THE FORGOTTEN FORESTS
THE ENVIRONMENTAL REGULATION OF FORESTRY ON PRIVATE LAND IN NEW SOUTH WALES BETWEEN 1997 AND 2002

A thesis submitted in fulfilment of the requirements for the award of

Doctor of Philosophy (Law)

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by

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Thesis Declaration

I, James Prest, being a candidate for degree of Doctor of Philosophy, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Law, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The work has not been submitted for qualifications at any other university or academic institution.

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James Prest

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Date
ABSTRACT

This thesis examines the regulation of private native forestry in two Australian jurisdictions: NSW and Tasmania. Private forests have long been the forgotten forests - a neglected aspect of forest policy in Australia. Appropriate supervision of private native forestry (PNF) is important because private forests are home to much threatened biodiversity, and as they make up a significant proportion of the total area of native forests in NSW. PNF also makes a substantial contribution to total timber production in NSW.

Research was conducted into the administration of environmental laws applying to PNF in NSW between 1997-2002 in order to assess the regulatory framework and to discern patterns of administrative behaviour. The thesis asked “Were NSW environmental laws applying to PNF effectively implemented and enforced?” The hypothesis that much PNF in NSW is “under-regulated” in practice was explored.

To examine these questions, a thorough review of all relevant legislative provisions and case law was conducted. The Native Vegetation Conservation Act 1997 and the Threatened Species Conservation Act 1995 and their implementation in relation to PNF were examined in particular. Defects in the legislative framework applying during the study period were revealed. The applicable law was found to be complex, and highly fragmented, with responsibility spread across many agencies. Over 100 interviews with agency staff at head office and regional offices were undertaken. Other information was obtained from internal documents and through requests under the Freedom of Information Act. The broader context was addressed by reviewing theoretical literature in environmental law, with an emphasis on the regulatory theory literature.

Some regulatory failures stemmed from inadequate implementation of the legislation. It was found that PNF was infrequently regulated under the Native Vegetation Conservation Act, primarily due to a problematic exemption for specified types of PNF. In the North Coast and Hunter regions the exemption was claimed by 100% of PNF operations (on land tenures where it was available). PNF was found to be infrequently regulated by local government under Local Environment Plans (64.5% of 107 local governments did not regulate PNF in the main rural zone). The safety net mechanism of licensing under the Threatened Species Conservation Act was infrequently applied with only five licences granted for PNF. Regarding law enforcement, a low level of prosecution activity was found to have taken place.

The findings support the proposition that in practice NSW law was inadequate to ensure ecologically sustainable forest management, due to the poorly designed and integrated statutory framework. They also provide some evidence to support the proposition that the applicable laws were generally implemented with a light touch, generally expressing a laissez-faire approach to PNF in most regions (with some exceptions). These findings suggest there is a pressing need for reform of the regulatory framework in NSW, if standards of ESFM are to be achieved. Thus any future exemptions must be of narrow application. Further, a more pro-active approach to ensuring compliance with legislative requirements is necessary.

While the results suggest regulatory failure, they do not constitute grounds for wholesale replacement of regulation with other mechanisms such as self-regulation and incentives payments. Issues of compliance and enforcement as well as adequacy of funding are crucial to choices of policy instrument for biodiversity conservation on private land.
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Chapter One

THE LAW AND PRIVATE NATIVE FORESTRY

INTRODUCTION

One of the key questions in the field of environmental law today is how to increase the law’s effectiveness in providing guidance and solutions to environmental problems. In view of mounting evidence of environmental damage, we must examine the extent to which the law is assisting the attainment of ecological sustainability. The severity of land, soil and water degradation and loss of biological diversity has been documented by numerous reports including the Commonwealth and New South Wales State of the Environment Reports. The impacts of these problems, combined with the steady growth of Australia’s obligations for environmental protection under international law make it imperative to investigate whether domestic legislative responses are adequate and effective.

Both the international literature and domestic journals are replete with concerns about the implementation and operation of environmental laws in practice. A second aspect of
interest in questions of implementation involves the study and use of third party open standing provisions in modern environmental statutes in Australia. The task of implementing and enforcing environmental laws is now undertaken by a disparate band of public interest litigants and environmental lawyers as well as public authorities. The duty to implement environmental laws is no longer conceived as the sole responsibility of the regulatory state.

Nevertheless, the perennial question remains, of whether environmental laws are providing an adequate contribution to the achievement of environmental conservation in the field in Australia. In 2003, Professor Bates, writing on the role of the law in natural resources management declared that “[t]he law as set down in legislation does not always reflect what happens in practice.” In the same volume, Professor Bonyhady advanced similar observations, more forcefully, in a paper entitled “The Disappointment of the Law”. He referred to “the gulf between the law and practice”. These sources suggest researchers need to pursue questions of the contribution of environmental laws to the achievement of conservation goals.


These provisions are particularly evident in NSW legislation, including National Parks and Wildlife Act 1974, s.176A, Environmental Planning and Assessment Act 1979, s.123; Threatened Species Conservation Act 1995, s.147; Native Vegetation Conservation Act 1997, s.63(2); Native Vegetation Act 2003, s.41(2). Consider also Environment Protection and Biodiversity Conservation Act 1999 (Cth), s.487.


**BIODIVERSITY, VEGETATION CLEARANCE AND OFF-RESERVE FOREST CONSERVATION**

It is well known that one of Australia’s most pressing environmental problems is the conservation of its unique biological diversity.\(^{10}\) A key issue in that field is the preservation of threatened species and ecosystems within forests used for timber and pulp production.\(^{11}\) Although forests are among the least extensive ecosystems in Australia in terms of sheer area, they are highly significant in terms of their biodiversity.\(^{12}\)

A related aspect of biodiversity conservation policy concerns questions of conservation in the ‘off-reserve’ or non-park context, outside formal nature reserves. There is much evidence to suggest a pressing need for ecologically sustainable management of privately held land in Australia. This is crucial in New South Wales which has 87% of its native vegetation on privately held land.\(^{13}\) The National Forest Inventory found that almost 70 per cent of Australian native forests\(^{14}\) are under private sector management, on freehold or leasehold land.\(^{15}\)

As long ago as 1990, the ecologist Professor Harry Recher observed that: “wildlife management and conservation, if it is to succeed, must be extended to all land, regardless of tenure, and despite arbitrary political boundaries or bureaucratic divisions.”\(^{16}\) More than a decade later, state and local governments are increasingly recognising the importance of off-reserve conservation. Traditional conservation strategies emphasising biodiversity protection in State-owned national parks and reserves are being

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\(^{14}\) The National Forest Inventory (NFI) defined ‘forest’ as “an area that is dominated by trees having usually a single stem and a mature or potentially mature stand height exceeding 2 metres and with existing or potential crown cover of overstorey strata about equal to or greater than 20 per cent.” National Forest Inventory (1998) *Australia’s State of the Forests Report 1998*, Bureau of Rural Sciences, Canberra, p.30.

\(^{15}\) Ibid at 35.

supplemented by a new consensus of domestic ecological experts and of international law\(^\text{17}\) regarding the need for in-situ conservation across the landscape.\(^\text{18}\)

The clearance, destruction and modification of habitats is acknowledged to be the major threat to Australia’s terrestrial biodiversity.\(^\text{19}\) The focus of recent academic and popular debate about vegetation (habitat) conservation on private land has been responses to broad-acre vegetation clearing for agriculture, particularly in Queensland and NSW. These concerns have not been misplaced. Although the annual rate of native vegetation clearing may have recently declined, the clearing has been on such a scale that in 1999 Australia was estimated to be amongst the world’s ten worst offenders for destroying vegetation.\(^\text{20}\)

In spite of the importance of vegetation clearing, there remain other areas of off-reserve biodiversity conservation which need to be considered by law and policy makers. An important but neglected component of both forestry and off-reserve biodiversity conservation policy involves the question of managing ecological impacts of commercial forestry activities within privately held native forests, i.e. private native forestry (PNF).\(^\text{21}\)

Forests and woodlands are home to over half of Australia’s species of terrestrial fauna, and three-quarters of its flora species.\(^\text{22}\) Forests support many species that are under

\(^{17}\) UN Biodiversity Convention, Article 8(c) (United Nations Convention on Biological Diversity, Done at Rio de Janeiro, 5 June 1992, ATS 1993 No.32; 31 ILM 818 (1992), in force 29.12.93, (signed for Australia 5.6.92, ratified by Australia 18.6.93).


\(^{21}\) The shorthand ‘private native forests’ is used to refer to indigenous, non-industrial (i.e. non-plantation) forests on privately held (i.e. leased or owned) land.

long-term threat of extinction. At the same time there is great concern about the environmental (and economic) sustainability of forestry, both in Australia and internationally. That concern was noted and considered at length in the National Forest Policy Statement of 1992, signed by State and Territory Governments. A number of Australian scientific authors (as well as the Resource Assessment Commission) have found that intensive logging operations may in various ways pose a long-term threat to biodiversity, particularly in old-growth forests and forests which often are the habitat of threatened species. The issue of sustainability received detailed attention in the National Forest Policy Statement of 1992 which stated that “maintaining this native forest estate in Australia will necessitate sustainable forest management on both public and private forested lands.”

There are a number of other reasons for the importance of study of private native forests and the forestry that takes place within them. Some private forests contain remnants of uncommon forest ecosystems that are important to the creation of a Comprehensive, 23 Resource Assessment Commission (1992) Forest and Timber Inquiry: Final Report, AGPS, Canberra, Vol.2A, p. J-13. The RAC also stated: “the long term persistence of a number of threatened species may be placed at risk by current silvicultural practices.” (Vol. 2A, p. J-13).


29 NFPS, above n 26 at p.6.

30 More detail is provided at p.122 et. seq. regarding the commercial and conservation significance of private native forests.
Adequate and Representative nature reserve system, a policy objective adopted by Commonwealth and State Governments in the Regional Forest Agreements process. In NSW, there were 56 such forest-types identified as a conservation priority on private land in the Upper North East of NSW and 85 such forest types as a priority on private land in the Lower North-East.\textsuperscript{31}

At the same time, in parts of NSW and Tasmania, PNF is now producing a substantial proportion of certain forms of timber production. Restrictions on timber supply from public land due to increased levels of reservation of public native forests under the NSW Regional Forest Agreements has generated additional pressure to fell timber within private native forests. There is evidence that in late 2000, in North East NSW, PNF contributed between 1/3 to as much as 1/2 of total sawlog production.\textsuperscript{32}

However, there is comparatively little known at this stage about the sustainability of forestry on private lands. The NFPS contained an aspirational “Vision” statement that endorsed the use of forests and forest resources “in an efficient, environmentally sensitive and sustainable manner”. The NFPS declared that henceforth the combined goal of Australian governments was to see that:

\begin{quote}
“Private forests are managed in an ecologically sustainable manner and in close cooperation with public forest managers, to complement the conservation and commercial objectives of public forests.”\textsuperscript{33}
\end{quote}

Yet a decade or more later, the key question is whether that aspirational vision has come any closer to becoming a reality. Whilst this thesis does not concentrate on ecological questions, it focuses on the adequacy of legislative and institutional arrangements for the attainment of sustainability, and on the implementation of environmental laws. The objective here is to contribute to debates over the effectiveness of environmental laws and debates regarding the impact of laws for biodiversity conservation on private lands\textsuperscript{34} by inquiring into one particular aspect of that subject. In simple terms, the thesis asks “In

\textsuperscript{31} Commonwealth of Australia and State of NSW, Regional Forest Agreement for North East NSW (Upper NE and Lower NE) (the Commonwealth, Canberra, 2000) (hereafter NE RFA), Table 1 “Percentage Reservation Status of Forest and Non-Forest Ecosystems in the Upper NE Region based on Vegetation Modelling to Establish the pre-1750 extent of Forest Ecosystems in the Region”, contained in Attachment 1(a): Comprehensive, Adequate and Representative Reserve System for Upper NE Region, pp.41-63.

\textsuperscript{32} Interview, Mr B. Attwood, Vegetation Resource Manager, Northern Region, DLWC, in person, Grafton Office, 23.11.00. Notes on file; See Chapter Six.

\textsuperscript{33} NFPS above n 23 at. 3.

\textsuperscript{34} Productivity Commission (2003) Inquiry into Impacts of Native Vegetation and Biodiversity Regulations (commenced April 2003), Productivity Commission, Canberra.
recent years, have environmental laws been able to effectively regulate forestry on private lands, so that policy objectives of sustainability are implemented?"

**ORIGIN OF THE RESEARCH TOPIC**

The inspiration for this research project arose from earlier work conducted by the author in the mid 1990s at the ANU. That project involved an investigation into the NSW National Parks and Wildlife Service’s (NPWS) administration of endangered species licensing provisions of the *National Parks and Wildlife Act 1974*. Specifically it examined the practice of granting licences to regulate the impacts of forestry on endangered species within publicly-owned native forests. During the course of that study, the author discovered – as an incidental finding - that attempts by the NPWS to regulate the impact of the native forest logging industry on private lands appeared to be haphazard, superficial, and perhaps unlawful.

It was found that the NPWS had authorised only a handful of private native forestry (PNF) operations in NSW (nine in total) between the period 1991-1995. Further, it had done so by the somewhat dubious means of issuing authorities under section 171 of the *National Parks and Wildlife Act 1974* - a section arguably never intended for such a purpose, and more frequently applied to authorise the unintended side-effects of feral animal control programs on native species. Section 171 authorities were an “authority to take or kill, etc.” that could be issued by the Director-General to “any person” to “(a) take or kill …(i) animals within a national park, [etc]” or “(ii) protected fauna outside a park,…[etc]”.

The approach of issuing authorities was adopted rather than granting “general licences to take or kill endangered fauna” under s.120 of the Act, the means more commonly applied to authorise other destructive activities. The application of such licensing requirements in the *NPW Act* to Crown agencies such as the Forestry Commission had

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36 Ibid.


39 Section 171 in its present form enables the Director-General to authorise persons to harm animals or protected fauna or to pick native plants. Reprint No.13, 4 March 2003.
been put beyond doubt by the *Endangered Fauna (Interim Protection) Act 1991* which codified the Land and Environment Court’s 1991 interpretation of the *NPW Act* in *Corkill v Forestry Commission* (the *Chaelundi* case).40

It appeared that the regulatory approach of issuing s.171 authorities to PNF operations was most probably selected due to agency resource constraints and to avoid imposing fauna impact statement (FIS) requirements associated with the endangered fauna licensing regime on the PNF industry. Although there was no discussion of the approach taken in any of NPWS’s publicly-available internal or external regulatory documentation, this conclusion was consistent with the broader research results of the project which revealed a strategy to avoid imposing FIS requirements by granting ‘temporary’ rather than conventional ‘general’ licences.41 The application of temporary licensing by NPWS for public forestry facilitated an exemption from FIS requirements.

**HYPOTHESES**

Thus a preliminary hypothesis for this research project emerged from the author’s earlier research. It was that although PNF in NSW in the past may have been subject to formal statutory controls, the industry was not at that time subject to substantial regulatory supervision in practice. A primary objective of undertaking the present research was to investigate whether and how PNF regulation in NSW had changed since 1994. The preliminary research hypothesis was lent support by the release of the 1995 NSW *State of the Environment Report*, which suggested “[s]ignificantly fewer external [regulatory] controls apply to logging of privately-owned forests [than on public land forestry].”42

Among the working hypotheses that emerge from the background information about the PNF industry is that the legislation applicable to the PNF industry may be inadequate for the industry to actually achieve ESFM. There is a preliminary picture that the applicable legislation in NSW is inadequately implemented, leaving the industry in practice either substantially unregulated or under-regulated, despite the formal application of various laws. These working hypotheses are further explored in Chapters 4 and 5 where

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background material describing the nature of the PNF industry in NSW and attempts to regulate it to date are presented.

EXISTING LITERATURE ABOUT PNF IN AUSTRALIA

The existing literature about the adequacy of PNF regulation and in particular the application of environmental laws in NSW to PNF is very sparse. Private native forests in Australia have been the forgotten forests, often placed in the ‘too-hard basket’ by policy-makers, legislators, conservationists and professional foresters. Private forests have typically been perceived as less significant in both conservation and economic terms than public forests. As Dr. Hannam of the former Department of Land and Water Conservation (NSW) observed: “the majority of political interest, financial and human resources are heavily biased towards the public forest area.” Yet private forests may be of greater conservation and economic significance than is often realised. Those dimensions are explored in Chapter Five.

Due to the focus on public forests, there is a substantial information gap surrounding both private native forests and PNF throughout much of Australia. The Resources Assessment Commission (RAC) stated in the final report of its Forest Inquiry of 1992:

> Very little is known about the extent and condition of private native forest and the management practices that are followed. There is a poor understanding of the economic and other forces that may be affecting decisions of private land owners in matters such as the frequency of logging, conservation management, and whether to regenerate cleared areas.46

Across Australia as a whole, governments have tended not to perceive private native forests as a resource potentially subject to their direction, if not control. Thus with some exceptions, notably Tasmania, governments have not made a serious effort to systematically gather commercial or ecological data that would enable improved decision-

43 Catalogue research conducted after the selection of title for this thesis suggested that the term “the forgotten forests” had been applied in another forestry context in Australia by Calder, M., Calder, J. (1994) The Forgotten Forests: A Field Guide to Victoria’s Box and Ironbark Country, Victorian National Parks Association, 120pp. Despite this, the author remains of the opinion that the term “the forgotten forests” is an appropriate title for a study of PNF in NSW. Calder & Calder is now in a 2nd edition as Victoria's Box-Ironbark Country: A Field Guide) on the basis that the Box and Ironbark forests are no longer the forgotten forests following the creation of a number of national parks. See also The Age (2001) Editorial “The forgotten forests’ last stand”, 30/08/2001.
making and forest management. The volume of both official documentation and secondary literature addressing private forest management and regulation is far smaller than that on the subject of public native forest management, or even that concerning plantation forestry and farm forestry. As most of the attention of interest groups, commentators and policy makers has focussed on the management of publicly-owned forests, a data gap surrounding private forests has inevitably developed.48

Nevertheless, over the past two decades in Australia, questions of adequacy of management and protection of private forests have slowly become more prominent with government, environmentalists, and foresters showing greater interest.49 As Dargavel and Moloney (1998) wrote, “there are signs of change”.50

The management of private forests was considered by a number of government inquiries in the early 1990s. As we have seen, whilst the RAC (1992) gathered and presented existing basic information about timber production from private forests, it acknowledged the reality of numerous data gaps about private forestry. PNF was considered and discussed at some length in the National Forest Policy Statement, in the NSW State of the Environment reports since 1995, and the National Forest Inventory published in 1998.51 During the process of preparing the Regional Forest Agreements (RFAs), between 1997 and 2001, both State and Commonwealth governments considered the economic and environmental importance of PNF. Many of the background reports produced for the various RFAs contained chapters dealing with PNF, publicly-owned forests. Important research findings were presented regarding aspects of PNF, including the extent of the timber resource,52 the environmental importance of private forests;53 intentions of private

48 A search of thesis databases was conducted online at the Australian Digital Theses Program at internet URL <http://adt.caul.edu.au>; the Kinetica National Bibliographic Database <http://search.kinetica.nla.gov.au> which searches the catalogues of all Australian universities. Other searches were conducted of University of Wollongong, Melbourne, Sydney and ANU library catalogues. These searches conducted in April 1998 and October 2003 did not reveal any doctoral research on the question of private forestry regulation in NSW, or other Australian jurisdictions. 49 ANU researchers have been conducting a research and forest management project in the SE forests of NSW aimed at improving PNF management in that region and “establishing a native forest management culture... that is sensitive to sustainability.” Bauhus, J. (ANU Forestry) (2000) “Private Native Forest Management in South East NSW: Challenges, Opportunities and Approaches”, Socio-Economic Research to Support Successful Farm Forestry, 2000 Research Colloquium Program, with support by the CRC for Sustainable Production Forestry and the Joint Venture Agroforestry Program, Monday 28th February 2000, ANU, Canberra.


52 A significant amount of research work has been performed on the extent and nature of private forests as part of the National Forest Inventory (1998) above n 22.

53 Environment Australia (1999) Identification, Assessment and Protection of National Estate -Part A Natural Values: Upper North Eastern NSW CRA Region, a Project Undertaken for the Joint Commonwealth NSW Regional Forest Agreements Steering Committee As
native forest owners and the legal and institutional framework for ecologically sustainable forest management (‘ESFM’) within private forests. Comparative viewpoints are also available from a body of international literature addressing private forestry issues, particularly from Europe, the United States, and neighbouring New Zealand.

THE SEARCH FOR SUSTAINABILITY IN PRIVATE NATIVE FORESTS

Broader concerns about environmental sustainability in forestry are likely to form a backdrop to future development of law and policy for PNF. Although considerable work has been done to investigate the sustainability of public forestry, there has been little investigation of the sustainability of private forestry. Ongoing, chronic disputation over the ecological impacts of public forest management has led to the adoption of goals of ESFM by state and Commonwealth governments. The interesting question is whether those goals have yet been translated into reality in relation to private native forests.

The picture of NSW private forests as the forgotten forests is slowly changing. The commercial importance of private forests was underlined in the mid to late 1990s when

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60 ESFM was first adopted as a goal by Australian governments in the NFPS, above n 45 at 25. See also: Commonwealth of Australia (1997) *First Approximation Report for the Montreal Process*, DPIE, Canberra. See further Australian reports to United Nations Commission on Sustainable Development’s Intergovernmental Forum and Panel on Forests (IPF).
substantial restrictions were placed on timber supplies from public forests (see further, Chapter Five). Also, the importance of private forests to the attainment of broader conservation goals - such as adequate representation of all forest ecosystem types within formal and informal reserves - is becoming gradually recognised.\(^61\)

Questions of the adequacy of institutional and policy responses to questions of ESFM in private forestry are now receiving greater attention.\(^62\) Since the mid 1990s, environmental groups in NSW have participated more actively in debate about PNF. This entailed membership of government panels such as Regional Vegetation Management Committees and Reference Groups reviewing PNF law. They have participated in debate over PNF law and policy by direct lobbying and campaigning in the media, Parliament and on the internet.

If issues of achieving timber production within the framework of ESFM are not addressed, it is likely that conflicts over management of native forests will spread to private forests.\(^63\) In NSW, litigation has not yet been initiated by NGOs over compliance of the PNF industry with applicable environmental laws, despite liberal open standing rules.\(^64\) By contrast, in Victoria and Tasmania, there has been a number of planning appeals by local governments, local residents and NGOs over the likely impact of PNF and plantation developments.\(^65\)

Differences of opinion over the attainment of goals of ecologically sustainable forestry are likely to influence future law reform efforts for Australia’s private native forests. With this growing debate, issues of PNF and PNF regulation are gradually gaining greater attention.

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\(^{64}\) National Parks and Wildlife Act 1974, s.176A, Environmental Planning and Assessment Act 1979, s.123; Threatened Species Conservation Act 1995, s.147; Native Vegetation Conservation Act 1997, s.63(2); Native Vegetation Act 2003, s.41(2).

RESEARCH QUESTIONS

As has been observed elsewhere, environmental laws are at risk of becoming mere words unless accompanied by sufficient implementation and enforcement. With such observations in mind, this thesis presents the results of an extensive inquiry into the application and implementation of environmental laws in relation to PNF in NSW.

Preliminary sources reviewed earlier in this Chapter raised the need for investigation of questions of adequacy of legal frameworks and adequacy of implementation of the law. These sources suggested several working hypotheses. Firstly, that the legislation applicable to the PNF industry is inadequate; and secondly that the legislation that does apply is inadequately implemented, leaving the industry either largely unregulated or under-regulated, despite the formal application of various laws.

Consequently, this thesis is an account of a detailed inquiry conducted into the nature and extent of regulation of the PNF industry in NSW between 1997 and 2002. The first main research questions were as follows: Precisely which regulatory controls applied to PNF in NSW during the study period, and in what circumstances did various different configurations of provisions apply?

This Chapter has also commented on the lack of information about whether existing laws were being applied diligently or effectively to the PNF industry. Thus the thesis progresses to ask “Were NSW environmental laws applying to PNF effectively implemented and enforced during the study period?” The hypothesis that much PNF in NSW may be ‘under-regulated’ in practice is explored.

These primary research questions prompt a number of subsidiary questions. Was the law sufficient to encourage, enable and require ESFM and biodiversity protection? What effort has been made by regulatory authorities to apply and enforce habitat conservation and threatened species laws on private land? What was the approach of other agencies to other categories of environmental law applying to PNF in NSW?

Questions considered later in the thesis include the following: How can the legal and institutional framework for regulation of PNF in NSW be improved? What are the broader implications, if any, for the application of environmental laws to activities on private lands? Are there implications for the application of other environmental laws in similar contexts involving limited scientific information, where small-to-medium sized enterprises often dominate the structure of industry?

OVERVIEW OF CHAPTERS

Part I explores the theoretical literature contextually relevant to the case study, and presents necessary background information regarding the private native forestry (PNF) industry, the subject of the case study. Chapters Two and Three present and discuss theoretical questions from the literature on regulation and self-regulation. These questions are relevant to questions of law reform for PNF because of the broader regulatory literature that takes issue with the application of traditional regulatory approaches to environmental protection. Chapter Four examines questions arising from the literature about biodiversity conservation law and policy on private land. It poses the question: “What are the implications of recent suggestions that the application of environmental regulation on private land be restricted?” Chapter Five presents relevant background data about the PNF industry in NSW and considers existing information about the environmental values of private forests. Available literature about the implementation of applicable laws is also reviewed, in order to develop the research hypotheses.

Part Two describes and discusses the legal framework applicable to PNF in NSW and presents the findings of empirical research carried out into the administration of these laws. Chapter Six sets out the provisions of the Native Vegetation Conservation Act 1997 (‘NVCA’), the main statute relevant to PNF in NSW during the study period. Chapters Seven and Eight present the findings of research into the administration and enforcement of the NVCA as it applied to PNF in NSW. Chapter Nine outlines the application of provisions of the Environmental Planning and Assessment Act 1979 relevant to

67 That Chapter addresses the NVCA as the legislation in force during the study period, and indeed during the period of final corrections to this manuscript in March 2005. The NVCA is to be repealed and replaced by the Native Vegetation Act 2003 at some stage during 2005. However, at 31.3.05, the NVCA remained in force and the NV Act 2003 had not yet commenced. (Source: NSW Parliamentary Counsel’s website www.legislation.nsw.gov.au).
PNF, and presents findings regarding their administration and enforcement by local government. Chapter Ten describes the application of the *Threatened Species Conservation Act 1995* (TSCA) and *National Parks and Wildlife Act 1974* (NPWA) to PNF in NSW. It presents research findings regarding the implementation and enforcement of the TSCA in relation to PNF activity.

Part Three sets out the legal framework applicable to PNF in Tasmania. Chapter Eleven explains the law affecting forestry operations on privately owned land in Tasmania, explaining the operation of the *Forest Practices Code*, and *Forest Practices Act 1985* (Tas), and their relationship to the Resource and Land Management Planning System. It also presents and discusses the findings of selective research into the application of Tasmanian laws to the PNF industry.

Part Four discusses policy options for law reform and draws a number of conclusions and makes some recommendations. Chapter Twelve discusses law reform options for PNF in NSW. It does this by comparing the laws applying to PNF in NSW with those in Tasmania. Chapter Thirteen discusses links between the research findings and wider theoretical debates in the field of environmental regulation. In particular, debates about the appropriate role of conventional regulatory techniques to achieve conservation objectives on private land are reviewed in light of the case study research, in order to form a picture of an ideal mix of regulatory, self-regulatory, motivational and economic instruments for the PNF context.

**JURISDICTIONS ANALYSED**

New South Wales and Tasmania were selected as jurisdictions for the study of regulation of PNF for several reasons that are further elaborated below. With two States under examination, a comparative approach was possible. Further, NSW was selected because there is a clear lack of information regarding the adequacy of regulation of PNF in that State. In 1995, Dr Hannam of the NSW Department of Land and Water Conservation summarised the situation: “there is, by comparison [with State forests], a poor understanding of the sociological characteristics of private-property forestry, a poor
policy basis, and only a very limited amount of research information. There is virtually no available data relating to the application and administration of environmental laws applying to PNF. The data gap regarding the application of the law reflects broader data gaps regarding PNF in general.

NSW was also selected as the subject of the study for reasons of logistical convenience, in that the regulatory agencies (and their staff) forming the subject of much of the study were relatively accessible to the researcher. Other reasons for the selection of NSW arose from preliminary information suggesting that the commercial and conservation importance of private forests in that State were significant. These reasons are canvassed in more detail below.

Tasmania was selected as an ideal jurisdiction to enable a comparative approach. It has a highly specialised regulatory apparatus applicable to PNF, which provides a useful point of contrast to NSW. Secondly, the sheer importance of PNF to the overall native-forest logging industry in Tasmania, with private forests accounting for 57.6 per cent of the total area of native-forest logging operations in 2000-2001, made it a crucial jurisdiction to study in order to gain at least a partial picture of the regulation of PNF in Australia. Further, Tasmania provides a crucial point of comparative reference in terms of regulatory policy for PNF in NSW. This is particularly because it applies a system embodying many elements of industry self-regulation. For reasons of space and research time available, questions surrounding the implementation of Tasmanian laws applying to PNF were considered selectively.

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69 There are a number of reasons for this lack of data relating to PNF. One of the key factors in NSW is that there is no overarching agency with a responsibility to collect information relating to private forests, in contrast to public forests (administered by NSW State Forests). Although NSW law already contains a requirement that all timber coming from PNF operations be branded or marked as coming from private property (Forestry Regulation 1999 (NSW), cl. 61) and previously sawmill returns including private property data were compiled by the Forestry Commission, it is difficult to establish whether these statistics are still being compiled or whether they are reliable.

The emphasis of this thesis is on the regulation of commercial saw-logging and pulp-logging operations within native forests that occur on privately-owned land within NSW. PNF within the Western and Central Divisions of NSW (see map, Appendix 5.2) is not addressed in detail. Most of the research regarding implementation of legislation was focussed on North-East NSW, as that area is the main centre of PNF activity. The thesis is not a study of the regulation of ‘farm forestry’ or timber plantations on privately-owned land, firewood logging, or charcoal logging. The important but complex topic of plantation activity - regulated under the Plantations and Reafforestation Act 1999 (NSW) is not addressed. Nor does the discussion cover the applicable law relating to taxation and investment issues regarding PNF, the law applying to the use of chemicals, or non-point-source water pollution from forestry operations.

**Terminology**

For clarity it is necessary at this point to briefly set out the definitions of key terminology. The shorthand ‘private native forests’ is used to refer to indigenous, non-industrial (i.e. non-plantation) forests on privately-held (i.e. leased or owned) land. Private native forestry (or PNF) refers to forestry activity within such native forests. It involves the management of indigenous native forest, as opposed to plantation forestry involving the establishment and management of artificially-planted plantations. In some instances, the link between native forest logging and plantation establishment is so close, that reference to plantation activities becomes necessary. For example, in Tasmania and parts of NSW, it is not an uncommon practice to log (by clearfelling) an area of native forest and convert this to a plantation of native hardwood or exotic softwood tree species. This thesis does not attempt to provide a thorough discussion of regulation of the plantation forestry sector as that task would have been outside the feasible scope of this thesis.

In this thesis, some care is taken to distinguish ‘forestry’ and ‘logging’. Forestry includes a wide range of forest activities besides typical silvicultural management activities (logging, roading, burning, spraying) including harvesting of non-wood forest products. The term ‘logging’ is narrower and includes the felling and removal of timber. For the purpose of consistency, the term ‘private forestry’ is applied to describe both forest management tasks and logging.

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71 Appendix 5.2 contains a map indicating the boundaries of the Western, Central and Eastern Divisions in NSW.

72 Plantation activity is not considered in detail partly because the emphasis of this thesis is on regulating the environmental impacts of
The term ‘private land’ is used to refer to either freehold or leasehold land. Leasehold land may be logged by the lessee, subject in some cases to constraints posed by lease conditions. Included in the category of privately-held land (as opposed to privately-owned land), are Crown timber lands granted under the Crown Lands Act 1989 (NSW) and Crown leasehold land.

Another key term employed in this thesis is ecologically sustainable forest management or ESFM. This term has become somewhat hackneyed, and tends to be applied by virtually all participants in forest debates in order to support their view of forest management. In other words, everyone seeks to claim that their version of forestry involves ESFM, whilst it may be the case that very little forestry on the ground unequivocally matches that definition. Thus the term ESFM is a difficult one to define in an exclusive sense. Several ideal type definitions were proposed in the National Forest Policy Statement of 1992 which suggested that ESFM fundamentally involves three requirements: “ecologically sustainable forest management […] entails the maintenance of the ecological processes that sustain forest ecosystems, the conservation of the biological diversity associated with forests (particularly endangered and vulnerable species and communities), and the protection of water quality and associated aquatic habitats.”

Another term employed is ‘ecologically sustainable’ and ‘principles of ecologically sustainable development’ (‘ESD’). A definition of the principles of ESD is provided in the Protection of the Environment Administration Act 1991 (NSW). It includes four principles of decision-making: the ‘precautionary’ principle, the principle of ‘intergenerational equity’, the principle of ‘improved valuation, pricing and incentive mechanisms’—namely, that environmental factors should be included in the valuation of assets and services. A final and often overlooked principle set out in NSW legislation within the definition of ESD is the proposition that “the conservation of biological diversity and ecological integrity should be a fundamental consideration.”

75 Protection of the Environment Administration Act 1991 (NSW), s.6(2)(c). However the difficulty is in moving beyond such general legislative exhortations towards legislation which sets out obligations in a more specific manner. See discussion at p. Error! Bookmark not defined.
DESCRIPTION OF THE RESEARCH TASK

The research task was made challenging by the paucity of comprehensive primary or secondary sources documenting the PNF industry. In particular there was an almost complete lack of published material concerning the question of the compliance of the PNF industry with environmental laws.\textsuperscript{76}

The primary step of the investigation involved description of the legislative provisions applicable to the industry, and in what circumstances. That task in itself was a considerable undertaking – given the layers of laws applying to PNF in NSW that had built up incrementally over time.

The next aspect of the research task involved investigating implementation of environmental laws. This entailed politely requesting, and later, persistently seeking, information and documentation relating to the application of environmental legislation to the industry. It required a large number of interviews, and review of a wide range of legal and inter-disciplinary sources, seeking the available fragments of information that had been published regarding the industry. One of the problems encountered was the political sensitivity aroused by seeking information directed at a research hypothesis of under-implementation of environmental laws.\textsuperscript{77}

METHODOLOGY

By focussing on the law applying to PNF in NSW and Tasmania, this thesis relies to a large extent upon a ‘case study’ approach to research.\textsuperscript{78} This method is accepted in sociology, criminology and the social sciences generally as a legitimate approach.\textsuperscript{79} The empirical approach associated with case study research is especially appropriate in this

\textsuperscript{76} That deficit has been partly filled by the publication of selected results of this thesis as Prest, J. (2004) “The Forgotten Forests”, in Lunney, D. (ed.) Conservation of Australia’s Forest Fauna, 2nd edition, Royal Zoological Society NSW, Mosman, NSW.

\textsuperscript{77} The response sometimes was that the data did not exist, or was not available; that to make it available was not in the public interest, and that a request for it under Freedom of Information legislation was inappropriate. Other officers hinted that they wished to talk more about the subject but were not in a position to provide greater details, or provided information only on condition of anonymity. See further Chapter One.


particular area where so little is known about the law in action. In cases such as this, the application of *a priori* rules either from the received wisdom of the discipline, from grand theory or from speculation in the abstract cannot provide the same level of insight as case-by-case analysis. A case study approach is ideal in instances such as the present where the researcher is “exploring complex social phenomena that require working with people and real life experiences and where the researcher seeks to understand the research problem by reflecting, probing, understanding and revising meanings, structures and issues”.

Nevertheless, this approach has some important limitations. Although a case study provides a useful point from which to discuss broader theoretical questions of regulatory policy, it is a mistake to over-generalise from the findings. They cannot support subsequent attempts to extract grand rules of theory from the data. At best, case studies raise particular issues that should be considered in future research. For these reasons, an important aspect of writing this thesis has involved review of the broader contextual and theoretical literature concerning environmental regulation and the literature regarding policy instruments for off-reserve biodiversity conservation.

As explained above, the initial idea of researching regulation of PNF in NSW was formulated during the course of an earlier research project in 1994-5 into the administration of the *Endangered Fauna (Interim Protection) Act 1991* (EFIP Act). In this thesis, a three-stage process was undertaken in order to explore the question of PNF regulation in an appropriate context. Stage One involved a legal search and a literature review to clarify the research problem originally identified. In more detail, that research had several aspects – (a) review of the applicable law, (b) review of literature specifically relating to regulation of private forestry, as well as (c) review of the literature concerning environmental regulation on private land and the future of the regulatory approach itself. In addition to a review of the literature, Stage One also involved (d) clarifying key research issues through pilot interviews.

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Stage Two involved the collection of data regarding administration of the law applying to PNF in NSW. Stage Three involved review of these results against the broader theoretical literature, and flowing from this the development of options for law reform and the making of observations about regulatory policy for off-reserve biodiversity conservation.

In reviewing the current law applying to PNF, the preliminary steps involved clarification of the structure, mechanism and detail of the law applying to PNF in both NSW and Tasmania. A thorough review was conducted of all relevant legislative provisions and case law, as well as independent commentary on the operation of legislation, including loose-leaf services. A further source was review of Departmental publications and internal documents that discussed and explained the application of the legislation.

In exploring the broader literature regarding PNF, an exhaustive search was conducted including computer database search of documents, newspapers, and articles. Further searches were conducted using internet search techniques and on-line databases of legal periodicals and the social science literature, including internet-based library catalogues. This enabled detailed review of articles specifically referring to forestry on privately-owned land in NSW, Tasmania, and a number of other jurisdictions with substantial private forestry activity, including the United States of America, New Zealand, Japan and Scandinavia.

In exploring the literature on regulatory policy and off-reserve conservation policy and the law, an extensive review of recent Australian and United States environmental law literature was conducted through similar search techniques to those outlined above in order to obtain relevant commentary in the fields of biodiversity conservation and the law, forestry regulation, and policy instruments for off-reserve conservation.

Another broad field of literature reviewed included the theoretical literature on the sociology of law, socio-legal studies, environmental law enforcement and compliance, environmental crime, criminology, and regulatory theory, particularly concerning debates over the future of conventional regulation and self-regulation. This thesis is mainly

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82 Libraries visited for the purpose of research included Wollongong University Library, National Library of Australia, Parliamentary Library (Canberra), Sydney University Library, Russell Fox Library (Supreme Court of the ACT), Australian National University law library, University of Tasmania law library, University of Canterbury law library (Christchurch NZ).
concerned with questions of conventional direct regulation. This is not to ignore the significance of self-regulation and other forms of indirect, privatised and non-governmental forms of regulation. Nevertheless it has been considered necessary to place the focus on questions raised by the operation of conventional regulatory models (i.e. the operation of legislation). This is because analysis of the actual record of the effectiveness and implementation of environmental legislation is a necessary pre-condition for conducting adequately informed studies of the broader context of questions surrounding the ‘reinvention of regulation’ and the appropriate mix of formal and informal modes of regulation to address social problems.

The second stage of the research project was based on empirical research concerning particular questions about the administration of legislation. Such work had not been previously conducted in NSW. In order to determine how the law was being applied in practice during the study period (January 1998 - December 2002), a variety of investigative techniques were employed. Primary documentary source material examined included licences and lists of consents, as well as correspondence and both internal and published reports produced by the Departments administering the legislation in NSW and Tasmania. A primary aim was a search for the number of exemptions, consents and licences granted for the PNF industry in various regions of NSW. Collecting this information was important to enable testing of the hypothesis that PNF in NSW was under-regulated during the study period. In some instances this search was facilitated because three of the main Acts specifically provide for access by the public to statutory registers of licences and consents. In relation to local government’s administration of the law, a combination of techniques was used in order to obtain data, including review of documents at the Department of Urban Affairs and Planning (DUAP) (as it then was) in Sydney, and review of Local Environmental Plans on the Australasian Legal Information Institute internet site (‘Austlii’). These sources were checked and elaborated

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83 The opening point of the study period, January 1998, coincides with the date of commencement of the NVC Act. The closing date of December 2002 was selected as it was not feasible to continually update or check the currency of all research findings beyond that date. Where possible information since that time has been checked or updated to include changes up to September 2003. In some cases the data collected is older, particularly in relation to a survey of North Coast local governments (councils) which was conducted in October 1999.

84 Native Vegetation Conservation Act 1997 (NSW), Threatened Species Conservation Act 1995 (NSW), Protection of the Environment Operations Act 1997 (NSW). In the case of the latter Act, the NSW EPA provides a searchable internet database.

85 During the course of the research and writing of this thesis the Department of Urban Affairs and Planning was initially re-badged as Planning NSW and later was incorporated within the Department of Infrastructure, Planning and Natural Resources on 29 May 2003, following the re-election of the Carr Government, by means of merging it with the Department of Land and Water Conservation (DLWC) to form the Department of Infrastructure, Planning and Natural Resources (DIPNR).
Access to information

In a number of instances obtaining information about implementation of the legislation proved difficult. There are a number of reasons. First, the subject involves the regulation of activities on private property. This inherently raises issues about respect for the rights of private property owners and particularly about intrusions into what are often considered to be the private financial and business affairs of others. Secondly, in some cases the data does not exist in a readily-accessible form. In these cases it exists only in raw form across a number of files within regional offices, and has not been systematically compiled, digested or recorded by the responsible agencies. Third, agencies were in many cases reluctant to divulge detailed information about the implementation of laws in relation to PNF due to the political sensitivity of the information. For agency staff to impart particular information to the researcher may have revealed that the legislation was being administered in accordance with ‘real world’ policies that to some extent diverged from a strict reading of ‘ideal world’ statutory objectives. More specifically, there was a political sensitivity associated with the hypothesis that a choice was being made by relevant agencies not to even attempt to regulate PNF, not to engage with the industry, but instead to allow a significant proportion of the industry to remain effectively unregulated in practice, despite the formal application of legislation to PNF.

Data was initially requested from DLWC and NPWS regarding the total number of consents and licences granted for PNF, as well as a number of associated questions. However these inquiries were refused on several occasions. Therefore, in order to obtain detailed information relating to the administration of NSW legislation, such as the number of authorities and permits granted, and the reasons if any for decision-making, it was considered necessary to file requests under the Freedom of Information Act 1989 (NSW).

This research method presented its own particular difficulties, including the associated workload, cost, delay, and the refusal to grant access to certain documents. In fact, it was

86 Appendix 5.4 contains copies of the requests as subsequently modified by the author in order to narrow their scope to accommodate Departmental requests. Note that this research strategy was not supported or endorsed by the candidate’s academic supervisor, Prof. Farrier.
communicated to the researcher by agency staff that the lodgement of an FOI request was considered an unwelcome and ‘unsporting’ act, presumably because it involved a refusal to accept assurances that the information was not available.\(^{87}\)

The response to both requests was an initial reluctance to process them at all, (and refusal to comply with statutory deadlines) despite subsequent reductions in their scope, and an eventual refusal of access to documents on the spurious grounds of ‘adverse diversion of agency resources’. In more detail, access was refused on the basis that the documents concerned were exempt from the Act as they allegedly contained “matter the disclosure of which…could reasonably be expected…to have a substantial adverse effect on the performance by an agency of the agency's functions”.\(^{88}\) A request was made to consider these decisions under internal review,\(^{89}\) but these reviews did not lead to an overturning of the decisions concerned.\(^{90}\) Difficulties arose in challenging such decision-making, due to the archaic state of the administrative law review system in NSW – relative to the Commonwealth or the A.C.T. - prior to the commencement of the Administrative Decisions Tribunal Act 1997 (NSW) in October 1998.\(^{91}\) (It was not economically feasible to pursue the DLWC FOI request. At that stage the only form of review available was judicial review in the District Court. With advice from an ANU expert on FOI this option was not pursued given the possible magnitude of a costs order upon an adverse finding.\(^{92}\))

So far as the NPWS FOI request was concerned, following an initial meeting with NPWS head office staff to resolve the issue and despite a subsequent narrowing of the scope of the request, NPWS continued to refuse the request. An application was made to

\(^{87}\) It says something about the culture of secrecy within some NSW public service agencies that an FOI request appeared to be considered the bureaucratic equivalent of a declaration of war, judging by the reaction of Departmental staff communicated directly to the author. Some of these communications amounted to attempts at intimidation by suggesting that persistence with the request for information would somehow ‘damage’ relations between the agency and the University. The decision to continue with the FOI requests effectively involved a demand for access (albeit statutorily enabled, in the public interest) to information rather than a request. From the author's personal experience of working within Commonwealth agencies, the receipt of an FOI request is informally considered an inconvenient and troublesome distraction from the ‘real business’ of an agency.

\(^{88}\) Freedom of Information Act 1989, s.16(a)(iv).

\(^{89}\) Letters to DLWC, 2.1.98, 27.1.98.

\(^{90}\) On 21 November 1997, the author made an FOI request to DLWC. On 2 December 1997, DLWC replied saying that the request was refused on a number of grounds including s.25(1)(a1) of the Act ‘substantial and unreasonable diversion of agency resources’. On 2 January 1998, the author applied for internal review of that decision. On 3 April 1998, DLWC replied saying that the result of the internal review was that the original determination had been upheld. On 15 April, the author lodged a written complaint with the NSW Ombudsman.


\(^{92}\) Discussions regarding the particular requests were conducted with Mr Peter Bayne, Reader in Law, ANU Law Faculty during 1998.
overturn this decision at internal review. This was unsuccessful.\textsuperscript{93} The next course was to initiate an application in the newly-constituted Administrative Decisions Tribunal. Following an initial directions hearing, the author had sufficient leverage as a result of the proceedings to negotiate far greater access than before. Documents were eventually supplied that answered the questions posed in the FOI request.\textsuperscript{94} Without the lodgement of such an appeal it is highly unlikely that any documents would have been supplied by NPWS.

The difficulties and delays experienced in seeking information through with FOI must be weighed against the need to obtain detailed, ‘hard’ information in terms of numbers and dates, as opposed to the general impressions and generalisations that were offered frequently by government officers during interviews.

Some of the DLWC data regarding administration of the \textit{Native Vegetation Conservation Act 1997} that was sought regarding regulation of PNF was subsequently released, apparently following a campaign by conservationists for greater transparency. It became available on DLWC’s internet site.\textsuperscript{95}

Part of the difficulty in accessing data from DLWC and NPWS arose from the fact that these agencies appeared not keep detailed and centralised sets of data on patterns of decision-making in relation to PNF during the study period. In other words, even if DLWC wanted to release the information, it could not, as the data may not have been compiled. This observation was made frequently in interviews. It became apparent during the course of the FOI exchange that DLWC and NPWS had failed to keep adequate centralised records and statistical information in relation to their regulation of PNF. There appeared to be difficulties with records management and file-keeping as the central offices appeared to be either unaware of the files kept at regional offices or unwilling to find out which files were kept in those offices. In terms of the FOI request this approach involved a refusal by both agencies to respond to requests to provide a listing of the names of files kept regarding PNF.

\textsuperscript{93} Appendix 5.5 contains the documents relating to the FOI request made of NPWS.

\textsuperscript{94} The requests filed with DLWC is reproduced at Appendix 5.4 and the NPWS request is reproduced at Appendix 5.5.

\textsuperscript{95} The information made available is a listing of the area of land approved for clearing under the NVCA, in each DLWC region, broken down into the proposed land use category. For example, the documentation shows that PNF was the most prominent form of land clearing approved in the Hunter and North Coast regions during 2002, on a per hectare basis. DLWC website at <www.dlwc.nsw.gov.au/care/veg/pdfs/clearing_landuse_nov02.pdf>.
The other primary method of data collection employed in order to determine how the law was being applied in practice during the study period was interviewing key informants. Over one hundred interviews were conducted with staff of government agencies, industry representatives, and non-government conservation organisations, either face-to-face or by telephone.\(^{96}\) Comprehensive notes of interview were taken and filed. The majority of face-to-face interviews were tape-recorded where consent was forthcoming. Interviews were frequently followed up with e-mail, fax or telephone contact. Field trips were conducted to Hobart, Deloraine, Sydney, Grafton, Queanbeyan and Canberra in order to interview relevant staff and to examine libraries, files and public registers held by DLWC, NPWS, DUAP, EPA, other departments, industry and NGOs. Face-to-face contact was preferred because telephone interviews involving ‘cold calling’ are less likely to succeed due to difficulty in establishing rapport with the interview subject.\(^{97}\)

The interview research involved a combination of qualitative and quantitative research methods,\(^{98}\) employing a triangulation strategy in which the results from each method can be used to check or corroborate the results from the other method.\(^{99}\) The main qualitative research technique was semi-structured interviewing conducted with key players drawn from the main interest groups (industry, government, environmental groups).\(^{100}\) Unstructured or ethnographic open-ended interviewing, such as would occur within a scenario in which the researcher had pre-arranged access to observe over a period of weeks within the office of a particular regulatory authority, was rejected as both unsuited to producing the data sought and as also too time-consuming.\(^{101}\) On the other hand, fully-structured quantitative interviewing was rejected as being likely to stifle or reduce the flow of information and candid admissions to the researcher, because in this area building rapport, trust, and credibility with interview subjects was extremely important. Further the subtle nuances of particular answers were important, providing detailed anecdotes and indications as to the day-to-day approach of the particular

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\(^{96}\) Appendix 5.6 provides a listing of persons with whom interviews were conducted.


\(^{101}\) In addition, given the sensitivity of the subject matter it is unlikely that full access to Departmental officers could have been obtained freely without resort to some form of subterfuge.
regulatory agency to the regulated community of landholders and private forestry contractors and sawmillers.

As the focus of the thesis is on questions concerning implementation of legislation in practice, the bulk of interview research involved government agency staff. In some instances a ‘snowball’ sampling technique (a form of convenience sampling) was used in order to select interview subjects most likely to be in a position to provide key information sought. The technique involves seeking referrals from interview subjects to other persons working in the field who may have greater knowledge of particular issues than the subject concerned. There are dangers of bias in this method of selecting interview subjects. They arise because the interview subject may be effectively stating “I’ll refer you to someone who will support my viewpoint”. However, snowball sampling is particularly useful in cases such as the present where the research involves an attempt to locate informants who are somewhat difficult to find - i.e., informants within agencies who were willing to talk candidly about the implementation of legislation, in a situation where agency staff were sometimes unwilling to talk in any detail and were reluctant to answer questions frankly or honestly. Due to the political sensitivity of some of the questions being asked there was a tendency for some interview subjects with whom good rapport had not been established effectively to offer ‘closed’ or yes/no answers, without explaining the reasons that lay behind the situation.

In addition, having found a sympathetic interview subject, this is likely to provide more valuable referrals to others who may also be willing to provide time to be interviewed and be forthcoming with confidential information. If a research strategy had been adopted of merely directing questions to the head of the agency concerned, the volume and incisiveness of information that would have been forthcoming would have been minimal, as there would have been a danger that the answers would have been tempered with ‘political spin’ or public relations waffle.

The focus of the interview research involved the North-Eastern coastal region of NSW, as that region has the most concentrated level of PNF activity in NSW. A significant number of interviews were also conducted with agency staff in the Hunter and Sydney-South Coast regions of DLWC.

102 This methodology is discussed in Gunningham and Grabosky (1998) above n 80 at 35.
103 Appendix 5.1 (Overview of PNF and Private Forestry in NSW).
CONCLUSION

The picture of NSW private forests as ‘the forgotten forests’ is slowly changing as their considerable commercial importance is underlined by restrictions on public forest timber supply, and as their conservation significance is explored and spoken for by environmentalists. The preliminary data available at the start of the research enterprise raised questions about the silvicultural standards of forestry practices in this sector of the industry, and about compliance with environmental laws.

This Chapter has argued the importance of examining the effectiveness of regulatory approaches to environmental protection, and biodiversity conservation in particular. It is important to determine whether laws are making an adequate contribution to the achievement of conservation objectives. The implications of failure to adequately regulate PNF will most likely involve loss of biodiversity, degradation of other environmental values, and mismanagement of an important timber resource.

In terms of the broader context, it is critical that we explore debates into which questions of PNF regulation fit – arguments about the future of environmental regulation. The next chapter, Environmental Protection and Regulatory Theory, reviews discussions within environmental law, the sociology of law and regulatory theory over regulation and self-regulation and the ‘reinvention of regulation’.

Chapter Three considers questions of industry self-regulation in environmental law. Those questions are relevant because in reviewing the regulatory framework for PNF in NSW some may suggest that PNF in that state should be subject to a system where substantial elements of industry self-regulation are relied upon.

Research into PNF regulation may have implications for broader research in regulatory theory, particularly into regulatory systems incorporating self-regulation and self-assessment by landholders. It is also relevant to other attempts to apply environmental

\[104\] Note that this title was applied by Calder, M., Calder, J. (1994) The Forgotten Forests: A Field Guide to Victoria’s Box and Ironbark Country, Victorian National Parks Association, 120pp. (This book is now in its 2nd edition as Victoria’s Box-Ironbark Country: A Field Guide) on the basis that they are no longer the forgotten forests following the creation of a number of national parks and reserves. See also Anon. (2001) “The forgotten forests' last stand”, Editorial, The Age, 30/08/2001, where the leader writer suggested “The woodlands are archetypal Australian bush, part of a cultural and literary heritage...”.
regulation to small and medium sized enterprises – entities often neglected in studies of environmental compliance.


Chapter Two

ENVIRONMENTAL PROTECTION
AND REGULATORY THEORY

INTRODUCTION

Although the law is only one instrument of policy to address environmental damage, it is a central aspect of contemporary responses. As such it requires study and investigation.¹ This is not to suggest that environmental law-making is a new phenomenon in Australia or that problems of implementation are entirely novel. Much of the customary law of the nation’s first peoples embodies rules and principles of environmental stewardship. For example, these principles are found in the tjurkurpa (or traditional law) of Pitjantjatjara people of North-Western South Australia.² Further, a number of environmental protection laws (albeit narrowly focussed) were promulgated almost immediately upon British colonisation of NSW.³ The colonists’ early environmental laws were directed at ensuring orderly and managed resource exploitation.⁴ An intense wave of environmental law-making activity in Australia took place in the 1960s and early 1970s with a rise in popular and official awareness of ecological damage, and increased influence of the environmental movement.⁵ The growth in environmental enactments has been steady, with the result that legislative responses to most aspects of the environmental crisis have been in place for a number of years now.⁶

¹ Other mechanisms include economic instruments such as taxes, and bounties, grants and incentives, policy statements and guidelines, and education campaigns, as well as institutional reforms and ‘capacity building’.
³ For example, laws were made to prevent pollution of water supplies - in NSW, to protect the Tank Stream in 1795, for similar purposes in Hobart in 1804, and in Victoria to protect the Yarra River with the Yarra Pollution Act 1855. Bonyhady, T. (2000) The Colonial Earth, Melbourne University Press, Melbourne, at pp. 5-10, 336.
⁶ There are some notable gaps, for example, the lack of regulation restricting emissions of greenhouse gases (apart from ozone depleting greenhouse gases).
that observers such as Fisher have noted it would be difficult to remain fully abreast of all the details.\textsuperscript{7}

With such legislative action there are now relatively comprehensive frameworks of environmental laws in place in most jurisdictions. Are these new enactments serving adequately to address problems of environmental damage? Unfortunately, much Australian literature on environmental law provides few answers about what is happening in terms of on-the-ground impact. This is because it typically fails to go beyond a merely descriptive, ‘black-letter’ depiction of the relevant statutory framework applicable to a given environmental issue, for example offering descriptions of recent legislative changes.\textsuperscript{8}

A related criticism of environmental law is that it is merely structural - caught up with administrative, procedural and institutional details.\textsuperscript{9} Much analysis of environmental law remains within the discipline, or if it considers questions of implementation, only looks at issues such as statutory provisions for enforcement or appropriate institutions from a relatively narrow perspective.\textsuperscript{10} That much environmental law scholarship is “preoccupied with mundane technical management issues”\textsuperscript{11} was demonstrated by Tranter in an analysis of the content of the *Environmental and Planning Law Journal* between 1984-1997. Tranter found the majority of 271 surveyed articles to be largely descriptive. 30 percent were purely descriptive and another 48.9 per cent were grounded in generic, standard legal analysis from within the discipline itself. Only 5.9 per cent of articles actually grounded their analysis in some discussion of the role of the law in addressing the broader ecological crisis.\textsuperscript{12}

\textsuperscript{7} This point is noted by Fisher, D (2003) *Australian Environmental Law*, Law Book Company, Pyrmont, NSW at vii.

\textsuperscript{8} In this respect, it reflects a characteristic of some overseas environmental law literature. For example, in the UK see Fry, M. (1995) *A Manual of Nature Conservation Law*, Clarendon, Oxford; and in the US see Campbell-Mohn, C.; Breen, B. (1993) *Sustainable Environmental Law*, West Law & Environmental Law Institute, St Paul, Minn.


\textsuperscript{10} Of course there are numerous exceptions to this generalisation; these are discussed further below. For example, Ramsay, R.; Rowe, G. (1995) *Environmental Law and Policy in Australia: Text and Materials*, Butterworths, North Ryde, wherein the authors introduce environmental law with chapters on the application of perspectives from economics, science, philosophy and politics to environmental law. See also Prest, J. (1995) *Licensed to Kill: Endangered Fauna Licensing Under the National Parks and Wildlife Act 1974 (NSW) Between 1991-1995*, Occasional Paper, ACEL, ANU, Canberra.


\textsuperscript{12} Ibid at 289-291.
A narrow approach to legal scholarship arises from a barely acknowledged adherence to legal formalism on the part of many lawyers. This perspective sees law as an autonomous discipline, as “a discrete set of principles in a vacuum”, as a series of statutory mechanisms to be explained. The ‘black-letter’ approach can be explained either by a lack of a conscious theoretical perspective on the part of many authors, or by a desire to simplify matters considered irrelevant by conveniently presenting only the law, in a spirit of value-free ‘professionalism’.

The emphasis on technical details in much environmental law writing has obscured a necessary broader focus on “the ecological crisis” and its various causes. The technocratic ‘management approach’ sees environmental problems as merely the result of failures in the management of environmental threats, not of underlying defects in social, economic and bureaucratic organisation. Within the technocratic perspective, there is less emphasis on asking the more fundamental contextual and normative questions such as ‘why’ and ‘should’.

Yet according to White (1999), a perspective that looks at political, economic and power relations suggests “regulation...can never be simply a matter of finding technical solutions to what are, essentially, political problems.”

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15 This arises from a barely acknowledged, almost sub-conscious, internalised professional identity, an unwitting rather than a deliberate failure to place environmental laws into their broader political and economic and sociological context. In this way the privileged status of law and the legal discipline can be maintained as value free, above politics and therefore of greater value. Many lawyers appear to be unwitting positivists, as opposed to the deliberate and conscious positivism of many neo-classical economists. Eichner, A.(ed.) (1983) *Why Economics is Not Yet a Science*, M.E. Sharpe, Armonk, N.Y. For another perspective see Simpson, G.; Charlesworth, H. (1995) “Objecting to Objectivity: the Radical Challenge to Legal Liberalism”, in R. Hunter, R. Ingleby and R. Johnstone (eds.), *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law*, Allen & Unwin, Sydney, at 86-132. Similar arguments are used elsewhere to explain the failure of British lawyers - and the same could be said for Australian lawyers on the whole - to fail to venture into economic analysis of the law. Ogus and Richardson have explained the reluctance of British lawyers to engage with the promise of economic analysis of law on the basis of their internalised belief that justice is the primary objective, rather than goals of overall social efficiency. They suggest that tort law operates on the basis of questions of justice regarding individual, private claims rather than general policy. U.S. lawyers are much more willing to ask whether legal solutions are economically efficient in the sense of maximising overall social welfare. Ogus, Richardson, G. (1977) “Economics and the Environment: a Study of Private Nuisance”, 36 (2) *Cambridge Law Journal* 284-325.
makes similar points about environmental law, arguing that it is “a shadow of development law”.  

Apart from the technical and descriptive environmental legal literature there is some writing offering a somewhat broader analysis, for example, literature considering allocation of decision-making responsibility, literature considering the divide between international and domestic law, and literature comparing the law across different jurisdictions. One approach within the framework of conventional legal analysis involves examining the allocation of responsibility for environmental management within federal and multi-jurisdictional systems. Domestically there is a considerable literature examining issues of federalism and allocation of decision-making responsibility between the States and the Commonwealth.  

At an international level, this literature examines the role of multilateral and bilateral agreements, particularly trade agreements on environmental law. A recent collection by Reversz, Stewart and Sands discusses themes including appropriate institutions, and the apportionment of responsibility for decision-making.  

Beyond these approaches, however, we are now beginning to see changes in the preoccupations of environmental law academics towards research into the implementation of environmental laws and the principles they embody. It is well known that environmental law has begun to develop and incorporate its own substantial policy and legal principles, based on the concept of ecologically sustainable development (‘ESD’). Since the 1992 Earth Summit, these evolving principles and norms have been incorporated, with ecologically sustainable development and ‘sustainability’ at the centre.

Leane criticises environmental law, arguing that it ‘fails’ because it “conforms to the underlying deep structure of liberal political ideology” which, it is argued is fundamentally in conflict with ecological protection. He argues that environmental law is part of and reproduces the political paradigm of liberalism. Leane, G. (1998) “Environmental Law’s Liberal Roots: (Not) a Green Paradigm” in Rogers, N. (ed) Green Paradigms and the Law, Southern Cross University Press, Lismore, N.S.W at 1.


as touchstone principles.\(^{25}\) Among them are the ‘precautionary’ principle, the ‘polluter pays’ principle, and the ‘right to a healthy environment’. But the important shift of recent years has been described by De Sadeleer as “the evolution of environmental principles from their origins as vague political slogans to their embodiment in enforceable laws”\(^{26}\). The ‘precautionary’ and ‘polluter pays’ principles have begun to be implemented in many jurisdictions at regional, national, and international levels.\(^{27}\) The extent to which these principles are actually binding is by no means resolved in all jurisdictions.\(^{28}\) Some of the more insightful Australian writing examines the degree of congruence of the law with ideals of ecological policy, and the extent to which the incorporation of the principles is binding or merely symbolic.\(^{29}\)

Even though recent enactments embody ecological principles, new tools, and stricter standards by which decisions are to be made, the broad question still remains, “are they actually working?” Although the approach of examining the extent to which laws embody the principles and approach of ESD represents a substantial advance, it is not clear that such actions are sufficient to thoroughly address ecological problems.

**INTERDISCIPLINARY PERSPECTIVES**

Aside from examining implementation it is increasingly seen that there is a need for an interdisciplinary analysis of law, perhaps in recognition of suggestions that “the significant problems we face cannot be solved at the same level of thinking we were at when we created them”, as Einstein is said to have once observed.\(^{30}\) If narrow approaches to environmental law are retained, mainly informed from within the legal

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\(^{28}\) For example, the question of whether the precautionary principle was applicable to U.S. mining companies operating in Indonesian West Papua was considered in *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) involving an attempted application of the *Alien Tort Statute*, 28 U.S.C. §1350. The Fifth Circuit held that the particular violations alleged did not give rise to environmental torts under the “law of nations” prerequisite. The principles relied on included the Polluter Pays Principle, and the Precautionary Principle. On appeal, the Fifth Circuit concluded that the principles cited “merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.”


discipline, we are unlikely to produce laws or analysis of them that will substantially contribute to solving environmental problems. In short, an inter-disciplinary approach is required that considers the implications of the broader context of economic and political forces and indeed the ecological crisis for law reform.31

Within the legal field as a whole there is now a widespread acceptance that “the study of law is far richer when it is not carried out in isolation from other fields of scholarship.”32 Some authors are applying inter-disciplinary perspectives to the study of the law33 by drawing lessons from such fields as history,34 sociology,35 economics,36 criminology,37 psychology,38 science,39 the study of social movements,40 and even art.41

One particularly influential interdisciplinary perspective has involved the application of techniques of economic analysis to review the efficiency and effectiveness of various aspects of the legal system. This literature typically presents a critique of legal (or ‘regulatory’) solutions to policy problems as being either ineffective or economically inefficient or both. This is the intellectual heritage of the most prominent debate within

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A key task of this thesis is to examine implications of this push to ‘re-invent’ environmental regulation for one particular aspect of environmental policy - the management of land for private native forestry and its implications for biodiversity conservation. It is almost axiomatic in the literature that conventional legislative approaches that seek to control and prohibit environmentally damaging activities are subject to a number of limitations. These arguments coalesce in a generalised allegation that conventional regulation is prone to ‘regulatory failure’.

‘Regulatory failure’ can be defined as “regulation which leads to outputs and outcomes which are perceived not to be in the ‘public interest’”.\footnote{Lodge, M. (2001) Competition, Innovation and Regulation: The Regulatory State and Policy Failure: Regulatory Regimes in Britain and Germany, Centre for Analysis of Risk and Regulation London School of Economics, Paper for the 51st Political Studies Association Conference, 10-12 April 2001, Manchester, United Kingdom.} A simpler definition is: an instance where legislation fails to achieve its stated objects. Empirical research provides an opportunity to test some of the claims made in wider debates within the theoretical literature about regulation and self-regulation.

It is necessary to examine in detail the evidence of, and reasons for regulatory failures, rather than merely accepting assertions that regulation is ineffective and an inappropriate policy choice for resolving environmental problems on private land. Thus it is crucial to embark upon a deeper level of investigation in relation to the implementation and enforcement of environmental laws. This approach is informed by a tradition of socio-legal research that compares ‘law in the books’ with the ‘law in action’ - the law as it is interpreted, communicated, applied, implemented and enforced in practice.\footnote{Pound, R. (1910) “Law in Books and Law in Action”, 44 American Law Review 12.} Socio-legal perspectives are relevant because questions of implementation cannot be answered without reference to the political, social, economic and micro-sociological factors which
influence enforcement and implementation. The interdisciplinary approach of socio-legal studies enables a variety of methodologies to be applied, depending on the research subject.

According to Hutter, “socio-legal studies are motivated by the belief that it is necessary to consider the law in its social context rather than for its own intrinsic value as a legal text.” Thus socio-legal research typically involves studies of compliance with particular regulations, and examines interactions within the regulatory process. A key concern is to explore the manner in which broader social forces are reflected in the minutiae of interactions between regulators and regulated community. This perspective is applied in order to enable more incisive consideration of the nature of regulatory offences against social and environmental laws, and the role of discretion and negotiation in the regulatory process. This approach can assist us to become better informed about the circumstances in which the law is most likely to be effective.

Much of the work that approaches environmental law from an explicit framework of socio-legal studies is international. There is a small but active community of socio-legal researchers in Australia, of whom only a few are examining environmental law. Nevertheless a recent edition of the Griffith Law Review was devoted to interdisciplinary perspectives on environmental law, and several authors have carried out studies from a socio-legal perspective.

Another aspect of socio-legal research is to undertake analysis of institutions established to implement laws. A standard law reform approach is to examine institutional structures

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45 The term ‘microsociological’ refers to the factors that influence individual interactions between individual regulatory officers and the regulated community, such as how cultural conditions, social exchange and interaction including the context within which one is seeking to implement legislation affect outcomes. In particular it refers to a research approach in which researchers examine a relatively small group of subjects in a particular locale and studies the face-to-face interactions of those subjects rather than studying large groups in society.


51 For example, environmental law was the focus of only 6 of 80 papers at “Opening Law: Making Links - Crossing Borders”, 20th Annual Law and Society Conference, University of Wollongong, 9-11 December 2002.

and arrangements and then suggest alterations. While such approaches are worth pursuing, and indeed are pursued in this thesis, a deeper analysis involves consideration of political and economic factors affecting public administration, involving observations about the nature of the regulatory process. An important component is to acknowledge the role of regulated parties in influencing the content and implementation of regulations. The approach that the law should not be studied in the abstract is well summarised in Bernstein's (1955) observation that: “Above all, regulation is a process which is neither isolated in relation to the general political and economic environment nor self-contained in its evolution.”

Given socio-legal studies’ perspective of looking at the law in action there is necessarily a strong tradition within socio-legal studies of conducting empirical research into the implementation of various laws. This typically involves examining issues of the enforcement of environmental laws. Empirical research into the enforcement of social regulation in Australia has focussed on fields other than environmental law - on occupational health and safety and criminal law - with some exceptions. A number of authors have carried out studies from a socio-legal perspective, looking at social relations as well as implementation and enforcement difficulties.

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53 Bernstein, M. (1955) *Regulating Business by Independent Commission*, Princeton University Press, Princeton, NJ, at p.280 observes, “the regulation of business is an intensely political process which arouses pervasive antagonisms and bitter disputes…Regulation…cannot be isolated from the web of economic and political relationships.” This work is a study of the effectiveness of seven independent regulatory commissions in the US.

54 Ibid at 281.


 tradition of empirical investigation in environmental law such as the work of Yeager\(^5\) and Hawkins.\(^6\)

Yet just because socio-legal research involves an empirical emphasis does not mean that it is atheoretical.\(^7\) Our choice of research questions arises inevitably from our theoretical assumptions, our worldview and values.\(^8\) The approach taken in this thesis tends more towards a socio-legal research perspective than one from the sociology of law.\(^9\) This is due to a desire to constrain the scope of the project to facilitate a meaningful research result, rather than to speculate more broadly about the manner in which the laws and agencies investigated reflect broader social, economic and political forces.\(^10\)

This is not to suggest that the approach taken is merely a positivist empirical investigation. A broader interdisciplinary perspective is adopted for the reasons set out above. In any case, the lines between socio-legal studies and the preoccupations of the sociology of law with grander theory are blurred. Hutter has argued: “Socio-legal scholars are as concerned to understand the social, economic, and political processes that bring law about and shape its form and content as they are to examine its enforcement and impact at the micro everyday level.”\(^11\)

Nevertheless, the perspective of the sociology of law is informative because it permits contemplation of the suggestion that environmental legislation has important symbolic political purposes, as a display of environmental concern by legislators.\(^12\) A host of exemptions as well as special projects legislation has been enacted, relieving industry in selected circumstances of obligations under particular environmental laws, particularly to prevent contemplated third party appeals or to override judicial decisions that were the

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\(^8\) Hutter (1999) above n 47 at 47 at 4.

fruit of successful third party litigation. This is not to suggest that all environmental laws are a symbolic façade subject to many loopholes. Reality is much more complex. Nevertheless such questions are important and often neglected aspects of environmental law.

The sociological and political critiques of environmental law briefly outlined above are useful, but there remain many areas of environmental law in Australia in which substantial basic research has not yet been conducted. It remains necessary to discover what is (i.e., positive questions), before we can discuss why it is and how it ‘ought to be’ (i.e., normative questions).

A prime area for investigation of the efficacy of environmental laws in practice concerns the law relating to nature conservation. Research is necessary in this area as the operation of legislation is not as well studied as it is in relation to pollution laws, although the environmental issues are at least as serious. Thus the core of this thesis presents the findings of empirical research into the implementation of particular environmental laws in NSW applying to the conservation of nature, particularly biological diversity (‘biodiversity’) outside protected areas (i.e. outside national parks and nature reserves). As a subset of that broad topic, in particular, the focus of research conducted concerned the effectiveness of legal methods for mitigating the impacts of forestry activity on privately owned land (i.e., private native forestry (PNF)) in New South Wales (NSW) and Tasmania.

CALLS FOR THE RE-INVENTION OF ENVIRONMENTAL REGULATION

Set against specific questions of the application of environmental laws in the off-reserve context, we must still examine the broader context of papers that question the future role

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66 In the ACT, special projects legislation was enacted to prevent scrutiny of the validity of approvals for a freeway under the *Gunghalin Drive Extension Authorisation Act 2004* (ACT). In NSW, special legislation was passed to defeat litigation in relation to the following projects: Bengalla Coal Mine (*State Environmental Planning Policy No. 43 (Permissible Mining)*), Kooragang Island coal terminal (*Kooragang Coal Terminal (Special Provisions) Act 1997*), the Port Kembla copper smelter (*Port Kembla Development (Special Provisions) Act 1997*), the Walsh Bay pier (*Walsh Bay (Special Provisions) Act 1999*) and the Sydney mega-tip waste transfer station (*Clyde Waste Transfer Terminal (Special Provisions) Act 2003*).

of conventional legal responses in this context. These have been described as proposals for regulatory re-invention\textsuperscript{68} or for the reconfiguration of regulation.\textsuperscript{69}

There is an increasing tendency within discussions of environmental law in Australia for direct regulation to be avoided and for alternative instruments such as self-regulation and market mechanisms to be advocated. Proposals for, and manifestations of, ‘light regulation’\textsuperscript{70} are spreading across all fields of regulatory endeavour, from mine safety to broadcasting and pollution control. The natural resources management field, too, is becoming increasingly subject to such proposals.\textsuperscript{71} Discussions about the effectiveness of methods for conservation on private land reflect broader debates within environmental law literature regarding the future of conventional direct regulation. It is argued that direct regulation is “an outdated approach”.\textsuperscript{72} The prevailing climate is one of preference for self-regulation, indirect governance, government-community partnerships, exemptions and de-regulation ahead of direct regulatory controls.\textsuperscript{73}

We must step back to consider the broader theoretical debates that have principally arisen regarding the effectiveness of direct regulation in the pollution control context. Some of the relevant questions include, ‘what are the options for supplementing conventional regulatory approaches?’ and ‘what are the necessary preconditions for alternative approaches to work effectively?’ The main topics explored are the modification of regulation to accommodate new mechanisms and the potential and limits of self-regulation.


\textsuperscript{69} Gunningham and Sinclair (2002) Leaders and Laggards above n 23.


\textsuperscript{71} NSW Vegetation Forum (1996) Report on Native Vegetation Management in NSW, DLWC, June, at 8: “The Forum favours a legislative scheme which allows self-regulation within a legislative regime, based on Regional Plans that cover local and property plans. Self regulation refers to clearing undertaken in a manner consistent with relevant approved plans of management.”

\textsuperscript{72} Dr G. G. Brown, Australian Academy of Technical Sciences and Engineering, Submission to the Senate ECITA Legislation Committee on the EPBC Bill, 18.3.99, criticised the EPBC Bill on the basis that its “excessive reliance” on criminal enforcement provisions “promotes an adversarial climate”, and claimed “the excessive reliance which the Bill seems to place on such measures is an outdated approach.” <www.atse.org.au/publications/government/env-bio-act.htm>, accessed 5.9.03. Note that the largest maximum penalties under the EPBC Act are civil penalties rather than the results of criminal prosecution. For example civil penalties include fines of $5.5million for a corporation, and $550,000 for an individual, eg. s.18 failure to obtain an approval prior to taking an action with a significant impact on listed threatened species. By comparison, criminal prosecution can levy a maximum penalty of $46,200 and/or seven year term of imprisonment (EPBC Act, s.18A(3)). Other, lesser penalties ($1.1 million for a corporation and $110,000 for an individual apply through civil enforcement in relation to failure to comply with conditions of an approval: s.142, EPBC Act).

THE REGULATORY APPROACH

At this point it is convenient to define key terms. This section defines ‘regulation’, describes its basic elements, and sets out the scope of debates surrounding its application.

The meaning of the terms ‘regulation’ and ‘regulatory’ is difficult to circumscribe.74 At its broadest, ‘regulation’ suggests behavioural control. To ‘regulate’ is to control systematically, i.e. to “direct by rule, principle, method, etc.”,75 to cause a person to obey a rule or standard. In this sense, ‘regulation’ can mean any form of behavioural control, whatever its origin.76

To many, the term ‘regulation’ implies regulation by the State, a persistent effort by a public agency to exercise oversight or control over matters of public interest or concern.77 Typically, ‘regulation’ is public in nature, and is centralised (‘public regulation’).78

Yet one can validly point to various modes of private regulation.79 These are increasingly assuming important roles in environmental law and policy. ‘Regulation’ goes further than the exercise of control (conventional direct regulation) by the State through legislation.

There exists a continuum commencing with laissez-faire policies of reliance upon the free market and extending to full State regulation of all activities within industries. Between these two extremes lies ‘direct regulation’ and various models of self-regulation. Examples at either end of the continuum are not as common as might be imagined, with the majority of regulatory arrangements involving some mix of public and private controls.80

77 Ibid.
DIRECT REGULATION

To be in a position to discuss recent trends in regulatory policy, it is necessary to define the benchmark of ‘direct regulation’. This is often referred to as the ‘command and control’ approach (or ‘command regulation’), which has long been the dominant technique of public environmental law. (In this thesis, ‘direct regulation’ is employed, as it is a neutral term.)

Public environmental regulation acquired significant momentum in Australia and the United Kingdom in the nineteenth century in response to growing official concern over the health effects of industrial pollution and the implications of mismanagement of natural resources such as forests and water supplies.81 Legislators recognised the limits of private law approaches (eg. tort law) in providing effective, coherent and expeditious responses to environmental damage, particularly from industrial pollution.82 It was on this basis that a grand edifice of statutory public environmental law was incrementally constructed.

‘Direct regulation’ is described by some as ‘command and control’ regulation, as it relies upon legislative commands from the State to the regulatee (the command), reinforced by the threat of criminal sanctions (the control). The State sets a requirement that a particular standard or environmental goal is to be achieved, (i.e. that pollution by agent $x$ is permitted to a maximum level of $y$ parts per million). It sometimes commands the technologies, methods or processes that are to be used. For this reason it is also described as ‘prescriptive regulation’.

In practice, in the environmental context, ‘direct regulation’ usually involves licensing. Licensing as applied in the pollution control context provides an excellent illustration of the main concepts. A given statute prohibits persons from polluting the environment. Yet licensed persons are permitted to pollute, subject to conditions. Licensing allows

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81 In Australia, laws were made to prevent pollution of water supplies, such as that made in NSW to protect the Tank Stream in 1795, and for the protection of water supplies in Hobart in 1804, as well as the Yarra Pollution Act 1855 to control pollution of the Yarra, as discussed in Bonyhady, T. (2000) The Colonial Earth, Melbourne University Press, Melbourne, at pp. 5-10, 336, In the UK the Alkali Act 1863 (UK) established the Alkali Inspectorate, the first specific-purpose environmental regulatory agency in that country, Second Alkali Act 1874, River Pollution Prevention Act of 1876 (UK), Alkali etc Works Regulation Act 1906, Public Health (Smoke Abatement) Act 1926. These Acts were preceded by the Public Health Act of 1848, and various mediaeval statutes which regulated local pollution of water sources.

individualised rules to be developed to address highly specific situations. The licence provides a means for legalising what is deemed to be acceptable pollution, and for the regulator to reduce or restrict the total amount of pollution from each enterprise. The regulated entity remains within the law if it obtains a licence to pollute and keeps within the limits of ‘acceptable’ pollution set out in the conditions. A criminal offence provision of general application is coupled with case-specific exemptions available through the licensing procedure. For example, in NSW, under the Protection of the Environment Operations Act 1997 (‘POEO Act’), any act causing water pollution is considered a crime, but possession of a licence and compliance with its conditions provides a statutory defence.

The essence of regulatory laws is that they aim to control and regulate particular activities, rather than to prohibit them absolutely. Obedience is sought through indirect coercion, the implied threats of prosecution and ultimately the cancellation or suspension of licences to pollute (and therefore to operate). The offence provisions operate in the background, ensuring the proper operation of the licensing scheme, provided that the threat of criminal sanctions generates sufficient deterrence to encourage compliance. For these reasons it is referred to by some as ‘coercive’ regulation.

Licensing is perhaps the most pervasive tool in public regulatory law. It is used to control industries ranging from alcohol sales, building and construction, to professional standards. In the environmental protection arena extending beyond pollution control, licensing and its variants (permits, consents, approvals, licences, permissions, and

84 POEO Act 1997 (NSW), s.120, whereas there is no blanket prohibition on air and noise pollution: see Farrier et al. (1999) above n 4 at 250.
85 POEO Act 1997, s.122.
87 Grabosky, P., and Gant, F.(2000) Improving Environmental Performance, Preventing Environmental Crime, Australian Institute of Criminology, Canberra, Research and Public Policy Series, Report No.27., at p. 95: “Incentives, which involve the carrot rather than the stick, often allow flexibility of response and are thus more likely to be regarded as legitimate by regulated interests than are more coercive regulatory instruments.” However, the choice of the terminology ‘coercive’ carries with it the suggestion that this form of persuasion is somehow illegitimate and inappropriate. Further, it implies that other policy instruments such as market mechanisms and information based mechanisms (eg. National Pollutant Inventory) do not involve any element of compulsion, which is misleading. Grabosky and Gant do concede that that “markets themselves may operate coercively”. (p.95).
exemptions) apply to the use and subdivision of land, the use of water, and the harming or killing of threatened species. Other examples in the natural resources context include controls over the clearing of native vegetation, and bans, bag limits and quotas on hunting, fishing and collecting.

Planning and natural resources management law applies a regulatory approach similar to that of pollution licensing. Prior authorisation, if successfully obtained, permits what would otherwise be an unlawful activity. Planning law is permissive in the sense that landowners and developers may carry out otherwise restricted forms of development provided they obtain approval in advance and then comply with any conditions placed on consent.

In both the pollution control and planning control contexts, the emphasis of the law is overwhelmingly on appropriate control of activities, rather than on outright prohibition. As Hawkins put it: “the issue is not whether to allow pollution, but how much pollution to allow.” As a result, a problem of moral ambiguity is inevitably associated with environmental law. Breaches of environmental law are often perceived as minor, technical, and not criminal or morally reprehensible. They are seen as merely an unintended by-product of economically beneficial activities.

This raises the issue of discretion and the extent to which it is possible or realistic to attempt to constrain agency discretion to permit polluting or environmentally damaging activities to continue. Studies of direct regulation have shown that agency discretion and negotiation by field officers with the regulated community play a crucial role in day-to-day regulatory implementation. Offence provisions provide a point of leverage for regulators to bargain for greater environmental performance from regulated parties. The fact that this form of regulation involves countless administrative decisions regarding

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89 Other direct regulatory techniques in the natural resources management arena include bans or restrictions coupled with licences, quotas and other approval systems such as timber harvesting plans. Approvals are typically granted subject to conditions or prescribed standards, and may be subject to specialised processes such as Species Impact Statements or inter-agency concurrence processes, where the agreement of a specialised regulatory agency on particular questions is required before the primary or ‘lead’ agency can approve the development in question. See Part Two in relation to the Threatened Species Conservation Act 1995 and its concurrence mechanisms.
90 Native Vegetation Conservation Act 1997 (NSW) to be repealed by the Native Vegetation Act 2003 (NSW), Vegetation Management Act 1999 (Qld), Native Vegetation Act 1991 (SA).
92 Farrier et al. (1999) above n 4 at 45.
94 Ibid at 206-207.
95 Ibid at 10.
details of the implementation of regulation in specific cases raises a host of potential difficulties and problems, which are addressed by doctrines of administrative law in order to ensure proper and lawful decision making. Administrative law has a crucial role to play in environmental law by controlling the scope of discretion exercised by regulatory bodies and their officers.96 This is the case because decision-making about the scope and content of the law is, in practice, effectively delegated to the decision-maker in this area of the law.97

THE CRITIQUE OF DIRECT REGULATION

Since the 1970s there has been a concerted critique of direct regulation, especially in the pollution control context.98 Calls for reform of environmental legislation continue to be made by regulators, industry, academics and commentators. These observers have a perception that “we are reaching the point of diminishing or even negative returns” with direct regulation.99 It is said that with the conventional approach “the low hanging fruit has all been picked”, with direct regulation reaching the limits of its technical capacity.100 Direct regulation is said to be less efficient, more costly, and less effective than other ‘less interventionist’ measures.101 The critics argue that instruments using less ‘intervention’ provide greater flexibility to regulated parties as to how to comply, enabling them to devise the most efficient and cost-effective means of compliance, thus generating less political resistance.

It is suggested that substantial efficiency gains are also available to regulators if they adopt a policy of only applying direct regulation to the ‘recalcitrant few’ who routinely, deliberately, or incompetently fail to comply with environmental laws.102 Such statements assume that only a minority are non-compliant. That assumption must be tested in each arena in which environmental laws are applied.

96 Ibid at 10.
101 Gunningham and Sinclair (1999) above n 42 at 855, 861.
102 Gunningham and Sinclair (1999) above n 42 at 862.
The cost- and efficiency-focussed critique of direct regulation is the offspring of law and economics scholarship, which in turn draws heavily on the analysis of regulation by economists in microeconomic case studies. The literature of neo-classical economics explains legislation in market terms, as an ‘intervention’ in the ‘free market’. Regulation in the public interest is a device to correct ‘market failures’ or externalities (i.e., ‘spill-over’ costs). Such market failures are said to occur where the market for a given product (e.g. private car transport) malfunctions, causing an externality or public ‘bad’ such as pollution or traffic congestion, imposing an unwanted cost on third parties. Thus environmental and social regulation involves action taken by government to correct market failures and address externalities; this is one technique for addressing market failure.

Neo-classical economists often demand that existing regulation be reviewed and that proposed regulations be subjected to tests of cost-benefit, effectiveness and efficiency instead of general principles such as environmental protection. The Industry Commission supervised the National Competition Policy review of all Commonwealth regulation in the mid 1990s along these lines. Some academics have taken this approach further and studied regulation as part of an analysis and critique of the economic costs of regulation - imposed on producers and consumers of goods. On the basis of such ‘cost of regulation’ studies and other ‘public choice’ analyses of interest-group participation in the legislative process, as well as the influence of broader
theories of macro-economic management critiquing deficit-financed government spending, a persistent case for deregulation and smaller government has been presented.\textsuperscript{111}

One of the pervasive objections of conservative economists to social and environmental regulation is that it involves excessive compliance costs for business. However the very objective of this form of regulation is to ‘internalise the externalities’ by including hidden social costs such as pollution into prices. The economist Lester Thurow suggests that the underlying reason for objections to the cost of regulation is self-interest, as “[t]he resisters do not want regulations and they do not want to pay for something that they have always had free (the right to pollute).”\textsuperscript{112} His suspicions are confirmed by action taken in Australia\textsuperscript{113} and Canada\textsuperscript{114} to prevent introduction of a carbon tax on greenhouse gas emissions. It is now known that the results of some ‘cost of regulation’ studies were exaggerated, or based on misleading assumptions.\textsuperscript{115} On the other side of the ledger must be placed the benefits of regulation - such as reductions in health expenditure following reductions in atmospheric pollution - as well as the fact that direct regulation has to some extent succeeded in improving environmental quality, at least in terms of reducing levels of specified pollutants.\textsuperscript{116} Apart from those laws that exist in order to provide the framework for the operation of markets, other regulations have substantial economic benefits that are often greater than the costs they impose.\textsuperscript{117}

role of interest groups in the passage of legislation. The public choice theorists argue that ‘market failure’ is often replaced by ‘government failure’, and argue that many laws were not enacted in the broader public interest, but due to the hijacking of the legislative process by particular ‘rent-seeking’ interest groups. Bottomley, S., Gunningham, N., Parker, S. (1991) \textit{Law in Context}, Federation Press, Sydney, at 208.


Another possible objection is that the economistic approach represents an emphasis on saving industry’s costs in compliance at the expense of an emphasis on the costs of remediying environmental damage.


115 Hamilton, C., Quiggin, J. (2002) “The Economics of Reducing Greenhouse Gases”, The Australia Institute, 26 July, 9pp which discusses economic modelling of climate change abatement strategies by the Australian Bureau of Agricultural Resource Economics (ABARE) and other consultants; Tabb, W. (1980) “Government Regulations: Two Sides to the Story”, \textit{Challenge}, November-December 1980, 40-48 at 48. Alternative studies found that often those studies which emphasised the cost of regulation - eg. the \textit{Clean Air Act} (US) - did not set out net costs of regulation, but instead emphasised costs of regulation without comparing benefits (such as reduced mortality and morbidity). In one study, when costs were compared with (monetised) benefits, social regulation (including air and water pollution controls) were found to provide benefits exceeding costs by a factor of 5:1. See Sunstein, C. (1990) \textit{After the Rights Revolution: Reconciling the Regulatory State}, at 77-79.


Present controversies over the direction of environmental regulation are best understood against this backdrop of a broader ideological clash occurring over the role of the public sector and the gradual ‘marketisation’ of society, (i.e., subjecting public administration to market principles): the debate between Keynesians and neo-liberal, monetarist, economic rationalists.118 With this relatively recent intellectual interest in a return to ‘unfettered’ market mechanisms grounded in the critique of Keynesian interventionism by Hayekian and Freedmanite adherents of small government119 there has been an associated political shift in many Western nations towards policies of de-regulation, and privatisation of State assets, as well as contracting out of public sector activities.120

Academic interest in the economic impacts of regulation diffused across to the political sphere to influence the direction of environmental policy and law making during the 1980s and 1990s. In the United States of America, small-government politics has profoundly influenced the literature if not the broad practice of environmental law. In that country, free market proponents have made extensive and detailed proposals for ‘free market environmentalism’ to reform environmental laws.121 For example, in 1998 alone, at least three detailed, high-profile reports were released arguing for the rejection of ‘command and control’ approaches to environmental regulation and the introduction of ‘performance-based’ and ‘outcomes-based’ regulation.122

The critique of direct regulation in Australia has mirrored the international critique.123 It is frequently argued that direct regulation as applied to environmental problems (‘command and control’) is ineffective, costly, economically inefficient, impractical or even politically unacceptable (eg. for being ‘coercive’).124

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122 Steinzor, R. (1998a) “Reinventing Environmental Regulation: Back to the Past by Way of the Future” 28 (7) Environmental Law Reporter 10361 at 10362. The three studies mentioned were published by Yale University, the National Academy of Public Administration, and a business group known as Enterprise for the Environment.
124 Some of these arguments are presented in Gunningham and Sinclair (1999) above n 42 at 861. The Commonwealth EPBC Bill was criticised as “command and control” regulation, by several industry organisations and associations in submissions to the Senate Environment Communications Information Technology and the Arts Committee Inquiry
Dovers and Gullett have pointed out that the term ‘command and control’ is equally applicable to economic instruments, as taxes also require taxpayers to take unpalatable actions. Thus on this basis, they suggest that it is “a derogatory and intentionally misleading description” since it implies that regulation alone amongst government interventions is coercive.\textsuperscript{125}

The term ‘command and control’ is pejorative and value laden.\textsuperscript{126} It is a label with some ideological force - the word ‘command’ makes subtle reference to the former Soviet Union as a ‘command’ economy. It contains an implication that regulation, or ‘coercive regulation’, was imposed on business by force and without consultation or input. This is despite the reality that it was enacted by democratically elected legislatures. Richard Stewart alleged in the \textit{Columbia Journal of Environmental Law} that:

\begin{quote}
Our current environmental regulatory system...has grown to the point where it amounts to nothing less than a massive effort at Soviet-style central planning of the economy to achieve environmental goals.\textsuperscript{127}
\end{quote}

The focus on the phrase ‘command regulation’, with its negative connotations - revealed more explicitly in the allied term, ‘coercive regulation’ - performs a disservice by blinding us to the positive benefits of regulation.\textsuperscript{128} Several surveys have found that the most important motivator of improved environmental performance is regulation.\textsuperscript{129}

Many so-called non-regulatory approaches such as rewards and incentives, pricing or market mechanisms actually rely upon a regulatory structure for their operation.\textsuperscript{130} As the economist Ronald Coase observed, “the delineation of rights is an essential prelude to

\begin{footnotesize}
\begin{enumerate}
\item Sunstein says: “The notion of laissez faire is a grotesque misdescription of what free markets actually require and entail. Free markets depend for their existence on law...Moreover, the law that underlies free markets is coercive in the sense that in addition to facilitating individual transactions, it stops people from doing many things that they would like to do.” Sunstein, C. (1997) \textit{Free Markets and Social Justice}, Oxford University Press, New York, at 5.
\end{enumerate}
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market transactions.” Planning laws, for example, facilitate the operation of the property development and real estate industries. The function of regulation in such a market is to reduce risks to capital investment, as well as to protect public ‘goods’.

The introduction of an environmental incentive or tax requires the introduction of a regulatory framework to support and implement it. There is in reality no such thing as an unregulated modern economy, because “without government regulation there are no property rights, and without property rights there is no free market.” Richardson (1998), drawing upon New Zealand’s experience with the introduction of market approaches, argues that substantial use of market mechanisms will entail “substantial environmental re-regulation” rather than wholesale deregulation.

The re-invention of regulation

Contemporary academic environmental law literature displays a virtual consensus in its calls for the ‘re-invention’ of traditional approaches to environmental regulation. The underlying premise is that conventional direct regulation has ‘failed’, or has at least enjoyed only mixed success. With this starting assumption it is a given that there is an

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131 Coase, R. (1959) “The Federal Communications Commission”, 2 Journal of Law and Economics 1-40, cited by Dawkins, J. (1996) “In Praise of Regulation”, 33(1) Australian Planner 10. Note in other work by Coase, particularly the article “The Problem of Social Cost”, Coase proposed that externality problems (eg. pollution) could be resolved most efficiently if property rights between conflicting parties involved in an externality problem were well-defined. If that were the case and there were no significant transaction costs impeding bargaining between the parties then the mere definition of property rights rather than the imposition of a pollution tax or a regulatory solution would lead to the most economically efficient outcome. However Coase also stated that if the parties were not in a position to reach or enforce an agreement, or the transaction costs involved in carrying out such a negotiation were excessive, government intervention would be required in order to resolve the externality problem. Coase, R. (1960) “The Problem of Social Cost” 3(1) Journal of Law and Economics 1-44.

132 Dawkins argues “The State regulates developers because urban development is not possible in an unregulated environment, any more than trade is possible under uninhibited piracy, or capital formation is possible when theft is unpunished.”, above n 131 at 11, 15.

133 On a broader scale, the numerous privatisations of State-owned assets, corporations and infrastructure which occurred as a result of the push for smaller government in the 1980s and 1990s, did not in fact lead to a reduction in the number of statutes and regulations, merely to an evolution - and new forms of regulation to govern the privatised provision of services to the public - in short the re-invention of the regulatory state. Braithwaite, J. (2000) “The New Regulatory State and the Transformation of Criminology”, 40(2) British Journal of Criminology 222-238 at 224-225.


urgent need to explore other policy instruments. 137 Yet this premise, the alleged ‘failure’ of direct regulation, is ill-explored and poorly tested, at least in the Australian literature.

Claims in the Australian literature that direct regulation is less efficient and more costly appear to be based on received wisdom, resting on either bare perceptions or theoretically-based claims from the international law and economics literature, rather than on the results of domestic empirical research. 138 This is one of the larger gaps in Australian environmental law literature. The critique of regulation must be set against the considerable evidence of its contribution, particularly in relation to pollution control. 139

Most of the debate over the role of direct regulation has been within the pollution control arena. Arguments against direct regulation may be either untested or inapplicable in the field of natural resources management. In the forestry context, there is evidence from the United States of America that regulation can achieve environmental goals. One survey revealed considerable increases in the annual extent of re-afforestation since the inception of laws governing State forest practices in Oregon, California and Washington. 140

The micro-economic critique of regulation has influenced many legal commentators to suggest that agencies should pursue voluntary agreements, self-regulation, information-based tools, price-based economic mechanisms or property rights-based instruments in preference to direct regulation. 141 Another aspect of the regulatory literature is debate

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137 Importantly such statements are made without testing the counterfactual scenario – i.e. the extent of environmental damage that would have occurred had the environmental laws in question not been enacted. LaPlante, B. (1995) “Comment on It's Not Easy Being Green: the Politics of Canada's Green Plan”, 21(4) Canadian Public Policy 461-467 at 465.

138 An exception to the lack of empirical research is the three case studies presented in Gunningham and Sinclair (2002) Leaders and Laggards, above n 23, of regulation of the vegetable growing, refrigeration manufacture and smash repair industries in selected Australian jurisdictions.


over the respective merits and demerits of sanctions and rewards, the choice of carrot or stick.\textsuperscript{142} With some commentators ranking instruments according to the degree of coerciveness,\textsuperscript{143} the choices have been cast as between the tools of persuasion (e.g. education and advertising campaigns) and command or exchange (i.e., the offer of incentives). Gunningham and Grabosky at one point suggest that policy makers apply a ‘regulatory design principle’ labelled as “Prefer Less Interventionist Measures”, that is to say, measures embodying both a low degree of prescriptiveness, and a low degree of coercion.\textsuperscript{144}

The law is but one means of many for altering, influencing and controlling the behaviour of citizens and corporations. The more sophisticated literature clearly states that policy instrument choices are not mutually exclusive but complementary. The challenge is to discern the combinations that work most effectively and to broaden the range of tools in the regulatory toolkit, rather than to debate the abandonment of direct regulation.\textsuperscript{145} With the widely varying characteristics of particular environmental problems, and different factual, legal, cultural, and historical contexts, policy responses to environmental problems must be context-specific.\textsuperscript{146} There is little point in attempting to articulate one single ideal solution to environmental and regulatory problems, based on grand theory.\textsuperscript{147} Instead, some analysts have devoted considerable time to questions of viable combinations of various instruments.\textsuperscript{148} The challenge is to study environmental problems and solutions at a lower level of generality, by consciously considering issues within their specific political, economic, and institutional contexts.\textsuperscript{149} We need to determine which scenarios are appropriate for the application of self-regulation and which other situations represent too great a risk for its application. Chapter Four explores issues of conservation on private land in this light.


\textsuperscript{143} Hoberg and Harrison (1995) above n 114 at 120 cites Doern and Phidd (1983) Canadian Public Policy, Methuen, Toronto.

\textsuperscript{144} Gunningham, N. and Grabosky, P. (1998) above n 42, at p.391-394. However this principle is subject to an almost impossible-sounding caveat that such low interventionism should only be applied if it is likely to be effective and mechanisms such as the use of tradeable permits can be readily verified.


\textsuperscript{146} Opschoor and Turner 1994 cited in Gunningham and Sinclair (1999) above n 42 at 855.

\textsuperscript{147} Ayres, I., Braithwaite, J. (1992) above n 42 at 101.

\textsuperscript{148} Gunningham and Grabosky (1998) above n 42; Ayres, I., Braithwaite, J. (1992) above n 42.

\textsuperscript{149} Gunningham and Young (1997) above n 145 at 297.
Modified models of regulation

By the 1990s, the message of advocates of regulatory reform began to influence the day-to-day practice and direction of environmental law as implemented by Australian regulatory agencies. With the preference for solutions tending to focus on the market and private actors, legislators and policy-makers to a limited extent are now experimenting with a “re-privatisation” of selected aspects of environmental law.

Yet the Australian experience so far has not involved abandoning the statutory approach altogether in favour of complete reliance on tort law and market mechanisms, and is better described as a “regulatory reconfiguration” than a retreat of the State. There has been little slowing of the pace of environmental law-making. If anything, there has been frenetic legislative activity since 1995, if NSW is an example. However, the range of mechanisms and approaches included both within legislation and outside it has broadened beyond permits and sanctions to give greater prominence to the ‘carrot’ of tax relief, subsidies, voluntary agreements and other incentives. Tools such as self-monitoring of pollution data, accredited licensing of industry leaders, bubble licensing, tradeable pollution credits and audited self-regulation have been considered and selectively applied in preventing pollution. Further, a range of voluntary agreement approaches has been implemented in the pollution control context such as ‘cleaner

151 Gaines & Kimber (2001) above n 136 at 158; The drive of agencies to select and identify supplements to regulation is probably not so much ideologically driven as driven by more immediate and practical needs - of finding more effective methods of environmental regulation which might bring results with the expenditure of fewer regulatory resources. Whilst the Howard government’s Natural Heritage Trust has dispensed large amounts for on-the-ground environmental repair projects - funded by the proceeds of the part-privatisation of Telstra – there is less information available regarding willingness to spend on regulatory approaches to environmental problems.
152 Gunningham and Sinclair (2002) above n 23 at 190.
production partnerships’ with industry, specifically involving grants to develop environmental management systems (EMS), and the encouragement of voluntary agreements with government described as ‘sustainability covenants’. Regulatory structures have also been expanded in order to create the preconditions or necessary frameworks for the operation of market-based environmental protection mechanisms, such as pollution trading, carbon trading and offset schemes. In a recent discussion of “Light handed regulation in Australia”, Papadakis suggests that novel environmental instruments such as tradeable pollution permits or voluntary approaches should not be viewed so much as a return to the market, rather as extensions of regulatory regimes. He argues that “the notion of ‘State-assisted marketisation’ assigns government a central role, and ‘voluntary’ approaches entail programs designed by the state or bargains struck between industry and government.” Nevertheless they indicate that government has stepped back and expects the market to play an increasing role in addressing environmental problems.

Thus in practice, the influence of pro-market literature has been more limited than it might have been, in terms of reduction in the number of environmental statutes. A broad program of repeal of all environmental laws – although occasionally recommended, as for example by the Industry Commission in its Inquiry into Sustainable Land Management – has not occurred. Rather, there have been additions to the regulatory toolbox, in some instances nevertheless entailing a streamlining and repeal of particular fields or sectors of existing legislation. The fact that wholesale deregulation has not eventuated is partly due to the strong and consistent public support for legislative action to control environmental damage.

159 In NSW, Parliament has moved to facilitate carbon trading by enacting the Carbon Rights Legislation Amendment Act 1998 (NSW).  
162 Examples of streamlining legislation include the Environmental Protection and Biodiversity Conservation Act 1999 (Cth), Native Vegetation Conservation Act 1997 (NSW), Protection of the Environment Operations Act 1997 (NSW).
Still, the lasting influence of the free-market environmentalists has been scepticism about direct regulation and advocacy of alternative policy instruments. Governments have been influenced to introduce or experiment with modified models of regulation.

Politically conservative governments (particularly the Commonwealth rather than the States) have chosen to avoid regulation in favour of intergovernmental agreements, broad policies, standards, goals, and outcomes, and voluntary corporate reporting and agreements. In recent years the Commonwealth government has been reluctant to regulate expansively for environmental protection.\textsuperscript{163} It has developed a framework to enable the future transfer of regulatory obligations to the States, primarily through the ‘approvals bilateral’ agreement mechanisms of the \textit{Environmental Protection and Biodiversity Conservation Act 1999}.\textsuperscript{164}

Examples of the Commonwealth’s light-handed approach are the National Environmental Protection Measures (NEPM) made under the \textit{National Environmental Protection Council Act 1994} (Cth) (‘NEPC Act’),\textsuperscript{165} the information-based approach of the National Pollutant Inventory (NPI), and the Commonwealth’s program for voluntary corporate greenhouse emissions reduction, the \textit{Greenhouse Challenge}.

Another influence on the approach of the Commonwealth government to environmental regulation has been the National Competition Policy. It has influenced Commonwealth policy, firstly, through the completion of a review of all Commonwealth laws with a view to determining whether those laws “restrict competition”,\textsuperscript{166} secondly, through the introduction of discourses of ‘markets in ecosystem services’,\textsuperscript{167} and thirdly, through pressure on the States to enact framework legislation to enable the implementation of market-based solutions to water quantity problems, i.e., tradeable property rights in water, to implement the COAG \textit{Water Reform Framework Agreement 1994}.\textsuperscript{168} The \textit{National Salinity Action Plan} has continued this dialogue. Although emphasising the role of

\textsuperscript{163} For example, in relation to control of land clearing, and emissions of greenhouse gases.
\textsuperscript{164} Similarly the States have sought to transfer certain obligations to local government, particularly in NSW under the \textit{Protection of the Environment Operations Act 1997}.
\textsuperscript{166} Lyster, R. (2002) above n 73 at 37.
effective land clearing control regulation in solving salinity problems, it has proposed establishment of markets in environmental services, and the use of government-community partnerships. The latter theme, of partnerships, had already been cemented as a central tenet of Commonwealth environment policy, in the methods selected for the implementation of the National Heritage Trust (NHT).

**REFLEXIVE LAW**

Many commentators depict the adaptation and modification of direct regulation as an evolution of environmental law to a more advanced state. In this vein, Fiorino suggests that “the heavy hand of regulation, which aims to control behaviour directly, is replaced by ‘indirect and abstract’ forms of legal control.” The recent and ongoing reinvention of regulation in many jurisdictions has involved a broader conception of the regulatory process. Structures and tools for greater participation in the regulatory process by private actors are the focus. Provisions are aimed at encouraging greater participation in the regulatory process by both regulated parties and by third parties (‘regulatory surrogates’) such as NGOs, financial institutions and industry associations. This section examines the theoretical influences lying behind proposals for industry self-regulation, a policy instrument that applies this philosophy and approach.

One school of recent theoretical writing on environmental law draws upon broader notions of regulation from the German post-modernist legal sociologist Teubner, who has presented and refined a notion of ‘reflexive law’ that draws on the work of political theorist Jurgen Habermas. This model suggests a reduced role for the law and the State in terms of direct social control. It proposes the development of indirect means and mechanisms which encourage regulated entities to “devise processes of internal self-

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169 Examples of such partnerships include Bushcare, Streamcare and other NHT programs. COAG (2001) *Our Vital Resources: A National Action Plan for Salinity and Water Quality in Australia*, Environment Australia and Department of Agriculture Fisheries and Forestry, Canberra, 12pp. According to the promotional material: “A National Action Plan for Salinity and Water Quality (the National Action Plan) was endorsed by the Prime Minister, Premiers and Chief Ministers at the Council of Australian Governments on 3 November 2000. It involves a funding package of $1.4 billion from the Commonwealth, States and Territories. The significant funding allocation is over a seven year period and complements the existing Commonwealth’s $1.5 billion Natural Heritage Trust.” Apart from endorsing and encouraging the investigation of market-based instruments, the plan also states that legislation is essential: “any Commonwealth investment in catchment/region plans will be contingent upon land clearing being prohibited in areas where it would lead to unacceptable land or water degradation.” at p.9.


regulation” to correct their own behaviour.\textsuperscript{174} The term ‘reflexive’ refers to organisational and corporate capacities of the private sector for self-reflection, self-learning and self-correction of behaviour.\textsuperscript{175} Strict reflexive law approaches emphasise “autonomous goal setting” and favour the exclusion of direct State involvement and public participation in making corporate decisions.\textsuperscript{176} Reflexive regulation principles are applied in practice in internal corporate EMS\textsuperscript{177} Similarly, reflexive law theories provide a theoretical background and explanation to policy proposals for self-regulation.

Another stream of this literature is more accommodating of a role for government. Farmer defines reflexive environmental law as “a law of ecological self-organisation \textit{using strong external pressures for internal self-regulation}.”\textsuperscript{178} This involves the State setting environmental protection goals, leaving the mechanism for achievement of those goals to the discretion of the regulatee, yet ensuring punishment if these goals are not achieved.\textsuperscript{179}

\section*{Conclusion}

It is important to note the prevailing scepticism about the future role of regulation in environmental protection. There is a discernible tendency within some writing in the field to reject the regulatory approach as being ineffective and inefficient. Despite this scepticism there remains scope for considering how to improve regulation by encouraging firms to improve their performance beyond mere compliance. Debates over the re-invention of regulation and reflexive law are relevant to an inquiry into the application of environmental laws to private forestry in NSW because they are likely to inform and guide law reform proposals for that sector. Features of the debate of particular relevance include proposals for more devolved, and less ‘interventionist’ policy methods such as systems of self-regulation and market mechanisms. The next Chapter

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\textsuperscript{175} Plumwood challenges the notion that capitalism is a sufficiently self-corrective system to avoid long term serious environmental damage, instead arguing that the system lacks self-correctiveness due to the fundamental assumptions lying at the core of economics and rationality: Plumwood, V. (2002) \textit{Environmental Culture: The Ecological Crisis of Reason}, Routledge, London.
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\textsuperscript{177} Gunningham and Sinclair (2002) above n 23 at 192.
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\textsuperscript{179} Fiorino (1999) above n 99 at 464.
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examines the implications of various possible forms of self-regulation in the context of environmental regulatory policy.
Chapter Three

SELF-REGULATION AND RESPONSIVE REGULATION

SELF-REGULATION

This Chapter discusses self-regulation as a particularly important example of regulatory reform or regulatory re-invention. A simple definition of self-regulation is of a process whereby an organised group, such as an industry association, regulates the behaviour of its members. A broader definition involves industries or individual firms regulating their own behaviour according to an organised voluntary or mandatory code of practice.

The objective of this Chapter is to review the literature which discusses the various permutations of self-regulation and indirect governance. In doing so, the broader context surrounding discussion of law and policy for PNF is presented.

Self-regulation schemes in many different forms are applied in Australia in industries including advertising, the media, direct marketing, financial services, mining, pharmaceuticals, the professions, retail trade, telecommunications - either alone or in combination with conventional regulatory requirements.

In Tasmania, substantial elements of industry self-regulation are relied upon in regulating the PNF industry. The Tasmanian forest industry regulator, the Chief Forest Practices Officer described it as “a co-regulatory approach comprising responsible self-management by the forest industry with independent monitoring and enforcement by the Forest Practices Board.” It is for that reason that questions about self-regulation become highly relevant to our inquiry into PNF regulation in NSW. In reviewing the framework

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for PNF in NSW some participants will suggest that PNF should be subject to a Tasmanian style system.

Self-regulation is commonly proposed as an efficient solution to problems of ‘regulatory overload’ faced by the State in times of ongoing fiscal and budgetary constraints. Proposals for self-regulation have been presented in Australian environmental law and policy debates, particularly by industry bodies, but also endorsed by some government bodies, mainly on the basis of the broader critique of regulatory effectiveness. It is argued that regulators must innovate by devising non-traditional forms of regulation, and exploring ‘co-regulation’ and other variants of self-regulation both as an alternative to, or as a complement to, direct regulation.

The basis of advocacy of self-regulation is threefold. The first is the broad literature claiming the ineffectiveness of direct regulation, and exploring the notions of indirect governance (discussed in Ch.1). Secondly, with the prospect of lower compliance costs, less ‘red tape’ and ‘green tape’, self-regulation is attractive to industry. Self-regulation schemes are often devised by industry (or negotiated with government) as a response to an imminent ‘threat’ of government regulation in reaction to revelations of sub-standard industry practices. Finally, self-regulation is attractive to governments, because by

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encouraging industry to develop systems of self-regulation, they can transfer some of the cost of regulating.  

There is no single form of self-regulation. Rather, a continuum of approaches exists. At one end there is pure industry self-regulation or voluntary self-regulation, which involves non-binding codes of conduct, established at the private initiative of firms or industry associations. At the other end of the spectrum is direct regulation by government of virtually all levels of activity within a given industry. Between these two extremes lie various forms of partial self-regulation or ‘co-regulation’. A useful means of classifying approaches is according to the proportion of components of the regulatory task “contracted out” or “privatised”, i.e., delivered by the private sector and/or third parties.

Pure self-regulation and private forestry

A purely free market approach (i.e., pure self-regulation) to private native forestry (PNF) management would involve allocating access to timber and forested land to the highest bidder. For example, a block of land containing turpentine-ironbark forest, Sydney’s rarest forest type, listed as an endangered ecological community (now reduced to 0.27% of its original area), was offered by a State government department to the highest bidder in March 2000. To leave decisions regarding the management of forests to be allocated purely according to the market and the wishes of private owners runs the risk of ignoring environmental considerations. In the USA, for example, almost all the remaining forest habitat for the Northern Spotted Owl in the Pacific Northwest is on federally owned public lands. By contrast, “virtually all the old growth on private lands has been logged because the market attributed no value to preservation of old growth ecosystems.”

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**Codes of practice**

Codes of practice are the tool at the centre of most self-regulation systems. Although the term ‘Code of Practice’ usually implies a voluntary code of conduct or a voluntary non-binding statement of best practice, there are in reality many types of Code spanning a continuum from voluntary non-binding guidelines (i.e., pure self-regulation) to regulatory Codes involving criminal penalties for non-compliance. In the latter case, the Code may be a form of delegated legislation, breach of which constitutes a regulatory offence. The Victorian\(^{13}\) and Tasmanian Forest Practices Codes\(^{14}\) and the British Columbia (Canada) Forest Practices Code\(^{15}\) are examples. Similarly the Plantations Code made under the *Plantations and Reafforestation Act 1999* (NSW) is a Regulation,\(^{16}\) breach of which constitutes an offence.\(^{17}\)

More commonly, however, the term ‘Code of Practice’ connotes a different form of regulation, involving a partial privatisation of government decision making, particularly of environmental impact assessment or development approval. Under the Tasmanian Forest Practices Code, licensed Forest Practices Officers (FPOs) can devise and approve their own Forest Practices Plan for logging. As the larger firms employ their own FPOs, they are effectively self-regulating.

**Partial self-regulation**

The term is intended to refer to self-regulation by way of adherence to industry- or company-devised codes of practice. This may be subject to varying levels of control by the regulatory State either at the margins or in relation to particular issues, such as the setting of rules or the enforcement of rules.

Different forms of partial self-regulation involve varying degrees of privatisation of the regulatory functions of the State. This may involve privatisation of the making of rules, the communication of rules, monitoring compliance with rules, enforcement, and

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\(^{13}\) *Conservation Forests and Lands Act 1987* (Vic), Part 5, ss.31-55.

\(^{14}\) *Forest Practices Act 1985* (Tas), Part IV. The Forest Practices Code gains force through the requirement that forest practices must be carried out in accordance with a Forest Practices Plan in which meets the specifications of the Code: *Forest Practices Act 1985*, s. 18 (3).


\(^{16}\) *Plantations and Reafforestation Act 1999* (NSW), s.29(1).

\(^{17}\) *Plantations and Reafforestation Act 1999* (NSW), s.31(3).
adjudication on compliance, sanctions, and evaluation. Some forms of self-regulation involve only the privatisation of monitoring and information-gathering functions (i.e., self-monitoring).

A useful distinction can be drawn between those schemes that involve privatisation of rule-making functions, those that imply privatisation only of decision-making relating to licences and approvals and those that also imply privatisation of implementation, monitoring and enforcement functions.

‘Mandated full self-regulation’ involves government requiring industry to put in place a formalised system of self-regulation (addressing both standards and enforcement), that is, an internal environmental management system (EMS) or Code of Practice that is subject to the approval of government. It is mandated in the sense that government, (sometimes through the tool of legislation, hence ‘statutory self-regulation’) requires industry to undertake these steps, to a certain standard, rather than allowing industry to choose whether or not to set up an industry Code of Practice. This form of self-regulation involves business carrying out rule-making and enforcement functions, usually through an industry representative body that sets codes of practice governing the behaviour of firms. The industry body then regulates the conduct of its members under that Code.

‘Enforced self-regulation’ (ESR) is different to full self-regulation to the extent that it involves broad objectives being mandated by government, with individual firms responsible for determining the details of how compliance is to be achieved. However,
in the event of serious breaches of Codes of Practice, government retains the option to step in to take punitive action.25

Ayres and Braithwaite see ESR as a type of self-regulation at the company level, without the involvement of industry associations.26 This model is said to be enforced because private rules are publicly enforceable, and firms are required to undertake the exercise.27

The particular variant of ESR envisaged by Ayres and Braithwaite involves “negotiation occurring between the State and individual firms to establish regulations that are particularised to each firm.” Individual firms are required to present self-regulation proposals in order to avoid stricter government regulation.28 These proposals are submitted for approval and may be rejected if insufficiently stringent.29

However, for the sake of simplicity, in this thesis the term ‘enforced self-regulation’ is applied more broadly, to situations where government regulation is applied to improve the effectiveness of a self-regulatory scheme, by setting targets and strategies and providing external verification.30 Self-regulation takes place at the level of individual firms within a framework operated by government where industry associations do not play a significant role in the operation of the scheme. Here, government creates a legislative framework and remains ready to take action against deviant firms.31 The most relevant example of enforced self-regulation of direct relevance to the present thesis is the Tasmanian Forest Practices Code (see Chapter 11).

**Co-regulation**

Co-regulation is a form of self-regulation that also entails combining the operation of self-regulation schemes with direct government regulation in the background or at the margins. A loose definition is applied by Emmett, and by Hopkins, as involving a

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26 Ayres and Braithwaite (1992) above n 24 at 101.
27 Ibid at 101.
28 Ibid.
29 Ibid at 106.
30 Gunningham and Grabosky (1998) above n 8 at 55.
combination of self-regulation and government regulation, where the regulatory task is shared between industry and government.\textsuperscript{32}

Co-regulation can be usefully distinguished from enforced self-regulation, if we follow the suggestion of Ayres and Braithwaite.\textsuperscript{33} Co-regulation is said to involve “industry-association self-regulation with some oversight and/or ratification by government” [emphasis added]. Co-regulation is described as such because industry associations co-operate with government to develop industry-wide voluntary standards. In NSW, an example is the co-regulatory disciplinary system handling complaints against the conduct of lawyers, which is self-regulation overseen by the Office of the Legal Services Commissioner (OLSC) and the Administrative Decisions Tribunal. Investigations into complaints are conducted by the Law Society and the Bar Association, but may be reviewed by the OLSC.\textsuperscript{34} Complaints are tested against a statutory definition of professional misconduct.\textsuperscript{35}

In this thesis, the distinction drawn by Ayres and Braithwaite between the terms ‘enforced self-regulation’ and ‘co-regulation’ is used, subject to the modifications noted above. The latter refers to schemes where industry associations are involved in the day-to-day operation of the self-regulation scheme. ESR entails some form self-regulation at the individual company level with government oversight.

\textit{Responsive regulation}

The notion of self-regulation (and developing indirect and hybrid methods of governance) is explored in great detail by Ayres and Braithwaite, who present a proposal for ‘responsive regulation’. This was a rejoinder to the “either/or debate” regarding regulation, designed to transcend “the sterile debate between regulation and de-regulation”.\textsuperscript{36}


\textsuperscript{33} Ayres and Braithwaite (1992) above n 24 at 102.


\textsuperscript{35} Legal Profession Act 1987 (NSW), s.155.

\textsuperscript{36} Braithwaite, J. (1993) “Responsive Regulation for Australia”, ch.6 in Grabosky, P. and Braithwaite, J. (eds.) Business Regulation and Australia’s Future, Australian Institute of Criminology, Canberra, 81-96 at 95.
The concept of ‘responsiveness’, rather than involving a series of detailed policy prescriptions or an ideal regulatory method, introduces a posture or attitude that can be adopted by regulators to increase regulatory effectiveness, and necessarily involves a wide variety of regulatory and self-regulatory approaches.\(^{37}\) At its core is the concept of regulators putting in place a regulatory strategy that is appropriate to the character of individual firms or entire industries. It involves tailoring the level of government ‘intervention’ (and, conversely, the extent of delegation of the regulatory task to private actors) to the record of conduct of the companies in question. Under this model the delegation of regulatory functions is limited, conditional and designed to be ‘enlightened’ or innovative. Other actors such as unregulated competitors or NGOs are thus incorporated into the operation of the regulatory scheme. Responsive regulation “is distinguished…both in what triggers a regulatory response and [in] what the regulatory response will be.”\(^{38}\)

This perspective involves a decision to identify a diverse range of explanations for non-compliance. Rather than assuming wilfulness it also explains non-compliance as stemming from ignorance of regulatory requirements, record-keeping failures or lack of capacity to comply.\(^{39}\)

The authors argue that the most appropriate regulatory model is usually a form of enforced self-regulation.\(^{40}\) Their approach places self-regulation in a context of reliance upon an explicit pyramid model of potentially escalating levels of government intervention, escalating according to the level of deviance and recalcitrance. The pyramid relies upon an initial stance of trust, but conveys an explicit message to industry of the regulator’s willingness and intention “to escalate regulatory intervention whenever lower levels of intervention fail”.\(^{41}\) Conversely the strategy implies scaling back the level of regulation to a lower point on the pyramid where industry demonstrates a record of compliance with regulatory objectives.\(^{42}\)

\(^{37}\) Ayres and Braithwaite (1992) above n 24 at 5.
\(^{38}\) Ayres and Braithwaite (1992) above n 24 at 4-5.
\(^{41}\) Braithwaite, J. (1993) above n 36 at 93.
\(^{42}\) Ayres and Braithwaite (1992) above n 24 at 6.
The model was further developed by Braithwaite (1992), proposing the establishment of “a dialogic regulatory culture” between the State, industry and environmentalists, who are each encouraged to participate in a continual dialogue with each other regarding the effective operation of regulatory institutions. According to Braithwaite, it will operate most effectively where each player knows that the other will react with “responsiveness to how responsibly others are playing the game”.43 The role of third parties is crucial to this version of self-regulation. Braithwaite warns: “[i]ncentives for effective self-regulation come from other players (the state, NGOs, the environmental movement) signalling to the industry that they will press for an escalation of regulatory intervention up the pyramid if self-regulation is not implemented with energy and with results.”44

*The pyramid of regulatory strategies*

The use of self-regulation is advocated by a number of authors on the basis of regulatory efficiency - the need for government to allocate its ‘scarce regulatory resources’ to their most effective use. This involves supplementing direct government regulation with varying forms of self-regulation wherever possible. Ayres and Braithwaite suggest that: “[a] fundamental principle for the allocation of scarce regulatory resources ought to be that they are directed away from companies with demonstrably effective self-regulatory systems and concentrated on companies that play fast and loose.”45

A sophisticated strategy for achieving this was proposed by Ayres and Braithwaite, in the form of a ‘pyramid of regulatory strategies’.46 It involves tailoring the regulatory method to the industry being targeted in order to more efficiently apply scarce regulatory resources.47 For those that will voluntarily comply, there may be no need for anything more than persuasion and education. Others less willing to comply must receive a more direct regulatory intervention, involving responses escalating from enforced self-regulation, to direct regulation with discretionary punishment, to a peak of direct regulation with non-discretionary punishment. (Figure 1)
In summary this proposal involves the State applying ESR, and making explicit its willingness to apply more rigorous regulatory approaches if firms abuse that privilege.\textsuperscript{48} In order for this approach to work, a regulator must create the perception that the toughest response is not remote, but that it is something to fear. If this perception is created there will be less need in practice to resort to tough enforcement. As Braithwaite suggests: “Regulators will be able to speak more softly when they are perceived as carrying big sticks.”\textsuperscript{49}

This is the essence of the conceptual pyramid of graduated enforcement strategies first presented by Braithwaite (1985), in To Punish or Persuade. Compliance is most likely to occur where the regulator communicates clearly the existence of “an explicit enforcement pyramid”.\textsuperscript{50} The tougher the possible enforcement action on view, the less likely the agency will need to in fact resort to tough enforcement.\textsuperscript{51}

Ayres and Braithwaite observed that a regulated party is more likely to comply when faced with a regulator who is clearly in possession of a number of possible regulatory responses, rather than just one possible response, even if that response is extremely serious. The seriousness of a response such as licence revocation is such that it is unlikely to be used, and the regulated party can foresee this, and adjust their strategy accordingly.\textsuperscript{52}

\textsuperscript{48} Ayres and Braithwaite (1992) above n 24 at 38-39.
\textsuperscript{49} Ayres and Braithwaite (1992) above n 24 at 6.
\textsuperscript{50} At the base of regulatory responses lies persuasion, and responses from there increase in severity, through the stages of warning letters or administrative notices which can be imposed if persuasion fails, to civil penalties, to the imposition of criminal penalties, to temporary licence suspension, to a peak response of permanent barring from the industry by means of revocation of the firm’s licence to operate. Ayres and Braithwaite,(1992) above n 24 at 35; cites Braithwaite (1985) To Punish or Persuade: Enforcement of Coal Mine Safety, State University of New York Press, Albany, NY.
\textsuperscript{51} Ayres and Braithwaite (1992) above n 24 at 6.
\textsuperscript{52}Ayres and Braithwaite (1992) above n 24 at 36.
Figure 1 Pyramid of Regulatory Strategies

Command regulation with discretionary punishment

Command regulation with non-discretionary punishment

Enforced self-regulation

Pure Self-regulation

Source: Ayres & Braithwaite (1992)\(^{33}\)

\(^{33}\) Ayres and Braithwaite (1992) above n 24 at 39.
Trust as a Regulatory Strategy

The literature advocating enforced self-regulation contains arguments suggesting that ‘trust’ and ‘nurturing corporate virtue’ should be the cornerstones of modern regulatory strategies.\(^{54}\) Conventional reliance upon legal coercion is rejected with an argument that assumptions of the likelihood of deviance paradoxically produce more deviance, when compared to a starting position of trusting the regulatee. According to Cherney, “[a]uthoritarianism is unable to motivate investment in trust due to it placing distrust in the foreground.”\(^{55}\) Instead, a scenario is envisaged where self-regulation is applied “with trust in the foreground”, but with coercive regulation lying in the background, as a fail-safe or back-stop.\(^{56}\)

This literature attempts to describe forms of regulation that will produce the maximum results in terms of compliance, without causing widespread antagonism between regulator and regulatee. It is suggested that the “coercive regulatory strategy”\(^{57}\) can be counter-productive, creating a culture of defiance and resistance.\(^{58}\) Many arguments relating to ‘regulatory backlash’ have their origins in the literature on occupational health and safety and regulation of the environmental impacts of the chemical industry. In 1982, Bardach and Kagan published a study of occupational health and safety enforcement in the USA entitled *Going By the Book: the Problem of Regulatory Unreasonableness.*\(^{59}\) That work argued that the over-zealous enforcement culture of the Federal Occupational Health and Safety Agency (OHSA) was having a negative effect on the extent of compliance, and instead proposed the application of techniques of “responsive regulation”. It was suggested that regulators could make laws more effective by cooperating with industry.\(^{60}\)

It has been argued that direct regulation inhibits the development of corporate virtue, which should be nurtured and encouraged.\(^{61}\)

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\(^{55}\) Cherney (1997) above n 54 at 76.

\(^{56}\) This approach essentially resembles co-regulation, which is discussed below. However, in political terms, self-regulation is often proposed by industry in order to head off demands for direct government regulation. It is frequently an “either or” situation.

\(^{57}\) Cherney (1997) above n 54 at 76.


\(^{60}\) Ibid.

Other studies have noted that successful regulatory schemes had significant levels of industry ‘ownership’ of standards. Where industry has been involved from the beginning in devising and monitoring the standards, they have a psychological attachment to the regulatory scheme and are more willing to abide by it. For example, some managers were able to recognise the need to create a level playing field by means of strong enforcement that prevented sub-standard firms from competing unfairly by avoiding environmental compliance costs.

However, the regulatory resistance argument may be inapplicable in the Australian environmental law context, because excessive and overzealous enforcement is extremely rare, with the majority of agencies adopting a strategy of trust and negotiation as a starting point in any case. This tendency was observed by Grabosky and Braithwaite (1986) in Of Manners Gentle, which although now out of date, made useful observations about organisational culture, behaviour and psychology, particularly tendencies towards ‘capture’ and the ‘revolving door syndrome’ in inspectorates. Importantly, this study found that the ‘softly softly’, ‘educate and conciliate’ approach involved regulatory agencies adopting a mindset of trust and reluctance to proceed to prosecution and licence suspensions in the event of corporate malfeasance. The authors found that prosecution is “commonly undertaken only as a last resort”. The majority (81.3%) of 96 regulatory agencies surveyed stated that education and persuasion were more important functions for them than law enforcement. If strong enforcement efforts are avoided in the face of multiple breaches of the legislation, then a strategy of relying upon self-regulation whilst coercive regulation awaits in the background as a back-stop will be ineffective.

**HYBRID OR INDIRECT GOVERNANCE**

With the emphasis on the cost of enforcement and administration, critics of direct regulation present an argument about the ‘regulatory overload’ or ‘regulatory burden’ of the State. They observe that with the growth of forms of social and economic regulation, with expansion of the scope of responsibilities assumed by the modern State, and with a tax base that is often shrinking, the State is typically overloaded and under-resourced.

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62 On the other hand, in the rural context it has some application almost regardless of the true extent of regulation, and this issue is discussed in more detail in Chapter Four.
64 Ibid at 190.
Therefore it is suggested that continued reliance on direct regulation alone is likely to be insufficient or ineffective.\(^{65}\) Broadening the range of players involved in the regulatory task is considered an important objective given limited regulatory budgets.\(^{66}\)

The literature on ‘governance’ explores alternative approaches for achieving compliance with agreed societal objectives and presents a broader conception of the task of governing. It is argued that the State need not have a monopoly on regulation.\(^{67}\) Grabosky discusses concepts of indirect regulation whereby government’s role is to ‘steer’ social enterprises from a distance,\(^{68}\) using ‘hybrid governance’ or ‘indirect governance’ by enlisting either regulated parties or third parties in the regulatory effort.\(^{69}\)

There are numerous historical examples of the State encouraging private acts of enforcement. Examples include: rewards for information leading to the capture of criminals; the reporting of street crime; arrangements for private tax farming (i.e. tax assessment and collection) in ancient Rome and Greece; rewards for detection of after-hours trading in 14\(^{th}\) Century England; and rewards for reporting tax evaders in the US since 1791.\(^{70}\)

Accordingly this literature explores options for the recruitment and involvement of the public and third party interest groups in governance - for example, by NGOs, community groups or the banking and insurance industry.\(^{71}\) Hence the literature discusses mechanisms including “information-based strategies” such as the Toxics Release Inventory (US), or National Pollutant Inventory (Australia) – the ‘community right to know’ schemes - which encourage public participation in the regulatory process.

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\(^{65}\) Gunningham, N, and Rees, J. (1997) above n 1 at 363; Grabosky, P. (1994c) *Organisational leverage and the technologies of compliance*, Administration, Compliance & Governability Program, Research School of Social Sciences, Australian National University, Working Paper No.24, at 2. However, A pernicious aspect of the ‘regulatory burden’ argument is that may obscure implicit social and political value choices about the forms of public spending which are a priority for the State.

\(^{66}\) Grabosky, P. (1994c) above n 65 at 3-6.


There is significant evidence of some movement towards self-regulation in the forestry industry in Australia. It is already in place at the Commonwealth level, in Tasmania, and there are strong demands for it to be introduced in private forests in NSW. The Commonwealth Department of Agriculture, Fisheries and Forestry (AFFA) recently argued that: “After nearly a century of operating in a highly regulated environment, Australia's agricultural and fisheries industries, together with the food and forestry industries, are moving inexorably along the path to self-regulation.” Two key aspects were identified by AFFA - product certification, linked to the application of Environmental Management Systems (EMS), and the progressive reduction in layers of Commonwealth regulation.

At the Commonwealth level, the forestry industry in Australia has recently achieved virtual self-regulation, after two decades of regulation. The woodchip export control regime applying to public and private forests has been removed. The controls applying to private forestry were gradually relaxed during the 1990s, partly with the creation of a category of “degraded forest licence” in 1996, which enabled the export of additional woodchips from private lands above the volume permitted under the normal quota.

