



briefing paper



NSW Parliamentary Research Service

Native vegetation clearing in NSW: a regulatory history

Briefing Paper No 05/2014

by Alec Bombell and Daniel Montoya

RELATED PUBLICATIONS

- Daniel Montoya, [*Rural Fires Amendment \(Vegetation Clearing\) Bill 2014*](#), e-brief No. 09/2014, NSW Parliamentary Research Service, June 2014
- Daniel Montoya, [*Burning native forest biomaterial for electricity generation*](#), Issues Backgrounder No. 03/2014, NSW Parliamentary Research Service, March 2014
- Holly Park, [*Biodiversity: Regulatory Frameworks*](#), Briefing Paper No. 3/2010, NSW Parliamentary Research Service, May 2010
- Holly Park, [*Biodiversity Certification*](#), e-brief No. 09/2010, NSW Parliamentary Research Service, May 2010
- Stewart Smith, [*Native Vegetation: An Update*](#), Briefing Paper No. 6/06, NSW Parliamentary Research Service, May 2006
- Stewart Smith, [*Native Vegetation: Recent Developments*](#), Briefing Paper No. 1/03, NSW Parliamentary Research Service, January 2003
- Stewart Smith, [*Native Vegetation in NSW: An Update*](#), Briefing Paper No. 6/99, NSW Parliamentary Research Service, March 1999
- Stewart Smith, [*Native Vegetation Protection in NSW*](#), Briefing Paper No. 28/95, NSW Parliamentary Research Service, 1995

ISSN 1325-5142

ISBN 978-0-7313-1925-1

October 2014

© 2014

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior consent from the Manager, NSW Parliamentary Research Service, other than by Members of the New South Wales Parliament in the course of their official duties.

Native vegetation clearing in NSW: a regulatory history

by

Alec Bombell and Daniel Montoya

NSW PARLIAMENTARY RESEARCH SERVICE

Gareth Griffith (BSc (Econ) (Hons), LLB (Hons), PhD),
Manager, Politics & Government/Law (02) 9230 2356

Daniel Montoya (BEnvSc (Hons), PhD),
Senior Research Officer, Environment/Planning (02) 9230 2003

Lenny Roth (BCom, LLB),
Senior Research Officer, Law..... (02) 9230 2768

Alec Bombell (BA, LLB (Hons)),
Research Officer, Law (02) 9230 3085

Tom Gotsis (BA, LLB, Dip Ed, Grad Dip Soc Sci)
Research Officer, Law (02) 9230 2906

Andrew Haylen (BResEc (Hons)),
Research Officer, Public Policy/Statistical Indicators (02) 9230 2484

John Wilkinson (MA, PhD),
Research Officer, Economics (02) 9230 2006

Should Members or their staff require further information about this publication please contact the authors.

Information about Research Publications can be found on the Internet at:

<http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/V3L1stRPSubject>

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

CONTENTS

SUMMARY	i
LIST OF ABBREVIATIONS	vii
1. INTRODUCTION AND BACKGROUND	1
1.1 Why is native vegetation important?	1
1.2 Historical background.....	2
1.3 The current state of native vegetation in NSW	4
2. NATIVE VEGETATION CLEARING CONTROLS PRIOR TO 1995	6
2.1 Crown Lands legislation and the Western Lands Act 1901	7
2.2 Soil Conservation Act 1938	10
2.3 Water Act 1912	15
2.4 Hunter Valley Conservation Trust Act 1950	16
2.5 Local Government Act 1919 and the Environmental Planning & Assessment Act 1979.....	17
2.5.1 Environmental Planning Instruments	19
2.6 Forestry Act 1916.....	24
2.7 Other relevant legislation.....	25
2.8 Total Catchment Management and State Tree policies.....	26
2.9 Summary.....	31
3. NATIVE VEGETATION REFORM: 1995 – 1997	32
3.1 Phase 1 - State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation	33
3.1.1 Background to introduction of SEPP 46.....	33
3.1.2 SEPP 46 Summary	33
3.1.3 Amendments to SEPP 46	36
3.1.3 Response to SEPP 46	37
3.2 Phase 2 – the NSW Vegetation Forum	39

3.3	Phase 3 – new legislation.....	41
3.3.1	Government Consideration of the NSW Vegetation Forum Report, the White Paper and the Native Vegetation Conservation Bill	41
3.3.2	Native Vegetation Conservation Act 1997	41
3.3.3	Initial Responses to the Native Vegetation Conservation Act 1997 47	
3.4	Phase 4 – Developments post enactment of the <i>Native Vegetation Conservation Act 1997</i>	47
3.4.1	Savings and transitional regulations 1998	47
3.4.2	Increased political activity at the Federal Level	48
3.4.2	Community Reference Panel reviews 2000-2001	50
3.4.3	The First Regional Vegetation Management Plans.....	52
3.5	Impact of the <i>Native Vegetation Conservation Act 1997</i> on clearing, and calls for review	55
3.6	2002 Auditor-General Report	56
4.	FURTHER REFORM AND THE <i>NATIVE VEGETATION ACT 2003</i>.....	57
4.1	Background to the introduction of the <i>Native Vegetation Act 2003</i>	57
4.1.2	The Wentworth Group	58
4.1.3	The Native Vegetation Reform Implementation Group	59
4.2	Key changes introduced by the <i>Native Vegetation Act 2003</i>	60
4.3	Native Vegetation Regulation 2005 and the Environmental Outcomes Assessment Methodology	66
4.4	2006 Auditor-General's follow-up report.....	68
5.	LEGISLATIVE REFORMS AND REVIEWS SINCE 2005.....	69
5.1	August 2007 private native forestry amendments	69
5.2	2009 review of the <i>Native Vegetation Act 2003</i>	70
5.3	Streamlining of the Property Vegetation Plan assessment process in the Environmental Outcomes Assessment Methodology	72
5.4	2011 review of the Native Vegetation Regulation 2005.....	72
5.5	The Native Vegetation Regulation 2013.....	75

5.5.1	Native Vegetation Regulation 2013 disallowance motion	78
5.6	NSW report on Native Vegetation 2011-2013	79
5.7	Related legislation	79
5.7.1	Burning native forest biomaterial for energy generation	79
5.7.2	2014 Vegetation Clearing Provisions in the Rural Fires Act 1997.	80
6.	CURRENT DEVELOPMENTS CONCERNING NATIVE VEGETATION REGULATION	83
6.1	Constitutional challenge	83
6.2	Self-Assessable Codes March 2014	84
6.3	Native Vegetation Amendment Bill 2014	85
6.4	Biodiversity Offsets Policy	89
6.5	2014 Biodiversity Legislation Review	90
7.	RECENT DEVELOPMENTS AT THE FEDERAL LEVEL.....	96
7.1	Senate Finance and Public Administration References Committee Inquiry 2010	96
7.2	2012 COAG Australia's Native Vegetation Framework	98
8.	EMERGING AND RECURRING ISSUES	100
9.	CONCLUSION	104
	APPENDIX A	105

SUMMARY

This paper outlines the ways in which the clearing of native vegetation has been regulated in NSW, from 1788 to the present. Since the 1980s the extent to which governments can regulate the clearing of native vegetation on private land has been the subject of continued debate. This debate is now playing out before the Independent Biodiversity Legislation Review Panel, established by the NSW Office of Environment and Heritage (OEH) to review biodiversity legislation in NSW, including the *Native Vegetation Act 2003*.

Note that the focus of this paper is chiefly on the regulation of native vegetation clearing in rural areas, as currently regulated under the *Native Vegetation Act 2003*. The regulation of tree clearing in non-rural local government areas under the *Environmental Planning and Assessment Act 1979* (EP&A Act 1979) and the *Trees (Disputes Between Neighbours) Act 2006* is beyond the ambit of this paper. Also not considered are the regimes established at the Commonwealth and State level for protected species of native vegetation, and harvesting in native State forests.

“Native vegetation” typically encompasses all vegetation present in NSW prior to European settlement. Since settlement, a significant proportion of vegetation present has been cleared for urban areas, infrastructure, industry and agriculture. [1]

Native vegetation provides many benefits, including controlling erosion and salinity, maintaining water quality, providing habitat, economic benefits to landholders, and acting as carbon sinks absorbing greenhouse gases. Conversely, broadscale clearing of native vegetation contributes to a decrease in native species, land degradation, increased salinity, and the disruption of many ecosystems. Throughout the 1980s, political and public awareness of these issues increased significantly, and action began to be taken at both State and Federal levels to arrest the clearing of native vegetation. [1]

The clearing of native vegetation in NSW has been regulated, to varying degrees, since 1881. The timeline below lists the significant regulatory developments with respect to native vegetation. Note that the timeline does not identify when provisions were repealed, where that applies.

Date	Act	Regulatory reform
1881	<i>Ringbarking on Crown Lands Regulation Act 1881</i>	Prohibited ringbarking or otherwise destroying a tree on Crown land without a permit
1884	<i>Crown Lands Act of 1884</i>	Prohibited ringbarking or otherwise destroying a tree on Crown land without a permit
1916	<i>Forestry Act 1916</i>	Prohibited ringbarking or otherwise destroying a tree on Crown land without a permit
1935	Western Lands Regulations 1935	Destruction of timber or scrub <i>could</i> be prohibited on Special leases in the Western Division
1938	<i>Soil Conservation Act 1938</i>	Indirectly prohibited clearing on private and public land in notified catchment areas

Date	Act	Regulatory reform
1938	<u>Soil Conservation Act 1938</u>	Provision made for regulations prohibiting destruction of timber and scrub on all Crown land
1946	<u>Irrigation and Water (Amendment) Act 1946</u>	Prohibited the destruction of trees in or alongside any prescribed river or lake without a permit; applied to private and public land
1950	<u>Hunter Valley Conservation Trust Act 1950</u>	Prohibited destruction of trees, shrubs and scrub on declared lands in the Hunter Valley without a permit; declared lands could include private and public land
1955	<u>Irrigation, Water and Rivers and Foreshores Improvement (Amendment) Act 1955</u>	Indirectly prohibited native vegetation clearing on protected land, namely private and public land in and adjacent to rivers
1972	<u>Forestry, Soil Conservation and Other Acts (Amendment) Act 1972</u>	Prohibited destruction of trees on protected land without a permit; protected land could include private and public land
1972	<u>Forestry, Conservation Authority of New South Wales and Other Acts (Amendment) Act 1972</u>	Prohibited ringbarking or otherwise destroying a tree on Crown land without a clearing licence
1973	Western Lands Regulations 1935	Preservation of native vegetation in certain areas <i>could</i> be required of Special leases in the Western Division
1977	<u>Heritage Act 1977</u>	Prohibited destruction of or damage to trees in a place under a conservation order without an approval
1979	<u>Environmental Planning and Assessment Act 1979</u>	Environmental Planning Instruments <i>could</i> be made to protect trees and vegetation
1979	<u>Environmental Planning and Assessment Act 1979</u>	Local Environmental Plans <i>could</i> provide for Tree Preservation Orders prohibiting the destruction of any tree or trees without a permit
1979	<u>Coastal Protection Act 1979</u>	Prohibited native vegetation clearing in the coastal zone without an approval
1985	<u>Western Lands (Amendment) Act 1985</u>	Conditions <i>could</i> be attached to leases in the Western Division requiring preservation of trees, scrub and vegetative cover
1985	<u>Western Lands (Amendment) Act 1985</u>	Prohibited destruction of trees on leasehold land in the Western Division without a clearing licence
1985	<u>State Environmental Planning Policy No. 14 – Coastal Wetlands</u>	Prohibited land clearing in coastal wetlands without development consent
1986	<u>Soil Conservation (Further Amendment) Act 1986</u>	Prohibited destruction of trees, shrubs and scrub on protected land without a permit; expanded definition of protected land to include environmentally sensitive land
1988	<u>State Environmental Planning Policy No. 26 – Littoral Rainforests</u>	Prohibited land clearing in or adjacent to littoral rainforests without development consent
1995	<u>State Environmental Planning Policy No. 44 – Koala Habitat Protection</u>	Native vegetation clearing permitted once a plan of management was in place
1995	<u>State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation</u>	Prohibited clearing of native vegetation on most rural land in the State without development consent.

Date	Act	Regulatory reform
1998	Native Vegetation Conservation Act 1997	Prohibited clearing of native vegetation on most rural land in NSW without development consent. Introduced regional vegetation management plans, which were to (inter alia) prescribe for each particular region when consent was required, and, if no consent was required, under what conditions clearing was to be carried out.
1998	Native Vegetation Conservation (Savings and Transitional) Regulation 1998	Maintained exemptions from the requirement to obtain development consent in place under pre-1998 arrangements.
2005	Native Vegetation Act 2003 Native Vegetation Regulation 2005 Environmental Outcomes Assessment Methodology	Prohibited clearing of native vegetation on most rural land in NSW otherwise than in accordance with a development consent or a property vegetation plan (PVP). Clearing would only be approved in a consent or a PVP where the clearing “maintained or improved environmental outcomes”. This was determined in accordance with the Environmental Outcomes Assessment Methodology. The Act and the Regulation provided several categories of clearing exempt from the need for approval.
2014	Native Vegetation Regulation 2013	Expanded the categories of clearing exempt from the need for approval. Provided for the making of draft self-assessable clearing codes of practice. Clearing undertaken in accordance with the codes requires no consent.
2014	Draft Self-assessable Clearing Codes of Practice	Three draft self-assessable clearing codes exhibited. The codes related to clearing invasive native scrub, clearing isolated paddock trees and thinning native vegetation.

Native vegetation clearing on public land was first regulated by the *Ringbarking on Crown Lands Regulation Act 1881*. The *Soil Conservation Act 1938* introduced native vegetation clearing controls on private land, albeit at first only in an indirect manner. This Act prohibited activities within a catchment area that might damage or interfere with the utility of a proclaimed work, namely a dam. It therefore *indirectly* regulated native vegetation clearing on private land that was part of a catchment area notified under the Act, to the extent that clearing may have caused soil erosion. [2]

Further regulatory controls were progressively introduced in a number of different statutes with regard to particular areas of the State. Most of these controls were enacted in the 1970s and 1980s. A Table on page 31 sets out the native vegetation clearing regulatory framework as it was at the beginning of 1995. [2]

Against the background of increasing awareness of environmental issues in the 1980s, the Carr Government embarked upon a process to reform native vegetation regulation in NSW. The first step was the introduction in 1995 of the first instrument to specifically regulate native vegetation clearing, [State](#)

[Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation](#) (SEPP 46). SEPP 46 was introduced as an interim measure whilst the Government formulated the *Native Vegetation Conservation Act 1997*, which commenced on 1 January 1998. [3]

With the [Native Vegetation Conservation Act 1997](#) (NVC Act 1997), for the first time the clearing of native vegetation was brought under one legislative framework. Clearing of native vegetation was prohibited otherwise than in accordance with a development consent or a regional vegetation management plan. Regional vegetation management plans were to be developed by region-specific regional vegetation committees, and were to stipulate when and under what conditions vegetation could be cleared without development consent. Two regional vegetation management plans were gazetted, but many others were never finalised. [3]

Whilst available data suggests a decline in land clearing from 1998 onwards, the NVC Act 1997 proved highly unpopular with landholder interest groups. Furthermore, the Auditor-General in a 2002 [Audit Report](#) identified significant issues with the administration of the legislation by the NSW Department of Land and Water Conservation (DLWC). [3]

Also in 2002, the Wentworth Group of Concerned Scientists published the [Blueprint for a Living Continent](#), which advocated an immediate end to broadscale land clearing of remnant native vegetation and the provision of adjustment assistance to rural communities. In a further document provided to the Premier in 2003, the [Wentworth Model for Landscape Conservation](#), the Wentworth Group provided the Government with the basis to reform the regulatory framework for native vegetation management in NSW. The Carr Government established the Native Vegetation Reform Implementation Group in 2003, whose recommendations contributed to the formation of the *Native Vegetation Act 2003*. [4]

The [Native Vegetation Act 2003](#) (NV Act 2003) became operational in December 2005, when the accompanying [Native Vegetation Regulation 2005](#) (NV Regulation 2005) and Environmental Outcomes Assessment Methodology (EOAM) were finalised. The legislation introduced a new framework, whereby broadscale clearing of native vegetation would only be permitted (under a development consent or under a longer term, property specific “property vegetation plan” (PVP)) where the proposed clearing improved or maintained environmental outcomes. Several exemptions to the requirement to obtain approval were also specified, including certain “routine agricultural management activities” (RAMAs) designed to provide landholders with flexibility to clear vegetation as part of ongoing farm management. In 2006, the Auditor-General published a follow-up report on native vegetation regulation, finding that in many respects the new legislation was an improvement upon the NVC Act 1997. [4]

Since 2005, several amendments have been made to the framework and instruments in place under the NV Act 2003. A table summarising these amendments is provided in **Appendix A**. Many of these were targeted at

streamlining the approval process, in response to frustrations voiced by landholder interest groups. A [2009 review](#) of the NV Act 2003 by the Minister for Climate Change and the Environment found that the objects of the NV Act 2003 remained valid and that no fundamental changes were necessary. In 2011, Robyn Parker MP, Minister for the Environment and Heritage, announced a review of the NV Regulation 2005 to reduce red-tape, improve service delivery, remove ambiguity, and maintain the environmental standard set by the NV Act 2003. [5]

The outcome of the review, the new [Native Vegetation Regulation 2013](#), saw an increase in the categories of activities where approvals were not required, changes to key definitions, and paved the way for self-assessable clearing codes to provide further flexibility to landholders. Environmental interest groups expressed grave concern about expanding the range of exempt and self-assessable clearing without concurrent increased monitoring, arguing that the NV Act 2003's objectives may no longer be met. Landholder groups, whilst supportive of the changes, maintained their view that broader changes to the legislation were required. [5.5]

More recently, in March 2014 the OEH published draft self-assessable clearing codes of conduct for clearing invasive native species, clearing isolated paddock trees and for thinning native vegetation. These three draft codes prompted criticism from both landholders, who saw them as too technical and unworkable, and environmental groups, who criticised the lack of oversight and monitoring. [6.2]

In May 2014, the Shooters and Fishers Party introduced the [Native Vegetation Amendment Bill 2014](#) into the Legislative Council. Amongst other things, the Bill seeks to amend the NV Act 2003 to introduce economic and social factors into the equation applied to determine whether clearing can be approved – a triple bottom line approach – to replace the existing “improve or maintain environmental outcomes” test. Debate on the Bill has currently been adjourned. [6.3]

Finally, the Independent Biodiversity Legislation Review Panel is due to provide its interim report in mid-October 2014. The Panel, which has been engaged in stakeholder consultation since August, has been created to evaluate the current biodiversity legislative framework (including the NV Act 2003), the evidence base for government intervention (including the status, trends and pressures on native vegetation, biodiversity and ecological processes), and will propose new legislative arrangements for biodiversity conservation in NSW. Dr Neil Byron, a member of the independent panel conducting the review, has indicated that an outcome may include recommendations that the broader community should pay for the benefits obtained by farmers setting aside productive land. [6.5]

Native vegetation has also been a feature of environmental policy at the Federal level. In 2010 the Commonwealth Senate referred to the Finance and Public Administration References Committee for inquiry and report on the impact of native vegetation laws on landholders. The committee considered the native

vegetation management legislative regimes of all the States. In its [report](#), the committee expressed concern about the costs of native vegetation regulations born by landholders, and recommended a national review be initiated through the Commonwealth Natural Resources Management Ministerial Council. [7]

In 2012, the COAG Standing Council on Environment and Water published [Australia's Native Vegetation Framework](#), a national framework to guide the ecologically sustainable management of Australia's native vegetation. The Framework sets national directions to guide actions across government strategies, policies, legislation and programs related to native vegetation management on the Australian continent and its islands. [7]

There are a number of themes recurring frequently throughout the debate, which will need to be carefully managed by the current Panel in its review and recommendations. These include the extent to which environmental factors are balanced with economic and social factors, how to provide flexibility through exemptions whilst maintaining the overall objective of protecting native vegetation, how to manage and maintain positive and cooperative relationships between landholders and regulators, the need to improve information on and monitoring of native vegetation, and how the costs of public benefits obtained by retaining and protecting native vegetation should be shared between the community and landholders. [8]

LIST OF ABBREVIATIONS

ABARE	Australian Bureau of Agricultural and Resource Economics
CAPB	Catchment Areas Protection Board
CMA	Catchment Management Authority
COAG	Council of Australian Governments
DLWC	Department of Land and Water Conservation
EDO	NSW Environmental Defenders Office
ELO	Environmental Liaison Office
EOAM	Environmental Outcomes Assessment Methodology
EP&A Act 1979	<i>Environmental Planning and Assessment Act 1979</i>
EPA	Environment Protection Authority
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i>
HVCT Act 1950	<i>Hunter Valley Conservation Trust Act 1950</i>
INS	Invasive Native Scrub
LEP	Local Environmental Plan
LGNSW	Local Government NSW
LLS	Local Land Services
NHT	Natural Heritage Trust
NPWS	National Parks and Wildlife Service
NVC Act 1997	<i>Native Vegetation Conservation Act 1997</i>
NV Act 2003	<i>Native Vegetation Act 2003</i>
NV Regulation 2005	Native Vegetation Regulation 2005
NV Regulation 2013	Native Vegetation Regulation 2013
OEH	NSW Office of Environment and Heritage
PNF Code	Private Native Forestry Code of Conduct
PVP	Property Vegetation Plan
RAMA	Routine Agricultural Management Activity

REP	Regional Environmental Plan
RF Act 1997	<i>Rural Fires Act 1997</i>
RFI Act 1948	<i>Rivers and Foreshores Improvement Act 1948</i>
SC Act 1938	<i>Soil Conservation Act 1938</i>
SEPP 14	State Environmental Planning Policy No. 14 – Coastal Wetlands
SEPP 26	State Environmental Planning Policy No. 26 – Littoral Rainforests
SEPP 44	State Environmental Planning Policy No. 44 – Koala Habitat Protection
SEPP 46	State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation
TPO	Tree preservation order
WL Act 1901	<i>Western Lands Act 1901</i>
WWF	World Wide Fund for Nature

1. INTRODUCTION AND BACKGROUND

1.1 Why is native vegetation important?

Native vegetation plays a critical role in the Australian environment. It forms a vital part of Australia's biodiversity, with approximately 85% of Australia's plant species being endemic to the continent.¹

According to the [NSW Office of Environment and Heritage](#) (OEH), native vegetation:

- controls erosion through protecting soils and riverbanks;
- reduces land degradation and salinity;
- improves water quality and availability; and
- provides habitat for a wealth of unique biodiversity, including threatened species.²

Native vegetation also plays a role in soil formation, nutrient storage and cycling, pollution breakdown and absorption, maintaining the hydrological cycle (rainfall patterns), and contributing carbon sinks which absorb greenhouse gases.³

In addition to these benefits, the Commonwealth Department of Agriculture, Fisheries and Forestry has identified native vegetation as being an important primary production asset, providing a range of economic benefits, such as fodder for stock and sustainable forest operations.⁴ The NSW OEH also suggests that farms with good native vegetation can increase crop yields, improve pasture growth, and reduce operational costs through improved pollination of crops, water retention, and pest reduction.⁵

Conversely, clearing of native vegetation has been widely recognised as contributing to a decrease in native species, land degradation, increased salinity, and the disruption of many ecosystems.⁶ Clearing native vegetation

¹ COAG Standing Council on Environment and Water, [Australia's Native Vegetation Framework](#), 2012 at p. 2.

² NSW OEH, [Why is Native Vegetation so Important?](#), last updated 27 March 2014 [online – accessed 9 September 2014].

³ DLWC, *Native vegetation protection and management in NSW – Information Paper*, Sydney, 1995, at p. 5.

⁴ Commonwealth Department of Agriculture, Fisheries and Forestry, Submission 371 to the Commonwealth Senate, Finance and Public Administration References Committee inquiry into native vegetation laws, greenhouse gas abatement and climate change measures, p.1, cited in Senate Finance and Public Administration References Committee, [Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures](#), April 2010 at p. 3.

⁵ NSW OEH, above n2.

⁶ Senate Finance and Public Administration References Committee, [Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures](#), April 2010 at p. 3; WWF

also results in the release of greenhouse gas emissions, both from the burning of cleared vegetation and from the loss of soil organic matter.⁷

1.2 Historical background

The environment in Australia has changed significantly over 200 years of European settlement. Whilst early botanists in the settlements collected samples, there was no scientific assessment of the vegetation as at and before 1788, nor was there any comprehensive record made of the ways in which Aboriginal people interacted with or burnt different vegetation types.⁸ Estimates suggest that the pre-settlement NSW landscape was dominated by eucalyptus woodlands and open forests, acacia forests and woodlands, acacia shrublands, and mallee woodlands and shrublands.⁹

On settlement, large areas of land were cleared by settlers for agricultural purposes, and, subsequently, for housing, roads and industry.¹⁰ Prior to the 1860s, this would have been largely limited to land in and around settlements.¹¹ However, with the shift to wheat production in the late 19th Century, broadscale clearing increased significantly.¹² A 1995 report, *Native Vegetation Clearance, Habitat Loss and Biodiversity Decline*, published by the Commonwealth Department of the Environment, Sport and Territories estimated that between 1788 and 1921, 35.3 million ha of native vegetation (44% of the State) were ringbarked and partially cleared in NSW.¹³ Clearing was most intensive on the Western Slopes, Central Plains and in the Riverina.¹⁴

Widespread clearing of native vegetation continued in NSW throughout the 20th Century, with the most impacted areas being the northern wheat belt within the

Australia and the Wentworth Group, *Blueprint for a Living Continent. A Way Forward from the Wentworth Group of Concerned Scientists*. 1 November 2002 at p. 10.

⁷ NSW Scientific Committee, “[Clearing of Native Vegetation – key threatening process listing](#)”, Gazetted 21 September 2001, last updated 28 February 2011, online – accessed 29 September 2014.

⁸ John Benson, “Setting the Scene – the Native Vegetation of New South Wales – A background paper of the Native Vegetation Advisory Council of NSW”, Background Paper Number 1, 1999, Native Vegetation Advisory Council of NSW, at p. 7.

⁹ State of the Environment 2011 Committee, *Australia State of the Environment 2011*, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Canberra, Department of Sustainability, Environment, Water, Population and Communities, 2011, figures 5.15 and 5.16. at pp. 307-308.

¹⁰ COAG Standing Council on Environment and Water, *Australia’s Native Vegetation Framework*, 2012, at p. 4.

¹¹ Commonwealth Department of the Environment, Sport and Territories, *Native Vegetation Clearance, Habitat Loss and Biodiversity Decline*, 1995, Biodiversity Series, Paper No. 6 at p. 6.

¹² Ibid.

¹³ Ibid at p. 20. The report, however, notes that comparison of the early data with the figures provided more recently by the Resource Assessment Commission in the 1990s suggests that the 1921 records used to estimate early clearance rates significantly overestimated the scale of clearance.

¹⁴ Ibid.

Central Division and a 150km wide belt of land along the eastern and southern boundaries of the western division.¹⁵

Estimates¹⁶ suggest that clearing rates increased throughout the 1970s and the 1980s.¹⁷ John Benson, in a paper published by the Native Vegetation Advisory Council in 1999, considered it likely that the total state-wide clearing rate of woody vegetation (native and non-native) with a canopy cover of >12-15% could have been as much as 100,000ha per year in the 1980s.¹⁸

Initially, the regulation of native vegetation clearing was sporadic, with no unified, strategic regulatory approach. Governments even encouraged the removal of native vegetation to free up land for agriculture. This was done through taxation incentives and land purchase agreements, which often required clearing of vegetation as a condition.¹⁹

However, attitudes changed in the 1980s along with increased public and political awareness of the issues associated with clearing of native vegetation, such as dryland salinity, land degradation and declining water quality.²⁰ Environmental issues became more prevalent on the political agenda. For instance, in 1982, the Commonwealth Government established the National Tree Program to reverse tree decline by encouraging individuals, communities and State Governments to act to conserve, regenerate and plant trees.²¹ In 1983, the NSW Government launched the “Trees on Farms” program, aimed at encouraging the establishment of trees on farming land throughout the State.²² Later, in 1989, the Commonwealth Government established two programs – “One Billion Trees” and “Save the Bush” – to protect and enhance native land cover. Also in 1989, the Landcare initiative was established by the Commonwealth Government, in response to a joint proposal of the National Farmers’ Federation and the Australian Conservation Foundation for action on land degradation in Australia.²³ More initiatives indicative of this change in

¹⁵ Ibid at p. 21.

¹⁶ Lack of comprehensive State-wide records make it difficult to paint a precise picture of the extent or rate of vegetation clearing in the 20th Century. Coarse estimates were made based on Landsat data obtained by the Commonwealth Department of Agriculture and comparing this with data from the Australian Bureau of Statistics, the former Western Lands Commission and the NSW National Parks and Wildlife Service.

¹⁷ Commonwealth Department of the Environment, Sport and Territories, above n11 at p. 22.

¹⁸ John Benson, above n8, at p. 28.

¹⁹ Ian Noble, Michael Barson, Robert Dumsday, Margaret Friedel, Ron Hacker, Neil McKenzie, George Smith, Mike Young, Mathew Maliel, Charlie Zammit, [“Land Resources”: in *Australia: State of the Environment 1996*](#), at p. 6-39

²⁰ Robyn L. Bartel, “Compliance and complicity: an assessment of the success of land clearance legislation in New South Wales”, (2003) 20 *Environmental and Planning Law Journal* 116 at p. 118; Noble et al, above n19.

²¹ Ibid.

²² R. Clarke, F. Irwin, C. Marshall and S. Wakefield, “Trees in Catchments”, (1986) 42(1) *Journal of Soil Conservation NSW* 54 at p. 56.

²³ NSW DLWC, *NSW Decade of Landcare Evaluation*, Sydney, NSW Department of Land and Water Conservation, 2001, p. 8; NSW Landcare Working Group, *Decade of Landcare Interim*

attitude are discussed throughout this paper.

1.3 The current state of native vegetation in NSW

In 2011, it was estimated that approximately 13% of Australia's native vegetation had been cleared or converted to other land uses (predominantly agriculture) since European settlement, and 62% had been subjected to varying levels of disturbance.²⁴ The greatest reductions in vegetation have been in eastern, south-eastern and south-western Australia, where European settlement and associated agricultural land uses were more extensive.²⁵ The extent of loss varies between particular vegetation types. For instance, eucalypt woodlands have been reduced by a third, down to 84 million ha in 2007 from more than 120 million ha in 1750.²⁶ Eucalypt open forests, mallee woodlands and shrublands and other grasslands have also been diminished by roughly a third, but were much smaller in extent originally.²⁷ The greatest proportional losses (around 60%) have been in casuarina forests and woodlands, low closed forests and tall closed shrublands.²⁸ In NSW, all major river valleys or plains have been extensively cleared. These include the Bega, lower Shoalhaven, Hunter, Clarence, Richmond and Tweed Valleys and the Cumberland Plain.²⁹

In 2012, the NSW Environment Protection Authority released its report, [State of the Environment 2012](#). The report noted that while the clearing of native vegetation in NSW stabilised between 2006 and 2012.³⁰

According to the report:

- 61% of NSW is covered by “intact” native vegetation (i.e., native vegetation in which the structure has not been radically altered). However, only 9% is regarded as being in close to natural condition, and the remaining 52% has deteriorated to some extent since settlement.³¹
- 8% of NSW is covered by “derived” native vegetation, being vegetation that is predominantly native but is no longer structurally intact due to substantial alteration and the absence of important structural components or layers. This still makes some contribution to overall native habitat values.³²

Plan for NSW, NSW Department of Conservation and Land Management, 1992, at p. 8.

²⁴ State of the Environment 2011 Committee, above n9, at p. 305.

²⁵ Ibid at p. 310.

²⁶ Ibid at pp. 305 and 307.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Commonwealth Department of the Environment, Sport and Territories, *Native Vegetation Clearance, Habitat Loss and Biodiversity Decline*, 1995, Biodiversity Series, Paper No. 6 at p. 20.

³⁰ NSW Environment Protection Authority, [“New South Wales State of the Environment 2012”](#), December 2012, at p. 4.

³¹ Ibid at p. 224-226.

³² Ibid at 227.

- 20% of NSW is covered by “native/non-native mosaic”, which is vegetation that cannot be classified as native or non-native using current remote sensing technologies. The remaining 11% of NSW is covered by non-native/other types of vegetation, such as crops, plantations or pasture.³³

The distribution of intact native vegetation reflects the differing rates of clearing across different parts of the State, with clearing being greatest in areas preferred for urban development (the coastal plain) or agricultural development (the wheat-sheep belt of central NSW).³⁴

The report identified land clearing as the main cause of vegetation change and decline in NSW.³⁵ Clearing rates of woody vegetation have reportedly been stable in recent years, fluctuating around the long-term combined average for agriculture and infrastructure of about 23,400 ha per annum.³⁶ Forestry is recorded separately, and experienced a spike post 2006-2007 but declined in 2010-2011.³⁷ However, according to a preliminary analysis in 2009, it appears as though the overall level of woody vegetation has been stable since 2003, with clearing being balanced by regrowth, revegetation and restoration. The report noted the need for further detailed investigation and interpretation to confirm this result.³⁸

The report concluded positively, observing that many revegetation and restoration activities are occurring regionally. As a consequence the condition of native vegetation is expected to improve over time.³⁹

In March 2014, the NSW OEH published the [Report on Native Vegetation 2011-2013](#), which supports the conclusion that clearing of woody vegetation in NSW is decreasing. Data analysed indicated that clearing of woody vegetation for crop/pasture or thinning activities in 2010-11 (6,600 ha) was at its lowest since data started being collected for the years 1988-1990 (30,900 ha/per annum).⁴⁰ The data was based on analyses of images collected by the Landsat5 satellite.⁴¹ According to the report, the rate of clearing across the State decreased between 2009-10 and 2010-11 by 37 per cent.⁴²

The report also indicates that cumulative management, conservation and

³³ Ibid.

³⁴ Ibid at p. 226 and p. 224.

³⁵ Ibid at p. 228.

³⁶ Ibid at p. 228.

³⁷ Ibid at p. 229.

³⁸ Ibid at p. 229.

³⁹ Ibid at p. 4.

⁴⁰ NSW OEH, [NSW Report on Native Vegetation 2011-2013](#), March 2004, at p. 13.

⁴¹ Separate data is provided based on images obtained by the SPOT5 satellite, which has higher resolution. However, this satellite was only active between 2010 and 2011.

