10 LEGAL CONSIDERATIONS

CHAPTER SUMMARY AND CONCLUSIONS:

- Implementing Reference Project 1 or 2 will involve widespread amendments to the Barron Water Plan, ROL, Operations Manual and Management Protocol. Noting that regardless of whether it is a standalone or conjunctive scheme, none of the relevant water instruments contemplate the construction of another bulk water storage facility such as Nullinga Dam.
- Pricing will be informed by the National Water Initiative (NWI) Pricing Principles. Submissions and a referral to the QCA will need to be considered in relation to customer irrigation pricing practices.
- The Mareeba- Dimbulah LMA investigation board submitted its revised business case in late 2017, however it was determined that the revised business case did not sufficiently demonstrate that it satisfied the LMA principles, and the scheme will not be transitioning to local management at the present time.
- Matters of NES have been identified from the desktop surveys.
- It is considered likely to almost certain that the Nullinga Dam (and its associated agricultural or public uses in the region supplied with water from the Nullinga Dam) will have a significant impact on matters of NES. Early ecological assessment, referral and approval under the EPBC Act will assist in managing this risk.
- Some of the additional key risks that require ongoing attention to ensure the success of the Reference Projects, are issues of approvals and issues concerning land, including acquisition, local heritage, native title and Aboriginal cultural heritage.
- There may be a requirement for an Indigenous Land Use Agreement for the Reference Projects.
- Land required for the Reference Projects may either be negotiated and purchased by Sunwater or compulsorily acquired under the *Acquisition of Land Act 1967* (Qld) (ALA). Sunwater is not a constructing authority and it is assumed Sunwater would liaise with DNRME or the Coordinator-General if it is determined to proceed with compulsory acquisition of any land.
- Other issues were identified in the legal and regulatory review. If managed with due care and diligence, these other issues are generally:
  - to be expected, and commonly encountered, in a project of this nature
  - unlikely to present significant risks to the Reference Projects

10.1 Purpose

This Chapter addresses the most important issues identified as legal and regulatory risks for the Reference Projects, including:

- legislative and policy issues pertaining to water planning, planning approvals, environmental legislation, property issues, native title and cultural heritage
- approvals that are, or may, be required to be obtained
- other legal matters, including those related to procurement and delivery.

10.2 Water planning

10.2.1 Water Act and other instruments

In Queensland, water resource management is primarily regulated by the *Water Act* and *Water Regulation 2016* (Qld) (*Water Regulation*). The *Water Act* establishes a hierarchy of water instruments. Relevant to the DBC, these are the:

- Water Plan (Barron) 2002 (Barron Water Plan) (formerly the Water Resource (Barron) Plan 2002), which underpins the management of water resources, and provides a framework for sustainably managing water and the taking of water in the Barron Water Plan area
- MDWSS Resource Operations Licence (ROL), held by Sunwater and dated 17 June 2005, which provides rules for the operation of water infrastructure listed in the ROL
- Barron MDWSS Operations Manual dated June 2017 (Operations Manual), which provides the day-to-day operating rules for water infrastructure, water sharing, and seasonal water assignment within the MDWSS
- Barron Water Management Protocol dated June 2017 (Management Protocol), which implements the objectives of the Barron Water Plan
- Water Plan (Mitchell) 2007 (as it contains links to the Water Plan (Barron).

10.2.2 The Dam

If Nullinga Dam is constructed under Reference Project 1 or 2, the Barron Water Plan must be amended to provide for the increased volume of water which is available for allocation.

The current Barron Water Plan does not provide for a Nullinga Dam. Consideration would need to be given to amending the Barron Water Plan if any of the Reference Projects were to proceed to construction. This includes amendments to provide a reserve volume of water (unallocated water) sufficient to support project development and a process for the allocation of that water.

Two operating models are currently proposed for the construction of Nullinga Dam under Reference Project 1 and 2:

- the construction of Nullinga Dam as part of the existing MDWSS (i.e. a conjunctive scheme), which would utilise existing distribution scheme infrastructure
- the construction of Nullinga Dam as a new and standalone scheme, with the likely construction of pipeline infrastructure from Nullinga Dam to the West Barron Main Channel to transmit water to Cairns for urban supply.

Regardless of scheme structure, none of the relevant water instruments contemplate the construction of another bulk water storage facility such as Nullinga Dam within the Barron Water Plan area.

To operate Nullinga Dam within a conjunctive scheme, the following amendments to water instruments would be required:

- amendment of the Barron Water Plan to contemplate a new bulk storage facility within the Barron Water Plan area and MDWSS, including amended EFOs and increased reserve volumes (as relevant).
- amendment of the MDWSS ROL to reflect the operation of new water infrastructure within the scheme, including relevant updated environmental management rules and monitoring requirements

- amendment of the Operations Manual to reflect updated operating and water sharing rules in the amended MDWSS. Adequate consultation with customers affected by the changes will need to be conducted and documented
- changes to the location of some allocations may also be necessary, if customers are required to take water from a different zone in the conjunctive scheme. Compliance with the Management Protocol would be required for such changes, and amendment to the Management Protocol may be required if maximum total nominal volumes for zones will increase. Adequate consultation with customers affected by the changes will need to be conducted and documented.

