

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



Native Title Research Series

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

**VOLUME ONE
NEW SOUTH WALES, VICTORIA, QUEENSLAND
AND SOUTH AUSTRALIA**

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies



Aboriginal Studies Press
2000

Produced by the Native Title Research Unit
AIATSIS
GPO Box 553
Canberra, ACT 2601

Phone (02) 6246 1161
Fax (02) 6249 1046
Email ntru@aiatsis.gov.au

National Library of Australia
Cataloguing in publication

A guide to Australian legislation relevant to native title.

ISBN 0 85575 361 7

1. Native title - Australia. 2. Land tenure - Law and legislation -
Australia. I. Australian Institute of Aboriginal and Torres Strait Islander
Studies. Native Title Research Unit. (Series: Native title research series.)

346.940432

Cover design by Andrew Lawrence and Penelope Moore

Printed by Panther Publishing and Printing, Canberra
2000/1/500

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Aboriginal
Studies
Press

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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.

ACKNOWLEDGEMENTS

Dr. Mary Edmunds, then Director of Research, initiated work on the Guide in 1997. It was compiled by Christian Fabricius in 1997 and 1998 with the assistance of Jon Stanhope in its early stages. Ann Jackson Nakano edited the first version of the text in 1999. Jessica Weir updated the text to incorporate amendments to legislation to January 2000. The staff at the Native Title Research Unit did the final editing and design. Financial and logistical support came from the Australian Institute of Aboriginal and Torres Strait Islander Studies and from the Aboriginal and Torres Strait Islander Commission.

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RELEVANT TO NATIVE TITLE**

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NEW SOUTH WALES

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NEW SOUTH WALES

1.1 LAND AND ENVIRONMENT

The preamble of the *Aboriginal Land Rights Act 1983* gives recognition to the prior ownership and occupation of land by Aboriginal people in the State and recognises the spiritual, social, cultural and economic importance of land to Aboriginal people. The Act represents the first acknowledgement of Aboriginal land rights and establishes land claims procedures in New South Wales.

Aboriginal Land Rights Act 1983

The Act establishes local Aboriginal land councils and the New South Wales Aboriginal Land Council (NSW ALC) and enables them to acquire, hold and deal with land. Land can be acquired in three ways.

In the first instance, title in existing reserves was previously vested in the Aboriginal Lands Trust under the repealed *Aborigines Act 1969*. Under the *Aboriginal Land Rights Act 1983*, titles were transferred as freehold to a local Aboriginal Land Council (established under Part 2 of the Act), or, where one does not exist, in the NSW ALC established under Part 4 (s.35).

Second, land may be vested in Aboriginal Land Councils (ALCs) pursuant to the claim process (ss.36 and 37). Claims can only be made by the relevant local ALC or by the NSW ALC on its behalf. Land that is acquired by claim is also acquired as freehold title. Lands that may be claimed include: those that may be dealt with under the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901* (see below); vacant Crown lands; and lands that are not lawfully used or occupied or needed, or likely to be needed, as residential lands or for a public purpose. Land cannot be claimed, however, if it is the subject of an application for a determination of native title or for an approved native title determination under the *Native Title Act 1993* (Cth) (see Chapter 9.6) (s.36(1)(d) and (e)).

Third, land or property may also be acquired by a local ALC or the NSW ALC by way of purchase, lease, gift, devise or bequest (s.38). Where an ALC seeks land that is not claimable

or available for purchase, the Governor may, as a last resort, acquire land by appropriation or resumption (s.39(1)).

Property may be acquired subject to a condition, to which the acquiring ALC has agreed, and must not be dealt with by the ALC except in accordance with the condition. The same is also presumably true of land vested in an ALC by way of appropriation or resumption by the Governor (s.39) or by action of the corporation as constituted by the Minister (ss.5, 53 and Schedule 4). Any acquisitions (whether by agreement or compulsory) must be made on just terms and subject to the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* and the *Public Works Act 1912* (see below) (ss.39(3), (5) and (6)).

Dealings in Land

The Act prohibits the NSW ALC or a local ALC from dealing with lands vested in them except as provided in Division 4 of Part 6 (s.40). Generally, unless there has been an approved determination of native title, the NSW ALC or a local ALC may sell, lease, mortgage or otherwise deal with land vested in it (s.40AA). The one exception to this is land leased by the land council to the Minister administering the *National Parks and Wildlife Act 1974* (see below) (under s.71C in Part 4A of that Act and s.36A of the *Aboriginal Land Rights Act 1998*), subject to the recognition in the lease of the reserve or dedicated status of the land under the Act.

Land may be transferred between local ALCs and between the NSW ALC and local ALCs (s.40A). The NSW ALC may only dispose of land if 80 per cent of a legally constituted quorum of members vote in favour of the proposal - and then only on the basis that the land is not of cultural significance to the Aboriginal people in the area. The Minister responsible for this Act (and, where applicable, the Minister administering the Crown lands Acts) must also be notified (s.40C(1)).

Cultural significance is defined in terms of the observances, traditions, beliefs or history of the Aboriginal people (s.40(3)). Similar provision is made in respect of land held by local ALCs, except that the NSW ALC must also approve the proposed disposal (s.40D(1)).

The Act prohibits the appropriation or resumption of lands vested in an ALC, except by an Act of the State's Parliament (s.42). In addition, land vested in an ALC cannot be sold, or

the land council wound up, for overdue local government or water rates (s.44). However, a local government or water authority is entitled to recover the unpaid rates of an ALC from the NSW ALC (s.44A). The Minister is empowered to exempt land vested in an ALC from payment of rates (s.43).

Access to Aboriginal Lands

The members of a local ALC have rights of access; others (including Aboriginal people who are non-members) do not, except as authorised by law. The local ALCs are responsible for negotiating with people desiring to use, occupy, or gain access to any part of the land (s.12(i)). A local ALC is empowered to negotiate agreements with the owner, occupier or people in control of any land to allow access for Aboriginal people for hunting, fishing or gathering (s.47).

Where an agreement cannot be reached, a local ALC may apply to the Land and Environment Court for a permit conferring those rights (s.48(1)). The Court is then required to give notice to any person who is likely to be directly affected by the issue, including members of the public, and must specify that there is a right to lodge an objection (s.48(4)).

The Court will only issue the permit if it is satisfied that the rights applied for are rights as provided for in this Act (s.48(6)). If the Court does issue the permit, it becomes an offence to refuse access to land if access is allowed under the permit (s.48(8)).

The objects of the *Catchment Management Act 1989* are to coordinate the policies, programs and activities as they relate to total catchment management; to achieve community participation in natural resource management; to identify and rectify natural resource degradation; and to promote the sustainable use of natural resources and productive vegetation in each of the State's water catchments (s.5(1)). 'Total catchment management' is defined as 'the coordinated and sustainable use and management of land, water, vegetation or other natural resources on a water catchment basis so as to balance resource utilisation and conservation' (s.4).

*Catchment
Management
Act 1989*

To achieve its objects, Part 2 of the Act provides for the establishment of catchment management committees, coordinated by the State Catchment Management Coordinating Committee, and also provides for catchment

management trusts to raise revenue for the purposes of the Act (s.5(2)). Management committees are established upon the creation of catchment areas under this Act; membership may include any people who are land holders or users in the area or who have an interest in environmental matters in that locality.

The Act empowers employees and people authorised by a catchment management trust to enter and inspect any land (but not a building) and carry out necessary works for the purposes of this Act (s.53). Such a trust may also acquire land, including an interest in land, for the purposes of this Act (s.52), subject to the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (see below).

Clean Waters Act 1970 The preamble of the *Clean Waters Act 1970* states that the Act is to make provision for the protection or the reduction of pollution of certain waters. Under the Act, ‘waters’ include any stream, lake, lagoon, swamp, wetland, uncontained surface waters, natural or artificial watercourse, dam, tidal waters (including the sea), or part thereof, and water stored in artificial works, water in watercourses, water pipes and water channels, and any underground or artesian water, or any part thereof (s.5).

The Act prohibits the pollution of water unless authorised under this Act (s.16) and contains a regime for preventing the pollution of waters and for ameliorating pollution that may have occurred. The Act also empowers the Environment Protection Authority to order the removal of pollutants and the clean-up of any pollution (ss.27 and 27A).

Additionally, authorised people are empowered to enter industrial and other premises not used for residential purposes if they suspect, on reasonable grounds, that pollutants have been, or are likely to be, discharged into water (s.29).

To the extent that the Act is inconsistent with the *Pollution Control Act 1970* or the *Marine Pollution Act 1987*, those Acts prevail.

Crown Lands Act 1989 The *Crown Lands Act 1989* provides for the administration and management of Crown land in the Eastern and Central Division of New South Wales. Crown land is defined as land that is vested in the Crown, or land that was acquired under

the repealed Closer Settlement Acts, but excluding land dedicated for a public purpose or land that has been sold or contracted to be sold (s.3).

The objects of the Act include the management of Crown land in accordance with the principles of Crown land management, and the proper development and conservation of Crown land having regard to these principles (s.10). The principles relate to the observance of environmental protection principles and, where possible, the conservation of natural resources (such as water, soil, flora and fauna) (s.11).

Under the provisions of the Act (s.6), Crown land is only to be dealt with in accordance with the Act or with the *Crown Lands (Continued Tenures) Act 1989* (see next Act below). The Act may not affect the operation of any Act which makes special provision for any particular kind of Crown land or authorises Crown land to be disposed of or dealt with in any manner inconsistent with the Act (s.7).

The Act retains the land districts established under the repealed *Crown Lands Consolidation Act 1913* and allows the Minister to establish land districts comprising irrigation or former irrigation areas in the Western District (s.8).

Part 2 provides for the administration of the Act, including making provision for the constitution of local land boards to assist the Minister. The powers of boards are provided for in Schedule 2 and include a range of judicial powers, such as compelling the attendance of witnesses.

Part 4 is concerned with procedures for the sale, lease, exchange or disposal of Crown land and the granting of easements, licences or permits in respect of Crown land. The Act authorises the Minister to vest any prescribed land in a Council if the land is a public reserve within the meaning of the *Local Government Act 1993* or is used, or is suitable for use, for any other purpose for which land may be required by a council under the *Local Government Act 1993* (s.76). The Minister may also dedicate Crown land for a public purpose (s.80) or as a reserve for future public requirements (s.87).

The Governor may, with the concurrence of the Minister administering this Act, dedicate any unoccupied Crown lands as an Aboriginal area or as part of an Aboriginal area for the purpose of preserving and protecting, and preventing damage to, relics or Aboriginal places in the Aboriginal area (see ss.82-86 of this Act and s.62 of the *National Parks and*

Wildlife Act 1974 below). The Act also provides for the reservation of lands (ss.87-91) and for the establishment of trusts to manage these reserves (ss.92-98).

The Act further provides for the preparation of management plans for lands dedicated or reserved under Part 5 (ss.112-116). The Minister is given discretion as to the determination of the contents and requirements to be specified in such plans. The Minister may also acquire land by purchase or compulsorily (s.135), subject to the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (see below).

A range of activities or actions on public land are prohibited under the provisions of the Act, including residing, erecting a structure, depositing litter or other waste, or interfering with any substance on public land, or clearing, digging up or cultivating public land, without lawful authority (s.155). In proceedings for an offence against this section, it is up to the accused to prove that they had such authority.

*Crown Lands
(Continued
Tenures) Act
1989*

The *Crown Lands (Continued Tenures) Act 1989* provides for the continuation and administration of tenures in force under the repealed provisions of the *Crown Lands Consolidation Act 1913*, the Closer Settlement Acts and other Acts. Under this Act (ss.3, 5-13), tenure means: a specified incomplete purchase; a perpetual lease; term lease; yearly lease or special lease; a permissive occupancy; a quarry licence; or a lease to the Commonwealth under the *Crown Lands Consolidation Act 1913* (s.69A).

The Schedules set out the conditions applying to the separate categories of tenures covered by the Act.

*Drainage Act
1939*

The purpose of the *Drainage Act 1939* is to make provision for the drainage of land, the mitigation of the effect of floods and the control of flood waters in certain areas of the State.

The Act allows an application for any land that is prone to flooding to be made subject to the Act (s.8) and to allow flood mitigation and prevention works to be undertaken on that land by a drainage union constituted for that purpose (s.12). Applications are made to the Water Administration Ministerial Corporation, constituted under the *Water Administration Act 1986* (see below).

The powers, functions, duties and authorities of the drainage unions are exercised by a three to four member Board of Directors (s.13). The Board's powers include maintaining and renewing works under their control, and constructing and altering such works in their respective districts (s.32). Districts are named by the Corporation (s.4). The Boards are empowered to enter, or authorise others to enter, any land within their district to inspect, survey, construct, maintain or extend works, but they must compensate the owner/occupier of the land for any damage they cause in so doing (s.33).

The Corporation may inspect any land under this Act to ensure that the works comply with the Act. If they do not, the Corporation is entitled to undertake the remedial works and recover the costs of so doing as prescribed by regulations made under the Act (s.36).

The owner of land may make and cut drains through neighbouring or adjoining land to mitigate or prevent flooding, but if the land is in a district then that person must get the consent of the trust for that district and must pay compensation to the owner of the neighbouring land as determined by the trust (s.76).

The Act makes provision for the levying of rates in Part 5. If rates levied in respect of any land remain overdue for more than seven years, the land subject to the rates may be sold (s.55).

The purpose of the *Eastern Gas Pipeline (Special Provisions) Act 1996* is: to facilitate the construction of a portion of the Longford (Victoria) to Wilton (New South Wales) gas pipeline on land that is in Morton National Park; to provide a defence for actions in the construction and operation of the pipeline that would otherwise constitute offences under such Acts as the *National Parks and Wildlife Act 1974* (see below); and to realign land included in Morton National Park and the Ettrema Wilderness Area for the purposes of this Act. The Act allows for essential modifications to the Morton National Park to enable the construction of the pipeline.

Eastern Gas Pipeline (Special Provisions) Act 1996

Environmental Planning and Assessment Act 1979 The *Environmental Planning and Assessment Act 1979* encourages the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals and water, to promote the social and economic welfare of the community and the protection of the environment, including the protection and conservation of native animals and plants and threatened species (s.5).

The term 'environment' includes all aspects of human surroundings, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages and the provision of land for public purposes (s.4).

The main aims of the Act are to be achieved through environmental planning instruments (Part 3), which allow for the protection of the environment and the control of development.

One such instrument is the State Environmental Planning Policy No. 4 (Development Without Consent). This policy, among other things, makes special provision for specified development on land dedicated or reserved under the *National Parks and Wildlife Act 1974* (see below) as an Aboriginal reserve, historical site, national park, nature reserve, or State game reserve or recreation area.

Under this policy the Director General of Parks and Wildlife or the trustee of a State recreation area may not carry out or cause developments that will generate traffic, or otherwise adversely affect other land in the locality, unless they have given notice to the council of the area and have given consideration to any matters requested by the council to be taken into account before the development commences.

An environmental impact statement must accompany an application for development (ss.112 and 113). The Minister, or consent authority, is required, under Regulation 56 of the Environmental Planning and Assessment Regulations 1994, to take account of the effect of development on Aboriginal land and heritage, such as the impact of a proposal on a locality, place or building having aesthetic, anthropological, archaeological, cultural, historical, scientific or social significance or other special value for present or future generations. The relevant consent authority is also required to take account of the provisions of any conservation agreement

made under the *National Parks and Wildlife Act 1974* (see below).

The Minister may, for the purposes of the Act (ss.8 and 9), acquire land by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* (see below).

The long title of the *Forestry Act 1916* indicates that its purposes include: to provide for the dedication, reservation, control and use of the State's forests, timber reserves and Crown lands for forestry and other purposes; and to consolidate the law in relation to forests. *Forestry Act 1916*

The Act establishes the Forestry Commission of New South Wales (s.5) which is responsible for the control and use of State forests, timber reserves, and Crown lands for forestry and other purposes (ss.8A and 9). This includes the power to sell or convert timber and products, and to purchase and sell animals depastured in State forests and on timber reserves.

The Act also empowers the Minister to acquire land for a State forest, or for access to or the management of a State forest, by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* (see below). Under the Act, the Governor has the power, by notice in the *Gazette*, to dedicate certain vacant Crown lands as State forests (s.15).

The Act does not apply to lands within an Aboriginal reserve (refer to the *Crown Lands Act 1989* above and the *National Parks and Wildlife Act 1974* below). However, all licences and permits under this Act affecting lands within an Aboriginal area, unless cancelled under this Act, continue in force until they expire, and the Act continues to apply to them until they are cancelled or expire (see the *National Parks and Wildlife Act 1974* below, ss.42 and 64).

Among other things, it is an offence under the Act to: cut, remove or destroy timber; or obtain, remove or destroy any products; or in any State forest or flora reserve to quarry for, dig, obtain or extract any forest materials (s.27). This is now subject to, and needs to be read in conjunction with, the *Native Vegetation Conservation Act 1997* (see below). 'Forest materials' refer to rock, stone, clay, earth, sand or like

material; ‘product’ means the products of trees or shrubs or vegetable growth of economic value (s.4).

The Act provides for the granting of licences to take timber, products or forest materials from Crown timber lands (ss.27A-27C). It restricts the issue of clearing licences, and these restrictions now apply to the granting of such instruments in respect of protected land under the *Native Vegetation Conservation Act 1997* (s.27H). The Commission may grant exemptions for the removal of small amounts of timber from certain land as specified (s.30).

The Act allows for the granting of a permit to occupy and use land within a State forest or timber or flora reserve or in respect of certain Crown land (s.31). It also authorises the granting of a hunting permit on land that is in a State forest, timber or flora reserve (s.32B).

*Forestry and
National Park
Estate Act
1998*

The *Forestry and National Park Estate Act 1998* legislates the regional forestry agreement process and has provisions for integrated forestry operations.

Part 2 deals with land transfers to the national park estate and for Aboriginal ownership. This includes the revocation of the dedication of certain lands as State forest and the associated flora reserves, which are then re-reserved or re-dedicated as national park or nature reserve lands under the *National Parks and Wildlife Act 1974*. Also, certain other former State forest and Crown lands are transferred to the ownership of local Aboriginal land councils. The lands covered in Part 4 are identified and described in Schedules 1-6.

Part 3 has provisions for forestry agreements which are made between the relevant Ministers responsible for the *Environmental Planning and Assessment Act 1979*, the *Forestry Act 1916*, the *National Parks and Wildlife Act 1974* and the *Protection of the Environment Administration Act 1991*. Forestry agreements can only be made after an assessment by the Resource and Conservation Assessment Council, which includes Indigenous heritage values in its assessment. The Eden region, the Lower North East region and the Upper North East region are the first areas where this legislation will take effect. A forestry agreement must include provisions for ecologically sustainable management, sustainable timber supply and community consultation.

Part 4 covers the approval of integrated forestry operations which are not part of the national park estate, or on timber plantations, or on land being cleared of natural forest for a timber plantation or non-forestry use. Integrated forestry operations are established only within the area within a forestry agreement, and are designed to integrate with parts of the regulatory regimes which protect the environment. This Act does not prevent or affect the carrying out of forestry operations authorised by the *Forestry Act 1916*, or any other legislation.

The *Inclosed Lands Protection Act 1901* protects inclosed lands. 'Inclosed lands' are defined in s.3 to include State schools and schools registered under the Act, and any land, whether public or private, that is surrounded or inclosed, by any wall, fence or other erection, or partly surrounded or partly inclosed by any such wall or fence, etc., and partly by a canal or by some natural feature such as a river or cliff by which its boundaries may be known or recognised, including the whole or part of any building or structure and any land occupied or used in connection with the whole or part of any building or structure.

Inclosed Lands Protection Act 1901

Section 4 makes it an offence to enter onto inclosed lands without lawful excuse and to refuse to leave such lands after being requested to do so by the owner or occupier or a person in charge of the land. An example of lawful excuse is where a drover or person in charge of stock being driven upon a road in an inclosed area enters onto the land to prevent the stock from straying or to regain control of the stock.

The purpose of the *Irrigation Act 1912* is to make better provision for the construction, control and management of works of water conservation, irrigation and water supply, and for the constitution, administration and management of irrigation areas, as well as for the resumption and disposal of land.

Irrigation Act 1912

The Act (s.5G) allows the Water Administration Ministerial Corporation, as constituted under the *Water Administration Act 1986* (see below), to acquire land (including an interest in land) by agreement or compulsory process for the purpose of constituting or altering an irrigation area, subject to the provisions of the *Land Acquisition (Just Terms Compensation)*

Act 1991 (see next). Under the Act, such acquisition is an ‘authorised work’ and ‘the Corporation’ is the constructing authority for the purposes of the *Public Works Act 1912* (see below).

The Governor of the State is empowered to constitute any specified area of Crown land in the State as an irrigation area in the Eastern, Central or Western Division (s.6). That land then becomes Crown land under the Crown lands Acts (see above) and may be dealt with as such by the Corporation. This includes any land acquired by the Corporation (under s.5G) or vested in the Corporation by the Governor (under s.22A). The Corporation has control of any irrigation area and works within, or used in connection with, the area (s.8).

The unauthorised use of water, and causing damage to or interference with, works in areas under this Act are an offence (ss.17A and 17AA). A person is liable for causing damage to bridges, culverts, and so on, constructed on land under the Act (s.17AB).

*Land
Acquisition
(Just Terms
Compensation)
Act 1991*

The main aims of the *Land Acquisition (Just Terms Compensation) Act 1991* are to provide for and ensure compensation on just terms for the owners of land when land is acquired compulsorily or by agreement by the Crown, when the land is not available for public sale (ss.5 and 7). Part 2 makes further provision for the acquisition of land by compulsory process.

The definition of ‘registered interest in land’ (s.4(1)) includes an interest in the land recorded in the Native Title Register under the *Native Title Act 1993* (Cth) (NTA) (see Chapter 9.6). ‘Owner of land’ includes a holder of native title rights and interests in relation to land (s.4(5)) and ‘interests in land’ confirms the inclusion of native title rights and interests (s.53).

Where the Crown is authorised by law to acquire land by compulsory process, this includes the acquisition of native title rights and interests (s.7A). For any such acquisition of native title rights and interests the Crown is authorised to comply with any relevant procedure under the NTA, such as the right to negotiate (s.7A(z)). Those engaged in negotiations about the compulsory acquisition of native title rights and interests in land are required under the Act to consider, and negotiate in good faith, requests for non-monetary forms of compensation (s.37A - this provision mirrors s.79 of the NTA). Examples of

what may constitute non-monetary compensation include the transfer of property or the supply of goods and/or services (see note to s.37A of this Act). Any person has the right to be justly compensated for the acquisition of land under the Act (s.54(1)).

The Act makes provision for solatium (s.60). This is defined as the payment of compensation to a person for non-financial disadvantage resulting from the necessity of that person to relocate their principal place of residence as a result of the acquisition (unless notified otherwise by the Minister in the *Gazette*, the maximum amount is \$15,000).

If a person from whom native title rights and interests in relation to land have been acquired but the compensation payable under this provision is not sufficient to amount to just terms (as defined under s.23(3) of the NTA), the person concerned is entitled to such additional compensation as is necessary to ensure that the compensation is as required under the NTA (s.54(2)).

The purpose of the *Murray Darling Basin Act 1993* is to approve, and provide for carrying out, an agreement between the Commonwealth, New South Wales, Victoria and South Australia with regard to the water, land and other environmental resources of the Murray Darling Basin (the MDB) (ss.1 and 6).

*Murray Darling
Basin Act 1993*

The Act allows the Governor to appoint two commissioners and two deputy commissioners to the MDB Commission (s.7). The powers, functions and duties of the Commission are as specified in the Agreement (s.13). The Commission has the power to authorise a person to enter land for the purposes of the Act and the Agreement (s.14) and to enter onto land to access works, subject to giving the owner/occupier of the land seven days' notice of the intention to do so (s.15). Premises cannot be entered without the owner/occupier's consent.

The Act authorises the construction of required works (s.17) and allows any body declared by the Minister as a relevant water authority to acquire the land required for the construction, control, maintenance and operation of the required works (subject to the *Land Acquisition (Just Terms Compensation) Act 1991* (see above) and the *Water Administration Act 1986* (see below) and to dispose of such land (ss.18-210).

*National Parks
and Wildlife
Act 1974*

The *National Parks and Wildlife Act 1974* relates to the establishment, preservation and management of national parks, historical sites and other areas, and the protection of certain fauna, native plants and Aboriginal relics. 'Aboriginal relics' are discussed in more detail in 1.2 below.

National Parks and Wildlife Service

The Act establishes the National Parks and Wildlife Service (NPWS) (s.6) and details the powers and functions of the Director General of the Service (s.8).

The functions and powers of the Service, in respect of the areas that are the subject of the Act, are also provided for (s.12). These include the management of national parks, historical sites and State recreation areas, nature reserves, state game reserves, karst conservation reserves, and wildlife areas.

Provision is made under this Act for the proclamation of Aboriginal areas by the Governor, areas which are deemed to be dedicated for the purpose of preserving, protecting and preventing damage to Aboriginal places and relics within these (ss.62 and 63)

In October 1997, the State's Environment Minister launched the NPWS Aboriginal Heritage Division, which is staffed by Aboriginal people from an operational level through to the Manager of the Division, representing a broad cross-section of Aboriginal communities within the State. The aim of the Division is to improve the NPWS's performance in protecting and preserving Aboriginal heritage in close consultation with Aboriginal communities across the State and to ensure that these communities will have greater input on the protection and management of important sites.

Aboriginal Cultural Heritage (Interim) Advisory Committee

The appointment of the Aboriginal Cultural Heritage (Interim) Advisory Committee is provided for in the Act (ss.27 and 28). The Committee advises the Minister and Director General on any matters relating to the preservation, control of excavation, removal and custody of relics from Aboriginal places, whether or not a matter is referred by the Minister or the Director General to the Committee.

Aboriginal Lands

There are also special provisions relating to Aboriginal land specified in Part 4A (ss.71B-71BN). These lands are administered by boards of management (constituted under s.71AN) and comprise 11 to 13 members. The members are appointed by the Minister administering the *Aboriginal Land Rights Act 1983* and, of these, the majority must be the Aboriginal owners of the relevant land; amongst the other members, one must be a person appointed from nominees of a local Aboriginal land council or councils in whose area the whole or parts of the land are located.

The parks and reserves set aside under this regime are:

- Mount Yarrowyck Nature Reserve near Armidale,
- Mount Grenfell Historic Site near Cobar,
- Mungo National Park near Mildura,
- Mootwingi National Park and Historic Site and Coturaundee Nature Reserve, both near Broken Hill,
- Jervis Bay National Park near Jervis Bay, and
- Biamanga National Park near Bega.

These lands are specified in the Act (s.14) and are acknowledged to have special cultural significance to Aboriginal people (ss.71D and 71L and Divisions 3, 7 and 8 of Part 4A).

The Act (s.71C) describes the main features of this regime as including the return of national parks and reserves of Aboriginal cultural significance to Aboriginal peoples and the transfer of ownership of land to Aboriginal land councils as established under the *Aboriginal Land Rights Act 1983* (see above).

There is also provision for the lease-back of these lands by the councils to the NPWS, to be then reserved or dedicated under Part 4A of this Act (s.71C). The taking of any action under this section is subject to any native title rights and interests existing in relation to the lands immediately before the taking of the action and does not extinguish or impair such rights and interests.

Despite any other provision in this Act, the exercise of functions by a board of management and the exercise of statutory power by the Director General under this Act in

relation to Part 4A lands is subject to the preservation of native title rights and interests in so far as any exist in the lands (s.71BI). Provision is also made for the return of Aboriginal relics, including ancestral remains, to the Aboriginal owners.

The Minister, the relevant Aboriginal land councils and boards of management are also charged with the responsibility of ensuring that native title rights and interests that have been subject to an approved determination (as defined under s.253 of the *Native Title Act 1993* (Cth)) (see Chapter 9.6) are preserved, and are entitled to enter into arrangements with the relevant native title holders to ensure that this happens. However, no compensation is payable for such an arrangement (s.71BI(4)).

In September 1998, Mootwingi National Park and Historic Site were handed back to the traditional owners, the Wiimpatja. The handover was made with the proviso that the lands then be leased back to the NPWS. The management of the renamed Mutawintji National Park is now overseen by a joint management committee. As of January 2000, the arrangements provided by Part 4A had not yet been implemented at any of the remaining nominated parks or reserves.

On 19 October 1997, the largest national park created in the Sydney metropolitan region was officially opened, being the 940 hectares Scheyville National Park at Pitt Town on the city's north-western outskirts. The Park includes recognition of the long association by local Aboriginal people with some of the areas of land in the Park and its importance to Aboriginal heritage.

For the purposes of obtaining land for reservation or dedication as historical sites, Aboriginal areas or protected archaeological areas, or for the purposes of preserving, protecting or preventing damage to relics or Aboriginal places, the Minister may acquire land by purchase, exchange, resumption, appropriation or agreement. The Act (ss.145-150) requires that any resumption or appropriation of land under this Act must be effected by the Governor under the *Public Works Act 1912* (see below).

Hunting and Gathering Rights

Aboriginal people and their dependants are exempt from prohibitions (under ss.70, 71 and 117 of this Act) against the taking of fauna or plants in wildlife districts, refuges and management areas, in conservation and wilderness areas, and areas subject to a wilderness protection agreement; and the taking or killing of protected or endangered fauna; and the taking of protected native plants (clauses 37 and 39 of the National Parks and Wildlife (Land Management) Regulation 1995).

The *Native Vegetation Conservation Act 1997* was assented to and commenced on 1 January 1998. It replaces and consolidates existing legislative controls over the clearing of native vegetation and protected lands, including those found in the *Forestry Act 1916* (see above), the *Soil Conservation Act 1938* (SCA) and the *Western Lands Act 1901* (for details on both these Acts see below).

*Native
Vegetation
Conservation
Act 1997*

The long title of the Act indicates that its main purpose is to make provision for the conservation and sustainable management of native vegetation and the clearing of land.

The main aims of the Act (s.3) are to:

- provide for the conservation and management of native vegetation on a regional basis;
- encourage and promote native vegetation management in the social, economic and environmental interests of the State, consistent with the principles of ecologically sustainable development;
- encourage the rehabilitation of land with the appropriate native vegetation; and
- prevent the inappropriate clearing of native vegetation.

The Act defines ‘clearing’ to include the cutting down, felling, thinning, logging or removing, killing, destroying, poisoning, ringbarking, uprooting, burning, severing, topping or lopping of branches, limbs or trunks, of native vegetation or substantially damaging or injuring, as the case may be, native vegetation (s.5). This is expressed specifically to apply to protected land under the SCA.

‘Native vegetation’ includes trees, understorey plants, ground-cover and plants in wetlands (s.6). Specifically excluded are mangroves, seagrasses or any marine vegetation provided for in the *Fisheries Management Act 1994* (see 1.4 below).

The Act also identifies land that the Minister may declare as protected land (s.7). This is land that: has a gradient equal to, or greater than, 18 degrees; is situated in or within 20 metres of the bed or banks of any part of a river or lake; or that is, in the opinion of the Minister, affected by, or likely to be affected by, soil erosion, siltation or land degradation. This includes protected land under the SCA. This does not apply to land that is identified as regional protected land under a regional native vegetation plan or as land to which such a plan applies.

Lands Covered by and Excluded from the Act

The Minister may designate any part of the State as a region for the purposes of the Act, which may comprise any one or more of the State’s local government areas (see *Local Government Act 1993*, 1.3 below), but must comprise at least one such area (s.8). Land zoned as residential (but not if zoned rural-residential), a village, a township, or for industrial or business use is excluded from the operation of the Act (s.9).

Also excluded are lands subject to Environment Protection Policies 14 (Grass Wetlands) and 26 (Littoral Rainforests) under the *Environmental Planning and Assessment Act 1979* (see above). Other lands specifically excluded are those in a State forest, flora or fauna reserve or timber reserve under the *Forestry Act 1916* (see above); land dedicated or reserved under, or subject to, Part 4 Division 7 (s.145), or an interim protection order under Part 6, of the *National Parks and Wildlife Act 1974* (see above); or lands subject to a conservation instrument under the *Heritage Act 1977* (see 1.2 below). Other exclusions cover lands mainly in the metropolitan area of the State (ss.10 and 11).

Development Consents

The central control mechanism for the clearing of native vegetation and protected land is the development consent process under Part 4 of the *Environmental Planning and Assessment Act 1979* (the EPA Act) (ss.14, 15). This applies to clearing of land which is subject to a regional plan and all protected lands under any State Act. This means that the

relevant environmental assessment and threatened species impact provisions of Part 4 of the EPA Act apply to all such clearing and protected lands. Responsibility for the Act is with the relevant consent authority (ss.18-22).

Regional Vegetation Management Plans

The Minister may direct any regional vegetation committee or the Director General to prepare a draft regional vegetation management plan (s.24). The Plan must identify the land to which it is intended to apply (s.25). The plan may provide for such consent as may be required for the clearing of native vegetation on regional protected lands, the way in which such clearing may be done, adopt a code of practice as part of the plan and outline strategies of how the objects of the Act may be achieved. Only land as specified (under s.7) may be identified for these purposes.

The Director General of National Parks and Wildlife must be consulted in this process (s.26). Consideration must also be given to matters such as the conservation of native vegetation and native species and their habitat, and conservation of the soil and of water resources, and of geologically, archaeologically or anthropologically sensitive areas (s.27). Instruments made under the *Catchment Management Act 1989* (see above) and matters relating to social and economic uses of land affecting native vegetation management must also be considered.

The Act deals with public notice of, and submissions and consideration of such submissions concerning, draft plans, as well as the duration, amendment, repeal and approval of these plans, and their status as legal instruments (ss.28-36).

Codes of Practice and Property Agreements

The Minister may draft codes of practice in consultation with the Advisory Council (ss.37-39). Such codes would contain provisions dealing with the clearing of vegetation on land and other purposes as specified. It would also specify the aims and objectives of the codes and the extent to which the land may be cleared.

The codes will be implemented by regulations made under the Act and may be varied by further regulations. A land holder must comply with any applicable code of practice, which has the effect of not requiring the land-holder to obtain a

development consent (ss.18-22). Similar exemptions apply to land holders that enter into a property agreement with the Director General (ss.40-42).

Committee and Council

The Minister is empowered to establish a regional vegetation committee (s.51). Its members must include four representatives of rural interests (two of them selected from the NSW Farmers' Federation), two representing conservation interests nominated by the Conservation Council of NSW, one nominee of the Catchment Management Trust as established under the *Catchment Management Act 1989* and two people representing Aboriginal interests nominated by the NSW Aboriginal Land Council.

The functions of this Committee will include the preparation of draft regional vegetation management plans for the region for which the Committee is established, monitoring and keeping under review the plan and any other functions imposed on it under the Act (s.52).

The Act establishes the Native Vegetation Advisory Council (s.54). It is to be chaired by a nominee of the Minister and is to comprise a membership that is similar to the one specified for the committees that may be established (s.51), including the requirement for two members to be nominees of the NSW Aboriginal Land Council.

The functions of the Council are to advise, monitor and report to the Minister on the status of native vegetation in the State, to develop and advise the Minister on a native vegetation conservation strategy that is designed to achieve the objects of the Act, and to advise and report on any other matters as requested by the Minister (ss.55(1 and 2)).

The strategy must outline those plans developed at State and national level that are relevant to the management of native vegetation (such as greenhouse or biodiversity) and that promote education and awareness of the conservation of native vegetation (s.55(3)).

Enforcement

The Director General is empowered to issue stop-work orders in cases of contraventions or potential contraventions of the Act, and to make a remedial work order where land has been cleared illegally (s.46). Any person authorised under the Act

may enter land and carry out inspections to ascertain possible breaches of the Act (s.61).

The objects of the *Noxious Weeds Act 1993* are to identify and control the spread of noxious weeds, specify control measures, provide a framework for the State-wide control of such weeds and specify the duties of public and private land holders as to the control of noxious weeds (ss.3, 12 and 13).

Noxious Weeds Act 1993

The Act provides the Minister with the power to declare plants to be noxious weeds for the purposes of this Act and to apply categories of control on them (s.33). The Minister is also empowered to declare any land to be a quarantine area to prevent the spread of class W1 and W2 noxious weeds, subject to obtaining the consent of the Ministers affected by this declaration (s.34A). Once such a declaration has been made, the Minister may prohibit or restrict the movement of people, animals and things into, out of and within the relevant area, specify conditions, entry and exit points, and a large variety of other matters incidental to this, including related powers to stop and search vehicles (s.34B).

Local authorities within local government areas are provided with extensive powers (ss.35-40), which may include draining a swamp to control noxious weeds if the occupier of the land requests this and if no-one objects to this being done (s.38(2)). They may also appoint inspectors (s.39), who, along with other authorised officers under the Act, have extensive powers to inspect land and enter premises (s.42). 'Land' is defined in Schedule 3 as all land, including watercourses, rivers and inland waters whether tidal or non-tidal.

The *Pipelines Act 1967* relates to the construction, operation and maintenance of pipelines (long title). Permits are issued under Part 2 Divisions 1 (Authority to Survey) and 2 (Permits) of the Act. An applicant for a permit must serve notice on the relevant council, or owner or occupier of the affected land, in respect of a permit issued (s.6), allowing the applicant to enter the land to determine the route of the proposed pipeline and where the related apparatus or works are to be placed (s.7). This also applies in respect of land required to gain access to the affected land. For the purposes of this Act, 'owner' includes any native title holder within the meaning of the *Native Title Act 1993* (Cth) (see Chapter 9.6) (s.3(1)(d)).

Pipelines Act 1967

A person must hold a licence (issued under s.14) to construct, alter or reconstruct a pipeline (s.11); such licences have a term of 21 years, and cover the operation, inspection and maintenance of a pipeline (s.17). The Act requires the Governor to vest the relevant land in the holder of a licence (granted under s.14) and of an easement granted for related purposes (s.18), subject to any restrictions specified in the Governor's notification (s.21).

The Act sets out in detail (s.22(1)) the various tracts of Crown land that are available for compulsory acquisition for the purposes of a licence or of a variation of a licence (granted under ss.14 and 19 respectively). However, special requirements are imposed on the acquisition of lands (specified under s.22(1)(c)), which include lands in fee simple over which the owner has no power of sale. This includes lands in relation to which an owner has native title rights and interests as provided under the *Native Title Act 1993* (Cth) in the definition of lands over which the owner has no power of sale (s22(2)).

*Plant Diseases
Act 1924*

The purpose of the *Plant Diseases Act 1924* is to prevent the introduction and spread of diseases that adversely affect fruit, vegetables and plants. The Minister is empowered to regulate or prohibit the introduction of things likely to introduce disease (s.4). To this end, the Minister may appoint specified ports or places as being the only areas through which plants or fruit (or specified kinds of these) may enter the State, to appoint quarantine stations and to prohibit specified use, storage, carriage or removal of relevant plant and fruit, or things containing such plant or fruit, if it is likely to convey any disease or pest (s.5).

The Minister also has the power to order the owner or occupier of any land or premises, or a person in the possession of plants or fruit, to do or permit such acts and to take such measures as may be required to treat or prevent the spread of a disease or pest, to eradicate or lessen the risk of disease or pest, or to prevent any disease or pest from attacking or being harboured (s.5A). Such an order may be limited in its application to a specified part of the State, may specify the time or times at which the order is to be carried out and cannot last longer than five years (and may be revoked before then).

The Minister may declare any land as a quarantine area by notice published in the *Gazette* on account of the presence or suspected presence of any disease or pest (s.6). The Act operates and must be read in conjunction with the *Noxious Weeds Act 1993* (see above).

The objects of the *Protection of the Environment Administration Act 1991* include establishing the constitution of the Environment Protection Authority, providing integrated administration for environment protection, and requiring the Authority to perform particular tasks in relation to the quality of the environment (s.4). ‘Environment’ is defined as meaning components of the earth, including land, air, water, any layer of the atmosphere, any organic or inorganic matter and any living organism, or any ‘human-made’ or modified structures and areas, and includes interacting natural ecosystems (s.3(1)).

Protection of the Environment Administration Act 1991

The objectives of the Authority are to protect, restore and enhance the quality of the environment of the State, having regard to the need to maintain ecologically sustainable development, to reduce the risks to human health and prevent the degradation of the environment through such means as promoting pollution prevention, recycling, setting mandatory targets for environmental improvement, and promoting and encouraging community involvement in decisions about environmental matters (s.6(1)).

For the purposes of the Act, ecologically sustainable development can be achieved through implementing principles and programs such as inter-generational equity (s.6(2)). That is that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for future generations.

The Authority is responsible for such matters as ensuring that the best practicable measures are taken for environment protection in accordance with the State’s environment protection legislation and other legislation, investigating and reporting on alleged non-compliance with environment protection legislation and advising people engaged in industry and commerce and other members of the community on environment protection (s.7(2)).

The Authority is administered by a Board comprising the Director General and nine part-time members appointed by the

Governor on the recommendation of the Minister, who have experience in, or knowledge of, such matters as environment protection policy, nature conservation, environmental science, local government and the environmental aspects of agriculture, industry or commerce (s.15). The Act establishes various consultation forums which comprise a number of representatives from industry and non-government organisations (s.24) and whose functions include advising the Authority on community concerns and attitudes about environment protection (s.25).

*Public Works
Act 1912*

The *Public Works Act 1912* consolidates Acts relating to public works (long title). Part 4 of the Act is concerned with the acquisition of land for a public work (specified in s.41). Part 6 sets out the powers of a constructing authority of a public work, which include the power to enter any land and to alter the course of rivers, streams or watercourses. A constructing authority is empowered to take temporary possession of land for the purpose of constructing, reconstructing, repairing or altering a public work (s.82).

The Minister responsible for this Act is empowered to take or acquire land for any works authorised under this Act (ss.39 and 40), or for public purposes (as specified in ss.40 and 41), either by agreement or compulsory process. If acquiring land (under s.40), the Minister is deemed to be the Construction Authority. The Act applies the *Land Acquisition (Just Terms Compensation) Act 1991* (see above) to acquisition of land (under ss.39 and 40).

*Real Property
Act 1900*

The *Real Property Act 1900* allows the Registrar General, if satisfied that the evidence is sufficient, to record in the Register of Titles (maintained under s.31B of this Act) all approved determinations of native title made under a law of this State or of the Commonwealth, and any other matters relating to native title rights and interests the Registrar General considers appropriate (s.12C(1)). The Act (s.12C(3)) provides that (for the purposes of s.12C), 'native title' and native title rights and interests have the same meaning as in the *Native Title Act 1993* (Cth) (see Chapter 9.6).

The Act entitles any person who claims, whether by virtue of an unregistered dealing or by the operation of law, to be entitled to a legal or equitable estate or interest in land under

the provisions of this Act (which includes most Crown lands and lands acquired by the Crown according to Part 3 of this Act and the Crown lands Acts mentioned above), to lodge a caveat with the Registrar General prohibiting the recording of any dealing affecting the estate or interests to which the person claims to be entitled (s.74F). Given that native title is recognised as a registrable interest under this Act, there would appear to be scope for a claimant of such title or related rights and interests to apply for the lodgement of a caveat in respect of such title, rights or interests.

Provision is made in the Act for the establishment of the Torrens Assurance Fund to make payment for such matters as the Registrar General's costs of investigating breaches of this Act and compensating a party for loss of land suffered because of fraud, land being brought under this Act, or by the registration of any other person as proprietor of such land, estate or interest (s.134A). No claim may be made against the fund, however, for any loss, damage or deprivation occasioned by, or as a result of, the recording, or the failure to record, in the Register, of an approved determination of native title or other matter relating to native title (s.133(2)).

This applies whether the loss, damage or deprivation is alleged to have been suffered by a holder or claimant of native title, a person deprived of land or an estate or interest in land as a result of the making of an approved determination of native title, or any other person (s.133(3)).

If the Registrar General makes an error in the recording of a matter relating to native title, however, such as the recording of a matter concerning native title on the incorrect folio or the incorrect recording of a matter on the correct folio, the right to make a claim for compensation on the Fund is preserved (s.133(4)).

The purpose of the *Rivers and Foreshores Improvement Act 1948* is to provide for the carrying out of works for the removal of obstructions from, and the improvement of, rivers and foreshores and to make provision for payments to be made by owners of lands who benefit from such works.

*Rivers and
Foreshores
Improvement
Act 1948*

‘Owner’ is defined as including every person who, jointly or severally, whether at law or in equity, is entitled to the land for any estate of freehold in possession (s.2). ‘Works’ includes the removal of timber, vegetation, silt, shingle, soil, sand, gravel, stone, rock or other things from beds, banks, or foreshores of any tidal waters, coastal lake or lagoon or river or from adjoining lands, as well as works to prevent siltation, erosion, flooding or related matters.

The Water Administration Ministerial Corporation, established under the *Water Administration Act 1986* (see below), may notify in the *Gazette* the constitution of any lands in the State as a river or foreshore improvement district to enable the relevant works to be undertaken (s.9). Such a notice must include a plan and description of the affected lands, a description of the costs, nature and purpose of the proposed work, and an estimate of the owner’s contribution where applicable. Provision for the making and dealing with objections must also be made. Once any objections have been dealt with and the formal requirements satisfied, the relevant district is then proclaimed by the Governor (s.10).

Part 3A of the Act makes provision for the protection of rivers and lakes, which includes making it an offence to excavate without a permit (ss.22B and 22C). Stop orders and injunctions may be granted where necessary for the purposes of this Part of the Act (ss.22D and 22E) and remedial work may also be undertaken (s.22G). The Act makes special provision for the removal of material from protected lands (s.22F), including the bank, shore or bed of protected waters (being a river, a lake into and from which a river flows, or a coastal lake or lagoon), land that is not more than 40 metres from the top of the bank or shore of protected waters, or material (which means any part of the surface of any land or any matter lying beneath the surface) at any time deposited, naturally or otherwise, on or under such lands (s.22A).

Under the Act, certain people are authorised to obtain information and enter onto land and take actions required to give effect to the Act (ss.22I-22K). Appeals in respect of matters covered under Part 3A must be addressed to the Land and Environment Court (s.22L). Matters relating to offences and penalties are also covered by the Act (s.26).

The objects of the *Rural Fires Act 1997* (s.3) include providing for: *Rural Fires Act 1997*

- the prevention, mitigation and suppression of bush and other fires in local government areas (or parts of these) and other parts of the State constituted as rural fire districts;
- the coordination of bush fire fighting and prevention throughout the State; and
- the protection of the environment by requiring activities undertaken to achieve these objects be carried out, having regard to the principles of ecologically sustainable development (as defined in s.6(2) of the *Protection of the Environment Administration Act 1991* above).

Each area under a local authority is constituted under the Act as a rural fire district, including lands under the Western Lands Commissioner in the Western Division (see *Western Lands Act 1901* below), but excludes land under the *Fire Brigades Act 1989* (s.6(1)). Responsibility for this Act is vested in the local authority (s.7).

Part 3 sets out the system of coordinated bush fire fighting, including the constitution of the Bush Fire Coordinating Committee and bush fire management committees; the latter are responsible for preparing plans of operation and bush fire management (ss.52-55). Regulation 15(1) of the Bush Fire Regulation 1997 specifies that among the people who are to be invited to become members of a bush fire management committee is a person nominated by the local Aboriginal land council (constituted under the *Aboriginal Land Rights Act 1983*).

The Act identifies a general bush fire danger season from 1 October to 31 March (s.81), but a local authority has the right to vary this if necessary by notice in a newspaper circulating on a daily basis in the area (s.82). Notice must be given of any fires to be lit for clearing of land or firebreaks if this is likely to be dangerous to any buildings in the area (s.86). The Minister is empowered to impose a total or conditional ban on the lighting of fires in any part or parts of the State, which must be broadcast to the affected parts by radio or television (s.99).

- Rural Lands Protection Act 1998* The *Rural Lands Protection Act 1998* empowers the Governor to, by proclamation, constitute rural lands protection districts, their boundaries and names, and a board for each district (ss.5 and 37). The board is made up of eight elected members who are accountable to an elected State Council. The State Council is accountable to the Minister (Part 3).
- The board is responsible in its district for such matters as: the levying and collection of rates levied under the Act (Part 7); animal health; protection of rural lands; administration of drought/disaster relief schemes; the provision of any service for a public authority (s.42); assessing the notional carrying capacity of a holding (s.69); certain stock watering places (Part 9); care, control and management of certain travelling stock reserves (Part 8); and controlling and eradicating pests (Part 11).
- Schedule 4 details the circumstances and procedures for selling land for the non-payment of money owing to a board and expenses incurred by a Board in respect of non-compliance with its order to an owner or occupier of land to suppress and/or destroy noxious animals.
- Soil Conservation Act 1938* The *Soil Conservation Act 1938* provides for the appointment by the Minister of a Commissioner of the Soil Conservation Service for the purposes of such functions as are imposed by this Act, subject to the Minister's control (s.4). It also empowers the Commissioner, or any officer or employee of the Service, to enter any land to carry out inspections, make surveys and place such markers as are necessary for the purposes of this Act and makes it an offence to obstruct them (s.15).
- The Commissioner is empowered to serve the owner (as defined in s.3) of land with a soil conservation notice and requires an owner (subject to the objections and appeals provisions of ss.15B and 15C) to comply with such a notice (s.15A). Non-compliance may entitle the Commissioner to undertake the required work; the costs and expenses associated with this become a recoverable charge against the property (s.15F).
- The Act allows the Commissioner from time to time to cause maps to be prepared identifying protected land (s.21B). The latter is defined (under s.21A) as including land shown on a map (s.21B) and any other land that is situated within, or

within 20 metres of, the bed or bank of any river or lake which is listed in Schedule 6 of the *Water Act 1912* (see below). This Act now operates in conjunction with the *Native Vegetation Conservation Act 1997* (see above).

Land that is excluded is land in any State or national forest or timber or flora reserve under the *Forestry Act 1916*, or any national park, historical site, or nature or state game reserve under the *National Parks and Wildlife Act 1974* (for both Acts see above). Other lands that may be identified as protected land include land in a catchment area, land that has a slope of more than 18 degrees and land that is, in the opinion of the Commissioner, environmentally sensitive or affected by, or likely to be affected by, soil erosion.

The Act defines land that is environmentally sensitive as being land in arid, semi-arid, landslip or saline areas, a habitat of or land containing threatened species as defined under the *Threatened Species Conservation Act 1995* (see below) and land containing sites of archaeological or historical interest (s.21B(6)). The latter are not defined for the purposes of this Act, but they could include sites of significance to Aboriginal peoples and containing Aboriginal relics or artefacts.

The *Stock Diseases Act 1923* provides for the appointment of inspectors who have the power to enter any land, building, vessel, vehicle, aircraft or airstrip to inspect or treat stock for the purposes of, or regulations made under, this Act (s.6). They may also order any person being the owner of, or in charge of, stock to cause the stock to be tested or mustered to a specified place to enable it to be tested; they may also detain travelling stock to be examined and treated if required.

*Stock Diseases
Act 1923*

The Act also empowers an inspector to require the owner of stock or of any land upon which the stock are found, to submit to the authority of the inspector for the purposes of the Act, whereupon the affected land becomes a quarantine area (s.8).

The Minister also has the power to declare a quarantine area (s.10) or, alternatively, the owner of affected land has the option of voluntarily submitting to the jurisdiction of the Act, whereupon the relevant land also will be deemed a quarantine area for the purposes of the Act.

The Act allows the Minister to declare any area a protected area. It imposes restrictions on the bringing into such an area any stock, carcass, fodder, fittings or animal products (s.11A).

Sydney Water Act 1994 The effect of the *Sydney Water Act 1994* is to transfer the operations of the dissolved Water Board to the Water Administration Ministerial Corporation established under the *Water Administration Act 1986* and to enable the Governor by order to vary (but not reduce) the area of operation of the Corporation (s.10), provided that this does not bring the Corporation into overlap with the Hunter Water Corporation Limited, a public authority under the *Water Administration Act 1986*, or a Water Supply Authority under the *Water Supply Authorities Act 1987* (see next).

The Corporation is required to (s.21):

- exhibit a sense of social responsibility by having regard to the interests of the community in which it operates;
- protect the environment by conducting its operations in compliance with the principles of ecologically sustainable development (as set out under s.6(2) of the *Protection of the Environment Administration Act 1991*); and
- protect public health by supplying safe drinking water to its customers and other members of the public in compliance with the requirements of any operating licence.

The Corporation has the power (s.47) to acquire land by agreement or compulsory process for the purposes of the Act, subject to the *Land Acquisition (Just Terms Compensation) Act 1991* (see above).

The Act empowers the Governor, on the recommendation of the Minister, to declare any area of land as a special area for the purposes of protecting its ecological integrity as well as the quality of stored waters in the area, which is consistent with the Corporation's obligations to provide, construct, operate, maintain or manage storage under an operating licence issued under Parts 4 and 5. The Governor may also declare controlled areas (s.88).

Under the provisions of Schedule 2, Part 1, Clause 13, land that is vested in an Aboriginal land council and that is exempt

land under Division 5 of Part 6 of the *Aboriginal Land Rights Act 1983* (see above and also 1.3 below), is also exempt from payment of fees and charges (levied under s.67 of this Act).

