



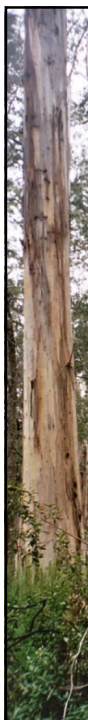
# Native Vegetation Law

Nambucca, 17 April 2010

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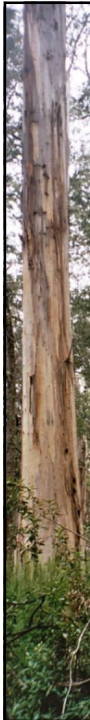


## About the EDO

- A community legal centre specialising in public interest environmental law
- Mission: To empower the community to protect the environment through law
- Functions:
  - Legal Advice and Representation
  - Scientific Assessment and Advice
  - Policy and Law Reform
  - Community Education



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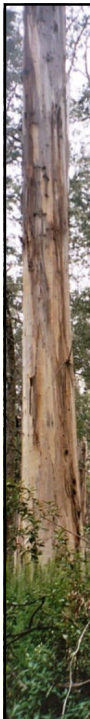


## Advice & casework guidelines

- Is it a public interest environmental issue?
  - the issue involves a real threat to the environment; or
  - engagement in the issue has the capacity to result in good environmental outcomes; or
  - the issue concerns the manner in which the environment is regulated; or
  - the issue raises matters regarding the interpretation and future administration of statutory provisions.



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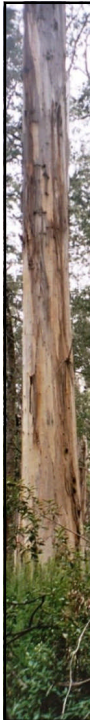


## Today

- introduction to native veg laws
- land clearing
- property vegetation plans
- obtaining development consent
- conservation agreements
- private native forestry
- dual consent
- biobanking
- plantations
- carbon offset forestry



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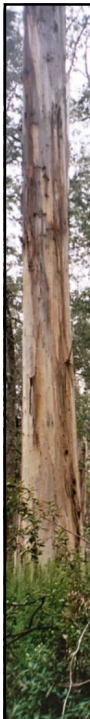


## Ecologically Sustainable Development

'...development that meets the needs of present generations while not compromising the needs of future generations to meet their needs.'



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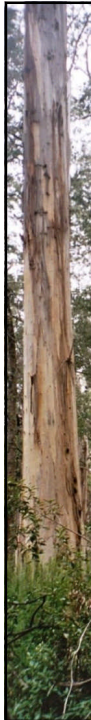


## Ecosystem services

'...the transformation of a set of natural assets (soil, plants and animals, air and water) into things that we value.'



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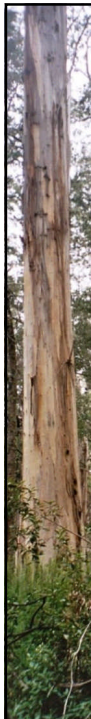


## Why protect native vegetation?

- Australia has lost 90% of its pre-European vegetation
- majority of remnant vegetation not in reserves
- provides habitat for native animals
- needed for climate change adaptation
- economic resource



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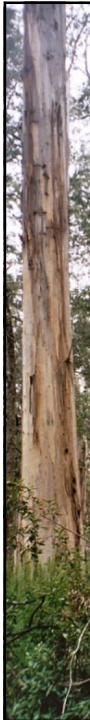


## Layers of native vegetation law

- National
  - Environmental Protection & Biodiversity Conservation Act 1999
- State
  - Environmental Planning and Assessment Act 1979
  - Native Vegetation Act 2003 & Regulation 2005
  - Threatened Species Conservation Act 1995
  - State Environmental Planning Policies
    - eg SEPP 44 (Koala Habitat)
- Local
  - Local Environmental Plans
  - Development Control Plans
  - Tree Preservation Orders
  - Plans of Management