Alternatively, the introduction of a new scheme and operation of Nullinga Dam within that scheme would involve the following amendments to water instruments:

- widespread amendments of the Barron Water Plan to contemplate the new and separate scheme within the Barron Water Plan area. Public consultation will be necessary for these amendments
- an application for a new ROL for the scheme. The application will need to include evidence of the expected impact of Nullinga Dam on flows, and operating arrangements for the infrastructure
- an application for a new Operations Manual for the scheme, or to amend the existing Operations Manual to include both the MDWSS and new scheme, with amended operating and water sharing rules
- amendment to the Management Protocol to insert a new chapter relevant to the standalone scheme.

10.3 Water pricing

Reference Projects will involve a consideration of:

- the rules applicable to the sale of new water allocations under the Water Act and Water Regulation
- the rules applicable to the sale, lease, or seasonal assignment of existing water allocations under the Water Act, Management Protocol, and Operations Manual
- the NWI Pricing Principles, which are principles agreed by the Commonwealth and States and Territories of Australia for the recovery of capital expenditure, and guide water service providers on asset valuation and cost recovery for urban and rural capital expenditure
- the Queensland Government's irrigation prices in the MDWSS, as set out in the relevant Rural Water Pricing Direction Notice issued to Sunwater under section 999 of the Water Act. These prices will form the basis for the supply charges under Sunwater's standard supply contracts.

10.3.1 Sale of new water allocations

The Chief Executive responsible for administering the Barron Water Plan will be able to sell new water allocations generated by Reference Project 1 or 2 by public auction, tender or fixed sale price. Again, the Chief Executive may decide the terms of sale, including customer pre-commitments and conditions precedent.

10.3.2 NWI Pricing Principles

Principle 1 of the NWI Pricing Principles (Section 6.2.2) will apply to new bulk water supply infrastructure constructed under the Reference Projects

Market forces will determine the sale price which the Chief Executive is able to achieve in relation to the sale of new water allocations for available water created as a result of the construction of Nullinga Dam. Principle 6 of the NWI Pricing Principles would apply so that a return on contributed capital is not recovered from customers.

10.3.3 QCA price paths

In recommending the relevant price paths for the MDWSS the QCA has not considered the construction of new bulk water assets.

As such, consideration will need to be given as to whether the Minister should make a referral to the QCA under section 23 of the QCA Act in relation to the pricing practices relating to the MDWSS (specifically as a result of the construction of Nullinga Dam), to ensure the State's compliance with the NWI Pricing Principles (unless the State decides not to apply the NWI Pricing Principles in this case, which would require it to table reasons in Parliament).

10.4 Local management arrangements

On 1 July 2017, Chapter 4A of the Water Act commenced (as inserted by the *Water (Local Management Arrangements) Amendment Act* 2017 (Qld)). The Chapter facilitates 'declared projects' – being the transfer of the businesses, assets, and liabilities of SunWater in relation to 'declared channel schemes' to an 'irrigation entity', and the divestment from the State of that irrigation entity.

The Mareeba-Dimbulah distribution system is not currently a declared channel scheme. However, in December 2017, the investigation board for the system submitted a revised business proposal which recommended the declaration of the system, and subsequent transfer to local management. The proposal suggests a transition date of 1 July 2019, if supported by government.

The Queensland Government assessed the revised business proposal and determined that it was unclear whether there were sufficient benefits to the taxpayer could be achieved from the transition to LMA. It was also uncertain whether there was sufficient support from customers for the transition. Accordingly, the Mareeba-Dimbulah irrigation scheme will remain owned and operated by Sunwater and the issues surrounding the potential transition to local management no longer impact on the Nullinga dam proposal

10.5 Third party supply arrangements

Sunwater's standard supply contracts provide details of the arrangements for the storage and supply of water under water allocations. Under section 146 of the Water Act, the standard contract is taken to have been entered into on the day the water allocation is registered, even if a customer has not signed it. Otherwise, a contract may be agreed between Sunwater and its customers.

Sunwater's Standard Channel and Standard River Contracts contemplate that Sunwater may suspend or restrict diversions and releases of water to customers:

- during maintenance or replacement of a distribution network relevant to the contract, or Sunwater's water infrastructure in the MDWSS
- where Sunwater is carrying out the construction of new water infrastructure which is the subject of a ROL
- where provided for under the Sunwater Distribution Rules.

The Sunwater Distribution Rules provide service guidelines to customers for the conduct of planned shutdowns. These guidelines provide that:

- the timing of shutdowns will be set following consultation with the Irrigation Advisory Committee (if the works will impact a large part of the MDWSS) or customer groups or individuals (where the works are isolated to small areas within the MDWSS)
- Sunwater will complete planned shutdowns within a period notified to customers (unless later varied by agreement with the group originally consulted with), subject to events beyond Sunwater's control

- varying periods of notice will be given to affected customers depending on the length of the shutdown period, and reminder notices will be placed in local newspapers.

