ANALYSIS OF VEGETATION MANAGEMENT REGULATORY FRAMEWORKS IN AUSTRALIA

WWF TREES SCORECARD 2023: EVIDENCE COLLECTION

July 2023

Environmental Defenders Office

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This report has been commissioned by WWF-Australia to inform its WWF Trees Scorecard 2023.

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Introduction

In 2021, over 100 countries, including Australia, pledged to halt and reverse deforestation and land degradation by 2030 through the *Glasgow Leaders' Declaration on Forests and Land Use* (**Glasgow Declaration**).[1] The Glasgow Declaration includes six key commitments, including to conserve forests and accelerate their restoration; and to reverse forest loss and degradation while ensuring robust policies and systems are in place to accelerate the transition to an economy that is resilient and advances forest, sustainable land use, biodiversity and climate goals.

Eastern Australia is listed as one of twenty-four deforestation fronts globally, alongside the Brazilian Amazon, the Congo Basin and Indonesian Borneo.[2] Australia is the only developed nation on the list. Significant work is needed to overcome Australia's deforestation past and move Australia to a leader on forest conservation and restoration, consistent with its commitments under the Glasgow Declaration.

WWF-Australia is developing a Trees Scorecard designed to benchmark and support Australia's progress towards the goal of the Glasgow Declaration to "halt and reverse forest loss and land degradation by 2030 while delivering sustainable development and promoting an inclusive rural transformation".

Some of the key activities that contribute to forest loss in Australia include land clearing (e.g., for urban expansion, infrastructure and agriculture) and forestry (i.e. timber logging).

WWF-Australia has commissioned EDO to undertake an analysis of legal frameworks across Australia that regulate land clearing. EDO's analysis will inform WWF-Australia's technical assessment and scoring that underpins the Trees Scorecard.

For each jurisdiction, WWF-Australia asked EDO to consider, broadly:

1. **Government commitments to end broadscale land clearing in line with the Glasgow Declaration:** What commitment has the government made, if any, to reduce or end land clearing by 2030? Does the government have a costed plan to end deforestation, and has this been funded (or enables private investment in such as markets)?

2. **Strengths and weaknesses of land clearing regulation that may be contributing to clearing rates**, including consideration of exemptions, code-based clearing, clearing requiring approval, protection of environmentally sensitive areas and offsets.

3. **Compliance and enforcement**, including effectiveness of regulatory oversight, strength of compliance and enforcement framework, opportunities for third party enforcement and transparency of information relating to enforcement and compliance.

To address these questions, EDO has undertaken a detailed analysis of current laws and government policy across all Australian jurisdictions.

This is a point-in-time analysis, finalised in May 2023.

[1] See https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/.
[2] Pacheco, P., Mo, K., Dudley, N., Shapiro, A., Aguilar-Amuchastegui, N., Ling, P.Y., Anderson, C. and Marx, A. 2021. Deforestation fronts: Drivers and responses in a changing world. WWF, Gland, Switzerland.

Australian Capital Territory

Australian Capital Territory

Background

The ACT Government has not made any explicit commitment to end land clearing by 2030.

The ACT is unique, in that approximately 55% of its land area is managed in reserves, with specific restrictions on clearing vegetation. However, much of the lowland areas do not fall within reserves and comprise critically endangered Natural Temperate Grassland and Blakely's Red Gum-Yellow Box Grassy Woodland.

The ACT Government has also set specific commitments and goals for protecting native vegetation and trees in various policy documents. For example:

- Outcome 1 of the *ACT Nature Conservation Strategy 2013-23* is to maintain and improve native vegetation and biodiversity.
- Objective 1 of the *Urban Forest Strategy 2021-2045* is to 'protect the urban forest'.
- One of the key objectives of the ACT Native Woodland Conservation Strategy and Action Plans is to retain and protect native woodlands.

A number of legislative reforms are currently on foot, including:

- A new Urban Forest Act (anticipated to commence in January 2024) to implement the Urban Forest Strategy; and
- Changes to the planning system.

Our analysis of the current and proposed regulatory frameworks shows there are clear opportunities to strengthen the regulatory framework.

Government commitments to end broadscale land clearing in line with the Glasgow Declaration

Commitment

The ACT Government has not made any explicit time bound commitment to end or reduce land clearing by 2030.

It has however, set specific commitments and goals for protecting native vegetation and trees in various policy documents. For example:

- Outcome 1 of the *ACT Nature Conservation Strategy 2013-23* is to maintain and improve native vegetation and biodiversity.
- Objective 1 of the *Urban Forest Strategy 2021-2045* is to 'protect the urban forest'.
- One of the key objectives of the *ACT Native Woodland Conservation Strategy* is to retain and protect native woodlands.

In this section we outline:

- Public commitments and statements;
- Legislative objectives; and
- Policy documents.

Public commitments and statements

The ACT Government has not made any public commitments and/or statements to reduce or end land clearing by 2030.

Legislative objectives

Unlike other jurisdictions, the ACT does not have any clear, standalone legislation or policy that regulates land clearing. Rather, land clearing is regulated across various legislative schemes, including:

- *Nature Conservation Act 2014* (ACT) (**NC Act**)

The NC Act aims to protect, conserve, and enhance the biodiversity of the ACT. This includes protecting native plants and habitats, ecological communities, ecosystems and landscapes of natural significance (e.g. reserves).[3] Notably the NC Act establishes reserve areas, where, subject to various exemptions, native vegetation clearing is not permitted.[4] A large proportion of the ACT's land is dedicated to reserve areas,[5] which by practical implication suggests a commitment to reducing land clearing.

- *Planning and Development Act 2007* (ACT) (**PD Act**)*/Planning Bill 2022* (ACT) (**Planning Bill**)

The Planning Bill is anticipated to replace the PD Act in 2023 and will regulate land clearing associated with development. The objects of the Planning Bill are 'to support and enhance the Territory's liveability and prosperity, and promote the well-being of residents by creating an effective, efficient, accessible, and enabling planning system that-

(a) is outcomes-focussed; and
(b) promotes and facilitates the achievement of ecologically sustainable development that is consistent with planning strategies and policies; and
(c) provides a scheme for community participation.'[6]

The extent to which the proposed objectives of the Planning Bill will facilitate a reduction in land clearing appears to be, at least partly, dependent on planning strategies and policies.

[3] *Nature Conservation Act 2014* (ACT) s 6.
[4] *Nature Conservation Act 2014* (ACT) Part 9.4.
[5] See, for example, ACT Government, *ACT Nature Conservation Strategy 2013-23 Implementation Plan Two (2019-23)* (2019) 25 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0009/1428363/ACT-Nature-Conservation-Strategy-Implementation-Plan-2-201923.pdf; see also ACT Government, *ACT Environmental Offsets: Draft Guidelines* available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0003/607053/Environmental-offsets-Guidelines-for-consultation.pdf.
[6] *Planning Bill 2022* (ACT) s 7.

- *Urban Forest Act 2023* (ACT) (**Urban Forest Act**)/*Tree Protection Act 2005* (ACT) (**TP Act**)

The Urban Forest Act was passed by the ACT Government on 30 March 2023 and is expected to commence in January 2024.[7] It has the following objectives:

a) to support a resilient and sustainable urban forest that contributes to community wellbeing in a changing climate; and
b) to protect and enhance the urban forest by recognising its value, including its cultural and heritage value; and
c) to contribute to biodiversity in urban areas; and
d) to support a target of the tree canopy covering 30% of the Territory's urban areas.

These objects improve on the objects of the current TP Act which will be repealed on commencement of the Urban Forest Act. [8]

Policy documents

The ACT Government's key strategies relevant to land clearing recognise that land clearing is a threat to nature conservation and commit to maintaining certain types of vegetation.[9] The strategies do not, otherwise, explicitly commit to reducing land clearing.

- *ACT Planning Strategy 2018*

The *ACT Planning Strategy 2018* contains commitments to maintain native vegetation. It aims to protect high value ecological areas by supporting a buffer zone between urban areas and adjoining land uses in NSW and sets the development target of 70% of development to occur within the existing urban footprint of Canberra.[10]

- *Draft Territory Plan and District Strategies*

In conjunction with the development of the Planning Bill, the ACT Government has developed a draft new Territory Plan and Draft District Strategies.[11] These documents will also provide guidance of the development of the ACT, including strategies to identify and maintain environmental values in the ACT.

[7] https://www.legislation.act.gov.au/a/2023-14/.
[8] The objects of the *Tree Protection Act 2005* include:
- to protect individual trees in the urban area that have exceptional qualities because of their natural and cultural heritage values or their contribution to the urban landscape; and
- to protect urban forest values that may be at risk because of unnecessary loss or degradation.

[9] As most land clearing in the ACT is associated with urban development, the *ACT Planning Strategy*, Draft Territory Plan and District Strategies are important documents for understanding land clearing in ACT. See also ACT Government, *ACT Nature Conservation Strategy 2013-23 Implementation Plan Two (2019-23)* (2019) 25 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0009/1428363/ACT-Nature-Conservation-Strategy-Implementation-Plan-2-201923.pdf.
[10] ACT Government, *ACT Planning Strategy 2018* (2018) available at: https://www.planning.act.gov.au/__data/assets/pdf_file/0007/1285972/2018-ACT-Planning-Strategy.pdf.
[11] See https://www.planning.act.gov.au/planning-our-city/planning-projects/act-planning-system-review-and-reform.

- *ACT Nature Conservation Strategy 2013-23*

The *ACT Nature Conservation Strategy 2013-23,* established under the NC Act, states that land clearing is one of the most critical threats to biodiversity to be addressed.[12] The Strategy makes some commitment to maintaining native vegetation. Outcome 1 of the Strategy is to maintain and improve native vegetation and biodiversity. The targets of Outcome 1 include to maintain and improve the overall extent of lowland native vegetation across the ACT and to measurably increase connectivity between patches of native vegetation. We note that the Strategy is to be reviewed towards the end of its ten-year life (in 2023) and its review may present an opportunity for the ACT Government to commit to end or significantly reduce land clearing. As far as we are aware, no indication has been made as to when the review will commence.

- *Draft Action Plan to Prevent the Loss of Mature Native Trees*

The ACT Government has also committed to protecting existing mature trees and young native trees in the *Draft Action Plan to Prevent the Loss of Mature Native Trees* (**Draft Mature Trees Action Plan**). The Plan notes that '[o]ptions to prevent mortality [of mature native trees in agricultural areas] pertain strongly to restricting land clearing, which should be implemented wherever possible.'[13]

- *Urban Forest Strategy 2021–2045*

The ACT's *Urban Forest Strategy 2021-2045* (**Urban Forest Strategy**) sets out the ACT Government's vision for a resilient and sustainable urban forest that supports a liveable city and the natural environment.[14] Objective 1 of the Urban Forest Strategy is to 'protect the urban forest'.

- *ACT Native Woodland Conservation Strategy*

The *ACT Native Woodland Conservation Strategy* (**Native Woodland Strategy**) aims to protect, maintain and improve native upland and lowland woodland in the ACT.[15] These woodlands cover an area of over 79,000 hectares. The strategy includes a key objective to 'retain and protect native woodlands'.

Costed plan to end deforestation

There is no costed plan to end deforestation, rather there is funding and investment towards revegetation and restoration efforts. The following discussion considers:

- Money connected to public commitments; and
- Money connected to legislation.

[12] ACT Government, *ACT Nature Conservation Strategy 2013-23* (2013) 19 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0004/576184/ACT-Nature-Conservation-Strategy_web.pdf.
[13] ACT Government, *Loss of Mature Native Trees Key Threatening Process: Draft Action Plan* (Action Plan, 2021) 13, 24 available at: https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/2216/4809/4291/Att_A_-_Loss_of_Mature_Native_Trees_Draft_Action_Plan.pdf.
[14] ACT Government, *Urban Forest Strategy 2021-2045* (2021) available at https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/5616/1710/4101/Urban_Forest_Strategy_2021-2045.pdf.
[15] ACT Government, *ACT Native Woodland Conservation Strategy and Action Plans* (2019) available at https://www.environment.act.gov.au/__data/assets/pdf_file/0003/1444098/Woodland-Conservation-Strategy.pdf.

Money connected to public commitments

Limited funds are connected to the ACT Government's public commitments. The ACT Government has made a budget promise of $14.5 million towards boosting the ACT's tree canopy to 30% which requires planting at least 54,000 trees by 2024, which is a target under the Urban Forest Strategy.[16]

Money connected to legislation

Funding for land restoration is more directly linked to the *ACT Nature Conservation Strategy 2013-23* and the ACT Natural Resources Management Investment Plan than legislation.

The ACT Government provides some funding to support the revegetation and rehabilitation of land through the Environmental Grants Program, which funds community projects that are consistent with the delivery of the *ACT Nature Conservation Strategy 2013-23.* For example, in 2021-22, the ACT Environment Grants Program provided $308,856 to 20 projects, two of which involved woodlands revegetation, one involved the planting of native trees and shrubs and one involved the rehabilitation of native understory.[17]

The ACT Natural Resources Management (**NRM**), an organisation under the Australian Government's National Landcare Program, provides funding to projects under the NRM Investment Plan. There are three main themes under the Investment Plan, namely Biodiversity, Sustainable Agriculture and Aboriginal NRM. The Biodiversity Investment Plan lists woodlands, grasslands, alpine bogs and riparian corridors as high priority areas due to their conservation values. One project under the Biodiversity Investment Plan commits up to $1.5 million over the next 5 years to undertake 900ha of on-ground works, which include re-vegetation, in Box Gum Woodland.[18] The Sustainable Agriculture Investment Plan supports rural landholders to apply best practice land management, including in relation to native vegetation. Investment towards native vegetation on farms focuses on capacity building and incentives or on-ground work, trials and demonstration projects. There is limited guidance on the amount of funding committed under the Investment Plan.[19]

[16] Media Release, *ACT Budget: More trees to be planted in CBR*, September 2021, available at https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2021/act-budget-more-trees-to-be-planted-in-cbr.

[17] Environment, Planning and Sustainable Development Directorate, *Annual Report 2021-22,* 113 available at: https://www.planning.act.gov.au/__data/assets/pdf_file/0004/2083729/2021-22-EPSDD-Annual-Report.pdf.

[18] ACT Government, Environment, Planning and Sustainable Development Directorate – Environment, 'Protecting and Connecting Endangered Woodlands in the ACT' available at: https://www.environment.act.gov.au/act-nrm/biodiversity/woodlands/current-projects.

[19] ACT Government, Environment, Planning and Sustainable Development Directorate – Environment, 'Investment Plan' available at: https://www.environment.act.gov.au/act-nrm/investment-plan.

Strengths and weaknesses of land clearing regulation

Overview

Land clearing in the ACT is indirectly regulated by a range of legislative schemes:

- The *Nature Conservation Act 2014* (ACT) (**NC ACT**) has specific provisions regulating the clearing of native vegetation on reserved public land.

- Clearing associated with development is currently regulated under the *Planning and Development Act 2007* (**PD Act**), however new planning rules, set out in the *Planning Bill 2022* (ACT) (**Planning Bill**) are expected to commence in 2023.

- Tree clearing in urban areas is currently regulated under the *Tree Protection Act 2005* (ACT) (**TP Act**), however this Act is intended to be replaced by the *Urban Forest Act 2023* (ACT) (**Urban Forest Act**), which passed the ACT Parliament on 30 March 2023, and is expected to commence in January 2024.

Each of these frameworks is outlined in more detail below.

NC Act

The NC Act includes provisions for the protection of native plants and animals and the reservation and management of public land for conservation. It has specific provisions aimed at regulating the clearing of native vegetation, for example:

- The NC Act provides for management agreements between agencies and the Conservator for a range of purposes including the protection of native vegetation on public land or unleased territory land.[20]

- Clearing of native vegetation in a reserve area is generally an offence under the NC Act.[21] A reserve area is defined as a wilderness area, national park, nature reserve or catchment area and any other area of public land that is reserved in the Territory Plan and prescribed by regulation to be a reserve.[22] It is not an offence, however, to conduct vegetation clearing in a reserve area where a Chapter 9 exception applies, including, for example, where a person is authorised to conduct vegetation clearing under a development approval issued under the PD Act.[23] The Chapter 9 exceptions relate to activities that generally require some form of approval process.

[20] *Nature Conservation Act 2014* (ACT) s 310.
[21] *Nature Conservation Act 2014* (ACT) ss 236-238.
[22] A reserve is defined in the *Nature Conservation Act 2014* (ACT) at s169.
[23] *Nature Conservation Act 2014* (ACT) s 252(2)(b)(iii).

- It is also an offence under the NC Act to take protected plants or to fell native timber unless a relevant person is authorised to do so under a development approval under the PD Act or another exemption applies.[24]

PD Act/Planning Bill

Clearing associated with development is regulated under the PD Act, which is currently proposed to be repealed by the Planning Bill, which is expected to commence in 2023.

The PD Act broadly requires proponents to lodge a development application and environmental impact statement (**EIS**) under s 127 for proposals that fall within the "impact track."

Developments will fall within the "impact track" if they involve the clearing of over 0.5ha of native vegetation outside of areas that are designated as future urban areas and the clearing of more than 5ha inside designated future urban areas.[25] An EIS is required for clearing native vegetation under the Planning Bill in the same circumstances as the PD Act.[26]

An EIS is not required, however, under both the PD Act and Planning Bill, where an environmental significance opinion is provided by the Conservator indicating the proposal is not likely to have an adverse environmental impact.[27] We also note that under the PD Act, an EIS is not required if the proponent is exempted from providing one,[28] however this exemption process has been removed in the Planning Bill.

The NC Act interacts with the PD Act/Planning Bill in circumstances where the Conservator provides advice to the planning and land authority (or Minister under the PD Act or the territory planning authority under the Planning Bill) which oversees the development application process. These circumstances include:

- *Significant adverse environmental impact on a protected matter*

Under s 147A of the PD Act (s 168(1)(c) of the Planning Bill), if the ACT Planning and Land Authority (**ACTPLA**) (the territory planning authority under the Planning Bill) is satisfied a proposed development is likely to have a significant adverse environmental impact on a protected matter, they must refer the development application to the Conservator who is to provide an assessment of whether the proposed development is likely to have a significant adverse environmental impact on a protected matter.[29] If the proposed development is likely to have a significant adverse environmental impact on a protected matter, under the PD Act development approval must not be given if it is inconsistent with the Conservator's advice.[30] However, under both the PD Act and under the Planning Bill the Minister or Chief Planner or Minister, may act inconsistently with the Conservator's advice (that is otherwise referred in

[24] *Nature Conservation Act 2014* (ACT) ss 139-146.
[25] *Planning and Development Act 2007* (ACT) s 123(b); See Sch 4, Pt 4.3, item 2.
[26] *Planning Bill 2022* (ACT), s103(2); *Planning (General) Regulation 2022* s 8, Sch 1, Pt 1.2, item 17.
[27] *Planning and Development Act 2007* (ACT) s 138AA; *Planning Bill 2022* (ACT) s 136(1).
[28] *Planning and Development Act 2007* (ACT) s 211H.
[29] The Conservator's advice must comply with the requirements of ss 317-318 of the NC Act.
[30] *Planning and Development Act 2007* (ACT) s 128(1)(b)(vi), 128(2).

relation to a protected matter) if the approval is consistent with the *ACT Environmental Offsets Policy* and the approval would provide substantial public benefit.[31]

Protected matter is defined to include matters:

- protected by the Commonwealth,[32] which includes nationally-listed threatened species and ecological communities. [33] In relation to matters protected by the Commonwealth, 'Significant Impact Guidelines— Matters of National Environmental Significance' (**Commonwealth Significant Impact Guidelines**) indicate that vegetation clearing that results in the fragmentation of an ecological community is a relevant consideration to whether a proposed development will have a significant impact to critically endangered or endangered ecological communities.[34]
- declared as such by the Minister for Planning.[35] In relation to protected matters declared by the Minister, the PD Act provides the Minister with a broad discretion to declare a matter as a 'protected matter' and there is limited guidance as to when this power would be used by the Minister, if at all, to protect native vegetation. Additionally, the current declaration made by the Minister protects a limited number of species - see *Planning and Development (Protected Matters) Declaration 2015* (ACT).

Notably, 'protected matter' doesn't include species/ecological communities that are protected under the NC Act.

A significant adverse environmental impact is defined under s 124A(1) as where:

- the environmental function, system, value or entity that might be adversely impacted by a proposed development is significant; or
- the cumulative or incremental effect of a proposed development might contribute to a substantial adverse impact on an environmental function, system, value or entity.

In deciding whether an adverse environmental impact is significant, the following matters must be taken into account:

- the kind, size, frequency, intensity, scope and length of time of the impact; and
- the sensitivity, resilience and rarity of the environmental function, system, value or entity likely to be affected.[36]

The Planning Bill adopts the same definitions for protected matter and significant adverse environmental impact as the PD Act.[37]

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[31] *Planning and Development Act 2007* (ACT) s 128(2); *Planning Bill 2022* (ACT) s187(2).
[32] *Planning and Development Act 2007* (ACT) s 111A(1)(a).
[33] *Planning and Development Act 2007* (ACT) s 111B.
[34] Australian Government Department of the Environment, *Matters of National Environmental Significance: Significant impact guidelines 1.1,* 11 available at: https://www.dcceew.gov.au/sites/default/files/documents/nes-guidelines_1.pdf.
[35] *Planning and Development Act 2007* (ACT) s 111A.
[36] *Planning and Development Act 2007* (ACT) s 124A(2); *Planning Bill 2022* (ACT s 102(2).
[37] See *Planning Bill 2022* (ACT) ss 217-218.

- *"Impact track"*

The planning and land authority is also required under s 148 of the PD Act to refer certain developments that fall within the "impact track" to the Conservator to provide advice about the adverse environmental impacts of the proposed development under ss 316-8 of the NC Act.[38]

Development approval must not be given for a development proposal in the impact track if it would be inconsistent with the advice given by the Conservator where a referral has been made, unless the decision-maker is satisfied that:

- applicable guidelines, reasonable development options and design solutions, any realistic alternative to the proposed development or relevant aspect of it have been considered; and
- the decision is consistent with the Territory Plan.[39]

The Minister, therefore, has a broader discretion to not accept the Conservator's advice where that advice is provided in relation to a development in the impact track, but is not a development that will likely have a significant adverse environmental impact on a protected matter.

The Planning Bill appears to further diminish the significance of the Conservator's advice and broadens a decision-maker's power to approve development. Under the proposed provisions of the Planning Bill, a decision-maker may approve a development that is contrary to the Conservator's advice if:

- the proposal or project does not involve a protected matter;
- the decision-maker has considered desired outcomes applying to the proposal under the Territory Plan;
- for a proposal or project requiring an EIS, the decision-maker has considered any reasonable alternative development options; and
- the decision-maker is satisfied that acting contrary to the advice will significantly improve the planning outcome to be achieved.[40]

Where a development application is referred to the Conservator, the advice must include:

- an outline of the environmental impacts of the proposed development;
- advice on how to avoid or minimise these impacts; and
- an assessment of whether the proposed development is likely to have a significant adverse environmental impact on a protected matter, and if so, suitable offsets for the proposed development.[41]

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[38] See *Planning and Development Regulation 2008* (ACT), s 26(1)(c). We note that the *Planning and Development Act 2007* (ACT) provides an exception to the referral at s 148(2) where the planning and land authority is satisfied that the applicant has adequately consulted the entity in relation to the application not earlier than 6 months before the day the application is made and the relevant entity, such as the Conservator, agrees in writing to the proposed development.
[39] *Planning and Development Act 2007* (ACT) s 128(4).
[40] *Planning Bill 2022* (ACT) s 187(1).
[41] *Nature Conservation Act 2014* (ACT) s 318(2).

In preparing the advice, the Conservator must consider the Commonwealth Significant Impact Guidelines and the *ACT Environmental Offsets Policy*, and may consider any other guidelines, plan or policy published by the ACT or Commonwealth governments about protected matters or matters of national environmental significance.[42] The Commonwealth Significant Impact Guidelines relevantly provide that clearing is likely to have a significant impact on a critically endangered or endangered species if there is a real chance or possibility that it will fragment or increase fragmentation of an ecological community.[43]

TP Act and Urban Forest Act

Clearing in urban areas is regulated under the TP Act. The TP Act contains provisions for:

- establishment of a register of significant trees with appropriate levels of protection;[44]
- approval requirements for tree damaging activities;[45]
- approval requirements for groundwork activities within the tree protection zone of a protected tree;[46]
- approval requirements for tree management plans;[47]
- offences and enforcement provisions;[48]
- ability for the Conservator to make directions with regard to tree protection matters (the Conservator is established under the NC Act);[49] and
- establishment of a Tree Advisory Panel.[50]

The TP Act defines two types of "protected trees":[51]

- Registered trees – a tree that is registered;[52]
- Regulated trees – a tree (other than a registered tree or a palm tree) that is on leased land within a tree management precinct that: [53]
    - is 12 metres tall; or

[42] *Nature Conservation Act 2014* (ACT) s 318(3).
[43] Australian Government Department of the Environment, *Matters of National Environmental Significance: Significant impact guidelines 1.1,* 11 available at: https://www.dcceew.gov.au/sites/default/files/documents/nes-guidelines_1.pdf.
[44] *Tree Protection Act 2005* (ACT) s 41.
[45] *Tree Protection Act 2005* (ACT) s 22(a).
[46] *Tree Protection Act 2005* (ACT) s 22(b).
[47] *Tree Protection Act 2005* (ACT) s 32.
[48] *Tree Protection Act 2005* (ACT) ss 15, 16, 17, 18, 20, Part 12.
[49] *Tree Protection Act 2005* (ACT) s 76.
[50] *Tree Protection Act 2005* (ACT) s 68.
[51] *Tree Protection Act 2005* (ACT) s 68.
[52] *Tree Protection Act 2005* (ACT) s 9.
[53] *Tree Protection Act 2005* (ACT) s 10.

- has a trunk circumstance of 1.5 metres or more, one metre above the ground; or
- has two or more trunks and the sum of their total circumference at 1 metre above the ground is 1.5 metres or more; or
- with a canopy 12 metres or more wide

The authority for registration, approvals and the issuing of tree protection directions is the Conservator, who is supported by the Tree Advisory Panel.[54]

The TP Act is due to be repealed by the Urban Forest Act. The Urban Forest Act will continue to provide a legislative framework for managing trees on private and public land, and includes an objective to 'support a target of the tree canopy covering 30% of the Territory's urban areas'. This target was set out in the Urban Forest Strategy, ACT Climate Change Strategy 2019-2045 and the Living Infrastructure Plan. The Urban Forest Act also seeks to strengthen and improve the management of the ACT's urban forest.

The Urban Forest Act seeks to protect trees on private and public land in the ACT under a single piece of legislation, recognising the important role trees play for the community and in combatting the impacts of climate change. The Urban Forest Act introduces several new elements, including: [55]

- an updated definition of protected trees including new size requirements for protected trees;
- the inclusion of trees on public land;
- the introduction of a canopy contribution framework; and
- tree bonds and an updated compliance framework.

The updated definition of protected trees will extend legal protections to an increased number of regulated trees (being trees which meet minimum size requirements on leased land) and to registered and remnant trees in future urban areas. The Urban Forest Act will also extend legislative protection to all public trees, regardless of their size,[56] which previously received limited protections under the *Public Unleased Land Act 2013* (ACT).

More trees on private land will be regulated, with all trees that are either more than 8 metres tall, have a canopy over 8 metres wide, or have a trunk circumference of more than 1.4m proposed to be covered by the Urban Forest Act (down from 12 metres tall, or with a canopy 12 metres wide in the TP Act).[57]

[54] Michelle Lensink, 'Tree protection laws in Australian states and territories' (2012) TREENET https://treenet.org/wp-content/uploads/2017/06/Urban-Trees_Lensink.pdf.
[55] Explanatory Statement and Human Rights Compatibility Statement, Urban Forest Bill 2022 (ACT).
[56] *Urban Forest Act 2023* (ACT) s 9.
[57] ACT Government, 'New laws to protect Canberra's trees from development for future generations' (3 August 2022) https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/chris-steel-mla-media-releases/2022/new-laws-to-protect-canberras-trees-from-development-for-future-generations.

We note that Conservation Council ACT Region's submission to the Inquiry into the Urban Forests Bill[58] made a number of key suggestions for strengthening the Bill, including:

- Construe the urban forest within the wider landscape context.
- Strengthen criteria for protected trees and provide resourcing to support business transition to this model.
- Strengthen protections for Mature Native Trees.
- Ensure that protected tree criteria and canopy contribution schemes are consistent with ecological understanding.

Other legislation

Other legislation and legislative schemes relevant to land clearing in the ACT include the:

- *Environment Protection Act 2014* (ACT) (**EP Act**), which aims to protect and enhance the quality of the environment, prevent environmental degradation and risk of harm to human health.
- *Heritage Act 2004* (ACT), which protects Aboriginal places and objects with cultural significance.
- *Trespass on Territory Land Act 1932*, s 7 of which prohibits damaging trees, plants, gardens, plantations or afforestation areas on unleased ACT land without a 'reasonable excuse'.
- *ACT Environmental Offsets Policy,* which is discussed further below.

Exemptions

NC Act

Overview:

There are no 'exemptions' under the NC Act in the general sense of the term (i.e., land clearing that does not require approval).

The NC Act does however refer to 'exceptions'[59] which are defences to the range of offences for clearing vegetation found in sections 236-238 of the NC Act (and offences for damaging land in sections 245-247 of the NC Act). These exceptions include clearing undertaken in accordance with a management plan, controlled native species management plan, cultural resource management plans, nature conservation license, bushfire management plans, development approval under the PD Act, a public unleased land permit, or a license under the PD Act.

[58] Conservation Council ACT Region, *Submission to the Inquiry into Urban Forest Bill 2022*, October 2022, available at https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/2085141/13-The-Conservation-Council-ACT-Region.pdf.
[59] *Nature Conservation Act 2014* (ACT) s 252.

Analysis:

These exceptions to the offence of clearing native vegetation in reserve areas generally require an approval or permit under a separate regulatory framework and are not 'exemptions' (i.e., clearing that does not require approval).

PD Act/Planning Bill

Overview:

Under the PD Act, certain development is exempt from requiring a development approval.[60] Developments that are exempt are outlined in schedule 1 of the *Planning Regulations 2008* (ACT). Notably it includes certain developments that have specific requirements for native vegetation including development on a rural lease if the development does not result in clearing of more than 0.5ha of native vegetation,[61] some public works carried out by the ACT Government,[62] and waterway protection works carried out by the ACT Government.[63] The Planning Bill retains the same exempt development categories relevant to clearing.[64] We understand that the Planning Bill also proposes new provisions that allow a person to apply to a works assessor or building surveyor (the ***exemption assessor***) for an assessment of whether a development is an exempt development.[65]

Analysis:

Exempt development is a common feature of planning systems in general. It is notable that there are specific restrictions limiting clearing in the case of certain exemptions – presumably those that, by their nature, are most likely to have more significant vegetation. As is the case with all exempt development, it is up to the proponent to determine whether their development is exempt from requiring a DA. There is no government oversight of this process. However, we note that under the Planning Bill, proponents can ask for guidance from the planning authority (see s 162 and s 163) and can also apply for exemption assessment via a private assessor (s 149), but again the onus is on developers to pursue this. Another key issue, which is not different in the ACT is the lack of effective monitoring and enforcement of development, which means there is a risk of development that should have been subject to a DA slipping through the cracks.

TP Act/Urban Forest Act

Overview:

The TP Act permits minor pruning of registered and regulated trees without an approval. [66] The TP Act also allows for urgent approval to be given by the Conservator if the circumstances require the

[60] *Planning and Development Act 2007* (ACT) ss 133 - 135.
[61] *Planning Regulations 2008* (ACT) Sch 1, s 1.85(2).
[62] *Planning Regulations 2008* (ACT) Sch 1, s 1.90.
[63] *Planning Regulations 2008* (ACT) Sch 1, s 1.93.
[64] *Planning Bill 2022* (ACT) cl 143 - 145, 148; *Planning (Exempt) Regulations 2022* (ACT) Sch 1, ss 1.68, 1.70, 1.74.
[65] *Planning Bill 2022* (ACT) cl 149.
[66] *Tree Protection Act 2005* (ACT) s 13(2).

application to be considered urgently; and the activity is necessary to protect the health or safety of people or animals, or public or private property.[67]

The Urban Forest Act retains the above provisions. It also permits any cultural heritage practice undertaken in relation to a protected tree.[68] It will also permit protected trees to be damaged and prohibited groundwork to be undertaken if carried out by an administrative unit authorised by the Minister.[69]

Analysis:

Beyond general concerns about exempt development (per analysis above), we have not identified any specific concerns about the exemptions in the TP Act or Urban Forest Act.

Code-based clearing / Self-assessable clearing

PD Act/Planning Bill

Overview:

Under the PD Act, development may fall into the 'code track' (see Division 7.2.2.) but still requires development approval.

Analysis:

Because approval must be given if development falls within the code track, rather than the code being 'self-assessed,' there is some level of oversight to the clearing.

NC Act; TP Act and Urban Forest Act

There is no pathway for self-assessable or code-based clearing under the NC Act or the TP Act and Urban Forest Act.

Clearing Requiring Approval

NC Act

The NC Act itself does not contain an assessment and approval process for the clearing of vegetation. As noted above, vegetation clearing in a reserve area can occur where a person is authorised to conduct vegetation clearing in accordance with an approval issued under a separate framework, including for example, a development approval issued under the PD Act.[70]

[67] *Tree Protection Act 2005* (ACT) s 29(3).
[68] *Urban Forest Act 2023* (ACT) s 14(2)(b).
[69] *Urban Forest Act 2023* (ACT) s 19.
[70] *Nature Conservation Act 2014* (ACT) s 252(2)(b)(iii).

PD Act/Planning Bill

Overview:

As stated above, the PD Act and the Planning Bill broadly require a proponent to lodge a development application and EIS for proposals that involve the clearing of:

- over 0.5ha of native vegetation outside of areas that are designated as future urban areas; and
- more than 5ha inside designated future urban areas.[71]

A development proposal and EIS is also required for development that is likely to have a significant adverse environmental impact on specified categories of threatened species, ecological communities and Ramsar wetlands and other protected matters, (unless the Conservator provides an environmental significance opinion indicating that the proposal is not likely to have a significant adverse environmental impact).[72]

The Planning Bill introduces 'pre-decision advice' that the territory planning authority may give to a proponent at any time before the authority decides on the application to indicate whether the application meets the requirements of the Territory Plan. The proponent then has the opportunity to amend the application according to the advice.[73] The pre-decision advice must be published on the planning authority's website.[74]

The PD Act and the Planning Bill both require the relevant authority to give public notice of a development application and must make the draft EIS publicly available for public consultation.[75]

The PD Act provides a public consultation period for a draft EIS; 35 working days if it is a concurrent development application[76] and in any other case, not less than 20 working days (or for the period it is extended under s 219(3)).[77] The Planning Bill provides a public consultation period of 20 working days.[78]

Under s 127(3) of the PD Act, an EIS may not be required if an EIS exemption is in force, or an EIS exemption application accompanies the development application. The PD Act enables proponents to seek an exemption to the requirement to provide an EIS where a recent study (meaning a study no more than 5 years old[79]), has already addressed the expected environmental impact of a development proposal, whether or not the recent study relates to the particular development proposal.[80] The approval process for an EIS exemption is similar to a draft EIS, requiring public notification and consultation.[81] We note that EIS exemptions are to be removed under the Planning Bill.

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[71] *Planning and Development Act 2007* (ACT), s 123(b); See sch 4, pt 4.3, item 2; *Planning Bill 2022* (ACT), s103(2); *Planning (General) Regulation 2022* s 8, Sch 1, Pt 1.2, item 17.
[72] *Planning and Development Act 2007* (ACT), Sch 4, Pt 4.3.
[73] *Planning Bill 2022* (ACT) s 179.
[74] *Planning Bill 2022* (ACT) s 179(5).
[75] *Planning and Development Act 2007* (ACT) ss 130, 217, 219; *Planning Bill 2022* (ACT) ss 173, 112.
[76] *Planning and Development Act 2007* (ACT) ss 147AA, 218(a).
[77] *Planning and Development Act 2007* (ACT) s 218(b).
[78] *Planning Bill 2022* (ACT) s 112(a)(iii).
[79] *Planning and Development Act 2007* (ACT) s 211A
[80] *Planning and Development Act 2007* (ACT) s 211B.
[81] *Planning and Development Act 2007* (ACT), Part 8.2, Div 8.2.1.

As stated above, the Conservator is to provide advice when a development proposal is likely to have a significant adverse environmental impact. However, both the PD Act and the Planning Bill permit the Minister, or the Chief Planner or Minister, to approve proposed development that is inconsistent with the Conservator's advice, even when the development is likely to have a significant adverse environmental impact on a protected matter. However, to do this, the decision-maker must be satisfied that the outcome is consistent with the *ACT Environmental Offsets Policy* and would provide a substantial public benefit.[82]

Under the PD Act, the Minister also has a 'call in' power where they can direct the ACTPLA to refer a development application to the Minister for consideration, and potentially for decision.[83] This power is exempt from ACAT review,[84] and there is limited time for judicial review.[85] Under the Planning Bill, this power is called the 'Territory Priority Project' declaration power and allows the Chief Minister and Minister to jointly declare a development proposal as a Territory Priority Project under certain circumstances.[86] The key difference under the Planning Bill is a declaration that a project is a Territory Priority Project must be made before the development application for the proposal is lodged[87] and, once declared as such, must be decided by the Minister.[88] The decisions under the Planning Bill remain exempt from third party ACAT appeal,[89] and the time frame for judicial review is limited.[90]

When deciding a development application, the decision-maker under both the PD Act and the Planning Bill must take into account 'the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts.'[91]

Under both the PD Act and the Planning Bill, third parties can only seek merits review of a decision in a limited number of circumstances.[92]

Analysis:

Overall, under both the PD Act and the Planning Bill, there are limited requirements for decision-makers to provide reasons for their decisions when approving development applications and an EIS, and limited opportunities for public participation in the decision-making process. This undermines transparency and accountability, as well as important public participation principles.

Whilst it is positive that the PD Act and the Planning Bill both make provision for the giving of notice of a development application, and public consultation opportunities on a publicly available EIS, EDO has raised concerns over whether the timeframes are sufficient, particularly when EIS' are very lengthy and

[82] *Planning and Development Act 2007* (ACT) s 128(2); *Planning Bill 2022* (ACT) s 187(2).
[83] *Planning and Development Act 2007* (ACT) s 158-161.
[84] *Planning and Development Act 2007* (ACT) s 407 and Schedule 1.
[85] *Planning and Development Act 2007* (ACT) s 410.
[86] *Planning Bill 2022* (ACT) s 215.
[87] *Planning Bill 2022* (ACT) s 215(3).
[88] *Planning Bill 2022* (ACT) s 182(3).
[89] *Planning Bill 2022* (ACT) Schedule 7, Part 7.2, item 1.
[90] *Planning Bill 2022* (ACT) s 216.
[91] *Planning and Development Act 2007* (ACT) s 129(h); *Planning Bill 2022* s 183(e).
[92] *Planning and Development Act 2007* (ACT) Sch 1; *Planning Bill 2022* (ACT) s 503, Sch 6.

technically complex documents.[93] In this regard, the Office of Best Practice Regulation within the Commonwealth Department of Prime Minister and Cabinet recommends that, in general, and depending on the significance of the proposal, a public consultation period of between 30 to 60 calendar days is usually appropriate for effective consultation, and that 30 days is considered the minimum appropriate period.[94] The 20 day time period retained in the Planning Bill would also appear to be at odds with one of its objectives to 'provide a scheme for community participation', given that 20 days is not likely to give the community sufficient time to meaningfully engage with the process.

Whilst it is positive that the EIS exemptions are to be removed from the Planning Bill, it still permits 'recent' studies to be included in a draft EIS.[95] This, alongside the fact that the Planning Bill generally appears to simplify the EIS process, may in turn result in a less rigorous process and may reduce oversight of clearing associated with development.[96]

The Chief Planner/Minister's power to approve proposed development that is inconsistent with the Conservator's advice is very problematic. There are no guidelines and/or limits on the power, granting the Planner/Minister wide discretion to approve development contrary to the Conservator's advice, even where development is likely to have a significant adverse environmental impact on a protected matter.[97] While the word 'substantial' in 'substantial public benefit' appears to impose a high threshold to justify the making of an inconsistent decision, this term is not defined in the PD Act or the Planning Bill, making it highly discretionary and easily exploitable. For example, the application of this test may be skewed towards favouring the economic benefits of a project, rather than a more even-handed consideration of whether the proposal promotes ecologically sustainable development.[98] There is also no requirement for a decision-maker to provide reasons as to why they made an inconsistent decision, which undermines the transparency of the process.[99]

The requirement for a decision-maker to take into account 'the probable environmental impacts' of the development is a positive (though expected) feature and may allow the decision-maker to consider cumulative impacts, as well as the ways in which land clearing (for example) contributes to compounding environmental impacts.[100]

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[93] See EDO's submission on the Planning Bill here: https://www.edo.org.au/wp-content/uploads/2022/06/220617-EDO-Submission-on-the-ACTs-Planning-Bill-2022-1.pdf.
[94] Office of Best Practice Regulation, 'Best Practice Consultation' (Online, March 2020) 5.
[95] *Planning Bill 2022* (ACT) s 111.
[96] ACT, *Parliamentary Debates,* Legislative Assembly, 21 September 2022 available at: https://www.hansard.act.gov.au/hansard/10th-assembly/2022/HTML/week08/2615.htm.
[97] *Planning and Development Act 2007* (ACT) s 128(2); *Planning Bill 2022* (ACT) s 187(2).
[98] Environmental Defenders Office, *Submission on the Planning Bill 2022* (17 June 2022) 29 available at: https://www.edo.org.au/wp-content/uploads/2022/06/220617-EDO-Submission-on-the-ACTs-Planning-Bill-2022-1.pdf.
[99] ACT Government, Department of the Environment, Climate Change, Energy and Water, *Review of the Roles and Functions of the ACT Conservator of Flora and Fauna,* (June 2011) 7 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0008/575207/PWC_report_on_Conservator_roles.pdf; Environmental Defenders Office and Conservation Council ACT, *Comments on the Nature Conservation Bill 2014* (29 April 2014) 15-6 available at: https://www.edo.org.au/wp-content/uploads/2019/12/20140429-Nature_Conservation_Bill_Submission-FINAL.pdf.
[100] Environmental Defenders Office, *Submission on the Planning Bill 2022* (17 June 2022) 28 available at: https://www.edo.org.au/wp-content/uploads/2022/06/220617-EDO-Submission-on-the-ACTs-Planning-Bill-2022-1.pdf.

It appears the Planning Bill has missed key opportunities to strengthen environmental safeguards, including those could improve protections for native vegetation. EDO's submission on the Planning Bill 2022 makes a range of recommendations to improve the Planning Bill, which, if made, would better protect the ACT's environment from harm caused by development, and better protect the rights of people in the ACT to participate in the planning system and to live in a clean, healthy and sustainable environment.[101]

TP Act/Urban Forest Act

Overview:

TP Act

There are two main ways tree clearing is approved under the TP Act:

- Approval for a tree damaging activity or groundwork activities within the tree protection zone of a protected tree.
- Approval for a tree management plan.

These are discussed below.

- *Approval for a tree damaging activity or groundwork activities within the tree protection zone of a protected tree*

The TP Act allows a person to apply to the Conservator for approval to damage a protected tree or undertake groundwork activities within the tree protection zone of a protected tree.[102]

The Conservator may require the applicant to provide more information or relevant documents.[103] If the applicant does not provide such information, the Conservator may refuse the application.[104]

The Conservator may ask the advisory panel for advice about the application.[105]

Approval of the application may require referral to other entities, including:

- The heritage council - if the application relates to a tree that forms part of a place with heritage significance.
- To each representative Aboriginal organisation - if the application relates to a tree that is an Aboriginal heritage tree.[106]

However, this referral is not required if the applicant has adequately consulted the entity about the application not earlier than 6 months before the day the application is made and an entity agrees in writing to the activity proposed in the application.[107] Additionally, referral is not required to the

[101] Environmental Defenders Office, *Submission on the Planning Bill 2022* (17 June 2022) 28 available at: https://www.edo.org.au/wp-content/uploads/2022/06/220617-EDO-Submission-on-the-ACTs-Planning-Bill-2022-1.pdf.
[102] *Tree Protection Act 2005* (ACT) s 22(a)-(b).
[103] *Tree Protection Act 2005* (ACT) s 23(1).
[104] *Tree Protection Act 2005* (ACT) s 23(2).
[105] *Tree Protection Act 2005* (ACT) s 24.
[106] *Tree Protection Act 2005* (ACT) s 24A(1).
[107] *Tree Protection Act 2005* (ACT) s 24A(2).

heritage council if the activity proposed in the application is included in a development application provided to the heritage council under s 148 of the PD Act.[108]

The entity must give the Conservator the entity's advice on the application not later than 10 working days or within a shorter period is prescribed by regulation.[109] If the entity does not respond within this time frame, they are taken to have provided advice in support of the application.[110]

The Conservator decides within 30 days after the day of receiving the application whether to approve the activity.[111] In making their decision they must have regard to:

- the approval criteria[112]; and
- the advice (if any) of the advisory panel; and
- the advice (if any) of an entity to which the application was referred under section 24A (i.e. from other relevant entities); and
- anything else the Conservator considers relevant.[113]

The Minister determines the approval criteria,[114] which are currently set out in the *Tree Protection (Approval Criteria) Determination 2006 (No 2)* (ACT).

The criteria include that the Conservator may give approval to damage a regulated tree when, for example, the tree is in decline and its life expectancy is short, the tree represents an unacceptable risk to public or private safety, the tree threatens to cause substantial damage to a substantial building, structure or service etc. and all other reasonable remedial treatments and risk mitigation measures have been determined to be ineffective.[115]

For approval to carry out groundwork within the tree protection zone of a regulated or registered tree, the criteria is that 'the groundwork will have minimal impact on the tree if the activity complies with the conditions stated in the approval'.[116]

The criteria for approval for major pruning of a registered tree is when work is required to maintain the health and safety of the tree, or to maintain clearance from services or as a remedial treatment. Further the work must be necessary and not substantially alter the tree's shape or form or cause it to become unsafe or result in the decline and death of the tree.[117]

The Conservator can cancel an approval if the activity does not or no longer satisfies the approval criteria.[118]

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[108] *Tree Protection Act 2005* (ACT) s 24A(2)(b).
[109] *Tree Protection Act 2005* (ACT) s 24B.
[110] *Tree Protection Act 2005* (ACT) s 24C.
[111] *Tree Protection Act 2005* (ACT) s 25(1).
[112] Approval criteria are determined by the Minister under s 21 of the *Tree Protection Act 2005* (ACT).
[113] *Tree Protection Act 2005* (ACT) s 25(3).
[114] *Tree Protection Act 2005* (ACT) s 21.
[115] *Tree Protection (Approval Criteria) Determination 2006 (No 2)* (ACT) sch 1(1).
[116] *Tree Protection (Approval Criteria) Determination 2006 (No 2)* (ACT) sch 1(2), (4).
[117] *Tree Protection (Approval Criteria) Determination 2006 (No 2)* (ACT) sch 1(3).
[118] *Tree Protection Act 2005* (ACT) s 28(1).

- *Approval for a tree management plan*

The TP Act also outlines the approval process for a tree management plan, which can provide for activities that may be undertaken in relation to a tree and may set out conditions about how the activities are to be undertaken.[119]

The Conservator may determine guidelines for tree management plans.[120]

The Conservator may initiate proposing a tree management plan for a registered tree.[121] A land management agency can also apply for a tree management plan and anyone else may also apply for approval of a tree management plan for any tree on leased land in a built-up urban area.[122]

The approval process of tree management plans is similar to the approval process for tree damaging activity or groundwork activities within the tree protection zone of a protected tree outlined above. The decision-maker must have regard to:

- the guidelines approved under section 31; and
- the advice (if any) of the advisory panel; and
- the advice (if any) of an entity to which the application was referred under section 34A; and
- anything else the Conservator considers relevant.[123]

However, a key difference is that the decision-maker must have regard to the guidelines approved under s 31 (rather than the approval criteria). The guidelines currently approved under s 31 are outlined under the *Tree Protection (Guidelines for Tree Management Plans) Determination 2010* (ACT). These guidelines include that the Conservator must consider whether the proposed activities within the tree management plan are in accordance with tree protection approval criteria discussed above.[124] The Guidelines also state that the objectives of a tree management plan include providing a tool to assist professionals in the development industry to incorporate tree protection requirements in the early stages of the development process.

In the Environment, Planning and Sustainable Development Directorate's 2020-21 Annual Report, there were 2,141 applications for a tree damaging activity made to the Conservator and a total of 1,242 approval granted (996 approvals granted plus 246 granted with conditions), 82 approvals granted under urgent circumstances and minor work, 283 applications covered by the legislation, 452 applications declined, 37 reconsideration requests and 6 decisions changed following reconsideration.[125]

[119] *Tree Protection Act 2005* (ACT) s 32, pt 4.
[120] *Tree Protection Act 2005* (ACT) s 31.
[121] *Tree Protection Act 2005* (ACT) s 32(1).
[122] *Tree Protection Act 2005* (ACT) s 32(3).
[123] *Tree Protection Act 2005* (ACT) s 35.
[124] *Tree Protection (Guidelines for Tree Management Plans) Determination 2010* (ACT) sch 1(1.4).
[125] Environment, Planning and Sustainable Development Directorate, *Annual Report 2020-2021,* 320 available at: https://www.planning.act.gov.au/__data/assets/pdf_file/0020/1910603/2020-21-EPSDD-Annual-Report.pdf.

Urban Forest Act

The *Urban Forest Act 2023* (ACT) generally retains the same approval process both for tree damaging activities and groundwork activities within the tree protection zone of a protected tree, and for tree management plans as under the TP Act.[126] Draft approval criteria have also been proposed.[127] The main approval criteria remain essentially the same.

However, a new provision explicitly requires the decision-maker, after receiving either an application for tree damaging activities and groundwork activities or application for a tree management plan, to assess the tree to which the application relates. A note provides that assessing a tree may include assessing any of the following: the health, condition and structure of the tree; the ecological significance of the tree; the tree's location, including the tree's proximity to infrastructure, services and construction activity; whether the tree is a protected tree; and whether the tree satisfies the approval criteria. This provides additional, explicit obligations on the decision-maker in assessing an application.

The Urban Forest Act does not contain any express Ministerial call-in powers. However, section 19 gives the Minister power to authorise an administrative unit to carry out an activity prohibited activities that could damage a protected tree or is prohibited groundwork and section 137 empowers the Minister to declare that a provision of the legislation applies or does not apply to a particular entity or activity. There do not appear to be similar provisions in the TP Act.

Analysis:

The decision to approve an application for a tree damaging activity or groundwork activities within the tree protection zone of a protected tree is discretionary. The approval criteria, especially for approval to damage a regulated tree seems fairly robust, requiring remedial treatments and risk mitigation measures to be ineffective before removal is considered. However, the extent to which the Conservator has regard to such criteria is unclear. The approval criteria to carry out groundwork within the tree protection zone of a regulated or registered tree is more vague, requiring that the groundwork has 'minimal' impact.

The *Guidelines for Tree Management Plans* incorporates some approval criteria focused on protecting trees, such as the Conservator is to consider whether the proposed conditions protect retained trees from damage, including the roots, during development that may occur at the site and whether the removal of a regulated tree will clearly enhance the environmental value of the site. Again, the extent to which and how these factors are considered when approving a tree management plan are unclear.

It is unclear why the approval criteria and guidelines are in subordinate instruments rather than the principal legislation itself, although it is noted that the determinations to make either the approval criteria and guidelines are disallowable by Parliament, meaning there is some oversight to establishing or amending decision criteria.

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[126] *Urban Forest Act 2023* (ACT) ss 20-33, 78-90.

[127] Draft Urban Forest (Approval Criteria) Determination 2022 (No 1) – Draft for Consultation, https://yoursayconversations.act.gov.au/download_file/7166/2302.

Generally, the approval process and assessment criteria in the new Urban Forest Act replicate the provisions of the TP Act, with additional requirement for the decision-maker to 'assess the tree to which the application relates'. Presumably this new provision is simply making this requirement explicit, although the notes under that provision provide some further guidance as to what the decision-maker should be considering when making their assessment.

Protection of Environmentally Sensitive Areas

In this section we examine a number of specific legal mechanisms aimed at protecting environmentally sensitive areas in the ACT.

Reserve System

Overview:

The ACT differs from other Australian jurisdictions in its conservation of threatened species, ecological communities and matters of national environmental significance because it has dedicated a large proportion of land as reserve areas with approximately:

- 55% of land explicitly managed for conservation purposes within wilderness areas, national parks, and nature reserves;
- 3% of land in special purpose reserves (reserved primarily for education/recreation); and
- 3% of land in catchment areas.[128]

As noted above, there are clear restrictions on clearing in reserve areas, except where an exception is allowed. Exceptions are set out in s 252 of the NC Act and can include a licence under the NC Act or approval under the PD Act.

Analysis:

While a large proportion of the ACT appears to be protected as reserve areas, vegetation clearing can still occur in reserve areas. However, clearing in reserve areas generally requires some form of environmental impact assessment and/or relevant approval, providing some level of oversight. There is also a requirement that the decision-maker consider any relevant reserve management plan.

We also note that the ACT Conservation Council has criticised the ACT reserve system, suggesting the system does not adequately protect all the Territory's natural values, leaving many unprotected and at risk of mismanagement.[129] We understand that protection is concentrated in upland areas, with many lowland areas, comprising significant areas of critically endangered ecological communities (namely Natural Temperate Grassland and Blakely's Red Gum Yellow Box Grassy Woodland), remaining unprotected and at risk from pressures such as urban expansion.

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[128] ACT Government, *ACT Environmental Offsets: Draft Guidelines* available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0003/607053/Environmental-offsets-Guidelines-for-consultation.pdf.

[129] https://conservationcouncil.org.au/wp-content/uploads/BRIEFING_BIODIVERSITY-NETWORK-_Final_Version_December.pdf.

The *ACT Nature Conservation Strategy 2013-2023* identifies that pressure on ACT's natural ecosystems is greatest in the lowlands, largely due to inadequate connections between reserves and native vegetation remnants being 'ecologically isolated' on both public and privately managed land, making them susceptible to threats such as climate change.[130] Specific strategies and action plans for native woodlands and grasslands were developed under the *ACT Nature Conservation Strategy*. These strategies include the need to develop management plans for grasslands not already covered by such plans, and in the case of woodlands, review and synthesis existing management plans.[131] However, clearing undertaken in accordance with a management plan is an exception to the offence of clearing native vegetation under the NC Act, hence the effectiveness of these areas being protected under the NC Act depends on the management plan.[132]

Land management agreements

Overview:

Land management agreements also present a way to protect native vegetation, thereby reducing land clearing, as they aim to conserve habitat and species as well as provide for productive and sustainable agriculture and other compatible uses on rural land.

The ACT Audit Office states:

Land Management Agreements provide a basis for cooperative land management between rural leaseholders and ACT Government agencies responsible for managing non-urban land on behalf of the Territory. The Agreements are unique to the Territory. No other jurisdiction in Australia has a legal agreement with every rural landholder to deliver sustainable management of rural lands including the conservation of natural and cultural values.[133]

There are an estimated 180 Land Management Agreements covering a total area of 27,000 ha as at March 2020. The Rural Services and Natural Resource Protection Team is in practice the primary ACT Government body responsible for developing an agreement with a rural leaseholder.

Analysis:

In 2021, the ACT Auditor-General identified that there is a lack of clear responsibilities in the Rural Services and Natural Resource Protection Team, which increases the risk of uncertainty in the management of Land Management Agreements. A Land Management Agreement must be signed by the Conservator.[134] There are also multiple other business unit and stakeholders involved in the

[130] ACT Government, *ACT Nature Conservation Strategy 2013-23* (2013) 3 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0004/576184/ACT-Nature-Conservation-Strategy_web.pdf.
[131] ACT Government, *ACT Native Grassland Conservation Strategy and Action Plans* (207) 38 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0010/1156951/Grassland-Strategy-Final-WebAccess.pdf; ACT Government, *ACT Native Woodland Conservation Strategy and Action Plans* (2019) 69 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0003/1444098/Woodland-Conservation-Strategy.pdf.
[132] *Nature Conservation Act 2014* (ACT) s 235.
[133] ACT Audit Office, ACT Auditor–General's Report Land Management Agreements Report No. 1 / 2021, 2021, available at https://www.audit.act.gov.au/__data/assets/pdf_file/0007/1697029/Report-No.-01-of-2021-Land-Management-Agreements.pdf.
[134] *Planning and Development Act 2007* (ACT) s 283(2).

development of Land Management Agreements. However, the ACT Auditor-General also identified a lack of coordination and cooperation between these bodies. The *Land Management Agreement Form* provides guidance to ACT rural leaseholders and ACT Government officers as to the type and nature of information to be included in an Agreement. However, the form lacks procedural and practical guidance as to the development of Land Management Agreements, which undermines the achievement of environmental obligations in accompanying ACT legislation, and risks rural leasehold agreements being overlooked, incomplete or omitting stakeholder feedback. Further, the ACT Auditor-General identified that neither the Rural Services and Natural Resource Protection Team nor the Conservator utilises an overarching risk management framework to assist in identifying, assessing and mitigating risks pertaining to rural land and the management of Land Management Agreements. A lack of regular and systematic program of compliance activity by either the Rural Services and Natural Resource Protection Team or Access Canberra monitoring Land Management Agreements further undermines their effectiveness in protecting vegetation.[135]

Other key policies

Key policies can also play a role in protecting environmentally sensitive areas (**ESA**s). For example, the National Capital Plan,[136] established under the *Australian Capital Territory (Planning and Land Management) Act 1988* (ACT) seeks generally to protect the natural landscapes of the ACT, but does not include any specific provisions for ESAs.

Offsets

ACT Environmental Offsets Policy

Overview:

The *ACT Environmental Offsets Policy* (**Offsets Policy**) provides for the use of offsets for both matters of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), and for ACT protected matters. It states that it has been developed to be consistent with the *EPBC Act Environmental Offsets Policy* and to facilitate Commonwealth accreditation of ACT processes. It also states that the Offsets Policy is a requirement under the PD Act and is implemented through a range of provisions under the Act.[137]

The aim of offsetting under the Offsets Policy is 'to maintain or improve the likelihood of matters of national environmental significance and ACT protected matters.'[138] As well as providing for the consideration of offsets for matters of national environmental significance (under the EPBC Act), the Offsets Policy also provides a framework for the delivery of offsets for ACT protected matters. The Offsets Policy states that ACT listed threatened species are required to be assessed for an offset, however, to avoid overlap with the EPBC Act Offsets Policy, additional environmental offsets are not required. When

[135] ACT Auditor General, *ACT Auditor-General's Report: Land Management Agreements* (Report No 1, 2021) 23 available at: https://www.audit.act.gov.au/__data/assets/pdf_file/0007/1697029/Report-No.-01-of-2021-Land-Management-Agreements.pdf.
[136] https://www.nca.gov.au/planning/plans-policies-and-guidelines/national-capital-plan.
[137] Act Environmental Offsets Policy,
[138] Act Environmental Offsets Policy, p 2.

the proposed development of land is expected to impact a matter of national environmental significance, offsets are required to be considered in accordance with obligations under the EPBC Act.[139]

The primary objectives of the current Offsets Policy are to:

1. Ensure areas of high conservation value or irreplaceable assets are avoided, or avoided and mitigated:
   a. environmental offsets are considered only after feasible and appropriate avoidance and mitigation measures have been taken;
   b. the use of environmental offsets cannot be used to make inappropriate actions appropriate. The Offsets Policy states that inappropriate actions are those that create an unacceptable risk that a species could become extinct;
2. Should impacts be acceptable, to ensure impacts from the loss of ecological communities and habitat are balanced by commensurate gains in extent or quality elsewhere.[140]

Offsetting is mentioned under multiple provisions in the PD Act and Planning Bill.[141] Under s 147A of the PD Act, the Conservator is to provide advice on suitable offsets when developments are likely to have a significant adverse environmental impact.[142] Under ss 111G and 111H of the PD Act and ss 223 and 234 of the Planning Bill, the Minister must consult with the Conservator on whether the offsets policy needs to be reviewed, and if so, they must consult with the Conservator about the review and in preparing a draft revised offsets policy.

The Planning Bill, similar to the PD Act, outlines procedural rather than substantive offset provisions, such as including details about making the offsets policy and guidelines, the form of offsets and how they are to be calculated. [143] Under both the PD Act and the Planning Bill the Minister 'may determine how the value of an offset is to be calculated' as long as it is consistent with the offsets policy.[144] This grants discretion to the Minister in calculating an offset value. This, along with the focus on procedural rather than substantive offset provisions, is of concern given the difficulties raised by critics of biodiversity offsetting, including in quantifying biodiversity values for market purposes, time lags in restoring areas, failure to account for declining base lines, failure to effectively manage offset sites, protect offset sites in perpetuity and perverse outcomes.[145]

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[139] ACT Government, *ACT Environmental Offsets Policy* (April 2015) 2 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0009/628758/ACT-Environmental-Offsets-Policy-ACCESS-PDF.PDF

[140] ACT Government, *ACT Environmental Offsets Policy* (April 2015) 11, 16 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0009/628758/ACT-Environmental-Offsets-Policy-ACCESS-PDF.PDF.

[141] ACT Government, *ACT Environmental Offsets Policy* (April 2015) 2 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0009/628758/ACT-Environmental-Offsets-Policy-ACCESS-PDF.PDF.

[142] *Planning and Development Act 2007* (ACT) s 124A: (a) the environmental function, system, value or entity that might be adversely impacted by a proposed development is significant; or (b) the cumulative or incremental effect of a proposed development might contribute to a substantial adverse impact on an environmental function, system, value or entity.

[143] *Planning and Development Act 2007* (ACT) Pt 6A.3; *Planning Bill 2022* (ACT) Pt 9.3.

[144] *Planning and Development Act 2007* (ACT) s 111T; *Planning Bill 2022* (ACT) s 236.

[145] Environmental Defenders Office, *Submission on the Planning Bill 2022* (17 June 2022) 25 available at: https://www.edo.org.au/wp-content/uploads/2022/06/220617-EDO-Submission-on-the-ACTs-Planning-Bill-2022-1.pdf.

The primary mechanism for securing offsets on public land in the current Offsets Policy is facilitating the management of offsets within conservation reserves.[146] The Offsets Policy Principles include that environmental offsets must be additional to what is already required under law or planning regulations, schemes, or programs.[147] The policy also allows for advance offsets, which are a supply of offsets for potential future use, transfer or sale, and are one way to ensure high conservation value land can be secured and managed for conservation gains.[148] Due to public concern about the potential for offsets in existing conservation reserves, the use of advance offsets in existing conservation reserves must undergo additional public consultation before use.[149]

Analysis:

The Office of the Commissioner for Sustainability and the Environment found that since 2009, the total offset area in the ACT has increased 100-fold.[150] It also reported on opportunities to improve environmental offsets in the ACT. These include:

- incorporating the environmental offsets policy into plans and actions for a changing climate and sustainable future;
- when preparing for future developments in the ACT, offset areas should be identified early;
- increased integration of Act-specific requirements with the national offsets policy;
- accurate recording of the initial health of an offset area;
- ongoing monitoring to assess management effectiveness and long term conditions;
- early onset of management actions for approved offset sites to ensure maintenance of condition;
- an enforcement regime for compliance with offset policies;
- appropriate agreements with leaseholders to be updated for approved offsets and management funding is provided to the leaseholder;
- the offsets register to be comprehensive and updated regularly.[151]

We have not found any other material reviewing the outcomes of the ACT offsets scheme and whether the scheme has delivered a net gain or not. While the scheme's aim to 'maintain or improve' is better than some jurisdictions, it does not require a net gain.

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[146] ACT Government, *ACT Environmental Offsets Policy* (April 2015) 5 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0009/628758/ACT-Environmental-Offsets-Policy-ACCESS-PDF.PDF.

[147] ACT Government, *ACT Environmental Offsets Policy* (April 2015) 7 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0009/628758/ACT-Environmental-Offsets-Policy-ACCESS-PDF.PDF.

[148] ACT Government, *ACT Environmental Offsets Policy* (April 2015) 4 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0009/628758/ACT-Environmental-Offsets-Policy-ACCESS-PDF.PDF.

[149] ACT Government, *ACT Environmental Offsets Policy* (April 2015) 17 available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0009/628758/ACT-Environmental-Offsets-Policy-ACCESS-PDF.PDF.

[150] Office of the Commissioner for Sustainability and the Environment, *Environmental offsets in the ACT* available at: https://envcomm.act.gov.au/latest-from-us/environmental-offsets-in-the-act/.

[151] Office of the Commissioner for Sustainability and the Environment, *Environmental offsets in the ACT* available at: https://envcomm.act.gov.au/latest-from-us/environmental-offsets-in-the-act/.

EDO has previously recommended that offsetting principles should be enshrined in the Planning Bill; and that the Bill should clearly state that offsetting should only be allowed in limited circumstances and in line with the best practice science-based principles.[152]

Urban Forests

Overview:

We note that the TP Act has no provisions for offsets. However, the Urban Forest Act introduces a new Canopy Contribution Framework,[153] a quasi-offset that will require that when regulated trees are approved for removal, they will need to be replaced through new planting. If new planting is not possible, a financial contribution (determined by a tree valuation formula) will need to be made to fund the planting and maintenance of trees nearby.[154] A tree bond system will be established[155] to protect trees that have the potential to be damaged by nearby development, by placing a financial value on the trees.[156]

Analysis:

The Canopy Contribution Framework appears to be a quasi-offset scheme. It does not appear to be based on best-practice offsetting principles so there are questions as to whether it is ecologically sound. We note that Conservation Council ACT Region supports the thinking underpinning the proposal, suggesting that the proposal to put a value on trees is positive.[157]

Compliance and enforcement

Effective regulatory oversight

There is no central authority regulating land clearing in the ACT. Instead, clearing is regulated by different agencies under respective legislation (e.g. NC Act, PD Act and TP Act). This fragmented approach can hinder compliance and enforcement – the legal framework can be complicated, monitoring and reporting is piecemeal and largely absent.

[152] See Environmental Defenders Office, *Submission on the Planning Bill 2022* (17 June 2022) 25 available at: https://www.edo.org.au/wp-content/uploads/2022/06/220617-EDO-Submission-on-the-ACTs-Planning-Bill-2022-1.pdf.
[153] *Urban Forest Act 2023* (ACT) ss 34-42.
[154] ACT Government, 'New laws to protect Canberra's trees from development for future generations' (3 August 2022) https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/chris-steel-mla-media-releases/2022/new-laws-to-protect-canberras-trees-from-development-for-future-generations.
[155] *Urban Forest Act 2023* (ACT) ss 91-96.
[156] ACT Government, 'New laws to protect Canberra's trees from development for future generations' (3 August 2022) <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/chris-steel-mla-media-releases/2022/new-laws-to-protect-canberras-trees-from-development-for-future-generations>.
[157] Conservation Council ACT Region, *Submission to the Inquiry into Urban Forest Bill 2022*, October 2022, available at https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/2085141/13-The-Conservation-Council-ACT-Region.pdf.

Strength of compliance and enforcement framework

Overview:

It is an offence to clear vegetation, without a relevant approval, under various legislation. For example:

- *NC Act*

Under the NC Act it is an offence to clear native vegetation in a reserve causing serious harm, clear native vegetation in a reserve causing material harm or to clear native vegetation in a reserve.[158] It is not an offence, however, to conduct vegetation clearing in a reserve area where a Chapter 9 exception applies, including, for example, where a person is authorised to conduct vegetation clearing under a development approval issued under the PD Act.[159]

Clearing native vegetation in a reserve causes serious harm to the reserve if:

(a) it causes the loss of, or the loss of part of—
    (i) a critically endangered ecological community in the reserve; or
    (ii) an endangered ecological community in the reserve; or
    (iii) a vulnerable ecological community in the reserve; or
(b) it causes a substantial loss of habitat of native plants or native animals in the reserve; or
(c) it happens in a Ramsar wetland in the reserve; or
(d) the total area cleared of native vegetation in the reserve is more than 2ha; or
(e) the cost of action needed to restore native vegetation to the area cleared in the reserve is more than $50 000.[160]

Clearing native vegetation in a reserve causes material harm to the reserve if:

(a) it happens in a wetland, other than a Ramsar wetland, in the reserve; or
(b) the total area cleared of native vegetation is more than 0.2ha but not more than 2ha; or
(c) the cost of action needed to restore native vegetation to the area cleared is within the range of $5,000 to $50,000.[161]

Section 241 provides that if a court convicts a person, or finds a person guilty, for clearing native vegetation in a reserve, the court may order the person to restore the cleared vegetation. If a court convicts a person, or finds a person guilty, for an offence, s 242 states the court may order the person to publicise the conviction or finding of guilt. Conservation officers, which includes the Conservator, are largely responsible for the enforcement of the NC Act.[162] Our understanding is prosecutions rarely occur.