With the Regional Forest Agreements process and with the passage of the Environmental Protection and Biodiversity Conservation Act 1999 and Regional Forest Agreements Act 2002, the Commonwealth has almost completely divorced itself from regulation of forestry, leaving forestry matters to companies, State agencies and State-level regulation. (See further, below, p. Error! Bookmark not defined.)

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74 Export Control (Hardwood Wood Chips) Regulation 1996 (Cth), r.13-19. Note that this category appears to have been made in response to lobbying by North Forest Products to enable it to clear wet sclerophyll forest and rainforest on its Surrey Hills, Tasmania block for woodchipping and plantation establishment. Although the Regulation required the Minister to consider “whether the floristic composition of the forest has been altered significantly”; the report of the Forest Practices Board on the block stated “in the remaining native forests at Surrey Hills there is no detectable change in the floristic composition, measured by species richness with regard to their varied selective logging histories.”(p.21). The CSIRO’s Division of Wildlife and Ecology review (February 1997) of this report stated “We consider it is not justified to be drawing any confident conclusions about floristic changes.” (p.9) Yet an internal Minute of DPIE (Cth Dept of Primary Industries and Energy) to the Minister for Resources regarding the licence application dated 28 February 1997 states “For Urgent Decision – as North is due to enter into sales and price negotiation with Japanese customers”. The licence itself, No. MEPWOOD 1509 was granted on the same day, 28 February 1997.

75 The exception is forestry operations in a property included within the World Heritage list or the Ramsar wetlands list will still require approval under the Act, according to the tests and definitions applied by Environmental Protection and Biodiversity Conservation Act 1999 (Cth), s.42.
In NSW, the PNF industry has in recent years actively sought self-regulation in preference to direct regulation. In a policy document entitled ‘Promotion of Private Forestry in NSW’ the PNF industry body, Australian Forest Growers (AFG), argues that: “Presently, private forestry is over-burdened with unnecessary regulation and over-zealous environmental limitation…” Instead AFG has called for the “practical application of self-regulation through codes based on best practice”.  

**SELF-MONITORING AND AUDITED SELF-REGULATION**

The most common form of self-regulation in practice in Australian environmental law is a very limited form of self-regulation that involves ‘self-monitoring’. This arrangement involves the recruitment of the regulated party into the compliance process. It does not involve industry determining the standards that are to be complied with. It simply involves privatising the collection of compliance data, by employing self-reporting strategies, whilst retaining the remainder of the regulatory and licensing apparatus. Under the *Protection of the Environment Operations Act 1997* (NSW), licensed premises can be required to conduct self-monitoring, and to report the results of their own collection of pollution data to EPA. Licensees may be required to self-certify the extent of their compliance with licence conditions and particulars of failures to comply with conditions. Self-monitoring typically relies for its effectiveness on a form of random auditing. The classic model of audited self-monitoring is in income tax assessment, where individual taxpayers complete a reporting form subject to random auditing. However there is little or no literature that poses the question of how such methods could be effectively applied in the forestry context.

The underlying objective is to provide regulators with more efficient means of administering the regulatory scheme. They reduce data collection costs, but do not abandon the existence of criminal penalties for deviance. The threat of a random audit

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77 *Protection of the Environment Operations Act 1997* (NSW), s.66(1), with offence of providing false and misleading information in self-monitoring data at s.66(2).

78 The privilege against self-incrimination is removed by the statute in relation to this clause. *Protection of the Environment Operations Act 1997* (NSW), s.66(5). The significance of this approach is that a fraud offence is attached to the making of a false of misleading certificate of compliance - which may be judicially regarded with potentially greater seriousness than a pollution offence. Similar strategies are applied in Victorian pollution control law. *Environment Protection Act 1970* (Vic), s.21(1)(e).
must be sufficiently real so as to guarantee accuracy in the reporting data supplied. This approach is at best described as a modified form of direct regulation. It does not dispense with the use of strong regulation.

Monitoring must be distinguished from auditing. Monitoring is the process of gathering information about environmental conditions and about environmental pollution and damage. Auditing is primarily an effort to check compliance with legal requirements. External verification or auditing involves checking by a certified, guaranteed independent third party.

**LIMITS TO SELF-REGULATION**

Although it appears that the new orthodoxy is to view self-regulation as a preferred policy response given limited regulatory resources, there are grounds for scepticism about its capacity to deliver substantial environmental protection. In popular terms, this scepticism finds expression in the retort that self-regulation amounts to “asking the fox to guard the chicken coop”. Behind this expression lies a reference to the inherent difficulty in requesting companies to forgo profits in deferring to public environmental protection goals. Any system of self-regulation must present or contain sufficiently strong disincentives to counteract the tendency for the profit motive to drive corporate behaviour to the detriment of environmental concerns. Yet the literature on reflexive law and trust-based strategies appears to take little account of the obligations of corporate management to shareholders to maximise returns.

Self-regulation approaches are likely to be subject to several other limitations. Self-regulation systems are often deployed as a public relations device, suggesting that problems are being appropriately managed by industry. In this way, industry can give the

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79 Defined in the *Environment Protection Act 1970* (Vic), “monitoring program” means all actions taken and equipment used for the purpose of detecting or measuring quantitatively or qualitatively the presence amount or level of any substance, characteristic, or effect.

80 Under the *POEO Act 1997* (NSW), s.172, an environmental audit is “a periodic documented evaluation of an activity (including an evaluation of management practices, systems and plant) for either or both of the following purposes: (a) to provide information to the persons managing the activity on compliance with legal requirements, codes of practice and relevant policies relating to the protection of the environment, (b) to enable those persons to determine whether the way the activity is carried on can be improved in order to protect the environment and to minimise waste.”


82 This assumes that there is a conflict between environmental protection and profitability, which may not be the case in some industrial contexts involving waste reduction and energy efficiency measures.

appearance of regulation, without necessarily delivering the substance. Braithwaite described the potential for self-regulation schemes to be misused - as he put it rather bluntly, “[s]elf-regulation is frequently an attempt to deceive the public into believing in the responsibility of an irresponsible industry.”

There is a related point that self-regulation schemes are often proposed by industry as a political strategy to forestall the imposition of legislation, or to shape the characteristics of legislation introduced. For example, the system of enforced self-regulation applying to Tasmanian PNF is said to have been introduced in recognition of the problems identified by a government inquiry, but was also introduced to avoid direct regulation of this sector by the Commonwealth. Governments facing fiscal imbalances may find a coincidence of interest with industry at this point, being granted a seemingly legitimate excuse for inaction. The desire to avoid mandatory regulation was a factor in the introduction of the Commonwealth Government’s Greenhouse Challenge Program. This program to encourage voluntary reductions in greenhouse gas emissions was introduced following industry lobbying aimed at forestalling an emissions tax.

Models of self-regulation have a recent intellectual heritage in theories of reflexive law (above, p.55.). That perspective can be criticised as


86 Bonyhady, T. (1992) “Property Rights”, ch.3 in Bonyhady, T. (ed.) Environmental Protection and Legal Change, Federation Press, explains the introduction of enforced self-regulation in Tasmania in the private forestry context of the basis of a desire to avoid direct Commonwealth regulation, at p.54. In Austria, “the business/industry sector clearly is the driving force behind the use of voluntary agreements. This instrument is primarily seen as a means to prevent threatening additional environmental regulation, as well as eco-taxes, in a country, which is perceived by all environmental policy actors to be strongly regulated or even over-regulated.” Brückner, L. (2001) “New Environmental Policy Instruments in Austria”, Paper for the European Consortium for Political Research (ECPR) Joint Session of Workshops, Workshop # 1, The Politics of New Environmental Policy Instruments, Grenoble, France, April 6-11, 2001, 33pp, at p.11.

87 “Sometimes it is a strategy to give the government an excuse for not doing its job”: Braithwaite (1993) above n 36 at 91.

88 The empirical record regarding the effectiveness of the Greenhouse Challenge shows that emission reduction targets set voluntarily by industry under this program were only actually attained in 8.4% of cases. Only 9 of 76 participants met the targets that they set for themselves under the program. See: Commonwealth Parliament, Senate Environment Communication Information Technology and the Arts Committee, Supplementary Estimates hearing, 3 May 2000, Hansard at 2. Of the 240 companies involved, only 76 (or 31.6%) actually lodged a report on their progress (at p.3). This example also raises questions of whether audited self-regulation models are actually more cost effective than direct regulation, given the amount spent on auditing and verification consultants for that program. It may be that these methods of ensuring corporate accountability were selected more for their ideological acceptability than their relative efficiency. During February-June 2000, the Australian Greenhouse Office paid “$201,042.43 in order to assemble a panel of 15 private sector consultants to perform independent verification under the Greenhouse Challenge”. Australian Greenhouse Office (2000) AGO Consultancies 1999-2000, 17pp, unpublished, AGO, Canberra.

politically naïve for its belief in, and reliance upon, ‘corporate virtue’ as an environmental protection strategy.\(^{90}\) Some theorists of reflexive law may have become lost in a fog of post-modernist relativism by believing excessively in the power of “autonomous goal setting” by corporations.\(^{91}\) The danger of allowing industry excessive scope in developing and setting regulatory standards is that it will tend to set standards to suit its immediate short- and medium-term economic objectives at the expense of the broader public and social interest. If the setting of environmental protection standards is left to individual firms or peak industry bodies, a relaxation of environmental protection standards is very likely. Such bodies are not normally driven by altruism, but by a commitment to the bottom line.\(^{92}\) Proposals for ‘autonomous goal setting’ are also probably unworkable, because, once we move beyond broadly shared goals of ‘environmental protection’ or ‘sustainable development’, there are numerous difficult - and inherently political - decisions to be made regarding the identification of ‘socially acceptable’ levels of pollution or destruction of biodiversity. The encouragement of public participation in the regulatory enterprise by the creation of information disclosure mechanisms, and statutory provision for citizen suits (third party litigation) may serve to mitigate the risk that self-regulation may degenerate into de-regulation in practice.\(^{93}\)

However, regulatory theorists such as Gunningham and Grabosky recognise this and argue there is “a substantial gap” between industry self-interest and the public interest.\(^{94}\) The greater the costs associated with environmental protection measures, the larger the gap that may develop between the public interest and the self-interest of firms and industry. As Gunningham and Grabosky put it: “the greater the incentive to renege on self-regulatory objectives.”\(^{95}\) Voluntary self-regulation is likely to be particularly ineffective in this context. One reason for this is because voluntary self-regulation schemes depend for their success on a high rate of participation by firms in the industry. The importance of profits rather than altruism in motivating the decision-making of firms to join such schemes has been recognised by various authors who have commented


\(^{91}\) Gaines & Kimber (2001) above n 90 at 173.


\(^{94}\) Gunningham and Rees (1997) above n 1 at 390.

\(^{95}\) Gunningham and Grabosky, (1998) above n 8 at 55.
that high rates of consumer recognition of a self-regulation scheme (such as a labelling or certification scheme) will create incentives for non-member firms to join the scheme.

A more substantial problem is that self-regulatory schemes will tend to set standards too low, requiring too little of industry participants, as higher standards will conflict with needs for profit maximisation. It is on this basis that Braithwaite argues that “self-regulation schemes often fail...” 96 For this reason, voluntary self-regulation is likely to be ineffective. Thus Gunningham argued: “only rarely can self-regulation alone be relied upon to achieve environmental goals.”97 Gunningham and Sinclair (2002) found: “Many less interventionist strategies are unlikely to succeed if they are not underpinned by direct regulation. For example, under reflexive regulation, some enterprises may be tempted to develop ‘paper systems’ and tokenistic responses which ‘independent’ third party auditors may fail to detect.”98

Even where industry does not set the standards, but merely applies and enforces those set by government, there remains the problem that self-regulation tends to be poorly enforced. Especially where enforcement is left to industry bodies, “enforcement is ineffective, and punishment is secret and mild.”99

These points suggest a hypothesis that externally-enforced self-regulation will be the only potentially viable species of self-regulation where there is any substantial gap between private self-interest and the public interest.100 Both regulatory theorists and regulators are sceptical about the scope for introducing schemes for voluntary self-regulation. Research in the US into the views of senior forestry administrators in the private forestry sector revealed that purely voluntary codes of practice or guidelines were considered by only a minority (20%) to be a “very effective” means for ensuring private forest landholders apply prescriptions for water quality protection. The majority indicated that voluntary approaches were in their opinion ineffective (41%) or of only moderate effectiveness (39%).101 It tends only to be industry that freely advocates self-regulation without

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96 Braithwaite (1993) above n 36 at 91.
97 Gunningham and Grabosky (1998) above n 8 at 55.
99 Gunningham and Grabosky (1998) above n 8 at 53.
100 Gunningham and Rees (1997) above n 1 at 390.
stressing the need for additional external enforcement – for example the Australian Forest Growers in relation to private forestry in NSW, and the Australian Industry Group in relation to the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*).102

Awareness of the limits of self-regulation is ubiquitous in the regulatory literature. Even the *Industry Task Force on Self-Regulation* report (2000) states: “Where there are strong public interest concerns, such as major health and safety issues, and the specific problems are of high risk and/or high frequency, then other forms of regulation may be more appropriate.” Self-regulation should only be introduced where the consequences of a failure of self-regulation are minor. These statements appear to indicate a lack of faith in self-regulation. In other words, it should only be attempted in contexts where it does not really matter whether it succeeds or fails.

Academic advocates of self-regulation such as Ayres and Braithwaite suggest self-regulation can only be effective if species of enforced self-regulation or co-regulation are introduced. Pure self-regulation is dismissed as ineffective.103 Braithwaite suggests the introduction of responsive regulation strategies that rely upon “genuine empowerment of all the stakeholders in a regulatory dialogue…”104

Although these models of indirect governance state, correctly, that third parties can be recruited into the enforcement process, they fail to emphasise that there are limits to what can be achieved by third parties. One of these barriers is secrecy. There is a natural tendency of firms to limit the flow of information to the public about their environmental impact. Full and frank disclosure to the public has the potential to reduce profit levels, and therefore the transmission of such information cannot be assumed. In the private property context, it is unlikely that significant volumes of information will be shared with government, let alone with third parties, especially with environmental groups that are traditionally regarded in the rural community as the enemy, not as partners in a regulatory dialogue. Braithwaite’s model may assume rather optimistically

102 However, Ian Whyte, former director of the Forest Industries Association of Tasmania, when interviewed stated that pure or voluntary self-regulation was not appropriate in the Tasmanian context, and the industry did not seek its introduction. Interview, Chief Executive, Forest Industries Association Tasmania, 12.11.98, Hobart, in person.
that in real life, stakeholders such as environmentalists are adequately resourced, and empowered, and provided with access to data - a situation that only occasionally pertains.

Further, insufficient attention has been paid to the incompatibility between the secrecy associated with privatisation, private agreements, and self-regulation, with measures for public participation such as FOI and third-party review, essential for viable enforced self-regulation. Thus Self concludes that even if theoretically attractive, indirect or ‘light’ regulation will not be effective in practice, as it produces results “under favourable or special conditions which often do not apply”.105 Similarly, Cole and Grossman have argued that: “Standard economic critiques of command environmental regulation are insensitive to the historical, technological and institutional contexts that can determine the comparative efficiency of alternative regulatory regimes.”106

A crucial issue raised in discussions of self-regulation is the role of trust.107 The effectiveness of trust-based strategies will depend on the social, economic and political context present. If new policy approaches are to be focussed on trust and nurturing corporate virtue, they must provide a plausible reply to the question of whether that trust will be abused in pursuit of short-term profit. Sutton and Haines suggest that advocacy of the ‘nurturing virtue’ theory should be subject to a number of qualifications. They argue that globalisation of economic activity, subcontracting, and competition within industries all place practical limitations on ‘responsive regulation’ strategies.108

Whether one believes ‘trust’-based regulatory strategies can work depends on an assessment as to whether trust strategies are “impractical utopian dreams”,109 or are a common-sense addition to the regulatory toolbox based on observations about the psychology of regulatory compliance. There is substantial agreement in the literature that pure self-regulation alone is unlikely to be effective and that additional external pressure

is required to ensure that self-regulation does not amount in practice to a glorified exemption from substantive legal requirements.

The most significant gap in this area of the regulatory literature in Australia concerns information about the existence or otherwise of various preconditions for viable self-regulation in various industry sectors. It remains to be asked whether such preconditions actually exist (or can be viably created) in natural resource management contexts involving issues of off-reserve conservation, such as forestry or agriculture.

**Small enterprises and self-regulation**

An important but little-investigated area in the regulatory literature concerns the environmental performance of small and medium-sized enterprises (‘SMEs’). This is a particular issue in the area of rural environmental regulation. These parties pose a unique challenge for environmental regulators as they commonly have limited resources to devote to environmental compliance. They may lack environmental expertise and awareness, and are often isolated from or invisible to the public and regulators. Further, many small and medium-sized enterprises and individual landholders may not be sensitive to adverse publicity, and may not be receptive to environmental issues.

Certain conditions that are required for successful application of a self-regulation approach relate to the structure of the regulated industry. Priest identified a number of key factors: “there are relatively few players; the costs of exiting from the industry are high; there is a history of effective cooperation [within the industry]; expertise and resources for regulation are within the industry; non-compliant behaviour can be punished; consumers value compliant behaviour...and some role is available for public participation or oversight.”

The Industry Task Force on Self-Regulation stated that self-regulation tends to be less effective where there is a broad spread of smaller businesses that communicate

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110 For example, Gunningham and Rees state that industry interests “may be entirely inconsistent with the public interest” - but fail to point to detailed examples in relation to environmental issues: above n 1 at 390.


infrequently. Sutton and Haines argued, on the basis of extensive research into compliance with occupational health and safety (OH&S) legislation in Australia, that smaller contractors in intensively competitive industries will be in no position to be motivated by virtue. Regardless of the existence or otherwise of any good intentions to comply, they will often be forced by competitive pressures and the need for profit to cut corners on environmental protection and occupational health and safety.

The sheer number of SMEs makes it difficult for regulators to conduct frequent inspections or even to make contact with enterprises for extension and education purposes. The literature based on empirical research suggests that micro-businesses involving one to five participants have the least environmental awareness. They are said to be “unwilling to take action unless threatened by strong external forces such as prosecution or customer demands.” Obviously there will be exceptions, as SMEs are a diverse and numerous group of organisations. The point remains that there is some evidence that this group is often unwilling to voluntarily take substantial actions for environmental protection.

Further research is required into the question of the compatibility of self-regulation with industries that are dominated by small and medium-sized enterprises. Given the domination of the private forestry sector in Australia by SMEs, this question will be explored in depth later in the thesis.

A viable strategy is to offer a ‘two-track regulatory system’ which offers co-regulation and EMS to larger firms who have proven that they can go, and have gone, ‘beyond compliance’, and a second tier of direct regulation for smaller and less adventurous firms, and the ‘laggards’ of a particular industry.

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This thesis focuses on proposals for self-regulation as one aspect of the reconfiguration of regulation. Other tools for supplementing regulation such as forestry certification, corporate environmental reporting, and environmental management systems are relevant but cannot be considered in detail in this study as they are beyond its scope and focus. Each of these techniques would normally apply to larger companies and larger forestry operations and therefore are not centrally relevant in the PNF context.

**CHAPTER SUMMARY**

This Chapter has reviewed recent debates over the reform and ‘reinvention’ of environmental regulation. The objective of this Chapter has been to review particular aspects of the broader theoretical literature that consider the various possible permutations of self-regulation and indirect forms of governance. By doing so the broader context surrounding discussion of law and policy for PNF has been presented.

The natural resources management field is becoming increasingly subject to proposals for self-regulation and ‘light regulation’, as is the case in other areas of environmental law and policy. The broader political context for environmental law reform in Australia is one of preference for indirect governance, government-community partnerships, exemptions and de-regulation, at the expense of direct regulatory controls.

A position taken in this thesis is that one cannot endorse self-regulation as inherently better than direct regulation, any more than direct regulation can be credibly criticised as inherently inefficient and ineffective. It is vital that such issues must be examined in the specific factual, sociological, and political contexts in which they arise. Although there are often numerous practical difficulties with the application of direct regulatory techniques,

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it has been argued that there is a need to avoid over-enthusiastic endorsement of self-regulation approaches.

The following Chapter continues to examine the consequences of the pervasive theoretical rejection of ‘prescriptive’ regulation. It addresses the specific contexts and challenges presented by the task of conserving biological diversity and other environmental values on privately-held property. Such issues (including questions of how to achieve and encourage ecologically sustainable forest management (ESFM) surround the question of how best to regulate forestry operations on privately-owned land.
PRIVATE LAND CONSERVATION AND THE LAW

“It’s our land. If the National Parks Service want us to farm some endangered beetle, they had better pay us to do it.”

- Grazier’s comment from the floor, during NPWS Community Consultation Seminar regarding proposed regulation to prescribe ‘routine agricultural activities’ under the *Threatened Species Conservation Act 1995* (NSW), Platypus Lodge, Cooma, August 1997.

“I think that the liberal Lockean conception of private property is pretty iniquitous. It always struck me when I first came here, that the kind of power I was given over this place was just inexcusable. I could raze the whole thing. But you can’t pick up an inch of soil here that isn’t occupied. You can see things squirming and jumping everywhere. The whole place is just packed and crammed with living things, and an incredible history of the earth. To think that I had the power to destroy it remains deeply shocking to me.”

- Dr Val Plumwood, philosopher, referring to her ownership of forested land adjacent to the Budawang National Park, near Braidwood, NSW.¹

INTRODUCTION

This chapter describes some of the specific legal, political, sociological and physical characteristics of the private land context that constrain policy choices for private native forestry regulation. The task of devising law and policy for the private land context requires legislators and regulators to address specific issues regarding private property ownership. This chapter reviews the rights of private property owners to deal with land at common law, as well as statutory and common law limitations on those rights. It also discusses cultural resistance to regulation.

Other policy constraints are raised by the inherent nature of the task of biodiversity conservation. The particular characteristics of this task, such as the problem of decision-making in a context of limited ecological information and the existence of thresholds of irreversible biodiversity loss, must also be addressed in setting policy in this situation.

In this context, as always, broader debates over the appropriate level of direct regulation of economic activity by the state are of central relevance. The consequences of the pervasive theoretical and political rejection of ‘command’ or ‘prescriptive’ regulation within the particular context of off-reserve production environments needs to be examined. There is a strong theme running through much Australian literature relating to nature conservation on privately owned land, of seeking to avoid or minimise the use of direct regulation, which is frequently perceived as ‘coercive’. This chapter asks “What are the opportunities and the dangers presented by the push to ‘reinvent’ environmental regulation in terms of the specialised context of biodiversity conservation on private land?”

**Laws for Nature Conservation**

Increasingly it has been recognised that actions for conservation within the off-reserve context are an important aspect of policies for biodiversity conservation. Such policies entail reviewing measures for sustainability outside of national parks and nature reserves, within primary production contexts such as agriculture and forestry. To an ever-greater degree, attention is being paid to the impacts of particular land-use practices on biodiversity and ecological sustainability.

As stated above, there are serious problems world-wide involving the loss of biodiversity. The severity of these problems is reflected in Australia, where biodiversity decline is recognised by scientists as one of the most pressing environmental issues. The large number of species, ecological communities and ecosystems listed within Australian legislation as vulnerable, threatened or endangered gives an idea of the magnitude of the

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crisis; in NSW there are 321 endangered species and 367 vulnerable species listed.\(^5\) Australia has a particular international responsibility for biodiversity conservation, being one of 17 nations which are custodians of a ‘megadiverse’ biota– and only one of two with ‘developed nation’ status.\(^6\) 80 per cent of its terrestrial and aquatic flora and fauna is endemic.

The reservation of natural areas within national parks and other protected areas has long been a strategy for nature conservation in Australia, starting with the gazettal of Royal National Park in 1879.\(^7\) Australian approaches have evolved from earlier preoccupations with the creation of public protected areas based on anthropocentric considerations (including the preservation of scenic, recreational, and hunting values\(^8\)), to a contemporary awareness of the need for comprehensive reservation of ecosystem types.\(^9\) Governments and commentators, prompted by the *National Strategy for the Conservation of Australia’s Biological Diversity* (1996), are now asking whether the reserve system adequately conserves samples of each ecosystem, meeting nationally agreed tests of comprehensiveness, adequacy, and representativeness.\(^10\)

Although publicly-owned reserves provide the greatest protection to natural habitats, they only cover a small proportion of the total land area,\(^11\) e.g. in NSW in 1999, protected areas under the *National Parks and Wildlife Act 1974* covered only 6.2 per cent (estimated) of the State.\(^12\) A biodiversity conservation strategy relying upon protected-areas legislation has significant limitations, as many ecosystems are not adequately ‘represented’

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\(^7\) Royal National Park is the second oldest national park in the world after Yellowstone (USA).

\(^8\) Cresswell, I., Thomas, G. (eds.) (1997) *Terrestrial and Marine Protected Areas in Australia*, Environment Australia, Biodiversity Group, Canberra, at p.3.


\(^11\) Across Australia, whilst 40 million hectares of land lies within the formal terrestrial nature reserve system, 500 million hectares or more than two thirds of Australia’s land mass is managed by private landholders.

\(^12\) Benson, J. (1999) *Setting the Scene: The Native Vegetation of New South Wales*, Background Paper No.1, Native Vegetation Advisory Council, Sydney at 34. However note that a large number of national parks have been proclaimed since that time.
within the publicly-owned nature reserve system. The reserve system has emerged largely as a result of a series of ad hoc and often politically opportunistic decisions.

It is apparent that off-reserve conservation entails a far broader range of options than simply “locking up” areas of privately-held land as though they were another form of nature reserve. It also involves incorporating sustainability approaches into production environments, within forestry and agricultural industries. One particular subset of off-reserve policies entails minimising the environmental impacts of forestry within native forests on privately-held land. As indicated earlier, nearly 70 per cent of Australian native forests are under private sector management, on freehold or leasehold land.

**INTERNATIONAL LAW AND BIODIVERSITY CONSERVATION**

Australia’s moral obligations and responsibilities as a custodian of certain unique components of global biodiversity now generate particular legal obligations which were accepted upon the signature (1992) and ratification (1993) of the United Nations Convention on Biological Diversity (CBD). The ongoing development of international instruments for nature conservation, such as the CBD, represents a source of pressure for domestic law reform. It encourages parties to confront problems at their source by emphasising *in situ* conservation rather than *ex-situ* actions. To this end, one of the CBD’s requirements is

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15 The National Forest Inventory (NFI) defined “forest” as “an area that is dominated by trees having usually a single stem and a mature or potentially mature stand height exceeding 2 metres and with existing or potential crown cover of overstorey strata about equal to or greater than 20 per cent.” National Forest Inventory (1998) Australia’s State of the Forests Report 1998, Bureau of Rural Sciences, Canberra, p.30.

16 Ibid at 35.

for parties to develop a system of protected areas and guidelines for the selection, establishment and management of those areas.\textsuperscript{18}

International environmental law, as exemplified in the CBD, has developed further towards accommodating the issue of off-reserve conservation (on private land), and away from its previous tendency of imposing other international environment-protection treaties and instruments to focus on public land reservation strategies for “special places” and “special areas”.\textsuperscript{19}

Domestic awareness of the importance of off-reserve conservation is reinforced by the requirements of the CBD for biodiversity conservation across the landscape,\textsuperscript{20} and conservation of habitats on all land tenures.\textsuperscript{21} The CBD requires biodiversity conservation across the landscape, including on private land. Article 8(c) of the CBD creates an obligation on State parties to “regulate or manage biological resources important for the conservation of biological diversity whether inside or outside protected areas with a view to ensuring their conservation and sustainable use”\textsuperscript{22} [emphasis added]. The provisions of the Convention are supplemented by international policy strategy documents that have called for legislative responses to biodiversity loss. For example, the Global Biodiversity Strategy (1992) calls upon nations to “improve and expand legal mechanisms to protect species.”\textsuperscript{23} Relevant international policy documents include the World Conservation Strategy\textsuperscript{24} and the Global Biodiversity Strategy. These include many relevant points such as Action 49, calling upon national governments to “Incorporate biodiversity conservation practices into the management of all forests.”\textsuperscript{25}

\textsuperscript{18} UN Convention on Biological Diversity (1992), above n 17, Article 8(a).
\textsuperscript{20} UN Biodiversity Convention, Article 8(c); Farrier, D., and Tucker, L. (1998) above n 19.
\textsuperscript{22} Convention on Biological Diversity, Article 8(c). The adoption of measures is not optional, however a specifically regulatory approach to biodiversity conservation appears optional given the choice of the phrase “regulate or manage” within the Article.
\textsuperscript{24} IUCN, UNEP, WWF (1980) World Conservation Strategy, IUCN, Gland, Switzerland.
\textsuperscript{25} World Resources Institute, World Conservation Union, United Nations Environment Program (1992) above n 23 at 108.
With the emphasis in national and international policy documents on improving legislation for biodiversity conservation, we must ask: is existing domestic legislation adequate for the task of off-reserve conservation? That broad question is addressed later in this thesis in relation to the specific issue of the regulation of private native forestry in NSW.

**IMPLEMENTING OFF-RESERVE CONSERVATION**

As argued above, the broad context of international agreements and soft international law are creating pressure in the domestic context for adequate conservation measures outside reserves and across the landscape. The relatively simple steps associated with setting up conservation reserves on public land have in most cases already been taken. By now the more difficult challenges are to be found on private land and in the ‘off-reserve’ context. The *National Strategy for Biodiversity Conservation* suggested that off-reserve conservation must involve “integrated and consistent approaches across freehold and leasehold and other Crown lands.” But the apparent difficulty of such actions in Australia was recognised by the OECD in an external review of Australia’s performance in 1996, stating that “progress with programmes for biodiversity conservation outside protected areas has been extremely limited.”

Conserving biodiversity on privately-owned land presents the sharpest point of confrontation between the special legal status afforded private property ownership and the particular policy difficulties associated with the task of biodiversity protection. Although land acquisition and reservation (the declaration of nature reserves) are recognised to be highly effective strategies for conservation, because of the security of tenure involved and (to a lesser extent) the likelihood of appropriate management, acquisition has a limited role in relation to conservation on private land. First, as there are thousands of patches of remnant vegetation on privately-held land, their very number

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28 Ibid at 11. Other features required are linkages across the landscape, such as habitat corridors, linking private land remnant vegetation with larger areas of habitat in national parks or other public land reserves. Benson, J. (1999) above n 12.
makes it impractical to place them all in reserves, even if this were politically feasible.\textsuperscript{31} Second, the use of acquisition powers by the State, whether by negotiation or compulsion, inevitably involves considerable expense, delay and other transaction costs.\textsuperscript{32} Third, some of these costs will be political. Cultural respect for private property suggests that there is usually a reluctance to interfere with it in such a drastic way, unless there is an extreme and urgent need.\textsuperscript{33}

Instead, the use of legislation to regulate and control the impact of primary industries on private land has become a much more common option.\textsuperscript{34} Official government policy documents at National and State level (eg \textit{NSW Biodiversity Strategy (1999)}) have endorsed legislative responses to prevent further biodiversity loss.\textsuperscript{35} The \textit{National Strategy} calls for the review of existing legislation “…that results directly or indirectly in loss of biological diversity.”\textsuperscript{36} Similarly, international strategy documents such as the \textit{Global Biodiversity Strategy} (1992) have called for nations to “improve and expand legal mechanisms to protect species.”\textsuperscript{37}

When seen in historical perspective, attitudes have changed markedly since 19\textsuperscript{th}- and early 20\textsuperscript{th}-century policies in regard to nature conservation on privately-held lands. Early policies, if they can be described as such, were characterised by \textit{laissez-faire}, voluntarism and self-regulation. In addition, pro-development policies encouraged removal of native vegetation, with tax concessions. On leased land tree felling was frequently directed, with lease conditions requiring vegetation clearance, usually by ringbarking.\textsuperscript{38} The 1970s marked the beginning of a move away from statutes aimed at the ‘wise use’ and conservation of individual species - in game- and wildlife-protection acts - towards

\begin{footnotesize}
\textsuperscript{31} Benson, J. (1999) above n 12, at 35.
\textsuperscript{33} A perception of urgency in relation to biodiversity conservation on private land is a perception which is unlikely to ever be adopted given the prevailing political context.
\textsuperscript{38} Author’s recollection of review of lease documents from the 1870s covering the Gudgenby Valley in what is now Namadgi National Park, ACT conducted in a historical tenure search in relation to a Determination Application under the \textit{Native Title Act 1993} (Cth).
\end{footnotesize}
biodiversity protection acts. In more recent versions, these represent statutory recognition of the importance of habitat conservation on private lands, particularly by restricting broad-acre vegetation clearing. More recent legislation has acknowledged critiques of the ‘species specific’ approach - exemplified by the US Endangered Species Act 1973, but also evident in the Victorian Flora and Fauna Guarantee Act 1988 - for their emphasis on particular species in isolation rather than ecosystem conservation as a whole.

The main cause of biodiversity decline in Australia is the clearance, removal and modification of habitats - most significantly from broad-scale vegetation clearing for agriculture. Thus recent law reforms have acknowledged this point by preventing habitat loss rather than emphasising the conservation of particular species. Other elements of the proactive approach involve addressing the causes of biodiversity loss by implementing development controls and ‘threat abatement plans’. Many of these threats are recognised in biodiversity protection legislation as “key threatening processes” to be addressed via statutory threat abatement plans. An ecosystem-based approach is partly achieved by means of protection measures such as listing of endangered ecological communities.

THE POLICY CHALLENGES OF BIODIVERSITY CONSERVATION

There are special difficulties raised by the characteristics of the biodiversity conservation task that must be taken into account by policy-makers in the private land and private

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39 Vegetation Management Act 1999 (Queensland), Soil Conservation and Land Care Act 1989 (SA), s8, Native Vegetation Act 1991(SA), Native Vegetation Conservation Act 1997 (NSW); State Section of Victorian Planning Scheme under Planning and Environment Act 1987, cl.3-8, cl.7-4 of Development Controls.

40 Perhaps this emphasis was driven by a popular emphasis on charismatic fauna such as koalas.


43 Threatened Species Conservation Act 1995 (NSW) (‘TSCA’), Part 3, and s.12.

44 Threatened Species Conservation Act 1995 (NSW), Part 5; Environmental Planning and Assessment Act 1979 (NSW) (‘EPAA’), s.5A.

45 Environment Protection and Biodiversity Conservation Act 1999 (Cth), s.183, 188, Part 12, Div.5; Threatened Species Conservation Act 1995 (NSW), s. 8,15, Part 5, Schedule 3. For example, land clearing has been listed under NSW and Commonwealth legislation as a KTP. Under Commonwealth legislation, “land clearance affecting nationally critically endangered, endangered or vulnerable species or ecological communities” has been listed as a key threatening process under the EPBC Act 1999, s.188. In NSW, “clearing of native vegetation” was listed as a key threatening process on Schedule 3 of the TSC Act, in September 2001.

46 Threatened Species Conservation Act 1995 (NSW), s.12; Environment Protection and Biodiversity Conservation Act 1999 (Cth), s. 181,182.
native forestry contexts. The unique aspects of the biodiversity conservation context are as follows. Firstly, the loss of biological diversity, after a particular point is reached, is ultimately irreversible and permanent—i.e. species extinction. This reduces the scope for ‘trial and error’ policy-making, which is often associated with the use of market mechanisms. Similarly, in relation to ecosystems as opposed to specific species, there exists a possibility of ecosystem collapse at a certain point, following continual damage and alteration.

Secondly, there is considerable scientific uncertainty surrounding many components of biodiversity. Many species, particularly invertebrates, are as yet undiscovered and there is a risk they may be destroyed before their ecological characteristics and habitat needs are well known, or even before they have been formally discovered. Limited scientific knowledge about known species means that it is often not possible to set out exactly where the 'thresholds of reversibility', up to which a species or ecosystem can withstand disturbance, actually lie. Thus in order to avoid actions that may cause the extinction of species, it is necessary to adopt a precautionary approach to the approval of actions which may contribute to the decline or extinction of species.

Given the inadequacy of information relating to biodiversity, there is frequently a need to apply the ‘precautionary principle’. A definition of the precautionary principle is contained in the Environment Protection and Biodiversity Act 1999 (Cth) and numerous NSW laws. It is that “lack of full scientific certainty should not be used as a reason for postponing measures to prevent degradation of the environment where there are threats of serious or irreversible damage.”

Whilst the precautionary principle is a very useful decision-making concept, it has a tendency to focus on micro level issues. It is possible to expand the precautionary principle to create a concept of ‘precautionary standards’. Regulators can set a target or

48 Environment Protection and Biodiversity Conservation Act 1999 (Cth), s. 391(2).
49 By reference to the Protection of the Environment Administration Act 1991, s.6(2).
51 Young et al. (1996) above n 2 at 177.
minimum standard of vegetation which must be preserved within a particular region, as a tool with which to measure the extent of compliance with the precautionary principle on a macro, or regional basis.\(^{52}\)

In order to implement precautionary standards, it may be necessary to ensure that legislation places an onus on landowners to justify proposed activities that exceed an agreed threshold of risk in terms of likely biodiversity loss.\(^{53}\) This approach has the benefit of shifting the burden of proof and the economic and logistical burden of information-gathering onto the developer, who is the party to gain economically from the proposed activity. This represents an adaptation of the ‘polluter pays’ principle to the biodiversity context.

A need has also been increasingly recognised for a natural resources management (NRM) framework which incorporates so-called ‘adaptive management’ strategies. This is an approach developed by ecologists, “who, bringing the scientific method to the messier world of policy and management, construed management interventions as testable hypotheses designed to advance ecosystem management through explicit experimentation and learning.”\(^{54}\) Dovers argues that environmental lawyers should ensure legal frameworks for NRM enable the operation of the adaptive management principle.\(^{55}\) However, this objective is directly contradicted by other trends in forest policy aimed at providing ‘resource security’ such as compensation commitments granted by the Commonwealth in RFAs, long term timber supply agreements in NSW and Private Timber Reserves in Tasmania.\(^{56}\) In the USA, adaptive management is threatened by ‘no surprises’ clauses being written into Habitat Conservation Plans under the *Endangered Species Act 1973* (ESA).\(^{57}\)

\(^{52}\) Ibid.

\(^{53}\) Ibid at 178.


\(^{57}\) These plans (HCPs) agree that one area of endangered species habitat can be destroyed if another area is retained, and that the threatened species requirements written into the plan will not be augmented within 20 years, hence, no surprises.
A third problem is that much biodiversity appears to have no immediate economic value, and therefore a classic externality problem or ‘market failure’ arises. Market signals cannot be relied upon to protect biodiversity. There is likely to be a large gap between the private interest of developers and the wider public and ecological interest. In most cases there is no immediate economic incentive for a private land-holder to preserve biodiversity. Thus serious policy-making difficulties can arise because of the conflict between pursuit of the profit motive and the objective of biodiversity conservation. There may be fundamental difficulties in applying self-regulatory approaches in this context.

Associated with this is the need for direct regulation to correct what is commonly described as the ‘free rider’ problem. Direct regulations are necessary, because without them, only certain market players will take action to ensure ESFM techniques are used in PNF. Other participants, variously described as ‘cowboys’ or ‘recalcitrants’, will be able to gain a competitive marketplace advantage by not expending scarce resources on environmental protection measures, and will be able to sell their product at a lower price, having a lower production cost structure. Thus, Reimbursing the Future recommended “that all incentive mixes be underpinned by ‘safety net’ regulations to catch the recalcitrant few not persuaded by positive instruments.”

Fourthly, there may be adverse and site-specific impacts on biodiversity caused by particular development activities, as different regions have different ecosystems and bioregions. This presents some challenges for the adoption of a market-based trading approach, for example, under a tradeable permits scheme, as biodiversity is not a uniform commodity, by comparison with sulphur dioxide or other airborne pollutants controlled under some US schemes.

Fifthly, the causes of biodiversity loss are numerous, complex and operate contemporaneously. Therefore, it is highly unlikely that a single policy

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58 Biodiversity and ecosystems provide ecosystem services which ultimately support industrial production. New industrial chemicals, products and pharmaceuticals can all be derived from biodiversity.

59 Similar debates have been canvassed frequently in relation to occupational health and safety - eg. Gunningham, N. (1984) Safeguarding the Worker: Job Hazards and the Rule of the Law, Law Book Company, Sydney, at 270. “The plain fact is that employers do not have an interest in minimising work hazards.”

60 Young et al. (1996) above n 2 at 177. Note, however, that empirical research will be required to check the assumption that the number of recalcitrants in the private land forestry industry will be tend to be “few”, as opposed to “many”.

or regulatory instrument can address all of these causes. Sixthly, there is a need for ongoing management actions (such as control of weeds and feral animals) in order to protect biodiversity. Preventing biodiversity loss requires more than a once-and-for-all policy response. It requires ongoing action.62

Finally, there is often a low level of awareness of the need for biodiversity protection and therefore the level of intrinsic moral support for conservation is low. Biodiversity conservation is a relatively new concept, and is not universally accepted in the rural community, especially where it comes into conflict with production objectives.

The characteristics of the biodiversity context also imply important differences from the pollution control context. Policy instruments and prescriptions appropriate that context may not be applicable here. For example, the need for biodiversity protection actions, and the consequences of not taking them may not be apparent to the landholder, whereas the need for ameliorative actions will often be obvious in the pollution control context.63

**LEGAL CHARACTERISTICS OF THE PRIVATE LAND CONTEXT**

The special status of private real property within the Anglo-Australian legal system raises a number of difficulties for governments seeking to conserve biodiversity on private land.64 These difficulties exist on two levels – first, impediments to environmental law-making affecting private property rights, and secondly political impediments to restricting the use of private land.

Environmental law in Australia has in recent years been evolving to extend its application to address industries and activities not previously subject to regulation. In an increasing number of jurisdictions it now seeks to more comprehensively regulate environmental impacts of activities on private land and not just immediate, drastic impacts on neighbours as have been long regulated by various common law doctrines such as nuisance and the law in *Rylands v Fletcher* (as now modified by the Australian High

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62 Young et al. (1996) above n 2 at v., 133.
The growth of reach of environmental laws will continue to raise questions of the scope of private property rights and notions of regulatory ‘acquisition’ of property.

In the context of discussing PNF, reference is frequently made by forestry advocates to the rights of private property owners, in an attempt to exclude the operation of environmental laws. For example, the Forest Products Association proclaimed in 2002: “Private forestry is just that, Private, and ultimately under the control of the landowners who have practiced [sic] conservation for many years...They have done so without any need for overzealous regulation.”

Yet notions of unassailable private property rights are more ideology than law; even the common law has long placed limitations on private property owners, albeit in order to protect the private rights of others. At this point it is necessary to briefly review the law relating to real property and the rights of beneficial owners of real property.

Does freehold title permit the landowner in New South Wales to fell trees and destroy vegetation at will? To answer this question we must briefly explore the definition of the terms ‘ownership’ and ‘property’ and determine the applicable law, consisting of the common law as modified by relevant statutes. British land law was imported into Australia upon the assertion or acquisition of sovereignty by the British, applying to all grants and interests in land - other than native title rights.

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65 The principles of negligence relating to an occupiers liability for damage caused by the escape of fire or dangerous substances introduced to his/her premises as set out in Rylands v Fletcher (1866) LR 1 Ex 265; afd (1868) LR 3 HL 330 were subsumed into the general law of negligence in Australia by the High Court in its decision in Burnie Port Authority v General Jones Pty Ltd (1994) 120 ALR 42.
66 Personal observation of the author from attending meetings of the PNF Reference Group, DLWC, Bridge St, Sydney, April-June 2002.
69 Mabo v Queensland [No.2] (1992) 175 CLR 1 at 48,49 per Brennan J. According to MacDonald et al at 29: “Prior to Mabo No.2 it had been held in a number of cases that the effect of the introduction of the doctrine of tenure into Australian law was that, on acquisition of sovereignty, the Crown became the absolute and beneficial owner of all land in Australia.” But the radical title acquired with the acquisition of sovereignty did not confer an absolute beneficial title upon the Crown to the occupied land - as the rights and interests in land of the indigenous inhabitants were recognised in the form of native title. MacDonald, C., McCrimmon, L., Wallace, A. (1998) Real Property Law in Queensland, LBC Information Services, North Ryde, NSW, at p.29. Native title rights are defined in the Native Title Act 1993 (Cth), s.223 as the rights or interests of indigenous Australians in land or waters, and the content of native title rights will vary from place to place: Wik Peoples v Queensland (1996) 187 CLR 1 at 169 per Gummow J. The native title of Australia’s indigenous inhabitants has been held to have been extinguished upon Crown grant of freehold (Mabo v Queensland [No.2] (1992) 175 CLR 1; Fejo v Northern Territory (1998) 156 ALR 721) and certain forms of leasehold: Wik Peoples v Queensland (1996) 187 CLR 1; Wilson v Anderson (2002) 190 ALR 313 re effect of leases under Western Lands Act (NSW). The issue of modification of native title rights by environmental laws is another question, and for reasons of limited space and time is not explored here. TSCA, s.145 provides that the TSCA is not intended to affect native title rights and interests.
The term ‘land owner’ can be more precisely defined as a person beneficially entitled to a fee simple estate in freehold tenure. An estate in fee simple comprises a bundle of rights relating to a particular parcel of land including the right to exclude others from the use or benefit of the land, the right to use and deal with land - to sell, mortgage, subdivide, as well as to possess, quietly enjoy, lease, and dispose of the property.

At common law, title to land entails title to the timber and vegetation growing on it. Thus ‘land’ is defined to include the soil and surface layer of the Earth and all physical things attached to it (such as trees and timber) or things which are in the ground (e.g. minerals). This position is reflected in statute law in NSW, except in relation to minerals. These aspects of land are referred to as corporeal hereditaments (loosely, tangible things as opposed to intangible rights such as easements). This definition is based on the Latin maxim quicquid plantatur solo, solo cedit, meaning “whatever is attached to the ground [i.e. fixtures] becomes a part of it”.

At common law, a landowner is generally free to carry out any lawful activity on her or his land and use the land for whatever purpose she or he desires. These rights are modified by the common-law doctrine of private nuisance and the so-called ‘natural rights’ of land ownership - the right to support for land (i.e. a right of action in the event of subsidence) and the right to the flow of water (i.e., riparian rights). The primary objective of such doctrines is to protect the proprietary rights of other land...

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70 In NSW a land owner is defined as “any person entitled to an estate of freehold in possession in the land… whether in fee simple or for life or otherwise…” Real Property Act 1900 (NSW), s.135A.
72 s.3, Real Property Act 1900 (NSW) largely adopts the common law definition of land. It defines land as: “Land, messuages, tenements, and hereditaments corporeal and incorporeal of every kind …, together with all … plantations, gardens, … and all trees and timber thereon…….” ‘Land’ is similarly defined in Interpretation Act 1987, s.21(1); Conveyancing Act 1919 s.7.
74 Ibid at 22.
75 MacDonald, C., McCrimmon, L., Wallace, A. (1998) Real Property Law in Queensland, LBC Information Services, North Ryde, NSW, at p.120.
78 Fennell v Rabone Excavations Pty Ltd [1977] 2 NSWLR 486.
79 Jennings v Sylvania Waters Pty Ltd [1972] 2 NSWLR 4 at 10.
owners. It would not be accurate to say that the common law and the law of equity have completely failed to provide tools to restrict indiscriminate tree-felling or environmental damage. The question is more one of the common law’s failure to provide adequate levels of environmental protection. The NSW Supreme Court confirmed in *Van Son v Forestry Commission* that non-point-source water pollution arising from timber-felling amounted to a private nuisance. The common law also places restrictions on the felling of timber on private property by life tenants, placing limits on cutting under the doctrine of ‘waste’ - in particular equitable waste (which is committed by acts of excessive tree felling). The law of equity has also made provision for land owners to impose negative or restrictive covenants upon the future use of property by subsequent owners. Such equitable covenants can require the owner of burdened land to refrain from particular activities such as cutting timber, but cannot oblige the assignee to expend monies.

Sax, Raff, Plumwood, and others have argued that the limited ecological perspective associated with the traditional common-law rights of private property are inimical to the creation of an ecologically sustainable society. According to Sax:

> Traditional legal concepts lead to the conclusion…that the owner of a forest may destroy it as a living and sustaining entity if to do so is advantageous. Except for nuisance type limitations - you may not burn if the smoke affects your neighbour, or perhaps you must not cut in ways that will cause massive erosive mud slides across your boundary line - your forest is yours to deal with as you wish…

Sax argues that individualistic ideologies of private property ownership “have had their day” as they rest on a factually incorrect assumption that the use of one’s land is a private matter “because it affects me and only me”, whereas the science of ecology has identified the interconnectedness and inter-relatedness of parts of the ecosystem. Similarly, Metzger bemoaned the “environmental insensitivity of the land use law produced by our view of property.” He suggested that the origin of the problem is “the fundamental denial in modern Western civilisation of the interdependence of people with their fellows

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and their environment.”\(^{87}\) In the time of Locke, it may have been true that, as Locke put it, “nor was the appropriation of any parcel of land, by improving it, any prejudice to any other man.”\(^{88}\) However there is now abundant scientific evidence that this is often no longer the case.

It is not intended to debate the institution of private property here, but to discuss the development of a more ecologically-aware law as applies to the rights of private property owners. Literature from conservation biology ponders the tendency of individuals and social institutions such as the media, the law, and our economic system, to persist in denying ecological damage.\(^ {89}\) Thus, a number of suggestions have been made about the extent of law reforms that might be required. Sax proposed an affirmative duty of proprietorship for land owners to use their property “in the service of a habitable planet”. (The notion of a landholder’s duty of care is discussed in Part IV). Secondly, he drew attention to the need for the law to distinguish between the environmental importance of particular parcels of land, rather than to treat all parcels of land alike.

There are essentially two competing conceptions of the western liberal concept of property, with one emphasising ‘freedom of property’ and the rights associated with property ownership, and the other suggesting that property ownership entails social obligations as well as rights.\(^ {90}\) The latter view was elaborated in *Backhouse v Judd*, albeit an animal welfare case. Napier J of the SA Supreme Court stated that “There is nothing novel in the idea that property is a responsibility as well as a privilege.”\(^ {91}\)

In any case, due to its limited effectiveness in providing environmental protection, the common law has now been extensively modified by modern environmental and land-use planning legislation which restricts the uses to which privately-owned land may be put,

\(^{87}\) Ibid at 793. He argues “The forces arrayed against the recognition of ecological reality in the area of land use planning are formidable. In addition to the entrenched ignorance, emotionalism, social inertia, and powerful vested interests…those who seek reform in land use planning…must do battle with the cherished notion of private ownership of real property.” (at 801).


\(^{90}\) Raff, M. (1998) above n 83 at 661; Bonyhady (1992) above n 68, pp.44-45. McAuslan identifies two other notions of the role of the law in relation to private property in the area of land use planning - that the law also has a crucial role in advance the public interest in relation to the use of private land; and a radical or populist view that the law should be used to enable rights of public participation in relation to the uses of private property. McAuslan, P. (1980) *The Ideologies of Planning Law*, Pergamon Press, Oxford, at 2.

\(^{91}\) *Backhouse v Judd* [1925] SASR 16; Further, according to international experts at the *UN Workshop on Land Tenure and Cadastral Infrastructures for Sustainable Development* “property rights in land do not in principle carry with them a right to neglect or destroy the land.” cited in Raff, M. (2000) *Submission to the House of Representatives Standing Committee on Environment and Heritage Inquiry into Public Good Conservation*, 8 May 2000, p.3.
and the activities that may be carried out on it. Rights to fell timber and clear vegetation on private property in NSW have been restricted by statutes including the *Native Vegetation Conservation Act 1997*, *Environmental Planning and Assessment Act 1979*, and the *Threatened Species Conservation Act 1995*.

It is an established principle of planning law that land uses permitted in one location may be prohibited in another, given the public interest in orderly direction of the development of land and the protection of public health, amenity, *et cetera*. The fact that planning laws restrict private rights was accepted by the judiciary long ago. In 1969, Lord Diplock said:

“[t]he whole purpose of planning control…is to take away private rights of property. Any refusal of planning permission does just this…”

Yet despite clear statutory statements of objects and parliamentary speeches about the necessity for environmental protection, these statutes occasionally fall foul of a common law presumption of statutory interpretation that Parliament does not intend to detract from property rights unless the statute in question states this expressly or by necessary intendment. In *Protean (Holdings) Ltd v Environment Protection Authority (Vic)* pollution control legislation was interpreted in favour of a polluting landholder on the basis of the landholder’s existing proprietary rights.

The ultimate source of justification for restrictions on the use of private property lies in the doctrine of tenures, which contains the proposition that private property ownership exists ultimately as a result of a grant from the Crown. On this basis there is no absolute ownership of land itself but ownership merely of an estate in land. The Crown’s radical title lies between the land itself and a freehold estate in it. With the reception of such doctrines of British law into Australian law, land owners ultimately hold their

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93 Rio Pioneer Gravel Co Pty Ltd v Warringah Shire Council (1969) 17 LGRA 153 (Land & Valn Ct NSW), Else-Mitchell J at 162.
94 Westminster Bank Ltd v Beverley Borough Council [1969] 1 QB 499, at 526 per Diplock J.
96 Protean (Holdings) Ltd v Environment Protection Authority (Vic) [1977] VR 51 at 55-56.
property at the pleasure of the Crown.\textsuperscript{99} It is from this point that the Crown ultimately derives its powers for compulsory acquisition of private property.\textsuperscript{100}

\textit{Acquisition, regulatory takings, and compensation}

One of the questions that arise when regulating PNF is: how far can the Parliament go in making forestry and environmental laws? In what circumstances does a regulatory ‘interference’ with the rights of a private landholder amount to, or come to represent, effectively, an ‘acquisition’ of that property giving right to an entitlement to compensation?

Laws of the Commonwealth Parliament providing for the acquisition of property by the Commonwealth and its agencies must be consistent with section 51(xxxi) of the Commonwealth Constitution, that any acquisition of property by the Commonwealth must be “on just terms”.\textsuperscript{101} The question of validity of environmental legislation under s.51(xxxi) was considered in the \textit{Tasmanian Dams} case. It was held by 3 of 7 justices that although the \textit{World Heritage Properties Conservation Act 1983 (Cth)} had effectively ‘sterilised’ the use of Tasmanian Crown land by preventing dam-building on it,\textsuperscript{102} this exercise of power did not amount to an acquisition. This was because the Commonwealth did not in fact gain any property or proprietary interest, or have such an interest vested in it.\textsuperscript{103} Murphy J observed: “[T]he extinction or limitation of property rights does not amount to acquisition…”\textsuperscript{104}

In the \textit{Dams} case the High Court also considered arguments regarding regulatory acquisition of property. The Australian law was described as “significantly different” to US doctrines on ‘regulatory takings’. According to Mason J: “The emphasis in s.51(xxxi)
is not on a ‘taking’ of private property but on the acquisition of property for purposes of the Commonwealth.” The US law was described as having “no direct relevance”.

The notion of a regulatory ‘acquisition’ of property has not been broadly accepted in Australian law. The exception is the High Court’s acceptance of such arguments in 1997 in the context of interpretation of the constitutional validity of Commonwealth proclamations under the former National Parks and Wildlife Conservation Act 1975 in Newcrest v Commonwealth. For the first time the High Court held that particular environmentally-based land-use restrictions infringed the Commonwealth Constitutional prohibition on uncompensated acquisitions of property. The expansion of a national park in the Northern Territory which had effectively sterilised a mining company’s property rights in the form of mining leases was held to amount to a compensable acquisition. However it is important to note that the decision applied in the Northern Territory and is likely to be of limited application in the states (see further, below).

In the United States, the Constitutional jurisprudence on regulatory ‘takings’ represents as a major impediment to environmentally-sensitive land-use regulation, as well as other forms of environmental regulation. Yet numerous restrictions on private land use are still in place in that country. For example under the Endangered Species Act 1973, and have survived challenge in the courts. In the Sweet Home case, a logging community was unsuccessful before the Supreme Court in winding back the Fish and Wildlife Service’s broad interpretation of ‘take’ (i.e. harming or killing) of endangered species in the Act to include habitat modification.

More importantly for our purposes, at the State level in Australia, Parliaments are free to legislate to modify the rights of land owners in the interests of environmental protection without fear of falling foul of constitutional limitations on the acquisition of property.

105 Mason J at 145, para 68 in original judgement.
108 Eg. Lucas v South Carolina Council 505 US1003 (1992); Metzger (1976) above n 86.
The States’ Constitutions do not contain an acquisition clause equivalent to s.51(xxxi) of the Commonwealth Constitution. The State Parliaments enact most environmental legislation affecting land use. The primary exception is the Commonwealth EPBC Act 1999 which has some application to land within the States, particularly where listed threatened species or other matters of national environmental significance are concerned.\textsuperscript{111}

Even though State Constitutions enable State Parliaments to enact legislation which does not require payment of compensation for the compulsory acquisition of property, they have proceeded to create such rights. In NSW these rights are created by the Public Works Act 1912\textsuperscript{112} and the Land Acquisition (Just Terms Compensation) Act 1991.\textsuperscript{113}

A vital distinction is drawn in Australian and English law between regulation that merely restricts the rights of property owners (even if it involves prohibition) and that which involves acquisition giving rise to a right of compensation.\textsuperscript{114} Bonyhady summarised the way in which this distinction has tended to be drawn by legislators: “The norm is that legislation provides for compensation for acquisitions of land, but not for restrictions on land use.”\textsuperscript{115} Generally statutes that only restrict the use of private property contain limited or no provisions for compensation. On this basis, planning statutes provide narrowly-defined circumstances in which compensation may be payable, if at all. Usually these situations are where private land is explicitly reserved for a public purpose.\textsuperscript{116}

In relation to private forestry, NSW legislation merely restricts private land use but does not amount to regulatory acquisition. Therefore Acts such as the Native Vegetation


\textsuperscript{112} The rights to compensation under this legislation were extensively litigated in Haig v Minister Administering National Parks and Wildlife Act 1974 (1994) 85 LGERA 143.

\textsuperscript{113} The latter provides a process for compulsory acquisition of land for public purposes by State authorities (that have powers to acquire land granted under other legislation Land Acquisition (Just Terms Compensation) Act 1991, Part 2; see also Environmental Planning and Assessment Act 1979, s.21 enabling LEPs to contain provision for reservation of land exclusively for a public purpose, but not authorising LEPs to “contain a provision empowering or purporting to empower the compulsory acquisition of land”.


\textsuperscript{115} Bonyhady, T. (1992) above n 68 at 76.

Conservation Act do not offer compensation directly to landholders. Nevertheless in recognition of cultural and political realities, financial recompense is offered through a statutory Native Vegetation Fund, in the form of grants and incentives available upon application to projects meeting specified criteria.\(^{117}\)

The question remains whether, as a matter of policy, land owners should be paid ‘compensation’ in order to encourage their cooperation with the spirit of environmental regulations. Raff argued: “It is by no means clear why the right of a property owner to beneficial use of the property extends to environmental destruction and why the owner should be compensated for desisting from it.”\(^{118}\)

There is a tendency on the part of some members of the PNF industry to confuse land use restrictions with land use prohibitions. For example, in a submission to a NSW Government panel examining private forestry regulation, a submission by a branch of the Institute of Foresters Australia suggested that the removal of exemptions for private forestry and equated the imposition of consent requirements with “creating national parks by stealth”.\(^{119}\)

Environmental laws instead usually only amount to restrictions rather than prohibitions. A distinction must be drawn between regulation which merely modifies the uses to which land may be put, and regulation which so fundamentally alters the capacity of the owner to deal with that property so as to ‘sterilise’ those rights of ownership involving absolute extinguishment of all economic uses of the land. The latter category is in fact rare in the field of environmental law. Similarly, road traffic rules do not typically prevent licensed persons from driving their cars – they merely restrict their use of cars by asking them to drive safely, obey speed limits and wear seat belts. There are many examples of environmental restrictions on the use of private property which are intended to ensure outcomes in the public good that do not amount to a prohibition of activity.\(^{120}\)

\(^{117}\) Native Vegetation Conservation Act 1997 (NSW), Part 7, Division 3 (ss.56-57).
\(^{119}\) Institute of Foresters Australia, Northern NSW Branch (2002) Submission to Private Native Forestry Exemption Reference Group, 24 May 2002, 6pp, at 3. A number of PNF industry representatives also verbally expressed the view that a consent requirement effectively amounted to a prohibition in practice; observation of the author at meetings of the PNF Reference Group, DLWC, Bridge St., Sydney, April-June 2002, particularly comments of Mr. Gaine Cartmill (NSW FPA), and Mr. Ken O’Brien (Riverina Freehold Forestry Management Group).

\(^{120}\) Similarly broader regulatory restrictions on the capacity of persons to earn income from business assets are not new. Legal limits on economic activity in the form of consumer protection and competition laws (Misrepresentation Acts and the Trade Practices Act 1974 (Cth), not to mention the prohibitions on economic exchange such as slavery, child labour, and drug trafficking.
In seeking to regulate forestry activity on private land, a problem for regulators arises in relation to dealing with that category of persons who have purchased land with “logging rights” (or a profit à prendre) attached and have an expectation of being able to log that land in the longer term. Raff suggests that the onus is on purchasers of land to ensure that land is fit for the purpose intended, that it be bought in a cleared state if the purchaser seeks a cleared property.\(^{121}\) Thus there is a similar onus on a purchaser to check the zoning restrictions on the land before purchase.\(^{122}\)

Considerable difficulty also exists for regulators in imposing restrictions on forestry under planning laws, on the basis of claims of ‘existing use’.\(^{123}\) Planning laws in all States provide for the preservation of “existing uses”, so that if a planning scheme is commenced having the effect that a previously-lawful use of land becomes prohibited or subject to a requirement for development consent, that land use may be continued as an existing use, despite those restrictions.\(^{124}\) The protection of existing uses is limited and does not encompass alterations to uses that amount to a change of land use, nor does it apply to land uses abandoned over time (see further, Chapter Nine).\(^{125}\) Yet the High Court has construed existing use provisions liberally in favour of private rights of land development so that activities such as land clearing have been considered consistent with an existing use of agriculture and thus restrictions on vegetation clearing contained in planning instruments were held ineffective.\(^{126}\) These problems are largely circumvented by imposing restrictions through laws other than planning instruments.

**THE PRIVATE LAND CONTEXT: IMPLICATIONS FOR REGULATORY POLICY**

A branch of the domestic and international literature raises specific practical - as opposed to legal - difficulties that arise when attempting to apply direct regulation for biodiversity conservation on private land. In addition to the difficulties generally attributed to direct,

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\(^{122}\) However these arguments do not address the situation where land was purchased in the previous era of lower ecological consciousness where there was an expectation of being able to clear land, or where property was inherited.

\(^{123}\) These questions are further discussed in Chapter Nine regarding the *Environmental Planning and Assessment Act 1979* (NSW).

\(^{124}\) For example, *Environmental Planning and Assessment Act 1979* (NSW), Part 4, Division 10; *Land Use Planning and Approvals Act 1993* (Tas), s.20(3); *Development Act 1993* (SA), s.6(2). See: further, Chapter Eight.

\(^{125}\) Farrier et.al. (1999)above n 92 at 13-14.

\(^{126}\) Parramatta CC v Brickworks Ltd (1971) 128 CLR 1. Regarding land clearance see *Dorrestijn v Planning Commission S.A* (1985) 59 ALJR 105. However in *Vann redhead Pty Ltd v Fairfield CC* (1992) 128 CLR 1, existing use rights were described as being more in the nature of a privilege than a right.
or ‘command and control’ regulation (Chapter Two), in this context, traditional regulation is said to be impracticable and ineffective for a variety of reasons. Instead, a mixture of policy instruments is advocated that either avoids regulation altogether or offers incentives such as stewardship payments alongside regulation.

In Australia, a sizeable recent literature presents and considers alternatives to regulation within the biodiversity context. A key paper is Reimbursing the Future, a consultant’s report to the Commonwealth which examined motivational, voluntary, price-based, property-right, and incentives approaches to biodiversity conservation. The broader political context of the commissioning of that report was a desire on the part of the Commonwealth to address biodiversity decline whilst focussing on non-regulatory approaches.

Several other reports produced at the Commonwealth level by the Productivity Commission and ANZECC - dealing with land clearing and conservation on private land - have sought to investigate alternatives to regulation. In 2002, the Department of Land and Water Conservation (DLWC), indicating its desire to explore regulatory alternatives, reviewed the literature regarding the application of economic mechanisms on private land. It also embarked on a pilot ‘environmental services scheme’ to investigate ways in which landholders could be paid for providing environmental services such as vegetation conservation.

One of the problems is that a degree of defiance and resistance to external regulation is often observed by environmental agencies in the rural context in Australia. This resistance is evident almost regardless of the extent of enforcement activity. It stems

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from landholders’ reluctance to accept the notion that certain rural activities on freehold land should be regulated.132

On private land, the imposition and enforcement of regulatory controls on activities (e.g. forestry) that have been considered “normal” and conducted for many years is often resented. Regulatory resistance is manifested in the formation of property rights committees within farmer associations, advocacy by PNF associations,133 and pressure for official investigation of the effects of environmental laws on private property holders. In response to this pressure, two recent Commonwealth inquiries were initiated to focus attention on the economic impacts of environmental laws on landholders.134

The private native forestry (PNF) industry has historically resisted the introduction or ‘imposition’ of external regulation. The Australian Forest Growers posed the rhetorical question of whether private forest owners are likely to “comply with unpopular and unsupported regulations imposed without their agreement”.135 They advocated “avoidance of excessive and unwarranted bureaucratic intervention and regulation” of PNF. 136

In a 2002 review of the regulation of PNF in NSW, industry representatives argued for a “general exemption” for PNF, with consent requirements only applying to “special areas”.137 A model put forward by Australian Forest Growers declared:

private native forestry is a basic right of landholders on their own properties without requiring planning consent as long as this is carried out according to a set of principles enshrining sustainable management.138

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132 Observations of the author at community consultation exercises conducted by DLWC (2001) and NPWS (1997) in Southern NSW. Notes on a Speech given by Mr. Robert Adam, DLWC, Sydney-South Coast region, DLWC re proposed BOS Best Operating Standards for Private Native Forestry (PNF) under the Native Vegetation Conservation Act on 21 February 2001, at Candelo, Southern NSW at ANU Forestry workshop, “The Evolving Legislative and Regulatory Environment for the Management of Private Native Forests in NSW”. Also observations of the author from attendance at NPWS consultation meeting, August 1997, Platypus Lodge, Cooma, NSW. The consultations was carried out by NPWS prior to introduction of a regulation to limit the routine agricultural activities exemption in the Threatened Species Conservation Act 1995. Sixty meetings were held throughout NSW in 1997. The regulation was never introduced due to the level of campaign generated against it.

133 In NSW, primarily the Australian Forest Growers and Forest Products Association NSW. Examples of their advocacy can be seen at <www.afg.asn.au> and <www.nswfpa.asn.au>.


136 Ibid.

Resistance to regulation is driven by ideologies of private property rights that reject the notion of State control of activities on privately-held land. Resistance is also generated particularly when the rationale for environmental laws is poorly understood and when laws perceived as unnecessary, coercive or unfair, are enforced stringently.\textsuperscript{139}

Critics of regulation sometimes cite research relating to the consequences of overzealous enforcement by Bardach and Kagan in the occupational health and safety context.\textsuperscript{140} In the rural context in Australia, even moderate levels of environmental protection regulation are likely to be resented. Thus the problem is not so much about overzealous enforcement, but often a fundamental objection to being regulated at all. For example, an Australian Forest Growers submission to a recent review of PNF regulation in NSW stated that “moving the private sector to a fully regulated system is a grossly unwarranted imposition on both the industry and the public.”\textsuperscript{141}

Some of the theoretical literature on regulation emphasises the need to develop trust with the regulated community as an explicit regulatory strategy.\textsuperscript{142} Whilst this approach may have its place, the language of trust becomes problematic when used to support arguments such as, “if landholders don’t like this law, then we won’t force it upon them”, for fear of jeopardising a ‘trust’ relationship. The question is whether government should go out of its way to avoid generating resistance, regardless of how pressing the need may be for state intervention for environmental protection.

This said, the law does not operate in a vacuum. Economic forces are still the major motivator and determinant of landholder decision-making about land management. It is not wise to simply advocate more stringent enforcement of environmental laws without awareness that this may generate a backlash in which landholders will take actions in

spite of the law.\(^{143}\) If incentives or stewardship payments are offered, then regulatory resistance can often be overcome and the regulatory framework can be retained unaltered and applied effectively.

Conventional direct regulatory strategies on private land must address the so-called ‘first mover problem’.\(^{144}\) This describes the common situation where a regulatory agency has poor levels of information regarding threatened biodiversity, and is at a disadvantage compared to the party it is regulating. In such a scenario, when a landholder discovers a threatened species on his/her property, there is a strong financial incentive to conceal that fact from regulators.\(^{145}\) Although many landholders may lack the knowledge to identify threatened species, particularly flora, if they do manage to do so, they may take actions to destroy them in order to remove the threatened species ‘problem’ from the land. Collectively this has been described as the tendency to “shoot, shovel and shut up”.\(^{146}\) It is also described as the first mover problem because if the regulatee moves first, the regulator will fail to achieve conservation objectives. Knowledge of these difficulties led the authors of a scientific manual on plant conservation to advise:

> When a rare plant is located [in a botanical survey], notify the landowner as soon as possible, but avoid giving the exact locality unless you are sure the site will not be destroyed.\(^{147}\)

Unless countervailing economic incentives to preserve threatened species are offered to landholders, biota may be destroyed.\(^{148}\) Incentives to conserve biodiversity are usually offered in the form of management agreements and stewardship payments. The latter involve a contract between landholder and government to provide environmental

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\(^{147}\) Cropper, S. (1993) *Management of Endangered Plants*, CSIRO Publications, East Melbourne, at 18-19. Cropper cites the following anecdote: “Even when legislation is used, populations can still be lost. A population of the endangered *Pterostylis gibbosa* (Illawarra Greenhood) occurs on private land. Three ICOs [interim conservation orders] under the *Heritage Act* were made by the relevant New South Wales minister to protect the orchid’s habitat. Despite the ICO, the landowners destroyed part of the site.” Cropper at 19 cites Benson (1989) “Establishing priorities for the conservation of rare or threatened plants and plant associations in New South Wales”, in Hicks, M., and Eiser, P. (eds.), *The Conservation of Threatened Species and Their Habitats*, pp.17-82, Australian Committee for International Union for Conservation of Nature and Natural Resources, Canberra.

\(^{148}\) In an interview with Mr. Gary Davey, 30.4.98, Manager Threatened Species Unit, Northern Zone, NPWS NSW the opinion was expressed that “too firm application of the Act [Threatened Species Conservation Act 1995] can backfire.” The officer described an incident in which a landholder was asked to examine threatened species issues arising on his property prior to development consent. A fauna consultant was bought in for a preliminary examination. Species were identified including koala and phascogale. The landowner then burnt and slashed vegetation on the property. A further fauna study was carried out which revealed that no threatened species were present.
services over a given time period in return for a specified price. Given shortcomings of these arrangements such as the limitations on their term (thus not guaranteeing long-term biodiversity conservation), and the risk of crucial sites not being included as stewardship agreements are voluntary, it is wisest that such economic instruments are applied in conjunction with regulation and other policy instruments.

Chapter Two explored the broader context of recent writing on regulatory theory, which displays a reticence about the application of direct regulation. Gunningham and Sinclair suggest: “It is essential that government regulation serves as a backstop, only being invoked where other instruments fail to achieve the desired effect.” This strategy is said to enable government to ‘regulate at a distance’ and more efficiently allocate its limited administrative capacity. Elsewhere Gunningham and Grabosky put forward axioms such as “Prefer Less Interventionist Measures”, implying that regulation be avoided where possible if a choice arises.

It is often argued that direct regulation alone is doomed to failure because it does not enlist the cooperation of landholders to either correct ecologically unsustainable forest management practices or to actively conserve forest values. Conventional regulation can prevent or restrict land uses but is not particularly effective at encouraging particular forms of active land management such as control of weeds and feral animals. These problems arise because conventional regulation does not address disincentives to ESFM. There is a need to offer incentives to secure cooperation by means of the carrot rather than by relying exclusively upon deterrence-based coercion. Yet this critique can be addressed if regulation is applied in conjunction with stewardship payments to those landholders who are required to perform a public-good conservation service at

149 These schemes are common in the United States and Europe, with 20% of European agricultural land under some form of stewardship arrangement: Gibbons, P., Briggs, S., Shields, J. (2002) “Are Economic Instruments the Saviour for Biodiversity on Private Land?” 7 Pacific Conservation Biology 223-228.
152 Grabosky, P., Gunningham, N. (1998) Smart Regulation: Designing Environmental Policy, Clarendon Press, Chapter One. However, in other contexts Gunningham has more often indicated the need for a mix of regulatory and non-regulatory approaches. The proposition “Prefer Less Interventionist Measures” implies that a choice must be made, a choice which is inconsistent with the proposal, on the subject of land clearance, for “a firm regulatory safety net that prohibits irreversible actions.” (p.360-1), and similar views about the value of a precautionary regulation in Gunningham, N., Young, M. (1997) “Toward Optimal Environmental Policy: The Case of Biodiversity Conservation” 24(2) Ecology Law Quarterly 243-298.
private expense, in excess of landholder’s normal environmental protection obligations to the community at large.

Another criticism of direct regulation is that its effectiveness is restricted by access difficulties associated with private land ownership, and the difficulty in gathering data and proving offences relating to vegetation clearance.\textsuperscript{156} Enforcement is said to be almost too difficult as there are large areas of land over which it is very difficult to check compliance with environmental laws. It is said to be impossible to ‘have a cop on the corner of every forest’.

However, with aerial photography, aircraft fly-overs, satellite mapping, and computer analysis of remote sensing data, regulators can obtain detailed information about changes to vegetation cover on private land, which can greatly assist in the detection and prosecution of offences of vegetation clearance.\textsuperscript{157} Vegetation disturbance detected can be investigated by site visits.\textsuperscript{158}

Regulating activities on private property involves other related difficulties, as a closed domain posing access problems for regulators. Yet statutes address the issue of access, with provisions in the \textit{Native Vegetation Conservation Act 1997}, the \textit{National Parks and Wildlife Act 1974 (NPW\textit{A})}, and the \textit{Protection of the Environment Operations Act 1997}.\textsuperscript{159} For example, the \textit{NPW\textit{A}} enables staff to enter any property for the purpose of “investigating the presence or condition of threatened species, populations or ecological communities, and their habitats”.\textsuperscript{160} However these provisions on their own do not address the source of regulatory resistance, and a backlash can arise when property entrance powers are applied insensitively.\textsuperscript{161}

\begin{thebibliography}{99}
\item\textsuperscript{156} Statements regarding the difficulty in proving pre-existing vegetation in the course of prosecutions for breach of the \textit{Native Vegetation Act 1991 (SA)}: Telephone interview, Ms J. Justine, Solicitor, Crown Solicitors office SA, 15 March 2001 (solicitor with primary carriage of prosecutions under SA legislation).
\item\textsuperscript{159} NVCA, s.61, POE\textit{O Act}, s. 196.
\item\textsuperscript{160} NP\textit{W\textit{A}}, s.164.
\end{thebibliography}
A useful summary of criticisms of direct regulation in the private land context was made in the NSW ESFM Expert Report (1998):

> It is cheap but inefficient to set up command and control regulatory regimes relating to private land. In practice, these are largely symbolic because inadequate resources are devoted to providing decision makers with background information through the strategic planning process, to auditing compliance, to providing incentives for active management. There is some evidence that this has happened in the past in NSW. 162

Ultimately these problems boil down to a question of providing the resources to make an effective PNF regime a priority. Even if we are to rely on incentives, governments will need to provide the necessary resources.

In spite of the criticisms of regulation, there is some consensus that a ‘bottom line’ of regulation needs to apply on private lands: a regulatory safety net to prevent irreversible environmental damage.163 Even in circumstances considered favourable to self-regulation, Gunningham and Young viewed a regulatory safety net as necessary “to deal with the irrational or incompetent”.164 There has been little work to clarify whether existing laws amount to an adequate safety net or what such a regulatory safety net would entail.165

**CONCLUSION**

This chapter has argued that aspects of the task of biodiversity conservation limit the policy options available to those seeking to regulate and guide activities on private land in Australia. It was argued that the private property context presents special challenges in making policy for sustainable land management, particularly in terms of issues of access and resentment of conservation-based government restrictions on land use. Although the law applying to private land often does not technically provide for the payment of compensation in the event of land use restrictions (and only in the event of compulsory acquisition of private land), deep-seated attitudes about property rights pervade the practical day-to-day context of making policy in this sector.

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165 Further, there is a danger that in practice advocacy of economic instruments may lead to an abandonment of attempts to regulate industry.
Despite the advocacy of self-regulation and tendencies to shun conventional direct regulation, the inherent difficulties of the biodiversity conservation context, particularly the problems of irreversibility, limited information, and multiple causes and effects all play havoc with setting policy for biodiversity conservation.

These problems have encouraged a conclusion in the Australian literature that a ‘baseline’ of effective regulation is essential, whether alone or in combination with other instruments.\textsuperscript{166} It is necessary to retain a regulatory structure to provide ‘precautionary standards’.\textsuperscript{167} Incentives and motivational instruments are usually not considered sufficient to protect biodiversity in all circumstances.\textsuperscript{168} The fact that it may be advisable for regulatory agencies to attempt to integrate offers of incentives into their regulatory approach does not detract from the necessity for a strong stance of enforcement in cases of blatant environmental damage.

Although the need for regulation in the biodiversity protection context is recognised,\textsuperscript{169} less frequently is the next step taken to discuss what effective regulation would entail. Once the need for a regulatory ‘safety net’ is accepted, it becomes necessary to examine regulatory effectiveness in practice. This is the purpose of the review conducted in subsequent chapters, of the law applicable to private native forestry in NSW and Tasmania.

\textsuperscript{166} Young et. al. (1996) above n 2, Part 1, p.viii; Gunningham suggests that “regulation may be made more acceptable, and effective, by combining it with other less coercive measures, such as tax concessions, compensating land owners for loss of profits, and voluntary agreements” : Gunningham (1996 a) above n 2 at 234.


\textsuperscript{168} Young, et.al., (1996) above n 2.

\textsuperscript{169} Gunningham and Sinclair (1999 ) above n 151, at 873.
Chapter Five

PRIVATE NATIVE FORESTS AND THE LAW

INTRODUCTION
To provide an informed background to later discussion, this Chapter briefly summarises the available data regarding the tenure of forests in NSW, about the conservation significance of private native forests and their economic importance. It then describes and discusses the various factors that have shaped, and which are likely to shape the law applying to PNF in NSW. To place later discussions of law reform in context the Chapter briefly reviews the implications of government commitments to ecologically sustainable forest management, the influence of international law relating to forests, as well as the role of the Commonwealth Parliament in regulating PNF. Finally the existing – and scarce - literature regarding the regulation of PNF in NSW is mapped out. That material is considered along with available data about the standards of forestry practices in the NSW PNF industry.

FACTS ABOUT PNF: TENURE OF FORESTS IN NSW
Almost 70 per cent of Australian native forests are managed by the private sector – either on freehold or leasehold land. But such broadly aggregated statistics are only a starting point, as much of these forests are not considered commercially viable for timber production.

In NSW, depending on the source consulted, between 35 and 38 per cent of the remaining forests are privately owned. Another 29 per cent are leasehold. The

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1 The National Forest Inventory defined ‘forest’ as “an area that is dominated by trees having usually a single stem and a mature or potentially mature stand height exceeding 2 metres and with existing or potential crown cover of overstorey strata about equal to or greater than 20 per cent.” National Forest Inventory (1998) Australia’s State of the Forests Report, Bureau of Rural Sciences, Canberra, at 30.
2 NFI (1998) above n 1 at 35.
4 Appendix 5.1 contains further detailed graphs and tables concerning private forests in NSW. According to the National Forest Inventory (1998) 38.69% of NSW are privately owned. According to the EPA NSW (1997) New South Wales State of the Environment 1997, (Chatswood, NSW, p.196) 35% of NSW forests are privately owned. The RAC (1992) stated that 36% of NSW forests were privately owned: Resource Assessment Commission (1992) Forest and Timber Inquiry: Final Report, AGPS, Canberra at 89; NFI (1998) above n 1, ch. 3 & p 167. The differences in these figures derive largely from the varying definitions of ‘forest’.
remaining forests are designated as State forests managed for timber production (15%) or as national parks and other reserves (15%). However such statistics do not differentiate between closed, open and woodland forests (i.e., based on density of crown cover). Therefore a useful analysis from the National Forest Inventory (NFI) is set out in Table 1.

<table>
<thead>
<tr>
<th>Forest Type</th>
<th>Closed Forest</th>
<th>Open Forest</th>
<th>Woodland</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Forest</td>
<td>32%</td>
<td>26%</td>
<td>7%</td>
</tr>
<tr>
<td>Conservation reserves</td>
<td>49%</td>
<td>21%</td>
<td>10%</td>
</tr>
<tr>
<td>Private Forest</td>
<td>19%</td>
<td>46%</td>
<td>34.4%</td>
</tr>
<tr>
<td>Leasehold</td>
<td>-</td>
<td>3%</td>
<td>46.6%</td>
</tr>
<tr>
<td>Other</td>
<td>-</td>
<td>4%</td>
<td>2%</td>
</tr>
</tbody>
</table>

Source: National Forest Inventory: *Australia’s State of the Forests Report*

The NFI found that a significant proportion of open forest in NSW is privately owned (46%), (compared to 26% in State Forests and 21% in conservation reserves). Similarly, much of the woodland forest in NSW is privately owned (34.4%), with an even greater proportion held on leasehold tenures (46.6%). Only 19% of the closed forest in NSW is privately owned.

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5 The NFI and RFA processes have defined private forest to exclude leasehold tenures. According to C. McElhinny of ANU Forestry: “This approach is at odds with the Montreal Process, which includes leasehold land under the category of private forests. This broader definition reflects the fact that while management options available under leasehold title are more restricted than options available under freehold title, in both tenures the landowner retains a major influence over the condition of the forest resource.” (McElhinny, C. (2000) Private Native Forest Inventory Within the Context of a Continental Sampling Framework, Discussion paper prepared for National Forest Inventory Steering Committee, Department of Forestry, ANU, Canberra). On the other hand it is a mistake to equate leasehold with freehold as some forms of lease do not permit the lessee to engage in tree felling other than for minor on-farm uses such as fencing and clearing for sheds.


7 NFI (1998) above n 1 at 36.

8 Open forest is defined as having 51–80 per cent crown cover of the land area when viewed from above: National Forest Inventory (1998) above n 1 at 30-31.

9 National Forest Inventory (1998) above n Error! Bookmark not defined. at 36.

10 Woodland forest is defined by the NFI as having 20-50% Crown cover: National Forest Inventory (1998) above n 1 at 30-31.


12 Closed forest is defined by the NFI as having 81-100% Crown cover; National Forest Inventory (1998) above n 1 at 30-31.
COMMERCIAL IMPORTANCE

PNF activity centres on North-East NSW, with private forests comprising 46% of the area of commercial forest types in the Upper and Lower North-East (‘UNE’ and ‘LNE’ respectively). Other important sectors of PNF activity involve river red gum-logging in the South-West, and cypress and ironbark logging in the Central West. (Other details of production are listed in Appendix 5.1)

To review the ecological impacts of PNF it is important to focus on forests of commercial significance subject to forestry activity. We must consider the extent of commercial forest types that are privately held, rather than just the extent of broadly defined “forest”. Such figures are difficult to obtain, but broadly speaking woodland forest ecosystems are not targeted for timber production, apart from firewood logging and charcoal production. Most PNF production activity in NSW centres on the north-east and coastal NSW. Private forests comprise 46% of the area of commercial forest types in Upper and Lower north-eastern NSW. Also significant are river red gum (*E. camaldulensis*) logging (e.g. sleeper cutting) in the south-west, and cypress (Callitris sp) and Ironbark logging in the central west.

A relatively small proportion of the moist coastal and tableland eucalypt forests and rainforest are privately held. On the other hand, a greater proportion (approaching 40%) of drier forest types are privately-owned (Table 2). While a higher percentage of the drier forest types are on private land, the proportion of these forest types which are commercial forest types or are commercially viable is lower than for the coastal forests.

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Table 2: Percentage of total forested area on privately owned land in NSW, June 1996

<table>
<thead>
<tr>
<th>Forest Type</th>
<th>% on private land</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rainforest</td>
<td>12.41%</td>
</tr>
<tr>
<td>Blackbutt</td>
<td>28.06%</td>
</tr>
<tr>
<td>Moist coastal eucalypts</td>
<td>28.4%</td>
</tr>
<tr>
<td>Dry coastal eucalypts</td>
<td>36.5%</td>
</tr>
<tr>
<td>Moist tableland eucalypts</td>
<td>16.04%</td>
</tr>
<tr>
<td>Dry tableland eucalypts</td>
<td>37.8%</td>
</tr>
<tr>
<td>Low dry eucalypts</td>
<td>34.3%</td>
</tr>
<tr>
<td>Western box–gum–ironbarks</td>
<td>40.3%</td>
</tr>
<tr>
<td>River red-gum</td>
<td>37.7%</td>
</tr>
<tr>
<td>White cypress pine</td>
<td>34.7%</td>
</tr>
</tbody>
</table>

PNF production has traditionally been around 25-35% of total sawlog production in NSW. Not only is PNF of considerable commercial significance but the contribution of private forests increased in the late 1990s to the point that production in the UNE and LNE was described by RFA consultants as reaching the limits of sustainable yield. In relation to the LNE forests, it was stated: “further substitution is unlikely because the limit of private wood supply has been reached.” In the UNE region, PNF was estimated in November 2000 to have recently increased to around 50% of total sawlog production.

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15 EPA NSW (1997) *New South Wales State of the Environment Report 1997* (Chatswood, NSW, p.196). Table 2.28. ‘Privately owned’ does not include “Other Crown Timber Lands” some of which may be held leasehold.


17 Centre for Agricultural and Regional Economics Pty Ltd (*CARE*), Gillespie Economics, Environment and Behaviour Consultants (1999b) *Regional Impact Assessment for the Lower North East CRA Region: A Project undertaken as part of the NSW Comprehensive Regional Assessments*, Project numbers NL 08/ES & NA39/ES, Published by Resource and Conservation Division of Department of Urban Affairs and Planning and Forests Taskforce of Department of Prime Minister and Cabinet, p.78. In the UNE, the production of timber from private native forests was estimated to have been at 200,000m³/pa in 1997/98 which according to CARE and “industry analysts”, “would be close to the sustainable yield of private sector forests”.

18 Interview, Mr B. Attwood, Vegetation Resource Manager, Northern Region, DLWC, in person, Grafton Office, 23.11.00. Notes on file; Centre for Agricultural and Regional Economics Pty Ltd (*CARE*), Gillespie Economics, Environment and Behaviour Consultants (1999a) *Regional Impact Assessment for the Upper North East CRA Region: A Project undertaken as part of the NSW Comprehensive Regional Assessments*, Project numbers NU 12/ES & NA39/ES, Published by Resource and Conservation Division of Department of Urban Affairs and Planning and Forests Taskforce of Department of Prime Minister and Cabinet, p.70; Department of Agriculture, Fisheries and Forestry
In the Lower NE region, more than half the mills (78 of 146) processed nothing but private timber, according to a 1998 survey.\textsuperscript{19} Collectively this data suggests that PNF is of considerable commercial significance.\textsuperscript{20} It also raises questions about the sustainability of PNF activity in NSW during the study period. (Such questions are considered in greater depth at p.32 in this Chapter.)

The importance of PNF has increased for several reasons. The primary reason why private forests have become more important is because large areas of State forests and other Crown land were added to the nature reserve system during the RFA process. A substantial report by economic consultants to the Forestry Commission in 1995 predicted that, with further restrictions, sawmillers will “turn to the private property resource for an increasing proportion of their supplies.”\textsuperscript{21} This is borne out by empirical research showing that when access to public forests was restricted in 1995-6, sawmills in NE augmented their wood supply with timber from private land.\textsuperscript{22} The secondary reason relates to increased awareness of the ecological importance of some private forests, awareness which has increased as a result of studies performed during the RFA process (see below, p. 19).

\textit{PNF industry structure}

There are two distinct types of private native forestry in NSW: small-scale, low-capital forestry by individuals, families and small companies, and the less-common large-scale and capital-intensive forestry ventures.\textsuperscript{23} However there is no available data on the proportion of the PNF industry that each category represents.\textsuperscript{24}
The available evidence suggests that the PNF industry is dominated by small-to-medium-sized enterprises, by individuals, family farms and small companies. There are three categories of participants in the PNF industry: landowners, forestry contractors, and timber processors (primarily sawmillers). Anecdotal evidence collected from interviews during the research process suggested that there is a low level of corporate ownership of private native forests in NSW (less than is the case in Tasmania). There appears to be a much higher level of large-company involvement in the plantations sector. In general terms, the majority of NSW farms are family-owned rather than run by larger corporate concerns (with the latter type occurring mainly in the intensive animal production sector).

There is evidence that the majority of PNF activity involves supplying the smaller-to-medium sawmills, in turn meaning that the processing sector of the PNF industry is dominated by small-to-medium-sized enterprises. The larger sawmills obtain the majority of their supply from public forests, often under long-term wood-supply agreements with the NSW government, but supplement these supplies with timber from private forests when necessary.

It appears to be the smaller mills that are more reliant upon the private property resource, with a significant proportion obtaining their supply exclusively from private forestry. In documents produced for the Lower North-East region RFA, economic consultants stated that:

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25 In Tasmania, the Forest Practices Board’s Annual Reports make a specific distinction between the “independent” private property sector and the company or corporate private property sector of the forestry industry. (See: Chapter Eleven).

26 A NSW Farmers Association statement reads: “We represent over 15 000 farming enterprises, the majority of which are family farms.” NSW Farmers Mission Statement for Community Solutions to Salinity Summit, organised by Nature Conservation Council of NSW, see: <http://www.nccnsw.org.au/veg/context/essmission.html>

27 Although no firm evidence exists on the question, it is most probably the case that these small mills are supplied by small family run companies and logging contractors rather than by large vertically integrated publicly listed industrial forestry companies such as Boral and North.

28 A survey conducted for ABARE in 1999 found that small and medium sized sawmills in the Southern RFA region purchased most of their hardwood logs from private land forest operations (60% of the intake in medium sized mills. ABARE (1999) Sawmill Survey: Southern Region, A project undertaken for the Joint Commonwealth NSW Regional Forest Agreement Steering Committee as part of the NSW Comprehensive Regional Assessments, project number NS 21/ES, RACAC (NSW) and PM&C (Commonwealth), at p.8.

29 Northern NSW Forestry Services (2000) Identifying the Available Forest Resource in Northern New South Wales and the Potential Investment Opportunities over the Next 5 Years, A project undertaken for the Northern Rivers Regional Development Board Inc. & the New England - North West Regional Development Board Inc., May 2000, Northern NSW Forestry Services, Casino, NSW. This pattern that can be traced as far back as wood-allocation practices in the post-war period because of industry rationalisation and changes to the allocation of timber rights in State Forests, many of the smaller sawmillers were forced to obtain the majority of their log supplies from private property, in order to survive at the margins of the industry. Watson argues that the smaller, family operated bush sawmills cutting timber from private forests were more economically marginal and many were edged out of business for various reasons including difficulties in obtaining credit and difficulties in securing wood supply. Small bush
Prior to the IAP, there were many mills, mostly small, who [sic] operated entirely by using wood from private property. Many of the larger mills accessed some of their supply from private property or had the potential to access wood from that source. In the two years following the IAP some of the log shortfall was replaced with timber from private property. This was a logical response to a reduction in supply from State Forests. [emphasis added]  

Similarly, another study, specifically of the timber industry in the Northern Tablelands of NSW stated that whilst the largest mill in the region processed timber mainly derived from State forests, “[t]he…smaller mills in the region source timber almost exclusively from private property.”  

Given that there is a multitude of private-forest owners with a diversity of motivations, objectives and resources, there is inevitably some difficulty in generalising about them. Further, there are inherent logistical and communication difficulties in regulating private forest owners, by comparison with the task of regulation of a single entity, State forests. 

An idea of the scale of this issue is evident from the fact that there are around 122,000 landholders with holdings over 10 hectares in New South Wales, although only some are forest owners. 

This information about the structure of the industry has important implications for questions of the choice of regulatory method. Some policy literature suggests that the nature of the regulatory target should guide the choice of policy intervention. 

Sociologically, both the smaller contractors and landholders could be typified as having
lesser capacity to effectively interact with a government regulatory bureaucracy because they operate on a small scale or, in the case of landholders, because they are not ‘repeat players’ in the forestry game. This issue is further explored in the following chapter. One source suggested that as the extent of government regulation of private forestry increases, this will tend to favour the domination of this industry sector by larger corporate forestry interests such as Boral, with a greater capacity to understand, and comply with, complex regulatory requirements. Later chapters consider in more detail the implications for regulatory policy of differences in the capacity to comply of small, medium and large enterprises.

**Conservation value**

In 1992, the *National Forest Policy Statement* (NFPS) advanced a solid rationale for private forest conservation:

As well as containing significant timber resources, native forests on private lands contain some ecosystems and species that are not well represented in nature conservation reserves. They also help to maintain environmental and aesthetic values and basic ecological processes, and under conditions of climate change they may provide refuges or corridors for the movement of native species.

Yet there is a body of opinion, particularly within the timber industry, that most private native forests in NSW are degraded regrowth and thus of minimal conservation value. Whilst such arguments may be valid in some areas they ignore the impact on other forest areas of conservation significance. A forestry consultant, O’Neill, states that a substantial area of old growth forest (OGF) exists on steep or remote sites on private land in Northern NSW.

There are significant areas of OGF and high conservation value (HCV) forests on private land according to the NSW State of the Environment Report. A more detailed study undertaken by Environment Australia (1999) found that 21% of total OGF in the UNE

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36 Interview, Mr. Cameron Slatyer, ex-SF NSW Forester (Buladelah), Forests Task Force, Environment Australia, 10.3.99, Canberra.
39 Old-growth forest can be defined in several ways. The NFPS defined old-growth forest as ‘forest that is ecologically mature and has been subjected to negligible unnatural disturbance such as logging, road building and clearing’. JANIS (1996) stated, ‘old-growth forest is ecologically mature forest where the effects of disturbances are now negligible’.
41 EPA NSW (1997) above n 4 at 197.
region was on private land. This report showed that a significant area of private forest was of environmental significance in several other respects.

Some private forests have considerable importance for conservation - particularly in Northern NSW. A sizeable number of forest ecosystem types exist on private land that are not adequately represented within the nature reserve system on public lands (56 forest types in the Upper N-E, 85 in the Lower N-E and 30 in the Southern Region). The conservation significance of private forests is further explored in Appendix 5.1.

PRIVATE FORESTS AND THE LAW

We have seen that in NSW there is a substantial area of privately-held forests, and that some of these forests have considerable conservation significance. Yet the volume of timber cut from them has tended to increase in recent years, whilst preliminary evidence - discussed further below in this Chapter at p. 31 - suggests that standards of environmental management in the PNF industry are often relatively unsophisticated. How effective was the response of the law to such a situation during the study period?

This section discusses the various factors and forces that have shaped, and are shaping the law applying to PNF in NSW. In order to properly answer questions regarding the effectiveness of the present law, it is useful to step back to briefly survey the broader

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42 Note that the Australian Heritage Commission Act 1975 was repealed in 2003 by the Australian Heritage Council Act 2003 (Cth) which inserted new Commonwealth heritage provisions into the Environment Protection and Biodiversity Conservation Act 1999 (Cth). Data from: Environment Australia (1999) Identification, Assessment and Protection of National Estate - Part A Natural Values: Upper North Eastern NSW CRA Region, a Project Undertaken for the Joint Commonwealth NSW Regional Forest Agreements Steering Committee As Part of the NSW Comprehensive Regional Assessments, project numbers NA 59/EH, NA 65/EH, February, joint publication of RACAC & Forests Task Force, Department of Prime Minister and Cabinet, Sydney and Canberra.


44 Research conducted by Environment Australia in 1999 into the natural National Estate values in the forests of the Upper North-East showed that on a number of indicators, private land was important for nature conservation. Of the total areas identified as having indicative national estate significance for vegetation community richness, 52.7% was on private land. Of those areas identified as above threshold for rare fauna, 23% was on private land. Of areas identified as above threshold for rare flora, 26% was on private property. Private land was also important for centres of species endemism (41.2% of total area), areas important for species of fauna with disjunct populations (36% of total area), environments important for refugia for the conservation of environmentally sensitive species (38.5% of total area). Private land provided the majority of area identified as having national estate significance on the basis of habitat richness (38.8% of total area); see Environment Australia (1999) above n 42.

45 Commonwealth of Australia and State of NSW, Regional Forest Agreement for North East NSW (Upper NE and Lower NE) (the Commonwealth, Canberra, (2000)(hereafter ‘NE RFA’), Table 1 “Percentage Reservation Status of Forest and Non-Forest Ecosystems in the Upper NE Region based on Vegetation Modelling to Establish the pre-1750 extent of Forest Ecosystems in the Region”, contained in Attachment 1(a): Comprehensive, Adequate and Representative Reserve System for Upper NE Region, pp.41-63.
picture of the development of forestry law in Australia in general terms, across all land tenures.

**Factors shaping forestry law in NSW**

Scholars of law and policy have long recognised that the law is the outcome of the interplay of economic, social and political interests. Dargavel has observed that forestry laws are the outcome of interactions between government, industry and the public, and that “these relationships – expressed in a mass of licences, leases, and regulations and administrative customs – do not arise in a political vacuum; rather they are the consequence of contests between various users and interests.” In a reflection of this fact, the content of the law has featured as a core aspect of recent disputes over the management of Australia’s native forests, particularly in NSW and Western Australia.

Such insights suggest that it is useful to briefly examine the various phases of social and political attitudes towards forest use and conservation which have shaped the law during several historical periods in Australia. Four distinct phases of forest management in Australia have been identified by forest historians. Each of these four phases has shaped the law relating to forestry and forests. Following Aboriginal custodianship and management of forests came a phase of colonial and pioneer use/exploitation of forests. The common law occupied much of the original picture, with statutes controlling forestry only introduced at a later date. The common law was directed overwhelmingly at protecting rights of land owners, and clarifying the rights of licensees, lessees and those holding profits à prendre to harvest timber. To the extent that it restricted tree-felling, the common law was concerned with protecting other private property owners’ interests

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50 *McCauley v Commissioner of Taxation (Cth)* (1944) 69 CLR 235; *Australian Softwood Forests Pty Ltd v Attorney-General (NSW) (Ex rel Corporate Affairs Commission)* (1981) 148 CLR 121. See also Manwood, J. (1598) *A treatise and discourse of the lawes of the forrest: wherin is decl ared not onely those lawes, as they are now in force, but also the originall and beginning of forrestes: and what a forrest is in his owne proper nature, and wherein the same doth differ from a chase, a park, or a warr en, ... Also a treatise of the purallee, decl aring what purallee is, how the same first began, what a purallee man may doe, how he may hunt and vse his owne purallee, ... / Collected and gathered together, aswell out of the common lawes and statutes of this land, as also out of sundry learned anciennt authors, and out of the assisses and iters of Pickering and Lancaster, Thomas Wight and Bonham Norton, London. (Held at the Bodleian Library, Oxford).
rather than with protecting the environment.\textsuperscript{51} The rapacious destruction of forests during this period,\textsuperscript{52} and a growing awareness of the value of native forests led to a phase of ‘wise use’ and ‘national development’ of forests which began around the 1860s. Concern about the rate of permanent clearing of forests had become strong by the mid-nineteenth century.\textsuperscript{53} State forests were established in Victoria in the mid 1860s\textsuperscript{54} and NSW in 1871\textsuperscript{55} in order to limit the deleterious impacts of uncontrolled timber-gathering as well as forest-clearing for agriculture on both Crown and private lands.\textsuperscript{56} The emphasis of the law during this period (1860-1970) was on ensuring ongoing production of timber (i.e. regulation of yields), and on preventing the permanent conversion of forest to agriculture. Other laws were aimed either at promoting industry development or allocating public forest resources to private corporations - such as the Tasmanian Concession Acts.\textsuperscript{57}

In the late 1960s, a modern phase commenced in which environmentalist ideals of forest and ecosystem conservation increasingly influenced policy and law.\textsuperscript{58} A key theme of this phase was conflict between those placing priority on timber production objectives and those emphasising environmental conservation.

Private forestry was largely forgotten in NSW in the course of epic struggles during the 1980s and 1990s over the future of publicly-owned forests (‘State forests’).\textsuperscript{59} Those

\textsuperscript{51} For example, the law of private nuisance, and the law regarding the “natural rights” of property owners - in the law of support of land and the law of water rights.


\textsuperscript{53} There has been commercial-scale logging in Glen Innes & Tenterfield since the 1860s, Coffs Harbour and Urunga since the 1890s, Batemans Bay since the 1870s, logging of coastal lowland spotted gum and blackbutt forests around Nowra since the 1820s, and forestry around Moss Vale and Tumut since the “early 1800s” : State Forests of NSW (1999) Mapping of Forest Management History Report: UNE, LNE and Southern Regions, Report No.52, at 109-110. This action led to the establishment of State forests) (i.e. dedicated public timber production reserves i.e., in order to ensure a permanent forest estate. Dargavel (1995) above n 47 at 66. The management of state forests was formalised with the passage of the Forestry Act 1916 which established the NSW Forestry Commission.


\textsuperscript{55} According to SFNSW (1994) Proposed Forestry Operations, Eden Management Area, Environmental Impact Statement, pit saws operated in the Eden area by the mid-1800s; sawmills operated in the south-east from 1869. Ten sawmills were operating by 1900, with most timber coming from freehold land. Sleeper cutting employed hundreds of cutters at its peak, the main species targeted being E. longifolia (woollybutt), E. bosistoana (coast grey box) and later, E. sieberi (silver top ash). By about 1960, the industry was in decline.


\textsuperscript{57} Dargavel, J. (1995) above n 47 at 12.

confrontations involved forest blockades, public inquiries, as well as litigation, and numerous contentious changes to legislation.\textsuperscript{60} In Tasmania, conflict has also been a constant feature of debates over the law applying to forestry, although the political might of the timber industry has shaped most of the dominant characteristics of this law.\textsuperscript{61} The heat of the social and political contest over forest management has been so intense that it has shaped and forged the development of many aspects of Australian environmental law beyond forestry, particularly environmental impact assessment law and threatened species law.\textsuperscript{62}

In NSW, with private forestry less in the spotlight, the development of the law applying to private forests has been characterised by political and policy inertia. When not forgotten, the private forests have typically been placed in the ‘too hard’ basket by policy makers, legislators, conservationists and foresters.

There are several explanations - apart from what a sheer lack of information about what is going on in private forests. The primary factor is a traditional political reluctance to interfere with what are seen as the rights of private rural landholders to deal with their land as they wish. Secondly, due to its very location, PNF is not highly visible and thus is not readily scrutinised.\textsuperscript{63} Thirdly, as the actors and participants in PNF are numerous and dispersed, they are not ready targets for lobbying and protest, unlike the large forestry


\textsuperscript{63} On the other hand, activities within public forests may not be entirely transparent for reasons such as forest closures on the grounds of ‘public safety’, claims of commercial confidentiality, and in Tasmania, exemptions from FOI legislation.
companies and government agencies operating on public land. Fourthly, private forests have been seen in the past as less significant in both conservation and economic terms.

Nevertheless the law applying to private forests has been gradually influenced since the mid 1990s by broader social concerns over environmental protection already so evident in amendments to the law applying to public forests. In NSW, statutes applicable in a broader context in response to concerns about vegetation clearing, threatened species decline, and pollution have been variously enacted, and some of these apply to a range of land-use activities on private land, including PNF. Thus there has not been so much a considered strategy to holistically regulate PNF, but rather a gradual encroachment by broader tides of legislative enactment.

The struggle over public forests in NSW has nevertheless had some unexpected spill-over effects into the private land context. For a long time many private forest owners in NSW operated under a working assumption that they were not subject to external regulation and environmental controls apart from protected land controls that have applied to steep slope and selected riparian logging since 1972. However in September 1991 the law applying to forestry on private land attained greater importance overnight with the decision of the NSW Land and Environment Court concerning logging of the Chaelundi State Forest near Dorrigo (Corkill v Forestry Commission). In a judgement later upheld by the NSW Court of Appeal, Stein J decided that the incidental taking or killing of endangered fauna by habitat modification and destruction, whether on public or private land, was unlawful without a licence granted under the National Parks and Wildlife Act 1974. Although that decision was temporarily overridden by the making of a regulation, it was effectively reinstated by the passage of a private member’s bill, the Endangered

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67 The Greiner Cabinet discussed an immediate response to the judgement in the form of a regulation under the NPWA. On 2 October, an extraordinary edition of the Gazette was rushed through the government printers - containing the ‘Chaelundi regulation’. Gazette, No.138 of 2.10.91, at pp.8499-8501. This was created under National Parks and Wildlife Act 1974 (NSW) s.100(2). So effective was this haste that it defeated an attempt by Mr Corkill to injunction the regulation’s gazettal. (Hansard, 12.12.91, p.6628. Hansard, 5.12.91, p.5748; 12.12.91, p.6602). On the same day, the Liberal Minister for Education, Dr Metherell resigned from the Government citing amongst his reasons the attitude of the Government towards environmental laws, including their decision to create the ‘Chaelundi regulation’. Robertson, T., Anderson, M., (1992) The Chaelundi Aftermath: Regulation of Forestry Activities and the Endangered Fauna (Interim Protection) Act 1991 (NSW), paper presented to 11th NELA Conference, Perth, September 1992, p.54; Woolf, “Editorial : Corkill v. Forestry Commission of NSW” , (1992) 9 Environmental and Planning Law Journal 1 at 3. By exempting all public authorities and persons from the endangered and protected fauna provisions of the NPW Act, the regulation effectively overturned the decision of Stein J.
Fauna (Interim Protection) Act 1991.\(^\text{68}\) That Act confirmed the requirement to obtain licences to take or kill endangered fauna\(^\text{69}\) if undertaking habitat-damaging activities on public or private land.\(^\text{70}\) Upon the expiry of this legislation, regulation of habitat modification on private land was continued by the Threatened Species Conservation Act 1995, an act that remains in force on private land today.

**Difficulties in regulating PNF**

With the expansion of environmental laws applying to private land, regulatory agencies are coming to realise that there are particular difficulties inevitably involved in this context. Not least are the issues that arise from applying environmental laws in a domain where they previously did not apply, or at least were perceived not to apply. Problems in regulating activities on private property arise from the fact it has been perceived as a closed domain. This introduces certain difficulties, albeit not insurmountable, of access and monitoring for regulators.\(^\text{71}\)

Another impediment to applying forestry laws on private land arises from the traditional cultural resistance of much of the rural community to external regulation. In Australia there is a collective social ambivalence regarding the application of environmental laws in the rural context, particularly on freehold land. There are inevitably difficulties for agencies in applying environmental statutes that impose new obligations overnight on rural landholders.\(^\text{72}\)

Historical sources suggest that previous governments have from time to time sought to rise above a laissez-faire attitude to PNF, attempting to regulate it. However, they have usually had mixed success. Two episodes in particular serve to illustrate this point.


\(^{69}\) Note that ‘endangered fauna’ was the umbrella or generic term under the former EFIP Act, divided into two categories – ‘threatened’ and ‘vulnerable’, whereas under the TSC Act, the generic term became ‘threatened’, divided into two categories ‘endangered’ and ‘vulnerable’.


\(^{71}\) Virtually all such legislation provides at least rudimentary powers of entry and inspection for the staff of regulatory agencies. Native Vegetation Conservation Act 1997 (NSW) s.61(1); Nature Conservation Act 1992 (Qld), s.145; Development Act 1993 (SA) s.19(1)(a); Environment Protection Act 1993 (SA) s.87(1)(a).

In the early years of the colony in NSW, according to one account, there was no restraint on logging private land - although on Crown lands early Governors issued edicts requiring licences to fell timber.\textsuperscript{73} Bonyhady recounts that in 1803, Lieutenant Philip King made an attempt to control tree felling on private land. He recounts:

King recognised...that clearing of river banks by landholders on the Hawkesbury River had increased the damage caused by floods. As a result, he prohibited the clearing of cedars on private land abutting the river, and ‘earnestly recommended’ that occupiers of this land replant these trees.\textsuperscript{74}

A key aspect is Bonyhady’s observation that concern for private property rights kept the lieutenant from requiring the replanting of trees that had been felled.

A second episode from NSW history, albeit from a much later period, serves to illustrate difficulties in regulating private native forestry. In 1992, an effort was made by the Legislative Council to introduce a framework for the environmental assessment of PNF during the passage of the \textit{Timber Industry (Interim Protection) Act}. That Act suspended the environmental assessment provisions of the \textit{EP&A Act} in relation to public forests.\textsuperscript{75} Opposition amendments inserted a framework for regulating private forestry, activated upon the making of a regulation. This included a requirement that a regulation could not be made unless the Minister certified that “proposed logging operations are to be conducted in a manner which mitigates their environmental impacts to the greatest practicable extent.”\textsuperscript{76} However, no regulation was ever made prior to the Act’s expiry in December 1998. This was likely due to the political sensitivity of raising the question of the adequacy of environmental standards in PNF. Robertson and Anderson speculated that this regime was never activated “probably because of the serious environmental problems which this additional albeit weak system of environmental accountability [would have] disclosed.”\textsuperscript{77}

Set against difficulties in regulating forestry on private land are contemporary concerns to ensure that forestry meets environmental protection objectives. There are three particular

\textsuperscript{73} Parliament of New South Wales (1990) Public Accounts Committee of the Forty-Ninth Parliament: Report on the Forestry Commission, Report No.52, at p.5. On the other hand, it was common for leases of Crown land to specify that a certain number of trees were to be ringbarked annually by the lessee.

\textsuperscript{74} Bonyhady, (2000) above n 54 at 10; cites Historical Records of Australia, series 1, Vol 5, pp.67-68.

\textsuperscript{75} Robertson, T., Anderson, M., (1992) above n 67 ; Bonyhady (1993) above n 60.

\textsuperscript{76} \textit{Timber Industry (Interim Protection) Act 1992}, s.12(3)(c). On the other hand, another section, inserted by the government stated that where a regulation was made, the effect would be to suspend the operation of the environmental assessment provisions of Part 5, \textit{EP&A}, and the provisions of the \textit{Endangered Fauna (Interim Protection) Act 1991}, see \textit{TIIP Act}, s.12(4).

\textsuperscript{77} Robertson, T. and Anderson, M. (1992) above n 67 at 60.
factors which emphasise the need to ensure that State laws for PNF are adequate. These factors are discussed in turn below. They are (a) the withdrawal of the Commonwealth from regulation of PNF; (b) the policy stance of Regional Forest Agreements in NSW to avoid placing restrictions on timber cutting on private lands and to apply only voluntary measures for conservation; and (c) government commitments to ecologically sustainable forest management.

**Commonwealth regulation of PNF**

Until the late 1990s, the Commonwealth played a significant part in the regulation of forestry, including PNF. The export of woodchips from private land was subject to Commonwealth environmental regulation, such as when the export control licence regime triggered legislation including the *Endangered Species Protection Act 1992* (Cth), and the *Australian Heritage Commission Act 1975* (Cth). By this means, environmental protection conditions were attached to woodchip export licences applying to PNF.

The Commonwealth’s regulation of forestry has long been a site of struggle over the overall direction of forest policy in Australia. Federal controls over forestry were introduced, frequently challenged in the courts and slowly consolidated in a gradual process between the mid-1970s to the mid-1990s. Disputes over logging in Tasmania and in North Queensland led to litigation which clarified the constitutional authority of the Commonwealth to legislate to intervene (eg. through World Heritage nominations, the application of export controls, and the establishment of inquiries) to protect forests in spite of State legislation that allowed logging of sensitive forests.

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78 Broadly, the *Endangered Species Protection Act 1992* (Cth) in Part 6, Division 4 and s.78 required that threatened species be taken into account in the taking of Commonwealth actions and the making of Commonwealth decisions. The Act applied to both Commonwealth land and, in certain circumstances, to activities on non-Commonwealth land (i.e. on private land). The main vehicle for this application was the *EPIP Act*. This is because the *ESP Act* was linked to the operation of the *EPIP Act*: (s.5A EPIP). Any action which could threaten with extinction or significantly impede the recovery of a listed species or community was considered to be a matter of environmental significance in terms of the *EPIP Act* and therefore may have required environmental assessment under that legislation.

79 Woodchip Export Monitoring Unit (1997) *IFEAU Annual Report 1996*, Department of Primary Industry and Energy, Canberra. For example, in 1996, conditions required parties to “ensure that operations...did not threaten with extinction, or significantly impede the recovery of threatened species or ecological communities.” The export conditions in turn affected the detail of harvesting prescriptions applied under state environmental laws - at p.36.

80 Whether these controls were particularly effective is another question which this thesis does not set out to answer.

81 Other disputes such as the South East Forests clarified the scope of Commonwealth legislation such as s.30 of the *Heritage Commission Act 1975*: *ACF v Minister for Resources* (1989) 76 LGRA 200 discussed in Bonyhady (1993) above n 60 at 92.
The Regional Forest Agreements process

The Regional Forest Agreements (RFA) process and changes to forestry legislation that have been associated with it, are part of the essential background context to recent law and policy making for PNF in NSW and Tasmania.

The notion, and later the reality, of Regional Forest Agreements has been at the centre of official forest policy since 1992. At that time it was agreed by the Commonwealth and States that the most appropriate means for implementation and achievement of the goals of the NFPS was through a series of Regional Forest Agreements. These agreements between the Commonwealth and States provided for common principles of forest management, specifying the means by which the aims of the NFPS were to be met. Australia was divided into twelve RFA regions. Tasmania is covered by a single RFA, which was concluded in November 1997, whilst NSW is covered by four RFA regions for which agreements have all have been made.

A tangible but always unstated objective of the RFA process was to reduce the role of the Commonwealth in forest management, thereby removing it from the political complications of ongoing conflict over forestry. The NFPS of 1992 marked the commencement of a process of diminishing the Commonwealth’s place in forestry regulation. The RFA process embodied that policy position of devolution of power to the States. Associated legislation was then altered to reflect that approach.

In the RFAs, the parties agreed that the Commonwealth would defer to state regimes for the management of public forests, and that it would withdraw itself from regulation of forestry. In particular, the Commonwealth asserted that it could rely upon accredited State legislative regimes for EIA and threatened species consideration for the purposes of the Inter-governmental Agreement on the Environment (IGAE) was the first endorsement of this practice, via Commonwealth accreditation of State environmental impact assessment regimes. IGAE, clause 1.5, 2.5.1.1; Schedule 2, Items 6,8; Schedule 3, Item 1,4,5. See also Fowler, R. (1994) “New National Directions in Environmental Protection and Conservation”, in Boer, Fowler, and Gunningham (eds.) Environmental Outlook: Law and Policy, Federation Press, Sydney, pp. 113-148.

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84 The NSW RFA regions are Upper North East, Lower North East, Southern NSW, and Eden.
85 At November 2000, the Southern RFA had not yet been concluded due to disagreements between the Commonwealth and the States, however it was signed in April 2001.
86 The Inter-governmental Agreement on the Environment (IGAE) was the first endorsement of this practice, via Commonwealth accreditation of State environmental impact assessment regimes. IGAE, clause 1.5, 2.5.1.1; Schedule 2, Items 6,8; Schedule 3, Item 1,4,5. See also Fowler, R. (1994) “New National Directions in Environmental Protection and Conservation”, in Boer, Fowler, and Gunningham (eds.) Environmental Outlook: Law and Policy, Federation Press, Sydney, pp. 113-148.
of implementing its own environmental legislative obligations. In parallel, the strictness of the woodchip export control licence regime was gradually relaxed (and then later totally removed). For example, a category of “degraded forest licence” was created in 1996 to enable the export of additional woodchips from private lands above normal quota levels.\(^87\)

The Commonwealth took the next step of withdrawing itself from the regulation of forestry during the course of a major revision of Commonwealth environmental law involved with the enactment of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). With that Act, the Commonwealth wrote itself out of obligations to impose environmental impact assessment upon forestry within RFA regions, by means of a broad-brush exemption clause.\(^88\)

The text of the RFAs prior to the passage of the *EPBC Act* reflected the stance of Commonwealth non-intervention with explicit policy commitments not to apply Commonwealth environmental laws to restrict logging.\(^89\) These commitments were backed up by promises in the RFAs to pay compensation in the event of ‘intervention’. Those promises became legally binding upon enactment of compensation provisions within the *Regional Forests Agreements Act 2002* (Cth).\(^90\)

Thus at the conclusion of the RFA process, and with the passage of the *EPBC* and *RFA Acts* the Commonwealth had largely divested itself of forestry regulation, both public and private.\(^91\) At the time of writing, regulation of the environmental impacts of forestry (public and private) now falls almost exclusively to State and local governments. The key implication of this gradual reduction in the Commonwealth’s role is that questions of the effectiveness of State laws have renewed importance.

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\(^87\) Export Control (Hardwood Wood Chips) Regulation 1996 (Cth), r.13-19.

\(^88\) *EPBC Act 1999*, Part 4, Division 4, s.38, 40, exemptions which are qualified in relation to World Heritage listed forests in s.42.

\(^89\) The questionable legality of such attempts to not apply existing legislation and further, to bind future parliaments were amongst the legal issues considered by the Senate Rural and Regional Affairs and Transport Committee (1999) *Report on Provisions of the Regional Forest Agreements Bill 1998*, 25 February 1999, the Senate, Parliament House, Canberra.

\(^90\) *Regional Forests Agreements Act 2002* (Cth), s.8.

Environmental assessment in the RFA process

These aspects of the RFA process were counterbalanced by advances in knowledge yielded through a comprehensive series of studies of all aspects of forests and forestry in each of the RFA regions. The signing of each of the RFAs was preceded by a process of study and assessment of forest values, forest inventory and review of ecological sustainability of forest management.

This was the Comprehensive Regional Assessment (‘CRA’) Process which identified the area and extent of each forest ecosystem type (current and pre-1750). For each RFA, a wide range of research reports were commissioned addressing ecological matters such as documentation of forest growth stages using aerial photographic interpretation, as well as economic and social issues.

The CRA process adopted nationally agreed ‘JANIS’ criteria to identify areas of forest requiring protection. It was recognised that it is necessary to retain a percentage or minimum area (for smaller ecosystems) of each type of forest ecosystem, and for these to be protected in perpetuity. One of the JANIS criteria was to include 15% of the pre-1750 distribution of each forest ecosystem type within reserves. Additional criteria were set for the conservation of vulnerable, rare and endangered forest ecosystem types as well as areas of old-growth and wilderness forests.

The RFA process in each region led to the protection of some of the under-target forest ecosystems found in State Forests by protecting them from logging and placing them in National Parks or informal flora reserves. However, as other under-target forest ecosystems are largely found on private land, the public land reservation approach was not sufficient to protect them. Protecting under-target forest ecosystems on private land from damage was necessary if NSW and Tasmania in particular were to meet JANIS targets and to create a CAR reserve system.

Private forest conservation in the RFA process

As the RFA process applied to both private and public forests, the agreements reveal many aspects of the policy stance of governments towards PNF. The agreements, signed
by four of the five states with a significant native forest industry, set the context for future legislation and policy making with regard to private native forests over a 20 year period. While these political agreements are highly unlikely to be legally binding,\textsuperscript{92} diverging from their approach in the future will be politically difficult.

The RFAs dictate four main policy parameters for PNF management in NSW and Tasmania. These are set out here. Firstly, it was agreed that private native forests would only be included within the CAR reserve system after options for filling reservation targets from public forests had been exhausted. In 1992 in the NFPS, the States and the Commonwealth had agreed that:

“...the representative areas for [nature] reservation will, in the first instance, be drawn from Crown lands. Purchase of private land for reservation purposes is appropriate in cases where high conservation values are inadequately represented on Crown land and where complementary management practices on those private lands are unlikely to adequately protect those conservation values...”\textsuperscript{93}

The second feature of forest policy set out in the NSW RFAs is that the methods for private forest conservation listed are overwhelmingly non-regulatory.\textsuperscript{94} The NSW RFAs embodied this policy stance by containing an agreement that “All conservation mechanisms for the establishment of the Private Land component of the CAR Reserve System will be voluntary.” \textsuperscript{95} Whilst following the course set by the NFPS, the RFAs went a little further and played down the role of acquisition to a minimum. The NE NSW agreement stated “Provision is also made in the JANIS Reserve Criteria for inclusion of Private Land in the CAR Reserve System, with the agreement of landholders, where the Criteria cannot be met from Public Land.” [emphasis added]\textsuperscript{96} It may be difficult to achieve such objective, given that the author’s research revealed that during the study period the NPWS was applying a protocol of not approaching private landholders to purchase properties, but instead waiting for them to contact NPWS.\textsuperscript{97}

The main tool envisaged for the completion of the private land component of the CAR reserve system in the N-E RFA was to place it “under secure management arrangement

\textsuperscript{93} NFPS above n 37 at 9.
\textsuperscript{94} Ibid, Attachment 2, Clause 5, p.70.
\textsuperscript{96} Ibid, cl 2, Attachment 1(a), p. 41.
\textsuperscript{97} Interview, Paul Packard, Conservation Assessment and Data Unit, NPWS Southern Directorate, 23.01.01.
by agreement with private landholders”. Other mechanisms specified included - “Voluntary Conservation Agreements; landholder initiated agreements; non-contractual voluntary agreements; fee for service; voluntary acquisition; fixed term common law contract; in perpetuity common law contract; community grants; property management plans; voluntary land and water management plans.”

The third feature of the RFAs in NSW was a policy position of explicitly avoiding restrictions on timber cutting on private lands. In relation to production forests, it was agreed:

“New South Wales confirms that the CAR Reserve System has been established through this Agreement …and that conservation levels achieved in that reserve system will not subsequently be used as a basis for preventing timber harvesting being carried out on Private Lands...”

This amounts to a promise not to prevent timber harvesting in private native forests, on the basis of an assertion that the CAR reserve system had already been created – overlooking the reality that it was still in the process of being created.

**Government commitments to ESFM**

A fourth and in the light of the foregoing, perhaps contradictory feature of policies for PNF set out in the RFAs was the adoption of a goal of ESFM. ESFM can be defined as “managing forests so that they are sustained in perpetuity for the benefit of society by ensuring that the values of forests are not lost or degraded for current and future generations.” These sustainability goals were adopted first in the National Forest Policy Statement (1992) and later were reiterated in the RFAs in relation to public and private

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98 Ibid, clause 2, p.2.
99 Ibid, Attachment 2, clause 5 (pp.70-71).
101 NSW RFA documents discussing ESFM set out a goal to “maintain or increase the full suite of values (biodiversity, forest ecosystem health, soil and water, heritage, carbon cycles, social and economic benefits) across the NSW native forest estate for present and future generations.” Independent Expert Working Group (1998) Assessment of Management Systems and Processes for Achieving Ecologically Sustainable Forest Management in NSW, A report undertaken for the NSW CRA/RFA Steering Committee, Project No. NA 18/ESFM, Resource and Conservation Division, Department of Urban Affairs and Planning (NSW) and Forests Taskforce, Department of Prime Minister and Cabinet (Cth), RACAC, Sydney at 20-21.
The goal was adopted in response to ongoing scientific concerns and public disputation over the ecological impacts of public forest management.\(^{104}\)

In addition to commitments to ESFM, there are national policy commitments to biodiversity protection which specifically call for biodiversity conservation within the commercial forestry context.\(^{105}\) The NSW Biodiversity Strategy recommended “ensuring that legislation, policies, institutional frameworks, codes, standards and procedures related to forest management require and provide incentives for ESFM.”\(^{106}\)

Part of the sustainability agenda of the RFAs involved the creation of a CAR reserve system. For forests designated by the RFAs to be production areas, the RFAs set an objective of ESFM (ecologically sustainable forest management). The North East RFA, concluded in March 2000 helps explain the constraints upon policy making for PNF presented by the RFAs. The “basis of [that] agreement” was expressed to include “promoting the conservation and management of the private forest estate.”\(^{107}\) In the North East RFA, the NSW government made a commitment to achieving ESFM on private native forest land. It was agreed that:

> “New South Wales confirms its commitment to the achievement of ESFM on Public and Private Land consistent with the principles of Ecologically Sustainable Forest Management [at Attachment 14], and to the ongoing review and subsequent implementation of its legislation, policy, plans, Codes and Regional Prescriptions to ensure ESFM objectives can be achieved in a more efficient regulatory environment.”\(^{108}\)

The N-E agreement spoke in terms of encouraging private land holders to improve practices, rather than regulating to ensure this. It was agreed that “The Parties agree to encourage private forest owners to ensure that their management operations are consistent

\(^{103}\) North East NSW Regional Forest Agreement, cl. 46, p.17.

\(^{104}\) ESFM was first adopted as a goal by Australian governments in the NFPS, above n 37 at p.25. See also Commonwealth of Australia (1997) *First Approximation Report for the Montreal Process*, DPIE, Canberra. See further Australian reports to United Nations Commission on Sustainable Development’s *Intergovernmental Forum and Panel on Forests* (IPF). Demands for ESFM have also been made by forest ecologists, conservationists and NGOs: Norton, T.W.; Kirkpatrick, J.B. (1995) “Sustainable Forestry – the Urgency to Make the Myth a Reality”, in Bradstock et.al. (eds.) *Conserving Biodiversity: Threats and Solutions*, Surrey Beatty & Sons Ltd, Sydney, at 240-248.


\(^{107}\) NE RFA, cl.7(d).

\(^{108}\) NE RFA, cl.46, p.17.
with ESFM practices.” {emphasis added}. In the Southern Forests RFA and Eden RFAs, a similar approach was taken to PNF.109

Although considerable work has been done to investigate the sustainability of public forestry. However there has been little investigation of the sustainability of PNF. In particular there has been absent any consideration of whether laws for PNF actually require ESFM. The only source to have done this for NSW were ESFM reports prepared for Regional Forest Agreements during 1998, after this study commenced.110

**Forest management – international treaties, conventions and policy initiatives**

In addition to commitments to ESFM at the domestic level, International agreements and strategy documents relating specifically to forests or applicable to forests are also generating a degree of policy momentum for the conservation of important forest habitats, and more sustainable management of forest resources.111 At present, there is no binding international instrument specifically related to conservation of temperate forests.112 Nevertheless, there are many international conventions of general application with a bearing on forest management. Eleven international environment protection treaties and agreements applicable to the question of forest management are listed by the *National State of the Forests Report* (1998), such as the *United Nations Framework Convention on Climate Change*.113 Other potentially relevant conventions include the UNESCO *World Heritage Convention*114, the *Ramsar Convention on Wetlands of International Importance*115, the CITES Convention116 and regional nature conservation conventions.117 Other

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109 Southern RFA, cl.53-58, p.18; Attachment 2, p.57-58; Eden RFA, cl.53-56, p.18, Attachment 12, p.74.
114 UN *Convention for the Protection of the World Cultural and Natural Heritage*, 23 November 1972, 11 ILM 1367 (Done at Paris, entered into force 17.12.75).
115 *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* (Ramsar Convention), 11 ILM 969 (1972) Done at Ramsar, Iran, 2.2.71, entered into force 21.12.75.
international agreements and statements such as the Rio Declaration and Agenda 21 are also of relevance to the broader context of forest management.\textsuperscript{118}

The importance of forests on all tenures has also increased in recent years because of recognition of their value as carbon sinks in the face of human induced climate change. The Kyoto Protocol to the United Nations Framework Convention on Climate Change in particular is a source of indirect pressure to conserve forests. This is because under the Protocol all forests are carbon sinks and changes in forest cover are now included in calculations of total national greenhouse gas emissions.\textsuperscript{119} Vegetation clearance is a source of greenhouse gas emissions, and over 17 per cent of Australia’s total emissions are considered to arise from land clearing and vegetation modification. At the Fourth Conference of the Parties, Australia negotiated special concessions in relation to the required extent of reduction in direct conventional carbon emissions, because promises to the international community to reduce broadacre vegetation clearance were accepted.\textsuperscript{120}

This has led to the creation of a market mechanism for ‘carbon trading’ by domestic and overseas jurisdictions enacting trading framework legislation. In 1998, NSW enacted the Carbon Rights Legislation Amendment Act 1998, providing an explicit framework for the recognition of carbon sequestration rights as a species of\textit{profits à prendre} created by the\textit{Conveyancing Act}.\textsuperscript{121} The Act thus makes a legal framework for the trading of carbon stored in trees and forests not confined to plantations. Specifically, it amends other legislation to enable generators and distributors of electricity and the Forestry Commission, as well as private individuals and corporations, to acquire and trade in such forestry carbon rights.\textsuperscript{122} These developments mean that regulation of forestry and

\begin{itemize}
\item \textsuperscript{119} Article 3(3) of the Protocol provides: “The net changes in greenhouse gas emissions by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation, and deforestation since 1990... shall be used to meet the commitments under this Article.”
\item \textsuperscript{120} Hamilton, C., Reynolds, A. (1998)\textit{Land Use Change in Australia and the Kyoto Protocol}, paper presented by the Australia Institute to the Fourth Conference of the Parties of the Framework Convention on Climate Change, Buenos Aires, 12th November 1998, Australia Institute, Canberra, 22pp.
\item \textsuperscript{121} The Act provides “carbon sequestration right, in relation to land, means a right conferred on a person by agreement or otherwise to the legal, commercial or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land after 1990” (s.87A\textit{Conveyancing Act 1919} as amended by the\textit{Carbon Rights Legislation Amendment Act 1998}.)
\end{itemize}
vegetation clearance on private land has assumed new importance in terms of compliance with international obligations.

An International law regime for forests? The Montreal Process

Apart from the indirect application of international agreements relating to other subject matters, considerable pressure is building, principally through the ‘Montreal process’, for the development of a specific-purpose international law regime governing the management of forests.\(^{123}\)

Australia is one of twelve countries, whom together represent 90 per cent of the world’s temperate and boreal forests, which, in 1994, signed a non-legally-binding agreement aimed at the development of criteria and indicators for the sustainable management of temperate and boreal forests.\(^{124}\) Australia recently submitted its First Approximation Report to the Process.\(^{125}\) This report suggests adequate Australian progress towards the targets set under the Montreal Process. It is, however, short on detail.

