the land holder to do so (ss.3, 11 and 12). The Commissioner may also serve a Soil Conservation Order on a land holder to prevent damage to timber, scrub or other vegetable cover or other disturbance to the surface area of the land that could create a risk of soil erosion (s.14). Failure to comply with an Order is an offence attracting a penalty of \$1,000 under the Act (s.14).

The Minister may also declare an area of land that is, or is likely to become, subject to soil erosion as an area of erosion

hazard. The declaration must be in writing and provide details of the areas of land affected, measures that must be taken, treatments to be carried out and livestock restrictions to be put in place under the notice.

The Soil Conservation Advisory Council, established under the Act (s.7), must give notice of a proposal to declare an Erosion Hazard Area. A land holder is required to reduce the hazards that are prescribed, or provided for, in the declaration or face a penalty of \$100 (see ss.17-20).

The Minister may declare a Restricted Use Area, on the recommendation of the Council, if the area of land is subject to soil erosion through the continued use of it by the public (s.20B). This imposes large scale restrictions on a number of activities on the land, but, given the restrictions imposed on access to Aboriginal land, is not likely to be used in respect of those lands; it is more likely to have application in respect of Aboriginal community living areas.

If a court has made a judgement for an amount to be paid to the Territory for a matter arising from this Act, the unpaid amount becomes a charge over the relevant land (s.23). This empowers the Commissioner, or someone authorised by the Commissioner, to lodge a caveat under the Territory's *Real Property Act 1995*, effectively preventing any dealing with the land until the debt has been paid.

Provisions relating to the acquisition of property under this Act now include reference to native title rights and interests and allow for compensation in a form other than money. The Minister must consider applications in good faith, disputes may be referred to the Land Acquisitions Tribunal established under the *Lands Acquisition Act 1978* (see above) and the applicant also has recourse to proceedings in a court with competent jurisdiction (see s.43).

The *Special Purposes Leases Act 1953* provides a mechanism to issue a special purpose lease, a 'special purpose' being any purpose other than residential in a town, or a pastoral, agricultural or mining purpose (s.3). The Minister may grant a special lease over any unleased land belonging to the Crown or the Territory to any person not under the age of 18 years, foreign missions and specified associations, companies and statutory corporations (s.4).

*Special Purposes
Leases Act 1953*

Except in the case of special leases ancillary to mining, the Act prevents the Minister from transferring the whole or part of a lease or the mortgaging or the subletting of all or part of a lease of land within an Aboriginal reserve unless such proposed action has been submitted to the relevant Aboriginal land council for consideration and report (s.6(2)). The land council must also have considered the proposed action and forwarded to the Minister a report containing advice and/or recommendations, and the Minister must have considered the report.

The land council is required to consult with the Aboriginal people residing in the affected area(s), and with a church or missionary society or like body that conducts an establishment or activities for the benefit of Aboriginal people on the reserve in which the land that is the subject of the proposed transfer, mortgage or sublease is situated (s.6(3)).

Where a special purposes lease (other than a lease ancillary to mining) within an Aboriginal reserve is held by an approved person (defined under s.3(1) as an Aboriginal person of, or over, the age of 18 years or a corporation or association whose shares are all beneficially owned by Aboriginal people), and that lease is acquired by a non-approved person, the Minister is required to get an opinion from the relevant land council as to whether that person should be permitted to hold the lease or to serve notice on the person requiring that person to dispose of the lease (s.6A). The land council may also recommend disposal, in which case the Minister must serve notice on the person requiring disposal (s.6A(2)). If that person receives notice requiring disposal, they must take all steps reasonably necessary to dispose of the lease, either to the Territory or to an approved person, within 12 months of receiving the notice, and if the person has not done so in that time, the Minister must recommend that the lease be resumed in 12 months' time.

The Act contains special provisions relating to the mortgaging of special purposes leases on Aboriginal reserves to non-approved people (s.6B).

Stock Diseases Act 1954 The *Stock Diseases Act 1954* provides the Minister, and the Chief Inspector of Stock or inspectors of stock appointed under this Act, with extensive powers to declare quarantine or protected areas (ss.14-19), or any vessel, holding, wharf or

place as a restricted area (ss.22A-B), in relation to the presence or suspected presence of a disease prescribed under this Act. An inspector must be notified of the outbreak of disease in travelling stock (s.35) and all landowners must notify an inspector of the infection of stock by disease (s.36).

Inspectors are empowered to enter or cross any land, building, vessel, vehicle or aircraft for the purpose of inspecting, testing, destroying, treating or seizing stock, fodder, equipment or a carcass where there is reasonable cause to believe it has been infected by a prescribed disease (s.42). This also applies to Aboriginal land, notwithstanding the fact that the inspector has no permit to enter onto or remain on that land (s.42A).

The Minister has extensive powers under the *Stock Routes and Travelling Stock Act 1980* to deal with stock routes, reserves (which are created under the *Crown Lands Act 1992*) and trucking yards for the purposes of this Act, but subject to the consent of the person who holds land under a lease or licence granted under the *Crown Lands Act 1992*, the *Pastoral Leases Act 1992*, the *Special Purposes Leases Act 1953* or the holder of a freehold estate (ss.15 and 16).

Stock Routes and Travelling Stock Act 1980

The Chief Inspector, appointed under this Act (s.5) may close stock reserves or routes or parts of them if desirable to do so because of drought or destruction of pasture (s.17).

The Act creates a right to drive stock on the hoof across land that is the subject of an estate in fee simple, a licence or a lease under any Act (s.27); however, this only applies if no alternative outward route is available and is subject to the requirement that the drover follow the most direct route from point of entry to point of exit. The route must not be more than 1.5 kilometres wide, and the drover must give the owner of the relevant holding two to ten days' written notice of the proposed route, number and types of stock, and the dates of the proposed traverse.

The Minister may grant a licence to a person to agist stock on land, or parts of land, reserved under the *Crown Lands Act 1992* (s.76) for stock routes and travelling stock, but only for periods of one to six months (s.34A). Camping within 1.5 kilometres of a watering place, except with the permission of an inspector appointed under the Act, is prohibited (s.51).

The owner of stock may enter onto another's land (including land leased from the Crown) to drive their stock off that person's land, but must give that person two to seven days' notice of the intention to do so or face a penalty of up to \$1,000 or imprisonment of up to six months (s.55A). However, if the owner of the straying stock, and/or their agent have given the required notice, and the subject land is Aboriginal land as per the Aboriginal Land Rights Act (see above), they may enter the land to recover the stock, notwithstanding the fact that they do not have a permit issued under the Aboriginal Land Rights Act to enter or remain on the land.

Territory Parks and Wildlife Conservation Act 1978 The *Territory Parks and Wildlife Conservation Act 1978* is Administered by the Minister for Parks and Wildlife and the Parks and Wildlife Commission of the Northern Territory established under the *Parks and Wildlife Commission Act 1980* (see above).

Under the Act, Aboriginal people are exempted from legislation regulating hunting and gathering rights, provided that the hunting and gathering is done in accordance with Aboriginal tradition and for non-commercial purposes (s.122(1)). However, regulations may be made for the purposes of conserving wildlife in an area that is expressly affecting the traditional use of it by Aboriginal people (s.122(2)). Where Aboriginal people are allowed to hunt in accordance with Aboriginal tradition, unless there is a contrary intention, they are not limited to hunting with traditional methods and weapons, but may also use a shotgun (see *Campbell v Arnold* (1982) 13 NTR 7, p.9).

Water Act 1992 The *Water Act 1992* empowers the Minister to declare any land not already a waterway, and over which water collects or flows, or that is adjacent to a waterway, to be a waterway for its purposes (s.5(1)). Notice of an application for such a declaration must be served on the owner and legal occupier of the relevant land (s.5(2)) and the owner of the land on the declared waterway, or anyone else who will suffer detriment, is entitled to compensation on just terms (ss.5(5) and 107).

The Act vests in the Territory the property, and the right to control the flow, of all water flowing or contained in a waterway and all ground water (s.9). Water may be taken, for

domestic purposes and to water travelling stock, from a waterway over which there is not a licence granted under this Act; but a person may not enter or remain on land if they do not otherwise have legal access (s.10). The owner/occupier of land on, or immediately adjacent to, a waterway may take water for domestic use, to water grazing stock on the land and to irrigate a garden of no more than 0.5 hectares which is part of, and adjacent to, a dwelling (s.11).

The Act vests in the Territory ownership of the bed and banks of waterways forming the boundary of land alienated by the Crown and ensures that this remains so even if the land is leased at some later stage (s.12). The right of access by the owners/occupiers and their families, employees and stock over land adjacent to the banks of such boundary waterways is preserved (s.13). Owners/occupiers of any lands are allowed to access ground water from beneath their land for the use of their families and employees, to water their stock and to irrigate their gardens over an area of not more than 0.5 hectares (s.14).

The obstruction or interference with a waterway is prohibited (s.15). The Act authorises the Controller of Water Resources, appointed by the Minister under the Act (s.18), to serve a notice in writing on the owner or occupier of the land comprising the bed or banks of a waterway, or immediately adjacent to both banks or part of a waterway, in which an obstruction or interference to the flow, or likely flow, of water exists, to require the owner or occupier to take such reasonable action to remove or abate the obstruction or interference that is specified in the notice and within the time specified.

The Controller is also given extensive powers to enter onto and remain on land (s.20(1)) and to conduct water resources investigations (s.34). This includes taking such measures, or undertaking such works, as they think fit for the control, use, protection or management of water. The Controller must give notice of this intention to the owner or occupier of the land, except in cases of an emergency, outlining whether a breach of the Act or an instrument granted under the Act has taken place, or if entry is for routine monitoring purposes (s.20(3)).

Where an application, notice or other document is permitted or required by this Act to be served on the owner or occupier of land held by an Aboriginal land trust of an estate in fee simple under the Aboriginal Land Rights Act, service may be effected

by serving the application, notice or other document on the Aboriginal land trust and a copy thereof on the Aboriginal land council for the area in which the land is situated (s.106).

*Water Supply
and Sewerage
Act 1983*

The *Water Supply and Sewerage Act 1983* is administered by the Minister for, and Department of, Lands, Planning and Environment in so far as it relates to plans referred to in the Act (ss.69(2) Divisions 1 and 2 of Part 3, and ss.69(2) and (3)).

The Minister may declare, by way of public radio broadcast, restrictions on the use of water anywhere in the Territory, specifying the areas affected, the duration and the reasons (s.14). The penalty for breaching the restriction is \$1,000.

If land is in a water supply area, the Power and Water Authority may direct the land owner to make a connection to a sewer and the owner must comply with this direction or face a \$2,000 penalty as well as the costs incurred by the Authority for undertaking the required works itself (s.21). The Authority, or person(s) authorised by it, may also enter the land to undertake all the works and activities necessary in conjunction with the operation and maintenance of water supply and sewerage facilities (s.30).

Inspectors appointed under the Act also have the power to enter land to ensure that the Act and related Code of Workmanship (issued under s.38(1)) are being complied with; they are also empowered to undertake a wide range of actions in relation to the inspection and testing of equipment, materials and works covered under this Act (s.43). The Authority may remove trees, shrubs or crops without notice within 1.5 metres of a sewer to gain access to it and does not need to restore the area to its previous state or pay compensation for doing so (s.61).

If the Authority can prove that the roots of a tree are blocking a sewer, it can serve a notice on the owner of the land requiring the owner to remove the roots causing the blockage, or, if the owner refuses to do so, undertake the work itself and charge the owner for doing so (ss.61(3) and (7)).

Unauthorised use of water (s.63), tapping water mains or drawing off water without the Authority's approval, and wasting water (s.65) are offences (penalty: \$2,000). It is also an offence to pollute a reservoir, dam, water storage tank or

aqueduct which is used or constructed to hold water for human consumption, or a stream or aquifer from which water is drawn for human consumption (penalty: \$5,000) (s.68).

NORTHERN TERRITORY

8.2 HERITAGE

The purpose of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is the preservation and protection from injury or desecration of areas and objects in Australia and Australian waters, being areas (including sites) and objects that are of particular significance to Aboriginal people in accordance with their traditions (ss.3 and 4). The Act is expressed specifically to bind the Crown in right of the Commonwealth and in right of the Northern Territory, but does not exclude or limit any Territory law that can operate concurrently with it. The Minister is also required to consult with the Territory about the adequacy of its legislation before making a declaration to protect an area or object in the Territory (ss.7 and 13).

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

The Federal Court has ruled that these provisions do not amount to a requirement to assess the application and effectiveness of the relevant legislation in an individual case (*Tickner v Bropho* (1993) 40 FCR 183, per Black CJ, pp.195-199).

Where there is a serious or immediate threat of injury or desecration to an area, upon receiving an application from, or on behalf of, an Aboriginal person or a group of Aboriginal people, the Commonwealth Minister for Aboriginal Affairs may make an emergency declaration (under s.9) that contains provisions for, and in relation to, that area for its protection and preservation (s.11). An emergency declaration is initially for up to 30 days, but the Minister may extend it for up to another 60 days if necessary (s.9(2)).

Applications for more comprehensive and longer lasting declarations may be made by, or on behalf of, an Aboriginal person or a group of Aboriginal people, seeking the protection of a specified area (s.10). The Minister must be satisfied that the area is a significant Aboriginal area (as defined in s.3 of the Act) and that it is under threat of injury or desecration and, before making a declaration, must first have received and considered a report on matters relating to the significance of the area, the risk of injury or desecration, the nature and extent

of the protection and restrictions required, proprietary and financial impacts on other people, and other matters (s.10(4)).

It is important to note that the Act does not require the Minister to make protective declarations under the Act (ss.9, 10 or 12), the power having been defined by the Federal Court as ‘facultative, not imperative’ (per Lockhart J in *Wamba Wamba Local Aboriginal Land Council v Minister* (1989) 23 FCR 239, p.247). Having received an application made in good faith for a protective declaration, however, the Minister must make a decision and cannot choose not to decide; in other words, the Minister is required to exercise the discretion (see *Tickner v Bropho*, quoted above).

Where the operation of the Act, or a declaration under Part 2, would result in the acquisition of property other than on just terms, the Commonwealth must pay reasonable compensation, agreed to between the land owner and the Commonwealth, or, in the absence of an agreement, as may determined by the Federal Court (s.28).

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (‘the Land Rights Act’) makes provision for the protection, among other matters, of sacred sites. A ‘sacred site’ is defined in the Act as a site that is sacred to Aboriginal people or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Territory, is declared to be sacred to Aboriginal people or of significance according to Aboriginal tradition (s.3(1)). The Act binds the Crown not only in respect of the Northern Territory, but also, to the extent that the power of the Legislative Assembly permits, in all its other capacities (see s.4).

Territory laws regulating or authorising entry of people on sacred sites must provide for the rights of Aboriginal people to have access to those sites in accordance with Aboriginal tradition. ‘Aboriginal tradition’ is defined as the body of traditions, observances, customs and beliefs of Aboriginal people, or of a community or group of Aboriginal people, and includes those traditions, observances, customs and beliefs as applied in relation to particular people, sites, areas of land, things or relationships (s.3(1)).

Account must be taken of the wishes of the Aboriginal owners relating to the extent to which those sites should be protected.

The land owners are the local Aboriginal descent group who have common spiritual affiliations to a site on the land and are entitled by Aboriginal tradition to forage as of right over that land (s.3).

The Act makes it an offence for a person to enter or remain on land in the Northern Territory that is a sacred site, except in the performance of functions under the Act or in accordance with an Act or law of the Northern Territory (s.69(1)). This provision does not prevent an Aboriginal person from entering or remaining on a sacred site in accordance with Aboriginal tradition (s.69(2)).

It is a defence if the person charged proves that they had no reasonable grounds for suspecting that the land concerned was a sacred site.

Where the charge relates to a sacred site on Aboriginal land, the defence is not established unless the person proves that their presence on the land would not have been unlawful if the land had been a sacred site and the person had taken all reasonable steps to ascertain the location and extent of the sacred sites on any part of the Aboriginal land that they were likely to visit (ss.69(3) and (4) and s.77B).

The Act empowers the Northern Territory Legislative Assembly to make provision for the protection, and prevention of the desecration, of a sacred site in the Territory, including sacred sites on Aboriginal Land. The *Northern Territory Aboriginal Sacred Sites Act 1989* (see below) evolved from this provision (s.73(1))

Secrecy Provisions

Secrecy has long been recognised in the conduct of land claim hearings under the Act, including the entitlement to confidence of the Aboriginal people so participating, which was upheld by the Federal Court in its decision in *Aboriginal Affairs Planning Authority v Maurice; re Waramungu Land Claim* (1986), 10 FCR 104.

The *Heritage Conservation Act 1991* commenced on 1 November 1991 and is directed primarily at non-Aboriginal natural and cultural heritage matters. The principal object of this Act is to provide a system for the identification, assessment, recording, conservation and protection of places

*Heritage
Conservation
Act 1991*

and objects of prehistoric, ‘proto-historic’, historical, social, cultural, aesthetic or scientific value. ‘Places’ include areas, archaeological sites, ruins, landscapes and coastlines (s.3). The Act is complementary to the *Northern Territory Aboriginal Sacred Sites Act 1989* (‘the Sacred Sites Act’, see below). It binds the Crown in right of the Territory to the extent that the legislative power of the Legislative Assembly permits, in all its other capacities (s.5). The Act prevails over other relevant Acts, such as the *Planning Act 1979* and the *Territory Parks and Wildlife Conservation Act 1978* (s.6).

This Act provides a structure for the identification and control of Aboriginal and Macassan archaeological places and objects (ss.4 and 39) but operates to exclude the Act from those places that fall within the meaning of ‘sacred sites’ (ss.6 and 26), as defined in the Sacred Sites Act.

Parts 5-9 of this Act do not apply to sacred sites under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see above) either, except marginally (s.6(2)).

Heritage Advisory Council

The Act establishes the Heritage Advisory Council (s.7), which comprises nine members, including one nominee from the Aboriginal Areas Protection Authority established under the Sacred Sites Act. The functions of the Council include:

- preparing criteria for the assessment of places and objects of heritage value;
- carrying out research into, and evaluating the heritage value of, places and objects;
- recommending to the Minister places and objects of heritage value for inclusion and removal from the Register of Sacred Sites (see the Sacred Sites Act below);
- advising the Minister on the use and conservation of heritage places and objects; and
- advising the Minister on all matters affecting the natural and cultural heritage of the Northern Territory (ss.12, 13 and 18-20).

The Act makes provision for a person to apply to the Council for a place or object to be declared a heritage place or object, for the Council to assess or reassess the heritage value of the

place or object, and for the place or object to be included in the Register (ss.16 and 21-26). If the Minister is aware of the presence of a sacred site within the meaning of the Sacred Sites Act, this must also be recorded in the Register.

The Minister may, on their motion or on the recommendation of the Council, declare a place or object to be subject to an interim conservation order. The order remains in force for 90 days, or until the Minister declares the place a heritage place or the object a heritage object, or refuses to make such a declaration and gives notice of this, whichever is the sooner (s.21(4) and s.28). Permission may be given to carry out work or do anything on a place in respect of which a conservation order is in force (s.29).

Permission may also be given to remove such an archaeological heritage object from one place to another, including a place outside the Northern Territory, but if the object is prescribed for the purposes of Part 6 of the Act as sacred according to Aboriginal tradition, the Minister or their delegate may not permit an action in relation to that object unless they have sought and taken into account the advice, if any, of the Aboriginal Areas Protection Authority (AAPA), given after consultation by the AAPA with the Aboriginal people it considers to be the traditional owners of the object (s.29).

The Council may prepare a Conservation Management Plan in respect of a heritage place or object, which must contain a description of the work and any conditions subject to which it may be carried out. The plan must be tabled in the Legislative Assembly; it would come into effect once approved by the Administrator and if not disallowed by the Assembly. The Council may amend the plan (see ss.30 and 31).

Consents, Authorities and Agreements

It is an offence for a person, without appropriate consent or authority, to carry out work on, or damage, desecrate or alter, a heritage place or object, or to remove from a heritage place a heritage object associated with a place declared to be part of the Northern Territory's heritage (s.33). The Act (s.35) provides that restrictions on the use of a place are able to be registered under the applied provisions of the *Real Property Act 1995* (RPA).

A heritage agreement may be entered into between the Director of the Conservation Commission and the landowner of a heritage place, or the owner or person having possession of a heritage object, for the protection and conservation of a heritage place or the lawful development or use of the land, or the protection and conservation of the object. The burden of a heritage agreement relating to the care, maintenance, or development of land is an interest that may be registered under the RPA and operates as a covenant that runs with the land (ss.36-38).

The Administrator may make regulations prescribing an archaeological place or object, which is then deemed to be a place or object in respect of which an interim conservation order is in force and is deemed to remain so until the Minister makes, or refuses to make, a declaration that it is a heritage place or object (see ss.4, 21, 26, 29, 34 and 54). The Minister may direct the owner of a heritage place to carry out work at their own expense for the purpose of maintaining or repairing the place or object (s.49).

Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989 Where the Minister has declared a heritage site or object under the *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* (s.26), the relevant Council may prepare a management plan in respect of such a site or object (s.30). The plan must specify the work that may be permitted on a heritage place, or the place on which a heritage object is located or to where it may be moved. It is an offence to carry out work on, damage or alter a heritage place or object, or to move a heritage object except in accordance with a management plan (s.33).

This Act is complementary to the *Northern Territory Aboriginal Sacred Sites Act 1989*.

National Parks and Wildlife Conservation Act 1975 (Cth) The *National Parks and Wildlife Conservation Act 1975* will be repealed on the commencement of Schedule 4 of the *Environmental Reform (Consequential Provisions) Act 1999* (see Chapter 9.1). For more details on the *National Parks and Wildlife Conservation Act 1975* see Chapter 9.1.

The *National Parks and Wildlife Conservation Act 1975 (Cth)* contains special provisions relating to the protection of areas of historical, archaeological or geological importance, or

having special significance to Aboriginal people (ss.6(2) and (3)). The legislation includes structures that provide for the broad protection of Aboriginal cultural heritage and cultural property in the land, and, where a national park is vested in the traditional owners, that park must be managed under a statutory scheme in which the Aboriginal owners have a majority on the Board of Management (ss.14C and 14D). The Act currently applies to Kakadu and Uluru – Kata Tjuta (Ayers Rock – Mt Olga) National Parks.

The Director of Parks Australia North is required to prepare a plan of management for a park or reserve as soon as practicable after declaration, and sites and areas of significance to Aboriginal people may be afforded some protection under such a plan (s.11(1)). Before preparing a plan, the Director must, by public notice, invite interested people to make representations in connection with it. Any person, including the chairperson of the relevant Aboriginal land council, may make representations to the Director, and the Director, together with a Board if established in respect of the area (ss.14A-14D) must give due consideration to any representation so made (s.11(3)).

In preparing a plan of management of a park or reserve wholly or partly within the Alligator Rivers region (ARR) or Uluru – Kata Tjuta ('Uluru'), special attention must be paid to the protection of such special features as objects and sites of historical or archaeological interest, and to the interests of the traditional Aboriginal owners and other Aboriginal people interested in any of the land within the park or reserve.

The Director is obliged to give interested people the opportunity to make representations and to give due consideration to such representations, and may alter the plan accordingly (ss.11(10) and 11(11)). When a plan has been made for a park or a reserve that is wholly or partially in the ARR or Uluru, and an Aboriginal land council has been established, the Director must serve a copy of the plan on the chairman of the relevant land council (ss.11(8) and 11(10)).

The functions of the Director include administering, managing and controlling parks, reserves and conservation zones (s.16(1)). If an Aboriginal land council has been established in respect of such a zone, the Director must consult with, and have regard to, the views of the chairperson of the land council (s.16(4)).

Nothing in the Act prevents Aboriginal people from continuing the traditional use of any land or water for ceremonial, religious or other purposes. This is, however, subject to any regulations made for the purpose of conserving wildlife in any area and expressly affecting the traditional use of the area by Aboriginal people, and is subject also to the operation of the Act (s.70).

Regulation 29(4) of the National Parks and Wildlife Regulations makes it an offence to deface intentionally, recklessly or negligently, or otherwise damage, an archaeological site, or to remove intentionally an archaeological artefact from an archaeological site. An archaeological site includes an area of land on which Aboriginal rock paintings, relics or remains are situated (Regulation 2). The prohibition does not, however, apply to the traditional Aboriginal owners of the land on which the site is situated (Regulation 29(5)). Regulation 29(6) provides a defence if the accused had no reasonable grounds to suspect that the object was a relic or the site was an archaeological site.

Regulations 33(1) and (2) allow the Director, with the agreement of a land council, to specify conditions and restrictions subject to which an Aboriginal person in a park or reserve may:

- enter an area to which access is restricted or prohibited;
- hunt animal, or harvest plant, wildlife;
- use a vehicle or vessel;
- take a dog into; or
- take firewood from, such park or reserve.

*Northern Territory
Aboriginal Sacred
Sites Act 1989*

The purpose of the *Northern Territory Aboriginal Sacred Sites Act 1989* is to effect a practical balance between the recognised need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement. It does so by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry is subject, as well

as establishing a procedure for the avoidance of sacred sites in the development and use of land. To give effect to these purposes, it provides for the establishment of an Authority and a procedure for the review of decisions of the Authority by the Minister, and for related purposes.

The Act makes provision for the protection of sacred sites, which adopts the definition of a sacred site contained in the Land Rights Act (s.3(1)) (see above). The Aboriginal Areas Protection Authority (AAPA) is established under the Act (s.5), which also makes provision for its powers, functions and duties (ss.6-19).