[158] *Nature Conservation Act 2014* (ACT) ss 236-8.
[159] *Nature Conservation Act 2014* (ACT) s 252(2)(b)(iii).
[160] *Nature Conservation Act 2014* (ACT) s 235.
[161] *Nature Conservation Act 2014* (ACT) s 235.
[162] *Nature Conservation Act 2014* (ACT) ss 28-9.

- *PD Act / Planning Bill*

ACTPLA under the PD Act and (the territory planning authority under the Planning Bill) is responsible for taking compliance and enforcement action.[163]

Sections 199 and 200 of the PD Act, and ss 399 and 400 of the Planning Bill, state it is an offence to develop without approval or undertake prohibited development. Penalties for non-compliance can include prohibition notices to prevent the starting or continuing of a development, penalties and injunctions.[164] The Environment Protection Authority (Access Canberra) has the delegated power to appoint inspectors for all rural and urban leases under the *Planning and Development (Inspectors) Appointment 2019 (No 2).*[165] Certain enforcement mechanisms including, a prohibition notice, direction under s 433 to undertake rectification work, an injunction under s 452 or an offence under the Act allow an inspector under both the PD Act and the Planning Bill to inspect or examine premises, take measurements, conduct tests, take photographs or recordings and ask the occupier of the premises for information or documents.[166]

Access Canberra is responsible for investigating complaints about breaches of the PD Act. Access Canberra apply a prioritisation approach to investigating complaints. This prioritises instances where:

- there is evidence of significant harm or detriment, particularly where the conduct is ongoing;
- there is a blatant disregard for the law, or pattern of deliberate non-compliance that may have the potential for substantial harm or detriment in the future;
- the conduct is impacting on vulnerable or disadvantaged groups;
- enforcement action is likely to have a strategic educative or deterrent effect;
- education or engagement is not considered to be an appropriate and proportionate response to address the alleged conduct.[167]

- *TP Act/Urban Forest Bill*

Under s 15 of the TP Act an individual person commits an offence if:

- the person does something that damages a protected tree; and the person is reckless about whether doing the thing would damage the protected tree; or
- the person does something and is reckless about whether doing the thing would damage a protected tree; or
- the person does something that damages a protected tree; and the person is negligent about whether doing the thing would damage the protected tree.

[163] *Planning and Development Act 2007* (ACT) s 12(j); *Planning Bill 2022* (ACT) s 18(l).
[164] *Planning and Development Act 2007* (ACT) s 199(a); ACT Government, 'Planning compliance mechanisms' (Web Page) available at: https://www.planning.act.gov.au/build-buy-renovate/for-industry/regulation/planning-compliance-mechanisms.
[165] *Planning and Development Act 2007* (ACT) s 387; *Planning Bill 2022* (ACT) s 457.
[166] *Planning and Development Act 2007* (ACT) s 392; *Planning Bill 2022* (ACT) s 464.
[167] ACT Government, Access Canberra, *Regulatory Compliance and Enforcement Policy* (June 2020) 8 available at: https://files.accesscanberra.act.gov.au/legacy/5285/200447%20%20AC%20Regulatory%20Compliance%20Enforcement%20Policy.pdf.

Similar offences apply under s 16 of the TP Act to a person who is doing work as part of a business involved in property development or maintenance; or any other activity in relation to land that may affect trees on the land.

Sections 17 and 18 set out offences for the person does prohibited groundwork in the protection zone for a protected tree; or a declared site. It is also an offence to contravene a tree protection condition of the development approval (s 20, TP Act).

Offences do not apply if action is undertaken in accordance with a relevant approval (s 19, TP Act).

The Urban Forest Bill generally retains these provisions, although it removes specific provisions for a person who is doing work as part of a business involved in property development or maintenance; or any other activity in relation to land that may affect trees on the land. The Urban Forest Bill also increased penalties for most offences.

Analysis:

While there are clear offences for clearing set out in legislation, the effectiveness of compliance and enforcement of land clearing regulations in the ACT is undermined by:

- Limited prosecutions under the NC Act and TP Act: Our understanding is prosecutions rarely occur under the NC Act. There have also been reported difficulties in enforcing offences against damaging protected trees under the TP Act. Figures from Territory and Municipal Service (**TAMS**) reveal only one individual was prosecuted for damaging protected trees in 2017. The difficulties surround evidence and the lack of witnesses coming forward. "People generally don't want to get their neighbours offside" so TAMS can't prosecute. In addition, people often damaged street trees by drilling holes into the trunk and applying herbicide – often undetected until it was too late.[168]

- Prioritisation approach for enforcement: Regulatory authorities use a prioritisation approach for enforcement, which risks overlooking smaller breaches of the PD Act including smaller instances of clearing without approval, compounding adverse environmental impacts of these smaller breaches.

- Lack of effective compliance programs: For example, in the specific case of land management agreements under the PD Act, the ACT Auditor-General found that: "There is no regular and systematic program of compliance activity to monitor rural leaseholders' compliance with their Agreement obligations and there is no evidence of any enforcement activity being undertaken by any ACT Government agency in relation to rural leaseholders and their Agreements".[169]

[168] Clare Coley, 'Government struggles to stop people killing protected trees' (23 April 2018) The Canberra Times available at: https://www.canberratimes.com.au/story/6140805/government-struggles-to-stop-people-killing-protected-trees/.
[169] ACT Auditor-General, Act Auditor–General's Report. Land Management Agreements, Report No. 1 / 2021, https://www.audit.act.gov.au/__data/assets/pdf_file/0007/1697029/Report-No.-01-of-2021-Land-Management-Agreements.pdf.

Opportunities for third party enforcement

There are limited opportunities for third party civil enforcement under ACT land clearing frameworks.

NC Act

While there are no broad civil enforcement powers to enforce any breach of the NC Act, any person is able to seek an injunction to restrain contravention of urgent directions and Conservator's directions (s 336 NC Act).

PD Act and Planning Bill

There are no broad civil enforcement powers to enforce any breach of the PD Act. Any person who believes that a person is carrying out, or has carried out, a controlled activity may submit a complaint to the Authority which then decides whether to investigate the complaint (Part 11.2, PD Act). Additionally, any person is able to seek an injunction to restrain contravention of controlled activity orders and prohibition notices (s 381, PD Act). Eligible and interested entities can also seek the review of decisions to approve or reject certain proposed developments where the requirements of Schedule 1 of the PD Act are met (Chapter 13 of the PD Act). The Planning Bill generally retains these same provisions and fails to expand third party civil enforcement rights to bring the ACT framework in line with other jurisdictions (like NSW, which has broad civil enforcement powers under its planning system).

TP Act and Urban Forest Act

There are no third party civil enforcement provisions under the TP Act or Urban Forest Act.

Transparency of information relating to enforcement and compliance

Because clearing is regulated under various legal frameworks there is no central register capturing information about approvals for clearing. This makes understanding and monitoring proposed and approved clearing difficult. While some agencies report enforcement action in their Annual Reports, the information is piecemeal and not specific to clearing. Where information about approvals is publicly available (e.g. on a DA tracker), clearing information cannot be easily distilled.

Commonwealth

Commonwealth

Background

The Australian Constitution is silent on land use. By default, Australian states and territories have the most significant direct powers regarding deforestation, native forest logging, reforestation and plantations. Notably, the *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment* agreed by the Council of Australian Governments (**COAG**) in 1997,[170] articulates that the Commonwealth has responsibilities for matters of national environmental significance (**MNES**) and responsibility and an interest in relation to the development and implementation of Regional Forest Agreements and the National Forest Policy Statement, but is otherwise is silent on land clearing.

However, under the external affairs power of the Australian Constitution (s 51(xxix)), the Australian Government is able to implement international treaties domestically, including the United Nations Convention on Biological Diversity and United Nations Framework Convention on Climate Change.

The Australian Government is signatory to the Glasgow Leaders' Declaration on Forests and Land Use adopted at the UN Climate Change Conference in Glasgow, UK, on 2 November 2021. The Declaration is non-binding and is not a formal legal commitment of the Conference of the Parties (COP26). The Declaration has a commitment to "…*working collectively to halt and reverse forest loss and land degradation by 2030 while delivering sustainable development and promoting an inclusive rural transformation*."

The Labor Government built upon the former Coalition Government's signing on to the Declaration by joining the Forests and Climate Leaders Partnership at the Climate COP27 at Sharm El Sheikh, Egypt, on 8 November 2022.[3]

Government commitments to end broadscale land clearing in line with the Glasgow Declaration

Commitment

The Australian Government has publicly committed to stop and reverse forest loss and land degradation by 2030 as a signatory to the *Glasgow Leaders' Declaration on Forests and Land Use.* This includes forest loss and land degradation from land clearing. However, there appears to be a lack of domestic policy commitment to support this goal.

The following discussion considers:

- public commitments and statements;

[170] https://www.dcceew.gov.au/environment/epbc/publications/coag-agreement#:~:text=In%20November%201997%2C%20the%20Council,Government%20Association%20signed%20the%20agreement.

- legislative objectives; and
- policy documents.

Public commitments and statements

- *Glasgow Leaders' Declaration on Forests and Land Use*

Australia has signed the *Glasgow Leaders' Declaration on Forests and Land Use,* which aims to halt and reverse forest loss and land degradation by 2030.[171] The first goal of this Declaration is to '[c]onserve forests and other terrestrial ecosystems and accelerate their restoration'.[172] This indicates a commitment to stop or at least reduce land clearing in order to conserve forests and protect terrestrial ecosystems. Media responses to this commitment noted Australia's shortcomings in realistically achieving this target without changes to domestic policy to strengthen land clearing legislation, particularly in Queensland and NSW.[173]

- *Leaders' Pledge For Nature*

Australia has also signed the *Leaders' Pledge For Nature*, making a commitment to reverse biodiversity loss by 2030.[174] The pledge includes promises to address multiple challenges and threats to biodiversity including deforestation, and to shift towards land use and agricultural policies that promote sustainable land and forest management to reduce deforestation.[175]

- *High Ambition Coalition for Nature and People*

In June 2021, the former Morrison Government announced that Australia had joined the *High Ambition Coalition for Nature and People* - an alliance of countries that is working towards a global agreement to halt and reverse biodiversity destruction by protecting at least 30% of the world's land and 30% of the world's oceans by 2030.[176] On 19 July 2022, Federal Minister for the Environment and Water, Tanya Plibersek, confirmed Australia's commitment to that target.[177]

- *Kunming-Montreal Global biodiversity framework*

The Kunming-Montreal Global Biodiversity Framework (**GBF**) was adopted during the 15th Biodiversity Conference of the Parties (**COP 15**) in December 2022.[178] The GBF sets out 4 goals (Section G) including that "the integrity, connectivity and resilience of all ecosystems are maintained, enhanced, or

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[171] UN Climate Change Conference, *Glasgow Leaders' Declaration on Forests and Land Use* (2 November 2021) available at: https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/.
[172] *Glasgow Leaders' Declaration on Forests and Land Use* [1].
[173] The Conversation, 'COP26: global deforestation deal will fail if countries like Australia don't lift their game on land clearing' (Media Article, 3 November 2021) available at: https://theconversation.com/cop26-global-deforestation-deal-will-fail-if-countries-like-australia-dont-lift-their-game-on-land-clearing-171108.
[174] UN Summit on Biodiversity, *Leaders' Pledge for Nature* (September 2020) available at: https://www.leaderspledgefornature.org/.
[175] UN Summit on Biodiversity, *Leaders' Pledge for Nature* (September 2020) [3], [4](c) available at: https://www.leaderspledgefornature.org/wp-content/uploads/2021/06/Leaders_Pledge_for_Nature_27.09.20-ENGLISH.pdf.
[176] See https://www.acf.org.au/australia-joins-global-biodiversity-alliance.
[177] Australian Government, National Press Club address (19 July 2022) available at: https://minister.dcceew.gov.au/plibersek/speeches/national-press-club-address.
[178] https://www.cbd.int/gbf/.

restored, substantially increasing the area of natural ecosystems by 2050" and "human induced extinction of known threatened species is halted" (Goal A). It also sets out 23 targets (Section H) including targets of conserving 30 per cent of terrestrial and inland water areas, and of marine and coastal areas, by 2030 (Target 3).

- *Nature Positive Plan*

Following COP 15 and in response to the Samuel Review, Minister Plibersek announced Australia's *Nature Positive Plan*, which commits to protecting 30% of our land and sea by year 2030.[179] The *Nature Positive Plan* does not contain any explicit policy commitments relating to land clearing.

Legislative objectives

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is the primary Federal environmental legislation.

The objects of the EPBC Act, include:

- to provide for the protection of the environment especially those aspects of the environment that are matters of national environmental significance; and
- to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
- to promote the conservation of biodiversity.[180]

While these objectives may contribute to reducing clearing, ending broadscale land clearing is not explicitly stated in the legislative objectives. Land clearing in its own right is not regulated by the EPBC Act. The impacts of land clearing will be assessed and regulated if it will have a significant impact on a matter of national environmental significance (**MNES**). MNES include listed threatened species and ecological communities.

In response to the 2020 Independent Review of the EPBC Act (**Samuel Review**),[181] the Australian Government's *Nature Positive Plan* proposes significant reform to the EPBC Act, although as noted above it does not contain any explicit policy commitments relating to land clearing.

[179] Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: better for the environment, better for business* (December 2022) 1 available at: https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf.
[180] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') s 3(a)-(c).
[181] Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, Foreword, October 2020) ii, (Samuel Review), available at: https://epbcactreview.environment.gov.au/resources/final-report.

Policy documents

- *Australia's Native Vegetation Framework*

Our understanding is that there is no current national framework for managing native vegetation. This is despite there being previous frameworks, including the 2001 *National Framework for the Management and Monitoring of Australia's Native Vegetation* and the 2012 *Australia's Native Vegetation Framework.*[182]

- *Nature Positive Plan*

As noted above, the Australian Government's *Nature Positive Plan* is its response to the Samuel Review of the EPBC Act. It sets out the Government's commitment to reform Australia's environmental laws. It does not contain any explicit policy commitments relating to land clearing.

- *Threatened Species Action Plan*

In 2022, the Australian Government released its *2022-2032 Threatened Species Action Plan - Towards Zero Extinctions.* It has four key objectives including: Objective 1. The risk of extinction is reduced for all priority species; Objective 2. The condition is improved for all priority places; Objective 3. New extinctions of plants and animals are prevented; and Objective 4. At least 30 per cent of Australia's land mass is protected and conserved. It does not contain any explicit policy commitments relating to land clearing.

Costed plan to end deforestation

There is no clear costed plan to end deforestation. Rather, the Australian Government has committed funding towards environmental protection under the *Nature Positive Plan* and *2022-2032 Threatened Species Action Plan - Towards Zero Extinctions*.

We have addressed this question by considering the following:

- funding connected to public commitments; and
- private investment.

Funding connected to public commitments

We note the following:

- It is unclear how much funding the Government will commit to implementing the *Nature Positive Plan.* We note:
    - The Plan proposes a Nature Repair Market to encourage investment in biodiversity restoration activities, such as improving the condition of remnant native vegetation or degraded land.[183] The Scheme will operate alongside the carbon market. It is unclear

[182] See COAG Standing Council on Environment and Water, *Australia's Native Vegetation Framework,* available at https://www.agriculture.gov.au/sites/default/files/documents/native-vegetation-framework.pdf.

[183] Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: better for the environment, better for business* (December 2022) 22 available at: https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf.

how much Government funding will be invested in getting the new market up and running.

- Under the *Nature Positive Plan*, the Government has also committed $29.3 million to start regional planning and guide sustainable development.[184]

- The Government has also committed $224.5 million to implement the *2022-2032 Threatened Species Action Plan - Towards Zero Extinctions*.[185]
- The Commonwealth Government has committed $121 million to establish a national EPA and $51.5 million to establish Environment Information Australia.[186]
- The Australian Land Conservation Alliance estimates that Australia needs to spend over $1 billion a year to restore and prevent further landscape degradation, illustrating the scale of funding required to address the issue and the shortcomings of the Government's monetary commitments to achieve this.[187]
- Since its inception (up until 2021), the Clean Energy Regulator has committed $2.5 billion towards emission reduction projects, which includes agriculture and land sector projects (mainly revegetation projects) amongst other sector projects.[188]

Private investment

In addition to public funding via the ERF, the carbon market established under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) provides a mechanism for private investment in the market through the buying and selling of Australian Carbon Credit Unit (**ACCUs**).

The proposed Nature Repair Market is intended to attract private investors to the market, to invest in biodiversity restoration projects.[189]

Strengths and weaknesses of land clearing regulation that may be contributing to clearing rates

Overview

The EPBC Act is the Commonwealth Government's primary piece of environmental legislation. It establishes a legal framework for protecting and managing matters of national environmental significance (**MNES**), which include nationally listed threatened species and ecological communities,

[184] Nature Positive Plan p 19.
[185] See https://budget.gov.au/2022-23-october/content/stronger-economy.htm.
[186] https://www.acf.org.au/federal-budget-2023-24
[187] Australian Land Conservation Alliance, 'National state of environment report must be a turning point for Australian nature' (Media Release, July 2022) available at: https://alca.org.au/wp-content/uploads/2022/07/ALCA-Media-release-SoE-220719.pdf.
[188] Australian Government, *Australia's Long Term Emission Reduction Plan* (2021) 59 available at: https://www.dcceew.gov.au/sites/default/files/documents/australias-long-term-emissions-reduction-plan.pdf.
[189] https://www.dcceew.gov.au/environment/environmental-markets/biodiversity-market.

listed migratory species, national heritage places, Ramsar wetlands and the Commonwealth marine environment.

The EPBC Act requires that if an action is likely to have a significant impact on MNES, proponents of development projects are to submit a referral to the Australian Government. While land clearing is not directly regulated as a MNES in its own right, clearing activities will require Commonwealth if likely to have a significant impact on a MNES.

The Federal Environment Minister will then decide whether a referral is:

- an action that is clearly unacceptable, because it poses too significant of a risk;[190] or
- a controlled action, that is, it is likely to have a significant impact on a MNES and therefore must be assessed before approval is granted or refused;[191] or
- not a controlled action, that is, the action is not likely to have a significant impact on a MNES and does not require approval under the EPBC Act.

We note that state or territory laws apply in addition to the EPBC Act. That is, an activity may require state or territory approvals, whether or not approval is required under the EPBC Act.

The Federal Government's *Nature Positive Plan* has proposed significant reform to Federal environmental laws.

Exemptions

Overview:

The EPBC Act does not contain exemptions for 'low-risk' activities the way other legal frameworks do. This is primarily because the EPBC Act is only triggered if there is likely to be a significant impact on a MNES. For any action that falls below this threshold, referral and assessment under the EPBC Act is not required.

However, under section 158 of the EPBC Act, a person wishing to take a controlled action, or the designated proponent of an action, may apply in writing to the Minister for an exemption from a specified provision of Part 3, the Part which outlines the environmental approval process.[192] The Minister can exempt a person from attaining an environmental assessment and/or obtaining an approval for an action if it is in the national interest to do so. In determining the national interest, the Minister may consider Australia's defence or security or a national emergency, but this does not limit the matters the Minister may consider.

The Minister must publish a notice of any exemption granted under s 158 along with the reasons for the exemptions. The register of exemption notices is available online.[193]

[190] EPBC Act Part 7, Div 1A.
[191] EPBC Act s 75.
[192] EPBC Act s 158(1).
[193] See https://environment.gov.au/epbc/notices/exemptions.html.

There are also a range of scenarios where environmental approval under the EPBC Act is not needed (see Chapter 2, Part 4 of the EPBC Act). Notably these include:

- Forestry operations undertaken in accordance with a Regional Forestry Agreement (**RFA**): There are 10 RFAs,[194] covering approximately 20.5 million hectares of forest.[195] The RFAs were established as long-term plans seeking to balance economic, social and environmental demands on forests, including by setting aside areas for conservation, and identifying areas and controls for timber logging. Based on this premise, forestry operations are exempt from the environmental approval requirements of Part 3 of the EPBC Act if undertaken in accordance with an RFA.[196]
- An action does not require approval under Part 3 of the EPBC Act if the action was authorised by a specific environmental authorisation prior to the commencement of the EPBC Act or is associated with a lawful continuation of a land use that was occurring before the commencement of the EPBC Act in July 2000.[197]

Analysis:

Requirements to publish decisions and reasons under section 158, provides some transparency into the exemption process.

However, the term 'national interest' is not defined and there does not appear to be any guidance material guiding the Minister's exercise of power under this section. There is a risk that such broad powers can undermine the objectives of the EPBC Act. EDO has previously recommended that the scope of section 158 be limited.[198]

There is broad community concern about the RFA exemption. It is evident that the Regional Forest Agreements are outdated, based on science that does not account for climate change, and are no longer tenable regulatory instruments. There are many instances where logging of native forest continues to contribute to the incremental loss of habitat, and decline in listed threatened species and communities, and as such do not achieve the objects of the Act. The Commonwealth government must regain and strengthen oversight of forestry including through enforceable assessment, approval and offence provisions for forestry activities, rather than exemptions under inadequate and outdated Regional Forest Agreements.

Code-based clearing / Self-assessable clearing

There are no self-assessable clearing codes at the Commonwealth level.

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[194] https://www.agriculture.gov.au/agriculture-land/forestry/policies/rfa.
[195] Australian Bureau of Agricultural and Resource Economics and Sciences, *Australia's State of the Forests Report 2018*, 58, available at https://www.agriculture.gov.au/sites/default/files/abares/forestsaustralia/documents/sofr_2018/web%20accessible%20pdfs/SOFR_2018_web_higherquality.pdf.
[196] EPBC Act s 38.
[197] EPBC Act ss 43A and 43B.
[198] See Environmental Defenders Office, *Submission to the 10 year review of the EPBC Act* (April 2020) 71 available at: https://www.edo.org.au/publication/submission-10-year-review-epbc-act/.

Clearing Requiring Approval

In this section we consider the two-stage process of assessing and determining controlled actions, including:

- Referral - a preliminary decision as to whether or not an action is a controlled action (i.e. is likely to have a significant impact on an MNES) and requires approval under the EPBC Act.
- Assessment – the assessment and determination of a controlled action.

Referrals

Overview:

Because there may be some uncertainty as to whether or not an action will, or is likely to, have a significant impact on a MNES, the EPBC Act provides a process for referring an action to the Commonwealth for a decision as to whether it is a controlled action which requires approval under the EPBC Act.

The process of deciding whether to refer a project to the Minister involves a level of self-assessment by proponents, who are required to proactively refer their activity. The Commonwealth Government website provides a guide to assist proponents to decide whether an action needs to be referred for assessment under the EPBC Act.[199] The website asks people to be as objective as possible and provides tools to search whether a project might affect protected matters and whether it may have a significant impact. It also states that the process will take time and the tools won't provide a definite answer but will provide a better idea of likely impacts.[200]

The Minister has the authority under s 70 of the EPBC Act to request a referral of a proposal if they believe a person proposes to take an action that may be a controlled action. The Minister can request the person, or the state, self-governing Territory or agency of a state or self-governing territory that has administrative responsibilities relating to the action, refer the proposal.[201]

Under section 69 of the EPBC Act a state or territory or agency of a state or territory may also refer a proposal to the Minister for a decision on whether the proposal by a person to take an action is a controlled action if they have administrative responsibilities relating to the action.[202] States and territories themselves wishing to take an action that may be a controlled action are required to refer the project to the Minister under s 68 of the EPBC Act.

When deciding whether an action that is the subject of a proposal is a controlled action, that is likely to have a significant impact on MNES, and which provisions are the controlling provisions for the action, section 74(3) of the EPBC Act invites anyone to provide comments to the Minister. Referrals made under the EPBC Act are recorded in an online public register, which encourages the transparency of the

[199] Department of Climate Change, Energy, the Environment and Water, 'Self-assessment before making a referral under the EPBC Act' (Web Page) available at: https://www.dcceew.gov.au/environment/epbc/advice-on-complying-with-the-epbc-act/self-assessments.
[200] Ibid.
[201] EPBC Act s 70.
[202] EPBC Act s 69.

process.[203] The Minister must consider public comment in their decision about the action.[204] The Minister also must consider all the adverse impacts the action will have or is likely to have on the relevant protected matter.[205] Within 10 business days of deciding whether an action is a controlled action, the Minister is to give written notice of the decision and provide reasons for the decision.[206]

The Minister is to decide on which assessment approach is most appropriate for the assessment of the relevant impacts of a controlled action.[207] The relevant impacts are the impacts the action has or will have or is likely to have on a protected matter.[208]

An assessment can be done using:

- a process laid down under a bilateral agreement; or
- a process specified in a declaration by the Minister; or
- a process accredited by the Minister; or
- information included in the referral; or
- preliminary documentation provided by the proponent; or
- a public environment report; or
- an environmental impact statement; or
- a public inquiry.[209]

Matters that the Minister must consider in determining the assessment approach are set out generally in criteria and restrictions set out in subsections 87(3) - (6) of the EPBC Act and in detailed criteria set out in cl 5.03A of the EPBC Regulation, including:

- the potential scale and nature of the relevant impacts of the action can be predicted with a high level of confidence;
- the relevant impacts are expected to be short term, easily reversible or small in scale;
- adequate information is available about relevant impacts on the matters protected;
- the action is likely to have a significant impact on only a small number of protected matters or elements of each relevant protected matter;
- if the information is available—the person proposing to take the action has a satisfactory record of responsible environmental management and compliance with environmental laws;

[203] See Department of Climate Change, Energy, the Environment and Water, 'EPBC Act Public Portal' (Web Page) available at: https://epbcpublicportal.awe.gov.au/all-referrals/.
[204] EPBC Act s 75(1A).
[205] EPBC Act s 75(2)(a).
[206] EPBC Act s 77(1), (4).
[207] EPBC Act s 87.
[208] EPBC Act s 82.
[209] EPBC Act s 66.

- the degree of public concern about the action is, or is expected to be, moderately low.

In making a decision on an assessment, the Minister must not consider financial or economic factors (cl 5.03A(2) of the EPBC Regulation).

Analysis:

The failure to refer land clearing proposals to the Commonwealth has been highlighted as a key issue. A 2018 review found that referrals from the agricultural sector, a sector that has significant impacts on matters of national environmental significance through tree clearing, made relatively low amounts of referrals to the EPBC Act at 2.7% of the total 6,002 referrals since the EPBC Act was introduced in 2000.[210] The review found that farmers were not aware of their obligations under the EPBC Act and how these interacted with State-based obligations.[211] This is particularly the case in jurisdictions like NSW and Queensland where changes to the law have allowed more clearing to be undertaken through self-assessable state codes and exemptions. Some landholders may not understand that even though approval may not be required under state law, approval may still be required under the EPBC Act.

Between 2000, when the EPBC Act came into force, and 2017, over 7.7 million hectares of threatened species known or likely-to-occur forest and woodland habitats were cleared without referral to the EPBC Act, accounting for 93% of such threatened species habitat destruction.[212] That is, only 7% of all potential habitat cleared in Australia is referred to the Australian Government for assessment and approval.[213]

In November 2022, an Australian Conservation Foundation report noted that land clearing proposals in Queensland, particularly within the pastoral sector, were generally not referred to the Commonwealth Environment Minister for assessment/approval under the EPBC Act. It found that in 2018-19 there were potentially thousands of prima facie breaches of the EPBC Act that should have been investigated by the regulator.[214] It also noted that deforestation at vast scales in Queensland is occurring in threatened species habitats to expand pasture, while other industries more commonly followed the correct legal processes being assessed through the EPBC Act.[215] In 2018-19, 93% of 680,688ha of vegetation cleared in Queensland was related to 'conversion to pasture' and almost all undertaken without federal approval.[216] There is no publicly available record of enforcement action being taken for not referring

[210] Department of the Environment and Energy, *Review of the interactions between the EPBC Act and the agriculture sector* 1 (Final Report, 28 September 2018) available at: https://www.dcceew.gov.au/sites/default/files/documents/review-interactions-epbc-act-agriculture-final-report.pdf.
[211] Ibid.
[212] See Michelle S Ward et al, 'Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia' (2019) 1(11) *Society for Conservation Biology.*
[213] See Michelle S Ward et al, 'Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia' (2019) 1(11) *Society for Conservation Biology* 6.
[214] Australian Conservation Foundation, *Double Standard: the failure of Australia's national environment law to prevent the pastoral industry bulldozing threatened habitat species in Queensland* (November 2022) 4 available at: https://assets.nationbuilder.com/auscon/pages/21249/attachments/original/1668483392/Qld_land_clearing_report_Nov_2022.pdf?1668483392.
[215] Ibid.
[216] Australia Conservation Foundation, *Aggravating extinction investigation: How the Australian government approves the destruction of threatened species habitats* (Report, 22 March 2022) 3, available at: https://assets.nationbuilder.com/auscon/pages/20116/attachments/original/1647489840/Aggravating_extinction.pdf?1647489840.

such projects that destroy threatened species habitat for pasture expansion in Queensland.[217] In effect, this allows for an exemption from the EPBC Act for habitat destruction for pasture expansion.[218]

Ward et al found during 2000-2017 only 4 of 3,058 referred actions were determined as 'clearly unacceptable' under the EPBC Act, 2,252 were decided to be not a controlled action (74%), therefore not requiring approval, and 806 as a controlled action (26%).[219] Within this period, Queensland made the highest rate of referrals at 35%, with Western Australia close behind representing 26% of referrals. Industry sectors that submitted the majority of application to remove MNES habitat were firstly residential developers at 21%, then the mining industry at 18% with the mining industry removing the most MNES habitat through compliant processes (37%) and non-renewable energy generation and supply accounting for 28% of compliant loss.[220] The agricultural sector for this time period between 2000-2017 submitted 1.3% of referrals, echoing the Australian Conservation Foundation findings above that there is an issue with lack of referrals from the agricultural sector, despite being responsible for large areas of vegetation cleared in Queensland. Further as proponents conduct a 'self-assessment' as to whether their actions require referral under the EPBC Act, the amount of habitat loss due to proponents deciding their actions would not have a significant impact cannot be calculated.

There are a number of reasons why so many referrals may be deemed to not be controlled actions:

- Proponents may ignore or downplay the impacts of their action hoping to avoid the environmental assessment process under the EPBC Act. For example, proponents often describe habitat to be impacted by their action as 'degraded' and there are no reliable Government data sources to check these claims, resulting in the process being highly dependent on a proponent's (and their hired consultant's) honesty.[221] This may result in an action being inappropriately determined as a non-controlled action. [222]

- Significant impact criteria are ambiguous. Despite *Significant Impact Guidelines,*[223] the concept of 'significant impact' can be difficult to apply and prone to subjective interpretation in favour of the landholder. For example, significant impact criteria for critically endangered and endangered species include those likely to 'lead to a long-term decrease in the size of a

[217] Australian Conservation Foundation, *Double Standard: the failure of Australia's national environment law to prevent the pastoral industry bulldozing threatened habitat species in Queensland* (November 2022) 5 available at: https://assets.nationbuilder.com/auscon/pages/21249/attachments/original/1668483392/Qld_land_clearing_report_Nov_2022.pdf?1668483392.
[218] Ibid.
[219] Michelle S Ward et al, 'Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia' (2019) 1(11) *Society for Conservation Biology* 9.
[220] Ibid 9.
[221] Natalya M Maitz, Martin FJ Taylor, Michelle S Ward and Hugh P Possingham, 'Assessing the impact of referred actions on protected matters under Australia's national environmental legislation' (2022) *Conservation Science and Practice* e12860, 10.
[222] Natalya M Maitz, Martin FJ Taylor, Michelle S Ward and Hugh P Possingham, 'Assessing the impact of referred actions on protected matters under Australia's national environmental legislation' (2022) *Conservation Science and Practice* e12860, 10.
[223] *Significant Impact Guidelines 1.1 - Matters of National Environmental Significance,* available at https://www.dcceew.gov.au/environment/epbc/publications/significant-impact-guidelines-11-matters-national-environmental-significance.

population', yet no objective species-specific thresholds are provided. This can permit different regulators to apply subjective decisions without considering objectively measured impact.[224]

- Cumulative impacts are not taken into consideration. Cumulative losses are essential when assessing significant impact, yet actions under the EPBC Act are assessed individually. There are no requirements under the EPBC Act for the regulator to consider cumulative impacts of multiple actions at landscape, ecosystem or species' scales.[225] The incremental and combined impact of small amounts of habitat loss can cause a 'death by a thousand cuts' impact,[226] yet there are no provisions in the EPBC Act that allow regulators to reject actions due to their cumulative significant impact.[227]

- There is a lack of transparency in the decision-making process. The Samuel Review raised concerns about social and economic factors taking preference over environmental factors[228] that may be influencing referrals to be determined as non-controlled actions in the interest of supporting industries.[229]

The failure of land clearing actions to be referred to the Commonwealth is a key issue and undermines the effectiveness of the EPBC Act in protecting potential habitat for terrestrial threatened species, migratory species or threatened ecological communities.

Determination

Overview:

If the Minister decides an action is a controlled action, an assessment and determination is required. The process will be slightly different depending on the applicable assessment method.

For some assessment approaches, there are specific obligations to invite public comment. For example:

- For assessment on referral information, the secretary must seek public comment on a draft recommendation report.[230]
- For assessment on preliminary documentation, the Minister must give the proponent a written direction to publish specified information and seek public comment.[231]

[224] Samuel Review 74-6**.** See also Michelle S Ward et al, 'Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia' (2019) 1(11) *Society for Conservation Biology* 10; Chris McGrath, 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act' (2006) 23 *Environmental and Planning Law Journal* 165–184.
[225] See also Ayesha Tulloch et al, 'Understanding the importance of small patches of habitat for conservation' (2016) 53 *Journal of Applied Ecology* 418-429.
[226] See U.S. Environmental Protection Agency, *Consideration of Cumulative Impacts in EPA review of NEPA* (1999) available at: https://www.epa.gov/sites/production/files/2014-08/documents/cumulative.pdf; Ayesha Tulloch et al, 'Understanding the importance of small patches of habitat for conservation' (2016) 53 *Journal of Applied Ecology* 418-429.
[227] Samuel Review 127; Michelle S Ward et al, 'Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia' (2019) 1(11) *Society for Conservation Biology* 11.
[228] Samuel Review 9.
[229] Natalya M Maitz, Martin FJ Taylor, Michelle S Ward and Hugh P Possingham, 'Assessing the impact of referred actions on protected matters under Australia's national environmental legislation' (2022) *Conservation Science and Practice*, 10.
[230] EPBC Act, s 93.
[231] EPBC Act, s 95.

- For assessment by a public environment report, the proponent must seek public comment on a draft report.[232]
- For assessment on environmental impact statements, the proponent must seek public comment on a draft environmental impact statement.[233]

Before making a decision, the Minister may also seek public comment on the proposal and any conditions that the Minister proposes to attach to the approval.[234]

Matters that must be considered by the Minister are set out in Part 9, Subdivision B of the EPBC Act. These include general matters of consideration, including the principles of ecologically sustainable development, any relevant assessment report or report prepared under relevant assessment approach, public comments received, and any relevant advice of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development. [235] The Minister can also take into account a person's environmental history.[236]

There are also specific, additional matters of consideration that may apply to each relevant MNES – see section 137 -140A of the EPBC Act.

Analysis:

Even once an action is deemed to be a controlled action, the extent that the EPBC Act can regulate land clearing is limited. The Minister can only regulate land clearing to the extent it impacts on an MNES.

There are no absolute protections for MNES. Unless an action is deemed clearly unacceptable at the referral stage,[237] no areas are off limits and there are no safeguards that would trigger a mandated refusal (e.g. serious or irreversible) impacts. There are some requirements for the Minister to not act inconsistently with certain international obligations,[238] management principles[239] or plans[240], however those obligations, principles and plans are often so generally worded it could be difficult to prove the Minister has acted inconsistently.

A 2022 study looked at the extent cleared woody vegetation that provides potential habitat for protected matters occurred as either a non-controlled action (i.e. it did not require approval under the EPBC Act) or as a controlled action (i.e. – it was approved under the EPBC Act) under the EPBC Act in Queensland and NSW. [241]

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[232] EPBC Act, s 98.
[233] EPBC Act, s 103.
[234] EPBC Act, s 131A.
[235] EPBC Act s 136.
[236] EPBC Act s 136(4).
[237] EPBC Act ss 74B and 74C.
[238] For example, under s139(1)(a) of the EPBC Act, the Minister must not act inconsistent with Australia's obligations under the Biodiversity Convention; or the Apia Convention; or CITES.
[239] For example, under section 137A of the EPBC Act the Minister must not act inconsistent with National Heritage management principles.
[240] For example, under section s 139(1)(b) of the EPBC Act the Minister must not act inconsistent with a recovery plan or threat abatement plan.
[241] Natalya M Maitz, Martin FJ Taylor, Michelle S Ward and Hugh P Possingham, 'Assessing the impact of referred actions on protected matters under Australia's national environmental legislation' (2022) *Conservation Science and Practice* e12860.

Relevantly, it found that:

- habitat for one or more threatened species lost 10,941 ha of woody vegetation, which was cleared under controlled action referrals, accounting for 57% of the total area referred to the Australian Government, compared with 8176 ha under non-controlled action referrals (43%).
- Migratory species lost 10,943 ha (57%) of potential habitat under controlled action referrals and 8,206 ha (43%) under non-controlled action referrals.
- Threatened ecological communities lost 2501 ha (85%) under controlled action referrals and 370 ha (15%) under non-controlled action referrals.[242]

That is, even once a matter was deemed to be a controlled action under the EPBC Act, the Act was not necessarily providing greater protection for the habitat of threatened or migratory species or threatened ecological communities.

Protection of Environmentally Sensitive Areas

Introduction

The premise of the EPBC Act is that it aims to provide protection for MNES. Under this structure, environmentally sensitive areas that are of national environmental significance are identified as a MNES e.g. Ramsar wetlands, world heritage areas, the Great Barrier Marine Park etc. meaning that an action that will have a significant impact on these areas must be referred and assessed under the EPBC Act.

While threatened and migratory species and threatened ecological communities are MNES, their habitat is not specifically protected other than as part of the assessment of the impacts of an action on threatened and migratory species and threatened ecological communities or indirectly through recovery plans. However, there is a mechanism in the EPBC Act for the Minister to declare certain areas as critical habitat – see below.

The Minister also has the power to declare Commonwealth reserves – see below.

The Albanese Government has proposed to implement a new 'traffic-light' system in new Regional Plans. Plans would pre-identify areas for protection, restoration, and sustainable development. This would also help to identify priority areas for action and investment.[243]

Critical Habitats

Overview:

A recovery plan must identify habitat 'critical to the survival of the species or ecological community'.[244] When determining whether or not to approve a controlled action, the Minister must not act inconsistently with a recovery plan.[245] The requirement to have a recovery plan is not mandatory, meaning habitat may not always be identified through this process.

[242] Ibid 7.
[243] Nature Positive Plan 3.
[244] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s270(2)(d).
[245] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s139(1)(b)

Separately, when making a recovery plan the Minister must consider whether to list habitat that is identified in the recovery plan as being critical to the survival of the species or ecological community on the Critical Habitat Register.[246] It is an offence to knowingly damage critical habitat in a Commonwealth area.[247] Where a Commonwealth agency completes a contract to sell or lease Commonwealth land that includes critical habitat, the agency must ensure that the contract includes a covenant which in effect protects the critical habitat.[248]

Analysis:

The process of identifying habitat 'critical to the survival of the species or ecological community' in a recovery is important, as is the obligation for the Minister to not act inconsistent with a recovery plan. However, the primary intent is not to protect native vegetation, so the ability for this mechanism to drive down clearing rates is likely to be limited.

The Critical Habitat Register is likely to have even limited effect, given that:

- At present, there are only five listed critical habitats;[249] and
- protections only apply to those habitats on Commonwealth land or sea, which means for most species there is no conservation advantage.

Commonwealth Reserves

Overview:

The Governor-General can proclaim Commonwealth reserves over areas of land or sea that the Commonwealth owns, or the Commonwealth or Director leases, or are in a Commonwealth marine area, or outside Australia that the Commonwealth has international obligations to protect.[250] Proclamations must assign the reserve to a particular category that affects how the reserve is managed and used.[251] Many activities cannot be carried out in a Commonwealth reserve unless permitted by a management plan.[252]

Analysis:

Given Commonwealth reserves can only be proclaimed over Commonwealth land, the ability for this mechanism to drive down clearing rates is likely to be limited.

[246] *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(2).
[247] EPBC Act s 207B.
[248] EPBC Act, 207C(2).
[249] See Department of Climate Change, Energy, the Environment and Water, 'Register of Critical Habitat' available at: https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl.
[250] EPBC Act s 344.
[251] EPBC Act s 346.
[252] EPBC Act ss 354 and 354A.

Offsets

Overview:

The Commonwealth's biodiversity offsetting framework is set out in the *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy* (**EPBC Environmental Offsets Policy**).[253]

It is a non-statutory policy document that outlines the Commonwealth's approach to the use of offsets under the EPBC Act. It is accompanied by an *Offsets assessment guide*[254] - a tool to assist proponents and departmental officers to plan offsets and assess the suitability of offset proposals.

Analysis:

The current offset arrangements under the EPBC Act Environmental Offsets Policy are not preventing environmental decline. They are failing to compensate for loss of habitat or heritage values and are often not enforced or maintained.[255]

The following specific concerns are noted:

- Commonwealth biodiversity offsetting rules are not mandated in legislation, rather the rules are set out in the non-statutory EPBC Environmental Offsets Policy. This means there are limitations on implementing and enforcing the policy.

- There is little guidance on how to apply the avoid, mitigate, offset mitigation hierarchy. There are concerns that its application is subjective, and not rigorously applied in practice.

- In-perpetuity protection is not guaranteed. While the EPBC Environmental Offsets Policy recognises that the best legal mechanisms for protecting land are intended to be permanent and secure, it does not provide certainty that protection will be in perpetuity. Instead, it outlines suitable offset mechanisms, including state and territory-based mechanisms, and acknowledges that *"(i)n some situations there may be difficulties in permanently securing a site for conservation purposes due to the existing tenure of the land. Such situations will be considered by the department on a case-by-case basis*". Additionally, even those state and territory-based mechanisms that are intended to provide permanent protection, can be overturned.[256]

In some instances, the EPBC Environmental Offsets Policy is more aligned with best practice principles than other jurisdictions. For example:

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[253] See https://www.awe.gov.au/environment/epbc/publications/epbc-act-environmental-offsets-policy.
[254] See https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.awe.gov.au%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2Foffset-assessment-guide.xlsm&wdOrigin=BROWSELINK.
[255] Nature Positive Plan 3.
[256] For example, section 5.10 of the BC Act, allows a Biodiversity Stewardship Agreement to be terminated in certain circumstances.

- The EPBC Environmental Offsets Policy requires that suitable offsets must deliver an overall conservation outcome that *improves or maintains* the viability of the protected matter; and

- 90% of offsets must be direct offsets (although deviation will be considered where it can be demonstrated that a greater benefit to the protected matter is likely to be achieved through increasing the proportion of other compensatory measures in an offsets package; or scientific uncertainty is so high that it isn't possible to determine a direct offset that is likely to benefit the protected matter).

The *Nature Positive Plan* proposes a National Environmental Standard for environmental offsets to be made under law to provide certainty and confidence about its implementation.[257] It is intended that:

- proponents will be required to demonstrate attempts to avoid and mitigate harm to protected matters before using environmental offsets.
- if a proponent cannot find or secure a 'like for like' offset, they can make conservation payments.[258] This may lead to a weakening of Commonwealth offsetting standards if there are no strict parameters on the use of conservation payments (there is a risk that conservation payments will result in increased indirect offsetting). The *Nature Positive Plan* commits $12 million towards reforming offset arrangements.[259]

Compliance and enforcement

Effectiveness of regulatory oversight

The Federal Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) is responsible for enforcing the EPBC Act. However, failure of land clearing actions to be referred to the Federal Government is a key issue and undermines the effectiveness of the EPBC Act in protecting MNES. The Department has not taken an active role in identifying and remedying breaches of the EPBC Act from clearing activities that have not been appropriately referred.

Strength of compliance and enforcement framework

Overview:

A breach of provisions of the EPBC Act can result in various enforcement mechanisms, including penalties,[260] enforceable undertakings,[261] remediation orders[262] and an injunction applied for by the Minister for the Environment or an 'interested person.'[263] The Department's Compliance Policy states

[257] Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: better for the environment, better for business* (December 2022) 3 available at: https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf.
[258] Ibid.
[259] Ibid 21.
[260] See e.g. EPBC Act ss 18, 20.
[261] EPBC Act ss 486DA, 486DB.
[262] EPBC Act ss 480A-480C.
[263] EPBC Act s 475

that the Department responds to non-compliance with the EPBC Act proportionate to risk and on a case-by-case basis.[264]

Sections 18 and 20 of the EPBC Act make it an offence to take an action without approval that has or will have a significant impact on listened threatened species or endangered communities or migratory species. There is a 5,000 penalty unit offence for individuals and 50,000 penalty unit offence for corporations. Sections 18A and 20A of the EPBC Act also provide that offences related to threatened species can be punishable under the criminal code with up to 7 years imprisonment and a 420 penalty unit fine or both.

If the Minister suspects an authorised action is having greater impacts than anticipated at the assessment stage, or there is a likely breach of an environmental authority, s 458 of the EPBC Act provides for an environmental audit of any project approved under the EPBC Act.

Analysis:

The Samuel Review stated there has been limited compliance activity under the EPBC Act and a lack of transparency about such compliance.[265] Further, serious enforcement actions are rarely used. The Review concluded the compliance and enforcement powers under the EPBC Act are outdated and applied in a piecemeal way across the Act, further undermining these powers.[266] The fact the legislation is also complex, uses 'impenetrable terminology', and the infrequency of many people's interaction with law, makes voluntary compliance and pursuing enforcement action difficult.[267] The *Nature Positive Plan* seeks to address some of these shortcomings and proposes a federal EPA to be responsible for assessing and approving actions and compliance under the EPBC Act.

In 2019 Ward et al commented that since the commencement of the EPBC Act there have been 18 successful court cases penalising companies or people for non-compliance for not referring their actions to the EPBC Act that resulted in habitat loss.[268] Together the 18 cases resulted in a collective fine of AUD $3.9 million for clearing a total of 340 ha. 62% of the cases involved the removal of threatened ecological communities listed as endangered or critically endangered. The fines were issued for a range of 0.54 ha to 13 ha of ecological community loss. Based on this threshold, there is potentially over 7.1 million ha of non-compliant habitat loss that warrants investigation and is potentially being ignored by the regulator, which suggests a severe lack of enforcement of the EPBC Act to protect against potential habitat loss.[269] This non-compliant (i.e. not referred to the Federal Government for assessment) 7.1 million ha of loss accounts for 93% of the total potential habitat loss for terrestrial threatened species, migratory species and threatened ecological communities between 2000 and 2017. This loss occurred with no assessment, regulation, or enforcement under the EPBC Act.

The Samuel Review noted that penalties and remedies for non-compliance and breaches of the EPBC Act need to be appropriate to actively deter non-compliance rather than being viewed as a 'cost of

[264] Department of Environment and Energy, *Compliance Policy* (2019)12 available at: https://www.dcceew.gov.au/sites/default/files/documents/compliance-policy_0.pdf.
[265] Samuel Review 21.
[266] Ibid.
[267] Ibid.
[268] Ward et al 9.
[269] Ward et al 10.

business'.[270] Outcomes from breaches of the EPBC Act are published on the DCCEEW's website.[271] Common outcomes for clearing habitat for matters of MNES are enforceable undertakings and remediation determinations.[272]

The DCCEEW's website records audits performed from 2006 to 2019. The 2019 audit, conducted by the then Department of Agriculture, Water and the Environment, records only three audits for that year, suggesting these audits do not take place often.[273] Two of the audits found non-compliance with one condition of the approval and in both cases the Department took no further action. In the third audit from 2019, non-compliance was found with 9 sub-criteria and the Department states it will further assess the findings.[274]

DCCEEW chooses projects for audit via a risk-focused strategic selection process, meaning projects in priority, high risk sectors.[275] This is a similar approach to many of the states, which as noted in those jurisdictions, can mean smaller projects considered lower risk are not audited. This risks environmental harm from the cumulative impacts of the smaller environmental impacts of these projects.

There is currently no standing for interested parties to seek merits review of decisions under the EPBC Act. Mertis review would strengthen public participation and enforcement of the Act.[276] The Samuel Review recommended limited merits review be introduced,[277] but the *Nature Positive Plan* indicated that the Government will not introduce a right to limited merits review of decisions.[278]

Overall, the enforcement mechanisms under the EPBC Act to protect against clearing that causes habitat loss for threatened species and ecological communities and migratory species are not being used effectively.

Opportunities for third party enforcement

'Interested persons' may apply to the Federal Court for an injunction to stop a party from engaging in conduct that constitutes an offence or other contravention of the EPBC Act or Regulations.[279] However,

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[270] Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, Foreword, October 2020) 21 available at: https://epbcactreview.environment.gov.au/resources/final-report.
[271] See Department of Climate Change, Energy, the Environment and Water, 'Outcomes of compliance and non-compliance cases under the EPBC Act' available at: https://www.dcceew.gov.au/environment/epbc/compliance/audit-outcomes.
[272] Ibid.
[273] Department of Agriculture, Water and the Environment, 'Compliance audits completed in 2019' available at: https://webarchive.nla.gov.au/awa/20200606101734/http://www.environment.gov.au/epbc/compliance-and-enforcement/auditing/compliance-audits-2019.
[274] Ibid.
[275] Department of Climate Change, Energy and the Environment and Water, 'Compliance audits' available at: https://www.dcceew.gov.au/environment/epbc/compliance/audits.
[276] See Environmental Defenders Office, *Submission to the 10 year review of the EPBC Act* (April 2020) 14 available at: https://www.edo.org.au/publication/submission-10-year-review-epbc-act/; Community rights to merits reviews are supported by both the Hawke Review of the EPBC Act and the Independent Commission Against Corruption, Anti-corruption safeguards in the NSW planning system (2012).
[277] Samuel Review 11.
[278] Nature Positive Plan, p 32.
[279] 'Interested person' is defined as a person or organisation whose interests have been, or would be, affected by the conduct in question, or who has been engaged in a series of activities for the protection or conservation of (or research into) the environment at any time within the past two years – see EPBC Act, s 475 (6) and (7).

there are no provisions for interested parties to seek a merit review of decisions. The threat of adverse costs orders, the significant cost of legal action, and lack of merits review remain considerable barriers to government accountability being achieved through the EPBC Act framework.

Transparency of information relating to enforcement and compliance

There are some general reporting requirements and provisions for monitoring of compliance under the EPBC Act.

For example:

- Section 516 of the EPBC Act requires the Secretary to prepare an Annual Report, which the Minister must table in Parliament.
- Section 516 of the EPBC Act requires the Minister to prepare an Australian State of the Environment (**SoE**) report every 5 years.
- Sections 407-412A of the EPBC Act provide authorised officers with powers to undertake monitoring for the purpose of compliance and enforcement, but there is no systematic framework of monitoring for this purpose.

The Samuel Review reported that there is ineffective capability of systems for surveillance to monitor illegal activities and compliance with conditions for approved projects.[280] The *Nature Positive Plan* proposed establishing the Data Division, which would be an independent environmental information office within the DCCEEW to oversee and coordinate improvements to Australia's environmental data and information. The Plan also states that the Government will improve environmental data using remote imaging through satellite and drone technology combined with advances in machine learning algorithms to monitor the environment. Detecting illegal land clearing is provided as an example of how such technology and data can be utilised. The Plan also commits to a new national EPA to undertake enforcement and compliance.

[280] Samuel Review 147.

New South Wales

New South Wales

Background

NSW previously had laws in place designed to end broadscale land clearing unless it maintained or improved environmental outcomes, however these laws were repealed and there is currently no policy or legislative commitment to reduce or end land clearing in NSW.

Data shows that land clearing rates for woody vegetation[281] on agricultural land across NSW have increased from 8,500 ha in 2011 to 27,100 ha in 2017, 29,400 in 2018, 23,400 in 2019, and 13,000 in 2020.[282] The major reduction in agricultural clearing in 2020 is considered to reflect the combined impacts of severe drought, unprecedented bushfires, record-breaking flooding and rains, and the Covid pandemic. Additionally, in 2020, 46,100 ha of non-woody vegetation[283] was cleared for agriculture, forestry and infrastructure on rural land (noting a significant proportion of clearing for forestry was for post-fire plantation salvage harvest).

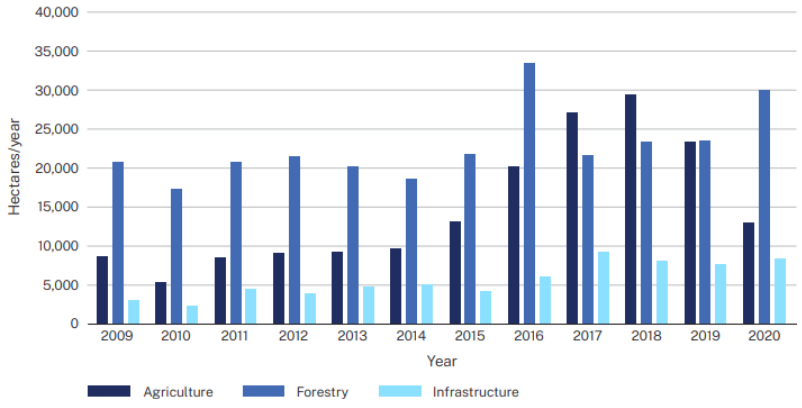

Figure 2 Woody vegetation loss by landcover class

Results for 2009–14 based on SPOT-5 and Landsat imagery; 2015–16 results based on SPOT-5, SPOT-6 and Sentinel-2 imagery; 2017–20 results based on Sentinel-2 imagery.

Image 1 - Woody vegetation loss by landcover class Source: NSW Department of Planning and Environment, *Woody vegetation change Statewide Landcover and Tree Study Summary report 2020,* 2022[284]

[281] For the purpose of NSW data, woody vegetation is defined as vegetation that: produces wood as their primary structural tissue, is typically trees, shrubs or woody vines (lianas), is usually perennial.
See NSW Department of Planning and Environment, *Statewide Landcover and Tree Study Method* available at:https://www.environment.nsw.gov.au/topics/animals-and-plants/native-vegetation/landcover-science/statewide-landcover-tree-study.

[282] See Department of Planning and Environment, *Results woody vegetation change statewide landcover and tree study 2020* tab 1, available at: https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Native-vegetation/results-woody-vegetation-change-statewide-landcover-and-tree-study-2020.xlsx?la=en&hash=3ABF0AF453CB9CF071482933184B51E1AF6804EB.

[283] Non woody vegetation includes grasses, small shrubs and groundcover – see Department of Planning, Industry and Environment, *Woody and non woody landcover change on rural regulated land Summary report 2019,* available at: https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Native-vegetation/woody-non-woody-landcover-change-rural-regulated-land-summary-rpt-2019-210192.pdf.

[284] NSW Department of Planning and Environment, *Woody vegetation change Statewide Landcover and Tree Study Summary report 2020* available at: https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Native-vegetation/woody-vegetation-change-statewide-landcover-tree-study-summary-rpt-2020-220266.pdf.

Much of the increase in land clearing rates can be attributed to the Land Management and Biodiversity Conservation Framework introduced in 2017.[285] Key weaknesses of the framework include a new framework for rural land clearing, including new vegetation clearing codes that have seen significant amounts of clearing occur with little oversight, poor implementation and regulation of the framework, and a new biodiversity offsets scheme that deviates too far from best practice, leading to an overreliance on biodiversity offsets.

Despite critical reviews by both the Audit Office of NSW and NSW Natural Resources Commission,[286] the framework remains largely unchanged.

Government commitments to end broadscale land clearing in line with the Glasgow Declaration

Commitment

There was no explicit commitment by the previous NSW Government to reduce or end land clearing by 2030. Rather legislative objectives aim to maintain a healthy environment, with a focus on protecting biodiversity.

The following discussion considers:

- public commitments and statements;
- legislative objectives; and
- policy documents.

Public commitments and statements

The previous NSW Government's position on land clearing remains essentially unchanged since 2015, when the then Baird Government committed to implementing all 43 recommendations in the report of the Independent Biodiversity Legislation Review Panel, including overhauling NSW land clearing laws.[287]

The then Government repealed the *Native Vegetation Act 2003* (**NV Act**) and instead introduced a new framework through Part 5A of the *Local Land Services Act 2013* (**LLS Act**) and *Biodiversity Conservation Act 2016* (**BC Act**). The framework (known as the Land Management and Biodiversity Conservation Framework) has remained largely unchanged since it commenced in 2017.

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[285] See https://www.lls.nsw.gov.au/help-and-advice/land-management-in-nsw.

[286] See:

- Audit Office of NSW, *Managing Native Vegetation,* June 2019 available at: https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation.
- Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, available at: https://www.nrc.nsw.gov.au/land-mngt.

[287] See NSW Department of Planning and Environment, *Biodiversity legislation reform background* available at: https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/overview-of-biodiversity-reform/legislation/review#:~:text=On%203%20May%202016%20the%20NSW%20Government%20released,to%20the%20Independent%20Biodiversity%20Legislation%20Review%20Panel%27s%20recommendations.

In March 2022, Minister for the Environment, James Griffin, noted his concern about land clearing, but did not commit to reducing it, stating that 'the rate of land clearing across New South Wales is too high... The issue of land management is one that I am particularly concerned about and focused on'.[288]

It is noted that the newly elected NSW Government committed prior to the March 2023 election to "*Ensure the statutory review of the Biodiversity Conservation Act strengthens environmental protections, **stops run away land clearing**, and fixes the biodiversity offset scheme*".[289]

Legislative objectives

The purpose of the BC Act is to 'maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future'.[290]

Specifically, the purpose of the Act includes 'to conserve biodiversity at bioregional and State scales'.[291]

The objects of the LLS Act are, relevantly:

…

(e) to ensure the proper management of natural resources in the social, economic and environmental interests of the State, consistently with the principles of ecologically sustainable development (described in section 6 (2) of the *Protection of the Environment Administration Act 1991*),

…

(i) to provide a framework for financial assistance and incentives to landholders, including, but not limited to, incentives that promote land and biodiversity conservation.[292]

Notably, the objective 'to prevent broadscale clearing unless it improves or maintains environmental outcomes' in the former NV Act was deliberately repealed.

The objectives of Chapter 2 – Vegetation in non-rural areas of the *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (NSW) are:

(a) to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and

(b) to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.[293]

[288] NSW Environment and Heritage, *Portfolio Committee No. 7 – Planning and Environment* (1 March 2022) 11 available at: https://www.parliament.nsw.gov.au/lcdocs/other/16810/Griffin%20-%20020322%20-%20QON.PDF.
[289] NSW Labor Party, March 2023, *Saving Koalas From Extinction*, March 2023 election commitment, available at https://www.chrisminns.com.au/issues.
[290] *Biodiversity Conservation Act 2016* (NSW) s 1.3.
[291] *Biodiversity Conservation Act 2016* (NSW) s 1.3(a).
[292] *Local Land Services Act 2013* (NSW) s 3.
[293] *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (NSW) reg 2.1.

The objects of the EP&A Act include, relevantly:

> (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
>
> (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
>
> …
>
> (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats.

Policy documents

No standalone policy on land clearing was produced by the previous NSW Government.

It is noted that the newly elected NSW Government took a commitment to stop "run away land clearing" to the March 2023 election.

Costed plan to end deforestation

There is no specific costed plan to end deforestation in NSW. Rather, NSW has arguably invested in implementing its Land Management and Biodiversity Conservation Framework.

The following considers:

- Money connected to legislation; and
- Private investments.

Money Connected to Legislation

The introduction of the Land Management and Biodiversity Conservation Framework was accompanied by a $240 million investment over five years.[294]

In the 2022-23 Budget there was no explicit additional funding for the regulation of land clearing.[295] However we do note the previous Government committed:

- $206.2 million over 10 years to enhance the State's natural capital by rewarding farmers who opt-in to a Sustainable Farming accreditation program to improve carbon and biodiversity outcomes on their land, while maintaining or enhancing productive land use;

[294] NSW Government, *Native Vegetation Act to be repealed, replaced with new and fairer system* (Media Release, 9 November 2016) available at: https://www.environment.nsw.gov.au/news/native-vegetation-act-to-be-repealed-replaced-with-new-and-fairer-system.

[295] See NSW Government, *Budget Paper No.02: Outcomes Statement* available at: https://www.budget.nsw.gov.au/sites/default/files/2022-06/2022-23_02_Budget-Paper-No-2-Outcomes-Statement.pdf.

- $106.7 million over 3 years to increase the supply of biodiversity offset credits through a new Biodiversity Credits Supply Fund; and

- ongoing funding to its Save our Species program.[296]

Private Investments

The previous NSW Government released a *Natural Capital Statement of Intent* which began to explore options for incentivising landholders as environmental stewards.[297] Options being explored include opportunities for private sector investment.

Strengths and weaknesses of land clearing regulation that may be contributing to clearing rates

Introduction

In NSW, there are multiple legal pathways for regulating land clearing, depending on the type of activity being undertaken (e.g. clearing only, or clearing associated with development), the scale of the activity, and type of land (e.g. rural land or non-rural land) - see **Table 1 – Legal pathways for regulating the clearing in NSW.**

Table 1 – Legal pathways for regulating the clearing in NSW.

Pathway	Scale of activity	Relevant legal framework
Clearing only – rural land	'Low impact' - Allowable activities	Part 5A, *Local Land Services Act 2013* (NSW) (**LLS Act**) Schedule 5A
	Code-based clearing	Part 5A, LLS Act *Land Management (Native Vegetation) Code 2018*
	High-impact clearing – approval	Part 5A, LLS Act
Clearing only – non-rural land	Allowable activities or clearing that does require an approval.	Chapter 2 – Vegetation in non-rural areas, *State Environmental Planning Policy (Biodiversity and Conservation) 2021*
	Council permit– general clearing	Chapter 2 – Vegetation in non-rural areas, *State Environmental Planning Policy (Biodiversity and Conservation) 2021*

[296] See NSW Department of Planning and Environment, *Budget boost to biodiversity* available at: https://www.environment.nsw.gov.au/news/budget-boost-to-biodiversity.
[297] See NSW Department of Planning and Environment, *Natural Capital Statement of Intent,* available at https://www.environment.nsw.gov.au/research-and-publications/our-science-and-research/our-research/social-and-economic/natural-capital/natural-capital-statement-of-intent.

	NV Panel approval – high impact clearing	Chapter 2 – Vegetation in non-rural areas, *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (**Biodiversity and Conservation SEPP**)
Clearing associated with development	'Low impact' – exempt development	*Environmental Planning and Assessment Act 1979* (**EP&A Act**) *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**Exempt and Complying Development SEPP**)
	Code-based development	EP&A Act Exempt and Complying Development SEPP
	Part 4 development (Local development and regional development) State significant development (SSD)	Part 4, EP&A Act
	Part 5 activity State Significant Infrastructure (**SII**) and Critical State significant infrastructure (**CSII**)	Part 5, EP&A Act

For the purpose of this report, we examine each of the following key pathways separately:

- Pathway 1: Clearing on rural land;
- Pathway 2: Clearing on non-rural land; and
- Pathway 3: Clearing associated with development.

- **Pathway 1: Clearing on rural land (Allowable Activities)**

Overview

Part 5A of the LLS Act regulates clearing (not associated with development) on rural land.[298]

For the purpose of Part 5A of the LLS Act, rural land is categorised as either:

- Category 1 – exempt land; or
- Category 2 – regulated land, including the following sub-categories:
  - Category 2 – vulnerable regulated;
  - Category 2– sensitive regulated.

[298] Section 60A of the LLS Act outlines areas that are not considered to be rural land for the purpose of Part 5A.

Clearing undertaken on category 1 exempt land is not regulated (i.e. it can be carried out with being an authorised activity, code-based clearing or requiring approval from the Native Vegetation Panel (**NVP**)).

Clearing on category 2 – regulated land can be carried out under various approval pathways depending on the scale of clearing:

- *Allowable activities:* Certain low-impact activities are described as allowable activities and can be carried out without approval or other authorisation. Allowable activities are listed in Schedule 5A of the LLS Act.
- *Code-based clearing:* A substantial range of activities can be carried out (with notification or certification – but not robust environmental assessment and approval) if they comply with the *Land Management (Native Vegetation) Code* (**Native Vegetation Code**). Substantial concerns have been raised regarding the scope of that Code.[299]
- *High impact clearing*: Higher impact clearing requires approval from the NVP. This clearing triggers biodiversity assessment requirements under the BC Act.

Additional restrictions apply to land categorised as category 2 – vulnerable regulated or category 2– sensitive regulated. For example:

- There are different allowable activity rules for category 2 – vulnerable regulated or category 2– sensitive regulated land.
- Code-based clearing cannot be undertaken on category 2– sensitive regulated land.[300]

Exemptions

Overview:

Under the LLS Act 'low-impact' native vegetation clearing, known as 'allowable activities' is permitted without approval in a regulated areas. Allowable activities are set out in Schedule 5A of the LLS Act and are generally land management activities, such as the construction of rural infrastructure including fences, dams, sheds and tracks. A more restricted set of activities apply in category 2 vulnerable land and category 2 sensitive land.

Analysis:

It is not necessarily unreasonable to provide exemptions for activities that are genuinely minimal-impact routine activities necessary for productive farms. However, EDO has previously raised concerns

[299] See, for example:
- Audit Office of NSW, *Managing Native Vegetation,* June 2019 available at: https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation.
- Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, available at: https://www.nrc.nsw.gov.au/land-mngt.
- Environmental Defenders Office, *Restoring the balance in NSW native vegetation law Solutions for healthy, resilient and productive landscapes*, August 2020, available at: https://www.edo.org.au/wp-content/uploads/2020/08/EDO-LC-report-2-spreads.pdf.

[300] *Local Land Services Regulation 2014*, clause 124(1)(a).

about the breadth of allowable activities and whether this category of activities is realistically limited to genuinely low impact activities.[301] In many cases, exemptions lack area or width restrictions.

In particular, with respect to clearing under the Native Vegetation Code, we note:

- While there are some restrictions on allowable activities in category 2-sensitive land, it does not prohibit allowable activities in category 2-sensitive land outright.
- Allowable activities do not need to notified or reported. Landholders essentially satisfying themselves that clearing is allowable.
- The lack of notification requirements and inadequate reporting makes it difficult to understand what percentage of reported 'unallocated clearing' is carried out as an allowable activity.[302]

Code-based clearing / Self-assessable clearing

Overview:

The *Land Management (Native Vegetation) Code 2018* (NSW) (**Native Vegetation Code**) regulates the clearing or thinning of native vegetation on Category 2 regulated rural land. Clearing that complies with the Code does not require approval. While notification or certification may be required, the Code allows broadscale clearing without robust environmental assessment or approval processes. It is an inappropriate regulatory tool for managing biodiversity impacts in rural areas.[303]

Analysis:

The Native Vegetation Code has been highly criticised for being poorly regulated and for contributing to increased land clearing rates in NSW.

Both the Audit Office of NSW and NSW Natural Resources Commission have undertaken independent assessments of the Code, highlighting key areas of regulatory failure.[304] The Government supported many of the recommendations from both reviews, [305] and has taken steps to improve internal processes. However, it failed to undertake a three-year review of the framework which it committed to both when

[301] EDO, *Submission on the draft Local Land Services Amendment Bill 2016*, June 2016 available at: https://www.edo.org.au/wp-content/uploads/2020/08/160628_EDO_NSW_Submission_on_the_draft_Local_Land_Services_Amendment_Bill_2016-1.pdf.

[302] Environmental Defenders Office, *Have your say on the statutory review of NSW native vegetation clearing rules (Part 5A of the Local Land Services Act 2013)* (2022) 3 available at: https://www.edo.org.au/wp-content/uploads/2022/12/EDO-submission-guide-land-clearing-rules.pdf.

[303] Environmental Defenders Office, *Have your say on the statutory review of NSW native vegetation clearing rules (Part 5A of the Local Land Services Act 2013)* (2022) 3 available at: https://www.edo.org.au/wp-content/uploads/2022/12/EDO-submission-guide-land-clearing-rules.pdf

[304] Audit Office of NSW; Natural Resources Commission.

[305] See:

- NSW Government response to the Natural Resources Commission, *Land management and biodiversity conservation reform,* available at https://www.dpie.nsw.gov.au/news-and-events/articles/2020/land-management.
- Audit Office of New South Wales, *Managing Native Vegetation* (27 June 2019) Attachment 1 – Departmental response to the NSW Audit Office's Performance Audit Recommendations, available at https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/Final%20report_Managing%20native%20vegetation_WEB%20version.pdf;

first introducing the laws to the NSW Parliament[306] and in its response to the Natural Resources Commission (**NRC**) review.[307] Neither review process was tasked with recommending legislative reform.