⁴² NSW OEH, [NSW Report on Native Vegetation 2011-2013](#), March 2004, at p. 14.

restoration of native vegetation have been increasing since 2005.⁴³ In the 2012 to 2013 financial year (the total area of NSW being approximately 80,062,800 ha)⁴⁴:

- 2,140 ha of native vegetation were cleared under approvals. Almost all of this area, which included broadscale and paddock tree clearing, was carried out under Property Vegetation Plans (PVPs) under the *Native Vegetation Act 2003*⁴⁵ where environmental outcomes were maintained or improved (See Figure 2.2 and Table 2.1 of the Report);
- 24,320 ha of native vegetation were included in new conservation areas. The aggregate area is low compared to previous years,⁴⁶ but the area protected by new PVPs (9,270 ha) was the highest since PVPs commenced in 2005;
- 277,280 ha of native vegetation were restored, a median amount (the highest being 514,800 ha in 2010-2011, and the lowest being 169,790 ha in 2009-2010). The majority of this (252,370 ha) was achieved through incentives other than PVPs (mostly specific revegetation activities conducted by Catchment Management Authorities through funding sources other than PVPs). PVPs and PVP offsets accounted for 22,900 ha of restored native vegetation; and
- 1,348,940 ha of native vegetation were brought under new management arrangements, the highest level recorded since PVPs commenced in 2005. 433,000 ha of this amount came under management of invasive native scrub PVPs, and 2,770 ha under management of thinning PVPs. Since 2005, 7,108,270 ha of native vegetation have been brought under management by PVPs.⁴⁷

The current data therefore suggests that clearing of native vegetation in NSW is stabilising and conservation efforts are increasing. However, due to difficulties in obtaining reliable data on clearing of native vegetation, further investigation is generally considered necessary in order to confirm this position.

2. NATIVE VEGETATION CLEARING CONTROLS PRIOR TO 1995

Prior to the introduction of the [State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation](#) (SEPP 46) in 1995, the clearing of native vegetation was regulated by a number of statutes and statutory instruments. While substantial native vegetation clearing controls were

⁴³ NSW OEH, [NSW Report on Native Vegetation 2011-2013](#), March 2004, at pp. 3.

⁴⁴ Geoscience Australia, "[Area of Australia – States and Territories](#)", undated [online – accessed on 15 October 2014].

⁴⁵ Plans approved under the *Native Vegetation Act 2003* permitting clearing of broadscale clearing where that clearing maintains or improves environmental outcomes. These are discussed in greater detail below.

⁴⁶ The report indicates that 329,180 ha of native vegetation were brought under new conservation initiatives in 2010-2011 (p. 6).

⁴⁷ NSW OEH, [NSW Report on Native Vegetation 2011-2013](#), March 2004, at pp. 6-7.

first introduced in SEPP 46, this chapter shows that its genesis can be traced to the early 1980s.

The legislation is dealt with in chronological order, according to the introduction of relevant statutory provisions. A brief section towards the end deals with several Acts of minor relevance. Each section sets out the key provisions and, where relevant, notes when they were repealed. Where possible, the reasons the provisions were introduced are also identified. The chapter ends with a summary of the regulatory regime prior to the introduction of SEPP 46.

2.1 Crown Lands legislation and the Western Lands Act 1901

Tree clearing on Crown lands was first regulated by the [Ringbarking on Crown Lands Regulation Act 1881](#). The Act prohibited ringbarking any tree on leased Crown land without having a permission issued by the Secretary for Lands, Secretary for Mines or other relevant Minister,⁴⁸ where ringbarking was defined as cutting or stripping the bark of a tree to kill the tree.⁴⁹ A tree was defined as any indigenous growing tree of any kind, including saplings.⁵⁰ Upon repeal of the [Ringbarking on Crown Lands Regulation Act 1881](#), the prohibition on ringbarking without having a permission was transferred to the [Crown Lands Act of 1884](#).⁵¹

The [Crown Lands Consolidation Act 1913](#) had no specific provisions relating to native vegetation clearing prior to its repeal in 1989,⁵² the requirement for a ringbarking permit having been transferred to the *Forestry Act 1916* (see section [2.6]). However, under the Crown Lands Regulations, conditions could be attached to Special leases granted under section 75 of the Act.⁵³ By the 1980s, leases of Crown land for grazing and agricultural purposes frequently took the form of Special leases.⁵⁴ Several of the conditions which could be attached to these leases were designed to protect the environment, including restrictions on the removal of vegetation in areas vulnerable to erosion, such as river banks.⁵⁵ No native vegetation clearing provisions were included in the Acts introduced to replace the 1913 Act – the [Crown Lands Act 1989](#) or the [Crown Lands \(Continued Tenures\) Act 1989](#).⁵⁶

⁴⁸ Section 2 of the [Ringbarking on Crown Lands Regulation Act 1881](#)

⁴⁹ Section 1 of the [Ringbarking on Crown Lands Regulation Act 1881](#)

⁵⁰ Section 1 of the [Ringbarking on Crown Lands Regulation Act 1881](#)

⁵¹ Sections 93 to 95 of the [Crown Lands Act of 1884](#)

⁵² See David Farrier, *Environmental Law Handbook: Planning and Land Use in New South Wales*, 1988, Sydney: Redfern Legal Centre Publishing, pp. 350

⁵³ Clause 106 of the Crown Lands Regulations

⁵⁴ Farrier, above n52, at p. 215

⁵⁵ *Ibid* at p. 242

⁵⁶ Note: it has been suggested that the [Crown Lands \(Continued Tenures\) Act 1989](#) contained provisions related to the clearing of native vegetation, and that these provisions were repealed by the *Native Vegetation Conservation Act 1997*. Upon close reading of the [Crown Lands \(Continued Tenures\) Act 1989](#), it appears that there are no, nor have there ever been, provisions dealing with the clearing of native vegetation for a purpose other than 'taking' timber of economic value. Timber was defined by the Act as 'the products of growing or dead

The [Western Lands Act 1901](#) (WL Act 1901) established and regulated a land tenure system for the Western Division of NSW. The Western Lands Regulations 1935⁵⁷ made provision for conditions to be attached to Special leases granted under section 28A⁵⁸ of the WL Act 1901. As first introduced, the Regulations provided that the lessee could not destroy any timber or scrub used for stock feed without the written consent of the Commissioner, except where required for building or similar purposes.⁵⁹ Two related conditions were added in 1973.⁶⁰ The most relevant required preservation of native vegetation in certain areas:

Notwithstanding any other condition annexed to the lease, the lessee shall carefully preserve all timber, scrub, vegetative cover and any regeneration thereof (except noxious plants) on the following parts of the land leased –

- (a) between the banks of and within strips at least one chain⁶¹ wide along each bank of any creek and/or defined watercourse;
- (b) within strips at least one and a half chains wide on each side of the centre line of any depression, the sides of which have slopes in excess of one (vertically) in four (horizontally), i.e. approximately 14 degrees;
- (c) where the slopes are steeper than one (vertically) in three (horizontally), i.e., approximately 18 degrees; and
- (d) within strips not less than three chains wide along the tops of any ranges and main ridges.

In addition to the foregoing requirements of this condition, the lessee shall preserve on so much of the land leased as is not used for agricultural purposes, where possible in well distributed clumps or strips, not less than an average of seven trees (where possible, honey producing varieties) per acre, together with any other timber, scrub, vegetative cover or any regeneration thereof which may, from time to time, be determined by the Minister to be useful or necessary for soil conservation or erosion mitigation purposes or for shade and shelter.⁶²

The second condition stated that:

The lessee shall not interfere with the timber and scrub upon the land leased except with the permission in writing of the Commissioner, and shall not prevent any person or persons authorised in that behalf from cutting or removing timber upon such lands.⁶³

timber, trees, shrubs and vegetable growth of economic value”.

⁵⁷ *NSW Government Gazette*, 2 January 1913, at p. 1

⁵⁸ Inserted into the original Act by the [Western Lands \(Amendment\) Act of 1905](#)

⁵⁹ Clause 34(8) of the Western Lands Regulations 1935. This exception was amended in 1964 to exclude live cypress pine; *NSW Government Gazette*, 1 March 1946, at p. 538

⁶⁰ *NSW Government Gazette*, 3 August 1973, at p. 3358. Clause 34 was replaced at this point, and the conditions contained in clause 34(8) were transferred to clause 34(15) of the Western Lands Regulations 1935.

⁶¹ 1 chain = 20.117 metres.

⁶² Clause 34(25) of the Western Lands Regulations 1935

⁶³ Clause 34(35) of the Western Lands Regulations 1935

The [Western Lands \(Amendment\) Act 1985](#) provided for a number of conditions which could be attached to any type of lease, including that the Western Lands Commissioner could direct the lessee:

- (e) to preserve trees, scrub and vegetative cover on the land; and
- (f) to take such measures to protect the land (including measures to prevent soil erosion or other damage to the land) as the Commissioner of the Soil Conservation Service may recommend.⁶⁴

As of October 2014, these provisions [remain in force](#).

The 1985 amending Act also introduced native vegetation clearing licences to the WL Act 1901; these were previously issued under the [Forestry Act 1916](#).⁶⁵ Clearing licences could permit native vegetation clearing on all leasehold land,⁶⁶ except for protected land without the consent of the Catchment Areas Protection Board.⁶⁷ A clearing licence was not required where the land was equal to or less than half a hectare⁶⁸ or where the timber was used for building, fencing or firewood.⁶⁹ Clearing was defined as ringbarking or otherwise killing or destroying trees on the land, being trees which do not have economic value.⁷⁰ A tree was defined as including saplings or seedlings of a tree.⁷¹ In 1997, section 18DB was replaced to make it a condition of any lease under the WL Act 1901 that native vegetation may only be cleared in accordance with the [Native Vegetation Conservation Act 1997](#). The exception for clearing for the purpose of obtaining timber for use on the leased land for building, fencing or firewood was retained.⁷²

The 1985 legislative amendments were accompanied by changes to the Regulations.⁷³ The Regulations still only prescribed possible conditions for Special leases. One amended condition was that native vegetation clearing was only permissible in accordance with a clearing licence issued under the WL Act 1901.⁷⁴ A set of exemptions were also introduced to the Regulations, including clearing woody weeds and the selective clearing of mulga trees for stock

⁶⁴ Section 18D(1) of the WL Act 1901

⁶⁵ Clearing licences had been issued in the Western Division of NSW by the Western Lands Commissioner, pursuant to a delegation by the Forestry Commission. See Farrier, above n52, at p. 200.

⁶⁶ Section 18DB(3) of the WL Act 1901. The application of section 27G of the [Forestry Act 1916](#) to land leased under the [Western Lands Act 1901](#) was curtailed by the cognate [Forestry \(Clearing Licences\) Amendment Act 1985](#).

⁶⁷ Section 18DB(13)(b) of the WL Act 1901

⁶⁸ Section 18DB(1) of the WL Act 1901

⁶⁹ Section 18DB(4)(b) of the WL Act 1901

⁷⁰ Section 18DB(2) of the WL Act 1901

⁷¹ Section 18DB(2) of the WL Act 1901

⁷² Section 18DB(4) of the WL Act 1901

⁷³ *NSW Government Gazette*, 11 April 1986, at p. 1622

⁷⁴ Schedule 3 (31) and (33) of the Western Lands Regulations 1935

feeding purposes in times of drought.⁷⁵

The requirement for the preservation of native vegetation in certain areas of Special leases was retained in the 1985 changes to the Regulations, with minor amendments.⁷⁶ However, these provisions were not included in the [Western Lands Regulation 1992](#).

2.2 Soil Conservation Act 1938

The [Soil Conservation Act 1938](#) (SC Act 1938) as introduced provided for the conservation of soil resources and the mitigation of erosion in catchment areas and areas of erosion hazard constituted or notified under the Act. Catchment areas were notified under the SC Act 1938 in connection with any proclaimed work, namely a dam or any other work for the storage, regulation or conservation of water, and could include private and public land. Three proclaimed works were listed in the original Act – Burrinjuck Dam, Hume Reservoir and Wyangala Dam. The SC Act 1938 prohibited activities within a catchment area that might damage or interfere with the utility of the proclaimed work.⁷⁷ The Catchment Areas Protection Board⁷⁸ was established in part to respond to objections to any notice requiring a landholder to avoid damaging or interfering with the utility of a proclaimed work.⁷⁹

As first introduced, the SC Act 1938 therefore *indirectly* regulated native vegetation clearing on private land that was part of a catchment area constituted or notified under the Act, insofar as clearing may have caused soil erosion. This was also true for Crown land that was part of a catchment area. The SC Act 1938 also provided for regulations to be made to regulate or prohibit the destruction of or interference with timber or scrub on *any* Crown land under lease or license.⁸⁰ The regulations could deal with all timber or scrub, or any particular class of timber or scrub.⁸¹

The [Forestry, Soil Conservation and Other Acts \(Amendment\) Act 1972](#) inserted a new Part 4, Division 2 into the original Act dealing with protected land. Protected land was land within a catchment area with a slope greater than 18 degrees as identified on a map prepared by the Catchment Areas Protection Board.⁸² Private land could be identified as protected land under this provision. Section 21C(1) prohibited a person from ringbarking, cutting down, felling,

⁷⁵ Clause 50C of the Western Lands Regulations 1935

⁷⁶ Schedule 3 (32) of the Western Lands Regulations 1935

⁷⁷ Section 22 of the SC Act 1938

⁷⁸ Section 32 of the SC Act 1938. This board was first established as the catchment areas board under section 34A of the *Crown Lands Consolidation Act 1913*, as inserted into the original Act by the [Crown Lands, Closer Settlement and Returned Soldiers Settlement \(Amendment\) Act 1935](#) (see further section [2.5]).

⁷⁹ Section 22(2) of the SC Act 1938

⁸⁰ Section 33(1) of the SC Act 1938

⁸¹ Section 33(3) of the SC Act 1938

⁸² Section 21B(1) of the SC Act 1938

poisoning or otherwise destroying a tree on protected land without an authority issued by the Catchment Areas Protection Board,⁸³ subject to certain conditions.⁸⁴ A tree was defined as including saplings.⁸⁵ Three exemptions were provided:

- Land exempted from identification as protected land included land under the *Forestry Act 1916*, such as State forests, land under the *National Parks and Wildlife Act 1967*, such as national parks, nature reserves under the *Fauna Protection Act 1948*, banana plantations, orchards, open-cut mining operations and quarries;⁸⁶
- Land where clearing was required on less than five acres;⁸⁷ and
- The cutting of three trees on any one acre in any one year for firewood, fence posts, building material or other domestic purposes.⁸⁸

The 1972 amendments were made because:

... the protection of the tree cover on steeply sloping lands is essential for the protection of the water resources of New South Wales. Extensive removal of the tree cover on steep lands results in silting and pollution of watercourses and storages because the rainfall is no longer absorbed but runs off rapidly into the watercourses, taking topsoil and debris with it.⁸⁹

Provisions of this nature had applied to Crown leases for thirty years prior to the 1972 Act.⁹⁰ In commenting on the extension of this regulatory scheme to private land within catchment areas, the Minister for Conservation noted that statutory precedents already appeared in the Water Act, Hunter Valley Conservation Trust Act and Town Planning Scheme Ordinances made under the Local Government Act. He further stated that:

This provision in regard to private property received the closest attention of the Government. Naturally, we are loath to interfere with landholders' rights. However, we had to give due regard to the best scientific and professional advice that was available to us.⁹¹

⁸³ Section 21D of the SC Act 1938

⁸⁴ Section 21D(3) of the SC Act 1938

⁸⁵ Section 3 of the SC Act 1938

⁸⁶ Section 21A of the SC Act 1938

⁸⁷ Section 21C(3)(b) of the SC Act 1938

⁸⁸ Section 21C(3)(a) of the SC Act 1938. *NSW PD*, 22 March 1972, p.5670

⁸⁹ *NSW PD*, 22 March 1972, p. 5669

⁹⁰ The provisions relating to Crown leases were inadvertently repealed by 1970 amendments to the *Crown Lands Consolidation Act 1913* and reintroduced, in effect, by the 1972 amendments to the *Soil Conservation Act 1938*. Under the *Crown Lands Consolidation Act 1913*, there had been a statutory requirement for the Department of Lands to refer to the Catchment Areas Protection Board applications for certain types of Crown leases and for their conversion to freehold in respect of lands within catchment areas proclaimed under the SC Act 1938. *NSW PD*, 22 March 1972, pp. 5735 & 5739.

⁹¹ *NSW PD*, 22 March 1972, p. 5669

Other themes common in contemporary debate on native vegetation legislation appeared in the Second Reading debate. For example, the Member for Oxley argued that the amendments did not take into account landholder experience:

Many people in this [Manning district watershed] area own freehold land which is caught up by the 18 degrees limit and they accept the need for some control over indiscriminate land clearing. However, many owners have had wide experience in clearing and know how to clear land without causing damage.

...

A landowner who can properly control his land should be given some kind of blanket exemption from the provisions of this measure.⁹²

Several Members commented on the importance of administering the legislation in a way that did not impose unnecessary restrictions on landholders. Another Member briefly raised the topic of compensation for loss of the ability to develop land affected by the Act.

The [Soil Conservation \(Amendment\) Act 1978](#) broadened the definition of catchment area to include, in addition to catchments connected to a proclaimed work, catchment areas of rivers or lakes where, in the Minister's opinion, the stability of the river or lake was adversely affected by soil erosion or siltation.⁹³ The definition of catchment area was broadened again by the [Soil Conservation \(Amendment\) Act 1985](#) to include the catchment area of *any* watercourse or body of water as notified by the Minister in the Gazette.⁹⁴

The [Environmental Planning and Assessment Act 1979](#) required all Determining Authorities to take the environmental impact of an activity into account when considering approval of the activity (see section [2.5]). In November 1984, the Catchment Areas Protection Board noted that, as a Determining Authority under the Act:

... in all its deliberations on applications to destroy or damage trees [it] gives consideration to the environmental implications of the works proposed by applicants.⁹⁵

The [Soil Conservation \(Further Amendment\) Act 1986](#) introduced significant amendments to the definitions of tree and protected land, and conditions on the

⁹² NSW PD, 22 March 1972, p. 5679

⁹³ Section 20 of the SC Act 1938

⁹⁴ Specifically, a river, lake, dam, port, harbour, bay, lagoon, creek, swamp or marsh (s 20 (1)(a)) or a number of those watercourses or bodies of water (s 20 (1)(b)).

⁹⁵ Catchment Areas Protection Board, *Report of the Catchment Areas Protection Board for the Period 1 January, 1980 to 30 June, 1984*, November 1984, at p. 3. This was still true of approvals for native vegetation clearing on protected land prior to the introduction of SEPP 46 (see chapter 3 of this paper), when it was the responsibility of the Department of Conservation and Land Management in 1993; Department of Conservation and Land Management, *Destruction or Injuring of Trees on Protected Land: A Step-by-Step Guide to the Application Process*, June 1993

authority to destroy trees. The definition of tree was expanded from including saplings only to include saplings, shrubs and scrub. The definition of protected land was also broadened; in addition to being land within a catchment area with a slope greater than 18 degrees, protected land now also included:

(b) land (whether or not within a catchment area), being land that is situated within, or within 20 metres of, the bed or bank of any part of a river or lake shown on any such map in some distinctive manner;⁹⁶ or

(c) land (whether or not within a catchment area), being land that is, in the opinion of the Board, environmentally sensitive or affected or liable to be affected by soil erosion, siltation or land degradation.⁹⁷

Section 21B(6) gave examples of land that may be considered to be environmentally sensitive:

- (a) land in arid, semi-arid, landslip or saline areas;
- (b) land containing rare or endangered fauna or flora;
- (c) land containing sites of archaeological or historical interest;
- (d) land containing bird breeding grounds;
- (e) wetlands; and
- (f) areas of scenic beauty.

The conditions which could be attached to an authority to destroy trees were expanded. A new condition was added to the list in section 21D(3):

(h) requiring an act or thing to be done or not to be done to eliminate or mitigate any adverse effects of the authorised action on the environment.

Without limiting the generality of this condition, a condition could be imposed by the Catchment Areas Protection Board under s 21D(3)(h) if it was of the opinion that the authorised action was likely to have:

- (a) an adverse effect on the aesthetic, recreational, scientific or other environmental quality or value of the land concerned or its locality;
- (b) an adverse effect on a locality, place or building which has, in the opinion of the Board, aesthetic, anthropological, architectural, cultural, historical, scientific or social significance or other special value;
- (c) an adverse effect on rare or endangered species of fauna or flora;
- (d) the effect of curtailing beneficial uses of the environment;
- (e) the effect of increasing demands, as a result of the action, on resources (other than the trees the subject of the action) which are, or are likely to become, in short supply; or
- (f) a cumulative adverse effect on the environment when considered with

⁹⁶ This provision was transferred from the *Water Act 1912*, section 26D of which was repealed by the cognate Act, the [Water \(Soil Conservation\) Amendment Act 1986](#).

⁹⁷ Section 21B of the SC Act 1938

existing or likely future activities on or in relation to the land.⁹⁸

The amending Bill was introduced following a review of the Catchment Areas Protection Board.⁹⁹ According to the Second Reading speech:

... the principal reason for this amendment [was] to empower the board to map environmentally sensitive areas of the State as an additional category of protected land, thereby requiring landholders to make application to the board if they wish to destroy trees on such land.¹⁰⁰

The Minister observed that the Board had been:

... under increasing pressure for some time to take an active role in the protection of the environment generally, instead of only regulating the destruction of trees on slopes over 18 degrees and within twenty metres of prescribed rivers. Certain environmental groups have stated categorically that they expect the board to substantially broaden its outlook, sphere of influence and overall responsibilities towards this end, and have been exerting pressure on the Government to take urgent action ... Moreover, the Soil Conservation Service has for a considerable time now been concerned at the quite arbitrary controls over tree destruction afforded by the legislation in that, for example, areas of erosion hazard, landslip areas, saline areas and semi-arid areas can often be to some extent protected from further degradation by tree cover. Similarly, other members of the board have been concerned about the impact that uncontrolled tree destruction can have in areas inhabited by rare and endangered species of plants, animals and birds, areas of cultural or historical significance, and areas of scenic beauty.¹⁰¹

The addition of a new condition on an authority to destroy trees in section 21D(3)(h) was intended to address the situation where:

... the board, when issuing permits, [could] only attach conditions to them that relate to the mitigation of soil erosion, the maintenance of high water quality and the minimum obstruction to river flows. It has no power at all to include any conditions designed to protect the environment generally. The board is frequently placed in the situation where it feels that it should be imposing environmental conditions but where the calling for an environmental impact statement from the applicant under section 112 of the Environmental Planning and Assessment Act, 1979, which is an unnecessarily formal, lengthy and costly exercise for most of the individuals with whom the board deals, could not be justified. However, when the board considers that any proposal submitted to it is likely to significantly affect the environment, it will of course continue to require an environmental impact statement in terms of section 112.¹⁰²

⁹⁸ Section 21D(3A) of the SC Act 1938

⁹⁹ The Report of the Catchment Areas Protection Board for the Period 1 January, 1980 to 2 November, 1984 notes that the Board was in the process of reviewing the administration of section 26D of the Water Act by the Board. The Report does not describe the review, but discusses the State Tree Policy in connection with the review – see further section [2.8].

¹⁰⁰ [NSW PD](#), 19 November 1986, p. 6624

¹⁰¹ [NSW PD](#), 19 November 1986, pp. 6623-6624

¹⁰² [NSW PD](#), 19 November 1986, p. 6624

Several criticisms of the Bill were made during the Second Reading debate. A few Members argued that the definition of a tree was too broad. Another criticism concerned property rights; for example, the Deputy Leader of the National Party, Mr Armstrong, stated:

By taking away the right of landholders to manage their own land in a common sense manner, let alone to act in an almost insulting manner to the individual capacity of landholders to manage their land, and absolutely insulting their intelligence by saying they are not capable of managing their lands, it is effectively saying that they are only custodians for a passing period.¹⁰³

One last legislative amendment of relevance was made prior to the repeal of Part 4, Division 2 of the SC Act 1938 by the *Native Vegetation Conservation Act 1997*. In 1988, the [Soil Conservation \(Amendment\) Act 1988](#) repealed the sections that listed the exemptions to the requirement for an authority prior to destroying a tree;¹⁰⁴ exemptions would henceforth be provided for by regulations or by an order published in the *Government Gazette*.

2.3 Water Act 1912

1946 amendments to the [Water Act 1912](#) introduced a new section 26D, which prohibited the destruction of trees in or alongside any river or lake prescribed under the Act.¹⁰⁵ Introduced by the [Irrigation and Water \(Amendment\) Act 1946](#), subsection 26D(2) provided that:

No owner or occupier of land or other person whomsoever shall, except with the permission of the Forestry Commission of New South Wales, ringbark, cut down, fell, or destroy, or cause or allow to be ringbarked, cut down, felled, or destroyed, any tree situated within, or within one chain¹⁰⁶ of, the bed or bank of any river or lake or section of a river to which this section applies.

The Forestry Commission of NSW could issue a permit for the destruction of a tree,¹⁰⁷ where a tree was defined as including saplings, shrubs and scrub.¹⁰⁸

According to the Second Reading of the Bill:

So far as private lands are concerned there is not any power to prevent or restrict the cutting of timber, and the unrestricted cutting of timber on and adjacent to the banks of our streams is causing a tremendous amount of damage to our soil and watercourses.¹⁰⁹

¹⁰³ [NSW PD](#), 1 December 1986, p. 7474

¹⁰⁴ Sections 21C(2), (3) and (3A) of the SC Act 1938

¹⁰⁵ According to the Second Reading speech, all major rivers and their main tributaries were to be prescribed by regulation in the first instance, minor rivers only being brought in from time to time as it was found to be necessary. *NSW PD*, 3 April 1964, p. 3099. See the Soil Conservation Regulations 1947.

¹⁰⁶ 1 chain = 20.117 metres.

¹⁰⁷ Section 26D(3) of the *Water Act 1912*

¹⁰⁸ Section 26D(6) of the *Water Act 1912*

¹⁰⁹ *NSW PD*, 3 April 1946, p. 3099

The purpose of the amendments was to “preserve timber along the banks of [any defined] stream and reduce the erosion of the banks to a minimum” on private property.¹¹⁰ It was noted in the Second Reading speech that similar legislative provisions had recently been enacted in Queensland.

Several relevant minor amendments were made to the *Water Act 1912* prior to the repeal of section 26D in 1986. In 1972, the [Forestry, Soil Conservation and Other Acts \(Amendment\) Act 1972](#) amended the Act to provide that the Catchment Areas Protection Board would issue permits for tree destruction under section 26D, rather than the Forestry Commission of NSW. The amending Act also provided the Catchment Areas Protection Board with new powers regarding tree destruction on private land by amending the *Soil Conservation Act 1938* (see section [2.2]).

In 1978, the [Water \(Soil Conservation\) Amendment Act 1978](#) extended the prohibition contained in section 26D to include poisoning, topping, lopping, removing or injuring trees.¹¹¹ It also inserted a new section 26DA under which the Catchment Areas Protection Board could issue notices to persons carrying out actions prohibited by section 26D that were likely to cause soil erosion. Sections 26D and 26DA were repealed by the [Water \(Soil Conservation\) Amendment Act 1986](#); the prohibition in section 26D was transferred to the *Soil Conservation Act 1938* by the cognate [Soil Conservation \(Further Amendment\) Act 1986](#).

2.4 Hunter Valley Conservation Trust Act 1950

The [Hunter Valley Conservation Trust Act 1950](#) (HVCT Act 1950) formed part of the McGirr Government’s programme for soil conservation and flood mitigation in NSW.¹¹² Introduced because “one hundred years of misuse and neglect of the Hunter River and its catchment [had] placed them in a deplorable condition”,¹¹³ the HVCT Act 1950 applied to all lands in the Hunter catchment above the boundaries of the city of Greater Newcastle (the Trust District).¹¹⁴ The poor state of the catchment had arisen, it was said, due to “unwise use of agricultural lands in the past, overstocking on grazing lands, and excessive destruction of vegetative cover generally”.¹¹⁵

Part VIII of the HVCT Act 1950 dealt with the preservation of timber on declared lands within the Trust District, where this may have included private land. A tree in this part of the HVCT Act 1950 was defined as including saplings, shrubs and scrub.¹¹⁶ It was prohibited to ringbark, cut down, fell or destroy a tree, or allow

¹¹⁰ *NSW PD*, 21 March 1946, p. 2846

¹¹¹ [NSW PD](#), 5 December 1978, p. 1251

¹¹² *NSW PD*, 17 October 1950, p. 786

¹¹³ *NSW PD*, 17 October 1950, p. 788

¹¹⁴ Section 4 and the Schedule to the HVCT Act 1950

¹¹⁵ *NSW PD*, 17 October 1950, p. 793

¹¹⁶ Section 38(6) of the HVCT Act 1950

such an action to happen,¹¹⁷ unless in possession of a permit issued by the Hunter Valley Conservation Trust.¹¹⁸

The Minister for Conservation noted in his Second Reading that:

... the trust has conferred upon it powers to control certain forms of land use. I readily admit that these powers entail a certain amount of interference with the free and unrestricted use of proprietary rights, but this is accepted by the people of the valley in recognition of the fact that only by some control of past and existing practices regarding land use can any real headway be made in solving their problems.¹¹⁹

The Minister pointed out that the legislation did not go as far as legislative precedent contained in British and Victorian legislation.¹²⁰ With particular reference to the preservation of timber, the Minister stated:

In order to prevent further unnecessary and harmful destruction of timber, the bill provides for the declaration of areas within the trust district in which the destruction of timber can be controlled.¹²¹

Two criticisms were made of the timber preservation provisions of the bill. One Member argued that it would lead to too much delay for landowners conducting annual routine suckering and scrub clearing.¹²² Another Member felt that:

... the bill confers on the trust too much power over the individual property owners ... Though some control may be necessary, the power [to control timber stands] conferred is exceedingly wide.¹²³

The HVCT Act 1950 was repealed by the [*Catchment Management Act 1989*](#).

2.5 Local Government Act 1919 and the Environmental Planning & Assessment Act 1979

Local governments have, under different legislation, been provided with the capacity to regulate the clearing of native vegetation on private land. This power was first given in 1951 to the Cumberland County Council. Established in 1945

¹¹⁷ Section 38(2) of the HVCT Act 1950

¹¹⁸ Section 38(3) of the HVCT Act 1950

¹¹⁹ *NSW PD*, 17 October 1950, p. 792

¹²⁰ *NSW PD*, 17 October 1950, pp. 792-793. Under the English Agriculture Act, the Secretary of State could give a warning notice to a land owner not fulfilling their responsibilities with regard to managing their property in accordance with rules of good estate management. The Secretary of State could give directions to the owner to manage their land in accordance with the rules of good estate management while the warning notice was in force. If the Secretary of State deemed that management of the land was not satisfactory, the owner or occupier could be dispossessed and their land compulsorily acquired.

¹²¹ *NSW PD*, 17 October 1950, p. 797

¹²² *NSW PD*, 18 October 1950, p. 863

¹²³ *NSW PD*, 17 October 1950, p. 810

in response to an urgent need for an organised town planning scheme,¹²⁴ the Council's jurisdiction encompassed 69 municipal and shire council areas in Sydney. The [Local Government \(Amendment\) Act 1951](#) contained the County of Cumberland Planning Scheme as a Schedule to the Act. Made under Part XIIA of the *Local Government Act 1919*,¹²⁵ the Planning Scheme allowed for the preservation of a tree or groups of trees by means of a tree preservation order (TPO), in the interests of amenity.¹²⁶ Any TPO could prohibit the ringbarking, cutting down, topping, lopping or wilful destruction of trees except with the consent of the responsible authority. What constituted a tree was not defined in the Planning Scheme.¹²⁷

Tree preservation based on planning schemes was transferred from the *Local Government Act 1919*¹²⁸ to the [Environmental Planning and Assessment Act 1979](#) (EP&A Act 1979) as part of broader legislative reforms aimed at integrating land use planning and environmental planning and protection.¹²⁹ Under Part 3 of the EP&A Act 1979, environmental planning instruments (EPIs) could provide for "protecting, improving or utilising, to the best advantage, the environment".¹³⁰ More specifically, they could make provision for "protecting or preserving trees or vegetation".¹³¹ By section 90(1), when determining a development application, the consent authority was required to take into consideration the provisions of any EPI,¹³² as well as:

... whether adequate provision has been made for the landscaping of the land to which that development application relates and whether any trees or other vegetation on the land should be preserved.¹³³

The Second Reading speech did not discuss the reasoning behind these provisions.

The [Environmental Planning and Assessment Amendment Act 1997](#) replaced section 90(1) with a new section 79C, setting out the matters for consideration when determining a development application. While the new section retained the requirement to take into consideration the provisions of any EPI, it no longer

¹²⁴ NSW Government State Records, "[Cumberland County Council](#)", no date [online – accessed 17 September 2014]

¹²⁵ This Part was inserted into the original Act by the [Local Government \(Town and Country Planning\) Amendment Act 1945](#)

¹²⁶ Clause 40(1) of the Cumberland Planning Scheme

¹²⁷ For a brief history of TPOs, see: Andrew Kelly, [The role of local government in the conservation of biodiversity](#), PhD thesis, Faculty of Law, University of Wollongong, 2004, at pp. 356-361

¹²⁸ Part XIIA of the *Local Government Act 1919* was repealed by one of the four cognate Acts introduced with the EP&A Bill 1979 – the [Miscellaneous Acts \(Planning\) Repeal and Amendment Act 1979](#).

¹²⁹ *NSW PD*, 14 November 1979, p. 3047

¹³⁰ Section 26(a) of the EP&A Act 1979

¹³¹ Section 26(e) of the EP&A Act 1979

¹³² Section 90(1)(a) of the EP&A Act 1979

¹³³ Section 90(1)(m) of the EP&A Act 1979

required consideration of whether any trees or other vegetation should be preserved.

In 2005, section 26 was expanded so that EPIs can now make provision:

- (a) for development control plans to specify the species or kinds of trees or other vegetation included in or excluded from the relevant provisions, and
- (b) for the grant of permission to remove or otherwise affect trees or other vegetation, and for a refusal to grant permission to be treated as a refusal or failure to grant development consent under and for the purposes of Part 4.