The Act requires that 10 out of the 12 members of the AAPA are custodians of sacred sites (s.6). The focus of the AAPA is the facilitation of discussions between custodians of sites and potential developers of sites, with a view to agreeing on appropriate means of sites avoidance and the protection of sites (s.10).

A custodian of a sacred site is empowered to apply to the AAPA for the site to be registered in the Register of Sacred Sites (s.27). The Act requires the AAPA to give the owners of the land, on which the site is situated, notice of this and invite written representations, to which it must give due consideration (ss.28 and 42). If, after going through this process, the AAPA is satisfied that this is a sacred site, it must record the information and any findings of detrimental effect in the Register and the site then becomes a sacred site (s.29).

A person may inspect as much of the Register or other records of the AAPA as required to be made available for public inspection (see ss.10G, 38 (secrecy), and, generally, ss.41, 45, 51 and 54; also see the decision of the High Court in *Aboriginal Sacred Sites Protection Authority v Maurice; Re Warumungu Land Claim* (1986) 65 ALR 247, concerning the confidential treatment of the Register and secrecy provisions).

The following are offences under the Act:

- to enter or remain on a sacred site except in the performance of a function under or in accordance with a certificate, or permission or approval (s.47), granted under this Act or the Aboriginal Land Rights Act (see above) (s.33);
- to carry out work on, or use, a sacred site unless the work is carried out, or the site is used, with an AAPA

Certificate or a Minister's Certificate (ss.20-22, 30-32 and 42);

- to cause damage to a sacred site or distress to a custodian of a sacred site by contravening or failing to comply with a condition of an Authority or Minister's Certificate (s.37).

Prosecutions must be brought by the AAPA (s.39).

The Act entitles a person 'aggrieved' by a Certificate of the AAPA to apply for a review of the decision to grant the Certificate. The Minister has broad powers to review, approve or override such Certificates, as well as to uphold the AAPA's decisions or actions and to set conditions for developments on or within sacred sites (ss.30-37).

It is a defence if the accused can prove that they did not believe that the site was a sacred site and there were reasonable grounds for this belief. Where the sacred site is on Aboriginal land, the defence is not available unless the accused can prove that their presence on that land would not have been unlawful if it had not been a sacred site and if the accused had taken all reasonable steps to ascertain the location and extent of sacred sites on any part of the Aboriginal land that they were likely to visit (s.37(2)).

Under the Act, the Administrator of the Northern Territory may take steps, or promote or cause steps to be taken, to protect sacred sites under the laws of the Northern Territory by the acquisition of an area of land, the reservation of an area of Crown land, the vesting of title to an area of Crown land in the AAPA, recommending special measures to protect a site on land vested in or controlled by a statutory corporation, or recommending or assisting with the funding of special measures to protect a site on land where a person has an estate or interest (s.41).

The Act specifies that the Northern Territory legislation provides for the right of Aboriginal people to have access to sacred sites in accordance with Aboriginal traditions and takes into account the wishes of Aboriginal people relating to the extent to which those sites should be protected (s.42).

The *Strehlow Research Centre Act 1988* established a research centre in Alice Springs to: honour the memory of the late Professor Theodore George Strehlow; be the repository of the material relating to Aboriginal people, their culture and traditions accumulated by him in his lifetime; and provide for the care, control and management of the Strehlow Collection for the benefit of Aboriginal people and as a national heritage asset (preamble).

*Strehlow
Research
Centre Act
1988*

The Act creates the Strehlow Centre Board, which has specified functions, including: assembling and preserving the Collection; providing access to the Collection and keeping some material secret in proper respect for cultural traditions; securing the Collection and keeping it intact; acquiring and holding Aboriginal heritage items which are not part of the Collection; and acquiring and holding other material which complements the Collection or the purposes of the Centre (s.6). Other functions, powers of the Board and procedural matters are specified in the Act (ss.7, 8, 20-23, 13-15 and 24).

The Act specifies that the Board will comprise Kathleen Stuart Strehlow or her nominee, plus six others nominated by the Minister (s.9). Of these six members, one is nominated by the Council of the Northern Territory University, one by the Commonwealth Minister with primary responsibility for matters relating to Aboriginal people, one is appointed to represent the interests of Aboriginal people and one who is the Director of, or an employee nominated by, the Museums and Art Galleries Board constituted under of the *Museums and Art Galleries Act 1999* (s.5).

NORTHERN TERRITORY

8.3 LOCAL GOVERNMENT

For a detailed synopsis of the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), see 8.1 above. Under this Act, a road may not be constructed over Aboriginal land unless the land council for that area consents to the construction (s.68).

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

For details about the operation of the *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981*, including administration of land, see 8.4 below. The grant of title to the Cobourg Sanctuary land was subject to the exclusion of all roads over which the public had a right of way immediately before the commencement of the Act (s.13(2)).

Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981

A detailed synopsis of the *Crown Lands Act 1992* is provided in 8.1 above. The Act provides that in every grant of an estate in fee simple for an Aboriginal Community Living Area there are reserved to the Territory such interests (including easements) reasonably necessary to provide essential services and facilities (for example, power, gas, water, sewerage, roads and communication, including access to them), and such services as health, education and police as agreed between the association to which the grant is made and the Minister (ss.20(1) and (2)).

Crown Lands Act 1992

Further details concerning the *Jabiru Town Development Act 1978* are in 8.1 above. The Act establishes the Jabiru Town Development Authority (s.4(1)) and requires it to act in accordance with the provisions of the Commonwealth's *National Parks and Wildlife Conservation Act 1975* in so far as they apply to Jabiru (s.4(4)). The Authority comprises a Chair and six other members appointed by the Minister, of whom one or more may be nominated from anyone involved in mining under the Commonwealth *Atomic Energy Act 1953* or the *Environment Protection (Alligator Rivers Region) Act 1978* (ss.5 and 7).

Jabiru Town Development Act 1978

The functions of the Authority are to: develop and maintain the town of Jabiru; grant leases of land and premises; administer, manage and control the town of Jabiru and carry out local government and related functions as provided under this Act; and protect the environment in so far as it is affected by the construction and operation of the town of Jabiru. The Authority is empowered to do all things necessary and convenient in relation to its functions, including the determination of the use of land (ss.15-16). The Act (s.17) further empowers the Minister to apply certain provisions of the *Local Government Act 1993* (see below) to Jabiru as if it were a municipality, council or community area.

Under the provisions of the Act (s.16A), the Authority provides and charges for services to the Director of Parks and Wildlife under the Parks and Wildlife Conservation Act. The Act establishes the Jabiru Town Council, which is not subject to Ministerial direction (s.25B). The Council comprises five people who live within a 10 kilometre radius of the police station, three of whom are appointed by the Minister (s.25C). The Council exercises the functions of the Authority; these functions are specified under Schedule 2 of the Local Government Act (see below).

The Authority is empowered to make by-laws for the control and management of an area of land set aside as a public place (under s.25), and to authorise entry onto private land and land that is the property of the Authority (s.31). These by-laws may have the same effect as regulations made under the *National Parks and Wildlife Conservation Act 1975* (Cth) that apply in Kakadu National Park surrounding Jabiru.

Local Government Act 1993 The *Local Government Act 1993*, while not making any special provisions in relation to Aboriginal land, does apply to relevant tracts of such land in areas declared as municipal councils (under ss.29 and 30) (generally larger towns and cities, including Darwin), or in a Community Government Scheme area (as constituted under s.105) (generally townships of less than 3,000 people). While only covering about 5 per cent of the land in the Territory, this Act covers about 90 per cent of the Territory's population; the remainder lives on large pastoral leases that are not covered by this Act.

Land owned by the Commonwealth, Crown Land occupied by the Territory (except for commercial or industrial under-

takings) and public reserves are exempt from rates (s.58). Land occupied by an association incorporated under the *Associations Incorporation Act* for a cultural purpose may also be exempted by a council from payment of rates.

Under the general provisions of this Act, land for which there are long overdue rates and charges owing may be sold, but this is unenforceable for inalienable freehold title over Aboriginal land so councils generally do not impose rates on such land – although several tracts have been rated via the relevant land trusts under mutual agreements (s.94).

Aboriginal land in Community Government Scheme areas is generally subject to service charges set, as agreed, by the relevant council (under s.116); this enables a council to carry out works and provide goods and services of any nature on request and to charge for these services.

Members, officers, employees of, and people authorised by, a council may enter any land or building within its area at any reasonable hour between sunrise and sunset to make an inspection or carry out any work required or authorised under this Act, but must give 24 hours notice of the intention to do so (s.119).

The *Milikapiti Community Government Scheme Act 1980* provides for a Community Government Scheme for an area situated at Snake Bay on Melville Island (s.2). To join the 11 member Melville Community Government Council (established under s.5) a person must have been resident in the area for at least five years (s.6). The Council has local government functions and responsibilities, including the provision of: sport and recreational and community and health facilities; electricity and water; roads, sewerage and fire fighting services; and commercial enterprises for the community's benefit (ss.10 and 11).

*Milikapiti
Community
Government
Scheme Act
1980*

The *Northern Territory (Self-Government) Act 1978* (Cth) constitutes the Legislative Assembly of the Northern Territory, which provides self-government to the Territory. The Act vests large tracts of unalienated Crown land in the Northern Territory (s.69).

*Northern Territory
(Self-Government)
Act 1978 (Cth)*

Water Act For a detailed synopsis of the *Water Act 1992* see 8.1 above.

1992 The Act (s.8(1)) requires that a council or community government, within the meaning of the *Local Government Act 1993* (LGA (see above)), shall not perform a function that is relevant to the purposes of the Water Act (as specified in Schedule 2 of the LGA) unless empowered to do so by the Minister or the Controller (s.19).

The Act (s.8(2)) empowers the Minister or Controller to give written directions to any such council or community government in relation to such functions (as set out under s.8(1)). The Controller is a person appointed by the Minister under the Act (s.18).

NORTHERN TERRITORY

8.4 MARINE

The purpose of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is the preservation, and protection from injury or desecration, of areas and objects in Australia and Australian waters; these are areas and objects that are of particular significance to Aboriginal people in accordance with their traditions – such traditions comprising the body of traditions, observances, customs and beliefs of Aboriginal people generally, or of a particular group of Aboriginal people – and includes any such traditions, beliefs, observances or customs relating to particular people, areas, objects and relationships (ss.3 and 4). *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)

The Act defines Australian waters to mean the territorial sea of Australia, or Territory of Australia, and any sea on the landward side of that territorial sea, and the sea over the continental shelf of Australia (s.3(1)).

Under this Act, an area or object is taken to be injured or desecrated if it is used or treated in a manner inconsistent with Aboriginal tradition, or the use or significance of the area is adversely affected, or passage through or over the relevant area is in a manner inconsistent with Aboriginal tradition (s.3(2)). The Act applies to all people, including foreigners, and to all vessels, including foreign vessels, whether or not they are within Australia or Australian waters, subject to applicable international law and agreements (s.8).

Part 3 of the *Aboriginal Land Act 1978* makes provision for the control of entry onto seas adjoining Aboriginal land. *Aboriginal Land Act 1978*

The Act authorises the Administrator to close seas adjoining and within 2 kilometres of Aboriginal land to any people, or for any purpose, other than Aboriginal people who are entitled by Aboriginal tradition to enter and use those seas (s.12(1)). Notice of such closure must be made in the *Gazette* and must specify the area closed, the person/s to whom it is closed and the purpose of closure (s.12(2)).

Before closure, the Administrator *may* (here the word ‘may’ indicates that although it would be preferable for the Administrator to do so, there is no actual requirement) refer the matter to the Aboriginal land commissioner to inquire into such issues as: interference by strangers with traditional use; potential disadvantages; the recreational, commercial and environmental interests of the public; and any other matters that the Commissioner considers relevant to the closure (s.12(3)).

The Administrator may also revoke or vary a notice to close the seas but must first refer this to the Commissioner, who has the discretion to inquire and report on the change of the circumstances which would justify the variation or revocation of the previous notice (s.13).

It is an offence for certain classes of people to enter onto, or remain on, closed seas without a permit issued by the land council for the area, the traditional owners of Aboriginal land adjoining the closed seas or the Minister (ss.14-16). An Aboriginal person, who is entitled by Aboriginal tradition to enter and use the seas adjoining an area of Aboriginal Land, may enter and use the resources of the seas adjoining and within two kilometres of that area of Aboriginal land, despite the publication of a notice under of this Act (s.12) affecting those seas.

Under the Act, it is a defence to a charge of illegally entering closed seas if the ‘offender’ can prove that the entry was due to necessity or was beyond their control, or that it was impractical in the circumstances to apply for a permit and, in any event, the person removed themselves from the closed seas as soon as practicable (s.19).

The Administrator and candidates for, and elected members of, parliament may enter onto, and remain on, closed seas (s.17). A person who holds a licence under the *Fisheries Act 1988* (see below) prior to the publication of a notice closing the seas may continue to enter and fish the area (s.18).

Nothing in a notice of closure prevents the *bona fide* transit of a vessel through seas that are otherwise open to the vessel (s.20). In effect, this means that this legislation does not provide a buffer zone of the sea which cannot be legally entered by commercial fishing interests or holiday makers.

For a detailed synopsis of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), see 8.1 above. The Act empowers the Legislative Assembly of the Northern Territory to make laws with respect to waters of the sea, including waters of Australia, adjoining and within two kilometres of Aboriginal land. These laws may regulate or prohibit the entry of people, and control fishing or other activities, in these waters, but these laws must provide for the right of Aboriginal people to enter and use the resources of these waters in accordance with Aboriginal tradition (s.73(1)(d)).

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Part 3 of the *Aboriginal Land Act 1978* (see above) implements this power. Any such law has effect only if it is capable of operating concurrently with the laws of the Commonwealth (s.73(1)(d)).

The *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) extends the limits of the coastal waters of the Territory to a distance of three nautical miles from the coastal baselines of the Territory in the territorial sea of Australia. This enables the Legislative Assembly of the Territory to make laws applying in, or in relation to, the sea-bed and subsoil beneath and the airspace above these waters for subterranean mining from the relevant land, coastal works and fisheries (ss.4 and 5).

Coastal Waters (Northern Territory Powers) Act 1980 (Cth)

The *Fisheries Act 1988*, the *Offshore Waters (Application of Territory Laws) Act 1985* and the *Petroleum (Submerged Lands) Act 1981* (see below) are examples of legislation passed by the Legislative Assembly under this Act.

For more details on the *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981*, see 8.1 above.

Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981

The plan of management prepared under this Act is required to make special provision for access to designated places for fishing (s.30(5)(a)). It also requires the land trust to grant a lease at a specified position to a previously established pearling company (s.39).

The Act was amended in 1996 to provide for Aboriginal people with traditional links to the Cobourg Marine Park (declared under the *Territory Parks and Wildlife Conservation Act 1978*, see 8.1 above) to participate in the management of the Marine Park (ss.3, 12, 24, 25 and 27).

The objective is that certain marine areas adjacent to the national park are managed for the benefit and enjoyment of all people and that (without purporting to affect native title, if it exists, or other existing title to those areas) the Aboriginal people entitled, by Aboriginal tradition, to the use, control and occupation of the national park should participate in the management of those adjacent areas (preamble).

Fisheries Act 1988 Under the *Fisheries Act 1988*, the taking of fish or aquatic life (any species of plant or animal, except bird life, that must inhabit the sea) or engaging in any commercial activity in relation to them, is prohibited with some exceptions (s.10).

Special licences to take fish or aquatic life, or to engage in commercial activities in relation to them, are issued under the Act, subject to prohibitions and restrictions as prescribed (s.11). Prohibitions and restrictions include: bringing into or releasing in the Territory any live fish or aquatic life and related life forms; possessing or selling them; or polluting the waters of the Territory where the effect of doing so would stun, injure, kill or detrimentally affect the fish or aquatic life or their habitat (s.15).

The Minister may declare Fisheries Management Plans over any area, place or waters in the Territory for purposes such as promotion, development and maintenance of commercial and amateur fishing, and to avoid endangering and over-exploiting species of fish or aquatic life (ss.21 and 22). The Minister's powers under these Plans are very broad and, apart from the matters dealt with in a Fisheries Management Plan, they are also empowered to declare fishing seasons in respect of fish and aquatic life in general or nominated species, use of fishing gear and the boundary lines of areas off limits to fishing (s.28).

Fisheries Officers appointed under the Act (s.5) have extensive powers to act without a warrant for purposes relating to the conservation or management of fisheries, the enforcement of the Act, or a legal or administrative instrument issued under it (s.30). This includes stopping, entering and searching a vessel or entering and searching any premises or place, if the Fisheries Officer has reasonable grounds to believe that any person is, or has been, engaged in taking, processing for sale, selling or buying fish or aquatic life, or in

activities not permitted under this Act. Other powers of enforcement are further described in the Act (ss.31-46).

Traditional Fishing by Aboriginal People

The Act provides general exemptions for certain Aboriginal people from this and related Northern Territory fisheries legislation (s.53(1)), applying only to Aboriginal people who have traditionally used the resources of an area of land or water in a traditional manner, and subject to any restrictions that are expressly made to apply to Aboriginal people.

This exemption does not authorise a person to enter into an area used for aquaculture (defined in s.3(1) as being the farming, culturing or breeding of fish or aquatic life for the purposes of trade, business or research) or to interfere with, or remove, fish or aquatic life from fishing gear that belongs to another person, and does not apply to commercial activities (s.53(2)).

The *Marine Act 1981* has limited application to Indigenous people engaged in traditional fishing activities, but where an Indigenous person owns or operates a ship or other vessel that comes under the provisions of this Act, the Act will apply to that person.

*Marine
Act 1981*

Boats used in traditional fishing activities would probably be excluded from most of the provisions of the Act, since, for the most part, it deals with fishing vessels engaged in commercial activities, which are specifically excluded from traditional Aboriginal fishing under the *Fisheries Act 1988* (s.53(2)) (see above), or that are eight metres or more in length, which would also exclude most traditional Aboriginal fishing boats.

However, the provisions of the Act are expressed to apply to people in charge of any vessel:

- giving assistance to a vessel involved in a collision (ss.109);
- prohibiting the sending off of false distress signals (ss.112);
- warning of navigation hazards, including tropical storms, where appropriate (s.115);

- operating, mooring, anchoring or securing a vessel so as to obstruct, impede or create a hazard to the safe passage or navigation of another vessel (s.115A); and
- endangering safe passage (s.115B).

A vessel is defined in the Act to include a boat, vessel, barge or lighter or any other craft capable of being used as a means of transportation by water (s.7(1)). This suggests that these provisions are likely to apply to boats or craft engaged in traditional fishing activities.

Authorised people under this Act may enter onto, and transport goods through or over, Aboriginal land for the purposes of erection, inspection or maintenance of a navigational aid (such as, lighthouse, lightship, beacon, buoy or any other structure that is ancillary to marine navigation), lamp or light (ss.143-151).

Traditional Indigenous fishing boats would also be bound by the provisions of the Act, which allows the Minister, by notice in writing, to close off any specified area of Territory waters for a period of up to 48 hours to allow the staging of a regatta or race, to facilitate salvage or construction operations, to clean up pollution or deal with any matter relating to safety (s.188B). The Minister is required to publicise the proposed closure beforehand, if possible. Anyone failing to comply with such a notice is liable to a \$500 penalty.

The provisions regulating small craft would probably not apply to boats engaged in traditional Aboriginal fishing since they only apply to commercial vessels not more than 12 metres in length, or to hire-and-drive vessels and pleasure craft (s.212).

*Offshore Waters
(Application of
Territory Laws)
Act 1985*

The purpose of the *Offshore Waters (Application of Territory Laws) Act 1985* is to make provision for, and in relation to, the application of laws made by the Legislative Assembly under the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) (see above). The Act extends the operation of Territory laws relating to subterranean mining beyond the outer limits of its coastal waters into adjacent areas, as permitted under the Commonwealth Act for the purposes of such mining activities (s.3).

The *Petroleum (Submerged Lands) Act 1981* forms part of the Offshore Agreement between the States, the Territory and the Commonwealth of Australia. For details of the scheme, see Chapter 9.4.

*Petroleum
(Submerged
Lands) Act
1981*

The preamble, while otherwise confirming the sovereignty of the Commonwealth over Australia's territorial sea beyond the three nautical mile limit of the coastal waters of the States and the Northern Territory, provides that the laws of the Legislative Assembly of the Territory should apply in relation to the exploration for, and exploitation of, the petroleum resources that are in submerged lands in the areas adjacent to Territory's waters, as provided under the Commonwealth Act and the Territory's Offshore Waters Act.

Part 1 Division 3 applies to acts under this Act that are future acts, to which Subdivision N of Division 3 of Part 2 of the *Native Title Act 1993* (Cth) (see Chapter 9.6) applies (s.15A). Where such an act affects native title rights and interests, the native title holders and registered claimants have the same procedural rights as other title holders (s.15B).

Any permits, leases, licences, pipeline licences or access authorities granted under this Act create a title in respect of the matters specified in those instruments or authorities (s.74A). Petroleum recovered under such instruments becomes the property of the holder of the relevant instrument (s.127).

The Act gives the Minister the power to declare, by written notice in the *Gazette*, a 500 metre radius Exclusion Zone around any well, structure or equipment (s.137). The penalty for unauthorised entry into the zone is \$100,000 or imprisonment for ten years, unless the entry was occasioned by an emergency or events beyond the control of the person charged.

On 16 November 1994, the Commonwealth declared an extension of its territorial sea from 12 to 200 nautical miles under the United Nations *Convention on the Law of the Sea*. Assuming that this is a permissible future act for the purposes of the *Native Title Act 1993* (Cth) (s.235(8)), native title rights in Australia's coastal waters and territorial sea now extend between three and 200 nautical miles from the territorial sea baselines. This means that Commonwealth and Territory legislation that extend the operation of this Act into those waters are potentially in conflict with native title, which raises

questions of a potential for claims for compensation to be made.

An analogous situation arose in relation to a legally binding agreement, signed in October 1997, between Tiwi Pearls Pty Ltd, which is a joint venture between Barrier Pearls Pty Ltd and the Aboriginal people of Croker Island, which lies about 200 kilometres north-east of Darwin. The agreement provides the company with a 10-year lease with a 10-year option over an area of two square kilometres of sea off Point David, on the southern tip of Croker Island, for the purpose of farming.

This area lies within the 2,000 square kilometres of ocean that is the subject of a native title claim determined by the Federal Court in *Yarmirr v The Northern Territory* (1998) 156 ALR 370 (see also *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426).

The agreement will pay about \$2 million in royalties over 20 years, provide employment opportunities to the Aboriginal people, respect sacred sites and assist with the development of infrastructure on the island. The court affirmed the decision of the trial judge, Justice Olney, that while the lease does not give the lessee exclusive possession and occupation of the waters of the leased area and hence they have not extinguished native title rights to hunt or fish in the area, any such rights and interests must yield to the rights of the lessees.

The case did not specifically address the issue of offshore petroleum, but the principles applied in relation to the pearling leases could be applied to offshore petroleum leases as well. Therefore, the Croker Island Case is relevant to the Act, and in particular to the grant of any instruments under the Act.

NORTHERN TERRITORY

8.5 MINERALS

For details concerning the *Aboriginal Land Act 1978* see 8.1 above.

*Aboriginal
Land Act
1978*

Under the Act, only people issued with a permit by the relevant land council or the traditional Aboriginal owners (as defined in s.3) may enter onto Aboriginal land (ss.4 and 5). The Administrator is authorised to issue a permit for the use of a road on Aboriginal land in certain circumstances (s.5A) and certain members of the Northern Territory Legislative Assembly are authorised to issue permits to staff (ss.6 and 16).

A permit may not be issued to enter land that is subject to the provisions of the Act (except land under a land trust, as defined in s.3) if to do so would authorise the presence of a person or people on the land that would interfere with the use and enjoyment of any interest or estate by the person(s) owning such estate or interest (s.10).

For a detailed synopsis of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), see 8.1 above.

*Aboriginal Land
Rights (Northern
Territory) Act
1976 (Cth)*

Part 4 of the Act covers exploration and mining on Aboriginal land (ss.40-48J). The responsible administrative bodies are the relevant land councils and the responsible Government department is the Aboriginal and Torres Strait Islander Commission (ATSIC).

The right to any minerals on or below the surface remains with the Commonwealth or the Northern Territory, whichever has all interests in those minerals vested in it (s.12). The ownership of minerals is divided between the Commonwealth and the Northern Territory under the *Northern Territory (Self-Government) Act 1978* (Cth) (s.69) (see 8.3 above).

However, consent to the exploration of minerals is required from the traditional owners, the relevant land council(s) and the Minister for Aboriginal Affairs, who have the statutory right to refuse their consent (ss.40 and 42). The royalty and royalty equivalents provisions of the Act ensure that Aboriginal people in the Territory derive financial benefit

from the exploration for, and exploitation of, mineral resources on and in their land (ss.62-64).

An agreement concerning the terms and conditions to which the grant of an exploration licence or mining interests will be subject may include provisions regulating or authorising the entry of people on Aboriginal land for purposes relating to the agreement. The Minister for Aboriginal Affairs must consent to and approve such agreements (ss.44, 46 and 48H).