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## Native Vegetation Act 2003

- Applies to all “Rural Lands”
- Does NOT apply to urban lands – ie land zoned:
  - Residential (other than rural residential)
  - Village
  - Township
  - Industrial
  - Business



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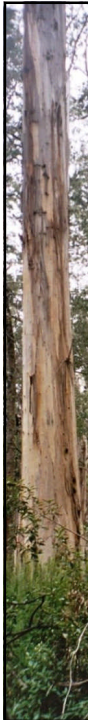


## What is native vegetation?

- Native vegetation includes:
  - Trees (saplings, shrubs, scrub),
  - Understorey plants,
  - Groundcover, and
  - Wetland plants...... that are indigenous to NSW



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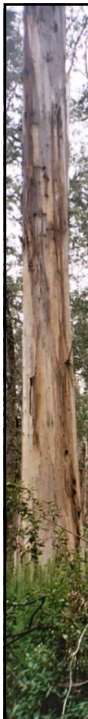
## Categories of native vegetation

- Re-growth – NV re-grown since 1990
- Protected Re-growth – NV re-growth identified in a plan
- Remnant native vegetation – NV not re-growth

All of these categories can be found on the one piece of land. The category determines whether approval is needed before the vegetation can be cleared.



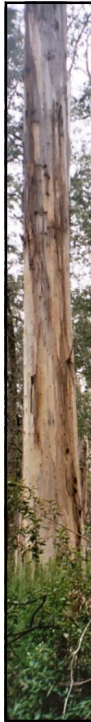
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## Clearing native vegetation



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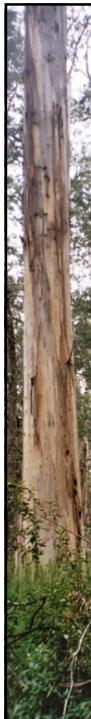
## What is clearing?

- Cutting down
- Thinning
- Removing
- Burning
- Ringbarking
- Felling
- Logging
- Poisoning
- Uprooting

***Broadscale clearing of native vegetation means the clearing of any remnant native vegetation or protected regrowth.***



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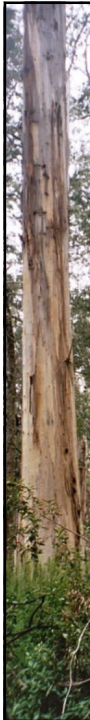
## Approvals

1. Development Consent
  - removal of trees may require development consent from the Minister for Environment, Climate Change & Water.
2. Property Vegetation Plan
  - voluntary agreements negotiated between the landholder and the Catchment Management Authority (CMA).
3. Private Native Forestry Property Vegetation Plan

**Development consents and PVPs that propose to clear remnant native vegetation can't be approved unless they will "improve or maintain environmental outcomes".**



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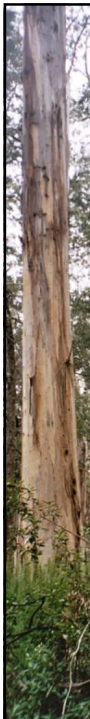


## When native veg can be cleared

- You can clear native vegetation if:
  - You have a Development Consent approved by the Minister; or
  - The clearing is permitted under an approved Property Vegetation Plan; or
  - The native vegetation is:
    - Regrowth that is not protected
    - Certain groundcover
    - Exempt from protection under the NV Act



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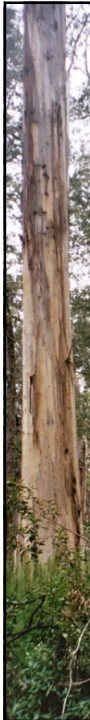


## “Maintain and improve” test

- A software program that is applied to the PVP or DA area to determine what impact the proposed clearing will have on:
  - Salinity
  - Water Quality
  - Biodiversity (including threatened species)
  - Soils