The objects of the *Threatened Species Conservation Act 1995* include the conservation of biological diversity and the promotion of ecologically sustainable development, the prevention of the extinction and promotion of the recovery of threatened species, populations and ecological communities and the encouragement of the conservation of threatened species, populations and ecological communities by the adoption of measures involving cooperative management (s.3).

*Threatened
Species
Conservation
Act 1995*

These objects are intended to be achieved by the listing of threatened species, populations and ecological communities and key threatening processes (as defined in s.4) in Schedules 1 to 3 as specified under Part 2.

The identification and registration of critical habitat is provided under Part 3, and various recovery plans and threat abatement plans are covered in Parts 4 and 5. Licensing and other conservation measures (such as stop-work orders and joint management agreements) are provided for in Parts 6 and 7. Part 8 establishes a scientific advisory committee to assist the Minister in the administration of the Act.

The Act provides for the establishment of the Biological Diversity Advisory Council (s.137(1), Part 9). Its functions include: advising the Minister and Director General of Parks and Wildlife on, and assisting in the preparation of, the Biological Diversity Strategy; advising on the status of, and threats to, the biological diversity of the State; and undertaking a review of existing legislation for implementing biological diversity programs and of existing legislation that directly or indirectly may result in the loss of biodiversity (s.139).

Among the ten members of the Council, one must be an Aboriginal person selected by the Minister from three nominees of the New South Wales Aboriginal Land Council.

The Act does not affect the operation of the *Native Title Act 1993* (Cth) (see Chapter 9.6) or the *Native Title (New South Wales) Act 1994* (see 1.6 below) in respect of the recognition

of native title rights and interests within the meaning of the Commonwealth Act or in any other respect (s.145).

Water Act 1912 The *Water Act 1912* consolidates the State's Acts relating to water rights, water and drainage, drainage promotion and artesian wells. The occupier of land which forms the bank of a river or lake has the right, without the need to obtain a licence, to take and use the water in the river or lake for domestic purposes; for the purposes of watering stock; for the purpose of irrigating gardens not exceeding two hectares and to construct dams and excavations as prescribed (s.7(1)), subject to exceptions (s.7(1A) and (2)).

Most other acts of taking water and related water works require licences or permits issued under Part 2 Divisions 3 and 3B by the Water Administration Ministerial Corporation established under the *Water Administration Act 1986* (see next).

Part 6 provides for the constitution of domestic and stock water supply and irrigation districts by the Corporation upon the completion of the works in districts previously declared as provisional districts to allow these works to proceed. The Corporation is provided with extensive powers to impose conditions on the use and supply of water and the construction and maintenance of works in these districts, as well as to impose rates and charges. Additional provision is made for the constitution of flood control districts and the water supply, use and works in these districts.

Water Administration Act 1986 The objects of the *Water Administration Act 1986* are to ensure that the water and related resources of the State are allocated and used in ways that are consistent with environmental requirements and provide the maximum long term benefit for the State and Australia and to provide water and related resources to meet the needs of water users in a commercial manner consistent with the overall water management policies of the Government (s.4).

The right to the use, flow and control of water resources, including water occurring naturally on the surface of the ground and sub-surface waters, is vested in the Water Administration Ministerial Corporation (established under s.7) (s.12).

The Corporation, through its officers, employees and agents, has wide powers of entry onto land to make inspections, surveys, tests, investigations and experiments and carry out boring, drilling or exploration, or undertake works or implement any proposals or plans for the purposes of the Act, but in so doing must ensure it causes as little damage as possible.

The Act (s.18) gives the Corporation power to acquire land (including an interest in land) by agreement or compulsory process for the purposes of this Act, subject to the *Land Acquisition (Just Terms Compensation) Act 1991* and the *Public Works Act 1912* (for both Acts see above). Local and county councils, the Minister for Public Works and the Electricity Commission may exercise certain rights in relation to water pursuant to a number of different Acts listed in Schedule 1.

The *Water Supply Authorities Act 1987* ensures that the water and related resources within the area of an Authority are allocated and used in ways that are consistent with environmental requirements and provide maximum long term benefits for the area and the State, having regard to such matters as promoting the efficient use of water resources, the public interest and community needs, the conservation of natural resources and pollution control and prevention (s.4).

*Water Supply
Authorities Act
1987*

Water Authorities are constituted by proclamation by the Governor (under s.6) and are identified under Part 1 of Schedule 1 (currently these include the Benerembah Irrigation District Environment Protection Trust, the Broken Hill and Cobar Water Boards, and the Upper Parramatta River Catchment Trust).

Other Authorities listed in Schedule 1 Part 2 include the Councils of Cessnock, Gosford, Lake Macquarie, Port Stephens and Wyong (s.5).

The functions of these Authorities include: to manage water resources on behalf of the Ministerial Corporation (see previous two Acts); to provide, construct, operate and maintain the relevant works for the purposes of impounding, conserving and supplying water, as well as for sewerage, drainage and flood mitigation; and to provide assistance to mitigate the effects of flood, drought, fire or other emergency

or hardship, and anything incidental to the achievement of its objects.

The Act (s.55) also permits the Authorities to acquire, by agreement or compulsory process, any land, or interest in land, subject to the *Land Acquisition (Just Terms Compensation) Act 1991* and the *Public Works Act 1912* (for both Acts see above).

Schedule 6 Clause 17 provides an exemption from service charges levied under Part 4 of this Act for land specified as exempt under Division 5 of Part 6 of the *Aboriginal Land Rights Act 1983*.

*Western Lands
Act 1901*

The *Western Lands Act 1901* vests management and control of the Western Division of New South Wales in a Western Lands Commission and provides for the extension of grazing and agricultural leases in that Division, which cover about 40 per cent of the State in an area west of the Shires of Walgett, Bourke, Cobar, Hillston and Balranald (s.3).

Under the provisions of the *Aboriginal Land Rights Act 1983* (s.36(9A)), the title to land successfully claimed under that Act in the Western Division is leasehold in perpetuity, unless the Minister responsible for this Act determines that the land is in an urban area in a city, town or village. The grant of any lease in perpetuity is subject to any native title rights and interests that were in existence prior to the transfer of the land (see Schedule 1 of the *Aboriginal Land Rights Act*). Additional security comes from the requirement that such a lease may not be cancelled unless the Minister administering the *Western Lands Act* has consulted with the Minister administering the *Aboriginal Land Rights Act* (see s.36(9B) of the that Act).

Part 3 of the Act enables the holder under the Crown lands Acts of a homestead grant or occupation grant or occupation licence of land in the Western Division to apply to bring the holding under the provisions of this Act. Part 5 sets out the conditions of leases of land in the Division, which includes the prohibition of cultivation or clearing of the land without the consent of the relevant authorities under the *Soil Conservation Act 1938* and the *Native Vegetation Conservation Act 1997* (for both Acts see above).

Under Part 7, the Minister may dispose of Crown land by way of a lease for grazing, agriculture, mixed farming or a purpose similar to those declared by the Minister to be a purpose for which a lease may be granted.

Western Lands leases are generally used for a variety of purposes, including grazing, cotton production, viticulture and horticulture. In April 2000, the Full Federal Court determined that these leases are not inconsistent with native title rights and interests (*Anderson v Wilson* [2000] FCA 394)

The objects of the *Wilderness Act 1987* are to provide for the permanent protection and proper management of wilderness areas in New South Wales (s.3). The management principles for these areas state that they should be free from human interference to allow them to be restored to their unmodified state and to enable plant and animal communities within them to evolve naturally (s.9).

*Wilderness Act
1987*

The Minister may declare an area of land subject to a wilderness protection agreement to be a wilderness area (s.8). The Minister may also declare land reserved or dedicated under the *National Parks and Wildlife Act 1974*, or land identified by the Director of National Parks and Wildlife as wilderness, to be a wilderness area (other functions of the Director for the purposes of this Act are set out in s.5(1)).

Wilderness protection agreements and conservation agreements, which are entered into under Division 2 of the Act, may contain terms restricting the use of the area, requiring a relevant statutory authority or the Crown to refrain from or not to permit specified activities in the area, or requiring any such statutory authority or the Crown to permit access to the area by specified people.

NEW SOUTH WALES

1.2 HERITAGE

For a detailed discussion of the *Environmental Planning and Assessment Act 1979* refer to 1.1 above.

*Environmental
Planning and
Assessment Act
1979*

The Act defines 'environment' to include all aspects of the surroundings of human beings, whether affecting them as individuals or in their social groupings (s.4).

Of particular relevance to heritage are the provisions of Parts 4 and 5 of this Act requiring an environmental impact statement (EIS) to accompany applications for a wide variety of development by public and private sector entities. Regulation 56 of the Environmental Planning and Assessment Regulations provides that, in an EIS, the following matters potentially relevant to Aboriginal heritage must be taken into account:

- the environmental impact on the community;
- any diminution of the aesthetic, recreational, scientific or other environmental quality or value of the locality; and
- any effect on a locality, place or building having cultural, aesthetic, anthropological, archaeological, historical, scientific or social significance, or other special value for present or future generations.

Examples of where specific provision in relation to Aboriginal places and relics have been made are the Nambucca Local Environmental Plan 1995 and the Narromine Local Environmental Plan 1997.

Under the Act, the relevant consent authority must also take account of the provisions of any conservation agreement under the *National Parks and Wildlife Act 1974* (see 1.1 above, and below) affecting the relevant land (s.90(1)(a1)).

The *Heritage Act 1977* is designed to conserve the environmental heritage of New South Wales. 'Environmental heritage' as defined in the Act includes buildings, works, relics or places of historic, cultural, social, archaeological,

*Heritage Act
1977*

natural or aesthetic significance (s.4(1)). A 'place' is defined as an area of land with or without improvement.

However, in that a 'relic' is defined specifically to exclude relics directly related to Aboriginal settlement (s.4(1)), the only protection that the Act can provide for an Aboriginal place is if that place is of general historical, scientific, cultural, social, natural, aesthetic or archaeological interest. Protection could be provided by the Minister making an interim or permanent conservation order over that place under Part 3. Thus, in practice this Act is not relied on to protect Aboriginal places, given the more comprehensive scheme provided for under the following Act.

*National Parks
and Wildlife Act
1974*

In New South Wales, Aboriginal cultural heritage is largely governed by the *National Parks and Wildlife Act 1974*, which provides for the protection of 'relics', 'Aboriginal places', 'Aboriginal areas' or a 'protected archaeological area' in NSW, and the preparation of a plan of management for such areas (see 1.1 above).

An Aboriginal 'relic' includes any deposit, object or material evidence relating to Indigenous habitation in NSW, not being a handicraft made for sale, and also includes Aboriginal remains (s.5).

The key provisions in this Act relating to Aboriginal heritage are contained within it (ss.62-66). The Director General of National Parks and Wildlife has responsibility for the dedication, care, control and management of relics and Aboriginal places. The Minister may also declare any lands on which a relic or Aboriginal place is situated to be a protected archaeological area. The Director General has power to control access to, and use of, a protected archaeological area.

The Governor may, on advice from the Minister administering the *Crown Lands Act 1989* (see 1.1 above) dedicate any unoccupied Crown lands as an Aboriginal area for the purpose of preserving, protecting and preventing damage to relics or Aboriginal places in the area. Land may be purchased, exchanged, resumed or appropriated for reservation or dedication as an Aboriginal area or protected archaeological area.

The Director General is responsible for the protection of relics and Aboriginal places (s.86). This involves the proper care, preservation and protection of such relics or places on any land reserved or dedicated under the Act, and for the restoration of any such land that has been disturbed or excavated for the purpose of discovering a relic. The Act create offences and penalties for disturbing or excavating any land with the purpose of uncovering a relic, or to disturb or remove any relic that is the property of the Crown, or to damage, deface or destroy a relic or fail to notify the Director General of a relic, without the consent of the Director General (ss.86-91).

The Director General, however, may issue a permit to a person to disturb or excavate land for the purpose of discovering a relic, or to disturb or move a relic and undertake related activities in relation to a relic. The relic must either remain under the custody or control of the Director General or be removed into the custody and control of the Australian Museum Trust, established under the *Australian Museum Trust Act 1975*.

If, in the Minister's opinion, a place is of special significance to Aboriginal culture, the Minister may declare that place to be an Aboriginal place (s.84). A person who, without consent, knowingly destroys, defaces or damages an Aboriginal place is guilty of an offence (s.90).

The Act establishes and sets out the functions and powers of the Cultural Heritage (Interim) Advisory Committee (ss.27 and 28). The Act requires five of the eight members of this Committee to be Aboriginal people, selected by the Minister from eight nominees of the NSW Aboriginal Land Council (see also Schedule 9 of the Act). The functions of the Committee are to advise the Minister and the Director General on any matter relating to the preservation, control, excavation, removal or custody of relics or Aboriginal places, regardless of whether the matter is referred to the Committee by the Minister or the Director General.

The *Mining Act 1992* (see 1.5 below) makes specific provision with respect to mining activity on Aboriginal areas (s.223).

*National Trust
of Australia
(New South
Wales) Act 1990*

The *National Trust of Australia (New South Wales) Act 1990*, which is created as a body corporate by the Act, is empowered, among other things, to lease, purchase, exchange, hold, dispose of and otherwise deal with property (ss.4 and 6).

The reasons for which the Trust may do these things include, for example, the protection and preservation for the benefit of the public of land, works, structures, and articles of national, historical, antiquarian or cultural interest, including Aboriginal relics, Aboriginal rock carvings and paintings and archaeological sites (s.5(a)).

The Trust is empowered to act as Trustee of any such land, structure or article acquired under this Act if it is appointed to do so by any person entitled under this Act to make the appointment (including the Crown) (s.27).

NEW SOUTH WALES

1.3 LOCAL GOVERNMENT

The *Aboriginal Housing Act 1998* constitutes the Aboriginal Housing Office (the AHO), confers functions on the AHO relating to housing for Aboriginal people and Torres Strait Islanders and makes provision for related matters (long title). *Aboriginal Housing Act 1998*

The objects of the Act (s.3) include ensuring that:

- Indigenous people have access to affordable and quality housing,
- such housing is appropriate, having regard to the social and cultural requirements, living patterns and preferences of the Indigenous people for whom the housing is to be provided,
- priority is given to providing housing assistance to those Indigenous people most in need, and
- registered Aboriginal housing organisations are accountable, skilled and effective in the delivery of housing programs and services.

The Act defines 'housing' as meaning any form of residential accommodation (s.4). A 'Registered Aboriginal Housing Organisation' is an eligible organisation (see s.25) registered under Part 5.

The functions of the AHO include planning and developing programs and services to assist Indigenous people in meeting their housing needs, delivering and evaluating these programs, and liaising and cooperating with other government agencies and non-government bodies in relation to these matters (s.8).

The AHO is authorised to fund registered Aboriginal housing organisations ('registered organisations') and to assist them in developing and implementing effective asset and management strategies or provide them with advice, support and other services (s.9(1)). The AHO may also, with the approval of the Minister, transfer or lease property to, and construct housing for, registered organisations (s.9(2)). The Act empowers the AHO to enter into agreements in relation to these matters (s.10).

The Act authorises the AHO to manage and control any property owned by it, and to develop or implement any effective asset or management strategies in respect of such property (s.12(1)). In exercising any of its functions, the AHO may lease, sell, exchange or otherwise deal with any property owned by it, subject to such terms and conditions it chooses to impose (s.12(2)). The Act allows the AHO to provide, construct or relocate, or arrange for the construction or relocation of, any housing, utility services, community facilities or housing related infrastructure (s.12(3)).

The AHO is also empowered by the Act (s.12(3)) to divide and subdivide any land, set out and construct any necessary access roads to any land, and erect, alter, repair or renovate buildings, and make other improvements, on any land, for the purposes of the Act (but subject to the written consent of the owner or occupier of such land).

The AHO has the power to acquire land for the purposes of the Act (s.13), either by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* (see 1.1 above); additionally, it may accept and deal with lands gifted to it by way of bequest or other donation (s.14).

The Act also deals with agency agreements (s.15) and with Commonwealth-State arrangements that the AHO may enter into and perform functions under (s.16).

The AHO has supervisory powers over, and in relation to, land under the control of registered organisations (ss.18-24). For an organisation to become eligible as a registered organisation it must be an Aboriginal or Torres Strait Islander corporation under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (see Chapter 9.1), an Aboriginal land council under the *Aboriginal Land Rights Act 1983* (see below and also 1.1 above), or a body corporate that the AHO considers to be controlled either directly or indirectly by Indigenous people (s.25). The Act allows the AHO to register them, provided they meet the listed criteria (s.26).

Part 6 provides details of the administration and management of the AHO, which is through a Board of six to 14 members, including the Chief Executive Officer and such Indigenous people as are appointed by the Minister (s.30). The functions of the Board include determining the policies of the AHO and

any other functions conferred on it under this or any other Act (s.31).

The Act also establishes an Aboriginal regional housing committee for each region as provided under the Commonwealth ATSIC Act or as determined by the Board (s.35). Membership of an ARHC is also determined by the Board; its functions include advising the Board on Aboriginal housing issues and such other functions as are conferred on it from time to time (s.36).

The Act requires the AHO to prepare and submit to the Minister a strategic plan in relation to Aboriginal housing, either as specified in any Commonwealth-State agreement on such housing, or, in the absence of such an agreement, every three years (s.37). The Act does not provide details of what is to be included in this strategic plan.

For a detailed synopsis of the *Aboriginal Land Rights Act 1983* see 1.1 above.

Aboriginal Land Rights Act 1983

Constitution of Aboriginal land councils

In essence, land ownership by the Aboriginal land councils (ALC) is communal and the councils have some of the powers of community government which are analogous to, but fall somewhat short of, local government powers. The ALC system has three levels: local ALCs, regional ALCs and the NSW ALC.

Local ALC areas are constituted by the Minister, but the Governor may make regulations with respect to the constitution of such areas (s.5(1)). A local ALC is constituted as a body corporate for each area (s.6(1)). All adult Aboriginal people (as defined in s.4(1)) are members of the local ALC for that area (s.6(3)). The Act restricts membership to Aboriginal people who are residents of, or have an association with, the area (s.7(2)).

Regional ALC areas may be constituted by the Minister by a notice published in the *Gazette* after consideration of any recommendation by the Registrar (the Registrar is appointed by the Minister under s.49) (s.14(1)). A regional ALC is constituted as a body corporate for each area under the Act (s.15(1)). The membership of each regional ALC consists of the elected representatives of the local ALCs within the

regional ALC's area (ss.11(1) and 15(3)). A local ALC must not have more than the prescribed number of members on a regional ALC (currently two) (s.11(2)). Members of each regional ALC are entitled to such fees, allowances and expenses as the regional ALC determines (s.15(5)).

The NSW ALC is a body corporate, whose members are elected as full-time Aboriginal councillors and are equal in number to the number of regional ALCs (ss.22(1)-(3)). The Act also specifies remuneration and allowances (s.22(4) and Schedule 5(1)).

Functions of Aboriginal Land Councils

The functions of regional ALCs relate primarily to assisting with the acquisition, management, use, control and disposal of land. This also extends to such matters as dispute resolution (with the consent of the parties concerned), housing (such as, upgrading and extending Aboriginal accommodation for Aboriginal people in their area; see also *Aboriginal Housing Act 1998* above) and the running of enterprises (see ss.12, 36 and 45).

Other functions of regional ALCs include assisting and servicing local ALCs when requested in such matters as the preparation of claims to Crown lands or the negotiation for the purchase or sale of land, and the keeping of financial records. They also assist the NSW ALC in the conciliation of disputes between local ALCs within their area, or between local ALCs and individuals, or between individual members of those ALCs (s.20). Regional ALCs do not have any specific function to acquire or hold land themselves, although they may have power to acquire and hold land by virtue of being statutory corporations (see the *Interpretation Act 1987* (NSW), s.50).

The functions of the NSW ALC are less directly concerned with acquisition, management, use, control and disposal of land except in respect of land that it itself holds. Its land-related powers are more supportive and supervisory; they relate to such matters as financial management and overseeing the operation of the Aboriginal land council system (s.23).

Local and regional ALCs and the NSW ALC are required, under the provisions of the Act (ss.13, 21 and 24), to submit rules to the Registrar, for approval, that relate to the Councils' functions or operations; the Registrar is also required to

approve any amendment to, or repeal or replacement of, such rules.

The Minister has the power to exempt land vested in an ALC from the payment of local government rates by declaration, notified in the *Gazette*, if special circumstances warrant this. Such a declaration operates for the time specified in the notice (ss.43(1) and (2)).

Land vested in an ALC can be sold, or an ALC wound up, for non-payment of rates (s.44). The Act does preserve other rights of recovery against the NSW ALC for non-payment of rates by an ALC (s.44A).

The Minister

The Minister is constituted as a corporation sole under the name 'The Minister, Aboriginal Land Rights Act 1983 (NSW)' (s.50). The corporation may acquire property by purchase, exchange, gift, devise or bequest and may take land on lease (s.52(1)). Any property acquired which is subject to a condition to which the corporation agreed shall not be dealt with other than in accordance with the condition (s.52(4)).

The corporation may build on its land and may vest any of its land or buildings in the NSW ALC or a local ALC, or in some other body or organisation established for the benefit of Aboriginal people (s.53). These provisions now apply in conjunction with the *Aboriginal Housing Act 1998* (see above), which repeals s.56 of the *Aboriginal Land Rights Act 1983* and provides ALCs with the status of registered organisations under the *Aboriginal Housing Act*.

The Minister is given the power to determine rules of conduct to be observed by ALCs and members of ALCs; there is no requirement for these rules to be tabled in Parliament (s.56A).

The main objects of the *Impounding Act 1993* include empowering authorised people to impound animals and articles on public places within their area of operation, and empowering occupiers of private land to impound and deal with animals trespassing on their land (s.3). The Act provides details of who can impound and what may be impounded (s.5). Division 2 of Part 2 provides impounding officers with powers to impound abandoned, unattended and trespassing animals. Division 4 deals with the impounding of articles.

*Impounding
Act 1993*

Authorised people for the purposes of this Act who are impounding officers are appointed by councils or impounding authorities such as the Forestry Commission, the Director of Parks and Wildlife and the Minister administering the Crown lands Acts (see 1.1 above). The area of operations in the case of an impounding officer appointed by the Director of National Parks and Wildlife, includes a national park, nature and state game reserves, a state recreation area, a regional park (other than a park under the care, control and management of a council) and an historical site and Aboriginal area as defined in the *National Parks and Wildlife Act 1974* (NPW Act) (see 1.1 above) (s.4 and Dictionary).

‘Animal’ is also defined in the Act and includes cattle, horses, donkeys, mules, asses, sheep, camels, goats, pigs and deer (s.4 and the Dictionary).

Also included is any dog that is in a national park, nature or state game reserve, a karst conservation area, or historical site or Aboriginal area as defined under the NPW Act; the Act further provides that a dog cannot be impounded under this Act unless it is in those NPW Act areas (s.7). The impounding of dogs is covered under the *Dog Act 1966*.

An authorised person may destroy and/or remove any animal from a public place if they believe on reasonable grounds that the animal poses a public risk (ss.41(1) and (2)). This authorisation does not apply to threatened species under the *Threatened Species Conservation Act 1995* (see above), or protected fauna, or an animal that is in a park, site, reserve or area under the NPW Act (s.41(3)).

*Local
Government
Act 1993*

The purposes of the *Local Government Act 1993* include providing the legal framework for an effective, efficient and environmentally responsible and open system of local government in the State. The Act gives councils the ability to provide goods, services and facilities, and to carry out activities, appropriate to the current and future needs of local communities and the wider public.

This includes the construction of works of water supply, sewerage or stormwater drainage under the *Public Works Act 1912* (see 1.1 above) (ss.7 and 24).

The Act applies to those parts of the State that are constituted as areas for the purposes of the Act (s.5). It does not apply to

those parts of the State not within a local government area, such as the lands specified in the Western Division of the State (to which the *Western Lands Act 1901* applies, see 1.1 above, and below).

The State Governor may constitute any part of the State as an area (s.204) by proclamation, in which case a council may be constituted for such an area upon the Governor's proclamation (s.219). The elected councillors, headed by a mayor, comprise the governing body of a council (s.222), whose role it is to direct and control the affairs of the council in accordance with the provisions of this Act (s.223).

Classification of Land

All land vested in a council (except a road or land to which the *Crown Lands Act 1989* applies) is classified as either community or operational (ss.25 and 31-33). The classification is generally achieved by a local environmental plan or in some circumstances by resolution of a council. The purpose of such classification is to distinguish clearly between land kept for use by the general public (community) and land for the use by the council but not the public (operational).

Community land, except in some limited circumstances, must not be sold (s.45), leased, or licensed for more than 21 years (and if it is for a period of more than five years, the Minister's consent must be given); no such restrictions apply to operational land. Operational land is land which facilitates the carrying out by a council of its functions and which need not be open to the public, such as a works depot or a council garage. A council is required to prepare a plan of management for community land, providing details of objectives and categories of purposes for the land; categories are a sportsground, an area of cultural significance, an area of general community use, a park or natural area (the latter two include bushland, wetland, watercourse, escarpment or foreshore) (s.36).

Acquisition of Land

The Act provides for a council to acquire land for the purposes of exercising any of its functions (ss.186 and 187). Land may be acquired by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* (see 1.1 above). If the land was community land prior to its acquisition, it remains subject to

any trusts, estates, interests, dedications, conditions, restrictions or covenants to which it was subject before acquisition.

The Act prohibits the acquisition of land by compulsory process if it is being acquired for re-sale without the written consent of its owner (s.188(1)). The need for consent is waived if the owner of the land cannot be identified after diligent inquiry and at least six months have elapsed since that inquiry was made (s.188(2)). ‘Diligent inquiry’ is defined to include the giving of notice of the proposed acquisition to the NSW ALC and the relevant local ALC as constituted under the *Aboriginal Land Rights Act 1983* (see above) (s.188(3)).

Powers of Entry

The Act empowers a council employee or other person authorised by a council to enter any premises and carry out necessary inspections and investigations during reasonable daytime hours for the purpose of enabling a council to exercise its functions (s.191). The Act makes it an offence to obstruct such people (s.660) and to fail to comply with their directions (s.661). Various other offences relating to a refusal to provide a name, making improper disclosure or misuse of, or providing false or misleading, information are also outlined in the Act (ss.662-665).

Rates/Exemptions for Aboriginal Land Council Land

The Act makes extensive provision for the powers of councils to impose rates and charges, and for the enforcement of these powers (ss.491-601). Land that is vested in the NSW ALC or a local ALC and is declared under Division 5 of Part 6 of the *Aboriginal Land Rights Act 1983* to be exempt from payment of rates, is exempt from all rates under this Act (s.555(1)(g)). Further exemptions are also provided in respect of land under the *Aboriginal Housing Act 1998* (see above).

Offences and Penalties

It is an offence for a person to injure, unnecessarily disturb or remove without lawful excuse, any animal or plant from a public place (s.629). However, the Act excludes land in reserves under the *National Parks and Wildlife Act 1974* and state forests and flora reserves under the *Forestry Act 1916* (see 1.1 above) from these provisions (s.633B). Provision is also made for penalties for committing these offences.

Most of the provisions of the *Local Government Act 1919* were repealed by the *Local Government Act 1993* (see previous). One of the few provisions retained is Part 12, which authorises a council to acquire any land for the purpose of pre-planning, replanning and reconstituting roads, land, building and works. This process is subject to the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (see above).

*Local
Government
Act 1919*

Acquisition of land for the purposes of roads under local government legislation has featured prominently in numerous native title claims and therefore the provisions of this Act are likely to be relevant.

The objects of the *Roads Act 1993* include: setting out the rights of members of the public to use public roads and people who own land adjoining a public road; establishing the procedures for opening and closing a public road; and vesting the Road and Traffic Authority (the RTA) with powers and functions for the purposes of this Act (s.3).

*Roads Act
1993*

Acquisition of Land/Native Title Provisions

The acquisition of land provisions in Part 12 (ss.177-206) are relevant to native title. First, the Act (Division 1, ss.177 and 178) empowers the Minister, the RTA or a council to acquire land for any of its purposes by agreement or compulsory process subject to the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (see 1.1 above).

A private person, who is not otherwise empowered to compulsorily acquire land, is entitled to apply to the Minister for the acquisition of land (other than unoccupied Crown land) for the purposes of a public road (ss.182(1)-(3)). The Minister may, by notice in the *Gazette*, compulsorily acquire the whole, or any part of, the land to which the application relates. The Act (note to s.182(4)) makes it clear that under the *Native Title Act 1993* (Cth) (NTA, s.26, see also Chapter 9.6) native title rights and interests in relation to land cannot be acquired compulsorily for the benefit of people other than a government party unless the right to negotiate procedures set out in the NTA (Part 2, Division 3, Subdivision B) are complied with (government party is defined in the NTA, s.253).

The Minister has the discretion whether to deal with the application (s.184(1)). If the Minister does decide to deal with

it, notice of this dealing must be published in a local newspaper and be served on each person who is an apparent owner of the affected land (s.184(2)), including any registered native title body corporate as provided under the NTA (within the meaning of the NTA) in relation to the land affected by the proposed acquisition (s.184(2)).

The Act defines an ‘apparent owner of land’ as including a person who has a registered interest in land (s.181); ‘registered interest in land’ is defined to include an interest in land recorded in the National Native Title Tribunal register kept under the NTA, being an approved determination of native title.

Any person from whom an interest in land is acquired under Part 12 Division 2 is entitled to compensation, except in relation to land subject to a Crown lease or an instrument granted under the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991* (see 1.5 below), or land in relation to which no claim for compensation has been made (s.190). The compensation provisions of the *Roads Act* (ss.40, 49, 52 and 53), and Division 4 of Part 3 of the *Land Acquisition (Just Terms Compensation) Act 1991* (see 1.1 above) are expressly applied to such claims.

The Act applies in relation to negotiations about a compulsory acquisition of native title rights and interests under Division 2 (s.191A). It requires the parties to consider and negotiate in good faith about a request by the claimant party that all or part of the compensation be in a form other than money; this could include the transfer of property or the supply of goods or services.

The Act further provides that if the compensation payable to a person from whom native title rights and interests have been acquired does not amount to compensation on just terms (within the meaning of the NTA) for the purposes of the NTA (s.23(3)), the person is entitled to such compensation as is necessary to ensure that the compensation is paid on that basis (s.194A).

Section 103 of the *Native Title (New South Wales) Act 1994* makes special provision with respect to the service of notices on native title holders where there is no approved determination of native title. Relevant provisions are also made by the NTA.

Part 2 of the *Western Lands Act 1901* vests management and control of the Western Division of New South Wales in the Western Lands Commission and provides for the extension of leases in that Division. The 'Western Division' is defined in the *Crown Lands Consolidation Act 1913*. *Western Lands Act 1901*

The Western Lands Commissioner performs the powers and functions of local government where land is not within a local government area for the purposes of certain statutes. (see, for example, s.35(2) of the *Noxious Weeds Act 1993*)

NEW SOUTH WALES

1.4 MARINE

The main purposes of the *Coastal Protection Act 1979* are: to constitute the Coastal Council of New South Wales and to specify its functions (as set out in Part 2 Divisions 2 and 3), to make provisions relating to the use and occupation of the State's coastal region (as defined and identified in s.4(1) and Schedule 1), and to facilitate the carrying out of specified coastal works by the Minister (Part 4).

*Coastal
Protection Act
1979*

The Act empowers the Coastal Council of New South Wales to advise the Minister for the Environment on the protection, maintenance, enhancement and restoration of the environment of the coastal region and its orderly and balanced utilisation and conservation (s.28).

If, in the opinion of the Minister for Public Works, a proposed activity could in any way adversely affect, or be adversely affected by, the behaviour of a body of water, or adversely affect an area of land or body of water, the public authority proposing the activity may not develop, use or occupy part of the coastal zone without the concurrence of the Minister for Public Works (s.38).

The Governor, on the recommendation of the Minister, may order that the special provisions respecting coastal development set out in this section apply to the area(s) specified in the order (s.39). These special provisions require the Minister to concur with any development or grant of consent for a person to use or occupy the whole or any part of the area concerned.

Any regulations made for the purposes of the special provisions (s.39) must not in any way be inconsistent with an environmental planning instrument made under the *Environmental Planning and Assessment Act 1979* (see 1.1 above), other than a State environmental planning policy (EPP).

The Minister may authorise a person to enter the coastal zone, or any development in the zone, carry out such investigations, inspections, tests, surveys, boring, drilling or exploration, and to take such samples and measurements and record such

information and do all things that are necessary in connection with this Act (s.48). The authorised person must give reasonable notice to the relevant owner or occupier and must ensure that, in the exercise of these functions, damage is kept to a minimum; the Minister is required to compensate any person for any damage so caused.

Fisheries Act 1935 The *Fisheries Act 1935* relates to fisheries and fishing, and to oyster farms (long title).

Part 3 (Division 6) provides details for the consignment and sale of fish; Part 4 deals with trout and salmon acclimatisation districts; and Part 7 empowers the Governor to make regulations relating to these matters.

The Act (s.17AB) authorises the Minister to acquire land (including interest in land) by agreement or compulsory process for the purpose of allowing oyster farming (under s.58) or fish farming (under s.90D), subject to the *Land Acquisition (Just Terms Compensation) Act 1991* (see 1.1 above).

Fisheries Management Act 1994 The objects of the *Fisheries Management Act 1994* are to conserve, develop and share the fisheries resources of New South Wales for the benefit of present and future generations.

The Act sets out further objectives: to conserve fish stocks and protect fish habitats, to promote viable commercial fishing, to provide quality recreational fishing opportunities, to share appropriately the fisheries resource between users, and to promote ecologically sustainable development (s.3(2)).

The objects are to be met, in part, through the creation of appropriate management plans that are required to specify such matters as: the area, times, periods, species and numbers of fish that may be taken in respect of the fishery specified in the plan, and the boats and gear that may be used for taking fish in the fishery (ss.56-65); the setting of limits on the size and quantity of fish allowed to be taken and the means of taking fish (ss.15-21); as well as, if necessary, the closure of waters (ss.8-14). The determination of a plan of management is a public process prescribed by the *Fisheries Management Act 1991* (Cth) (see Chapter 9.4).

General Provisions

The Act provides for access to the fisheries resources of the State for commercial purposes (ss.102-106). These require commercial fishing licences which are subject to the terms and conditions specified in them. The Act also provides for the determination of the total allowable catch of fish in any fishery for the commercial fishing sector (s.28).

A wide range of provisions are contained in the Act for the protection of aquatic habitats (ss.194-214). These include controls on dredging and reclamation, protection of mangroves, protection of spawning areas of salmon and trout and the control of noxious fish.

Enforcement of the Act

The Act provides for the appointment of fisheries officers (s.243) and makes it an offence to obstruct such officers in the exercise of their powers and functions (s.247). These include extensive powers to enter onto and search vessels or premises, and to enter any waters and banks for the purposes of ascertaining and dealing with any breach, or likely breach, of the provisions of this Act (ss.248-254), as well as to seize any vessels, gear or fish involved, or suspected of being involved, in matters constituting a breach of this Act (ss.264-275).

Provisions Relating to Native Title

The Act does not affect the operation of the *Native Title Act 1993* (Cth) or the *Native Title (New South Wales) Act 1994* in respect of the recognition of native title rights and interests (s.287). The decision of the Federal Court in *Yarmirr & Others v Northern Territory & Ors* (1998) 156 ALR 370 (later upheld by the Full Federal Court in *Yarmirr & Others v Northern Territory & Ors* (1999) 168 ALR 370; ‘the *Croker Island Case*’) recognised the continuation of non-exclusive off-shore native title rights and interests in the Northern Territory.

Joint State-Commonwealth Regime

The coastal waters of the State beyond the three nautical mile limit come under the regime of the Joint Authority established under this Act (ss.128-141) and the *Fisheries Management Act 1991* (Cth) (see Chapter 9.6). This raises issues regarding the rights of Aboriginal people to fish in accordance with traditional laws and customs. Again, the decision of the

Federal Court in the *Croker Island Case* confirmed that such native title rights will be recognised by the common law, but they would likely not be exclusive and subject to any rights granted under a statute such as this Act.

Marine Parks Act 1997

The objects of the *Marine Parks Act 1997* include the conservation of marine biological diversity and marine habitats by declaring and providing for the management of a comprehensive system of marine parks and maintaining ecological processes in marine parks (s.3).

Declaration of Marine Parks

Marine parks are declared by the Governor under the Act (s.6(1)) and may include any area of waters of the sea that are subject to tidal influence, or any area of water or land adjacent to such waters, or any area of land within or from time to time covered by such waters (s.6(2)).

If the area is Crown land, the consent of the Minister administering the *Crown Lands Act 1989* (see 1.1 above) in the case of unoccupied, or the owner or occupier of occupied, Crown lands must be obtained, as must the consent of the owner or occupier of any other land in the relevant area (s.6(3)).

Any land that is reserved or dedicated for a public purpose, as well as any land that is reserved or dedicated under the *National Parks and Wildlife Act 1974* (see above) and any other Act (other than land declared to be an aquatic reserve under the *Fisheries Management Act 1994*) may be declared a marine park (s.11). The provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (see 1.1 above) apply to any compulsory acquisition (s.14).

Marine Parks Authority

The Act establishes the Marine Parks Authority (s.29), which is chaired by the Director General of the Premier's Department and has the Director of NSW Fisheries and the Director General of the National Parks and Wildlife Service as members.

Its functions include: investigating, assessing and considering proposals for the establishment or variation of marine parks; managing and controlling activities that may affect marine biological diversity, marine habitats and marine ecological

processes; and providing for and regulating the ecologically sustainable use (including commercial and recreational fishing) of marine parks (s.30). The Authority is also required to prepare an operational plan for each marine park (s.23).

The Minister administering the *Coastal Protection Act 1979* (see above) must notify the Authority of the intention to give a concurrence under Part 3 to the carrying out of development within any area of a marine park or the use or occupation of any area in a marine park (s.21). The *National Parks and Wildlife Act 1974* and the *Fisheries Management Act 1994* apply to any relevant area of a marine park (s.22(2)).

Marine Parks Advisory Council

The Act establishes the Marine Parks Advisory Council (s.32) and its functions (s.33). Members of the Council include the Director of NSW Fisheries and the Director General of National Parks and Wildlife Service, as well as nine other members appointed by the relevant Minister, including one member representing the interests of Aboriginal people (s.32(2)).

The Marine Parks Authority must establish an advisory committee for each marine park, the principal function of which is to advise the Authority on the management of the marine park for which it was established (s.35). An advisory committee is to include at least nine members, representing amongst others the interests of the National Parks and Wildlife Service, NSW Fisheries, marine conservation, the tourism industry and Aboriginal people.

Operation of Native Title Legislation

This Act does not affect the operation of the *Native Title Act 1993* (Cth) (see Chapter 9.6) or the *Native Title (New South Wales) Act 1994* (see 1.6 below regarding the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect (s.45).

The *National Parks and Wildlife Act 1974* establishes the National Parks and Wildlife Service (s.6) and details the powers and functions of the Director General of the Service (s.8). The functions and powers of the Service in respect of the areas that are the subject of the Act are detailed in the Act (s.12). These are national parks, historical sites, state

*National Parks
and Wildlife Act
1974*

recreation areas, nature reserves, state game reserves and karst conservation reserves and include wildlife and Aboriginal areas and Aboriginal places and relics. These are reserved by the Governor by proclamation and are Crown lands or lands vested in a Minister of the Crown or in a public authority (s.5).

Even though the Act does not provide a definition of 'land' for the purposes of the Act, the definition of 'Crown lands' (s.5) specifies that these include those parts of the seabed, and of the waters beneath which it is submerged, that are within the territorial jurisdiction of New South Wales (except for the Eastern Division described in Schedule 2 of the *Crown Lands Consolidation Act 1913*). Also, 'animals' and 'fauna' are defined to include mammals, which include aquatic and amphibious mammals. Therefore, all provisions relating to animals and fauna would include those in marine environments. The Act also makes special provision for plans of management in relation to lands submerged by water (s.80).

Part 7A of the Act makes special provisions for marine mammals and empowers the Director General to prepare relevant plans of management (s.112C). These may deal with matters such as the distribution and abundance of marine mammals, as well as threats to their survival.

Nothing in this Act affects the operation of the *Fisheries Management Act 1994* (see above) except that a lease under the Fisheries Management Act must not be granted in respect of lands within a national park or historical site, or in respect of any waters beneath which those lands are submerged, without the consent of the Fisheries Minister (s.44).

*Petroleum
(Submerged
Lands) Act
1982*

The *Petroleum (Submerged Lands) Act 1982* makes provision for the exploration for, and the exploitation of, the petroleum resources, and certain other resources, of submerged lands adjacent to New South Wales (long title). It is a response to the establishment of a joint Commonwealth-State scheme relating to the mineral and petroleum resources of the Australian territorial sea. The scheme of the Act and its legislative and constitutional basis is outlined in the preamble. The details of the scheme are specified in the *Seas and Submerged Lands Act 1973* (Cth) and other related legislation, the details of which are set out in Chapter 9.4.

Titles

As with all offshore petroleum legislation in Australia, titles fall under three categories, namely those permitting exploration (s.29), those licensing production (s.53) and those licensing related private pipeline works and operations (s.67); there is no provision regarding government pipelines.

Exploration titles are divided into two categories: exploration permits (Part 4 Division 2) and retention leases (Part 4 Division 2A). In addition, there are two special purpose titles, namely special prospecting authorities (s.112) and access authorities (s.113).

Terms of Tenements Granted Under the Act

The initial term of an exploration permit is six years (s.30(a)) and renewals are for five years, but they may only include a maximum of 50 per cent of the blocks covered in the original permit (ss.30(b) and 32(1)). A production licence remains in force for a period of 21 years and the first renewal is also for 21 years; subsequent renewals may be for periods of up to 21 years as decided between the licensee and the relevant authority (ss.54 and 55). A retention lease, both on original application and renewal, has a term of five years.

A special prospecting authority has a maximum and non-renewable term of six months (s.112(6)) and an access authority remains in force for as long as is specified in the instrument and may be extended for such period as the relevant authority decides (s.113(7)). The term of a pipeline licence is as prescribed in this Act (s.68).

The *Ports Corporatisation and Waterways Management Act 1995* establishes the Newcastle, Port Kembla and Sydney Ports Corporations as statutory, State-owned corporations and vests control and management of the respective ports in these corporations (ss.6-10).

*Ports
Corporatisation
and Waterways
Management
Act 1995*

Marine safety functions and related matters and management of trading ports not managed by the Port Corporations are transferred to the Minister responsible for this Act (ss.23-28).

The Marine Ministerial Corporation is established under the Act (s.29). It is managed and controlled by the Minister (s.30). Its functions include: holding, retaining, transferring and disposing of assets, rights and liabilities transferred to it

under the Act on behalf of the State; and acquiring, exchanging, leasing, disposing of and otherwise dealing with or developing property (s.31).

A Waterways Authority is also established under the Act for the purposes of managing the State's waterways (s.35). To do so the Authority may acquire, use or dispose of land, buildings, vessels, equipment and other assets, as well as enter into any contracts or arrangements for the carrying out of works or the performance of services or the supply of goods or materials (s.41).

NEW SOUTH WALES

1.5 MINERALS

The *Aboriginal Land Rights Act 1983* vests certain lands in Aboriginal land councils and the establishes a claims system (for more details see 1.1 above). *Aboriginal Land Rights Act 1983*

The Act contains provisions in relation to ownership of mineral resources whereby all minerals except gold, silver, coal and petroleum are vested in the relevant councils, regardless of whether the land was acquired by transfer, claim, purchase or compulsory process (ss.35 and 45). An Aboriginal land council (ALC) has the power to investigate and exploit resources on the land it holds, including improving the land and exploiting the natural resources that are vested in it (s.41).

Under the Act, any statutory right to explore for or exploit natural resources does not include natural resources that are vested in the relevant councils (s.45(3)), nor is anyone allowed to carry on mining operations on the lands of a council without its consent; a council may give its consent subject to any terms and conditions it chooses to impose (ss.45(4) and (5)). Where a local ALC gives consent, the New South Wales ALC must give its approval and has the right to impose further conditions or refuse consent. The Land and Environment Court also has jurisdiction in these matters and the application of other legislation in respect of the exploration and exploitation of mineral resources (ss.45(6) to (8)).

As provided under the Act, however, these provisions are subject to the *Mining Act 1992* and the *Offshore Minerals Act 1999* (expected to commence by March 2000), which, for example, applies so as not to prevent the renewal or extension of any right, mineral claim or authority, or the registration of a mineral claim or the granting of an authority under an exclusive right conferred by the *Mining Act 1983* or of a licence in accordance with an exclusive right conferred by the *Offshore Minerals Act 1999* (s.45(13)). The Land and Environment Court relied on these provisions when dealing with a land claim over land subject to a mining lease for clay/shale extraction for the Nowra Brickworks (*New South*

Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (1992), 78 LGRA 1).

Broken Hill Proprietary Company Limited (Steelworks) Agreement Act 1950 The preamble specifies that the purpose of the *Broken Hill Proprietary Company Limited (Steelworks) Agreement Act 1950* is to ratify the agreement between the Company and the Crown with respect to the sale of certain lands in the region of Newcastle and to grant to the Company the right to obtain leases of certain adjoining lands to provide for the carrying into effect of the agreement.

The Act provides for the ratification of the agreement in the Schedule, notwithstanding the provisions of any other Act, and confirms and sanctions anything done under the Act (s.3). Clauses 4 and 5 of the agreement make provision for the non-appealable transfer of the relevant land in the Hunter River Region for the purposes of the Act.

Coal Acquisition Act 1981 The effect of the *Coal Acquisition Act 1981* (s.5) is to vest all coal in the State in the Crown, free of any and all trusts, leases, licences, obligations, estates, interests and contracts, with the exception of coal leases granted under the *Coal Mining Act 1973* and coal granted under the *Coal Ownership (Restitution) Act 1990*.

Mining Act 1992 ‘Minerals’ are defined in the *Mining Act 1992* as any substance prescribed by the regulations as a mineral but does not include uranium or petroleum (s.4). Schedule 1 of the regulations lists the substances that are prescribed as minerals for the purposes of the definition of minerals.

The Act preserves the prerogative of the Crown in respect of gold mines and silver mines (s.379). Accordingly, the Crown owns all gold and silver. By virtue of the *Coal Acquisition Act 1981* (see above), the Crown has appropriated all coal in New South Wales. The Crown has also, in effect, obtained ownership of all other minerals by requiring the reservation to the Crown of all minerals in land upon the grant of title to that land.

Parts 3, 4 and 5 of the Act relate, respectively, to exploration licences, assessment leases and mining leases. An exploration licence, assessment lease and mining lease may be granted

over land of any title or tenure (ss.24, 42 and 68). The Act provides for a special class of exploration licence called a low-impact exploration licence that may be approved under section 26A of the *Native Title Act 1993* (Cth). A low-impact exploration licence authorises prospecting operations that the Minister is satisfied are unlikely to have a significant impact on the land (s.32).

Under the Act, the holder of an exploration licence or assessment lease must make an access arrangement with each owner/occupier of land in respect of which they wish to prospect (s.142). The Act (s.138) states that Division 2 of Part 8 (of which s.142 is a part) does not apply if the prospecting title concerned was granted after compliance with Subdivision B of Division 3 of Part 2 of the *Native Title Act 1993* (Cth) (NTA) (see Chapter 9.6) and the grant of the title was not an act that attracted the expedited procedure under and within the meaning of that Subdivision. Under such circumstances it is not necessary to make an access arrangement with a land holder who is a native title holder. In addition, Division 2 of Part 8 does not apply if the prospecting title concerned was granted after compliance with a registered Indigenous Land Use Agreement under the NTA and the agreement provides that an access arrangement is not required under this Division in respect of such a landholder (s.138).

Under the Act, the Governor may constitute any land as a mineral claims district, subject to some exceptions, notably in relation to land within a reserve or land within an exempted area, as defined in the Act (s.173). The Act excludes, among a range of prescribed places, land that is an Aboriginal area, or an Aboriginal place within the meaning of the *National Parks and Wildlife Act 1974* (see next) from the areas of land that may be included in an opal prospecting area (s.223).

The Act outlines the considerations which the Minister must take into account and the conditions under which the Minister may subsequently grant an exploration licence, an assessment lease, a mining lease or a mineral claim, including the need to conserve and protect features of 'Aboriginal, architectural, archaeological, historical or geological interest' in or on the land that is the subject of the application (ss.237 and 238).

National Parks and Wildlife Act 1974 For details about the *National Parks and Wildlife Act 1974* refer to 1.1 above, especially in that the following affects all national parks and historical sites, some of which include lands of cultural significance to Aboriginal people that are set out in Schedule 14 to the Act.

Under the Act, it is illegal to prospect or mine for minerals in a national park or a historical site unless this is expressly authorised by legislation (s.41(1)). Minerals are defined in the Act to include coal, shale and petroleum (s.5)

The Act further states that the *Mining Act 1992* (see previous Act) the *Petroleum (Onshore) Act 1991* (see next Act) and the *Petroleum (Submerged Lands) Act 1982* (see 1.4 above) do not apply in national parks and historical sites (s.41(2)), although existing interests and renewals or extensions are not affected by this (ss.39 and 41(3)).

The Minister may, however, give approval for minerals prospecting to a person nominated by the Minister for Minerals and Energy (via a disallowable instrument tabled in both Houses of the State Parliament) and subject to any conditions the Minister chooses to put on the approval (ss.41(4 to 6)).

Petroleum (Onshore) Act 1991 The *Petroleum (Onshore) Act 1991* regulates the search for, and mining of, petroleum. The Act vests all petroleum, helium and carbon dioxide existing in a natural state on or below the surface of any land in the Crown (s.6). It is prohibited for any person to prospect or mine petroleum except in accordance with a petroleum title (s.7). The Act authorises the Minister, with some exceptions in relation to specially designated areas, to grant a petroleum title over any onshore area whether Crown land or private land (s.9). ‘Private land’ is defined in the Act (s.3) to include ‘land in relation to which native title rights and interests within the meaning of the Commonwealth Native Title Act exist’.

The Act contains provisions for the grant of: exploration licences (Part 3 Division 2) which commit the holder to nominating and adhering to a work program; retention titles (Part 3 Division 3) which include assessment leases that entitle the holder to explore exclusively for petroleum and to assess the petroleum deposit on the land comprising the title; special prospecting titles (Part 3 Division 4) which authorise the holder exclusively to conduct speculative geological,

geophysical or geochemical surveys or scientific investigations; production leases (Part 3 Division 5) which confer on the holder the exclusive right to conduct petroleum mining operations and the right to construct and maintain structures and equipment necessary for the full enjoyment of the title); and low-impact prospecting titles (Part 3 Division 6) which are limited to those operations which the Minister is satisfied are unlikely to have a significant impact.

Exploration and retention titles are fixed by the Minister to last not more than six years with the right to renewal being discretionary (s.31); special prospecting authorities last up to 12 months, and the right of renewal is discretionary (s.3). Production titles are fixed by the Minister for not more than 21 years (s.45).

Part 4A deals with access arrangements for prospecting titles on private land or on land held under a lease for pastoral purposes, but this does not apply to an owner or occupier of land who is a native title holder within the meaning of the *Native Title Act 1993* (Cth), if the prospecting title concerned was granted after compliance with Subdivision P of Division 3 of Part 2 of that Act and the grant of the title was not an act that attracted the expedited procedure under and within the meaning of that Act (s.69A(1)). In addition, this Division does not apply if the prospecting title concerned was granted or renewed after compliance with a registered Indigenous Land Use Agreement under that Act and the agreement provides that an access arrangement is not required under this Division in respect of such a landholder (s.69A (2)).

Compensation may be paid by a person who has been granted a petroleum title, easement or right of way under this Act to every person who holds an estate or interest in the land and is injuriously affected by the grant (s.107(1)). A native title holder as defined in the Commonwealth Act is to be treated as having such an estate or interest in the land (s.107(1A)).

Any compensation already paid for a related claim under Subdivision M or P of Division 3 of Part 2 of the Commonwealth Act must be taken into account for the purposes of assessing compensation payable under this section (s.107(4)). Agreements to compensation and the criteria to be applied in determining compensation are specified in the Act (ss.108 and 109).

The Act sets out the procedure for service of documents on native title holders who are the owners of land (s.134A). The Act (s.134B) gives a special meaning to the term ‘diligent inquiry’ for its purposes (ss.69E, 71 and 72) regarding an owner of land who is a native title holder. Those sections relate to the need for the consent or agreement of owners of land in certain circumstances and the procedures applying if, after diligent inquiry, the owner cannot be located.

In deciding whether or not to grant a petroleum title, the Minister must take into account the need to conserve and protect fauna, flora, fish, fisheries and scenic attractions, and the features of Aboriginal, architectural, archaeological, historical or geological interest in or on the land over which the petroleum title is sought (s.74(1)).

The Act (s.75) provides that among the conditions subject to which a petroleum title is granted are those relating to the conservation and preservation of the matters to which it refers (s.74(1)). The Minister may insert conditions relating to the rehabilitation, re-grassing, reforestation and contouring of the land or any part of the land under a petroleum title (s.76).