Exploration Licences

As a general rule, an exploration licence may not be granted in respect of Aboriginal land (including land in a Conservation Zone declared under the *National Parks and Wildlife Conservation Act 1975* (Cth), s.8A) unless the Minister and the relevant land council consent to the grant and the land council has entered into an agreement with the applicant regarding the terms and conditions to which the grant of the licence will be subject (ss.40-44A, 47-48B, 48F, 48H and 48J). Specifically, the Act:

- requires the parties to gain the consent of the Northern Territory Mining Minister to negotiate (ss.41(1));
- provides that an application must be made within three months (ss.41(2));
- allows for extensions of time (ss.41(4));
- requires the application to describe the whole proposal in all relevant detail (ss.41(6));
- requires the relevant land council to notify affected Aboriginal groups within 30 days of receiving an application (ss.41(7));
- requires a land council to consent or refer the matter to a responsible person or agency within the negotiating period (ss.42(1));
- provides that a land council cannot consent unless traditional land owners understand and agree to the terms of the proposal and the terms are reasonable (ss.42(6));
- contains provisions dealing with deemed consent (ss.42(7));

- requires the Minister to grant consent (ss.42(7) and 46(8)); and
- provides for an optional process of conciliation and then arbitration if terms cannot be agreed (ss.42(11)).

One or both parties may request the Minister refer an intractable dispute about the terms and conditions of the grant of an exploration licence to a Mining Commissioner, who may determine by conciliation, or, failing that, by arbitration, the terms and conditions of the grant (ss.44(1), (4) and (5)).

Provisions for the granting of mining licences are similar to those for exploration licences and also require applicants to enter into negotiations with the relevant land council (ss.45, 46, 48A-E, 48H and 48J). One or both parties may request the Minister to refer a dispute over the terms and conditions to which the grant of a mining interest will be subject to a Mining Commissioner for resolution by conciliation or arbitration (s.48F).

An exploration licence may be cancelled, and a mining interest either not granted or cancelled, if, for example, the works or activities are not in accordance with those proposed and would affect Aboriginal people and their land to such an extent that the land council would not have consented if they had known the consequences, or if it is in the national interest to do so (s.47).

Special provision is made for the application of Commonwealth mining legislation, such as the *Atomic Energy Act 1953* (Cth) (see next), to Aboriginal land. No mining for minerals under a law of the Commonwealth is permitted unless an agreement has been entered into between the Commonwealth and the relevant land council, setting out the terms and conditions under which an activity may take place under that legislation (ss.48C-E and 48G).

The *Atomic Energy Act 1953* (Cth) makes special provision for the mining of radioactive substances in the Ranger Project Area, which is delineated in Schedule 2 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see above). The Act empowers the Minister to authorise a person or people engaged in a joint venture to enter onto land in the Area and explore for and mine such substances, and construct

Atomic Energy Act 1953 (Cth)

associated works for those purposes, in association with, or on behalf of, the Commonwealth (s.41).

This is backed by the Ranger Uranium Project Government Agreement that was made on 9 January 1979 between the Commonwealth, Peko-Wallsend Operations Limited, Electrolytic Zinc Company of Australasia Limited and the Atomic Energy Commission (now the Australian Nuclear Science and Technology Organisation). The Act (s.42) makes provision for the payment of compensation to anyone who had a right, title or interest in such substances or minerals and who suffers loss or damage because of something done under it (see s.41).

The Act (s.41C) makes it possible for the authority granted under it (s.41) to be extended by the Minister for a period of seven years up to the length of the original authority. If this is the case, then no later than three months before the original authority expires, the original agreement between the Commonwealth and the Northern Land Council (entered into under s.43 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) on 3 November 1978) must be extended correspondingly, or another agreement must be drawn up for the extended authority period between the Commonwealth and the relevant land council, covering the parts of the Area that are or have become Aboriginal land under the Aboriginal Land Rights Act.

The Minister administering the Aboriginal Land Rights Act is responsible for endeavouring to obtain these agreements. The Minister administering the Atomic Energy Act is responsible for ensuring that the conditions and restrictions set out in these agreements are incorporated into the new authority, that proper provision is made for rehabilitation of the land and that nothing is done that is inconsistent with the Commonwealth's obligations under these agreements (s.41C(4)). Further relevant provisions covering the Ranger Project Area are in the *Uranium Mining (Environment Control) Act 1979* (see below).

The *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981* provides that the grant of title to the Cobourg Peninsula Sanctuary land was subject to a reservation in favour of the Crown of the rights to all minerals, whether in their natural state or in a deposit of waste material, on or below the surface of the land (s.13(3)). However, the acquisition by the Crown of land, or an interest in land, in the Sanctuary for the purposes of mining is not permitted (ss.17(4)).

Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981

Exploration, mining or mineral processing operations may be carried out in the Sanctuary, but require the approval of the Cobourg Peninsula Sanctuary and Marine Park Board in accordance with the applicable plan of management, and no mining interest may be granted without the prior written approval of the Board (s.33). An agreement between the Board and the applicant for a mining interest for the payment of fees, or amounts by the applicant to the Northern Land Council for the right to carry out those operations, is also required (s.34).

The plan of management must not provide for exploration, mining or mineral processing operations unless the Board has agreed with the applicant for the payment of fees or amounts to the Northern Land Council for the right to carry out those operations (s.34). The Act contains special provisions for mining in the adjacent marine park (ss.27 and 34A).

Through the Land Council's nominations to the Board and the obligation imposed on the Land Council to consult with the traditional Aboriginal owners as set out under the Act (s.4), the Aboriginal owners and the other Aboriginal members of the group living in the Sanctuary have substantial control over the question of whether mining operations and other resource development activities proceed on the Sanctuary, and over the terms and conditions under which such activities shall be permitted. This control, however, does fall short of an actual veto.

For further details concerning the *Crown Lands Act 1992*, see 8.1 above. The Act provides that an estate in fee simple in Crown land is subject to a reservation to the Crown of all minerals, mineral substances and ores in or on the land (s.21(1)). This includes all gems, stones, sands, valuable earths and fossil fuels. The Act also reserves to the Crown the

Crown Lands Act 1992

right to authorise any person to enter onto the land to explore for, to mine or to recover these substances, and to do all things necessary for those purposes.

As regards Aboriginal Community Living Areas, under this Act (s.22) and the *Lands Acquisition Act 1978* (s.46(1B)(a)) (see 8.1 above), the land is granted subject to any exploration licence, mining tenement, exploration retention licence, reservation, occupation or other right under the *Mining Act 1980* (see below). However, any new mining tenements, exploration licences or exploration retention licences within one kilometre of a point designated by the relevant Aboriginal incorporated association may not be issued without the consent of the owner(s).

Environment Protection (Alligator Rivers Region) Act 1978 (Cth), in conjunction with the *Aboriginal Land Rights (Alligator Rivers Region) Act 1976* (see above), the *National Parks and Wildlife Conservation Act 1975* (see 8.1 above) and the *Environment Protection (Northern Territory Supreme Court) Act 1976* (Cth), create a legislative regime for the Ranger uranium deposits in the Region (as set out in the Schedule to this Act). The Region is situated about 220 kilometres east of Darwin. The Act gives effect to an agreement signed in November 1978 under the Land Rights Act between the Northern Land Council (on behalf of the traditional owners) and the Commonwealth Government for the development of the Ranger uranium mine.

The Act establishes the Office of the Supervising Scientist (s.4), the principal function of which is to protect the environment of the Region from the effects of the uranium mining operations; additionally, the office is expected to advise the Minister for the Environment on the effects on the environment of such operations, as well as on measures for the protection and restoration of the environment, and on standards, practices and procedures (s.5). The Act also creates a Coordinating Committee (s.16), whose functions include overseeing the mining operations and their impact on the environment in the Region (s.17).

The Supervising Scientist must consult with the Directors of Parks Australia North and Territory Parks and Wildlife (s.33). The Director Parks Australia North cannot bring a suit under the *Environment Protection (Northern Territory Supreme*

Court) Act (s.4) unless the relevant area is located in a park, reserve or Conservation Zone under the National Parks and Wildlife Conservation Act. Similarly, a land council cannot bring a suit in respect of the Alligator River Region Act under the Environment Protection (Northern Territory Supreme Court) Act (s.4) unless the matter that is the subject of the suit relates to the environment in a part of the Region that is in an area for which the land council has been established and that is Aboriginal land under the Aboriginal Land Rights Act.

The *Granites Exploration Agreement Ratification Act 1994* ratifies and entrenches the Exploration Agreement between the Government of the Territory and North Flinders Mines Limited in respect of the Granites Gold Mine situated in the Tanami Region (s.4). Clause C of the preamble to the Agreement acknowledges that the Company has entered into an agreement with the Central Land Council under Part 4 of the Aboriginal Land Rights Act (see above) in respect of those parts of the area that that are Aboriginal land.

*Granites
Exploration
Agreement
Ratification Act
1994*

The Agreement provides that exploration licences granted under this Act may be for 10 years, but may be extended (cl.5(1)). Under the Act (cl.5(3)), any such extension is subject to the provisions of the *Aboriginal Land Rights Act 1976* and the Commonwealth's *Native Title Act 1993*. The provisions of the *Mining Act 1980* apply specifically to the Agreement unless the contrary intention appears in the Agreement (cl.5(4)).

The *Koongarra Project Area Act 1981* (Cth) (s.3) provides for the variation of the boundary of the Kakadu National Park in the Northern Territory, which was initially proclaimed by the Governor General on 5 April 1979 under of the *National Parks and Wildlife Conservation Act 1975* (s.7(2)) (see 8.1 above and Chapter 9.1).

*Koongarra
Project Area
Act 1981 (Cth)*

The effect of this is to exclude land (referred to as 'the relevant land' in this Act, s.2(3)) from the Park for the purposes of the Parks and Wildlife Act (s.7(8)), which will enable a uranium mining project to proceed on that land.

The variation referred to in the Act (s.3) will come into operation on a date to be fixed by proclamation (s.2(2)). A Social Impact Study of Impact of Development on Aboriginal

Communities in the Kakadu Region was released in August 1997. As at 19 August 1999, no date had been fixed for the commencement of s.3. The Act may not be proclaimed unless the Minister for Aboriginal and Torres Strait Islander Affairs and the relevant land council have consented in writing (for the purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s.40(1)) (see 8.1 and 8.5 above) to the grant of a mining interest in respect of the relevant land. The relevant land council as provided under the Act is the Northern Land Council (s.2(3)).

Lands and Mining Tribunal Act The *Lands and Mining Tribunal Act* establishes the Lands and Mining Tribunal (s.4), for more details see 8.1 above. The main functions of the Tribunal (s.5) are to hear, make recommendations, determine claims, dismiss, and/or determine disputes about a number of matters relating to the *Lands Acquisition Act 1978* (see 8.1 above), the *Mining Act 1980* (see below), the *Petroleum Act 1984* (see below), the *Pastoral Land Act 1992* (see 8.1 above), and the *Energy Pipelines Act*.

McArthur River Project Ratification Agreement Act 1992 The purpose of the *McArthur River Project Ratification Agreement Act 1992* is to ratify the Agreement of 25 November 1992 and to authorise the grant of mineral leases to Ashton Mining Limited which had previously carried out substantial exploration under various licences. The purpose of this was to overcome the perceived uncertainties about the validity of its mining interests arising from the decision of the High Court in *Mabo v Queensland [No. 2]* (1992), 175 CLR 1. The Act, in effect, re-issues all of the relevant mining interests and it also makes provision for compensation on just terms if the effect of the grant of these leases is to amount to an 'acquisition of property'.

If native title applies for the land affected by the Project, then a claim to compensation could arise to the degree that the native title is affected.

Merlin Project Agreement Ratification Act 1998 ratifies an agreement between the Northern Territory of Australia and Ashton Mining Limited, and provides for security of diamonds produced from the Merlin Project.

Merlin Project Agreement Ratification Act 1998

In 1992, the Company discovered diamond bearing kimberlites called the Merlin prospect in the Boomerang Creek District in the Northern Territory. On 19 December 1996, the Company made application for the grant of a mineral lease known as MLN 1154 for the mining of diamond bearing ore in the Boomerang Creek District. The lease was granted on 15 June 1998.

The *Mine Management Act 1990* requires those engaged in minerals exploration activities to ensure that those activities are carried out in a manner that minimises damage to the environment (s.25(e)).

Mine Management Act 1990

For the purposes of determining the applicable regime permitting mining and exploration on land in the Northern Territory, the *Mining Act 1980* classifies land in four categories: Crown land; parks and reserves; Aboriginal land; and private land (s.4(1)).

Mining Act 1980

Crown land means all land (including pastoral leases) in the Territory except reserves, parks, private land, Aboriginal land, land subject to a mining tenement (that is, a mineral lease, mineral claim, extractive mineral licence or extractive mineral permit and includes an application for a lease) or exploration retention licence. As a matter of principle, all Crown land is open for exploration and mining (see ss.16, 54, 82, 96, 107 and 133).

Special Provisions Relating to Certain Acts Affecting Native Title

Parts of 11A and 11B provide for prescribed mining acts above and below the high water mark or for infrastructure facilities. A prescribed mining act is a grant, variation or renewal of an exploration licence, exploration retention licence, mineral lease, mineral claim, extractive mineral lease, or the authority to occupy and use land for a specified purpose under s.178, to which the Right to Negotiate provisions of the *Native Title Act 1993* (NTA) apply (s.140A). This Part applies

where a determination is in force under s.43A(1)(b) of the NTA, or where the prescribed mining act is a compulsory acquisition or grant under 24MD(6b) (s.140A and 140B). Where a determination is in force under s.26A of the NTA in respect of a prescribed petroleum act, the Minister may declare that this Part does not apply.

In addition to any other requirements of this Act, an application for a prescribed mining act must serve written notice of the application to the registered native title claimants, native title bodies corporate, and the representative Aboriginal or Torres Strait Islander bodies in relation to any of the affected land (s.140D-E) who then have the opportunity to lodge a native title objection. If there is an objection, the Secretary must then advise the applicant for the prescribed mining act of the objection, and make provision for certain consultation procedures (140F). Agreement is strongly encouraged (s.140FA), and if the parties cannot agree the Minister may refer the objection to the Lands and Mining Tribunal for hearing (s.140G) (the Lands and Mining Tribunal is established under the *Lands and Mining Tribunal Act*, see 8.1 above).

In making a recommendation the Lands and Mining Tribunal must take into account the effect on registered native title rights and interests of the native title claim group (such as: the enjoyment of their way of life, culture and traditions; the development of their social, cultural and economic structures; and, their freedom of access to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of significance on the land or waters, in accordance their traditions). The Tribunal has to also consider ways of minimising the impact of the prescribed petroleum act on registered native title rights and interests; the significance of the prescribed petroleum act to the Territory and to the region; and, the public interest (s.140JB).

The Minister must comply with the recommendations of the Tribunal unless it is in the interest of the Territory not to do so (s.140K). A person aggrieved by a decision to do a prescribed petroleum act under this Act, because of the effects on registered native title rights and interests, may apply to the Supreme Court for judicial review of the decision (s.140L). Compensation for the effect of the prescribed mining act on native title is payable to a native title holder by the holder of the mining interest. A claim for compensation may be made

whether or not the person lodged a native title objection (s.140N).

Mining on Aboriginal Land

The *Mining Act 1980* (ss.135-137) reflects the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ss.40-42), entitling any corporation or person over the age of 15 years to apply for, and to be granted, a mining interest in respect of Aboriginal land (including Aboriginal land in a conservation zone declared under the *National Parks and Wildlife Conservation Act 1975* (Cth)).

With certain exceptions, an application for a mineral lease cannot be made over Aboriginal land unless an exploration or exploration retention licence is already held (s.139). The Act requires the written consent of the Minister to grant an exploration licence.

An applicant for an exploration licence is also required to provide the land council (which has a right of veto at this stage) with a comprehensive proposal, which includes information about the applicant, the land affected, the proposed exploration program and the various methods for the recovery of any minerals found as a result of the exploration (ss.45, 46 and 137). In addition, an exploration retention licence is subject to conditions determined by the Minister which may include minimising impacts on registered native title rights and interests, or other conditions whether in accordance with a National Native Title Tribunal recommendation or otherwise (s.45A). Provisions of this Act are complementary to corresponding provisions in the Land Rights Act (see above) which deal with mining interests (ss.135-136 and 139-140). The effect is to require the relevant land council and intending miner to enter into an agreement regarding the terms and conditions to which the grant of the mining interest will be subject, and the Minister's consent to such a grant.

A licensee must not interfere with any Aboriginal sacred site or object otherwise than in accordance with law (s.24(k)). This raises the question as to whether a person with an interest in such a site or land on which such an object is located could lodge a caveat under the Mining Regulations 1982 (s.174 and Regulation 32), forbidding any dealing with a licence, lease or claim under this Act.

The Minister may also request that land included in an exploration licence be surrendered if it is required for the preservation and protection of places of cultural or historical interest (s.30). This raises the possibility (as yet untested) that an Aboriginal person could ask the Minister to make such a request in respect of a land that is of historic interest to Aboriginal people in the area.

As regards Aboriginal Community Living Areas (CLA), a company must apply for an exploration licence to the Minister under the Act (ss.16 and 17), who may then consent to the company entering into negotiations with the relevant land council (s.137). The Land Rights Act (ss.41 and 42) (see above) would then require the consent of the traditional Aboriginal owners before the land council may grant an exploration licence. The provisions of that Act (s.46) impose similar requirements in respect of mining companies intending to carry out mining operations.

Where private land is granted to an association for an Aboriginal CLA, then, subject to existing mining tenements, exploration licences and exploration retention licences, such tenements and licences may not, except with the consent of the owner, be granted on that private land within one kilometre of a designated point on that land, such point being designated by the relevant incorporated Aboriginal association (s.174AA).

Mining in Parks and Reserves

An exploration licence or exploration retention licence or mineral lease must not be granted in respect of parks and reserves under Commonwealth legislation or sanctuaries under Territory legislation unless the proposed exploration or mining activity is in accordance with the relevant plan of management and the Minister has received the Administrator's approval (s.176).

If the land is in a park or reserve under the *National Parks and Wildlife Conservation Act 1975* (Cth), approval must be sought from the Minister responsible for that Act, the person in whom management of the land is vested, and the Board administering the *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981*.

Furthermore, an exploration licence or exploration retention licence cannot be granted over land in a Territory park or reserve or Conservation Zone unless the opinion of the

Minister responsible for the *Territory Parks and Wildlife Conservation Act 1978* has been considered, and subject to any conditions specified by the Minister (s.176A).

Where the Minister has reserved land (land that is not occupied under an exploration licence or mining tenement) from occupation under this Act or has prohibited the recovery of any mineral from that land, and that land is granted to an association for a CLA, the Minister may not cancel the reservation in respect of the CLA except with the consent of the owner(s) and the approval of the Administrator of the Northern Territory.

The Minister also may not authorise a person or statutory corporation to occupy the land for exploration, mining or related purposes except after consultation with the owner (s.178).

For details of the *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* see 8.1 above.

The Act covers Aboriginal living areas outside Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see above). Under the Act, an Aboriginal person, or a group of Aboriginal people, may apply to the Minister for Lands, Planning and the Environment for a grant in fee simple of land subject to a pastoral lease for use as a CLA (ss.6 and 102A). The Minister has discretion as to whether or not to grant a living area.

A mining tenement, exploration licence or exploration retention licence shall not, except with the consent of the owner(s), be granted on the land within a distance of one kilometre from a designated point on the land, such point being designated by the relevant incorporated Aboriginal association, but this limitation does not extend beyond the boundaries of the land (ss.11 and 174AA(1)). This Act is complementary to the *Northern Territory Aboriginal Sacred Sites Act 1989* (see below).

Where the Minister has declared a heritage site or object under this Act (s.26), the relevant council may prepare a management plan in respect of such a site or object (s.30). The plan must specify the work that may be permitted on a heritage place, or the place on which a heritage object is located or where it may be moved to (s.30).

*Miscellaneous
Acts Amendment
(Aboriginal
Community
Living Areas)
Act 1989*

The Act makes it an offence to carry out work on, damage or alter a heritage place or object, or to move a heritage object except in accordance with a management plan (s.33). An employee may be responsible for breaches by a body corporate (s.54).

Mt Todd Project Ratification Act 1993 The *Mt Todd Project Ratification Act 1993* ratifies, implements and entrenches the Agreement made on 2 March 1993 between the Northern Territory Government and Zapopan NL in respect of gold mining operations in the Batman deposits in the Mt Todd Region, about 50 kilometres north of Katherine (s.4). The preamble confirms the grant of leases and the facilitation of development, construction and operation of the Mt Todd Project under the *Mining Act 1980* (see above).

The Agreement (cl.5) requires the Company to comply with the relevant environmental impact statements covering the area and prohibits the Territory from taking any action prejudicial to the Company's operations under this Agreement except in relation to the protection, conservation or rehabilitation of the environment (cl.10(2)).

As part of the process enabling this Project to proceed, the Company entered into a joint venture agreement with the traditional Aboriginal owners of the land, the Jawoyn people, who received land grants under the Aboriginal Land Rights Act (see above) and were provided with employment opportunities.

However, in 1995 the Company sold its share to the American mining company Pegasus Gold Inc, which, in November 1997, was forced to close the mine due to falling world gold prices, resulting in the loss of jobs for about 25 Jawoyn workers at the mine (as reported in *The Sydney Morning Herald*, 17 November 1997, p.39).

Northern Territory Aboriginal Sacred Sites Act 1989 The *Northern Territory Aboriginal Sacred Sites Act 1989* covers sites identified under the Act as being sacred sites (s.29). The responsible administrative body is the Aboriginal Areas Protection Authority (AAPA), established under this Act, and the Minister is the Minister for Lands, Planning and Environment. Further details concerning the operation of the Act are set out in 8.2 above.

The Act makes entry, not authorised under the Act, an offence (s.30); it is also an offence to work on a sacred site without a Certificate from the AAPA or from the Minister (s.34). An application to work on a site must be made to the AAPA, who will consult with the custodians of sites that may be affected and an applicant may be required to consult with the custodians (s.20).

Permission may be given to proceed where there is no substantive risk to the site(s) or, if after consultation, an agreement has been reached, the AAPA may issue a Certificate, which will describe the work, the site and set out conditions (s.21(1)).

For a detailed synopsis of the *Pastoral Land Act 1992*, see 8.1 above. Under the *Mining Act 1980* (s.4(1)) (see above), pastoral leases are specifically included in the category of Crown land that is available for the exploration for and mining of minerals.

Pastoral Land Act 1992

A pastoral lease is subject to a reservation in favour of the Territory of all minerals in or on the land (s.38(1)(b)). These are defined for the purposes of this item as minerals and extractive minerals under the *Mining Act 1980* and the *Petroleum Act 1984* (see next).

Petroleum titles under the *Petroleum Act 1984* fall into two broad categories, namely: those permitting exploration (Part 2, Divisions 2 and 3); and those permitting production (Part 2, Division 4). There are also special provisions relating to certain acts affecting native title in Part 2A and Part 2B. References in the Act to 'land' see any land within the jurisdictional limit of the Northern Territory (s.5(1)). All petroleum on or below the surface of land within the Territory is, and shall be deemed to always have been, the property of the Crown (s.6(1)).

Petroleum Act 1984

Any person 15 years of age or older, subject to the provisions of the Act, is entitled to apply for and be granted a permit or licence under the Act, which is treated like a mining interest as defined in the Aboriginal Land Rights Act (see above) in relation to Aboriginal land (s.12).

The Act contains special provisions relating to Aboriginal land (s.13(1)). They require an applicant for a permit to lodge the

application with the Minister and for the Minister to give notice to the relevant land council prior to the applicant being permitted to enter into negotiations (as provided under the *Aboriginal Land Rights Act 1976*, s.41(1), see 8.1 above) with the land council for the necessary consent to the grant of a permit to the applicant.

The Act (s.14(1)) prevents people not holding a permit (as per s.13(1)) from applying for a licence unless that person is one of the traditional Aboriginal owners in relation to the land or had lodged an application prior to the land becoming Aboriginal land.

Any person granted a permit or licence under this Act may be required to lodge with the Minister such amount as the Minister, at their discretion, decides to impose for any claim for compensation against the holder of such a permit or licence (s.80).

The owner of any estate or interest (including native title rights or interests within the meaning of the *Native Title Act 1993* (Cth) (NTA)) of land within the permit or licence area is entitled to compensation for deprivation of the use and enjoyment of the land, including improvements, rights of access and damage to the land (s.81(1)). Similar provisions apply in respect of any road and related works that are required to be carried out to provide access to the relevant permit or licence area where such area is injured or diminished in value as a result (s.82(1)) In such a case, the permit or licence holder must pay the holder of the estate or interest for such damage.

Special Provisions Relating to Certain Acts Affecting Native Title

Part 2A and Part 2B detail provisions for prescribed petroleum acts, similar to those provisions for the *Mining Act 1980* (see above). A prescribed petroleum act is a grant, renewal or variation of a permit, retention licence, production licence, access authority, or the variation of the area of a licence to which the Right to Negotiate provisions of the NTA apply (s.57B). This Part applies where a determination is in force under s.43A(1)(b) of the NTA, or where the prescribed petroleum act is a compulsory acquisition or grant under 24MD(6b). Where a determination is in force under s.26A of the NTA in respect of a prescribed petroleum act, the Minister may declare that this Part does not apply.

In addition to any other requirements of this Act relating to applications, an application for a prescribed petroleum act must serve written notice of the application to the registered native title claimants, native title bodies corporate, and the representative Aboriginal or Torres Strait Islander bodies in relation to any of the affected land (s.57E-F) who then have the opportunity to lodge a native title objection. The Minister must then advise the applicant for the prescribed petroleum act of the objection, and make provision for certain consultation procedures (such as meetings and mediation) (57G). Agreement is strongly encouraged (s.57GA), and if the parties cannot agree the Minister may refer the objection to the Lands and Mining Tribunal (established by the *Lands and Mining Tribunal Act*, see 8.1 above) for hearing (s.57KA).

