THE LEGAL OPERATION OF A WILD RIVER DECLARATION

SUPPLEMENTARY SUBMISSION OF CAPE YORK LAND COUNCIL AND BALKANU

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Introduction

1. The *Wild Rivers Act 2005* (Qld) (**WRA**) does not, on the whole, itself create regulatory mechanisms or penalties directed to protecting the natural values of wild rivers. Rather, this is achieved by a number of other regulatory schemes which give effect to wild river declarations, namely:
   (a) the *Coastal Protection and Management Act 1995* (Qld) (**CPMA**);
   (b) the *Environmental Protection Act 1994* (Qld) (**EPA**);
   (c) the *Fisheries Act 1994* (Qld) (**Fish Act**);
   (d) the *Forestry Act 1959* (Qld) (**Forests Act**);
   (e) the *Fossicking Act 1994* (Qld) (**Fossicking Act**);
   (f) the *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) (**LPA**);
   (g) the *Mineral Resources Act 1989* (Qld) (**MRA**);
   (h) the *Nature Conservation Act 1992* (Qld) (**NCA**);
   (i) the *State Development and Public Works Organisation Act 1971* (**SDPWOA**);
   (j) the *Sustainable Planning Act 2009* (Qld) (**SPA**)
   (k) the *Transport Infrastructure Act 1994* (Qld) (**TIA**);
   (l) the *Vegetation Management Act 1999* (Qld) (**VMA**);
   (m) the *Water Act 2000* (Qld) (**WA**).

2. On 3 April 2009, the Queensland Governor in Council purported to approve three wild river declarations relevant to Cape York. The three declarations are:
   (a) the *Archer Basin Wild River Declaration 2009* (Qld) (the **'Archer declaration'**);
   (b) the *Lockhart Basin Wild River Declaration 2009* (Qld) (the **'Lockhart declaration'**); and

(c) the *Stewart Basin Wild River Declaration 2009* (Qld) (the **'Stewart declaration'**).

SPA

3. The SPA is a code for the assessment and approval of development by local government and the State.[1] A key element of the SPA is IDAS – an integrated system of development approval that permits approvals under numerous, discrete legislative regimes to be amalgamated into one statutory approval under the SPA. IDAS is defined in chapter 6 of the SPA as follows:

> **230 What is IDAS**
> IDAS is the system detailed in this chapter for integrating State and local government assessment and approval processes for development.

4. The SPA scheme regulates 'development' as defined by SPA s.7:

> **7 Meaning of development**
> Development is any of the following—
> (a) carrying out building work;
> (b) carrying out plumbing or drainage work;
> (c) carrying out operational work;
> (d) reconfiguring a lot;
> (e) making a material change of use of premises.

5. Development is classified in one of five ways – as exempt development, self-assessable development, development requiring compliance assessment, assessable or prohibited development.[2] The classification of development can be by regulation[3] or by a range of planning instruments.[4] Exempt development is the residuary category – all development is exempt unless classified otherwise.[5] A regulation may prescribe development as exempt development.[6]

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[1] Generally, local governments may not make local laws that provide for the assessment and approval of development: see *Local Government Act 2009* (Qld) s.37.

[2] SPA s.231(1).

[3] SPA s.232(1).

[4] The planning instruments that may classify development are a State planning regulatory provision, a structure plan, a master plan, a temporary local planning instrument, a preliminary approval to which s.242 applies and a planning scheme.

[5] SPA s.231(2).

[6] SPA 232(2). The language of this subsection is absurd. It provides:

> Also, a regulation may prescribe development that a planning scheme, a temporary local planning

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6. No approval under the SPA is required for exempt development. A person undertaking self-assessable development must comply with the applicable codes.[7] An 'effective compliance permit' is required before a person undertakes development that is development requiring compliance assessment.[8] Assessable development may not be carried out unless there is an 'effective development permit' for the development.[9] It is an offence to carry out prohibited development.[10]

7. Given the operation of the SPA in respect of wild river areas outlined below, it is the latter development offence – undertaking prohibited development – that is most relevant to the land use controls imposed in a wild rivers declaration. The offence of undertaking prohibited development carries a maximum penalty of 1,665 penalty units which is equivalent to $166,500, or $832,500 for a corporation.[11]

8. All but one of the 12 categories of prohibited development described in SPA schedule 1 concern wild rivers.[12] Many of those categories are prohibitions cognate to the regulatory provisions of other legislation (for example, most development that would damage a marine plant[13] in a wild river area is prohibited under SPA schedule 1, item 7 while that which is not prohibited must comply with the

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> instrument, a preliminary approval to which section 242 applies or a master plan can not declare to be self-assessable development, development requiring compliance assessment, assessable development or prohibited development.

This language is a euphemistic attempt to provide that a regulation may declare development to be exempt development, and that such a regulation will prevail over any consistent provision in the planning instruments mentioned in the subsection.

[7] SPA s.574.

[8] SPA s.575. A person must comply with the permit, a condition in the permit or a compliance certificate: SPA s.576.

[9] SPA s.578.

[10] SPA s.581.

[11] A penalty unit is equivalent to $100: see *Penalties and Sentences Act 1992* (Qld) s.5. Where a penalty provision does not provide a separate penalty for a corporation, the maximum fine for a corporation is five times that provided: see *Penalties and Sentences Act 1992* (Qld) s.181B.

[12] Prohibited development is that described in SPA schedule 1, declared under a State planning regulatory provision, a planning scheme, a structure plan or a temporary local planning scheme: see SPA schedule 3, definition of 'prohibited development'. The one category of prohibited development in SPA schedule 1 that does not relate to wild rivers is development for a brothel: SPA schedule 1, item 5.

[13] See Fish Act s.8 (meaning of marine plant).

applicable wild rivers code under Fish Act s.76DB). For ease of reference, the SPA prohibitions are detailed below, under the heading which corresponds to the cognate legislation.

CPMA

9. The CPMA provides a management planning framework for the coastal zone in Queensland. The existence of a wild river area in, or adjacent to, the coastal zone is reflected in many provisions of the CPMA.

10. The removal of quarry material from below the high water mark is prohibited under the CPMA unless a person has an 'allocation notice' or an approved 'dredge management plan'.[14] The Act prohibits applications for an allocation notice to remove quarry material from below the high water mark within any part of a wild river area.[15] Consequently, quarry materials from below the high water mark in a wild river may only be removed under an approved dredge management plan.

11. A person may prepare a dredge management plan to manage the impacts of the removal of quarry material below the high water mark, or the placement of spoil derived from the removal of that material.[16] A person preparing a dredge management plan, where the plan includes part of a wild river area, must consider the impact of the wild river declaration for the wild river area.[17] The dredge management plan may only be approved if, amongst other things, it does not adversely affect the management of a wild river area.[18] The approval of a dredge management plan may be renewed.[19] If the plan includes part of a wild river area, it cannot be renewed unless it includes 'consideration of the wild river declaration' for the area.[20]

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[14] CPMA s.101(1).

[15] CPMA s.73(3). If an application is made for an 'allocation' relates to a wild river area below the high water mark, 'the application is of no effect': *ibid.*

[16] CPMA s.89.

[17] CPMA s.90(1)(c).

[18] CPMA s.93(1)(c)(iv).

[19] CPMA s.96.

[20] CPMA s.96(1A).

12. Development applications under IDAS are subject to additional requirements under the CPMA when they relate to certain parts of the coastal zone.[21] In the case of operational work[22] in a wild river area that is tidal works[23] or development in a coastal management district,[24] development for 'specified works' must comply with the applicable code mentioned in the wild river declaration for the area.[25] Specified works are defined by reference to the WRA,[26] which provides the following definition:[27]

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[21] CPMA part 6 (development approvals for assessable development).

[22] 'Operational work' is one kind of development as defined by SPA s.7. Operational work is defined by SPA s.10(1) as a variety of discrete activities such as quarrying, undertaking a forest practice or, relevantly to the CPMA, undertaking tidal works or work in a coastal management district: SPA s.10(1), definition of 'operational work', paragraph (1)(h).

[23] CPMA schedule, definition of 'tidal works' includes most forms of infrastructure in, or near, the tidal zone. It does not include removing quarry material for sale: see definition of 'tidal works', paragraph 4(e).

[24] A coastal management district may be declared by regulation under CPMA s.54. Only 4 such districts have been declared under the CPMA, one of which – the Wet Tropical Coast Coastal Management District – applies to a small part of the Cape York region: *Coastal Protection and Management (Coastal Management Districts) Regulation 2003* (Qld) schedule part 3. However, coastal management districts are deemed to exist as a continuation of coastal management control districts and erosion prone areas established under the former *Beach Protection Act 1968* (Qld): see CPMA ss.168 and 169. These deemed coastal management districts apply to most parts of the coastal land within the Archer, Lockhart Stewart wild river areas: see <www.derm.qld.gov.au/ecoaccess/coastal_development/assessment_of_development_on_coastal_land/erosion_prone_areas.html > [accessed 29 March 2011].

[25] CPMA s.104A(2). For the Archer Declaration, the Lockhart Declaration and the Stewart Declaration, the applicable code is the *Wild Rivers Code 2007* (Qld): see Archer Declaration s.34(3), Lockhart Declaration s.34(3), Stewart Declaration s.34(3). The requirement to comply with the code only applies to operational works that are prescribed as assessable development under SPA s.232(1), and do not involve prohibited development. SPR schedule 3 part 1 prescribes tidal works and certain works in a coastal management district as assessable development. Nine categories of works in a coastal management district are prescribed, including reclaiming land under tidal water and removing, or interfering with, dunes above the high water mark in an erosion prone area other than on State coastal land.

[26] CPMA schedule, definition of 'specified works'.

[27] WRA s.48. The definition was amended, with effect from 7 December 2006, by *Wild Rivers and Other Legislation Amendment Act 2006* (Qld) s.18 to add the present subparagraphs 48(2)(c)(iii) and (iv). *Wild Rivers Regulation 2007* (Qld) s.3 prescribes infrastructure for the purposes of WRA s.48(2)(c)(ix) as follows:

> **3 Specified works—other infrastructure (Act, s 48)**
> (1) For section 48(2)(c)(ix) of the Act, a jetty, boat ramp or pontoon on, or providing access to, indigenous land is prescribed infrastructure.
> (2) In this section—
> ***indigenous land*** means land held under a following Act by, or on behalf of or for the benefit of, Aboriginal or Torres Strait Islander inhabitants or for Aboriginal or Torres Strait Islander purposes—
> (a) the *Local Government (Aboriginal Lands) Act 1978*;
> (b) the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*;
> (c) the *Aboriginal Land Act 1991*;
> (d) the *Torres Strait Islander Land Act 1991*;

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48 Meaning of *specified works*

(1) The object of this provision is to provide a definition of *specified works* for a provision of any other Act that refers to specified works in relation to regulating or prohibiting the carrying out of an activity or the taking of a natural resource because of a declaration or a moratorium under this Act.

(2) *Specified works* means—

(a) infrastructure and works prescribed under a regulation to be necessary for disaster management; or

(b) desnagging that is the minimum necessary to allow safe navigation of a marked navigable channel; or

(c) the following infrastructure and works—

(i) roads;

(ii) railways;

(iii) jetties and boat ramps for use by the public;

(iv) works for the rehabilitation of land, including, for example, rehabilitation of abandoned mines;

(v) infrastructure for the transmission or distribution of electricity;

(vi) pipelines;

(vii) conveyor belts;

(viii) cables;

(ix) other infrastructure, prescribed under a regulation, that relates to the transportation, movement, transmission or flow of anything through a wild river area including, for example, goods, materials, substances, matter, particles with or without charge, light, energy, information and anything generated or produced.

13. Operational works for tidal works or works in a wild river area that is also within a coastal management district, that are both assessable development and not specified works, are prohibited.[28] The freedom to prescribe development as assessable, or not,[29] means the scope of this prohibition is determined by regulation. The net effect of the current scope of the prohibition is that the construction of infrastructure that is not 'specified works' in or near the tidal areas of wild river areas in Cape York is heavily constrained.

EPA

14. Under the EPA, where an environmental impact statement (**EIS**) is required for a project with 'operational land'[30] within a wild river area, draft terms of reference of

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(e) the *Land Act 1994*.

Section 3 of the *Wild Rivers Regulation 2007* (Qld) was inserted by *Wild Rivers Amendment Regulation (No.1) 2009* (Qld) s.3 with effect from 4 December 2009.

[28] SPA schedule 1 item 4.

[29] SPA s.232(1).

[30] Operational land is land on which a project is to be carried out: see EPA s.39, definition of 'operational land'.

an EIS prepared by the proponent must:

(a) explain how the proponent 'proposes to decide' the depth beneath the surface of a high preservation area, special floodplain management area or nominated waterway where mining operations (other than specified works) will be conducted in order to comply with the relevant wild river declaration;[31] and

(b) include any other material required to be included in an EIS by a wild river declaration.[32]

15. IDAS permits an application for the approval of an 'environmentally relevant activity'[33] (**ERA**) under the EPA to be made as, or as part of, a development application under the IPA. Special restrictions exist for these applications (if they are not otherwise prohibited development), in a wild river area, where they are:[34]

(a) a development application for a 'material change of use'[35] for an environmentally relevant activity that is assessable development (other than, in a designated urban area,[36] a sewage ERA,[37] a water treatment ERA[38] or an

[31] EPA s.41(2)(c)(i). Thus subparagraph was amended by *Water and Other Legislation Amendment Act 2010* (Qld) s.50, with effect from 1 December 2010, to include reference to the new category of 'special floodplain management area' introduced by the same Act: see *ibid.*, parts 3 (amendment of EPA) and 16 (amendment of the WRA).

[32] EPA s.41(2)(c)(ii). The Archer Declaration, the Lockhart Declaration and the Stewart Declaration all state additional matters that must be included in draft terms of reference for an EIS: see Archer Declaration s.46, Lockhart Declaration s.46, Stewart Declaration s.46.

[33] An 'environmentally relevant activity' is a category of activity that is defined by the *Environmental Protection Regulation 2008* (Qld) (**EPR**) and subject to regulation under the EPA: see EPR s.17(1) and schedule 2.

[34] EPA s.73AA. These two alternatives are overlapping, with the second entirely encompassing the former. The definition of 'development' in EPA schedule 4 adopts the SPA definition of development. SPA s.7 defines development whereby a material change of use is one of 5 categories of development. Consequently, EPA s.73AA(1)(a)(i) is a subset of EPA s.73AA(1)(a)(ii).

[35] Essentially, the commencement of a new use of land, the re-establishment of an abandoned use of land or a material increase in the intensity or scale of a use of land: see SPA s.10(1), definition of 'material change of use'.

[36] A designated urban area is the area designated as such in a wild river declaration: WRA schedule, definition of 'designated urban area'.

[37] A sewage ERA is that defined by regulation: EPA s.73AA(4), definition of 'sewage ERA'. EPR s.19(2) prescribes 'sewage treatment', an ERA under EPR schedule 2, section 63.