*Public Works
Act 1912*

The *Public Works Act 1912* provides that the constructing authority is entitled to all minerals on the land other than those expressly excluded in the notification of the taking of the land and certain minerals already vested in the Crown (s.141(2)). ‘Minerals’ are defined in the Act as including mines or deposits of minerals within land taken under this Act (s.141(1)). For further details about this Act, in particular what constitutes a ‘constructing authority’ see 1.1 above.

If the owner, lessee or occupier of any mines or minerals lying under any authorised work wants to work such mine or minerals, that person must give 30 days’ notice to the relevant constructing authority (s.142(1)). If the authority considers that authorised works on the land may be damaged, the authority may agree to compensate the person if the person is not allowed to work the mine. If the parties cannot agree, the matter may be dealt with and resolved as provided for under the *Land Acquisition (Just Terms Compensation) Act 1991* (see 1.1 above).

The *State Environmental Planning (Permissible Mining) Act 1996* provides for the implementation of State Environmental Planning Policy No 45 (Permissibility of Mining), as specified in the Schedule to the Act. State environmental planning policies (EPP) are made under Part 3 of the *Environmental Planning and Assessment Act 1979* (see Chapter 1.1 above) which also make EPPs subject to the provisions of other applicable environmental planning instruments.

*State
Environmental
Planning
(Permissible
Mining) Act
1996*

The object of the policy implemented by this Act includes facilitating the development of the State's natural resources and enabling certain mining operations to proceed, notwithstanding the provisions of applicable environmental planning instruments (Schedule Item 2). Under Schedule Item 4 (Land to Which this Policy Applies), this policy is expressed to apply to the whole of the State. Item 3 applies the policy to all mines and forms of mining be they open cut or any other method and underground mining. Item 6 specifies that this policy is to prevail over inconsistent provisions of other policies.

The *Uranium Mining and Nuclear Facilities Prohibition Act 1986* imposes a prohibition on the prospecting and mining for uranium in the State (s.7). The *Radiation Control Act 1990* makes provision for the regulation and control of the sale, use, keeping or disposal of radioactive substances and radiation apparatus.

*Uranium
Mining and
Nuclear
Facilities
Prohibition Act
1986*

NEW SOUTH WALES

1.6 NATIVE TITLE

The *Native Title (New South Wales) Act 1994* is designed to establish a process for dealing with native title rights and interests in New South Wales in a manner consistent with the *Native Title Act 1993* (Cth) (the NTA) (see Chapter 9.6). The National Native Title Tribunal, established and provided for under that Act, maintains a Registry in Sydney.

*Native Title
(New South
Wales) Act
1994*

Some of the Act, such as Parts 1, 3, 10 and 11, commenced on 28 November 1994. The *Native Title (New South Wales) Amendment Act 1998* has replaced and repealed provisions, and introduced provisions which commenced on 9 September 1998 and 1 March 1999, as consistent with Commonwealth legislation which amended the NTA.

Part 2 provides for the validation of past acts and intermediate period acts, which may have been deemed invalid due to the existence of native title, that are consistent with the NTA, and establishes State-based mechanisms to determine questions of native title.

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). This allows for the validation of land dealings which did not comply with the provisions of the NTA before the 1998 amendments or with the common law and *Racial Discrimination Act* prior to the passing of the original Act in 1993.

Part 3 confirms the preservation of existing ownership of natural resources, the right to the flow of water and fishing and other access rights.

Part 4 confirms the complete extinguishment of native title by previous exclusive possession acts, and partial extinguishment by previous non-exclusive possession acts. This confirmation is as contemplated by sections 23E and 23I of the NTA. Transfers of land under the *Aboriginal Land Rights Act 1983* and acts covered by Indigenous Land Use Agreements are validated in parts 5 and 6 respectively.

Independent adjudication of objectives under the NTA by native title claimants is provided for in Part 7 which confers that jurisdiction on the Administrative Decisions Tribunal. Native title claimants can object to the compulsory acquisition of native title rights and interests, the creation or variation of certain mining rights, or renewals and other dealings with non-exclusive agricultural or pastoral leases (s.32).

Parts 8 and 9 were repealed by the *Native Title (New South Wales) Amendment Act 1998*.

Part 10 deals with the compulsory acquisition of native title rights and interests as consistent with the NTA (s.23 of the NTA). There are also specific provisions applying to the *State Mining Act 1992* (s.99). The Act ensures that its regulations regarding mining acts are consistent with the NTA.

Part 11 contains information on how to give notice of an act when native title holders have a procedural right to know, yet where there had been no approved determination of native title.

There are other miscellaneous provisions, including those dealing with notification and recovery of compensation paid by the Crown to an authority of the State, consistent with the NTA (s.24). The power to make regulations is also specified in this Part.

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

2. VICTORIA

VICTORIA

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VICTORIA

2.1 LAND AND ENVIRONMENT

The *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) was made under the Commonwealth's races and acquisitions powers in the Constitution (ss.51(xxvi) and 51(xxxi)), and followed a request by the Victorian Government for the Commonwealth to legislate on its behalf to vest the lands at Lake Condah and Framlingham Forest in their traditional Aboriginal owners. *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth)

The preamble to the Act reproduces the preamble in an earlier Victorian Bill, which acknowledged the prior ownership of the land by the Kerrup-Jmara and Kirrae Whurrong 'tribes' and recognised that their rights to traditional title had never been extinguished and that the land had been taken without compensation being granted. The preamble in the Act is, however, subject to a proviso that the Commonwealth does not acknowledge the matters acknowledged by the Victorian Government. However, any relevant laws of the Commonwealth and the laws of Victoria apply unless expressly varied under this Act.

Freehold title (cleared and discharged of all prior interests, trusts, restrictions, dedications, reservations, obligations, contracts, licences, charges and rates in the land) is vested, as of 1 July 1987, in the Kerrup-Jmara Elders Aboriginal Corporation at Lake Condah (53 hectares) and the Kirrae Whurrong Aboriginal Corporation at Framlingham Forest (1,130 hectares) (ss.6, 7 and Schedules 1 and 2). Each of these is a body incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth) (see Chapter 9.3) (ss.3(1), 6(1) and 7(1)).

A person is eligible to become a member of a corporation if the relevant committee of Elders declares the person eligible. A committee of Elders comprises people who are members of the relevant corporation and considered by Aboriginal tradition and practice and by the local community to be such. A committee's functions include: hearing and determining disputes about breaches of traditional customs, 'lores' and practices; anything concerning the management or development of any significant or sacred site on the land; and

the harvesting, taking, use or pursuit of animal life (including fish and bird life) on the land (ss.17, 18 and 25-27).

The corporations have the full power of management, control and enjoyment of the land granted to them, subject to the laws of Victoria and the Commonwealth (ss.13(1), 21(1) and 22(1)). The corporations may make by-laws with respect to certain matters, including: the management, access (see next paragraph), conservation, fire protection, development and use of the land; the declaration of sacred or significant sites or other areas of significance to Aboriginal people on the land; and the activities to be permitted on the land (ss.15(1) and 23(1)). A duty to compile a register of sacred and significant sites is imposed on the Corporations (ss.16 and 24).

Any legal rights of access over the land which existed immediately before the day of vesting continue as they did before the vesting, with the exception of certain roads shown on plans in Schedules 1 and 2 (ss.6(2), 7(2), 14 and 22). Except as provided, any person acting under, and in accordance with, a Federal Act or a law of Victoria may enter and remain on the land (ss.14(2) and 22(2)). Among the other matters for which a corporation may make by-laws is the control of visitors, charging fees for entrance to the land, the regulation and control of motor traffic, and parking (ss.15 and 23).

The corporations may transfer the land to another corporation incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth) (see Chapter 9.3), unless there is an objection from a member of the relevant committee of Elders or an adult member of the corporation. The corporations may give a lease of the land or a licence over it to the Crown, a public authority or any other person under certain conditions (ss.13(1-3) and 21(1-3)). If land is transferred or granted to another Aboriginal group, this Act applies to that group and the land (ss.27 and 29).

The vesting provisions in the Act expressly exclude minerals, interest in which remains the property of the State (ss.6(1)(b), 7(1)(b) and 8). Special provision is also made for compensation in respect of vesting of land in which Victoria or other people had an interest, with provisions of the *Land Acquisition Act 1955* (Cth) (see Chapter 9.1) being made to apply (ss.9, 11, 12 and 40).

The *Aboriginal Land (Manatunga) Act 1992* authorises the grant by the Crown of a specified area of land near the township of Robinvale in the north west of the State, to the Murray Valley Aboriginal Cooperative Limited (preamble and ss.1 and 3(1)). The grant was in fee simple, subject to the proviso that the land be used for Aboriginal cultural purposes (s.3(2)).

Aboriginal Land (Manatunga) Act 1992

The Act provides for the extinguishment of the prior Crown Lease over the land and of any other encumbrance, estate or interest in the land, existing prior to the date of issue of the Crown grant under it (s.4). There are no express restrictions on dealings with the land, but the Governor in Council may also determine any other terms or conditions (s.3(2)).

No compensation is payable by the Crown in respect of anything done under or arising out of this Act (ss.7 and 8). The Act has effect despite any indication to the contrary in the *Land Conservation Act 1970* or in any recommendation made or notice published under that Act (s.5).

The land that is the subject of the *Aboriginal Land (Northcote Land) Act 1989* was temporarily reserved under the *Crown Land (Reserves) Act 1978* (see below) as a site for public recreation. This Act provides for the grant of this land, which is adjacent to the land reserved under the *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* (see next), also to be vested in the Aborigines Advancement League Incorporated. The land was granted in freehold, free of all limitations, interests or encumbrances, but subject to the condition that it continues to be used for Aboriginal cultural and recreational purposes; it is also subject to any other terms and conditions that the Governor in Council determines (ss.4, 5 and Schedule).

Aboriginal Land (Northcote Land) Act 1989

There are no express restrictions on dealings with this land, but all these are subject to the condition that the land continues to be used for Aboriginal cultural and recreational purposes (s.5(3)). This would presumably form the legal basis for access to the land by members of the Aboriginal community and there are no express statutory restrictions on access to this land.

The Act contains a provision in the same terms as contained in the *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* (see next Act) in respect to

mining, which includes provision for the restriction of access for exploration and mining purposes (s.5(4)). The reference to the *Mines Act 1958* is changed to *Mineral Resources Development Act 1990*.

Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982 The *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* granted land in Watt Street, Northcote, to the Trustees of the Aborigines' Advancement League (Victoria) (s.3(2)). The Crown grant was conditional on the land continuing to operate as an Aboriginal Community Centre (s.3(3)); this would presumably provide the legal basis for access to the land by members of the Aboriginal community.

The Act provides that a lease, licence, permit or other authority under the *Mines Act 1958* or the *Extractive Industries Act 1966* or a lease or permit under the *Petroleum Act 1958* shall not be granted in respect of any part of Watt Street land except with the consent of the governing body of the League and subject to such terms and conditions as it imposes (s.3(4)).

Aboriginal Lands Act 1991 The objective of the *Aboriginal Lands Act 1991* is to authorise the granting by the Crown of specific areas of land to certain Aboriginal bodies in the interests of the Aboriginal people of Victoria (preamble and s.1). The land available for grant comprises three small areas (including relevant access roads): the Coranderk Mission near Healesville; Ebenezer Mission near Dimboola; and Ramahyuk Mission near Stratford (Gippsland) (see Schedules 2, 3 and 4, being respectively 2,656 square metres, 3,861 square metres and 8,603 square metres in size). Under the *Crown Land (Reserves) Act 1978* (see below) they had been reserved, respectively, for the protection of Aboriginal graves, the conservation of an area of historical interest, and for the use of Aboriginal people for cultural purposes (Schedule 1).

The Act revokes existing reservations and grants in fee simple specified areas of land, including cemetery sites and portions of access roads on old mission locations, to local Aboriginal bodies: the Wurundjeri Tribe Land and Compensation Cultural and Heritage Council Incorporated (Schedule 2 land), the Goolum Goolum Aboriginal Cooperative Limited (Schedule 3 land) and the Gippsland and East Gippsland Aboriginal

Cooperative Limited (Schedule 4 land), on condition that the land must be used for Aboriginal cultural and burial purposes (ss.4-6). No compensation is payable by the Crown in respect of anything done under or arising out of this Act (s.9).

An organisation to which land has been granted, or its successor-in-law, must not sell or dispose of its interest in fee simple in the land (s.7). The Act commenced on 18 June 1991.

The preamble of the *Aboriginal Lands Act 1970* provides for land that had been reserved for the use of Aboriginal people at Framlingham and Lake Tyers, to be vested in fee simple in the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust respectively, as of 24 July 1971 (see ss.3-27 and Schedules 1 and 2). The issue of a Crown grant to the Aboriginal Trusts under the Act is made notwithstanding anything to the contrary in the *Land Act 1958* (see below); otherwise there is no restriction on the application of the laws of Victoria and any relevant laws of the Commonwealth (ss.9(1),13(1) and 21(1)).

*Aboriginal
Lands Act 1970*

Any grant under the Act may be made subject to such covenants, conditions, reservations, exceptions and restrictions as the Governor in Council thinks fit (s.9(3)). There may also be excepted from any grant in the case of the Framlingham Reserve any portion that lies within 200 links (just under 40 metres) of the Hopkins River, and in the case of the Lake Tyers Reserve any portion that lies within 200 links of the high water mark of Lake Tyers (s.9(4)).

The relevant Aboriginal trust is entitled to be granted a perpetual licence to occupy and use the part of the reserve excepted from the grant of title, but such licence may be revoked by the Governor in Council (s.9(5)). While there are no specific provisions on access to land owned by an Aboriginal trust, since the grant is freehold the trust has power under the general law to grant or deny access. The Act does provide that no person other than the trust, a member of the trust or a person authorised by the trust is entitled to enter onto any land that is the subject of a licence granted under the Act (s.9(7)).

Each Aboriginal trust is a body corporate comprising the people who appear on the register of Aboriginal people (established under s.3) who satisfy certain criteria as to

residence on the reserve and who are, in effect, shareholders in the trust (ss.8, 12-14 and 18-21). The trusts have enumerated powers, including the power to manage, maintain, improve and develop the land held by the trust, to carry on any business on such land and, subject to a number of restrictions, to deal with the land (ss.9-11). Seven people, who are not required to be members of the trust, are elected to form a committee of management of the trust (s.15). The powers and functions of the trust may be exercised on its behalf by the committee, but the latter is subject to any terms and conditions imposed on it by the trust by resolution as provided for under the Act (ss.16, 17).

Any person, whether a member of the trust or not, who is aggrieved by anything that the trust has done or failed to do in contravention of this Act may apply to the Supreme Court of Victoria and the Court may make the appropriate orders (s.27). There are no provisions in the Act in respect to mining or resource development.

*Catchment and
Land Protection
Act 1994*

The purposes of the *Catchment and Land Protection Act 1994* are to set up a frame-work for the management and protection of catchments, encourage community participation in the management of land and water resources and control noxious weeds and pest animals (s.1). The Act establishes the Victorian Catchment Management Land Protection Council (s.6), which comprises not more than ten members appointed by the Governor in Council on the Minister's recommendation. The members of the Council are drawn from rural, urban, private and public land uses and experience (s.7). The functions of the Council are to advise the Minister on matters relating to catchment management and land protection, the condition of the State's land and water resources, and generally on the administration of this Act (s.9).

Division 2 of Part 2 empowers the Governor in Council on the recommendation of the Minister to order the creation of catchment and land protection regions, and for the Minister to establish a catchment management authority for each region (s.10 and 11). The function of these authorities is to prepare regional catchment strategies and special area plans (see ss.23-32 and Schedule 2) for meeting the objectives of the Act.

Part 3 imposes an obligation on land owners to avoid causing land degradation, conserve soil, protect water resources, and to prevent the spread of and eradicate weeds and pest animals (s.20).

Part 4 provides for the preparation and approval of regional catchment strategies that assess the condition of the land and water resources in the region and set a program of remedial action, monitoring and review (ss.23 and 24). The Act requires a Minister or public authority carrying out a function requiring land management on behalf of the Crown or under an Act to have regard to any regional catchment strategy applying to the relevant land (s.26). The Act (s.33) also empowers the Secretary appointed under the *Conservation, Forests and Lands Act 1987* (see next Act) to serve on a landowner a document setting out land use conditions in respect of special area plans made under it (ss.27-32), which enable the making of special provision concerning the quality and condition of relevant lands, waters and aquifers.

Part 7 prohibits, without the authorisation of the Secretary of Conservation, Forests and Lands, extractive activities, being the extraction for sale or removal of sand, soil, gravel or stone to a depth of more than two metres, if the area of surface broken is more than 2,000 square metres. This Part does not apply to extractive activity carried out under the *Water Act 1989* (see below) or the *Mineral Resources Development Act 1990* (see 2.5 below).

Part 8 provides for the control of noxious weeds and pest animals, except for a number of classes of these listed in Schedule 2 of the *Fauna and Flora Guarantee Act 1988* (see below) or declared to be endangered or notable wildlife under the *Wildlife Act 1975* (see below).

Part 9 empowers authorised personnel to enter land and carry out inspections and, if there are reasonable grounds for believing that required works or compliance with the Act are not likely to occur within the required time, to enter the land to undertake certain works and for other purposes relating to enforcement of the Act. The land owner is entitled to 24 hours notice of proposed entry (s.82).

*Conservation,
Forests and
Lands Act
1987*

The objective of the *Conservation, Forests and Lands Act 1987* is to enable the Minister to be an effective conservator of the State's lands, water, flora and fauna, and to make provision for the productive, educational and recreational use of these in ways that are environmentally sound, socially just and economically efficient (s.4).

The Act establishes the Secretary of Conservation, Forests and Lands and specifies the powers and functions that attach to this body corporate (ss.6-11). The Secretary is subject to the direction and control of the Minister (s.7). The Act empowers the Minister to appoint councils and committees to assist the Minister and the Secretary in the administration of this Act (s.12).

The Act (ss.11(3A)-(3B)) enables the Secretary to delegate any of their powers, functions or duties under the *Coastal Management Act 1995* (see 2.4 below), the *Crown Land (Reserves) Act 1978* (see next Act), the *Forests Act 1958*, the *Land Act 1958*, the *National Parks Act 1975* and the *Wildlife Act 1975* (see below) to Parks Victoria, as established under the *Parks Victoria Act 1998* (see below).

The Secretary may purchase or compulsorily acquire land, or interest in land, for the purposes of the Act (ss.13 and 14), subject to the *Land Acquisition and Compensation Act 1986*.

Part 5 of the Act makes provision for Codes of Practice, to be approved by the Minister, relating to conservation practices for land management, such as soil deterioration, erosion and salination, eradication and control procedures for pest plants and pest animals and forest practices. Before approving it, the Minister must refer a draft Code to the Victorian Catchment and Land Protection Council, established under the *Catchment and Land Protection Act 1994* (see above), if it has been prepared for the purposes of that Act.

The Secretary may, under Part 8 of the Act, enter into a co-operative agreement with any land-owner relating to the management, use, development, preservation or conservation of their land. Such agreements may restrict the use of the land, require the owner to do or refrain from doing things, and for the Secretary to grant or loan the land-owner financial assistance for the purposes of the agreement. Appointment and powers of authorised officers are provided for in Part 9.

The *Crown Land (Reserves) Act 1978* delineates the public purposes for which the Governor in Council may reserve, either temporarily or permanently, any Crown land (ss.4(1)(a)-(zf)). These include the preservation of areas of ecological significance, the conservation of areas of natural interest or beauty, or of scientific, historical or archaeological interest, the propagation or management of wildlife or the preservation of wildlife habitat, and the protection of the coastline. Thirty days' notice must be given of the intention to permanently reserve land, to be advertised in a newspaper generally circulating in the affected area (s.4(2)).

*Crown Land
(Reserves) Act
1978*

The Act (s.5) empowers the Minister to purchase, by agreement, any land which they consider should be reserved for a specified purpose (see s.4), and by compulsory process in respect of the nature conservation purposes specified in section 4. The *Land Acquisition and Compensation Act 1986* (see below) applies to such acquisitions. The selling, leasing or issuing of a licence over such land is prohibited unless the reservation has been revoked or such a transaction is specifically authorised under the Act (s.8).

Part 3 sets out provisions for the management and control of reserved land. The Minister or trustees of the land (where appointed under s.12) are empowered to make regulations in relation to the care, protection and management of the land, the carrying out of work and improvements on the land, the issuing of permits and licences and entering into of agreements in relation to the land, and other related matters (s.13). The Act (ss.14 and 15) provides for the appointment of committees of management by the Governor in Council, to manage and improve the land, and to carry out any functions and duties as specified in regulations made under the Act (s.13).

The Act (s.18) empowers the Governor in Council to place any land reserved under it (see s.4) under the control and management of the Secretary, the Rural Water Commission, the Director General of National Parks and Wildlife (see *National Parks Act 1975* below), or certain others. In such cases the provisions of the Act (ss.13-17) do not apply. Schedule 3 provides a list of these lands, which includes Lake Tyers (see *Aboriginal Lands Act 1970* above).

Any municipal council that is a committee of management of any Crown land in Schedule 3 may construct a marina (s.24),

but the council must enter into an agreement with the Minister of this Act and the Minister responsible for the *Planning and Environment Act 1987* regarding the care, control, management, construction, operation and maintenance of a marina.

*Environment
Conservation
Council Act
1997*

The *Environment Conservation Council Act 1997* establishes the Environment Conservation Council (s.4) which consists of three members appointed by the Minister who, in the Minister's opinion, have the experience and knowledge necessary to carry out its functions (s.5). These functions are to carry out those investigations that are requested by the Minister into the balanced use or development of public land or any flora, fauna or minerals on, above or under that land or water flowing over that land, and to carry out any other functions that may be conferred on the Council by this or any other Act (s.6). Public land includes land under the *Crown Land (Reserves) Act 1978* (see above), state forests under the *Forests Act 1958* (see below), parks under the *National Parks Act 1975* (see below) and land vested in a public authority, other than a municipal council or an authority under the *Water Act 1989* (see below).

The Council is provided with the power to carry out these functions (s.7). The Minister may also require the Council to carry out investigations into matters (specified under s.6), subject to the Minister's direction (s.17). Such requests must be tabled in Parliament (s.18) and the Council must submit a plan for the relevant investigation that must have the approval of the Head of the Department of Natural Resources and Environment in relation to the allocation of resources (s.19). The Act specifies matters that must be taken into account in an investigation. These include: ecological sustainability; any economic and social value of the proposal; and the existence of, and the need to conserve, any areas of ecological, historical, cultural or recreational value or areas of landscape significance on the land (s.20).

The Council must give notice of an investigation in a newspaper that circulates generally through the State (s.21). Any person may make a submission within 60 days of the giving of the notice (s.22). The Council must present a report on the outcome of its investigation to the Minister and the

Minister must table the report in Parliament within seven sitting days of receipt (s.23).

The *Environment Protection Act 1970* defines the environment as the physical factors of the surroundings of human beings, including the land, waters, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factor of aesthetics (s.4(1)).

*Environment
Protection Act
1970*

The Act establishes the Environment Protection Authority (EPA) (s.5), the powers, functions and duties of which are provided for (under s.13) and include the administration of this Act and any regulations or Orders made under it, as well as a large number of matters relating to environmental protection. It also provides for the establishment of an Environment Protection Board (s.8), the functions of which include advising the Minister and Chair of the EPA on its administration, policies and strategic direction, and on national and international trends of significance in environment protection.

The Act provides for the Governor in Council by Order, on the recommendation of the Minister and the EPA, to declare and publish State Environment Protection Policies (SEPPs) (Part 3). A SEPP must include: an identification of the boundaries of the affected area; the beneficial uses to be protected in that area; selection of the environmental indicators to be applied to measure and define environmental quality; a statement of environmental quality objectives; and a program by which such objectives are to be attained, maintained, and so on (s.18). The Act provides for a Policy Impact Assessment of a SEPP (s.18C) and for mandatory reviews of SEPPs (s.19).

The Act also makes provision for a range of environment protection measures in respect of matters such as clean water and air (Parts 5 and 6), control of wastes (Part 7), noise emissions (Part 8) and recycling (under the title 'Resource Recovery' in Part 9). Persons authorised under this Act have extensive powers to enter land and premises and to take preventative and remedial action for the purposes of this Act (s.55). Reviews are provided for in Part 4; at first instance they are carried out by the Tribunal established under the *Victorian Civil and Administrative Tribunal Act 1998*.

*Flora and
Fauna
Guarantee Act
1988*

The purpose of the *Flora and Fauna Guarantee Act 1988* is to establish a legal and administrative structure for promoting the conservation of Victoria's native flora and fauna (s.1). The objective is to guarantee that all *taxa* of Victoria fauna and flora listed in Schedules 1 and 2 (see also ss.10-16) can 'survive, flourish and retain their potential for evolutionary development in the wild', free from the threatening processes listed in Schedule 3; the conservation of flora and fauna through cooperative community action is also encouraged (s.4).

The Act is administered by the Secretary appointed under the *Conservation, Forests and Lands Act 1987* (see above), who must do so in such a way as to promote the fauna and flora conservation and management objectives of this Act (s.7). The Act provides for the establishment of a Scientific Advisory Committee to advise the Minister on matters relating to it (s.8). The Secretary is required to prepare a Flora and Fauna Guarantee Strategy for the State (ss.17, 19 and 20).

The Act enables the Secretary to prepare flora and fauna management plans (ss.21 and 22); amongst the matters that must be addressed in such a plan are the nature conservation and the social and economic consequences of the plan, which the Secretary is required to consider (s.23).

Division 1 of Part 5 enables the making of conservation orders and control measures in respect of flora and fauna on Crown land, in water under the control of the Crown, on private land or in water under private control. The Secretary must give notice of the intention to make an order under this Part and enable submissions to be made by any person wishing to do so. The Minister must either confirm or revoke the Secretary's recommendation and may consult with any person with relevant knowledge or interest.

Divisions 2 and 3 of Part 5 impose restrictions on dealings with certain classes of flora and fish, and create offences for such matters as taking, trading in, keeping, moving or processing protected flora, abandoning or releasing prescribed flora into the wild, or taking, trading in or keeping listed fish without a licence or permit issued under Part 6 of the Act. The Governor in Council may make regulations for prescribing criteria for the listing of species, processes and communities for the purposes of this Act, and for dealings in fauna and flora

and procedures that authorised officers must follow when acting under and for the purposes of this Act (s.69).

The purpose of the *Forestry Rights Act 1996* is to provide for the creation of forest property rights (s.1). 'Forest property' is defined in the Act (s.3) to mean all parts of trees above and below the ground and the product of trees, regardless of whether those products have become separated from those trees prior to being harvested; this Act does not apply to Crown land (s.4).

Forestry Rights Act 1996

The owner of land may enter into an agreement with a person to grant that person, amongst other matters, the right to plant, maintain and harvest forest property on that land, to vest ownership of the forest property in that person, to enter onto the relevant land and to carry out any related works (s.5). The agreement must specify the parties to it, the land and forest property to which it applies and the rights and duties of the parties to it (s.6). The Act makes it clear that such a forest property right does not amount to an interest in land and a right of access/entry given under an agreement made under the Act is not deemed to be a right of way (s.11).

The purpose of the *Forests Act 1958* is the management and protection of State forests (long title).

Forests Act 1958

The Act vests in the Secretary of Conservation, Forests and Lands (see above) power to manage and control State forests and plantations, nurseries, forest schools and industrial undertakings carried on under the Act.

Other powers include: managing and controlling the forest produce of other Crown lands as specified under the Act; managing land reserved under the *Crown Land (Reserves) Act 1978* (s.4, see also above); authorising dealings in any forest produce (as defined under s.3); and undertaking other incidental matters for the purposes of this Act (ss.5 and 18-21). The Secretary must also prepare and implement working plans covering such matters as the control, maintenance, improvement, protection from destruction by fire or otherwise, and removal of forest produce in and from each State forest or any part thereof (s.22).

The Minister is empowered to purchase, by agreement or compulsory process, any land required for access to reserved

forest or for the due conservation of State forests (s.38). The Governor in Council may acquire land required by the Department for the purposes of the Act (ss.47-49). The *Land Acquisition and Compensation Act 1986* (see below) applies for the purposes of any such acquisitions. The Minister may, at any time, proclaim any unoccupied Crown land to be a protected forest (s.58).

The Act enables the Governor in Council, on the recommendation of the Minister, to declare by Order that any lands of the Crown not within a State forest or a national park are protected public land (s.62). The Act also imposes numerous restrictions on the lighting of fires, including fire bans (ss.63 and 64).

Authorised officers appointed under the Act have extensive powers of entry to carry out inspections to ensure compliance with this Act and any statutory authorisation granted under it, and to undertake necessary preventative, remedial and any other related works for the purposes of the Act (s.95). The Act creates offences and penalties for obstructing authorised officers (s.78) and for acting, or attempting to act, or assisting others in acting, contrary to this Act (s.96).

*Land
Acquisition and
Compensation
Act 1986*

The purpose of the *Land Acquisition and Compensation Act 1986* is to set out the procedures for the acquisition of land for public purposes and the process for the determination of the compensation payable in respect of such land (s.1). The Act applies to any Act, or provision of an Act, in which it is expressed that this provision applies (s.3(2)).

An acquiring authority must comply with the provisions of the Act when compulsorily acquiring an interest in land or doing so by agreement (s.4). It must also reserve the land by, or under, a planning instrument for a public purpose when doing so (s.5). The Act outlines the requirements to give notice for the purposes of taking any action under the Act. (ss.6-11 and 13-17).

The Act prohibits any dealings in the land, once the relevant notice has been given, without the express consent of the acquiring authority, although any rights, obligations and actions arising from a mortgage over the land are preserved (s.12).

When the authority is intending to acquire an interest in the land, the onus is on the acquiring authority to obtain the agreement of the owner or occupier regarding the terms and conditions on which it will enter into possession of the land (s.26).

If a person is divested of an interest in land or has such interest diminished, that person is entitled to compensation (s.30). The Act defines an interest in land as being any legal or equitable estate or interest, or easement, right, charge, power or privilege in, under, over, affecting, or in connection with, the land (s.3(1)).

The general principles on which compensation is to be based are outlined in the Act (s.41). Apart from the more obvious market value of the interest as at the date of acquisition, also included are such matters as any special value of the interest, any loss attributable to disturbance, and the enhancement or depreciation in the value of the interest of the claimant in other land adjoining or severed from the acquired land.

Matters affecting compensation are provided for in the Act and include such things as changes in market value, any special characteristics of the land, any licences or other instruments over the land and the presence of any durable improvements on the land (s.43).

The Act also provides for payment of a solatium of up to 10 per cent above the market value of the land to compensate the claimant for intangible and non-monetary disadvantage resulting from the acquisition (s.44). Matters to be considered here include: the length of occupation of the land by the claimant; the inconvenience likely to be suffered by the claimant by being removed from the land; the age of the claimant, the age, number and circumstances of other people (if any) living with the claimant; and if the claimant is occupying the land as a principal place of residence. Under certain conditions, loans are provided to dispossessed home owners (s.45).

Part 9 provides for powers of entry and temporary occupation for an acquiring authority for the purposes of the Act.

The *Land Act 1958* relates to the sale and occupation of Crown land. The Act (s.4A) empowers the Minister to *Land Act 1958*

purchase land attached to land purchased under the *Crown Land (Reserves) Act 1978* (s.5, see also above).

The Governor in Council may grant, convey or otherwise dispose of Crown land for such estate or interest as authorised by the Act (s.12). The Act also deals with the exchange, surrender or leasing of Crown lands or the granting of licences in respect of such lands (s.12A). Any land acquired by purchase or otherwise by the Crown may be sold, granted, conveyed or otherwise disposed of by the Governor in Council in the same manner (s.13).

Division 4 makes provision for the granting of perpetual Crown leases by the Governor in Council for up to 1,170 hectares of land.

Division 6 sets out the procedures applying to the sale of Crown land by auction or tender or to a public authority. The Act (s.89(1)) empowers the Minister to sell any Crown land in fee simple by public auction or by public tender at such reserve price and on such terms and conditions as the Minister thinks fit, unless the land is reserved under the *Crown Land (Reserves) Act 1978* (s.98A of the Land Act). The Act also applies to the sale of Crown land subject to lease (s.100).

Division 8 of the Act deals with agricultural leases, licences and permits (s.121). The Act (s.123) lists the land over which a lease may be granted, including unreserved Crown land, certain Crown land reserved under the *Crown Land (Reserves) Act 1978* (s.4), unused roads, and water frontages. The Act lists the general conditions that a lease may contain (s.124 (a)-(o)). Division 9 is concerned with leases or licences for non-agricultural purposes.

If land is bounded in whole or in part by a watercourse and the land was alienated by the Crown before, or is so alienated on or after, the commencement of the *Water Act 1989* (s.327), the bed or banks of the watercourse remain, and must be taken always to have remained, the property of the Crown despite the alienation of the land (s.385).

The Act provides that the owner or occupier for the time being of land adjacent to a watercourse, the bed and bank of which have remained the property of the Crown (by virtue of s.385) has the same right of access to, and the same right to use for grazing purposes, the part of the land and banks adjoining the owner's or occupier's land as they would have had if the bed and banks had not remained the property of the Crown (s.386).

Anyone may enter water frontages for recreational purposes (s.401A)

The purpose of the *Murray-Darling Basin Act 1993* is to approve and provide for carrying out an agreement between the Commonwealth, New South Wales, Victoria and South Australia with regard to the water, land and other environmental resources of the Murray-Darling Basin (MDB) (s.1). The Act confirms approval of the agreement, which is annexed to and forms part of the Act (s.5).

*Murray-Darling
Basin Act 1993*

The Governor in Council may appoint two Commissioners and two Deputy Commissioners to the MDB Commission (s.6). The Commission may authorise a person to enter land for the purposes of the Act and the agreement (s.13) and also the construction of required works (s.16).

The Act also permits any body declared by the Minister as a relevant water authority to acquire the land required for the construction, control, maintenance and operation of the required works (subject to the *Land Acquisition and Compensation Act 1986*, see above, and s.157 of the *Water Act 1989*, see below) and to dispose of such land (ss.17-20).

The Act empowers the Governor in Council to reserve any Crown lands required for the purposes of the Act in accordance with the *Crown Land (Reserves) Act 1978* (see above); such land may be used or occupied for the purposes of the agreement by, or on behalf of, a contracting Government (s.21). The Governor in Council, on the recommendation of the Minister administering the *Conservation, Forests and Lands Act 1987* (see above), may place such land under the management and control of a relevant water authority (s.22).

The objectives of the *National Parks Act 1975* are to make provision in respect of national and State parks in Victoria, including the preservation and protection of the natural environment, the indigenous flora and fauna, and of features of scenic, archaeological, ecological, geological, historical or other interest, and the responsible management of those parks (s.4).

*National Parks
Act 1975*

The Act provides for the appointment of the Director of National Parks (s.5). It also provides for the appointment by the Governor in Council of the National Parks Advisory

Council (s.10), the functions of which are to advise the Minister generally in relation to this Act (s.11) and to act as a committee of management of land reserved for the purposes of a park under section 14 of the *Crown Land (Reserves) Act 1978* (see above) (s.12).

The Act also provides for the appointment of advisory committees (s.14), the functions of which are to make recommendations to the Secretary (the body corporate established under the *Conservation, Forests and Lands Act 1987*) relating to the care and control of the park or parks in respect of which they are appointed (s.15).

Creation of National, State and other Parks

National and State parks comprise those areas of land described under Schedules 2 and 2B of this Act (s.17); these Schedules list 39 national and 36 State parks. Other parks are identified in Schedule 3 (currently 16 are listed) (s.18). The Secretary is required to ensure that these are controlled and managed in accordance with the objects of this Act (s.4).

Similar provision is made for wilderness parks identified in Schedule 2A (three such parks are listed in that Schedule) (s.17A), but the Secretary also is required to ensure that there is no hunting in such a park (s.17C) and that a management plan is drawn up within two years of the inclusion of such a park in Schedule 2A (s.17B). Schedule 5 identifies 20 wilderness zones.

Permits for Use of Parks

The Act provides the Secretary with the power to grant a permit to carry out certain recreational and commercial activities in national and State parks, and also a more limited range of activities in wilderness parks (s.21). The Secretary must ensure that remote and natural areas listed in Schedule 6 are managed in a way that is consistent with the objects of this Act, including limiting activities in these areas but allowing existing lawful activities to continue and be completed (ss.21B-21D).

The Governor in Council is empowered to make regulations establishing zones within parks that have special needs as far as management and control are concerned (s.22). The Act contains special provisions for specific parks, relating to such

matters as rights of access by adjoining land holders and grazing rights (ss.28-32N).

Enforcement

Authorised officers appointed under this Act are empowered to stop, search and detain vehicles, and request any person that is, on reasonable grounds, acting in contravention of this Act to leave a park (ss.38 and 38A). They may also direct any person acting in a manner which is likely to damage or pollute a designated water supply catchment area to stop so acting and to rectify any damage so caused.

The *Parks Victoria Act 1998* (s.4) establishes Parks Victoria as a corporate entity consisting of a chairperson and not more than eight other people appointed by the Governor in Council on the recommendation of the Minister (s.6).

Parks Victoria Act 1998

The functions of Parks Victoria include providing services to the State and its agencies for, or with respect to, the management of parks, reserves and other land under the control of the State and that, in performing its functions, Parks Victoria must act in a way that is environmentally sound (s.7).

Parks Victoria is empowered to enter into agreements and arrangements for provision of services or the prevention and suppression of fire, as well as acting as a committee of management under the *Crown Land (Reserves) Act 1978* (see above) (ss.8, 9 of the Parks Victoria Act). Parks Victoria is subject to such directions as the Minister may give it.

The Act requires Parks Victoria to prepare and hand to the Minister a corporate plan for three-year periods and an annual business plan (s.20). The former must include a statement of corporate intent that includes the objectives and main undertakings, performance targets, details of any agreements, the nature and scope of activities to be undertaken, as well as accounting and other matters to be included in the annual report.

The preamble to the *Pipelines Act 1967* provides for the ownership and use and the construction, maintenance and operation of pipelines in Victoria. The Act differentiates between Crown and private land, and provides specifically that 'private land' does not include land that is subject to

Pipelines Act 1967

native title rights and interests, or Crown lands definitions (s.3). The Act (s.3A) provides that ‘just terms’, ‘native title’, ‘native title rights and interests’, ‘registered native title Body Corporate’, ‘registered native title claimant’ and ‘right to negotiate provisions’ have the same meaning as in the *Native Title Act 1993* (Cth) (see Chapter 9.6).

Applications

The Act provides that ownership and use of a pipeline shall be in accordance with a permit (ss.8 and 9). A licence is required to construct and operate a pipeline (s.25).

A person proposing to apply for such a permit may be empowered by the Minister to enter any Crown or other lands along the intended route of the pipeline, if they are unable to obtain the permission of the owner or occupier of the land lying in the intended route of the pipelines (s.8A(1)).

An application for a permit or licence must state certain prescribed information and must be accompanied by a map showing the proposed route of the pipeline (in the case of a permit) or the authorised route and full design plan and specification of the pipeline (in the case of a licence) (ss.10(1) and 26(2)). An applicant must notify the municipality in which any part of the proposed pipeline is intended to be situated and the application must be advertised (ss.10(3) and 11(1)).

The proposed route for a pipeline must be satisfactory to the Minister responsible for the *Planning and Environment Act 1987* (see below), who must also be consulted about any proposal to grant a permit to own and use a pipeline.

If the proposed or authorised route of a pipeline is on land over which native title rights and interests may exist (except those subject to an agreement with the registered native title body corporate or claimant), then the Minister must not grant the application, or alter the proposed route, unless satisfied that the requisite compulsory acquisition and compensation processes have been complied with (s.12AB(1)(b)).

The Minister may refuse or grant a permit (s.12(1)). A permit holder whose application for a licence complies with the requirements and who supplies any further information as required, is entitled to be issued with a licence (s.26(3)). No term is specified for an access permit under this Act and it remains in force for as long as the Minister determines

(s.27(1)), but the Minister must renew a permit if the permit holder shows that the pipeline is still in use (s.13(4)).

If a permit is renewed, the Minister must also renew a licence granted in association with that permit upon receipt of payment of the prescribed fee and the renewed permit remains in force for the same terms as the renewed licence (s.27B(2)).

The Governor in Council has extensive powers to grant the holder of a permit any necessary lease, easement, licence or other authority necessary or expedient to enable the permittee to construct, operate, maintain, inspect or repair an authorised pipeline on Crown land (s.20). However, this does not authorise the granting of an easement, lease, licence or other authority over, or in respect of, native title rights and interests. The Act (ss.22A and 22B) makes further special provisions in relation to compulsory acquisition of land, other than private land, that includes giving notice of compliance with right to negotiate provisions in the *Native Title Act 1993* (Cth) (NTA) and just term compensation under the NTA and the *Land Acquisition and Compensation Act 1986*.

The *Planning and Environment Act 1987* establishes a framework for planning the use, development and protection of land in Victoria. The objectives the Act are to provide for the fair, economic, orderly and sustainable use and development of land, for the protection of natural and ‘man-made’ resources, and the maintenance of ecological processes and genetic diversity (s.4(1)). The objectives of the planning framework include establishing a system of planning schemes, based on municipal districts, as the principal way of setting out objectives, policies and controls for the use, development and protection of land (s.4(2)).

Planning and Environment Act 1987

A planning scheme can be approved for an area under this Act and may make provision for the use, development, protection or conservation of any land in the area, including regulating or prohibiting the use or development of any land and related matters (ss.5 and 6). A planning scheme may not apply to land reserved under the *Crown Land (Reserves) Act 1978* (s.46).

A planning scheme may require a permit to be obtained for the use or development of land (see also s.6A; such permits are issued under ss.47-61). The Act (s.62) provides the responsible authority with power to impose conditions on these permits, including for the development of the land in

stages and requiring the permit holder to do the things specified in the permit to the satisfaction of the responsible authority (which may include a public authority, municipal council, referral authority or the Minister (s.3)).

An authorised person has power of entry to any land to carry out and enforce the Act, the regulations, a planning scheme or a permit condition (s.133). The *Land Acquisition and Compensation Act 1986* (s.172, see above) delineates powers of compulsory acquisition and declares that the Act applies to land acquired under this Act.

*Plant Health
and Plant
Products Act
1995*

The *Plant Health and Plant Products Act 1995* prohibits the importing, introducing or bringing into the State from a prescribed State or Territory any prescribed plant, plant product, used package or used agricultural equipment, or soil, or to cause these things to be done unless authorised under the Act (s.6).

The Act imposes a duty on anyone who knows, or has reason to suspect, that an exotic or notifiable pest or disease is present in any plant or plant product, to notify an inspector (s.7). Inspectors are appointed under the Act (s.51), which provides them with extensive powers of entry, search, inspection, seizure and detention for its purposes (ss.52-56), and to deal with exotic pests (ss.58 and 59).

The Act empowers the Governor in Council to declare any place in Victoria a control area and to specify all prohibitions and restrictions in the area for the purpose of preventing the spread of pests or diseases within and/or from the area, preventing the entry of pests and diseases into the area and incidental matters (s.9). Inspectors are empowered to serve any owner/occupier of infested land with control notices, which require that the person do whatever is specified in the notice to deal with the land and affected things on the land (ss.12 and 13).

The Minister may declare any place a quarantine or a restricted area for the purposes of preventing the spread of exotic pests or diseases (ss.17-20); such exotics must be declared as such by Order in Council (s.3(1)). Declarations may impose prohibitions on the entry to and from the affected areas, as well as points of entry and exit, restrictions on the movement in and out of these areas, and any other relevant prohibitions and requirements.

The Minister may recommend to the Governor in Council that an area be proclaimed a reference area under the *Reference Areas Act 1978* if they are of the opinion, after considering a report from the Environment Conservation Council (established under the *Environment Conservation Council Act 1997*, see above), that any public land (as defined under s.2 of the *Land Conservation Act 1970* immediately before its repeal by the *Environment Conservation Council Act 1997*) should be preserved in its natural state as far as possible because of the area's ecological interest and significance (s.3).

*Reference
Areas Act
1978*

The Act requires the Minister to appoint an advisory committee to advise on how such areas should be protected, controlled and managed so as to preserve them in perpetuity as a reference to which people concerned with the study of land may be permitted to refer for comparative purposes, particularly where solutions to problems that arise from the use of land by humans are being sought (s.5(1)). The membership of the advisory committee is specified in the Act (s.5(2)). The Minister is empowered to issue directives concerning the protection, control or management of reference areas (s.6).

The *Transfer of Land Act 1958* sets out the regime for dealing with and registering estates and interests in land in Victoria. It applies to all Crown land, whether alienated in fee or by way of perpetual lease (s.8). Anyone claiming an estate or interest in the land is empowered to lodge a caveat with the Registrar of Titles appointed under this Act (s.13).

*Transfer of Land
Act 1958*

The Act provides for the lodgment of caveats temporarily forbidding dealings with lands (s.89). Anyone claiming an estate or interest in land under any unregistered dealing, instrument or operation of a law has the right to lodge a caveat, in the form specified under this Act, forbidding the registration of any person as the transferee or owner of any interest or estate in the land, either absolutely or conditionally (s.89(1)).

The *Urban Land Corporation Act 1997* establishes the Urban Land Corporation (ULC) as a public authority (but not a representative of the Crown), with primary functions being the development, on a commercial basis (but see exceptions specified in s.13) of residential land, and other land incidental

*Urban Land
Corporation Act
1997*

to residential land, in Victoria (ss.4-6). The Act empowers the ULC to acquire or dispose of land, to enter into contracts, agreements, leases and licences, and to do all things necessary or convenient for, or in connection with, carrying out its functions (s.7).

Unalienated Crown land may be granted to the ULC by the Governor in Council on the recommendation of the Minister, the Treasurer and the Minister administering the *Land Act 1958* (s.12) (see above) under the ULC Act (s.11). The ULC must obtain the approval of the Minister and the Treasurer before acquiring private land (s.12).

The ULC is accountable to the Treasurer and Minister through a corporate plan that it must present to them annually by 31 May (s.18). The plan must include a statement of corporate intent that must specify such matters as the main undertakings and nature and scope of the activities of the ULC, accounting policies and any other relevant matters as specified by the Minister and the Treasurer (s.19).

*Victorian
Plantations
Corporation
Act 1993*

The *Victorian Plantations Corporation Act 1993* establishes the Victorian Plantations Corporation (VPC) and empowers it to acquire (not compulsorily) and administer lands specified in the Schedules as forest plantations and to deal with forest produce derived from these lands (Part 2). Once vested in the VPC, the lands cease to be subject to legislation under which they were previously administered (for example, *Forests Act 1958*, see above) (s.9).

Water Act 1989

The *Water Act 1989* gives the Crown the right to the use, flow and control of all water in a waterway and also to all groundwater (s.7). The beds and banks of rivers forming the boundaries of areas of land are the property of the Crown by virtue of s.385 of the *Land Act 1958*.

The Act authorises the taking and use of water for domestic and stock use from a bore when it is located on the land they occupy or from a waterway or bore to which they have access by a public road or public reserve; a waterway may be used where they occupy land adjacent to it and the beds and banks of the waterway are the property of the Crown (s.8).

‘Wildlife’ is defined in the *Wildlife Act 1975* (s.3) to include any animal of an invertebrate species other than mankind which is indigenous to the whole or part or parts of Australia or its territories or territorial waters, and any *taxon* of terrestrial invertebrate animal which is listed under the *Flora and Fauna Guarantee Act 1988*. The Act does not apply to fish within the meaning of the *Fisheries Act 1995*.

*Wildlife Act
1975*

The Act empowers the Governor in Council, on the recommendation of the Minister, to order that any wildlife causing damage to buildings, gardens, orchards, vineyards or property, or crops, grass or trees, is to be declared unprotected for that area (s.7A).

Part 2 provides for land brought under the management and control of the Secretary of the Department of Conservation, Forests and Lands for the purposes of the Act to be State wildlife reserves and to be made subject to the *Crown Land (Reserves) Act 1978* (see above). The Act prohibits the taking or destroying of wildlife in a wildlife reserve (s.20) and the taking, destruction, hunting, injuring or wilful disturbance of wildlife, or the taking, destruction or damaging of native flora, in a nature reserve, unless authorised by the Secretary (s.21).

The Secretary is empowered to grant written permission to hunt, take or destroy wildlife, or buy, sell, acquire, receive, dispose of, keep, possess, control, breed, process, take samples from or experiment on wildlife for, among other matters, Aboriginal cultural purposes (s.28A). The Secretary has the discretion to make this grant subject to any conditions, limitations or restrictions that they see fit to impose.

Part 5 provides for wildlife management cooperative and prohibited access areas, and wildlife sanctuaries, with special protective laws.

VICTORIA

2.2 HERITAGE

For more details about the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) refer to Chapter 9.2.

Part 2A of the Act consists of a scheme for the protection of Aboriginal cultural heritage in Victoria. Part 2A is not intended to affect any provision of the *Archaeological and Aboriginal Relics Preservation Act 1972* (see below), in so far as it applies to an entry made in a register, or a declaration made under that Act before the inclusion of Part 2A in this Act on 10 July 1987.

The Act does not affect any other law that is capable of operating concurrently with it (s.7). The Minister responsible for this Act cannot make a declaration under the general provisions of this Act in relation to a significant Aboriginal area or object in Victoria unless satisfied that an application has been made and rejected under Part 2A or that such an application would be inappropriate or could not be made; similar provisions apply to authorised officers (ss.8A(1 and 2)).

The Federal/State cooperative scheme provided for under the Act recognises ownership of Aboriginal cultural heritage as vesting directly in Aboriginal people (preamble). Administration of the Act is currently vested in 27 Aboriginal communities.

The focus of Part 2A of the Act is on the protection of Aboriginal cultural property, which is defined under the Act (s.21A(1)) as being any Aboriginal places, Aboriginal objects (including Aboriginal remains) and Aboriginal folklore (which comprises traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginal people, including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) that are of particular significance to Aboriginal people in accordance with Aboriginal tradition.

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

Aboriginal Remains

The Act provides mechanisms for consultation with Aboriginal communities on the return of Aboriginal remains (ss.20(1), 21P and 21Q). If a local Aboriginal community has reason to believe that any Aboriginal remains held by a university, museum or other institution were found or came from its community area, the local Aboriginal community may request the Minister to negotiate with the relevant institution for the return of the remains to the community (s.21X).

Aboriginal Cultural Heritage Agreements

A local Aboriginal community may enter into an Aboriginal Cultural Heritage Agreement (ACHA) with a person who owns or possesses any Aboriginal cultural property in Victoria (s.21K(1)).

This provision does not apply to any Aboriginal cultural property in the possession of an Aboriginal person if the property has been handed down from generation to generation to that person, unless that person expressly agrees that the property should be the subject of an ACHA (s.21K(3)). Such an agreement may cover the preservation, use, sale, maintenance or exhibition of the property and the rights, needs and wishes of the person and of the Aboriginal and general communities (s.21K(2)). Provision is made for the registration of ACHAs with the relevant State Registrar of Titles (ss.21K(4) and (5)).

Declarations of Preservation

Emergency declarations (in force for 30-44 days), temporary declarations (in force for 60-120 days) or full declarations of preservation may be made in relation to an Aboriginal place, that is, an area in Victoria that is of particular significance to Aboriginal people in accordance with Aboriginal tradition; these provisions also allow for such declarations to be made in relation to an 'Aboriginal object', that is, an object that is in Victoria and is of particular significance to Aboriginal people in accordance with Aboriginal tradition (ss.21C-21E). People affected, or likely to be affected, by a temporary or full declaration may ask the Minister to appoint an arbitrator to review the Minister's decision (ss.21D(7) and (8), 21E(6) and (7) and 21F).

Register

The Minister must ensure that a register containing a summary of particulars of declarations of preservation is kept (s.21V(1)). The register is not open for inspection except by prescribed people or in prescribed circumstances (s.21V(2)). Regulation 10 of the Aboriginal and Torres Strait Islander Heritage Protection Regulations 1984 provides that the prescribed circumstances in which a register must be open for inspection are where a person has applied in writing to the Minister to inspect the register and the Minister is satisfied that the applicant is likely to be affected by a declaration of preservation or has a lawful reason for knowing the particulars in the register, and the Minister is satisfied that disclosure of the particulars would not be likely to frustrate any of the purposes of the Act.

Unauthorised Acts

It is an offence to contravene the terms of a declaration relating to an Aboriginal place (s.21H(1)), to wilfully deface, damage or otherwise interfere with, or do any act likely to endanger, an Aboriginal place (s.21U(1)), or destroy, damage, remove or interfere with a notice indicating that a place is subject to a declaration (s.21G(3)). Under the Act, it is an offence to contravene the terms of a declaration relating to an Aboriginal object, or to wilfully deface, damage, otherwise interfere with or do any act likely to endanger such an object (s.21H(2)), although under the provisions of the Act an Aboriginal person may interfere with such an object in accordance with Aboriginal tradition (ss.21U(1) and (2)).

A local Aboriginal community may also consent, subject to whatever terms and conditions (if any) it seeks to impose, to the excavation of any Aboriginal place or object on a community area of that community, the carrying out of scientific research on Aboriginal objects in that area, or the defacing, damaging or otherwise interfering with or endangering of an Aboriginal object or place in its area (ss.21U(3) and 4)).