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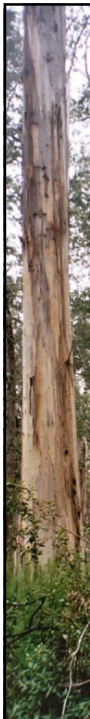


## Property Vegetation Plans

- Voluntary agreements negotiated between the landholder and the Catchment Management Authority (CMA)
- For individuals or groups of neighbouring farms
- For part or the whole of a property
- Last up to fifteen years – binding and enforceable
- Continue to have effect if the land is sold (“run with the land”);



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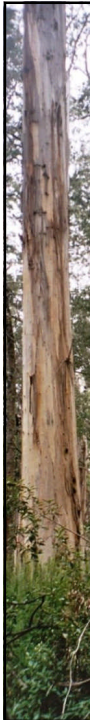


## PVPs

- Clarify what can and cannot be done to native vegetation on private land.
- Consist of maps and other documents that define the land and what can be done to it.
- Provide a mechanism for accessing financial and non-financial incentives from Catchment Management Authorities.



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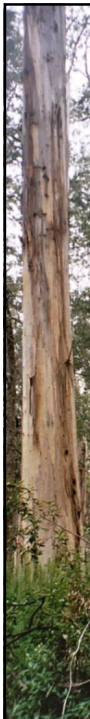


## Approvals not needed if...

1. The native vegetation is:
  - Re-growth that is not protected
  - Certain groundcover
2. The clearing is:
  - a 'routine agriculture management activity' ("**RAMA**") to the minimum extent necessary to carry out that activity
  - a continuation of existing cultivation, grazing, or rotational farming practices that is not clearing of remnant vegetation
  - The minimum extent necessary for the erection of a single dwelling that has development consent
  - Authorised under other legislation such as planning legislation – or a development consent
3. The land is being sustainably grazed
  - Grazing that is not likely to result in substantial long-term decline in structure/composition of the native vegetation



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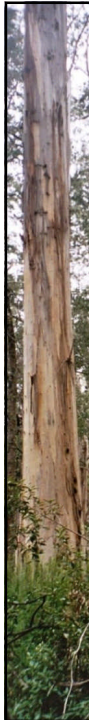


## State Protected Lands

- State Protected Lands now **Vulnerable Lands** under the NV Act & Regulation
- Vulnerable Land categorised as:
  - Steep or Highly Erodible Land
  - Protected Riparian Land
  - Special Category Land
- Maps available at CMA Office



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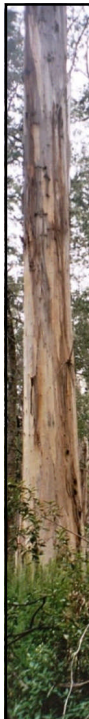


## Vulnerable Riparian Land

- Clearing Requires Approval from CMA
  - Except clearing associated with the following RAMAs:
    - the removal or reduction of an imminent risk of serious personal injury or damage to property
    - safety clearances around electricity transmission lines
    - the removal of noxious weeds under the Noxious Weeds Act 1993
    - under an eradication order or pest control order under the Rural Lands Protection Act 1999
    - the construction and maintenance of a boundary fence with a width of clearing not exceeding 3 metres on each side
    - the construction and maintenance of fencing to improve management of the protected riparian land, with a total width not exceeding 3 metres, and
    - the construction and maintenance of farm roads, with a total width not exceeding 4 metres and provided a road is reasonably required to access a site and the route minimises the amount of clearing required.