We note the following key areas of concern regarding the Native Vegetation Code:

- The Native Vegetation Code is an inappropriate regulatory tool for managing impacts on biodiversity in rural areas. There is limited ability for Local Land Services (**LLS**) to refuse certification and prevent unacceptable and cumulative impacts on threatened species.[308] The most recent figures (31 October 2022) indicate that total hectares approved for clearing under the Codes is more than 780,000 ha[309] (but not all approved clearing has been carried out).

- Purported environmental safeguards in the Native Vegetation Code are inadequate. The Native Vegetation Code does not adequately manage the environmental risk associated with substantial amounts of clearing undertaken with limited environmental assessment and oversight.

- The scope of category 2 sensitive land is too narrow. The Code offers some protection for environmentally sensitive areas as code-based clearing cannot take place on category 2 sensitive land. However, the scope of category 2 sensitive land is limited.

- Only critically endangered ecological communities are off-limits to code-based clearing. Other categories of threatened ecological communities (e.g. vulnerable and endangered) may be cleared under the Native Vegetation Code.

- Set asides are arbitrary and have little ecological basis. The introduction of self-assessable codes was originally justified on the basis that 'set aside' areas and areas managed under conservation would offset cleared areas. Yet, the use of an arbitrary set ratio for determining set asides requirements under the Native Vegetation Code is not ecologically sound. The Native Vegetation Code does not specify that the vegetation to be set aside should be the same condition (or of ecological equivalence) and what condition the vegetation should be in.[310] The Audit Office of NSW also noted the Code often discounted, or reduced in area size, set asides which contain threatened ecological communities.[311]

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[306] See New South Wales, Parliamentary Debates, Legislative Assembly, 16 November 2016 (Mr Mark Speakman, Minister for the Environment, Minister for Heritage, and Assistant Minister for Planning), available at: https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3357.

[307] NSW Government response to the Natural Resources Commission, *Land management and biodiversity conservation reform,* available at: https://www.dpie.nsw.gov.au/news-and-events/articles/2020/land-management.

[308] The Auditor-General has raised similar concerns regarding the limited ability for LLS to refuse an application for a certificate even if LLS is concerned about the level of impact of the clearing and how well it will be managed. See Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019, p 16.

[309] See *Public Information Register - Certificates Under Section 60Y*. The report for the period 09/03/2018 - 31/10/2022 shows the total treatment area for certificates issues section 60Y of the Local Land Services Act 2013 to be 782701.67 hectares available at: https://www.lls.nsw.gov.au/__data/assets/pdf_file/0004/747031/Public-Information-Register-Certificates-Under-Section-60Y-LMC2018-31102022.pdf.

[310] These types of deficiencies have been identified by the Auditor-General, Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019, p, 21.

[311] Audit Office of NSW.

- Protections for threatened species are not stringent enough. Under the Code clearing is not permitted if the person carrying out the clearing harms an animal that is a threatened species and that person knew that the clearing was likely to harm the animal.[312] Therefore ignorance can excuse a person who claims they did not know clearing was likely to harm the animal.

- Maximum clearing caps have expired. The Code provides for maximum limits on the amount of clearing that can be undertaken under Part 5 – Equity Code in the initial three-year period immediately following publication of the Code. [313] This was included as a safeguard to prevent excessive clearing. However, the cap on maximum clearing was not revised once the initial three-year period expired, meaning there is currently no cap on clearing under the equity code.

The Audit Office of NSW also raised that the Code incorrectly treated some native species as 'invasive'.[314]

Clearing Requiring Approval

Overview:

For clearing of rural land that is not an allowable activity or regulated under the Native Vegetation Code, clearing approval is required. Applications for approval are assessed and determined by the NVP. Biodiversity assessment requirements under the BC Act apply.

Analysis:

The NVP is not operating as intended. Since the commencement of Part 5A of the LLS Act, only one application has lodged (as of May 2023) and been determined by the NVP (approved in February 2021).[315] This suggests that essentially all rural land clearing under the Framework has been authorised as an allowable activity or under the Code, raising concerns about whether the NVP, the overall Framework and the approval pathways are operating as intended. The failure of the NVP to operate as intended is concerning given the alternative approval pathways (allowable activities provisions and the Code) are less rigorous in terms of environmental assessment requirements. It also suggests that the scope of allowable activities provisions and the Code are too broad or open to misuse.

Protection of Environmentally Sensitive Areas

Overview:

The key mechanism for protecting environmentally sensitive areas under the framework is by categorising certain land as category 2 vulnerable land and category 2 sensitive land. The type of land

[312] *Land Management (Native Vegetation) Code 2018*, clause 9.
[313] *Land Management (Native Vegetation) Code 2018*, clause 82.
[314] Audit Office of NSW.
[315] Environmental Defenders Office, *Have your say on the statutory review of NSW native vegetation clearing rules (Part 5A of the Local Land Services Act 2013)* (2022) 5 available at: https://www.edo.org.au/wp-content/uploads/2022/12/EDO-submission-guide-land-clearing-rules.pdf.

that can fall within these categories is prescribed in the LLS Act and LLS Regulation, and such areas are identified on the Native Vegetation Regulatory (**NVR**) Map.

The scope of allowable activities permitted in category 2 vulnerable land and category 2 sensitive land is more limited that other category 2 regulated land.[316]

Code-based clearing cannot be undertaken in category 2 sensitive land. [317] A landholder must seek clearing approval from the NVP before undertaking clearing in category 2 sensitive land.

For clearing that requires approval, land with high biodiversity value is identified on the Biodiversity Values Map (**BV Map**), which triggers the Biodiversity Offsets Scheme (**BOS**). Clearing is not prohibited, but impacts of clearing must be assessed in a biodiversity development assessment report (**BDAR**) and the BOS applies. The 'serious and irreversible impacts' mechanism may also act to limit clearing where it may have a serious and irreversible on threatened species or ecological communities – see **Box 1 – Serious and irreversible impacts.**

Analysis:

There is no absolute protection for environmentally sensitive areas (i.e. – these areas are not off limits to clearing). Instead, high-impact clearing in these areas are assessed under the most robust assessment pathway, i.e., assessment and determination by NVP.

However, protection is limited because the scope of category 2-sensitive land is too narrow. For example, it only includes critically endangered ecological communities (and not endangered and vulnerable ecological communities), core koala habitat (which, by its legal definition, is limited) and some parts of the coastal zone (but not all of the coastal zone) and does not include other sensitive areas such as travelling stock routes or steep or highly erodible land.

Box 1 – Serious and irreversible impacts

The concept of 'serious and irreversible impacts on biodiversity values' is a mechanism used to assess the severity of impacts on biodiversity that would be caused by a proposed development or clearing activity. Specific provisions create obligations on decision-makers once serious and irreversible impacts (**SII**) are identified. For example:

- If vegetation clearing that requires approval by the NVP will have SII on threatened species, it must be refused.[318]
- If proposed Part 4 development (development assessed and determined under Part 4 of the EP&A Act) will have SII on threatened species, it must be refused.[319]
- If a development proposal for state significant development or state significant infrastructure will have SSI on threatened species, the consent authority must take those impacts into

[316] *Local Land Services Act 2013*, Schedule 5A, Part 4.
[317] *Local Land Services Regulation 2014,* clause 124(1)(a).
[318] *Local Land Services Act 2013* s 60ZF; Vegetation in non-rural areas SEPP, cl 2.14(6).
[319] *Biodiversity Conservation Act 2016* s 7.16(2).

consideration, and is required to determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted.[320]

The Department of Planning and Environment (**DPE**) has published *Guidance to assist a decision-maker to determine a serious and irreversible impact.*[321] DPE has prepared a list of threatened entities that it has assessed as likely to be at risk, to assist assessors and approval authorities.[322]

The mechanism may restrict land clearing where the impact of the clearing will have a serious and irreversible impact on a threatened species or ecological community, however it could be further strengthened to more accurately reflect the principles of ecologically sustainable development. For example:

- the standard should be serious *'or'* irreversible, not 'and';
- the test should be objective, rather than subjective;
- references to extinction risk should be clarified to refer to an appropriate scale and scope;
- consent authorities should be required to have regard to the precautionary principle and cumulative impacts on threatened species; and
- the requirement to refuse proposals that will have SSI on biodiversity (as is the case for most development), must also extend to SSD and SSI, not just to local projects.

Offsets

Overview:

- *Allowable activities:* There are no offset requirements for allowable activities.

- *Code based clearing:* Most clearing under Parts 5 and 6 of the Native Vegetation Code requires landholders to establish 'set-aside' areas of managed vegetation to compensate for the impacts of clearing. These set-asides act as a 'quasi-offset'.

- *Clearing requiring approval from NVP*: Clearing applications must be accompanied by a biodiversity development assessment report.[323] Where clearing exceeds the Biodiversity Offsets Scheme (**BOS**) threshold, the BOS applies.

[320] *Biodiversity Conservation Act 2016* s 7.16(3) and (4).
[321] See NSW Department of Planning and Environment, *Serious and irreversible impact of development on biodiversity* available at: https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/local-government-and-other-decision-makers/serious-and-irreversible-impacts-of-development.
[322] See NSW Department of Planning and Environment, *Serious and irreversible impact of development on biodiversity* available at: https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/local-government-and-other-decision-makers/serious-and-irreversible-impacts-of-development.
[323] *Local Land Services Act 2013* s 60ZG.

Analysis:

- *Set asides:*

Set asides are essentially 'quasi-offsets'. Set asides side-step genuine, commensurate evidence-based offsets. Instead, set-asides are based on simple area-based ratios and do not prevent a net loss of biodiversity.

Currently, there are no requirements that vegetation to be set-aside should be the same (or of ecological equivalence) to the vegetation being cleared, and no requirements on what condition the vegetation should be in. Landholders are only required to 'make reasonable efforts to manage the set-aside area in a manner expected to promote vegetation integrity in the set-aside area'.[324] Without a clear requirement for landholders that set-asides achieve no net loss or better, or detailed guidance about the location, type, extent, quality and diversity of vegetation provided, there is a high risk that set-asides will not actually achieve environmental benefits to compensate for the biodiversity values that are lost. For example, remnant vegetation containing mature trees can be cleared and compensated with shrubs and/or planted seedlings of a completely different species. The provisions that allow a discount or reduction in the area of a set-aside if it contains threatened ecological communities[325] may incentivise landholders to focus conservation efforts on high conservation value land, but would only lead to improved environmental outcomes if the set-asides were genuine, ecologically valid offsets.

Further, while set-aside areas are intended to be managed in perpetuity (i.e. set-asides run with the land so as to apply to future landholders), legal requirements under the LLS Act are that set-asides are recorded on a public register.[326] This is not as effective as registering set-asides on title.[327] Additionally, provisions allow set-aside areas to be cleared in the course of land management activities authorised or required by the Code or a certificate, and for allowable activities under Schedule 5A that improve the native vegetation on the set-aside area as determined under that code and certificate.[328]

The use of set-asides (including areas of replanted vegetation) to ameliorate impacts under Parts 5 and 6 of the Code is not appropriate for managing environmental harm. Any clearing of this type and scale should be properly assessed by the NVP, with adequate offset requirements imposed.

The Audit Office of NSW has identified several concerns regarding the operation, biodiversity value and feasibility of set-asides to achieve actual environmental benefits, including that there are limited requirements and no specific goals for the management of set-asides; no measures have been developed for gauging the success of the Code; there are limited monitoring requirements and no specific requirements to control grazing.[329]

[324] *Land Management (Native Vegetation) Code 2018,* clause 18(1)(a).
[325] *Land Management (Native Vegetation) Code 2018,* clause 81(5) and (6) 88(6) and (7).
[326] *Local Land Services Act 2013* s 60ZC and *Local Land Services Regulation 2014* clause 130.
[327] We note that Property Vegetation Plans under the former *Native Vegetation Plan 2003* were required to be registered on title. Best-practice offsetting would require genuine offsets to be registered on title.
[328] *Local Land Services Act 2013* s 60ZC(5).
[329] Audit Office of NSW, 20-22.

Concerns with the use of set-asides are reinforced by the findings of the NRC Report which found that, in contrast to the stated policy goal of setting aside two to four times the area approved for clearing:

> *nine of the eleven regions are setting aside less than the area approved for clearing (between 6 and 69 percent of the area approved to be cleared). These low set aside ratios are driven mainly by the extensive use of Part 3 of the Code (pasture expansion).*[330]

- *Biodiversity offsets scheme (BOS):*

The BOS has been highly criticised for failing to meet best-practice. See **Box 2: The Biodiversity Offsets Scheme** for a more detailed analysis.

Box 2: The Biodiversity Offsets Scheme

The Biodiversity Offsets Scheme (**BOS**) aims to provide a framework for offsetting unavoidable impacts on biodiversity. It does this by requiring impacts from development to be 'offset' with biodiversity gains, usually generated by protecting and managing land for biodiversity outcomes, via landholder stewardship agreements.

The BOS is established under the BC Act, and operates across multiple assessment pathways. For example:

- For vegetation clearing on rural land, the BOS may apply to clearing that requires approval by the Native Vegetation Panel. [331]
- For vegetation clearing on non-rural land, the BOS may apply to clearing under the Vegetation in non-rural areas SEPP): that requires approval by the Native Vegetation Panel.[332]
- For clearing associated with development, the BOS may apply where a BDAR is required.

In each of these pathways, the BOS applies when the BOS threshold is reached, which can occur in two ways:

a) If the land is included on the Biodiversity Values Map[333] or
b) The size of the area exceeds the area clearing threshold set out in a table in the *Biodiversity Conservation Regulations 2017* (NSW).[334]

EDO has written extensively regarding our concerns with the NSW BOS.[335] In summary, the BOS does not align with best practice, permits an inappropriate level of variation, and does not contain the

[330] NRC Report 6.
[331] See *Local Land Services Act 2013* s 60ZG.
[332] See Vegetation in non-rural areas SEPP cl 2.15.
[333] *Biodiversity Conservation Regulation 2017* (NSW) cl 7.3.
[334] *Biodiversity Conservation Regulations 2017* (NSW) cl 7.2.
[335] See, for example:
- Environmental Defenders Office, *Submission to the inquiry into the Integrity of the NSW Biodiversity Offsets Scheme*, 14 September 2021 available at: https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/.
- Environmental Defenders Office, *Defending the Unburnt: Offsetting our way to extinction*, November 2022 available at: https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf.

ecologically necessary limits to prevent extinctions, including with respect to koalas. We are particularly concerned that:

- The BOS does not impose a clear and objective '*no net loss or better'* environmental standard.[336]
- There are no safeguards to ensure the *genuine* application of the avoid, minimise, offset hierarchy impacts on threatened species.[337] Offsets should be a measure of last resort and there must be clear guidance provided as to what steps must be taken and evidenced before offsets can be used. Projects that do not demonstrably attempt to avoid or minimise environmental impacts should be rejected.
- The current offset rules for a threatened species provide a significant degree of flexibility.[338] The variation rules and ability to pay money to the Biodiversity Conservation Trust in lieu of actual like for like offsets undermines the integrity of the BOS. Under the variation rules, proponents clearing koala habitat can discharge obligations by offsetting koala populations with another animal.[339] And even where koalas are being offset with koalas, there are no location requirements for offsetting 'species credit' species. This means that, for example, a local koala population and habitat in one part of the SBB could be offset with a different koala population elsewhere in the SBB which may be hundreds of kilometres away.
- The system does not recognise that if like for like offsets are not available, [340] this is a strong indication that the proposal's impact is significant (and potentially serious or irreversible). That is, there are no effective red lights, and everything is amenable to offsetting despite ecological evidence to the contrary.
- Decision-makers may be able to reduce or increase the number of biodiversity credits required to be met (i.e., retired) by a proponent, for non-ecological reasons (having regards to social and economic impacts of the proposed development); and in some cases may not be required to give reasons for a decision.[341]

[336] The current test is subjective and discretionary: when the Minister establishes the BAM, the Minister is to adopt a standard that, in the opinion of the Minister, will result in no net loss of biodiversity in New South Wales. (BC Act s 6.7(3)(b)).
[337] *Biodiversity Conservation Regulation 2017* cl 6.2(1).
[338] *Biodiversity Conservation Regulation 2017* cl 6.2(1).
[339] See *Biodiversity Conservation Regulation 2017* cl 6.4(1)(c)(ii).
[340] Like for like also meaning within an appropriate geographic distance of the impact.
[341] Specifically,

- In the case of Part 4 local development, a consent authority may reduce or increase the number of biodiversity credits that would otherwise be required to be retired if the consent authority determines that *the reduction or increase is justified having regard to the environmental, social and economic impacts of the proposed development.* The consent authority *must give reasons for a decision* to reduce or increase the number of biodiversity credits (BC Act, s 7.13(4)).
- In the case of State Significant Development or State Significant Infrastructure, the Minister *may* require the applicant to retire biodiversity credits to offset the residual impact on biodiversity values. The Minister is not required to justify the decision having regard to the environmental, social and economic impacts of the proposed development, or provide reasons for the decision BC Act, s 7.14(3)).
- In the case of Part 5 activities, the determining *may* require the proponent to retire biodiversity credits to offset the residual impact on biodiversity values. If the number of biodiversity credits required to be retired is less than that specified in the biodiversity development assessment report, the determining authority is to *give reasons for the decision to reduce the number of biodiversity credits* (BC Act, s7.15(4)).

In 2022 a Parliamentary Inquiry into the integrity of the BOS found that 'there are multiple problems with the scheme, including serious flaws in its design and operation that raise fundamental questions about whether it can achieve the stated goal of 'no net loss' of biodiversity;' and that it does not implement best practice offsetting principles, supporting EDO's submission to the Inquiry.[342]

Other key issues

Native Vegetation Regulatory Map not finalised

The Native Vegetation Regulatory Map (**NVR Map**) is fundamentally important as it underpins the entire regulatory regime – it determines where the rules apply. However, five years since the framework commenced, this map had not been finalised prior to the March 2023 election (the previous Government had released a draft NVR Map for landholders in eleven local government areas in sections of the Riverina, Murray and South East regions).[343]

The mapping for the vast majority of the state, which is supposed to be categorised as either Category 2 (regulated land) or Category 1 (unregulated land) is incomplete. For these areas, landholders are required to 'self-categorise' unmapped land in accordance with transitional arrangements.[344]

An incomplete map makes an already confusing regulatory scheme even more difficult to navigate for landholders and members of the public alike, and transitional provisions are open to misuse. The Audit Office of NSW found that a lack of a complete NVR Map can make categorising land more difficult for LLS staff, particularly for areas of groundcover such as shrubs and grassland,[345] and the NRC found that an incomplete map creates a risk in terms of ensuring LLS staff can provide consistent and accurate advice.[346]

- **Pathway 2 - Clearing on non-rural land**

Overview

Clearing on non-rural land is regulated under Chapter 2 (Vegetation in non-rural areas) of the Biodiversity and Conservation SEPP. This framework regulates clearing that is not ancillary to development. Any clearing that is ancillary to the carrying out of other development requires development consent under the EP&A Act.

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[342] New South Wales Parliament, Legislative Council, Portfolio Committee No. 7, *Integrity of the NSW Biodiversity Offsets Scheme Report 16, November 2022*, available at: https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf.

[343] See NSW Department of Planning and Environment, *View your map* available at: https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/native-vegetation-regulatory-map/view-your-map.

[344] *Local Land Services Act 2013* s 60F.

[345] Audit Office of NSW 14.

[346] Natural Resources Commission 13.

In general, clearing can be categorised as:

- Clearing that does not require a permit;
- Allowable activities (see exemptions below);
- Clearing that requires a council permit (see clearing that requires an approval below); or
- Clearing that requires approval from the NVP *(*see clearing that requires an approval below).

Exemptions

Overview:

There are two categories of clearing that can be viewed as exempt from requiring approval:

- *Clearing that does not require a permit:* In accordance with cl 2.7 of the Biodiversity and Conservation SEPP, a permit or approval is not required for the removal of vegetation that the relevant council is satisfied is a risk to human life or property, or clearing for a traditional Aboriginal cultural activity (other than a commercial cultural activity). Additionally, a permit is not required for the removal of vegetation that the council or NVP is satisfied is dying or dead, and is not required as the habitat of native animals.

- *Allowable activities*: A list of allowable activities is set out in Part 2.5 of the Biodiversity and Conservation SEPP. Generally, the types of activities are similar to those in category 2-vulnerable and category 2-sensitive land under Schedule 5A, Part 4 of the LLS Act.

Analysis:

Similar to allowable activities under Part 5A of the LLS Act, there are no notification and reporting requirements for allowable activities, and challenges with compliance and enforcement. In many cases, exemptions lack area or width restrictions.

Code-based clearing / Self-assessable clearing

There is no code-based clearing under Chapter 2 - Vegetation in Non-Rural Areas of the Biodiversity and Conservation SEPP. Clearing is either permitted without approval (see above) or requires approval by either the local council or NVP – see below.

Clearing Requiring Approval

Overview:

Under Chapter 2 of the BC SEPP either:

- When clearing falls below the BOS threshold (see Box 2) (and the vegetation is covered by a Council's Development Control Plan (**DCP**)), a Council permit is required to clear non-rural land.

- Where clear exceeds the BOS Threshold, the NVP must assess and determine applications for clearing. Applications to the NVP require a biodiversity development assessment report

prepared by an accredited assessor. The report must identify the biodiversity values of the area to be cleared as well as the type and number of biodiversity credits required to offset those values.[347]

Analysis:

There is no obligation for Councils to update DCPs to identify vegetation requiring a permit and many Councils have not updated this information.[348] This creates a regulatory issue where some vegetation clearing is occurring when it should not because a Council's DCP does not accurately identify vegetation that requires a clearing permit.

The decision-making process under the Biodiversity and Conservation SEPP as to whether a permit will be issued is entirely discretionary with no evaluation criteria, leading to uncertainty for applicants, neighbours, and local communities. While Councils can choose to create comprehensive policies for their decision-making process to attain vegetation clearing permits, there is no obligation for Councils to do so.[349] Councils also have discretion as to which types of vegetation require a clearing permit, resulting in uneven and inconsistent regulation across the State.

The Biodiversity and Conservation SEPP does not require public notification of applications to clear or permit public comment on such applications. The lack of public register of clearing applications means the public cannot monitor or challenge urban vegetation clearing.

There are no public notification or consultation requirements for clearing assessed by the NVP, no public register of clearing applications and little information about the NVP's existence and activities. This differs to the requirement of a public register of applications and approvals by the NVP for native vegetation clearing rural land.[350] The lack of transparency and information about the NVP's assessments results in uncertainty about the regulation of biodiversity of native vegetation in urban areas.

Protection of Environmentally Sensitive Areas

Overview:

There are no absolute protections for environmentally sensitive areas (ie – no areas are off limits to clearing). However, two mechanisms do provide some additional oversight for clearing in environmentally sensitive areas:

[347] Environmental Defenders Office, *Implementation of the NSW land clearing laws: Part 2 – Clearing in urban areas and E zones* available at: https://www.edo.org.au/publication/implementation-of-the-nsw-land-clearing-laws-part-2-clearing-in-urban-areas-and-e-zones/.
[348] Environmental Defenders Office, *Implementation of the NSW land clearing laws: Part 2 – Clearing in urban areas and E zones* available at: https://www.edo.org.au/publication/implementation-of-the-nsw-land-clearing-laws-part-2-clearing-in-urban-areas-and-e-zones/.
[349] See *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (NSW) cls 2.10, 2.11.
[350] Environmental Defenders Office, *Implementation of the NSW land clearing laws: Part 2 – Clearing in urban areas and E zones* available at: https://www.edo.org.au/publication/implementation-of-the-nsw-land-clearing-laws-part-2-clearing-in-urban-areas-and-e-zones/.

- Land with high biodiversity value is identified on the Biodiversity Values Map (**BV Map**), which triggers the BOS. Clearing is not prohibited, but impacts of clearing must be assessed in a biodiversity development assessment report (BDAR) and the BOS applies.
- The 'serious and irreversible impacts' mechanism may also act to limit clearing where it may have a serious and irreversible on threatened species or ecological communities – see **Box 1 – Serious and irreversible impacts.**

Analysis:

See Box 1 and Box 2 for an analysis of the serious and irreversible impacts mechanism and the BOS respectively.

Offsets

Overview:

There is no offsets framework in place for clearing undertaken in accordance with a council permit. For clearing that exceeds the BOS threshold, the BOS applies.

Analysis:

See **Box 2** for an analysis of the BOS.

▪ Pathway 3 – Clearing associated with development

Overview

Clearing associated with development and infrastructure is regulated under *the Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) under Part 4 and Part 5 of the EP&A Act respectively.

For the purpose of this analysis we focus primarily on Part 4 development. In general, the mechanisms used to manage the impacts of infrastructure under Part 5 are the same. We note however in the case of both state significant development and state significant infrastructure there is generally more discretion in decision-making, meaning that safeguards may fall short of protecting vegetation from clearing as might otherwise be the case if those mechanisms were to be applied objectively and absolutely.

The EP&A Act interacts with the BC Act, specifically in relation to assessing impacts on biodiversity and applying the BOS.

Exemptions

Overview:

Exempt development is minor development that does not require planning approval under the EP&A Act. It can include things like decks, garden sheds, fences, and house repairs. In order to be exempt

development, the development must meet the requirements of *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**Exempt and Complying Development SEPP**).[351]

Notably, to be exempt development, the development must not involve the removal or pruning of a tree or other vegetation that requires a permit, approval or development consent, unless the removal or pruning is carried out in accordance with the permit, approval or development consent.[352] That is clearing associated with development must not remove trees without the appropriate permit, approval or development consent.

Analysis:

In the case of exempt development under the EP&A Act and Exempt and Complying Development Code, provisions providing that exempt development must not remove trees without the appropriate permit, approval or development consent ensures there is important oversight and provide an important safeguard against the unchecked clearing of vegetation.

Code-based clearing / Self-Assessable clearing

Overview:

Complying development is simple development that can be fast-tracked because it complies with the relevant provisions of the Exempt and Complying Development SEPP. It can include things like new houses, house renovations, new industrial buildings, or demolition of certain buildings. In order to carry out complying development, you must obtain, and the development must be carried out in accordance with, a complying development certificate.[353]

If development involving the removal or pruning of a tree or other vegetation requires a permit, approval or development consent, that must be obtained before the complying development certificate is issued.[354] Additionally, complying development must not be on land that is within an environmentally sensitive area,[355] or within land identified in an environmental planning instrument as either an ecologically sensitive area, or environmentally sensitive area. [356]

Analysis:

Due to existing safeguards, complying development is unlikely to be driving significant vegetation clearing.

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[351] Further information about exempt development is available on the Department of Planning and Environment's website: NSW Department of Planning and Environment, *Exempt development* available at: https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways/Exempt-development.

[352] *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* cl 1.16(3)(b).

[353] Further information about complying development is available on the Department of Planning and Environment's website: NSW Department of Planning and Environment, *Complying development* available at: https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways/Complying-development.

[354] *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* cl 1.18(1)(h).

[355] *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* cl1.17A(1)(e).

[356] Housing Code, Inland Code, Low Rise Housing Diversity Code, Rural Housing Code and Greenfield Housing Code.

Clearing Requiring Approval

Overview:

Development that is not exempt or complying development requires consent from the appropriate consent authority. The impacts of any tree clearing will be assessed as part of any relevant environmental impact assessment process. Requirements will vary slightly depending on the type and scale of the development (e.g. local development, state significant development, infrastructure), whether it is likely to have a significant impact on threatened species and/or whether it exceeds the BOS threshold.

Analysis:

There is no absolute protection for native vegetation under the EP&A Act. That is, in most cases the decision-maker ultimately has discretion to approve development that will clear trees.

We have not examined in detail the various approval pathways within the EP&A Act. Instead, we comment generally on environmental assessment process broadly and on mechanism and safeguards common to multiple pathways - see specifically commentary on the protection of environmentally sensitive areas and offsets below.

Protection of Environmentally Sensitive Areas

There are a number of mechanisms within the EP&A Act and BC Act that can provide protection for environmentally sensitive areas. These are discussed below.

Land use zoning

Overview:

Land use zones are identified in local environmental plans (**LEPs**) prepared by councils for their LGA. Land use zones are used to categorise land and specify what type of development activities can be carried out in that land use zone without consent, with consent, or those activities which are prohibited.

Analysis:

Conservation zones (previously known as environmental zones) can be used to classify land for the purpose of conserving the environmental values and natural qualities in areas where this land use zoning is applied. Councils may choose to use conservation zones as a way to identify and protect environmentally sensitive areas, including areas of native vegetation. Councils are also able to identify permissible and prohibited development using appropriate land use zones. In general, the scope of activities permitted in conservation zones is restricted in order to maintain the environmental values of these area.

State Environmental Planning Policies (SEPPs)

Overview:

The Governor, on recommendation of the Minister, can make environmental planning instruments for the purpose of environmental planning by the State – these are known as State Environmental Planning Policies or SEPPs. SEPPs can be used to protect environmentally sensitive areas (and limit clearing). For example:

- The Biodiversity and Conservation SEPP includes, for example:
  - Chapter 2 – Vegetation in non-rural areas. As discussed above, this regulated land clearing not associated with development non-rural areas.
  - Chapter 3 – Koala Habitat Protection 2020 (**Koala SEPP 2020**), which applies to *rural zones (except rural zones in nine metropolitan LGAs across Sydney, the Blue Mountains and the Central Coast) in relevant LGAs;* and Chapter 4 - Koala Habitat 2021 (**Koala SEPP 2021**), which applies to all other zones in relevant LGAs. These SEPPs provide additional safeguards for development that will impact on koala habitat (but ultimately do not prohibit development in koala habitat).
  - Chapter 5 – River Murray lands, which provides additional protections to conserve and enhance the riverine environment of the River Murray, and includes specific planning controls (namely council consent) for the destruction of native vegetation (in addition to any other rules that may apply).
- Chapter 2 of the *State Environmental Planning Policy (Resilience and Hazards) 2021* contains specific protections for coastal areas, including littoral rainforest.

Analysis:

SEPPs can provide an additional layer of protection for environmentally sensitive areas.

Serious and irreversible impacts

Overview:

As outlined in **Box 1 – Serious and irreversible impacts**, the concept of 'serious and irreversible impacts on biodiversity values' is a mechanism used to assess the severity of impacts on biodiversity that would be caused by a proposed development or clearing activity.

Analysis:

The mechanism may restrict land clearing where the impact of the clearing will have a serious and irreversible impact on a threatened species or ecological community, however it could be further strengthened to more accurately reflect the principles of ecologically sustainable development.

Areas of outstanding biodiversity value

Overview:

Under the BC Act, the Minister can declare an area as an Area of Outstanding Biodiversity Value (**AOBV**). It is an offence to damage an AOBV without any relevant approval.[357] Certain assessment and determination pathways cannot be used in an AOBV,[358] and development proposals within an AOBV are deemed likely to significantly affect threatened species for the purpose of determining whether a BDAR is required.[359]

Analysis:

While there is more oversight in circumstances where proposed development will impact an AOBV, AOBVs are not off limits to development.

AOBVs are intended to be a 'priority for government investment' but no new AOBVs have been declared since the BC Act came into effect. One significant barrier to third parties nominating an area for declaration as an AOBV is the requirement to demonstrate landholder support. This is not a legislative requirement, but a procedural step in the nomination process.[360] Requiring a person nominating an AOBV to provide landholder consent places an undue obligation on nominators, and may create an obstacle for nominations, particularly when nominators may have no existing relationship with landholders or appropriate avenue to commence discussions. Further, the consent and support of the landholder should not be a factor in deciding whether an area should be declared as an AOBV.

Offsets

Overview:

The BOS applies to:

- Part 4 development that triggers the BOS threshold or is likely to significantly affect threatened species based on the test of significance in section 7.3 of the BC Act.
- State significant development and state significant infrastructure projects, unless the Secretary of the Department of Planning and Environment and the environment agency head determine that the project is not likely to have a significant impact.

[357] BC Act, s 2.3.
[358] For example, exempt development must not be carried out on land that is a declared AOBV – per State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, cl 1.16(1)(b1).
[359] BC Act, cl 7.2.
[360] Section 3.3 of the BC Act provides that it is the role of the Environment Agency Head to notify landholders whose land is within the proposed area and give landholders a reasonable opportunity to make submissions. While there is no explicit obligation on the BC Act on a person nominating an AOBV to seek landholder support, the Department's website and nomination form require evidence that the person nominating an area has have spoken to the owner of the land, and that the landowner supports your proposal being made: https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value/proposals-for-areas-of-outstanding-biodiversity-value/making-a-proposal/area-of-outstanding-biodiversity-value-proposal-form.

Analysis:

The BOS has been highly criticised for failing to meet best-practice. See **Box 2: The Biodiversity Offsets Scheme** for a more detailed analysis. Notably, there is more flexibility for decision-makers in applying the BOS when assessing and determining State significant development and state significant infrastructure projects. This does not accord with the premise that projects likely to have the most impact (such as SSD) should be subject to the greatest scrutiny and objective decision-making processes. In our experience, with such discretionary decision-making, the interests of development proponents often trump the interests of the environment.

Compliance and enforcement

Effectiveness of regulatory oversight

Pathway 1: Clearing on rural land

In the case of rural land, LLS administers Part 5A of the LLS Act and the Code, while the Department of Planning and Environment (**DPE**) is the regulatory authority responsible for enforcement of Part 5A of the LLS Act. Concerns have been raised about the implementation of this joint arrangement. For example:

- The NRC has recommended that the roles and responsibilities for monitoring and enforcing the Code between LLS and DPE needs to be reviewed; and monitoring of compliance with certifications and notifications to clear, including the establishment and management of set asides, under the Code needs to be strengthened, including increasing transparency.[361]

- The NSW Audit Office found while DPE has resources, policies and guidance to support its compliance and enforcement activities, there is limited evidence of effective enforcement activity being undertaken in response to unlawful land clearing. The NSW Audit Office also found that the LLS undertakes only limited monitoring of whether landholders are meeting the requirements of the Code, including whether set-asides are being established and managed appropriately.[362]

DPE monitors vegetation to ensure compliance with the vegetation framework by using investigations, audits, aerial surveys, and satellite imagery.[363] Monitoring via satellite imagery involves an annual SLATS and early change monitoring (**ECM**) which occurs more regularly. The satellite imagery from the SLATS and ECM is analysed and cross-checked against available government databases to check for approvals. This aids compliance as the landholder can be contacted and if the clearing is unexplained an investigation takes place. An investigation includes site inspections to collect photos, videos, vegetation

[361] Natural Resources Commission.
[362] Audit Office of NSW.
[363] NSW Department of Planning and Environment, *Monitoring for Vegetation Compliance* (Web Page, 17 February 2022) available at: https://www.environment.nsw.gov.au/topics/animals-and-plants/native-vegetation/land-management-native-vegetation-compliance-and-enforcement/monitoring-for-vegetation-compliance.

samples, witness statements and record interviews.[364] Following an investigation decisions and actions are undertaken in accordance with the *Office of Environment and Heritage Compliance Policy.*[365] While the use of SLATS and ECM provide an effective way to monitor changes in vegetation, there are concerns about the application of that information for compliance and enforcement. As outlined below, despite DPE resources, policies, and guidance to support its compliance and enforcement activities, in practice there is little evidence of effective enforcement against unlawful clearing.

Pathway 2: Clearing on non-rural land and Pathway 3: Clearing associated with development

For non-rural land clearing, the regulator for clearing under the Chapter 2 of the Biodiversity and Conservation SEPP is the local council for clearing that requires a permit. For clearing that requires an approval from the NVP, the regulator is DPE.

In the case of clearing associated with local development, each council is responsible for enforcing the rules with their own local government area. This means that regulatory oversight can be inconsistent across local government areas. DPE is responsible for regulating major projects – like State significant development and infrastructure.

Reflecting the fact that there are multiple approval pathways and shared regulatory roles, there is no central system for monitoring and reporting across the planning system.

Strength of compliance and enforcement framework

Pathway 1: Clearing on rural land

The LLS Act sets out offence provisions, defences, and a range of enforcement powers and penalties. In short, it is an offence to clear native vegetation on regulated rural land unless the clearing is authorised under the LLS Act or other legislation. Clearing will be authorised under the LLS Act if it is an allowable activity, code-compliant, or subject to an approval issued by the Native Vegetation Panel. Clearing can also be authorised as private native forestry or under other legislation such as planning laws or the 10/50 Vegetation Clearing Code.

Clearing in breach of the rural land clearing laws can attract significant penalties. For example, if the offence was committed intentionally and caused, or was likely to cause, significant harm to the environment, the maximum penalty is $5 million for a corporation and $1 million for an individual. Otherwise, the maximum penalty is $2 million for a corporation and $500,000 for an individual.

These penalties can only be imposed by a court if the regulator is able to prove the offence beyond a reasonable doubt. This can be difficult to do, so it is more common for regulators to issue Penalty Infringement Notices (**PINs**) for less serious offences. While much more straightforward to impose, these fines are for amounts significantly lower than the maximum monetary penalties set by the legislation. For example, a PIN cannot exceed $15,000 for a corporation or $5,000 for an individual.

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[364] Department of Planning, Industry and the Environment, *Monitoring land clearing* (Factsheet, September 2020) available at: https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Native-vegetation/monitoring-land-clearing-fact-sheet-200396.pdf.

[365] *Office of Environment and Heritage Compliance Policy 2018* (NSW).

In addition to criminal proceedings and PINs, there are a range of administrative orders that can be issued by the regulator in order to prevent or remedy unlawful clearing. These include stop work orders, remediation orders and interim protection orders. Non-compliance with an order is itself an offence which attracts significant monetary penalties.

DPE can commence civil enforcement proceedings in the NSW Land and Environment Court (**LEC**) in order to remedy or restrain a breach of the rural land clearing laws. If the LEC is satisfied, on the balance of probabilities, that the alleged breach has occurred, it can make whatever orders it thinks fit. For example, it can order the clearing to stop and for any environmental harm to be remediated.

Additionally, any person is able to commence civil enforcement proceeding in the LEC, however it is obviously better if the regulator enforces the law. It is the regulator that has the power to enter premises for the purpose of investigating whether the law has been breached and gathering evidence to support criminal or civil legal action. It can be extremely difficult for a member of the public to determine whether observed clearing is lawful because the native vegetation regulatory map is still not complete and the public registers that record authorised clearing do not, for the most part, identify the relevant property – see below. This lack of information will make civil enforcement by the public extremely difficult.

Division 7 of the LLS Act outlines public reporting requirements.[366] The Division provides that LLS is to publicly report on rates of allowable and authorised clearing of native vegetation in regulated rural areas on an annual basis.[367] Section 60ZO further provides that LLS is to maintain public information registers regarding native vegetation management including notices of clearing, certification by LLS prior to clearing, certificates under sch 5A, approvals under Division 6 and applications for approvals.[368]

Compared to the previous regime under the *Native Vegetation Act 2003* (**NV Act**), there is a significant reduction in information included in public registers under the new framework. This is essentially because most clearing is now undertaken as code-based clearing, or via allowable activities provisions. The LLS Act only requires reporting on aggregated information for code-based clearing that requires notification or certification,[369] or an annual estimate of allowable activities.[370] The lack of similar detailed information for notification and certification applications under the Code means monitoring and reporting is less transparent.[371]

The Audit Office of NSW found that the processes in place to support the regulatory framework are weak and there is no evidence–based assurance that clearing of native vegetation is being carried out in accordance with approvals.[372] There are lengthy delays, up to two years, in assessing compliance and identifying unlawful clearing. DPE compares satellite imagery on an annual basis, through the SLATS, to examine changes in the vegetation cover against clearing approvals and exemptions to identify unlawful

[366] https://www.parliament.nsw.gov.au/bill/files/3358/2R%20Biodiversity%20and%20Local%20Land.pdf p 6.
[367] *Local Land Services Act 2013* s 60ZN.
[368] *Local Land Services Act 2013* s 60ZO.
[369] *Local Land Services Act 2013* s 60ZO.
[370] *Local Land Service Act 2013* s 60ZN.
[371] Environmental Defenders Office, *Have your say on the statutory review of NSW native vegetation clearing rules (Part 5A of the Local Land Services Act 2013)* available at: https://www.edo.org.au/wp-content/uploads/2022/12/EDO-submission-guide-land-clearing-rules.pdf p 7.
[372] Audit Office of NSW.

clearing. The delay limits the DPE's ability to reduce the level of environmental harm of unlawful clearing. There is also a delay in publicly releasing the most current data on the amount of land clearing taking place, which shows land clearing has increased.[373] Despite DPE resources, policies, and guidance to support its compliance and enforcement activities, in practice there is little evidence of effective enforcement against unlawful clearing. There is a high number of reports to the DPE and investigations being carried out in response to the reports, yet very few prosecutions for unlawful clearing take place with landholders receiving limited remedial directions and penalty notices for unlawful clearing.[374]

The Audit Office of NSW also found that there is also a lack of current satellite images to map areas proposed for clearing or set aside areas in the certificate assessments.[375] The Audit Office of NSW reported some images were up to nine years old, which limits confirmation of vegetation type, density and condition in areas being thinned or cleared in set asides. Current images would enable a more comprehensive report alongside LLS field staff who prepare treatment area and set aside area assessments during site visits.[376]

The Audit Office of NSW found there needs to be increased coordination among agencies responsible for the management of the native vegetation in NSW. There are three agencies that are responsible for delivering on the reforms, each with their own specific objectives for the pillar of the reform they are responsible for.

The NRC found that the 'compliance frameworks are inadequate and high rates of clearing pose a major risk.'[377] Unexplained clearing has increased since before the native vegetation reforms, with a long-term average of just under 60% of agricultural land cleared being unexplained. This alongside significant increases in approvals undermines the wellbeing of NSW's biodiversity and the legitimacy of the reforms.[378]

In August 2022 it was reported that the NSW Government has completed just two prosecutions into "unexplained land clearing" since the Land Management and Biodiversity Conservation Framework commenced in 2017.[379]

The NRC advised that as a priority, the NSW Government should develop processes to report up to date data on unexplained clearing every six months and review the drivers behind high rates of unexplained clearing with the goal of implementing measures to address land clearing issues.[380]

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[373] Audit Office of NSW.
[374] Audit Office of NSW.
[374] Audit Office of NSW.
[375] Audit Office of NSW.
[376] Audit Office of NSW.
[377] NSW Government response to the Natural Resources Commission, *Land management and biodiversity conservation reform,* available at https://www.dpie.nsw.gov.au/news-and-events/articles/2020/land-management.
[378] NSW Government response to the Natural Resources Commission, *Land management and biodiversity conservation reform,* available at https://www.dpie.nsw.gov.au/news-and-events/articles/2020/land-management.
[379] The Guardian, *Just two prosecutions for 'unexplained land clearing' made since NSW Coalition changed rules*, August 2022 available at: https://www.theguardian.com/environment/2022/aug/22/just-two-prosecutions-for-unexplained-land-clearing-made-since-nsw-coalition-changed-rules.
[380] Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, p 33.

Pathway 2: Clearing on non-rural land

The regulator for clearing under Chapter 2 of the Biodiversity and Conservation SEPP is the local council for clearing that requires a permit. For clearing that requires an approval from the NVP, the regulator is DPE.

Chapter 2 of the Biodiversity and Conservation SEPP does not contain any offence provisions; these are contained in the EP&A Act.

Chapter 2 of the Biodiversity and Conservation SEPP does not include requirements to notify the public of applications to clear or to seek comments from the public, nor does it require councils or the NVP to maintain a public register of clearing permits or NVP approvals under Chapter 2 of the Biodiversity and Conservation SEPP.

There is no central or consistent information about enforcement of Chapter 2 of the Biodiversity and Conservation SEPP. Because tree clearing rules are set by individual councils and because some clearing requires approval by the NVP, enforcement is likely to be uneven and inconsistent. As a result, the aims of Chapter 2 of the Biodiversity and Conservation SEPP, including protecting the biodiversity values of trees and other vegetation in non-rural areas, are unlikely to be achieved. Some clearing may be falling through the regulatory cracks (e.g. in cases where a council has not updated its DCP).

Without mandatory reporting requirements there is no way for the public to keep track of what vegetation is approved for clearing under the Chapter 2 of the Biodiversity and Conservation SEPP. Additionally, the framework does not account for the 'stacking' of multiple clearing actions over time or provide a mechanism for systematic review of tree removal permits, which could assist in monitoring the cumulative impacts of urban clearing and reducing the clearing rate.[381]

Pathway 3: Clearing associated with development

Particularly with local development, because each council is responsible for regulating local development, compliance and enforcement can be inconsistent across LGAs.

Local councils are responsible for enforcing local development consents. DPE regulates state significant development and state significant infrastructure. The DPE publishes a summary of their compliance functions in its Annual Report.[382] However, it is not broken down into specific offences so it is difficult to establish which compliance and enforcement action relates to clearing-related offences.

Because each council is responsible for regulating local development, compliance and enforcement can be inconsistent across LGAs.

[381] Environmental Defenders Office, *Implementation of the NSW land clearing laws: Part 2 – Clearing in urban areas and E zones* available at: https://www.edo.org.au/publication/implementation-of-the-nsw-land-clearing-laws-part-2-clearing-in-urban-areas-and-e-zones/.

[382] See, for example, Department of Planning and Environment, *Annual Report 2021-22*, p 26, available at https://media.opengov.nsw.gov.au/pairtree_root/20/4e/6c/be/f3/1b/43/92/a5/59/39/05/0d/1c/84/77/obj/Annual_Report_2021_22___Final.pdf.

Importantly, there is open standing to enforce breaches of the EP&A Act. However, in the case of merits appeals, the restriction of third party merit appeal rights where there has been a public hearing of the IPC reduces oversight and accountability of decision making.

Opportunities for third party enforcement

Pathway 1: Clearing on rural land

Section 13.14 of the BC Act allows any person to bring civil proceedings to remedy both a breach of the BC Act or the land clearing rules under Part 5A of the LLS Act. However, this can be challenging, especially as it is extremely difficult for a member of the public to determine whether observed clearing is lawful because the NVR Map is still not complete and the public registers that record authorised clearing do not, for the most part, identify the relevant property.

Pathway 2: Clearing on non-rural land and Pathway 3: Clearing associated with development

Section 9.45 of the EP&A Act allows any person to bring to remedy a breach of that Act. However, in the case of merits appeals, the restriction of third party merit appeal rights where there has been a public hearing of the IPC reduces oversight and accountability of decision making.

Transparency of information relating to enforcement and compliance

As noted above:

- The DPE publishes a summary of their compliance functions in its Annual Report. However, it is not broken down into specific offences, so it is difficult to establish which compliance and enforcement action relates to clearing-related offences.
- In the case of local councils, there is no readily available information about compliance and enforcement action undertaken by council.

Northern Territory

Northern Territory

Background

There is no government policy commitment aimed at protecting vegetation or reducing land clearing in the NT, and no overarching biodiversity conservation strategy.

In the past few years, it has been reported that there has been almost a tenfold increase in the land targeted for clearing and a corresponding increase in clearing application approvals.[383] Yet, the NT does not have an adequate system in place to properly manage and regulate the environmental impacts of land clearing. It is characterised by an incoherent patchwork of legislation and guidelines, contains weak and inconsistent controls for assessing proposed land clearing applications, and fails to provide appropriate and enforceable safeguards to protect biodiversity and other environmental values. It also lacks robust governance structures to support objective and accountable decision making and compliance and enforcement mechanisms (including reporting) that are fit for purpose.

Government commitments to end broadscale land clearing in line with the Glasgow Declaration

Commitment

The Northern Territory Government (**NTG**) has not made any commitment to reduce or end land clearing by 2030. Rather, its policy approach is to support an increase in land clearing.

To demonstrate, the following section considers:

- public commitments and statements;
- legislative objectives; and
- policy documents.

Public commitments and statements

The NTG has not made any public commitment to reduce or end land clearing by 2030. Rather, it appears to support the continuation and expansion of land clearing activities. For example:

- In February 2021, the NTG streamlined the process for clearing native vegetation on pastoral land, by introducing the *Simplified Pastoral Land Clearing Applications Policy*. The then Minister for Agribusiness stated the 'new simplified pastoral land clearing process will make approvals more efficient and streamlined, making sure works are done quicker with more local job opportunities.'[384]

[383] The Guardian, 'Northern Territory land clearing approvals increase nearly tenfold' (11 December 2017) available at: https://www.theguardian.com/australia-news/2017/dec/11/northern-territory-land-clearing-approvals-increase-nearly-tenfold.
[384] https://www.katherinetimes.com.au/story/7185059/nt-govt-streamlines-pastoral-land-clearing-approvals/.

- In October 2021, the NTG passed the *Environmental Legislation Amendment Bill 2021* (NT), which, amongst other things, amended the *Pastoral Land Act*, to empower the Pastoral Land Board (the regulator) to exempt certain clearing activities from requiring a permit. The then Minister for the Environment stated that this would 'modernise and clarify land clearing requirements on pastoral land and ensure the clearing is undertaken in a sustainable manner, while being supported by comprehensive compliance and enforcement tools.'[385]

Legislative objectives

While progress has been made over recent years to reform environmental legislation, the objectives of the relevant legislation do not demonstrate a commitment to end or reduce clearing by 2030. Rather, they focus on facilitating the sustainable development of land, and, to various (and, in some instances, lesser) degrees, the protection of the environment. This is primarily because the laws regulating land clearing in the NT are derivative of laws dominated by other purposes such as pastoralism, or development.

There is no legislation in the NT aimed specifically at regulating land clearing. However, a Bill for a *Native Vegetation Management Act* was drafted by the NT Government in 2011, through a multi-stakeholder engagement process. It was not tabled for debate or a vote in the Legislative Assembly, but remains a well-developed Bill which could be reviewed and strengthened as the basis for a modern stand-alone native vegetation law in the Northern Territory.

Instead, the *Planning Act 1999* (NT) (**Planning Act**) and the *Pastoral Land Act 1992* (NT) (**Pastoral Land Act**) comprise the principal regulatory tools that regulate land clearing in the NT, although the *Environment Protection Act 2019* (NT) (**EP Act**) may also apply.[386]

The purpose of the Planning Act is to 'establish a system to facilitate planning for the orderly use and development of land' to achieve a number of objectives, which relevantly include:

- to promote the sustainable development of land;
- to promote the responsible use of land and water resources to limit the adverse effects of developments on ecological processes;
- to maintain the health of the natural environment and ecological processes;
- to protect the quality of life for future generations; and
- to assist the conservation and enhancement of places, areas, buildings, other works and landforms that are of cultural, aesthetic, architectural or historical value.

The Planning Act establishes the Northern Territory Planning Scheme (**Planning Scheme**) that applies to the whole of the Territory[387] (except the town of Jabiru, which has its own scheme).[388]

[385] https://www.nationaltribune.com.au/creating-better-efficiency-and-accountability-within-our-environment-act/.
[386] As well as the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. However, the focus of this analysis is on NT-based laws and policies.
[387] Planning Act s 7.
[388] Planning Act s 8.

The purpose of the Planning Scheme is to, relevantly, further the objectives of the Planning Act, and establish controls to guide development.[389] It includes various provisions relevant to land clearing.

The objects of the Pastoral Land Act relevantly include:

> (a) to provide a form of tenure of Crown land that facilitates the sustainable use of land for pastoral purposes and the economic viability of the pastoral industry.
>
> (b) to provide for:
>
> > (i) the monitoring of pastoral land so as to detect and assess any change in its condition;
> >
> > (ii) the prevention or minimisation of degradation of or other damage to the land and its indigenous plant and animal life; and
> >
> > (iii) the rehabilitation of the land in cases of degradation or other damage.

The objects of the EP Act relevantly include:

> (a) to protect the environment of the Territory;
>
> (b) to promote ecologically sustainable development so that the wellbeing of the people of the Territory is maintained or improved without adverse impact on the environment of the Territory;
>
> (c) to recognise the role of environmental impact assessment and environmental approval in promoting the protection and management of the environment of the Territory.

Policy documents

There are a number of policy documents that have been issued by the NTG to support the regulation of land clearing under the Planning Act and the Pastoral Land Act. These include the:

- *Land Clearing Guidelines*[390] (made under the Planning Act);[391]
- *Pastoral Land Clearing Guidelines*[392] (made under the Pastoral Land Act);[393]
- *Simplified Pastoral Land Clearing Applications Policy*.[394]

None of these documents express, or indicate, a commitment by the NTG to end or reduce land clearing in the NT by 2030.

[389] Planning Scheme cl 1.3.
[390] Available here: https://nt.gov.au/__data/assets/pdf_file/0007/236815/land-clearing-guidelines.pdf.
[391] Planning Act ss 81B(c) and 135B.
[392] Available here: https://nt.gov.au/__data/assets/pdf_file/0003/902289/northern-territory-pastoral-land-clearing-guidelines.pdf.
[393] Pastoral Land Act s 91E.
[394] https://nt.gov.au/__data/assets/pdf_file/0004/1133536/simplified-plc-policy.pdf.

Costed plan to end deforestation

The NTG does not have a costed plan to end deforestation in the NT. Instead, it's regulatory frameworks and policy positions support an increase in land clearing, particularly to support pastoral and agricultural development.

Strengths and weaknesses of land clearing regulation that may be contributing to clearing rates

Overview

There is no legislation in the NT aimed specifically at regulating land clearing. Instead, land clearing is generally regulated under the Planning Act and the Pastoral Land Act. The EP Act also applies in some circumstances. Table 2 generally summarises the framework.

Table 2 - Summary of NT framework

Land tenure	Pathway	Relevant legal framework
Clearing on freehold land	Exemptions	*Planning Act 1999* (NT)
	Clearing requiring approval	*Planning Act 1999* (NT) *Land Clearing Guidelines*
	Clearing requiring approval – has the potential to have a significant impact on the environment	*Planning Act 1999* (NT) *Land Clearing Guidelines* *Environment Protection Act 2019* (NT)
Clearing on pastoral land	Exemptions	*Pastoral Land Act 1992* (NT)
	Simplified land clearing requiring approval	*Pastoral Land Act 1992* (NT) *Land Clearing Guidelines* *Simplified Pastoral Land Clearing Policy*
	Land clearing requiring approval	*Pastoral Land Act 1992* (NT) *Land Clearing Guidelines* *Pastoral Land Clearing Guidelines*
	Land clearing - 'has the potential to have a significant impact on the environment'	*Pastoral Land Act 1992* (NT) *Land Clearing Guidelines* *Pastoral Land Clearing Guidelines* *Environment Protection Act 2019* (NT)

Clearing on freehold land

Clearing on freehold land (that is, land owned in perpetuity, including Aboriginal land and Crown land) is regulated by the Planning Act. Proposed clearing of freehold land that:

- is zoned under the Planning Act requires development consent from the Development Consent Authority;[395]

- is unzoned requires approval from the Minister for Infrastructure, Planning and Logistics (**Planning Minister**).[396]

As noted above, the Planning Act establishes the Planning Scheme and provides for the making of the *Land Clearing Guidelines* (which are also referenced in the Planning Scheme). The *Land Clearing Guidelines* are applicable to 'development applications for the purpose of clearing of native vegetation' under the Planning Act and 'applications to clear pastoral land' under the Pastoral Land Act.[397]

If a proposal to clear land (either on zoned or unzoned land) 'has the potential to have a significant impact on the environment', the applicant must also refer their application to the Northern Territory Environment Protection Authority (**NT EPA**) for assessment.[398]

Clearing on pastoral land

Almost half (45%) of the land in the NT is managed under pastoral lease and the majority of broadscale land clearing in the NT occurs on pastoral leases.[399] Since 2018, the Pastoral Land Board (**PLB**) has approved approximately 59,000 ha of clearing on pastoral land.[400]

Clearing on pastoral land is regulated by the Pastoral Land Act. Proposed clearing generally requires a clearing application to be lodged with the PLB,[401] unless the clearing is permitted (without a permit) under section 91D of the Pastoral Land Act.[402]

The *Pastoral Land Clearing Guidelines* and the *Simplified Pastoral Land Clearing Policy* apply to clearing carried out on pastoral land, as do the *Land Clearing Guidelines*.

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[395] Planning Act s 44.
[396] Planning Act s 4.
[397] Department of Environment, Parks and Water Security, *Land Clearing Guidelines: Northern Territory Planning Scheme* (13 September 2021) 6 available at: https://nt.gov.au/__data/assets/pdf_file/0007/236815/land-clearing-guidelines.pdf.
[398] EP Act s 48.
[399] Pastoral Land Board Annual Report 2018-2019, p ii. Available at: https://depws.nt.gov.au/boards-and-committees/pastoral-land-board.
[400] NT Government, Pastoral Land: Current land clearing applications and approvals: https://nt.gov.au/property/land-clearing/pastoral-land/pastoral-land-clearing-applications-and-permits.
[401] See part 7A of the Pastoral Land Act. We note this part was inserted into the Pastoral Land Act in March 2022. Prior to this, land clearing on pastoral land was regulated under the condition provisions of the Pastoral Land Act (as it is a condition of a pastoral lease that a lessee will not clear land without a permit).
[402] Pastoral Land Act, s 38(h). See also, Northern Territory Government, Gazette, No S11, 31 March 2022 for a list of activities for which the clearing of vegetation associated with those activities does not require a permit.

Like with clearing on freehold land, if a proposal to clear pastoral land 'has the potential to have a significant impact on the environment', the applicant must refer their application to the NT EPA for assessment.[403]

Exemptions

Freehold Land

Overview:

There are a number of circumstances where consent is not required under the Planning Act to clear land, including where:[404]

- it is required or controlled under any Act in the Territory, or is for the purpose of:[405]
    - a firebreak as specified by the *Bushfires Management Act 2016* (NT) or the *Fire and Emergency 1996* (NT), up to 5 m wide along a boundary of a lot having an area of 8ha or less, up to 10 m wide on a lot having an area greater than 8 ha unless otherwise specified by a Regional Fire Control Committee;
    - an internal fence line up to 10 m wide on a lot having an area greater than 8 ha;
    - a road to access the land or other land; or
    - the maintenance and repair of public infrastructure.
- it is associated with the development of a specified Youth Justice Centre, and the development of a specified road as part of the Tiwi Islands Road Upgrade Program.[406]
- an activity does not fall within the definition of 'clearing of native vegetation' in the Planning Scheme.[407] This includes:
    - the removal or destruction of a declared weed within the meaning of the *Weed Management Act 2001* (NT) or of a plant removed under the *Plant Health Act 2008* (NT);
    - the lopping of a tree;
    - incidentally through the grazing of livestock;
    - the harvesting of native vegetation for harvest;
    - in the course of Aboriginal traditional use, including the gathering of food or the production of cultural artefacts;
    - by fire;

[403] EP Act s 48.
[404] Clause 3.2(4) of the Planning Scheme.
[405] This means that clearing associated with a mine or an onshore gas (fracking) activity is only regulated by the legislation regulating that activity (through, for example the provisions of mine management plans and environmental management plans). The only holistic environmental oversight available in these circumstances is if the main activity (i.e. a mining proposal) triggers the requirement for environmental impact assessment under the EP Act.
[406] Schedule 3 of the Planning Scheme.
[407] Schedule 2 of the Planning Scheme.

- the removal or destruction of native vegetation occurring on a site previously cleared in accordance with a permit under the Planning Act; or
- incidentally through mowing an area previously cleared of native vegetation.

- a person is clearing less than 1ha (unless in a Zone CN (Conservation)).[408]
- the native vegetation was previously cleared in accordance with the terms and conditions of a development permit. In this instance, providing the clearing was undertaken prior to the expiry date of the permit, the permit is valid indefinitely and the land can be re-cleared for the purpose of maintaining regrowth.
- a person is continuing an existing use by undertaking clearing activities (if that land was cleared prior to the introduction of clearing controls[409] and the use is restricted to the part of the land on which the use was being made immediately before the introduction of clearing controls and the intensity of the use is not greater than the intensity of use immediately before he introduction of the clearing controls.[410]

Analysis:

Whilst it is accepted that exemptions should be allowed for genuinely low risk activities, it is not necessarily the case that the above activities would have genuinely low impacts.

They are also broad and drafted in vague terms, meaning they are open to excessive use.

There are also no notification requirements (nor a clear monitoring and compliance reporting system), which makes it difficult to determine how much clearing without consent is being carried out, and unclear as to how the permitted clearing is being overseen (if at all) to ensure landholders are not exceeding the limits of the allowable activities. It is also unclear how the exemptions would be enforced.

The requirement for consent to clear less than 1 ha in a conservation zone is positive, however it is questionable whether clearing in a conservation zone should be permitted at all.

There is also no guidance as to what constitutes 'continuing an existing use' (other than how it is defined in the legislation, as noted above), meaning it is also open to excessive use.

Pastoral Lease

Overview:

On 31 March 2022, under s 91D of the Pastoral Land Act, the PLB gazetted a wide range of exemptions from the requirement to obtain a permit for clearing on pastoral land, including (but not limited to) clearing:

- that is for a pastoral purpose and caused by grazing stock;
- that is bailing of native vegetation for hay for a pastoral purpose;

[408] Department of Environment, Parks and Water Security, *Land Clearing Guidelines: Northern Territory Planning Scheme* (13 September 2021) 10 available at: https://nt.gov.au/__data/assets/pdf_file/0007/236815/land-clearing-guidelines.pdf.
[409] See Appendix 1 of the *Land Clearing Guidelines* to see when controls came into force.
[410] Planning Act s 34.

- for a pastoral purpose that is reasonably necessary for construction and maintenance of buildings, vehicle tracks, airstrips, helipads, yards, fenced laneways, holding paddocks, water storages;
- of up to 10 m wide for fences;
- for firebreaks up to 20 m wide;
- necessary for fire hazard reduction burning;
- that occurred before 1992 and has been consistently and regularly maintained on pastoral land;
- that is reasonably necessary for the construction, operation maintenance, repair or alteration of a dam or other water storage or dam (as long as the dam is not in a waterway).
- of trees for timber used in the maintenance or construction of infrastructure on the pastoral lease that is reasonably necessary for a pastoral purpose.[411]

Analysis:

The *Pastoral Land Clearing Guidelines* says that the PLB recognises the need for certain clearing activities to occur on a pastoral lease as part of regular day-to-day operations and has worked to ensure the circumstances are fit-for-purpose and reflect current expectations of reasonable clearing to support a pastoral enterprise. Whilst it is accepted that exemptions should be allowed for genuinely low risk activities, and the gazette notice includes a condition that the person clearing the land must ensure, where practicable, that the clearing does not affect 'sensitive or significant vegetation',[412] the above activities cannot be said to necessarily have low impacts, nor should they necessarily be allowed to occur without some consideration or oversight by the PLB.

The exemptions are broad and drafted in vague terms and are therefore open to excessive use. The inclusion of words like 'reasonably necessary' and 'where practicable' means enforcement action would likely be very difficult.

As above, there are also no notification requirements (nor a clear monitoring and compliance reporting system), which makes it difficult to determine how much clearing is being carried out without a permit, and unclear as to how this clearing is being overseen (if at all) to ensure lessees are not exceeding the limits of the permitted activities. It is also unclear how clearing that exceeds the above exemptions would be enforced.

Code-based clearing / Self-assessable clearing

There is no code-based clearing in the NT. In general, clearing either requires an approval (see Clearing requiring approval - below) or is exempt from requiring an approval (see Exemptions - above).

[411] See Determination of Circumstances for Permitted Land Clearing, 31 March 2022, https://nt.gov.au/__data/assets/pdf_file/0003/1096527/S11-31-March-2022.pdf#:~:text=Clearing%20that%20is%20for%20a%20pastoral%20purpose%20and,or%20feed%20and%20is%20for%20a%20pastoral%20purpose.

[412] As per the Gazette notice, this includes rainforest, vine thicket, dense or close forest, riparian vegetation, and vegetation containing large trees with hollows suitable for fauna habitat.

Clearing requiring approval

Overview:

Freehold Land

Section 75C of the Planning Act provides that land must not be developed by clearing it of native vegetation except in accordance with:

- a planning scheme;
- an interim development control order; or
- a permit.

A permit is required for clearing greater than one hectare, except in a conversation zone where consent is required for all clearing of native vegetation, regardless of the level.[413]

Applications to clear freehold land lodged under the Planning Act are technically referred to as 'development applications for the purpose of clearing native vegetation' and undergo an impact-based assessment.

An application must address a number of requirements specified in the Planning Act, the Planning Scheme, and the *Land Clearing Guidelines*.

As noted above, the consent authority for an application under the Planning Act for zoned land is the relevant division of the Development Consent Authority (for each of seven relevant divisions: Alice Springs, Batchelor, Darwin, Katherine, Litchfield, Palmerston and Tennant Creek).[414] For unzoned land, and in certain prescribed instances, the Minister is the consent authority.[415]

Section 46(3) of the Planning Act lists mandatory items to be included in a development application, such as an assessment that shows how the proposed clearing will comply with the Planning Scheme, and section 51 of the Planning Act requires the consent authority to take into account the Planning Scheme when considering a development application (amongst other considerations). The requirements in section 46 of the Planning Act are all general in nature and do not include specific environmental considerations (this is left to the Planning Scheme and the *Land Clearing Guidelines*).

The Planning Scheme relevantly provides that in relation to native vegetation clearing, its purpose is to ensure that clearing does not 'unreasonably contribute to environmental degradation of the locality'[416] and requires a person to:[417]

- avoid impacts on environmentally significant or sensitive vegetation;
- be based on land capability and suitability for the intended use;
- avoid impacts on drainage areas, wetlands and waterways;
- avoid habitat fragmentation and impacts on native wildlife corridors; and

[413] Planning Scheme cl 3.2(1)-(2).
[414] https://dipl.nt.gov.au/committees/dca.
[415] Planning Act s 4.
[416] Planning Scheme cl 3.2 'Purpose'.
[417] Planning Scheme cl 3.2(5).

- avoid impacts on highly erodible soils.

However, the consent authority may consent to the clearing of vegetation that is not in accordance with the above if it is satisfied that it is consistent with the purpose of those requirements and is appropriate in the context of the site and the locality having regard to such matters as:

- the suitability of the site for the proposed use;
- the values associated with the environmental characteristics (as applicable);
- the significance, extent and likelihood of any potential environmental impacts; and
- the measures the application proposes will be implemented to mitigate any potential impacts.

In addition to addressing the requirements in the Planning Act,[418] the Planning Scheme provides that an application for the clearing of native vegetation is to demonstrate consideration of the following:[419]

- the *Land Clearing Guidelines* [particularly, Chapter 4 – Environmental Considerations];
  - This includes (but is not limited to) identifying:
    - the environmental characteristics of the proposals clearing footprint;
    - the values associated with the environmental characteristics (as applicable);
    - the potential environmental impacts associated with the proposed clearing;
    - the likelihood the potential impacts will occur;
    - any proposed mitigation measures.
- the presence of threatened wildlife as declared under the *Territory Parks and Wildlife Conservation Act 1976* (NT);
- the presence of sensitive or significant vegetation communities such as rainforest, vine thicket, closed forest or riparian vegetation;
- the presence of essential habitats, within the meaning of the *Territory Parks and Wildlife Conservation Act 1976* (NT);
- the impact of the clearing on regional biodiversity;
- whether the clearing is necessary for the intended use;
- whether there is sufficient water for the intended use;
- whether the soils are suitable for the intended use;
- whether the slope is suitable for the intended use;
- the presence of permanent and seasonal water features such as billabongs and swamps;
- the retention of native vegetation adjacent to waterways, wetlands and rainforests;
- the retention of native vegetation buffers along boundaries;
- the retention of native vegetation corridors between remnant native vegetation;
- the presence of declared heritage places or archaeological sites within the meaning of the *Heritage Act 2011* (NT); and
- the presence of any sacred sites within the meaning of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).

Importantly, all of the above factors must also be considered for the wider area. That is, each clearing application has to address the proposed clearing within the context of not only the site, clearing

[418] Planning Act s 46(3).
[419] Planning Scheme cl 3.2(6).

footprint and property but also the adjoining properties, wider landscape, region and Territory.[420] There is limited detail on the exact standards the application must adhere to, with the *Land Clearing Guidelines* stating that the level of detail required is dependent on the 'complexity of the clearing footprint and surrounding area and the risk of environmental degradation associated with the proposed clearing in the immediate and longer-term', and that applications require 'sufficient information to enable full consideration of the proposed clearing by the consent authority.'[421]

The *Land Clearing Guidelines* also provide that a person must demonstrate how the 'environmental considerations'[422] set out in the *Guidelines* have been addressed in an application either through:

- direct adoption of the guidelines (e.g., the recommended buffer width is applied); or
- appropriate alternative mitigation proportionate to the level of risk.