Sunwater will need to proactively consider these customer service standards when conducting the improvement works under either Reference Project.

10.6 Service provider registration

Sunwater currently maintains its registration under the *Water Supply (Safety and Reliability) Act 2008* (Qld) (*Water Supply Act*) as a water service provider, being an entity that owns infrastructure for supplying water services for which a charge is made.

Among other things, water service providers are required to register and keep updated the details of the infrastructure they operate, and the nature of the services they offer.

In implementing any of the Reference Projects, any new water supply and distribution infrastructure constructed, or any other changes to the details of the infrastructure operated by Sunwater to supply the water service, and/ or changes to the nature of the services offered by Sunwater, will require updates to Sunwater's registration as a water service provider to reflect those changes and new infrastructure for the water service.

10.6.1 Transfer to irrigation entity

A transition to local management arrangements will involve a transfer of irrigation infrastructure currently recorded under Sunwater's registration in relation to its water service in the MDWSS.

Generally, where infrastructure for a water service is proposed to be transferred to another entity, the current infrastructure owner must give DNRME notice of the proposed transfer. However, where Sunwater ceases to be the water service provider for a declared channel scheme in accordance with Chapter 4A of the Water Act, the notice requirements under the Water Supply Act do not apply to:

- Sunwater's cessation as a water service provider for the supply of an irrigation service in the area of the declared channel scheme
- the irrigation entity becoming the water service provider for the irrigation service.

10.7 Other infrastructure and assets – Utilities

Implementation of either Reference Project may involve interaction with existing public utilities and third-party infrastructure. These options will require consideration of the impact to such infrastructure and the extent of any removal or relocation of infrastructure if required to implement the final design.

There are a number of registered easements and other encumbrances that will need to be considered when determining the final configuration and proposed infrastructure footprint for either Reference Project.

Depending on the final designs, negotiations may be required with particular stakeholders for:

- the relocation or removal of any existing infrastructure within the construction footprint
- temporary access to the area if required, for example, to lay the pipelines.

Legal and regulatory compliance will be able to be managed by routine procedures, early engagement and consultation with the relevant local councils and public utility providers, as well as contract specification.

10.8 Environment Protection and Biodiversity Conservation Act

Upon referral to the Australian Department of the Environment and Energy it is expected that both Reference Projects would be declared as controlled actions under the EPBC Act and the controlling provisions would include:

- Listed threatened species
- Migratory species.

Depending how the department views the risks associated with facilitated actions (e.g. further irrigated agriculture in the Barron catchment which develops as a consequence of Nullinga Dam) in accordance with section 527E of the Act, the controlling provisions may also include all those related to the Great Barrier Reef because the Barron River is a reef catchment. The additional provisions could include:

- World Heritage properties
- National Heritage places
- Commonwealth marine areas and
- The Great Barrier Reef.

Each of the controlling provisions would need to be assessed in accordance with the Significant Impact Guidelines v1.1 (2013).

The level of assessment decided would very likely be EIS and it could be conducted coincident with the State EIS assessment, likely under the *State Development and Public Works Organisation Act 1971* and in accordance with the Bilateral agreement between the Queensland and Commonwealth governments.

Field survey will be necessary to better define the extent of impact. If a residual impact remains after implementation of all mitigation measures, an environmental offset (Commonwealth) may be required. Alternatively, the Department may consider the impact so 'significant' that any selected Reference Project would not be approved. This is a very rare occurrence with respect to water infrastructure in Queensland with only one dam not being approved under the EPBC Act in the last 20 years. In that same period several dams or weirs in reef catchments have been approved (e.g. Nathan Dam, Connors River Dam, Lower Fitzroy Weirs, Paradise Dam and Eidsvold Weir). The desktop investigations to date did not suggest the risk associated with Nullinga Dam was any greater than that associated with any of these recently approved dams and the risk is better described as less (because the dam is not in a reef catchment, it does affect any threatened ecological communities nor any critically endangered species, but it does affect or may affect several endangered species).

10.9 Planning and Environment

Below is a list of the key regulatory approvals which may be required for works under either Reference Project. The ultimate detailed design of the relevant project works may affect whether or not an approval in the list will need to be obtained.