As noted by the Catchment Areas Protection Board with regards to its role in determining applications to clear native vegetation under the SC Act 1938 (see section [2.2]), Determining Authorities under the EP&A Act 1979 as introduced were required to take the environmental impact of an activity into account when considering approval of the activity. Specifically:

For the purpose of attaining the objects of this Act relating to the protection and enhancement of the environment, a determining authority in its consideration of an activity shall, notwithstanding any other provisions of this Act or the provisions of any other Act or of any instrument made under this or any other Act, examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.¹³⁴

Further, a Determining Authority was not to make a final decision to undertake an activity or to approve an activity that was either a prescribed activity or an activity that was likely to significantly affect the environment unless it had first considered an environmental impact statement made with respect to that activity.¹³⁵ As of October 2014, these provisions are still in force, in amended form.

2.5.1 Environmental Planning Instruments

Originally, three types of environmental planning instruments (EPIs) could be made under the EP&A Act 1979: State Environmental Planning Policies (SEPPs); Regional Environmental Plans (REPs);¹³⁶ and Local Environmental Plans (LEPs). Several EPIs have dealt, or attempted to deal, with native vegetation clearing. The most significant of these was the 1995 [State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation](#) (SEPP 46) (see chapter 3 of this paper).

Three earlier SEPPs regulated native vegetation clearing in particular areas of the State. Introduced in 1985, [State Environmental Planning Policy No. 14 –](#)

¹³⁴ Section 111 of the EP&A Act 1979

¹³⁵ Section 112(1) of the EP&A Act 1979

¹³⁶ The [Environmental Planning and Assessment Amendment Act 2008](#) repealed Part 3 Division 3 of the EP&A Act 1979, which provided for REPs

[Coastal Wetlands](#)¹³⁷ aimed to preserve and protect coastal wetlands in the environmental and economic interests of the State.¹³⁸ To this end, it prohibited land clearing in coastal wetlands without development consent from the council and the concurrence of the Director of Planning.¹³⁹ Matters to be taken into account by the Director included:

- (a) The environmental effects of the proposed development, including the effect of the proposed development on –
 - (i) The growth of native plant communities;
 - ...
- (b) Whether adequate safeguards and rehabilitation measures have been, or will be, made to protect the environment; and
- (c) Whether carrying out the development would be consistent with the aim of the policy.¹⁴⁰

In a similar manner, the 1988 [State Environmental Planning Policy No. 26 – Littoral Rainforests](#)¹⁴¹ aimed to preserve areas of littoral rainforest in their natural state.¹⁴² It prohibited any person from disturbing, removing, damaging or destroying any native flora on the land to which the policy applied as well as all land located within 100 metres of the nominated land;¹⁴³ native flora was defined as including trees, shrub and vegetation.¹⁴⁴ Matters to be taken into consideration when the Minister and Director decided whether to grant concurrence included:

- If the carrying out of the proposal and the use (if any) thereafter of the land concerned for the purpose for which it will be used may cause destruction or disturbance of the natural environment; and
- The public interest (if any) in the carrying out of the proposal in relation to the public interest in the preservation of littoral rainforest in its natural state.¹⁴⁵

Development under SEPPs 14 and 26 was classified as ‘designated development’, which required submission of an environmental impact statement with any development application.

Introduced in 1995, the third SEPP – [State Environmental Planning Policy No.](#)

¹³⁷ *NSW Government Gazette*, 12 December 1985, at p. 6439

¹³⁸ Clause 2 of SEPP 14

¹³⁹ Clause 7(1) of SEPP 14. Note that the prohibition makes no direct reference to the destruction of trees. Rather, it states that “in respect of the land to which this policy applies, a person shall not clear that land.”

¹⁴⁰ Clause 7(2) of SEPP 14

¹⁴¹ *NSW Government Gazette*, 5 February 1988, at p. 653

¹⁴² Clause 2 of SEPP 26

¹⁴³ Clauses 7(1) and 7(2) of SEPP 26

¹⁴⁴ Clause 3 of SEPP 26

¹⁴⁵ Clause 8(1) of SEPP 26

44 – Koala Habitat Protection – encouraged the proper conservation and management of native vegetation to provide habitat for koalas.¹⁴⁶ For those local government areas listed in Schedule 1, a plan of management was required to be in place for core koala habitat before development consent could be granted.

Regional Environmental Plans (REPs) could be made by the Director of Planning or the Minister on any matter of significance for environmental planning for a particular region.¹⁴⁷ The potential effectiveness of REPs was limited by at least two factors. As of 1999, REPs had not been systematically used for integrated regional planning across the State.¹⁴⁸ Further, Local Environmental Plans (LEPs) did not have to be consistent with REPs. While a council was expected to prepare its draft LEP so that it was not substantially inconsistent with a relevant REP,¹⁴⁹ the Director of Planning could approve the LEP if of the opinion that the inconsistency was justifiable in the circumstances.¹⁵⁰

The Hunter Regional Environmental Plan 1989¹⁵¹ provides an example of how a REP could deal with native vegetation clearing. The Hunter REP, in part, aimed to strictly control any reduction in the extent of important natural areas, especially important habitats such as natural wetlands.¹⁵² More specifically, it recommended, in part, that any relevant draft LEP *should* include rural environmental protection zones in order to protect areas such as important wetlands, forests and wildlife habitats.¹⁵³ It also recommended that a council *should not* grant clearing consent in a prescribed wetland without taking potential environmental impacts into consideration.¹⁵⁴ Note that the Hunter REP could only recommend a particular course of action, rather than stipulate that a relevant draft LEP *must* include certain provisions. It is also worth noting that, with regards to rural land, while the Hunter REP aimed to protect prime crop and pasture land from degradation, it did not make provisions regarding native vegetation clearing.¹⁵⁵

With regards to Local Environmental Plans (LEPs), Tree Preservation Orders were retained in the Environmental Planning and Assessment Model Provisions

¹⁴⁶ Clause 3 of SEPP 44

¹⁴⁷ Section 40 of the EP&A Act 1979

¹⁴⁸ Department of Urban Affairs and Planning, *Plan making in NSW: Opportunities for the future – discussion paper*, February 1999, at p. 17

¹⁴⁹ Section 61(e) of the EP&A Act 1979

¹⁵⁰ Section 65(2) of the EP&A Act 1979

¹⁵¹ *NSW Government Gazette*, 17 March 1989, at p.1436

¹⁵² Clause 59(b) of the Hunter REP

¹⁵³ Clause 61(b) of the Hunter REP

¹⁵⁴ Clause 62(2) of the Hunter REP

¹⁵⁵ Part 4 Division 1 of the Hunter REP. The closest this Division came to regulating native vegetation clearing was by recommending that councils should undertake rural land studies aimed at protecting prime crop and pasture land, and identifying appropriate land uses and planning controls (cl 28(1)).

1980 (a LEP template made under section 33(1) of the EP&A Act 1979). TPOs could be made for the purpose of “securing amenity or of preserving existing amenity”.¹⁵⁶ A TPO could prohibit the ring-barking, cutting down, topping, lopping, removing, injuring or wilful destruction of any tree or trees.¹⁵⁷

Agriculture was generally unregulated by early EPIs. Where land clearing provisions were included, they only related to environmental protection zones¹⁵⁸ and, it appears, these rarely applied to private land.¹⁵⁹ In 1981, the Moree Plains Shire attempted to introduce restrictive environmental protection zones over certain lands, including remnant woodlands containing rare brigalow and ooline communities. Following a Commission of Inquiry, established in response to public outcry, the Council abandoned the environmental protection zones along with a clause regulating land clearance in the general rural zone. Opposition to the proposals was founded on the importance of maintaining private property rights.¹⁶⁰

In the late 1980s, the Department of Planning prepared draft LEP templates for NSW that aimed to extend the native vegetation clearing controls contained in LEPs. In 1989, a Sample Draft Rural LEP¹⁶¹ was released to assist inland rural councils “wishing to update their planning controls into a modern instrument”.¹⁶² Several native vegetation controls were included. The objectives of the General Rural Zone were to protect, enhance and conserve resources, including:

- (v) trees and other vegetation in environmentally sensitive areas where the conservation of the vegetation is significant to scenic amenity or natural wildlife habitat or is likely to control land degradation; and
- (vii) areas of significance for nature conservation, including areas with rare plants, wetlands and significant habitats.¹⁶³

¹⁵⁶ Clause 8(1) of the Environmental Planning and Assessment Model Provisions 1980

¹⁵⁷ Clause 8(2) of the Environmental Planning and Assessment Model Provisions 1980

¹⁵⁸ David Farrier, “[Vegetation conservation: the planning system as a vehicle for the regulation of broadacre agricultural land clearing](#)”, *Melbourne University Law Review*, 1991-1992, 26: pp. 26-59

¹⁵⁹ Andrew Kelly, [The role of local government in the conservation of biodiversity](#), PhD thesis, Faculty of Law, University of Wollongong, 2004. Farrier (1988) gave the example of the Gloucester LEP 4, in which land clearing for the purposes of agriculture was prohibited altogether in two out of four environmental protection zones, while in the other two it was permissible without consent but subject to any conditions the Council chose to attach; David Farrier, *Environmental Law Handbook: Planning and Land Use in New South Wales*, 1988, Sydney: Redfern Legal Centre Publishing, at p. 205.

¹⁶⁰ Andrew Kelly, [The role of local government in the conservation of biodiversity](#), PhD thesis, Faculty of Law, University of Wollongong, 2004

¹⁶¹ According to Farrier, a Sample Draft Rural Local Environmental Plan for councils within the Western Division had similar provisions; Farrier, above n158, at p. 33

¹⁶² Department of Planning, “Circular C12 – Sample Draft Rural Local Environmental Plan”, 17 March 1989, quoted in Andrew Kelly, [The role of local government in the conservation of biodiversity](#), PhD thesis, Faculty of Law, University of Wollongong, 2004, at p. 234

¹⁶³ Clause 9 of the Sample Draft Rural LEP

Note, however, that agriculture did not require development consent.¹⁶⁴

The Sample Draft Rural LEP also provided for the identification of areas of environmentally sensitive land (Environmental Protection Zones) and imposed a development consent requirement where trees were to be destroyed on whichever was the less of:

- More than one hectare of environmentally sensitive land of an existing holding; or
- More than 5 per cent of the area of an existing holding, where that 5 per cent comprises environmentally sensitive land.¹⁶⁵

A tree was defined as including saplings and shrub, but not scrub.¹⁶⁶ The Sample Draft Rural LEP recommended that a council not grant consent unless satisfied that the clearing would be carried out in a manner that minimised:

- (a) the risk of soil erosion or other land degradation;
- (b) the loss of scenic amenity; and
- (c) the loss of important vegetation systems and natural wildlife habitats.¹⁶⁷

The Sample Draft Rural LEP also included provisions for conservation areas.¹⁶⁸ These could cover areas of significance for nature conservation such as important species of trees, remnant forests and wildlife habitats of local ecological heritage significance without the need for specific Environmental Protection Zones. Within these areas, no trees of a nominated species could be destroyed without council consent.¹⁶⁹ The Sample Draft Rural LEP was never gazetted by the Government. Nevertheless, it was used, at least in part, by a number of rural councils.¹⁷⁰

Also in the late 1980s, the Department of Planning prepared Draft Model Provisions which broadened the purpose for which TPOs could be issued. The draft clause read as follows:

- (1) The consent authority may make a tree preservation order...
- (2) The consent authority may not grant consent for any action [to ringbark, cut down, top, lop, remove, injure or destroy a tree] ... unless it has made an assessment of the importance of the tree or trees in relation to:
 - (a) soil stability and prevention of land degradation;
 - (b) scenic or environmental amenity; and

¹⁶⁴ Clause 9 of the Sample Draft Rural LEP

¹⁶⁵ Clause 21(2) of the Sample Draft Rural LEP

¹⁶⁶ Clause 5 of the Sample Draft Rural LEP

¹⁶⁷ Clause 21(3) of the Sample Draft Rural LEP

¹⁶⁸ Clause 26 and 28 of the Sample Draft Rural LEP

¹⁶⁹ Clause 26(1) of the Sample Draft Rural LEP

¹⁷⁰ Brett Whitworth, *pers. comm.*, 6 October 2014

(c) vegetation systems and natural wildlife habitats.¹⁷¹

The Draft Model Provisions were never adopted by the Government.

As of October 2014, the current LEP template (the [Standard Instrument – Principal Local Environmental Plan](#)) deals with native vegetation with regards to development in the coastal zone and through TPOs. Development consent must not be granted to development in the coastal zone unless the authority has considered, amongst other matters, how native coastal vegetation can be conserved.¹⁷² TPOs, now known as tree preservation controls, may be made to “preserve the amenity of the area, including biodiversity values, through the preservation of trees and other vegetation”.¹⁷³ A person must not ringbark, cut down, top, lop, remove, injure or wilfully destroy any tree or other vegetation without either development consent or a permit granted by the Council.¹⁷⁴ Tree preservation controls may not deal with native vegetation clearing regulated under the *Native Vegetation Act 2003*.

2.6 Forestry Act 1916

The [Forestry Act 1916](#) as made prohibited ringbarking or otherwise destroying trees¹⁷⁵ on land leased or licenced under the *Forestry Act 1916* or the *Crown Lands Consolidation Act 1913*.¹⁷⁶ Permits to ringbark or otherwise destroy a tree (ringbarking permits) could be issued by the Forestry Commission.¹⁷⁷ A tree was defined as including a sapling.¹⁷⁸

Ringbarking permits were replaced with clearing licences by the [Forestry, Conservation Authority of New South Wales and Other Acts \(Amendment\) Act 1972](#).¹⁷⁹ Amended slightly by the [Forestry \(Amendment\) Act 1978](#), these licences authorised the holder to ringbark or otherwise kill or destroy trees,¹⁸⁰ other than those trees having economic value.¹⁸¹ By this point, the *Forestry Act 1916* defined a tree as including saplings or seedlings of a tree.¹⁸² Clearing licences could not be issued in respect of protected land, as defined by the SC Act 1938, except with the consent of the Catchment Areas Protection Board.¹⁸³

¹⁷¹ Clause 28 of the Draft Model Provisions, no date; cited in Andrew Kelly, [The role of local government in the conservation of biodiversity](#), PhD thesis, Faculty of Law, University of Wollongong, 2004, at p. 358

¹⁷² Clause 5.5 of the Standard Instrument – Principal Local Environmental Plan

¹⁷³ Clause 5.9(1) of the Standard Instrument – Principal Local Environmental Plan

¹⁷⁴ Clause 5.9(3) of the Standard Instrument – Principal Local Environmental Plan

¹⁷⁵ Section 31(1)(e) of the *Forestry Act 1916*

¹⁷⁶ Section 31(2) of the *Forestry Act 1916*

¹⁷⁷ Section 31(5) of the *Forestry Act 1916*

¹⁷⁸ Section 4 of the *Forestry Act 1916*

¹⁷⁹ Section 26A of the *Forestry Act 1916*

¹⁸⁰ Section 27G(1) of the *Forestry Act 1916*

¹⁸¹ Section 27H(e) of the *Forestry Act 1916*

¹⁸² Section 4 of the *Forestry Act 1916*

¹⁸³ Section 27H(d) of the *Forestry Act 1916*

When first introduced, these provisions applied to all Crown leases and permissive occupancies larger than two hectares in area.¹⁸⁴ From 1985 onwards, these provisions no longer applied to Crown lands in the Western Division (see section [2.1]).¹⁸⁵

The *Native Vegetation Conservation Act 1997* amended the clearing licence provisions so that they could not be issued to clear any native vegetation within the meaning of the NVC Act 1997.

2.7 Other relevant legislation

Four additional pieces of legislation have been of minor importance to the regulation of native vegetation clearing in NSW. The *Rivers and Foreshores Improvement Act 1948* was first amended to *indirectly* regulate the clearing of native vegetation by private persons in 1955.¹⁸⁶ Excavation on, in or under a river bank or land within 40 metres of the top of the river bank was prohibited without permission from the Government. These provisions were updated in 1991 by the *Rivers and Foreshores Improvement (Amendment) Act 1991*, but continued to apply to the same land.¹⁸⁷ The *Rivers and Foreshores Improvement Act 1948* was not amended by either the *Native Vegetation Conservation Act 1997* or the *Native Vegetation Act 2003*. It was repealed in 2006 by the *Water Management Act 2000*.

From their introduction, interim and permanent conservation orders made under the *Heritage Act 1977* could be made to protect, among other things, places of scientific, natural or aesthetic significance for the State.¹⁸⁸ With respect to anything under an interim or permanent conservation order, a person could not damage or destroy any tree or remove any tree from that place or land without an approval from the Heritage Council.¹⁸⁹ In 1987, this prohibition was extended to include any other vegetation.¹⁹⁰ As of October 2014, this prohibition remains in force.¹⁹¹

The *Coastal Protection Act 1979* as introduced regulated development in the coastal zone, where development could include the clearing or propagation of vegetation including marine vegetation.¹⁹² A public authority was not permitted

¹⁸⁴ Section 27G(1)(b) and Schedule 1 of the *Forestry Act 1916*

¹⁸⁵ These changes were introduced by the cognate acts, the *Forestry (Clearing Licences) Amendment Act 1985* and the *Western Lands (Amendment) Act 1985*.

¹⁸⁶ Amendments introduced by the *Irrigation, Water and Rivers and Foreshores Improvement (Amendment) Act 1955*. Note that, from its introduction, the Act regulated works constructed, operated or maintained in the port of Sydney by the relevant government body, where those works included 'the removal of dead or growing timber, or other vegetation' (s2).

¹⁸⁷ Part 3A of the *Rivers and Foreshores Improvement Act 1948*

¹⁸⁸ Environmental heritage as defined under section 4(1) of the *Heritage Act 1977*

¹⁸⁹ Section 57(1) of the *Heritage Act 1977*

¹⁹⁰ This amendment was introduced by the *Heritage (Amendment) Act 1987*

¹⁹¹ section 57(1)(h) of the *Heritage Act 1977*

¹⁹² Section 37(e) of the *Coastal Protection Act 1979*

to carry out development, or grant consent to a person to carry out development, without the concurrence of the Minister.¹⁹³ In order to give concurrence, the Minister had to be of the opinion that the development would not adversely affect the coastal zone. As of October 2014, these provisions remain [in force](#).

Total catchment management (TCM) was adopted as Government policy in 1984 (see section [2.8]).¹⁹⁴ In 1989, TCM was strengthened by the introduction of the [Catchment Management Act 1989](#).¹⁹⁵ TCM was defined under the Act as:

... the co-ordinated and sustainable use and management of land, water, vegetation and other natural resources on a water catchment basis so as to balance resource utilisation and conservation.¹⁹⁶

The objects of the Act were:

- (a) to co-ordinate policies, programs and activities as they relate to total catchment management; and
- (b) to achieve active community participation in natural resource management; and
- (c) to identify and rectify natural resource degradation; and
- (d) to promote the sustainable use of natural resources; and
- (e) to provide stable and productive soil, high quality water and protective and productive vegetation cover within each of the State's water catchments.

The Act was replaced by the [Catchment Management Authorities Act 2003](#) (CMA Act 2003), a cognate Act to the [Native Vegetation Act 2003](#) (NV Act 2003). Catchment Management Authorities established under the CMA Act 2003¹⁹⁷ had functions under the NV Act 2003 (see chapter 4 of this paper); one of the CMA's specific functions was to assist landholders further the objectives of the CMA's catchment action plan, including providing information about native vegetation.¹⁹⁸ The CMA Act 2003 was in turn replaced by the [Local Land Services Act 2013](#). Native vegetation related responsibilities of the Catchment Management Authorities under the NV Act 2003 were transferred to the Local Land Services.

2.8 Total Catchment Management and State Tree policies

In 1984, the Wran Government adopted total catchment management (TCM) as official policy.¹⁹⁹ TCM involved:

¹⁹³ Section 38 of the *Coastal Protection Act 1979*

¹⁹⁴ Soil Conservation Service, *Soil Conservation Service Annual Report 1984/85*, 1985

¹⁹⁵ [NSW PD](#), 15 November 1989, at p. 12468

¹⁹⁶ Section 4 of the *Catchment Management Act 1989*

¹⁹⁷ Parts 2 and 3 of the *Catchment Management Authorities Act 2003*

¹⁹⁸ Section 15(d) of the *Catchment Management Authorities Act 2003*

¹⁹⁹ Soil Conservation Service, *Report of the Soil Conservation Service of New South Wales for the Year Ended 30 June, 1985*, 21 November 1985

...the co-ordinated use and management of land, water, vegetation and other natural resources on a catchment basis.²⁰⁰

More specifically, TCM policy aimed to:

- Encourage effective co-ordination of policies and activities of relevant departments, authorities, companies and individuals which impinge on the conservation, sustainable use and management of the State's catchments, including soil, water and vegetation;
- Ensure the continuing stability and productivity of the soils, a satisfactory yield of water of high quality and the maintenance of an appropriate protective and productive vegetative cover; and
- Ensure that land within the State's catchments is used within its capability in a manner which retains as far as possible, options for future use.²⁰¹

TCM also operated as an umbrella policy for other natural resource management policies, including a tree policy. In 1983, the Catchment Areas Protection Board (CAPB) began investigation of the feasibility of a State Tree Policy. Its terms of reference included:

- (1) An identification of the environmental consequences of tree destruction in NSW.
- (2) An examination of the need for regulation or any other controls on tree destruction and clearance.
- (3) An examination of the need for reforestation and afforestation in NSW.
- (4) An examination of relevant legislation and other options for Tree Policies in NSW and the likely practical, financial, administrative and sound consequences of this.²⁰²

Regulatory controls were expanded in 1986 by amendments to the *Soil Conservation Act 1938* (see section [2.2]). However, broad State-wide vegetation clearing controls were not introduced at this stage. It appears that TCM was, in part, intended to fill this gap:

Legislation can control the destruction of trees in specific or identifiable situations and act as a means of last resort to deter unwise land use. However, the overall management of trees and forests depends on the adoption of a sensitive land use ethic by individuals, corporate and government land managers.²⁰³

²⁰⁰ Soil Conservation Service, *Total Catchment Management: A State Policy, including State Soils Policy and State Trees Policy*, 1987, at p. 2

²⁰¹ G. M. Cunningham, "Total Catchment Management: Resource Management for the Future", *Journal of Soil Conservation New South Wales*, Special Edition: Total Catchment Management, 1986, 42(1), at p. 4

²⁰² Catchment Areas Protection Board, *Report of the Catchment Areas Protection Board for the Period 1 January, 1980 to 30 June, 1984*, 2 November 1984, at p. 26

²⁰³ R. Clarke, F. Irwin, C. Marshall and S. Wakefield, "Trees in Catchments", *Journal of Soil*

In 1987, the Wran Government released its Total Catchment Management Policy, which also included the State Tree Policy. The State Tree Policy observed that native vegetation clearing had contributed to soil erosion and the degradation of land and water resources and other environmental values. While noting that some land clearing was an essential prerequisite for development, it also recognised that:

... incentives aimed at promoting replacement of trees in rural New South Wales are inadequate and that current legislation and regulation concerning tree management should be reviewed and monitored to ensure a clear, co-ordinated approach to the problem, which addresses the needs of those areas where tree cover management requires guidance.²⁰⁴

The following Policy position was adopted:

... on non-urban lands an adequate tree cover be conserved, maintained and, where appropriate, increased as a means of:

- conserving soil and water resources;
- optimising agricultural and silvicultural capability in the long term;
- conserving native flora and fauna and their habitats; and
- conserving scenic and aesthetic qualities of the environment.²⁰⁵

The Policy was to be implemented via improved co-ordination between relevant government bodies, and increased community awareness of the role and value of trees. Specifically:

- The Government intends to achieve the objectives of this Tree Policy by:
 - ...
 - an examination of the need for altered regulatory and planning controls over the clearing or destruction of vegetation.
 - ...
- Government organisations and local government authorities must ensure that in considering proposals and, where appropriate, in preparing related guidelines for development, use and management of land held under their control or for which they hold statutory responsibility for development concurrence:
 - proposals are treated on their merits and in a regional context, having regard to social, economic and environmental considerations, and with a special view to the consequences of tree removal on land degradation;

Conservation New South Wales, Special Edition: Total Catchment Management, 1986, 42(1), at p. 56

²⁰⁴ Soil Conservation Service, *Total Catchment Management: A State Policy, including State Soils Policy and State Trees Policy*, 1987, p. 15

²⁰⁵ *Ibid* at p. 15

- trees are considered as components of ecological communities rather than as individual specimens;
 - sufficient trees are retained or established to:
 - control soil erosion,
 - maintain existing ecosystems,
 - provide adequate stock and/or crop shelter where necessary,
 - provide a source of wood for local use,
 - maintain and improve the visual amenity,
 - protect wildlife and fishery values, and
 - protect heritage values; and
 - special consideration is given to riverine and estuarine regimes in the interests of protecting stream banks and beds, water quality and fisheries and wildlife habitat.
- ...
- The Catchment Areas Protection Board will, with the co-operation of its member authorities ... provide advice and prepare guidelines for extension officers, the farming and pastoral community, State and local government authorities and the general public in relation to:
 - environmental assessment of proposals for tree destruction.²⁰⁶

In 1993, the Tree Forum (a group established in 1989 with members from government agencies and community groups) released the NSW Tree Plan to implement the State Tree Policy.²⁰⁷ The goal of the Plan was to:

... increase and improve tree cover by retaining existing trees and remnant bushland, establishing new trees, and adopting sound tree management practices.²⁰⁸

The Plan was intended to apply to the whole State. Its goal was considered achievable despite its success being dependent “to a large extent on the goodwill and cooperation of diverse individuals and organisations, many of whom have different objectives”.²⁰⁹ Seven key areas for action were identified in the Plan, including tree retention and management, tree establishment and regeneration, commercial tree growing, community action, community participation and legislative review. With regards to the control of native vegetation clearing, the following specific actions were identified:

²⁰⁶ Ibid at pp. 17-18

²⁰⁷ The NSW Tree Forum, *New South Wales Tree Plan*, July 1993

²⁰⁸ Ibid at p. 8

²⁰⁹ Ibid at p. 8

- Promote community and landholder awareness and careful consideration of the long-term impacts of clearing and of the values of retaining forests, bushland and trees;²¹⁰
- Department of Conservation and Land Management, Department of Planning and local government authorities to more effectively use protected land provisions, environmental plans, tree preservation orders and other regulatory controls to protect remnant bushland;²¹¹
- Encourage private and public landholders to carefully consider and plan any proposed clearing, ensuring that the necessary approvals have been obtained;²¹²
- The Tree Forum was to request all State agencies and local government authorities to record and report annually on the use and enforcement of legislation and policies pertaining to the protection of existing tree cover and the opportunities for the continuing natural regeneration of that tree cover;²¹³ and
- The Tree Forum was to review laws and policies for compatibility with the goal of the Plan and, where necessary, recommend amendments taking full account of legislative and other statutory controls elsewhere in Australia.²¹⁴

With regard to the proposed legislative review of native vegetation controls, the Tree Plan noted that:

In general, the use of enforcement measures should be contemplated only when attempts to safeguard significant vegetation on a cooperative basis have failed. However, it should be recognised that the existence of legislative measures may form an important part of a total strategy, including education, advisory and extension services. The fact that there are protective measures through the law to safeguard vegetation may be an important deterrent, even though no action is taken to enforce the particular provision.²¹⁵

In mid-1995, the NSW Tree Forum was replaced by the NSW Vegetation Forum, a sub-committee of the State Catchment Management Coordinating Committee established under the *Catchment Management Act 1989*. One of the Forum's first tasks was to review the [State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation](#) (SEPP 46) introduced in August 1995.²¹⁶

²¹⁰ Ibid at p. 10

²¹¹ Ibid at p. 10

²¹² Ibid at p. 10

²¹³ Ibid at p. 25

²¹⁴ Ibid at p. 25

²¹⁵ Ibid at p. 25

²¹⁶ State Catchment Management Coordinating Committee, *Total Catchment Management Triennial Report 1995-98*, July 1999, at p. 18

2.9 Summary

Table 1 sets out a summary of the regulatory regime as it stood prior to the introduction of SEPP 46 and the NVC Act 1997. Clearing controls are listed in the Table in descending order according to the amount of the State to which they may apply.

Table 1: Native vegetation clearing controls prior to 1995

Area	Native vegetation clearing controls	Legislation
The whole State	<ul style="list-style-type: none"> Environmental Planning Instruments <i>could</i> make provision for protecting or preserving trees or vegetation Local Environmental Plans <i>could</i> provide for Tree Preservation Orders prohibiting the destruction of any tree or trees 	<i>Environmental Planning & Assessment Act 1979</i> (ss 26(e) & 33(1))
Protected land (under the SC Act 1938)	<ul style="list-style-type: none"> Protected land defined as: <ul style="list-style-type: none"> Land within a catchment area with a slope greater than 18 degrees; Land situated within 20 metres of a river or lake; and Environmentally sensitive land. Tree destruction prohibited without an authority issued by the Catchment Areas Protection Board Tree defined as including a sapling, shrubs and scrub 	<i>Soil Conservation Act 1938</i> (Part 4 Division 2)
All leases in the Western Division	<ul style="list-style-type: none"> Leases <i>may</i> contain conditions requiring the preservation of trees, scrub and vegetative cover 	<i>Western Lands Act 1901</i> (s 18D(1))
All leases over half a hectare in the Western Division	<ul style="list-style-type: none"> Destruction of trees, other than those with economic value, prohibited without a clearing licence Tree defined as including saplings or seedlings of a tree A clearing licence could not be issued in respect of protected land without the consent of the Catchment Areas Protection Board 	<i>Western Lands Act 1901</i> (s 18DB)
Crown leases larger than two hectares in the Eastern and Central Divisions	<ul style="list-style-type: none"> Destruction of trees, other than those with economic value, prohibited without a clearing licence Tree defined as including saplings or seedlings of a tree A clearing licence could not be issued in respect of protected land without the consent of the Catchment Areas Protection Board 	<i>Forestry Act 1916</i> (ss 27G & 27H)
Coastal wetlands	<ul style="list-style-type: none"> Land clearing in coastal wetlands prohibited without development consent 	SEPP 14 – Coastal Wetlands
Littoral Rainforests	<ul style="list-style-type: none"> Land clearing in littoral rainforests, or within 100 metres of the nominated land, prohibited without development consent 	SEPP 26 – Littoral Rainforests
Koala Habitat	<ul style="list-style-type: none"> Native vegetation clearing in koala habitat only permitted once a plan of management was in place 	SEPP 44 – Koala Habitat Protection
Protected land (under the RFI Act 1948)	<ul style="list-style-type: none"> Protected land: land comprising the bed of a river and land up to 40 metres from the top of the river bank <i>Indirect</i> regulation of native vegetation clearing: Excavation on, in or under protected land prohibited without a permit 	<i>Rivers and Foreshores Improvement Act 1948</i> (Part 3A)

Area	Native vegetation clearing controls	Legislation
Place under heritage conservation order	<ul style="list-style-type: none"> Destruction of trees or vegetation in a place under a heritage conservation order prohibited without an approval from the Heritage Council 	<i>Heritage Act 1977</i> (s 57(1))
Coastal zone	<ul style="list-style-type: none"> Clearing of vegetation prohibited without approval from a relevant public authority and the concurrence of the Minister 	<i>Coastal Protection Act 1979</i> (s 38)

3. NATIVE VEGETATION REFORM: 1995 – 1997²¹⁷

Native vegetation reform was accorded high priority by the Carr Government after the 1995 election. This was against the background of increasing awareness of environmental issues in the 1980s and 1990s. It is also worth noting the proximity of these reforms to the adoption by the 1992 Commonwealth, State and Territory Governments, and the Australian Local Government Association of the [National Strategy for Ecologically Sustainable Development](#) (ESD Strategy). The ESD Strategy required governments, amongst other things, to take action to address clearing of native vegetation, including:

- working through appropriate agencies to develop a native vegetation conservation education program targeted at land managers, and that focused on the value of retaining native vegetation in situ while integrating this with major land uses;
- reviewing relevant legislation related to clearing, and ensuring criteria for assessing land clearance applications integrated enhancement of productivity of all lands with biodiversity conservation, land protection, water management and landscape values;
- encouraging voluntary management of native vegetation remnants, and reviewing the effectiveness of mechanisms for the long term voluntary protection of native vegetation and wildlife, in order to provide a basis for deciding on the most appropriate mix; and
- undertaking cooperative development of a range of measures, including financial incentives, cost reimbursements, and rate rebates to encourage land managers to better protect native vegetation.²¹⁸

It has also been suggested that the reforms, and in particular [State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation](#), were prompted in part by the release by the Commonwealth Department of Environment, Sport and Territories in 1995 of the report [Native Vegetation Clearance, Habitat Loss and Biodiversity Decline](#), discussed above in section [1.2], which highlighted the need for strengthened action to retain

²¹⁷ This section of the paper draws from Stewart Smith, [Native Vegetation in NSW – An Update](#), Briefing Paper No. 6/1999, March 1999.

²¹⁸ Ecologically Sustainable Development Steering Committee, COAG, [National Strategy for Ecologically Sustainable Development](#), [Chapter 11](#).

native vegetation.²¹⁹

The Carr Government described the proposed native vegetation reforms as a four phase process:

1. The introduction in August 1995 of [State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation](#)²²⁰ (SEPP 46);
2. The NSW Vegetation Forum to consult with stakeholders regarding long term options to replace SEPP 46, and report to the Government;
3. The Government to consider the NSW Vegetation Forum's recommendations, and to introduce new legislation (the [Native Vegetation Conservation Act 1997](#)²²¹ (NVC Act 1997)); and
4. Ongoing sustainable management of native vegetation through the NVC Act 1997, which came into effect on 1 January 1998.²²²

3.1 Phase 1 - State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation

3.1.1 Background to introduction of SEPP 46

SEPP 46 was introduced as an interim measure, never intended to provide a long term regulatory framework. Its sudden introduction, without prior consultation, was designed to prevent a rush of speculative clearing by landholders fearing tighter regulation through the reform process.²²³

3.1.2 SEPP 46 Summary

SEPP 46 was gazetted and commenced on 10 August 1995. It applied to mostly rural areas of the State, except land zoned residential, township or village, protected land under the [Soil Conservation Act 1938](#), land administered under the [Western Lands Act 1901](#), and land protected by certain other legislation.²²⁴

The object of SEPP 46 was to prevent inappropriate native vegetation

²¹⁹ Sydney Morning Herald, "Crackdown on land-clearing; Carr moves on two fronts: the environment and gun control", 8 August 1995 (late edition), p. 1.

²²⁰ Link is to SEPP 46 as it was when first gazetted.

²²¹ Link is to the NVC Act 1997 as made in 1997.