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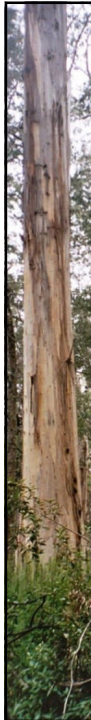


## Compliance and enforcement

- Authorised Officer – appointed by the Minister - DECCW officers – CMA - Council Officers
- Can enter property with consent of the land owner or the D-G has authorised entry
- It is an offence to obstruct (delay, threaten or hinder) an authorised officer in the exercise of their functions and giving false or misleading information.
- It is an Offence to refuse to comply with a requirement of an authorised officer
  - Penalty max \$11,000.00



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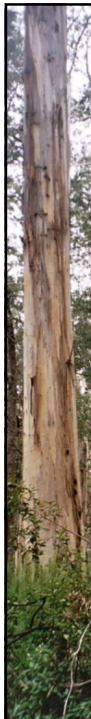


## Penalties for illegal clearing

- Breaches of the *Native Vegetation Act* may result in civil or criminal action being brought by the Department of Environment and Climate Change & Water
- Max Penalty \$1,100,00.00 + remedial + \$110,000.00 for each day of continued breach
- Third parties can also take civil action to restrain breaches of the Act - Court has Wide Powers
- 'Stop work' and remedial orders may also be made against infringers of the legislation



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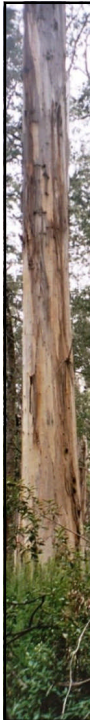


## Prosecutions

- Prosecutions can be brought in Local Court or Land and Environment Court
- Proceedings for offences under the NV Act or Regulation must be commenced within 2 years of the date on which the offence is alleged to have been committed or within 2 years of the alleged offence coming to the attention of the authorised officer



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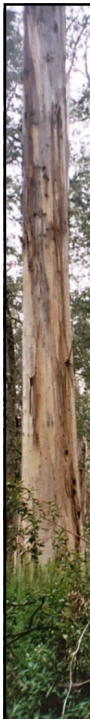
## Case study

***Director-General of the Department of Environment and Climate Change v Hudson [2009] NSWLEC 4 (11 February 2009)***

- John Ross Hudson prosecuted in the Land and Environment Court for contraventions of the *Native Vegetation Act 2003*
- Accused of authorising the clearing of 486 hectares of native vegetation without first obtaining development consent and without a property vegetation plan.
- Fined \$400,000 for clearing the native vegetation and \$8,000 for failing to comply with a notice.



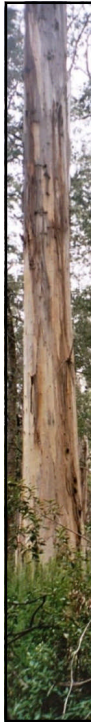
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## Conservation Agreements



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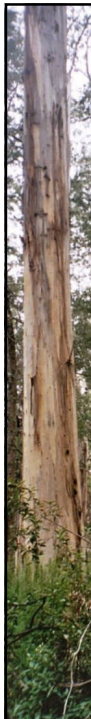


## Private conservation law

- **Soft law options**
  - Wildlife Refuge Agreements
  - Land For Wildlife
- **Hard law options**
  - Voluntary Conservation Agreement (VCAs) - DECC
  - Trust Agreements (TAs) – NCT
  - PVPs?



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## Conservation agreements

- A formal agreement or promise in a deed or under seal
- An agreement is a completed negotiation
- A contract is a legally binding promise or an agreement



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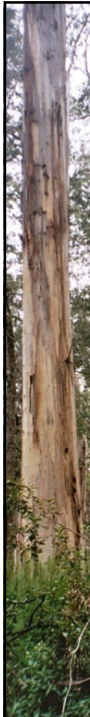


## Conservation agreements

- **Who are the parties to the Agreement?**
  - Landholder(s)  
AND
  - Minister for the Environment (VCA) or
  - Nature Conservation Trust (TA) or
  - Relevant Minister administering the Statute under which the Agreement is provided (PVP)



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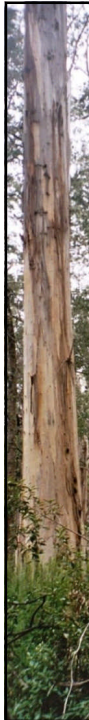