In making a recommendation the Tribunal must take into account the effect on registered native title rights and interests of the native title claim group (such as: the enjoyment of their way of life, culture and traditions; the development of their social, cultural and economic structures; and, their freedom of access to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of significance on the land or waters in accordance their traditions). The Tribunal has to also consider ways of minimising the impact of the prescribed petroleum act on registered native title rights and interests; the significance of the prescribed petroleum act to the Territory and to the region; and, the public interest (s.57KB).

The Minister must comply with the recommendations of the Tribunal unless it is in the interest of the Territory not to do so (s.57L). A person aggrieved by a decision to do a prescribed petroleum act under this Act, because of the effects on registered native title rights and interests, may apply to the Supreme Court for judicial review of the decision (s.57M). A claim for compensation can be made whether or not the person lodged a native title objection (57P).

The purpose of the *Uranium Mining (Environment Control) Act 1979* is to control the mining of uranium in the Alligator Rivers region with a view to lessening any damage which may be caused to the environment in the Region. A 'prescribed agreement' is defined as one entered into under the *Aboriginal Land Rights (Northern Territory) 1976 Act* (Cth) (ss.43-46)

Uranium Mining (Environment Control) Act 1979

and the 'Ranger Project Area' as the land described in the 1978 Agreement between the Commonwealth and the Northern Land Council (s.2).

The Act (s.6(1)(b)) requires a manager of a mine to instruct staff under their control on any restrictions imposed on them by, or under the provisions of, the *Aboriginal Land Rights Act 1976* and the *Aboriginal Land Act 1978*, arising from and in relation to the Commonwealth's *Environment Protection (Alligator Rivers Region) Act 1978* and *Atomic Energy Act 1953*.

The Act imposes strict environmental controls on the Ranger and Nabarlek uranium mines covered under it (ss.14-17). The Act specifically requires the Minister to have regard to the contents of a prescribed agreement before granting any authorisation or exercising any powers or performing any functions under this Act (s.18(1)(a)) and provides that if an application or authorisation relates to the storage or use of explosives within the Ranger Project Area, the Minister must have regard to the location of Mount Brockman and any Aboriginal sacred sites on or near that place (s.18(1)(d)).

Schedule 1 of the Act specifies environmental requirements for the Ranger Project, such as the appointment of a suitably qualified and experienced environment protection officer to ensure effective environmental control of the project, including the protection of objects of 'material culture' of concern to Aboriginal people (cl.1(a)(i)). All officers, servants and employees, including contractors and subcontractors, must be informed of the plan of management for Kakadu National Park and the provisions of all applicable laws relating to the preservation of the natural environment, including Aboriginal sacred sites, relics and works of art (cl.3).

Schedule 2 contains similar provision in relation to the uranium mine at Nabarlek, the only difference being that the provisions of the *Environment Protection (Alligator Rivers Region) Act 1978* (see above) must be explained and made available (cl.3).

NORTHERN TERRITORY

8.6 NATIVE TITLE

The *Validation (Native Title) Act* is designed to deal with native title rights and interests in the Northern Territory in a manner consistent with the *Native Title Act 1993* (Cth) (NTA) (see Chapter 9.6). *Validation (Native Title) Act*

Part 2 validates past acts and intermediate acts attributable to the Territory which may have been deemed invalid due to the existence of native title, that are consistent with the NTA (ss.4 and 4A).

Intermediate period acts are certain acts that took place between 1 January 1994 and 23 December 1996, as defined by the amendments to the NTA (s.232A). These provisions relating to intermediate period acts allow for the validation of land dealings which did not comply with the NTA or with the common law and *Racial Discrimination Act* prior to the passing of the original Act in 1993.

A previous exclusive possession act under s.23B(2) of the NTA extinguishes any native title in relation to the land or waters covered by freehold estates, scheduled interest or lease concerned, and the extinguishment is taken to have happened when the act was done (s.9H). Schedule 2 details what is meant by scheduled interests in the Territory.

Where a previous non-exclusive possession act involves the grant of rights and interests that are not inconsistent with native title rights and interests, the rights and interests granted, and the doing of any activity in giving effect to them, prevail over the native title rights and interests but do not extinguish them (s.9L). This does not include the beneficial reservations and conditions for Aboriginal people under the grant of a pastoral lease or agricultural lease, which are preserved (s.11).

Part 6 confirms certain rights of the Territory, such as the existing ownership of natural resources, the right to use, control and regulate the flow of water, and all existing fishing rights under Territory law that prevail over other public or private fishing rights (s.12). Existing public access is also confirmed to waterways, the foreshores of waterways, coastal

waters, beaches, stock routes, and public places that were so at the end of 31 December 1993 (s.13).

Section 3C states explicitly that native title or native title rights and interests may have been extinguished other than by this Act.

**A GUIDE TO AUSTRALIAN LEGISLATION
RELEVANT TO NATIVE TITLE**

9. COMMONWEALTH

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COMMONWEALTH

9.1 LAND AND ENVIRONMENT

The *Aboriginal Affairs (Arrangements with the States) Act 1973* gives the Governor General of the Commonwealth the power to enter into an arrangement with the governor of a State with respect to Aboriginal affairs (s.5).

Aboriginal Affairs (Arrangements with the States) Act 1973

This includes, but is not limited to, arranging for transfers of State employees to the Australian Public Service (APS) and appointment of officers of the APS to offices under the laws of a State relating to Aboriginal affairs. Also included are the performance of functions of State laws by officers of the APS and the assumption by the Australian Government of responsibilities of a State for Aboriginal affairs.

The Act (s.6) provides State employees with the right to be notified of their entitlement to be employed in the APS to give effect to the Act's provisions (s.5). The remainder of the Act specifies the terms and conditions of such employment.

The objectives of the *Aboriginal and Torres Strait Islander Commission Act 1989* (s.3), in recognition of the past dispossession and dispersal of Aboriginal and Torres Strait Islander people and their present disadvantaged position in Australian society, are to:

Aboriginal and Torres Strait Islander Commission Act 1989

- ensure maximum participation of Aboriginal and Torres Strait Islander people in the formulation and implementation of government policies that affect them;
- promote development, self-management and self-sufficiency among them;
- further their economic, social and cultural development; and
- ensure coordination between all levels of government without distracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

Establishment of ATSIC

The Act provides for the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) (s.6), whose functions include:

- the formulation and implementation of programs for Aboriginal and Torres Strait Islander people;
- monitoring the effectiveness of such programs;
- developing policy proposals to meet national, State, Territory and regional needs and priorities;
- assisting, advising and cooperating with Indigenous communities, organisations and individuals at national, State, Territory and regional levels;
- advising and providing the Minister with information relating to matters under this Act; and
- any other functions conferred on ATSIC by this or any other Act.

Membership of ATSIC

ATSIC comprises of members appointed by the Minister. The Minister must appoint as members the people elected under Division 7 of Part 3 to represent the 16 zones (s.27 and Schedule 1). The Chairperson of the Commission is elected by the Commissioners (s.31A). The Act (s.21A) makes special provision for ATSIC to be the holder of an interest in land where it has made a grant or a loan to an individual or corporate entity (ss.14, 20 and 21). Part 3A also contains special provisions establishing and relating to the Torres Strait Regional Authority.

Indigenous Land Corporation and Fund Provisions

Part 4A was inserted by the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*. The object of these provisions is to amend the ATSIC Act and other Acts to establish a Land Fund and an Indigenous Land Corporation (ILC), to help redress the dispossession of Aboriginal and Torres Strait Islander people, and for related purposes.

The ATSIC Act stipulates that the purpose of the Indigenous Land Corporation (ILC) is to assist Indigenous people in the acquisition of land and in the management of Indigenous-held land (s.191B). The latter is defined in the ATSIC Act as

including land held by an Aboriginal or Torres Strait Islander corporation (see *Aboriginal Councils and Associations Act 1976*, 9.3 below) or land held by an Aboriginal or a Torres Strait Islander person (s.4B). The powers and functions of the ILC are exercised and performed by the ILC board of directors, established and provided for under the Act (ss.191V-192J), the majority of whom must be Aboriginal or Torres Strait Islander people.

Details of ILC's land acquisition and land management functions are specified in the Act (ss.191C-191E). The Act requires the ILC, in performing its land acquisition functions, to search any relevant registers of the National Native Title Tribunal (as provided for under the *Native Title Act 1993*, see 9.4 below) to ascertain whether any claims have been lodged, accepted or determined in relation to land under consideration for acquisition (s.191D(4)). In the performance of its functions, the ILC is required to give priority to matters such as ensuring that Indigenous people derive social and cultural benefits from the land, that it has access to the requisite skills and resources, and that it maximises the employment of Indigenous people. The ILC is also charged with the responsibility for preparing and revising the National Indigenous Land Strategy (s.191N(1)).

This strategy is required to cover such matters as the acquisition of interests in land for the purpose of making grants of those interests to Aboriginal or Torres Strait Islander corporations, and land management and environmental issues relating to Indigenous-held land (s.191N(2)). In doing so, the ILC is required to consult with ATSIC and may also consult with such other people and bodies as it considers appropriate (s.191N(3)). The strategy must be tabled in each House of the Commonwealth Parliament by the Minister (ss.191N(6) and (7)).

A further requirement of the ILC is that it prepares regional Indigenous land strategies, covering similar matters to the national strategy, in respect of regional areas as determined by the ILC (s.191P). These only need to be handed to the Minister on the Minister's request and do not need to be tabled in Parliament.

The Act (s.192W) provides for the establishment of the Aboriginal and Torres Strait Islander Land Fund, the purpose of which is the making of payments to ATSIC and the ILC

(s.192X). Credits to and payments from the Fund are specified under the Act (ss.193-193I).

The Act (s.193S) contains detailed secrecy provisions that are binding on all ILC officers (being ILC directors, managers and staff and employees past and present). It covers all information acquired, or documents obtained, by an ILC officer in connection with the performance of a function or exercise of a power of the ILC and related matters.

Among the matters to be considered are whether information, or a document, contains information that is considered sacred or otherwise significant by a particular group of Aboriginal and Torres Strait Islander people, or disclosure of the information or production of the document would be inconsistent with the views or sensitivities of those Indigenous people.

Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 The purpose of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* is to make provision with respect to Aboriginal and Torres Strait Islander peoples, to prevent discrimination in certain respects against those peoples under the laws of Queensland. The Act binds both the State of Queensland and the Commonwealth of Australia (s.4).

Any property of an Aboriginal or Torres Strait Islander person in Queensland is not allowed to be managed by another person without the consent of the property owner, and if that Indigenous person has given such consent, they may withdraw it at any time (s.5(1)). This does not apply to any property that, in accordance with any other law of Queensland or Australia, applies generally without regard to the race, colour or national or ethnic origin of a person (s.5(2)).

The Act preserves special rights of access to, and residence and conduct on, reserves (ss.6-8). 'Reserves' are defined as reserves established under the (now repealed) *Aborigines Act 1971* (Qld) and *Torres Strait Islander Act 1971* (Qld) or any Acts replacing these (s.3). These would now be covered under the *Aboriginal Land Act 1991* (Qld), the *Torres Strait Islander Land Act 1991*, and the *Land Act 1994* (Qld) (see Chapter 3.1).

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* grants certain land in the Jervis Bay Territory (located on the coast of New South Wales, south of Nowra) to the Wreck Bay Aboriginal community. The Wreck Bay Aboriginal Community Council is established under the Act (s.4) and is to constitute people who are registered members, that is, people who are on the Register kept under the provisions of this Act (Part 4 Division 2).

*Aboriginal
Land Grant
(Jervis Bay
Territory)
Act 1986*

The functions of the Council include holding title to Aboriginal land, providing community services to members of the community and engaging in land use planning in relation to Aboriginal land. The Act requires the Council, in the performance of its functions, to have regard to the preservation of the environment and to give the Minister written notice of any works that it proposes to carry out that could have a significant effect on the environment (s.47). 'Environment' is defined to include all aspects of the surroundings of 'a natural person', whether affecting the person as an individual or in the person's social groupings. The Act gives the Council power to acquire, hold and dispose of property and enter into contracts (s.7).

The Act provides details of the tracts of land in the Territory that were granted to the Council, including lands in the Jervis Bay National Park and the Jervis Bay Botanic Gardens (ss.8 and 9A, and the Schedule). These lands are now renamed as Booderee National Parks and Booderee Botanic gardens. The Act also makes provision for later grants of adjoining vacant Crown land (s.9) and for the vesting of the land in the Council (s.10), including the relevant buildings (s.12).

The Act prohibits the Council from disposing of any estate or interest in Aboriginal land, and imposes restrictions on the granting of leases of, and licences to use, Aboriginal land (s.38). It allows the Council to surrender the whole or a part of its estate in Aboriginal land to the Crown, but only with the written consent of the Minister (s.39).

The Minister may not permit access to a site that has been declared to be of special significance to Aboriginal members of the community (s.38). Entry to such an area may be prohibited to people other than members of the Wreck Bay community and it is an offence to otherwise enter or remain in any such place. A public right of access to Aboriginal land is

dependent on the existence of a declaration to that effect by the Minister (s.49).

The Act empowers the Council to make by-laws for such matters as the management, access, conservation, fire protection, development and use of, activities to be permitted and the control of visitors on Aboriginal land (s.52A).

Other Aboriginal Land Acts

The Commonwealth has passed two other Aboriginal Land Acts that apply only in their particular jurisdictions. The first is the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). That Act applies solely in the Northern Territory, see Chapter 8.1. The other is the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*. That Act applies solely in Victoria, see Chapter 2.1.

Australian Capital Territory (Planning and Land Management) Act 1988 provides for the development of the National Capital Plan, the object of which is to ensure that Canberra and the Australian Capital Territory are developed in accordance with their national significance. The Territory Plan, which can not be inconsistent with the National Capital Plan, is created under the *Land (Planning and Environment) Act 1991* (ACT) (see Chapter 7.1).

The National Capital Plan may declare areas that have special characteristics of the national capital to be ‘designated areas’ (s.10). The Plan must define planning principles and policies and set standards for Canberra as the national capital. It must also set out general principles throughout the Australian Capital Territory with respect to land use and the planning of national and arterial road systems. It may specify detailed conditions and priorities in the planning, design and development of designated areas. The National Capital Authority (NCA) is responsible for the preparation and administration of the National Capital Plan.

The Act authorises the Minister administering it to declare specified areas within the Australian Capital Territory which are used, or are intended to be used, by, or on behalf of, the Commonwealth as ‘national land’ (s.27). National land may be administered by the Australian Capital Territory on behalf of the Commonwealth under the National Land Ordinance 1989 (s.6).

However, national land in the Parliamentary Triangle is managed entirely by the NCA, which has entered into service agreements with agencies of the ACT government for the provision of a number of services. The Aboriginal Embassy on the lawns in front of Old Parliament House is on national land administered by the NCA.

The Act specifies that land that is neither ‘designated land’ nor ‘national land’ is ‘Territory land’ (s.29); this land is managed and controlled by the Australian Capital Territory Executive on behalf of the Commonwealth under the laws which are summarised in Chapter 7.

The *Brigalow Lands Agreement Act 1962* is an Act relating to an agreement between the Commonwealth and the State of Queensland with respect to the development of the Brigalow Lands in the Fitzroy River Basin. The Agreement comprises of four agreements signed between 1962 and 1967, the purposes of which are to terminate existing tenancies in the specified areas to enable the relevant development works to proceed. The total area covers over 11 million acres.

Brigalow Lands Agreement Act 1962

Details of these works are specified in the various Schedules to the Agreements and centre around the clearing from the relevant blocks of land any timber and undergrowth, maintaining the blocks free of regrowth to enable the establishment of sown pastures, and to make provision for fencing, cattle tick control units, water facilities and breeding cattle. Provision is also made for the construction and maintenance of all-weather standard gravel roads.

The agreements also provide for the Commonwealth to give financial assistance to the State (s.4 and the preamble).

The *Commonwealth Places (Application of Laws) Act 1970* provides that the laws of a State in force from time to time, whenever passed, are adopted by the Commonwealth and will operate in any place in the State that is a Commonwealth place (s.4). The latter is defined in the Act (s.3) as being a place (excluding the seat of government, that is, the Australian Capital Territory) in respect of which the Commonwealth has the power to make laws for the peace, order and good government of the Commonwealth under s.52 of the Australian Constitution. This includes all places acquired by

Commonwealth Places (Application of Laws) Act 1970

the Commonwealth for a public purpose (Constitution: s.52(i)), matters relating to a department of the public service as well as any other matters within the exclusive power of the Commonwealth under the Constitution (s.52(iii)). This does not mean that States have power to legislate for Commonwealth places but State laws are effectively adopted. To avoid ambiguity, the Act specifically provides that any State law that would otherwise be invalid, for example because it is beyond power or is inconsistent with a law of the Commonwealth, does not apply (s.4(2)(a)).

Defence Act 1903 For the purposes of the *Defence Act 1903*, the Commonwealth owns significant tracts of land. The Constitution (s.51(vi)) provides the Commonwealth with power to legislate in relation to Australia's defence.

The Act enables the Minister for Defence to declare any area of defence land as specified in the written notice in the *Gazette* as a public area (s.116Q).

It also empowers the Minister to make by-laws for such public areas for their control and management (s.116ZD). This includes: specifying the responsibilities of rangers appointed for these purposes; regulating or prohibiting the pollution of soil, air or water in a manner that is, or is likely to be, harmful to people in, or to the natural features of, the area concerned; providing for the protection and preservation of public areas and property and things in those areas; and regulating, or prohibiting access to, public areas.

By-laws may also be made for the issue of permits, licences and authorities and the imposition of charges in public areas.

Endangered Species Protection Act 1992 The *Endangered Species Protection Act 1992* will be repealed on the commencement of Schedule 2 of the *Environmental Reform (Consequential Provisions) Act 1999* (see below). However, as the provisions of the Environmental Reform Act were not yet commenced at the time of writing, April 2000, and as, after the repeal of the *Endangered Species Protection Act 1992*, a number of instruments made under it and in force immediately before its repeal will continue to apply under certain conditions, the new Act is included in this Chapter below.

The objects of the *Endangered Species Protection Act 1992* include: promoting the recovery of species and ecological communities that are endangered or becoming vulnerable; and preventing other species or ecological communities from becoming endangered (s.3).

The objects are achieved by providing for the listing of native species, ecological communities and threatening processes under Part 2 and for certain protective measures to be adopted. These include: recovery and threat abatement plans (Part 3), conservation agreements and orders (Parts 4 and 5), and imposing obligations on people generally to comply with conservation orders in Commonwealth areas to which this Act applies (s.86).

The Commonwealth's powers in respect of these matters are limited and hence the operation of the Act is confined to Commonwealth areas. These are defined in the Act (s.5) as being land leased to or owned by the Commonwealth or a Commonwealth agency, including the Jervis Bay Territory and any area of land or sea that is declared to be a reserve or a park under the *National Parks and Wildlife Conservation Act 1975* (s.7) (see below and Chapter 8.1).

The Act defines a Commonwealth agency as being any Minister, department or body established for a public purpose by a law of the Commonwealth (s.4). This includes an Aboriginal land trust or an Aboriginal land council established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see Chapter 8.1), an Aboriginal corporation within the meaning of the *Aboriginal Councils and Associations Act 1976* (see 9.3 below) and the Wreck Bay Aboriginal Community Council established under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (see above and 9.3 below).

The Act imposes additional obligations on a Commonwealth agency to not take any action that contravenes a recovery or threat abatement plan or an impact assessment conservation order (ss.99 and 100). The Act requires such an agency, in taking any action or making a decision, to have regard for the need to comply with the relevant law of a State relating to the protection of native species or ecological communities, or the habitats of these (s.102).

The Act (ss.103 and 104) also imposes a requirement on a Commonwealth agency (other than the Minister responsible

for this Act) to notify the Minister in writing if that agency believes that the action which it is proposing to take may be an action to which the provisions of this Act (ss.99 and 100) applies.

Environment Protection and Biodiversity Conservation Act 1999 The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) becomes operative in July 2000. The Act combines the provisions of several environmental protection and biodiversity conservation acts, which are repealed on the commencement of this Act. The repealed Acts include the *Endangered Species Protection Act 1992* (see above), the *Environment Protection (Impact of Proposals) Act 1974*, the *National Parks and Wildlife Conservation Act 1975*, and the *World Heritage Properties Conservation Act 1983* (see below).

Included within the objects of the Act are: to promote a cooperative approach to the protection and management of the environment involving governments, the community, landholders and Indigenous peoples; to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and to promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge (s.3).

The Minister has power to decide whether an action that has, will have, or is likely to have a significant impact on certain aspects of the environment should proceed (Part 3 Division 1). These aspects are: world heritage, wetlands of international importance, listed threatened species and communities, listed migratory species, protection of the environment from nuclear accidents, and marine environment. The act prohibits a person from taking an action without the Minister having given approval or decided that approval is not needed. Approval is not needed to take a particular action in a bilateral agreement between the Commonwealth and the State or Territory if the agreement includes a declaration to that effect, or if a declaration by the Minister likewise, declares that approval is not required (Part 4 Divisions 1 and 2). Actions taken in accordance with regional forest agreements or a plan for managing the Great Barrier Reef do not need approval (Part 4 Divisions 4 and 5).

Bilateral Agreements

Chapter 3 provides for agreements between the Commonwealth and a State or self-governing Territory, these are called bilateral agreements. A bilateral agreement can detail the level of Commonwealth accreditation of State practices, procedures, processes, systems, management plans and other approaches to environmental protection.

A prerequisite for making bilateral agreements is for the Minister to have considered the role and interests of Indigenous peoples in promoting the conservation and ecologically sustainable use of natural resources in the context of the proposed agreement, taking into account Australia's relevant obligations under the *UNEP Convention on Biological Diversity* (s.49A of the Act).

A provision of a bilateral agreement does not have any effect in relation to an action in Booderee National Park, Kakadu National Park or Uluru – Kata Tjuta National Park (s.49). Special procedures apply to planning the management of these reserves, such as the protection of Aboriginal interests in the process of preparing management plans (s.390). It is also possible to develop a township within the Kakadu and Uluru – Kata Tjuta National Parks (s.388). Section 390A provides for the appointment of a person nominated by the Northern Territory as a member of the board for a Commonwealth reserve on Indigenous people's lands, where the lands are held by the Director of National Parks under lease in the Territory. This appointment is possible only with the consent of the members of the board nominated by the traditional owners of the lands, unless the traditional owners are unreasonably withholding consent.

Environmental Assessments and Approvals

Chapter 4 deals with assessment and approval of actions that are prohibited without approval under Chapter 2 Part 3, these are called controlled actions. These provisions do not deal with actions that a bilateral agreement declares do not need approval. An assessment may be done using: a process laid down under a bilateral agreement; a process specified in a declaration by the Minister; a process accredited by the Minister; the preliminary documentation provided by the proponents; a public environment report; and environmental impact statement; or a public inquiry. Once the report of the assessment is given to the Minister, they must decide whether

or not to approve the action, and what conditions to attach to any approval.

Conservation of Biodiversity

Chapter 5 has specific provisions for the conservation of biodiversity. The Minister may cooperate with, and give financial or other assistance to, any person for the purpose of identifying and monitoring components of biodiversity (s.171). The definition of 'components of biodiversity' includes species, habitats, ecological communities, genes, ecosystems and ecological processes (s.171(3)).

The killing, injuring or taking of a member of a listed threatened species or community is prohibited, but this can be authorised by a permit issued under s.201 (s.197). Among the conditions under which the Minister may issue permits, the Minister must not issue a permit unless satisfied that, where relevant, the specified action is of particular significance to Indigenous tradition and will not adversely affect the survival or recovery in nature of the listed threatened species or listed threatened ecological community concerned (s.201). Indigenous tradition refers to the body of traditions, observances, customs and beliefs of Indigenous people generally or of a particular group of Indigenous people (s.201(4)).

The role and interests of Indigenous people in the conservation of Australia's biodiversity must be considered when the Minister adopts a recovery plan, threat abatement plan, or wildlife conservation plan (ss.270, 271 and 287).

The Minister may enter into a conservation agreement with a person, including specifically an Indigenous person or body corporate, or a trust which holds land for Indigenous people (s.305). Conservation agreements may relate to private or public land or to marine areas (s.304).

Chapter 6 Part 17 has provisions for the enforcement of the EPBC. These provisions include powers of authorised officers, conservation orders, and civil penalties.

The Minister must consider the precautionary principle in making decisions. The precautionary principle acknowledges that lack of full scientific certainty should not be a reason for preventing environmental degradation where there are threats of serious or irreversible environmental damage (s.391).

Specific Provisions for Aboriginal and Torres Strait Islander Peoples Interests

It is specifically stated (s.8) that nothing in the EPBC affects the operation of the *Native Title Act 1993* (NTA) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see Chapters 8.1 and 9.6). To avoid doubt, nothing in the EPBC affects the operation of s.211 of the NTA – that section provides that holders of native title rights covering certain activities do not need authorisation required by other laws to engage in those activities.

An Indigenous advisory committee is established by the Act to advise the Minister on the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity (s.505A). Section 504 establishes the biological diversity advisory committee, and the Minister must ensure that membership of the Committee includes Indigenous people (s.504).

Commonwealth Reserves

Commonwealth reserves can be declared over areas of land or sea that the Commonwealth owns or leases (s.344). A proclamation must assign the reserve to a particular category that affects how the reserve is managed and used. Some activities can be undertaken in a reserve only if a management plan provides for them. The Minister may approve a management plan prepared by the Director of National Parks and any board for a reserve.