The Working Group of the Montreal Process first met in Montreal, Canada in September 1993, charged with developing ways to implement the Global Statement of Principles on Forest Conservation (signed the previous year at the United Nations Earth Summit at Rio de Janeiro, Brazil).\(^{126}\) While non-binding, the Statement represented a first step towards the creation of a binding instrument to address the global problems of deforestation. The Statement called upon States to preserve representative samples of forest types, but as is apparent from its preamble, maintained a non-binding stance, and an emphasis on sovereign rights of resource exploitation. The Principles encouraged States to direct conservation efforts as follows:

National policies and/or legislation aimed at management, conservation and sustainable development of forests should include the protection of ecologically viable representative or unique examples of forests, including primary/old growth forests,

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cultural, spiritual, historical, religious, and other unique and valued forests of national importance.127

In February 1995, the Working Group of the Montreal Process endorsed the Santiago Declaration, which presents seven criteria and sixty-seven indicators which can be used to arrive at a common understanding of the term “sustainable forest management”.128 The seventh criterion relates to the development of legislation and other institutional frameworks of each country that are necessary to achieve the form of sustainable management set out in the first six criteria.129 Criterion 7, ‘Legal, institutional and economic framework for forest conservation and sustainable management’, states that the indicators concern:

the extent to which the legal framework (laws, regulations, guidelines) supports the conservation and sustainable management of forests, including the extent to which it:

a) clarifies property rights…
b) provides for periodic forest-related planning, assessment and policy review…
c) provides opportunities for public participation in public policy and decision-making related to forests and public access to information;
d) encourages best-practice codes for forest management;
e) provides for the management of forests to conserve special environmental, cultural, social and or scientific values.

Further, indicator 7.2(e) is concerned with:

the extent to which the institutional framework supports the conservation and sustainable management of forests, including the capacity to …(e) enforce laws, regulations and guidelines.

Australia’s First Approximation Report merely provides a two-paragraph response to this last indicator, reporting somewhat blandly that enforcement officers and tribunals are used to enforce laws and guidelines. It admits, perhaps unsurprisingly, that “Compliance monitoring of … timber harvesting on private lands is less extensive than the level of monitoring of timber harvesting on public lands.”130

In addition to the Montreal process, parallel developments have been occurring through efforts to develop an international instrument specifically related to forest conservation. These efforts have been drawn out, and it may be several years before such an

127 Ibid, Article 8(f).
128 A criterion is defined as “A category of conditions or processes by which sustainable forest management may be assessed. A Criterion is characterised by a set of related indicators which are monitored periodically to assess change.” An indicator is defined as “A measure (measurement) of an aspect of the criterion. A quantitative or qualitative variable which can be measured or described and which, when observed periodically, demonstrates trends.” See Montreal Process home page at <http://www.mpci.org/criteria_e.html>.
130 Commonwealth of Australia (1997) above above n 104 at 103.
instrument is complete, if, indeed, it is ever complete.\textsuperscript{131} This process is being pursued via the United Nations Commission on Sustainable Development’s Intergovernmental Forum on Forests (IFF) which was preceded by the Intergovernmental Panel on Forests (IPF), established in April 1995\textsuperscript{132}. The process builds upon the 1992 Rio UNCED Statement of Forest Principles and upon the content of Chapter 11 of the UNCED Agenda 21 Program of Action\textsuperscript{133} for Sustainable Development.\textsuperscript{134}

A further source of ongoing international policy and ‘soft law’ development of the international soft law on forests has been pressure exerted by NGO groups for the development of a Forest Protocol to the Convention on Biological Diversity\textsuperscript{135} or the Climate Change Convention.\textsuperscript{136} Similar efforts are being pursued by NGOs to list certain species of timber such as certain mahogany species into Appendix II of the CITES Convention on Endangered Species of Wild Flora [and fauna].\textsuperscript{137} Such efforts to regulate the trade in forest products may, however, run foul of the World Trade Organisation’s rulings on Technical Barriers to Trade and its Code of Good Practice.\textsuperscript{138}

\textsuperscript{131} The doubts over the future prospects for such a binding statement on forests arise principally from intense friction between the main timber producing and exporting nations (such as Canada and Malaysia) and other States which are seeking to impose greater controls on the environmental consequences of timber production and the rate of tropical deforestation (such as European Community nations). The timber producing nations have adopted the objective of establishing a forests agreement separate to the biodiversity convention in order to avoid the restrictions that would flow from the alternative approach of a forests protocol to the CBD. A number of governments including Australia and the United States have argued against the adoption of a separate forests agreement. See: Gillespie, A., (1996) “The Malaysian Agenda and Influence on the International Tropical Deforestation Debate” 1(1) Asia Pacific Journal of Environmental Law 25 at 37.

\textsuperscript{132} Internet URL <www.un.org/esa/sustdev/forests.htm>.

\textsuperscript{133} UNCED: Rio Conference on Environment and Development (1992) 22 Environmental Policy and Law 204 at 208. [Agenda 21: “an agreed programme of work by the international community addressing major environment and development priorities for the initial period 1993-2000 and leading into the twenty first century”]

\textsuperscript{134} In the form of the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of All Types of Forests and reporting to the UN CSD (Commission on Sustainable Development). The Third Session of the Intergovernmental Forum on Forests was held in Geneva, on 3-14 May 1999.

\textsuperscript{135} At the expiry of the IPF, no conclusion was reached on a forest convention, but the IPF provided governments with a set of over 130 Proposals for Action on Forests. The Intergovernmental Forum on Forests (IFF) was established as a successor body, for two years. “The IFF; whose main mandate was to monitor and enhance the implementation of the PFAs, resulted in additional PFAs being developed and in the establishment of a new body called the United Nations Forum on Forests (UNFF) plus an enhanced interagency task force on forests called the Collaborative Partnership on Forests.” According to FERN, the Forests and the European Union Resource Network, at <www.fern.org>, accessed 10.8.03.


\textsuperscript{137} The Traffic Network - WWF and IUCN (1997) Recommendations on Proposals to Amend the CITES Appendices at the Tenth Meeting of the Conference of the Parties, Harare, Zimbabwe, June. at p.27-8; Pers. Comm., Mr Ian Fry, Greenpeace Australia, Canberra, 20.5.99.

The development of an international legal instrument regarding forests has many implications for domestic forests policy, particularly the question of the need for review of legislation at the provincial (i.e. state) level relating to forestry. Such a review would have the aim of achieving a certain amount of consistency in “philosophy and practice”, according to a recent review by Professor Boer. However it seems many NGOs are opposed to a specific forests convention on the basis that it may represent a ‘lowest common denominator’ solution, and one that by-passes existing, binding conventions such as the CBD.

Relevance of international instruments to domestic forest policy

Apart from being a general and indirect influence on domestic forest policy and biodiversity conservation policy development, these agreements may in certain specific circumstances generate obligations on domestic decision-makers and policy-makers. It is an accepted principle in Australian law that treaties are not directly or automatically incorporated into Australian domestic law merely by the action of ratification or accession to the treaty in question. That is, a doctrine of ‘automatic incorporation’ does not apply. Without Parliamentary approval in the form of domestic legislation, treaties, conventions and ‘soft’ international law cannot create legal rights or obligations in Australian domestic law. For example, unless the CBD has been implemented directly into domestic legislation, it is not immediately applicable in Australia. However, that treaty has been domestically implemented to a limited extent by the recent enactment of the Commonwealth EPBC Act and provisions of State legislation.


140 According to Boris Romaguera of the NGO Ambioterra, (2003) “The Third United Nations Forum On Forests As Seen By An Environmental NGO Representative On The Canadian Delegation” internet published at <http://www.centre.org/eng/caucus/forests/docs/3rd_un_forum_on_forests_nogo_perspective.pdf> : “Although many NGOs were in favour of a forest convention at the time of the Earth Summit, their position has changed. At the moment, most NGOs are no longer as enthusiastic about a forest convention as they believe that the present political atmosphere is not favourable to an environmentally-based convention. They fear that if a forest convention is to be agreed upon now, it would be done so at the lowest common denominator. Many believe that the forest convention would principally promote the financial and commercial interests of its proponents.”.

The above proposition is qualified by the long-accepted practice of Australian courts making reference to international treaties in order to interpret ambiguous statutes. Where there is ambiguity, the provision in question should be read in accordance with relevant international laws rather than in breach of them. This principle was applied in the Teoh, Leatch and Blue Sky decisions which each involved interpreting the implications of provisions of international agreements not formally incorporated into Australian domestic law by means of legislation.

*Australian forest policy responses to international developments*

The present context of international agreements and domestic government policy documents concerning sustainable forestry and biodiversity conservation is so comprehensive - and only likely to develop further - that their combined effect is to provide a strong mandate for effective regulatory oversight and guidance of PNF at both Commonwealth and State levels. Nevertheless, as we have seen above, Commonwealth legislation and policy has recently sought to reduce the Commonwealth’s role in forestry regulation. Such developments have increased the importance of State laws. Thus the effectiveness of State laws has become much more crucial. So, what is already known about the regulation of PNF in one particular state, NSW?

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142 Pearce and Geddes, (1996) *Statutory Interpretation in Australia*, Fourth edition, Butterworths, Sydney, at pp.45-47. The *Acts Interpretation Act 1901* (s.15AB(2)(d)) provides that in order to resolve a question of ambiguity surrounding a particular provision, reference can be made to “any treaty or other international agreement that is referred to in the Act”.

143 *Newcrest Mining v Commonwealth* (1997) 147 ALR 42 at 147-8 per Kirby J; *Kartinyeri v Commonwealth* (1998) 152 ALR 540- at 571 per Gummow and Hayne JJ; *Kruger v Commonwealth* (1997) 146 ALR 126 at 190 per Gaudron J). The reasoning is that Parliament would have intended to legislate in conformity with international law, rather than in conflict with it.


145 In *Teoh*, the High Court decided that when the Executive ratifies an international agreement, given no statutory or executive indications to the contrary, such action will generate a legitimate expectation that administrative decisions will be made in accordance with the provisions of that international agreement that Australia has ratified (even where no legislation has been enacted to incorporate those provisions into domestic law). Mason CJ and Deane J explained: “ratification of a convention is a positive statement by the Executive government of this country to the world and to the Australian people that the Executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers will act in conformity with the Convention.” Note that although the so-called ‘anti-Teoh’ bill, the Administrative Decisions (Effect of International Instruments) Bill 1997 was reintroduced to Parliament, it did not have bipartisan support, and was not enacted. If enacted it would have attempted to overturn the Teoh decision by providing along the lines that “the act of entering into a treaty does not give rise to legitimate expectations in administrative law which could form the basis for challenging an administrative decision made from the date of enactment onwards.” Cf. Commonwealth Parliamentary Library (1997) Bills Digest No.10 of 1997-8.
EXISTING LITERATURE ABOUT PNF REGULATION IN NSW

Questions of the effectiveness and adequacy of the law applying to PNF in NSW were difficult to answer at the commencement of this research project. The application of the law to PNF is one of the main data gaps within the literature on PNF in NSW. There are few published papers that focus on regulation of PNF in NSW.\(^{146}\) Virtually the only works that directly discuss this in any detail are Hannam (1994, 1995) and the NSW ESFM Working Group (1998).\(^{147}\) Dr. Ian Hannam of the Department of Land and Water Conservation\(^ {148}\) - the de facto ‘lead agency’ on PNF during the study period, reviewed the operation of the protected lands provisions of the *Soil Conservation Act 1938* which at the time regulated PNF logging on steep slopes and riparian zones and concluded that although those provisions were making a substantial contribution to environmental protection there was a need for a specific purpose *Private Forests Act*.\(^ {149}\) Later, in 1998, the Expert Working Group on ESFM in NSW examined PNF law and stated: “It would be a significant understatement to conclude that the law and policy relating to private forestry is complex, confused and inconsistent.”\(^ {150}\) It later concluded that “current processes for ensuring ecologically sustainable management of private forests are poorly developed.”\(^ {151}\)

Yet apart from these reviews which have focussed on the inadequacies of the regulatory framework itself, there is virtually no available data relating to the application of those environmental laws to PNF in practice. In particular, there was no readily available data confirming how many consents and licences were granted, and for what purposes, which would enable a picture to be developed of the ‘under-regulation’ or conversely, the ‘over-regulation’, of the industry. These data gaps regarding the implementation of environmental laws reflect broader data gaps regarding PNF in NSW.\(^ {152}\)

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148 DLWC is now part of the Department of Infrastructure Planning and Natural Resources.


152 Regarding the lack of data about PNF, see Hannam, I. (1995b) above n 147 at 225. There are a number of reasons for this lack of data. One of the key factors in NSW is that there is no overarching agency with a responsibility to collect information relating to private forests, in contrast to public forests (administered by NSW State Forests). Although NSW law already contains a requirement that all timber coming from PNF operations be branded or marked as coming from private property (*Forestry Regulation 1999* (NSW), cl. 61) and previously sawmill returns including private property data were compiled by the Forestry Commission, it is difficult to establish whether these statistics are still being compiled or whether they are reliable. McElhinny, op.cit., casts doubt on the reliability of sawmill return data. The second key fact is the sheer physical remoteness of many areas of private forest, creating
In Tasmania, the data gap regarding PNF is narrower than in NSW. In the former State, PNF is a larger component of the timber industry in terms of its share of total output. There is a more established institutional structure and a more systematic approach to the regulation of PNF in Tasmania under the Forest Practices Act and the Private Forests Act. Information-gathering tasks regarding PNF were carried out by the statutory authority Private Forests Tasmania (PFT), as well as by the Forest Practices Board. For these reasons, far more is known about PNF in Tasmania, than in NSW, which has no equivalent bodies. Questions concerning the regulation of PNF in Tasmania are considered in detail in Chapter Eleven.

Standards of forest management

Even though there was scant data available concerning the implementation of environmental laws in practice to the PNF industry in NSW, some material about PNF regulation became available during the course of the research process in addition to the author's own research results (1995). That data lends itself to the formation of preliminary views regarding the application of environmental laws to the sector during the study period.

There exists a body of opinion amongst regulatory agencies and consultants with experience of the PNF industry that, on the whole, in NSW there are comparatively poor levels of forest management and planning within the PNF industry when compared with public forests. The NSW State of the Environment Report in 1997 found:

difficulties in access and monitoring. Thirdly, the very fact that these forests are on private property leads to additional difficulties in gaining access to information.


154 Now the Forest Practices Authority.

155 In addition, a considerable amount of data was produced by the Tasmanian Public Land Use Commission and numerous consultants during the RFA process: Tasmanian Public Land Use Commission (1996) Inquiry into areas to be reserved under the Tasmania-Commonwealth Regional Forest Agreement: Background Report Part F, PLUC, Hobart.

156 Prest above n 33.

157 These findings are also consistent with those of a study of PNF in Queensland which concluded: “Long term sustainable timber production is rarely practised in private native forests in Queensland.” Queensland Department of Primary Industry (1995) “From the Forest”, Between the Leaves magazine, Summer 1995, pp.16-19.
private forests [in NSW] are not generally managed for long term sustainability [of timber production].\textsuperscript{158}

A forestry consultant from Northern NSW, O’Neill (1998), helped to explain that proposition by observing:

Generally the history and pattern of logging and management has been demand driven and sometimes exploitive, resulting in a significant proportion of the private hardwood forests being generally of a young age.\textsuperscript{159}

Later, a forestry consultant, Dr Andrew Smith, engaged by the DLWC to work on ESFM standards for PNF,\textsuperscript{160} noted that such high-intensity exploitative harvesting of private forests was often “a precursor to land clearing or land sale.”\textsuperscript{161}

A DLWC regional officer from the Sydney-South Coast region with experience in regulating PNF operations commented on the “generally low level of forest management skills and opportunistic approach to timber harvesting common in the [private] industry” in an internal document dated 2000.\textsuperscript{162} In a report for the Rural Industries Research and Development Corporation, based on interviews with participants in the PNF industry in the Northern Tablelands, Thomson (1999) stated:

There was … concern (from both saw-millers and land owners) that some saw millers/contractors operated in a less than professional manner. This included incidences [sic] of taking more timber than they paid for, not paying at all, not following the landowner’s instructions about where to log or leaving the logged area in a considerable mess...\textsuperscript{163}

Such statements are indeed generalisations, and probably cannot be relied upon as reliably descriptive of the entire sector. Nevertheless there is evidence that standards of environmental management in PNF operations in much of NSW are often low.

These preliminary sources, when taken together, clearly indicate that there are problems with the level of environmental standards met by the PNF industry in NSW. These

\textsuperscript{158} EPA NSW (1997) above n 4 at 199.
\textsuperscript{160} DLWC was amalgamated with the former Department of Urban Affairs and Planning in 2003 to form DIPNR the Department of Infrastructure, Planning and Natural Resources. This thesis refers however to DLWC, as that was the agency at the time of writing, and during the study period January 1998- December 2002.
\textsuperscript{162} DLWC (2000) Summary of Comments on Desktop Audit of Exemptions (Stage 1 Review of Exemptions), Comments by DLWC and RVC only, internal unpublished document, at 63, Comments by DLWC Officer No.12 (Compliance Officer), Sydney-South Coast Region.
sources raise questions about the contribution of NSW law to the attainment of sustainability objectives. However, there are limits to the scope of this thesis. It does not attempt to answer the question of whether private native forestry practices during the study period in NSW were - as a matter of fact - ecologically unsustainable. This thesis is primarily concerned with the extent to which the legal framework is likely to contribute to the attainment of sustainability. It is not concerned to come to speculative conclusions outside the boundaries of the legal discipline. The author’s research suggests that the data gaps regarding PNF are so broad that there is insufficient data for appropriately qualified ecologists to come to generalised or even regional conclusions in relation to the ecological sustainability of private forestry in NSW.

CONCLUSION

The picture of NSW private forests as ‘the forgotten forests’ is slowly changing as their considerable commercial importance is underlined by restrictions on public forest timber supply, and as their conservation significance is explored and spoken for by environmentalists. The existing data about PNF in NSW also raises questions about the silvicultural standards of forestry practices in this sector of the industry, and about its compliance with environmental laws.

This chapter has argued that there are difficulties in regulating PNF because of access and cultural issues, particularly regarding claims of private property rights. Historically this has led to reluctance on the part of regulators to concern themselves greatly with questions of sustainability of PNF activity and with strongly implementing existing legislation. Yet against this background of past difficulties with such questions, there exist more recent Commonwealth and State government commitments to ESFM in the Regional Forest Agreements and the international arena.

The background material describing the nature of the PNF industry in NSW and attempts to regulate it to date enable us to pose several working hypotheses. Among

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Note that this title was applied by Calder, M., Calder, J. (1994) *The Forgotten Forests: A Field Guide to Victoria’s Box and Ironbark Country*, Victorian National Parks Association, 120pp. (This book is now in its 2nd edition as *Victoria’s Box-Ironbark Country: A Field Guide*) on the basis that they are no longer the forgotten forests following the creation of a number of national parks and reserves. See also Anon. (2001) “The forgotten forests’ last stand”, Editorial, *The Age*, 30/08/2001, where the leader writer suggested “The woodlands are archetypal Australian bush, part of a cultural and literary heritage…..”.
these are that the legislation applicable to the PNF industry is inadequate for the industry to achieve ESFM. Further, there is a preliminary picture that the legislation that applies is inadequately implemented, leaving the industry in practice either largely unregulated or under-regulated, despite the formal application of various laws.

These are the hypotheses which informed the research process set out in Part Two and subsequent Parts. Part Two presents the results of research into the law applicable to PNF in New South Wales and its record of implementation during the study period. It asks “Precisely which regulatory controls apply to PNF in NSW, and in what circumstances do various different forms of regulation apply?” This survey is conducted with a view to being able to comment on the extent to which the legal framework in place during the study period was likely to contribute to the attainment of ecological sustainability. Chapters Six to Ten examine the administration of environmental protection laws as they applied to PNF in NSW. Later, in order to provide a point of comparison, Part Three (Chapter Eleven) examines laws applying to PNF in Tasmania.

In concluding, Part Four poses questions for law reform which include: Is the existing law sufficient to encourage, enable and require ESFM and biodiversity protection? How can the legal and institutional framework for regulation of PNF in NSW be improved?
This Chapter provides an overview of the regulatory framework in NSW for PNF during the study period. Detailed discussion of the *Native Vegetation Conservation Act 1997* (NSW) ensues. The application of the *Threatened Species Conservation Act 1995* (NSW) and the *Environmental Planning and Assessment Act 1979* (EPAA) to private forestry to PNF are considered in subsequent Chapters.

**OVERVIEW OF NSW LAWS APPLYING TO PNF**

The law in NSW regulating private forestry is not part of a unified system of forestry regulation applying across all land tenures. Rather, NSW has three legal regimes applicable to forestry depending on the type of forestry and where it takes place. In State Forests, it is regulated under the *Forestry Act 1916*, *Forestry and National Park Estate Act 1998*, in plantations under the *Plantations and Reafforestation Act 1999,* and on privately held forest under a variety of laws.

There is no single law setting out the main framework for regulating PNF, by contrast to Tasmania or Victoria with their Forest Practices Codes which apply across all tenures. Rather, PNF operations in NSW are subject to a complex, multi-layered and often

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1 This discussion of the NVCA is prefaced by the observation of the passage of the *Native Vegetation Act 2003* in December 2003 which is to gradually replace the operation of the NVCA. Many of the practical issues in regulating PNF and native vegetation clearance – such as the definition and application of regulatory exemptions - will remain the same and will continue to bedevil the implementation of the legislation.

2 The *Plantations and Reafforestation Act 1999* (PRA) (NSW) applies to most land tenures (i.e. privately owned land, State forest or other Crown-timber lands, “or any other land”). PRA, s.5(4). However it does not apply to land within 13 nominated categories, including land protected by SEPP 14 (wetlands), or SEPP 26 (littoral rainforests). PRA, s.7, Schedule 1.

overlapping regulatory framework that has developed incrementally over time. The laws that apply to PNF are not industry specific, but rather are environmental laws of general application directed at broad environmental objectives such as land use planning (Environmental Planning and Assessment Act 1979, and associated Planning Instruments), and statutes directed at broad environmental problems such as native vegetation clearing and soil loss/degradation (Native Vegetation Conservation Act 1997 (during the study period),\(^4\) loss of threatened species (Threatened Species Conservation Act 1995, National Parks and Wildlife Act 1974), water pollution (Protection of the Environment Operations Act 1997), and as well as the common law.\(^5\)

<table>
<thead>
<tr>
<th>Approval requirements which may be applicable to PNF operations</th>
<th>Relevant instrument during the study period</th>
<th>Administering Agency during the study period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consent to clear native vegetation</td>
<td>Native Vegetation Conservation Act 1997 in conjunction with Environmental and Planning Assessment Act 1979, Part 4</td>
<td>Dept of Land and Water Conservation (DLWC)(^6)</td>
</tr>
<tr>
<td>Development consent requirements according to content of Local Environment Plan (LEP)</td>
<td>Environmental and Planning Assessment Act 1979, Part 4.</td>
<td>Local government</td>
</tr>
<tr>
<td>Development consent requirements or prohibitions to protect littoral rainforest</td>
<td>SEPP 26 consent</td>
<td>Local government</td>
</tr>
<tr>
<td>Development consent requirements or prohibitions to protect koala habitat</td>
<td>SEPP 44 consent</td>
<td>Local government</td>
</tr>
<tr>
<td>Development consent requirements</td>
<td>Regional Environmental Plans under EPAA (various) (not applicable in all regions)</td>
<td>Local government</td>
</tr>
<tr>
<td>Pollution Control licences</td>
<td>Protection of the Environment Operations Act 1997</td>
<td>EPA/Local government</td>
</tr>
<tr>
<td>Licence to harm or pick threatened species(^*)</td>
<td>Threatened Species Conservation Act 1995, s.91</td>
<td>National Parks and Wildlife Service</td>
</tr>
</tbody>
</table>

\(^4\) To be repealed and replaced by the Native Vegetation Act 2003 which had not yet commenced at April 2005. See further below, this Chapter.


\(^6\) Now part of DIPNR Department of Infrastructure, Planning and Natural Resources. See further below.

\(^7\) The EPA is now part of the DEC Department of Environment and Conservation. See further below.
Licence to harm threatened species of freshwater fish* | Fisheries Management Act 1994, Part 7A, s.220ZW | Fisheries NSW
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Consent to interfere with Aboriginal heritage | National Parks and Wildlife Act 1974, s.90 | NPWS
Commonwealth approvals for actions with significant impact on listed threatened species | Environment Protection and Biodiversity Conservation Act 1999 (Cth) - only applicable to forestry in World Heritage listed forests or Ramsar sites. | Commonwealth Department of Environment and Heritage

* TSCA and FMA licensing only required if neither Part 4, 5 EPAA apply.

**THE NATIVE VEGETATION CONSERVATION ACT**

The most important legislation applying to PNF in NSW during the study period was the *Native Vegetation Conservation Act 1997* (NVCA), administered by the Minister for Land and Water Conservation with the assistance of the Department of Land and Water Conservation (DLWC).\(^9\) Discussion of the NVCA is prefaced by noting the passage of the *Native Vegetation Act 2003* in December 2003 which is to gradually replace the operation of the NVCA, but which had still not commenced operation at April 2005.\(^11\) Although there is to be a major legislative change,\(^12\) many of the practical issues in regulating PNF and native vegetation clearance – such as the definition and application of regulatory exemptions\(^13\) - will remain the same - and will probably continue to bedevil the implementation of the legislation.

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8 The NPWS was merged with the EPA in September 2003 to form the Department of Environment and Conservation.
9 Threatened fish are listed in Schedule 4 (endangered) and Schedule 5 (vulnerable) of the *Fisheries Management Act 1994*.
10 On 29 May 2003, following the re-election of the Carr Government, the Department of Land and Water Conservation (DLWC) was merged with Planning NSW (formerly DUAP) to form the Department of Infrastructure, Planning and Natural Resources (DIPNR) with the Hon Craig Knowles MP Minister for Infrastructure and Planning, and Minister for Natural Resources. The former Minister was the Hon Richard Amery MP.
11 The NVCA remained in operation at the time of final revisions of this thesis in March 2005, but is to be repealed, along with its associated Regulation and Regional Vegetation Management Plans upon commencement of the *Native Vegetation Act 2003*, s.52, to commence operation upon proclamation. The new Act had not commenced operation at 11.4.05 according to the NSW Parliamentary Counsel’s Office. Note also associated amendments introduced by the *Natural Resources Commission Act 2003* (which commenced 23.1.04).
12 The new legislation offers landholders the option of either submitting a development application to DIPNR, or to submit a Property Vegetation Plan to the new Catchment Management Authority in their region. That plan may last up to 15 years (s.30(1)). The new Act purports to exclude the operation of local government plans (LEPs) and other environmental planning instruments prohibiting or restricting clearing that are made after the approval of a PVP (s.17(b)).
13 A specific purpose exemption from development consent requirements existed under the NVCA for PNF during the study period, and will exist on a transitional basis until the new regime commences at some time in 2005. *Native Vegetation Act 2003* ss.2, 12, 14,15 and *Natural Resources Commission Act 2003*. Departmental fact sheets at www.dipnr.nsw.gov.au viewed on 29.1.05 stated that the Act would not commence operation until the associated Regulation was prepared and approved by the Minister and then came into force. That Regulation was put on public exhibition on 9 November 2004 and was open for comment until 31 January 2005.
The broader purpose of this Chapter is to commence an evaluation of the NVCA. It asks “Is this legislation sufficient to provide for ecologically sustainable forest management (ESFM)?” Chapter Seven analyses data on the implementation of the NVCA in relation to PNF.

**THE NVCA—BACKGROUND**

The NVCA was enacted in December 1997 with the object of preventing “the inappropriate clearing of native vegetation”. The Act affected forestry as well as agriculture, as it controls native vegetation clearing regardless of the cause (subject to exemptions and exclusions). Nevertheless, the primary intention was to manage broadacre vegetation clearing in the agricultural context.

The NVCA commenced operation on 1 January 1998, replacing *State Environmental Planning Policy No. 46: Protection and Management of Native Vegetation* (SEPP 46), made under the Environmental Planning and Assessment Act 1979 (‘EPAA’) in August 1995. SEPP 46 was introduced following political, scientific and popular recognition of and concern over the deleterious effects of excessive clearing of native vegetation. NSW was amongst the last of the States (but not the very last) to introduce legislative controls with statewide application addressing broad-scale clearance of native vegetation.

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14 NVCA, s.3(f).
15 Clearing is defined in s.5 to include “cutting down, felling, thinning, logging or removing native vegetation” as well as other actions which substantially damage or injure ‘native vegetation’, which is defined in NVCA, s.6.
16 Commonwealth of Australia (1995), *Native Vegetation Clearance, Habitat Loss and Biodiversity Decline*, Biodiversity Series, Paper No.6, Department of Environment, Sport and Territories.
17 Prior to the introduction of SEPP 46, clearing in NSW was estimated to be occurring at 150,000 hectares per annum, at “unsustainable levels”, according to Departmental documents. DLWC (1998) *Native Vegetation Conservation Act Fact Sheet No.2: Why Was the Act Introduced*, DLWC, Sydney, p. 2. Over 50% of the woodlands and forests of NSW had been cleared since colonisation, including most of the original grassy woodlands. Benson, J. (1998) “The Structure And Composition of Pre- European Native Vegetation In South Eastern Australia: How Was It Burnt And How Should What Remains Be Managed Today?” in *Environmental Defender’s Office (NSW) Conference Papers: Caring for the Land*, EDO, Sydney, at p.2.
SEPP 46 had commenced overnight on 10 August 1995 by gazettal, without substantial advance warning or publicity. In this way it forestalled the ‘panic clearing’ associated with a drawn-out debate over a legislative mechanism for vegetation protection, as has recently been the case in Queensland. It was an interim measure designed to reduce vegetation clearance during negotiations and public consultation over the shape of longer-term vegetation-clearing legislation.

Prior to the introduction of SEPP 46, the protection of native vegetation in the rural context on private land was largely a matter of the haphazard application of planning requirements in Local Environmental Plans (LEPs) and Regional Environmental Plans (REPs) made under the Environmental Planning and Assessment Act 1979, and the application of the protected-lands provisions of the Soil Conservation Act 1938, where steep slopes and specified riparian vegetation were involved. A Tree Policy was released in 1984, and a Tree Plan followed in 1993.

On Crown timber lands, the clearing of trees was regulated by the Forestry Act 1916, in recognition of the value of timber on public land as a Crown asset. In the Western Division, (see map, Appendix 5.2.) clearing was regulated by the Western Lands Act 1901. However, it was generally the case in practice that neither the Soil Conservation Act, nor the Forestry Act, nor the Western Lands Act prevented the broad-scale clearance of vegetation, but rather resulted in the imposition of conditions upon clearing.

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19 Under authority of s.34(5) Environmental Planning and Assessment Act 1979.
21 Vegetation Management Act 1999 (Qld) (assent 21 December 1999, commencement by proclamation 15 September 2000); Vegetation Management Amendment Act 2000 (Qld) (assent 13.9.00), Vegetation Management Regulations 2000 (Qld).
23 Murray REP No.2 - Riverine Land, cl.13, part 9. The policy covers “the clearing, logging, removal or damaging of any species of trees and shrubs that are indigenous to the River Murray floodplain. Some examples of LEP controls - forestry is prohibited in Hastings LEP 2001, Zone 7 (h) Environment Protection - Habitat, but permitted with consent in Zone 7 (d) Environmental Protection - Scenic. In the Kiama LEP 1996 forestry is prohibited in Zone No 7 (e) Rural Environmental Protection (Hinterland) and Zone No 7 (l) Rural Environmental Protection (General), however in the former zone “tree plantations and harvesting” are permitted with consent. In the Tweed LEP 2000, forestry is permitted with consent in Zone 7(l) Environmental Protection - Habitat zone, but faces a special onus of proof of necessity and consistency with plan and zone objectives against clause 8.
26 Smith, S. (1995) “Native Vegetation Protection in New South Wales”, NSW Parliamentary Library Research Paper, 15pp., Briefing Paper No.028/95. The picture was also complicated by the operation of Tree Preservation Orders (“TPOs”) made by some councils under the authority of the Environmental Planning and Assessment Act 1979. However the effect of TPOs is patchy as many (rural)
One reason for replacing SEPP 46 with an Act was to create a more permanent regime for native vegetation protection.\textsuperscript{27} It would be more difficult for an unsympathetic future government to attempt to repeal an Act than a SEPP, which could be removed by a simple action of the Executive.\textsuperscript{28} Similarly, it would be more difficult to weaken an Act by amendment than would be the case with a SEPP.

A second reason for the replacement of SEPP 46 was the desire to create a simpler, streamlined and less fragmented regime for native vegetation management across NSW, by consolidating the various requirements relating to vegetation clearance throughout NSW.\textsuperscript{29} This involved repealing SEPP 46\textsuperscript{30} and the ‘protected land’ provisions contained in the *Soil Conservation Act 1938* (*SCA*), incorporating the clearing controls from the *Western Land Act 1901* (*WLA*) and the *Crown Lands (Continued Tenures) Act 1989*, and drastically restricting the scope for granting clearing licences ‘on Crown timber lands’\textsuperscript{31} under the *Forestry Act*.\textsuperscript{32} Before the passage of the *NVCA*, PNF in the Eastern and Central Divisions (see: map, Appendix 5.2) was subject to two separate clearance controls, namely the protected lands provisions of the *Soil Conservation Act (SCA)*, and the provisions of SEPP 46 on areas not mapped as protected land. With the enactment of the *NVCA*, the protected lands provisions of the *SCA* were repealed and most aspects of that protected land regime were transferred to the *NVCA*.\textsuperscript{33} The *NVCA* brought most of the Western councils have not made TPOs, and those that have made them usually have drafted them so that TPOs only protect established trees rather than all native vegetation (eg. understory species).

\textsuperscript{27} In part, this decision may have been related to the unpopularity of SEPP 46 within many rural communities.

\textsuperscript{28} Note that the NSW Liberal-National Party opposition promised the repeal of the *NVCA* during the March 2003 election campaign and Mr D. Page (MP, National Party) stated on 04/09/2002, *NSW Legislative Assembly Hansard*, at p. 4598 et. seq. that “the Government has chosen an unnecessarily complex, intrusive, costly and highly regulated implementation model” and that “Under a Coalition government, the Native Vegetation Conservation Act will be one of a number of pieces of legislation that will be replaced by a more integrated, clearer and more practical Resource Management and Conservation Act...”

\textsuperscript{29} An additional objective has been to bring the Western Division within the scope of the Act. *NVCA*, Schedule 5.4.

\textsuperscript{30} *NVCA*, s.70.

\textsuperscript{31} ‘Crown timber lands’ refers to vacant Crown land, and parcels of Crown land larger than 2ha that are leased or under licence under Crown lands legislation.

\textsuperscript{32} *Forestry Act 1916*, s.4. These areas were not regulated by SEPP 46: Clause 3(c),(d), SEPP 46. Following amendments by the *NVCA*, the *Forestry Act now* states that the Forestry Commission cannot issue a clearing licence for Crown timber land that is subject to a Crown lease under that Act for the purpose of clearing native vegetation. Farrier, D., Lyster, R., Pearson, L. (1999) *Environmental Law Handbook: Planning and Land Use in NSW*, 3rd edition, Reifern Legal Centre Publishing, Sydney at 394. However, the regime of clearing licences granted has not been completely repealed by the *NVCA* and still applies to types of Crown timber land, primarily State Forests, which are not subject to the provisions of the *NVCA*, and for which a forest lease has been granted. *Forestry Act 1916*, s.27G. Under s.27(3)(a)(ia) clearing is not an offence if done in accordance with the *NVCA*. Further clearing licences cannot be granted under s.27H over protected land (s.27H(d)), or to clear native vegetation within the meaning of the *NVCA* (s.27H(d1)).

\textsuperscript{33} Division 2 of Part 4 of the *Soil Conservation Act 1938* (ss. 21A-21E) was repealed. Protected land is provided for in the *NVCA*, s.4(1) (definitions), s.7,22 (State protected land), s.19 (regional protected land).
Division within the clearing-control regime.\textsuperscript{34} It also extended coverage of clearing controls to include land affected by Murray REP No. 2 (Riverine Land), which were not previously regulated by SEPP 46.\textsuperscript{35}

\textit{Mechanisms of the NVCA}

The NVCA differed from SEPP 46 in that it introduced a broader range of tools for the protection of native vegetation than its predecessor. The NVCA combined both conventional regulation (through the development control process), and alternative policy instruments, best described as flexibility mechanisms. These instruments complement the development consent mechanism. They include the making of Regional Vegetation Management Plans (RVMPs),\textsuperscript{36} and Codes of Practice for particular industries.\textsuperscript{37} The NVCA also provided for the payment of incentives for vegetation protection to landholders, particularly those who sign a statutory property agreement.\textsuperscript{38} Financial assistance can be paid from a statutory Native Vegetation Management Fund.\textsuperscript{39}

\textbf{THE DEVELOPMENT CONSENT MECHANISM OF THE NVCA}

The central mechanism of the NVCA for the management of clearing and preservation of native vegetation was development consent under Part 4 of the \textit{Environmental Planning and Assessment Act 1979} (‘EPAA’). The precise approval requirements applicable to a clearing or logging proposal in a particular area depend upon whether there is an RVMP in force for that region. The Act continued the approach of SEPP 46, by providing a general rule that in order “to clear native vegetation”, in those regions where there is no RVMP in

\textsuperscript{34} \textit{Western Lands Act} 1901, s.18DB, \textit{Western Lands Regulation} 1992; note major amendments by \textit{Western Lands Amendment Act} 2002. SEPP 46 did not apply to leasehold lands in the Western Division administered under the \textit{Western Lands Act} (94\% of the land in that Division). SEPP 46, Clause 3(f). However, it did apply in those parts of the Western Division which are freehold land. This is 2.5\% of the Western Division; Adrian, P. (1998) “Where Else has a Vegetation Program in the State Worked ?” in Environment Defender’s Office (NSW) (ed.), \textit{Caring For the Land : Conference Proceedings}, EDO, Sydney at 2.
\textsuperscript{35} SEPP 46, Clause 3(g). The Murray REP applies to “the riverine land of the River Murray within the City of Albury and the [local government] areas of Balranald, Berrigan, Conargo, Corowa, Deniliquin, Hume, Murray, Wakool, Wentworth and Windouran” (Murray REP No. 2, clause 4).
\textsuperscript{36} NVCA, Part 3.
\textsuperscript{37} NVCA, Part 4. Although it is the case that COPs and RVMPs were first introduced in amendments to SEPP 46, these mechanisms were expanded upon in the NVCA and given much broader application.
\textsuperscript{38} NVCA, Part 5. Property agreements are a written agreement between a private landholder and the Director General of L&WC, providing for the future conservation and management of native vegetation on a particular parcel of land: ss40-41. Property agreements are not an exemption from the NVCA. The signing of a property agreement will not remove the need for development consent in order to clear: NVCA, s.41(3); Salvin, S. (1998) “Clearing Act explained”, \textit{The Land}, 2.4.98, p.14.
\textsuperscript{39} NVCA, ss.56,57. The retention of the consent requirement operates as the stick accompanying the carrot of funds from the NVM Fund. Departmental publications suggest there may be room for ‘trade-offs’ - “appropriate clearing may be offset by the establishment, enhancement and/or retention of other native vegetation which has positive environmental impacts.” See: DLWC (1998) \textit{NVCA Fact Sheet No.4}, “Property Agreements”, p.2.
place, development consent under Part 4 *EPAA* must be sought and obtained from the Minister prior to clearing. If permission to clear is refused the applicant may appeal to the Land and Environment Court. The clearing of vegetation without consent in breach of Part 2 of the Act is an offence.

**Matters for consideration**

The *NVCA* does not set out particular statutory guidelines that direct the attention of the consent authority to questions of conservation of significant native vegetation communities. The closest it comes to this are its objects, which include “to protect native vegetation of high conservation value” and “to prevent the inappropriate clearing of vegetation”. The Act does not absolutely prohibit the clearing of particular classes of vegetation (eg. endangered ecological communities). Nor does it specify particular land categories of high biodiversity value (eg. rainforest or under-represented ecosystem types) that will automatically be protected.

Despite this relative vacuum of specific statutory guidance, certain matters must still be considered in the consent decision-making process under the *NVCA*. When assessing an application, the Minister (DLWC in practice) is required to “take into consideration” the factors that any other consent authority must address, specified in s.79C *EPAA*, those listed in the *EPAA* Regulation as well as the scope, purpose and objects of the *NVCA*. That section requires consideration of “the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality”. These include the provisions of any applicable EPI, the likely impacts of the development (environmental, economic or social), the suitability of

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40 *NVCA*, s.15(1).
41 *NVCA*, s.14. On a day-to-day basis, it is DLWC which has a significant role in applying threatened species protection law under the *NVCA*.
42 *NVCA*, s.21(2)(a).
43 *EPAA*, s.97(1). Under SA legislation appeals against refusal to grant consent or conditions attached to a consent are not possible: *Native Vegetation Act 1991 (SA)*, s.29(12). *Native Vegetation Act 1991 (SA)*, except for claims of denial of natural justice, s.29(15).
44 *NVCA*, s.17(1). The penalty provisions of s.126 *EPAA* are applied by s.17(2) *NVCA*.
45 By contrast, under SEPP 46, the consent authority was originally required to take into account 13 different environmental considerations.
46 *NVCA*, s.3(c)(f).
47 The Queensland *Vegetation Management Act 1999*, has an object of preserving “remnant endangered regional ecosystems” s.3(1)(a)(i). It originally specified “of concern” vegetation.
48 *EPAA*, s.79C (previously, s.90), see also *NVCA*, s.15(2).
49 The *EPAA* Regulation 2000, cl.92 which replaced *EPAA* Regulation 1994, cl.65 now no longer requires consent authorities to take into account “the effect of the development on... the habitat of any...protected fauna, and the means to be employed to protect them from harm, or to mitigate the harm.” as was previously the case.
50 *EPAA*, s.79C(1)(b).
the site for development, and the public interest. The consent process also involves consideration of the likely impact of logging and clearing on threatened species, against an 8-part test of significance set out in s.5A EPAA. Additional matters for consideration include the Department’s Staff Guidelines for the Assessment of Clearing Applications, the Department of Urban Affairs and Planning’s Guide to s.79C and the EPAA Regulation.

Discussion of whether the NVCA embodies a precautionary approach

The issue facing those drafting legislation for the protection of native vegetation and its provisions for the guidance of the decision-maker is the tension between objectives of conserving nature by taking ‘a precautionary approach’ to permitting clearing, and that of allowing clearing to proceed in the economic interests of the State.

The NVCA is ambiguous about the approach required of the decision-maker in addressing such questions raised by clearing applications. Although the NVCA states that its object is to prevent “inappropriate clearing”, it fails to specify the components of “inappropriate clearing”. Indeed, this particular choice of words for the objects clause implies that a certain amount of vegetation clearance is considered both appropriate and acceptable. Further, the NVCA does not set out specific statutory obligations on the Minister to protect and conserve native vegetation.

The fact that the Act contains an exhortation that its objects (eg. “to encourage and promote native vegetation management in the social, economic and environmental interests of the State”) are expected to be achieved “in accordance with the principles of ecologically sustainable development” (ESD) (thus including the ‘precautionary principle’), suggests that the consent-decision process should require the refusal of clearing in some instances, e.g. where native vegetation is potentially of high significance for nature conservation. On the other hand, the fact that the NVCA and EPAA together require the examination of economic considerations may lead to a risk of allowing such matters to

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51 EPAA, s.79C(1).
53 EPAA Regulation 2000, cl.92, will be of limited relevance in practice. SEPP 46 required consideration also of the factors listed in s.90 EPAA and in cl.65 of the EPA Regulation 1994. Since then the EPAA and EPAA Regulation have been amended extensively, with the effect that the EPAA Regulation is irrelevant to PNF: EPAA Regulation 2000, cl.92.
54 The closest the Act comes is its objective: “to encourage and promote native vegetation management in the social, economic and environmental interests of the State…in accordance with the principles of ESD.” NVCA, s.3(b). This is an ambiguous and internally contradictory objective.
55 NVCA, s.3(b),(c).
overwhelm environmental considerations. This is particularly the case as the EPAA, in s.79C, requires the application of a series of potentially conflicting heads of consideration, with no clear ranking assigned to them. More broadly, there is a tension within the objects of the NVCA, making the Act subject to the principles of ESD and the objective of encouraging and promoting “native vegetation management in the social, economic, and environmental interests of the State.”\(^5^6\) The objects clause is ambiguous in the sense that native vegetation management ‘in the economic interests of the State’ could be interpreted as an encouragement for the consent authority to err on the side of approving clearing proposals, given the short-term economic benefits which are likely to accrue to applicants.

The ambiguity of the Act in relation to conservation objectives is further exhibited in the fact that it merely requires the decision-maker to weigh up relevant social, economic and environmental considerations, as is required by any Part 4 consent authority under s.79C EPAA. The approach of the judiciary to the question of the conflicting objectives in the Part 4 consent process is discussed in Chapter Eight. The Land and Environment Court has held that there is no rule indicating the weight that must be applied to each of the relevant s.79C considerations, as long as each is considered. There is no requirement that environmental factors be accorded weight equal to economic factors in the decision-making process.\(^5^7\) There is also no requirement that that consent must be refused upon a finding that the proposal meets a negative reaction against any single head of consideration.\(^5^8\)

The lack of specific statutory guidance relating to native vegetation for the decision-maker within the NVCA is a step backwards from the previous approach of SEPP 46 and the approach still contained within South Australian legislation.\(^5^9\) SEPP 46, in its earliest incarnation, required the consent authority to consider the likely impact of clearing against twelve specific matters regarding native vegetation conservation.\(^6^0\) It allowed the consent authority to grant consent to the clearing of native vegetation only “if satisfied” that none of twelve issues of environmental sensitivity listed (regarding native vegetation) were raised by the clearing proposal in question. For example, the decision-maker could only consent if

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\(^ {56}\) NVCA, s.4(1). The principles of ESD are as defined in Protection of the Environment Administration Act 1991, s.6(2)

\(^ {57}\) Parramatta City Council v Hale (1982) 47 LGRA 319.

\(^ {58}\) Bauer Holdings Pty Ltd v Sydney City Council (1981) 48 LGRA 356.

\(^ {59}\) South Australian legislation also contains a statutory presumption against the grant of development consent for clearing affecting particular specified forms of native vegetation, i.e., clearing which offends statutory Principles of Native Vegetation Conservation. SA Native Vegetation Act 1991, s.29(1)(b) & Schedule 1.

\(^ {60}\) SEPP 46 (Amendment No.1), Clause 7. (Gazette No. 158 of 22.12.1995, p. 8835)
satisfied that “the area does not have a high biological diversity”. If any one of these twelve mandatory criteria could not be met, consent could not be lawfully granted. Thus SEPP 46 effectively prohibited clearing in these 12 categories, when clearing exemptions were not available or applicable. Amendments saw these requirements reduced to an obligation to consider only six matters, “where relevant”. The decision to relax these provisions of SEPP 46 was almost certainly influenced by lobbying by rural interests.

In summary, the Part 4 EPAA consent process applied under the NVCA, as interpreted by the courts to date, does not inspire confidence that ESFM objectives will take precedence over short-term economic objectives such as timber production. By contrast, a precautionary approach to the question of whether or not to approve applications to clear vegetation would involve delaying approval of clearing until it could be demonstrated that the native vegetation to be cleared was not of conservation or biodiversity significance or that measures to address these issues were to be put in place.

**Exemptions and Exclusions**

The requirement of the NVCA for landholders to seek development consent prior to logging or clearing is subject to a large number of exemptions. Study of these exemptions is essential to a full understanding of the operation of the NVCA in practice. The exemption provisions have crucial implications for the capacity of the NVCA to deliver ESFM.

Under the NVCA, exemption clauses relieve certain categories of clearing in specified circumstances on particular land tenures from the general obligation created by the Act to seek Part 4 EPAA consent.

There are 34 exemptions under the NVCA that were carried over from existing legislation – the former SEPP 46, the Soil Conservation Act 1938 (protected lands), and the Western...
When combined with exclusions of the NVCA from particular land tenures such as state forests and national parks, and clearing authorised under other legislation (eg. Mining Act 1992), the total number of exempt situations climbs to sixty-four. Most exemptions will not be either (i) simultaneously available to a given set of circumstances, or (ii) applicable to a given situation. Nevertheless, some exemptions (eg. the SEPP 46 exemptions) can be claimed in combination.

Where there is a plan in force, it will be necessary to consult the plan to see if it has adopted or modified these exemptions or whether other new exemptions have been incorporated.

There are six categories of exemptions and exclusions set out in the NVCA. The first category of exemptions was those types of clearing activity permitted under former legislation and instruments, including SEPP 46. This includes exemptions transferred into the NVCA from the Western Lands Act and from the Soil Conservation Act. The second category covered various exempt land tenures, managed under particular statutes, such as national parks and state forests. The third applied to lands within local government areas exempted by Gazettal or Regulation. Under the fourth category, particular types of clearing activity authorised under certain other legislation, e.g. regarding rural fires and roads, were excluded. The fifth category was for plantations under plantations legislation. The sixth category of exemptions involved Native Vegetation Codes of Practice (COPs). These groups of exemptions and exclusions are discussed below.

**Exemption category one: exempt types of clearing**

The NVCA retained and continued the list of exempt forms of clearing available under the former SEPP 46, as well as under the Soil Conservation Act and the Western Lands Act. The

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67 Twelve exemptions from former SEPP 46, and 14 exemptions carried over from the Western Lands Regulation 1997. See also Western Lands Act, s.18DB plus Regulations Schedule 4. The exemptions under the other legislation were repealed but were carried forward under the savings and transitional provisions of the NVCA.

68 There are 34 exemptions under Schedule 4 (SEPP 46, Protected lands, Western Lands Act), 12 exemptions under NVCA section 9 (exempt land classifications), 1 exemption for LGAs, 16 for other legislation, 1 for Codes of Practice.


70 SEPP 46, r.11, and Schedule 3, clause (j).

71 The exemptions from Western Lands Act 1901 are now contained in NVCA, Schedule 4 (with 14 sub-sections), and s.18DB of the WLA refers to the obligations of the lessee to comply with the provisions of the NVCA regarding clearing.

72 NVCA, s.9, referring to areas listed in Schedule 1 or 2.

73 NVCA, ss.10,11, and s.67(3).

74 Those listed in NVCA, s.12.

75 NVCA, s.68, giving effect to Schedule 4, Clause 3(2).

76 SEPP 46, Clause 11 referring to exemptions listed in Schedule 3.
SEPP 46 exemptions are most relevant to private forestry. The exemptions most relevant to PNF\textsuperscript{77} include:

(a) Minimal Clearing. The clearing of up to 2 hectares per annum for any contiguous land holding in the same ownership.
(b) Minimal Tree Cutting. The cutting of no more than 7 trees per hectare in any period of one year for on-farm uses, including fence posts and firewood.
(f) Burning. The clearing of native vegetation if it is authorised under the Bush Fires Act 1949.
(h) Planted Native Vegetation. The clearing of native vegetation planted for forestry, agriculture, agroforestry, woodlots, gardens and horticultural purposes.
(j) Private Native Forestry. The clearing of native vegetation in a native forest in the course of its being selectively logged on a sustainable basis or managed for forestry purposes (timber production).
(j) Regrowth. The removal of native vegetation, whether seedlings or regrowth, of less than 10 years of age if the land has been previously cleared for cultivation, pastures or forestry plantation purposes.

Exemptions within this category are not available on State protected land. This is because SEPP 46 did not apply to protected land.

The private native forestry (PNF) exemption

The most important exemption in relation to PNF is that entitled ‘private native forestry’. It was originally an exemption from SEPP 46, and was carried over by Schedule 4 of the NVCA.\textsuperscript{78} In regions not yet covered by an RVMP (i.e. most of NSW at the time of writing),\textsuperscript{79} it removes the usual development-consent requirement.\textsuperscript{80} However, the exemption is not available where the land is State protected land as SEPP 46 never applied to that land; and where an RVMP is in force – although a similar exemption may apply under the terms of a future RVMP.\textsuperscript{81}

The text of the exemption states that it may be claimed in the following circumstances:

“Private Native Forestry. The clearance of native vegetation in a native forest in the course of its being selectively logged on a sustainable basis or managed for forestry purposes (timber production).”\textsuperscript{82}

This text contains two distinct parts open to diverse interpretations – e.g. “selectively logged on a sustainable basis”, or “managed for forestry purposes”. For example, it is unclear if the phrase ‘sustainable basis’ refers to sustained timber yield or to a broader


\textsuperscript{78} This exemption (and others) from SEPP 46 were carried over and saved by Schedule 4 of the NVCA. Although the PNF exemption is not explicitly set out within the NVCA, it applies because of the operation of savings provisions: NVCA, s.68, giving effect to Schedule 4, Clause 3(2).

\textsuperscript{79} Two plans have been made - Riverina Highlands RVMP, Mid Lachlan RVMP, and ten other plans are at draft stage. Source: <http://www.dlwc.nsw.gov.au/care/veg/vegact/vegact3.htm>, accessed 2.10.03.

\textsuperscript{80} This exemption (and others) from SEPP 46 were carried over and saved by Schedule 4 of the NVCA. Although the PNF exemption is not explicitly set out within the NVCA, it applies because of the operation of savings provisions: NVCA, s.68, giving effect to Schedule 4, Clause 3(2).

\textsuperscript{81} NVCA, Schedule 4, clause 3(3).

\textsuperscript{82} SEPP 46, Schedule 3, Clause (i).
notion of ecological sustainability. The term ‘sustainable’ is a matter of dispute amongst ecologists, foresters and others. In its ambiguity, the PNF exemption is similar to many of the other SEPP 46 exemptions. Research findings about the interpretation and implementation of this exemption in practice are presented in the next Chapter.

Exemption category two: exempt lands

Twelve specified land tenures including national parks, state forests and areas with natural values protected by other legislation, are excluded from the operation of the Act. Any proposed clearing or logging on land within these classifications is not subject to consent requirements under the NVCA, because of the operation of other legislation for their protection and management.

Exemption category three: exempt local government areas

The NVCA made provision for the partial or total exemption of particular local government areas (‘LGAs’) from the provisions of the Act. The rationale for this category of exemption was presumably so that the vegetation clearance controls contained in LEPs of the more conservation-minded LGAs could be preserved. The Act also excluded councils in the Greater Sydney metropolitan area from requirements for development consent.

Exemption category four: clearing under other legislation

Where permission to clear native vegetation granted under various other statutes, such as the Rural Fires Act 1997, the Roads Act, and the Mining Act has been granted, consent was not required under the NVCA.

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83 NVCA, s.9. In summary, they include the following: land dedicated or reserved under the National Parks and Wildlife Act 1974 (NPWA); land affected by SEPP 14 (coastal wetlands); land affected by SEPP 26 (littoral rainforests); land managed under the Forestry Act 1916; land acquired for the purposes of a State Forest; land dedicated or reserved under the NPWA; land acquired for dedication or reservation under the NPWA or for the preservation of Aboriginal heritage under the NPWA; land subject to conservation agreement under the NPWA; land subject to an IPO Interim Protection Order under the NPWA; land known as critical habitat under the NPWA.

84 NVCA, ss. 10, 11. Partially exempt LGAs are listed in Schedule 1 and are only LGAs within the Greater Sydney region. Totally exempt LGAs can be listed in Schedule 2. At the time of writing none are listed in this category. November 2000. However, in future the Coffs Harbour LEP and Tweed LEP may be exempted, if material on the websites of these LGAs is to be taken seriously.

85 This interpretation was confirmed by the Second Reading speech which explained that: Certain LGAs are to be excluded where their LEPs provide adequate native vegetation protection. Hansard, 5.12.97, p.89.

86 NVCA, s. 10 (1) ; 11 (1) (a).

87 NVCA, s.12(b) permits clearing in accordance with a bush fire management plan under the Rural Fires Act 1997. Section 12 excludes sixteen different types of clearing authorised under other legislation from the requirements of the
Exemption category five: Clearing under the Plantations and Reafforestation Act

The Plantations and Reafforestation Act 1999 (‘PRA’) - which replaced the Timber Plantations Harvest Guarantee Act 1995[^88] - provides a separate regime for the control of the clearing of native vegetation in the course of plantation establishment. The Plantations and Reafforestation Code provides the detail of regulatory requirements under the PRA.[^89] The NVCA does not apply to vegetation clearance for authorised plantation establishment, as the PRA created an additional category of exempt vegetation clearance within the NVCA.[^90] Excluded from the requirement to seek consent is clearing consisting of “plantation operations” taking place on an ‘authorised plantation’, in accordance with the conditions of the authorisation and the Code. “Plantation operations” includes “establishment operations” being: “activities carried out for the purpose of establishing a plantation, for example, the clearing of land, the use of pesticides, herbicides and fertilisers…and the planting of trees or shrubs.”[^91] Thus land-clearing is contemplated by the Act as falling squarely within the scope of the term ‘plantation operations’.

Under the framework created by the PRA it is not possible for landholders to elect to wait to obtain authorisation until just after clearance operations have been completed.[^92] The conduct of such clearing operations on an unauthorised plantation constitutes an offence.[^93] The Act also states “to avoid doubt, a natural forest is not a plantation for the purposes of

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[^90]: NVCA, s.12(l); PRA, Schedule 2, Clause 2.7, part [1]; amending NVCA, s.12.
[^91]: PRA, s.4(1).
[^92]: This is because the PRA, in section 9(1), requires all plantations (except ‘exempt farm forestry’) to be authorised. As plantation establishment falls within the definition of plantation operations this requirement for authorisation includes a requirement that clearing for plantation establishment be authorised under the PRA, s.9(1), see also Plantations and Reafforestation Bill 1999, Explanatory Note, p.4.
[^93]: PRA, s.9(3). The Act further closes this potential loophole by giving the Minister the capacity to elect to refuse the authorisation of plantations on land which was illegally cleared. It provides in s.17 that the Minister may refuse an application for authorisation of a plantation that is already fully or partially established “if the Minister determines that the establishment operations were not carried out in accordance with any applicable requirements of this Act, the EPAA 1979, any law dealing with native vegetation conservation and any other relevant law.” Will the PRA encourage the PNF for conversion to plantation on smaller blocks fitting the definition of ‘exempt farm forestry’ (EFF)? EFF covers plantations operations on a single farm that do not exceed 30 hectares, so long as clearing involved is exempt under the NVCA. If the clearing is associated with an EFF proposal, it may exploit the exemptions of the NVCA. The significance of this depends (a) on the proportion of PNF operations which are captured within the 30 hectare boundary of the ‘exempt farm forestry’ definition; and (b) the breadth of the PNF exemption as interpreted by landholders, DLWC, and the Courts.
As the PRA defines ‘plantation’ as “an area of land on which the predominant number of trees …are trees or shrubs that have been planted…”, private native forestry will not be able to take direct advantage of the approvals regime provided by the PRA.94 However the PRA may indirectly encourage the logging of native forests on smaller parcels of private land, prior to conversion to plantations, if the operation falls under the category of ‘exempt farm forestry’ – where it involves an area of less than 30ha, is exempt from the development consent requirements of the NVCA.95 The extent to which this is the case depends on the proportion of PNF operations on blocks smaller than 30 hectares; and the breadth of the PNF exemption as interpreted by landholders, DLWC, and the Courts.

**Exemption category six: Codes of Practice**

The NVCA also provides for the making96 of Codes of Practice (‘COP’) to regulate the clearance of native vegetation by particular industries or land uses.97 Where there is no RVMP in place, clearing undertaken in accordance with a COP is exempt from the general requirement to seek development consent.98 If a COP for PNF was made, it would amount to a more detailed PNF exemption.99 Where clearing has been carried out in purported compliance with a COP, but in reality was not “in accordance with” its terms, development consent would be required.100

If logging or clearing is undertaken in accordance with a COP, can additional consent requirements be imposed by the operation of LEPs or other legislation? This depends on whether or not an RVMP is in place in the relevant region. In a non-RVMP area, COPs cannot prevail over the operation of applicable LEP requirements. PNF logging under a

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94 PRA, s.5(2).
95 PRA, s.5(1).
96 PRA, s.6(1); Plantations Code r.5. NVCA s.12(j) provides that exempt clearing includes “any clearing that consists of plantation operations within the meaning of the Plantations and Reafforestation Act 1999 on an authorised plantation in accordance with any conditions of the authorisation and with the Plantations and Reafforestation Code under that Act.”
97 The COPs, although devised by the Department, must be signed off by the Minister, who is obliged to consult with the Native Vegetation Advisory Council, and take the Council’s views into account prior to approving any COP. See NVCA, s.37(1)(b), s.37(2).
98 NVCA, Part 4 (ss.37-39). According to a departmental publication use of the COP mechanism is to limited to situations “where an industry specific approach to clearing is needed.” DLWC (1997) A Proposed Model for Native Vegetation Conservation in New South Wales: A White Paper, DLWC, July, 26pp, at p.19. It is debatable whether this represents an environmental safeguard, or whether it in fact represents an unjustifiable “open slather” approach for a particular industry. One commentator argued that the COP provisions of the Act were problematic in that particular powerful industry lobby groups may “use these provisions to circumvent other checks and balances in the Act and entrench dubious environmental practices.”
99 NVCA, s.21(2). COPs come into force when adopted by Regulation: NVCA, s.39. They can be amended by subsequent regulations. NVCA, s.39(3).
100 NVCA, s.21(2)(b). It is unlikely in such a situation that consent would have been obtained, and as a result a criminal offence (of clearing without consent) would have been committed. NVCA, s.64.
COP would remain subject to any applicable consent requirements or prohibitions under an LEP, REPP or SEPP.\textsuperscript{102} In those regions where an RVMP is in place, RVMPs may adopt or incorporate provisions of a COP as part of the Plan.\textsuperscript{103} However, an RVMP cannot amend the provisions of a Code, either adding environmental protection requirements or removing them.\textsuperscript{104} A Code may impose additional requirements to those contained in an RVMP. The inconsistency provisions that prevent imposition of additional restrictions on vegetation clearing in situations where vegetation is to be cleared in accordance with an RVMP do not apply to the operation of COPs (because COPs do not fit the definition of an EPI).\textsuperscript{105}

The operation of COPs is subject to several safeguards including that they cannot be inconsistent with the objects of the NVCA,\textsuperscript{106} and are not applicable to either ‘State’ or ‘regional’ protected land.\textsuperscript{107}

To date, no COPs have been made, although two possible COPs have been considered. First, in order to clarify the ambiguity of the PNF exemption, a COP was proposed for PNF. It was to be developed on the basis of a consultancy report into sustainable private forestry. However that report was shelved, due to its political and economic implications.\textsuperscript{108} Second, there was preparation (to an advanced stage) of a COP for clearing for plantation establishment, but that was abandoned upon the enactment of the Plantations and Reafforestation Act 1999.\textsuperscript{109}

\textsuperscript{102} The effect of the Plantations and Reafforestation Act has some similarity to impact of the PNF exemption, in areas where there is no RVMP in force, which does not oust requirements for development consent which may be contained in an LEP. This interpretation of the Act is confirmed by a Note attached to s.23(3) which states: For example, in any case where clearing is carried out in accordance with a native vegetation code of practice, the clearing may still require development consent because of an environmental planning instrument.

\textsuperscript{103} NVCA, s. 25(2)(c).

\textsuperscript{104} NVCA, s.38(4).

\textsuperscript{105} NVCA, s.20(1).

\textsuperscript{106} NVCA, s. 38(2)(a).

\textsuperscript{107} NVCA, s. 38(2)(b).


INTERACTION OF EPIs WITH THE NVCA

This section discusses the interaction between requirements of the NVCA and those of Environmental Planning Instruments (such as LEPs and TPOs, REPs, and SEPPs), and the implications of their interaction for the PNF industry. ¹¹⁰

The precise impact of EPIs on a given PNF proposal in NSW depends upon at least six factors, including:

• whether an RVMP is in force in that region;
• the terms of the LEP in question, depending on the zoning of the area;
• the effect of paramountcy or inconsistency clauses in the NVC Act;
• whether exemptions (carried over from SEPP 46 or other NVCA exemptions) are applied;
• whether SEPP 26 (littoral rainforests) or 44 (koala habitat) are applicable; and
• whether there is any relevant restriction in an REP. ¹¹¹

Since the passage of the NVCA, there is still a role for Local Environmental Plans (LEPs), despite claims made in Parliament that the Act would represent a comprehensive ‘one-stop shop’ for all requirements relating to clearing activities on private land.¹¹² LEPs may require a private-forest owner to seek consent for PNF, where consent is not required under the NVCA because of the operation of exemptions. However, where NVCA exemptions are not claimed, additional consent requirements cannot be imposed by an LEP or by the provisions of any Act (other than the NVCA or the EPA).¹¹³ The underlying policy principle is to avoid duplication of consent requirements.

We have seen above (p.11) that the NVCA has retained ‘activity based’ exemptions from SEPP 46, e.g., PNF exemption. Where this exemption is available and is relied upon, then the provisions of the relevant LEP, REP, SEPPs and TPO should be examined as they may require consent to be sought.¹¹⁴ (See Error! Reference source not found.) Whether consent is required depends on the content of the LEP, and the zoning of the land in question. Some LEPs require consent for forestry in the General Rural 1(a) zone, and more still require it in environmental protection (‘7’) zones. If the LEP contains a requirement to

¹¹⁰ Environmental Planning Instrument as defined in the EPA, s.4(1) “means a State environmental planning policy, a regional environmental plan, or a local environmental plan, and except where otherwise expressly provided by this Act, includes a deemed environmental planning instrument.”
¹¹¹ For example, certain vegetation clearance is not permitted without consent in the Kosciusko REP, cl.9(3).
¹¹² The Hon J. Shaw, NVCA Bill: Second Reading, NSWPD (Hansard), 5.12.97, p.90.
¹¹³ The Parliamentary Counsel’s Explanatory Note which accompanied the NVCA Bill 1997 stated in this context: “there will generally be no need to obtain any other form of approval or authorisation to clear.” Native Vegetation Conservation Bill 1997, Explanatory Note, p.5.
¹¹⁴ NVCA, s.23(3).
seek consent for PNF in that particular zone, then this requirement will be unaffected by operation of the NVCA and the inconsistency provision contained in sub-section s.23(1). Under s.23(3) NVCA, where NVCA exemptions are claimed, then development consent may still be required, because of the requirements of an LEP or TPO.\textsuperscript{115}
Figure 1 Abbreviated Overview of regulation of non-plantation private forestry

Is an RVMP in force?
- NO
  - YES
    - Decision: Is Development Consent Required?
      - NO
        - Clearing proposed for non-protected land – PNF exemption not available
          - YES
            - Refer to content of RVMP.
            - Development consent of Minister for Land and Water Conservation is required.
              - NO
                - Does the Local Environmental Plan require consent for forestry in the Zone in question?
                  - NO
                    - 8 part test of significance (likely impact on threatened species) is carried out by DLWC
                      - YES
                        - Licensing provisions of Part 6 TSCA may apply if picking of threatened plant species or damage to habitat of threatened species is planned.
                          - Local council carries out the 8 part test of significance, regarding likely impact of development on threatened species.
                            - Is there likely to be a significant effect on threatened species, etc.?
                              - NO
                                - SIS not required
                              - YES
                                - SIS and concurrence required.
**EFFECT OF NVCA ON PART 5 EPAA**

The NVCA makes special provision such that the clearing it regulates will not be affected by Part 5 EPAA. That is, it will not become a Part 5 ‘activity’ where Part 4 consent is not required, e.g. due to the operation of exemptions contained in the NVCA. The Act provides:

> Part 5 of the EPA Act does not apply to any clearing carried out in accordance with this Part [i.e. Part 2 which provides the consent rules for clearing] and any such clearing is not an activity for the purposes of Part 5 of the EPA Act.\(^{116}\)

Therefore Part 5 cannot be applied as an alternative to Part 4 EPAA, despite the existence of approval requirements which may have ordinarily triggered environmental assessment requirements under that Part. This is no different to the situation that applied previously under SEPP 46.\(^{117}\) Nevertheless, other requirements may apply where neither Part 4 nor Part 5 apply, such as licensing requirements of the Threatened Species Conservation Act 1995.

**REGIONAL VEGETATION MANAGEMENT PLANS (RVMPs)**

The other key mechanism of the NVCA of relevance to PNF is provision for the making of Regional Vegetation Management Plans (‘RVMPs’).\(^{118}\) These provisions are an attempt to transcend the impact of thousands of micro-level decisions under planning law that have been taken without consideration of cumulative regional environmental impacts.

In the Second Reading Speech,\(^{119}\) it was stated that RVMPs “will be the single source of information required by anyone within that region who is responsible for managing native vegetation”. Once an RVMP is in place, local government would no longer be involved in vegetation-clearing control (below, p.\textit{Error! Bookmark not defined.}). RVMPs will specify

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\(^{116}\) NVCA, s.16.

\(^{117}\) SEPP 46, where it required landowners to seek development consent under Part 4 EPAA, obviously did not trigger Part 5 of the EPA Act. SEPP 46 originally contained a broad requirement to seek consent (Clause 6(1)), but this was modified by Amendment No.2 of 18.7.97, so that consent was not required where a vegetation management plan or code of practice applied.


\(^{119}\) The Hon J. Shaw, NVC Bill: Second Reading, \textit{NSWPD (Hansard)}, 5.12.97, p.90.
in which areas development consent is required to clear vegetation, and where it is not required.

RVMPs are drafted by Regional Vegetation Management Committees, which include representatives mainly drawn from rural interests, conservation interests, and government agencies. In making a draft RVMP, a Committee must have regard to specified statutory requirements relating to vegetation conservation and soil and water management. RVMPs are formally ‘made’ through a process of public exhibition and consultation, followed by approval by the Minister for Land and Water Conservation. The Minister for the Environment is required to inspect draft RVMPs to assess their adequacy for threatened species protection and may make recommendations, which must be taken into account by, but are not binding on, the Minister administering the NVCA.

The provisions relating to RVMPs and their administration have significant potential to affect PNF because in the future they will contain the rules affecting the industry. These rules are likely to vary from region to region, perhaps creating problems for companies operating across several regions, and particularly for larger companies operating in numerous regions across the state. Further, the ongoing uncertainty associated with the scope for future amendment of plans are said to be a concern to private forest owners.

Eighteen RVMP regions had been proclaimed by May 2000, and it is proposed to make a total of approximately twenty RVMPs. Only two RVMPs had been made at October 2003 with another ten plans at draft stage.

The rules for clearing where an RVMP is in force

In a region where an RVMP is in force, there may or may not be a requirement for consent to be obtained for a clearing proposal. The answer depends on the content of the RVMP – which is ultimately signed off, or ‘made’, by the Minister for Land and Water

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120 NVCA, s.51(4).
121 NVCA, s.27.
122 NVCA, ss.29-31,33.
123 NVCA, s.32.
124 NVCA, s.35(1).
Conservation. With the eventual making of RVMPs to cover the State, the requirements for consent for PNF and other forms of vegetation clearing may vary widely across the State - according to the applicable plan. The Act provides that an RVMP may either require development consent to be sought for vegetation clearance in specified areas indicated in the Plan, or it may not. In other words, requirements for development consent are optional. Where a plan does not require consent for clearing, any clearing must still be carried out in accordance with other provisions of the plan. In practice, plans have been devised to take what is effectively a zoning approach, with land-use controls varying according to the classification of the land. Principally, the rules for vegetation clearance in an RVMP area depend on whether the proposed clearing relates to an area of ‘regional protected land’, within which consent will normally be required. For example in the Riverina Highlands RVMP, PNF is exempt on land specified as “unclassified land”, that is, land that is not in a linear regional reserve or regional protected land.

Development can be classified in a Plan as development not requiring consent (exempt development), or development permissible with consent, or prohibited development. Exempt development must follow the rule in s.76(2) EPAA, that it is: “development of a specified class…that is of minimal environmental impact”. If a Plan makes an exemption that, as a matter of fact, will have more than minimal impact, that exemption is invalid.

Implications of RVMP-making for EPIs

The enactment of the NVCA has commenced a process of reducing the role of local government in controlling vegetation clearing. The implications of the making of RVMPs on the operation of EPIs, such as Local Environment Plans, are drastic for local government. In a region where an RVMP is in force, its rules about clearing will override any inconsistent requirements of other EPIs such as LEPs and REPs that “prohibit, restrict or otherwise affect that clearing” - even requirements introduced in subsequent LEP

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128 NVCA, s.33.
129 NVCA, s.18.
130 NVCA, s.18(2).
132 This is referred to in a note attached to NVCA, s.25(3).
133 EPAA, s.76(3).
amendments.\textsuperscript{135} This rule applied regardless of whether or not the RVMP in question requires development consent for clearing.\textsuperscript{136} The strength of these inconsistency provisions may in some circumstances lead to a reduction in compliance requirements for the PNF industry. It is possible that the PNF industry will in some LGAs go from being required to obtain consent under an LEP, to not having to obtain consent at all, once RVMPs are made. (On the other hand, in some circumstances where the LEP does not require consent for PNF, the making of an RVMP may introduce requirements for consent where they previously did not exist.) If an RVMP does not require consent, PNF will not be regulated at all, unless a pollution control licence is required making the EPA a determining authority under Part 5 \textit{EPAA} (which, in practice is extremely unlikely) or a Part 6 \textit{TSCA} licence is required to harm or pick threatened species. These other forms of regulation are addressed in Chapters 8 & 9.

If an RVMP is made that does not require consent for clearing or PNF there is little that can be done in creating future EPIs to override its provisions.\textsuperscript{137} However, there is scope for councils to make representations to the Minister administering the Act to influence him to apply provisions in the \textit{NVCA} to exclude,\textsuperscript{138} or partially exclude,\textsuperscript{139} their local government area from the operation of the Act. In this way the operation of provisions of the applicable LEP can be revived.

Nevertheless, the Act contains a number of provisions restricting the making of RVMPs, to prevent reductions in environmental protection requirements. Firstly, where there is an applicable EPI making provision for native-vegetation protection, the Act states that the RVMP must provide “at least the same level of protection and conservation in relation to native vegetation”.\textsuperscript{140} In other words, if consent is required under the LEP in a particular zone, it must similarly be required under the RVMP. This is of little comfort if the applicable LEP was inadequate for the purpose of ensuring ESFM, eg. not requiring consent for PNF in any zone. Secondly, RVMPs must provide for adequate protection of core koala habitat within the meaning of SEPP 44 for koala-habitat protection.\textsuperscript{141} Finally,
RVMPs cannot oust the operation of SEPP 14 (coastal wetlands) or SEPP 26 (littoral rainforest), or critical habitat for threatened species, as these areas are not subject to the NVCA. 142

The RVMP process provides a useful tool to move NSW away from micro-level, project-based assessment. But at present there is a danger that the process may not be a particularly strong one for biodiversity conservation on a regional basis. Controls must be instituted to ensure that it actually takes into account the need for protection of under-represented and rare/threatened forest ecosystems, rather than allowing increased logging under new RVMP exemptions for PNF. Further it must be amended to prevent its present capacity to exclude the operation of provisions of the TSCA such as s.91 licensing.143

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142 NVCA, s.9.
143 NVCA, s.20(1)(a).
Figure 2 Operation of the NVCA where there is an RVMP in place

- **Consult text of RVMP**
  - **Is the land or the proposed form of clearing exempted under the terms of the RVMP?**
    - **NO**
    - **YES**
      - *Landholder may proceed without notifying Department*

- **Is clearing prohibited by the RVMP in the area concerned?**
  - **YES.**
    - Plantations Act cannot remove this requirement (s.16(3))
  - **NO**

- **Is Development consent required under the RVMP?**
  - **YES**
    - *Clearing only in accordance with terms of RVMP*
  - **NO**

- **Do other controls apply?**
  - **YES**
    - Consent process involves consideration of likely impact on threatened species and other environmental factors listed in s.79C EP&A Act
  - **NO**

- **Clearing must be in accordance with terms of consent and terms of RVMP**
  - **Is it regional protected land?**
    - **NO**
      - **LEP cannot apply to restrict clearing**
    - **YES**
      - Development consent may or may not be required depending on content of RVMP

- **Does a local government exemption apply?**
  - **YES**
    - TSCA licensing is not required (s.20(1) NVCA)
  - **NO**

- **Check if SEPP 44 (koala habitat) consent, or water pollution licensing, or consent for destruction of Aboriginal heritage is required. (s.20 NVCA)**
  - **NO**
    - Codes of practice cannot apply on regional protected land.
  - **YES**
    - RVMP excludes LEPs, TPOs and most SEPPs which would restrict clearing

- **However, if either SEPP 14 (wetlands), or SEPP 26 (coastal rainforest) apply, then development consent may be required.**
The effect of RVMPs on clearing exemptions

Once an RVMP is made for an area, the NVCA states that the exemptions that were carried over from SEPP 46 into the NVCA (e.g., the PNF exemption) cease to have effect on that land.\textsuperscript{144} A committee can propose an entirely new suite of exemptions for inclusion in the final RVMP, subject to Ministerial approval. Although early publicity material from Department of Land and Water Conservation (DLWC) on the NVCA suggested that all the existing exemptions would be contained in RVMPs,\textsuperscript{145} the Act permits committees to redefine or delete any of these, and to draft alternative or additional exemptions. Although this may suggest an ‘open slather’ approach to inclusion of new exemptions, some safeguards apply to the making\textsuperscript{146} of RVMPs.\textsuperscript{147}

**PROTECTED LANDS PROVISIONS OF THE NVCA**

Another key aspect of the regulatory framework for PNF created by the NVCA is the ‘protected land’ provisions which apply to certain steep slope and riparian lands in NSW. These were carried over from the *Soil Conservation Act 1938* with some modifications.\textsuperscript{148} ‘Protected land’ is land mapped as such by the former Commissioner of the Soil Conservation Service as meeting one of three criteria: (1) it is steep land, being generally steeper than 18 degrees, or (2) land within 20 m of “prescribed streams” or (3) land mapped as “environmentally-sensitive land” requiring special protection.\textsuperscript{149} The effect of the NVCA on the third category, environmentally sensitive land categorised as ‘State-protected land’ is of critical importance. The protected lands provisions frequently apply to PNF, particularly in the North Coast, because a large percentage of the commercially viable, private-land forest estate is sufficiently steep to be mapped as protected land.\textsuperscript{150}

\textsuperscript{144} NVCA, Schedule 4, Clause 3(3).
\textsuperscript{145} DLWC (1998) *Native Vegetation Conservation Act – A New Era for Native Vegetation Management (No.5); Exclusions and Exemptions*, September, DLWC, Parramatta, at 1.
\textsuperscript{146} NVCA, s.33.
\textsuperscript{147} These include (1) the fact that a range of community representation exists on the RVM Committees (2) that prior to the making of RVMPs by the Minister, there is a rather involved draft RVMP process, which includes public notification and consultation. NVCA, s.28-30. Further, RVMPs cannot be weaker than relevant LEPs: NVCA, s.27(3), see Chapter Nine.
\textsuperscript{148} Division 2 of Part 4 of the *Soil Conservation Act 1938*, NVCA, s.4, 7.
\textsuperscript{149} Soil Conservation Act 1938, s.21B(1); NVCA, s.7(1)(a) –(c).
\textsuperscript{150} Interview, Dr Ian Hannam, DLWC, 15 January 1998, Parramatta office (in person); Interview, Mr Bob Attwood, DLWC Northern Region, 5 October 1999, by telephone.
The NVCA divides land previously mapped as ‘protected land’ into two sub-categories: ‘State-protected land’, and ‘regional-protected land’, according to whether or not the land is subject to a RVMP. ‘State-protected land’ includes any land previously defined as ‘protected land’ under the SCA, plus any additional areas identified by the Minister by Order.

In terms of PNF, the main reason for the importance of the provisions in practice is because the PNF exemption is not available on State-protected land. This is because the NVCA exemptions were carried over from SEPP 46, and that policy did not apply to protected land. Therefore, where there is no RVMP in force, development consent is automatically required to clear vegetation on State-protected land. Neither codes of practice nor property agreements can remove this requirement. Where an RVMP is in force, development consent may or may not be required to clear on protected land, depending on the terms of the Plan.

The role of protected lands provisions

In 1995, Dr Hannam of DLWC wrote that the protected lands provisions provide a “significant contribution” to the conservation of private forests in NSW. The provisions made a contribution towards ESFM by requiring authorisation of PNF on this particular land tenure. It remains to be seen whether with the making of RVMPs, the

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151 NVCA, s.7.
152 NVCA, s.4.
153 NVCA, s.4(1).
154 NVCA, s 4, 7(1).
155 Farrier et.al. (1999) above n 32 at 369.
156 The SEPP 46 exemptions (which were contained in Schedule 3 of SEPP 46) are carried over into the NVCA by NVCA, s.68, and Schedule 4, clause 3(2).
157 SEPP 46, cl.3(c) exempted ‘protected land’ from the operation of SEPP 46. ‘Protected land’ within the meaning of SCA, former s.21AB. DLWC officers confirmed this interpretation in interviews: Mr Bob Attwood, DLWC Northern Region, Grafton, 5.10.99.
158 Previously an authority was required under s.21D of the SCA to “destroy timber on protected land”.
159 NVCA, s.21(1)(b), 22(2)(b).
160 NVCA, s.41(5).
161 Statements about the contribution of the protected lands provisions must be tempered against other considerations. Importantly, the protected lands provisions were contained in legislation aimed at soil management rather than forest or vegetation management. The provisions were originally introduced for the purpose of preventing land degradation and to achieve soil conservation. These provisions were later amended to provide the capacity to achieve these objectives via the protection of native vegetation. With the passage of the EPAA in 1979, the

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NVCA will continue the same provision for ESFM that the protected lands provisions used to provide.

There are three major issues regarding the RVMP-making process for the protection of areas which were previously mapped as ‘protected land’ under the Soil Conservation Act. One is the possibility that the RVMP process will involve the de-listing of areas of protected land. The second – related to the first, but different - is the possibility that the RVMP process could lead to the removal of requirements for authorisation or consent to clear vegetation on protected land. A third is whether there are flow-on implications regarding protected land status in relation to the availability of the PNF exemption in the NVCA. These issues are addressed in turn below.

The first issue concerns the conversion of ‘state-protected land’ to ‘regional-protected land’. By way of background, areas that were previously mapped as ‘protected land’ under the Soil Conservation Act automatically became ‘State-protected land’ with the commencement of the NVCA. Upon the making of an RVMP, there is no automatic conversion of ‘State-protected land’ to ‘regional-protected land’. The Act says that areas of State-protected land ‘may’ be listed as regional-protected land. It does not specify that this ‘must’ take place.\textsuperscript{164} This was the intention of the legislative drafters, according to DLWC officers interviewed.\textsuperscript{165} Where land is identified as regional-protected land by an RVMP, it ceases to be State-protected land, (if it was previously identified as such).\textsuperscript{166} However, if ‘State-protected land’ is not defined as ‘regional-protected land’ under a Regional Plan, it is no longer ‘State-protected land’, because of the operation of the RVMP.\textsuperscript{167} In this way, a Regional Plan could involve the de-listing of significant areas presently mapped as State-protected land.\textsuperscript{168}

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\textsuperscript{164} NVCA, s.25(6).
\textsuperscript{165} Interview, P.Wright, DLWC, 29.6.00, following discussions with Mr Peter Houghton, Manager, Land and Vegetation Unit, Sustainable Land and Coastal Management (Information and Planning), DLWC.
\textsuperscript{166} NVCA, s.7(4)(a).
\textsuperscript{167} NVCA, s.7(4)(b).
\textsuperscript{168} NVCA, s.7(4)(b).
Secondly, a key implication of any areas being removed from protected land status by RVMPs, if this does eventuate, is that development consent may no longer be required to log on these lands. This is important as logging of protected lands involves logging particularly environmentally sensitive areas such as steep slopes (with potential for soil erosion and water pollution), and riverine vegetation. Without a requirement for departmental authorisation, there is no capacity to either refuse such proposals, or to impose conditions on proposed logging. However this is not the case under the Riverina Highlands RVMP.\(^{169}\)

The third issue regards the effect of RVMPs on the availability of exemptions for PNF. The de-listing of protected land could possibly result in wider availability of the PNF exemption under the NVCA. This is because the operation of SEPP 46 exemptions such as the PNF exemption ceases upon the gazettal of an RVMP. Some RVMPs may retain a version of the PNF exemption, and some may choose not to make it available. It is impossible at this point to predict the impact of the RVMP process on exemption availability, but the Riverina Highlands Plan retains a similar PNF exemption, albeit one that is more detailed (Appendix 6.2).

**CONCLUSION**

The NVCA has several features suggesting *prima facie* that it can assist in the task of achieving ESFM on private land. The principal factor is that development consent is required for all types of vegetation clearance, including PNF, enabling regulation, control or refusal of proposals with potentially unacceptable impacts.

Advocates of alternatives to conventional regulatory approaches must note that the enactment of the NVCA and the replacement of SEPP 46 has also reduced reliance on the regulatory ‘consent’ approach, and has enabled resort to more flexible mechanisms (property agreements, COPs, and RVMPs) and incentives (through the statutory Native Vegetation Fund).

However, the Act retains four principal defects, which suggest that ESFM may be unattainable other than in exceptional cases. The primary difficulty is with the

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exemptions such as the PNF exemption and the 2 hectares per annum exemption. These 
militate against the attainment of ESFM (similarly, consent is not automatically required 
under a code of practice or RVMP). Due to a historical quirk, rather than by design, the 
PNF exemption is not available for State-protected land.\footnote{NVCA, s.22.}

The second defect is that in spite of an objective of preventing inappropriate clearing, the 
Act fails to provide criteria by which “inappropriate clearing” can be identified. This is in 
contrast to the first version of its predecessor, SEPP 46, and to South Australian 
legislation, both of which specified ecological principles and criteria against which 
clearing applications could be assessed.\footnote{South Australian legislation also contains a statutory presumption against the grant of development consent for 
clearing affecting particular specified forms of native vegetation, i.e., clearing which offends statutory Principles of 
Native Vegetation Conservation). SA Native Vegetation Act 1991, s.29 (1)(b) & Schedule 1.} An associated problem is that the consent 
process is not sufficiently weighted in s.79C \textit{EPAA} in favour of environmental matters. 
Although Part 4 decision-makers must consider the five factors listed in the \textit{EPAA}, as 
well as the objects of the \textit{NVCA}, there is little assurance that decision makers will place 
environmental considerations foremost; in short, ESD is not a required outcome.

A third problem is the fact that the Minister administering the Act is the consent 
authority. The legislation fails to provide an independent consent authority. South 
Australia, by contrast, has a Native Vegetation Council which guards against the 
politicisation of the consent process.\footnote{Native Vegetation Act 1991 (SA), ss. 6-7.} Arguably this reduces the risk that applications to 
clear native vegetation will be approved on the basis of pressure, lobbying and local 
political sensitivities.

A fourth problem is that DLWC is required to regulate the PNF industry with a statute 
not designed specifically as a forestry-management instrument. The \textit{NVCA} contains no 
specific provisions for assessment and subsequent monitoring of PNF operations, such 
as requirements for the preparation of Timber Harvesting Plans (THPs) and other 
planning documents. Even if THPs were required to be prepared for PNF operations, 
the Act does not provide mechanisms for devising, approving and auditing such plans, 
other than by requiring development consent according to generic criteria of the \textit{EPAA}. 

\footnote{NI\textit{VCA}, s.22.}
Some of these issues are further explored in Chapter Seven, which presents research findings regarding the implementation of the NVCA in relation to PNF.
Chapter Seven

IMPLEMENTATION OF THE NATIVE VEGETATION CONSERVATION ACT 1997 (NSW) IN RELATION TO PNF

This Chapter presents and discusses research findings regarding the implementation of the Native Vegetation Conservation Act 1997 (‘NVCA’) in relation to the PNF industry in NSW during the study period. Discerning the impact of this Act is a crucial aspect of examining the application of NSW environmental laws to PNF.

The Chapter describes issues that have arisen in a day-to-day context of applying the NVCA to PNF. This provides some background to later suggestions for law reforms necessary for ESFM to be achieved.¹

The research objective is to test the hypothesis that in many instances, the PNF industry in NSW was ‘under-regulated’ during the study period. This involves the propositions that (i) the industry was subject to a legal framework inadequate to deliver ESFM, and (ii) that the law was inadequately implemented and enforced. The previous Chapter has already argued that in a number of senses the NVCA, as part of the legal framework for PNF in NSW, is inadequate.

This chapter does not attempt to comprehensively survey or document the decision-making and administrative behaviour of the DLWC in relation to the NVCA as a whole, nor in relation to all facets of the Act’s application to PNF during the study period.² Instead, it focuses on DLWC’s approach to PNF in DLWC’s coastal organisational regions - North Coast, Hunter and Sydney-South Coast.

Key findings of this Chapter were that the volume of sawlog production from PNF activity occurring in Northern NSW during the latter part of the study period was estimated by a senior DLWC regulator from the North Coast regional office to make up

¹ Whilst noting that law reform, of itself, will not automatically lead to the adoption of ESFM practices.
² For example, the implementation of incentives and voluntary conservation mechanisms are not discussed due to the focus of this thesis on the implementation of regulatory controls.
to 50 per cent of total sawlog production in that Region from all tenures. Secondly, it was found that all PNF logging outside protected land (ie. 100% of operations on that land classification) in the North Coast and Hunter regions claimed the PNF exemption, regardless of the type of logging. Therefore it was not regulated by the NVCA. Even in spite of the operation of the exemption in the North Coast and Hunter regions, PNF was the most important cause of native vegetation “clearing” within the category of all types of approved vegetation clearing activity between 1999-2001 inclusive. If PNF logging under exemption were to be included in these figures showing the most common intended land use after clearing activity, then it is abundantly clear that PNF would have been, by a considerable margin, the most important cause of native vegetation clearing in those Regions.

THE PNF EXEMPTION IN PRACTICE

Examination of the impact of the PNF exemption is crucial to a full picture of how the NVCA has been applied, interpreted, and administered to date in relation to the PNF industry. The previous chapter briefly described the exemption, and its precise meaning will be discussed below.

Let us consider the availability of the PNF exemption. When is it available, and to whom? Persons conducting forestry operations permitted by the exemption are not required to obtain development consent. In Chapter Six we saw that the exemption is not available on State protected land. Elsewhere, the Act provides little guidance regarding the process to be applied in terms of applying for exemptions, other than to inform us that types of clearing described in Schedule 3 of SEPP 46 are “clearing that is exempt from any requirement ... for development consent”. There is no other detail regarding the process to be followed by landholders seeking to rely upon exemptions. In particular, the Act contains no requirement that landholders must apply for exemptions.

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3 Interview, Mr. B. Attwood, interview, in person, Grafton DLWC Office, 23.11.00.
5 NVCA, Schedule 4, clause 3(2).
6 Under the Pesticides Act 1999 (NSW), s.115, where exemptions must be sought from the regulator.
The Act simply provides that a person must not clear native vegetation except in accordance with development consent.\(^7\) Thus the Act allows those who wish to use an exemption to make a ‘self-assessment’ as to its scope, and to lawfully commence clearing or logging under exemption without informing DLWC.\(^8\) The interpretation of exemptions is effectively left to landholders. Many are likely to find this task difficult, because of the complex nature of most exemptions, and their ambiguous drafting. Some respond to this uncertainty by seeking the assistance of DLWC, with the definitional uncertainty acting as an informal notification mechanism. If the landholder asks DLWC whether a development application will be necessary, a site visit usually takes place, and during that meeting DLWC will explain the factors to be applied in order to determine if the PNF exemption is available.\(^9\)

**Interpretation of the PNF exemption**

Let us consider the task facing a landholder in determining the boundaries of the PNF exemption. The exemption, headed *Private Native Forestry*, applies to:

> The clearance of native vegetation in a native forest in the course of its being selectively logged on a sustainable basis or managed for forestry purposes (timber production).\(^10\)

There are two phrases open to diverse interpretations – “selectively logged on a sustainable basis”, and “managed for forestry purposes”. For example, the meaning of the term ‘sustainable’ is a matter of dispute amongst ecologists, foresters and others. Further, it is not clear whether ‘sustainable basis’ refers to sustained timber yield or to ecological sustainability.

In order to resolve difficulties surrounding the Act, DLWC has produced a range of explanatory literature, and distributed it throughout rural areas. Some of this material attempts to explain the activity-based exemptions, including the PNF exemption. In that literature, DLWC encourages landholders to apply a self-assessment approach to the application of the exemptions. A detailed publication entitled *Definitions and Exemptions* was first published in April 1996 in order to clarify the scope of the SEPP 46

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\(^7\) NVCA, s.21.


\(^9\) Interview, Mr. Rob Adam, DWLC, Sydney-South Coast office, 19.6.02, by telephone; DLWC (1999) *Guidelines and Application Form for the Assessment of Clearing Applications under the Native Vegetation Conservation Act 1997* (booklet for public distribution), DLWC, Parramatta, 22pp.

\(^10\) SEPP 46, Schedule 3, Clause (6).
exemptions. Now into a second edition, the booklet expounds DLWC’s view of the scope of the various exemptions carried over into the NVCA.\textsuperscript{11} It advises, “it is the responsibility of the land owner to be familiar with the exemptions and to ensure that the proposal to clear...is within the parameters of a particular exemption(s).”\textsuperscript{12} If a landholder’s assessment of the scope of the PNF exemption is in fact incorrect he/she could, theoretically, be liable to prosecution for clearing without consent.

In relation to the applicability of the PNF exemption, \textit{Definitions and Exemptions} suggests:

\begin{quote}
To satisfy this exemption, there should be clear evidence of the implementation of the various types of native forest land management practices that are consistent with selective logging on a sustainable basis or evidence of an area of native forest being managed for forestry purposes.\textsuperscript{13}
\end{quote}

Other than suggesting the need for evidence of ongoing management, that statement largely re-states the exemption. The booklet goes on to divide the exemption into two sub-categories, named Option I and Option II. In order to claim Option I, “selective logging on a sustainable basis”, DLWC suggests:

\begin{quote}
It would be reasonable to expect a private native forest owner to be able to furnish evidence of the application and accomplishment of these sustainable land practices through some form of forest management plan or the like.\textsuperscript{14}
\end{quote}

\textit{Definitions and Exemptions} suggests that criteria for evaluating whether a forest is being “selectively logged on a sustainable basis” include logging which maintains habitat value and an uneven aged forest structure over time, which retains greater than 50 per cent of trees greater than 40 centimetres diameter at breast height (‘dbh’) in each logging cycle, and leaves the forest in a state from which it can recover to a similar structure before the next cutting cycle.\textsuperscript{15}

In order to claim Option II, “being managed for forestry purposes”, DLWC suggests:

\begin{flushleft}
\textsuperscript{13} DLWC (1997) above n 11 at 17.
\textsuperscript{14} DLWC (1997) above n 11 at 18.
\textsuperscript{15} DLWC (1997) above n 11 at 18.
\end{flushleft}
On one interpretation, Option II was designed to provide an exemption for incidental management practices as well as logging, in order to include thinning, roading, burning, spraying, and fencing within this particular category of exempt clearing.

DLWC’s formal policy position regarding the PNF exemption, expressed in the Definitions and Exemptions booklet, is that it applies only to “selective logging on a sustainable basis”. In practice, a common departmental shorthand for the exemption observed during interviews was “the sustainable private forestry exemption”. Departmental officers have stated during public forums on the Act and PNF, that the exemption applies only to sustainable forestry, asserting that Option II, as well as Option I, contains a sustainability requirement. However, this is not explicitly stated within the text of the exemption, only in explanatory literature. In relation to Option II, “managed for forestry purposes (timber production)”, the Definitions and Exemptions booklet states: “managed for forestry purposes’ is taken to be managing native forest on a sustainable basis whilst allowing timber production.” However it does not set out specific indicators of sustainability in relation to this Option. The booklet asserts that in order to be able to qualify for either limb of the exemption, private forest owners must prepare forest management plans. The emphasis of the explanatory booklet, on proving and recording evidence of ongoing management over time, implies that opportunistic logging operations by visiting contractors that involve no ongoing intention of silvicultural management or ongoing commercial relationship with the landholder concerned may not claim the exemption.

A literal reading of the exemption text reveals that its latter limb, Option II (‘managed for forestry purposes’), does not contain a sustainability requirement, despite the

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18 Interview, Mr. Bob Attwood, DLWC, North Coast Region Office, Grafton, 29.11.00. (in person, notes on file).
19 Notes on a Speech given by Mr. Robert Adam, DLWC, Sydney-South Coast region, DLWC n proposed BOS Best Operating Standards for Private Native Forestry (PNF) under the Native Vegetation Conservation Act on 21 February 2001, Candelo, Southern NSW at ANU Forestry workshop, “The Evolving Legislative and Regulatory Environment for the Management of Private Native Forests in NSW”.
21 These include that logging only removes 50% of stems 40cm diameter at dbh, etc., DLWC (1997) above n 11 at 18.
explanation to that effect in *Definitions and Exemptions*. This interpretation conceivably allows virtually any form of logging or forestry under the exemption, including clearfelling and cable logging, as long as there is some evidence of ongoing management intent fitting the test of “managed for forestry purposes”. Opportunistic one-off logging converting forest to other (non-forestry) land uses - such as agriculture, real-estate subdivision, or plantation establishment - would not obtain the benefit of the exemption as there is no suggestion of ongoing management.

On another interpretation even these activities will not be regulated, according to internal DLWC publications. The internal *Review of Exemptions* report opined that: “the wording suggests that non-sustainable forestry is also permissible under this exemption ... Due to the location of “or” in the exemption there is no other interpretation possible.” [i.e., “or managed for forestry purposes”]. The Compliance Branch was of the opinion that: “This exemption in effect, allows any clearing of native forests without consent so long as timber is being produced”.

Thomson (1999) some further observations regarding the application of the NVCA:

Anecdotal evidence from Department of Land and Water Conservation (DLWC) officers suggests that the interpretation of this legislation is somewhat vague in practice. [...] Given this background, it is not surprising that the procedures followed by land owners and saw-millers/contractors in terms of logging existing timber range from the well planned and documented to virtually *ad hoc*. There is considerable confusion at present about what their responsibilities are. Discussion with local saw-millers indicated that while some consulted extensively with DLWC and prepared harvesting plans for their activities on private land, others have not, and have relied on years of logging experience and common sense to ‘do the right thing’... In summary, the legislation and on-ground logging practices surrounding private native timber harvest are something of a ‘grey area’.

The present exemption system is not precautionary in nature. Without a notification mechanism, if clearing takes place on the basis of an erroneous interpretation of an exemption, the error cannot be readily reversed. Although land-holders would be liable to prosecution for unauthorised vegetation clearance, this is an ‘after the event’ response, relying for its effectiveness on resolve to prosecute. Where landholders perceive a low

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22 The booklet is unlikely to be binding as it will not fit the definition of extrinsic materials in s.34 *Interpretation Act 1987 (NSW)*.

23 Interview, Mr. Terry Moody, Chair, Richmond RVC, 18.6.02, in person, DLWC, Bridge St., Sydney.


risk of detection and punishment, some will decide to make adventurous or excessive exemption claims.

The unresolved difficulties of interpretation retained in the NVCA and its PNF exemption are likely to encourage another group of landowners to ignore the Act and carry on with ‘business as usual’ without contacting DLWC or applying for development consent. Whether landowners will seek Departmental advice depends on a variety of sociological and psychological factors such as personal values (e.g. the extent of their acceptance of the regulation of activities on private land) and perceptions as to the level of risk of prosecution (and the likely severity of penalty) associated with clearing without notifying DLWC. For the Northern Region, the notion of an informal notification mechanism is not convincing. Interviews with staff of that region suggested that only a minority of PNF operators in that Region who log under the exemption contact DLWC regarding their proposals. It is quite probable, indeed likely, that logging contractors, as repeat players in the system, will advise the landholder that in their experience, all PNF (except on protected lands) is exempt and thus no contact will be made with DLWC. The breadth of the phrase within the exemption “or managed for forestry purposes”, combined with the title “private native forestry” rather than “sustainable private native forestry” also tend to suggest that all PNF is exempt. Findings in relation to the popularity of the exemption are reviewed below.

The available evidence presented in this section suggests the PNF exemption is the greatest single legislative impediment to the attainment of ESFM in the PNF industry in NSW. Although the NVCA Act, in its objects clause, refers to the principles of ESD, it is self-evident that the precautionary principle cannot be implemented in a regulatory environment dominated by self-regulation and self-assessment as to the application of the law. The Department’s administrative approach taken during the study period was to suggest a self-assessment methodology be applied by landholders in relation to the application of the PNF exemption. This administrative approach appears to be incompatible with the application of the precautionary principle. Under a self-assessment approach there is no regulatory supervision of exemption claims. There is substantial evidence that it is difficult for landholders and even administrators to determine whether the development consent requirements of the NVCA apply in given situations, or to

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28 Interview, Mr. Bob Attwood, North Coast DLWC office, Grafton, 29.11.00.
particular activities. To rely upon landholders to seek legal advice regarding this question – the interpretation of exemptions – is unrealistic and therefore is unlikely to be sufficient to achieve a precautionary approach to vegetation management. It risks vegetation clearance based on mistaken or erroneous interpretations of exemptions. To be effective, self-assessment policies require the Department to communicate to the regulated community an unequivocal willingness to commence enforcement action where necessary. (see: Chapter Eight).  

**RELIANCE ON THE PNF EXEMPTION**

*The extent of reliance on the PNF exemption*

The number of forestry operations that used the PNF exemption during the study period is unknown, because of the lack of a statutory notification requirement. Extensive searches and inquiries failed to reveal any published or internal documentation on the extent of exempt PNF logging.  

None of the exemption-based forms of clearing are included in Departmental statistics showing total vegetation approved for clearing.  

As a whole, it is unknown what area of native vegetation was cleared in reliance upon any of the NVCA exemptions. Thus DLWC statistics showing total vegetation cleared with consent under-report the true extent of vegetation clearing in NSW, as they show neither legitimately exempt nor illegal clearing.  

Specifically in relation to the PNF exemption, interview research revealed that during the study period in the North Coast and Hunter Regions, apart from operations on ‘protected’ land, there were no applications for development consent under the NVCA by those involved in PNF in these Regions. This was because of widespread reliance upon the PNF exemption. Another way of expressing this proposition is that in those

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29 “Prosecution of alleged offenders is considered the last option to be used by the Department. The Department’s preferred approach is to focus on extension and education of the rural community…” Minister for Land and Water Conservation (2000) Letter to Ecological Society of Australia, February 2000.

30 Part of this search involved the lodgment of an FOI request with DLWC which was refused, and later refused on internal review.

31 This category of clearing is not included in regional or State-wide statistics showing the total amount of vegetation cleared under the ambit of the NVCA in any given year. DLWC website. <www.dlwc.nsw.gov.au>. This means that statistics released by the DLWC showing total vegetation cleared under consent under-report the true extent of native vegetation clearing in NSW.

32 This could be established by comparing satellite data on clearing against the official figures of area cleared under NVCA consents. This would provide a figure of clearing taking place (a) under exemptions and (b) illegally, without either consent or an applicable exemption.

33 Clearly, this could be established by comparing satellite data on clearing against the official figures of area cleared under NVCA consents. This would provide a figure of clearing taking place (a) under exemptions and (b) illegally, without either consent or an applicable exemption.

34 Interview, Mr. B. Attwood, Vegetation Resource Manager, interview, in person, Grafton DLWC Office, 23.11.00. Notes on file with author; Interview, Mr. S. Gowland, DLWC Hunter, 17.3.00.
situations where the PNF exemption was available for claim, it was claimed for 100 per cent of PNF operations, (i.e., a 100 per cent claim rate).\textsuperscript{35} This suggests that it is highly likely that intensive logging such as clearfelling took place under the PNF exemption in these regions.

If we assume that only a relatively small amount of PNF occurs on protected land, the implication is that most PNF logging in the North Coast and Hunter regions during the study period was not regulated at all under the \textit{NVCA}.

An indication of the extent of PNF logging occurring in the North Coast and Hunter regions during the study period could be derived from the figures for development applications for logging on protected lands. Even in spite of the considerable level of resort to the PNF exemption, in the North Coast and Hunter regions, PNF was the most important cause of native vegetation “clearing” of all forms of clearing activity in recent years (1999-2001). In the year 2000, PNF was the most significant land-use intention behind all forms of native-vegetation clearing applications received in the North Coast (87.5%), Hunter, and Sydney-South Coast regions, especially when clearing for plantation establishment is included.\textsuperscript{36}

PNF attained this prominence \textit{even though} PNF logging under exemption is not included in these figures. An indication of the volume of PNF activity now occurring in Northern NSW is that log production from private land was estimated by a senior DLWC regulator from the North Coast regional office to make up to 50 per cent of total sawlog production in that Region from all tenures.\textsuperscript{37} If PNF logging under exemption were to be included in these figures showing the most common intended land use after clearing activity, then it is clear that PNF would be, by a considerable margin, the most important cause of native vegetation clearing in those Regions.\textsuperscript{38}

One way to approach the question of the extent of exempt logging is to investigate the frequency of granting of development consent for PNF in the North Coast DLWC.

\textsuperscript{35} Note that the PNF exemption is not available on land classified as ‘protected land’, i.e. steep slope land, or land within 20 metres of particular rivers, or land mapped as particularly ecologically sensitive.

\textsuperscript{36} See: Appendix 7.1.

\textsuperscript{37} Interview, Mr. B. Attwood, interview, in person, Grafton DLWC Office, 23.11.00.

Region. Regional staff stated that there had been no applications to clear for forestry purposes on land that was not designated as protected land. The explanation was that most landholders already knew of the PNF exemption, or were advised of it by DLWC, and thus relied upon it in order to avoid lodging an application for development consent. Staff admitted that it is unknown how many times the PNF exemption had been claimed, given the lack of a notification mechanism in the Act.

An inspection of the DLWC North Coast Region’s register of applications under the NVCA at the Grafton Regional Office revealed that between January 1998 and October 2000 there were 103 applications to log on State protected land (SPL). Repeated inquiries received the response that the number of exempt operations in the same region in the same period was “unknown”. DLWC documentation suggests that “approximately 30% of the private forests and woodlands of the State” are mapped as protected land. It is not possible to provide an accurate estimation or indeed a precise figure at this point of the number of PNF operations relying upon the exemption during the study period in the region, because of the lack of a notification requirement and associated record-keeping.

Why was the rate of reliance on the exemption so high in the North Coast and Hunter Regions? There are two explanations. The first is that the high claim rate was the result of DLWC not constraining use of the exemption (either due to administrative incapacity or deliberate policy decision). The second explanation is that operating under an exemption (as opposed to obtaining development consent) is in the economic interests of the regulated industry, as it involves no delay or expense.

In other regions with a high level of PNF operations, such as river red gum logging within the Murray Region, surprisingly, there were no consents granted under the NVCA in 2000 and 2001, in spite of the fact that in at least some of that region riparian

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39 Interview (in person) and inspection of records supervised by Mr. Bob Attwood, Vegetation Resource Manager, Grafton Regional office of DLWC, 29.11.00.
40 Interview, Mr. Phil Redpath, Regional Ecologist, DLWC, North Coast office, 13.10.99.
41 Interview (in person) and inspection of records supervised by Mr. Bob Attwood, Vegetation Resource Manager, Grafton Regional office of DLWC, 29.11.00.
42 Interview, Mr. Bob Attwood, Vegetation Resource Manager, Grafton Regional office of DLWC, 29.11.00.
land is classified as ‘State protected land’. A VMO stated, “all [railway] sleeper-cutters are operating under the private forestry exemption.” It was confirmed that no applications for consent had been received from the industry in that region.

**Extent of unapproved PNF activity**

No data was available regarding the extent of unauthorised (i.e., illegal) PNF activity during the study period. A deductive approach would be necessary to estimate the extent of such PNF activity, given three possible categories of PNF activity: (a) forestry under NVCA consent, (b) exempt forestry and (c) unauthorised or illegal PNF.

Alternatively, the extent of unapproved clearing of all types (not just logging) could be estimated by examining remote sensing (i.e. satellite) data showing the full extent of clearing and deducting the area approved for clearing, and then making an estimated area of land cleared under exemptions. The relative proportions of land cleared without approval under exemption as opposed to cleared without approval unlawfully would remain unknown.

**Regional variations in implementation of the exemption**

The interpretation of the scope of the PNF exemption appeared to differ in the Sydney-South Coast Region. This region applied a strict definition as in the booklet *Definitions and Exemptions*, whilst the North Coast Region diverted from this policy position by allowing more intensive forms of PNF to claim the exemption. The explanation for this difference is that the volume of PNF activity occurring in the North Coast exceeds the available administrative resources.

Interviews with senior management of the Sydney-South Coast Region revealed the reasons for this region’s different approach to the exemption. They claimed that DLWC

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45 Interview, Ms Deanne Stephens, Vegetation Management Officer, Murray Region, Albury Office, 15.9.03, by telephone, notes with author. It was suggested that “not many operate on state protected land. Most choose not to go there because then they’d have to go to the trouble of getting consent.” However given that a number of participants in the industry applied for authorisation under the *Soil Conservation Act 1938* in order to log on protected lands prior to the commencement of the NVCA this raises the question of why no applications for consent under the new regime have been received, or whether these operations are taking place without authorisation.

46 Interview, Robert Adam, DLWC, Goulburn, 14.4.00 (by telephone).
uses the PNF exemption to extract higher standards of forestry practices from the industry. Whilst this suggestion might at first appear counter-intuitive, it was argued that this is possible because landholders wish to obtain the benefit of the exemption, (i.e. no development application), and therefore are willing to negotiate with DLWC and make concessions in relation to modification of logging practices in order to obtain the benefit of the exemption. The South Coast Region office was said to be in a position to negotiate upon such proposals, because the volume of PNF operations in the region is much lower than in the North Coast Region. The officer suggested – on the basis of conversations with senior officers of the North Coast Region - that North Coast allowed a high claim rate on the exemption because of lack of administrative resources to cover the far higher volume of PNF in that region.  

The use of bluff in negotiations with landholders appeared to be an important part of the Sydney South Coast Region’s strategy – which was to assert that the scope of the exemption is limited, and to state that consent is required for any form of forestry falling outside the category of sustainable selective logging. However, if the Sydney-South Coast Region’s interpretation of the exemption was subjected to legal challenge, it would possibly fail.

Environmental implications

The PNF exemption has significant environmental implications. Without a consent requirement there is no capacity to refuse or modify proposed logging. In short, there is no oversight by DLWC. It appears that the impact of the exemption to date has been significant. According to the comments of DLWC officers in an internal survey of regional offices, the exemption “allows high conservation value forest on private land to be logged without assessment” and it “may be used for clearfelling”. One office in the Barwon Region reported, “landholders use this exemption to log vegetation of high conservation value within corridor areas and riparian zones.” An internal Review of Exemptions described the PNF exemption as the NVCA exemption with the greatest environmental impact when measured by the estimated total area of land cleared. The

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47 Interview, Mr. Robert Adam, DLWC, Goulburn, 15.6.02 (by telephone), reference is to Mr. Bob Attwood, North Coast, Grafton office.
49 This will be possible because not all riparian areas are mapped as State Protected Land. DLWC (2000) Response by a Barwon Region Office to an Internal survey distributed by Soil and Vegetation compliance Branch Regarding Problems with Exemptions under the Native Vegetation Conservation Act 1997, 11pp, unpublished, DWLC, on file with author.
area cleared under the PNF exemption was estimated to be four times larger than the area cleared under the next most significant exemption.\footnote{DLWC (2000) Review of the Native Vegetation Conservation Act 1997 Exemptions (Internal Draft Report, unpublished), at p.12.}

Yet the PNF exemption is merely part of a wider problem with the Act’s 34 exemptions.\footnote{There are 34 exemptions under the NVCA that were carried over from existing legislation. When combined with exclusions of the NVCA from particular land tenures such as state forests and national parks, and clearing authorised under other legislation (e.g. Mining Act 1992), the total number of exempt situations climbs to sixty four. This figure has some potential to mislead, as most exemptions will not be either (i) simultaneously available to a given fact situation, or (ii) actually applicable to a given situation. Nevertheless, some exemptions (e.g. the SEPP 46 exemptions) can be claimed in combination. An internal report states “the SEPP 46 Minimal Tree Cutting and Rural Structures exemptions are used to remove larger trees, for example, and the Regrowth exemption is used to remove smaller vegetation”. DLWC (2000) above n 50 at 11.} DLWC’s compliance staff argued, “the exemptions [collectively] appear to be the most significant cause of inappropriate clearing”.\footnote{NPWS (2000) Submission to the Review of Exemptions under the NVCA, NPWS, unpublished at p.6.} The fact that forestry operations in potentially high-conservation-value private forest can occur whilst purporting to rely upon the PNF exemption is inappropriate and inconsistent with the State Government’s commitment to ESFM made in recent RFAs.\footnote{NE NSW RFA, clause 57.} Further, the exemption of PNF from consent requirements is inconsistent with the promise of RFAs to ensure that a Code of Practice would regulate private forestry.\footnote{DLWC (2000) above n 50 at 18. Although this report was initially leaked to the press, the NSW Parliament ultimately forced its public release by passing a motion for release proposed by R. Jones MLC: Minutes of Legislative Council, 7.3.01. The motion also forced the release of four other documents previously suppressed by DLWC: Smith, A. (1999) Guidelines for Application of Native Vegetation Conservation Act 1997 Exemption to Sustainable Forestry on Private Lands in NSW, a report to the DLWC by Setscan Pty Ltd, Armidale; DLWC (2000) A Scientific Basis for the Native Vegetation Conservation Act 1998: Objects and Exemptions, Soil and Vegetation Access Branch, November, Internal unpublished report; Bates, G. Franklin, N. (1999) Compliance with the Native Vegetation Conservation Act 1997 (NSW): Consultancy Report - Operational Phase, prepared for Department of Land and Water Conservation NSW; DLWC (2000) Spatial Database for Monitoring of Native Vegetation Activities in NSW: a report and GIS map showing approved clearing applications from the inception of the Native Vegetation Conservation Act in January 1998, Author: Emery, K; DLWC, Parramatta.}

Summary of findings regarding PNF exemption

An unpublished internal review of the exemptions (2000) stated: “Regional staff from all over the State have suggested that the PNF exemption is so broadly worded, and difficult to enforce that it should be removed.”\footnote{Interview, Mr. Bob Attwood, North Coast DLWC office, Grafton, 29.11.00.} A substantial number of DLWC officers involved in PNF regulation were interviewed and also referred to the ambiguity of the exemption and the consequent implications in the field. It was variously described as “very difficult”,\footnote{Interview, Anonymous DLWC officer, Head Office, in person, 6.10.00; Interview, North Coast DLWC officer, 31.3.99.} “vague”, “unenforceable”, and even “a joke”.\footnote{DLWC (2000) above n 50 at 5.}
Were difficulties with the exemptions foreseen? The exemptions were intended to reduce the obligations of landholders to apply for consent for relatively small areas of clearing for routine land management such as fencing and rural structures. They were also intended to reduce the overall workload placed on DLWC that would have applied if all clearing required consent.\(^58\) It is also plain that exemptions were devised to reduce the economic impacts on industry, thus reducing the backlash against the policy.\(^59\)

The ill-considered drafting of some of the exemptions probably arose because SEPP 46 was finalised in haste, after the Press prematurely obtained details of its imminent gazettal.\(^60\) In the author’s opinion, it is probable that the first limb of the PNF exemption (with its emphasis on sustainable selective logging) was drafted by the Department, but the broader second limb (“managed for forestry purposes”) was added at the last minute following lobbying from rural and timber interests. The impact of the exemptions has lasted longer than was originally planned, as the exemptions were only ever intended as a transitional provision, having effect until the gazettal of RVMPs.\(^61\) However, with the Plans experiencing considerable delays in production, the exemptions acquired greater longevity.

It is important to separate a critique of the legislation from critique of its administration. It is not reasonable to criticise DLWC for problems arising from statutory defects. It is important to emphasise the failure to date of the Parliament to clarify and amend the exemptions. Yet DLWC may be taken to task for failures to stop clearing that did not fit within the exemption. Another shortcoming is that DLWC has not established a State-wide system of auditing claims for exemptions from the Act. As a senior staff member in the Hunter Region stated: “We don’t do a check on claims for exemptions.”\(^62\)

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59 An interesting question for further research is to determine which parties actually put forward the proposition for exemptions, as SEPP 46 itself was designed as a regulation to be introduced by surprise in order to prevent a round of panic clearing that would have preceded the passage of an Act through Parliament. It is possible that the Sydney Morning Herald, in publishing an article foreshadowing the imminent release of the SEPP, on the basis of a leaked document, pressured the Department into gazetting the Policy earlier than it had planned.

60 The final text of the exemptions was drafted in what appears to have been a 2-3 day period, after the leaking of the news regarding the proposed gazettal of SEPP 46 and the consequent necessity to gazette the SEPP before either panic clearing set in or a political campaign against the instrument gathered momentum. Interview, Mr. R. Adam, DLWC, Sydney-South Coast, 18.6.2002, by telephone.

61 This is evident from the Second Reading speech and the fact that the exemptions are contained in a Schedule headed “Savings and Transitional Provisions”. DLWC (2000) Review of the NVCA Exemptions at p.5.

62 Interview, Mr. S. Gowland, DLWC Hunter, 17.3.00.
It may be imagined that difficulties with the PNF exemption will fade with the making of RVMPs. However the problems described above are likely to be perpetuated if similar versions of the PNF exemption are included within RVMPs that fail to take account of the hard lessons of administration during 1998 - 2002.

**Patterns of Consent Decision-Making by DLWC**

This section presents and analyses findings about patterns of development consent decision-making regarding PNF proposals. The emphasis is on the administrative behaviour of DLWC regions in the Eastern Division, particularly the North Coast and Hunter Regions. The emphasis of consent decision-making in those regions related to applications for consent for logging on protected land (where the PNF exemption was not available.)

*Findings*

This section examines data concerning patterns of decision-making by DLWC in relation to applications for consent for PNF between January 1998 and December 2002. Where relevant this data is supplemented with data regarding decision-making about all forms of vegetation clearing under the *NVCA*.

A key source was the public register of consents to clear native vegetation granted under the Act.\(^{63}\) However, the register provides insufficient detail, as it does not indicate the purpose for which consents to clear have been granted. A second vital source of additional data was publicly released by DLWC in 2001 following pressure from the Native Vegetation Advisory Council (NVAC) and conservationists. This information shows, among other things, the intended post-clearing land-use on a region-by-region basis (“Native Vegetation Clearing Reports: Proposed land use - Area approved for clearing”).\(^{64}\)

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\(^{63}\) *NVCA* s.15(3)(a) requires the D-G to keep a public register of applications for development consent to clear native vegetation.

\(^{64}\) This data is now released on the DLWC internet web-site at [http://www.dlwc.nsw.gov.au/care/veg/clearing.html.](http://www.dlwc.nsw.gov.au/care/veg/clearing.html). It also shows the proportions of total clearing in each region according to the various classes of vegetation cleared. These charts showed dominant species of vegetation.
Relative importance of PNF as a form of vegetation clearing

According to these Native Vegetation Clearing Reports, logging was the most significant form of clearing approved under the Act (compared to clearing for other land uses such as cropping or grazing) in the North Coast and Hunter regions during 2000-2002, and in Sydney-South Coast in 2002 (on an area basis). For example, in the North Coast region, PNF accounted for 81.2 per cent of the area for which approval to clear was granted during 2002.

Further, if taken together, applications for approval for logging and plantation establishment dominated the approval statistics during 2000-2002 in North Coast, Hunter and Sydney-South Coast regions. Applications for these land uses in the year 2000 amounted to 80.56 per cent of total area for which approval was granted in the Hunter Region, 87.5 per cent of the total area approved in the North Coast Region, 85.19 per cent of the total area approved in the Sydney-South Coast Region. These statistics do not show the actual number of applications that related to clearing in the course of PNF as opposed to clearing for agricultural purposes. They show the area affected by clearing for various intended land uses. (Table 4)

Relative regional importance of PNF

The most significant regions for PNF activity in NSW between 1998 and 2002, in terms of consents granted (by area), were North Coast, followed by Hunter, then Murray, and Sydney-South Coast regions. (See Map in Appendix 6.1)

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65 According to data from DLWC (DIPNR) there were no consents granted for plantation establishment in any region in 2002 or 2003, presumably due to the commencement of the approvals regime and Code under the Plantations and Reafforestation Act 1999. The Native Vegetation Clearing Reports for 2000 and 2001 indicate approvals were being granted for clearing for commencement of plantation activity. The reports are published on the Internet at <http://www.dlwc.nsw.gov.au/care/veg/clearing.html>. The NVCA provides (s.12(l)) that clearing that consists of plantation operations on an authorised plantation in accordance with the conditions of an authorisation under the PRA is exempt from the consent requirements of the NVCA.

Table 1 Area for which consent granted for PNF by DLWC region ( hectares) 67

<table>
<thead>
<tr>
<th>DLWC Region</th>
<th>1998 Area (ha)</th>
<th>1999 Area (ha)</th>
<th>2000 Area (ha)</th>
<th>% of total, 2000</th>
<th>2001 Area (ha)</th>
<th>% of total, 2001</th>
<th>2002 Area (ha)</th>
<th>% of total, 2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Coast</td>
<td>286</td>
<td>2080</td>
<td>7196</td>
<td>53.77</td>
<td>5259</td>
<td>55.36</td>
<td>2481</td>
<td>81.22</td>
</tr>
<tr>
<td>Hunter</td>
<td>1597</td>
<td>2623</td>
<td>3158</td>
<td>57.15</td>
<td>4220</td>
<td>40.63</td>
<td>2557</td>
<td>52.77</td>
</tr>
<tr>
<td>Sydney-South Coast</td>
<td>0</td>
<td>55</td>
<td>105</td>
<td>7.81</td>
<td>806</td>
<td>44.31</td>
<td>182</td>
<td>49.78%</td>
</tr>
<tr>
<td>Central West</td>
<td>47</td>
<td>0</td>
<td>27</td>
<td>0.3</td>
<td>131</td>
<td>2.45</td>
<td>219</td>
<td>2.17</td>
</tr>
<tr>
<td>Murrumbidgee</td>
<td>0</td>
<td>5</td>
<td>33</td>
<td>0.77</td>
<td>72</td>
<td>1.65</td>
<td>41</td>
<td>0.71</td>
</tr>
<tr>
<td>Barwon</td>
<td>327</td>
<td>530</td>
<td>19</td>
<td>0.27</td>
<td>0</td>
<td>0.0</td>
<td>0</td>
<td>0.0</td>
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<tr>
<td>Far West</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0.0</td>
<td>0</td>
<td>0.0</td>
<td>633</td>
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<tr>
<td>Murray</td>
<td>1311</td>
<td>67</td>
<td>0</td>
<td>0.0</td>
<td>0</td>
<td>0.0</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Total</td>
<td>3568</td>
<td>5360</td>
<td>10,538</td>
<td>13.54%</td>
<td>10,488</td>
<td>11.39%</td>
<td>6113</td>
<td>10.49%</td>
</tr>
</tbody>
</table>

Another interesting finding highlighted above is that Murray Region had no applications for PNF in 2000-2002, despite the existence of an active river redgum-logging industry on private land,68 and despite approvals for PNF in 1998. In other words, this data prima facie suggests that all such logging took place under the PNF exemption during 2000-2002. Further, the Table lends some weight to the proposition that the use of the PNF exemption increased in some regions, particularly the North Coast, Murray and Barwon.69

**Consent decision-making patterns specific to PNF**

When asked in face-to-face interviews, departmental officers at both the State-wide and Regional level stated that dis-aggregated statistics (i.e. showing consent decision-making regarding vegetation-clearing applications on an industry-by-industry basis) were simply not available. However these statistics were eventually obtained from the Hunter and

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69 However there are other possible explanations, including a decrease in the overall extent and intensity of PNF activity.
Sydney-South Coast regions and were derived for the North Coast by cross-checking other sources including the public register.

**Decision-making in North Coast Region**

No applications for PNF (or indeed any other form of clearing) were refused during January 1997 - August 1999 in the North Coast and Hunter regions. This pattern of decision-making continued during January - December 2000 in the case of the North Coast Region, with no refusals for any purpose, according to a close examination of the NVCA consent decisions register for 2000.

**Decision-making in Hunter Region**

In the Hunter Region, interview research and subsequent correspondence revealed the following information. Of 27 applications under the NVCA for PNF operations (between January 1998 and February 2000), all were granted consent with conditions. All these applications were for protected land. In relation to all forms of vegetation clearance proposals in the Hunter region, there were two refusals of consent during 2000.

**Decision-making in Southern Region**

In the Sydney-South Coast Region, between January 1998 and April 2002, there were only three applications for PNF - with one granted, and two pending (for selective logging on part-protected, part-unprotected land). The region made use of exclusion zones to protect threatened species, covering 13 per cent of area applied for. Earlier, under SEPP 46 (between August 1995 and December 1997), three applications for clearfelling (integrated harvesting including woodchipping) were refused.

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71 DLWC (2001) *Public Register of Clearing Applications under the Native Vegetation Conservation Act 1997: Records of all applications received for the period January to December 2000*. The register shows that there were 0 refusals in the North Coast region and 2 refusals of consent in the Hunter region during that period.

72 Interview, Mr. S. Gowland, DLWC Hunter region, 23.3.00. Notes on file with author.

73 Department of Land & Water Conservation (2001) *Public Register of Clearing Applications under the Native Vegetation Conservation Act 1997: Records of all applications received for the period January to December 2000*.

74 Interview, Robert Adam, DLWC, 14.4.00; Letter from DLWC to author, 13.4.00.
Research revealed that clearing for plantation establishment was the largest category of all clearing applications in 1998-2001, but in 2002, PNF was the most prominent category of all clearing applications.

**Treatment of all types of clearing applications by DLWC**

The pattern of granting consent in the North Coast and Hunter regions is consistent with broader patterns of administration under the Act to grant consent to most applications under the Act.

Up to October 2000, the great majority of all applications to clear vegetation under the NVC Act received approval. Of a total of 1525 applications, 91.6 per cent of those conclusively determined were granted consent with conditions (at October 2000). Only 2.16 per cent were refused, 1.57 per cent were rejected prior to formal assessment, and 4.65 per cent were withdrawn by the applicant. A breakdown of approval decision-making relating specifically to PNF across the state is not publicly available.

<table>
<thead>
<tr>
<th>Decision made</th>
<th>Number of decisions involved</th>
<th>Percentage of total decisions made</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rejected</td>
<td>24</td>
<td>1.57</td>
</tr>
<tr>
<td>Refused</td>
<td>33</td>
<td>2.2</td>
</tr>
<tr>
<td>Consent with conditions</td>
<td>1397</td>
<td>91.6</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>71</td>
<td>4.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1525</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

The Table shows that the dominant pattern of administration of the Act has been to grant development consent with conditions, rather than to refuse proposals. By comparison, the approval rates under SEPP 46 were lower, at 61 per cent of resolved applications in its first year ('95-'96), and 78 per cent in its subsequent year of operation.

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Table 2 Cumulative decision-making under the Native Vegetation Conservation Act, State-wide, from Jan 98 to Oct 2000 (all land uses)  

75 Clearing application decisions 1 January 1998 – 11 October 2000. From data provided by DLWC to author from statutory register of consent decisions.
The rate of refusal in other jurisdictions such as South Australia has historically been much higher - as high as 97 per cent at times (under the earlier Vegetation Management Act 1985 (SA), for those applications to clear relatively intact native vegetation with an understorey). More recent evidence shows that the refusal rate in SA is now lower, in 1998-1999 being only 30.45 per cent for broad-acre clearing, and 68.55 per cent for isolated tree clearing.

How are statistics that largely relate to land-clearing relevant to PNF? It is not possible to extrapolate from the DLWC’s approach to administration of the NVCA in general to its administration in relation to PNF. There is some possibility that its approach to PNF could be atypical. However it is possible to discern some overall patterns in the approach to the granting of development consents to clear native vegetation for all purposes. Few applications were refused or rejected, comprising only 4 per cent of the total applications during the period 1998-2000. We can assume that it is most likely that PNF proposals followed the general trend of the vast majority of applications receiving consent. The limited data above at p.18 supports this conclusion. Thus the treatment of PNF proposals under the Act depended in practice on the imposition of conditions on consents.

Cautions in interpretation of consent statistics

Interpretation of consent statistics must proceed cautiously. Firstly, the statistics tend to under-report the extent of refusal of vegetation-clearing proposals as they do not reflect the significant number of landholders who were interested in clearing vegetation, but who were dissuaded from making clearing applications for various reasons. These may

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76 DLWC (1997) Annual Report 1996-7, p.31. One possible reason for the increase in the rate of consent under SEPP 46 and the NVCA was the fact that SEPP 46 was amended twice, to reduce the stringency of environmental assessment required – with the list of environmental matters requiring mandatory consideration in assessment being considerably shortened. See also Hannam, I. (1995) Land clearance and State Environmental Planning Policy Number 46 Protection and management of Native Vegetation, paper presented to Planning Law and Practice Short Course University of NSW, 23pp.
77 State of the Environment Advisory Council (eds.) Australia: State of the Environment Report, 1996, an independent report to the Commonwealth Minister for the Environment, CSIRO Publishing, Melbourne, at 6-39. This Act was superseded by the Vegetation Act 1991, and under that Act, according to the SOE Report “the few applications for broadacre clearance have been refused.”
78 Native Vegetation Council (SA) (1999) Annual Report 1998-1999, Native Vegetation Council (SA), Adelaide, p.8. In the previous year (1997-1998) the extent of refusals was much lower still, with only 6.63% of broadacre scrub clearing refused, and 44.54% of isolated tree clearing refused: Native Vegetation Council (SA) (1998) Annual Report 1997-1998, Native Vegetation Council (SA), Adelaide, p.8. Note that these figures are calculated on a different basis in SA, and relate to the percentage of hectares permitted to be cleared v hectares for which clearing was refused.
79 Review of these decisions would require an examination of particular application files, a task which lies outside the scope of this research project.
80 Interview, Mr. Bob Attwood, DLWC North Coast Region, 13.10.99.
have included concerns about the application process, or because of a hard line taken by departmental officers, with certain landholders told informally that their clearing applications had little chance of success if not modified substantially - due to the conservation of significant vegetation.

Secondly, the statistics gloss over the possibility that the total area eventually sought for clearing may be less than the area that landholders originally sought to clear. This is due to the influence of pre-application site visits on the decision-making of landholders intending to clear vegetation. Thirdly, the area approved for clearing may be considerably less than the area that landholders applied to clear. Fourthly, another possibility - difficult to credit yet often stressed by DLWC in public relations - is that clearing may not proceed, despite successful applications for consent.

