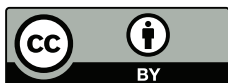

Water, Law and Concepts of Equity

—
Preliminary review
August 2024



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Rebecca Nelson is a member of the Murray-Darling Basin Authority's Social and Economic Advisory Group, and its Advisory Committee on Social, Economic and Environmental Sciences. The views expressed in this report are her own.

Contribution statement

Each listed author has made a significant intellectual contribution to the work, as follows: *Rebecca Nelson*¹, conception and design, data acquisition, data analysis and interpretation, report drafting; *Genevieve Walsh*¹, data acquisition, data analysis, report drafting; *L.M. Shirley*¹, data acquisition, data analysis, report drafting; *Rod Marsh*², conception and design, contribution of knowledge, report review.

Author affiliation: ¹University of Melbourne; ² marsh.eco.

Corresponding author: Rebecca Nelson, Associate Professor of Law, rebecca.nelson@unimelb.edu.au

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Watertrust Australia acknowledges the Traditional Owners of land, sea and waters across Australia and their continuing connection to culture and Country. We pay our respects to Elders past and present.

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Executive summary of findings

Across Australia, concepts of equity, fairness and justice (for brevity, 'equity concepts') appear in diverse ways in water-related legislation. This preliminary review investigates how these concepts emerge in the legislation of New South Wales, the Northern Territory, Queensland, South Australia, Victoria, and the Commonwealth. The research underlying this report has involved reviewing and analysing over 70 pieces of current legislation across 10 water-related areas of law. The intention was to capture all major pieces of current principal legislation in the selected jurisdictions that deal with water in the contexts of water entitlements and water planning, water services, catchment management, interstate water sharing, environmental protection, wilderness/wild rivers, dam safety, land use and development, mining and climate change (to the extent that jurisdictions have legislation in these areas). To further investigate what significant legislative provisions mean, accompanying law-related material was examined in a preliminary way. This review included selected explanatory memoranda, second reading speeches, regulations, management plans and strategies, reviews of rules undertaken by statutory bodies, and case law.

This executive summary provides an overview of the key points and issues relevant to policy makers.

Equity concepts are ubiquitous across many areas of water-related legislation, but equity considerations also appear to underlie provisions of water-related legislation that do not expressly mention it.

Each jurisdiction reviewed expressly adopts equity concepts in most of the areas of law investigated. Further, while this report focuses largely on how water-related laws expressly adopt equity concepts, legislative history materials suggest that equity considerations underlie or otherwise motivate legislation, even where this is not express in the legislative text. This observation is true in multiple jurisdictions. In such cases, it is unclear whether certain provisions are intended to advance equity in substantive ways (without this being expressly stated), or whether references in second reading speeches, for example, are primarily rhetorical.

Different jurisdictions expressly adopt equity concepts in their water-related legislation to differing degrees, and across different areas of law.

Table 1 shows which jurisdictions have legislation that expressly mentions equity concepts in each area of law. 'N/A' signifies that a jurisdiction does not have a dedicated piece of legislation dealing with the subject matter in a way that is relevant to water.

Table 1: Legislation making express mention of equity concepts, by jurisdiction and area of law.

Area of law	NSW	NT	QLD	SA	VIC	CTH
Water entitlements and planning	✓	✓	✓	✓	✓	✓
Water services/prices	✓	✓	✓	✓	✗	✓
Catchment management	✓	N/A	✗	N/A	✓	N/A
Interstate water sharing	✓	✗	✓	✓	✓	✓
General sustainability/ environmental protection	✓	✓	✓	✓	✓	✓
Wilderness/wild rivers	✗	✓	N/A	✗	N/A	N/A
Dam safety	✗	✗	N/A	N/A	N/A	N/A
Land use/development	✗	✓	✓	✓	✓	N/A
Mining	✓	✗	✗	✗	✓	N/A
Climate change	N/A	N/A	N/A	✓	✓	N/A

Areas of law in which concepts of equity are frequently found include laws related to water entitlements and planning, interstate water sharing, catchment management, water services and pricing, environmental protection (which deals with water pollution), land use and development (which deals with water infrastructure in developing areas), and climate change (which deals with the water sector in terms of adaptation and/or mitigation). Equity concepts tend to appear less frequently in laws that deal with mining, dam safety and wilderness/wild rivers.

Equity concepts appear in water-related legislation in two major ways: first, through general legislative objects and purposes provisions; and second, in provisions that deal with specific decisions.

The most common way that the concept of equity appears in legislation is as a component of ecologically sustainable development (ESD) set out in the objects, purposes provisions, or ‘guiding principles’ provisions of legislation. In some cases, these provisions are not directly connected to a specific substantive decision for which the legislation provides. In such cases, it is unclear precisely how an objective relating to equity is intended to be operationalised. The purpose provisions are relevant to interpreting the substantive provisions, but discerning their precise influence is a complex task of statutory interpretation that is difficult to do at scale because objects may be qualified by specific provisions in the legislation.¹

In other cases, equity concepts are mandatory considerations that apply to the making of specific decisions. For example, under Queensland’s *Environmental Protection Act 1994*, relevant decision-makers (including the Chief Executive of the Department of Regional Development, Manufacturing and Water, the Land Court, and various other administering authorities) must consider equity in relation to a group of authorisations relating to environmental impact statements, approvals for mining activities on mining leases and other ‘environmentally relevant activities’, and decisions about issuing environmental protection orders in response to non-compliance with environmental protection requirements.

Yet other types of provisions require a decision-maker to consider a concept of equity that is specific to a narrow kind of decision and is expressed in that provision alone. Such provisions involve diverse kinds of decisions, e.g., appointing representatives to a consultative committee to draft a management plan, compul-

¹D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7th ed., LexisNexis Butterworths, 2011) [2.7]-[2.19].

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orarily acquiring water entitlements, levying water-related rates and allocating costs associated with water-related infrastructure between water suppliers.

Different formulations of equity concepts can focus on varying communities of concern, sometimes in a way that varies spatially.

The groups in the focus of equity-related provisions in specific decision-making contexts (i.e. the most detailed provisions, rather than objects/purposes provisions) tend to be those for whom equity has a clear economic aspect. This includes water users (customers of water service providers and self-supplied water users) in the context of water charges and changes to water entitlements, utilities in the context of the costs of infrastructure, and states in relation to sharing the costs of water infrastructure associated with transboundary resources. Uniquely among the laws reviewed for this project, provisions of the *Landscape South Australia Act 2019* (SA) expressly identify ecosystems and environmental needs (in addition to human communities) as subject to concerns about equity. Spatial aspects of equity (i.e. equity as between communities in different regions) are also present in some formulations, e.g. financing works for the development of the state equitably across the state: *State Development and Public Works Organisation Act 1971* (Qld) s 23(d).

Concerns about First Nations aspirations and values appear prominently in the legislation and implementing materials of many jurisdictions. However, this research uncovered only one example of this being expressly connected with unambiguous expressions about equity, even if this may be an underlying principle – the exception being parks managed under ‘equitable partnerships’ with First Nations peoples in the Northern Territory (*Territory Parks and Wildlife Conservation Act 1976* (NT)).

Concepts of equity may also vary spatially. This may be because:

- Legislation expressly provides for an equity-related mechanism to apply in a spatially limited way, for example, the dispute resolution procedures in *Energy and Water Ombudsman Act 2006* (Qld), which are aimed at fair resolution of disputes about water services, only apply to disputes involving small water customers in south-east Queensland; local councils who supply water outside south-east Queensland do not come under the jurisdiction of the Energy and Water Ombudsman. In South Australia, the requirement that irrigation rights be fixed on a ‘fair and equitable’ basis applies only to holders of irrigation rights under the *Renmark Irrigation Trust Act 2009* (SA) s 30(4); or
- Legislation provides for local- or regional-scale plans (which potentially overlap) that allow for advancing different dimensions of equity within and across each of these plan types (e.g. local-scale management plans for water supply protection areas and regional-scale sustainable water strategies made under the *Water Act 1989* (Vic)). This variation is implied in South Australia: water allocation plans made under the *Landscape South Australia Act 2019* must set out ‘principles associated with the determination of water access entitlements and for the taking and use of water so that ... an equitable balance is achieved between environmental, social and economic needs for the water’. This leads to different formulations of equity between plans. Different water allocation plans in the Northern Territory include different express formulations of equity (e.g. focusing on the needs of existing water users versus those of future generations) even though the *Water Act 1992* (NT) does not expressly refer to equity considerations.

There are gaps and inconsistencies in where and how concepts of equity appear in water-related legislation across jurisdictions and within a single jurisdiction.

Across jurisdictions, there are gaps in relation to which areas of law express equity concepts (e.g. equity concepts appear in mining legislation in New South Wales and Victoria, but not in the Northern Territory, South Australia or Queensland). There are also inconsistencies between jurisdictions that have legislation

in the same area of law, and even dealing with the same substantive decision, which use concepts of equity that are expressed differently and may have different meanings.

Equity concepts also vary within a state. Varying concepts of equity may appear in legislation across different areas of law or within an area of law, in different provisions in a single piece of legislation, or across different materials that implement a legislative provision (e.g. management plans). They may also vary in whether they refer to equity concepts at all.

These differences may not necessarily point to a problem, but because inconsistent treatment may itself be a cause of inequity and confusion, this does indicate a need for transparency and guidance about reasons for the differences and gaps, discussed further below.

The concept of equity in water law is dynamic.

Whether and how legislation adopts and implements equity concepts can change over time, as:

- Legislation is amended to add concepts of equity, for example, the concept of restorative justice was introduced to the *Protection of the Environment Operations Act 1997* (NSW) s 253A(1A) in 2005;
- New legislation is introduced that uses new concepts of equity not present in previous legislation. For example, in Victoria, more recent legislation directly addresses equity concerns associated with climate change (e.g. *Climate Change Act 2017* (Vic)), introduces ideas of restorative justice (e.g. *Environment Protection Act 2017* (Vic) s 336(4)), and more clearly addresses equity in its distributive aspects, like avoiding disproportionate environmental harms or risks (*Environment Protection Act 2017* (Vic) s 21(2));
- Some legislation provides for regularly updated documents that implement the idea of equity in a given context in a way that applies throughout the state (e.g. South Australia's Landscape Strategy prepared under *Landscape South Australia Act 2019* (SA) s 44) or portions of the state, e.g. water management plans. The way these documents implement legislative ideas of equity can change when these documents are reviewed and updated.

The dynamic nature of the concept of equity suggests that jurisdictions would benefit from regularly reviewing and considering whether current legislative and policy expressions of equity remain fit-for-purpose (i.e. whether there is a need to confront new contexts like climate change, or new ideas like restorative justice and environmental justice). This extends to confirming that legislation that currently omits reference to equity is justified in doing so.

This preliminary review provides a snapshot of current legislative arrangements; the dynamism revealed looking across jurisdictions suggests that further work could examine how equity features in legal transitions within a jurisdiction, including how compensation is used when specific legal requirements under a single piece of legislation change.

The precise meaning of equity-related concepts rarely receives legislative or policy elaboration, and often remains unclear. The most detailed provisions relate to economic aspects of equity and those in which impacts and benefits are traditionally quantified.

While there are diverse formulations of equity, most are similarly brief. This often leaves their precise meaning unclear. It is often unclear whether equity is to be achieved by:

- appropriately balancing multiple objectives, for example an aim that 'an equitable balance is achieved between environmental, social and economic needs for the water': *Landscape South Australia Act 2019* (SA) s 53(1)(d)(i); or

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- pursuing an undefined stand-alone set of considerations that is distinct from economic, environmental and social considerations, for example, as suggested by one of the most common formulations of ecologically sustainable development, ‘decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations’ (e.g. *Water Act 2007* (Cth) s 4(2)(a)); or
- some combination of a ‘balancing’ and ‘stand-alone’ approach that might be situation-dependent. For example, the concept of avoiding disproportionate environmental harms or risks (*Environment Protection Act 2017* (Vic) s 21(2)) would seem to require an environmental component (environmental risks), an equity component (differences between risks among different populations), and a situation-dependent judgement about which populations, where, and what degree of difference in risk between them is inequitable.

Formulations that place equity alongside other considerations are perhaps most ambiguous as to whether equity is a distinct concept with distinct requirements, or related, perhaps synergistically, to the adjacent concepts (e.g. ‘equitable, efficient and sustainable use of the Basin water resources’ (*Water Act 2007* (Cth) s 172(1)).

This lack of clarity is problematic for several reasons.

First, it means that there is little recognition that equity has multiple dimensions that require resolution, that equity considerations may conflict with other considerations, and that for both reasons, decisions require trading off different dimensions and considerations against each other to resolve conflicts. An exception to this is the express recognition of the need for trade-offs between equity and other considerations (though not different dimensions of equity) under the *Landscape South Australia Act 2019* (SA) s 7(3)(h).

Second, confusion or uncertainty about what equity requires may discourage decision-makers from considering equity at all.

Third, the combination of ambiguity in legislative drafting, popular contestation about what fairness requires, the fact that equity concepts can deal with vulnerable groups who experience barriers to advocating for their interests, and the apparently limited utility of judicial review (see below), highlights the importance of transparency about how discretion is interpreted and applied by decision-makers to facilitate democratic accountability in an electoral sense.

The emergence of legislation specific to climate change appears to be giving rise to clearer provisions about equity. The multi-part ‘equity principle’ in Victoria’s *Climate Change Act 2017*, for example, specifies three separate ways in which present generations should consider future generations, as well as highlighting the situation of ‘vulnerable communities’. This goes far beyond simply mentioning ‘intergenerational equity’ as a two-word phrase in a definition of ecologically sustainable development, as do some other pieces of legislation.

Other relatively detailed legislative provisions or operationalisation of concepts of equity include provisions for allocating costs and quantities of water among states through interstate water sharing agreements (e.g. Murray-Darling Basin Agreement, New South Wales-Queensland Border Rivers Agreement), and provisions that relate to changes to water entitlements or allocations (e.g. methods of reducing share components of floodplain harvesting access licences: *Water Management (General) Regulation 2018* (NSW) ss 23J(2)–(3)).

There is pronounced need for greater legislative clarity in relation to dimensions of equity that are less amenable to quantification, and extend beyond economic interests.

A wide range of decision-makers must consider equity in relation to water.

Water-related legislation requires a wide range of decision-makers to consider equity concepts, including

ministers, independent panels, appointed committees that formulate water management plans, water corporations, independent statutory bodies or commissioners, technical consultants, etc. This is true in all jurisdictions reviewed.

These diverse bodies have different resources available to them to support them in considering equity—in some cases, an entire government department, in other cases, presumably few resources at all. This further underscores the desirability of policy guidelines related to equity, discussed further below.

The connection between equity and what a decision-maker must do is usually expressed relatively weakly, allowing for significant administrative discretion. Stronger expressions of what a decision maker must do typically relate to monetary matters.

Where equity concepts appear in provisions about making specific decisions, the responsibilities of decision-makers in relation to equity are formulated in diverse ways, but are typically expressed in relatively weak terms that allow for significant discretion. For example, they may require a decision-maker to ‘consider’ or ‘have regard to’ equity concepts; ‘as far as possible’ to act in accordance with equity or to ‘take all reasonable steps’ to do so, or to act in this way ‘where appropriate to do so’. This may run the risk that decision-makers pay insufficient attention to equity concepts in decision-making processes, or apply the concept in *ad hoc* and inconsistent ways.

The main exceptions to this generalisation are requirements in relation to monetary matters (e.g. fair compensation, levying of rates, pricing mechanisms), which are often expressed in stronger language. It may be that this is due to the comparatively well-established need to consider equity in these contexts, the well-defined nature of the problem space, and the availability of established mechanisms that apply in these contexts (like market value). The contexts in which concepts of equity are expressed more weakly deal with circumstances in which equity is a vaguer, more contested concept. This produces a greater need for clarity and transparency about whether and how equity is considered.

Based on a small sample of case law, courts considering different legislative formulations of equity in different jurisdictions appear to give little independent weight to equity considerations or consider that equity is a matter for political decision-making. Further case law research would be needed to confirm this finding.

- The NSW Court of Appeal has held that ‘considerations of equity are quintessentially matters for political decision-making’ subject to minimal constraints on the exercise of ministerial discretion, for example, ensuring that a decision is not so ‘irrational’ that the decision ‘operates beyond the legally permissible limits of the statutory power’.²
- Queensland’s Supreme Court has held that the concept of intergenerational equity, at least in the context of its expression in the *Environmental Protection Act 1994*, is not a stand-alone requirement that is capable of being breached so as to warrant refusing an authorisation; rather, none of the principles of ecologically sustainable development has overriding weight and each must be balanced against other principles in the legislation.³
- The Victorian Civil and Administrative Tribunal has confirmed that equitable considerations support not over-allocating a resource even if an applicant for a licence is not able to obtain a water licence because the area was overcommitted.⁴ However, this was consistent with other legislative provisions, rather than an independent outcome of considering equity.

² *Murrumbidgee Groundwork Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10, (2005) 138 LGERA 11, citing selected other decisions.

³ *New Acland Coal Pty Ltd v Smith* [2018] QSC 88 (2 May 2018) [271].

⁴ *Leonard v Southern Rural Water* [2007] VCAT 1562 (29 August 2007).

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This research has not undertaken a comprehensive case law review of equity concepts, and has not considered a case dealing with an allegation that a decision-maker has not considered equity. The review suggests that judicial review will be available in only a limited way to keep decision-makers accountable for how they consider equity.

There is a need for clear policy guidance and transparency about decisions that consider equity to facilitate appropriate public scrutiny of values-rich decisions.

The apparent reluctance of courts to review how decision-makers consider equity highlights the need for transparency about how decision-makers interpret and apply equity concepts, so that voters can keep decision-makers accountable. Yet there is usually no dedicated regulatory or publicly available policy guidance about equity available to decision-makers, and no scrutiny entity with the clear mandate to investigate and report on equity in relation to water or natural resources more generally. Even equity-related provisions that relate to specific decision-making contexts tend to use broad language about what is required without accompanying policy guidance.

Mechanisms are available to promote greater transparency and consistency in how decision-makers pursue legislative objectives relating to equity, though they seldom appear in legislative arrangements.

Based on existing practice relevant to the water context, governments could make greater use of guidance documents to elaborate transparently on what equity means and may require in different types of situations, while maintaining the flexibility of a policy rather than legislative document. For example:

- The *Water Management Act 2000* (NSW) provides for a State Water Management Outcomes Plan that could fulfil this function (though there is no such plan currently in effect);
- The NSW Government *Social Impact Assessment Guideline* (February 2023) deals with social impact assessment for the purposes of assessing the impacts of major projects under the *Environmental Planning and Assessment Act 1979* (NSW), and details social equity considerations; and
- Every five years, the NSW Minister for Water is to conduct a review to determine whether ‘the work and activities of the Department ... have been effective in giving effect to the [statutory] water management principles’, which include equity: *Water Management Act 2000* (NSW) s 10(1).