If land is in a State or self-governing Territory (except the Northern Territory); or the Northern Territory outside both Uluru – Kata Tjuta National Park and the Alligator Rivers region (as defined by the *Environment Protection (Alligator Rivers Region) Act 1978*), and is dedicated or reserved under a law of the State or Territory for purposes related to nature conservation or the protection of areas of historical, archaeological or geological importance or of areas having special significance in relation to Indigenous people, then the Commonwealth must not acquire the land for the purposes of declaring it a Commonwealth reserve, without the consent of the State or Territory (s.344(2)).

The provisions and regulations under Part 15 Division C (activities in Commonwealth reserves) do not prevent an Indigenous person from continuing in accordance with law the

traditional use of an area in a Commonwealth reserve for hunting or food-gathering (except for purposes of sale), or ceremonial and religious purposes. However, regulations may prevent such activity if they are made for the purpose of conserving biodiversity in the area, and expressly affect the traditional use of the area by Indigenous people (s.359A).

If a land council for Indigenous people's land in a jointly managed reserve and the Director of National Parks disagree about whether the Director is exercising the Director's powers and performing the Director's functions consistently with a management plan in operation, the Director must inform the Minister and then follow the Minister's direction ('land council', 'Indigenous person', 'Indigenous peoples land', and 'jointly managed reserve' are all defined in the same section) (s.363).

In agreement with Indigenous people, the Minister can set up a board for reserves including land leased from Indigenous people. A majority of board members must be Indigenous people nominated by traditional owners if the reserve is wholly or mostly on Indigenous people's land (s.377(4)).

Environment Protection (Impact of Proposals) Act 1974 The *Environment Protection (Impact of Proposals) Act 1974* will be repealed on the commencement of Schedule 3 of the *Environmental Reform (Consequential Provisions) Act 1999* (see next). However, as the provisions of the *Environmental Reform Act* were not yet commenced at the time of writing, April 2000, and as, after the repeal of the *Environment Protection (Impact of Proposals) Act 1974*, a number of instruments made under it and in force immediately before its repeal will continue to apply under certain conditions, the Act is included in this Chapter.

The object of the *Environment Protection (Impact of Proposals) Act 1974* is to ensure that matters affecting the environment are fully examined and taken into account in the consideration of proposals (s.5(1)). The Act defines 'the environment' as including all aspects of the surroundings of humans, including those affecting them as individuals and in social groupings (s.3). Even though there is no express reference to Aboriginal places, sites or objects, to the extent that these are part of the environment, there is a possibility that they would be covered.

The Act (s.4A), specifically excludes its operation in respect of any land, submissions made or anything done under the *World Heritage Properties Conservation Act 1983* (see below).

The Act provides for the making of approved procedures for its purposes, which include details of the requirements for, and contents of, public environment reports and environmental impact statements (s.6).

This Act commences when the *Environment Protection and Biodiversity Conservation Act 1999* commences, and was not yet commenced at the time of writing, April 2000. The Act repeals a number of Acts, including the *Endangered Species Protection Act 1992*, the *Environment Protection (Impact of Proposals) Act 1974*, the *National Parks and Wildlife Conservation Act 1975*, and the *World Heritage Properties Conservation Act 1983* (s.2). The provisions of these acts are replaced by the *Environment Protection and Biodiversity Conservation Act 1999* (see above).

Environmental Reform (Consequential Provisions) Act 1999

The *Human Rights and Equal Opportunities Commission Act 1986* provides for the establishment of the Human Rights and Equal Opportunities Commission (HREOC) (s.7), which consists of a President and a Human Rights Commissioner, and includes the Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) (s.8).

Human Rights and Equal Opportunities Commission Act 1986

The ATSISJC is appointed by the Governor General and must be a person who has significant experience in the community life of Aboriginal and Torres Strait Islander people (s.46B). The HREOC functions to be performed by the ATSISJC include reporting to the Minister on Indigenous peoples' enjoyment and exercise of human rights (as defined in the international instruments to which Australia is a party, s.46A), promoting discussion and awareness of human rights in relation to Indigenous people, and examining enactments and proposed enactments in relation to these matters (s.46C(1)).

In the performance of these functions, the ATSISJC is required to consult with ATSIC and may also consult with organisations established as Aboriginal or Torres Strait Islander communities, organisations of Indigenous peoples in other countries, international organisations and agencies, and

such other organisations, agencies or people as the Commissioner considers appropriate (s.46(3)). The Act also empowers the ATSIJSC to obtain information or documents that may be relevant for their purpose from the relevant government agency (s.46K).

The *Native Title Act 1993* (s.209) (see 9.6 below) provides that, as soon as practicable after 30 June in each year, the ATSIJSC must prepare and submit to the Minister responsible for the Native Title Act a report on the operation of the Native Title Act and the effect of the Act on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander people.

Lands Acquisition Act 1989 The *Lands Acquisition Act 1989* enables the Commonwealth to acquire land for a public purpose, which is defined to mean a purpose in respect of which the Parliament has power to make laws (s.6).

The interests that may be acquired under this Act include a legal or equitable estate or interest in land; such interests include an interest of the Commonwealth, a State or Territory in Crown land or an interest that did not previously exist in relation to particular land (s.17). The Governor General is also empowered to make a proclamation setting or dedicating to a public purpose land vested in the Commonwealth or in a person or an officer on behalf of the Commonwealth (s.122).

Any authorised person, being a person authorised by the Minister (s.7), may enter onto land and adjoining land to determine whether or not it is suitable for the proposed public purpose, including making surveys, taking levels, digging or boring into the land, and examining the soil (s.10). A person who has suffered loss or damage as a result of such action is entitled to claim compensation (s.95).

Means by Which Land May Be Acquired

The Act (s.16) provides the two means by which land may be acquired: by agreement (ss.19 and 40) and by compulsory process (ss.20 and 41). An acquisition (s.41) may not proceed in respect of a public park (being land that is dedicated, reserved or vested in trustees as a public or national park or otherwise for the purposes of public recreation under a law of a State or Territory, s.3) unless the Governor or Administrator of the State or Territory has agreed and Parliament has been

satisfied in relation to the processes required under the *Environment Protection (Impact of Proposals) Act 1974*.

If the land is, or is in, a national estate area under the *Australian Heritage Commission Act 1975* (see 9.2 below) or a world heritage area under the *World Heritage Properties Conservation Act 1983* (see below), an environmental impact statement under the *Environment Protection (Impact of Proposals) Act 1974* will need to be prepared (s.42) (see above).

The Act makes provision for the entitlement to compensation (s.52), and the principles to be applied (s.55). These include the market value of the interest on the day of acquisition, any loss of market value due to the severance of the acquired interest from the remainder of the land, and any legal costs that the holder of the interest incurred as a result of proceedings under this Act.

The formalities for making a claim for compensation are set out in the Act (s.67). The Act requires the courts to ensure that, consistent with the provisions of the Constitution (s.51(xxxi)), compensation is paid on just terms (s.93).

The Act (s.124) contains special provisions relating to mining on certain tracts of land that are discussed under 9.5 below.

The *Lands Acquisition (Defence) Act 1968* provides for the acquisition of land for defence purposes in the south-western outskirts of Sydney for the Holsworthy Base (as set out in Schedule 1) and land at O'Hare's Creek near Wollongong (as set out in Schedule 2).

Lands Acquisition (Defence) Act 1968

The object of the *Lands Acquisition (Northern Territory Pastoral Leases) Act 1981* was to enable the land in the Schedule (the Mudginburra and Munmarlay pastoral leases) to be acquired by the Commonwealth for the purposes of including it under the *National Parks and Wildlife Conservation Act 1975* (see below) and to enable it to be used for the mining of uranium (s.4).

Lands Acquisition (Northern Territory Pastoral Leases) Act 1981

The acquisition was through compulsory process and subject to payment of compensation as provided under the repealed *Land Acquisition Act 1959* (Part 4 and s.7).

The Act ensures that any application made to the Aboriginal land commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (s.50(1)) (see Chapter 8.1) is preserved as if the land was unalienated Crown land (s.14). Existing mining interests under the Northern Territory's *Mining Act 1980* (see Chapter 8.5) or the *Atomic Energy Act 1953* (see 9.5 below) are also intended to not be affected by this Act.

*Murray-Darling
Basin Act 1993*

The purpose of the *Murray-Darling Basin Act 1993* is to approve and provide the implementation of the agreement between the Commonwealth, New South Wales, Victoria and South Australia of 24 June 1992, with regard to the water, land and other environmental resources of the Murray-Darling Basin. The States have passed complementary legislation (see Chapter 1.1, 2.1, 3.1 and 4.1 above).

The purpose of the agreement is to promote and coordinate effective planning and management for the equitable, efficient and sustainable use of the waters, land and environmental resources of the Murray-Darling Basin (Part 1). The Act provides for the establishment of the MDB Commission to advise and assist the Minister in respect of these purposes, and to give effect to the policies of the Ministerial Council (Part 5). The Commission's powers include acquiring, holding and disposing of property for the purposes of the agreement.

The Ministerial Council is established under the Act and comprises three Ministers from each jurisdiction who have prime responsibility in relation to water, land and the environment (Part 3). Its functions are to give effect to matters relating to the purposes of the agreement and to authorise related works.

*National Parks
and Wildlife
Conservation
Act 1975*

The *National Parks and Wildlife Conservation Act 1975* will be repealed on the commencement of Schedule 4 of the *Environmental Reform (Consequential Provisions) Act 1999* (see above). Under the repeal provisions of Schedule 4 of that Act, provision is made for the continuation of: parks and reserves, and any boards of these parks and reserves; plans of management and their preparation; town plans; conservation zones; and, the appointment of wardens, rangers and wildlife inspectors. The provisions of the Environmental Reform Act were not yet commenced at the time of writing, April 2000.

The object of the Act (Part 2) is to provide for the establishment of parks and reserves appropriate to the Commonwealth, given its status as the national government, in the territories and coastal seas of Australia (s.6(1)). This includes matters relating to the continental shelf, carrying out obligations arising from international instruments signed by Australia and encouraging tourism between the States and between other countries and Australia.

Under the Act, land in the Northern Territory, other than land in Uluru – Kata Tjuta National Park or in the Alligator Rivers region (as defined under the *Environment Protection (Alligator Rivers Region) Act 1978* (see Chapter 8.1)), shall not be acquired by the Commonwealth if it is land that is dedicated or reserved under a law of the Territory for nature conservation or for the protection of areas of historical, archaeological or geological importance or of special significance to Aboriginal people (s.6(3)).

The Act empowers the director of national parks and wildlife to declare an area specified in the declaration as a park or reserve (s.7(2)). It limits an area in respect of which a declaration may be made to: land wholly owned or held under lease by the Commonwealth; any park, reserve, protected area or wildlife sanctuary in a Territory; an area of Aboriginal land held under lease by the director; and specified areas of the sea (s.7(1)).

‘Aboriginal land’ is defined as land in the Alligator Rivers region over which an Aboriginal land trust, established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), holds an estate in fee simple (s.3(1)). It also includes land in Booderee National Park that has been declared as Aboriginal land under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (see above and also 9.3 below).

The Act (s.9) prevents the Director from selling, leasing or otherwise disposing of an interest in a park or reserve, unless the applicable plan of management (prepared under s.11) provides for the grant of a licence or lease, or a re-issuing of them, to the jurisdiction of the Aboriginal Land Rights Act (Part 2).

The Act requires the director to prepare, as soon as practicable after the declaration of a park or reserve, a plan of management for such park or reserve (ss.11(1)-(5)).

If a board of management has been established under the Act (Part 2A), then this becomes the joint responsibility of the Board and the director. Public notice must be given, and the chairperson of the relevant Aboriginal land council or of the Wreck Bay Aboriginal Community Council (where applicable) must also be notified. Submissions must be invited on the draft plan and consideration must be given to any submissions received.

A plan of management must include a description of any existing or proposed buildings, structures, facilities or other development, as well as any mineral resources extraction proposals, including related works (ss.11(6) and (7)). The Act makes detailed provision for what needs to be included in a plan of management (s.11(8)), namely:

- parks – encouragement and regulation of the appropriate use, appreciation and enjoyment of the park by the public;
- reserves – regulation and use of the reserve for the purposes for which it was declared;
- parks or reserves in the Alligator Rivers region – the interests of the traditional Aboriginal owners of, or other Aboriginal people interested in, so much of a park or reserve as is in the region;
- Booderee National Park – the interests of the traditional Aboriginal owners of the land; and
- all parks and reserves – the preservation of their condition and the protection of special features, including objects and sites of biological, historical, palaeontological, archaeological, geological or geographical interest.

‘Traditional Aboriginal owners’ are defined (s.3(1)) in the same terms as under the Aboriginal Land Rights Act in the case of the Northern Territory or, as in relation to the Wreck Bay Aboriginal Community Council, in the Jervis Bay Territory Act.

Under the Act (Part 2A), the Minister, in conjunction with relevant Aboriginal land councils, is authorised to establish boards of management for parks and reserves that include areas of Aboriginal land.

The Aboriginal Land Rights Act (s.70(1)) does not prevent a person from entering or remaining on Aboriginal land for the purposes of exercising powers or functions under this Act (s.17F). The director of the Parks and Wildlife Service is required to consult with the appropriate Aboriginal people in the management of relevant lands (ss.18 and 19). The Act permits the traditional use of land or water for hunting or food gathering and ceremonial and religious purposes (s.70).

The effect of the *Petermann Aboriginal Land Trust (Boundaries) Act 1985* is to change the boundaries of the land held by the Petermann Aboriginal land trust (s.3). The land was vested in the trust (under s.4(1)) and through deeds executed under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (s.12) (see Chapter 8.1). The Act indemnifies the Commonwealth against any claims for compensation under Commonwealth or Territory law as a result of its commencement (s.5).

*Petermann
Aboriginal
Land Trust
(Boundaries)
Act 1985*

The relevant land is identified in the Schedule to the Act. It covers 44,970 square kilometres of land in the south-western area of the Territory around Uluru – Kata Tjuta national parks, and includes land in Mulga Park.

The *Urban and Regional Development (Financial Assistance) Act 1974* authorises Commonwealth departments to approve programs and grant financial assistance to the States for the restoration, preservation and improvement of landscapes of special significance. It does not refer explicitly to Aboriginal places, sites or objects, but it appears possible that it could be applied to provide resources for the protection of these.

*Urban and
Regional
Development
(Financial
Assistance) Act
1974*

The object of the *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* ('the Commonwealth Act') is to give effect to the agreement made between the Commonwealth and the State of Queensland on 16 November 1990. A copy of the agreement is set out in Schedule 1 to the *Queensland Wet Tropics World Heritage Protection and Management Act 1993* ('the Queensland Act') (see Chapter 3.1).

*Wet Tropics of
Queensland
World Heritage
Area
Conservation
Act 1994*

The purpose of the Commonwealth Act is to facilitate the implementation of Australia's international responsibility for

the protection, conservation, presentation, rehabilitation and transmission to future generations of the Wet Tropics of Queensland World Heritage Area. Under the provisions of the Act (s.9), nothing in it is intended to affect the operation of the *World Heritage Properties Conservation Act 1983* (see next).

The Queensland Act (s.6) provides for the establishment of the Wet Tropics Management Authority. The Commonwealth Act allows the Commonwealth Minister administering it to nominate members of the authority (s.5), among whom must be one or more Aboriginal representatives who have the appropriate knowledge of, and experience in, the protection of cultural and natural heritage (s.6).

The Commonwealth Act (s.8) also requires the Minister to use their best efforts, through consultation with the authority, to ensure that any advisory committee established under the Queensland Act includes among its members Aboriginal representatives who have appropriate knowledge of, and experience in, the protection of cultural and natural heritage.

World Heritage Properties Conservation Act 1983 The *World Heritage Properties Conservation Act 1983* will be repealed on the commencement of Schedule 6 of the *Environmental Reform (Consequential Provisions) Act 1999*. However, as these provisions were not yet commenced at the time of writing, April 2000, and as after the repeal the *World Heritage Properties Conservation Act 1983* and all instruments (including regulations, proclamations and consents) made under it and in force immediately before its repeal will continue to apply in relation to properties and sites to which sections of the Act apply, the Act is included in this Chapter. The new provisions limit the making of new proclamations and regulations. When the provisions become operative, a proclamation will no longer be able to be made under ss.6, 7 or 8, nor will regulations be able to be made for the purposes of ss.9, 10 or 11.

Power of Governor General to Make Declarations

The effect of the *World Heritage Properties Conservation Act 1983* is to empower the Governor General to declare a property as being a property to which the Act (s.9) applies if it is identified as property that is not in a State and if it is likely to be damaged or destroyed (ss.6(1) and 6(3)). The Act (s.9)

enables the Governor General to make regulations prohibiting acts in relation to property to which this provision applies.

The Act also empowers the Governor General to make a proclamation (s.6(3)) in respect of property in a State (s.6(2)). Such a proclamation may only be made upon the request of a State that the property be the subject of an application by the Commonwealth to the World Heritage Committee under the UNESCO *Convention for the Protection of the World Cultural and Natural Heritage* (Article 11) for its inclusion in the World Heritage List.

The Act also specifies that the protection or conservation of the property must be a matter for Australia's international obligations and the property must be part of the distinctive heritage of Australia (s.6(2)).

The Act (s.7) provides the Governor General with further power, by proclamation, to declare that property identified for the purposes of this Act is in danger of being damaged or destroyed by unlawful acts by foreign or trading corporations (s.10), over which the Commonwealth has powers under of the Constitution (s.51(xx)).

Provisions Relating to Aboriginal People

The Act (s.8(1)) declares the necessity of enacting special laws for Aboriginal people (ss.8, 11, 13(7) and 14(5)). The Act empowers the Governor General to declare, by proclamation, an Aboriginal site that is being or is likely to be damaged or destroyed as a site to which the Act (s.11) applies (s.8(3)). An Aboriginal site is defined as a site that is, or is situated within, identified property, the protection or conservation of which is, of significance to Aboriginal people whether by reason of the presence on the site of artefacts or relics or otherwise (s.8(2)).

Aboriginal Sites

The Act lists unlawful acts in relation to Aboriginal sites, which include any act that damages or destroys, or that is likely to result in the damage to or destruction of, any site to which this Act applies, or any artefacts or relics on such a site (s.11). Furthermore, it is unlawful under this Act for a person, without the consent of the Minister, to do acts such as carry out excavation works, mining operations, erect buildings or

substantial structures, remove artefacts or relics, or kill, cut down or damage any tree on land to which this Act applies.

Standing for Aboriginal People to Take Legal Action

The Act (s.13(7)) enables any Aboriginal person to make an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) if that person is aggrieved by the Minister's decision to give or refuse to give consent to the protection of Aboriginal sites or artefacts in danger of damage or destruction as provided under this Act (s.11). The Act (s.14(5)) empowers an Aboriginal person to apply to the Federal or High Court for an injunction restraining a person from doing an act that is unlawful by virtue of the provisions of this Act (ss.9-11).

COMMONWEALTH

9.2 HERITAGE

For a detailed synopsis of the *Aboriginal and Torres Strait Islander Commission Act 1989* see 9.1 above. The Act contains limited provision relating to heritage. The objects of the Commission include furthering the economic, cultural and social development of Aboriginal and Torres Strait Islander people (s.3(c)). The Commission's functions include the protection of Aboriginal and Torres Strait Islander cultural material and information considered sacred or otherwise significant by Aboriginal and Torres Strait Islander people (s.7(g)).

Aboriginal and Torres Strait Islander Commission Act 1989

The purpose of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is, 'the preservation and protection from injury or desecration of areas and objects in Australia and Australian waters of significance to Aboriginal people in accordance with Aboriginal tradition' (s.4).

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

'Aboriginal' is defined in the Act to mean a member of the Aboriginal race of Australia and includes descendants of the Indigenous inhabitants of the Torres Strait Islands (s.3(1)). An area is taken to be injured or desecrated if the use or significance of the area, in accordance with Aboriginal tradition, is adversely affected, or passage through or over, or entry upon, the area occurs in a manner inconsistent with Aboriginal tradition. An object is taken to be injured or desecrated if it is used or treated in a manner inconsistent with Aboriginal tradition (s.3(2)).

The Act is expressed to bind the Crown specifically in right of the Commonwealth, but does not exclude or limit any State law that can operate concurrently with it (s.7). The Minister is required to consult with a State or Territory about the adequacy of their legislation before making a declaration to protect an area or object in that State or Territory (s.13). However, the Federal Court has ruled that these provisions do not amount to a requirement to assess the application and effectiveness of the relevant legislation in an individual case

(*Tickner v Bropho* (1993) 40 FCR 183, per Black CJ, pp.195-199).

The Act provides the Minister for Aboriginal and Torres Strait Islander Affairs with powers to make declarations for the permanent or temporary protection of areas or objects (ss.9-12).

The Act (s.11) also provides that, where there is a serious or immediate threat to an area of injury or desecration, the Minister may, upon receiving an application from or on behalf of an Aboriginal person or a group of Aboriginal people, make an emergency declaration (under s.9). Such a declaration may contain provisions for, and in relation to, the protection and preservation of the area from injury or desecration (s.11). An emergency declaration is initially for up to 30 days, but the Minister may extend it for up to another 60 days (s.9(2)).

Applications under the Act (s.10) for more comprehensive and longer lasting declarations may be made by, or on behalf of, an Aboriginal person or a group of Aboriginal people seeking the protection of a specified area. As with an emergency declaration application (s.9), the Minister must be satisfied that the area is a significant Aboriginal area (as defined in s.3) and that it is under threat of injury or desecration. But, in addition, before making a declaration, the Minister must first have received and considered a report on matters relating to the significance of the area, the risk of injury or desecration, the nature and extent of the protection and restrictions required, proprietary and financial impacts on other people, and other matters (s.10(4)).

The Act provides a scheme of application for, and grant of, declarations in respect of a significant Aboriginal object or class of objects (s.12). The Minister is required to consider any effects that the making of a declaration may have on the pecuniary or proprietary interests of people other than the Aboriginal people who made the application or on whose behalf the application was made.

A declaration must describe the object with sufficient detail to enable it to be identified and must contain provisions for the protection and preservation of the object from injury or desecration. A declaration in relation to Aboriginal remains may include provisions ordering the delivery of the remains to the Minister or an Aboriginal person. An authorised officer

may make an emergency declaration that will be effective for a period of not more than 48 hours.

The Act does not require the Minister to make protective declarations under the Act (ss.9, 10 or 12), the power having been defined by the Federal Court as being ‘facultative, not imperative’ (per Lockhart J in *Wamba Wamba Local Aboriginal Land Council v Minister* (1989) 23 FCR 239, p.247). Having received an application made in good faith for a protective declaration, however, the Minister must make a decision and cannot choose not to decide; in other words, the Minister is required to exercise his discretion (*Tickner v Bropho* (1993) 40 FCR 183, per Black CJ, pp.195-199).

It is an offence for a person or body corporate to contravene a provision of a declaration made in relation to a significant Aboriginal area (ss.22 and 23). The Minister is empowered to apply to the Federal Court for an injunction where a person has engaged, or is proposing to engage, in conduct which breaches a declaration, or other related conduct (s.26).

Secrecy

In any proceedings in a court arising under this Act, the court may order the exclusion of the public, or of specified people, from a sitting of the court and make such orders as it sees fit for the purpose of preventing or limiting the disclosure of information with respect to the proceedings. Before making an order on application, the court must be satisfied that it is desirable to do so having regard to the interests of justice and the interests of Aboriginal tradition (s.27).

As was pointed out by the Federal Court in *Tickner v Chapman* (1995) 57 FCR 451, per Black CJ, pp.465-6, Burchett J, pp.478-9 and Kiefel J, p.487), this is the only express provision in this Act limiting the disclosure of information. For discussion of factors to be taken into account when deciding whether to restrict the legal representatives of parties from having access to documents, see *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 54 FCR 144.

It needs to be noted that, whereas the Act does not expressly provide for the acquisition of land for the purposes of protecting a significant Aboriginal area, where the operation of, or a declaration under, the Act would result in the acquisition of property other than on just terms, the Act

provides that the Commonwealth must pay such compensation as agreed between the parties or, in the absence of an agreement, as determined by the Federal Court (s.28).

In essence, the purpose of the Act is to provide the basis for Commonwealth action where the laws of the State or Territory cannot provide, or are not being applied to provide, the necessary protection for Indigenous heritage. It should also be kept in mind that the provisions of the Act that enable a declaration to be made by the Commonwealth Minister are only intended to be used as a last resort, after all other heritage protection mechanisms at State level have been exhausted.

The Act is intended to co-exist with legislation of the States and the Northern Territory. Those provisions are discussed in more detail in the Heritage sections of other Chapters. The Minister is required to consult with a State or Territory about the adequacy of its legislation before making a declaration to protect an area or object in a State or Territory (s.13(2)). The Federal Court has ruled that a mere acknowledgment of the existence of relevant State legislation does not amount to the required assessment of its application and effectiveness in an individual case (*Tickner v Bropho* (1993) 40 FCR 183, per Black CJ, pp.195-199).

- Aboriginal Land Grant (Jervis Bay Territory) Act 1986* For a detailed synopsis of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*, see 9.1 above. Among the functions of the Wreck Bay Aboriginal Community Council, established under the Act (s.4) to administer land declared as Aboriginal land in the Jervis Bay Territory, is to protect and conserve natural and cultural sites on Aboriginal land (s.6(cc)). The Council may also make by-laws for, or with respect to, cultural activities on Aboriginal land (s.52A(1)(b)) and the declaration of sacred or significant sites or other sites of significance to Aboriginal people on Aboriginal land (s.52A(1)(d)).
- Australian Heritage Commission Act 1975* The *Australian Heritage Commission Act 1975* is the primary national heritage legislation that creates the Australian Heritage Commission (s.6), the functions of which include advising the Minister on matters relating to, and identifying places included in, the national estate and compiling the Register of the national estate (s.7). In the performance of its functions the Commission must consult with departments and

authorities of the Commonwealth and the States, local government authorities and community and other organisations as it considers appropriate, having regard to the nature of the matter (s.8).