**Achievements of the NVCA**

In many instances the NVCA and its predecessor SEPP 46 prevented the clearing of important habitats. For example, according to Dr. Hannam: “In some cases the SEPP has been able to prevent the clearing of ‘old growth’ E.fastigata - E.riminalis forest for woodchip. In others, it has prevented the destruction of important habitat (e.g. Koala and Brush-tailed Phascogale). Further cases involve important remnants adjacent to nominated wilderness areas.”

Daishowa in a number of instances applied for approval to clear under SEPP 46 in order to conduct forestry operations on private land in Southern NSW and in at least three instances consent was refused.

**Conditions on consents**

DLWC has attempted to improve the standard and sustainability of PNF logging operations that require consent in a number of ways, principally by imposing conditions on consent. Once an application to clear is foreshadowed to DLWC by a landholder, it is standard practice to require a site visit and pre-application interview. The site visit and associated site assessment enables appropriate conditions to be selected. The latter involves an officer surveying the land to be logged, determining what species are present,
the size of particular trees, and areas to be protected. There are two main categories of conditions – those for mitigating impacts on threatened species, and those for mitigating soil erosion and water quality impacts.\textsuperscript{86}

Applications to clear are assessed by DLWC with the aid of computerised ‘objective decision support systems’ to assist and enable statutory decision-making.\textsuperscript{87} These decision support systems operate in combination with threatened species location databases enabling DLWC to more readily justify its decision-making in relation to threatened species.\textsuperscript{88} These reduce the prospect of the exercise of excessive discretion by individual officers, and help to systematise the agency’s approach.

Departmental documents indicate that all clearing approvals are granted conditionally. These conditions generally require the retention and replanting of trees within the approved area to ensure, among other things, preservation of habitat, and protection against land degradation.\textsuperscript{89} Data regarding the specifics of imposition of conditions on PNF approvals was not available. DLWC officers stated that some PNF applications were subjected to site-specific conditions for threatened species conservation.

An important aspect of setting conditions for consent to PNF involved applying the \textit{Interim Best Operating Standards for PNF (‘BOS’)} published in 2001, (to be replaced by the \textit{Forestry Operating Standard}).\textsuperscript{90} These standards have the stated aim of ensuring the sustainability of PNF operations, and providing consistency in conditions attached to development consents for PNF. According to DLWC, landholders are “encouraged” to use the Interim BOS, but it seems are not required to do so.\textsuperscript{91} The BOS are designed to streamline the approval process, as applications conforming to the BOS “generally should not require the imposition of additional conditions of consent” except in special

\textsuperscript{86} Logspert is a decision support system, developed by DLWC to facilitate selection of appropriate conditions.


\textsuperscript{88} The approach of DLWC to applying threatened species legislation is addressed in Chapter Nine.


The standards address threatened species planning, heritage planning, identification of exclusion zones (e.g., steep areas, wetlands, heath), silvicultural standards, drainage feature protection, habitat management outside exclusion areas, roading, log dumps and snig tracks. However, the BOS have been criticised on the grounds of providing inadequate protection for old-growth forest, rainforest and threatened species habitat.

In applying conditions to approvals to clear native vegetation, DLWC must be mindful of the recent decision of the Land and Environment Court in *Carr v Minister for Land and Water Conservation* which emphasised implied restrictions on the extent to which a consent authority can impose conditions which significantly alter the development for which consent is being sought. In this Class 1 merits appeal, Pearlman CJ overturned a DLWC consent on the grounds that specific conditions imposed on that consent to mitigate environmental impacts excessively modified the original application, and thus had no valid basis in law. The consent was invalid because: “[t]he development which was the subject of the development consent is significantly different from the development which was the subject of the development application.”

It remains open to a consent authority to impose conditions so that it “modifies details of the development”, but it does not authorise a modification of the substantial nature of a development. Yet as Pearlman CJ observed, such questions are a matter of fact and degree in each case. The message is that DLWC must be ‘reasonable’ in its imposition of conditions, so as not to impose too many conditions on an application, or conditions that substantially alter the nature of an application. As a result, DLWC’s strategy is likely to shift to pre-application negotiations so that the application submitted is closer to that which will be approved (e.g., the area applied for and the area eventually granted).

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95 Applying *Mison & Ors v Randwick City Council* (1991) 23 NSWLR 734 at 737.
96 *Carr v Minister for Land and Water Conservation* (unreported, Land and Environment Court, NSW, Pearlman CJ, 22 May 2000, (No. 10675 of 1999) at paragraph 56.
97 DLWC (2000) *Implications for Undertaking Clearing Assessments as a Result of the Findings of the 'Carr' Case*, Briefing Paper provided to the NVAC, Tabled 24.11.00, DLWC, Sydney. Yet if DLWC goes too far in terms of making guarantees to applicants regarding the prospects of success of modified applications, they will be in danger of unlawfully fettering their decision-making discretion.
LAW REFORM SUGGESTIONS FOR THE NVCA

Sometimes industry representatives run an argument that PNF should be removed from coverage of the NVCA because of the dissimilarity of forestry and broad-acre land clearing. This argument draws attention away from the need to provide some sort of environmental impact assessment of forestry. Some PNF industry participants view any level of regulation as an impediment and a disincentive to economic activity. The development-consent process is too often incorrectly conflated with an outright prohibition. Such positions are often backed up by misleading references to the sanctity of private property ownership that ignore numerous other laws that control activities on private land. Without coverage of PNF by the NVCA, oversight would be left to the vagaries of local government regulation. The majority of NSW local governments appear to be are reluctant to regulate PNF (see Chapter Eight).

Improving the PNF exemption

Some steps have been taken by DLWC to address problems with the PNF exemption. First, DLWC conducted an internal review of exemptions by seeking the opinions of regional office staff. Secondly, public education efforts have been conducted to control the PNF exemption by clarifying it in a leaflet and a detailed booklet, Definitions and Exemptions. The Sydney-South Coast Region in particular has attempted to limit exemption claims by reference to this booklet.

Thirdly, in order to reform all the exemptions under the NVCA, including the PNF exemption, the NSW Premier announced a review in July 2000. A Community Reference Panel (CRP) and an Independent Scientific Group (ISG) carried out the review. In October 2001, the CRP reported and delivered an additional report on the PNF exemption. It concluded: “[t]he PNF exemption as it exists is an inappropriate mechanism for managing and controlling this industry sector.” Similarly, the report of the Independent Scientific Group (ISG) found “there is no scientific justification for this

100 Notes on a Speech given by Mr. Robert Adam, (2001) above n 19.
exemption. It …may result in significant impacts on biodiversity and ecosystem function values.103

Reform of the PNF exemption with a view to achieving the ESFM objective will involve either its complete deletion, or a substantial limitation of its scope. These choices are now discussed in turn.104

**Deletion of the exemption**

One of the key reforms necessary to create a legal framework that encourages and requires ESFM is the deletion of the PNF exemption in its present form. Industry has argued that the removal of a broad-based PNF exemption would have adverse economic consequences. They have lobbied for its retention.105 These arguments are based on a predictable commercial self-interest.

The CRP cited a lack of specialised expertise to address the technical issues involved, and the PNF exemption was referred to a third body, the Private Forestry Reference Group. This group was constituted on a model of stakeholder representation rather than disinterested policy experts, and was heavily weighted towards industry interests.106 DLWC and the Minister accepted all of the recommendations of this industry-dominated PNF Reference Group107 particularly its proposed retention of a broad-based exemption for PNF, subject to minor limits on logging intensity and affected environments.108 The new rules will continue to exempt the majority of PNF from consent requirements.109 The exemption will not be available in very narrowly-defined “scheduled areas” of environmental significance.110

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104 Either option could be achieved by regulation, without the need for an amending Act: NVCA s.67(3).
109 The exemption will apply where specified conditions are met, including a requirement that the average basal area of the forested area will not be reduced below 12m2/ha. However the scope of environmental impact associated with the proposed exemption is unlikely to be minor. For example, the NPWS observed that “as some forests may have basal areas of 40 m2/ha or more, the potential reduction to 12 m2/ha cannot be considered minimal.” NPWS (2002) *Dissenting Statement in Draft Exemption Operating Protocol*, above n 108 at 24, 28.
110 These include narrowly defined versions of rainforest vegetation, riparian areas, ‘protected land’, as well as under represented vegetation communities, and HCV old-growth.
There is little point in requiring detailed assessment of small-scale activities with minor impacts. Yet there will be difficulties in attaining ESFM if a broad-based PNF exemption is retained. These difficulties will involve (i) problems of interpretation by landholders (e.g. their capacity to identify areas where the exemption is not available, such as under-represented vegetation communities), (ii) problems of enforcement, and (iii) problems of administration. A senior DLWC regional officer interviewed rejected the idea that a broad exemption should be retained because of limited administrative resources. He stated that in his experience, “if there was no PNF exemption, it would be easier and simpler to administer the Act.” Without an exemption, DLWC field officers would not face complex problems of interpretation of its scope. Allegations of illegal logging could be resolved simply by considering if a landholder had development consent and had complied with the conditions of that consent.

Retaining a limited exemption

As we have seen, industry supports a broad-based exemption. A compromise is a limited form of exemption. But what form of exemption can be compatible with ESFM? As long as the exemption is without an ecological sustainability threshold, it will be inconsistent with the Act’s exhortation that its objects are to be carried out “in accordance with” the principles of ESD.

To meet the definition in the EPAA of exempt development, any retained exemption must apply only to small-scale operations with minimal impact. The Independent Scientific Group doubted if this was possible, stating: “this activity [PNF] is beyond the scope of a simple exemption to allow small scale, minimal impact routine activities.”

This test of minimal impact is derived from the EPAA. Any retained exemption must be consistent with the objects of the Act, and with the provisions of Part 4 EPAA through which the NVCA operates. The EPAA permits exemptions in RVMPs to be exemptions of only minimal impact. This is because RVMPs are environmental planning...
instruments, and the Act provides in s.76(2) that “An environmental planning instrument may provide that development of a specified class or description that is of minimal environmental impact is exempt development.” The Macquarie Dictionary defines ‘minimal’ as “pertaining to, or being a minimum. Least possible. Smallest. Very small. Negligible.” Examples of exempt development having only minimal impact provided by Planning NSW are “small fences, barbecues and pergolas”. It is doubtful whether PNF fits into such a category.

Only a strictly limited form of exemption is likely to be compatible with NSW’s commitment to ESFM made in the RFAs. These arguments are presented in internal and external DLWC reports. In 2000, DLWC advised RVMCs that exemptions should be available only in circumstances of “minimal environmental impact”.

One way of ensuring an exemption would apply only to minimal-impact and small-scale activities is to apply a narrow-volume and area-based cut-off. For example, Tasmanian Regulations provide that an approved forest practices plan is not required where operations are low-volume timber-harvesting operations, covering less than one hectare p.a. or less than approximately five truckloads.

An effort to identify a framework for defining sustainable selective PNF logging in NSW was carried out by a consultant to DLWC (Dr Andrew Smith), with the aim of clarifying the scope of the PNF exemption. Smith’s lengthy report examined the present PNF exemption and concluded that even the “sustainable forestry” leg of the PNF exemption “lacks detail and does not consider the full range of forest values identified in the Montreal process.”

The Smith report proposed that a new regime for oversight of PNF forestry involve a requirement that any timber harvesting take place in accordance with an approved

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115 Macquarie Dictionary (2001) Federation Edition, p.1216. Minimum is defined as “the least quantity or amount possible, assignable, allowable, etc.”
117 NE RFA, cl. 57.
118 DLWC (2000c) above n 112 at 63-64.
120 DLWC (2000d) above n 119 at 1.
121 r.3, 5 Forest Practices Regulations 1997.
harvesting plan valid for a five-year period. Such a plan could only be prepared by licensed forest-planning consultants, and would include prescriptions for environmental protection and maintenance of all forest values. Such plans would be part of a longer-term PNF Management Plan (PNFMP) requiring DLWC approval. Approval of further harvesting plans in the future would be subject to satisfactory completion of post-harvest monitoring of conditions laid out in the first harvesting plan.

However, the report was never acted upon. One DLWC officer interviewed suggested that this was because it suggested logging protocols which represented a political and economic threat to public land forestry, as higher standards for PNF might result in pressure for higher standards for public forestry. It was further alleged that the shelving of the report followed lobbying of the Minister and Director-General by the Forest Products Association.124

Using exemptions to extract improved performance

Exemption provisions can be applied appropriately if they do not result in a diminution of environmental protection standards. Steinzor has argued that exemptions in environmental law are usually appropriate only in terms of reducing procedural requirements rather than substantial environmental protection obligations. The PNF exemption under the NVCA however removes substantive requirements and therefore fails this test. Instead a ‘quid pro quo’ approach to granting exemptions has been suggested, requiring proof of superior, or equivalent environmental protection outcomes under the exemption. This solution is “…to ask them [firms] to demonstrate that a significant portion of the costs saved through exemptions will be used to make the achievement of superior performance possible.”125

In this vein it may be possible to make exemptions available in return for agreement to enter into property agreements under Part 5 NVCA. This approach is consistent with achieving a greater environment protection outcome than would have otherwise taken place.

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124 Interview, Anonymous DLWC officer, Head Office, in person, 6.10.00.
**Notification mechanism**

The NVCA enables those who wish to claim an exemption to make a ‘self-assessment’ as to its scope.\(^{126}\) It appears DLWC is infrequently informed by landholders about proposed exemption-based logging.\(^{127}\) The solution is a ‘notification mechanism’ - a requirement that logging proponents seeking to rely on the exemption notify DLWC 30 days prior to commencing logging. A notification mechanism should also be included in future RVMPs, where the same problems of (incorrect) subjective interpretations of exemptions are likely to arise.\(^{128}\)

There is a body of internal departmental opinion suggesting that there are frequently poor standards of logging operations in the PNF industry in NSW (see Chapter Four). One DLWC officer described “the generally low level of forest management skills and opportunistic approach to timber harvesting common in the industry”.\(^{129}\) Provided such opinions are accepted as valid, such a situation poses risks that a revised PNF exemption allegedly confined to sustainable forestry, yet based on self-assessment mechanisms (i.e. without a notification mechanism) will be unworkable and ineffective.

Any workable system will require some form of formal oversight such as review of timber harvesting plans or certification. Even if an exemption were to be retained, an associated notification requirement would facilitate checks on the appropriateness of exemption claims, enabling DLWC to advise landholders of the applicability or otherwise of the PNF exemption, giving it time to take action if it disagreed with a proposal to clear.\(^{130}\) At present, many landholders have significant financial incentives to select a liberal interpretation of the PNF exemption.

A notification mechanism would also provide information-gathering benefits. It would enable DLWC to compile information about clearing under exemptions in a systematic way, and to calculate total 'clearing' under the PNF exemption.\(^{131}\) This would facilitate

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\(^{127}\) Interview, Mr. Bob Attwood, DLWC, North Coast Region Office, Grafton, 29.11.00. (in person, notes on file).

\(^{128}\) EDO (1997) *A Proposed Model for Native Vegetation Conservation in NSW*, September, section 2.9; This was suggested by environmental groups during debate on the NVC Bill, who suggested that landholders seeking to clear or log under an exemption in RVMPs be required to notify the Department. *Hansard*, 5.12.97, p.99.

\(^{129}\) DLWC (2000) above n 48, Comments of DLWC officer No.12, pp.63-64.

\(^{130}\) Environment Defender's Office (1997) above n 128 at section 2.9.

\(^{131}\) This category of clearing is not included in regional or State-wide statistics showing the total amount of vegetation cleared under the ambit of the NVCA in any given year.
production of more accurate data about overall clearing rates, in turn permitting better monitoring and management of native vegetation in NSW.\textsuperscript{132}

A notification mechanism would not correct all problems associated with the PNF exemption, for several reasons. Firstly, it is not equivalent to development consent. Notification does not offer an opportunity for a regulator to refuse permission, nor to impose conditions. Secondly, it relies upon the honesty of landholders. It will not expose deliberate illegal clearing outside the scope of the exemption. Thirdly, a danger of broad-based exemptions is that they will always be subject to creative interpretation.\textsuperscript{133} A revised exemption for ‘sustainable’ private forestry only would solve a minority of problems associated with the present clause, as “sustainable” is an inherently ambiguous concept.

To best facilitate enforcement of the notification approach it would be necessary to require persons relying upon the PNF exemption to obtain an exemption certificate from DLWC. These would be granted only if proposed clearing genuinely fell within the scope of the exemption. This approach retains the power to require development consent if an exemption claim is not appropriate. This certificate model is applied in NSW pollution control and pesticides regulation.\textsuperscript{134}

Critics may argue that this represents a de facto development consent process.\textsuperscript{135} However it differs in that it remains optional for DLWC to investigate a notified PNF proposal, whereas the consent approach requires a detailed examination of proposals. Further, the notification process would be simpler than the consent process, as appeal mechanisms would not be available.\textsuperscript{136}

\textsuperscript{132} EDO (1997) above n 128 at section 2.9.
\textsuperscript{133} A perfect example is the so-called “2 hectare exemption”. DLWC’s document on the review of exemptions stated: “The Department is of the view that the exemption allows the clearing of one two-hectare area of land, whereas some landholders have measured tree canopies or trunk areas and have then cleared the number of trees whose canopy or trunk would fit into two hectares.” See also: Woodford, J. (2001) “Plundered Forests at Mercy of Farmers”, Sydney Morning Herald, 23/1/01, p.3.
\textsuperscript{134} Pesticides Act 1999 (NSW), s.115, especially s.115(2)(b). Protection of the Environment Operations Act 1997 (NSW), s.284. Under the Protection of the Environment Operations Act 1997 (NSW), and the Pesticides Act 1999, persons seeking an exemption must apply to the EPA. It is for the EPA to decide if exemptions are available, not the owner of the land. The EPA must be satisfied that non-compliance with the standard provision will not have any significant adverse effect on the environment. Exemptions are time limited, may be subject to conditions and must be approved by EPA Board.
\textsuperscript{135} This was the position adopted by the NSW Farmers Federation during the negotiations preceding the enactment of the NVCA.
\textsuperscript{136} Environmental Defender’s Office (SA) (2000) above n 8.
Another option for a retained-but-improved exemption under the *NVCA* is to replace it with a Code of Practice (COP), made by regulation. There is no requirement for development consent for operations in compliance with a Code in certain situations.\(^{137}\)

Under a statutory COP made under the *NVCA*, consent is not required for clearing where there is no RVMP in place.\(^{138}\) Where an RVMP is in force, consent requirements will depend on the plan, but PNF may be exempt if a COP is fully adopted by a plan.\(^{139}\) COPs under the *NVCA* do not apply to protected land. This means many PNF operations cannot be regulated with a COP. On this basis, DLWC announced in 2000 that it would not develop a Code for PNF.\(^{140}\)

DLWC’s official rationale for the COP mechanism is to assist “where an industry specific approach to clearing is needed.” A COP for PNF made under the *NVCA* would be insufficient for the achievement of ESFM. The statutory provisions for COPs involve no additional environmental protection requirements to the development consent rules. This form of Code of Practice would amount to a highly-detailed exemption, admittedly clarifying what at present is extremely vague and uncertain. The consent process offers a better route for the application of a Code (or Best Operating Standards).

The RFAs for NSW stipulate a requirement that a Code of Forest Practice is put in place for PNF within five years. The objective was to achieve some level of equivalence between PNF and public forestry requirements. However a COP made under the *NVCA* would not amount to such a Code, because it would not ordinarily impose a consent requirement.\(^{142}\) The meaning of Code applied in the RFAs is a document setting out in prescriptive terms appropriate forestry practice, involving consent requirements. A

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\(^{137}\) *NVCA*, s.21(2)(b); 25(2)(c).

\(^{138}\) *NVCA*, s.21(2)(b).

\(^{139}\) RVMPs may adopt or incorporate provisions of a COP as part of the Plan: *NVCA*, s. 25(2)(e). However, an RVMP cannot amend the provisions of a Code, either adding environmental protection requirements or removing them: *NVCA*, s.38(4).

\(^{140}\) Ms Leanne Wallace, DLWC, Executive Director, Regional and Commercial Services, Letter to National Parks Association NSW and Nature Conservation Council NSW, regarding PNF, 16.10.00, 1pp.


\(^{142}\) For example, as is required in the UNE NSW RFA, clause 57.
Forest Practices Code, such as applies in Tasmania, requires PNF operators to prepare and gain approval for, a forest practices plan.

**Summary regarding the PNF exemption**

The present PNF exemption is inconsistent with notions of ESFM. Continued availability of a broad-based exemption on a self-assessment basis is inherently problematic. In order to evaluate the sustainability of proposed forestry operations it is essential to have an approval process of some sort. It is not reliable to delegate determination of sustainability to industry.

The most desirable option for reform includes the following components:

1. deletion of the exemption, or limiting the scope of the exemption by regulation, so that it applies only to forestry involving lower environmental risks such as selective logging, or forestry that is independently certified as ecologically sustainable;
2. a requirement that all applications for consent for PNF be accompanied by timber harvesting plans (THPs) or forest practices plans (FPPs) prepared by independent FPOs;
3. a requirement that such FPOs be appropriately qualified, licensed and independent;
4. a requirement that all PNF timber be branded or marked as coming from private property; and
5. a requirement that timber contractors and processors must also be part of the compliance chain, as in Tasmania (see Chapter Eleven).

**Insertion of an onus-of-proof within development assessment process**

In order to achieve a standard of ESFM in the PNF industry in NSW, it will be necessary for those applications subject to a consent requirement (i.e. those that could not meet the criteria of a tighter PNF exemption) to be subject to an ‘onus of proof’ test. This would involve a statutory presumption against vegetation clearing in high-risk circumstances, enabling a precautionary approach to regulating PNF. ¹⁴³

The counter-argument is that there is a difference between outright vegetation clearance and forestry, as there is no intention in forestry to create a permanent removal of native

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¹⁴³ *Native Vegetation Act 1991 (SA), ss.26-29, Schedule 1 (Principles of Clearance of Native Vegetation).*
vegetation. Yet some forestry can alter forest ecosystems substantially. Legislators are not absolved from the need to ensure that the NVCA restricts biodiversity loss by placing adequate controls on the PNF industry.

At present, the NVCA fails to take a precautionary approach to environmental risk, by not defining “inappropriate vegetation clearance”. The solution is to insert ‘Principles of Native Vegetation Conservation’ against which consent decisions must be made.

The first version of SEPP 46 contained a test that development consent could not be granted if the consent authority was “satisfied” that a particular area under application “does have” or “does contain” particular ecological values.

Summary of Essential Content requirements

In summary, the most advantageous options for reform include:

- deletion of the NVCA’s PNF exemption, or limiting its scope to extremely small scale and low volume forestry involving lower environmental risks;

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144 It is imperative to provide a definition of “inappropriate clearing”, i.e. filling out the objects of the Act in s.3(f). For example an amendment could be made that “inappropriate clearing is clearing which offends the Principles of native vegetation conservation set out in Schedule X.” This would amount to a statutory presumption against vegetation clearing in high risk circumstances (e.g. acid sulphate soil or salinity risk area, or where clearing would affect an endangered or vulnerable regional ecosystem).

145 Nowhere does the NVCA specify that the clearing of particular classes of native vegetation of high conservation and biodiversity value is prohibited. Nor are there any circumstances specified in which there is an outright prohibition on native vegetation clearing. There ought to be some such circumstances, at a minimum for the protection of endangered ecological communities. Such an approach would be supported by the fact that NSW is obliged under the NHT Partnership Agreement with the Commonwealth to establish mechanisms to ensure compliance with the goal of “no clearing of endangered ecological communities”. Natural Heritage Trust Partnership Agreement between Commonwealth and NSW, Attachment A: Bushcare: the National Vegetation Initiative Clause 5.1(c), Performance Indicators: Environment, at p.3-4. The NVCA could place a ban on the clearing of endangered ecological communities as defined and listed under the T/C/A in much the same way as Queensland legislation, the Vegetation Management Act 1999 (and Regulations). That Act provides some protection for “endangered regional ecosystems”, and previously also applied to “of concern regional ecosystems”. Vegetation Management Act 1999 (Qld) (assent 21 December 1999, commencement by proclamation 15 September 2000); Vegetation Management Amendment Act 2000 (Qld) (assent 13.9.00), Vegetation Management Regulations 2000 (Qld). Vegetation Management Act 1999, s.5. Another provision, relating to ‘of concern regional ecosystems’ was removed at the last minute from the legislation. It previously read: “of concern regional ecosystem” means a regional ecosystem that is prescribed under a regulation and has either—(a) 10% to 30% of its pre-clearing extent remaining; or (b) more than 30% of its pre-clearing extent remaining and the remnant vegetation remaining is less than 10,000 ha. (s.5)

146 Hannam, I. (1995) above n 76 at 8. This approach of defining the circumstances in which clearing would be inappropriate, is contained in the SA Native Vegetation Act 1991, ss.26-29, Schedule 1 (Principles of Clearance of Native Vegetation). The Native Vegetation Council is required to have regard to the statutory principles and “must not make a decision that is seriously at variance with those principles.” The SA Act provides eleven statutory “Principles of Clearance of Native Vegetation” contained in Schedule 1. These commence by stating “Native vegetation should not be cleared if, in the opinion of the Council…” any one of the eleven factors is present, for example “(a) it comprises a high level of diversity of plant species”. Native Vegetation Act 1991 (SA), s. 29(1). This general rule is subject to an exception which relates to the clearance of isolated plants where a satisfactory proposal for their replacement is made: Native Vegetation Act 1991 (SA), s.29(4).
in the event that a revised PNF exemption (reduced in scope) is retained, to insert a notification mechanism requiring those seeking to rely on a curtailed PNF exemption to notify regulators;

- a requirement that all applications for consent for PNF be accompanied by timber harvesting plans or forest practices plans prepared by independent FPOs;

- a requirement that such FPOs be appropriately qualified, licensed and independent;

- an ESFM Code addressing threatened species questions, and requiring surveys by qualified flora and fauna experts;

- adopting a precautionary approach of requiring non-exempt forestry that exceeds a specified risk threshold to meet an onus of sustainability during the development consent decision-making process (implementing the risk-based tiering of assessment principle); and

- a requirement that timber contractors and processors must be part of the compliance chain.

CONCLUSION

The main findings presented in this Chapter were that, during the study period:

- All PNF logging outside protected land (i.e. 100% of operations on that land classification) in the North Coast and Hunter regions claimed the PNF exemption, regardless of the type of logging. Therefore it was not regulated by the NVCA. In the North Coast and Hunter regions, DLWC appears to have failed to adequately clarify the PNF exemption, due to its policy of allowing self-assessment as to the scope and application of exemptions, and its general failure to audit reliance on the exemption.

- Compliance officers and regional offices have asked for the PNF exemption to be abolished, due to compliance difficulties and the environmental impact of exemption-reliant forestry.

- A combination of PNF logging and private plantation establishment formed the majority of clearing applications made in the North Coast, Sydney-South Coast and Hunter regions.

- All the development applications for PNF in North Coast and Hunter Regions involved logging on State protected lands.
There were no instances of refusal of applications for consent for PNF in the North Coast or Hunter regions.

The strategy for managing the impact of PNF operations granted consent is to impose conditions on consent. This means that the landholder’s proposal may be significantly modified and subjected to constraints. However with this strategy comes a high risk of non-compliance, given the lack of a process to audit compliance with conditions.

Explanations for the high rate of reliance on the exemption in the North Coast and Hunter Regions involve a certain amount of educated guesswork due to the lack of available data or studies by the Department. Nevertheless there are two logical explanations. Firstly, the high claim rate was due to DLWC failing to restrict resort to the exemption. Secondly, it is self-evident that industry participants would be keen to obtain the benefit of exemption for their operations because of the lower economic and administrative cost of not having to obtain development consent.

Such findings have necessary implications for attainment of the goal of ESFM. There is some evidence that that there was a significant regulatory failure, particularly in regulating the environmental impacts of PNF in NSW during the study period. This had two main causes—shortcomings in the legislation, principally the PNF exemption, and to lesser extent shortcomings of administration. The latter cannot realistically be addressed by law reformers, who must concentrate on amendments to the law that will guide and direct future administrative behaviour.

With regard to the institutional framework, there is a risk that consent authority arrangements are insufficiently independent to rule out the scope for political interference and Ministerial direction in the consent decision-making process. The South Australian model of an independent Native Vegetation Council as decision-maker is a relevant alternative.

The Act does not adequately provide for ESFM primarily because of the defective PNF exemption clause. Adherence to ESD principles including the precautionary principle could be achieved with reform of the PNF exemption, and with a clearer definition of “inappropriate clearing of vegetation”.
Further, the Act does not amount to best-practice legislation for ESFM as it contains no percentage targets for protection of particular under-represented vegetation types. Nor does it provide generic principles to guide the Minister and DLWC in deciding whether or not clearing should be approved, other than its broad and somewhat conflicting objects. The failure to set targets means that the NVCA fails to attain a preventative approach to biodiversity conservation. In order for a genuine framework for ESFM to be created, it will be necessary to address these defective aspects.

The present emphasis of the NVCA is on management of native vegetation clearing, not the prevention of clearing. The Act takes a procedural rather than substantive approach to native vegetation management and habitat protection. Whilst forestry on private land is a legitimate land use (when compared to outright clearing for other purposes), it remains the case that without sufficient guiding principles in the legislation indicating what amounts to “inappropriate vegetation clearance” there is a danger that the consent mechanism may come to represent little more than a bureaucratic hurdle before clearing can commence - even in circumstances where a precautionary approach would suggest that it be restricted or even prohibited.¹⁴⁷

The future of the NVCA will lie in the detail of RVMPs. That subject was not amenable to examination, as most RVMPs had not been completed during the study period.¹⁴⁸ Most draft plans have adopted a zoning approach based on ecological mapping and ecological sensitivity. With clearing and logging rules tailored to the issues raised by mapped vegetation communities, a more specific and precautionary approach will be possible. However with such complexity has come a bureaucratic desire to delegate some of the decision-making, particularly in relation to the application of exemptions and the consent threshold.¹⁴⁹ Therefore some plans incorporate a range of self-assessment mechanisms, for example in relation to vegetation communities.¹⁵⁰

¹⁴⁷ Much has been written about the “culture of consent” in local government and in this context there is clearly a danger of repetition of the problems, because decision making under the NVCA is effectively under Part 4 of the EPA. (These matters are discussed in Chapter Nine).
¹⁴⁸ The detail of RVMPs was not selected as the focus of study in this thesis, for several reasons. Primarily most of the plans were not complete during the period of research and writing and therefore it would have been difficult to discuss such a ‘moving target’. Further it would be difficult to generalise about the approach taken by the range of plans, as each plan is likely to adopt a slightly different approach and different zonings.
¹⁴⁹ That is, the threshold past which consent will be required.
¹⁵⁰ The Mid Lachlan plan is the most commonly cited example. According to DLWC this could involve self-assessment (where the area to be affected is less than 400 hectares) or a formal development consent process (over
self-assessment and self-regulation are raised by the PNF exemption and the future direction of its reform.

In relation to the NVCA, Bates and Franklin warned that:

> Regional planning is a slow and resource intensive process, carrying with it dangers of parochialism, lack of competence, under-resourcing and inconsistencies between regions.\textsuperscript{151}

Questions of self-assessment and self-regulation need to be separated from the question of the most appropriate role for economic instruments such as conservation incentives and forest-stewardship payments.

It is necessary to design a native vegetation and forestry strategy that contains a range of instruments including regulation, extension services, conservation agreements, and incentives that target particular aspects of the spectrum of the regulated community. Some people within the regulated community will be more responsive to certain policy instruments than others.

In response to critics who state that the Act is excessively ‘regulatory’ and fails to offer enough incentives for landholders, it needs to be said that the NVCA already contains provision for a Native Vegetation Management Fund with monies to be primarily allocated to encourage entry into statutory conservation agreements under the Act.\textsuperscript{152} This is supplemented in its operation by the Revolving Fund established under the Nature Conservation Trust Act 2001.\textsuperscript{153}

Sole reliance upon incentives, education and encouragement, in a rejection of regulation and the consent pathway as ‘excessively coercive’ would be unlikely to produce adequate results in terms of native vegetation conservation.\textsuperscript{154} Questions of enforcement and compliance with the NVCA in relation to PNF are further explored in Chapter Eight.

\textsuperscript{400} ha), depending on the location and extent of proposed clearing.

\textsuperscript{151} Bates, G. Franklin, N. (1999) above n55 at 120.
\textsuperscript{152} NVCA, Part 7, Division 3.
\textsuperscript{153} Nature Conservation Trust Act 2001 (NSW), ss.10, 11.
ENFORCEMENT OF THE NATIVE VEGETATION
CONSERVATION ACT 1997

INTRODUCTION
This Chapter presents research findings regarding compliance with the NVCA by the PNF industry during the study period. The focus is on patterns of enforcement of the legislation by DLWC in relation to the PNF industry. This information is supplemented by data relating to other clearing activity regulated by the Act. Such an examination is necessary in order to compare the Act on paper with the Act in practice. The findings contribute to our understanding of whether PNF in NSW was ‘under-regulated’ during the study period.

The main finding is that during the study period, in the regions examined, DLWC appeared to avoid punitive approaches to enforcement of the Act both in general but also in relation to PNF in the North Coast and Hunter regions. A major source of compliance difficulties was found to be the imprecise drafting of the PNF exemption.

COMPLIANCE AND ENFORCEMENT
One must distinguish between the terms compliance and enforcement, as these terms have implications for the strategy adopted by the regulator. Compliance involves full implementation of the requirements of legislation by landholders and industry. Enforcement comprises the range of actions taken by government and/or others to achieve compliance by the regulated community.1

Compliance-focussed regulatory strategies are forward-looking or pro-active in that they emphasise the end result sought, as opposed to strategies that emphasise punishment after the event. They apply the tools of landholder extension and education in relation to regulatory responsibilities, the provision of information and assistance regarding legislation, and involve activities directed at the promotion of compliance such as site visits and informal negotiation. A particular aspect of a compliance-based strategy is a

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conscious decision to offer, then communicate and deliver positive incentives for compliance.

Compliance with the NVCA has been encouraged by means of site visits and other extension activity, publicity in the rural press regarding the introduction of the Act,\(^2\) regional workshops conducted by the DLWC, as well as the residual deterrent effect exerted by prosecutions under the previous SEPP 46 regime, and the deterrent effect generated by enforcement action under the NVCA.

Enforcement refers to those activities of a regulator directed at ensuring the achievement of compliance, and the correction and punishment of non-compliance. The aim of enforcement is to generate compliance, principally through deterrence which may be generated by inspections and surveillance, negotiation, warnings, and legal action - including stop-work orders, remediation notices, civil enforcement and criminal prosecutions.

The principle of deterrence relies upon an assumption, based on the observations of many regulators, that in any given situation involving the application of regulatory laws, there will be several categories of regulatee: those who will voluntarily comply, those who will not comply, and those who comply only when they perceive that it is likely that significant enforcement activity will be directed at them if they do not. The objective of specific deterrence enforcement activity is to deter persons who have been found to be in breach. The objective of general deterrence is to deter other persons from non-compliance by communicating a message that they will also be subjected to serious consequences if they are detected in non-compliance.

It is often argued that deterrence-based enforcement has negative impacts upon the motivation of private landholders to carry out ongoing management of land for conservation objectives as well as production objectives.\(^3\) It is also said that it is counterproductive in terms of improving compliance, as it may generate ‘regulatory resistance’ and a culture of defiance amongst the regulated community.

\(^2\) On the other hand some journals such as *The Land* (in particular) have run a relentless campaign against the NVCA, and some of the articles and editorial comment appear calculated to discourage compliance with the Act.

In response to such points Bates and Franklin have argued: “While there is a large element of truth in the observation that positive action is best secured in a climate of support, encouragement and incentives, it is too simplistic…Neither gentle persuasion, nor tough sanctions, nor incentives, on their own has proved comparatively more effective than another, or effective in absolute terms.”

In the PNF context there are many different people with various motivations making up the regulated community. It is difficult to generalise about what will influence “landholders” as a group, as each will respond differently to the prospects of either positive or negative incentives. Deterrence-based enforcement remains necessary as breaches will inevitably occur and must be responded to in order to maintain the credibility of the regulatory system. Some landholders will only respond to the ‘big stick’, the coercive threat of criminal prosecution. Other landholders will even resist the ‘big stick’, defending prosecutions vigorously (e.g. as in the Greentree matters), or will resist administrative enforcement (eg. by appealing remediation orders).

There are other reasons why deterrence-based enforcement remains necessary. Even with large maximum penalties set out in the statute (such as $1.1 million in the NVCA), without active enforcement as an accompaniment, high penalties on paper will have little influence on the regulated community. Prosecution is also necessary on the grounds of equity, because if breaches are not punished then those who have voluntarily complied may lose respect for the law’s failure to punish the non-compliance of others. Further, it is necessary in the PNF context to counteract the pull of the profit motive and the influence of private property rights ideologies. In the private land context, a significant

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number of landholders may not comply if enforcement activity is not visible and vigorous\(^7\) because of their objections to being regulated by government. These individuals often perceive regulation of activities on freehold land as inappropriate and illegitimate.\(^8\) Particularly in this context and because of the prevalence of these attitudes, where government seeks to impose environmental protection requirements onto the management of private property, compliance is unlikely to be perceived as a priority without an active enforcement effort. Otherwise rules will be regarded merely as voluntary or optional suggestions. This point has been made before. In 1955, Marver Bernstein stressed the importance of enforcement to the success of a regulatory program, arguing:

The attitude of [a government agency] toward its enforcement responsibilities affects its entire regulatory program. Unless it demonstrates a capacity to enforce its regulations, they will be more honoured in the breach than in the observance. Those who discover that violations go undetected and unpunished will have little respect for the [regulatory scheme] and will violate regulations with impunity if it is to their financial or commercial advantage.\(^9\)

If there is some enforcement activity, there is a higher probability that the ecological objectives of legislation will be achieved.\(^10\) A strong approach to enforcement in the context of regulating PNF is likely to:

- encourage approaches to DLWC to discuss forestry proposals;
- encourage more development applications and fewer exemption claims;
- encourage a higher rate of compliance with conditions of consent;
- reduce the number of ‘creative’ claims on exemptions; and
- improve forestry standards on private land.

Deterrence-based enforcement activity can provide important outcomes. Firstly, it communicates ‘specific deterrence’, i.e. convincing an offender not to repeat or continue

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\(^7\) A Canadian court judgement regarding occupational safety standards states: “if the regulations were not enforced by the use of sanctions, they would come to be perceived not as regulatory requirements but merely as statements of aspiration.” Re Industrial Hygiene Decision No.167 (1975), 2 W.C.R. 234 at 252 cited in D Saxe, (1990) Environmental Offences: Corporate Responsibility and Executive Liability, Canada Law Book Co., Aurora, Ontario at 26.


\(^10\) In asking about the sufficiency of enforcement, one must not forget that even if there was full compliance, this will not necessarily result in the achievement of ESFM objectives if the legislation itself does not require performance to this standard.
their offending behaviour. In *Piva v Brinkworth*, a prosecution under the *Native Vegetation Act 1991* (SA), Duggan J of the Supreme Court of South Australia observed:

> In order for legislation such as that under discussion to succeed, there must be effective means of enforcement... Often the clearing of land in circumstances such as this will result in a lasting commercial gain to the landholder. Mitigating factors can be allowed for, but the emphasis on general and individual deterrence remains a vital consideration.  

Secondly, enforcement activity communicates and promotes ‘general deterrence,’ warning other regulated parties not to offend. Hopefully it will be of sufficient magnitude to suggest that it will not be profitable to breach the regulations. The importance of general deterrence has been emphasised in a number of court decisions regarding vegetation-clearing offences, and in particular in appeal decisions which increased the quantum of penalties, in order to exert a greater general deterrence effect. Enforcement involves both primary and secondary deterrence purposes - educating both the offender and the community about the law, “so that the law will come to be known and obeyed”.

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11 *Piva v Brinkworth* (1992-93) 59 SASR 92 at 96, per Duggan J.


14 In *Piva v Brinkworth* (1990), the Supreme Court of SA an appeal against sentence (fines totaling $41,020 for clearing 210 hectares) for two separate offences was dismissed. Arguments that the monetary penalties imposed were excessive were rejected. At first instance the magistrate rejected a plea that no conviction be recorded, stating: “In the case of breaches of regulatory legislation (such as the *Native Vegetation Management Act*) general deterrence as well as specific deterrence is paramount.” Cited in *Piva v Brinkworth* (1992) 59 SASR 92 at par 8. See also: *Dal Piva v Maynard* [2000] SASC 349 SCGRG-00-655 (2 November 2000) at p.8, para 41. [100%]. Further, see *Witte v B.E. Arnold*, Supreme Court Tasmania, No.84/1996 where a probation order was overturned and a $10,000 fine imposed.

<table>
<thead>
<tr>
<th>Type of Factor</th>
<th>FACTORS MOTIVATING COMPLIANCE</th>
<th>BARRIERS TO COMPLIANCE AND FACTORS ENCOURAGING NONCOMPLIANCE</th>
</tr>
</thead>
</table>
| **ECONOMIC**           | * Desire to avoid a penalty.  
* Desire to avoid future liability.  
* Desire to save money by using more cost-efficient and environmentally-sound practices.  
* Desire to increase profits and access new niche markets by selling products independently certified as environmentally sustainable. | * Lack of funds.  
* “Cost of compliance”
* Greed/desire to achieve competitive advantage.  
* Competing demands for resources. |
| **SOCIAL/MORAL**       | * Moral and social values for environmental quality.  
* Societal respect for the law.  
* Clear government will to enforce environmental laws | * Lack of social respect for the law.  
* Lack of public pressure for environmental protection.  
* Lack of government willingness to enforce environmental laws in the rural context. |
| **PERSONAL**           | * Positive personal relationships between regulatory agency staff and industry staff.  
* Desire to avoid legal process.  
* Desire to avoid the stigma of enforcement, and adverse publicity. | * Fear of change.  
* Inertia.  
* Ignorance about requirements.  
* Ignorance about how to meet requirements.  
* Doubts about extent of predicted environmental impacts. |
| **FORESTRY SPECIFIC FACTORS** | * Lack of logger concern.  
* Lack of logger knowledge.  
* Lack of landowner knowledge of regulations. | |
| **MANAGEMENT**         | * Jobs and training dedicated to compliance.  
* Bonuses or salary increases based on environmental compliance. | * Lack of internal accountability for compliance.  
* Lack of management systems for compliance.  
* Lack of compliance training for personnel. |

Likelihood of breaches

Examination of questions of compliance is important because there are several factors suggesting the likelihood of breaches of the Act is high, as follows:

- There are frequently substantial financial incentives to breach the Act, because logging or forest clearing for plantation establishment will produce immediate income, whereas the consent path represents delays and conditions restricting the scope and volume of harvesting.

- Impatient landholders may be encouraged to commence clearing without approval because of delays in obtaining consent from DLWC. These can amount to up to one year.\(^{19}\)

- Industry associations have not pressured their members to comply with the legislation; rather they have campaigned and lobbied for its repeal,\(^ {20} \) and for retention of broad exemptions.

- Self-assessment aspects of the Act (such as exemptions, and provisions of certain RVMPs) require landholders to undertake complex tasks of evaluation and decision-making for which they are unlikely to have appropriate skills or support.

- With the remoteness of the regulated area, and the large number of properties that are regulated, there is difficulty in detecting breaches.\(^{21}\)

- There is some evidence that the majority of the PNF industry comprises small-scale operators (landholders and logging contractors) who are supplying small-to-medium sawmills.\(^{22}\) Particular compliance difficulties arise with the smallest operators as their knowledge and institutional capacity to undertake ESFM practices are usually more limited.\(^{23}\) One DLWC officer from the Sydney-South

\(^{19}\) Notes on a Speech given by Mr Robert Adam, DLWC, Sydney-South Coast region, DLWC re proposed BOS Best Operating Standards for Private Native Forestry (PNF) under the Native Vegetation Conservation Act on 21 February 2001, at Candelo, Southern NSW at ANU Forestry workshop, “The Evolving Legislative and Regulatory Environment for the Management of Private Native Forests in NSW”.

\(^{20}\) This is evident from statements made by NSW Farmers Association during the 2003 election campaign: eg. NSW Country Hour ABC Radio, 12.24pm, 10.3.03, Mr. Mal Peters, NSW Farmers Association, referring to “the 'Gestapo' in the bush trying to catch farmers out”.


\(^{22}\) A survey conducted for ABARE in 1999 found that small and medium sized sawmills in the Southern RFA region purchased most of their hardwood logs from private land forest operations (69% of the intake in medium sized mills. ABARE (1999) *Sawmill Survey: Southern Region* A project undertaken for the Joint Commonwealth NSW Regional Forest Agreement Steering Committee as part of the NSW Comprehensive Regional Assessments, project number NS 21/ES, RACAC (NSW) and PM&C (Commonwealth), at p.8.

\(^{23}\) The poorest performing operators in terms of environmental performance in Tasmania, across the forestry industry are the small independent private property operations. This statement is consistently made in *Annual Reports* of the Forest Practices Board. See Chapter Eleven. Note that the reporting practices of the large private forestry operators within a self-regulatory system may hide many of their malpractice. In the USA, large tracts of private forests land are actually owned by large forestry multinationals, such as in Maine where 8 million acres are privately owned
Coast Region with experience working on PNF described “the generally low level of forest management skills and opportunistic approach to timber harvesting common in the [private] industry.”

With such factors increasing the likelihood of non-compliance, there is a need for DLWC to have an effective compliance and enforcement strategy.

**Detection of breaches**

An important question relating to the administration of the *NVCA* is to ask how DLWC becomes aware of PNF operations in the first place. Without a notification mechanism attached to exemptions, it may not hear about exempt PNF activity. Landholders can choose if they wish to apply for consent or, if they will, rely on the PNF exemption on the basis of a self-assessment as to its scope. Landholders run the risk of prosecution if they cannot legitimately claim the PNF exemption.

Interviews with DLWC officers suggested that there was no organised strategy for detection of offences during the study period. Instead, an ad hoc method of detecting offences applies, involving detection by DLWC officers driving through the area (as in the *Greentree* prosecution), and upon haphazard reporting of clearing by neighbours (as in the *Locke* and *Harrison* matters). The NSW Audit Office stated “DLWC’s compliance and enforcement efforts have been characterised by a reactive approach (responding to allegations), rather than a pro-active approach (based on systematic monitoring or audit).”

The inherent difficulty of detecting vegetation changes on private land due to access restrictions can be overcome with an ‘eye in the sky’ - aerial photography or satellite remote sensing. DLWC used remote sensing during the study period to monitor changes

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24 DLWC (2000) *Summary of Comments on Desktop Audit of Exemptions (Stage 1 Review of Exemptions)*, Comments by DLWC and RVC only, internal unpublished document, at 63, Comments by DLWC Officer No.12 (Compliance Officer), Sydney-South Coast Region.


26 Audit Office NSW (2002) above n 21 at 47.
in vegetation. However, the primary purpose overwhelmingly lay in an intention to gain accurate data on the extent of vegetation clearing and overall rates of vegetation clearance, rather than to embark upon a satellite-assisted breach detection programme. Yet an automatic satellite monitoring alert system could be readily devised to provide a map of recent changes in vegetation cover. DLWC has stated that it has the capacity to monitor vegetation-clearing using satellite data it receives every 26 days. However it appears that this capacity was under-utilised during the study period.

Towards the end of the study period in 2001 there was a restructuring of compliance activity and the appointment of regional compliance officers tasked with developing regional compliance plans. Departmental material suggested that additional methods of surveillance would be employed by these officers including spot audits, fly-overs and satellite imagery. Although DLWC had started to discuss systematic satellite detection

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28 Minister for Land And Water Conservation, Media Release, 25 August 2000, p. 1. Nevertheless satellite images were used by the prosecution (unsuccesfully) in *D-G DLWC v Ramke* [1999] NSWLEC 22 (16 February 1999), 50971 of 1998, Talbot J. and in *Pye*. In *D-G DLWC v Pye* part of the prosecution case was compiled using satellite remote sensing, in order to show the difference in vegetation cover following clearing activity. Satellite imagery was used as an adjunct to evidence produced from on ground and aerial inspections, and the investigation was commenced following a report to the Department, *D-G DLWC v Pye* [1998] NSWLEC 292 (24 November 1998) at pars 6-10.


31 Ibid.

32 DLWC, (2000) “Natural Resource Compliance Strengthened in North Coast Region”, Media Release, 7 September 2000. The dark side of these changes was decision to disband the Soil and Vegetation Compliance unit in Parramatta (and for its relocation to rural NSW, ultimately Wellington in the Hunter Valley) one day after the leaking and publication in the *Herald* in 2001 of a story based on reports written by that unit describing the negative impacts of the exemption provisions on compliance. (see Media Release, Richard Amery, Minister for Agriculture), That report was entitled: DLWC (2000) Review of the Native Vegetation Conservation Act 1997 Exemptions, Soil and Vegetation Access Branch, Internal unpublished document, DLWC, Sydney; DLWC (2000) A Scientific Basis for the Native Vegetation Conservation Act 1998: Objects and Exemptions, Soil and Vegetation Access Branch, November, internal unpublished report; Woodford, J. (2001) “Plundered Forests at the Mercy of Farmers”, *Sydney Morning Herald*, 23.1.01, p.3; see also *Daily Telegraph*, 24.1.01; Interview, anonymous DLWC officer, Parramatta, by telephone 24.1.01. There is a suggestion here that the officers involved were being punished, as the move created an indirect pressure on staff to resign if they were unprepared to move to rural NSW. The Compliance Unit was to be disbanded. However in the DLWC’s PR spin, it was to be “centralised” with other Sydney native vegetation units as a new Central Native Vegetation Management unit - in a triumph for Country Labor’s regional employment strategy. According to NCC Native Vegetation Officer, Paul Kravchenko, “I am aware that virtually most of the DLWC veg officers are going to resign.” (Email to author 14.2.01.) A thinly veiled threat was made by NSW Farmers: “To relocate officers to a country town such as Wilcannia or Walgett will put them in a position where they’ll experience the direct implications of >their decisions.” Media release at: <http://www.nswfarmers.org.au/press/cw-2001-008.asp>. See further, *Local Government and Shires Association Weekly Circular*, No.11 of 2001, p.39, 16.3.01 announcing that the Central Native Vegetation Management unit of the Department would be relocated to Wellington.
of offences by 2001, and the development of more sophisticated compliance and
detection strategies, it remains doubtful whether DLWC’s compliance efforts during the
study period transcended haphazard reporting and detection of breaches.

Evidence of breaches

Examination of DLWC’s approach to enforcing compliance becomes all the more
important given strong evidence of numerous breaches of the NVCA. By October 2000,
according to data presented by DLWC to NVAC, there had been 471 alleged breaches of
the Act since the commencement of the Act in January 1998.\(^33\) The Compliance Manager
stated that these were estimated to be only one-third of the total number of actual breach
incidents, with the shortfall partly due to failures of some regional offices to report
breaches to Sydney.\(^34\) By April 2002 there had been a total of 705 alleged breaches.\(^35\) The
number of breaches alleged per annum has grown, from 125 in 1998 to over 225 in
2001.\(^36\) This may illustrate increased awareness of the legislation amongst the community
and increased surveillance by DLWC – but it may also indicate more breaches of the Act.

In relation to the rate of breaches by the PNF industry the available data was limited.
DLWC’s Soil and Vegetation Compliance Manager stated that the majority of alleged
breaches of the Act in the North Coast region concerned infringements in the course of
selective logging operations.\(^37\) Unfortunately there is no specific statistical evidence about
the compliance rate of the PNF industry with the NVCA. This is because DLWC
appears not to compile such data for particular industries.\(^38\)

There are other indicators of difficulties in relation to compliance with the Act. Firstly,
the area of vegetation cleared during alleged breaches between January 1998 and August
2000 was estimated by DLWC to be 33,000 hectares. Secondly, there was some limited
evidence in relation to non-compliance (other than blatant clearing without consent),

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\(^33\) Data provided by DLWC to Native Vegetation Advisory Council, October 2000, unpublished.
\(^34\) Dr Ian Hannam, interview, at DLWC Parramatta, 6.10.00.
\(^35\) Audit Office NSW (2002) above n 21 at 45, based on DLWC briefing notes provided 24.5.02 to Audit Office. In late
June 2002, Dr Smith, the Director-General stated to an Estimates Committee of the NSW Parliament that there had
been 805 alleged breaches. General Purpose Standing Committee No.5 Estimates: Land and Water Conservation, 26.6.02,
p.18
\(^36\) Audit Office NSW (2002) above n 21 at 45.
\(^37\) Dr Ian Hannam, interview, at DLWC Parramatta, 6.10.00
\(^38\) It is a theoretical possibility that patterns of enforcement relating to the PNF industry were widely divergent from
the general patterns of enforcement under the Act, i.e. that this industry was subject to vigorous enforcement action.
However this is unlikely because of the extent of problems faced by DLWC in enforcing the Act against this sector
caused by the operation and interpretation of the PNF exemption.
particularly clearing in breach of conditions of consent. This data is again not specific to PNF. A DLWC audit conducted in the Central West in 1999 found that 66% of landholders had not complied with one or more of the conditions of approval, or had cleared after requests for approval had been refused.\textsuperscript{39}

**ENFORCEMENT TOOLS**

The NVCA provides for administrative, civil and criminal enforcement. It makes adequate provision for the implementation of a graduated approach to enforcement by DLWC, with a range of enforcement options apart from prosecution.

The ability of a regulatory agency to implement this approach and thereby to efficiently target scarce enforcement resources to the cases most deserving of attention (and avoiding the ‘sledgehammer to crack a nut’ scenario in others) depends fundamentally upon the credibility of its threats to escalate the severity of enforcement action up the enforcement pyramid (Figure 1) in response to non-cooperation.\textsuperscript{40} These requests can only have any force if it is apparent to landholders that severe consequences (e.g. prosecution or remediation directions) are likely to flow from non-cooperation.

\textsuperscript{39} Audit Office NSW (2002) above n 21 at 44.

Licence revocation

Licence suspension

Criminal penalty

Remedial civil penalty

Administrative enforcement: remediation notices, orders, directions

Warning Letters

Investigations, inspections and examination

Negotiation and settlement

Education and persuasion

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**Administrative enforcement**

The range of administrative enforcement mechanisms available to DLWC includes warning letters, stop-work orders and remediation direction notices, and property agreements.

Another device in the administrative enforcement toolkit is the compliance bond. DLWC could impose conditions requiring lodgement of a bond or other security to ensure compliance with conditions placed on consent to clear. Such bonds would be forfeited if conditions of consent were not complied with. There is a need for this measure to be applied as DLWC audits have indicated low rates of compliance with conditions. DLWC had not taken advantage of the provisions during the study period.

The use of bonds in order to ensure compliance with conditions of consent is applied in the mining, pollution-control, plantations, and urban-planning contexts.

**Civil enforcement - tools**

An alternative to criminal proceedings is the use of the Act’s civil enforcement provisions. Civil proceedings may be brought in the Land and Environment Court either by the DLWC or third parties (in fact “any person”), for an order to remedy or restrain breaches of the Act including threatened or apprehended contraventions.

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42 NVCA, s.46(5). The maximum penalty is 1000 penalty units plus 100 units per day of a continuing offence.
43 NVCA, s.47(4). The maximum penalty is 1000 penalty units plus 100 units per day of a continuing offence. Further it is an offence to obstruct an authorised officer in their investigation of possible contraventions of the Act or regulations: NVCA, s.61(4).
44 Under EPAA s.80A(6), 93(2).
45 An audit of parties granted NVCA development consent in the Central West found 68% had not complied with conditions of consent. A compliance officer observed it was that the category of landholders who were most strongly opposed to the notion of regulation of activities on freehold land who most commonly interpreted the granting of consent “as a ‘green light’ for commencing clearing operations without reading the conditions of consent.” Priestley, S. (2000) above n 8.
46 Apart from using a bond to ensure the retention of significant vegetation, a bond can be used to ensure the completion of particular works such as fencing or weed control. This approach was suggested in SA by a review of legislation. Native Vegetation Working Party (1999) Native Vegetation Act (Enforcement, Appeals etc) Amendment Report 1999, Report to Minister for Environment and Heritage (SA), unpublished, Adelaide, at pp.26-27. Native Vegetation Act 1999, s.46.
47 Charges on land can be made to secure payment of financial contribution to local government. The Registrar-General acts on instruction of Minister to register a charge on land title to secure payment. The charge is lifted when payment is made.
48 Under EPAA, s.80A(6), 93(2). An example of their application is described in Canterbury City Council v Saad (2000) 12 IGERA 107 at 117 where a $1,000 bond was applied (unsuccessfully) in order to secure the retention of 2 mature trees in an urban construction context.
49 NVCA, s.63(2). In relation to civil proceedings, breach of the Act is defined to include a breach of any of the following: an RVMP, a Code of Practice, a development consent to clear native vegetation or (state or regional)
Civil enforcement proceedings have many advantages for the regulator. Civil proceedings confront fewer procedural obstacles as fewer protections are available to defendants than in criminal proceedings. Further, civil proceedings in NSW may be brought in response to threatened or apprehended breaches of legislation. Also interim court orders (i.e. interlocutory injunctions) may be sought. Most importantly, there is a lower standard of proof (on the balance of probabilities). Given the inherent evidentiary difficulties in this area, there is therefore greater chance of obtaining an order against a defendant. Also there is greater opportunity to incorporate remedial environmental measures as part of the sentencing outcome.

In addition to allowing enforcement proceedings to be brought by the regulator, s.123 EPAA also allows third parties to seek judicial review of decision-making processes. Objectors may appeal a decision to grant development consent - for example on the grounds of unreasonableness or failure to take into account relevant considerations. Such proceedings can be brought only seeking to challenge the procedural validity of a decision to grant consent, in judicial review but not in merits review.

Criminal enforcement - provisions of the Act

TheNVCA provides that “a person must not clear” native vegetation except in accordance with a development consent that is in force or a native vegetation code of practice. The main categories of offences are failing to obtain consent, or breach of conditions of a consent. Some failures to obtain consent may arise from a defendant neglecting to check whether PNF is proposed for State-protected land, or to ensure that the PNF exemption is genuinely applicable to a proposed operation.
The PNF Exemption and enforcement

An essential component of an effective law is that it is readily enforceable, i.e. it is simple to distinguish between situations involving compliance and those involving non-compliance. Interviews, internal documents, and close examination of the legislation all suggest that, in the PNF context, the NVCA does not possess this attribute.

The breadth and ambiguity of the PNF exemption - discussed in the previous chapter - have caused significant difficulties in the field, according to several internal departmental documents. The Internal Review of Exemptions observed: “Regional staff from all over the State have suggested that the PNF exemption is so broadly worded, and difficult to enforce that it should be removed.”55 In a survey of all DLWC operational regions, five regions reported difficulties in the interpretation and/or implementation of the PNF exemption.56 Most DLWC officers interviewed by the author referred to its ambiguity, describing it as “very difficult”, “unenforceable”, “useless”, and “a joke”.57 The exemption is said to be unenforceable as its boundaries of operation are indeterminate.58

Collectively, the activity-based exemptions of the NVCA were described by an internal report as: “the most problematical part of the Act in terms of achieving compliance.”59

Whilst comments regarding the difficulties with the exemptions were on the public record for several years in isolated places, it was not until March 2001 that they were made public with any prominence. At that time the Sydney Morning Herald reported on the contents of two ‘leaked’ internal compliance unit papers concerning the exemptions.60

This publicity, combined with growing internal and public criticism of the exemptions was the catalyst for the announcement in June 2001 by the Premier of a formal review of the exemptions.61 The PNF exemption was criticised for its indeterminacy by both

57 Interview, Bob Attwood, North Coast DLWC office, Grafton, 29.11.00.
58 Interview, Anonymous DLWC officer, Head Office, in person, 6.10.00.
60 DLWC (2000) Review of the NVCA Exemptions, at p.5. The review of exemptions was announced by the Premier in July 2000. (Transcript of Speech by Premier Bob Carr at Annual Conference of NSW Farmers Association 17 July 2000 at p.10) reported in Stephenson, A. “Carr plan for land clearing draws fire” Sydney Morning Herald, 18.7.00, p.3.
62 Evidence of creative interpretation of many of the exemptions is abundant. Even the responsible Minister admitted in a media release of 30 August 2000: “Some of the exemptions are poorly defined and open to interpretation. There are also concerns about the cumulative impacts of the exemptions and how they are being monitored and complied
bodies set up to review the NVCA exemptions - the Independent Scientific Group, and the Community Reference Panel (‘CRP’).63

In relation to the Act as a whole, over time the use of exemptions appears to have become widespread and those using them have become bolder. The internal Review of Exemptions report (2000) stated that alleged breach reports were indicating “use of the exemptions over a much greater area; increasing use of a combination of exemptions in order to clear more land; clearing just outside the exemptions so that prosecution is unlikely; and more creative application of the exemptions.”64

Staff reported that the PNF exemption “attracts all kinds of interpretations from landholders and their logging contractors”65 These difficulties mirror broader systemic problems with other activity-based exemptions.66

But such conflict will only occur where the department seeks to restrict application of the exemption in the face of an expansive interpretation by landholders. Research presented in the previous chapter revealed a marked difference between the approach taken to the PNF exemption by the South Coast Regional Office and that taken by the North Coast Regional Office. In the North Coast and Hunter regions, it appears there was a laissez-faire stance of allowing self-assessment. In these regions, during the study period, 100% of PNF logging in these regions relied upon the PNF exemption - where it was available on non-protected land.67 At its worst, this involved DLWC turning a blind eye to the impact of logging under exemption. It is explicable (but perhaps not completely defensible) because in the North Coast, PNF activity is at its highest and departmental resources to assess forestry proposals are most stretched.68


65 DLWC (2000) above n 24 at 63, Comments of DLWC Officer No.12, Sydney-South Coast Region.

66 The exemptions were described in D-G DLIFC v Crawford by Talbot J as “convoluted, obscure and difficult to construe” in D-G DLIFC v Crawford at p.19.

67 The exemption was not available on State protected land.

68 This explanation was offered by Interview, Mr R. Adam, DLWC, Sydney-South Coast, 18.6.2002, by telephone.
Hawkins’ writing suggests that regardless of the detail of the law in statutes or court decisions, the law is worked out in practice by negotiation.\(^69\) A distinction is drawn between *negotiated compliance* and *enforced compliance*.\(^70\) This former analysis (negotiated compliance) is applicable in the PNF context because compliance with the law was not obtained through enforcement. But it most closely resembles a scenario of ‘negotiated non-compliance’, a term invented by Gunningham to explain where regulator and regulatee come to an unspoken agreement not to apply the legislation to the letter.\(^71\)

On the other hand, in the South Coast Region DLWC was able to adopt a tough stance - of only allowing PNF exemption claims meeting the strict definition of selective logging in the *Definitions and Exemptions* booklet – by playing a game of bluff, apparently with some success.\(^72\)

In such instances where DLWC seeks to enforce a narrow interpretation of the PNF exemption, it is constrained because of awareness of the likely difficulty in successfully prosecuting unauthorised forestry outside the scope of the PNF exemption. In the context of an exemption claim, it would be very difficult to prove which actions amount to a breach.

When confronted with a breach report and subsequently encountering regulatory resistance from landholders in the form of exemption claims, DLWC faces the dilemma of whether to attempt to prosecute landholders for exceeding the scope of this uncertain exemption. The leaked *Internal Review of Exemptions* stated that in the course of investigations of alleged breaches of the Act, the PNF exemption was very commonly raised by landholders, second only in incidence to the ‘minimal clearing’ (or ‘2 hectare’) exemption.\(^73\) These exemption claims are significant because 51 per cent of investigations into reported alleged breaches were abandoned following the assertion of exemptions.\(^74\)


\(^70\) Yeager (1991) above n 69 at 295.


\(^72\) Interview, R Adam, 15.6.02; Observations of the author at ANU Private Forestry field day, Candelo, 21.2.01.


\(^74\) DLWC (2000) *Review of the NVCA Exemptions*, at p.11. Where reported, the average area of investigation into a breach which was discontinued due to SEPP 46 exemptions was 18 hectares. At p.11, it states: “The total area of alleged breaches for which investigations were discontinued due to SEPP 46 exemptions is estimated to be about 2500 hectares, although this is less than 10% of the total area of reported alleged breaches. Note that this does not
The internal DLWC Exemptions Review stated “According to advice from regional staff, every breach investigation is significantly affected by the exemptions...”

In a submission to the review, one DLWC regional officer wrote: “This [PNF] exemption is so ... lacking in any definition that logging on non-protected lands is effectively unregulated by the NVCA. It would be absolutely impossible to convict anyone for alleged breaches that involve forestry.

It is departmental policy that the onus for determining whether proposed clearing is within the scope of the exemption rests with the landholder - an onus that is underpinned by the ultimate, if remote, threat of prosecution. The DLWC Staff Guidelines state:

> Although the exemptions should be explained to the landholder, the landholder must be satisfied that a proposal conforms to the exemptions. DLWC staff should not endorse, in writing, that a certain proposal is exempt...If the landholder is unsure if an exemption applies then they should make an application.

Ultimately, DLWC has chosen this course because the legal consequences of a mistake as to the scope of an exemption will ultimately fall on the landholder. It is evident that DLWC does not wish to provide further potential criminal defences for landholders based on ‘acting in reliance upon Departmental advice’.

Interviews with regional staff revealed that DLWC in the South Coast region has advised landholders that a management plan must be prepared if PNF logging is to proceed under exemption. DLWC is encouraging landholders to take positive steps to think through the possible environmental impacts of different logging practices, and to adjust their logging

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75 DLWC (2000) Review of the NVCA Exemptions, at p.11. Where reported, the average area of investigation into a breach which was discontinued due to SEPP 46 exemptions was 18 hectares. Page 11 states: “The total area of alleged breaches for which investigations were discontinued due to SEPP 46 exemptions is estimated to be about 2500 hectares, although this is less than 10% of the total area of reported alleged breaches. Note that this does not include cases which are currently under investigation, in which some landholders have cleared large areas and rely heavily on exemptions.” DLWC (2000) above n 73 at p.12. On the basis of estimates provided by the Compliance Branch in the Exemptions Review Report, the NCC calculated that the extent of illegal clearing was 33,000 hectares annually for all forms of clearing. (p.11 at footnote 59).

76 DLWC (2000) above n 73 at p.11. Comments of DLWC Officer “Number 5”.


78 This scenario has already created problems for DLWC. An internal DLWC report on the exemptions stated that “Potential prosecutions have been abandoned because of the combination of exemptions and statements made within the published material which are inconsistent with the exemptions, for example, the Cassidy and Malouf cases.” Review of the NVCA Exemptions, p.6.
Persons not entitled to the PNF exemption may claim it with impunity if there is inadequate enforcement. In those regions where DLWC takes the position that anyone can claim the PNF exemption on non-protected land, it is effectively signalling that no harm will come to those who choose a liberal interpretation. Conversely, stringent compliance activity could encourage landholders and logging contractors to be cautious about claiming the exemption.

It remains doubtful whether, as a matter of law, DLWC could overcome the broad definition of the exemption and successfully prosecute a landholder for failing to act within its scope. DLWC’s narrow interpretation of the PNF exemption expressed in Definitions and Exemptions is unlikely to be legally binding. This is because it is unlikely to fall within the definition of extrinsic materials that could be relied upon by a court as a definitional aid. There is no case law on the scope of the PNF exemption which can be relied upon for assistance in interpretation.

**OTHER ENFORCEMENT ISSUES**

*Proving pre-existing vegetation*

Another particular difficulty in conducting a prosecution for breach of the Act is the lack of baseline data regarding pre-existing native vegetation. The difficulty is in proving that certain native vegetation existed on a site prior to clearing, an issue raised by the NSW...
Audit Office, and arising in some of the SEPP 46 prosecutions. Similar problems have been reported interstate. The issue is of particular concern where DLWC would seek to establish that logging which had taken place did not meet sustainability criteria such as retention of 50 per cent of stems. In broad terms, the answer to these sorts of problems is to insert evidentiary deeming provisions, e.g. deeming that native vegetation pre-existed clearing, with the onus on the defence to prove otherwise.

A review of the South Australian Act recommended adoption of a civil standard of proof for native vegetation offences:

a lesser standard of proof [i.e. a civil standard] will clearly result in a greater number of successful matters, particularly given the nature of the contraventions under the Native Vegetation Act. For example, there are rarely any eyewitnesses, other than the defendant, and it is often difficult to prove who is responsible for the clearance and when it occurred. The evidence is often collected some time after the clearance and it can be very difficult to demonstrate the exact position of the vegetation before clearance.

ENFORCEMENT FINDINGS AND DISCUSSION

There is limited information that specifically describes the extent of enforcement activity that was undertaken directly in relation to PNF, as this data is not separately compiled by DLWC. However an internet search showed that no prosecutions for PNF had taken place without consent or in breach of conditions of consent during the study period either under the NVCA or under SEPP 46. In the North Coast and Hunter regions for which detailed enforcement statistics were gathered by means of interviews it appears that DLWC applied only administrative enforcement techniques to non-compliant PNF.

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81 Interview, Bob Artwood, North Coast DLWC office, Grafton, 29.11.00, (in person); Audit Office NSW (2002) above n 21 at 43: “It can be very difficult to prove, after the event, that none of the many exemptions applied to an area of cleared land.”
83 A review of the South Australian Act stated, regarding evidentiary difficulties: “For example, there are rarely any eye witnesses, other than the defendant, and it is often difficult to prove who is responsible for the clearance and when it occurred. The evidence is often collected some time after the clearance and it can be very difficult to demonstrate the exact position of the vegetation before clearance.” Native Vegetation Working Party (SA) (1999) above n 46 at 11.
84 This criteria is contained in the booklet, Definitions and Exemptions, 2nd edition, at p. 18. In some instances, the North Coast Region conducts forest survey transects as part of the site visit if informed that the landholder intends to log under the exemption. The purpose is so that baseline data is on file to enable a future prosecution for logging operations which have exceeded the scope of the exemption. However no such prosecutions have taken place.
85 Native Vegetation Act 1991 (SA), s.34; Vegetation Management Act 1999 (Qld), s.67.
Interviews with staff responsible for compliance revealed some PNF-specific data. The Director of Soil and Vegetation Compliance stated in interview that by October 2000 several warning letters had been issued in relation to PNF. Some related to logging without consent where logging took place in purported but improper reliance on the PNF exemption, and others concerned breach of conditions attached to consents for logging on protected land.\(^{88}\)

In the North Coast Region, enforcement efforts to November 2000 had focussed on warning letters, stop-work orders and remediation directions in preference to prosecution. Nevertheless DLWC legal staff visited the region in order to investigate several matters with a view to prosecution.\(^{89}\)

In the Hunter Region, interviews of senior management in March 2000 revealed a preference for the use of warning letters; nothing else had been used in relation to PNF. Specifically, there were no stop-work orders, no prosecutions and no remediation directions. Three warning letters had been sent, two relating to logging without consent.\(^{90}\)

It is unlikely that such actions were sufficient to exert a strong general deterrent effect to encourage applications for consent by the PNF industry. Further, there was no auditing of exemption claims. Nor were there efforts to test the scope of the PNF exemption in the courts.

This information, although inconclusive, suggests that enforcement methods used in these regions in relation to PNF were probably consistent with the general approach to enforcement of the NVCA across the entire State, which, in relation to all forms of vegetation clearance, was as follows. By October 2000, there had been only one prosecution formally commenced (and none completed)\(^{91}\) and only nine stop-work orders issued for alleged offences against the NVCA.\(^{92}\) One hundred and twelve warning

\(^{88}\) Interview, Dr Ian Hannam, Director Soil and Vegetation Compliance, DLWC, 5.10.00, by telephone.

\(^{89}\) Interview, Bob Attwood, North Coast DLWC office, Grafton, 29.11.00, (in person).


\(^{91}\) The first prosecution under the NVCA was proceedings against Greentree and Prime Grain Pty Ltd for clearing 2000 hectares of native vegetation. Director-General Land and Water Conservation v Greentree & Prime Grain Pty Ltd, proceedings commenced in Land and Environment Court, 23 March 2001 for clearing 2000 hectares of native vegetation between March 1999 and May 2000. Media Release, 23.3.01. Note that an earlier prosecution of Mr Greentree was discontinued following negotiations between the defence and prosecution.

\(^{92}\) Interview, Dr Ian Hannam, Director Soil and Vegetation Compliance, DLWC, 5.10.00, by telephone. A newspaper report provided similar data: by August 2000, there were 401 reports of illegal clearing. The Department considered that 270 of these clearances were illegal, had sent 82 warning letters, and issued nine stopwork orders since January 1998. Woodford, J. (2000) “Carr drags the chain on illegal land clearing”, SMH, 29.08.00, p.1.
letters had been sent, in response to a total of 471 alleged breaches of the Act. At April 2002 there had been little change in these patterns of enforcement. By that time there had been 705 alleged breaches, in response to which 141 warning letters had been sent. Seventy-one per cent of alleged breaches involved no further action being taken. Twenty-one per cent of allegations were responded to with a warning letter (see Table 2).

Table 2 Results of Alleged breach investigations 1 January 1998 to 30 April 2002 (State-wide)

<table>
<thead>
<tr>
<th>Action taken</th>
<th>Number of alleged breaches</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>No further action</td>
<td>499</td>
<td>71</td>
</tr>
<tr>
<td>Warning letter</td>
<td>147</td>
<td>21</td>
</tr>
<tr>
<td>Remediation agreement</td>
<td>23</td>
<td>3</td>
</tr>
<tr>
<td>Stop-work order</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Direction for remedial work</td>
<td>16</td>
<td>2</td>
</tr>
<tr>
<td>Property agreement</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Prosecution commenced</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Total (still under investigation)</td>
<td>705</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: DLWC advice to NSW Audit Office

The fact that the number of alleged breaches of the Act increased steadily every year between 1998 and 2001, from just over 130 per annum in 1998 to around 230 in 2001, lends weight to the suggestion that there was limited deterrent effect being generated by the Act, partly because of limited coercive enforcement. The increase in the number of breaches alleged could also reflect increased enforcement activity in 2001, and may also reflect increased reporting by the community of suspected breaches. At this stage there is insufficient evidence to support a firm conclusion based on these propositions.

The question remains whether the number of prosecutions is an adequate indicator of the degree of diligence of enforcement activity. It is not a complete or sufficient

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93 Data provided by DLWC to Native Vegetation Advisory Council, October 2000, unpublished.
94 DLWC Briefing Notes provided to NSW Audit Office, 24 May 2002, as reproduced in Audit Office NSW (2002) above n.21.
95 Statistics presented in table in Audit Office NSW (2002) above n.21 at 44.
indicator. Yet it remains a crucial element of evaluating the extent of enforcement. Some level of prosecution activity is essential in order to encourage compliance. One might expect that DLWC would have carried out some prosecutions for unauthorised PNF and PNF operations in breach of conditions. But there were no prosecutions in relation to PNF under the NVCA during the study period. In relation to alleged non-forestry breaches of the NVCA, seven prosecutions had been commenced by April 2002. In other jurisdictions under similar forestry or vegetation-protection legislation, there was a higher level of enforcement than that applied under the NVCA during the study period. For example, in Tasmania, in relation to PNF offences alone, there were a total of 38 notices, 3 fines and 9 prosecutions during the study period (1997-2002). In South Australia during 1999-2000 alone there were 13 prosecutions in response to allegations of illegal native vegetation clearing.

It is likely that the general deterrence effect in operation under the NVCA was limited during the study period as there appears to have been little use made of the criminal (or civil) enforcement provisions of the Act, particularly in relation to the PNF industry. The strategy was reliant upon the deterrent effect of administrative actions such as warning letters and to a lesser extent notices and stop-work orders combined with the residual deterrence effect from the SEPP 46 prosecutions (see Appendix 8.1). Some of these prosecutions were still being concluded during the study period and may have exerted some deterrent effect against illegal vegetation clearance.

Towards late 2000, there was some evidence of a toughening of resolve at DLWC, with the hiring of regional compliance staff, the review of exemptions by the CRP and ISG,
and the commencement of the first prosecution under the Act in March 2001.\(^{100}\) By 2002
the freeze on prosecution activity had clearly been lifted - with six prosecutions
commenced under the NVCA by July 2003. Yet none of these prosecutions related to
PNF, involving instead mainly agricultural clearing.\(^{101}\)

**Administrative enforcement findings - general**

As we have seen from Table 2, DLWC showed a tendency to avoid ‘coercive’
enforcement of the NVCA in general during the study period. There was a preference
for administrative enforcement, or no enforcement, in response to breaches. 92 per cent
of responses to alleged breaches between January 1998 and April 2002 involved either
warning letters or no formal action at all.\(^{102}\) The capacity of DLWC to successfully apply
administrative techniques as compliance tools depends on the extent to which the
Department demonstrated a willingness to resort to more coercive enforcement
responses.

Although the question of the extent to which landholders cooperated with administrative
enforcement actions and requests was not examined systematically in the research phase
of this thesis, some evidence came to hand of instances of non-cooperation with requests
that landholders sign a property agreement under Part 5 of the NVCA containing
remediation clauses following the detection of breaches of the Act.\(^{103}\) Section 47 of the
Act enables the Director-General to issue a mandatory direction to landholders, and
more recently there have been appeals by landholders to the Land and Environment
Court against directions to carry out remedial work.\(^{104}\) A North Coast officer recounted

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\(^{100}\) D.G. DLIFC v Prime Grain Pty Ltd & Ors; Greentree v D-G DLIFC [2002] NSWLEC 93 revised- 26/07/2002,
No.40039 of 2002, 0404 of 2002; D-G DLIFC v Greentree & Anor [2002] NSWLEC 102, Nos. 50039-40 of 2001 and

\(^{101}\) Director-General DLIFC v Leverton Pastoral Company Pty Ltd [2002] NSWLEC 212 (18 September 2002) (involving 325
hectares of Belah and Bimble Box woodlands $5,000 fine); Director-General of National Parks and Wildlife & Director
General DLIFC v Wilkinson & Anor [2002] NSWLEC 171 (27 September 2002); Director- General DLIFC v Greentree

\(^{102}\) It is not suggested here that all alleged breaches in fact amounted to genuine breaches of the legislation, as a matter
of law or fact.

\(^{103}\) Email from anonymous North Coast region DLWC officer, 17.6.02, reproduced in Appendix 8.3.

\(^{104}\) Slack-Smith and Another v D-G DLIFC[2003] NSWLEC 189, No. 40856 of 2002, (22 August 2005), Talbot J (judicial
review proceedings) ; Buttersworth v D-G DLIFC[2003] NSWLEC 169, No. 10552 of 2002 (9 July 2003), Talbot J
(class one proceedings; part-heard).
difficulties in obtaining compliance following an incident involving unauthorised clearing of up to 20 hectares of native vegetation including rainforest on steep slopes:

Various blokes from this office went out to prepare a remediation plan, and Mr. [X] {the landowner, name deleted} said, well you can stick that up your a----. And now we’ve apparently missed the 2 year court registration limitation [for commencement of a prosecution].

In the SEPP 46 prosecutions, DLWC placed an emphasis on pursuing court orders for site remediation by consent rather than seeking substantial fines. Several of the successful prosecutions secured the entry of the defendant into consent orders, which involved signing a property agreement with DLWC. By associating property agreements with criminal proceedings, the potential exists to unintentionally create a perception amongst the rural community that property agreements are associated with criminal penalties, perhaps affecting the rate of voluntary entry into such agreements.

Civil enforcement - findings

Given the advantages of civil enforcement discussed above (at page 13), intuitively one might expect that if few criminal prosecutions were occurring, then civil enforcement would have been more frequently employed. However, despite the more economical nature of civil proceedings, there is no evidence that they were used by DLWC during the study period against any form of illegal vegetation clearance.

This omission may be due to a mental association on the part of regulators of civil enforcement with the relatively notorious “any person” provisions in NSW laws enabling judicial review by NGOs and environmentalists. With this cultural view of civil litigation there may have been a tendency to overlook the more obvious potential of civil enforcement provisions for the regulator.

Further, during the study period there were no third-party (i.e. non-DLWC and non-applicant) judicial review actions by NGOs or concerned citizens to challenge the grant of consent to conduct PNF. This is most likely because of the poor prospects of success (due to the broad discretion allocated to decision-makers under s.79C EP&A) and the

105 Email from Anonymous North Coast DLWC officer 17.6.02, Reproduced in Appendix 8.3.
107 Bates, G. Franklin, N. (1999) above n 4. This consultants' report by academics from Sydney University Law Faculty was suppressed by the Department until a Parliamentary order in March 2001 forced its release.
risk of adverse costs orders, as well as non-legal barriers to litigation such as lack of resources and information with which to enforce the law.

Compliance on Protected lands

At this point we briefly review the residual effect of prosecutions under the protected lands provisions of the *Soil Conservation Act*. Prior to the enactment of the *NVCA*, PNF was partly regulated under the protected lands provisions and partly under SEPP 46. Regulation on protected lands is relevant as many members of the PNF industry during the study period would probably have been aware that DLWC had enforced protected lands provisions in the recent past (e.g. during 1996-1997). Thus there may have been some residual deterrent effect in operation during the study period.

Under the former protected lands regime, there were at least four prosecutions for offences occurring in the course of commercial PNF operations. Of these, two related to clearing riparian vegetation. The most significant penalty was imposed in *Simpson v Gatacre*, involving fines of $10,000 for breach of conditions of authority in the course of PNF on protected lands. In *Hannam v O'Connor & Veness* (1995), fines totalling $4000 were imposed for unauthorised PNF on protected land.

DLWC’s approach to enforcing the protected land provisions must be distinguished from its approach to forestry elsewhere. DLWC and the PNF industry had accommodated themselves to the protected lands provisions since the 1970s. The *NVCA* regulating PNF elsewhere was a new development. However we have seen how in the North Coast and Hunter regions there was a very high claim rate on the PNF exemption where it was available on non-protected land. Thus it appears little changed for the PNF industry in these regions upon the commencement of the *NVCA*. In other

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108 During 1996-7, eight alleged breaches of protected lands provisions were reported. This resulted in one successful prosecution in the Land and Environment Court and one statutory notice to rehabilitate, and the issuing of warning letters in six other cases. Section 15A powers to order rehabilitation of illegally cleared land were exercised once during 1996-7. DLWC (1997) *Annual Report 1996-7*, p.31.


110 *Simpson v Love*, Land and Environment Court, Nos 50312-6 of 1990, per Bignold J; *Hannam v Adam*, Land and Environment Court, No.50026 of 1996, per Bignold J.

111 *Simpson v Gatacre* (1992) 74 LGRA 320. In this case the offence was held to be one of strict liability. Further the defendant was liable for having caused trees to be felled by contractor.

112 Appendix 8.2 provides the details of prosecutions relating to forestry on protected land.
words, activity on protected land was regulated, just as it always was, and PNF elsewhere was left effectively unregulated, because of the operation of the PNF exemption.

Awareness amongst the industry of protected lands provisions is relatively high because of the fact that they have been in place since 1972; a number of prosecutions have taken place, and landholder-education materials have been distributed over a relatively long period of time. The key question is the extent to which DLWC improved the regulation of PNF on non-protected land, thereby expanding the reach of the regulatory net.

The SEPP 46 Prosecutions and PNF

Although there were no prosecutions under the NVCA during the study period, there were 16 prosecutions carried out under its predecessor, SEPP 46. The majority of these related to vegetation clearance in the course of agriculture, and none related to PNF.

During the study period, some SEPP 46 prosecutions were still in progress, with judgements being delivered as late as February 1999. The results of these prosecutions were becoming known in the rural community. Although none of the prosecutions related to PNF activity, had the courts imposed large penalties in relation to illegal agricultural clearing, this would indirectly have sent a message to the PNF industry.

The Land and Environment Court imposed relatively low fines for general vegetation clearing offences under SEPP 46, when compared with results in other jurisdictions. Under that instrument, the largest fine imposed on a corporation was $35,000, and on

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114 Interview, Dr Ian Hannam, Director Soil and Vegetation Compliance, DLWC, 15.1.98, (in person), Parramatta.
115 Appendix 8.1 provides the results of the SEPP 46 prosecutions in detail. During 1996-7, 40 alleged breaches were reported which resulted in 13 warning letters and 6 legal proceedings were commenced, with 2 successful prosecutions secured, and others pending. DLWC (1997) Annual Report 1996-7, p.31. The defences raised to prosecutions under SEPP 46 were the application of various exemptions, the defence of honest and reasonable mistake of fact, and that of existing use rights. Lee, E.; Baird, M.; Lloyd, I. (1998) “State Environmental Planning Policy No 46 – Protection and Management of Native Vegetation”, 15(2) Environmental and Planning Law Journal 127 at 131-134.
117 In particular, comparison with SA prosecutions is warranted. In the Brinkworth prosecution of 2003, a penalty in excess of $270,000 was imposed (on appeal).
118 D-G DLWC v Orlando Farms Pty Ltd & Ors, unreported Nos 50040,50041,50042,50045-50053 of 1997.
an individual was $10,000. On at least six occasions, a guilty verdict was delivered but no conviction was recorded, due to the application of s.556A Crimes Act 1900. The average fine imposed in the event of a conviction (including matters in which s.556A Crimes Act was applied) was $6238. The Department did not appeal any of the lower sentences imposed.

Section 556A Crimes Act (now s.10 Crimes (Sentencing Procedure) Act 1999) allows a trial judge to take into account the character of defendant or the “trivial nature of the offence” or other extenuating circumstances to make an order dismissing a charge despite having found that an offence was committed. The application of s.556A in these prosecutions ignores the serious nature of vegetation-clearing offences. They are also in conflict with Land and Environment Court decisions stating that s.556A should not normally be applied in the environmental context. Yet DLWC did not appeal the decisions in which s.556A was applied. During these prosecutions, DLWC preferred to negotiate “better environmental outcomes” such as property agreements and consent orders for site remediation, in preference to pursuit of larger fines.

A factor in weighing the severity of the penalty imposed is the imposition of orders that the offender pay the prosecution’s costs. The impact of consent orders for the remediation and conservation of native vegetation must also be taken into account, as well as consent orders to enter into property agreements. However, the global effect of these decisions was that SEPP 46 probably did not exert sufficient general deterrence to alter decision-making in the PNF industry.

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120 Six instances, not counting D G DLWC v Ikaro.
121 Removing the influence of the decisions in which s.556A was applied, the average fine was $10,076.
122 One possible amendment to the Act would be to link the sentencing formula to the area and significance of the vegetation illegally cleared and to the associated increase in value of land, as is the case under the Native Vegetation Act 1991 (SA), s.26. Such a reform would assist in generating a deterrent effect, and in reducing the risk that fines are internalised as a cost of doing business. This principle is discussed in EPA v Aaron Plant Hire & Earthmoving Pty Ltd [2000] NSWLEC 122 (10 May 2000), Unreported, No. 50129 of 1998. Fines should reflect the economic gains associated with illegal clearing, and should seek to nullify that gain.
124 Unlike other agencies in a similar position in SA and Tasmania.
125 Crimes (Sentencing Procedures) Act 1999, s.43(6)(e).
Although there were a number of prosecutions under SEPP 46, it is also the case that there were many alleged breaches that were not prosecuted. While many of these may have been trivial there may also have been a considerable proportion of serious incidents. One of these involved extensive clearing of forest in 1996 on a 500 ha site on slopes of up to 26 degrees, without authorisation under SEPP 46. No prosecution occurred on the basis that the vegetation cleared fell within the ten-year-old regrowth exemption. Neighbours contested this assertion.

The SEPP 46 prosecutions relied upon the offence provisions of the EPAA, particularly s.125. The defendants in each of these matters were charged with failure to obtain development consent as required by cl.6(1) SEPP 46, in breach of s.76(2) EPAA, being an offence under s.125(1) EPAA. The maximum penalty for breach of SEPP 46 was $110,000. The maximum penalty for unauthorised vegetation clearance under the NVCA is now $1.1 million (10,000 penalty units) plus a possible further daily penalty to a maximum of $110,000 per day of a continuing offence, with the potential for imposition of court orders for replanting of vegetation, secured with a bond if necessary.

Criminal enforcement: discussion

Attempts to assess the performance of DLWC on the basis of prosecution results do not provide a complete picture of the department’s compliance record. However, it is still a necessary step to set out prosecution results. The data helps to assemble a picture of the deterrent effect on the regulated community during the study period. The low penalties imposed and the fact that few convictions involved PNF suggest that it is unlikely that the legislation had a major deterrent effect on the PNF industry, especially when set against the potential financial gain from logging.

126 Under SEPP 46, 129 alleged breaches were reported to Head Office between August 1995 and December 1997. Data provided to Native Vegetation Advisory Committee, for meeting on 26.8.99, Agenda Item 4.2. During 1996-7, 40 alleged breaches were reported which resulted in 13 warning letters and 6 legal proceedings were commenced, with 2 successful prosecutions secured, and others pending. DLWC (1997) Annual Report 1996-7, p.31.


128 Interview, Mr. Jim Morrison, Nature Conservation Council NSW Representative, Tenterfield Regional Vegetation Management Committee, 14.8.01, by telephone.

129 EPAA, s.126(1); penalty increased from previous level of 1000 penalty units to new penalty of 10,000 penalty units by the Environment Planning and Assessment Amendment Act 1999, No.72 of 1999. The NVCA also applies the penalty provisions of the EPAA: NVCA, s.17(2). Therefore there is some ground to suggest that if prosecutions were brought under the NVCA the sentence imposed is likely to be greater than those imposed in the SEPP 46 matters, because of the new increased maximum penalty.

130 EPAA, s.126(3). However, where those prosecutions are brought in the Local Court, instead of in Class Five of the Land and Environment Court, the NVCA provides that the maximum penalty is $110,000: NVCA, s.64(2).
How can patterns of enforcement of the *NVCA* be explained? Suggestions that the reason for the low number of prosecutions was due to “few” breaches are inaccurate. By April 2002 there had been over 700 breaches alleged, involving all types of land use. Although some of these either involved no actual breach, or amounted to technical or minor breaches, more sophisticated explanations must consider the impact of the PNF exemption. Serious difficulties arose from the ambiguous drafting of this exemption. Its uncertain scope limited DLWC’s capacity to prosecute unauthorised logging even where the activity was considered to fall outside the scope of the exemption.

Perhaps DLWC should have initiated a trial prosecution directed at clarifying the scope of the PNF exemption. On the other hand, there were grounds for regarding the PNF exemption as “unenforceable” - that any prosecution confronting a defence based on this exemption would have inevitably failed.

Environmental agencies are often reluctant to prosecute ‘borderline’ cases, preferring to concentrate on clear-cut breaches. This is for several reasons: they prefer to avoid the risk of adverse costs orders, and they wish to ensure that the credibility of legislation is not called into question, undermining the fragile deterrent effect exerted by offence provisions. Yet such accounts still do not explain why there were no prosecutions for unauthorised PNF on protected land during the study period, a situation where the PNF exemption was not applicable.

Nevertheless, explanation of DLWC’s pattern of enforcement is best achieved by reference to a range of factors in addition to technical legal issues. The question needs to be seen in its broader social and political context. Some breaches must have been sufficiently serious to warrant a more rigorous application of administrative, civil or criminal enforcement techniques. But many of these breaches were not subject to such

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131 However based on the legal analysis presented in this chapter, such litigation may have been futile, and could have exposed the PNF exemption as applicable to any form of forestry where timber is produced rather than only sustainable private forestry.

132 In a submission to DLWC’s *Internal Review of Exemptions*, one DLWC Regional officer wrote: “This [PNF] exemption is so … lacking in any definition that logging on non-protected lands is effectively unregulated by the *NVCA*. It would be absolutely impossible to convict anyone for alleged breaches that involve forestry.” DLWC (2000) above n 24 at 63, Comments of DLWC Officer “Number 5”.

133 Observations of the author from participant observation at Victorian EPA Legal Section, October 1995.

134 Given that breaches of the PNF exemption were described as “virtually impossible to prosecute” etc, accordingly we would expect the majority of enforcement activity to have related to protected land – where the exemption is not available.
action. The literature on regulation suggests that the key factors affecting agency behaviour in implementing legislation are practical, cultural, organisational, and political. According to the literature, agencies typically seek to avoid the development of adversarial attitudes between regulator and regulatee. Cotterrell has remarked that policies of accommodation are “clearly revealed in virtually all studies of regulatory agencies”. He wrote: “[t]he entire regulatory process is seen by regulatory agencies to depend on cooperation, goodwill and the mutual appreciation of problems”.

In relation to PNF in particular, one DLWC officer described an internal culture of wishing to avoid imposing regulatory requirements. This undoubtedly stemmed from a reluctance to apply stringent regulation on private land, particularly where it had not been imposed previously. He remarked upon a cultural desire to avoid commencing prosecutions in order “to maintain some credibility” with the rural community, by not “going too far”. The necessity to tread warily increased because the introduction of the NVCA occurred simultaneously with controversial reforms to water law that also antagonised some landholders.

In the literature it is argued that vigorous law enforcement on private land may paradoxically generate a backlash, resulting in lower levels of compliance. In the PNF context there is little evidence of overzealous enforcement during the study period. The situation is better characterised as one in which there was little vigorous enforcement. In spite of this, a broad-based political campaign was still waged by rural interests against the legislation, exacerbating a situation in which virtually any amount of enforcement activity, including simple property inspections, would generate resistance and conflict.

The desire on the part of the department to be seen as “friendly to landholders” was mentioned by agency staff. This arises partly from the history of DLWC as successor to the Soil Conservation Service, which had an identity as a rural extension service, with a

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139 Interview, Mr Martin Fallding, ex DLWC Hunter staff member, 27.9.00, notes on file with author.
140 Water Management Act 2000 (NSW). Interview, Mr Martin Fallding, ex DLWC Hunter staff member, 27.9.00, notes on file with author.
141 See Chapter Three.
142 By contrast, in Tasmania, industry appears to broadly support the forest practices legislation and its enforcement as the law involves a degree of self-regulation and compensation provisions that sweeten the elements of coercive enforcement. See Chapter Nine.
“positive role” of helping farmers, as opposed to DLWC which has the potentially conflicting roles of extension service and regulator.\footnote{143 Interview, Mr Martin Fallding, ex DLWC Hunter staff member, 27.9.00, notes on file with author.}

Grabosky and Braithwaite’s 1986 study of some 96 Australian regulatory agencies, Of Manners Gentle, found that a tendency to avoid prosecution was common.\footnote{144 Grabosky, P., Braithwaite, J. (1986) Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies, Oxford University Press, Melbourne, 260pp.} Grabosky wrote: “Generally, Australian regulatory executives overwhelmingly rejected a law enforcement ideology…Prosecution, we were consistently told, was a ‘last resort’.”\footnote{145 Grabosky, P. (1993) “Australian Regulatory Enforcement in Comparative Perspective”, ch.2 in Grabosky, P, Braithwaite, J. (eds.) (1993) Business Regulation and Australia’s Future, Australian Institute of Criminology, Canberra, at 10. This is consistent with a British survey of enforcement of environmental and OH&S legislation by Hutter (1989) which again showed prosecution was used as a last resort: Hutter, B. (1989) Variations in Regulatory Enforcement Styles, \textit{11 Law and Policy} 153 cited in Ingleby, R.; Johnstone, R.(1995) “Invocation and enforcement of legal rules” in R. Hunter, R. Ingleby and R. Johnstone (eds.), \textit{Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law}, Allen & Unwin, Sydney,157-173 at 164-165.} Farrier et.al. argue that the traditional practice of NSW agencies has been very similar.\footnote{146 Farrier, D., Lyster, R., Pearson, L. (1999) \textit{Environmental Law Handbook: Planning and Land Use in NSW}, 3rd edition, RLCP, Sydney at 67. In a 1989 review of OH&S enforcement in NSW, Gunningham described a broad philosophy of “advice and persuasion” … He wrote that the regulatory agencies “have been… particularly reluctant to invoke criminal sanctions against employers who break the law.” Gunningham (1989) above n 12 at 231. He wrote that these policies were ineffective: “self-regulation and the ‘advise and persuade’ philosophy have failed in relation to the asbestos industry…” (at 227).}


Vegetation Management Officers (VMOs), the front-line officers in implementing the legislation, were most often described as enthusiastic about enforcing the legislation. Managerial officers were described as sometimes keen to overturn recommendations of VMOs to reject applications to clear vegetation. One source referred to “some extreme conflicts” between VMOs and regional managers. He argued that some management-level officers had “not much idea about native vegetation”, partly because of their backgrounds in soil conservation or public administration.

One of the difficulties for DLWC staff in implementing a more rigorous enforcement stance is DLWC’s apparent lack of resources with which to do so. In November 1999, the Ecological Society of Australia alleged that the compliance branch of DLWC was not able to pursue many breach allegations to prosecution due to staff cuts and redeployment. More recent evidence from 2002 supports this view, with one officer complaining that serious breaches of the Act (such as an incident where 20 ha of vegetation including rainforest and wet sclerophyll were cleared on steep slopes in the Hunter Region) could not be pursued because of insufficient organisational capacity. The Legal Branch apparently explained: “the Greentree prosecution is consuming all of the resources of the legal branch.” Several papers in the theoretical literature have noted the pressure to adopt a conciliatory approach when agency resources are meagre.

Another explanation for DLWC’s seemingly ambivalent attitude to prosecutions is its lack of a clear organisational policy on compliance. For the first two years of the study period DLWC had no formal prosecution or compliance policy in place, unlike the EPA or the DPP. A policy would have made the task of ensuring compliance easier for individual officers seeking to take action against breaches. By December 1999 a draft had been released but this had not yet been finalised two-and-a-half years later in September 2002. The policy originally stated “every effort will be made to resolve breach matters

149 Interview, Mr Martin Fallding, ex DLWC Hunter staff member, 27.9.00, notes on file with author.
150 The approach of DLWC officers to administering the NVCA in relation to agricultural clearing may not be the same as its approach in relation to PNF.
151 Interview, Anonymous ex DLWC staff member, 23.9.00, notes on file.
153 At Upper Pappinbarra in the Hastings Council area, Hunter Region. See Appendix 8.3.
154 Appendix 8.3.
by negotiation.” Further, it stated “only in extreme circumstances will prosecution be considered”, for example in the case of repeat offending, significant environmental harm or where a satisfactory result cannot be obtained by negotiation or stop-work order.157 It stressed the use of non-statutory measures such as extension and warning letters, stating: “in those circumstances where a landholder agrees to undertake rehabilitation measures as recommended by DLWC, DLWC should not generally pursue legal action.”158 The policy was criticised by the EDO for placing an excessive emphasis on negotiation and conciliation.159 The essence of the test in the NSW EPA and Commonwealth and State DPP policies is that a decision to prosecute should be made on the basis of whether (a) there is a prima facie case with reasonable prospects of success, and (b) whether prosecution is in the public interest.160 DLWC’s policy was later revised to take account of this critique; however, at the time of writing it remained in draft form.

Associated with DLWC’s lack of resources for compliance purposes was the lack of resources that it could allocate to developing a policy for the achievement of ESFM in the PNF industry. With a lack of clear policy direction on PNF, staff would have found implementing the Act in relation to the PNF industry more difficult. DLWC’s seemingly accommodatory approach to breaches and to exemption claims during the study period may have to some extent stemmed from a lack of commitment on the part of senior staff at head office to addressing the issue of the potential impacts of PNF, and therefore of enforcing the rules that applied to it. A North Coast officer, who suggested this arose from the “complete lack” of any policy directive in relation to PNF from senior management, described enforcement of the Act as “lax”. He described DLWC’s overall attitude to PNF as “laissez-faire”.161

An additional factor undermining the capacity of field officers to present a firm position regarding the law has been the impact of frequent amendments to legislation over the seven years since the commencement of SEPP 46 in August 1995. These required many landholders to comply with the protected lands provisions, to then understand three different versions of SEPP 46, and later to comply with the NVCA and more recently to

159 EDO and NCC (NSW) Joint Submission on the DLWC’s Draft Soil and Vegetation Compliance Policy, December.
160 Office of the Director of Public Prosecutions (NSW) (1998) Prosecution Policy and Guidelines at 4. Note that DLWC could argue that limiting the number of prosecutions is in the public interest, on the basis of reducing the expenditure of public funds.
161 Interview, Phil Redpath, ecologist, DLWC Grafton (North Coast Region Office), 31.3.99.
consider the controls set out in RVMPs and draft RVMPs. The changes have caused confusion amongst the regulated community, and may have undermined the ability of DLWC staff to stringently enforce the law where necessary.

Another reason to be wary of generalisations about DLWC’s stance is because of regional variations. According to one informant “much depends on the whole district level culture” in each region. As seen above, there is evidence that the Sydney-South Coast Regional Office (in contrast to the North Coast Region) adopted an assertive stance in relation to landholder’s claims for the PNF exemption. In the North Coast there was no evidence of active encouragement of applications for consent in response to inquiries. As a result the PNF exemption was used by 100% of landholders on non-protected land. Still, the Regional Manager refuted the suggestion that his office may not have been interested in enforcement, stating, “most of my staff’s time is tied up in investigating and following up breach allegations.”

Even though regional offices may have spent substantial time on breach allegations, during the study period it was difficult to get a prosecution approved. The decision to commence a prosecution under the NVCA belongs to the Director-General (D-G). There is a possibility that reluctance to take a robust approach to compliance issues in relation to PNF may have been related to the leadership of the department. The NSW Audit Office commented in 2002 on the fact that Dr Bob Smith was simultaneously Managing Director of State Forests and D-G of DLWC. It stated “there is the potential for a conflict of interest, including… in relation to consideration of exemptions for private native forestry.” Whether these involvements of the Director-General actually influenced enforcement decisions cannot be established.

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162 Interview, Mr Martin Fallding, ex DLWC Hunter staff member, 27.9.00, notes on file with author.
163 Interview, Bob Attwood, North Coast DLWC office, Grafton, 29.11.00. As evidence of the Region’s toughness an example was cited of DLWC refusing to lift a stop work order despite landholder demands, and of insisting on conditions of consent to protect a threatened eucalypt species that led to a plantation company abandoning a $135 million project. It was suggested that the company in question insisted on 100% removal of all trees and would not accept zones for tree retention that were proposed by DLWC.
165 The reasoning lying behind this comment is as follows. If PNF standards are tightened considerably this will reduce the role that private forests can play as a pressure release valve for the timber supply difficulties that exist on public land in NE NSW. PNF will not be as easy to pursue as an alternative source of supply to logging in State Forests. Such reasoning is bolstered by the fact of DLWC’s rejection of the Smith report which proposed a method for achieving ESFM within the PNF sector and would have introduced stricter standards to the PNF industry in NSW: Smith, A. (1999) Guidelines for Application of Native Vegetation Conservation Act 1997 Exemption to Sustainable Forestry on Private Lands in NSW, a report to the DLWC by Setscan Pty Ltd, Armidale, 128pp.
Importantly, the D-G’s decision is subject to Ministerial influence and direction.166 This factor appears to provide a large part of the explanation for the low level of prosecution activity. According to an anonymous compliance officer interviewed in September 1999, “some prosecutions” under the NVCA had been commenced, but were later discontinued in response to “an unwritten policy” directive from “up the line [of management]”.167 It was stated under condition of anonymity that a Ministerial directive had been issued that all current prosecutions be discontinued and that no further prosecutions be commenced.168

This policy emerged more explicitly in 2000 in a letter signed by the then Minister for Land and Water Conservation in February. He wrote: “Prosecution of alleged offenders is considered the last option to be used by the Department. The Department’s preferred approach is to focus on extension and education of the rural community in terms of its obligations under the Act...”169 In an interview in April 2000, the then Minister expressed a preference for resolving matters by negotiations aimed at securing remediation agreements, on the basis of: “getting a real environmental income [sic] rather than a scalp for our prosecution branch.”170

The political reasons for DLWC’s negotiation- rather than enforcement-based strategy arose mainly from the limited public support for the Act, particularly in rural areas of NSW. The ill-will of the regulated community towards SEPP 46 has already been described. This distrust continued under the NVCA, for example with incidents such as the blockading of DLWC compliance staff in early 2003 to prevent them from carrying out (or leaving) a property inspection at Nyngan in the Central West.171 The long-term effect of such resistance to enforcement upon the stance of regulators is accepted as considerable in the theoretical literature. The legal sociologist Cotterrell described a “lack

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166 Another form of political intervention is that which results in the abandonment of prosecutions once commenced. This was alleged by conservation interests in relation to the discontinuance of the prosecution in DLIFC v Greentree. It is alleged that negotiations took place between DLWC Deputy Secretary Susan Kemp and lobbyist and representative of Greentree, Mr. Lawrie Brown, a former employee of Pollmark research, who had previously worked for Agriculture Minister the Hon. Richard Amery. Following these negotiations the prosecution was discontinued.


of unequivocal public support” as a key factor tending to create an accommodatory approach to the implementation of legislation.\textsuperscript{172}

The decision not to prosecute breaches of the Act appears to have been motivated by a political desire by government to differentiate the NVCA from its predecessor.\textsuperscript{173} SEPP 46 was hated within the rural community for a variety of reasons, but amongst these appears to have been a relatively active level of enforcement. As SEPP 46 was so despised – a fact evident from a review of articles in the rural press, particularly The Land - the government faced a political imperative to differentiate the NVCA from it. One way of achieving this was to create a perception that the NVCA was “different”, as it would not be enforced in the same way.

The risk that serious breaches of the legislation may not be met with an appropriate enforcement response because of the political unpalatability of strongly enforcing the Act could be excluded by placing the responsibility for such decisions in the hands of an independent statutory officer or agency with status equivalent to that of the Director of Public Prosecutions (DPP).\textsuperscript{174} An Office of the Forestry Regulator with responsibility for law enforcement on both private and public forests was suggested by the NSW ESFM Expert Working Group. At present in NSW, environmental offences are not handled by the DPP. The prosecution capacity of the NSW EPA provides a model for reform. The EPA is a statutory authority, governed by a statutory board. It is the Board’s task to determine whether or not the EPA should institute proceedings for serious ‘Tier One’ offences.\textsuperscript{175} The legislation creating the EPA states that it is not subject to the control and direction of the Minister in respect of decisions to institute criminal and related proceedings.\textsuperscript{176} The EPA appears to have a more vigorous record of prosecuting offences under the legislation it administers.\textsuperscript{177}

\textsuperscript{172} Cotterrell, R. (1992) above n 136 at 269.
\textsuperscript{173} In particular, it has been speculated that political factors include the desire of the Labor government to maintain its hold on a number of rural regional seats in order to maintain power. Interview, J. Benson, ESA representative on NVAC, 17.6.02, by telephone.
\textsuperscript{174} For example, for fear of offending the rural community because of a desire to win or returning various marginal rural or regional electorates in NSW.
\textsuperscript{175} Protection of the Environment Administration Act 1991, s.16(d).
\textsuperscript{176} Protection of the Environment Administration Act 1991, s.13(2)(c).
\textsuperscript{177} Whilst there is no attempt to make a direct comparison it is interesting to note that the EPA ran significantly more prosecutions (under the POEO Act) in each year of the study period. During 2000-01, 55 prosecutions were conducted in relation to matters not involving motor vehicles. In 1999-2000, 60 such prosecutions were conducted, in 1998-99, 39 such prosecutions were conducted, and in 1997-98, 55 such prosecutions were conducted. NSW EPA (2001) Annual Report 2000-2001, EPA, Sydney, p.65. However there are likely to be other causes for more prosecutions by the EPA such a greater number of offences committed against pollution legislation than vegetation legislation. Under the POEO Act, the average penalty for the 40 prosecutions carried out by EPA during 1999-2000
In a report commissioned by DLWC, the consultant academics Bates and Franklin argued strongly that the Department adopt a graduated enforcement strategy in which warning letters, stop-work orders, remediation notices and civil proceedings are applied prior to the institution of criminal prosecutions. It was advised that the latter be reserved for more serious and flagrant breaches of the legislation.\textsuperscript{178} The rationale of the pyramidal enforcement strategy is that if the regulated community is aware of the existence of a graduated-response policy of increasing severity that poses a credible threat, it is more likely to voluntarily comply without the need for coercion. This enables more strategic allocation of scarce agency enforcement resources, and increases the power of agencies in negotiation with the regulated community.\textsuperscript{179}

However, for its success, this strategy is predicated upon a credible threat of coercive enforcement - where the regulator is perceived as willing and likely to initiate swift and severe enforcement action against more serious breaches. It is likely that DLWC’s low-key approach to enforcement ultimately undermined its capacity to apply a pyramid strategy to raise PNF standards. Without a visible record of vigorous enforcement it is unlikely that threats made in negotiations would have been considered credible. According to one rather cynical officer: “Our valued rural clients have worked out that it’s all bluff - that when push comes to shove, we won’t be doing it.”\textsuperscript{180}

Another possible underlying reason for reluctance in relation to enforcement was suggested by Farrier, who submitted that the fact that the NSW Government is not yet offering a comprehensive scheme of stewardship payments to landholders affected by native vegetation laws is an important factor.\textsuperscript{181} As there is no ‘\textit{quid pro quo}’ on offer, government finds it difficult to justify a strong stance against offenders.\textsuperscript{182}

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\textsuperscript{178} Bates and Franklin (1999) above n 4 at 121.
\textsuperscript{180} Email, Anonymous DLWC North Coast officer, 1.8.03, on file.
\textsuperscript{181} Nevertheless moves in this direction have been taken in the form of the Native Vegetation Fund, Part 6, NVCA; and the pilot Environmental Services Scheme under which grants can be made for the provision of environmental services by landholders.
\textsuperscript{182} Prof. Farrier was interviewed by Skinner, S. (2003) “Bulldozers, Trees and Making a Quid”, \textit{Background Briefing}, ABC Radio National, 14.9.03, 9.10am; transcript at <www.abc.net.au/rn>.
CONCLUSION

One of the hypotheses posited in Chapter Five arising from the literature review was that the law applying to PNF in NSW is often inadequately implemented and enforced. It cannot be said that this proposition is entirely applicable to all aspects of administration of the NVCA applying to PNF during the study period. The proposition invites an overly-broad generalisation about the behaviour of an entire agency, which tends to oversimplify a complex picture. DLWC has over 100 regional offices and confronts a variety of situations across those regions.\textsuperscript{183} Further, the approach of the agency has varied over time.

A second difficulty is that the data available regarding the specifics of PNF enforcement was limited. DLWC has not dis-aggregated its compliance data so as to provide information about the compliance rate of particular industries. Therefore patterns of enforcement regarding the PNF industry must be derived from overall patterns of enforcement. Reliance upon the broad patterns of agency behaviour is likely to be relatively safe, as it is improbable that PNF was consistently subject to more rigorous enforcement. This general information obtained from various published sources was supplemented with information gleaned from interviews with individual regional officers regarding the specifics of PNF enforcement, both State-wide and in particular regions.

A third difficulty involved actually obtaining data about enforcement patterns, specifically about PNF. The political sensitivity of the subject of PNF meant that when DLWC staff were asked for information about enforcement of the NVCA in relation to the PNF industry, they often replied that information either did not exist (i.e. it had not been compiled) or that it was not publicly available. Sometimes it was suggested that a FOI request was necessary if the researcher was to insist on obtaining the information.\textsuperscript{184}

In spite of the above qualifications, the broad findings were that DLWC showed a tendency to avoid coercive enforcement. The main features of enforcement of vegetation laws during the study period (not just in relation to PNF) were as follows. Firstly, there was a tendency to respond to alleged breaches of the NVCA with either no formal

\textsuperscript{184} Interview, Mr. Todd Spencer, Compliance Officer, DIPNR Murray Region, Deniliquin, 15.9.03, by telephone, notes with author.
action or with administrative measures (such as warning letters).\textsuperscript{185} Secondly, there was a total failure to explore the possibilities of civil enforcement. Thirdly, the overall level of prosecution activity under the NVCA in relation to all forms of unauthorised clearing (not just forestry) was very low relative to that which occurred under SEPP 46. Specifically in relation to PNF, no prosecutions were launched under the NVCA, or under SEPP 46.\textsuperscript{186} This avoidance of commencing prosecutions involved a policy emphasis on negotiation and resolution of matters. DLWC also discontinued a number of prosecutions under SEPP 46 and was reluctant to appeal adverse judgments or inadequate sentencing.

DLWC’s strategy of emphasising non-coercive compliance appears to have been relatively ineffective, as there was little decrease, if any, in the number of breaches of the Act alleged. In fact, the number of breaches alleged has grown each year that the Act has been in operation.\textsuperscript{187} This suggests the need for stronger approaches to enforcement, and perhaps closer consideration of incentives-based strategies if ESFM is to be achieved in the PNF sector. The lack of commitment to enforcing PNF law ultimately flows from the low political priority attached to the question of private forest management. As Dr Hannam of DLWC said: “the majority of political interest, financial and human resources are heavily biased towards the public forest area.”\textsuperscript{188}

The next chapter turns to examine the influence and effectiveness of regulation of PNF by local government under the EPAA. These controls are important as they may apply in instances where the PNF exemption under the NVCA is claimed.

\textsuperscript{185} It is not suggested here that all alleged breaches in fact amounted to genuine breaches of the legislation, as a matter of law or fact.

\textsuperscript{186} Yet by April 2002 the political bar on commencement of prosecutions had been lifted and six prosecutions had been commenced, although all of these related to forms of clearing other than PNF. This change of policy roughly coincided with a Ministerial reshuffle that saw the Hon Richard Amery replaced by the Hon John Aquilina as Minister for Land and Water Conservation.

\textsuperscript{187} This may be due to better detection techniques and higher rates of reporting of alleged breaches than any change to overall levels of offending.

Chapter Nine

REGULATION OF PNF BY LOCAL GOVERNMENT UNDER THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 (NSW)

INTRODUCTION

The regulation of private native forestry (PNF) by local government under the Environmental Planning and Assessment Act 1979 (‘EPAA’) takes place in the shadow of the Native Vegetation Conservation Act 1997 (‘NVCA’). However, land-use planning law administered by local government and the Minister for Planning remains important to the PNF industry because of the present extent of the loopholes in the NVCA, particularly the widespread reliance on the PNF exemption.

NSW land-use planning law is made up of 3 parts: the Environmental and Planning Assessment Act 1979 (‘EPAA’), regulations under the Act, and Environmental Planning Instruments (EPIs). There are three categories of EPIs: State Environmental Planning Policies (SEPP); Regional Environmental Plans (REP); and Local Environmental Plans (LEP).

This suite of instruments affects PNF in several ways. Firstly, in those instances where the vegetation-clearing controls of the NVCA are not applicable, e.g., due to exemptions, the planning controls of the EPAA may apply, depending on the content of applicable EPIs. The application of EPIs by local government provides an important ‘safety net’ role in the legal framework for PNF. Depending on the location, particular local councils play an important role in overseeing PNF. Further, the EPAA is important to regulation of PNF in that the Act operates as the baseline development-control

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1 Local government’s capacity to regulate PNF will be greatly restricted by the making of RVMPs under the NVCA, (but remained significant during the study period, prior to the making of significant numbers of RVMPs) (see Chapter Six). Likewise its control over plantation developments has been severely limited by the Plantations and Reafforestation Act 1999, s.47, 51.

2 Note that in 2001, DUAP assumed the trading name of Planning NSW. Then in May 2003, DUAP was merged with DLWC to form the Department of Infrastructure, Natural Resources and Planning (DIPNR) (see Chapter Four). This Chapter refers to DUAP because this was the name of the Department during the majority of the study period.

3 Note that in addition, RVMPs made under the NVCA are also defined as EPIs: NVCA, s.36(1).
mechanism through which other statutes including the *NVCA* (*see* Chapter Six) and the *TSCA* (*see* Chapter Ten) operate.

This chapter is set out as follows. First, aspects of the law applying to PNF administered by local government are explained, including a review of the law relating to development control by local government. Policy questions regarding the appropriateness of applying planning law to the regulation of PNF are discussed. Research findings regarding the regulation of PNF by local government during the study period are then presented. Finally, we examine data regarding enforcement and compliance activity by local government against unauthorised PNF.

**INTERACTION OF NVCA AND LEPs**

The regulatory regime applicable to a given private forestry proposal depends first on whether the *NVCA* applies or not. If forestry is already subject to consent requirements under the *NVCA* (i.e. where the PNF exemption does not apply), there is no need to examine the LEP or SEPPs. This is because development consent cannot be required under both *NVCA* and *EPAA*.4

In those regions where an RVMP has not yet been made,5 LEPs still have a considerable role in areas where the PNF exemption is claimed, particularly in the North Coast and Hunter regions (*see* Chapter Seven). In these cases it remains necessary to examine the provisions of the applicable EPI, such as the LEP, Tree Preservation Order, or SEPP.

As discussed in Chapter Six, the passage of the *NVCA* has already marginalised local government and LEPs in control of PNF and other vegetation clearing.6 Over time, the importance of LEPs for control of PNF will decline further, with the progressive gazettal of more RVMPs across the state, with the eventual scenario not too far into the future of almost complete exclusion of local government regulation.7 The inconsistency provisions

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4 *NVCA*, s. 23(1) is an inconsistency provision applying where there is no RVMP in place. It has the effect that where consent is required under the *NVCA*, that requirement cannot be augmented by consent requirements from another source, such as an EPI. Native Vegetation Conservation Bill 1997, Explanatory Note, p.5.

5 It appears that progress has been slow against targets originally set by the Minister. At the time of writing, only one RVMP has been finalised: Mid Lachlan RVMP was made in December 2001, Drafts of the North-Lachlan Bogan RVMP, Riverina Highlands RVMP, Moree RVMP, Walgett RVMP have been placed on public exhibition during 2002. Source: DLWC website: <www.dlwc.nsw.gov.au>, accessed 17.7.02.


7 A further complication flows from the fact that the boundaries of RVMP regions and Local Government areas (LGAs) are not identical. Accordingly, the average RVMP region will contain at least one LGA, and possibly up to
of the *NVCA* regarding LEPs are such that local government will be prevented from having a role in controlling vegetation-modification even where on an objective basis an RVMP fails to adequately regulate logging and clearing (see Chapter Five).\(^8\) If an RVMP does not require consent for forestry, the LEP cannot impose additional requirements.\(^9\) In these regions, LEP provisions will have no effect, to the extent of the inconsistency.\(^10\) Similarly, where an RVMP requires consent, the LEP cannot impose stricter requirements. Yet, as was explained in Chapter Five, there are some safeguards. Where there is an applicable EPI making provision for native vegetation protection, the Act states that the RVMP must provide “at least the same level of protection and conservation in relation to native vegetation”.\(^11\) This is of little comfort if the applicable LEP was inadequate for the purpose of ensuring ESFM.

**LAND-USE CONTROL UNDER PART 4 *EPA*\(^{12}\)**

The main approach taken by councils in relation to environment protection on privately-owned land has been a regulatory approach, involving development control.\(^12\) The main planning tools available to local government with the capacity to affect PNF are zoning and associated development-consent requirements.

The main planning tool employed is zoning, which aims to regulate land uses, allowing only uses compatible with the dominant economic activities and environmental capacity of particular areas, principally by separating incompatible land uses. Within a particular mapped area of land, allocated a particular zoning, only specified forms of development

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\(^8\) One concern about the development of RVMPs is the likelihood that many of them will employ a “self assessment” methodology under which the landholder will decide whether the legislation is applicable. On the other hand, RVMP making could raise environmental standards in some regions because if it contains a consent requirement for PNF, this may mean increased regulatory requirements in those LGAs where consent was previously not required.

\(^9\) *NVCA*, s.20(1)(b).


\(^11\) *NVCA*, s.27(3). Farrier, et.al. (1999) above n 10 at 368. Note that RVMPs are deemed to be EPIs for the purposes of Part 4 of the *EPA*, *NVCA*, s.36(1).

are permitted ‘as of right’ without development consent, whilst others are either permitted only with the consent of council or completely prohibited.

Traditionally, in planning law, development-consent requirements applied only in urban contexts, but in recent decades consent requirements have been selectively extended to higher-impact activities in rural areas.\(^{13}\) Despite the gradual evolution of local government’s role to include environmental-protection objectives and rural conservation, much rural land remains within general purpose zones such as the 1(a) zone in which agriculture and usually forestry are permitted without consent.\(^{14}\) These activities, with their capacity to damage native vegetation and important habitats, have traditionally been unregulated by local government, and frequently remain so. A typical objective of a rural 1(a) zone is “to encourage the productive and efficient use of land for agriculture”.\(^{15}\) In some LEPs such objects have more recently been tempered by objectives of habitat conservation, e.g. “to protect, conserve and enhance natural and scenic resources, wildlife habitat refuges and corridors”.\(^{16}\)

The laissez-faire attitude of many LEPs to PNF activity within the rural 1(a) zone reflects deeply-held attitudes in rural Australia that stem from ‘property rights’ ideologies, that rural production activities are ‘as of right’ uses of the land.\(^{17}\) There is a perception that requiring development consent for activities on private land, particularly forestry and agriculture, is not legitimate as it implies a violation of rights and privileges traditionally associated with freehold ownership.

The Australian Forest Growers suggest that the “requirement for planning consent sends unnecessarily negative connotations of forestry…” Further, they argue that: “The variation between consent requirements from one local government area to another, the possibility of frequent change in consent requirements, the risk of refusal of consent and the potential for onerous consent conditions to be applied are all major impediments to

\(^{13}\) Farrier et.al. (1999) above n 10 at 376.
\(^{14}\) For example, Bellingen LEP 2003, cl.11 development control table: forestry is permitted without consent within zone 1(a1) agricultural protection zone, 1(a2) secondary agriculture zone.
\(^{15}\) Cowra LEP, Zoning table, zone 1(a).
\(^{16}\) Nambucca LEP 1995, zone 1(a1).
investment in plantation development or the management of regrowth forests.” They assert that PNF should be recognised as an ‘existing use’ that pre-exists planning requirements (p.29, below).

**Plantation forestry and LEPs**

A significant proportion of LEP zoning tables distinguish between plantation forestry and other forestry. For example many LEPs state that pine plantations require consent, but other forestry or plantations involving native species do not require consent. Such requirements are now largely obsolete, given that local government’s role has been reduced by the *Plantations and Reafforestation Act 1999* (PRA). Industry representatives interviewed stated that strict LEP requirements constituted a disincentive to plantation investment. ‘Authorised plantations’ are exempt from all of the provisions of the *EPAA* and associated EPIs.

*When is Part 4 consent required for PNF?*

Where the development consent requirements of the *NVCA* do not apply, the applicable regime depends on the content of relevant EPIs made under the *EPAA*, principally the LEP. The consent requirements of LEPs vary according to the local government area in which forestry is proposed, and the zoning of the land. Other consent requirements may also apply because the land is mapped under a SEPP for

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19. Elsewhere, other LEPs may require consent for forestry, but not for ‘farm forestry’ or ‘farm wood-lots’, or “the planting of trees for wind breaks or firewood, or for purposes incidental to farming”: *Culcairn LEP 1998*. The Mulwaree LEP, in the rural 1(a) zone permits “tree planting (including planting for the purpose of growing farm woodlots of up to 10ha each), but not including planting for the purpose of forestry” *Mulwaree LEP 1995*, Cl.9 (zoning table)
20. More recent LEPs were drafted to encourage tree farming and plantation development, and to distinguish that activity from harvesting of native forests. For example, in the *Culcairn LEP 1998*, “tree farming” is permitted without consent in the Rural 1(a) Zone. By implication other forms of forestry require development consent. However, the planting of trees for purposes incidental to farming such as the planting of trees for windbreaks or firewood are not included within the definition of forestry in the plan and therefore do not require consent.
21. Interview, 28.2.00, Mr. Hugh Daneke, Joint Venture plantations officer, State Forests of NSW, in person, at ANU Farm Forestry Symposium. Along with requirements for s.49 contributions relating to roads, which the *Plantations and Reafforestation Act 1999* enables councils to levy in relation to plantation development.
22. *PRA*, s.47. Specifically, consent under Parts 4 or 5 *EPAA* is not required for authorised plantations or for ‘exempt farm forestry’: s.47(2)(a),(b).
23. The *PRA* states that “plantation operations carried out on an authorised plantation cannot be prohibited or restricted” by an EPI: see *PRA*, s.47(2)(c). A debate took place over a proposed amendment that would have prevented clearing in areas zoned environment protection under an LEP. It was rejected by government members who argued that the *NVCA* states that an RVMP must provide for the same level of environmental protection as that provided by an EPI. Hansard, Council, 30.11.99, p.124. Tree preservation orders made by local councils have no application to plantations authorised under the *PRA*, as the Act excludes plantations from the impact of the *EPAA*: see *PRA*, s.47. Nor can TPOs apply to clearing in the course of plantation establishment where that clearing is taking place on authorised plantations or as ‘exempt farm forestry’.
particular environmental protection, e.g. SEPP 44 (koala habitat) or SEPP 26 (littoral rainforests).  

There are three possible categories into which a development may fall under these EPIs -

- prohibited development,
- development permissible only with consent,
- development for which consent is not required.

Development that does not require consent must still be carried out “in accordance with” the terms of relevant EPIs. If consent is not required for the proposed undertaking, then PNF may be, but is not automatically regulated by Part 5 EPAA. Part 5 may be triggered where an environment protection licence is obtained which authorises non-point-source water pollution from new forestry works (as opposed to existing works).

In practice, the main determinant of whether consent is required or not is the zoning of the land in question under the LEP. In relation to PNF, the most relevant zone is Rural 1(a), the main rural zoning within which much of the forested private land in NSW falls. Many LEPs explicitly state that forestry does not require consent in the Rural 1(a) zone. (A survey of 107 LEPs was conducted and the results are set out in Appendix 9.1). However, numerous LEPs contain a variety of environmental protection zones

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25 EPAA, s.31, 76B.
26 EPAA, s.76A.
27 EPAA, s.26(1)(b), 76(1).
28 EPAA, s.76(1).
29 A point of comparison between the legal requirements applicable to forestry on private and public land is that for a long period during the 1990s, there was a requirement that EIS be produced for public land forestry operations (within State Forests). However EIS have never been produced for PNF under NSW law, although this obligation also probably applied to larger PNF operations. Since changes introduced by the Forestry and National Park Estate Act 1998 (TNPE Act), provisions of Part 5 EPAA no longer apply to State Forests, and as a result this difference has dissolved. Parts 4 & 5 EPAA do not apply to public forestry covered by an integrated forestry operations approval, nor do they apply to the granting of such approval. FNPE Act, s.36(1) states that Part 5 EPAA does not apply, whilst s.36(2) states that an EPI cannot affect forestry operations subject to that Act.
30 If an undertaking requires development consent or is a prohibited development, then it is not an activity for the purposes of Part 5 EPAA. Severn SC v Water Resources Commission (1982) 47 LGRA 257; Kindergarten Union NSW v Sydney City Council (1984) 51 LGRA 381. Protection of the Environment Operations Act 1997, s.52(2), Regulations may make provision excluding the issue of environment protection licences from the operation of Part 5 EPAA. POEO (General) Regulations 1998, r. 45 states: “The EPA is not a determining authority … in respect of an approval …that consists of the issue of an environment protection licence … so long as the licence authorises only the same or substantially the same work or activity, and level of work or activity, as was being carried out immediately before the application for the issue of the licence was made.” See also EPAA, s.76(1) (Attached Note). Part 5 will apply if the project meets the definition of “activity” set out in s.110(1) to be carried out by a public authority or by a private authority, where some additional form of government approval is required. See Farrier, D. (1993) Environmental Law Handbook, p.350.
31 Zone 1(f) is not relevant to private land forestry as it applies to State Forest and other Crown timber lands classified under the Forestry Act 1916.
32 The Richmond River LEP states explicitly that forestry is permissible without consent within 3 of 4 rural zones. (cl.9) Ditto the Copmanhurst LEP 1990 in the Rural 1a zone. In the Nambucca LEP 1995, cl.11, forestry is explicitly permitted without consent in the Rural 1(a1) zone, as it is in the Tenterfield LEP 1996, cl.9.
(zone 7(χ)) within which forestry is subject to consent or prohibited. The ‘forestry zone’ (‘1(6)’) typically included within LEPs is not applicable to private forestry as it only applies to public forests managed under the Forestry Act 1916.

Under Part 4 EPAA, anything that meets the definition of ‘development’ may require consent depending on the applicable EPIs. If the undertaking amounts to ‘development’, then consent is required when an EPI so specifies. Will forestry meet the definition of development? Most LEPs put the question beyond doubt by explicitly specifying forestry within the zoning table as one of the controlled categories of development. The question of exactly which activities are controlled turns around the definition of “forestry”. Many LEPs adopt the Model Provisions, which define it as “arboriculture, silviculture, forest protection, the cutting, dressing and preparation, other than in a sawmill, of wood and other forest products and the establishment of roads required for the removal of wood and forest products and for forest protection.” Forestry is defined within many LEPs in similar terms.

Another scenario is presented in LEPs where the zoning table does not explicitly state whether consent requirements attach to forestry. Here, forestry is neither specified as not requiring consent, nor listed as a prohibited development. It falls within an unnamed
residue of developments requiring consent (the ‘innominate use’ category).