²²² NSW Vegetation Forum, *Report on Native Vegetation Management in NSW*, August 1996, at p. 20.

²²³ Sydney Morning Herald, "Crackdown on land-clearing; Carr moves on two fronts: the environment and gun control", 8 August 1995 (late edition), p. 1; [NSW PD](#), 10 October 1995, p. 1459.

²²⁴ Such as land dedicated or reserved under the [National Parks and Wildlife Act 1974](#), certain land under the [Forestry Act 1916](#), land to which [State Environmental Planning Policies No. 14 – Coastal Wetlands](#) and [No. 26 – Littoral Rainforests](#) applied, and to land which [Murray Regional Environmental Plan No. 2 – Riverine Land](#) applied – see clause 3 of SEPP 46.

clearance in the State.²²⁵ “Native vegetation” was defined as vegetation that is indigenous²²⁶ to the State, including trees, shrubs, understorey plants and specified native grasslands, but excluding seagrasses and other marine vegetation. Clearing of native vegetation meant directly or indirectly:

- (a) killing, destroying or burning native vegetation;
- (b) removing native vegetation;
- (c) severing or lopping branches, limbs, stems or trunks of native vegetation; or
- (d) substantially damaging native vegetation in any other way.²²⁷

Clearing native vegetation did not include “sustainable grazing”, a term which was not defined in SEPP 46.

Clearing of native vegetation was prohibited except with development consent of the Director-General of the Department of Land and Water Conservation (DLWC), granted with the concurrence of the Director-General of the National Parks and Wildlife Service (NPWS).²²⁸ Because the instrument was a SEPP made under the EP&A Act 1979, development applications for clearing were considered and determined in accordance with Part 4 of the EP&A Act 1979. Clearing without approval, or otherwise in breach of the SEPP, attracted penalties of up to \$100,000.00 as a breach of the EP&A Act 1979.²²⁹

When first enacted, SEPP 46 required the Director-General of DLWC to be satisfied of eleven separate matters before a consent could be issued:

- (a) the vegetation was not remnant vegetation in a region which has been extensively cleared (remnant vegetation being any patch of native vegetation around which most or all of the native vegetation has been removed);
- (b) the area did not have high biological diversity;
- (c) the area did not contain:
 - i. an endangered plant species or community;
 - ii. habitat for rare and endangered fauna;
 - iii. disjunct populations of a native species or a species which is near the limit of its geographic range;
 - iv. riparian vegetation (being native vegetation located in or within 20 metres of the bed or bank of any river or lake); or
 - v. vegetation associated with wetlands; and
- (d) the area did not have connective importance as, or as part of, a corridor of native vegetation;

²²⁵ Clause 2(1) of SEPP 46.

²²⁶ Indigenous meaning existing in the State before European settlement.

²²⁷ Clause 5 of SEPP 46.

²²⁸ Clause 6(1) of SEPP 46.

²²⁹ Sections 125 and 126 of the EP&A Act 1979.

- (e) the area was not, and was not part of, land identified as wilderness by the Director-General of NPWS;
- (f) the area did not contain or drain into a karst system;
- (g) the vegetation was adequately represented in a conservation reserve system;
- (h) the area was not land which is significant as wildlife habitat;
- (i) the area was not an "inholding" situated within land reserved or dedicated under the *National Parks and Wildlife Act 1974*;
- (j) the area was not important as a site along a migratory route for wildlife; and
- (k) clearance would not have been likely to contribute significantly to any of the following problems – soil erosion, salinization of soil and water, acidification of soil, land slip, deterioration in quality of surface or ground water, or increased flooding.²³⁰

This was a high bar for applicants to satisfy. If the Director-General was not satisfied of *any* one of these eleven factors, consent to the proposed clearing could not be granted.

When determining an application, the Director-General of DLWC was required to take into consideration whether there was any need for conservation of all or some of the vegetation because of:

- (a) its unusually good condition or integrity as a sample of its type;
- (b) the low boundary to area ratio of the area;
- (c) the existence within the area of Aboriginal sites; or
- (d) the existence within the area of a site of geological significance.²³¹

These matters were also required to be considered by the Director-General of NPWS when deciding whether to grant concurrence to the application.²³²

Consent was not required for clearing of native vegetation described in Schedule 3 to SEPP 46,²³³ including:

- clearing of up to two hectares per annum for any contiguous land holding in the same ownership;
- cutting no more than seven trees per hectare per annum for on farm uses, including fence posts and firewood;
- lopping of native vegetation for stock fodder, but only in a period of declared drought and where the vegetation's continued health would not be affected;
- clearing to a minimum extent if necessary for the construction, operation and maintenance of farm structures (such as dams, tracks, bores, windmills, fences and fence lines, stockyards, sheds etc.);

²³⁰ Clause 7 of SEPP 46.

²³¹ Clause 8 of SEPP 46.

²³² Ibid.

²³³ Clause 11 of SEPP 46.

- burning authorised under the *Bush Fires Act 1949*;
- clearing for maintenance of public utilities;
- clearing of planted native vegetation (for instance, gardens, woodlots, horticultural purposes);
- clearing of native vegetation in a private native forest in the course of its being selectively logged on a sustainable basis for forestry purposes (timber production);
- the removal of native vegetation, whether seedlings or regrowth, of less than 10 years of age if the land had been previously cleared for cultivation, pastures or forestry plantation purposes;
- clearing native vegetation proclaimed to be a noxious weed; and
- clearing to the minimum extent necessary to control vermin.²³⁴

Apart from one amendment replacing the reference to the *Bush Fires Act 1949* to the [Rural Fires Act 1997](#), the exemptions in Schedule 3 remained unaltered over the lifetime of SEPP 46. They also persisted throughout the life of the NVC Act 1997, where they were maintained as exemptions.

3.1.3 Amendments to SEPP 46

SEPP 46 was amended four times, only two of the amendments being noteworthy.

The first amendment, [gazetted on 22 December 1995](#):

- removed the requirement for the concurrence of the Director-General of NPWS before consent could be granted to clear native vegetation. The concurrence of NPWS was effectively still required when proposed clearing was to be carried out on land that was in whole or in part “critical habitat”, or was likely to significantly affect a threatened species, population or ecological community or its habitat;²³⁵
- removed the need for the Director-General of DLWC to be satisfied as to the existence of the eleven matters set out in clause 7 of the original SEPP (outlined above); instead, these became additional matters that the Director-General simply had to *consider* when exercising the discretion to grant consent;²³⁶
- required the Director-General of DLWC when determining whether to grant consent to also consider the likely social and economic consequences of granting consent from the point of view of the applicant, the locality, region and the State;²³⁷ and

²³⁴ Schedule 3 of SEPP 46.

²³⁵ Clause 7(c) of State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation (Amendment No. 1) 1995 – No. 775.

²³⁶ *Ibid* clause 7(c).

²³⁷ *Ibid* clause 7(e).

- provided a further exemption from the need to obtain consent for clearing native grasslands in respect of which a plan of management had been approved.²³⁸

The second key amendment, [gazetted on 18 July 1997](#):

- made provision for clearing without approval under codes of practice prepared by DLWC or interim regional vegetation management plans developed by Regional Vegetation Committees (made up of a wide range of interest group representatives, including NSW Farmers Association and the NSW Conservation Council) and approved by the Minister for Land and Water Conservation. The interim regional vegetation management plans were to (inter alia) provide for criteria, specifications and standards for clearing native vegetation and avoiding land degradation, and deal with matters pertaining to the social and economic aspects of land use activities as they relate to native vegetation management,²³⁹ and
- simplified the range of matters required to be considered by the Director-General when deciding whether to grant consent, narrowing the previous list of over 15 factors (i.e. those originally in clauses 7 and 8) to a list of 7 factors.²⁴⁰

3.1.3 Response to SEPP 46

The policy behind SEPP 46 was generally supported. In light of the increasing awareness raised in the 1980s and 1990s of the problems associated with broadscale clearing of native vegetation, the need to introduce controls to prevent inappropriate clearing was broadly recognised.²⁴¹

However, the method adopted by SEPP 46 was met with strong opposition and consternation amongst rural communities. Chief among the criticisms was that there had been no community consultation prior to the gazettal of the SEPP.²⁴² Further, the NSW Farmers Association, in a submission dated April 1996 to the NSW Government, argued that the SEPP was inflexible, unworkable and counterproductive.²⁴³ According to the Association, farmers, being the

²³⁸ Ibid clause 7(f), inserting new clause 12 into SEPP 46. Note that the new clause provided that a plan of management was not required to clear native grasslands without approval for the limited period of time between enactment of SEPP 46 and 16 February 1996.

²³⁹ Schedule 1 [8] of the State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation (Amendment No. 2) 1997 – No. 326, inserting new Part 3 into SEPP 46.

²⁴⁰ Schedule 1 [7] of the State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation (Amendment No. 2) 1997 – No. 326.

²⁴¹ NSW Vegetation Forum, *Report on Native Vegetation Management in NSW*, August 1996, at p. 25.

²⁴² Edmund Lee, Matthew Baird, Ian Lloyd QC, “State Environmental Planning Policy No 46 – Protection and Management of Native Vegetation”, (1998) 15(2) *Environmental and Planning Law Journal* 127 at p. 128.

²⁴³ NSW Farmers Association submission to the NSW Government on SEPP 46, dated April

caretakers of the land responsible for its continued health and productivity, would not allow an activity to take place that would harm the environment, as doing so would threaten the very nature of their existence.²⁴⁴

These views were reflected in comments made by Nationals Party members in the Legislative Assembly shortly after the introduction of the SEPP. Don Page MP, bringing an urgent motion on SEPP 46, stated that:

[SEPP 46] was introduced without any consultation with the farming community. Lack of consultation has caused confusion, uncertainty and anger about the effects of this SEPP on normal farming activities.

...

The onus of determining whether a particular land-clearing activity is exempt lies with the farmer and not with the [DLWC] or [NPWS]. Farmers are extremely concerned about this because penalties of up to \$100,000 can be imposed for breaches of SEPP 46. The farmer must decide if he is exempt from SEPP 46, and he wears the full consequence of his decision in this complex and arguable area.²⁴⁵

The difficulties surrounding the application of the exemptions engendered ongoing frustration with the SEPP. Once the prosecution had proven that the clearing had been carried out without development consent under the SEPP, the burden of proof fell on the defendant to show that a relevant exemption applied.²⁴⁶ The exemptions, particularly the exemptions with respect to native grasses in clause 12, proved difficult to interpret and apply with any certainty.²⁴⁷ Defendants were, in one case,²⁴⁸ found guilty after relying on advice (later to be found incorrect) that the clearance fell within the exemptions.²⁴⁹ As Bartel states:

In the end, the offenders would be entitled to feel that they were punished for the fact that the legislation was opaque. This result was hardly likely to engender popular support for the provisions or for the court.²⁵⁰

Issues like these surrounding the implementation and drafting of SEPP 46 would fall to be considered by the next stage of the reform process, the NSW

1996, referred to in Edmund Lee et al, above n242, at p. 128.

²⁴⁴ Ibid.

²⁴⁵ [NSW PD](#), 10 October 1995, p. 1466.

²⁴⁶ Edmund Lee et al, above n242, at p. 131.

²⁴⁷ Bartel, above n20, at p. 138.

²⁴⁸ [Director-General Land and Water Conservation v Tony Rial \[1998\] NSWLEC 72](#).

²⁴⁹ Bartel, above n20, at p. 138. Justice Talbot emphasised that the officer's advice was almost negligent. However, he also noted that the defendant who bore the bulk of the responsibility "saw a window of opportunity and throwing caution to the wind decided to proceed without seeking further outside advice". The other two defendants "being aware that consent had not been obtained, failed to make appropriate inquiries and were culpable on that account". Bartel notes that the decision was appealed and the conviction quashed two years later.

²⁵⁰ Ibid.

Vegetation Reform review.

It is worth noting that in 1996, Australia's first national biodiversity strategy, the [National Strategy for the Conservation of Australia's Biological Diversity](#), was prepared by the Australian and New Zealand Environment and Conservation Council and endorsed by COAG. A priority of the Strategy was that Australia would have, by 2000, arrested and reversed the decline of remnant native vegetation and avoided or limited any further broad-scale clearance of native vegetation.²⁵¹ This would likely have been further motivation for the Carr Government to produce tighter regulatory controls as part of a longer-term strategy than SEPP 46.

3.2 Phase 2 – the NSW Vegetation Forum

The NSW Vegetation Forum was made up of representatives of stakeholder groups, including local government, environmental interest groups, and the NSW Farmers Association.²⁵² The Forum consulted extensively with stakeholders and the general community regarding appropriate long-term options to replace SEPP 46.

In its report, released in August 1996, the Forum noted that stakeholder submissions indicated that SEPP 46's main achievement was to increase community awareness of the need for some form of native vegetation management and protection.²⁵³ However, many of the submissions considered SEPP 46 to be uncoordinated and disparate in its approach to native vegetation protection and management.²⁵⁴

Key recommendations made by the NSW Vegetation Forum in its report included:

- the goal of native vegetation management should be to increase and improve vegetation cover by preventing inappropriate clearance, establishing new areas of vegetation and educating the community in the conservation and management of native vegetation;
- native vegetation management should be based on the overall goal of ecologically sustainable development, recognising environmental, economic and social values;
- the new legislation should apply to all lands except areas managed specifically for their native vegetation values (such as areas covered by the [National Parks and Wildlife Act 1974](#) and land managed under the [Forestry Act 1916](#));

²⁵¹ Australian and New Zealand Environment and Conservation Council, [National Strategy for the Conservation of Australia's Biological Diversity](#), Commonwealth Department of Environment, Sport and Territories, 1996, at p. 56.

²⁵² NSW Vegetation Forum, *Report on Native Vegetation Management in NSW*, August 1996, at p. 6.

²⁵³ *Ibid* at p. 22.

²⁵⁴ *Ibid* at p. 22.

- management of native vegetation should be a component of integrated natural resource management, which also includes management of soil, water, biodiversity and cultural heritage;
- a tiered approach should be adopted, where appropriate, with State guidelines, regional management plans, local agreements and a permit system;
- a self-regulated approach should be adopted, with approved regional guidelines and management plans as well as State-wide 'safety nets'. This could be achieved through either a separate Native Vegetation Management Act, with subsidiary amendments to a range of existing legislation, or enacting a new Native Vegetation and Soil Conservation/Management Act, created by extensive amendment to the [Soil Conservation Act 1938](#);
- new legislation should provide for the following: a NSW Vegetation Council; regional management plans; acknowledgment of the need for landholder/community participation; stewardship incentives for landholders; ongoing research and monitoring; and education services; and
- new legislation should also provide appropriate types of exemptions to allow clearing of native vegetation without approval (such as clearing for the purposes of establishing rural structures, or clearing for bushfire hazard reduction).²⁵⁵

Between the release of the Native Vegetation Forum's report and the Government's response, in May 1997 the Commonwealth Government established the Natural Heritage Trust (NHT), committing \$1.25 billion to investment in the reclamation, rehabilitation and protection of the environment.²⁵⁶ The largest of the 18 programs to be administered by the NHT was "Bushcare", which had the goal of reversing the decline in the quality and extent of Australia's native vegetation cover.²⁵⁷ Overall, it aimed to achieve "no net loss" of native vegetation by June 2001.²⁵⁸ NSW subsequently committed itself to this aim by way of a Partnership Agreement entered into with the Commonwealth Government in 1997.²⁵⁹

²⁵⁵ NSW Vegetation Forum, *Report on Native Vegetation Management in NSW*, August 1996, at pp. 9-16.

²⁵⁶ Centre for Resource Economics, CSIRO, Resource Policy and Management, *Midterm Review of the Natural Heritage Trust Bushcare Program*, Canberra, 1999, at p. v.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid* at p. 54.

²⁵⁹ [NSW PD](#), 24 June 1999, p. 1286.

3.3 Phase 3 – new legislation

3.3.1 *Government Consideration of the NSW Vegetation Forum Report, the White Paper and the Native Vegetation Conservation Bill*

After consideration of the NSW Vegetation Forum's report, the Carr Government announced the preferred long-term management regime on 18 March 1997. The proposals were released for public discussion in a White Paper "A proposed model for native vegetation conservation in NSW" on 23 July 1997. More than 340 submissions on the White Paper were received during the consultation process.²⁶⁰

On 19 November 1997, the then Minister for Land and Water Conservation, Kim Yeadon MP, introduced the Native Vegetation Conservation Bill into the Legislative Assembly. In the Second Reading Speech for the Bill, Mr Yeadon stated that:

The bill moves beyond being the blunt regulatory instrument, typical of many of the older natural resource Acts, to being an instrument that encourages ecologically sustainable native vegetation management and partnerships between landholders and the Government for active vegetation restoration and rehabilitation of land. In recent history we have seen serious issues of salinization, soil erosion and loss of biodiversity arise, to name a few of the problems our communities are now facing.²⁶¹

3.3.2 *Native Vegetation Conservation Act 1997*

The [Native Vegetation Conservation Act 1997](#) (NVC Act 1997) came into effect on 1 January 1998.²⁶²

As recommended by the NSW Vegetation Forum, the NVC Act 1997 brought the clearing of native vegetation in NSW under one regulatory regime. The Act repealed clearing provisions in the *Soil Conservation Act 1938* and the whole of SEPP 46. It also amended the *Western Lands Act 1901* to bring the clearing of native vegetation on leasehold land in the Western Division under the regulation of the NVC Act 1997, where previously this was regulated by section 18DB of the *Western Lands Act 1901*. The changes to the *Western Lands Act 1901* were significant, in that previously only clearing of trees had been regulated in the Western Division. With the new legislation, the clearing of all native vegetation in the Western Division, not just trees, was covered by the regulatory framework.²⁶³

The objects of the NVC Act 1997 were:

²⁶⁰ [NSW PD](#), 19 November 1997, p. 2075.

²⁶¹ Ibid.

²⁶² Link provided is to the NVC Act 1997 as made.

²⁶³ NSW DLWC, *A proposed model for native vegetation conservation in New South Wales – A White Paper*, at p. 24.

- (a) to provide for the conservation and management of native vegetation on a regional basis;
- (b) to encourage and promote native vegetation management in the social, economic and environmental interests of the State;
- (c) to protect native vegetation of high conservation value;
- (d) to improve the condition of existing native vegetation;
- (e) to encourage the revegetation of land, and the rehabilitation of land, with appropriate native vegetation;
- (f) to prevent the inappropriate clearing of native vegetation; and
- (g) to promote the significance of native vegetation;

in accordance with the principles of ecologically sustainable development.²⁶⁴

“Ecologically sustainable development” involves the effective integration of economic and environmental considerations in decision-making processes.²⁶⁵
The principles of ecologically sustainable development are:

- (a) the precautionary principle – namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:
 - i. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
 - ii. an assessment of the risk-weighted consequences of various options;
- (b) inter-generational equity – namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations;
- (c) conservation of biological diversity and ecological integrity – namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration; and
- (d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:
 - i. polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement;
 - ii. the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste; and
 - iii. environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits

²⁶⁴ Section 3 of the NVC Act 1997.

²⁶⁵ Section 6(2) of the [Protection of the Environment Administration Act 1991](#).

or minimise costs to develop their own solutions and responses to environmental problems.²⁶⁶

The NVC Act 1997 effectively applied to all “rural” and “rural-residential” land in the State (including land in the Western Division).²⁶⁷

“Native vegetation” was defined as any of the following types of indigenous²⁶⁸ vegetation: trees; understorey plants; groundcover (being any herbaceous vegetation occurring in an area where not less than 50% of the herbaceous vegetation covering the area comprises indigenous species); or plants occurring in a wetland.²⁶⁹

The NVC Act defined “clearing native vegetation” as any one or more of the following:

- (a) cutting down, felling, thinning, logging or removing native vegetation;
- (b) killing, destroying, poisoning, ringbarking, uprooting or burning native vegetation;
- (c) severing, topping or lopping branches, limbs, stems or trunks of native vegetation; or
- (d) substantially damaging or injuring native vegetation in any other way.²⁷⁰

On land declared by the Minister or a regional plan to be “protected land”, “clearing” included doing any of the above activities to *non*-native trees as well as native trees, and also standing dead or fallen trees.²⁷¹

Protected land was land declared by the Minister or identified by a regional vegetation management plan to be protected land (referred to as “State protected land” and “regional protected land” respectively). Land could only be identified as protected if it was:

²⁶⁶ Ibid. For further discussion of the concept of ecologically sustainable development, see Daniel Montoya, “[NSW Planning Reforms: sustainable development](#)”, Briefing Paper No. 07/2013, August 2013.

²⁶⁷ It did not apply to land zoned “residential”, “village”, “township”, “industrial” or “business” under an environmental planning instrument. It also did not apply to land to which [State Environmental Planning Policy No. 14 – Coastal Wetlands](#) and [State Environmental Planning Policy No. 26 – Littoral Rainforests](#) applied, land under the [Forestry Act 1916](#), and certain other land (see section 9). It also did not apply to certain land in and around Sydney, Campbelltown, Hawkesbury and Wollongong, to name a few local government areas mentioned, save to the extent that any of the named areas included State protected land (see section 10 and Schedule 1 of the NVC Act 1997).

²⁶⁸ Vegetation was indigenous if it was of a species of vegetation, or if it comprised a species of vegetation, that existed in the State before European settlement – see section 4(2) of the NVC Act 1997.

²⁶⁹ See section 6 of the NVC Act 1997. Mangroves, seagrasses or other types of marine vegetation within the meaning of the [Fisheries Management Act 1994](#) were not included in the definition of native vegetation.

²⁷⁰ Section 5 of the NVC Act 1997.

²⁷¹ Section 5(2) and (3) of the NVC Act 1997.

- land within 20m of the bed or bank of any prescribed river or lake;
- steep land with a slope of greater than 18 degrees; or
- land that is environmentally sensitive or affected or liable to be affected by soil erosion, siltation or land degradation.²⁷²

Under the NVC Act 1997, clearing native vegetation did not include sustainable grazing. Sustainable grazing was defined as the level of grazing that, in the opinion of the Director-General, the vegetation concerned was capable of supporting without resulting in a substantial long-term modification of the structure and composition of the vegetation.²⁷³

At the core of the NVC Act 1997 were regional vegetation management plans, introduced under Part 3 of the Act. The plans were to stay in effect for ten years and could include the following matters:

- provisions specifying whether or not development consent was required to clear native vegetation or regional protected land;
- provisions relating to the manner in which native vegetation or regional protected land may be cleared without development consent;
- provisions adopting or incorporating a native vegetation code of practice;
- identification of certain land to which the plan applies as regional protected land; and
- strategies designed to achieve the objects of the Act.²⁷⁴

The regional vegetation management plans would be developed by Regional Vegetation Committees, each Committee being made up of 15 representatives from a wide cross-section of stakeholders.²⁷⁵ The draft plans were to be exhibited for public comment.²⁷⁶ According to the Minister in the Bill's Second Reading speech in the Legislative Assembly, much of the comment on the White Paper was directed at implementation of a regional approach.²⁷⁷ The regional vegetation management plans were intended to address this by allowing the community to establish regional vegetation management plans, and to support scientifically rigorous, practical and workable solutions developed to address land management problems experienced by communities.²⁷⁸

A regional vegetation management plan would provide for two scenarios with respect to clearing native vegetation. Firstly, if the plan specified that areas could not be cleared without development consent, a person could not carry out

²⁷² Sections 7(1) and 25(5) of the NVC Act 1997.

²⁷³ Section 5(4) of the NVC Act 1997.

²⁷⁴ Section 25(2) of the NVC Act 1997.

²⁷⁵ Sections 51 and 52 of the NVC Act 1997.

²⁷⁶ Section 29 of the NVC Act 1997.

²⁷⁷ [NSW PD](#), 19 November 1997, p. 2075.

²⁷⁸ *Ibid.*

that clearing unless consent was obtained and the clearing was carried out in accordance with the development consent and the regional vegetation management plan.²⁷⁹ Alternatively, if the plan specified that native vegetation may be cleared without development consent, it could be cleared without consent provided that it was carried out in accordance with the terms of the plan.²⁸⁰

For land not subject to a regional vegetation management plan, native vegetation could not be cleared otherwise than in accordance with a development consent or a native vegetation code of practice. State protected land could only be cleared with development consent.²⁸¹

Part 2 of the NVC Act 1997 dealt with the actual clearing of native vegetation and protected land. If development consent was required to clear native vegetation, consent was to be sought by application to the Minister for Land and Water Conservation.²⁸² The Minister was required to determine the application in accordance with Part 4 of the EP&A Act 1979.²⁸³ If clearing was carried out without consent, or otherwise than in accordance with the Act, section 126 EP&A Act 1979 penalties applied (penalties up to 1000 penalty units – i.e. \$110,000).²⁸⁴

Apart from clearing carried out in accordance with other legislation, such as the [Rural Fires Act 1997](#), the [Noxious Weeds Act 1993](#), or the [Threatened Species Conservation Act 1995](#),²⁸⁵ the NVC Act 1997 did not provide for any express exemptions from the requirement to obtain an approval. This was intended to be covered by the regional vegetation management plans, or codes of practice in areas with no plans.²⁸⁶ However, clause 3 of Schedule 4 of the NVC Act 1997 continued the operation of the exemptions provided for in Schedule 3 of SEPP 46. Also, clearing of protected land in accordance with an exemption order under section 21C(2) of the [Soil Conservation Act 1938](#), and clearing in the Western Division for a purpose described in Schedule 4 of the [Western Lands Regulation 1997](#), remained exempt from the requirement for approval under the NVC Act 1997.²⁸⁷ These were meant to be transitional provisions, but they remained operational until the Act's repeal in 2005.

In terms of enforcement, the NVC Act 1997 provided powers of investigation and entry,²⁸⁸ the ability for the Director-General to issue stop work and remedial

²⁷⁹ Section 18 of the NVC Act 1997.

²⁸⁰ Section 18 of the NVC Act 1997.

²⁸¹ Sections 21 and 22 of the NVC Act 1997.

²⁸² Section 14 of the NVC Act 1997.

²⁸³ Section 15 of the NVC Act 1997.

²⁸⁴ Section 17 of the NVC Act 1997.

²⁸⁵ Section 12 of the NVC Act 1997.

²⁸⁶ [NSW PD](#), 19 November 1997, p. 2075.

²⁸⁷ Clauses 4 and 5 of Schedule 4 of the NVC Act 1997.

²⁸⁸ Section 61 of the NVC Act 1997.

orders,²⁸⁹ and the ability for third parties to commence actions in the Land and Environment Court to restrain or remedy a breach of the Act.²⁹⁰

The DLWC issued guidelines on the level of information required to support an application to clear native vegetation under the Act.²⁹¹ The requirements were divided into three categories based on the size of the proposed clearing – small, medium and large – with increasing levels of information (including reports and surveys) required as the complexity of the proposal increased.²⁹²

The NVC Act 1997 also established a 16 member Advisory Council which was empowered (inter alia) to advise, monitor and report to the Minister on the status of native vegetation throughout the State.²⁹³

Importantly, section 56 of the NVC Act 1997 established a Native Vegetation Management Fund, to which the Government was to allocate \$5 million each year for three years. Accessible from October 1998, the Fund and provided for two types of grants:

- Grants up to \$10,000 for landholders wanting to carry out simple native vegetation management work, such as fencing, weed control or revegetating; and
- Grants of more than \$10,000 for landholders wanting to carry out more substantial work involving the revegetation and rehabilitation of larger areas of land. This would also require the landholder to enter into a Property Agreement with the DLWC for a specified period of time (usually five to ten years).

The Property Agreements provided for by the NVC Act 1997 were forerunners to the Property Vegetation Plans implemented by the NV Act 2003. The Agreements could include provisions identifying land or specified vegetation to be set aside for conservation or rehabilitation purposes, outlining methods and practices for vegetation management, and provide financial and technical assistance to a landholder.²⁹⁴

Despite several minor amendments, the NVC Act 1997 remained substantially the same in form until its repeal in 2005 upon the [Native Vegetation Act 2003](#) coming into effect.²⁹⁵

²⁸⁹ Sections 46 and 47 of the NVC Act 1997.

²⁹⁰ Section 63 of the NVC Act 1997.

²⁹¹ NSW DLWC, *Guidelines and Application Form for clearing vegetation under the Native Vegetation Conservation Act 1997*, Parramatta, June 1998.

²⁹² *Ibid* at pp. 8-9.

²⁹³ Sections 54 and 55 of the NVC Act 1997.

²⁹⁴ Section 42 of the NVC Act 1997.

²⁹⁵ Most amendments were minor and/or consequential upon enactment of other legislation, such as the [Water Management Act 2000](#), the [Nature Conservation Trust Act 2001](#), and amendments to the [Rural Fires Act 1997](#) in 2002.

3.3.3 Initial Responses to the Native Vegetation Conservation Act 1997

The NSW Farmers Association was highly critical of the NVC Act 1997. At an Association meeting in 1998, the President moved motions calling on the NSW Government to replace the Act with legislation that recognised the NSW Native Vegetation Forum recommendations. In particular, the Association objected to the vegetation legislation being subservient to the approval process provided for in the EP&A Act 1979, and the problems posed by lengthy periods of time taken to get approval for regional vegetation plans.²⁹⁶ Later in 1998, the Association referred to the preparation of regional vegetation management plans as a “farce”, citing problems with lack of information and direction.²⁹⁷

The Nature Conservation Council of NSW was supportive of the new legislation, particularly the advent of the regional vegetation plans. However, two areas were identified for improvement: clear policy direction and adequate funding. It was asserted that Departmental guidelines provided to the regional vegetation committees were too vague and simplistic, and that clear, consistent guidelines were required at the broad bioregional level to avoid incompatible plans. Similarly, a lack of resources and funding to gain and use basic vegetation maps was hindering the process of developing the regional vegetation management plans.²⁹⁸

Over time, further issues would be identified with the framework under the NVC Act 1997 and its implementation (see sections [3.5] and [3.6]).

3.4 Phase 4 – Developments post enactment of the Native Vegetation Conservation Act 1997

3.4.1 Savings and transitional regulations 1998

The [Native Vegetation Conservation \(Savings and Transitional\) Regulation 1998](#) (NVC Transitional Regulation), was made in June 1998, but was deemed to have commenced with the NVC Act 1997 on 1 January 1998.²⁹⁹ The object of the Regulation was to provide for further savings and transitional provisions beyond those set out in Schedule 4 of the Act.³⁰⁰ The Regulation extended the exemption provided in the NVC Act 1997 for clearing carried out under SEPP 46 exemptions to land in the Murray region until such time as that land became subject to a regional vegetation management plan.³⁰¹ The Regulation also provided that any clearing authorised under existing clearing licences under the [Forestry Act 1916](#), and clearing authorised under existing cultivation consents under the [Western Lands Act 1901](#) was exempt from the requirement to obtain approval under the NVC Act 1997 until such time as the licence/consent ceased

²⁹⁶ The Land, “Donges leads drive for vegetation law overhaul”, 19 March 1998.

²⁹⁷ The Land, “Vegetation Plans a Farce”, 15 October 1998.

²⁹⁸ “Better bush beefs up the bank balance” in *Environment NSW*, Vol 5 No 1 Summer 1999.

²⁹⁹ Clause 2 of the NVC Transitional Regulation.

³⁰⁰ NVC Transitional Regulation, explanatory note.

³⁰¹ Clause 5 of the NVC Transitional Regulation.

to be in force, or the land to which the licence/consent applies was made subject to a regional vegetation management plan.³⁰²

The NVC Transitional Regulation was amended a number of times between 1998 and 2005, but most amendments were of little substantive consequence. A more significant amendment occurred in 2004, where the NVC Transitional Regulation was amended to effectively remove the exemption for clearing of up to 2 ha once per year provided under SEPP 46 (and kept alive by Schedule 4 of the NVC Act 1997) in the coastal zone of NSW (as defined in the [Coastal Protection Act 1979](#)).³⁰³

3.4.2 Increased political activity at the Federal Level

Over the period 1999 to 2003, political activity bearing on native vegetation increased at the Federal level.

In 1999, the Murray-Darling Basin Ministerial Council, Chaired by the Federal Minister for Agriculture, Fisheries and Forestry, Warren Truss, released “The Salinity Audit of the Murray Darling Basin: A 100-Year Perspective”.³⁰⁴ The Audit established a trend for salt mobilisation in the landscape and its expression in rivers at the land surface, and provided predictions for increases in salinity in the absence of new management interventions to prevent them.³⁰⁵

The Audit concluded that:

[T]he Murray-Darling Basin, over geological time, has been a natural salt trap. The clearing of native vegetation and its replacement with annual crops and pastures, irrigated agriculture, town gardens and lawns has unleashed a hydrological disequilibrium that brings this vast salt store to the land surface and increases its seepage to river systems.³⁰⁶

According to the Audit:

- The salt mobilisation process across all major river valleys was on a very large scale. It predicted that the annual movement of salt in the landscape would double in the next 100 years;
- There was a future hazard for some rivers and those dependent upon them as a water source. Average river salinities would rise significantly, exceeding the desirable thresholds for domestic and irrigation water supplies in many tributaries and exceeding critical levels in some reaches; and

³⁰² Clauses 6 and 7 of the NVC Transitional Regulation.

³⁰³ [Native Vegetation Conservation \(Savings and Transitional\) Amendment \(Minimal Clearing Exemption\) Regulation 2004 – No. 142](#).

³⁰⁴ Murray-Darling Basin Ministerial Council, “The Salinity Audit of the Murray-Darling Basin – A Hundred Year Perspective”, Canberra, Murray-Darling Basin Commission, 1999.

³⁰⁵ Ibid at p. iv.

³⁰⁶ Ibid at p. 37.