APPROVAL MATRIX			
APPROVAL	**DESCRIPTION**	**TIMING**	**RESPONSIBLE AUTHORITY**
EPBC Act	Potential to impact several MNES including: ▪ listed threatened and species and communities ▪ listed migratory species ▪ Commonwealth marine areas. The use of water could be considered a facilitated impact of the dam operation because of the provisions in s 527E of the EPBC Act. This is most relevant in a reef catchment.	Controlled action decision within two months from lodgement of Referral. If determined to be a 'controlled action', assessment process then determined and likely to be an EIS for which studies, documentation and approval will take 18 – 36 months or more to finalise.	Commonwealth Minister administering the *EPBC Act*
Clearing permits	Permits for clearing native plants that are protected under the *Nature Conservation Act 1992* (Qld) (NCA).	Allow three to six months from lodgement of any relevant application. It is assumed Sunwater has operational experience with this type of permit and its working timeframes to make the application at the appropriate time.	Chief executive administering the NCA
Damage Mitigation Permits	Permits for removal and relocation of endangered, vulnerable, near threatened or disturb breeding habitat under the NCA.	Allow three to six months from lodgement of any relevant application. It is assumed Sunwater has operational experience with this type of permit and its working timeframes to make the application at the appropriate time.	Chief executive administering the NCA
Disposal permit	Permit for disposing of contaminated soil under the *Environmental Protection Act 1994* (Qld) (EP Act).	About 10 business days from lodgement of a properly made application with the DES	Administering Authority under the EP Act
Environmental authority	Environmental authority for undertaking a prescribed Environmentally Relevant Activity (ERA) under the EP Act.	Allow three to six months from lodgement of any relevant application.	The relevant administering authority under the EP Act

APPROVAL MATRIX			
Transport Infrastructure Act	Road closures, temporary closures to accommodate works, or road corridor permits may be required.	Requirements to be developed during detailed design. Ongoing liaison with the relevant state, local or other road authority to continue.	Chief Executive administering TI Act.
Designation of land for development of infrastructure	Designation of land for development of water cycle management infrastructure under the *Planning Act 2016* (Qld) (PA)	Allow 9 to 12+ months.	The Planning Minister or MSC under the PA
If land is not designated for development of infrastructure, the following approvals may be required			
Development permit for material change of use – Dam	Development approval for a material change of use made assessable under the Mareeba Planning Scheme	Allow six to 12 months for a decision from the relevant Council. If the application is approved, depending on the level of assessment, third parties may appeal against the approval, which may take a significant time to finalise.	The relevant Council, in conjunction with any referral agency assessment required
Development permit for material change of use – ERA	Development approvals for ERAs under the PA and *Planning Regulation 2017* (Qld) (PR).	Allow three to six months from lodgement of any relevant development application.	Chief executive administering PA (as the assessment manager or as a referral agency)
Development permit for operational works for vegetation clearing regulated by the *Vegetation Management Act 1999* (Qld) (VMA)	Development permit for operational works for clearing native vegetation, unless accepted development or an exemption applies, including if clearing is not for particular community infrastructure listed in the PR.	Allow three to six months from lodgement of any relevant development application.	Chief executive administering PA (as the assessment manager or as a referral agency)
Development permit for operational works for raising or construction of waterway barrier works	Development permit for operational works for raising or construction of waterway barrier works unless accepted development or an exemption applies.	Allow three to six months from lodgement of any relevant development application.	Chief executive administering PA (as the assessment manager or as a referral agency)
Development permit for operational works for taking or interfering with water	Development permit for operational works for taking or interfering with water unless accepted development or an exemption applies.	Allow three to six months from lodgement of any relevant development application.	Chief executive administering PA (as the assessment manager or as a referral agency)

APPROVAL MATRIX			
Development permit for operational works for removing quarry material (for construction materials)	Development permit for operational works for removing quarry material (for construction materials) unless accepted development or an exemption applies.	Allow three to six months from lodgement of any relevant development application.	Chief executive administering PA (as the assessment manager or as a referral agency)
Development permit for operational works for referable dam or particular dams	Development permit for operational works for referable dam or particular dams unless accepted development or an exemption applies.	Allow three to six months from lodgement of any relevant development application.	Chief executive administering PA (as the assessment manager or as a referral agency)
Development permit for reconfiguring a lot	Development permit for reconfiguring a lot, unless an exemption applies.	Allow three to six months from lodgement of any relevant development application.	MSC

Any environmental assessment and approval process for the approvals stated in Table 1 above requires proactive management of potential issues. Unless the relevant land is 'designated' for development of infrastructure, it is 'likely' to 'almost certain' that development permits will be required under the PA.

The following factors may delay the time it takes to obtain any of the approvals stated in Table 1 above:

- adequacy of the environmental and heritage surveys, studies and reporting conducted
- public consultation (noting some of the approvals do not enable third party appeal rights)
- agency attitudes and responses
- negotiation or approvals
- legal challenges.

Conditions that are imposed on any approval granted may restrict the way in which the works for the relevant Reference Project must be undertaken. Environmental offsets are likely to be required in relation to both EPBC Act and State legislation (*Environmental Offsets Act*).

The risk of delay and inconsistency of conditions can be managed by coordinating approvals through the infrastructure designation process. Alternatively, or in addition, the proponent could seek determination as a "coordinated project" under the *State Development and Public Works Organisation Act 1971* and follow the EIS process. This will allow use of the bilateral agreement to coordinate the EPBC Act assessment. This has been the approval path for all recent dams and weirs in Queensland. The EIS process is viewed as satisfying the requirements to support later infrastructure designation.