In this situation forestry will require consent only if it amounts to “development”. 40

A strong case can be made that most PNF will constitute development for the purposes of this test, and therefore Part 4 consent requirements will apply. If the LEP employs the terminology “forestry” elsewhere, or adopts the Model Provisions and its definitions which themselves define forestry, this implies that forestry is also intended to be regulated as a development within innominate use categories. Actions controlled by such environment protection provisions in an EPI automatically amount to ‘development’. 41

In cases where forestry is not mentioned at all in the LEP and Model Provisions are not incorporated, a review of the definitional provisions of the Act itself (s.4) suggests that forestry would fall within the definition of development as “the carrying out of a work in, on, or over land” 42 and therefore Part 4 consent requirements may apply. 43 The case law suggests that most forestry operations will amount to a work. 44

**Joint-venture forestry and the Crown clause**

With the recent expansion of plantation development by the Forestry Commission under joint venture (JV) with landholders, rules contained in Part 5A, EPA, ‘Development by the Crown’, are relevant. This Part states that a consent authority, when considering a DA made by or on behalf of the Crown, must not refuse the application except with written approval of the Minister for Planning, nor impose a condition on consent, except

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39 Example taken from Deniliquin LEP 1997, cl. 9, Rural 1(a) zone.
40 An example is the Great Lakes LEP 1996, cl.8 (which says that consent is required for all development not included in items 2 or 4 - the categories of consent not required or outright prohibition).
41 Therefore section 26 provides a means to bypass the previously restrictive definition of development. Section 4(f) says that anything regulated under s.26 constitutes development - and therefore requires consent. Farrier, et.al.,(1999) above n 10 at 166.
42 As defined in the Dictionary contained in Great Lakes LEP, ‘forestry’ means “the cultivation, growing and tending of trees and shrubs, and includes forest protection, the cutting, dressing and preparation of wood and other forest products otherwise than in a sawmill, and any construction or maintenance of roads required for the removal of wood, forest products and forest protection.” For example, the same definition is applied in the Singleton LEP.
43 EPA, s.26(b).
44 A significant body of case law relating to the interpretation of Part 5 EPA has decided that forestry is an “activity” requiring assessment under that Part. The definition of “activity” contained in Part 5 is identical to that of “development” under Part 4. EPA, s.110(f), s.4(1). By analogy, the case law regarding the meaning of “activity” is relevant to determining whether forestry operations constitute “development”. In Jarasius (No.1) it was accepted by the parties that the various components of intensive timber harvesting operations in a State Forest were ‘activities’ within the meaning of Part 5 of the Act. Jarasius v Forestry Commission of NSW [No.1] (1988) 71 LGRA 79 at 90. Similarly, in Evans & Spicer v Forestry Commission “clearing land of timber” was held to constitute “an activity” attracting Part 5 EPA. This case was an appeal against the rejection of a licence application for permission to clear vegetation on leased Crown land under the Forestry Act 1916. A majority of the Court of Appeal ruled that the vegetation clearance was “an activity” for the purposes of s.111 of the EPA.
with the written approval of the Minister or the applicant. These JV initiatives in some cases involve logging of native forest prior to plantation establishment. In the case of private forest logged by the Commission under a JV contract, the Crown clause may apply, thus requiring that approval be granted. “The Crown” includes public authorities and public utilities. The Crown clause will apply to JVs in which the Commission applies for consent (which will normally be the case). The application of the PRA to these scenarios will depend on whether prior logging is defined as plantation activity under that Act.

DEVELOPMENT CONTROL AND PLANNING

Determination of development applications

Where development consent is required, it must be obtained by means of a development application to the consent authority (in most cases the local council). It is an offence to carry out development on land that is subject to a requirement for development consent without a valid consent, or to carry out development outside the scope of that consent and its conditions.

The consent authority can determine the application by granting consent unconditionally, granting consent subject to conditions, or refusing consent. Particular provisions apply to the attachment of conditions to a development consent, but principally these are that the conditions must relate back to the statutory factors for consideration listed in s.79C. If consent is granted, then the development must be carried out in accordance with the terms and conditions of the consent and in accordance with the terms of the relevant EPIs.

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45 EPAA, Part 5A, but particularly s.115I.
46 EPAA Regulation 2000, r.226(1).
48 EPAA, s.76A, 78A(1).
49 EPAA, ss.78A(1), 125.
50 EPAA, s.80A(1).
51 EPAA, s.80(1)(b).
52 EPAA, s.80A(1).
Matters for consideration

The EPAA, in Part 4, Division 2, sets out the decision-making procedure regarding development proposals requiring consent. Having received a development application (‘DA’), a local council must “take into consideration” relevant matters from the range of decision-making factors listed in s.79C of the Act\(^{53}\) as well as those listed in the EPAA Regulation.\(^{54}\) These include the provisions of any applicable EPI, the likely impacts of the development (environmental, economic or social), the suitability of the site for development, and the public interest.\(^{55}\) Decisions must also be made considering the objects of the Act, which include, to encourage “the protection of the environment” and “ecologically sustainable development”…*\(^{56}\) Following amendments in 1997 the heads of consideration in s.79C were dramatically narrowed from 31 matters to a shorter, less precise list of five points.\(^{57}\) Of particular relevance to PNF was the fact that the previous considerations included s.90(1)(n) requiring that DAs be considered in light of “whether any trees or other vegetation on the land should be preserved”.

Important amongst the provisions of applicable EPIs that must be considered are the stated objectives of LEPs, as well as any objectives attached to specific zones. Many LEPs contain quite comprehensive general, and zone-specific environmental protection objectives, which provide some guidance and structure to decision-making. Many LEPs also list a range of additional specific environmental protection considerations for consent decision-makers, such as “the protection of areas of nature conservation significance”.\(^{58}\) Some go further, with vegetation protection provisions that impose a rebuttable presumption against the grant of consent to clear vegetation. Such clauses mean that greater weight will be placed on vegetation and habitat-retention matters than is usually the case under s.79C.\(^{59}\)

\(^{53}\) EPAA, s.79C(1).
\(^{54}\) The EPAA Regulation 2000, cl.92 which replaced EPAA Regulation 1994, cl.65 now no longer requires councils to take into account “the effect of the development on…the habitat of any…protected fauna, and the means to be employed to protect them from harm, or to mitigate the harm. as was previously the case, but merely requires specified councils to take account of the NSW Coastal Policy 1997: A Sustainable Future for the New South Wales Coast.
\(^{55}\) EPAA, s.79C(1).
\(^{56}\) EPAA, s.5(a).
\(^{57}\) The heads of consideration were previously contained in EPAA, s.90.
\(^{58}\) The Cooma LEP 1999 requires consideration of “the protection of areas of nature conservation significance or of high scenic or recreational value, and of items of heritage significance,” as well as soil erosion and the effect of the development on vegetation, timber production, land capability and water resources. Cooma LEP (Rural)1999, Schedule 2.
Another integral part of the assessment of PNF operations under Part 4 is an assessment of the likely impact of forestry on threatened species and their habitat against a statutory eight-part test with a view to determining whether an SIS should be prepared for consideration.\(^6\) When making consent decisions by reference to s.79C \textit{EPAA},\(^6\) consent authorities are also assisted by non-binding guidelines issued by DUAP.\(^6\) These guidelines recommend that councils take into account “flora and fauna”, including the “maintenance of biodiversity”.\(^6\)

The scope of decision-making obligations of consent authorities has been determined in numerous appeal decisions, most arising from judicial review challenges by third-party objectors.\(^6\) Because of statutory restrictions on merits review, third-party objectors often attempt to run arguments in judicial review proceedings that sail as close as possible to merits review - i.e. \textit{Wednesbury} unreasonableness - a decision so unreasonable that no reasonable decision-maker could have reached it.\(^6\) The record shows there is usually significant difficulty in proving a breach of s.79C on this basis.\(^6\)

\(^6\) Eight factors listed in s.5A \textit{EPAA} must be taken into account in order to decide whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats. Consideration of the likely impact of logging against the eight-part test is discussed in Chapter Nine regarding the \textit{TSCA}.

\(^6\) Department of Urban Affairs and Planning (NSW) (DUAP) (1998) \textit{Guide to s.79C}, DUAP, Sydney. These matters include the following: the provisions of EPIs and draft EPIs, environmental impacts, wilderness, a range of factors relating to threatened species, soil erosion, public submissions, the public interest.

\(^6\) These guidelines present 21 possible considerations including numerous sub-factors. DUAP (1998) above n 61. These guidelines exhibit even-handedness in balancing environment and ecology - whilst one heading is “flora and fauna” including “maintenance of biodiversity”, another head of consideration is “economic impact” including “economic income” and “employment generation”. (at pp. 6 & 8)

\(^6\) Third-party objector appellants are entitled only to commence judicial review proceedings to challenge the legality of consent decision-making processes, i.e. whether correct procedures were followed or whether there was an error of law, rather than whether the decision was correct and preferable. Decisions of a consent authority can be appealed to the Land and Environment Court in merits appeal (Class 1) or judicial review (Class 4) proceedings. Third party enforcement is facilitated by \textit{EPAA}, s.123. However, merits appeal proceedings are usually only available to development applicants. Unless the development is designated development (which private forestry is most unlikely to be. A development is designated if it falls within any of the categories listed in Schedule 3 of the Regulations or is considered to be a designated development under the terms of the relevant LEP. Designated developments are generally `high impact' developments, requiring an EIS and providing for public participation rights.

\(^6\) \textit{Associated Provincial Picture Houses Ltd v Wednesbury Corporation} [1948] 1 KB 223. The High Court ruled in \textit{Minister for Aboriginal Affairs v Peko W adiend Ltd} (1986) 162 CLR 24 that “A court must proceed with caution when reviewing an administrative decision on the ground that the administrative body did not properly weigh up the relevant considerations, lest it exceed its supervisory role by reviewing the decision on its merits.”

\(^6\) \textit{Farrier et.al.} (1999) above n 10 at 203-4. The decision must have been completely “unreasonable”, that is, “so devoid of plausible justification that no reasonable person could have taken that course”. \textit{Minister for Immigration and Ethnic Affairs v Teoh} (1995) 183 CLR 273 at 290. In \textit{Minister for Immigration and Multicultural Affairs v Eshetu} (1999) 197 CLR 611 at 626 Gleeson CJ and McHugh J said: “Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as 'illogical' or 'unreasonable'... If these are merely emphatic ways of saying that the reasoning is wrong then they may have no particular legal consequence.”.
Section 79C does not indicate that particular weight must be given to environmental factors above social or economic factors. If a council explicitly gives lower priority to environmental considerations, this is lawful, provided that the consent authority can establish that it in fact gave consideration to all relevant factors listed in s.79C. There is no rule stating that if a proposal raises a serious issue in relation to one of the s.79C factors, consent must be refused. Further, even if a development raises a question of the application of the principles of ESD, such as the precautionary principle, there is nothing to say that these principles outweigh the application of other considerations in s.79C.

For a consent to be valid the council must have taken into consideration (i.e. merely considered) the factors in s.79C, where they are relevant, and no irrelevant matters. There must be “proper, genuine and realistic consideration upon the merits” by the decision-maker of relevant considerations. The question of the quality of consideration of s.79C matters required of a consent authority was recently addressed by the Court of Appeal in *Weal v Bathurst CC*, where Priestley JA held that “taking relevant matters into consideration called for more than simply adverting to them. There had to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration.” On this basis, a ‘tick the box’ approach to implementation of s.79C is not appropriate.

Although LEPs contain environmental protection objectives there are often inconsistencies with other zonal objectives aimed at economic development. Particularly within the general rural 1(a) zone - with a few notable exceptions – the drafting of most LEPs fails to ensure that economic objectives do not outweigh less

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68 Bauer Holdings v Sydney City Council (1981) 48 LGRA 356.
71 The classic case of invalidation on the grounds of failure to take into account relevant considerations is *Parramatta CC v Hale* where a consent was invalidated by the Land and Environment Court because councillors failed to seek the advice of their planning staff. See Farrier et.al. (1999) Above n 10 at 56-58; *Weal v Bathurst City Council* (2000) 111 LGERA 181 at 185.
72 Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291 at 292, per Gummow J.
tangible environmental concerns, such as the problem of biodiversity loss through habitat destruction.  

There is a broad discretion available to councils in consent decision-making. This is reinforced by the case law regarding the weight that must be accorded to environmental protection objectives of LEPs. The Land and Environment Court has generally been unreceptive to proceedings claiming that particular consent decisions were at odds with zonal objectives contained in LEPs. In Schaffer Corp Ltd v Hawkesbury SC, Pearlman CJ set a notably high hurdle. Her Honour held: “a development will generally be consistent with the objectives if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.” Nevertheless this decision has been criticised, and may not represent good law.

Role of ESD objectives in decision-making of councils

Does NSW planning law require councils making decisions on PNF proposals to take into account principles of ESD, such as the precautionary principle? Following amendments in 1997, the objects of the EPAA now include “to encourage…ecologically sustainable development.” However, the Act does not direct that any consent decisions arrived at must be in conformity with the ESD principles. Consideration of the ESD principles (which are not included in s.79C) must be read into the decision-making process from the objects clause of the Act, via general principles of statutory interpretation and administrative law. It appears to be on this basis that Fisher...

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76 Kelly and Farrier (1996) above n 74.
77 Schaffer Corp Pty Ltd v Hawkesbury SC (1992) 77 LGRA 21 at 27.
78 Farrier et al. (1999) above n 74 at 10 and 92 argue that the decision represents a mis-application of the Court of Appeal decision in Coffs Harbour Environment Centre Inc v Coffs Harbour City Council (1991) 74 LGRA 185, per Clarke J.
79 EPAA, s.5(a)(vii). See also ss.79B(5) consideration by DG of NPWS in concurrence decision making, s.112D, 112E.
80 Stein, P., Mahony, S. (1999) “Incorporating Sustainability Principles in Legislation”, in Leadbeter, P., Gunningham, N., Boer, B. (eds.) Environmental Outlook No.3: Law and Policy, Federation Press, Sydney, 57 at 72. By contrast with the EPAA, the Water Management Act 2000 explicitly states that its objects include the far more active objective, “to apply the principles of ecologically sustainable development” [emphasis added]. Further, water management committees under that Act are under a statutory duty to exercise their functions “consistently with the principles of ESD”: s.14(3).
81 The only section of Part 4 of the Act which explicitly mentions ESD is the clause relating to concurrence decision making by the DG of NPWS regarding threatened species matters. In deciding whether or not to grant concurrence to a proposed development consent which has involved SIS preparation, the D-G of NPWS is obliged to take into account the principles of ESD. EPAA, s.79B(5)(g); 112D(g) refers to the principles of ESD as defined in Protection of the Environment Administration Act 1991, s.6(2). Further, the term ESD is not defined in the EP&A Act, by contrast to other NSW legislation which defines the term by reference to the PROTEA Act 1991.
concluded that the objects clause in s.5 *EPAA* “represent[s] a constraint on decision making”.  

In an attempt to bolster the relatively restrained drafting of s.5 *EPAA*, many LEPs and some SEPPs include additional reference to the ESD principles. Also, obligations to consider ESD arise from the *Local Government Act 1993 (‘LGA’)*. Councils must consider the expressed purposes of that Act, which “require councils, councillors and council employees to have regard to the principles of …[ESD] in carrying out their responsibilities”.  

The lack of an explicit requirement to make decisions in accordance with the principles of ESD within the *EPAA* leads to a conclusion that the Act is not sufficient to ensure compliance with the principles of ESFM set out in Chapter Five - principles which, together with the scientific literature on native forest ecology, dictate a precautionary approach to forest management.

Montreal Process criteria dictate that in order for ESFM to be achieved, legislation must provide for “forest planning and environmental impact assessment”. The specific test is criterion 7.1(b), being the extent to which the legal framework supports ESFM by providing for periodic forest-related planning, assessment and policy review. In NSW, this responsibility is shared between local government under the *EPAA*, and by DLWC under the *NVCA*.

In those situations where the PNF exemption is claimed and local government does not require consent, there is clearly a failure against criterion 7.1(b). Yet in other situations, where some level of assessment takes place, the criterion is not sufficiently specific to enable a determination of whether the legal framework supports the attainment of ESFM.

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83 *Local Government Act 1993*, s.7(e). The principles of ESD are defined in the *Protection of the Environment Administration Act 1991*, s.6(2). Although one of these principles is the precautionary principle, it is unlikely to have much impact as again the requirement is to merely consider such matters.

84 Montreal Process criteria 7.1.b.
ADMINISTRATION OF THE *EPAA*

*Consent requirements relating to forestry contained in LEPs*

Research was conducted to determine council requirements for approval of PNF within LEPs, particularly within the Rural 1(a) zone. A total of 107 different local councils were surveyed to determine their consent requirements in the main rural zone, the 1(a) zone. A map in Appendix 9.1 indicates the councils surveyed, and a detailed chart lists the requirements of each council surveyed, as well as providing an explanation of the survey methodology.
Table 1 Summary of consent requirements for private forestry in the 1(a) zone by DUAP region

<table>
<thead>
<tr>
<th>DUAP Region</th>
<th>Percentage of councils requiring consent</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Coast</td>
<td>15.8% (n=19)</td>
</tr>
<tr>
<td>Hunter and Central Coast</td>
<td>38.4% (n=13)</td>
</tr>
<tr>
<td>Illawarra and South Coast</td>
<td>85.7% (n=14)</td>
</tr>
<tr>
<td>Western (portion only)</td>
<td>27.1% (n=59)</td>
</tr>
<tr>
<td>Sydney (rural-urban fringe)</td>
<td>100% (n=2)</td>
</tr>
<tr>
<td>Total</td>
<td>38.5% (n=107)</td>
</tr>
</tbody>
</table>

State-wide, the majority of councils surveyed (69 of 107, i.e. 64.5%) during the study period did not require the grant of development consent before forestry could proceed in the general rural zone (1(a)) (Table 1). On a regional basis, the majority of councils in the North Coast Region (84.2%) and Central Coast and Hunter regions (61.5%) and the parts of the Western Region (72.9%) surveyed did not require applications for development consent for private forestry, unlike the majority of councils on the South Coast and Illawarra Region (85.7%). Some councils changed their LEP requirements during the course of the study period. Detailed findings are contained in Appendix 9.1.

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85 Appendix 9.1 explains the survey methodology. In summary, only a portion of Western and Central Division councils were surveyed because not all LGAs are sites of PNF activity.

86 The councils surveyed were Hawkesbury and Wollondilly. See Appendix 9.1.

87 A combination of research techniques was used in order to obtain the data including review of documents at DUAP headquarters, Sydney, review of LEPs on the Australian Legal Information Institute internet site, corroborated by interviews with strategic planners, in some cases confirmed by writing to Council. By way of comparison, an earlier survey of local government controls over PNF appears in a 1993 Commonwealth EIS for licences to export woodchips from NSW Mid-North coast. Of 23 respondents in the Mid North Coast region, 13 LGAs required no consent for intensive forestry for woodchips within the Rural 1(a) zone. Within 43.5% of surveyed LGAs, consent was required (cf 41.7% in the Mid-Coast/Hunter in the survey above). Commonwealth Environment Protection Agency, Environment Assessment Branch (1994) Environmental Assessment Report on the Export by Sawmillers Exports Pty Ltd. of woodchips produced from silvicultural operations in State Forests in Northern NSW and from private forestry operations, DEST, Canberra, July, 46 pp.

88 Between 1997-2002 one council (Bellingen) changed its position on consent for PNF several times (Interview, Alf Said, Office of Private Forestry, at DLWC Bridge St, Sydney, 26.4.02, in person). See also Radio interview, ABC Mid North Coast, Port Macquarie, Graham Robinson 9.07am, 4 September 2002, Interview with Jillian Cranny, Bellingen Shire Council about the Council decision to remove development consent requirements for logging on private rural land. According to a transcript, Cranny said “235 people were opposed to this move and it’s a big issue for Bellingen community. This decision would mean council would lose control over haulage trucks using local narrow roads. One of the small remaining koala communities is in this shire.”
Environmental protection zones

In order to accommodate conservation objectives, councils have, to varying degrees, mapped land within specific-purpose ‘environmental protection zones’ (‘EP zones’, zones 7 (x)). Section 26(e) EPAA permits councils to make provision for ‘protecting or preserving trees or vegetation’ within an LEP. Section 26(e1) permits provision for protection and conservation of flora and fauna, particularly threatened species, within LEPs. Indeed, a Ministerial direction under s.117 EPAA requires councils to create EP zones within their LEPs.89 The number and type of EP zones included within LEPs varies widely from council to council.90 They include vegetation conservation, habitat, scientific, scenic/escarpment, water catchment, wildlife refuge, coastal lands protection, wetlands, and archaeological zones.

Although the existence of such zonings shows recognition of the need for environmental protection, the extent to which they restrict PNF in environmentally-sensitive areas may be limited. Despite EP zones taking a more stringent approach than that typically applied in the rural 1(a) zone, the majority of plans still permit forestry subject to development consent91 rather than prohibiting it altogether,92 according to a survey of LEPs in the Northern Region undertaken by the author.93 Only 41.2% prohibited forestry within EP (habitat) zones, while 58.8% permitted it with consent. Two other LEPs contained no EP zones at all.94 In other regions, in a minority of LEPs, forestry is permitted without consent within EP zonings.95

89 It states that where a plan applies to an area “which is of ecological significance for the local government area, the plan shall contain provisions to facilitate the conservation of that …area.” Kelly, A.; Farrier, D. (1996) above n 74 at 377.
91 Forestry permitted with consent in Great Lakes LEP 1996, zone 7(c) scenic protection zone; Gunnedah LEP 1998, zone 7(d) Environment Protection – scenic zone; Snowy River LEP 1997, zone 7 - environmental protection, cl.19(3). Forestry permitted with consent in Hastings LEP 2001, Zone 7 (d) Environmental Protection – Scenic. In the Tweed LEP 2000, forestry is permitted with consent in Zone 7(1) Environmental Protection - Habitat zone, but faces a special onus of proof of necessity and consistency with plan and zone objectives against clause 8.
92 For example, forestry is prohibited in Hastings LEP 2001, Zone 7 (b) Environment Protection – Habitat; and also in the Great Lakes LEP 1996, Zone 7(a), Wetlands and Littoral Rainforest Zone, and 7(b) Conservation zone. In the Kiama LEP 1996 forestry is prohibited in Zone No 7 (c) Rural Environmental Protection (Hinterland) and Zone No 7 (f) Rural Environmental Protection (General), however in the former zone “tree plantations and harvesting” are permitted with consent. See also: Farrier, D. (1993) above n 31 at 258.
93 Only a geographically limited survey (Northern Region of Department of Planning operations) into the requirements of EP zonings was conducted, on the basis that the most concentrated area of PNF activity in NSW is within that region.
94 Kyogle operates under an IDO, which contains no EP zones. Interview, Strategic Planner, 30.1.02. Similarly, the Grafton LEP cl.9 contains no EP zones.
95 Singleton LEP, Part 8 “Environment Protection and Nature Conservation”. Indexed on internet at Austlii. In making such comparisons there is inevitably some difficulty because of variations between LEPs regarding the types of EP zone. In order to standardise this survey, a focus was directed at ‘habitat conservation’ zones or similar, where
It is somewhat incongruous for LEPs to permit clearing and forestry within EP zones, especially where these are directed at habitat or vegetation conservation. For example, the Nambucca LEP’s Environment protection - vegetation conservation zone 7(b) permits the “clearing of native vegetation” if development consent is obtained. Similar questions are raised by environment protection - water catchment zonings in certain LEPs that permit forestry without consent.\(^9^6\)

In some LEPs, however, council’s discretion to grant consent is restricted by a listing of additional environmental factors requiring consideration. In other LEPs, an “onus of proof” approach is taken, where consent may only be granted if environmental impacts will be minimal, or if the development cannot feasibly be undertaken elsewhere.\(^9^7\)

For example, in the Nambucca LEP, an additional control exists in the form of a specific clause of the LEP relating to vegetation protection.\(^9^8\) This clause permits native vegetation clearance associated with forestry and agriculture in all of the rural zones without consent except where (in summary) the land is steep, comprises a wildlife corridor, or has particular scenic values. In these areas consent is required, but council’s discretion to grant that consent is constrained by mandatory consideration of specified environmental factors.\(^9^9\)

Ultimately the question is whether EP zones are sufficient to achieve their environmental goals. Knox and Francis, in a detailed survey of four coastal LEPs, criticised the adequacy of EP zones, as they:

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\(^{96}\) Nambucca LEP zone 1(a3) Rural (Upper Water Catchment). This is not an isolated example. Similarly, in the Glen Innes LEP, cl.9, in the Environment Protection - Water Catchment Zone, the only EP zone, forestry is permitted without consent.

\(^{97}\) For example, Tweed LEP, zone 7(f), “Environment Protection – Habitat”.

\(^{98}\) Nambucca LEP 1995, cl.18.

\(^{99}\) Nambucca LEP 1995, cl. 18(2),(5). Another approach is taken by the Culcairn LEP, which states that development for the purpose of forestry is not permitted without consent on land declared to be ‘environmentally sensitive land’. A further layer of protection is added on such land, preventing clearing of such land without consent. Within that LEP, to “clear land means to remove trees and other vegetation or bush rock from the land, but does not include the eradication of noxious plants.” (Culcairn LEP 1998, cl. 26). Thus protection is provided for reptiles such as the broad headed snake for which bush rock is an important habitat, threatened by commercial removal for sale to nurseries and landscaping outlets. Additional specific LEP provisions for vegetation protection, for example the Mulwaree LEP 1995 and others are discussed in Farrier (1993) above n 31 at 258-9.
show very little understanding of ecological principles...Issues such as habitat fragmentation...the minimum viable habitat size,...the value of the understorey,...the importance of the maintenance of corridors...are overlooked in development assessment, LEP formulation, and strategic planning generally.\textsuperscript{100}

A number of explanations for the inadequacies of LEPs may be advanced. The first reason is local politics, as “the elected councillors in rural shires are usually agriculturalists and/or local businessmen who depend on rural endeavour for their livelihood.”\textsuperscript{101} In many cases, local politicians would be reluctant to impose zonings on privately-owned land restrictive of uses such as forestry - typically regarded within the rural community as both traditional and legitimate. This is particularly the case where regulatory action may be perceived as reducing the resale value of the land in question. Other explanations include a lack of resources to undertake detailed ecological mapping and planning. To some extent it is likely that such shortcomings in the design of LEPs will be progressively rectified over time, because of statutory requirements for the involvement of NPWS in the drafting of new LEPs. If threatened species or their habitats will be affected, these entail that a council must consult with the Director-General of NPWS before preparing a draft LEP.\textsuperscript{102}

**FINDINGS REGARDING ADMINISTRATION OF THE EPAA**

This section presents further research findings regarding implementation of the EPAA by local government. There are significant difficulties in generalising about the approach of local government to PNF. The research revealed a range of approaches and attitudes to private forestry. The difficulty in producing meaningful results from empirical research was hinted at in an earlier review by Kelly and Farrier, who observed, “the exercise of discretion [by local government] is largely hidden from systematic investigation…”\textsuperscript{103}

It is important to analyse the decision-making patterns of councils that require consent for PNF. Commentators have remarked that within local government there frequently exists a ‘culture of consent’, where the operative question in practice is not whether a DA will receive consent, but rather which conditions will be attached to the consent.\textsuperscript{104}


\textsuperscript{102} EPAA, s.34(2).

\textsuperscript{103} Kelly and Farrier (1996) above n 74 at 380-382.

\textsuperscript{104} Kelly and Farrier (1996) above n 74.
A sub-survey of decision-making by Northern Region councils was conducted to gather data on implementation of the *EPAA* and *TSCA*, within a centre of significant PNF activity. A series of identical letters\(^\text{105}\) was sent to councils in DUAP’s Northern Region. The replies\(^\text{106}\) confirmed that between January 1996 and October 1999, only four of a total of eighteen councils in the Region required consent for PNF under rural 1(a) zones in their LEPs.\(^\text{107}\) There were only eighteen development applications for PNF during the study period. All were approved, although some were subject to conditions imposed following consultation with NPWS.\(^\text{108}\)

Thus despite the fact that most PNF in Northern NSW during the study period was proceeding under *NVCA* exemption, and is potentially subject to LEP regulation, the number of DAs received by local government in Northern NSW was low. The main reason is that 84 per cent of local councils did not require consent to be sought for forestry in the 1(a) zone. Also it is possible that some did not apply for consent due to existing-use claims, or even where consent was required, did not seek consent, e.g. within selected zone 1(a) or Zone 7 (environment protection) areas.

**Conditions on consents**

Conditions can be imposed on consents to control the method and intensity of the logging operation.\(^\text{109}\) Without a consent requirement, there is no opportunity to impose any operating conditions. Many strategic planners interviewed commented that they were unaware of the extent of PNF within their LGA, as council did not require development consent for forestry.\(^\text{110}\)

For those councils that required consent for PNF, interview evidence and correspondence revealed that they had imposed conditions on logging which usually were additional to those normally attached to a consent, and site-specific. For example, a

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\(^{105}\) Survey results contained in table at Appendix 9.1. Copy of survey letter contained in Appendix 9.3.


\(^{107}\) Kempsey SC, Great Lakes Council, Uralla SC, Bellingen SC required consent.

\(^{108}\) Interview, 10 October 1999, Mr. Gary Davey, Threatened Species Unit Manager, NPWS Northern Zone. Notes of interview on file.

\(^{109}\) *EPAA*, s. 80A, and s.79B(9) which states in effect that conditions imposed as part of the concurrence process under the *TSCA* are additional to conditions imposed under s.80A by the consent authority.

\(^{110}\) A list of the questions posed to planners in telephone interviews is reproduced at Appendix 9.4.
PNF consent granted by the Bellingen Shire Council in November 1996 was examined and was accompanied by 30 conditions. These included a cross-compliance provision linking the consent to continued compliance with other legal requirements, particularly an authority issued by DLWC to log protected lands. Specific conditions were applied following liaison with the NPWS. These were identical to the conservation protocols applied to operations within State Forests.

It has been suggested that more creative use could be made of the planning system by imposing conditions to require environmental monitoring. This is an example of a ‘positive planning’ approach, involving setting out positive obligations for environmental management, as opposed to reliance upon listing prohibited activities. This approach may be presently under-utilised. No evidence came to light that councils had imposed conditions requiring either the lodgement of an environmental bond (e.g. to ensure reforestation), or regular environmental monitoring (e.g. to establish the efficacy or otherwise of threatened species management prescriptions).

**ARE LEP REQUIREMENTS AFFECTED BY OTHER EPIS?**

*Impact of State Environment Planning Policies*

State government makes State Environmental Planning Policies (SEPPs) and Regional Environmental Plans (REPs), whereas LEPs are devised by local government (although formally made by the Minister for Planning). A SEPP may only be made where the Minister is of the opinion that the matters dealt with in the policy are “of

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112 The condition stated “A copy of an ‘authority to log’ protected lands on the property from the DLWC is to be submitted to the council prior to the commencement of the development. Any new or updated authorities issued during the life of the operation are also to be submitted to Council. [To ensure the legality of the development].” However, obviously this requirement would now be modified in future conditions to take account of the incorporation of the protected lands provisions of the SCA into the NVCA. Condition 10 of Consent on Activity Application No.330/96 by Bellingen Shire Council, 5 November 1996.

113 Interview, Mr. Gary Davey, Northern Zone Manager, Coffs Harbour, 22.10.99; Mr. Andrew McIntyre, Threatened Species Unit Manager Northern Zone, 22.10.99.

114 Knox, S., Francis, K. (1997) above n 100 at 145.


116 EPAA, s.39(1), formally by the Governor, but upon the instigation of the Director of Planning and the Minister administering the Act: s.37 EPAA.

117 EPAA, s.70.
significance for environmental planning for the State.”118 State government may use SEPPs in order to raise the bar of environmental protection in situations where local government tends to promote local economic development ahead of environmental protection.119 The main SEPPs possibly relevant to PNF are SEPP 44 (Koala Protection), and SEPP 26 (littoral rainforests). If these SEPPs apply, a development consent requirement will attach to the forestry proposal.

**Koala Habitat Protection**

SEPP 44 (Koala Habitat Protection) is relevant to PNF, as it applies certain measures for the protection of a species of indigenous arboreal marsupials. Made in 1995, its objective is to “encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas to ensure a permanent free-living population over their present range and to reverse the current trend of koala population decline.”120 The policy applies within 109 scheduled local government areas, including most of those in the Eastern Division of NSW121 corresponding to the known distribution of koalas.122

It contains three main mechanisms. The primary mechanism supplements the development consent process, i.e. it is predicated upon the existence of a consent requirement under another EPI such as an LEP. There are several requirements which must all exist before the development control provisions of the policy apply.123 The most important is that the land concerned must be “land in relation to which a development application has been made”.124 SEPP 44 applies when a DA is made involving a parcel of land larger than 1 hectare, within a scheduled local government area.125 Before a council may grant consent to such a DA, the council “must satisfy itself whether or not the land

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118 EPAA, s.39(3).

119 In other situations, SEPPs are paradoxically used to remove consent requirements that may be contained in LEPs - particular examples are the SEPP 45 - Permissibility of Mining, SEPP 4 (“Development without consent”), SEPP No. 34 — Major Employment Generating Industrial Development. Other examples include SEPP No. 3 — Castlereagh Liquid Waste Disposal Depot, SEPP No. 7 — Port Kembla Coal Loader, SEPP No. 27 — Prison Sites, SEPP No. 38 — Olympic Games and Related Development Proposals, SEPP No. 41 — Casino/Entertainment Complex, SEPP No. 43 — New Southern Railway, SEPP No. 47— Moore Park Showground, SEPP No. 48— Major Putrescible Land fill Sites. The use of SEPPs to override LEPs have been endorsed by the courts in decisions such as *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning (1997)* 95 LGRA 33.


121 SEPP 44, cl.5, Schedule 1.


123 SEPP 44, cl.6.

124 SEPP 44 cl6(b).

125 Or totalling one hectare including adjoining parcels of land owned by the same development applicant.
is a potential koala habitat.” If the site is considered ‘potential koala habitat’, then the council must “satisfy itself whether or not the land is a core koala habitat” on the basis of information “from a person with appropriate qualifications and experience in biological science and fauna survey and management”. If core koala habitat is identified, a Koala Plan of Management must be prepared prior to the granting of development consent. A council’s determination of a DA must not be inconsistent with this plan (see Figure 1).

If SEPP 44 is not properly taken into account in determining a DA, a consent may be invalidated. In *Canyonleigh Environment Protection Society Inc v Wingecarribee SC*, Bignold J held that a consent for a resort and golf course granted in breach of SEPP 44 was partially invalid. The applicants successfully argued that the Council in granting development consent had breached its obligation to satisfy itself whether or not the land was core koala habitat. The Council ill-advisedly relied upon a report by consultants engaged by the developers. Although prepared by a qualified expert, the report was not sufficient in legal terms to be capable of meeting the decision-making obligations of council.

SEPP 44 also provides that a council may prepare an LGA-wide plan of management for koalas for approval by the Director of Planning. By the end of 2001, only one council

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126 SEPP 44, cl.7.
127 SEPP 44, cl.8.
128 SEPP 44, cl.9.
129 SEPP 44, cl.9(2). See also O'Connor, S., Leathley, S., (1996) above n 120.
132 Bignold J held (obiter): “The crucial question…is whether the information in the…Report was legally capable of supporting the conclusion required to be made by the Council in fulfilment of the obligation imposed on it by cl.8(1) of SEPP No.44, that it was satisfied that the Manna Gum Forest was not core Koala habitat. An alternative formulation of the question is whether it was reasonably open to the Council on the information in the Second Mills Report to be satisfied that the Manna Gum Forest was not a core Koala habitat.” (p.54) However, the consultant’s report assumed that the development proposal would be modified to avoid the Manna gum forest, rather than by answering the question of whether the forest was core koala habitat. Bignold J observed: “the Second Mills Report did not positively state that the Manna Gum Forest was not core Koala Habitat.” (p.52) Bignold J concluded that the Report was “not capable of supporting the requisite conclusion of satisfaction on the Council’s part and that in consequence, it was not reasonably open to the Council to be satisfied.” (at p.54) The council was “diverted unwittingly from the true task posed by the statutory duty imposed by cl.8(1) of SEPP No.44 by relying upon the suggestion (even if that suggestion were to be translated into future certainty) that the Second Respondent would modify the golf course by retaining the Manna Gum Forest.” (p.55). The consent was held to be invalid in relation to those components of the development which would affect koala habitat forest types. Ibid at 61.
133 SEPP 44, cl.11(1)(a), 12, 13(1).
of 109 had done so.\textsuperscript{134} A third mechanism in SEPP 44 encourages the systematic identification of areas of ‘core koala habitat’\textsuperscript{135} by local government.\textsuperscript{136} The Policy states that councils “should” conduct koala surveys, and take the results regarding core koala habitat into account when making environmental protection zones and development control plans.\textsuperscript{137}

The implementation of SEPP 44 depends substantially on the approach of each local council as consent authority, because they decide which activities will require consent under the LEP, and therefore become caught by SEPP 44. We have seen that in the North Coast region, LEPs usually do not require consent for PNF. The policy’s capacity to provide for ESFM outcomes is limited by the fact that if Part 4 \textit{EPA}A consent is not required for PNF, it cannot apply, regardless of the fact that logging may be proposed for forest which represents ‘core’ or ‘potential koala habitat’\textsuperscript{138} (see Figure 1). There is no accurate data available regarding the frequency with which PNF has been subjected to the requirements of SEPP 44.\textsuperscript{139}

In relation to the \textit{NVCA}, SEPP 44 and PNF, the Minister for LWC is not required to apply SEPP 44 to his/her decision-making under the \textit{NVCA}, because SEPP 44 refers specifically to “a council”.\textsuperscript{140} Further, SEPP 44 cannot apply to restrict vegetation clearing where that clearing is authorised by a consent under the \textit{NVCA}, because of an ouster or exclusion provision in that Act.\textsuperscript{141} The Policy may only come into operation where the \textit{NVCA} does not require consent, e.g. because of a Code of Practice or an exemption such as that for ‘private native forestry’.\textsuperscript{142}


\textsuperscript{135} ‘Core koala habitat’ means an area of land with a resident population of koalas, evidenced by attributes such as breeding females (that is, females with young) and recent sightings of and historical records of a population”. (cl.4).

\textsuperscript{136} SEPP 44, cl.3.


\textsuperscript{138} SEPP 44, cl.7. ‘Potential koala habitat’ is defined in cl.4 as “areas of native vegetation where the trees of the types listed in Schedule 2 constitute at least 15% of the total number of trees in the upper or lower strata of the tree component.”

\textsuperscript{139} Primarily because there is no centralised record keeping regarding statewide administration of SEPP 44.

\textsuperscript{140} SEPP 44, cl.7,8.

\textsuperscript{141} \textit{NVCA}, s.23(1), in instances where no RVMP is in force - at the time of writing, the majority of NSW.

\textsuperscript{142} However, any RVMPs must make provision “for appropriate protection and management” of core koala habitat identified by the Policy. \textit{NVCA}, s.27(2), 32(2).
In conclusion, SEPP 44 is unlikely at this stage to be of more than limited effectiveness in koala protection because it is excluded wherever the NVCA requires consent, and it only applies in those LGAs where development consent is required under an LEP.  

Figure 1 Summary of Application of SEPP 44 to Private Forestry

Is the proposal within one of the 109 LGAs affected by SEPP 44?
- YES
- NO

Does the NVCA apply?
- YES
- NO

Is consent required for PNF under the LEP for this land in this zone?
- YES
- NO

Does the land involved have an area > 1ha?
- YES
- NO

Is it potential koala habitat?
- YES
- NO

Council “must satisfy itself whether or not the land is a core koala habitat”
- YES
- NO

Prepare plan of management. Council's consent decisions must be consistent with this Plan of Management.

SEPP 44 does not apply

Licensing may be required under TSCA, Part 6 (s.91)

Development consent decision making process as per usual following s.79C and s.5A (8 part test - threatened species)
SEPP 26 Littoral rainforests

SEPP 26 applies to mapped “core areas” of coastal rainforest and a 100 metre wide buffer, but excluding areas listed as residential land or SEPP 14 coastal wetland. This SEPP has the potential to apply to PNF operations within eighteen local government areas fronting the Pacific Ocean, from the Tweed to Eurobodalla. The policy is “a mechanism for the consideration of applications for development that is likely to damage or destroy littoral rainforest areas”. Development consent is required to “carry out work, use land for any purpose, … or disturb, remove, damage or destroy any native flora …” on land mapped as littoral rainforest. Unlike SEPP 44, the policy comes into operation without the necessity for piggybacking on another consent requirement in an LEP; if controlled actions are proposed for mapped land, consent is required. Before consent may be granted, the concurrence of the Director-General of Urban Affairs and Planning is required. SEPP 26 prevails over LEPs and REPs in the event of inconsistency.

REGIONAL ENVIRONMENT PLANS AND PNF

REPs can have an impact on PNF in two ways. They may impose consent requirements for forestry, overriding an LEP which permits PNF without consent. They can also guide the preparation of new LEPs by recommending that PNF be permitted with consent in some situations and without consent in others.

Several REPs impose over-riding consent requirements for forestry. The main plans involved are the Murray REP and Illawarra REP. The Murray REP No.2 - Riverine Land requires persons to seek consent for forestry from local government except where consent is required from the Minister for LWC in relation to protected land. The Illawarra REP states that “development for the purposes of forestry” shall not be carried

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144 SEPP 26, cl.4(1)(a).
145 SEPP 26, cl.4(1)(b). see also: DUAP website : listing of all SEPPs, 1.5.00. URL <www.duap.gov.nsw.au>.
146 SEPP 26, cl.2.
147 SEPP 26, cl.3 provides that “damage”, in relation to flora, includes lopping, topping and felling.
148 SEPP 26, cl.7.
149 SEPP 26, cl.7.
150 SEPP 26, cl.5.
151 Murray REP No.2 - Riverine Land, cl.13, part 9. The policy covers “the clearing, logging, removal or damaging of any species of trees and shrubs that are indigenous to the River Murray floodplain”.
152 There are some other exemptions for logging and clearing regulated under other legislation eg. for logging on Crown timber lands >2ha.
out on land mapped as supporting rainforest vegetation without consent.\textsuperscript{153} It also provides that a consent authority shall not grant consent on land being a wildlife corridor which will involve significant tree felling or vegetation clearance, unless it has consulted NPWS.\textsuperscript{154} The Kosciusko REP requires consent to be sought for clearance of any stand of trees of more than two hectares on private land.\textsuperscript{155}

Other REPs adopt an indirect approach of guiding the preparation of new LEPs. The Lower South Coast REP states that all draft LEPs should “require development consent for private forestry and include provisions to control adverse environmental impacts.”\textsuperscript{156} The North Coast REP requires the opposite, that in draft LEPs, PNF not be made subject to consent if consent is not required for agriculture.\textsuperscript{157} These provisions only affect draft LEPs and do not override existing LEPs which require consent for PNF.\textsuperscript{158}

\textbf{THE IMPLEMENTATION OF REPS AND SEPPS APPLYING TO PNF}

The capacity of regional planning to assist in the task of achieving ESFM on private land is potentially considerable. There is great scope for the use of REPs and SEPPs to reduce inconsistencies that presently exist between LEPs, thereby reducing compliance costs for business associated with regional variations in regulatory requirements. However in practice, limited and inconsistent use has been made of REPs. Firstly, REPs do not apply to many areas within the State. Secondly, REP requirements relating to forestry are not consistent across the State. For example, the North Coast REP does not recommend consent for forestry, whilst the Murray\textsuperscript{159} and Hunter REPs only contain general provisions for the protection of native vegetation.\textsuperscript{160} On the other hand, the REP for the Far South Coast states that LEPs should require consent for PNF and include provisions to control adverse environmental impacts,\textsuperscript{161} and the Illawarra REP provides additional provisions for the protection of rainforests and wildlife corridors.\textsuperscript{162}

\begin{footnotes}
\item[153] Illawarra REP, cl.14.
\item[154] Illawarra REP, cl.15.
\item[155] Kosciusko REP, cl.9(3).
\item[156] Lower South Coast REP No.2, cl.31(b)
\item[157] Cl.26, North Coast Regional Environment Plan 1988, Reprint No 1, 5 June 2001.
\item[158] Clause 4(1), North Coast Regional Environment Plan 1988. EPAA s.74(1) provides: “An environmental planning instrument may be amended in whole or in part by a subsequent environmental planning instrument whether of the same or a different type.” Interview, Mr. Daris Olsauskas, Senior Town Planner, Bellingen Shire Council, 3.4.98. If the LEP was already in force before the introduction of the REP, then the LEP is not impliedly amended by the REP.
\item[159] Murray REP No.2 Riverine Land, cl.13.
\item[160] Hunter REP, cl.62.
\item[161] North Coast REP, cl.26; Lower South Coast REP (No.2), cl.31(b).
\item[162] Illawarra REP, cl. 14 (rainforests), 15 (wildlife corridors).
\end{footnotes}
Tree preservation orders

Another instrument made and administered by councils with the capacity to affect PNF is the tree preservation order (TPO).\textsuperscript{163} TPOs have been largely superseded by broader provisions contained in LEPs. Typically LEPs contain a provision enabling council to make an order for tree preservation.\textsuperscript{164} A survey by ALGA (2000) of 131 councils found that TPOs had been made by 73 councils (56 per cent of sample).\textsuperscript{165} Mather’s 1990 study of TPOs found that 13 rural councils had no TPO, and that TPOs often only applied to town areas.\textsuperscript{166}

Existing uses and planning controls

Provisions relating to ‘existing uses’ are within Division 10, Part 4, \textit{EPAA}, and Part 5, \textit{EPAA Regulation 2000}.\textsuperscript{167} There are two situations in which the provisions apply: ‘existing uses’ and so-called ‘existing consents’. The ‘existing use’ provisions permit previously lawful uses of land which have overnight become prohibited under the terms of an EPI (e.g. an LEP), to continue until they naturally come to a conclusion.\textsuperscript{168} The ‘existing consent’ provisions authorise the continuation of previous land uses regardless of any introduction of a requirement for development consent in a subsequent EPI.\textsuperscript{169} The existing consent provisions set out guidelines for existing uses that overnight require consent due to the introduction of a new requirement in an EPI.\textsuperscript{170} Provisions restrict the scope of the existing consent provisions to the same extent as the existing-use provisions; the protection of uses does not apply to uses abandoned,\textsuperscript{171} or uses intensified or expanded.\textsuperscript{172}

\textsuperscript{163} Under powers provided by cl.8 \textit{Environmental Planning and Assessment Model Provisions 1980}, s.33 \textit{EPAA}.

\textsuperscript{164} For example, Great Lakes LEP 1996, cl.10.

\textsuperscript{165} 131 responses from 177 councils at time of survey. Source: ALGA (2000) \textit{National Local Government Biodiversity Survey, National Local Government Strategy Implementation Project Stage 1, NSW Fact Sheet}, June, ALGA, Deakin, ACT.


\textsuperscript{167} \textit{EPAA} s106-109B, \textit{EPAA Regulation 2000}, r.39-46.

\textsuperscript{168} \textit{EPAA}, s.106(a), 107, 108.

\textsuperscript{169} \textit{EPAA}, s.109(1). ‘So-called’ because these provisions (s.109, 109B) apply to situations where no consent was previously required, and therefore logically there cannot have been an “existing consent”. Generally see Farrar, D. (1993) above n 31 at 27-8,118-121; Austin, S. (1992) “Existing Use Rights: The Impact of Vaughan-Taylor and Ku-Ring-Gai v Mobil” 33 \textit{Environmental Law News (NSW)} 14-17.

\textsuperscript{170} \textit{EPAA}, s.109(1) operates so that these uses do not require development consent, as long as the land was being used for a lawful purpose immediately prior to the EPI coming into force.

\textsuperscript{171} \textit{EPAA}, s.109(2)(e),(3).

\textsuperscript{172} \textit{EPAA}, s.109(2),(3); see \textit{Aquatic Airways Pty Ltd v Warringah Shire Council} (1990) 71 LGRA 10 at 19.
Both depend on proof of a lawful pre-existing use. The person claiming existing-use rights bears an evidentiary burden, and many claims are likely to be defeated due to the inability of claimants to provide sufficient documentary evidence. In order to claim an existing use, it is necessary for the landowner to establish that the existing use is lawful - that all necessary approvals were obtained before it began.

In most areas of NSW where PNF proposals arise, there is a history of logging activity. Some private forest owners may be in a position to claim that selective logging has occurred on their land for 50-150 years. This raises the legal question of the extent to which previously-lawful land uses such as PNF can be either restricted or prohibited by subsequent EPIs such as LEPs and RVMPs made under the NVCA.

The protection of non-conforming existing uses is a long-standing feature of planning law in most jurisdictions, having been imported into Australian law from English planning law. In Strathfield MC v Australian Centre for Languages, Stein J described how the Courts have sought to hold a balance between the private rights of property owners to enjoy existing uses and the “public right of authorities to achieve reasonable town planning objectives.”

The effect of existing use and existing consent provisions is the insulation of PNF from the operation of LEPs and SEPPs. Where existing uses exist, local government may be relegated to the role of onlookers whilst forestry operations continue. The effect is such that if land is rezoned from ‘general rural’ (where forestry may not require consent) to ‘environment protection’ (where forestry is prohibited or requires consent), the new LEP provisions may not apply to forestry.

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176 NVCA, s.36(1).


179 This analogy was suggested by Mr. Andrew Kelly, Senior Lecturer, Faculty of Law, University of Wollongong, 3.7.00.
Interview research suggested that for a number of councils, existing-use provisions are an impediment to councils seeking to impose ESFM standards on the PNF industry. Existing-use claims by landholders were described as having created a “grey area” of legal uncertainty, in which councils, and elected councillors, mindful of their limited legal budgets, and the political sensitivity of the forestry issue, have been unwilling to test the veracity or lawfulness of existing-use claims by demanding the lodgement of a DA from private forest owners. In practice, regardless of the letter of the law, particularly the onus on landholders to substantiate claims of existing use, it appears frequently to have been the case that the threat of existing consent claims has undermined the capacity of some councils to require consent for PNF. The fact that landholders are relying upon existing-use-right claims meant that in one council area where consent was required for forestry in the 1(a) zone, there had been no development applications for forestry since 1994.

**Intensification of uses**

Non-conforming use protections are constrained in two ways. Firstly the intensification of existing uses is prohibited. Existing uses are only permitted to continue on the basis that they are not expanded, intensified or increased in scope. Any “increase in the area of the use made of …land from the area actually physically and lawfully used immediately before the coming into operation of the instrument” is not authorised. Further, any enlargement, expansion or intensification in the work or use of land is not permitted. In addition, a contemplated or intended future use of land does not amount to an existing use. Again, parallel limitations apply to so-called ‘existing consents’ permitted

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180 Interview, G. Tuckerman, Strategic Planner, Great Lakes Council, 16.7.02, by telephone, notes on file.
182 Interview, G. Tuckerman, Great Lakes Council, 16.7.02, by telephone, notes on file. The interviewee described one incident at Nabiac in which logging proceeded under the N/C/A’s PNF exemption, and in purported reliance upon existing use. Council did not seek to test claims of existing use, nor did it seek to prosecute the landholder for failing to obtain development consent. As the logging operation had already taken place, a position was taken that there was little point in taking action, as “the horse had already bolted.”
183 The application in 1994 was for the Tureel property where consent was granted to log approximately 2000ha of forest including old growth and rainforest, subject to numerous conditions. No FIS was required under the EFIP Act. Interview, G. Tuckerman, Great Lakes Council, 16.7.02, by telephone, notes on file.
185 EPAA, s.107(2)(b).
186 EPAA, s.107(2)(c).
under the Act.\textsuperscript{188} It is probable that the conversion of native forest to plantation would amount to an intensification of use, on the basis of the higher yield of timber per hectare from a plantation. Similarly, change from selective logging to clearfell woodchipping would amount to an intensification of use.

If development consent is obtained, the Regulations provide that existing uses may be “enlarged, expanded or intensified”\textsuperscript{189} or “changed to another use, including a use that would be otherwise prohibited under the Act”.\textsuperscript{190} Exactly which changes in land use are acceptable is not obvious.

The High Court considered the question of proper characterisation of an existing use in \textit{Shire of Perth v O’Keefe}.\textsuperscript{191} Decisions in relation to existing-use rights state that those rights apply to the particular purpose for which the land was previously used. A continuation of land use exactly as before is not required. Instead a “real and substantial purpose test” is applied.\textsuperscript{192}

In \textit{Tagget v. Tweed Shire Council} the question of whether existing-use rights for agriculture were available to protect activities on land that became subject to the operation of SEPP 14 (coastal wetlands) was addressed.\textsuperscript{193} The land in question had never been used for growing crops, but had been used for grazing cattle. The applicant had cleared vegetation for the purpose of growing banana plants, and the question was whether that amounted to a continuation of the existing use. The Court held that the applicant’s existing-use rights were confined to grazing and did not extend to the adoption of the use even though the use was related to agriculture. It held that to characterise existing use as agriculture “generally” would involve an unacceptable level of generality, encompassing activities “which differed in kind from the activities being undertaken at

\textsuperscript{188} Section 109(2)(c) prevents the exemption from the requirement for development consent from applying to uses where there is “any enlargement or expansion or intensification of the use”.

\textsuperscript{189} \textit{EPAA} Regulations 1994, cl.39(1)(a).

\textsuperscript{190} \textit{EPAA} Regulations 1994, cl.39(1)(d); \textit{EPAA} Regulations 1994, Part 5; cl.40(1), 43(a).

\textsuperscript{191} \textit{Shire of Perth v O’Keefe} (1964) 110 CLR 529.

\textsuperscript{192} The identification of the purpose is not to be approached, the High Court said "through a meticulous examination of the details of processes or activities or through a precise cataloguing of individual items or goods dealt with, but by asking what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date". \textit{Shire of Perth v O’Keefe} (1964) 110 CLR 529 at 535. See also: \textit{Cascone and Maria Vella v City of Whittlesea}, 11 AATR 174 (Supreme Court of Victoria), \textit{City of Nunawading v Harrington} [1985] VR 641 at 644-3.

\textsuperscript{193} \textit{Tagget v Tweed Shire Council}, NSW Court of Appeal, unreported, 3 November 1993, No.40520/92.
the relevant date”. However other case law suggests that existing-use rights are to be classified by considering the context in which classification is made, rather than adopting a narrow definition that would restrict the use to only the precise activities shown by the evidence.

The Tagget case also addressed the question of intensification of uses. In future disputes relating to the scope of existing-use rights, Tagget suggests that the facts and circumstances of each case will be crucial in determining rights. The Court ruled that by virtue of s.109(2) of the EPAA, the landholder was not entitled to further clear partially-timbered land for grazing purposes without consent, as this would amount to an increase in the use of the land, or an intensification of that use.

**Abandonment of existing uses**

The second key limitation on the existing-use protections offered by the EPAA is ‘abandonment’. A use that is abandoned cannot be resumed. The Act provides a rebuttable presumption that: “a use is to be presumed, unless the contrary is established, to be abandoned if it ceases to be actually so used for a continuous period of 12 months.” This limitation applies also to existing consents.

In relation to forestry this is a difficult matter, as forest management is not as obvious as the ploughing of a field or the use of a building. This is one reason why existing use rights in Tasmania have been protected with special ‘Private Timber Reserve’ (‘PTR’) provisions in the *Forest Practices Act 1985*. These provisions insulate PTRs from the requirements of local government planning schemes in Tasmania (see Chapter Eleven).

There are two cases that directly address the question of abandonment of existing uses involving PNF. In *Bornholdt v Tweed Shire Council*, the Land and Environment Court considered the question of abandonment of existing-use rights by lapse of time in

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196 Tagget v Tweed Shire Council, Court of Appeal, unreported, 3 November 1993, No.40520/92 at 13.
197 EPAA, s.107(2).
198 EPAA, s.109(3).
199 Interview, Mr. Peter Taylor, Private Forests Tasmania, 6.11. 98, at PFT, Patrick St, Hobart.
relation to selective logging of native forest.\textsuperscript{200} The landholders wished to avoid the effect of an LEP which placed most of their land into an environment protection zone in which forestry was prohibited. They argued that existing-use rights applied to a parcel of land last logged 25 years before, as they had managed the forest in question for the purpose of selective logging at a time when this would become economically feasible. It was argued that it had been, and still was, used for forestry as timber was maturing on the land. Hemmings J held that a future intention to log did not by itself amount to use, i.e. that more active management was required.\textsuperscript{201} This decision also points to significant evidentiary difficulties for landholders, particularly where there have been a number of owners of the property over the relevant time period.\textsuperscript{202}

In the Victorian case \textit{Walker v Macedon Ranges SC}, the Civil and Administrative Tribunal also addressed the question of abandonment.\textsuperscript{203} It rejected an application for a declaration that there was an existing-use right to timber production. The applicant argued that forestry had been conducted continuously on the land in question. However, the Tribunal decided that the forest in question had not been actively managed over the previous six years. It rejected the application on the basis that existing-use rights had not been continuously pursued, and logging under later permits had eclipsed the operation of earlier existing-use rights. The Tribunal stated that selective logging activity in the past would have to be virtually continuous in order to provide the foundation for a legitimate claim of existing use. It held: “In the case of the selective harvesting of timber, because of the passive nature of the regeneration component of the use, (which might lead the observer to believe the land is disused), in order that the use is kept “alive”, other activities would have to occur with some frequency – especially logging.”\textsuperscript{204}

The message is that it may be difficult as a matter of law to establish existing use in the PNF context, as merely watching trees grow with a future intention to harvest is likely to be considered an ‘abandonment’ of any existing use. Forestry management activities such as fencing, weeding, thinning, and road maintenance must be regular or continuous in

\textsuperscript{200} \textit{Bornholdt v Tweed Shire Council} (1989), Land and Environment Court, unreported, No. 40088 of 1988, Hemmings J., 4 August 1989, discussed in Farrier (1993) above n 31 at 260. (This case is not covered in the 3rd edition of Farrier.)

\textsuperscript{201} \textit{Bornholdt v Tweed Shire Council} (1989) above n 200 at 9; citing \textit{Earle Cameron Investments Pty Ltd v Parramatta City Council} (1981) 46 LGRA 130 at 137. Other caselaw suggests that a contemplated or intended future use of land cannot amount to an existing use: \textit{Parramatta City Council v Brickaworks Ltd} (1972) 128 CLR 1 at 21-2.


\textsuperscript{204} \textit{Walker v Macedon Ranges Shire Council} above n 203 at 21.
order for an existing-use argument to be successfully maintained. The *EPAA* requires more active management of land within the past 12 months in order to sustain an existing-use claim.

**DEVELOPMENT ASSESSMENT UNDER PART 5 EPAA**

Where Part 4 *EPAA* does not apply, a PNF operation\(^\text{205}\) may be regulated by Part 5 *EPAA*.\(^\text{206}\) The possible application of Part 5 is an important question because of the possibility that an Environmental Impact Statement (EIS) may be required.\(^\text{207}\) Part 5 *EPAA* applies to activities approved by public authorities\(^\text{208}\) under some other form of approval, which do not require development consent and are ‘likely to significantly affect the environment’.\(^\text{209}\) If Part 5 applies, a determining authority is required to take into account (to the fullest extent reasonably possible) the impact of logging on the environment. If it determines that the impact is likely to be significant then an EIS must be obtained from the proponent and considered.\(^\text{210}\)

\(^{205}\) A point of comparison between the legal requirements applicable to forestry on private and public land is that for a long period during the 1990s, there was a requirement that EIS be produced for public land forestry operations (within State Forests). However EIS have never been produced for PNF under NSW law, although for a significant time period this obligation also probably applied to larger PNF operations. However since changes introduced by the *Forestry and National Park Estate Act 1998* (‘FNPE Act’), provisions of Part 5 *EPAA* no longer apply to State Forests, and as a result this difference has dissolved. Parts 4 & 5 *EPAA* do not apply to public forestry covered by an integrated forestry operations approval, nor do they apply to the granting of such an approval. *FNPE Act*, s.36(1) states that Part 5 *EPAA* does not apply, whilst s.36(2) states that an EPI cannot affect forestry operations subject to that Act.

\(^{206}\) If an undertaking requires development consent or is a prohibited development, then it is not an activity for the purposes of Part 5 *EPAA*. \(^{207}\) No EIS is required to accompany a development application under Part 4 for PNF operations because forestry does not amount to ‘designated development’: “designated” because of their potential to cause major environmental impact. They can be designated either by Regulation (*EPAA*, s.158) or by EPI (*EPAA*, s.29). These developments must be advertised, and EIS preparation and submission is required. Logging or timber harvesting activities are highly unlikely to constitute a designated development, because to date they have not been listed within Schedule 3 of the *EPAA Regulation 2000*, as referred to in cl.4.

\(^{208}\) A condition precedent for the application of the EIA requirements of Part 5 *EPAA* is the existence of a relevant determining authority, arising from requirements to obtain some additional authorisation or permit. Part 5 is expressed in terms of “a public authority whose approval is required in order to enable the activity to be carried out”: s.110 *EPAA*. If some type of approval is required, then there is a determining authority.

\(^{209}\) If the undertaking fits the definition of ‘an activity’, and there is a relevant determining authority, then at a minimum there is a requirement for a consideration of environmental factors, pursuant to the requirements of s.111(1) *EPAA*, which provides that a determining authority shall examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity. The determining authority is required to decide whether EIS preparation is required in accordance with criteria set out in the *EPAA* and the EP&A Regulation. They may also consider DUAP guidelines: Department of Urban Affairs and Planning (NSW) (1996) *Is an EIS required? Best Practice Guidelines for Part 5 of the Environmental Planning and Assessment Act 1979*, DUAP, Sydney.

\(^{210}\) The application of Part 5 *EPAA* to the granting of a licence to pollute waters was considered and confirmed in *Brown v Environment Protection Authority and North Broken Hill Ltd, T/as Associated Pulp and Paper Mills [No.2]* (1992) 78 LGERA 119. Pearlman J of the Land and Environment Court concluded that there was a duty (under s.111) for the EPA in granting pollution control licences to comply with *EPAA*’s requirement to “take into account to the fullest extent possible all matters affecting or likely to affect the environment”.[p.131].
Until recent amendments to the law, many of the environmental approvals which may have been formally required for a lawful PNF operation had the potential to trigger the operation of Part 5 EPAA. However, after legislative amendments, newer forms of approvals such as native vegetation clearance consents, and s.91 TSCA licensing have no capacity to trigger Part 5. The possibility remains that Part 5 may be triggered where a pollution control licence (‘environment protection licence’) is obtained which authorises non-point source water pollution from new forestry works (as opposed to existing forestry works). During the study period, it appears that landholders were discouraged from applying for licences.

211 These included authorities to clear vegetation on protected land formerly issued under Soil Conservation Act 1938, and licences to pollute water formerly issued under Clean Waters Act 1970, Pollution Control Act 1970.

212 NVCA, s.16. Native vegetation clearance consents under the NVCA do not trigger Part 5 because the development is assessed under Part 4. Protected land authorities no longer trigger Part 5 because the protected lands provisions have now been subsumed into the NVCA regime. The NVCA explicitly states that any clearing carried out in accordance with Part 2 NVCA (which covers clearing and consents for clearing either where there is an RVMP in place and where there is not) is not an activity for the purposes of Part 5 EPAA. Clearing authorised by Part 4 NVCA, ‘Codes of Practice’ does not trigger Part 5 EPAA because it is considered to be a form of clearing under Part 2 NVCA, subject to the development consent regime therein: NVCA, s.21(2)(b),23(3). Further, clearing in accordance with a Property Agreement under NVCA is still subject to any development consent requirements that may apply under Part 2 NVCA (s.41(3).

213 TSCA, s.99(5). D-G of NPWS not a determining authority for purposes of Part 5 EPAA when granting licence under Part 6 TSCA.

214 Further, as clearing licences issued for activities on leased ‘Other Crown land’ under Forestry Act have been abolished, these cannot trigger Part 5. See s.27G, H Forestry Act 1916.

215 Protection of the Environment Operations Act 1997, s.52(2), Regulations may make provision excluding the issue of environment protection licences from the operation of Part 5 EPAA. POEO (General) Regulations 1998, r. 45 states: “The EPA is not a determining authority … in respect of an approval …that consists of the issue of an environment protection licence … so long as the licence authorises only the same or substantially the same work or activity, and level of work or activity, as was being carried out immediately before the application for the issue of the licence was made.”
Figure 2 Abbreviated overview of obligations for non-plantation PNF

Is an RVMP in force?  

- NO

YES

Refer to content of RVMP.

YES. Clearing proposed for protected land – PNF exemption not available

NO. Clearing proposed for non-protected land, ie, Private Native Forestry exemption is available

Decision: Is Development Consent required under the NVCA?

- NO

YES

Development consent of Minister for Land and Water Conservation is required.

Does the Local Environmental Plan require consent for forestry in the Zone in question?

- NO

YES

Is a licence under POEO Act obtained for non-point-source water pollution?

- NO

YES

Local council makes consent decision referring to the s.79C EPAA considerations.

POEO licence will trigger Part 5 EPAA assessment.

- YES

Licensing provisions of Part 6 TSCA may apply if picking of threatened plant species or damage to habitat of threatened species is planned.

- NO

Note that Part 5 EPAA cannot apply to decision-making under NVCA.
THE EPAA AND PNF POLICY

The RVMP provisions of the NVCA, and the PRA have challenged local government’s involvement in PNF regulation. These Acts exhibit a clear intent to exclude local government from development consent roles in a range of circumstances. Although PNF regulation by local government may have some shortcomings, an important ‘safety net’ role remains for local government to perform EIA under the development consent process, particularly due to the popularity of the PNF exemption.

There is inevitably a wide range of views, approaches to, and awareness of PNF within local governments. Nevertheless most councils did not wish to regulate PNF, and as we have seen, often chose not to require consent for it. A key explanation lies in ‘cultural factors’. Environmental regulation is foreign to much of rural local government culture. The cliché that ‘roads, rates and rubbish’ are the traditional purview of local government holds more than a grain of truth. A decade ago Farrier and Byron said that the expansion of responsibilities of councils from previously narrow bases “raises questions about the expertise of the decision-makers involved”, aside from questions of their motivation to address non-traditional policy issues. Indeed many councils have taken a conscious decision not to require consent, arguing that to do so is a disincentive to PNF. In the words of one planner: “forestry is important to the shire. We’re keen to encourage it.”

Even where local government wishes to regulate PNF, it usually does not possess the resources to employ the specialised expertise necessary to assess and monitor forestry.

216 It is likely that industry lobbied for the exclusion of local government from regulatory roles during the enactment of the NVCA and the PRA. The enactment of legislation to reduce the role of local government in regulating private forestry can be partly explained by the evolution of PNF from being a relatively small-scale activity, to becoming an almost equal partner in native timber production in parts of NSW, with associated demands by business - for statewide uniformity of legal requirements. The desire to exclude local government regulation is the idea at the core of RVMPs and their exclusion clauses which are broader than those in the pre-RVMP aspects of the NVCA. The RVMPs, once made, will completely cut local government out of the picture. The legislative intention of Parliament, evident from Hansard was that the NVCA would represent a comprehensive ‘one-stop shop’ for all NSW requirements relating to clearing activities on private land. The Hon J. Shaw, NVCA Bill: Second Reading, NSWPD (Hansard), 5.12.97, p.90.


219 Interview, Mr. Bruce Heise, Planner, Gloucester SC, 31.3.98, by telephone, notes on file with author.
operations regarding either silviculture or nature conservation. Within the broader context of inadequate funding for maintenance of rural infrastructure such as roads and bridges, there is “reluctance in many Councils to spend scarce resources on a subject they know little about—conservation planning and management.”

Councils also find PNF regulation challenging given the broader picture of limited resources, declining or static rate-bases, and the devolution of various responsibilities from State to local government, e.g. pollution control. With limited resources, local government in NSW is required to understand the complex legislative framework regarding native vegetation and forestry, which in itself leads to administrative difficulties. A 1999 survey by CSIRO Wildlife and Ecology found that “local government officials in NSW all commented on experiencing difficulty with the complexity of the legislative framework for managing native vegetation in the State…They questioned council’s capacity to adequately administer all of the functions that have been prescribed by State government.”

The evidence of the reluctance of most councils to regulate PNF during the study period lies in the author’s survey results showing a decision not to regulate forestry in the main rural zoning in 64.5% of 107 councils surveyed. A 1999 CSIRO survey of councils provides further evidence. Having asked councils whether vegetation management amounted to ‘core business’, it found that “rural councils were firmly of the view that vegetation management was beyond their resources or control.” The report stated: “most rural councils were strongly of the view that the State government should be the primary regulator of vegetation clearance on privately managed lands.”

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220 The National Local Government Biodiversity Survey published by the Australian Local Government Association (ALGA) stated: “Most rural and smaller Councils lack the resources and the expertise to plan and deliver comprehensive Local Government conservation strategies.” ALGA (1998) National Local Government Biodiversity Strategy, Berwick, M., with Thorman, R. (ed.), ALGA, Deakin ACT, 40pp, at p.10. The report adds: “Although many urban and coastal Councils are better resourced, many of these Councils also lack qualified staff in ecology and natural resource management.” An ALGA commissioned survey of 131 NSW councils in 2000 found that only 21% of councils employed a dedicated environment officer. This figure is significantly less than the national figure of 35%. Of the rest, 52% do not have an environment officer. The remainder (27%) share an officer with other councils. ALGA (2000) National Local Government Biodiversity Survey, National Local Government Strategy Implementation Project Stage 1, NSW Fact Sheet, June, ALGA, Deakin, ACT.


222 Protection of the Environment Operations Act 1997, s.6(2): “A local authority is the appropriate regulatory authority for non-scheduled activities in its area.”

223 Eighteen councils within Four regions in NSW and Queensland were surveyed - two in each - including the Lower Hunter and Central Coast and the Murray Catchment in NSW; Binning, C., Young, M. (1999) above n 12 at 127, Appendix A, “Needs Assessment”.

Some councils choose to regulate PNF - for various reasons including threatened species issues, landscape planning, water quality, and soil erosion control as well as maintenance of roads and bridges (due to wear from logging trucks), and social amenity.\footnote{Letter, Uralla SC to author, 20.9.99; Letter, Great Lakes SC to author, 29.10.99; Letter, Byron SC to author, 22.10.99; Letter, Kempsey SC to author, 24.9.99 (all on file).} Thus Kempsey SC stated “Council’s reasons are of an environmental nature. Council was concerned that with public forests becoming less available, sawmills would turn to private lands for logs.”\footnote{Letter, RB Pitt, Strategic Planning/Development Control Co-Ordinator, Environmental Services, Kempsey SC to author, 24.9.99.} In interviews, a strategic planner stated that Council was concerned PNF logging would become “harsher in order to make up for State Forests restrictions.”\footnote{Interview, Rob Pitt, by telephone, 5.10.99, Notes on file.}

A laissez-faire attitude on the part of some councils, and the stricter requirements of others produce regional inconsistencies in regulatory requirements, with PNF unregulated in the main rural zone by most councils particularly on the North and Central Coast. This suggests lower levels of environmental protection in those areas where the PNF exemption is available (and is claimed).

Consistency and uniformity in regulatory requirements are objectives which can be justified on grounds of encouraging investment in PNF. Inconsistency in local government requirements is frequently cited as a disincentive to investment.\footnote{Dept of Natural Resources and Environment Victoria (DNRE) (2001) “Private Forestry in Victoria: Strategy towards 2020” located at URL <www.nre.gov.vic.au> on 12.3.02.} On this basis, there is a case for the introduction of a SEPP to cover PNF logging. This would mimic the Victorian approach of inserting a section regarding PNF into all local planning schemes.\footnote{Local government administers the Code through Planning Schemes under the Planning and Environment Act 1987 (Vic). Amendment S13 to the State Section of all planning schemes introduced planning controls for timber production on private lands for all local government areas in Victoria.}

The regional variation in rules also fails to exert steady pressure for an improvement in PNF standards. At present there is no articulation by local government of a consistent State-wide policy for PNF, let alone standards for ESFM. There is no uniform system for production of pre-logging biodiversity surveys, EIA reports and timber harvesting plans (THPs), nor systematic auditing of their implementation.
The EPAA, which provides the legislative basis for local government’s involvement, enables - but does not mandate - an ‘across the landscape’ approach of regional planning. Kelly and Farrier concluded “there remains a strong suspicion that the history, culture and financial position of local government will ensure that biodiversity on private land will slowly die the death of a thousand ad hoc decisions.”

One answer is for councils to undertake programs of habitat mapping and identification of important wildlife corridors, and to use LEPs as pro-active landscape-planning tools which will help to overcome the tyranny of small decisions, particularly protecting the habitat of wide-ranging species.

Another response to the present disjointed system is to make greater use of existing powers relating to the making of REPs and SEPPs, so that planning is undertaken on a more strategic, landscape-based scale across the State.

The use of planning law to regulate PNF is another example of NSW’s approach of applying non-specialised, non-forestry legislation for the regulation of forestry. NSW addresses PNF with general-purpose vegetation-clearance legislation and planning law, by contrast with Tasmania which applies specific-purpose forestry legislation. However, the NSW approach enables considerations of a broader range of environmental matters than Tasmania’s forest practices legislation, which has ecological shortcomings, e.g. in terms of protection of threatened species. The debate over the involvement of local government in PNF regulation is nowhere as strong as it is in Tasmania. In that state there has been strident opposition to the removal of local government’s capacity to regulate private forestry with the designation of Private Timber Reserves (PTRs) (see: Chapter Eleven).


It is important that debate must also concern the content of requirements, not just about how they are delivered and administered. In Tasmania, the recent Velvet Worm case (2001) revealed the shortcomings of the Tasmanian Forest Practices System in taking account of threatened species issues: Giles & Weston v Break O’Day Council & Ors [2001] TASRMPAT 115 (23 July 2001).

Gee, D.; Stratford, E. (2001) “Public Participation and Integrated Planning in the Tasmanian Private Timber Reserve Process”, 18(1) Environmental and Planning Law Journal 54-70 at 68. Although this opposition may have been partly based on the self-interest of local government, but it has also been genuinely grounded in concerns about the capacity of the Forest Practices Code and System to deliver ESFM. In relation to Tasmania, Gee and Stratford argued in favour of local government regulation on the basis that it provides: “better opportunities to integrate local environmental strategies in the private forestry framework; consideration of the wider ecological and social impacts of timber harvesting, including on adjoining properties and water bodies.” Further, in terms of biodiversity protection, local government regulation has considerable advantages over project-by project approval of logging under a Code, because of scope for “identification of significant environmental values at a localised scale, … e.g., locally significant vegetation communities.”
While there might seem to be a prima facie case for local government to lose its role in the regulation of PNF in NSW, on the basis of regulatory simplification, there is a need for caution. The present breadth of loopholes in the *NVCA*, such as the PNF exemption, means that some local councils are presently playing an important role in overseeing PNF. Whilst regulation by local government has its flaws, it is better than nothing in an imperfect world of legislative loopholes. Yet with the progressive gazettal of RVMPs there is likely in the not-too-distant future to be an almost complete eclipse of local government from PNF regulation.

**COMPLIANCE POLICY AND ENFORCEMENT OF THE *EPAA***

A range of administrative enforcement options is available to councils under both the *EPAA* and the *Local Government Act 1993*, prior to reaching for the ‘big stick’ of criminal prosecution. These include verbal and written warnings, orders to landholders and Court orders. In addition, the *EPAA* provides for the instigation of civil proceedings to restrain breaches of the *EPAA*. The breaches most relevant to PNF are undertaking development without consent, breaching the conditions of consent, and breaching a TPO made under an LEP. A lower standard of proof (‘on the balance of probabilities’) applies, making civil proceedings an attractive enforcement option. The Act also encourages third-party civil enforcement with open-standing provision. Ministerial directions can be given to a council that is failing to implement its own LEP.

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234 On the other hand, advocates of the PNF exemption will argue that the exemption becomes meaningless if, despite it, an additional layer of approvals exists in the form of local government consent requirements. They argue that Parliament created the exemption for PNF for whatever reason, and that Parliamentary intent should be respected. This ultimately amounts to a “question nothing” and “accept everything” philosophy.

235 The *LGA* provides councils with a large array of different powers to make orders, to “order a person to do or to refrain from doing a thing.” *Local Government Act 1993*, s.124. Generally, see Ch.7, Part 2 of the Act. This is supplemented by a power to issue orders to “prevent environmental damage, repair environmental damage, or to prevent further environmental damage.” *LGA*, s.124. Notice must be given to the person the subject of an order, prior to the making of the order, and an opportunity provided to make submissions. In addition, activities within plantations accredited under the *Plantations Act* are insulated from the operation of local government’s power to issue orders: *Plantations and Reafforestation Act 1999*, s.51.

236 *EPAA*, s.121B. Consent authorities have broad ranging powers to make orders, particularly in order to enforce the conditions of development consents.

237 *EPAA*, s.124.

238 *EPAA*, s.127(7).

239 For example, it is an offence under cl.10(2) of the *Great Lakes LEP* to breach the terms of a tree preservation order made under cl.10(2).

240 *EPAA*, s.123. Provisions which permit “any person” to bring proceedings to restrain or remedy a breach of the Act.

241 *EPAA*, s.117(1).
EPIs can also be enforced under the *EPAA*’s criminal offence provisions. These provide that it is an offence to breach the provisions of a planning instrument,\(^\text{242}\) punishable with the maximum penalty for unauthorised vegetation clearance of $1.1 million plus a possible further daily penalty to a maximum of $110,000 per day for a continuing offence.\(^\text{243}\) There is also the option to seek court orders for replanting of vegetation, secured with a bond if necessary.\(^\text{244}\) The decision as to whether to commence a criminal prosecution rests with local government, as there is no independent authority in NSW for environmental prosecutions.\(^\text{245}\) Proceedings to enforce NSW planning controls are commenced by councils in the Land and Environment Court, which has jurisdiction to hear such summary proceedings.\(^\text{246}\)

Ample enforcement options are available to local government in NSW. But how much use was made of these options during the study period in relation to PNF? A limited amount of empirical research was conducted. The data sources included (i) telephone interviews with council planners,\(^\text{247}\) (ii) secondary sources, (iii) reports of prosecutions, formally reported, or informally reported in internet transcripts, and (iv) replies to a series of survey letters sent to selected councils that require consent for PNF. Several planners commented that they did not know how much PNF activity was occurring within their LGA.\(^\text{248}\) Some planners stated that council was unaware of how much PNF was occurring in breach of LEP requirements, where these existed.\(^\text{249}\) It appears that a sizeable proportion of landholders may not go to the trouble of applying for consent for PNF. This proposition gathers some support from the findings that four

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\(^{242}\) *EPAA*, s.125(1).

\(^{243}\) *EPAA*, s.126(1), penalty increased from previous level of 1000 penalty units to new penalty of 10,000 penalty units by the *Environment Planning and Assessment Amendment Act 1999*, No.72 of 1999. One penalty unit is equivalent to $110. *Crimes (Sentencing Procedure) Act 1999* (NSW), s.17.

\(^{244}\) *EPAA*, s.126(3).

\(^{245}\) The NSW Director of Public Prosecutions is unlikely to have a role in prosecution for a breach, as a general rule, the DPP only run prosecutions for indictable offences. *Director of Public Prosecutions Act 1986*, s.8(3). *NSW Crimes Act* ss.476-481 (deals with which offences are summary and which are indictable), *Summary Offences Act 1988*, *DPP Act* and *DPP Regulation 1995* r.4, ‘prescribed summary offences’.

\(^{246}\) These proceedings include Class 4 - environmental planning and protection - civil enforcement, and Class 5 - environmental planning and protection - summary enforcement. See: *Land and Environment Court Act 1979*, ss.20-21.

\(^{247}\) Using the semi-structured interview methodology described in Chapter Four.

\(^{248}\) Interview, Ms. Leanne Fuller, Development Control Planner, Hastings Shire Council, by telephone, 31.3.98. Notes on file with author.

\(^{249}\) Severn Shire Council. Under the LEP 1991, cl10. Accessed at <www.austlii.edu.au> on 7.12.01, private forestry does not require consent in Zone 1(a) Rural (Agricultural Protection) Zone unless it is for a pine plantation. Also: Letter from Severn Shire Council General Manager, 6.10.99. No changes are proposed in present redrafting of LEP. However, in an interview, Mr. Jim Robinson, Strategic Planner, Severn Shire Council, 31.3.98 suggested that development consent was required at that time for private forestry. Mr. Robinson admitted that some PNF operators in the Shire are operating without development consent, but stated that Council lacks detection and enforcement resources.
councils in the Northern DUAP Region requiring consent only received eighteen PNF applications during the study period. This low level of applications could be explained either by claims for non-conforming uses, as well as some element of unlawful PNF activity in breach of LEP requirements.

In areas that require consent, a combination of factors suggests that the rate of voluntary compliance with planning controls requiring consent for PNF is likely to be low. Traditionally PNF in NSW has been unregulated. It is probable that some landholders will be unaware of relatively new requirements for consent.\footnote{One council officer from an area which requires consent for forestry stated that “many loggers are not familiar with the requirement for development consent” under \textit{EPAA}. G. Tuckerman, Environment Officer, Great Lakes Council, Forster, NSW, 5.9.97.} Even where landholders are aware, it is necessary to take into account traditional rural attitudes that often view regulation as an inappropriate intrusion upon private property rights.\footnote{The legitimacy of requirements in an area that requires consent may be called into question where the majority of neighbouring councils do not require consent. This is frequently the case in the North Coast region.}

‘Voluntary compliance’ draws attention to the fact that under Part 4 \textit{EPAA}, it is up to a landholder to apply for consent, when consent is required. Some landholders may not apply for consent and will proceed with the regulated activity in the hope that they will not be detected. This may be based on rational calculation of the risk of detection versus the return from unlawful actions, or it may derive from negative attitudes towards regulation. Without a credible threat of detection and punishment, a section of the regulated community will not come forward seeking consent.

The fact that both the \textit{NVCA} and LEPs impose consent requirements, albeit in different circumstances, has the potential to generate confusion and thus problems with compliance. Some landholders using the PNF exemption will not realise that they may require consent under an LEP. Other landholders who are aware may be sufficiently confused by regulatory complexity that they decide that they do not need LEP consent as they have already claimed or ‘complied with’ the PNF exemption under the \textit{NVCA}. To these persons an ‘exemption’ will logically connote an exemption from all approval requirements. Others may be sufficiently annoyed about being exempt under one law but subject to another, to avoid approaching council about lodging a DA.
Although such propositions are intuitively attractive, they are not readily susceptible to empirical testing. A feeling for how the law plays out in practice was gained from interview research. One council officer described a typical scenario: “If someone comes to us asking for permission to log, we are just as likely to send them down the road to DLWC. If DLWC say an exemption is applicable, there’s no way they would bother coming back to council. And we have no resources to follow it up in any case.”

Education programs are an important aspect of compliance efforts. ‘Compliance’ and ‘enforcement’ activities must be distinguished. Enforcement efforts (such as prosecutions, warning letters, notices and orders) employ the regulatory tools of command and deterrence, yet they are not the only method of achieving compliance. The term ‘compliance’ refers to any measures implemented by a regulatory agency (and third parties it might enlist) to ensure the regulatory requirements are met. Agencies can also secure ongoing industry compliance by means of negotiation and inculcating trust as well as by means of education and training programs and by offering incentives and inducements.

The reverse side of the compliance problems arising from landholder confusion is the difficulties faced by councils. The primary difficulty for councils in enforcing LEP requirements appears to be the structuring and operation of the NVCA’s PNF exemption. Significant difficulties arise from the fact that there is no ‘notification requirement’ for PNF proceeding under exemption. Therefore, DLWC is often unable to inform councils that a particular operation is proceeding under exemption rather than NVCA consent, as it is itself unaware that particular PNF operations are proceeding. In order adequately to enforce and monitor LEP requirements in relation to PNF, councils would need to be in receipt of detailed, up-to-date information from DLWC specifying operations relying upon the exemption.

The legislative complexity between the NVCA and LEPs also creates policy confusion for local governments. Interviews suggested that a determinant of the compliance stance

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252 Interview, Mr. R. Pitt, Strategic Planning/Development Control Co-Ordinator, Environmental Services, Kempsey Shire Council, by telephone, 15.3.02, notes on file.
254 Interview evidence suggested that at least several Councils were not in a position to track loggers using the PNF exemption, and to ensure that they applied for consent. Interview, 12.7.02, Mr. Bruce Byatt, Planner, Greater Taree City Council; Interview, Mr. R. Pitt, Kempsey Shire Council, 15.3.02, notes on file. Mr. Pitt stated: “We have no effective means of policing it. It’s always been that way.”
of local government regarding PNF is the extent of internal confusion regarding the impact of the PNF exemption on LEP requirements. In some cases this confusion resulted in an operational decision not to apply the consent requirement for PNF. One council officer stated, “We haven’t controlled logging since it [the NVCA] was enacted…We used to be out chasing bulldozers the whole time, before the Native Veg Act came in.”

It is for such reasons that the effectiveness of LEP regulation of PNF depends to a large extent on the approach of DLWC and its regional offices and staff towards exempt PNF. Criticism of DLWC may be warranted over the fact that some of its public affairs material fail to draw landholder attention to the possibility of consent requirements of local councils.

Findings about regulatory compliance strategies employed

Some basic research in relation to compliance strategies adopted by various local councils was conducted via interviews. Given the broad range of options potentially available for securing compliance, it would be a considerable undertaking to obtain systematic data on the regulatory compliance strategies employed by the 107 local governments surveyed for this thesis. This aspect of the subject is not amenable to relatively simple and systematic evaluation.

255 Yet the officer from the same council stated that he was aware of the questionable legal validity of their position: “I’m just waiting for the time when someone takes council to court in a third party action for failure to enforce its own LEP. It’s going to happen one day.” Interview, Mr. R. Pitt, Strategic Planning/Development Control Co-Ordinator, Environmental Services, Kempsey Shire Council, by telephone, 15.3.02, notes on file. As a justification it was claimed that DLWC legal officers had issued an advice stating that the NVCA s.23 overrode the LEP requirements. However, a close reading of that advice (supplied by the council), by the author revealed that council was in fact advised that clearing under NVCA exemptions would still be subject to LEP requirements for consent. DLWC (2002) Letter of Legal Advice to Kempsey Shire Council regarding Effect of Native Vegetation Conservation Act on the Kempsey LEP, 9 January, Author : L. Paget-Cooke, DLWC, Sydney, 7pp. It was also claimed that local, regional, and head offices of DLWC had issued inconsistent verbal and written advice on the question. In particular Council had sought clarification from DLWC regarding the impact of the NVCA on environment protection zones. “We had a real concern that people could now clear these zones, which we really want to protect, using NVCA exemptions under the NVCA Council is concerned.”

256 In particular, DLWC Fact Sheet No.5 is potentially misleading as it fails to draw attention to the fact that other sources of a consent requirement may exist, thus implying that if clearing is exempt there is no need to obtain other consents (from local council under LEP). When discussing the PNF exemption (on land that is not State protected land) does not warn of the possibility of the requirement for consent from local government. It simply states “the following clearing is exempt from the need to obtain Development Consent”. However warns the reader to refer to the more detailed booklet “Definitions and Exemptions”. This has been brought to DLWC’s attention, but so far the Department has not altered the document. DLWC (1998) Native Vegetation Conservation Act: Exclusions and Exemptions Factsheet No.5, September 1998). Also, Pers. Comm., T. Holden, Policy Director, NSW EDO, 27.11.01 (by telephone).

257 Apart from the sheer number of councils, which limits attempts to make reliable generalisations about their ‘approach to enforcement’, there is considerable difficulty in devising a series of markers against which valid comparisons of the approach of various councils could be made. A survey approach would be required, and then the results would be of limited reliability. Participant observation based in a local government office would be the only way of obtaining reliable data, but would only yield data from a small number of councils, even if the procedure were repeated.
Interviews suggested that few, if any, rural councils have a systematic approach to monitoring or surveillance for the detection of breaches of PNF requirements. Many council staff interviewed reported a lack of enforcement resources. This suggests that a passive and ad hoc approach to detection of non-compliant activity is the norm. To a large extent, reporting by neighbours or haphazard detection by council staff driving through the area is relied upon. Few if any councils appear to have a published compliance or prosecution policy. Interviewees stated that satellite monitoring or aircraft fly-overs were not applied. Another issue for further research is the extent of compliance with conditions of consent. An officer of a council that granted consent for logging on a 2000ha property containing old-growth and rainforest on private land stated that although consent was granted subject to many conditions, the council has no enforcement staff, so it was unknown whether conditions were complied with.

A small number of interviews led to discussions of enforcement and compliance which raised some of the issues. For example, when asked what steps council had taken to inform landowners and logging contractors about their obligations to seek consent under the LEP, one officer from a North Coast council replied, “none”. When asked whether council had an approach or strategy to address issues of enforcement and compliance regarding PNF and its LEP, the officer stated “Not at all”. Still, these statements cannot at this stage support broad generalisations about “the enforcement approach of local government” in NSW towards PNF. One council may treat applications for consent for PNF harshly, whilst others approach PNF leniently.

However, no interview subject stated that their LGA ran a vigorous compliance or enforcement program relating to PNF activity. No evidence came to light of any instance in which an order had been made under either the EPAA or the LGA in order to enforce environmental protection conditions in relation to PNF operations. Nor did any interviewees describe any civil enforcement activity relating to PNF.

258 In the 37,000 km² area covered by Greater Taree City Council, the primary method of detection of offences is reporting by neighbours. There is no use made of satellite monitoring, nor of aircraft fly-overs. There have been no prosecutions, and no civil or administrative enforcement activity relating to PNF. Interview, 12.7.02, Mr. Bruce Byatt, Planner, Greater Taree City Council.

259 DLWC have used aircraft fly-overs to audit compliance with conditions of consent for clearing in the Central West region. See Chapter Eight. Satellite monitoring is used in other environmental enforcement contexts in other jurisdictions: again, see: Chapter Eight. Satellite technologies such as remote sensing and GIS are employed by some councils for other purposes, such as habitat mapping.

260 Interviews, G.Tuckerman, Great Lakes Council, 5.9.97, 16.7.02, by telephone, notes on file.

261 Interview, Mr. R. Pitt, Strategic Planning/Development Control Co-Ordinator, Environmental Services, Kempsey Shire Council, by telephone, 15.3.02, notes on file.

262 See Appendix 9.1: Table of Consent Requirements.
Councils may prosecute parties who fail to obtain, or to comply with a development consent (and its conditions). A comprehensive review of reported and unreported case law revealed that during the study period (1997-2002), local government launched no prosecutions in the Land and Environment Court concerning unauthorised PNF.\footnote{A review was conducted of the case law reported in the LGERA and of unreported judgments indexed on the internet at \(<www.austlii.edu.au>\), and at NSW Attorney General's Lawlink website of unreported Land and Environment Court judgements. Note that proceedings for offences against the Local Government Act (such as s.626, failure to obtain approval), can be dealt with summarily by a Local Court or by the LEC exercising its summary jurisdiction: \emph{Local Government Act 1993}, s.691(3). Proceedings to remedy or restrain breaches of the LG Act may be heard in either the Local Court or the Land and Environment Court: s.673.}
The last prosecution appeared to have taken place in 1990.\footnote{\textit{Fry v Patterson}, 10 October 1990, Land and Environment Court NSW, Unreported, Nos.50076-50078 of 1990, Stein, J.}

In relation to other forms of vegetation clearance in breach of LEP requirements (e.g. agricultural clearing), there has been some prosecution activity by councils. The average fine in the seven successful rural prosecutions (relating to tree clearance, not unauthorised forestry) since 1990 was $10250 (Appendix 9.5). This level of penalties is best described as low. The prosecution results suggest that the general deterrence effect being exerted to encourage compliance with the LEP provisions is likely to be rather small. Land and Environment Court decisions suggest an equivocal approach to imposing severe penalties for illegal tree-felling in the rural context than in the urban context. A comparison between the results of prosecutions for destruction of native vegetation in the country and in urban areas reveals that penalties imposed for the former have been lower than those imposed for the latter. The average fine for urban tree felling was $13718, and involved far fewer trees.\footnote{It is certainly lower than the average fine that was imposed in the 8 urban prosecutions of $13718. In the urban context, in \textit{Canterbury City Council v Saad}, a $5000 fine was imposed for the removal of two mature trees, and in \textit{Ryde CC v Calleija}, a $15,000 fine was imposed for the removal of 15 mature trees. In \textit{Hornsby SC v Moit}, a penalty totalling $40,000 was imposed for the felling of 49 trees in urban bushland. These results indicate a different calculus of decision making (ie. around $1000 per tree) to that applied in the cases relating to rural vegetation destruction. The fines are certainly larger on a per-tree basis than penalties imposed in the rural context. However it must be recognised that judicial discretion in sentencing takes into account the particular circumstances and facts of each case. \textit{Canterbury City Council v Saad} (2000) 112 LGERA 107, Land and Environment Court NSW; \textit{Canterbury City Council v Saad}, Land and Environment Court NSW, Unreported No. 50022 of 2000; Bignold J. (Judgment on Sentence), 28 February 2001; \textit{Ryde City Council v Calleija} (1998) 99 LGERA 360; \textit{Hornsby Shire Council v Moit}, [2001] NSWLEC 50,Unreported, Nos 50023 of 2000 and 50024 of 2000, Land and Environment Court of NSW, 26 February 2001, Lloyd, J.; see also \textit{Cameron v Lake Macquarie City Council} (2000) 107 LGERA 308.}

So what are the implications of these findings regarding formal enforcement of LEP requirements? The finding that local government has undertaken no prosecutions relating to PNF since 1990 is almost certainly related to the (equivocal) evidence suggesting a low level of engagement with the industry by councils (as regulators of...
PNF). The proposition that there is a low-key approach to both compliance and enforcement tends to reinforce the proposition that the overall level of compliance with LEP requirements for PNF is relatively low.

**CONCLUSION**

Although regulation of PNF by local government under the *EPAA* is not the primary aspect of regulation of the industry, with DLWC formally playing the lead role, EPs administered by local government still play an important ‘safety net’ role. With the broad scope of the *NVCA*’s exemption for PNF, and the widespread use made of that exemption, this is the position at the time of writing, prior to the Gazettal of a significant number of RVMPs. At present, selected local councils in each of the five DUAP regions surveyed play a role in overseeing PNF, either in the main rural zone or in selected environmental protection zones, or both.266

Yet the major finding of this Chapter is that in the North Coast and Hunter regions, where the PNF industry is most active, local councils tend not to regulate the industry. On this basis it can be said that overall, during the study period, the *EPAA*, as applied by local government, failed to exert sustained and consistent pressure for ESFM outcomes. The majority of one hundred and seven councils surveyed across the State (64.5 per cent) did not require development consent before forestry could proceed in the general rural zone (1(a)). In the North Coast DUAP Region, the majority of councils (84.2 per cent) and Central Coast and Hunter regions (61.5 per cent) did not require applications for development consent for PNF. Conversely, the majority of councils on the South Coast and Illawarra Regions require consent to be sought.

The author’s survey of LEPs in the Northern Region267 revealed that within environment protection zones, the majority of plans (58.8 per cent) permit forestry with consent268 rather than prohibit it (36.8 per cent).269

266 Appendix 9.2 contains a map indicating the boundaries of the DUAP regions.

267 Only a geographically limited survey into the requirements of EP zonings was conducted, as it is evident that the majority of PNF in NSW takes place within the rural 1(a) zone.

268 Forestry permitted with consent in Great Lakes LEP 1996, zone 7(e) scenic protection zone; Gunnedah LEP 1998, zone 7(d) Environment Protection – scenic zone; Snowy River LEP 1997, zone 7 - environmental protection, cl.19(3). Forestry permitted with consent in Hastings LEP 2001, Zone 7 (d) Environmental Protection – Scenic. In the Tweed LEP 2000, forestry is permitted with consent in Zone 7(1) Environmental Protection - Habitat zone, but faces a special onus of proof of necessity and consistency with plan and zone objectives against clause 8.

269 Calculated from a total of 19 LEPs. Two LEPs contained no EP zones at all. Kyogle operates under an IDO that contains no EP zones. Interview, Strategic Planner, 30.1.02. Similarly, the Grafton LEP cl.9 contains no EP zones.
Even where consent is required by LEPs, little pressure is exerted for ESFM. Part of the difficulty derives from defects in the *EPAA*, principally the shortcomings of s.79C. In spite of the fact that the objects of the *EPAA* include to encourage “the protection of the environment” and “ecologically sustainable development”, the Act (as interpreted by the courts to date) has limited this promise. Section 79C does not mandate placing particular weight on environmental factors above social or economic factors in the consent decision-making calculus. A council may lawfully place lower priority on environmental considerations in the decision-making process, provided that it can establish that it gave genuine consideration to all relevant s.79C factors. This chapter has argued that the *EPAA* does not require decision-making in accordance with ESD (or ESFM) principles.

For various institutional reasons, the capacity of local government to effectively regulate PNF, even where it wishes to, is limited. Often councils, particularly smaller councils, do not possess the resources for a broad range of environmental protection tasks. Judging by the research findings, this would also appear to be the case for assessing and monitoring PNF operations at a more central level. There is a strong argument for seeking some measure of consistency and uniformity in regulatory requirements for PNF across NSW, a task that local government regulation is inherently unsuited to, unless regional planning (with REPs) were to be adopted with some vigour.

Another problem brought to light was inadequate coordination between DLWC and local government over the demarcation between the *NVCA* and LEPs, a difficulty caused by the PNF exemption. However, some of the difficulty with environment protection efforts directed at PNF are of local government’s own doing - perverse incentives generated by the present configuration of the local government rating

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270 *EPAA*, s.5(a).
271 *EPAA*, s.79C(1). See Chapter Six. Stein, P., Mahoney, S. (1999) “Incorporating Sustainability Principles in Legislation”, in Leadbeter, P., Gunningham, N., Boer, B. (eds.), *Environmental Outlook No.3: Law and Policy*, Federation Press, Sydney, 57 at 72. By contrast, the *Water Management Act 2000* explicitly states that its objects include the far more active objective, “to apply the principles of ecologically sustainable development” [emphasis added]. Water management committees are under a statutory duty to exercise their functions “consistently with the principles of ESD”: s.14(3).
system\textsuperscript{272} which indirectly encourages logging and vegetation clearance in preference to native vegetation conservation.\textsuperscript{273}

In spite of these problems, we should be cautious about removing local government’s regulatory role. The present breadth of deficiencies in the NVCA, in the form of exemptions such as the PNF exemption, means that those local councils that require consent for PNF could play an important supervisory role, if they take questions of compliance seriously.


\textsuperscript{273} Binning, C., Young, M. (1999) above n 12. In NSW land used as farmland (including forestry is sometimes rated at a lower level than used for conservation. However to date there has been no specific research carried out into the specific question of the impact of the rating system on the decision making of landowners relating to proposed forestry activities. Notably the categories of land tenure granted rating exemptions in the \textit{Local Government Act 1993}, s.555 such as national park, does not include informal private nature reserves. Land subject to conservation agreements made under the \textit{National Parks and Wildlife Act 1974} are included, however, land subject to a property agreement under the \textit{Native Vegetation Conservation Act 1997} is not. An additional concern is the fact that the \textit{Valuation of Land Act 1916}, s.4(1)(a) includes within the heading of “land improvements,” “the clearing of land by the removal or thinning out of timber, scrub, or other vegetable growths.” Land used for forestry (on a commercial basis) falls within the definition of farmland for rating purposes: \textit{Local Government Act 1993}, s.515(1).
THE THREATENED SPECIES CONSERVATION ACT 1995
AND PRIVATE NATIVE FORESTRY IN NSW

Why should we care? What difference does it make if some species are extinguished, if even half
of all the species on earth disappear? Let me count the ways. New sources of scientific
information will be lost. Vast potential biological wealth will be destroyed. Still undeveloped
medicines, crops, pharmaceuticals, timber, fibres, pulp, soil-restoring vegetation, petroleum
substitutes, and other products and amenities will never come to light. It is fashionable in some
quarters to wave aside the small and obscure, the bugs and weeds, forgetting that an obscure moth
from Latin America saved Australia's pasture from overgrowth by cactus, that the rosy periwinkle
provided the cure for Hodgkin's disease and childhood lymphocytic leukaemia, that the bark of
the Pacific yew offers hope for victims of ovarian and breast cancer, that a chemical from the
saliva of leeches dissolves blood clots during surgery, and so down a roster already grown long
and illustrious despite the limited research addressed to it.

Wilson, E.O. (1992) The Diversity of Life.1

REQUIREMENTS OF THE THREATENED SPECIES CONSERVATION ACT

NSW legislators have attempted to provide some protection to forest biodiversity with
the Threatened Species Conservation Act 1995 (‘TSCA’). This Act is relevant to PNF because
it applies on both public and private lands. As well as providing protection for listed
threatened species (an umbrella term used to describe both listed endangered2 and
vulnerable species3), it provides for the listing of endangered populations4 and both
vulnerable and endangered ecological communities5 (these categories are referred to
collectively below as ‘threatened species’).6

The TSCA contains a large range of mechanisms and instruments including recovery
plans, threat abatement plans, and provision for the declaration of critical habitats.7

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2 Endangered species are defined in TSCA, s.4(1), and listed in TSCA, Schedule 1, Part 1 by virtue of TSCA s.6(1).
3 Vulnerable species are defined in TSCA s.4(1), listed in Schedule 2, by virtue of TSCA ss. 7(1),14.
4 Endangered populations are defined in T3CA, s.4, and listed in T3CA, Schedule 1, Part 2 by virtue of T3CA s.6(2).
5 Endangered ecological communities are defined in T3CA, s.4, and listed in Schedule 1, Part 3, by virtue of T3CA
   s.6(3).
6 Note that recent amendments to the TSCA and in turn the EPAA and NPFWA by the Threatened Species Conservation
   Amendment Act 2002 have altered the definitions of threatened species by adding a category of ‘vulnerable ecological
   community’.
7 Including recovery plans: TSCA, Part 4; threat abatement plans: TSCA, Part 5; and provision for the designation of
critical habitat TSCA, Part 3; and joint management agreements with public authorities for the control of actions
jeopardising the survival of threatened species: TSCA, Part 7, Division 2.
Other provisions are for listing of key threatening processes, and the making of stop-work orders. Apart from these stand-alone provisions, the TSCA also operates through provisions inserted in Parts 4 and 5 of the Environmental Planning and Assessment Act 1979 (‘EPAA’) and the National Parks and Wildlife Act 1974 (‘NPWA’).

In terms of PNF, the most important mechanism through which the TSCA operates in practice is the EPAA’s planning process. The TSCA requires consideration of the likely impact of proposed development on threatened species in development consent deliberations under Part 4 EPAA.

There are two pathways under Part 4 EPAA whereby threatened species questions are considered. Firstly, given an application for consent to log (clear) under the NVCA, the Minister for Land and Water Conservation is required to consider a number of specified threatened species matters during consent decision-making (see ‘8-part test’, below). Secondly, where private forestry is exempt from the NVCA, but requires consent from a local council under an Environmental Planning Instrument (i.e. LEP, REP, SEPP) then that consent authority may need to consider threatened species issues during its deliberations.

Consent authorities under Part 4 EPAA, determining authorities under Part 5 EPAA and the National Parks and Wildlife Service (‘NPWS’) under TSCA Part 6, must all consider as part of their overall deliberations the question of whether there is likely to be a significant effect on threatened species associated with a proposed “development” (i.e. logging). The likely magnitude of future impacts is presently assessed using a threshold ‘8-part’ test of significance contained in Section 5A of the EPAA. Where a person is

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8 TSCA, Schedule 3.
9 TSCA, Part 7, Division 1.
11 EPAA, s.5A; ss.78A, 79B, 79C,80A (Part 4).
12 Since 24 September 2003, the NPWS is part of the DEC Department of Conservation of Environment which comprises the National Parks and Wildlife Service, the Environment Protection Authority, the Royal Botanic Gardens and Resource NSW.
13 There were a number of legislative amendments to the 8-part test in October 2002, likely to commence in late 2003. These amendments have not fundamentally altered the mechanism and approach of the legislation. The purpose of the amendments, according to the Second Reading Speech was to bring “the scale of assessment down to the local level, reflecting the fact that long-term loss of biodiversity arises primarily from the accumulation of losses and depletions at a local level.” Legislative Assembly, Hansard, 31 May 2002, p.2302. See: Threatened Species Conservation Amendment Act 2002, Schedule 2, as yet largely uncommenced at 16.9.03, based on a search of NSW Parliamentary Counsel's Office, NSW Legislation in Force (<www.legislation.nsw.gov.au>). These amendments reduced the number of
conducting activities in accordance with the terms of a development consent, they have a
defence against prosecution for contravention of threatened species legislation.  

The 8-part test is used to determine “whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats”. If any one or more of the eight factors raised in s.5A EPAA are answered positively, indicating that a significant effect is likely, then the proponent must prepare and submit an adequate Species Impact Statement (‘SIS’) along with the development application in accordance with the detailed requirements in the TSCA (see further: 8.2, below). The SIS is designed to function as an aid to the decision-making of the consent or determining authority, and is prepared at the developer’s expense in accordance with formal requirements supplied by the Director-General of the NPWS regarding its form and content (‘Director-General’s requirements’).

In addition, if there is likely to be a significant effect on threatened species, the consent authority must take a further step, of either Ministerial-level consultation or agency-level concurrence, depending on which party is the consent authority. Where the development application for PNF activity has been made under the NVCA, the Minister administering that Act is the consent authority. Given a preliminary assessment of likely significant effect on threatened species, a statutory consultation process with the

considerations listed under s.5A(2) by one, but also added another consideration at 5A(1), that “assessment guidelines” in force under s.94A TSCA must be considered. It is on this basis that I continue to refer to the test as an ‘eight part’ test rather than a ‘seven part’ test.

It is a defence to prosecution for offences under the NPWA if the offending actions (e.g. damage to habitat of threatened species) taken was “essential for the carrying out of development in accordance with a development consent” under Part 4 of the EPAA. See NPWA s.118A(3)(b)(i). The same formula is applied in s.118C and 118D. The equivalent applies to development under Part 5 EPAA if the activity was done pursuant to a Part 5 approval: NPWA s.118A(3)(b)(ii). The same formula is applied in s.118C and 118D.

Section 77(3)(d1) EPAA has been repealed and replaced by s.78A(8)(b) EPAA. (Environmental Planning and Assessment Amendment Act 1997. Further, there were a number of legislative amendments to the 8-part test in October 2002, likely to commence in late 2003. These amendments have not fundamentally altered the mechanism and approach of the legislation. The purpose of the amendments, according to the Second Reading Speech was to bring “the scale of assessment down to the local level, reflecting the fact that long-term loss of biodiversity arises primarily from the accumulation of losses and depletions at a local level.” Legislative Assembly, Hansard, 31 May 2002, p.2302. See: Threatened Species Conservation Amendment Act 2002, Schedule 2, as yet largely uncommenced at 16.9.03, based on a search of NSW Parliamentary Counsel’s Office, NSW Legislation in Force (<www.legislation.nsw.gov.au>). These amendments reduced the number of considerations listed under s.5A(2) by one, but also added another consideration at 5A(1), that “assessment guidelines” in force under s.94A TSCA must be considered. It is on this basis that the test is still referred to here as an ‘eight part’ test, rather than a ‘seven part’ test.

A SIS must contain the information required by Division 2, Part 6, TSCA, ss.109-112 TSCA.

Part 4 applications: EPAA s.78A(8)(b), Part 5 activities: EP-A, s.112(1B).


TSCA, s.111.

NVCA, s.14.
Environment Minister must take place prior to making the development consent decision (see Figure 1)\textsuperscript{22}.

Where a Development Application (DA) is in relation to the provisions of an EPI, and there is a finding that significant effects are likely, the consent authority must also request the concurrence of the Director-General (‘D-G’) of NPWS.\textsuperscript{23} That concurrence may be granted either conditionally or unconditionally, or refused.\textsuperscript{24} In concurrence decision-making, the D-G is required to consider “the likely social and economic consequences” of granting or refusing concurrence.\textsuperscript{25} The D-G is also required to “take into account” seven other statutory factors including the principles of ESD, such as the precautionary principle.\textsuperscript{26} It is open to the D-G or the Environment Minister (if acting in place of the D-G) to refuse concurrence to a development.\textsuperscript{27} Following the conclusion of the concurrence/consultation process, the application is remitted to the consent or determining authority for evaluation,\textsuperscript{28} which can refuse, or grant consent, with or without conditions.\textsuperscript{29}

In some situations neither of the above may apply. Where Part 4 \textit{EPAA} does not apply (i.e., where PNF is exempt under the \textit{NVCA} and is not regulated by an EPI), the Part 5 activity approval process may apply where Part 5 is triggered (e.g. by the granting of a licence by the Environment Protection Authority (EPA) for non-point source pollution of water from logging operations).\textsuperscript{30} Until relatively recently, many of the approvals

\textsuperscript{22}\textit{EPAA}, s.79B(3), (4). This requirement only applies in relation to development likely to significantly affect a threatened species or its habitat.
\textsuperscript{23}\textit{EPAA}, s.79B(3).
\textsuperscript{24}\textit{EPAA}, s.77C.
\textsuperscript{25}\textit{EPAA}, s.79B(5)(h).
\textsuperscript{26}\textit{EPAA}, s.79B(5).
\textsuperscript{27}\textit{EPAA}, s.79B(8).
\textsuperscript{28}\textit{EPAA}, s.79C.
\textsuperscript{29}\textit{EPAA}, s.80(1).
\textsuperscript{30}\textit{EPAA}, s.111,112B-E (Part 5). Note that the EPA was incorporated within the Department of Environment and Conservation (DEC), in September 2003. An interview conducted in late 1998 with high level EPA staff confirmed that PNF operations had never been issued with any pollution control licences from the NSW EPA. Interview, 21.9.98, Ms Lisa Corbyn (Deputy Director-General EPA), Mr. Steve Beaman, EPA, Sydney. Further it was indicated there was no intention to require operators in the PNF industry to hold licences. The staff indicated that they had no plans for formal consultation with the PNF industry, and stated that they had no plans to offer a model licence to operators, on the basis that PNF is not a scheduled activity under the \textit{POEO Act}. Policy considerations advanced by EPA to justify the non-licensing approach on private land include (1) limited resources mean that regulating private as well as public land logging by licensing would be impossible (2) that the policy approach is echoed in the \textit{POEO Act} in that licensing is not required as PNF is not a scheduled activity by comparison with certain forms of intensive forestry on State forest land. Other reasons advanced include (3) the EPA will take a 'general oversight' role and will investigate on a case-by-case basis if a non-trivial pollution incident comes to its notice. Note that a number of prosecutions for water pollution crimes have been concluded by the EPA in relation to forestry operations on State Forest. \textit{EPA v Forestry Commission}, Land and Environment Court Nos. 50006-50010 of 1997 and \textit{EPA v Forestry Commission (No.2)}, Land and Environment Court No.50058 of 1996, unreported, Sheehan J, 23 July
which may have been required for a PNF operation had the potential to trigger the operation of Part 5 EPAA. However, following amendments in the late 1990s to legislation covering soil conservation and pollution, the approvals that have replaced them have no capacity to trigger the operation of Part 5 EPAA. These include native vegetation clearance consents, and also s.91 TSCA licensing. Pollution control law still may trigger Part 5 (but this may be excluded on the making of special-purpose regulations). However in practice it appears not to.

Activities not regulated under either EPAA Part 4 or 5 but still involving the harming or picking of threatened species or damage to their habitat are subject to the Part 6 TSCA licensing process. Persons concerned are required to obtain s.91 licences to harm or pick threatened species (see Figure 1). Licensing is necessary in order to avoid conviction under the offence provisions in the NPWA, of “harming” or “picking” threatened species, populations or ecological communities and damage to a mapped

1997. However none appeared to have taken place during the study period in relation to PNF, according to a search conducted at <www.austlii.edu.au>.

31 If an undertaking requires development consent or is a prohibited development, then it will not be considered an activity for the purposes of Part 5 of the Act. Severn SC v Water Resources Commission (1982) 47 LGRA 257; Kindergarten Union of NSW v Sydney City Council (1984) 51 LGRA 381.

32 Approval provisions previously had the potential to trigger Part 5 included authorities to clear vegetation on protected land formerly issued under the Soil Conservation Act 1938, licences to pollute water formerly issued under the Clean Waters Act 1970 and the Pollution Control Act 1970.

33 NVCA, s.16. Native vegetation clearance consents under the NVCA do not trigger Part 5 because the development is assessed under Part 4. Protected land authorities no longer trigger Part 5 because the protected lands provisions have now been subsumed into the NVCA regime. As the protected land regime has been incorporated into Part 2 of the NVCA, (where it is treated as just another category of vegetation clearance requiring Part 4 EPAA consent) therefore it is does not trigger Part 5 EPAA. The NVCA explicitly states that any clearing carried out in accordance with Part 2 (which covers clearing and consents for clearing either where there is an RVMP in place and where there is not) is not an activity for the purposes of Part 5 of the EPAA, and “Part 5 does not apply to any clearing carried out in accordance with this Part”: NVCA, s.16. Clearing authorised by Part 4 of the NVCA, ‘Codes of Practice’ does not trigger Part 5 EPAA because it is actually considered to be a form of clearing under Part 2 of the NVCA, and is subject to the development consent regime therein: NVCA, s.21(2)(b),23(3). Further, clearing in accordance with a Property Agreement under the NVCA is still subject to any development consent requirements that may apply under Part 2 of the NVCA. NVCA, s.41(3).

34 TSCA, s.99(5). The D-G of NPWS is not a determining authority for the purposes of Part 5 EPAA when granting a licence under Part 6 of the TSCA.

35 Protection of the Environment Operations Act 1997, s.52(2), Regulations may make provision excluding the issue of environment protection licences from the operation of Part 5, EPAA.

36 Review of EPA Public Register of Environment Protection Licences, 16.9.03; conducted on-line at <www.epa.nsw.gov.au> which revealed that for the search of all licences using the term “forestry-logging” the only forestry operations licensed by EPA are in State Forests. The Forestry Commission of NSW holds 5 licences, one for each RFA region. Interview, 21.9.98, Ms L. Corbyn (Deputy D-G, EPA), Mr Steve Beaman, EPA, Sydney. Interview confirmed that PNF operations have never been issued with any pollution control licences from the NSW EPA.

37 The s 91 licence requirement is removed in the case of projects approved under the EPAA. See ss 118A(3)(b), 118C(5)(b) & 118D(2) National Parks and Wildlife Act 1974 (NSW).

38 NPWA, ss. 118A(3)(b), 118C(5)(b) & 118D(2), TSCA, s.94.

39 NPWA, s.118A(5)(a).
critical habitat of threatened species. The person may also be at risk of committing an offence of knowingly damaging the habitat of threatened species.

Where a person applies for a licence from NPWS to authorise the harming or picking of threatened species or damage to the habitat of threatened species, an SIS is not automatically required to accompany the application. Nevertheless, an option of preparing and submitting an SIS with an application is available.

Where no SIS has been supplied, the D-G of NPWS must determine whether the action proposed is likely to significantly affect threatened species or their habitats. An 8-part test of significance of impact is applied, identical to that under Part 4 EPAA. If the D-G decides that a significant effect is likely, an SIS must be submitted by the proponent.

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40 NPW Act, s.118C(1). However few critical habitats have been declared: Habitat of the endangered Mitchell’s rainforest snail on Stott’s Island Nature Reserve, and the endangered little penguin colony at Sydney’s North Harbour. The critical habitat of the Bomaderry Zieria (plant) is being considered for listing. Source: <www.npws.nsw.gov.au>, 1.4.03.
41 NPW Act, s.118D(1). An exception is where a certificate has been granted by the D-G of NPWS stating that the action proposed is not likely to significantly affect threatened species or their habitat, or where actions are undertaken under a property management plan: TSCA, s.95(2).
42 Licences for this purpose are granted under TSCA s.91(1).
43 TSCA, s.92(3),(4).
44 TSCA, s.92(4). Only where the actions proposed are to be taken on land that is critical habitat is submission of a SIS automatically required to accompany the licence application: TSCA, s.91(1)(c), 92(2).
45 TSCA, s.94(1).
46 TSCA, s.95(1).
Figure 1: Schematic Summary of the Interaction Between the *Environmental Planning And Assessment Act*, The *Native Vegetation Conservation Act*, and the Threatened Species Conservation Act in Relation to PNF

Does Part 4 EPAA apply (through the Native Vegetation Conservation Act (NVCA)?)

- **NO** (PNF exemption claimed)
- **YES**, private forestry exemption not available (including protected land).

Does Part 4 EPAA apply as a result of an LEP or SEPP?

- **NO**
- **YES**

Does Part 5 EPAA apply as a result of pollution licensing of the private land logging operations?

- **NO**
- **YES**

Development consent process under Part 4 *EPAA* with local council as consent authority. Threatened species assessment using 8-part test.

Part 6 TSCA licensing provisions administered by NPWS may apply where threatened species issues arise.

Comprehensive environmental assessment under Part 5 EPAA
If the finding is of non-significance, no SIS is required, and no licence is required, and the D-G must issue a s.95 certificate to the effect that no significant impact is likely. In deciding whether to grant a s.91 licence, the D-G is required to consider, in addition to the contents of the SIS, “the likely social and economic consequences” of granting or refusing the licence. S/he must also take into account seven other statutory factors including the principles of ESD.

In summary, consent authorities under Part 4 EPAA, determining authorities under Part 5 EPAA, and the NPWS under TSCA Part 6, must all consider as part of their overall deliberations whether there is likely to be a significant effect on threatened species associated with a proposed “development” (i.e. logging). The likely magnitude of future impacts is presently assessed using a threshold ‘8-part’ test of significance in s.5A, EPAA.

DetaiLed analysis of the legislation

The ‘8-part’ test

Parliament recognised that it would be impractical, beyond a certain point, to require an SIS for every DA involving land uses potentially affecting threatened species. Therefore the legislation provides a threshold test with which to eliminate projects of minor concern from detailed consideration - the 8-part test.

The test requires the consideration of eight detailed ecological questions. A selected portion of section 5A, EPAA is reproduced here:

The full text of section 5.A is reproduced in Appendix 10.2.
in the case of a threatened species, whether the life cycle of the species is likely to be disrupted such that a viable local population of the species is likely to be placed at risk of extinction…

(c) in relation to the regional distribution of the habitat of a threatened species, population or ecological community, whether a significant area of known habitat is to be modified or removed, [etc…]

To answer such questions, it is necessary to know whether such a population or species exist on a site. Yet a common feature of PNF is decision-making in the absence of adequate data regarding threatened species and their habitats. The data set regarding threatened species on private land is poor in terms of quality and coverage. Most of the data on the occurrence of threatened species is derived from computer modelling of data collected on the public land estate and thus has limitations - being modelled rather than actual data. These problems are exacerbated by difficulties of access to private forests for survey teams on the infrequent occasions that they have been conducted.

To apply the 8-part test satisfactorily for even one species it is necessary to have adequate data about it, about its interaction with habitat, about the location of such habitat, and about which parts of that habitat are essential for its survival. Yet according to NPWS staff interviewed it is “very rare” to have complete data, or even some relevant data for a particular proposal on private land. Apart from such practical issues, there are legislative issues. Many of the operational difficulties faced by consent authorities can be traced back to aspects of the drafting of the TSCA and problems with the application of the criteria contained in the 8-part test. The TSCA and EPAA inadequately address the problem of decision-making in a context of pervasive scientific uncertainty. Firstly, this is because in order to answer the 8-part test we would usually need to have the benefit of an SIS, given the paucity of scientific data in many situations. However, the legislation is not constructed this way – instead the

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53 Interview, 25 October 1999, Northern Zone Threatened Species Unit staff. Notes of interview on file with author.
54 Interview (25 October 1999) above n 53.
55 Those issues were discussed in Threatened Plants Project: Northern Region, a report completed in 1999 for the NSW Upper N-E RFA process. It states that the ecological survey for that report: “… was largely confined to public land, as no formal arrangement for gaining access to areas of freehold tenure had been implemented prior to surveys commencing…Under… [the RACAC protocol], NPWS employees were not permitted to solicit permission to survey on private land. They were, however, permitted to survey on private land if an invitation to do so was made by the owner.” in P Richards, (1999) Threatened Plants Project: Northern Region (a project undertaken for the Joint Commonwealth NSW Regional Forest Agreement Steering Committee as part of the NSW Comprehensive Regional Assessments, Sydney: Department of Urban Affairs and Planning, 1999), p 10.
56 Interview, Mr. D. Robson, Western Directorate NPWS regional TSU manager, Dubbo, 18.6.01, by telephone.
57 Interview, P. Redpath, ecologist, DLWC Grafton (North Coast Region Office), 31.3.99.
58 The difficulty of answering these questions in the 8-part test led in 2002 to amendments of the test and the inclusion of a requirement to refer to ‘assessment guidelines’ that will “assist in the interpretation and application of the factors. Whether these guidelines actually assist or confuse the process remains to be seen. EPAA, s.5A(1)(b); NPWS (2005) Guide to the Threatened Species Conservation Amendment Act 2002, NPWS, Hurstville, 26pp. at p.17.
8-part test precedes the question of whether an SIS must be prepared. The 8-part test’s questions are answered using preliminary information only.\(^9\)

The \textit{TSCA/EPAA} is unclear about the extent of preliminary information and surveying for threatened species required in order to adequately answer the 8-part test.\(^6\) The legislation does not state whether landowners can simply supply ‘yes/no’ answers or whether they must organise a proper survey. It is also not clear who must provide (and pay for) this data. Landowners are not explicitly obliged to collect data in order to answer the 8-part test, it seems, unless the consent authority requires them to.\(^6\)

The legislation is also not very clear about who is responsible for correctly applying the 8-part test, i.e. whether it is the applicant or the consent authority. Section 5A \textit{EPAA} provides:

\begin{quote}
For the purposes of this Act and, in particular, in the administration of sections 78A, 79C (1) and 112, the following factors must be taken into account in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats:…
\end{quote}

Close consideration of the legislation suggests that the 8-part test is ultimately the responsibility of the consent authority. This conclusion flows from the fact that it is the consent authority that administers s.79C(1) regarding consent decision-making. The key words are “For the purposes of administration of s.79C”, which indicate that application of the 8-part test is necessary for the consent authority to carry out its responsibilities under that section.

This approach was applied in \textit{Byron Shire Businesses for the Future v Byron Council} (the ‘\textit{Club Med}’ case), in judicial review proceedings, where Pearlman J of the Land and Environment Court invalidated a consent granted to a development, partly on the basis that the council had unreasonably made decisions on the basis of inadequate information regarding 32 of 33 species using the site or predicted to do so. Her Honour found that:

\begin{quote}
Because the material before it in relation to these species pointed to the likelihood of significant effect, but was insufficient, it was not reasonably open to the Council to conclude that there was no likelihood of significant effect on their environment.\(^6\)
\end{quote}


\(^6\) Kelly, A. (1996) above n 59 at 89.

\(^6\) However if \textit{aware} of the presence of threatened species they remain in danger of committing an offence under \textit{NPWSA}, s.118D of knowingly damaging the habitat of threatened species.

\(^6\) \textit{Byron Shire Businesses for the Future v Byron Council} (1994) 84 LGERA 434 at 447.
Other case law suggests that the responsibility for ensuring that the DA is valid by way of completeness rests with the consent authority. In the Court of Appeal in *Timbarra Protection Coalition v Ross Mining NL*, Spigelman CJ set out the required approach:

A consent authority may be called upon to decide whether it has a valid application before it...In making such a decision with respect to s.77(3)(d1) it must take into account the relevant factor or factors in s.5A.63

The proper application of the 8-part test is necessary for the validity of the subsequent decision regarding the DA. In the *Club Med* case, Pearlman CJ ruled, “the determination of whether or not the proposed development will have a significant effect on the environment of endangered fauna is a threshold question.”64 It was considered to be a threshold question in the sense that (a) the test must be properly addressed prior to proceeding to determine the development application and (b) its determination would affect whether an SIS and concurrence is required. The Court held that a development consent can be invalidated by improper implementation of the 8-part test.65 Her Honour held that the test:

requires determination in order to determine in turn the question of whether the development application conforms to statutory requirements of the EP&A Act. The council’s power to proceed to a determination of the development application...is predicated upon having before it a development application which complies with the statutory requirements which the Act has imposed.66

A similar approach was applied by Talbot J of the Land and Environment Court in *Cameron v Nambucca SC*, where a development consent was declared void on the basis that the Council in question had erred in holding that a particular development was not likely to have a significant effect on threatened species. Talbot J’s reasons for invalidating the consent included the fact that the evidence for a likely significant effect was “all one way” suggesting a significant effect was probable.

63 *Timbarra Protection Coalition v Ross Mining NL* (1999) 102 LGERA 52 at 68.
64 *Byron Shire Businesses for the Future* at 447.
65 A very similar chain of reasoning was applied by the Court of Appeal in *Helman v Byron Shire Council* (1995) 87 LGRA 349.
66 *Byron Shire Businesses for the Future* at 447.
Figure 2 Interaction of the TSCA and Part 4 EPAA

Development application for PNF to either council (under LEP & EPAA) or DLWC under NVCA

Is development likely to significantly affect threatened species or their habitat, applying the 8-part test? (EPAA, s.5A)

YES

Prepare SIS (Species Impact Statement) to be submitted with development application (TSCA, s.109-110)

Seek the concurrence of the Director-General of NPWS (EPAA, s.79B(3))

Ministerial level consultation (where DA is made under Native Veg Act)

Consent granted EPAA s.80(1)(a)

Consent refused EPAA s.80(1)(b)

NO

Concurrence refused (EPAA, s.79B(8)(b)) or granted with conditions (s.79B(8)(a))

Development application evaluated (s.79C), and determined (s.80(1))
His Honour also suggested that the proponent’s survey did not amount to “a proper survey” (see below). Evidence of the presence of 18 threatened species was held to “clearly indicate” that an SIS was required. In applying the Court of Appeal’s decision in *Helman v Byron Shire Council*, he held that council had made an incorrect decision on a question of fact (i.e. regarding threatened species) which meant that the precondition for the making of a valid decision did not exist. In other words, insufficient information had been gathered in order for the consent authority to be in a position to make a valid decision.67

The upshot is that a consent authority must reject a development application and not proceed to determine it, if the application does not comply with statutory requirements. However, it is not fatal to a DA for it to be unaccompanied by an FIS/SIS at the time of lodgement, as one can be lodged at an intermediate stage, prior to determination by the consent authority.

A consent authority is unable to answer the questions posed by the 8-part test if it does not have adequate information regarding threatened species. However, the Act does little to force proponents to collect this information. Amendments made in 2002 will mandate the production of “assessment guidelines” that will assist “in the interpretation and application of the factors” of the 8-part test.68 The situation may improve depending on the content of “assessment guidelines”69 to be considered in applying the revised 8-part test.

An associated difficulty is the question of responsibility for the provision of data for decision-making. Obviously, preliminary data is required in order to make the threshold decision regarding likely significance of impacts of proposals such as PNF logging. Yet the legislation does not clearly state which party (i.e., the proponent or consent authority) must supply the information on which the 8-part test is to be carried out. In practice,

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67 *Cameron v Nambucca Shire Council* (1997) 95 LGERA 268 at 283-284. This decision was made on the basis of provisions of the *EPAA* which have since been repealed. These were *EPAA*, s.77(3)(d1), 77A(2), 83. The relevant provision today is s.79B(10). However, their contemporary replacement has essentially the same effect. Where the concurrence of the D-G of NPWS is required, for example, following a positive finding of likely significant impact on threatened species on the basis of the 8-part test, the *EPAA* states in s.79B(10) that any consent subsequently granted by a consent authority without concurrence having been obtained, is voidable. In other words, where concurrence was required, and not obtained, then any development consent granted may be subsequently invalidated.


69 *Threatened Species Conservation Act 1995*, s.94A (section not in force at time of writing on 3.4.03).
where local government is the consent authority it appears to be the proponent which supplies the bulk of this preliminary data at the request of the consent authority in a report addressing the test.

On the other hand there was some evidence (although not conclusive) of a tendency for DLWC to perform the 8-part test for PNF proponents. DLWC staff in the South Coast and Hunter Regions stated in interviews that the DLWC, rather than the proponent, prepares most of the documentation related to the 8-part test for PNF proposals.\textsuperscript{70} DLWC has greater resources than the average rural council, and has its own ecological databases and ‘expert systems’ for computer-aided decision-making. This approach appears lawful, as there is no requirement that says that a proponent must gather all the information for the application of the 8-part test. Nevertheless DLWC’s approach involves an implicit subsidy to industry. Usually consent authorities such as councils shift the costs onto proponents by requiring them to complete ecological surveys. In fairness, DLWC’s threatened species manual states that PNF proponents may be required to obtain surveys. The extent to which such requirements have actually been imposed in practice is unknown.

The proponent’s report (if any) addressing the 8-part test is assessed by the consent authority. Consent authorities need not rely upon proponents for their decision-making information, and many do not. In fact, in order to arrive at a defensible decision of no significant effect (following the principle in \textit{Club Med}) it is up to the consent authority to supplement the information. Usually this takes place by way of desktop review of published papers and databases. A quantity of information is available to consent authorities in the form of ecological databases, including NPWS’ \textit{Atlas of NSW Wildlife}, and the ROTAP list of threatened plants.\textsuperscript{71} More sophisticated councils may supplement this review using habitat- and species-prediction models, and other techniques such as aerial photographic interpretation, and, less frequently, by resort to detailed site-specific surveys. Further, councils and DLWC can approach either NPWS or private ecological consultants for advice.

\textsuperscript{70} Interview, Mr Rob Adam, DLWC Sydney/South Coast Region Head Office, 14.4.00; Interview, anonymous Vegetation Management Officer, DLWC Hunter Region, 23.3.00, notes on file with author.
\textsuperscript{71} ROTAP – Register of Threatened Australian Plants. Interview, Mr P. Craven, Project Officer, NPWS, Southern Directorate, Queanbeyan, 14.4.00. Many of these databases are available to landholders over the internet at Community Access to Natural Resources Information website <www.canri.nsw.gov.au>.
The consent authority must come to a judgement (implicit or explicit) regarding the veracity and reliability of the information supplied. However some commentators have argued that 8-part test reports submitted by the proponent (where supplied) may not receive critical scrutiny, or at worst, may be uncritically accepted at face value where council is the consent authority. Some less-affluent councils, facing severe resource constraints, will lack the time, resources and/or expertise to adequately assess the 8-part test documentation supplied by a proponent.\textsuperscript{72}

The broader literature suggests that there are often problems with the quality of some 8-part test reports produced by proponents and their consultants. There is some indication that a “tick the box” approach has its adherents. The Local Government Association stated to a Parliamentary Committee reviewing the \textit{TSCA} that “often only yes/no answers are supplied by consultants for the Eight Part Test”.\textsuperscript{73} These slapdash methods appear not to be confined to developers - a recent Land and Environment Court decision refers to a council environment officer conducting an 8-part test mentally but failing to commit the result to paper.\textsuperscript{74} The Expert Working Group on ESFM (1998) recommended a requirement for approval (or even auditing) of 8-part tests by an independent biodiversity agency (presumably NPWS).\textsuperscript{75}

There are several issues concerning consultants engaged by proponents to prepare reports addressing the 8-part test. There are no formal accreditation standards in the ecological surveying and consulting industry in NSW.\textsuperscript{76} This enables under-qualified consultants to enter the market and prepare such reports. An ecologist noted: “instances where an unqualified applicant has prepared their own 8-part test or hired a landscape architect, architect or horticulturalist to prepare the report.”\textsuperscript{77}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{74} \textit{Maude v Liporoni & Gosford City Council} \cite{Maude:2002} [2002] NSWLEC 25, 19 March 2002, No.40018 of 2001, at para 102: “In his oral evidence Mr Allen (the council’s environment officer) said he carried out the 8-part test required by s.5A but did not reduce it to writing.”
\item \textsuperscript{75} “Inadequate surveys that fail to detect threatened species may lead to false conclusions about the significance and level of impact. It is common for 8-part test surveys to detect only a portion of the threatened species actually present on development sites”: Independent Expert Working Group (1998) \textit{Assessment of management systems and processes for achieving ecologically sustainable forest management in NSW}, A report undertaken for the NSW CRA/RFA Steering Committee, Resource and Conservation Division, DUAP; Forests Taskforce, Dept. of PM&C, p.63.
\item \textsuperscript{76} Parliament of New South Wales (1997) above n 73 at 36-39. The Act does set out in detail requirements for the content of a SIS.TSCA, s.110.
\item \textsuperscript{77} Douglas, S. (1999) above n 72.
\end{itemize}
\end{footnotesize}
Amendments to the Act in 2002 introduced requirements for the Director-General of NPWS to establish a regime to govern the accreditation of consultants preparing SISs.\textsuperscript{78} Whilst these new provisions address problems with the SIS, they do not address the quality of 8-part test reports.\textsuperscript{79} Thus the reforms have not addressed a fundamental underlying problem - quality control at the level of the 8-part test.