[38] A water treatment ERA is that defined by regulation: EPA s.73AA(4), definition of 'water treatment ERA'. EPR s.19(2) prescribes 'water treatment', an ERA under EPR schedule 2, section 64.

exempt environmentally relevant activity[39]);

(b) a development application for an ERA that is assessable development (other than, in a designated urban area, a sewage ERA, a water treatment ERA or an exempt environmentally relevant activity).

16. These restrictions require that any decision made under IDAS, wether by an assessment manager or a referral agency, must comply with the wild rivers code mentioned in the relevant wild river declaration.[40] For a sewage ERA or water treatment ERA in a high preservation area, the assessment manager and any concurrence agency must be satisfied there is 'no viable location for the development outside' the high preservation area.[41]

17. There are three broad categories of ERA that are prohibited in a wild river area. The first[42] concerns development in waters in a wild river area that is an extraction ERA.[43] Development is prohibited to the extent that it involves development in

[39] An exempt ERA is defined by EPR s.18(1) as a 'chapter 4 activity for which there is no aggregate environmental score' or a motor vehicle workshop operation. The former category does not include five specified ERAs with no aggregate environmental score – three forms of intensive animal rearing (cattle or sheep feedlotting, pig keeping and poultry farming), asphalt manufacturing and extracting, other than by dredging, material from a wild river: EPR s.18(2). Examples that are part of the category include refining less than 200 million cubic metres of gas per year, battery recycling, drum and container reconditioning, incinerating waste vegetation, clean paper or cardboard: see EPR schedule 2.

[40] The Archer Declaration, the Lockhart Declaration and the Stewart Declaration all state that a dredging ERA must comply with part 10 of the *Wild Rivers Code 2007* (Qld) for riverine quarry material extraction and all other ERAs must comply with part 3 of the *Wild Rivers Code 2007* (Qld): see Archer Declaration s.65(1)(b), Lockhart Declaration s.65(1)(b), Stewart Declaration s.65(1)(b).

[41] EPA s.73AA(4).

[42] SPA schedule 1, item 9.

[43] An extraction ERA is an ERA prescribed under the SPR relating to the extracting rock or other material: SPA schedule 3, definition of 'extraction ERA'. SPR s.41(4) defines an extraction ERA as extractive and screening activities under EPR schedule 2, section 16(1)(b) or (c) which, in turn, provides:

> **16 Extractive and screening activities**
> (1) Extractive and screening activities (the ***relevant activity***) consists of any of the following—
> (a) ...
> (b) extracting, other than by dredging, material from a wild river area;
> (c) extracting, other than by dredging, a total of 5000t or more of material, in a year, from an area other than a wild river area;
> *Examples—*
> - extracting material for excavating a bund between existing waters and an artificial waterway being constructed on dry land
> - extracting virgin rock from a quarry
> - extracting rock, that has been previously broken, from a stockpile on the site from which the rock was originally extracted

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waters in a wild river area that is for an extraction ERA (other than if the development application is accompanied by an allocation notice[44]) where it is:

(a) an ERA, or a material change of use of premises for an ERA;

(b) assessable development.[45]

18. The second category of prohibition[46] relates to development for any ERA,[47] or a material change of use of premises for an ERA, that is assessable development[48] to the extent that it involves development in a high preservation area or special floodplain management area other than:

(a) a sewage ERA;[49]

(b) a water treatment ERA;[50]

(c) a dredging ERA;[51]

(d) an extraction ERA,[52] if the activity is a low impact activity[53] carried out

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Clearly, paragraph (c) has no application to this prohibition as it relates to areas other than a wild river area. It is significant that dredging material in a wild river area is not an extraction ERA.

[44] An 'allocation notice' is an allocation notice under WA s.283 or CPMA s.76 before 2 December 2005: SPA schedule 3, definition of 'allocation notice'. The specified date was the commencement date of the WRA. Recall that under the CPMA an allocation notice may not be given for an area below the high water mark within any part of a wild river area: CPMA s.73(3). The definition of 'allocation notice', in its application to CPMA allocation notices, is poorly constructed in that an allocation notice may be granted after 1 December 2005 for an area below the high water mark that later becomes a wild river area and not violate CPMA s.73(3).

[45] Again, the freedom to prescribe development as assessable, or not, under SPA s.232(1) means that the scope of this prohibition is determined by regulation.

[46] SPA schedule 1, item 10.

[47] EPR schedule 2 defines 64 different categories of ERAs. Of these, SPA schedule 1, item 10 permits only 4 ERAs (bearing in mind that a dredging ERA, extraction ERA and screening ERA are all part of ERA 16) in a high preservation area or floodplain management area that is outside a designate urban area.

[48] Again, the freedom to prescribe development as assessable, or not, under SPA s.232(1) means that the scope of this prohibition is determined by regulation.

[49] Defined by reference to EPA s.73AA(4). See note 37.

[50] Defined by reference to EPA s.73AA(4). See note 38.

[51] A dredging ERA is an ERA prescribed under the SPR relating to dredging material: SPA schedule 3, definition of 'dredging ERA'. SPR s.41(3) defines a dredging ERA as extractive and screening activities under EPR schedule 2, section 16(1)(a) which, in turn, provides:

> **16 Extractive and screening activities**
> (1) Extractive and screening activities (the ***relevant activity***) consists of any of the following—
> (a) dredging a total of 1000t or more of material from the bed of naturally occurring surface waters, in a year;
> (b) ...

outside waters and is for specified works,[54] residential complexes,[55] or another commercial, industrial or residential purpose in a designated urban area,[56] in the area;

(e) a screening ERA,[57] if the activity is carried out outside waters and is for specified works,[58] or residential complexes,[59] in the area;

(f) a crude oil or petroleum product storage ERA,[60] if the activity is for residential

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[52] See note 43.

[53] A low impact activity is a borrow bit of not more than 10,000m^3: SPA schedule 3, definition of 'low impact activity'.

[54] See para.[12].

[55] SPA schedule 3, definition of 'residential complex' provides:

> ***residential complex***—
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> 1 A residential complex is land in a wild river area, including buildings and infrastructure on the land, that is used to accommodate fewer than the following—
> (i) 50 permanent residents;
> (ii) 200 temporary residents.
> *Examples*—
> homestead, out-station, resort complex
>
> 2 The term does not include land in a designated urban area.

[56] See note 36. SPA schedule 1, item 10 was amended by *Water and Other Legislation Amendment Act 2010* (Qld) s.175(4) with effect from 1 December 2010 by adding the words 'or another commercial, industrial or residential purpose in a designated urban area' that now appear.

[57] A screening ERA is an ERA prescribed under the SPR relating to screening, washing, crushing, grinding, milling, sizing or separating material extracted from earth or dredged: SPA schedule 3, definition of 'screening ERA'. SPR s.41(5) defines a screening ERA as extractive and screening activities under EPR schedule 2, section 16(1)(d) which, in turn, provides:

> **16 Extractive and screening activities**
> (1) Extractive and screening activities (the ***relevant activity***) consists of any of the following—
> (a)-(c) ...
> (d) extracting material from a road reserve, other than in a wild river area, if—
> (i) the material is to be used for constructing or maintaining a road; and
> (ii) the surface area from which the material is extracted is less than 10000m^2; or
>
> ...

[58] See para.[12].

[59] See note 55.

[60] A crude oil or petroleum product storage ERA is an ERA prescribed under the SPR relating to storing crude oil or petroleum product: SPA schedule 3, definition of 'crude oil or petroleum product storage ERA'. SPR s.41(2) defines a crude oil or petroleum product storage ERA as chemical storage under EPR schedule 2, section 8(1)(c) which, in turn, provides:

> **8 Chemical storage**
> (1) Chemical storage (the relevant activity) consists of storing—
> (a)-(b) ...
> (c) 10m^3 or more of chemicals of class C1 or C2 combustible liquids under AS 1940 or dangerous goods class 3; or

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complexes[61] in the area and is carried out outside a designated urban area;[62]

(g) an exempt environmentally relevant activity[63] in a designated urban area.[64]

19. The final category of prohibition[65] concerns an extraction ERA,[66] or a material change of use of premises for an extraction ERA, that is assessable development[67] and located in a floodplain management area other than an extraction ERA that is:

    (a) a low impact activity[68] carried out outside waters; and

    (b) for specified works,[69] residential complexes,[70] or another commercial, industrial or residential purpose in a designated urban area.[71]

20. The existence of a wild river area is relevant to determining the level of assessment the EPA applies to environmental authorities for mining. Two levels of assessment apply under the EPA – prosaically named 'level 1 mining projects' and 'level 2 mining projects'.[72] Level 1 mining projects are subject to a more rigorous assessment process.

21. Applications for environmental authorities for mining are not made through IDAS as, under the SPA, mining activities are exempt from assessment – they are prescribed as 'development that cannot be declared to be development of a particular type'; a

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[61] See note55.

[62] See note 36.

[63] Defined by reference to EPA s.73AA(4). See note 39.

[64] See note 36.

[65] SPA schedule 1, item 11.

[66] See note 43.

[67] Again, the freedom to prescribe development as assessable, or not, under SPA s.232(1) means that the scope of this prohibition is determined by regulation.

[68] See note 53.

[69] See para.[12].

[70] See note 55.

[71] See note 36. SPA schedule 1, item 10 was amended by *Water and Other Legislation Amendment Act 2010* (Qld) s.175(6) with effect from 1 December 2010 by adding the words 'or another commercial, industrial or residential purpose in a designated urban area' that now appear.

[72] EPA s.151.

euphemism for exempt development.[73]

22. The declaration for a wild river area in which an application for an environmental authority (mining activities)[74] is made is one of the 'application documents' for the application,[75] so the declaration is considered in the assessment of the application.[76]

23. At present, all mining projects in a wild river area are level 1 mining projects unless they are:[77]

    (a) an environmental authority for a mining activity under a prospecting permit or a mining claim; or

    (b) an environmental authority for a mining activity under an exploration permit if it is within a preservation area within a wild river area.

24. However, this greater scrutiny arising from the requirement that applications for exploration permits in a high preservation area, mineral development licences and mining leases in wild river areas (the **'three mining activities'**) are all treated as level 1 mining projects will soon end. Section 51 of the *Water and Other Legislation Amendment Act 2010* (Qld) will repeal the provision that automatically classifies the three mining activities as level 1 mining projects.[78] In that event, the three mining activities in wild river areas will fall to be classified as level 1 or level 2 mining projects on the same basis as applications outside wild river areas. The effect of this amendment will be to significantly reduce the extent of environmental scrutiny to mineral development licence and mining lease applications in wild river areas.

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[73] SPA s.231 and 232(2), SPR schedule 4, table 5, item 1.

[74] An environmental authority (mining activities) is an authority granted under chapter 5 of the EPA (environmental authorities for mining) which authorises a person to undertake mining activities for the purposes of the EPA. It is an offence to conduct mining activities without an environmental authority (mining activities): EPA s.426.

[75] EPA s.150(ga).

[76] EPA ss.171(2)(b), 193(b)(i), 207(2)(b)(i), 210(3)(b)(i), 212(1)(c)-(e), 213, 219(2), 223(a).

[77] EPA s.151(1)(c).

[78] Section 51 will commence its proclamation: *Water and Other Legislation Amendment Act 2010* (Qld) s.2(4)(c). No proclamation has been made to date: <www.legislation.qld.gov.au> [accessed 12 April 2011]. If no proclamation is made, the provision will automatically commence 2 December 2011 unless a postponing regulation is made (which may postpone commencement to as late as 1 December 2012): *Acts Interpretation Act 1954* (Qld) s.15DA.

25. The greater scrutiny of level 1 mining projects[79] is reflected in the mandatory requirement for an EIS if the project includes mining activities (other than activities for specified works[80]) below the surface of a high preservation area or special floodplain management area or underneath a nominated waterway in a preservation area.[81] The existence of a wild river area is taken into account when determining whether an EIS will be required for any other level 1 mining project in a wild river area.[82]

26. For mining activities within a wild river area under a prospecting permit, mining claim or exploration permit, the administering authority may decide that an environmental management plan is required and when considering whether to do so, must consider the relevant wild river declaration.[83]

27. For certain level 2 mining projects that do not involve a mining claim or mining lease,[84] the administering authority may impose additional conditions and must decide the application in both cases considering the relevant wild river declaration.[85]

28. When determining applications for any level 1 mining projects that is for a mining claim, or considering whether to impose additional conditions in respect of such an application, any relevant wild rivers declaration must be considered.[86]

29. Applications for non-code compliant level 1 mining projects concerning exploration permits or mineral development licences must include an environmental

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[79] Not all level 1 mining projects are relevant; only non-code compliant level 1 mining projects that are not part of a significant project. Code compliant projects are low impact mining projects for which an environmental authority automatically issues: EPA ss.164 and 168. Significant projects are subject to environmental impact assessment under the SDPWOA: see EPA s.162(3).

[80] For specified works, see para.[12].

[81] EPA s.162(3A). The reference to specified works and a special floodplain management area in this subsection was inserted on 1 December 2010 by *Water and Other Legislation Amendment Act 2010* (Qld) s.52. The Minister cannot overturn this requirement for an EIS: EPA s.163(1)(b).

[82] EPA s.162(2). Such a requirement for an EIS can be overturned by the Minister under s.163 but, in deciding to do so, the Minister must consider the relevant wild river declaration: EPA s.163(4)(b).

[83] EPA s.163B.

[84] The level 2 mining projects are those that are non-code compliant: EPA s.169.

[85] EPA ss.170(4)(b)(ii) and 171(2)(b)(iii).

[86] EPA ss.173(2)(b)(ii) and 176(2)(b)(ii)

management plan.[87] Where the environmental management plan concerns mining activities in a wild river area, it must state the way the applicant proposes to minimise any adverse effect of mining upon the wild river area.[88] The relevant wild river declaration must be considered in assessing the application.[89]

30. Applications for non-code compliant level 1 mining projects concerning mining leases must include an environmental management plan.[90] Where the environmental management plan concerns mining activities in a wild river area, it must state the way the applicant proposes to minimise of any adverse effect of mining upon the wild river area.[91] The relevant wild river declaration must be considered in assessing the application.[92] In determining the conditions attaching to a draft environmental authority, an administering authority must consider any relevant wild river declaration.[93] When determining objections to environmental authorities for mining leases, the Land Court must take into account the existence of a wild river area amongst other things.[94] A Land Court decision takes the form of a recommendation,[95] and the Minister administering the EPA must then make a decision to grant or refuse the application; in so doing, he or she must consider any relevant wild river declaration.[96]

31. The existence of a wild river area is also relevant to the granting of environmental authorities for petroleum and gas operations and greenhouse gas storage activities (called **chapter 5A activities**).[97] As with environmental authorities (mining),

[87] EPA s.187.

[88] EPA s.189(1)(da).

[89] EPA s.193(3)(b)(iii).

[90] EPA s.201.

[91] EPA s.203(1)(da).

[92] EPA s.207(2)(b)(iii).

[93] EPA s.210(3)(b)(iii).

[94] EPA s.223(d).

[95] EPA s.222.

[96] EPA s.225(3)(c).