Next steps

There are significant opportunities for further investigation to better understand how Australian jurisdictions adopt and implement concepts of equity in the context of water, and to identify global good practices from comparable jurisdictions in which these concepts are further advanced.

There are many possible lines of further investigation, which are outlined below. In relation to each of these, it is important to note that because of the breadth of concepts and provisions relating to equity uncovered by this research, it would not be possible to examine all facets of any one of these lines of investigation: careful scoping would be required for feasibility.

Extended review of implementing material and case law. The focus of this research has been on capturing a breadth of ways in which water-related laws include concerns about equity. It has found that legislation rarely does so in great detail. However, the findings suggest that in some circumstances, plans and decisions for which the legislation provides elaborate significantly on what equity means in specific contexts. Future

work could focus on analysing such materials in a broader way to understand how legislative provisions are implemented in practice. In addition, because the research scope to date has sought ‘implementing material’ of at least one sort in relation to each significant legislative provision, it has not produced an in-depth or comprehensive view of how courts have considered equity matters. Judicial consideration is most likely to have occurred in relation to state legislation. To make such a task feasible, it would be desirable to narrow the scope to certain types of provisions, rather than all the provisions uncovered by this research. Some possible approaches to doing this would be to focus on case law across multiple jurisdictions that relates to either certain types of provisions, or types of circumstances that are politically salient and controversial (e.g. allocation of water under conditions of scarcity; effects of developing water infrastructure by the water industry or water-intensive industries like mining; effects of flooding, etc). The choice of jurisdictions to examine would depend on the type of provision or circumstance in focus to select those jurisdictions for which the issue is most salient and the law is likely to be most developed through litigation.

Arrangements likely to be motivated by equity. There are significant areas of law that seem likely to have some relationship to concerns about equity, but that seem rarely to be expressly described as such in legislation, based on the jurisdictions and laws dealt with here. These include: arrangements for participation in relation to advising government or making objections in relation to plans and decisions; involvement of First Nations peoples and consideration of their interests;⁵ principles related to ‘balancing’ different concerns without express reference to equity being a consideration in this balancing exercise; and penalties imposed for non-compliance with water-related obligations. Further research could focus more on specific types of situations that are considered to be linked with equity, but where this is not express in the legislative text.

Alternatively (or additionally), further analysis could classify the decision-making contexts in which equity arises expressly to determine trends based on variables such as discretion available to decision-makers, heterogeneity of stakeholders, information availability, etc. Note that this form of analysis would most clearly apply to references to equity that apply to specific decisions, rather than those that appear in objects and purposes provisions.

Equity at points of legal transition. The focus of this preliminary review has been a snapshot of current legislative regimes related to water in selected Australian states. Equity is also a concern at transition points between legal regimes, for example: moving between different approaches to water entitlements (e.g. replacing common law rights with statutory entitlements, or unbundling water entitlements); and expanding regulatory requirements (e.g. requiring water entitlements for some forestry operations in South Australia, or for previously exempt mining operations). Considering these aspects of equity is likely to reveal issues and approaches not canvassed in this report, for example, how compensation of affected persons and grandfathering older approaches are used to deal with equity concerns. Further research could focus on how laws across a sample of areas have dealt with transition issues, aiming to reveal contrasting approaches, e.g. examining changes to water quantity versus water pollution control regimes.

Socio-legal aspects of Australian legislation dealing with equity in the context of water. The general way in which much of the reviewed legislation is framed highlights the value of empirical legal approach—law on the ground, as opposed to law on paper—to understand reasons for legislative drafting, how decision-makers understand and are implementing equity provisions, and associated factors like barriers to considering equity. Relevant empirical legal approaches include interviewing legislative drafters, decision-makers and departmental staff, and obtaining and reviewing records that document how equity has been considered in specific decisions, including the imposition of penalties for non-compliance with obligations related to water. An interdisciplinary approach would be valuable to gain insights from other disciplines that deal with related issues. The political nature of equity trade-offs suggests the value of political science expertise. It is important to note that research interviews would require ethics approvals, but early informal conversations on the basis of this preliminary report would be helpful to design further research.

Scholarly literature and commentary has arisen in this research, but not to a significant degree given the more important focus on legislation and interpretive materials that have legal status themselves, like ex-

⁵Note that in late October 2023, litigation is reported to have been commenced in relation to accreditation of the NSW Fractured Rock Water Resource Plan. The Murray Lower Darling Rivers Indigenous Nations argues that Nations were not properly consulted, such that the Plan is legally invalid ([link](#)). In late 2022, litigation in relation to sea country and failures of consultation: *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193.

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planatory memoranda and implementing regulations. There is a vast literature across legal and other disciplines dealing with concepts and phenomena relevant to this report, including: ecologically sustainable development (which includes intergenerational equity); the use of administrative discretion; and approaches to ensuring government accountability in decision-making contexts that involve implementing broad principles. Further research could investigate this literature, for example, to uncover further guidance about how best to deal with equity (or other broadly framed concepts, like the ‘public interest’) in legislation or guidance documents associated with legislation.

Comparative jurisdictions. The research could be expanded to other Australian jurisdictions to investigate whether they include any significantly different approaches to equity concepts. More broadly, the research could extend to jurisdictions outside Australia. Which jurisdictions would be most useful to consider depends on the matters of greatest interest, which helps identify jurisdictions in which the relevant matter has produced significant legal arrangements and thinking. For example:

- Quantitative aspects of transboundary water sharing are central to the international law principle of equitable and reasonable utilisation, and many treaties;
- Relative to Australian jurisdictions, western U.S. jurisdictions often have deeper and more extensive provisions for stakeholder participation in water-related decision-making contexts that have parallels in Australia, for example, water planning and issuing water rights. Investigating stakeholder participation provisions could shed light on procedural aspects of equity;
- California is a leading jurisdiction in the adoption and implementation of the concept of environmental justice (which includes both procedural and distributive components) in relation to water. At the U.S. national level, executive orders requiring agencies to assess environmental justice associated with regulatory actions are long-established. Most recently, Presidential Executive Order 14,094 of 6 April 2023 requires all regulatory analysis to consider distributive impacts and equity (s 3(a)). These contexts are valuable for comparison with Australia to address the following types of concerns, which are common to both jurisdictions:
 - the original driver of environmental justice concerns in the western U.S. was racial disparities in water pollution and water services, which have the clearest parallels in Australia in relation to Indigenous communities, regional and remote communities with unreliable water supplies, and towns with polluting industries (e.g. mining or smelting);
 - contemporary concerns about environmental justice go beyond this context, and focus on disproportionate *cumulative* environmental and socio-economic burdens, which include indicators of water pollution, water scarcity, air pollution, poverty, health, low educational attainment, unemployment, etc.⁶ This broader conceptualisation of equity is worth investigating as a way to contextualise water-related equity concerns more broadly alongside other issues in the Australian context; and
 - a key way that Californian policy responds to environmental justice concerns is to prioritise compliance and enforcement activities in communities that experience disproportionately high cumulative burdens. This way of operationalising equity concerns seems not to have been explored in Australian regulatory policy in relation to water (which tends to see equity as about sharing, balancing and compensating, but not expressly about prioritising), but may be worth exploring, especially given high concerns about non-compliance with water regulations in recent years;
- New Zealand and Canada are considered to have advanced frameworks for restorative justice in a natural resources management context, particularly that which involves First Nations peoples.

⁶See <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40>.

New South Wales: water, law and concepts of equity

Summary for policy makers – New South Wales

Equity concepts are expressly considered in half of the pieces of NSW water-related legislation considered (7 out of 14). Concepts of equity are express in laws related to water entitlements and planning, water services, catchment management, interstate water sharing, environmental protection and mining. However, in many of these categories, there is also legislation that lacks express equity concepts. In some cases, legislation that does not expressly refer to equity is described in second reading speeches as advancing it. It is unclear whether certain provisions are intended to advance equity in substantive ways (without linking to equity expressly), or whether references in second reading speeches are primarily rhetorical.

The water-related legislation in which equity is arguably most prominent is the *Water Management Act 2000* (NSW) and the *New South Wales–Queensland Border Rivers Act 1947* (NSW). Courts have been active in relation to the former, and apparently to a greater degree than in other jurisdictions. The NSW Court of Appeal has held that ‘considerations of equity are quintessentially matters for political decision-making’ subject to minimal constraints on the exercise of ministerial discretion, for example, ensuring that a decision is not so ‘irrational’ that the decision ‘operates beyond the legally permissible limits of the statutory power’. The limited availability of judicial review in situations in which equity is a contested matter highlights the need for transparency about how discretion is interpreted and applied by decision-makers to facilitate democratic accountability in the absence of accountability in court.

New South Wales legislative arrangements are relatively rare among the state legislation analysed here in that they provide for guidance documents that are used, or could be used, to elaborate transparently on what equity means and requires in different contexts. The *Water Management Act 2000* (NSW) provides for a State Water Management Outcomes Plan that could fulfil this function (though there is no such plan currently in effect), and a 2023 policy dealing with social impact assessment details equity considerations in relation to assessing the impacts of major projects for the purposes of the *Environmental Planning and Assessment Act 1979* (NSW).

Many distinct ideas and ‘communities of concern’ are engaged by equity concepts in NSW legislation. Concern for future generations is common through the concept of intergenerational equity, which displays the ongoing influence of the international environmental idea of ecologically sustainable development. Notably, the NSW *Mining Act* of 1992 was amended in 2008 to introduce the concept of ecologically sustainable development for the first time. However, where present, this concept always arises as a general legislative object or purpose rather than being detailed in a specific decision-making context, and may be the only context in which the concept of equity arises in the piece of legislation. In such cases, it is unclear precisely how an objective relating to equity is intended to be operationalised.

The groups who benefit from equity-related provisions in specific decision-making contexts tend to be those for whom equity has a clear economic aspect, such as water users (customers of water service providers and self-supplied water users) in the context of water charges and availability of water under entitlements; utilities in the context of the costs of infrastructure; and, the state of NSW in relation to sharing the costs of water infrastructure in the context of transboundary resources.

Different pieces of legislation tend to draw attention to different communities of concern, and it is unclear whether this is the result of conscious selection and retention of concepts most appropriate for a particular

context, or whether concepts evolve but older legislation is not adapted to these changes. Relatively recent ideas of equity that encompass issues broader than economic aspects of equity are present in NSW law or legislation, but only in relatively narrow contexts like remedies for water pollution offences (in relation to ‘restorative justice’ under 2005 and 2014 amendments to the *Protection of the Environment Operations Act 1997*) or assessing the impacts of major projects (in relation to ‘distributive equity’ under a guideline for the purposes of impact assessment under the *Environmental Planning and Assessment Act 1979*.)

Concepts of equity in NSW laws related to water

In which areas of NSW water-related laws do concepts of equity arise?

Concepts of equity and fairness in relation to water are considered in legislation relating to water entitlements and water planning, water services, interstate water sharing, environmental protection and mining. There are also pieces of legislation relating to these and other areas that do not expressly include requirements that decision-makers should have regard to equity or fairness in some form, such as the *Local Land Services Act 2013* (NSW) (Table 2).

Table 2 sets out relevant legislation in these areas, and whether it makes express reference to equity or a related term in a significant way (in the Act’s objects or substantive provisions, or both), or whether it contains no, or only minor reference to an equity-related term (where a minor reference is one that applies only to a narrow context that is not a core part of the Act).

In some instances, legislative history materials suggest that equity considerations underlie or otherwise motivate legislation, even where this is not express in the legislative text. For example, the *Natural Resources Access Regulator Act 2017* (NSW) s 10(b) notes that the principal objectives of the regulator include ensuring the ‘effective, efficient, transparent and accountable compliance and enforcement measures for the natural resources legislation’ and ‘maintaining public confidence’ in this enforcement. There is no express mention of equity. However, the second reading speech for the corresponding Bill makes reference to concepts of equity, for example, noting that ‘staged implementation, based on risk, will also be a key element of the policy, which will be developed in consultation with water users... this is a matter of equity’. As such, it is possible that more legislation is motivated by equity concerns, but that this is not express in the statutory language.

While there are only a handful of instances in which equity is expressly considered in legislation, it appears that the New South Wales Land and Environment Court and Supreme Court have engaged with equity more, and more directly, than courts in other jurisdictions. Courts have examined equity in the contexts of water distribution, irrigation, unlawfully extracting water and the validity of particular water sharing plans. The NSW Court of Appeal has held that the meaning of equity is a matter for the Minister’s discretion, and that determining what is ‘equitable’ is a political decision:

“inevitably, when significant changes are made to an established regulatory regime, there will be winners and losers. **Considerations of equity are quintessentially matters for political decision-making.** I am not satisfied that anything in the nature, scope and purpose of the Act prevents the Minister from implementing a scheme which operates to the **detriment of some persons and to the advantage of others**, in a manner not determined by availability of water but by **broader considerations of what the Minister regards as equitable.**”¹ [emphasis added]

A limited constraint on the meaning that might be given to equity is that an element of unfairness must not be so ‘irrational’ that the decision ‘operates beyond the legally permissible limits of the statutory power’.²

¹ *Murrumbidgee Groundwork Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10, (2005) 138 LGERA 11, 144, also followed in *Arnold v Minister Administering the Water Management Act 2000* (No 6) [2013] NSWLEC 73 (31 May 2013), [184].

² *Murrumbidgee Groundwork Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10, (2005) 138 LGERA 11, citing *Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) HCA 30; (2003) 77 ALJR 1165;

Table 2: NSW water-related legislation considering equity, by area of law.

Area of law	Legislation making express mention of equity concept(s) in a significant way	Legislation with no express mention of equity concept(s), or only minor mention
Water entitlements and planning	<i>Water Management Act 2000</i> (NSW)	<i>Natural Resources Access Regulator Act 2017</i> (NSW)
Water services/prices	<i>Water Industry Competition Act 2006</i> (NSW)	<i>Independent Pricing and Regulatory Tribunal Act 1992</i> (NSW)
Catchment management	<i>Water NSW Act 2014</i> (NSW)	<i>Local Land Services Act 2013</i> (NSW)
Interstate water sharing	<i>New South Wales - Queensland Border Rivers Act 1947</i> (NSW)	
General sustainability/ environmental protection	<i>Protection of the Environment Administration Act 1991</i> (NSW); <i>National Environment Protection Council (New South Wales) Act 1995</i> (NSW) [†]	<i>Protection of the Environment Operations Act 1997</i> (NSW)
Wilderness/wild rivers		<i>National Parks and Wildlife Act 1974</i> (NSW)
Dam safety		<i>Dams Safety Act 2015</i> (NSW)
Land use/development		<i>Environmental Planning and Assessment Act 1979</i> (NSW)
Mining	<i>Mining Act 1992</i> (NSW)	
Climate change	N/A	

[†] See Commonwealth chapter for analysis (NSW Act contains identical provisions in intergovernmental agreement)

How do concepts of equity arise in NSW laws related to water?

Where NSW legislation makes explicit references to equity and fairness, these references are predominantly found in the objects or purposes of the Act and provisions relating to decisions about water allocation, enforcement of water limitations, pricing mechanisms for water, and the allocation of costs for water infrastructure (Table 3). Objects and purposes provisions tend to relate to broad social justice concerns about equity, notably, intergenerational equity as a component of environmentally sustainable development (e.g. *Water Management Act 2000* (NSW) s 3(e)).

However, relatively few of the objects provisions of the legislation analysed contain explicit references to equity and fairness. Some acts seemed to include concepts and ideas that are often associated with equity, but this link was not explicitly made. For example, the principal objectives of the *Water NSW Act 2014* (NSW) include objectives such as capturing and storing water in an ‘efficient, effective, safe and financially responsible manner’ (s 6(1)(a)), promoting ‘water quality, the protection of public health and public safety, and the protection of the environment’ (s 6(1)(c)) and exhibiting social responsibility through ‘having regard to the interests of the community in which it operates’ (s 6(2)(b)).

Other concepts of equity are intended to apply to narrower, specific decision-making contexts, for example:

- Allocating water between applicants for an entitlement: *Water Industry Competition Act 2006* (NSW) s

Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) HCA 32; (2004) 74 ALJR 992; *Williams v Melbourne Corporation* [1933] HCA 56; (1933) 49 CLR 142; *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* [1993] FCA 45; (1993) 40 FCR 381; *Bienke v Minister for Primary Industries and Energy* (1994) 125 ALR 151; *Bienke v Minister for Primary Industries and Energy* (1995) 63 FCR 567

7(1);

- Compulsorily acquiring access licences: *Water Management Act 2000* (NSW) s 79(1);
- Sharing costs for water and sewerage services: *Water Industry Competition Amendment (Review) Act 2014* (NSW) No 57 s 2A(a)–(c); *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) s 11(1)(a)–(b));
- Interstate water sharing: *New South Wales–Queensland Border Rivers Act 1947* (NSW) s 16(2)(d);
- Fixing levy rates relating to a channel in proportion to the benefits received: *Water Management Act 2000* (NSW) s 232;
- Undertaking investigations to ensure an equitable flow or distribution of the flow of water: *New South Wales–Queensland Border Rivers Act 1947* (NSW) s 16(2)(d);
- Apportioning water for the daily flow of water in the Dumaresq River at the Mingoola Gauging Station in equal shares: *New South Wales–Queensland Border Rivers Act 1947* (NSW) s 33;
- Adjusting proposed share components of replacement floodplain harvesting access licences where the long-term average annual extraction limit is exceeded, adjusted proportionately to each landholder: *Water Management (General) Regulation 2018* (NSW) s 231(2)–(3);
- Imposing conditions on licences to promote the equitable sharing among public water utilities and licensed retail suppliers of drinking water of the costs of water industry infrastructure that contributes to water security: *Water Industry Competition Act 2006* (NSW) s 13(2)(c);
- Accepting an undertaking to carry out a restorative justice activity: *Protection of the Environment Operations Act 1997* (NSW) s 253A(1A);
- Ensuring stakeholder confidence in the equitable sharing of available resources: *New South Wales–Queensland Border Rivers Act 1947* (NSW) s 39; and
- Promoting equitable sharing of the costs of water industry infrastructure among participants in the drinking water market: *Water Industry Competition Act 2006* (NSW) s 7(1)(g).

Table 3: Legislative contexts in which equity arises in NSW: general objects vs specific decision-making contexts.