## Conservation agreements

- run with the land
- last in perpetuity
- bind successors in title
- can be varied by subsequent agreement



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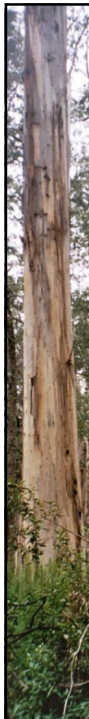


## Conservation agreements

- **Legally enforceable**
  - Conservation agreements are enforceable in the Land & Environment Court in its Class 4 jurisdiction of civil enforcement
  - Damages only awarded in cases that involve intentional or reckless breach



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## Nuts and bolts

- Pragmatic considerations of the terms and conditions of Agreement and any associated binding document (such as a Plan of Management) for example:
  - obligations to fence to keep livestock out
  - weeding regimes
  - tenancy
  - mortgage



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## Private native forestry



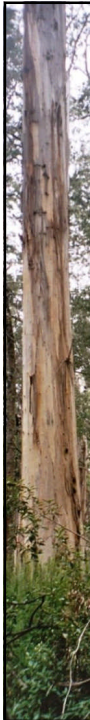
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## Private Native Forestry

- **Getting approval**
  - PNF PVP applications are made to DECCW and are free.
- **Details**
  - Consist of a map of the property showing the areas subject to the PVP and marking the areas that cannot be logged such as old growth forest.
- **PNF Codes of Practice**
  - The codes set out the manner in which PNF activities should occur and require the preparation of a Forest Operation Plan.



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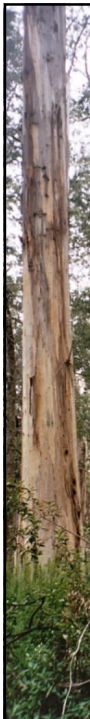


## Negotiating a PNF PVP

- If a landholder wishes to dispute areas delineated as Old Growth Forest and Rainforest can apply for a reassessment
- DECCW officers can reassess disputed areas in accordance with Old Growth Forest and Rainforest protocols



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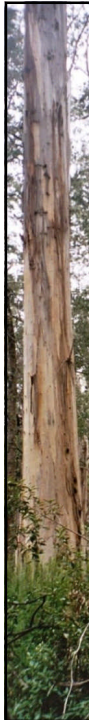


## Environmental constraints

- **Environment Protections**
  - Landscape Features, EECs, Threatened Species, Rainforest, OGF, Wetlands, Heathlands, Rocky Outcrops, Cultural Heritage Items and more...
- **Habitat and Biodiversity Protections**
  - Tree Retention
- **Riparian Protections**
  - Exclusion and Buffer Zones apply



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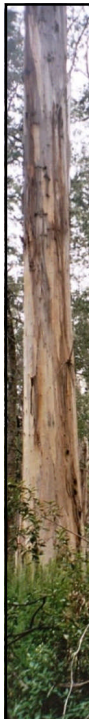


## Ecological Prescriptions

- Prescriptions for 39 species of native animals
- Prescriptions for 125 species of native plants
- Generally by exclusion zones and buffers



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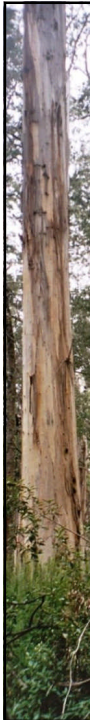


## Forestry Operation Plan

- Must be lodged with DECCW before commencing any logging operation
- Landholder required to send an annual report to DECCW if they have carried out a PNF operation
- DECCW has power to conduct audits



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## PNF & RAMAs

- Restrictions apply to RAMAs on lands covered by a PNF PVP
- Eg cannot obtain timber for rural infrastructure as a RAMA must be in accordance with the PNF/PVP
- Some exceptions