The 'national estate' is defined in the Act as consisting of places which are components of the natural or cultural environment, that have 'aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community' (s.4(1)). Among the criteria for the listing of a place are: its importance in the course or pattern of Australia's natural or cultural history; its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons; and its special association with the life or works of a person or a group of people of importance to Australia's natural or cultural history (s.4(1A)).

Indigenous Cultural Heritage

Many aspects of Aboriginal and Torres Strait Islander cultural heritage can fall within these criteria, and places of Indigenous heritage significance are included among those that may be included on the Register of the national estate (ss.22-24). The protection of national estate places under the Act is limited to an obligation on a Minister or an authority of the Commonwealth to refrain from taking action adversely affecting places, as part of the national estate, without first consulting with the Commission before taking any action which could harm or affect a registered place, and ascertaining that there are no 'prudent and feasible alternatives' to such action (s.30).

For an example of a listing of an area based on Indigenous heritage, see under *Lands Acquisition (Defence) Act 1968* in 9.1 above (interim listing of the Cubbitch Barta/Holsworthy national estate area). In approving the listing, the Commission took into account the continuous ties between the Aboriginal people and the area, being maintained through some Tharawal Local Aboriginal Land Council members who were in the Army, and other community organisations who wanted to conserve the area and had strong ties to the Army. The Commission took the view that there were sound prospects that the area would continue to be conserved through the joint efforts of the local Aboriginal land council, community organisations and the Department of Defence.

Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 The *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* establishes the Australian Institute of Aboriginal and Torres Strait Islander Studies and provides the Institute with the power to promote the study and protection of cultural heritage matters and to encourage community understanding of Aboriginal and Torres Strait Islander people and their societies (s.5). The Institute's functions include the establishment and maintenance of a cultural resource collection consisting of materials concerning Aboriginal and Torres Strait Islander studies (s.5(e)). Such studies are defined to mean research and study in relation to aspects of the culture, history and society of Aboriginal and Torres Strait Islander people (s.3).

Council for Aboriginal Reconciliation Act 1991 The *Council for Aboriginal Reconciliation Act 1991* establishes the Council (s.4), the object of which is to promote a process of reconciliation between Aboriginal and Torres Strait Islander people and the wider Australian community, based on an appreciation by the Australian community of the unique position of Aboriginal and Torres Strait Islander people of Australia and their cultures (s.5).

The functions of the Council include: undertaking initiatives to promote reconciliation between Aboriginal and Torres Strait Islander people and the wider Australian community; and promoting, by leadership, education and discussion, a deeper understanding by all Australians of the history, culture, past dispossession and continuing disadvantage of Aboriginal and Torres Strait Islander people (s.6(1)). In carrying out its functions, the Council is required to have regard to the specific functions and responsibilities of ATSIC and the Torres Strait Regional Authority established under the *Aboriginal and Torres Strait Islander Commission Act 1989* (see above and 9.1).

The Council is empowered to do all things necessary or convenient for, or in connection with, its functions, including inviting submissions, holding inquiries and organising conferences and public education activities, but it may not enter into contracts (s.7). It comprises between 15 and 25 people, including: a chairperson, who must be an Aboriginal person; a deputy chairperson; a member nominated by the Prime Minister; a member nominated by the Leader of the

Opposition in the House of Representatives; members nominated by each of the leaders of any non-Government party in the Parliament which has at least five members and is not part of the Opposition; two members, each nominated by the chairperson and deputy chairperson of ATSIC; and other members. At least 12 of the members must be Aboriginal people and two must be Torres Strait Islander people (s.14).

The Council must prepare a strategic plan in three-year cycles that covers the Council's goals and objectives, proposed programs, the cost of these, and such performance indicators as the Council considers appropriate, which the Minister must table in Parliament within 15 sitting days of receipt (s.10). The Act ceases on 1 January 2001 (s.32).

The *Environment Protection (Impact of Proposals) Act 1974* will be repealed on the commencement of Schedule 3 of the *Environmental Reform (Consequential Provisions) Act 1999* (see 9.1 above). The *Environment Protection (Impact of Proposals) Act 1974* could be invoked in relation to Aboriginal cultural heritage through the mechanisms of environmental impact assessment and public environmental inquiries (s.6(2)).

*Environment
Protection
(Impact of
Proposals)
Act 1974*

Under the Act, the Ranger Uranium Inquiry investigated, among other matters, the question of Aboriginal cultural interests relating to land in the Northern Territory (see R. Fox, C.G. Kelleher and C.B Kerr, *Ranger Uranium Inquiry*, AGPS Canberra, 1976).

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) becomes operative in July 2000. The Act combines the provisions of several environmental protection and biodiversity conservation Acts, which are repealed on the commencement of this Act (see 9.1 above for a more detailed description of the EPBC). One of the repealed Acts is the *World Heritage Properties Conservation Act 1983* (see next and 9.1 above).

*Environment
Protection and
Biodiversity
Conservation
Act 1999*

Under the EPBC the Commonwealth may submit a property for inclusion in the World Heritage List only after seeking the agreement of relevant States, self-governing Territories and land holders (s.314). The World Heritage List is the list kept under that title under Article 11 of the UNESCO *Convention*

for the Protection of the World Cultural and Natural Heritage. The Commonwealth must try to prepare and implement management plans for properties on the World Heritage List, in cooperation with the relevant States and self-governing Territories (s.316).

Hindmarsh Island Bridge Act 1997 The *Hindmarsh Island Bridge Act 1997* ensures that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (see above) does not extend to the making of a declaration in relation to the preservation or protection of the Hindmarsh Island bridge area (s.4).

This area extends from the shoreline at the town of Goolwa in South Australia and the area opposite on Hindmarsh Island. The purpose of the legislation was to clear the way for the proponents of the bridge construction project to proceed with the project, notwithstanding the objections of the Ngarrindjeri people on the basis of the area's traditional significance.

In the case of *Kartinyeri and Anor v The Commonwealth* (1998) 152 ALR 540 the High Court with a 5-1 majority ruled that the Act was valid because the Commonwealth's power to make laws on racial matters which are set out in the Constitution (s.51(xxvi)) included the power to amend such legislation, regardless of the detriment to any particular group.

National Gallery Act 1975 The *National Gallery Act 1975* provides for the National Gallery of Australia to develop and maintain a national collection of works of art (s.6). Through this Act the Gallery has established and is maintaining a large collection of items of Aboriginal art, playing an important role in the recognition and protection of Indigenous heritage objects.

National Museum of Australia Act 1980 The *National Museum of Australia Act 1980* established the Museum as a body corporate (s.4), one of the functions of which is to develop and maintain a collection of historical material (s.6). A primary responsibility is the Gallery of Aboriginal Australia (s.5).

Part 3 established a Museum Council of up to 12 members, who are required to have knowledge of matters relating to Australian history (s.13). There is no requirement for Aboriginal representation on the Council, but to date it has

always included at least one Aboriginal person. The Council has also set up an Aboriginal advisory committee and the Museum provides for the protection of an extensive collection of Indigenous heritage objects.

The *National Parks and Wildlife Conservation Act 1975* will be repealed on the commencement of Schedule 4 of the *Environmental Reform (Consequential Provisions) Act 1999* (see 9.1 above). The *National Parks and Wildlife Conservation Act 1975* provided for the establishment of parks and reserves by the Commonwealth.

National Parks and Wildlife Conservation Act 1975

The effect of the Act was to prevent the Commonwealth from acquiring for the purposes of this Act, without the consent of the relevant State, land that has been dedicated or reserved under a law of a State for purposes that include the protection of areas of historical or archaeological importance or areas having special significance to Aboriginal people (ss.6(2) and (3)).

The *Protection of Movable Cultural Heritage Act 1986* carries into domestic law Australia's obligations under the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property* (Paris, 17 November 1970). It binds the Crown in right of the Commonwealth, the States, the Northern Territory and Norfolk Island, and applies both within and outside Australia, and to all external Territories (ss.4-6).

Protection of Movable Cultural Heritage Act 1986

The Act defines movable cultural heritage as objects that are of importance to Australia, or a particular part of Australia, for historical, ethnological, archaeological, artistic or scientific reasons, and explicitly includes objects relating to Aboriginal people and descendants of the Indigenous inhabitants of the Torres Strait Islands (s.7(1)(b)).

The Act makes it an offence to export knowingly, or attempt to export, an Australian protected object unless authorised in writing by the Minister (s.9). However, the Minister must not grant such authority if the object is of such importance that its loss would significantly diminish Australia's cultural heritage (s.6).

The Act sets up a national cultural heritage control list of objects constituting the movable cultural heritage. The list is

divided into Class A and B objects. Class A objects are not to be exported other than in accordance with a certificate of exemption and Class B objects can be exported only with a certificate of exemption or a permit (s.8). Permits and exemptions may be granted subject to specified conditions (ss.10 and 12) and a person exporting an object other than in accordance with a permit or certificate may forfeit the object. Penalties of up to \$100,000 for people and \$200,000 for corporations are provided for as sanctions against those convicted of knowingly exporting such objects (s.9).

Further specifics are provided in Part 2 of the Schedule to the Protection of Movable Cultural Heritage Regulations 1987, which itemises the categories of heritage objects made by, or having cultural significance to, Indigenous people of Australia. Human remains, sacred and secret ritual objects, rock art, bark and log coffins and carved burial trees are Class A objects. Objects relating to famous Aboriginal people, archaeological objects, objects made on reserves and missions, objects relating to the development of Aboriginal protest and self-help movements, and original documents, photographs, drawings, sound recordings, film and video recording and other similar objects are among the relevant Class B objects.

Racial Discrimination Act 1975 The *Racial Discrimination Act 1975* represents in domestic law the ratification by Australia of the *International Convention on the Elimination of All Forms of Racial Discrimination*. The Act makes it unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, which has the effect or purpose of nullifying or impairing the recognition, enjoyment or exercising, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life (s.9).

The Act (s.8) empowers the Commonwealth to make special measures as provided in the Convention (Article 1, para.4), but only for the purposes specified (in s.10). The Act ensures that all people have a right to equality before the law, notwithstanding the provision of any law of the Commonwealth, the States or the Territories to the contrary (s.10(1)).

The Act (s.10(3)) makes any law that authorises property owned by an Aboriginal or Torres Strait Islander person to be managed by another person without the consent of the Aboriginal or Torres Strait Islander person, or that prevents or restricts an Aboriginal or Torres Strait Islander person from terminating the management by another person of property owned by an Aboriginal or Torres Strait Islander person, repugnant to its provisions (s.10(1)).

For a more detailed synopsis of the *World Heritage Properties Conservation Act 1983* see 9.1 above. The *World Heritage Properties Conservation Act 1983* will be repealed on the commencement of Schedule 6 of the *Environmental Reform (Consequential Provisions) Act 1999* (see 9.1 above). However, as these provisions were not yet commenced at the time of writing, April 2000, and as, after repeal, the *World Heritage Properties Conservation Act 1983* and all instruments (including regulations, proclamations and consents) made under it and in force immediately before its repeal, will continue to apply in relation to properties and sites to which sections of the Act apply, the Act is included in this Chapter.

World Heritage Properties Conservation Act 1983

The Act implements Australia's obligations under the UNESCO *Convention for the Protection of the World Cultural and Natural Heritage* (Paris, 23 November 1972), which is in the Schedule 2 and forms part of the Act. 'Cultural heritage' is defined as the works of humans or the combined works of nature and humans, and includes areas such as archaeological sites which are of value from an historical, aesthetic, ethnological or anthropological point of view (s.3(1)).

A national cultural heritage committee is established to advise the Minister (s.15). One of the 10 members must be a nominee of the Minister for Aboriginal and Torres Strait Islander Affairs (s.17).

The Act contains special provisions relating to Aboriginal people. An Aboriginal site is defined as one which is within identified property and the protection of which is of particular significance to Aboriginal people, whether by reason of the presence on the site of artefacts or relics or otherwise (s.8(2)(b)).

Under the Act it is an offence, without the written consent of the Minister for the Environment with respect to Aboriginal

sites, to: undertake excavation work, exploratory drilling work or operations in connection with the recovery of minerals; erect buildings or structures; remove, damage or destroy any artefacts or relics; cut down, kill or damage any tree; construct or establish any road or vehicular track; or use explosives (s.11).

COMMONWEALTH

9.3 LOCAL GOVERNMENT

The stated purpose of the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978* is to empower Aboriginal and Torres Strait Islander people who live on reserves in Queensland to manage and control their own affairs.

Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978

The Act empowers the Minister to declare an Aboriginal or Islander reserve or community to be one to which the Act applies if the Council for the relevant reserve or community requests the Minister to do so, or if the Minister is satisfied that a substantial majority of the relevant Indigenous adults resident on the reserve or in the community wish to manage and control their affairs in accordance with and under the Act (s.5). It also empowers the Minister to declare an Aboriginal or Island council for the purposes of the Act (s.6).

The functions of a council are to manage and control the affairs of the community or reserve for which it has been established and is responsible, and such other functions provided for under regulations made under the Act (s.7). Councils are responsible to their communities for the provision of such matters as education or training, relief work for unemployed people, housing, health, sewerage, water and electricity supply, communications, roads and associated works, community amenities and welfare (ss.8 and 9). Entry to, and residence on, a reserve is subject to a permit issued at the discretion of a council (s.12).

The purpose of the *Aboriginal Councils and Associations Act 1976* is to provide for the constitution of Aboriginal councils and the incorporation of associations of Aboriginal people and related matters. An 'Aboriginal Association' is defined under the Act as an association or body, for which eligibility for membership is limited to Aboriginal people and their spouses, and that has no fewer than five adult Aboriginal people as members and that is formed or carried on for any lawful object (s.3). 'Aboriginal' for the purposes of the Act includes Aboriginal or Torres Strait Islander people.

Aboriginal Councils and Associations Act 1976

The Act provides for the appointment of a Registrar of Aboriginal corporations, who maintains a separate Register of Aboriginal councils and incorporated Aboriginal associations, and advises Aboriginal people on the constitution of Aboriginal council areas and the incorporation of associations (ss.4 and 5).

Aboriginal councils and associations are collectively defined as Aboriginal corporations (s.3). By the end of 1999, over 2,850 Aboriginal corporations were registered under the Act.

The Registrar is given extensive powers of investigation of the affairs of an Aboriginal corporation (ss.68 and 69). This includes the power to enter the land and premises of a corporation at all reasonable times (s.70) and to examine any or all of the books on that land or premises that relate to the affairs of the corporation and take possession of them (s.70(1)). The Act provides for a \$1,500 penalty for obstructing the Registrar in the exercise of these powers (s.70(3)).

Aboriginal Councils—Part 3

The Act enables 10 adult Aboriginal people living in a particular area to make written application to the Registrar for the area to be constituted as an Aboriginal council area with a view to the establishment of a council for that area (s.11). The application must specify what services the council will be expected to provide, which may include health, housing, sewerage, water and electricity supply, communications, education or training, relief work for unemployed people, roads and associated works, garbage disposal, and welfare and community amenities. This legislation creates local self-government for Indigenous people analogous to municipal local government operating throughout Australia.

If the Registrar is satisfied that the substantial majority of the Aboriginal people living in the area is in favour of the proposal and that, having regard to the needs and resources of the Aboriginal people living in the area the proposed council could effectively perform the functions specified in the application, and that there are no other legal impediments to the proposal, the Registrar may, by notice published in the Commonwealth *Gazette*, constitute the area as an Aboriginal council area (ss.16(1) and (2)).

If the Registrar is not satisfied in respect of these matters, they must refer the proposal to the Minister for resolution (s.16(4)). The Minister has discretion on how to resolve the issue and may, having regard to the customs and wishes of the adult Aboriginal people living in the area, direct the Registrar to constitute the area as an Aboriginal council area unless there is a legal impediment (s.17). Once the area is constituted, the relevant Aboriginal council is established (s.19). That council is a body corporate that may acquire, hold and dispose of real and personal property, and may pass by-laws for purposes connected with its functions (s.30).

Aboriginal Associations—Part 4

The Act enables a committee (that is, the members who conduct the affairs of the association, see s.3) of an Aboriginal association to apply for incorporation under this Act (s.43). The application must state the objects of the association, as well as details of members' liability, the place(s) where the association's activities are to be carried on, the names and addresses of the members of the committee, and the proposed rules of the association.

Once incorporated, the association becomes an incorporated Aboriginal Association and the name of the association must include 'Aboriginal Corporation' or 'Torres Strait Islander Corporation' (s.43(2)). It becomes a body corporate with power to acquire, hold and dispose of real and personal property (s.46(1)).

For a detailed synopsis of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* see 9.1 above and Chapter 7.

The Act provides for the Wreck Bay Aboriginal Community Council to administer part of the Jervis Bay Territory, which is situated near Nowra in New South Wales but is part of the Australian Capital Territory. The community performs the powers and functions associated with local government in the area.

Aboriginal Land Grant (Jervis Bay Territory) Act 1986

Australian Capital Territory (Self-Government) Act 1988 The *Australian Capital Territory (Self-Government) Act 1988* provides for the government of the Australian Capital Territory (ACT) and establishes the ACT as a body politic under the Crown (s.7). It establishes the legislative assembly of the ACT (s.8) and vests in it the power, subject to the Act, to make laws for the peace, order and good government of the Territory (s.22).

In respect of all matters beyond the statutory powers of the legislative assembly, the laws of the Commonwealth apply and the Constitution (s.128) gives the Commonwealth overriding powers in respect of Australian territories such as the ACT and Jervis Bay. On national land (being land in the parliamentary triangle, as well as certain tracts of defence and other land set aside for the purposes of administration by the Commonwealth), the laws of the Commonwealth, such as the *Australian Capital Territory (Planning and Land Management) Act 1988* (see 9.1 above), apply.

The effect of this regime is to provide the Commonwealth National Capital Authority (NCA) and various other Commonwealth agencies, such as Australian Estate Management, with the powers and functions that equate to 'local government'. The NCA has entered into numerous agreements with the ACT government and other agencies to assist it in the provision of the relevant goods and services.

Local Government (Financial Assistance) Act 1995 The objects of the *Local Government (Financial Assistance) Act 1995* are to provide financial assistance to the States and Territories for the purposes of improving: the financial capacity of local governing bodies; the capacity of these bodies to provide their residents with an equitable level of services; the certainty of funding for these bodies; the effectiveness and efficiency of these bodies; and the provision by these bodies of services to Aboriginal and Torres Strait Islander communities (s.3).

The grants are administered by a local government grants commission established in each State and the Northern Territory, which must be a body whose principal function is the making of recommendations to the government in its jurisdiction with respect to the provision of financial assistance to local governing bodies in that jurisdiction.

The membership of such a commission must include at least two people who are, or have been, associated with local government in the jurisdiction (s.5).

The Act sets out the national principles governing allocation of funds under it, which include ensuring that each local governing body in each jurisdiction is able to function by reasonable effort at a standard not lower than the average standard of other local governing bodies in the jurisdiction, and that takes account of differences in expenditure required to be incurred by local governing bodies in the performance of their functions and in their capacity to raise revenue (s.6).

The *National Environment Protection Council Act 1995* implements the Inter-governmental Agreement on the Environment (IGAE), signed by the Prime Minister, the premiers of the States and the chief Ministers of the ACT and the Northern Territory in May 1993. The States and Territories have enacted complementary legislation. For a detailed discussion see Chapter 8.1. The relevance of the Act to issues in this section is that the IGAE makes the Australian Local Government Association (ALGA) a party to the Agreement and a key stake-holder in the implementation process. ALGA has also played a key role in seeking to ensure that local governments become familiar with and understand the law relating to native title.

*National
Environment
Protection
Council Act
1995*

COMMONWEALTH

9.4 MARINE

The *Coastal Waters (State Powers) Act 1980* confers legislative power over the first three nautical miles of the territorial sea to the States (s.4). This includes giving power to the States to make laws over coastal waters as if those waters were within the State limits, including laws applying to the sea-bed and subsoil beneath, and the airspace above (s.5(a)).

*Coastal Waters
(State Powers)
Act 1980*

The Act does not authorise a State to make a law that is inconsistent with a law of the Commonwealth (s.7(c)), as specified in s.109 of the Australian Constitution. These powers are also subject to the operation of the *Great Barrier Reef Marine Park Act 1975* (see below). However, this has been modified by the provisions of the *Coastal Waters (State Title) Act 1980* to an important degree.

The *Coastal Waters (State Title) Act 1980* vests the first three nautical miles of the territorial sea, the seabed and airspace above these waters (called the 'coastal waters') in the States, but is subject to any immediately pre-existing right or title to property in the sea-bed (s.4). This is likely to mean that the Act does not extinguish native title rights, including fishing rights, in the coastal waters. However, amendments to the *Seas and Submerged Lands Act 1973* (s.16(1)(b)) (see below) have the effect of authorising State governments to deal with the coastal waters as though they were part of the State.

*Coastal Waters
(State Title)
Act 1980*

Therefore power vested in the States under this Act would likely enable the States to extinguish native title hunting, gathering and fishing rights in their coastal waters, despite the fact that the original vesting of title in offshore areas was subject to native title interests. However, there would be doubts over the validity of such a law in light of the provisions of the *Racial Discrimination Act 1975* (see 9.2 above); even if such a law was valid, in that the legislative power is derived from a law of the Commonwealth, it is possible that Indigenous Australians would be entitled to just terms compensation for any extinguishment under s.51(xxxi) of the Constitution.

Environment Protection and Biodiversity Conservation Act 1999 The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) becomes operative in July 2000. The Act combines the provisions of several environmental protection and biodiversity conservation Acts, which are repealed on the commencement of this Act (for a more detailed description of the EPBC see 9.1 above).

The Minister has the power to decide whether an action that has, will have or is likely to have a significant impact on certain aspects of the environment, including the marine environment, should proceed (Part 3 Division 1). Actions taken in accordance with a plan for managing the Great Barrier Reef do not need this approval (Part 4 Division 5).

In a Commonwealth marine area, or outside a Commonwealth marine area but in the Australian jurisdiction, a person must not take an action that has, will have or is likely to have a significant impact on the environment of Commonwealth marine area (s.23). Although, such actions are not an offence if approval is given or not necessary (ss.23(4) and 23(5)).

Within the coastal waters of a State or the Northern Territory a person must not fish in a Commonwealth managed fishery (as defined in the *Fisheries Management Act 1991*, see below) in a manner that will or is likely to have a significant impact on the marine environment (s.23(3)). Such actions are not an offence if approval is given or otherwise excepted (ss.23(4) and 23(5)).

The Australian Fisheries Management Authority must make agreements under Part 10 Division 1 of the EPBC for the assessment of actions in fisheries managed under the *Fisheries Management Act 1991* (see below) (s.148 of the EPBC). An agreement must be made whenever it is proposed to make a management plan or a determination not to have a plan. An agreement must be made within five years of the commencement of this Act for all fisheries that did not have plans at that commencement (s.150).

The Minister responsible for the *Torres Strait Fisheries Act 1984* (see below) must make agreements under Division 1 for the assessment of actions permitted by policies or plans for managing fishing in the Torres Strait. All policies or plans must be covered by an agreement within five years after the commencement of this Act (s.151).

A further agreement for assessment must be made if the impact of the actions is significantly greater than assessed under an earlier agreement (s.152).

If the Minister endorses a policy or plan assessed under an agreement under Division 1, the Minister must make a declaration that actions under the policy or plan do not need approval under Part 9 for the purposes of ss.23 or 24A (which protect the marine environment) (s.153).

The Minister must prepare inventories that state the abundance of the listed marine species on Commonwealth land and establish a list of marine species (ss.172, 173 and 248). A Commonwealth marine area must be covered by such surveys within 10 years after the commencement of this Act, or within 10 years after the area became a Commonwealth marine area, whichever is later.

The killing, injuring, trading or taking of a member of a listed threatened species or community is prohibited, but this can be authorised by a permit issued under s.257 (ss.253-258). The provisions relating to conservation agreements and Commonwealth reserves apply to marine areas (ss.304-312 and 342-373).

The *Fisheries Management Act 1991* controls fishing in the waters of Australia's continental shelf and exclusive economic zone, which extends 200 nautical miles from the Australian shoreline. Depending on the width of the continental shelf, the fishing zone may extend up to 350 nautical miles. There is provision for joint management of fisheries with the States and the Northern Territory (this is discussed in more detail below).

*Fisheries
Management
Act 1991*

The Act, along with the *Fisheries Act 1952* (which has been repealed except for those parts providing for the regulation of certain fisheries and implementing the *Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America*, signed by Australia, New Zealand, United States of America, Papua New Guinea and a number of Pacific island states at Port Moresby in April 1987), implements a regime of management of fisheries on behalf of the Commonwealth.

The objectives of this regime include ensuring that the exploitation of fisheries resources and related activities are conducted in a manner consistent with ecologically sustainable

development, and that regard is had to the impact of fishing on non-target species and to the long term sustainability of the marine environment (s.3(1)(b)).

Another objective centres on ensuring that the resources of the Australian Fishing Zone (AFZ) are not over-exploited, while at the same time ensuring optimum utilisation of the living resources of the AFZ, without acting in a way inconsistent with the preservation, conservation and protection of all species of whales (s.3(2)).