Part of the explanation for variable standards in this area is commercial pressures. The detection of threatened species on private property is likely to be perceived by landholders as having adverse economic consequences. These include the direct cost of preparation of an SIS (in the order of $5,000-50,000)\textsuperscript{80} and the indirect cost of lost timber production that would be associated with the imposition of prescriptions for the protection of threatened species. If the SIS requirements can be averted then this also eliminates the possibility of NPWS involvement.

There is a temptation for proponents to exploit the lack of adequate information regarding biodiversity on private land and to simply assert that threatened species do not exist on a site. This should put consent authorities on notice regarding the objectivity of 8-part test reports. Where the landowner is unqualified and prepares their own report, the potential for defective analysis, as well as bias and selective attention is self-evident. Even where a consultant is involved, it has been observed that some ecological consultants may be willing to produce findings overly favourable to developers in order to maintain a steady flow of work.\textsuperscript{81} The present 8-part test provisions do not address the commercial pressures on consultants to present a case favourable to proponents. These problems of objectivity associated with threatened species information mirror wider issues in the planning approval system. There is an extensive literature documenting and discussing the problems with the reliability of proponent-prepared EIS documentation.\textsuperscript{82}

\begin{footnotes}
\item[78] TSCA, \textsection 113.
\item[80] The figure depends on a range of factors including the nature of the activity proposed, the extent of pre-existing data and the area of the site. Correspondence with S Douglas, ecological consultant, ESP Planning Ltd, Hornsby, 1 May 2000, on file with author.
\end{footnotes}
Even where searches are completed with the utmost integrity, they may not bear fruit. Surveys for threatened species are time-consuming and complex. The species in question are rare and uncommon and many threatened species are cryptic (difficult to detect). For some species, even a thorough search in core habitat may not reveal them.\textsuperscript{83} Typically, surveys will only detect a portion of the threatened species on a site.\textsuperscript{84} In \textit{Cameron v Nambucca SC}, the council had requested the developers to submit an 8-part test for 6 threatened species that were listed by databases as potentially occurring on the site. Later surveys by experts for the third-party objectors in fact revealed 18 threatened species.

The commercial pressures at play mean there may often be a tendency in practice for certain proponents to deny that threatened species exist on a site, or a tendency to avoid conducting a thorough survey for them, or any survey at all. This is a problem according to the NSW Expert Working Group on ESFM (1998) because “Inadequate surveys that fail to detect threatened species may lead to false conclusions about the significance and level of impact.”\textsuperscript{85} The Working Group also noted the lack of minimum standards for pre-logging surveys in NSW, at least on private land.\textsuperscript{86}

There is some evidence of a tendency of some less ethical consultants to opportunistically schedule surveys at times of the year when seasonally-active species will be dormant or not present. In \textit{Cameron v Nambucca SC}, the Land and Environment Court addressed the question of scheduling fauna- and flora-surveying during mid-winter, at time at which many species would either not be present or would escape detection due to non-flowering, hibernation, or migratory patterns, according to some expert witnesses. In \textit{obiter} remarks, the Court held: “a proper assessment of a development site may require investigation during more than one season and the utilisation of a range of techniques to take account of migratory movements and seasonal variation in the detectability of species.”\textsuperscript{87} The shortcomings of the developer’s survey formed part of the reasoning for Talbot J’s decision to invalidate the consent and to require an SIS.

\begin{footnotesize}
\textsuperscript{84} Expert Working Group (1998) above n 75 at68.
\textsuperscript{85} According to the Independent Expert Working Group (1998) above n 75 at 63: “It is common for 8 point test surveys to detect only a portion of the threatened species actually present on development sites.”
\textsuperscript{86} Independent Expert Working Group (1998) above n 75 at 63.
\textsuperscript{87} \textit{Cameron v Nambucca Shire Council} (1997) 95 LGERA 268 at 287.
\end{footnotesize}
Where a local council is a consent authority it may be keen to avoid the SIS and concurrence processes. Councils may place an unspoken priority on approving developments, or on ensuring expansions in the rating base, and in avoiding annoying and potentially politically-hazardous conflict with developers. This is particularly likely to be the case with PNF proposals, which from a cultural perspective are regarded as a routine rural activity in many areas. Further, there may be reluctance to stringently regulate because of the perceived economically-marginal status of some PNF activity.\textsuperscript{88}

To impose a requirement for SIS production involving thousands of dollars is politically difficult. Further, local councils may avoid requiring SIS because of their lack of in-house expertise to evaluate them, or lack of resources to engage consultants to do the same.\textsuperscript{89} It may be easier for councils to ‘keep it simple’ by dealing only with basic 8-part test reports.

For a combination of such reasons there is a danger that some development proposals likely to involve a significant effect on threatened species may pass through the approvals process without the closer scrutiny associated with production of an SIS.

In spite of these problems, litigation has occasionally provided a countervailing force for integrity, although the practical, as well as legal barriers to third-party civil enforcement litigation can also be considerable. Until recently, it was understood that the scope for judicial review of threatened species aspects of consent decisions (particularly the adequacy and accuracy of reports addressing threatened species issues submitted by developers) was very limited, and restricted primarily to difficult-to-win challenges based on ‘unreasonableness’ arguments.\textsuperscript{90} In particular, the Courts had been reluctant to revisit in detail the underlying basis of findings of consent authorities that particular developments were not likely to involve a significant effect on threatened species.\textsuperscript{91}

However, in a line of authority commencing with \textit{Helman v Byron Shire Council}, and \textit{Cameron v Nambucca Shire Council}, and culminating with the Court of Appeal’s decision in

\textsuperscript{88} Mainly due to poor economies of scale, the ‘price taker’ position of many producers, the hidden subsidies of public land forestry.

\textsuperscript{89} For example, one council within whose area there is a significant river red-gum resource, Balranald council, has a staff of 6 and the staff member responsible for planning is also responsible for environmental health (i.e. waste disposal and garbage), and infrastructure. Interview Mr. Roy Hetherington, Director, Infrastructure & Development, 28.10.03, by telephone.

\textsuperscript{90} \textit{Associated Picture Houses v Wednesbury Corporation} [1848] 1 KB 223.

\textsuperscript{91} However in \textit{Cameron v Nambucca Shire Council} and \textit{Helman v Byron Shire Council}, such decisions had been reviewed on a similar basis to that applied by the Court of Appeal in \textit{Timbarra Protection Coalition v Ross Mining NL} (1999) 102 LGERA 52.
Timbarra Protection Coalition v Ross Mining NL, the Courts have considerably broadened the legitimate scope for judicial review of decision-making involving questions of the likely significance of impacts of proposed development on threatened species. In Timbarra, the plaintiffs (third-party objectors) challenged a decision of Tenterfield Council to grant consent to a proposed gold mine on a site, which comprised habitat for several threatened species. The Council had, on the basis of a negative finding on the 8-part test, decided that an SIS was not necessary. The plaintiff sought to challenge this determination by adducing additional evidence as to the likely impact of the mine on threatened species. In the first instance, the Court held that it could not hear such additional evidence about the likely impact of the proposal. Talbot J ruled that: “[t]he question…is whether, based on the material relevantly before the council, it was reasonably open to determine the question in the way it did…” It was held that the permissible scope of judicial review did not involve revisiting the facts before the primary decision-maker.

The Court of Appeal addressed the question of the power of the Land and Environment Court to review decisions of consent authorities about the likely impact of development on threatened species. The doctrine of ‘jurisdictional fact’, which involves identifying certain factual pre-conditions as essential for the valid exercise of a decision-making power by a consent authority, was applied in order to widen the legitimate scope of judicial review. The Court held that it was the intention of Parliament to invalidate a development application which was not accompanied by an SIS when, on an objective test, it should have been.

As a result of Timbarra, courts can now reconsider the question of significant effect on the facts before the original decision-maker and any relevant additional evidence. Therefore the scope for consent authorities to uncritically accept the claims of

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92 Timbarra Protection Coalition v Ross Mining NL (1999) 102 LGERA 52 at 58 per Spigelman CJ.
94 However in an ironic twist, showing the limitations of litigation which seeks to challenge failures to comply with procedural requirements, following the High Court decision the mining company simply lodged a new development application which was not accompanied by an SIS when, on an objective test, it should have been.
96 Timbarra Protection Coalition at 69 per Spigelman CJ.
developers on the questions of the 8-part test has been narrowed considerably. The ruling may exert pressure for more rigorous decision-making and for consent authorities to demand the production of an SIS more frequently to avoid the risk of third party challenge.

**Defects in the legislative framework**

As we have seen, some of the difficulties in regulating the impact of PNF on biodiversity stem from the difficult interface between science and law, and the manner in which the legislation addresses these issues. Several principal statutory defects can be identified. The first is the PNF exemption under the NVCA (see Chapter Five). The level of threatened species assessment of those PNF operations relying upon the PNF exemption may be very limited, unless LEP consent requirements apply or the Part 6 TSCA licensing provisions are applied by NPWS.

The second principal defect of the legislative framework is that the approach of the TSCA is largely procedural, based on a premise that the SIS processes and its associated information-gathering will lead to improved decision-making. Yet most proposals never make it to the SIS stage. It could be argued that an SIS would be required in order to fully answer the 8-part test in most cases, but this is not how the legislation is drafted.

Further, the TSCA does not guarantee that habitats of threatened species will be protected. Even if an SIS is prepared indicating that development will seriously affect threatened species, a consent authority is not obliged to reject the development application. Threatened species issues are only one factor of many considered by a consent authority in its decision-making process under s.79C EPAA. The concurrence requirement formalises the role of NPWS in checking and reviewing decision-making of consent authorities in relation to threatened species matters. However, the occasions on which concurrence has been called for in relation to PNF have been few. In relation to

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100 In fact, only 45 of approx. 700,000 development applications led to a concurrence request (i.e., 0.0064%); Second Reading Speech, Threatened Species Conservation Amendment Bill, NSW Legislative Assembly Hansard, 31.5.02, p.2300.
101 This point was made in Kelly and Prest (2000) above n 59.
102 Parramatta City Council v Hale (1982) 47 LGRA 319; Department of Urban Affairs and Planning (DUAP) (no date), Guide to Section 79C, DUAP, Sydney.
the entire gamut of development proposals, the instances of concurrence having been refused are relatively rare.\textsuperscript{103}

The third difficulty is that the NPWS, the agency with primary expertise in threatened species matters, no longer has a major role in assessment of PNF proposals under the \textit{NVCA}. Its former concurrence role under SEPP 46 has been replaced with a requirement only for consultation at the Ministerial level, and this comes into effect only if there is likely to be a significant effect. Thus under the \textit{NVCA}, NPWS has no capacity to veto decisions of the Minister for LWC regarding PNF proposals. Interviews with NPWS staff revealed that this former role was often crucial:

\begin{quote}
we would put our heads together [i.e. DLWC and NPWS staff] to see how we could find a way to reject these clearing applications. Often the only really effective tool DLWC had was to ask NPWS to apply the Threatened Species Act [under NPWS’ concurrence role] once we had found some threatened species on the site.\textsuperscript{104}
\end{quote}

Further, SISs, on their own, are likely to be insufficient to achieve meaningful conservation outcomes on the ground. A primary difficulty is that an SIS may be prepared and considered without sufficient contextual information regarding threatened species on a regional scale. A Western Directorate NPWS manager remarked that “SIS is the wrong level of investigation…We think it is better to place the focus on planning, not [development] assessment. A better approach is to plan at a regional level.”\textsuperscript{105} On this basis, the key to the effectiveness of the threatened species conservation strategy applying to PNF is more likely to be the integrity or otherwise of the Regional Vegetation Management planning process under the \textit{NVCA}.\textsuperscript{106}

\textit{The law regarding mitigating conditions on consent}

An interesting question surrounds the appropriate role for conditions on consent in order to mitigate likely impacts on threatened species. In many cases, it appears to be the

\begin{note}\textsuperscript{103} Of the total of 45 requests for concurrence, there were 5 refusals, only 2 of which were permanent. Second Reading Speech, \textit{Threatened Species Conservation Amendment Bill}, NSW Legislative Assembly Hansard, 31.5.02, p.2300. Concurrence was refused in relation to a development proposal considered likely to adversely affect the Byron Bay Dwarf Gramminoid Clay Heath: discussed in \textit{Detala v Byron SC [No.1]} (2000) 107 LGERA 385 at 391, Bignold J.
\end{note}

\begin{note}\textsuperscript{104} Interview, Ms T. Stacpoole, ex NPWS Forest Conservation Unit, Southern Zone, 22.9.03, by telephone.
\end{note}

\begin{note}\textsuperscript{105} Interview, Mr D. Robson, NPWS regional TSU manager, Western Directorate, Dubbo, 18.6.01, by telephone.
\end{note}

\begin{note}\textsuperscript{106} That question is complex and remains outside the scope of this study. However, a conservation representative on the Manning RVMC (an Eastern Division Committee) stated that DLWC had refused to supply data on the location of under-represented forest ecosystem types to his and other RVMCs. Interview, Mr Greg Hall, NCC NSW representative on Manning RVMC, Elands, by telephone, 13.2.01. It was also alleged that senior DLWC management told vegetation committees that they do not need to identify high conservation value forest on private land fall reservation in order to meet forest ecosystem type reservation targets. Further, it is alleged that DLWC has not informed committees which targets have not being met on public land and therefore for which the shortfall must be met on private land.
\end{note}
modus operandi of DLWC, councils and NPWS to view species-impact mitigation prescriptions (as conditions placed on consent e.g., requiring retention of \( x \) habitat trees per hectare) as a means to transform logging operations into activities which are not likely to involve a significant effect on threatened species or their habitats - thereby avoid requiring the production of an SIS. It is difficult to generalise in this area as the application of the law depends on the facts in each particular situation. We saw above that, in DLWC’s North Coast Region, no SISs were required for more than 100 PNF applications up to November 2000.\(^{107}\) The low number of SISs prepared for PNF operations arouses at least a suspicion that agencies are applying s.5A EPAA by formulating conditions that purport to make impacts insignificant.

Several Land and Environment Court decisions frown upon the practice of using conditions of consent to reduce the apparent environmental impact of development to such a level that formal assessment requirements are avoided. This question was first considered in depth in *Drummoyne Municipal Council v Maritime Services Board*,\(^{108}\) which concerned the proposed expansion of a marina assessed under Part 5 EPAA. Here Stein J, then of the Land and Environment Court, held that a determining authority may not determine the question of whether a proposed activity is likely to involve a significant effect on the environment under s 112(1) by reference to imposition of conditions designed to minimise environmental impact. Stein J made it clear that it was the activity itself that requires environmental assessment, rather than the activity as altered by conditions of approval. He held that:

\[\ldots\] a determining authority cannot determine the question of whether a proposed activity is likely to significantly affect the environment by reference to the imposition of certain conditions which may have the effect of mitigating the environmental impact. This is particularly so where such conditions have the effect of altering or changing the application made by the proponent. To do so would lead to absurd situations which will defeat the objectives of the legislation.\(^{109}\)

\(^{107}\) Interview, Mr. B. Attwood, Vegetation Resource Manager, interview, in person, Grafton DLWC Office, 23.11.00. Notes on file with author. This finding was corroborated by interview results with NPWS in which a senior North Coast manager stated that there have been no Ministerial level consultations regarding threatened species aspects of a PNF proposal in the Northern Zone of NPWS operations as a result of consideration under the NVCA.

\(^{108}\) *Drummoyne* at 192. The *Drummoyne* approach was subsequently applied in *Donnelly v Delta Gold Pty Ltd* [2001] NSWLEC 55, in *Commonwealth of Australia v Randwick City Council* [2001] NSWLEC 79 (27 April 2001) where the Commonwealth (as a land developer) was required by the court to prepare a SIS; and in *Silverwater Estate Pty Ltd v Auburn Council* [2001] NSWLEC 60 (4 April 2001). In that decision it was noted that a condition designed to mitigate impact that has been introduced during the course of a hearing cannot be taken into account in the decision making process: *Westport Marina Developments Pty Ltd v Concord Council* (2000) 109 LGERA 451.
The same issue of the appropriate use of conditions arose in the *Club Med* case, which concerned a development application under Part 4 *EPAA*.\(^{110}\) That case (under the former legislative regime) considered the impact of a proposed tourist resort on certain threatened species and the question of whether a fauna impact statement (FIS), rather than an SIS, was required.\(^{111}\) Pearlman CJ applied the reasoning of Stein J in *Drummoyne* to find that the consent authority, Byron Council, had erred in law by attempting to mitigate environmental impact through the imposition of consent conditions, thereby overcoming the potential likelihood of significant effect on threatened species. The Court held that an FIS should have been obtained and that the consent was, therefore, invalid.\(^{112}\)

The appropriate consideration to be paid by a consent authority to proposed ameliorative measures when conducting the 8-part test of significance was also considered by the Land and Environment Court in *Smyth v Nambucca Shire Council* (*Smyth*).\(^{113}\) This case was an appeal on a point of law against the decision of a Commissioner in Class One proceedings to dismiss an appeal against the deemed refusal of a development application for subdivision. It was argued that the Commissioner had erred in stating “no provision exists [in s.5A *EPAA*] to take into account any ameliorative measures as part of the 8-part test”.\(^{114}\)

Section 5A does not explicitly refer to ameliorative measures. By contrast, its predecessor (inserted by the *EFIPA*, being the repealed s 4A *EPAA*) required a consent authority to consider the role of proposed ameliorative measures in deciding whether impacts would be significant.\(^{115}\) However, Lloyd J accepted the appellant’s submissions in interpreting the various factors under s 5A to require consideration of “associated ameliorative measures which may be part of such development.”\(^{116}\) His Honour stated that “the focus

\(^{110}\) *Byron Shire Businesses for the Future Inc v Byron Council and Holiday Villages (Byron Bay) Pty Ltd* (1994) 84 LGERA 434 at 446-448.

\(^{111}\) Following the application of the 7 part test contained in (the now repealed) s.4A *EPAA*. These provisions were inserted into the *EPAA* by the *Endangered Fauna (Interim Protection) Act 1991*.

\(^{112}\) *Byron Shire Businesses for the Future* at 447-8.


\(^{114}\) *Smyth* at 68.

\(^{115}\) This requirement was contained as part of the former seven part test of significance in *EPAA*, s.4A(e), prior to the repeal of that section by the *TSCA*.

\(^{116}\) *Smyth* at 69.
of the provision \textsuperscript{117} is on the development, which necessarily includes any ameliorative measures which are proposed as part of such development.\textsuperscript{118}

Thus Lloyd J observed that the task of the decision-maker was to “determine for himself whether there was likely to be a significant effect by dint of the proposed development \textit{and its ameliorative measures}” [emphasis added] \textsuperscript{119} He concluded that a consent authority is entitled to take into account proposed ameliorative measures in applying the 8-part test.

How then can the decision in \textit{Smyth} be reconciled with the approach taken in \textit{Drummoyne} and \textit{Club Med}? On one view, in order to properly resolve the question of the appropriate role of ameliorative measures it is necessary to define strictly the decision-making process as having two stages. These are (i) application of the 8-part test by the consent authority under s.5A to the development as proposed by the developer (which may propose impact mitigation measures), and (ii) the subsequent determination of the DA by the consent authority (under s.79C, 80 \textit{EPAA}), which may include the imposition of conditions on consent.

Lloyd J’s decision in \textit{Smyth} was restricted to ameliorative measures proposed by the developer and incorporated within the development application prior to determination, as opposed to measures imposed by the consent authority as conditions attached to the development consent. Thus the decision in \textit{Smyth} is limited in its application in so far as it does not authorise the practice of consent authorities [or the NPWS under Part 6 \textit{TSCA} licensing] of imposing conditions on consent such that significant impacts appear to be eliminated.

Yet this is an unsatisfactory distinction and the question was further explored by Bignold J in \textit{Donnelly v Delta Gold}, where his Honour concluded that the distinction was not a meaningful one.\textsuperscript{120} It is artificial and diverts attention from the desired statutory objective of biodiversity conservation. In practice there is a fine line between proponents

\begin{itemize}
\item Former \textit{EPAA}, s.77(3)(d1).
\item \textit{Smyth} at 69.
\item \textit{Smyth} at 70.
\item \textit{Donnelly v Delta Gold Pty Ltd \& Ors [2001] NSWLEC 55} (23 March 2001), No. 40098 of 2000, Bignold J, at paragraph 122 said “To so state the combined effect of these decisions is, in my respectful opinion, to inevitably expose the apparent difficulty in seeking to maintain any meaningful distinction between the different effects of an ameliorative measure (i) introduced by way of condition of consent and (ii) one already included in the proposed activity or development. It is this intrinsic difficulty concerning the sustainability of the distinction that I would respectfully understand the President to have been adverting to in his judgment in the Transport Action Group case…”
\end{itemize}
suggesting conditions and consent authorities imposing them. The main point is whether, when looking at the question objectively, it is really possible in the majority of cases to design away any significant impacts by altering project configurations using mitigation prescriptions such as ‘habitat’ trees. Will such modifications reduce impacts to a level where the likely impacts are insignificant? 121

The principle applied in *Club Med* of stating that conditions could not be applied in order to decide the 8-part test has some parallels with statutory limitations on formulating conditions of consent contained in the *EPAA*. Part 4 of that Act limits the application of conditions that radically modify development proposals. Section 80A(1)(g) *EPAA* entitles a consent authority to attach a condition that “modifies details of the development the subject of the development application”. However, it does not empower a council to change a proposal into something substantially different. 122 This point was addressed in the recent decision of May 2000 in *Carr v Minister for Land and Water Conservation* regarding the granting of a consent to clear native vegetation subject to conditions under the *NVCA*. In this Class 1 merits appeal, Pearlman J overturned the decision of the Minister to grant the consent in question on the basis that it is not open to a consent authority to grant consent upon conditions which significantly alter the development for which consent is being sought. 123

**FINDINGS REGARDING IMPLEMENTATION OF THE TSCA**

This section covers the implementation of the *TSQA* in two different scenarios. These involve (i) implementation by DLWC in the course of decision-making under the

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121 See also *Westport Marina Developments Pty Ltd v Concord Council* (2000) 109 LGERA 451 and Court of Appeal in *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* (1999) 104 LGERA 133. In *Donnelly v Delta Gold Pty Ltd & Ors* [2001] NSWLEC 55 (23 March 2001), No. 40098 of 2000, Bignold J, at paragraph 121 His Honour discussed the difficulties in this area: “There is no inconsistency in the four decisions of this Court just discussed, the combined effect of them appearing to be that in determining a threshold question as to whether a proposed activity or development ‘is likely to significantly affect the environment’ etc whereas it is an impermissible approach to answer the question by reference to mitigating or ameliorative measures to be introduced by way of conditions of any requisite approval or development consent, it is a permissible approach to answer the question by reference to the proposed activity or development, including any mitigating or ameliorative measures that are included in the proposal.”

122 This principle was applied in relation to an application to clear land under the *Native Vegetation Conservation Act 1997* (NSW): *Carr v Minister for Land and Water Conservation* (unreported, No.10675 of 1999, Land and Environment Court, NSW, Pearlman J, 22 May 2000). According to the judgment of Pearlman J, “The applicant, Mr R J Carr, appeals against the determination of the Minister for Land and Water Conservation granting in the applicant's favour a development consent to clear native vegetation subject to conditions….The applicant is the registered proprietor of land comprising an area of about 80 hectares ("the site") being lot 44 in DP 753205 and situated at Barbies Road, Bungwahl.”

123 Applying *Mison & Ors v Randwick City Council* (1991) 23 NSWLR 734 at 737. The applicant, Mr R J Carr, appeals against the determination of the Minister for Land and Water Conservation granting in the applicant's favour a development consent to clear native vegetation subject to conditions.
Because of the integration of the TSCA and the NVCA into the development-consent process under Part 4 EPAA, the DLWC has a significant role in applying threatened species protection law to PNF. The DLWC implements the TSCA through its role in assisting the Minister for Land and Water Conservation as consent authority under the NVCA. The Minister must consider the statutory factors set out in the EPAA regarding threatened species during the consent decision-making process, to determine whether there is likely to be a significant effect on threatened species or their habitat associated with a PNF proposal.

The NVCA, to the extent that it adopts and applies the mechanisms of assessment of the impact of development on threatened species that are contained in the TSCA and EPAA, adopts both the strengths and shortcomings of that legislation. These relate to an emphasis on the procedure rather than the substance of biodiversity protection, and also the lack of mechanisms to enable regional level assessment of impacts on threatened species. However, the RVMP mechanism of the NVCA could serve to fill this gap if adequately implemented.124

DLWC has its own internal methodology for threatened species assessment. The impact of vegetation clearing, including logging, is assessed according to the criteria laid down in the NVCA and EPAA, under a standardised methodology set out in the lengthy Staff Guidelines for Assessment of Clearing Applications. These guidelines, together with the standardised clearing application form, and Interim Guidelines for Threatened Species Surveys,125 as well as computerised decision support systems (particularly the Native Vegetation Assessment Support System ‘NVASS’) comprise a standardised methodology for threatened species assessment. Every NVCA application is subject to a site visit. Prior to the site visit, the TSCAB database and Atlas of Wildlife are checked to see which threatened species are likely to occur, on the basis of records of species within a 10-15km

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124 Chapter Six discusses the progress with the making of RVMPs in detail. In brief, at the time of writing, in October 2003 2 plans had been gazetted and twelve others were at draft stage. Of the two plans actually made, only the Riverina Highlands RVMP actually touched upon PNF in detail.
125 Strictly speaking, applications under the NVCA are for development consent under the EP&A Act, s.78A.
radius of the site. Aerial photographic interpretation is also carried out prior to the visit. At a site visit, transects of vegetation are surveyed if necessary, in order to identify vegetation types, and further predict threatened species habitats.

The guidelines explain the process: “Depending on the complexity and scale of an application, it may be necessary for the applicant to submit a flora and/or fauna survey to DLWC that determines the presence/absence and, where appropriate, the abundance and distribution of particular species...Surveys must be undertaken by appropriately qualified persons.”

DLWC’s requirements for pre-logging surveys for threatened species are tailored to the scale and intensity of proposed harvesting. Selective logging proposals may be subject to a requirement that a targeted flora and fauna survey be completed. Intensive logging involving removal of more than 70% of the canopy, or proposals over 200ha will be classed as ‘large’ applications. Only these large-scale proposals will be required to provide a detailed flora and fauna survey report. Medium-sized applications are likely to be required to be accompanied by a targeted flora and fauna report, which “…simply seeks to determine whether [a particular threatened species] … is on site.” Because of the cryptic, seasonal (e.g. flowering), or migratory nature of some species this approach may have some significant shortcomings (p.17).

**SIS production under NVCA - Findings**

One important aspect of DLWC’s administration of threatened species aspects of the NVCA is the frequency with which SIS production is required. The production of an SIS is likely to lead to more informed decision-making. However, a high rate of production of SISs is not synonymous with the achievement of ESFM.

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There were no findings of likely significant effect, and no SISs required, in the Hunter Region\textsuperscript{131}, or the Sydney/South Coast Region,\textsuperscript{132} or the Northern Region during the study period.\textsuperscript{133} In the North Coast Region, no SISs were required for any of 103 PNF applications under the \textit{NVCA} during the study period prior to November 2000.\textsuperscript{134} \textit{TSCA} implementation data relating to the Western regions of DLWC operations was not systematically collected, but we have seen there were no applications for \textit{NVCA} approvals in the Murray Region despite the significant river redgum PNF-logging industry.\textsuperscript{135}

It was stated that the strategy of DLWC in the North Coast Region is to apply conditions to development consents, so that no significant effect is likely to occur, and therefore SIS production has not been necessary. A senior DLWC regional manager said that: “doing a SIS wouldn’t help us. It wouldn’t provide any useful information [i.e., additional to that retrieved from NPWS and DLWC databases].”\textsuperscript{136} Such a statement involves a working assumption that these databases are adequate, but the predictive power of point-source records of species occurrence is limited.\textsuperscript{137}

In the Hunter Region, interview research revealed that for 27 applications under the \textit{NVCA} for PNF operations, all were granted consent with conditions and no SIS required to be prepared. All these applications were for protected land.\textsuperscript{138} An officer interviewed explained the non-production of SIS: “This is done for administrative convenience, not for the science of it.”\textsuperscript{139} He added, “It is very rare for existing information to be adequate for an objective assessment under the 8-part test”.\textsuperscript{140} In that

\textsuperscript{131} Interview, Mr S. Gowland, DLWC Hunter, 17.3.00.
\textsuperscript{132} Interview, Mr R. Adam, DLWC Sydney-South Coast, 14.4.00; Letter, 13.4.00.
\textsuperscript{133} Interview, Mr B. Attwood, Vegetation Resource Manager, interview, in person, Grafton DLWC Office, 23.11.00.
\textsuperscript{134} Interview, Mr. B. Attwood, Vegetation Resource Manager, interview, in person, Grafton DLWC Office, 23.11.00. Notes on file with author. This finding was corroborated by interview results with NPWS in which a senior North Coast manager stated that there have been no Ministerial level consultations regarding threatened species aspects of a PNF proposal in the Northern Zone of NPWS operations as a result of consideration under the \textit{NV/CA}. Interview, Mr. Gary Davey, Northern Directorate Manager, Coffs Harbour, 22.10.99; Mr. Andrew McIntyre, Threatened Species Unit Manager Northern Directorate, 22.10.99.
\textsuperscript{135} Note however that in regions such as Murray there were no development applications for consent during 2000 and 2001, despite a large PNF industry based on red gum logging.
\textsuperscript{136} Interview, Mr B. Attwood, Vegetation Resource Manager, interview, in person, Grafton DLWC Office, 23.11.00. Notes on file with author.
\textsuperscript{137} Interview, Mr., D. Robson, NPWS, Dubbo, 18.6.01., by telephone.
\textsuperscript{138} Thus everywhere else, the PNF exemption was claimed.
\textsuperscript{139} Interview, anonymous, DLWC Hunter region, 23.3.00. Notes on file with author.
\textsuperscript{140} Interview, anonymous, DLWC Hunter region, 23.3.00. Notes on file with author.
region, it was reported that DLWC undertook liaison with NPWS only on large applications of regional significance.\textsuperscript{141}

**IMPLEMENTATION OF THE TSCA BY LOCAL GOVERNMENT**

Data was gathered on the implementation of the EPAA and TSCA by local government in relation to PNF in North-Eastern NSW, a centre of significant PNF activity.\textsuperscript{142} We saw in Chapter Eight that only a minority of North Coast and Hunter Region councils required consent for PNF in the main rural zone during the study period (p.268).

A survey (by letter) of decision-making by this minority of Northern Region councils requiring consent revealed only 18 development applications for PNF during the study period. All of these applications were approved, although many were said to be subject to special conditions imposed following informal consultation with the NPWS. Importantly, there was only one instance of a preliminary determination by a council that proposed logging was likely to involve a significant effect on threatened species, thereby triggering requirements for an SIS and the concurrence of the Director-General of National Parks and Wildlife.\textsuperscript{143} Concurrence was granted, subject to the imposition of a number of prescriptions for the mitigation of impact on threatened species.\textsuperscript{144}

**IMPLEMENTATION - CONDITIONS ON CONSENT**

The passage of threatened species legislation has given consent authorities and the NPWS some considerable leverage to protect threatened species. Consent authorities may exert this leverage by (i) seeking the redesign of development proposals prior to determination, (ii) imposing conditions of consent that modify proposals, or (iii) refusing unsympathetic projects outright. Further, the D-G of National Parks and Wildlife may not only impose requirements regarding contents of an SIS\textsuperscript{145} but can wield the ultimate threat of refusing to grant concurrence.

\textsuperscript{141} Interview, anonymous, DLWC Hunter region, 23.3.00. Notes on file with author.
\textsuperscript{142} Forestry Commission NSW and Margules Groome Poyry, *The Economic Impact of the New South Wales Timber Industry* (Sydney: Margules Groome Poyry, 1995).
\textsuperscript{143} As far as research could ascertain, there were no requests for concurrence relating to PNF in other regions of NSW.
\textsuperscript{144} Interview, 10 October 1999, Mr Gary Davey, Threatened Species Unit Manager, NPWS Northern Zone. Notes of interview, on file with author.
\textsuperscript{145} TSC-I, s.111(1).
Yet the evidence in relation to treatment of PNF proposals - in particular the agencies’ findings that logging was unlikely to involve a significant effect on threatened species, etc. in the vast majority of cases – arguably reflects broader patterns of administration failing to take advantage of the leverage of the TSCA. It suggests that the bulk of the NPWS’ administrative efforts under the TSCA to date have been directed towards assisting consent authorities and proponents with the 8-part test rather than exercising its concurrence role. Such assistance has led to fewer SISs. This is confirmed by evidence provided by the NPWS to a NSW Parliamentary Committee in December 1997 by the NPWS.¹⁴⁶

A typical response from the NPWS to allegations of lack of sufficient attention to its concurrence responsibilities¹⁴⁷ is to argue that it is far better to expend limited resources at the project planning stage than at the end of the approval process. One NPWS officer argued that:

> a large number of requests for concurrence or s 91 licences demonstrates a failure to impose adequate protection for threatened species within the initial design of the proposal. It is clearly logical to design such proposals in such a manner that they do not lead to a significant impact in the first place.¹⁴⁸

Whilst these arguments are valid they only paint part of the picture. The missing piece is whether the use of management prescriptions can reduce impacts to a level of insignificance. This question is essentially one for ecologists, botanists, and zoologists: on an objective basis, is it possible to design away any significant impacts by altering project configurations by means of mitigation prescriptions, such as filter strips, ‘habitat’ trees, etc.? Recent scientific literature does question the efficacy and adequacy of the present levels of forestry management prescriptions for the conservation of hollow-dependent fauna in most jurisdictions.¹⁴⁹ On this basis, can we be sure that existing prescriptions even if complied with, will have the effect of altering a development to such an extent that it will no longer be likely to have a significant effect on threatened species?

¹⁴⁷ Note that the Director of National Parks and Wildlife has certainly exercised her or his discretion to refuse concurrence on some occasions – for example, in relation to a development proposal considered likely to adversely affect the Byron Bay Dwarf Gramminoid Clay Heath: see Detala v Byron SC [No.1] (2000) 107 LGERA 385 at 391. See also evidence presented to the Joint Select Committee on the Threatened Species Conservation Act 1997, given on 19 September 1997 by Ms Leanne Wallace, Acting Executive Director, Policy and Planning, NPWS, reported in Parliament of New South Wales (1997) above n 73 at 45.
The discussion of the case law above (p. 21) relating to the use of ameliorative measures may pose problems for present administrative approaches to PNF applied by both the NPWS and to a lesser extent by the DLWC. Nevertheless, for a host of practical and political reasons, it is likely to remain an operational reality that the majority of effort undertaken by consent authorities and the NPWS to protect threatened species will be to attach conditions to development approvals.

We must remember the ultimate purpose and intent of the threatened species legislation. It may be necessary to inquire whether the entire SIS process is systematically subverted by the blanket application of management prescriptions. Agencies such as the NPWS cannot be scientifically certain that present prescriptions are effective in conserving threatened species, or if they are sufficient. A further uncertainty associated with reliance on conditions is whether the consent authorities will have adequate resources to ensure compliance with conditions.

The implications of the discussion concerning the reliance on conditions in the decision-making of consent authorities are as follows. Where a consent authority applies the 8-part test incorrectly, it does so at the risk of invalidating the development consent. The 8-part test is an essential pre-condition to the exercise of power to determine a development application. Due to the broadening of scope of judicial review proceedings introduced by Timbarra, the approach of consent authorities and the NPWS to the 8-part test is no longer effectively insulated from challenge. Consent authorities must be more careful in applying the 8-part test and demanding the preparation of SISs when required, rather than preferring as a matter of course to apply standard impact-mitigation conditions. The big question, however, is whether the prediction that the Timbarra decision will “improve the quality of environmental decision making” will come to fruition.

150 In many ways the apparent conflict between the Smyth and Drummoyne decisions can be explained as a conflict between purpose and literal approaches to interpretation of legislation. From the point of view of purposive analysis of legislation as required by the Interpretation Act 1987 (NSW), s.33.
151 Byron Shire Businesses for the Future v Byron Council (1994) 84 LGERA 434.
152 Timbarra Protection Coalition v Ross Mining NL (1999) 102 LGERA 52.
IMPLEMENTATION OF THE TSCA AND NPWA BY NPWS

The licensing provisions in Part 6, TSCA are also relevant to PNF. This Part may apply if Parts 4 and 5 of the EPAA do not apply. Licensing is necessary in order to avoid conviction under the offence provisions in the NPWA including “harming” or “picking” threatened species, populations or ecological communities, and knowingly damaging the habitat of threatened species. Landholders must also look out for indigenous objects and artefacts as these are also protected under the NPWA and a permit to disturb or consent to destroy must be obtained. The area of the impacts of PNF on both indigenous and European cultural heritage is an important one in both NSW and Tasmania but has been excluded from this study to constrain the scope of research.

The licensing data collected from the public register suggests that during the study period, the licensing provisions of Part 6 TSCA have had only minor application to PNF. First, there were very few operators licensed. By June 2000 there had been only three s.91 licences and one s.95 certificate granted for PNF throughout NSW. All these applications were made in the Northern Directorate (or Zone) of NPWS operations in NSW. All four applications involved a finding by the Director-General of NPWS that the proposed logging was unlikely to significantly affect threatened species or their habitat. The approach of the NPWS’ Threatened Species Unit (TSU) was to apply threatened species protection prescriptions to logging operations and to attach these to licences as conditions. Accordingly, the SIS and Ministerial consultation processes

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154 NPWA , s.118A(3)(a).
155 NPWA , s.118D(1). An exception is where a certificate has been granted by the D-G of NPWS stating that the action proposed is not likely to significantly affect threatened species or their habitat, or where actions are undertaken under a property management plan: TSCA, s.95(2).
156 Under NPWA s.86(a) it is an offence to disturb or move on any land an Aboriginal object that is the property of the Crown. Permits to disturb must be obtained (s.87) or consent to destroy must be obtained in order to avoid committing the offence of “knowingly destroys, defaces or damages, or knowingly causes or permits the destruction or defacement of or damage to, an Aboriginal object or Aboriginal place” under s.90(1).
158 Extract of the licence register supplied by NPWS Threatened Species Unit, Hurstville, 30 June 2000. Initial inspections of the s.104 licensing register, NPWS Head Office, Hurstville, were conducted on 15.1.98 and 23.7.99, in person.
159 A map indicating the boundaries of the NPWS Directorates (or regions) is reproduced at Appendix 10.1. Note that the term selected, “Northern Region” necessarily involves some ambiguity, as the boundaries of the Northern Zone or Directorate of NPWS do not overlap with the Northern Region boundaries employed by DLWC, which again do not coincide with those employed by DUAP in administering the EPAA.
160 Interview, 25.10.99, Northern Zone TSU staff. Notes of interview on file with author.
under the *TSCA* were never activated in relation to PNF under Part 6 *TSCA*, and thus no detailed biotic survey of sites proposed for PNF was performed under the ambit of the licensing regime.

In summary, the findings reveal a low level of licensing activity in relation to PNF across the whole of NSW. Given the broad distribution of threatened species throughout forested ecosystems in NSW, it might be expected that the *TSCA* licensing provisions would have had far more application on the ground. The result is unexpected as the licensing provisions are potentially applicable to a large proportion of operators within the industry. This is because either Part 4 or Part 5 *EPAA* did not catch the majority of PNF activity during the study period (Figure 1). In the Northern Region of DLWC operations, for the study period, there was 100 per cent reliance upon the PNF exemption, in instances where it was available on non-protected land. Thus Part 4 *EPAA* did not apply via the *NVCA*. Further, regulation of PNF in LEPs was limited, particularly in DUAP’s Northern Region, where most councils did not require development consent for forestry in the Rural 1(a) zone. Taken together, these findings indicate that Part 4 *EPAA* did not apply to a large proportion of the PNF industry in Northern NSW. Also, Part 5 *EPAA* did not apply due to lack of licensing effort by the Environment Protection Authority (EPA) regarding non-point source water pollution from PNF between 1997-2003. One can therefore infer that Part 6 licensing provisions probably applied to a large number of operators within the industry. If that is the case, it is probable that, objectively speaking, significantly more forestry contractors in the region actually required licences than were in fact licensed. Note that all the licensing activity

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161 In relation to one of these operations, a document described as a Fauna Impact Statement (FIS) was prepared under the regime created by the former EFIP Act. This is discussed in NPWS (1997) *Logging By Rural Timber Division – Section 91 Licence Application – Director-General’s Decision Report*, NPWS, Northern Zone, 22pp. at p.16.

162 At present there is no publicly available data on the exact number of persons relying upon the private forestry exemption or indeed the *NVCA* exemptions. The DLWC does not collect this data. Interview, Mr B. Attwood, DLWC, Northern Region Office, Grafton NSW, 24.4.00.

163 Paragraph (i) Sch 3 State Environmental Planning Policy No 46 – Protection and Management of Native Vegetation, ‘saved’ by cl 3(2) Sch 4 *Native Vegetation Conservation Act* 1997 (NSW).

164 The DLWC does not compile or record data on the exact number of persons relying upon the private forestry exemption or indeed the *NVCA* exemptions, as the Act does not contain a notification mechanism. Interview, Mr B. Attwood, protected lands officer, DLWC, Northern Region office, Grafton, 20.3.00.

165 *NVCA*, s. 15(1).

166 Review of EPA Public Register of Environment Protection Licences, 16.9.03; conducted on-line at <www.epa.nsw.gov.au> which revealed that for the search of all licences using the term “forestry-logging” the only forestry operations licenced by EPA are in State Forests. The Forestry Commission of NSW holds 5 licences, one for each RFA region. Interview, 21.9.98, Ms L. Corbyn (Deputy D-G, EPA), Mr Steve Beaman, EPA, Sydney. Interview confirmed that PNF operations have never been issued with any pollution control licences from the NSW EPA.

167 In discussing the scope of non-regulated (or illegal) activity, one caveat which must be raised is that it is not possible to assume that all PNF proposals will automatically involve what can be described as threatened species issues. On the other hand, given the broad distribution of threatened species in NSW forested ecosystems, it is fair to say that
described above related to PNF in the Northern Directorate of NPWS operations.\footnote{Extract of the licence register supplied by National Parks \& Wildlife Service Threatened Species Unit, Hurstville, 30 June 2000. Previous inspections of the s 104 licensing register, NPWS Head Office, Hurstville, were conducted by the author on 15 January 1998 and 23 July 1999.} This suggests that there may have been a high level of unlicensed activity in other regions of NPWS operations.\footnote{“Off the record” admissions were made by NPWS staff in relation to the “under-regulation” of PNF in NSW. Interview, Anonymous high ranking Southern Directorate staff member, 8.6.00 (Interview in person, Canberra, ACT).}

These findings raise a crucial question: “How are regulatory requirements communicated to the regulated community?” The low level of licensing of operators in the PNF industry in NSW can be partly explained by a policy of NPWS - revealed in interviews during the study period, at least in the Northern Region - to wait for PNF operators to make inquiries as to requirements for licensing,\footnote{Interview, 25.10.99, Northern Zone TSU staff. Notes of interview on file with author.} and its failure to conduct an education campaign within the PNF industry regarding the \textit{TSCA}. A NPWS manager working on the issue in Northern Zone admitted: “Operators don’t know the rules, and generally don’t approach NPWS for advice.”\footnote{Interview, 25.10.99, Northern Zone TSU staff. Notes of interview on file with author.} The informal response of some NPWS officers to these findings has been to state that licensing is optional, and that persons who are required to comply with Part 6 licensing who do not obtain licences are running the risk of prosecution for offences against the \textit{NPWA}.\footnote{Compliance with s.118D \textit{NPWA} is discussed below.} This suggests a poor administrative policy of placing the onus entirely on the proponent to approach the NPWS, and relies excessively on compliance being motivated by fear of prosecution and financial penalties.

\section*{COMPLIANCE WITH THREATENED SPECIES PROVISIONS}

\textit{Administrative enforcement}

Councils and the NPWS have a number of statutory administrative enforcement tools open to them under the \textit{EPAA}, \textit{TSCA} and \textit{NPWA} to enforce their requirements in relation to the protection of threatened species and habitat. Aside from issuing warning letters, both the \textit{TSCA} and the \textit{NPWA} allow the Director-General to make stop-work orders,\footnote{\textit{TSCA}, Part 7, Division 1, particularly s.114(1). \textit{NPWA} s.91AA.} and the \textit{NPWA} provides for the making of interim protection orders.\footnote{Compliance with s.118D \textit{NPWA} is discussed below.} Stop-
work orders may be made directing that any such “action” cease or that any proposed action not be carried out. Such orders can be made under the TSCA where the Director-General is “of the opinion that any action is being, or is about to be, carried out that is likely to result in” harm to, or picking of, a threatened species, population or ecological community, or damage to critical habitat, or the habitats of threatened species.  

Interviews conducted with the NPWS Northern Zone revealed that there had been no use made of techniques such as warning letters or notices to influence the behaviour of participants in the PNF industry. Further, as far as could be ascertained, the NPWS did not grant any stop-work orders in relation to PNF operations during the study period.

**Civil enforcement**

Civil enforcement proceedings may involve pursuit of remedies such as injunctions or declarations in order to enforce provisions of environmental legislation. For a natural resources management agency, the advantages of civil litigation are the lower standard of proof involved, and the absence of many of the procedural and evidentiary safeguards for a defendant found in the criminal law.

Section 147 TSCA provides that any person may seek orders relating to the alleged breaches of the TSCA. Section 176A, NPWA contains a provision in identical terms relating to the enforcement of the NWPA. Civil enforcement represents an easier, more flexible and more efficient option for regulatory agencies than resort to criminal prosecutions. It is often argued that criminal provisions should be reserved for dealing

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174 NPW Act, s.91B.
175 TSCA, s.114(1).
176 Interviews 22.10.99, 25.10.99, Mr Gary Davey, Northern Zone Manager, NPWS Northern Zone, Mr Andrew McIntyre, Threatened Species Unit Manager Northern Directorate, 22.10.99 (by telephone).
177 This finding is consistent with a some broader evidence of occasional reluctance of NPWS to impose orders in other arenas, shown in the Iron Gates case. On the other hand, the NPWS has imposed several IPOs in other contexts, in relation to private farmland in NSW, and also on an area of Cumberland Plains Woodland at Toongabbie in Western Sydney which was threatened by a subdivision proposal, and this order survived challenge in Grand United Friendly Society v Allan (Minister for Environment), Land and Environment Court, 18 May 1998, Talbot J., No.40292 of 1997.
with the worst breaches of the law. The dividing line between criminal and civil enforcement has become increasingly blurred with statutes such as the EPA providing both forms of remedy in the alternative. Recently in the field of pollution control law, a number of statutory provisions have been enacted empowering courts to grant a range of civil remedies such as orders for restoration, compensation and damages where a criminal offence has been proven.

Yet there is no evidence that DLWC, NPWS or local councils in the Northern Zone, or indeed any Zone, resorted to civil enforcement in relation to PNF breaches by the PNF industry during the study period. This may be due to a perception on the part of agency staff that civil enforcement provisions are primarily designed for use by third-party objectors, meaning that their potential as a regulatory tool has been overlooked.

The open standing provisions in the TSCA and NPWA, and the litigation which they facilitate, form an important part of the civil enforcement regime. These open standing provisions mean that the environmental law-enforcement efforts of citizens can supplement those of agencies such as the NPWS, DLWC, and local government, providing that barriers such as security for costs and non-legal barriers involving access to information and resources can be overcome. Yet a danger exists that these provisions may mean that state agencies are tempted to some extent to 'pass the buck' to the public.

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182 For example, the EPA is empowered to seek restraining orders against parties in order to uphold the objects of the POEO Act.(s.232,233). Such restraining orders can be made subject to a charge freezing the assets of a defendant, providing a fund for payment of fines and costs. (s.236)
183 Interview, 25.10.99, Mr. Gary Davey, Northern Zone Manager, NPWS Northern Zone; Interview, Mr. Andrew McIntyre, Threatened Species Unit Manager Northern Directorate, 22.10.99 (with Mr. John Martindale, NPWS); Interview, Mr. B. Attwood, Vegetation Resource Manager, DLWC North Coast Region; interviews of local government staff as documented in Chapter Nine.
185 They were used to great effect to restrain environmental damage from clearing of coastal rainforest and wetlands in Oshlack v Iron Gates Pty Ltd. See also Iron Gates Pty Ltd v Oshlack (1998), NSW Court of Appeal, 5 February 1998, No. 40485/95, (appeal by developer dismissed). However such third party rights have been wound back by legislative amendment in a number of areas since 1995, particularly in relation to legislation applying to public forests. The principal area in which these have been removed is in relation to forestry operations within State Forests covered by an integrated forestry operations approval’ under the Forestry and National Park Estate Act 1998. Ricketts, A., Rogers, N. (1999) “Third Party Rights in NSW Environmental Legislation: the Backlash”, 16(2) Environmental and Planning Law Journal 157.
Criminal enforcement

Aside from the use of civil and administrative enforcement techniques, there exists the option of criminal prosecution to encourage compliance with environmental laws. The purposes of prosecution include the communication of clear statements regarding community standards, and secondly, the exertion of a deterrent effect on potential offenders. However, one of the prime difficulties in attempting to devise an adequate regulatory framework for the protection of biodiversity is that the law is increasingly imposing restrictions on the conduct of many rural activities once regarded as unexceptional and routine. The sudden ‘criminalisation’ of such actions may either appear to be artificial to, or simply may not be apparent to, rural landholders who are less convinced about the need for biodiversity conservation, or who may be unaware of the location and distribution of threatened species.

The TSCA inserted three particular offence provisions into the NPW Act. Discussion of the criminal offence provisions is closely related to the question of licensing (above, p.5). Grant of a licence immunises the licence-holder from prosecution.\(^{186}\) Without a licence, any person damaging the habitat of threatened species, or harming or ‘picking’ threatened species is at risk of prosecution.\(^{187}\)

A key issue is whether the offence provisions are drafted so as to focus the attention of persons in the PNF industry on the need to obtain a licence where there is likely to be a significant effect on threatened species or their habitats.\(^ {188}\) Without a significant deterrent effect attached to the threatened species regime, the NPWS regulatory strategy of waiting for industry to make the first approach is likely to fail.

To discuss the impact of the offence provisions with some precision, it is necessary to classify the offences according to whether a mental element must be proved by the prosecution, and if so, what form it takes. This is necessary to examine (a) the practicality and utility of embarking upon prosecutions based on the present provisions, (b) what

\(^{186}\) It is a defence to prosecution under Part 8A of the NPW Act if the accused proves that the act was authorised to be done, and was done in accordance with, a general licence under section 120 or a licence granted under Part 6 TSCA. See NPW Act, s.118A(3)(a). The same formula is applied in s.118C and 118D. The same applies to actions done in accordance with or was the subject of a certificate issued under section 95 (2) TSCA: see e.g. NPW Act s.118A(3(a1). The same formula is applied in s.118C and 118D.

\(^{187}\) NPW Act, s.118A(3(a); s.118D(2)(a).

\(^{188}\) EPA Act, s.78A(8)(b).
type of evidence must be presented by the prosecution in order to secure a conviction, and (c) which defences may be raised.

Criminal offences can be classified into 3 categories – those requiring proof of *mens rea*, offences of strict liability, and offences of absolute liability.\(^{189}\) There is a presumption (which may be displaced) of *mens rea* being an essential element of every offence.\(^{190}\) The classification of offences as not requiring proof of *mens rea*, and imposing instead either strict or absolute liability, is a matter of statutory interpretation.\(^{191}\) Offences of strict liability can be defined as: “offences in which *mens rea* will be presumed to be present unless and until material is advanced by the defence demonstrating the existence of an honest and reasonable belief that the conduct in question is not criminal, in which case the prosecution must undertake the burden of negativing such belief beyond reasonable doubt”.\(^{192}\)

**Offence of knowingly damaging threatened species habitat**

Section 118D of the *NPWA* provides:

(1) A person must not, by an act or an omission, do anything that causes damage to any habitat (other than a critical habitat) of a threatened species, population or ecological community if the person knows that the land concerned is habitat of that kind.

Section s.118D specifically uses the words “*if the person knows* that the land concerned is habitat of that kind.” [emphasis added].\(^{193}\) *Mens rea* is explicitly required by the use of the word “knows”.\(^{194}\) The prosecution is required to prove knowledge on the part of the defendant of all the essential elements of the offence.

The question of the extent of knowledge required in order to make out s.118D was considered in *Oshlack v Iron Gates Pty Ltd* by the Land and Environment Court, and later the Court of Appeal.\(^{195}\) The Court of Appeal upheld the finding of Stein J that in that particular instance, the clearfelling of known habitat of threatened species amounted to a breach of s.118D, albeit according to a civil standard of proof. This was a clear-cut case on the facts in a situation where the developer knew of the existence of threatened

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\(^{189}\) *R v Wampfler* (1987) 11 NSWLR 541 at 546 per Street CJ.

\(^{190}\) *He Kau Teh v R* (1985) 157 CLR 523.

\(^{191}\) *He Kau Teh v R* (1985) 157 CLR 523; 15 A Crim R 203 at 252 per Dawson J.


\(^{193}\) *NPWA*, s.118D(1).


species on the site.\textsuperscript{196} In this way it provides little guidance as to the outer boundaries of applicability of s.118D \textit{NPW\textquoteright A}.

A more helpful case is \textit{D-G NPWS v Schultz}\textsuperscript{197} a 1996 prosecution (under a previous version of the legislation) for “taking” of endangered fauna (the koala) in the course of land-clearing operations for agricultural purposes on private land. Despite the fact that the defendants were aware of the contents of an ecological consultant’s report regarding the population of koalas on another large block of land which they owned 2km to the north of the subject land, Bignold J held that this knowledge did not provide a sound basis for concluding that the defendants were put on notice regarding the likely existence of koala habitat on the site on which clearing occurred. Neither did their failure to make inquiries establish wilful blindness.\textsuperscript{198} This decision suggests that it may be extremely difficult to establish knowledge on the part of a defendant.

A number of tentative observations can be made on the basis of the \textit{Schultz} decision.\textsuperscript{199}

The prospects of success of most prosecutions under s.118D \textit{NPW\textquoteright A} will be slim, unless the prosecution can produce clear evidence of knowledge of the existence of threatened species habitat on the part of the defendant. It is evidently going to be extremely difficult to secure a prosecution for damaging the habitat of threatened species where full \textit{mens rea} must be proved, except in the more extreme circumstances of cases such as \textit{Iron Gates}.

The key policy issue arising from the legal discussion above is whether the knowledge requirement in s.118D encourages private landowners and forestry operators working on private land to deliberately avoid investigation of threatened species issues prior to commencing work. The low level of licensing may be partly explained by the lack of a deterrent effect being exerted by offence provisions of the \textit{TSCA} and \textit{NPW\textquoteright A}.

\textsuperscript{196} A more recent civil enforcement case (notably brought by the same litigant) was \textit{Donnelly v Solomon Islands Mining NL \& Ors} [2002] NSWLEC 112 (5 July 2002), No. 40169 of 1999 (unreported), in relation to the Timbarra gold-mine near Tenterfield. Bignold J held as follows: “I find that there have been contraventions, as earlier noted, of nine of the conditions of the development consent and there has been a contravention of the \textit{National Parks and Wildlife Act}, s 118D.”

\textsuperscript{197} \textit{Director-General NPWS v Schultz \& Schultz} [1995] Land and Environment Court, unreported, Nos.50050, 50053 and 50055 of 1995, Bignold J.

\textsuperscript{198} \textit{Schultz} at 12.

\textsuperscript{199} It is also useful to examine the judgment in \textit{Director of National Parks and Wildlife v Histollo Pty Ltd} (1995) 88 LGERA 214; \textit{Director of National Parks and Wildlife v Histollo Pty Ltd} (1995) 89 LGERA 116 in the Land and Environment Court which relates to the offence of knowingly damaging Aboriginal relics. The decision was appealed successfully by the defendants in \textit{Histollo Pty Ltd v Director-General National Parks and Wildlife Service}, (1998) 103 LGERA 355, Spigelman CJ, Sperling, Greg JJ. The case is another illustration of the difficulty for the NPWS in securing a conviction where the offence provision requires proof of knowledge on the part of the defendant of all elements of the offence.
During the study period there were no prosecutions regarding PNF under the *NPW Act* / *TSCA*. However, in 2002 there was one successful prosecution under s.118D *NPW Act* for vegetation clearance - albeit in the course of a rural subdivision development. In *Director-General of National Parks and Wildlife v Wilkinson*, Lloyd J made *obiter* remarks that knowledge under s.118D could be inferred from the act of a defendant commissioning preparation of a SIS.\(^{200}\) The defendant had been advised by both the local council and DLWC to prepare an SIS in order to support his development applications under the applicable LEP and under SEPP 46 in order to carry out clearing.

*Offence of picking threatened species*

Where a prosecution under s.118D is not possible due to evidentiary difficulties (relating to the knowledge requirement), the NPWS can consider the fall-back position of proceeding under s. 118A *NPW Act*. This provision makes it an offence to harm or pick threatened species (without a licence). Subsection 118A(1)(a) provides:

A person must not:  
(a) harm any threatened species, population or ecological community, being an animal, or...

Harm is further defined in s.5(1) as follows: “harm an animal (including an animal of a threatened species, population or ecological community) includes hunt, shoot, poison, net, snare, spear, pursue, capture, trap, injure or kill, but does not include harm by changing the habitat of an animal.” Thus the offence of harming fauna is not made out where the harm is a result of modification of the habitat of the animal.

Although s.118A(1)(a) does not include harm to fauna as a result of incidental habitat modification, the same express restriction does not apply to the provision for threatened plant species. Sub-section 118A(2) provides:

A person must not pick any threatened species, population or ecological community, being a plant.

“Pick” is defined in s.5 as:

pick a native plant (including a threatened species, population or ecological community) means gather, pluck, cut, pull up, destroy, poison, take, dig up, remove or injure the plant or any part of the plant.

\(^{200}\) *Director-General of National Parks and Wildlife v Wilkinson & Anor; Director General of the Department of Land and Water Conservation v Wilkinson & Anor* [2002] NSWLEC 171 (27 September 2002). Lloyd J at para 83. A total of fines of $43,500 were imposed under s.118D *NPW Act* and s.21 *NVCA*. 
This subsection is applicable to removal and destruction of threatened species through PNF and associated incidental injury to threatened species falling within the definition of “pick”. On this basis a strict liability offence (or even absolute liability offence) exists, as an alternative to s.118D which requires proof of knowledge (or a narrowly defined form of constructive knowledge). The importance of these provisions protecting threatened plants is probably higher than is realised since the majority of threatened biota now listed under the TSCA are plants (68.8 per cent of all listed species), with numerous plant communities now also recognised under the TSCA.

It is useful to briefly examine s.118C, as it provides a point of contrast. Section 118C creates the offence of damaging critical habitat. It provides: “A person must not, by an act or an omission, do anything that causes damage to any critical habitat.” In those instances where a map of the critical habitat concerned has been published in the Gazette, the section provides, “it is not necessary for the prosecution to prove that the person knew that the habitat was declared as critical habitat or that the person knew that it was habitat of an endangered species, population or ecological community.” The inclusion of this sub-section suggests that s.118C is to be interpreted as a strict liability offence. However, to date only two terrestrial critical habitats have been declared, neither on private land.

In summary, NPWA s.118A will have application to logging within threatened species habitat only if applied by the courts to the picking of threatened plants. Accordingly, the NPWS will be required to resort to s.118D NPWA in order to prosecute an offender.

201 It is relevant to consider the application of s.118A and s.118D to corporations, as additional provisions of the NPWA apply in relation to the personal liability of company directors and managers for corporate offences. Section 175B was recently improved in July 2002 so that knowledge can now be imputed or constructively applied to company directors. However they now also have a due diligence defence available. During the study period, the following provision applied: “If a corporation contravenes any provision of this Act or the regulations, each person who is a director of the corporation…shall be taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.” Thus it required proof of knowledge to achieve a conviction, even if the offence is normally one of strict liability. As much of the PNF operations in NSW are carried out by companies, the application of a more restrictive standard of proof may have meant the Act failed to have a strong influence on corporate behaviour.

202 There are 520 plant species listed as endangered or vulnerable, compared to only 235 animal species (Source: NPWS Threatened Species Unit web page, <www.npws.nsw.gov.au>, accessed 1.4.03; Douglas, S.(1999) above n 72 at 2.

203 NPWA, s.118C(2).

204 Habitat of the endangered Mitchell’s rainforest snail on Stott’s Island Nature Reserve, and the endangered little penguin colony at Sydney’s North Harbour. The critical habitat of the Bomaderry Zieria (plant) is being considered for listing. Source: <www.npws.nsw.gov.au>, 1.4.03.
operating without a licence, as the NPWA and TSCA fail to provide an offence of operating without a s.91 TSCA licence.\textsuperscript{205}

\textit{Additional statutory defences}

Another defence is that s.91 licences are “not required for the carrying out of routine agricultural activities”, unless an activity is prescribed by regulations.\textsuperscript{206} A regional TSU manager stated in interview that “A lot of [PNF] operators have argued that it is applicable to their industry. We say that it isn’t, but no-one really knows until there is a prosecution.”\textsuperscript{207} Other NPWS Northern Region staff stated in interview that many PNF operators in that region had relied on the ‘routine agricultural activities’ exemption to justify their decision not to apply for a s.91 TSCA licence.\textsuperscript{208} However, the same NPWS staff stated that the true extent of reliance upon the exemption is unknown.\textsuperscript{209} This is presumably because there is no notification mechanism.

\textit{Summary of compliance discussion}

The evidence suggests that there was little formal enforcement - as opposed to compliance - activity directed at the PNF industry during the study period. If there had been more prosecutions commenced, and successfully finalised, this might have encouraged more operators within the industry who should have sought licences to apply for them. In this manner, their activities would become subject to management prescriptions aimed at reducing the negative impacts of logging.

The present drafting of the offence provisions in the NPWA makes it less likely that prosecutions will be attempted, and as a result the legislation will exert less of a deterrent effect on the PNF industry than it might otherwise do. The drafting appears to have caused major difficulties for the NPWS as a regulatory agency. Research revealed that the

\textsuperscript{205} This is evident from a detailed examination of the text of both the TSCA and the NPWA.

\textsuperscript{206} TSCA, s.91(3), s. 91(6)(b). No such activities have been prescribed, after a proposal to restrict four specified activities particularly damaging to certain threatened species was abandoned following strong opposition by the farming community. NPWS (1997) Discussion Paper: (Proposed Initial) Prescribed Routine Agricultural Activities under the Threatened Species Conservation Act 1995, NPWS, Revised v. 29/1/97, 14pp. The proposed activities (but only where they were considered likely to impact on threatened species, critical habitats or threatened ecological communities were the removal of dead standing timber and the removal of bush rocks for sale, dead timber collection or removal for sale which may have an impact on threatened species; certain pesticide/herbicide applications, or activities affecting the distribution of water within a naturally occurring wetland. The author attended an NPWS seminar in Cooma in July 1997 in which the antagonism of the farming community to the proposal was extremely evident.

\textsuperscript{207} Interview, Mr G. Davey, Threatened Species Unit Manager, NPWS Northern Zone, 25.10.99.

\textsuperscript{208} Interview, Mr G. Davey, Threatened Species Unit Manager, Northern Zone, 30.4.98.

\textsuperscript{209} Interview, Mr. G. Davey, Threatened Species Unit Manager, Northern Zone, 25.10.99.
NPWS has tended not to resort to, nor rely heavily upon, conventional enforcement techniques such as prosecution in order to achieve compliance with the *TSCA* and the *NPWRA*.

Similarly, the knowledge requirement in the offence provisions, to the extent that there is an awareness of it in the industry, may be perversely encouraging private landowners and PNF forestry operators to deliberately avoid investigation of threatened species issues prior to commencing work. In this sense the knowledge requirement runs directly counter to the objects of the legislation.

**CONCLUSION**

The *TSCA* has provided agencies such as DLWC, councils and NPWS with greater leverage to protect threatened species, by placing modifying conditions on development approvals. In particular, the Act requires Part 4 consent authorities to take threatened species questions into account in their deliberations. These provisions have probably encouraged far greater consideration of threatened species matters by landholders applying for approvals than was previously the case – even if this has involved only consideration of the preliminary 8-part test. However, due to the lack of requirements in relevant LEPs, and the exemption for PNF in the *NVCA*, it was found that the *TSCA* applied infrequently to PNF through the Part 4 consent process.

The production of an SIS, when it occurs, enables decision-makers to engage in more informed decision-making. However, as we have seen, SIS production has been a rarity and thus genuinely-informed decision-making has also been uncommon. The threat of NPWS refusing to issue concurrence combined with the expense and difficulty of the SIS process have indirectly encouraged proponents and consent authorities to seek to steer clear of SIS production.

The evidence presented provides some support for the hypothesis that PNF was underregulated during the study period. The principal findings revealed:

- evidence of poor standards in testing PNF proposals against the 8-part test in some instances;
- a tendency for agencies to apply ameliorative conditions of consent in order to avoid imposing SIS requirements; and
fewer PNF operations licensed under Part 6 TSCA than might have been expected, given the low levels of regulation under Parts 4 and 5 EPAA.

Nevertheless the work presented in this Chapter is only a preliminary investigation of one aspect of administration of legislation applying to PNF, mainly in the North Coast Region – the centre of PNF activity in NSW.

One of the major issues about implementation of the TSCA concerns difficulties with application of the 8-part test. These arise partly from statutory failures to delineate roles and responsibilities for the provision of information about both threatened species and decision-making regarding likely impacts. To some extent, recent amendments to the TSCA are likely to improve the clarity and rigour of 8-part tests, by providing for the development of administrative guidelines to illuminate the test. However there is no guarantee that these guidelines will solve the problems; the difficulties involved in writing such guidelines is evident in the fact that none have been produced on an informal level during seven years’ operation of the Act.

The 8-part test, as interpreted by the courts to date, requires a consent authority to make informed decisions about the likely impact of development on threatened species. Consents granted on the basis of inadequate information can be invalidated, following Timbarra and Helman v Byron SC. Yet there is little preliminary evidence to suggest that these court decisions have led to behavioural change by the PNF industry or indeed regulatory agencies when deciding whether to require SISs. This is a question for further research.

A key finding relates to decisions not to require SISs nor to activate concurrence or Ministerial consultation processes in relation to PNF in the North Coast, Hunter or Sydney-South Coast regions. In the North Coast Region, during the study period, no SISs were required for any one of a total of 125 applications examined by DLWC, councils and NPWS collectively. Without an SIS, and relying only on preliminary information applied to the 8-part test, it is probable that decisions have been made on the basis of inadequate information about the likely effects of logging on threatened species.

103 applications under the NVCA, 18 applications to local government under the EPAA, and 4 licences under the TSCA Part 6. However note that a Fauna Impact Statement was produced for the NPWS in relation to PNF by Boral at Elands, as discussed above.
There was little licensing activity under TSCA Part 6 in the Northern and Hunter regions, despite the widespread resort to the PNF exemption and low levels of LEP regulation of private forestry. Only four licences were issued throughout NSW to PNF operators. Interviews revealed that the approach of NPWS to licensing in the Northern Directorate was to wait for the industry to inquire about licensing. This approach effectively meant that the majority of the industry had not contacted NPWS. Such findings give strong support to the hypothesis of under-regulation of PNF.

Neither the development-consent mechanism nor the licensing mechanisms are a particularly good tool for systematic protection of high-conservation-value habitats, as they have a project-level focus. Alternatives are mechanisms with a more regional focus. For example, the ESFM Expert Working Group recommended “ecological communities on private land which are inadequately represented in the CAR [comprehensive, adequate and representative] reserve system should be considered for listing as endangered ecological communities under the TSCA to facilitate protection from potential clearing and degradation.”

211 Another option available under the Act is the critical habitat mechanism. Yet for a combination of resourcing and political reasons, only two critical habitats have actually been listed.

Little use appeared to be made of civil and administrative enforcement techniques such as notices and stop-work orders by NPWS in relation to PNF during the study period. A backstop in the TSCA is the inclusion of a provision making it an offence to damage threatened species habitat (s.118D). However, as we have seen, in relation to PNF there have been no successful prosecutions to date under this section.212 The present drafting of this provision may deter future attempts at prosecution, especially since the failure of the Schultz and Histollo prosecutions.213 Yet the recent successful s.118D prosecution in Wilkinson shows that these obstacles are not insurmountable in instances of a clear

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212 However, note the Wilkinson prosecution discussed above n 200 in relation to non-PNF vegetation clearing.
213 Director of National Parks and Wildlife v Histollo Pty Ltd (1995) 88 LGERA 214; Director of National Parks and Wildlife v Histollo Pty Ltd (1995) 89 LGERA 116 in the Land and Environment Court which relates to the offence of knowingly damaging Aboriginal relics. The decision was appealed successfully by the defendants in Histollo Pty Ltd v Director-General National Parks and Wildlife Service, (1998) 103 LGERA 355, Spigelman CJ, Sperling, Greg JJ. The case is another illustration of the difficulty for the NPWS in securing a conviction where the offence provision under the NPWA requires proof of knowledge on the part of the defendant of all elements of the offence.
breach where knowledge of the contents of an SIS is undeniable. Still, there is an urgent need to reform offence provisions to either make liability strict or to extend the knowledge requirement to include recklessness. The analysis presented above showed that NPWAs s.118A(2), the “pick” offence in relation to threatened plants is a relatively neglected provision with much potential as it does not require the prosecution to prove knowledge on the part of a defendant.

The evidence of a lack of a compliance education campaign by agencies and authorities directed specifically at PNF supports a preliminary conclusion of under-regulation of the industry. With DLWC and local councils at the front-line of considering PNF proposals under Part 4 EPAA, it is important to focus on their role in applying threatened species provisions. The role of NPWS in terms of evaluating this category of PNF proposals has been drastically curtailed since the removal of a concurrence role administered by the Service in 1995-6 under SEPP 46, but it probably should have a greater role in terms of regulating PNF by means of Part 6 licensing. The evidence collected raises doubts about the overall adequacy of consideration of threatened species questions raised by PNF activity in the North Coast Region of NSW by DLWC and councils. There was a failure by DLWC, councils and the NPWS to require SISs to enable thorough evaluation of the likely impacts of PNF proposals. Without SISs, and relying only on preliminary information applied in the 8-part test, it is probable that decisions were made on the basis of inadequate information about the likely effects of logging on threatened species. These findings raise questions about the success of biodiversity provisions in ensuring that the PNF industry meets goals of ESFM.

Wilkinson, above n 200; see also Carmody v Brancourts Nominees Pty Limited, Carmody v Brancourt (No. 2) [2003] NSWLEC 84 Nos. 50057 of 2002 and 50058 of 2002, prosecution under NPWA, s.118D (non-logging).

During 1995-1997, NPWS actively sought to regulate PNF operations at least in the Southern Zone. A large volume of NPWS file material at Southern Directorate office was examined by the author in 1997 which revealed that at least 17 proposed logging or clearing operations associated with PNF or plantation establishment were reviewed by NPWS in that region with a view to mitigating impacts on threatened species. NPWS Correspondence with DLWC, councils and proponents on file held by author.
PRIVATE NATIVE FORESTRY LAW IN TASMANIA

INTRODUCTION

This chapter reviews the law applying to PNF in Tasmania. This provides a useful point of comparison with NSW law. It enables a more thorough detection of elements of forestry legislation that are likely to be inconsistent with the attainment of ESFM.

Tasmanian law affecting PNF is more specialised and more highly tailored than its counterpart in NSW. This is attributable to a number of factors, but mainly the fact that private land is relatively more important for overall timber production in Tasmania. Further, a policy decision has been taken to regulate PNF under the same broad framework as for public forestry. Therefore PNF in Tasmania has the benefit of much of the regulatory infrastructure applicable to public forestry.

In Tasmania, PNF is subject to a cohesive regulatory system that has been purpose-built for forestry, rather than subjected haphazardly to a series of largely disjointed instruments such as those incrementally introduced by the NSW Parliament.

In Tasmania, the applicable law consists of the following elements:

- a regime of specific obligations contained within the Forest Practices Act 1985 and Forest Practices Code applicable to both private and public forests;
- provisions for Private Timber Reserves (under the Private Forests Act 1994) which exempt PNF from local government regulation;
- provisions for the registration and protection of profits à prendre under the Forestry Rights Registration Act 1990;
- measures to protect threatened species under the Threatened Species Protection Act 1995;
- land use planning controls applicable to areas not designated as Private Timber Reserves; and
• limited measures to protect water quality and prevent water pollution.

The Tasmanian approach to implementation and enforcement of the regulatory framework depends on fewer agencies than in NSW. It involves audited self-regulation within a broader framework of command regulation. The key actors and agencies are the Forest Practices Board, Forest Practices Officers (FPOs) employed by private logging interests, the Forest Practices Tribunal, and Private Forests Tasmania (PFT) (see Figure 1) Standing outside the ‘Forest Practices System’ are local government, and the Parks and Wildlife Service (PWS), within the Department of Primary Industries Water and Energy (DPIWE).

**Tenure of forests**

Approximately 29 per cent of Tasmania’s forests are in private ownership, according to the National Forest Inventory (2003) and the Public Land Use Commission (PLUC) (1996), whilst 43 per cent of the total forested land in Tasmania (excluding woodland and scrub) are held as State forests. The majority of the remainder are in nature reserves. (Table 1). An earlier study for the Resource Assessment Commission Forests Inquiry (1991) suggested that 35.7% of Tasmanian native forests were private forests.²

<table>
<thead>
<tr>
<th>Tenure</th>
<th>Area ('000 ha)</th>
<th>%age</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Land</td>
<td>922</td>
<td>29.1</td>
</tr>
<tr>
<td>Multiple-use public forest</td>
<td>1062</td>
<td>33.5</td>
</tr>
<tr>
<td>Nature Reserves</td>
<td>1105</td>
<td>34.9</td>
</tr>
<tr>
<td>Other Crown Land</td>
<td>80</td>
<td>2.5</td>
</tr>
<tr>
<td>Leasehold Land</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 1
Area of Tasmanian forest ('000 ha) by tenure

Total native forest

<table>
<thead>
<tr>
<th>Tenure</th>
<th>Area</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private land</td>
<td>922</td>
<td>46.47</td>
</tr>
<tr>
<td>Multiple use forests</td>
<td>1062</td>
<td>53.52</td>
</tr>
<tr>
<td>Leasehold</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>1984</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: National Forest Inventory (2003) State of the Forests Report 2003, p.114. Note: Multiple use forests includes areas of state forest reserved from harvesting as special reserves to protect environmental values.

However, the more important issue for consideration is the ownership of productive forests, i.e. the tenure of forests in which timber harvesting is permitted, a figure that excludes national parks and nature reserves. From Table 2 we can see that private forests comprise 46.5 per cent of Tasmanian forests available for logging.

Table 2 Area of native forest ('000 ha) by tenure not legally restricted from harvesting

Relative commercial importance of PNF

Private land plays a much more significant role in Tasmania’s logging industry than in other states.\(^3\) According to Private Forests Tasmania, “since 1945, over 50 per cent of the hardwood pulpwood has been harvested from private land”\(^4\), and over 25 per cent of total hardwood sawlog production in Tasmania has come from private land.\(^5\) According to the Forest Practices Board, private forests accounted for 57.6 per cent of the total area

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\(^5\) Private Forests Tasmania (1997) above n 1, p.5.
of native forest logging operations in Tasmania, in 2000-01 (down from 59.25 per cent in 1999-2000), with this figure falling to 50.24 per cent in 2001-2002.6

Table 3 Native forests - area (hectares) of operations covered by Forest Practices Plans certified in 2001/2002 by harvesting method, and tenure

<table>
<thead>
<tr>
<th>Tenure</th>
<th>Partial logging</th>
<th>Clearfelling</th>
<th>Total</th>
<th>%age</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Land</td>
<td>11130</td>
<td>4960</td>
<td>16090</td>
<td>50.24</td>
</tr>
<tr>
<td>State Forest</td>
<td>7860</td>
<td>8070</td>
<td>15930</td>
<td>49.75</td>
</tr>
<tr>
<td>Total</td>
<td>18990</td>
<td>13030</td>
<td>32020</td>
<td>100%</td>
</tr>
</tbody>
</table>


Table 3 indicates the considerable importance of private native forestry in Tasmania vis-à-vis public land forestry, with over half of forestry by area of operations occurring on private land.

Ecological importance of private forests

The crucial importance of much of Tasmania’s privately-owned forests for biodiversity conservation was recognised in the RFA process. There were 24 forest types and 22 old-growth forest communities identified as a conservation priority in the Tasmanian RFA and the Private Forest Reserve Program Strategic Plan.7 For these under-represented forest communities, 100 per cent reservation of remnants on private land is required to meet the JANIS reserve targets agreed upon in the Tasmanian RFA.

A Commonwealth-Tasmania steering committee concluded in 1997:

For a number of forest communities, there is insufficient area on public land to meet the shortfall in the JANIS criteria. In summary, 17 forest communities (out of a total of 32 for which there is a shortfall) including 15 of the 16 rare, vulnerable and endangered forest communities, 16 old-

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7 The list of under-represented forest types and the area required to be conserved on private land is reproduced in Appendix 11.1. See also: DELM/DPWIE Private Forests Reserve Program (1998) Strategic Plan for the Private Land Component of the CAR Reserve System, Hobart, Tasmania, 110pp., at pp.63-64.
growth forest communities (out of a total of 29 old-growth forest communities for which there is a shortfall) and all 11 of the rare and depleted old-growth forest communities cannot be adequately protected on public land. In addition most poorly reserved endangered and threatened flora and fauna species occur on private land. All of the indicative National Estate values are represented on private forested land.8

Sources

Sources examined in relation to PNF in Tasmania included relevant legislation,9 judgments of the Forest Practices Tribunal and the Resource Management and Planning Appeal Tribunal (RMPAT), government reports, and secondary sources including conference papers and articles. The Regional Forest Agreement process also involved the production of a number of important documents which contain information regarding various regulatory, ecological, and economic aspects of PNF.

A two-week field trip to Tasmania was conducted in November 1998. This was necessary in order to interview relevant subjects in depth and to examine libraries, files and public registers - to obtain better-quality information and clarify questions relating to the Tasmanian context. The primary research site was Hobart. A number of private forest sites in Central Tasmania (e.g. Meander Valley near Deloraine) and Southern Tasmania were also viewed. Additional primary information came from interviews with industry, regulators, and conservationists. Representatives of the following organisations were interviewed: Private Forests Tasmania, Forest Practices Board, Parks and Wildlife Service, Forest Industries Association Tasmania, University of Tasmania Law Faculty, Tasmanian Conservation Trust, and other NGOs.

In Tasmania there is less of a ‘data gap’ regarding PNF than in NSW. As PNF is a larger component of the timber industry, more visible and subject to greater public debate,10 it receives more direct scrutiny and study by government, industry and NGOs. Thus there

8 Tasmania-Commonwealth Joint Regional Forest Agreement Steering Committee (1997) Options for the Tasmania-Commonwealth Regional Forest Agreement: A Strategic Approach, April, 179pp., at 43.
is more published primary and secondary literature as well as raw data on PNF, and most of this is more readily accessible than equivalent information in NSW.

Further, with a more established institutional structure and a systematic approach to the regulation of PNF - under the Forest Practices Act and the Private Forests Act 1994 - the task of gathering information about PNF is less ambiguously allocated, with Private Forests Tasmania and the Forest Practices Board systematically collecting data. In contrast to NSW, statistical information regarding the administration of forestry law on private land (e.g. the number and scale of operations conducted) is systematically published in Annual Reports of the Forest Practices Board.

THE FOREST PRACTICES SYSTEM

Background to PNF controls in Tasmania

The introduction of export woodchipping in Tasmania in the early 1970s led to a drastic acceleration in the rate of private native-forest logging, with only a small proportion of logged areas on private land being regenerated and returned to production forest.11 Official and public concern about the unsustainable nature of the logging resulted in a parliamentary inquiry by Everett and Gentle in 1977.12 Its recommendations to limit cutting to a sustainable level were not implemented, nor was its advice to devise logging standards to minimise environmental impacts.13 In 1982, the Commonwealth subjected forestry for the purpose of export woodchipping to a regulatory regime in the form of licensing subject to conditions under the Export Control Act 1982.14 In 1985, Tasmanian controls - in the form of the Forest Practices Act 1985 and Code,15 were introduced

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“reluctantly”, according to Bonyhady’s examination of primary sources, in preference to further conditions being attached to export woodchip licences granted by the Commonwealth.16 This action was exacted with the ultimate or underlying threat (from the Commonwealth) of non-renewal of annual export licences.17 Perhaps in an indication of its lack of confidence in Tasmanian laws, the Commonwealth persisted in imposing conditions on export licences, which included PNF-specific conditions.18 Over time, the scope of environmental concerns addressed in these licence conditions expanded. For example, ‘transitional’ licences granted in 1996 contained conditions relating to PNF involving:\(^19\)

- a requirement for pre-logging surveys and harvesting plans;
- a ban on export of woodchips from private property on the Register or interim Register of the National Estate under the *Australian Heritage Commission Act 1975*,\(^20\)
- a ban on export of woodchips sourced from rainforest on private land;\(^21\) and
- a ban on export of woodchips from private operations from nine specified rare eucalypts vegetation communities.\(^22\)

However, Commonwealth controls have now been phased out almost completely since the signing of the Tasmanian Regional Forest Agreement (RFA) in November 1997, the passage of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (*EPBCA*) (and consequential amendments), and the *Regional Forest Agreements Act 2002* (*RFAA*).\(^23\)

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18 These conditions were, it seems, ineffectually enforced by WEMU, the Commonwealth Department of Primary Industry and Energy’s Woodchip Export Monitoring Unit, with a staff of two. Interview, 5.2.98 with Mr. Charles Body, Woodchip Export Monitoring Unit, DPIE, Canberra; see also DPIE/WEMU, *Annual Compliance Report 1996* and *Annual Compliance Report 1995*, DPIE (1997) *Transitional Woodchip Export Licences 1997-99*, 120pp. The author rang Mr. Body to obtain a copy of the consultants report relating to Northern NSW export woodchipping by Boral/SEPL listed in WEMU, *Annual Compliance Report 1996* at p.17. This consultant (Price Waterhouse) was required to audit the licensee’s reporting on compliance with environmental conditions of the licence. Mr. Body refused to supply a copy of the report, suggesting an FOI request. I asked for the reason for refusal to supply a copy of the document: he claimed “commercial in confidence”.
19 Five operators were licensed under the transitional licensing scheme prior to December 1997. These were Boral, Gunns, North, Farmwood, and P.Griggs.
21 *Export Control (Hardwood Wood Chips) Regulation* (1996), above n 20, Condition 9(b).
23 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides an exemption from the EIA approval requirements under Part 9 for “RFA forestry operations” where undertaken in accordance with an RFA : EPBC, s.38. This exemption does not apply to forestry “in a property included in the World Heritage List”: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBCA*), s.42(a)) or in a Ramsar listed wetland: *EPBCA*, s.42(b).
The Tasmanian Forest Practices Act 1985 (FP Act) sets out the main aspects of the regulatory framework for forestry on private and public lands. This framework is described in the FP Act as the “Forest Practices System of Tasmania”. The objectives of the system include:

(a) an emphasis on self-regulation; ....
(b) a delegated and decentralised approval system for timber harvesting plans ....
(c) an independent appeal process....

The Act creates a Forest Practices Board reporting directly to the Minister who in turn reports to the Parliament, as well as a Forest Practices Tribunal with the capacity to review certain decisions of the Board. A statutory Forest Practices Advisory Council provides advice to the Board, particularly regarding review of the FP Act.

Figure 1 Tasmanian Institutional Structures for PNF Administration
The Forest Practices Code

The FP Act enables the Board to issue a Forest Practices Code (‘the Code’) setting out the details of appropriate timber-harvesting practice applicable on private and public forests. The Code addresses issues including biodiversity, soil protection, water quality, site productivity, and archaeological protection. It applies to all aspects of commercial forestry on both private and public tenures, including roading, afforestation and reforestation.

The Forest Practices Code is merely a series of guidelines. On its own, it has no legal force. It is neither a statutory rule nor a regulation. It is unlikely that the text of the Code alone would provide grounds for action in the event of breach. The Code becomes enforceable when specifically mentioned in a Forest Practices Plan (‘Plan’) that has been devised and certified by an authorised FPO or the Board. It is the FP Act that makes extensive references to the Code and generates obligations to comply with it.

Apart from this, the Code is divided into mandatory requirements and advisory recommendations. Much of the Code is not binding, employing language such as “may” and “should”. Some of the requirements are merely to consider issues. For example, the formula “will give consideration to” is used repeatedly. Overall, the Code takes a non-prescriptive, non-detailed approach, providing general principles rather than an exhaustive list of requirements. For example there is no mandatory formula for retention of tree hollows, such as ‘10 hollow-bearing trees per 2 hectares’; but instead, it contains an ‘advisory recommendation’ that “clumps” of these trees “should” be retained where coupes have “few other retained areas”. Similarly the Code has no mandatory requirement for retention of rainforest, only several advisory recommendations for

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28 FP Act, s.30, 31(1).
30 The Code is a form of delegated quasi-legislation issued by the FP Board under s.30 of the FP Act.
31 Offence provisions are contained within the FP Act rather than the Code.
34 Forest Practices Code (2000), p.62 states: “Patches of mature forest (wildlife habitat clumps) containing habitat trees with nesting hollows and other old growth structural elements should be retained in coupes with few retained areas (e.g. streamside reserves, areas reserved for other values, areas reserved for operational reasons etc.).”
minimising damage to rainforest in limited circumstances. An exception to the general approach is that the Code sets out minimum stream buffers. Also, in limited circumstances, site-specific prescriptions may be devised for threatened species protection if the FP Board is notified (p.31, below).

**Forest Practices Plans**

A distinctive feature of Tasmanian law for PNF is the requirement that regulated parties (“responsible persons”) have forest practices plans (FPPs) prepared, and obtain certification of them (either by the FP Board or by an FPO acting under delegation) before commencing forestry controlled by the *Forest Practices Act*. The Act applies to private native forestry whether within Private Timber Reserves (see p. 20, below) or on other areas of private land. This includes establishment of forests, timber harvesting, roading, or quarrying. Recent amendments have applied the Code to firewood logging, tree-fern harvesting, and land clearing in excess of 1 ha. “Responsible persons” must not harvest timber, or “cause or allow timber to be harvested” from land unless there is a certified FPP for that operation. An exemption exists in the Regulations for small-scale operations. However, it is more constrained than the NSW PNF exemption, applying only to operations of less than 1 ha in area or producing less than 100 tonnes per annum, whichever is the lesser. Further, the exemption does not apply to ‘vulnerable land’ which includes streamside reserves, steep slopes, highly erodible soils, and land inhabited by threatened species.

The legislation states that an FPP may be prepared by any person, but in practice most plans are prepared by authorised Forest Practices Officers (FPOs) appointed by the Board, as few other people have the expertise necessary to prepare plans in conformity with the Code. Larger companies operating on private land employ their own

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35 Advisory recommendation re rainforest relics in streamside reserves (p.57), and recommendation that logging of “relict or old growth rainforest should be avoided or minimised” in order to protect epiphytic plant species (p.61).
36 The required buffer width depends on stream size classifications from 1 to 4; *Forest Practices Code 2000*, pp.55-56.
37 *FP Act*, s.17(4).
39 *FP Act*, s.17(4).
40 Forest Practices Regulations 1999, r.5. 100 tonnes is equivalent to approximately 5 loaded logging trucks.
42 *FP Act*, s.18(1).
43 *FP Act*, s.39.
44 *FP Act*, s.18(3).
authorised FPOs. Smaller companies and private landowners usually engage consultant FPOs to prepare their FPPs.\(^{45}\)

Once prepared, before operations may lawfully commence, the plan must be certified (i.e. approved).\(^ {46}\) Formally, FPPs must be certified by the Board.\(^ {47}\) However, certification is often made by FPOs under an instrument of delegation.\(^ {48}\) In practice it appears most certifications are actually carried out by FPOs.\(^ {49}\)

Nevertheless, the Board can approve, refuse, or amend a Plan by inserting additional or different conditions.\(^ {50}\) A landowner can appeal to the FP Tribunal in the event of the Board or an FPO refusing to certify an FPP, or approving it subject to amendments and conditions that restrict timber harvesting and tree clearing.\(^ {51}\) Third parties (i.e., the public) cannot appeal or object to the grant of FPPs or to the conditions applied to them.\(^ {52}\)

An additional regulatory step was introduced in July 1999 to apply at the post-harvesting stage. At the time of completion of an FPP, an FPO now is required to self-certify whether operations were in compliance with the Code at the conclusion of operations (the expiry of the plan).\(^ {53}\) This certificate of compliance must be lodged with the FP Board.\(^ {54}\) The choice of terminology in relation to “certification” has the potential to cause some confusion.

\textbf{TASMANIA’S BROADER ENVIRONMENTAL LAW FRAMEWORK}

Tasmania’s forestry legislation exists alongside a broader framework of environmental laws known as the Resource Management and Planning System (RMPS).\(^ {55}\) This integrated

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\(^{46}\) FP Act, 18(1)(b), 19(1).

\(^{47}\) FP Act, s.18(1)(b).

\(^{48}\) FP Act, s.43(2) allows to Board to delegate its powers and functions in relation to FPPs (Part III, Division 1) to FPOs. Section 19(5) refers to delegation by the Board of power to certify FPPs.


\(^{50}\) FP Act, s.19(1).

\(^{51}\) FP Act, s.25(1). Upon an appeals to the FP Tribunal based on s.25 FP Act involving rare or endangered species, a special division of the Tribunal must be convened to hear and determine the appeal: FP Act, s.34(7A).


\(^{53}\) Forest Practices Code 2000 (p.5).

\(^{54}\) FP Act, s.25A.

system of four Acts shares statutory objectives of sustainable development and sustainable use of natural resources. The objectives include reference to the necessity for maintenance of ecological processes and genetic diversity; and the encouragement of public involvement in resource management.\(^{56}\) The RMPS comprises the following Acts: the \textit{Land Use Planning and Approvals Act 1993} (LUPAA), the \textit{Resource Management and Planning Appeal Tribunal Act 1993} (RMPATA), the \textit{State Policies and Projects Act 1993} (SPPA), the \textit{Environmental Management and Pollution Control Act 1994} (EMPCA). Other Acts, including the \textit{Threatened Species Protection Act 1995} (TSPA) and the \textit{Public Land (Administration and Forests) Act 1991}, are linked to the RMPS, sharing the same sustainable development objectives.\(^{57}\) The TSPA obliges those who have powers or functions under the Act to perform their functions “in such a manner as to further the objectives specified” in the RMPS.\(^{58}\) Also relevant to PNF in Tasmania is the \textit{National Parks and Wildlife Act 1970} which following amendments in 1998 is similarly linked to the RMPS objectives.\(^{59}\)

\textit{Planning control}

Tasmanian planning-control law comprises three main statutes - the \textit{SPPA}, \textit{LUPAA} and the \textit{RMPAT Act}. There are three levels of planning control: State-wide sustainable development policies made under the \textit{SPPA}; local-area planning schemes made under \textit{LUPAA}, and specific land-use classifications applying within particular land-use zones within each local government area. There is no provision for the making of regional environmental plans equivalent to NSW’s REPs or RVMPs.

Briefly, the \textit{SPPA} spells out the overarching sustainable development objectives of the RMPS that must be observed by decision-makers.\(^{60}\) One broad objective is to promote sustainable development.\(^{61}\) Sustainable development is defined in detail, and this definition attempts to balance social and economic objectives against sustaining and

\begin{footnotesize}
\begin{enumerate}
\item \textit{Threatened Species Protection Act 1995}, Schedule 1.
\item \textit{Threatened Species Protection Act 1995}, s.4, Schedule 1.
\item Davies (1994) “Sustainable Development: The Tasmanian Legislative Response to Brundtland’s Challenge” 1(2) \textit{Australasian Journal Natural Resources Law and Policy} 161.
\item \textit{State Policies and Projects Act 1993}, Clause 1(a), Schedule 1.
\end{enumerate}
\end{footnotesize}
protecting ecosystem processes. State policies may be made which attempt to address planning issues of concern across the State.

The next tier in the planning system is provided by \textit{LUPAA} which creates a regime for land-use planning and development control by local government. It requires the making of local planning schemes, in conformity with the approach of State sustainable development policies under the \textit{SPPA}. Such local schemes control land uses by assessing a range of factors including land capability, and potential effects on the environment, whilst remaining integrated with broader resource management policy objectives. Local schemes must be consistent with State sustainable development policies made under the \textit{SPPA}. State policies prevail over inconsistent local schemes. Further, \textit{LUPAA} requires that planning schemes attempt to further the broader objectives of the RMPS. \textit{LUPAA} has the potential to apply to all parts of Tasmania except those specified in the Regulations, or where excluded by other legislation, for example, relating to Private Timber Reserves (PTRs) (see below, p.20).

The \textit{RMPAT Act} created a specialist Tribunal, the RMPAT, to hear planning appeals, and provided it with civil enforcement powers relating to the operation of the RMPS. For example, it can and has heard appeals against the grant of permits for PNF operations by local government under \textit{LUPAA}. The Tribunal has a wide range of enforcement powers – including remediation orders, powers to restrict land use, powers to require compliance with environmental agreements, environmental improvement programs, and environment protection notices under the \textit{EMPCA}. It also has power to order payment of costs of remediation completed by government, and the payment of compensation to affected third parties.

\begin{footnotesize}
\begin{itemize}
  \item[63] State Policies and Projects Act 1993, Part 2. The SPPA also provides for compulsory ‘State of the Environment Reporting’. The other key objective of the SPPA is the ‘fast tracking’ of major projects, dubbed ‘projects of state significance’. Where a project is so designated its environmental impacts are not assessed under the normal rules of \textit{LUPAA}. Full \textit{LUPAA} appeal rights and other legal rights to challenge such projects are not available in relation to ‘projects of state significance’.
  \item[64] Davies (1994) above n 60 at 171.
  \item[65] State Policies and Projects Act 1993, s.13.
  \item[66] \textit{LUPAA}, s.20(1)(a).
  \item[67] \textit{LUPAA}, s.4(2).
  \item[69] Davies, above n 60 at 173.
\end{itemize}
\end{footnotesize}
An essential element of effective environmental law enforcement is to provide for public access to tribunals and courts to enable merits and judicial review of decision-making by public authorities. Decisions under *LUPAA*, *EMPCA*, and the *TSPA* may all be appealed to RMPAT under relatively liberal standing provisions. 70 For example, objectors have a right of appeal against decisions to grant a planning permit under *LUPAA*.

However, the Forest Practices System has its own tribunals and appeal processes. Decisions of FPOs, and the Forest Practices Board,71 are appealable to the Forest Practices Tribunal, and thence to the Supreme Court. The existence of a separate tribunal for review of decisions made under forestry legislation is anomalous. Notably, public third-party access to that FP Tribunal is very much restricted. For example, decisions to certify Forest Practices Plans cannot under any circumstances be appealed by a member of the public.72 The Tasmanian forest practices regime may be contrasted with that of NSW, which provides third parties with “any person” standing, under provisions in virtually all of its environmental statutes.

The extent of planning control over non-PTR PNF

The regulatory regime applicable to private forests in Tasmania depends on whether or not they have been declared to be Private Timber Reserve (PTR) by the Forest Practices Board (see below, p.20). All forestry not conducted in Private Timber Reserves (PTRs), may be subject to local planning schemes. The operation of these schemes can be excluded by the declaration of ‘private timber reserves’ (“PTRs”) by Forest Practices Board under Part 2, *FP Act*.73 When land has been declared as a PTR, local councils are blocked from requiring development applications for PNF.(see below, p.20) However, Sixty three percent of the private forest resource at mid-2002 was not in PTRs.74

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70 *LUPAA*, s.61(5) provided that a representation/objection was lodged under 57(5). Similarly, *TSPA*, s.14 provides a right of appeal against a range of threatened species listing decisions; *EMPCA*, s.48 provides civil enforcement proceedings may be commenced by a third party (“any other person who has, in the opinion of the Appeal Tribunal, a proper interest in the subject matter of the proceedings and desires to be heard in the proceedings”).

71 *FP Act*, s.4A-4H.

72 *FP Act*, s.25(1).

73 Private Forests Tasmania also makes PTR declarations under delegation from the Board.

According to surveys, the majority of landholders in this category plan some logging at some stage in the future.\textsuperscript{75}

Local planning schemes made under \textit{LUPAA} have the capacity to affect PNF.\textsuperscript{76} \textit{LUPAA} provides that “a planning scheme may regulate or prohibit the use or development of any land.”\textsuperscript{77} The definition of “development” includes “the carrying out of works”.\textsuperscript{78} PNF is caught by the definition of “works” as it includes “the removal, destruction, or lopping of trees and the removal of vegetation or topsoil.”\textsuperscript{79}

The planning requirements applicable to non-PTR PNF vary according to the content of the local planning scheme and the zoning of the land. Planning schemes provide for two classes of development applications - for which the grant of permits is either discretionary or mandatory. The ‘discretionary’ class of development is that which a planning authority, under its planning scheme, has discretion to refuse or permit.\textsuperscript{80} The ‘mandatory’ or ‘permitted development’ category is that to which a council, under its planning scheme, must grant a permit, either unconditionally or subject to conditions.\textsuperscript{81}

Within a typical scheme in the ‘general rural zone’, forestry is not a discretionary or prohibited use, but rather is a ‘permitted development’. Thus it is not open to a council to refuse a permit for such proposals.\textsuperscript{82} However, an application must still be made,\textsuperscript{83} and the council can attach a range of conditions to the permit\textsuperscript{84} as long as these remain consistent with the terms of the scheme\textsuperscript{85} and the objectives of the RMPs.\textsuperscript{86} For example, in \textit{Toora Primary Industries} v \textit{Tasman Council} [1997] 103 TASRMPAT (27 May 1997), \textit{LUPAA} does not apply to forest practices in State Forests, because of a specific exclusion attached to the definition of “works”.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{75} A survey of owner intentions carried out by PFT in 1996 revealed that 61\% of non-PTR forest owners intended to harvest the timber on their land. Taylor, Peter (1997) \textit{An Overview of the Private Forest Resource in Tasmania}, Private Forests Tasmania, unpublished.
\item \textsuperscript{76} \textit{Toora Primary Industries} v \textit{North Forest Products} v \textit{Tasman Council} [1997] 103 TASRMPAT (27 May 1997). \textit{LUPAA} does not apply to forest practices in State Forests, because of a specific exclusion attached to the definition of “works”.
\end{itemize}
\end{footnotesize}
and the Forest Practices Code.” It appears that the aim of the latter condition was to provide leverage so that if the operation were to breach the Code, this would amount to a breach of planning consent conditions, an offence under LUPAA punishable on summary conviction.\(^{87}\) Planning authorities are under a statutory obligation to enforce observance of their planning schemes.\(^{88}\) Further compliance with such conditions could be enforced by members of the public who meet the “proper interest” test, in accordance with the civil enforcement provisions of LUPAA.\(^ {89}\)

Decision-makers under LUPAA are obliged to make their decisions in accordance with the objectives of the RMPS, attached in a schedule to the Act.\(^ {90}\) Section 5 states that decision-makers (“any person on whom a function is imposed or a power is conferred”) must “perform the function or exercise the power in such a manner as to further the objectives” of the RMPS. An identical clause is included in EMPCA.\(^ {91}\)

Decision-making by local government under LUPAA, whilst not constituting formal EIA, is an important form of environmental assessment. In determining an application for a permit, a planning authority must “seek to further” the sustainable development objectives of the RMPS, and must “must take into consideration such of the prescribed matters as are relevant to the use or development the subject of the application” in determining permit applications.\(^ {92}\) Decided case reports indicate that councils routinely apply these objectives both as a decision-making aid and as a condition attached to planning approval permits.\(^ {93}\)

A particularly relevant case to the discussion of PNF and local government planning requirements is Dudley v Break O’Day Council (2001), where the RMPAT considered a third-party appeal against the grant of planning permission for a PNF operation.\(^ {94}\) The appeal was partly allowed, with the Tribunal varying the permit granted to exclude the habitat of the threatened Giant Velvet Worm. The Tribunal did not directly refer to the

\(^{87}\) LUPAA, s.63. Toora Primary Industries & North Forest Products v Tasman Council [1997] 103 TasRMPAT (27 May 1997).

\(^{88}\) LUPAA, s.48.

\(^{89}\) LUPAA, s.64.

\(^{90}\) Obviously, if the PNF operation in question is not subject to planning permit requirements then the sustainable development objectives of LUPAA will not apply. Pers.comm., Mr. Michael Stokes, Lecturer, Faculty of Law, Univ. of Tasmania, 16.8.98.

\(^{91}\) Environmental Management and Pollution Control Act 1994 (‘EMPCA’), s.8.

\(^{92}\) LUPAA, s.51(2)(a).

\(^{93}\) e.g., Scheppein v Hobart City Council [1997] 95 TasRMPAT (20 May 1997).

precautionary principle nor the sustainable development objects of the RMPS; however, it decided that both the proposed selective harvesting and plantation operations should not proceed on the basis of the possible impact of the forestry operations on this threatened species. More specifically, the “potential impact” of the plantation, the fact that the chemical use proposed was “possibly detrimental” caused the Tribunal to vary the planning permit.

Hall, a solicitor of the Tasmanian Environmental Defender’s Office (EDO) reads more into the decision, wrote:

The case has set an important planning precedent because it involved application of the precautionary principle, possibly for the first time in Tasmanian environmental litigation; and it is the first Tasmanian case where protection of a threatened species was the determining factor in the outcome of a planning appeal. It thus represents the first definitive determination recognising biodiversity as an important element of the ‘sustainable development’ objectives that underpin Tasmania’s Resource Management and Planning System (RMPS).95

In summary, non-PTR PNF may be subject to local government regulation. Given that there are 101 different local government areas in Tasmania, differing rules potentially apply to PNF across the State subject to planning requirements under these various planning schemes.

Is forestry subject to the objectives of the RMPS?

Decision-makers under LUPAA are obliged to act in accordance with the objectives of the RMPS, which are attached in a schedule to the Act.96 However, FPOs, the FP Board and the FP Tribunal are not persons with functions or duties under LUPAA or under the EMPCA. Therefore the RMPS sustainable development objectives under those Acts do not apply to decision-making under the Forest Practices Act, for example, in relation to the approval of Forest Practices Plans. A similar position exists for Private Forestry Tasmania’s decision-making in relation to declaration of private timber reserves (PTRs) (see below, p.20).

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96 LUPAA, s.5, Sch.1. An identical clause is included in the EMPCA, s.8.
Environmental impact assessment of PNF in Tasmania

In addition to planning controls, it is important to consider briefly the extent to which PNF is subject to environmental impact assessment (‘EIA’) requirements. Tasmania’s EIA provisions are contained within the Environmental Management and Pollution Control Act 1994 (EMPCA). In summary, EIA requirements do not apply to PTRs or publicly-owned forests. It is also highly unlikely in practice that forestry on non-PTR private lands will be subject to EIA requirements, for reasons set out below.

Various forms of environmental assessment are required for the specified categories of proposed ‘environmentally relevant activity’ - being an activity which may cause environmental harm, whether proposed by the private or public sector, in instances where no applicable exemptions prevail.97 ‘Activities’ are classified as either Level 1, 2 or 3. A different assessment process is applicable to each.

Level 1 activities are those activities for which a planning permit is required from local government under LUPAA.98 Whether an activity is considered Level 1 depends on the detail of the planning scheme in question. If the activity is not a Level 1 activity, then no assessment will be required. Areas of private forest not exempted as Private Timber Reserves (below, p.20) may fall within the definition of Level 1 activities if they are considered “an activity which may cause environmental harm”, and they are subject to planning permit requirements.99 Table 4, below, summarises the law.

Level 1 activities are subject to a limited form of environmental assessment, given the obligation of local authorities to take account of sustainable development objectives in their planning approval decision-making.100 A number of RMPAT decisions have upheld Councils’ refusal of planning approval on the basis of their sustainable development strategies or the sustainable development objectives of the legislation.101

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97 EMPCA, s.3(1), 74(1).
98 Level 1 activities are by definition not Level 2 or Level 3 activities. LUPAA, s.3(1) defines ‘permit’ as follows: “any permit, approval or consent required by a planning scheme or special planning order to be issued or given by a municipality in respect of the use or development of any land.”
99 EMPCA, s.3(1).
100 Pers.comm., Prof. Gerry Bates, Faculty of Law, Univ. of Sydney, 16.8.98.
101 Property Tasmania v Dorset Council [1997] 97 TASRMPAT (16 May 1997); D James & Ors v Launceston City Council & Fletcher Constructions [1997] 117 TASRMPAT (3 June 1997) (where it was held that the objectives of sustainable development within LUPA-A did not entail economic considerations overriding other objectives); but compare DC Booth v Break O’Day Council [1996] 111 TASRMPAT (15 May 1996), where appeal against planning consent refusal upheld despite sustainable development objectives.
Level 2 activities are scheduled activities with a potential to cause greater environmental harm, and are automatically subject to EIA requirements, roughly equivalent to the NSW concept of designated development. Requirements for the production of an environmental impact statement (EIS) only attach to Level 2 activities. Private native forestry is not subject to such requirements as it is not listed or scheduled as Level 2 activity in the EMPCA.¹⁰² (The Act lists “Level 2 activities” in Schedule 2, being those industries most likely to cause serious environmental pollution.)

Table 4 Levels of environmental assessment of development in Tasmania

<table>
<thead>
<tr>
<th>Level</th>
<th>Description</th>
<th>Implications</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Level</td>
<td>Not a ‘work’, ‘development’, or ‘use’.</td>
<td>No requirements.</td>
</tr>
<tr>
<td>Level 1</td>
<td>Activities for which a permit is required, under <em>LUPAA</em></td>
<td>No additional requirements unless ‘called in’ (as if Level 2)(^{103})</td>
</tr>
<tr>
<td>Level 2</td>
<td>Activities listed in Sch 2 of <em>EMPCA</em>(^{104})</td>
<td>EIA required.</td>
</tr>
<tr>
<td>Level 3</td>
<td>Activities declared and gazetted under <em>State Policies and Projects Act</em> as ‘Projects of State Significance’(^ {105})</td>
<td>Separate ‘fast-track’ truncated assessment process.</td>
</tr>
</tbody>
</table>

**PRIVATE TIMBER RESERVES**

A key aspect of the law applicable to PNF in Tasmania are provisions for the declaration of ‘private timber reserves’ (‘PTRs’) by Forest Practices Board under Part 2, *FP Act*.\(^{106}\) Any landholder can apply to the Board for declaration of a PTR and need not establish an existing use in order to achieve such a declaration. The aim of PTRs is to provide a form of ‘resource security’ to private forest investors.\(^ {107}\) Farrier and Byron, consultants to the Resources Assessment Commission Inquiry into Forestry (1992) described PTRs as a “special regulatory strategy designed to offer protection to …[forestry] against demands for nature conservation.”\(^ {108}\)

When land has been declared as a PTR, local councils are prevented from requiring development applications for PNF. Declaration of a PTR represents a form of perpetual rezoning - in that the zoning status of a PTR cannot be reviewed during the term of the

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\(^{103}\) *EMPCA*, s.24(1).
\(^{104}\) *EMPCA*, s.3(1).
\(^{105}\) *EMPCA*, s.3(1).
\(^{106}\) Private Forests Tasmania also makes PTR declarations under delegation from the Board.
\(^{107}\) *FP Act*, Schedule 7(h).
PTR, whereas *LUPAA* provides that all other zonings are to be reviewed on a regular and periodic basis.\(^\text{109}\)

As a general rule, *LUPAA* provides that “a planning scheme may regulate or prohibit the use or development of any land.”\(^\text{110}\) However it also provides that planning schemes cannot affect forestry in land declared as a PTR. Thus PTRs are subject to the *Forest Practices Code* but not to local planning schemes made under *LUPAA* \(^\text{111}\) By mid-2002, 1244 PTRs had been approved and were in force covering 37 per cent of Tasmanian private forests.\(^\text{112}\)

The PTR provisions were considered necessary to augment the law of existing uses. The hardwood sawmilling industry has operated on private land in Tasmania since the early nineteenth century.\(^\text{113}\) The existing-use provisions of *LUPAA* state that planning schemes cannot prevent the continuance of any use of land which was in progress prior to the commencement of the scheme.\(^\text{114}\) These provisions are inapplicable if the use is intensified.\(^\text{115}\) They also state that where a use has stopped for more than two years it can no longer be regarded as an existing use.\(^\text{116}\) The amendments to create PTRs were designed to address such shortcomings of the existing use regime to ensure that forestry was better protected. This was necessary given the long term nature of forest management, and the fact that the “use” of land for forestry may not be very obvious. A Private Forests Tasmania officer explained: “The activity on an area of forest, used for forestry purposes, is [often] infrequent and the period between any activity may span decades.”\(^\text{117}\)

There is considerable controversy in Tasmania over the declaration of PTRs.\(^\text{118}\) At its core lies the policy question of whether PNF should be subject to planning controls by local government in the same way as other primary industries, or whether it is

\(^{109}\) *LUPAA*, s.44.

\(^{110}\) *Land Use Planning and Approvals Act 1993*, s.20(2).

\(^{111}\) *LUPAA*, s.20(7)(a). “Nothing in any planning scheme or special planning order affects—(a) the management of land declared as a private timber reserve under the *Forest Practices Act 1985*;”


\(^{114}\) *LUPAA*, s.20(3)(a).

\(^{115}\) *LUPAA*, s.20(6) modifies s.20(3).

\(^{116}\) *LUPAA*, s.20(6).


legitimately entitled to a parallel assessment scheme separate to that applicable to all other developments. Placing PTR forestry in a privileged position, insulating it from the planning laws with which other land-uses must comply, is justified on the basis of providing ‘resource security’ and incentives to investment. It is argued that forestry rights will be of little commercial value without a guarantee that future harvesting will be unrestricted by planning laws. Whilst NSW also has specialised timber harvest guarantee laws, in the form of the Plantations and Reafforestation Act 1999, the difference is that the Tasmanian law applies to all PNF and not just plantation activity.

Part of the reason for the controversy over PTRs relates to the disparity between the extremely limited rights of objection of the public to PTR declarations, and the very generous appeal and compensation provisions available to landholder applicants relating to PNF (see below, p. 34). A landholder can claim compensation where the Board refuses to declare a PTR and that refusal has been appealed unsuccessfully to the FP Tribunal. Between 1985 and April 2002, there were five applications for compensation regarding refusal to register a PTR. No compensation claims had been paid. Until corrective amendments were made to the FP Act in 2002, compensation payments could be made but there was no mechanism in place to secure the protection of the values which had been the reason for the refusal of PTR status. There was no obligation on the owner to protect these environmental values for which s/he had been paid compensation.

Only very limited objections may be made by the public to the declaration of land as a PTR. Standing to object is significantly restricted to ‘prescribed persons’ which include

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119 Gee, D., Stratford, E. (2001) above n 10 ; Interview, Mr. Kim Booth, Deputy Mayor, Meander Valley Council, 29.9.98, by telephone.
120 In NSW, the Plantations and Reafforestation Act 1999 provides a similar regime to insulate accredited timber plantations from the operation of a number of environmental and planning laws.
121 Taylor, P. (1997) Legislative Approaches to Supporting Private Forest Development in Tasmania, Private Forests Tasmania, unpub., 4pp., at p.1. Given that local planning schemes are open to revision, if PNF were exposed to variation in compliance obligations then the investment may be placed at risk, by being either devalued by limitations on harvest. Similar thinking is applied by the NSW Plantations and Reafforestation Act 1999.
122 FP Act, s.8(2).
123 FP Act, s.16(1).
125 The amendments mean that a landowner must enter into a conservation covenant in order to obtain compensation. In fact, the defect went further, as it was theoretically possible for a landowner to obtain compensation for refusal of a PTR to then sell the property, and the next owner to go through the same process, also applying for PTR status and claiming compensation in the event of a refusal. Mr. Lennon MHA, 2nd Reading Speech, 24 April 2002, Forest Practices Amendment (Conservation Covenants) Bill 2002, subsequently enacted.
local government, a State authority, persons with a legal or equitable interest in the land in question or the timber growing on it, and neighbouring landowners within 100m of the boundary of the proposed PTR.\textsuperscript{126} In other words, although recent amendments improved the Act permitting limited objections by neighbours, broad third-party objections are not allowed by the legislation. This stands in contrast to the broad appeal rights applying if the land remains under the jurisdiction of the local planning scheme and \textit{LUPAA}\textsuperscript{129}. Discontent on the part of some local governments over the effects of the PTR regime led to a series of legal challenges.\textsuperscript{127} Declaration of one particular PTR was unsuccessfully challenged by the Meander Council in the FP Tribunal. This was successfully appealed to the Supreme Court in 1998 in \textit{R v Pitt, McCutchan ex parte Meander Valley Council}, a decision that temporarily cast doubt upon the insulation of PTRs from local planning schemes.\textsuperscript{128} The case revolved around the FP Act, s. 8(2)(d) which provides:

8. Grant or refusal of application for declaration of land as private timber reserve…

...(2) An application for a declaration of land as a private timber reserve shall be refused if the Board is satisfied that -

...(d) by virtue of the operation of any Act, the owner of the land is prohibited from establishing forests, or growing or harvesting timber, on the land.

In overturning the decision of the FP Tribunal, Justice Crawford held that:

It seems clear to me that the Tribunal was in error and failed to understand, even under the first planning scheme...that the use of this land for the purposes of forestry was prohibited by the \textit{Land Use Planning and Approvals Act 1993}, unless and until the council gave permission for it to be used for that purpose.\textsuperscript{129}

Crawford J. concluded that Private Forests Tasmania had no jurisdiction to declare the land in question a PTR, as at the time of the declaration, the use of the land for that purpose was prohibited by the local planning scheme.\textsuperscript{130}

Following the Supreme Court decision, proposals were presented for legislation to override the decision, reinstating the conventional understanding of the legal position of PTRs.\textsuperscript{131} This legislation was enacted, inserting new provisions into the \textit{FP Act} stating

\begin{flushright}
\textsuperscript{126} FP Act, s.7(1),(4).
\textsuperscript{128} \textit{R v Pitt, McCutchan ex parte Meander Valley Council}, Supreme Court of Tasmania, 16 March 1998; Environmental Defender’s Office (Tasmania) (1998) “Council Planning Schemes are Relevant When it Comes to Forestry “\textsuperscript{, EDO Newsletter, June, p.1.}
\textsuperscript{130} \textit{R v Pitt, McCutchan ex parte Meander Valley Council}, Supreme Court of Tasmania, 16 March 1998, transcript of reasons for judgement (delivered orally).
\textsuperscript{131} Pers. comm., Kim Booth, Deputy Mayor, Meander Valley Council, 29.9.98; Pers.comm., Evan Boardman, Local Government Association of Tasmania, 22.9.98.
\end{flushright}
that a planning permit requirement in a local planning scheme is not be taken as a prohibition of forestry.\textsuperscript{132}

Another challenge was made to the validity of PTRs on the basis that the Board’s delegations to Private Forests Tasmania to make declarations of PTRs were legally defective. This litigation was forestalled by the government issuing fresh delegations and by retrospectively validating the declarations of PTRs that may have been defective as a result of improper delegation to PFT.\textsuperscript{133}

Another aspect of the legislative framework for PTRs is that the \textit{FP Act} enables regulations to be made to prevent any specified legislation or provisions from applying to PTRs.\textsuperscript{134} At present no such regulations are in force.\textsuperscript{135} A similar provision states that regulations may be made so that in relation to PTRs, any specified legislation or provisions are not to affect the operation of certified FPPs where that plan relates to a PTR.\textsuperscript{136}

The strength of the PTR provisions is illustrated by the fact that decisions of the RMPAT which refuse consent for forestry operations, as in \textit{McDonald v Meander Valley Council},\textsuperscript{137} or alter the terms of permission for it, can be overridden if the forest owner later successfully makes an application for the declaration of a PTR.

\textbf{The Role of Private Forests Tasmania}

A key part of the institutional apparatus involving PNF in Tasmania is Private Forests Tasmania (PFT), a statutory authority created by the \textit{Private Forests Act 1994}, responsible to the Minister for Forests. Its statutory objectives include: “to facilitate and expand the development of the private forest resource in Tasmania in a manner which is consistent with sound forest land management practice…”\textsuperscript{138} One of its key functions is to process

\textsuperscript{134} \textit{FP Act}, s.12(2).
\textsuperscript{136} \textit{FP Act}, s.26.
\textsuperscript{137} \textit{McDonald v Meander Valley Council [2000] TASRMPAT 124}.
applications for PTRs under the *Forest Practices Act* pursuant to a delegation from the FP Board.\footnote{Private Forests Act 1994, s. 6(1)(c).}

There is a substantial level of disputation between PFT and a coalition of local councils, environmental groups and local residents over the further declaration of PTRs. An element of the Strategic Plan of PFT is to actively encourage applications for PTRs.\footnote{Private Forests Tasmania (1996) *Annual Report 1995-6*, p.7.}

A second, important, role of PF Tasmania is in providing regulatory services to the under-resourced small-operator sector of the PNF industry. In order to facilitate compliance with the Code by PNF operations of smaller landowners, PFT employs forest practices officers (FPOs). Given that PFT has a statutory obligation to encourage the development of the PNF industry, including providing financial assistance, the potential exists for FPOs employed by PFT to feel pressure to enforce the Code less than rigorously.\footnote{PFA, ss.26-30.}

**Forestry Rights Registration Act 1990**

The *Forestry Rights Registration Act 1990* (*FRRA*) is another important aspect of the law applying to PNF in Tasmania. It provides for the registration\footnote{Registration under the *Land Titles Act 1980* or the *Registration of Deeds Act 1935*.} of “forestry rights” granted by land owners to other persons.\footnote{*Forestry Rights Registration Act 1990*, s.3. See also *Land Titles Act 1980*, *Registration of Deeds Act 1935*.} Such forestry rights include ownership of trees and/or rights to establish, maintain and harvest trees, as well as carbon sequestration rights (since amendments in 2002).\footnote{Forestry Rights Registration Amendment Act 2002.}

Forestry rights are deemed to be *profits à prendre*, in much the same way as they are defined within NSW law.\footnote{Conveyancing Act 1919 (NSW), s.87A, 88AB, 88EA; Real Property Act 1900, s.46,47 (for Torrens Title land). Butt, P. (1996) *Land Law*, 3rd edition, Law Book Company, Sydney, at pp.461-2.} They do not confer a right to exclusive possession of the land in question.\footnote{Forestry Rights Registration Act 1990, s.5(1).} The effect of the Act is to allow the legal separation of the land from
the timber growing on it. This measure is designed to encourage investment in private forestry, because investors need not purchase land in order to conduct forestry.

The FRRA creates another incentive for investment in PNF by enabling the attachment of restrictive covenants to the title of private land to ensure its dedication to future forestry production, preventing its diversion to other land uses. Thus the Act addresses problems that arise from the long maturation time of forests where there is a high probability of changes in ownership of land. Restrictive covenants protect the interests of owners of profits à prendre against changes of management intention associated with the sale of a property.

**WATER POLLUTION LAW**

The exposure of bare soil to the elements during logging, and the practice of post-logging burning, associated with intensive forestry operations, can cause non-point-source pollution by increasing erosion and hence increasing the sediment load in watercourses. In NSW, water pollution from forestry on public lands is licensed under an Integrated Forestry Operations Approval granted under the FNPE and POEO Acts.

Tasmania does not have a separate system for pollution-control licensing. Instead, these licensing functions are fulfilled by local government under the planning permission system, which is integrated with the EMPCA. In other words, a planning permit has a combined function, also constituting a pollution licence. Forestry within a PTR is not subject to water-pollution controls under EMPCA, because local planning schemes under LUPAA have no application. All private forestry (i.e. including within PTRs) is

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152 The categorisation of activities as Level 1, Level 2, and Level 3 represents a deliberate linking of the planning permit requirements of LUPAA, and the pollution control approach of the EMPC. See also: Ramsay, R.; Rowe, G. (1995) *Environmental Law and Policy in Australia: Text and Materials*, p.531.

subject to water pollution controls contained within the soil and water provisions of the *Forest Practices Code*.

Non-PTR PNF operations may be Level 1 activities, depending on the local planning scheme. Applications are made to the relevant local council and may subsequently be ‘called in’ by, or referred to, the Director of Environmental Management. The pollution control responsibility in this instance is borne by local government which may attach specific related conditions to planning permits. As forestry is not designated as a Level 2 activity (in a schedule to the *EMPCA*), State Government is not considered responsible to control pollution. Such control would only apply if the Board of EMPC required conditions to be included on a planning permit issued by local government to operate a Level 2 activity on a given parcel of land.

Another relevant consideration is the *State Policy on Water Quality Management 1997*, made pursuant to the *State Policies and Projects Act 1994*. This policy is designed to “achieve the sustainable management of Tasmania’s surface water and groundwater resources by protecting or enhancing their qualities while allowing for sustainable development in accordance with the objectives of the RMPS.” An objective is to apply the precautionary principle to actions and outcomes sought under the policy. In relation to non-point-source pollution from forestry operations, the policy simply suggests that operations should be carried out in accordance with the FP Code, whilst having regard to the policy. At this stage, forestry operations are not listed within the policy as a source of diffuse water pollution. Therefore they cannot be dealt with as such.

In the *Diddleum Plains* case (2001), neighbouring landowners sought an injunction against proposed logging for plantation establishment in the Resource Management and Planning Tribunal to enforce the pollution-control provisions of the *Environmental Management and Pollution Control Act (EMPCA)* against forestry operations, claiming that logging and subsequent chemical usage would result in environmental harm in breach of

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156 *State Policy on Water Quality Management 1997*, Cl.5.1.
158 *State Policy on Water Quality Management 1997*, above n 156, cl.34.1
the Act. However, the application was withdrawn because of an undertaking by Forestry Tasmania that logging would not continue on the subject land. This line of argument was considered in greater detail in Dudley.160

The Code makes indirect provision for the mitigation of water pollution by providing some protection for streamside vegetation. The ‘vulnerable land’ classification under the Forest Practices Regulation requires the preparation of FPPs for small-scale logging that would normally be exempt, where land is within 40 metres of a watercourse, 2km upstream of a water supply intake, or upon a slope greater than 26 degrees (i.e.48.8 per cent slope). Some other water-pollution provisions under other legislation appear to apply to PNF but appear not to been implemented in practice.161

Regulation of use of chemicals

Another controversial issue associated with Tasmanian PNF, especially where native forests are to be replaced by plantations, is the use of herbicides (such as atrazine and simazine), and poisons to control mammal predation of seedlings such as ‘1080’ (sodium monofluoroacetate). In Tasmania, control of the use of chemicals is achieved first by registration and approval processes under the ‘Agvet Code’ of Tasmania, and second by placing conditions and controls on use under the Agricultural and Veterinary Chemicals (Control of Use) Act 1996 (Tas).163 In addition, the State Policy on Water Quality Management 1997 made under the SPP Act states that use of chemicals along stream banks for control of pests (including weeds) should where practical be replaced with non-chemical means. Further, where chemical agents are to be used, they must be registered or approved under the Agvet Code of Tasmania and applied in accordance with the Agvet Chemicals Act.

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160 Dudley v Brack O’Day Council, above n 94.
161 EMPCA, s.53 offence of creating an environmental nuisance; restrictions on water pollution in Inland Fisheries Act 1995 s.126(1),(3). Note also Code of Practice for Aerial Spraying and Draft Code of Practice for Ground Spraying applying to application of pesticides.
162 Tasmania is the only state in which 1080 baiting of native species is permitted by law. See: Supreme Court appeal by Gunns against RMPAT ruling requiring them to pay $4000 to an organic farmer to enable erection of a fence to prevent entry of poisoned mammals: Gunns Ltd v Kingborough Council and Stuart Young [2003] TASSC 44 (26 June 2003).
163 State Policy on Water Quality Management 1997 (Tas), Cl. 44.2.
Neither the *FP Act* or Code contain detailed restrictions on the use of specific chemicals with the capacity to kill aquatic life, such as atrazine, within plantations and regrowth forests, other than to suggest that aerial spraying should not be conducted where there is a risk of spray-drift into streamside reserves and to state that responsible persons are to ensure that chemicals do not enter waterbodies. The limitations inherent in the statutory framework for the protection of water supplies from pollution, either by siltation or by the application of chemicals, has encouraged some landowners adjacent to PTRs and other forestry operations on private land, particularly those running organic farming operations concerned about loss of their organic certification status, to seek legal advice about the application of common law remedies such as nuisance. Some recent litigation has sought to restrict the declaration of PTRs partly on the basis that the organic certification of nearby farms would be affected.

**THREATENED SPECIES LAW**

The *Threatened Species Protection Act 1995* (*TSPA*) has the capacity to place a number of environmental protection obligations on private forest owners. Its objectives include ensuring that the “genetic diversity of native flora and fauna is maintained”. To this end, it provides numerous mechanisms including:

- listing of threatened flora and fauna as either endangered, vulnerable or rare;
- land management plans and agreements;
- stop-work orders in the form of Interim Protection Orders (IPOs) applying to private land to protect any listed threatened species; and
- a fund for payment of compensation to landholders adversely affected by IPOs or land-management agreements.

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164 *FP Code* (2000), pp.89-90. Interestingly, despite the existence of provisions for streamside reserves, the Code suggests a number of methods for targeted application of chemicals “next to watercourses”. (p.89)
165 Interview, Ms Susan Gunter, Principal Solicitor, Environment Defender’s Office (Tasmania), Hobart, 6.11.98; *Van Son v Forestry Commission NSW* (1995) 86 LGERA 108 (a successful claim for nuisance against the Commission for pollution of a domestic water supply by siltation).
168 *TSPA*, Part 3, Div. 2, Schedules 3,4,5 contain the lists.
169 *TSPA*, Part 3, Div. 7.
171 *TSPA*, s.44, 45(13).
The TSPA is one of three Tasmanian laws addressing biodiversity protection in forestry. It exists alongside sections of the FP Code addressing threatened species, and the conservation covenant provisions of the National Parks and Wildlife Act 1970 (NPW Act).

It is an offence under the TSPA for a person to knowingly, without a permit take, keep, trade in or process any specimen of a listed taxon of flora or fauna. "Take" is defined to include “kill, injure, catch, damage, destroy and collect". In the past, until certain legislative amendments, this definition would appear to have included incidental habitat-modification as a form of taking. In order to comply with this requirement, where an FPP acknowledged the existence of threatened species, an application for a permit should have been made to the Director of Parks and Wildlife. However, no forestry operators ever applied for a permit, and the PWS failed to take action to ensure that permits were required. In any case, following the threat of legal challenge by the Tasmanian Conservation Trust (TCT) in 2001 to enforce this aspect of the law, the definition of “take” was amended to permit takings of listed threatened species without a permit by persons acting in accordance with a certified FPP, in effect a specialised exemption from permit requirements for forestry. However, it remains possible that where persons are prosecuted for breaches of the FP Act of logging in breach of a certified FPP, or without a plan, they could also be prosecuted for breach of the TSPA, s.51.

The Forest Practices Code and biodiversity conservation

The Forest Practices Code operates in conjunction with the TSPA. Under the Forest Practices Regulations, land inhabited by threatened species is classified as vulnerable land, and as a result exemptions from requirements to prepare forestry plans for small-scale...
production are not available. Where threatened species are present, requirements of the Code creating particular obligations in the course of preparation and execution of FPPs come into play.

The Code provides two main strategies: the application of logging-management prescriptions, and reservation of particularly sensitive areas. The Code contains a general requirement that threatened species be taken into account in the process of devising FPPs. FPOs are required to check the Forest Botany Manuals, the Threatened Fauna Manual for Production Forests (and its 1:25,000 scale maps), and the Threatened Fauna Adviser (a computer database) to discern whether threatened species or inadequately reserved plant communities occur or are likely to occur in the area to be logged. This involves a requirement to assess the area to determine the potential habitat for rare or threatened species. Where a threatened species is present, the FPO must notify the appropriate specialist within the FP Board (“notification”), and obtain an endorsed management prescription for the area and incorporate it into the FPP. Upon notification, the Chief FPO (in practice, delegated FPB botanists and zoologists), must liaise with the Parks and Wildlife Service within DPIWE to determine appropriate management conditions. The staff of the Threatened Species Unit within DPIWE have an opportunity to influence forest practices, as the Code provides that threatened species and communities will be managed according to procedures agreed between the FP Board and DPIWE. The FP Board can amend FPPs lodged for certification by inserting conditions and restrictions to be complied with during logging. It is a function of the Board to “oversee standards for forest practices plans”.

It is now necessary to discuss issues of implementation and effectiveness of threatened species provisions. An initial problem is that measures for habitat protection are largely discretionary. For example, rather than specifying particular exclusion zones, the Code

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179 *Forest Practices Regulations 1997*, r.3(f), 5, provide that an approved FPP is still required for low volume timber harvesting operations (“less than 100 tonnes for each property for each year”) or for firewood logging, when the land is classed as “vulnerable land”. This category includes land that “is inhabited by threatened species within the meaning of the TSPA 1995”.


186 *FP Act*, s.19(1)(c).