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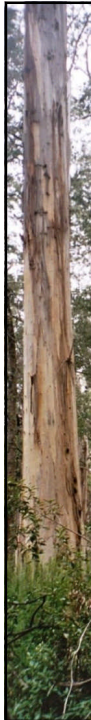


## Enforcement

- PNF PVPs are legally binding and run with the land
- DECCW has the power to conduct audits and ensure that the PNF operations are being conducted in accordance with the Codes of Practice
- Recent PIN issued to a forestry company & manager in Coramba (logging too close to stream)



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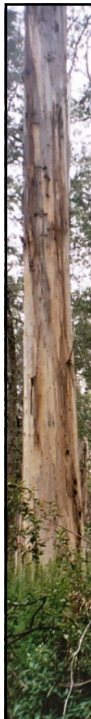


## Dual consent

- The NV Act does not remove the requirement to obtain development consent under an LEP for the removal of NV where development consent is required
- Tree Preservation Orders (TPOs) may also require consent for vegetation removal in certain circumstances



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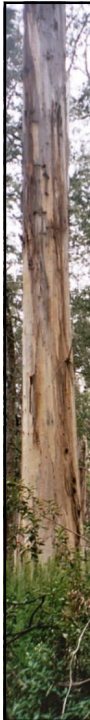


## Current Nambucca LEP

- Consent required for native veg removal in the following zones:
  - Zone 7 (a) Environment Protection (Wetlands)
  - Zone 7 (b) Environment Protection (Vegetation Conservation)
  - Zone 7 (f) Environment Protection (Coastal Lands)
  - Zone 7 (g) Environment Protection (Archaeological)



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## Nambucca Draft LEP 2009

- Does NOT adopt the optional Tree Preservation provision
- no other local provision controlling veg removal unlike Tweed and Ballina



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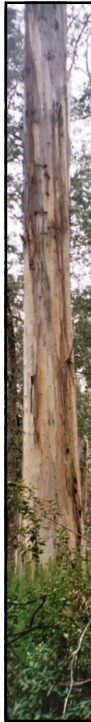


## Plantations

- ~ 2 million ha, ~ 1% of land area
- 50/50 hardwood/softwood
- Plantations 2020 Vision (1997) — trebling of area of commercial tree crops by 2020
- Uses Aust Forestry Standard, not Forest Stewardship Council certification
- 3 levels of industry:
  - state forests (33%)
  - large timber companies (60%)
  - farmers selling timber or leasing land



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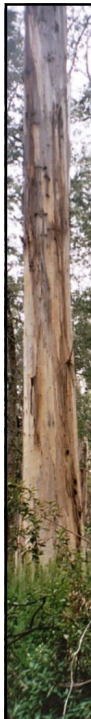


## Plantations

- Regulated under Plantations and Reafforestation Act 1999 and Code 2001 (amended 2010?)
- Applications for authorisation are made to the Minister for Primary Industries
- Requirement to consider impact on unique or special wildlife values
- Conditions may be attached to an authorisation



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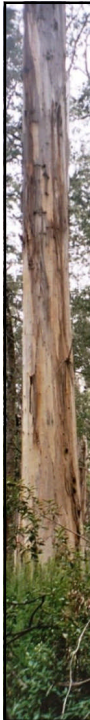


## Plantations Code

- Sets out standards for:
  - soil & water protection
  - cultural heritage protection
  - retention of small areas of native veg
  - retention of habitat trees
- Regulation of management operations
- Restoration of harvested areas



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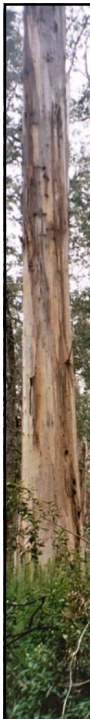


## Problems with plantations

- Loss of native veg and wildlife
- Reduced downstream water flow
- Pesticide use
- Loss of productive agricultural land
- Loss of local employment