- At the downstream end of several tributary river valleys, rising salinity would be even greater. For example, the Macquarie, Namoi and Bogan rivers were predicted to exceed the threshold for drinking water desirability within 20 years, and to exceed the threshold for irrigation crop and environmental damage within 100 years.³⁰⁷

Both Government and Opposition members in the NSW Legislative Assembly noted the Audit's findings with concern.³⁰⁸

The following year, a Salinity Summit was held in Dubbo, where it was agreed and recognised that salinity should be viewed in the context of the integrated management of natural resources, including soil, vegetation and biodiversity, as well as consideration of social and economic drivers.³⁰⁹

Further, in October 1999, then NSW Minister for Land and Water Conservation, Richard Amery, reported to the Legislative Assembly that the Federal Minister for the Environment had written to him to remind the NSW Government that clearing rates needed to be improved if Australia was to meet the national obligation, agreed to at the 1997 Kyoto Conference, to reduce greenhouse gas emissions.³¹⁰

In 2001, the Natural Resource Management Ministerial Council adopted the [National Framework for the Management and Monitoring of Australia's Native Vegetation](#), developed by the Australia New Zealand Environment and Conservation Council. The Framework recognised that State and Territory Governments have primary responsibility for native vegetation management and that private landholders (including leaseholders), as managers of large tracts of native vegetation, are important in the implementation of the Framework. The Framework established a series of benchmarks for best practice native vegetation and monitoring mechanisms, along with a national monitoring and public reporting mechanism to demonstrate progress towards reducing the broadscale clearance of native vegetation and increasing revegetation.³¹¹

On 3 November 2003, the Council of Australian Governments (COAG) endorsed the [National Action Plan for Salinity and Water Quality](#). The Action Plan identified that as at the year 2000 at least 2.5 million ha of land were affected by dryland salinity, one third of Australian rivers were in extremely poor condition, and that land and water degradation cost an estimated \$3.5 billion per year.³¹² The Action Plan also identified land clearing in salinity risk areas as

³⁰⁷ Ibid at pp. iii-iv.

³⁰⁸ [NSW PD](#), 28 October 1999, p. 2341.

³⁰⁹ [NSW PD](#), 5 April 2000, p. 4206.

³¹⁰ [NSW PD](#), 28 October 1999, p. 2350.

³¹¹ Natural Resource Management Ministerial Council, [National Framework for the Management and Monitoring of Australia's Native Vegetation](#), Commonwealth Department of Environment and Heritage, 2001, at p. 5.

³¹² COAG, [National Action Plan for Salinity and Water Quality](#), 3 November 2000, at p. 5.

a primary cause of dryland salinity and called for improved controls on land clearing in each jurisdiction.³¹³

3.4.2 Community Reference Panel reviews 2000-2001

In July 2000, then Premier Bob Carr announced several reviews into aspects of the NVC Act 1997, including a review of offsets that could be used in native vegetation management, consideration of fast-tracking native vegetation management plans, and a review of the current system of exemptions. A community reference panel, comprised of an independent chair, Lorraine Cairnes, and representatives from the NSW Farmers Association and the Nature Conservation Council of NSW, was appointed by the Government to conduct the reviews.³¹⁴

The review into the use of offsets culminated in the release of a discussion paper, "Offsets, Salinity and Native Vegetation" in July 2001.³¹⁵ The discussion paper proposed four principles to guide the application of an offset policy:

1. An offset policy should be consistent with relevant government policies for salinity, water quality, and the "No Net Loss" principle set out in the NSW and Commonwealth Partnership Agreement for the Bushcare Program under the Natural Heritage Trust;
2. An offset should lead to a net gain that improves the condition of the environment;
3. An offset agreement should not lead to permanent environmental costs due to the delay before offset actions yield environmental benefits;
4. Clearing should only proceed when the offset site is making acceptable progress towards the predicted ecological state and management arrangements are legally secure.³¹⁶

It is not clear whether there was any further development of the offset policy prior to the enactment of the [Native Vegetation Act 2003](#).

The review into fast-tracking regional vegetation management plans concluded that expediting approval of the plans would not be beneficial. Their view was accepted by the Government in light of the size of the problems to be dealt with by the plans and the need for the support of affected parties and the broader community.³¹⁷ In this regard, Gerard Martin, Labor MP and member for Bathurst, stated in the Legislative Assembly that "we cannot afford to compromise the quality and effectiveness of plans for the sake of faster time

³¹³ Ibid at p. 9.

³¹⁴ [NSW PD](#), 15 November 2001, p. 18734.

³¹⁵ Richard Amery MP, Minister for Agriculture, Minister for Land and Water Conservation, "Amery Invites Discussion on Native Vegetation Offsets", Ministerial Media Release, 6 July 2001.

³¹⁶ NSW DLWC, *Offsets, Salinity and Native Vegetation: Discussion Paper*, Sydney, July 2001, at pp. 7-11.

³¹⁷ [NSW PD](#), 14 March 2002, p. 508.

frames”³¹⁸.

With respect to the panel’s review of the exemptions, then Minister for Land and Water Conservation, Richard Amery, indicated that the review was sought because some of the exemptions were poorly defined, and there were concerns about the cumulative impacts of the exemptions and how they were being monitored and complied with.³¹⁹ It was suggested that confusion arose from the fact that the exemptions were all drawn from different legislative sources (the [Soil Conservation Act 1938](#), Schedule 4 of the [Western Lands Regulation 1997](#) and [SEPP 46](#)), incorporated through the savings and transitional provisions of the NVC Act 1997.³²⁰ As part of the review, the panel considered the 34 exemptions provided for under Schedule 4 of the NVC Act 1997, their social and economic implications, their scientific base, and how they were best measured.³²¹ The key recommendations of the review, according to Mr Amery, were:

- to allow for current productive land uses to continue;
- to reduce the cumulative impacts on native vegetation arising from the current 2ha exemptions;
- not to delay or impose extra or unnecessary costs on landholders or the department;
- exemptions should be practicable, workable, clear, enforceable and understandable;
- exemptions should apply in areas where no regional vegetation plans are in place, as regional vegetation communities can develop their own exemptions.³²²

Upon receiving the panel’s report on exemptions, Mr Amery indicated that a major change to the current process would be to develop a general exemption to enable farmers to continue their ongoing land maintenance works. This would include work such as clearing land to build fences and maintain roads, and enable farmers to build rural structures such as sheds and airstrips without permission to clear.³²³ He also proposed to:

- remove the requirement to apply for permission to clear paddocks which have been untouched for 10 years or more. Landholders would be allowed to clear those paddocks for normal farming practices without permission, unless the land to be cleared was at risk of salinity or in

³¹⁸ Ibid.

³¹⁹ Richard Amery MP, Minister for Agriculture, Minister for Land and Water Conservation, “Review of Native Vegetation Clearing Exemptions Underway”, Ministerial Media Release, 30 August 2000, p. 2.

³²⁰ [NSW PD](#), 15 November 2001, p. 18734.

³²¹ Ibid.

³²² Ibid.

³²³ Ibid.

another sensitive area, and prior notification to the Department would be necessary; and

- remove the exemption allowing land-holders to clear up to 2ha of native vegetation without approval. This could have a cumulative impact as small pockets of 2ha can lead to more ongoing pockets across a wider landscape. The proposed replacement of general exemption clauses would enable ongoing farm management involving minimal clearing to continue without approval.³²⁴

Mr Amery indicated that a draft regulation committing to the outcomes of the community reference panel's review would be finalised by July 2002.³²⁵ However, it seems that most of the proposed reforms were abandoned.

3.4.3 The First Regional Vegetation Management Plans

On 7 September 2001, the [Mid Lachlan Regional Vegetation Management Plan 2001](#) was gazetted, the first regional vegetation management plan to be made under the NVC Act 1997. It came into effect on 3 December 2001.

The Plan applied to all land in the Mid Lachlan region (including Parkes, Forbes, Weddin, Bland, and Lachlan south of the Lachlan River).³²⁶ The aims of the Plan were to:

- (a) promote and encourage partnerships between the community and governments through consultation and participation;
- (b) encourage and promote the retention, restoration and re-establishment of native vegetation;
- (c) identify native vegetation and habitat of high conservation value, or social or cultural significance, requiring protection;
- (d) encourage the revegetation of land with appropriate vegetation;
- (e) identify areas where clearing native vegetation needs development consent; and
- (f) identify where clearing can be undertaken without the need for development consent; and
- (g) recognise the social and economic impacts of this plan.³²⁷

Part 2 of the Plan set out areas where clearing native vegetation required development consent. These included clearing on: landscape management areas; riparian, wetland and floodplain protection areas; and priority plant communities and habitats areas.³²⁸

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ Clause 5 of the Mid Lachlan Regional Vegetation Management Plan 2001.

³²⁷ Clause 4 of the Mid Lachlan Regional Vegetation Management Plan 2001.

³²⁸ Clauses 6 to 8 of the Mid Lachlan Regional Vegetation Management Plan 2001. The various areas were defined and identified by maps provided with the Plan.

Division 1 of Part 3 of the Plan provided for certain types of clearing to be carried out without development consent. Categories included clearing for: strainer posts; firewood; stock fodder; maintenance of existing structures; maintenance of existing public utilities or in emergencies; clearing planted native vegetation; clearing in a private native forest; clearing to control pest animals; and clearing regrowth native vegetation.³²⁹ Each category of exemption applied to certain areas defined on district maps provided with the Plan, and prescribed strict circumstances in which clearing was permitted in any given case.

Division 2 of Part 3 of the Plan provided for clearing to be carried out without consent on certain “nominated self-assessment areas”. This set up a regime whereby landholders could nominate areas of land on their holdings on which native vegetation could be cleared without consent, provided minimum planning requirements and best practice clearing standards set out in the Plan were complied with.³³⁰ To do so, farmers were required to obtain an information support package from the DLWC which included district maps, the *Mid Lachlan Regional Vegetation Management Strategy*, relevant vegetation guides, Aboriginal Sites Register searches, checklists and a property planning kit. The landholder was then required to prepare a full farm plan which identified all areas of native vegetation on the landholding and the areas of native vegetation to be cleared and retained respectively in the nominated self-assessment area, and sign a written statement certifying that the landholder completed the self-assessment process in accordance with the Plan.³³¹ Clearing was to be commenced within 12 weeks, and completed within 2 years of completion of self-assessment.³³²

Certain clearing types could not be carried out under this self-assessment mechanism, such as clearing that is “large development,”³³³ clearing of Crown Land in self-assessment areas, and clearing that did not comply with the standards prescribed for self-assessable exempt clearing.³³⁴

A second plan was gazetted on 21 February 2003, the [Riverina Highlands Regional Vegetation Management Plan 2003](#). This Plan was completely different in form and structure to the Mid Lachlan Regional Variation Management Plan 2001.

Part 3 and Schedule 2 of the Plan designated certain types of clearing as clearing “allowed without development consent”, clearing “allowed after development consent is obtained”, and clearing “not allowed by this plan”. Different exemptions applied to land classified by the Plan as “Regional

³²⁹ Clauses 14 to 22 of the Mid Lachlan Regional Vegetation Management Plan 2001.

³³⁰ See clause 26 of the Mid Lachlan Regional Vegetation Management Plan 2001.

³³¹ Clauses 28(2) and (3) of the Mid Lachlan Regional Vegetation Management Plan 2001

³³² Clause 28(5) of the Mid Lachlan Regional Vegetation Management Plan 2001

³³³ For instance, clearing or thinning more than 400ha of land in a 10-year period.

³³⁴ Clauses 29 and 9-12 of the Mid Lachlan Regional Vegetation Management Plan 2001.

protected land – steep and erodible land” than to “Land within a regional linear reserve” or “Unclassified land”.

Where consent was required in accordance with clause 11 and the relevant table in Schedule 2, the consent authority was required by the Plan to consider a number of matters when determining an application, including:

- cumulative impacts from the proposed method of clearing and associated disturbance;
- proposed management practices for the subject land;
- any proposed offsets proposed for the clearing to achieve “no net loss”;
- likely visual impacts; and
- likely impacts on any wetlands and salinity.³³⁵

The consent authority was also required to consider, and be satisfied that the proposal was consistent with, a number of guiding principles for the region set out in clause 8 of the Plan and the primary objectives set out in clause 9 of the Plan.³³⁶

The Plan also provided for landholders to enter into property vegetation plans, which would indicate the distribution of native vegetation on the property, any regional protected land (identified by the Plan), any areas proposed for clearing, any areas proposed for conservation management, any areas where native vegetation was proposed to be retained, and any proposed revegetation areas.³³⁷ The consent authority was required to consider any property vegetation plan for a property that would be affected by proposed clearing for clearing involving more than one hectare of land, or for clearing of native vegetation of “high conservation value” as defined in Schedule 3 of the Plan.³³⁸

Where a type of clearing was classified as “allowed without development consent”, it could only be carried out in accordance with the conditions specified for the particular clearing in Schedule 2 and Schedule 4 of the Plan. Types of exempt clearing (depending on the particular area) included: maintenance of fence lines; clearing for rural structures; eucalyptus leaf cutting to distil oil; incidental horticultural harvesting or pruning; minimal tree cutting (according to prescribed stem densities); pest and noxious weed control; planted native vegetation (gardens etc.); public utility clearing; regrowth removal; and stock fodder provision.³³⁹

Whilst a number of other regional vegetation management plans were prepared

³³⁵ Clause 13(1)(d) of the Riverina Highlands Regional Vegetation Management Plan 2003.

³³⁶ Clause 13(1)(a) and (b) of the Riverina Highlands Regional Vegetation Management Plan 2003.

³³⁷ Clause 14 of the Riverina Highlands Regional Vegetation Management Plan 2003.

³³⁸ Clause 13(2) of the Riverina Highlands Regional Vegetation Management Plan 2003.

³³⁹ Schedule 4 of the Riverina Highlands Regional Vegetation Management Plan 2003.

in draft form and exhibited for public consultation,³⁴⁰ it appears that the Plans discussed above were the only plans ever to be finalised and Gazetted.

3.5 Impact of the *Native Vegetation Conservation Act 1997* on clearing, and calls for review

According to the Carr Government, the introduction of the NVC Act 1997 resulted in a decrease in clearing of native vegetation across NSW. Average annual rates of clearing in the period 1997 to 2000 (14,028ha/year) were almost 50% lower than 1995-1997 under SEPP 46 (32,800ha/year).³⁴¹ However, an article published in the *Environmental and Planning Law Journal* by Robyn Bartel, casts doubt on the link between these figures and the effectiveness of the NVC Act 1997. Bartel suggests that the dramatic drop between SEPP 46 and the NVC Act 1997 could simply be lead time for the response to the enactment of SEPP 46 in 1995 to become manifest in clearing levels, or alternatively could reflect a change in conditions at the time unrelated to the regulations.³⁴² For instance, land may not be cleared because it is uneconomic for farmers to do so at the particular time, or because the land is marginal to agriculture.³⁴³

On 14 March 2002, National Party Leader George Souris MP introduced a motion into the Legislative Assembly calling on the Government to review and amend the NVC Act 1997 to ease the financial burden the Act was said to place on rural and regional NSW.³⁴⁴ The motion referred to a paper by Associate Professor Jack Sinden of the University of New England entitled “Who pays to protect native vegetation? Costs to farmers in Moree Plains Shire, New South Wales” presented at the 46th Annual conference of the Australian Agricultural and Resource Economics Society in February 2002. The paper argued that the NVC Act 1997 had reduced land values and farm incomes in north-west NSW and burdened farm families with a mandatory payment for conservation of native vegetation.³⁴⁵

Taking up the argument, Mr Souris said that it was unfair that the cost of conservation was imposed on farmers, particularly livestock farmers, and called for compensation and incentive measures to be added to the regulatory framework:

In order to move forward in the management of natural resources in New South Wales, the Carr Government must cease its big stick, regulatory approach and

³⁴⁰ [NSW PD](#), 18 September 2002, p. 4942.

³⁴¹ Richard Amery MP, “Native Vegetation Clearing Reduces in NSW: Amery”, Ministerial Media Release, 16 May 2001; See also Bartel, above n20, at p. 125, where different total average figures are provided using a different assessment method, but the proportionate reduction remains approximately the same.

³⁴² Bartel, above n20, at p. 124.

³⁴³ *Ibid* at p. 126.

³⁴⁴ [NSW PD](#), 14 March 2002, p. 508.

³⁴⁵ [NSW PD](#), 14 March 2002, p. 508.

instead work with land-holders to ensure workable outcomes...Farmers are fully aware that they need to operate their farms sustainably or they will soon be out of business. The expertise of farmers must be harnessed rather than shunned. They have an innate duty of care and they have recognised their responsibility to protecting [sic] their landholdings. The Native Vegetation Conservation Act is simply not delivering positive outcomes on native vegetation management; it is imposing a substantial cost on farmers and land-holders. The act must be amended to protect the future viability of farmers throughout New South Wales. Meaningful incentives must be introduced to promote native vegetation, including stewardship payments for protective native vegetation as well as compensation where farmers act in the public interest, but at a private cost.³⁴⁶

Government members noted that Associate Professor Sinden's paper did not deal with the costs associated with land degradation, including salinity, which would in turn affect asset value, nor did it address the benefits of retaining native vegetation. Labor MP and member for Bathurst Gerard Martin indicated, however, that the information included in the paper tabled by Mr Souris would provide input for the finalisation of the draft regional vegetation management plan for Moree.³⁴⁷

3.6 2002 Auditor-General Report

In August 2002, the Auditor-General released his report on the performance of the DLWC's regulation of the clearing of native vegetation under the NVC Act 1997. The [Audit Report](#) identified the following issues with the regulatory framework under the NVC Act 1997:

- Regulating native vegetation is increasingly complex. Reaching trade-offs between environmental, economic and social considerations is not easy, and it is largely unavoidable that some parties will be dissatisfied with the process and the outcomes;³⁴⁸
- Accountability issues arising from the lack of a clearly identified single government agency responsible for the state of native vegetation;³⁴⁹
- The strategies, regional vegetation management plans, objectives and targets critical to the practical workings and administration of the NVC Act 1997 were yet to be finalised after four years of the Act's operation;³⁵⁰
- The DLWC did not have sufficient information on native vegetation to effectively regulate the clearing of native vegetation in NSW. There were no systematic monitoring or complete-coverage mapping programs and

³⁴⁶ Ibid.

³⁴⁷ [NSW PD](#), 14 March 2002, p. 508.

³⁴⁸ Audit Office of New South Wales, [New South Wales Auditor-General's Report, Performance Audit, Department of Land and Water Conservation, Regulating the Clearing of Native Vegetation](#). August 2002, at p. 3.

³⁴⁹ Ibid at p. 17.

³⁵⁰ Ibid at p. 30.

no formal risk assessment to assist prioritisation of monitoring and mapping efforts;³⁵¹

- There are several opportunities to improve the assessment of applications to clear land of native vegetation, including: completing a recommended rewrite of staff guidelines; improving the timelines of assessments; permit applicants, rather than DLWC staff, to prepare the environmental assessment;³⁵²
- The lack of any significant assessment of the socio-economic impacts of the NVC Act 1997;³⁵³
- The NVC Act 1997 was difficult to enforce, and the likelihood of breaches of the Act was high. The number of alleged breaches was steadily increasing;³⁵⁴ and
- There was no system in place to monitor and report on the regulation of native vegetation.³⁵⁵

The Auditor-General did not specifically recommend legislative reform. Rather, the report's recommendations included:

- Clarifying accountability for outcomes in relation to native vegetation and for finalising the strategy and targets for native vegetation, with due regard to socio-economic impacts;
- Commencing initiatives (such as monitoring and mapping) to improve information on native vegetation;
- Improving the processes for assessment of clearing proposals;
- Establishing a program to independently monitor and publically report on compliance with the NVC Act 1997; and
- Reporting annually on the performance of the regulatory system, including environmental and socio-economic impacts.³⁵⁶

4. FURTHER REFORM AND THE NATIVE VEGETATION ACT 2003

4.1 Background to the introduction of the *Native Vegetation Act 2003*

The [*Native Vegetation Act 2003*](#) (NV Act 2003) was introduced in light of the perceived need to reform the framework for management and conservation of native vegetation under the NVC Act 1997. The formation of the new framework

³⁵¹ Ibid at p. 23.

³⁵² Ibid at p. 39.

³⁵³ Audit Office of New South Wales, [*New South Wales Auditor-General's Report, Performance Audit, Department of Land and Water Conservation, Regulating the Clearing of Native Vegetation*](#), August 2002, at p. 30.

³⁵⁴ Ibid at p. 47.

³⁵⁵ Ibid at p. 52.

³⁵⁶ Ibid at p. 6.

under the NV Act 2003 was shaped by input from the Wentworth Group of Concerned Scientists, and the Native Vegetation Reform Implementation Group established by the Carr Government in 2003.

4.1.2 The Wentworth Group

In November 2002, the Wentworth Group of concerned scientists developed a [*Blueprint for a Living Continent*](#),³⁵⁷ which advocated an immediate end to broadscale land clearing of remnant native vegetation and the provision of adjustment assistance to rural communities.³⁵⁸

In a follow-up report to then NSW Premier Bob Carr in February 2003 the Wentworth Group proposed a “radically new way” of managing native vegetation in NSW. The [*Wentworth Model for Landscape Conservation*](#) incorporated five interdependent components:

1. Strengthening and simplifying native vegetation regulations, ending the broad-scale clearing of remnant vegetation and protected regrowth;
2. Setting environmental standards and clarifying responsibilities for native vegetation which will, over time, create healthy rivers and catchments;
3. Using property management plans to provide investment security, management flexibility and financial support for farmers;
4. Providing significant levels of public funding to farmers to help meet new environmental standards and support on-ground conservation; and
5. Restructuring institutions by improving scientific input into policy setting, improving information systems, and regionalising administration.³⁵⁹

The Wentworth Model identified the following actions as necessary:

- The State Government sets four environmental standards to underpin native vegetation management: water quality; salinity; biodiversity; and soil conservation. These are then converted into practical conservation priorities by regionally-based water catchment authorities using local knowledge and scientific expertise;
- Farmers are then provided with assistance to implement these standards on their properties through property management plans, an alternative to having to apply for development consent every time they wish to clear native vegetation. Farmers are to be given financial support where the new environmental standards applied to their property involve significant costs or a loss of income due to above average levels of native vegetation of high conservation value; and

³⁵⁷ WWF Australia and the Wentworth Group, [*Blueprint for a Living Continent. A Way Forward from the Wentworth Group of Concerned Scientists*](#). 1 November 2002.

³⁵⁸ Ibid at 4.

³⁵⁹ WWF Australia and the Wentworth Group, [*A New Model for Landscape Conservation in New South Wales – the Wentworth Group of Concerned Scientists Report to Premier Carr*](#), 3 February 2003.

- The establishment of a Natural Resource Management Commission, which would report directly to the Minister on matters such as state-wide standards and targets, and funding priorities for implementing catchment strategies.³⁶⁰

The Wentworth Group emphasised the importance of regionalisation. There should be one single authority in each major water catchment responsible for land, water, native vegetation and biodiversity conservation. Each catchment authority should be run by a Board of experts, answerable to the Minister.³⁶¹

4.1.3 The Native Vegetation Reform Implementation Group

The NSW Government welcomed the Wentworth Group's model for native vegetation management. Prior to the 2003 State election, the Premier announced a plan to help farmers protect native vegetation. Key strategies included:

- \$120 million over four years to help farmers protect and replant native vegetation;
- Cutting red tape by allowing farmers to prepare a voluntary 10 year property management plan that avoids land clearing regulations;
- Fast tracking vegetation mapping to help farmers develop property management plans;
- Ending confusion about what is considered native vegetation by setting clear definitions;
- Reducing the number of State and regional committees and Government agencies responsible for land and water conservation; and
- The formation of a Native Vegetation Reform Implementation Group.³⁶²

The Native Vegetation Reform Implementation Group published its [Report](#) in October 2003. The Implementation Group made 46 recommendations on how to implement the Government's native vegetation policies as part of a broader set of natural resource management reforms. Principal recommendations included:

- Establish a Natural Resources Commission to: recommend state-wide environmental standards and targets; recommend certification of catchment plans; and conduct a state-wide audit of outcomes and effectiveness at least every two years;³⁶³

³⁶⁰ Ibid at p. 3.

³⁶¹ Ibid at p. 13.

³⁶² "Premier Carr announces \$120 million plan to help farmers protect native vegetation," Ministerial Media Release, 15 March 2003

³⁶³ Department of Infrastructure, Planning and Natural Resources, [Native Vegetation Reform Implementation Group – Final Report](#), October 2003, at p. 8.

- Establish Catchment Management Authorities to prepare and implement catchment plans to achieve a fully functioning and productive landscape capable of sustaining commercially viable agricultural production and the environment;³⁶⁴
- Develop a new property vegetation plan system to support landholders to voluntarily develop individual or group property vegetation plans;³⁶⁵ and
- A set of native vegetation definitions to be included in new legislation.³⁶⁶

In response, a suite of bills was prepared by the Government to implement the new natural resource management regime. Legislation passed concurrently in the second half of 2003 included:

- The [Catchment Management Authorities Act 2003](#), which established 13 Catchment Management Authorities (CMAs) to manage the day-to-day administration and delivery of natural resource management programs, and to develop plans with respect to matters including native vegetation particular to their relevant catchment area;³⁶⁷
- The [Natural Resources Commission Act 2003](#), which established the Natural Resources Commission (NRC) as a statutory, independent body, with the power to conduct inquiries and provide advice on specific issues as directed by the Government. The NRC was intended to help the Government establish targets and standards for natural resource management based on the best available scientific, economic and social information, and to monitor progress towards those targets;³⁶⁸ and
- The [Native Vegetation Management Act 2003](#) (NV Act 2003), discussed below in detail.

4.2 Key changes introduced by the [Native Vegetation Act 2003](#)³⁶⁹

This section of the paper discusses the NV Act 2003 as introduced, and the changes it made. The Act is still in force, but has been amended over time (see Appendix A). However, broadly speaking the key provisions remain the same. Where a provision discussed has been subsequently amended, a note is made in the footnote referencing the particular section.

The NV Act 2003 was introduced into the NSW Parliament on 12 November 2003, and received formal assent on 11 December 2003.³⁷⁰ The key changes

³⁶⁴ Ibid.

³⁶⁵ Ibid at pp. 17 to 18.

³⁶⁶ Ibid at pp. 11 to 15.

³⁶⁷ [NSW PD](#), 12 November 2003, p. 4890.

³⁶⁸ Ibid.

³⁶⁹ References to the NV Act 2003 in this section are to the [NV Act 2003 as made 11 December 2003](#). Amendments to the NV Act 2003 after that date are discussed in a later section of this paper and in Appendix A.

³⁷⁰ It did not come into effect until 1 December 2005, when the regulations were made.

can broadly be summarised as:

- A new development consent process to control clearing of native vegetation, and prevent broadscale clearing unless it “improves or maintains environmental outcomes.” The new approach was intended to tighten the controls on broadscale clearing whilst providing farmers flexibility to continue routine agricultural management practices; and
- The introduction of a system of property management plans to give farmers the flexibility to develop a plan for their properties.³⁷¹

In the [Second Reading speech for the Native Vegetation Bill in the Legislative Assembly](#), then Minister for Natural Resources, Craig Knowles MP, stated that the new legislation’s objects “reflect the Government’s commitment to end broadscale clearing and maintain productive landscapes”.³⁷² Mr Michael Costa MLC, in the [Second Reading speech of the Bill in the Legislative Council](#) stated that the Government was, through the Bill, implementing its response to the Native Vegetation Reform Implementation Group’s recommendations.³⁷³

The objects of the NV Act 2003 have not changed since the Act received assent. They are:

- (a) To provide for, encourage and promote the management of native vegetation on a regional basis in the social, economic and environmental interests of the State;
- (b) To prevent broadscale clearing unless it improves or maintains environmental outcomes;
- (c) To protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation;
- (d) To improve the condition of existing native vegetation, particularly where it has high conservation value; and
- (e) To encourage the revegetation of land, and the rehabilitation of land, with appropriate native vegetation;

in accordance with the principles of ecologically sustainable development.³⁷⁴

The NV Act 2003 was given broad application, applying to all rural land in NSW. Land in certain local government areas in and around Sydney and Newcastle and land zoned for residential, business or industrial uses was excluded from the application of the Act.³⁷⁵ Also excluded was land reserved or dealt with

³⁷¹ [NSW PD](#), 4 December 2012, p. 5894.

³⁷² [NSW PD](#), 12 November 2003, p. 4890.

³⁷³ [NSW PD](#), 4 December 2012, p. 5894.

³⁷⁴ Section 3 of the NV Act 2003. The principles of ecologically sustainable development are discussed earlier in section [3.3.2] of this paper.

³⁷⁵ Section 5 and Schedule 1 of the NV Act 2003. The general nature of the land to which the NV Act 2003 applies has not changed since enactment. However, various specific amendments have been made to section 5 and Schedule 1. For instance, the specific local

under certain provisions of the [National Parks and Wildlife Act 1974](#), land subject to interim orders or listing on the State Heritage Register under the [Heritage Act 1977](#), critical habitat under Part 3 of the [Threatened Species Conservation Act 1995](#) or Part 3 of the [Fisheries Management Act 1994](#), and State forestry land under the [Forestry Act 1916](#) (now [Forestry Act 2012](#)).

Under the NV Act 2003 native vegetation could not be cleared except in accordance with a development consent (granted in accordance with the Act) or a property vegetation plan.³⁷⁶ Carrying out or authorising the carrying out of clearing in contravention of section 12 of the NV Act 2003 was made an offence, and breaches would attract the maximum penalty under section 126 of the EP&A Act 1979.³⁷⁷ The court dealing with the offence was empowered to, in addition to or in substitution for any pecuniary penalty, direct the offender to plant and maintain new trees and vegetation, and provide a security for the performance of that obligation.³⁷⁸

“Native vegetation” was defined as any of the following types of indigenous³⁷⁹ vegetation:

- (a) trees (including any sapling or shrub, or any scrub);
- (b) understorey plants;
- (c) groundcover (being any type of herbaceous vegetation);
- (d) plants occurring in a wetland.³⁸⁰

“Clearing native vegetation” was defined as any one or more of the following:

- (a) cutting down, felling, thinning, logging or removing native vegetation,
- (b) killing, destroying, poisoning, ringbarking, uprooting or burning native vegetation.³⁸¹

Broadscale clearing of native vegetation was defined as the clearing of any **remnant native vegetation** or **protected regrowth**.³⁸² **“Remnant native**

government areas in Sydney and Newcastle excluded from the Act have changed over time. Further, following 2010 amendments to biodiversity certification in NSW, the NV Act 2003 does not apply to biodiversity certified land within the meaning of Part 7AA of the [Threatened Species Conservation Act 1995](#). Land excluded from the operation of the NV Act 2003 will continue to be subject to local planning controls and the provisions of the [Environmental Planning and Assessment Act 1979](#) generally.

³⁷⁶ Section 12(1) of the NV Act 2003.

³⁷⁷ Section 12(2) of the NV Act 2003. The current maximum penalty under section 126 of the [Environmental Planning and Assessment Act 1979](#) is 10,000 penalty units (\$1,100,000.00).

³⁷⁸ Section 126(3) of the EP&A Act 1979.

³⁷⁹ Vegetation is indigenous if it is of a species of vegetation, or if it comprises a species of vegetation, that existed in NSW before European Settlement – see section 6(2) of the NV Act 2003.

³⁸⁰ Section 6(1) of the NV Act 2003.

³⁸¹ Section 7 of the NV Act 2003.

³⁸² Section 8 of the NV Act 2003.

vegetation” was defined as any native vegetation *other than* “**regrowth**”.³⁸³ The Act defined “**regrowth**” as any native vegetation that has regrown since the earlier of the following dates:

- (a) 1 January 1983 in the case of land in the Western Division and 1 January 1990 in the case of other land; or
- (b) The date specified in a property vegetation plan (in exceptional circumstances being a date based on existing rotational farming practices).³⁸⁴

For instance, if on a Western Division property, the native vegetation in question had regrown since 1 January 1983 it would be **regrowth** for the purposes of the NV Act 2003, not “**remnant native vegetation**”. Accordingly, unless it is “**protected regrowth**” (see below) removal of the vegetation would not be “**broadscale clearing**”. The clearing of *non-protected regrowth* did (and still does) not require approval under the NV Act 2003.³⁸⁵ However, if the native vegetation regrew before 1 January 1983, it would not be classified as **regrowth**, and would instead be “**remnant native vegetation**” for the purposes of the NV Act 2003. Clearing it would amount to “**broadscale clearing**”, and an approval under the NV Act 2003 would be required prior to doing so.

The date at which the cut off point for “**regrowth**” is set was therefore crucial to what vegetation landholders can clear without approval under the NV Act 2003. Paragraph (b) of the definition of “**regrowth**” was inserted to cover situations where regrowth has arisen as part of existing rotational farming practices that commenced *before* 1 January 1983 in the Western Division and 1 January 1990 elsewhere.³⁸⁶ That is, it was designed to accommodate the situation where farmers can show that the native vegetation in question is **regrowth** arising from clearing undertaken some time ago for existing rotational crop purposes in an area where, for instance, a particular area may be suitable for cropping only one year in thirty.³⁸⁷

Native vegetation which has regrown before or after the relevant dates due to unlawful clearing of **remnant native vegetation**, or following clearing of **remnant native vegetation** by bushfire, flood, drought or other natural cause would not be “**regrowth**” and would be “**remnant native vegetation**”. Its removal would require approval, unless it fell within an alternate exempt category (discussed below).

“**Protected regrowth**” was defined as any native vegetation that is regrowth and that is identified as protected regrowth for the purposes of the NV Act 2003 in a property vegetation plan, an environmental planning instrument, a natural

³⁸³ Section 9(1) of the NV Act 2003.

³⁸⁴ Section 9(2) of the NV Act 2003.

³⁸⁵ Section 19 of the NV Act 2003.

³⁸⁶ *NSW PD*, 12 November 2003, p. 4890.

³⁸⁷ Chris Norton and Kathryn Ridge, *Local Government Planning and Environment New South Wales* (General Editor: The Hon. Justice Brian J Preston SC), “Biodiversity and Conservation”, Volume C (at Service 73), at paragraph [587,875].

resource management plan or an interim protection order.³⁸⁸ “**Protected regrowth**” was also defined to include any native vegetation that is **regrowth** and that has been grown or preserved with the assistance of public funds granted for biodiversity conservation purposes.³⁸⁹

The Minister was made the consent authority for development applications to clear native vegetation.³⁹⁰ Applications were to be assessed in accordance with the provisions of Part 4 of the EP&A Act 1979, subject to Division 1 of Part 3 of the NV Act 2003 and the regulations.³⁹¹ Where the clearing proposed involves **broadscale clearing**, the Minister could not grant development consent unless the clearing will “improve or maintain environmental outcomes”.³⁹² This central concept was left to the regulations, and is discussed later in this paper (section [4.3]).