The Act picks up on the definition and delineation of coastal waters as provided under the Coastal Waters Acts (see above) for the purposes of this Act, while including the territorial sea adjacent to the Jervis Bay Territory as being adjacent to New South Wales for these purposes (s.5). The Act applies to all boats and people (domestic and foreign) in the AFZ, as well as to any Australian boats and all people (including foreigners) on boats engaged in a managed fishery outside the AFZ (s.7).

The Act ensures that no laws of the States or Territories apply to activities in the AFZ, or to activities relating to fisheries in the coastal waters of a State or Territory in respect of which an arrangement under the *Fisheries Act 1952* or under this Act (s.76) applies, or to the landing of fish in a State or Territory under a statutory fishing right (see Divisions 2 to 4 of Part 2 of this Act) or permit (see Divisions 5 and 6 of this Act), requiring such landing (s.10). Otherwise, the Act makes it clear that the concurrent operation of State or Territory laws is contemplated (s.10).

The Act (Part 5) provides for the establishment of joint authorities for each of the States and the Northern Territory with responsibility shared between the Minister responsible for this Act and the relevant Minister of each State and the Northern Territory (ss.61 and 62). It also provides for the joint authority to manage any arrangements entered into between the States and the Commonwealth (s.71).

The Commonwealth may enter into an arrangement with a State with respect to a particular fishery, in waters relevant to the State, that enables the fishery to be managed exclusively under either Commonwealth law or State law (s.72).

Where an arrangement under Part 5 Division 3 (ss.71-81) provides that a particular fishery is or may be carried on partly within the coastal waters of a State, it is to be managed under Commonwealth law; the coastal waters of that State are to be

taken to be in the AFZ for the purposes of the application of this Act in relation to that fishery (s.76). Conversely, if an arrangement under those sections provides that a fishery is to be managed in accordance with the laws of a State, this Act (other than Part 5 Division 3) does not apply to that fishery except in relation to foreign boats, and operations on and from and people on such boats, and matters that occurred before the arrangement took effect (s.77).

Native Title Rights and Interests

At common law, traditional rights to fish are a recognisable form of native title (see Kirby P in *Mason v Tritton* [1994] 34 NSWLR 572, p.579, and *Yanner v Eaton* (1999) 166 ALR 258). Traditional fishing rights may only be extinguished by legislation if it contains a clear and plain intention to do so. A law which merely regulates native title fishing rights, or a law which is consistent with the continuation of those rights, does not amount to extinguishment (Brennan J in *Mabo v Qld [No. 2]* (1992) 175 CLR 1, pp.64-65).

The Act must be read in conjunction with the other Acts listed in this section, in particular the *Native Title Act 1993*, discussed below, which preserves traditional fishing rights (specifically ss.17, 20, 23 and 223). Reference in this context should also be made to the decision of the Federal Court in the *Croker Island Case (Yarmirr v Northern Territory)* (1998) 156 ALR 370 and see also *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426).

The objects of the *Great Barrier Reef Marine Park Act 1975* include providing for the establishment, care, control and development of a marine park in the Great Barrier Reef region off the coast of Queensland (see ss.30-39), specifically as they relate to the Commonwealth's constitutional powers in relation to such matters as the Australian coastal sea, the continental shelf of Australia, fisheries in Australian waters beyond territorial limits and places acquired by the Commonwealth for public purposes (s.5).

*Great Barrier
Reef Marine
Park Act 1975*

The Act establishes the Great Barrier Reef Marine Park Authority (s.6), the functions of which include making recommendations to the Minister in relation to the care and development of the marine park, preparing zoning plans for the marine park under Part 5 and plans of management under

Part 6, and furnishing advice and information to the Minister on matters relevant to the State of Queensland.

Queensland has also enacted legislation to give effect to its obligations under the legislative regime applying to the marine park (see *Marine Parks Act 1982* in Chapter 3.4).

The authority is to comprise a chairperson, one member appointed to represent the interests of the Aboriginal communities adjacent to the marine park and two other members (s.10).

The Act enables the authority to prepare plans of management for the marine park (s.39W). The objects include ensuring that activities in the marine park are managed on the basis of ecologically sustainable use, providing for the management of the marine park in conjunction with community groups that have a special interest in the area concerned, and ensuring that threats to the nature conservation and cultural and heritage values of particular areas of the marine park are reduced or eliminated.

The authority may also enter into agreements or arrangements with community groups who have special interests in the area (s.39ZA).

Native Title Rights and Interests

The Act imposes a regime of control of fisheries and other activities in Queensland waters, but this would not amount to an extinguishment of native title rights and interests. Native title rights may survive where the Crown has appropriated and set aside land for use as a national park.

The *Native Title Act 1993* (s.211) (see next) provides for the preservation of certain native title rights and interests, including fishing. Therefore native title holders may not need to apply for a permit or licence for fishing in those parts of the marine park in which they have carried out traditional fishing activities, particularly for personal, domestic or non-commercial purposes.

Native Title Act 1993 The *Native Title Act 1993* (NTA) (s.6) extends its application to the coastal sea of Australia and the external territories, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* (see below).

The extension by Australia of its exclusive economic zone to 200 nautical miles under the United Nations *Convention on the Law of the Sea* arguably constitutes a permissible future act. If this is the case, native title rights in Australia's territorial waters may extend from between three and 200 nautical miles from the territorial sea baselines (see further under the Coastal Waters Acts above, and the *Seas and Submerged Lands Act 1973* below).

The NTA preserves from the operation of Commonwealth, State and Territory regulatory laws, all native title rights and interests involving certain classes of activities, including hunting, gathering and fishing (s.211).

The Federal Court in the *Croker Island Case (Yarmirr v Northern Territory)* (1998) 156 ALR 370 and *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426, confirmed that native title rights and interests exist offshore. However, as Olney J pointed out in the *Croker Island Case*, these rights are not exclusive. They are subject to any pre-existing fishing and mining rights, similar to native title rights in onshore places such as land under a pastoral lease.

The *Offshore Minerals Act 1994* applies to the exploration for and mining of minerals other than petroleum in the sea and sea-bed (ss.22 and 35). The legal framework applies to the mineral resources of the continental shelf, extending from the three nautical mile limit of the States to the outer limits of the continental shelf (s.13). Under Part 2.2 and Part 2.3 of this Act, two types of exploration title may be granted, they are exploration and retention licences. Production rights are granted by mining licences under Part 2.4, and other forms of title come via works licences (allowing works in blocks outside other licence areas to enable licence holders to effectively exercise licence rights or perform licence obligations) issued under Part 2.5 and special purpose consents (for scientific investigations, reconnaissance surveys or sample collections) given under Part 2.6.

*Offshore
Minerals
Act 1994*

A joint authority is established in respect of each offshore area, which is constituted by the relevant State and Commonwealth Minister, depending on the type of offshore area (s.32). Day to day administration is delegated to the responsible State Minister as the designated authority (s.29).

The Act specifically provides that the grant of a licence or special purpose consent under it does not extinguish native title in the licence or consent area (s.43(1)). However, it provides that, while a licence or consent under the Act is in force over an area, native title in that area is subject to the rights conferred by the licence or consent (s.43(2)).

Offshore mining within the coastal waters (that is, the first three nautical miles of the Australian territorial sea) remains within the sole control of the States and Territories (see the Offshore Constitutional Settlement provided for in s.3). The States and Territories do not have legislation dealing with offshore mining for minerals as defined under this Act, although applications for offshore tenements within State coastal waters have occasionally been granted under onshore legislation such as the *Mining Act 1978* (WA) (see Chapter 5.5).

Petroleum (Submerged Lands) Act 1967 The *Petroleum (Submerged Lands) Act 1967*, along with complementary legislation of the States and the Northern Territory reflects the 1977 scheme agreed to by the States, the Northern Territory and the Commonwealth for offshore petroleum exploration and production. Part 1A makes provision for administration by joint authorities comprising the relevant State, Northern Territory and Commonwealth Ministers. As with all the mirror State and Northern Territory legislation, offshore petroleum titles fall into a variety of tenements in the forms of permits, licences or leases.

Exploration permits (Part 3 Division 2) and retention leases (Part 3 Division 2A) enable the lessee to retain a title to an area where production of petroleum is not yet commercially viable but is likely to become commercially viable within a period of 15 years. Production licences (Part 3 Division 3) allow the licensee not only to recover petroleum, but also to explore for further petroleum in the area covered by the licence, and to carry out the necessary works. Pipeline licences (Part 3 Division 4) permit the necessary works and operations to construct and manage a pipeline.

The Act allows the holder of an exploration permit, retention lease or production permit to apply to the relevant authority or Minister for the grant of an access authority to enable the conduct of operations related to the recovery of petroleum, in or from the permit, lease or licence area in a part of the

adjacent area not subject to the permit, lease or licence of petroleum exploration operations (s.112).

The terms and renewals of offshore titles are as follows:

- *exploration permits*: six years, renewable in lots of five years but with blocks to reduce by 50 per cent on each grant of renewal (ss.29-31);
- *access authorities*: for such period as specified and may be extended (s.112(7));
- *retention leases*: on both original grant and by way of renewal for five years (s.38D);
- *production licences*: 21 years, first renewal 21 years, subsequent renewals for terms of up to 21 years (s.53); and
- *pipeline licences*: as prescribed (s.67).

The Act (s.127, as inserted by the *Native Title Act 1993*, s.221(1)) provides that petroleum recovered in the area specified under a permit, licence or lease granted under it becomes the property of the holder of that permit, licence or lease. Such a tenement is not subject to any rights of other people (other than those to whom the holder transfers, assigns or otherwise disposes of the petroleum or an interest in the petroleum).

The *Seas and Submerged Lands Act 1973* proclaims the sovereignty of the Commonwealth over the territorial sea, which extends for 12 nautical miles from the baselines of the coast but excluding internal waters enclosed by bays and estuaries (ss.6 and 7). This proclamation was made on 13 November 1990.

*Seas and
Submerged
Lands Act
1973*

The rights and jurisdiction of Australia in its exclusive economic zone (EEZ) are vested in, and exercisable only by, the Crown in right of the Commonwealth (s.10A). In July 1994, the Commonwealth issued a proclamation declaring an EEZ of 200 nautical miles under this Act (s.10B). The EEZ was declared to take effect from 1 August 1994 and serves to assert Australia's rights under the United Nations *Convention on the Law of the Sea* (CLOS).

The two proclamations post-date the *Racial Discrimination Act 1975* (RDA) (see 9.2 above). However, since they are

executive and not legislative measures and since they have been made under legislation that pre-dates the RDA, they are unlikely to be in conflict with the RDA.

The sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purposes of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth (s.11). The High Court upheld these provisions in *New South Wales v Commonwealth* (1975) 135 CLR 337 (the *Seas and Submerged Lands Case*). The Act adopts the definition of the continental shelf in Article 76 of CLOS for its purposes (s.12). The text of Article 76 is included in the Schedule.

The powers provided to the Commonwealth under this Act are broad. They were enacted under the Commonwealth's foreign affairs power under s.51(xxix) of the Constitution and are supported further by its power to legislate in relation to over fisheries under s.51(x) of the Constitution.

In effect, the Commonwealth enjoys sovereign rights in the territorial sea including the seabed, subsoil, sea and air-space, and also sovereign rights to explore and exploit the continental shelf. This would probably be broad enough to allow the Commonwealth to make laws regulating or extinguishing offshore marine native title rights.

Native Title Fishing Rights

Native title, and its constituent rights such as hunting, gathering and fishing rights, regardless of their characterisation, constitute property for the purposes of s.51(xxxi) of the Constitution (see *Mabo v Queensland [No.2]* (1992) 175 CLR 1, per Deane and Gaudron JJ, at p.111). Therefore, their extinguishment would give rise to the right to compensation, particularly as such extinguishment almost invariably results in some financial benefit flowing to either the Commonwealth or a third party.

The Act (s.16(1)(b)) provides that the assertion of sovereignty by the Commonwealth in the territorial sea does not exclude the operation of State law, nor does it affect the powers conferred on the States by the *Coastal Waters (State Powers) Act 1980* (see above), which provides the States with plenary powers over the first three nautical miles of the territorial sea as though it were part of the State. This power would appear to be broad enough to include the right to regulate or

extinguish native title rights and interests, despite the fact that the original vesting of title was subject to them.

However, if extinguishment by a State or Territory in its coastal waters were valid under this Act, given that the power to do is purportedly derived from a law of the Commonwealth, the affected native title holders would likely be entitled to just terms compensation under s.51(xxxi) of the Constitution.

The *Torres Strait Fisheries Act 1984* mirrors the Queensland *Torres Strait Fisheries Act 1984* (see Chapter 3.4) in all key aspects, but applies in the area of Australian jurisdiction, which is those waters in the protected zone of Australia as identified in Annex 5 of the treaty (see below) and that are outside the protected zone of Queensland (s.3(1)).

*Torres Strait
Fisheries Act
1984*

‘The treaty’ is the *Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as the Torres Strait, and Related Matters*.

Protection of Traditional Rights and Way of Life

The Act specifies that, in its administration, regard must be had in particular to the traditional way of life and livelihood of the traditional inhabitants (s.8). This includes their rights in relation to traditional fishing. The Act adopts the definitions of ‘traditional inhabitants’ and ‘traditional fishing’ as set out in the treaty (s.3(1)).

The Act empowers the Minister to declare, by way of a written notice published in the *Gazette*, that the taking by traditional inhabitants of fish by a method, or with the use of equipment or a boat, of a kind specified in the notice, is not traditional fishing (s.3(2)).

The Act also requires the Minister, when they consider it appropriate, to seek the views of the members of the joint advisory council established under Article 19 of the treaty (s.13).

The members of the council who are required to be consulted on any matter relating to the administration of the Act are those who are traditional inhabitants and Australian citizens; they must be consulted on any matters that may affect the

interests of the traditional inhabitants who are Australian citizens.

The Act allows the Minister, by notice published in the *Gazette*, to prohibit the taking, processing or carrying of fish included in a class of fish that are specified in the notice (s.16). Such classification may also specify the size, weight, method of taking, processing or carrying of fish, and prohibit the use of equipment.

The Act (s.17) also empowers the Minister to declare by way of notice that a licence issued under it (s.19) is required for the taking of fish in the course of community fishing, which is defined to mean commercial fishing carried on by a person or people who are traditional inhabitants and Australian citizens (s.3(1)).

Protected Zone Joint Authority

The Act establishes a protected zone joint authority (s.30), comprising the Commonwealth Minister and the Queensland Minister, which has such functions as are imposed on it under arrangements made between the Commonwealth and Queensland (s.1).

The authority is required to seek the views of the members of the joint advisory council, where appropriate, who are traditional inhabitants and Australian citizens, on any matter relating to a protected zone joint authority fishery where that matter may affect the interests of traditional inhabitants who are Australian citizens.

COMMONWEALTH

9.5 MINING

For further details on the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* see 9.1 above, which outlines the protection of sites of significance to Aboriginal members of the Wreck Bay Aboriginal community and the issues concerning the ownership of, and mining for, minerals in the Jervis Bay Territory. *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*

The Act provides that the Commonwealth retains title in all minerals existing in their natural condition on or below the surface of the land (s.14). Any law authorising mining or exploration for minerals in the Jervis Bay Territory does not extend to Aboriginal land (s.43). No mining operations may be carried out on Aboriginal land without the agreement of the Commonwealth and the Wreck Bay Aboriginal Community Council (s.44).

Powers conferred by the *Atomic Energy Act 1953* may be exercised only in relation to specific powers of the Commonwealth as set out in the Constitution, or in relation to substances situated in or recovered from, or things done, or proposed to be done, in or in connection with the Ranger project area (s.34). The latter area is defined in the Act (s.5(1)) to mean the land described in Schedule 2 to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see Chapters 8.1 and 8.5). *Atomic Energy Act 1953*

The effect of the provisions of the Act is to vest title in the Crown in right of the Commonwealth to all prescribed substances existing in their natural condition, or in a deposit of waste material obtained from underground or surface, on or below the surface of land in a territory of Australia (s.35). Prescribed substances are defined in the Act as being uranium, thorium, an element having an atomic number greater than 92, or any other substance declared by the regulations to be used for the production of atomic energy or related research (s.3(1)).

A person who discovers uranium anywhere in Australia is required to report it in writing to the Minister within one

month of making that discovery (ss.36 and 37). The Minister may request that person to give particulars of uranium in their control or possession. The Minister may also take possession of that uranium, subject to the payment of compensation under the Act (s.42).

The Minister is empowered to authorise a person or people engaged in a joint venture to mine for prescribed substances on behalf of, or in association with, the Commonwealth in the Ranger project area (s.41). This includes entering onto the relevant land with the required personnel and equipment for the purpose of carrying out the required operations to discover and mine for these substances, and also to allow an authorised person to take possession of the whole or part of that land.

Any person who suffers loss by virtue of the acquisition by the Commonwealth of any prescribed substance or minerals, or by virtue of anything done under the Act (s.41), is entitled to compensation as agreed between the Commonwealth and the claimant (s.42). If agreement cannot be reached, compensation may be determined by action against the Commonwealth in a court of competent jurisdiction.

*Environment
Protection
(Nuclear Codes)
Act 1978*

The *Environment Protection (Nuclear Codes) Act 1978* is the result of the Commonwealth inquiry into the Ranger uranium mine in the Northern Territory and provides codes of practice covering the mining and milling of radioactive ores, transport of radioactive substances and the management of radioactive wastes.

The object of the Act is to make provision, within the limits of the powers of the Commonwealth Parliament, for protecting the health and safety of the people of Australia, and the environment, from possible harmful effects associated with nuclear activities in Australia (s.3).

Nuclear activities are defined as underground or surface mining for, or recovery or production of, any prescribed substance or any mineral containing a prescribed substance, as well as related activities concerning prescribed substances or any mineral or other matter containing such substances (s.4). Prescribed substances are defined in the same way as described in the *Atomic Energy Act 1953* (s.3(1)) (see above).

The Minister responsible for this Act is empowered to arrange for the formulation of codes of practice for regulating or

controlling nuclear activities in Australia, including variations to, and replacement of, existing codes (s.7). The Minister must provide each relevant Minister from the States and the Territories the opportunity to be consulted on such formulation. The Act provides for the Governor General, by order in writing, to approve the codes of practice (s.9(1)). Any variations to, and revocation of, such codes, are subject to consultation with the relevant State and Territory Ministers (s.9(2)).

The Act sets out the contents of these codes, which may specify standards to be observed, practices and procedures to be followed, and measures to be taken (including measures for, and in relation to, the restoration of the environment from the effects of nuclear activities) with respect to nuclear activities, as well as recommending practices and procedures that may be followed, and measures that may be taken, to further those standards (s.9(3)).

The Act (ss.9(4)-(5)) prohibits the Commonwealth from making codes of practice that are inconsistent with the obligations of Australia under the Safeguards Agreement signed between Australia and the International Atomic Energy Agency in Vienna on 10 July 1974, in connection with the *Treaty for the Non-Proliferation of Nuclear Weapons*.

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) becomes operative in July 2000. The Act combines the provisions of several environmental protection and biodiversity conservation Acts, which are repealed on the commencement of this Act (see 9.1 above for a detailed description of the EPBC).

*Environment
Protection and
Biodiversity
Conservation Act
1999*

A person must not carry on mining operations in a Commonwealth reserve unless the Governor General has approved the operations; and the person carries them on in accordance with a management plan in operation for the reserve (s.355).

Mining operations are operations or activities connected with, or incidental to, the mining or recovery of minerals or the production of material from minerals, including prospecting, exploration, milling, refining, treatment, processing, storage and disposal of minerals, and the construction and use of towns, camps, dams, pipelines power lines or other structures

for the purposes of mining. A mineral is a naturally occurring substance or mixture of substances (ss.355(2) and 355(3)).

A management plan for a Commonwealth reserve must provide for the protection and conservation of the reserve, and must specify any mining operation, major excavation or other work that may be carried on in the reserve, and the conditions under which it may be carried on (s.367). Section 387 generally prohibits mining operations in Kakadu National Park.

Koongarra Project Area Act 1981 The *Koongarra Project Area Act 1981* provides for the variation of the boundary of Kakadu National Park in the Northern Territory (s.3). The Governor General proclaimed the park on 5 April 1979 under the *National Parks and Wildlife Conservation Act 1975* (NPWCA) (s.7(2)) (see below and Chapters 8.1 and 9.1).

The effect of this is to exclude land (referred to as ‘the relevant land’ in s.2(3) of this Act) from the park, under the provisions of the NPWCA (s.7(8)), to enable a uranium mining project to proceed on the relevant land. Section 3, which provides for the variation of a boundary, remained unproclaimed as at 19 August 1999. Proclamation can only occur when the Minister for Aboriginal and Torres Strait Islander Affairs and the relevant land council have consented in writing (for the purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (s.40(1)) (see Chapter 8.1 and 8.5)) to the grant of a mining interest in respect of the relevant land. The relevant land council is defined in this Act to mean the Aboriginal land council established by or under the Land Rights Act for the area in which the relevant land is situated (s.2(3)).

Lands Acquisition Act 1989 For a detailed synopsis of the *Lands Acquisition Act 1989* see 9.1 above. The Act provides that regulations may be made (under s.140) prohibiting or regulating the exploration and mining for, and the recovery of, minerals (being a naturally occurring substance or mixture of substances), as well as for the carrying out of any related operations and works on land that is relevant land for its purposes (s.124(1)).

‘Relevant land’ is defined in the Act (s.124(7)) as being land in a State vested in an acquiring authority, or land that is in a

conservation zone within the Northern Territory pastoral lease area and that has been vested in an Aboriginal land trust under section 12 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (s.12) (see Chapter 8.1).

The Act (s.124(7)) defines a ‘conservation zone’ in the same terms declared under the *National Parks and Wildlife Conservation Act 1975* (s.8A) (see below and 9.1 above). The ‘Northern Territory pastoral lease area’ is the area delineated by the outer boundaries of the aggregate area comprising Gimbat and Goodparla; these are defined by the map referred to in the definition of the ‘Alligator Rivers Region’ in the *Environment Protection (Alligator Rivers Region) Act 1978* (s.3) (see Chapter 8.5). An ‘acquiring authority’ is defined as meaning the Commonwealth or an authority that is incorporated by, or under, a law of the Commonwealth (s.6).

The Act (s.124) provides that nothing in it authorises the making of regulations extending to land vested in an Aboriginal land trust other than the relevant land described above (and referred to in s.124(7)).

The *Moomba Sydney Pipeline Sale Act 1994* provides for the sale of the Moomba (South Australia) to Botany Bay (New South Wales) gas pipeline system, through which New South Wales and the Australian Capital Territory are supplied with natural gas.

*Moomba Sydney
Pipeline Sale
Act 1994*

The Act abolishes the Pipeline Authority (established under the *Pipeline Authority Act 1973* (s.5) to construct and maintain the gas pipeline and related works) and provides for the transfer to the Commonwealth of residual assets and liabilities (ss.162-173).

The *National Parks and Wildlife Conservation Act 1975* will be repealed on the commencement of Schedule 4 of the *Environmental Reform (Consequential Provisions) Act 1999* (see 9.1 above). For a detailed synopsis of the *National Parks and Wildlife Conservation Act 1975* see 9.1 above and also Chapter 8.1.

*National Parks
and Wildlife
Conservation
Act 1975*

The Act provides a definition of recovery of minerals for its purposes, being: the prospecting and exploration of minerals; the milling, refining, treatment and processing of these; and also the handling, transport, storage and disposal of these and

any material produced from them (s.3A(1)). The construction of any related infrastructure and other works is also included.

Anything done for the purposes of the building or construction, or the supply of water, in a park or reserve, unless those purposes are connected with, or incidental to, operations for the recovery of minerals, are excluded from the Act (s.3A(2)). Provision is also made for the regulations to prescribe activities and routes in Kakadu National Park for purposes related to the recovery of minerals.

The Act prohibits operations for the recovery of minerals in Kakadu National Park, except for the use, development or reconstruction of Jabiru township (ss.10(1A) and (1B) and see Chapter 8.1). The Act (s.10(2)) provides that no operations for the recovery of minerals shall be carried out in a park or reserve (excluding Kakadu) unless they have been approved by the Governor General and are carried on in accordance with a plan of management drawn up under the Act (s.11).

The Act specifies that among the matters that must be included in a plan of management is a detailed description of any proposed operations for the recovery of minerals in the park or reserve in respect of which the plan of management has been prepared (s.11(6)(b)).

The preparation of these plans includes a process of public consultation and consideration of submissions from key stakeholders, including from Aboriginal land councils where applicable in the Northern Territory (see 9.1 above and Chapter 8.1).

COMMONWEALTH

9.6 NATIVE TITLE

In its landmark decision in the case of *Mabo and Others v State of Queensland [No. 2]* (1992) 175 CLR 1, the High Court rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement. It held that the common law of Australia recognises a form of native title that reflects the entitlement of the Indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands (see preamble to the *Native Title Act 1993*, to be referred to as ‘the Native Title Act’ or the NTA). The *Native Title Amendment Act 1998* (‘the 1998 Amendment Act’), which was passed on 7 July 1998 and received Royal Assent on 27 July 1998, made substantial and important amendments to the Native Title Act. The history of these amendments is discussed here in tandem with the provisions of the Native Title Act.

Section 3 provides that the main objects of the NTA are to provide for the recognition and protection of native title, to establish ways in which future dealings affecting native title may proceed and set standards for those dealings, to establish a mechanism for determining claims to native title, and to provide for, or permit the validation of, past acts and intermediate period acts because of the existence of native title.

What is ‘native title’?

The answer is contained in s.223 of the NTA, which, because of its importance, is extracted almost in its entirety. The 1998 Amendment Act inserted s.223(3A). The text of the current s.223 follows.