If a local Aboriginal community does not grant or refuse consent within 30 days, or an application is made to the Minister for consent to undertake a prohibited action in an area in respect of which there is no Aboriginal community, the Minister may grant consent to a person to undertake such action in the area; but before doing so, the Minister must seek

and consider the recommendation of a person or body that, in the Minister's opinion, should consider the matter (ss.21U(5) and (6)).

Inspectors

Provision is also made for the appointment of inspectors, who must be people who have knowledge and expertise in the identification and preservation of Aboriginal cultural property; they are appointed after consultation with the local Aboriginal community (s.21R).

A magistrate may issue a warrant authorising any police officer, together with a named inspector, to enter and search land, premises or a vehicle where there are any Aboriginal objects and for which there are reasonable grounds for suspecting that the objects are under threat of desecration (s.21S(1)). They may take possession of, or secure against desecration, any Aboriginal object that appears to the inspector to be under threat of injury or desecration. Any such object must be delivered to a person authorised by the Minister to receive them and must be returned to its owner within 120 days unless compulsorily acquired or otherwise becomes the property of the local Aboriginal community (s.21S(5)). Evidentiary matters are set out in the Act (s.21Z).

Compulsory Acquisition/Compensation

The Minister may compulsorily acquire any Aboriginal cultural property where the property is of such religious, historical or cultural significance that it is irreplaceable and no other arrangements can be made for its proper continuing preservation and maintenance. Property so acquired is vested and held in trust for the local Aboriginal community or other Aboriginal people in Victoria (s.21L).

The Act contains provisions for compensation, but includes an extra provision, unrelated to acquisition of property, where a person is, or is likely to be, affected by a declaration of preservation of an object under this Act (ss.21E, 21M and 21N). The amount of compensation payable may be agreed between the Minister and the person or, failing agreement, may be determined by an arbitrator appointed by the Minister.

For further details on the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* refer to 2.1 above.

Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)

The Aboriginal Corporations of Lake Condah and Framlingham Forest may make by-laws for, or with respect to, the declaration of sacred or significant sites or other sites of significance to Aboriginal people in respect of the land vested in them (ss.15(1) and (2)).

The Corporations are also required to compile a register of sites on their land that are sacred or significant to Aboriginal people, or to any group of Aboriginal people, and must record in the register the boundaries as specified (s.23). Each register must be kept in such a way as to prevent unauthorised disclosure of its contents (ss.16, 24 and 30).

The operation of the *Archaeological and Aboriginal Relics Preservation Act 1972* has been effectively replaced by the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (see above).

Archaeological and Aboriginal Relics Preservation Act 1972

Under this Act, land may be declared to be an archaeological area where the Governor is satisfied that it is necessary to reserve the land and to control access to the land for the preservation of relics (s.15(1)). ‘Relics’ are defined as any Aboriginal deposit, carving, drawing, skeletal remains and anything belonging to the total body of material relating to past Aboriginal occupation, except remains buried after 1834 or handiwork made for sale (s.2). A proclamation of land as an archaeological area may not be made unless the written consent for the proclamation has first been received by the relevant State Minister (in the case of Crown land) or the owner/occupier of the land (in the case of private land) (s.15(2)).

The Governor may also, by order in council, declare an area as a temporary archaeological area if satisfied that this is expedient for the preservation or protection of a relic and that it is necessary in the meantime to prevent or control the entry of people into that area. An area ceases to be a temporary archaeological area six months after its declaration unless it has been declared or has otherwise become an archaeological area in the meantime (s.16).

Administration

The Minister, before taking a number of actions under this Act, is required to seek and rely on advice from the

Archaeological Relics Advisory Committee, which is responsible for advising the Minister on all matters it thinks necessary in relation to relics and their preservation (s.7). The Committee comprises 12 members, chaired by the Secretary of the Department of Natural Resources and Environment, three of whom must be Aboriginal people appointed by the Minister (ss.5 and 8).

The Act specifies a number of powers and functions vested in the Secretary under it (ss.10(1)(a)-(e)). These include the establishment and maintenance of a register of all archaeological areas, of all unproclaimed known occurrences of relics and of all people known to be holding private collections of artefacts and unique specimens that include relics, seeking information in relation to the location of relics and to any new discoveries of relics, and arranging for adequate protection of relics, and making necessary investigations and researches in the State with respect to archaeological relics.

The Secretary may also, in respect of an archaeological area, enter into an arrangement with the Minister and the person whose consent was required, for the land to be proclaimed as an archaeological area. The arrangement may relate to the control of the area, the granting of leases and permits for the use of the land in the area, or the construction of buildings or making of roads or trails if the Minister considers it necessary or desirable to accommodate the public or for administration.

The Governor in Council may appoint honorary inspectors and wardens who have specified statutory powers, including seeking information in relation to the location of any relic or inspecting or examining any relic. An inspector or warden may impound any relic and retain it pending investigation and legal proceedings (ss.9, 12-14, 29 and 31).

Compulsory Acquisition of Land

The Minister may compulsorily acquire any land (other than an Aboriginal reserve or land on which an Aboriginal person is living) if informed by the Archaeological Relics Advisory Committee that there is a unique and irreplaceable relic on, in or under the land, which is in danger of loss or damage. However, before taking action the Minister must notify the owner of the land in writing that the Minister has been so informed and must allow time for an appeal to the Appeals Committee (which comprises a magistrate, the Secretary and a

person experienced in land conservation appointed by the Minister). The owner of the land may appeal on the grounds that the relic is not so unique and irreplaceable that it is necessary to acquire the land or that, having regard to the use or nature of the land, the land should not be compulsorily acquired (ss.18(1)-(5)).

The control of access to archaeological areas lies with the relevant Ministers or landowners, rather than with the Aboriginal people, and ownership of the relics within those areas vests in the Crown (ss.17 and 20).

Preservation of Relics

A person who discovers a relic must immediately report the discovery to an authorised official (either the Secretary, an inspector or a warden), unless the person has reasonable cause to believe that the relic is recorded in the Register kept by the Secretary (s.23(1)).

When any relic is discovered in the course of any construction or excavation on any land, it is the duty of the person in charge of such activity to report the discovery to the Secretary. If the Secretary considers the relic to be worthy of preservation, they must take whatever action is necessary to preserve it, unless the Minister, in consultation with the Archaeological Relics Advisory Committee directs otherwise (s.23(2)).

The Minister must take such action as is reasonable for the preservation of a relic. The Minister may, for that purpose, purchase or otherwise acquire a relic on behalf of the Crown, purchase land on which immovable relics are present, and erect screens, shelters or other structures or take such other action as is reasonably necessary (s.26). Subject to Ministerial determination, the official place of lodgment for movable relics is the Museum of Victoria in Melbourne.

It is an offence to wilfully or negligently deface or damage or otherwise interfere with a relic or carry out an act likely to endanger a relic, or to disturb or excavate land for the purpose of uncovering a relic, without the consent of the Minister. Before giving such consent, the Minister must consult with the Archaeological Relics Advisory Committee and any other person or body that, in the Minister's opinion, should consider the matter (ss.21 and 22).

The provisions of the Act require the Minister, in deciding whether a relic is of special significance, to give particular

regard to any former use or significance that may be attributed to the relic on the basis of Aboriginal oral tradition or historical association, any existing or potential anthropological, archaeological or ethnographic research of importance, and the recommendation of any Aboriginal person as submitted (ss.21 and 22). Ministerial consent may be subject to such conditions as the Minister sees fit to impose and the Minister may direct the removal of the relic to safe storage.

The Act also makes it an offence for a person, without the consent of the Secretary, to buy or sell, or have possession or be in control of, a relic (other than a portable relic) unless the person has possession of the relic prior to commencement of this Act on 16 August 1972 (ss.26A and 26B). It is also an offence under these provisions for a person to display or have control of any Aboriginal remains. The Secretary may give consent, subject to such conditions as the Secretary sees fit to impose.

*Heritage Act
1995*

The purpose of the *Heritage Act 1995* is to provide for the protection and conservation of places and objects of cultural heritage significance and the registration of such places and objects (s.1). This includes interim protection orders (ss.55-62), permits and covenants (ss.63-92), protection of archaeological places (ss.120-134) and enforcement and legal proceedings (ss.146-182). ‘Cultural heritage significance’ is defined under the Act to include aesthetic, archaeological, architectural, cultural, historical, scientific or social significance (s.3).

The Act also establishes the Heritage Council (ss.6-13), the office of Executive Director (ss.14-17, vests most of the key administrative functions under the Act in the Executive Director) and the Victorian Heritage Register (ss.18-62).

The Act does not apply to a place or object that is of cultural or heritage significance only on the grounds of its association with Aboriginal tradition or Aboriginal traditional use (s.5). This is confirmed by the definition of ‘archaeological relic’ in the Act (s.3), meaning ‘any archaeological deposit or any artefact, remains, or material evidence associated with an archaeological deposit which relates to the non-Aboriginal settlement or visitation of the area or any part of the area which now comprises (the State of) Victoria and which is 50 or more years old...’ ‘Archaeological site’ is defined in the

Act as being an area where archaeological relics are located (s.3).

But there are some residual applications to Aboriginal relics. For example, the Act provides that the Heritage Inventory must include all places or objects identified as historical archaeological sites, areas or relics on the register under the *Archaeological and Aboriginal Relics Preservation Act 1972* immediately before the commencement of this Act (s.121).

Also, whereas it is an offence to buy, sell or possess archaeological relics without the consent of the Executive Director (s.134(1)), there is a defence to any proceedings under the Act (s.1) if the accused can prove that they had possession of the relic prior to the 1972 Act (s.134(2)).

The further provisions of this Act in relation to the 1972 Act (ss.212, 213 and 217) preserve consents given in respect of archaeological relics by the Minister (under ss.21 and 22 of the 1972 Act) by deeming them to be consents given by the Executive Director under this Act (s.129).

The purpose of the *Heritage Rivers Act 1992* is to make provision for the protection of public land, in particular parts of rivers (that is, their foreshores) and river catchment areas in Victoria which have significant nature conservation, scenic or cultural heritage attributes.

Heritage Rivers Act 1992

Heritage river areas are provided for under the Act (s.5 and Schedule 1), and natural catchment areas are also provided for (s.6 and Schedule 2). Schedules 3 and 4 make provision for restricted and specific land and water uses in heritage river areas and Schedule 5 does likewise in respect of particular natural catchment areas.

For a detailed synopsis of the *National Parks Act 1975* see 2.1 above. Among the objectives of this Act in respect of national parks is the preservation and protection of the natural environment of the parks, and of features of scenic, archaeological, historic or other scientific interest in these parks (s.4).

National Parks Act 1975

VICTORIA

2.3 LOCAL GOVERNMENT

For a detailed synopsis of the *Crown Land (Reserves) Act 1978* see 2.1 above. The Governor in Council, on the recommendation of the Minister, may direct that any land reserved under the Act (s.4, which gives the Governor in Council power to declare reserves for the purposes of the Act) may vest in a municipal council on trust for the purposes for which the land has been reserved (s.16(1)).

*Crown Land
(Reserves) Act
1978*

The Act also empowers the Governor in Council to allow a municipal council to grant leases or licences over land vested in it (under s.16(1)) for a term of up to 21 years (ss.16(1) and (2)), subject to conditions and restrictions as specified (ss.17-17F).

The *Cultural and Recreational Lands Act 1963* (CRL Act) empowers the Governor in Council to declare land that is vested in specified bodies corporate for providing or promoting cultural or recreational or similar features or objectives on a non-profit basis as recreational land (ss.2 and 2A). Such land may not be acquired compulsorily except by agreement (s.3). Municipal councils have the discretion to charge rates in relation to the land that reflect the benefit to the community derived from such land (s.4). Rates can only be set under the *Local Government Act 1989* (s.5 of the CRL Act).

*Cultural and
Recreational
Lands Act 1963*

The *Local Government Act 1989* establishes three types of councils: city, rural and shire (s.4). The purposes of a council are to provide for the peace, order and good government of its district, to facilitate and encourage appropriate development, to provide equitable and appropriate services and facilities for the community, and to manage and develop resources in its district (s.6).

*Local
Government
Act 1989*

The primary functions of a council are set out in Schedule 1 under the general headings of: general public services; health, education, welfare and other community services; planning

and land use; property services; recreational and cultural services; roads; and other functions such as transport, tourism and the encouragement of employment, commerce and industry.

The Act (s.187) permits a council to compulsorily acquire any land which is, or may be, required by the council for, or in connection with, or incidental to, the performance of its functions, subject to the terms of the *Land Acquisition and Compensation Act 1986*. Under the Act (s.202), the Crown has absolute property in all land reserved as a road under the *Crown Land (Reserves) Act 1978* or purchased under the *Land Act 1958*.

Subdivision Act 1988 The *Subdivision Act 1988* sets out the procedure for the subdivision and consolidation of land for the creation, variation or removal of easements or encumbrances. The Act also regulates the management of common properties and details the responsibilities of a Council of a municipal district in respect of plans required to be prepared pursuant to the Act (s.1).

VICTORIA

2.4 MARINE

The purposes of the *Coastal Management Act 1995* are to establish the Victorian Coastal Council and Regional Coastal Boards, provide for co-ordinated strategic planning and management for the Victorian coast and the preparation and implementation of management plans for coastal Crown land, and provide for a co-ordinated approach for approvals for the use and development of coastal Crown land (s.1). Crown land as defined in the Act (s.3) includes Crown land that is, or is part of, a national park or a park as specified under the *National Parks Act 1975* (see below).

*Coastal
Management
Act 1995*

The Act establishes a Victorian Coastal Council of not more than 11 members who are recommended by the Minister (ss.6 and 7(1)). In making such recommendations the Minister must consider the need for people with experience in conservation, tourism, business, recreation, commerce, town planning, local government, coastal engineering, community affairs and issues relating to Indigenous peoples (s.7(2)).

The functions of the Council are also set out in the Act (s.8). They include: undertaking state-wide strategic planning, preparing and submitting to the Minister a draft Victorian Coastal Strategy, advising the Minister on matters such as coastal planning and management (including coastal development proposals), and the implementation of the objectives of the Act. The Council is also responsible for giving consideration to the needs of Aboriginal people and other interested groups in relation to the coast (s.8(1)(k)).

The Act empowers the Minister to determine and define the boundaries of coastal regions (ss.9 and 10) and, after doing so, requires the appointment of a Regional Coastal Board for that region with not more than 12 members. Indigenous interests are included in the issues the Minister must consider when appointing members to the board. There is a requirement for up to four members of the Board, with experience in areas involving community affairs, to be drawn from the community (s.11(2)). The functions of the Board (apart from developing

Coastal Action Plans and providing advice to the Council) include liaising with community groups (s.12(1)).

Specific provisions covering the Victorian Coastal Strategy are contained in the Act (ss.14-21). When preparing and reviewing the Strategy, the Council is required to consult with the land owners in any area, including Indigenous land-owners, and any other people or organisations whose interests the Council considers likely to be affected by the Strategy (ss.16(1)(c)-(d) and 20(3)(c)-(d)). Coastal Action Plans are provided for in more detail in the Act (ss.22-29), with parallel provisions to the Strategy (ss.24(2)(c)-(d) and 28(3)(c)-(d)).

The Act prohibits the use or development of coastal Crown land without the Minister's written consent (s.37). When deciding whether to give or refuse consent, the Minister must have regard to the Coastal Strategy and Coastal Action Plans (s.40).

*Crown Land
(Reserves) Act
1978*

For further details of the provisions of the *Crown Lands (Reserves) Act 1978* see 2.1 above.

Under the Act (s.4(1)(ze)) the Governor in Council has the power to reserve, permanently or temporarily, any Crown land for a public purpose, including the protection of the coastline, which then becomes coastal Crown land for the purposes of the *Coastal Management Act 1995*. The Act (s.4(3)) requires the Minister to consider a report from the Victorian Coastal Council established under the *Coastal Management Act 1995* (see above). The Governor in Council may also declare any land, or part thereof, reserved, either temporarily or permanently, under any Act to be permanently reserved for the protection of the coastline (s.4(6)). Before any land within a designated port is temporarily or permanently reserved under the Act (s.4(3A)), the Minister must consult with the Minister responsible for the *Marine Act 1988* (see below).

When regulations have been made under the Act for the care, protection and management of the land (s.13), the consent of the Minister administering the *Coastal Management Act 1995* (see previous Act) is required before any works or improvements may be carried out on coastal Crown land (s.15(1)(c)). The Act prohibits the vesting of land reserved for the protection of the coastline in a municipal council (s.16(5)).

The *Fisheries Act 1995* repeals the *Fisheries Act 1968* (s.1). The Act applies to any fish, fishing bait, protected aquatic biota or noxious aquatic species in Victoria, regardless of its origin (s.11). *Fisheries Act 1995*

The objectives of this Act are to provide for the management, development and use of Victoria's fisheries, aquaculture industries and associated aquatic biological resources; to protect and conserve fisheries resources, habitats and ecosystems; to promote sustainable commercial fishing and viable aquaculture industries and quality recreational fishing opportunities; to facilitate access to fisheries resources for commercial, recreational, traditional and non-consumptive uses; to promote the welfare of people engaged in the commercial fishing industry and to facilitate the rationalisation and restructuring of the industry; and, to encourage the participation of resource users and the community in fisheries management (s.3). 'Traditional' is not defined in the Act.

The Crown in right of Victoria owns all wild fish and other fauna and flora found in Victorian waters, except where fish is taken in accordance with a licence or permit, or taken lawfully where no licence or permit is required (s.10).

Part 2 outlines the fisheries management responsibility of the Commonwealth and State. The State may, in accordance with section 74 of the *Fisheries Management Act 1991* (Cth), make an arrangement referred to in section 71 or 72 of that Act for the management of a particular fishery (s.19).

The Minister may declare a management plan, and prepare and issue guidelines for it by notice published in the *Gazette*. A management plan may be prepared for any noxious aquatic species. A management plan must also be prepared in respect of a fisheries reserve as soon as possible after the fisheries reserve is declared under section 88 of this Act (s.28). The purpose of a fishery management plan is to specify policies and strategies which are ecologically sustainable, while having regard to other matters such as traditional use (s.29).

Powers of enforcement of the provisions of this Act are listed in Part 7 Division 1, and the offences are listed in Part 7 Division 2. In any proceedings for an offence under this Act the onus of proof is on the person charged with the offence (s.122).

Marine Act 1988 The *Marine Act 1988* applies to all vessels operating, or intended to be operated, in the State's territorial sea. It is concerned with the implementation of national and international law relating to the registration and operation of vessels, prevention of pollution from and by vessels and safety issues in the State's waters (s.1). The Act defines a 'vessel' as being any kind of vessel used, or capable of being used, in navigation by water, however propelled or moved (s.3(1)). Part 4 deals with offences and penalties relating to alcohol and other drugs, and Parts 5 and 6 deal with pollution and international conventions (the full texts of which are attached to the Act in the Schedules).

It is an offence to operate State vessels on State waters if they are not registered under Part 2 of this Act (ss.7 and 8) or are not exempted from registration (by regulations made under s.67). The Act empowers authorised officers with the right to inspect a vessel at any time if they have reasonable grounds for suspecting that the vessel is in breach, or being operated in breach, of the Act or regulations made under it (s.13).

The Marine Board established and provided for under Part 8 may regulate or prohibit the operation of any vessel or class of vessel (s.15). Officers of the Board also have the power to stop vessels and require the person in charge to supply their name and address for purposes related to the Act (s.19).

Maritime Accidents

The Act imposes a duty on any person in charge of a vessel to stop and provide assistance in the case of an accident, involving vessels, which has resulted in injury and/or death and/or damage to, or destruction of, property (s.20). The provisions prohibiting the operation of unsafe vessels, including those relating to overloaded and unseaworthy vessels, also have general application.

The Act requires the owner of a trading or fishing vessel to report, in writing and without delay, all damage to, or defects in, vessels and operative parts of vessels such as boilers, machinery or equipment (ss.20A and 21).

Powers of the Marine Board

The Act (s.66A) empowers the Marine Board to acquire land compulsorily for, or in connection with, or incidental to, the provision of navigation aids in the State's waters, subject to

the provisions of the *Land Acquisition and Compensation Act 1986* (see 2.1 above). Part 9 provides the Board with further powers in respect of matters such as navigation infrastructure, lighthouses, control of speed of vessels, and implementation and enforcement of other safety measures.

The Act authorises the Board, by notice in writing, to exempt a person or vessel or classes of them from any requirement under this Act if it decides that compliance with the requirement(s) would, in the circumstances, be impractical, unnecessary or inappropriate (s.67). Such an exemption may be indefinite or for a specified period and either absolute or subject to specified conditions. The Board has the discretion to cancel, at any time, or alter the terms and conditions of the exemption.

While it does not appear that the Act covers most aspects of traditional fishing by Aboriginal people (except those relating to safety or operation of vessels), those affected could apply to the Board for an exemption.

Special provisions relating to Ports are provided for in Part 10.

For a detailed synopsis of the provisions of the *National Parks Act 1975*, which apply to all parks established and administered under the Act, refer to 2.1 above. Schedule 4 makes provision for, and provides details of, marine and coastal parks under the Act. These parks are listed and identified under Parts 1 to 7 of Schedule 4.

National Parks Act 1975

Schedule 4 specifies that these parks are administered by the Secretary appointed under the *Conservation, Forests and Lands Act 1987* (ss.5 and 19B). Each Part of the Schedule specifies which sections of the Act apply (with some minor variations, these are generally ss.1-6, 9-29) and 33(3)- 48).

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

Petroleum (Submerged Lands) Act 1982

For further details, refer to Chapter 9.4, which provides a detailed synopsis of the off-shore petroleum agreements that govern the Commonwealth-State regime.

Underseas Mineral Resources Act 1963 The *Underseas Mineral Resources Act 1963* makes provision for the exploration and exploitation of the mineral resources of the seabed and the subsoil in certain waters within, and beyond, the territorial limits of Victoria, and for other purposes (preamble).

The Act (s.2(1)) provides that, for the purposes of encouraging the exploration and exploitation of the mineral resources of the sea-bed and its subsoil, the provisions of the *Mineral Resources Development Act 1990* (MRDA, see 2.5 below) extend and apply to the sea bed and its subsoil within the territorial limits of Victoria. It also applies to those parts of the seabed and its subsoil of the submarine areas outside such territorial limits, to which the jurisdiction and legislative power of the State extend in the same manner, and to the same extent, as if it were land within the State.

In the application of the MRDA, gold, silver, uranium and thorium and other minerals found on or in the sea-bed and subsoil are deemed to be the property of the Crown (s.2(2)). All powers to make by-laws and regulations vested in the Governor in Council under the MRDA also apply to the areas and minerals covered by the Act (s.2(3)).

VICTORIA

2.5 MINERALS

For a detailed synopsis of the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth), refer to 2.1 above.

The vesting provisions in the Act expressly exclude minerals, interest in which remains the property of the State (ss.6(1)(b), 7(1)(b) and 8). ‘Mineral’ is defined in the Act (s.3(1)) to include any substance other than water that occurs naturally in the earth’s crust, petroleum within the meaning of the *Petroleum Act 1958* (although this Act has since been repealed and replaced by the *Petroleum Act 1998*) and stone within the meaning of the *Mineral Resources Development Act 1990* (see below).

*Aboriginal Land
(Lake Condah
and
Framlingham
Forest) Act
1987 (Cth)*

Role of the Aboriginal Corporations in the Area

No person, even under the authority of a mining tenement, may carry out mining operations on, nor enter for the purpose of mining, land managed by, respectively, the Kerrup-Jmara Elders Aboriginal Corporation at Lake Condah and the Kirrae Whurrong Aboriginal Corporation at Framlingham Forest, unless the relevant corporation has granted the necessary permission (s.30(1)). In cases when the Minister is considering making a declaration that they are satisfied that any registered sacred or significant site has been adequately protected from mining operations on the relevant land, the relevant corporation must make the register of sites that are sacred or of significance to Aboriginal people (provided for under ss.15 and 23) available on the Minister’s request (s.30(2)).

The relevant corporation may refuse permission, grant permission unconditionally or subject to such conditions as it considers appropriate and that are not inconsistent with any law of the State or the Commonwealth (ss.31(1)-(4)). These conditions may include payment or other consideration being given to the corporation. Such consideration must be reasonable for any disturbance to the relevant land and to the traditional owners of the land and their lifestyle that has resulted, or is likely to result, from the granting of a mining tenement (ss.32(1) and (2)).

In the case of an application for an exploration licence, search permit, prospecting area licence, permit to search for stone or

petroleum permit, the payment or other consideration may not exceed any amount that would have become payable as compensation under the relevant Victorian legislation (s.32(2)(b)). In the case of an application for an instrument under the *Mineral Resources Development Act 1990* or the *Petroleum Act 1958*, the payment or other consideration may exceed the amount otherwise provided for (s.32(2)(c)).

Any other payment or consideration for the purpose of obtaining the corporation's permission to carry out a mining operation is prohibited except with the Minister's consent (see ss.35 and 37).

Appeals Against Decision of a Corporation

There is a process, however, by which a person with a mining tenement, who is aggrieved by a decision of a corporation to refuse permission or grant permission subject to conditions, may seek and achieve the reversal of a decision of a corporation by conciliation (s.33(1)). If this fails then either the applicant, the corporation, or the Minister (depending on the circumstances) must appoint an arbitrator to review the decision of the corporation; the arbitrator may vary or confirm the corporation's decision or set it aside and substitute another decision (ss.33(2) to (4)).

Upon receiving an application, the Minister is also required to consult with the relevant corporation about the existence of the whole or a part of a sacred or significant site on the subject land (s.34(1)). The Act requires the corporations to compile and maintain a register of sites of land that are sacred and significant to Aboriginal people (ss.16 and 24). The Act (s.34(2)) provides that if the Minister is satisfied that the land does include such a site, they must advise the applicant accordingly. The corporation is then deemed to have advised the Minister that it considers a declaration should be made to protect that site under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (s.21E) (see 2.2 above). This provision does not apply to renewals or extensions of existing mining tenements unless the Minister decides otherwise (ss.34(3)).

Permission to Carry Out Mining Activities

Mining activity may be carried out where the Minister has declared that any sacred or significant site has been appropriately protected (s.30(2)(c)). If a corporation grants

permission to carry out any mining operation on the relevant land, the person authorised, and that person's agents, contractors and employees, may enter that land for the purpose of carrying out these operations; however, entry is subject to any conditions on which permission has been granted and to the relevant Victorian mining legislation (but without requiring any further permission to enter the land under any of those Acts) (s.36).

The *Aboriginal Land (Manatunga) Act 1992* (s.3(2)(b)) provides that the land, that is subject to the Act, is granted, subject to the condition that it must not include any term or provision that purports to exclude, modify or restrict the operation of the *Mineral Resources Development Act 1990*, the *Petroleum Act 1958* or the *Extractive Industries Development Act 1995*. See 2.1 above for more details of this Act.

*Aboriginal Land
(Manatunga)
Act 1992*

The *Aboriginal Land (Northcote Land) Act 1989* provides that an instrument under the *Mineral Resources Development Act 1990* and the *Extractive Industries Development Act 1995*, or a lease or permit under the *Petroleum Act 1958*, must not be granted in respect of any of the land that is the subject of this Act (refer to 2.1 above for details) except with the consent of the Aboriginals Advancement League Incorporated and subject to any terms and conditions that the League determines (s.5(4)).

*Aboriginal Land
(Northcote Land)
Act 1989*

The main purpose of the *Extractive Industries Development Act 1995* is to provide for a coordinated assessment and approval process for extractive industries and their safe and appropriate operation (s.1). An extractive industry is defined under the Act as 'the extraction or removal of stone from land if the primary purpose of the extraction or removal is the sale or commercial use of the stone or the use of the stone in construction, building, road or manufacturing works...' (s.3(1)). It also includes any place or operation declared by the Minister to be an extractive industry. Stone is: sandstone or other building stone; basalt, granite, limestone or rock used for road making or construction; slate and gravel; clay; sand, earth or soil; or any other similar material.

*Extractive
Industries
Development
Act 1995*

Authorities and Consents

It is an offence to search for stone on Crown or private land, or to carry out an extractive industry on any such land, without an authority or consent issued under this Act (s.8).

The Act (s.10) does not allow the Minister to grant a permit to search for stone on certain land, including land that is a national park, wilderness park or State park, under the *National Parks Act 1975* (see below; also 2.1 above) or land that is an Aboriginal place, to the extent of any terms of a declaration of preservation in force under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ss.21C, 21D or 21 E) (see 2.2 above and Chapter 9.2). The Minister also may not grant a permit to search for stone on land that is an archaeological area under the *Archaeological and Aboriginal Relics Preservation Act 1972* (see 2.2 above) or that contains relics, the occurrence of which is registered under section 10(a) of that Act.

The Act entitles a person to apply to the Minister for a permit to search for stone on Crown land (s.11). The Minister must refer any application to the Ministers responsible for the *Conservation, Forests and Lands Act 1987* (see 2.1 above) and must give notice of the application to ‘any person or body nominated by the Minister administering the *Archaeological and Aboriginal Relics Preservation Act 1972* and to a person or body nominated under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The Minister must also have regard to the advice of the Minister or Ministers responsible for the relevant provisions of the *Conservation, Forests and Lands Act 1987* in determining any application.

A person authorised to carry on an extractive industry is required to develop a work plan for approval (s.17) and apply to the Minister for a work authority (s.19). A work authority may be made, subject to conditions relating to the rehabilitation of land, the protection of the environment, and the amenity of the area and ground-water, and also for public safety (ss.20, 31-37).

The Act (s.41) provides for the appointment of inspectors who have extensive powers of entry at all reasonable times of the day and night to ensure compliance with this Act (s.43); it is an offence to obstruct an inspector in the exercise of those powers (s.44).

Sections 204 and 205 of the *Land Act 1958* provide that in every Crown grant of land alienated in fee simple there is to be a covenant that such land is granted subject to the right of a licensee under the *Mineral Resources Development Act 1990* to undertake necessary mining activity under the same terms and conditions as when the land was Crown land. This is subject to the payment of compensation for any surface damage.

Land Act 1958

Section 340 provides that no grant of a lease or licence shall pass or convey the property in or right to any metal or mineral in or under any such land, and that it remains the property of the Crown.

For a detailed synopsis of the *Land Act 1958* see 2.1 above.

The main purpose of the *Mineral Resources Development Act 1990* is to encourage an economically viable mining industry which makes the best use of mineral resources in a way that is compatible with the economic, social and environmental objectives of the State (s.1).

Mineral Resources Development Act 1990

Land that is not available for searching, exploration and mining includes (s.6):

- reference areas under the *Reference Areas Act 1978* (see 2.1 above);
- land that is a national, wilderness or state park under the *National Parks Act 1975* (see 2.1 above, and next Act below), unless subject to instruments validly granted before commencement of this Act;
- land that is an Aboriginal place under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) or that is an archaeological area under the *Archaeological and Aboriginal Relics Preservation Act 1972* (for a detailed synopsis of both Acts see 2.2 above); and
- land exempted under the Act (s.7).

The Act (s.13) empowers the Minister to grant exploration licences and mining licences (s.14). The *Crown Land (Reserves) Act 1978* (s.7) (referred to in 2.1 above) requires the consent of the person or manager administering or managing land under that Act to give consent to any mining activity proposed to be carried out.

It is an offence to search for minerals without a proper authority issued under the Act (s.8).

Applications for Licences

After an applicant for a licence is notified that the application has priority, notice must be given within 14 days to any person or body nominated by the Minister administering the *Archaeological and Aboriginal Relics Preservation Act 1972*, and any person or body nominated in relation to the application by the Minister to whom a power has been delegated under section 21B of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (s.18).

Any person may object to a licence being granted in writing to the Minister and, after considering the objection(s), the Minister may refuse to grant a licence (ss.24 and 25(1)).

The Minister may, for any appropriate reason, exempt any land from being subject to an exploration licence or a mining licence, or both (ss.6(e), 7 and 25). A licensee must not do any work within 100 metres of an archaeological and Aboriginal site (s.45(1)(a)(xii)).

Protection for Aboriginal Sites and Objects

The holder of a miner's right who searches on land under that right, and the holder of a tourist fossicking authority, must not disturb any Aboriginal place in relation to which a declaration has been made under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

It is an offence for the holder of such a right or authority to disturb, on the relevant land, an Aboriginal object (including Aboriginal remains) that is of particular significance to Aboriginal people in accordance with Aboriginal tradition (ss.58(1)(d), 62(1)(d)).

Mining Wardens

The Act provides for the appointment of mining wardens by the Governor in Council (s.96). A party to a dispute may refer the problem to a mining warden, who must investigate, try to settle or mediate in the dispute, and, where appropriate, make recommendations to the Minister (s.97). A mining warden may, while exercising the power of investigation, conduct hearings, enter land or premises, make orders in relation to the production and examination of documents and, for the

duration of the investigation, restrain people from dealing with minerals (ss.99-104).

Uranium

Uranium is included in the definition of 'mineral' under the Act, but, generally, Commonwealth legislation governs uranium mining (see *Atomic Energy Act 1953* (Cth), which also mandates the written notification of the discovery of uranium to the Minister administering this Act s.36(1)). The Governor General has also approved Codes of Practice covering the mining and milling of radioactive ores, transport of radioactive substances and the management of radioactive wastes under the *Environment Protection (Nuclear Codes) Act 1978* (Cth) (s.12(10)) For further details of these Commonwealth Acts, see Chapter 9.5.

The Act requires disclosure of the discovery of uranium to the Minister (s.113(1)). A person must not possess, use, sell or otherwise dispose of uranium, unless under and in accordance with an authority of the Minister (s.113(4)). The Minister may order a person who is unlawfully in possession of uranium to deliver it to the Minister (s.113(6)). Further provisions concerning uranium are in the *Nuclear Activities Prohibition Act 1983*.

For further details concerning the *National Parks Act 1975* see

National Parks Act 1975
2.1 above.

Provisions Concerning Fossicking and Prospecting

The Act (s.32D) empowers the Minister to designate an area or areas specified in Parts 13, 26, 31, 33 and 36 in Schedule 2B, or Parts 1, 13 and 15 in Schedule 3, and Parts 14 and 15 in Schedule 2B as parks in which fossicking and/or prospecting may be permitted. Similarly, the Minister may also designate an area or areas in parks (Part 31 in Schedule 2), and tidal zones in parks listed in Schedule 4, where fossicking for gemstones may be permitted.

Upon designation, the responsible authority may issue the relevant permit or authorisation to fossick and/or prospect as the case may be.

Provisions Concerning Mining and Petroleum Tenements

The Act prohibits the granting of a lease, licence or other authority under the *Mineral Resources Development Act 1990* or the *Extractive Industries Development Act 1995* (see above) in respect of a park, except with the consent of the Minister and subject to such terms and conditions as the Minister sees fit to impose (s.40(1)). Certain existing statutory authorisations are preserved by the Act (ss.40(1AA) and (1AB)) and the restrictions are relaxed somewhat in relation to exploration licences (s.40(1A)). But if the Minister responsible for the *Conservation, Forests and Lands Act 1987* subsequently refuses to give consent to the park being included in a licence area, that land is excluded from the area.

The Act prohibits the doing of anything under a statutory instrument issued under the *Petroleum Act 1998* (see below) in a wilderness park or wilderness zone, and any other park except with the consent of the Minister and subject to whatever terms and conditions the Minister thinks fit to impose (s.40(2)). The Minister is required to obtain the advice of the National Parks Advisory Council before giving any consent under the Act (s.40(3)).

*Nuclear
Activities
Prohibition
Act 1983*

The objects of the *Nuclear Activities Prohibition Act 1983* are to protect the health, welfare and safety of the people of the State and to limit deterioration of the environment in which they dwell by prohibiting the establishment of nuclear activities and by regulating the possession of nuclear materials (s.3).

‘Nuclear activities’ are defined in the Act as any procedure or operation involved in the mining, milling, conversion, enrichment, fabrication, use, reprocessing or disposal of nuclear material (s.2). ‘Nuclear material’ is defined as being any radioactive substance associated with the nuclear fuel cycle, including fertile and fissile material, spent fuel and waste.

Any exploration, mining or quarrying for uranium or thorium is prohibited (s.5). The exception is if it occurs in the process of another quarrying or mining operation, consistent with the miner’s title and only in small amounts, and provided it is treated in the prescribed manner and complies with any conditions imposed by the Governor in Council (s.6). Also prohibited are the construction and operation of facilities

related to nuclear activities (s.8) and the processing of nuclear material (s.9).

The objectives of the *Petroleum Act 1998* are to encourage the exploration for petroleum in Victoria and to promote petroleum production for the benefit of all Victorians (s.3). This Act applies to all land in Victoria, other than land that is within the area defined as the adjacent area in the *Petroleum (Submerged Lands) Act 1982* (see 2.4 above) (s.11). The Crown owns all petroleum on or below the surface of any land in Victoria that came to be on or below that surface without human assistance (s.13).

*Petroleum Act
1998*

A person must not carry out any petroleum operation on wilderness Crown land, and no authority or other authorisation granted under this Act can authorise otherwise (s.137). Wilderness Crown land means land that is a reference area under the *Reference Areas Act 1978* (see 2.1 above) or that is a wilderness zone or wilderness park under the *National Parks Act 1975* (see 2.1 above) (s.4).

Part 3 details the process of providing exploration permits. In issuing an exploration permit the Minister must ensure that the area to which the permit applies is not more than 12,500 square kilometres, and forms a continuous parcel of land, and that no part of the area to which the permit applies is within an area that is already the subject of an exploration permit (s.25).

Retention leases and production leases are provided for in Part 4 and Part 5 respectively. A retention lease enables the holder of an exploration permit to retain certain rights to a petroleum discovery that it is not commercially viable to develop under a production licence at the time the lease is granted, but which might become viable to develop within 15 years (s.36).

Before carrying out any petroleum operation on any land, the holder of the authority under which the operation is to be carried out must take reasonable steps to ensure that the operation will not contravene the *Archaeological and Aboriginal Relics Preservation Act 1972* nor the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (see 2.2 above) (s.146).

Specific Provisions Relating to Native Title Land

Compensation is payable by the authority holder to the owners and occupiers of private land or native title land for any loss or damage that has been, or will be, sustained in relation to the land as a consequence of any petroleum operation under the authority (s.129). ‘Authority’ means an exploration permit, a retention lease, a production licence or a special access authorisation (s.4). Disputes may be referred to the Victorian Civil and Administrative Tribunal or the Supreme Court (s.134).

In respect of the approval or carrying out of any petroleum operation, the *Native Title Act 1993* (Cth) (NTA) rights prevail if the right to negotiate provisions of the NTA have applied, or an Indigenous Land Use Agreement within the meaning of the NTA applies in relation to native title land. The provisions of this Act that provide for similar processes do not apply except to the extent that the parties otherwise agree in writing (s.136).

Notice is to be given before an operation is carried out on any land. In the case of native title land in respect of which there has been no approved determination of the native title within the meaning of the NTA, it is sufficient compliance with this section if the person gives the notice required by this section in accordance with section 24MD(7) of the NTA (s.145 of this Act).

Wildlife Act 1975 For a detailed synopsis of the *Wildlife Act 1975* refer to 2.1 above.

Notwithstanding the provisions of the *Mineral Resources Development Act 1990* (see above), no person has any rights of entry, prospecting, exploration or mining in respect of lands being part of a State Wildlife Reserve without the written permission of the Minister (s.19(1)). Similarly, notwithstanding the provisions of the *Mineral Resources Development Act 1990*, no person has any rights of entry, prospecting, exploration or mining in respect of lands being part of a State Wildlife Reserve without the written permission of the Minister (s.19(2)).

VICTORIA

2.6 NATIVE TITLE

The *Land Titles Validation Act 1994* provides for the validation of past acts as provided for in Part 2 Subdivision B of the *Native Title Act 1993* (Cth) (NTA) (see Chapter 9.6). The Act received Royal Assent on 20 December 1994 and commenced on 31 December 1994. It does not make any provision for claims to native title or for the establishment of a Native Title Tribunal to determine native title claims. The Commonwealth Administrative Appeals Tribunal operates Registry services on behalf of the National Native Title Tribunal (NNTT) in Melbourne and Victoria is part of the NNTT's South East Region.

*Land Titles
Validation Act
1994*

The purpose of the Act is to validate past acts attributable to the State that might otherwise have been deemed invalid due to the existence of native title (s.1). More detailed provision for the validation of past acts, picking up on the past act provisions of the NTA (s.229), is made in Part 2 (ss.6-12) of this Act.

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). Detailed provision for the validation of intermediate acts is made in Part 2A (ss.13A-13G) of this Act. 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.

Part 2B confirms the past extinguishment of native title by certain valid or validated acts. If an act is a previous exclusive possession act under section 23B(2) or 23B(7) of the NTA and is attributable to the State, the act extinguishes any native title in relation to the land or waters covered by the freehold estate, scheduled interest or lease concerned (s.13H-I). If the doing of a previous exclusive possession act attributable to the State affects rights or interests (other than native title rights and interests) of Aboriginal peoples (whether arising under legislation, at common law or in equity and whether or not rights of usage), nothing in section 13H or 13I affects that reservation or condition or those rights or interests (s.13J).

The Act (s.13) ensures that native title holders do not lose their entitlement to compensation under the Commonwealth Act (s.17) because of the operation of Part 2, 2A or 2B. Compensation is payable by Victoria and is to be determined in accordance with the principles set out in Division 5 of Part 2 of the Commonwealth Act.

Sections 13P and 13Q have provisions for validating future acts when details on the Register of Indigenous Land Use Agreements state that: the future act has already been done invalidly; the act is attributable to the State; the State is a party to the agreement; and, the person liable to pay compensation in relation to the act is also party to the agreement. The act is then taken as valid and as always to have been valid.

The Act also confirms ownership by the Crown of natural resources, the right to regulate water flow and existing fishing rights under State law (s.14) and public access to waterways, beds and banks of waterways, coastal waters, beaches and public areas (s.15). The Act makes it clear that the confirmation of the matters set out under it (ss.14 and 15) are not intended to impair or extinguish any native title rights or interests, nor to affect any conferral of land or water, or any interests in land or water, under a law that confers benefits only on Aboriginal people or Torres Strait Islanders (s.16).

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

3. QUEENSLAND

QUEENSLAND

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QUEENSLAND

3.1 LAND AND ENVIRONMENT

The preambles to both the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* recognise the spiritual, social, historical, cultural and economic importance of land to Aboriginal and Torres Strait Islander people and the need to enact special measures for the purpose of advancing the interests and responsibilities of the Aboriginal people and Torres Strait Islanders of Queensland and to rectify past injustices. Since these Acts mirror each other in most respects, they are discussed together. They are abbreviated as ALA and TSLA respectively for convenience.

Aboriginal Land Act 1991
and
Torres Strait Islander Land Act 1991

Part 2 of the ALA sets out the basic concepts underpinning the Act. It provides a definition of Aboriginal people as a race with traditions, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people (ss.7-9).

The TSLA similarly sets out in Part 2 basic concepts underpinning the legislation. It provides that a Torres Strait Islander is a person who is a descendant of an Indigenous inhabitant of the Torres Strait Islands (s.7) and that Island custom, known in the Torres Strait as Ailan Kastom, is the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular people, areas, objects or relationships (s.8). Both Acts expand on the concept of particular connections with the land and people on neighbouring lands (ALA, s.4; TSLA s.4).

In addition to these basic concepts, native title interests are defined in both Acts (s.5) to mean the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in land or waters if: (a) the rights and interests are possessed under Aboriginal tradition or Island custom; and (b) the Aboriginal or Torres Strait Islander people, by Aboriginal tradition or Island custom, have a connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia. Rights and

interests include hunting, gathering or fishing rights and interests.

Grants of Transferable Land

The Acts provide for the grant of specified categories of land to trustees in freehold for the benefit of either Aboriginal people or Torres Strait Islanders without the need to make a claim.

This scheme applies to transferable land, which includes: land reserved or set apart for the benefit of Aboriginal and Torres Strait Islander inhabitants; the Aurukun and Mornington Shire leases and other leases as established under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*, as they were on 12 June 1991; or land which is granted by deed in trust (DOGIT land) for the benefit of Aboriginal and Torres Strait Islander inhabitants or for the purpose of an Aboriginal and Torres Strait Islander reserve under the repealed *Land Act 1962*; or available Crown land declared by regulation to be transferable land (ALA ss.10-16 and 27-43; TSLA ss.9-13 and 25-40).

Claimable Land

Groups of Aboriginal people, or groups of or individual Torres Strait Islanders, may make claims to areas of land transferred under the scheme outlined above (unless they are declared to be un-claimable) and to areas of land declared by regulation to be available Crown land. Claimable lands, other than transferred lands, are outside city, town or township land, and include nominated national parks (ALA ss.17-25; TSLA ss.14-23).

The ALA (s.18) and the TSLA (s.15) describe lands that are claimable as available Crown land, declared by Regulation to be claimable land, or land that is transferred land. Available Crown land is described in the ALA (ss.19-25) and the TSLA (ss.16-22) as including: land that is reserved, set apart or dedicated for a public purpose under the repealed *Land Act 1962*; or land set apart and declared as a State forest or timber reserve under the *Forestry Act 1959* (see below); and/or any national park. Details of the lease-back of national park (Aboriginal land) and national park (Torres Strait Islander land), as constituted and provided for under the *Nature Conservation Act 1992*, are provided under the synopsis of the latter Act below. Available Crown land can, in certain

circumstances, include the beds and banks of watercourses and lakes and tidal land. The ALA (s.25) and the TSLA (s.22) declare, for the purposes of allaying doubt, lands that are not available Crown lands: these include the waters of the sea and the seabed, freehold land, an occupation licence under the *Land Act 1994* and land subject to a lease under the Land Act, including a grazing homestead lease, a perpetual lease and a pastoral lease.

Claims Process

Claims may be made on the grounds of traditional affiliation (in the case of Aboriginal people), customary affiliation (in the case of Torres Strait Islanders), historical association or economic or cultural viability. Certain land, such as land in a national park or Deeds of Grant in Trust (DOGIT) land, or Aurukun Shire lease land or Mornington Island Shire lease land may not be claimed on the grounds of economic or cultural viability (ALA ss.46, 53-55 and 57; TSLA ss.43, 50-52 and 55). A land claim must be made by no later than 21 December 2006 (ALA s.48; TSLA s.45).

Claims are evaluated by a Land Tribunal established under each Act, which recommends to the Minister whether or not land should be granted (ALA and TSLA, Parts 4 and 8). Title to the successfully claimed land (freehold or leasehold) is held by the grantees for the benefit of the specified people or class of people (ALA ss.63 and 64; TSLA ss.60 and 61).

The Minister must appoint grantees to be trustees of the land for the benefit of the relevant Aboriginal or Torres Strait Islander people (ALA s.65; TLA s.62). The consent of the grantees must be obtained by those wishing to obtain an interest in the land, to create a mining interest in the land or to enter into an agreement for access to or use of the land (ALA ss.39-41, 76-79, 83-88, 131 and 132; TSLA ss.36-38, 73-76, 80-85, 128 and 129).

Access

Aboriginal and Torres Strait Islander land under the Acts that is not subject to the control of a local government under either the *Community Services (Torres Strait) Act 1984* and *Community Services (Aborigines) Act 1984* or the *Local Government (Aboriginal Lands) Act 1978* (see 3.3 below) is subject to the ordinary laws of trespass and access (ALA s.26;

TSLA s.24). There are no special powers vested in the landholders to preclude access to their land by others. Where a person has an interest in land adjoining Aboriginal and Torres Strait Islander land under either Act, that person and related categories of people are entitled to cross this land to gain access to their land (ALA s.132; TSLA s.129).

Certain access rights are preserved and may be granted to the holder of a mining interest (ALA s.87; TSLA s.84) (see 3.4 below). Any right of access to or across an area of the coast that existed immediately before the land became claimable land continues in force if the land becomes claimable land under this Act. Also, where a national park becomes claimable land under this Act, the public rights of access that existed immediately before the land became claimable do not change (ALA ss.82-83; TSLA ss.79-80).

If land that is occupied or used by the Crown in right of the Commonwealth or of the State becomes Aboriginal and Torres Strait Islander land under the Acts, the Crown may continue to use or occupy the land rent free. The Crown's officers, employees and others authorised by the Crown may also enter and cross such lands for the purposes of gaining access to the land (ALA ss.83-86; TSLA ss.81-83).

Dealings with the Land

The Acts stipulate that an interest in transferred land cannot be resumed, taken or otherwise compulsorily acquired, sold or dealt with except by legislation that expressly provides for this and that makes provision for just compensation (ALA s.41; TSLA s.38). This applies in spite of what may be provided in any Act passed before or after the commencement of these provisions.

Subject to a number of qualifications, the grantees of lands under the Acts may grant a lease or licence or easement over all or any part(s) of the land, or consent to a mining interest (ALA ss.39 and 76; TSLA ss.36 and 73). The land may not be mortgaged or sold, but a lessee may sublet the land (ALA ss.76 and 77; TSLA ss.73 and 74). The grantees may enter into an agreement with the Crown in relation to the getting and sale of forest products or quarry material above, on or below the land (ALA ss.39(4) and 76(5); TSLA ss.36(4) and 73(5)). Such actions must not be taken unless the grantees have given notice of them, explained them to the affected Aboriginal and Torres

Strait Islander people and given these people the opportunity to express their views and give their consent (ALA ss.39(5) and 76(6); TSLA ss.36(5) and 73(5)).

The *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* enables any person over the age of 17 years to apply for the grant of a lease of any term, including in perpetuity, to members of communities of Aboriginal people or Torres Strait Islanders (s.5); it also empowers the Minister administering the Act to grant these (s.10), subject to notifying and obtaining the consent of the Minister responsible for the *Land Act 1994* (see below). This regime has the effect of bringing land under this Act under the DOGIT land regime of the *Land Act 1994*.

Aborigines and Torres Strait Islanders (Land Holding) Act 1985

Every lease granted under this Act must, amongst other matters, contain such covenants and be subject to such conditions, reservations and restrictions as are specified in the lease or prescribed by this Act (s.12(1) and ss.16 and 17). These cannot be varied or removed by the Minister without the written approval of the Minister responsible for the *Land Act 1994*. A lessee may, at any time, transfer, mortgage or sublease the tenement, and may grant or take an easement that affects the tenement, subject to the provisions of this Act. A tenement held under a lease is a lease under the *Land Act 1994* and the provisions of that Act relating to transfers, mortgages or subleases and easements apply in respect of such a tenement. Any person who is not a qualified person as defined in the Act (s.4(1)) may not hold land or an interest in land in respect of which an Aboriginal or Torres Strait Island Council is charged with the functions of local government, and any transfer to a non-qualified person is void (s.18).

Part 3 also contains provisions concerning leases and the Act also makes specific provision for matters relating to the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984* (see 3.3 below).

All applications for a lease closed under this Act (s.33A) after commencement of the ALA and the TSLA (see above). This Act (s.33B) also makes transitional provision for leases over land that becomes claimable land under the ALA or the TSLA.

For a further synopsis of the provisions of the *Aboriginal and Torres Strait Islanders (Land Holding) Act 1985* relating to local government, see 3.3 below.

*Acquisition
of Land Act
1967*

The *Acquisition of Land Act 1967* provides for the acquisition of land where it is required for a public purpose. Land is defined under the Act (s.2) to mean land, or any estate or interest in land, that is held in fee simple, but does not include a free-hold lease under the *Land Act 1994* (see below).

The Act specifies the public purposes for which land may be acquired (s.5(1) and the Schedule). These include:

- dams or other works for the conservation or reticulation of water, for departmental or official purposes;
- flood prevention and/or mitigation;
- forestry and related purposes;
- gravel and sand pits;
- parks, quarries, reservations, roads and soil conservation;
- works for the protection of the seashore and land abutting the seashore; and
- the use of land as town or suburban land.

The Act requires the relevant authority proposing to acquire the land to serve a notice of intention to acquire on any person who would be entitled to claim compensation under this Act (s.7). The notice must specify the purpose of the acquisition, and provide for the right to object, and the right to negotiate an agreement which may include matters concerning compensation (s.15).

The Act (s.18) specifies that compensation is claimable from the relevant authority; as far as land held in trust is concerned, such compensation is limited to the actual damage caused to the trust in terms of claims by the trustee(s). The claimant is required to provide full particulars about the nature of their interest in the land and the amount of compensation being sought (s.19). Further details of entitlement to, claims for and assessment of, compensation are provided in the Act (ss.18-35).

Any member, officer, employee, agent or contractor of the authority may enter onto land to make inspections, valuations or surveys, or to dig or bore into the land to determine the nature of the soil and other related actions, for the purposes of this Act (s.36(1)). Such people may re-enter and remain on the land for these purposes (s.36(2)); and the Act (s.36(4)) creates

offences and penalties for obstructing such people acting according to their rights (under s.36). Refusals or obstruction in respect of the taking of the land may result in a sheriff's warrant to take possession of the land (s.38).

The provisions of the *Anti-Discrimination Act 1991* overlay the provisions of the State's various Aboriginal and Torres Strait Islander Land and related Acts.

Anti-Discrimination Act 1991

The Act provides that a person may restrict access to land of a cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction is in accordance with the culture or doctrine of religion concerned and it is necessary to avoid offending the cultural or religious sensitivities of people of that culture or religion (s.48).