It states that 'should direct adoption of the guidelines not be feasible, an application must request that the consent authority apply discretion and provide reasons to support the proposed mitigation measure or strategy'.[423]

Section 47 provides that before a consent authority determines a development application (including an application for clearing), it must (a) give public notice of the application, or (b) require, by written direction, the applicant to give public notice of the application. The notice must include an invitation to members of the public to make written submissions about the application within the period specified in the notice.[424]

In determining an application, a consent authority must consider whether the proposed clearing will satisfactorily avoid environmental degradation based on the information provided in the application and advice from advisory agencies and service authorities. Having regard to the guidelines, the consent authority must be satisfied that the applicable environmental matters have been effectively considered and that the risks posed by the clearing will be effectively mitigated.[425]

The *Land Clearing Guidelines* also incorporate the precautionary principle and provide that it should be adopted where different environmental matters overlap, and that the most conservative recommendation should be applied.[426]

Pastoral Lease

Section 38(1) of the Pastoral Land Act provides that a pastoral lease is subject to a number of conditions, including that a lessee will not clear pastoral land unless the lessee is granted a clearing permit or, as noted above, the clearing is permitted under section 91D. Moreover, a person will commit an offence if

[420] https://nt.gov.au/__data/assets/pdf_file/0007/236815/land-clearing-guidelines.pdf.
[421] https://nt.gov.au/__data/assets/pdf_file/0007/236815/land-clearing-guidelines.pdf p 14-15.
[422] These are set out in detail in Chapter 4 of the Land Clearing Guidelines and include land resource management, biodiversity, water, and culture heritage.
[423] *Land Clearing Guidelines*, p 16.
[424] Pastoral Land Act s 47(1)(c).
[425] Land Clearing Guidelines, p 17.
[426] *Land Clearing Guidelines*, p 18.

they intentionally engage in conduct that results in clearing pastoral land and that clearing was not conducted in accordance with a clearing permit, or otherwise permitted under the Pastoral Land Act.[427]

As per section 91F of the Pastoral Land Act, a pastoral lessee may apply to the PLB for a permit to conduct clearing for all or part of the land the subject of the lessee's pastoral lease. An application for a clearing permit must be in the form approved by the PLB and accompanied by the relevant application fee.[428] The *Pastoral Land Clearing Guidelines* provide further guidance on the duty of the board,[429] how an application is made, the process after an application is lodged (including public notice) and how the PLB decides on an application.

Importantly, the Pastoral Land Act provides that a clearing permit only permits a pastoral lessee to clear land subject to the lessee's pastoral lease and does not permit the lessee to use the land for a non-pastoral purpose.[430] A separate application must be made to the PLB for a non-pastoral use permit.[431]

Section 91G provides that before making a decision on an application for a clearing permit, the Board must give public notice of the application. The notice must invite any person who is interested in doing so to make written submissions to the Pastoral Land Board about the application within the time specified in the notice (which must not be less than 14 days after the date the notice is first published).[432]

Public notification of an application for a non-pastoral purpose use permit is also required under section 87A. The notice must invite any person who is interested in doing so to make written submissions to the Pastoral Land Board (section 87A(3)(c)).

Section 91H of the Pastoral Land Act provides that before making a decision on whether to grant a clearing permit, the PLB must consider any submissions received, the *Pastoral Land Clearing Guidelines*, and any other matters the PLB considers relevant. A number of matters the PLB considers relevant are set out in the *Pastoral Land Clearing Guidelines* and include (but are not limited to):[433]

- whether the proposal complies with the requirements of the *Greenhouse Gas Emissions Management for New and Expanding Large Emitters* (discussed below under question 4);
- an assessment and report from the Native Vegetation Assessment Panel;[434]

[427] Pastoral Land Act s 91C.
[428] Pastoral Land Act s 91F(1).
[429] The *Pastoral Land Clearing Guidelines* state that (at p. 6) that the PLB aims to ensure that pastoral land clearing avoids impacts on environmentally significant or sensitive vegetation, is based on land capability and suitability for the intended use, avoids impacts on drainage areas, wetlands and waters, avoids habitat fragmentation and impacts on native wildlife corridors, and avoids impacts on highly erodible soils.
[430] Pastoral Land Act s 91F(3).
[431] Pastoral Land Act s 85A. There are more stringent requirements in place for the application of a non-pastoral permit. See, generally, Part 7 of the Pastoral Land Act. Section 87(2) requires the PLB to consider a number of matters, including the 'likely effect of the proposed use on the environment' (which is not a mandatory consideration for assessing land clearing applications for pastoral purposes. See our case study on this below: ECNT v PLB.
[432] Pastoral Land Act s 91G(3)(c)).
[433] *Pastoral Land Clearing Guidelines*, p 9.
[434] The Native Vegetation Assessment Panel (NVAP) primarily reviews (and provides advice on) applications for clearing on unzoned freehold for the Planning Minister. There is no legislative basis for the NVAP.

- whether the application has demonstrated consideration of the *Land Clearing Guidelines* (and the relevant matters set out therein).

The *Simplified Pastoral Land Clearing Policy* was introduced in March 2021 after the NT Government announced it would "streamline" approval times for pastoral land clearing applications on "simplified" land clearing proposals of up to 1,000 ha. The duration of the assessment process for simplified applications is reduced to six weeks[435] (instead of the usual six months) [436] and includes a shorter public exhibition period.

In order to be assessed under the *Simplified Pastoral Land Clearing Policy*, an application must be for the clearing of native vegetation on land that is considered "unconstrained land"[437] and also meets the criteria outlined in Schedule 1 of the *Pastoral Land Clearing Guidelines*.[438] Prior to lodging an application, applicants are also required to seek advice from a number of government departments and must include the responses from those departments when lodging their application.[439]

Environment Protection Act

For both freehold and pastoral land, if the development proposal has the potential to have a significant impact on the environment, the proponent is required to refer it to the NT EPA for decision as to whether assessment (and approval) under the EP Act is required. However, the *Pastoral Land Clearing Guidelines* state that the PLB requires a pastoral lessee to self-refer, or to obtain appropriate advice from the NT EPA that self-referral is not required, if the proposed clearing has the potential to have a significant impact on the environment and/or will result in a total of 5,000 ha to be cleared in aggregate.[440]

Current applications and approvals for both freehold and pastoral land clearing are available online.[441]

Analysis:

A primary weakness with the current framework is the absence of appropriate safeguards under the Planning Act and the Pastoral Land Act to ensure the consistent and robust assessment of potential impacts of land clearing. The lack of clear decision-making tests and guidance leads to inconsistent determinations that are frequently lacking in rigor.

While under the Planning Act the consent authority must consider various matters when assessing an application, there is no guidance on how all the elements of an application should be synthesised in the decision-making process and how competing factors should be weighed. Additionally, proponents are only required to demonstrate consideration of factors, or how they have addressed certain matters, listed in the Planning Scheme, or *Land Clearing Guidelines*, rather than demonstrating that they meet minimum standards or environmental outcomes. Notably, there is also no explicit obligation imposed

[435] *Simplified Pastoral Land Clearing Policy*, p 10.
[436] *Pastoral Land Clearing Guidelines*, p 8.
[437] As per the *Simplified Pastoral Land Clearing Policy*, this is land generally defined as having the most suitable soil and land resources with low biological and cultural value.
[438] See *Simplified Pastoral Land Clearing Policy*, p 7. This includes that the application must be for pastoral and non-irrigated purposes only, and certain buffers widths must be met.
[439] *Simplified Pastoral Land Clearing Policy*, p 9.
[440] *Pastoral Land Clearing Guidelines*, p 6.
[441] See https://nt.gov.au/property/land-clearing.

on consent authority to consider the principles of ecologically sustainable development (**ESD**) when determining an application, or the impacts of climate change.

One strength of the planning system is that the relevant Development Consent Authority must generally consist of 'two specialist members', in addition to a Chair and two community members (if the Division of the Development Consent Authority is within a council area).[442] However, while a specialist member could be someone with expertise in the area of 'environmental studies',[443] the Planning Act does not require it (i.e., the Minister has discretion to appoint the two specialist members from any one of the 12 different areas of expertise). Moreover, the requirement for specialist members only applies where a division of the Development Consent Authority is within a council area. This means decisions on land clearing applications under the planning system may consistently be made with no input from someone with specific expertise, which could potentially lead to clearing (and waters down the strength).

The Pastoral Land Act does not impose any specific decision-making requirements on, or provide any guidance to, the PLB when determining a land clearing application (including in regards to ecologically sustainable development or climate change). Although the PLB "aim" to avoid things like habitat fragmentation, the *Pastoral Land Clearing Guidelines* are very vague and only loosely refer to environmental considerations, and it is not clear they are enforceable. The PLB is only required by law to act consistently with and further the objects of the Pastoral Land Act (i.e., they have discretion to make decisions that are inconsistent with policy documents, such as the *Land Clearing Guidelines*). Moreover, unlike under the Planning Act, given the members of the PLB are not specifically required to have environmental expertise[444] significant potential conflicts of interest arise resulting from the fact that the PLB's members are themselves, in many cases, also pastoralists (or at least have been). This poses clear risks in relation to the objectivity of the decision-making process for land clearing permit applications.

The *Land Clearing Guidelines,* that apply to clearing applications made under the Planning Act and the Pastoral Land Act, operate as 'guidance' rather than as clear standards that must be adhered to, and it is not clear that they are enforceable, nor that the respective decision-makers are required, by law, to consider them when determining a clearing application (i.e., there is no requirement under the Planning Act to consider the *Guidelines* (despite the *Guidelines* stating 'they must be applied'[445]), and under the Pastoral Land Act, the PLB is only strictly required to consider the *Pastoral Land Clearing Guidelines*). It is even less clear whether the respective decision-makers are required to make decisions that are consistent with the guidance provided in *Land Clearing Guidelines*.[446]

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[442] Planning Act s 89(1).

[443] See clause 16(d) of the *Planning Regulations 2000*.

[444] See s 13 of the Pastoral Land Act for the qualification requirements of the PLB. This section provides that 'in appointing members to the [PL]Board, the Minister shall ensure that 2 persons who have experience as pastoralists are included, and, as far as practicable, the members collectively have expertise or experience that, in the opinion of the Minister, is relevant to their role as members'.

[445] See p. 6 of the *Land Clearing Guidelines*.

[446] However, section 9C of the Planning Act does say that 'the interpretative provisions and administrative guidelines in a planning scheme consist of (b) any guidance a consent authority is expected to follow when administering the planning scheme, including what it is allowed to consider in relation to specific matters'.

Problematically, the *Land Clearing Guidelines* are oriented towards land capability rather than focusing equally (or primarily) on protecting biodiversity, ecological integrity, and water resources. And the *Simplified Pastoral Land Clearing Applications Policy* will only serve to accelerate the approval process for pastoral land clearing, which is likely to increase clearing rates, and reinforces our view that the NTG is prioritising efficiency over adequate assessment and environmental protection.

While the EP Act has the potential to act as an important safeguard, it is not clear it is being utilised to its full potential and being appropriately applied to land clearing applications. For example, the EP Act makes provision for 'referral triggers' (such as a 100 ha land clearing trigger) to be set by the Environment Minister, but to our knowledge, the NTG has not developed any triggers (nor do they have plans to). While the EP Act gives power to the Environment Minister to approve and refuse projects, the effectiveness of this new governance arrangement depends on the EP Act being applied at appropriate thresholds. Based on our review of the NT EPA's environmental assessment register in May 2023, only one application that is solely for clearing appears to have been referred to the NT EPA since the EP Act commenced in 2020, and the NT EPA determined that the proposal did not require assessment, although we note other applications may involve some aspects of clearing as part of a broader proposal for development or infrastructure.[447]

Although the *Pastoral Land Clearing Guidelines* state that proposals that have the potential to have a significant impact on the environment require a referral to the NT EPA in accordance with the EP Act, they also provide – in the next sentence - that the PLB requires a pastoral lessee to self-refer, or to obtain appropriate advice from the NT EPA that self-referral is not required, if the proposed clearing results in a total of 5,000 ha to be cleared in aggregate. Whether intentional or not, the reference to the PLB's 'requirement' is suggestive of the NTG's pro-clearing policy approach and creates a dangerous baseline assumption that clearing of less than 5,000 ha of land will not have a significant impact on the environment.

There is also no mechanism under the Planning Act or the Pastoral Land Act to address the cumulative impacts of land clearing at a landscape scale, or to restrict 'stacking' of multiple applications (i.e., there are no prohibitions on the same proponent making smaller applications, which over time cumulatively amount to a large-scale clearing application). While it is possible for an environmental impact assessment under the EP Act to require consideration of cumulative impacts,[448] in the absence of broader bioregional scale conservation planning, this would remain relatively ineffective for landscape scale outcomes.

On a positive note, current and historical applications, and approvals for both freehold and pastoral land clearing are available online,[449] which means information about how many applications are being lodged and approved is available to the wider community (and the public can see how many hectares of land is being approved to clear). However, it is not clear from this information how much land is

[447] See NT EPA Environmental Impact Assessment Register: Clearing of native vegetation on Ucharonidge Station https://ntepa.nt.gov.au/your-business/public-registers/environmental-impact-assessments-register/completed-assessments/register/clearing-of-native-vegetation-on-ucharonidge-station.
[448] EP Act s 10.
[449] See https://nt.gov.au/property/land-clearing. Although, applications are removed once the public consultation period has concluded.

actually cleared by the relevant approval/permit holder due to the lack of a monitoring and compliance reporting program.

Protection of Environmentally Sensitive Areas

Overview:

Freehold land

The NTG attempts to provide some protections for environmentally sensitive areas under the planning system by including certain measures in the Planning Scheme.

As noted above, the Planning Scheme requires:

- a person to 'avoid impacts on environmentally significant or sensitive vegetation'.[450]
- an application for the clearing of native vegetation to demonstrate consideration of:
    - the *Land Clearing Guidelines*, which include a section entitled 'sensitive or significant vegetation types'.[451] Amongst other things, the *Guidelines* provide that sensitive and significant vegetation types should be excluded from the proposed clearing footprint and appropriate native vegetation buffers retained to protect them, and that a person must demonstrate how the 'environmental considerations' set out in the *Guidelines* (under which the section on 'sensitive or significant vegetation types' sits) have been addressed in an application either through direct adoption of the *Guidelines*, or appropriate alternative mitigation proportionate to the level of risk.
    - the presence of threatened wildlife as declared under the *Territory Parks and Wildlife Conservation Act 1976* (NT);
    - the presence of sensitive or significant vegetation communities such as rainforest, vine thicket, closed forest or riparian vegetation;
    - the presence of essential habitats, within the meaning of the *Territory Parks and Wildlife Conservation Act 1976* (NT).

Pastoral land

The Pastoral Land Act attempts to provide some protection for environmentally sensitive areas in the following ways:

[450] Planning Scheme, cl 3.2(5). As per the *Land Clearing Guidelines,* 'sensitive or significant vegetation' is defined to mean 'sensitive or significant vegetation communities such as rainforest, vine thicket, closed forest or riparian vegetation (clause 3.2 of the Planning Scheme). The terms are used in these guidelines to also include mangroves, monsoon vine forest, sandsheet heath and vegetation containing large trees with hollows suitable for fauna habitat'.
[451] *Land Clearing Guidelines*, section 4.4.6.

- Under the Pastoral Land Act, every pastoral lease is subject to 'general conditions'[452] and 'land management conditions'.[453] One of the land management conditions provides that the lessee will 'take all reasonable measures to conserve and protect features of environmental, cultural, heritage or ecological significance'.[454]

- The PLB must consider 'any relevant guidelines issued under section 91E of the Pastoral Land Act' before making a decision whether to grant a clearing permit.[455] Section 91E provides for the making of the *Pastoral Land Clearing Guidelines* (but not specifically the *Land Clearing Guidelines*, though the *Land Clearing Guidelines* are referred to in the *Pastoral Land Clearing Guidelines*. The *Land Clearing Guidelines* include guidance on clearing land with 'significant or sensitive vegetation and 'threatened species').

Despite this, a pastoral lessee is not required to include any information about environmentally sensitive areas in an application for a permit to clear land.

Analysis:

The existing legal framework does not contain strong, mandatory conservation mechanisms to adequately protect areas of high conservation value.

While the Planning Scheme requires an application to 'demonstrate the consideration of' matters pertaining to environmentally sensitive areas (which is a positive feature), there is no binding obligation, or 'no go zones', that operate consistently to protect sensitive areas, or areas of high conservation value, from clearing. Moreover, clearing may still be carried out in a Conservation Zone.[456]

Although the requirement to 'avoid impacts on environmentally significant or sensitive vegetation' attempts to put protections in place for environmentally sensitive areas, it will not necessarily prevent clearing (or protect such areas), because the consent authority has broad discretion to consent to clearing that does not accord with this requirement so long as it is satisfied of certain matters.[457]

While a pastoral lessee is required, by a land management condition, to take all reasonable measures to conserve and protect features of environmental, cultural, heritage or ecological significance, there is no requirement for a pastoral lessee's application for a clearing permit to include information about these matters.[458] There is also no explicit requirement for the PLB to take into account any environmental considerations when determining an application to clear pastoral land. While the *Pastoral Land Clearing Guidelines* set out a number of matters that the PLB says are relevant to its determination of an application to clear land (which includes the *Land Clearing Guidelines*[459]), the Pastoral Land Act does not require the PLB to consider the *Land Clearing Guidelines* (or the matters set out therein e.g., 'significant

[452] Pastoral Land Act s 38.
[453] Pastoral Land Act s 39.
[454] Pastoral Land Act s 39(b).
[455] Pastoral Land Act s 91H(1)(b).
[456] See clause 3.2(1)-(2) of the Planning Scheme.
[457] See cl 3.2(3) of the Planning Scheme.
[458] See section 91F of the Pastoral Land Act.
[459] *Pastoral Land Clearing Guidelines*, p 9.

or sensitive vegetation'). In other words, the PLB is afforded very broad discretion when determining an application to clear land (which likely contributes to clearing).

The *Territory Parks and Wildlife Conservation Act 1976* (NT) (**TPWC Act**) is the key conservation legislation in the NT and provides for the declaration of 'areas of essential habitat', the listing of threatened species and the protection of wildlife. However, a person is only required to demonstrate consideration of these matters under the Planning Scheme (there is no similar requirement under the Pastoral Land Act, though the *Pastoral Land Clearing Guidelines* state that 'areas of essential habitat' are one of the matters it considers relevant in making a decision on a clearing permit application).[460] In any event, to our knowledge, there have been no areas declared as essential habitat in the NT, and there is no mechanism under the TPWC Act to protect threatened ecological communities. The lack of such protections could, in theory, contribute to clearing.

As a result, there are no mechanisms, either under the Planning Act or the Pastoral Land Act, that ensure the proper assessment of the impacts of clearing applications on high conservation value habitat, ecological communities and species, and that trigger 'red flags' or 'no go zones' where highly sensitive areas do exist.

While the Environment Minister now has the power to establish 'protected environmental areas' under the EP Act (which could be used to establish 'no go' sensitive areas where clearing is not permitted), the effectiveness of this mechanism will depend on its use by the Environment Minister, and for the EP Act to be applied appropriately and consistently to land clearing applications. To our knowledge, the Environment Minister has not declared any 'protected environmental areas' to date.

Offsets

Overview:

Section 125 of the EP Act provides a legislative power to require offsets from projects that have undergone environmental impact assessment under the EP Act or are subject to regulatory approval under another Act that has been prescribed in the *Environment Protection Regulations 2020* (**EP Regulations**). As part of this power, the Minister may establish an environmental offsets framework for use under the EP Act, or any other Act prescribed in the EP Regulations.

While the NTG has established the NT Offsets Framework and has published the *Greenhouse Gas Emissions Offsets Policy and Technical Guidelines*[461] and the *Biodiversity Offsets Policy*[462], neither the Planning Act nor the Pastoral Land Act are prescribed Acts under the EP Regulations. In light of this, it is our understanding that unless a land clearing proposal under either the Planning Act or the Pastoral Land Act triggers an assessment under the EP Act (because it 'has the potential to have a significant

[460] *Pastoral Land Clearing Guidelines*, p 9.
[461] Available here: https://depws.nt.gov.au/__data/assets/pdf_file/0004/1144957/nt-ghg-emissions-offsets-policy-and-technical-guidelines.pdf. See also EDO's submission on the draft here: https://www.edo.org.au/wp-content/uploads/2021/11/Submission-on-the-Northern-Territory-Draft-Greenhouse-Gas-Emissions-Offsets-Policy-and-Technical-Guidelines.pdf.
[462] Available here: https://depws.nt.gov.au/__data/assets/pdf_file/0003/1182450/biodiversity-offsets-policy.pdf.

impact on the environment'), or the Planning Act and/or the Pastoral Land Act become prescribed Acts under the EP Regulations, the NT Offsets Framework will not apply to land clearing activities in the NT.

Analysis:

If offsets are to be used under the Planning Act or the Pastoral Land Act, then the Offsets Framework, should apply, even if those activities are not assessed under the EP Act. However, the Offsets Framework should first be strengthened.

In November 2022, the NTG released the draft *Biodiversity Offsets Policy* and draft *Biodiversity Offsets Technical Guidelines* for stakeholder consultation. Stakeholders flagged concerns about how biodiversity offsetting would be implemented, and about some of the assumptions that appeared to have underpinned the draft.

The *Biodiversity Offsets Policy* was finalised in January 2023. EDO raised a number of concerns with the draft policy; some concerns were addressed, yet a number of EDO's concerns remain.[463] These include (but are not limited to):

- It is positive that the general target of the *Policy* is that biodiversity offsets should contribute to a net gain in the ecological conditions of natural habitats in the Territory.[464] However, the *Policy* does not provide detail of the mechanisms by which environmental gain will be measured. The *Policy* is also dependent on the existence of NT-wide biodiversity conservation targets being in place, which do not currently exist.

- While the Offsets Framework is based on the mitigation hierarchy of 'avoid, minimise, mitigate', and the *Policy* states that the mitigation hierarchy must be rigorously applied,[465] the *Policy* does not provide detail on the mechanisms to monitor or enforce this. The *Policy* also needs to provide details of what is required to properly investigate all lower impact alternatives, and the mechanism by which all reasonable avoidance and mitigation measures are to be applied. It also needs to be stress that offsets must only be used as a last resort, rather than 'where all reasonable steps have been taken to avoid and mitigation potential impacts,'[466] particularly where no guidance is provided on what constitutes 'reasonable steps'.

- The *Policy* is not based on the principle of 'like for like' and instead adopts a targets-based approach to biodiversity to enable improved environmental outcomes at landscape or regional scales - the *Policy* refers to this as a 'broadly defined 'like-for-like' approach' in that it applies offsets in the same biome and broad habitat type.[467] While we acknowledge the *Policy's* attempt to implement a nuanced approach to offsetting due to the 'unique circumstances of

[463] EDO, Submission on draft Northern Territory Offsets Policy, 21 February 2020 available here: https://www.edo.org.au/wp-content/uploads/2020/02/200221_EDO-submission-NT-Offsets-Policy_Final.pdf; EDO, Submission on the Draft Northern Territory Biodiversity Offsets Policy and Draft Biodiversity Offsets Technical Guidelines, 16 November 2022 available here: https://www.edo.org.au/wp-content/uploads/2022/11/221116-EDO-Submission-NT-Biodiversity-Offsets-Policy.pdf.
[464] *Biodiversity Offsets Policy*, p 8.
[465] *Biodiversity Offsets Policy,* p 4.
[466] *Biodiversity Offsets Policy*, p 6.
[467] *Biodiversity Offsets Policy*, p 8.

the Territory', any ecologically credible offset scheme must enshrine the requirement for like for like offsets to ensure that the environmental values being used as an offset are equivalent to the environmental values impacted by the proposed action.

- No 'red flag' or 'no go' areas have been identified or developed to make it clear when offsetting is not an appropriate strategy (though this could be achieved through the use of the 'protected environmental areas' mechanism provided for under the EP Act).

- Under the *Policy*, a biodiversity offsets plan is required only after a project has been approved under the EP Act with a biodiversity offset condition attached[468] – there is no requirement to include a proposed biodiversity offset plan as part of the initial application process even where residual impacts are identified in that process. While it is positive that the biodiversity offset plan requires approval 'prior to the impacts which are being offset occurring',[469] it is not clear that appropriate offsets are required to actually be identified or secured at that time. Moreover, the *Policy* provides that a biodiversity offset plan must demonstrate that ecological gains will occur as 'close in time as possible' to the impact and threats must be managed as 'quickly as feasible'.[470] These requirements are too broad and cannot be measured.

- The *Policy* allows for the use of alternative direct offsets, although the 'preferred type of offset is a habitat-based offset with direct habitat management activities'[471] (which EDO supports, though there are some questions over whether some of the activities described by the NTG can be properly characterised as such (e.g., 'capacity building for land managers'[472])). The use of alternative direct offsets (or indirect offsets) should be strictly limited.

- The *Policy* does not require an offset to be implemented in perpetuity, in recognition that 'this cannot be readily achieved in most areas of the NT'.[473] This directly contradicts a key principle of offsetting that offsetting must achieve benefits in perpetuity.

- Although the *Policy* states that offset arrangements 'will be subject to compliance monitoring by the regulator',[474] we understand the NT EPA will monitor compliance of a biodiversity offset approval condition through self-reporting, which, in our view, is an unsatisfactory approach. Although we acknowledge that the reliance on self-reporting is due to the limited resourcing of the NT EPA, we cannot see how any offsets policy can deliver genuine outcomes in the absence of proper resourcing.

[468] *Biodiversity Offsets Policy*, p 7.
[469] *Biodiversity Offsets Policy*, p 7.
[470] *Biodiversity Offsets Policy*, p 14.
[471] *Biodiversity Offsets Policy*, p 9.
[472] *Biodiversity Offsets Policy*, p 9.
[473] *Biodiversity Offsets Policy*, p 14.
[474] *Biodiversity Offsets Policy*, p 15.

- The *Policy* does not (but should) include reference to climate change and potential impacts to biodiversity offsetting arrangements.

The *Policy* should be further revised and amended to ensure that it aligns with best practice science-based offsetting principles and delivers improved biodiversity conservation outcomes for the NT.

Compliance and enforcement

Effectiveness of regulatory oversight

Freehold Land

Both the Development Consent Authority (in relation to its relevant divisions) and the Minister are responsible for enforcing the Planning Act. The Development Consent Authority and the Minister can receive and investigate complaints made under Part 7, Division 4 of the Planning Act. The Development Consent Authority publishes figures on number of complaints received and number of complaints resolved in its Annual Reports.[475] We have been unable to find any clear information about what enforcement action, if any, is taken by the Minister or Department of Infrastructure, Planning and Logistics.

Pastoral Lease

Both the Minister and Pastoral Lease Board (PLB) have a role to play in enforcing the Pastoral Land Act. While under the Pastoral Land Act the enforcement powers of the Minister are broad, they are highly discretionary and are not necessarily targeted to an offence of unlawful land clearing (because they are only engaged when a person has breached a condition of their pastoral lease, not a clearing permit). They appear unlikely to be utilised by the Minister and therefore unlikely to operate as a suitable deterrent. The PLB has various enforcement powers. For example, the PLB has power to give a person a stop work direction. The PLB may issue a rehabilitation direction to a person. It is unclear how often it utilises its powers (e.g., there are no details provided in its Annual Reports, and they are not required to publicly report on compliance and enforcement efforts).

Strength of compliance and enforcement framework

Overview:

- *Freehold land*

Under the Planning Act, it is an offence to use or develop land in contravention of the planning scheme that applies to the plan, except in accordance with a permit.[476] There is also a specific offence for intentionally clearing native vegetation without a permit. [477] The maximum penalty for both offences is 500 penalty units, while the 'default penalty' for both offences is 4 units. One penalty unit is currently $162.

[475] https://dipl.nt.gov.au/committees/dca.
[476] Planning Act s 75.
[477] Planning Act s 75C.

The relevant consent authority may issue an enforcement notice to any person it believes on reasonable grounds has contravened, is contravening, or is likely to contravene the above offence provisions (amongst others).[478] Generally, a consent authority must give a written 'show cause' notice to the proposed recipient of the enforcement notice before it issues the enforcement notice.[479] If an enforcement notice issued, it may impose any requirement reasonably required to remedy or prevent the contravention.[480]

In the alternative, an authorised officer may also give an infringement notice to a person if the authorised officer believes on reasonable grounds that a person has committed an infringement notice offence[481] (such as if a person intentionally clears native vegetation).[482]

Any person may lodge a complaint with a consent authority that a person has contravened the Planning Act,[483] but the consent authority is not required to investigate that complaint (and may refuse if satisfied that the complaint is trivial, frivolous or vexatious, or no grounds exist).[484]

While the Planning Act does not specify what offences can be prosecuted, a prosecution may be brought but only in the name of the Development Consent Authority, or the Minister.[485]

There are no third party civil enforcement proceedings under the Planning Act.

- *Pastoral land*

Under the Pastoral Land Act, there are different compliance and enforcement mechanisms available, depending on the nature of the breach/offence, including, relevantly:

- Under Part 4, which contains provisions regarding breaches of a condition of a pastoral lease.

  If a lessee has failed to comply with a condition of a pastoral lease (either a 'general condition' or a 'land management condition'), the Environment Minister may request an explanation as to why the lessee has not complied with the condition,[486] waive the breach and direct that the lessee comply with the condition,[487] or, and unless the lease is a perpetual pastoral lease, decide to forfeit the lease.[488]

  The Minister may also direct the rehabilitation of the land at the cost of the lessee.[489]

- Under Part 7A, which contains the specific offences in relation to the clearing of pastoral land.

[478] Planning Act s 77.
[479] Planning Act s 77A(1).
[480] Planning Act s 77C(2).
[481] *Planning Regulations 2000* cl 18.
[482] *Planning Regulations 2000* Schedule.
[483] Planning Act s 78(1)-(2).
[484] Planning Act s 79.
[485] Planning Act s 80G(1).
[486] Pastoral Land Act s 40(1).
[487] Pastoral Land Act s 40(2).
[488] Pastoral Land Act s 40.
[489] Pastoral Land Act s 42.

As noted above, a person commits an offence if the person intentionally clears pastoral land and the clearing was not conducted in accordance with a clearing permit, or otherwise permitted.[490]

The PLB has power to give a person a stop work direction if it believes on reasonable grounds that the clearing has contravened, is contravening or will contravene a condition of a clearing permit or a provision of the Pastoral Land Act,[491] and a person will commit an offence if they contravene that direction.[492] The maximum penalty for both these offences is 500 penalty units,[493] but it is a defence to a prosecution if the person 'has a reasonable excuse'.

The PLB may issue a rehabilitation direction to a person if it believes on reasonable grounds that clearing land by the person resulted in substantial degradation of the land or clearing was contrary to the clearing permit or the Pastoral Land Act.[494] The rehabilitation direction may require the person to prepare a rehabilitation plan for the person to implement.[495] A rehabilitation plan is a registrable instrument for the purpose of the *Land Title Act 2000* (NT) (which means it runs with the land, not just the lease).[496] It is also an offence to contravene a rehabilitation direction[497] and a rehabilitation plan.[498]

The PLB may also vary,[499] suspend[500] or revoke[501] a clearing permit.

There are also offence provisions (and associated compliance and enforcement mechanisms) under Part 5 – Pastoral Land Monitoring, Part 6 – Access to pastoral land, and Part 7 – Non pastoral use of pastoral land.

Proceedings for an offence relating to a breach of a pastoral lease condition can only be instituted with the written consent of the Minister.[502]

There are no third party civil enforcement proceedings under the Pastoral Land Act.

- *Environment Protection Act 2019*

While the new EP Act has a stronger compliance and enforcement regime than the Planning Act or Pastoral Land Act, its utility will depend on whether it is being applied to land clearing applications (which it is not to date), and the commitment of the NT EPA to take strong compliance action.

[490] Pastoral Land Act s 91C.
[491] Pastoral Land Act s 91T.
[492] Pastoral Land Act s 91U.
[493] Pastoral Land Act ss 91C, 91U, 91C(3), 91U(3).
[494] Pastoral Land Act s 91V.
[495] Pastoral Land Act s 91V(2).
[496] Pastoral Land Act ss 91Y, 91Z.
[497] Pastoral Land Act s 91ZA.
[498] Pastoral Land Act s 91ZB.
[499] Pastoral Land Act s 91P.
[500] Pastoral Land Act s 91Q.
[501] Pastoral Land Act s 91R.
[502] Pastoral Land Act s 40(8).

Analysis:

EDO has previously opined that the compliance and enforcement mechanisms that are available under the Planning Act and the Pastoral Land Act are weak and rarely, if ever, used in practice.[503]

While under the Pastoral Land Act the enforcement powers of the Minister are broad, they are highly discretionary and are not necessarily targeted to an offence of unlawful land clearing (because they are only engaged when a person has breached a condition of their pastoral lease, not a clearing permit). They appear unlikely to be utilised by the Minister and therefore unlikely to operate as a suitable deterrent. The PLB is not afforded the same powers in respect of land clearing offences, and it is unclear how often it utilises its powers (e.g., there are no details provided in its Annual Reports, and they are not required to publicly report on compliance and enforcement efforts). Additionally, there are no requirements in the Pastoral Land Act for a lessee to report against their clearing permit, including in instances of non-compliance (though they may volunteer to report instances to the PLB). Nor does the Pastoral Land Act make provision for a member of the public to make complaints (like the Planning Act does).

While there are some (albeit fairly limited) enforcement mechanisms provided for under the Planning Act, it is unclear how and when these are used to address unlawful clearing.

The penalty amount under both the Pastoral Land Act and the Planning Act is small in comparison to other jurisdictions and will not necessarily act as a strong deterrent from breaching the relevant Act.

While one of the significant strengths of the EP Act is its compliance and enforcement regime,[504] its utility will depend on whether it is being applied to land clearing applications (which it is not to date), and the commitment of the NT EPA to take strong compliance action.

Further, the limited compliance capacity in the NT (including human resourcing and technical capacity), particularly when considering the size of the jurisdiction, means that compliance action is (in our experience) rarely taken, even if suitable powers do exist.

There are also very limited third party merits appeal rights in the Planning Act,[505] and no provisions for open standing for judicial review in either the Planning Act or the Pastoral Land Act. This has a significant impact on accountable and evidence-based decision-making, by reducing the ability for the community to hold decision-makers accountable with important public interest matters.

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[503] See discussion paper for WWF. See also EDO's publication 'A Biodiversity Conservation and Land Management Act for the Northern Territory' July 2020 available at: https://www.edo.org.au/wp-content/uploads/2020/07/A-Biodiversity-Conservation-and-Land-Management-Act-for-the-Northern-Territory-1.pdf. And also the Environment Centre NT's discussion paper 'Our Nature: Our Future – The case for next-generation biodiversity conservation laws for the Northern Territory' available at https://assets.nationbuilder.com/ecnt/pages/759/attachments/original/1670951406/ECNT_Nature_Laws_Discussion_Paper_WEB.pdf?1670951406.

[504] See EP Act, Part 10 – 12. The EP Act allows a limited form of a third party civil enforcement. Section 230 provides that 'a person who is affected by an alleged act or omission that contravenes or may contravene this Act may apply to the court for an injunction or another under this Division'.

[505] Merits appeal rights are limited to where the subject application adjoins land that is zoned 'residential', which in many cases would not be relevant for land clearing applications: cl 14 of the Planning Regulations 2000.

While the EP Act has an extended form of standing for judicial review, this will only become relevant where an application has been referred, assessed, or approved under the EP Act. There are no third party merits review rights.

Opportunities for third party enforcement

It is noted:

- There are no third party civil enforcement provisions under either the Planning Act or the Pastoral Land Act.
- There are very limited third party merits appeal rights in the Planning Act and they are heavily curtailed by Part 4 of the Planning Regulations 2000 (NT), and generally are available only in relation to residential zones.[506]
- There are no provisions for open standing for judicial review in either the Planning Act or the Pastoral Land Act. However, a person may commence judicial review proceedings under Order 56 of the *Supreme Court Rules 1987* (NT).
- Any person may lodge a complaint with a consent authority that a person has contravened the Planning Act,[507] but the consent authority is not required to investigate that complaint (and may refuse if satisfied that the complaint is trivial, frivolous or vexatious, or no grounds exist).[508]
- While the EP Act has an extended form of standing for judicial review, this will only become relevant where an application has been referred, assessed, or approved under the EP Act. There are no third party merits review rights under the EP Act.

Transparency of information relating to compliance and enforcement

Freehold land

- It is unclear if the NTG carries out monitoring of unlawful clearing on freehold land. This is reflective of the planning system that is not specifically designed to regulate land clearing.
- While the Development Consent Authority reports on the number of complaints received and resolved in its Annual Plans, there is no further detailed information about enforcement action taken.
- We have not been able to find any published enforcement action taken by the Minister or Department of Infrastructure, Planning and Logistics in relation to the Planning Act.
- No other reporting on compliance and enforcement activity appears to be carried out under the NT planning system.

[506] Merits appeal rights are limited to where the subject application adjoins land that is zoned 'residential', which in many cases would not be relevant for land clearing applications: cl 14 of the Planning Regulations 2000.
[507] Planning Act s 78(1)-(2).
[508] Planning Act s 79.

- It is understood that the NTG is currently developing a land clearing spatial layer, which will be publicly available when it has been completed, and information will be released on land use mapping figures and permitted land clearing areas. Whilst it is unclear at this point in time, it is possible that this information could be used to further compliance and enforcement efforts.

Pastoral land

- The Pastoral Land Board issues Annual Reports.[509] Some of these reports (for e.g., the report for 2019-20[510]) include information about compliance and enforcement activity, though it is limited/high level information only.
- More compliance/enforcement activity may be reported once the Pastoral Land Board finalises its compliance framework[511] (all documents under this framework are currently in draft form).
- Whilst the PLB's 'draft Compliance Plan' states that the 'rangeland monitoring' and 'remote sensing' play a key role in relation to pastoral compliance, it is unclear whether the Pastoral Land Monitoring Program is currently used for compliance and enforcement purposes (despite the draft Plan stating that the remote sensing program monitors land condition and land clearing extent). It is possible that once the plan has been finalised, the monitoring programs will be used for monitoring and reporting on compliance, as well as enforcement, but it is unclear at this stage, or whether that information would be publicly available, if they were to be used for that purpose.
- It is unclear how often the PLB utilises its enforcement powers (e.g. there are no details provided in its Annual Reports, and they are not required to publicly report on compliance and enforcement efforts).
- There are no requirements in the Pastoral Land Act for a lessee to report against their clearing permit, including in instances of non-compliance (though they may volunteer to report instances to the PLB).

[509] Available online here: https://depws.nt.gov.au/boards-and-committees/pastoral-land-board.
[510] https://depws.nt.gov.au/__data/assets/pdf_file/0010/1063639/pastoral-land-board-annual-report-2019-20.pdf.
[511] https://depws.nt.gov.au/boards-and-committees/pastoral-land-board.

Queensland

Queensland

Background

As of 2020, remnant vegetation covered 80% of the state with 10.1% located in protected areas.[512] Land clearing and fragmentation exert significant pressures on terrestrial ecosystems in Queensland. Queensland continues to record the highest rate of land clearing in Australia, with pasture the primary driver.[513] Eastern Australia, particularly Queensland, is a global deforestation front.[514]

In 2018-19 the Queensland SLATS report found that over 680,000 hectares (ha) of woody vegetation were affected by clearing. The 2019-20 SLATS report found a 38% decrease in clearing activity from 2018-19. However, there is still a substantial amount of clearing occurring with 418,656 ha of woody vegetation affected by clearing activity in 2019-20.[515] Of this, 357,604 ha (about 85%) of land cleared was attributed to the pasture landcover replacement class, and 87% of this land was fully cleared.[516] This decrease in clearing rates is likely due to the increased protections of native vegetation under the *Vegetation Management and Other Legislation Amendment Act 2018* (Qld) (**VMOLA Act**), which largely aimed to reinstate the vegetation management laws in place prior to the Newman Government's weakening of the laws. However, the VMOLA Act retained some of the exemptions and codes introduced by the Newman Government, which is likely contributing to the clearing recorded in the SLATS data.

Land clearing activity in Queensland is generally concentrated in specific areas. In 2019/20, the Brigalow Belt and the Mulga Lands bioregions accounted for three-quarters of all clearing activity. Of the clearing in these regions, 80% was full clearing.[517] Over 50% (216,335 ha) of the total clearing activity in Queensland was of vegetation older than 15 years.[518]

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[512] Department of Environment and Science (2021), *Queensland State of the Environment 2020 Summary,* Queensland Government, p.24, available at: https://www.stateoftheenvironment.des.qld.gov.au/_media/documents/Queensland-State-of-the-Environment-2020-Summary.pdf.

[513] Cox L (2021), 'Calls for tougher regulations as Queensland records highest rate of land clearing in country'*, The Guardian,* available at: https://www.theguardian.com/environment/2022/dec/16/calls-for-tougher-regulations-as-queensland-records-highest-rate-of-land-clearing-in-country#:~:text=The%20Queensland%20government's%20annual%20statewide,Melbourne%20Cricket%20Grounds%20a%20day.

[514] Pacheco, P., Mo, K., Dudley, N., Shapiro, A., Aguilar-Amuchastegui, N., Ling, P.Y., Anderson, C. and Marx, A. 2021. Deforestation fronts: Drivers and responses in a changing world. WWF, Gland, Switzerland. Available for download at https://wwf.panda.org/discover/our_focus/forests_practice/deforestation_fronts_/.

[515] Queensland Government, 'Key Findings' in *2019-20 SLATS Report* (2020) available at: https://www.qld.gov.au/environment/land/management/mapping/statewide-monitoring/slats/slats-reports/2019-20-slats-report/key-findings.

[516] Queensland Government 2022, *2019–20 SLATS Report*, data accessed 1 March 2023, https://www.qld.gov.au/environment/land/management/mapping/statewide-monitoring/slats/slats-reports/2019-20-slats-report/key-findings.

[517] Ward M and Watson J (2023), 'Why Queensland is still ground zero for Australian deforestation,' *The Conversation*, available at: https://theconversation.com/why-queensland-is-still-ground-zero-for-australian-deforestation-196644.

[518] Cox L (2021), 'Calls for tougher regulations as Queensland records highest rate of land clearing in country,' *The Guardian,* available at: https://www.theguardian.com/environment/2022/dec/16/calls-for-tougher-regulations-as-queensland-records-

Land clearing for pasture is the greatest pressure on threatened fauna and flora habitat in Queensland. Throughout 2019/20, approximately 417 threatened species lost some of their habitat – since then, koalas and greater gliders have been declared endangered.[519]

Species declines are accelerating – between 2007 and 2022 the number of species listed as threatened in Queensland increased by 97 animals and 244 plants.[520]

Government commitments to end broadscale land clearing in line with the Glasgow Declaration

Commitment

The Queensland Government has not made an explicit commitment to end land clearing by 2030. While the VMOLA Act re-introduced many protections for native vegetation in Queensland, it retained some of the weakened protections introduced by the Newman Government, in effect failing to deliver the Palaszczuk Government's pre-election commitment to end broadscale clearing of native vegetation.

The following discussion considers:

- public commitments and statements;
- legislative objectives; and
- policy documents

Public commitments and statements

In 2017 the Palaszczuk Labor Government made a pre-election commitment to 'drive down tree clearing rates by legislating to end broadscale clearing of remnant vegetation.'[521] The commitment outlined in the policy document titled '*Saving Habitat, Protecting Wildlife and Restoring Land: Ending broadscale tree clearing in Queensland (again)'* lacked a timeframe and was specific to remnant vegetation.[522] Remnant woody vegetation accounted for 22% of total state wide woody vegetation clearing in 2016-17.[523] A spokeswoman for Annastacia Palaszczuk publicly stated 'During the election campaign the

highest-rate-of-land-clearing-in-country#:~:text=The%20Queensland%20government's%20annual%20statewide,Melbourne%20Cricket%20Grounds%20a%20day.

[519] Cox (2021), 'Calls for tougher regulation,' available at: https://www.theguardian.com/environment/2022/dec/16/calls-for-tougher-regulations-as-queensland-records-highest-rate-of-land-clearing-in-country#:~:text=The%20Queensland%20government's%20annual%20statewide,Melbourne%20Cricket%20Grounds%20a%20day.

[520] Queensland Government 2022, *Conserving Nature—a Biodiversity Conservation Strategy for Queensland*, https://www.qld.gov.au/environment/plants-animals/biodiversity/strategy.

[521] Queensland Labor Party, *Saving Habitat, Protecting Wildlife and Restoring Land: Ending Broadscale tree clearing in Queensland (again)* (Policy Document, 2017) 3, available at: https://pdf4pro.com/view/protecting-wildlife-and-restoring-land-2202ae.html.

[522] Queensland Labor Party, *Saving Habitat, Protecting Wildlife and Restoring Land: Ending Broadscale tree clearing in Queensland (again)* (Policy Document, 2017) 4, available at: https://pdf4pro.com/view/protecting-wildlife-and-restoring-land-2202ae.html.

[523] Queensland Government, *State of the Environment Report 2020* (Government Report, 2020) available at: https://www.stateoftheenvironment.des.qld.gov.au/biodiversity/terrestrial-ecosystems/land-clearing-impact-on-woody-native-vegetation.

Palaszczuk government committed to ending broadscale tree clearing in Queensland by introducing tough and effective legislation.'[524] Upon election the Palaszczuk Labor Government re-introduced provisions in the VMA in place prior to the Newman Government's relaxing of the laws while retaining some changes from the Newman Government, declaring they had delivered on their commitment to address unsustainable clearing in Queensland.[525]

In 2021, the Queensland Minister for Resources, the Honourable Scott Stewart, reflected that the changes to the vegetation management laws to protect 'our most valuable ecosystems from broadscale clearing are working' and restated the Government's commitment to 'continue to work with stakeholders to reduce damage in other vegetation areas.'[526]

The Queensland Government has established the Native Vegetation Scientific Expert Panel to help understand the factors behind the land clearing identified in the 2018–19 Statewide Land and Trees Study (**SLATS**) report.[527]

In addition, the Queensland Government has made commitments to address the high rates of clearing of koala habitat in South East Queensland, launching the South East Queensland Koala Conservation Strategy 2020–2025 on 29 August 2020. As part of this work, amendments were made in 2020 to the Planning Regulation to seek to increase protections of koala habitat from clearing or other impacts in South East Queensland.[528] The Queensland Government is currently undertaking a Post Implementation Review (**PIR**) to evaluate whether the 2020 koala regulations will provide strong and effective protection for SEQ's koala habitat in the long term.[529] While the Consultation PIR does not quantify the precise amount of koala habitat cleared since February 2020, according to the Queensland government case studies suggest that rates of koala habitat clearing in SEQ are reducing compared to the previous regulations. However, the Consultation PIR also found several elements of the framework have not been working as intended, diminishing the success of the 2020 koala regulations. This includes excessive habitat clearing under exemptions, lack of data on habitat clearing, and unnecessary time delays and costs for stakeholders in preparing development applications.

Legislative objectives

The VMOLA Act amended the *Vegetation Management Act 1999* (Qld) (**VMA**) and the *Planning Act 2016* (Qld) (**PA**), *Planning Regulation 2017* (Qld) and *Water Act 2000* (Qld) with the overall objective to reinstate

[524] The Guardian, 'Palaszczuk to flex new parliamentary muscle with tougher land-clearing laws' (News Article, 15 December 2017) available at: https://www.theguardian.com/australia-news/2017/dec/15/palaszczuk-to-flex-new-parliamentary-muscle-with-tougher-land-clearing-laws.
[525] Queensland Government, 'Palaszczuk Government Delivers on Vegetation Management' (Media Release, 3 May 2018) available at: https://statements.qld.gov.au/statements/84354.
[526] Queensland Government, 'Land clearing laws are working – but more work to be done' (Media Release, 30 December 2021) available at: https://statements.qld.gov.au/statements/94205.
[527] https://www.chiefscientist.qld.gov.au/publications/reviews-audits/native-vegetation-scientific-expert-panel.
[528] Department of Environment and Science, 'New koala conservation protections for South East Queensland' (Web Page, 19 December 2022) available at: https://environment.des.qld.gov.au/wildlife/animals/living-with/koalas/mapping/legislation-policy.
[529] https://environment.des.qld.gov.au/wildlife/animals/living-with/koalas/mapping/improving-seq-koala-habitat-regulations.

responsible clearing laws which had been amended by the previous Newman Government.[530] The Act aimed to deliver on Labor's election commitments to re-strengthen vegetation management laws of remnant and high conservation value non-remnant vegetation, to protect the Great Barrier Reef, re-instate vegetation protection laws to reduce Queensland's carbon emissions, maintain self-assessable clearing codes if they provide appropriate protection and protect against excessive clearing of riparian vegetation by re-introducing riverine protection permits.[531]

The amendment legislation aims to do this by protecting:

> '…remnant and high conservation value non-remnant vegetation; amend[ing] the accepted development vegetation clearing codes to ensure they are providing appropriate protections based on Queensland Herbarium advice; and align[ing] the definition of high value regrowth vegetation with the international definition of High Conservation Value.'[532]

The VMOLA Act also removed the ability to obtain permits for the clearing of high value agriculture, which were introduced by the Newman Government.

The objectives of the VMA, so amended, are outlined in s 3 of the Act:

(1) The purpose of this Act is to regulate the clearing of vegetation in a way that—

(a) conserves remnant vegetation that is—
  (i) an endangered regional ecosystem; or
  (ii) an of concern regional ecosystem; or
  (iii) a least concern regional ecosystem; and
(b) conserves vegetation in declared areas; and
(c) ensures the clearing does not cause land degradation; and
(d) prevents the loss of biodiversity; and
(e) maintains ecological processes; and
(f) manages the environmental effects of the clearing to achieve the matters mentioned in paragraphs (a) to (e); and
(g) reduces greenhouse gas emissions; and
(h) allows for sustainable land use.[533]

Policy documents

The Palaszczuk government's commitment to end broadscale land clearing was outlined in the policy document titled '*Saving Habitat, Protecting Wildlife and Restoring Land: Ending broadscale tree clearing in Queensland (again).*'

[530] Explanatory Notes, Vegetation Management and Other Legislation Amendment Bill 2018 (Qld) 1, available at: https://cabinet.qld.gov.au/documents/2018/Mar/VegMgtAmBill/Attachments/ExNotes.PDF.
[531] Explanatory Notes, Vegetation Management and Other Legislation Amendment Bill 2018 (Qld) 1, available at: https://cabinet.qld.gov.au/documents/2018/Mar/VegMgtAmBill/Attachments/ExNotes.PDF.
[532] Explanatory Notes, Vegetation Management and Other Legislation Amendment Bill 2018 (Qld) 1, available at: https://cabinet.qld.gov.au/documents/2018/Mar/VegMgtAmBill/Attachments/ExNotes.PDF.
[533] *Vegetation Management Act 1999* (Qld) s 3.

The legislative reforms to reduce land clearing are also noted as supporting the commitment of the Government's Reef 2050 Plan to reduce land clearing to protect the Great Barrier Reef.[534]

Queensland's Climate Action Plan 2020-2030 (**Action Plan**) also mentions land clearing as a driver of CO_2 emissions and notes the VMA as an opportunity for reducing CO_2 emissions.

The South East Queensland Koala Conservation Strategy 2020–2025 was launched on 29 August 2020.[535] The strategy amends the state planning framework to restrict clearing of koala habitat areas. The Plan establishes koala priority areas where clearing of koala habitat is prohibited unless an exemption that ensures safety and appropriate land management applies.[536] The Strategy states how the Queensland Government is delivering on the Koala Expert Panel's six recommendations aimed at addressing the most appropriate and realistic actions to halt the decline in koala population densities in South East Queensland. The South East Queensland Koala Conservation Strategy 2020-2025 Implementation Plan (phase 1) provides guidance for the implementation of the Strategy's 46 actions and outlines the activities for successful outcomes. As mentioned above, in 2020 amendments were made to the Planning Regulation to seek to increase koala habitat protections in SEQ.

Queensland's Biodiversity Conservation Strategy, *Conserving Nature – a Biodiversity Conservation Strategy for Queensland* includes the vision "Nature is actively supported to thrive in Queensland".[537] Its key goals are framed as "protect", "restore and recover", "adapt" and "connect".

Costed plan to end deforestation

The Queensland Government does not have a costed plan to end deforestation. While its Department of Resources publishes an annual compliance strategy and plan, resulting compliance work appears to be part of routine departmental funding only. However, the Government has directed funding towards restoration programs, such as the Land Restoration Fund (**LRF**) and the Natural Resources Recovery Program.

Land Restoration Fund

When the VMA Act and other legislation was amended in 2018, the Government announced a $500 million Land Restoration Fund – aimed predominantly at restoration via carbon farming projects.[538]

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[534] Australian Government, Queensland Government, Department of Agriculture, Water and the Environment, *Reef 2050 Long-Term Sustainability Plan 2021-2025* (2021) 11, available at: https://www.dcceew.gov.au/sites/default/files/documents/reef-2050-long-term-sustainability-plan-2021-2025.pdf; Queensland Government, 'Palaszczuk Government delivers on vegetation management' (Media Release, 3 May 2018) available at: https://statements.qld.gov.au/statements/84354.

[535] See Queensland Government, *South East Queensland Koala Conservation Strategy 2020-2025* (Strategy, 2020) available at: https://environment.des.qld.gov.au/wildlife/animals/living-with/koalas/conservation/seq-koala-strategy.

[536] Department of Environment and Science, *South East Queensland Koala Conservation Strategy 2020-2025* (2020) 7 available at: https://environment.des.qld.gov.au/__data/assets/pdf_file/0016/211732/seq-koala-conservation-strategy-2020-2025.pdf.

[537] Queensland Government, Conserving Nature – a Biodiversity Conservation Strategy for Queensland, 2022, available at: https://www.qld.gov.au/__data/assets/pdf_file/0015/222081/queensland-biodiversity-conservation-strategy.pdf.

[538] The Guardian, 'Palaszczuk to flex new parliamentary muscle with tougher land-clearing laws' (News Article, 15 December 2017) available at: https://www.theguardian.com/australia-news/2017/dec/15/palaszczuk-to-flex-new-parliamentary-muscle-with-tougher-land-clearing-laws.

Priority 2 of the Priority Investment Plan for the LRF is land restoration for threatened species and ecosystems. The LRF's objectives are:

- to facilitate a pipeline of qualifying Queensland based carbon offset projects, including through private sector investment;
- pursue environmental, economic and social co-benefits as defined by the Government; and
- invest in research and development into emerging carbon farming areas where Queensland has a comparative advantage.[539]

The LRF will make three types of investment to uphold these objectives:

- Investment in projects that will deliver ACCUs plus co-benefits;
- Investment to build capacity across Queensland to undertake land restoration activities that deliver carbon offsets with co-benefits;
- Investment in research and development that will enable the growth of land sector carbon and other environmental markets.[540]

One example of the LRF supporting land restoration by supporting landholders to engage in avoided clearing is the Burnham Regenerative Product Project. The Project received funding under Queensland's LRF, applying the ERF's 'avoided clearing of native regrowth method'. The land has historically been cleared for cattle grazing. The Project allowed for 190 ha of native vegetation to be retained and regenerated by ceasing broadscale clearing and implementing time-controlled grazing to maintain ground cover and soil structure. The property also contains 5.7 km of riparian frontage flowing into the Fitzroy River and the Great Barrier Reef. By retaining mature vegetation along the creek bank, the Project improves streambank stability, protects aquatic habitat, and reduces sedimentation flow to the Reef. It also assists in protecting koalas as 97% of the native vegetation to be regenerated encompasses ecosystems suitable for koala habitat.[541]

Natural Resources Recovery Program

In November 2022 Minister Stewart announced $11 million over two years for the Natural Resources Recovery Program, which will invest in improving soils and farming practices and building up native vegetation. This is the first investment of a $40 million Budget commitment over four years to increase Queensland's natural resources and enhance the economy in regional communities.[542] The money has been awarded to 24 projects by Queensland-based, not-for-profit organisations, 9 of which include improving vegetation conditions.[543]

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[539] Queensland Government, Department of Environment and Science, *The Land Restoration Fund: Priority Investment Plan* (Plan, 2021) 4, available at: https://www.qld.gov.au/__data/assets/pdf_file/0024/116547/lrf-priority-investment-plan.pdf.
[540] Queensland Government, Department of Environment and Science, *The Land Restoration Fund: Priority Investment Plan* (Plan, 2021) 4, available at: https://www.qld.gov.au/__data/assets/pdf_file/0024/116547/lrf-priority-investment-plan.pdf.
[541] Queensland Government, 'R1063- Burnham Regenerative Production Project' (Web Page, 27 July 2022) available at: https://www.qld.gov.au/environment/climate/climate-change/land-restoration-fund/carbon-farming/case-studies/burnham.
[542] Queensland Government, 'State funds help restore soils, native vegetation' (Media Release, 9 November 2022) available at: https://statements.qld.gov.au/statements/96526.
[543] Business Queensland, 'Projects funded under the Natural Resources Recovery Program' (Web Page, 15 November 2022) available at: https://www.business.qld.gov.au/running-business/environment/natural-resource-funding/recipients.

Strengths and weaknesses of land clearing regulation that may be contributing to clearing rates

Overview

The clearing of native vegetation in Queensland is primarily regulated under the vegetation management framework, which applies to freehold land, Indigenous land, leasehold land, and occupational licenses under the *Land Act 1994* (Qld).

It is a complex legislative framework incorporating multiple pieces of legislation.

The framework consists chiefly of the *Vegetation Management Act 1999* (Qld) (**VMA**) and the *Planning Act 2016* (Qld) (**PA**) and subordinate regulations, codes, and policies. Together, they make the clearing of native vegetation 'operational work', a form of development that can require approval. Clearing may also be regulated under other laws – see below.

The framework regulates clearing under various 'pathways', depending on the purpose and scale of the clearing – see **Table 3: Native Vegetation Clearing Pathways in Queensland**.

Notably:

- Exempt clearing can be carried out without approval or notification – as set out in Schedule 21 of the *Planning Regulation*;
- Routine or 'low-risk' activities can be carried out if in accordance with an accepted development vegetation clearing code, with notification required, or an Area Management Plan; or
- Other clearing, including clearing for a relevant purpose as defined by the VMA, requires a development permit.

Table 3: Native Vegetation Clearing Pathways in Queensland

Pathway	Activities / description	Requirement	Legislation
Exempt Clearing	Routine property management activities	No notification or approval requirements	Planning Regulation sch 21 - Part 1(1): General - Part 2(2): Freehold Land - Part 2(3): Indigenous land - Part 2(4): land leased under Land Act - Part 2(5): Land dedicated as a road under Land Act - Part 2(6): Particular trust land under Land Act - Part 2(7): unallocated State land - Part 2(8): Land subject to a license or permit under Land Act

Accepted development clearing codes (**ADCC**)	"low risk" clearing activities	Notification required and must follow requirements set out in the relevant code	- Minister has the power to make an ADCC under s 19O of the VMA
Area Management Plans (**AMPs**)	"low risk" clearing activities not addressed by an ADCC	Notification required and requirements of AMP to be followed	- VMA Div 5B
Clearing requiring development approval	If none of the above pathways apply, a development approval is required for operational works, material change of use or reconfiguring a lot.	Development approval required	- *Planning Regulation 2017* (Qld) sch 10 Part 3(5), sch 7 Part 3(12).

Vegetation under the VMA is defined as a native tree or plant other than grass or non-woody herbage, a plant within a grassland regional ecosystem prescribed under a regulation, or a mangrove.[544] The VMA defines clearing native vegetation as removing, cutting down, pushing over, poisoning, or destroying in any way, including by burning, flooding, or draining, and excludes destroying standing vegetation by stock or lopping a tree.[545]

The vegetation excluded from the definition of vegetation under the VMA is regulated under other laws. For example:

- the *Water Act 2000* (Qld) applies to the clearing of riparian vegetation;
- the *Fisheries Act 1994* (Qld) applies to clearing of mangroves and other marine or tidal plants;
- the *Nature Conservation Act 1992* (Qld) applies to clearing that impacts protected flora and fauna;
- the *Environmental Protection Act 1994* (Qld) applies to clearing for some environmentally relevant activities like mining and gas activities; and
- the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is relevant when clearing will or may have a significant impact on matters of national environmental significance.

[544] *Vegetation Management Act 1999* (Qld) s 8.
[545] *Vegetation Management Act 1999* (Qld) s 5.

The VMA classifies vegetation into categories, which determine the type of approval, if any, required for the clearing of vegetation. These are:

- Category A: Vegetation subject to compliance notices, offsets, and voluntary declarations.[546]
- Category B: Remnant vegetation on a regional ecosystem or remnant mapped as an endangered regional ecosystem, an of concern regional ecosystem, or a least concern regional ecosystem.[547]
- Category C: An area that contains high value regrowth vegetation.[548]
- Category R: An area that is a regrowth watercourse and drainage feature area.[549]
- Category X: All areas other than Category A, B, C and R areas, 'exempt areas' that are not covered by the VMA.[550]

These categories are identified on the 'regulated vegetation management map'.[551]

A property map of assessable vegetation (**PMAV**) maps the boundaries of the vegetation category areas on a property. An owner may apply to government to make a PMAV for their land or part of their land, including to correct errors on the regulated vegetation management map.[552]

The analysis below focuses on the VMA, the PA, and subordinate legislation as the most relevant pieces of legislation.

Exemptions

Overview:

Schedule 21 of the *Planning Regulation* lists numerous clearing activities that are exempt from requiring notification or development approval under the PA. Exemptions are dependent on (and many repeated across) seven different land tenures, and on the purpose of the clearing. They cover a wide range of activities, for example: private and public safety reasons (fire management and prevention, emergencies); construction or maintenance of residential, utility and community infrastructure (e.g. roads, airports, fences, buildings); Aboriginal or Torres Strait Islander cultural purposes; resource activities under the *Environmental Protection Act 1994* (Qld) (mining, petroleum or gas) and public forestry on State land. Many exemptions reflect activities regulated under different legislation – that is, they may be exempt from requiring approval under the PA, but may be regulated under other legislation. Other approvals can still be required under local, State, or Federal laws to clear the vegetation.

As noted above, Category X areas are 'exempt areas' that are not covered by the VMA – see further analysis below.[553]

[546] *Vegetation Management Act 1999* (Qld) s 20AL.
[547] *Vegetation Management Act 1999* (Qld) s 20AM.
[548] *Vegetation Management Act 1999* (Qld) s 20AN.
[549] *Vegetation Management Act 1999* (Qld) s 20ANA.
[550] *Vegetation Management Act 1999* (Qld) s 20AO.
[551] *Vegetation Management Act 1999* (Qld) s 20A.
[552] *Vegetation Management Act 1999* (Qld) ss 20AJ, 20C.
[553] *Vegetation Management Act 1999* (Qld) s 20AO.

Analysis:

Some of the exemptions in Schedule 21 operate as true exemptions – meaning clearing can be undertaken with little or no oversight. Other 'exemptions' are in place simply to remove duplication – for example, where regulation of the activity occurs under other legislation. These may not be 'exemptions' from oversight, as the other regulatory framework may include notification or approval requirements.

For those exemptions that remove all oversight, there are concerns that the exemptions are phrased in broad terms, making it difficult to know when they apply and widening the applicability of the exemption. One such example is the urban purpose in an urban area freehold land exemption. An urban area is identified by the chief executive in a gazette notice. An urban purpose is defined as purposes for which land is used in cities or towns, including residential, industrial, sporting, recreation, and commercial purpose, but not including environmental, conservation, rural, natural or wilderness area purposes.[554] This definition is broad, widening the scope of the exemption and potential for vegetation to be cleared without assessment. The urban purpose in an urban area exemption does not apply to Category A areas, slightly limiting its scope.

Another example of a broad exemption is with respect to Priority Development Areas (**PDAs**), which applies to a number of land tenures specified in Part 2 Schedule 21 of the *Planning Regulation.* A PDA is declared under section 37 of the *Economic Development Act 2012* (Qld) to facilitate economic development and can be amended from time to time.[555] The discretion to declare such an area, and the changing nature of what is defined, indicates a broad, uncertain exemption. This is compounded where the Government has broad discretion in declaring what specific planning prescriptions apply for development in an area. PDAs also apply to, and therefore can undermine the protections in place for, environmentally sensitive areas (discussed below).

With respect to the increased koala habitat protections in South East Queensland, many of the Schedule 21 exemptions are essentially repeated as 'exempted development'[556] from the prohibition of development in koala habitat. The wide range and scope of the exemptions obviously undermines the effectiveness of those protections.

Additionally, there is some overlap between the exemptions and the accepted development vegetation clearing codes (**Codes**) (discussed below). The fact there is such double-up challenges the need for Codes when many of the actions regulated under the Codes are already provided for in the exemptions. For example, the Necessary Environmental Clearing Code permits clearing for genuine safety concerns in a declared disaster area and for remediation of contaminated land, which are also provided for as exemptions in Schedule 21 of the *Planning Regulation*.[557]

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[554] *Planning Regulation 2017* (Qld) sch 24.
[555] *Economic Development Act 2012* (Qld) sch 1.
[556] See definition in *Planning Regulation 2017* (Qld) sch 24.
[557] Environmental Defenders Office and the Wilderness Society, *Joint Submission to draft accepted development codes: Necessary Environmental Clearing, Managing Weeds and Managing Encroachment* (26 October 2018); Department of Natural Resources and Mines, *Necessary environmental clearing under the Vegetation Management Act 1999: A guideline for development applications* (July 2017) available at: https://www.resources.qld.gov.au/__data/assets/pdf_file/0008/1258595/guidelines-necessary-clearing.pdf.

Code-based clearing / Self-assessable clearing

Overview:

A significant amount of clearing is permitted under accepted development vegetation clearing codes (**Codes**), which the Minister has the power to make under the VMA.[558] The Codes permit "routine" and "low risk" clearing activities without the need for a development approval.[559] The Minister has wide discretion in making a Code, with s 19O(2) of the VMA stating they can make a Code 'for any other matter about clearing vegetation the Minister considers is necessary or desirable for achieving the purpose of this Act.'[560]

There are Codes for managing encroachment, clearing for an extractive industry, managing fodder harvesting, clearing to improve agricultural efficiency, managing regulated regrowth vegetation, managing a native forest practice, necessary environmental clearing, clearing for infrastructure and managing weeds.[561] Each of these Codes outlines the scope of the activities covered by that Code, the compulsory notification process, the compliance requirements and the clearing requirements.[562]

In order to undertake clearing under the Codes, a land holder must notify the Queensland Department of Resources and carry out the clearing in accordance with the specific Code.[563] Some Codes may require further approvals before allowing the commencement of clearing under the Code.[564]

Area Management Plans (**AMPs**) also operate in a similar way - by allowing clearing that is consistent with an AMP. AMPs list the approved purpose and clearing conditions for the area covered by an AMP and apply to specific vegetation categories and regional ecosystems. Notification of clearing before it begins is required using the Area Management Clearing Notification Form. Recording of clearing activity is recommended as it may be audited for compliance monitoring.[565] Under the 2018 amendments to the VMA, a landholder can no longer apply for an AMP. However, the chief executive may still declare an AMP to provide for any matter about clearing vegetation they consider necessary or desirable for achieving the purpose of the VMA.[566]

Activities undertaken in accordance with the accepted development vegetation clearing codes are not subject to any formal community consultation or appeal rights.

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[558] *Vegetation Management Act 1999* (Qld) s 19O.
[559] Queensland Government, 'Clearing codes' (Web Page) https://www.qld.gov.au/environment/land/management/vegetation/clearing-approvals/codes.
[560] *Vegetation Management Act 1999* (Qld) s 19O.
[561] *Vegetation Management Regulation 2012* (Qld) reg 3; Queensland Government, 'Clearing codes' (Web Page) https://www.qld.gov.au/environment/land/management/vegetation/clearing-approvals/codes.
[562] Queensland Government, Department of Natural Resources, Mines and Energy, *General guide to the vegetation clearing codes* (7 February 2020) 5, available at: https://www.resources.qld.gov.au/__data/assets/pdf_file/0006/1447098/general-guide-vegetation-clearing-codes.pdf.
[563] Queensland Government, Department of Natural Resources, Mines and Energy, *General guide to the vegetation clearing codes* (7 February 2020) 5, available at: https://www.resources.qld.gov.au/__data/assets/pdf_file/0006/1447098/general-guide-vegetation-clearing-codes.pdf.
[564] See, for example, the Material Change of Use Development approval.
[565] Queensland Government, 'Area management plans' (AMPs) (Web Page, 16 March 2021) available at: https://www.qld.gov.au/environment/land/management/vegetation/clearing-approvals/area-management-plans.
[566] *Vegetation Management Act 1999* (Qld) s 21B.

Analysis:

The Codes allow extensive clearing with no robust environmental assessment or approval process. The self-assessable Codes generally, and in particular the 2018 changes to the Necessary Environmental Clearing, Managing Weeds and Managing Encroachment Codes, permit extensive clearing that is not "negligible", "low risk" or "necessary" as claimed by the Queensland Government.[567] The Managing Encroachment and Managing Weeds Codes allow up to 400 ha of clearing, which is arguably not negligible or low risk.[568]

This clearing is particularly occurring across large areas of land, predominantly for grazing activities, in Central Queensland. It is understood that in 2018-19, clearing activity under the ADVCC occurred on 100,000 ha. Of this, 69,000 ha was fodder harvesting, and 5,200 ha NFP – both sustainable uses that retain the vegetation over time. About 5,000 Ha was treating threatening processes such as weeds and encroachment.