[97] EPA s.223(d). The Archer Declaration, the Lockhart Declaration and the Stewart Declaration, all incorrectly refer to environmental authorities (petroleum activity) rather than to environmental authorities (chapter 5A activity): see Archer Declaration chapter 4 part 4 division 4 (petroleum activities), Lockhart Declaration chapter

contd...

environmental authorities (chapter 5A activities) are classified as level 1 or level 2 according to the risk of environmental harm they present.[98]

32. Code compliant level 2 chapter 5A activities[99] must comply with relevant codes of environmental practice and, when undertaken in a wild river area, with the conditions stated in the wild river declaration for the area.[100]

33. The content of a wild river declaration must be considered when a non-code compliant level 2 chapter 5A activity is proposed.[101] The conditions for an environmental authority for such an activity, where the activity will be carried out in a wild river area, must include the conditions stated in the relevant wild river declaration.[102]

34. The content of a wild river declaration must be considered when a level 1 chapter 5A activity is proposed.[103] The conditions for an environmental authority for such an activity, where the activity will be carried out in a wild river area, must include the

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4 part 4 division 4 (petroleum activities), Stewart Declaration chapter 4 part 4 division 4 (petroleum activities). The latter form of authority supersedes the former: see EPA s.651. The references to various EPA provisions concerning environmental authorities (petroleum activity) in the declarations are taken to be references to the corresponding provisions of chapter 5A: EPA s.650. EPA chapter 5A was enacted by the *Greenhouse Gas Storage Act 2009* (Qld), the relevant provisions of which commenced on royal assessment, given on 23 February 2009. This suggests that the Archer Declaration, the Lockhart Declaration and the Stewart Declaration were all prepared before 23 February 2009.

[98] EPA s.309C.

[99] An application for a code compliant authority for a chapter 5A activity is one which the applicant certifies will comply with applicable codes of environmental practice: EPA ss.309Q(c) and 309T. To date, no code of environmental compliance has been prepared for chapter 5A activities: see <www.derm.qld.gov.au/services_resources/item_list.php?series_id=205866> [accessed 13 April 2011].

[100] EPA s.309T(3). Archer Declaration s.52(4), the Lockhart Declaration s.52(4) and the Stewart Declaration s.52(4), all provide that the following conditions are stated for the activity:

(a) in the high preservation area, a level 2 petroleum activity must not occur within 200 lateral metres of a watercourse or lake; and
(b) in the preservation area, a petroleum activity must not occur within 100 lateral metres of a nominated waterway.

[101] EPA s.309Y(b)(ii).

[102] EPA s.309Z(2)(b). Archer Declaration s.52(4), the Lockhart Declaration s.52(4) and the Stewart Declaration s.52(4), all provide that the following conditions are stated for the activity:

(a) in the high preservation area, a petroleum activity must not occur within 200 lateral metres of a watercourse or lake; and
(b) in the preservation area, a petroleum activity must not occur within 100 lateral metres of a nominated waterway.

[103] EPA s.310N(b)(ii).

conditions stated in the relevant wild river declaration.[104]

35. Transitional provisions from the *Environmental Protection and Other Legislation Amendment Act 2008* (Qld) operated to convert previous SAA (special agreement act) environmental authorities (mining) into transitional authorities (SAA).[105] Holders of the latter authority are obliged to apply for a new environmental authority or amend surrender or transfer their transitional authority (SAA) by 21 May 2011.[106] If applying for a new environmental authority, the applicant cannot be obliged to prepare an EIS unless the application relates to a wild river area.[107]

Fish Act

36. The existence of a wild river declaration is relevant to the consideration of all applications for authorities[108] under the Fish Act.[109]

37. Assessable development[110] within a high preservation area or special floodplain management area that is a material change of use of premises for aquaculture, or for certain operational work that is the construction or raising waterway barrier works[111] is prohibited.[112] The operational works for constructing or raising a

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[104] EPA s.310N(2)(b). Archer Declaration s.52(6), the Lockhart Declaration s.52(6) and the Stewart Declaration s.52(6), all provide that the following conditions are stated for the activity:

> (a) in the high preservation area, a petroleum activity must not occur within 1 lateral kilometre of a watercourse or lake; and
> (b) in the preservation area, a petroleum activity must not occur within 100 lateral metres of a nominated waterway.

[105] EPA s.616B.

[106] EPA s.616H.

[107] EPA s.616P(6) and (7).

[108] An authority is defined by Fish Act schedule as follows:

> ***authority*** means—
> (a) a licence, permit, resource allocation authority or other authority issued, and in force, under this Act; or
> (b) a quota in force under this Act.

[109] Fish Act s.55(2)(b).

[110] Again, the freedom to prescribe development as assessable, or not, under SPA s.232(1) means that the scope of this prohibition is determined by regulation.

[111] Fish Act schedule defines 'waterway barrier works' as follows:

> ***waterway barrier works*** means a dam, weir or other barrier across a waterway if the barrier limits fish stock access and movement along a waterway.

[112] SPA schedule 1, item 6.

waterway barrier works that are excepted from the prohibition are:[113]

(a) specified works[114] in the area;

(b) the maintenance of existing waterway barrier works;

(c) the construction or raising of temporary waterway barrier works associated with the carrying out of operational work for specified works or maintenance of existing waterway barrier works;[115]

(d) the construction of new waterway barrier works, or the raising of existing waterway barrier works, in the Lake Eyre Basin for storing water for town water supply demands;

(e) authorised wild river operational work[116] for the area (this clause is effectively a grandfathering clause).

38. Decisions upon applications for the construction of waterway barrier works, or aquaculture, that do not involve prohibited development (such as aquaculture outside a high preservation area) must comply with the applicable wild rivers code.[117]

39. Development that is assessable development and operational work that is the

[113] *ibid.* These exceptions were effectively added by the enactment of the SPA (and the concurrent amendment of Fish Act s.76DA which previously prohibited all operational works for constructing or raising waterway barrier works: see Fish Act s.76DA(3), reprint 6C (1 July 2009)).

[114] For definition of 'specified works', see para.[12]. The present scope of the definition of 'specified works' in WRA s.48, together with *Wild River Regulation 2007* (Qld) s.3 and its prescription of additional infrastructure, includes no operational works that amounts to waterway barrier works.

[115] As noted in note 114, there is presently no specified works that are waterway barrier works.

[116] SPA schedule 3 defines 'authorised wild river operational work' as follows:

> ***authorised wild river operational work***, for a wild river area, means operational work that is necessary for the carrying out of an activity, or the taking of a natural resource, that may be continued, or started and continued, under the *Wild Rivers Act 2005*, section 17(3)(a) as if the wild river declaration for the area had not been made.

WRA s.17(3)(a) allows a person to continue, or start and continue, an activity or taking a natural resource where, at the time of the making of a wild river declaration:

(a) the person is carrying out the activity, or taking the resource, under an Act or law;

(b) the person is authorised to carry out the activity, or take the natural resource, under a licence, permit or other authority.

[117] Fish Act s.76DA. For the Archer Declaration, the Lockhart Declaration and the Stewart Declaration, the applicable code is part 8 of the *Wild Rivers Code 2007* (Qld): see Archer Declaration s.30(3), Lockhart Declaration s.30(3), Stewart Declaration s.30(3).

removal, destruction, or damage of a marine plant[118] in a wild river area is prohibited unless it is for 'specified works'[119] or development:[120]

> that is a necessary and unavoidable part of installing or maintaining works or infrastructure required to support other development for which a development permit is not required or, if a development application or request for compliance assessment is required, the permit is held or has been applied for.

40. If such development is not prohibited, because it is consistent with the exclusion of specified works or necessary and unavoidable development, it must comply with the applicable wild rivers code.[121]

41. Development that is assessable development within a high preservation area which includes building work in a declared fish habitat area, or operational work (completely or partly) in a declared fish habitat area, is prohibited unless it is for specified works.[122] The same kind of development if undertaken in a preservation area or, if it is for specified works anywhere in a wild river area, must comply with the applicable wild rivers code.[123]

42. It is an offence to release 'nonindigenous fisheries resources' into a waterway or lake in a wild river area, or to place or cause them to be released into such an area.[124]

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[118] Fish Act s.8 defines a 'marine plant' as follows:

> **8 Meaning of marine plant**
> (1) ***Marine plant*** includes the following—
> (a) a plant (a tidal plant) that usually grows on, or adjacent to, tidal land, whether it is living, dead, standing or fallen;
> (b) material of a tidal plant, or other plant material on tidal land;
> (c) a plant, or material of a plant, prescribed under a regulation or management plan to be a marine plant.
> (2) Marine plant does not include a plant that is a declared pest under the *Land Protection (Pest and Stock Route Management) Act 2002*.

[119] See para.[12].

[120] SPA schedule 1, item 7.

[121] Fish Act s.76DB. For the Archer Declaration, the Lockhart Declaration and the Stewart Declaration, the applicable code is part 4 of the *Wild Rivers Code 2007* (Qld): see Archer Declaration s.30(4), Lockhart Declaration s.30(4), Stewart Declaration s.30(4).

[122] SPA schedule 1, item 8. For definition of specified works, see para.[12].

[123] Fish Act s.76DC.

[124] Fish Act s.90(1)(d).

Forests Act

43. The chief executive under the Forests Act must prepare a management plan for the management of State forests, timber reserves and forest entitlement areas within wild river areas.[125] Also, the chief executive may approve a code of practice for getting forest products (other than quarry materials in a watercourse or lake) in a wild river area.[126] The code of practice must state the minimum distance on either side of a wild river, or its major tributary, within which forest products must be retained.[127] The code may state different distances for particular forest products.[128] It must not be inconsistent with achieving the purpose of the WRA.[129] No such code of practice has been approved to date.

44. When granting the range of authorities for taking forest products in a wild rivers area,[130] the chief executive must ensure that each authority requires the holder to

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[125] Forests Act s.33A. The plan must be consistent with any code relevant code of practice under Forests Act s.44A and must not be inconsistent with the wild river declarations for any wild river area: Forests Act s.33A(2). To date, the chief executive has not made a management plan under Forests Act s.33A.

[126] Forests Act s.44A(1).

[127] Forests Act s.44A(2).

[128] Forests Act s.44A(3). Forests Act schedule 3 defines 'forest products' as follows:

> ***forest products*** means all vegetable growth and material of vegetable origin whether living or dead and whether standing or fallen, including timber, and, in relation to a State forest, timber reserve or forest entitlement area the term includes—
> (a) honey;
> (b) all form of indigenous animal life;
> (c) any nest, bower, shelter or structure of any form of indigenous animal life;
> (d) fossil remains;
> (e) relics;
> (f) quarry material;
> but does not include grasses on a stock route under the *Land Protection (Pest and Stock Route Management) Act 2002*, or grasses (indigenous or introduced) or crops grown on a Crown holding by the lessee or by the licensee or on a forest entitlement area by the lessee or owner.

'Quarry material' is in turn defined as follows:

> ***quarry material*** includes—
> (a) guano; and
> (b) stone, gravel, sand, rock, clay, earth and soil;
> but does not include—
> (c) minerals within the meaning of the *Mineral Resources Act 1989*; or
> (d) topsoil, if quarry material is reserved in a deed of grant; or
> (e) topsoil on a freeholding lease.

[129] Forests Act s.44A(4).

[130] Any 'lease, licence or permit granted, or any agreement or contracted entered': Forests Act s.44B(1).

comply with the Forests Act code of practice and any additional requirement in a wild river declaration[131] or, if a Forests Act code has not been approved (as is presently the case), the relevant code stated to apply in a wild river declaration.[132]

Fossicking Act

45. The Fossicking Act does not apply to a protected area.[133] Some parts of a wild river area are covered by this exclusion because of the definition of 'protected area' as follows:[134]

> ***protected area*** means—
> (a) land dedicated under the *Nature Conservation Act 1992* as—
> (i) a national park (scientific); or
> (ii) a national park; or
> (iii) a national park (Aboriginal land); or
> (iv) a national park (Torres Strait Islander land); or
> (v) a national park (recovery); or
> (vi) a conservation park; or
> (b) in a wild river area, whether or not in an area mentioned in paragraph (a)—
> (i) the wild river high preservation area; or
> (ii) a nominated waterway in the wild river preservation area.

LPA

46. A wild river area is included in the definition of 'environmentally significant area' in s.78(7) of the LPA. This means that a wild river area is one of the component, or adjacent, areas for which an owner of land can be given a 'pest control notice' if an 'issuing entity'[135] reasonably believes that a 'category 3 pest' on the owners land is causing, or has the potential to cause, adverse economic, environmental or social

[131] Forests Act s.44B(1)(a). In the event of an inconsistency, the code with the greater level of protection over the other to the extent of the inconsistency: Forests Act s.44B(2). Where a Forests Act code of practice is in place (which is not presently the case), the Archer Declaration, the Lockhart Declaration and the Stewart Declaration impose no additional requirements: see Archer Declaration s.18(5), Lockhart Declaration s.18(5), Stewart Declaration s.18(5).

[132] Forests Act s.44B(1)(b). Where a Forests Act code of practice is not in place (which is presently the case), the Archer Declaration, the Lockhart Declaration and the Stewart Declaration state that the applicable code is part 4 of the *Wild Rivers Code 2007* (Qld): see Archer Declaration s.18(4)(b), Lockhart Declaration s.18(4)(b), Stewart Declaration s.18(4)(b).

[133] Fossicking Act s.9.

[134] Fossicking Act s.3 (definition of 'protected area').

[135] The chief executive of the department administering the LPA, a pest operational board or a local government: see LPA schedule 3 (definition of 'issuing entity').

impact to the area.[136] Even without a pest control notice, a land owner (whether within a wild river area or not) is obliged to keep their land free of category 1 and 2 pests[137] and a pest control notice can be issued to enforce compliance with that duty.[138]

MRA

47. The status of an area as a wild river area has significant implications for all of the five tenements that exist under the MRA – prospecting permits, mining claims, exploration permits, mineral development licences and mining leases (collectively 'mining tenements'[139]). Mining tenements within a wild river area are subject to any conditions stated in the wild river declaration for the area.[140] The Archer Declaration, the Lockhart Declaration and the Stewart Declaration impose the following conditions:[141]

    (a) a prospecting permit or mining claim in a wild river area is subject to a condition that no activity must occur within 20 lateral metres of a nominated waterway;

    (b) an exploration permit that includes a wild river area is subject to a condition that no activity must occur:

        (i) within 100 lateral metres of a watercourse or lake for that part of the permit within a high preservation area;

        (ii) within 50 lateral metres of a nominated waterway;

    (c) a mineral development licence in a wild river area is subject to a condition that no activity must occur within 50 lateral metres of a nominated waterway;

    (d) a mining lease in a wild river area is subject to a condition that no activity

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136 LPA s.78(1)(b). Category 3 pests are prescribed in schedule 2 of the *Land Protection (Pest and Stock Route Management) Regulation 2003* (Qld) and include animals such as feral red deer and plants such as camphor laurel.