Although, as a general rule, it is unlawful to discriminate in the disposition of land, it is not unlawful to discriminate on the basis of race if the relevant interest in the land is an interest of cultural or religious significance and the discrimination is in accordance with the culture or doctrine of the religion concerned and it is necessary to avoid offending that culture or religion (ss.76-80).

The *Body Corporate and Community Management Act 1997* states that its objective is to provide for flexible and contemporary communally-based arrangements for the use of free-hold land, having regard to its secondary objects (s.3). Its secondary objectives are set out and include balancing the rights of individuals with the responsibility for self-management as an inherent aspect of community title schemes (s.5). Another key element is ensuring that bodies corporate for community title schemes have control of the common property and body corporate assets that they are responsible for managing.

Body Corporate and Community Management Act 1997

The Act limits the application of schemes to freehold land (s.10) which must comprise two or more lots, plus common property (s.11, see also ss.36-42) and a single body corporate for each scheme. Details of body corporate assets are outlined in the Act (ss.12 and 43), as are other key concepts (defined in ss.13-22). The constitution and responsibilities of bodies corporate are also set out in the Act (ss.31-35); the Act empowers the bodies corporate, for the purposes of a scheme,

to acquire and incorporate with the common property land under freehold title that is next to a lot or lots already under a scheme (s.39).

The Act (s.131) allows a body corporate to make by-laws for the scheme covering matters such as: the administration and control of common property; regulation of, and conditions applying to, the enjoyment and use of lots in the scheme; utility and infrastructure; body corporate assets; services and amenities supplied by, and to, the body corporate; and other matters (set out in Schedule 2). These include matters relating to noise, vehicles, obstruction, damage to lawns and common property, the disposal of rubbish, the behaviour of visitors, the appearance of the lots, storage and the keeping of animals.

*Environmental
Protection Act
1994*

The main objective of the *Environmental Protection Act 1994* is to protect Queensland's environment (s.3), while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (the principle of ecologically sustainable development). The Act states that the protection of Queensland's environment is to be achieved by an integrated management program that is consistent with ecologically sustainable development (s.4).

Environment is defined in the Act (s.8) to include ecosystems and their constituent parts (including people and communities and the social, economic, aesthetic and cultural conditions that affect, or are affected by, these systems, people and communities).

The Act is to be administered, as far as practicable, in consultation with, and having regard to, the views and interests of industry, interested groups and the community generally, including Aboriginal and Torres Strait Islander people under Aboriginal tradition and Island custom (s.6).

The Act deals with Environment Protection Policies (EPP), which may be prepared by the Minister on their own initiative or on the basis of a request received from any person (ss.23-33). Matters that may be included in an EPP are those relating to environmental values, which are defined in the Act as relating to qualities or physical characteristics of the environment that are conducive to ecological health or public amenity or safety (s.9). Any activity that causes, or is likely to

cause, environmental harm is prohibited unless all reasonable and practicable measures to minimise the harm are taken (s.36).

The Act also makes provision for environmental authorities, evaluations, management programmes, orders and a variety of offences and penalties that are all consistent with the objectives of the Act (Parts 4 to 10 of Chapter 3). The Act deals with investigation and enforcement by people authorised under it, which includes the power to enter onto any land where environmental harm has been caused by a contaminant (Chapter 4). A duty is imposed on all people who carry out an activity and become aware of any resulting serious or material environmental harm to notify the responsible person specified under the Act of the occurrence of such harm (s.37).

The *Forestry Act 1959* defines ‘forest products’ (s.5(1)) to mean all vegetable growth and material of vegetable origin in relation to a State forest, timber reserve or forest entitlement area (Part 4 Division 5 of the *Land Act 1994*, see below, provides for an area to become a forest entitlement area; see also s.39A of the *Forestry Act*). This includes Aboriginal remains, artefacts or handicraft of Aboriginal origin or traces thereof, all forms of indigenous animal life, fossil remains, and, and relics and quarry material, but does not include minerals within the meaning of the *Mineral Resources Act 1989* (see 3.5 below).

*Forestry Act
1959*

Administration

The Act is administered by the Primary Industries Corporation (established under the *Primary Industries Corporation Act 1992* (s.4) see below). Its functions and duties include the management of all State forests and forest entitlement areas with the purpose of maintaining, as far as practicable, adequate supplies in perpetuity of timber and other forest products (s.11(1)(b)). Investigations and research into problems arising out of, or related to (amongst other matters), the processing, marketing, utilisation and identification of forest products may be conducted according to the provisions of the Act (s.11(1)(g)).

The corporation is provided with the power to advise people on matters concerning the proper utilisation of any forest products (s.12(1)(k)).

Enforcement

The Act provides for the appointment of forest officers (s.17) and gives these officers the power to search and examine all containers, vehicles, vessels or other receptacles for holding or transporting any forest products and to demand the owner or person in charge of them to open them and expose their contents to view (s.18). The officers may also enter and inspect any place suspected of containing forest products that have been handled in anyway that is contrary to this Act, and to seize, remove and detain any such forest products and the thing(s) containing them.

State Forests

The Governor in Council is given the power to set apart any Crown land as a State forest, all or any part of which may then become a timber reserve by regulation made by the Governor in Council (ss.25 and 28). The Act prohibits a person from interfering with, or causing interference with, any forest products in any State forest, timber reserve or forest entitlement area (s.39(1)). The only exception is if this is done under the authority of, or in strict compliance with, the requirements of a lease, licence, permit, agreement or contract granted or made under this Act, the *Land Act 1994* (see below) or the State's Mining Acts (see 3.5 below).

Forest Products

The Act vests ownership in the Crown, 'unless and until the contrary is proved', of all forest products in State forests and timber reserves, Crown lands, lands granted in trust or reserved for, or dedicated to, public purposes – including all roads except controlled roads under the *Transport Infrastructure Act 1994* and all forest entitlement areas (s.45). Under this Act (s.5) Crown land does not include State forests, national parks or reserves under the *Land Act 1994*.

The fact that the vesting is made subject to the contrary being proved has potential implications for resources management under this Act. It is clear that legislation requires a clear and plain intention to extinguish native title. Indeed it is arguable that the words 'unless and until the contrary is proved' protect native title rights to forest products (to which s.45 of this Act applies). Further support can be found in the judgement of the High Court in *Yanner v Eaton* (1999) 166 ALR 258.

The Act (s.47) gives the Minister the power to give directions to the Primary Industries Corporation with respect to the selling or getting of forest products on or in any Crown holding or on or in any lease granted under the mining Acts. The Act also provides the Corporation with specified powers to deal with forest products (s.48).

It is an offence to interfere (except with an authority under the Act or any other Act or law) with forest products or quarry material on Crown land under the Act (s.54), which also limits interference with forest products on Crown holdings and land held under mining leases (s.53). Crown holdings are defined in the Act (s.5) as being land held under a pastoral lease and various other holdings provided for under the now repealed *Land Act 1962* as well as land held as a term lease, a perpetual lease, a licence or a permit issued under the *Land Act 1994*.

Statutory Powers

The Act provides the Primary Industries Corporation with the power to grant licences, permits and authorities, and to make contracts for dealing with forest products (ss.55 and 61). Particular attention is drawn to the provisions of the Act that states the corporation shall not sell or otherwise dispose of any Aboriginal remains, artefacts or handicrafts of Aboriginal origin or traces thereof situated, or which were situated, on or in any State forest or timber reserve, unless the provisions of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (see 3.2 below) have been complied with (s.61A).

The *Integrated Planning Act 1997* is a framework to integrate planning and development assessment so that development and its effects are managed in a way that is ecologically sustainable.

*Integrated
Planning Act
1997*

Ecological sustainability is defined as a balance that integrates ecological processes, economic development, and the well-being of people and communities at local, regional, State and wider levels (s.1.3.3).

The Act commenced on 30 March 1998 following the passage of the legislation through Parliament in November 1997. Once fully implemented, the Act will bring together 60 separate state approval processes from 30 statutes through the Integrated

Development Assessment System (see below). The Act replaces the *Local Government (Planning and Environment) Act 1990* (see 3.3 below).

This Act does not affect existing lawful use of premises, development permits, constructed buildings and works, or preliminary approvals (Chapter 1, Part 4).

Chapter 2 outlines the making and amending of planning schemes, including the reviewing of local planning instruments, State powers and State planning policies. The process for making and amending a planning scheme has three stages: first, preliminary consultation and preparation; second, consideration of State interests and consultation; and, third, adoption (s.2.1.5). Further details are listed in Schedule 1. Part 5 of Chapter 2 contains provisions for the establishment by the Minister of regional planning advisory committees.

Chapter 3 deals with the Integrated Development Assessment System (IDAS) which is a system for integrating State and local government assessment and approval processes for development. The chapter includes development applications, the information, referral, notification, and decision stages as well as Ministerial powers and plans of subdivision. Appeals, offences and enforcement are covered in Chapter 4.

Land Act 1994 The *Land Act 1994* provides for the administration and management of non-freehold land, Deeds of Grant in Trust (DOGIT) land and the creation of freehold land, and related purposes.

Reserves/DOGITs for Community Purposes

Among the objects of the Act is the allocation of land to people who will facilitate its most appropriate use to support the economic, social and physical well-being of the people of Queensland (s.4). If the land is needed for a community purpose, this may be achieved by the retention of land for the community in a way that protects and facilitates the community purpose. Land may be dedicated to be a reserve and unallocated State land may also be granted in trust for a community purpose, including Aboriginal and Torres Strait Islander purposes (s.3).

Community purpose is defined in the Act to include Aboriginal and Torres Strait Islander community purposes, heritage,

historical and cultural purposes (Schedule 1). Other purposes include the protection of environmental and culturally sensitive areas. The Governor in Council has the power to grant in fee simple in trust any unallocated State land for use for a community purpose (s.14(2)). The Act specifies that DOGITs or leases may be issued containing a reservation for a public purpose, which (under Schedule 6) includes a community purpose (s.23(1)).

Native Title

This Act (according to s.7) does not affect the operation of the *Native Title (Queensland) Act 1993* (see 3.6 below). The Act (ss.27 and 28(1)) further emphasises that land administered under it must be dealt with in a way that is not inconsistent with the *Native Title Act 1993* (Cth) (NTA) (see Chapter 9.6) or the *Native Title (Queensland) Act 1993* (see 3.6 below).

If native title exists over land, the land may still be dealt with under the Act (s.28(2)), but subject to the limitations imposed by it (s.28(1)). The example provided under the Act (s.28(3)) is that the issue of a permit under this Act, with appropriate conditions, could be a low impact future act under the NTA. The Act (s.28(4)) provides a list of actions that comprise the sort of dealings with land that are contemplated in the relevant section (s.28).

The Act provides that where an authorised person exercises a power to enter and inspect land as specified under Chapter 7, Part 1, Division 3 (see, in particular, ss.400-402) and the land is registered in a native title register under the NTA or the *Native Title (Queensland) Act 1993*, or the land has been transferred or granted under the *Aboriginal Land Act 1991* or the *Torres Strait Islander Land Act 1991*, the entry must take Aboriginal traditions and Torres Strait Islander customs into consideration (s.29).

Unallocated State Land

Chapter 3 Part 1 of the Act deals with the dedication of unallocated State land as a reserve or as a grant in fee simple in trust for community purposes. The Act specifies that the purpose of this Part is to ensure that the reserves and land granted in trust are properly and effectively managed by people who have some particular association or expertise with the reserve or land and its purpose or with the local community

(s.30). They must do so in a way that is consistent with the purpose for which the reserve was dedicated or the land was granted in trust. The trustees do not have title in the relevant unallocated State land and must manage the land consistent with achieving the purpose of the trust. They have the responsibility for a duty of care for the trust land and are, for the purposes of legal proceedings, deemed to be the owners of the land (ss.44-55). Further provisions are contained in the Act (ss.31-34 and Schedules 1 and 6).

DOGIT Land

DOGIT land is dealt with in Division 3 of Part 1. The Act specifies that such land must be used in a way consistent with the community purpose for which it was granted (s.35). The Minister may apply to the court for the removal of DOGIT land if it is surplus to the reasonable needs of a trust and, if the court approves, the Governor resumes that land (s.37). Compensation is only payable in respect of any improvements to, or development of, the land. The Act provides the Governor in Council with the power to cancel a DOGIT if the affairs of the trust are not properly managed in the public interest or the land is used in a way inconsistent with the purpose of the trust (s.38).

The Act makes special provisions that apply only to DOGIT lands granted for the benefit of Aboriginal and Torres Strait Islander inhabitants or for Aboriginal and Islander purposes (s.39). This includes the exclusion from the deed of improvements owned by the State (other than buildings built for the relevant Indigenous inhabitants) and the land containing, surrounding and providing access to those buildings, as well as aerodromes, landing strips, ports, stock routes, bridges and railways (s.40). Only an Act of the Queensland Parliament may delete land from, or cancel, an existing DOGIT (ss.42 and 43).

Reserves

By-laws may be made for reserve land that, amongst other things, make provision for the protection and use of that land (s.56). A trustee may issue a trustee permit for the use of all or part of the reserve land (s.60(1)). Such a permit must not be inconsistent with the community purpose of the reserve or guidelines prescribed by regulation (s.60(2)). It is a condition of a permit that the holder will continue to allow the land to be

used for the community purpose for which it was reserved without interruption or disturbance (s.61(3)). A trustee or the Minister may cancel the permit if the conditions are not complied with (s.65).

Dealings with Land by Trustee

The trustee of a reserve may not dispose of or mortgage the land (ss.64 and 67). The trustee must seek the Minister's written approval to lease the land and any lease must not exceed 30 years and must not be inconsistent with the purposes for which the land was reserved. There are many other restrictions on dealings with and under the lease (see generally ss.32-34 and 58-65).

The trustees of such land have the power to do all things necessary for the maintenance and management of the land consistent with the purpose for which the land was granted in trust (s.52). The trustees are not authorised to dispose of the trust land (s.54).

The trustees may lease the land, but must first get the Minister's written approval to do so; the Minister is empowered to impose conditions on the lease (s.57). A lease must not exceed a period of 30 years (s.61) and any rent received must be spent on the maintenance and enhancement of the trust land unless the Minister approves otherwise (s.63). A lease may be cancelled if it does not comply with the conditions imposed on it (s.65).

As regards reserve land, a person must not unlawfully: occupy or live on the land; enclose the land; build, place or maintain any structure, improvement, work or thing on the land; dig, clear or cultivate the land; or depasture stock on the land (s.404). Action can be taken against a person who is unlawfully occupying or trespassing on reserve land (ss.405-420).

Part 3 of Chapter 4 makes further provision in respect of leases: a lease must only be used for the purpose for which it was issued (s.153); a term lease for pastoral purposes must be used only for agricultural or grazing purposes, or both (s.153(2)). However, the Act empowers the Minister to authorise the use of a lease for additional purposes (s.154).

All DOGITs and trustees existing at the time of the commencement of this Act are preserved (ss.451 and 452).

Any person who occupied any building or structure as a residence, as an authorised resident of land that was granted in trust for the benefit of Aboriginal or Islander inhabitants under the Act preceding this one, will be entitled to continue to do so until the trustee of the land ends this right or the trustee and the occupant agree to new terms and conditions governing that person's occupancy (s.452A(1)). The Act requires the Governor in Council to have regard to the views of, and any recommendation made by, the trustee of such land in considering whether or not to approve a permit, claim, licence or lease in respect of that land (s.452A(3)).

*Land and
Resources
Tribunal Act
1999*

The *Land and Resources Tribunal Act 1999* establishes the Land and Resources Tribunal. In exercising its jurisdiction conferred under this or another Act, the Tribunal is not subject to the direction of the Minister (s.5).

Part 2 gives details of the membership of the Tribunal, which consists of presiding and non-presiding members (s.6). Presiding members are appointed by the Governor in Council, and can only be appointed if the person is eligible for appointment as a Supreme Court judge, and has particular knowledge of relevant issues (s.8(1)). Non-presiding members can only be appointed if the person has over 5 years experience at a high level in certain professions, and has knowledge of particular issues (s.17(1)(b)). Members of the Tribunal must not hold, or be entitled, directly or indirectly, to the benefits of interest in a mining tenure (s.26(1)). Nothing in the Act stops a member from holding office as a member of the National Native Title Tribunal (s.28).

Part 3 has provisions for the establishment of a Tribunal Registrar and the appointment of deputy registrars. Part 4 has provisions for the organisation and operation of the Tribunal. For establishing a standard panel for proceeding there must be one or more presiding members and two or more non-presiding members. Subject to certain provisions, hearings are open to the public (s.48). When conducting a hearing, the Tribunal must observe natural justice and act as quickly as possible, and is not bound by the rules of evidence (s.49).

For details of the Murray-Darling Basin scheme across the relevant States, refer to the parallel Acts in Chapters 1, 2, 4 and 9 of this Guide. The long title to the *Murray-Darling Basin Act 1996* acknowledges the agreement between New South Wales, Victoria, South Australia and the Commonwealth and confirms approval of the agreement by Queensland (s.5).

*Murray-Darling
Basin Act 1996*

The Governor is empowered to appoint two commissioners and two deputy-commissioners to the Murray-Darling Basin Commission set up under the agreement (s.6). The agreement is in the Schedule, and forms part of, the Act. Part 6 of the agreement provides powers to construct, operate and maintain works on land covered by the Act, but unlike the parallel Acts of the parties to the agreement, this Act does not provide power to acquire land.

The basic objective of the *Nature Conservation Act 1992* is to ensure the conservation of nature (s.4). This is to be achieved by an integrated and comprehensive conservation strategy for the whole of Queensland, that involves, among other matters, the recognition of the interest of Aboriginal and Torres Strait Islander people in nature and their cooperative involvement in its conservation through recognition of the interests of Aboriginal and Torres Strait Islander people in protected areas (including national parks), and also in native wildlife (s.5).

*Nature
Conservation
Act 1992*

The Act further provides that it is to be administered, as far as practicable, in consultation with, and having regard to the views and interests of land-holders and interested groups and people, including Aboriginal and Torres Strait Islander people (s.6). The Act acknowledges the need to conserve the cultural resources of a protected area (s.7). These are defined to include: places or objects that have anthropological, archaeological, historical, scientific, spiritual or sociological significance or value, including those relating to Aboriginal tradition or Island custom.

Protected Areas

The Act sets out the classes of protected areas to which it applies, including national parks (Aboriginal land), national parks (Torres Strait Islander land) and wilderness areas (s.14). The Act requires that national parks (Aboriginal land) and national parks (Torres Strait Islander land) are to be managed in accordance with the lease or sublease of the area (s.15).

Such parks are to be managed as national parks and, as far as practicable, in a way that is consistent with any Aboriginal tradition or Island custom applicable to the area, including any tradition relating to activities in the area (ss.18 and 19). Among the management principles specified for wilderness areas (s.24) are that they are to be managed so as to provide opportunities for the appropriate spiritual activities.

Other protected areas are also listed in the Act (s.25) and other sections relate to the dedication of a national park as a national park (Aboriginal land), as a national park (Torres Strait Islander land), the dedication of Aboriginal or Torres Strait Islander land as such a park and the dedication of leasehold land as a park (ss.40-42). The Minister is required to prepare a plan of management in line with the provisions of the Act (s.111), and must do so in cooperation with the grantees of, and the board of management for, the land.

The *Aboriginal Land Act 1991* (s.46(2)) and the *Torres Strait Islander Land Act 1991* (s.43(2)) provide that no claims for land can be made over national park land dedicated under the *Land Act 1994*. The ALA (s.83) and the TSLA (s.80) also make special provision in relation to national parks subject to State leases.

The Act prohibits a person from taking, using, keeping or interfering with a cultural or natural resource in a protected area unless authorised by, or under, a permit or some other instrument or agreement issued or made under the Act (s.62; for a more detailed synopsis, see 3.2 below).

Provisions Relating to Wildlife

The Act provides a scheme for the classification of wildlife into different categories and for the application of different management principles to different classes of wildlife (s.71). It specifies that wildlife will be managed in such a way as to conserve the biological diversity of wildlife, and to ensure its survival and natural development in the wild (s.73). It also seeks specifically to ensure that any use of wildlife by Aboriginal people under Aboriginal tradition and by Torres Strait Islanders under Island custom is ecologically sustainable.

The Act provides that protected animals and protected plants are, with certain exceptions, the property of the State (ss.83 and 84). The major exception is that a protected animal or plant

ceases to be the property of the State if it is taken under a licence, permit or authority under a regulation.

Aboriginal people and Torres Strait Islanders may take, use and keep protected wildlife in accordance with tradition and custom, except in a protected area (see s.62) and subject to any specific exclusion in an applicable management plan (s.93). In *Yanner v Eaton* (1999) 166 ALR 258 the High Court confirmed that mere regulation of native title rights for conservation or licensing purposes does not extinguish native title.

Nature Conservation Regulations 1994 - Special Provisions Relating to Aboriginal Tradition and Island Custom in Protected Areas

Regulations 4, 28, 29 and 31 enable the chief executive to grant an authority to an Aboriginal or Islander corporation to authorise the taking or using of cultural or natural resources in accordance with Aboriginal tradition or Island custom. Regulation 123 specifies that this Division applies only to situations in which, under a conservation plan, a person must hold such an authority to take protected wildlife under Aboriginal tradition or Island custom.

Regulation 125 provides that the chief executive may only grant such an authority to a corporation whose members represent a community or group of Aboriginal or Torres Strait Islander people particularly concerned with the land on which the wildlife is to be taken. The authority may state the names of the individuals who may take wildlife under the authority and those individuals must be individuals named by the corporation in the application for the authority (Regulation 127).

Regulation 126 explains the restrictions applying to the grant of an authority, including an application concerning the coastal waters of the State adjacent to the Great Barrier Reef Marine Park and also the need to meet the requirements for the grant of a permit under the *Great Barrier Reef Marine Park Act 1975*. Regulation 128 confines the duration of an authority to not more than one year from the date for commencement stated in the authority.

- Primary Industries Corporation Act 1992* The *Primary Industries Corporation Act 1992* establishes the Primary Industries Corporation (s.4), the powers and functions of which are to be as provided in this Act (s.6), the *Forestry Act 1959* (see above) and the *Water Resources Act 1989* (see below). The Act gives the corporation the power to do all things necessary and convenient to be done for, or in connection with, the performance of its functions (s.7). This includes the acquisition, holding and disposal of, and dealing with, property. The Act enables the corporation to acquire land by agreement or resumption (s.12); in the latter case the *Acquisition of Land Act 1967* (see above) applies.
- Property Law Act 1974* The *Property Law Act 1974* relates to conveyancing of property and contracts in respect to land or interests in land. All instruments governing real property are required to be in writing (s.11). The Act operates in conjunction with the *Land Title Act 1994*, which deals with all freehold title land and interests. The sections of the latter Act (ss.121-131), relating to the lodgment of caveats are relevant, in that the right to lodge them applies to anyone claiming an interest in the land. The *Property Law Act 1974* applies itself to the registration and any other matter relevant to grant deeds, which include deeds of grant of reserve land. (s.51).
- Recreation Areas Management Act 1988* The long title of the *Recreation Areas Management Act 1988* specifies that the Act establishes a system of recreation areas throughout Queensland. It makes provision for the management of recreation areas, which may be an area of land or water, and is construed in conjunction with the *Forestry Act 1959*, the *Land Act 1994* and the *Nature Conservation Act 1992* (ss.5, 14 and 15) (see above). For the purposes of the Recreation Areas Management Act (s.5), Crown land includes all unallocated land in Queensland except national park (Aboriginal land) and national park (Torres Strait Islander land) (as declared under the Nature Conservation Act), but does include timber reserves under the Forestry Act.
- The Governor in Council has the power to make a regulation declaring land or waters, which are subject to a proposal to be converted to a recreation area, to be considered as such for the purposes of this Act (s.9).

The Act provides for the preparation of management plans, which are to contain a comprehensive statement of specific recreational objectives in relation to the planning, development and management of the area concerned, taking into account the objectives of the current proprietors and the values of the recreation area in relation to such matters as conservation, recreation, education and production (s.20).

All authorised officers appointed under the Act (ss.22 and 23) are empowered to make such inquiries as are necessary to ensure compliance with this Act. In the course of their investigations they may stop any vessel or vehicle that they suspect, or have reasonable grounds to suspect, is being, or is about to be, used for the conveyance or taking of land resources or marine resources, and to search the vehicle or vessel or any containers or receptacles for any such resources, including opening these to expose their contents to view.

It is an offence under the Act (s.40) for a person, within a recreation area, to interfere with any Aboriginal remains, artefacts or handicrafts of Aboriginal origin, or traces of these, which come within the definitions of land resources or marine resources (s.5). 'Interfere with' is defined in the Act (s.5) to include destroy, obtain, damage, mark, move, use or in any other way interfere with such items.

The *Rural Lands Protection Act 1985* provides for the management and control of certain plants, primarily noxious weeds, and harmful animals, and the prohibition and regulation of the introduction and spread of plants and animals. The Act ensures that the provisions of this Act prevail over those of the *Nature Conservation Act 1992* (see above) in case of an inconsistency between the two (s.5(2)).

*Rural Lands
Protection Act
1985*

The Act makes provision for various animals and plants, or classes of these, to be declared for the purposes of this Act, and measures to deal with the introduction, control, destruction and management of these (s.70); there are also specific provisions in respect to land owned by public authorities, local government and private people (ss.73-75). The Act makes further provisions relating to the prevention of the introduction or spread of various categories of declared animals and plants, which apply to all landowners in all parts of the State (ss.89-100).

Authorised people and inspectors appointed under this Act (s.10) have extensive powers of entry, search and inspection for the purposes of the Act, including the taking of remedial and preventative action (ss.101-119). A variety of offences and penalties apply under the Act for obstructing and failing to cooperate with authorised people and inspectors, and for making false or misleading statements to them (s.243).

The Act also allows any part of the State to be constituted as a vermin protection district (vermin being defined as foxes, dingoes, feral pigs and any other animal declared as such by regulation) (ss.177-178) and empowers the Minister to order the construction and maintenance of barrier fences to prevent the entry of vermin (ss.179 and 180). Inspectors are permitted to enter land to ensure and compel compliance (s.195).

*Vegetation
Management
Act 1999*

The purpose of the *Vegetation Management Act 1999* is to regulate the clearing of vegetation on freehold land. This is to protect remnant endangered regional ecosystems, remnant regional ecosystems of concern, and areas of high conservation value, and prevent land degradation, maintain or increase biodiversity, maintain ecological processes, and allow for ecologically sustainable land use. At the time of writing, April 2000, this Act was yet to commence.

The Act amends the *Integrated Planning Act 1997* by providing codes for the clearing of vegetation as part of the assessment of development applications within the Integrated Development Assessment System (see above). The other tool for meeting the purpose of this Act is the enforcement of vegetation clearing provisions (Part 3). Vegetation is defined as a native tree or a native plant other than a grass or mangrove (s.8).

Schedule 10 provides for the preparation by the Minister of a State policy for the management of vegetation on freehold land. The Minister must also prepare regional vegetation management plans. These plans can identify areas of high nature conservation value or land vulnerable to degradation (ss.7, 11 and 16-19). In preparing these plans the Minister must consult an advisory committee set up to advise the Minister, the relevant regional vegetation management committee, and each local government whose area is affected

by the plan (s.13). Public notice of the plans must also be given and submissions invited (s.14).

The purposes of the *Water Resources Act 1989* include: to consolidate and amend the law relating to matters such as rights in water; the measurement of water; the construction, control and management of works with respect to water conservation and protection, irrigation, water supply, drainage, flood control and prevention; protecting and improving the physical integrity of watercourses; and incidental purposes.

*Water
Resources
Act 1989*

The Act provides the rights to the use, flow and control of water at any time in a watercourse that flows through or past the land of two or more owners or occupiers, or a lake or spring that is situated within or abuts the land of two or more owners or occupiers, or water in a dam or weir constructed in, on, or over any such waters, or water in an artesian bore, vests with the Crown (s.3). The beds and banks of a watercourse that form the boundary, whether wholly or partially, of a parcel of land, do not pass, and are deemed never to have passed the land after its alienation by the Crown (s.5). They remain, and are deemed always to have remained, the property of the Crown, regardless of the repeal of any prior acts.

This is, however, subject to rights bestowed on any person or body by the Act (s.4). For example, whereas the Act (s.33) prohibits the diversion or appropriation of water from a watercourse, lake or spring, the owner/occupier of land abutting these is entitled to use these waters for domestic purposes or to water stock where access to the water is by a road or reserve within the meaning of the *Land Act 1994* (see above).

The Act also entitles the owner/occupier of land abutting a watercourse or lake, the bed and banks of which belong to the Crown, to have access to these waters for his family's, employees' or agents' purposes, as well as to graze stock (s.34). The owner/occupier is also empowered to enforce trespass against any other person making unauthorised use of the waters.

The Act prevents anyone from acquiring (except as provided under the Act) the right to take, use or direct water from a work that has been constructed in or on a watercourse, lake or spring, or weir, barrage or dam, that belongs to the Primary Industries

Corporation (established under the *Primary Industries Corporation Act 1992*, see above) or is under the control of an officer authorised under this Act (s.35). The Act does authorise the owners/occupier of land abutting the waters (covered under s.35) to use them for domestic purposes and to water stock (s.36).

Officials authorised under the Act may enter onto land (but not a dwelling house or premises used as a dwelling) for any purpose related to the Act (s.11), but seven days' notice must be given prior to entry. Once on the land, the official(s) may carry out inspections, surveys, tests, investigations, experiments, boring and drilling operations, and may construct, maintain, operate and alter any authorised works.

The Primary Industries Corporation is entitled under the Act to acquire, by agreement or resumption, any land, no matter where situated, that in the opinion of the corporation is required for the purposes of the Act (s.12(1)). For the purposes of acquiring land by resumption under the Act, the corporation has all the powers and obligations imposed on acquiring authorities under the *Acquisition of Land Act 1967* (see above), which governs such acquisitions (12(2)).

The Act provides for regulations to be made declaring any area to be a catchment area and for such an area to be under the control of an official appointed for that area (s.27). That official is responsible for any use, sub-division and rezoning of land in the catchment area, as well as the disposal of effluent and any other activity affecting water quality.

Under the Act (s.28), all quarry material is the property of the Crown where it is within that part of a watercourse or lake that is the property of the Crown, or is situated in or on Crown land or Crown holding, or is land reserved for a public purpose under the *Land Act 1994* (see above).

The Act provision for various licences (ss.38-55), and for various permits (ss.56-69), that may be issued to authorise the taking, use and diversion of water, and related matters, for the purposes of the Act, that would otherwise not be lawful. Offences and penalties are created under the Act for the unauthorised destruction of vegetation in, excavation of and placing of fill into a watercourse (s.70).

The Act provides for regulations to constitute any part of the State as a designated area, to control within that area the

construction, use or maintenance of works that obstruct, divert or otherwise interfere with the flow of water over land within that area (s.104). Irrigation areas may also be constituted anywhere in the State where a proposal to establish an irrigation undertaking (defined in s.2(2)) has been approved by regulation (ss.110-115).

The Governor in Council may also, by regulation, constitute any part of the State as a water supply area or a drainage area for purposes such as water conservation and supply, drainage and the prevention of floods (s.129). These areas, once constituted, are administered by a board of management consisting of members of the local government and people appointed and/or elected to the board (ss.132-136). All boards have extensive powers and functions to ensure the objects of the Act are met in respect of the area under their control (ss.145-147).

The *Water Resources Act 1989* confers the right to the use, flow and control of most onshore water on the Crown (s.3). This raises the issue of whether the Act extinguishes native title rights to such water. In the case of *Thorpes Limited v Grant Pastoral Company Limited* (1955) 92 CLR 317, the High Court ruled that the Crown's right to the use, flow and control of waters did not extinguish the common law riparian rights of owners. It is no more than a superior management right. Common law riparian rights survived and could be enjoyed provided they were not inconsistent with the way the Crown exercised its power of management from time to time.

In the same way, there would appear to be scope for arguing that native title would not be extinguished by management of water resources by the Crown and may be exercised in a manner not inconsistent with that management. Support for this may be found in the High Court's decision in *Yanner v Eaton* (1999) 166 ALR 258.

The *Wet Tropics World Heritage Protection and Management Act 1993* provides, amongst other things, for the involvement of Aboriginal people in the management of the Wet Tropics of Queensland World Heritage Area ('the wet tropics area') and for regard to be had to the traditions of Aboriginal people particularly concerned with land in the Area, which is in far north Queensland (s.5).

*Wet Tropics
World Heritage
Protection and
Management
Act 1993*

The Wet Tropics Management Authority

The Act establishes the Wet Tropics Management Authority (s.6), the functions of which are, among other matters, to enter into, and facilitate the entering into, of cooperative management agreements (including joint management agreements) with land-holders, Aboriginal people particularly concerned with land in the wet tropics area, and other people. The Act provides that the chairperson and members of the Authority must all be people who have qualifications relevant to, or special experience in, a field related to the functions of the authority (Schedule 1).

The Authority is also required to establish a community consultative committee that has the function specified in the Act (s.40(3)) of advising the authority on the views of the community on the authority's policies and programs for the Area (s.40(1)(a)(ii)). Schedule 1 provides that this committee will comprise a chairperson nominated by consensus and 12 other members, with the Commonwealth and the State each nominating six.

The committee must include representatives from a number of non-government community interest areas, including local government, scientific, conservation, tourism, mining, commerce, primary production and the Aboriginal community.

Advisory Committees

Under the Act, the authority also has the discretion to establish any other advisory committee (s.40(1)(b)). Such an advisory committee could, among other things, have the function of advising the authority on matters generally relating to the management of the wet tropics area, including the traditions of Aboriginal people particularly concerned with the land in the Area (s.40(4)(b)).

Management Plans

The Act requires the authority to prepare a management plan for the wet tropics area as soon as practicable (s.41(1)). The authority must give public notice of its proposal to prepare such a draft plan (s.42(1)); the notice must invite submissions from, amongst others, Aboriginal people particularly concerned with land in the wet tropics area (s.42(2)(c)).

The Authority must consider all submissions properly made to it. Similar arrangements are required of the authority when preparing the final management plan (ss.43, 44(2)(d) and 45).

The Wet Tropics Management Plan 1998 began on 1 September 1998. The management plan prevails over any planning scheme under the *Integrated Planning Act 1997* (see above) and any local authority approval must be consistent with the plan (ss.49 and 50).

For further legislative provisions governing this Area, see *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* (Cth) (Chapter 9.1) and the *Local Government (Planning and Environment) Act 1990* (3.3 below).

QUEENSLAND

3.2 HERITAGE

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and other Commonwealth legislation under which some areas or objects of significance to Aboriginal or Torres Strait Islander people in Queensland, and areas or objects which are otherwise evidence of Aboriginal or Islander history and culture, may be recorded or protected, are discussed in Chapter 9.2. It should be noted that the provisions of such legislation apply only after the relevant State provisions have been exhausted.

Aboriginal and Torres Strait Islander Heritage Protection Act 1994 (Cth)

For a detailed synopsis of the provisions of the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* see 3.1 above and 3.3 below.

Aboriginal Land Act 1991
and
Torres Strait Islander Land Act 1991

The *Aboriginal Land Act* (s.110) and the *Torres Strait Islander Land Act* (s.107) provide that the Land Tribunal may hold hearings in private and prohibit publication or restrict disclosure (including disclosure to the parties) of evidence of a confidential nature for the purposes of an action taken under this Act; in determining whether to do so, the Tribunal must have regard to Aboriginal or Torres Strait Islander tradition.

The *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* protects items of the Queensland Estate, which is defined to include Aboriginal and Torres Strait Islander sites, objects and relics, including burial remains other than those buried in accordance with non-Indigenous law. Landscapes Queensland are areas or features within Queensland that have been, or are being, used, altered or affected in some way by humans and are of significance to humans for some anthropological, cultural, historic, prehistoric or societal reason, and include any item of the Queensland Estate found in those areas or features. All these and other relevant definitions are contained in s.5.

Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987

Provisions Relating to Indigenous People

The Act specifies that none of its provisions will be construed so as to prejudice the rights of ownership of a traditional group or members of a group of traditional owners in a part of the Queensland Estate that is used or held for traditional purposes (s.32). Free access to, and use and enjoyment of, any part of the Queensland Estate, where this is sanctioned by traditional custom, is also confirmed under the Act (s.32).

All parts of the Queensland Estate that constitute evidence of the occupation of the State by Indigenous people, or in respect of which there is no identifiable owner, are, and will always be deemed to have been, the property of the State and this applies notwithstanding that the evidence was or is found in, on or under private land (s.33).

Certain burial remains are also recognised to be the property of traditional groups of Aboriginal and Torres Strait Islander people (s.34) and anyone in possession of these must immediately submit them to the Minister for examination and classification, regardless of whose property the remains are on (s.35).

The Act generally does not provide a mechanism for consultation with, or identification of, traditional owners. The exceptions are burial remains (s.34) and any object in a specified category, evidencing occupation of any part of Queensland by Indigenous people, that has been removed from its location in, on or under that land (ss.33(4) and (5)). The Queensland Museum (see further under *Queensland Museum Act 1970* below) is given certain rights of possession and other protection of cultural heritage (ss.63 and 65).

Designated Landscape Areas

The Governor may, on the advice of the Minister, declare any area of Queensland to be a designated landscape area if it is necessary or desirable to do so in order to preserve Landscapes Queensland or the Queensland Estate. Where the declaration involves privately owned land, the consent of the occupier or owner must be obtained. Before making the declaration the Minister must seek the consent of relevant Ministers, particularly the Minister for Mines (s.19). Temporary designated landscape areas may also be declared under the Act if this is necessary or expedient to regulate or prevent the entry of people in a period of up to three months

prior to the final declaration of a designated landscape area (s.18).

The Act requires the Minister to cause a register to be kept of all designated landscape areas, to cause those areas to be delineated by suitable boundary marks and notices to enable them to be identified, and to cause such structures as the Minister deems necessary to be erected to protect the area or the Queensland Estate within the area (ss.20 and 21). The Minister may assign a Landscapes Queensland protector (see next paragraph) to the area to prevent, as far as possible, entry of unauthorised people into the area in accordance with the Act and to protect all items of the Queensland Estate contained in the area.

Statutory Appointments

The Minister may appoint individuals as Landscapes Queensland protectors and Landscapes Queensland advisers (ss.8-10), as well as the Minister's own advisory committees (ss.12-13). On application from a local government authority, the Minister may also approve the formation of area-specific regional Landscapes Queensland committees, with responsibility to advise the Minister and/or the advisory committees on local heritage issues (ss.14 and 15). There is no requirement for Aboriginal or Torres Strait Islander people to be appointed to any such positions or bodies.

Offences and Penalties

It is an offence to interfere with area notices (s.23) or trespass on landscape areas (s.24). Permission to be upon a designated landscape area may be granted to a particular person or members of a 'class of people' under the Act, subject to the conditions specified in the instrument of permission (s.25). Such permission does not authorise any person to take, deface, damage, excavate, conceal, expose or interfere with any part of the Queensland Estate, and the provisions of the Act make it an offence to do these things (s.56).

Compulsory Acquisition

If the Minister is satisfied, in relation to a particular area of private land, that Landscapes Queensland or any item of the Queensland Estate cannot be properly preserved or managed by the maintenance of the area as a designated landscape area, the Minister may compulsorily acquire land for this purpose

(s.26). The preservation of Landscapes Queensland is a function of local government (s.45) and a purpose for which land may be taken under the *Acquisition of Land Act 1967* (see 3.1 above).

Permits: Secrecy Provisions

The Minister may issue permits for the exploration, survey, excavation or examination of designated landscape areas of the State for the purposes of discovering and investigating items of the Estate. These permits may also authorise the removal of any part of the Queensland Estate from its location in the field to the Queensland Museum. A permit does not authorise any person to destroy or damage, willfully or negligently, any property unless this is necessarily incidental to the work for which the permit has been issued (ss.27-30). The holder of a permit must furnish progress reports to the Minister and also restore the area to which the permit relates to a condition, and within a time-frame, nominated by the Minister (ss.31(1) to (3)).

A person who has collected any item of the Queensland Estate under a permit must submit it to the Director of the Queensland Museum at a place and manner specified by the Minister (ss.31(4), 36 and 37). A person may not disclose in a progress report (unless written publication is authorised under the permit) any information given to that person or knowledge acquired concerning any anthropological or archaeological matter that is of a sacred or secret nature in the understanding of Indigenous people (s.31(1A)).

Acquisition and Possession of Items of the Queensland Estate

The Minister may, on behalf of the State, acquire, by purchase or gift, any item of the Queensland Estate for the purpose of its preservation and undertake such steps as are required to be taken to preserve any item so acquired (ss.38(a) and (b)). If the relevant advisory committee so recommends, the Minister may permit any person to take possession of the item for such time and purpose, and on such conditions, as the Minister approves, including the removal of the item from Queensland if necessary (s.39). A person to whom permission to deal with the item is given may deal with the item in accordance with the permission and must comply with the conditions (if any) attached to the permission (s.40).

Register of the Queensland Estate

The Act makes provision for the Register of the Queensland Estate to be maintained by the Minister (ss.41-43). The Register contains particulars of items of the Estate approved by the Governor in Council as items of great significance to Queensland's history and as items that should be preserved. Any person, or association of people, may nominate particulars of items of the Estate for entry in the Register, but if the owner of the item is not the State, the Governor in Council may only approve the nomination with the owner's written consent. There is also provision for an owner, or prospective owner, to apply to have an item removed from the Register.

Any person who proposes to do an act that might destroy, damage, deface, expose, excavate, conceal or interfere with the item, must first submit the proposal to the Minister, who must refer the proposal to the relevant advisory committee for a recommendation. The result may be removal of the item from the Register, but, if not, the Minister must, in accordance with the recommendations of the advisory committee, set such standards and guidelines as necessary to protect the item (s.44).

A more detailed synopsis of the provisions of the *Forestry Act 1959* is contained in 3.1 above. The Act provides for Crown ownership (s.45), purchase (s.49), control and removal (s.61) of all forest products (ss.11 and 12). *Forestry Act 1959*

Forest products in relation to a State forest, timber reserve or forest entitlement area include Aboriginal remains, artefacts of Aboriginal origin and relics (s.5). The Act (s.61A) states that the Primary Industries Corporation (established under the *Primary Industries Corporation Act 1992*, see 3.1 above) may not sell or otherwise dispose of forest products of this sort unless in accordance with the provisions of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (see above).

It is an offence to interfere with any forest product on specified categories of land other than in accordance with a lease, licence, permit, or agreement granted or made under this Act (ss.39, 53-61 and 88), the *Land Act 1994* (see 3.1 above) or relevant mining legislation (see 3.5 below).

Land and Resources Tribunal Act 1999 A more detailed synopsis of the provisions of the *Land and Resources Tribunal Act 1999* is contained in 3.1 above. The Tribunal has exclusive jurisdiction for certain cultural heritage matters. A group of Aboriginal or Torres Strait Islander people with a traditional, historical, or custodial interest may apply to the Tribunal for an injunction under this section to stop the doing of an act if the relevant act is a contravention of section 56 of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*, or if an item, area or place of cultural significance is adversely affected by the doing of the act (s.53).

Legislative Standards Act 1992 The *Legislative Standards Act 1992* sets out the fundamental legislative principles that underlie parliamentary democracy based on the rule of law. These principles include requiring that legislation has sufficient regard to the rights and liberties of individuals, which in turn depends on whether, amongst other things, the legislation has sufficient regard to Aboriginal tradition and Island custom (s.4). Aboriginal tradition is defined in the *State's Acts Interpretation Act 1954* (s.36) as the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular people, areas, objects or relationships.

Marine Parks Act 1982 The *Marine Parks Act 1982* makes provision for the protection of marine products in areas set aside under the Act as a marine park (s.15). Marine products are defined to include Aboriginal remains, artefacts or handicrafts, or traces of them (s.9). For a more detailed synopsis of the provisions of the Act and the scheme of protection provided, see 3.4 below.

Nature Conservation Act 1992 For a detailed synopsis of the *Nature Conservation Act 1992*, see 3.1 above.
The objectives of the Act relate primarily to the conservation of nature, but the protection provided by this Act extends to places and objects of significance or value under Aboriginal tradition or Island custom (ss.4 and 5).

One of the principles of management for national parks under the Act is to provide, to the greatest possible extent, for the permanent preservation of the area's natural condition and the protection of the area's cultural resources and values (ss.4-6). Cultural resources of a protected area are places or objects that have archaeological, historical, scientific, spiritual or sociological value or significance, including such value or significance under Aboriginal tradition or Island custom (ss.7 and 17). National park (Aboriginal or Torres Strait Islander) land) is to be managed as a national park and, as far as practicable, in a way consistent with any Aboriginal tradition or Island custom applicable to the area, including any tradition/custom relating to the area (s.18 and 19).

The Act prohibits the use, taking, keeping or interference with a cultural or natural resource of a protected area unless specifically permitted under a lease, agreement, licence, permit, authority or other form of exemption (s.62(1)). However, it is a defence to a charge of taking or interfering with a cultural resource if the accused can prove that the taking or interference happened in the course of a lawful activity that was not directed towards the taking or interference and that this could not have been reasonably avoided (s.61(2)). Such a defence does not entitle the person to use or keep the resource (s.61(3)).

The objective of the *Queensland Heritage Act 1992* is to provide for the conservation of Queensland's cultural heritage (s.3(1)). The cultural heritage significance of a place or object includes its aesthetic, architectural, historical, scientific, social or technological significance to present or future generations (s.4).

*Queensland
Heritage Act
1992*

The Act provides for the entry into the Heritage Register, established and maintained under the Act, of places of cultural heritage significance (ss.20-32). Provision is also made for the making of heritage agreements with the owner of registered places to encourage the conservation of such places (ss.39-43).

The Act makes provision for the protection and conservation of relics, including submerged relics (ss.44-49) and regulates the excavation of sites that contain, or may contain, objects of significance to Queensland's cultural heritage (ss.50-53).

Powers of protection and enforcement are contained in the Act (ss.43, 46-49, 51,52, 54-59 and 64-66).

The Act has only limited application to places of cultural significance to Aboriginal or Torres Strait Islander people. Section 61(b) excludes operation of the Act in relation to a place situated on Aboriginal land or Torres Strait Islander land or a place of cultural heritage significance solely through its association with Aboriginal tradition or Island custom. Aboriginal land and Torres Strait Islander land have the same meaning as in the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* (see 3.1 above) (s.4). If the place is of cultural heritage significance because of its association with Aboriginal tradition or Island custom together with European or other cultures, this Act may apply to the place if the trustees of the land consent (s.61(b)).

*Queensland
Museum Act
1970*

While the *Queensland Museum Act 1970* does not make specific provision for Aboriginal remains, artefacts or handicrafts or relics, such objects could probably be included amongst the objects of history or objects pertaining to the study of history that are covered by the Act.

The Queensland Museum Board of Trustees established by the Act has the power to receive, purchase, take or hire any objects pertaining to, amongst other things, the study of all natural history, 'historical and technological collections', and exhibits and other property. It may also sell, exchange or otherwise dispose of such of these as are under the care and control of the board and to do all things necessary or convenient to be done in connection with, or incidental to, the performance of its functions (ss.3-26).

The Act makes it an offence to damage unlawfully, mutilate, destroy or remove from the possession of the board any item, exhibit or chattel in the board's possession (s.36). A person convicted is liable to pay the board the expenses of making good any damage, or the full value of the item which has been destroyed or removed (s.36).

Any item of the Queensland Estate that is in the possession of the Board is outside the operation of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (see s.65 of that Act, discussed above).

For more details on the *Recreation Areas Management Act 1988* see 3.1 above. Detailed provision is made for the administration of land and waters set apart and declared by the Governor in Council as recreation areas (s.9), including the creation of various offences and penalties (ss.20-58). The Act is read and construed with, and in addition to, the *Forestry Act 1959*, the *Land Act 1994* and the *Nature Conservation Act 1992* (see above) and any other Act(s) prescribed by regulation.

*Recreation
Areas
Management
Act 1988*

Among the offences provided for under this Act is one relating to the interference by a person with land resources in a recreation area (s.40(1)(k)). Land resources include Aboriginal remains, artefacts or handicrafts of Aboriginal origin, or traces thereof, other than such remains that are marine resources. These are defined to include Aboriginal remains, artefacts or handicrafts of Aboriginal origin or traces thereof within, or removed from, Queensland waters or tidal waters that are within the limits of Queensland (s.5).

QUEENSLAND

3.3 LOCAL GOVERNMENT

For a detailed synopsis of the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*, in particular in its application to land under a Deed of Grant in Trust (DOGIT), see 3.1 above.

Aborigines and Torres Strait Islanders (Land Holding) Act 1985

The Act provides for the grant of leases in perpetuity and other title in land to members of communities of Aboriginal or Torres Strait Islander people. The Act enables a qualified person to make an application to the trust council for approval that a lease be granted over land in a trust area (s.5).

The Act (s.4) defines a 'qualified person' to mean an Aboriginal person or other person authorised under the *Community Services (Aborigines) Act 1984*, or a Torres Strait Islander or other person authorised by the *Community Services (Torres Strait) Act 1984* (for details on both these Acts, see below) to enter upon, or be in and reside in, a trust area. A trustee council is an Aboriginal council, an Island council or, where the trust area is vested in or under the control of another council, that other council. A trust area is land granted in trust by the Governor in Council for the benefit of Aboriginal or Islander inhabitants or set aside for the benefit of Aboriginal people under the provision of law relating to Crown land.

The Act sets out the terms and conditions under which an application for a lease will be granted and the terms and conditions of the grant (ss.9-17). Refer to 3.1 above for details.

Under the Act (s.32), notwithstanding that land or land and improvements may have been excluded from a DOGIT under the *Land Act 1994*, they will be deemed to be part of the trust area for the purposes of the discharge of the functions of local government within that area, the charging of service fees and the application of the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984* (see below). The relevant Aboriginal or Torres Strait Islander council in which the trust area is vested will be deemed to be charged with the functions of local government for that particular land.

Community Services (Aborigines) Act 1984 and Community Services (Torres Strait) Act 1984

Lands granted by Deeds of Grant in Trust (DOGIT) under the repealed *Land Act 1962* are now administered under the *Community Services (Aborigines) Act 1984* (CSAA) and the *Community Services (Torres Strait) Act 1984* (CSTSA) (see *Land Act 1994*, at 3.1 above).

The Acts provide for the deeds to be granted to the relevant Aboriginal councils and Torres Strait Islander councils established under the repealed Act (s.335) for the relevant Aboriginal and Torres Strait Islander lands. These are constituted as a local governments for the respective trust area (s.6(1) and Part 3) by the Governor in Council .

Functions and Powers of Councils

The councils provide support, administrative services and assistance for Aboriginal and Torres Strait Islander communities to manage lands for use by those communities, and for related purposes. The Aboriginal and Islander Affairs Corporation is also able to exercise powers conferred on it under the Acts (ss.6 and 8 of both Acts and also s.8A of the CSAA), including maintaining the Aborigines' welfare fund (CSAA ss.5(8), 6(1), and 82(z)).

The council can make by-laws for the good rule and government of its trust area and enforce observance of these by-laws (CSAA ss.25(1) and 25(1A); CSTSA ss.23(1) and 23(1A)). The matters in respect of which a council may make by-laws and exercise its powers and functions include: the provision of most services associated with local government; imposing fees; charging fares and dues; authorising the entry and residence of people; and excluding or restricting access to trust areas (CSAA ss.25-28; CSTSA ss.22-26). The Acts also make provision for the constitution of an Aboriginal/Islander court in each area to hear and determine matters relating to breaches of the by-laws (CSAA ss.42 and 43; CSTSA ss.41 and 42).

Both Acts make provision for the Island Coordinating Council and the Aboriginal Coordinating Council respectively (CSTSA ss.44-46 and 51-51B; CSAA ss.46-48 and 53-53B). They are responsible for reporting to the Minister concerning the operation of the Acts and submitting their recommendations concerning changes in the provisions and administration of these Acts that, in their opinion, should be made to assist the progress, development and well-being of their respective communities. The members of the

coordinating councils are the chairpersons and one other member of the various Aboriginal councils.

A council that is the trustee of the land may make by-laws restricting the entry or residence of people of a specified class in the area; a person aggrieved by such a decision may ask the council for written reasons (CSAA ss.68 and 69; CSTSA ss.66 and 67). A council also has the power to remove, or cause the removal of, any person who is on the land without authority or has breached that council's by-laws (CSAA s.70; CSTSA s.68).

Aboriginal people and Torres Strait Islander people and other members of the community, people discharging their authorities under the Acts, any person providing certain services to the relevant area, members of the Federal and Queensland Parliament and those campaigning for a seat in these, and the Governor General of Australia and the Governor of the State, are authorised to enter upon and be in the area until the purpose of their entry into the area has been fulfilled (CSAA ss.66 and 67; CSTSA ss.64 and 65).

These councils' powers are limited to protecting community lands. Access to a town area, park, road or any other public place or place of public business is the same as for any country town (CSAA ss.38 and 65; CSTSA ss.36 and 63). A council may not permit a person to occupy or use any land for a purpose that is inconsistent with the benefit of the Indigenous inhabitants (CSAA s.70; CSTSA s.69).