Part 4 of the NV Act 2003 introduced property vegetation plans (PVPs) as an alternative to development consent under Part 3 of the NV Act 2003. PVPs could include the following:

- (a) proposals for clearing native vegetation on the land;
- (b) the identification of native vegetation on the land as regrowth;
- (c) proposals relating to the thinning of native vegetation in the central area of NSW that has regrown between 1 January 1983 and 1 January 1990;
- (d) proposals to enable landholders to obtain financial incentives for the management of natural resources;
- (e) proposals relating to the continuation of existing farming or other rural practices;
- (f) provisions excluding clearing for routine agricultural management or other activities from being permitted clearing;
- (g) such other provisions as prescribed by the regulations.³⁹³

The Minister was prevented from approving PVPs that propose broadscale clearing of native vegetation, unless the clearing concerned would “improve or maintain environmental outcomes”.³⁹⁴

The Act provided that PVPs for clearing native vegetation could remain valid for up to 15 years.³⁹⁵ If agreed by the land owner, a PVP could be registered on the

³⁸⁸ Section 10(1) of the NV Act 2003.

³⁸⁹ Section 10(2) of the NV Act 2003.

³⁹⁰ Section 13 of the NV Act 2003.

³⁹¹ Section 14(1) of the NV Act 2003. Amendments have since been made to section 14 to take into account clearing with the benefit of biodiversity certification under Division 4 of Part 7 of the [Threatened Species Conservation Act 1995](#) and Part 7A of the [Fisheries Management Act 1994](#), and to update references to catchment management authorities to Local Land Services.

³⁹² Section 14(3) of the NV Act 2003.

³⁹³ Section 28 of the NV Act 2003.

³⁹⁴ Section 29 of the NV Act 2003.

³⁹⁵ Section 30 of the NV Act 2003. Provisions not pertaining to the clearing of native vegetation may have effect for more than 15 years.

title of the land so that it applies to any successors in title of the land.³⁹⁶

Part 5 of the NV Act 2003 set out the enforcement mechanisms, including appointment of authorised officers, powers of entry, stop work and remedial work orders, powers to obtain information, penalty provisions and appeals against enforcement steps. Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a contravention of the NV Act 2003.³⁹⁷

The Act introduced exemptions for certain activities and types of clearing to be carried out without consent or a property vegetation plan.³⁹⁸ These included:

- Clearing of native vegetation that is non-protected regrowth;³⁹⁹
- Clearing of native vegetation that comprises only groundcover in certain circumstances;⁴⁰⁰
- Clearing for routine agricultural management activities;⁴⁰¹
- Continuation of existing farming activities,⁴⁰² and
- Sustainable grazing that is not likely to result in the substantial long-term decline in the structure and composition of native vegetation.⁴⁰³

“Routine agricultural management activities” (RAMAs) were defined to mean any of the following activities on land carried out by or on behalf of the landholder:

- (a) the construction, operation and maintenance of rural infrastructure:
 - i. including (subject to the regulations) dams, permanent fences, buildings, windmills, bores, air strips (in the Western Division), stockyards, and farm roads, but
 - ii. not including rural infrastructure in areas zoned as rural-residential under environmental planning instruments or on small holdings (as defined in the regulations);
- (b) the removal of noxious weeds under the [Noxious Weeds Act 1993](#);
- (c) the control of noxious animals under the *Rural Lands Protection Act 1998*;⁴⁰⁴
- (d) the collection of firewood (except for commercial purposes);
- (e) the harvesting or other clearing of native vegetation planted for commercial purposes;

³⁹⁶ Section 31 of the NV Act 2003.

³⁹⁷ Section 41 of the NV Act 2003.

³⁹⁸ Divisions 2 and 3 of Part 3 of the NV Act 2003.

³⁹⁹ Section 19 of the NV Act 2003.

⁴⁰⁰ Section 20 of the NV Act 2003.

⁴⁰¹ These are set out in section 11 of the NV Act 2003.

⁴⁰² Section 23 of the NV Act 2003.

⁴⁰³ Section 24 of the NV Act 2003.

⁴⁰⁴ Now this exemption pertains to the control of pests under the [Local Land Services Act 2013](#).

- (f) the lopping of native vegetation for stock fodder (including uprooting mulga in the Western Division in areas officially declared to be drought affected);
- (g) traditional Aboriginal cultural activities (except commercial activities);
- (h) the maintenance of public utilities (such as those associated with the transmission of electricity, the supply of water, the supply of gas and electronic communication); and
- (i) any activity reasonably considered necessary to remove or reduce an imminent risk of serious personal injury or damage to property.⁴⁰⁵

Section 11(2) of the NV Act 2003 provides that the regulations to be made under the Act could make provision for or with respect to extending, limiting or varying the activities that are RAMAs, and the definition set out above was to be construed accordingly.

The types of activities prescribed as RAMAs have proven to be politically contentious and have been the subject of extensive review and debate.

4.3 Native Vegetation Regulation 2005 and the Environmental Outcomes Assessment Methodology

While the NV Act 2003 provided the key concepts and structure for the regulation of the clearing of native vegetation,⁴⁰⁶ the practical operation of the NV Act 2003 relied heavily upon the development of its regulations. The [Native Vegetation Regulation 2005](#) (NV Regulation 2005)⁴⁰⁷ was not finalised until 18 November 2005. Upon finalisation, the NV Regulation 2005 and the NV Act 2003 came into effect on 1 December 2005.⁴⁰⁸

As noted above, the Minister can only grant development consent or approve a PVP proposing broadscale clearing where that clearing “improves or maintains environmental outcomes.” Part 5 of the NV Regulation 2005 dealt with the assessment methodology used to determine those environmental outcomes and guide the assessment of whether they are “improved or maintained” by a particular proposal.

The NV Regulation 2005 adopted the *Environmental Outcomes Assessment Methodology* (EOAM). Development applications are assessed against the EOAM to determine whether any proposed broadscale clearing “improves or maintains” environmental outcomes. The EOAM is applied using computer-based decision support software.⁴⁰⁹ The software weighs up the positive and

⁴⁰⁵ Section 11(1) of the NV Act 2003.

⁴⁰⁶ Rosemary Lyster, Zada Lipman, Nicola Franklin, Graeme Wiffen and Linda Pearson, *Environmental and Planning Law in New South Wales*, The Federation Press: Sydney, 3rd Ed., 2012 at p. 377.

⁴⁰⁷ The link provided is to the NV Regulation 2005 as in force between 1 December 2005 and 1 June 2006. Amendments to the Regulation from that point on are discussed below.

⁴⁰⁸ *NSW Government Gazette No. 140*, 18 November 2005, pp. 9404; Clause 2 of the NV Regulation 2005.

⁴⁰⁹ The software was initially known as the “PVP Developer”, but subsequently changed to the

negative benefits of different management actions, assessed against the following environmental values:

- Water quality;
- Salinity;
- Biodiversity; and
- Land degradation.⁴¹⁰

If the software determined that a proposed broadscale clearing would *not* improve or maintain environmental outcomes, an accredited expert could make an assessment that (despite the software's determination) the proposed clearing *will* improve or maintain environmental outcomes, provided that the expert was of the opinion that:

- (a) a minor variation to the EOAM would result in a determination that the proposed clearing will improve or maintain environmental outcomes; and
- (b) strict adherence to the EOAM is in the particular case unreasonable and unnecessary.⁴¹¹

However, the following factors could not be varied by the accredited expert's opinion:

- (a) riparian buffer distances or associated offset requirements;
- (b) classification of vegetation as likely habitat for threatened species;
- (c) classification of a plant species as a threatened species or a component of an endangered ecological community;
- (d) classification of the condition of vegetation;
- (e) classification of the vegetation type or landscape type as overcleared; and
- (f) the assessment of the regional value of vegetation.⁴¹²

The EOAM also made express provision for offsets to be provided in PVPs. Where management actions that have environmental benefits are proposed as part of a PVP, the benefits could be offset, in certain circumstances, against proposed clearing of native vegetation and be taken into account when determining whether the proposed clearing maintained or improved environmental outcomes.⁴¹³

"Native Vegetation Assessment Tools" package.

⁴¹⁰ NSW OEH, "[How the PASACS program and assessment tools operate](#)", last updated 27 March 2014, accessed on 10 September 2014.

⁴¹¹ Clause 27(1) of the NV Regulation 2005.

⁴¹² Clause 27(2) of the NV Regulation 2005. Please note that amendments to the NV Regulation 2005 in 2008 permitted variations of the matters at paragraphs (d) – (e) in certain circumstances.

⁴¹³ See pages 6 to 7 of the [original EOAM Gazetted on 18 November 2005](#) (pages 9449 to 9533); See page 6 of the [current EOAM](#). Specific requirements for offsets are also provided in sections 3 to 6 of the EOAM.

Clarification of the types of activities that would constitute RAMAs (Routine Agricultural Management Activities) not requiring an approval under the NV Act 2003 was also left to the NV Regulation 2005. The RAMAs initially specified in the NV Regulation 2005 included:

- Clearing native vegetation planted as part of a garden;⁴¹⁴ and
- Clearing native vegetation on land for use in the construction or maintenance of rural infrastructure, subject to certain conditions.⁴¹⁵

The NV Regulation 2005 as first made also limited the RAMAs provided under section 11(1)(a) of the NV Act 2003 (being rural infrastructure, such as dams, fences, windmills, farm roads and bores) by prescribing maximum distances or areas of native vegetation that may be cleared without approval.⁴¹⁶

4.4 2006 Auditor-General's follow-up report

In July 2006, the Auditor-General published a follow-up report to its 2002 Performance Audit report, incorporating an initial assessment as to whether the reformed native vegetation regulatory framework addressed the key issues raised in its earlier report.

The [Auditor-General's follow-up report](#) commented positively on the new legislation. It found that:

- The NV Act 2003 and NV Regulation 2005 address many of the enforcement problems encountered under the NVC Act 1997. The exemptions have been changed and the occupier of the land is now deemed to be responsible for clearing in the absence of evidence to the contrary;⁴¹⁷
- The reform process has addressed the key systemic issues identified in the 2002 Performance Audit Report, in that:
 - Responsibilities for regulation of the clearing of native vegetation have now been separated and clarified. Catchment Management Authorities⁴¹⁸ have been given the responsibility for approvals of clearing, as part of catchment management, and the Department of Natural Resources was allocated responsibility for regulating compliance with the legislation and enforcement actions.⁴¹⁹

⁴¹⁴ Clause 18 of the NV Regulation 2005.

⁴¹⁵ Clause 16 of the NV Regulation 2005.

⁴¹⁶ Clause 20 of the NV Regulation 2005.

⁴¹⁷ Audit Office of New South Wales, [New South Wales Auditor-General's Report, Performance Audit, Regulating the Clearing of Native Vegetation – Follow-up of 2002 Performance Audit](#), July 2006, at p. 22.

⁴¹⁸ Catchment Management Authorities were replaced by Local Land Services in 2013.

⁴¹⁹ Audit Office of New South Wales, [New South Wales Auditor-General's Report, Performance Audit, Regulating the Clearing of Native Vegetation – Follow-up of 2002 Performance Audit](#), July 2006, at p. 25.

- A new strategy has been adopted to regulate clearing of native vegetation, key changes being more consultation with farmers and payments to farmers to protect native vegetation on their properties.⁴²⁰
- An improved satellite system (part of the Department of Natural Resources' new compliance policy) is supplying high resolution images to monitor compliance and to support prosecutions.⁴²¹
- The extent and condition of native vegetation was not, at the time of publication, being regularly reported on. The Auditor-General noted that the Department of Natural Resources was to report annually in the future, initially on the extent of native vegetation, and then on the condition of native vegetation once adequate monitoring processes were established.⁴²²

5. LEGISLATIVE REFORMS AND REVIEWS SINCE 2005

A number of amendments have been made to the NV Act 2003, the NV Regulation 2005 and the EOAM since coming into effect in December 2005. A table is provided at Appendix A to this paper listing and summarising the amendments. Key amendments and reviews of the native vegetation legislation are discussed in further detail below.

5.1 August 2007 private native forestry amendments

Initially, neither the NV Act 2003 nor NV Regulation 2005 provided for private native forestry – that is, operations carried out on private land to obtain timber from native forests. Instead, as an interim measure, the NV Regulation 2005 permitted private native forestry to continue under SEPP 46 and the NVC Act 1997 until either the code to determine whether proposed private native forestry would improve or maintain environmental outcomes was finalised, or until 6 months had expired from the commencement of the NV Regulation 2005 (whichever occurred first).⁴²³

There was prolonged debate over the proposed code for private native forestry.⁴²⁴ As such, the 6 month deadline for protection of private native forestry under the previous legislation was extended on several occasions.

In August 2007, Amendments were made to the NV Regulation 2005 to require persons seeking to undertake private native forestry on land to obtain approval through a private native forestry property vegetation plan. A definition of “private

⁴²⁰ Ibid at p. 26.

⁴²¹ Ibid at p. 27.

⁴²² Audit Office of New South Wales, *New South Wales Auditor-General's Report, Performance Audit, Regulating the Clearing of Native Vegetation – Follow-up of 2002 Performance Audit*, July 2006, at p. 31.

⁴²³ Clause 41(1) of the NV Regulation 2005, as made.

⁴²⁴ *NSW PD*, 30 August 2006, p. 1090.

native forestry” was inserted into the NV Regulation 2005, being “the management of native vegetation on privately owned land for the purposes of obtaining, on a sustainable basis, timber products (including sawlogs, veneer logs, poles, girders, piles and pulp logs)”.⁴²⁵

Also in August 2007, the Department of Environment and Climate Change released the [Private Native Forestry Code of Practice](#) (PNF Code).⁴²⁶ The PNF Code was adopted by new provisions inserted into the NV Regulation 2005 as part of the amendments.⁴²⁷

Under the amendments to the NV Regulation 2005, broadscale clearing for the purpose of private native forestry is taken, for the purposes of the NV Act 2003, to be clearing that will improve or maintain environmental outcomes if it is carried out in accordance with the PNF Code.⁴²⁸ An application for approval of a private native forestry PVP proposing broadscale clearing may therefore only be granted by the Minister if the PVP adopts the PNF Code and provides for the clearing to be carried out in accordance with that document.⁴²⁹

Further amendments were made to the NV Regulation 2005 in February 2008. Amongst other changes, these amendments restricted the types of activities that amount to Routine Agricultural Management Activities (RAMAs) on land covered by private native forestry PVPs,⁴³⁰ and included additional circumstances in which a minor variation to the EOAM may be allowed.⁴³¹

5.2 2009 review of the *Native Vegetation Act 2003*

The first five year statutory review of the NV Act 2003 was undertaken by the Minister for Climate Change and the Environment in 2009. The [review found](#) that the objects of the NV Act 2003 remained valid and that no fundamental changes were necessary.⁴³² However, the review noted issues raised in the submissions that would need to be considered in the longer term. These included:

- Concerns with lack of clarity surrounding critical definitions, including “clearing”, “broadscale”, “native vegetation”, “regrowth”, “routine agricultural management activities”, “minimum extent necessary” and

⁴²⁵ Schedule 1 [1] of the [Native Vegetation Amendment \(Private Native Forestry\) Regulation 2007](#).

⁴²⁶ The Code is in four separate parts: Northern NSW, Southern NSW, Red Gum Forests, and Cypress and Western Hardwood Forests. The Code has undergone revision over time, which is not discussed in this paper. For further information and to view the Codes as in force from time to time see <http://www.epa.nsw.gov.au/pnf/>.

⁴²⁷ NSW Environment Protection Authority, [Overview of Private Native Forestry](#), undated.

⁴²⁸ Clause 29B(1) of the NV Regulation 2005.

⁴²⁹ Clause 29B(2) of the NV Regulation 2005.

⁴³⁰ Clauses 23A and 23B of the NV Regulation 2005

⁴³¹ Clauses 27(2A), (3A) and (3B) of the NV Regulation 2005.

⁴³² Department of Environment, Climate Change and Water NSW, [Report on the Review of the Native Vegetation Act 2003](#), December 2009, at p. 18.

“existing farming activities”.⁴³³ The review indicated that, in the short term, the Government would request the Department to increase its efforts to provide clear information to all stakeholders on the definitions, and to review its administrative practices to ensure consistency in the application of these terms. The Government committed to considering whether legislative change was necessary at a later date.⁴³⁴

- Concerns with the appropriateness of categories of clearing which do not require approval, in particular, exemptions with respect to certain RAMAs.⁴³⁵ Many local governments and environmental organisations suggested that certain RAMA exclusions may allow more clearing than is intended by the NV Act 2003. Other stakeholders, such as farmers and farmer organisations, suggested that certain RAMA exclusions were too restrictive.⁴³⁶

The review noted that objective evidence of the systematic use of RAMAs to undermine the objectives of the NV Act 2003 was not available. The Department planned to continue ongoing investigations in this regard, with a view to advising the Government on options to ensure the practical delivery of the objects of the NV Act 2003.⁴³⁷

- Improved administrative practices were needed to provide stakeholders with clearer information describing the interaction between the NV Act 2003 and other Acts, such as the [EP&A Act 1979](#), the [Rural Fires Act 1997](#) and the [Threatened Species Conservation Act 1995](#).
- In terms of PVP assessment processes, submissions sought to increase flexibility of offset requirements, a simplified assessment procedure for minor clearing of low environmental impact, and changes to the way invasive native scrub was assessed.⁴³⁸ Submissions also stated that existing native groundcover exemptions were confusing and difficult to implement in practice.⁴³⁹ The review indicated that the majority of these concerns would be considered through a review of the EOAM.
- In relation to enforcement and compliance, the review noted that the community was divided on the current enforcement provisions. It stated that the Government would give further consideration to the issues raised and develop legislative amendments in consultation with stakeholders to ensure that administration of the NV Act 2003 was appropriate and effective.⁴⁴⁰

⁴³³ Ibid at p. 10.

⁴³⁴ Department of Environment, Climate Change and Water NSW, [Report on the Review of the Native Vegetation Act 2003](#), December 2009, at p. 11.

⁴³⁵ Ibid.

⁴³⁶ Ibid at p. 12.

⁴³⁷ Ibid.

⁴³⁸ Ibid at p. 15.

⁴³⁹ Ibid at p. 16.

⁴⁴⁰ Ibid at p. 18.

5.3 Streamlining of the Property Vegetation Plan assessment process in the Environmental Outcomes Assessment Methodology

On 4 March 2011, a new Chapter 8 of the EOAM was gazetted, aimed at reducing administrative processing times for PVP approvals.⁴⁴¹ The new chapter established a streamlined PVP assessment process for three vegetation categories:

- Low condition vegetation, including paddock trees;
- Trees not in low condition where there is no groundcover or the groundcover is non-native; and
- Vegetation in the Western Division where the Mitchell landscape and vegetation type are less than 10% cleared.⁴⁴²

In addition to falling into one of these three categories, to obtain the benefit of the streamlined process the PVP proposal must also satisfy environmental filter criteria and include an offset of a prescribed nature.⁴⁴³

5.4 2011 review of the Native Vegetation Regulation 2005

In September 2011, the Minister for Environment, Ms Robyn Parker MP, announced a [statutory review of the NV Regulation 2005](#). The review focused on cutting red-tape, improving service delivery, removing ambiguity, increasing transparency, and maintaining the environmental standard set by the NV Act 2003.⁴⁴⁴ In a media release on 13 September 2011, the Minister stated that:

We'll be looking at where the current regulations can be simplified and can foster a more strategic approach. We want to make sure the regulations are sensible, balanced and effective to help ensure we get the best possible environmental and economic outcomes.⁴⁴⁵

Following an initial community consultation period,⁴⁴⁶ on 29 May 2012 the Minister released the [Draft Native Vegetation Regulation 2012](#) for public consultation, along with a revised draft of the EOAM.⁴⁴⁷ Key changes proposed in the draft documents included:

⁴⁴¹ Natural Resources Commission, [Review of Proposed Amendments to the Environmental Outcomes Assessment Methodology](#), February 2011, at 10; Lyster et al, above n406, at 378.

⁴⁴² Lyster et al, above n406, at 378.

⁴⁴³ Ibid.

⁴⁴⁴ NSW OEH, ["Review of the Native Vegetation Regulation"](#), [online – accessed 13 August 2014].

⁴⁴⁵ Robyn Parker MP, Minister for Environment, Minister for Heritage, "Review of Native Vegetation Laws", Ministerial Media Release, 13 September 2011.

⁴⁴⁶ Robyn Parker MP, Minister for Environment, Minister for Heritage, "Broad range of voices heard on native vegetation regulation", Ministerial Media Release, 8 December 2011.

⁴⁴⁷ Robyn Parker MP, Minister for Environment, Minister for Heritage, "Draft native vegetation regulations will slash red tape", Ministerial Media Release, 29 May 2012.

- Broadening the range of clearing activities able to be carried out without approval. The draft regulation proposed to introduce new RAMAs, including a new type of RAMA where clearing does not require approval if carried out in accordance with a code of practice (for instance, certain treatments for invasive native species and thinning native vegetation);⁴⁴⁸
- A revised EOAM to introduce a faster assessment process for types of clearing considered to pose a low risk to the environment;⁴⁴⁹ and
- Amendments to the Regulation and the Private Native Forestry Code of Practice to improve flexibility and operation.⁴⁵⁰

In its [submission](#) to the draft regulations and revised EOAM, the NSW Environmental Defender's Office (NSW EDO) indicated that, whilst it supported a more efficient system, it was concerned that several of the proposed changes (such as the broadening of categories of clearing that may be undertaken without approval) would undermine the NV Act 2003's ability to maintain or improve environmental outcomes. It argued that any changes to the Regulation or EOAM must be justified ecologically, rather than in terms of administrative streamlining.⁴⁵¹ The EDO's key recommendations on the draft documentation included:

- Appropriately limit the use of RAMAs and balance any expansion with practical record-keeping requirements;
- Install processes for monitoring and data collection in relation to the proposed changes in order to assess whether activities continue to meet the objectives of the NV Act 2003, and to understand the cumulative impacts of clearing undertaken in circumstances where no approval is required;
- Ensure that there is public consultation and requirements for expert scientific input into any changes of the Regulation, the EOAM or codes of practice; and
- Provide Catchment Management Authorities with additional resources and training to increase capacity to make PVPs in a timelier manner and increase staff with expertise in communications.⁴⁵²

The [NSW Farmers' Association](#) was also critical of the draft documentation. It argued that the NV Act 2003 itself required amendment, as the current system was deeply flawed. It considered that the native vegetation framework needed to be refocused on achieving environmental outcomes while minimising the cost

⁴⁴⁸ NSW OEH, [Review of the Native Vegetation Regulation, Fact Sheet 2: Proposed New Rules for Clearing](#), June 2012, at p. 1.

⁴⁴⁹ Ibid at p. 2.

⁴⁵⁰ NSW OEH, [Review of the Native Vegetation Regulation, Fact Sheet 1: New approach to native vegetation management](#), June 2012, at p. 2.

⁴⁵¹ Environmental Defender's Office of NSW, [Submission on the review of the Native Vegetation Regulation](#), 24 August 2012, at p. 6.

⁴⁵² Ibid at p. 5.

to the NSW economy and pressure on farming communities.⁴⁵³ The submission called for changes to the NV Act 2003 to: abolish PVPs and instead implement regional plans which set boundaries for environmental management; and to balance protection of the environment against the social and economic benefits of productive agriculture.⁴⁵⁴ The NSW Farmers' Association put forward 13 recommendations, including:

- That the NV Act 2003 and the *Threatened Species Conservation Act 1995* be amended to reflect a balanced triple bottom line approach, assessed at local plan level by amending the “improve or maintain” test such that the net benefit is tested across the social, economic, soil, water, salinity and biodiversity factors;⁴⁵⁵
- That penalties for clearing offences be reduced, and that current prosecutions be suspended until such time as a more workable native vegetation framework is in place;⁴⁵⁶
- That the proposed restrictions placed on the broad definition of “routine agricultural management activities” be removed from the draft regulation;⁴⁵⁷
- That the proposed categories of native vegetation identified in the draft revised EOAM for streamlined assessment instead be made permissible to be cleared under self-assessed codes;⁴⁵⁸ and
- That all references to grasslands be removed from native vegetation policies and statutes.⁴⁵⁹

In November 2012, an independent facilitator, Mr Joe Lane, was appointed to re-engage with key stakeholders and agencies and provide advice on ways of improving the native vegetation management system, including the NV Regulation 2005.⁴⁶⁰ The [Facilitator's Final Report](#) published on 25 March 2013 made 40 recommendations with respect to changes to the native vegetation regulatory framework. Major recommendations included:

- Providing self-assessable codes for certain types of clearing activities, including clearing of isolated paddock trees and invasive native species at a paddock scale, and the thinning of native vegetation, provided the codes require pre-clearing notification and record keeping requirements

⁴⁵³ NSW Farmers' Association, [Submission to the NSW Government Native Vegetation Regulation Review](#), August 2012, at p. 2.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid at p. 19.

⁴⁵⁶ Ibid at p. 21.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid at p. 26.

⁴⁵⁹ Ibid at p. 30.

⁴⁶⁰ Joe Lane, [Native Vegetation Regulation Review: Facilitator's Final Report](#), 25 March 2013 at p. 1.

and prohibit the clearing being undertaken to change the use of the relevant land (for instance, from grazing to cropping);⁴⁶¹

- Increasing the focus on sustainable management of grasslands by:
 - Amending clause 17(2) of the NV Regulation 2005 to enable the listing of specified native species as feral native species able to be cleared as a RAMA; and
 - Increasing education and advisory services to raise awareness of what can be done in relation to native groundcover and managing weeds (i.e. non-native species) under the NV Act 2003;⁴⁶²
- Providing streamlined assessment for certain types of clearing activities, such as clearing of scattered trees/small clumps;⁴⁶³
- Clarifying clearing exemptions for existing farming activities and RAMAs, to address many landowners' lack of awareness or understanding of many of the available legislative exemptions;⁴⁶⁴ and
- Implementing supporting reforms, such as:
 - An improved extension and governance framework for native vegetation management focussed on supporting sustainable agricultural production with improved access to information;
 - Timelier determination of PVP applications (40 days for streamlined assessments) and improved mapping products to allow for regional assessments where appropriate; and
 - Maintaining effective compliance approaches that optimise voluntary compliance and include appropriate audits.⁴⁶⁵

5.5 The Native Vegetation Regulation 2013

On 19 September 2013, the NSW Government published revised regulations.⁴⁶⁶ The [Native Vegetation Regulation 2013](#) (NV Regulation 2013) is structured in a manner similar to the NV Regulation 2005, retaining many of the key concepts. A new definition was inserted for "landholding",⁴⁶⁷ meaning a parcel of land, or several parcels of land which are contiguous with one another or separated only by a road, river, creek etc., and constitute or are worked as a single property (even where those parcels are held under the same or different titles).⁴⁶⁸ This

⁴⁶¹ Joe Lane, [Native Vegetation Regulation Review: Facilitator's Final Report](#), 25 March 2013, at pp. 2 and 5-6.

⁴⁶² Ibid at pp. 7-8.

⁴⁶³ Ibid. at pp. 8-9.

⁴⁶⁴ Ibid at p. 10.

⁴⁶⁵ Ibid at p. 2.

⁴⁶⁶ Robyn Parker MP, Minister for Environment, Minister for Heritage, "[New Native Vegetation Regulation Changes](#)", Ministerial Media Release, 19 September 2013.

⁴⁶⁷ NSW OEH, [Supplementary Regulatory Impact Assessment: Native Vegetation Regulation 2013](#), September 2013, at p. 5.

⁴⁶⁸ Clause 3(1) of the NV Regulation 2013.

definition is used to provide for the application of certain new RAMAs to many parcels of land worked as a single property (rather than individual parcels).⁴⁶⁹

The NV Regulation 2013 also extends RAMAs for the purposes of section 11(1) of the NV Act 2003 to include:

- Clearing for the construction, operation and maintenance of permanent boundary fences, sheds and access tracks and trails for non-rural infrastructure purposes;⁴⁷⁰
- Clearing for the construction, operation and maintenance of privately owned power lines;⁴⁷¹
- Clearing of native vegetation that has been planted, provided it was not planted with the assistance of funds granted for nominated purposes (such as biodiversity conservation, improving water quality or preventing land degradation);⁴⁷²
- Clearing in accordance with self-assessable codes to be prescribed by way of ministerial order, including:
 - Clearing of feral species declared by the Minister;⁴⁷³
 - Clearing of invasive species;⁴⁷⁴
 - Carrying out environmental works, including revegetation and rehabilitation, provided that the Minister is satisfied that the carrying out of the work will have an overall positive effect on the environment;⁴⁷⁵
 - Thinning of native vegetation, thinning being defined as “the selective removal of individual trees, or parts of trees, for the purposes of reducing competition between trees, allowing growth of remaining trees, tree regeneration and groundcover growth and improving or maintaining the structure and composition of native vegetation;⁴⁷⁶
 - Clearing of paddock trees in a cultivation area (being a tree within an area that is cropped, ploughed, fallow or covered in perennial or annual non-indigenous pasture);⁴⁷⁷ and
 - The clearing of mulga in the Western Division for stock fodder.⁴⁷⁸

⁴⁶⁹ For instance, see clause 30 (Construction, operation and maintenance of sheds) and clause 31 (construction, operation and maintenance of access trails and tracks) of the NV Regulation 2013.

⁴⁷⁰ See clauses 29 to 31 of the NV Regulation 2013.

⁴⁷¹ Clause 54 of the NV Regulation 2013.

⁴⁷² Clause 53 of the NV Regulation 2013.

⁴⁷³ Clause 37 of the NV Regulation 2013.

⁴⁷⁴ Clause 38 of the NV Regulation 2013.

⁴⁷⁵ Clause 39 of the NV Regulation 2013.

⁴⁷⁶ Clause 40 of the NV Regulation 2013.

⁴⁷⁷ Clause 41 of the NV Regulation 2013.

With respect to RAMAs carried out in accordance with the prescribed self-assessable codes, the NV Regulation 2013 requires landholders to report their intention to carry out clearing of vegetation under the codes at least 14 days prior to carrying out the clearing, together with information, such as details of the area of land to be cleared, the species of native vegetation to be cleared, and the method of the intended clearing.⁴⁷⁹ It is an offence to fail to do so, punishable by a penalty infringement notice and fine of \$200.00.

The Minister is required to exhibit and consider public submissions on proposed codes prior to making a ministerial order giving effect to a code.⁴⁸⁰ The codes may impose conditions on how clearing is to be carried out, including specifying methods and maximum areas.⁴⁸¹

The NV Regulation 2013 also alters the means by which a PVP may change the relevant dates pertaining to whether vegetation is “**regrowth**” under the NV Act 2003. This is significant change, as the Act defines **broadscale clearing** as the clearing of **remnant native vegetation**,⁴⁸² which is any vegetation that is not **regrowth**.⁴⁸³ The NV Act 2003 defines “**regrowth**” as native vegetation that has regrown since 1 January 1983 for Western Division land, and 1 January 1990 elsewhere,⁴⁸⁴ or an earlier date stipulated in a PVP, where that date is based on existing rotational farming practices.⁴⁸⁵ Under the NV Regulation 2005, a PVP could only stipulate an earlier date if the native vegetation on the land concerned had been cleared pursuant to existing rotational farming practices on at least two occasions since 1 January 1943 (Western Division) or 1 January 1950 (elsewhere).⁴⁸⁶ The NV Regulation 2013 still requires the Minister to be satisfied that the earlier date is based on existing rotational farming practices; however, it removed the requirement to prove two prior clearings. It also expressly permits PVPs to set the relevant date at no earlier than 1 January 1943 (Western Division) and 1 January 1950 (elsewhere).⁴⁸⁷ The new provision therefore makes it easier for landholders to set an earlier date for the purposes of the definition of “**regrowth**”, thereby excluding more vegetation from the definition of “**remnant native vegetation**”.

The proposed revised EOAM was not made. Rather, the NV Regulation 2013 adopted the EOAM as amended on 4 March 2011. As at 15 October 2014, the NSW OEH [website](#) indicated that the EOAM was under review. The review appears to be distinct to the review of biodiversity legislation by an independent

⁴⁷⁸ Clause 42 of the NV Regulation 2013

⁴⁷⁹ Clause 43 of the NV Regulation 2013.

⁴⁸⁰ Clause 44(1) of the NV Regulation 2013.

⁴⁸¹ Clause 44(2) of the NV Regulation 2013.

⁴⁸² Section 8 of the NV Act 2003.

⁴⁸³ Section 9(1) of the NV Act 2003.

⁴⁸⁴ Section 9(2) of the NV Act 2003.

⁴⁸⁵ Section 9(2) of the NV Act 2003.

⁴⁸⁶ Clause 10 of the NV Regulation 2005.

⁴⁸⁷ Clause 10 of the NV Regulation 2013.

panel. A draft amended EOAM for public exhibition was expected to be available in early 2014, with the new EOAM to take effect late 2014. It appears that this timeline has been pushed back.

5.5.1 Native Vegetation Regulation 2013 disallowance motion

On 12 November 2013, Dr Mehreen Faruqi of the NSW Greens [moved the disallowance](#) of the NV Regulation 2013 in the Legislative Council. During the debate, Dr Faruqi argued that:

- The extension of RAMAs (including clearing under the proposed self-assessable codes) could lead to deliberate or accidental clearing of endangered ecological communities. The cumulative impacts of hundreds of instances of small clearings can be especially damaging for the environment;⁴⁸⁸
- The expanded RAMAs and self-assessable codes have a high chance of failure, because the risk is being offloaded from the Government to individual landholders and because their operation will be largely unregulated with no reporting requirements;⁴⁸⁹
- There is the potential for landowners to apply the codes multiple times on the same property. This will result in “at best, an increase in inadvertent ecological losses due to incorrect classification and, at worst, deliberate misuse for widespread clearing”;⁴⁹⁰ and
- The NV Regulation 2013 reduces scientific insight and input into the regulatory framework by removing the requirement for the Minister for the Environment to consult with the Natural Resources Commission in relation to the declaration of a species of native vegetation as a feral species.⁴⁹¹

Labor MLC and Shadow Minister for the Environment and Climate Change, Luke Foley, spoke in support of the disallowance motion, arguing that the NV Regulation 2013 undermines the integrity of the laws concerning RAMAs put in place under the Labor Government that struck an appropriate balance between property owners’ rights and their need to increase the economic productivity of their land, on one side, with the community’s expectation that the environment would not be undermined in the pursuit of private benefit, on the other.⁴⁹²

Arguing against the motion, Trevor Khan MLC stated that:

The new regulation is not about unrestricted clearing of native vegetation. The centrepiece of the new regulation is the development of self-assessable codes that will allow farmers to carry out common clearing activities provided that they

⁴⁸⁸ [NSW PD](#), 12 November 2013, p. 25295.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² [NSW PD](#), 12 November 2013, p. 25295.

operate consistently with the environmental standards that are set out in the codes. Let us be clear: this will allow farmers to carry out common clearing activities provided that they operate consistently with the environmental standards set out in the codes – nothing more and nothing less. This would include routine agricultural management practices such as removing isolated paddock trees and managing invasive native species, all of which currently require a property vegetation plan and approval. This process has been demonstrated time and again to be cumbersome and time consuming... The codes have the potential to substantially reduce unnecessary red tape and support sensible land management activities.