137 LPA s.77.

138 LPA s.78(1)(a).

139 See MRA schedule 2 (definition of 'mining tenement').

140 MRA ss.25(1A), 80(1A), 141(1A), 194(3), 276(2A).

141 See Archer Declaration s.43, Lockhart Declaration s.43, Stewart Declaration s.43.

must occur within 100 lateral metres of a nominated waterway unless:

(i) the mining lease is a 'significant project' under the SDPWOA; or

(ii) a report evaluating an environmental impact statement for the project shows:

A. the relevant natural values of the wild river, included in the preservation area, will be preserved;

B. it is not reasonably feasible to take the natural resource under the lease by underground mining; and

C. the value of the natural resource is sufficient to warrant the grant of the lease over the nominated waterway.

48. MRA part 10A provides a special regime for mining tenements in wild river areas. Where a prospecting permit, mining claim or mineral development licence is granted over an area that includes a wild river area, any part of the wild river area that is a high preservation area, or a nominated waterway within a preservation area, is excluded from the grant.[142] In the case of an exploration permit or mineral development licence, only 'low impact activities'[143] may be undertaken in a high preservation area or special floodplain management area (other than watercourses or lakes) and only 'limited hand sampling techniques' may be used in the watercourses and lakes of a high preservation area, special floodplain management area or nominated waterways.[144]

49. For mining leases, mining operations (other than for specified works) may not be carried out on the surface of land (which term includes the bed of a watercourse and the waters above land[145]) in a high preservation area, the surface of land in a special floodplain management area or in a nominated waterway.[146] An exception to this restriction of mining leases, inserted in December 2010,[147] to permit low impact

[142] MRA s.383(1).

[143] MRA s.382 (definition of 'low impact activity') defines the term by reference to ss.482 and 538.

[144] MRA ss.383(2) and (3).

[145] See MRA schedule 2 (definition of 'land').

[146] MRA s.383(3A).

[147] *Water and Other Legislation Amendment Act 2010* (Qld) s.62(4).

activities or limited hand sampling techniques in the same way as for an exploration permit or mineral development licence.[148]

50. The prohibition of mining activities under a mining lease in the area of a nominated waterway does not apply to certain mining projects including projects declared 'significant projects' by the Coordinator General where:[149]

    (a) the relevant natural values of the wild river, included in the nominated waterway in a preservation area, will be preserved;

    (b) it is not reasonably feasible to take the natural resource under the lease by underground mining; and

    (c) the value of the natural resource is sufficient to warrant the grant of the lease over the nominated waterway.

51. The restrictions on mining operations in high preservation areas, special floodplain management areas or nominated waterways do not apply to mining tenements granted under a 'special agreement Act' which includes the legislation for the bauxite operation at Weipa.[150]

52. Cognate, but not identical, constraints apply to the renewal of mining tenements that are located within wild river areas at the time of renewal.[151] The only significant difference is that the renewal of a mining claim is not affected by the existence of a wild river area.

53. An application for a mining tenement other than a prospecting permit may be amended to exclude all or part of a wild river area from the application.[152] Where a mining tenement other than a prospecting permit had an area excluded from their area by operation of MRA part 10A and the excluded area later ceases to be such that it would be excluded (for example, if an area ceases to be a high preservation area), the tenement holder may apply for the excluded area to be included in the

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[148] MRA s.383(3B).

[149] MRA s.383(4).

[150] See MRA schedule 2 (definition of 'special agreement Act').

[151] MRA s.384(1). There is no apparent justification for this distinct treatment of mining claims.

[152] MRA s.385(2).

mining tenement.[153] Similarly, if land was excluded from an original application voluntarily, a mining tenement holder may later apply for it to be included.[154]

NCA

54. The existence of a wild river area does not alter the management of protected areas or protected wildlife under the NCA itself. Its impact is confined to the operation of management plans for protected areas. Generally, all protected areas must have management plans prepared for them.[155] The NCA provides a procedure for making management plans. The relationship between a management plan under the NCA and a wild river declaration is described by NCA s.117(1A) which provides:

> A final management plan for a protected area may be inconsistent with a wild river declaration that applies to a part or all of the protected area only to the extent the management plan provides for a greater level of protection for the area than is provided for in the declaration.

55. The undertaking of development on some protected areas, where development involves clearing vegetation, is constrained by the existence of a wild river area. Unlike State land or Aboriginal land national parks,[156] vegetation clearing restrictions apply on private land protected areas such as nature refuges, coordinated conservation areas and wilderness areas.[157] These restrictions are detailed below under the heading for the VMA.

SDPWOA

56. Under the SDPWOA, the Coordinator General may declare a project to be a 'significant project' in which case the development coordination and facilitation provisions of the Act apply.[158] Furthermore, the Coordinator General may decide

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[153] MRA s.386

[154] MRA s.386A.

[155] NCA s.111(1).

[156] State land national parks are national parks (scientific), national parks, national parks (recovery), conservation parks and resources reserves: see NCA s.28. Aboriginal land national parks are national parks (Aboriginal land), national parks (Cape York Peninsula Aboriginal land) and national parks (Torres Strait Islander land): see NCA part 4 division 3.

[157] NCA s.43. See VMA s.7 (application of act).

[158] SDPWOA s.26.

that an EIS is, or is not, required for a significant project.[159] If an EIS is required, SDPWOA division 3 to 6 apply to the project (which provisions set out an environmental assessment and approval process).[160]

57. SDPWOA part 4 division 4 alters the operation of IDAS for significant projects. One effect of this is remove all referral agencies from the IDAS process,[161] presumably on the basis that all comments that would otherwise be received from referral agencies can be made as submissions to the EIS process. Where a significant project involves a material change of use in a wild river area (made after the relevant wild river declaration is made), the involvement of the assessment agencies responsible for the WRA is preserved.[162] This means that a development application that is a significant project in a wild river area is still assessed by the department administering the WRA. Furthermore, conditions imposed by that department in the assessment of wild rivers matters prevail over the conditions imposed by the Coordinator General for the significant project.[163]

58. After an EIS for a significant project is complete, the Coordinator General prepares a report evaluating the EIS.[164] Amongst other things, as part of the report the Coordinator General may impose conditions that operate upon the approval of a development application under IDAS.[165] This power includes the power to exclusively determine the conditions of a development approval.[166] However, this power is qualified for a development application that is made for a wild river area after the relevant wild river declaration is made.[167] In that case, the assessment manager may still assess the application against the wild rivers code and impose

[159] SDPWOA s.26(1).

[160] SDPWOA s.28.

[161] SDPWOA s.37(1)(b).

[162] SDPWOA s.37A(2).

[163] SDPWOA s.37A(3).

[164] SDPWOA s.35(3).

[165] see SDPWOA s.39.

[166] SDPWOA s.39(1)(a).

[167] SDPWOA s.39(3A)-(3C).

conditions that prevail over the Coordinator General's conditions.[168]

59. Another impact of the existence of a wild river concerns the Coordinator General's power to alter watercourses and water bodies when undertaking authorised works.[169] This power does not apply in a wild river area.[170]

TIA

60. The chief executive administering the TIA has the power to temporarily occupy and use land for the purpose of road maintenance, construction and operation.[171] This power does not authorise the chief executive to take quarry materials from a watercourse in a wild river area.[172] A related power to divert a watercourse, or create a temporary watercourse, does not authorise the chief executive, for a wild river area, to divert or create a watercourse in a wild river area or extract quarry material from a watercourse.[173] Similar limitations exist for railway operators.[174]

VMA

61. Under the SPA, clearing vegetation is development, specifically operational work.[175] The SPR prescribes the following forms of clearing of vegetation as assessable development (**assessable clearing**):[176]

> Operational work that is the clearing of native vegetation on—
> (a) freehold land; or
> (b) indigenous land; or
> (c) any of the following under the *Land Act 1994*—
> (i) land subject to a lease;

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[168] SDPWOA s.39(3A)-(3C).

[169] SDPWOA s.138.

[170] SDPWOA s.138(3A).

[171] TIA s.35.

[172] TIA s.35(2).

[173] TIA s.39(4). See also TIA s.306(3) for a similar limitation of the chief executive's powers for busway transport infrastructure works.

[174] TIA s.167(4).

[175] SPA ss.7(c) and 10(1) (definition of 'operational work', para.(1)(f)). SPA s.10(1), definition of 'operational work', para.(2)(b) specifically excludes the clearing of vegetation on a forest reserve, protected area under NCA s.28 [which provision does not include a national park (Cape York Peninsula Aboriginal land); compare VMA s.7(1)(b)(v) which excludes such a park from the VMA], a State forest or timber reserve under the Forests Act or a forest entitlement area under the *Land Act 1994* (Qld) from the definition of 'operational work'.

[176] SPR schedule 3, part 1, table 4, item 1 (for clearing native vegetation).

(ii) a road;
(iii) trust land, other than indigenous land;
(iv) unallocated State land;
(v) land subject to a licence or permit;

unless the clearing is—

(d) on premises to which structure plan arrangements apply; or
(e) clearing, or for another activity or matter, mentioned in schedule 24, part 1; or
(f) clearing mentioned in schedule 24, part 2 for the particular land.

62. Indigenous land is defined as follows:[177]

> ***indigenous land*** means land held under a following Act by, or on behalf of or for the benefit of, Aboriginal or Torres Strait Islander inhabitants or for Aboriginal or Torres Strait Islander purposes—
> (a) the *Local Government (Aboriginal Lands) Act 1978*;
> (b) the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*;
> (c) the *Aboriginal Land Act 1991*;
> (d) the *Torres Strait Islander Land Act 1991*;
> (e) the *Land Act 1994*.

63. In consequence of these provisions, all native vegetation clearing on freehold or Indigenous land is subject to assessment unless it is excluded by paragraphs (d)-(f) of the definition of assessable clearing (see **Attachment A**), or entirely prohibited because of their prescription as prohibited development.[178] Important exceptions to the category of assessable clearing include clearing that is:

(a) a traditional Aboriginal or Torres Strait Islander cultural activity, other than a commercial activity;[179]

(b) a mining, petroleum, gas or greenhouse gas sequestration activity;[180]

(c) an activity authorised by the Forests Act;[181]

(d) clearing that the VMA does not apply to;[182]

(e) for residential clearing;[183]

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[177] SPA schedule 3 (definition of 'indigenous land').

[178] SPA schedule 1, item 3 (for clearing vegetation).

[179] SPR schedule 24, item 1(5).

[180] SPR schedule 24, item 1(6).

[181] SPR schedule 24, item 1(13).

[182] SPR schedule 24, items 2(a), 3(a), 4(1)(a), 4(2)(a).

[183] SPR schedule 24, items 2(c), 3(c), 4(1)(b), 4(2)(b). SPR schedule 26 defines 'residential clearing' as:

> ***residential clearing***—
> (a) for the clearing of vegetation on freehold land or land subject to a lease under the *Land Act*

contd...

(f) in exercise of the right of Aurukun Shire Council to authorise the taking of forest products for use in its local government area or, for a Aboriginal community government or Indigenous regional council, the same right but only for land that has been transferred or granted as Aboriginal freehold;[184]

(g) necessary for essential management;[185]

1994—means clearing the vegetation to the extent necessary for building a single dwelling house on a lot, and any reasonably associated building or structure, if the building of the dwelling house is—

(i) building work for which a development permit for a building development application, or a compliance permit, has been given; or

(ii) building work mentioned in schedule 3, part 2, table 1, item 1 [public sector or local government building work]; or

(iii) for public housing; or

(b) for the clearing of vegetation on indigenous land—means clearing the vegetation to the extent necessary for building dwelling houses, and any reasonably associated building or structure, for Aboriginal or Torres Strait Islander inhabitants of the land or persons providing educational, health, police or other community services for the inhabitants, if the building of the dwelling houses is—

(i) building work for which a development permit for a building development application, or a compliance permit, has been given; or

(ii) building work mentioned in schedule 3, part 2, table 1, item 1 [public sector or local government building work]; or

(iii) for public housing.

[184] SPR schedule 24, item 3(j).

[185] SPR schedule 24, items 2(d), 3(d), 4(1)(c), 4(2)(c), 6(a), 7(a) and 8(a). 'Essential management' is defined by schedule 26 as follows:

essential management means clearing native vegetation—

(a) for establishing or maintaining a necessary firebreak to protect infrastructure other than a fence, road or vehicular track, if the maximum width of the firebreak is equivalent to 1.5 times the height of the tallest vegetation adjacent to the infrastructure, or 20m, whichever is the greater; or

(b) for establishing a necessary fire management line if the maximum width of the clearing for the fire management line is 10m; or

(c) necessary to remove or reduce the imminent risk that the vegetation poses of serious personal injury or damage to infrastructure; or

(d) by fire under the *Fire and Rescue Service Act 1990* to reduce hazardous fuel load; or

(e) necessary to maintain infrastructure including any core airport infrastructure, buildings, fences, helipads, roads, stockyards, vehicular tracks, watering facilities and constructed drains other than contour banks, other than to source construction material; or

(f) for maintaining a garden or orchard, other than clearing predominant canopy trees to maintain underplantings established within remnant vegetation; or

(g) on land subject to a lease issued under the *Land Act 1994* for agriculture or grazing purposes to source construction timber to repair existing infrastructure on the land, if—

(i) the infrastructure is in need of immediate repair; and

(ii) the clearing does not cause land degradation as defined under the Vegetation Management Act; and

(iii) restoration of a similar type, and to the extent of the removed trees, is ensured; or

(h) by the owner on freehold land to source construction timber to maintain infrastructure on

contd...

(h) necessary for routine management and the vegetation is regulated regrowth vegetation, or a least concern regional ecosystem of a specified kind.[186]

64. Some aspects of assessable clearing are prohibited development. The SPA declares the following to be prohibited development:[187]

> Assessable development prescribed under section 232(1) that—
> (a) is operational work that is the clearing of native vegetation; and
> (b) is not for a relevant purpose under the Vegetation Management Act, section 22A.

65. The concept of a 'relevant purpose' under VMA s.22A is central to the vegetation clearing restrictions within a wild river, and under the VMA generally. VMA s.22A(1) explains that the section describes when a 'vegetation clearing application' is taken to be for a relevant purpose. A 'vegetation clearing applications' is defined as

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any land of the owner, if—
(i) the clearing does not cause land degradation as defined under the Vegetation Management Act; and
(ii) restoration of a similar type, and to the extent of the removed trees, is ensured.

[186] SPR schedule 24, items 2(i), 3(i), 4(1)(g), 4(2)(g). SPR schedule 26 defines 'routine management' as follows:

> ***routine management***, for clearing native vegetation on land, means the clearing of native vegetation—
> (a) to establish a necessary fence, road or vehicular track if the maximum width of clearing for the fence, road or track is 10m; or
> (b) to construct necessary built infrastructure, including core airport infrastructure, other than contour banks, fences, roads or vehicular tracks, if—
> (i) the clearing is not to source construction timber; and
> (ii) the total extent of clearing is less than 2ha; and
> (iii) the total extent of the infrastructure is on less than 2ha; or
> (c) by the owner on freehold land to source construction timber for establishing necessary infrastructure on any land of the owner, if—
> (i) the clearing does not cause land degradation as defined under the Vegetation Management Act; and
> (ii) restoration of a similar type, and to the extent of the removed trees, is ensured; or
> (d) by the lessee of land subject to a lease issued under the *Land Act 1994* for agriculture or grazing purposes to source construction timber, other than commercial timber, for establishing necessary infrastructure on the and, if—
> (i) the clearing does not cause land degradation as defined under the Vegetation Management Act; and
> (ii) restoration of a similar type, and to the extent of the removed trees, is ensured.

