



Environmental
Defenders Office

JULY 2020

A Biodiversity Conservation and Land Management Act for the Northern Territory



Introduction

The Northern Territory (NT)'s spectacular landscapes contain some of the most intact ecosystems in Australia. However, the NT also has, arguably, the weakest land clearing regulation of all the states and territories. Recently, it has seen an almost tenfold increase in land clearing approvals than of those given over the previous twelve years.¹ In 2016 and 2017, the NT Government (NTG) approved approximately 45,500 ha of pastoral land for clearing through the Pastoral Land Board, while a further estimated 14,400 ha was approved by the PLB between 2018 and 2019.²

The pressures driving land clearing in the NT continue to grow due to the diversification of land use on the pastoral estate (e.g. for irrigated cotton cropping) and industrial expansion (e.g. associated with onshore shale gas expansion), amongst other things. With existing threats arising from climate change, pests and weeds, and degradation from existing pastoral uses, the growing risk for loss and degradation of native vegetation is an ongoing threat to the NT's biodiversity and the resilience of its ecosystems.

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The NT's current environmental laws have failed to effectively regulate land clearing, and have also failed to support real conservation action. The proper regulation and sustainable management of native vegetation, together with a comprehensive framework to establish and guide modern conservation policy, would deliver significant benefits for the NT's environment and communities.

¹ Michael Slezack, 'Northern Territory land clearing approvals increase nearly tenfold', The Guardian (article, 11 December 2017) <https://www.theguardian.com/australia-news/2017/dec/11/northern-territory-land-clearing-approvals-increase-nearly-tenfold>.

² NT Government, Pastoral land: current land clearing applications and approvals <https://nt.gov.au/property/land-clearing/pastoral-land/current-applications-and-approvals-for-pastoral-land-clearing>

What's wrong with current laws?

There is no coherent, rigorous legal framework regulating land clearing in the NT. Instead, a patchwork of laws exist, the application of which depends on land tenure and the clearing's purpose. The principal regulatory tools are the *Planning Act 1999* (NT) and the *Pastoral Land Act 1992* (NT), with both containing serious limitations.

Key issues arising from these laws include:

- Inadequate safeguards and standards to protect the environment, including no enforceable mechanisms to address land clearing in relation to critical issues such as climate change and water, and to manage the cumulative impacts of clearing across the landscape;
- Weak governance mechanisms, which undermines accountable and transparent decision-making;
- Ineffective mechanisms to protect high conservation values in the landscape and consider the holistic conservation of biodiversity;
- Poor access to information, public participation and access to justice provisions, undermining the public's ability to properly engage in decision-making and ensure the law is upheld; and
- Weak compliance and enforcement powers.

The weaknesses of the current laws, particularly on pastoral land, are most starkly illustrated by the circumstances of a recent case in the NT Supreme Court, in which the EDO represented the Environment Centre NT to challenge a permit granted to Maryfield Station, southeast of Katherine, to clear more than 20,000 hectares of native vegetation. This was the single largest land clearing permit ever to be issued in the NT and was granted without the proponent being required to undertake an environmental impact assessment (EIA). The estimated greenhouse gas emissions from this permit alone would have been 2-3 million tonnes, about 18.5% of the NT's entire annual emissions.

While the EIA and approval processes of the new *Environment Protection Act 2019* (EP Act)³ may be an improved safeguard for potentially significant land clearing activities, it is uncertain whether it will effectively overcome the many weaknesses of its predecessor, the *Environmental Assessment Act 1982*. This will be largely determined by whether the powers newly available to the Minister for the Environment and NT EPA are appropriately utilised. It is also worth noting that the Commonwealth's *Environment Protection Biodiversity Conservation Act 1999*, a potential safeguard for significant land clearing applications, has never been applied to a land clearing application in the NT, despite the scale of some applications (such as Maryfield).

Finally, the legal framework for biodiversity conservation, which is established through the *Territory Parks and Wildlife Conservation Act 1976* (TPWC Act), is also seriously outdated. It does not set the strategic vision for NT-wide conservation policy, and it does not encourage nor incentivize conservation action on private land, including the pastoral estate. Its mechanisms are largely un-used or only weakly connected with regulatory approval processes, significantly undermining their utility.

³ The EP Act commences on 28 June 2020. The significant weaknesses with the Environmental Assessment Act 1982 have been one of the major reasons why the land clearing framework in the NT has been so poor. No environmental impact assessment process has ever been applied to a land clearing application in the NT.

A new Biodiversity Conservation and Land Management Act

In response to this context, a Biodiversity Conservation and Land Management Act would integrate conservation and land management laws in the NT, setting a coherent approach to respond to the inadequacies with existing land clearing regulation, and the outdated legal framework guiding biodiversity conservation.

A Biodiversity Conservation and Land Management Act⁴ would:

- Be based on **objectives and principles** focused on achieving long term environmental outcomes through conserving biodiversity and sustainable land management in the context of critical issues for the NT, particularly climate change and water;
- Require the Minister to prepare a Territory-wide **Conservation and Land Management Strategy**, with review and public reporting requirements for accountability;
- Establish **comprehensive biodiversity conservation mechanisms** including threatened species and ecosystem listing, recovery planning, and protection for high value areas;
- Create a **bioregional approach to managing land clearing** to respond to cumulative and landscape scale impacts and protect high conservation value vegetation;
- Develop a **risk-based approval process** for land clearing based on the 'avoid, mitigate, offset' hierarchy, under which:
 - Appropriate approval triggers apply (e.g. 100ha of clearing in any two-year period; 100,000t Co2-e/year);
 - High impact activities have the highest assessment and scrutiny;
 - High value areas are not cleared (e.g. essential habitat for endangered species);
 - Approval decisions are underpinned by a scientific assessment method;
 - Self-assessment is available only for low risk activities when expertise is not required;
 - Exemptions are available only for clearly defined and very low risk activities.
- Include arrangements for **independent expert advisory committees** to advise on matters including policy, bioregional planning and approval applications;
- Set a framework for **incentive mechanisms for conservation, restoration and regeneration** on private land including the pastoral estate (such as funding arrangements, partnerships, and legal tools such as covenants and agreements);
- Include strong **compliance and enforcement powers**;
- Provide for **public participation** in decisions, **access to information** through public registers and **access to justice** through the inclusion of broad appeal rights (judicial review and merits appeals).

⁴ This model adopts various elements that were developed in 2012 under a proposal for a *Native Vegetation Management Bill* (NT), which could be drawn on for the development of a new Biodiversity Conservation and Land Management Act.

Interim measures under the new Environment Protection Act

Developing a Biodiversity Conservation and Land Management Act, with appropriate community and stakeholder consultation processes, would take at least two years. In the interim period, important steps would need to be taken to operationalise mechanisms under the EP Act to establish safeguards to mitigate the immediate environmental risks associated with land clearing.

These steps include:

- Developing a **referral trigger** for the Minister to declare (under s 30) land clearing activities that require referral for EIA and environmental approval, based on:
 - an area-based threshold (100 ha in any two-year period);
 - an emissions-based threshold (100,000 tonnes CO₂-e/year);
 - a sensitive values threshold (listed threatened species, national parks and reserves, etc);
- Developing an **interim land clearing assessment method** or guidance document to ensure consistent, rigorous and science-based assessment of land clearing applications (to supersede current guidelines); and
- Establishing a program to **identify and declare 'protected environmental areas'** (under ss 35 and 35) which are not to be cleared (e.g. essential habitat for critically endangered species).