The risk of conditions adversely affecting the works through either imposition of additional cost or time delays can be managed by proactive management and document preparation including the various management plans and reports, the preparation of draft conditions and early liaising with regulators about conditions.

10.10 Land Acquisition

10.10.1 Revocation of any protected areas

No areas of national park declared under the NC Act or *State forest under the Forestry Act 1959* (Qld) are located within or adjoining the Reference Projects.

It is 'possible' that a Nullinga Dam will impact Lot 19 on CP HG539 (Lot 19). Lot 19 is unallocated State land, part of which is affected by a permit to occupy granted for water facility purposes. If Reference Project 1 and Reference Project 2 will affect any part of the permit to occupy, the permit will need to be cancelled. It is assumed Sunwater will liaise with DNRME to cancel the permit to occupy affecting Lot 19 (if necessary).

It is 'likely' to 'almost certain' that a Nullinga Dam, under any Reference Project, will impact Lot 492 on CP HG759 (Lot 492). Lot 492 is dedicated as reserve for the purpose of 'experimental farm'. The registered trustee of Lot 492 is the Department of Agriculture and Fisheries (DAF). Sunwater will need to liaise with DAF and DNRME to amend or revoke part or all of the reserve over Lot 492.

10.10.2 Land acquisition legislation

The *Acquisition of Land Act 1967* (Qld) (ALA Act) authorises constructing authorities to take land for public purposes, either by agreement or by compulsory acquisition. Sunwater is not a constructing authority.

Under this Act, the Chief Executive of DNRME has power to acquire land by resumption for purposes relating to water, including for dams and dam-associated development. The Coordinator-General also has power to acquire land under the *State Development and Public Works Organisation Act 1971* (Qld). The power to acquire land includes the power to acquire property for the facilitation of dam infrastructure, as well as land for future dam purposes, even if the time when the land will be required is indefinite or unknown. Land taken by a gazette resumption notice vests in the constructing authority. The acquisition extinguishes all other interests in the land, including mortgages, charges and easements.

Land will need to be acquired for Reference Project 1 and Reference Project 2, either by purchasing the land or by resumption. Thirty-five properties have been identified as being affected by Reference Project 1 and Reference Project 2. This includes freehold land, including land in private ownership and state ownership, and land encumbered by easements and leases. If compulsory acquisition is to be pursued for some or all of the properties, it would be expected that Sunwater would liaise with DNRME or the Coordinator-General, including in relation to access to the land, and eventual transfer of ownership, as required.

Taking land under the ALA Act creates rights to compensation for people (or entities) with an estate or interest in the land at the time of taking. The issue of compensation can be dealt with after the relevant land is taken. The issue of compensation may require dedicated time and costs to address issues and consequences. Development of an acquisition strategy by Sunwater will assist in managing this risk. Sunwater has substantial experience with land acquisition under the legislation but generally achieves acquisition through voluntary negotiation.

10.10.3 Land access agreements and roads

Sunwater may consider entering into access agreements with landowners for properties to enable Sunwater and its contractors to temporarily occupy and use the land, if the land is not acquired under the ALA Act. Sunwater may also have to pay compensation for any physical damage caused by the entry, occupation or use of the land.

The Reference projects will impact on Collins Weir Road, a local government-controlled road. Accordingly, the required works trigger consideration of temporary or permanent road closure under the *Local Government Act 2009* (Qld) (LG Act). Sunwater and its contractors will need to comply with procedures under the LG Act and apply to MSC to temporarily or permanently close Collins Weir Road before entering and temporarily occupying Collins Weir Road. This may result in delays to Reference Project 1 and Reference Project 2. It is recommended that Sunwater give consideration early in the planning process as to whether temporary or permanent occupation of Collins Weir Road is required for the relevant Reference Project, and, if necessary, commence the closure application procedures under the LG Act as soon as possible to manage the risk.

10.11 Local Heritage

Places of local heritage significance may be listed by a local government in a local heritage register under the *Queensland Heritage Act 1992* (Heritage Act).

Reference Project 1 and 2 areas do not contain or adjoin any known local heritage places. A heritage assessment would still need to be undertaken as part of the EIS.

10.12 Native Title

10.12.1 Native Title considerations

The *Native Title Act 1993* (Cwlth) (NT Act) recognises the traditional rights and interests of Aboriginal and Torres Strait Islander people in Australia.

Native title processes will not be required where native title has been 'extinguished' over land.

If native title has not been extinguished, any proposed act that is inconsistent with the existence or exercise of native title will trigger the need for compliance with the 'Future Act' requirements set out in the NT Act. The Future Act Requirements establish particular processes that must be followed, which are informed by the type, or category, of Future Act.

If native title has not been extinguished over the entire area of the Reference Projects, the Reference Projects will be required to comply with the Future Act Requirements, which can only be determined with certainty once the final project footprint is confirmed.