A substantial majority of the land in Cape York under Indigenous control is land that is in a 'least concern regional ecosystem' and shown on a 'regional ecosystem map ...as remnant vegetation'. The category of 'routine management' is therefore particularly significant. It is notable that the owner of Indigenous land is not entitled to the concession for freehold land, or land subject to an agricultural or grazing lease under the *Land Act 1994* (Qld), that permits clearing that does not cause land degradation if restoration of a similar type and extent of trees is ensured.

[187] SPA schedule 1, item 3.

follows:[188]

> ***vegetation clearing application*** means a development application that involves development that is:
> (a) the clearing of native vegetation defined under that Act; and
> (b) assessable development prescribed under section 232(1) of that Act.

66. Relevant purposes are defined by VMA s.22(2), (2AA) and (2A) which provide:

> (2) A vegetation clearing application is for a relevant purpose under this section if the applicant satisfies the chief executive that the development applied for is—
> (a) a project declared to be a significant project under the *State Development and Public Works Organisation Act 1971*, section 26; or
> (b) necessary to control non-native plants or declared pests; or
> (c) to ensure public safety; or
> (d) for establishing a necessary fence, firebreak, road or vehicular track, or for constructing necessary built infrastructure, (each ***relevant infrastructure***) and the clearing for the relevant infrastructure can not reasonably be avoided or minimised; or
> (e) a natural and ordinary consequence of other assessable development for which a development approval was given under the repealed *Integrated Planning Act 1997*, or a development application was made under that Act, before 16 May 2003; or
> (f) for fodder harvesting; or
> (g) for thinning; or
> (h) for clearing of encroachment; or
> (i) for an extractive industry; or
> (j) for clearing regrowth vegetation on freehold land, indigenous land or leases issued under the Land Act 1994 for agriculture or grazing purposes, in an area shown as a registered area of agriculture on a registered area of agriculture map in a wild river high preservation area.
>
> (2AA) Also, a vegetation clearing application is for a relevant purpose under this section if, under the CYPH Act, the Minister is satisfied the development applied for is for a special indigenous purpose.
>
> (2A) However, a vegetation clearing application is not for a relevant purpose under this section if the development applied for is—
> (a) mentioned in subsection (2)(a) or (i) or subsection (2AA); and
> (b) proposed for a wild river high preservation area. [*emphasis added*]

67. By reason of the operation of VMA s.22A(2A), there are only 8 relevant purposes for clearing in a high preservation area – those under paragraphs (b)-(h) and (j). The limited scope of clearing of encroachment is apparent from the definition of the term 'encroachment' which the VMA schedule defines as follows:

> ***encroachment*** means a woody species that has invaded an area of a grassland regional ecosystem to an extent the area is no longer consistent with the description

[188] VMA schedule (definition of 'vegetation clearing application'. This definition fails to properly identify the Act to which reference is made. However, given that the definition was inserted by SPA schedule 2, item 37, and the legislative history of the provision, it is tolerably clear that the intended reference is to the SPA.

of the regional ecosystem.

68. There is particular ambiguity about the operation of paragraph 22A(2)(d) and the term 'necessary built infrastructure'. The term has never been judicially considered. The legislative history of VMA s.22A gives some indication of the purpose of this term.

Example of application of clearing controls to residential or small scale commercial use

69. The three-fold application of these provisions, in determining whether clearing is permissible, requires an approved development application or is prohibited, can be demonstrated by considering the examples of residential, or small scale commercial, development on Indigenous land.

70. For the purposes of this example:

    (a) the tenure of land is deed of grant in trust for the benefit of Aboriginal people under the *Land Act 1994* (Qld)—Indigenous land;

    (b) the parcel is 2 ha in size, systematically vegetated and classified as a 'least concern regional ecosystem' and shown on a 'regional ecosystem map ...as remnant vegetation';

    (c) the proposed use is for residential dwellings or tourist accommodation, not undertaken in an urban area.

71. For both residential or commercial purposes, clearing of vegetation on Indigenous land is assessable clearing unless it falls within the exceptions in paragraphs (e) or (f) of the SPR description of assessable clearing.[189]

72. Residential development on Indigenous land is excluded from the definition of assessable clearing by item 3(c) in SPR schedule 24. In its application to Indigenous land, residential development:[190]

    means clearing the vegetation to the extent necessary for building dwelling houses,

[189] Bearing in mind that if the development is not assessable development under SPR schedule 3 it cannot be prohibited development under SPA schedule 1 if it is not for clearing for a relevant purpose.

[190] The key difference between residential clearing on freehold land, and that on Indigenous land, is that freehold land residential clearing is confined to 'a single dwelling house on a lot' whereas Indigenous land residential clearing is not so confined.

and any reasonably associated building or structure, for Aboriginal or Torres Strait Islander inhabitants of the land or persons providing educational, health, police or other community services for the inhabitants, if the building of the dwelling houses is—

(i) building work for which a development permit for a building development application, or a compliance permit, has been given; or

(ii) building work mentioned in schedule 3, part 2, table 1, item 1 [public sector or local government building work, other than exempt development]; or

(iii) for public housing.

73. SPA schedule 3 defines public housing as follows:

public housing—
(a) means housing—
(i) provided by or for the State or a statutory body representing the State; and
(ii) for short or long term residential use; and
(iii) that is totally or partly subsidised by the State or a statutory body representing the State; and
(b) includes services provided for residents of the housing, if the services are totally or partly subsidised by the State or a statutory body representing the State.

74. As a result of the definition of residential clearing, housing can only be constructed by an Indigenous local government or by the State.[191] Development for residential purposes by a private individual will not qualify as residential clearing. The development may qualify for an exemption under SPR schedule 24 item 3(i) as routine management in an area of least concern regional ecosystem shown on a regional ecosystem map. Development for a commercial purpose, such as a retail outlet, tourist cabins or a fishing lodge, is in the same position.

75. Routine management is defined in SPR schedule 26 and relevantly means clearing native vegetation:

(a) to establish a necessary fence, road or vehicular track if the maximum width of clearing for the fence, road or track is 10m; or
(b) to construct <u>necessary built infrastructure</u>, including core airport infrastructure, other than contour banks, fences, roads or vehicular tracks, if—
(i) the clearing is not to source construction timber; and

[191] For the purposes of this example, no existing approval under paragraph (a)(i) of the definition of residential clearing is in place. This reflects the position of the vast majority of planned housing development on Indigenous land in Cape York. Public housing provided by the State is that under the *Housing Act 2003* (Qld): see *Housing Act 2003* (Qld) s.11(2)(a) and schedule 3 (definition of 'public housing').

> (ii) the total extent of clearing is less than 2ha; and
> (iii) the total extent of the infrastructure is on less than 2ha; or
>
> (c) by the owner on freehold land to source construction timber for establishing <u>necessary infrastructure</u> on any land of the owner, if—
> (i) the clearing does not cause land degradation as defined under the Vegetation Management Act; and
> (ii) <u>restoration of a similar type, and to the extent of the removed trees, is ensured</u>; or
>
> (d) ... [*emphasis added*]

76. Paragraph (b) shows that residential development that is not residential clearing, or commercial development, can be cleared if it qualifies as 'necessary built infrastructure'. The use of timber on the land for construction purposes is not permitted on Indigenous land even where the restoration of a similar type, and extent, of timber is 'ensured'. There is no articulated, valid reason for this distinction between Indigenous land and freehold land – nor could there be.

77. Necessary built infrastructure (and 'necessary infrastructure') in this respect determines the exclusion of the relevant residential or commercial development from the scope of assessable clearing, and so an effective development permit is not required. If the extent of clearing is 2 ha or more (ie. not less than 2 ha), the routine management exception from the definition of assessable development is not available, and an effective development permit would be required. In order to obtain such a permit, it is necessary to show that the clearing is for a relevant purpose under VMA s.22A. For both residential development that is not residential clearing, and commercial development, only the 'necessary built infrastructure' relevant purpose is available to authorise a development application. Otherwise, the development is not for a relevant purpose and so is prohibited development.[192]

78. The terms 'necessary built infrastructure' and 'necessary infrastructure' are not defined in the SPA or SPR, and so the indicia of necessity fall to be determined according to the normal rules of statutory interpretation.

'Necessary built infrastructure' and the history of VMA s.22A

79. The substance of s.22A, as it presently defines 'relevant purpose', was introduced by

[192] SPA schedule 1, item 3.

the *Vegetation Management and Other Legislation Amendment Act 2004* (Qld).[193] This Act was introduced as part of a series of measure to eliminate broadscale clearing by December 2006.[194]

80. As introduced, s.22A provided:

> **22A Particular vegetation clearing applications may be assessed**
> (1) Despite the Planning Act, section 3.2.1, if a vegetation clearing application is not for a relevant purpose under this section—
> (a) the application is taken, for the Planning Act, not to be a properly made application; and
> (b) the assessment manager must refuse to receive the application.
> (2) A vegetation clearing application is for a relevant purpose under this section if the applicant satisfies the chief executive that the development applied for is—
> (a) a project declared to be a significant project under the *State Development and Public Works Organisation Act 1971*, section 26; or
> (b) necessary to control non-native plants or declared pests; or
> (c) to ensure public safety; or
> (d) for establishing a <u>necessary</u> fence, firebreak, road <u>or other built infrastructure, if there is no suitable alternative site for the</u> fence, firebreak, road or <u>infrastructure</u>; or
> (e) a natural and ordinary consequence of other assessable development for which a development approval as defined under the Planning Act was given, or a development application as defined under the Planning Act was made, before 16 May 2003; or
> (f) for fodder harvesting; or
> (g) for thinning; or
> (h) for clearing of encroachment; or
> (i) for an extractive industry; or
> (j) for clearing regrowth on leases issued under the *Land Act 1994* for agriculture or grazing purposes.
> (3) In this section—
> **"extractive industry"** means 1 or more of the following—
> (a) dredging material from the bed of any waters;
> (b) extracting rock, sand, clay, gravel, loam or other material, from a pit or quarry;
> (c) screening, washing, grinding, milling, sizing or separating material extracted from a pit or quarry. [*emphasis added*]

81. The purposes of s.22A was described by the explanatory notes for the *Vegetation*

[193] The operative provisions of the *Vegetation Management and Other Legislation Amendment Act 2004* (Qld) commenced on 21 May 2004: see 2004 SL No.62. An earlier VMA s.22A was inserted by the *Natural Resources and Other Legislation Amendment Act 2003* (Qld). That provision concerned the refusal of a development application if the applicant, or the owner of the land to which the application related, was convicted of an offence of unlawful clearing (equivalent to the present VMA s.22M). The *Vegetation Management and Other Legislation Amendment Act 2004* (Qld) repealed the earlier version of s.22A.

[194] *Vegetation Management and Other Legislation Amendment Bill 2004* (Qld), explanatory notes, p.1

Management and Other Legislation Amendment Bill 2004 (Qld) as follows:

> In summary, [the clause of the Bill which inserted s.22A] introduces the phasing out of broadscale clearing, by prohibiting applications for broadscale clearing outside of a ballot process. The ballot applies to broadscale applications in order to allocate the area available for permits under a cap on the clearing of vegetation. The clause also outlines a number of exceptions where particular vegetation clearing applications (ongoing applications) may be assessed outside of the cap and the ballot process. Modification to appeal rights and application processes under IDAS are also outlined.

82. The purpose of s.22A(1) was to preclude the making of vegetation clearing applications under the IPA where those applications were not for a 'relevant purpose'. Such applications 'cannot be accepted and must be refused to be received by the assessment manager unless it is for one of the ongoing purposes outlined in section 22A(2)'.[195] The relevant purposes for applications in s.22A(2) were:[196]

> a number of exceptions where applications for vegetation clearing (ongoing applications) will continue to be accepted, provided the chief executive is satisfied the clearing is for that purpose. These applications will be assessed outside the cap on clearing vegetation.

83. In reference to s.22A(2)(d) (which concerned infrastructure), the explanatory notes for the *Vegetation Management and Other Legislation Amendment Bill 2004* (Qld) stated:

> Under this section applications will also be accepted for clearing required for establishing a necessary road, fence, firebreak or other built infrastructure, if there is no suitable alternative site available and where the amount of clearing required is greater than that allowed without a permit under the exemptions in the *Integrated Planning Act 1997* schedule 8, part 1.

84. The exemptions referred to concern the exclusion of 'routine maintenance' from the requirement to obtain development approval for vegetation management. At the time the *Vegetation Management and Other Legislation Amendment Bill 2004* (Qld) was tabled, a development application was not required for certain kinds of vegetation clearing that were routine maintenance.[197]

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[195] *Vegetation Management and Other Legislation Amendment Bill 2004* (Qld), explanatory notes, p.10.

[196] *Vegetation Management and Other Legislation Amendment Bill 2004* (Qld), explanatory notes, p.10.

[197] On 1 March 2004, reprint 5 (under the *Reprints Act 1992* (Qld)) of the *Integrated Planning Act 1997* (Qld) included a definition of 'routine management' in schedule 8 the following:

> ***"routine management"*** means clearing native vegetation—
> (a) for establishing a necessary fence, road or other built infrastructure that is on less than 5 ha;

contd...

85. The WRA, as enacted, amended VMA s.22A by inserting the penultimate version of VMA s.22A(2A) as follows:

> (2A) However, a vegetation clearing application is not for a relevant purpose under this section if the development applied for is—
> (a) mentioned in subsection (2)(a), (f), (g), (i) or (j); and
> (b) proposed for a wild river high preservation area.

86. The explanatory notes for the *Wild Rivers Bill 2005* (Qld) described the operation of this amendment:

> Clause 4 of the Bill provides for a new sub-section 22A(2A) of the *Vegetation Management Act 1999*. The sub-section provides a list of purposes for which an application for vegetation clearing would not be a properly made application. If the application is for those purpose(s) listed, despite section 3.2.1 of the *Integrated Planning Act*, the application is taken to be not properly made and must not be accepted.
>
> For wild rivers, the list of purposes for which applications may be received has been reduced from the current list in the *Vegetation Management Act 1999*. From the time of the notice of intent, applications for vegetation clearing in the high preservation area will only be accepted for the following purposes listed in the *Vegetation Management Act 1999*:
> - necessary to control non-native plants or declared pests; or
> - to ensure public safety; or
> - for establishing a necessary fence, firebreak, road or other built infrastructure, if there is no suitable alternative site for the fence, firebreak, road or infrastructure; or
> - a natural and ordinary consequence of other assessable development for which a development approval as defined under the *Integrated*

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or
(b) that is not remnant vegetation; or
(c) for supplying fodder for stock, in drought conditions only.