Legislative context	Legislative provisions
Objects and purposes provisions, including principles of ecologically sustainable development or similar	<i>Mining Act 1992</i> (NSW) s 3A <i>New South Wales–Queensland Border Rivers Act 1947</i> (NSW) 16(3)(e)–(f) <i>Protection of the Environment Administration Act 1991</i> (NSW) s 6(2)(b) <i>Water Management Act 2000</i> (NSW) s 3 <i>Water NSW Act 2014</i> (NSW) s 6(2)(d)
Specific decision	<i>New South Wales–Queensland Border Rivers Act 1947</i> (NSW) ss 16(2)(d), 33, 39 <i>Protection of the Environment Operations Act 1997</i> (NSW) s 253A(1A) <i>Water Industry Competition Act 2006</i> (NSW) ss 7(1)(g), 13(2)(c) <i>Water Management Act 2000</i> (NSW) s 232

Which groups are the focus of concerns about equity?

Different legislative formulations related to equity, and documents that implement legislative provisions, adopt different groups as the focus of concerns about equity. For most of these, the primary concern appears to be economic inequity or impacts on water entitlements. Relevant groups are:

- Water users, in the context of impacts caused by other water users: *Water Management Act 2000* (NSW) s 5(4)(c);

- Holders of floodplain harvesting access licences, in relation to methods of reducing share components of these licences: *Water Management (General) Regulation 2018 (NSW)* ss 23J(2)–(3);
- Small retail customers (*Water Industry Competition Act 2006 (NSW)* s 7(1)(f));
- Participants in the drinking water market, including public water utilities and small retail customers, in relation to the distribution of costs for water infrastructure (*Water Industry Competition Act 2006 (NSW)* ss 7(1)(f), 10(c), 13(2)(c)) and consumers of water services as a form of government monopoly service (*Independent Pricing and Regulatory Tribunal Act 1992 (NSW)* s 11(1)(a)–(b), as demonstrated by Sydney Desalination Plant Pty Ltd Review of Prices to apply from 1 July 2023 Final Report); and
- The state as a whole, in relation to sharing water and related costs with Queensland: *New South Wales–Border Rivers Act 1947 (NSW)* s 16(2)(d).

Other types of groups who are the focus of equity concerns for reasons that appear to go beyond economic inequity include:

- Future generations, in relation to broad objectives: e.g. *Water Management Act 2000 (NSW)* s 3(e));
- Communities, in the context of the social and economic benefits of water use: *Water Management Act 2000 (NSW)* s 5(4)(b));
- A person who suffers harm as a result of a water pollution contravention, in relation to restorative justice undertakings: *Protection of the Environment Operations Act 1997 (NSW)* s 253A(1A); and
- Vulnerable or marginalised people: *Environmental Planning and Assessment Act 1979 (NSW)* s 5.7, implemented through the NSW Government *Social Impact Assessment Guideline*, February 2023.

What does equity require a decision-maker to do?

In relation to the uses of equity in provisions about making specific decisions, the responsibilities of decision-makers are formulated in diverse ways, but are typically expressed in relatively weak terms that allow for significant discretion, e.g. requiring the decision-maker to ‘consider’ or ‘have regard to’ equity concepts, with additional qualifiers:

- All persons exercising functions under the *Water Management Act 2000 (NSW)* have a duty to ‘take all reasonable steps to do so in accordance with, and so as to promote, the water management principles’ of the Act, which include equity concerns;
- An objective of the Environment Protection Authority is ecologically sustainable development, which ‘can be achieved through’ the principle of inter-generational equity: *Protection of the Environment Administration Act 1991 (NSW)* s 6;
- The Environment Protection Authority ‘may’ accept an undertaking to carry out a restorative justice activity: *Protection of the Environment Operations Act 1997 (NSW)* s 253A;
- ‘Having regard to’ the object of promoting equitable sharing among participants in the drinking water market of the costs of water industry infrastructure that significantly contributes to water security (*Water Industry Competition Amendment (Review) Act 2014 No 57 (NSW)* s 10(c));
- ‘Make recommendations’, ‘where the Commission expects that the supplies of water resulting from such works to the parties ... will not be substantially equal, [on] the proportions in which the cost of constructing such works should be met by the parties...’ *New South Wales–Queensland Border Rivers Act 1947* s 16(3)(e)–(f);
- The Minister ‘may’ impose licence conditions to promote the equitable sharing among public water utilities and licenced retail suppliers of drinking water of the costs of water industry infrastructure (*Water Industry Competition Act 2006 (NSW)* ss 13(2)(c); *Water Industry Competition Amendment (Review) Act 2014 No 57 (NSW)* s 20F(4)(e));

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- Licence determinations under the *Water Industry Competition Act 2006* (NSW) ‘must have regard to’ encouraging competition in the supply of water and the provision of sewerage services, promoting equitable sharing among participants in the drinking water market (s 7(1)(b)); and
- NSW and Qld agree to ‘develop and maintain accounting systems in respect of the allocation and management of water resources in the Border Rivers Catchment to ... ensure stakeholder confidence in the equitable sharing of the available resource’: New South Wales–Queensland Border Rivers Intergovernmental Agreement cl 39(i).

The first of these obligations has the rare feature of attracting a review requirement, which is to be published in a relevant annual report for the Department: every five years, the Minister for Water is to conduct a review to determine whether ‘the work and activities of the Department ... have been effective in giving effect to the water management principles’: *Water Management Act 2000* (NSW) s 10(1).

The following requirements are expressed in more mandatory language:

- The entitlement of a person whose access licence has been compulsorily acquired to receive compensation from the state for the market value of the licence: *Water Management Act 2000* (NSW) s 79(2).
- The Commission under the Border Rivers Act ‘shall investigate’ works necessary to ensure equitable distribution of waters (s 16(2)(d)).

It may be that these stronger expressions are due to the comparatively well-established need to consider equity in these contexts—to compensate for property loss, and to provide security for the water resources of a state. By contrast, the contexts in which concepts of equity in the earlier examples were expressed more weakly deal with circumstances in which equity is a vaguer, more contested, and perhaps less easily definable concept.

How do concepts of equity apply and vary in space and time?

NSW law facilitates developing and applying different concepts of equity in different places, including through water sharing plans made under the *Water Management Act 2000* (NSW). Those sampled for this review tend to address equity in a more muted and implicit way than those of some other states. For example, the Water Sharing Plan for the Namoi Alluvial Groundwater Sources Order 2020 does not explicitly mention ‘equity’ or ‘fairness’, but it notes that in response to the impacts of previous reductions in entitlements imposed under a previous water sharing plan, 500 ML of water allocation will be redistributed.

Pricing mechanisms and concepts also have the potential to differ across the jurisdiction in relation to ideas of equity. As an example, a straight-line depreciation method was used to calculate Sydney Desalination Plant’s depreciation allowance to promote intergenerational equity in the use and recovery of long-lived assets (Sydney Desalination Plant Pty Ltd Review of prices to apply from 1 July 2023 – Final Report). The same price review noted that it was important that regulatory water pricing settings achieve a fair and efficient balance of risk between Sydney Desalination Plant, Sydney Water and water customers in Greater Sydney and that sharing costs between customers based on each customer’s proportionate use of desalinated water was an efficient allocation of costs.

A rare feature of NSW law is that it provides for statewide guidance related to equity in the form of the social impact assessment guidelines that apply to the environmental impact assessment process under the *Environmental Planning and Assessment Act 1979* (NSW). This Act requires that all State significant projects must have an approved environmental impact assessment before commencing work. This should contain information about the economic, environmental and social impacts of the project, including a Social Impact Assessment. There is also the potential to develop guidance on implementing the ‘water management principles’ that relate to maximising community benefits from water use under a State Water Management Outcomes Plan, which is to promote the water management principles (*Water Management Act 2000* (NSW) s 6(2)(c)). However, there is no such Plan currently in effect.

As demonstrated in the summary table below, concepts of equity manifest in different ways in different legislative contexts through time. Unlike some other states, however, it is more difficult to discern trends because of the smaller number of legislative expressions of equity that arise. It is notable, though, that traditional concepts of ‘equitable sharing’ and ‘proportional burdens’ are now complemented by more modern concepts like restorative justice and distributive equity.

New South Wales summary table – key phrases and decision-makers

The table below summarises the different concepts of equity in NSW water-related legislation with respect to key equity-related phrases and decision-makers. Key phrases are ordered chronologically with respect to the year that they were introduced. The table also includes legislation that makes no express reference to equity-related matters (first row). Decision-makers are listed for substantive provisions that provide for a specific decision to be made, and make express reference to equity in that context.

Table 4: Chronological table of equity-related legislative phrases in NSW and corresponding decision-makers.

Legal provision	Key equity-related phrase in the legal provision	Decision-makers
National Parks and Wildlife Act 1974 (NSW) ; Local Land Services Act 2013 (NSW) ; Dams Safety Act 2015 (NSW) ; Natural Resources Access Regulator Act 2017 (NSW) ; Independent Pricing and Regulatory Tribunal Act 1992 (NSW) ; Protection of the Environment Operations Act 1997 (NSW) ; National Parks and Wildlife Act 1974 (NSW) ; Dams Safety Act 2015 (NSW) ; Environmental Planning and Assessment Act 1979 (NSW)	no clear equity-related phrase in legislation or in implementing material NB: equity provisions found in the <i>National Environment Protection Council (New South Wales) Act 1995 (NSW)</i> are found in the summary table for the Commonwealth (provisions are identical across multiple pieces of legislation)	N/A
New South Wales–Queensland Border Rivers Act 1947 (NSW) s 16(3)(e)–(f)	‘where the Commission expects that the supplies of water resulting from such works to the parties ... will not be substantially equal, [report on] the proportions in which the cost of constructing such works should be met by the parties...’	Dumaresq–Barwon Border Rivers Commission
New South Wales–Queensland Border Rivers Act 1947 (NSW) s 16(2)(d) , provision introduced in 1968 by the New South Wales–Queensland Border Rivers (Amendment) Act No 65, 1968	‘equitable distribution of the flow of water’; complex provisions in relation to water sharing	Dumaresq–Barwon Border Rivers Commission
Protection of the Environment Administration Act 1991 (NSW) s 6(2)(b)	‘inter generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations’	Environment Protection Authority

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Table 4: Chronological table of equity-related legislative phrases in NSW and corresponding decision-makers.

Legal provision	Key equity-related phrase in the legal provision	Decision-makers
<i>Independent Pricing and Regulatory Tribunal Act 1992 (NSW) s 11(1), as illustrated by Sydney Desalination Plant Review of Prices, Final Report 2023, p. 104</i>	no clear equity-related legislative phrase; price review uses the terms ‘impactor and beneficiary pays principles’ and ‘efficient allocation of costs’	Independent Pricing and Regulatory Tribunal
<i>Water Management Act 2000 (NSW) s 3(e)</i>	sustainable and integrated management [of water] for the benefit of both present and future generations and, in particular—... orderly, efficient and equitable sharing of water	N/A
<i>Water Management Act 2000 (NSW) s 232</i>	levying water rates in proportion to the benefit received	Members of a private water trust
<i>Protection of the Environment Operations Act 1997 (NSW) s 253A(1A) (provision introduced in 2005)</i>	restorative justice	Environment Protection Authority
<i>Water Industry Competition Act 2006 (NSW) s 7(1)(g)</i>	equitable sharing among participants in the drinking water market	Minister for Water
<i>Water Industry Competition Act 2006 (NSW) s 13(2)(c)</i>	‘promote the equitable sharing among public water utilities and licensed retail suppliers of drinking water of the costs of water industry infrastructure’	Minister for Water
<i>New South Wales–Queensland Border Rivers Act 1947 (NSW) s 39, provision introduced in 2008</i>	‘ensure stakeholder confidence in the equitable sharing of the available resource’	States of NSW and Qld
<i>Mining Act 1992 (NSW) s 3A (provision introduced in 2008)</i>	ecologically sustainable development	N/A
<i>Water NSW Act 2014 (NSW) s 6(2)(d)</i>	‘where its activities affect the environment, to conduct its operations in compliance with the principles of ecologically sustainable development [contained in specified legislation]’	Water NSW
<i>Water Management (General) Regulations 2018 (NSW) s 23J</i>	allocating adjustments proportionately to each landholder	Minister for Water
<i>Environmental Planning and Assessment Act 1979 (NSW) s 5.7, as elaborated in NSW Government Social Impact Assessment Guideline, Feb 2023</i>	no clear equity-related legislative phrase; distributive equity (from 2023 Guideline)	A ‘determining authority’

Northern Territory: water, law and concepts of equity

Summary for policy makers – Northern Territory

Equity concepts appear in half of the current Northern Territory water-related legislation examined here (6/12 pieces of legislation). These concepts are considered in legislation relating to water entitlements and planning, water services, environmental protection, parks and wildlife, and land use planning. Legislation relating to mining and energy do not contain express or clear considerations of equity concepts. Compared to some other Australian jurisdictions, but similar to Queensland, Northern Territory laws have more limited reference to concepts of equity in both objects and purposes provisions and substantive provisions of legislation. Like other jurisdictions, the most strongly worded provisions that refer to equity do so in relation to concerns about economic aspects of equity.

To a relatively high degree compared to other states, concerns about equity seem to be ‘below the legislative surface’ in the Northern Territory, in that significant water-relation legislation that does not expressly refer to equity produces implementing materials that do expressly adopt the concept. This is true of both water allocation plans and land use plans. Examples of both types of plans expressly refer to equity even though the parent legislation (the *Water Act 1992* (NT) and the *Planning Act 1999* (NT)) do not do so in relevant ways. Different water allocation plans focus on different groups in the absence of legislative guidance about whether and how to consider equity. This warrants further investigation and policy consideration about the degree to which these differences are appropriate.

In some cases, legislation or specific provisions that do not expressly refer to equity are described in second reading speeches as advancing it. This was the case, for example, in relation to changes to appeal rights under the *Planning Act 1999* (NT). The relevant change made planning-related appeal rights available to remote communities, that is, the amendment sought to promote fairness by ensuring spatial consistency in the availability of a legislative mechanism. This encouragement of spatial consistency contrasts with the situation of water allocation plans, which adopt meanings of equity that vary, leading to spatial diversity. It is not clear whether acceptance of spatially diverse meanings of equity is intended by the legislation. Clarity on this point, and guidance to relevant decision-makers about considerations that are relevant to determining what equity requires in a given context, would be desirable.

Distinct ideas and ‘communities of concern’ are covered by equity-related provisions in Northern Territory legislation. These communities include future generations, which displays the ongoing influence of international environmental ideas. This is not merely a reflection of the prominence of this idea in the 1990s; a 2020 amendment to the *Planning Act 1999* (NT), for example, added reference to future generations to the objects of that legislation. Other communities of concern in the context of equity provisions include market participants, traditional Aboriginal owners of park areas (who participate in ‘equitable partnerships’ to manage these parks), and those who would be harmed by improper management or use of bores and groundwater. Notably, the Northern Territory is the only jurisdiction reviewed that expressly connected concepts of equity with Indigenous issues in relevant legislation (though only on one occasion).

It is difficult to discern trends in how provisions that deal with equity have changed over time because of the smaller number of legislative expressions of equity that arise. It is evident, though, that Northern Territory legislation does not clearly embrace more modern concepts about equity that are evident in recent legislative contexts in some other jurisdictions, for example restorative justice, distributive equity, and environmental justice.

Concepts of equity in Northern Territory laws related to water

In which areas of Northern Territory water-related laws do concepts of equity arise?

Equity concepts are not widely represented in Northern Territory (NT) legislation relating to water and the environment compared to other jurisdictions under study. When concepts of equity and fairness are mentioned, they are considered in legislation relating to water entitlements and planning, water services, environmental protection, parks and wildlife, and land use planning. Legislation relating to mining and energy do not contain express or clear considerations of equity concepts. Some legislation relating to water services includes equity concepts by way of concern for fair markets and competition (for example, the *Utilities Commission Act 2000* (NT)), while other water service legislation does not substantively engage with equity concepts (for example, the *Power and Water Corporation Act 1987* (NT)).

Table 5 sets out relevant legislation in these areas, and whether it makes express reference to equity or a related term in a significant way (in the Act's objects or substantive provisions, or both), or whether it contains no, or only minor reference to an equity-related term (where a minor reference is one that applies only to a narrow context that is not a core part of the Act).

Table 5: Northern Territory water-related legislation considering equity, by area of law.

Area of law	Legislation making express mention of equity concept(s) in a significant way	Legislation with no express mention of equity concept(s), or only minor mention
Water entitlements and planning	<i>Water Act 1992</i> (NT)	N/A
Water services/prices	<i>Utilities Commission Act 2000</i> (NT)	<i>Power and Water Corporation Act 1987</i> (NT); <i>Water Supply and Sewerage Services Act 2000</i> (NT)
Catchment management	N/A	N/A
Interstate water sharing	N/A	<i>Lake Eyre Basin Intergovernmental Agreement Act 2009</i> (NT)
General sustainability/environmental protection	<i>Environment Protection Act 2019</i> (NT) <i>National Environment Protection Council Act 1994</i> (NT)	<i>Waste Management and Pollution Control Act 1998</i> (NT)
Wilderness/wild rivers	<i>Territory Parks and Wildlife Conservation Act 1976</i> (NT)	N/A
Dam safety	N/A	N/A
Land use/development	<i>Planning Act 1999</i> (NT)	N/A
Mining	N/A	<i>Mineral Titles Act 2010</i> (NT) <i>Mining Management Act 2001</i> (NT)
Climate change	N/A	N/A

How do concepts of equity arise in Northern Territory laws related to water?

NT legislation makes relatively few direct references to equity concepts. This makes it difficult to identify patterns in the introduction of these concepts into legislation and changes in use and meaning.

Express references to equity often occur in the objects or purposes of the legislation, for example, referring to concern for intergenerational and intragenerational equity.

In a small number of legislative contexts, concepts of equity are intended to apply to making specific decisions, for example:

- Serving a notice on a person to remedy an action or omission in relation to a bore that may result in inequitable distribution of groundwater: *Water Act 1992* (NT) s 70;
- Having regard to promoting competitive and fair market conduct in undertaking the Utilities Commission's functions: *Utilities Commission Act 2000* (NT) s 6(2)(a); and
- Determining fees under the *Planning Act 1999* (NT) s 135(3).