EDO has previously recommended that clearing taking place under Codes should be limited to 1% of a property area or 50ha.[569] We understand WWF-Australia has raised similar concerns about the fodder harvesting code, suggesting it should include a property area cap and restrict harvesting to periods of formal drought declarations.

There is also the risk of landholders misunderstanding the Codes, leading to potential misapplication and unlawful harmful clearing. As the Codes are self-assessable, the Government's ability to assess where and whether the clearing complies with the Codes is dependent on the information the land holder provides.

One strength of the Codes is that they require notification. The Queensland Government has a register of accepted development vegetation clearing code notifications.[570] From 2022 until the 28 February 2023 there have been 1,488 such notifications. The notification requirements are therefore of particular importance and should be very specific to provide comprehensive information for the Government to assess. The notification period should be limited to 1 year, so the notification is up to date and relevant to the current law and state of the environment. Clearing notifications should also provide GPS pinpoints so it is clear what area is being cleared.

Further, there is a need for consistent standards across the Codes for setbacks from all streams and wetlands for clearing, herbicide use and heavy machinery use. The Codes vary from 20m for wetlands

[567] Environmental Defenders Office and the Wilderness Society, *Joint Submission to draft accepted development codes: Necessary Environmental Clearing, Managing Weeds and Managing Encroachment* (26 October 2018).
[568] Department of Natural Resources, Mines and Energy, *Accepted development vegetation clearing code: Managing Encroachment* (21 June 2019) available at: https://www.resources.qld.gov.au/__data/assets/pdf_file/0005/1446908/encroachment-clearing-code-2019.pdf; Department of Natural Resources, Mines and Energy, *Accepted development vegetation clearing code: Managing Weeds* (7 February 2020) available at: https://www.resources.qld.gov.au/__data/assets/pdf_file/0011/1446914/managing-weeds-clearing-code.pdf.
[569] Environmental Defenders Office and the Wilderness Society, *Joint Submission to draft accepted development codes: Necessary Environmental Clearing, Managing Weeds and Managing Encroachment* (26 October 2018).
[570] See Queensland Government, 'Vegetation management – register of accepted development vegetation clearing code notifications' available at: https://www.data.qld.gov.au/dataset/vegetation-management-register-of-self-assessable-code-notifications.

under the Managing Encroachment Code to 100 m setbacks for the Necessary Environmental Clearing Code.[571]

Any clearing that does not meet the requirements of a Code or an AMP, and where an exemption does not apply, requires approval.

Clearing Requiring Approval

Overview:

Clearing that cannot be carried out as exempt clearing, or under the Codes or an AMP, requires approval under the PA.

The PA defines clearing vegetation as 'assessable development', specifically as 'operational works', meaning a development permit is required for clearing, unless a Code or exemption applies.[572] The application to clear must be for a relevant purpose, including:

- Developments that are a project under the *State Development and Public Works Organisation Act 1971* (Qld),
- necessary to control non-native plants or declared pests,
- to ensure public safety,
- fodder harvesting,
- managing thickened vegetation,
- clearing for encroachment,
- for an extractive industry, or
- necessary environmental clearing.[573]

The relevant purposes above do not apply to clearing in a Category C or Category R areas if the land is freehold land, Indigenous land or subject to a lease under the *Land Act 1994* (Qld) for agriculture or grazing purposes or an occupation license.[574]

The assessment manager and applicable rules may be different depending on whether the application is for vegetation clearing only or vegetation clearing associated with development:

- *Vegetation clearing only*

If the application is solely for clearing native vegetation, the chief executive, who administers the PA, is the assessment manager through the State Assessment and Referral Agency (**SARA**). The assessment of the clearing application will be undertaken by the assessment manager, that is the Chief Executive, or

[571] Environmental Defenders Office and the Wilderness Society, *Joint Submission to draft accepted development codes: Necessary Environmental Clearing, Managing Weeds and Managing Encroachment* (26 October 2018).
[572] *Planning Regulation 2017* (Qld) sch 10 Part 3(5), sch 7 Part 3(12).
[573] *Vegetation Management Act 1999* (Qld) s 22A.
[574] *Vegetation Management Act 1999* (Qld) s 22A(2B).

SARA, in accordance with the State Development Assessment Provisions (**SDAP**): State Code 16: Native Vegetation Clearing.[575] The SDAP State Code 16: Native Vegetation Clearing operates by stating:

- a purpose benchmark, which sets the intent of the code,
- a performance outcome, which sets the benchmark for achieving the purpose statement, and
- acceptable outcomes, which identify ways to achieve the performance outcome.[576]

- *Vegetation clearing associated with development*

If the application involves both the clearing of native vegetation and other aspects of assessable development, then the assessment manager will be determined under Schedule 8 of the *Planning Regulation.* Commonly, the relevant local government will be the assessment manager and applications are assessable against the relevant local government planning scheme. SARA may be a referral agency exercising concurrence agency powers under the Planning Act.

Some applications require an environmental report and environmental offsets may be used in some cases to attempt to compensate for environmental values lost because of the development.[577]

Generally, public notification and submission period is required for assessable development.[578] Appeal rights against certain decisions may be available to persons who have made an eligible submission. Schedule 1 of the PA sets out circumstances where appeal rights are available, and includes decisions on assessable development.

The Minister has call-in powers under section 103 of the PA. This call-in power is for matters that are in the State interest - so does not apply to all clearing applications. The Minister needs to give reasons as to why call-in is in state interest.

Analysis:

- *Vegetation clearing only*

Some performance outcomes under the SDAP State Code 16 are vague, such as clearing for an extractive industry includes the performance outcome 'clearing avoids and minimises impacts.' To achieve this, the applicant must demonstrate the clearing and adverse impacts of clearing have been either 'reasonably avoided' or 'reasonably minimised where it cannot be reasonably avoided.' This is a broad

[575] *Planning Regulation 2017* (Qld) sch 10 Div 2; Queensland Government, 'Development approvals for clearing native vegetation' (Web Page, 16 March 2021) available at: https://www.qld.gov.au/environment/land/management/vegetation/clearing-approvals/development.
[576] *State Development Assessment Provisions Version 3.0: Code 16 Native Vegetation Clearing* (Qld) 16-1, available at: https://planning.statedevelopment.qld.gov.au/__data/assets/pdf_file/0030/67287/version-3.0-state-development-assessment-provisions-complete-version.pdf.
[577] Queensland Government, 'Development approvals for clearing native vegetation' (Web Page, 16 March 2021) available at: https://www.qld.gov.au/environment/land/management/vegetation/clearing-approvals/development.
[578] *Vegetation Management Act 1999* (Qld) s 53.

requirement with no further explanation or guidance of what 'reasonably' entails, suggesting the chief executive and SARA have the discretion to interpret such terms.[579]

Clearing for extractive industries also includes the performance outcome 'conserving endangered and of concern regional ecosystems.' However, the acceptable outcomes provide the option of clearing in endangered regional ecosystems and of concern regional ecosystems if it is within the widths and areas prescribed by the SDAP State Code 16: Native Vegetation, which are dependent on the regional ecosystems structure category.[580] This allows clearing to take place in endangered and of concern regional ecosystems and exemplifies the type of broad requirements of the application process.

- *Vegetation associated with development*

In the case of clearing associated with development, exact controls may vary between local government areas in accordance with the relevant local government planning scheme.

Protection of Environmentally Sensitive Areas

Protection of regional ecosystems

Overview:

The VMA aims to regulate vegetation clearing in a way that conserves remnant vegetation in an endangered regional ecosystem, an of concern regional ecosystem and a least concern regional ecosystem, and conserve vegetation in declared areas.[581] The Queensland Herbarium is responsible for the Regional Ecosystem Description Database (**REDD**), which revises and refines the status of regional ecosystems. The status of each regional ecosystem class is based on its remaining pre-clearing extent. For example, an endangered regional ecosystem is defined as when the 'area of remnant vegetation for the regional ecosystem is less than 10% of the pre-clearing extent of the regional ecosystem.'

Analysis:

A benefit of a regional ecosystems mapping approach is it provides a robust conservation framework based on the environmental factors of an ecosystem rather than its attractiveness to humans, which can guide conservation area planning. It also provides comprehensive mapping that clearly identifies protected vegetation across large, varied areas. However, the regional ecosystem approach is not robust in protecting all species, particularly rare and threatened species and species distributed in a scattered manner.[582] It is also critically dependent on the accuracy of the mapping. We understand the State has an ongoing program to improve the scale and refine both the RE mapping and HVR layer.

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[579] *State Development Assessment Provisions Version 3.0: Code 16 Native Vegetation Clearing* (Qld) 16-11, available at: https://planning.statedevelopment.qld.gov.au/__data/assets/pdf_file/0030/67287/version-3.0-state-development-assessment-provisions-complete-version.pdf.

[580] *State Development Assessment Provisions Version 3.0: Code 16 Native Vegetation Clearing* (Qld) 16-13, available at: https://planning.statedevelopment.qld.gov.au/__data/assets/pdf_file/0030/67287/version-3.0-state-development-assessment-provisions-complete-version.pdf.

[581] *Vegetation Management Act 1999* s 3.

[582] Chris McGrath, 'End of Broadscale Land Clearing in Queensland' (2007) 24(1) *Environmental and Planning Law Journal* 1, 7-8.

The 2019-20 SLATS report found that 18% of clearing occurred in least concern regional ecosystems, 5% in of concern regional ecosystems, and around 1% in areas that have endangered regional ecosystems present.[583] While this demonstrates only small percentages of clearing in of concern and endangered regional ecosystems, clearing is still occurring in these environmentally sensitive areas. One potential way this can occur is through the SDAP State Code 16: Native Vegetation Clearing acceptable outcome (mentioned above).

A strength of the 2018 amendments to the VMA was making it possible for landowners to apply to change Category X land to Category A land where the land contains remnant vegetation or high value regrowth vegetation. This change increased opportunities for landholders to protect remnant or high value regrowth vegetation on their land.[584]

Declared Areas

Overview:

The VMA aims to conserve declared areas. The Governor in Council by gazette notice can declare an area to be of high nature conservation value or an area vulnerable to land degradation.[585] Criteria for a declaration of an area as an area of high conservation value requires the area to be considered at least one of the following:

- a wildlife refugium;
- a centre of endemism;
- an area containing a vegetation clump or corridor that contributes to the maintenance of biodiversity;
- an area that makes a significant contribution to the conservation of biodiversity, or
- an area that contributes to the conservation value of a wetland, lake or spring stated in the notice.[586]

A declaration of an area vulnerable to land degradation requires the area to be subject to one or more of the following:

- soil erosion;
- rising water tables;
- the expression of salinity, whether inside or outside the area;
- mass movement by gravity of soil or rock;
- stream bank instability;
- a process that results in declining water quality.[587]

[583] Queensland Government, 'Key Findings' in *2019-20 SLATS Report* (2020) available at: https://www.qld.gov.au/environment/land/management/mapping/statewide-monitoring/slats/slats-reports/2019-20-slats-report/key-findings.
[584] *Vegetation Management and Other Legislation Amendment Bill 2018* (Qld) 'Explanatory Notes' available at: https://documents.parliament.qld.gov.au/tp/2018/5618T300.pdf.
[585] *Vegetation Management Act 1999* (Qld) s 17.
[586] *Vegetation Management Act 1999* (Qld) s 19.
[587] *Vegetation Management Act 1999* (Qld) s 19.

Analysis:

Notably, this power to declare an area of high nature conservation value or vulnerable to land degradation is rarely (if ever) used, undermining its ability in practice to protect environmentally sensitive areas. The owner of land can by written notice ask the chief executive, that is, the Director General of the Department of Resources, to declare the land as an area of high conservation value to vulnerable to land degradation using the same criteria as stated above.[588] The result of a declared area is the issuing of a management plan for the area, which is binding on each person who is the owner of the land regardless of whether they are the person who signed the plan.[589] While it depends on the specific plan, a management plan for a declared area can still permit clearing if it is done in accordance with an exemption under Schedule 21 of the *Planning Regulation* or a development approval under the PA.[590] The chief executive also has the discretion to end the declaration if it is not in the interest of the State or the management outcomes have been met, limiting the robust protection of these environmentally sensitive areas.[591]

The apparent infrequent or rare use of this declaration power is reflective of a weakness in the administration of clearing regulation; it appears to be a tool that could be used to better protect environmentally significant areas from clearing.

Protection of koala habitat

The *Planning Regulation 2017* (Qld) provides for regulations which apply to restrict clearing of koala habitat in south-east Queensland. New laws were introduced in 2020, along with new mapping providing for the introduction of koala priority areas, being large, connected areas that include koala habitat areas as well as areas that are suitable for habitat restoration. These laws removed the ability of local governments in south-east Queensland to provide for their own level of regulation of koala habitat, which has led to some increases and some decreases in koala habitat clearing laws across local government areas. It is noted that the koala habitat map includes area of mature vegetation that might not meet the Queensland Government's criteria; however these areas may contain locally important vegetation, including some areas previously protected under local government planning schemes.

A development approval under the PA is needed for activity within property that is a koala habitat area.[592] There are numerous exemptions to these laws, for example for developing urban areas of a certain size, and if a Code applies, such as where the clearing is for fire management, to manage serious risks to people or infrastructure or is necessary due to a disaster situation.

[588] *Vegetation Management Act 1999* (Qld) s 19E.
[589] *Vegetation Management Act 1999* (Qld) s 19K(6).
[590] See e.g., Queensland Government, *Declared area management plan* (Template) available at: https://www.resources.qld.gov.au/__data/assets/pdf_file/0007/1599406/declared-area-management-plan.pdf.
[591] *Vegetation Management Act 1999* (Qld) s 19L.
[592] Department of Infrastructure, Local Government and Planning, *Shaping SEQ: South East Queensland Regional Plan 2017* (August 2017) available at: https://dsdmipprd.blob.core.windows.net/general/shapingseq.pdf

Protected Plants

The *Nature Conservation Act 1992* (Qld) further requires a permit in some cases to clear protected native plants.[593] There are exemptions to acquiring a permit if a Managing Weeds or Managing Encroachment Code applies, the clearing is for fire management or to manage serious risks to people or infrastructure.

Offsets

Overview:

Queensland's Environmental Offsets Framework consists of the:

- *Environmental Offsets Act 2014* (Qld), which coordinates offset delivery across Queensland jurisdictions;
- *Environmental Offsets Regulation 2014* (Qld), which details the activities and environmental matters regulated under the legislation; and
- *Queensland Environmental Offsets Policy Version 1.13,* which outlines the policy for assessing offset proposals to satisfy offset conditions.[594]

For controlled actions assessed under the EPBC Act, the Commonwealth *EPBC Act Environmental Offsets Policy* may also apply.

Analysis:

A 2019 Government review of Queensland's Environmental Offsets Framework found there was strong stakeholder support for Queensland's offsets laws to be better aligned with the Commonwealth laws, for increased guidance on how to deliver an offset condition, and for 'greater identification of suitable areas for offset delivery.'[595] The review also noted multiple current failings of the offsets framework including:

- The process to legally secure an offset is difficult and lengthy.
- Local governments should be able to offset matters of state environmental significance.
- Financial settlement offsets are too low to encourage landholder participation.
- The legislation is too complex. One policy is better than five policies.
- There needs to be clearer definitions of matters of local environmental significance.
- Offset ratios should be based on scientific evidence.
- There should be a greater supply of advanced offsets.
- There is need for only one significant residual impact guide.[596]

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[593] *Nature Conservation Act 1992* (Qld) ss 88D-90.
[594] Queensland Government, 'Environmental Offsets' (Web Page, 5 December 2022) available at: https://www.qld.gov.au/environment/management/environmental/offsets/legislation.
[595] Department of Environment and Science, *A review of Queensland's environmental offsets framework* (Consultation and Response Report, October 2020) 4, available at: https://www.qld.gov.au/__data/assets/pdf_file/0008/141020/review-qld-env-offsets-framework-report.pdf.
[596] Department of Environment and Science, *A review of Queensland's environmental offsets framework a discussion paper – February 2019*, 9, available at: https://www.qld.gov.au/__data/assets/pdf_file/0018/94131/qld-enviro-offsets-framework-discuss-paper.pdf.

Demonstrating the long lag in the provision of offsets from the point of approval and clearing of vegetation, the review found that, between 1 July 2014 and 30 June 2018 approximately:

- 156 approvals were granted with an offset condition:
  - 73% are for development approvals;
  - 15% are for mining and resource activities;
  - 12% are for protected plants, wildlife and other approvals;
  - These authorities may require an offset for 354 environmental values;
- 97% of environmental offsets were delivered as a financial settlement. The other 3% of were delivered as proponent driven offsets;
- $9.6m received by the state as financial settlement offsets. Of this:
  - $5.1m is allocated towards delivering offset projects;
  - only $1.5m has been contracted, committed or spent delivering offset projects.[597]

EDO's report *Key legal solutions to safeguard Queensland's natural environment* notes the limitations of the current offsets framework, concluding that some environmental impacts are either not being offset adequately or at all and others can be offset with monetary payment that cannot sufficiently provide the offset.[598]

Under the offsets scheme those seeking to offset areas have the option of land-based offsets or making payments to a fund, which the government can then use to deliver on offsets. This is problematic in substantially delivering environmental protection and compensation through offsets. As demonstrated above, and as pointed out by the Queensland Audit Office, in 2018 there were only 3 land-based offsets, the other 97% of offsets were acquired through financial payments and not one of these financial payment offsets were wholly implemented.[599]

There is also a restriction on offset conditions imposed by the Commonwealth being imposed at the State or local government level. If the Commonwealth has considered the same environmental impact as the State, even if the Commonwealth does not impose this offset condition, the *Environmental Offsets Act 2014* (Qld) does not permit this offset condition being imposed at the state or local government level.[600] In practice, the offsetting scheme is not adequately compensating for environmental loss.

[597] Department of Environment and Science, *A review of Queensland's environmental offsets framework a discussion paper – February 2019*, 10, available at: https://www.qld.gov.au/__data/assets/pdf_file/0018/94131/qld-enviro-offsets-framework-discuss-paper.pdf.
[598] Environmental Defenders Office, *Key solutions to safeguard Queensland's natural environment* (Report, 15 May 2020) available at: https://www.edo.org.au/wp-content/uploads/2020/09/200520-Legal-solutions-for-a-healthier-Qld.pdf.
[599] Queensland Audit Office, *Conserving Threatened Species: Report 7: 2018 – 2019* (Report, 2018) 43, available at: https://www.qao.qld.gov.au/sites/default/files/reports/conserving_threatened_species_.pdf.
[600] Environmental Defenders Office, *Key solutions to safeguard Queensland's natural environment* (Report, 15 May 2020) 14, available at: https://www.edo.org.au/wp-content/uploads/2020/09/200520-Legal-solutions-for-a-healthier-Qld.pdf. *Environmental Offsets Act 2014* (Qld) s 15.

Compliance and enforcement

Effectiveness of regulatory oversight

Department of resources

The Department of Resources is responsible for monitoring compliance with the vegetation management framework and uses the Early Detection System (**EDS**), to monitor changes in regulated vegetation across the state. EDS information is cross-referenced with information about exemptions, current notifications and clearing approvals, so unexplained clearing of native vegetation can be identified, allowing a proactive approach to compliance. Local councils can also enforce their own land clearing regulations in Category X areas. However, whether or not enforcement occurs can be dependent on a range of factors such as available resources (time, money, expertise), competing regulatory priorities, and enforcement appetite.

Local councils

In 2019 the Queensland Court of Appeal held that Category X areas, which make up 33 million ha of Queensland's total 173 million ha of land, are subject to local council planning schemes, where they exist.[601] This was an important ruling as many landholders, developers and pastoralists assumed Category X areas could automatically be cleared without a development approval. An example of a local government planning scheme that regulates clearing is the *Brisbane City Natural Assets Local Law 2003,* which protects various types of protected vegetation, issues vegetation protection orders, and the application and approval or refusal of permits for clearing protected vegetation at law.

While it is now clear that local councils can also enforce their own land clearing regulations in Category X areas, whether or not enforcement occurs (in those or other areas) can be dependent on a range of factors such as available resources (time, money, expertise), competing regulatory priorities, and enforcement appetite. Further, in some instances, local government have been influenced by corruption, unlawful development proposals and applications involving clearing.

Further, local councils may cover large areas, and/or not have active or adequately resourced monitoring or surveillance activities. As such, they often rely on public complaints to investigate instances of illegal clearing, such as a case of illegal clearing in Tuan, which resulted in a $40,000 fine.[602]

Strength of compliance and enforcement framework

Overview:

Under the PA and VMA enforcement actions for unauthorised clearing include penalties, enforcement notices, restoration notices and restoration plans. Local councils also play an important role in the

[601] *Fairmont Group Pty Ltd v Moreton Bay Regional Council* [2019] QCA 81.
[602] Fraser Coast Regional Council, '$40K fine sends strong message about illegal clearing' (Media Release, 20 October 2020) available at: https://www.frasercoast.qld.gov.au/news/article/1000/-40k-fine-sends-strong-message-about-illegal-clearing.

enforcement of smaller scale unauthorised clearing, which can otherwise have cumulative landscape effects.

Sections 162 and 163 of the PA make undertaking prohibited development or assessable development without a development permit serious offences. The Magistrates Court hears prosecution proceedings for such offences.[603] Section 68(2) of the VMA provides that proceedings must begin within one year after the commission of an offence or the offence comes to the complainant's knowledge. Section 68(6) explains that merely receiving a remotely sensed image that may provide evidence an offence does not constitute the complainant having knowledge. This section permits the complainant, usually a departmental employee, more time to investigate and gather evidence of the potential offence, including on-ground assessment.

Enforcement mechanisms against illegal clearing include enforcement notices and orders under the PA, and restoration notices and plans under the VMA.

An enforcement notice can require a person to refrain from committing a development offence and/or remedy the effect of a development offence in a stated way.[604] Enforcement notices can be appealed to the Planning and Environment Court within 20 business days.

A restoration notice can be issued if an official reasonably believes a person has committed a vegetation clearing offence and the matter can be rectified.[605] The restoration notice must include information about the clearing offence and the reasonable steps the person must take to rectify the matter and within what time period these steps must be taken.[606] In response to a restoration notice, a person who has committed the vegetation clearing offence must prepare a restoration plan for the land addressing the matters raised in the restoration notice or they can ask the chief executive to prepare a restoration plan for the land.[607]

One strength of the PA is that a third party can bring proceedings for an enforcement order.[608] This provides a potential safeguard against lack of regulator action. Further, proceedings are brought in the Planning and Environment Court, where risks of an adverse costs order if unsuccessful are lower than other courts – making it more open to potential action by a concerned third party.

Analysis:

- *Prosecutions and infringement fines*

Between 2013 and 2019, the number of fines for illegal clearing steadily increased; however, prosecutions for illegal land clearing have significantly reduced, despite the increasing rate of land clearing in Queensland.[609] This may be a result of regulatory approach taken with the introduction of the EDS. While the enforcement approach should not be affected by the EDS (i.e. if illegal has occurred,

[603] *Planning Act 2016* (Qld) s 174.
[604] *Planning Act 2016* (Qld) s 168.
[605] *Vegetation Management Act 1999* Qld) s 54B(1).
[606] *Vegetation Management Act 1999* (Qld) s 54B(3).
[607] *Vegetation Management Act 1999* (Qld) s 55AB.
[608] *Planning Act 2016* (Qld) s 180.
[609] Evan Hamman, 'Clearing of Native Vegetation in Queensland: An Analysis of Finalised Prosecutions over a 10-Year Period (2007-2018) (2019) 36 *Environmental and Planning Law Journal* 658, 658.

prosecution should be considered as an option), the EDS may play a role in detecting illegal clearing early, preventing more serious clearing before it is undertaken – leading to a trend in more infringement notices being issued than matters leading to prosecution. The penalty amounts will not necessarily act as a strong deterrent from breaching the relevant Act. For example, a man was fined only $6,000 for clearing more than two hectares of National Park.[610]

Transparency and public access to information about prosecutions is limited, making analysis of their potential regulatory impact difficult. Prosecutions occur in the Magistrates Court, where decisions and outcomes are not generally published. Further, the Department of Resources does not appear to regularly publish the outcomes of its completed prosecutions and/or penalty infringement fines issued under the VMA/PA, unlike the Department of Environment and Science for its matters under the EP Act.[611]

- *Enforcement notices*

Recent appeal cases highlight that enforcement notices require sufficient detail to be an effective enforcement tool. In *Serratore & Anor v Noosa Shire Council* [2022] QPEC 505, enforcement notices were issued for vegetation clearing without a development permit to 'create a series of bush fire access track and firebreaks/fire lines.'[612] Despite the Council establishing a development offence had occurred, the enforcement notices were set aside by the Court because the Court found that the notices were too general and did not provide sufficient detail of the action to be carried out, which is necessary under s 168(3)(c)(i) of the PA.[613]

The Serratore decision also raises the potential challenges of drafting detailed actions to remedy a clearing offence. While enforcement notices can be an effective tool, the strict legislative requirements of and opportunity to appeal enforcement notices can mean that enforcement is not carried out in practice.

A further issue is that there is no public register of enforcement notices, unlike the case for such action by DES under the EP Act.[614]

- *Restoration notices*

Again, details of restoration notices and plans are not publicly available in regular reports or a register, making it difficult to comment on how often they are used, how effective they are in restoring native vegetation and their overall effectiveness in enforcing native vegetation legislation. While prevention of vegetation clearing is preferred, restoration plans may provide an opportunity to strengthen native vegetation growth if they are effectively enforced.

[610] https://www.des.qld.gov.au/our-department/news-media/media-centre/fine-for-unlawful-land-clearing-carnarvon-national-park.
[611] https://www.des.qld.gov.au/__data/assets/pdf_file/0030/303789/report-admin-EPAct2021-22.pdf.
[612] *Serratore & Anor v Noosa Shire Council* [2022] QPEC 505.
[613] *Serratore & Anor v Noosa Shire Council* [2022] QPEC 505 [67]-[69].
[614] See https://apps.des.qld.gov.au/public-register/search/enforcement.php.

Opportunities for third party enforcement

Third party enforcement rights under the PA permits a third party to bring proceedings for an enforcement order. This provides a potential safeguard against lack of regulator action. Further, proceedings are brought in the Planning and Environment Court, where risks of an adverse costs order if unsuccessful are lower than other courts – making it more open to potential action by a concerned third party.

A significant proportion of clearing is also exempt or covered under a code, and therefore does not go through the PA. There is no opportunity for third party enforcement in relation to this clearing.

Transparency of information relating to enforcement and compliance

Public information about compliance and enforcement is limited. For example:

- *Prosecutions and infringement fines:* Transparency and public access to information about prosecutions is limited, making analysis of their potential regulatory impact difficult. Prosecutions occur in the Magistrates Court, where decisions and outcomes are not generally published. Further, the Department of Resources does not appear to regularly publish the outcomes of its completed prosecutions and/or penalty infringement fines issued under the VMA/PA, unlike the Department of Environment and Science which publishes some outcomes of its prosecutions for its matters under the EP Act.
- *Enforcement notices:* There is no public register of enforcement notices.
- *Restoration notices:* Details of restoration notices and plans are not publicly available. While prevention of vegetation clearing is preferred, restoration plans may provide an opportunity to strengthen native vegetation growth if they are effectively enforced.

South Australia

South Australia

Background

The 2018 South Australian State of the Environment Report notes biodiversity decline as the second greatest challenge to the South Australian environment after climate change, concluding '[h]abitat loss, primarily through the widespread historic clearance of native vegetation and drainage of wetlands, continues to threaten native plants and animals.'[615]

Native vegetation removal in South Australia is primarily regulated under the *Native Vegetation Act 1991* (**NV Act**) and *Native Vegetation Regulations* 2017 (SA) (**NVR).** The Native Vegetation Council (**NVC**) and Department for the Environment and Water's (**DEW**) submission to the Natural Resources Committee (**NRC**) dated October 2021, the (**NVC and DEW NRC Submission**) notes that SA was the first jurisdiction to introduce broad controls of clearance of native vegetation, but that such controls were implemented after much of the vegetation in the agricultural region had already been removed. It claims that such clearance controls of native vegetation brought an end to broadscale clearance in SA yet acknowledges that there is continuing incremental clearance of vegetation, resulting in a continued decline in the extent and condition of native vegetation.[616]

SA's native vegetation regime heavily relies on offsets, called significant environmental benefits (**SEBs**). The majority of applications to clear native vegetation are approved by the NVC because the NVC has satisfied itself that the clearing can be offset through a SEB or a payment to the Native Vegetation Fund.

The NVC lacks the power and resources to properly monitor compliance of, and enforce, the NVA and to prevent illegal clearing. The NVC and DEW NRC Submission states in recent times resourcing for compliance has been limited and it has been challenging to maintain an active presence in the State's regions.[617]

Government commitments to end broadscale land clearing in line with the Glasgow Declaration

Commitment

The SA Government has not made a clear commitment to reduce or end land clearing by 2030.

[615]Government of South Australia, Environmental Protection Authority, *State of the Environment Report 2018 – Summary*, (November 2018) 9 available at: https://www.epa.sa.gov.au/soe-2018/files/14003_soer2018_print-summary_cover.pdf
[616] Native Vegetation Council and Department of Environment and Water, 'Submission to Natural Resource Committee - Review of the Native Vegetation Act 1991' (October 2021) 76 available at https://prodinterappst.blob.core.windows.net/committees-doc-cache/519d7704-50de-4eac-9cdd-e202d4927973?sv=2019-02-02&sr=b&sig=P7I1KlCe%2BrTQFbeYYTlp1CRRFinnkQG9g46rK%2Bemers%3D&se=2023-07-24T23%3A33%3A11Z&sp=r (NVC and DEW NRC Submission).
[617] NVC and DEW NRC Submission, page 70.

DEW has claimed that broadscale clearance was brought to an end in the 1980s with the introduction of clearance controls, yet incremental clearing of native vegetation continues.[618]

The website of the DEW states the Government is 'committed to protecting native vegetation as part of a broader nature conservation strategy'. The objects of the NVA include 'the conservation, protection and enhancement of the native vegetation of the State'.

The following discussion considers:

- public commitments and statements;
- legislative objectives; and
- policy documents

Public commitments and statements

The South Australian Government has committed to protecting and enhancing native vegetation. The South Australian Department for Environment and Water states on their website they are 'committed to protecting native vegetation as part of a broader nature conservation strategy'.[619]

South Australia has also made a Green Infrastructure Commitment, which aims to increase urban green cover by 20% by 2045.[620]

Legislative objectives

The NVA governs the protection of most native vegetation in South Australia. The objects of the NVA include:

> (a) 'the conservation, protection and enhancement of the native vegetation of the State and, in particular, remnant native vegetation in order to prevent further—
> …
> (ii) loss of quantity and quality of native vegetation in the State; …
>
> (c) 'the limitation of the clearance of native vegetation to clearance in particular circumstances including when the clearance will facilitate the management of other native vegetation or will facilitate the sustainable use of land for primary production'.[621]

Policy documents

In the 2020 *Nature Conservation Directions Statement*, the South Australian Government commits 'to preserving and enhancing South Australia's enviable diversity of natural systems.'[622] One of the nature

[618] NVC and DEW NRC Submission 76.
[619] Government of South Australia, Department for Environment and Water, 'Native Vegetation' (Web Page) available at: https://www.environment.sa.gov.au/topics/native-vegetation.
[620] Government of South Australia, *Green Infrastructure Commitment* (September 2021) available at: https://www.dit.sa.gov.au/__data/assets/pdf_file/0006/958236/DOCS_AND_FILES-17839389-v4-Technical_Services_-_Green_Infrastructure_Commitment.pdf.
[621] *Native Vegetation Act 1991* (SA) ss 6(a), 6(c).
[622] Government of South Australia, Department of Environment and Water, *Nature Conservation Directions statement 2020: A new relationship with nature* (2020) available at: https://cdn.environment.sa.gov.au/environment/docs/nature-conservation-directions-statement-gen.pdf, (**Directions Statement 2020**).

conservation goals is to 'protect and restore ecosystems.'[623] Vegetation clearance is noted as a continuing threat to South Australia's ecosystems. The compounding impacts of climate change are also noted.[624]

Policies in South Australia's Planning and Design Code, implemented under s 66 of the *Planning, Development and Infrastructure Act 2016* (SA), seek to consider native vegetation early on in the planning process to avoid unnecessary clearance.[625] Although in practice it is unclear how the Planning and Design Code can achieve this (see further discussion below).

The State Planning Policy 4.1 seeks to 'minimise impacts of development on areas with recognised natural character and values, such as native vegetation and critical habitat so that critical life-supporting functions to our state can be maintained.'[626]

Costed plan to end deforestation

There is no clear costed plan to end deforestation in SA, rather investment focuses on preserving and maintaining native vegetation.

The following discussion considers:

- Money connected to legislation; and
- Private investments

Money connected to legislation

The NVA states that it is 'an Act to provide incentives and assistance to landowners in relation to the preservation and enhancement of native vegetation; to control the clearance of native vegetation; and for other purposes.'[627]

The NVA establishes the NVC and the Native Vegetation Fund, into which fees and penalties incurred under the NVA are paid. The NVA does not provide legislative objectives for the Native Vegetation Fund. However, the NVC's most recent annual report provides that the major purpose of the Fund is to provide funds to be applied for research, preservation, enhancement and management of native vegetation in South Australia and encouraging the re-establishment of native vegetation on land from which it has been previously cleared.[628]

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[623] Directions Statement 2020, 7.
[624] Directions Statement 2020, 5.
[625] Department for Trade and Investment, *Preserving our Green Infrastructure: Policies in the Planning and Design Code* (August 2022) available at: https://plan.sa.gov.au/__data/assets/pdf_file/0011/744941/Preserving_our_green_infrastructure.pdf.
[626] State Planning Commission, *State Planning Policies for South Australia* (23 May 2019) 37 available at: https://plan.sa.gov.au/__data/assets/pdf_file/0005/552884/State_Planning_Policies_for_South_Australia_-_23_May_2019.pdf.
[627] *Native Vegetation Act 1991* (SA).
[628] Government of South Australia, Native Vegetation Council, 2020-21 Annual Report (2 December 2021) 43 available at: https://cdn.environment.sa.gov.au/environment/docs/Native-Vegetation-Council-Annual-Report-2020-21.pdf, (NVC Annual Report 2020-21).

The NVC is responsible for the administration of the Native Vegetation Fund in accordance with the NVA.[629] The NVC, with the Minister's approval, can generally determine how to invest the money in the Fund.[630]

The greatest proportion of money paid into the Fund is typically in relation to native vegetation clearing applications made under s28 of the NVA and clause 12 of the *Native Vegetation Regulations 2017* (SA) (**NVR**) and SEB payments made to offset the relevant clearing.[631]

The NVC's 2021-2022 annual report states that 2,321.11 hectares of native vegetation and 1,068 scattered trees were cleared during the 2020-2021 period and that this clearing was 'offset' by the management and restoration of 9,666.63 hectares of native vegetation and $11,014,187.30 of agreed SEB payments into the Native Vegetation Fund.[632] These figures do not include clearing associated with mining and energy infrastructure activities, which comprised of 1,412.307 hectares. In 2021-22, the Native Vegetation Fund received $1.258 million of intra-government transfers.[633]

The NVC uses a Native Vegetation Incentives Program to fund numerous research and conservation projects that focus on the responsible and ongoing management of SA's native vegetation. The Native Vegetation Incentives Program administers the NVC Significant Environmental Benefit (**SEB**) Grants, NVC Biodiversity Credit Exchange and the NVC Heritage Agreement Scheme.[634]

Private investments

The NVC has partnered with landholders to deliver the Biodiversity Credit Exchange. The program facilitates private investment in biodiversity credits by giving eligible landholders access to funding to protect, manage and restore areas of native vegetation on their land. The credits are sold to buyers who are required to offset vegetation clearances in the same region.

The South Australian Government supports the Revitalizing Private Conservation grant program, which provides small grants up to $10,000 and linking landscape grants between $10,000 and $250,000 to successful recipients to better manage Heritage Agreement areas and achieve landscape scale conservation outcomes across multiple properties respectively. In the 2021-22 round, there were 46 successful small grant recipients (totalling $46,000) and nine successful linking landscape grant recipients, who received a total of $1 million with a real impact of $4.2 million.[635]

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[629] *Native Vegetation Act 1991* (SA), s21(2).
[630] *Native Vegetation Act 1991* (SA) s 21(4); See, however, the requirements of *Native Vegetation Act 1991* (SA) s21(6).
[631] We note that where applications have been made to local councils or body corporates, the prescribed application fee can generally be retained by the relevant agencies, *Native Vegetation Act 1991* (SA), s21(3a). See NVC Annual Report 2020-21, page 20.
[632] NVC Annual Report 2020-21, page 3.
[633] Department for Environment and Water, *2021-2022 Annual Report* (29 November 2022) 139 available at: https://cdn.environment.sa.gov.au/environment/docs/Department-for-Environment-and-Water-Annual-Report-2021-22.PDF.
[634] Department for Environment and Water, 'Native Vegetation Incentives Program' (Web Page) available at: https://www.environment.sa.gov.au/get-involved/grants-and-funding/native-vegetation-incentives-programs.
[635] Conservation Council SA, 'Revitalising Private Conservation SA,' (Web Page) available at: https://www.conservationsa.org.au/revitalising_private_conservation.

Strengths and weaknesses of land clearing regulation that may be contributing to clearing rates

Overview

Native vegetation removal in South Australia is primarily regulated under the NVA and *Native Vegetation Regulations* 2017 (SA) (**NVR)**. The NVA applies to all of SA except some parts of metropolitan Adelaide, which are identified in the DEW's online maps.[636]

It is notable that SA has standalone native vegetation legislation, with a clear objective of the conservation, protection and enhancement of the native vegetation of the State, and clear principles for native vegetation clearing. However, the legislation is complicated, and there are key components that could be strengthened.

Table 4 below identifies the key pathways for regulating native vegetation clearance in SA.

[636] *Native Vegetation Act 1991* (SA), s4; Government of South Australia, 'Maps of where the Native Vegetation Act applies in SA' (Web Page) available at: https://www.environment.sa.gov.au/topics/native-vegetation/clearing/maps.

Table 4: Summary of Clearing Pathways in SA

Approval pathway	Requirements	Relevant Activities	Legislation
Clearance under the NVA	Data Report by an Accredited Consultant, which determines clearance level based on a risk assessment and SEB requirements NVC approval	When proposed activity is not included in the NVR. Most common s 28 clearance applications are for: • scattered trees for centre pivots • scattered tress for farm purposes, other than those activities listed in the regulations • cropping purposes • vineyards or horticulture activities • vegetation regrowth that is more than 5 years old and is to be permanently removed • changing land use or expanding an existing use • cemetery expansion • harvesting native vegetation for brushcutting, woodcutting or any other purpose that involves taking or collecting native vegetation (Section 27(3) of the Act).	NVA ss 27, 28, 29
Clearance under the NVR **Pathway 1: Permitted clearance without conditions** (a) Permitted clearance - no notification (Exemptions)	Does not require approval from or notification to the NVC	• vegetation within 10 metres of existing building • maintenance of infrastructure • maintenance of dam • clearance under the Electricity Act or Emergency Act • ongoing grazing practices • safety of persons and property • walking tracks • cultural activities • regrowth • firewood • taking of seed and specimens • Cultana training area	NVR reg 8(1); NVR Sch 1, Pt 1, Div 1

(b) Permitted clearance - Notification to the NVC	Permits clearing without conditions, but notification to the NVC is required	• vehicle tracks • fences • plant and animal control • native vegetation causing natural resource management problems	NVR reg 8(2); NVR Sch 1, Pt 1, Div 2
Clearance under the NVR **Pathway 2: Fire Hazard Reduction** (a) FHR 1 (Exemptions)	Does not require CFS approval	• fire prevention and control • clearance for the purposes of the FES Act	FHR 1: NVR reg 9(1); NVR Sch 1, Pt 2, Div 1
(b) FHR 2 (Approval from CFS required)	CFS approval is required	• fire prevention and control (large trees) • fuel reduction • fuel breaks • fire access tracks	FHR 2: NVR reg 9(2); NVR Sch1, Pt 2, Div 2
Clearance under the NVR **Pathway 3: Vegetation management**	Requires a Management Plan approved by the NVC	• Roadside or rail corridor vegetation management • Maintenance of existing agriculture, forestry or farming • Ecological restoration and management of vegetation • Grazing of domestic stock	NVR reg 11; NVR Sch 1, Pt 3
Clearance under the NVR **Pathway 4: Risk assessment (Division 5 of the NVR)** Requires a Data Report by an Accredited Consultant, which determines clearance	NVC provided with an EIS, public environment report or development report for comment. NVC assesses clearance against whether there are any other alternatives that involve no clearance, less clearance or clearance of vegetation that is less	• Major developments (section 48 *Development Act 1993* (SA)/ *Planning Development and Infrastructure Act 2016* (SA) Sch 6, Pt 6, s 20))	NVR, Pt 3, Div 5; NVR Sch 1, Pt 4

level based on a risk assessment and SEB requirements.	significant (or has been degraded to a greater extent than the vegetation proposed to be cleared). Clearance can occur if development consent is granted under the *Planning Development and Infrastructure Act 2016* (SA) and the provision of an SEB (on-ground or payment) is approved by the NVC. For an on-ground SEB, an NVC-approved management plan is required.[637]		
	In providing comment on the proposed clearance and SEB, the NVC will assess the clearance in accordance with the Guide for the Mining and Petroleum Industry and the mitigation hierarchy. Approval is delegated to Department for Energy and Mining in accordance with the Guide for the Mining and Petroleum Industry.	• Mining, petroleum, and exploration activities	NVR Pt 3 Div 5; NVR Sch 1, Pt 5

[637] Guide to Native Vegetation Regulations, pages 37-38.

	SEB required as per SEB management plan (or payment into the Native Vegetation Fund) (unless clearance is in accordance with NVC approved industry standards for exploration).[638]		
	Requires NVC approval or in accordance with NVC-approved Standard Operating Procedure and a SEB offset.[639]	• Other activities where the level of risk associated with the activity is not yet known.	NVR Pt 3 Div 5; NVR Sch 1, Pt 6
Development application under the *Planning Development and Infrastructure Act 2016* (SA) that involves the clearance of native vegetation	Data Report prepared by an Accredited Consultant Potential referral to the NVC Native vegetation clearance approval under the NVA can still be required	• Development proposals that fall within the Native Vegetation Overlay and State Significant Native Vegetation Areas Overlay under the Planning and Design Code require referral to the NVC to provide expert assessment and direction to the relevant authority on the potential impacts of development on native vegetation if proposal is according to a report prepared in accordance with Regulation 18(2)(a) of the NVR deemed to be: - level 3 or level 4 clearance for the Native Vegetation Overlay; and - Levels 2-4 Clearance for the State Significant Native Vegetation Overlay	Planning and Design Code Part 3: Overlays

[638] Guide to Native Vegetation Regulations, pages 39-40.
[639] Guide to Native Vegetation Regulations, page 41.

Other pieces of SA legislation and legislative schemes that are also relevant to land clearing include the:

- *Planning Development and Infrastructure Act 2016* (SA), which replaces the now repealed *Development Act 1993* (SA);
- *State Planning Policy 4.1* (SA), which seeks to minimise the impact of development on native vegetation;
- *Planning and Design Code* (SA): The Planning and Design Code provides for overlays that seek to better integrate the clearance assessments required under the NVA and the planning and development approval processes. Areas where the Native Vegetation Overlay or State Significant Native Vegetation Overlay apply, and a development application involves the removal of native vegetation, may trigger a requirement for expert input into the development assessment process via an accredited consultant's report and/or a referral to the NVC;[640]
- *Wilderness Protection Act 1992* (SA);
- *Policy for a significant environmental benefit under the Native Vegetation Act 1991* (SA);
- *Native Vegetation (Credit for Environmental Benefits) Regulations 2015* (SA).

Exemptions

Overview:

The NVR provides a number of exemptions under which native vegetation clearing can occur without approval:

- *Permitted clearance – Exemption - no notification*

Schedule 1, Part 1, Division 1 of the NVR sets out 12 types of clearing activities that are exempt from approval. These include clearing vegetation within 10 metres of existing buildings, dam maintenance, ongoing grazing, some clearance under the *Electricity Act 1996* (SA) or *Emergency Management Act 2004* (SA), and cultural activities. The NVC's *Guide to Native Vegetation Regulation 2017 (***NVR Guidelines**) provides guidance on the parameters for these activities and examples of clearing that fall outside the scope of the exemptions. [641] Generally, exemptions include area and width restrictions and are aimed at limiting clearing.

- *Permitted clearance – Exemptions requiring notification to the NVC*

Schedule 1, Part 1, Division 2 sets out four additional activities (vehicle tracks, fences, plant and animal control and native vegetation causing natural resource management problems) that are exempt from approval, but proponents intending to undertake vegetation clearing activities must provide notification to the NVC about the amount and location of clearance.[642]

[640] Department for Trade and Investment, *Preserving our Green Infrastructure: Policies in the Planning and Design Code* (August 2022) 4 available at: https://plan.sa.gov.au/__data/assets/pdf_file/0011/744941/Preserving_our_green_infrastructure.pdf.
[641] Guide to Native Vegetation Regulations, page 18ff.
[642] *Native Vegetation Regulations 2017* (SA), Sch 1, Pt 1, Div 2.

- *Fire Hazard Reduction (FHR) 1 Activities (Exemptions)*

In the case of NVR - Pathway 2 there are some activities that do not require notification or approval, where those activities fall within fire hazard reduction 1 activities.[643] The NVR Guidelines identify additional requirements and regulations for each activity.[644]

Analysis:

The NRC's Interim Report on South Australia's Native Vegetation laws found that stakeholders held significant concerns about the current regime's complexity and the ability for laypersons to understand it.[645] The complexity of the system is evident where, for example, proponents seeking to rely on exemptions are required to consider a minimum of four different documents, which set out the requirements for exemptions under the NVR. [646] Given the complexity of the regime, there is a heightened risk that persons will misapply the NVR when seeking to rely on exemptions.

Exemptions also poorly defined, which leaves them open to interpretation and misuse. For example, vegetation within 10 metres of an existing building can be cleared for the purpose of maintaining the building. However, "maintaining" is not defined.

Because in most instances there are no notification requirements, the NVC, has little oversight of the relevant vegetation clearing activity and a limited capacity to identify illegal clearing. The exemptions also create a risk that the cumulative impacts of native vegetation clearing are not properly understood or assessed under the native vegetation framework. For example, the Conservation Council SA found that approximately 75,000 trees are cleared in Greater Adelaide per annum.[647] Where notification is required under Sch 1, Pt 1, Div 2, this at the very least enables the NVC to maintain a record of clearing taking place under the relevant pathway for data collection purposes.[648] However the framework does not provide the NVC with any powers, other than data collection, in relation to the proposed clearing. It cannot, for example, disallow the clearing where it is concerned that the clearing will have a significant cumulative impact.

Code-based clearing / Self-assessable clearing

There is no self-assessable or code-based clearing in South Australia.

Clearing Requiring Approval

To clear native vegetation in SA (unless an exemption applies), either:

- consent is required under the NVA;
- the activity is listed in the NVR, in which case there are different approval pathways dependent on the different activities. The pathways under the NVR that require approval include fire hazard reduction activities 2, native vegetation management plans and the risk

[643] See *Native Vegetation Regulations 2017* (SA), Sch 1, Part 2, Div 1.
[644] Guide to Native Vegetation Regulations, page 24ff.
[645] Natural Resources Commission, *Review of the Native Vegetation Act 1991* (Interim Report No 10, 28 October 2021) 12.
[646] Guide to Native Vegetation Regulations, page 8ff.
[647] Conservation Council SA, "A Call to Action: Protecting Adelaide's Tree Canopy (2021)" accessed at: https://www.conservationsa.org.au/trees_call_to_action.
[648] *Native Vegetation Regulations 2017* (SA) sch 1.

assessment pathway (which also captures certain clearing associated with development being assessed under the PDI Act).

In this section we consider:

- Clearance under s 28 of the NVA;
- Clearance under the NVR for:
  - pathway 2 - fire hazard reduction activities 2;
  - pathway 3 - native vegetation management plans;
  - pathway 4 - risk assessment;
- Development proposals that involve the clearing of native vegetation, including referral to the NVC in overlay areas defined under the PDI Act.

Box 3- The Requirement for Data Reports

For applications for consent to clear under:

- s 28 of the NVA,
- Division 5 of the NVR (that is, Pathway 4: Risk assessment, except for Level 1 clearances in certain circumstances - discussed below); or
- development applications under the PDI Act that involve the clearance of native vegetation (also discussed below),

an application must be accompanied by a Data Report prepared by an Accredited Consultant and undergo a risk assessment.[649]

An Accredited Consultant is a person or body approved by the NVC in accordance with s28(5) of the NVA and Regulation 18(2)(a) of the NVR. The Data Report is to include a field survey and address key matters under the NVA or NVR to be considered by the NVC. It also provides information regarding the SEB by including calculations of size and location of any proposed offset. This can be used to inform the Offset Management Plan if the offset is to be provided on the ground.

The Data Report must also identify the level of risk the proposed clearance presents to biological conservation (level 1, 2, 3, 4), which is used to determine the level of assessment required and whether public consultation is required.[650] Level 1 applications pose a low risk to biodiversity and level 4 pose a high risk to biodiversity. The risk assessment is undertaken against criteria outlined in the Guide for Applications to clear Native Vegetation, which broadly identifies the number of trees and extent of vegetation proposed to be cleared in a particular area for agricultural and pastoral land. [651]

There are several escalating factors that will raise the clearance assessment to the next level if found to be positive. For levels 2 and 3, for example, if the clearance is seriously at variance with Principles of Native Vegetation Clearance b, c or d, the assessment will be raised to the next

[649] *Native Vegetation Act 1991* (SA) s 28(3)(b)(ii)(A); *Native Vegetation Regulations 2017* (SA) reg 18(2); Government of South Australia, *Guide for applications to clear native vegetation* (July 2020) 4 available at: https://cdn.environment.sa.gov.au/environment/docs/native_vegetation_guide_for_applications_to_clear_under_the_act_or_regulations.pdf (Guide For Applications to Clear Native Vegetation 2020).

[650] Guide For Applications to Clear Native Vegetation 2020, page 7.

[651] Guide For Applications to Clear Native Vegetation 2020, page 14.

level.[652] The NVR Guide states that in cases involving escalation factors, the NVC will consider the mitigation hierarchy and propose alternative location(s), where practicable, that have less impact on the vegetation or where clearance can occur in a more degraded area. Issues with the risk assessment process are discussed within the analysis under Pathway 4 Risk Assessment.

Applications that reach level 4 are to be made available for public comment for a 28-day period.

Once an application is submitted, the Native Vegetation Branch (**NVB**) of the DEW checks the Data Report for data quality and completeness.[653] An Assessment Officer from the NVB prepares an Assessment Report based on the information supplied by the Data Report, which includes recommendations about whether consent should be granted and, if so, what conditions should be imposed.[654]

If an application is approved, level 1 applications require a $500 payment to the NVC to satisfy the SEB requirement and SEBs for level 2-4 applications must be determined in accordance with, and at a level compliant with, the SEB Policy and SEB Guide.[655]

Specific requirements pertaining to clearance under the NVA, under Pathway 4 and under the PDI Act are considered below.

Clearance under the NVA

Overview:

Clearing under the NVA generally requires consent from the NVC.

Section 27 of the NVA sets out the overarching considerations for the clearance of native vegetation. Section 27(2) of the NVA states that the NVC cannot give its consent to the clearance of native vegetation under s29 of the NVA if it comprises or forms part of a stratum of native vegetation that is substantially intact.[656] However, s 27(3) allows the NVC to consent to the clearance of substantially intact stratum if, in its opinion, the harvesting will not result in any lasting damage to the plants comprising the vegetation, lead to significant soil damage or erosion, or result in any long-term loss of biodiversity.

Section 28 sets out the application process for consent from the NVC. The owner of the land on which native vegetation is growing or situated, or a person acting on their behalf, may apply for consent to clear the vegetation.[657] The application must be in a form approved by the NVC and be accompanied by certain environmental benefit requirements.[658]

[652] Guide For Applications to Clear Native Vegetation 2020, page 36.
[653] Guide For Applications to Clear Native Vegetation 2020, page 4.
[654] Ibid.
[655]Guide For Applications to Clear Native Vegetation 2020, page 16.
[656] *Native Vegetation Act 1991* (SA) s 3A.
'substantially intact vegetation' is defined as:
a. the stratum has not been seriously degraded by human activity during the immediately preceding period of 20 years; or
b. the only serious degradation of the stratum by human activity during that period has been caused by fire.
[657] *Native Vegetation Act 1991* (SA) s 28(1).
[658] *Native Vegetation Act 1991* (SA) s 28(1).

Applications for consent under s 28 of require a Data Report – see **Box 3**. The application must also be accompanied by other information as the NVC reasonably requires and the prescribed fee.[659] The NVC can give consent to the clearance of native vegetation under the NVA if it is satisfied that actions will be taken that result in a SEB. An SEB aims to compensate for the loss of native vegetation from an approved clearance activity and must result in an overall environmental gain that considers both the loss of vegetation at the clearance site and the gain in vegetation, meaning its condition, protection and/or the extent, to be achieved through actions elsewhere.[660] We discuss SEBs further below (See subsection '6. Offsets').

The *Native Vegetation (Credit for Environmental Benefits) Regulations 2015* (SA) govern the process for applying to the NVC for credit for an environmental benefit. Credit for environmental benefits can be obtained by the proponent seeking to undertake clearing or through third party providers. [661]

When applying to the NVC for consent to clear native vegetation, the application must include certain SEB requirements based on which method the proponent uses to establish an environmental benefit (the requirements are outlined in Table 5 below).[662]

Table 5: Environmental Benefits Options for an application for consent to clear vegetation under the NVA

Options	Section of the NVA	Requirements in application to consent
Option 1: Environmental benefit required under the NVA to be satisfied by the application of a **credit** under s25A	25A – application for credit 25B – assignment of credit 28(3)(b)(i)(A) – requirements to be included in application to consent (listed in column to the right)	• If the credit has been assigned in accordance w s 25B – a management agreement prepared under s 25D; and • In any other case, information that establishes the applicant has been credited in accordance with s 25B with having achieved an environmental benefit of a particular value is required; and • information that establishes that the environmental benefit the subject of the credit amounts, after allowing for the loss of the vegetation to be cleared, to a SEB.
Option 2: environmental benefit to be achieved by an accredited **third party provider**	25C – accreditation by third party provider 28(3)(b)(i)(B) – requirements to be included in application to consent (listed in column to the right)	• management agreement under s 25D; • information that establishes that the environmental benefit achieved, or to be achieved, by the accredited third party provider will, after allowing for the loss of the vegetation to be cleared, result in a SEB.
Option 3: environmental benefit to be achieved **by**	28(3)(b)(i)(C) – requirements to be included in application to	• a native vegetation management plan prepared by the applicant in accordance with guidelines adopted by the Council under Part 4;

[659] *Native Vegetation Act 1991* (SA) s 28(3)(ii).
[660] Government of South Australia, *Policy for a Significant Environmental Benefit* (July 2020) 2 available at: https://cdn.environment.sa.gov.au/environment/docs/native_vegetation_significant_environmental_benefit_policy_1_july_2019.pdf.
[661] *Native Vegetation Act 1991* (SA) s 25A(1); *Native Vegetation (Credit for Environmental Benefits) Regulations 2015* (SA) s 4.
[662] *Native Vegetation Act 1991* (SA) s 28(3)(b)(i)(A)-(D).

any other means	consent (listed in column to the right)	• information that establishes that subsequent establishment, regeneration or maintenance of native vegetation (whether on the land after the proposed clearance or on other land) in accordance with the native vegetation management plan will, after allowing for the loss of the vegetation to be cleared, result in a SEB.
Option 4: Not possible to achieve a SEB by any other means (option 3 above)	28(3)(b)(i)(D) – requirements to be included in application to consent (listed in column to the right)	• information that establishes that it is not possible for the applicant to achieve a SEB in the manner contemplated by subparagraph (C) – see option 3 Where an applicant provides information referred to in subsection (3)(b)(i)(D), he or she may propose that he or she make a payment into the Fund to compensate for the fact that there will not be a significant environmental benefit SEB clearance.[663]

We note that the NVC must take into account the following principles when performing a function or exercising a power under the NVA and in relation to applications for consent:

- the objects of the NVA;
- the objectives of the State Natural Resources Management Plan; and
- the principles of clearance of native vegetation and must not, generally, make a decision that is seriously at variance to the principles.[664]

When deciding whether to consent to an application to clear native vegetation the NVC:

- must have regard to the principles of clearance of native vegetation so far as they are relevant to that decision; and
- must not make a decision that is seriously at variance with those principles.[665]

Schedule 1 of the NVA lists the principles of native vegetation clearance, which should be addressed in the Data Report (see Box 3) for an application under this section. These principles are framed as circumstances where native vegetation should not be cleared. For example, they include that native vegetation should not be cleared if in the opinion of the NVC:

- it includes plants of a rare, vulnerable or endangered species; or
- the vegetation comprises the whole, or a part, of a plant community that is rare, vulnerable or endangered; or
- it is significant as a remnant of vegetation in an area which has been extensively cleared; or
- the clearance of the vegetation is likely to cause deterioration in the quality of surface or underground water.[666]

The NVC can, however, still make a decision seriously at variance with these principles in multiple circumstances. Firstly, if:

- the vegetation comprises one or more isolated plants; and
- the applicant is engaged in the business of primary production; and

[663] *Native Vegetation Act 1991* (SA) s 28(4).
[664] *Native Vegetation Act 1991* (SA), ss 14(2); See also s29(1); *Cf* s29(4a).
[665] *Native Vegetation Act 1991* (SA) s 29(1).
[666] *Native Vegetation Act 1991* (SA) Sch 1(c), (d), (e), (i).

- in the opinion of the NVC, the retention of that plant, or those plants, would put the applicant to unreasonable expense in carrying on that business or would result in an unreasonable reduction of potential income from that business.[667]

Second, the NVC can give its consent to the clearance of native vegetation seriously at variance with the principles of native vegetation clearance if:

- the NVC adopts guidelines under s 25 that apply in the region where native vegetation is situated; and
- the NVC is satisfied a SEB will be achieved through conditions and outweigh the value of retaining the vegetation; and
- the circumstances justify the consent.[668]

Finally, the NVC may also give consent if satisfied a SEB outweighs the value of retaining the vegetation and this has been achieved under s 25A, s 25B or s 25C of the NVA (as outlined above).[669]

Before giving consent the NVC must also consult the regional landscape board for the landscape management region, where the native vegetation is situated, and have regard to the Board's recommendation regarding the application.[670] Similarly for applications to clear native vegetation on pastoral land, before giving its consent, the NVC must consult the Pastoral Board and have regard to its recommendations.[671]

The NVC may consent to the clearance of native vegetation under s 29 of the NVA with additional conditions to protect native vegetation.[672] It may, however, only consent to unconditional clearance of native vegetation if satisfied the clearance would:

- not result in any loss of biodiversity; and
- the attachment of a condition to the consent under subsection would place an unreasonable burden on the applicant.[673]

Analysis:

It appears that clearing can be permitted in almost every circumstance under the NVA, where the NVC can satisfy itself that a 'SEB' can be achieved. The NVA therefore appears to facilitate native vegetation clearing, rather than prevent or limit its clearance.

The NVA is supplemented by complex, convoluted guidelines and policies, which set out key aspects of the native vegetation framework, such as the assessment of SEBs. These policies and guidelines are subject to limited review, due to a lack of review and appeal rights under the NVA. Review rights would enable scrutiny of the relevant policies and guidelines and may result in a more informed, principled decision making by the NVC.

The NVA provides the NVC with broad discretion to approve native vegetation clearing. First, the principles of native vegetation clearing, which the NVC must have regard to, only focus on the most

[667] *Native Vegetation Act 1991* (SA) s 29(4).
[668] *Native Vegetation Act 1991* (SA) s 29(4a).
[669] *Native Vegetation Act 1991* (SA) s 29(4b).
[670] *Native Vegetation Act 1991* (SA) s 29(5).
[671] *Native Vegetation Act 1991* (SA) s 29(6).
[672] *Native Vegetation Act 1991* (SA) s 29(11).
[673] *Native Vegetation Act 1991* (SA) s 29(12).

extreme consequences of clearing, for example for areas where an area includes plants of "rare, vulnerable or endangered species" and do not provide adequate protections to proactively prevent the deterioration of the environment from clearing. The NVC also appears to have the discretion to downgrade clearing identified as "seriously at variance" with the principles of vegetation clearing to "at variance" where it considers that "moderating factors apply."[674]

Second, the NVC is not expressly required to comply with the principles of clearance of native vegetation or to ensure that native vegetation clearing will result in a SEB. Rather, the legislation provides that the NVC is merely required to "have regard" to the relevant principles and may consent to clearing that is at significant variance to the principles if 'satisfied' that a SEB is to be achieved and the circumstances justify the giving of consent.[675] There is no objective standard in the NVA for the NVC to satisfy itself of a SEB outcome.

Third, the exceptions to the principles of native vegetation clearance are broad and provide the NVC with the discretion to permit clearing in areas significant to rare species and plant communities. The NVA, therefore, appears to preference the needs of primary production over protecting vegetation, which is also an objective of the NVA. There do not appear to be any absolute prohibitions against native vegetation clearing under the NVA, including for areas of high environmental value.

Finally, the requirement to show an environmental benefit are very broad, given that an applicant can state under section 28(d) that they cannot achieve a SEB but can propose to make a payment to the Native Vegetation Fund. This provides an option for applicants to pay to clear native vegetation without demonstrating that other physical land will be protected, which undermines the compensatory purpose of the environmental benefit scheme to protect other physical native vegetation areas. Further, in effect, it allows consent for clearing in almost all circumstances where a defined amount is paid into the Fund. The NVC also has a vested interest in approving applications where payments can be made into the Fund because it has the management and control of the Fund. Given the NVA's significant reliance on SEBs, its efficacy appears to turn on whether SEBs do, in fact, provide an environmental gain. Issues with the implementation and effectiveness of SEBs are discussed further below in subsection '6. Offsets'.

The NVC's broad discretion to approve native vegetation clearing is reflected in the Native Vegetation Clearance Application Register. The Register indicates the vast majority of clearance applications are approved with 98% of applications made between 2010 and 2020 approved, a further 1% allowed for a smaller area than originally applied and only 1% of over 1,400 application completely refused.[676] Between 2021 to present (as of 15 February 2023) the Register records only 6 refusals out of 537 applications.

Third party participation in the application process is also very limited. Public consultation is permitted under Regulation 18(3)(b) of the NVR, which sets out that any person can make representations to the NVC within 28 days of the day on which the application is received and under regulation 18(3)(c) may allow as they see fit a person to appear personally or by representative to be

[674] Guide For Applications to Clear Native Vegetation 2020, page 18ff.
[675] See *Native Vegetation Act 1991* (SA), s 29.
[676] Government of South Australia, Department for Environment and Water, 'Clearance application register' available at: https://www.environment.sa.gov.au/topics/native-vegetation/clearing/clearance-application-register; Conservation Council SA, *Submission to the Review of the Native Vegetation Act 1991* (6 August 2021) 3 available at: https://d3n8a8pro7vhmx.cloudfront.net/conservationsa/pages/23877/attachments/original/1628465195/Conservation_Council_SA_Submission_Review_of_the_Native_Vegetation_Act_1991_August2021.pdf.

heard on whether the NVC should or should not approve the application. Yet there are no consultations for mining and petroleum activities.[677] Further, consultations are not widely publicised.[678] There are also no third party appeal rights and only limited enforcement rights for decisions made by the NVC in relation to clearing applications under s 28 of the NVA, even for proposed large scale vegetation clearing such as Level 4 applications.

Cumulative impacts are not considered under the NVA. Applications for native vegetation clearing are not considered in relation to other proposed or approved clearance within the same area or region (cumulative impacts).[679]

The application of the NVA is also limited by the definition of native vegetation. The NVA defines native vegetation as intact vegetation, which means that it does not govern degraded vegetation.[680] The NVR includes dead plants in its definition of native vegetation in certain circumstances based on the trunk circumference of a tree and that provide or have the potential to provide a habitat for animals of a listed threatened species under the EPBC Act.[681] The NVC and DEW NRC Submission provides that a potential consequence of seeking to overcome section s 27(2) of the NVA, which prevents the clearing of intact stratum, is that more exemptions have been introduced under the NVR and the majority of clearing applications are made under the NVR.[682] While the intact stratum provision was initially introduced to limit broadscale clearing, given the significantly diminished and degraded levels of native vegetation across SA, it appears that the provision has the effect of excluding the protection of native vegetation under the NVA. A broader definition encompassing degraded vegetation may be more suitable the context of the ongoing loss of vegetation in South Australia.

Clearance under the NVR

It is noted that Pathway 1 involves exemptions – see analysis above.

- *Pathway 2 – Fire Hazard Reduction 2 Activities*

  Overview:

  FHR 2 activities require more significant vegetation clearance than FHR 1 activities and require approval from the Chief Officer of the South Australian Country Fire Service (**CFS**) and not the NVC.[683] The CFS is not required to take the same considerations into account as the NVC when considering Pathway 2 clearing, but must be satisfied that the clearance of native vegetation is reasonably required or appropriate for the purpose of fire prevention or control.[684]

[677] Environmental Defenders Office, *Submission to the SA Parliamentary Natural Resources Committee* (6 August 2021) 3 available at: https://www.edo.org.au/publication/review-of-the-native-vegetation-act-1991-sa/.
[678] Environmental Defenders Office, *Submission to the SA Parliamentary Natural Resources Committee* (6 August 2021) 3 available at: https://www.edo.org.au/publication/review-of-the-native-vegetation-act-1991-sa/.
[679] See NVC and DEW NRC Submission, page 38.
[680] *Native Vegetation Act 1991* (SA) s 3.
[681] *Native Vegetation Regulations 2017* (SA) s 4.
[682] NVC and DEW NRC Submission, page 28.
[683] See *Native Vegetation Regulations 2017* (SA), Sch 1, Part 2, Div 2.
[684] *Native Vegetation Regulations 2017* (SA) reg 10 (1).

Analysis:

Because Fire Hazard Reduction 2 activities require the approval of the CFS and not the NVC,[685] there is a risk that the native vegetation framework, including the objects of the framework, will not be consistently applied where the relevant activities relate to fire management. The CFS appears to have a broad discretion to permit native vegetation, with seemingly no controls over the amount or type of native vegetation that can be cleared. The CFS is only required to apply a subjective test as to whether it is satisfied that the clearing is reasonably required or appropriate for the purpose of fire prevention or control and must "have regard to" applicable bushfire management plans and relevant standards made or approved by the NVC.

- *Pathway 3 - Native Vegetation Management Plans*

Overview:

Pathway 3 enables native vegetation clearing for certain activities where a management plan is in place or the proposed clearing is conducted in accordance with guidelines developed by the NVC under s25 of the NVA (as determined by the NVC).[686]

Where a management plan applies, the proponent must provide the proposed management plan to the NVC for approval. The NVC will assess the management plan against whether the ongoing management avoids, minimises and restores the impact of the clearance as far as practicable, and does not lead to permanent degradation. The NVC may seek and consider the advice of the regional NRM board for the NRM region where the relevant land is situated. The proponent may also be required to comply with guidelines developed by the NVC for the particular activity.[687]

Analysis:

The NVR prescribes limited requirements for native vegetation management under Pathway 3. It is concerning that the NVC has the complete discretion to determine if activities under Pathway 3 should be self-assessable or subject to a management plan and is empowered to develop the parameters for what it considers to be permissible self-assessable clearing with limited scrutiny under s 25 of the NVA.

Much like the NVA, the requirements for native vegetation management are predominantly contained in the NVC's guidelines. As such, any outcomes under the native vegetation management plans are dependent on the robustness of the NVC's guidelines, rather than the statutory scheme.

For example, in relation to maintenance of existing agriculture, forestry or farming as part of a commercial enterprise in the immediately preceding 10 years, the NVR provides minimal requirements for clearance.[688] The NVR provides that clearing can occur where:

- it is to be undertaken for the purpose of maintaining the existing use of the land and will not cause permanent degradation or loss of native vegetation; and
- guidelines relating to the clearance have been adopted by the NVC and the person undertaking the clearance must comply with the guidelines.

[685] See *Native Vegetation Regulations 2017* (SA), Sch 1, Part 2, Div 2.
[686] *Native Vegetation Regulations 2017* (SA) Sch 1, Div 3.
[687] *Native Vegetation Regulations 2017* (SA), reg 11(1)(b).
[688] *Native Vegetation Regulations 2017* (SA), Sch 1, Pt 3, reg 24.