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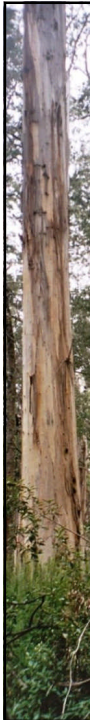


## Exempt farm forestry

- Authorisation or consent not necessary for “exempt farm forestry”:
  - < 30 ha
  - clearing doesn't require consent under NV Act
  - harvested timber doesn't exceed limit in Code
- Defined as intensive agriculture under standard template LEP so permissible without consent



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## Biodiversity banking & offsets



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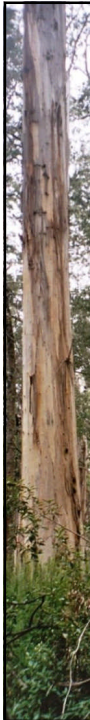


## Biodiversity offsets

“Conservation actions intended to compensate for the residual, unavoidable harm to biodiversity caused by development projects, so as to ensure no net loss of biodiversity. Before developers contemplate biodiversity offsets, they should have first sought to avoid and minimise harm to biodiversity’.



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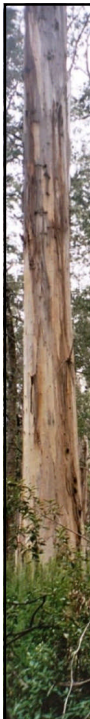


# BioBanking

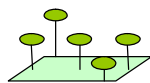
- BioBanking will allow 'biodiversity credits' to be generated by landowners who commit to enhance and protect biodiversity values on their land
- **Key Concepts: BioBanking Site – BioBanking Agreement**
- These credits can then be sold
- Developers can buy these credits and use them to counterbalance (offset) the impacts on biodiversity values that are likely to occur as a result of development.
- **Key Concepts: Development Site – BioBanking Statement**



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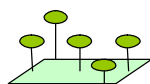
# The theory



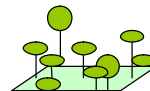
**Development site –**  
Current biodiversity value = 50 credits



**Loss** in biodiversity values  
Future biodiversity value = 0 credits  
Credits required to offset = 50 credits  
= **biobanking statement**

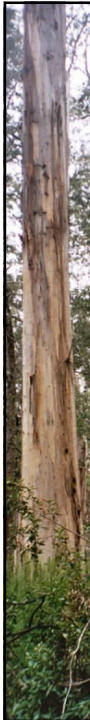


**Biobank (offset) site –**  
Current biodiversity value = 50 credits



**Gain** in biodiversity values  
Future biodiversity value = 60 credits  
Credits created = 10 credits  
= **biobanking agreement**





## BioBank sites

- Can be established on land subject to existing conservation management actions ie lands subject to a conservation agreement
- Only for management actions that are additional to any actions already required under a TA or a VCA



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## Assessment methodology

- **Must 'improve or maintain biodiversity values'**
- Must apply the **BioBanking Assessment Methodology**
  1. Defines 'improve or maintain biodiversity values'
  2. Biodiversity databases
  3. Survey and assessment of biodiversity values
  4. Calculation of biodiversity credits
  5. Offset rules





## Offset rules

To offset impacts, a biobank site must contain:

### 1. Ecosystem credits

- Same vegetation type to that impacted, OR
- Another vegetation type that is more scarce (>% cleared) that is within the same vegetation formation to that impacted, AND
- Suitable habitat for all threatened species impacted.

### 2. Species credits

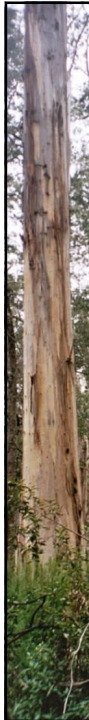
- Known/likely habitat (fauna) or individuals (flora) for all threatened species impacted.