The *Water Act 1992* (NT) makes no reference to equity in its objects or in its provisions related to water allocation plans (e.g. purposes of the plans in s 22B). However, a small sample of water allocation plans and associated implementing materials from the Georgina Wiso Water Allocation Plan, the Katherine Tindall Limestone Aquifer Water Allocation Plan and the Alice Springs Water Allocation Plan, indicates that some plans do expressly incorporate equity concepts. This is most commonly in the plans' objectives, intended outcomes and strategies to deliver those outcomes in relation to water quantity. As the *Water Act 1992* (NT) does not specify the type of equitable considerations to be addressed in this context, when the plans do engage with equity, they include varying levels of detail and emphasis. When engaging with equity, the plans primarily address intergenerational equity and intragenerational equity, noting that identifying and addressing potential risks to water resources will assist the NT in ensuring that water resources are available for future generations.¹ Concepts of equity and fairness are also used with regards to sharing water between human and environmental needs. The Katherine Tindall Limestone Aquifer Water Allocation Plan is particularly concerned with fair access to water in supporting ecologically sustainable regional development.²

Historical explanatory materials suggest that the *Water Act 1992* (NT) was intended to effect a distinctive change in water resources management, and to provide comprehensive protection for water resources and for the equitable distribution of water in the Northern Territory, even though the legislation does not expressly mention equity in this broad way. The Minister introducing the Water Bill 1991 (NT) referred to the widespread problem of 'competition for limited resources and of having to protect both surface and groundwaters from serious, long-term contamination' and that the government required this 'clear and comprehensive legislative basis for water management' in order to supervise the 'rational and equitable distribution of water' and to ensure that 'quality is preserved'.³

Explanatory materials associated with land use planning legislation also suggest that concerns about equity motivated provisions of legislation that do not expressly refer to the concept. In addition to the express mention of future generations in the objectives of the *Planning Act 1999* (NT) (s 2A(h)), which was introduced by amending legislation in 2020, the second reading speech for a planning amendment bill in 2004 reveals that concerns about equity motivated two changes to appeal rights. One change ensured that people in remote areas had the same rights to appeal planning decisions as others ('This is a matter of equity for people in remote areas'⁴). The other change was to introduce limited third party rights to appeal planning decisions. Limitations to those rights were justified on the basis that 'unrestricted rights of appeal would be just as inequitable as a complete absence of such a right'; restrictions appeared to be connected to the concerns of

¹ *Georgina Wiso Water Allocation Plan Implementation Actions 2023-2031* (2023) 4; *Alice Springs Water Allocation Plan 2016-2026* (2016) 41.

² *Katherine Tindall Limestone Aquifer Water Allocation Plan 2019-2025* (2019) 45.

³ Northern Territory of Australia, Legislative Assembly, *Parliamentary Debates*, 12-20 November 1991 at 3490-3491; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 [69]-[70].

⁴ Northern Territory of Australia, Legislative Assembly, *Parliamentary Debates*, 2 December 2004 at 8405.

industry representatives about ‘uncertainty, delays and additional costs that can be associated with third party appeals’ and a statement that ‘government is mindful of the need to strike a balance between the legitimate expectation of developers and landowners on one hand and, on the other hand, the expectations of people for preserving and enhancing their living environment’.⁵

Table 6: Northern Territory legislative contexts in which equity arises: general objects vs specific decision-making contexts.

Legal context	Provision expressly referring to equity concept
Objects and purposes provisions, including principles of ecologically sustainable development or similar	<i>Environment Protection Act 2019</i> (NT) ss 18, 21 <i>National Environment Protection Council Act 1994</i> (NT) Schedule <i>Planning Act 1999</i> (NT) s 2A(h) <i>Territory Parks and Wildlife Conservation Act 1976</i> (NT) s 25AB <i>Utilities Commission Act 2000</i> (NT) s 2
Specific decision-making context	<i>Planning Act 1999</i> (NT) s 135(3) <i>Utilities Commission Act 2000</i> (NT) s 6(2) <i>Water Act 1992</i> (NT) s 70

Which groups are the focus of concerns about equity?

Different legislative provisions adopt different groups as the focus of concerns about equity.

Among the objects and purposes provisions that refer to equity (row 1, Table 6), future generations are the most common group of concern (*Environment Protection Act 2019* (NT) s 21; *National Environment Protection Council Act 1994* (NT) Schedule; *Planning Act 1999* (NT) s 2A(h)). Intragenerational equity is also mentioned (*Environment Protection Act 2019* (NT) s 21), as is fairness in a market context (*Utilities Commission Act 2000* (NT) s 2), and a principle of jointly managing parks in an ‘equitable partnership’ with Aboriginal people.

Among the provisions that relate to specific decision-making contexts, groups of concern are:

- those who would be harmed by inequitable distribution of groundwater caused by, for example, a bore that is improperly constructed, maintained or used: *Water Act 1992* (NT) s 70;
- market participants: *Utilities Commission Act 2000* (NT) s 6(2); and
- traditional Aboriginal owners who jointly manage certain parks under an ‘equitable partnership’ with government: *Territory Parks and Wildlife Conservation Act 1976* (NT) s 25AB. The second reading speech for the associated bill used the language of recognition justice in describing these equitable partnerships: ‘recognising traditional Aboriginal culture and acknowledging and validating Aboriginal land management practices that have shaped the landscape for more than 60 000 years’.⁶ The concept of an ‘equitable partnership’ is notable for expressly connecting ideas of equity to First Nations arrangements—this connection is the only example of this found across the legislation of the jurisdictions under study, even though equity concerns may motivate these arrangements.

As discussed above, the *Water Act 1992* (NT) makes no express reference to equity in its objects or in provisions related to water allocation plans. However, the sample of water allocation plans reviewed did expressly refer to equity, revealing concerns for groups that differ among the different plans. Groups in focus across the plans included future generations and existing water users:

- The *Georgina Wiso Implementation Actions* document (2023), associated with the Water Allocation Plan, makes reference to its risk assessment methodology being directed to, among other things, ‘ensuring that water resources are available for future generations’ (*Georgina Wiso Implementation Actions 2023–2031* (2023) p 4);

⁵Ibid.

⁶Northern Territory of Australia, Legislative Assembly, *Parliamentary Debates*, 2 December 2004, 8391 (Ms Martin).

- The *Katherine Tindall Limestone Aquifer Water Allocation Plan* (2019) implicitly reveals concern for existing water users through an express objective of the plan to ‘[p]rovide fair access to water to support ecologically sustainable regional economic development’ (pp. 9 and 41). Since the stated ‘outcomes’ of this specific objective refer to benefits for ecosystems, Aboriginal people, communities, commercial users, and other existing water users (p. 45), these groups can be understood to be the focus of this concern for ‘fair access’. This Water Allocation Plan makes no reference to future generations; and
- The *Alice Springs Water Allocation Plan* (2016) refers to intergenerational equity (concern for future generations) in the context of determining its maximum allowable yield (noting that other express relevant factors included ‘public acceptance, current values [and] future opportunities’) (p. 41). It also notes that it adopts ‘a conservative approach to water allocation’ in ‘consider[ing] the needs of future generations’ (p. 41).

The distinction between focusing on the needs of existing users and the needs of future generations is notable, given that their interests may be in tension. The fact that different water allocation plans focus on different groups in the absence of legislative guidance about whether and how to consider equity warrants further investigation and policy consideration about the degree to which these differences are appropriate.

What does equity require a decision-maker to do?

Decision-makers are not always required to consider equity, and when this requirement is present, it is often expressed in weaker terms of ‘to consider’, ‘take into account’ or ‘have regard to’ equitable objectives. Often, the equitable concept is listed alongside other distinct and different concepts without any legislative guidance as to how to prioritise these considerations. Examples of this weaker language include:

- the Controller ‘may’ give directions such as restricting the amount of water taken from a bore if they are ‘satisfied’ that an act or omission with regards to a bore ‘may result, directly or indirectly’ in, among other things, the ‘inequitable distribution’ of the water (*Water Act 1992* (NT) s 70);
- decision-makers ‘should’ integrate long and short-term environmental and equitable considerations (*Environment Protection Act 2019* (NT) s 18(1)); and
- policies for the intergovernmental agreement relating to the *National Environment Protection Council Act 1994* (NT) ‘should’ be informed by the need for intergenerational equity (*National Environment Protection Council Act 1994* (NT) Sch 3.5.2).

As in some other jurisdictions, the most strongly worded legislative provisions are those that relate to economic aspects of equity:

- the Utilities Commission ‘must have regard to’ the objective of promoting ‘competitive and fair market conduct’ and preventing the ‘misuse of monopoly or market power’ (*Utilities Commission Act 2000* (NT) s 6(2)(a)-(b)); and
- charges for the provision of services must be ‘reasonably proportionate to the reasonable cost of providing the service’ (*Planning Act 1999* (NT) s 135(3)).

How do concepts of equity apply and vary in space and time?

Some of the laws examined here provide for mechanisms that apply differently in different areas. This provides opportunities for concepts of equity to vary spatially. This variation occurs under both the *Planning Act 1999* (NT) and the *Water Act 1992* (NT). Neither piece of legislation expressly includes equity concepts in ways that are relevant to plans, but the spatially explicit plans for which they provide do refer to equity.

As discussed above, a sample of three water allocation plans under the *Water Act 1992* (NT) display variation in the concepts of equity that they adopt. In some cases, they adopt a focus on future generations in

relation to water availability, and in others, concern for existing water users with no express mention of future generations.

Planning schemes under the *Planning Act 1999* (NT) ss 7–8 are not expressly required to include or consider equitable concepts. However, some plans include equity in their objectives. For example, the ‘town purpose’ for the town of Jabiru includes allowing for ‘appropriate sustainable and equitable residential, commercial and community/cultural development’ including providing appropriate services to residents. The plan does not include water-specific equitable concepts, but it does demonstrate that localised planning schemes can choose to include equitable concepts and that these may vary in space.

Similar to Queensland, the relatively small sample of legislative provisions that expressly identify equity concepts makes it more difficult to discern trends in space and time. Generally, considering NT legislative expressions of equity chronologically (see summary table) suggests a trend of equity concepts being applied to more diverse contexts over time. Concepts of equity themselves become more diverse over time, with commitment to future generations being an enduring focus of equity (first appearing in 1994, and introduced to legislation most recently in 2020).

Northern Territory summary table: key phrases and decision-makers

The table below summarises the different concepts of equity in Northern Territory water-related legislation with respect to key equity-related phrases and decision-makers. Key phrases are ordered chronologically with respect to the year that they were introduced. The table also includes legislation that makes no express reference to equity-related matters (first row). Decision-makers are listed for substantive provisions that provide for a specific decision to be made, and make express reference to equity in that context.

Table 7: Chronological table of equity-related Northern Territory legislative phrases and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker for a specific decision
<i>Power and Water Corporations Act 1987</i> (NT); <i>Waste Management and Pollution Control Act 1998</i> (NT); <i>Mineral Titles Act 2010</i> (NT); <i>Mining Management Act 2001</i> (NT); <i>Lake Eyre Basin Intergovernmental Agreement Act 2009</i> (NT)	No clear equity-related phrase in legislation or in implementing material	N/A
<i>Water Act 1992</i> (NT) s 70	‘where the Controller is satisfied that an act or omission by a person in relation to a bore may result, directly or indirectly, in the pollution or deterioration, inequitable distribution, loss, wastage or undue depletion of water, the Controller may, by notice served on the owner or occupier of the land on which the bore is situated, direct that person, within the period specified in the notice...’	NT Controller of Water Resources
<i>National Environment Protection Council (NT) Act 1994</i> (NT) Schedule, s 3.2	‘the effective integration of economic and environmental considerations in decision making processes, in order to improve community well being and to benefit future generations’	N/A

Continued on next page...

Table 7: Chronological table of equity-related Northern Territory legislative phrases and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker for a specific decision
<i>National Environment Protection Council (NT) Act 1994 (NT) Schedule, s 3.5.2</i>	‘intergenerational equity’: ‘the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations’	N/A
<i>National Environment Protection Council Act 1994 (NT) s 4 of Sch 5 (climate change) to the Schedule</i>	‘...development and implementation of the National Greenhouse Response Strategy will require coordinated and effective action by all levels of government and the community to achieve equitable and ecologically sustainable solutions’	N/A
<i>National Environment Protection Council Act 1994 (NT) s 1 of Sch 8 (World Heritage) to the Schedule</i>	‘...the Commonwealth has an international obligation as a party to the World Heritage Convention to ensure the identification, protection, conservation, presentation and transmission to future generations of Australia’s natural and cultural heritage of outstanding universal value’	N/A
<i>Planning Act 1999 (NT) s 135(3)</i>	charges for the provision of services must be ‘reasonably proportionate to the reasonable cost of providing the service’	Entities that charge non-prescribed fees under the Act
<i>Utilities Commission Act 2000 (NT) ss 2, 6(2)</i>	‘create an economic regulatory framework for regulated industries that promotes and safeguards competition and fair and efficient market conduct’ ‘...the Utilities Commission must have regard to the need: (a) to promote competitive and fair market conduct; (b) to prevent misuse of monopoly or market power’	Utilities Commission
<i>Territory Parks and Wildlife Conservation Act 1976 (NT) s 25AB (provision introduced in 2005, amended in 2007)</i>	‘the objective of joint management of a joint management park or reserve is to jointly establish an equitable partnership to manage and maintain the park or reserve as part of a comprehensive and representative system of parks and reserves in the Territory...(a) benefiting both the traditional Aboriginal owners of the park or reserve and the wider community’	N/A
<i>Environment Protection Act 2019 (NT) s 18(1)</i>	‘decision-making processes should effectively integrate both long-term and short-term environmental and equitable considerations’	N/A
<i>Environment Protection Act 2019 (NT) s 21</i>	‘principle of intergenerational and intragenerational equity’: ‘The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of present and future generations’	N/A
<i>Planning Act 1999 (NT) s 2A(h), (l) (provision introduced by the Planning Amendment Act 2020 (NT))</i>	the purpose of the Act includes protecting ‘the quality of life of future generations’ and ‘to respect and encourage fair and open decision making and public access to processes for review of planning related decisions’	N/A

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Summary for policy makers – Queensland

Equity concepts appear in about half of the current Queensland water-related legislation examined here. Concepts of equity are expressly included in laws relating to water entitlements and planning, environmental protection (including water pollution), and land use/development. Legislation in the areas of catchment management, some inter-state water sharing agreements, and mining lack clear and express provisions about equity. Compared to other states, Queensland laws have more limited reference to concepts of equity in objects and purposes provisions of legislation, and use of the concept in specific decision-making contexts is largely restricted to concerns about economic aspects of equity.

Queensland's Supreme Court has held that the concept of intergenerational equity, at least in the context of its expression in the *Environmental Protection Act 1994*, is not a stand-alone requirement that is capable of being breached so as to warrant refusing an authorisation; rather, none of the principles of ecologically sustainable development has overriding weight and each must be balanced against other principles in the legislation.¹ This suggests that the use of the principle in this context has a relatively weak effect on decision-makers. Even specific decision-making provisions are phrased in relatively weak terms, allowing for significant (generally unguided) discretion, e.g. requiring the decision-maker to 'consider' or 'have regard to' equity concepts, often with additional qualifiers.

Distinct ideas and 'communities of concern' are covered by equity-related provisions in Queensland legislation. These communities include future generations, which displays the ongoing influence of international environmental ideas; communities in different areas of Queensland, in terms of the spatial spread of financing works for the development of the state; a person experiencing hardship because of natural disasters or economic recession; residential and small business water services customers; and self-supplied water users. Queensland legislation and legislative instruments also include a focus on the interests of First Nations. However, this does not appear in the analysis here because these discussions are not expressly connected with expressions about equity, even if this may be an underlying principle.

Compared to other states reviewed, Queensland law seems to provide for fewer opportunities for ideas of equity to vary with space. This is a side-effect of the small scale of most of the decisions for which legislation requires equity to be applied (e.g. specific projects or holders of water entitlements). Equity may well vary between these decisions, but this is not captured by this research. On the other hand, the one clear instance of spatial variation in the Queensland laws analysed is perhaps the clearest among all the states' legislation investigated: the dispute resolution procedures in *Energy and Water Ombudsman Act 2006* (Qld), which are aimed at fair resolution of disputes about water services. These procedures only apply to disputes involving small water customers in south-east Queensland; local councils who supply water outside south-east Queensland do not come under the jurisdiction of the Energy and Water Ombudsman.

It is difficult to discern trends in how provisions that deal with equity change over time because of the smaller number of legislative expressions of equity that arise. Queensland legislation does not clearly embrace more modern concepts about equity that are evident in recent legislative contexts in other states, for example restorative justice, distributive equity, and environmental justice.

¹*New Acland Coal Pty Ltd v Smith* [2018] QSC 88 (2 May 2018) [271].

Concepts of equity in Queensland laws related to water

In which areas of Queensland water-related laws do concepts of equity arise?

Equity concepts appear in around half of the pieces of current Queensland water-related legislation considered (9 out of 17). Concepts of equity are expressly included in laws relating to water entitlements and planning, environmental protection (including water pollution), and land use/development. Legislation in the areas of catchment management, some inter-state water sharing agreements, and mining lack clear and express provisions about equity.

Table 8 sets out relevant legislation in these areas, and whether it makes express reference to equity or a related term in a significant way (in the Act's objects or substantive provisions, or both), or whether it contains no, or only minor reference to an equity-related term (where a minor reference is one that applies only to a narrow context that is not a core part of the Act).

Table 8: Queensland water-related legislation considering equity, by area of law.

Area of law	Legislation making express mention of equity concept(s) in a significant way	Legislation with no express mention of equity concept(s), minor mention or inclusion only by implication
Water entitlements and planning	<i>Water Act 2000</i> (Qld)	<i>Cape York Peninsula Heritage Act 2007</i>
Water services/prices	<i>Energy and Water Ombudsman Act 2006</i> (Qld); <i>South-East Queensland Water (Distribution and Retail Restructuring) Act 2009</i> (Qld)	<i>Water Supply (Safety and Reliability) Act 2008</i> (Qld)
Catchment management		<i>River Improvement Trust Act 1940</i> (Qld)
Interstate water sharing	<i>Murray-Darling Basin Act 1996</i> (Qld); <i>New South Wales-Queensland Border Rivers Act 1946</i> (Qld)*	<i>Lake Eyre Basin Agreement Act 2001</i> (Qld)
General sustainability/environmental protection	<i>Environmental Protection Act 1994</i> (Qld); <i>National Environment Protection Council (Queensland) Act 1994</i> (Qld) [†]	
Wilderness/wild rivers		<i>Wild Rivers Act 2005</i> (Qld) (now repealed)
Dam safety	N/A – Qld does not have specific dam safety legislation	
Land use/development	<i>State Development and Public Works Organisation Act 1971</i> (Qld); <i>Planning Act 2016</i> (Qld)	<i>Regional Planning Interests Act 2014</i> (Qld)
Mining		<i>Mineral Resources Act 1989</i> (Qld); <i>Geothermal Energy Act 2010</i> (Qld); <i>Mount Isa Mines Limited Agreement Act 1985</i> (Qld)
Climate change	N/A – Qld does not have specific climate change legislation	

*See New South Wales chapter for analysis of this legislation (contains identical intergovernmental agreement); [†]See Commonwealth chapter for analysis (QLD Act contains identical provisions in intergovernmental agreement)

In some instances, legislative history materials suggest that equity considerations underlie or otherwise motivate legislative provisions, even where this is not express in the legislative text. For example, the *Water Act 2000* (Qld) s 28 essentially replicates an earlier provision dealing with the sharing of water shortages; while not expressly mentioning equity, an explanatory note to the relevant bill stated that the provision ‘has been used frequently during local seasonal water shortages or drought to ensure equitable sharing of diminished water supplies and to maintain the availability of water for high priority uses.’ As such, it is possible that more legislation is motivated by equity concerns, but that this is not expressed in the statutory language.