Under the *Electricity Act 1994*, the Minister may authorise a representative of the electricity authority to enter onto land and remain on it for as long as necessary to decide on the suitability of the land for the authority's proposed works (s.115). The Minister may, under the Act, authorise an electricity authority to acquire land for works (s.116). The *Acquisition of Land Act 1967* applies to an electricity authority acting under such an authorisation.

*Electricity
Act 1994*

The *Local Government Act 1993* provides a legal framework for a system of local government and to allow local governments to take autonomous responsibility for the good rule and government of its area.

*Local
Government Act
1993*

The Act (s.4) applies to Aboriginal and Torres Strait Islander local governments functioning under the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984*, only so far as is expressly provided for under this or another Act (s.13(1)). If an Indigenous local government is, or is to become, a component of local government in a joint local government, this Act will then apply to the Indigenous local government as if it were a local government established under the Act (s.13(3); s.14 makes further provision in this regard).

Powers of Local Government

A local government has, in the exercise of its jurisdiction, all the powers of an individual, including the power to acquire, hold, deal with and dispose of property (Chapter 2 Part 1). The Act also gives a local government control over roads and the power to acquire land to realign a road. Provision is made for the payment of compensation for an acquisition.

The Act provides local government with power to make local laws and policies (Chapter 8) and contains provisions aiding local government in the enforcement of these for the purposes of the Act (Chapter 11). A local government is empowered to authorise entry to rateable land to search for, dig, raise and gather on the land and remove from the land any materials necessary for exercise of the local governments jurisdiction (Part 4). Reasonable compensation is payable if a person suffers loss or damage because of the exercise of the power.

A local government also has authority, under the Act, to enter land or a structure, at all reasonable times, for the exercise of the local governments jurisdiction, for instance in order to carry facilities into, through, across or under the land or to perform work on the land (s.665).

Local Government (Aboriginal Lands) Act 1978

The *Local Government (Aboriginal Lands) Act 1978* provides for the creation of a local government area over leased lands that were previously reserves that existed for the benefit of the Aboriginal inhabitants at Aurukun and at Mornington Island. Each reserve was abolished by an Order in Council made under this Act on 6 April 1978 (s.3). New leases of land were granted to the shires of Aurukun and Mornington Island ('the shires') respectively over the whole of the land comprising

their newly-created local government areas and for related purposes (ss.6 and 9).

Powers and Functions of the Aboriginal Shire Councils

The lands comprising the shires remain Crown land; the two respective Aboriginal councils are granted 50 year leases over the land, together with improvements included in the grant (s.7, Schedule 1). Each council is deemed to be constituted under the *Local Government Act 1993* and, subject to this Act, has the functions, powers, duties and obligations of a local government in respect of its area (ss.12-14). The Act provides for the councils to be assisted by coordinating and advisory committees established under it (ss.17-22).

The Act specifies that a person must not be in the shire unless that person is authorised under this Act or under the by-laws of the shire (s.28). An extensive list of the classes of people who may reside in, or enter, the shires, or who may be authorised to enter and remain in them for specified purposes, are provided in the Act (ss.23 and 24).

The councils have the power to make local laws, and by-laws consistent with this power, restricting entry or authorising people of a specific class to enter, be in, or reside in the area under its control (s.25). The Aboriginal people in the area have the right to be consulted and to have their views heard in relation to any such by-laws.

The councils have the power to remove, or cause the removal, of any person from its area (s.26). A person who is denied entry or the right to remain or reside in the area may appeal to the person appointed as the local government (Aboriginal lands) appeals magistrate (s.27).

The councils of the shires have extensive powers to deal with land, including subdividing and mortgaging the land, as well as granting licences to occupy or enjoy exclusive possession of any part of the land. These powers are subject to referral of the proposal to the Minister and approval by the Governor in Council (s.32).

A road constructed or formed within each shire, whether before or after the commencement of the Act, is deemed to be dedicated for public use, but no person is entitled to be on such a road unless that person has been authorised to be in the shire under the relevant and applicable provisions of the Act (s.39).

The Act preserves certain rights of Aboriginal people who lawfully reside in Aurukun and Mornington to hunt native fauna or gather and remove forest products or to quarry material for sustenance (s.29).

The Crown reserves gold, minerals and forestry rights in the leased land, as well as all rights of way for access and for pipelines and conveyors and for other purposes required for obtaining and conveying petroleum, gold, minerals, or and other material (ss.30 and 31).

*Local
Government
Finance
Standard
Act 1994*

The *Local Government Finance Standard Act 1994* provides, among other things, details of the corporate plan required by the *Local Government Act 1993* (s.421, see above) to be prepared and adopted by a local government. The corporate plan must include an assessment of local and regional issues affecting its area and its responses to the issues. The assessment of local and regional issues must include information about the local government's role in such things as cultural and infrastructure development, and environmental management.

*Local
Government
(Planning and
Environment)
Act 1990*

The *Local Government (Planning and Environment) Act 1990* was repealed by the *Integrated Planning Act 1992* (see 3.1 above). Part 6 of the *Integrated Planning Act* and Regulations made under that Act, preserve most of the instruments made and relevant matters done under the *Local Government (Planning and Environment) Act 1990*. The objectives of the *Local Government (Planning and Environment) Act 1990* were to provide a code by which a local government or the Minister could undertake the planning of an area to facilitate orderly development and the protection of the environment and to provide a framework for a person to apply for approval of a development proposal (ss.1.3(a) and (b)). 'Environment' was defined as including '...ecosystems and their constituent parts including people and communities, those qualities and characteristics of locations, places and areas, however large or small, which contribute to their interest, amenity, harmony and sense of community, and the social, economic, aesthetic and cultural conditions which affect these matters...' (s.1(4)).

The Act empowered the Governor in Council to make State planning policies on town planning and related environmental matters that applied in the whole of the State unless otherwise

provided. Local governments were also entitled to make such policies in relation to their areas (Part 1A).

The Act also made provision for planning schemes and related zoning and rezoning and land use applications (Part 2). Planning studies conducted in conjunction with these matters were required to include an assessment of relevant matters such as the natural and built environment, regional land use patterns, and the social and cultural features of the population (s.2.7(2)). An obligation was imposed by the Act on a local government to implement, administer and enforce every planning scheme approved for an area (s.2.16).

A local government was required to take into consideration whether any deleterious effect on the environment would result from the implementation of a proposal made to the local government by way of an application for approval, consent, permission or authority (s.8.2(1)). The applicant was also required to investigate with the head of the Department responsible for the administration of the Act, the possibility of requirement for an environmental impact statement (EIS) (for a definition and the formal requirements of an EIS for the purposes of this Act see ss.1.4 and 8.2(2)-(15)).

The Local Government (Planning and Environment) Regulation 1990 provides for proposals and areas that are prescribed in relation to EIS requirements (s.16 and Schedules 1 and 2). These areas include specified areas under the *Nature Conservation Act 1992*, the *Water Resources Act 1989* and the *Wet Tropics World Heritage Protection and Management Act 1993* (see 3.1 above), specified areas and places under the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* and the *Queensland Heritage Act 1992* (see 3.2 above) and various sanctuaries set apart and declared under the *Fisheries Act 1994* (see 3.4 below). Also included are wetlands (whether fresh, brackish or marine, including coral reefs, mangrove areas, mudflats, sand flats, sandy beaches, seagrass beds and tidal marshes).

The Act contains special provisions relating to proposals for a relevant development on land within or neighbouring the wet tropics area (s.8.2A). A local government in these areas is required to consult with, and have regard to, the advice of the Wet Tropics Management Authority established under the *Wet Tropics World Heritage Protection and Management Act 1993* (see 3.1 above) and also provide the Authority with written

notice within 10 days of any decision in relation to a relevant development on land in or neighbouring the area.

QUEENSLAND

3.4 MARINE

For a detailed synopsis of the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* see 3.1 above. Both Acts provide that where land in an area of the coast became Aboriginal or Torres Strait Islander land because of a claim under the Acts, the right of access to or across the area that existed immediately before the land became claimable land, continues in force as if that land had not become Aboriginal or Torres Strait Islander land (ALA: s.82; TSIL: s.79).

Aboriginal Land Act 1991
and
Torres Strait Islander Land Act 1991

The *Coastal Protection and Management Act 1995* provides for the protection, conservation, rehabilitation and management of the Queensland coast (s.3) – that is, all areas of land along the foreshore between the high and low water marks (ss.6 and 9), as well as its resources and biological diversity. Coastal resources are defined to mean the natural and cultural resources of the coastal zone. Cultural resources are defined in the Act (Schedule 2) to mean the places or objects that have anthropological, archaeological, historical, scientific, spiritual, visual or sociological significance or value, including such value or significance under Aboriginal tradition or Island custom.

Coastal Protection and Management Act 1995

The Act establishes a regime of coastal management based on coastal management plans that state key principles and policies, identify key coastal sites and resources, are developed in consultation with the public and have regard to Aboriginal tradition and Island custom in respect of those Indigenous people particularly concerned with the land affected by the plans (s.4). Indigenous people are said to be particularly concerned with land if (a) they are members of a group that has a particular connection with land under Aboriginal tradition or Island custom, or (b) they live on or use the land, or neighbouring land (s.13).

Coastal Protection Advisory Council

The Coastal Protection Advisory Council is established under the Act (ss.15(1) and 17(1) and s.18) to advise the Minister about coastal management plans and areas of the coastal zone

needing special coastal management. The Council is required, in performing its functions, to have regard to the Aboriginal tradition or Island custom of those Indigenous people particularly concerned with the relevant land, and to consult with them, and also to have regard to the existing tenure of, interests in, and rights to land in the coastal zone (s.16(3)).

Management Plans

The Act provides for the Minister to prepare a State coastal plan for the State's coastal zone (ss.25-29), which includes the State's coastal waters and all areas to the landward side of coastal waters in which there are physical features, ecological or natural processes or human activities that affect, or potentially affect, the coast or coastal resources (s.11).

The Minister is also required to prepare regional coastal management plans for parts of the coastal zone as soon as practicable, identifying key coastal sites requiring special coastal management (ss.30 and 31). To assist in the preparation of such plans the Minister must appoint a regional consultative group, the members of which must include representatives of local government, tourism, conservation, industry and Aboriginal and Torres Strait Islander interests (ss.19-24).

The Act provides that an area may be declared a control district either under a regional coastal plan or, if the area is not covered under a regional plan, by regulation (s.47). Before an area is declared a control district, various matters must be considered, including the Aboriginal tradition and/or Island custom of those Indigenous people particularly concerned with the area (s.49).

Such districts may be declared: over coastal waters; over a foreshore and over land up to 400 metres inland from the high water mark along the foreshore; at a river mouth or estuarine delta over land up to 1000 metres inland from the high water mark at the river mouth or estuarine delta; along tidal rivers, saltwater lakes and other bodies of internal tidal waters over land up to 100 metres from the high water mark along the river; or over an island in coastal waters (s.48).

For a detailed synopsis of the *Community Services (Aborigines) Act 1984* see 3.3 above. A resident of a community in areas covered under this Act cannot be prosecuted for taking marine products or fauna by traditional means for personal consumption (s.77(1)).

Community Services (Aborigines) Act 1984

The objectives of the *Fisheries Act 1994* include: ensuring that fisheries resources (such as, fish and marine plants, s.4) are used in an ecologically sustainable way, achieving the optimum community, economic and other benefits obtainable from fisheries resources and ensuring that access to fisheries resources is fair (s.3(1)).

Fisheries Act 1994

The Act vests responsibility for achievement of the objectives in the Queensland Fisheries Management Authority and the head of the Department (s.3(2)). It also provides that these objectives are to be achieved mainly by, among other matters, the management and protection of fish habitats, and the management of commercial, recreational and Indigenous fishing. The Act binds all people, including the State (s.10).

Recognition of Traditional Indigenous Fishing Rights

The Act recognises Indigenous peoples' customary rights in relation to fishing. It provides that Aboriginal and Torres Strait Islander people may take, use or keep fisheries resources or use fish habitats according to their respective traditions or customs (s.14(1)). This right is granted subject to the provision of a regulation or management plan which specifically applies to acts carried out under Aboriginal tradition and Torres Strait Island custom (s.14(2)).

The relevant Aboriginal and Torres Strait Islander communities must be consulted in an appropriate fashion before such regulations or management plans are developed and the relevant fishing authority is required to consider whether such regulation or management plans are appropriate (s.14(3)). The operation of the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* (see 3.1 above) is subject to this Act (Schedule 2).

Administration of the Act

The Act provides that the primary function of the Fisheries Management Authority is to ensure the appropriate management, use, development and protection of fisheries

resources (s.25(1)). This is achieved primarily through a regime of regulations, management plans and declarations having regard to the principles of ecologically sustainable development.

The Act provides details to be included in management plans for a fishery, including a description of the fishery, its status, the objectives of the management plan and how the objectives are to be achieved (Part 5). A management plan may declare a closed season, closed waters or regulated fish and it may prescribe quotas or authorise the issue of quotas for the fishery (ss.37 and 38). Closed seasons, closed waters and quotas may be declared by a fisheries agency, which is required to engage in consultation in relation to these declarations (ss.43 and 44).

The Act declares areas such as fish habitats to ensure their protection and conservation (s.120), provides for the preparation of an optional management plan for such an area (s.121) and makes specific provision for the protection of fish resources and marine plants (ss.122 and 123).

The chief executive of the department administering this Act has the power to take action to rehabilitate or restore the relevant land, waters, marine plants and fish habitat area (ss.124 and 125). The Act also requires action to be taken if the Chief Executive suspects, on reasonable grounds, that a person is responsible for causing polluting matter to be on or in such land, waters, marine plants or fish habitat areas.

Part 8 provides for the appointment of inspectors and gives them wide-ranging powers of entry to places and vehicles, boarding of vessels and seizure of things required as evidence, for purposes relating to ensuring compliance with this Act and statutory instruments granted under the Act.

*Marine
Parks Act
1982*

Under the *Marine Parks Act 1982* marine products in a declared marine park are part of the park for the purposes of the Act (s.9(1)); marine products include Aboriginal remains, artefacts or handicrafts, or traces of them (see further, Regulation 33 below). The Act vests ownership of all marine products in the Crown (s.45).

The chief executive of the department administering this Act may assess the suitability of the State's tidal lands and waters for setting aside as marine parks, to recommend to the Minister that such land or waters to be set aside as marine

parcs, and also for the development of zoning plans and for the management of marine parks (s.11(1)). Tidal land is defined in the Act as land that is submerged at any time by tidal waters (s.9(1); the latter are defined as being Queensland waters that are subject to tidal influence.

Where an area is set apart and declared under the Act (s.16) as a marine park, all that area, including marine products, will be taken to be in the marine park and, for the purposes of the Act, to be a part of the area (s.15). The Act provides for the setting apart and dedication of an area of tidal water and/or tidal land to be a marine park (s.16).

A zoning plan may specify purposes for which each zone of the park may be entered (s.17). A zoning plan may, with some exceptions, prohibit or regulate any act that may be done by a public authority in the discharge of its functions or in the exercise of its powers within, or in respect of, that area (s.20). The chief executive is empowered to authorise works for the conservation and the proper management of marine parks, including to enable public enjoyment of a marine park and related matters (s.23).

Regulations Controlling the Taking of Marine Products

The Act allows the Governor in Council to make regulations to control, among other things, the taking of marine products from marine parks and, where such taking is permitted, to prescribe the size and the numbers that may be taken (s.30(1)). 'Taking' in respect of marine products is defined in the Act (s.9(1)) as removing, gathering, catching, capturing, killing, destroying, dredging for, raising, carrying away, or bringing ashore, marine products or otherwise removing items from a natural environment, including attempting or permitting such an act.

Regulation 8A provides that a person must not enter a zone or designated area (for an example of these, see Marine Parks (Cairns Zoning Plan) Order below) other than for a purpose allowed under Regulation 14 (limited emergencies) or specified in the relevant zoning plan, or with permission under this regulation.

Application for permission must be made under Regulation 9(1); Regulation 9(5) provides that, in considering the application, the chief executive must have regard to, amongst

other things, a plan of management prepared under Regulation 17.

Regulation 16(1) requires the chief executive to have regard to the protection and conservation within the marine park, zone or designated area of marine products and of objects and sites of significance; the latter are defined under Regulation 5 as being objects and sites within a marine park which are of scientific, cultural or other significance.

Regulation 33(1)(b) prohibits, in a zone or designated area in a marine park, the taking or having in one's possession, any marine product, the taking of which is not permitted in that zone or area, unless that person has permission to do so for the purposes of research or marine park management (Regulation 33(2)).

Regulation 38(1)(h) also empowers an inspector appointed under the Act to search any place in a marine park if they suspect, on reasonable grounds, that there is likely to be a marine product or other thing in that place in respect of which an offence was or is being committed, or is likely to be committed, or that will provide evidence of such an offence.

Regulations 38(1)(i) and (j) give the inspector the added power to seize and detain any such marine product (and any receptacle containing it) and to remove or retain it at the place of seizure and make arrangements for its safe keeping.

Marine Parks (Cairns Zoning Plan) Order 1992

This Order divides the marine park into seven different zones (s.4), which are specified in the zoning maps (Schedule 5).

The Act specifically excludes the tidal waters and lands that are part of the Deed of Government in Trust to the Yarrabah Aboriginal community from the Habitat Protection Zone provided for under this Order (Schedule 2, Clause 2(3)(g)(vii)).

Divisions 4 to 7 of Part 3 of this Order make provision for estuarine conservation, conservation park, buffer and national park zones respectively. One of the objectives of these zones is to provide for traditional fishing and traditional hunting and gathering. These are defined in the Schedule to the Order as fishing and collecting, other than for recreation, sale or trade, by a traditional inhabitant; the latter is defined as being a person of Aboriginal or Torres Strait Islander descent who is

recognised by the community and identifies as an Aboriginal or Torres Strait Islander person.

Designated areas are those set aside under Division 1 of Part 4 of the Order and include Aboriginal management areas. The objective of setting aside these areas is to involve the traditional inhabitants in the planning and management, including conservation of the natural resources and protection of the cultural values of those areas.

The *Mineral Resources (Adjacent Submarine Areas) Act 1964* extends and applies the *Mining Act 1898*, the *Coal Mining Act 1925*, the *Petroleum Act 1923* and Acts succeeding them that relate to the seabed and its subsoil within the territorial limits of Queensland, and to the seabed and its subsoil of certain adjacent submarine areas outside such territorial limits (s.2(1)). The Act makes provision for authorisation to be given for the exploration for and exploitation of these minerals (s.2(2)). The Act confirms that these mineral resources remain the property of the Crown (s.3) and provides for authority to be given to prospect for these minerals (s.8).

Mineral Resources (Adjacent Submarine Areas) Act 1964

The long title of the *Off-Shore Facilities Act 1986* states that its objective is to provide for the application and administration of laws where offshore facilities are, or are to be, moored or fixed in the adjacent waters of Queensland and for related purposes.

Off-shore Facilities Act 1986

Adjacent waters of Queensland are defined as being those waters of the territorial sea of mainland Australia or of the sea adjacent to any island forming part of Queensland as defined in Schedule 3 of the *Petroleum (Submerged Lands) Act 1982* (see below) and other waters beyond these as specified in the Act (s.2(1)). An offshore facility is defined in the same subsection as being any vessel, any made structure or any thing declared by a regulation to be an off-shore facility that is, or is to be, moored or fixed in, on or under the adjacent waters of Queensland for a purpose other than under the *Petroleum (Submerged Lands) Act 1982*.

The Act applies every provision, rule and doctrine of the laws of the State to the lands and waters of the site of the offshore facility as if the land were part of Queensland and as if the waters were within the limits of the State, unless such

application would be inconsistent with a valid applicable law of the Commonwealth or could not 'sensibly be applied' (s.4).

Offshore Minerals Act 1998

The *Offshore Minerals Act 1998* relates to the exploration for, and the recovery of, minerals (other than petroleum, see s.35) in the first three nautical miles of the territorial sea in relation to Queensland (s.16) and for related purposes.

The Act confirms the Offshore Constitutional Settlement, whereby the States and the Commonwealth have agreed that Commonwealth offshore legislation should be limited to the area that is outside the State coastal waters and that State mining legislation should apply in the States' coastal waters beyond the baselines of the territorial sea (s.3).

The Act provides details of the Commonwealth-State regime applying in the State's waters beyond the baselines of the territorial sea and as administered by the Joint Authority, of which the State Minister responsible for this Act is a member (ss.29-34). For details of the Commonwealth-State regime, see Chapter 9.4.

The Act defines minerals as being naturally occurring substances or a naturally occurring mixture of substances, including, but not limited to clay, limestone, evaporates, shale, oil-shale and coal (s.22). Specifically excluded are coral limestone, gravel and rock.

Under the Act, a person must not explore for minerals in, or recover minerals from, the State's waters, unless authorised to do so via a tenure or consent (s.38). Exploration for, and recovery of, minerals does not include exploration for, or recovery of, minerals of the subsoil of coastal waters that is carried out by way of underground mining from land in the State under the *Mineral Resources Act 1989* (ss.23 and 24) (see 3.5 below).

A summary of the tenures and consents that may be granted under and for the purposes of the Act (s.39) include:

Exploration Permits: these allow for the exploration for and the recovery of mineral samples (see ss.45-121 for details for applications, how to apply, terms and conditions, renewals, cancellations, and so on);

Minerals Development Licences: these allow the holders of Exploration Permits to retain the rights over the area covered

by their Permits (details of applications, terms and conditions, renewals and cancellations are provided in ss.132-191);

Mining Leases: these cover the commercial phase of the project and authorise the full commercial recovery of minerals, including any further incidental exploration in the area (see ss.192-266 for details);

Works Licences: these need to be applied for to authorise the holder of the above tenures to undertake the necessary engineering and related works to enable them to undertake the authorised activities under their tenements (see ss.267-314 for details); and

Special Purpose Consents: these enable a person to undertake any necessary scientific investigations or reconnaissance surveys associated with the above tenures (details in ss.315-327).

The Act outlines some of the preliminary steps that applicants have to follow to obtain a tenure or consent (s.40). Note 5 confirms that these are granted over sub-blocks in the areas of the Queensland coast covered by the Act (ss.17-20) and specifies the need to obtain a works permit for any related works. Note 7 specifies that even though a person holds a valid tenure or consent, that person must not interfere unnecessarily with navigation, fishing, resource conservation, native title or other activities in the area.

Any minerals recovered by the holder of a tenure or consent from a sub-block covered by that instrument becomes the property absolutely of the holder of that instrument upon recovery (s.42). The Act specifies that nothing in the grant of such an instrument extinguishes native title in the relevant area, although native title rights and interests are subject to any matters specified in such instruments (s.43). If compensation is payable in respect of native title, then the holder of the instrument must pay as provided under of the *Native Title Act 1993* (Cth) (s.25) (see Chapter 9.6).

The *Petroleum (Submerged Lands) Act 1982* relates to the exploration for, and the exploitation of, petroleum resources and certain other resources of submerged lands adjacent to Queensland. 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. The

*Petroleum
(Submerged
Lands) Act
1982*

scheme of the Act and its legislative and constitutional basis is outlined in its preamble.

*Torres Strait
Fisheries Act
1984*

The *Torres Strait Fisheries Act 1984* promotes the management, development and welfare of the fishing industry; provides for the protection, conservation and management of fisheries resources; and implements the provisions of the Torres Strait Treaty between Australia and the Independent State of Papua New Guinea, which was signed on 18 December 1978. The Treaty creates a Protected Zone of land and water in the Torres Strait Region (s.6(1)). The *Fisheries Act 1994* (see above) does not apply to the taking (as defined in that Act) of fish for the purposes of a fishery in areas that are the subject of the Act (s.5), known as the Torres Strait area (s.4). Such fisheries may be governed by the Commonwealth-State management arrangements provided for under Part 3.

*Special Provision for Traditional Fishing and
Other Activities*

In administering the Act, the Minister shall have regard to the rights and obligations conferred on Australia by the Torres Strait Treaty (see the Schedule to this Act), and in particular to the traditional way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing (s.7).

Article 1(1)(l) of the Treaty provides that traditional fishing means taking, by traditional inhabitants for their own or their dependants' consumption or for use in the course of traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle. Traditional activities are defined in Article 1(1)(k) of the Treaty to mean activities performed by the traditional inhabitants in accordance with local tradition, and includes, when so performed: activities on land, including gardening, collection of food and hunting; and activities on water, including traditional fishing, and various religious and secular ceremonies.

Article 1(1)(m) provides that traditional inhabitants means, in relation to Australia, people who are Torres Strait Islanders who live in the Protected Zone (as defined in Article 10 of the Treaty) or the adjacent coastal area of Australia and are citizens of Australia and maintain traditional customary associations with areas or features in, or in the vicinity of, the

Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities.

Articles 10, 14 and 20 provide that, in pursuing the conservation objectives of the Treaty, the parties are to minimise any restrictive effects on the traditional activities of the traditional inhabitants. Article 20(1) specifically gives traditional fishing priority over commercial fishing. Article 11 of the Treaty commits each party to continuing to permit free movement and the performance of lawful traditional activities in, and in the vicinity of, the Protected Zone by the traditional inhabitants of the other party. Article 12 provides likewise for the continuing of traditional customary rights of access to, and usage of, areas of land, seabed, seas, estuaries and coastal tide areas that are in, or in the vicinity of, the Protected Zone and that are under the jurisdiction of the other party.

Torres Strait Joint Advisory Committee

Article 19(1) of the Treaty provides for the establishment and maintenance of the Torres Strait Joint Advisory Committee, consisting of nine members from each party. Each side will be represented by at least two national representatives, at least one member representing the Government of Queensland in the case of Australia and the Fly River Provincial Government in the case of Papua New Guinea, and at least three members representing the traditional inhabitants (Article 19(7)).

The functions of the committee include considering and making recommendations to the parties on any developments or proposals which might affect the protection of the traditional way of life and livelihood of the traditional inhabitants, their free movement, performance of traditional activities and exercise of traditional customary rights as provided for in the Treaty (Article 19(2)).

QUEENSLAND

3.5 MINERALS

For a detailed synopsis of the provisions of the *Aboriginal Land Act 1991* (ALA) and the *Torres Strait Islander Land Act 1991* (TSLA) see 3.1 above.

Aboriginal Land Act 1991
and
Torres Strait Islander Land Act 1991

Both Acts provide that a deed of grant of transferred land and granted land must contain a reservation to the Crown of all minerals and petroleum (ALA ss.42 and 80; TSLA ss.39 and 77). Part 7 of each Act sets out the circumstances in which the *Mineral Resources Act 1989* (see below) applies to transferable land, Aboriginal and Torres Strait Islander land, Aboriginal and Torres Strait Islander land that is, or was, transferred land and Aboriginal and Torres Strait Islander land that was claimable land. Both Acts make special provisions concerning forest products or quarry material above, on or below the surface of specified classes of transferred lands (ALA s.81; TSLA s.78).

The provisions of the *Mineral Resources Act 1989* (see below) apply to transferable land (as defined, ALA ss.11-16; TSLA ss.10-13) as if it were a reserve for the purposes of that Act. Special provision is made in respect of non-transferred land, claimable land and land subject to rights of the Crown (ALA s.87; TSLA s.83). The creation of a mining interest in transferable land is provided for in both Acts (ALA s.131; TSLA s.129).

Before making an application for a mining lease or a variation of a mining lease, the holder of the lease must consult, and seek to reach agreement with, the Aboriginal or Torres Strait Islander people particularly concerned with the land (as defined in s.4 of both Acts, see 3.1 above) in relation to which the application is to be made about the route of the proposed access. The access provisions in respect of mining leases in the *Mineral Resources Act* (ss.316 and 317) apply to land under these Acts (ALA ss.87(6) and 132; TSLA ss.84(6) and 129).

If the State receives royalties in respect of land (other than land that is subject to a non-transferred land lease) under these Acts pursuant to the *Mineral Resources Act 1989* or the

Petroleum Act 1923 (see below), the grantees of the land are entitled to receive the prescribed percentage of the royalty amount (ALA s.88, TSLA s.85, and Regulation 55 of the Aboriginal Land Regulation 1991 and the Torres Strait Islander Land Regulation 1991). The grantees are required to apply these amounts received for the benefit of the Indigenous people on whose behalf they hold the land, in particular those who are affected by the activities to which the royalties relate (ALA s.88(2); TSLA s.85(2)).

Regulations 55 and 56 also make provision for the relevant department to receive a percentage of royalties, and the chief executive of the department is required to apply these for the benefit of the Aboriginal and Torres Strait Islander people of Queensland (ALA s.88(3); TSLA s.85(3)).

*Aborigines and
Torres Strait
Islanders (Land
Holding) Act
1985*

For a detailed synopsis of the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* see 3.1 and 3.3 above.

The *Aborigines and Torres Strait Islanders (Land Holding) Regulations 1986* made under the Act prescribe specific reservations concerning minerals, rights of access for the purpose of searching for, and working mines in, any part of the land, and petroleum and related operations, including pipelines.

*Alcan
Queensland
Pty Limited
Agreement
Act 1965*

The *Alcan Queensland Pty Limited Agreement Act 1965* provides that the Agreement in the Schedule of the Act will have the force of an enactment of the State Parliament (s.3).

Clause 1 of the Agreement identifies the minerals that are the subject of the Agreement, bauxite and other ores of aluminium, and clause 5 serves to provide the relevant mining leases for these minerals in the Weipa region of far north Queensland as well as the required permits and so on to allow construction of the related mining treatment operations, housing, dams, roads, weirs, reservoirs and harbour works.

The lease is for an initial period of 84 years as of 1 January 1964 and is renewable for a further period of 21 years. Clauses 15 and 16 apply and continue in operation the provisions of the *Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957* (which applies in the Wenlock and Watson Rivers watershed area, which is the same area covered by this Act).

Clause 32 permits discharge into the Wenlock and Dulcie Rivers and their tributaries and other waters, but such discharge must not be injurious or dangerous to public health. Clauses 35 to 38 provide for the establishment of a form of local government for the town and surrounding area that are the subject of this Act. Clause 46 allows a person to make an arrangement with the company for entry onto its land and to gain access from there to the coast, including on any roads. Clause 47 gives the company the right to expand the area of its operations and such expansion is expressed to not be subject to the provisions of the *Acquisition of Land Act 1967* (see 3.1 above).

Native Title Agreement

On 3 September 1997, Alcan signed a native title agreement with the Aboriginal communities at Mapoon and Napranum in the western Cape York area of Queensland, which will enable a major new bauxite mining and shipping facility to be developed at Ely with the support of Aboriginal people. Alcan had decided in 1996 to develop its 32 year old bauxite lease (granted under this Act) and had conducted a series of talks with members of local Aboriginal communities. Under the agreement, native title issues will be overseen by a management committee. Employment opportunities and compensation for Aboriginal people are also provided for.

The *Aurukun Associates Agreement Act 1975* gives the Agreement in the Schedule to the Act the force of a law of the Queensland Parliament (s.3). The agreement was signed by, amongst others, the Director of the Aboriginal and Islander Advancement Company. *Aurukun Associates Agreement Act 1975*

Part 2 of the agreement makes provision for the proper care of the environment. This includes a report on environmental studies, to be furnished to the responsible Minister(s), concerning the proposed mining and related activities, water supply, harbour and associated works, the town, service routes and the smelter. The report must be approved by the responsible Minister(s) prior to approval being given for the relevant activities and works to proceed.

Schedule 1 of the agreement provides the guidelines for the environmental studies. The mining operations, refinery, smelter and any acquisition of land, must include the

determination of areas of special environmental significance, including the significance of the area, or part of the area, to Aboriginal culture. The companies are also required to consult with, amongst others, the Department of Aboriginal and Islanders Advancement in the preparation of the report.

Part 2 creates a Special Bauxite Mining Lease for the companies for an initial period of 42 years, renewable for 21 years. Part 4 preserves the riparian rights of upstream landowners and requires the company to ensure adequate flow of fresh water for downstream riparian landowners. Part 6 establishes a system of local government for the Weipa/Archer Bay area that ties in with that covering the area referred to in the ALCAN/COMLACO agreements Acts (above). Part 7 specifies that acquisition of land for the purposes of this Act is, at all times, subject to the proper care of the environment, as are any related leases or other tenure, licences or permits.

Clause D of Schedule 3 to the agreement confirms that one of the companies that is a party to this agreement has conducted negotiations with the Council of Elders of Aborigines at the reserve (being the reserve for the benefit of the Aboriginal inhabitants at Aurukun and covering 7,503 square kilometres in the Counties of Kendall, Lukin, Pera and Weipa and placed under the control of the Director of the Aboriginal and Islander Advancement Company under an Order of Council dated 24 February 1972). In return for being granted access to the reserve under Clause D for the purpose of prospecting and otherwise developing the mineral resources within the prospecting area, it is acknowledged that the company had given assurances for the betterment of Aboriginal people within the reserve.

Clause 2 of Schedule 3 contains details of what is constituted in the concept of betterment. It includes such matters as: paying Aboriginal people employed by the companies the usual award rate; paying to the Director of the Aboriginal and Islander Advancement Company, on behalf of Aboriginal people, a sum of 3 per cent of the profits of the companies from their mining operations, not later than three years after commencement of mining activities; allowing any capital installations, fixtures and improvements (other than of a demountable nature) to remain and revert to the Director for the use and benefit of Aboriginal people on the reserve; and the companies agreeing to conduct their operations so as to

cause as little inconvenience to the Aboriginal people on the reserve as practicable.

Among the undertakings given by the companies under Clause 2 are: ‘to employ employable Aboriginal people in positions and occupations which they are reasonably capable of filling; to encourage maximum participation by Aboriginal people in the employment opportunities within the Companies’ activities; and to purchase supplies from the Mission store, and to hire boats and dinghies from there’.

Clause 5 commits the companies, and those for whom they are responsible, not to enter upon, take, deface, damage, interfere with, be in possession of or disturb any relic, sacred site, contemporary sacred site, or Aboriginal site upon or within the reserve after being notified by the Director or Aboriginal council for the reserve of the location of one or any number of these. Clause 6 provides that the companies recognise the inviolable right of Aboriginal people to live subject and according to their law, custom, religion and established practices and undertake to not do or allow anything to be done by those for whom they are responsible that is contrary to these if they are known, or have been revealed to, the companies, or anything else that is otherwise sacrilegious or offensive.

The preamble to the *Century Zinc Project Act 1997* states that:

- (Clause 2): after negotiations under the right to negotiate provisions of the *Native Title Act 1993* (Cth) (NTA) the parties to the negotiations have made the agreement allowing certain acts to be done;
- (Clause 6): the project will result in social and other benefits for all people of the mineral province (in north west Queensland, around Normanton and Karumba on the Gulf of Carpentaria); and
- (Clause 7): it is important that any native title should not be extinguished by the grant of a right to mine or acquisition of land or interests in land affected by the project, and it is not intended to prevent native title claims being pursued.

*Century Zinc
Project Act
1997*

The purpose of the Act (s.3) includes facilitating certain aspects of the agreement made under the right to negotiate provisions of the NTA. Specific provisions are made for the

various parcels of native title land and easements that the parties agree should be taken for the purposes of this Act (s.5 and Schedule 1). This is subject at all times to the provisions of the *Acquisition of Land Act 1967* (see 3.1 above), except for those provisions specifically excluded under Schedule 2 (s.6). The Act (s.7) specifies that the State is the relevant authority for the purposes of the Land Acquisition Act.

The Act provide for the cancellation and grant of specified mining leases to remove any doubt about their validity in light of the NTA and State native title legislation and relevant decisions of the High Court (ss.8-10).

Further provisions dealing with easements, the vesting of port land (see also Schedule 3), the crossing of roads, reserves, watercourses, and so on, are dealt with under the Act (ss.11-13). The Act also deals with the use or development proposed to be undertaken under a development application made to the Burke Shire Council by the Bidunggu Aboriginal Land Trust in relation to the Gregory Outstation (ss.14-17).

Part 5 deals specifically with native title. Section 18 expressly states the intention that anything done under the Act does not extinguish native title and that the non-extinguishment principle under the NTA applies to anything pursuant to the Act. Each interest granted under the Act (s.20) is taken to include the statement in Schedule 4 (this confirms the intention of non-extinguishment). Schedule 6 provides a dictionary for expressions used in the Act and identifies the parties to the agreement (Aboriginal people, the State and Century Zinc).

Coal Mining Act 1925 This Act (s.1(1)) must be read in conjunction with the *Mineral Resources Act 1989* (see below). The Act is excluded from operation in relation to petroleum, natural gas and mineral oils (s.3(1)). Part 2 provides for the granting of coal mining licences over unalienated State land and Part 4 requires all coal mines to be registered under the Act. The removal of timber from land that is the subject of the provisions of the Act is prohibited (s.103).

Fossicking Act 1994 The *Fossicking Act 1994* is concerned with the regulation of recreational and tourist fossicking for minerals, gemstones and ornamental stones. The Act does not apply to a protected area (s.9). A protected area refers to land dedicated under the *Nature Conservation Act 1992* (see below) as a national park

(scientific), a national park, a national park (Aboriginal land) and a national park (Torres Strait Islander land) or a conservation park.

The Act (s.11(1)) applies to native title land in a designated area or a fossicking area under the repealed *Mining (Fossicking) Act 1985* that became designated fossicking land or a fossicking area under the *Fossicking Act 1994* (s.11). Provision is made for the designation of fossicking land and areas under Part 4.

The Act (s.11(2)) applies to other native title land for which there is a registered native title body corporate (as provided for under the *Native Title (Queensland) Act 1993*) (see 3.6 below) if the Commonwealth Minister makes a determination under the *Native Title Act 1993* (Cth) (s.26(3)) that a licence under the *Fossicking Act 1994* is excluded from the Commonwealth Act (s.26(2)). However, the Act (ss.11(1), (2) and (3)) does not always apply to native title land.

For details about the *Land Act 1994* see 3.1 above. Land that is reserved for a community purpose (such as Aboriginal or Torres Strait Islander purposes) under the Act is a reserve for the purposes of the *Mineral Resources Act 1989* (MRA, see below) (s.5 of the MRA and Schedules 1 and 6 of the *Land Act 1994*). A Deed of Grant in Trust (DOGIT) under the Act is made subject to specified reservations and conditions, including the reservation of minerals on and below the surface of the land, and the right of access for prospecting, exploring or mining, and similar reservations in respect of petroleum (ss.21 and 23; see also the MRA s.8 and the *Petroleum Act 1923* s.10, see below). A DOGIT issued for land containing quarry material must also contain a reservation of the quarry material, other than topsoil, to the State (s.22).

*Land Act
1994*

Agreement to Negotiate Code of Practice for Exploration

At the time of writing, the Queensland Mining Council and other mining interests and Indigenous representatives had agreed to begin negotiations for a proposed code of conduct covering minerals exploration on Indigenous lands in the State. The code would initially apply to Aboriginal DOGIT lands, but the parties left open the possibility that, once established, the code could also provide the foundation for

negotiation with native title claimants in respect of exploration or mining on non-DOGIT lands.

Restrictions on the Grant of Mining Tenements

The granting of any permit, claim, licence or lease under the *Mineral Resources Act 1989* in respect of DOGIT land is prohibited without the prior consent of the Governor in Council (s.452A(2)).

*Land and
Resources
Tribunal Act
1999*

A more detailed synopsis of the provisions of the *Land and Resources Tribunal Act 1999* is contained in 3.1 above. The Act amends the *Mining Resources Act 1989* so that appeals which were previously dealt with by the Mining Warden's Court are now transferred to the Tribunal (s.40 and Schedule 1). The Act provides for exclusive jurisdiction over negotiated agreements (as defined in the *Mining Resources Act 1989*). A party to a negotiated agreement can apply to the Tribunal for an enforcement order, to decide a dispute, or, to make a declaration about the interpretation of an agreement (s.52).

*Local
Government
(Aboriginal
Lands) Act
1978*

For a detailed synopsis of the provisions of the *Local Government (Aboriginal Lands) Act 1978* see 3.3 above. The land covered comprises the Shires of Aurukun and Mornington in the far north of the State.

All gold, minerals and petroleum are reserved to the Crown, as are rights of access to the subject land for the purpose of searching for, mining or obtaining these (s.30(1)). The *Aurukun Associates Agreement Act 1975* (see above) contains a franchise agreement between the State of Queensland and the three Companies to whom a bauxite mining lease and other rights and privileges were granted over land, much of which was in the (then) Aurukun Aboriginal reserve and is now subject to the provisions of this Act.

Land that is the subject of a lease under this Act (s.6) is a reserve for the purposes of the *Mineral Resources Act 1989* (s.5, see below) and the Shires are the 'owners' for the purposes of that Act. The statutory regime for the exploration for, and mining of, minerals as applied to reserves applies to the Aurukun and Mornington Shire land.

The long title of the *Mineral Resources Act 1989* (MRA) indicates that its purpose is to provide for the assessment, development and utilisation of mineral resources to the maximum extent practicable, consistent with sound economic and land use management. Among the objectives specified in the Act with respect to prospecting, exploring and mining are the avoidance of land use conflict and the encouragement of environmental responsibility and responsible land care management (s.2).

*Mineral
Resources
Act 1989*

The Act defines 'land' for the purposes of the Act sufficiently broadly to include virtually all land, waters and subsoils in the State (s.5). However, protected areas under the *Nature Conservation Act 1992* are excluded except for matters covered under the MRA (ss.8, 9 and 10) and the Nature Conservation Act (s.27).

'Mineral' is defined in the MRA to mean a substance which normally occurs naturally as part of the earth's crust or is dissolved or suspended in water within or upon the earth's crust and includes a substance which may be extracted from such a substance (s.5). Petroleum, within the meaning of the *Petroleum Act 1923*, is excluded from the meaning of mineral, as are soil, gravel or rock and water.

The following other relevant definitions are included in the Act (s.5):

- occupied land means land (other than land occupied under a permit under the *Land Act 1994*) of which there is an owner, and includes a reserve;
- occupier of land means a person other than the owner lawfully occupying the land;
- owner of land means, among other things:
- if the reserve is DOGIT land under the *Aboriginal Land Act 1991* or the *Torres Strait Islander Land Act 1991*, then the trustee for that land;
- if the reserve is land held under a lease under the *Local Government (Aboriginal Lands) Act 1978* (s.6), then the relevant local government;
- if Aboriginal or Torres Strait Islander land is considered a reserve under the Aboriginal and Torres Strait Islander land Acts (ALA s.87 and TSIL s.84) then the respective grantees of the land; or

- if the reserve is held in trust for Aboriginal or Torres Strait Islander purposes under the *Land Act 1994*, then the trustees of the land.

Whereas lessees are generally deemed to be owners for the purposes of this Act, no specific provision is made in respect to leasehold under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*, see 3.1 and 3.3 above. A reserve includes land held under a lease under the *Local Government (Aboriginal Lands) Act 1978* (see above).

Ownership of Minerals

The Act provides that virtually all minerals in their natural state are the property of the Crown (s.8), including gold on or below the surface of land (s.8(1)) and coal (s.8(2)). The Crown is also the owner of all other minerals on or below the surface of land in Queensland (s.8(3)), other than land alienated in fee simple under the *Alienation of Crown Lands Act 1860* (s.22), the *Crown Lands Alienation Act 1868* (s.32) or the *Mineral Lands Act 1872* (s.21). The Act provides for the reservation of all minerals in each deed of grant or lease of unallocated State land, as well as for a right of access for prospecting and mining (s.8(4)).

No person, including an owner of a freehold estate in fee simple, which includes the ownership of minerals, can authorise or undertake prospecting, exploring or mining for any mineral, notwithstanding the mineral is not the property of the Crown, except with an authorisation under the Act (s.9(1)). A prospecting permit, mining claim, exploration permit, mineral development licence or mining lease may be granted over land (s.9(3)). The definition of 'land' does not include protected areas, which are thus not open to mining.

Part 3 of the Act deals with the granting of prospecting permits; Part 4 is concerned with mining claims; Part 5 with exploration permits; Part 6 with mineral development licences; and Part 7 with mining leases.

Consents

A prospecting permit, a mining claim or a mining lease may be granted over occupied land. The Act requires the consent of the owner of a reserve before the grant of a mining claim or mineral lease over the reserve is permitted (ss.54 and 238). If the owner fails to consent, the Governor in Council may

approve the grant of the claim or lease. The owners of other occupied land may object to the grant of a mining claim or mineral lease in respect of that land. At least seven days' notice must be given before initial entry is made to occupied land under a prospecting or exploration permit, or a mineral development licence.

Prospecting Permits

Part 3 sets out the procedures applying, and the rights and obligations attaching, to the grant of a prospecting permit. It authorises entry on land for the purposes of making a mining claim or mining lease, for prospecting or for hand mining (s.13). The Act provides for two types of prospecting permit; a district prospecting permit, granted for a mining district and a parcel prospecting permit, which is granted for one or more lots (s.14.).

More than one prospecting permit may be issued over the same land (s.15). The Act requires the holder of a prospecting permit to rehabilitate land at the conclusion of any activity authorised under the permit (s.45). The Act also sets out other conditions attached to the entry on land of a person with a prospecting permit (s.47).

Exploration Permits

Part 5 sets out the procedures applying, and the rights and obligations attaching, to the grant of an exploration permit. The Act provides for the surface of the earth to be deemed to be divided into blocks and sub-blocks (s.126). It authorises the holder of an exploration permit to enter sub-blocks of land specified in the permit (s.127) and sets out the entitlements, including conditions relating to entry to, and exploration for minerals on, any part of the land comprised in the exploration permit (s.129)

The Act details a range of conditions that each exploration permit shall be subject to, including conditions relating to environmental impact, rehabilitation of the land and rights of access to the land of other people (s.141). The definition of 'environment' in the *Environmental Protection Act 1994* (which includes the social, aesthetic and cultural conditions of the environment, see 3.1 above) is applied for the purposes of this Act. The Act allows for compensation to be claimed from the holder of an exploration permit for damage suffered or loss

incurred as a result of a person acting under the authority of an instrument granted under this Part (s.145).

Mineral Development Licence

Part 6 sets out the procedures applying, and the rights and obligations attaching, to a mineral development licence. Under the Act, the Minister may specify the activities which must be carried out under a mineral development licence (s.181). These include activities to evaluate and determine the economics of developing an ore body, including carrying out geological and geophysical programs as well as feasibility, environmental, engineering and design studies.

The initial term of a mineral development licence is five years, but it may be renewed at the Minister's discretion. The Act sets out the conditions of a mineral development licence, including controlling the impact on the environment and the rehabilitation of land (s.194). Compensation may be paid to the Crown or an owner of land over which a mineral development licence is, or has been, granted (s.191). The Act requires that notice be given of an intention by the holder of a mineral development licence to enter land (s.211).

Mining Claims

Mining claims are the subject of Part 4. A mining claim confers rights of entry and occupation under the Act to prospect and mine over land comprised in a prospecting permit granted under Part 3 (s.50). A mining claim may be granted in respect of any mineral other than coal (s.52). A mining claim may not be granted over land that is a reserve, except with the consent of the owner or the Governor in Council (s.54).

Where the Mining Registrar is not satisfied that the owner of a reserve consents to a grant of a mining claim, the Registrar must fix a date for the consideration of the matter by the Land and Resources Tribunal (see *Land and Resources Tribunal Act 1999* below). The Tribunal may recommend to the Minister that the Governor in Council grant consent with or without conditions. The Minister must instruct the Registrar either to reject the application or make the specified recommendation to the Governor in Council to consent to the grant, subject to any of the stated terms and conditions (ss.76-79).

The Act sets out the conditions applying to a mining claim (s.81). These include a requirement that the land is used for the purposes for which it was granted, the impact on the environment is controlled, the surface area of the land is rehabilitated and no permanent building or structure is erected. Compensation arrangements must be negotiated between an applicant for a mining claim and affected landowners prior to the grant of the claim (s.85).

Mining Leases

Mining leases are granted under Part 7. A mining lease confers rights of entry and occupation of land for any purpose authorised by the lease.

The Act provides that a mining lease for a mineral or minerals may be applied for in respect of contiguous land comprised in a prospecting permit, an exploration permit or a mineral development licence (s.232). Unless the Governor in Council otherwise approves, a mining lease may be granted over the surface of a reserve only if the written consent of the owner of that land is lodged with the Mining Registrar (s.238).

The Act contains a list of the conditions to which a mining lease is subject (s.276). Compensation must be determined prior to the grant of the mining lease under terms similar to those for a mining claim (s.279).

The Act provides, amongst other things, that the holder of a mining lease may be authorised to carry any thing through, over or under land that is not comprised in the current mining lease by means of a pipeline, aerial ropeway, conveyor apparatus, transmission line or similar method of transport for purposes associated with the current mining lease (ss.316 and 317). The holder of a mining lease may apply to the Mining Registrar for a variation of the land used, or proposed to be used, as access to the land that is the subject of the mining lease.

If the land owner does not consent, this matter may be referred to the Land and Resources Tribunal for resolution and compensation may be payable by the mining lease holder to the land owner. Provision is made for a written agreement to be made between the parties to resolve this matter (see also the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*, ss.132 and 129 respectively).

The provisions of the Act make it an offence to prospect or explore for minerals or mine minerals without authorisation under the Act or another Act relating to mining (s.402).

*Mount Isa
Mines Limited
Agreement Act
1985*

The *Mount Isa Mines Limited Agreement Act 1985* provides for the ratification of the agreement in the Schedule to the Act between the State and Mount Isa Mines and gives it precedence over any other enactment or law of the State, but without limiting the power of Parliament to make an inconsistent law (ss.2 and 4).

Part 2 of the agreement provides the company with the relevant mining leases and tenements under the applicable mining Acts for an initial period of 50 years, renewable for a further 21 years. These are for exploring and mining for minerals, including silver, lead, zinc, copper, silica and clay, the treatment of ores, and the construction and all related and necessary infrastructure and other works. The mining plan that the company must prepare is required to include measures for the control of impact on the environment and for rehabilitation of the area.

Schedule F makes more detailed provision for the matters that must be included in mining plans. Clause 3(c) specifies waste storage and removal and reducing environmental impact of these. Clause 3(d) mandates control of pollution of air, water, lands and adjacent lands, and measures to control noise and vibration from blasting. Clause 3(e) deals with rehabilitation. Clause 3(f) requires details of steps to be taken to monitor the impact on the environment of all proposed works and undertakings in relation to all proposed activities and operations.

Clauses 4 to 10 provide further environmental conditions, including further details on measures to monitor environmental impacts and rehabilitation.

Clause 14 of Schedule F provides that 'Subject to the Agreement, the Company shall observe at all times the provisions of [a list of laws including] the *Aboriginal Relics Preservation Act 1967* ... or any Act amending or substituting [these]'. The *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (see 3.2 above) is the Act substituting the Relics Preservation Act and its provisions must be observed by the company for the purposes of the Mount Isa Mines Act.

For a detailed synopsis of the *Nature Conservation Act 1992*, see 3.1 above. The Act (s.27) provides that a mining interest cannot be granted in relation to a national park (Aboriginal land) or a national park (Torres Strait Islander land), which are included in the definition of protected areas under the Act (s.14). A mining interest is a lease, claim or other interest in, or other right in relation to, land that is granted under the *Mineral Resources Act 1989* (see above).

*Nature
Conservation
Act 1992*

The *Petroleum Act 1923* makes provision for encouraging and regulating the mining for petroleum and natural gas in Queensland. The Act vests in the Crown property in petroleum on or below the surface of all land in Queensland (s.9).

*Petroleum Act
1923*

The 'corporation sole' (constituted by the Minister, s.11) has a general authority under the Act to search for, recover and refine petroleum, to construct and own pipelines and oil refineries and to distribute petroleum products (s.12). The corporation sole may also, for the purpose of searching for and recovering petroleum by its servants and agents, enter and occupy temporarily or permanently, unallocated State land and land held from the Crown on any tenure, or used under licence from the Crown. Unallocated State land has the same meaning as in the *Land Act 1994* (see 3.1 above).

Part 4 of the Act provides for the grant by the Minister of prospecting permits and leases and for the conditions, including the rights of private landowners, applying to such grants.

Divisions 4 and 5 of Part 7 relate to the construction and operation of pipelines. The Act authorises the Minister to grant entry permission to a person to enter land to investigate and survey it for the purposes of planning for or constructing a pipeline (s.67) and makes provision for the grant of a licence to construct and maintain a pipeline (s.69).

Petroleum Regulations

The Petroleum Regulations 1966 provide broad detail of the rights and obligations and conditions relating to the regulation of the petroleum industry.

Regulation 19 provides that the holder of a petroleum authority under the Act shall not conduct, nor permit to be conducted, on the title holders' petroleum title, any

exploration or drilling program in or upon an Aboriginal reserve, or a reserve for the benefit of Aboriginal or Islander inhabitants, or in or upon any land granted by deed of grant in trust for the benefit of Aboriginal and Islander inhabitants pursuant to the *Land Act 1994* (see 3.1 above), unless the approval of the Governor in Council has first been obtained, and then only under conditions fixed by the Governor in Council .

*Thiess Peabody
Coal Pty
Limited
Agreement
Act 1962*

The *Thiess Peabody Coal Pty Limited Agreement Act 1962* identifies the parties to this Agreement as Thiess Peabody-Matsui Coal Pty Limited and its successor(s) (s.2). The agreement has the force of an enactment of Parliament (s.3) and provides for its commencement on 31 December 1962 (s.5).