...

For the past seven years we have had a system that was meant to move us away from the argy-bargy style of conflict to a professional, outcomes based approach. It is clear that that has not happened. We need to engage the farming community, most of whom want to do the right thing. The making of the Native Vegetation Regulation 2013 is the first stage in a much broader look at the policy framework to manage our important natural assets.⁴⁹³

The disallowance motion was defeated.⁴⁹⁴

5.6 NSW report on Native Vegetation 2011-2013

In March 2014, the NSW OEH published the [Report on Native Vegetation 2011-2013](#). The findings of this report have been discussed above in section 1.4 of this paper.

5.7 Related legislation

5.7.1 *Burning native forest biomaterial for energy generation*⁴⁹⁵

In March 2014, the [Protection of the Environment Operations \(General\) Amendment \(Native Forest Bio-material\) Regulation 2013](#) came into effect. Made under the [Protection of the Environment Operations Act 1997](#), it amended the [Protection of the Environment Operations \(General\) Regulation 2009](#) to permit the combustion of four additional types of native forest biomaterials for electricity generation:

- Bio-material obtained from trees (invasive native species) cleared in accordance with PVPs approved under the NV Act 2003;

⁴⁹³ Ibid.

⁴⁹⁴ [NSW PD](#), 12 November 2013, p. 25316.

⁴⁹⁵ For further detail on the changes, please see Daniel Montoya, [Burning native forest biomaterial for electricity generation](#), Issues Backgrounder 03/2014 NSW Parliamentary Research Service, March 2014. The Regulation was subject to a disallowance motion in the Legislative Council brought by Labor MLC, Luke Foley: see [NSW PD](#), 6 May 2014, p. 28124 and [NSW PD](#), 7 May 2014, p. 28224. The disallowance motion was defeated.

- Bio-material obtained from trees cleared in accordance with a declaration relating to invasive species by an order under clause 38 of the NV Regulation 2013;
- Bio-material obtained from pulp wood logs, heads and off-cuts resulting from clearing carried out in accordance with a private native forestry PVP approved under the NV Act 2003, or forestry operations carried out in accordance with an integrated forestry operations approval under Part 5B of the *Forestry Act 2012*; and
- Bio-material obtained from trees cleared as a result of thinning carried out in accordance with a private native forestry PVP approved under the NV Act 2003 or an integrated forestry operations approval under Part 5B of the *Forestry Act 2012*.⁴⁹⁶

According to the NSW Minister for Resources and Energy, Anthony Roberts, “The new regulation is in line with the NSW Renewable Energy Action Plan to remove barriers to renewable energy production”.⁴⁹⁷

5.7.2 2014 Vegetation Clearing Provisions in the Rural Fires Act 1997

Clearing vegetation to protect properties from bushfires is regulated under the [Rural Fires Act 1997](#) (RF Act 1997) as a form of “bush fire hazard reduction work.” Prior to August 2014, all bush fire hazard reduction work was permissible, despite any requirement under the NV Act 2003, the [Threatened Species Conservation Act 1995](#), the [National Parks and Wildlife Act 1974](#), or any other Act, but only if:

- (a) the work is carried out in accordance with a bush fire risk management plan⁴⁹⁸ that applies to the land; and
- (b) there is a bush fire hazard reduction certificate in force in respect of the work and the work is carried out in accordance with any conditions specified in the certificate; and
- (c) the work is carried out in accordance with the provisions of the [Bush Fire Environmental Assessment Code](#).⁴⁹⁹

On 1 August 2014, the [Rural Fires Amendment \(Vegetation Clearing\) Act 2014](#) came into force. The Act inserted a new Division 9 into Part 4 of the *Rural Fires Act 1997*, providing for “vegetation clearing work” – that is, vegetation clearing work to protect properties from bushfires – which could be carried out without the need for approval under the RF Act 1997, the NV Act 2003 or the EP&A Act

⁴⁹⁶ Schedule 1 [2] of the [Protection of the Environment Operations \(General\) Amendment \(Native Forest Bio-material\) Regulation 2013](#).

⁴⁹⁷ Anthony Roberts MP, Minister for Resources and Energy, [Removing Barriers to Renewable Energy Generation](#), Ministerial Media Release, 7 March 2014.

⁴⁹⁸ Bush fire risk management plans are documents prepared by Bush Fire Management Committees to provide for the reduction of bush fire hazards in their respective areas of the State – see section 54 of the RF Act 1997.

⁴⁹⁹ Section 100C of the RF Act 1997.

1979. The amendments were developed in response to bushfire events over the summer of 2013 and 2014, and were intended to cut “green and red tape” to enable homeowners to minimise fuel loads near their homes.⁵⁰⁰

Under the new Division 9, any of the following vegetation clearing work may be carried out without any approval, provided it is within a “10/50 vegetation clearing entitlement area”⁵⁰¹ and carried out by or with the authority of the land owner:

- (a) the removal, destruction (by means other than by fire) or pruning of any vegetation (including trees or parts of trees) within 10 metres;
- (b) the removal, destruction (by means other than by fire) or pruning of any vegetation, except for trees or parts of trees, within 50 metres;⁵⁰²

of an external wall of a building containing habitable rooms that comprises or is part of residential accommodation⁵⁰³ or a high-risk facility.⁵⁰⁴

All vegetation clearing must be carried out in accordance with the [10/50 Vegetation Clearing Code of Practice](#) (10/50 Clearing Code).⁵⁰⁵ The 10/50 Clearing Code deals with the following matters:

- The type of vegetation that can and cannot be cleared, including types of trees;
- The circumstances in which vegetation should be pruned and not entirely removed;
- Managing soil erosion and landslip risks;
- Protection of riparian buffer zones;
- Protection of Aboriginal and other cultural heritage; and
- Protection of vegetation that the owner of the land on which vegetation clearing work may be carried out is under a legal obligation to preserve by agreement or otherwise.⁵⁰⁶

⁵⁰⁰ [NSW PD](#), 29 May 2014, p. 29374. For a more detailed summary and analysis of the amendments, see Daniel Montoya, [Rural Fires Amendment \(Vegetation Clearing\) Bill 2014](#), NSW Parliamentary Research Service e-brief 09/2014, June 2014.

⁵⁰¹ Being an area of land determined by the Commissioner of the NSW Rural Fire Service and identified on a map published on the NSW Rural Fire Service website (see section 100P of the RF Act 1997).

⁵⁰² Section 100R(1) of the RF Act 1997.

⁵⁰³ “Residential accommodation” in this context means the following types of buildings as defined in the standard local environmental planning instrument prescribed by the [Standard Instrument \(Local Environmental Plans\) Order 2006](#): residential accommodation, tourist and visitor accommodation, caravans installed in caravan parks. It also covers manufactured homes installed in manufactured home estates within the meaning of the [Local Government Act 1993](#).

⁵⁰⁴ High-risk facility means a child care centre, school or hospital within the meaning of the standard local environmental planning instrument prescribed by the [Standard Instrument \(Local Environmental Plans\) Order 2006](#) (see section 100P of the RF Act 1997).

⁵⁰⁵ Section 100R(2) of the RF Act 1997.

⁵⁰⁶ Section 100Q of the RF Act 1997.

Throughout the exhibition period of the draft 10/50 Clearing Code and debate surrounding the amendments to the RF Act 1997, environmental groups expressed concerns regarding the potential impact of the 10/50 clearing laws on high conservation value native vegetation and endangered ecological communities in rural and non-rural areas. Other issues concerned the interaction between the proposed changes and the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#), and the increased risk of non-compliance due to an absence of formal approval processes.⁵⁰⁷

The [10/50 Clearing Code](#) commenced on 1 August 2014, after a public consultation period from 1 to 21 July 2014. RFS Deputy Commissioner Rob Rogers stated that the changes were necessary to protect homes and fire fighters in the lead up to a potentially devastating bush fire season.⁵⁰⁸

On one hand, the amendments to the RF Act 1997 and the new 10/50 Clearing Code were welcomed by some MPs from electorates at risk from bushfires, such as Hornsby,⁵⁰⁹ Goulburn,⁵¹⁰ the Blue Mountains⁵¹¹ and Tamworth.⁵¹²

On the other hand, Local Government NSW (LGNSW) indicated in a [media release](#) that it considered the laws to be premature and rushed.⁵¹³ LGNSW President, Cr Keith Rhoades AFSM, said that:

Councils have complained that they are still unable to access maps for their entire Local Government Area (LGA) or even composite suburbs or precincts.

Others have noted that the online tool does not seem to pick up listed Environment Protection and Biodiversity Conservation Act 1999 vegetation communities or species. Fears have been expressed that large tracts of land will be stripped out.

Further, there is confusion as to whether the existing hazard complaint process based on assessed risk and the environmental assessment code will continue to apply, or whether it will now be based on the 10/50 entitlement area.

These laws could possibly open a can of worms for NSW councils with eligible home owners using the 10/50 Code to unnecessarily clear valuable vegetation

⁵⁰⁷ See, for instance, NSW Environmental Defenders Office, [Submission on Draft 10/50 Vegetation Clearing Code of Practice](#), 21 July 2014.

⁵⁰⁸ ABC Rural, NSW Country Hour, "[NSW Bushfire clearing rules and fines come into force says RFS Deputy Commissioner Rob Rogers](#)", page last updated 4 August 2014 [online – accessed on 15 October 2014].

⁵⁰⁹ Hornsby Advocate, "Bushfire laws clear way for owners", 7 August 2014, p. 17.

⁵¹⁰ Post Weekly Goulburn, 'Clearing red tape helps clear bushfire risk: MPs', 7 August 2014, p. 7.

⁵¹¹ Blue Mountains Gazette, 'New bushfire clearing laws in play', 6 August 2014, p. 1.

⁵¹² Namoi Valley Independent, 'Fire season brings new tree clearance laws', 5 August 2014, p. 2.

⁵¹³ Local Government NSW, Media Release, "[LGNSW believe Vegetation Clearing Laws to be premature](#)", 22 August 2014.

simply to improve their views rather than to improve fire protection.⁵¹⁴

At the end of August 2014, a number of media outlets reported residents in suburbs such as Pittwater, Mosman, Lane Cove and Beecroft cutting down trees at a high rate in reliance upon the new 10/50 Clearing Code, suggesting that the trees were being felled to improve views.⁵¹⁵ The RFS has reportedly stated it will consider amendments to the 10/50 clearing laws,⁵¹⁶ and will consult further with local councils and other concerned parties.

6. CURRENT DEVELOPMENTS CONCERNING NATIVE VEGETATION REGULATION

6.1 Constitutional challenge

In June 2007, Mr Peter Spencer, the owner of a farm at Shannons Flat, NSW, commenced proceedings against the Commonwealth Government in the Federal Court of Australia.

In broad terms, Mr Spencer claims that some or all of his interests in his farming land were acquired, other than on just terms, when prohibitions on clearing native vegetation on his land were imposed under the NVC Act 1997 and the NV Act 2003.⁵¹⁷ He also asserts that the Commonwealth acquired, other than on just terms, the carbon credits provided by the native vegetation on his property, and is using them to meet its commitments under the *United Nations Framework Convention on Climate Change*.⁵¹⁸ The link between the Commonwealth Government and the NSW native vegetation legislation is alleged to arise through a series of agreements entered into by the Commonwealth and NSW Governments, and two Commonwealth laws authorising entry by the Commonwealth Government into the agreements.⁵¹⁹

Mr Spencer's claims were summarily dismissed by Justice Emmett of the Federal Court, without a full hearing, on the basis that he had no reasonable prospect of successfully prosecuting the proceedings.⁵²⁰ Mr Spencer appealed to the Full Court of the Federal Court against Justice Emmett's summary dismissal of his case. The Full Court dismissed his appeal.⁵²¹ He then appealed to the High Court against the summary dismissal of his case.⁵²²

⁵¹⁴ Local Government NSW, Media Release, "[LGNSW believe Vegetation Clearing Laws to be premature](#)", 22 August 2014.

⁵¹⁵ See for instance, Sydney Morning Herald, "[Bushfire laws used to increase waterfront views](#)", 24 August 2014.

⁵¹⁶ Sydney Morning Herald, "[Rural Fire Service considers review of urban bush clearing laws](#)", 31 August 2014.

⁵¹⁷ *Spencer v The Commonwealth of Australia* [2010] HCA 28 at [43].

⁵¹⁸ *Ibid.*

⁵¹⁹ *Ibid* at [44].

⁵²⁰ *Spencer v The Commonwealth of Australia* [2008] FCA 1256 at [212].

⁵²¹ *Spencer v The Commonwealth of Australia* [2009] FCAFC 38.

⁵²² *Spencer v The Commonwealth of Australia* [2010] HCA 28.

Between the rulings of Justice Emmett and the Full Court of the Federal Court, the High Court in a different decision, [ICM Agriculture Pty Ltd v The Commonwealth \[2009\] HCA 51](#), ruled that the Commonwealth Government's power under sections 96 and 51(xxxvi) of the [Constitution](#) does not extend to providing grants to State Governments on terms and conditions requiring the State to acquire property other than on just terms.⁵²³ The High Court held that in light of the *ICM* decision, it could not be said that Mr Spencer's case before the Federal Court had no reasonable prospects of success and set aside Justice Emmett's order for summary dismissal.⁵²⁴

In doing so, the High Court was not indicating that Mr Spencer had a strong case.⁵²⁵ Indeed, there are many complex issues of constitutional law, beyond the ambit of this paper, which will need to be resolved when the Federal Court proceedings are resumed.⁵²⁶

The matter is listed for hearing before the Federal Court on 25 November 2014.

6.2 Self-Assessable Codes March 2014

The self-assessable codes for certain RAMAs proposed as part of the reform of the native vegetation regulations were not issued with the publication of the NV Regulation 2013 in September 2013.

In March 2014, the NSW OEH exhibited three proposed self-assessable codes:

- a [Draft Invasive Native Species \(INS\) Code](#);
- a [Draft Clearing Isolated Paddock Trees Code](#); and
- a [Draft Thinning of Native Vegetation Code](#).⁵²⁷

Both environmental groups and farmers' groups have criticised the draft codes. The NSW EDO, which published its [submission](#) on the codes on its own website, expressed concern with the following matters:

- The draft codes are not capable of being effectively applied, monitored and enforced, and therefore are not capable of adequately implementing the "maintain or improve environmental outcomes" test required under the NV Act 2003;
- The lack of any limit on the number of notifications allowed under each clearing type, with the implication that significant areas can be progressively cleared by submitting multiple notifications. Misuse of the

⁵²³ [ICM Agriculture Pty Ltd v The Commonwealth \[2009\] HCA 51](#) at [46].

⁵²⁴ [Spencer v The Commonwealth of Australia \[2010\] HCA 28](#) at [34]-[35].

⁵²⁵ *Ibid* at [34].

⁵²⁶ See Stephen Lloyd, [Compulsory Acquisition and Informal Agreements: Spencer v Commonwealth](#) (2011) 33(1) *Sydney Law Review* 137.

⁵²⁷ A number of submissions were received, but at the time of writing these have not been made available on the NSW OEH website.

codes in this way would potentially reintroduce broadscale clearing to NSW;

- The potential for misapplication of the codes is high in the absence of technical input, as the effective implementation of the codes requires a high degree of technical knowledge; and
- The codes will be difficult to enforce, given the inadequate requirements for expert input, record keeping and notification and the vague nature of many of the provisions.⁵²⁸

The EDO acknowledged the present PVP process was never intended to take months to negotiate.⁵²⁹ However, the EDO recommended that instead of adopting the self-assessable codes, the Government should improve the current EOAM and PVP process by providing better resources and staff to Local Land Services so that PVPs can be processed more efficiently. This would mean that the activities proposed to be covered in the draft codes could be implemented via PVPs much faster, without compromising environmental objectives.⁵³⁰

In a [media release](#) the NSW Farmers' Association rejected the draft codes.⁵³¹ It was concerned that most farmers would find the codes frustrating, unworkable and difficult to understand, and that a broader review of the NV Act 2003 was required.⁵³² The Association expressed frustration with the lack of progress on a comprehensive review of the legislation.

As at 15 October 2014, the self-assessable codes are yet to be finalised. A summary report on the submissions made on the draft codes is currently being prepared.⁵³³

6.3 Native Vegetation Amendment Bill 2014

On 29 May 2014, Robert Brown MLC of the NSW Shooters and Fishers Party introduced the [Native Vegetation Amendment Bill 2014](#). The Bill will, if passed, decrease restrictions on clearing native vegetation.

Objects of the Bill include amending the NV Act 2003 to:

- (a) Modify the current controls on clearing native vegetation so that they only apply to the clearing of indigenous trees;

⁵²⁸ NSW Environmental Defenders Office, [Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the Native Vegetation Regulation 2013](#), May 2014 at pp. 3-4.

⁵²⁹ Ibid.

⁵³⁰ Ibid.

⁵³¹ NSW Farmers' Association, "[NSW Farmers rejects native veg codes](#)", Media Release PR/020/14, 27 March 2014 [online – accessed 3 September 2014].

⁵³² Ibid.

⁵³³ NSW OEHS, "[Native Vegetation](#)", last updated 26 August 2014 [online – accessed 15 October 2014].

- (b) Provide that broadscale clearing of native vegetation may be carried out only if the clearing is in the social, economic and environmental interest of the region in which it is carried out rather than, as is presently the case, if it improves or maintains environmental outcomes;
- (c) Ensure that the objects of the NV Act 2003 are pursued in order to promote the social, economic and environmental interests of the State; and
- (d) Reduce the penalties for unauthorised clearing of native vegetation and for certain other offences under the NV Act 2003.⁵³⁴

The Bill was introduced, in part, as a result of perceived inaction by the Government on a review of the NV Act 2003 and the dissatisfaction amongst landholders with the limited changes made by the NV Regulation 2013.⁵³⁵

The Bill proposes to modify the objects of the NV Act 2003. Currently, section 3(b) of the Act embodies the object to “prevent broadscale clearing unless it improves or maintains environmental outcomes”. This would be altered to “prevent broadscale clearing unless it is in the social, economic and environmental interests of the region in which it is carried out”.⁵³⁶ Similarly, the words “in accordance with the principles of ecologically sustainable development” in section 3 (as a general qualifier applicable to all objects of the NV Act 2003) would be replaced with the words “in order to promote the social, economic and environmental interests of the State”.⁵³⁷ The Bill also proposes other changes to the objects to shift the focus to *involving landowners in* improving the condition of existing native vegetation of high conservation value.⁵³⁸

In line with the proposed amendments to the objects of the NV Act 2003, the Bill proposes to change the test to be applied when determining both development applications and applications for PVPs for broadscale clearing. The “improve or maintain environmental outcomes” test would be replaced with a requirement that the clearing be in the social, economic and environmental interests of the region in which it is carried out.⁵³⁹ According to the [Second Reading speech of the Bill](#), the shift in focus from the “improve or maintain environment outcomes” test to the “social, economic and environmental interests of the region” reflects landholders’ desire for a “triple bottom line” test, rather than one based on purely ecological factors.⁵⁴⁰

A number of new definitions are also proposed by the Bill. The definition of “native vegetation” would change to “any indigenous tree”, being a tree of a

⁵³⁴ Native Vegetation Amendment Bill 2014, [Explanatory Note](#) at p. 1.

⁵³⁵ [NSW PD](#), 29 May 2014, p. 29374.

⁵³⁶ Native Vegetation Amendment Bill 2014, Schedule 1 [1].

⁵³⁷ Native Vegetation Amendment Bill 2014, Schedule 1 [3].

⁵³⁸ Native Vegetation Amendment Bill 2014, Schedule 1 [2].

⁵³⁹ Native Vegetation Amendment Bill 2014, Schedule 1 [13] and [19].

⁵⁴⁰ [NSW PD](#), 29 May 2014, p. 29374.

species that existed in NSW before European settlement.⁵⁴¹ A “tree” would be defined as a large perennial woody plant that usually has one main trunk, “a number of branches and a crown of foliage.”⁵⁴² Through these amendments, the Bill would effectively change the NV Act 2003 so as to not apply to indigenous understorey plants or groundcover.⁵⁴³

A further key change is redefining “broad-scale clearing” as “the non-selective clearing of large areas of remnant native vegetation”, specifically excluding the clearing of single trees on a selective basis.⁵⁴⁴ The concept of “protected regrowth” would be removed from the NV Act 2003.⁵⁴⁵

The Bill also proposes to extend available RAMAs. The RAMA exemptions would be extended to include any activity reasonably considered necessary to remove or reduce the risk of any serious personal injury or damage to property.⁵⁴⁶ Currently, only “imminent” risks are covered by this exemption. The Bill also proposes to include new RAMA exemptions for undertaking reasonably necessary drought preparation or recovery measures, activities necessary to control non-indigenous species of vegetation, and clearing which is reasonably necessary to comply with the *Work Health and Safety Act 2011*.⁵⁴⁷

Finally, the Bill also proposes to modify the penalties and enforcement provisions of the NV Act 2003. For instance, the current maximum penalty under section 126 of the EP&A Act 1979 (10,000 penalty units, or \$1,100,000) would be replaced with a lesser maximum penalty of 1,000 penalty units (\$110,000).⁵⁴⁸ Other amendments would permit a person to refuse to provide information if it may tend to incriminate that person,⁵⁴⁹ and would require any proceedings for an offence under the NV Act 2003 or the NV Regulation 2013 to be brought within two years of the date on which the offence is alleged to have been committed.⁵⁵⁰ Currently, proceedings for offences may be commenced within two years of the date on which evidence of the alleged offence first came to the attention of an authorised officer.⁵⁵¹

The [NSW Farmers' Association](#) has applauded the introduction of the Bill, which it considers would provide “balanced protection of the environment against the social and economic benefits of productive agriculture”.⁵⁵² The Association

⁵⁴¹ Native Vegetation Amendment Bill 2014, Schedule 1 [6].

⁵⁴² Native Vegetation Amendment Bill 2014, Schedule 1 [5].

⁵⁴³ Native Vegetation Amendment Bill 2014, [Explanatory Note](#) at p. 2.

⁵⁴⁴ Native Vegetation Amendment Bill 2014, Schedule 1 [7].

⁵⁴⁵ Native Vegetation Amendment Bill 2014, Schedule 1 [4] and [9].

⁵⁴⁶ Native Vegetation Amendment Bill 2014, Schedule 1 [10] and [Explanatory Note](#) at p. 3.

⁵⁴⁷ Native Vegetation Amendment Bill 2014, Schedule 1 [11] and [17].

⁵⁴⁸ Native Vegetation Amendment Bill 2014, Schedule 1 [12].

⁵⁴⁹ Native Vegetation Amendment Bill 2014, Schedule 1 [22].

⁵⁵⁰ Native Vegetation Amendment Bill 2014, Schedule 1 [25].

⁵⁵¹ Section 42(4) of the NV Act 2003.

⁵⁵² NSW Farmers' Association, [“Farmers support sensitive native vegetation bill”](#), Media Release, PR/040/14, 29 May 2014 [online – accessed 3 September 2014].

particularly praised the proposal to remove the application of the NV Act 2003 from the felling of single trees.⁵⁵³ The Association, however, expressed continued frustration with the lack of meaningful progress on a full overhaul of the NV Act 2003 and indicated that the Bill would not take away all farmers' issues with the current legislation.⁵⁵⁴

Jeff Angel from the Total Environment Centre has criticised support shown by the Nationals for the Bill in light of the current independent review into biodiversity legislation, including the NV Act 2003 (see below).⁵⁵⁵ Peter Cosier, Dr John Williams and Professor Leslie Hughes of the Wentworth Group stated in an [article in the Sydney Morning Herald on 17 September 2014](#) that:

If legislation introduced by the Shooters and Fishers Party to open up land clearing across NSW is passed, the benefits of the independent review will be lost, and with it, the option of a better way forward.

Dr Mehreen Faruqi MLC of the NSW Greens, in a [media release](#), argued that the Bill would lead to a return to broadscale clearing in NSW.⁵⁵⁶ According to Dr Faruqi, farms with good native vegetation management can improve land value, increase production outcomes and reduce operating costs.⁵⁵⁷ NSW Greens agricultural spokesperson Jeremy Buckingham was quoted as saying “this is massive overreach and the last thing farmers in NSW need is a return to broad-scale land clearing and a new war over native vegetation”.⁵⁵⁸

Nationals' MP Kevin Humphries, Minister for Natural Resources, Lands and Water, has indicated he would support the Bill, subject to amendments, if it reaches the Legislative Assembly. He was quoted in a [Sydney Morning Herald article](#) on 25 August 2014 as saying:

If the bill passed, and it came to the lower house, where we could amend [it]... it would give everyone protection...It would allow landholders to get on and do some of the work they want to do. The government hasn't landed on that but it's the preference from my end, and certainly the rural constituency's [view].⁵⁵⁹

Debate on the Bill resumed briefly in the Legislative Council on 11 September 2014. Duncan Gay MLC, speaking for the Government, stated that:

I congratulate the Hon. Robert Brown on introducing the Native Vegetation Amendment Bill 2014. I know a lot of members are concerned about this area of legislation. The Government sees some merit in the bill and some problems in

⁵⁵³ Ibid.

⁵⁵⁴ Ibid.

⁵⁵⁵ ABC News, NSW Country Hour, “[Shooter's native vegetation amendment bill is a thorn in the side of NSW politics](#)”, 26 August 2014 (27 August 2014).

⁵⁵⁶ Dr Mehreen Faruqi, [NSW to Return to Broadscale Clearing under Proposed Native Veg Bill](#), Medial Release, 29 May 2014.

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

⁵⁵⁹ Sydney Morning Herald, “[Native vegetation bill a seed of contention](#)”, 25 August 2014.

it. This bill was put together in good faith some time ago, before a tragedy occurred in this State. The Government's concerns with the bill are with its content and not the circumstances around the bill since it was put together.

It is interesting that the bill has been supported by NSW Farmers. The honourable member worked with NSW Farmers in developing the bill. I congratulate the honourable member on that collaboration ... As I said earlier, the Government thinks some parts of this bill are good and that other parts are missing. The Government believes that some parts are wrong and need more work. The Government believes we need to review the bill and come back for a meaningful debate.⁵⁶⁰

Mr Gay then adjourned debate on the Bill.

6.4 Biodiversity Offsets Policy

In September 2014, the OEH released the [Biodiversity Offsets Policy for Major Projects](#).⁵⁶¹ The policy principally applies to proponents for major projects (such as highways, mines and hospitals) who wish to utilise biodiversity offsets as part of the biodiversity impact assessment of those projects.⁵⁶²

Part of the policy involves the establishment of a NSW Biodiversity Offsets Fund. Proponents will be able to satisfy their offset requirements via a monetary contribution to the Fund, and the Fund will then purchase offsets from landholders on proponents' behalf. Until the Fund is fully operational an interim fund will be in place.⁵⁶³

The Fund is intended to provide a way for landholders to receive income by managing biodiversity well on their own land, essentially as stewardship payments.⁵⁶⁴

Minister for the Environment, Rob Stokes MP, stated in a ministerial media release:

Our aim is to use offsets as an opportunity for landholders to diversify their income and ensure they are a genuinely integrated part of the landscape.

The move was welcomed by the NSW Farmers Association, which saw it as a way to decrease tensions between farmers and mining companies.⁵⁶⁵

⁵⁶⁰ [NSW PD](#), 11 September 2014, p. 21.

⁵⁶¹ Rob Stokes MP, Minister for the Environment, Pru Goward MP, Minister for Planning, "[The Environment, Farmers and Industry to Benefit from New Offsets Policy](#)", Ministerial Media Release, 8 September 2014.

⁵⁶² NSW OEH, "[NSW Biodiversity Offsets Policy for Major Projects](#)", last updated 1 October 2014 [online – accessed 7 October 2014].

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

⁵⁶⁵ Australian Financial Review, "NSW biodiversity offset fund comes in peace", 8 September 2014, p. 7.

Environmental interest groups, whilst supportive of measures providing incentives to landholders to preserve biodiversity, were concerned about the potential for developers to simply “throw money” into the biodiversity fund rather than properly identifying appropriate offset sites; the shift in responsibility for offsets moving from developers to the administrator of the Fund was also identified as an issue of concern.⁵⁶⁶

6.5 2014 Biodiversity Legislation Review

In June 2013 Deputy Premier Andrew Stoner MP announced that the Government would be undertaking a comprehensive review of NSW’s biodiversity legislation, including the NV Act 2003.⁵⁶⁷ The purpose of the review is to improve the current legislative framework, viewed by the Government as a “patchwork of laws that is fragmented, often rigid and overly complex”.⁵⁶⁸ The [NSW OEH’s website](#) states that:

The current laws do not deliver balanced outcomes across the NSW Government’s environmental, social and economic objectives. The laws also no longer link coherently with emerging laws and policies.

While each piece of legislation has been subject to many separate amendments, a major holistic review of the native vegetation and biodiversity legislation in NSW has never been undertaken and the Government considers that such a review is necessary to achieve the Government’s goals and policy objectives.⁵⁶⁹

The stated aims of the review are to establish simpler, streamlined and more effective legislation that will facilitate the conservation of biological diversity, support sustainable development and reduce red tape.⁵⁷⁰

The review will also be guided by the broader goals and reform directions set out in [NSW 2021](#), the [2012 Commission of Audit](#), and the [OEH Corporate Plan 2014-2017](#), including:

- A focus on devolution to regional and local levels;
- Minimising the private costs and maximising the public benefits of regulation;
- Encouraging economic development, including by supporting regional and rural communities without devaluing the environment and biodiversity; and

⁵⁶⁶ Sydney Morning Herald, “[Miners, developers get environmental damage leeway](#)”, 8 September 2014 [online – accessed 7 October 2014]; NSW EDO, [Submission on the Draft NSW Biodiversity Offsets Policy for Major Projects](#), May 2014, pp. 19-20.

⁵⁶⁷ Sydney Morning Herald, “[Land-clearing Laws set for shake-up](#)”, 14 June 2013.

⁵⁶⁸ Andrew Stoner MP, Deputy Premier of NSW, and Robyn Parker MP, Minister for Environment and Heritage, “[NSW Government Announces Changes to Native Vegetation Regulation](#)”, Ministerial Media Release, 14 June 2014.

⁵⁶⁹ NSW OEH, “[Biodiversity legislation review terms of reference](#)”, last updated 18 June 2014 [online - accessed 26 August 2014].

⁵⁷⁰ Ibid.

- Building resilience to environmental hazards and risks.

The review is being undertaken by an independent panel appointed by the Minister for the Environment. It will consider the [NV Act 2003](#), the [Threatened Species Conservation Act 1995](#), the [Nature Conservation Trust Act 2001](#), and Part 4 Divisions 11 to 13, Part 6A (insofar as it relates to native plants and animals), and Parts 7 to 9 of the [National Parks and Wildlife Act 1974](#). The review will also encompass all associated regulations and policies under these Acts.⁵⁷¹

The panel will evaluate the current legislative framework (including whether or not the current objectives remain valid and whether the policy framework reflects best practice), the evidence base for government intervention (including the status, trends and pressures on native vegetation, biodiversity and ecological processes), and will propose new legislative arrangements for biodiversity conservation in NSW.⁵⁷²

The review panel published its [Issues Paper](#) for public consultation on 6 August 2014. The Issues Paper was framed around six major themes of the legislation:

- Objects and principles for biodiversity conservation;
- Conservation action;
- Conservation in land use planning;
- Conservation in development approval processes;
- Wildlife management; and
- Information provisions.

Dr Neil Byron, a member of the independent panel conducting the review has indicated that the review will place emphasis on local knowledge.⁵⁷³ Speaking with ABC Radio, he has also emphasised the contentious nature of the issues involved:

It is difficult to please farmers and environmentalists who are diametrically opposed, but maybe we need to look at solutions where no one group gets everything they want.

It is also a very complex area affecting land clearing, biodiversity, and affecting several tiers of government, from local, state, federal and even international climate or carbon protocols or United Nations treaties.⁵⁷⁴

Dr Byron has also indicated that an outcome of the review may include recommendations that the broader community should pay for the benefits that

⁵⁷¹ NSW OEH, "[Biodiversity legislation review terms of reference](#)", last updated 18 June 2014 [online - accessed 26 August 2014].

⁵⁷² Ibid.

⁵⁷³ The Land, "[Leading with an ambition to clean up the Act](#)", 25 August 2014.

⁵⁷⁴ ABC News, "[Independent panel to review NSW environment laws](#)", 22 August 2014.

arise when by farmers set aside productive land.⁵⁷⁵ He suggested such payments might involve expanding biodiversity offset schemes, offering landholders reductions in council rates, or greater government payments to landholders who set aside land.⁵⁷⁶

Political debate surrounding the Biodiversity Review and the Shooters and Fishers [Native Vegetation Amendment Bill 2014](#) increased in August 2014, following the death of NSW OEH conservation officer, Mr Glen Turner, on 29 July 2014. Mr Turner was allegedly shot by landholder Mr Ian Turnbull. Reports on the circumstances surrounding the shooting differ, but Mr Turner was ostensibly attempting to serve Mr Turnbull with a notice pertaining to illegal clearing of native vegetation on his properties near Moree.⁵⁷⁷ The NSW OEH had prosecuted Mr Turnbull in the Land and Environment Court, where he pleaded guilty to clearing native vegetation on his properties without approval.⁵⁷⁸

Submissions on the Issues Paper closed on 5 September 2014 and have now been published on the NSW OEH's [website](#).

The NSW Farmers Association's [submission](#) maintained the Association's longstanding view that a complete overhaul of the native vegetation framework and legislation was required. Their principal recommendations include:

- Enacting legislation which balances conservation of biodiversity and the social and economic benefits of productive land use, including by replacing the "improve or maintain" test with a "triple bottom line" test;
- Abolishing prescriptive property-by-property PVPs in favour of regional plans which could set boundaries for landscape environmental management and enable Local Land Services (LLSs) to work with farmers to achieve common objectives;
- A best practice environmental stewardship code with incentives and support for participating landholders;
- Strong emphasis on self-assessment for development within the parameters of the landscape plan, with support from LLSs; and
- The removal of native grasses from vegetation laws.⁵⁷⁹

⁵⁷⁵ Sydney Morning Herald, "[Pay farmers to save threatened species: expert](#)", 3 October 2014, accessed online – 7 October 2014.