187 *FP Act*, s.4C(e).
tends to make general recommendations, as for example: “[d]isturbance to native vegetation in localised environments (such as rocky knolls, swamps, heaths, and stream banks) should be avoided or minimised.”

Pre-logging site-specific surveying is not mandatory. Rather, ‘desktop surveys’ are acceptable. In the Dudley case, it was admitted that the FPB’s site survey took place (in addition to the FPO’s own survey) only because of the pressure of litigation. It is more than possible, in fact likely, that the data contained in the manual is incomplete, particularly for private land. The lack of a requirement for pre-logging surveys compounds this problem. However in some instances, site-specific surveys are conducted by FPB specialists, if they are called out to a particular operation by a FPO.

What happens to FPPs for PNF that have become subject to the notification of FPB threatened species specialists? Recent experience is that approximately 10-20 per cent of PNF operations for which an FPP has been certified are subject to a site survey from FPB botanical or zoological specialists. Even though there may be a large number of requests for advice, only a small proportion of these operations actually become subject to specialised prescriptions from FPB staff. In 1998-99, only 23.4 per cent of the total PNF operations had specialised prescriptions designed by the FP Board zoologists.

Whether or not as a matter of law the FPB and FPOs are bound by the precautionary principle when designing and conducting the forestry operations on non-PTR land, it appears that many participants in the FP System do not consider themselves bound to take a precautionary approach to the design of environmental prescriptions. Even where prescriptions have been recommended by the Forest Practices Board’s specialists, some of these may not be adequate, as there has been little long-term scientific research.

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189 Hall (2001) above n 95.
190 Appendix 11.3 gives detailed information in relation to the proportion of PNF operations that have been subject to site surveying by FPB specialists.
192 Wilkinson, G. (1999) above n 3 at p. 9-10, argues that given the lack of research regarding the efficacy of prescriptions for protection of class 4 streams, the adoption of a precautionary approach would “have an overwhelming effect on the viability of forestry operations over much of the State.”
into the efficacy of prescriptions.\textsuperscript{193} There is no statutory requirement that the prescriptions applied must be up-to-date at the time an FPP is carried out.\textsuperscript{194}

Some PNF operations, particularly those conducted by the larger corporations, have been modified in order to protect threatened species. According to a Private Forests Tasmania FPO, the picture for larger operators is as follows:

Large forest owners, such as North Forest Products (NFP), have an approach to land management that is equivalent to the system adopted on Crown forests. The NFP Surrey Hills area in the North West has been planned to meet the requirements of the Forest Practices Code and has provisions for the protection of an endangered butterfly, trout spawning streams and various historic and archaeology sites.\textsuperscript{193}

In 1999 the majority of operations had generalised management prescriptions imposed (80.7 per cent), or no prescriptions (17.0 per cent), with only 2.27 per cent subject to a combination of prescriptions and exclusions.\textsuperscript{196} A tiny minority have part or total exclusions in the coupe imposed, according to the data available from FPB Annual Reports.\textsuperscript{197} No coupes were subject to total exclusion.\textsuperscript{198}

The option of applying special prescriptions for threatened species protection is “rarely available” when logging is followed by clearing for plantation or agriculture, according to a Forest Practices Board botanist.\textsuperscript{199} In 2000-01 this was the case for more than a quarter of PNF operations, and a year earlier involved more than one-third of PNF.\textsuperscript{200} (Even though situations involving outright vegetation clearance are now covered by the Code

\begin{itemize}
  \item Gibbons, P. & Lindenmayer, D. (1997) “A Review of Prescriptions Employed for Conservation of Hollow Dependent Fauna in Wood Production Forests of Eastern Australia”, in P Hale & D Lamb (eds.), Conservation Outside Nature Reserves (Brisbane: Centre for Conservation Biology, University of Queensland, pp 497-505. Gibbons (1999) found that in NSW the Code applied by State forests was not adequate, so that hollow bearing trees retained were six times less numerous than the rate at which they were being inhabited by hollow dependent fauna: Gibbons, PhD Thesis, ANU, unpub.
  \item In instances where some months elapse between the approval of the Plan and its execution, there are quite frequently improvements on what is often an inadequate scientific understanding of many species. This was a serious problem in relation to design of prescriptions for logging of the habitat of the Mt Arthur burrowing crayfish. See Putt, P. Tasmanian Parliamentary Debates, Hansard, on the Threatened Species Protection Amendment Bill, 20 November 2001.
  \item In 1997-8, 78% of FPPs for private land operations subject to the notification of FPB specialists were modified to include management prescriptions for threatened species protection (In 1998-99, 80%). However, in only 3% of cases was logging excluded from all or part of a logging coupe on the basis of threatened species issues. Tasmanian Forest Practices Board (1998) Annual Report 1997-8, Forest Practices Board, Hobart, Tasmania.
  \item The FPB's 2002 Annual Report does not provide similar information on the extent of application of threatened species management prescriptions.
\end{itemize}
since amendments in 2001 (see below, p.40 ), the question of the application of
prescriptions in the event of plantation establishment is a separate question to that of
whether the Code is applicable.)

**Duty of care and compensation issues**

Compensation provisions apply to private land in relation to threatened species where
requirements for fauna and flora protection exceed the “duty of care” provisions of the
Code. The duty of care of a landowner under the Code is defined as “the fundamental
contribution of the landowner to the conservation of natural and cultural values that are
deemed to be significant under the forest practices system.” The scope of the duty of
care of a landowner has two aspects. The first is reservation of soil and water values to
the standard required by the Code. The second is conservation of other special values
(such as threatened species) at a level equivalent to 5% of the gross area of the property
totally excluded from logging operations, or up to 10% of the property where partial
harvesting of the reserve area is compatible with the protection of values. Achieving
further conservation levels above these thresholds is achieved voluntarily or through
compensation mechanisms. The selection of the 5% threshold appears to be
politically-rather than scientifically-based.

Where proposed forestry operations in an FPP are modified for the purpose of
threatened species protection, the **FP Act** and Code operate in conjunction with the
National Parks and Wildlife Act 1970 (**NPWA**) to create a regime for the payment of
compensation to an “affected owner” of land. The **NPWA** provides in Part V(A) for
the payment of compensation upon entry into a conservation covenant with the Minister,
in circumstances where certification of an FPP has been refused, or has been approved
with amendments for the purpose of protecting a rare or endangered species of flora or
fauna. A landowner who has applied to the FP Board for certification of an FPP,

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directly cause economic loss: interim protection orders, TSPA, s. 45(1), and land management agreements with
private landholders: TSPA, 30(2)(b), 45(1), but these appear not to have been relevant to forestry.
205 NPWA, s. 37A under definition of “affected owner”.

termed an “affected owner”206, who has been affected by amendments to that FPP, is entitled to apply to the relevant Minister for compensation for subsequent related financial losses.207 A landowner in these circumstances is also an “affected owner” if their FPP has been refused wholly or partially on the ground that it would threaten a rare or endangered species of flora or fauna, and where an appeal to the FP Tribunal has been wholly or partially dismissed. In such cases, where the Minister considers it necessary or desirable for a conservation purpose, s/he has the power to enter into a conservation covenant with an affected owner who has applied for compensation.208 Such a covenant may contain requirements for a management plan or the imposition of management conditions upon the land.209 The covenant is registered against the title of the property by the Recorder210 and runs with the land.211 The amount of compensation payable is determined by a Conservation Compensation Committee, and if in dispute, can be subjected to arbitration.212 This committee is empowered to take into account the value of timber on the land, “any government restrictions relating to threatened species of flora and fauna” including restrictions under the Code, and “the likely impact of a conservation covenant”.213 Covenants are enforceable in the sense that it is an offence not to comply with a covenant,214 and that relevant Crown employees have a statutory power of entry and inspection.215

There are a number of limitations to the compensation provisions, as observed by the Public Land Use Commission: “The idea of compensation is entirely consistent with the principles of the ESFM but provision for compensation can, in theory, lead to harvesting or clearing of habitat if the minister responsible for the National Parks and Wildlife Act 1970 refuses or fails to pay compensation.”216

Mention of the compensation provisions is perhaps an abstract discussion, with Parks and Wildlife staff stating that no compensation had been paid for amended FPPs under

206 NPW Act, s.37A.
207 NPW Act, s.37C.
208 NPW Act, S.37B(1). This raises the question of whether forestry can proceed if the Minister does not offer compensation and a covenant.
209 NPW Act s.37B(2)(a).
210 NPW Act, s.37H.
211 NPW Act, s.37G(1)(a).
212 NPW Act, s.37D.
213 NPW Act, s.37D(2)(c)(i),(v),(vii).
214 NPW Act, s.37K.
215 NPW Act, s.37J.
these provisions.\textsuperscript{217} This is because although the compensation provision is in place, funds have not been budgeted to pay compensation; therefore the PWS appears to date to have not recommended actions that would generate a compensation liability.\textsuperscript{218}

**Protection of rare forest types**

Tasmanian forestry legislation itself gives no explicit protection to rare, vulnerable and endangered vegetation communities, or old-growth forests - although some protection is provided by the TSPA, by listing individual threatened species but not ecological communities. The Forest Practices Code refers to these issues but does not set out specific requirements for their protection, merely making advisory recommendations.\textsuperscript{219} It does however set out a requirement that the site be assessed to determine which plant communities are present and whether threatened plant species occur or are likely to occur.\textsuperscript{220} If an FPB botanist is contacted for advice about threatened plant species, they may refer particular parcels of forested land to the Private Forests Reserve Program ("PFRP") for evaluation. Eight per cent of notifications were referred to the program for further investigation in 2002.\textsuperscript{221}

The FPP making-and-approval process takes account only of these priority-vegetation communities on an informal basis, as there is no statutory requirement to avoid logging of these communities. The issue is managed informally through the process of FPOs making notifications for advice to Forest Practices Board specialists.

Issues of rare forest-types were taken up within the Tasmanian RFA, as special provision was made for the establishment of a “Program to Protect CAR Values on Private Land”.\textsuperscript{222} Thirty million dollars was allocated by the Commonwealth to this private forest conservation program.\textsuperscript{223} The objective is to give “priority attention… to protecting rare, vulnerable and endangered vegetation communities, rare and depleted old growth forests

\textsuperscript{217} Interview, Naomi Lawrence, Threatened Species Botanist, Parks and Wildlife Service, Hobart, 6.11.98, in person, at PWS Offices; Tasmanian Public Land Use Commission (1996) above n 1 at 3.

\textsuperscript{218} This interpretation was confirmed in an interview with Interview, Naomi Lawrence, PWS Botanist, Hobart, 6.11.98, in person, at PWS Offices.

\textsuperscript{219} The Code suggests the general principle that “As far as practicable, areas of retained vegetation (including wildlife habitat strips) should include localised features associated with threatened species; species with disjunct or unusual distributions; sites with high species diversity; inadequately reserved communities; forests that have oldgrowth characteristics.” (at p.59).

\textsuperscript{220} FP Code, p.60.


\textsuperscript{223} Commonwealth of Australia & Tasmania (1997) above n 222 at 33.
and... Priority Species” as well as protecting National Estate values on Private Land. A crucial point about the program is that participation was declared to be voluntary. The RFA states that “no non-voluntary instruments will be used to achieve protection of CAR values on Private Land without proper compensation being paid.”

It is questionable whether incentives and a deliberately non-regulatory approach are enough to achieve conservation of these crucial private forest remnants. Even if approached, some landholders will not enter into management or acquisition arrangements, according to the Tasmanian experience with the PFRP. For the 484 properties where the PFRP was interested in securing an agreement, and where negotiations had been completed or concluded at September 2003, only 31.0 per cent were successfully secured, whilst 69 per cent of negotiations failed (47.7 per cent of owners were not interested, and in another 21.3 per cent of cases negotiations could not be secured because either the price or timing was not sufficiently attractive to the owner).

EVALUATION OF TASMANIAN FORESTRY LAW

There are two main schools of thought about the adequacy of the framework for regulating PNF in Tasmania. One is that the Code provides an adequate level of environmental protection, and that a separate process of EIA is not necessary. The other questions the degree to which the Tasmanian PNF sector is insulated from planning controls under the RMPS, and its statutory sustainable development objectives. It is argued that the Code, even where fully adhered to, provides insufficient protection for environmental values for a number of reasons, essentially because it is a forestry code and not an environmental protection code.
Although the Code has been subjected to a number of revisions,\textsuperscript{229} conservation interests have drawn attention to what they see as certain uncorrected defects.\textsuperscript{230} The Code places insufficient emphasis on ensuring ESFM as it does not meet the Montreal Process requirement for statutory provision for conservation of special values because provisions are not aimed at the objective: “maintain or increase the full suite of forest values”. Many of the provisions aimed at environmental protection are merely guidelines or recommendations (expressed as ‘should’) and are not mandatory or prescriptive (‘will’ or ‘must’).\textsuperscript{231} It permits the logging of old-growth forest and permanent removal of rainforest, for example, in the course of plantation establishment.\textsuperscript{232} It has, for example, not taken account of recent scientific literature that has questioned the efficacy of Australian management prescriptions for the conservation of hollow-dependent fauna.\textsuperscript{233} Further, the Code permits environmentally-damaging practices such as clearfelling and cable logging in all but the most extreme circumstances. It permits clearance of native forest for plantation establishment. It permits the use of chemicals with few restrictions.\textsuperscript{234} The Code has a legitimation purpose in that it enables industry to claim that it is regulated under a world-class system, whilst the ecological impact may be considerable.\textsuperscript{235}

**Permanent forest estate**

Within many parts of Tasmania, native forests are being either cleared for plantations, or in a lesser number of instances, cleared for agriculture or subdivision.\textsuperscript{236} This is seemingly at odds with the goal expressed in the National Forest Policy Statement (NFPS) to “maintain an extensive and permanent native forest estate in Australia”.\textsuperscript{237} However the limits the NFPS set on clearing referred to public, not private land – e.g. “further clearing of public native forests for non-forest use or plantation establishment will be avoided or

\textsuperscript{229} FP Act, s.32.


\textsuperscript{232} See: photographs reproduced in Appendix 11.5.


\textsuperscript{234} Pers.comm. Tim Cadman, Native Forest Network, Deloraine, 8.10.98.


\textsuperscript{237} NFPS (1992) at 4.
limited”. There is no Tasmanian legislative requirement to maintain perpetual forest cover on private land. However there are now controls on tree clearing under the FP Act, and the Board must now “monitor and report to the Minister on harvesting, the clearing of trees and reafforestation activity in relation to the maintenance of a permanent forest estate.”

Clearing for plantations

In 2000-01, more than a quarter of PNF logging operations were followed by clearing for plantation establishment or non-forest use. In the previous year, 36 per cent of PNF operations involved this form of forest clearing and removal. These statistics were confirmed by field observations in November 1998, and interviews with industry, government and conservationists which revealed that in Tasmania plantations are often established following the logging and clearing of native forests. Returns from sale of timber from the pre-existing native forests are used to finance the subsequent plantation establishment. It is often more economically-viable to establish plantations on the site of native forest than on sites of cleared agricultural land. International literature suggests that the Tasmanian approach is not unique.

Clearing of streamside reserves and clearing for conversion to agriculture

Until recently, a loophole existed that enabled the logging and clearing of streamside reserves retained under the Code upon completion of the main body of a forestry operation if the owner was converting the land to agricultural use. However, as areas

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238 NFPS (1992) at 21: “Whilst encouraging the retention of native forests, the Governments acknowledge that private forest owners may wish to clear native forest for a range of economic uses. They agree that land clearing can be permitted provided it complies with State and regional conservation and catchment management objectives, relevant planning schemes and legislation.”

239 Tasmania: Public Land Use Commission (1997) above n 216, p.20

240 FP Act, s.17(4)(ba).

241 FP Act, s.4C (fa).


244 The ESFM Expert Working Group’s RFA report stated: “[T]he lack of a mechanism for control of land clearing in circumstances where the FP Act does not apply is of great concern. For example, streamside reserves protected as part of a forest operation governed by a timber harvesting plan are sometimes destroyed after the plan has expired, in order to facilitate agricultural production.” Tasmania: Public Land Use Commission (1997) above n 216, p.20; Bates (1995) above n 204 at 221-2.
reserved from harvesting under a previous FPP are now included within the definition of vulnerable land, these areas are no longer potentially exempt from control and are now regulated under the Code.\textsuperscript{246}

\textit{Self-regulation in Tasmanian forest practices}

It is a statutory objective of the forest practices system, expressed by the \textit{FP Act}, that it be self-funding and self-regulating.\textsuperscript{247} Yet it is a modified form of self-regulation, not pure self-regulation.\textsuperscript{248} The sharing of various aspects of the regulatory task between the private and public sectors is described in Table 5. The self-regulatory aspects are integrated within a broader regulatory framework created by the \textit{FP Act} requiring that FPPs must be devised and certified before forestry may commence.

\textsuperscript{246} The rules addressing clearing of streamside reserves were improved by the \textit{Forest Practices Amendment Act 2001}; see \textit{Hansard}, 1 November 2001 at pp.41-106.
\textsuperscript{247} \textit{FP Act}, ss. 4B, 4E, 37B, Schedule 7(a).
\textsuperscript{248} A senior industry representative argued that industry did not desire full-self regulation, and discounted it as risky and unrealistic. Interview, Ian Whyte, Chief Executive, Forest Industries Association of Tasmania, Hobart, 12.11.98.
<table>
<thead>
<tr>
<th>Regulatory function</th>
<th>Private</th>
<th>Public</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communication of rules</td>
<td>Internal company manuals and use of ISO 14000 EMS in large company operations.</td>
<td>Via FPOs and literature disseminated by Private Forests Tasmania and the Forest Practices Board.</td>
</tr>
<tr>
<td>Administration of rules</td>
<td>Approval of FPPs by FPOs is defined as certification of plans.</td>
<td>FPB has a role in refusal, variation and amendment of FP Plans. (<em>s.19(1), FP Act</em>).</td>
</tr>
<tr>
<td>Approval of operations (Certification of FPPs)</td>
<td>Certification function is often delegated to FPOs.</td>
<td>The FP Board can certify FPPs, but this function is often delegated to FPOs.</td>
</tr>
<tr>
<td>Monitoring compliance</td>
<td>Self-monitoring. When operations are complete, an FPO must complete a certificate of compliance with the FP Code.</td>
<td>(1) Except where offences are alleged by public and others, FP Board has a compliance role. (2) Annual random audit of 15% of FPPs by FP Board under <em>s.4, FP Act</em>.</td>
</tr>
<tr>
<td>Enforcement</td>
<td>FPO must not certify compliance if operations did not conform to the Forest Practices Plan.</td>
<td>Forest Practices Board and Chief FPO are to cause complaints to be made (<em>s.4G, FP Act</em>).</td>
</tr>
<tr>
<td>Adjudication on compliance</td>
<td>FPO under delegation from Forest Practices Board.</td>
<td>Contravention of certified FPP is a summary offence heard in Magistrates Court (<em>s.21(1), FP Act</em>).</td>
</tr>
<tr>
<td>Sanctions</td>
<td>Large company systems may incorporate internal sanctions.</td>
<td>Penalties imposed by Magistrates Court or by Forest Practices Board (fines under <em>s.47B</em> as an alternative to prosecution).</td>
</tr>
<tr>
<td>Appeal function</td>
<td></td>
<td>FP Tribunal hears appeals re granting or refusal of PTRs, re Forest Practices Plans (i.e. amendment, refusal or variation), imposition of <em>s.41</em> notices, and 3 year plans.</td>
</tr>
</tbody>
</table>
The self-regulatory aspect of the system is that companies and private forest owners are entitled to employ or engage their own FPOs to devise and approve their FPPs. Larger firms employ FPOs who are qualified to supervise and inspect forest operations on behalf of the Board - in other words industry employs its own inspectors. Self-regulation means that the company undertaking logging operations has usually engaged the services of an FPO as an employee or consultant under contract. The system was summarised in an interview with the Chief FPO as follows:

GRAHAM DAVIS (Reporter): A Gunns employee working on a Gunns coupe where Gunns wants to log draws up the plan, certifies it and that’s it?
GRAHAM WILKINSON (Chief FPO): That is the responsibility put on industry to operate within the rules.249

Finally, the completion of FPPs is certified by FPOs engaged and employed by industry. These supervisory roles are not carried out by government-employed inspectors, with the exception of a small number of FPOs employed by the FP Board.

Industry-employed FPOs are placed in a difficult position of conflict between loyalty to their employer, and loyalty to the integrity of the system involving an FPO’s responsibility to certify an FPP and also to enforce compliance with the Code. Problems will particularly arise in instances where it is necessary to report serious breaches of the code, or to impose stringent prescriptions for threatened species protection. There is a distinct possibility that such an officer could be ostracised or dismissed, or that the contracts of a consultant FPO are not renewed in the event of insisting upon compliance with the spirit of the code and adequate threatened species protection.250

According to a former FPO employed by the Board, only 3 of approximately 150 FPOs throughout the State are truly independent, drawing wages from the State rather than a company or from contracts. He stated, “The problem is that forest practices officers are often faced with a conflict of interest, as virtually all of them work for the commercial forest industry... Forest practices officers are not independent.”251 The FP Act provides

249 Comments of Mr. Graham Wilkinson, Chief FPO, FP Board to Channel 9 ‘Sunday’ Program, “Tasmanian Fire Sale”, Reporter: Graham Davis, 09/02/2003, 9:00:00 AM. (Transcript).
251 Manning, B. (2003) Transcript of Evidence given to Senate Rural and Regional Affairs and Transport References Committee Inquiry into Plantation Forestry, Wednesday, 8 October 2003, Canberra. (Mr. Bill Manning, former Forest Practices Officer, Tasmanian Forest Practices Board, at p.503.
that it is an offence for a person to lodge a Plan with the Board that is false or misleading, however this is only a summary offence with a maximum penalty of $1000.252

As logging contractors are paid by the tonne, there is a disincentive for FPOs to limit the earnings of these contractors by enforcing prescriptions that would reduce timber volume extracted, particularly in instances where the prescription contains a requirement that work must cease, e.g. in order to report the existence of a threatened species, such as upon discovery of a wedge-tailed eagle’s nest. A key problem is that there is little provision for independent inspection of compliance with FPPs, other than the annual audit of 15 per cent of all FPPs that is performed by the FP Board. Under a self-regulatory system there may be significant disincentives for FPOs to enforce compliance with the code.

Another difficulty is that recommendations of FP Botanists and other Board specialists (e.g. zoologists, archaeologists) may not be taken up by the FPO devising the Plan. One example was the FPP devised for the logging on private land, for plantation establishment, at Reedy Marsh in Central Tasmania. In November 2002 Gunns Ltd submitted a development application to the Meander Valley Council for operations on that land, based on an FPP prepared by two employee FPOs.253 The Plan that was subsequently certified by the same FPOs completely failed to mention the presence on the site of stands of *Eucalyptus ovata*, *E. viminalis* and *E. pauciflora* in spite of written advice from FPB botanists in a Special Values Flora Report which showed that most of the land contained RFA priority-vegetation communities. According to the Chief FPO “there was a major error. A plan was prepared and was lodged that was not a correct plan.”254

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252 *Forest Practices Act*, s.45(1). One penalty unit is presently equal to $100. Section 38 of the Act governs the appointment of forest practices officers. Section 39 provides that the appointment of an FPO may be revoked by the Board on the grounds that an FPO has been negligent or not diligent in performing the duties of an FPO (s.39(3)(a)), but does not provide any related capacity to fine FPOs other than through s.45(1). By comparison, under NSW pollution control law, the penalty for knowingly providing false or misleading information to the EPA is $120,000 for an individual and $250,000 for a corporation: *Protection of the Environment Operations Act 1997* (NSW), s.211.


254 Comments of Mr. Graham Wilkinson, above n 249. According to Alistair Graham of the TCT, above n 249: “We would describe [this] as the smoking gun we've been looking for, for a long time ... We've been hearing anecdotal stories for years now that there is a systematic practice of failing to map forest types which are rare and endangered, because it just complicates decision-making in the forest practices system.”
Under-reporting of threatened species

As we have seen, the incentives to not report or to inadequately address threatened species issues under a self-regulatory system are very powerful. The operation of the Tasmanian system is premised upon the accuracy of the information presented in the FPP by the FPO. However there are strong incentives for FPOs to under-report the ecological richness or significance of the site in question.

This was illustrated in a recent planning-appeal decision *Dudley v Break O’Day Council* (2001), which revealed an instance of serious failure by an FPO to identify vegetation of significance within an FPP. In *Dudley*, the Resource Management and Planning Appeal Tribunal partly allowed a third-party appeal against the grant of planning permission for a PNF operation. The FPO concerned had granted his employer firm consent for PNF to proceed. Despite recognising that the coupe fell within the known range of the rare giant velvet worm and the endangered blind velvet worm, the FPO had not included any prescriptions for their protection within the Forest Practices Plan. Further, the FPO initially failed to carry out an adequate flora survey and did not detect a stand of rare *Eucalyptus Brookeriana* which had conservation priority under the Tasmanian RFA.

This case alerts one to the possibility of FPOs failing to report and map under-reserved vegetation communities. In a separate incident, two FPOs were suspended by the FP Board temporarily, it is understood, for wilful failure to map under-represented forest types, on the basis that if endangered forest types were mapped the FPP would not have been eligible for certification.

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255 *Dudley v Break O’Day Council*, above n 94.
256 *Dudley v Break O’Day Council*, above n 94.
257 *Tasmanipatus barretti*, rare, and *Tasmanipatus anophthalmus*, endangered.
259 In its judgment, the RMPAT varied the permit to exclude the habitat of the threatened Giant Velvet Worm and restrict the proposed selective harvesting and plantation operations.
260 The annual audit does check for whether under-represented forest communities were allowed to be logged. However this is done in a roundabout way: “If identified..., have the communities been protected?”, rather than asking “Is an RFA priority vegetation community present on the site?”; FPP Audit Form in FPB (2002) *Annual Report 2001-2002*, p.63, Question 94.
There is a need for regulation to incorporate a role for expert biodiversity agencies, so that the conservation requirements of threatened species are taken into account.262 Otherwise, persons with inadequate training, knowledge and resources will be assigned the task of identifying, reporting and preserving threatened species when often it is not in their economic interest to do so. In such circumstances, unless there is a countervailing offer of a stewardship payment for landholders who conserve threatened species habitat, self-regulation is virtually guaranteed to fail, at least from a biodiversity-preservation perspective.

Another issue relates to deficiencies in the preparation of FPPs. One council reported that an incident of illegal land-clearing arose because a plantation proposal straddled two local government areas, and a declared PTR applied only to land within one LGA because the FPP listed only one of the LGAs involved. As a result, clearing within the other 200ha of the site was illegal. A Council committee reported that: “Council staff have a concern that if this application is any guide, the concept of self-regulation within the forestry industry is not performing sufficiently well. No less than 5 amendments to the FPP have been made, there have been basic inaccuracies in the FPP relating to which local government area is affected, which properties are within the forest coupe…”263

Nevertheless it is not suggested that the FP System in Tasmania is entirely problematic. There are a number of indicators suggesting an intention to exert control over, or at least to punish, inadequate forestry practices on private land. Firstly, a number of FPPs are refused approval by the FP Board annually, and details of these refusals can be gleaned from the occasional appeal against such refusal to the Forest Practices Tribunal.264

262 On this basis conservationists recommended that the responsibility for mapping rare forest types be transferred to DPWIE. Graham, A. (2003) above n 261.
ENFORCEMENT

There are some admirable features of the institutional structure for PNF regulation in Tasmania, at least when compared with NSW. These include statutory enforcement officers and regulation of the entire timber supply chain (see below). The FP Act places a statutory obligation on the FP Board to monitor the compliance of industry with both the FP Act and Code.\textsuperscript{265} The Board is required to commence prosecutions for breaches against the Act, through the Chief FPO.\textsuperscript{266} As an alternative to prosecution, the Board has the option of imposing a fine “equal, or approximately equal, to twice the amount required to make good any damage done or any loss incurred by reason of the commission of an offence” under the Act.\textsuperscript{267}

Tasmania has a more detailed enforcement system relating to PNF than NSW. This includes a highly-developed system of warnings and suspensions of FPOs for offences such as approval of a deficient or, even potentially misleading, FPP.\textsuperscript{268} Forest Practices Officers are appointed by the Forest Practices Board, and FPOs may have their authorisation revoked by the Board on the grounds of negligence, lack of diligence in performing their duties, if convicted of offences against the FP Act\textsuperscript{269} or for approving a substantially flawed FPP.\textsuperscript{270}

Regulation of supply chain

The Tasmanian FP system has an inbuilt advantage in terms of ensuring compliance as it regulates all aspects of the timber supply chain including the land owner, logging contractor and timber processor. It does this by controlling forestry undertaken by persons deemed to be a “responsible person”. This includes a person carrying out (or causing to be carried out) forest practices, a timber processor, the owner of the land or a person to whom the owner has formally, under seal, assigned his or her

\begin{itemize}
\item \textsuperscript{265} FP Act, s.4G(a).
\item \textsuperscript{266} FP Act s.4G(b), s.39A.
\item \textsuperscript{267} FP Act, s.47B, as an alternative to prosecution for offences under ss.17(4) (carry out or allow operations without certified FPP), 17(5) (timber purchaser acquiring timber produced without a certified FPP), 21(3) (failure to comply with FPP or contravention of FPP), 21(3) (failure to comply with restocking requirements), 41(5) (failure to comply with a make-good notice), 42(5) (failure to comply with a make-good notice confirmed by the FP Tribunal).
\item \textsuperscript{269} FP Act, s.39(3).
\item \textsuperscript{270} FP Act, s.39(3); Chief Forest Practices Officer (1994) above n 268 at p.6.
\end{itemize}
responsibilities. In practice, FPPs are countersigned by the land owner, logging contractor, and the buyer of the timber.

The Act creates an offence of harvesting timber or causing or allowing timber to be harvested without a certified FPP in place. The Act provides for vicarious liability of principals for the actions of their agents or employees. In this manner, land owners may be found liable for environmental offences (such as logging without an approved FPP) committed by contractors on their land. A defence of due diligence is available.

In addition, timber processors must not purchase or acquire timber that has been harvested from land without a certified FPP. It is also an offence for timber processors to cause forest practices to be carried out in contravention of a certified FPP. In Arnold, a timber processor was convicted of offences against this provision and fined $10,000 on appeal. Underwood J observed that:

> The Act … thrusts an onus on timber processors to play their part in maintaining forestry environment values by refusing to accept timber that has been taken without due regard having been given to those values as reflected in the legislation and the Forest Practices Code.

Elsewhere, his Honour explained that the miller had an obligation “to put in place an effective system to ensure that each log that came into his mill had been harvested from land in respect of which there was a forest harvesting plan.”

**Enforcement provisions and their application**

Enforcement of the Code is the responsibility of designated Forest Practices Officers, overseen by a statutorily-appointed Chief Forest Practices Officer. Ensuring compliance with the Code is assisted by specialised FPOs (Inspecting), rather than FPOs (Planning) - also appointed by the Board - who have statutory powers of entry and to

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271 FP A, s.17(1).
273 This offence is punishable by a fine not exceeding 150 penalty units.
274 FP A, s.47C(1).
275 Chief Forest Practices Officer (1994) above n 268, at p.34.
276 FP A, s.47C(2).
277 FP A, s.17(5).
278 FP A, s.21(1)(b)
279 Witte v B. Arnold, Supreme Court Tasmania, No.A84/1996. The previous penalty imposed was a probation order.
280 Witte v Arnold, per Underwood J at par 17.
281 Witte v Arnold, per Underwood J at par 23.
282 FP A, s.39A.
283 FP A, s.38, 39.
issue notices.\textsuperscript{284} Offence provisions are contained within the \textit{FP Act} rather than the Code.\textsuperscript{285} The primary offences are harvesting without a certified FPP,\textsuperscript{286} and harvesting in contravention of a certified FPP.\textsuperscript{287} These are summary offences, but, importantly, the Act is drafted so that offences need only be proved on the balance of probabilities.\textsuperscript{288}

The \textit{FP Act} provides a number of enforcement mechanisms – notices,\textsuperscript{289} fines imposed by the Board,\textsuperscript{290} and prosecution leading to fines.\textsuperscript{291} The maximum penalty is $15,000 for harvesting without a certified FPP and $10,000 for harvesting in contravention of a certified FPP, amounts considerably lower than the maximum penalty for unauthorised vegetation clearance in NSW.\textsuperscript{292} The Act contains provisions allowing a court to impose orders recovering the cost of remediating damage done, or to remedy any other loss.\textsuperscript{293} Another compliance tool is the power of the Board to revoke the operation of an approved FPP, “for any reason”, thus providing leverage to regulate logging at all times.\textsuperscript{294}

The PNF sector is the most problematic forestry sector according to the \textit{Annual Reports} of the FPB. In particular the small-sized or ‘independent’ sector of the PNF industry is particularly problematic as far as compliance with the Code is concerned.\textsuperscript{295} The Public Land Use Commission (PLUC) wrote: “The Forest Practices Board acknowledges that self-regulation by a small number of independent operators and some private forest owners has not been satisfactory. A disproportionate amount of time is spent dealing with problems arising from this situation.”\textsuperscript{296} It is apparent from \textit{Annual Reports} of the Board that the majority of enforcement action, particularly prosecutions and fines, initiated by the FP Board are against small, independent operators on privately-owned

\begin{itemize}
\item \textit{FP Act}, s.39A.
\item \textit{FP Act}, s.30 of the \textit{FP Act}. It does not have the character of a statutory rule or a regulation, and it is unlikely that the text of the Code itself would provide grounds for action in the event of illegality. However the \textit{FP Act} makes extensive references to the Code and obligations to comply with it. Offence provisions are contained within the \textit{FP Act} rather than the Code.
\item An offence against \textit{FP Act}, s.17(4)(b).
\item \textit{FP Act}, s.21(1).
\item \textit{FP Act}, s.21(1A).
\item \textit{FP Act}, s.41.
\item \textit{FP Act}, s.47B.
\item \textit{FP Act}, s.47B.
\item \textit{FP Act}, s.17(4), s.41(5). One penalty unit was $100 at the time of writing in February 2003.
\item \textit{FP Act}, s.47A.
\item \textit{FP Act}, s.24A.
\item However, Manning’s evidence to the Senate (2003) (above n 251) indicates a view that performance by Forestry Tasmania on public land was not perhaps worse than performance on private land, at least by some larger firms on private land.
\item PLUC (1997) above n 216, Chapter 4: “Monitoring and Compliance”, at p.102.
\end{itemize}
land. For example, all four of the court actions commenced by the FPB during 1997-1998 were against independent private-property operators. Nevertheless, there has been some action against larger firms involved in PNF. In 2002, the largest penalty ever imposed by the FP Board of $50,000 was imposed on Gunns Ltd for serious erosion arising from poor road-building practices on private land.

Enforcement statistics show that notices are the most commonly-used method of enforcement, apart from informal negotiation. Graham Wilkinson, Chief FPO, argued that: “alternatives to prosecution are often the most effective tools for enforcement of a forest practices system”, emphasising “corrective action” rather than punitive action.

During the study period (1997-2002), there was greater prosecution and enforcement activity in Tasmania in relation to PNF than in NSW, with a total of 38 notices, 3 fines and 9 prosecutions commenced in relation to PNF (Table 6). Nevertheless, there was also a tendency to avoid imposing fines and commencing prosecutions, rather a preference for either no penalty, a warning letter or notices to make good.

### Table 6 Enforcement action taken by Forest Practices Board by Type (all land tenures)

<table>
<thead>
<tr>
<th>Enforcement action taken</th>
<th>2001-02</th>
<th>2000-01</th>
<th>99-00</th>
<th>98-99</th>
<th>97-98</th>
<th>96-97</th>
<th>95-96</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Breach</td>
<td>21</td>
<td>48</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minor Breach, no serious environmental harm</td>
<td>19</td>
<td>34</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Notices issued</td>
<td>11</td>
<td>10</td>
<td>4</td>
<td>18</td>
<td>21</td>
<td>34</td>
<td>38</td>
</tr>
<tr>
<td>Fines imposed by the Board</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Complaints laid through DPP</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>5</td>
<td>6</td>
<td>2</td>
<td>4</td>
</tr>
</tbody>
</table>

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Amendments to the *FP Act* in 1999 introduced a requirement for post-harvesting lodgement of Certificates of Compliance with the terms of an FPP.\(^{303}\) This is certification by an FPO upon expiry of a Plan, that forestry operations were carried out in accordance with the Plan and the Code. This compliance mechanism was introduced, according to the FPB, on the basis of the poor record of performance of ‘independent’ private operations in Tasmania.\(^{304}\) However according to the Board, the level of compliance with the requirement has been “very disappointing”, with one in five independent private-property operations not even lodging a certificate during 2001-2002.\(^{305}\) In 2001, only 32 per cent operators who had FPPs approved prior to 1 July 99 lodged a certificate. The proportion for operations approved after that date was 47 per cent.\(^{306}\)

A full picture of the operation of the FP System requires mention of recent allegations made before a committee of the Commonwealth Senate by a former FPO employee of the FPB regarding defects in the system of self-regulation. One of the points made concerned the fact that the FP Board only ever receives a copy of the cover page of FP Plans, and not the entire text of the plan concerned.\(^{307}\) Therefore, according to the former officer, “It is relatively easy for a forest practices plan to be altered after being approved… The full forest practices plan is held by the person—who usually in the logging company—who drew it up and approved it.”\(^{308}\) The former employee alleged that FPPs

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\(^{304}\) The independent PNF sector is consistently identified as having “continuing deficiencies in the degree of self-regulation for operations”. Forest Practices Board Tasmania (1999) *Annual Report 1998-99*, at 8. The compliance certification approach has also been successfully applied in the pollution control context in NSW, where a system of self-monitoring of licensees is in place. POEO Act 1997 (NSW), s.65. It is an offence to supply to the regulatory body, a certificate of compliance with conditions of a pollution control licence which is false or misleading in a material particular, and the privilege against self-incrimination does not apply : s.65(5).


\(^{308}\) Manning (2003) above n 251 at 524: “I will give you an example. You would get a member of the public ring up and complain about a particular coupe or something that was happening on private property, state forest or wherever. In Launceston, where I was, I would ring them up in Hobart and say, ‘Have you got a cover page for this coupe?’ I would say where it was. One of the secretaries there would hunt around through the pile of a thousand plan face pages that we get a year—there are about 1,000 coupes logged—and might find that particular one. Then I
were frequently breached, and in some cases, the plans were amended afterwards to legitimise the breaches which had occurred. It was further alleged that such amendments had occurred with the concurrence of the Chief Forest Practices Officer.\(^{309}\)

There is evidence that the nature of the Tasmanian system of self-regulation, and the membership of industry staff on the Forest Practices Board may have compromised the integrity of the regulator. It was alleged that in two instances the Chief FPO failed to act upon the results of auditing of compliance with fauna-protection provisions by FPB staff which found 80 breaches in coupes audited, so that logging could proceed uninterrupted, to the extent that the deadline for prosecution expired.\(^{310}\)

Conservationists have argued that the self-regulatory system employed in Tasmania is under threat from undue influence by the forest industry. This is partly because of the funding for the FP Board received from industry.\(^{311}\) The Tasmanian Conservation Trust (TCT) suggested that “[t]he FP Act and its attendant Code and PTRs should be replaced with a State Environmental Protection Agency, serviced by the Department of Environment and Land Management.”\(^{312}\)

*The annual audit of FPPs*

A key safeguard applied by the FP Board to measure compliance with the Code is an annual audit of 15 per cent of all FPPs as a means of reviewing the extent of compliance. The audit results are a measure of the quality standards set by the Board, rather than an

\(^{309}\) Manning (2003) above n 251 at 524.

\(^{310}\) Manning (2003) above n 251 at 505: “The Chief Forest Practices Officer had instructed the zoologist of the Forest Practices Board to delay reports of alleged breaches to allow logging activity to go ahead. In 2000-01 I carried out a State-wide audit of the forest practices plans for compliance with fauna protection provisions. Across the state I found 80-plus breaches in the 40 per cent of the coupes which I audited. Sixty per cent of the coupes were not audited because they did not have endangered species within their boundaries.” “…Why did the Chief Forest Practices Officer instruct his subordinates not to make him aware of the breaches which occurred in 80-plus forest practices plans until time had elapsed for their prosecution?” (p.506) Manning stated: “I took all relevant documentation concerning my case about breaches of the Forest Practices Act to the Attorney-General. I expected him to uphold the Forest Practices Act and refer the failures of the Forest Practices Board to the Department of Public Prosecution. Instead, he held on to the documents for six months and took no action other than to hand them to the former chief executive officer of the Forest Industries Association of Tasmania and now secretary of the Department of Infrastructure, Energy and the Resources—the same department overseen by the deputy premier and minister for forests. The only action taken by the department secretary was to remove me from my role.” (p.506).


\(^{312}\) Tasmania–Commonwealth Joint Regional Forest Agreement Steering Committee (1997) above n 8 at 158.
indicator of compliance *per se*. The Board has set a performance target for all audited elements to be at or above a rating of 85 per cent. In 2002 the audit showed that, collectively, independent PP operations, on average, did not meet the target for streamside reserves and cultural heritage, and only just met the standard for fauna protection and FPP quality.

The audit has been criticised in several regards. Firstly the audit performed does not meet the conventional definition of audit, which involves independent or objective third-party verification and checking of data. Secondly, the audit can be criticised on the basis that it is not sufficiently independent of the FP Board, and that the staff who conduct the audit have no formal qualifications in environmental auditing and are too closely linked to the timber industry.

Thirdly, it is said that the audit schedule is structured to give a misleading impression of higher-quality results than occurred in practice as no negative scores are attached to non-compliant events. According to a former senior FPO:

> The system under which the Forest Practices Board is audited is, I believe, fraudulent and designed to give a glowing report which misleads the parliament and public alike. There are 13 sections in the audit form and points are allotted to each section such that the total equals 100 points or 100 per cent. However, the form is designed in such a way that one could have an operation which clear-felled the streamside reserves of the Franklin River for a kilometre but, as long as the forest practices plan was clear in other areas, could still maintain an audited rate of 90 per cent. In other words, there is no negative weighting for environmental damage.

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314 Each plan is assessed for its performance against 124 questions. An indicative percentage score from 1-5 is assigned to the audited plan for each question where: 95%-100% compliance = 1; 71-94% compliance = 2. (FPB (2002) *Annual Report 2001-2002*, p.59. The rating is calculated as the proportion of the sample which contains a score of 1 or 2. (FPB (2002), p.70).
315 The area of the impacts of PNF on both indigenous and European cultural heritage is an important one in Tasmania but has been excluded from this study by a desire to constrain the scope of research. In Tasmania, controversy has recently arisen over plans for logging of private property containing evidence of sites of the first contact between French explorers and Aborigines in 1792 and 1793 at Recherche Bay on the Far South Coast: Altman, C. (2003) “The French Connection”, *The Weekend Australian*, 15-16 February, pp.R4-6.
316 FPB (2002) *Annual Report 2001-2002*, p.21, Figure 1(b).
317 An environmental audit can be defined as: “A management tool comprising a systematic, documented, periodic and objective evaluation of how well a project, organisation or equipment is performing with the aim of helping to safeguard the environment.” European Commission (1999) *Integrating Environmental Concerns Into Development And Economic Cooperation*, Brussels.
318 “The Forest Practices Board… has complete control over its own audit, using compromised, industry friendly forestry practices officers who have no qualifications in environmental auditing.” Manning, above n 251, at p.505. Two FPOs were employed for the audit in 2002, one from Private Forests Tasmania, and the other an independent consultant. (FPB (2002) *Annual Report 2001-2002*, p.19).
319 Manning, above n 251, p.504.
The audit function was also criticised by the Independent Panel’s review of the Soil and Water provisions of the FP Code. On the other hand, it was largely given the all-clear by another review of its audit protocols during 2001/2002. The theoretical literature on environmental auditing suggests that a viable system of audited self-regulation must include NGO and third-party involvement in enforcement.

Yet the Tasmanian system deliberately excludes third-party participation, by means of FOI exclusions and by the removal of most third-party appeal rights regarding approval of FPPs and declaration of PTRs. The lack of third-party standing provisions denies the public access to the courts to bring actions seeking enforcement of the Code. The FP Board can receive complaints, but the public has no statutory right to bring enforcement proceedings in the FP Tribunal. On this basis it cannot meet tests set out in the theoretical literature for an effective self-regulation system.

CONCLUSION

Tasmania has a detailed and unified system of forestry regulation in the form of the Forest Practices Act 1985 and Code which applies across all tenures to include all but the smallest-scale PNF activities. This is a significant advance on the complex and fragmented NSW regime with its open-ended exemptions. Other positive aspects of the Tasmanian system include the consistency of standards for regulation of PNF with those for public forestry, strict limits on exemptions for PNF, and regulation of the entire timber-supply chain. The fact that the Tasmanian FP Code applies across all land tenures gives those enforcing it a greater mandate with which to argue that it be respected, as PNF is not seen as having been singled out for ‘special treatment’.

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321 Mr. Clynt Wells, a forestry/environmental audit consultant with national and international experience, undertook the review. He found that “audit procedures that follow the normally accepted protocols for an environmental audit, and a sampling percent that exceeds the level commonly accepted for general audits”; but also found there was “a need for special or appropriately stratified audits to reliably assess special issues”: FPB (2002) Annual Report 2001-2002, p.19.
323 Freedom of Information Act 1991 (Tas), s.32A effectively exempts the Forestry Corporation (Forestry Tasmania) and Private Forests Tasmania from the Act, except in relation to personal information.
325 One problem is that FPPs and data used to compile them are neither centrally registered nor located. Only a cover-sheet can be obtained from the FPB.
Still, there are a number of serious deficiencies in the Tasmanian approach. These suggest that it does not represent an ideal model for reform of PNF law in New South Wales. These difficulties relate to the lack of ESFM obligations, the deleterious consequences for compliance associated with self-regulation, and the lack of transparency flowing from exemptions from FOI and limits on appeal rights. The difficulty faced by administrators of the Tasmanian system in improving standards in the PNF industry under such a regime are evident in the research findings that the PNF sector - particularly the small-sized or ‘independent’ sector of the PNF industry - is the most problematic forestry sector as far as as far as compliance with the Code is concerned according to the Annual Reports of the FPB.\(^{326}\)

The first difficulty is the lack of sufficient specific obligations within the FP System to ensure ESFM. The Tasmanian Code does not amount to a Code for ecological management of forests. It permits clearfelling and replacement of native forests with plantation monocultures. During the study period this was a major component of PNF activity. Even with 100 per cent compliance with the Code, major ecological questions will remain about the impacts of intensive forestry (particularly clearfelling and cable logging on steep slopes). The Code is biased towards timber production objectives, and appears to take insufficient account of ecological impacts such as destruction of habitat (e.g. tree-bearing hollows).

Secondly, it is evident that other Tasmanian laws do not exert sufficient control over PNF in order to achieve the overall objective of ESFM. This is particularly due to the fact that forestry regulation has been excised from Tasmania’s broader environmental law framework, the RMPS. The sustainable-development objectives applicable to other industries, including the precautionary principle, are not applicable to most aspects of forestry operations. This anomaly cannot be explained away by the need for specialised regulation of forestry. Perhaps the most controversial aspect of this insulation from the RMPS concerns the application of provisions for the declaration of PTRs under the PF Act. The question of whether or not private forests should be subject to land-use planning controls applicable elsewhere under LUPAA, and the question of inadequate public-appeal rights, remain important.

\(^{326}\) However, Manning’s evidence to the Senate (2003) (above n 251) indicates a view that performance by Forestry Tasmania on public land was not perhaps worse than performance on private land, at least by some larger firms on private land.
The third major problem with the Tasmanian approach to regulating PNF stems from the selection of self-regulatory approach. These issues have been documented above, but briefly, systems of self-regulation face the same considerable practical difficulties in relation to monitoring and auditing of PNF as the regulatory approach, and in fact may be more prone to regulatory failure. One cannot avoid the fact that an expansion in the application of environmental laws will result in a decrease in timber volumes extracted. Without a dramatic shift to greater value-added processing of timber felled, there is a tension between environmental protection objectives and the profit maximisation objectives of companies involved in PNF.  

The self-regulation approach in Tasmania does not contain sufficient safeguards or measures to counteract the considerable incentives to under-report threatened species issues. This was illustrated in *Dudley v Break O'Day Council* (2001), (the ‘giant velvet worm case’) in the RMPAT, which revealed failures to include threatened species prescriptions and failure to detect rare forest types which had conservation priority under the RFA. *Dudley* illustrates the need for regulation to grant expert biodiversity agencies a role in the approvals process. Otherwise persons with inadequate training, knowledge and resources will be left the primary responsibility for detecting, identifying, and reporting threatened species, when it is usually not in their economic interest to do so.

When combined with the existing statutory secrecy provisions, the system of self-regulation creates an environment in which external review, evaluation and critique are unwelcome, and creates conditions in which it is possible to turn a blind eye to breaches of the Act and Code. There may however be some consolation for the reader in learning that the data available on the enforcement of Tasmanian environmental law by the FP Board, when compared to the limited and scattered data set on the enforcement of NSW environmental laws relating to PNF, indicates at least a greater level of enforcement activity in relation to PNF in Tasmania than in NSW. It is apparent that virtually no prosecutions have taken place during the study period in NSW for offences relating to

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328 *Dudley v Break O'Day Council*, above n 94.

329 *Freedom of Information Act 1991* (Tas), s.32A(a),(b) exempting Private Forests Tasmania and Forestry Tasmania from the Act.
breach of threatened species protection laws (see: p.343), pollution-control laws (see: p.306), native-vegetation protection laws (see: p.243) or environmental impact-assessment laws (see: p.298), in the PNF industry.

The Tasmanian FPS is characterised by a lack of transparency, narrow appeal rights, and potential for conflicts of interest. The audit provisions, which might have kept a check on the operation of the system, are insufficient and in some respects unsatisfactory. At the core of problem is the application of self-regulation in an environment where profits are at stake. There is some evidence that the Tasmanian system is unreliable in protecting the full range of forest values, as required by the Montreal Process criteria for ESFM.

Chapter Twelve considers a number of options for law reform to ensure ESFM in the private forest sector in NSW. Aspects of the Tasmanian approach will be considered in that chapter for the purposes of comparison.
Chapter Twelve

LAW REFORM:
EVALUATION AND RECOMMENDATIONS

INTRODUCTION

This chapter suggests and evaluates options for law reform to improve the ecological sustainability of PNF in NSW. The chapter is intended as a general review of possible legal frameworks for PNF. A comparison of approaches taken in NSW (Part Two), and Tasmania (Part Three) forms the basis for review of models for reform of the NSW legislative and institutional framework.

Before commencing that discussion it is necessary to reveal the main premise underlying the analysis and recommendations in this chapter. It is that if conventional or ‘command’ regulation is retained as part of the overall policy response, one must ask how existing legislation can be improved. Part Two described and documented significant regulatory failures of the legislative regime governing PNF in NSW. Various loopholes, exemption clauses and shortcomings of the law itself have caused some of the regulatory failures. Other failures were the result of administrative shortcomings and others arose as a result of enforcement deficits.

One group of observers may conclude that such findings suggest a need to reject conventional regulation in this context, and to replace it with other instruments such as self-regulation and voluntary codes of practice. On the basis of a number of arguments, including the need for adherence to the ‘precautionary principle’ in order to achieve ESFM, it is argued that conventional regulation will remain an essential part of the policy landscape for PNF regardless of whether other measures are also applied in this context. On that basis, it is rational to consider how to improve existing legislation.

The most powerful reason for law reform is that without an adequate legal framework, high-conservation-value private forests will continue to be logged without assessment, or if they are assessed, without the application of adequate environmental protection prescriptions. Government policy commitments to ESFM made in the RFAs and the NFPS will not be met. If the necessary program of law reform is not completed, it is
likely that defects in the legislative framework for PNF will continue to make legislative implementation and enforcement tasks difficult.

Criteria for assessment of legislative frameworks

Chapter Five briefly presented a number of criteria by which the contribution of legislative frameworks towards ESFM can be assessed. These criteria were derived from a number of sources including national policy statements, the soft international law relating to forestry including the Montreal Process, and the academic literature. They enable us to ask whether a given statutory framework requires the adoption of ESFM practices.

Five primary criteria for ESFM on private land were identified in that chapter. These are:

- adherence to ESD principles including the ‘precautionary principle’;
- an adequate institutional framework;
- provision for conservation of special values i.e. ‘maintain or increase the full suite of forest values’;
- adequate compliance and enforcement provisions; and
- provision for public participation.

With ‘best practice’ regulation as a criterion of ESFM, it is essential to identify its constituent parts, otherwise it remains a self-referential objective. This task has not yet been adequately undertaken by government in NSW in relation to PNF.

Characteristics of the NSW Regulatory Framework

With private forests less in the eye of the government and the community than public forests, and historically surrounded by community ignorance and agency inertia, the law

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2 These were identified as important elements of mechanisms for conservation on private forested land in Commonwealth of Australia and State of NSW (2000) Regional Forest Agreement for North East NSW (Upper N-E), March 2000, Attachment 2, Clause 4, p.70.
4 The two exceptions are an expert committee’s review of questions of ESFM in NSW forestry undertaken during the RFA process, and the Smith report (the recommendations of which were shelved and largely ignored): Independent Expert Working Group (1998) Assessment of management systems and processes for achieving ecologically sustainable forest management in NSW, A report undertaken for the NSW CRA/RFA Steering Committee; Smith, A. (1999) Guidelines for Application of Native Vegetation Conservation Act 1997 Exemption to Sustainable Forestry on Private Lands in NSW, a report to the DLWC by Setscan Pty Ltd, Armidale.
applicable to PNF in NSW has been shaped less by controversy and more by inaction. Surrounding PNF has been what is best characterised as the uncoordinated, incremental growth of a legislative scrub – dense in some places, patchy in others.\(^5\)

In 1998 the Independent Expert Working Group on ESFM, appointed to examine NSW law and policy during the RFA process, reached certain conclusions about the unsuitability of NSW law for ESFM. That report stated that: “[c]urrent processes for ensuring ecologically sustainable management of private forests are poorly developed”.\(^6\)

There are several reasons for this. Firstly, the law in NSW regulating PNF is not part of a unified system of forestry regulation applying across all land tenures. NSW has three different tenure- and activity-specific legal regimes applicable to forestry: in State Forests (under the *Forestry Act 1916*, *Forestry and National Park Estate Act 1998*),\(^7\) in plantations (under the *Plantations and Reafforestation Act 1999*),\(^7\) and on privately-owned forest. There is no single law setting out the overarching framework for regulating forestry in NSW (see Table 1). This contrasts with Tasmania\(^8\) and Victoria\(^9\) which have Forest Practices Codes applying across all tenures. The NSW approach is mirrored in Queensland\(^10\) and Western Australia,\(^11\) which also do not regulate PNF under a Code.\(^12\)

It is unnecessarily complex for different rules in NSW to apply to PNF and to public forestry. It is difficult to identify environmental protection benefits on private land arising from this arrangement. Industry members justify the difference in regulatory framework by pointing to differences in the structure of the industry operating on public

\(^5\) A detailed analysis of the problems with the NSW legislative framework for regulating and managing PNF operations was provided in Part Two.


\(^7\) The *Plantations and Reafforestation Act 1999* (PR-A) (NSW) applies to most land tenures (i.e. privately owned land, State forest or other Crown-timber lands, “or any other land”), PR-A, s.5(4). However it does not apply to land within 13 nominated categories, including land protected by SEPP 14 (wetlands), or SEPP 26 (littoral rainforests). PR-A, s.7, Schedule 1.


\(^9\) Victoria, Department of Natural Resources and Environment (1996) *Code of Practice: Code of Forest Practices for Timber Production – Revision No.2, November, 68pp*, DNRE, East Melbourne, at p.4. (Note that there are relevant laws applicable in addition to Forest Practices Codes).


and private lands. Yet in Tasmania and Victoria, the application of forestry law across tenures appears unproblematic, and PNF is regulated under the same Forest Practices Codes as public forestry. A similar case can be made in relation to several overseas jurisdictions. In Tasmania, as we have seen, only the smallest non-commercial PNF operations are excluded from the Forest Practices Code (see: p.357).

The NSW approach is indicative of historical patterns of land-use regulation and of a political desire to avoid infringing upon private property rights. It is in conflict with the National Forest Policy Statement, where governments agreed to “making the codes of practice for wood production in public native forests applicable to private native forests”. In favour of a uniform approach is the fact that ecological issues do not respect jurisdictional boundaries such as those between private and public land.

The principle that there should be a uniform framework of environmental laws across both private and public forests also has the benefit of simplicity, reducing administrative confusion for regulators and regulated parties, particularly companies and contractors operating across tenures. It could considerably reduce legal complexity. It would not be necessary for industry and regulators to understand and apply separate rules for each tenure. With a single Code, a higher degree of familiarity with regulatory requirements would result across the forestry industry in NSW.

A second-best solution, still preferable to the present approach in NSW, is to apply a specific-purpose law providing holistically for the management of PNF, such as a Private Forests Act. However in NSW, PNF operations are subject to a complex, multi-layered and often overlapping regulatory framework that has developed incrementally over time.

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13 Observation of the author at meetings of the PNF Reference Group, March-June 2002, DLWC, Bridge St., Sydney.
14 Victoria, Department of Natural Resources and Environment (1996) Code of Practice: Code of Forest Practices for Timber Production – Revision No.2, November, 68pp, DNRE, East Melbourne, at p.4. (Note that there are relevant laws applicable in addition to Forest Practices Codes).
18 Private Forests Act 1994 (Tas) created an industry extension body named Private Forests Tasmania, and made provision for areas of private forest to be declared 'Private Timber Reserves'.
This reflects a tendency in NSW environmental law - subject to a number of recent exceptions - for legislation to be introduced without thorough efforts to renovate existing laws. Statutes applicable in a broader context in response to concerns about vegetation clearing, threatened species decline, and pollution have been variously applied to a range of activities on private land, including PNF. Such laws were not specifically designed for regulating forestry and on some counts may not be as effective as purpose-built legislation. On the other hand an argument can be made that there is also an important complementary role for specific-purpose environmental legislation aimed at particular environmental problems, such as threatened species protection and pollution control.

Responsibility for administering the law for PNF is highly fragmented in NSW. During the study period, responsibility for administration was spread between up to 5 regulatory agencies in any one situation, each dealing with different aspects of the environmental impact of PNF. During the study period the relevant agencies were DLWC, local councils, NPWS, EPA and potentially DUAP and NSW Fisheries (protecting threatened freshwater fish from the effects of non-point-source pollution of rivers from logging and roading).

With complexity comes a lack of integration between the regulatory requirements imposed under each statute, and between the measures applied on public and private forests. As an American writer observed: “Multiple agency authority …may diminish the ability of forest resource agencies to guide the use and management of forests in an integrative way.” Inter-departmental lines of demarcation limit the capacity of those agencies responsible for only single aspects of forest ecosystems (e.g. biodiversity) to monitor other aspects. A Department of Urban Affairs & Planning report described another important aspect of what is a general problem in NSW environmental law - that...
there are “agencies regulating sequentially within separate paradigms and issuing approvals on the basis of differing heads of consideration, operating requirements and standards” - with the EPAA operating in parallel with sector and issue-specific environmental legislation.\(^\text{24}\)

With numerous Acts, administered by different agencies, under different Ministries, the capacity of government to regulate PNF operations with a coordinated and effective policy approach is reduced.\(^\text{25}\) It also increases the likelihood of regulatory buck-passing from one agency to another, with the result that enforcement is compromised.\(^\text{26}\)

Interview evidence suggested that the PNF exemption (in its present form) under the NVCA increased the tendency for DLWC and local government to avoid responsibility for regulating PNF. Measures are required to develop a whole-of-government approach.

Such complexity has led to situations where even the agencies administering various parts of the legal framework have been uncertain as to the detailed points of application of relevant laws to PNF (‘regulatory confusion’). It is possible that regulatory complexity has given rise to a reluctance to apply and enforce the law stringently.\(^\text{27}\)

A different aspect of the same problem, that will tend to come into play under different circumstances, is that under a multi-Act system, a reluctance on the part of agencies to relinquish responsibilities to other agencies is frequently observed. More frequently, there is reluctance to delegate to one another and to share information. This approach arises from barely concealed ‘turf wars’ between agencies.\(^\text{28}\) The solution is to make the performance and productivity of agencies dependent upon mutual cooperation, by interlacing their role in the approvals process.


\(^{25}\) Grabosky and Braithwaite (1986) found that fragmented regulatory arrangements lead to buck-passing, particularly where there is overlap between levels of government, such as between State and local government. Grabosky, P., Braithwaite, J. (1986) *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Oxford University Press, Melbourne, at 2.

\(^{26}\) Many of these observations were made by the Independent Expert Working Group, above n 4. Particular problems were revealed in my research in relation to the nexus between the NVCA and local government regulation – see interviews with Kempsey SC in Chapter Nine. Similar comments have been made in the US context. Ellefson, P.; et.al. (1997) above n 16 at 203.

\(^{27}\) However, although logically appealing, it is not possible to come to conclusions regarding “regulatory confusion” as a cause of lax enforcement without further empirical research.

At the core is the issue of whether PNF should be managed under industry-sector-specific legislation, or under legislation of more general application espousing broad principles and processes (e.g. an Environmental Protection Act). Sector-specific legislation has created a segmented and un-integrated approach to natural resource management in NSW. Forestry on public land is regulated under the *Forestry Act 1916,*\(^{29}\) mining is regulated under the *Mining Act 1992,*\(^ {30}\) fisheries are regulated under the *Fisheries Management Act 1994,* and water use is regulated under the *Water Management Act 2000.*\(^ {31}\)

The problems of complexity and lack of coordination in the PNF arena are by no means unique. Abel et.al. (1998) described similar problems in the NSW water-management regime and proposed that water legislation be integrated with land-use planning law.\(^ {32}\) Another paper that looked at the integration of land and water management in NSW by some of the same authors described “a fragmented planning regime wracked by complexity and lack of coordination.”\(^ {33}\) A similar conclusion is applicable to the law applying to PNF in NSW.

**Landholder Confusion**

Having reviewed the NSW statutory framework applying to PNF for the RFA process, the Expert ESFM Working Group concluded: “It would be a significant understatement to conclude that the law and policy relating to PNF is complex, confused and inconsistent.”\(^ {34}\)

Regulatory complexity gives rise to confusion within the minds of land-holders and forestry contractors as to their legal obligations in relation to PNF. Complexity is likely to have resulted in reduced compliance by landholders with statutory obligations. Further antagonism between landholders and regulators is likely to develop because of the need to deal with numerous agencies, with sometimes indistinct lines of authority.

\(^{29}\) see also: *Plantations and Reafforestation Act 1999* (‘PRA’), *Forestry and National Park Estate Act 1998,* *Native Vegetation Conservation Act 1997.*

\(^{30}\) See also: *Petroleum (Onshore) Act 1991* (NSW).

\(^{31}\) Formerly under the *Water Act 1912.*


Part Two II presented some evidence of a relatively low level both of knowledge and of acceptance of regulatory requirements within the PNF industry. Landowners in particular, seem likely to have limited knowledge of regulatory requirements. O’Neill, a Northern NSW forestry consultant with first hand experience of the needs of private forest owners, argued that the complexity of the regulatory regime “results in confusion for the forest owner, with the very real likelihood that many may continue to manage their forests in ignorance of the legislative requirements, or even despite them.”\(^\text{35}\) If there was greater enforcement activity in NSW, then this would have focussed attention on obligations to comply with newer environmental laws.

Research conducted for Part Two showed that the intersection and overlap of legislative requirements is a source of confusion for poorly-resourced landholders. This is particularly the case with the scope of the PNF exemption, the application of the TSCA\(^*\), and the role of pollution-control law.\(^\text{36}\) The exception to the rule is the protected lands regime which is relatively well-known by logging contractors, it has been in existence for over thirty years, since 1972.\(^\text{37}\)

As was found to be the case in Tasmania (Part Three), it is the smaller logging contractors and landholders who are most likely to fall through the regulatory net, because of the scale of their operations and their lack of resources to focus on compliance obligations.

By contrast, in public native forestry there is a substantial public institutional infrastructure designed to assist with compliance. In fact, the Forestry Commission has assumed the role of shielding industry from having formally to apply for authorisations, and has taken the role of ‘fall guy’ in prosecutions for environmental offences.\(^\text{38}\)


\(^{36}\) Personal observation made from discussion of PNF issues with numerous landowners in attendance at ANU forestry field day in the Bega Valley, at Candelo, (Kameruka Bowling Club) 23.2.01.

\(^{37}\) Interview, Dr. I. Hannam, 11.1.98, DLWC Parramatta Office, in person. Notes with author. Another factor in boosting the acceptance of the protected lands provisions is that soil conservation objectives are more readily accepted within the culture of rural land holders than biodiversity conservation.

In Tasmania, knowledge of regulatory requirements by the PNF industry is assisted by two factors. In the first place, Private Forests Tasmania employs a number of Forest Practices Officers who assist smaller operators and landholders with preparation of plans and supervision of their execution. Also the industry is well serviced by private-sector forest planning consultants. Secondly, the simple, unified application of the Forest Practices Act and Code across tenures means that the gist of regulations is well known across industry. Contractors working across all three forestry sectors (i.e. private, public, and plantation) only need to be familiar with a single regulatory framework.

Choice of Regulatory Target

Our approach to regulating PNF partly depends on who it is we are attempting to regulate. Typical conceptions of the private forestry participant are of a farmer or landholder. In truth, PNF is carried out by a combination of corporations, contractors and individuals. A well designed regulatory system will take account of the characteristics of each broad category of regulatory target. Empirical research is required to test the fairly reliable assumption that it is largely farmers who are being regulated and not sawmillers or large consolidated resource companies with private forestry landholdings.39

In NSW a primary design defect of the legislation is that obligations (such as consents under the EPAA and the NVCA) fall on the landholder rather than the logging contractor or the sawmiller. The application of NSW laws to the landholder (rather than the contractor) arises from the decision to anchor the operation of environmental laws on planning law.40

At present the legislation focuses attention and responsibility for gaining approvals on landholders who are usually only occasional participants in the PNF industry. For

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39 In general it seems that forestry companies have not sought to acquire significant landholdings in NSW in order to secure supplies of timber, because such a step has not proven necessary, as sufficient landholders have been willing to respond to offers to enter into short-term timber supply contracts.

40 Nevertheless the approach of regulating on a property specific basis has some merits in terms of biodiversity protection because of the need for site-specific surveying and prescriptions. The alternative of granting a single prospective approval for a forestry contractor or company, regardless of the site to be logged, will ignore the need to gather site specific information in relation to biodiversity and soils of high erosion hazard.
example, the NVCA places responsibility for gaining approvals on the landholder.\footnote{Bates, G. Franklin, N. (1999) above n 42 at 113-114. The Act provides for corporate offences but may not adequately cover offences by non-incorporated clearing contractors engaged by landholders. For the removal of doubt it may be necessary to insert a provision stating that a landholder shall not cause or permit unauthorised native vegetation clearance by independent contractors or agents.} As it does not set out a clear policy in relation to the vicarious liability of landholders for the actions of independent contractors they have engaged, it will fail to exert pressure on landholders to ensure that their contractors are complying with the law.\footnote{Bates, G. Franklin, N. (1999) Compliance with the Native Vegetation Conservation Act 1997 (NSW): Consultancy Report - Operational Phase, prepared for Department of Land and Water Conservation NSW, at 113-114.} Nevertheless, the rules of vicarious liability applied in some of the SEPP 46 prosecutions would most likely apply.\footnote{There has been some judicial recognition, in decisions delivered in prosecutions for breach of LEPs and TPOs for illegal vegetation clearance, that the responsibility to the community of professional foresters and clearing contractors is greater, than that of private landholders who do not exclusively derive their income from logging. For example, in \textit{Byron Shire Council v Sommerville}, Sheahan J rejected a submission that a s.556A order be granted in favour of a defendant clearing contractor on the basis that the defendant was “a professional operator who has been heavily engaged in the relevant industry since 1991…who should have made the relevant enquiries as to any approval that was required for the works proposed to be undertaken.” \textit{Byron Shire Council v Sommerville}, [1999] NSWLEC 97 (8 February 1999) unreported decision of Land and Environment Court, No. 50127 of 1999, Sheahan J.}

The alternative to placing responsibility for compliance with a complex regulatory framework on the landholder is to place compliance obligations onto repeat players - harvesting contractors and sawmillers.\footnote{Stone, Christopher (1989) “Choice of Target and Other Law Enforcement Variables”, ch.10 in Friedland, M. (ed.), \textit{Sanctions and Rewards in the Legal System: A Multidisciplinary Approach}, Univ. of Toronto Press, Toronto.} In Tasmania, sawmills must ensure they only accept timber produced by operations in compliance with forest practices law.\footnote{This is the approach taken in Tasmania, and also by the Commonwealth in regulating fisheries under the \textit{Fisheries Management Act 1991} (Cth) (fish receiver permits), ss.91-92.} A similar approach of regulating the entire supply chain is applied in New Zealand by prohibiting the milling of indigenous timber at sawmills unless the timber has been obtained from operations in accordance with a registered\footnote{Registered by the Registrar of real property for a term of 50 years. \textit{Forests Act 1949} (NZ), s.67D(3). Also discussed in Williams, D. (ed.) (1997) \textit{Environmental and Resource Management in New Zealand}, 2nd edition, Butterworths, Wellington, at p.184.} sustainable-forest management plan.\footnote{\textit{Forests Act 1949} (NZ), s.67C(1)(a), 67D(1)(b).} Repeat players will have greater familiarity with legislative obligations and are likely to assist less-well-informed landholders to comply, as well as exerting commercial pressures on them to become more compliant.

\textit{Lack of protection of ecological values}

Present NSW law relating to PNF fails in many respects to protect ecological values in private forests. The prime cause is the application of the scientifically-unjustified PNF exemption in the NVC Act with its unclear threshold of operation. The ESFM Working
Group summarised the situation this way: “it is quite inappropriate to leave assessments of what constitutes sustainable forestry to those who wish to engage in these activities.”

Although parts of the present statutory framework for PNF make reference to the precautionary principle, it remains a fact that the regulatory landscape is dominated by the operation of the exemption provisions of the *NVCA*. The PNF exemption epitomises a lack of adherence to the precautionary principle in the present law.

The primary finding of Part Two is that (within the study regions, during the study period) most PNF logging in NSW was not subject to approval requirements in practice. In such cases, on areas not classified as protected land, no formal assessment of the conservation significance of forest is conducted prior to logging. Only in a minority of cases is PNF subject to assessment through the Part 4 *EPAA* process, under either the *NVCA* or LEPs, or in a very small number of cases through the s.91 *TSCA* licensing mechanism.

Exemption provisions for PNF must be removed or significantly modified if the law is to facilitate ESFM. The present PNF exemption should not be given further life by RVM committees. This exemption and the fact that most LEPs do not cover PNF, particularly in the Northern and Hunter regions, mean that high-conservation-value private forest may be logged without independent environmental assessment.

*Comparison between public and private forestry compliance obligations*

A comparison between the regulatory compliance obligations applying to forestry on public land and those applicable on private land reveals one possible approach to addressing the problem of fragmented legislative frameworks.

Public forestry in NSW has long been regulated under the *Forestry Act 1916* and Regulations, with a Code of Logging Practice applied at an operational level. However in 1998 the system of approvals for public forestry was considerably amended by the *Forestry and National Park Estate Act*. That Act created a system of integrated approvals

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49 Some RVMCs have refused to incorporate DLWC’s revised exemption and may instead be directed by the Minister to adopt it.
jointly granted by relevant Ministers (rather than government agencies).\textsuperscript{51} Under this system, approvals under the \textit{Forestry Act 1916} were merged with those relating to EIA, threatened species and pollution control, effectively creating a one-stop shop for licensing of forestry within State Forests in the form of an ‘Integrated Forestry Operations Approval’ (IFOA).\textsuperscript{52} Individual approvals for each of four RFA regions specify the conditions under which forestry can occur in State forests or Crown-timber lands, and contain licence conditions specifically addressing water pollution, threatened species and fisheries protection.

This method of applying a coordinating act or umbrella statute to integrate approvals for PNF is sound and should be investigated for PNF in NSW. One proviso is that it will be impracticable to apply an approach to PNF identical to that relating to public forests as the level of detail contained within IFOA approvals, such as licence conditions, is quite considerable, running to hundreds of pages.\textsuperscript{53} Dargavel was right in stating that regulation of PNF - \textit{on a scale similar to that applied to public forests} - is unlikely to be “feasible or enforceable”.\textsuperscript{54} The question is mainly one of selecting an appropriate level of detail and keeping requirements and thresholds of application simple and readily applicable in the field.

Further, if ESFM is to be achieved on private land, certain aspects of the FNPE Act’s approach should not be adopted. One relates to the grant of exemptions from selected provisions of environmental legislation\textsuperscript{55} - on the basis that IFOAs are expressed to last

\begin{thebibliography}{9}
\bibitem{53} The Eden IFOA itself is 42pp. in length but is supplemented by 3 appendices containing the terms of licences under the \textit{POEO Act} (34pp, plus schedules 84pp.), \textit{TSCA} (103pp.) and \textit{Fisheries Management Act}. Full text at \texttt{<www.racac.nsw.gov.au/ria/ifoa.shtml>}, accessed 9.7.03.
\bibitem{54} Dargavel, J.; Moloney, D. (1998) “Private Native Forests: Are we doing enough?” 293-300 at 300 in Dyason, R., Dyason, L., Gardsen, R. (eds.), \textit{Plantation and Regrowth Forestry: A Diversity of Opportunity}, Australian Forest Growers Biennial Conference Proceedings, Lismore, NSW, 6-9 July 1998. Dargavel later clarified this indicating that the approach of choosing regulation of private forestry is certainly not impossible, as it is carried out effectively in Japan, Scandinavia and Western Europe; however the questions related to the appropriateness of regulatory framework applied. He suggested that reasons for avoiding regulation altogether were more political than practical. John Dargavel, ANU SRES, interview 17.2.03, (by telephone).
\bibitem{55} The \textit{FNPE Act} states that IFOAs exclude the operation of licensing provisions of the \textit{POEO Act} and the \textit{TSCA}, (ss.33,34). Further the existence of an IFOA creates an exemption from Parts 4 and 5 of the \textit{EPAA} (\textit{FNPE Act}, s.36) as well as exemptions from the operation of the \textit{Wilderness Act} and wilderness provisions of the \textit{NPFA}. (\textit{FNPE Act}, s.39 excluding certain provisions of the \textit{TSCA} and \textit{NPFA}). In addition the \textit{FNPE Act} exempts public land forestry covered by an IFOA from the stop work order provisions of the \textit{NPFA} and \textit{TSCA} (\textit{FNPE Act},

\end{thebibliography}
for 20 years, in a purported offer of resource security to industry. These exclusions from environmental legislation represent constraints on future policy making. They also block adaptive environmental management in response to emerging scientific knowledge about risks to species and ecosystems. Another aspect of the FNPE Act to be avoided is its abolition of third-party appeal rights, a measure which would most probably serve to reduce pressure for compliance with environmental legislation.

Comparison with Tasmania’s framework for regulating PNF

It is useful to compare NSW laws for PNF with those of Tasmania (Table 1). As Chapter Eleven explained, Tasmania has a detailed and unified system of forestry regulation in the form of the FP Act and Code, which apply across all tenures to include all but the smallest-scale PNF activities. This is a significant advance on the complex, fragmented and often ambiguous regime in NSW. Other important aspects of the Tasmanian law are the principle of consistency of standards for regulation of PNF with those for public forestry, strict limits on exemptions, and regulation of the entire supply-chain.

Yet the Tasmanian system is unlikely to deliver ESFM for a number of reasons. Forestry sits outside the RMPS and its unified system of statutory sustainable development objectives. It is also excluded from its appeals and public participation provisions. Further, Tasmanian law, while more uniform and subject to fewer exceptions, does not amount to a Code for ecological management of forests. Even with 100 per cent compliance with the Tasmanian Code, it is evident that ecological problems are associated with intensive forestry (particularly the practices of clearfelling, and cable

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56 In December 1999, IFOAs for Eden, UNE and LNE regions were granted until 31 December 2018. The IFOA for the Southern region has been granted until 3 May 2022.

57 FNPE Act, s.40. This will inevitably lead to less transparency in decision-making. It raises the possibility that the timber industry may breach environmental legislation without fear of third party enforcement actions. In the past, it has often been public interest litigation that has revealed and proven non-compliance with environmental laws in public forests, rather than the efforts of regulatory agencies. In relation to the Forestry Commission's compliance record, Bonyhady spoke of its “remarkable contempt for the law.” Bonyhady, T. (1993) Places Worth Keeping: Conservationists, Politics and Law, Allen & Unwin, at 83.


59 Clearfelling with retained habitat clusters (of 30m+ diameter) may be necessary in order to “rehabilitate an even aged stand from a forest area that is moribund due to past harvesting of all merchantable stems or which has been damaged or destroyed by fire or windstorm.” Smith, A. (1999) above n 4 at 72. Smith notes “Clearfelling with habitat clusters should not be used where assessed stand structure is such that effective regeneration and growth could be achieved through uneven-aged selection silviculture.”
logging on steep slopes). Particular problems are the lack of restrictions on logging of old-growth forest and the fact that there is no requirement to retain a minimum number of tree (fauna) hollows per hectare.

An important difference between the two jurisdictions is that Tasmania has no specific native-vegetation protection legislation.\textsuperscript{60} Retention of native vegetation and vulnerable forest ecosystems is not adequately addressed by the Code, which imposes few mandatory controls on the wholesale conversion of native forests into plantations.\textsuperscript{61}

\textsuperscript{60} NVCA (NSW). Tasmania has no specific soil conservation law the equivalent of Soil Conservation Act 1938 (NSW).

\textsuperscript{61} Other gaps relating to post-logging clearing and conversion of streamside reserves for agricultural purposes, and the uncontrolled harvesting of tree ferns (particularly for export), and the firewood logging industry have been addressed recently by amendments to the Code: Forest Practices Amendment Act 2001; see Hansard, 1 November 2001 at pp.41-106; Forest Practices Amendment (Tree Ferns) Act 2001.
To address the objective of evaluating the provision of legislation for ESFM, one necessary action is to briefly to assess the legislation against the yardstick of the Montreal

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62 Environmental Management and Pollution Control Act 1994, s.53 offence of creating an environmental nuisance; Code of Practice for Aerial Spraying and Draft Code of Practice for Ground Spraying applying to application of pesticides. Note also restrictions on water pollution in s.126(1),(3) of the Inland Fisheries Act 1995 (Tas).
Process criteria. This is one means of testing adequacy of the legal framework to deliver ecologically sustainable forest management. This comparison is set out in Table 2. One such question is whether NSW and Tasmanian legislation provides sufficiently for environmental impact assessment of PNF proposals sufficient to fulfil criterion 7.1.b., the “[e]xtent to which the legal framework provides for periodic forest-related planning, assessment, and policy review that recognizes the range of forest values.”

Although formal provision is made in legislation of both jurisdictions for some level of forest planning and environmental assessment of PNF, it is difficult to tell by reference to such a criterion whether the objective of ESFM is likely to be achieved. The Tasmanian legislation requires the production of forest practices plans but does not require formal environmental impact assessment for PNF. Although the Code addresses biodiversity and soil and water protection issues, and in that sense addresses part of the above criterion, of recognising “the range of forest values”, it can be argued that it does so superficially. In NSW, environmental assessment under NVCA is sporadic due to the operation of the PNF exemption, and to patchy coverage under LEPs.

A judgement about the adequacy of compliance by the legislative framework with various legal framework related criterion depends on the extent of obligations which are imposed by those criterion. However each of the criterion set out in the Table below, being the legal criterion agreed to in the Montreal Process, are themselves insufficiently specific to provide much guidance and assistance in evaluating the adequacy of legislation. It is evident that a wider perspective and broader points of reference are required in order to test the likelihood of attainment of the objective of ESFM. Therefore such a broader approach is followed in this Chapter.

Nevertheless a brief consideration of the legislative frameworks in each jurisdiction is provided in Table 2. In some instances, it is clear that, especially when combined with the broader discussion in this chapter, that the legislation of a particular jurisdiction fails against a particular criterion. For example, it is evident that the Tasmanian forestry legislation (the Forest Practices System as described in Chapter Eleven, as opposed to the broader Resource Management and Planning System) fails against criterion 7.1.c. which requires statutory provision for public participation, because it places limits on the appeal rights of the public and as it provides for exemptions for the forestry industry
from *Freedom of Information* legislation. In particular the legislation for PTRs fails against this evaluation criterion for public participation.

<table>
<thead>
<tr>
<th>Criteria description</th>
<th>Criterion number</th>
<th>NSW legislation</th>
<th>Tasmanian legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statutory provision for forest planning e.g. EIA</td>
<td>7.1.b</td>
<td>Assessment under NVCA is sporadic due to PNF exemption, and patchy LEP coverage.</td>
<td>Timber harvesting plans only - no EIA</td>
</tr>
<tr>
<td>Statutory provision for public participation and access to information</td>
<td>7.1.c</td>
<td>Private forests – some provision for public participation</td>
<td>Limits on FOI. PTRs limit third-party rights to judicial review</td>
</tr>
<tr>
<td>Statutory provision for best practice codes</td>
<td>7.1.d</td>
<td>No Code applies to PNF</td>
<td>Code is not an ecological protection code, e.g. permits old-growth forest logging.</td>
</tr>
<tr>
<td>Statutory provision for conservation of special values (“maintain or increase the full suite of forest values”)</td>
<td>7.1.e</td>
<td>NVCA, TSCA, POEO, EPAA all provide some protection. But exemptions and administrative practice reduce this potential.</td>
<td>Application of the TSPA to forests limited by institutional factors. No vegetation clearance law. Planning law excluded by PTRs.</td>
</tr>
<tr>
<td>Institutional arrangements that provide capacity to enforce relevant laws</td>
<td>7.2.e</td>
<td>No agency solely responsible for PNF. An Office of Private Forestry which largely promotes industry development (extension work).</td>
<td>Forest Practices Board and Forest Practices Tribunal. Also Private Forests Tasmania. DPP is involved in prosecutions (cf. NSW).</td>
</tr>
</tbody>
</table>
LAW REFORM RECOMMENDATIONS

General ecological protection principles to guide law reform - Regional-scale conservation assessment of private forests

The first key element of a revised regulatory framework for PNF management is that it must take account of the need for regional-scale land-use planning, as opposed to the piecemeal, small-scale project assessment of Timber Harvesting Plan or development-consent processes.

Such planning considers the need for improved biodiversity conservation by addressing that issue on a regional scale rather than assessing some land in intense detail, and conducting no studies at all in others. The regional approach was recommended by the ESFM Expert Working Group. It stated: “ESFM cannot be achieved by relying on project based assessment. For the precautionary principle to be implemented effectively… a shift to bioregional planning …[is] essential.”63 Regional assessment involves using techniques of remote sensing, aerial photographic interpretation, data analysis using geographic information systems software, and rapid ground-based biodiversity surveys, in order to determine which habitats remain and which have the greatest conservation significance.64 The regional assessment approach is likely to be a more efficient way to direct biodiversity conservation efforts over the long run. It should also be seen as largely a responsibility of government, the achievement of which would reduce uncertainty and financial risk to forest owners.

An initial land-use assessment process linked to a wider regional planning process would help to identify key components of the private-land estate necessary for the Comprehensive Adequate and Representative (CAR) reserve system.65 Attempts must be made to reverse the fact, recognised by the RAC, that “most land use patterns in Australia are the result of historical processes rather than systematic evaluations of

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resource capability and values.\textsuperscript{66} To some extent the RFA process identified HCV private forest, even if it did not adequately provide for its protection (which is another question which cannot be considered in detail in this thesis).\textsuperscript{67}

A general principle which should guide revision of the law for PNF is to protect rare forest types required for the CAR reserve system. These forest ecosystems were identified during the RFA process as under-represented and ‘under-target’ on the public land conservation estate, and therefore remnants on private land require conservation.\textsuperscript{68}

In the Upper North-East region, 56 forest ecosystem types were identified as a conservation priority on private land,\textsuperscript{69} and 85 types were identified in the LNE.\textsuperscript{70} Controls must be applied up-front to prevent logging of these rare forests on private land. By definition any logging of these forests cannot amount to ESFM – because for ecological sustainability to be achieved, a minimum level of reservation of rare and threatened forest ecosystem types must be attained.

We cannot assume that all these significant parcels of forest land have been, or will be, protected by secure management agreement under the RFA. One reason is because governments agreed in the N-E RFA that private forests would be added to the reserve system only with the agreement of landholders.\textsuperscript{71} Even if they were approached it is likely that some landholders would not enter into management or acquisition arrangements, if the Tasmanian experience with a better-funded ($30m) private-forests reserve program is anything to go by. It is by no means clear that this target has been achieved.\textsuperscript{72} Such parcels of important rare forest types may be inadvertently logged or


\textsuperscript{67} The reader is referred to discussion of the Tasmanian PFRP Private Forest Reserve Program and its modest rate of success in convincing landholders to enter into various forms of protective agreements, contained in Chapter Eleven.

\textsuperscript{68} In other words, there is a shortfall on public land so that the reserve system is “under-target” to achieve JANIS objectives of 15% reservation of each forest type.

\textsuperscript{69} UN-E RFA (2000) above n 2, Attachment 2, “Private Land Conservation”, Table 1 “Private Land priorities for the Upper North East CAR Reserve System”, at 70.

\textsuperscript{70} Commonwealth of Australia and State of NSW (2000) \textit{Regional Forest Agreement for North East NSW} (Lower North East), March 2000, Attachment 2, Table 2, “Private Land priorities for the Lower North East CAR Reserve System”, at pp.70-73. This is less of an issue in the Southern Region of NSW, apart from on the South-West Slopes. Interviews, Paul Packard, Manager Conservation Assessment and Data Unit, & Phil Gibbons, Conservation Assessment and Data Unit, NPWS Southern Directorate, 23.1.01. (by telephone).

\textsuperscript{71} Upper N-E RFA (2000), above n2, cl. 2, Attachment 2, p.70. Further, it appears to be the case that NPWS has a policy of not approaching landholders to seek to purchase land for reservation.

\textsuperscript{72} Department of Primary Industries Water and Environment Tasmania (2003) \textit{Private Forest Reserves Program: Progress: June 2003}, states that negotiations failed in relation to 50.6% of properties (45.2% involving owner not being interested or being unwilling to commit, and 5.4% where property rejected as having insufficient values). Internet URL <www.pfrp.tas.gov.au/progress/index.html>
cleared for plantation development or agriculture as there is certainly no statutory mechanism in place in NSW to ensure that this does not take place.

A constraint placed upon policy-making is that the RFAs contain an attempt to lock in the size of the private-land reserve system to the proportions identified in the RFA process. The N-E RFA purports to block future restrictions on timber harvesting on the basis of a bald assertion that the RFA had already created the CAR reserve system and therefore there is no need to expand that reserve system. The RFAs, the NPWS is not permitted to force the landholder to sell property, exercising the State’s powers of compulsory acquisition on the basis that a private native forest ecosystem is ‘under-target’.

An effort to undertake regional planning is currently being carried out to varying degrees through the RVMP process under the NVCA. This is the secondary mechanism identified in the N-E RFA for achieving targets for the conservation of rare-forest ecosystems. Yet there are reasons to believe that it may not be a particularly strong process for biodiversity conservation on a regional basis. This is largely due to the barely-scientific and politicised nature of the committee process, the retention of exemptions in RVMPs, and statutory defects in the NVCA (see above, p.213).

The NVCA does not explicitly specify that the clearing of particular classes of native vegetation of high conservation value is prohibited. There should be such restrictions, at a minimum to protect endangered ecological communities. Such an approach is supported by NSW’s obligation under its NHT Partnership Agreement with the Commonwealth to meet the goal of ‘no clearing of endangered ecological communities’. Further, the NVCA must be amended to prevent RVMPs from

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75 The NVCA, and in particular, its provisions regarding the making of RVMPs gives no formal recognition to the concept of under-represented ecosystems, and the need for their conservation, apart from a statement that one of the objects of the Act is to “protect native vegetation of high conservation value.” NVCA, s.3(c). NPWS officers interviewed suggested that this could be achieved through informal means (such as membership of RVMCs, and through comments made to DLWC during the development consent process) and non-regulatory programs (such as NPWS applications for NHT funding to purchase significant private land). Interview, Mr Paul Packard, Manager, Conservation Assessment and Data Unit, NPWS Southern Directorate, 23.1.01. (by telephone).
76 Upper N-E RFA (2000) above n 2, at 70, cl.8, Attachment 2.
77 Importantly, most RVMPs contain zones in which this is the case. Yet it will remain necessary to constrain self-assessment approaches (eg leaving the task of identification of HCV forests and vegetation to landholders) and to ensure scientific overview and review of adequacy of plans (i.e., so that all areas of under-represented forest are included in protection zones, not just a portion). To address clearfell forestry leading to agricultural or plantation development, the NVCA could be amended to place a ban on the clearing of endangered ecological communities.
78 Natural Heritage Trust Partnership Agreement between Commonwealth and NSW, Attachment A: Bushcare: the National Vegetation Initiative Clause 5.1(c), Performance Indicators: Environment, at p.3-4.
excluding the operation of the \textit{TSCA}, particularly s.91 licensing in order to retain the operation of the \textit{TSCA} in zones where the RVMP does not require consent.  

\textit{Inclusion of ESD obligations}

A further principle that should guide the revision of the regulatory framework for PNF in NSW is that legislation should require decision-makers to make decisions consistent with the principles of ESD, including the precautionary principle.\footnote{A definition of the precautionary principle is contained in the Commonwealth \textit{Environment Protection and Biodiversity Act 1999}, s.391(2). See also s.6(2), \textit{Protection of the Environment Administration Act 1991} (NSW). Gullet, W. (1997) “Environmental Protection and the Precautionary Principle: A Response to Scientific Uncertainty in Environmental Management”, 14 \textit{Environmental and Planning Law Journal} 52.} Such an approach is necessary if we are to avoid actions that may contribute to the decline of species - particularly given the usual inadequacy of information about the distribution of threatened species.

Although at least 47 NSW Acts contain reference to the principles of ESD,\footnote{Stein, P. (2000) “Are Decision Makers too Cautious with the Precautionary Principle ?” 17(1) \textit{Environmental and Planning Law Journal} 3-23 at 9.} the dominant tendency is merely to include the principles within objects clauses;\footnote{For example, the \textit{NVCA} states that its objects are to be achieved “in accordance with the principles of ESD.” \textit{NVCA}, s.3.} or somewhat better, to require that decision-makers “take into consideration” or “take into account” the principles in making a particular decision. However, in order to implement policies of ESD more strongly, amendments are necessary so as to require decision-makers to make decisions consistent with ESD principles.

Does the legislation applying to PNF in NSW require enough of administrators to implement ESD principles? Unfortunately it seems not. For example, although the principles are included in legislation such as the \textit{EPAA}, it is in a long list of objects, one of which is merely to “encourage” ESD.\footnote{\textit{EPAA}, s.5(a)(vii).} This is only indirectly effective as an exhortation to decision-makers, and provides only a limited route for judicial review of decision-making on the grounds of failure to take into account relevant considerations.\footnote{Willoughby \textit{v} Minister (1992) 78 LGERA 19; Packham \textit{v} Minister for the Environment (1993) 80 LGERA 205; Rohde, J. (1995) “The Objects Clause in Environmental Legislation: The Nature Conservation Act 1992 (Qld) Exemplified” 12 \textit{Environmental and Planning Law Journal} 80-96 at 81.} Such clauses are ambiguous, deal with inherently difficult concepts, and do not amount

\footnote{This will require amendment of \textit{NVCA}, s.20(1)(a) which excludes the operation of \textit{TSCA} s.91 licensing in those instances where an RVMP does not require consent for PNF and other vegetation removing activities.}
to a substantive requirement for changes of behaviour.\textsuperscript{85} This situation was summarised by Justice Stein who observed that: “the inclusion of the [ESD] principles in Australian legislation has been largely confined to objectives of statutes without any real guidance to decision makers as to whether and how to apply the core principles or what weight to give them.”\textsuperscript{86}

In terms of the primary legislation in the case study, the objects clauses of the \textit{TSCA}, \textit{EPAA} and \textit{NVCA} all refer to the principles of ESD – with, respectively, objects to “promote” or “encourage” and to achieve the other statutory objectives “in accordance with” ESD.\textsuperscript{87} Yet whilst objects clauses are a relevant consideration for decision-makers, they do not prevail over express provisions of legislation in the event of a conflict. The prospect of a decision being invalidated on this basis is remote, as objects clauses do not prevail over specific legislation.\textsuperscript{88} For example, at odds with provisions for ESD are the \textit{NVCA}’s exemption provisions. Also in conflict is the ‘routine agricultural activities’ exemption of the \textit{TSCA} (p.343). Such provisions must be significantly modified to enable ESFM. By providing that ESD principles have primacy, legislators can ensure that the principles are accorded particular weight by decision makers, rather than being merely one of a series of factors to be taken into account.\textsuperscript{89}

The second, but less common way in which the precautionary principle has been incorporated into NSW legislation is through a requirement that decision-makers must \textit{take the principles of ESD into consideration} in decision-making under certain provisions. Some selected provisions in the \textit{TSCA} and \textit{EPAA} require this. First, in deciding whether or not to grant concurrence to a proposed development consent that has involved SIS preparation, the Director-General (D-G) of NPWS is obliged to take into account the

\begin{footnotesize}
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\textsuperscript{85} They could be drafted in stronger terms as a duty “to further the objects of the Act” or a duty “to achieve the objects of the Act” rather than a duty “to take the objects into consideration”. Fisher, D. (2000) “Considerations, Principles and Objectives in Environmental Management in Australia” 17(6) \textit{Environmental and Planning Law Journal} 487-501 at 500.

\textsuperscript{86} Stein, P. (2000) above n 81 at 3.

\textsuperscript{87} \textit{NVCA}, s.3(c) states that the objects of the Act are “...to protect native vegetation of high conservation values... in accordance with the principles of ecologically sustainable development”. The \textit{EPAA}, s.5(a)(vii) states that “the objects of this Act are to encourage... ecologically sustainable development.” The \textit{TSCA} in s.3(a) provides that the objects of the Act include “to conserve biological diversity and promote ecologically sustainable development”.

\textsuperscript{88} This conclusion is based on application of the interpretative maxim "generalibus specialia derogant" – the principle that a provision of general application gives way to a specific provision. This principle is applied when interpreting provisions that occur within a single piece of legislation.

\textsuperscript{89} For example the \textit{National Parks and Wildlife Act 1975} (Qld), s.25 sets out “the cardinal principle to be observed in the management of national parks”. This point is made in Fisher, D. (2000) “Considerations, Principles and Objectives in Environmental Management in Australia” 17(6) \textit{Environmental and Planning Law Journal} 487-501.
\end{footnotesize}
principles of ESD. Further, in deciding whether to grant a licence to harm or pick threatened species, the D-G of NPWS is obliged to “take into account” eight factors including the principles of ESD, as well as the likely social and economic consequences of the decision. Finally, some LEPs require selected consent authorities to “have regard to” or “take into consideration” the principles of ESD when making decisions under Part 4 EPAA. Yet under the majority of consent-decision-making where LEPs are not drafted in this manner, one turns to the EPAA itself, where consent authorities are not explicitly required to take the principles of ESD into account when considering a development application.

Even where the particular statute has not incorporated the precautionary principle (e.g. the NPWA) it can be applied as a principle of statutory interpretation. For example, in Leatch it was applied it as a principle of ESD by the NSW Land and Environment Court. There are grounds for arguing that the principles of ESD can be considered as a principle of interpretation applicable in the event of statutory uncertainty, on the basis of their inclusion in many recent international environmental treaties and conventions, and the principle of consistency with international law. The courts are entitled and even perhaps obliged to interpret and apply statutes in conformity with customary international law.

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90 EPAA, s.79B(5)(g); 112D(g) refers to the principles of ESD as defined in Protection of the Environment Administration Act 1991, s.6(2). A similar requirement applies in the Plantations and Reafforestation Act 1999 which has objects (s.3) of promoting “plantations on essentially cleared land”… “consistently with the principles of ecologically sustainable development; and see: s.15(6)(g) regarding consideration of the principles during concurrence decision making.
91 TSCA, s.97(1)(e).
92 For example, under the Dubbo LEP, “All applications for consent for development must be assessed with regard to the Principles of ESD in terms of land, air and water resources, biodiversity, and waste and noise matters.” Dubbo LEP 1998: Urban Areas, cl.7. Similarly, in Tasmania, local government, in determining planning permit applications, is bound to take the sustainable development objectives of the RMPS into account. s.51(2)(a) Land Use Planning and Approvals Act 1993. This is based on the meaning and intent of the Land Use Planning and Appeals Act (LUPA), as interpreted in reported decisions of the Resource Management and Planning Appeal Tribunal. However, the forest practices system is outside the RMPS, and is not subject to its objectives.
93 EPAA, s.79C.
As the interpretation of the content of the precautionary principle by Australian courts has been somewhat inconsistent to date, it is necessary to require more of decision-makers than encouraging them to consider statutory objects or requiring them merely to consider the principle as a strategy for its implementation. Instead, the legislation should require that decisions be consistent with ESD principles. This is a stronger requirement and there is greater likelihood that inappropriate decisions will be invalidated under such a provision.

An even more strongly-precautionary approach could be achieved if legislation were to place the onus on forestry proponents to justify to some reasonable extent that proposed activities represent only a minimal threat to biodiversity. This approach reverses the burden of proof, and shifts the burden of information-gathering onto the proponent, the primary party to gain economically from the proposed activity. It represents an adaptation of the ‘polluter pays’ principle to the biodiversity preservation context. This could be done in practice by linking the precautionary principle explicitly to requirements for surveying for threatened species, and by strengthening the 8-part test and SIS provisions.

The core idea is to put the burden of proof onto industry once certain thresholds of precautionary standards are crossed. For example, if a threshold of 15% minimum vegetation-cover retention was required throughout a region, and proposed logging was to involve permanent native vegetation removal of a given threatened forest ecosystem type thus compromising the achievement of that 15% target, then onus-of-proof requirements would be triggered. This approach is applied in Western Australia in relation to land clearing (where a 20% vegetation retention standard applies).

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96 Compare the treatment of the precautionary principle in Leatch v Director-General NPWS (1993) 81 LGERA 270 at 281-283; with that applied in Nicholls v D-G of NPWS (1994) 84 LGERA 397 at 418-421; or Greenpeace Australia Ltd. v Redbank Power Co Pty Ltd (1994) 86 LGRA 143, and Bridgetown /Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management (1997) 18 WAR 102, per Wheeler J.

97 Parramatta City Council v Hale (1982) 47 LGRA 319 per Moffit J. See also Farrier et.al. (1999) 3rd edition at 59, 200.


99 The Smith Report recommended that “a minimum portion (15%) of total forest cover on the property and 15% of each Forest Ecosystem present on the Property should be retained to provide refuge areas for fauna populations reduced by harvesting.” Smith, A. (1999) above n 4 at 61.

SPECIFIC PROPOSALS FOR BEST PRACTICE PNF REGULATION

This section discusses options for reforming the legislation governing PNF in NSW, with the objective of creating a legal framework sufficient to ensure that ESFM practices take place.

The approach adopted is first to discuss the various statutory mechanisms by which requirements could be delivered and later to discuss the necessary content of legislation for ESFM. Four possible approaches to the regulation of PNF are considered. The rationale for examining the range of options is that improved legislative frameworks should assist in achieving improved on-the-ground environmental management.

The regulatory models explored are:

- Comprehensive forest-practices code or legislation;
- Uniform cross-tenure forestry regulation;
- Multi-program regulations (i.e. application of several environmental laws of general application); and
- Single-Act integrated natural resource management.

**Option 1. Comprehensive forest-practices code or rules**

The simplest option, and one that could be introduced quickly, requiring relatively little impact on the existing suite of legislation for public and plantation forestry in NSW, is the enactment of specific-purpose private forestry legislation, i.e. a *Private Forests Act*. Although NSW already has provisions that specifically apply to PNF in particular situations in the form of the protected lands provisions, the need to expand and improve upon these provisions was recognised in 1995 by Dr Hannam of DLWC, who proposed an ecologically-oriented *Private Forests Act*.

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101 Self-regulation and co-regulation models are explored later in Chapter Thirteen.
102 Department of Land and Water Conservation (NSW) (1998) *Natural Resource Management under the NZ Resource Management Act: Implications for NSW*, DLWC, Sydney at 23. Another school of thought is to emphasise the role of defective political and agency will power to confront problems. Even with the best legislative framework implementation may still be ineffective. However an improved statutory framework will make implementation and enforcement easier. (see Chapter Thirteen).
103 This is aside from the other policy options, which include: incentives and stewardship payments, voluntarism (eg voluntary conservation agreements unaccompanied by incentive payments), pure self-regulation, education programs, correction of perverse economic incentives.
Briefly, the approach would be to have a *Private Forests Act* contain the broad principles, with specific details contained in a Forest Practices Code (a Regulation under the Act), which in turn would require preparation of THPs. A compulsory forest-practices code applying to private land was recommended by the NSW ESFM Expert Working Group, and agreed to in the RFA for North-East NSW.

This model for law reform is likely to fail on several counts. First, the achievement of ESFM goals (such as ‘maintain the full suite of forest values’) would not be guaranteed, as Forest-Practices Codes are Codes for forestry and logging, and rarely resemble comprehensive ecological protection Codes. A Forest-Practices Code would be unlikely to give a high priority to nature and biodiversity conservation, but instead place a priority on timber production.

Secondly, this model for law reform neglects to address the proposition (above) that there are considerable benefits in integrating forestry legislation across tenures. Still, if comprehensive regulation for PNF were to be introduced, ideally one would ensure that such a law would incorporate explicit objectives in relation to biological diversity, land degradation, greenhouse gas sinks, protection of catchments and water quality. In this sense such a law would amount to more than a *Forest Practices Act*, and would contain elements of an ecological protection law.

**Option 2. Uniform cross-tenure forestry regulation**

This model, of uniform cross-tenure forestry regulation, would involve legislation and regulations in order to amalgamate the requirements for forestry activities in public and private forests (and perhaps, with some modifications for plantations) in NSW. As discussed above, a uniform framework of laws for both private and public forests has the

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105 Note that the word “Code” does not imply a voluntary code of practice with which compliance is optional. In Tasmania, compliance with the Code of Forest Practice is not voluntary. Failure to observe provisions of the Code amount to a breach of the *Forest Practices Act 1985*. This is the case because Forest Practices Plans must be prepared in accordance with the Code, and s.21(c) states that it is an offence for a landowner to cause forestry operations to take place in contravention of a certified forest practices plan.


107 Upper N-E RFA (2000), above n 2 at 20, clause 57.

108 Some claims have been made that the British Columbia Forest Practices Code provides sufficient protection for biodiversity: Fenger, M. (1996) “Implementing biodiversity conservation through the British Columbia Forest Practices Code”, 85 *Forest Ecology and Management* 67-77. However, there is no space here to evaluate the validity of such claims.

benefit of simplicity. In particular it will reduce complexity for regulated parties and thus a higher degree of familiarity with requirements would result.

Its disadvantage involves failure to provide for the specialised circumstances of each tenure and activity, to the extent that these differences are regarded as material. Further, if it were to involve applying the level of regulation of public forestry to PNF, the private land industry may have great difficulty in complying given the complexity of the Integrated Forestry Operations Approvals conditions applied to public forestry. It must be recognised that there exists an implicit in-kind subsidy (by way of regulatory and bureaucratic compliance assistance) of public forestry by the Forestry Commission and other agencies, that assists companies operating on public land to comply with applicable legislation.

Option 3. Modify present approach of multi-program regulations

Another approach is to continue to regulate PNF under the present broad regulatory framework. This involves applying specific-purpose statutes aimed at particular environmental problems rather than a single Forest Practices Act. The multi-Act approach is described in the USA as multi-program regulation. Its advantage is that it applies specialised legislation to address specific environmental issues such as biodiversity protection and pollution prevention. The danger of such a multi-program approach is that it can degenerate into a complex and conflicting mess in which overall policy objectives are not clear and where responsibilities are confused. This approach was critiqued earlier in this Chapter, and Part Two provided some evidence of these types of difficulties in NSW during the study period.

The reformed version of this model involves applying existing specific purpose statutes but in a more coordinated, integrated and effective manner, in the form of ‘integrated natural resource management legislation’. Instead of one specific forestry Act, a number of general-purpose Acts continue to be applied, but with improved statutory methods of inter-agency coordination, such as concurrence provisions.

Legislation for integrated NRM applies more or less uniformly across a number of sectors of industry that affect the environment, allowing a more effective, coherent and

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An ecologically-based approach. The difference from the present multi-Act approach and integrated NRM is that a more holistic approach to environmental protection is taken.\(^\text{111}\) The inter-connections between decisions taken in one industry sector and the impacts elsewhere are addressed. Under the sectoral approach, insufficient notice is taken of the fact that actions taken in one industry may affect the environment in another sector. The integrated approach addresses the potential for cumulative environmental impacts, an issue that is not properly considered where there exists poorly-coordinated legislation and policies, each addressing particular environmental issues.

The ideal model for integrated NRM legislation involves statutes being integrated via the introduction of shared statutory objectives, linked administrative approvals, and uniform appeal mechanisms and processes. This involves incorporating shared ESD principles and objectives across all the legislation, and allocating these principles a high priority within the legislative framework.

The Tasmanian Resource Management and Planning System (RMPS) is a good example of the possibilities for the integration of legislation through the mechanism of shared statutory objectives. The main features include common statutory objectives including ESD, and a common appeals tribunal. Yet the Tasmanian model for PNF is not included as the Forest Practices System stands outside the RMPS. That PNF system has different statutory objectives to the RMPS, a different appeals system, and is protected by a number of exemptions from aspects of Freedom of Information (FOI) legislation.\(^\text{112}\)

\(\text{The introduction of integrated NRM principles in NSW legislation}\)

The introduction of an integrated NRM approach to PNF in NSW would not be an isolated step, as there has already been a substantial trend towards integrated approaches to environmental management in recent NSW legislation. These include:

- regional planning provisions under Part 3 of the \(\text{EPAA}\);
- the integrated development approvals process under the \(\text{EPAA}\) (Part 4, Division 5); and
- integrated catchment management under the \(\text{Catchment Management Act 1989}\).


\(^{112}\) For example, members of the public have no right to access THPs for private land under the \(\text{FOI Act (Tas)}\).
The most recent example of efforts by NSW legislators to create integrated NRM systems has been the inclusion of a specific statement within the objects clause of the new *Water Management Act 2000 (NSW)*. One of its objects is “to integrate the management of water sources with the management of other aspects of the environment, including the land, its soil, its native vegetation and its native fauna.” On the other hand it can be argued that when it comes to the integration of procedures and systems, that Act does little.

**Streamlining v. integration**

Reforms aimed at streamlining legislation must be distinguished from those aimed at integration of a legislative framework. Streamlining involves simplification of legislation, and an effort to reduce duplication and overlap between regulatory requirements. The challenge in reforming the law in this area is to rationalise and streamline the legislative framework without an associated reduction in environmental protection standards or public participation rights.

In relation to public forestry and plantation forestry, the NSW Parliament has taken steps to streamline legislative requirements. Approvals for public forestry were reformed by the *Forestry and National Park Estate Act 1998*, creating a system of integrated forestry approvals (above p.12).

Another example of the “one-stop shop” approach to approvals in the forestry arena is the *Plantations and Reafforestation Act 1999*, applying to plantation forestry only. Plantation operations on authorised plantations and exempt farm forestry are not subject to the provisions of Parts 4 and 5 of the *EPAA*, and thus the potential requirement for local government approvals has been removed. The operation of EPIs such as LEPs is

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113 *Water Management Act 2000 (NSW)*, s.3(f). Whether the WMA contains sufficient mechanisms to achieve this objective is a question which must be addressed elsewhere. Another example is the *Catchment Management Act 1989 (NSW)*, which attempts to deal with water quality issues on a holistic basis, using the tool of Total Catchment Management, defined as the "coordinated and sustainable use and management of land, water, vegetation and other natural resources on a water catchment basis." (s.4).

114 The number of agencies and laws involved is only one indicator of the adequacy of the legislative framework - adequate consideration of environmental values is another - and it is doubtful that the Tasmanian legislation is superior in this respect. Questions are raised by litigation such as *Giles, Weston & Dudley v Break O’Day Council & T. Denney TAS RMPAT No. J115/2001, 23 July 2001* (‘Dudley’).

115 Other forestry legislation enacted in recent years to provide special exemptions for sections of the forestry industry from selected provisions of NSW environmental laws has included *Timber Industry (Interim Protection) Act 1992* and *Timber Plantations (Harvest Guarantee) Act 1995*.

116 *Forestry and National Park Estate Act 1998*, s.25,26,27.

117 *PR-A*, s.47(1); 47(2)(a),(b).
restricted,\textsuperscript{118} as are TPOs.\textsuperscript{119} Likewise, authorised plantations are exempt from specified provisions of seven other environmental laws.\textsuperscript{120} In addition, open standing provisions have been removed and replaced by a power for Ministerial civil enforcement.\textsuperscript{121}

Further, the \textit{NVCA} also played its part in streamlining NSW law in relation to environmental requirements in two respects. It reduced the role of local government, through the RVMP process.\textsuperscript{122} It also excluded the \textit{TSCA}'s licensing provisions that would have applied in those instances where the RVMP did not require development consent.\textsuperscript{123}

These examples show that there have been attempts to introduce principles of integrated NRM into NSW legislation. However some of the amendments involved have been motivated more by a desire to streamline existing laws than to create integrated legislation for ESD.\textsuperscript{124}

\textit{Specific reform proposals for NSW under existing legislation}

Present arrangements could be greatly improved by identifying a “lead agency” with expertise in PNF matters, with provision for the effective and efficient coordination and implementation of statutory responsibilities by all agencies involved. The present \textit{de facto} lead agency, DLWC,\textsuperscript{125} could be explicitly granted a mandate for regulating PNF, and the responsibility for addressing a broader range of issues arising from PNF whilst dealing with applications for consent to conduct PNF operations. The lead agency would be

\textsuperscript{118} \textit{PR-A}, s.47(2)(c). A debate took place over a proposed amendment which would have prevented clearing in areas zoned environment protection under an LEP. It was rejected by government members who argued that the \textit{NVCA} states that an RVMP must provide for the same level of environmental protection as that provided by an EPI. \textit{Hansard}, Legislative Council, 30.11.99, p.124.

\textsuperscript{119} \textit{PR-A}, s.47.


\textsuperscript{121} \textit{PR-A}, s.57.

\textsuperscript{122} This may not be a bad thing in terms of removing additional layers of regulation, which may not have contributed greatly to increased environmental protection. Nevertheless, given the exemptions under the \textit{NVCA}, planning law has provided an important safety net in some local government areas.

\textsuperscript{123} \textit{NVCA}, s.20(1)(a).

\textsuperscript{124} Similarly, the “integrated development” reforms of the \textit{EPAA} in 1997 streamlined the systems for approvals under 8 separate Acts with the development consent process under the \textit{EPAA}. Where development consent is required for a development and one or more other permits or approvals are also required under 8 specified Acts, (\textit{EPAA}, s.91(1)) then the consent authority must forward a copy of the DA to the other approval body. That body is required to give the consent authority “the general terms of any approval proposed to be granted by the approval body in relation to the development.” \textit{EPAA}, s.91A(2), 92(2). The regulatory body retains its capacity to refuse to grant approvals, as long as it responds to the request of the consent authority within the designated time limit.

\textsuperscript{125} DLWC was amalgamated with the former Department of Urban Affairs and Planning in May 2003 to form DIPNR the Department of Infrastructure, Planning and Natural Resources. This thesis refers however to DLWC, as that was the agency at the time of writing, and during the study period January 1998- December 2002.
required to consult with other agencies including the NPWS, DUAP and local government, EPA, and NSW Fisheries. Under this model, the main approval would be granted in the form of development consent under Part 4 \textit{EPAA} by DLWC under the \textit{NVCA}. The scope of the PNF exemption would be drastically curtailed, only being applicable to very small, low-risk, non-commercial operations, as in Tasmania. Further, this model could make use of planning instruments such as RVMPs in order to achieve a measure of integration. If RVMPs universally required consent for PNF, then their exclusion of the operation of LEPs (i.e. local government planning controls) would pose no problems in terms of diminution of standards.

If a curtailed PNF exemption were to be retained, an associated notification mechanism, as proposed in Chapter Six should be put in place. This would require those seeking to rely on a restricted PNF exemption to notify regulators who would at least retain the option of requiring consent. The notification approach is applied in most States in the United States to private forestry (at a minimum).\textsuperscript{126}

Further, more use could be made of the existing concurrence mechanism in the \textit{EPAA}.\textsuperscript{127} Under this mechanism, specialist agencies not having primary carriage of the approvals process remain in a position to comment upon and ultimately veto any unacceptable proposals for development. DLWC could be required to take greater account of threatened species issues by reason of making it the consent authority, rather than the Minister (see Chapters Six and Seven). This step would have the function of depoliticising the approvals process and of granting a concurrence role to NPWS regarding threatened species (rather than a mere right to Ministerial level consultation).\textsuperscript{128}

A key question is whether local government should have any role in the approvals process. At present there is unnecessary potential for overlap between the development-consent requirements of local government under LEPs and those of the DLWC under

\textsuperscript{126} Alaska, California, Idaho, Maine, Massachusetts, Nevada, New Mexico, Oregon, Washington. Some of these jurisdictions do not attach to the notification requirement a requirement for submission and approval of a timber harvesting plan (THP); Connecticut, Idaho, Maine (for smaller operations less than 50 acres), New Mexico.

\textsuperscript{127} \textit{EPAA}, s.79B. This was recommended by Independent Expert Working Group, (1998) above n 4 at 46, 152.

\textsuperscript{128} This was the position under the former SEPP 46, which was abandoned under pressure from rural interests keen to reduce the influence of NPWS in the approvals process.
the NVCA. However, RVMPs, once made, will cut local government out of the picture.  

**INSTITUTIONAL ISSUES**

Another aspect of law reform concerns the institutions called upon to implement legislation, particularly in relation to any new statutory framework. So far, only minor institutional reforms have been made in NSW at the time of writing in relation to PNF forestry. An Office of Private Forestry was established in November 1999, in order to implement the *Plantations and Reafforestation Act* and to encourage investment in the private forest sector in NSW. The main intent has been to provide extension services to forest owners, and to raise the profile of PNF within government, rather than to assume or coordinate regulatory roles.

An important general principle that can be applied to improve the institutional framework is to separate forest management from forest regulation. The ESFM Working Group identified difficulties for agencies such as NPWS and DLWC that carry out both regulatory and extension and education roles. It wrote: “Regulatory responsibilities can lead to confrontation which undermines the extension role…this tension could be leading to a reluctance to implement… regulatory responsibilities”. To this end, the Group recommended the creation of an Office of the Forest Regulator, and a separate Office of the Forest Manager (applying across all tenures).

In terms of the identification of institutions for specific regulatory models, the choice is broadly between a “mega-department” on the one hand, or on the other coordinating the decision-making of a number of specialist agencies which supplement and oversee the

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129 This is unless local government makes a special application which is approved, in order to have its LEP provisions apply in place of the RVMP. Hurrell, J. (1998) “Clearing Controls And Rural Councils : Growth Opportunity Or Role Reversal?” 3(1) *Local Government Law Journal* 135-141 at 140-1. Against proceeding totally under RVMPs, are arguments that local government is democratically elected, as opposed to RVMCs. If this view is preferable, then PNF could be regulated under LEPs and REPAs instead of under RVMPs. This would involve, leaving the regulation of PNF to local government, something which raises other issues of certainty and dependability. An alternative is to amend the legislation so that neither the RVMP provisions nor the LEP provisions apply to PNF at all. Instead, one set of approval requirements could be applied to PNF throughout NSW under the NVCA. There would be room in this case to take into account (as do the DLWC ‘Best Operating Standards’ for PNF) the regional variations involved in management of coastal and tablelands forests, river-redgum forests in the South West, and cypress pine forests in the North West).

130 In July 2003.

131 The OPF is now situated within the Department of Infrastructure, Planning and Natural Resources.


decision-making of the lead Department where necessary, e.g. where the PNF proposal involves a moderate-to-high degree of environmental risk.

One argument in favour of retaining a number of agencies is that there is a need for specialist agencies - such as the NPWS, with expertise in threatened species protection and management - which can act as a strong advocate for conservation which may otherwise not be given significant weight. The multi-agency approach would require less radical reform than the introduction of one single natural resource management statute which would replace existing legislation and administrative agencies. It would be necessary merely to introduce a system by which one “lead agency” would be identified to deal with PNF matters. Further, if linked approval and concurrence processes are built in, the difficulties in achieving integrated natural-resource management under a multi-Act system may not be as great as imagined.

However under the single-agency approach, employing ‘mega-departments’, the danger exists that biodiversity concerns will be allocated lower priority than timber-production objectives, upon the merger of specialist wildlife agencies with forest-management agencies. The retention of specialist agencies is important as it ensures that particular ecological issues will have a ‘voice’ in decision making. Still, with the multi-agency approach, a danger remains that the objectives of achieving integrated natural resource management and creating a less-convoluted regulatory process may not be achieved. To some extent these problems can be addressed by ensuring inter-agency coordination in approvals processes, e.g. by concurrence mechanisms and integrated licensing mechanisms.

The argument frequently presented in favour of industry-specific legislation is that it is necessary that only those with a detailed knowledge of the industry (e.g. foresters) should be regulating it. Clearly one needs to have a specialist agency with specific expertise in forestry matters, but it is not automatically the case that this approach is only open to a stand-alone forestry agency. Other agencies are perfectly capable of employing staff with background and expertise in forestry, and expertise in management of the environmental impacts of forestry operations.
**ESSENTIAL ENVIRONMENTAL PROTECTION REQUIREMENTS**

Ultimately, questions of ideal institutions and statutory arrangements are probably of lesser importance than those of content of legislation. All models, if they are to deliver ESFM outcomes, must contain sufficient specific environmental-protection requirements. Thus it is necessary to discuss the content of legislation required to achieve ESFM. These questions of content are perhaps more important than the mechanisms of the law. The pervasive challenge is to ensure that law reforms do not result in less environmental protection. Changes must require ESFM, not just an elegantly-streamlined legal form.

**Restricting Exemptions**

As a general principle, any legislative framework for PNF will be ineffective in achieving ESFM outcomes if it does not apply uniformly to the majority of logging operations. In particular, issues will arise if either the law is subject to many exemptions, such as the NVCA, or the law is patchy in its coverage or application - as is currently the case with LEPs under the EPAA. It is impossible to delegate the decision as to what amounts to ESFM to industry itself, as the concept of ESFM is highly contested and subject to many interpretations.

The key case in point is the PNF exemption, discussed in Chapters 5 & 6. The continued operation of the exemption in its present form enables the logging of high-conservation-value (HCV) forest where it exists on private land, without any approval requirements. Part Two showed that the fall-back positions of the LEP or the section 91 licensing provisions of the TSCA were frequently not applied in the study regions during the study period. In order to adopt a precautionary approach to the environmental risk associated with PNF, it will be necessary to curtail the availability of the exemption or to repeal it altogether.

**Suggested approval process – Timber-Harvesting Plans**

In place of an exemption (or, representing a slight improvement, a notification requirement) it would be preferable to require all commercial PNF operations to seek development consent from DLWC, and as part of this process to submit a timber-harvesting plan (THP) for approval before operations may lawfully proceed. Such plan-preparation is a standard approach to forestry management in many jurisdictions, even
on private land, both in Australia and internationally.\textsuperscript{135} THPs typically contain a description of the forest to be logged, its location, the volume of timber to be extracted, the method of logging, the purpose of the logging, the location of roads, log dumps and snig tracks, and the proposed restocking approach. Such plans require approval before operations may lawfully proceed. As we have seen, Tasmania requires preparation and approval of Forest Practices Plans for all but the smallest-scale non-commercial operations.\textsuperscript{136}

Yet if the legal framework for PNF is to be sufficient to enable attainment of ESFM standards, it must require more than just preparation of a THP. The plan must require more than cursory attention to environmental matters, more than a ‘tick the box’ approach. This is the danger with a document whose prime purpose is to facilitate, document and plan timber-gathering. It must contain genuine environmental protection conditions, which could be derived from an ESFM Forest Practices Code with appropriate links to specialised legislation and agencies.\textsuperscript{137}

THPs would be subject to specified minimum standards including requirements for vegetation and habitat surveys, and requirements for vegetation retention, particularly retention of hollow-bearing habitat trees and for forest connectivity across tenures.\textsuperscript{138}

Control of the loss of habitat trees in forestry operations could be achieved through the threat abatement process in the \textit{TSCA}.\textsuperscript{139}

In NSW, the Smith Report into the PNF exemption proposed a new regime for oversight of PNF involving a two-part system of approvals - both timber-harvesting plans, and a longer-term PNF management plan. The first requirement would be that timber-harvesting must take place in accordance with an approved Plan. Such a Plan could only be prepared by licensed forest-planning consultants, and would include

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{135} See Wilkinson (1999) above n 12 at 43-60. California requires detailed THPs for all private forestry. Ellefson, P.; et.al. (1997), above n 16 at 195-209.
  \item \textsuperscript{136} On a broader level of analysis the approach of requiring THPs has similarities to requirements for production of a ‘native vegetation management plan’ under native vegetation law in SA. \textit{Native Vegetation Act 1991 (SA), s.28(3)(b)}, requires all applications for consent to clear vegetation to be accompanied by drawn up in accordance with guidelines issued by the Native Vegetation Council. The property planning approach is also reflected in provisions for preparation and approval of property management plans under the \textit{Threatened Species Conservation Act 1995 (NSW)}. However, such plans would not amount to a genuine approval requirement, as it provides an exemption to the licensing requirements and offence provisions of that Act.
  \item \textsuperscript{137} All the above comments are pertinent to the recently released DLWC document, “Best Operating Standards for PNF”, proposed the use of “operational plans”, essentially THPs by another name. DLWC (2001) above n 3 at 3.
  \item \textsuperscript{138} Independent Expert Working Group, (1998) above n 4 at 76.
  \item \textsuperscript{139} Independent Expert Working Group, (1998) above n 4 at 66.
\end{itemize}
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prescriptions for environmental protection and maintenance of all forest values. THPs would be merely part of a more detailed PNF Management Plan (PNFMP) also requiring DLWC approval. This plan would involve more detailed assessment of a broader range of environmental and silvicultural factors over a longer time horizon. Approval of further Harvesting Plans in the future would be subject to satisfactory completion of post-harvest monitoring of conditions laid out in the first harvesting plan. Similar approaches are applied in New Zealand.

An important aspect of THP preparation requirements is to ensure that the content of THPs is of sufficient quality and accuracy. Under a Code of Practice in NSW, all commercial-scale PNF operations could be required to submit THPs prepared by licensed forest-planning consultants. Such THP plans would be subject to a requirement for development-consent approval by the regulatory agency following multi-agency review to include matters such as threatened species assessment. Such inter-agency review, and also in some circumstances, public review, of THPs for proposed PNF operations is applied in Washington State, USA. This approach of inter-agency review was also recommended by the NSW ESFM Expert Working Group which suggested that THPs be reviewed utilising the EPAA’s concurrence mechanism.

Ecological Code requirements

Hannam, in proposing an ecologically-oriented Private Forests Act suggested that it must require maintenance of ecological integrity of private forests, and address questions of appropriate silvicultural practice such as restocking, regeneration and road-building. He argued that it should contain detailed environmental assessment provisions, which take account of selective and integrated logging as well as outright vegetation clearance. Further improvements would involve ensuring that a Private Forests Act incorporates explicit objectives in relation to biological diversity, land degradation, greenhouse gas sinks, protection of catchments and water quality. In this sense such a law relating to

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142 Associated with this type of requirement is a requirement that all forestry operations must be carried out only by certified foresters and forest supervisors. This approach applies in Connecticut: see Ellefson (1997) above n 16.
143 DLWC (2000) Summary of Comments on Desktop Audit of Exemptions (Stage 1 Review of Exemptions), Comments by DLWC and RVC only, internal unpublished document, 115pp.
146 This approach to native vegetation conservation law in general was suggested in Anton, D. (1999) above n 109 at 6.
the conservation of forests on privately-owned land would be more than simply a Forest Practices Act, but also would contain elements of an ecological protection law.

Notably the ESFM working group recommended that the preparation of THPs must be subject to strict guidelines regarding systematic flora, fauna and habitat surveying as a baseline for plan preparation. Other contextual controls directed at maintaining forest connectivity across tenures, and meeting CAR reservation targets for inadequately-protected forest types were also recommended. The report recommended that THPs be based on a Code specifying minimum standards relating to the silvicultural method, the length of rotation, and regeneration, as well as biodiversity, soil and water requirements.

One approach is to ensure parity of PNF standards and prescriptions for threatened biota with those for public land forestry. In public forests, the NPWS require searches by qualified persons for trees of particular fauna value prior to logging, including for nests and roosts. The principle of requiring the same threatened species protection prescriptions or conditions on private land as in public forest would involve more rigorous and detailed requirements relating to a far wider range of species. By contrast, DLWC’s best operating standards for PNF contain only some generalised exclusions from particular habitat types, e.g. rocky outcrops. They are not as rigorous as the standards applied to public forestry.

The Code must contain the following elements, if it is to amount to an ESFM Code rather than a logging Code: minimum tree retention rates, and rotations, as well as constraints on clearfelling; steep-country logging, protection of old-growth forest; and a comprehensive series of exclusion zones for specific fauna and flora species on a par with prescriptions applied on public land. The preparation of such plans needs to be subject to strict guidelines regarding systematic flora-, fauna- and habitat-surveying as a


148 In N-E NSW within public forests the National Parks and Wildlife Service (1999) requires pre-logging surveys for threatened species be undertaken, exclusion zones (varying from 20m to 300ha) be established: for nests and roosts of 11 separate birds, all subterranean bat-roosts, all tree bat-roosts, and all flying fox camps; around records of 6 other animal species; around specified habitat for 15 animal species; and around 213 plant species. Upper North East Integrated Forestry Operations Approval, Terms of Licence under the TSCA 1995: Upper North East Region, Appendix B.

149 As well as constraints on the use of cable logging technologies that are typically employed to facilitate steep-slope logging: see Prest, J. (1997) “An Environmental Plus? The Introduction of Cable logging in NSW”, 18(3) Bogong 6-8.

150 Pugh, D. (2001) above n 3 at 13 : “In NE NSW, the NPWS requires that pre-logging surveys for threatened species be undertaken and that exclusion zones (varying from 20m to 300ha) be established: for nests and roosts of 11 separate birds, all subterranean bat-roosts, all tree bat-roosts, and all flying fox camps; around records of 6 other animal species; around specified habitat for 15 animal species; and around 213 plant species.”
baseline for plan preparation. The DLWC 'best operating standards' for PNF fail to contain these specific requirements, the incorporation of which would be necessary to achieve ESFM on private land.\textsuperscript{151}

\textit{Old-growth forest logging restrictions}

The protection of old-growth forests is a central requirement in a regime for ESFM of native forests. This importance was recognised by the RAC Inquiry which concluded that:

\begin{quote}
Logging of old-growth forest … potentially violates the precautionary principle of sustainable development in that an irrepealable resource is being destroyed. Although the ecological attributes of old growth may be regenerated in the long term (a century or more), the values associated with the pristine attributes cannot be replaced.\textsuperscript{152}
\end{quote}

\textit{Sustainable-yield requirements}

If ESFM objectives such as “maintain the full suite of forest values” are to be achieved it is necessary to ensure that PNF is subject to requirements regarding minimum tree-retention. This issue is an important one in the PNF context given the evidence (although inconclusive) concerning harvesting patterns. Smith, the DLWC’s private forestry consultant wrote: “Historically private property forestry has been dominated by high intensity exploitative harvesting as a precursor to land clearing or land sale. There has been little focus on regeneration silviculture and management of private forests to provide an ongoing income stream.”\textsuperscript{153} Similarly, Wilson (1995) in his survey of the impact of the river redgum industry in NSW identified a substantial proportion of ‘once over’ logging on private land involving ‘maximum economic utilisation’ of stands with little long-term view to silvicultural or environmental considerations.\textsuperscript{154}

This problem could be corrected with an explicit legislative limit on harvesting, that is, up to maximum sustainable yield (preferably, maximum ecologically-sustainable yield), as in Victorian legislation applying to public lands and British Columbia.\textsuperscript{155} However, given the lack of inventory documentation surrounding private forests this requirement may

\textsuperscript{155} Forests Act 1958 (Vic), s.52D which provides for Ministerial review of sustainable yield rates every 5 years or lesser intervals if deemed necessary. See also s.52A. These sustainable yield limits must be taken into account when granting harvesting licences: s.52C. \textit{British Columbia Forest Act}, section 28 (1)(g). This provision that timber harvesting must be limited to the maximum annual sustainable yield was recently removed.
well prove impossible in the short term. Recently proposed DLWC standards contain no minimum retention rates and no constraints on clearfelling. 156

**Adequate biodiversity-surveying requirements**

Another central requirement in a regime for ESFM of native forests is adequate protection for threatened species of fauna and flora. The legislative framework must take sufficient precautionary measures because there are numerous threatened species that exist on private forested land. 157

The issues with identification of threatened species are most crucial in relation to threatened plants, as their distribution is poorly known, and they are difficult to identify. As was discussed in Chapter Nine, it is unlikely that landowners will have full knowledge of the threatened species that occur on their properties. Further, given the economic incentives to conceal the existence of threatened species it would be optimistic to assume that landholders would declare the existence of such species even if furnished with sufficient information. On this basis, if the ESFM target of maintaining the “full suite of forest values” is to be achieved, it is necessary to require surveys by qualified and accredited botanists of properties on which PNF is proposed. 158 There are no legislative controls at present to ensure that biodiversity surveys are conducted by suitably qualified and accredited ecologists. 159 Further, neither the NVCA nor DLWC’s proposed standards for PNF require threatened species surveys to be conducted only by qualified experts. One solution would be to require independent audit or oversight of threatened species assessments, for example of proponents’ 8-part test documentation. 160

It may be argued that sufficient protection exists in the operation of the TSCA through the NVCA, and, where the NVCA does not apply, through LEPs, or section 91 licensing. However in view of the gaps in coverage due to exemptions and implementation deficits, this is unlikely to be sufficient.