In the 2018 Supreme Court case of *New Acland Coal Pty Ltd v Smith*, Judge Bowskill considered a Land Court determination that a mining application should not be approved, based in part on concerns about intergenerational equity in the context of groundwater impacts; the *Environmental Protection Act 1994* imposed the relevant requirement to consider intergenerational equity. Following precedent, Bowskill J held that the Land Court decision-maker had erred in treating the principle of intergenerational equity as a stand-alone requirement that was capable of being breached so as to warrant refusing the relevant authorisations; rather, none of the principles of ecologically sustainable development has overriding weight and each must be balanced against other principles in the legislation.²

How do concepts of equity arise in Queensland laws related to water?

Some concepts of equity arise in the context of broad social justice concerns, particularly in the form of concerns about ecologically sustainable development, encompassing intergenerational equity and future generations (e.g. *Water Act 2000* (Qld) s 7(c); *Environmental Protection Act 1994* (Qld) s 3; *State Development and Public Works Organisation Act 1971* (Qld) s 138(4)(a)(ii)).

Other provisions apply equity concepts to narrower, specific decisions, for example:

- Financing works for the development of the state equitably across the state: *State Development and Public Works Organisation Act 1971* (Qld) s 23(d);
- Determining whether compensation is payable (*State Development and Public Works Organisation Act 1971* (Qld) ss 138, 139(4)(a));
- Waiving water fees or charges to a person experiencing hardship: *Water Act 2000* (Qld) s 1013A(3);
- Paying compensation for reduction in the value of a water allocation: *Water Act 2000* (Qld) s 986(1);
- Granting an interim water allocation under an interim resource operations licence, one of the relevant considerations being ‘whether the customer has paid the full commercial value for all or part of the supply of the water under the authority and it is reasonable that a proportion of the authority should be granted to the customer as an interim water allocation’: *Water Act 2000* (Qld) s 1114(2)(e);
- Resolving disputes between small water customers and South-East Queensland Water, under the *Energy and Water Ombudsman Act 2006* (Qld); and
- Making a customer service charter that includes policies about hardship because of inability to pay water accounts: *South East Queensland (Distribution and Retail Restructuring) Act 2009* (Qld) s 99AD.

Notably, in each of these more specific decision-making contexts, concerns relate to economic aspects of equity rather social, cultural or other aspects.

²*New Acland Coal Pty Ltd v Smith* [2018] QSC 88 (2 May 2018) [271].

Table 9: Legislative contexts in which equity arises in Queensland: general objects vs specific decision-making contexts.

Legislative context	Provision expressly referring to equity concept
Objects and purposes provisions, including principles of ecologically sustainable development or similar	<i>Energy and Water Ombudsman Act 2006</i> (Qld) s 3 <i>Environmental Protection Act 1994</i> (Qld) s 3 <i>Planning Act 2016</i> (Qld) ss 3(3), 5(2)(a)(iii) <i>Water Act 2000</i> (Qld) ss 7(a), 7(c)
Specific decision-making context	<i>Environmental Protection Act 1994</i> (Qld) provisions re 'standard criteria' (Sch 4) <i>South East Queensland (Distribution and Retail Restructuring) Act 2009</i> (Qld) s 99AD <i>State Development and Public Works Organisation Act 1971</i> (Qld) ss 23(d), 138 <i>Water Act 2000</i> (Qld) ss 986(1), 1013A(3), 1114(2)(e), 1172

Which groups are the focus of concerns about equity?

Different laws adopt different groups as the focus of concerns about equity. Key groups are:

- Future generations: e.g., *Water Act 2000* (Qld) s 7(c);
- Communities in different areas of Queensland, in terms of the spatial spread of financing works for the development of the state: *State Development and Public Works Organisation Act 1971* (Qld) s 23(d);
- A person experiencing hardship because of the effects of 'drought, flood, fire or other natural disaster' or 'economic recession': *Water Act 2000* (Qld) s 1013A(3);
- A person who has experienced a reduction in the value of their water allocation: *Water Act 2000* (Qld) s 986(1);
- A customer under an interim operation licence who has paid full commercial value for water under the authority: *Water Act 2000* (Qld) s 158(3)(a)(i); and
- Residential water customers and small business water customers of South-East Queensland Water under the *Energy and Water Ombudsman Act 2006* (Qld).

Based on a review of sample water plans under the *Water Act 2000* (Qld) (Water Plan (Barron) 2023 and Water Plan (Cape York) 2023), and the *Cape York Peninsula Heritage Act 2007* (Qld), Queensland appears to focus strongly on the interests of First Nations. However, this does not appear in the analysis here because these discussions are not expressly connected with expressions about equity (as opposed to supporting First Nations' aspirations), even if this may be an underlying principle.

What does equity require a decision-maker to do?

In relation to the uses of equity in provisions about making specific decisions, the responsibilities of decision-makers in relation to equity are formulated in diverse ways, but are typically expressed in relatively weak terms that allow for significant (generally unguided) discretion, e.g. requiring the decision-maker to 'consider' or 'have regard to' equity concepts, with additional qualifiers:

- In considering whether to grant an interim water allocation, the Minister must 'consider' whether 'the customer has paid the full commercial value for all or part of the supply of the water under the authority and it is reasonable that a proportion of the authority should be granted to the customer as an interim water allocation': *Water Act 2000* (Qld) s 1113(2)(e);
- The Coordinator General must 'have regard' to 'the provision of ways and means whereby finance in respect of works and the creation of works may be spread over the State in equitable proportions': *State Development and Public Works Organisation Act 1971* (Qld) s 23(d);

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- The Coordinator General must ‘consider’ one or more stated matters, one of which is the principles of ecologically sustainable development, in determining whether to exercise powers to take water or otherwise influence the water environment in relation to water not covered by a water plan, where this is necessary for works under the *State Development and Public Works Organisation Act 1971* (Qld) s 138(4)(a)(ii);
- The chief executive ‘may’ grant a person, who had an authority under previous arrangements to do works in a waterway, a temporary authority even if under new arrangements this would otherwise be refused, if the person would suffer hardship due to a refusal: *Water Act 2000* (Qld) s 1172(8); and
- The Minister ‘may’ waive complete or partial payment of a fee or charge if the Minister is satisfied that a person is suffering hardship due to the effects of drought, flood, fire or other natural disaster (*Water Act 2000* (Qld) s 1013A(3)(a)).

An exception to this is the stronger wording related to compensation: a person ‘is entitled to be paid reasonable compensation’ when the State reduces the value of a water allocation (and certain conditions are met) (*Water Act 2000* (Qld) s 986(1)).

How do concepts of equity apply and vary in space and time?

Compared to other states, Queensland law seems to provide for fewer opportunities for ideas of equity to vary with space. This is a side-effect of the small scale of most of the decisions for which legislation requires equity to be applied (e.g. specific projects or holders of water entitlements). Equity may well vary between these decisions, but this is not captured by this research. On the other hand, the one clear instance of spatial variation in the Queensland laws analysed is perhaps the clearest among all the states’ legislation investigated: the dispute resolution procedures in *Energy and Water Ombudsman Act 2006* (Qld), which are aimed at fair resolution of disputes about water services. These procedures only apply to disputes involving small water customers in south-east Queensland; local councils who supply water outside south-east Queensland do not come under the jurisdiction of the Energy and Water Ombudsman.³

As demonstrated in the summary table below, concepts of equity manifest in different ways in different legislative contexts through time. Unlike some other states, however, it is more difficult to discern trends because of the smaller number of legislative expressions of equity that arise. Queensland legislation does not clearly embrace more modern concepts about equity that are evident in recent legislative contexts in other states, for example restorative justice, distributive equity, and environmental justice.

Queensland summary table – key phrases and decision-makers

The table below summarises the different concepts of equity in Queensland water-related legislation with respect to key equity-related phrases and decision-makers. Key phrases are ordered chronologically with respect to the year that they were introduced. The table also includes legislation that makes no express reference to equity-related matters (first row). Decision-makers are listed for substantive provisions that provide for a specific decision to be made, and make express reference to equity in that context.

³Who needs to join EWOQ’, <https://www.ewoq.com.au/members/about-scheme-participants>.

Table 10: Chronological table of equity-related legislative phrases in Queensland and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker
<i>Lake Eyre Basin Agreement Act 2001 (Qld); Cape York Peninsula Heritage Act 2007 (Qld); Water Supply (Safety and Reliability) Act 2008 (Qld); River Improvement Trust Act 1940 (Qld); Wild Rivers Act 2005 (Qld) (now repealed); Mineral Resources Act 1989 (Qld); Geothermal Energy Act 2010 (Qld); Mount Isa Mines Limited Agreement Act 1985 (Qld); Regional Planning Interests Act 2014 (Qld)</i>	no clear equity-related phrase in legislation or in implementing material NB: equity provisions included in the <i>New South Wales-Queensland Border Rivers Act 1946 (Qld)</i> are included in the summary table for New South Wales (identical provides apply in both states).	N/A
<i>State Development and Public Works Organisation Act 1971 (Qld) s 23(d), provision introduced in 1971 by Act No 62</i>	‘the provision of ways and means whereby finance in respect of works and the creation of works may be spread over the State in equitable proportions’	Coordinator General
<i>State Development and Public Works Organisation Act 1971 (Qld) s 138(4)(a)(ii) provision introduced in 2000 by Act No 34</i>	‘must consider’ one or more stated matters, one of which is the principles of ecologically sustainable development	Coordinator General
<i>Environmental Protection Act 1994 (Qld) s 3, ‘standard criteria’ definition</i>	Definition of ‘standard criteria’, which is used for various purposes in the Act, includes reference to intergenerational equity (used in relation to environmental impact statements, ss 58, 143, 173C; in relation to environmental authorities, ss 175(2)(b)(iii), 176, 176A, 194B(2)(d), 241(b)(iii); in relation to making a decision about objections, s 191(g); in relation to environmental protection orders, s 359)	Chief Executive of the Department of Environment and Science, ‘administering authority’, Land Court
<i>Water Act 2000 (Qld) s 986(1)</i>	‘entitled to be paid reasonable compensation by the State if a change ... [to a water plan] reduces the value of the allocation’	N/A
<i>Water Act 2000 (Qld) s 1114(2)(e)</i>	‘whether the customer has paid the full commercial value for all or part of the supply of the water under the authority and it is reasonable that a proportion of the authority should be granted to the customer as an interim water allocation’	Chief Executive of the Department of Regional Development, Manufacturing and Water
<i>Water Act 2000 (Qld) s 1013A(3), introduced in 2001</i>	waiver of a fee for a person who ‘is suffering hardship because of the effects of– (a) drought, flood, fire or other natural disaster; or (b) economic recession’	Minister for Water
<i>South East Queensland (Distribution and Retail Restructuring) Act 2009 (Qld) s 99AD, provision introduced in 2010 by Act No 20</i>	‘customer hardship because of inability to pay accounts’	South East Queensland service provider
<i>Water Act 2000 (Qld) s 1172, introduced in 2011</i>	‘hardship’ a factor in granting an authority to a person who would otherwise not receive it	Chief Executive of the Department of Regional Development, Manufacturing and Water

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Table 10: Chronological table of equity-related legislative phrases in Queensland and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker
<i>Energy and Water Ombudsman Act 2006 (Qld) s 3, applicable to water in South East Queensland as of 2010 under Act No 53 (previously only applicable in relation to energy)</i>	‘give ... small customers (water) a timely, effective, independent and just way’ of resolving disputes	Energy and Water Ombudsman
<i>Energy and Water Ombudsman Act 2006 (Qld) ss 28, 32 applicable to water in South East Queensland as of 2010 under Act No 53 (previously only applicable in relation to energy)</i>	‘act in a way that is fair, reasonable, just, informal and timely, and maintains confidentiality’ ‘may make the order only if the ombudsman considers it is fair and reasonable in the circumstances’	Energy and Water Ombudsman
<i>Water Act 2000 (Qld) s 7(a),(c) introduced in 2016 by Act No 60</i>	‘decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations’; ‘the present generation should ensure the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations’	N/A

South Australia: water, law and concepts of equity

Summary for policy makers – South Australia

South Australia's water-related legislation prominently and commonly advances concepts of equity. In general, though, these concepts are expressed in vague ways that give little guidance to decision-makers about what the concepts mean and provide little foundation for holding governments accountable to communities of concern for decision-making that pursues equity.

Concepts of equity in South Australian legislation and policy arise in a diverse range of laws studied including water entitlements and planning, catchment management, water services, interstate water sharing, climate change and general sustainability and the environment. Legislation in the area of mining stands out as lacking express equity provisions. Legislation that expressly recognises equity concerns often leads to local and regional plans that also mirror the legislative language, and sometimes significantly elaborate on how equity is to be determined.

Like other states, the most common way in which these concepts arise is in the objects and purposes provisions of legislation and general principles that apply to the administration of the legislation. More rarely, equity concerns arise in relation to a specific decision-making context (e.g., formulating water allocation plans, reducing allocations or entitlements, through hardship policies for water services customers, and through schemes for equitably distributing the costs of water infrastructure). While general objects, purposes and principles provide the broadest scope of application of equity concepts—potentially to most or all decision-makers and decisions under a piece of legislation—they are also usually expressed in the broadest way, offering decision-makers the least guidance on how to implement them, and making accountability to the public for achieving equity difficult.

Many distinct ideas and 'communities of concern' are engaged by equity concepts in South Australian legislation. The most common is future generations. This displays the ongoing influence of international environmental ideas. Another important focus is water users (both customers of water service providers and self-supplied water users) and contributors to water infrastructure: provisions dealing with these groups tend to be the most detailed, and deal with specific decisions rather than being restricted to general objects provisions, as for future generations. This suggests that economic aspects of equity receive the greatest concern among framers of legislation. Uniquely among all the laws reviewed across states for this project, provisions of the *Landscape South Australia Act 2019* expressly identify ecosystems and environmental needs (as opposed to human communities) as raising concerns about equity.

Different areas of legislation tend to draw attention to different communities of concern. Unsurprisingly, the legislation that has the greatest impact on economic aspects of equity (e.g. affecting water entitlements or obligations to pay for water infrastructure) tends to contain equity provisions that focus on these groups. However, it is not clear why future generations should be the focus of special concern in relation to water entitlement and planning legislation, environmental protection legislation and land use and development legislation, but not in relation to mining legislation, particularly when the impacts of mining extend beyond a single generation. This may reflect the older vintage of this legislation, or a political decision that the impacts of mining are warranted for the benefit of current generations. The chronology of South Australian legislative provisions that refer to equity concepts does not disclose any significant shift in the formulations of equity used over time.

Another dimension in variation among concepts of equity arises from different elaborations of what equity means for water management at local and regional levels. Water allocation plans made under the *Landscape South Australia Act 2019* must set out ‘principles associated with the determination of water access entitlements and for the taking and use of water so that ... an equitable balance is achieved between environmental, social and economic needs for the water’. This leads to different formulations of equity between plans. Variation may well be appropriate where different issues arise in different locations. However, the possibility of undesirable inconsistency also arises, for example, where inconsistent ideas of equity influence water sharing in different locations because stakeholder groups were not able to participate equally across locations, because of varying compositions of advisory panels, or because policy positions in relation to equity change but do not influence plans that are already made until they are formally reviewed. Such reviews may be at long intervals, for example, 10 years in the case of water allocation plans. Schemes for contributions to new infrastructure associated with developing areas, under the *Planning, Development and Infrastructure Act 2016*, are another context in which there may be local variation in the application of concepts of equity.

Concepts of equity in South Australian laws related to water

In which areas of South Australian water-related laws do concepts of equity arise?

The concept of equity is well represented in South Australian legislation: equity-related concepts are expressed in 12 of the 17 pieces of legislation reviewed. Equity concepts often appear as part of a definition of the principle of ecologically sustainable development.

Concepts of equity in South Australian legislation and policy arise in a diverse range of laws studied including water entitlements and planning, catchment management, water services, interstate water sharing, climate change and general sustainability and the environment. Legislation that expressly recognises equity concerns often leads to local and regional plans that mirror the legislative language, and sometimes significantly elaborate on what equity means.

Table 11 sets out relevant legislation in these areas, and whether it makes express reference to equity or a related term in a significant way (in the Act’s objects or substantive provisions, or both), or whether it contains no, or only minor reference to an equity-related term (where a minor reference is one that applies only to a narrow context that is not a core part of the Act).

Table 11: South Australian water-related legislation considering equity, by area of law.

Area of law	Legislation making express mention of equity concept(s) in a significant way	Legislation with no express mention of equity concept(s), minor mention or inclusion only by implication
Water entitlements and planning	<i>Landscape South Australia Act 2019</i> (SA); <i>River Murray Act 2003</i> (SA); <i>Renmark Irrigation Trust Act 2009</i> (SA)	
Water services/prices	<i>Essential Services Commission Act 2002</i> (SA); <i>Water Industry Act 2012</i> (SA)	
Catchment management	N/A	

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Table 11: South Australian water-related legislation considering equity, by area of law.

Area of law	Legislation making express mention of equity concept(s) in a significant way	Legislation with no express mention of equity concept(s), minor mention or inclusion only by implication
Interstate water sharing	<i>Groundwater (Border Agreement) Act 1985 (SA)*</i> ; <i>River Murray Act 2003 (SA)</i> ; <i>Murray-Darling Basin Act 2008 (SA)</i>	<i>Lake Eyre Basin (Intergovernmental Agreement) Act 2001 (SA)</i>
General sustainability/ environmental protection	<i>Environment Protection Act 1993 (SA)</i> ; <i>National Environment Protection Council (South Australia) Act 1995 (SA)†</i>	
Wilderness/wild rivers		<i>Wilderness Protection Act 1992 (SA)</i>
Dam safety	(N/A – SA lacks specific legislation on this topic)	
Land use/development	<i>Planning, Development and Infrastructure Act 2016 (SA)</i>	
Mining		<i>Mining Act 1971 (SA)</i> ; <i>Petroleum and Geothermal Energy Act 2000 (SA)</i> ; <i>Roxby Downs (Indenture Ratification) Act 1982 (SA)</i>
Climate change	<i>Climate Change and Greenhouse Emissions Reduction Act 2007 (SA)</i>	

* For further discussion, see the Victorian section below, which examines the same arrangements under Victorian law.