The agreement provides the company with an exclusive right to prospect for coal (s.7) and the necessary special coal mining leases (s.18). These leases provide the requisite mining rights and permits for the construction of buildings, housing and related infrastructure works, including residences, dams, roads and so on (s.19). The initial term is for 21 years, renewable indefinitely in lots of 21 years.

The agreement places an obligation on the company to undertake all necessary rehabilitation works, including the construction of dams, cover or removal of acid forming materials and the filling in and revegetation of open cuts, where made, and anything else to promote and encourage the regeneration of vegetation (s.31).

These works must be undertaken within three years of the cessation of mining. If the company fails to do so to the Minister's satisfaction, the Minister is empowered to cause these works to be done and the cost of this is recoverable against the company as a debt.

The company is also obliged to cause minimal interference with the natural drainage system (except in relation to storage works) and to use its best endeavours to avoid any pollution of the drainage system to the extent that this would be dangerous or injurious to the public.

The area subject to this agreement is the Moura Mine and includes the railway from the mine to Port Gladstone on the east coast of Queensland (ss.32-49).

QUEENSLAND

3.6 NATIVE TITLE

A more detailed synopsis of the provisions of the *Land and Resources Tribunal Act 1999* is contained in 3.1 above. The Act provides for the establishment of an independent body as required by s.43 of the *Native Title Act 1993* (Cth).

Land and Resources Tribunal Act 1999

The *Land and Resources Tribunal Act 1999* establishes the Land and Resources Tribunal. In addition to the standard panel, it is possible to form a National Native Title Tribunal (NNTT) panel when one of the presiding or non-presiding members is also an NNTT member, or where there is a standard panel and a member of the NNTT who is not also a member of the State Tribunal (s.39(2)). Provision has been made for hearings or conferences concerning culturally sensitive issues to be held in private (s.48).

The *Native Title (Queensland) Act 1993* is consistent with the provisions of the *Native Title Act 1993* (Cth) (NTA) and provides for the recognition and protection of native title in Queensland. The objectives include validating past acts and intermediate period acts and ensuring that Queensland law is consistent with the standards set by Commonwealth native title legislation (s.3(2)). Validating past acts and intermediate period acts validates the land dealings which did not comply with the provisions of the NTA before the 1998 amendments or with the common law and *Racial Discrimination Act* prior to the passing of the original Act in 1993. Intermediate period acts are acts granted between the passing of the NTA and the Wik decision (for more detail see Chapter 9.6).

Native Title (Queensland) Act 1993

Part 4 confirms the total extinguishment of native title by previous exclusive possession acts, and the partial extinguishment of native title by previous non-exclusive possession acts.

Parts 5-10 are repealed by the *Native Title State Provisions Act 1998*. Part 7 contains miscellaneous provisions.

Part 2 provides for interim provisions which expire two years after this part commences, which will be September 2000. These interim provisions are pending a full review of

Queensland law, and specifically seek to ensure Queensland law is consistent with the NTA, and that native title claims can be dealt with by State-based mechanisms that are also consistent with the NTA (s.147).

For provisions relating to the operation of the National Native Title Tribunal see the *Land and Resources Tribunal Act 1999* below.

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

4. SOUTH AUSTRALIA

SOUTH AUSTRALIA

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SOUTH AUSTRALIA

4.1 LAND AND ENVIRONMENT

The *Aboriginal Lands Trust Act 1966* was the first Aboriginal land rights legislation enacted by a State in Australia. As was pointed out in the 1968 Annual Report of the Aboriginal Lands Trust established under the Act, the purposes of the Trust were to secure title in existing Aboriginal reserves to Aboriginal people, have a body to which royalties from mineral activities on reserve land could be paid and used to acquire further land and have a body to which funds could be provided so that the lands vested in it could be developed.

Aboriginal Lands Trust Act 1966

Transfer of Land to Aboriginal Land Trust

The Act gives the Governor of the State the power to proclaim the transfer of Crown lands or lands reserved for Aboriginal people to the Trust either as freehold or some lesser estate (s.16(1)). But if a council has been established and exists in respect of any Aboriginal reserve under provisions (since repealed) of the *Family and Community Services Act 1972* (see below), the consent to such a transfer must first be given by the council. In the case of Crown lands not reserved for Aboriginal people, the approval of the relevant Minister and a resolution in favour by both Houses of Parliament must be given.

Special provision has been made for the North West Aboriginal Reserve under the Act (s.16(6)), and other areas are now provided for under separate legislation following negotiated Aboriginal land rights settlements (see *Maralinga Tjarutja Land Rights Act 1984* and *Pitjantjatjara Land Rights Act 1981* below).

The holder of the title is the Trust. The Act (s.6) provides that the Trust comprises a Chairperson and at least two members appointed by the Governor, and they must all be Aboriginal people as defined in the *Family and Community Services Act 1972*. The Governor also has discretion to appoint additional members on the recommendation of Aboriginal councils established under the Community Services Act or of such Aboriginal communities as are recognised by the Minister and whose members ordinarily reside on land owned by the Trust.

The Trust may sell, lease, mortgage or develop the land, subject to the Minister's consent (and a favourable resolution by both Houses of Parliament in the case of a sale) and compliance with the provisions of any relevant Act or other law (s.16(5)).

The policy of the Trust is to act as a land title holding body only and to lease all its lands and assets to Aboriginal communities, organisations and people, and not engage in management operations (see the Trust's Annual Report for 1988, pages 4-5). This policy has resulted in grants of 99-year leases with rights of renewal in respect of former Aboriginal reserves to incorporated Aboriginal communities.

However, the Trust may appoint a manager or management committee in respect of that land, where the lessee requests the Trust to do so, or with the consent of the Minister where the Trust is satisfied that the land is not being managed properly by the lessee for the benefit of the relevant Aboriginal community. The manager or management committee appointed in such circumstances has all the powers, functions and duties of the lessee and must report regularly to the Trust on the management of the land (s.16aa).

Under the Act (s.20A) an Aboriginal Lands Business Advisory Panel is established to advise and assist Aboriginal communities and people ordinarily residing on the lands in the establishment and management of business or community enterprises, and in the development of skills required for the effective operation of such enterprises. The Panel is comprised of the Chairperson of the Trust, the Chief Executive Officer of the Department of Technical and Further Education and three others with relevant skills, as appointed by the Governor in consultation with the Aboriginal Lands Trust Parliamentary Committee.

The Committee comprises the Minister, two Government and two Opposition members of the State's House of Assembly. It is required to take an interest in the operation of this Act, matters of relevance to the Aboriginal people who reside on, and management use and control of, the land, and matters referred to it by the Minister (s.20B).

The Act specifically states that neither the Trust, nor any lessee or assignee of the Trust, is permitted to depasture stock on any lands situated within the pastoral area of the State as defined under the *Pastoral Act 1936* (repealed, refer now to

Pastoral Land Management and Conservation Act 1989 below) and vested in the Trust, without the approval of, and subject to any conditions imposed by, the Pastoral Board established under that Act (s.16(5)(b)).

The vesting of land in the Trust does not extinguish or affect native title in the land (s.16AAA)

Application of Other Legislation

The Governor may, on the recommendation of the Trust following a request initiated by the relevant Aboriginal community or communities, make a proclamation applying the *Public Intoxication Act 1984* and the powers and duties imposed under that Act (s.16A). The Act also empowers the Governor, on the recommendation of an Aboriginal community (but without reference to the Trust), to make regulations concerning alcoholic liquor, petrol or any other substance declared by the regulations to be a regulated substance (s.21).

The purpose of the *Community Titles Act 1996* is to provide for the division of land into lots with common property and for the administration of those lots by their owners (long title). Provision is made for the subdivision of land into community lots (s.6).

*Community
Titles Act
1996*

Among the matters that are required to be taken into consideration in processes under the Act are encumbrances over the relevant land, which are defined in the Act (s.3) to include statutory encumbrances, which in turn are defined to include:

- an Aboriginal heritage agreement entered into under the *Aboriginal Heritage Act 1988* (see 4.2 below);
- an agreement relating to the management, preservation or conservation lodged under the *Development Act 1993* (see below);
- a heritage agreement made under the *Heritage Act 1993* (see 4.2 below); and
- a heritage agreement entered into under the *Native Vegetation Act 1991* (see below).

The Act (s.23(8)) requires the Registrar General to make notes or other endorsements on the relevant certificate(s) of title in relation to any statutory encumbrance(s).

Country Fires Act 1989 The *Country Fires Act 1989* makes extensive provision for the prevention and control of bushfires in the State. It establishes the Country Fire Service Board to administer the Act (ss.6-14) and various Bushfire Committees to provide the Board with advice and assistance (ss.28-33).

The Board may declare a fire danger season to cover the whole or any part or parts of the State. With some notable exceptions, the Act creates a major offence for lighting or maintaining fires in the open air during a fire danger season (s.36(1)). The exceptions as specified in the Act (s.36(2)) are:

- small attended fires for cooking or personal comfort where the means to extinguish it are easily accessible;
- well contained and attended fires for burning of refuse;
- heating of bitumen;
- welding, gas-cutting, soldering, grinding or charring, again subject to the means for extinguishing them being close at hand, or
- as provided for under a permit or regulations.

The Act requires the owner of private land (that is, land alienated by the Crown, whether in freehold or under lease or licence, but not to a local government or Crown body (s.3) to take all reasonable steps to protect property on the land from fire and to prevent or inhibit the outbreak of fire on the land. This includes taking into account proper land management principles (s.40).

In times of extreme fire risk or where there is no relevant Country Fire Service (CFS) or other relevant authority, the Board may, by notice in the *Gazette*, establish a Special Fire Area and constitute a committee of management to handle fire prevention and suppression planning for the area. The committee must include representative(s) from the CFS and the relevant council (if applicable), the National Parks and Wildlife Service if there is a reserve or part of a reserve administered under the *National Parks and Wildlife Act 1972* (see below) and from any other organisation or agency that may, in the opinion of the Board, have a special interest in the

prevention or suppression of fires in the area (Regulation 58 of the Country Fire Regulations 1989).

Special Provisions Concerning Aboriginal People

The Country Fire Regulations 1989 provide that for the purposes of the Act (ss.36 and 37), a fire may be lighted or maintained in the open air during the fire danger season, contrary to the terms of a total fire ban, by an Aboriginal person, provided that the fire is lit on land set aside for Aboriginal purposes and that the fire is used for ordinary domestic purposes within the traditional Aboriginal way of life (Regulation 35(a)).

The *Crown Lands Act 1929* consolidates certain Acts relating to Crown lands (long title). Vacant Crown land covers only about 8,300 square kilometres of the State, or less than one tenth of one per cent of the State.

*Crown Lands
Act 1929*

Section 5AA empowers the Governor to grant freehold title for any Crown land and also to resume or cancel the grant of any land dedicated as Crown land where, in the opinion of the Minister, the lands are not being used for the purposes for which they were dedicated, or there is no registered proprietor of the land willing or able to have the care, control and management of the land. The Minister has powers to deal with the land, including leasing and dedication for a number of public purposes (s.5). These purposes include forest and travelling stock reserves and preservation of water supply. Sections 22 and 77 make further provisions concerning leasing of Crown lands, including for grazing and related purposes (s.77(1)(IX)).

The Minister has power to develop and improve Crown lands for any agricultural, pastoral, residential, commercial or industrial purpose, or for any other purpose whatsoever (s.9(la)). The Minister may also authorise any person to take possession of such lands and to eject all other persons not so authorised (s.9(m)).

Section 260 further empowers the Minister to acquire lands in any part of the State for any agricultural, pastoral, residential, commercial or industrial purpose, for the development or closer settlement of the lands or for the exclusion of the lands from development, or for any other purpose whatsoever. The

Land Acquisition Act 1969 (see below) applies to any such acquisition (s.260(2)).

Development Act 1993 The *Development Act 1993* applies to any land in the State, including the Pitjantjatjara and Maralinga lands, unless the regulations provide otherwise (s.7). The objects of the Act are to provide for proper, orderly and efficient planning and development in that State and for that purpose to provide for the creation of development plans to enhance the proper use, conservation, management and development of land and buildings and to advance the social and economic interests and goals of the community (s.3).

The Act establishes the Development Policy Advisory Committee (s.8(1)). Among the members required to be appointed is a person with wide experience in environmental conservation and a person with wide experience in planning or providing community development (s.8(2)). When making appointments to the Committee, the Governor is required to have regard to the need for the Committee to be sensitive to cultural diversity in the population of the State (s.8(3)). The function of the Committee is to advise the Minister on all matters relating to the administration of this Act (s.9).

The Act requires development plans to be prepared for the purposes of this Act (s.23(1)) and ensures that such a plan may apply to any part of the State (s.23(2)). A plan may set out planning or development objectives and principles relating to such matters as ecologically sustainable development, social or socio-economic issues, and the management or conservation of land and heritage places and areas, and of natural and other resources (s.23(3)(a)).

An environmental impact statement (EIS) and public environmental report (PER), if prepared under the Act (ss.46B and 46C respectively), must, amongst other things, include matters relating to the environmental, social or economic effects associated with the relevant development or project (ss.4(4) and (5)) and all matters relevant under the *Environment Protection Act 1993* (see next).

The Minister may enter into an agreement with the owner of any land relating to the management, preservation or conservation of the land (s.57); 'owner' for the purposes of the Act includes a person who has the care, control or management of a reserve (s.57(13)). However, the owner of

the land is not entitled to enter into such an agreement without the consent of all other people who have a legal interest in the land (s.57(4)).

The *Environment Protection Act 1993* applies to all territorial and coastal lands of the State, and by definition that would include the Pitjantjatjara and Maralinga lands (s.9). The objects of the Act are to promote the principles of ecologically sustainable development by ensuring that, amongst other things, the use, development and protection of the environment is managed in such a way, and at such a rate, that people and communities are able to provide for their economic, physical and social well-being and their health and safety while preserving and causing minimal harm to the environment (s.10).

*Environment
Protection Act
1993*

‘The environment’ is defined in the Act (s.3) to mean land, air, water, ecosystems and organisms that include ‘human-made’ or modified areas or structures, and the amenity value of an area (that is, any condition of the area that contributes to an enjoyment of it).

Environment Protection Authority—Functions and Powers

The Act establishes the Environment Protection Authority (EPA) (s.11). Among the EPA’s functions is to prepare draft environment protection policies (EPPs) and to promote the objects of the Act by Commonwealth, State and local government bodies, as well as the private sector and the public.

In performing its functions the EPA is required to consult with agencies of the other States and Territories and of the Commonwealth, and other inter-governmental agencies that have functions corresponding to those of the EPA (s.13).

EPPs may generally be made towards securing the objects of this Act, including matters to be determined by the EPA concerning applications for, and the granting of, environmental authorisations under Part 6 and relevant offences and penalties where enforceable controls and requirements are included (s.27). After drafting EPPs, the EPA is required to give notice in the press about the availability of the EPPs and invite submissions from interested people (s.28).

To ensure compliance with an EPP or other environmental duties or conditions under this Act, the EPA has the power to serve an environment protection order on any person, specifying to whom the order is addressed and for what reason, and creating an offence and penalty for non-compliance (s.93).

Officers authorised by the EPA and State police officers have extensive powers of entry, search and inspection for the purposes of this Act, as well as the power to take audio-visual recordings and to seize and retain things as specified under the Act (s.87). The Act creates offences and penalties for hindering and wilfully obstructing authorised officers from exercising their powers (s.90).

Family and Community Services Act 1972 One of the many objectives of the *Family and Community Services Act 1972* is to promote the welfare of the South Australian community generally and of Aboriginal individuals, families and groups in the community. It is designed to assist in the provision, implementation and promotion of services to assist them to overcome the disadvantages they suffer, and to encourage them to participate in the life of the community (ss.10(1)(a) and (e)).

The Act states that in providing any service under it, the Minister and the Department must not discriminate against, or in favour of, any person on the grounds of race, unless necessary to assist a person to overcome any social or other disadvantage arising out of his or her racial origin (s.10(3)). The Act requires the Minister and the Department to take into account the different traditions, cultural values and religious beliefs of ethnic or racial groups in the community (s.10(4)).

The Minister is empowered, for the purpose of giving effect to the objects of this Act, to employ the resources of the Department as the Minister sees fit, establish any facility, acquire land under the provisions of the *Land Acquisition Act 1969* (see below), and perform any other action that may be necessary or expedient for this (s.10(5)).

Forestry Act 1950 The *Forestry Act 1950* empowers the Governor to proclaim any Crown lands as a forest reserve and to declare any part(s) of such forest reserves as a native forest reserve for the purposes of the conservation, development and management

of that land to support native fauna and flora (s.3). The Act requires the Minister to manage a forest reserve having regard to the purposes for which it was established and to ensure that nothing is undertaken in a reserve that is inconsistent with the purposes for which it was established (s.9A).

Forest wardens appointed by the Minister (under s.8A) are given wide powers to stop and question people acting suspiciously, and to eject offenders from a reserve, if an offence is being, or has been, or is suspected of being, committed against this Act (s.8C(1)). It is an offence not to comply with the demands made by a warden, or to hinder, abuse or assault a warden acting under this Act (ss.8C(3)-(8)).

The main objectives of the *Gas Act 1997* include the establishment and maintenance of a safe and efficient system of gas distribution and supply (s.3). *Gas Act 1997*

The Act (s.46) enables a gas entity to acquire land in accordance with the *Land Acquisition Act 1969* (see below), but may only acquire land by compulsory process with the written consent of the Minister administering this Act. The Act (s.97) allows a gas entity to install any gas infrastructure on public land, that is, Crown land or land owned by an agency or instrumentality of the Crown, a council or other authority.

A ‘gas entity’ is any person licensed under Part 3 of the Act.

Under the *Irrigation Act 1994*, any land that was used to carry on the business of primary production and that was connected to an irrigation system any time prior to the commencement of this Act (2 June 1994), is deemed to be a private irrigation district for the purposes of this Act (s.9). The owners of land may also apply to the Minister for conversion of their land to a private irrigation area. If the Minister is satisfied that the land will be used to carry on the business of primary production, that all long term occupiers have been notified and that no objections have been received from those occupiers, the Minister may declare that land to be a private irrigation district (s.10). The land then comes under the control of the irrigation authority, which has extensive powers and functions relating to the installation of irrigation infrastructure, and acquisition of *Irrigation Act 1994* and *Irrigation (Land Tenure) Act 1930*

land under the *Land Acquisition Act 1969* (see below) (Irrigation Act, ss.3, 18, 30 and 31).

Under the *Irrigation (Land Tenure) Act 1930* (s.9), all property, both real and personal, including all works for irrigation of land or the reclamation of swamp land, is transferred to and vested in the Minister, who is a Body Corporate for the purposes of this Act (s.8). Any land within an irrigation area may be offered on perpetual lease in such an area and on such terms as the Land Board established under the *Crown Lands Act 1929* (see above) decides and as approved by the Minister (s.42).

Land Acquisition Act 1969 The *Land Acquisition Act 1969* relates to the Crown acquiring land (both native title and other title) on just terms (ss.3 and 7), including under legislation providing for the compulsory acquisition of land (for example, the *Lands for Public Purposes Acquisition Act 1914*) or by an agreement made under the Land Acquisition Act (s.15).

The *Land Acquisition (Native Title) Amendments Act 1994* has made extension provisions to this Act for native title issues.

Provisions Relating to Native Title

If the Government proposes to acquire land, a person who has an interest in the land must: be notified (s.10); have the reason for the intended acquisition explained (s.11); and be told that they have a right to object to the acquisition (s.12). Grounds for objection specified in the Act (s.12) include that the intended purpose of the acquisition would seriously impair scenic beauty, destroy, damage or interfere with an Aboriginal site, the public interest or some other grounds stated in the request by the interested party. Registered claimants to, and holders of, native title in the land, and representative Aboriginal bodies, may hold the relevant interest in land.

If the notice of acquisition relates to native title land, it must contain a notice explaining matters relating to compensation to the people claiming native title (s.16(1a)). An acquisition of land does not itself extinguish native title except if the purpose stated in the notice of acquisition is inconsistent with the continued existence of native title (s.16(3a)).

Where an acquisition is being made to transfer the land to a person, and not the Crown, the Government must first

negotiate with the native title parties in good faith (s.19). If the parties are unable to reach an agreement, they may apply to the Court established under the *Environment, Resources and Development Court Act 1993* (see 4.6 below) for a resolution of (but not compensation for) the matter (s.20).

The Court is required to consider such matters as the effect of the proposed acquisition on native title, the way of life, culture and traditions of any of the native title parties, freedom of access to the land and freedom to carry out ceremonies, rites or other activities of cultural significance on the land in accordance with their traditions, and any area or site of particular significance to the native title parties (s.21). The Minister has the power to overrule a s.21 determination and substitute another one if the Minister considers it to be in the interests of the State to do so (s.22).

In the matter of any acquisition under this Act, the Crown is required to negotiate with all interested people, including native title claimants, on the issue of compensation (s.23(1)). In the case of native title claimants, the parties may apply to the ERD Court to mediate between them to assist in obtaining an agreement (s.23(3)).

If native title land is acquired under the Act, and at the end of two months from publication of a notice of acquisition in the *Gazette* no claim for compensation has been notified, the Crown may apply to the Land and Valuation Court of the State to declare that the land is not subject to native title, or to fix compensation to be held in trust subject to receipt of a native title claim over the relevant land within a period of six years of the date of the order (s.23D).

The principles of compensation are set out under the Act (ss.25(1) and (2)) and provide that, where native title land is acquired from native title holders, the latter must be compensated for the diminution, impairment, loss or other effect on the native title of the acquisition or the consequent use of the land for the purpose for which it was acquired (see also s.51(1) of the *Native Title Act 1993* (Cth)).

Access to Land

The Act provides the Crown with broad powers of entry and temporary occupation of land for purposes related to, and authorised under, this Act (ss.27 and 28). However, written notice is required to be given to all those who hold, or may

hold, native title in the land (ss.27(2)(a), 28(2)(a) and 28A). The Act (s.28A(3)) also provides that in the case of (a) the intended removal of minerals from the land or substantial interference with the land or its use or enjoyment, the notice must be given two months in advance; in all other cases (b), at least seven days' notice must be given before entry (ss.28A(1) and (2)).

In the case of (a), the Crown is also required to negotiate in good faith with the relevant native title parties: these parties are the people who are at the relevant period registered under the law of the State or the Commonwealth as holders of or claimants to native title in the land and the negotiations are required to be conducted with the registered representatives of those people as per the *Native Title (South Australia) Act 1994* (see 4.6 below).

Acquisition of Land for Housing

The Act (s.26G) also makes provision for the acquisition of land constituting or including a place of residence to be acquired under it with the assistance of the Re-Housing Committee (established under s.26A of the Act). The Committee consists of five members appointed by the Governor, one of whom must be a person with expertise in Aboriginal housing nominated by the Minister for Aboriginal Affairs (s.26A(2)(b)).

The Committee has the power to make arrangements with the Crown or a person, or body of people, by which the applicant will be re-housed in a satisfactory social environment, or any social problems arising from the acquisition will be overcome (s.26G(4)(a)). It may also recommend to the Crown that it provide financial assistance to the applicant to enable accommodation to be obtained in a satisfactory social environment or for the purpose of overcoming or ameliorating any other social problems arising from the acquisition.

Lands for Public Purposes Acquisition Act 1914 The long title of the *Lands for Public Purposes Acquisition Act 1914* indicates that its purpose is to provide for the acquisition by the Crown of lands for public purposes. These include lands for offices and buildings to accommodate State departments or Government works that require land (s.4).

The Act (s.6) allows the promoter of a public work to acquire land either by agreement or compulsory process for a public

purpose. The promoter is the person appointed by the proclamation of a public work to undertake the work (ss.3 and 7).

The Governor may grant an inalienable freehold title to the Maralinga Tjarutja under the *Maralinga Tjarutja Land Rights Act 1984* (s.13). Compulsory acquisition, resumption or forfeiture of any estate or interest of these lands under South Australian law is prohibited and the land cannot be alienated (ss.14-15).

*Maralinga
Tjarutja Land
Rights Act
1984*

The lands vested in the Maralinga Tjarutja do not include an area of about 510 square kilometres around the Emu nuclear test sites, nor another 200 square kilometres area immediately to the west of land retained by the Commonwealth on which the Maralinga nuclear tests were conducted between 1956 and 1963, although they are subject to some control by the Maralinga Tjarutja and may be vested in the Maralinga Tjarutja some time in the future (see ss.3, 13 and 18).

The Maralinga lands were granted on the basis that certain people were acknowledged as the traditional owners of these lands; 'traditional owners' are defined in the Act as being those people who have, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part(s) of them (s.3).

The Maralinga Tjarutja has the power to grant leases or licenses on behalf of the traditional owners, or an organisation comprised of these, for an unlimited period for up to 50 years to the Crown or for up to five years to any other person or body of people (s.5(2)(b)). The land grant of most of these lands is dated 6 December 1984 and covers an area of about 76,420 square kilometres (or about 7.7 per cent of the area of the State) and the grant of all of the additional lands is dated 6 December 1991.

The Maralinga Tjarutja is a body corporate whose functions include ascertaining the wishes and opinions of the traditional owners of the lands and giving effect to them if possible, protecting the interests of the traditional owners in relation to the management, use and control of the lands and negotiating with people wanting to use, occupy or gain access to any part of the lands. The powers, functions and affairs of the Maralinga Tjarutja are exercised and administered by its Council, which, in making decisions and conducting business,

is required to consult with the traditional owners and have regard to their customs. All traditional owners are members of the Maralinga Tjarutja (see ss.5-8).

Access to Maralinga Tjarutja Lands

The Act provides that the Council of the Maralinga Tjarutja has control over access to the land, with all traditional owners having right of access; the traditional owners may also invite other Aboriginal people to enter the land (s.18). The Maralinga Tjarutja may refuse or grant conditional or unconditional permission to enter the land and the Council may also evict these visitors.

These restrictions do not apply to police officers or officers acting under statutory authority, or candidates for election to the Federal or State Parliament, or people who can prove they obtained a licence to take rabbits on the land prior to the Act coming into force, or in the case of emergencies, or in the case of minerals operations (covered by s.21 of the Act), or the construction of roads by the Commissioner for Highways. Officers other than police, political candidates and people invited by traditional owners must give reasonable notice of the proposed entry.

Members of the public are provided with free access to a conservation park outlined in Schedule 4 and the roads described in Schedules 2 and 3 (ss.28-30). Any regulations that apply to the depasturing of stock by the holders of pastoral leases under the *Pastoral Act 1934* (repealed, see now *Pastoral Land Management and Conservation Act 1989* below) apply in respect of the depasturing of stock upon the lands as if the Maralinga Tjarutja were the holder of a lease in respect of the lands (see ss.42 and 44(1)(b)). The Maralinga Tjarutja does not have the power to make by-laws. However, the Governor may make regulations concerning the depasturing of stock on any specified portion of the lands. Regulations may also be made, upon consultation with the Maralinga Tjarutja, concerning any activities on the lands that may have adverse consequences (ss.44(1)(b)-(c) and 44(3)). This specifically includes regulations concerning alcoholic liquor (s.44(1)(d)).

Tribal Assessors

A Tribal Assessor is appointed by the Minister with the approval of the Maralinga Tjarutja. Any traditional owner

who is aggrieved by a decision or action of the Maralinga Tjarutja or any of its members may appeal to the Assessor against such a decision or action. Appeals are informal and the Assessor should observe the relevant customs and traditions. The Assessor may give directions or refer a matter back to the Maralinga Tjarutja to be dealt with in accordance with their directions. A local court may make an order to compel compliance with an Assessor's directions (ss.34-35).

Parliamentary Committee

The Act constitutes the Aboriginal Lands Trust Parliamentary Committee (s.43(3)). The Committee comprises the Minister and two Government and two Opposition members of the State's House of Assembly and is required to take an interest in the operation of this Act, matters of relevance to the Aboriginal people who reside on the land as well as management use and control of the land. The Committee is required to report annually to the Parliament on its work.

The *Marginal Lands Act 1940* (s.3) empowers the Minister to acquire marginal land, which is defined in the Act (s.2) as being land that has been used principally for wheat growing but that, in the opinion of the Minister, has become unsuitable, due to inadequate rainfalls and other causes, for wheat growing as the principal operation carried on that land. The acquisition would be subject to the provisions of the *Land Acquisition Act 1969* (see above).

Marginal Lands Act 1940

The Act (s.4) also gives the Minister the power to lease the land to such people as the Minister approves on the recommendation of the Land Board (established under the *Crown Lands Act 1929* (see above)), subject to the terms and conditions approved by the Land Board and any other relevant matters set out in the Crown Lands Act.

The *Murray-Darling Basin Act 1993* (s.1) specifies that its purpose is to approve and provide for carrying out an agreement between the Commonwealth, New South Wales, Victoria and South Australia with regard to the water, land and other environmental resources of the Murray-Darling Basin (MDB).

Murray-Darling Basin Act 1993

The Act confirms approval of the agreement, which is annexed to, and forms part of, the Act (s.5). The Governor may appoint two Commissioners and two Deputy-Commissioners representing South Australia to the MDB Commission (s.6).

The Commission has the power to authorise a person to enter land for the purposes of the Act and the agreement (s.13) and also authorises the construction of required works (s.16).

Any body declared by the Minister as a relevant water authority may acquire the land necessary for the construction, control, maintenance and operation of the required works (subject to the *Land Acquisition Act 1969*, see above) and dispose of such land (ss.17-20).

*National Parks
and Wildlife
Act 1972*

The long title of the *National Parks and Wildlife Act 1972* suggests that its objective is to provide for the establishment and management of reserves for public enjoyment and benefit, for the conservation of wildlife in a natural habitat, and other purposes. The Act (s.9) provides the Minister with the power to acquire land for the purposes of this Act but subject to the provisions of the *Land Acquisition Act 1969* (see above).

The Act provides for the establishment and appointment of members of the South Australian National Parks and Wildlife Council by the Governor on the recommendation of the Minister (s.15). None of the members are required to be an Aboriginal person but all of them must be people who, in the opinion of the Minister, are committed to the conservation of animals, plants and other natural resources.

The Minister may, at the request of the Council, establish one or more advisory committees to advise it on such matters as threatened species, the management of wildlife, the issuing of permits, plans of management and, specifically, the involvement of Aboriginal people in the management of land and wildlife (s.19E(4)).

Consultative Committees

The Minister may also establish consultative committees to represent the community interest in the management of reserves established under the Act and the conservation of animals, plants and ecosystems in a particular part of the State (s.19M (1)).

Section 19M(2) requires that the members of a consultative committee must have local knowledge that is relevant to, or be interested in, the management of reserves or the conservation of plants, animals or ecosystems in that part of the State in relation to which the consultative committee is established (s.19M(3)). This would facilitate Aboriginal representation in a number of areas in the State.

Establishment of Reserves

The Act provides for the establishment of reserves for its purposes (ss.27-34A).

These comprise national parks, conservation parks, game reserves, recreation parks and regional reserves, which are listed in Schedules 3 to 6 of, or may be proclaimed by the Governor under, this Act. Conservation parks and regional reserves may be proclaimed for purposes that include the conservation of the natural and historical features of the land (see ss.30(1) and 34A(1) respectively). These could include Aboriginal sites.

Provisions Relating to Aboriginal People

The Act provides that the constitution of a reserve by proclamation under this Act on or after 1 January 1994 is subject to the existence of native title when the proclamation was made (s.34B), as is the addition of land to a reserve made after 1 January 1994. Similar provision is made in respect of sanctuaries proclaimed under Division 7 of Part 2 (see s.44(1a)).

Most of the restrictions on taking protected animals and native plants do not apply to Aboriginal people when the animals or plants are taken for food on a non-commercial basis for the hunter or their dependants, or for Aboriginal cultural purposes (ss.68C to 68E); Aboriginal people are not required to hold a permit for hunting an animal for the purposes of the Act (s.68A). The Governor is empowered to make regulations which exempt (conditionally or unconditionally) Aboriginal people generally, or Aboriginal people of a 'specified class', from all or any of the provisions of this Act in such portion of the State as may be specified in the regulations (s.80(2)(w)).

Native Vegetation Act 1991 With some minor exceptions not relevant for these purposes, the *Native Vegetation Act 1991* applies to the whole of the State, and this would include to the Pitjantjatjara and Maralinga lands (s.4). The objects of the Act are the conservation of the native vegetation of the State and the provision of incentives and assistance to landowners in relation to the preservation, enhancement and management of native vegetation (s.6).

Native vegetation includes a plant or plants of a species indigenous to the State, including those growing in or under the waters of the sea (ss.3(1)). The Principles of Clearance of Native Vegetation are set out in Schedule 1. There are no exemptions for Aboriginal activities.

A seven-member Native Vegetation Council is established, with members being nominees from interested organisations such as the SA Conservation Council, the Local Government Association and the United Farmers and Stock-Owners of SA Inc. The Commonwealth Minister for the Environment also nominates a member. The Council authorises people to clear native vegetation (including by use of fire); unauthorised clearance is an offence (ss.26-29).

The Act (s.23) empowers the Minister to enter into a heritage agreement with the owner of land on which native vegetation is growing (see further under *Heritage Act 1993*, 4.2 below). A heritage agreement may: include any provision for the preservation or enhancement of native vegetation; restrict the use of the land; require or restrict specified works on the land; and provide for the management of the land, native vegetation on the land or any animals living on or visiting the land (s.23A). These agreements are enforceable in the District Court (s.23C).

Outback Areas Community Development Trust Act 1978 The *Outback Areas Community Development Trust Act 1978* (s.4) defines areas to which the Act may apply as the whole of the State except districts and municipalities established under the *Local Government Act 1934* and Aboriginal reserves. The Act establishes the Outback Areas Community Development Trust, which exercises such powers and performs such functions in relation to its area as are assigned to it under the Act (s.5). The Trust generally carries out development projects and provides services for local communities in such areas (s.15).

The objectives of the *Pastoral Land Management and Conservation Act 1989* include ensuring that pastoral land of the State is used and managed prudently and degradation is avoided, and providing a form of tenure of Crown land for pastoral purposes that is conducive to the economic viability of the pastoral industry, while at the same time recognising the right of Aboriginal people to follow traditional pursuits on pastoral land (s.4).

Pastoral Land Management and Conservation Act 1989

The Minister and the Pastoral Board established under the Act (s.12) are required to act consistently with, and seek to further the objects of, the Act (s.5).

‘Pastoral purposes’ are defined in the Act as being the pasturing of stock and ancillary purposes (s.3); stock means any species of animal permitted by the terms of a pastoral lease to be pastured by the lessee on the land as part of the commercial enterprise under the lease. Further provisions relating to stock are in the *Stock Act 1990*.

The Act prohibits the Minister from granting a freehold title over pastoral land unless the Governor has determined that the land should be used for some purpose other than pastoral purposes. A pastoral lease is the only form of tenure that can be granted over Crown land that is to be wholly or substantially used for pastoral purposes.

The Act recognises the right of Aboriginal people to follow traditional pursuits on pastoral land in South Australia. It reserves the right of Aboriginal people to enter, travel across or stay on pastoral land for the purpose of following traditional pursuits (s.47). The right excludes camping within a radius of one kilometre of a house or building on the property, or within a radius of 500 metres of a dam or stock watering point. A pastoral lease is granted subject to a lessee’s obligation not to hinder or obstruct any person who is exercising a right of access to the land under this or any other Act (s.22(1)(a)(vi)).

Clause 5(1) of the Schedule provides for the continuance of leases granted under the repealed *Pastoral Act 1936* for 42 years as of the date of commencement of this Act (7 September 1989). However, the effect of Clause 5(2)(c) is that all reservations relating to Aboriginal people and access to land under the repealed Act have been revoked.

Pitjantjatjara Land Rights Act 1981 The *Pitjantjatjara Land Rights Act 1981* provides for the Governor to grant land in the north-west area of the State, including land in the North-West Reserve and a number of pastoral leases, in freehold to the Anangu Pitjantjatjara (s.4 and Schedule 1).

The land granted is inalienable, and compulsory acquisition, resumption or forfeiture of any estate or interest in the lands under a law of the State is prohibited (ss.15-17). The land grant of all Anangu Pitjantjatjara land is dated 30 October 1981 and covers an area of about 102,630 square kilometres or about 10.4 per cent of the State.

This Act has been described as ‘a special measure for the purpose of adjusting the law of the State to grant legal recognition and protection of the claims of the Anangu Pitjantjatjara to the traditional homelands on which they live and as the legal means by which present and future generations may take up and rebuild their relationship with their country in accordance with tradition, free of disturbance from others’ (see the decision of High Court in *Gerhardy v Brown* (1985) 159 CLR 70).

Powers and Functions of the Anangu Pitjantjatjara

The Anangu Pitjantjatjara is a body corporate comprising all Pitjantjatjaras, with an executive board comprising a chairperson and 10 other members, who are elected at an annual general meeting. Its functions include: ascertaining the wishes and opinions of the traditional owners of the lands and giving effect to them if possible; protecting the interests of the traditional owners in relation to the management, use and control of the lands; and negotiating with people wanting to use, occupy or gain access to any part of the lands.

The Anangu Pitjantjatjara is required to consult with the relevant traditional owners before carrying out, or authorising or permitting the carrying out, of any proposal relating to the use, administration or development of any portion of the lands. The Anangu Pitjantjatjara must be satisfied that the Pitjantjatjaras have had the opportunity to express their views and have given their informed consent (see generally ss.5-14).

The Anangu Pitjantjatjara has the power to grant leases or licences to a Pitjantjatjara or an organisation of Pitjantjatjaras for any period it chooses, to the Crown for up to 50 years and

to any other person or body of people for up to five years (s.6(2)). The Anangu Pitjantjatjara also has power to make by-laws on matters relating to the abuse of alcohol and other regulated substances, and prohibiting specified forms of gambling (ss.43(3 to 13)).

Access to Land Under Anangu Pitjantjatjara Control

The Act contains provisions relating to access (s.19). All Pitjantjatjaras have unrestricted rights of access to the lands, but all others must not enter the lands without the Anangu Pitjantjatjara's permission. Application for permission to enter Anangu Pitjantjatjara land must be made to the executive board, which has right of refusal, and the right to grant conditional or unconditional entry.

These restrictions do not apply to police officers or other officers acting under statutory authority, candidates campaigning for the Federal or State Parliament, emergencies, or minerals operations as provided for under the Act (s.20). Officers other than police and political candidates are required to give reasonable notice of proposed entry to the Anangu Pitjantjatjara.

In the case of mining operations, access must be confined to those parts of the land specified for the operations.

Where a pastoral lease remains in force in relation to any part of Anangu Pitjantjatjara lands, the lessee and the lessee's family and employees and their families, or any others authorised by the lessee in writing, may enter such lands without the Anangu Pitjantjatjara's permission, but any written authorisation must be given to the Anangu Pitjantjatjara (ss.19(11)-(12)). The Act contains special provisions relating to roads and highways, providing for arbitration if the Anangu Pitjantjatjara and Commissioner for Highways cannot agree on a matter relating to road and associated works, as well as ensuring public access to the relevant portions of the Stuart Highway and the Oodnadatta-Granite Downs Road. (ss.31-34)

Regulation of Stock

Any regulations relating to overstocking that apply to holders of pastoral leases under the *Pastoral Act 1936* (repealed, see now *Pastoral Land Management and Conservation Act 1989*, above) apply in respect of the depasturing of stock upon the

lands (other than at the Granite Downs Station) as if the Anangu Pitjantjatjara were the holder of a lease in respect of the lands (s.42b). The Governor may also make regulations concerning the depasturing of stock on any specified portion of the lands, and also, upon the recommendation of the Anangu Pitjantjatjara, any activities on the lands that may have adverse consequences may be regulated (s.43(1)(b)).

Tribal Assessors

A Tribal Assessor is appointed by the Minister with the approval of the Anangu Pitjantjatjara. Any Pitjantjatjara person who is aggrieved by a decision or action of the Anangu Pitjantjatjara, or any of its members, may appeal to the Assessor against such decision or action. Appeals are informal and the Assessor should observe the relevant customs and traditions. The Assessor may give directions or refer a matter back to the Anangu Pitjantjatjara to be dealt with in accordance with their directions. A local court may make an order to compel compliance with an Assessor's directions (ss.36 and 37).

The Act constitutes the Aboriginal Lands Trust Parliamentary Committee (ss.42c(2)-(3)). The Committee comprises the Minister and two Government and two Opposition members of the State's House of Assembly. Members of the Committee are required to take an interest in the operation of this Act and matters of relevance to the Aboriginal people who reside on the land, and the management, use and control of, the land. The Committee is required to report annually to the Parliament on its work.

Soil Conservation and Land Care Act 1989

The objects of the *Soil Conservation and Land Care Act 1989* are, as set out in the Act (s.6), to provide legislative recognition that:

- the land and its soil, vegetation and water constitute the most important resource of the State;
- degradation is a threat to the economy and the community of the State; and
- a system must be established ensuring that planned and systematic conservation of the land becomes a priority for the State.

The Act provides for the establishment of the Soil Conservation Council, a body of 12 people drawn primarily from farmers' groups and pastoral and conservation bodies (s.14). Its functions include advising the Minister on matters relating to the objects of this Act and making recommendations to the Minister on the declaration of soil conservation districts and boards (s.19 and 22).

The boards are also responsible for developing community awareness and understanding in the district of land conservation issues, and promoting the principles that land must be used within its capacity and that forward planning on that basis must become standard land management practice (s.29(1)). A board is required to develop a district soil conservation plan that identifies the capability of the land, the extent of degradation, measures that should be taken for rehabilitation and a programme of land conservation (s.36). The Board may also make soil conservation orders requiring landowners to take, or refrain from taking, such action as is specified in s.38.

Officers with statutory authority as provided under this Act (s.53) have wide powers of entry onto land to carry out inspections, take samples and photographs, and (but subject to the landowner's consent) erect markers or photo-points for survey or research. With some exceptions, landowners are entitled to receive seven days' notice of the intended entry, but the Act makes it an offence to hinder or obstruct people exercising powers under it (s.54).

The *Water Resources Act 1997* repeals the *Catchment Water Management Act 1995* and the *Water Resources Act 1990*. It implements a comprehensive regime for the use and management of the water resources of the State to ensure that those resources are able to sustain the physical, economic and social well-being of the people of the State while protecting the eco-system and its biological diversity (s.6). The Act applies to all areas of the State, including the Pitjantjatjara and Maralinga lands.

*Water
Resources
Act 1997*

Whereas the Act does allow the occupier of land adjacent to a lake or a watercourse to draw that water for domestic and small scale watering of stock, generally the Act imposes a comprehensive regime of permits and licenses relating to the taking of water throughout the State (ss.7, 9 and 11). The

relevant authority for the granting of water licences and other relevant instruments under the Act is the Minister administering the Act (s.10). The Minister is also responsible for keeping the condition of the State's water supply under review and for the allocation of water from prescribed watercourses, lakes, wells and other sources (s.45).

The Minister may implement, and amend if necessary, the State Water Plan, *South Australia - Our Water, Our Future*, signed in September 1995 (s.90).

Any relevant area of the State may also be covered by catchment water management, water allocation or local water management plans (ss.92-115), which are drawn up in conjunction with Development Plans under the *Development Act 1993* (see above). Local Water Management Plans may be drawn up by each council in the State and must be referred to the public for comment. The Minister and council must consider those comments.

Membership of Catchment Water Management Boards ensures community involvement in the management of resources by including local knowledge and active community membership as criteria for membership for at least one person on the board.

This Act must also be read in conjunction with the *Water Conservation Act 1930* and the *Waterworks Act 1932*, which contain additional provisions relating to the proclamation of water districts and the vesting of Water Conservation Reserves in local councils. Other matters dealt with under those Acts include the construction, maintenance and servicing of waterworks (such as, any works related to the storage, channelling and accumulation of water, including buildings, reservoirs, dams, tanks, aqueducts, wells, channels, pipes, drains, cuts, culverts, tunnels, sluices, trenches filters and bridges (for example, see s.5 of the Water Conservation Act).

South Australian Water Corporation Act 1997 Another Act of relevance to the Water Resources Act is the *South Australian Water Corporation Act 1997* (s.5), which establishes the South Australian Water Corporation. The Corporation's functions include providing a supply of water by means of reticulated systems, storage, treatment and supply of bulk water, and removal and treatment of waste-water through sewerage systems.

The purpose of the *Wilderness Protection Act 1992* is to provide for the protection of wilderness and the restoration of land to its condition before European colonisation (long title).

*Wilderness
Protection
Act 1992*

The Act (s.3(1)) defines ‘wilderness’ as land that meets the wilderness criteria outlined within the Act (s.3(2)). To meet these criteria, the land and its ecosystems must not have been affected, or only have been affected to a minor extent, by modern technology, and not been seriously affected by exotic animals, plants or organisms. ‘Modern technology’ is defined in the Act as all forms of human technology except Aboriginal technology (s.3(1)).

The Act provides the Minister for the Environment and Natural Resources with the power to acquire any land in the State for its purposes, but the Minister must observe the provisions of the *Land Acquisition Act 1969* when doing so (s.5).

The Minister is assisted by the Wilderness Advisory Committee, established under the Act (s.8), which makes recommendations on what land in the State should be constituted as a wilderness protection area or zone (s.11).

The Act required the Committee, as soon as possible after the Act came into effect (21 May 1992), to prepare a code of management for wilderness protection areas and zones (s.12). These areas and zones set out policies relating to matters that include the restoration of the land and its ecosystems to their condition before European colonisation, the preservation of Aboriginal sites and objects (as defined in the *Aboriginal Heritage Act 1988*, see 4.2 below), the preservation of historical sites and objects, hunting by Aboriginal people and the entry into and use of these areas and zones by Aboriginal people to observe Aboriginal tradition.

‘Aboriginal tradition’ is defined in the Act (s.3) as Aboriginal traditions, observances, customs or beliefs, and includes those that have evolved or developed since European colonisation.

The Act empowers the Governor by proclamation to constitute any land (and this would including Pitjantjatjara and Maralinga lands, but subject respectively to the consent of the Anangu Pitjantjatjara or Maralinga Tjarutja) as a wilderness protection area or zone (s.22).

If the land concerned, or part of it, is a reserve under the *National Parks and Wildlife Act 1972* (see above), that land

will cease being a reserve and the Parks Act will no longer apply to it. The grazing of stock and all other forms of primary production, and the construction or erection of roads, tracks, buildings or structures are prohibited unless specifically authorised under the applicable plan of management (s.26).

The Minister is required to draw up a plan of management for each zone or area as soon as possible after its proclamation. The plan must, to the greatest extent possible, implement the policies set out in the wilderness code of management that are relevant to the area or zone and any other matters set forth by the Minister in relation to attaining the objects of this Act and management of the zone or area (s.31).

The Minister may also declare any part of a zone or area as a prohibited area if it is considered necessary for the purposes of protecting human life or conserving wildlife; entry into these areas without a permit is illegal (s.33).

SOUTH AUSTRALIA

4.2 HERITAGE

For further details on the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), refer to Chapters 8.2 and 9.2.

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

The Act establishes a system to protect places, areas and objects that are of particular significance to Aboriginal and Torres Strait Islander people and empowers the Minister to make a declaration to protect an area of land or water of significance to Indigenous people. A declaration must be revoked if the Minister becomes satisfied that the relevant State law provides effective protection. The declarations are only intended to be used as a last resort after all other heritage mechanisms at State level have been exhausted. The following Acts are the relevant State Acts for South Australia.

The *Aboriginal Heritage Act 1988* is the primary State Act dealing with Aboriginal heritage in South Australia. It provides a comprehensive scheme for the location, protection and preservation of Aboriginal sites, objects and remains. Aboriginal sites and objects are defined in the Act in relation to their significance according to Aboriginal tradition, to Aboriginal archaeology, history or anthropology unless excluded by regulation (s.3). Aboriginal remains are the whole or part of the skeletal remains of an Aboriginal person, but do not include remains that have been buried in accordance with the laws of the State. The Act makes detailed provision for the registration of these sites and objects (ss.24(7) and (8)). The Act recognises traditional ownership, but does not vest the ownership of Aboriginal heritage in Aboriginal people.

Aboriginal Heritage Act 1988

The Act requires owners and occupiers of private land to report the discovery of Aboriginal sites, objects or remains to the Minister, but this requirement does not extend to the traditional owner of a site or object (ss.20). It is an offence to excavate land to uncover any Aboriginal site, object or remains unless the Minister has authorised it (s.21).

The Minister may also authorise a person to enter land to search for a site, object or remains if the Minister has reason to

believe that it has been or may be found on that land, and take possession of it if satisfied that this is necessary for its protection or preservation (s.22).

The Act (s.30) also provides the Minister with the power to acquire land for the purposes of protecting or preserving an Aboriginal site, object or remains. Such an acquisition must be made in accordance with the *Land Acquisition Act 1969* (see 4.1 above).

The Act (s.6) states that if the traditional owners of an Aboriginal site or object so request, the Minister must delegate to the traditional owners powers under specified sections of the Act dealing with the treatment of sites, sale of objects and the giving of information (see ss.6, 21, 23, 29 and 35).

To ensure preservation or conservation of sites, objects and remains, the Minister (with the approval of the Governor) may give directions prohibiting or restricting access or dealings as necessary. However, the Minister must take reasonable steps to give at least eight weeks' notice of the proposed directions to the Aboriginal Heritage Committee (see below), the relevant landowner or occupier, a representative of any traditional owners or other Aboriginal person(s) who, and any Aboriginal organisation that, in the opinion of the Minister may have a particular interest in the matter (s.24).

The Act imposes an obligation on people who own Aboriginal objects to take reasonable measures to protect them and makes it an offence to sell or dispose of objects without the Minister's consent or to remove them from the State (ss.28 and 29).

The Minister must accept the views of the traditional owners of land or an object in relation to whether these are of significance to Aboriginal tradition (s.13). Nothing in the Act prevents Aboriginal people from doing anything in relation to Aboriginal sites, objects or remains in accordance with Aboriginal tradition (s.37).

Aboriginal Heritage Committee

The Act establishes the Aboriginal Heritage Committee (s.7), which must consist of Aboriginal people appointed by the Minister from, as far as practicable, all parts of the State, to represent the interests of Aboriginal people throughout the State in the protection and preservation of Aboriginal heritage. The Minister is required to consult with the Aboriginal

Heritage Committee, along with other interested Aboriginal organisations or people or traditional owners before making determinations, authorisations or regulations (s.13) or restricting access to sites, objects or remains under the Act (s.24).

South Australian Aboriginal Heritage Fund

The Act establishes the South Australian Aboriginal Heritage Fund (s.19), which consists of money received from the Commonwealth and appropriated by the South Australian Parliament and by the Minister for the purposes of the Act. The Minister may apply the Fund to acquire land or Aboriginal objects or records under this Act, provide financial assistance in respect of research into Aboriginal heritage, make payments in respect of agreements (see next) for the administration of this Act and for any other purposes related to the protection or preservation of Aboriginal heritage.

Agreements

The Minister may enter into an Aboriginal heritage agreement with the owner of land on which there are any Aboriginal sites, objects or remains, but must take all reasonable steps to consult with the Aboriginal Heritage Committee, any Aboriginal organisation and any traditional owners or any other Aboriginal person who, in the Minister's opinion, has a particular interest in the matter, before doing so (s.37A).

Such agreements are binding on all current and future owners and occupiers of the land and the Registrar General must, on application by the Minister or any one of the parties to the agreement, note the agreement on the relevant title document to the land (s.37C). An agreement is legally enforceable in the District Court (s.37D).

Confidentiality

The Act requires the Minister to keep central archives relating to Aboriginal heritage (s.9). The Register of Aboriginal sites and objects (which forms a part of this archive) must contain entries describing sites or objects determined by the Minister to be Aboriginal sites or objects. As a rule, the confidentiality of information entered in the central or local archives relating to an Aboriginal site or object must be maintained. The exception is if the traditional owners of the site or object approve disclosure or all reasonable steps have been taken to

consult the traditional owners and the Minister, or organisation keeping the archive, is satisfied that there are no traditional owners or that they cannot be located or identified (s.10).

The Aboriginal Heritage Committee in the case of the central archives and the organisation keeping the archives in the case of local archives must also have approved the disclosure of information (s.10(2)). Section 12(5) of the Act also provides that where the Minister receives an application under s.12(3) of the Act in respect of a proposed action in relation to an area that includes an Aboriginal site or in which an Aboriginal object is located, the Minister must not disclose the exact location of the site or object if, in the Minister's opinion, the disclosure is likely to be detrimental to the protection or preservation of the site or object, or to be in contravention of Aboriginal tradition.

As a general rule, a person must not divulge information relating to Aboriginal sites, objects, remains or tradition (s.35). Such information may, however, be divulged with the authority of the Minister, but before doing so the Minister must consult with the Aboriginal Heritage Committee, any Aboriginal organisation, traditional owner or other Aboriginal person who, in the opinion of the Minister, has an interest in the matter.