At the same time, clearing that was routine management was excluded from the scope of assessable clearing under *Integrated Planning Act 1997* (Qld) schedule 8 item 3A unless it was clearing in:

(a) an area of high nature conservation value; and

(b) an area vulnerable to land degradation; and

(c) a remnant endangered regional ecosystem shown on a regional ecosystem map; and

(d) an area of unlawfully cleared vegetation (see *Integrated Planning Act 1997* (Qld) schedule 8 item 3A(c)).

The exclusion of an 'area of high nature conservation value' resulted in the inclusion of clearing in such an area within the category of assessable clearing; hence the significance of the deemed declaration of a high preservation area as an area of high nature conservation value: VMA s.17(1A). Curiously, the status of an area as one of high nature conservation value is no longer relevant to the definition of 'routine management'. This change was made by *Vegetation Management and Other Legislation Amendment Act 2004* (Qld) s.31 which introduced provisions similar to the contemporary terms 'routine management' and 'essential management'. The amendments commenced on 21 May 2004: see 2004 SL No.62.

Planning Act 1997 was given, or a development application as defined under the *Integrated Planning Act 1997* was made, before 16 May 2003; or

- for clearing of encroachment.

Applications for vegetation clearing in the proposed high preservation area will not be accepted for the following purposes:

- a project declared to be a significant project under the *State Development and Public Works Organisation Act 1971*, section 26; or
- for fodder harvesting; or
- for thinning; or
- for an extractive industry; or
- for clearing regrowth on leases issued under the *Land Act 1994* for agriculture or grazing purposes.

There has been a reduction in the number of purposes that can be applied for to clear native vegetation because the high preservation area of a proposed wild river area is considered to be of particular significance in maintaining the natural values of the wild river. Purposes such as thinning, and the clearing of regrowth, are not appropriate for the high preservation area because of the high level of biophysical importance, including connectivity, that is placed on the high preservation area of a wild river.

87. Section 66 of the *Wild Rivers and Other Legislation Amendment Act 2006* (Qld) amended VMA s.22A in the following ways:

(a) a new item, s.22A(2)(k) was added to the list of relevant purposes which item described the purpose of 'clearing regrowth on freehold land, or indigenous land, in a wild river high preservation area';[198]

(b) the list of permissible relevant purposes for a vegetation clearing application in the high preservation area of a wild rivers area was altered to add regrowth clearing on agricultural or grazing leases under the *Land Act 1994* (Qld);[199]

(c) regrowth clearing on agricultural or grazing leases, or the new relevant purpose of clearing regrowth in a wild river high preservation area, were limited to a 'registered area of agriculture shown on a registered area of agriculture map'.[200]

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[198] *Wild Rivers and Other Legislation Amendment Act 2006* (Qld) s.66(1).

[199] *Wild Rivers and Other Legislation Amendment Act 2006* (Qld) s.66(2).

[200] *Wild Rivers and Other Legislation Amendment Act 2006* (Qld) s.66(3). See also definition of 'registered area of agriculture map' inserted by *Wild Rivers and Other Legislation Amendment Act 2006* (Qld) s.66(4).

88. The *Land and Other Legislation Amendment Act 2007* (Qld)[201] amended VMA s.22A(2)(d), which describes infrastructure construction as one of the relevant purposes for making a vegetation clearing application, to bring it close to its present form as follows:[202]

> for establishing a necessary fence, firebreak, road or vehicular track, or for constructing necessary built infrastructure, if there is no suitable alternative site for the fence, firebreak, road, track or infrastructure...

89. The explanatory notes for the *Land and Other Legislation Amendment Bill 2007* (Qld) aid in understanding 'necessary built infrastructure' in the explanation for cl.223 as follows:

> Clause 223 amends s 22A to replace "establishing necessary built structure" with "constructing necessary built infrastructure", this is consistent with earlier amendments to the IPA. The replacement of "for establishing" with "to construct" limits clearing to the area required for constructing the built infrastructure. "Establishing" could allow clearing for not only construction of built infrastructure but also for the subsequent operation of infrastructure which is not the intent of this provision. For example, the construction of a centre pivot irrigator would require only a relatively narrow linear area to be cleared. For the centre pivot irrigator to then operate effectively the area required to be cleared would be a circle with a radius equivalent to the length of the irrigator—a much larger area. To remove doubt the term "built infrastructure" includes public and privately owned buildings, pipelines, dams and powerlines. The term does not include agricultural purposes such as growing crops in the soil and pasture for stock. The addition of "to construct" also ensures consistency with the definition of routine management in the IPA where the term built infrastructure is also used. In addition "vehicular track" has been added to section 22A(2)(d) because the ordinary meaning of "road" only allows clearing of roads for public uses. The intent of this provision is to allow for clearing applications to maintain and establish public and private roads and tracks. The inclusion of the term "vehicular track" achieves this intent. [*emphasis added*]

90. The other amendment to which this part of the explanatory notes refers is the amendment to IPA contained in s.9(6) of the *Land and Other Legislation Amendment Bill 2007* (Qld) which altered the definition of 'routine management' in the dictionary of IPA to the following:

> ***routine management*** means clearing native vegetation—
> ...

[201] The operative provisions of the *Land and Other Legislation Amendment Act 2007* (Qld) commenced on 18 May 2007: see 2007 SL No.235.

[202] *Land and Other Legislation Amendment Act 2007* (Qld) s.223(1).

> (b) to construct <u>necessary built infrastructure</u> other than contour banks, fences, roads or vehicular tracks if—
> (i) the clearing is not to source construction timber; and
> (ii) the total extent of clearing is less than 2ha; and
> (iii) the total extent of the infrastructure is on less than 2ha;
>
> ... [*emphasis added*]

91. The explanatory notes for *Land and Other Legislation Amendment Bill 2007* (Qld) cl.9, which made corresponding amendments to the IPA, describe the reasons for this amendment:[203]

> The definition of "routine management" is amended to remove the phrase "for establishing necessary" and replaced with "to construct necessary built". Under "routine management", clearing to establish necessary infrastructure (other than contour banks, fences or roads) is exempt development if the clearing and the area of infrastructure is less than 2 ha. Prior to 2004, the definition of "routine management" in relation to freehold land included clearing for necessary "built" infrastructure subject to certain area limits and exclusion of endangered vegetation. However in the changes in 2004 the reference to "built" was omitted. Because "infrastructure" is defined under the IPA as including land, facilities, services and works used for supporting economic activity and meeting environmental needs, the definition of the exemption was significantly expanded. The amendment to reinstate "built" in the "routine management" definition ensures the intent of the definition is restored and provides consistency with the VMA.
>
> The replacement of "for establishing" with "to construct" limits clearing to the area required for constructing the built infrastructure. "Establishing" could allow clearing for not only construction of built infrastructure but also for the subsequent operation of infrastructure which is not the intent of the exemption. For example, the construction of a centre pivot irrigator would require only a relatively narrow linear area to be cleared. For the centre pivot irrigator to then operate effectively the area required to be cleared would be a circle with the radius of the length of the irrigator—a much larger area. The addition of "to construct" ensures consistency with a similar change in section 22A(2)(d) of the VMA where the intent is to prevent broadscale clearing by limiting applications to clear to particular relevant purposes.

92. This part of the explanatory memorandum demonstrates that the amendment introducing the phrase 'necessary built infrastructure' was intended to narrow the scope of the phrase that would otherwise flow from the use of the term 'infrastructure' given its definition under the IPA.[204]

93. The *Land and Other Legislation Amendment Act 2007* (Qld) also inserted VMA

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[203] *Land and Other Legislation Amendment Bill 2007* (Qld), explanatory notes, p.17.

[204] The expansive term remains in the SPA, see SPA schedule 3 (definition of 'infrastructure').

s.22A(2C) which restricts the relevant purposes for a vegetation clearing application in a voluntarily declared area of high nature conservation value or area vulnerable to land degradation.[205]

94. An additional relevant purpose for a vegetation clearing application was added by the *Urban Land Development Authority Act 2007* (Qld), namely clearing in an urban development area under that Act.[206]

95. The *Cape York Peninsula Heritage Act 2007* (Qld) added another relevant purpose, being clearing for a 'special indigenous purpose' (which is clearing under a special Indigenous purpose under the code in VMA s.19N).[207] That relevant purpose is not available in a high preservation area.[208]

96. The *Vegetation Management and Other Legislation Amendment Act 2009* (Qld) retrospectively amended VMA s.22A with effect from 8 October 2009.[209] These amendments:

    (a) amended s.22A(2)(d) so that the phrase 'no suitable alternative site' was replaced by one involving 'clearing [which cannot]... reasonably be avoided or minimised';[210]

    (b) consolidated what were paragraphs (j) and (k) as a single paragraph (j) (and a new subsection (2B)) covering regrowth clearing;[211]

    (c) replacing the definition of 'extractive industry'.[212]

97. The explanatory notes for the *Vegetation Management and Other Legislation*

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[205] *Land and Other Legislation Amendment Act 2007* (Qld) s.223(2). A voluntarily declared area of high nature conservation value (or area vulnerable to land degradation), under VMA s.19F(1)(a), is distinct from an area taken to be declared as an area of high nature conservation value under VMA s.17(1A).

[206] *Urban Land Development Authority Act 2007* (Qld) s.250.

[207] *Cape York Peninsula Heritage Act 2007* (Qld) s.60. See also *Cape York Peninsula Heritage Act 2007* (Qld) ss.18 and 19.

[208] VMA s.22A(2A).

[209] *Vegetation Management and Other Legislation Amendment Act 2009* (Qld) s.2. The Act received royal assent on 3 November 2009.

[210] *Vegetation Management and Other Legislation Amendment Act 2009* (Qld) s.27(1).

[211] *Vegetation Management and Other Legislation Amendment Act 2009* (Qld) s.27(2), (3) and (4).

[212] *Vegetation Management and Other Legislation Amendment Act 2009* (Qld) s.27(5).

Amendment Bill 2009 (Qld) explain the purpose of the amendments related to 'necessary built infrastructure'. They provide:[213]

> Section 22A(2)(d) replaces reference to 'no suitable alternative site relating to the fence, firebreak, road, track or infrastructure', with reference to, 'for each relevant infrastructure, that the clearing can not reasonably be avoided or minimised'. This change reflects the principles of the Queensland Government's Environmental Offsets Policy, which provides the overarching framework and principles for detailed specific-issue policies such as the offsets policy for vegetation management recognised by this Bill in section 10C. Principal two of the Environmental Offsets Policy directs that environmental impacts must first be avoided, then minimised before considering an offset for any remaining impact, where it is possible to do so under a relevant offsets policy.
>
> Avoiding impacts may involve the project's design and location whereby the need for the clearing vegetation is avoided through locating in existing cleared areas and limiting the development's footprint. Minimising impacts may include only clearing vegetation to the extent that does not impact on the structure and function of the regional ecosystem.
>
> If offsetting is possible under a relevant regional vegetation management code or concurrence agency policy, the development application must demonstrate how the application has reasonably avoided and minimised impacts on vegetation. Clause 29, new section 22DH, reflects this hierarchy of avoid, minimise and offsetting.

98. With the enactment of the SPA, the pre-existing IPA treatment of necessary built infrastructure was retained, but references in VMA s.22A were updated to reflect the new SPA.[214]

99. The *Water and Other Legislation Amendment Act 2010* (Qld) amended VMA s.22A, with effect from 1 December 2010, to remove the prohibition of (arising from its exclusion from the list of relevant purposes) thinning or fodder harvesting within a wild river high preservation area. The explanatory memorandum for the *Water and Other Legislation Amendment Bill 2010* (Qld) provides no explanation for this change of policy.

100. The scope and extent of necessary built infrastructure remains ambiguous.

[213] *Vegetation Management and Other Legislation Amendment Bill 2009* (Qld), Explanatory Notes, p.38.

[214] SPA (as enacted) schedule 2 (amendments to VMA).

Correspondence from the department administering the VMA indicates that economic benefit is not sufficient to justify necessity for the purpose of the definition, and alternative site requirements will be rigorously enforced.[215]

101. No official policy of the department concerning the application of the term 'necessary built infrastructure' is publicly available. The legislative history of VMA s.22A suggests that 'necessary' is to be considered in light of the countervailing factor 'can not reasonably be avoided or minimised'. In other words, necessity must be considered in light of the ability to reasonably avoid or minimise the clearing required to establish the 'necessary built infrastructure'. In many cases, avoidance will be achieved by simply refusing permission to establish the relevant infrastructure. What is 'necessary' is determined by the satisfaction of the chief executive administering the VMA.[216]

102. The SPR reference to 'necessary built infrastructure'[217] and 'necessary infrastructure'[218] offer no corresponding textual indications of the meaning of 'necessary'.[219] It is unlikely that necessity for the purposes of the SPR is significantly different from that under the VMA.

103. It is a distinct disincentive to development that the scope and meaning of 'necessary built infrastructure' under the VMA and SPR is so lacking in clarity.

Balance of VMA provisions relevant to wild river areas

104. The high preservation area of a wild river area is taken to be a declared 'area of high conservation significance'.[220] Declared areas of high conservation significance must

[215] Email of Department of Natural Resources and Water to Balkanu Cape York Development Corporation Pty Ltd, 13 October 2008.

[216] VMA s.22A(2) (preliminary words).

[217] SPR schedule 24, item 6(d)(ii) and schedule 26 (definition of 'routine management').

[218] SPR schedule 26 (definition of 'routine management', paragraphs (c) and (d)).

[219] It is unfortunate that no explanatory notes were prepared when the SPR was made which could have been used in the construction of ambiguous terms: see *Acts Interpretation Act 1954* (Qld) s.14B(3)(e) and *Statutory Instruments Act 1992* (Qld) s.15 (definition of 'extrinsic material', paragraph (f)). If the *Parliament of Queensland (Reform and Modernisation) Bill 2011* (Qld) is enacted, all subordinate legislation will require explanatory notes: see part 2 of the Bill.

[220] VMA s.17(1A).

each have a 'declared area code'. For a high preservation area, this is the code stated in the wild river declaration which establishes the area.[221] The normal procedure for making and amending a declared area code does not apply to the high preservation area.[222] The *Wild Rivers Code 2007* (Qld), and part 12 which applies to clearing in a high preservation area,[223] is a code for the purposes of IDAS and therefore an applicable code that must be applied to clearing under VMA s.21.[224]

105. But for the statutory deeming of a high preservation area as a declared area of high conservation significance, the relevant area would be assessed against the criterion for declaring areas of high conservation significance under the VMA, which is whether the area is one of:[225]

(a) a wildlife refugium;

(b) a centre of endemism;

(c) an area containing a vegetation clump or corridor that contributes to the maintenance of biodiversity;

(d) an area that makes a significant contribution to the conservation of biodiversity; or

(e) an area that contributes to the conservation value of a wetland, lake or spring stated in the notice.

WA

106. Self-assessable development relevant to a wild river area is operational work for taking water from a watercourse, lake, spring, overland flow water or subartesian water if the work is 'mentioned as' self-assessable development in a wild river declaration (IPA schedule 8, part 2, table 4, item 1). Other aspects of water infrastructure that are relevant to the IPA are considered below in the context of the WA.