† See Commonwealth chapter for analysis (SA Act contains identical provisions in intergovernmental agreement)

How do concepts of equity arise in South Australian laws related to water?

South Australian legislation tends to view equity as an overarching consideration in the context of broad social justice concerns, notably, intergenerational equity as a component of ecologically sustainable development, which arises in five pieces of water-related legislation (see Table 12).

Table 12: Legislative contexts in which equity arises in SA: general objects vs specific decision-making contexts.

Legislative context	Provision expressly referring to equity concept
Objects and purposes provisions, including principles of ecologically sustainable development or similar	<i>Climate Change and Greenhouse Emissions Reduction Act 2007 (SA)</i> s 3(2)(a)(i), (b) <i>Environment Protection Act 1993 (SA)</i> s 10(1)(a)(i)(A), (ii), (b)(vi) <i>Essential Services Commission Act 2002 (SA)</i> s 6(b)(ii) <i>Landscape South Australia Act 2019 (SA)</i> s 7(3)(c), (h) <i>Planning, Development and Infrastructure Act 2016 (SA)</i> s 14(a)(i), (g)(ii) <i>River Murray Act 2003 (SA)</i> s 2(a)(i), (b)
Specific decision-making context	<i>Landscape South Australia Act 2019 (SA)</i> ss 53(1)(d)(i)-(ii), (9), 155(3)(a) <i>Planning, Development and Infrastructure Act 2016 (SA)</i> ss 164(1)-(2)(b), 169(10)(a)-(b) <i>Renmark Irrigation Trust Act 2009 (SA)</i> ss 30(4)(a)-(b), 58(1)(d) <i>Water Industry Act 2012 (SA)</i> ss 25(5), 37(1)

South Australian legislation also operationalises equity concerns in specific decision-making contexts:

- Formulating water allocation plans: *Landscape South Australia Act 2019 (SA)* s 53(1)(d)(i)-(ii);

South Australia: water, law and concepts of equity

- Reducing water allocations and water access entitlements: *Landscape South Australia Act 2019* (SA) s 155(3);
- Making policies for customers experiencing hardship in the context of providing water services (*Water Industry Act 2012* (SA) s 37(1));
- Fixing irrigation rights, and winding up an irrigation trust under the *Renmark Irrigation Trust Act 2009* (SA) ss 30(4), 58(1)(d); and
- Establishing schemes for equitably distributing the costs of infrastructure: *Planning, Development and Infrastructure Act 2016* (SA) ss 164(1)-(2)(b), 169(10)(a)-(b).

Which groups are the focus of concerns about equity?

Different laws adopt, either expressly or by implication, different groups as the focus of concerns about equity. Generally, those who pay costs or otherwise experience economic burdens related to water are the most prominent focus groups of concern in detailed provisions about equity. These groups include those who might be affected by the misuse of monopoly or market power under the *Essential Services Commission Act 2002* (SA) s 6(b), and those who pay for:

- costs associated with managing natural resources, under the *Landscape South Australia Act 2019* (SA) s 7(3)(c);
- water infrastructure, under the *Planning, Development and Infrastructure Act 2016* (SA);
- holders of irrigation rights under the *Renmark Irrigation Trust Act 2009* (SA); and
- groups who pay for water service, and who experience hardship, under *Water Industry Act 2012* (SA) s 37(1).

Water users are also recognised as a group of concern in the context of impacts across different water resources (*Landscape South Australia Act 2019* (SA) ss 53(9), 155(3)).

The general category of ‘future generations’, the precise meaning of which is not detailed, is also prominent in South Australian water-related laws, albeit always through general objects and purposes provisions, rather than in the context of specific decisions (*River Murray Act 2003* (SA) s 2(a)(i); *Landscape South Australia Act 2019* (SA) s 7(3)(h); *Environmental Protection Act 1993* (SA) s 1(a)(i)(A); *Planning, Development and Infrastructure Act 2016* s 14(a)(i); *Climate Change and Greenhouse Emissions Reduction Act 2007* (SA) s 3(2)(a)(i)).

Uniquely among all the laws reviewed across states for this project, the provisions of the *Landscape South Australia Act 2019* relating to water allocation plans expressly identify ecosystems and environmental needs as subject to concerns about equity:

- ‘A water allocation plan ... must set out principles associated with the determination of water access entitlements and for the taking and use of water so that ... an **equitable balance** is achieved between **environmental**, social and economic **needs for the water**’: s 53(1)(d)(i), emphasis added; and
- ‘If the taking, or the taking and use, of water from a water resource has, or is likely to have, a detrimental effect on the quantity or quality of water that is available from another water resource, the water allocation plan for the first mentioned resource must take into account **the needs of** persons and **ecosystems** using water from the other resource as well as the needs of persons and ecosystems using water from its own resource and may, to achieve an **equitable balance between competing interests**, include provisions designed to prevent or reduce those detrimental effects’: s 53(9), emphasis added.

Finally, it should be noted that based on implementing materials of various kinds (management plans, strategies, etc), South Australia appears to focus strongly on the interests of First Nations. However, this does not appear in the analysis here because these discussions are usually not expressly connected with expressions about equity, even if this may be an underlying principle.

What does equity require a decision-maker to do?

The responsibilities of decision-makers in relation to equity are formulated in diverse ways, but are typically expressed in relatively weak terms, e.g. requiring the decision-maker (and sometimes other entities, like communities) to ‘consider’ or ‘have regard to’ equity concepts, with additional qualifiers:

- The Minister ‘may’ reduce water allocations in relation to a particular water source if they are of the opinion that it is ‘necessary or desirable to do so’ in the interests of water quality, affected ecosystems and the need to meet the expected future demand for water (*Landscape South Australia Act 2019* (SA) s 130(1)(a)-(d)(ii)), and adopt a model to be used in determining how to reduce water allocations (*Landscape South Australia Act 2019* (SA) s 130(2)); and ‘may’ also reduce allocations when a resource is prescribed (s 155). The Minister has discretion in relation to how to achieve the reduction – proportionately or in another way (ss 130(2), (3), 155(3)).
- The Essential Services Commission ‘must have regard to the need to ... promote ... fair market conduct’: *Essential Services Commission Act 2002* (SA) s 6(b)(i) and ‘must’ make a water industry licence subject to conditions determined by the Commission requiring compliance with codes, which must include hardship provisions: *Water Industry Act 2012* (SA) s 25(5).
- The Renmark Irrigation Trust ‘must’ fix an irrigation right on a fair and equitable basis, having regard to crop types and ‘such other matters considered relevant by the trust’: *Renmark Irrigation Trust 2009* (SA) s 30(4).
- A scheme for the provision of essential infrastructure ‘should relate’ to purposes that include ‘to provide a mechanism for the equitable distribution and apportionment of the costs of essential infrastructure’: *Planning, Development and Infrastructure Act 2016* (SA) s 164(1)-(2)(b).

The following responsibilities are expressed in stronger terms:

- The Minister must develop and publish a customer hardship policy in respect of residential customers experiencing payment difficulties due to hardship (*Water Industry Act 2012* (SA) s 37(1)); and
- A water allocation plan ‘must’ set out ‘principles associated with the determination of water access entitlements and for the taking and use of water so that ... an equitable balance is achieved between environmental, social and economic needs for the water’ (*Landscape South Australia Act 2019* (SA) s 53(1)(d)(i)).

How do concepts of equity apply and vary in space and time?

Concepts of equity in South Australian law are sometimes implemented at different spatial scales. In some cases, it appears that ideas about equity are intended to apply across the state without a specific provision for varying how they apply in different places (for example, in the case of legislative objects or purposes, the State Landscape Strategy under the *Landscape South Australia Act 2019* (SA) s 44, or rules to assist residential water customers experiencing hardship: *Water Industry Act 2012* (SA) ss 25(5), 37(1)). In other cases, legislative instruments that apply in portions of the state may express different ideas of what equity means or pursue different dimensions of equity, though usually the legislation does not specifically provide for this variation, e.g.:

- The requirement that irrigation rights be fixed on a ‘fair and equitable’ basis applies only to holders of irrigation rights under the *Renmark Irrigation Trust Act 2009* (SA) s 30(4); and
- Different water allocation plans (and different sections of the same water allocation plan) include localised interpretations of what equity requires. Some do not clearly connect the requirement for equity with specific objectives, but may emphasise the interests of groups that are commonly centrally considered in equity matters. For example, the *Far North Prescribed Wells Areas Water Allocation Plan 2019* seeks to provide water security for water users, provide access to water resources for Aboriginal people, and ‘authorise the taking of water, for equitable economic and social development within resource management

limits and sustainable environmental limits’ (part 1.9). In others, the link is clearer. For example, the *Murraylands and Riverland Landscape Board Water Allocation Plan for the River Murray Prescribed Watercourse* addresses the objective to ‘allocate water in a sustainable and equitable manner between the different users’. The plan then outlays the series of questions and criteria that have been used to determine their compliance with this objective, including: 1) ‘to what extent have the model predictions eventuated?’; and 2) ‘was the quality of water provided through the allocations of sufficient quality for its intended use?’. Answers to these questions are then used to answer the question of whether water is allocated in a sustainable and equitable manner.

Rarely among the states’ legislation analysed, South Australian law transparently (but implicitly) frames redistribution of funds for natural resources management from urban to regional areas as promoting equity. While this substantively occurs in other states (e.g. Victoria’s environmental contribution levy, the rate of which is different for water services customers in urban versus regional areas), the legislative structuring is more prominent and the transparency of the intended redistribution is greater in South Australia.

Within the set of legislation reviewed, there is no clear link between the date of a piece of legislation and whether or not it includes a provision related to equity. However, none of the pre-1992 legislation reviewed includes such a provision in express terms, raising the possibility that international discussions about ecologically sustainable development, in which expressions of equity are prominent, brought the issue to the fore in terms of express recognition. The chronology of South Australian legislative provisions that refer to equity concepts does not disclose any significant shift in the formulations of equity used over time (Table 10).

South Australia summary table – key phrases and decision-makers

The table below summarises the different concepts of equity in South Australian water-related legislation with respect to key equity-related phrases and decision-makers. Key phrases are ordered chronologically with respect to the year that they were introduced. The table also includes legislation that makes no express reference to equity-related matters (first row). Decision-makers are listed for substantive provisions that provide for a specific decision to be made, and make express reference to equity in that context.

Table 13: Chronological table of equity-related legislative phrases in South Australia and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker for a specific decision
<i>Lake Eyre Basin (Intergovernmental Agreement) Act 2001 (SA); Mining Act 1971 (SA); Petroleum and Geothermal Energy Act 2000 (SA); Roxby Downs (Indenture Ratification) Act 1982 (SA)</i>	no clear equity-related phrase in legislation or in implementing material NB: equity provisions found in the <i>National Environment Protection Council (South Australia) Act 1995 (SA)</i> are found in the summary table for the Commonwealth (provisions are identical across the legislation)	N/A
<i>Wilderness Act 1992 (SA)</i>	no clear equity-related legislative phrase; two sampled park management plans in areas where water is key to the area protected emphasized ‘future generations’ and areas of significance to Aboriginal people	N/A

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Table 13: Chronological table of equity-related legislative phrases in South Australia and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker for a specific decision
Environment Protection Act 1993 (SA) s 10(1)(a)(i)(A), (ii), (1)(b)(vi)	In the context of ecologically sustainable development– ‘sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations’; ‘proper weight should be given to both long and short term economic, environmental, social and equity considerations in deciding all matters relating to environmental protection, restoration and enhancement’; ‘ensure that, as far as is reasonably practicable, the following measures are taken ... to allocate the costs of environment protection and restoration equitably and in a manner that encourages responsible use of, and reduced harm to, the environment with polluters bearing an appropriate share of the costs that arise from their activities, products, substances and services’	N/A
Essential Services Commission Act 2002 (SA) s 6(b)(ii)	‘have regard to the need to ... promote competitive and fair market conduct’; price determinations reviewed did not include express reference to equity, but mentioned hardship and had a strong focus on customer views and engagement	Essential Services Commission
River Murray Act 2003 (SA) s 2(a)(i), (b) NB: the ‘Objectives for a Healthy River Murray’ (s 7) omit reference to equity despite referring to many other concepts related to the principle of ecologically sustainable development; and the current River Murray Act Implementation Strategy 2014, for which the Act provides (s 21), makes no express reference to future generations or equity	Related to the principle of ecologically sustainable development: ‘sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations’, while meeting the needs of current generations (expressed in some detail); ‘proper weight should be given to both long and short term economic, environmental, social and equity considerations in deciding all matters relating to environmental protection, restoration and enhancement and to the facilitation of sustainable economic development’	N/A
Climate Change and Greenhouse Emissions Reduction Act 2007 (SA) s 3(2)(a)(i), (b)	In the context of ecologically sustainable development– ‘sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations’ and ‘proper weight should be given to both long and short term economic, environmental, social and equity considerations in deciding all matters relating to environmental protection, restoration and enhancement’	N/A
Renmark Irrigation Trust Act 2009 (SA) s 30(4)	Fixing irrigation rights on a ‘fair and equitable’ basis, including considering crop types and other factors in the discretion of the decision-maker	Renmark Irrigation Trust
Renmark Irrigation Trust Act 2009 (SA) s 58(1)(d)	Decision to wind up the Trust if this would be ‘just and equitable’ in the Minister’s opinion, ‘in the circumstances of the particular case’	Minister for Climate, Environment and Water
Water Industry Act 2012 (SA) ss 25(5), 37(1)	‘assist customers who may be suffering specified types of hardship’; ‘customers experiencing payment difficulties due to hardship’	Minister for Climate, Environment and Water, Essential Services Commission

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Table 13: Chronological table of equity-related legislative phrases in South Australia and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker for a specific decision
<i>Planning, Development and Infrastructure Act 2016 (SA) s 14(a)(i), (g)(ii)</i>	‘seek to promote equity between present and future generations’; ‘planning, design and development should promote integrated transport connections and ensure equitable access to services and amenities’	N/A
<i>Planning, Development and Infrastructure Act 2016 (SA) s 164(1)-(2)(b)</i>	‘a mechanism for the equitable distribution and apportionment of the costs of essential infrastructure’	Minister for Planning
<i>Planning, Development and Infrastructure Act 2016 (SA) s 169(10)(a)-(b)</i>	Scheme provides for contributions in a manner that is ‘fair and equitable’, and ‘would not unreasonably disadvantage persons who own small areas of land within the relevant contribution area or areas’ and ‘is reasonable’, taking into account matters that are specified in great detail, and which refer to economic impacts and charges that are in proportion to benefits	State Planning Commission
<i>Landscape South Australia Act 2019 (SA) s 7(3)(c)</i> (‘principles to be taken into account in connection with achieving ecologically sustainable development’)	‘costs associated with managing natural resources and landscapes should be allocated and shared equitably and in a manner that encourages the responsible use of natural resources’	N/A
<i>Landscape South Australia Act 2019 (SA) s 7(3)(h)</i> (‘principles to be taken into account in connection with achieving ecologically sustainable development’)	‘decision-making should be informed by long term and short term environmental, social, cultural, economic, equity (including intergenerational equity so that our natural resources and landscapes are maintained or enhanced for the benefit of future generations) and practical considerations, recognizing that trade-offs may be necessary’	N/A
<i>Landscape South Australia Act 2019 (SA) s 53(1)(d)(i)-(ii), as elaborated in Far North Prescribed Wells Areas Water Allocation Plan 2019</i>	Legislative phrase: ‘equitable balance ... between environmental, social and economic needs for [] water’; Far North Prescribed Wells Area WAP seeks to ‘authorise the taking of water, for equitable economic and social development within resource management limits and sustainable environmental limits’ (part 1.9)	Minister for Climate, Environment and Water; regional landscape board; Chief Executive
<i>Landscape South Australia Act 2019 (SA) s 53(9)</i>	‘to achieve an equitable balance between competing interests, [may] include provisions designed to prevent or reduce those detrimental effects’	Regional landscape board; Chief Executive
<i>Landscape South Australia Act 2019 (SA) s 155(3)(a)</i>	‘reduce each water access entitlement proportionately’ or pursuant to a scheme set out in the regulations if the aggregate of water access entitlements exceeds the capacity of the resource	Minister for Climate, Environment and Water

Victoria: water, law and concepts of equity

Summary for policy makers – Victoria

Victoria's water-related legislation prominently and commonly advances concepts of equity. In general, though, these concepts are expressed in vague ways that give little guidance to decision-makers about what the concepts mean and provide little foundation for holding governments accountable to communities of concern for decision-making that pursues equity. Judicial pronouncements offer little assistance and, in any case, the fact that they are necessarily restricted to specific fact situations and specific legislative provisions, and that many relevant provisions are rarely or never litigated, mean more comprehensive policy thinking and guidance is desirable.

Concepts of equity are prominent and express in laws related to water allocation and planning, catchment management, sustainability and environmental protection, interstate water sharing, climate change adaptation, geothermal energy and mining.

Like other jurisdictions, the most common way in which these concepts arise is in the objects and purposes provisions of legislation and general principles that apply to the administration of the legislation. More rarely, equity concerns arise in relation to a specific decision-making context, a specific decision-maker, or in arrangements for participatory processes. While general objects, purposes and principles provide the broadest scope of application of equity concepts—potentially to most or all decision-makers and decisions under a piece of legislation—they are also usually expressed in the broadest way, offering decision-makers the least guidance on how to implement them, and making accountability to the public for achieving equity largely impossible without additional mechanisms for transparency. There appears to be no dedicated regulatory or policy guidance for decision-makers that would help, and no scrutiny entity with the clear mandate to investigate and report on equity in relation to water or natural resources more generally. Even equity-related provisions that relate to narrow decision-making contexts tend to use broad language about what is required without accompanying policy guidance.

Many distinct ideas and 'communities of concern' are engaged by equity concepts in Victorian legislation. The most common is intergenerational equity and concern for future generations, which displays the ongoing influence of international environmental ideas. Other important areas of focus are water users (both customers of water service providers and self-supplied water users), and vulnerable communities, including those who experience disadvantage or are vulnerable to climate change.