The threshold for limiting clearance in the above example, being that it will not cause "permanent degradation or loss of native vegetation," appears to be particularly low and does not align with the NVA's objects to preserve, enhance and properly manage native vegetation.

The NVC's Guidelines for the relevant activity provide that a native vegetation management plan must be prepared by the proponent and provided to the NVC for assessment. The Guidelines set out the information that must be contained in a management plan, including the identification of species, and indicate that the NVC may attach conditions to the proponent's management plan. A management plan must be reviewed every five years or as deemed appropriate. However, landowners are not required to engage accredited specialists to identify relevant species, ecological communities or sites of conservation significance that may be affected by the proposed activity and the NVC does not conduct its own site assessment as part of the management plan process. As such, the impact of the proposed activity could be significantly underestimated and management actions under the management plan may not be adequate to address the impact of the proposed activity. Other than self-assessment and monitoring by the landowner, there appear to be limited mechanisms in place that enable the NVC to conduct on-site assessments to ensure that the landowner is complying with the native vegetation management plan, which in turn reduces any incentive for landowners to do so.

Guidelines relevant to Management Plans, much like the activities listed under the NVR, appear to be geared towards the removal or managing the degradation of native vegetation, rather than encouraging the preservation, enhancement and proper management of native vegetation in accordance with objects of the NVA. For example, the NVC's Guidelines for the Management of Roadside Native Vegetation and Regrowth Vegetation have increased the age of vegetation regrowth requiring approval from the NVC from 5 years to 20 years. [689] The Guidelines acknowledge that they focus on how to clear regrowth vegetation but state that persons should find alternatives to native vegetation clearance where practicable. This statement is inconsistent with the first and second principles of the mitigation hierarchy and appears to suggest that clearing is generally permissible. Finally, there do not appear to be any reporting mechanisms in the Guidelines, which diminishes the NVC's capacity to monitor and enforce against noncompliance.

Despite having the potential to support landowners to develop and utilise sustainable land use practices, the management plans and relevant guidelines appear to do little more than enable landowners to clear native vegetation within set timeframes.[690]

[689] Native Vegetation Council, 'Guidelines for the Management of Roadside Native Vegetation and Regrowth Vegetation' 4 (September 2020) available at: https://cdn.environment.sa.gov.au/environment/docs/native_veg_guideline_for_roadside_sept2020.pdf.

[690] See the example provided in the Native Vegetation Council, 'Clearance associated with maintenance of existing agriculture, forestry or farming' (13 February 2018), available at: https://cdn.environment.sa.gov.au/environment/docs/nvc_guideline_1124_maintenance_of_existing_agriculture_forestry_or_farming.pdf.

- *Pathway 4 – Risk Assessment*

  Overview:

  The NVR Guide states that the risk assessment pathway is designed to streamline the approval process for activities with low or undefined levels of risk to biodiversity to be identified early, so that the focus of the NVC's assessment can be on activities that pose a high risk to biodiversity. The purpose of the risk assessment, is, therefore, to identify the level of risk to biodiversity attached to a particular clearing activity, the level of assessment that should be undertaken for the relevant activity and the appropriate offset.

  The risk assessment under Pathway 4 of the NVR applies to:

  - major developments and projects;
  - mining, petroleum and exploration activities; and
  - "Other activities," being activities where the level of risk associated with the activity is undefined.[691]

  When making decisions under the Division 5, the NVC must:

  - have regard to the mitigation hierarchy;
  - consider, and aim to minimise, potential impacts on biological diversity arising from any proposed clearance of native vegetation;
  - consider, and aim to minimise, potential impacts on soil, water and other natural resources arising from any proposed clearance of native vegetation;
  - take into consideration comments from agencies or bodies provided in response to any request for comment made by the NVC;
  - consider, and aim to minimise, impacts on—
    - species or ecological communities listed as threatened under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
    - species listed as rare or threatened under the *National Parks and Wildlife Act 1972* (SA)
  - consider the potential cumulative impact, both direct and indirect, that is reasonably likely to result from a proposed clearance activity.[692]

  In addition, in relation to Regulation 16 – Clearance for other activities, the NVC must assess and have regard to the level of risk to biological diversity conservation presented by the clearance proposal.[693]

  The Data Report (see Box 3) under Division 5 must demonstrate how the clearance meets the requirements of the NVR, including requirements specific to each activity, identify the area of impact (including cumulative impacts), address the mitigation hierarchy, address the principles of clearance (noting principles (a)-(g) only need to be addressed for level 3 and level 4 clearance), for Regulation 16 the risk assessment must also identify the level of risk proposed clearance presents to biological conservation.[694]

[691] *Native Vegetation Regulations 2017* (SA) Div 5.
[692] *Native Vegetation Regulations 2017* (SA) reg 19.
[693] *Native Vegetation Regulations 2017* (SA) reg 17.
[694] Guide For Applications to Clear Native Vegetation 2020, page 10.

Analysis:

In relation to Pathway 4, criteria for the risk-based assessment pathway can be simplistic and arbitrary, undermining the strength of the approval process. For example, the criteria to assess the risk level of a proposal includes:

- the size of the clearance, which is either the area of the clearance or number of trees to be cleared; and
- the presence of threatened species or communities.

Tree and patch size do not adequately reflect ecological value, and there are other significant biodiversity matters that should be considered beyond merely threatened species and communities. The assessment could also more thoroughly consider 'the likely impact to values of the native vegetation at the site.' Location risk, for example, is not considered in the risk assessment, which would include consideration of the importance of vegetation for biodiversity conservation based on available data.

The NVC appears to have limited powers to have an impact on proposed clearing where that clearing relates to major developments and projects or mining and petroleum activities under pathway 4. For example, the NVR Guide states that the NVC will:

- comment on an EIS for proposed major developments in relation to whether the proposal avoids and minimises the clearance of native vegetation as far as possible; and
- can determine the SEB required to offset the impact.

However, ultimately, the NVC's comments in relation to avoiding or minimising clearing are of little, to no effect on the actual development where the development is subsequently approved under the *Planning, Development and Infrastructure Act 2016* (SA) (**PDI Act**) or relevant mining legislation.[695] Notably, s 115 of the PDI Act ultimately gives the Minister for Planning and Local Government the discretion to grant or refuse a major development proposal. Clearing that relates to mining projects authorized after 2003, for example, is permitted where it is undertaken in accordance with a Management Plan under the Mining Act. The NVC is provided with the management plan for comment but does not provide approval for clearing.[696] Rather, it appears that the NVC's main role is to approve an SEB so that the development can go ahead. As such, in practice the NVC has little power, and the NVA has limited application, in relation to projects that are likely to have some of the most substantial levels of clearing and the Mitigation Hierarchy appears to be applied in an advisory manner rather than with any real force.

Interaction between the PDI Act and NVA

Overview:

Development approvals that involve the clearance of native vegetation under the PDI Act generally require clearance approval under the NVA in addition to development approval.

[695] See also for mining activities: NVC, 'Guide for a Significant Environmental Benefit for the clearance of native vegetation associated with the Minerals and Petroleum Industry' (August 2017), available at: https://cdn.environment.sa.gov.au/environment/docs/seb_mining_guide_august_2017.pdf.
[696] Ibid.

Where proposed development involves the clearing of native vegetation is to occur within the Native Vegetation Overlay or State Significant Overlay under the Planning and Design Code, it may require referral to the NVC depending on the risk clearance level.

The two main overlays relevant to native vegetation removal operate as follows:

- *The Native Vegetation Overlay*

  The Native Vegetation Overlay applies to areas of the State where native vegetation is protected under the NVA, that is, Adelaide metropolitan areas are exempt from the NVA and the Overlay does not apply to these areas.[697] The Overlay requires that 'development avoids, or where it cannot be practically avoided, minimises the clearance of native vegetation taking into account the siting of buildings, access points, bushfire protection measures and building maintenance.'

  Under this overlay, where clearance is deemed level 3 or level 4 by a Data Report (see Box 3) it is to be referred to the NVC for 'direction' within 20 business days.

- *The State Significant Native Vegetation Overlay*

  The State Significant Native Vegetation Overlay[698]applies to Wilderness Protection Areas, National Parks, Conservation Parks, and areas subject to heritage agreements (plus a 50 m buffer). It aims to protect, retain, and restore significant areas of native vegetation.

  Under this overlay, level 2 – 4 clearance is to be referred to the NVC for 'direction' within 20 business days. [699]

Under both overlays, where proponents deem no clearance is involved, they must provide a written declaration stating as such alongside the lodgement of the development application. [700]

As outlined above, if the applicant proposes any form of native vegetation clearance, an Accredited Consultant must prepare a Data Report (see Box 3) to provide alongside the development application. A report prepared under regulation 18(2)(a) is required for a level 1 clearance and satisfies the 'deemed to satisfy criteria' of the two overlays, meaning that level 1 clearance does not require referral to the NVC.[701] Development categorised as Level 3 or Level 4 clearance in a Native Vegetation Overlay area, or Level 2 to Level 4 of the State Significant Native Vegetation Overlay, is to

[697] State Planning Commission, *Native Vegetation* (Fact Sheet) available at: https://plan.sa.gov.au/__data/assets/pdf_file/0008/597842/Fact_Sheet_-_Native_Vegetation.pdf.
[698] State Planning Commission, *Native Vegetation* (Fact Sheet) available at: https://plan.sa.gov.au/__data/assets/pdf_file/0008/597842/Fact_Sheet_-_Native_Vegetation.pdf.
[699] See *Planning and Design Code* Pt 3 Overlays, Native Vegetation Overlay, Assessment Provisions, PO 1.1, DTS/DPF 1.1(a), State Significant Native Vegetation Areas Overlay, Assessment Provisions, PO 1.1, DTS/DPF 1.1(a) available at: https://code.plan.sa.gov.au/home/browse_the_planning_and_design_code?PubID=1&DocNodeID=4od0tpCwdr4%3D&DocLevel=2; *Planning, Development and Infrastructure (General Regulations) 2017* (SA) sch 9, cl 3, item 11.
[700] See *Planning and Design Code* Pt 3 Overlays, Native Vegetation Overlay, Assessment Provisions, PO 1.1, DTS/DPF 1.1(a), State Significant Native Vegetation Areas Overlay, Assessment Provisions, PO 1.1, DTS/DPF 1.1(a) available at: https://code.plan.sa.gov.au/home/browse_the_planning_and_design_code?PubID=1&DocNodeID=4od0tpCwdr4%3D&DocLevel=2.
[701] See *Planning and Design Code* Pt 3 Overlays, Native Vegetation Overlay, Assessment Provisions, PO 1.1, DTS/DPF 1.1(b), State Significant Native Vegetation Areas Overlay, Assessment Provisions, PO 1.1, DTS/DPF 1.1(b) available at: https://code.plan.sa.gov.au/home/browse_the_planning_and_design_code?PubID=1&DocNodeID=4od0tpCwdr4%3D&DocLevel=2.

be referred to the NVC for an expert assessment and direction on the potential impacts of the development on native vegetation.[702]

Where referrals under the PDI Act occur, the NVC is to consider the same provisions relating to consent as they do for clearance generally under s 29 of the NVA as if they were considering an application for consent under the NVA (see 'clearance under the NVA' above).[703]

Despite the aim of better alignment between the PDI Act and NVA, an approval under the NVA is still required to clear native vegetation for development purposes.[704]

Analysis:

The planning system and native vegetation regime appear to be poorly integrated. It is often unclear as to when referrals are required under the Planning and Design Code and when a referral does occur under the NVA, proponents are often separately required to seek approval from the NVC under Pathway 4 of the NVR.

Only certain levels of clearance require mandatory referral to the NVC. Where such applications are referred to the NVC, the role of the NVC is limited 'to provide expert assessment and direction' on the potential impacts of development on native vegetation.

Before the PDI Act commenced in 2016, the native vegetation assessment process would often commence after, or later in the process of, a planning approval being granted. This could result in delayed decisions, inconsistent information requirements, confusion and uncertainty for applicants. A referral mechanism did exist under the now repealed *Development Regulations,* but it did not operate in practice because native vegetation mapping was absent from local council development plans.[705]

The Planning and Design Code aims to streamline and improve the referral process and interaction between the PDI Act and NVA, yet it is unclear whether this has occurred. A referral to the NVC does not necessarily preclude an applicant from a subsequent approval process under the NVA. The referral process under the Planning and Design Code also does not distinguish between native vegetation clearance under the NVA and NVR, which have different approval requirements.

Since becoming a referral body under the *PDI (General Regulations) 2017* (SA), the NVC has received 8 referrals. Prior to July 2020 the NVC processed an estimated average of 100 non-mandatory referrals per annum for native vegetation clearance for development purposes.[706] This raises concerns about the clarity and use of the new referral process.

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[702] *Planning and Design Code* Pt 3 Overlays available at: https://code.plan.sa.gov.au/home/browse_the_planning_and_design_code?PubID=1&DocNodeID=4od0tpCwdr4%3D&DocLevel=2. See also *Planning, Development and Infrastructure (General Regulations) 2017* (SA) sch 8 cl 2(1)(a)(g), sch 9, cl 3, item 11.

[703] *Native Vegetation Act 1991* (SA) s 29(17).

[704] South Australia Productivity Commission, *Development Referrals Review* (Issue Paper, 26 March 2021) 17 available at: https://www.sapc.sa.gov.au/reviews/reviews/development-referrals/documents/Development-Referrals-Issues-Paper.pdf.

[705] South Australia Productivity Commission, *Development Referrals Review* (Issue Paper, 26 March 2021) 17 available at: https://www.sapc.sa.gov.au/reviews/reviews/development-referrals/documents/Development-Referrals-Issues-Paper.pdf.

[706] South Australia Productivity Commission, *Development Referrals Review* (Issue Paper, 26 March 2021) 17 available at: https://www.sapc.sa.gov.au/reviews/reviews/development-referrals/documents/Development-Referrals-Issues-Paper.pdf.

Protection of Environmentally Sensitive Areas

Two mechanisms under SA's NVR may offer some protection to environmentally sensitive areas are overlays under the Planning and Design Code and Heritage Agreements.

State Significant Native Vegetation Areas Overlay

Overview:

As outlined above, the State Significant Native Vegetation Areas Overlay aims to protect, retain, and restore significant areas of native vegetation. It applies to wilderness protection areas, National and Conservation Parks and areas subject to Heritage Agreements.[707] It does this by ensuring clearance associated with development is likely to be assessed as higher risk in these areas and is referred to the NVC for direction.

Analysis:

The State Significant Native Vegetation Areas Overlay requires referral to the NVC for a greater amount of risk clearance levels (levels 2-4) compared with the Native Vegetation Overlay (which requires referral for clearance levels 3-4). However, as noted above the practical effect of this referral under an Overlay is that the NVC is to provide direction to the Planning Authority who can determine a refusal or impose conditions on a development application, limiting the protections such a referral can provide.[708] It is concerning that clearing can still occur in areas included in the State Significant Native Vegetation Overlay and that there are limited, if any, absolute prohibitions against native vegetation clearing under the NVA.

Regulated and Significant Trees Overlay

Overview:

In instances where development is in Adelaide metropolitan areas, the landholder must check with their local council whether the clearing involves significant or regulated trees. The Regulated and Significant Tree Overlay aims to conserve regulated and significant trees as defined by the PDI Act or listed under Part 10 of the Planning and Design Code.[709]

Analysis:

Similar to the State Significant Native Vegetation Overlay, the Regulated and Significant Tree Overlay allows the removal of trees, as long as the development proposal undergoes assessment under the PDI Act (as tree damaging activity, in relation to a regulated or significant tree, is included in the definition of development under the PDI Act). [710] Provisions under the Planning and Design Code require that for the removal of significant trees 'all reasonable development options and design solutions have been considered to prevent substantial tree-damaging activity occurring'.[711] This,

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[707] *Planning and Design Code,* Pt 3: Native Vegetation Overlay and State Significant Native Vegetation Areas Overlay DO1.
[708] See *Planning and Design Code,* Pt 3: Native Vegetation Overlay and State Significant Native Vegetation Areas Overlay Procedural Matter; Government of South Australia, Native Vegetation Council, 'Native vegetation for relevant authorities' (Fact Sheet) available at: https://cdn.environment.sa.gov.au/environment/docs/Fact-Sheet-Relevant-Authorities.pdf.
[709] See *Planning and Design Code* Pt 3 Regulated and Significant Tree Overlay, Pt 10 available at: https://code.plan.sa.gov.au/home/browse_the_planning_and_design_code?code=browse.
[710] See *Planning, Development and Infrastructure Act 2016* (SA) s 3(1).
[711] See Planning and Design Code, Part 3 Regulated and Significant Tree Overlay, PO 1.3, 1.4.

however, suggests there are still avenues for the removal of significant trees, and it is unclear what criteria is used to establish what constitutes 'all reasonable development options'.

Heritage Agreements

Overview:

Section 23 of the NVA also provides for Heritage Agreements between the owner of the land and the Minister to preserve or enhance native vegetation.[712] Heritage agreements attach to the land, meaning they are binding on the current owner of the land regardless of whether they were the one to enter into the Agreement.[713] They, therefore, last in perpetuity, providing long term protection for the land. A heritage agreement may, for example, restrict the use of land to which it applies, require specified work or work of a specified kind to be carried out in accordance with specified standards on the land; or restrict the nature of work that may be carried out on the land.[714] The NVC must agree the land should be placed under a Heritage Agreement. It is a slow process to establish a Heritage Agreement, involving several different agencies and requiring an assessment process to see if it meets the criteria of having significant conservation value, meets the Surveyor-General criteria via a special "GRO" plan and the document and plan must meet legal standards.[715] Since the introduction of the Native Vegetation Heritage Agreement program in 1980, more than 2800 landholders have entered into heritage agreements, protecting of over 1 million ha of SA's native vegetation.[716]

Analysis:

Heritage agreements appear to provide the most protection to native vegetation, and even those agreements can be overridden.[717] Section 27 of the NVA provides that the Chief Officer may authorise the clearance of native vegetation subject to a Heritage Agreement if the Minister has given their consent, the vegetation is of a prescribed class or prescribed circumstances apply.[718] While this indicates that generally clearing of native vegetation is not permitted where there is a Heritage Agreement in place, there are multiple exemptions to this, with many activities under the NVR permitted to take place within a Heritage Agreement area.[719]

Offsets

Overview:

Offsets operate under SA laws as a significant environmental benefit (**SEB**). As noted above, a SEB aims to compensate for the loss of native vegetation under an approved clearance activity.

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[712] *Native Vegetation Act 1991* (SA) s 23(1).
[713] *Native Vegetation Act 1991* (SA) s 23(2).
[714] *Native Vegetation Act 1991* (SA) s 23A(2)(a)-(c).
[715] See Government of South Australia, *NV Heritage Agreements frequently asked questions* (Information Sheet, November 2013) available at: https://data.environment.sa.gov.au/Content/Publications/native_veg_heritage_FAQ.pdf
[716] See Department for Environment and Water, 'Heritage Agreements' (Web Page) available at: https://www.environment.sa.gov.au/topics/native-vegetation/protecting-enhancing/heritage-agreements.
[717] See *Native Vegetation Act 1991* (SA), s 27(5).
[718] *Native Vegetation Act 1991* (SA), s 27(4a)-(6).
[719] See for e.g., *Native Vegetation Regulations 2017* (SA) Sch 1, Div 1(2) maintenance of infrastructure, Sch 1, Div 1(6) safety of persons, Sch 1, Div 1(6) taking of seeds and specimens, Sch 1, Div 2(13) vehicle tracks etc.

There are four mechanisms to achieve a SEB:

1. Establishing and managing native vegetation on land (approved by the NVC);
2. Protecting and managing existing areas of native vegetation on land (approved by the NVC);
3. Entering into a Heritage Agreement which provides for ongoing protection of established native vegetation on land (approved by the NVC and Minister);
4. Payments into the Native Vegetation Fund.[720]

Options 1, 2 and 3 are called an 'on ground SEB Areas' and option 4 a 'SEB payment'.

There is a publicly available Native Vegetation Credit Register which records SEB credit sites, potential SEB credit sites and assignment of SEB credit.[721]

As mentioned above, the NVA appears to permit the SEB scheme to be used to allow clearing in almost all circumstances as long as a SEB is approved. This means that the effectiveness of the SEB program in protecting native vegetation is especially important.

We note that the SEB Policy sets out "Biodiversity Offsetting Principles," which the SEB Policy is to be implemented in accordance with. Broadly Biodiversity Offsetting Principles require:

- *Adherence to the Mitigation Hierarchy*

  Offsetting should only be considered when the proponent has identified and documented appropriate measures to avoid and minimize negative impacts of proposed activities on biodiversity.

- *Limits to what can be offset*

  Biodiversity offsets must never be used to circumvent responsibilities to avoid and minimise damage to biodiversity, nor to justify projects that would otherwise not happen. The SEB Policy also states that the NVC will employ the precautionary principle at all times when making a decision, such that where uncertainty exists as to whether the SEB will outweigh the impact of the clearance, approval should not be given.

- *Net environmental gain resulting from the SEB*

  A SEB must achieve an overall environmental gain over and above the scale of the impact. This must involve measurable conservation outcomes resulting from specific actions. In order to achieve a net gain, a method for calculating the loss at the development site and the potential gain at the proposed SEB Area is used. [722] The formula for calculating a SEB payment has led to insufficient funds for the required restoration work, in part due to SEB calculations not factoring ongoing monitoring and maintenance.[723]

[720] *Native Vegetation Act 1991* (SA) s 29(11).
[721] Department for Environment and Water, 'Native Vegetation Credit Register' available at: https://www.environment.sa.gov.au/topics/native-vegetation/offsetting/turn-your-native-vegetation-into-income/native-vegetation-credit-register.
[722] Government of South Australia, *Guide for Calculating a Significant Environmental Benefit* (July 2020) 30 available at: https://cdn.environment.sa.gov.au/environment/docs/native_vegetation_significant_environmental_benefit_guide_1_july_2019.pdf.
[723] Environmental Defenders Office, *Submission to the SA Parliamentary Natural Resources Committee* (6 August 2021) 3 available at: https://www.edo.org.au/publication/review-of-the-native-vegetation-act-1991-sa/.

- *Like-for-like, or better offsets*

  Offsets should be tailored to the attributes of the vegetation or habitat being impacted;

- *Additional conservation outcomes*

  Biodiversity offsets need to be new, or additional, to what is required by duty of care or any other environmental and planning legislation at any level of government;

- *Landscape context*

  SEB Areas should align with priorities identified in key planning documents to ensure that the landscape context is taken into account;

- *Long-term outcomes*

  Offsets need to secure outcomes for at least as long as the project's impact and in areas that are not likely to be affected by future development;

- *Transparency*

  The design and implementation of SEBs and communication of results to stakeholders and community is to be undertaken in a transparent and timely manner;

- *Stakeholder participation*

  All persons involved in offsetting are to understand and apply offsetting principles;

- *Science and traditional knowledge*

  The offsetting process should be documented and informed by sound science and appropriate consideration of traditional knowledge.

<u>Establishing SEB Areas</u>

The SEB Policy sets out requirements for establishing on ground SEB Areas, so that the areas can achieve the objectives set out in the Principles of Biodiversity Offsetting, which broadly relate to:

- *Suitability of a SEB Area*

  The SEB Area must achieve the principle of like for like or better;

- *Location of an SEB Area*

  The SEB Area should be located as close as possible to the site of impact;

- *SEB Area required*

  The SEB Area must directly improve the condition, protection and/or extent of native vegetation over an area of land;

- *Additionality*

  Areas being considered for SEBs should not generally already be protected for conservation purposes.

- *SEB protection*

The SEB Area must be conserved in perpetuity for the growth of native vegetation and must not be used in a way that is inconsistent with that dedication. This can be achieved under section 30 of the NVA, which provides that any condition of consent is binding and enforceable against the applicant, owner or occupier of the land and subsequent owners of the land on which the consent relates. However, the NVC could also require that a Heritage Agreement or Management Agreement be entered into in certain circumstances.

- *SEB Management*

  A SEB Area must be managed in accordance with an NVC approved management plan;

- *Establishing an SEB Area*

  Six criteria are listed, including the SEB Area must be established over a clearly defined area of land.

- *Revegetation or reconstruction*

  Where the clearance of remnant vegetation, and other criteria apply, the SEB should incorporate an area of revegetation or habitat reconstruction of an equivalent area to that being cleared.

Third Party Providers

A SEB can be achieved by an accredited third party under the *Native Vegetation (Credit for Environmental Benefits) Regulations 2015* (Vic).

SEB Payments

'SEB Payments' are payments made into the Native Vegetation Fund to fund on ground activities, which are then recorded in the SEB Register.

Analysis:

In our experience, most offsets frameworks are flawed because they fail to impose genuine ecological limits on offsetting (e.g. not strict like for like), and numerous scientific studies conclude that offsets frameworks generally are failing to deliver environment outcomes. In relation to SA specifically, we note the following:

- SEBs are seen, and used, as a way of facilitating clearing, rather than a last resort. This is particularly the case, where one option for meeting SEB obligations is to pay money into the Native Vegetation Fund.
- Key parts of the framework, such as the meaning of, and process for, SEBs, are contained in complex policy documents, rather than legislative instruments that are subject to parliamentary scrutiny and a proper consultation process.
- The NVC and DEW have noted that much of the research that exists today suggests that payments or management costs need to increase significantly to support the restoration of native vegetation to ensure that SEBs are in fact generating gains.
- Research has also found that there are limitations in the information available about both clearance and SEB areas, which has made it very difficult to evaluate the effectiveness of the SEB scheme in achieving significant environmental benefits, in terms of quantity and quality of vegetation.

The SEB scheme presently operates in a manner that is contrary to the very objects of the NVA, in that SEBs are used to enable vegetation clearing, rather than as a last resort. As the NVC and DEW NRC Submission notes, consideration should be given to whether the SEB scheme is effectively deterring clearance.[724] At present, high clearing approval rates suggest that SEBs are not being used as a last resort.

It is concerning that key parts of the native vegetation framework, such as the meaning of, and process for, SEBs, are contained in complex policy documents, rather than legislative instruments that are subject to parliamentary scrutiny and a proper consultation process.

One of the fundamental principles underpinning the SEB scheme is that SEBs should create an overall environmental gain. The NVC and DEW have noted that much of the research that exists today suggests that payments or management costs need to increase significantly to support the restoration of native vegetation to ensure that SEBs are in fact generating gains.[725] This is a concerning conclusion in circumstances where vast amounts of clearing have been approved on the basis that an environmental gain will be achieved through SEBs.

Research has also found that there are limitations in the information available about both clearance and SEB areas, which has made it very difficult to evaluate the effectiveness of the SEB scheme in achieving significant environmental benefits, in terms of quantity and quality of vegetation.[726]

The assumptions and calculations underpinning the quantification of SEBs are not appropriate. As the NVC and DEW identify in the NVC and DEW NRC Submission, the value of native vegetation is in many ways immeasurable and is not properly understood in terms of its economic, ecological, social and First Nations value.[727] Given that the value of native vegetation is unquantifiable, it is difficult, if not impossible, to establish that SEBs will generate environmental gains and the SEB system is, and will continue to be, fundamentally flawed in this way. Metrics in the calculations cannot, for example, account for the loss of certain types of habitat or habitat features in the landscape. Elements of native vegetation such as canopy, tree hollows and habitat for threatened species are irreplaceable.

The NVC and DEW NRC Submission states that the NVC favours the establishment of SEBs in areas of existing vegetation that can be managed to improve its condition and prevent its decline.[728] Therefore, SEBs often contribute to the overall decline in the extent of vegetation.

There is also limited transparency about how SEBs are monitored. The *Policy for a Significant Environmental Benefit* states that monitoring occurs at two levels, SEB Areas and the SEB Program as a whole. Monitoring at the SEB Area level is dependent on proponents responsible for the management of a SEB Area to submit annual progress reports for the first 10 years of management. The progress reports are to outline the actions taken, outcomes achieved and proposed works for the next year along and include photos at specific photo points of the SEB Area. If a SEB Area provides more than 150 SEB points of grain proponents generally will also have to undertake repeat vegetation assessments. A member of the NVC, or a person authorised under the NVA, can also enter

[724] NVC and DEW NRC Submission 67.
[725] NVC and DEW NRC Submission; See also Crossman N. D. et al, 'Establishing a Biodiversity Market for South Australia: Stage 1 – Review and Scoping' (2009) available at: https://publications.csiro.au/rpr/download?pid=changeme:1192&dsid=DS1, page 12.
[726] Crossman N. D. et al, 'Establishing a Biodiversity Market for South Australia: Stage 1 – Review and Scoping' (2009).
[727] NVC and DEW NRC Submission 73.
[728] NVC and DEW NRC Submission, page 40.

a property of a landowner to assess and record a SEB Area.[729] It is unlikely that this level of monitoring will enable the NVC to properly assess whether SEBs are achieving environmental gains and the principles more generally outlined in the SEB Policy. There do not appear to be any reporting requirements for specific metrics such as the 'like for like' nature of the offset. While site assessments by the NVC can occur, there does not appear to be any guarantee that they will, to verify data provided by landowners and there appear to be limited, if any, enforcement mechanisms in the SEB Policy to require landowners to ensure that they are meeting SEB outcomes. Post-approval compliance with SEBs is reportedly low.[730]

The SEB Policy simply states that the NVC will conduct a review of the Policy and associated Guide and Manual to see whether a program is achieving the objective of an overall environmental benefit in June 2025. The review is intended to evaluate the strengths and weaknesses of the SEB options available, areas for improvements and evaluate the method for calculating losses and gains to the environment.[731] At present, however, it appears the NVC is undertaking limited monitoring of the SEB program and there is a lack of transparency about how funds acquired under the scheme are used.

Compliance and enforcement

Effectiveness of regulatory oversight

The NVC is responsible for keeping 'the condition of the native vegetation of the State under review'. The NVC utilises a risk-based approach towards its enforcement. The NVC and Department of Environment and Water (**DEW**) have stated that in recent times resourcing for compliance has been limited and it has been challenging to maintain an active presence in the State's regions in relation to native vegetation regulation.

Strength of compliance and enforcement framework

Overview:

Part 5 of the NVA regulates clearance and enforcement of native vegetation. It is an offence to clear native vegetation under the NVA unless an exception applies (which may include relevant permit or approval).[732]

The NVC utilises a risk-based approach towards its enforcement.[733] Under the NVA, authorised officers have a range of powers, including to:

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[729] Government of South Australia, *Policy for a Significant Environmental Benefit* (July 2020) 24 available at: https://cdn.environment.sa.gov.au/environment/docs/native_vegetation_significant_environmental_benefit_policy_1_july_2019.pdf

[730] Environmental Defenders Office, *Submission to the SA Parliamentary Natural Resources Committee* (6 August 2021) 3 available at: https://www.edo.org.au/publication/review-of-the-native-vegetation-act-1991-sa/.

[731] Government of South Australia, *Policy for a Significant Environmental Benefit* (July 2020) 24 available at: https://cdn.environment.sa.gov.au/environment/docs/native_vegetation_significant_environmental_benefit_policy_1_july_2019.pdf.

[732] See *Native Vegetation Act 1991* (SA), s 26(1).

[733] See Department of Environment, Water and Natural Resources, *Compliance Commitment Statement* available at: https://cdn.environment.sa.gov.au/environment/docs/dewnr-compliance-commitment-statement-fact.pdf; See also *Native Vegetation Regulations 2017* (SA), Div 5.

- enter and inspect any land for any reasonable purpose connected with the administration or enforcement of the NVA and gather certain information relevant to the officers' inquiries;[734]

- issue enforcement notices where the officer has reasonable grounds to believe that a person has breached or is likely to breach the NVA. Broadly, the enforcement notice can direct a person to refrain from a particular act or direct a person to make good a breach. The officer can also broadly take such urgent action as is required as a result of the situation arising from the breach. A person that fails to comply with the enforcement notice is guilty of an offence, which has a maximum penalty of $10,000;[735] and

- issue an expiation notice to a person alleged to have committed an offence under the NVA unless the officer refers the matter to the NVC.[736]

Specified persons can also apply to the Environment, Resources and Development Court (**ERD Court**) for an order to remedy or restrain a breach of the NVA.[737] Section 31A of the NVA sets out the application process for the ERD Court. The ERD Court is established under the *Environment, Resources and Development Court Act 1993* (SA) (**ERDC Act**) and has jurisdiction over native vegetation matters.

An application must first be referred to a conference under s 16 of the ERDC ACT.[738]

If the Court is satisfied on the balance of probabilities the respondent to the application has breached the NVA, the Court can order one or more of the following:

- require the respondent (the person that has committed the breach) to refrain, either temporarily or permanently, from the act, or course of action, that constitutes the breach;

- require the respondent to make good the breach in a manner, and within a period, specified by the Court, or to take such other action as may appear appropriate to the Court, taking into account the nature and extent of the original vegetation;

- require the respondent to pay to any person who has suffered loss or damage as a result of the breach, or incurred costs or expenses as a result of the breach, compensation for the loss or damage or an amount for, or towards, those costs or expenses;

- require the respondent to pay into the Fund an amount, determined by the Court to be appropriate in the circumstances, on account of the financial benefit that the respondent has gained, or can reasonably be expected to gain, by committing the breach;

- require the respondent to pay into the Fund an amount, determined by the Court, in the nature of exemplary damages (and this amount may be in addition to any amount ordered to be paid under paragraph (d) above);

- require the respondent to take specified action to publicise—

[734] *Native Vegetation Act 1991* (SA) s 33B(1).
[735] *Native Vegetation Act 1991* (SA) s 31E.
[736] *Native Vegetation Act 1991* (SA) s 35(5).
[737] Specified persons are the NVC, a person who owns or who has any legal or equitable interest in land that has been or will be affected by the breach; or in the case of a contravention of, failure to comply with, a heritage agreement, a party to the agreement - see *Native Vegetation Act 1991* (SA), s 31A(1).
[738] *Native Vegetation Act 1991* (SA) s 31A(6).

- the breach of this Act; and
- the environmental and other consequences flowing from the breach; and
- the other requirements of the order made against the respondent;

- require the respondent to refrain from an act or course of action, or to undertake an act or course of action, to ensure that the respondent does not gain an ongoing benefit from the breach.[739]

The Court is to assess any damages to be paid into the Fund,[740] by having regard to:

- damage to the environment caused by the breach of this Act; and
- the detriment to the public interest resulting from the breach; and
- any benefit (including financial benefit) that the respondent sought to gain by committing the breach; and
- any other matter it considers relevant.[741]

The ERD Court can also issue an interim order if it is satisfied that it is desirable to protect native vegetation from clearance or to preserve the rights or interests of parties to the proceedings.[742] Orders are enforced under s 31D and a person who contravenes or fails to comply with an order is, in addition to liability for contempt of the order, guilty of an offence with a maximum penalty of $100,000.[743]

Analysis

The NVC and DEW NRC Submission states that in recent times resourcing for compliance has been limited and it has been challenging to maintain an active presence in the State's regions in relation to native vegetation regulation.[744] This is evidenced through the lack of resourcing available for CDP and the NVC's annual reporting on enforcement. Currently, due to the NVC's limited enforcement activities, there is limited incentive for persons to comply with the NVA. The extent of illegal clearing and compliance action is also not known, nor whether landholders follow approval decisions.

The NVC's Annual Report details clearance decisions, illegal clearance complaints and the enforcement action taken in the relevant year. The NVC's 2020-21 annual report stated that of 183 clearance reports, there were 45 compliance actions that had not been finalised and would be carried over to the next financial year. Of the reports that were actioned, a total of 52 reports (38%) were classified as either:

- No Further Action required (14% of the 52 reports)
- Exempt-non native (7% of the 52 reports)
- Exempt – regulation (17% of the 52 reports) under the NVR

[739] *Native Vegetation Act 1991* (SA) s 31A(6)(c)-(h).
[740] *Native Vegetation Act 1991* (SA) s 31A(6)(g).
[741] *Native Vegetation Act 1991* (SA) s 31A(7).
[742] *Native Vegetation Act 1991* (SA) s 31C.
[743] *Native Vegetation Act 1991* (SA) s 31D.
[744] NVC and DEW NRC Submission, page 71.

A further 45 reports (32%) received Education letters for trivial or minor clearance breaches.[745] We note that the NVC and DEW NRC Submission states that education letters are generally used in the first instance to seek voluntary compliance.[746]

This indicates that a substantial amount of the reported clearances were permitted under SA's native vegetation framework or deemed to not require further action.

The NVC Annual Report does provide information about alleged illegal clearing, including number of reports made (including by region) and action taken, but does not report on area (ie hectares) of alleged (or proved) illegal clearing.[747]

The offence for clearing native vegetation contrary to the NVA attracts a maximum penalty of a sum calculated at the prescribed rate for each hectare (or part of a hectare) of the land in relation to which the offence was committed or $100,000, whichever is greater.[748] Failure to comply with a condition attached to consent to clear native vegetation under the NVC attracts the same maximum penalty.[749]

The NVC Annual Reports suggest there are only a small number of prosecutions and low penalties for illegal clearing. The 2021-22 Annual Report recorded that the NVC received 183 reports of potential illegal clearing.[750] For matters that were a found to be a breach the enforcement actions taken included:

- 19 caution letters (14%);
- 8 enforcement notices (6%);
- 2 (1%) of serious offences referred for investigation and further evidence for legal proceedings.[751]

The above figures demonstrate that penalties for non-compliance are low, and that there are minimal incentives for compliance with the native vegetation regime.

The 2021-22 Annual Report also provides that there were no reports of potential clearance of native vegetation received through the CDP due to resourcing constraints. The CDP analyses satellite imagery on an annual basis to detect changes in native vegetation cover. Prior to 2019-20, on an average, 20-30% of alleged native vegetation clearances annually are detected via the CDP. Therefore, given that the reports of illegal clearing for 2021-22 do not take the CDP figures into account, the reported figures for the period are significantly higher than the number of reports received in the preceding eight years, with an average of 145 reports in preceding years where CDP reporting is removed.[752]

In the financial year 2020-21, the Department indicates that it has been investigating the clearance of around 2500 ha of native vegetation in Southeast SA. These clearances were detected between February 2018 and August 2020 through community reports, observations by DEW and Landscape

[745] NVC Annual Report 2020-21, page 26.
[746] NVC and DEW NRC Submission, page 12.
[747] See https://cdn.environment.sa.gov.au/environment/docs/Native-Vegetation-Council-Annual-Report-2020-21.pdf.
[748] *Native Vegetation Act 1991* (SA) s 26(1).
[749] *Native Vegetation Act 1991* (SA) s 26(2).
[750]NVC Annual Report 2020-21, page 24.
[751] NVC Annual Report 2020-21, page 26.
[752] NVC Annual Report 2020-21, page 25.

SA staff and the change detection program. Civil enforcement, not criminal proceedings are being pursued.[753]

There appears to be a significant gap in relation to the NVC's power to prevent low level non-compliance (through education letters and enforcement notices) and more substantial breaches. The NVC's only recourse for more significant breaches is to commence proceedings in the ERD Court. As such, it is questionable as to whether the NVC's powers remain fit for purpose for moderate level breaches under the NVA. There is room for the NVC's powers to be enhanced under the NVA to ensure compliance with, and enforcement of, the NVA.

It is also noted that proceedings in the ERD Court are particularly burdensome because the NVA does not provide for evidentiary presumptions and the use of evidentiary certificates, which makes it difficult to prove the elements of an offence including the identity and intent of the provider of the false or misleading information.[754]

Finally, the NVA lacks third party appeal rights or broad civil enforcement rights, which limits the robust enforcement of the NVA and scrutiny of the NVC's decisions.

Opportunities for third party enforcement

The NVA lacks broad third party appeal rights or enforcement rights, which limits the robust enforcement of the NVA and scrutiny of the NVC's decisions. There are no third party appeal rights or limited enforcement rights for decisions made by the NVC in relation to clearing applications under s 28 of the NVA, even for proposed large scale vegetation clearing. Only specified persons have civil enforcement rights to enforce a breach of the NV Act, including the Council, a person who owns or who has any other legal or equitable interest in land that has been, or will be, affected by the breach, or in the case of a contravention of, or failure to comply with, a heritage agreement—a party to the agreement.[755]

Transparency of information relating to enforcement and compliance

As demonstrated above, the NVC's Annual Report details clearance decisions, illegal clearance complaints and the enforcement action taken in the relevant year. The data from the NVC's 2020-21 annual report indicates that a substantial amount of the reported clearances were permitted under SA's native vegetation framework or deemed to not require further action.

[753] NVC Annual Report 2020-21, page 28.
[754] Environmental Defenders Office, *Submission to the SA Parliamentary Natural Resources Committee* (6 August 2021) 3 available at: https://www.edo.org.au/publication/review-of-the-native-vegetation-act-1991-sa/.
[755] *Native Vegetation Act 1991* (SA) s 31A.

Tasmania

Tasmania

Background

The Tasmanian Government claims that broadscale clearance and conversion of native forest ceased on public land more than a decade ago,[756] and in 2017 announced it would ban broadscale clearing on agricultural land (while still allowing some clearing under certain exemptions).

Tasmania's *Policy for Maintaining a Permanent Native Forest Estate,* the current version of which was adopted in 2017, clearly states that '**broad scale clearance and conversion of native forest on public or private land is not permitted'**. Prior to this, an earlier version of the Policy outlined an approach for phasing out broadscale clearing and conversion of native forest.

No significant legislative changes were made in response to the 2017 Policy. However, in 2019, the *Forest Practices Act 1985* (Tas) was amended to impose an additional function on the Forest Practices Authority which is now to implement the *Policy for Maintaining a Permanent Native Forest Estate*.

Data suggests that Tasmania's land clearing rates are relatively low. However, inadequate monitoring and reporting makes it difficult to understand the drivers of any ongoing clearing and which legislative settings are the weakest.

Government commitments to end broadscale land clearing in line with the Glasgow Declaration

Commitment

The Tasmanian Government claims that broadscale clearance and conversion of native forest ceased on public land more than a decade ago, and in 2017 announced it would ban broadscale clearing on agricultural land (while still allowing some clearing under certain exemptions).

To demonstrate, the following section considers:

- public commitments and statements; and
- legislative objectives; and
- policy documents.

Public commitments and statements

In 2017, the then Resources Minister Guy Barnett stated, 'we will have a ban on broad scale clearing on agricultural land, but there will be exemptions for farmers for up to 40 hectares per year, per property'.[757]

[756] This is despite the fact that much of Tasmania's native forests have been converted to plantation or production forests for the purpose of commercial timber harvesting.
[757] Emilie Gramenz, 'Tasmanian farmers allowed to cut down more native timber under government changes' *ABC News* (News Article, 4 June 2017) available at: https://www.abc.net.au/news/2017-06-04/tasmanian-farmers-allowed-to-clear-more-native-.

In 2020, in a media release, Minister Barnett declared that 'Broad-scale clearance and conversion of native forest ceased on public land more than a decade ago'.[758] And the Department of State Growth's website states that 'broadscale clearing of native forest on public land ceased in 2010'.

Data does indicate that Tasmania's clearing rates have declined over the past decade.

We note these statements reflect the Tasmanian Government's *Policy for Maintaining a Permanent Native Forest Estate*, which we address further below.

Legislative objectives

The objectives of relevant legislation do not reflect the 'ban' on broadscale clearance and conversion of native forest on public land, nor a commitment to end or reduce clearing by 2030. Rather, the focus is on facilitating sustainable development of land and, where relevant, maintaining ecological processes and genetic diversity and conserving threatened native vegetation communities.

The *Land Use Planning and Approvals Act 1993* (Tas) (**LUPA Act**) and the *Forest Practices Act* 1985 (Tas) (**FP Act**) are the principle regulatory tools that regulate land clearing in Tasmania, although other laws may also apply.[759]

- *LUPA Act*

The LUPA Act is one piece of legislation that falls within Tasmania's 'Resource Management and Planning System' (**RMPS**). The RMPS aims to achieve integration and consistency in planning, environmental, heritage, infrastructure and local government decision-making by applying sustainable development objectives across a suite of legislation.[760]

The LUPA Act provides that it is the obligation of any person on whom a function is imposed, or a power is conferred under the Act to perform the function or exercise the power in such a manner as to further the objectives set out in Schedule 1 to the Act.[761] These objectives relevantly include:

- to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and
- to provide for the fair, orderly and sustainable use and development of air, land and water.

Schedule 1 provides that sustainable development means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –

timber/8588136#:~:text=Tasmanian%20farmers%20allowed%20to%20cut%20down%20more%20native%20timber%20under%20government%20changes,-By%20Emilie%20Gramenz&text=Tasmanian%20farmers%20will%20be%20able,to%2040%20hectares%20per%20year.

[758] The National Tribune, 'Forestry facts rather than furphies' (News Article, 3 August 2020) available at: https://www.nationaltribune.com.au/forestry-facts-rather-than-furphies/.

[759] These include (but are not necessarily limited to) the *Threatened Species Protection Act 1995*, *Nature Conservation Act 2002*, and the *National Parks and Reserves Management Act 2002*.

[760] The RMPS also comprises the *Environmental Management and Pollution Control Act 1994*, *State Policies and Projects Act 1993*, *Tasmanian Planning Commission Act 1997*, *Resource Management and Planning Appeal Tribunal Act 1993*, *Major Infrastructure Development Approvals Act 1999*, *Historic Cultural Heritage Act 1995*, *Living Marine Resources Management Act 1995*, *Marine Farming Planning Act 1995*, *Threatened Species Protection Act 1995*, *Water Management Act 1999*, *Nature Conservation Act 2002*, *National Parks and Reserves Management Act 2002*.

[761] LUPA Act, s 5.

- sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
- safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
- avoiding, remedying or mitigating any adverse effects of activities on the environment.

Schedule 2, Part 2 - Objectives of the Planning Process Established include ensuring that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land.

- *FP Act*

The FP Act does not fall within the RMPS and does not include a set of objectives for the purposes of the FP Act itself. Rather, Schedule 7 sets out the 'objectives of the forest practices system of Tasmania', which is to achieve sustainable management of Crown and private forests with due care for the environment, and taking into account social, economic and environmental outcomes while delivering, relevantly, the conservation of threatened native vegetation communities.

As these objectives are not as strong as those of the RMPS, environmental outcomes may be better achieved if land clearing is regulated by the RMPS and planning authorities assess all clearing applications.

Policy documents

The *Policy for Maintaining a Permanent Native Forest Estate* (**Native Forest Policy**) is a component of the Tasmanian Regional Forest Agreement[762] and a part of the Tasmanian Government's approach to trying to achieve ecologically sustainable forest management (by maintaining a permanent native forest estate).[763] The policy establishes that, 'broad scale clearance[764] and conversion of native forest on public or private land is not permitted'.[765] This Policy applies only to native forest operations as defined under the FP Act,[766] and includes a number of exemptions, including where the clearance and conversion is for agricultural purposes and amounts to less than 40ha per property per year.[767] Notably, the Native Forest Policy does not apply to the 'clearance and conversion of threatened native vegetation communities' – which is a term used in the FP Act (clause 2.2. of the Native Forest Policy). Clearance and conversion of threatened native vegetation communities is regulated in accordance with the FP Act and the *Nature Conservation Act 2002* (**NC Act**).

[762] An analysis of Regional Forest Agreements is outside the scope of this report.
[763] Tasmanian Government, Department of State Growth, *Policy for Maintaining a Permanent Native Forest Estate* (30 June 2017) available at: https://www.stategrowth.tas.gov.au/__data/assets/pdf_file/0006/149748/Tasmanian_Government_Policy_for_Maintaining_a_Permanent_Native_Forest_Estate_-_30_June_2017.pdf.
[764] Defined in the Policy as "clearance and conversion of more than 20 hectares of native forest in any period of five consecutive years (based on calendar years) per property").
[765] Tasmanian Government, Department of State Growth, *Policy for Maintaining a Permanent Native Forest Estate* (30 June 2017) s 3.1.
[766] Tasmanian Government, Department of State Growth, *Policy for Maintaining a Permanent Native Forest Estate* (30 June 2017) s 2.1. However, we note that the FP Act does not specifically define 'native forest operations'. It does not apply to clearance and conversion of threatened native vegetation communities.
[767] Tasmanian Government, Department of State Growth, *Policy for Maintaining a Permanent Native Forest Estate* (30 June 2017) s 3.3. It also does not apply to the clearing of threatened native vegetation communities or non-forest communities. There are also discretionary exceptions to the limits for clearing for some agriculture or major infrastructure development.

One of the functions of the FPA is to implement the Policy. It is our understanding that the Policy is not otherwise reflected in legislation.

Costed plan to end deforestation

The Tasmanian Government does not have a costed plan to end deforestation. While it claims to have ended broadscale clearing, it is unclear whether it has allocated sufficient resourcing to properly implement the rules regulating clearing.

Strengths and weaknesses of land clearing regulation that may be contributing to clearing rates

Overview

In Tasmania, clearing of vegetation is regulated under both the:

- *Forest Practices Act 1985* (**FP Act**) (also referred to as the **forest practices system**);
- *Land Use Planning and Approvals Act 1993* (**LUPA Act**) (also referred to as the **planning system**).

The Acts are not mutually exclusive. In some cases, both Acts apply, and a landholder may need a certified Forest Practices Plan (**FPP**) under the FP Act and a permit under the LUPA Act.

Forest Practices Act 1985

In Tasmania, both timber harvesting (e.g., for commercial purposes) and clearing of trees/native vegetation for other purposes (e.g., agriculture, development) on public and private land is regulated under the FP Act. The term 'forest practices' is used to describe a range of activities covered by the FP Act including timber harvesting, the clearing of trees, and the clearance and conversion of a threatened native vegetation community (amongst other things). The rules under the FP Act are slightly different for forest vegetation and non-forest vegetation. The term 'clearance and conversion of a threatened native vegetation community' is used to regulate the clearing of *threatened* forest and *non-forest* vegetation. There are no controls on the clearing of non-forest vegetation that is not threatened under the FP Act.[768]

The focus of our analysis is on the clearing of trees and other native vegetation, and in particular threatened, non-forest vegetation, for non-commercial purposes, for example clearing for agriculture or development, rather than harvesting of native forests for commercial purposes.

Most land clearing on public or private land will require a FPP, certified by the Forest Practices Authority (**FPA**), a statutory body established under the FP Act. However, there are a number of circumstances where a FPP will not be required (which we discuss further below).

Land Use Planning and Approvals Act 1993

Where clearing of trees/native vegetation is undertaken for the purposes of development or works, a separate permit may be required under the relevant planning scheme (established under the LUPA

[768] See FPA Fact Sheet – Information on land clearing controls in Tasmania, https://fpa.tas.gov.au/Documents/Land_clearing_information_sheet.pdf.

Act) that applies to the area. The planning permit may be required in addition to, or instead of a FPP under the FP Act (or, no permit may be required at all, as we discuss further below).

There are currently different planning schemes that apply to different municipal areas of Tasmania, meaning that land clearing under the planning system is regulated differently across the State. While the Tasmanian Government is in the process of rolling out the 'Tasmanian Planning Scheme' (**TPS**),[769] a single, state-wide planning scheme that will replace the old planning schemes to deliver consistent planning rules across Tasmania, it currently only applies to 18 of the 29 local government areas - interim planning schemes are in place for the remaining councils while they transition to the TPS.

Whether an area of land is subject to the TPS or an interim planning scheme, the requirement for a person to obtain a permit to clear land will generally depend on the purpose and location of the activity.

In general, a person will usually require a permit under the TPS if the clearing is associated with other development/works and it is not otherwise regulated under the FP Act.

Exemptions

As noted above, a person wishing to clear land/native vegetation will generally require approval under the FP Act or the LUPA Act (or both), but there are a number of exceptions to this. If clearing is exempt under the FP Act, it does not necessarily mean it will be exempt under the LUPA Act and vice versa. The below section therefore discusses the exemptions under the FP Act and the LUPA Act separately.

Under the forest practices system

Overview:

While a FPP is generally required to clear trees/native vegetation in Tasmania, there are a number of exemptions provided for in the FP Act, and the *Forest Practices Regulations 2017* (**FP Regulations**).

- *Under the FP Act*

Under the FP Act, in the case of 'clearing and conversion of a threatened native vegetation community' only, certain 'management practices' do not require a certified FPP.[770] That is, so long as they are carried out to not deliberately remove a threatened native vegetation community, 'management practices' can be undertaken without a FPP because they are not considered to be

[769] The TPS outlines the requirements for use or development of land in accordance with the LUPA Act and comprises two parts, the:
- State Planning Provisions (SPPs) which includes the identification and purpose, the administrative requirements and processes, including exemptions from the planning scheme and general provisions that apply to all use and development irrespective of the zone, the zones with standard use and development provisions, and the codes with standard provisions; and
- Local Provisions Schedules (LPSs) that apply to each municipal area and include zone and overlay maps, local area objectives, code lists, particular purpose zones, specific area plans, and any site-specific qualifications.

The SPPs and the relevant LPS together form all of the planning provisions that apply to a municipal area (the local application of the TPS). These will be administered by planning authorities.

[770] FP Act, s 3A

clearing of a threatened native vegetation. As per section 3A of the FP Act, a management practice is defined to mean any of the following:[771]

- applying fertilizer or changing the nature or scale of a fertilizer regime;
- burning off to reduce wildfire fuel;
- constructing fire-breaks;
- mowing, slashing or scything grasses or undergrowth;
- pruning, trimming or lopping vegetation for work safety purposes or to ensure the health of specific specimens of vegetation or vegetation communities;
- removing or controlling noxious weeds;
- grazing of livestock;
- harvesting of timber or other vegetation products.

Analysis:

It is likely that this exemption exists so as to allow persons to carry out routine, small-scale/minimal impact, low risk activities for the purposes of managing their land. However, the activities that comprise a management practice are, at times, described in broad and vague terms (e.g., 'constructing fire breaks'), meaning some of them could be exploited/open to excessive use.

They are also self-assessable, meaning people may be clearing beyond the limits of the exemptions (and it would be difficult to enforce non-compliance).

There are also no notification requirements, which makes it difficult to determine how much clearing under exemptions is being carried out and to ensure people are clearing within the limits of the exemption.

- *Under the FP Regulations*

Overview:

Under the FP Regulations, a FPP will not be required in a number of circumstances, including, relevantly, the following: [772]

- Clearing less than 100 tonnes or 1 hectare of trees in one year, provided the land is not 'vulnerable land'; [773]

[771] FP Act, s 3A(3).
[772] FP Act, s 17(6), FP Regulations, cl 4.
[773] As per s. 3 of the FP Regulations, **vulnerable land** means land that (a) is within a streamside reserve or a machinery exclusion zone within the meaning of the *Forest Practices Code*; or (b) has a slope of more than the landslide threshold slope angles within the meaning of the *Forest Practices Code*; or (c) is within the High or Very High Soil Erodibility Class within the meaning of the *Forest Practices Code*; or (d) consists of, or contains, a threatened native vegetation community; or (e) is inhabited by a threatened species within the meaning of the *Threatened Species Protection Act 1995*; or (f) contains vulnerable karst soil within the meaning of the *Forest Practices Code*; or (g) contains an area of trees reserved from the harvesting of timber or the clearing of trees under a forest practices plan where the period specified in the plan has expired.

- Clearing native vegetation regrowth from an area that has previously been cleared and converted[774] to a non-native forest use;

- Clearing reasonable buffers for existing infrastructure (to protect the infrastructure from damage or for public safety);

- Clearing associated with approved dam works;

- Clearing necessary for creating and maintaining easements for electricity infrastructure and associated tracks;

- Clearing associated with construction and maintenance of gas pipelines, railway corridors and public roads;

- Clearing associated with buildings and related development, provided the buildings and related development are authorised by a permit issued under the LUPA Act;

- Clearing carried out in accordance with an approved conservation covenant, vegetation management plan or a fire management program;

- Harvesting up to 6 tree ferns annually in an area (with the consent of the owner);

- Establishing trees in areas less than 10 hectares which have not had trees (or a threatened native vegetation community) on them for at least 5 years (provided a person does not need to build any roads of quarries).

Analysis:

These exemptions are extensive and may contribute to clearing, especially because they are self-assessable and so it is difficult to enforce non-compliance.

While some of the exemptions may be necessary for the carrying out of urgent, small-scale, public works (e.g., public safety), most of these activities (particularly e.g., clearing of trees or native vegetation regrowth from an area of previously cleared and converted land, clearing for dam works, large-scale electricity infrastructure) warrant rigorous assessment, approval, and oversight.

They should not be exempt from the requirement to obtain a certified FPP authorising the activity, particularly in circumstances where assessment and approval may not be required separately under the planning system. This would help to ensure that only clearing that is absolutely necessary is being carried out, that strict conditions are adhered to, and that associated environmental impacts are minimised.

[774] As per s. 3 of the FP Regulations, ***previously cleared and converted land*** means land (a) whose owner can demonstrate a history of agricultural or other non-forest land use over a consecutive period of at least 5 years, since 1985, during which the land did not contain trees or threatened native vegetation communities; or (b) that has been cleared and converted in the immediately preceding 5-year period in accordance with a certified forest practices plan.

As above, there are no notification requirements, which makes it difficult to determine how much clearing under exemptions is being carried out and to ensure people are clearing within the limits of the exemption.

Under the planning system

Overview:

As noted above, there are a number of different planning schemes in place in Tasmania, which means that land clearing may be regulated differently throughout the State.

However, 'vegetation exemptions' (see Table 6) has been incorporated into, and therefore applies to all those councils that have adopted, the TPS. These activities do not require a permit under the LUPA Act/TPS provided they meet the corresponding requirements.

Table 6 - 'Vegetation exemptions'

Use or development	Requirements
vegetation removal for safety or in accordance with other Acts	If for: (a) clearance and conversion of a threatened native vegetation community, or the disturbance of a vegetation community, in accordance with a forest practices plan certified under the *Forest Practices Act 1985*, unless for the construction of a building or the carrying out of any associated development; (b) the clearing of trees, or the clearance and conversion of a threatened native vegetation community, on any land to enable the construction and maintenance of electricity infrastructure in accordance with the *Forest Practices Regulations 2017* (Tas); (c) fire hazard management in accordance with a bushfire hazard management plan approved as part of a use or development; (d) fire hazard reduction required in accordance with the *Fire Service Act 1979* (Tas) or an abatement notice issued under the *Local Government Act 1993* (Tas); (e) fire hazard management works necessary to protect existing assets and ensure public safety in accordance with a plan for fire hazard management endorsed by the Tasmania Fire Service, Sustainable Timbers Tasmania, the Parks and Wildlife Service, or council; (f) clearance within 2 m of lawfully constructed buildings or infrastructure including roads, tracks, footpaths, cycle paths, drains, sewers, power lines, pipelines and telecommunications facilities, for maintenance, repair and protection; (g) safety reasons where the work is required for the removal of dead wood, or treatment of disease, or required to remove an unacceptable risk to public or private safety, or where the vegetation is causing or threatening to cause damage to a substantial structure or building; or

	(h) within 1.5m of a lot boundary for the purpose of erecting or maintaining a boundary fence, or within 3m of a lot boundary in the Rural Zone and Agriculture Zone
landscaping and vegetation management	Landscaping and vegetation management within a private garden, public garden or park, or within State-reserved land or a council reserve, if: (a) the vegetation is not protected by legislation, a permit condition, an agreement made under section 71 of the Act, or a covenant; or (b) the vegetation is not specifically listed and described as part of a Local Heritage Place or a significant tree in the relevant Local Provisions Schedule, unless the management is incidental to the general maintenance.
vegetation rehabilitation works	The planting, clearing or modification of vegetation for: (a) soil conservation or rehabilitation works including Landcare activities and the like, provided that ground cover is maintained and erosion is managed; (b) the removal or destruction of declared weeds or environmental weeds listed under a strategy or management plan approved by a council; (c) water quality protection or stream bank stabilisation works approved by the relevant State authority or a council; (d) the implementation of a vegetation management agreement or a natural resource, catchment, coastal, reserve or property management plan or the like, provided the agreement or plan has been endorsed or approved by the relevant State authority or a council; or (e) the implementation of a mining and rehabilitation plan approved under the terms of a permit, an Environment Protection Notice, or rehabilitation works approved under the *Mineral Resources Development Act 1995* (Tas).

We have not reviewed the interim planning schemes for the remaining 13 councils (which vary), but we understand those schemes include a similar - though not identical - list of exemptions.[775]

The TPS also incorporates a number of codes, which identify areas of land or planning issues which require compliance with additional controls.

One of these codes is the 'Natural Assets Code' which aims to (amongst other things):

- minimise impacts on water quality, natural assets including native riparian vegetation, river condition and the natural ecological function of watercourses, wetlands and lakes;
- minimise impacts on identified priority vegetation;[776] and

[775] The Minister for Planning has issued a Planning Directive which more or less incorporates the above exemptions into interim schemes. See https://www.planning.tas.gov.au/__data/assets/pdf_file/0005/651308/Planning-Directive-No.-8-Exemptions,-Application-Requirements,-Special-Provisons-and-Zone-Provisions.PDF. There are some limitations on the incorporation - see clause 4.3 and attachment or 2.1.

[776] As per section C7.3.1 of the Natural Assets Code, priority vegetation means native vegetation where the any of the following apply: it forms an integral part of a threatened native vegetation community as prescribed under Schedule 3A.

- manage impacts on threatened fauna species by minimising clearance of significant habitat.[777]

It does this by imposing 'development standards' for 'buildings and works' and 'subdivisions'. These standards comprise controls for 'buildings and works within a waterway and coastal protection area or a future coastal refugia area' and 'clearance within a priority vegetation area', and controls for 'subdivisions within a waterway and coastal protection area or a future coastal refugia area' and 'subdivision within a priority vegetation area. For example, the controls for clearance within a priority vegetation area under the standards for buildings and works provide that the clearance must:

- be for:
    - an existing use on the site, provided any clearance is contained within the minimum area necessary to be cleared to provide adequate bushfire protection, as recommended by the Tasmania Fire Service or an accredited person;
    - buildings and works associated with the construction of a single dwelling or an associated outbuilding;
    - subdivision in the General Residential Zone or Low Density Residential Zone;
    - use or development that will result in significant long term social and economic benefits and there is no feasible alternative location or design;
    - clearance of native vegetation where it is demonstrated that an ongoing pre-existing management cannot ensure the survival of the priority vegetation and there is little potential for long-term persistence; or
    - the clearance of native vegetation that is of limited scale relative to the extent of priority vegetation on the site.

- minimise adverse impacts on priority vegetation, having regard to:
    - the design and location of buildings and works and any constraints such as topography or land hazards;
    - any particular requirements for the buildings and works;
    - minimising impacts resulting from bushfire hazard management measures through siting and fire-resistant design of habitable buildings;
    - any mitigation measures implemented to minimise the residual impacts on priority vegetation;
    - any on-site biodiversity offsets; and
    - any existing cleared areas on the site.

While the Natural Assets Code generally applies, it exempts a number of activities from the requirement to comply with it, including (but not limited to):[778]

- clearance of native vegetation:

Fire Service Act 1979 of the *Nature Conservation Act 2002* (Tas); is a threatened flora species; it forms a significant habitat for threatened fauna species; or it has been identified as native vegetation of local importance.

[777] As per section C7.3.1 of the Natural Assets Code, significant habitat means the habitat within the known or core range of a threatened fauna species, where any of the following applies: is known to be of high priority for the maintenance of breeding populations throughout the species' range; or the conversion of it to non-priority vegetation impact on breeding populations of the threatened fauna species.

[778] Natural Assets Code, Section C7.4 (of the Tasmanian Planning Scheme).

- within a priority vegetation area[779] on existing pasture or crop production land; or
- if the native vegetation is within a private garden, public garden or park, national park, or within State-reserved land or a council reserve (provided the native vegetation is not protected by legislation, a permit condition, an agreement made under section 71 of the LUPA Act, or a covenant);

- forest practices or forest operations in accordance with a FPP under the FP Act (unless for the construction of a building or the carrying out of any associated development);
- consolidation of lots.

Moreover, it only applies to:[780]

- a waterway and coastal protection area;
- a future coastal refugia area; and
- a priority vegetation area, but only within certain zones (and in some of these zones, the Code only applies to subdivisions, not other developments).

Analysis:

While some exemptions may be warranted in theory (e.g., to enable urgent, small-scale, public works to be carried out, or where otherwise authorised under another Act (i.e., assessment processes should not necessarily be duplicated), the exemptions in the TPS are extensive and may contribute to clearing, because, for example:

- the "safety" exemption may be exploited to clear unwanted vegetation;
- clearing for boundaries or fencing may cover extensive areas (and may therefore involve large amounts of clearing);
- some clearing may occur with no oversight by a local council or FPA if the above activities are also exempt from requiring a FPP (e.g., to enable the construction and maintenance of electricity infrastructure, which is a controversial issue in Tasmania at present).

While the Natural Assets Code is an important safeguard in theory, developments or works falling within the exemptions to the Code could have enormous impacts on natural values, but those developments/works are not necessarily regulated adequately under other laws (e.g., even if the developments or works are carried out in accordance with a FPP, this will not necessarily protect the natural and cultural values of the area).

The limited application of the Natural Assets Code (i.e., because it only applies to some development, and development within certain areas) also means that development that is not carried out in these areas are subject to fewer (or no) vegetation clearance controls, potentially leading to increased clearing in these areas.

Code-based clearing / Self-assessable clearing

There is no code-based clearing in Tasmania. In general, clearing either requires an approval (see below) or is exempt from requiring an approval (see above).

[779] As per section C7.3.1 of the Natural Assets Code, this means land shown on an overlay map in the relevant Local Provisions Schedule, as within a priority vegetation area.
[780] Natural Assets Code, Section 7.2 (of the Tasmanian Planning Scheme).

Clearing Requiring Approval

Under the forest practices system

Overview:

Under the FP Act, a person must not carry out, or cause or allow the carrying out of, the clearing and conversion of a threatened native vegetation community, or the clearing of trees (amongst other things), unless authorised by a FPP,[781] except if that person is carrying out a 'management practice' (in the case of clearing and conversion of a threatened native vegetation community), or the activity falls within one of the other exemptions listed above. A person must not also harvest tree ferns unless in accordance with a FPP (unless it falls within the exemption above). Here:

- threatened native vegetation communities are those defined in Schedule 3A of the NC Act, and include both forest and non-forest communities; and
- clearance and conversion (of a threatened native vegetation community) means the deliberate process of removing all or most of the threatened native vegetation community from an area of land and –
    - leaving the area, on a permanent or extended basis, in an unvegetated state; or
    - replacing the threatened native vegetation so removed, on a permanent or extended basis, with any, or any combination of, the following:
        - another community of native vegetation;
        - non-native vegetation;
        - agricultural works;
        - residential, commercial or other non-agricultural development; or
    - doing a combination of the above things.

Any person may prepare a FPP and apply to the FPA for certification of that plan.[782]

Section 18(2) of the FP Act sets out what a FPP is to contain, which includes (but is not limited to):

- details of the forest practices to be carried out on the land;
- in circumstances where the owner of the land intends to:
    - revegetate an area:
        - details of how the land is to be restocked with trees;
    - harvest tree ferns:
        - the name of the person intending to harvest the tree ferns;
        - the estimated number of tree ferns to be harvested;
        - an estimate of the period during which tree ferns are to be harvested.
    - clear and convert a threatened native vegetation community:
        - the identity of the community and its range;
        - how much of the community would be cleared and converted;
        - the kind of vegetation, works or development that would replace the threatened native vegetation and converted under the plan.
- an estimated time period for the completion of the operations;
- specification of how long the plan is to remain in force.

[781] FP Act, s 17.
[782] FP Act, s 18(1).

Further, a FPP must be prepared in accordance with the *Forest Practices Code*.[783]

The Forest Practices Code aims to provide a practical set of guidelines to manage natural and cultural values. Its purpose is to 'prescribe the manner in which forest practices shall be conducted so as to provide reasonable protection to the environment'.[784] It applies to all land tenures.

The FPA can request further information about the FPP before making its decision.[785]

The FPA then has the power to decide whether to certify, amend (and then certify), or refuse, a FPP.[786]

However, the FPA must not certify a FPP involving the clearing and conversion of a threatened native vegetation community unless satisfied that:[787]

- the clearance and conversion is justified by exceptional circumstances; and/or
- the activities authorised by the FPP are likely to have an overall environmental benefit; and/or
- the clearance and conversion is unlikely to detract substantially from the conservation of the threatened native vegetation community;
- the clearance and conversion is unlikely to detract substantially from the conseervation values in the vicinity of the threatened native vegetation community.

Section 3 of the Forest Practices Act defines 'exceptional circumstances' as:

> Exceptional circumstances that may justify the clearance and conversion of a threatened native vegetation community, include the need to do one or more of the following:
>
> (a) ensure the physical safety of an owner of land or the owner's relatives or employees;
>
> (b) remove or reduce a bushfire risk;
>
> (c) respond to a threat to the State's biosecurity;
>
> (d) protect a rare, vulnerable or endangered species of flora or fauna;
>
> (e) discharge a statutory obligation or comply with an order of a court;

'Overall environmental benefit', and 'unlikely to detract substantially from the conservation' are not defined in the FP Act and no other guidance appears to be provided by the FPA on what these terms/concepts mean.