223(1) The expression ‘native title’ or ‘native title rights and interests’ means the communal, group or individual rights of Aboriginal peoples or Torres Strait Islanders in relation to land or water, where (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed by, the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples

or Torres Strait Islanders, by those laws and customs, have connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia.

223(2) Without limiting s.223(1), 'rights and interests'... includes hunting, gathering or fishing, rights or interests.

223(3) Subject to ss.223(3A) and (4), if native title rights and interests as defined in s.223(1) are or have been at any time in the past compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights or interests are also covered by the expression 'native title' or 'native title rights and interests'.

The Note to this section indicates that it cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a permissible future act.

223(3A) Section (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).

223(4) To avoid any doubt, s.223(3) does not apply to any rights or interests created by a reservation or condition (and which are not native title rights or interests) (a) in a pastoral lease granted before 1 January 1994; or (b) in legislation made before 1 July 1993 where the reservation or condition applies because of the grant of a lease before 1 January 1994.

Section 5 provides that the Act binds the Crown in right of the Commonwealth, of each of the States, of the Northern Territory and of the Australian Capital Territory and Norfolk Island. Section 6 specifies that the Act extends to each external territory, the coastal sea of Australia and of each external territory, and to any waters over which Australia

claims sovereignty under the *Seas and Submerged Lands Act 1973* (see 9.4 above). Section 8 provides that this Act is not intended to affect the operation of any law of a State or Territory that is capable of operating concurrently with this Act.

The provisions of the *Racial Discrimination Act 1975* (see 9.2 above) apply to the performance of functions and the exercise of powers conferred or authorised by this Act, any ambiguous terms in the NTA are to be construed consistently with the Racial Discrimination Act (s.7). However, the validation of past acts or intermediate period acts are not subject to the Racial Discrimination Act (s.7(3)).

Recognition and Protection of Native Title

Section 10 provides that native title is recognised and protected in accordance with this Act. Section 11(1) provides that native title is not to be extinguished contrary to this Act. Legislative extinguishment of native title after 1 July 1993 may only occur in accordance with Part 2 Division 2B (which deals with confirmation of past extinguishment of native title) and Part 2 Division 3 (which deals with future acts and other matters, and native title), or by validating past acts or intermediate period acts in relation to the native title.

Past, Intermediate and Future Acts

Sections 14 to 16 and 226 to 232 provide for the validation of various categories (A, B, C and D) of past acts attributable to the Commonwealth that are invalid because of the existence of native title. Section 19 gives legal recognition to laws of the States or Territories to validate past acts.

Sections 17 and 20 provide for compensation to be paid to the holders of native title for validation of category A and B past acts under ss.14 to 16, and under s.19. Sections 10-19 have not been changed substantially by the 1998 Amendment Act, although there are minor amendments to account for the regime implemented by that Act. However, most of the provisions that follow have been either repealed in their entirety or amended in substantial ways.

Division 3 of Part 2 was repealed and substituted by Divisions 2A, 2AA, 2B and 3 upon commencement of the 1998 Amendment Act.

Division 2A (ss.21 to 22H) deals with the validation of intermediate period acts. These are defined in new ss.232A-E as being a variety of legislative acts that took place in the period between 1 January 1994 and 23 December 1996 when native title existed in relation to particular land and waters. This covers the period from the commencement of the Native Title Act to the date of the High Court's decision in *The Wik peoples v Queensland* (1996) 187 CLR 1. These provisions relating to intermediate period acts allow for the validation of land dealings which did not comply with the NTA or with the common law and *Racial Discrimination Act* prior to the passing of the original Act in 1993.

Section 21 in Division 2A Subdivision A allows native title holders to enter into an agreement with the Commonwealth, a State or a Territory to extinguish their native title rights and interests in any land or waters, by surrendering those interests, or to authorise any future act that will affect their native title. A 'future act' in relation to land or waters is defined in s.233(1) as consisting of legislative action taken after 1 July 1993, or any other act that takes place after 1 January 1994 that validly affects native title and that is not a past act. Section 233(1) is one of the few provisions not changed by the 1998 Amendment Act.

Future acts attracting the expedited procedure are provided for under s.237. Section 32 contains details on expedited procedure. This applies if the act is not likely to interfere directly with the carrying on of the community or social activities of the people who are the holders of native title, not likely to interfere with sites or areas of particular significance to the native title holders, and is not likely to involve, or is not likely to create rights whose exercise would involve, major disturbance to any lands or waters concerned.

Division 2AA provides for the validation by the State of New South Wales of a number of transfers under s.36 of the *Aboriginal Land Rights Act 1983* (NSW) (see Chapter 1.1). The division applies to claims for land made before 28 November 1994 and regardless of whether the transfer took place before or after commencement of the division. An entitlement for compensation is also provided for.

Division 2B (ss.23A-23JA) provides for the confirmation of past total or partial extinguishment of native title by certain

acts or acts that are validated under this division. The division applies to:

- certain acts of the Commonwealth done on or before 23 December 1996 that have resulted in complete or partial extinguishment;
- acts being previous exclusive possession acts, involving the grant or vesting of things like freehold estates or leases that conferred exclusive possession, or the establishment of public works, which will be deemed to have completely extinguished native title; and
- acts being previous non-exclusive possession acts, involving grants of non-exclusive agricultural or non-exclusive pastoral leases, that will have extinguished native title to the extent of any inconsistency.

The division also allows States and Territories to legislate, in respect of certain acts attributable to them, to extinguish native title in the same way as the Commonwealth may under this division. Compensation is provided for in the case of extinguishments under this division.

Indigenous Land Use Agreements

Division 3 contains the future act regime (ss.24AA-60AA). Subdivisions B to E deal with Indigenous Land Use Agreements (ILUAs), which are divided into three categories, being (i) body corporate, (ii) area and (iii) alternative procedure agreements. They may be entered into at any time and the parties may ask the Registrar of the National Native Title Tribunal (NNTT or 'the Tribunal') to approve and enter them on the Register if all the parties agree to do so. An ILUA may cover a variety of matters, including:

- the doing of future acts such as the granting of mining tenements;
- withdrawing, amending or varying native title claims;
- extinguishment of native title rights by surrender;
- final settlement of compensation claims in relation to past, intermediate period and future acts;
- co-existence issues, that is, the relationship between native title and other rights; and

- any other matters concerning native title rights and interests, such as access issues and the like.

Subdivisions F (ss.24FA-24FE) and G (ss.24GA-24GE) contain special future act provisions in cases where procedures initiated under the Act indicate an absence of native title or where the future act that permits or requires the carrying out of primary production activities and activities that are incidental to these.

Subdivision H (s.24HA) clarifies the position of legislative acts, leases and licences in relation to surface and subterranean waters, of living aquatic resources in those waters, and airspace over the lands and waters the subject of these. Compensation is provided for the validation of matters covered under this subdivision.

Subdivision I (ss.24IA-24ID) validates future acts comprising pre-existing rights acts that arose, and renewals of leases that were validly granted before, 23 December 1996. Further special provisions in respect of reservations, leases and others are in Subdivision J.

Subdivision K (s.24KA) validates future acts that comprise the establishment of facilities for services to the public (for example, roads, railways, bridges, wharves, jetties, pipelines or other water reticulation systems, irrigation channels, and sewerage facilities), provided that these do not involve compulsory acquisition of the whole or part of native title rights or interests.

Subdivision L (s.24LA) validates low impact future acts, which include acts that do not continue after the making of an approved determination of native title, provided that they are not acts such as the grant of a freehold estate, a lease, a right to exclusive possession or a mining tenement (apart from fossicking by using hand-held implements).

Subdivision M (ss.24MA-24MD) contains provisions for validation of future acts comprising the making, amendment or repeal of legislation, or non-legislative acts, that pass the freehold test. An example of a future act covered by this test is the grant of a mining lease over land in relation to which there is native title when a mining lease would also be able to be granted if the native title holders instead held ordinary title. These provisions apply only to onshore places; offshore places are covered under subdivision N. Subdivision O provides that

unless a future act is validated under this Act, it is invalid to the extent that it affects native title.

Right to Negotiate

Subdivision P (ss.25-44) contains the amended right to negotiate provisions. The subdivision applies to future acts done by the States, the Territories or the Commonwealth, who continue to be referred to as the Government party for the purposes of these provisions. These acts include permissible lease renewals, specified conferrals of mining rights, compulsory acquisition of native title rights and interests and other acts approved by the Commonwealth Minister. ILUAs, approved gold or tin, opal or gem mining acts, and compulsory acquisitions of native title rights and interests that relate solely to lands or waters in a town or city, are specifically excluded.

Acts to which subdivision P applies, done before the negotiation or objection/appeals process has been completed, are invalid (s.28). Section 29 requires the government party to notify the relevant native title parties. These are any registered native title body corporate and/or any registered native title claimant. Either the government party or the grantee party (that is, the third or non-native title party, upon whom the right is proposed to be bestowed, such as the mining company) must also give public notice as provided under s.252. The government, grantee and native title parties comprise the negotiation parties for the purposes of these provisions (s.30A).

Section 31 retains the requirement to enable the native title party to make submissions and the requirement for the negotiating parties to negotiate in good faith.

These provisions apply unless the government party has provided in its notice that it considers the proposed act an act attracting the expedited procedure under s.32. Sections 33-42 contain further provisions relating to negotiations and referral of matters to arbitral bodies (as defined in s.27) for determination if agreement cannot be reached.

Sections 43-43B enable the States or Territories to make laws that apply instead of subdivision P. These must, however, be tabled and be approved by the federal Parliament, and comply with s.43A.

Subdivision Q (ss.44A-44G) contains special provisions for the conferral of rights on native title claimants in respect of non-exclusive agricultural and pastoral leases, including in respect of access for traditional activities and suspension of native title rights or interests.

Division 4 (ss.44H-47B) makes other provisions relating to native title and division 5 (ss.48-54) provides for the determination of compensation for acts affecting native title.

Division 6 (ss.55-60AA) contains new provisions concerning the making of determinations, which hand most powers to the Federal Court, as opposed to the NNTT. This is the result of the High Court's decision in *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245 regarding the powers of tribunals, such as the NNTT. Under these provisions, determinations of the NNTT, which is not a court, could take effect upon registration with the Federal Court as if they were orders of that Court.

These matters are covered in more detail under Parts 3 to 5 below.

Applications

Under the 1998 Amendment Act, a new Part 3 (ss.60A-79) is inserted. An application may be made to the Federal Court under Part 3 for a determination of native title in relation to an area for which there is no approved determination of native title, or to revoke or vary an approved determination of native title (s.13(1)). All applications for compensation must be made to the Federal Court (see ss.61-70). The Tribunal's jurisdiction is confined to applications by native title parties in relation to the inclusion of a statement under s.32(3) that an act is an act attracting the expedited procedure and by a negotiation party to a determination of a future act under s.35 (see ss.75-79).

Determinations by the Federal Court

Sections 80 to 94 deal with matters referred to the Federal Court. The new ss.79A-94A reflect the wider jurisdiction placed on the court by the 1998 Amendment Act. The 1998 Amendment Act also repeals the statutory requirement for the Federal Court to provide a mechanism of determination that is fair, just, economical and prompt, and while the requirement to consider the concerns of Indigenous people has been

retained, it is qualified by the statement that this must not be done 'so as to prejudice unduly any other party to the proceedings'. Emphasis is placed on resolution by conference.

There is also a new power given to the Commonwealth Minister to intervene in a proceeding before the Court in any matter arising under the Act. The court may, however, refer certain proceedings involving the determination of the existence of native title as set out in s.225, and not involving compensation, to the NNTT for mediation. This may include negotiating an agreement. The court may also direct the holding of conferences to help resolve any matter that is relevant to the proceedings before the court.

Native Title Registrar

Section 95 provides for the appointment of the Registrar by the Governor General. Section 96 provides the Registrar with all powers to assist the president of the NNTT and in relation to applications as set out in Part 3.

National Native Title Tribunal

Section 107 establishes the Tribunal. Part 6 (ss.107-183) is modified under the 1998 Amendment Act to reflect the changed role for the NNTT under the new regime. Its functions are summarised in s.108 and include applications, inquiries and determinations under Part 3 and Division 5 of Part 6 (ss.137-170, dealing with inquiries and determinations by the NNTT), mediations in relation to Federal Court proceedings under Division 4A of this Part (ss.136A-136G), requests for assistance in mediation, and research.

The provisions of ss.110-36 dealing with the membership, organisation and management of the NNTT have not been amended in any significant detail. Section 110 provides for membership of the Tribunal. It must comprise the president, who must be a judge of the Federal Court or a former judge. It also may (but does not have to) include a deputy president or several deputy presidents (with the same requirements as for the president).

In addition, the Tribunal may (but does not have to) include other members. These must be people (other than a judge or a former judge) who in the opinion of the Governor General have special knowledge in relation to Aboriginal or Torres

Strait Islander societies, or land management, or dispute resolution, or have other experience in matters the Governor General considers relevant, or that are assessors, or that are members of a recognised State or Territory body (these may be any court, office, tribunal or body set up under a law of a State or Territory).

Generally, the Tribunal when sitting may comprise either a single member or three members (being the president or a deputy president, and two non-presidential members). If constituted by three members, the president must, as far as is reasonably practicable, ensure that the Tribunal includes at least one member with special knowledge in relation to Aboriginal or Torres Strait Islander societies (s.124).

Section 136A adds a new role for the NNTT, empowering it to hold mediation conferences if the Federal Court refers a matter to the NNTT for mediation under s.86A; s.136G requires the Tribunal to provide the Federal Court with a report setting out the results of the mediation.

The provisions of Division 5 (Inquiries and Determinations) have been altered quite substantially by the 1998 Amendment Act to reflect the NNTT's changed role and also its new powers in the process of approval and registration of ILUAs. Division 6 (Offences) has also undergone a number of changes, especially in relation the non-disclosure of confidential information and the provision of assistance.

Registers

Section 185 requires the Registrar to keep a Register of native title claims. The Register must set out information such as whether an application was filed with the Federal Court or lodged with a recognised State or Territory body, the date it was lodged, details of the claimant and of the land and/or waters claimed, and a description of the people claiming to hold native title (s.186). Section 188 makes provision for parts of the Register to be kept confidential in the public interest. In determining this the Registrar is required to have due regard to the cultural and customary concerns of the relevant Indigenous people.

Section 192 also mandates that the Registrar will keep a National Native Title Register. This must set out all approved determinations of native title by the Tribunal and the Federal and the High Court, by recognised State and Territory bodies

and other determinations of, or in relation to, native title in decisions of courts or tribunals (s.193).

The 1998 Amendment Act makes significant changes to Part 7, most notably through the repeal of old s.190 and the substitution with new ss.190-190D. These include a new test to be applied for the registration of claims, in particular the requirement in s.190B(7) that the Registrar must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any land or waters covered by the application. Under the old provisions, a spiritual connection was sufficient.

However, this is qualified by the provision of s.190B(7)(b). This enables an applicant to satisfy the registration test if the Registrar is satisfied that at least one member of the native title claim group previously had, and would reasonably have been expected currently to have, a traditional physical connection with the land, but for things done by the Crown, a statutory authority of the Crown in any capacity, or any holder of a lease over such land or waters. This is intended to overcome the problems faced by the stolen generation and those affected by locked gates who could otherwise be excluded under the registration test.

The changes to the provisions of Part 8 (National Native Title Register, ss.192-199) are minor and mainly designed to ensure that the matters now being determined by the Federal Court, rather than the NNTT as under the previous regime, are included on this Register.

The 1998 Amendment Act inserted a new Part 8A (ss.199A-199F) which provides for a Register of ILUAs to be established and kept by the Registrar. The provisions outline those parts of the ILUA that must be included on the Register; procedures for removal of details of an agreement; provide for public inspection of the Register; and allows for details of the ILUA to remain confidential where requested by the parties.

Financial Assistance to the States and Territories

Section 200 empowers the Commonwealth to enter into a written agreement with a State or Territory for the provision of financial assistance to that State or Territory in relation to acts affecting native title.

Representative Bodies

Part 11 provides for representative Aboriginal or Torres Strait Islander bodies. These provisions are redrafted entirely by the 1998 Amendment Act. The amendments provide for the management of representative bodies in a nationally consistent manner across Australia. For example, the Commonwealth Minister will have the capacity to adjust the areas of these bodies in certain circumstances and to withdraw recognition if they cease to meet the applicable recognition criteria.

Section 202 empowers the Minister to determine in writing that a body is a representative Aboriginal or Torres Strait Islander body for an area specified in a determination. The Minister must only appoint such a body if satisfied that the body is broadly representative of the Indigenous people in the area, that it satisfactorily performs its existing functions and that it will satisfactorily perform its functions for the purposes of this section. This includes assisting with claims and negotiations, and the resolution of disagreements.

The 1998 Amendment Act inserted Part 11 Division 3. These specify the functions and related powers and duties of these bodies. A representative body has widely ranging functions of assisting native title holders, or people who may hold native title, in relation to applications for determinations of native title, future acts, ILUAs and other matters relating to native title and the operation of the Act.

The substantial changes to this Part made by the 1998 Amendment Act, account for the important role that these bodies play in the ILUA process, the process of certification of applications for the determination of native title, achieving agreement in cases of overlapping applications for determinations of native title and related matters.

The 1998 Amendment Act also introduced new procedures for the recognition of such bodies (ss.203A-203AI), requiring them to comply with the wishes of traditional custodians (s.203FCA) and regarding the conduct of their directors, agents and employees (s.203FH).

Parliamentary Joint Committee on Native Title and Land Fund

Section 204 provides for the establishment of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, which must comprise five Senators appointed by the Senate and five

Members of the House of Representatives appointed by the House, and which must not include a Minister, or Speaker or Deputy Speaker of the House, or President or Deputy President of the Senate. The duties of the committee are set out in s.206 and include to consult extensively on the operation of the Act, to report to both chambers of the Parliament on the implementation and operation of the Act and to examine and report on the NNTT's annual report.

One of the changes made by the 1998 Amendment Act is to require the Committee to report on from time to time (rather than at the end of two years after commencement of this Part) to the Parliament on matters such as the effectiveness of the NNTT, the effect of the operation of the Act on land management and the extent of extinguishment or impairment of native title rights and interests as a result of the operation of the Act.

The only other change was to extend the sunset clause of s.207 from five years after the first appointment of the Committee to 23 March 2004.

State or Territory Bodies

Part 12A (ss.207A-207B) was inserted by the 1998 Amendment Act. It comprises what was s.251 under the previous regime of the Native Title Act and ensures that there is a nationally consistent approach to the recognition and protection of native title. There are not many changes made to s.251 under new s.207A, one of the few being to ensure that the new registration test under s.190B is included in the relevant law of the State or Territory. Section 207B provides for a new system of recognition of equivalent State/Territory bodies, which enable State and Territory governments to assume NNTT responsibilities.

Miscellaneous Provisions

Section 210 provides that nothing in the Act affects the rights or interests of any person under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (see 9.1 and 9.2 above), the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (see Chapters 2.1 and 2.2) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see Chapter 8.1).

Section 211(1) provides for the preservation of the right to exercise certain native title rights and interests, including

specifically hunting, fishing, gathering, cultural or spiritual activity, or any other type of activity prescribed for these purposes (s.211(3)). This applies to enable the native title holders to gain access to land to carry out these activities for the purpose of satisfying their personal, domestic or non-commercial communal needs, and as part of the exercise or enjoyment of their native title rights and interests (s.211(2)).

However, this does not apply where a law of a State, a Territory or the Commonwealth imposes a prohibition on such an activity without authorisation (s.211(1)(b)).

The Act also confirms and allows the States to confirm, a range of existing rights such as ownership by the respective Crowns in right of the Commonwealth, the States or the Territories of natural resources and rights to use, control and regulate the flow of water, and public access to waterways, coastal waters, beaches and stock routes. However, it is made clear that this confirmation does not extinguish or impair any native title rights or interests, nor does it affect any conferral of land or waters (or interests in these) under a law that confers benefits only on Aboriginal or Torres Strait Islander people (s.212).

Other provisions relate to the jurisdiction of the Federal Court (s.213), disallowable instruments (s.214) and the Governor General's powers to make regulations (s.215).

Amendment of Acts

Sections 216-219 contain amendments to the *Federal Court Act 1976* that account for its role under the Act. Sections 220-221 contain incidental amendments to other Acts such as the *Jurisdiction of Courts (Cross-vesting) Act 1987* and the *Petroleum (Submerged Lands) Act 1981* (see 9.4 above).

Definitions

Part 15 (ss.222-253) contains definitions and explanations of words and concepts used in this Act. Section 222 contains a table of these and the sections under which they may be found.

The 1998 Amendment Act repealed and substituted a new s.222 to account for the new concepts and expressions introduced by that Act. The key concept of 'native title' set out in s.223 does not change substantially, as outlined at the beginning of this synopsis. Nor does the meaning of a 'native title holder' in s.224.

Section 225 deals with ‘determinations of native title’; the version as amended by the 1998 Amendment Act expands on and clarifies the existing provisions. Sections 226-227 explain what constitutes an ‘act’ and an ‘act affecting native title’ for the purposes of the Native Title Act. Sections 228-232 define ‘past act’, and ‘category A, B,C’ and ‘D past acts’. None of these provisions is changed by the 1998 Amendment Act.

Sections 232A-232E insert definitions of ‘intermediate period acts’ and divide them into ‘category A to D intermediate period acts’, reflecting the introduction of these under new Part 2 Division 2A. Section 233 defines ‘future act’ for the purposes of the Act and the only amendment to this section is the expansion of the exclusion clause to include both validation and extinguishment legislation, not just validation legislation as provided under the previous version. Sections 234, 235 and 236, dealing with (respectively) ‘low impact future acts’, ‘permissible future acts’ and ‘impermissible future acts’, are repealed by the 1998 Amendment Act.

Section 237 defines an ‘act attracting the expedited procedure’ for the purposes of ss.29-32. The 1998 Amendment Act changes the key operative provisions from ‘the act does not interfere with’ to ‘is not likely to interfere with’ the relevant matters (that is, community life of, areas or sites of particular significance to, and the lands and waters claimed by, the native title parties).

Section 237A defines ‘extinguish’ when used in the context of the Act to mean permanently extinguish, with no revival. Sections 238, 239 and 240 explain the concepts of ‘non-extinguishment principle’, ‘acts attributable to the Commonwealth, a State or a Territory’ and ‘similar compensable interest test’. Of these, only s.240 is amended by the 1998 Amendment Act to include an intermediate period act.

Division 3 (ss.241-249) provides definitions for different leases. Special definitions are made in respect of ‘mining leases’ (s.245), ‘commercial leases’ (s.246), ‘agricultural leases’ (s.247), ‘pastoral leases’ (s.248) and ‘residential leases’. These were largely unaffected by the 1998 Amendment Act, except for new ss.247A and 247B which provide for exclusive agricultural leases (which confer a right of exclusive possession over the land or waters covered by the

lease) and other agricultural leases that are non-exclusive. Sections 248A-B do the same in relation to pastoral leases.

Sections 249A-C, inserted by the 1998 Amendment Act, add provisions defining 'community purposes lease', 'perpetual lease' and 'scheduled interest'. Schedule 1 lists the provisions that are referred to as the scheduled interests under new s.249C. It is divided into seven parts, each part dealing respectively with legislation of New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania and the Northern Territory. The provisions cover a wide range of leases and related instruments issued under the legislation listed for each of those jurisdictions.

Section 250 ensures that matters that happened before commencement of the Act that were intended to be covered are actually provided for, in spite of the use of the present tense throughout the Act. Section 251 has been converted into s.207A (see above) by the 1998 Amendment Act.

The 1998 Amendment Act also adds ss.251A and 251B that authorise the making of ILUAs and applications for native title or compensation determinations under the Act.

The authorisation is deemed to be given by the person or persons holding native title in relation to land or waters in the area covered by the ILUA (s.251A) and by all the people in a native title claim group or compensation claim group respectively (s.251B).

Section 251C (inserted by the 1998 Amendment Act) makes special provision in relation to towns and cities. A town or a city for the purposes of the Act for Western Australia, South Australia and the Northern Territory, is one constituted as such under the listed laws of those States and of the Territory, unless the Commonwealth Minister makes a written determination to the contrary. For all other jurisdictions the Minister is required to make a written determination that in their opinion, the area was a town or city as at 23 December 1996 for the purposes of the Act.

Section 251D (inserted by the 1998 Amendment Act) clarifies that any reference to 'land or waters on which a public work is constructed, established or situated' is intended to include any adjacent land or waters, the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the public work.

Section 252 (not amended) provides a definition of what is meant by the use of the expression 'notify the public in a determined way'. It means to give notice in the way determined by the Commonwealth Minister for the purposes of the relevant provision in the Act. An example could be a determination that the notice be given in newspapers (including those that cater mainly or exclusively for the interests of Aboriginal or Torres Strait Islander people), or by radio and/or television broadcasts.

Other definitions are provided in s.253, which has been amended by the 1998 Amendment Act to include definitions of new expressions and key concepts and also to re-define existing ones in line with the changes made by that Act. For example, the word 'authorise' is defined to account for the provisions of ss.251A and 251B (inserted by the 1998 Amendment Act) referred to above. The definition of 'compulsory acquisition act' is removed following the repeal of the provisions in the Act that make reference to these. Other definitions, such as 'public work', are re-defined to reflect the intended use of these expressions for the purposes of the revised Act. Many of the definitions in this section include references to the provisions in the Act in which they are used and it is advisable to make reference to s.253 when reading those other provisions.

LIST OF ACTS

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