Different pieces of legislation tend to draw attention to different communities of concern, without any clear rationale for this. For example, it is not clear why generally disadvantaged groups should be the focus of special concern in relation to environmental protection (water quality concerns, under the *Environment Protection Act 2017*), but not in relation to water quantity concerns under the *Water Act 1989*. A possible explanation for this kind of difference is that rather than deriving from comprehensive, cross-legislative consideration of equity concerns, different legislation simply reflects concerns that were prominent at the time the legislation was passed. This is not to say that legislation is not reviewed for its equity implications: some legislative equity provisions are the result of amending legislation (rather than the form of the Act as originally passed). However, this is relatively rare. More recent legislation and legislative history materials introduce new ideas of equity that are not found in earlier materials, for example, restorative justice and environmental justice (both in relation to the *Environment Protection Act 2017*), and the idea that justice requires recognition of, and respect for, certain groups.

Another dimension in variation among concepts of equity—even under a single piece of legislation—arises from different elaborations of what equity means for water management at local and regional levels. Local-scale management plans for water supply protection areas and regional-scale sustainable water strategies, both made under the *Water Act 1989*, advance different dimensions of equity within and across each of these plan types. Variation may well be appropriate where different issues arise in diverse locations. However, the possibility of undesirable inconsistency also arises, for example, where inconsistent ideas of equity influence water sharing in different locations because stakeholder groups were not able to participate equally across locations, because of varying compositions of advisory panels, or because policy positions in relation to equity change but do not influence plans that are already made until they are formally reviewed. Such reviews may be at long intervals, for example, 10 years in the case of sustainable water strategies; no legislative review requirement applies to management plans for water supply protection areas.

Concepts of equity in Victorian laws related to water

In which areas of Victorian water-related laws do concepts of equity arise?

The concept of equity is well represented in Victorian legislation: equity-related concepts are express in 10 of the 16 pieces of legislation reviewed. When ‘equity’ is explicitly referenced, its intended meaning and implications in relation to water can sometimes be unclear, as it is often presented as part of a composite phrase together with other different concepts (like ‘efficiency’). The meaning and implications of equity provisions in water-related legislation are generally not explored in depth in the Victorian case law reviewed.

In terms of legislative text, concepts of equity arise most prominently in areas of law relating to water entitlements and water planning, catchment management, climate change, interstate water-sharing, mining, energy and general sustainability and environmental protection. Consideration of equity, fairness, and justice do not expressly arise in relation to water services. Although equity-related concepts appear in areas of law relating to the environment and water and catchment management, some specific Acts in these areas do not expressly include these concepts.

Table 14 sets out relevant legislation by area of law, and whether it makes express reference to equity or a related term in a significant way (in the Act’s objects or substantive provisions, or both), or whether it contains no, or only minor reference to an equity-related term (where a minor reference is one that applies only to a narrow context that is not a core part of the Act), e.g. an indemnity provision making reference to a decision-maker acting in ‘good faith’.

Table 14: Victorian water-related legislation considering equity, by area of law.

Area of law	Legislation making express mention of equity concept(s) in a significant way	Legislation with no express mention of equity concept(s), minor mention or inclusion only by implication
Water entitlements and planning	<i>Water Act 1989</i> (Vic)	<i>Traditional Owner Settlement Act 2010</i> (Vic)
Water services/prices		<i>Water Industry Act 1994</i> (Vic); <i>Essential Services Commission Act 2001</i> (Vic)
Catchment management	<i>Yarra River protection (Wilip-gin Birrarung murrn) Act 2017</i> (Vic)	<i>Catchment and Land Protection Act 1994</i> (Vic)

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Table 14: Victorian water-related legislation considering equity, by area of law.

Area of law	Legislation making express mention of equity concept(s) in a significant way	Legislation with no express mention of equity concept(s), minor mention or inclusion only by implication
Interstate water sharing	<i>Groundwater (Border Agreement) Act 1985</i> (Vic)	<i>Murray-Darling Basin Act 1993</i> (Vic)
General sustainability/ environmental protection	<i>Commissioner for Environmental Sustainability Act 2003</i> (Vic); <i>Environment Protection Act 2017</i> (Vic); <i>National Environment Protection Council (Victoria) Act 1995</i> (Vic) [†]	<i>Environmental Effects Act 1978</i> (Vic)
Wilderness/wild rivers	N/A	
Dam safety	N/A	
Land use/development	<i>Planning and Environment Act 1987</i> (Vic)	
Mining/energy	<i>Mineral Resources (Sustainable Development) Act 1990</i> (Vic); <i>Geothermal Energy Resources Act 2005</i> (Vic)	
Climate change	<i>Climate Change Act 2017</i> (Vic)	

[†] See Commonwealth chapter for analysis (Victorian Act contains identical provisions in intergovernmental agreement)

How do concepts of equity arise in Victorian laws related to water?

When equity is expressly referenced in legislation, it is often referenced as an object or purpose of the legislation, or a general principle to guide the administration of the legislation (Table 15), and tends to evidence broad social justice concerns. In this context, equity is represented through the broader concepts of equitable management, equitable sharing, sustainability, inter- and intra-generational equity. These objects and purpose provisions are intended to guide interpretation of the entire piece of legislation. However, the meaning of ‘equity’ in this context is not always explained and is rarely clearly connected to specific decision-making processes or other implementing provisions. For example, when a court refers to s 1(c) of the *Water Act 1989* (Vic) in case law, the reference to ‘equity’ is not separated from the other concepts of ‘orderliness’ and ‘efficiency’; the three (distinctly different) concepts are treated as one ‘consideration’, based on the cases reviewed. Newer pieces of legislation such as the *Yarra River protection (Wilip-gjin Birrarung murrn) Act 2017* (Vic), the *Environment Protection Act 2017* (Vic) and the *Climate Change Act 2017* (Vic) present equity as a distinctive ‘principle’ that creates specific obligations or considerations for water corporations, the Minister and water users.

The research did not reveal any clear guidance on what equity means (or does not mean) for the purpose of guiding decision-makers in general. The most detail about equity arises in local- and regional-level management plans that deal with water allocation, sharing and broader management issues. For example, the *Groundwater Management Plan for the Katunga Water Supply Protection Area 2017* notes that equity is fair treatment and that in the context of water allocation, this means all licence holders will be treated in the same manner, while the *Northern Region Sustainable Water Strategy* notes that all stakeholders will be treated equally. Water sharing plans discuss equity in relation to, for example, water flow, distribution of costs between groundwater and surface water, appropriate restrictions during periods of drought, distribution between other entitlement holders and the environment. It appears that the consultative and advisory committees involved in these plans, or the Minister adopting the plans, may tailor the understanding of equity advanced by these plans to suit local or regional concerns.

Other concepts of equity are intended to apply to narrower, specific decision-making contexts (Table 15), for example:

- allocating water between applicants for an entitlement (*Water Act 1989* (Vic) ss 33J(1)(b)(iii), s 40(1)(m));
- supporting vulnerable communities (*Climate Change Act 2017* (Vic) ss 22(e), 26(b));
- planning for water supply protection areas, including deciding the membership of a consultative committee (*Water Act 1989* (Vic) div 3);
- a water corporation carrying out its functions (*Water Act 1989* (Vic) s 93(c)(i));
- developing a strategic plan of an area relating to the Yarra River (Birrarrung) (*Yarra River protection (Wilip-gin Birrarung murrn) Act 2017* (Vic) s 18(2)(c));
- adjourning civil or criminal proceedings to enable a restorative justice process to be conducted (*Environment Protection Act 2017* (Vic) s 336(4)); and
- in conducting planning hearings under the *Planning and Environment Act 1987* (Vic) (ss 161(a)–(b)).

Table 15: Legislative contexts in which equity arises in Victoria: general objects vs specific decision-making contexts.

Legislative context	Provision expressly referring to equity concept
Objects and purposes provisions, including principles of ecologically sustainable development or similar	<i>Climate Change Act 2017</i> (Vic) ss 22(e), 26(a)–(d) <i>Commissioner for Environmental Sustainability Act 2003</i> (Vic) ss (3)(a), 4(2)(b) <i>Environment Protection Act 2017</i> (Vic) s 21(1)–(3) <i>Geothermal Energy Resources Act 2005</i> (Vic) ss 3(2)(b), 3(2)(f), 3(2)(i) <i>Groundwater (Border Agreement) Act 1985</i> (Vic) schedule 1 <i>Mineral Resources (Sustainable Development) Act 1990</i> (Vic) s 2A(2)(b), 2A(2)(e)–(f) <i>Water Act 1989</i> (Vic) s 1(c) <i>Yarra River protection (Wilip-gin Birrarung murrn) Act 2017</i> (Vic) ss 8(4), (5)
Specific decision-making context	<i>Environment Protection Act 2017</i> (Vic) s 336(4) <i>Planning and Environment Act 1987</i> (Vic) ss 161(a)–(b) <i>Water Act 1989</i> (Vic) ss 29(2)(a)(i), 32A(1), 33J(1)(b)(iii), 40(1)(m); 93(c)(i) <i>Yarra River protection (Wilip-gin Birrarung murrn) Act 2017</i> (Vic) s 18(2)(c), referring to ss 8(4), 8(5)

Which groups are the focus of concerns about equity?

Different laws adopt, either expressly or by implication, different groups as the focus of concerns about equity. Key groups, with illustrative example references, are:

- Future generations (*Water Act 1989* (Vic) s 1(c); *Commissioner for Environmental Sustainability Act 2003* (Vic) ss 4(2)(b), 4(3)(a); *Yarra River protection (Wilip-gin Birrarung murrn) Act 2017* (Vic) preamble, s 8(4); *Environment Protection Act 2017* (Vic) s 21(3); *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 2A(2)(b); *Geothermal Energy Resources Act 2005* (Vic) s 3(2)(b) and the *Climate Change Act 2017* (Vic) s 22(e));
- Existing holders of entitlements to water in a specific resource (evident in management plans for water supply protection areas made under *Water Act 1989* (Vic) s 32A(1));
- Future potential applicants for entitlements to water in a specific resource (*Water Act 1989* (Vic) ss 33J(1)(b)(iii), 40(1)(m));
- Groups who experience disadvantage in other ways (*Climate Change Act 2017* (Vic) ss 22(e), 26(b)); and
- People who are most vulnerable to the impacts of adapting to climate change (*Water Cycle Climate Change Adaptation Action Plan 2022–2026*).

What does equity require a decision-maker to do?

The responsibilities of decision-makers in relation to equity are formulated in diverse ways, but are typically expressed in relatively weak terms, e.g. requiring the decision-maker (and sometimes other entities, like communities) to ‘consider’ or ‘have regard to’ equity concepts, with additional qualifiers:

- The Minister must ‘consider’ the needs of other potential applicants before issuing water shares (*Water Act 1989* (Vic) ss 33J(1)(b)(iii), 33J(2)(l)), bulk entitlements or take and use licences (*Water Act 1989* (Vic) s 40(1)(m)).
- The Minister must make sure ‘as far as possible’ that all relevant interests are represented fairly on a consultative committee to draft a management plan for a water supply protection area (*Water Act 1989* (Vic) s 29(2)(a)(i)).
- Corporations must ‘have regard to’ equity, risk management, and community engagement, among other things (*Water Industry Regulatory Order (General) Statement of Obligations*).
- The Minister and all people engaged in the administration of the *Geothermal Energy Resources Act 2005* (Vic) ‘may have regard to’ equity within and between generations (s 3(2)(b)) and the integration of both long and short term economic, environmental, social and equity considerations in their decision making (s 3(2)(f)).
- All levels of government, industry, business, communities and the people of Victoria ‘should’ ensure intergenerational equity (*Yarra River protection (Wilip-gin Birrarung murrong) Act 2017* (Vic) ss 8(4), 10(1); *Environment Protection Act 2017* (Vic) s 21(3)).

Exceptionally, an equity-related provision of the *Planning and Environment Act 1987* (Vic) is phrased in stronger terms: when hearing submissions, a planning panel ‘must act according to equity’ in the sense of not having ‘regard to technicalities or legal forms’ (s 161(a)).

How do concepts of equity apply and vary in space and time?

Concepts of equity in Victorian law apply at different spatial scales. In some cases, it appears that ideas about equity are intended to apply uniformly across the state, though their implementation would likely depend on the specific situation or decision. In other cases, what equity means may vary across the jurisdiction because the legislation provides for local or regional plans that elaborate on views of equity (though the legislation does not expressly provide for this). Some examples that illustrate this include:

- Individual management plans for water supply protection areas made under section 27(1) of the *Water Act 1989* make references to equity that appear to differ, for example:
 - Under the management plan for the Upper Ovens River Water Supply Protection Area 2012:
 - » Unrestricted groundwater use is inequitable because in times of low flow, groundwater reduces flow in the Ovens River which may negatively impact surface water users by reducing their direct access to water, or their reliability of access (due to increased restrictions on water use) (p. 26);
 - » Water restrictions should be tailored to specific stream flows (p. 26);
 - » It is inequitable to charge domestic and stock groundwater users, while not charging surface water users (p. 57); and
 - » Metering helps to ensure that water is shared equitably (p. 51).
 - Under the management plan for the Katunga Water Supply Protection Area 2017:
 - » Equity means that all licence holders are treated in the same way; (p. 1) and
 - » Equity means that all licensees stay within their annual allocation limits, so it is important to know the location and amount of water being used through metering (p. 1).

- Sustainable water strategies made under the Water Act 1989 also differ in the degree to which, and how, they deal with equity:
 - Under the Central and Gippsland Region Sustainable Water Strategy 2022:
 - » State resources must be managed through equitable participation of Victoria's Traditional Owners (p. 116);
 - » Caring for Country involves the equitable sharing of resources. This means that where more than one party claims an interest in new water entitlements for a river or aquifer, Traditional Owners will receive a negotiated and equitable share of the available water (p. 139);
 - » It is unfair to cause Traditional Owners to 'jump through hoops' to secure water (p. 148);
 - » Returning water now and having a longer-term approach ensures intergenerational equity and prevents continuing past inequities (p. 177);
 - » Business cases for future water supplies must account for long-term planning for sharing water and costs (p. 257);
 - » Past practices have caused historical and continuing harm and inequity, and this must be addressed through restorative justice practices of returning rights to water that were never ceded (p. 276); and
 - » Long-term water and resource assessments must consider how the reduction of water will be shared between consumptive users and the environment (p. 295).
 - By contrast, the Northern Region Sustainable Water Strategy 2009 deals briefly with equity, stating that equity requires all *stakeholders* to be treated equitably, in their responsibilities and the benefits they receive (Guiding Principle 1.3).

If what equity means is capable of being different in different places in Victoria, this raises the potential for inconsistent attention to the issue, and inconsistent meanings being used. This elevates the importance of participatory processes for formulating local or regional plans to ensure that, at minimum, they accurately reflect local values.

Considering Victorian legislative expressions of equity chronologically (see summary table) suggests a trend of equity concepts becoming more diverse and detailed over time.

Victoria summary table – key phrases and decision-makers

The table below summarises the different concepts of equity in Victorian water-related legislation with respect to key equity-related phrases and decision-makers. Key phrases are ordered chronologically with respect to the year that they were introduced. The table also includes legislation that makes no express reference to equity-related matters (first row). Decision-makers are listed for substantive provisions that provide for a specific decision to be made, and make express reference to equity in that context.

Table 16: Chronological table of equity-related legislative phrases in Victoria and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker(s)
<i>Traditional Owner Settlement Act 2010 (Vic); Water Industry Act 1994 (Vic); Essential Services Commission Act 2001 (Vic); Catchment and Land Protection Act 1994 (Vic); Environmental Effects Act 1978 (Vic)</i>	no clear equity-related phrase in legislation or in implementing material NB: equity provisions found in the <i>National Environment Protection Council (Victoria) Act 1995 (Vic)</i> are found in the summary table for the Commonwealth (provisions are identical across multiple pieces of legislation)	N/A
<i>Groundwater (Border Agreement) Act 1985 Schedule 1</i>	'co-operative management and equitable sharing of those resources... guard against the undue depletion or degradation'	N/A
<i>Planning and Environment Act 1987 s 161(a)</i>	'act according to equity and good conscience without regard to technicalities or legal forms'	Planning panel
<i>Water Act 1989 (Vic) s 1(c)</i>	'to promote the orderly, equitable and efficient use of water resources'	N/A
<i>Water Act 1989 (Vic) ss 33J(1)(b)(iii), 40(1)(m)</i>	'must consider the needs of other potential applicants'	Minister
<i>Water Act 1989 (Vic) s 29, introduced in 2002</i>	'all relevant interests are fairly represented on the committee'	Minister
<i>Water Act 1989 (Vic) s 93(c)(i)</i>	'integrate ... economic, environmental and equitable considerations'	Water corporations
<i>Water Act 1989 (Vic) s 32A, introduced in 2002, as operationalised through Upper Ovens River Water Supply Protection Area (WSPA) (2012); Groundwater Management Plan for the Katunga WSPA (2017)</i>	'managed in an equitable manner and so as to ensure the long-term sustainability of those resources'; examples of phrases used in implementing management plans for water supply protection areas: 'Metering also ensures that the water is shared equitably'; including stream-connected groundwater in a plan and subjecting users to the same restrictions as surface water 'provide[s] more equitable water management between users'; 'it is seen to be inequitable to charge domestic and stock groundwater users and not to charge surface water users'	Minister
<i>Commissioner for Environmental Sustainability Act 2003 (Vic) ss (3)(a), 4(2)(b)</i>	'an "objective" of ecologically sustainable development is "to provide for equity within and between generations" ' 'decision making processes should effectively integrate both long-term and short-term economic, environmental, social and equity considerations'	N/A for this provision; Commissioner for Environmental Sustainability in general
<i>Geothermal Energy Resources Act 2005 (Vic) ss 3(2)(b), (f), (i)</i>	'provision of equity within and between generations' 'effective integration of ... environmental, social and equity considerations into decision making'; 'development should make a positive contribution to social equity, public health and safety... and respect the aspirations of the community and indigenous peoples'	All employed or administering the Act
<i>Mineral Resources (Sustainable Development) Act 1990 (Vic) ss 2A(2)(b), 2A(2)(e)-(f), provisions introduced in 2006</i>	'there should be equity within and between generations'; 'both long and short term economic, environmental, social and equity considerations should be effectively integrated into decision-making'; 'measures to be adopted should be cost effective and flexible, not disproportionate to the issues being addressed, including improved valuation, pricing and incentive mechanisms'	N/A

Continued on next page...