When 'performing its functions and exercising its power' under the FP Act, the FPA must not 'diminish the ongoing application of the Forest Practices Code'.[788]

[783] FP Act, s 18(3). The current code is the *Forest Practices Code 2020* and is available here: https://www.fpa.tas.gov.au/__data/assets/pdf_file/0025/9439/Forest_Practices_Code_2020.pdf.
[784] FP Act, s 31.
[785] FP Act, s 18(5).
[786] FP Act, s 19(1).
[787] FP Act, s 19(1AA).
[788] FP Act, s 4DA.

The Forest Practices Code and guidelines within the Code use discretionary rather than mandatory language (such as "should" instead of "must) which is unlikely to provide adequate or enforceable protections for natural or cultural values.

There are also provisions in the Forest Practices Code that relate to threatened fauna species – section D4.2 for fauna generally and D4.3 for listed threatened species and communities. Additional management prescriptions for threatened species are provided through a tool known as the 'Threatened Species Adviser' (**TSA**).[789] The TSA is a decision-support tool intended for use by those conducting biodiversity evaluations (ordinarily Forest Practice Officers) as part of the preparation of FPPs.

The FPA also has the specific function of implementing the *Policy for Maintaining a Permanent Native Forest Estate.*[790]

Once a FPP is certified, it authorises forest practices and any associated operations to be carried out in accordance with that FPP, and it is an offence to contravene or fail to comply with the provisions of that FPP.[791]

There is no power for the Minister to 'call in' and determine an application for an FPP.

If the FPA refuses to certify a FPA, the person who applied for the FPP may appeal to the Tasmanian Civil and Administrative Tribunal (**TasCAT**).[792]

If the FPA refuses to certify a FPP on the ground that the FPP would threaten a threatened species or involve the clearance and conversion of a threatened native vegetation community, and an appeal to the TasCAT is dismissed, then that person may apply to the Environment Minister for compensation under the NC Act for any financial loss suffered as a result of the FPP not being certified.[793] If the Minister refuses an application for compensation (e.g., because the person refused to protect the threatened native vegetation community under a covenant[794]), the landowner may re-apply for certification of the same FPP and the FPA cannot refuse to certify it.[795] For the purpose of the analysis below, we refer to this avenue as the "**FPP Loophole**" (which was brought to light by the recent EDO case of *Tasmanian Conservation Trust v Forest Practices Authority* [2022] TASSC 29).

Finally, if the proposed forest practices will have, or are likely to have, a significant impact on a matter of national environmental significance (e.g., federally listed threatened species), the proposal must be referred to the Commonwealth Environment Minister for a decision on whether assessment and approval is required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).[796]

[789] https://fpa.tas.gov.au/planning/biodiversity/threatened-species-adviser/threatened-species-adviser-system.
[790] FP Act, s 4C(fb).
[791] FP Act, s 21(a).
[792] FP Act, s 25(1).
[793] NC Act, s 41(1).
[794] See NC Act, s 41A(2)(c).
[795] NC Act, s 44(8)(a) – on the grounds that implementation of the plan would adversely affect a threatened species of flora or fauna or a threatened native vegetation community which has previously been considered by the FPA in respect of the FPP.
[796] Unless forestry operations are undertaken in accordance with a Regional Forest Agreement (s 38, EPBC Act).

Analysis:

It is a general strength of the forest practices system that it is overseen by a specialist, independent, body[797], and that FPPs are required to be assessed and certified in order that clearing be carried out. It is also a strength that the FPA may vary a FPP[798], or revoke a certified FPP 'for any reason it considers sufficient'[799] (though in either case it must first seek submissions from the holder of the FPP). [800]

However, the lack of appropriate safeguards in the FP Act, together with the FPA's broad discretion to certify (or vary) a FPP, is a key weakness.

The FP Act does not impose any specific decision-making requirements on, or provide any guidance to, the FPA when determining a FPP (including a requirement to consider the principles of ecologically sustainable development and/or climate change), except in the case of considering whether to certify a FPP to clear a threatened native vegetation community where the FPA must be satisfied of certain matters. It is also concerning that the FPA may certify a FPP for a threatened native vegetation community in 'exceptional circumstances', especially as there are no clear limits on what may constitute 'exceptional circumstances'.

Applications for an FPP are required to include specifications that are in accordance with the Forest Practices Code.[801] While the Code aims to manage natural and cultural values, there are concerns that the Forest Practices Code does not adequately protect biodiversity values (amongst other things). For example, EDO has previously submitted that the Code must include prescriptions and management actions to better protect biodiversity, including prescribed requirements for the protection of threatened native vegetation communities and criteria for assessment under s19(1AA) of the FP Act; and requirements for protection of habitat for threatened species, both flora and fauna. [802]

There is also no requirement for a person wanting to carry out forest practices to undertake any kind of environmental impact assessment of the proposed practices. Rather, they must only include certain information in the FPP and prepare the FPP in accordance with the Forest Practices Code. And there is no mechanism under the FP Act to address the cumulative impacts of forest practices.

Additionally, while the FPA has the function of implementing the *Policy for Maintaining a Permanent Native Forest Estat*e, it is unclear how this guides its decision making, particularly in terms of considering the policy when considering whether or not to certify a FPP. And, as noted above, the *Policy for Maintaining a Permanent Native Forest Estat*e does not apply to the 'clearance and conversion of threatened native vegetation communities'.

Whilst it is consistent with other jurisdictions' environment and planning law frameworks, the fact that the applicant for clearing may appeal to TasCAT if the FPA refuses to certify a FPP may lead to clearing (though the FPA's report *'Procedures for the management of threatened species under the forest practices system: Report on implementation during 2019-20*' notes that there were no tribunal

[797] FP Act, s 4A(1).
[798] FP Act, s 22(1).
[799] FP Act, s 24A(1).
[800] FP Act, s 22(2), 24A(2).
[801] FP Act, s18.
[802] EDO, *Submission on the Draft Forest Practices Code 2019*, 20 September 2019, available at https://www.edo.org.au/publication/edo-submission-on-the-draft-forest-practices-code-2019/

cases in 2019-20[803], so it is not clear when/how often appeals eventuate). Similarly, it is not clear how many FPPs have been certified as a result of the FPP Loophole (due to a lack of specific data on how FPPs are certified), however, it is possible that the Loophole contributes to clearing. In any event, its existence illustrates that the forest practices system in Tasmania (like other jurisdictions' respective frameworks) generally prioritises development and landholders' rights over environmental protection.

While the FPA is required to report on various matters, there is no publicly available register which shows what and how many FPPs have been certified (and how much land clearing has actually been carried out under certified FPPs), which makes it difficult for the public to understand how much and where clearing is being carried out under the forest practices system.

There is also no statutory right for the public to view or comment on applications for the certification of FPPs (and therefore no requirement for the FPA to take account of public views on proposed forest practices), and no third party merits appeal rights, which undermines important public participation principles.

Under the planning system

Overview:

A person will generally need to seek planning approval if they want to, amongst other things, undertake a new development on an area of land.[804] As per the LUPA Act, the definition of development includes the 'carrying out of works', and the definition of 'works' includes the 'removal, destruction or lopping of trees and the removal of vegetation'.[805]

However, whether or not a person ultimately requires a permit to clear land will depend on the applicable planning scheme, and:

- whether the clearing is exempt (as per the discussion above);
- the purpose of the clearing; and
- the location of clearing.

If a person is carrying out clearing that is not ancillary to another development or use,[806] it will likely fall within the 'resource development'[807] use category under the relevant planning scheme and be assessed according to the relevant zone and code requirements of that scheme.

[803] FPA & DPIPWE 2021, Procedures for the management of threatened species under the forest practices system: Report on implementation during 2019–2, p 8.
[804] See generally s 51(1) of the LUPA Act.
[805] LUPA Act, s 3.
[806] As per s 3 of the LUPA Act, use, in relation to land, includes the manner of utilising land but does not include the undertaking of development.
[807] See Tasmanian Planning Scheme, State Planning Provisions, Table 6.2 Use classes, which describes 'resource development' as 'use of land for propagating, cultivating or harvesting plans or for keeping and breeding of livestock or fishstock. Examples include agriculture use, aquaculture, controlled environment agriculture, crop production, horse stud, intensive animal husbandry, plantation forestry, forest operations, turf growing and marine farming shore facility. However, planning scheme adopts the definition of 'forest operations' in the *Forest Management Act 2013* (Tas) which, as per s 3 means, 'the work connected with (a) seeding and planting trees; or (b) managing trees before they are harvested; or (c) harvesting, extracting or quarrying forest product and includes any related land clearing, land preparation, burning-off or access construction'. The Forest Management Act is what establishes the State-owned forestry corporation (Sustainable Timber Tasmania, formerly known as Forestry Tasmania) and the reservation of land for commercial timber harvesting (the regulation of which is outside the scope of this report). It is therefore not clear to us

However, clearing that occurs under a planning scheme will usually be an ancillary/subsidiary use and will therefore be assessed as part of the assessment for the primary development/use (if that activity requires assessment under the scheme).[808] If that primary development/use does not require assessment (i.e., no permit is required or it is otherwise 'permitted'),[809] the associated clearing will generally not be assessed (though there are certain requirements (e.g., 'development standards' and codes), that the primary development/use generally has to comply with).

The Natural Assets Code will apply to clearing in some circumstances (see discussion above about exemptions). Where the Code does apply, it may require the proposed development/use to comply with certain requirements (e.g., clearance of native vegetation within a priority area must minimise adverse impacts on priority vegetation).

The Local Historic Heritage Code includes a 'Significant Trees' provision which provides some protection for trees that are listed as 'significant' under a planning scheme. These trees generally cannot be removed or damaged without a permit.

Under the TPS, an application must be made for any use or development for which a permit is required under the planning scheme.[810] Amongst other things, an application must include details of the location of the proposed use or development and a full description of the proposed use or development.[811] A planning authority may also require further or additional information as it considers necessary to satisfy it that the proposed use or development will comply with any relevant standards in the zone or codes that are applicable to the use or development. Amongst other things, this could include a site analysis and site plan showing 'vegetation types and distribution, including any known threatened species and trees and vegetation to be removed.[812] In determining an application for any permit for use or development, the planning authority must, in addition to the matters required by section 51(2) of the LUPA Act, take into consideration all applicable standards and requirements in the planning scheme and, if the development/use is a 'discretionary' use/development, any representations (i.e., public or other submissions) received.

Under section 51(2) of the LUPA Act, a planning authority must, in determining an application, seek to further the objectives of the RMPS (which includes 'to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity'), amongst other things.

A planning authority must consider further matters if the application for a permit is for a 'discretionary' use/development.[813]

whether, in practice, land clearing other than commercial timber harvesting, falls within the 'resource development' use category, but it is possible given the definition.

[808] This is because most clearing in the planning context is generally associated with other development/use. Even though the definition of 'works' under the LUPA Act captures the lopping of trees or removal of native vegetation, there is no use category for clearing land and so it is generally assessed alongside other development.

[809] Under the planning schemes, there are five kinds of use or development: 'Exempt', 'No Permit Required', 'Permitted' or 'Discretionary' and 'Prohibited'.

[810] Tasmanian Planning Scheme, State Planning Provisions, cl 6.1.1.

[811] Tasmanian Planning Scheme, State Planning Provisions, cl 6.1.2(c),(e).

[812] Tasmanian Planning Scheme, State Planning Provisions, cl 6.1.3(a)-(c).

[813] Tasmanian Planning Scheme, State Planning Provisions, cl 6.10.2.

If an application is for a development/use that is 'permitted' under the planning scheme and the application meets the requirements of the planning scheme, the planning authority must grant the application either unconditionally or subject to conditions.[814]

If an application is for a 'discretionary' use/development, a planning authority may refuse to grant a permit.[815] If a planning authority grants, or refuses to grant, a permit, the planning authority must provide a notice of its decision on the applicant and any person who made a representation in relation to the application.[816]

If a planning authority refuses to grant a permit, the applicant may appeal to the TasCAT.[817]

A person who made a 'representation' in respect of a discretionary use/development application may also appeal to the TasCAT.[818]

If an application is for a development/use that is likely to have a significant impact on the environment, the Director of the Environment Protection Authority (**EPA**) may require that it be referred to the EPA for assessment. If the development is a "level 2 activity"[819] under the *Environmental Management and Pollution Control Act 1994* (Tas), it must be referred to the EPA for assessment.

If an application is declared to be a major project by the Minister, it will be determined by a Development Assessment Panel established by the Tasmanian Planning Commission (**TPC**).[820] The Panel can determine the assessment criteria for the application.[821]

There is no power for the Minister to call in or determine applications under the LUPA Act.

If the proposed development/use will have, or is likely to have, a significant impact on a matter of national environmental significance (e.g., federally listed threatened species), the proposal must be referred to the Commonwealth Environment Minister for decision on whether assessment/approval is required under the EPBC Act.

Finally, if a FPP (or any other approval) is required in addition to a planning approval, the planning approval will not take effect until the FPP has been certified (or the other approvals granted).[822]

Analysis:

It is a general strength of the planning system that a planning authority must consider a number of matters when determining a development application (including the objects of the RMPS which includes sustainable development), and that a permit is generally required for development/use.

[814] LUPA Act, s 58(1).
[815] LUPA Act, s 57(2).
[816] LUPA Act, s 57(7).
[817] LUPA Act, s 61(4).
[818] LUPA Act, s 61(5). We note there are no third party merits appeal rights for development/uses other than 'discretionary' uses/developments, nor are there any opportunities to make public submissions on development/uses other than those that are categorised as discretionary.
[819] These are defined and set out in Schedule 2 to the *Environmental Management and Pollution Control Act 1994*. One example includes 'Wood Processing Works' which means the 'conduct of works at which timber is sawn, cut, compressed, milled, machined or kiln-dried, being works with a total production of 1000 cubic metres or more per year.
[820] LUPA Act, Part 4, Division 2A.
[821] LUPA Act, Part 4, Division 2A, Subdivision 9.
[822] LUPA Act, s 53(4).

However, the fact that there is no clear and dedicated pathway for clearing in and of itself to be assessed is a key weakness, as are the numerous exemptions (as we discussed above). It is these two factors that, in our view, are most likely to contribute to clearing in Tasmania under the planning system.

Under the TPS, there is no use category which squarely captures land clearing (other than 'forestry operations'), which means an application for clearing will only be assessed where:

- it falls into the 'resource development' category and the clearing will be carried out within a zone that requires a planning authority to assess/determine the application;
- it is ancillary/subsidiary to another development/use that is within a zone that requires a planning authority to assess/determine the application.

This means that at least some clearing is likely to go unassessed under the planning system and proceed with no oversight by relevant planning authorities (though it may be assessed by the FPA if it requires a FPP under the FP Act e.g., clearing of trees on area of land that is more than one hectare).

Further, the codes only apply in certain circumstances and do not necessarily provide adequate protections for the environment. In this regard, we refer to our comments above on the Natural Assets Code.

Moreover, there is no requirement for a person to carry out environmental assessment under the planning schemes, nor for an application to consider the likely impacts of the development/use on a specified area (there is only a requirement to, for example, show the presence of threatened species and the type and volume of native vegetation that is proposed to be removed – there is no requirement to show how any impacts to those threatened species will be mitigated/minimised).

While applications for clearing that are associated with discretionary use/development have to be advertised (so that people can make representations), other applications are not required to be made publicly available, and there is no public register which records where and how much clearing is proposed to take place, nor are there any notification requirements for exempt development/uses. This means there is the potential for there to be little transparency over clearing being carried out under the planning system.

Additionally, the assessment process is still ultimately decided based on a discretionary judgment by the relevant planning authority. The major assessment process is also concerningly discretionary, with the Development Assessment Panel being able to determine the assessment criteria.

Protection of Environmentally Sensitive Areas

Under the forest practices system

Overview:

The forest practices system provides some additional protections for environmentally sensitive areas in two main ways:

- *Vulnerable land*

As noted above, under the FP Regulations, a FPP will be required where a person wants to clear trees on an area of vulnerable land that is less than one hectare, or the volume of trees is less than 100 tonnes. As per clause 3 of the FP Regulations, **vulnerable land** means land that:

- is within a streamside reserve or a machinery exclusion zone within the meaning of the *Forest Practices Code*; or
- has a slope of more than the landslide threshold slope angles within the meaning of the *Forest Practices Code*; or
- is within the High or Very High Soil Erodibility Class within the meaning of the *Forest Practices Code*; or
- consists of, or contains, a threatened native vegetation community; or
- is inhabited by a threatened species within the meaning of the *Threatened Species Protection Act 1995* (Tas); or
- contains vulnerable karst soil within the meaning of the *Forest Practices Code*; or
- contains an area of trees reserved from the harvesting of timber or the clearing of trees under a forest practices plan where the period specified in the plan has expired.

- *Significant natural and cultural values*:

The Forest Practices Code refers to 'significant natural and cultural values'. These are defined as 'natural and cultural values identified by the evaluation processes, and for which management prescriptions are developed where required'. As per the Code, 'natural and cultural values' include biodiversity, genetic resources, landscape, cultural heritage, geodiversity, soils, water quality and flow, and landforms. The Code sets out 'general principles' and the 'operational approach' that should (though not always "must") guide forest practices in respect of these values, including for the management of threatened species and communities. Endorsed and site-specific management prescriptions will generally be applied/developed in order to manage these values.

Analysis:

The current legal framework does not contain strong, mandatory conservation mechanisms to protect areas of high conservation value (or similar areas, such as 'environmentally sensitive areas').

The classification of land as 'vulnerable' will not necessarily prevent clearing, because a person is still able to carry out forest practices on vulnerable land so long as they do so in accordance with a certified FPP. As noted above, the FPA has broad discretion to certify FPPs, including where a person applies to clear/convert a threatened native vegetation community (which falls under the definition of vulnerable land). Although a person is generally not allowed to clear/convert a threatened native vegetation community, the FPA may certify a FPP for such activities in certain circumstances (including in "exceptional circumstances" for which no definition/guidance is given), which means the protections in place for threatened native vegetation communities are not as strong as they likely should be. In saying that though, the FPA's latest annual report indicates that approximately 15.3 ha of threatened native vegetation communities were cleared and converted in 2021–22. The FPA may also amend a FPP by inserting conditions and restrictions to be complied with, which could, in theory, include extra measures for 'vulnerable land'. This appears to be envisaged by the Forest Practices Code (see, for example, section 2.2 of the Code which states that "in most cases, the Code provides the minimum standards that must be achieved. In certain cases, further protection of particular environmental values will require appropriate measures to be specified in FPPs'). However, unless the measures relate to the volume of clearing, they are unlikely to affect clearing rates.

The FP Act and the Forest Practices Code do not refer to 'vulnerable land', 'environmentally sensitive areas', 'areas of high conservation value', or 'critical or essential habitat'. While the Forest Practices

Code refers to 'areas containing significant natural and cultural values', it does not appear to mandate any specific protections for those areas (rather the Code indicates that management prescriptions will be developed by the FPA and/or the Department of Natural Resources and Environment for those values), nor does it provide a comprehensive or exhaustive definition of what 'significant natural and cultural values' are or include. The Forest Practices Code is replete with discretionary rather than mandatory language (such as "should" instead of "must) and is generally not considered to provide adequate or enforceable protections for natural or cultural values.[823]

The FPA is not required to consider listed threatened species when deciding whether to certify a FPP. And even if they were required to consider whether an area contains 'critical habitat', or critical habitats were otherwise protected under the FP Act from clearing, it is our understanding that no critical habitats (nor interim protection orders under the NC Act) have been declared in Tasmania to date. The lack of such protections could, in theory, contribute to clearing.

Under the planning system

Overview:

As noted above:

- the Natural Assets Code provides some protection for 'priority vegetation' in 'priority vegetation areas' and 'significant habitat'; and
- a planning authority may require a development application to include details about the presence of any listed threatened species.

Analysis:

The existing legal framework does not contain strong, mandatory conservation mechanisms to adequately protect areas of high conservation value (or habitats essential or critical for threatened species).

While the Natural Assets Code ostensibly provides some protection for 'priority vegetation' and 'significant habitat', it ultimately focuses on development control rather than managing natural assets at a landscape or ecosystem level, and therefore misses the opportunity to protect and preserve remnant native vegetation and habitat corridors.

The exemptions from complying with the Natural Assets Code, and the Code's limited application (amongst other things), are also problematic and means it fails to provide contemporary and comprehensive protection.

While there are mechanisms to protect 'critical habitats' under the *Threatened Species Act 1995* (Tas) (**TS Act**), or to make interim protection orders under the NC Act, it is our understanding that no such declarations or orders have been made.

[823] See, for example, EDO, *Submission on the Draft Forest Practices Code 2019*, 20 September 2019, available at https://www.edo.org.au/publication/edo-submission-on-the-draft-forest-practices-code-2019/

Offsets

Under the forest practices system

Overview:

There is no statutory framework for offsets under the FP Act (nor under the NC Act, or TS Act).

However, the FPA has a policy entitled '*The use of offsets to compensate for the loss of significant biodiversity values within forest practices plan*' (**FPA Offsets Policy**).[824]

Amongst other things, the FPA Offsets Policy provides that:

- offsets to mitigate for the loss of a known site or habitat for threatened species may be approved by the FPA in consultation with the Threatened Species Section of the DNRE under the agreed procedures for management of threatened species[825]

- offsets to compensate for the conversion of native forest or threatened native vegetation will be considered by the FPA in accordance with s. 19(1AA) of the FP Act.[826]

- offsets are determined on a case-by-case basis in accordance with the DNRE's 'General Principles for Biodiversity Offsets'.[827]

- as a general rule of thumb, a one to five ratio will be used for an 'area offset', (i.e., a loss of one hectare will require an offset of five hectares on a 'like for like' basis). However, in some cases a 1:1 approach might be acceptable. The 1:5 ratio may be adjusted by the FPA in either direction to take account of factors such as the size, condition, context and viability of the impacted site compared to the proposed offset site.

- the FPA will not accept monetary payments as a means of off-setting the loss of values on one piece of land with the intention of securing those values on other land. However, the FPA may facilitate monetary payments to a third party to meet the DNRE's General Offset Principles following the FPA financial offsetting options.

In applying DNRE's General Principles for Biodiversity Offsets, the FPA Offsets Policy adopts, in theory, a mitigation hierarchy and 'like for like' principles (i.e., the Principles state that alternatives and options to avoid, minimise and remedy the impacts of a proposal must be adequately addressed prior to the consideration of offsets' and that 'proposed offsets should aim to maintain or improve

[824] Available here: https://www.fpa.tas.gov.au/__data/assets/pdf_file/0020/5825/FPA_policy_on_offsets_April_2017.pdf.
[825] We note that the procedures (which are made pursuant to the Forest Practices Code) do not refer to offsets.
[826] As noted above, section 19(1AA) of the FP Act sets out the circumstances in which the FPA may certify a FPP for the clearing and conversion of a threatened native vegetation community. There is no reference to offsets.
[827] The DNRE's 'General Offset Principles' are available at Attachment 1 of the FPA Offsets Policy. This document indicates that offsets have been set up under Tasmania's Resource Management and Planning System (RMPS) by virtue of the definition of 'sustainable development' (the promotion of which is one of the objectives of the RMPS). This is because the RMPS definition of sustainable development includes 'avoiding, remedying or mitigating any adverse effects of activities on the environment' and offsets are one form of mitigation for the potential impacts of proposed activities on natural values.

conservation outcomes, and offsets should generally be for the same species, native vegetation community, or other natural value that is to be adversely impacted by the proposal').

Analysis:

It is positive that the FPA Offsets Policy applies the DNRE's General Principles for Biodiversity Offsets and thereby adopts, in theory, a mitigation hierarchy and 'like for like' principles. However, because the FP Act does not provide for the imposition of offsets in the FPP certification process, the Forest Practices Code does not provide any further guidance, the FPA Offsets Policy is at a very high level, and certified FPPs are not publicly available, it is unclear how offsets are applied in practice and how effective they are at compensating and improving native vegetation loss, especially as no reviews of the framework appear to have been carried out (and there is no legal obligation to assess or report on the framework).

The FPA's Annual Report for 2021-22 does suggest that 'vegetation management agreements' have been made under the FP Act[828] for the purpose of managing offset areas,[829] but, once again, it is difficult to know how effectively these areas offset impacts without further details.

Under the planning system

Overview:

There is no specific statutory framework for offsets under the LUPA Act. However, the Resource Management and Planning System (under which the LUPA Act sits) does appear to envisage the use of offsets. This is because the definition of 'sustainable development' includes 'avoiding, remedying or mitigating any adverse effects of activities on the environment'.[830] The DNRE's General Principles for Biodiversity Offsets (which also appear to apply to the planning system[831]) state that 'offsets are one form of mitigation for the potential impacts of proposed activities on natural values.'

While there is no specific statutory framework for offsets, planning authorities have a broad power to impose conditions,[832] meaning offsets can be imposed as a condition of a planning permit, and the condition can require a landowner to enter into an agreement with a planning authority under Part V of the LUPA Act to protect the offset area.[833]

The Natural Assets Code, under the Tasmanian Planning Scheme, also provides that regard is to be had to 'any on site biodiversity offsets' when clearing in a priority vegetation area.[834]

Some local councils also have their own offsets policy (e.g., Kingborough Council), though it is unclear what will happen to these policies once all local councils transition to the TPS.

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[828] We note that under clause 4(g)(ii) of the FP Regulations, an FPP is not required for the clearing of trees, or the clearance and conversion of a threatened native vegetation community, that is carried out in accordance with a vegetation management agreement. A vegetation management agreement is defined in the regulations as 'an agreement that an owner of land enters into with an instrumentality or agency of the Crown for the purposes of managing native vegetation on land' (s 3).

[829] FPA's Annual Report 2021-22, p 23. Available here: https://www.fpa.tas.gov.au/__data/assets/pdf_file/0017/9503/2021-22-FPA-annual-report.pdf.

[830] See LUPA Act, Schedule 1, Part 1, Clause 2.

[831] See for example; *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council & Anor* [2020] TASRMPAT 12.

[832] LUPA Act, s 51(3A)-(4).

[833] See section 71 which allows planning authorities to enter into agreements with owners of land.

[834] See Tasmanian Planning Scheme, State Planning Provisions, Natural Assets Code, Clauses 7.6.2 P1.2(e) and 7.7.2 P1.2(e).

Analysis:

We note our analysis above regarding offsets under the forest practices system applies equally here.

Criticism has also been levelled at Part V agreements because:

- although they can be registered on land title, they are not required to be;
- offset areas are not required to be considered in the assessment of future development applications, meaning there is a possibility that other activities can be approved on land subject to a Part V agreement; and
- offsets arrangements only bind the council and landowner (no third party enforcement) and can be amended or revoked by agreement.

Compliance and enforcement

Effectiveness of regulatory oversight

Forest practices system

Tasmania's forest practices system is based on a co-regulatory approach,[835] which is comprised of self-management by the forest industry and monitoring and enforcement by the FPA.[836] This approach has been criticised for resulting in little to no regulation.[837] There is no clear reporting by local councils on compliance and enforcement actions specifically in relation to land clearing.

A key feature of the co-regulatory system is the training, accreditation, and performance monitoring of Forest Practices Officers (**FPOs**) by the FPA. The FPA appoints FPOs[838] who are responsible for monitoring[839] and enforcement[840] of FPPs. In some cases, FPOs will be employees of the FPA, but they can also be employees of Sustainable Timbers Tasmania (the State-owned forestry corporation), or other, private logging companies or consultants.[841] This has given rise to cases concerning allegations of apprehended bias in FPOs in certain circumstances.[842]

Planning system

Local councils, acting as planning authorities, are primarily responsible for enforcing compliance with planning laws. This means that the effectiveness of regulation and enforcement will vary across local government areas. There is no clear reporting by local councils on compliance and enforcement actions specifically in relation to land clearing.

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[835] FP Act, Schedule 7.
[836] FP Act, s 4G.
[837] https://www.ran.org/wp-content/uploads/2018/06/ran_thetruthbehindtasmanianforestdestruction_final.pdf. See also Environment Tasmania's report 'Pulling a Swiftie: Systemic Tasmanian Government approval of logging known to damage Swift Parrot habitat' available at: https://assets.nationbuilder.com/marine/pages/2258/attachments/original/1684308584/Pulling_a_Swiftie_Report.pdf?1684308584.
[838] FP Act, s 39.
[839] FP Act, s 40.
[840] FP Act, s 41.
[841] FP Act, s 38(1).
[842] See *Blue Derby Wild Inc v Forest Practices Authority* [2022] TASSC 67. This Supreme Court decision is currently the subject of an appeal to the Full Court of the Supreme Court of Tasmania.

Strength of compliance and enforcement framework

Forest practices system

Under the FP Act, it is an offence to carry out forest practices that require a FPP without a FPP (1,000 penalty units),[843] or to breach a condition of a FPP (1,000 penalty units in total or daily fine of 50 penalty units).[844] One penalty unit is currently $181.

Section 41 of the FP Act sets out what action the FPA may take if a person fails to comply with provisions of a certified FPP. It includes actions such as repairing damage to land, vegetation or objects, rehabilitate or revegetate land that has been damaged, degraded or altered by the forest practices specified in the request.

Section 47 provides that proceedings may be commenced in respect of an offence against the FP Act within 3 years of the date the alleged offence was committed (but only by the chief forest practices officer, a police officer, or any other person who is authorised by the FPA). Third parties are not able to enforce breaches of the FP Act (unless with permission from the FPA).

Section 47B of the FP Act provides that, as an alternative to prosecution, if a 'prescribed fine' is paid by the alleged offender who committed unlawful clearing (of timber or a native threatened vegetation community), the FPA may allow them to retain the timber, or the threatened native vegetation.

Section 4E of the FP Act requires the FPA to assess, at least once in each financial year, the degree to which the forest practices system is self-funding and self-regulating and the implementation and effectiveness of a representative sample of FPPs. The FPA must prepare a report of its findings and include that report in the annual report of the same financial year.

The FPA has a Compliance Program in place to monitor compliance with FPPs.

The Compliance Program carries out an assessment of FPPs as required by the FP Act.

Further, under the FP Act, the responsible person for a certified FPP must lodge an interim compliance report with the FPA within 30 days after the completion of each discrete operational phase of the forest practices authorised to be carried out under the FPP (non-compliance with which attracts a fine of 10 penalty units).[845] The report must state whether or not the plan has been complied with and anything else the FPA considers appropriate.[846] The responsible person must then lodge a final compliance report with the FPA within 30 days after the FPP expires stating whether or not the plan has been complied with and any other particulars the FPA considers appropriate (non-compliance with which also attracts a fine of 10 penalty units).[847]

The penalty amount under the FP Act is small in comparison to other jurisdictions and will not necessarily act as a strong deterrent from breaching the FP Act.

There is also the troubling provision in the FP Act (s 47B) that allows a person who has unlawfully cleared land to keep the timber or native vegetation community, which sends offenders the wrong

[843] FP Act, s 17(4).
[844] FP Act, s 21(1).
[845] FP Act, s 25A(1).
[846] FP Act, s 25A(1)(a)-(b).
[847] FP Act, s 25A(2).

message about compliance and is very unlikely to act as a strong deterrent (but rather may encourage (or at least not dissuade non-compliance)). Under this provision, the 'prescribed fine' is also at the FPA's discretion (i.e., the FPA and the offender come to an agreement about the fine and so a prosecution is withdrawn), which is also problematic and is unlikely to indicate that non-compliance will not be tolerated.

Whilst the compliance reporting described above (on FPPs, by responsible persons) could be a useful tool in understanding how and when FPPs are not being complied with (and ensuring proper enforcement action is taken), it is unclear how effective this mechanism is as it relies on the relevant person reporting to the FPA honestly and accurately.

The FPA have reported that while compliance and enforcement standards are being strengthened, many forest operations on non-industrial private land indicate a limited understanding of, or disregard for, the FPA and the Forest Practices Code.

The FPA admits that only a small number of FPPs are audited every year and most audits take place after logging or clearing of trees is completed, meaning (in our view) that enforcement action is unlikely to be taken if non-compliance is ultimately detected once the auditing has been taken out.

Notwithstanding the above, it is understood that the FPA has, in recent times, increased its level of enforcement.[848]

Planning system

Under Tasmanian planning laws, there are a range of enforcement measures available, which can be used to address non-compliance with planning requirements.

Local councils, acting as planning authorities, are primarily responsible for enforcing compliance with planning laws. Under the LUPA Act, an authorised officer acting on behalf of a planning authority may issue an infringement notice,[849] or an enforcement notice[850] for non-compliance with planning laws. There is also a general obligation on planning authorities to enforce observance of the planning scheme.[851] And planning authorities may also prosecute offenders for breaches of the LUPA Act (or relevant planning scheme).

If the responsible planning authority decides not to take enforcement action, then civil enforcement provisions enable a person with a 'proper interest' to seek certain orders from the TasCAT (but only in certain circumstances).[852]

While there are fairly strong enforcement mechanisms provided for in the LUPA Act, it is unclear how and when these are used by planning authorities to address unlawful clearing.

The lack of a central register of permits issued under the LUPA Act makes it difficult for the community to understand where and how much clearing is being carried out, and further complicates compliance and enforcement efforts.

[848] See for example FPA's Annual Report 2021-22 available at: 2021-22-FPA-annual-report.pdf.
[849] LUPA Act, s 65A.
[850] LUPA Act, s 65C.
[851] LUPA Act, s 48.
[852] LUPA Act, s 64.

Opportunities for third party enforcement

Forest practices system

The lack of third party civil enforcement powers has been a longstanding criticism of the forest practices system.

Planning system

It is a general strength of the system that third parties with a 'proper interest' may bring third party civil enforcement proceedings, though it would be stronger if the LUPA Act included 'open standing' provisions.

Transparency of information relating to enforcement and compliance

Forest practices system

Section 4G of the FP Act imposes a responsibility on the FPA to monitor the degree of compliance with the FP Act and the Forest Practices Code.

Further, and as noted above, under the FP Act, the responsible person for a certified FPP must lodge an interim compliance report with the FPA within 30 days after the completion of each discrete operational phase of the forest practices authorised to be carried out under the FPP.

There is no public register of certified FPPs.

While the FP Act contains strong and important mechanisms to report on the performance and effectiveness of the forest practices system, it remains difficult to establish the level of unlawful vegetation clearing occurring in Tasmania. The FPA's last annual report says that 180 hectares of unlawful clearing was identified in the 2020-21 financial year, but it is not clear how that was identified by the FPA (e.g., was it just based on tip-offs from the public?).

Moreover, the FPA have reported that while compliance and enforcement standards are being strengthened, many forest operations on non-industrial private land indicate a limited understanding of, or disregard for, the FPA and the Forest Practices Code.[853] Compliance audits revealed non-industrial private forest activities accounted for 63% of below sound findings and 82% of unacceptable practices. 97% of all investigations were for non-industrial private forest land and 75% attributable to the landholder. Of these investigations, 56% were due to operations undertaken without a FPP, 58% related to the permanent removal of trees and 25% related to the clearing and conversion of a Threatened Native Vegetation Community.[854]

The FPA also freely admits that only a small number of FPPs are audited every year and most audits take place after logging or clearing is completed, meaning (in our view) that enforcement action is unlikely to be taken if non-compliance is ultimately detected once the auditing has been taken out.

Some reporting (e.g., the report on the state of Tasmania's forest) is also overdue, which diminishes the utility of such reporting requirements.

[853] https://www.fpa.tas.gov.au/__data/assets/pdf_file/0017/9503/2021-22-FPA-annual-report.pdf p 9.
[854] https://www.fpa.tas.gov.au/__data/assets/pdf_file/0017/9503/2021-22-FPA-annual-report.pdf p 9.

Planning system

No specific information regarding enforcement of land clearing provisions under the planning system was found.

It is therefore unclear what monitoring, if any, local councils undertake for unlawful clearing in their municipal areas. The lack of a central register of permits issued under the LUPA Act also makes it difficult for the community to understand where and how much clearing is being carried out, and further complicates compliance and enforcement efforts.

Victoria

Victoria

Background

Victoria has not committed to reduce or end land clearing.

Victoria's native vegetation clearing regulations, implemented under the Victoria Planning Provisions (**VPPs**), are framed around achieving "no net biodiversity loss".

An independent report prepared by the Victorian Auditor General Office's (**VAGO Report**) in 2022, reported that Victoria was losing native vegetation on private land, with an estimated 9,900 habitat hectare/year[855] (**HHa**) of land being cleared in 2008, 10,300 HHa being cleared in 2015 and 10,380 HHa being cleared in 2020.[856] We note that HHa is a measurement of both extent and quality of vegetation. We also note this data is based on modelled data and a range of assumptions, as there is no actual data to measure this against, highlighting the lack of monitoring and reporting mechanisms within Victoria's native vegetation regulations. The VAGO Report also found that proportional to land mass, Victoria has the most original (at time of European settlement) native vegetation cleared compared with any Australian state.[857]

The VAGO Report also found Victoria is not achieving its no net biodiversity loss goal from native vegetation clearing on private land.[858] It found serious shortcomings in relation to Victoria's native vegetation regulations, including that unauthorised clearing is occurring across the state and that DELWP's assessment tools for determining offsets are limited and cannot determine the offsets required to completely compensate for biodiversity loss.[859]

Extensive exemptions to seeking approval for vegetation clearing and a fragmented system further undermine effective native vegetation protection. Local authorities are primarily responsible for implementing the monitoring, reporting, compliance and enforcement of the regulations and are failing to do so.

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[855] Victorian Auditor General's Office (VAGO), 'Offsetting Native Vegetation Loss on Private Land,' (Audit Report, 11 May 2022) 2 (VAGO Report) available at: https://www.audit.vic.gov.au/sites/default/files/2022-11/20220511_Offsetting-Native-Vegetation-Loss-on-Private-Land.pdf.
Note: a habitat hectare (HHa) measures quality by scoring habitat attributes at a site in comparison to a reference point (benchmark) for the relevant vegetation type. The result is expressed as a 'habitat score'.
HHa =extent x habitat score.
For example:

- 10 hectares with a habitat score of 100 per cent = 10 HHa
- 10 hectares with a habitat score of 50 per cent = 5 HHa.

[856] Department of Environment, Land, Water and Planning, *2020 Net Gain Accounting Qualitative Update,* available at https://www.environment.vic.gov.au/__data/assets/pdf_file/0024/553344/2020-Net-Gain-Accounting-Qualitative-Update.pdf.
[857] VAGO Report 9.
[858] VAGO Report 1.
[859] VAGO Report 2.

Government commitments to end broadscale land clearing in line with the Glasgow Declaration

Commitment

There is no explicit commitment by the Victorian Government to reduce or end land clearing by 2030. The main policy objective relating to native vegetation is set out in the VPP. The objective of cl 12.01-2S of the VPP is 'ensure that there is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation'.

The *Flora and Fauna Guarantee Act 1988* (Vic) (**FFG Act**) aims to conserve Victoria's native plants and animals, and policy documents focus on protecting biodiversity or revegetation to reduce carbon emissions.

The following discussion considers:

- legislative objectives; and
- policy documents.

Legislative objectives

Land clearing in Victoria is primarily regulated under the *Planning and Environment Act 1987* (Vic) (**PE Act**) which aims 'to establish a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians.'[860] The VPP, subordinate legislation under the PE Act, sets out standard provisions for adoption in all of Victoria's planning schemes.

Victoria's previous native vegetation management framework aimed to achieve a 'net gain' in the quality and extent of vegetation across Victorian landscapes, indicating a desire to improve or enhance Victoria's native vegetation.[861] The 'no net loss' standard in the revised vegetation regulations is a less ambitious target.[862]

The FFG Act aims to 'enable and promote the conservation of Victoria's native plants and animals and to provide for a choice of procedures which can be used for the conservation, management or control of flora and fauna and the management of potentially threatening processes'.[863]

Policy documents

The Victorian Government's biodiversity strategy, *Protecting Victoria's Environment - Biodiversity 2037*, developed in 2017, was developed with the overarching goal of stopping the decline of biodiversity in Victoria.[864] It acknowledges that the declining condition of Victoria's biodiversity is in

[860] *Planning and Environment Act 1987* (Vic) s 1.
[861] See Department of Sustainability and Environment, 'Victoria's Native Vegetation Management, A Framework for Action,' (2011) 5 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0021/90363/Native_Vegetation_Management_-_A_Framework_for_Action.pdf.
[862] Victoria Planning Provisions cl 12.01-2S ('**VPP**').
[863] *Flora and Fauna Guarantee Act 1988* (Vic) s 1.
[864] Department of Environment, Land, Water and Planning, *Protecting Victoria's Environment – Biodiversity 2037* (2017) 4 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0022/51259/Protecting-Victorias-Environment-Biodiversity-2037.pdf.

part due to the extensive clearing of native vegetation in Victoria.[865] The plan reflects the VPP objective for the regulation of native vegetation clearing, being to ensure that there is 'no net loss' to biodiversity as a result of the permitted clearing of native vegetation through a three-stage mitigation hierarchy to: avoid, minimise and offset.[866] At a broader level, the plan states that the Victorian Government is committed to achieving an overall 'net gain', expressed as an improvement in the overall extent and condition of native habitats across terrestrial, waterway and marine environments. The plan does not contemplate that all habitats or vegetation types will need to be improved or increased in order to achieve this goal, but overall gains will need to outweigh losses, with the most important places to achieve gains being locations with higher relative contribution to biodiversity benefit.[867] This suggests a commitment to protecting native vegetation where it can be shown that the clearing will otherwise result in a net loss to biodiversity and a commitment to protect biodiversity in specific high value areas.

The Victorian Government has also implemented the BushBank program which aims to restore natural environments across Victoria through millions of native plants and trees being planted. The project aims to revegetate land to reduce carbon emissions and create habitat for some of Victoria's most 'iconic species.'[868]

Costed plan to end deforestation

There is no costed plan to end deforestation, rather the Victorian government has invested in enhancing natural habitats and facilitating private markets.

The following discussion considers:

- Money connected to legislation; and
- Private investments

Money connected to legislation

To support the Victorian Government's commitments under the *Climate Change Act 2017* (Vic), Victorian Government sector pledges have been created. Relevantly, the Victoria's Land Use, Land Use Change and Forestry Sector Emissions Reduction Pledge comprises two primary elements: restoring degraded landscapes and planting millions of new trees enhance natural habitats. The Pledge outlines the following Government programs that support the revegetation of land:

- $15.3 million over ten years for the Victorian Carbon Farming Program, which incentivises private landholders to plant shelterbelt trees and participate in agroforestry; and

[865] Department of Environment, Land, Water and Planning, *Protecting Victoria's Environment – Biodiversity 2037* (2017) 10 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0022/51259/Protecting-Victorias-Environment-Biodiversity-2037.pdf.
[866] Department of Environment, Land, Water and Planning, *Protecting Victoria's Environment – Biodiversity 2037* (2017) 14 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0022/51259/Protecting-Victorias-Environment-Biodiversity-2037.pdf.
[867] Department of Environment, Land, Water and Planning, *Protecting Victoria's Environment – Biodiversity 2037* (2017) 14 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0022/51259/Protecting-Victorias-Environment-Biodiversity-2037.pdf.
[868] See Department of Energy, Environment and Climate Action, *BushBank Program* available at: https://www.environment.vic.gov.au/bushbank.

- $76.98 million is provided for the BushBank Program, which aims to incentivise the restoration and protection of natural habitats by private and public landowners.[869] The funding includes:
    - $30.9 million to go towards the revegetation and restoration of at least 20,000 hectares of native vegetation across private land in Victoria;
    - $2.7 million to be used to revegetate public land; and
    - $14.5 million to be available over 10 years for Traditional Owners to lead and participate in habitat restoration and carbon markets.[870]

We note that the Government also provides funding through the BushTender program, which enables private landholders to bid for government investment in return for providing improved biodiversity outcomes on their land. Successful tenders are those that offer the best environmental outcome value for money and will receive periodic payments for management activities under a five-year agreement.[871]

Private Investments

Victoria's offsets framework also incentivises private native vegetation markets. Under the Native Vegetation Credit Register landholders, who have native vegetation on their land, can issue credits that can be sold to clearance applicants looking to offset their activities.[872] As discussed further below, there are significant issues with the Victorian offsets framework.

Strengths and weaknesses of land clearing regulation that may be contributing to clearing rates

Overview

There is no standalone native vegetation legislation in Victoria. Rather, management of native vegetation broadly occurs under Victoria's state planning system, which is governed by the PE Act and subordinate legislation, including the VPP. The VPP provides the template on which Victoria's planning schemes are based. It sets standardised planning scheme provisions that are implemented through local council planning schemes.

Victoria's native vegetation regulations are comprised of:

- *Relevant sections of the PE Act and the VPP* (predominantly clauses 12.01-2S, 52.16 and 52.17). The VPP is a form of delegated legislation and are, therefore, rules with legal effect.[873] Specifically:

[869] Victorian State Government, Department of Environment, Land, Water and Planning, *Cutting Victoria's Emissions 2021-2025: LULUCF Sector Emissions Reduction Pledge* 5 available at: https://www.climatechange.vic.gov.au/victorian-government-action-on-climate-change/LULUCF-sector-pledge-accessible.pdf.
[870] Department of Energy, Environment and Climate Action, 'BushBank Program' available at: https://www.environment.vic.gov.au/bushbank.
[871] Department of Energy, Environment and Climate Action, 'Bush Tender' available at: https://www.environment.vic.gov.au/innovative-market-approaches/bushtender.
[872] Department of Environment, Land, Water and Planning, 'Native Vegetation Credit Register -Pricing Native Vegetation Credits,' available at: https://www.environment.sa.gov.au/topics/native-vegetation/offsetting/turn-your-native-vegetation-into-income/native-vegetation-credit-register.
[873] *Planning and Environment Act 1987* (Vic) (PE Act) Pt 1A.

- Clause 12.012S of the VPP sets out that the native management objective is to ensure that there is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation.
- Clause 52.16 of the VPP sets out the requirements for Native Vegetation Precinct Plans (**NVPP**), which are plans for the management of native vegetation within a specified area, including conditions for the removal of native vegetation within that area.
- Clause 52.17 of the VPP sets out that the removal, destruction or lopping of native vegetation must comply with the *Guidelines for the removal, destruction or lopping of native vegetation* (**Guidelines**), requires a permit and outlines the permit application process.

- *Guidelines for the removal, destruction or lopping of native vegetation*.[874]The Guidelines underpin the VPP's native vegetation clauses. The Guidelines inform how the VPP is to be interpreted.

In Victoria to remove, destroy or lop native vegetation generally requires a planning permit unless:

- The removal is outside the scope of the planning scheme; or
- The planning scheme allows for the removal without a permit, such as where:
  - The removal is part of a continuation of a lawful existing use under s 6(3) of the PE Act;
  - An exemption under clause 52.16 or 52.17 of the planning scheme applies;[875] or
  - The native vegetation is identified in a schedule to clause 52.17 of the relevant planning scheme.

Landholders must apply for a planning permit from their local council. When councils are deciding whether to issue a permit for land clearing, they are to follow a three-step approach prescribed in the Guidelines:

1. avoid the removal of vegetation,
2. minimise the impacts from clearing of native vegetation that cannot be avoided,
3. offset the removal, destruction or lopping of native vegetation if a permit is granted.[876] (The native vegetation regulations, however, do not require offsetting of native vegetation clearing where it falls within an urban growth area that is not a conservation area).[877]

Table 7 - Summary of Clearing Pathways in Victoria under the Planning Scheme

Activity	**Relevant legal framework**	**Application Process**	**Approval**
Permits			
Remove, destroy or lop native vegetation	VPP cl 52.17	Information to be included in application for permit (Guidelines, 6.4)	Permit from responsible authority (often local council)

[874] Department of Environment, Land, Water and Planning, *Guidelines for the removal, destruction or lopping of native vegetation*, December 2017, (**Guidelines**) https://www.environment.vic.gov.au/__data/assets/pdf_file/0021/91146/Guidelines-for-the-removal,-destruction-or-lopping-of-native-vegetation,-2017.pdf
[875] See VPP cl 52.16-3 and 52.17-7.
[876] Guidelines, page 4.
[877] The exemption is expressed as applying to a levy area under the *Melbourne Strategic Assessment (Environment Mitigation Levy) Act 2020* (Vic) under VPP, cl 52.16-9, 52.17-8.

		Considerations when deciding whether to grant a permit: Decision Guidelines (Guidelines, 7) *Note:* *Additional decision guideline 9 for Intermediate and Detailed Assessment Pathways* *Additional decision guideline 10 for Detailed Assessment Pathway*	
Strategic plans for native vegetation protection and management			
Remove, destroy or lop native vegetation in accordance with an NVPP (*which provides for the strategic management of native vegetation for a defined area or precinct)*	VPP cl 52.16	Application to establish an NVPP (Guidelines, 10.1)	Application for an NVPP to be approved by the Minister for Planning
		Application for a permit to remove vegetation within an NVPP (Guidelines, 6.4) Decision Guidelines (Guidelines, 7) plus Decision Guideline 8 must be addressed.	No permit is required if the proposal is in accordance with an NVPP A permit to be approved by the responsible authority (defined in each Victorian planning scheme and is usually the local council)
Remove, destroy or lop native vegetation in accordance with a property vegetation plan **(PVP)** (*which provides for the strategic management of native vegetation for a single property)*	VPP cl 52.17-3	Application to establish PVP (Guidelines, 10.2) Application for a permit to remove native vegetation specified in PVP (VPP cl 52.17-3)	PVP must be approved by the Secretary to DELWP For permit to remove - the responsible authority must include conditions that the native vegetation removal must start within two years and be completed within ten years of the date of issuing a permit

Exemptions

Overview:

Generally, removing, destroying, or lopping native vegetation must be done in accordanc wih a permit, NVPP, or PVP. However, exemption do apply:

- Clause 52.17-7 lists exemptions to requiring a permit from the local council.
- Clause 52.16-8 lists exemptions to requiring a permit to remove, destroy or lop native vegetation in an NVPP area (which is required where those activities cannot be undertaken in accordance with the NVPP).[878]

Table 8 summarises the various exemptions.

Table 8 - Exemptions from requiring a permit under VPP

Exemptions under Clause 52.17-7	Exemptions to a NVPP under Clause 52.16-8
• Conservation work • Crown land (subject to certain requirements) • Most dead vegetation • Emergency works • Existing buildings • Existing buildings and works in the Farming Zone and Rural Activity Zone • Extractive industry • Fences • Fire protection • Geothermal energy exploration and extraction • Grazing • Grasses Greenhouse gas sequestration and exploration • Harvesting for timber production – naturally established native vegetation • Land management or directions notice • Land use conditions • Lopping and pruning for maintenance • Mineral Exploration and Extraction • New buildings and works in the Farming Zone and Rural Activity Zone • New dwellings in the Farming Zone and Rural Activity Zone (includes limitations in year periods) • Personal use • Pest animal burrows (includes limitations in year periods)	• Conservation work • Crown land (subject to certain requirements) • Emergency works • Extractive industry • Fire protection • Geothermal energy exploration and extraction • Greenhouse gas sequestration and exploration • Land management or directions notice • Land use conditions • Mineral exploration and mining • Pest animal burrows • Planted vegetation • Railways • Regrowth • Road safety • Stone exploration • Surveying • Traditional owners (e.g. under natural resource agreement under Traditional Owner Settlement Act) • Utility installations

[878] We note that there are also other exemptions not listed in the table for bushfire protection (clause 52.48 of the VPPs), specific sites and exclusions (clause 52.03 of the VPPs) and exemptions incorporated into the schedule to clause 52.17 in planning schemes.

Exemptions under Clause 52.17-7	Exemptions to a NVPP under Clause 52.16-8
• Planted vegetation • Railways • Regrowth (e.g. less than 10 years old) • Road safety • Site area • Stock movements on roads • Stone exploration (includes limitations in year periods) • Surveying • Traditional owners • Tram stops • Transport land • Utility installations (if done in accordance with a code of practice) • Vehicle access from public roads • Weeds	

Landholders, landowners, and land managers are responsible for complying with the requirements of the exemptions to remove native vegetation. While these activities may be exempt from requiring a clearing permit, they may require minimal oversight or be assessed under different regulations. For example, 'extractive industry' is an exemption under both cl 52.16-8 and cl 52.17-7. Such an activity must be carried out in accordance with a work plan under the *Mineral Resources (Sustainable Development) Act 1990* (Vic).

Often exemptions include requirements to:

- minimise the environmental impact of the native vegetation removal;
- assess certain aspects of the vegetation, such as amounts to be cleared, whether the vegetation is dead and the height of vegetation; and
- ensure that the proposed clearing is to occur for a certain purpose (for example, grazing).[879]

A guidance document, *Exemptions from requiring a planning permit to remove, destroy or lop native vegetation – Guidance* **(Exemptions Guidance**), sets out further best practice principles for relying on exemptions. These principles include, for example, proponents checking with local council planning departments if they are unsure whether an exemption applies and keeping records of native vegetation removal to substantiate that an exemption has been relied upon.[880]

An NVPP can be drafted to alter the exemptions listed in clause 52.16-8. However, DELWP indicates that the exemptions for geothermal energy extraction and exploration, mineral exploration, mining and search for stone should be retained as they either:

- reflect exemptions under the *Geothermal Energy Resources Act 2005* (Vic) and *Mineral Resources (Sustainable Development) Act 1990* (Vic), or

[879] See VPP cl 52.17-7 'Table of Exemptions'.
[880] Department of Environment, Land, Water and Planning, *Exemptions from requiring a planning permit to remove, destroy or lop native vegetation: Guidance* (December 2017) 1.4 ('**Exemptions Guidance'**) available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0018/91251/Exemptions-from-requiring-a-planning-permit-to-remove,-destroy-or-lop-native-vegetation-Guidance.pdf.

- reflect State planning policy allowing these activities without planning approval (see clause 52.08 of the planning scheme, which encourages land to be used and developed for exploration and extraction of earth and energy resource); or
- provide an alternative approval process that incorporates an assessment of native vegetation issues in accordance with the Guidelines.[881]

Analysis:

Exemptions under the Victorian planning scheme broadly serve two purposes:

- to remove the need for an approval or permit, where the policy intent is to permit clearing for certain activities (e.g. routine management activities, land management activities, emergency works or hazard reduction); or
- to remove duplication, where the activity may require separate approval under other rules (geothermal energy exploration and extraction, greenhouse gas sequestration, mineral exploration and extraction, stone extraction, harvesting for timber production).

The *Exemptions Guidance* briefly explains the rationale for each exemption.

While some exemptions are clearly defined, others are broad. For example, clause 52.17-7 exempts: *"Site Area: Native vegetation that is to be removed, destroyed or lopped on land, together with all contiguous land in one ownership, which has an area of less than 0.4 hectares".* Additionally, the inclusion of words like 'minimum extent necessary' also means enforcement action would likely be very difficult.

Where exemptions remove the need for approval, the Exemptions Guidelines contain best practice principles to assist persons seeking to rely on exemptions,[882] and to minimise the removal of native vegetation.[883]

In the case of clearing that requires approval under a different framework, there is no guarantee that the assessment of the impacts of clearing will be as robust as under the planning framework.

In 2020-21, DELWP reported that there were 567 approvals for native vegetation removal, 30% of these approvals were granted by the Secretary to DELWP as exemptions. The exemptions accounted for 12% of vegetation approved for removal.[884] Notably, these statistics are based on approval information that only 33 out of 79 local governments provided. Councils are expected to voluntarily provide data to DELWP.

The Department of Jobs, Precincts and Regions (**DJPR**), who approves extractive work industry plans under *the Mineral Resources (Sustainable Development) Act 1990* (Vic), accounted for 1% of approvals and 5% the total extent of native vegetation approved for removal.[885] The report notes

[881] See Department of Environment, Land, Water and Planning, *Preparing a Native Vegetation Precinct Plan* (December 2017) available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0016/91222/Preparing-a-Native-Vegetation-Precinct-Plan.pdf.
[882] Exemptions Guidance [1.4].
[883] Exemptions Guidance [1.5].
[884] Department of Environment, Land, Water and Planning ,*Native vegetation removal regulations 2020-2021 Annual no net loss summary,* 9, available at https://www.environment.vic.gov.au/__data/assets/pdf_file/0034/569329/AnnualReport20202021_Final.pdf#Annual%20Report%202020/21.
[885] Department of Environment, Land, Water and Planning ,*Native vegetation removal regulations 2020-2021 Annual no net loss summary,* 9, available at

that it is likely not all the approved removal data has been provided by the responsible authorities, including DJPR.[886]

In its recent Annual Report, DELWP stated that for exemptions not requiring written agreement landowners are not required to notify the responsible authority when relying on these exemptions. It is, therefore, not possible to accurately determine the extent of native vegetation removal occurring under these exemptions.[887]

It is clear that DELWP lacks key data in relation to vegetation clearing occurring under exemptions and more broadly. This in turn impacts its ability to assess and understand the cumulative impacts of clearing across the State.

From what has been reported, it can be seen that a significant amount of land clearing appears to have occurred under the Crown land exemption in the 2019-20 financial year, with 780 ha cleared.[888] 'Road/Track–Other' clearing contributed to the largest hectare loss, of 485.68 ha. DELWP has established a separate procedure, *The Procedure for the removal, destruction or lopping of native vegetation on Crown land*, to provide transparency to the removal, destruction or lopping of all native vegetation managed by, or on behalf of DELWP and PV on Crown land.[889] The Procedure outlines:

- the requirement that native vegetation removal must be minimal;
- how the State is to "counterbalance" this removal, through activities that contribute to an increase in native vegetation condition, extent or security. Counterbalancing activities can comprise activities other than native vegetation restoration, such as pest animal control and control of over abundant wildlife. The counterbalancing activities appear to lack any meaningful metrics to properly quantify their contribution to biodiversity;
- a method for recording new removal of vegetation through spatial data; and
- a method for recording counterbalancing activities.

Under the Procedure, DELWP annually reports on vegetation clearing that has occurred under the Crown land exemption and counterbalancing activities. Similar procedures for exemptions that require separate approval processes, such as mining activities, are lacking. As such, there is limited

https://www.environment.vic.gov.au/__data/assets/pdf_file/0034/569329/AnnualReport20202021_Final.pdf#Annual%20Report%202020/21.

[886] Department of Environment, Land, Water and Planning, *Native vegetation removal regulations 2020-2021 Annual no net loss summary,* 8, available at https://www.environment.vic.gov.au/__data/assets/pdf_file/0034/569329/AnnualReport20202021_Final.pdf#Annual%20Report%202020/21.

[887] Department of Environment, Land, Water and Planning ,*Native vegetation removal regulations 2020-2021 Annual no net loss summary,* 12, available at https://www.environment.vic.gov.au/__data/assets/pdf_file/0034/569329/AnnualReport20202021_Final.pdf#Annual%20Report%202020/21.

[888]Department of Environment, Land, Water and Planning, *Native vegetation removal regulations - Crown land exemption* 5 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0024/521628/CrownLandReport20192020.pdf.

[889] Department of Environment, Land, Water and Planning, *Procedure for the removal, destruction or lopping of native vegetation on Crown land* 5 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0033/408489/CrownLandProcedure.pdf.

transparency as to how much clearing is occurring under other exemptions that require a separate approval and if any "counterbalancing" activities or offsets are being utilised.

While the Procedure provides some transparency and parameters around Crown land exemptions, the exemption in general is far too expansive and it is unclear as to why exemptions (such as emergency management) are inadequate for facilitating any needed clearing.

Some of the exemptions listed above require further permissions before clearing can be carried out. For example, removing, destroying or lopping native vegetation for road safety, an exemption under both 52.16-8 and 52.17-7, must be done in accordance with the written agreement of the Secretary to the DELWP. This provides some oversight to the process, however, still allows clearing to occur without a rigorous assessment and approval process.

Code-based clearing / Self-assessable clearing

There is no code-based clearing under the Victorian framework.

Clearing requiring approval

There are two ways that clearing requiring approval is regulated under the Victorian framework:

- Clause 52.16 sets out the requirements for removing native vegetation under a Native Vegetation Precinct Plan (**NVPP**)
- Clause 52.17 outlines the requirements for seeking a permit (where an NVPP is not in place)

Clause 52.16 – Application to establish an NVPP

Overview:

Clause 52.16 sets out the requirements for removing native vegetation under a Native Vegetation Precinct Plan (**NVPP**), which outlines the strategic management of native vegetation within a defined area, including:

- which vegetation can be removed and which needs to be protected, based on the conservation significance and land protection role of the vegetation;
- the identified values of vegetation within the planning scheme such as amenity and landscape; and
- the broader strategic planning objectives for the defined precinct.[890]

The NVPP must also establish the offset requirement for native vegetation that can be removed, destroyed or lopped.[891]

A planning authority, land owner or group of landowners can initiate the creation of an NVPP. It must be authorised by the Minister for Planning. If proposed vegetation clearing is proposed to be undertaken in accordance with the requirements and conditions of a NVPP, a person does not require a permit to conduct that clearing. However, a permit is required to clear native vegetation under cl 52.16 if it is not in accordance with the conditions and requirements of an NVPP or is

[890] Victorian Planning Authority, 'What is a native vegetation precinct plan?' (8 January 2018) available at: https://vpa.vic.gov.au/faq/pakenham-east-what-is-native-vegetation-precinct-plan/.
[891] Guidelines p 32 [10.1].

required by another provision of the scheme (such as an overlay).[892] Exemptions also apply – see above.

Section 10 of the Guidelines sets out the requirements to prepare an NVPP for incorporation into a planning scheme. An application for an NVPP must:

- demonstrate that the objectives for native vegetation management have been met;
- demonstrate that the NVPP has been developed in accordance with the Guidelines, including the application of the three-step approach;
- include information listed at Table 4 and Table 5 of the Guidelines (which are the same requirements for a permit to remove native vegetation under cl 52.17 – see below), noting that the site assessment report must:
    - be for the total area to which the NVPP applies, and
    - include information for the native vegetation to be removed and the native vegetation to be retained.[893]

An application for an NVPP is subject to public exhibition and the relevant planning authority must consider all submissions made by the public in relation to the proposed NVPP (PE Act, s.19(1B), s.21, s.22).

Where an NVPP applies to an area clause 52.17 does not apply.[894] However, a permit may still be required (where the clearing is not in accordance with the NVPP). Obtaining a permit to remove native vegetation under cl 52.16 requires a similar process to cl 52.17 with additional considerations, which we have noted below.

An NVPP cannot be drafted to prevent the granting of a permit to remove, destroy or lop native vegetation. The appropriateness of such permit applications to remove native vegetation not in accordance with an NVPP should be carefully considered as to not compromise the purpose and objectives of the NVPP.[895]

Analysis:

NVPPs may provide further protection of vegetation from clearing at a landscape scale depending on the conditions established in the plan. The application process to establish an NVPP requires a site assessment to be undertaken and the aim of an NVPP generally is to manage native vegetation within a specific area by identifying which native vegetation can be removed and which must be protected based on conservation significance. They are also incorporated into the planning scheme with changes to an NVPP to generally be exhibited.[896] They can, however, allow clearing with no approval process if clearing is undertaken in accordance with the NVPP, placing extra importance on the rigor of the NVPP application process and the conditions for removal. We also note the Minister

[892] VPP cl 52.16-3.
[893] Guidelines p 32 [10.1] .
[894]Department of Environment, Land, Water and Planning, 'Assessor's handbook – Applications to remove, destroy or lop native vegetation,' 19 ('Assessor's Handbook') available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0022/91255/Assessors-handbook-Applications-to-remove,-lop-or-destroy-native-vegetation-V1.1-October-2018.pdf.
[895] Department of Environment, Land, Water and Planning, *Preparing a Native Vegetation Precinct Plan* (December 2017) cl 2.9 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0016/91222/Preparing-a-Native-Vegetation-Precinct-Plan.pdf.
[896] See Department of Environment, Land, Water and Planning, *Preparing a Native Vegetation Precinct Plan* (December 2017) 5 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0016/91222/Preparing-a-Native-Vegetation-Precinct-Plan.pdf.

can grant a permit to remove native vegetation that is contrary to an NVPP. In considering the granting of the permit, the Minister must consider Decision Guideline 8, which includes considering the loss or fragmentation of native vegetation identified for retention in the NVPP and the objectives of the NVPP, however, it is unclear what weight is provided to such considerations in the approval process.

An NVPP must include mechanisms for tracking the removal of native vegetation and corresponding securing of offsets.[897] However, as discussed below, there are compliance and enforcement issues, including lack of council capacity. The lack of compliance oversight limits the effectiveness of NVPPs aiming to protect native vegetation.

Obtaining a permit to remove native vegetation under clauses 52.16 and 52.17

Overview:

The VPP requires landholders to obtain permits for native vegetation clearing (unless an exemption applies or clearing is in accordance with an approved NVPP – see above).[898] If a permit is required for the removal, destruction or lopping of native vegetation, the biodiversity impacts must be offset.[899]

There are three assessment pathways for an application to remove native vegetation, dependent upon the amount of native vegetation to be removed, whether any large trees are to be removed and the location of the native vegetation (the framework adopts three location categories that indicate the potential risk to biodiversity vegetation).[900]

These three assessment pathways are:

- *basic*: where the removal of native vegetation will have limited impacts on biodiversity;
- *intermediate*: where the removal of native vegetation could impact on large trees, endangered ecological vegetation class (**EVC**s), and sensitive wetlands and coastal areas; and
- *detailed*: where the removal of native vegetation could impact on large trees, endangered EVCs, sensitive wetlands and coastal areas, and could significantly impact on habitat for rare or threatened species.[901]

The Guidelines and Assessor's Handbook sets out the information that must be included in applications to remove native vegetation. Guideline 6.4.1 requires all applications to include:

- Descriptions of the vegetation to be removed and maps showing the native vegetation in context.[902]
- An avoid and minimise statement to describe efforts to avoid the removal and minimise the impacts of the biodiversity and values of the native vegetation.[903]

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[897] Guidelines p 32 [10.1].
[898] VPP cl 52.17.
[899] VPP cl 52.16-6, cl 52.17-5; We note that an exception applies where the clearing is proposed to occur in a levy area as defined under the *Melbourne Strategic Assessment (Environment Mitigation Levy) Act 2020* (Vic), per cl 52.16-9 and 52.17-8.
[900] Guidelines s 6.2. Location categories are shown in the Location map as Location 3, Location 2 and Location 1, see Figure 2. Location 3 – includes locations where the removal of less than 0.5 hectares of native vegetation could have a significant impact on habitat for a rare or threatened species. Location 2 – includes locations that are mapped as endangered ecological vegetation classes (EVCs) and/or sensitive wetlands and coastal areas (section 3.2.1) and are not included in Location 3. Location 1 – includes all remaining locations in Victoria.
[901] Guidelines cl 6.1,cl 6.3.
[902] See Guidelines cl 6.4.1.
[903] See Guidelines cl 6.4.1.

- An offset statement explaining that an offset meets the offset requirements for native vegetation to be removed has been identified and can be secured in accordance with the Guidelines. Offset statements can be adequate if they show merely that the landholder can demonstrate an offset is available and that they are going to purchase such offset. This is a significant weakness in the offset scheme because there is no requirement for the offset to have been purchased or implemented. Further limitations of offsets are discussed below.

Guideline 6.4.2 sets out additional requirements for applications under the Detailed Assessment Pathway including:

- A site assessment report, which includes a habitat hectare assessment, the location, number, circumference and species of any scattered trees and whether each tree is small or large.
- Information about impacts on rare or threatened species habitat.

Information about impacts on rare or threatened species habitat is not necessary in an application to clear vegetation in the basic or intermediate pathway.[904] Therefore, where proposed vegetation clearing falls within the basic or intermediate pathway, the impact of the clearing on habitat for rare or threatened species is not considered.[905]

The local council is usually responsible for assessing the application. Applications that fall within the Detailed Assessment Pathway, Crown Land occupied or managed by the responsible authority or a Property Vegetation Plan must be referred to the Secretary to DELWP.[906]

A site assessment is required for land clearing within the detailed assessment pathway and for the application process to establish an NVPP. All proposed clearing of 0.5ha or more of native vegetation or in location 3 falls within the detailed assessment pathway and requires a site assessment. All other proposed types of land clearing is likely to fall within the basic or intermediate assessment pathway and will not require a site assessment (see page 19 of the Guidelines for further information on the assessment pathways). We also note that native vegetation is narrowly defined as a "patch" or "scattered tree" outlined at section 3.1 of the Guidelines and where the clearing of native vegetation that is not a "patch" or "scattered tree" is proposed, the clearing is deemed to fall within the basic assessment pathway.