Access

The Act empowers the Minister to authorise an Aboriginal person or a group of Aboriginal people to enter any land (including private land) to gain access to an Aboriginal site, object or remains (s.36). Before giving such authorisation, the Minister must allow the owner/occupier of the affected land to make representations on whether such authorisation should be given at all, and, if so, subject to what conditions the Minister is issuing the authorisation. If the Minister does give authorisation, the owner/occupier of this must be notified, and of any conditions of authorisation. It is an offence punishable by a penalty of \$2,000 or three months' imprisonment to hinder or obstruct a person acting under an authorisation granted under the Act without reasonable excuse (s.36(4)).

Unauthorised dealings with, or causing damage to, an Aboriginal site, object or remains, is an offence unless performed by Aboriginal people in accordance with Aboriginal tradition (ss.23 and 37).

The Minister is required, at the request of the traditional owners of an Aboriginal site or object, to delegate his or her powers to those traditional owners to enable them to prosecute for breaches of the Act, namely the excavation of land for the purpose of uncovering any site, object or remains (s.21), damage, disturbance or interference with any site or object (s.23), unauthorised sale of an Aboriginal object (s.29) and unauthorised divulgence of information in contravention of Aboriginal tradition (s.35).

Under s.45 of the Act, prosecutions for offences can only be commenced by a person or bodies authorised to do so in accordance with specific provisions relating to Aboriginal sites, objects or remains, if:

- located on, or partly on, lands vested in Maralinga Tjarutja, under the *Maralinga Tjarutja Land Rights Act 1984*;
- located on, or partly on, lands vested in Anangu Pitjantjatjara, under the *Pitjantjatjara Land Rights Act 1981*;
- located on, or partly on, lands vested in the Aboriginal Lands Trust, under the *Aboriginal Lands Trust Act 1966*; or
- otherwise, only by a person authorised by the Minister upon application by the traditional owners of the relevant Aboriginal site or object.

All offences against this Act are summary offences (s.44).

For further details on the *Development Act 1993*, refer to 4.1 above.

Development Act 1993

Section 23(1) of the Act (s.23(1)) requires development plans to be prepared for the purposes of this Act and ensures that such a plan may apply to any part of the State (s.23(2)). A plan may set out planning or development objectives, or principles relating to the management or conservation of land or heritage places and areas, to be identified as a State Heritage Area (see also under *Heritage Act 1993* below) in the plan (s.23(3)(a)(iv)).

A plan may designate as a place of local heritage value an area if it (a) displays historical, economic or social themes that are of importance to the local area; (b) represents customs or ways

of life that are characteristic of the local area; (c) has played an important role in the lives of local residents; (d) displays aesthetic merit, design characteristics or construction techniques of significance to the local area; (e) is associated with a notable local personality or event; or (f) is a notable landmark in the area (s.23(4)).

No development may proceed unless approved by the relevant authorities for the purposes of the Act (s.32). ‘Development’, in relation to State or local heritage places, includes the demolition, removal, alteration of, or addition to, the place or any other work that could materially affect the heritage value of the place.

Heritage Act 1993 The objective of the *Heritage Act 1993* is to conserve places of heritage value (long title). The State Heritage Authority established under the Act has the power to enter a place of heritage value in the State Heritage Register if the place demonstrates, amongst other things, important aspects of the evolution or pattern of the State’s history (s.4); it has rare, uncommon or endangered qualities that are of cultural significance; it is an outstanding representative of a particular class of places of cultural significance; or it has strong spiritual or cultural associations for the community or a group within it (ss.16-17).

The Authority may designate a place provisionally entered in the Register as a place of specified significance, such as archaeological significance, but must give written notice to the relevant owners and occupiers of the land, the Minister and council, and in a newspaper of State-wide circulation (s.17). The Authority is required to give consideration to all representations made in respect of the application and the Minister may direct the removal of an entry if it is the view of the Minister that confirmation of the entry would be contrary to the public interest (s.18).

Heritage Agreements

After seeking and considering the advice of the Authority, the Minister may enter into an heritage agreement with the owner of land constituting a registered place or a state heritage area established by a development plan under the *Development Act 1993* (see above) (ss.3 and 33). Such an agreement may contain provisions to promote the conservation of such places

and the public's appreciation of their importance to South Australia's cultural heritage, as well as provisions restricting the use of the land, works to be carried out, management of the land and of any place or artefacts on it, and for assistance to the owner of the land (ss.33(1) and (2)).

Such agreements may also be entered into with the owner of land upon which native vegetation is growing or situated as provided for under the *Native Vegetation Act 1991* (see under 4.1 above and Schedule 2 of this Act, which inserts new sections 23 and 23A into the Native Vegetation Act).

An agreement attaches to the land and is binding on all current and subsequent owner/occupiers (ss.32 (2)-(4)) and must be registered on the relevant title instrument upon the application by the Minister or one of the parties to the agreement (s.34(2)). The Court established under the *Environment, Resources and Development Court Act 1993* (see 4.6 below) has power of enforcement (s.35).

State Heritage Register

The Authority maintains the State Heritage Register, which has an inventory containing descriptions of, and notes relating to, places designated in any development plan as places of local heritage value, places within the State entered on a register kept under a law of the Commonwealth, State heritage areas and heritage agreements (s.14). The Register must be made available for public inspection (s.15) and the Authority may correct any inaccuracies in entries (s.21).

Offences

Under the Act, it is an offence, without a permit, to excavate or disturb a registered place designated as a place of archaeological significance, or to remove cultural artefacts from such a place; or to excavate and disturb a registered place not designated as a place of archaeological significance for the purpose of searching for, or recovering, cultural artefacts; or to damage, destroy or dispose of a cultural artefact removed from a registered place designated as a place of archaeological significance, whether removed before or after registration (ss.25-29).

A person who intentionally damages a registered place so as to destroy or reduce its heritage value is also guilty of an offence, unless the damage results from an action authorised under a

specified Act (for example, *Development Act 1993*, *Mining Act 1971*, *Petroleum Act 1940* and *Petroleum (Submerged Lands) Act 1982*) (s.36).

If a person is convicted of an offence against this Act, the Environment, Resources and Development Court may (in addition to imposing a penalty) also order the person to make good any damage caused through the commission of the offence (s.37). The Court may also order that no development of the place be undertaken for a fixed period of not more than 10 years (s.38).

The application of the Act to Aboriginal sites, objects or remains is not beyond doubt and the scope of the *Aboriginal Heritage Act 1988* is such that the latter statute is likely to be of more direct application to the Indigenous people of South Australia. However, in that the provisions of this Act apply in conjunction with such statutes as the *Development Act 1993* there could be some advantage in bringing some Aboriginal heritage places under, or subject to agreements made under, this Act, to protect them from the effects of current or future development.

*Maralinga
Tjarutja Land
Rights Act
1984*

Under the *Maralinga Tjarutja Land Rights Act 1984* the Maralinga Tjarutja may compile a Register of sacred sites, recording either an identified site or, where a site is known to exist but has not been specifically identified, the boundaries of the area within which it is known to exist. The Register must be kept by the Maralinga Tjarutja in such a manner as it considers appropriate to prevent disclosure without the authority of the Maralinga Tjarutja (s.16).

There is no parallel provision for a Register of sacred sites in the *Pitjantjatjara Land Rights Act 1981* (see 4.1 above).

SOUTH AUSTRALIA

4.3 LOCAL GOVERNMENT

For a more detailed synopsis of the *Community Titles Act 1996*, see 4.1 above.

*Community
Titles Act
1996*

The Act makes provision for the subdivision of land into community lots (s.6). Among the matters that are required to be taken into consideration in processes under the Act are:

- encumbrances over the relevant land, which are defined to include statutory encumbrances, which, in turn, are defined to include an Aboriginal heritage agreement entered into under the *Aboriginal Heritage Act 1988* (see 4.2 above);
- an agreement relating to the management, preservation or conservation lodged under the *Development Act 1993* (see 4.1 and 4.2 above);
- a heritage agreement made under the *Heritage Act 1993* (see 4.2 above); and
- a heritage agreement entered into under the *Native Vegetation Act 1991* (see 4.1 above).

The Act (s.23(8)) requires the Registrar General to make notes or other endorsements on the relevant certificate(s) of title in relation to any statutory encumbrance(s).

The *Local Government Act 1934* does not apply to certain Aboriginal lands. Pitjantjatjara and Maralinga lands, for example, do not lie within a local government area under the Act, and therefore there is no municipal or district council with powers over those lands, and no rates are levied.

*Local
Government
Act 1934*

The Act empowers a council in the performance of its functions to undertake such projects as it sees fit (s.196(2)), these functions relate mainly to the development of the council's area plus any other functions approved by the Minister (s.196(1)).

The council must consider the impact a project may have on other services or facilities or business, as well as the objectives of any applicable development plan made under the

Development Act 1993 (see under 4.1 and 4.2 above), which would be of relevance to any Aboriginal places included in such a plan (s.196(4)).

The Act (ss.198(1)-(3)) provides municipal or district councils with the power to acquire land to carry out projects, but this is subject to the Minister's conditional or unconditional approval, and also to the provisions of the *Land Acquisition Act 1969*, which contains a number of provisions relating to native title rights and interests (see under 4.1 above). However, if a council is authorised to acquire land under another provision of this or any other Act then s.198(4) provides that ss.198(1)-(3) do not apply.

The power of a council under the Act (s.303) to declare any land in its area as a public street or road, subject to its provisions (s.303(1)), and to form, level, drain, improve, repair and alter levels of all streets, roads, alleyways, courts, lanes and thoroughfares, and engage in related works (s.314), stand in potential conflict with native title.

Care and Control Over Certain Public Lands

The Act vests care, control and management of all park lands and public squares, and all water and other reserves for public conveniences (subject to the *Harbours and Navigation Act 1993*, see further under 4.4 below) in the council for the area (ss.450 and 451). The Act gives a council the power to acquire land for the purpose of carrying out work for the prevention or mitigation of floods (s.640), but this is subject to the provisions of the *Land Acquisition Act 1969* (see 4.1 above).

Outback Areas Community Development Trust Act 1978 The long title of the *Outback Areas Community Development Trust Act 1978* states that its purpose is to establish the Outback Areas Community Trust (s.5).

The functions of the Trust are set out in the Act, and include carrying out development projects in the relevant outback area, making grants and loans to community organisations and carrying out works to improve communications to outback areas (s.15).

The Act defines these areas as being the whole of the State except those parts of the State that lie within municipalities and districts established under the *Local Government Act 1934*

(see above) and such parts of the State as lie within Aboriginal reserves (s.4).

The *Maralinga Tjarutja Land Rights Act 1984* (s.40) and the *Pitjantjatjara Land Rights Act 1981* (s.42) exclude the operation of the provisions of this Act on land administered under them (see further under 4.1 above for more information on both Acts).

SOUTH AUSTRALIA

4.4 MARINE

For a detailed synopsis of the provisions of the *Coastal Waters (State Powers) Act 1980* (Cth) and of the Commonwealth-State Offshore Agreement made under a regime comprising this and other Commonwealth Acts, and complementary State and Northern Territory legislation, refer to Chapter 9.4.

Coastal Waters (State Powers) Act 1980 (Cth)

The Act provides that the coastal waters of the States extend to three nautical miles into the territorial sea (s.4) and for the State to have full plenary powers over their coastal waters (s.5). The *Seas and Submerged Lands Act 1973* (Cth) (see below) extends the width of Australia's territorial sea to 12 nautical miles. This is in line with the statutory request by this State, as set out in the *South Australian Constitutional Powers (Coastal Waters) Act 1979* (Cth) to legislate an Act in accordance with the model provisions specified in the Schedule to the State Act.

The purpose of the *Coast Protection Act 1972* is to make provision for the conservation and protection of the beaches and coast of the State and for related purposes (long title).

Coast Protection Act 1972

The coast is defined in the Act to be all land within the mean high water mark and the mean low water mark on the seashore at spring tides, or above and within 100 metres of that mean high water mark, or below and within three nautical miles of that mean low water mark, or within any estuary, inlet, river, creek, bay or lake and subject to the ebb and flow of the tide, or declared by a regulation made under the Act to be the coast (s.5).

The Act establishes the Coast Protection Board (s.6), which is subject to the Minister's control and direction (s.7) and comprises six members (s.8). Its duties include to:

- protect the coast from erosion, damage, deterioration, pollution or misuse;
- restore any part of the coast subjected to such erosion, damage, and so on;

- develop any part of the coast for aesthetic improvement or render it more appropriate for the use of those who may resort thereto;
- manage, maintain and, where appropriate, develop and improve coast facilities that are vested in, or under the care, control and management of, the Board; and
- report to the Minister on matters referred to the Board for advice.

The Act empowers the Governor, on the recommendation of the Board, to proclaim a Coast Protection District (CPD) consisting of any part of the coast (s.19). Where there are councils, the Board must have sought not only representations from them about the proposal to declare a CPD but also submitted a report to the Minister containing details and comments on these representations.

The Act obliges the Board to investigate to determine the most appropriate measures to be taken to protect, restore or develop the coast in a CPD in the best interests of the public (s.20). The results of this investigation will constitute the management plan, into which any relevant council must also have had an input in relation to matters of its concern or interest. The plan must set out any measures that the Board considers necessary or expedient for the protection, restoration or development of the coast.

The Board has the power to carry out any works on land in a CPD as is necessary or expedient to give effect to a management plan, and to repair or restore any damage to the coast resulting from a storm or pollution (s.21). The Act also authorises the Board to remove sand and other matter from any part of the coast, except private land, to another part of the coast for the purpose of protecting, restoring or developing the coast or any part of it (s.21A).

The Board may, subject to the Minister's approval, acquire any part of the coast to enable it to execute works for the purposes of the Act or any other related purpose (s.22). The *Land Acquisition Act 1969* (see 4.1 above) applies to such acquisitions. The Board may also sell, lease or otherwise dispose of the land so acquired, or by agreement with the relevant council, may place the land under the care, control and management of the council.

The Act empowers the Board, and anyone authorised by it, to enter and remain on any land, make the necessary inspections, affix survey devices and bore into the land for the Act's purposes (s.23). However, in the case of private land, the owner/occupier must be given at least seven days' notice. Offences and penalties are also provided for the wilful obstruction of a person lawfully acting under the Act.

The Minister may declare any part of a CPD, except private land, as a restricted area (s.34). The notice declaring the restricted area may impose such restrictions or prohibitions on access as the Minister chooses.

The Board must put up notices advising of these restrictions and/or prohibitions upon or in the vicinity of the affected area. It is an offence and penalties are provided for ignoring these signs, which are enforceable under the Act (s.34B) by wardens appointed under it (s.34A).

The purposes of the *Fisheries Act 1982* are to provide for the conservation, enhancement and management of the State's fisheries, to regulate fishing and ensure the protection of certain fish, to provide for the protection of marine mammals and aquatic habitat, to provide for the control of exotic fish and diseases in fish, and to regulate fish farming and fish processing.

*Fisheries
Act 1982*

The provisions of this Act (Part 2) and of the *Coastal Waters (State Powers) Act 1980* (Cth) (s.5(c) - see also above) ensure that effect is given to the Joint Authority, established under the Fisheries Act (s.61) and acting under the *Fisheries Management Act 1991* (Cth) (ss.66-68 - see also Chapter 9.4), of which the State Minister is a member. The effect of this is to apply the provisions of this Act in the territorial sea of the State to ensure that through proper conservation, preservation and management, the living resources of these waters are not endangered or over-exploited (s.15).

Fisheries officers appointed under the Act (s.25) have extensive powers for the administration and enforcement of this Act in relation to any premises, land, waters, boats, vehicles, equipment, devices or other thing that the officer suspects may have been in some way involved in connection with an activity or omission that is contrary to this Act (s.28). Fishery activities may only be carried out by licensed people on licensed boats (s.34), and these licences must be carried at

all times while such people and their boats are engaged in fishing activities (s.40). These provisions apply to all people and boats engaged in fishing activities, which are defined in the Act to include the catching, taking or obtaining of fish (whether alive or dead), as well as the killing or destroying of fish, or an act in preparation of doing so (s.3).

The Act authorises the Minister to grant a person a lease or licence to take fish or run a fish farm for a period of up to 10 years in any waters and adjacent lands as are covered by the Act, subject to payment of such fees as the Minister determines are appropriate (s.53). The Minister is also empowered to exempt any person or class of people from the provisions of the Act, subject to such terms and conditions as the Minister sees fit to impose (s.59).

The Act empowers the Governor to proclaim any waters, or land and waters, to be an aquatic reserve (s.47). It also empowers the Governor to proclaim any waters, or land and waters, to be a marine park if the Governor considers them to have national significance by reason of their aquatic fauna or flora or as an aquatic habitat (s.48A). The Act prohibits a person from entering or remaining in, or engaging in any fishing activity in, a marine park or an aquatic reserve, unless as provided for under regulations made or a permit issued under the Act (s.48G).

Plans of Management

The Minister is required to prepare a plan of management for a marine park within two years of its proclamation, which must contain measures for the protection, conservation and preservation of fauna and flora of the relevant waters and their habitat, to regulate fishing, mining and research activities in, and public access to and use of, the marine park, and coordinated management of the marine park (s.48B).

The Act prohibits activities in a marine park that are not consistent with the plan (s.48D(1)), unless any land in the park is subject to an existing mining tenement, in which case the Minister responsible for this Act and the Minister for Mines may enter into an agreement with the holder of the tenement to cover the situation (s.48E).

Under the Act (s.48F(1)) rights of entry, prospecting, exploration and mining cannot be acquired or exercised in respect of land forming part of a marine park under the *Mining*

Act 1971 or the *Petroleum Act 1940* (see 4.5 below) or the *Petroleum (Submerged Lands) Act 1982* (below). However, the Act does empower the Governor, by proclamation, to declare that, subject to any conditions specified in the proclamation, such rights may be acquired and exercised, subject to the plan of management (s.48F(2)).

The *Harbours and Navigation Act 1993* repeals the *Harbours Act 1936* and the *Marine Act 1936* and, along with the *South Australian Ports Corporation Act 1994* (see below) governs the use of land and waters for the purposes of port facilities and navigation in the State's waters (long title).

*Harbours and
Navigation Act
1993*

The Act vests in the Minister all adjacent and subjacent land, all wharves, docks, jetties and other structures that are situated in a harbour and outside a harbour but on adjacent or subjacent land, and all navigational aids in the jurisdiction (s.15(1)). The land so vested is in fee simple, but is subject to any pre-existing registered interests in the land (s.15(2)). Interest is defined in the Act to mean any legal or equitable estate or interest in the land, or any easement, right, power or privilege in, under, over, affecting or in connection with the land (s.3).

Adjacent land is defined in the Act (s.3) as being land that extends either from the low water mark on the seashore or from the edge of any other navigable waterway or body of water (but not if vested in fee simple in any person other than the Minister) in the State to the nearest road or section boundary, or to a distance of 50 metres from the low water mark (whichever is the lesser distance). Subjacent land is defined in as being land underlying navigable waters (s.3).

The Act (s.15(3)) excludes from its operation (s.15) all property of the Commonwealth or of a council or in private ownership or, after the commencement of the Act, transferred to these. Also excluded is land that forms part of a reserve under the *National Parks and Wildlife Act 1972*, or property vested in the Corporation under the *South Australian Ports Corporation Act 1994* (see below) or excluded by regulation. The Act (s.16(1)) empowers the Minister to acquire land to establish or improve a harbour or harbour facilities and to facilitate industrial or commercial development associated with, or to be associated with, a harbour. The *Land Acquisition Act 1969* (see 4.1 above) applies to such acquisitions (s.16(2)).

Section 19 also gives the Minister the power to grant leases and licences over the land.

Powers of Regulation and Control

The Act empowers the Chief Executive Officer (as provided for under s.9) with the power to grant to any person or organisation a licence entitling that person or organisation to engage in any aquatic sport or activity as specified in the licence (s.26).

The Act also empowers the Governor, by regulation, to regulate, restrict or prohibit the entry of vessels, or the operation or use of vessels, or any aquatic activity, in the waters covered under the Act (s.27). Vessels are defined sufficiently broadly in the Act to include virtually any craft on the State's waters (s.3). A council may request regulations made under the Act, but if made the Minister has the discretion to ask for recovery of any costs associated with this.

The Act (s.32) requires a person in charge of a vessel in a harbour to comply with directions given by any person authorised to do so under the Act (ss.12 and 14). The Act prohibits the operation of unsafe vessels, vessels that are overloaded and vessels that do not have the required equipment or markings (s.65). Vessels must be operated with due care (s.69); the Act creates offences and penalties associated with the operation of vessels and intoxicating liquor and other drugs (s.70). These provisions apply to all vessels plying the State's waters and cover all operators and crew members of such vessels. Other relevant provisions deal with accidents (ss.75 and 76), the conduct of all people aboard vessels and the unlawful use of vessels (s.85).

Application of the Act

The harbours to which this Act applies are listed in Schedule 1 and include most major ports of the State, including Ports Adelaide, Augusta, Lincoln, Pirie, Stanvac and Victor Harbor. Schedule 2 ensures that actions under the repealed Acts are preserved to the extent required to effect an efficient transition to the provisions of this Act.

Marine Act 1936 The long title of the *Marine Act 1936* indicates that it is intended to apply to merchant shipping, over which the State has limited jurisdiction.

The Act empowers the Governor to make regulations for, or with respect to, fishing vessels (s.67g). These vessels are defined in the Act (s.5) as being any vessel not propelled solely by oars and used in the taking of fish or oysters for sale (including trawlers, pearling luggers and whale chasers). The regulations may cover matters such as the qualifications of skippers, surveys and inspections, seaworthiness and safety, personnel and the equipment of these vessels.

The Act also applies all the provisions of Part 5 that deal with inquiries and inspections in relation to casualties, incompetence and misconduct to fishing vessels (s.67h).

The *Off-shore Waters (Application of Laws) Act 1976* provides that, subject to the provisions of the *Petroleum (Submerged Lands) Act 1982* (s.13 - see also below), all laws of the State apply in, over and under off-shore waters (s.3(1)). Off-shore waters are identified in the Schedule as being those waters between the southward prolongation of the boundaries with Western Australia and Victoria, which extend for a total of 100 nautical miles from the coast of the State.

*Off-shore
Waters
(Application
of Laws) Act
1976*

The *Petroleum (Submerged Lands) Act 1967* (Cth) (s.9(1)) confirms that the laws of the State of South Australia apply in the waters beyond the territorial sea out to the outer limit of the continental shelf, for the purposes of the Act ('the adjacent area') (s.5A).

*Petroleum
(Submerged
Lands) Act
1967 (Cth)*

The Act establishes the Commonwealth-South Australia Off-shore Petroleum Joint Authority (s.8A). The Authority comprises the Federal Minister responsible for this Act and the State Minister. It is responsible for administering the provisions relating to the exploration of the sea-bed or subsoil of the adjacent area for petroleum or the exploitation of the natural resources, being petroleum, of that sea-bed or subsoil (see s.9(4)).

Day to day administration of the Commonwealth adjacent area is delegated to the State Minister as the designated authority (ss.14(1) and (2)).

Under additional provisions of the Act (s.127), inserted by the *Native Title Act 1993* (Cth), (s.221(1)), where petroleum is recovered by the holder of a permit, license or lease in the area specified in that instrument, that petroleum becomes the

property of that permittee, licensee or lessee, and is not subject to any rights of other people.

Petroleum (Submerged Lands) Act 1982 The *Petroleum (Submerged Lands) Act 1982* provides for three categories of title: those permitting exploration (Part 3, Divisions 2 and 2A) and production (s.51), and those relating to pipelines (s.65), plus special prospecting authorities (s.111) and access authorities (s.112). In the case of the latter, provision is made for these to be granted to the holder of an onshore title as well as the holder of an adjacent off-shore title. The Act also enables the holder of a current exploration permit to apply for a retention lease over the block or blocks that make up a location for the purposes of production (s.37a(1)).

Retention leases run for an initial period of five years and are renewable in lots of five years (s.37d). Production licences remain in force for an initial term of 21 years, which is also the length of the first term of renewal; after that, these licences may be renewed for periods of up to and including 21 years as determined by the Minister or the Joint Authority (the Joint Authority is the same as established under the *Petroleum (Submerged Lands) Act 1967*, see previous Act) (s.52). All renewals are at the discretion of the Minister or the Joint Authority absolutely (s.54).

The Minister or Joint Authority is required to provide a pipeline licence to the holder of a production licence, provided the applicant has submitted the application in the required form and includes particulars of the proposed design, construction, size and capacity, expenditure and a plan of the proposed route (ss.63 and 64).

Summary of Off-shore Scheme

The effect of the Commonwealth-State off-shore scheme is to vest in the State proprietary rights and title in respect of lands beneath the coastal waters to the three nautical mile limit of the State's coastal waters, in which the Minister is the responsible authority. The territorial sea beyond these waters out to the continental shelf is the Commonwealth adjacent area for which the Joint Authority has administrative responsibility, but currently the State Minister acts as the Designated Authority under the Commonwealth Act.

The Act (s.13) provides for regulations to be made to modify or cease the application of laws in the adjacent area that apply by virtue of the *Off-shore Waters (Application of Laws) Act 1976* (see above).

Under the Proclamation made under the *Seas and Submerged Lands Act 1973* (Cth) (s.7), and noted in the *Gazette* (on 13 November 1997), the extent of Australia's territorial sea is 12 nautical miles from coastal baselines as identified in later editions of the *Gazette* (9 February 1983 and 31 March 1987). For further details refer to Chapter 9.4.

*Seas and
Submerged
Lands Act
1973* (Cth)

The *South Australian Ports Corporation Act 1994* (ss.3 and 5) establishes the South Australian Ports Corporation, which is responsible for managing public commercial ports in the State. The Act (s.11) gives the Corporation power to acquire land compulsorily, subject to the provisions of the *Land Acquisition Act 1969* (see 4.1 above).

*South Australian
Ports
Corporation
Act 1994*

Under this Act, the Governor may, by proclamation, vest any harbour or land, or wharves, jetties or other structures, currently under the control of the Minister under the *Harbours and Navigation Act 1993* (see above), in the Corporation (s.22). The Governor may also resume land currently held by a council or other authority as a reserve, street, or road or for other purposes, and vest this land in the Corporation. Land vested under this Act vests in the Corporation in fee simple.

The Act provides the Corporation with powers to issue licences for aquatic activities, declare restricted areas and regulate the conduct of vessels in its ports in respect of ports and lands vested in, or acquired by, the Corporation (ss.28-31).

SOUTH AUSTRALIA

4.5 MINERALS

The *Aboriginal Lands Trust Act 1966* vests land in the Aboriginal Lands Trust free of all encumbrances except that all gold, silver, copper, tin and other metals, ore, minerals and other substances containing metal, and all gems and precious stones, coal and mineral oil in and upon any of the Trust land, are reserved in the Crown (s.16(2)).

*Aboriginal
Lands Trust
Act 1966*

The *Mining Act 1971* and the *Petroleum Act 1940* (for details on the provisions of both Acts, see below) do not confer any rights of entry, prospecting, exploration or mining in respect of land vested in the Trust, unless the Governor declares otherwise and subject to such conditions or modifications as are specified in the Governor's proclamation (ss.16(8) and (9)).

The Government may make payments to the Trust of an amount not exceeding any royalties which the Crown may have received for any mining leases over the land (s.16(4)).

The *Broken Hill Proprietary Company's Indenture Act 1937* provides BHP with the power to acquire and occupy land in the Whyalla/Port Augusta area for the purposes of operating iron ore smelters and ancillary works, plant and equipment including, but by no means limited to, jetties and wharves, roads and rail, water and electricity supply, and the required buildings and structures. Under this Act, indenture has precedence over all other statutory provisions of the State (s.2).

*Broken Hill
Proprietary
Company's
Indenture Act
1937*

The *Broken Hill Proprietary Company's Steel Works Indenture Act 1958* empowers BHP to expand its Whyalla operations by establishing a steel-making plant, rolling mills and ancillary and related works, as well as providing the Company with the relevant lease and licences to engage in the prospecting and exploration for, and mining of, minerals, metals and other natural substances, including iron ore and iron bearing materials if discovered, in reserved areas.

*Broken Hill
Proprietary
Company's Steel
Works Indenture
Act 1958*

The indenture secures BHP's lease and licences and makes them immune from termination by another statute or proclamation (Clause 7(5)). Leases granted to the company are renewable in lots of 21 years or less, as applied for by the Company (Clause 13).

Clause 9 of the lease (which is annexed to the indenture) requires BHP to keep the mines that are the subject of the lease in good order and repair; this is to enable them to be returned in a good state to the Crown when it resumes possession of the relevant land at the end of the lease or earlier termination.

Clause 10 requires the company to permit pastoral lessees (if any) access to the land for domestic purposes and to allow for the watering of stock and access to surface water that has not been stored in some way by the company on the land.

Cooper Basin (Ratification) Act 1975 The *Cooper Basin (Ratification) Act 1975* (ss.9 and 12) provide the 10 companies who are party to the indenture ('the producers') all necessary licences for the production of petroleum and for the construction and maintenance of pipelines, pumping stations and roads, as required under the *Petroleum Act 1940* (see below). The indenture (Clause 2(4)) provides the producers with a right of termination and preserves the right of the producers to pursue other legal remedies if the State passes any laws that derogate from the producers' rights under this Act and if the State does not remedy this situation within six months of being notified by the producers. The State will ensure that the land at the Moomba site will remain zoned for, or is otherwise protected so as to preserve, the use of that land in respect of petroleum production and matters ancillary thereto (Clause 4(3)).

The Act and indenture do not address issues relating to Indigenous land rights. The indenture (Clause 21) commits the producers to compliance with the State's environmental protection laws. The *Stony Point (Liquids Project) Ratification Act 1981* further confirms the terms and conditions of the indenture under the 1975 Act and adds a new, more comprehensive agreement to cover the petroleum and gas producing and pipeline operations of the producers at Moomba. The Act confirms the compulsory land acquisition provisions of the indenture (s.5(2)(m)). The indenture (clauses 78-81 of Schedule 1) contains more stringent environmental

requirements than in the 1975 document, including provision for an Environmental Impact Statement (clause 79) and the establishment of the Stony Point Environmental Consultative Group, comprising representatives from industry groups, the State, the producers and environmental specialists (clause 80).

As a general rule, it is an offence for a person to carry out mining operations on any land covered by the *Maralinga Tjarutja Land Rights Act 1984* without permission from the Maralinga Tjarutja or to enter land for that purpose (ss.21(1)-(2)). A person wishing to carry out mining operations on Maralinga Tjarutja land must make an application for a mining tenement in accordance with the Mining Act or the Petroleum Act (s.21(3)). However, a mining tenement may only be granted to a person who has permission from the Maralinga Tjarutja to enter lands for that purpose, or by virtue of a determination of an arbitrator; the Maralinga Tjarutja may refuse permission or grant it conditionally or unconditionally (ss.21(6) to (9)).

*Maralinga
Tjarutja Land
Rights Act
1984*

An arbitrator may affirm, vary or reverse the Maralinga Tjarutja's decision and that determination will be binding on the applicant and the Crown (ss.21(10) to (22)). The Act requires the Minister responsible for the Mining and Petroleum Acts and the Minister responsible for this Act to consult, in relation to sacred sites listed on the Maralinga Tjarutja's Register that are located on land to which the application relates, and to familiarise themselves with the special provisions relating to such sites (ss.16 and 22).

The provisions governing mining and petroleum operations on lands covered by this Act do so in a manner that is, in parts, inconsistent with traditional ownership (see ss.3 and 23-25; also the *Native Title (South Australia) Act 1994* (s.39) (see 4.6 below). For example, royalties are payable to the Minister responsible for the *Mining Act 1971* and the *Petroleum Act 1940* (see below) in respect of minerals recovered from the lands. However, there is some provision for resource revenue sharing in that the Minister is required to maintain a special fund into which to pay such royalties, with one-third (subject to a specified maximum) to be paid to the Maralinga Tjarutja, the other third being paid to the Minister for Aboriginal Affairs 'to be applied towards the health, welfare and advancement of the Aboriginal inhabitants generally', and the

remaining one third and any excess being paid into the general revenue of the State (s.24).

The Act provides that, apart from the share in the statutory royalty, payment or consideration may be made or given by the mineral or petroleum explorer or producer - who has obtained permission from the Maralinga Tjarutja to enter the land to carry out mining operations – for disturbance to the land arising from the grant of the relevant mining tenement (s.26). However, any such payments or consideration in respect of exploratory operations are limited to such amounts as are payable by way of compensation under the *Mining Act 1971* (s.61) and the *Petroleum Act 1940* (see below).

Mining Act 1971 As a general rule, the *Mining Act 1971* has not conferred any right of entry, prospecting, exploration or mining in respect of land vested in the Aboriginal Lands Trust since an amendment to the *Aboriginal Lands Trust Act 1966* that became operative on 8 November 1973. The Governor may, however, declare by proclamation that these rights will be exercisable subject to the conditions and modifications (if any) specified in the proclamation. The Governor may, by subsequent proclamation, vary or revoke a proclamation.

Under this Act, property in all minerals (including uranium) remains vested in the Crown (s.16), which includes those on land granted under the *Maralinga Tjarutja Land Rights Act 1984* (see above) and the *Pitjantjatjara Land Rights Act 1981* (see below). As neither of those Acts provides otherwise, and in that any land grants made under those Acts do not include the vesting of any minerals, any Aboriginal interests in these could only have existed as an incident of native title (*Mabo v Queensland [No. 2]* (1992) 175 CLR 1). In light of the provisions of this Act (s.16), there can be little doubt that any such interest that may have existed has been extinguished and that all the minerals in the lands are owned by the Crown.

Uranium is covered under all of the general provisions of the Act, except that it requires special Ministerial approval for the mining of uranium, and any relevant mining or retention lease has to be endorsed with such consent (s.10A). The *Atomic Energy Act 1953* (s.36(1)) requires a person to report the discovery in writing to the Commonwealth Minister within one month of making the discovery.

Schedule 2 of the *Aboriginal Heritage Act 1988* (see 4.2 above) has amended this Act to the extent that, in determining the conditions to which an exploration licence, a mining or retention lease or a miscellaneous purposes licence are to be granted under it (ss.30, 34, 41A and 52 respectively), the Minister must give proper consideration to the protection of any Aboriginal sites or objects, as defined under the Aboriginal Heritage Act, that may be affected by those operations.

Native Title Land

The *Mining (Native Title Amendment) Act 1995* (Assented to 1 May 1995, operative as of 17 June 1996), has inserted a new Part 9B into the Mining Act, dealing with mining issues on native title land (ss.63F-63ZD refer). The amended Act (s.63F) has the effect of nullifying the right to carry out mining operations on native title land unless it can be shown that the mining operations are not wholly or partially inconsistent with the continued existence, enjoyment or exercise of rights derived from native title (see the *Native Title Act 1993* (Cth) (NTA), s.227; also Chapter 9.6, and s.63O of the Mining Act: 'expedited procedure').

The other exception to the prohibition of mining provided in the Mining Act (s.63F) occurs where a declaration is made under the law of the Commonwealth or the State to the effect that the land is not subject to native title (such a declaration may be made either under the NTA or the *Native Title (South Australia) Act 1994* (see 4.6 below) and the effect is that the land ceases to be native title land). The Mining Act also acknowledges the right of the parties to rely on agreements to settle the issue of mining operations under a valid exploration authority on native title land (ss.63F(2) and (3)).

Section 63H of the Act prevents the granting or registration of production tenements over native title land unless the mining operations to be carried out are authorised under a pre-existing agreement or a determination registered under this Part, or a declaration is made under the law of the Commonwealth or the State to the effect that the land is not subject to native title.

The Minister has discretion to grant to an applicant a production tenement, subject to the registration of an agreement or a determination, or refuse the application if not satisfied that the applicant is proceeding with 'reasonable diligence' to obtain the relevant agreement or determination

(s.63I). Applications for declarations are made under the Act (s.63J) to the Environment, Resources and Development Court (see under 4.6 below), and details of agreements and negotiations are covered under it (ss.63K-63T).

The powers of the Environment, Resources and Development Court are specified under the Act (s.63U) and deal with the making and effects of declarations and related matters (ss.63V and 63W). The Act specifically excludes the *Maralinga Tjarutja Land Rights Act 1984* and the *Pitjantjatjara Land Rights Act 1981* from the operation of Part 9B (s.63Y).

The Act makes provision for the determination (by the Environment, Resources and Development Court) of compensation, and the holding by the Court of compensation on trust subject to payment as specified in the Act (s.63Z). It also provides for negotiation for, and payment of, non-monetary compensation (s.63ZA).

The Act ensures the saving of claims registered, and leases or licences, or renewals of leases or licences, granted under this Act before 1 January 1994, by providing that Part 9B does not apply to them (s.63ZC).

The Mining Register, as provided for in s.15A, must establish a distinct part of its operations for the registration of native title agreements and determinations (s.63ZBA).

A sunset clause provides that Part 9B will expire on 17 June 2000 (s.63ZD).

*National Parks
and Wildlife
Act 1972*

For further details about the *National Parks and Wildlife Act 1972*, refer to 4.1 above.

The Act provides that where the Minister responsible for the Act has approved a plan of management in relation to a reserve created under the Act, activities in the reserve must be consistent with the plan (s.40(1)). The one exception is where a mining tenement has been granted in respect of a regional reserve (see s.34A), in which case the management of that reserve is subject to the exercise by the holder of the tenement of rights granted under that tenement. Regional reserves are set up for the purpose of conserving any wildlife or the historic or natural features of the land, while at the same time permitting the use of the natural resources of that land.

The Act requires applications for mining tenements in regional reserves to be referred to, and approved by, the Minister administering this Act (s.43A). The one exception (s.43A(6)) is the petroleum licence granted under the *Cooper Basin (Ratification) Act 1975* (see above).

Mining And Petroleum Tenements In Other Reserves

The Act (ss.43(1) and (1a)) provides that rights of entry, prospecting, exploration or mining cannot be acquired or exercised under the State's Mining and Petroleum Acts in respect of reserves (except regional reserves) proclaimed under it, although it does empower the Governor by proclamation to declare that such rights may be acquired or exercised, subject to any conditions specified in such a proclamation (s.43(2)).

However, in the case of a national or conservation park and the recreation and game parks listed in the Act, a proclamation can only be made for the purpose of continuing such rights as they existed before the commencement of this Act, or the proclamation is made simultaneously with the proclamation constituting the national or conservation park (s.43(5)). A proclamation under this Act must be made under a resolution passed by both Houses of the State Parliament (s.43(5)(c)).

The Act entitles the Minister, or a person authorised by the Minister, to enter any reserve to carry out a geological, geophysical or geochemical investigation or survey without the approval of the Minister responsible for this Act, if such investigation or survey will not result in the disturbance of the land (s.43B). However, a person wishing to enter land for these purposes must, before doing so, consult with the Minister.

Special Provisions for Witjira National Park

Witjira National Park was proclaimed under the Act in 1985, and covers some 7,770 square kilometres in the State's far north. Clause 2 of the Proclamation, makes it clear that existing rights of entry, prospecting, exploration or mining under the Mining and Petroleum Acts may continue to be exercised in respect of the lands constituting the National Park; clause 3 allows for such rights to be acquired (ss.28 and 43).

Clause 4 provides for strict compliance with a number of provisions designed to protect and rehabilitate the environment and ensure the preservation of objects, structures or sites of historical, scientific or cultural interest, and any plan of management.

Such a plan has been prepared and was adopted under the Act in October 1995 (s.38). Clause 4.9 provides that as far as minerals and petroleum are concerned, the objective is to permit exploration and use of any mineral, oil or gas deposits in the National Park where this can be done without compromising protection values. The plan also provides for special implementation, procedural and monitoring strategies with a view to meeting this objective.

Opal Mining Act 1995 The *Opal Mining Act 1995* covers the prospecting for, and mining of, precious stones, but does not include fossicking (which refers to the gathering of precious stones without disturbing the land by machinery or explosives as a recreation, or without the intention of selling the stones or using them for a commercial purpose) (long title and definitions).

The Act empowers the Governor to declare any land in the State (including that under marine waters) as a precious stones field, or to reserve any such land from the operation of the Act (s.4) or to declare designated areas within a precious stone field (s.5). A precious stones prospecting permit is issued under this Act (s.7), whereas exploration licences are issued under the *Mining Act 1971* (ss.50 and 51) (see above). Precious Stones Tenements, such as opal development leases (s.20), are registered under Part 3 of this Act (ss.19-30).

Part 7 contains provisions relating to native title land that mirror those of Part 9B of the *Mining Act* (see above), including the 17 June 2000 sunset clause (s.71).

Pastoral Land Management and Conservation Act 1989 Under the *Pastoral Land Management and Conservation Act 1989* (ss.22(1)(a)), a pastoral lease is granted subject to general conditions providing for the obligation on the part of the holder of the lease to comply with the provisions of, and regulations made under, the *Mining Act 1971* (see above) and the *Petroleum Act 1940* (see next), to the extent that they apply in relation to the land.

Nothing in this Act derogates from the operation of these two Acts or any tenement granted under either (s.62).

Under the *Petroleum Act 1940* (s.4), all petroleum existing in its natural condition at or below the surface of land is the property of the Crown, which includes petroleum on land granted under the *Maralinga Tjarutja Land Rights Act 1984* and the *Pitjantjatjara Land Rights Act 1981* (see above and below respectively).

*Petroleum
Act 1940*

Petroleum titles under this Act are divided into three categories, those permitting exploration (ss.15-18e), production (ss.27-37) and those relating to pipelines (Part 2B). An application may be made for an exploration title over any land in respect of which another petroleum title is not already in force or applied for, or which is otherwise unavailable (s.6). There is no limit on the size of an area over which an application may be made.

A production title may be applied for as a matter of right by the holder of an exploration title in respect of land covered by the latter (s.27). The application must be made within 12 months of the declaration by the Minister of the discovery of petroleum of economic quantity or quality, otherwise the field in question may be excised from the exploration and the Minister may grant the production licence to another person (ss.27a, 35a and 36).

Exploration titles are granted for five years (s.15(2)) and are renewable for five years as of right, but the size of the area reduces by 25 percent upon each renewal (s.18). Production titles are granted for 21 years and are renewable as of right for a further 21 years if the Minister is satisfied that the licensee has carried out the obligations imposed by the licence (s.32).

Private on-shore petroleum pipeline titles fall into two broad categories, namely those authorising access to conduct surveys and preliminary investigations (s.80d(6)) and those permitting the construction and operation of a pipeline (Part 2B). Applications for pipeline licences must be accompanied by such plans, maps and other documents that show the proposed route, size and capacity of the pipeline and details of related plant and machinery (s.80e(1)).

It is an offence to construct or operate a pipeline except under, and in accordance with, a pipeline licence (s.80d(1)). The

holder of such a licence is required to give other people access to the pipeline for conveyance of their petroleum under the 'common carrier provisions' of the Act (s.80l). Pipeline licences remain in force for 21 years or less, as agreed between the applicant and the Minister. Renewals take place as of right, provided the licensee has complied with the Act and the conditions of the licence (s.80i(2)).

The Natural Gas Authority of South Australia has power to construct, acquire and operate pipelines under the *Pipelines Authority Act 1967* (ss.4 and 10).

Pitjantjatjara Land Rights Act 1981 As a general rule, it is an offence for a person to carry out mining operations on any land covered by the *Pitjantjatjara Land Rights Act 1981* without permission from the Anangu Pitjantjatjara, or to enter land for that purpose (s.20(2)). A person wishing to carry out mining operations on the Anangu Pitjantjatjara land must make an application for a mining tenement in accordance with the Mining Act or the Petroleum Act (s.20(3)).

However, a mining tenement may only be granted to a person who has permission from the Anangu Pitjantjatjara to enter lands for that purpose, or by virtue of a determination of an arbitrator; the Anangu Pitjantjatjara may refuse permission or grant it conditionally or unconditionally (ss.20(6-7b, 14 and 16). An arbitrator may affirm, vary or reverse the Anangu Pitjantjatjara's decision and that determination will be binding on the Anangu Pitjantjatjara, the applicant and the Crown (ss.20(10)-(18)). Special and somewhat different provisions apply in respect of the Mintabie Precious Stones Field (ss.20(19) and 25-29).

The provisions governing mining and petroleum operations on lands covered by this Act do so in a manner that is partly inconsistent with traditional ownership (see also the *Native Title (South Australia) Act 1994*, s.39, in 4.6 below) (ss.4 and 21-23). For example, royalties are payable to the Minister administering the *Mining Act 1971* and the *Petroleum Act 1940* (see above) in respect of minerals recovered from the lands.

However, there is some provision for resource revenue sharing. The Minister is required to maintain a special fund into which royalties are paid, with one-third (subject to a specified maximum) to be paid to the Anangu Pitjantjatjara,

the other third being paid to the Minister for Aboriginal Affairs, 'to be applied towards the health, welfare and advancement of the Aboriginal inhabitants generally', and the remaining one third and any excess paid into the general revenue of the State (s.22).

Apart from the share in the statutory royalty payment, consideration may be made or given by the mineral or petroleum explorer or producer who has obtained permission from the Anangu Pitjantjatjara to enter the land to carry out mining operations, for disturbance to the land arising from the grant of the relevant mining tenement (s.24). The Act also contains special provisions relating to compensation (s.24).

The *Roxby Downs (Indenture Ratification) Act 1982* provides for the ratification and approval of the indenture (s.6(1)). The Act also prohibits anyone from doing, or omitting to do, anything that frustrates, hinders, interferes with or derogates from the operation or implementation of the indenture, or any aspect of the indenture, or the ability of the parties to the indenture or any other person to exercise rights or discharge duties or obligations under it (s.6(3)). The indenture is made between the State of South Australia, the Minister of Mines and Energy, Roxby Mining Corporation Pty Ltd, BP Australia Ltd, BP Petroleum Development Ltd, and Western Mining Corporation Ltd ('the joint venturers').

*Roxby Downs
(Indenture
Ratification)
Act 1982*

The Act modifies the laws of the State to enable full effect to be given to the indenture, including the *Crown Lands Act 1929*, the *Development Act 1993* and the *Environment Protection Act 1993* (see 4.1 above), the *Harbours and Navigation Act 1993* (see 4.4 above) and the *Mining Act 1971* and the *Petroleum Act 1940* (see above), including the granting of the relevant authorisations, approvals and licences (s.7).

Application of the Aboriginal Heritage Act

The Act (s.9(1)) specifically applies the provisions of the *Aboriginal Heritage Act 1979* (that Act has been repealed by the *Aboriginal Heritage Act 1988*, see 4.2 above), but preserves the 1979 Heritage Act, for the purposes of this Act, to activities carried out under it in the Stuart Shelf and Olympic Dam areas (s.9(10)). However, the Act suspends the requirement to obtain permission to enter or use land within a protected area in those areas until 31 December 1985 (s.9(2)).

Entry into a protected area must be strictly in compliance with the relevant mining tenement and any consent to enter such an area must be confirmed by the Minister of the Environment.

The Act (ss.9(3) and (4)) further restricts application of the *Aboriginal Heritage Act 1979*, and provides (s.9(5)) that, unless land is designated or identified in any applicable environmental impact statement as an Aboriginal site, or the joint venturers agree that the land should be declared a protected area under that Act, no part of the project areas will be declared to be a protected area under that Act.

Protection of Significant Aboriginal Sites and of the Environment

The indenture (clauses 6(2) and 6(3)(m) and (p)) provided that before 31 December 1987, the joint venturers would have to notify the Minister of their intention to proceed with the project and provide details of any significant Aboriginal and historical sites, and measures for their protection, and an environmental management programme specifying any measures to be taken by the joint venturers for the protection and management of the environment. Clause 11 imparts a requirement to provide a three-yearly environmental report covering environment protection and rehabilitation, and a mechanism for monitoring the effectiveness of the programme.

Clause 10 of Schedule 3 requires the licensees to take all due care to preserve all Aboriginal and historic relics, sites and areas of archaeological or anthropological importance, and requires them to notify the Heritage Section of the State's Environment Department if any such localities are discovered in the course of their activities.

Expansion of Mining Operations - December 1997

In December 1997, the Federal Minister for the Environment approved expansion of mining operations under this Act in the Olympic Dam copper and uranium mine area, which will more than double the output of the mine. Parallel to this the State introduced legislation amending this Act, ensuring that provisions relating to Aboriginal heritage are compatible with the expanded mining operations proposed to be carried out in the affected area.

The *Wilderness Protection Act 1992* (s.13(7)) states that where a mining tenement is in force in relation to a wilderness protection zone, any person authorised by, or appointed under the *Mining Act 1971*, the *Petroleum Act 1940* (see above) or the *Petroleum (Submerged Lands) Act 1982* (see 4.4 above) is a warden for the purposes of this Act in relation to that zone (or that part of the zone covered by the mining tenement). The Act preserves mining tenements in force before its commencement (s.28(3)).

*Wilderness
Protection
Act 1992*

The Act (s.23(1)) provides the Governor with the power to constitute land by proclamation as a wilderness protection area or a zone that is subject to, and in contravention of, the various indenture Acts of the State (that is, the Broken Hill Proprietary Company's, Cooper Basin, Roxby Downs and Stony Point Indenture Acts, referred to above). However, the Governor must ensure that the rights of the parties as specified in those Acts are not affected without their consent (s.23(2)).

The Act prohibits the acquisition or exercising of rights of entry, prospecting, exploration or mining under the State's mining Acts (that is, the Petroleum and Mining Acts, referred to above) in respect of land being proposed by the Minister by notice as, or comprising, a wilderness protection area or zone (ss.25(1) and (2)). However, it does provide the Governor with the power to authorise, by proclamation and subject to any conditions specified in the proclamation, the acquisition and exercising of these rights in such areas or zones (s.25(3)). This is subject to a number of restrictions and favourable resolution in both Houses of the State's Parliament, as well as a review after five years of the effects of the mining operations on the affected land (ss.25(5-10)).

All forms of primary production and the construction of roads, tracks, buildings or structures (except for those specifically authorised under the applicable plan of management) in wilderness protection areas and zones are prohibited under the Act (s.26(1)).

SOUTH AUSTRALIA

4.6 NATIVE TITLE

The *Environment, Resources and Development Court Act 1993* establishes the Court of first instance for most native title claims in the State. The Act allows for the transfer to the Supreme Court of important and complex native title, mining, petroleum, minerals exploration and land acquisition issues (s.20A).

*Environment,
Resources and
Development
Court Act 1993*

Under the Act, the Court, when sitting in its native title jurisdiction, is required to consist of, or include, at least one legal practitioner of five years' experience or more (s.15(1a)). The Act provides that if the Court, when dealing with native title matters, is to be constituted by a commissioner or a panel of commissioners, the sole commissioner and at least one half of the panel are required to be native title commissioners (s.15(1b)). A native title commissioner is defined in the Act as meaning a commissioner with expertise in Aboriginal law, traditions and customs (s.3) and requires that a native title commissioner have such expertise (s.10(2a)).

Further procedural and administrative matters are provided for in the *Environment, Resources and Development Court (Native Title) Rules 1995* and the *Environment, Resources and Development Court (Native Title) Regulations 1995*, both of which were gazetted on 12 October 1995 and commenced on 17 June 1996.

The *Native Title (South Australia) Act 1994* provides definitions, in respect of this and all other South Australian Acts, of matters relating to native title (s.3). It provides a specific definition of native title and makes provision for recognition and protection of existing native title rights relating to hunting, gathering and fishing (s.4).

*Native Title
(South Australia)
Act 1994*

The Act (s.5) confers native title jurisdiction on the State's Supreme Court and the *Environment, Resources and Development Courts* (the section specifies that the latter should be used if it is clear that a native title issue is involved). It provides for the native title commissioners appointed under the *Environment, Resources and Development Court Act 1993*

(see previous) to be made use of in proceedings involving a native title question (s.7).

The Environment, Resources and Development Court Act also provides that any court or tribunal may hold hearings or conferences concerning native title in private and may make orders prohibiting the disclosure of evidence (s.20(2)(f)). In determining whether to do so, the court or tribunal must take into account the cultural and customary concerns of Indigenous people (s.14).

The National Native Title Tribunal, established under the *Native Title Act 1993* (Cth) (see Chapter 9.6) maintains a Registry in Adelaide.

Part 4 of the Act deals with the State Native Title Register and the Registration of Claims (Divisions 1 and 2, ss.17 and 18), and Native Title Declarations (Division 3, ss.19-27). Parts of these Registers may be kept confidential for the inclusion of information and materials which cannot be publicly disclosed without contravening Aboriginal tradition. (s.17(4)).

Part 5 (ss.28-30) outlines the procedures and requirements for the service of documents on native title holders.

Part 6 provides for the validation of past acts, either picking up on, or operating complementary to, the parallel provisions in the *Native Title Act 1993* (Cth) (which are identified in ss.31-38 of this Act). The Notes to this Part identify the relevant provisions of the Native Title Act.

The Act confirms existing Crown rights in relation to the ownership of natural resources and to the use, control and regulation of the flow of water (ss.39(1) and (2)). It confirms that existing fishing access rights under the laws of this State prevail over any other public or private fishing rights (s.39(3)), and confirms public access to, and enjoyment of, waterways, beds and banks or foreshores of waterways, coastal waters, beaches and areas that were public places as 31 December 1993 (s.39(4)). However, the Act makes it clear that nothing in section 39 extinguishes or impairs native title or affects land, or an interest in land, held by Aboriginal peoples under a law that confers benefits only on Aboriginal peoples (s.39(5)).