Table 16: Chronological table of equity-related legislative phrases in Victoria and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker(s)
Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 ss 8(4)-(5), implemented in s 18	‘environmental social and cultural benefits that have been acquired are maintained or enhanced for the benefit of future generations’	Melbourne Water
Environment Protection Act 2017 (Vic) s 21(1)-(3), introduced in 2020	‘Principle of equity- (1) All people are entitled to live in a safe and healthy environment irrespective of their personal attributes or location; (2) People should not be disproportionately affected by harm or risks to human health and the environment; (3) The present generation should ensure the state of the environment is maintained or enhanced for the benefit of future generations’	Environment Protection Authority
Climate Change Act 2017 (Vic) ss 22(e), 26(a)-(d), as operationalised through Water Cycle Climate Adaptation Action Plan 2022-2026	Legislative phrases: ‘support vulnerable communities and promote social justice and intergenerational equity’; ‘opportunities should be created by the present generation to increase the capacities within that generation and future generations to adapt to climate change’; ‘the present generation should consider the opportunities to increase the capacities to adapt to climate change of those people most vulnerable to the potential impacts of climate change’; ‘the present generation should consider the long-term, medium-term and short-term consequences of decisions, policies, programs and processes that may impact on climate change’; Phrase used in statutory Water Cycle Climate Adaptation Plan: ‘the need for affordable essential services like water, and to ensure adaptation does not cost future generations and amplify inequality’	N/A
Environment Protection Act 2017 (Vic) s 336(4)	‘restorative justice process’	Environment Protection Authority

Commonwealth: water, law and concepts of equity

Summary for policy makers – the Commonwealth

Equity, fairness and related concepts are expressly included in most Commonwealth legislation related to water, which, although much slimmer than state legislation, extends across the areas of water entitlements and planning, interstate water sharing, trade practices (relevant to water charges), sustainability and environmental protection.

The main way in which equity concepts appear in Commonwealth legislation is through objects and purposes provisions, usually associated with principles of ecologically sustainable development in the form of inter-generational equity (*Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A(c); *National Environment Protection Council Act 1994* (Cth) 3.5.2). When reflecting equity in this form, Commonwealth legislation does not provide any detail about what equity concepts mean or require. This can be contrasted with the detailed statements of principle about the requirements of intergenerational equity in Victoria's *Climate Change Act 2017* (Vic), which provides for a water cycle climate adaptation plan that further elaborates on equity concerns.

The vagueness of concepts of equity as they appear in objects and purposes provisions of water-related legislation can also be contrasted with the great detail of provisions for equitable water sharing between State Contracting Governments to the Murray–Darling Basin Agreement. Perhaps this reflects the need to crystallise a negotiated bargain between states about water sharing to provide certainty and stability for economic development, in contrast to the desire of governments for flexibility and discretion in giving meaning to equity in social contexts. Nonetheless, the contrast is striking, and communities might argue that they at least deserve transparency about how holders of statutory functions are executing their functions in a way that reflects the objects and purposes of the legislation that establishes them.

Explanatory materials about legislative documents, like second reading speeches and reviews of legislative instruments, suggest that equity concerns feature prominently in a more informal way in relation to legislation, that is, significant Commonwealth legislating and rule-making is accompanied by stated concerns about equity that 'fly under the radar' if one considers only the text of the legislation. This is evident in second reading speeches for water-related bills, reviews of water-related rules, and consideration of water reforms undertaken by bodies with statutory functions in relation to some aspects of water, for example the Australian Competition and Consumer Commission and the Productivity Commission. These reviews focus on economic aspects of equity, as do references to fairness and equity in the two second reading speeches reviewed, although neither is exclusively about water markets. Among the Commonwealth materials reviewed, there is a relative dearth of references to non-economic aspects of equity. This is not to say that Commonwealth legislators and administrators do not consider social, cultural or ecological aspects of equity, just that this research did not discover any significant material to explain policies in relation to equity, or to describe how consideration occurs in practice.

The frequent broad reference to equity in Commonwealth legislation, usually unsupported by legislative provisions that explain what it mean or how to achieve it (in terms of process or outcome), together with policy commitments to transparency, especially within the Murray–Darling Basin, suggest the need for enhanced transparency about how Commonwealth ministers and agencies understand and pursue equity. This need is further heightened by the significant Commonwealth funding that is expended on water-related matters. Water-related arrangements at the Commonwealth level have not involved the establishment of detailed

policy guidelines or transparency mechanisms in relation to equity that do exist, in a limited way, at state level.

Concepts of equity in Commonwealth laws related to water

In which areas of Commonwealth water-related laws do concepts of equity arise?

Equity, fairness and related concepts are expressly included in most of the Commonwealth legislation related to water (5 of the 7 pieces of legislation reviewed). Although a much slimmer collection than relevant state legislation, relevant Commonwealth legislation extends across the areas of water entitlements and planning, interstate water sharing, trade practices (relevant to water charges), sustainability and environmental protection (Table 17).

However, reviewing legislative materials suggests that equity considerations motivate, and generate discussion and debate about provisions in a way that may not be reflected in legislative text; that is, significant Commonwealth legislating and rule-making is accompanied by stated concerns about equity that ‘fly under the radar’ if one considers only the text of the legislation. For example:

- Part 4 of the *Water Act 2007* (Cth) provides for water charge rules, and gives the Australian Competition and Consumer Commission (‘ACCC’) functions in relation to those rules. Part 4 does not mention equity or fairness, nor do the current Water Charge Rules 2010 (Cth). However, ‘fair trading’ is a key objective of the *Competition and Consumer Act 2010* (Cth), which establishes the ACCC. The ACCC’s 2016 review of the Water Charge Rules (Australian Competition and Consumer Commission, *Review of the Water Charge Rules – Final Advice* (September 2016)) frequently refers to equity concerns in a way that clearly connects to the intention underlying the Rules, for example:
 - ‘ensuring that water market participants are not unfairly disadvantaged in charging arrangements’;
 - ‘the intent ... to promote equitable treatment of customers and ensure that operators do not circumvent the non-discrimination requirements of Part 3 by using distributions, rather than differences in charges, to favour members or customers who hold irrigation rights over others’;
 - ‘Broadening the scope of the rules to non-standard distributions of all infrastructure operators means that customers of all infrastructure operators would be protected from being unfairly treated by their operator’s distribution practices’; and
 - ‘the ACCC also recognises that due to information asymmetries there may be conduct by market participants that may distort or manipulate the market to unfairly benefit some entities’;
- The ACCC’s advice in relation to the Water Market Rules similarly makes frequent references to fairness and inequality in relation to irrigators (Australian Competition and Consumer Commission, *Water Market Rules – Final Advice to the Minister for Climate Change and Water* (December 2008)).
- The *Productivity Commission Act 1998* (Cth) is silent as to equity and fairness, but the Productivity Commission’s 2008 urban water reform report focuses substantially on the impact and meaning of equity in urban water markets (Productivity Commission, *Towards Urban Water Reform: A Discussion Paper* (2008); Andrew Barker, Tim Murray and John Salerian, *Developing a Partial Equilibrium Model of an Urban Water System: Productivity Commission Staff Working Paper* (2010)).
- The *Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Act 2021*, which amended the *Water Act 2007* (Cth) and the Basin Plan 2012 to create the statutory office of the Inspector-General of Water Compliance, makes no mention of equity concepts. However, the second reading speech accompanying the corresponding bill states that ‘[c]ompliance is at the heart of a fair water-sharing system. All participants need to know that they are being held to the same standard and that they are playing by the same rules.’

- The Water Amendment (Restoring Our Rivers) Bill 2023 proposes changes to various water market measures, the text of which do not refer to equity. However, the corresponding Explanatory Memorandum states that ‘The effect of this item would be that grandfathered entitlements are subject to the same restrictions, if any, as all water allocation trade. The Roadmap concluded that it is more equitable if all market participants are subject to the same rules for moving water between valleys...’ More broadly, the Commonwealth summary of the Bill describes the Bill as ‘strengthening compliance and enforcement of the Water Act to reduce unsustainable and illegal extraction of water resources to improve equitable access to water for current farmers and future generations.’

The constitutional prohibition on the Commonwealth acquiring property otherwise than on ‘just terms’ (s 51(xxix)) has also received judicial consideration in the context of water. For example, in the 2009 case of *ICM Agriculture Pty Ltd v Commonwealth*, the High Court of Australia found that the replacement of bore licences with water access licences in NSW, funded partially by the Commonwealth, did not amount to an acquisition of property on other than just terms.¹

The remainder of this report focuses on the Commonwealth legislative provisions that expressly deal with equity concepts.

Table 17: Commonwealth water-related legislation considering equity, by area of law.

Area of law	Legislation making express mention of equity concept(s) in a significant way	Legislation with no express mention of equity concept(s), or only minor mention
Water entitlements and planning	<i>Water Act 2007</i> (Cth)	
Water services/prices	<i>Competition and Consumer Act 2010</i> (Cth)	<i>Productivity Commission Act 1998</i> (Cth); <i>Water Market Rules 2010</i> (Cth); <i>Water Charge Rules 2010</i> (Cth)
Catchment management	N/A	
Interstate water sharing	Murray-Darling Basin Agreement, schedule to <i>Water Act 2007</i> (Cth)	<i>Lake Eyre Basin (Intergovernmental Agreement) Act 2001</i> (Cth)
General sustainability/ environmental protection	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth); <i>Natural Resources Management (Financial Assistance) Act 1992</i> (Cth); <i>National Environment Protection Council Act 1994</i> (Cth)	
Wilderness/wild rivers	N/A, dealt with by <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth) (World Heritage, Ramsar wetlands)	
Dam safety	N/A	
Land use/development	N/A	
Mining	N/A, dealt with by <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth) (water trigger, applicable to coal seam gas and coal mining)	

¹*ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.

How do concepts of equity arise in Commonwealth laws related to water?

The main way in which equity concepts appear in Commonwealth legislation is through objects and purposes provisions, usually associated with principles of ecologically sustainable development in the form of inter-generational equity (*Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A(c); *National Environment Protection Council Act 1994* (Cth) 3.5.2). Commonwealth legislation also provides significant detail in relation to equitable interstate water sharing, for example, about allocating the costs and flows of water in the Murray–Darling Basin Agreement (*Water Act 2007* (Cth) Sch 1) (Table 18).

Table 18: Commonwealth legislative contexts in which equity arises: general objects vs specific decision-making contexts.

Legal context	Provision expressly referring to equity concept
Objects and purposes provisions, including principles of ecologically sustainable development or similar	<i>Competition and Consumer Act 2010</i> (Cth) s 2 <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth) ss 3(1)(b), 3A(a), (c) <i>National Environment Protection Council Act 1994</i> (Cth) Sch ss 3.2, 3.5.2 <i>Natural Resources Management (Financial Assistance) Act 1992</i> (Cth) s 3(2)(a), (b) <i>Water Act 2007</i> (Cth) s 4(2)(a), (c)
Specific decision	<i>Water Act 2007</i> (Cth) s 172(1), Sch 1 (Murray–Darling Basin Agreement) cll 1, 43(1), 63(5)(b), 72, 84, 96, 110(2)(a), 111, 117–122, 145, sch B (accountability for salinity effects)

Compared to the states, Commonwealth laws adopt a narrower range of groups that are the focus of concerns about equity, given the narrower scope of its legislation relating to water. Key groups are future generations, in the context of intergenerational equity (e.g. *National Environment Protection Council Act 1994* (Cth) 3.5.2), and State Contracting Governments to the Murray–Darling Basin Agreement in relation to interstate water sharing.

Concern for other groups is evident in explanatory materials, e.g. current farmers (*Explanatory Memorandum, Water Amendment (Restoring our Rivers) Bill 2023* (Cth)) and water service customers (e.g. Australian Competition and Consumer Commission, *Review of the Water Charge Rules – Final Advice* (September 2016)). First Nations also receive significant focus in the Basin Plan 2012 (pt 14, 10.54, 10.55) and *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (e.g. s 3(1)(d)–(g)), but these provisions are not expressly connected with equity.

Commonwealth summary table – key phrases and decision-makers

The table below summarises the different concepts of equity in Commonwealth water-related legislation with respect to key equity-related phrases and decision-makers. Key phrases are ordered chronologically with respect to the year that they were introduced. The table also includes legislation that makes no express reference to equity-related matters (first row). Decision-makers are listed for substantive provisions that provide for a specific decision to be made, and make express reference to equity in that context.

Table 19: Chronological table of equity-related Commonwealth legislative phrases and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker for a specific decision
<i>Productivity Commission Act 1998 (Cth); Lake Eyre Basin (Intergovernmental Agreement) Act 2001 (Cth)</i>	no clear equity-related phrase in legislation or in implementing material	N/A
<i>Natural Resources Management (Financial Assistance) Act 1992 (Cth) s 3(2)(a), (b)</i>	‘achieving efficient, sustainable and equitable management of natural resources in Australia ... consistent with the principles of ecologically sustainable development’	N/A
<i>National Environment Protection Council Act 1994 (Cth) Sch ss 3.2, 3.5.2</i>	‘the effective integration of economic and environmental considerations in decision-making processes, in order to improve community well-being and to benefit future generations’; ‘intergenerational equity—the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.’	N/A
<i>Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 3(1)(b), 3A(a), (c)</i>	‘to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources’, where ecologically sustainable development includes ‘decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations’ and ‘the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations’	N/A
<i>Water Act 2007 (Cth) s 4(2)(a), (c)</i>	‘decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations’, ‘the principle of inter-generational equity—that the present generation should ensure that the health, biodiversity and productivity of the environment is maintained or enhanced for the benefit of future generations’	N/A
<i>Water Act 2007 (Cth) s 172(1)</i>	‘develop, or assist the development of, measures for the equitable, efficient and sustainable use of the Basin water resources (including measures for the delivery of environmental water)’	Murray-Darling Basin Authority
<i>Water Act 2007 (Cth) Sch 1 (MDB Agreement) cl 1</i>	‘effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Murray-Darling Basin, including by implementing arrangements agreed between the Contracting Governments to give effect to the Basin Plan, the Water Act and State water entitlements’	N/A
<i>Water Act 2007 (Cth) Sch 1 (MDB Agreement) cl 43(1)</i>	‘surveys, investigations and studies regarding the desirability and practicability of works or measures for the equitable, efficient and sustainable use of water and other natural resources of the Murray-Darling Basin’	Murray-Darling Basin Authority

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Table 19: Chronological table of equity-related Commonwealth legislative phrases and corresponding decision-makers.

Legal provision	Key equity-related phrase	Decision-maker for a specific decision
<i>Water Act 2007 (Cth), Sch 1 (MDB Agreement), various clauses, provisions introduced in 2008</i>	Detailed provisions re apportionment of costs among State Contracting Governments for water-related infrastructure (ss 63(5)(b), 72), compensation for damage by works (s 84), flows of water (ss 96, 111, Sch F), losses (s 110), accounting (ss 117-122), provisions related to indemnities (s 145), salinity-related costs (Sch B)	Ministerial Council, Murray-Darling Basin Authority
<i>Competition and Consumer Act 2010 (Cth) s 2</i>	'The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'	N/A

Methods and limitations

Jurisdictional scope

The jurisdictional scope of this preliminary review was determined by Watertrust Australia, and covers New South Wales, Queensland, South Australia, Victoria and the Commonwealth.

Temporal scope

This preliminary review gives a snapshot of legal arrangements current in early December 2023. With few exceptions that are noted where they arise, it does not deal with legislation that has been repealed, nor amending rather than principal legislation. Summary tables for each jurisdiction list relevant equity-related legislative provisions chronologically, noting the year in which a provision was introduced if it was not present in the original legislation.

Scope in relation to areas of law and legislation

Legislation was chosen for examination based on a review of Australia's main water law textbook (Alex Gardner, Richard Bartlett, Janice Gray, and Rebecca Nelson, *Water Resources Law* (2nd ed, LexisNexis Australia, 2017)), updated by jurisdiction-specific searches. The intention was to capture all major pieces of current principal legislation in the selected jurisdictions that deal with water in the contexts of water entitlements and water planning, water services, catchment management, interstate water sharing, environmental protection, wilderness/wild rivers, dam safety, land use and development, mining and climate change (to the extent that jurisdictions have legislation in these areas). For reasons of feasibility, this did not include legislation that has a narrow scope, e.g. legislation dealing with some individual statutory irrigation or water services entities; or legislation that deals with issues that are less centrally related to water as conceived in Australian law (e.g. native title, fire).

Concepts of equity that are express versus implied in legislation

This research focuses mainly on express concepts of equity in legislation, usually as determined by the presence of the following kinds of words: equity, justice, fairness, reasonable, good faith, and proportionate, and their derivations (e.g. fair, fairness, unfair). Provisions are also included even if they lack these words if the intention behind the provision is unambiguously the pursuit of equity (i.e. if the answer to the following question was negative: could this provision be reflecting a concern about something else, like economic efficiency, environmental sustainability, or consideration of human rights, rather than equity?). In practice, an intention to pursue equity is rarely unambiguous in provisions that do not expressly refer to equity concepts. Those relatively few situations include reference to 'future generations' even in the absence of 'intergenerational equity', and references to 'hardship' (because of the closeness of those concepts).

It is important to note that for these reasons, certain kinds of provisions rarely appear in this report as ex-

pressing equity concerns, notably: provisions about the participation of the public or particular groups in decision-making (unless the provision makes reference to ‘fair representation’, for example), and provisions that deal with First Nations interests. In these cases, express reference to equity is relatively rare.

Interpreting and implementing material

To further examine what significant legislative provisions mean, at least one piece of accompanying law-related material was examined, including explanatory memoranda, second reading speeches, regulations, management plans and strategies, reviews of rules undertaken by statutory bodies, and case law. Due to the breadth of legislation and legislative provisions considered, it was not possible to undertake this for every legislative provision that expressly refers to equity, or to review multiple interpreting and implementing materials for single legislative provisions (though some exceptions to this latter point were made in the case of management plans, to investigate the potential for spatial variation in ideas about equity). This is an important limitation to the comprehensiveness of the research: a more comprehensive search of interpreting and implementing material may uncover more detailed understandings of equity in particular contexts. To make such an extension to the project feasible, this would need to be targeted to specific provisions or types of provisions, or specific forms of interpreting and implementing material (e.g. case law).

Determining relevant decision-makers for summary tables

Objects and purposes provisions of legislation are relevant to interpreting the substantive provisions of a piece of legislation, but discerning their precise influence is a complex task of statutory interpretation because objects may be qualified by specific provisions in the legislation.¹ Due to this complexity, the summary tables of legislation provided for each jurisdiction, which list decision-makers relevant to each provision, do not attempt to list decision-makers in relation to objects and purposes provisions that refer to equity. Rather, decision-makers are only listed for substantive provisions that provide for a specific decision to be made, and make express reference to equity in that context.

¹D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7th ed., LexisNexis Butterworths, 2011) [2.7]-[2.19].



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