The responsible authority can request further information about the application before making their decision as to whether to approve an application for a permit under cl 52.17 or 52.16. The responsible authority must consider the 'decision guidelines' outlined in section 7 of the Guideline before making their decision.[907] Examples of considerations include the role of the native vegetation proposed to be removed in protecting water quality and waterway and riparian ecosystems, preventing land degradation and preventing adverse effects on groundwater quality as well as

[904] Guidelines cl 6.4.2.
[905] Guidelines cl 6.4.1; Department of Environment, Land, Water and Planning, *Assessor's Handbook: Applications to remove, destroy or lop native vegetation* (October 2018) 7-8 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0022/91255/Assessors-handbook-Applications-to-remove,-lop-or-destroy-native-vegetation-V1.1-October-2018.pdf; See VPP, cl 12.01-2S.
[906] VPP cl 66.
[907] VPP cl 52.17-4. See Guidelines, part 7. The Victoria Planning Provisions provide at 12.01-2S that the relevant guidelines are the Guidelines for the removal, destruction or lopping of native vegetation (Department of Environment, Land, Water and Planning, 2017).

impacts on biodiversity.[908] Section 8 of the Guideline is applicable only to cl 52.16 application and includes consideration of:

- The purpose and objectives of the NVPP;
- The effect on any native vegetation identified for retention in the Native Vegetation Precinct Plan;
- The potential for the effectiveness of the Native Vegetation Precinct Plan to be undermined;
- The potential for the proposed development to lead to the loss or fragmentation of native vegetation identified for retention in the Native Vegetation Precinct Plan;
- Offset requirements in the Native Vegetation Precinct Plan.

While the decision guidelines provide some guidance to decision-makers, there are inadequacies. For example, the decision guidelines:

- Limit the ability for local authorities to request additional information, such as through a site assessment, where proposed land clearing is deemed to fall within a lower risk assessment pathway at the beginning of the assessment process;
- Do not provide adequate safeguards against illegal land clearing;
- Do not require local councils to monitor and report on land clearing under exemptions and generally, which significantly undermines Victoria's land clearing data, incentives for compliance with the scheme and consistency of assessments;
- Rely on tools and datasets that are incomplete and inadequate to assess the impact of land clearing on biodiversity;
- Provide decision-makers with a broad discretion in relation to how they may take various considerations into account and how the considerations will affect their decision. As such, local councils are not applying the Decision Guidelines consistently and fail to apply the mitigation hierarchy, being that clearing and offsetting are a last resort, before approving clearing. When councils fail to apply the mitigation hierarchy, clearing and offsetting becomes the default position;
- Do not provide adequate safeguards in relation to establishing, monitoring and managing offsets.

The *Assessor's Handbook* provides further information in relation to how a responsible authority may consider the elements of the decision guidelines for each assessment pathway. Decision-makers appear to be provided with broad discretion in relation to how they might take the various considerations into account and how the various considerations will affect their decision.[909]

In addition to the decision guidelines in the Guidelines, the responsible authority when deciding on a NVPP application under cl 52.16 or an application under cl 52.17 is to also consider the decision guidelines in cl 65 of the VPP. Clause 65 states the responsible authority must consider the matters in s 60 of the PE Act, which are:

- the relevant planning scheme;
- the objectives of planning in Victoria;
- all objections and other submissions which it has received and which have not been withdrawn;
- any decision and comments of a referral authority which it has received;

[908] Guidelines p 24 cl 7.
[909] See Assessor's Handbook [4] - [5.3].

- any significant effects which the responsible authority considers the use or development may have on the environment or which the responsible authority considers the environment may have on the use or development; and
- any significant social effects and economic effects which the responsible authority considers the use or development may have.[910]

Other considerations under cl 65 include:

- the purpose of the zone, overlay or other provision. Any matter required to be considered in the zone, overlay or other provision;
- any significant effects on the environment, including the contamination of land, may have on the use or development;
- factors likely to cause or contribute to land degradation, salinity or reduce water quality;
- the extent and character of native vegetation and the likelihood of its destruction;
- whether native vegetation is to be or can be protected, planted or allowed to regenerate.[911]

Where the removal, destruction or lopping of native vegetation occurs within a levy area, being an area declared to be within the urban growth areas that is not a conservation area, under the *Melbourne Strategic Assessment (Environment Mitigation Levy) Act 2020* (Vic), certain offset requirements under the VPP do not apply, such as the biodiversity impacts resulting from land clearing are not required to be offset in accordance with the Guidelines.[912]

A responsible authority can also enter into an agreement with an owner of land in the area covered by a planning scheme for which it is a responsible authority.[913] Agreements can be made that prohibit, restrict or regulate the use or development on land, which can include protecting native vegetation.[914] Decision-makers must consider the general VPP Guidelines as well as agreements entered into that can protect vegetation when assessing a permit application.[915]

Generally, an application for a permit is to be made publicly available and persons that may be affected by the grant of the permit may object to a permit being granted (PE Act, s 51 and s 57). The VPP also contains additional public consultation for certain categories of development including State projects (clause 52.30-5) and major road projects (clause 52.35-5).

The Minister has the discretion to override rules, for example, the Minister has the power to:

- grant a permit that is contrary to an NVPP; and
- permit the clearing of native vegetation that is contrary to Habitat Conservation Orders.

The Minister has the power, under section 97B of the P&E Act to call-in and determine a planning permit application, including if it raises a major issue of policy and that the determination of the application may have a substantial effect on the achievement or development of planning objectives. The responsible authority may also request the Minister to decide an application for a permit (PE Act, s 97C).

[910] *Planning and Environment Act 1987* (Vic) s 60.
[911] VPP cl 65.01.
[912] VPP cl 52.16-9, 52.17-8.
[913] *Planning and Environment Act 1987* (Vic) s 173(1).
[914] See *Planning and Environment Act 1987* (Vic) s 174(2)(a).
[915] See *Planning and Environment Act 1987* (Vic) s 60.

Property Vegetation Plans

A property vegetation plan (**PVP**) applies to a single property and shows all native vegetation proposed to be cleared.[916] Clause 52.17-3 sets out that a permit granted to remove, destroy or lop native vegetation in accordance with a PVP must include the condition that vegetation clearing occur within two years of the date of the permit and must conclude within 10 years.[917]

Analysis:

Victoria's risk-based assessment method is supposed to support a more efficient and effective assessment of proposed native vegetation clearing on biodiversity by categorising proposed clearing into risk categories and enabling assessments to occur for "low" and "intermediate" risk clearing using less resources. The risk assessment method, therefore, acknowledges that there is some level of risk to biodiversity resulting from all forms of clearing native vegetation but that some threats, or level of threats, to biodiversity are deemed to be acceptable under the scheme. Of course, the risk assessment method sits within the broader three stage mitigation hierarchy to avoid, minimise, and offset vegetation clearing. However, as discussed below, in practice, this hierarchy is not being applied.

The risk assessment method also appears to facilitate vegetation clearing, by streamlining the requirements for clearing proposals deemed to be lower risk. However, the risk assessment occurs at the very beginning of the assessment process, before the relevant risks of clearing can be properly understood, and limits decision-makers' powers to obtain further information so that they can properly assess risks before approving proposed clearing. For example, the risk assessment method assumes that the extent and location of clearing is indicative of the impact of the clearing on biodiversity. The framework provides that clearing under the basic assessment pathway, being clearing of less than 0.5ha of native vegetation and no large trees in Location 1 of the Location Map,[918] will have a limited impact on biodiversity. As a result of this assumption, where clearing falls within the basic assessment pathway, decision-makers are not required to consider the biodiversity impacts (decision guidelines 9) or impacts to rare or threatened species (decision guidelines 10) of the proposed clearing.[919]

In our view, the risk assessment process is premised on assumptions that are not supported by datasets or other information held by the relevant authorities. As discussed further below, we understand that DELWP does not have habitat distribution models for 477 threatened species – 25% of all threatened species in Victoria. It is, therefore, highly likely that areas within Location 1 of the Location Map contain threatened species and that clearing is occurring under the basic assessment pathway in these areas.

Given that it is a key objective of the VPP to ensure there is 'no net loss' of biodiversity, and the most common form of clearing does not require proponents to assess the impact of the proposed clearing on biodiversity, there is a real risk that the VPP objective is not being met where clearing occurs under the basic assessment pathway. There is also a risk that the cumulative impacts of clearing

[916] Assessor's Handbook [4.1.1].
[917] VPP cl 52.17-3.
[918] See Guidelines cl 6.2.
[919] See Assessor's Handbook p 18 [4], p 34 [4.4.1].

under the basic assessment pathway on biodiversity and threatened species is not properly assessed or understood.[920]

Further, the basic and intermediate assessment pathways do not require proponents to provide site assessments, which include habitat hectare assessments that consider the relevant vegetation's condition, extent, EVC and bioregional conservation status.[921] Without site assessments, it is unlikely that persons assessing a native vegetation clearing application have a good understanding of the value of the vegetation and the impact clearing such vegetation may have. Further, there is no discretion for decision-makers to require an applicant in the basic or intermediate pathway to engage an accredited native vegetation assessor for a site assessment where the decision-maker forms the view that they require further information to consider the application.[922] We understand that the current iteration of the VPP is much weaker than former versions of the native clearing vegetation regimes in Victoria, which required all forms of proposed clearing to be accompanied by on-ground ecological assessments.

Protection of Environmentally Sensitive Areas

Overview:

There are overlays and habitat conservation orders that can act to protect environmentally significant areas.

- *Overlays*

Local planning schemes can contain additional requirements for native vegetation clearance by local council implementing overlays. The VPP outlines four overlays that protect native vegetation of particular significance. The four overlays are:

1. The Vegetation Protection Overlay (**VPO**), which is designed to protect significant native and exotic vegetation in both urban and rural environments;[923]
2. The Environmental Significance Overlay (**ESO**), which is applied if vegetation protection is a part of a wider objective to protect the environmental significance of an area, such as coastal or riparian habitats;[924]
3. The Significant Landscape Overlap (**SLO**), which is applied more broadly than a VPO and aims to identify and conserve the character of a significant landscape;[925] and
4. The Heritage Overlay (**HO**), which aims to conserve and enhance places of natural and cultural significance, ensuring that development does not negatively affect significant heritage places.[926]

Where native vegetation falls within one of the above overlays, an applicant must generally seek a permit before being permitted to clear the vegetation. [927] We note, however, that even where native

[920] See Environmental Justice Australia, *Submission in response to draft native vegetation clearing regulations and guidelines* (20 February 2017) 4 available at: https://envirojustice.org.au/wpcontent/uploads/2017/02/EJA_native_vegetation_clearing_submission_Feb-2017.pdf
[921] See Assessor's handbook p 15 [3.10] for details on a site assessment report.
[922] Guidelines cl 6.5.1.
[923] VPP cl 42.02.
[924] VPP cl 42.01.
[925] VPP cl 42.03.
[926] VPP cl 43.01.
[927] We note that other overlays in the Victorian Planning Provisions also require permits for native vegetation which are less relevant to ESAs, such as the Erosion Management Overlay at cl 44.01, the Salinity Management Overlay at cl 44.02.

vegetation falls within the above overlays, there are still exemptions to the requirement to obtain a permit to clear vegetation. For example, the SLO overlay provides a table of exemptions at clause 42.03-3, which includes where extractive industries are authorised. Each of the overlays contain exemptions.

The Planning Practice Note 07 states that overlays are the main way to protect vegetation in urban areas as clause 52.17 of the VPP is targeted more towards broadscale land clearing rather than urban areas with small lot sizes.[928] It instructs proponents wishing to protect vegetation in urban areas to firstly seek a vegetation survey or study to be undertaken to determine the vegetation significance. The conclusions and data from the assessment phase can then be used to develop local policy content for the Local Policy Planning Framework (LPPF).[929]

- *Habitat Conservation Orders*

The Minister can make Habitat Conservation Orders (**HCOs**) under the FFG Act to conserve, protect or manage critical habitat.[930] Where a critical habitat determination has been made in relation to a taxon of flora or fauna, the Minister must consider whether to make a HCO for that critical habitat within 2 years of the determination.[931] HCOs can:

- prohibit any activity, land use or development within the critical habitat or proposed critical habitat; or
- require any person proposing to undertake any activity, land use or development within the critical habitat or proposed critical habitat to obtain a permit from the Minister; or
- enable the Secretary to undertake any actions or works to conserve, protect, or manage the critical habitat or proposed critical habitat; or
- require the person to repair any damage to the critical habitat or proposed critical habitat that has occurred since the person was given notice of the critical habitat determination or proposed critical habitat determination.

If there is a conflict between a planning scheme and an HCO, the HCO prevails over the planning scheme.[932]

If a landholder or water manager wishes to undertake a use or activity that requires a permit under a HCO, they must apply to the Minister. In assessing whether to grant such a permit, the Minister will consider:

- the objectives of the FFG Act;
- the significance of the likely impacts of the proposal on the habitat the persistence of taxa or communities of flora or fauna within the area;
- whether all reasonable steps have been taken to avoid the impacts of the proposal on the habitat or the persistence of taxa or communities of flora or fauna within the areal;
- the likely effectiveness of any proposed measures to mitigate the impacts of the proposal on the habitat or the persistence of taxa or communities of flora or fauna within the area; and

[928] https://www.planning.vic.gov.au/guides-and-resources/guides/planning-practice-notes/vegetation-protection-in-urban-areas
[929] Department of Transport and Planning, *PPN-07 Vegetation Protection in Urban Areas* available at: https://www.planning.vic.gov.au/resource-library/planning-practice-notes
[930] *Flora and Fauna Guarantee Act 1988* (Vic) ss 26(1), 27(1).
[931] *Flora and Fauna Guarantee Act 1988* (Vic) s 26(2).
[932] *Planning and Environment Act 1987* (Vic) s 41.

- any possible social and economic effects that the granting of the permit might have.[933]

This provides some further protection of critical habitat areas under a HCO, although there is still the opportunity for a permit to be acquired for development purposes in these areas.

Historically, there has been only one critical habitat determination made under the FFG Act, in 1996, which was subsequently withdrawn.[934] Recent amendments to that Act included revisions to the critical habitat provisions that expand the concept of critical habitat, provide an inclusive list of factors which may contribute to an area being critical habitat and create a greater role for the Scientific Advisory Committee (**SAC**).[935]

Analysis:

Each of these mechanisms provides an additional opportunity to strengthen protections for environmentally sensitive areas and protect native vegetation. Although, as noted above, protection is not absolute. The removal of native vegetation can still take place in these areas, such as via an exemption to an overlay or permits for activities contrary to a HCO being permitted based on Ministerial discretion.

Offsets

Overview:

Victoria's principal biodiversity offsetting rules are contained in the *Guidelines for the removal, destruction or lopping of native vegetation,* (**Guidelines**).[936]

Offsets play a key role throughout Victoria's native vegetation removal regulations, which are framed around avoiding, minimising and offsetting impacts of vegetation removal. Offsets are largely relied upon to achieve a 'no net loss' outcome, making it especially important that they operate effectively.

Analysis:

The offsets framework does not appear to effectively compensate for native vegetation loss, and lacks the ambition to improve native vegetation and biodiversity. Key concerns include that:

- *The Guidelines do not aim to improve biodiversity:* As noted above, the policy objective of the framework is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation. Simply requiring 'no net loss' does not acknowledge current trajectories of biodiversity loss and that positive action is required to halt and reverse this trend.

- *The Guidelines do not provide clear limits (e.g. no go zones) for the use of offsets:* Rather, 'decision guidelines' must be considered by the responsible authority (Guidelines, Part 7).

[933] *Flora and Fauna Guarantee Act 1988* (Vic) s 35(2)(a)-(e).
[934] Fitzsimons, J., Urgent need to use and reform critical habitat listing in Australian legislation in response to the extensive 2019-2020 bushfires, (2020), 37 EPLJ 143.
[935] See Victoria Department of Environment, Land Water and Planning, Critical habitats and HCO factsheet, available at https://www.environment.vic.gov.au/__data/assets/pdf_file/0032/466682/Critical-habitat-and-HCO-factsheet.pdf.
[936] Victorian Department of Environment, Land, Water and Planning, *Guidelines for the removal, destruction or lopping of native vegetation,* available at https://www.environment.vic.gov.au/__data/assets/pdf_file/0021/91146/Guidelines-for-the-removal,-destruction-or-lopping-of-native-vegetation,-2017.pdf.

As with planning decisions generally, decisions on permits to clear native vegetation require the exercise of discretion, albeit controlled and conditioned by the Guidelines.

- *Like-for-like offsetting is not guaranteed:* In general, offset obligations are calculated according to abstract metrics (e.g. a 'strategic biodiversity score') that are based on modelled ecological information, occasionally combined with on-ground ecological assessments (Guidelines, Part 5). These metrics ('score') inform offsetting as well as permit decisions. In many cases (general offsets) there is no requirement for vegetation to provide the same ecological function to that being cleared, i.e. there is no 'like-for-like' obligation. In the case of habitat for rare or threatened species, where the relevant threshold is triggered (species offset), like-for-like requirements are more robust; offsets must compensate for the removal of that particular species' habitat.

- *'Alternative arrangements' and discounting can reduce offsetting obligations:* The Guidelines allow 'alternatives arrangements' to vary and discount offsetting requirements. For example:
    - The strategic biodiversity value score for general offsets can be reduced by a maximum of ten per cent (i.e. to no less than 70 per cent of the strategic biodiversity value score of the native vegetation to be removed) if the offset secured includes protection of ten per cent more general habitat units than are required and/or at least two large trees for every large tree to be removed (Guidelines, cl 11.2);
    - If a proponent is unable to secure a suitable species offset, alternative arrangements for species offsets can be on a case-by-case basis (Guidelines, cl 11.3); and
    - Offset requirements for removing native vegetation for timber harvesting can be met via regeneration (Guidelines, cl 11.4).

- *Certain activities are exempt from offsetting requirements:* The VPP identifies an extensive list of activities that do not require a permit to clear vegetation, meaning that the offsetting framework in the Guidelines is not applicable. In some instances, the Guidelines are still applied as a matter of policy (e.g. in relation to certain activities undertaken on Crown land), however concerns have been raised about the ability to review or enforce offsetting arrangements in the same manner as when a planning permit in required.[937]

The VAGO Report raised serious shortcomings with Victoria's offset framework, concluding that:

- DELWP's oversight is undermined by data quality issues of its datasets for the offset credit register and native vegetation calculator.[938] The native vegetation calculator operates by determining the nature and extent of biodiversity that will be affected by proposed clearings based on habitat distribution models (HDMs). This is used to calculate the offset requirements for landholders to compensate for biodiversity loss. DELWP does not have HDMs for 477 or 25% of threatened species in Victoria, meaning in areas where these species

[937] See EJA, *Submission in response to Draft native vegetation clearing regulations and guidelines,* 2017, p 7, available at https://envirojustice.org.au/wp-content/uploads/2017/02/EJA_native_vegetation_clearing_submission_Feb-2017.pdf.
[938] VAGO Report 3.

reside the calculator will not provide sufficient offset requirements or fully compensate for the biodiversity loss.

- There are also many incomplete DELWP native vegetation reports about the number of council approved permits and state offset sites. DELWP's management of the credit register allows the oversubscription of offset credits. The 'accuracy' and 'completeness' of DELWP's datasets and processes are rated poorly against the Department of Premier and Cabinet's *Data Quality Guideline—Information Management Framework.*[939]

The VAGO report concluded that "Victoria is not achieving its objective of no net biodiversity loss from native vegetation clearing on private land".[940]

Compliance with offsets is also limited. Landowners are usually required to enter into agreements with DELWP or the local government to protect offset sites.[941] To ensure compliance at offset sites, there is a large reliance on landowners self-reporting. Landowners are to undertake annual reports outlining the action they have taken to maintain and improve native vegetation at offset sites. In the period of 1 November 2020- 30 April 2021, 28% of annual reports required further action from DELWP before the landowners were deemed compliant with offset site management.[942]

Compliance and enforcement

Effectiveness of regulatory oversight

In Victoria, councils are primarily responsible for implementing native vegetation regulations through local planning schemes. DELWP is generally responsible for setting policy and regulations.

DELWP is required to release reports under its *Monitoring, evaluating and reporting plan (***MER***)*,[943] which are supposed to report on whether the native vegetation removal regulations are achieving Victoria's "no net loss" to biodiversity objective. The 2020-21 Annual Report found that:

- 47% of sites had minor compliance issues, which are considered as having negligible risk and are not urgently responded to;
- 24% of sites had moderate compliance issues, which landowners are provided with guidance to resolve the issue and asked to report back with evidence by a certain date; and
- 3% of sites were not compliant, meaning they failed to address compliance issues identified and DELWP is to follow up with landowners in these circumstances.[944]

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[939] VAGO Report 3.
[940] VAGO Report 1.
[941] See PE Act s 173 re an agreement with a local government; *Conservation Forest and Lands Act 1987* (Vic), s69 re an agreement with DELWP and Victorian *Conservation Trust Act 1972* (Vic), s 3A re an offset covenant with the Victorian Conservation Trust.
[942] Department of Environment Land, Water and Planning, *Native Vegetation Regulations Three-Yearly Report* (July 2017-June 2020) 29 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0031/535981/Three_Yearly_Report_Final_280721.pdf
[943] Department of Environment, Land, Water and Planning, *Monitoring, evaluating and reporting plan: Removal, destruction or lopping of native vegetation* (January 2019) available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0016/414700/Native-vegetation-regulations-MER-plan.pdf
[944] Department of Environment, Land, Water and Planning, *Native vegetation removal regulations 2020-2021* (Annual Report, April 2022) 15 available at: https://www.environment.vic.gov.au/__data/assets/pdf_file/0034/569329/AnnualReport20202021_Final.pdf#Annual%20Report%202020/21.

There are a number of factors that may be contributing to these results:

- There appears to be limited oversight at both the local and State level of the extent and impact of vegetation clearing, making enforcement of the native vegetation regulations particularly difficult;
- Regulatory authorities lack the financial support and resources to conduct enforcement activities.

Some case studies of successful enforcement outcomes are set out in the *Native Vegetation Regulations Compliance and Enforcement Toolkit,*[945]but these are provided as examples only and are not intended to be a complete register of compliance and enforcement action.

The *Outcomes Report* that informed changes to Victoria's native vegetation regulations in 2017 foreshadowed ongoing work beyond the 2017 amendments to better manage native vegetation included:

- improvements to compliance and enforcement of clearing regulations;
- improvements to monitoring and assessment of native vegetation extent and condition.[946]

Despite noting these issues, there continues to be monitoring, reporting, compliance, and enforcement challenges under Victoria's native vegetation regulations.

Strength of compliance and enforcement framework

Overview:

Clearing vegetation without the appropriate authority is an offence under the PE Act (s 126, PE Act).

The Native Vegetation Compliance and Enforcement strategy (**the Strategy**) is used by agencies to inform compliance activities in relation to the native vegetation removal regulations, including in relation to the development of compliance and enforcement plans. [947] The Strategy aims to promote the collaboration between the regulatory bodies responsible for the compliance of the native vegetation regulations, primarily local councils and DELWP and provides a framework for making consistent and transparent compliance enforcement decisions. The Strategy promotes a risk-based approach to compliance and enforcement. Enforcement is to focus on matters that will potentially cause the greatest amount of harm to the environment, with the level of intervention proportional to the likelihood of non-compliance and the consequences to the environment. The Strategy provides a list of tools for responding to non-compliance with permit requirements or conditions and states that:

- revegetation alone will not meet the no net loss objective or satisfy the offset requirements for the native vegetation removal; and

[945]https://www.environment.vic.gov.au/__data/assets/pdf_file/0014/520313/NVR-Compliance-and-Enforcement-Toolkit-.pdf.

[946] Department of Environment, Land, Water and Planning, *Outcomes Report: Review of the native vegetation clearing regulations* (November 2016) 8-9 available at: https://engage.vic.gov.au/native-vegetation-review.

[947] Department of Environment, Land, Water and Planning, 'Compliance and enforcement strategy,' available at https://www.environment.vic.gov.au/__data/assets/pdf_file/0015/91221/Compliance-and-enforcement-strategy-Native-vegetation-removal-regulations.pdf.

- where possible and appropriate the requirement to secure an offset should be a component of enforcement responses to confirmed cases of unauthorized native vegetation removal.[948]

Victoria is not achieving its no net biodiversity loss from native vegetation clearing on private land objective. [949] The reasons for this include unauthorised clearings and ineffective assessment tools.[950] DELWP acknowledges substantial unauthorised clearing could be occurring with little to no enforcement. As it is unauthorised, it does not go through the permit process and there are no offsets to compensate for biodiversity loss. Unauthorised clearing occurs when native vegetation is removed:

- without a native vegetation permit and without being exempted under the regulations;
- with a permit in place, but clears beyond the permit conditions; or
- as an exempted clearing, but goes beyond allowable limits.

The Strategy outlines enforcement responses for non-compliance. The level of intervention depends on the risk level of the scenario. From a low-moderate level of intervention to a high level of intervention, the following enforcement responses are utilised:

Low-Moderate

- Informal negotiations with the alleged offender;
- Warning letters;
- Notice to comply;
- Infringement notices under s 130 of the PE Act;
- Remedial plan;
- Requiring rectification for unauthorised native vegetation removal and site remediation. This may include options such as purchasing offsets off the Native Vegetation Offset Register.

High

- Enforcement order;
- Injunctions and interim enforcement orders;
- Permit revocations;
- Prosecutions;
- Court injunctions.

Analysis:

While the Strategy focuses on making efficient use of resources, it means that smaller scale environmental harm is unlikely to be monitored and there is minimal incentive for persons to follow the native vegetation regulations where native vegetation clearing is not considered high risk. The Strategy also indicates that DELWP does not intend to allocate sufficient resources to appropriately enforce the native vegetation regulations. The risk-based approach also provides landholders with significant discretion to determine the value of the native vegetation that is proposed to be cleared, the pathway that the permit approval process should take, and to subsequently limit the information that the relevant authority receives in relation to an application. The landholder's assessment may in turn affect the offsets that they are required to seek.

[948] Department of Environment, Land, Water and Planning, 'Compliance and enforcement strategy 15.
[949] Vago Report 2.
[950] Vago Report 2.

The VAGO Report found in relation to compliance and enforcement of native vegetation laws on private land:

- Unauthorised land clearing continues to take place across Victoria. DELWP has acknowledged that it is possible substantial unauthorised clearing is occurring with little to no enforcement. Further, as these clearings do not go through the permit process, there are no offsets to compensate for their biodiversity loss;

- Councils do not effectively manage native vegetation clearing in their areas. Under the native vegetation regulations, councils are required to ensure native vegetation cleared is either permitted or exempt, to monitor landowner's compliance with requirements for first-party offset sites and to monitor landowner's compliance with native vegetation permit conditions. VAGO found that councils do not currently have any processes to proactively identify illegal clearing. As such, they cannot meet their first function under the native vegetation regulations. Currently councils rely on community complaints about clearing to have knowledge of clearing.[951] Councils have also advised that they have insufficient resources to effectively enforce the native vegetation regulations. VAGO found that from July 2018 to June 2020, only 50 per cent of permits could be matched to proof of purchased offset credits.[952]

- DELWP has been slow to address known issues to support councils' implementation of the regulations; and

- While permitted clearing is offset, limitations in DELWP's assessment tools mean that in some parts of the state, DELWP cannot determine if the required offset fully compensates for biodiversity loss.[953]

VAGO recommended that DELWP improve:

- the currency and completeness of its datasets and its management of the offset credit register. Relevantly, VAGO found that DELWP does not have habitat distribution models for 477 threatened species – 25% of all threatened species in Victoria. The lack of datasets means that in parts of the state where the 477 threatened species reside, DELWP's native vegetation calculator is unable to identify sufficient offset requirements. VAGO also found that there are no quality assurance processes to ensure that recorded information is accurate,[954] none of the 4 audited councils could reliably say how many permits with native vegetation requirements they issued from July 2018 to June 2020 and councils could not indicate if clearing occurred under a permit or exemption. [955]

- its monitoring of clearing across the state, including using spatial imagery analysis. VAGO found that DELWP's reports on native vegetation clearing in relation to council approved permits and established offset sites were incomplete. Some of the councils audited did not require landowners to present proof of purchased offsets before allowing the removal of native

[951] VAGO Report 28.
[952] VAGO Report 29.
[953] VAGO Report 1-2.
[954] VAGO Report.
[955] VAGO Report.

vegetation and in most cases, councils did not ensure that the vegetation removed is consistent with the permit.[956] All audited Councils stated that unauthorised clearing occurs, yet their knowledge about illegal clearing relies on community complaints or permit holders consulting the Council about their plans. VAGO also found that it is likely that more clearing has occurred than what is recorded in DELWP's database regarding permitted clearing. It made this finding by comparing DELWP's data against spatial imagery.[957]

- its management of offset sites. DELWP actively monitors offset sites in the first 10 years of their establishment. However, DELWP's communications regarding management of offset sites after this ten year period have been inconsistent.[958]

- its support to councils in implementing the regulations. VAGO found that councils are not applying the regulations consistently and fail to apply the mitigation hierarchy, being that clearing and offsetting are a last resort, before approving clearing. When councils fail to apply the mitigation hierarchy, clearing and offsetting becomes the default position.

DELWP's commitment to ameliorate enforcement and compliance issues has been limited. In 2019, it identified key reasons for failed enforcement against unauthorised clearing, which included:

- lack of council staff resourcing;
- budget constraints;
- insufficient staff knowledge and capability to implement the regulations; and
- history of poor outcomes from enforcement actions, where court-imposed fines are considerably less than the cost of offset credits.[959]

In August 2019, DELWP established the Illegal Clearing Working Group (**ICWG**) and asked it to develop an action plan to deliver more effective administration of Victoria's native vegetation regulations and reduce the impacts of unauthorised vegetation removal. However, VAGO found that while ICWG has made some progress, this progress has been slow and DELWP has not committed to a date for completion of the revised action plan.[960]

Overall, Victoria's compliance and enforcement of native vegetation regulations appears to be poor. At best, it provides for inconsistent and incomplete enforcement of native vegetation regulations by local councils, who lack financial support and resources to conduct enforcement activities. Further, it appears that councils themselves are failing to appropriately apply the three-stage mitigation hierarchy to achieve the no-net loss objective, with clearing often approved where there has been no consideration as to whether it could have been avoided. Due to such a fragmented system, there also appears to be limited oversight at both the local and State of the extent and impact of vegetation clearing, making enforcement of the native vegetation regulations particularly difficult.

As identified above, VAGO found significant issues with monitoring, reporting and enforcement of the native vegetation regulations across Victoria. VAGO has recommended that DELWP and councils confirm the issues facing the effective management of native vegetation clearing on private land and

[956] VAGO Report 6.
[957] VAGO Report 27.
[958] VAGO Report 7.
[959] VAGO Report 5.
[960] VAGO Report 6.

determine strategies to address such issues.[961] It is unclear what action DEWLP or councils may be taking in response this recommendation or what steps DEWLP may be taking to better support councils to effectively enforce land clearing laws.

Opportunities for third party enforcement

Under s 114 of the PE Act, a responsible authority or any person may apply to the Tribunal for an enforcement order against any person specified in subsection (3) (the owner of the land, occupier of the land, any other person who has an interest in the land and any other person by whom or on whose behalf the use or development was, is being, or is carried out to be) who has contravened the Act (including not obtaining a relevant permit), or contravened a condition of a permit.

Transparency of compliance and enforcement

It is clear from VAGO's findings that monitoring and reporting of native vegetation clearing is wholly inadequate in Victoria. As such, there is little to no oversight of the extent of native vegetation clearing, whether clearing is occurring under permits or an exception and the effectiveness of offset programs.

Enforcement actions are not recorded in DELWP's annual native vegetation removal regulations report. Rather the report states that DELWP has systems to follow up with non-compliant landowners.

There is no uniform process for councils (as regulatory authorities) to report on their native vegetation compliance action.

[961] VAGO Report 1.

Western Australia

Western Australia

Background

Western Australia (**WA**) has announced a new *Native Vegetation Policy* with the key aim of achieving a net gain in vegetation. It aims to improve policy settings, practices and systems at a statewide and regional level. Implementation of the policy will include a review of the existing legislative and policy framework for native vegetation in WA, and may lead to reform.

There are key aspects of the current regulatory framework in WA that need strengthening. For example:

- Administration and regulation is fragmented and uncoordinated;
- A new referral process removes important oversight; and
- Monitoring and reporting is inadequate.

The Department of Water and Environmental Regulation (**DWER)** publishes clearing statistics on its website.[962] It includes areas approved for clearing by industry group. Data indicates that the industry group associated with the largest levels of clearing is state development, which includes clearing for mineral products, mineral exploration, petroleum production, petroleum exploration and other state development.

Government commitments to end broadscale land clearing in line with the Glasgow Declaration

Commitment

While there is no direct commitment from the WA government to reduce or end land clearing by 2030, in May 2022 a *Native Vegetation Policy* was introduced that acknowledges the need to reverse the decline in native vegetation and the role land clearing plays in this.

In this section we outline:

- Public commitments and statements;
- Legislative objectives; and
- Policy documents.

Public commitments and statements

In May 2022 Western Australia's first *Native Vegetation Policy* was released, outlining the Government's plan to protect and enhance native vegetation. The media statement accompanying its release notes that the policy is a response to the decline of native vegetation due to clearing or

[962] https://www.dwer.wa.gov.au/clearingstatistics.

degradation.[963] The Policy is supported by the *Implementation Roadmap*,[964] which sets out the actions that the WA Government will take in implementing the policy over four years - 2022 to 2026.

The *Native Vegetation Policy* acknowledges the need to reverse the decline in native vegetation, that clearing has contributed to this decline and clearing's role in causing costly problems like 'salinity, erosion and intensifying urban temperatures'.[965] The Policy also aims to enable all sectors to contribute to a net gain in the extent or condition of native vegetation, meaning improvements in the extent or condition of native vegetation exceeds the losses at a landscape scale.[966]

Legislative objectives

The *Native Vegetation Policy* has not been enacted in law. Instead, the *Implementation Roadmap* includes key actions for evaluating existing legislation and developing policy reform options to support the aims of the Policy. This includes an overarching aim of "a net gain in native vegetation and landscape-scale conservation and restoration". Key actions include:

- Action 1.1: Evaluate efficacy of existing legislative and policy provisions for native vegetation strategic planning and protection. Map the interrelationships between existing policy frameworks for regulation, land management, land planning and funding.
- Action 1.3(b): Develop policy reform options to better incentivise conservation and restoration, support a net gain in native vegetation and build the restoration economy.

At present, the *Environmental Protection Act 1986* (WA) (**EP Act**) is the main act that regulates native vegetation clearing in WA. Broadly, the EP Act has many functions including 'to provide for an Environmental Protection Authority, for the prevention, control and abatement of environmental pollution, for the conservation, preservation, protection, enhancement and management of the environment and for matters incidental to or connected with the foregoing.'[967] The EP Act focuses on protecting and enhancing the environment rather than explicitly on reducing clearing.

Policy documents

As noted above, the Government's *Native Vegetation Policy* is the key policy document aimed at implementing the Government's commitment to achieving a net gain in native vegetation and landscape scale conservation and restoration.

Costed plan to end deforestation

There is no clear costed plan to end deforestation. The key funding commitments made by the Government in relation to ending deforestation (land clearing) are linked with the implementation

[963] Government of Western Australia, 'New native vegetation policy for Western Australia' (Media Statement, 26 May 2022) available at: https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/05/New-native-vegetation-policy-for-Western-Australia.aspx#:~:text=The%20new%20policy%20aims%20for,have%20different%20purposes%20and%20objectives.
[964] Government of Western Australia, 'Native vegetation policy for Western Australia - Implementation roadmap', May 2022, available at https://www.wa.gov.au/system/files/2022-07/Native-vegetation-policy-Implementation-roadmap.pdf.
[965] Government of Western Australia, *Native vegetation policy for Western Australia* (May 2022) 10 available at: https://www.wa.gov.au/system/files/2022-07/Native-vegetation-policy-for-Western-Australia.pdf.
[966] Government of Western Australia, *Native vegetation policy for Western Australia* (May 2022) 7 available at: https://www.wa.gov.au/system/files/2022-07/Native-vegetation-policy-for-Western-Australia.pdf.
[967] *Environmental Protection Act 1986* (WA).

of the *Native Vegetation Policy* – see below. We have also identified other funding commitments connected to WA legislation/policy.

Money connected to legislation / policy

- *Native Vegetation Policy*

On introducing the *Native Vegetation Policy*, the WA Government committed $3.3 million to support the policy's first two years of implementation and indicated that progress in the first two years, and its findings, will inform how it will be resourced into the future.[968]

- *Other government funding for vegetation*

Under the WA Green Jobs Plan, $15 million was allocated to the Native Vegetation Rehabilitation Scheme, which targets revegetation, habitat restoration and protection of existing vegetation.[969] This is alongside $8 million for the Offsets Fund for Recovery Program. The Green Jobs Plan also invests $1.7 million into the Environmental Revegetation and Rehabilitation Fund (ERRF), which aims to deliver the Offsets Funds for Recovery and Native Vegetation Rehabilitation Scheme programs. The ERRF supports projects on the ground located in intensive land use zones where employment was most impacted by COVID-19 and where environmental priorities can be achieved such as offset projects.[970]

The Government has also set up the Pilbara Environment Offsets Fund, designed to facilitate industry funding of offsets for mining-related clearing.[971]

Strengths and weaknesses of land clearing regulation that may be contributing to clearing rates

Overview

In WA a permit is needed to clear native vegetation unless:

- an exemption applies; or
- the relevant government department decides a permit is not required during the clearing referral process.

There is no code-based clearing in WA.

[968] Government of Western Australia, 'New native vegetation policy for Western Australia' (Media Statement, 26 May 2022) available at: https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/05/New-native-vegetation-policy-for-Western-Australia.aspx#:~:text=The%20new%20policy%20aims%20for,have%20different%20purposes%20and%20objectives.
[969] Government of Western Australia, 'Green Jobs Plan unveiled to support recovery' (Announcement, 10 November 2020) available at: https://www.wa.gov.au/government/announcements/green-jobs-plan-unveiled-support-recovery.
[970] Government of Western Australia, 'Environmental Revegetation and Rehabilitation Fund' (Announcement, 8 November 2021) available at: https://www.wa.gov.au/service/environment/business-and-community-assistance/environmental-revegetation-and-rehabilitation-fund#:~:text=The%20Environmental%20Revegetation%20and%20Rehabilitation,Native%20Vegetation%20Rehabilitation%20Scheme%20programs.
[971] See https://www.wa.gov.au/service/environment/business-and-community-assistance/program-pilbara-environmental-offsets-fund.

Clearing is regulated primarily under the *Environmental Protection Act 1986* (**EP Act**) and its subsidiary instruments, including the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (**Clearing Regulations**).

The Department of Water and Environmental Regulation (**DWER)** is the chief regulator of the clearing provisions of the EP Act, except for clearing associated with mineral and petroleum activities. Clearing associated with mineral and petroleum activities is regulated under the EP Act by the Department of Mines, Industry Regulation and Safety (**DMIRS**) acting under delegation.

Clearing is also regulated under numerous other pieces of legislation including:

- *Biodiversity Conservation Act 2016* (WA) (**BC Act**);
- *Conservation and Land Management Act 1984* (WA) (**CALM Act**);
- *Land Administration Act 1997* (WA) (**LA Act**);
- *Soil and Land Conservation Act 1945* (WA); and
- *Mining Act 1978* (WA).

Exemptions

Overview:

The following clearing does not require a permit under the EP Act:

- Clearing that is done to give effect to a 'prescribed enactment' (i.e. specified rule or law) or authorised under certain statutory processes, as set out in Schedule 6 of the EP Act; and

- Clearing exemptions under the Clearing Regulations. Clearing is authorised if it is of a kind prescribed for the purposes s 51C(c) of the EP Act. Such prescribed clearing for the purposes of s 51C(C) of the EP Act are set out in clause 5 of the Clearing Regulations. Exemptions under clause 5 must be done in such a way as to limit damage to neighbouring native vegetation.[972] Specific requirements for how these exemptions are carried out are specified in the Table under Regulation 5. Many of these exemptions do not apply within environmentally sensitive areas (**ESAs**).

There are no notification requirements for clearing carried out under clause 5 of the Clearing Regulations.

Analysis:

Together, Schedule 6 of the EP Act and the Clearing Regulations provide for approximately 40 clearing exemptions, allowing proponents to clear native vegetation without being required to apply to DWER for a clearing permit. This is an extensive number of exemptions. Further, it is concerning that the language used in Schedule 6 and the Clearing Regulations is extremely broad. [973] For example, in Clause 5 of the Clearing Regulations terms such as "reasonable" and "no wider than necessary" are used, and are not defined. While DWER has published *A guide to the exemptions and*

[972] Clearing Regulations cl 5(1)(c).
[973] Environmental Defenders Office, *Native Vegetation Issues Paper: Submissions* (2020) 7-8 available at: https://www.edo.org.au/wp-content/uploads/2020/02/EDO-submissions-Native-Vegetation-Issues-Paper-20200210.pdf

regulations for clearing native vegetation,[974] which provides some guidance on the application of the exemptions, these vague terms may still create ambiguity. The exemptions leave it to the discretion of the person wishing to clear native vegetation/proponent to determine what is reasonable or necessary. Because there are no notification requirements it is difficult to monitor and enforce clearing undertaken under these provisions. We understand this guidance is being updated to reflect changes to Schedule 6 of the EP Act and public consultation on the draft updated Guideline is expected in mid-2023.

A number of the exemptions can be particularly problematic. For example:

- The exemption in Regulation 5, Item 1 of the Clearing Regulations relating to certain clearing that does not exceed 5 hectares should be removed or amended. We note that this exemption was previously limited to clearing that does not exceed 1 hectare.

- The Clearing Regulations permit 'low impact or other mineral or petroleum activities' to occur without a clearing permit under certain conditions set out in Schedule 1 of the Regulations.[975] This Schedule permits clearing up to 10ha per financial year per authority area.[976] Schedule 1 of the Clearing Regulations lists the activities that are considered low impact such as 'activities involving no ground disturbances and little or no vegetation damage.'[977] Such low impact activities must be carried out in certain ways such as 'so that it does not result in clearing of riparian vegetation and limits or avoids indirect harm to riparian vegetation'.[978] This exemption also does not apply if it involves clearing in an area of the State that is a non-permitted area.[979] These areas are listed in schedule 1, clause 4. Substantial amounts of clearing can be undertaken under this exemption. Vegetation in semi-arid areas often does not regenerate after this clearing, so it is not really 'low impact'. The EPA generally does not assess exploration activities as they are considered 'not significant', so this clearing occurs without any assessment of the impacts.

- Item 2(b) in Schedule 6 of the EP Act exempts clearing done under subdivision, planning or development approvals under an assessed scheme. This is of particular concern in the Perth metro area as it facilitates clearing for urban expansion with limited, or sometimes no, assessment of the environmental impacts. Habitats in the metropolitan region are under intense pressure from population and development and contain a lot of threatened species and ecosystems.

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[974] https://www.der.wa.gov.au/images/documents/your-environment/native-vegetation/Guidelines/A%20guide%20to%20the%20exemptions%20and%20regulations%20for%20clearing%20native%20vegetation.pdf.

[975] Clearing Regulations, reg 5 Item 20.

[976] *Environmental Protection (Clearing of Native Vegetation) Regulations 2004 (WA)* Sch 1, Cl 2(2)
Authority area is defined as the area in which the holder of one of the following authorities may carry out the activity or activities authorised by that authority (Clearing Regulations Sch 1, cl 2(3).):

a. a mining tenement as defined in the Mining Act 1978;
b. a permit, drilling reservation, lease, licence, special prospecting authority or access authority, as defined in the Petroleum Act 1967;
c. a licence as defined in the Petroleum Pipelines Act 1969;
d. a permit, lease, licence, pipeline licence, special prospecting licence or access authority, as defined in the Petroleum (Submerged Lands) Act 1982, or a consent of the Minister under section 60 of that Act.

[977] Clearing Regulations Sch 1, cl 2(1)(a).

[978] Clearing Regulations Sch 1, cl 3.

[979] Clearing Regulations reg 5 Item 20.

- Additionally, a blanket exemption for Alcoa bauxite mining in Jarrah Forest was granted at the same time the legislative controls on clearing were introduced in 2004. The exemption exists currently as a statutory instrument, allowing clearing to occur with no approval process for mining purposes.[980]

Where clearing is approved under another statutory process the environmental assessment of impacts and oversight may not be as robust as the EP Act.

For example, clearing that is carried out for prospecting or exploration activities under an authority granted under the *Mining Act 1978* (**Mining Act**) does not require a native vegetation clearance permit under the EP Act.[981] Assessment does not require consideration of the clearing principles. However, under section 63(c) of the Mining Act exploration licenses are granted subject to the condition that the holder will take all necessary steps to prevent damage to trees.[982] The Minister may also impose conditions for the prevention or reduction of injury to land.[983] Clearing under the Mining Act is discussed in more detail below.

Similarly, the provisions of Part V of the EP Act relating to clearing are not well integrated with the provisions in Part IV relating to environmental impact assessment of proposals. Due to a lack of integration and coordination between provisions of the EP Act and the *Planning and Development Act 2005 (*WA), the potential exists for a significant amount of clearing to occur under planning schemes that is not regulated or conditioned through the clearing or environmental impact assessment processes.

Code-based clearing / Self-assessable clearing

There are no self-assessable or code-based clearing codes in WA.

Clearing Requiring Approval

There are three key pathways for assessing proposals to clear vegetation under the EP Act, based on the anticipated scale of impacts:

- Part V clearing referral (very low environmental impact);
- Part V clearing permit applications;
- Part IV referral to EPA for assessment (for 'significant proposals).

These are examined in more detail below.

Part V clearing referral (very low environmental impact):

Overview:

A new referral process was introduced into the EP Act in October 2021. It allows those wishing to clear land that will likely have a 'very low environmental impact' to seek a decision from the CEO of

[980] Western Australia, *Western Australian Government Gazette,* No 114, 30 June 2004 available at: https://www.legislation.wa.gov.au/legislation/prod/gazettestore.nsf/FileURL/gg2004_114.pdf/$FILE/Gg2004_114.pdf?OpenElement.
[981] *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA) Cl 5, Item 25.
[982] *Mining Act 1978* (WA) s 63(c).
[983] *Mining Act 1978* (WA) s 63AA.

DWER as to whether a permit is required – see s51DA of the EPA Act. The CEO must have regard to specified criteria in section 51DA, including whether:

- The area proposed to be cleared is small relative to the total remaining vegetation. There are no known or likely significant environmental values within the area. The state of scientific knowledge of native vegetation within the region is adequate.
- Conditions will not be required to manage environmental impacts.[984]

The Government has introduced *Guidelines - Native vegetation clearing referral* to guide decisions under s 51AD, and suggests that the referral process is intended for clearing that will have a 'very low environmental impact'.

A decision will be made as to whether a permit will be required or not. Clearing activities that do not meet all the criteria listed above will require a permit.

Analysis:

The new referral process broadens the CEO's discretion substantially without commensurate oversight (e.g. the decision of the CEO is not subject to appeal by third parties).

Part V clearing permit applications:

Overview:

Clearing (under the EP Act) that cannot be undertaken via an exemption, and that has not been referred and determined under s51DA as not requiring a permit (see above), will require a permit under Part V of the EP Act. However, if the clearing is part of 'significant project' it will need to be referred to the EPA for assessment under Part IV of the EP Act (see below).

Applications for a permit are assessed and determined by the CEO of DWER (or by DMIRS under delegation – see below). Clearing permits are granted as either area permits or purpose permits.[985] Area permits are granted for two years and purpose permits for 5 years.[986] Permits are granted subject to conditions determined by what the CEO considers to be necessary to prevent, control, abate or mitigate environmental harm or offsetting the loss of the cleared vegetation.[987]

It is an offence under the EP Act to unlawfully clear (that is clearing done without a clearing permit or applicable exemption) under s 51C of the EP Act and to contravene the conditions of a clearing permit under s 51J of the EP Act.[988]

When making decisions as to clearing permits the CEO must have regard to the 'clearing principles' set out in Schedule 5 of the EP Act. These are:

- Principle (a) Native vegetation should not be cleared if it comprises a high level of biological diversity.

[984] Department of Water and Environmental Regulation, *Guidelines: Native vegetation clearing referrals* (October 2021) available at: https://www.wa.gov.au/system/files/2021-10/Guideline_Native_vegetation_clearing_referrals.pdf; *Environmental Protection Act 1986* (WA) s 51DA(4).
[985] *Environmental Protection Act 1986* (WA) s 51E(1)(b)(ii).
[986] *Environmental Protection Act 1986* (WA) s 51G.
[987] *Environmental Protection Act 1986* (WA) s 51H.
[988] *Environmental Protection Act 1986* (WA) ss 51C, 51J.

- Principle (b) Native vegetation should not be cleared if it comprises the whole or a part of, or is necessary for the maintenance of, a significant habitat for fauna indigenous to Western Australia
- Principle (c) Native vegetation should not be cleared if it includes, or is necessary for the continued existence of, rare flora.
- Principle (d) Native vegetation should not be cleared if it comprises the whole or a part of, or is necessary for the maintenance of, a threatened ecological community.
- Principle (e) Native vegetation should not be cleared if it is significant as a remnant of native vegetation in an area that has been extensively cleared.
- Principle (f) Native vegetation should not be cleared if it is growing in, or in association with, an environment associated with a watercourse or wetland.
- Principle (g) Native vegetation should not be cleared if the clearing of the vegetation is likely to cause appreciable land degradation.
- Principle (h) Native vegetation should not be cleared if the clearing of the vegetation is likely to have an impact on the environmental values of any adjacent or nearby conservation area.
- Principle (i) Native vegetation should not be cleared if the clearing of the vegetation is likely to cause deterioration in the quality of surface or underground water.
- Principle (j) Native vegetation should not be cleared if clearing the vegetation is likely to cause, or exacerbate, the incidence or intensity of flooding.

A guide to the assessment of applications to clear native vegetation also guides decision making, including the application of the clearing principles.[989]

If a decision-making authority (e.g. DWER or DMIRS) considers the proposal is likely to constitute a 'significant proposal', under section 38(5) of the EP Act, they must refer the proposal to the EPA for assessment under Part IV, if such a referral has not already been made.

There are opportunities for public comment on clearing applications (s 51E(4C), EP Act). Third parties may also lodge an appeal with the Minister to the decision of the CEO to issue a permit (s 101A(4)).

DMIRS has delegated authority under s 20 of the EP Act to administer clearing of native vegetation permits for mining and petroleum activities regulated under the:

- *Mining Act 1978* (WA);
- *Petroleum and Geothermal Energy Resources Act 1967* (WA);
- *Petroleum Pipelines Act 1969* (WA);
- *Petroleum (Submerged Lands) Act 1982*(WA);
- a government agreement (State Agreement Act) administered by the Department of Jobs, Tourism, Science, and Innovation.

DMIRS assesses applications using the same assessment process, including against the ten clearing principles in Schedule 5 of the EP Act. Assessments of clearing permits by DMIRS are subject to the same advertising, publishing and appeal provisions as DWER.

[989] Department of Environment Regulation, *A guide to the assessment of applications to clear native vegetation* (December 2014) available at: https://www.der.wa.gov.au/images/documents/your-environment/native-vegetation/Guidelines/Guide2_assessment_native_veg.pdf.

An Administrative Agreement between DWER and DMIRS exists to facilitate formal delegation of powers under the EP Act to DMIRS to administer clearing permit provisions for exploration and development activities in the mineral and petroleum resources sector.[990] The Administrative Agreement ensures that DMIRS considers the assessment of clearing permits and referrals in accordance with the relevant guidance.

The Administrative Agreement also requires a periodic audit of the delegation to DMIRS and its performance in administering its delegated functions and refers to the use of audits as a means of reviewing the effectiveness of both agencies' programs for the administration of native vegetation clearing applications and permits.

Analysis:

Despite clearing principles in the legislation, permits are ultimately decided based on the discretion of the relevant Department.

Part IV referral to EPA for assessment (for 'significant proposals):

Clearing that is part of a 'significant proposal' must be referred to the WA Environmental Protection Authority (**EPA**) for assessment under Part IV of the EP Act. 'Significant proposal' is defined as "a proposal likely, if implemented, to have a significant effect on the environment and includes a significant amendment of an approved proposal" (EP Act, s 37B(1)).

The requirements for assessing a referred proposal are set out in s 40 of the EP Act. The EPA has significant discretion in determining how the assessment will be carried out. For example, the EPA *may* (this list is not exhaustive):

- require *any person to provide it with such information* as set out in the requirement (s40(2)(a));
- *require the proponent to undertake an environmental review* and to report thereon to the Authority (s40(2)(b); and shall *determine the form, content, timing and procedure of any environmental review* and publish an indicative outline of the timing of the environmental review (s40(3));
- *conduct a public inquiry* (with the approval of the Minister) (s 40(2)(c));
- *make such other investigations and inquiries as it thinks fit* (s 40(2a));
- *publish information or reports* provided (e.g. under (s40(2)(a)) and *open them for public review* (ss s 40(4) and (5)).

Under s122 of the EP Act, the EPA *may* draw up administrative procedures for the purposes of this Act, and in particular, for the purpose of establishing the principles and practices of environmental impact assessment. In October 2021, in response to amendments to Part IV of the EP Act, the EPA updated its administrative procedures.[991] The administrative procedures set out the principles and practices for environmental impact assessment under Part IV of the EP Act. Further, guidance is

[990] https://dmp.wa.gov.au/Documents/Environment/ENV-MEB-016.pdf.

[991] https://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/Environmental%20Impact%20Assessment%20Administrative%20Procedures%202021.pdf.

also provided in the EPA's Environmental Impact Assessment (Part IV Divisions 1 and 2) Procedures Manual.[992]

The EPA's Strategic Plan outlines a number of ways the EPA intends to lead the ongoing enhancement of environmental impact assessment practices to deliver environmental protection outcomes, including:

- developing guidance that improves cumulative and holistic environmental impact assessment to deliver regional environmental protection outcomes;
- evaluating the success of environmental impact assessment processes in predicting, and approval conditions in achieving, expected environmental protection outcomes; and
- facilitating meaningful public consultation processes in EIA and ensure that consultation outcomes inform EIA decision-making to achieve environmental protection outcomes.

The Minister may direct the EPA to assess a proposal (even if the Authority considers that a referred proposal should not be assessed), or to assess or re-assess that proposal more fully and/or more publicly (s 43, EP Act).

If the application is approved, a Ministerial Statement will be issued stating the project can proceed and setting out any relevant conditions. Clearing that is assessed under Part IV of the EP Act does not require a clearing permit (and cannot be subject to, including if refused) a permit under Part V.

Analysis:

There is significant discretion in the legislation. While it is good that the EPA has, and is developing, policies and procedures to guide the EIA process, the framework would be strengthened by making some of the processes mandatory in law. For example, mandatory public participation would embed transparency and accountability in legislation. Similarly, key environmental impact assessment requirements could be set out in the legislation to ensure they form part of the assessment process – e.g. requirements in relation to applying the principles of ecologically sustainable development, a requirement that offsets deliver a net gain etc.

Protection of Environmentally Sensitive Areas

Overview:

The EP Act provides for the identification of environmentally sensitive areas (**ESAs**) – see s 51B of the EP Act. Under now repealed provisions of the EP Act, ESAs were identified by declaration. Declared ESAs were set out it the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* and include defined wetlands, threatened ecological communities, Bush Forever sites in the Perth metropolitan area, an area covered by vegetation within 50 m of rare flora, and land covered by certain environmental protection policies. ESAs are included on the Clearing Permit System Map.

Amendments to the EP Act in 2020 inserted new provisions. Under current rules Regulations may declare either a specified area of the State or a class of areas of the state an environmentally sensitive area.[993] No relevant Regulation has been yet, and savings and transitional provisions mean ESAs identified in *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*

[992] https://www.epa.wa.gov.au/procedures-manual.
[993] *Environmental Protection Act 1986* (WA) s 51B.

remain in place until such time as a regulation is made.[994] Prior to declaring any new regulations for environmentally sensitive areas, the Department must notify and consult with affected landowners or occupiers.

Exemptions under clause 5 of the Clearing Regulation do not apply in ESAs. That is, ESAs can provide protection from clearing that might otherwise occur under an exemption. Other forms of clearing may still be able to be undertaken in ESAs (subject to relevant assessment and approval).

Analysis:

The mechanism for identifying and protecting ESAs is not being used to its full potential. The *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* is out of date and parts of it no longer function. For example, clause 4(1)(g)-(j) is partly non-functional, as most of the Environmental Protection Policies referred to in it have been repealed, which means those areas are no longer ESAs except to the extent that they (wholly or partially) fall into another category (such as a wetland). Also, the protection of Bush Forever sites under clause 4(1)(f) can be overridden by development approval by the WA Planning Commission. There are also concerns about inadequate monitoring and enforcement. For example, we are aware of at least one instance of clearing taking place in a Bush Forever site without a permit and without any attention or enforcement action by the Department.

Offsets

Overview:

Clearing permits may include conditions requiring offsets – see s 51H and s 51I of the EP Act.

Offsets are implemented in accordance with WA's environmental offsets framework, which includes the *WA Environmental Offsets Policy*[995] and *WA Environmental Offsets Guidelines*[996]. While there is a legislative basis for the use of offsets (e.g. the EP Act provides that conditions can be imposed in order to directly or indirectly offset impacts of a proposal, including the loss of the cleared vegetation – s 45A(1)(b), s 51H(1) and s 51I(2)(b)), the key elements of the framework and policy settings are set out in policy documents and guidelines, and are not contained within the legislation itself.

Analysis:

In 2019 the WA Government reviewed the WA environmental offsets framework. The review concluded that environmental offsets have not completely countered the significant impacts of clearing approvals. While completed on-ground management offsets delivered environmental benefits, reporting was insufficient to determine whether all intended results were met.[997]

In general, it was found that avoidance and mitigation were consistently considered in assessment processes and sound decisions generally made. However, the review also found proponents may

[994] *Environmental Protection Amendment Act 2020* s 133B.
[995] https://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/WAEnvOffsetsPolicy-270911.pdf.
[996] http://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/WA%20Environmental%20Offsets%20Guideline%20August%202014.pdf.
[997] Department of Water and Environmental Regulation, *Review of the Western Australian environmental offsets framework* (Final Report, October 2019) v available at: https://www.wa.gov.au/system/files/2021-10/Review_of_the_WA_environmental_offsets-framework.pdf.

provide insufficient detail about the avoidance and mitigation effort undertaken prior to applicant's submissions, they may overstate the impact avoided by using unrealistic alternatives to compare the impacts of the activity and the environmental benefits of preferred alternatives can be difficult to measure. More specific information about avoidance and mitigation measures undertaken is desirable. Approval holders should further be encouraged to avoid and mitigate impacts in the implementation of the project.

The review found that the *WA Environmental Offsets Register 2013* (Offsets Register) provides a central public record of all offset agreements in WA which enhances transparency and accountability, [998] however it should be revised so that information is complete, up to date, collated and clearly presented.

The WA Government review made recommendations for improving the offsets framework, including that:

- The offsets policy be amended to be consistent with the offsets guidelines, to reflect that offsets are not appropriate for impacts which are environmentally unacceptable or where no offset can be applied to reduce the impact (Recommendation 3);
- A regular broad review of the offsets framework and its implementation in achieving environmental outcomes should be undertaken and published (Recommendation 22);
- The operational procedures and methods for calculating offset fund contributions, including the Part V fund and the Pilbara Environmental Offsets Fund, are regularly reviewed and updated (Recommendation 16);
- Offset conditions be strengthened to improve enforceability and allow monitoring of implementation through the use of tools such as satellite imagery (Recommendation 18); and
- DWER's annual compliance program should include reporting of offset compliance (Recommendation 21).[999]

Overall, the offsets framework has serious limitations in effectively compensating and improving native vegetation loss. In October 2021, the WA Government released its *Implementation Plan*[1000] for addressing the recommendations of its review.

[998] Department of Water and Environmental Regulation, *Review of the Western Australian environmental offsets framework* (Final Report, October 2019) 1 available at: https://www.wa.gov.au/system/files/2021-10/Review_of_the_WA_environmental_offsets-framework.pdf.

[999] Department of Water and Environmental Regulation, *Review of the Western Australian environmental offsets framework* (Final Report, October 2019) vi -vii available at: https://www.wa.gov.au/system/files/2021-10/Review_of_the_WA_environmental_offsets-framework.pdf.

[1000] Department of Water and Environmental Regulation, *Review of the Western Australian environmental offsets framework - Implementation plan for review recommendations,* October 2021, available at https://www.wa.gov.au/system/files/2021-10/Implementation_plan_for_review_recommendations.pdf.

Compliance and enforcement

Effectiveness of regulatory oversight

DWER and DMIRS are the main bodies that regulate land clearing in WA. However, there are over ten government departments and authorities that contribute to managing activities that affect the clearing of native vegetation and there is a lack of coordination between these regulatory bodies.[1001]

There are no opportunities for third party enforcement of clearing provisions.[1002]

The fact that there are multiple regulatory agencies leads to the inconsistent application of environmental standards.[1003] There is also a risk that those other agencies do not have the relevant expertise to properly assess the impacts of clearing on the environment or do not give environmental impacts as much weight in decisions, especially where there is significant decision-maker discretion.

Strength of compliance and enforcement framework

DWER's Compliance and Enforcement Policy uses a risk-based compliance priority method that considers the nature and scale of the activity, the mitigation impacts in place, the location of water resources and the environment and any suspected impacts to public health.[1004]

The Compliance and Enforcement Policy outlines the compliance monitoring processes for clearing include:

- inspections, reviews and audits, which includes analysis of aerial and satellite imagery;
- industry reporting, which can be required by statute and includes self-reporting;
- information from other regulatory bodies, including local governments; and
- community reports and complaints, which DWER will assess and determine an appropriate response. DWER provides an online form to report suspected unlawful clearing of native vegetation.[1005]

Enforcement for breaches of the law includes actions such as:

- Non-statutory notice
- Non-statutory written warning
- Statutory notice or direction
- Modified penalty notice

[1001] Environmental Defenders Office, *Native Vegetation Issues Paper: Submissions* (2020) 3 available at: https://www.edo.org.au/wp-content/uploads/2020/02/EDO-submissions-Native-Vegetation-Issues-Paper-20200210.pdf; Department of Water and Environmental Regulation, *Native Vegetation in Western Australia: Issues paper for public consultation* (Issues Paper, November 2019) 6 available at: https://www.wa.gov.au/system/files/2021-09/Native_Vegetation_in_Western_Australia_Issues_paper.pdf.

[1002] Environmental Defenders Office, *Native Vegetation Issues Paper: Submissions* (2020) 4 available at: https://www.edo.org.au/wp-content/uploads/2020/02/EDO-submissions-Native-Vegetation-Issues-Paper-20200210.pdf.

[1003] Environmental Defenders Office, *Native Vegetation Issues Paper: Submissions* (2020) 3 available at: https://www.edo.org.au/wp-content/uploads/2020/02/EDO-submissions-Native-Vegetation-Issues-Paper-20200210.pdf.

[1004] Department of Water and Environmental Regulation, *Compliance and Enforcement Policy* (May 2021) 7 available at: https://www.wa.gov.au/system/files/2021-05/Compliance_and_Enforcement_Policy_0.pdf.

[1005] Department of Water and Environment Regulation, 'unlawful clearing of native vegetation' available at: https://www.wa.gov.au/service/environment/environment-information-services/unlawful-clearing-of-native-vegetation.

- Physical intervention
- Suspension or revocation of permits
- Infringement notices

DWER (and DMIRS) has discretion as to the type of enforcement action taken dependent on the nature of the breach. However, the enforcement action must be consistent, transparent, and proportionate to the seriousness of the offence.[1006] DWER's Compliance and Enforcement Policy guides decisions about compliance and enforcement. The most appropriate enforcement action will depend on the circumstances of the individual case. DWER considers on a case-by-case basis whether both a vegetation conservation notice (**VCN**) and prosecution are required. Returning an area to its original vegetated state in accordance with a VCN may deliver a better environmental outcome than a stand-alone fine with no requirement to revegetate.

DWER's Compliance and Enforcement Policy states in the interest of transparency the outcomes of compliance and enforcement activities and actions will be made publicly available where possible. This includes publication of prosecutions and VCNs on the DWER website and through DWER's annual reports and quarterly regulatory performance report.[1007] Since 2007 the DWER website records that they have issued 51 VCNs for illegal land clearing, and between the period of 2014 and 2022 there have been only 16 prosecutions for unauthorised native vegetation clearing resulting in fines. This indicates a preference to issue VCNs rather than fines for illegal land clearing. There has been a large number of VCNs recorded for illegal land clearing that was identified by satellite imagery. For example, the Blue Whale Farm Plantation Pty Ltd received a VCNs for illegally clearing native vegetation which was detected by satellite imagery and a subsequent site inspection of the land by Department of Water and Environmental Regulation Inspectors on 20 June 2022 and 15 August 2022. The VCN required the company to re-establish and maintain vegetation in the affected area for a period of 10 years.[1008]

There are varying reports regarding the timeliness of compliance and enforcement action. On the one hand there often seems to be a delay up to 4 years between the time of the illegal clearing and the date when the fine was imposed. This is the most evident in a conviction where there was a 7-year time lag between the illegal land clearing occurring and being identified and a time lag of another 4 years before the fine was imposed. On the other, we understand that DWER has a proactive satellite surveillance program which uses the European Space Agency's Copernicus Sentinel –2 Mission satellite to flag areas of vegetation clearing. This proactive program has led to several successful prosecutions for unlawful clearing. These offences would not have been identified had DWER not carried out this proactive monitoring for clearing.

The fines imposed for illegal land clearing also appear to be inadequate to discourage unauthorised clearing in the future. For example, a recent recorded fine of $30,000 appears to be inadequate for illegally clearing 210 hectares of native vegetation over a 7-year period.[1009] The maximum penalty for

[1006] Department of Water and Environmental Regulation, *Compliance and Enforcement Policy* (May 2021) 12 available at: https://www.wa.gov.au/system/files/2021-05/Compliance_and_Enforcement_Policy_0.pdf.
[1007] Department of Water and Environmental Regulation, *Compliance and Enforcement Policy* (May 2021) 14 available at: https://www.wa.gov.au/system/files/2021-05/Compliance_and_Enforcement_Policy_0.pdf.
[1008] Government of Western Australia, *Vegetation Conservation Notice CPS 9794/1* available at: https://www.wa.gov.au/system/files/2023-01/VCN%20CPS%209794-1%20Blue%20Whale%20Farm%20Plantation.pdf.
[1009] Government of Western Australia, 'Farmer fined $30 000 for illegal clearing' (Media Release, 6 October 2021) available at: https://www.wa.gov.au/government/announcements/farmer-fined-30000-illegal-clearing.

unlawful clearing (s 51C of the EP Act) for an individual is $250,000 and for contravening clearing permit conditions (s 51J of the EP Act) for an individual is $62,500. [1010]

There is also a lack of integration of clearing provisions within the same or different relevant legislation. For example, the Part V provisions of the EP Act regulating clearing and the Part IV regulations regarding the environmental impact assessment of proposals are not well integrated.[1011]

The lack of coordination between the EP Act and *Planning and Development Act 2005* (WA) further risks significant clearing occurring under planning schemes not regulated through clearing or environmental impact assessment processes.[1012]

Opportunities for third party enforcement

There are no opportunities for third party enforcement of clearing provisions. This is a key weakness of the EP Act.[1013]

Transparency of compliance and enforcement information

There is some reporting of enforcement actions with prosecutions and VCNs published on the DWER website, and through DWER's annual reports and quarterly regulatory performance report. Where notices are published, they are published in full including property details, details of offence and requirements of notice, but lack details on area of clearing.[1014]

DWER's Compliance and Enforcement Policy states the outcomes of compliance and enforcement activities and actions will be made publicly available *where possible*, suggesting reporting is not comprehensive. We understand that DWER is considering further opportunities to improve transparency relating to its compliance and enforcement activities as part of the development and implementation of its Transparency First Policy.

The *Native vegetation policy for Western Australia - Implementation roadmap*[1015] outlines opportunities to improve mapping and monitoring, including:

- Strategy 2 – Contemporary systems and practice, and specifically Action 2.2 - Collate decisions affecting the condition or extent of native vegetation in spatial datasets, using common data standards.
- Strategy 3 - Build, share and use knowledge, and specifically Action 3.1 - WA native vegetation extent dataset (WAVE) - a proposed new dataset and monitoring system: semi-automated, regularly updated statewide dataset, leveraging remote sensing and machine learning. Includes publicly available satellite products for multiple purposes, such as tracking clearing over time.

[1010] *Environmental Protection Act 1986* (WA) Sch 1.
[1011] *Environmental Protection Act 1986* (WA) Pt V, IV.
[1012] Environmental Defenders Office, *Native Vegetation Issues Paper: Submissions* (2020) 3 available at: https://www.edo.org.au/wp-content/uploads/2020/02/EDO-submissions-Native-Vegetation-Issues-Paper-20200210.pdf.
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