10.12.2 Native title process

It is likely that either Reference Project will comprise various project components, each of which may trigger different Future Act Requirements informed by the underlying tenure of each component, and the nature of the activities. For example, as outlined above, section 24HA and section 24KA may apply to different project components.

Assuming that the Future Act Requirements will be triggered by the construction of the new dam, it is likely that Sunwater will pursue an Indigenous Land Use Agreement (ILUA) for Reference Project 1 and Reference Project 2. An ILUA would provide Sunwater with an opportunity to address all Future Act Requirements for the Reference Project in a single agreement.

An ILUA is a particular type of statutory agreement, which attaches particular notification, negotiation, and authorisation requirements, and can deal with broad ranging project consents.

The type of ILUA required (i.e. a 'Body Corporate' or 'Area Agreement') will be informed by the relevant Reference Project footprint – namely, whether it solely overlaps land covered by a native title determination, or also an area over which native title has not been determined.

There is no statutory time frame for the negotiation of an ILUA, and no guarantee that agreement will be reached and an ILUA will be obtained.

If an ILUA is not pursued, each component of the Reference Project will need to be considered in light of the underlying tenure, and the nature of the activities.

10.12.3 Native title process – Compulsory Acquisition

If an ILUA is required for the Reference Projects and cannot be obtained or the Reference Project requires the compulsory acquisition of any land over which native title has not been extinguished, native title will also be required to be compulsorily acquired over those portions of land. The compulsory acquisition process results in the acquisition of all interests in the land, including native title, which has the effect of extinguishing native title.

In accordance with the NT Act, the practices and procedures in acquiring native title rights and interests must not cause the native title holders to be at any greater disadvantage than the holders of non-native title rights and interests when their rights and interests are acquired.

Importantly, this involves more than affording the same procedural rights. Instead, it means that the same opportunities must be afforded to the native title party or parties.

In practice, before compulsorily acquiring native title, the State (DNRME or Coordinator-General) will require a genuine attempt to be made to reach agreement under an ILUA.

If native title is compulsorily acquired, the State will be liable to pay compensation to the native title holders. This process will involve additional time and expense.

10.13 Aboriginal cultural heritage

10.13.1 Relevant legislation

The *Aboriginal Cultural Heritage Act 2003* (Qld) (ACH Act) recognises, protects, and conserves Aboriginal cultural heritage. In part, it achieves this protection by providing that any person who undertakes an activity has a 'Duty of Care' to take all reasonable and practicable measures to ensure that the activity does not harm Aboriginal cultural heritage (Duty of Care).

Under the ACH Act, the Duty of Care can be discharged in a number of ways, including:

- at a minimum, adhering to the Duty of Care Guidelines
- entering into a voluntary Cultural Heritage Management Agreement with an 'Aboriginal party' for the given area or
- entering into a CHMP under Part 7 of the ACH Act.

The identified Reference Projects will involve further development or infrastructure that involves disturbance activities. Accordingly, Sunwater (as the Reference Project proponent) will be required to comply with its Duty of Care. To ensure compliance, Sunwater should engage with the relevant Aboriginal Party for each affected property.

Further, in the event an EIS is required for the Reference Projects, additional provisions of the ACHA apply. The ACHA provides that a CHMP must be developed where a project requires an EIS unless cultural heritage is included in an ILUA or other native title agreement for that project.

Accordingly, any ILUA pursued for Reference Project 1 and Reference Project 2 should include cultural heritage provisions. This will avoid the need for the Reference Projects to develop a CHMP (which would be

made more complicated in this case given the number of Aboriginal Parties and areas for which there are no identified Aboriginal Party).

If an ILUA cannot be obtained, and native title is required to be compulsorily acquired, a CHMP will be required.

Other relevant legislation includes the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth) (ATSIHP Act). The ATSIHP Act preserves and protects areas and objects that are of particular significance to Aboriginal people. The ATSIHP Act allows the Federal Minister for the Environment, on an application by an Aboriginal person or group, to make a declaration to protect such areas or objects from specific threats of injury or desecration for defined periods of time.

In this instance, a declaration is unlikely to be made where Sunwater is complying with the provisions of the ACH Act on the Reference Projects (including through the negotiation of and compliance with an agreement with the Aboriginal parties).

10.14 Other Legal Matters

10.14.1 Contract Delivery Model

The key legal risk in relation to the delivery model for Sunwater is that the model itself contributes to time or cost overruns, quality issues or that Sunwater is exposed to some third party claim or non-compliance issues.

Adopting the Competitive Alliance (CA) model for either Reference Project does not cause any material concern, noting each would pass a different level of legal responsibility to the contractor for the legal risks associated with that Reference Project.

Certain risk items may need to be given close attention during the drafting, negotiation and implementation of the relevant contracts for the delivery model in order for it to be successfully utilised.

If one or more of the Reference Projects proceeds, once all further refinements to that Reference Project have been made, then as suggested in the DBC, the opportunity to revisit and test that delivery model adopted for that Reference Project (against a further advanced delivery model analysis) remains the most prudent approach.