⁵⁷⁶ Ibid.

⁵⁷⁷ Sydney Morning Herald, "[Tragic end to disputes over illegal land clearing](#)", 30 July 2014.

⁵⁷⁸ Mr Turnbull pleaded guilty to the charge of unlawful clearing, but disputed the extent of the clearing alleged by the OEH. The OEH adduced expert evidence to the effect that approximately 494 ha had been cleared unlawfully. Mr Turnbull's expert asserted that only 38.7 ha had been cleared. In a decision handed down on 19 September 2014, Justice Sheahan found that 38.7 ha had been cleared, not 494 ha. Mr Turnbull was convicted and fined \$140,000.00, plus the OEH's reasonable costs of the proceedings (see [Chief Executive of the OEH, Department of Premier and Cabinet v Turnbull \[2014\] NSWLEC 150](#)).

⁵⁷⁹ NSW Farmers' Association, "[NSW Farmers Submission to the Independent Biodiversity](#)

The Wentworth Group of Concerned Scientists in its [submission](#) indicated that there is substantial evidence that the NV Act 2003 has been successful in addressing several issues. However, it raised a number of issues that require examination, including:

- In terms of RAMA exemptions under the NV Act 2003, the Act was never intended to restrict clearing of all native vegetation and provision was made for exemptions for routine agricultural management activities. The question remains, however, whether these exemptions have been successful in helping farmers to efficiently manage their business, or conversely, whether the exemptions have resulted in clearing of large areas of protected regrowth or remnant native vegetation;
- Only a very small proportion of clearing has been carried out under PVPs and PVP uptake has been slow. This suggests there may be barriers in the operation of the legislation which is discouraging landholders from developing a PVP;
- There have been assertions that the native vegetation framework is having an adverse impact on agricultural production across NSW, but the Group was not aware of any analysis of the long-term opportunity costs to farming operations attributable to native vegetation laws in NSW;
- In terms of PVP approval timeframes, the intention of the software was to enable local authorities to assist landholders quickly reach an understanding on whether a PVP was required, and if so, what offsets would be most effective. If there is evidence of significant delays, a review of administrative arrangements is encouraged; and
- It was a goal of the 2003 reforms that public funding would be made available through an Incentive PVP. What is unknown is the level of public funding provided as part of these reforms in 2003 that is still available to farmers to encourage conservation and management of native vegetation on their properties.⁵⁸⁰

In addition to making individual submissions, the NSW Farmers Association and the Environmental Liaison Office (ELO)⁵⁸¹ were also commissioned by the independent review panel to provide detailed reports.

The [ELO report](#) was strongly in favour of strengthening existing biodiversity regulatory frameworks to arrest declining biodiversity in NSW. It identified land clearing and habitat loss as the single biggest cause of biodiversity loss in NSW.⁵⁸² The NV Act 2003 was highly commended for curtailing land clearing,

[Legislation Review Panel](#)”, September 2014, at pp. 7-8

⁵⁸⁰ The Wentworth Group of Concerned Scientists, “[Submission to Biodiversity Legislation Review Panel – Native Vegetation Reforms in NSW](#)”, September 2014, at pp. 6-7.

⁵⁸¹ A group of environmental interest groups including the Total Environment Centre, the Nature Conservation Council and the Wilderness Society.

⁵⁸² Nature Conservation Council, Total Environment Centre, National Parks Association of NSW, the Wilderness Society, *Conserving and Restoring Biodiversity in NSW*, September 2014, at p. 10.

and thereby making a major contribution to preserving the value and productivity of agricultural land and avoiding costs in combating soil erosion and salinization.⁵⁸³ The report stressed the need to avoid weakening the existing framework for native vegetation regulation. Principal recommendations concerning native vegetation in particular included:

- Extending the operation of the NV Act 2003 to include high conservation value regrowth vegetation;
- Apply the ‘maintain or improve’ methodology of the NV Act 2003 assessment process to all development applications;
- Consideration of the ‘costs’ to landowners of protecting ecosystem services and biodiversity should be balanced by considering the benefits that accrue directly to landowners by maximising the productivity and value of their land. Any additional payments to landowners should discount speculative views about increased (short term) income but rather focus on whether a property is better managed for the long term;
- Retain the ‘improve or maintain’ approach under the EOAM. Reverse recent weakening of the NV Regulation 2005;
- Retain and strengthen protection of native vegetation and habitat under the NV Act 2003, *Threatened Species Conservation Act 1995*, and the EP&A Act 1979. Buy out grandfathered clearing approvals⁵⁸⁴ and limit exemptions. Increase resources for compliance activities and prosecution of illegal clearing and other development.⁵⁸⁵

The ELO also expressed their deep concern with the short time frame over which the review was required to be conducted. The report called on the Government to extend the review process to allow the panel sufficient time to gather evidence, evaluate information and provide a detailed and comprehensive response.⁵⁸⁶

The EDO provided a separate [legal assessment of NSW biodiversity legislation](#) to the panel. The report found that failure to achieve legislative objectives is largely due to lack of resourcing and coordination for implementation, rather than inadequate legislation.⁵⁸⁷ Many of the report’s recommendations concerning the NV Act 2003 overlapped with those made by the ELO in its report. Additional recommendations included:

- Appropriately limit the use of RAMAs and balance any expansion of RAMAs with notification and practical record-keeping requirements;

⁵⁸³ Ibid at p. 17.

⁵⁸⁴ That is, clearing approvals granted under previous legislation and that have been granted transitional protection under new legislation.

⁵⁸⁵ Ibid at pp. 5-9.

⁵⁸⁶ Ibid at p. 11.

⁵⁸⁷ NSW EDO, *A legal assessment of NSW biodiversity legislation – A report prepared for the Independent Biodiversity Legislation Review Panel*, September 2014, at p. 1.

- Put in place processes for monitoring and data collection in relation to the proposed changes in order to assess whether activities continue to meet the objectives of the NV Act 2003 and cumulative impacts are assessed;
- Provide LLSs with additional resources and training to increase capacity to make PVPs in a more timely manner;
- Provide LLSs with additional resources and staff with expertise in communications;
- Have a clearer separation of roles with OEH/EPA undertaking compliance activities and LLSs focussing on extension, incentives and cooperative work with farmers;
- Insert a new object into the Act to expressly recognise the contribution of broadscale clearing to climate change as well as the important role played by native vegetation as carbon sinks;
- Improve monitoring of illegal clearing and exempt clearing; and
- Strengthen innovative court order provisions and remediation orders.⁵⁸⁸

The NSW Farmers' Association commissioned an evidence based report on the NV Act 2003 from Evidentiary Pty Ltd, to be provided to the independent review panel. The research focused on three key areas of concern for the Association's members:

1. What has worked and what has not worked in regard to the Act achieving triple bottom line outcomes
2. Evidence regarding the use of a more community based approach to regional native vegetation management
3. The process and any barriers for landholders in applying for a PVP.

Evidentiary Pty Ltd's [report](#) made the following findings:

- The NV Act 2003 has not met its objective of managing native vegetation on a regional basis in the social, economic and environmental interests of the State;
- More flexibility is needed to enable LLS staff and landholders to manage native vegetation in a regionally appropriate and practically workable manner;
- More landholders who had applied for a PVP found the overall process acceptable than not; however many landholders did not consider applying for a PVP because they distrust government intentions; and
- The adversarial approach of the Act has caused stress and anxiety for many of those involved in its implementation.⁵⁸⁹

⁵⁸⁸ NSW EDO, *A legal assessment of NSW biodiversity legislation – A report prepared for the Independent Biodiversity Legislation Review Panel*, September 2014, at p. 20.

The independent review panel is due to provide an interim report to the Minister in October 2014, with a final report in December 2014.⁵⁹⁰

7. RECENT DEVELOPMENTS AT THE FEDERAL LEVEL

As at 2012, there were some 61 national frameworks, policies and initiatives and 11 international agreements and initiatives touching on biodiversity and native vegetation management.⁵⁹¹ These included:

- The [Convention on Biological Diversity](#) (1993);
- The [United Nations Convention to Combat Desertification](#) (1992);
- [Australia's Biodiversity Conservation Strategy 2010-2030](#);
- The [Intergovernmental Agreement on the Environment](#) (1992);
- The [COAG Heads of agreement on Commonwealth and State roles and responsibilities for the Environment](#) (1997); and
- [Australia's Strategy for the National Reserve System 2009-2030](#).

This section of the paper provides a brief overview of selected key recent developments and reports concerning native vegetation at a federal level.

Two important reports to note briefly are the 2004 Productivity Commission's [Report](#) into the impacts of native vegetation and biodiversity regulations and the 2006 Australian Bureau of Agricultural and Resource Economics (ABARE) [Report](#) on the impacts of native vegetation regulation on productivity and returns on native vegetation. A summary of these reports is provided in parts 6.1 and 6.2 of Stewart Smith, [Native Vegetation: An Update](#), Briefing Paper No. 6/06, NSW Parliamentary Research Service, May 2006.

7.1 Senate Finance and Public Administration References Committee Inquiry 2010

On 4 February 2010, the Senate referred to the Finance and Public Administration References Committee for inquiry and report on the impact of native vegetation laws and legislated greenhouse gas abatement measures on landholders. The committee considered the native vegetation management legislative regimes of all the States.

In its [report](#) published in April 2010, the committee drew the following conclusions:

⁵⁸⁹ Evidentiary Pty Ltd, *Review of the Native Vegetation Act 2003 – an evidence based review*, 2014, at pp. 3-4.

⁵⁹⁰ NSW OEH, "[Biodiversity Legislation Review](#)", undated, [online - accessed 10 September 2014].

⁵⁹¹ COAG Standing Council on Environment and Water, [Australia's Native Vegetation Framework](#), 2012, at pp. 80-85.

-
- There are legitimate concerns about the impact of the current native vegetation laws on a small group of Australians, namely landholders in regional Australia. In the committee's view, it is unreasonable that the burden of broad environmental objectives is borne by a small number of Australians;
 - Australia currently enjoys substantial environmental benefits that are the result of preservation, management and restoration efforts conducted by agriculturalists and pastoralists;
 - Recently, laws focused on preventing broadscale land clearing have become much more specific and involve a greater degree of government and bureaucratic control over the use and management of private land;
 - A significant burden of this change has been borne by those involved in agricultural or pastoral activities. The burden is not limited to economic or financial issues, but also encompasses personal and family costs;
 - There is substantial scope to improve the operation of these laws to the satisfaction of all stakeholders and to reduce these personal costs;
 - There is also an apparent lack of trust and cooperation between affected landowners and various State Government agencies in the planning, implementation, management and enforcement of native vegetation laws;
 - The committee considered that it is in the best interests of all concerned that the processes involved are built upon trust, cooperation and understanding to achieve outcomes that protect the environment generally but at the same time maintain secure and sustainable food production in Australia; and
 - In terms of potential compensation to landholders:
 - The committee did not consider government regulation of the use of private land was necessarily inappropriate, however, it stressed that there is a point at which regulation may be so comprehensive as to diminish the value of the land to the landholder. In these circumstances, consideration should be given to compensation;
 - Where the community has a need for a private asset, then the cost of acquiring that should be borne by the community;
 - Where future regulation reflects an outcome desired by the broader community, and the costs of this are to be borne by the landholder, the committee considered that the Productivity Commission's recommendations in its 2004 Report concerning compensation provide an equitable basis for compensation payments for landholders; and

- Where the cost of compensation for past regulatory actions is prohibitive, consideration should be given to reducing the current impediments upon landholders as a remedy.⁵⁹²

The committee made three recommendations:

1. That COAG re-examine the native vegetation legislation with a view to establishing a balance between maximising agricultural production and best practice conservation.⁵⁹³
2. That the Commonwealth initiate, through the Natural Resources Management Ministerial Council, a national review to assess the impact of various native vegetation legislative and regulatory regimes, particularly those at the State level. Matters the committee identified to be specifically addressed in the review included:
 - a. The liability of landholders complying with native vegetation laws for the payment of rates or taxes on land that is not available for productive use;
 - b. The application of state-wide regulations where there are distinct and notable variations in both the environmental conditions and objectives across regions within States;
 - c. The burden of these laws on newer farming areas and communities as opposed to more established ones; and
 - d. The imposition of caveats by State authorities which prevent or restrict the existing use of land in order to preserve native vegetation when converting title from leasehold to freehold.⁵⁹⁴
3. That a review be undertaken of best practice in relation to stewardship initiatives across the country with a view to re-orientating future regulatory activities.⁵⁹⁵

7.2 2012 COAG Australia's Native Vegetation Framework

In 2012, the COAG Standing Council on Environment and Water published [*Australia's Native Vegetation Framework*](#), a national framework to guide the ecologically sustainable management of Australia's native vegetation. The Framework updates the 2001 [*National Framework for the Management and Monitoring of Australia's Native Vegetation*](#). It is intended to guide the actions of State Governments and encourage and support the active involvement of the community and the private sector.⁵⁹⁶ Its purpose is to set national directions to guide actions across government strategies, policies, legislation and programs

⁵⁹² Senate Finance and Public Administration References Committee, [*Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures*](#), April 2010, at pp. 81 to 83

⁵⁹³ Ibid at p. 84.

⁵⁹⁴ Ibid at p. 84.

⁵⁹⁵ Ibid at p. 85.

⁵⁹⁶ COAG Standing Council on Environment and Water, [*Australia's Native Vegetation Framework*](#), 2012, at p. vi.

related to native vegetation management on the Australian continent and its islands.⁵⁹⁷

The Framework's vision is:

Native vegetation across the Australian landscape is managed in an ecologically sustainable way in recognition of its enduring environmental, economic, social, cultural and spiritual values.⁵⁹⁸

Eight threats to native vegetation are identified in the Framework, and goals are prescribed to address these threats. The threats are:

- Loss, fragmentation and degradation of habitat;
- Unsustainable use of natural resources;
- Invasive species;
- Changes to the aquatic environment and water flows;
- Inappropriate fire regimes;
- Urban development;
- Lack of valuation of the environment, in terms of limited understanding or appreciation of our dependence on the environment, whether in economic or social terms, which drives activities such as clearing; and
- Climate change.⁵⁹⁹

The goals set by the Framework to address these threats are:

1. Increase the national extent and connectivity of native vegetation;
2. Maintain and improve the condition and function of native vegetation;
3. Maximise the native vegetation benefits of ecosystem service markets;
4. Build capacity to understand, value and manage native vegetation; and
5. Advance the engagement and inclusion of Indigenous peoples in management of native vegetation.⁶⁰⁰

Targets and outcomes are also identified for each of the five goals. For example, targets for Goal 2 include having developed by 2015 strategic plans for Australia's native vegetation, and by 2025 having realised a net national improvement in the condition of native vegetation.⁶⁰¹ Outcomes for Goal 3 include increasing incentive arrangements and business opportunities to

⁵⁹⁷ Ibid at p. viii.

⁵⁹⁸ Ibid at p. xii.

⁵⁹⁹ COAG Standing Council on Environment and Water, [Australia's Native Vegetation Framework](#), 2012, at pp. 21-22.

⁶⁰⁰ Ibid at pp. 34.

⁶⁰¹ Ibid at p. 35.

encourage and support native vegetation conservation on private land.⁶⁰²

An implementation plan was to be developed through the COAG Standing Council on Environment and Water to align jurisdictions' approaches and set out priorities for the implementation and reporting of the Framework.⁶⁰³ The COAG Standing Council on Environment and Water was to monitor implementation of the framework through a cycle of reporting and review. All jurisdictions were to report to the COAG Standing Council on Environment and Water on qualitative progress towards the goals in the first review phase. In subsequent review phases, reports were to be made on quantitative progress towards targets in line with the review cycle and timelines, to be established by the implementation plan.⁶⁰⁴

On 13 December 2013, COAG replaced its 22 Standing Councils, Select Councils and governance fora with a set of eight Councils and the decision saw the revocation of the Standing Council on Environment and Water. COAG is currently resolving how the Standing Council's existing work will be handled in the future.⁶⁰⁵

On 29 April 2014, the COAG Environment Ministers issued an [Agreed Statement](#), in which the Ministers indicated the next step in environmental regulation reform would be a National Review of Environmental Regulation. The proposed Review is to focus on identifying unworkable, contradictory or incompatible regulation and seeking opportunities to harmonise and simplify regulations.⁶⁰⁶

8. EMERGING AND RECURRING ISSUES

From the foregoing, it is possible to distil a number of themes or tensions that drive public and political debate surrounding the regulation of clearing of native vegetation. Broadly speaking, there now appears to be a general consensus that broadscale clearing of native vegetation is detrimental, from both an holistic environmental perspective and an agricultural productivity perspective. The tension remains, however, focused on the way in which the problem is regulated.

We attempt below to set out some (but by no means all) of the questions and issues that have arisen repeatedly over the course of public debate on native vegetation laws in NSW, and that remain pertinent to the present inquiry:

⁶⁰² Ibid at p. 36.

⁶⁰³ Ibid at p. 78.

⁶⁰⁴ Ibid at p. 79.

⁶⁰⁵ Former Standing Council on Environment and Water, "Landscape and Ecosystem Scale Biodiversity", undated [online – accessed on 15 October 2014].

⁶⁰⁶ Greg Hunt MP, Commonwealth Minister for the Environment, "[Agreed Statement – Environment Ministers meeting](#)", ministerial media release, 29 April 2014.

1. *How should environmental considerations/outcomes be balanced with or against social and economic considerations when determining whether clearing of native vegetation may be carried out?*

The current “improve or maintain environmental outcomes” test has been the subject of much criticism by landholders. This is particularly evident in the NSW Farmers’ Association’s submissions to the 2011 Review of the Native Vegetation Regulation 2005 and the 2014 Biodiversity Review. It is also reflected in the Bill introduced by the Shooters and Fishers Party into the Legislative Council, which proposes amendments to the NV Act 2003 incorporating social and economic considerations into the objects of the Act and as matters required to be considered when determining whether to approve a proposal for clearing or a PVP.

By contrast, environmental groups continue to advocate strongly for keeping the “improve or maintain environmental outcomes” test,⁶⁰⁷ and even suggest that it should be applied to other areas of biodiversity regulation as a best practice principle.⁶⁰⁸ It is also worth noting that the objects of the NV Act 2003 include a reference to the principles of ecologically sustainable development, which requires the effective integration of social, economic and environmental considerations in decision-making processes.⁶⁰⁹

2. *How to ensure the regulatory framework adequately protects native vegetation, whilst providing exemptions from the requirement to obtain approvals in appropriate circumstances?*

This tension has been evident since native vegetation controls of broad application were first introduced through amendments to the *Soil Conservation Act 1938* in 1972.

More recently, it was raised in discussion surrounding the 2009 review of the NV Act 2003, the draft self-assessable codes earlier this year and the extension of RAMA categories in the new NV Regulation 2013. It is also reflected in the Shooters and Fishers Party’s Bill, which seeks to remove groundcover and single trees from the operation of the NV Act 2003.

Landholders maintain that the current arrangements are not sufficiently flexible to deal with single paddock trees, or clumps of trees, thereby inhibiting innovative agriculture techniques and farm productivity.⁶¹⁰ Environmental groups have expressed concern over expanding the

⁶⁰⁷ See, for instance, NSW Environmental Defenders Office, “[Featured Opportunity – Biodiversity Legislation Review](#)”, undated, accessed online on 24 September 2014.

⁶⁰⁸ Nature Conservation Council, Total Environment Centre, National Parks Association of NSW, the Wilderness Society, *Conserving and Restoring Biodiversity in NSW*, September 2014, at pp. 5-9.

⁶⁰⁹ Section 6(2) of the [Protection of the Environment Administration Act 1991](#).

⁶¹⁰ See, for instance, NSW Farmers’ Association, “[NSW Farmers Submission to the Independent Biodiversity Legislation Review Panel](#)”, September 2014, pp. 19-20.

scope of permissible unregulated clearing activities without corresponding monitoring of cumulative impacts.⁶¹¹

3. *The need for cooperation between regulators and landholders, and administrative best practice.*

Delay in processing and complicated administrative procedures have been a constant feature of the debate. It was raised at least as early as the parliamentary debates on the *Hunter Valley Conservation Trust Act 1950*, and it was a significant criticism made of the regime under the *NVC Act 1997* in the Auditor-General's Report in 2002. The 2009 departmental review of the *NV Act 2003* also identified the need to improve administrative practices surrounding PVP assessment and provision of information. It is reflected in the attempts to streamline the assessment process under the *EOAM*, including the insertion of Chapter 8 in 2011, and in the provision of self-assessable clearing codes in 2014.

One of the matters now being considered by the Independent Biodiversity Legislation Review Panel is whether there are opportunities to improve regulatory efficiency, remove duplication and adopt proportionate, risk-based approaches to regulation and compliance.⁶¹²

The [2004 Productivity Commission report](#) concluded that policies that fail to engage the cooperation of landholders will themselves ultimately fail – a reminder of the political realities of legislating in such a contentious area.⁶¹³

4. *Need for more information to inform policy and decision making.*

Regulatory approaches have been hampered by a lack of information with respect to how much native vegetation is being and has been cleared, whether that clearing was lawfully carried out, how much vegetation has been restored, the costs of the regulatory framework on landowners and the value of the wider benefits provided to society obtained by maintaining native vegetation.

Lack of information was identified as an issue in the Auditor-General's Report in 2002, and remains the subject of submissions in the context of the current review.⁶¹⁴

⁶¹¹ See, for instance, NSW Environmental Defenders Office, [Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the Native Vegetation Regulation 2013](#), May 2014 at pp. 3-4; NSW Environmental Defenders Office, ["Featured Opportunity – Biodiversity Legislation Review"](#), undated, accessed online on 24 September 2014.

⁶¹² NSW OEH, ["Biodiversity legislation review terms of reference"](#), last updated 18 June 2014 [online - accessed 26 August 2014].

⁶¹³ Productivity Commission, [Impacts of Native Vegetation and Biodiversity Regulations](#), Report no. 29, Melbourne 2004 at p. XLVI.

⁶¹⁴ See NSW Farmers' Association, ["NSW Farmers Submission to the Independent Biodiversity Legislation Review Panel"](#), September 2014, at pp. 12 and 15-16; The Wentworth Group of Concerned Scientists, ["Submission to Biodiversity Legislation Review Panel – Native Vegetation Reforms in NSW"](#), September 2014, at pp. 6-7.

5. *How should the burden associated with providing public environmental benefits be shared between private landholders and the public?*

A major source of frustration among landholders is that the legislation puts the costs associated with retaining native vegetation almost exclusively on landholders. This issue has been a theme common to parliamentary debates on native vegetation clearing controls, first appearing in the debates on the Hunter Valley Conservation Trust Bill in 1950, and the 1972 and 1986 amendments to the *Soil Conservation Act 1938*.

More recently, this was raised in the NSW Farmers' Association submission on the current review,⁶¹⁵ and is discussed at some length in the 2010 Commonwealth Senate Committee Report, the 2004 Productivity Commission Report and the 2006 ABARE Report. This gives rise to the further question of the extent (if any) to which landholders should be paid (whether through incentives, compensation or otherwise) for providing environmental benefits by retaining and maintaining native vegetation on their properties.⁶¹⁶

⁶¹⁵ NSW Farmers' Association, "[NSW Farmers Submission to the Independent Biodiversity Legislation Review Panel](#)", September 2014, at pp. 10 and 22.

⁶¹⁶ This is discussed at length in Productivity Commission, [Impacts of Native Vegetation and Biodiversity Regulations](#), Report no. 29, Melbourne 2004. See also Pamela O'Connor, "The changing paradigm of regulation as a 'taking'", 36 *Monash U. L. Rev* 50 (2010) at pp. 69 -74.

9. CONCLUSION

This paper has traversed native vegetation clearing controls in a number of statutes from 1881 to the present. Controls have gradually become more extensive, in terms of the types of native vegetation regulated and the amount of the State to which they apply. Today, the clearing of native vegetation is regulated on all rural land in the State, both public and private.

First introduced in 1946, native vegetation clearing controls on private land have provoked substantial debate. Central to this is the question of how the burden of providing public environmental benefits should be shared between private landholders and the public. Other key issues include balancing social, environmental and economic considerations when regulating clearing, and the provision of appropriate exemptions from requirement for development consent. The Independent Biodiversity Legislation Review Panel is presently grappling with these and related issues as it reviews current regulatory controls in this difficult area of public policy.

APPENDIX A Table of amendments to the *Native Vegetation Act 2003*, *Native Vegetation Regulation 2005*, the *Native Vegetation Regulation 2013* and the *Environmental Outcomes Assessment Methodology (EOAM)*⁶¹⁷

Date	Component Amended	Amended by	Summary of key changes
30/11/2004	NV Act 2003	Threatened Species Legislation Amendment Act 2004 No. 88	Amended section 14 of the NV Act 2003 to remove the need for development applications to be accompanied by a species impact statement and for the Minister to consult with the Minister administering the <i>Threatened Species Conservation Act 1995</i> where the clearing of native vegetation has the benefit of biodiversity certification under Division 4 of Part 7 of the <i>Threatened Species Conservation Act 1995</i> .
01/12/2005	NV Act 2003	Native Vegetation Regulation 2005	Made amendments to land in Schedule 1 of the NV Act 2003 (i.e. land excluded from the operation of the NV Act)
02/06/2006	NV Regulation 2005	Native Vegetation Amendment (Private Native Forestry) Regulation 2006 – No. 274	Extended the period of time in clause 41(2) of the NV Regulation 2005 for which clearing for the purposes of private native forestry operations may be continued without approval under the NV Act.
21/07/2006	EOAM	Gazetta ⁶¹⁸	Replaced Chapter 4 of the EOAM to implement changes concerning measurement and assessment of salinity impacts.
04/08/2006	NV Regulation	Native Vegetation Amendment	Removed certain areas from the definition of western coastal region in

⁶¹⁷ Minor amendments such as corrections of typographical errors or minor amendments consequential upon the enactment of other legislation are not included in this table.

⁶¹⁸ NSW Government Gazette No. 93, 21 July 2006, pp. 5820 – 5842.

Date	Component Amended	Amended by	Summary of key changes
	2005	(Miscellaneous Regulation) 2006 – No. 423	clause 3(1) of the NV Regulation 2005. Adopted the amended EOAM Gazetted on 21 July 2006
29/09/2006	NV Regulation 2005	Native Vegetation Amendment (Private Native Forestry) Regulation (No. 2) 2006 – No. 602	Further extended the period of time in clause 41(2) of the NV Regulation 2005 for which clearing for the purposes of private native forestry operations may be continued without approval under the NV Act.
24/11/2006	EOAM	Gazetta ⁶¹⁹	Amended Chapter 7 of the EOAM, which deals with the assessment of proposals to clear invasive native scrub (INS) species of native vegetation. The amendments concerned changes to administrative processes and definitions, changes to requirements relating to retention of individual large trees and small plans, changes to management actions associated with INS retention areas, and management of INS in threatened ecological communities. ⁶²⁰ The changes were intended to make the system for INS removal more flexible in response to demand from farmers to allow them to effectively deal with woody weeds. ⁶²¹
24/11/2006	NV Regulation 2005	Native Vegetation Amendment (Assessment Methodology) Regulation 2006 – No. 675	Adopted the amended EOAM Gazetted on 24 November 2006

⁶¹⁹ NSW Government Gazette No. 145, 24 November 2006, pp. 9924 - 9949

⁶²⁰ NSW Government Gazette No. 145, 24 November 2006, p. 9924.

⁶²¹ Ian Macdonald MP, Minister for Natural Resources, Primary Industries and Mineral Resources, "State Government Moves to Get the Balance Right on Native Vegetation", Ministerial Media Release, 26 October 2006.

Date	Component Amended	Amended by	Summary of key changes
02/03/2007	EOAM	Gazetta ⁶²²	The Gazetted document does not list or otherwise readily identify the changes since the last version. Communications between the Minister for Natural Resources and the Natural Resources Commission concerning the changes indicate that they were mostly minor amendments correcting typographical errors and to ensure consistency and accuracy. ⁶²³ There were also a number of technical amendments to Chapter 5 of the EOAM dealing with Biodiversity Assessment. ⁶²⁴
02/03/2007	NV Regulation 2005	Native Vegetation Amendment Regulation 2007 – No. 120	Inserted clause 18A into the NV Regulation 2005 providing for Councils to clear native vegetation in connection with Infrastructure works (such as sewerage treatment works, landfill operations, water supply works, cemeteries etc.). Adopt amended EOAM gazetted on 2 March 2007
29/06/2007	NV Regulation 2005	Native Vegetation Amendment (Private Native Forestry – Transitional) Regulation 2007 – No. 292	Further extended, for one month only, the period in clause 41(2) of the NV Regulation 2005 for which clearing for the purposes of private native forestry operations may be continued without approval under the NV Act.
01/08/2007	NV Regulation 2005	Native Vegetation Amendment (Private Native Forestry) Regulation 2007 – No. 372	Provided for the clearing of native vegetation for the purposes of private native forestry in accordance with a code of practice approved by the Minister.

⁶²² NSW Government Gazette No. 36, 2 March 2007, pp. 1520-1617.

⁶²³ Ian Macdonald MLC, Minister for Natural Resources, Minister for Primary Industries, Minister for Mineral Resources, [letter to Dr John Williams, Commissioner, Natural Resources Commission](#), 21 November 2006 [online – accessed 4 September 2014]; John Williams, Commissioner, Natural Resources Commission, [letter to the Hon. Ian Macdonald MLC](#), 15 January 2007 [online – accessed 4 September 2014].

⁶²⁴ Ibid.

Date	Component Amended	Amended by	Summary of key changes
			Introduced private native forestry PVPs as a method of regulating private native forestry.
08/02/2008	NV Regulation 2005	Native Vegetation Amendment (Miscellaneous) Regulation 2008 – No. 26	Made further provision with respect to private native forestry PVPs (including “routine agricultural management practices” on land the subject of private native forestry PVPs), the submission of draft PVPs, minor variations of the Private Native Forestry Code of Practice, and minor variations to the EOAM.
04/12/2009	NV Act 2003	Native Vegetation (Application of Act) Regulation 2009 – No. 554	Amended Schedule 1 of the NV Act 2003 to provide for the exclusion of land on which development for the purposes of senior housing (but no other development) is carried out under <i>State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004</i> and for which a site compatibility certificate has been issued under that Policy.
26/05/2010	NV Act 2003	Trees (Disputes Between Neighbours) Amendment Act 2010 No. 27	Amended section 25 of the NV Act to exclude the application of the NV Act to any clearing carried out in accordance with an order under the <i>Trees (Disputes Between Neighbours) Act 2006</i> .
02/07/2010	NV Act 2003	Threatened Species Conservation Amendment (Biodiversity Certification) Act 2010 No. 39	Amended section 5 of the NV Act to exclude biodiversity certified land (within the meaning of part 7AA of the <i>Threatened Species Conservation Act 1995</i>) from the application of the NV Act.
08/10/2010	EOAM	Gazetta ⁶²⁵	The Gazetted document does not list or otherwise readily identify the changes since the last version. Communications between the Minister for Climate Change and the Environment and the Natural Resources Commission in late 2009 to early 2010 suggest that the changes included

⁶²⁵ NSW Government Gazette No. 119, 08 October 2010, pp.5116-5221.

Date	Component Amended	Amended by	Summary of key changes
			amendments to the listed Invasive Native Scrub species in Table 7.1, being INS species that may be treated in accordance with the EOAM. ⁶²⁶ Viewing the documents side by side also indicates detailed changes were made to Chapter 5 dealing with Biodiversity Assessment.
08/10/2010	NV Regulation 2005	Native Vegetation Amendment (Assessment Methodology) Regulation 2010 – No. 575	Adopted the amended EOAM gazetted on 8 October 2010
03/03/2011	NV Regulation 2005	Native Vegetation Amendment (Assessment Methodology) Regulation 2011 – No. 150	Adopted the amended EOAM gazetted on 4 March 2011
04/03/2011	EOAM	Gazetta ⁶²⁷	Additional Chapter 8 added listing vegetation categories that are eligible for a streamlined PVP assessment process. ⁶²⁸
11/01/2013	NV Act 2003	Miscellaneous Acts Amendment (Directors' Liability) Act 2012 No. 97	Amended section 45 of the NV Act and inserts new section 45A to implement COAG reforms relating to the criminal liability of directors.
29/11/2013	EOAM	Gazetta ⁶²⁹	Made administrative amendments to take account of the enactment of the

⁶²⁶ John Robertson MLC, Minister for Climate Change and the Environment, [letter to John Williams, Commissioner, Natural Resources Commission](#), 3 December 2009 [online – accessed 4 September 2014]; John Williams, Commissioner, Natural Resources Commission, [letter to the Hon Frank Sartor MP, Minister for Climate Change and the Environment](#), 15 February 2010 [online – accessed 4 September 2014].

⁶²⁷ NSW Government Gazette No. 24, 4 March 2011, pp. 1756 - 1871.

⁶²⁸ Lyster et al, above n406 at 378.

⁶²⁹ NSW Government Gazette No. 162, 29 November 2013, pp. 5403 - 5517.

Date	Component Amended	Amended by	Summary of key changes
			<i>Local Land Services Act 2013.</i> ⁶³⁰
01/01/2014	NV Act 2003	Local Land Services Act 2013	Made consequential amendments to the NV Act arising from the repeal of the <i>Catchment Management Authorities Act 2003</i> and the enactment of the <i>Local Land Services Act 2013</i> , under which the roles of Catchment Management Authorities were taken over by Local Land Services.
01/01/2014	NV Act 2003	Native Vegetation Regulation 2013	Amended Schedule 1 of the NV Act to update the land excluded from the operation of the Act.
01/01/2014	NV Regulation 2005	Native Vegetation Regulation 2013	Repealed NV Regulation 2005
01/01/2014	NV Regulation 2013	Native Vegetation Amendment (Local Land Services) Regulation 2013 No. 679	Made consequential amendments to the NV Regulation 2013 arising from the repeal of the <i>Catchment Management Authorities Act 2003</i> and the enactment of the <i>Local Land Services Act 2013</i> , under which the roles of Catchment Management Authorities were taken over by Local Land Services. Adopted the amended EOAM gazetted on 29 November 2013, incorporating changes made as a consequence of the abolition of catchment management authorities.

⁶³⁰ See NSW OEH, "[Environmental Outcomes and Assessment Methodology](#)", last updated 20 January 2014 [online – accessed 3 September 2014].