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[221] VMA s.17(2A). The Archer Declaration, the Lockhart Declaration and the Stewart Declaration all state that the applicable code is part 12 of the *Wild Rivers Code 2007* (Qld): see Archer Declaration s.61(2), Lockhart Declaration s. 61(2), Stewart Declaration s. 61(2).

[222] VMA s.19D.

[223] *Wild Rivers Code 2007* (Qld) p.1.

[224] See also SPA schedule 3 (definitions of 'applicable code' and 'code').

[225] VMA s.19(1).

107. Under the WA, general permission is given to take the overland flow of water for stock and domestic purposes, and subartesian water generally, unless certain executive action has been taken. A wild river declaration, amongst other things, may limit or alter the water of this kind that may be taken.[226]

108. The Minister administering the WA is given a wide range of powers during a 'water supply emergency' including the power to make a water supply emergency declaration. Where such a declaration is made, it is ineffective to the extent of any inconsistency with a wild river declaration in the case of inconsistency.[227] The same limitation applies to a water supply emergency regulation.[228]

109. Water resource planning under the WA is primarily achieved by instruments known as water resource plans. A draft water resources plan must not be inconsistent with a wild river declaration[229] and the Minister, in making the draft plan, must consider any relevant wild river declaration.[230] A water resources plan must be amended if it is inconsistent with a wild river declaration and the inconsistency relates to:[231]

    (a) the prohibition, or regulation, of activities or taking natural resources;
    (b) matters to be considered when deciding to allow activities or the taking of natural resources;
    (c) works for overland flow (including those in a floodplain management area, special floodplain management area or subartesian management area) that are assessable or self-assessable under the SPA; or
    (d) information about water available for future consumptive use and priorities for the use or reservation of that water.

110. Amendments may be made to a water resource place without undertaking a public

[226] WA s.20(6)(a). The water commission, or a water service provider, can apply for approval to impose a restriction on the taking of subartesian water by a customer of a water service provider (other than for stock purposes) under wild river declaration amongst other things: WA s.25ZA(1) and (2).

[227] WA s.25C(4).

[228] WA s.25F(6).

[229] WA s.46(5).

[230] WA s.47(ba).

[231] WA s.55(2A).

consultation process where, amongst other things, a plan is inconsistent with a wild river declaration in respect of the matters mentioned in the last paragraph and the amendment ensures the plan is consistent with the declaration.[232]

111. Requirements and authorities similar to those for water resource plans exist for resource operation plans (**ROPs**), which are plans made to implement water resources plans.[233]

112. Water licence and permit decisions must be made in accordance with, amongst other things, any wild river declaration.[234] When deciding to grant or refuse an application for, or impose conditions upon, a water licence, the chief executive administering the WA must consider any applicable wild river declaration amongst other factors.[235] A wild river declaration may state a process to be followed for allocating water under a water licence which must be observed despite the generally applicable application process for water licences.[236]

113. The WA regulates the destruction of riverine vegetation and the excavation or filling of a watercourse, lake or spring.[237] In a wild river area, this includes dead vegetation.[238] Furthermore, to destroy vegetation includes to burn it.[239] An

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[232] WA s.57(c).

[233] WA chapter 2 part 4 division 2. A draft ROP must not be inconsistent with an applicable wild river declaration: WA s.98(6). An applicable wild river declaration must be considered when preparing a draft ROP: WA s.99(ca). The amendment of a ROP without public consultation is permitted when the amendment will bring the ROP into line with an applicable wild river declaration: WA s.106(c).

[234] WA s.205(1). If granting an application would be inconsistent with a wild river declaration, the application must be refused and` public notice of the application need not be given: WA s.209(1).

[235] WA s.210(1)(c).

[236] WA s.212.

[237] WA chapter 2 part 8 (riverine protection).

[238] see WA schedule 4 (definition of 'vegetation') which provides:

> ***vegetation***—
> (a) means native plants including trees, shrubs, bushes, seedlings, saplings and reshoots; and
> (b) for a wild river area, includes dead vegetation.

[239] see WA schedule 4 (definition of 'destruction') which provides:

> ***destruction***, of vegetation, means the removing, clearing, killing, cutting down, felling, ringbarking, digging up, pushing over, pulling over or poisoning of the vegetation.

Grammatical forms of defined terms have a corresponding meaning: *Acts Interpretation Act 1954* (Qld) s.32. Consequently, the meaning of destroy is determined by the definition of 'destruction'.

application for a permit to destroy vegetation, excavate or place fill in a watercourse, lake or spring cannot be made for a high preservation area, a special floodplain management area or a nominated waterway in a preservation area unless it is for:[240]

(a) an activity necessary to control non-native plants or declared pests in the area; or

(b) an activity for specified works;[241] or

(c) an activity that is 'a necessary and unavoidable part of installing or maintaining works or infrastructure required to support other development for which a development permit is not required or, if a development permit is required, the permit is held or has been applied for'.

114. Even where such an application is permissible, the chief executive administering the WA when deciding to grant or refuse the application or impose conditions must consider the relevant wild river declaration and any code mentioned in the declaration for the proposed activities.[242]

115. Similar restrictions exist for taking quarry materials from a watercourse or lake.[243] In a wild river area, an application to take quarry materials is 'taken not to have been made' unless the quarry material is to be 'used in the wild river area'.[244] The relevant declaration must be considered when deciding whether to grant or refuse an application or impose conditions.[245] Furthermore, a permit to take quarry material in a wild river area cannot be granted unless the chief executive is satisfied

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[240] WA s.266(4).

[241] Specified works has the same meaning as WRA s.48, see WA schedule 4, definition of 'specified works'.

[242] WA s.268(h).

[243] WA chapter 2 part 9 (quarry materials). The term 'quarry materials' is defined by schedule 4 as follows:

> ***quarry material***—
> 1 Quarry material means material, other than a mineral within the meaning of any Act relating to mining, in a watercourse or lake.
> 2 Quarry material includes stone, gravel, sand, rock, clay, earth and soil unless it is removed from the watercourse or lake as waste material.

[244] WA s.280(3). Before 1 December 2010, when WA s.280(3) was amended by *Water and Other Legislation Amendment Act 2010* (Qld) s.185, WA s.280(3) requires that quarry materials taken from a watercourse or lake in a wild river area be used for specified works or 'residential complexes' in the wild river area.

[245] WA s.282(1A).

that:[246]

> there is no other suitable source of quarry material that is—
> (a) outside a watercourse; and
> (b) within a reasonable distance from where the quarry material will be used.

116. Merits review under the WA for a decision to which a wild river declaration applies is only permissible to the extent it is consistent with the declaration.[247]

117. SPR schedule 3 specifies that particular operational work for taking water from a watercourse, lake, spring, overland flow water or subartesian water is assessable development as follows:

> For assessing operational work against the *Water Act 2000*, operational work (other than work carried out in an urban development area or on premises to which structure plan arrangements apply) that involves—
> (a) taking or interfering with water from a watercourse, lake or spring (other than under the *Water Act 2000*, section 20(2), (3) or (5)) or from a dam constructed on a watercourse or lake if it is not self-assessable development under part 2;
> (b) taking, or interfering with, artesian water as defined under the *Water Act 2000*, schedule 4; or
> (c) taking, or interfering with—
> (i) overland flow water, if the operations are mentioned as assessable development in a water resource plan or a wild river declaration, or prescribed as assessable development under a regulation under the *Water Act 2000*; or
> (ii) subartesian water, if the operations are mentioned as assessable development in a water resource plan or a wild river declaration, or prescribed as assessable development under a regulation under the *Water Act 2000*; or
> (d) interfering with overland flow water in an area declared under the *Water Act 2000* to be a drainage and embankment area if the operations are declared under that Act to be assessable development; or
> (e) interfering with overland flow water in a wild river floodplain management area if the operations are specified works or stated in the wild river declaration for the area to be assessable development.

118. Of this category of assessable development, SPA schedule 1 prescribes certain development in a wild river area as prohibited development, namely:[248]

(a) is for operational work in a high preservation area , or special floodplain management area, that interferes with the flow of water in a watercourse,

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[246] WA s.282(3).

[247] WA s.851(2).

[248] SPA schedule 1, item 12.

lake or spring in the area (other than for the maintenance of works, operational works that increases the interference with water in the Lake Eyre Basin to the extent necessary for town water supply, or authorised wild river operational work[249]); or

(b) operational work in a preservation area (other than authorised wild river operational work) that interferes with the flow of water in a nominated waterway and is not a dam or weir; or

(c) operational work in a high preservation area, or a special floodplain management area, that takes overland flow water (other than works stated in a wild river declaration for the area to be assessable development for which a development application under that Act may be made);

(d) operational work that interferes with overland flow water in a floodplain management area or special floodplain management area, if the operations are declared under the WA or a wild river declaration to be assessable development (other than operational work for specified work or stated in a wild river declaration to be assessable development for which an application may be made).

119. Where the chief executive administering the WA is an assessment manager or referral agency under the SPA for a development application in a floodplain management area or special floodplain management area, the chief executive must assess the application against the purposes of the WA to the extent the application relates to the protection of watercourse and water in watercourses.[250]

120. Development applications may be made for the operational work concerning taking water that is not prohibited development, but such applications must comply with the applicable wild rivers code.[251]

121. Development applications concerning operational work that is interfering with overland flow water in a floodplain management area or a special floodplain

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[249] see note 116.

[250] WA s.966(1)(c) and (2)(c).

[251] WA s.966A.

management area for specified works, or development stated to be assessable development in a wild river declaration, and which is not prohibited development, must comply with the applicable wild rivers code.[252] Similarly, the taking of quarry materials under the WA must comply with the applicable wild rivers code.[253]

122. The chief executive may refuse to give his or her consent to works (which consent must accompany any development for works associated with taking or interfering with water) where the works would not be in accordance with a wild river declaration.[254]

123. Special arrangements are made for water allocations in the Wenlock wild river area for the benefit of mine operators.[255]

124. Regulations under the WA may be made to establish a process for dealing with unallocated water in a wild river area.[256]

WRA

125. A material change of use in a wild river where the proposed use is agricultural activities,[257] or animal husbandry activities,[258] is assessable development.[259]

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[252] WA s.966B.

[253] WA s.966C.

[254] WA s.967(2), (3) and (4)(c).

[255] WA chapter 8 part 3C (authorities under particular special agreement acts).

[256] WA s.1014(2)(gb).

[257] WRA schedule (definition of 'agricultural activities') provides:

> ***agricultural activities***—
> 1 *Agricultural activities* means—
> (a) cultivating soil; or
> (b) planting, irrigating, gathering or harvesting a crop, including a food or fibre crop; or
> (c) disturbing the soil to establish non-indigenous grasses, legumes or forage cultivars; or
> (d) using the land for horticulture or viticulture.
> 2 The term does not include—
> (a) producing agricultural products for the domestic needs of the occupants of the land if the maximum area of the land on which the products are produced is the following—
> (i) for fewer than 10 occupants of the land—0.25ha;
> (ii) for 10 or more but fewer than 50 occupants of the land—2ha;
> (iii) for 50 or more but fewer than 100 occupants of the land—4ha;
> (iv) for 100 or more occupants of the land—6ha; or
> (ab) producing agricultural products in a market garden, if the maximum area of land on which the products are produced is not more than 4ha; or

contd...

Operational works for the same purpose are also assessable development, if the operational work is declared to be assessable in the relevant wild river declaration.[260]

126. These two kinds of assessable development associated with agricultural or animal

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(b) baling or cutting pasture; or
(c) broadcasting seed to establish an improved pasture; or
(d) planting, gathering or harvesting a crop of pasture or grain species in a preservation area if the pasture or grain species is—
  (i) only for animal feed; and
  (ii) neither a high risk species nor a moderate risk species for the wild river area of which the preservation area is a part; or
(e) improving pasture using low impact soil disturbance if the pasture species is neither a high risk species nor a moderate risk species for the wild river area; or
(f) forestry activities; or
(g) activities carried out for land rehabilitation or remediation; or
  Examples—
  deep ripping, shallow ponding
(h) blade ploughing in an area that, under the Vegetation Management Act 1999, is a category X area or category C area on a PMAV.

Paragraph (2)(ab) was introduced on 1 December 2010 by *Water and Other Legislation Amendment Act 2010* (Qld) s.257(4).

[258] WRA schedule (definition of 'animal husbandry activities') provides:

animal husbandry activities—
1 *Animal husbandry activities* means—
  (a) breeding, keeping, raising or caring for animals, for commercial purposes, that—
    (i) rely on prepared, packaged or manufactured feed or irrigated or ponded pastures; and
    (ii) are kept in a pen, yard, enclosure, pond, cage, shed, stables or other confined area or structure; or
  (b) establishing a feedlot, piggery or dairy.
2 The term does not include—
  (a) grazing; or
  (b) raising livestock for the domestic needs of the occupants of the land; or
  (c) keeping livestock, for example horses, necessary for working the land; or
  (d) giving livestock supplementary feed, including, for example, by using roller drums, blocks, licks or protein meals—
    (i) to maintain the livestock's survival; or
    (ii) to improve the livestock's fertility; or
    (iii) for an activity associated with an activity mentioned in item 1; or
      Example—
      weaning
    (iv) if the livestock is predominantly reliant on native or improved pasture for feed—to prepare the livestock for sale; or
  (e) aquaculture; or
  (f) environmentally relevant activities. applicable code see the Planning Act, schedule 3.

[259] SPR schedule 3, part 1, table 2, item 11.

[260] SPR schedule 3, part 1, table 4, item 9.

husbandry activities are prohibited development in a high preservation area. SPA schedule 1 prescribes the following as prohibited development:[261]

> Development that is—
> (a) a material change of use of premises in a wild river area if the proposed use is for agricultural activities, to the extent the development is—
> (i) in a wild river high preservation area; or
> (ii) in a wild river preservation area or wild river special floodplain management area in relation to the production of a high risk species; or
> (iii) in a wild river special floodplain management area and for agricultural activities that involve irrigation; or
> (b) a material change of use of premises in a wild river area if the proposed use is for animal husbandry activities, to the extent the development is in a wild river high preservation area or a wild river special floodplain management area; or
> (c) operational work for agricultural activities in a wild river area, if the operations are assessable development prescribed under section 232(1), to the extent the development is—
> (i) in a wild river high preservation area; or
> (ii) in a wild river preservation area or a wild river special floodplain management area in relation to the production of a high risk species; or
> (d) operational work for animal husbandry activities in a wild river area, if the operations are assessable development prescribed under section 232(1), to the extent the development is in a wild river high preservation area or a wild river special floodplain management area.

127. By this definition of prohibited development, new agricultural activities or animal husbandry activities are prohibited in a high preservation area, amongst other things.

128. Agricultural or animal husbandry activities in a preservation area that are assessable development, but not prohibited development, must comply with the relevant wild rivers code.[262]

129. A material change of use, reconfiguration of a lot or operational work within a wild river area (other than in a designated urban area) must comply with the relevant wild rivers code where it:

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[261] SPA schedule 1, item 1.