10.14.2 General Liabilities – Negligence, Breach of Statutory Duty, Nuisance and Trespass

In undertaking the Reference Projects, Sunwater will face potential claims from persons who suffer any loss or damage (e.g. to themselves personally or their property) in connection with the Reference Project adopted (Injured Persons). The ability of Injured Persons to recover against Sunwater will depend on whether those persons have a right of action against Sunwater, and the likelihood they can establish legal liability of Sunwater under that right of action against Sunwater.

There risks have been analysed in a generic manner, given each claim if brought by an Injured Person, would be determined on its particular facts and merits. In a project of this scope and scale, it is not possible to classify every potential claim that could be brought by an Injured Person during the course of delivery and management of the Reference Projects.

Nevertheless, the analysis done has identified numerous project risk areas, many of which may be the subject of loss or damage to an Injured Person. The analysis has focused on those risks where Injured Persons may have claims that are less likely to be regulated by a contractual relationship with Sunwater and created a list of key risks to be analysed. The risks identified in Table 10-1 are those risks determined as requiring the most attention for Sunwater in proceeding with any of the Reference Projects.

Table 10-1 Key risks

RISK DESCRIPTION	RISK ANALYSIS
General Liability – Flood caused or exacerbated (during construction phase)	Potential actions here are broad, including negligence, breach of statutory duty, nuisance and/or trespass. Common insurances would usually be in place for liabilities. Engaging a competent contractor with proven policies and methodology will also assist in mitigating this risk.
General Liability – Physical injury or death of persons (workers)	The most common action in this instance would be negligence or breach of statutory duty. Some protection for Sunwater may be obtained, at least during the construction phase for either Reference Project. However, given the nature of the Competitive Alliance model, the shared responsibility and extent of the risk allocation between Sunwater and the contractor, handled through allowances, pools and risk share arrangements, will determine the ultimate risk rating on this aspect. Nevertheless, the adoption of a Competitive Alliance model will see a large portion of residual risk remain with Sunwater (potentially including residual risk for design issues and geotechnical issues). Sunwater's policies and procedures would also have a bearing on risk mitigation. Common and project specific 'alliance' insurances would usually be in place for liabilities. Engaging a competent contractor with proven policies and methodology in successfully participating in a Competitive Alliance model will also assist in mitigating this risk.
General Liability – Physical injury or death of persons (other than workers)	The most common action in this instance would be negligence or breach of statutory duty. Some protection for Sunwater may be obtained, at least during the construction phase for either Reference Project. However, given the nature of the Competitive Alliance model, the shared responsibility and extent of the risk allocation between Sunwater and the contractor, handled through allowances, pools and risk share arrangements, will determine the ultimate risk rating on this aspect. Nevertheless, the adoption of a Competitive Alliance model will see a large portion of residual risk remain with Sunwater (potentially including residual risk for design issues and geotechnical issues). Sunwater's policies and procedures would also have a bearing on risk mitigation. Common and project specific 'alliance' insurances would usually be in place for liabilities. Engaging a competent contractor with proven policies and methodology in successfully participating in a Competitive Alliance model will also assist in mitigating this risk. It is noted that Sunwater may rely on section 49 of the *Water Supply (Safety and Reliability) Act 2008* (Qld) (Water Safety Act) where there is an event or circumstance beyond the control of Sunwater.
General Liability - Contaminated water (including added flood and storm impacts)	Potential actions here are broad, including negligence, breach of statutory duty, nuisance and trespass. Some protection for Sunwater may be obtained, at least during construction phase for either Reference Project 1 or Reference Project 2. However, given the nature of the Competitive Alliance model, the shared responsibility and extent of the risk allocation between Sunwater and the contractor, handled through allowances, pools and risk share arrangements, will determine the ultimate risk rating on this aspect. Nevertheless, the adoption of a Competitive Alliance model will see a large portion of residual risk remain with Sunwater (potentially including residual risk for design issues and geotechnical issues). Sunwater's policies and procedures would also have a bearing on risk mitigation. Project specific insurances will need to be placed for liabilities not covered by common insurances. Engaging a competent contractor with proven policies and methodology in successfully participating in a Competitive Alliance model will also assist in mitigating this risk. It is noted that Sunwater may rely on section 49 of the Water Safety Act where there is an event or circumstance beyond the control of Sunwater.
General Liability – Contaminated land (including acid	Potential actions here are broad, including negligence, breach of statutory duty, nuisance and trespass. Some protection for Sunwater may be obtained, at least during the construction phase for either Reference Project 1 or Reference Project 2. However, given the nature of the Competitive Alliance model, the shared responsibility and extent of the risk allocation between Sunwater and the contractor, handled through allowances, pools and risk