## Benefits of methodology

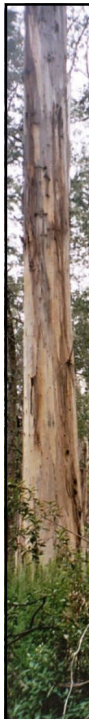
- Improved objectivity, consistency, transparency, and reduced decision-making discretion
- Red flags protective of biodiversity
- Better addresses cumulative impacts
- Better ensures offsets are adequate





## Criteria for variation of red flags

1. Measures to avoid impacts on red flag areas must be considered.
  2. The development must not impact on a vegetation type that is > 90% cleared in a CMA and that is in a patch > 4 ha in size.
  3. The site's contribution to regional biodiversity values must be low.
  4. The site's long term viability must be low or not viable.
- Accuracy of biodiversity databases
  - Species assessment – habitat assessment v targeted

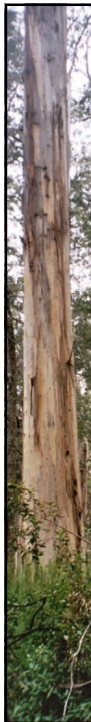


## How's it working?

- Scheme commenced in July 2008
- 49 assessors trained
- 12 expressions of interest for NRCMA region
- 0 BioBanking statements for whole of NSW
- 0 BioBanking agreements for whole of NSW



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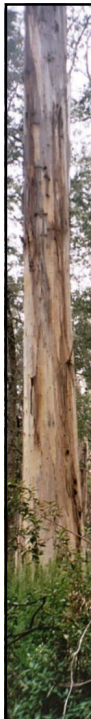


## Carbon offset forestry

- No offsets in Aust under Kyoto Protocol
  - Available in some countries under REDD scheme
- Current legally binding offset responsibilities
  - NSW Greenhouse Gas Abatement Scheme (power stations)
  - NSW Energy Saving Scheme (energy retailers)
- Current voluntary carbon market
  - GreenFleet
  - LandCare CarbonSMART
- New carbon sink forestry tax incentives
- Future: emissions trading scheme (ALP) or “direct action plan” (Coalition)



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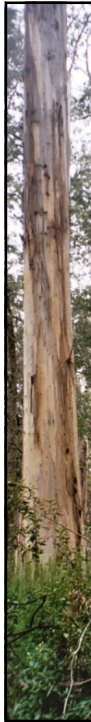


## Issues

- Additionality
- Location
- Species
- Permanency
- Double-dipping
- Accreditation
- Net carbon sequestration gain/loss



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# The bottom line

Best for biodiversity & climate change to

- conserve old growth forests
- plant local mixed species on degraded or marginal land

Only try to profit in context of

- a strong ETS
- strong regulations for carbon sink forest tax deductions
- a highly transparent & accountable offsetting standard



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The EDO supports the renewable energy industry by being a Green Power customer.

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**Mission**  
The EDO's mission is to promote the public interest and improve environmental outcomes through the informed use of the law.

**Strategic Approach**  
The EDO seeks to achieve its mission using the following strategies:

- Using a multidisciplinary approach which incorporates legal and scientific advice and representation; contributing to law reform and the development of public policy; and providing education and information to the community
- Promoting the value of public participation in environmental decision making and empowering the community to achieve better environmental outcomes through the informed use of the law
- Increasing access to justice by working with diverse groups within the community, and providing equitable access to services throughout New South Wales
- Recognising the importance of indigenous involvement in the protection of the environment
- Contributing to national and international work to achieve positive environmental outcomes through the law, within the limits imposed by funding
- Engaging early in environmental decision-making processes
- Managing the legal complexities of client campaigns and issues to the fullest extent possible
- Focusing on the merits of cases, both through contributions prior to decisions being made and as an adjunct to judicial review.

**Acknowledgments**

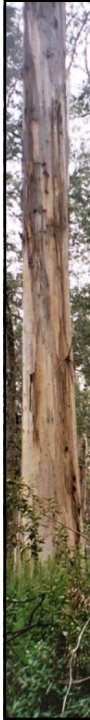
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