[262] WRA s.42. For the Archer Declaration, the Lockhart Declaration and the Stewart Declaration, the applicable code is the part 1 of the *Wild Rivers Code 2007* (Qld) for a material change of use: see Archer Declaration s.60(4), Lockhart Declaration s.60(4), Stewart Declaration s.60(4). There is no code for operational works: see Archer Declaration s.60(3), Lockhart Declaration s.60(3), Stewart Declaration s.60(3).

(a) is assessable development under a local government planning scheme, or the reconfiguration of a lot (or associated operational works) provisions of SPR schedule 3; and

(b) relates to residential, commercial or industrial development.[263]

130. The WRA provides a mechanism by which activities that are prohibited or constrained within a high preservation area may be undertaken. This mechanism requires the preparation and Ministerial approval of a property development plan.[264] Where an approved property development plan exists, the Minister is authorised to amend a wild river declaration to permit the activity to which the plan relates.[265]

131. For applications under WA ss.266 (to destroy riparian vegetation, or excavate or fill a watercourse) or 280 (to take quarry materials from a watercourse or lake), the application must be refused unless it is consistent with the applicable property development plan.[266]

132. Development inconsistent with a property development is largely prohibited development.[267]

133. The WRA purports to preserve native title from the impact of a wild river declaration by WRA s.44 which provides:

> **44 Relationship with other Acts**
> (1) Other than as mentioned in sections 42 and 43, the prohibition and regulation in a wild river area of carrying out activities and taking natural resources are dealt with in the Acts that prohibit or regulate the activities or taking.
> (2) However, a wild rivers declaration or a wild rivers code, in applying for the purposes of any of those other Acts, can not have the direct or indirect effect under the other Act of limiting a person's right to the exercise or enjoyment of native title.
> (3) This section does not limit the *Acts Interpretation Act 1954*, section 13A in relation to any Act.

134. WRA s.44(2), in its reference to 'those other Acts' is ineffective to prevent the application of WRA ss.42 and 43 to native title holders. Those provisions require

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[263] WRA s.43.

[264] WRA part 2 division 2A.

[265] WRA ss.31F and 31FA.

[266] WRA s.43B.

[267] SPA schedule 1, item 2.

code compliance for a variety of forms of development related to agricultural activities, animal husbandry activities, and residential, commercial or industrial development.

Abbreviations and acronyms

CPMA	*Coastal Protection and Management Act 1995* (Qld)
DERM	Department of Environment and Resources Management
EIS	environmental impact statement
EPA	*Environmental Protection Act 1994* (Qld)
EPR	*Environmental Protection Regulation 2008* (Qld)
ERA	environmentally relevant activity
Fish Act	*Fisheries Act 1994* (Qld)
Forests Act	*Forestry Act 1959* (Qld)
Fossicking Act	*Fossicking Act 1994* (Qld)
IDAS	integrated development approval system
IPA	*Integrated Planning Act 1997* (Qld)
LPA	*Land Protection (Pest and Stock Route Management) Act 2002* (Qld)
MRA	*Mineral Resources Act 1989* (Qld)
NCA	*Nature Conservation Act 1992* (Qld)
NTA	*Native Title Act 1993* (Cth)
ROP	resource operation plan
SDPWOA	*State Development and Public Works Organisation Act 1971* (Qld)
SPA	*Sustainable Planning Act 2009* (Qld)
SPR	*Sustainable Planning Regulation 2009* (Qld)
TIA	*Transport Infrastructure Act 1994* (Qld)
VMA	*Vegetation Management Act 1999* (Qld)
WA	*Water Act 2000* (Qld)
WRA	*Wild Rivers Act 2005* (Qld)

ATTACHMENT A

Copy of SPR schedule 24

Schedule 24 Clearing of native vegetation—not assessable development under schedule 3, part 1, table 4, item 1

schedule 3, part 1, table 4, item 1(e) and (f)

Part 1 Clearing and other activities or matters—general

1 Clearing and other activities or matters for land generally

(1) Clearing under a development approval for a material change of use or reconfiguring a lot, if the approval is given for a development application—

(a) made after 4 October 2004; and

(b) for which the chief executive administering the Vegetation Management Act is a concurrence agency.

(2) Clearing an area of vegetation that is less than 0.5ha within a watercourse or lake for an activity (other than an activity relating to a material change of use of premises or the reconfiguring of a lot) that is subject to an approval process and is approved under the Act or another Act, or is carried out under the document called ‘Guideline—Activities in a watercourse, lake or spring carried out by an entity’ approved by the chief executive of the department that administers the *Water Act 2000*, if the area is—

(a) a least concern regional ecosystem—

(i) shown on the regional ecosystem map or remnant map as remnant vegetation; or

(ii) shown on a PMAV as a category B area; or

(b) shown on a PMAV as a category X area; or

(c) shown on the regional ecosystem map or remnant map as other than remnant vegetation.

(3) Clearing vegetation in an area declared under the Vegetation Management Act, section 19F if the clearing is carried out under the management plan for the area.

(4) Clearing vegetation under a land management agreement for a lease under the *Land Act 1994.*

(5) A traditional Aboriginal or Torres Strait Islander cultural activity, other than a commercial activity.

(6) A mining activity or a chapter 5A activity.

(7) Any aspect of development for geothermal exploration carried out under a geothermal exploration permit under the *Geothermal Exploration Act 2004.*

(8) Any aspect of development for core airport infrastructure on airport land.

(9) An activity under the *Fire and Rescue Service Act 1990*, section 53, 68 or 69.

(10) An activity under—

(a) the *Electricity Act 1994*, section 101 or 112A; or

(b) the *Electricity Regulation 2006*, section 17.

(11) For a State-controlled road under the Transport Infrastructure Act—

(a) road works carried out on the State-controlled road; or

(b) ancillary works and encroachments carried out under section 50 of that Act.

(12) Clearing, for routine transport corridor management and safety purposes, on existing rail corridor land, new rail corridor land, non-rail corridor land or commercial corridor land (within the meaning of the Transport Infrastructure Act) that is not subject to a commercial lease.

(13) Any activity authorised under the *Forestry Act 1959.*

Part 2 Clearing for particular land

2 Freehold land

For freehold land, clearing that is—

(a) clearing of vegetation to which the Vegetation Management Act does not apply; or

(b) for a forest practice; or

(c) residential clearing; or

(d) necessary for essential management; or

(e) in an area shown on a PMAV as a category X area; or

(f) in an area for which there is no PMAV and the vegetation is not regulated regrowth vegetation or shown on the regional ecosystem map or remnant map as remnant vegetation; or

(g) for urban purposes in an urban area and the vegetation is regulated regrowth vegetation, or an of concern regional ecosystem or a least concern regional ecosystem—

(i) shown on a PMAV for the area as a category B area; or

(ii) if there is no PMAV for the area—shown on the regional ecosystem map or remnant map as remnant vegetation; or

(h) for urban purposes in an urban area in a wild river high preservation area and the vegetation is—

(i) remnant vegetation, shown on the regional ecosystem map or remnant map, that is an of concern regional ecosystem or a least concern regional ecosystem; or

(ii) shown on the regional ecosystem map or remnant map as other than remnant vegetation; or

(iii) regulated regrowth vegetation; or

(i) necessary for routine management in an area of the land and the vegetation is regulated regrowth vegetation, or a least concern regional ecosystem—

(i) shown on a PMAV for the area as a category B area; or

(ii) if there is no PMAV for the area— shown on the regional ecosystem map or remnant map as remnant vegetation; or

(j) in an urban development area; or

(k) on airport land and the operational work—

(i) is consistent with the land use plan approved under the *Airport Assets (Restructuring and Disposal) Act 2008*, chapter 3, part 1 for the land; and

(ii) is carried out on land that is not stated, under the land use plan, to remain undeveloped land; or

(l) clearing of regulated regrowth vegetation under the regrowth vegetation code or a regrowth clearing authorisation, other than if the vegetation is shown on a PMAV for an area of the land as a category A area; or

(m) for development that is for an extractive industry under the Vegetation Management Act, section 22A(3) in a key resource area to the extent it involves clearing regulated regrowth vegetation, other than if the vegetation is shown on a PMAV for an area of the land as a category A area; or

(n) for development that is a significant community project to the extent it involves clearing regulated regrowth vegetation, other than if the vegetation is shown on a PMAV for an area of the land as a category A area.

3 Indigenous land

For indigenous land, clearing that is—

(a) clearing of vegetation to which the Vegetation Management Act does not apply; or

(b) for a forest practice, other than on land on which the State owns the trees; or

(c) residential clearing; or

(d) necessary for essential management; or

(e) in an area shown on a PMAV as a category X area; or

(f) in an area for which there is no PMAV and the vegetation is not regulated regrowth vegetation or shown on the regional ecosystem map or remnant map as remnant vegetation; or

(g) for urban purposes in an urban area and the vegetation is regulated regrowth vegetation, or an of concern regional ecosystem or a least concern regional ecosystem—

    (i) shown on a PMAV for the area as a category B area; or

    (ii) if there is no PMAV for the area—shown on the regional ecosystem map or remnant map as remnant vegetation; or

(h) for urban purposes in an urban area in a wild river high preservation area and the vegetation is—

    (i) remnant vegetation, shown on the regional ecosystem map or remnant map, that is an of concern regional ecosystem or a least concern regional ecosystem; or

    (ii) shown on the regional ecosystem map or remnant map as other than remnant vegetation; or

    (iii) regulated regrowth vegetation; or

(i) necessary for routine management in an area of the land and the vegetation is regulated regrowth vegetation, or a least concern regional ecosystem—

    (i) shown on a PMAV for the area as a category B area; or

    (ii) if there is no PMAV for the area—shown on the regional ecosystem map or remnant map as remnant vegetation; or

(j) gathering, digging or removing forest products—

    (i) for the purpose of improving the land or for use under the *Local Government (Aboriginal Lands) Act 1978*, section 28; or

    (ii) for use under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*, section 62; or

(k) in an urban development area; or

(l) clearing of regulated regrowth vegetation under the regrowth vegetation code or a regrowth clearing authorisation, other than if the vegetation is shown on a PMAV for an area of the land as a category A area; or

(m) for development that is for an extractive industry under the Vegetation Management Act, section 22A(3) in a key resource area to the extent it involves clearing regulated regrowth vegetation, other than if the vegetation is shown on a PMAV for an area of the land as a category A area; or

(n) for development that is a significant community project to the extent it involves clearing regulated regrowth vegetation, other than if the vegetation is shown on a PMAV for an area of the land as a category A area.

4 Land subject to a lease under the Land Act 1994

(1) For land subject to a lease under the *Land Act 1994* for agriculture or grazing purposes, clearing that is—

(a) clearing of vegetation to which the Vegetation Management Act does not apply; or
(b) residential clearing; or
(c) necessary for essential management; or
(d) in an area shown on a PMAV as a category X area; or
(e) in an area for which there is no PMAV and the vegetation is not—
  (i) shown on the regional ecosystem map or remnant map as remnant vegetation; or
  (ii) regulated regrowth vegetation; or
(f) clearing of regulated regrowth vegetation under the regrowth vegetation code or a regrowth clearing authorisation, other than if the vegetation is shown on a PMAV for an area of the land as a category A area; or
(g) necessary for routine management in an area of the land and the vegetation is regulated regrowth vegetation, or a least concern regional ecosystem—
  (i) shown on a PMAV as a category B area; or
  (ii) if there is no PMAV for the area—shown on the regional ecosystem map or remnant map as remnant vegetation; or
(h) for development that is for an extractive industry under the Vegetation Management Act, section 22A(3) in a key resource area to the extent it involves clearing regulated regrowth vegetation, other than if the vegetation is shown on a PMAV for an area of the land as a category A area; or
(i) for development that is a significant community project to the extent it involves clearing regulated regrowth vegetation, other than if the vegetation is shown on a PMAV for an area of the land as a category A area.

(2) For land subject to a lease under the *Land Act 1994* other than for agriculture or grazing purposes, clearing that is consistent with the purposes of the lease and is—

(a) clearing of vegetation to which the Vegetation Management Act does not apply; or
(b) residential clearing; or
(c) necessary for essential management; or
(d) in an area shown on a PMAV as a category X area; or
(e) for rental category 3.1, 3.2, 4, 5, 8.2, 9.1 and 9.2 leases under the *Land Regulation 1995*—in an area for which there is no PMAV and the vegetation is not shown on the regional ecosystem map or remnant map as remnant vegetation.

5 Land that is a road under the Land Act 1994

For land that is a road under the *Land Act 1994*, clearing that is—

(a) carried out by a local government, or by or for the chief executive of the department in which the Transport Infrastructure Act is administered, and is—
  (i) necessary to construct road infrastructure or to source construction material for roads; or
  (ii) in an urban area and the vegetation is a least concern regional ecosystem shown on the regional ecosystem map or remnant map as remnant vegetation; or
  (iii) in an urban area and the vegetation is shown on the regional ecosystem map or remnant map as other than remnant vegetation; or
(b) carried out by a local government and is for an activity, approved by the chief executive administering the Vegetation Management Act, that is carried out—
  (i) to remove, under a management plan for the local government's area or part of its area, declared pests or vegetation that is not native vegetation; or
  (ii) in response to an emergency situation or a natural disaster; or
(c) necessary to remove or reduce the imminent risk that the vegetation poses of serious personal injury or damage to infrastructure; or
(d) by fire under the *Fire and Rescue Service Act 1990* to reduce hazardous fuel load; or
(e) necessary to maintain infrastructure located on the road, other than fences; or
(f) necessary to maintain an existing boundary fence to the maximum width of 1.5m; or
(g) necessary for reasonable access to adjoining land from the existing formed road for a maximum distance of 100m with a maximum width of 10m; or
(h) necessary to maintain an existing firebreak or garden located on the road.

6 Particular trust land under the Land Act 1994

For land that is trust land under the *Land Act 1994*, other than indigenous land, clearing that is carried out by the trustee and is—
(a) necessary for essential management; or
(b) in an area shown on a PMAV as a category X area; or
(c) in an area for which there is no PMAV and the vegetation is not shown on the regional ecosystem map or remnant map as remnant vegetation; or
(d) for an activity, approved by the chief executive administering the Vegetation Management Act, that is carried out for the purpose of maintaining the trust land for the purpose for which it was granted and is necessary—
  (i) to maintain a necessary fence, road or vehicular track; or
  (ii) to maintain necessary built infrastructure, other than contour banks, fences, roads or vehicular tracks; or
  (iii) to remove, under a management plan for the land, declared pests or vegetation that is not native vegetation.

7 Unallocated State land under the Land Act 1994

For land that is unallocated State land under the *Land Act 1994*, clearing that is carried out by the chief executive administering that Act and is—
(a) necessary for essential management; or
(b) to control declared pests or vegetation that is not native vegetation; or
(c) in an urban development area.

8 Land subject to a licence or permit under the Land Act 1994

For land that is subject to a licence or permit under the *Land Act 1994*, clearing that is carried out by the licensee or permittee and is—

(a) necessary for essential management; or

(b) in an urban development area.