RISK DESCRIPTION	RISK ANALYSIS
sulphate and contaminated soil)	share arrangements, will determine the ultimate risk rating on this aspect. Sunwater's policies and procedures would also have a bearing on risk mitigation. Nevertheless, the adoption of a Competitive Alliance model will see a large portion of residual risk remain with Sunwater (potentially including residual risk for design issues and geotechnical issues). Project specific insurances will need to be placed for liabilities not covered by common insurances. Engaging a competent contractor with proven policies and methodology in successfully participating in a Competitive Alliance model will also assist in mitigating this risk.
General Liability – Vibration and subsidence impacts caused by	Potential actions here are broad, including negligence, breach of statutory duty and nuisance. Some protection for Sunwater may be obtained, at least during the construction phase for either Reference Project. However, given the nature of the Competitive Alliance model, the shared responsibility and extent of the risk allocation between Sunwater and the contractor, handled through allowances, pools and risk share arrangements, will determine the ultimate risk rating on this aspect. Nevertheless, the adoption of a Competitive Alliance model will see a large portion of residual risk remain with Sunwater (potentially including residual risk for design issues and geotechnical issues). Sunwater's policies and procedures would also have a bearing on risk mitigation. Project specific insurances will need to be placed for liabilities not covered by common insurances. Engaging a competent contractor with proven policies and methodology in successfully participating in a Competitive Alliance model will also assist in mitigating this risk.
General Liability – Flood caused or exacerbated (during construction phase)	Potential actions here are broad, including negligence, breach of statutory duty, nuisance and trespass. Some protection for Sunwater may be obtained, at least during construction phase, for either Reference Project. However, given the nature of the Competitive Alliance model, the shared responsibility and extent of the risk allocation between Sunwater and the contractor, handled through allowances, pools and risk share arrangements, will determine the ultimate risk rating on this aspect. Nevertheless, the adoption of a Competitive Alliance model will see a large portion of residual risk remain with Sunwater (potentially including residual risk for design issues and geotechnical issues). Sunwater's policies and procedures would also have a bearing on risk mitigation. Project specific insurances will need to be placed for liabilities not covered by common insurances. Engaging a competent contractor with proven policies and methodology in successfully participating in a Competitive Alliance model will also assist in mitigating this risk. It is noted that Sunwater may rely on section 49 of the Water Safety Act where there is an event or circumstance beyond the control of Sunwater.
General Liability – Fire caused by the project	Potential actions here are broad, including negligence, breach of statutory duty, nuisance and trespass. Some protection for Sunwater may be obtained, at least during the construction phase for either Reference Project. However, given the nature of the Competitive Alliance model, the shared responsibility and extent of the risk allocation between Sunwater and the contractor, handled through allowances, pools and risk share arrangements, will determine the ultimate risk rating on this aspect. Nevertheless, the adoption of a Competitive Alliance model will see a large portion of residual risk remain with Sunwater (potentially including residual risk for design issues and geotechnical issues). Project specific insurances will need to be placed for liabilities not covered by common insurances. Engaging a competent contractor with proven policies and methodology with proven experience participating in a Competitive Alliance model will also assist in mitigating this risk.

10.14.3 Legal and Policy Changes

Given the time frame for the lifecycle of the Reference Projects, with construction not due to commence before mid-2027 for the considered Reference Projects, it is almost certain that there will be amendments to legislation and polices that impact in some way on the Reference Projects.

However, it is only where the change will impact on the Reference Projects negatively (e.g. in terms of time, cost or quality) that it would truly be a real risk to the Reference Projects (e.g. there is equally potential for legislative or policy change to bring benefits to the Reference Projects).

In that sense, in a national and state jurisdiction of relatively low sovereign risk, the potential for legislation stifling projects for dam infrastructure completely is probably negligible but some level of negative impact is possible. It is extremely difficult to estimate the consequences of a future change (which is unknown).

The main impact would be to time and cost consequences, altering those which have underpinned the Reference Projects (e.g. the change makes the time and costs assessments at this DBC stage inaccurate). From a strict compliance perspective, the risk is much less concerning, as Sunwater deals with legislative and policy change on a constant basis and has a demonstrated ability to manage the changes and adapt.

10.14.4 Work Health and Safety

WHS legislative and regulatory requirements will apply to the Reference Projects and Sunwater will have some duties to discharge under WHS Law, which encompasses:

- *Work Health and Safety Act 2011* (Qld)
- *Work Health and Safety Regulation 2011* (Qld)
- WHS Codes of Practice and Guidelines

The precise activities undertaken by Sunwater itself will determine the extent of Sunwater's WHS Law duties for the Reference Projects.

The extent to which duties are in part delegated to others (e.g. the contractor) under WHS Law will also continue to be a relevant consideration if one or more of the Reference Projects proceeds. Sunwater is very familiar with managing duties under WHS Law and compliance with its existing policies and procedures will render appropriate risk mitigation.

The key risk in relation to WHS Law for Sunwater is around Sunwater's own potential for a non-compliance with the WHS Law (the risk level is dependent on how much is outsourced to third parties, and how much is retained by Sunwater, including with respect to design liability)