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157 The N-E NSW CRA identified 215 fauna species as being of conservation concern. Of these, expert panels identified 102 as having logging posing a significant threat to their regional populations, with 138 threatened by clearing, 34 threatened by the loss of large logs and 33 requiring hollow-bearing trees. Pugh, D. (2001) above n 3 at p.16.
159 Chapter Nine discusses the effect of recent amendments to the TSCA which require accreditation for those preparing SIS but not for those preparing 8-part test documentation.
Legislation can provide for a more strongly-precautionary approach if it requires surveying before and monitoring after approval of a logging operation. Post-logging monitoring enables comparison of actual performance with the requirements of conditions attached to development consent. It is unlikely that the application of the development consent process under the EPAA and NVCA will be sufficient to ensure that such monitoring will take place on a routine basis.

Information- and inventory-gathering

Another problem in the PNF arena in NSW is the lack of inventory and management information flowing to government. At present there is insufficient documentation of PNF. Although NSW law already contains a requirement that all timber coming from PNF operations be branded or marked as coming from private property, it appears to be the case that neither timber processors nor the Forestry Commission have sufficient incentives to compile accurate and comprehensive data in relation to PNF. Parsons, a forestry consultant to the Rural Industries R&D Corporation recounts the following observations of industry insiders:

According to Dyason (pers. comm. 1997) estimated [sic] that actual removals [from private property] may be underestimated by as much as 50%. About three quarters of sawmills on the north coast of New South Wales obtain timber from private native forests (O'Neill pers.comm.1997).

With better regulation there would be better documentation and therefore enhanced capacity to make judgements about the extent of PNF activity. Better inventory information would enable evaluation of the sustainability and cumulative impact of PNF. It would also enable monitoring of the practices and compliance of private forestry contractors. According to Wilson “The potential for contractors to deliberately undervalue timber taken from properties (a practice that, it has been suggested, is currently occurring) may be reduced.”

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162 Pers.comm., Dr Ross Florence, ANU Forestry (School of Resource and Environment Studies), 14.10.03.
163 Forestry Regulation 1999 (NSW), cl. 61.
CONCLUSION

Building upon the analysis presented in Part Two, this chapter has reviewed the existing NSW legislation applying to PNF against forest-specific evaluation criteria. On this basis, the standard of the present legislative framework for PNF is not considered adequate to facilitate ESFM, principally because of failures to provide adequately for the “conservation of the full suite of forest values” and failure to apply the principles of ESD.

Four possible models for reform of PNF regulation were considered. This included a Forest Practices Act and Code; a conventional multi-Act framework; a multi-Act system for integrated natural resources management; and a single-Act approach to integrated natural resources management.

In relation to the first model, it was argued that mere introduction of a Forest Practices Act and Code which applied to private land, whilst representing an improvement, would be insufficient to achieve ESFM in NSW. The main reason is that such a Code is likely to over-emphasise timber-production objectives, whilst paying insufficient attention to detailed environmental-protection requirements.

Regarding the second model, the multi-Act strategy, it was agreed that there is an urgent need to rationalise and clarify the present multi-Act legal framework for PNF, which is convoluted. Arguments for streamlining the legislative framework were examined and considered to be sound, but only where they do not involve a diminution of environmental-protection and public-participation requirements. However, it was argued that a number of recent exercises in this vein in NSW have involved exclusions of various provisions of environmental laws that have enabled public participation in the administration of environmental law.

In order to resolve some of the issues arising from the complexity of the existing legislation, a number of measures were suggested. Principal amongst these was for legislative drafters to make greater use of the Part 4 EPAA development consent process (including a requirement for THP preparation for all PNF) and its associated concurrence provisions, whilst clearly identifying a ‘lead agency’ for PNF matters in NSW.
However, it was argued that either the third or fourth law reform options, of multi-Act or single-Act integrated natural-resources management legislation, are probably the most appropriate vehicle for delivering ESFM. Whether they in fact deliver ESFM depends on what they contain. As argued earlier, questions of ideal mechanisms perhaps are of lesser importance than those of content of legislation. All models, if they are to deliver ESFM outcomes, must contain sufficient specific environmental-protection requirements.

There exist a number of essential components of a legal regime for ESFM on private land. These include, first, a precautionary approach to decision-making, including incorporation of the principles of ESD into all relevant legislation, particularly an obligation to make decisions consistent with the precautionary principle. Secondly, drafters of the new framework need to ensure that an integrated approach to natural-resources management is considered. Thirdly, comprehensiveness of coverage of the PNF industry is a key aspect of future proposals, with removal of exemptions a priority.

Yet this is not the end of the story. The broader debate over how to improve environmental regulation by replacing or complementing it with a range of quasi-regulatory (i.e. information-based, market-based, property rights, and self-regulation) measures is ongoing. Some commentators argue that the very decision to apply a direct regulatory approach - as opposed to other approaches – is of limited effectiveness. For example, the Australian Forest Growers have argued that various permutations of self-regulation systems will be a more effective means for balancing economic and environmental outcomes than conventional regulation.167

Chapter Thirteen examines arguments that the regulatory failures revealed in Part Two regarding NSW regulation justify moving to a policy of self-regulation. The theoretical literature regarding the environmental regulation in the context of off-reserve conservation is reconsidered in light of the findings of the case studies.

Chapter Thirteen

REFLECTIONS ON REGULATORY THEORY

This chapter makes some closing remarks about the broader implications of the case studies of PNF for environmental law and regulation. It is not an excessive generalisation to state that the dominant approach to PNF in NSW during the study period was a half-hearted reliance upon conventional command regulation that was of limited effectiveness in achieving ESFM.

In light of such findings, we must return to debates considered in Chapter Four about the appropriate role for conventional regulation in achieving conservation objectives on private land. When confronted with sub-optimal outcomes, many will suggest that regulation be abandoned as ineffective in the PNF context. Yet in reconfiguring the regulatory framework for PNF we need to be sensitive to the implications of this particular context, especially the goal of biodiversity conservation on private land.

Also considered is the question of how conventional regulation can be modified to make it more effective. For example, could greater levels of third-party enforcement be encouraged? How viable would it be to apply ‘outcomes-based regulation’ or self-regulation alone, or in combination with command regulation?

Identifying likely issues with the application of complementary regulatory instruments to PNF is a major task in reconfiguring regulatory policy. This Chapter also considers the literature setting out preconditions for effective self-regulation. A suggested ‘ideal mix’ of regulatory, self-regulatory, motivational and economic instruments for the PNF context is presented.

REGULATORY FAILURES OR FAILURE TO REGULATE?

Part Two revealed a picture of poorly integrated laws, patchy implementation and instances of defective enforcement in NSW applying to PNF. One way of explaining these shortcomings is to apply the concept of regulatory failure. This is ‘regulation which
leads to outputs and outcomes which are perceived not to be in the public interest”, 1 or more simply, where legislation fails to achieve its stated objects.

If a conclusion is drawn that we have an instance of regulatory failure, the question can be raised whether it follows ipso facto that conventional regulation should be dispensed with. Few in the academic context actually go so far as to state this, most instead suggesting that other instruments should be applied in combination with regulation. However, it remains a political reality that self-regulation is often proposed as an alternative to conventional regulation. 2 Self-regulatory and voluntary compliance standards frequently arise as an alternative to regulation. 3 Industry lobby groups regularly advocate the avoidance of “command and control” regulation in the environmental context. 4 In a recent policy document the NSW Farmers Association decried “command and control measures… [as] often inefficient, ineffective, and inequitable.” 5 The PNF industry in NSW has argued that government should avoid command and control and should pursue voluntary and self-regulatory policy instruments. 6

These critics of regulation may query why it is necessary to research how to improve frameworks of conventional regulation. The answer is as follows. Rather than proceeding from a starting assumption that “command and control is ineffective”, it is better to conduct empirical research into the precise causes of regulatory failures, and to act accordingly to address those causes. Multiple causes of regulatory failure were identified in the PNF environment in Part Two. The inappropirate application of the tool of conventional regulation to particular problems is only one potential cause (among

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3 Grabosky, P., Gant, F. (2000) *Improving Environmental Performance, Preventing Environmental Crime*, Australian Institute of Criminology, Canberra, Research and Public Policy Series, Report No.27 at 23. One academic writing for the financial press advised her business readers that “introducing voluntary industry standards…can also pre-empt or prevent further regulation”. Howard, E. (1998) “Keeping Ahead of the Green Regulators”, *Australian Financial Review*, 16 December 1998, p. 8; Walker, L., Cocklin, C., LeHeron, R. (2000) “Regulating for environmental improvement in the New Zealand forestry sector” 31 *Geoforum* 281-297 at 290, citing interviews with the representative of the NZ subsidiary of US multinational Weyerhauser Ltd, stating that the impetus for self-regulation in that country has come from the desire to avoid the experience of the US forest industry with regulation. It was stated that industry are “keen to avoid regulatory constraints that forestry companies in the Pacific Northwest are facing”.


A contrary viewpoint that must also be contemplated is that in many instances regulation of PNF in NSW has not failed, as it has not been seriously or comprehensively attempted. Instead of regulatory failure, an alternative picture of a failure to regulate can be painted.

Regulatory failures in the PNF context in NSW have been largely due to the poor organisation and design of the legislative framework, the deleterious effect of the NVCA's broad exemption for PNF, as well as patterns of ineffectual implementation and enforcement of environmental laws.

Certainly, as Cane has observed, command regulation is “currently rather out of fashion”. But is the present distaste for regulation merely a matter of fashion? To what extent is it based on evidence? This is an important question. Worldwide, there is an increasing demand that legislators and government regulatory agencies transcend the political amnesia and ad hoc application typical of environmental policy, to apply a strategy of evidence-based policy making. With the prevailing preference for market and incentives approaches as superior to regulation, can we rely upon those methods to achieve an equal or greater level of environmental protection? Those proposing the use of market mechanisms or self-regulation also need to provide empirical evidence of the contexts in which those approaches are effective.

Even if mechanisms such as economic incentives or self-regulation are introduced, there is also a reasonable consensus in the literature that it will remain necessary to retain a baseline of conventional command regulation (‘a regulatory safety-net’) to provide a reliable and dependable regime for biodiversity protection.

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8 Pers. Comm., Dr Tim Bonyhady, CRES, ANU, 20.2.2001, by telephone. In a different context, Farrier wrote in 1990: “We cannot conclude that coercive legal regulation of vegetation destruction to protect wildlife habitats and plant communities has failed, because such a policy has never been fully implemented [in NSW].” Farrier, D. (1990) “Regulation of Rural Land Use: Coercion or Consensus?” 2(1) Current Issues in Criminal Justice, 95-124 at 123.
inherent in the task of biodiversity conservation discussed in Chapter Four, such as scientific uncertainty, require preventative regulation.

As has been noted elsewhere, it is ultimately futile to characterise the regulatory policy debate in ‘either/or’ terms. A combination of conventional command regulation and alternative approaches will probably provide a more successful conservation outcome than either of these two mechanisms alone. It is widely agreed that pure self-regulation is likely to fail (see Chapter Three). Most academic authors, even where they place different emphasis on the issue and present different perspectives, still advocate a combination of approaches. For example, Curran argues that it is necessary to offer incentives for biodiversity conservation but that these should be offered alongside regulation and education measures. Similarly, Pittock argues that whilst incentive approaches are important, they are not sufficient to protect native vegetation. He writes: “despite any number of voluntary measures and incentives, nowhere has the rate of vegetation destruction in Australia been substantially reduced without a complementary regulatory safety net to control the minority of landholders to persist with clearing.”

Nevertheless, at this time, the attention of the majority of commentators has been focused on the promise of new mechanisms - not how to make existing regulatory frameworks more effective. For example, Curran devotes considerable time to exploring the potential of tradeable biodiversity credits, and chooses not to explore the details concerning issues of regulatory effectiveness, compliance and enforcement. Similarly, other Australian commentary on mechanisms for improved biodiversity protection in Australia, such as the highly influential report Reimbursing the Future, which explored the potential of incentive and market mechanisms, spent comparatively little time analysing the extent of regulatory failure and the reasons for it. That analysis of biodiversity policy options, if only by the sheer weight of its emphasis and focus, clearly favoured the application of voluntary and market-based measures over the regulatory approach. At the same time as it recommended a combination of a ‘safety net’ of conventional regulation,

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15 Curran, above n 13.
it recommended market-based solutions for biodiversity conservation. In relation to this, Tulau made the incisive observation that:

"It is unclear in practice how the self-regulatory approach is to be reconciled with the simultaneous recommendation for clearing controls."

This question of how a regulatory ‘safety net’ is to be applied in conjunction with other measures is generally glossed over in the literature (with some exceptions). The difficulty is that environmental laws must specify the situations in which approvals are required, and the situations in which they are not. In some instances, certain instruments are inherently incompatible. It may not be possible to ‘have it both ways’. In other cases, it may be possible to supplement regulation with mechanisms such as compensation and/or stewardship payments, offering incentives for environmental protection, whilst simultaneously mandating a bottom line of protection.

Yet in order to progress such debates, we must consider issues concerning regulation and self-regulation at a lower level of generality than merely debating in the abstract whether self-regulation or regulation should apply. The most appropriate mix of instruments will depend on the particular context for which we are attempting to design regulatory policy, and the particular threats and risks posed. Different cultural and ecological considerations, as well as questions of the characteristics of the industry to be regulated should suggest the combination of policy and regulatory instruments most likely to be effective. This led Gunningham to ask, “how, in what circumstances, and in what combinations, can regulation, and economic mechanisms (and other instruments) achieve

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18 The notable exception is Gunningham and Grabosky (1998) above n 12, at p. 422-448, where a table and detailed consideration of compatible and incompatible instrument combinations is presented.
19 This raises a fundamental problem with Braithwaite’s approach of tailoring regulatory strategy to each particular entity (ie. firm) being regulated: where self-regulation or regulation can be applied according to a pyramid strategy based on past performance. This is that the approach runs foul of the rule of law and principles of consistency of the law. There is a legal difficulty in proposing that one have different versions of the law for different actors.
21 Gunningham argues: “Since there are unlikely to be any generally applicable ‘optimal mixes’, analysis which is located at a much lower level of generalisation is likely to yield the most fruitful results.” Gunningham, N. (1996) “Biodiversity: Economic Incentives and Legal Instruments”, ch.15 in Boer, Fowler, Gunningham (eds.) Environmental Outlook No.2: Law and Policy, Federation Press, Sydney at 232-233.
optimal policy outcomes?" Importantly, the objective here is not to draw ‘big-picture’ lessons for theory from the case studies of PNF regulation, nor to present a definitive, ‘last-word’ policy-package for PNF in NSW. What is appropriate in this context may not be appropriate or applicable in other contexts.

The regulatory theorist Malcolm Lodge cautioned against “arguments which suggest that institutional rearrangements will lead to a ‘perfect’ system”. He warned that under any system, both regulators and regulated “actors have always the incentive to ‘drift’ or ‘shirk’, and therefore any regulatory system is bound to ‘failure’ ”. Therefore it is important that whichever model is proposed, one eye is trained on the question of systems for accountability; and that an awareness of the importance of implementation and enforcement is maintained.

**SELF-REGULATION AND ITS VARIANTS**

Aside from advocacy of self-regulation that is politically and economically motivated (eg. to reduce ‘red tape’ and ‘green tape’ and compliance costs for industry), the academic rationale for self-regulation is to assist environmental regulators operating within an ongoing context of budgetary restraint to modify the regulatory process so as to make it less costly to administer.

On this basis, it is often suggested that governments incorporate elements of self-regulation within an overall statutory framework. The application of self-regulation is not an either/or question. Elements of self-regulation can be incorporated within a regulatory framework, and the regulation of Tasmanian PNF is a case in point. The main question is whether that approach will deliver ESFM with more certainty and dependability, whilst addressing the economic issues involved with regulating productive land uses.

The range of possible approaches to the intensity of regulation of PNF can be set out on a regulatory continuum, ranging from pure self-regulation with no externally imposed

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24 Lodge (2001) above n 1 at 4, 22.
requirements (i.e. exempt PNF), to ‘full regulation’.\textsuperscript{26} In between lie models of co-regulation (self-regulation involving industry associations) and company-based enforced self-regulation (see Chapter Three).

The three main aspects of the regulatory function that may be privatised comprise (i) the rule-making function, (ii) the implementation of rules (such as through the application of approval processes), and (iii) the enforcement of rules. There are a number of different possible permutations. For example, in the Tasmanian forest practices system, the rule-implementation function is privatised but the rule-making and enforcement functions remain the responsibility of the public sector. The Tasmanian forest practices system is a form of firm-level enforced self-regulation where self-regulatory aspects are integrated within the framework of the Forest Practices Act. In particular, companies are entitled to employ their own Forest Practices Officers (FPOs) who have the power to devise and approve their own forest practices plans.

It would be inappropriate to allow industry to define its own version of acceptable rules for PNF, and it would also be inappropriate to allow it to have primary responsibility for enforcement. This is particularly the case in a context where there is a risk of ongoing environmental consequences such as biodiversity decline and biodiversity loss.

\textbf{PRECONDITIONS TO EFFECTIVE SELF-REGULATION}

Could some form of self-regulation be applied in NSW to PNF yet still enable ESFM goals to be achieved? Some may suggest a shift to a Tasmanian-style system, incorporating substantial elements of self-regulation. However, we need to examine the factual pre-conditions necessary to create a climate in which self-regulation approaches might produce the same or better environmental results than conventional regulation.\textsuperscript{27}

The literature describes certain factual circumstances that tend to favour industry acting to voluntarily establish systems of industry -association-administered self-regulation (described in Chapter Three as co-regulation). According to Gunningham and Rees, this

\textsuperscript{26} At its extreme ‘Full regulation’ would entail a complete prohibition on an activity. One step less than this is to allow an activity with consent and subject to conditions of consent.

\textsuperscript{27} Buckley (1994) set out a four part test that must be satisfied by proposed industry self-regulatory schemes if they are to represent an improvement on conventional regulation. These are that the self-regulatory system must provide improvements in four areas - the degree of environmental impacts, the rate of improvement in environmental performance, the cost of improving environmental performance and the equity of the distribution of those costs. Buckley, R. (1994) “Environmental Self-regulation in Industry”, 11(1) \textit{Environmental and Planning Law Journal} 3-5.
type of voluntary self-regulation has as a necessary but not sufficient pre-condition for its success, “a strong natural coincidence between the public and private interest in establishing self-regulation”[emphasis added]. Yet often in the environmental protection arena, problems arise because a gap exists between industry self-interest and the public interest. The empirical evidence suggests that steps to create a formal program of self-regulation will only be taken under external pressure.

Certain tests are set out in the literature regarding whether a particular industry is suited to the introduction of industry association-based self-regulation. These concern the number of firms in the industry, their size, the stability and culture of the industry, as well as the strength, capability and authority of industry associations. This form of self-regulation is most likely to work where there are few firms, particularly where the industry is dominated by a small number of large firms, and where there are strong industry associations and a business culture sympathetic to ensuring compliance with the requirements of self-regulation schemes.

The second precondition for effective self-regulation is the domination of each sector by large firms, where the costs of exiting from the industry are high, because the entry and investment costs at stake are considerable. This makes it difficult for fly-by-night operators to enter the industry, and means that participating firms have a large investment at stake, one they wish to protect from the reputation-damaging antics of ‘cowboy’ firms. In such a context, industry participants have an incentive to monitor each other’s performance.

However in the NSW PNF context, a significant proportion of landowners are only temporary or part-time participants in the industry, with most private forests not being

actively managed under formal forest management plans, but rather opportunistically exploited as an alternative income source in times of drought or depressed commodity prices. Thus the primary objective of many landholders intending to conduct forestry may be to conduct it (or commission it) in order to supplement on-farm income, or as a precursor to land sale or plantation development.

The third indicator of an environment in which industry self-regulation can work effectively is where there is a history of effective cooperation between regulators and industry and amongst industry members. There must be a well-organised industry association that is receptive to environmental protection initiatives, and willing to develop a credible EMS and to promote its use. However in NSW PNF there appears not to be a business culture sympathetic to strong industry self-regulation. The two relevant industry associations, the Forest Products Association and Australian Forest Growers are not sufficiently well organised, resourced, or willing to control their members in favour of environmental protection. The likelihood of strong industry-association action to control free-riding is unlikely. Nevertheless, there is such a strong aversion to government regulation within the NSW PNF sector that a tightly-constrained system of enforced self-regulation may seem attractive to industry if confronted with a choice between that approach and tighter conventional regulation.

Will members of the industry be willing to participate in detecting breaches? The likelihood of an honest and open partnership between industry and government in NSW to enforce rules applying to PNF is slim. The adoption of a self-regulation-based strategy for PNF could even be counterproductive. A regional DLWC Manager involved in regulating PNF suggested that the introduction of self-regulation would feed existing un-cooperative anti-regulatory private property rights ideologies amongst PNF owners. In such a context, the finer points of subtle complementarity between instruments of regulation and bounded self-regulation would be lost.

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37 Interview, Mr. Rob Adam, DLWC Goulburn, 1.3.01, by telephone, notes on file.
The likelihood of introducing a system of co-regulation where industry associations fulfil enforcement and compliance roles should be dismissed as unrealistic in NSW. This is largely because of the lack of a strong industry association willing to establish and enforce significant environmental rules against individual member firms. This point is established by the fact that the industry, under the leadership of the Forest Products Association (FPA) engaged in some work in 1993 on a self-regulatory Code described as a Draft Private Property Logging Protocol in negotiations with the precursor of DLWC.\textsuperscript{38} However, the draft it devised never came into force. In 1995, the EPA stated that the protocol was still “being developed” and noted that the intention of the protocol was “to promote standards and to self-regulate harvesting operations on private property”.\textsuperscript{39} However it appears this Protocol was never adopted by the industry in any systematic way. Nor did government endorse it as a sufficient policy instrument for management of PNF, instead electing to apply SEPP 46 and the NVCA to the industry, albeit with an exemption for PNF.

\textit{Enforced self-regulation models in Forestry}

However, there are other more limited forms of self-regulation that require consideration. We must examine the appropriateness and viability of a much more limited objective of introducing Tasmanian-style enforced self-regulation schemes to PNF in NSW. In this case, we need to consider systems of enforced self-regulation rather than industry-administered schemes of co-regulation. Under the Tasmanian forest practices system, the application of self-regulation by forestry companies and landholders employing licensed Forest Practices Officers who devise and approve their own Forest Practices Plans, is bounded with a framework of external regulatory control enabling prosecution of those found to have transgressed the requirements of the Forest Practices Act.

For various reasons, a decision was taken in Tasmania to constrain self-regulation within a context of external regulation. On one view this was done to devise a system with sufficient credibility to be supported by the public as well as industry. According to Bonyhady, it is more likely this action in 1985 was taken to introduce a system with just sufficient rigour to forestall the enactment of Commonwealth controls on private


forestry, whilst remaining sensitive to requirements for industry profitability.\textsuperscript{40} The Tasmanian \textit{Forest Practices Act} contains an explicit commitment to self-regulation.\textsuperscript{41} It also sets out offences such as harvesting and processing timber without a certified Forest Practices Plan. The former Chief FPO, Mr. Witte, explained the choice of self-regulation as one of deciding to utilise “existing expertise” within industry, instead of creating “a major bureaucracy” in a small jurisdiction with limited budgetary resources.\textsuperscript{42} In favour of this approach one can point to greater levels of industry ‘ownership’ of, and participation in, the regulatory system,\textsuperscript{43} as opposed to the alienation and distance of landholders and industry from it in NSW.\textsuperscript{44}

Many of the preconditions set out in the literature for viable self-regulation relate to whether the structure of the industry is amenable to the establishment of self-regulation based on industry association (i.e., co-regulation).\textsuperscript{45} These tests are not immediately applicable to an investigation of enforced-self-regulation. Still, there are a number of relevant factors that touch upon whether the broad objectives of utilising indirect governance and enlisting regulatory surrogates can be pursued effectively. One is whether the expertise and resources necessary for self-regulation are within the industry. On the whole, this is not the case. It cannot be credibly argued that the PNF industry in NSW has sufficient knowledge, staff or internal processes to adequately address issues relating to the conservation of threatened biodiversity or other complex ecological questions.

Another marker of the viability of self-regulation set out in the literature is whether the environmental issues arising in the particular industry context are few or numerous.\textsuperscript{46} In the PNF context, they are numerous - one cannot express environmental performance in

\begin{itemize}
\item \textsuperscript{41} The \textit{Forest Practices Act} states that an objective of Tasmania’s statutory ‘Forest Practices System’ is to “achieve sustainable management of Crown and private forests with due care for the environment, while delivering..."(a) an emphasis on self-regulation.” Schedule 7(a) \textit{Forest Practices Act 1985}; see also. ss.4B, 4E, 37B \textit{Forest Practices Act 1985}.
\item \textsuperscript{43} Wilkinson, G. (2001) “Building Partnerships - Tasmania’s approach to Sustainable Forest Management” In \textit{International Conference on the Application of Reduced Impact Logging to Advance Sustainable Forest Management: Constraints, Challenges and Opportunities, 26\textsuperscript{th} February to 1 March 2001, Kuching, Sarawak, Malaysia, Compendium of Conference Papers, 219-226.}
\item \textsuperscript{44} Personal observation of the author based on attendance at meetings with landholders at ANU Department of Forestry Workshops: The Evolving Legislative and Regulatory Environment for the Management of Private Native Forests in NSW”, 21 February 2001, at Candelo, Bega Valley.
\item \textsuperscript{45} Priest, M. (1997) above n 30 at 239.
\item \textsuperscript{46} Gunningham, N. Sinclair, D. (2002) above n 30 at 36.
\end{itemize}
simple numerical terms against an uncomplicated scale. Instead, performance must be tested against a multivariate matrix of factors. In Tasmania, the complexity of environmental and planning considerations is tested against 124 questions in the annual audit of Forest Practices Plans (FPPs).47

**SELF-REGULATION AND SMALL ENTERPRISES**

One of the most problematic contexts for the application of self-regulation is where the behaviour of numerous small and micro-sized enterprises needs to be controlled. This issue was considered above and also in Chapter Three. These firms and individuals have been identified as “amongst the least likely candidates for effective self-regulation”, as they often lack environmental awareness or the resources to apply environmental protection strategies.48

This problem emerges as a very serious one in the NSW PNF context because of the large proportion of actors in the industry who are either individual landholders or very small businesses. The configuration of the NSW PNF industry is almost the opposite of the ideal conditions for industry self-regulation set out in the literature, of a small number of large firms. Instead, there are numerous private forest owners, probably running into the thousands. Hundreds of forestry contractors service this sector, and scores of sawmills process timber from private lands.49

The broad position in the literature regarding difficulties with the compliance record of small enterprises appears to be borne out by the evidence from the Tasmanian case study (see Chapter Eleven, p.393). In Tasmania the small, ‘independent’ private property sector of the timber industry is the most problematic sector for compliance with the FP Code according to the Forest Practices Board. The Board has consistently stated in its *Annual Reports* that self-regulation by a number of actors in the independent private property sector has not been satisfactory.50

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49 See: Chapter Five, p.123.
The extent of compliance with regulations can be affected by other economic factors such as the size of the enterprise and the size of its competitors, and whether the use of subcontractors with firms operating at lowest-cost tendering is widespread within the industry.\textsuperscript{51} Haines and Sutton’s research into compliance rates with occupational safety laws in the Australian building industry suggested that the widespread use of subcontracting and commercial pressures in that industry tended to cause cost-cutting which reduced safety standards.\textsuperscript{52} Similar factors may operate within the PNF context, but such questions would require further investigation.

The effectiveness of the regulation of small and medium sized enterprises (SMEs) could be increased by incorporating a number of tools to exert additional pressure by means of indirect governance and third-party involvement, by encouraging the generation of ‘supply chain pressure’ (p.28, below) and by facilitating the participation of third parties such as NGOs in the compliance and enforcement process.

**ECONOMIC CONSIDERATIONS**

Regardless of the mix of policy instruments that is ultimately applied to PNF, a number of economic issues arising within production contexts must be addressed when devising biodiversity conservation policy. A perennial issue is how conservation measures can be made an economically feasible aspect of land management. Landholders usually need to obtain a viable economic return from their land. In this context, the challenges are to encourage environmentally positive actions, whilst making the destruction of biodiversity financially unattractive, and removing perverse economic incentives to destroy habitats.\textsuperscript{53}

Some argue that biodiversity protection laws often create unintended incentives to damage the environment.\textsuperscript{54} One US study of landholder behaviour in relation to the effect of the *Endangered Species Act 1973* referred to the impact of listing of the red-cockaded woodpecker as endangered. It suggested that landholders adjoining known


\textsuperscript{53} Further, it is also essential to reverse the perverse legal incentives to avoid investigating threatened species issues, presently in place in s.118D NPFIA (Chapter Nine).

habitat areas would log their properties sooner than would otherwise be the case, in order to reduce the likelihood of ‘invasion’ of their forested land by these migratory threatened species. One NPWS staffer recounted an incident of land being burnt and slashed by a landholder in order to remove the possibility of threatened flora existing on a site, at the mere suggestion of a subsequent investigative visit by NPWS. Such incidents suggest that some landholders perceive that they are not financially rewarded by legislation to retain native vegetation and protect threatened species, but perceive that they are penalised by restrictions on economic activity.

There are often strong incentives for landholders to conceal information regarding biodiversity. This is a major barrier to introducing a system of self-regulation for PNF in NSW consistent with the objective of ESFM. (Chapter Eleven presented evidence of a tendency for under-reporting of biodiversity in Tasmania, see p.388 et.seq.).

This concealment conundrum was described in Chapter Four as the ‘first-mover problem’. This describes the scenario where a landholder discovering a threatened species on his/her property has a strong financial incentive to conceal this fact from regulators, and government is at a disadvantage due to its lack of knowledge (as the landholder has the ‘first move’). The policy challenge is to offer strong countervailing incentives to encourage landholders to save this vegetation or species.

Where government is to consider sharing its regulatory responsibilities with industry in some form of enforced self-regulation, then the threat of the first-mover problem to the dependability of the system in protecting biodiversity is at its greatest. The incentives to not report or to inadequately address threatened species issues under a self-regulatory system are very powerful. The operation of the Tasmanian system is premised upon the accuracy of the information presented in the FPP by the FPO. Chapter Eleven presented examples of the difficulties with under-reporting of the ecological significance of forestry

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56 Interview, Mr Gary Davey, Northern Directorate Manager, Coffs Harbour, formerly Threatened Species Unit Manager, NPWS Northern Zone, 30.4.98 (by telephone, notes held by author).
sites in Tasmania under self-regulation. In such circumstances, unless there is a strong countervailing offer of a stewardship payment for landholders who conserve threatened species habitat, both self-regulation and conventional regulation may fail to preserve biodiversity.

Granting regulators better surveillance and monitoring capacity is also essential to address the problem. Also, if government carries out adequate regional and local level biodiversity surveys, it will be in a position to predict with more accuracy the land likely to form threatened species habitat. Planning will also enable government to order a prioritisation of actions to avert threats to biodiversity.

We must also consider the possibility that provisions of non-environmental laws are generating perverse incentives to destroy biodiversity. For example, such incentives may be generated by the drafting of the *Valuation of Land Act 1916*, s.4 which states that “‘Land improvements’ means: (a) the clearing of land by the removal or thinning out of timber, scrub or other vegetable growths, (b) the picking up and removal of stone”, as both of these actions involve the destruction of habitats. As a result, land valuers are obliged to give cleared land a higher market valuation than vegetated land.

The NSW Expert Working Group on ESFM was of the opinion that present regulation in NSW does not address disincentives to ESFM. There clearly is a need to offer incentives and encouragement for ecological stewardship of private forests, particularly in combination with environmental regulation of PNF. Offering incentives may enable cooperation to be obtained by means of ‘the carrot’ rather than by relying exclusively upon deterrence-based coercion.

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59 On this basis conservationists recommended that the responsibility for mapping rare forest types be transferred to DPWIE. Graham, A. (2003) “Endangered Forest Types and Forestry Jobs: going, going…”, 286 *The Tasmanian Conservationist*, February, 5pp., at <www.tct.org.au>, accessed 17.7.03.


61 However some of these issues are being addressed to some extent in NSW. Land subject to conservation agreements under the *National Parks and Wildlife Act 1974* are exempt from all local government rates: *Local Government Act 1993*, s.555(b1), as are areas of land held by the Nature Conservation Trust of NSW under the *Nature Conservation Trust Act 2001*; see *Local Government Act 1993*, s.555(b2).


In which circumstances should the carrot be offered? The question is essentially how responsibility should be allocated to pay the future costs of actions for biodiversity conservation. The introduction of regulatory controls on activities on private land raises complex questions of the equity of allocation of costs between landholders and the broader community.65

As a general principle, it is not appropriate to make payments to landholders as a result of regulation of land use per se, for what in effect amounts to their ordinary obligations as citizens to prevent environmental externalities that will affect their neighbours and the broader community. Incentives regimes, if improperly designed, can offend the principle that rewards should not be offered for actions that are a normal social obligation of citizenship, that is, to act within the ecological constraints of the land. ANZECC suggested that: “[f]inancial assistance should generally not be paid to landholders to meet their duty of care…”66 According to the regulatory theorist Grabosky: “The idea of monetising civic norms strikes one as no less preposterous than that of paying people to obey the law. Citizens should not be rewarded for doing their duty, but rather punished for failing to do so.”67

However, it is also evident that if there are community benefits from the protection of biodiversity on private land, then the broader community is obligated to contribute to some extent. It is argued that it is unfair to place the burden of compliance with biodiversity conservation regulations on a small group. If the community derives a benefit the community should pay, it is said, under the so-called ‘beneficiary pays principle’. 68 In the words of one Cooma-Monaro farmer at a NPWS seminar on the Threatened Species Conservation Act 1995, “if you want us to farm beetles, then you had better pay us for it.”69

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69 Land-owner’s comment from the floor, during NPWS Community Consultation Seminar regarding proposed regulation to prescribe ‘routine agricultural activities’ under the Threatened Species Conservation Act 1995 (NSW), Cooma, August 1997, Platypus Lodge.
There is a point at which the duty of care of a landholder stops and actions for broader public benefit begin. Thus defining the scope of a landholder’s duty of care enables us to specify “the point at which the ‘polluter pays principle’ ends and the ‘beneficiary pays principle’ begins.”

Against such equity concerns must be balanced the need to apply the ‘polluter pays principle’ to the problem of biodiversity loss. Private land conservation policy must also take account of the fact that landholders derive private benefits from economic activity that has, as a side effect, varying degrees of destruction of community resources such as biodiversity and environmental services (e.g., clean water, pollination services, and genetic resources).

The ‘polluter pays principle’ is premised on the removal of hidden subsidies that give an unfair competitive advantage to polluting industries. When applied to the biodiversity context, (the ‘impactor pays principle’) it can be seen that those firms which destroy habitat and are not required to pay to protect it are in fact being subsidised by the community as they are making private profit with an associated social cost, which is hidden and not paid for.

Given the need to encourage ongoing management of areas of private forest considered important for conservation, an ideal mechanism is through stewardship payments for providing ongoing conservation services to the community at large. However, such payments should not be conceived of as compensation for lost opportunities (instead, Farrier suggested a forward-looking payment for land management services), and should commence only at a point beyond the normal duty of care of a landholder to the community. However, in the PNF context we are often more concerned with questions of the appropriateness of compensation for land-use restrictions as opposed to management payments for land-use prohibitions. These issues, such as the impact of wildlife protection prescriptions that lead to a loss of timber volume, are discussed further below.

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Public interest v private interest

A key test of systems of regulation for biodiversity conservation identified in the literature is whether they meet tests of dependability. This entails whether a given strategy can be relied upon to protect biodiversity. The literature suggests that the dependability of self-regulation in securing environmental outcomes depends on the size of the gap between the pursuit of private interests and the protection of the broader public interest. Where there is only a small gap, voluntary instruments will be at their most dependable. However, even in those situations, a regulatory safety net will be required in order to control actors who are incompetent, intransigent or irrational.

In Chapter Four, it was argued that in the PNF arena there may often be a significant gap between the private interest of landholders and forestry companies and the broader public interest in ecological protection. Young et.al. were of the opinion that “in the large majority of circumstances, there is a considerable gap between the public interest in biodiversity conservation and the private interests of individual land owners.” Usually there is no economic incentive for a private landholder to take expensive action to mitigate the effects of their actions on biodiversity. In the forestry context, an expansion in the reach of environmental laws will usually cause a decrease in timber volumes extracted. Without a shift to greater value-added processing of timber felled, a tension exists between environmental-protection objectives and profit-maximisation objectives. Thus there is usually a large gap between the natural self-interest of industry members (timber-harvest maximisation (within limits) and profit maximisation) and the public interest (environmental protection, maintenance of the full suite of forest values).

The literature also suggests that where participants in an industry are operating within tight economic margins, the effectiveness of voluntary and self-regulatory approaches will be compromised. In such a situation, smaller firms and individuals in particular will be less willing to voluntarily reduce short-term returns for the sake of environmental protection, unless faced with a credible threat of coercive regulatory action (see p.35,
Given the lack of a level playing-field for PNF forestry vis-à-vis public native forestry, and given the poor economies of scale of much PNF forestry, it is unlikely that many PNF landholders and contractors will be willing to voluntarily make substantial expenditures in favour of environmental protection.\(^7\)

**Public good conservation measures**

Actions that extend beyond the duty of care were described as a “public conservation service” in the *National Framework for Management of Native Vegetation*.\(^8\) There is likely to be considerable difficulty in precisely drawing this dividing line. Thus there is a strong argument that it is the responsibility of government to conduct and pay for regional assessment of land for its conservation significance. To some extent this has been undertaken with the RVMP process and the RFA process, but the extent to which surveying was effective or sufficiently comprehensive on private land in either of these processes is unclear.

Tasmanian legislation explicitly applies both conventional regulatory and economic mechanisms to PNF. It provides for the payment of (backward-looking) compensation if greater than 5-10% of the area of a compartment is reserved or excluded from logging for the purpose of threatened species protection. Compensation is payable because to require efforts above this threshold is defined as requiring landholders to exceed their ‘duty of care’ to the community for environmental protection.\(^9\) Compensation in this instance can be considered backward looking as it does not constitute an incentive for positive land management actions by landholders to alter their behaviour in favour of nature conservation.

In some circumstances compensation provisions may have a counter-productive effect. Research by the author into the implementation of Tasmanian statutory provisions that contain compensation clauses provides an example. The research revealed that the

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\(^8\) Nevertheless this should not be taken as an indication that all PNF activity is economically small-scale or marginal. One PNF sawmiller indicated to the author that a single operation of river redgum logging on private land in NSW had produced timber that once processed would have a finished market value of around approximately $2 million. Pers. Comm. Mr. Ken O'Brien, O'Brien's Sawmills, and Riverina Freehold Forestry Management Group, 10.5.02, PNF Reference Group meeting at DLWC, Bridge St., Sydney.

\(^8\) ANZECC (2000) above n 66 at 17.

regulatory agency, the Parks and Wildlife Service was reluctant to insist on a robust threatened species management approach involving prevention of logging in critical areas. The reason for this attitude was that such action would generate a statutory liability to pay compensation, for which no funds are allocated in the agency’s budget.\textsuperscript{82} Thus the preference is to allow logging to go ahead subject to management prescriptions, rather than to insist on the exclusion of logging from an area, as that step would generate liability for compensation.

One of the potential difficulties with incentives and stewardship payments is that the cost of providing and then distributing rewards and incentives for conservation on private land may far outweigh the cost of a negative, sanctions-based approach. Grabosky recounts the observations of the Scandinavian philosopher Norregaard who argued that the cost of rewarding one thousand obedient citizens would far outweigh the cost of punishing one wrong-doer. Will sufficient financial resources be available for implementing incentives approaches\textsuperscript{83} such as negotiation of management agreements with landholders, payment of such management fees, and the surveying and research work in order to best target the application of such techniques?

The difficulties of questions of allocation of responsibility between the landholder and the broader community is aggravated by the lack of scientific certainty in relation to the manner and extent of environment-protection measures required, particularly when discussing biodiversity preservation. Legislators and policy-makers attempting to design any effective system of incentives, self-regulation or conventional regulation for private land activities must directly confront these problems.

\textit{Problems with duty-of-care approach - Inadequate content}

One problem with the duty-of-care approach is the uncertainty inherent in the mechanism as to exactly what obligations for environmental stewardship the duty of care should encompass. Leaving that uncertainty unresolved would be incompatible with the application of the precautionary principle. Under the duty-of-care approach, the landowner making the decision is much more likely to err on the side of continued

\textsuperscript{82} Interview, N. Lawrence, Botanist, Threatened Species Unit, Tasmanian Parks and Wildlife Service, 6.11.98; Tasmanian Public Land Use Commission (1996) \textit{Inquiry into areas to be reserved under the Tasmania-Commonwealth Regional Forest Agreement: Background Report Part F: Mechanisms for achieving conservation management on private forested land: a discussion paper}, Hobart, p.3.

income than on the side of threatened species protection. These difficulties arise particularly under a system reliant upon self-regulation.

The Natural Resources Management Ministerial Council’s National Framework for the Management and Monitoring of Australia’s Native Vegetation (2001) argued that “best practice” legislation would contain a duty of care (‘DOC’) for sustainable native vegetation management.84 The document suggests that such a DOC could “reasonably be expected to include protection of endangered species and/or ecosystems, protection of vegetation on land at risk of land degradation…protection of riparian vegetation…[etc]”.85

However, there is no guarantee that it would contain such a duty of care because in an outcomes-based system, there is a danger of allowing stakeholders to capture the process of devising codes of practice. Major problems with outcomes-based regulation include defining the content of the duty of care, and determining which party is entitled to devise the text of the duty of care. For example, in Queensland, the Queensland Farmers Federation devised the Environmental Code of Practice for Agriculture under the Environment Protection Act 1994.86 Not surprisingly, an inspection of the Code of Practice reveals that it fails to restrict native vegetation clearing in any significant respect.87 This type of problem is recognised in ANZECC’s National Vegetation Framework. It states that for best practice: “Codes should be targeted at enhancing industry practices, rather than simply ‘codifying’ the status quo.”88 But in reality, they may tend not to do so.

The Tasmanian experience suggests that the application of a duty-of-care approach combined with substantial self-regulation by industry under the Forest Practices Code is that threatened species protection in timber-production areas may not be allocated a high degree of priority over the competing interest of timber production. In other words, the duty-of-care concept may not provide sufficient protection to threatened species.

87 The counter argument is that all COPs in Queensland must be approved by the Minister. However this amounts to little if the political agenda of the government in question is to devolve responsibility for regulation to the regulated community itself.
Under the Forest Practices Code, the scope of the duty of care of the landowner encompasses the following actions. Firstly, it requires the reservation of soil and water values to the standard required by the Code. Secondly, it requires the conservation of other special values (such as threatened species) at a level equivalent to 5% of the gross area of the property totally excluded from logging operations, or up to 10% of the property where partial use is compatible with the protection of values (eg. under selective logging operations). There is no evidence that the choice of these thresholds is based on peer-reviewed scientific literature – rather, it is more likely that the choice has been based on the political economy of the timber industry in Tasmania.

Similarly, in Victoria, according to Raff, no Interim Conservation Orders were made under the *Flora and Fauna Guarantee Act 1988* (Vic) during its first ten years of operation because of the scarcity of funds to pay compensation under s.43 for the loss of “hypothetical development rights”. Similarly, Bonyhady argued that the *Hope Inquiry* into the National Estate in 1974 advised against the provision of an entitlement of compensation for the imposition of heritage controls because “public authorities rarely exercised their powers to avoid the expense of pay-outs…”

**RISK-BASED TIERING OF ASSESSMENT**

One factor motivating academic proponents of the investigation of self-regulation is a desire for the regulatory State to achieve better results within an ongoing context of scarce resources. Another part of the solution to this perennial issue is to apply risk-based rationing of regulatory effort. This involves applying the most stringent regulation to activities posing the largest environmental risk, and the least regulation (or exemptions) to the lowest-risk developments. In some respects, this simply amounts to making a decision to apply self-regulation to those sectors of industry that pose the least risk, and to apply conventional regulation to the sectors associated with higher risks of negative outcomes.

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This proposed strategy has some parallels with Braithwaite’s recommendation to apply a pyramid-based regulatory strategy. That approach relies upon an initial stance of trusting industry. This is implicit in self-regulation, but conveys an explicit message of a regulator’s firm intention to increase regulatory intervention in the event of failures of low-intervention policies.\(^\text{92}\)

The risk-based tiering approach does not necessarily entail self-regulation \textit{per se}, but involves a tiered assessment approach, where regulatory requirements are reduced for ‘low risk’ activities or for ‘proven performers’. This model is applied in the Plantations Act and also the EPAA, under the complying development provisions. In that legislation, complying plantations\(^\text{93}\) that comply with predetermined development standards can expect automatic approval.\(^\text{94}\)

\(^\text{92}\) Braithwaite, J. (1992) above n 126 at 93.
\(^\text{93}\) Plantations and Reafforestation Act 1999, s.13.
\(^\text{94}\) Plantations and Reafforestation Act 1999, s.13(3). Complying plantations must meet the requirements of the Plantations Code of Practice. Complying plantations are plantations whose establishment complies with relevant complying development standards of the code of practice and for which an SIS is not required to be produced.
Table 1 A continuum of possible models of PNF regulation

<table>
<thead>
<tr>
<th>Level of environmental risk</th>
<th>Low impact, low environmental risk</th>
<th>Medium</th>
<th>High</th>
<th>Very High</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stringency of approval requirements</td>
<td>Notification requirement only, but no assessment or approval. Only for low-volume, low-area proposals or where FSC certification has been obtained.</td>
<td>Forest Practices Plan (FPP) and development consent required</td>
<td>Consent plus SIS. Built-in concurrence requirement. Approval only of FPPs that meet genuine ESFM standard; subject to external expert agency (i.e. NPWS) review</td>
<td>Prohibited (endangered ecological communities, RFA under-represented vegetation communities).</td>
</tr>
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</table>


Two-track regulatory systems are applied in OH&S and pollution-control contexts.95 They place the onus of proof on companies in high-risk industries to show they deserve the right to operate. In the OH&S context this is described as the 'safety case' approach and is applied to the offshore oil and gas industry in Europe and Australia.96 The onus-of-proof aspect of the model is unlikely to be applied in the forestry context.

Nevertheless, the key focus is how to free regulatory resources from the other, low-risk, end of the regulatory spectrum, where exemptions and simple notification requirements are applied. Legislation in several jurisdictions gives regulatory agencies discretion as to which types of forest practices are subject to a mere notification requirement and which are subject to stricter requirements according to the predicted escalation in

environmental hazard or risk. The suggestion is that the lowest-risk forestry operations would operate under an exemption, subject only to a notification requirement without an accompanying obligation to submit a FPP for approval.

In New Zealand forestry law, a risk-based tiering approach is applied to the availability of exemptions on private forest land. A less onerous ‘sustainable forest management permit’ can be obtained in preference to a full-blown ‘sustainable forest management plan’, only if the quantity of timber to be harvested by species is no more than 10% of the timber of that species standing on the landholding. The permit option is also subject to a maximum harvest volume of 500m$^3$ (or less depending on the predominant species). Further the permits remain subject to a series of statutory management prescriptions as well as a sustainable-yield requirement that prevents approval for subsequent harvesting until timber volumes have replaced that removed under a previous permit. Permits are valid for 10 years but remain subject to a requirement to submit an Annual Logging Plan. 

The approach of tailoring the level of approval requirements according to the likely environmental impact of proposed forest operations is also applied (albeit to a somewhat limited extent) in Tasmania where the Forest Practices Regulations 1997 provide that an approved Forest Practices Plan (FPP) is not required where operations are low-volume timber harvesting operations or for firewood-logging where certain types of higher-impact harvesting machinery are not employed. This exemption is not available on certain areas of land classified as ‘vulnerable’ (e.g. streamside forest, high altitude forest).

A more thorough regulatory-tiering approach is applied in Washington State (USA) where proposed forest operations are graded into four classes. Stricter requirements apply to those classes of operations involving greater environmental hazards. For

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99 Forest Practices Regulations 1997, r.3(f), 5, provide that an approved FPP is still required for low volume timber harvesting operations (“less than 100 tonnes for each property for each year”) or for firewood logging, when the land is classed as ‘vulnerable land’. This category includes land that “is inhabited by threatened species within the meaning of the TSPA 1995”.
100 r.3, s Forest Practices Regulations 1997.
example, the strictest level of review applies to road-building and logging in steep-slope or high-erosion-risk category areas, and aerial spraying of pesticides.\textsuperscript{101}

In the PNF context in NSW, this approach of rationing of regulatory effort is applied, at least on paper, by offering an exemption from the consent requirements of the NVCA for certain forms of PNF - on the official interpretation, only for sustainable, selective logging of private native forests.\textsuperscript{102} Other more intensive forms of PNF must obtain development consent from the Department of Land and Water Conservation. However, as the application of the PNF exemption is subject to self-assessment by the landholder, who makes a decision as to its application, the availability of the exemption was not constrained in most operational regions during the study period.

In general terms, in order to ensure maximum dependability, if a ‘light’ regulation or self-regulation strategy is applied to lower-environmental-risk situations, it would be advisable to put several mechanisms in place. Firstly, regulators must ensure that at a minimum a notification mechanism applies to all PNF logging, even exempt logging. Secondly, agencies could be empowered by statute with a residual power to ‘call-in’ proposals, even those operating under self-regulation. Finally, to minimise the risk to threatened biodiversity and ecosystems, the revised regulatory framework should apply a precautionary approach by requiring that sufficiently-detailed site assessment surveys by qualified individuals take place prior to allowing clearing/logging.

Enabling the regulator to require prospective PNF operators to lodge an environmental compliance bond prior to commencing logging, particularly in higher risk situations, can strengthen the strategy of risk-based tiering of assessment. The performance bond represents an application of the ‘polluter pays’ principle. At the commencement of operations a bond is lodged in a government trust account. If harvesting is completed in accordance with required environmental standards the monies are refunded.\textsuperscript{103} This approach ensures that social costs can be internalised by private actors. This mechanism is applied in relation to private forestry in British Columbia, Sweden, Finland

\textsuperscript{101} See generally: Forest Practices Act, Chapter 76.09 of the Revised Code of Washington (RCW). Forest Practices Rules, Chapter 222 WAC, Stewardship of Non-industrial Forests and Woodlands (Title 76.13 RCW). See also Salmon Recovery Act Section 101 chapter 75.46 RCW, Forestry Riparian Easement Program for small private forest landholders, added to chapter 76.13 RCW to enable the state to acquire easements.

\textsuperscript{102} See Chapter Six.

ADDITIONAL COMPONENTS OF AN OPTIMAL REGULATORY MIX

There are a number of other options and approaches that could be applied to supplement traditional regulation in order to improve the effectiveness of the regulatory framework for PNF in NSW - whilst avoiding the dangers of ‘smorgasbordism’.  

Strategic selection of regulatory targets: regulating the entire supply chain

An important aspect of law reform for PNF in NSW is to make a decision to regulate timber contractors and processors as well as landholders, that is, the entire supply chain (see Chapter Eleven, above). This step gives regulators the opportunity to select the most appropriate and strategic targets for efficient regulatory attention.

In NSW, there is significant scope for applying provisions similar to those in Tasmania, whereby timber contractors and processors are subject to the provisions of a Forest Practices Code making it an offence to process timber produced without a forest practices plan. A similar approach is applied in New Zealand. Under the Tasmanian system, compliance is enhanced, and ‘free-riding’ restricted because of the decision to regulate the entire supply chain. This arrangement recruits additional parties into the process of encouraging improved compliance, as the fate of participants in the regulatory system becomes linked to the actions of others.

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106 The FP Act regulates all aspects of the timber supply chain including the land owner, logging contractor and timber processor. It regulates forestry undertaken by persons deemed to be a “responsible person”. This includes a person carrying out (or causing to be carried out) forest practices, a timber processor, the owner of the land or a person to whom the owner has formally, under seal, assigned his or her responsibilities. FP Act, s.17(1). In practice, FPPs are countersigned by the landowner, logging contractor, and the buyer of the timber.

107 This is achieved by prohibiting the milling of indigenous timber at sawmills unless the timber has been obtained from operations in accordance with a registered sustainable forest management plan, i.e. registered by the Registrar of real property for a term of 50 years. Forests Act 1949 (NZ), s.67C(1)(a), 67D(1)(b), (3). Also discussed in Williams, D. (ed.) (1997) Environmental and Resource Management in New Zealand, 2nd edition, Butterworths, Wellington, at p.184.

Encouraging supply-chain pressure

A related technique, applied by the private sector of its own volition, involves larger players in an industry exerting ‘supply chain pressure’ on their suppliers and customers to achieve environmental and quality targets. In the industrial pollution control context, major firms place pressure on their suppliers to lift their environmental performance, requiring that they meet certain predetermined standards, particularly environmental certification such as ISO 14001 or compliance with the ‘product stewardship’ aspects of the chemical industry’s Responsible Care program.  

For governments, encouraging and facilitating private firms to exert ‘supply-chain pressure’ is a promising method of exerting additional, third-party pressure for compliance with regulations. In the forestry context, this would theoretically involve timber processors demanding that suppliers only provide logs that have been produced according to high standards of ecological sustainability, or to some lesser standard e.g. compliance with a Forest Practices Code. Supply-chain pressure can work especially in instances where there is vertical integration of industry (i.e. company ownership of all levels of production and processing).

However, it is doubtful there is significant scope for encouraging the private sector to apply supply-chain pressure within the NSW PNF industry. It would require timber processors to exert commercial pressure on suppliers to ensure ecologically-sustainable standards of production, to the point where they would be willing to exclude non-complying suppliers from access to processing facilities and markets. Yet in Chapter Four we saw that many small-to-medium-sized sawmills process timber from private land only. It appears that these mills have difficulty in obtaining sufficient supply from public forests due to larger processors monopolizing the available public supply. In such a situation of uncertain supply it is unlikely that smaller processors will be willing to be highly selective about the sources of their raw materials.

110 The introduction of supply chain pressure was recommended by Gunningham and Sinclair (2002) as a means for dealing with the problems raised by regulating SMEs in the vegetable growing industry in Victoria; above n 30 at 93.
Gunningham and Rees (1997) believe that self-regulation cannot usually work effectively without a backdrop of strong and adequately-enforced direct regulation. They argue for an enforced self-regulation strategy rather than pure self-regulation, in the course of investigating methods for the State to support stronger systems of self-regulation. Without a natural coincidence between public and private interests, it is argued that for such self-regulation efforts to be effective, a range of external pressures must be deployed in an attempt to create a link between public and private interests. This can be achieved by introducing supply-chain pressure, public shaming, external regulation, encouraging the involvement of public interest groups (NGOs) through effective statutory mechanisms, as well as third-party pressure from the financial and insurance industry.

It is important to ask whether the industry is susceptible to public or consumer pressure. In other words, will shaming strategies work? This presupposes that the industry has a high public profile and that consumers are in a position to differentiate between a product derived from ESFM and an unsustainably produced product. Further, it assumes that sufficient consumers value compliant behaviour by industry to generate enough market pressure to cause industry and firms to alter their behaviour. Where firms have no direct connection with the public and have no public image to protect, they will be less susceptible to strategies based on exposing environmental performance to the public. Small firms are likely to be the least reputation-sensitive, and the least susceptible to consumer pressure relating to environmental management. Although there are many consumers concerned about unsustainable forest management, there are many impediments to the free flow of information about environmental standards in PNF operations. In sum, there are a considerable number of barriers to consumer labelling or consumer pressure amounting to effective mechanisms to increase the integrity of self-regulation systems.

112 Similarly, Gunningham and Sinclair (2002) above n 30 at 204 argue for co-regulation not self-regulation.
116 Gunningham (1994) above n 78 at 65.
117 On this basis Gunningham and Sinclair (2002) above n 30, Chapter Three suggest that SME’s “may need concrete specification standards.”
Using regulatory surrogates

An important strand of the regulatory ‘re-invention’ literature discusses means of encouraging ‘regulatory surrogates’ to engage in acts of indirect governance, thereby reducing the regulatory load on government. This method could be employed to address the issue of the performance of small- and medium-sized enterprises (‘SMEs’). It is particularly relevant where governments are seeking to make systems of industry self-regulation more effective.

The two most commonly identified regulatory surrogates in the literature include third parties in the financial/insurance sector and environmental groups. The question in the PNF context is whether there are readily identifiable third parties with commercial power who can act as regulatory surrogates in exerting supply-chain pressure. Although in regulating certain other industries it may be practicable to suggest that banks and insurance providers play a role in exerting pressure for improved performance, it is unlikely that this particular strategy could be readily applied to the NSW PNF context. This is due to the limited extent of hands-on involvement of these participants within the PNF industry (which appears to be dominated by SMEs). Perhaps more importantly, assumptions that they would be willing to demand improved environmental performance of the industry are also questionable.

Other regulatory surrogates are likely to be more willing to play a greater role in ensuring environmental improvements in the PNF sector. Principally this role could fall to public and non-government organisations (NGOs) and individual members of the public.

The need to make a significant role available for public participation, in order to bolster the effectiveness of regulatory systems (particularly those involving elements of self-

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118 Gunningham and Sinclair (2002) above n 30 at 36.
119 Gunningham and Sinclair suggested that the environmental performance of SMEs in the crash repair industry could be improved by encouraging third parties in the financial sector and the insurance industry to exert pressure, given their substantial pre-existing financial power over SMEs (i.e., in paying for smash repairs). Gunningham and Sinclair (2002) above n 30 at 58.
120 Although banks may be often mortagagees of land used for PNF, they are unlikely to be held to be in a position of responsibility to direct and control detailed aspects of land use decisions.
121 In terms of dealing with problematic SMEs, Gunningham and Sinclair concluded following their case study of the vegetable growing industry that it would be beneficial for government to take deliberate steps to empower the community to become an active participant in the process of environmental improvement in that industry. Gunningham and Sinclair (2002) above n 30 at 93.
regulation) is acknowledged in the regulatory literature.\footnote{Braithwaite, J. (1992) “Responsive Regulation for Australia”, ch.6 in Grabosky, P. and Braithwaite, J. (eds.) \textit{Business Regulation and Australia’s Future}, Australian Institute of Criminology, Canberra, 81-96 at91; Gunningham, N., Grabosky, P. (1998) \textit{Smart Regulation}, Oxford University Press at 197-205.} In NSW there are few formal legal barriers to third-party law enforcement, at least in terms of commencement of proceedings. However, for a number of reasons, policy-makers need to be realistic about limits on the possible contribution of third parties to the enforcement of PNF legislation. There are also non-legal and cultural barriers to participation and litigation, primarily the expense and financial risk associated with running third-party proceedings. Significant barriers still exist in relation to litigation in terms of rules relating to security for costs and undertakings as to damages.\footnote{Johnson recounts that when the barefoot environmentalist litigant Al Oshlack sought an injunction to prevent the Iron Gates development at Evans Head in coastal Northern NSW his application was refused because he was unable to provide security for costs. The site, comprising areas of rainforest, coastal wetland and threatened species habitat, was subsequently razed in breach of the conditions of the development consent. Johnson, J. (1998) “Civil Enforcement of Environmental Laws in Australia”, 5th International Conference of INECE, Monterey, California, November, Vol. 1, pp. 435 - 444. Full text at <www.inece.org>. Nevertheless there is an emerging ‘public interest’ jurisprudence. In other related litigation, in \textit{Oshlack v Richmond River Council} (1993) 82 LGERA 222 Stein J held that the nature of proceedings to challenge the validity of a development consent on the basis of the likely impact of a development on endangered fauna was enough to amount to special circumstances, warranting displacement of the usual rule that costs should follow the event. This decision was overturned by the Court of Appeal (1996) 39 NSWLR 622; However, the High Court allowed the appeal (\textit{Oshlack v Richmond River Council} (1998) 193 CLR 72).} There are also practical and technical barriers to involving the public in enforcement tasks, principally regarding access to information about PNF activity. It may be possible for NGOs with sufficient motivation and resources to employ remote-sensing data and GIS technology to gather information about PNF activity and to cross-match this with records of PNF approvals, in order to detect unauthorised activity. However, without a certain measure of tacit encouragement from government and a certain level of acceptance by industry of such monitoring, this method is unlikely to form a significant part of any PNF enforcement strategy. The rights of third-parties to perform the oversight role need to be both guaranteed and then respected by the regulatory State. If it is seriously contemplated that third parties are to play an important role in ensuring the integrity of modified regulatory regimes, it is important that they be adequately resourced and assisted by government to fulfil this role. Otherwise propositions by Braithwaite and others in this context will remain merely of theoretical, rather than practical, interest.\footnote{Braithwaite (1992) above n 126 at 93.; Gunningham and Sinclair (2002) above n30 at 51.}

However significant political barriers to the introduction of measures to facilitate third-party involvement in compliance-enforcement actions, in the form of industry resistance to the involvement of the public, must be considered. In NSW, private-forest owner organisations have expressed an explicit desire to exclude the operation of FOI laws and
In Tasmania, third-party enforcement and FOI provisions have been excluded from the ambit of the Forest Practices System. It would be necessary to remove statutory barriers to public participation, particularly regarding appeals against PTR designations, and regarding industry exemptions from FOI legislation. Significant barriers to third-party involvement in the enforcement process in Tasmania are generated by the fact that FPPs and the data used to compile them are not available for inspection by the public. These plans are protected from FOI requests. FPPs need to be at least centrally registered, or preferably centrally located and available for public inspection, in order for the public to play a regulator role (e.g. bringing civil enforcement proceedings). Taken together, these issues suggest limits to the applicability of the third-party approach advocated by commentators such as Braithwaite.126

Corporate environmental-reporting mechanisms are another instrument of indirect governance raised in Chapter Three, which could be theoretically be applied in the PNF context to improve the performance of modified regulatory systems. However, investor-disclosure requirements would have an impact in relation only to large publicly-listed forestry companies that operate in Tasmania (e.g. Gunns), and to a lesser extent in NSW (e.g. Boral), to the extent that these companies are engaged in PNF.

Transparency and disclosure requirements will increase the pressure on companies to take action to address their social and environmental performance, but only to the extent that the type of information they are required to disclose is significant, and genuinely revealing in relation to environmental performance. Proposals to make directors personally liable for the actions of their companies, and to democratise shareholder powers are important, but again have more role in relation to the actions of large publicly listed companies, which at this stage play only a limited role within the PNF context in NSW.

However, transparency can be encouraged in other ways, principally by government taking steps to make enforcement information available. Firstly, this can be done by

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125 Australian Forest Growers (2002) A Three Tier Option for an Exemption for Private Forestry: Submission to PNF Reference Group, 8.5.02, 6pp. which states that in relation to PNF operations under all three proposed regulatory tiers “The notification will not be placed on the public record by the authority and will not be available to FOI applicants.” pp3-5. Note also that the NSW Farmers Association argued for the exemption of farm vegetation management plans from public scrutiny under amendments to the Native Vegetation Conservation Act made in December 2003: see Hansard.

introducing requirements for agencies to publish details of enforcement action and decisions for that action. Secondly it can be done by encouraging a culture of respect and compliance for FOI laws. Thirdly, government can assist independent efforts to ensure compliance with environmental legislation by making raw data such as remote-sensing information available, against which compliance checks could be made.

**Timber certification as a non-regulatory governance strategy**

One of the means for expanding the range of environmental governance tools is to encourage certification and labelling of timber products. Falling within the broad category of information-based instruments, certification is a form of non-regulatory governance by civil society. According to Meidinger: “the methods used by certification programs closely resemble law, since they rely on the public promulgation of generalized rules and the definition of special organizational responsibilities for determining compliance.”

Government regulatory agencies could encourage firms to gain credible certifications as a means of targeting their enforcement efforts on uncertified firms, by making the (perhaps risky) assumption that certified firms will be in compliance with environmental laws.

The main question at this point is what action can legislators take to encourage the uptake and membership of certification schemes? In particular, a key question is how to get SMEs involved in seeking ESFM certification? It may be possible to appeal to the self-interest of small firms and landholders at this point, where they may be able to make greater profits and access new markets if they obtain FSC certification. It was argued earlier that a limited “ESFM only” exemption for PNF within the NVCA might have the potential to create an incentive for the pursuit of ESFM in the industry. Those who adopted certified ESFM practices would be spared the development-consent process.

However a major and outstanding issue in relation to certification concerns its content. If the industry self-certifies its sustainability, without external verification of claims, the potential exists for major deception of the public, motivated by corporate marketing.

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priorities. Any proposed system for certification of PNF operations would have to be subject to credible third-party certification as to the content of environmental protection. Certification as to the process employed (such as whether an EMS is in place, as in the case of ISO 14000 series certification) should not be taken as automatically securing sufficient environmental improvements to warrant regulatory exemptions. U.S. environmental groups have launched a major campaign in response to the American Forest & Paper Association’s Sustainable Forestry Initiative (SFI), on the basis that it represents a deceptive public-relations illusion.

**THE ROLE OF ENFORCEMENT**

Another factor affecting the viability of any regulatory system is the extent to which it is feasible to detect and punish non-compliant behaviour. There are significant difficulties in identifying, monitoring and detecting non-compliant behaviour in the PNF context. This is due to (i) the complex nature of biodiversity conservation issues, (ii) the remoteness and difficulties in accessing private lands, (iii) low visibility of activities on private land, and (iv) cultural difficulties in accessing private land for inspections. However as discussed earlier in Chapter Eight, the statutes all provide access provisions, and problems of detection are not insurmountable and can be partially addressed with existing technologies for aerial photography and remote sensing. The US Forest Service and the US EPA both use remote sensing for law enforcement purposes.

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130 “Clearly, by the evidence of past practices, the forest products industry is not sufficiently objective or motivated to set standards which will ensure the continuing existence of healthy forest lands for our children or their children. We need objective standards without self interest involved in setting the bar. We will be using FSC [Forest Stewardship Council], not SFI [Sustainable Forest Initiative] products for certified Green Built homes.” Bruce Hammond, Hammond Fine Homes, Cotati CA, Board Member, US Green Building Council, Redwood Empire Chapter. <http://www.dontbuysfi.com/action/>.

131 As opposed to the process of environmental management systems applied by the enterprise (as in ISO 14000 series certification).

132 It is claimed that the “SFI does not protect old growth forests, does not protect roadless areas and U.S. public lands, does not protect forests from conversion to tree-farms and urban sprawl, does not adequately restrict clearcutting, and does not consistently protect and help recover imperiled species…” “Despite all this, the logging industry wants the public to buy wood with an ecolabel that they have given themselves. It is the fox guarding the henhouse. Loggers call it the Sustainable Forestry Initiative, or SFI. We call it the Same-old Forest Industry.” <http://www.dontbuysfi.com/action/>.


134 Carrera data from the IKONOS satellite has a panchromatic band with a spatial resolution of 0.82 m, and multispectral spatial resolution of 3.28 m. Both Landsat 5 and 7 have a spatial resolving power of 30 m. Therefore anything 30 m x 30 m is technically detectable. However processing usually reduces the resolution, 1: 25,000 is achievable but 1: 100,000 resolution is more common. Fallen timber produces a different spectral signature to canopy. A 30-50% reduction in forest canopy would be detectable in remote sensing data at the finer resolutions. See further: Behn, G., McKinnell, F. H., Caccetta, P. and Verne, T. (2000) “Mapping Forest Cover”, *Proceedings of the 10th Australasian Remote Sensing and Photogrammetry Conference*, paper no 97, pp. 190-203; Lucas, R. M., Tickle, P. K. and Carter, J. (1998) “A proposed framework for the inventory and monitoring of Australia’s forest biomass”, in
Both empirical evidence and logic suggest that without external monitoring or enforcement, self-regulation systems are at grave risk of failure. A survey by the Canadian Federal Environment Department found that industry sectors relying upon self-monitoring or voluntary observance had a compliance rate of 60%. Industries subject to federal regulation and a consistent inspection regime had a 94% compliance rate.\textsuperscript{135}

It is necessary, because of the strong incentives to evade rules with regards to biodiversity conservation, to have strong enforcement when applying self-regulation.\textsuperscript{136}

Yet external compulsion is likely to be considered by many industry participants to be incompatible with their understanding and expectations of the operation of systems of self-regulation.

Methods of co-regulation and modified forms of self-regulation depend on a strong enforcement response and attitude in order to maintain their credibility. As Hopkins argues: “the key issue in making the regulatory system more effective is not the style of regulation, but the ability of inspectorates to enforce it.”\textsuperscript{137}

A key factor in determining the effectiveness of self-regulation in Tasmania is the magnitude of the deterrence effect generated by enforcement and compliance activities. The Tasmanian system employs conventional regulatory methods for punishment and does not rely heavily on internal systems for self-correction of behaviour such as internal company procedures. It uses a combination of neighbour and FPO reporting to detect


breaches, as well as incidental detection through the annual audit of selected Forest Practices Plans (FPPs). Offences on private land are relatively frequently detected and punished, as compared with NSW.\textsuperscript{138} Tasmania’s enforcement system relating to privately-owned land is more highly tailored to the forestry context, and is more detailed than the system applicable in NSW. For example it applies systems of warnings and suspensions of FPOs for offences such as the approval of a deficient or misleading FPP.\textsuperscript{139}

If a system of self-regulation were introduced in the NSW PNF context, its effectiveness would turn upon the strength of the deterrence effect generated by ongoing conventional enforcement techniques and upon the integrity of any auditing process. The same considerable practical difficulties in relation to funding of compliance-monitoring activity and auditing of PNF would be confronted as under the present regulatory approach.

\textsuperscript{138} For example in Forest Practices Board v Watson, an individual was fined $1500 plus costs for cutting firewood on private property on an area reserved from harvesting under a FPP in order to protect habitat of a threatened species of stag beetle: Forest Practices Board (2002) Annual Report 2001-2002, p.27.

CONCLUSION

The journey of investigation documented in this thesis into the application of environmental laws to private native forestry in NSW was sparked by concerns about the adequacy of environmental regulation during an earlier research project by the author. A review of NPWS documents in the mid-1990s concerning the implementation of threatened species legislation revealed that regulation of the PNF industry was superficial and haphazard. It indicated an intent to avoid imposing requirements on the industry to produce Fauna Impact Statements, statutory documents that would have considered the possible impacts of logging on endangered fauna.\(^1\)

Subsequent preliminary research for this thesis also revealed documentation suggesting a low level of regulatory control of the industry. The NSW *State of the Environment Report* of 1997 stated that: “private forests [in NSW] are not generally managed for long term sustainability [of timber production].”\(^2\) Other documentation was uncovered suggesting poor standards of forestry within the PNF sector.\(^3\)

The objective of this thesis was to test the hypotheses that emerged from such background information - that legislation applicable to the PNF industry was inadequate for the achievement of ESFM, and that the legislation was inadequately implemented.

The research task was made challenging by the general lack of comprehensive primary or secondary sources surrounding the industry and particularly the lack of published material concerning the question of the compliance of the PNF industry with environmental laws.

\(^1\) This was achieved by the NPWS employing the dubious means of granting authorities to kill species under s.171 of the *National Parks and Wildlife Act 1974* rather than by following the more conventional process of licensing of such activities under s.120. See Prest, J. (1995) *Licensed to Kill: Endangered Fauna Licensing Under the National Parks and Wildlife Act 1974 (NSW)* Between 1991-1995, Occasional Paper, Australian Centre for Environmental Law, Australian National University, Canberra.


\(^3\) One DLWC officer described “the generally low level of forest management skills and opportunistic approach to timber harvesting common in the [private] industry.” DLWC (2000) *Summary of Comments on Desktop Audit of Exemptions (Stage 1 Review of Exemptions)*, Comments by DLWC and RVC only, internal unpublished document, at 63, Comments by DLWC Officer No.12 (Compliance Officer), Sydney-South Coast Region.
The primary step of the investigation involved solving the puzzle of exactly which legislative provisions applied to the industry and in what circumstances. That in itself was a considerable undertaking – given the tangle of laws applying to the industry that had built up incrementally over time. The Expert Working Group on ESFM described the applicable law as “complex, confused and inconsistent.”

The investigation also involved politely requesting, and later, persistently seeking, information and documentation relating to the application of environmental legislation to the industry. This involved a large number of interviews, and review of a wide range of legal and inter-disciplinary sources, seeking the available fragments of information that had been published regarding the industry. One of the problems encountered was the political sensitivity aroused by seeking information aimed at such a research hypothesis.

The lack of readily-available data about policy questions surrounding PNF was primarily due to the overwhelming focus of all players on questions of public forest management. Private forests have been the forgotten forests, usually placed in the ‘too-hard basket’ by policy-makers, legislators, conservationists and foresters. As Dr Hannam of DLWC observed: “the majority of political interest, financial and human resources are heavily biased towards the public forest area.”

Private forests have been seen in the past as less significant in both conservation and economic terms than public forests. However, the picture of NSW private forests as the forgotten forests is changing as their commercial importance is underlined by restrictions on public-forest timber supply, and as their ecological significance is explored and increasingly highlighted by environmentalists. Sawmillers have typically turned to private forests to augment their wood supply when access to public forests has been restricted.

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4 Independent Expert Working Group (1998) *Assessment of management systems and processes for achieving ecologically sustainable forest management in NSW*, A report undertaken for the NSW CRA/RFA Steering Committee, Resource and Conservation Division, Department of Urban Affairs and Planning (NSW); Forests Taskforce, Department of Prime Minister and Cabinet (Cth), Canberra.

5 The response sometimes was that the data did not exist, or was not available; that to make it available was not in the public interest, and that a request for it under Freedom of Information legislation was inappropriate. Other officers hinted that they wished to talk more about the subject but were not in a position to provide greater details, or provided information only on condition of anonymity. See further Chapter One.

6 Note that this title was applied by Calder, M., Calder, J. (1994) *The Forgotten Forests: A Field Guide to Victoria's Box and Ironbark Country*, Victorian National Parks Association, 120pp. (This book is now in a 2nd edition as *Victoria's Box-Ironbark Country: A Field Guide*) on the basis that they are no longer the forgotten forests following the creation of a number of national parks and reserves. See also The Age (2001) *Editorial* “The forgotten forests' last stand”, 30/08/2001 where the leader writer suggested “The woodlands are archetypal Australian bush, part of a cultural and literary heritage….”.

The contribution of private forests increased in the late 1990s to the point that production in the Upper North-East and Lower North-East regions of NSW was described as “reaching the limits of sustainable yield.” As much as 50 per cent of wood production in the Upper North-East is now coming from private native forests. Yet at the same time private forests are home for unique and threatened biodiversity. They also include remnants of a number of under-protected forest ecosystem-types (56 such forest-types in the Upper N-E and 85 in the Lower N-E) that should be preserved to create a comprehensive, adequate and representative reserve system.

But with private forestry largely out of the spotlight of government and environmentalist attention, the development of the law applying to these forests has been characterised both by inertia and piecemeal development. There has been a long-standing reluctance to interfere with private property rights. Chapters in Part Two also revealed that difficulties in regulating PNF arise because of politico-cultural issues, as well as practical problems of access. Regulators have been hesitant to concern themselves greatly with questions of sustainability of PNF activity or with strongly implementing existing legislation intended to regulate the industry.

Yet against this background of difficulties, there are recent Commonwealth and State government commitments to ESFM in the Regional Forest Agreements and the international arena which specifically refer to the sustainability of private forestry. The Commonwealth’s withdrawal from regulating PNF, and growing public demands for ecological sustainability in the sector have made it crucial to improve State laws governing PNF.

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8 Centre for Agricultural and Regional Economics Pty Ltd (‘CARE’), Gillespie Economics, Environment and Behaviour Consultants (1999b) Regional Impact Assessment for the Lower North East CRA Region: A Project undertaken as part of the NSW Comprehensive Regional Assessments, Project numbers NL 08/ES & NA39/ES, Published by Resource and Conservation Division of Department of Urban Affairs and Planning and Forests Taskforce of Department of Prime Minister and Cabinet, p.78. In the UNE, the production of timber from private native forests was estimated to have been at 200,000m3/pa in 1997/98 which according to CARE and “industry analysts”, “would be close to the sustainable yield of private sector forests”.

9 Centre for Agricultural Economics, Gillespie Economics, Environment and Behaviour Consultants (1999) Regional Impact Assessment for the Upper North East CRA Region: A Project undertaken as part of the NSW Comprehensive Regional Assessments, Project numbers NU 12/ES & NA39/ES, Published by Resource and Conservation Division of Department of Urban Affairs and Planning and Forests Taskforce of Department of Prime Minister and Cabinet, p.70.

10 Commonwealth of Australia and State of NSW, Regional Forest Agreement for North East NSW (Upper NE and Lower NE) (the Commonwealth, Canberra, 2000)(hereafter ‘NE RFA’), Table 1 “Percentage Reservation Status of Forest and Non-Forest Ecosystems in the Upper NE Region based on Vegetation Modelling to Establish the pre-1750 extent of Forest Ecosystems in the Region”, contained in Attachment 1(a): Comprehensive, Adequate and Representative Reserve System for Upper NE Region, pp.41-63.
It is in this context that this research project has sought to investigate the adequacy of the development and implementation of environmental legislation. As argued earlier, empirical research is not often carried out by environmental lawyers, with the result that much Australian environmental-law literature typically fails to go beyond a black-letter analysis of the statutory framework or discussion of broad principles and concepts of environmental law and policy.

It has been found that the present regulatory system applying to PNF in NSW largely fails to ensure sustainability in terms of timber production terms or ecosystem protection. There is good reason to believe that the present regulatory framework in NSW is inadequate to achieve these objectives. The law is highly fragmented and complex, with responsibility for administration spread across a large number of agencies – a situation detrimental to the effective supervision of PNF operations. Excessively broad exemptions, and in some instances, inadequate requirements for ESFM are also contributing factors.

This thesis has also demonstrated that the existing regulatory framework, even where adequate, is often sporadically, or inadequately, implemented and enforced in practice in relation to private forestry, particularly in NSW. The hypothesis that most PNF was unregulated ‘in practice’ during the study period was found to be largely accurate.

In summary, primarily due to the operation of the PNF exemption, PNF is not adequately regulated under the *Native Vegetation Conservation Act 1997* (‘NVCA’). Frequently local government does not regulate it under Local Environment Plans (‘LEPs’). Where neither of these controls apply, research revealed that the safety net mechanism of licensing under the *Threatened Species Conservation Act 1995* (‘TSCA’) is infrequently applied.

In detail, in relation to implementation of the NVCA, it was found that all PNF logging outside protected land in the North Coast and Hunter regions claimed the PNF exemption, regardless of the type of logging. The mass-exemption of much of the PNF industry during the study period amounted to a *de facto* form of self-regulation.\(^{11}\) The ill-

\(^{11}\) A DLWC internal memo upon the introduction of SEPP 46 (NSW’s first attempt at broadscale vegetation clearing controls), answered the question “Why Regulation?” by stating: “The substantial documentation on the rate of past clearing and modification of native vegetation generally indicates that self-regulation has failed.” DLWC (1995b).
defined and excessively-broad PNF exemption clause in the \textit{NVCA} requires reform before that Act can adequately provide for ESFM.

In relation to the provisions of Environmental Planning Instruments made and administered under the \textit{Environmental Planning and Assessment Act} by local government, in some cases these still play an important ‘safety net’ role given the broad scope of the \textit{NVCA}’s PNF exemption, and the widespread use of that exemption. Yet the case study revealed a decision by the majority of local councils surveyed (64.5 per cent) not to regulate PNF in the General Rural Zone (1a). In the North Coast and Hunter regions, where the PNF industry is most active, local councils tended not to regulate the industry (North Coast Region, 84.2 per cent; Hunter Region 61.5 per cent). On this basis it can be said that, during the study period, the \textit{EPAA}, as applied by local government, failed to exert sustained and consistent pressure for ESFM outcomes.

This thesis also explored the administration of the \textit{TSCA} by the National Parks and Wildlife Service in instances where neither the \textit{NVCA} nor the \textit{EPAA} were applied by DLWC or local government. The licensing data available suggests that to date, the \textit{TSCA} has had only minor impact on the PNF sector in NSW. First, there have been very few operators licensed, and fewer than one would expect given the patchy coverage of Part 4 \textit{EPAA} requirements across NSW. Second, in every instance of licensing there was a finding that logging was not likely to significantly affect threatened species or their habitat. Therefore the Species Impact Statement and Ministerial consultation processes under the \textit{TSCA} were never activated, and thus no detailed survey of sites proposed for PNF was performed under the ambit of the licensing regime.

Considerable research was conducted regarding the Tasmanian system for regulation of PNF. However it was found that the Tasmanian Code does not amount to a Code for the ecologically sustainable management of forests. The Code is biased towards timber production objectives, and appears to take insufficient account of ecological impacts such as destruction of habitat (e.g. tree-bearing hollows). It permits clearfelling and replacement of native forests with plantation monocultures. The sustainable development objectives applicable to other industries are not applicable to most aspects

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Questions and responses on native vegetation management and protection issues for staff. Internal Memo, 11 August 1995.
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of forestry operations in Tasmania. This anomaly cannot be explained away by the need for specialised regulation of forestry.

Applying a socio-legal studies perspective

The thesis then explored how such patterns of implementation of laws can be explained. An inter-disciplinary approach, considering the implications of the broader context of economic and political forces for law reform provides more answers than merely looking at the shortcomings of the legal framework itself. As Bernstein (1955) suggested, it is helpful to see the application of the law in its broader context. He wrote: “Above all, regulation is a process which is neither isolated in relation to the general political and economic environment nor self-contained in its evolution.”12

Although conventional analysis suggests that the law arises as an outcome of the will of society expressed through the Parliament, environmental laws also have a symbolic political meaning. The mere passage and existence of legislation carries meaning about the collective intention of society (and the degree of concern of particular legislators) to resolve pressing issues.13 It appears that often less importance is placed on questions of its effectiveness in practice.

The role of enforcement

The enactment of environmental laws is part of a process of attempting to alter ‘community values’14 about land-use practices that have the potential to cause environmental damage. However such change does not arrive overnight. There is a danger - summarised by the cynical phrase “the light-switch theory of regulation” - in merely enacting legislation and then expecting that that action, alone, will resolve social or environmental problems.15

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12 Ibid at 281.
15 Comments made by Banks in delivering paper: Banks, (2001) “Forest Regulation - Acquisition of Property on Just Terms?” in Country Conferences Pty Ltd, (ed.) 2nd Australasian Natural Resources Law & Policy Conference (Focus on Forestry), Country Conferences Pty Ltd, Perth, WA.
These offences are socially constructed, and the criminal law serves to indicate the seriousness with which unwanted conduct is regarded by the Parliament. But it is difficult for regulators to apply rules that are not broadly accepted by the regulated community. As we have seen, the rural community resists regulation on private land. Environmental offences are created by statute, and suddenly, activities such as the clearing of native vegetation - once considered ‘routine’ – are described as an environmental crime overnight. Even with a lengthy phase-in period there is often limited support for environmental laws in the rural context, where the reasons for the enactment of such laws may not have been well-communicated or -understood. Yeager’s observation of regulatory implementation issues in the US seems also to hold true in Australia. He wrote: “While true of law generally, the process of implementation is particularly uncertain and dynamic when the statutory guidance is culturally novel – threatening long established patterns and relations.”

To a certain extent, improving the environmental performance of the PNF industry will require the application of non-regulatory techniques to alter the decision-making of participants in the industry. Techniques such as education campaigns and incentives fall broadly within the headings of information-based instruments and inducements. Yet such ‘soft’ techniques for behaviour change, although vital, must take place within a context of the threat of coercive action by government to ensure compliance. Threats and inducements must be perceived as real, not as mere bluff. Education and stakeholder communication initiatives are usually a useful complementary tool at this point as they can explain and make more palatable the prospect of coercive enforcement. Similarly, the effectiveness of education campaigns is increased against a background of stringent enforcement activity against those blatantly evading regulatory requirements.

A broader aim of this thesis has been to explore some of the limits of the law in altering behaviour to achieve ecological sustainability. The case studies raised the question of why

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16 In relation to forestry law in British Columbia, Pendleton argues that the enactment of statues creating such environmental crimes is a process of social construction: “The normative basis for defining organizational behaviour as deviant depends on a social process. The process is based on the interactions between accusers, organisations and interested audiences, which create organisational crime as a socially constructed reality. Central to the defining process is the construction of a shared meaning that redefines organisational behaviour that was previously ignored or considered acceptable, as wrong.” Pendleton, M. (1997) “Beyond the Threshold: The Criminalization of Logging”, 10 Society and Natural Resources 181-193 at 182.


19 Ibid, pp.427-431
there were such difficulties with implementation and enforcement. It appears the difficulties were due to a combination of shortages of agency resources and political pressure to avoid prosecution of environmental offences. However, apart from overt political direction to agencies (in relation to enforcement of the NVCA by DLWC), there were other pressures at play, particularly relating to the application of relatively novel and contested laws in the rural primary-production context.

Some difficulty arises from the fact that environmental offences are morally ambiguous. Much of the emphasis of environmental laws is on appropriate control of activities rather than on outright prohibition. Breaches of environmental law in the rural context are often perceived as minor or technical breaches. They are seen as neither criminal in nature nor morally reprehensible. Landholders may view environmental impacts as minor, unproven or as an unintended by-product of economically-beneficial activities. In such a context, it is inherently difficult to secure high levels of voluntary compliance, particularly where that compliance would come at an economic cost to the landholder.

Enforcement remains a crucial aspect of the implementation of environmental laws. Without it, the regulated community may perceive compliance as optional, and environmental laws will remain mere words on paper. As stated in a Canadian ruling about occupational health and safety standards: “if the regulations were not enforced by the use of sanctions, they would come to be perceived not as regulatory requirements but merely as statements of aspiration.” There will always be a section of the regulated population which will not comply without pressure - and environmental laws will have little credibility in that community without enforcement. If regulations and the agencies enforcing them are perceived as weak, the rate of compliance will remain low. Further, without compliance activity, the important function of reminding the community about...

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20 Operational (i.e. non-legislative) factors affecting the extent of enforcement using the criminal law include the agency's perception of its functions; the accountability of the agency; the existence of a formal enforcement policy; the existence of an informal enforcement policy, culture, attitudes at officer level; the methods for detecting offences; the nature of the regulated community; the availability of administrative and civil enforcement options. Another factor is agency decisions about how to allocate resources between detection, site visits and extension work and formal prosecution actions. Rowan-Robinson, J., Watchman, P., Barker, C. (1988) "Crime and Regulation", Criminal Law Review 211 at 215-217.


rules is lost. As Brennan J said in *Walden v Hensler*, enforcement involves both primary and secondary deterrence purposes - educating both the offender and the community about the law, “so that the law will come to be known and obeyed.”

Some of the limits of the law are prescribed by the social, economic and political context within which the particular law has been created and is enforced. Yeager argued that “the most basic limits to law’s effectiveness are institutionalised in enduring structures of social relations in a political economy.” One aspect of this is that agency discretion and negotiation by field officers with the regulated community play a crucial role in day-to-day regulatory implementation. It has been observed that:

> Enforcement officials...are the gatekeepers to the regulatory process. But they do not work in a vacuum or free from constraints – they operate within varying political, social, legal and organizational parameters.

Although offence provisions provide a point of leverage for regulators to extract greater environmental performance, it has been observed that such “workers act to minimise role strains”, i.e. the extent of conflict associated with enforcing the law. For regulatory officers based in Australian rural communities, the difficulty of living within small close-knit communities, often hostile to environmental regulations must be taken into account. Empirical studies have shown that often the enforcement process involves an exchange relationship in which a soft touch and patience in enforcement is often traded for good-faith efforts at compliance. These issues have not been explored in depth in this thesis, and the Australian rural context represents an important direction for further research.

Ambiguous provisions such as the PNF exemption place agencies such as DLWC in a position where they must bargain with the regulated community over the meaning of particular legislative requirements. If officers do not have a strong bargaining position to begin with, it may become extremely difficult to secure compliance. The regulator is

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27 Yeager above n 17.
required to bargain in good faith in order to avoid creating a backlash against the regulatory scheme.\textsuperscript{34}

Many regulatory agencies find themselves caught in a position where there is a conflict between their role in meeting and accommodating the demands of industry, and their broader role of serving and protecting the public interest.\textsuperscript{35} The neo-liberal agenda of marketisation of government functions has introduced an additional complicating factor into this equation relatively recently. There is a trend within regulatory practice to describe industry as the ‘client’ or ‘customer’ of the regulatory agency. DLWC has adopted this approach in the implementation of the \textit{NVCA}, issuing a document entitled ‘Customer Service Guarantee’, relating to the timelines for processing of clearing applications.\textsuperscript{36} There are dangers in this approach of describing regulatees as ‘customers’. There may be confusion of roles between that of regulator and extension officer, resulting in a reluctance to displease the ‘customer’ when exercising regulatory functions such as inspections.\textsuperscript{37} The thesis suggests that the institutional solution is to separate roles and responsibilities between the regulator and the service provider, by creating an Office of the Forest Regulator separate to extension services (above, p.432).

\textit{The re-invention of regulation}

A major theme traversed in this thesis has been the movement to re-invent and reconfigure regulatory policy, to broaden the range of policy responses and instruments beyond conventional regulation. The challenge in reconfiguring regulatory policy for PNF is to determine the potential for novel combinations of instruments that might

\textsuperscript{34} Interview, Mr. G. Davey, Threatened Species Unit Manager, Northern Zone, NPWS, 30.4.98.

\textsuperscript{35} Gunningham, N. (1974) \textit{Pollution, Social Interest and the Law} Martin Robertson & Co, London, argued that the former Alkali-Inspectorate was caught between 2 roles, serving the public and serving industry. (p.65.)

\textsuperscript{36} The Director-General’s foreword to the DLWC \textit{Staff Guidelines for assessing clearing applications under the NVCA} raises with staff the importance of “professional customer relations” and the preliminary section contains a box headed “Customer Service – Top Ten Helpful Hints”. DLWC (1999) \textit{Staff Guidelines for the Assessment of Clearing Applications under the Native Vegetation Conservation Act 1997}, DLWC NSW, Parramatta, at 7.

\textsuperscript{37} Leadbeter talks of the dangers of the SA EPA adopting a client or customer focus in their enforcement of environmental laws, citing the SA Coroner’s report into the Garibaldi meat contamination incident. The Coroner wrote: “I must say I have some difficulty with the concept of a regulatory authority describing the occupier of premises to be inspected as a customer...it implies a relationship of service which is inappropriate...there will be times when the 'customer' will be displeased by an environmental officer’s actions... The public has a right to expect that an environmental health officer will not be daunted by that.” SA Coroner (1995) \textit{Report into the Death of Nicki Robinson}, Inquiry No 19 of 1995. Delivered 28 Sept, at p.131. Cited in Leadbeter, P. (1999) “Recent Trends and Developments in South Australian Environmental Law” in Leadbeter, P., Gunningham, N., Boer, B. (eds.), \textit{Environmental Outlook No.3: Law and Policy}, Federation Press, Sydney, 146-164 at 162.
appropriately supplement (but not replace) conventional regulation, whilst enabling the
goal of ESFM to be achieved.

The debate over regulation is focussed on proposals for more devolved policy methods
such as systems of self-regulation and market mechanisms. There is a prevailing
scepticism about the role of conventional regulation, which is often rejected as
ineffective and inefficient. There is a focus on the economic impacts of regulation at the
expense of ecological considerations.

Yet it is also commonly stated in the Australian literature that there is a need for a
‘bottom line’ of precautionary regulation in order to ensure the achievement of
biodiversity conservation objectives. Thus it is important to ask how regulation can be
improved – and not just to improve rates of compliance, but to encourage firms to
improve their performance beyond compliance.

As we have seen, the alternative of self-regulation frequently proposed, especially by
industry, and particularly in the case of Tasmania, is by no means without shortcomings.
In NSW, the ‘alternative’ of self-regulation of PNF, is in many ways the present reality.
The breadth of the PNF exemption under the NVCA has created a situation of de facto
self-regulation on areas of private land that are not classed as protected land.

Even if self-regulation is bounded by substantial external regulation, in this particular
context it is unlikely to provide the answers that many would like it to. The literature
suggests that the introduction of self-regulation measures, even limited forms of self-
regulation, depends on a series of special preconditions being present in order for them
to be effective.38 It appears from this review of PNF in NSW that few of these special
factors exist at present. Peculiar difficulties - explored in Chapter Four in relation to off-
reserve biodiversity conservation, and in relation to Tasmanian regulation of forestry in
Chapter Eleven– are associated with the goal of biodiversity conservation. Difficulties are
also associated with the task of regulating a large number of small enterprises, and with
barriers to public participation and third-party enforcement. These place serious limits on
the promise of self-regulation of PNF. With such constraints, most self-regulation

Administration, Compliance & Governability Program, Research School of Social Sciences, Australian National
University, Working Paper No.24 at 43-55.
models (other than very tightly-constrained forms of enforced self-regulation applying to activities of low environmental significance) are likely to represent high-risk policy, especially if we intend to achieve goals of ensuring ESFM. Self-regulation systems are at considerable risk from powerful financial incentives for non-compliance and under-reporting of threatened biodiversity.

Investigation of self-regulation strategies for application to the PNF arena in NSW must proceed cautiously for several other reasons. Firstly, given the biodiversity-conservation objectives, there is a reasonable consensus that such a strategy must ultimately rely upon a safety net of regulation. Secondly, problems of enforcement and implementation that beset conventional regulation are likely also to affect the application of alternative policy instruments. Such real-world problems are virtually unavoidable. Self-regulation strategies must address the problem of self-interest. Regardless of the mix selected on the continuum between pure command regulation and pure self-regulation, practical difficulties in relation to funding, monitoring and auditing will remain.

The Tasmanian example of forestry self-regulation does not offer an appropriate alternative for NSW as it was found to contain insufficient safeguards for ESFM, and insufficient measures to counteract the strong incentives to under-report threatened species matters. This was illustrated in the ‘giant velvet worm case’ which revealed failures by self-regulating Forest Practices Officers to include adequate threatened species prescriptions.\(^{39}\) When combined with the existing Tasmanian statutory secrecy provisions, the system of self-regulation can create an environment in which external review, evaluation and critique are unwelcome. In such a context, conditions are created in which it is possible, or even expected, for participants to turn a blind eye to breaches of the Act and Code.\(^{40}\)

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39 F. Giles, J. Weston & T. Dudley v Break O’Day Council & T. Denney TASRMPAT No. J115/2001 (referred to as ‘Dudley’), 23 July 2001. The case also concerned failure to detect rare forest types that had conservation priority under the RFA. Dudley illustrates the necessity that regulations provide expert biodiversity agencies with an active review role. Otherwise persons with inadequate training, knowledge and resources will be left the task of identifying, reporting and preserving threatened species, when it is not in their economic interest to do so.

40 The Australian literature on indirect governance appears to fail to consider the implications of the strong Australian cultural trait of reluctance to inform authorities about misdemeanours committed by one’s colleagues, workmates and associates, i.e., the cultural prohibition on “dobbing on your mates”. In a small, close-knit rural community it is unrealistic to expect that landholders will ‘dob in’ their neighbours, or that logging contractors will report their industry compatriots to regulatory agencies for instances of failure to abide by environmental regulations. This question requires further sociological research.
A combination of risk-based tiering of regulation with other policy actions and instruments such as removal of perverse incentives and payment of private land-stewardship payments is required in order to create an ideal regulatory mix for PNF. Conventional regulation will require adaptations of this type in order to improve its effectiveness. Further improvements can be achieved by expanding regulatory education and extension efforts and the introduction of positive measures for participation by regulatory surrogates, principally the public and NGOs.
An optimal mix of regulatory policy for private native forestry in NSW would entail:

- constraining the application of self-regulation measures to very small-scale operations of low-environmental-risk, and only within a broader framework of external regulation;\(^{41}\)
- encouraging the up-take of forestry certification as to the content (not process) of industry sustainability requirements (e.g. FSC certification) by enabling such operations to self-regulate, subject to an annual random auditing regime;
- introducing measures to enable and encourage the exertion of supply-chain pressure, combined with measures to regulate the entire supply chain in the industry;
- offering financial incentives and other inducements for biodiversity conservation and for positive land-management actions to private landholders, in order to overcome existing countervailing incentives to destroy biodiversity;
- conducting a compliance-education strategy for the industry (as outlined in Chapter Nine regarding the TSCA); and
- evaluating the introduction of a strategy to encourage public participation in the regulation of PNF as a means of exerting indirect governance pressure.

As suggested earlier, ensuring compliance in the PNF context, although it involves particular difficulties, is neither technically impossible nor prohibitively expensive. We must be wary of simplistic arguments that findings of implementation deficits indicate a need to reject regulatory approaches altogether. Such suggestions appear a little like abandoning a car that has stopped because we have neglected to fill it with fuel.\(^{42}\) Before saying that we cannot afford to fill the regulatory vehicle with enforcement fuel, we must check for, and test, dubious assumptions that other approaches are relatively free of cost.\(^{43}\)

Sufficient, intelligent enforcement and adequate funding applied in a strategic manner are necessary requirements regardless of the mix of incentives, regulation or self-regulation applied. If there are inadequate resources to enforce regulations, it is likely that there will also be inadequate funds to provide sufficient monetary incentives to convince landholders and their contractors to log sustainably.\(^{44}\) Further, without auditing and

\(^{41}\) As discussed in Chapters Seven and Eight on the NVCA, and Chapter Twelve, the appropriate threshold is to ensure that exemptions from forestry regulation only apply to operations involving a small area of land (e.g. Less than one hectare), or a small volumes of timber (less than 100 tonnes).

\(^{42}\) The counter-argument is that the cost of filling the regulatory vehicle is too high for governments faced with severe fiscal constraints. It is possible to respond that costs of providing incentives or of auditing self-regulation systems may also be equally considerable. The costs of continued biodiversity loss to future generations may be even greater.

\(^{43}\) For example, a recent OECD report (2003) on voluntary agreements by industry with environmental regulators argued that such approaches to environmental protection are often resource-intensive for both industry and regulators. OECD (2003) *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes*, OECD, Paris at p.76-80. The report states that the costs for Intel and Merck to enter into Project XL agreements with the US EPA exceeded $500,000 each and involved negotiations in excess of 17 months.

\(^{44}\) There was evidence of a strategy of avoidance of action that would trigger the compensation provisions in Tasmanian legislation. See Chapter Eleven, interviews with Naomi Lawrence, Botanist, Parks and Wildlife Service.
enforcement of rules surrounding incentives regimes, there is a danger that such mechanisms will be ineffective.

The issue of the adequacy of resources for implementation will not go away simply if we adopt alternative policy tools in order to tackle the issue of biodiversity conservation on private land. The late American legal sociologist Laurence Ross was close to the mark when he argued: “The legal system provides no exceptions to the truism that the things we want are not free.” Commitment to the objective of achieving ESFM in the PNF industry is what has been lacking to date. The problem has been placed in the ‘too-hard basket’, largely due to the practical and political difficulties associated with regulating the use of private land.

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INTRODUCTION

This Appendix briefly sets out much of the available background information about private forests and forestry in NSW. Information about private forests is required in order to establish the significance of the conservation task involved. Secondly, information is required about the characteristics of the private native forestry (PNF) industry in order to be in a position to regulate it effectively.

SIGNIFICANCE OF PRIVATE NATIVE FORESTS IN NSW

This section briefly sets out the various ways in which private native forests in NSW are of significance. In summary, private forests: (i) represent important habitat for much of NSW threatened biodiversity\(^1\), (ii) constitute a significant proportion (about 35%) of the total area of native forests in NSW,\(^2\) (iii) comprising 46% of the area of commercial forest types in the NSW Upper and Lower North-East RFA Region,\(^3\) and (iv) make a sizeable contribution to total hardwood sawlog production (35% in the same region).\(^4\) Furthermore, private forests have importance for conservation objectives, as many forest ecosystem types are not adequately represented within the nature reserve system on public lands.\(^5\)

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\(^5\) Commonwealth of Australia and State of NSW, *Regional Forest Agreement for North East NSW* (Upper NE and Lower NE) (the Commonwealth, Canberra, 2000), Table 1 “Percentage Reservation Status of Forest and Non-Forest Ecosystems in the Upper NE Region based on Vegetation Modelling to Establish the pre-1750 extent of Forest Ecosystems in the Region”, contained in Attachment 1(a): Comprehensive, Adequate and Representative Reserve System for Upper NE Region, pp.41-63.
Data gaps regarding the private forest estate

NSW EPA's *State of the Environment Report 1997* cited among the “Information needs” regarding forests in NSW, the need for information about the “[e]xtent of forest and logging on private land and extent of forests in western and central NSW.” In NSW considerable gains have been made in filling some of the data gaps about the private forest estate and the PNF industry, particularly since the RFA process (1996-2000) and through the Bureau of Rural Science’s *National Forests Inventory* and the NSW *State of the Environment Report*.

Tenure of forests in NSW

The three main sources of information regarding the tenure of forests in NSW are the Commonwealth Government’s National Forest Inventory (1998), EPA (1997) and Resource Assessment Commission (1992). According to the National Forest Inventory (1998) (*Australia’s State of the Forests Report*), 38.69% of NSW are privately owned. According to the NSW *State of the Environment Report* (1997) 35% of NSW forests are privately held. The RAC (1992) stated that 36% of NSW forests were privately owned. The differences in these figures derive largely from the varying definitions of ‘forest’ and of ‘privately owned’. The NFI and RFA processes have defined private forest to exclude leasehold tenures. McElhinny argues that this approach is inconsistent with the Montreal Process and leasehold should be included within the definition of privately owned because leaseholders still have a very substantial capacity to affect and influence the condition of forests on land they hold.

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6 EPA NSW (1997) above n 1, Section 2.11.
7 EPA NSW (1997) above n 1.
9 For example in EPA NSW (1997) above n1, Forest is defined as having a potential stand height of 20 m or more (or cypress pine in commercial production) and a minimum crown cover of 30%. Areas are net areas and exclude non-forest (e.g. heath, swamp, cleared).
10 McElhinny writes: “This approach is at odds with the Montreal Process, which includes leasehold land under the category of private forests. This broader definition reflects the fact that while management options available under leasehold title are more restricted than options available under freehold title, in both tenures the landowner retains a major influence over the condition of the forest resource.” McElhinny, C. (2000) *Private Native Forest Inventory Within the Context of a Continental Sampling Framework: a discussion paper prepared for the National Forest Inventory Steering Committee, Department of Forestry, ANU, Canberra.*
### FIGURE 1

**TENURE OF FORESTS OF NSW**  
PROPORTION OF NSW FOREST ON PRIVATELY HELD LAND

<table>
<thead>
<tr>
<th>Tenure of forested land</th>
<th>Area (km$^2$)</th>
<th>% (EPA SOE 1997)$^{11}$</th>
<th>NFI (1998)</th>
<th>RAC 1992$^{12}$</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Forests</td>
<td>32,390</td>
<td>21.9%</td>
<td>14.89 %</td>
<td>23%</td>
</tr>
<tr>
<td>Private Land</td>
<td>51,880</td>
<td>35.0%</td>
<td>38.69 %</td>
<td>36%</td>
</tr>
<tr>
<td>National Parks</td>
<td>27,890</td>
<td>18.8%</td>
<td>14.711 %</td>
<td>15%</td>
</tr>
<tr>
<td>Other Crown Timber lands</td>
<td>35,860</td>
<td>24.2%</td>
<td>28.70 %</td>
<td>27%</td>
</tr>
<tr>
<td>Other</td>
<td>Na</td>
<td>Na</td>
<td>2.99%</td>
<td>na</td>
</tr>
<tr>
<td>Total NSW native forests</td>
<td>148,020</td>
<td>100.0%</td>
<td>100.0</td>
<td>100%</td>
</tr>
</tbody>
</table>

$^{11}$ EPA NSW (1997) above n 1 at 196.

$^{12}$ RAC (1992) above n 1 at 89.
Figure 2 presents the findings of one of these reports, the NSW State of the Environment Report, in graphical terms.

**FIGURE 2: TENURE OF FORESTED LAND IN NSW**

![Pie chart showing tenure of forested land in NSW](image)

- Private land: 35%
- Other Crown: 24%
- National Parks: 19%
- State Forests: 22%


Figure 2 shows that of the total area of native forest\(^{13}\) within NSW, 35% is held on private land, 23% within state forest, and 25% on "other crown land". The other 17% of forest is within national parks and reserves.\(^{14}\)

When compared with other jurisdictions, NSW has a relatively high proportion of its native forests held freehold. The National *State of the Forests Report* found that 38.7% of

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\(^{13}\) This chart does not include plantation forests. Forest is defined as having a potential stand height of 20m or more (or cypress pine in commercial production), and a minimum crown cover of 30%. Areas are net areas and exclude non-forest (eg. heath, wetland, cleared).

NSW forests were private forests,\textsuperscript{15} compared to 27.6\% of Tasmanian\textsuperscript{16} and 14.2\% of Victorian Forests.\textsuperscript{17} However the picture is more complicated as a greater proportion of Tasmanian private forests than NSW private forests are commercially viable.

Figure 2 does not indicate which types of forest are within which tenures. The State of the Forests report, produced for National Forest Inventory, breaks down the tenure data according by categories of “closed forest”, “open forest”, and “woodland” forests. In terms of closed forests, in NSW private tenure is significant (18.9\%), but less so than state forests or nature reserves. In terms of open forest in NSW, private land is extremely important (45\%), and holds more of this forest type than either state forests or national parks. In terms of the total area of woodland forest in NSW, private land is very important (34.4\%), but not as important as leasehold tenures (46.6\%).\textsuperscript{18} This information is summarised in Figures 3 to 5 below.

\textsuperscript{17} National Forest Inventory (1998) above n 1, Chapter 3 : ‘Size, Distribution and Tenure of the Forest Estate’, p.36.
\textsuperscript{18} National Forest Inventory (1998) above n 1 at 36.
Source: Australia’s State of the Forests Report 19

19 National Forest Inventory (1998) above n 1 at 36.
FIGURE 4: NSW OPEN FOREST BY TENURE

Source: Australia’s State of the Forests Report

26% State Forest
21% Nature Reserve
46% Private
3% Leasehold
4% Other

20 National Forest Inventory (1998) above n 1 at 36.
FIGURE 5: NSW WOODLAND FOREST BY TENURE
Source: Australia’s State of the Forests Report 21

In NSW a small proportion of the moist coastal and tableland eucalypt forests and rainforest are privately held. On the other hand it shows that a greater proportion (approaching 40%) of drier forest types are privately owned (freehold). This EPA data appears to be consistent with the findings of the National Forest Inventory. While a higher percentage of the drier forest types are on private land, the proportion of some of these forest types which are commercial forest types or are commercially viable is much lower than for the coastal forests. Of the low and western eucalypts, an estimated 90% is either not economically feasible or is reserved, according to Forestry Commission data.22

### Table 1: Percentage of Forest Type Privately Owned in NSW, June 1996 23

<table>
<thead>
<tr>
<th>Forest Type</th>
<th>Percentage of total forested area on privately owned land</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rainforest</td>
<td>12.41%</td>
</tr>
<tr>
<td>Blackbutt</td>
<td>28.06%</td>
</tr>
<tr>
<td>Moist coastal eucalypts</td>
<td>28.41</td>
</tr>
<tr>
<td>Dry coastal eucalypts</td>
<td>36.5%</td>
</tr>
<tr>
<td>Moist tableland eucalypts</td>
<td>16.04%</td>
</tr>
<tr>
<td>Dry tableland eucalypts</td>
<td>37.8%</td>
</tr>
<tr>
<td>Low dry eucalypts</td>
<td>34.3%</td>
</tr>
<tr>
<td>Western box – gum – ironbarks</td>
<td>40.3%</td>
</tr>
<tr>
<td>River red-gum</td>
<td>37.7%</td>
</tr>
<tr>
<td>White cypress pine</td>
<td>34.7%</td>
</tr>
</tbody>
</table>

This thesis has only examined in detail the issue of commercial timber harvesting on privately held land within the Eastern Division, and does not examine the data regarding regulation of PNF operations in the Central or Western Division in detail. The majority of logging in the Central West is in the cypress pine forests, and Ironbark forest communities around Dubbo.24 In the Western Division forestry operations are

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23 NSW EPA (1997) above n1 at Table 2.28. ‘Privately owned’ does not include “Other Crown Timber Lands” some of which may be held leasehold.
Appendix 5.1 Overview of Private Forests and Forestry in NSW

primarily cypress pine harvesting and sleeper cutting operations, including River Red Gum logging.\textsuperscript{25}

COMMERCIAL IMPORTANCE OF PRIVATE NATIVE FORESTS

This section explores the relative importance of PNF to total native forest logging output in NSW. Whilst the PNF industry produces a smaller volume of sawlogs and pulplogs than operations on State forests, it produces a significant proportion of total output, particularly in the Upper and Lower North East of the State.

The main points are:

- PNF production has been traditionally around 25-33\% of total sawlog production;
- In the UNE region, PNF has recently increased to around 50\% of total sawlog production and there are questions about the sustainability of such a rate of logging;
- Private production has tended to increase when access to public forests is restricted.

A study published in 1999 found that PNF makes a 35\% contribution to total sawlog production in NSW.\textsuperscript{26} Another study (1996-1997) stated that private property provided 33.7\% of hardwood sawlog production and 12.5\% of hardwood pulpwood production.\textsuperscript{27} An earlier study found that between 1984 and 1995 private production ranged between 26.7\% and only 17.7\% of total sawlog production.\textsuperscript{28} It has not been possible to obtain more recent state-wide data from official sources (because of the cessation of publication of these statistics).\textsuperscript{29} Although NSW law requires sawmills to record the source and volume of all timber processed,\textsuperscript{30} such requirements are


\textsuperscript{26} Bureau of Rural Sciences/State Forests of NSW (1999) above n 4.


\textsuperscript{29} State Forests of NSW (1999) Annual Report 1998/9, SNFNSW, Pennant Hills, ceased to provide data relating to private property logging, instead only providing yield data from State Forests: see p.75. The main primary data source regarding PNF production are ‘sawmill returns’. All sawmills in NSW are required to be licensed by the Forestry Commission. Under the licence terms, the sawmill is required to submit fortnightly returns to the Commission specifying logs received from each source.

\textsuperscript{30} Further, it is a requirement that private property timber be branded. Forestry Regulation 1999 (NSW), cl.61(1)
approximate and unreliable.  

Apart from supplementing the supply of sawlogs, private forests are also important as a source of thinning logs, veneer, poles, piles, girders, salvage logs and pulpwood. They are particularly important as a source of supply of poles and mining timber. A 1998 survey by the forestry consultants Fortech concluded that PNF was particularly important as a source of poles, piles and girders (25%) and mining timber (42% of total state production).

Regional variations in importance of PNF

There are important regional variations in the importance of PNF in NSW. Private production is most important in the UNE and LNE, less important in the Southern Region and least important in the Eden CRA region.  Despite these variations, a significant proportion of sawmills, particularly small and medium sized mills, in each region rely exclusively on PNF.

PNF in Northern RFA regions

The privately owned forests of Northern NSW have typically supplied around one

31 State Forests itself stated that statistics it supplied regarding the volume of timber harvested on private property must be regarded as “approximate, as not all private mills keep accurate records of timber processed.”: Bureau of Rural Sciences/State Forests of NSW (1999) above n 4 at 42. See also RAC (1992) above n 1, Vol.2A at G38. McElhinny (2000) above n 10 at 11 states “Annual estimates of quota sawlogs harvested on freehold land are prepared by State Forests of NSW. These estimates are based on data supplied by sawmills and do not provide an estimate for other wood products such as pulp and firewood. The method is likely to be biased towards under-estimating the sawlog resource harvested on freehold land and cannot be assigned a level of accuracy”.


33 Commonwealth Department Of Primary Industries And Energy (1998) A Report on Forest Wood Resources and Wood Based Industries in the Eden CRA Region: A report undertaken for the NSW CRA/RFA Steering Committee, contributions from Bureau Of Resource Sciences, Australian Bureau Of Agricultural And Resource Economics, project number NE 05/ES, March 1998. Data on sawlog production in the Eden Region was unavailable, according to a 1996 report. (p.58) However there were 8 sawmills in the region in 1995-6 which obtained private property logs. (p.62) In 1997-98, only 5% of the projected total log intake of mills sourcing logs from the Eden CRA region is expected to be from private property (p.63) A sawmill survey put the volume of private property logs from the Eden Region processed by hardwood sawmills in 1995-96 in the Region at a mere 1604m3 which was 1.5% of the total sawmill throughput in the Region. (p.63). The volume of pulpwood processed at Eden by H.D.A. fell from 51000 tonnes in 1994 to 1800 tonnes in 1997, allegedly because of the impact of SEPP 46 in restricting private property logging. (p.29).

35 Defined as the area of land North of Newcastle to Queensland border and West to the ridgeline of Great Dividing Range.
third of the timber utilised by the sawmills in the Region. A 1998 survey revealed that in the LNE region alone, more than half the mills processed nothing but private timber. There were “78 mills that solely processed private property resource” of a total of 146 sawmills.

Official data released during the RFA process showed that in 1997 PNF contributed 35% of the production of sawlogs and veneer logs in the UNE and LNE regions. However there is more recent evidence that in the North-East private forests are presently considerably more important. Sawlog production from PNF in the North Coast Region was estimated at 50% of total sawlog production according to a senior DLWC protected lands manager in November 2000. This estimate was corroborated by the work of RFA forestry economics consultants (1999) who concluded that in the UNE “it is likely that the proportion of wood supplied from private property is approaching 50 percent of the wood used.”

The contribution of private forests to total timber production has increased since the mid 1990s, to the point that production in the UNE and LNE has been described by RFA consultants as reaching the limits of sustainability. In the UNE, it was estimated that the level of production “would be close to the sustainable yield of private sector forests”. Similar observations were made about the LNE. The researchers stated: “further substitution [from PP forests] is unlikely because the limit of private wood supply

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36 Northern NSW Forestry Services (2000) Identifying the Available Forest Resource in Northern New South Wales and the Potential Investment Opportunities over the Next 5 Years, A project undertaken for the Northern Rivers Regional Development Board Inc. & the New England - North West Regional Development Board Inc. May 2000 Northern NSW Forestry Services P.O. Box 245 CASINO 2470 Supported by the Federal Department of Industry Science and Resources. Internet publication at <www.nrrdb.co.au/privateforestry>.
37 Centre for Agricultural Economics, Gillespie Economics, Environment and Behaviour Consultants (1999) Regional Impact Assessment for the Lower North East CRA Region: A Project undertaken as part of the NSW Comprehensive Regional Assessments, Project numbers NL 08/ES & NA39/ES, Published by Resource and Conservation Division of Department of Urban Affairs and Planning and Forests Taskforce of Department of Prime Minister and Cabinet, p.78.
38 This data was provided by State Forests of NSW to Bureau of Rural Sciences/State Forests of NSW (1999) above n31 at 42.
39 Interview, Mr B. Arwood, Vegetation Resource Manager, interview, in person, Grafton DLWC Office, 23.11.00. Notes on file with author.
40 Centre for Agricultural Economics, Gillespie Economics, Environment and Behaviour Consultants (1999) Regional Impact Assessment for the Upper North East CRA Region: A Project undertaken as part of the NSW Comprehensive Regional Assessments, Project numbers NU 12/ES & NA39/ES, Published by Resource and Conservation Division of Department of Urban Affairs and Planning and Forests Taskforce of Department of Prime Minister and Cabinet, at p.70. According to Northern NSW Forestry Services (2000) above n 36: “The most recent data suggests that the private hardwood forest resource in northern NSW is contributing between 270,000 and 280,000 cubic metres of sawlogs, thinnings, veneer, poles, piles, girders and salvage logs to the annual forest industry log intake.”
41 Centre for Agricultural Economics (1999) above n 37 at 78.
42 Centre for Agricultural Economics (1999) above n 37 at 78. In the Upper N-E, the production of timber from private native forests was estimated to have been at 200,000m3/pa in 1997/98 which according to CARE and “industry analysts”, “would be close to the sustainable yield of private sector forests”.
has been reached.”[emphasis added]43

Whilst some believe that present levels of production cannot continue sustainably, others have argued that logging on private land could increase beyond present levels. Certain PNF consultants have asserted that there exists a large under-utilised forest resource in Northern NSW.44 For example, O’Neill (1998) argued that only one third of the potential total annual yield from private property hardwood forests is utilised for sawlogs,45 and only 2% of a potential annual yield of 890,000 m$^3$ of pulpwood is utilised.46 At present the importance of private property in the UNE region for pulpwood (woodchip) supply is low, largely because there is limited export woodchip infrastructure47 and no large scale pulpmills.

**PNF in Southern RFA Region**

In the Southern regions of NSW, PNF is of lesser importance to total native forest wood production. In 1997-98, 21.1% of hardwood logs processed at sawmills in the Southern RFA Region were from private forests.48 However, for many smaller mills, private native forests are a critical resource. Small and medium sized sawmills in the Southern region purchased most of their hardwood logs from private land forest operations - 69% of the intake of medium sized mills according a 1999 survey).49 Further, seven mills of a total of 22 relied

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43 Centre for Agricultural Economics (1999) above n 37 at 83.
47 Apart from export facilities at Tea Gardens (near Newcastle), and Brisbane.
48 “Approximately 114 700 cubic metres of hardwood State forest logs were delivered to sawmills from the Southern NSW RFA region in 1997-98. In addition, the mills obtained a further 30 700 cubic metres of hardwood logs from private forests.” ABARE (1999) *Sawmill Survey: Southern Region* A project undertaken for the Joint Commonwealth NSW Regional Forest Agreement Steering Committee as part of the NSW Comprehensive Regional Assessments, project number NS 21/ES, RACAC (NSW) and PM&C (Commonwealth), at p.7. In total, hardwood log purchases in the region were around 166,400 cubic metres in 1998/99. Wood supply contracts between State Forests of NSW and the timber industry currently provide 83,603 cubic metres per annum of quota quality sawlog. Total log supply commitments for the region are of the order of 180,000 cubic metres for 1999/2000. In addition to the supply of timber from State forest, approximately 15,000-20,000 cubic metres of sawlog comes from the region’s private forests. ABARE (1999) *Sawmill Survey: Southern Region* A project undertaken for the Joint Commonwealth NSW Regional Forest Agreement Steering Committee as part of the NSW Comprehensive Regional Assessments, project number NS 21/ES, RACAC (NSW) and PM&C (Commonwealth), at p.7.
49 ABARE (1999) *Sawmill Survey: Southern Region* A project undertaken for the Joint Commonwealth NSW Regional Forest Agreement Steering Committee as part of the NSW Comprehensive Regional Assessments, project number NS 21/ES, RACAC (NSW) and PM&C (Commonwealth), at p.8. Survey undertaken in November 1999.
exclusively on private land in 1997/98.\textsuperscript{50} Private property is of lesser importance for pulpwood production - supplying 8.8\% of Southern Region production in 1994/5.\textsuperscript{51}

\textit{Future importance of PNF}

Potentially the rate of logging of private forests in NSW could increase. This may arise as a result of three factors. In the first case, private forests will become of increasing importance as additional areas of State forests and other Crown land are added to the nature reserve system. A substantial report by economic consultants to the Forestry Commission in 1995 predicted that, with further restrictions, sawmillers will “turn to the private property resource for an increasing proportion of their supplies.”\textsuperscript{52}

Empirical research has confirmed these predictions. It shows that when restrictions have been placed on timber supply from public land, the industry has sought access to privately owned lands. Research undertaken by interviewing sawmills in LNE and UNE for the RFA process revealed that when access to public forests was restricted in 1995-6 due to the Interim Forest Assessment (IFA) and Deferred Forest Areas process, sawmills in both regions augmented their wood supply with timber from private land.\textsuperscript{53}

With the restriction in supply from public land, there came a “substantial increase [in private property production] since the implementation of the IAP agreement.”\textsuperscript{55} A survey of a substantial proportion of North-East sawmills showed that between 1994-95 and 1996-1997, in the UNE there was a 65\% increase in harvest from private property, and in the LNE there was a 23\% increase.\textsuperscript{56}

\textsuperscript{50} Southern CRA/RFA: Background Report, RACAC (NSW) and PM&C (Canberra), at p.19.
\textsuperscript{52} Forestry Commission NSW and Margules Groom Poyry (1995) above n 51.
\textsuperscript{53} The joint Commonwealth-State Deferred Forest Areas process was one of the first stages towards the completion of the RFA process, in which areas of production forest on public land were set aside as Deferred Forest Areas (DFAs). In NSW, the DFA process was implemented in the form of an Interim Forest Assessment. This was an interim protection measure for areas which were under consideration for inclusion in the Comprehensive Adequate and Representative (CAR) reserve system of forests. The IFA involved an agreement between Commonwealth and NSW which came into effect in July 1996, restricting wood supply from public forests by up to 35\%. Statement to House of Representatives by the Hon PJ Keating, MP, 30 November 1995 at p.6; Centre for Agricultural Economics (1999) above n 37 at 13, 94. It also increased the security of supply to timber processors by introducing (10 year) long term wood supply agreements.
\textsuperscript{54} Centre for Agricultural Economics (1999) above n 37 at 78; Centre for Agricultural Economics (1999) (Upper North East Regional Impact Assessment Report) above n 40 at 69.
\textsuperscript{55} Centre for Agricultural Economics (1999) above n 37 at 78; Centre for Agricultural Economics (1999) (Upper North East Regional Impact Assessment Report) above n 40 at 69.
However, a shift to private forestry may only be short term for two reasons. One, it may not be possible to sustain over the longer term. As we have seen, in the UNE in 1997/98, private timber production was estimated to be close to its maximum sustainable yield. Two, the broader trend over a longer time scale, according to some sources, has been that yields from private property have shown a declining trend.

A second factor is that forested private land will also become of increasing importance in terms of the future expansion of the plantation forest estate, because of the superior economics of forested sites. Three, private native forests may achieve increasing importance as carbon sinks. The advent of carbon rights trading as a response to human induced climate change has contributed to the present acceleration of the rate of plantation establishment and intensification of native forest uses on private and public lands throughout Australia. In NSW, Parliament has moved to facilitate carbon trading by enacting the Carbon Rights Legislation Amendment Act 1998 (NSW).

A further illustration of the importance of PNF is that private forests of high timber production value are being acquired by State Forests in order to facilitate their harvesting. In the NE RFA $18m was allocated for the purchase of private land and/or timber rights in order to supplement supplies from public forests. During the Southern RFA process in 2000, the Forest Products Association (FPA) lobbied for...
additions to the State Forest estate by purchases of 2500ha of Southern private forests.\textsuperscript{63}

The proportion of commercially viable forests on private land

The degree of expansion of production from private forests will depend on a combination of physical, economic and political factors. Some private forests are not considered at present to be economically viable, and thus are inappropriate for logging, e.g. because they are low grade forest in commercial terms, or excessively remote, physically inaccessible or too steep to log using conventional techniques. The future of such forests will also depend on the future price of, and demand for hardwood timber, regulations applying to steep slope logging e.g. cable logging,\textsuperscript{64} as well as the direction of government policy on public and private land such as RFA conservation quotas.

Regardless of the total area of forest in private hands, the more crucial factor dictating logging is the proportion of commercially valuable forest in private hands. According to the NSW \textit{State of the Environment Report 1997} some 40.47\% of private forests in NSW are estimated to be 'commercially available' with the rest being uncommercial forest types or remote forests or steep terrain.\textsuperscript{65} This report states that private native forests amount to 52.5\% of the total area of NSW forests which are commercially available for harvesting.\textsuperscript{66} According to RFA research, private forests constitute 46\% of the total area of commercial forest types (i.e. timber species) in the Upper and Lower NE CRA regions.\textsuperscript{67}

Non-sawlog PNF

Apart from the harvesting of timber for saw logs, there are a number of other potential commercial uses of private native forests which are likely to expand in coming years.

\textsuperscript{63} The FPA argued for the purchase of “2500ha of timbered private property adjoining state forests for about $5 million, which could be funded from the NSW Environmental Trust Fund.” Pacey, L. (2000), “Timber Industry Pushes for Bigger Sawlog Quota”, \textit{Canberra Times}, 27.5.00, p.C7.
\textsuperscript{65} EPA NSW (1997) above n 1 at 196, Table 2.28.
\textsuperscript{66} State forests (34.9\%) and other Crown timber land (12.5\%) make up the total area. EPA NSW (1997) above n 1 at 196, Table 2.28.
\textsuperscript{67} Some forests contain species not presently commercially sought after. This data was provided by State Forests of NSW to Bureau of Rural Sciences see Bureau of Rural Sciences/State Forests of NSW (1999) above n 4 ; cited by Northern NSW
Although technological improvements will lead to milling of a greater range of timber, at some point firms will seek to find broader markets for timber which is presently too small, or of poor quality or misshapen to be useful to the saw log industry. These markets include woodchipping, firewood\(^{68}\), charcoal plants, biogas energy plants, electricity generation plants and even steel smelting.\(^{69}\) In order to facilitate the burning of forest biomass for electricity generation, the *Natural Resources Legislation Amendment (Rural Environmental Services) Act 1999* was enacted. All these uses of private native forests have potentially adverse effects on threatened species and biodiversity and other environmental values, if not properly managed.

A large volume of wood is removed annually from the most threatened wooded ecosystem in Australia – the temperate woodlands. Firewood logging targets the drier forest areas for this timber which is denser and has a greater heating value.\(^{70}\) In 1992 the RAC estimated that approximately 6 million tonnes of firewood are consumed in Australia annually, but accurate figures are hard to obtain because of the decentralised nature of the firewood industry.\(^{71}\) Some of this logging is for charcoal production, which has been on a relatively non-intensive scale, apart from a recent proposal for harvesting of 120,000 tonnes of timber from forests in the Central West for a charcoal plant near Dubbo, to supply a proposed silicon smelting plant at Lithgow.\(^{72}\)

Already, firewood cutting is described as one of the ‘major threatening processes’ affecting native vegetation in two of NSW’s IBRA bioregions, the South Western Slopes, and the New England Tablelands.\(^{73}\) In a recent report, the CSIRO examined the scope and ecological impact of the firewood logging industry. It concluded that the “limited evidence indicates that firewood harvesting in dry forests and woodlands

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\(^{68}\) Benson, J. (1999), *Setting the Scene: The Native Vegetation of New South Wales*, Background Paper No.1, Native Vegetation Advisory Council, Sydney at 18.


\(^{71}\) RAC (1992) above n 1, Vol.1, at 248.


\(^{73}\) Benson (1999) above n 68 at 18.
occurs at rates well above a sustainable level.”74 The report used the limited available evidence to infer that “firewood collection has an impact on the whole spectrum of biodiversity.”75 It also concluded that “up to 70% of firewood that is purchased is collected by unregulated means, including legal collection from private property and illegal collection from state forests, nature reserves, roadsides and other public land. The actual proportion may be even higher because firewood merchants with premises can be supplied by small, unregulated operators.”76 The report found some evidence that the majority of collected firewood was harvested from private land, as “State forest department permit sales account for less than 10% of the firewood market; therefore the majority of collected firewood is unregulated, and over 80% of it is obtained from private land. It is difficult to find out how much is collected illegally.”77 (As a postscript, amendments to the Native Vegetation Conservation Act in December 2003 introduced regulatory controls on certain firewood harvesting.)78

**CONSERVATION IMPORTANCE OF PRIVATE FORESTS IN NSW**

Back in 1992, the National Forest Policy Statement (NFPS) advanced a solid rationale for private forest conservation:

“As well as containing significant timber resources, native forests on private lands contain some ecosystems and species that are not well represented in nature conservation reserves. They also help to maintain environmental and aesthetic values and basic ecological processes, and under conditions of climate change they may provide refuges or corridors for the movement of native species.”79

However, there is an identifiable body of opinion, particularly amongst foresters, that most private forests in NSW are regrowth or ‘degraded’, and therefore are of minimal conservation value. These commentators argue that the only appropriate management of such forests which have been ‘high graded’, ie. progressively selectively logged over

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74 Driscoll, D., Milkovits, G., Freudenerberger, D. (2000) *Impact and Use of Firewood in Australia*, CSIRO Sustainable Ecosystems, Lyneham, ACT, 24 November 2000, p.30. The “total amount of firewood used in Australia {annually} was between 6 and 7 million tonnes.” (p.3)
75 Driscoll, D., Milkovits, G., Freudenerberger, D. (2000) above n 74 at 29 states: “Several plant communities are probably threatened by firewood collection, and a wide-ranging assessment like that done in Victoria would be valuable. Forest Red Gum (*E. tereticornis*) has been extensively cleared on the New South Wales south coast and now occurs mainly on private property. It could be further degraded by timber removal for Firewood.”
78 *Native Vegetation Act 2003*, s.46 allows for the making of a regulation to control commercial firewood harvesting.
several generations, is for them to be clearfelled or heavily logged in order to improve stand quality by providing an environment for proper regrowth. It is argued that on many sites the forest is ‘locked up’ by an excess of unthrifty, bent stems which prevent the growth of higher quality sawlog timber.\(^{80}\)

Even where these authors admit that some old growth forest (OGF) exists, their prescription often remains logging. One forestry consultant, O’Neill, states that a substantial area of old growth forest exists on steep or remote sites on private land. He writes “The higher site quality New England forests will typically contain a range of tree sizes, often including an overstorey of overmature, defective trees.” This is, of course, forester’s code for OGF. The treatment suggested for this “low quality wood” is logging for woodchips.\(^{81}\)

Whilst it may be true that “a significant proportion of the private hardwood forests [are] generally of a young age” \(^{82}\), there are also significant areas of OGF\(^{83}\) and high conservation value (HCV) forests on private land. In 1997, the NSW EPA stated, on the basis of data supplied to it by the Forestry Commission, that “perhaps only 35% of forests on private property …has been logged.” A more detailed study undertaken by Environment Australia (1999) during the NSW Comprehensive Regional Assessment (CRA) process aimed to identify potential areas of natural National Estate significance in the forests of the Upper North-East (in accordance with the Australian Heritage Commission Act 1975 (Cth)).\(^{85}\) This research showed that private forests are of conservation significance in many respects. For example, in relation to OGF, 641,470

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\(^{83}\) Old-growth forest can be defined in several ways. The NFPS defined old-growth forest as ‘forest that is ecologically mature and has been subjected to negligible unnatural disturbance such as logging, road building and clearing’. Joint Australian and New Zealand Environment and Conservation Council (ANZECC) and Ministerial Council on Forestry Fisheries and Aquaculture (MCFFA) National Forest Policy Statement Implementation Sub-Committee (JANIS) (1996) Proposed Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative Reserve System for Forests in Australia, Department of Prime Minister and Cabinet (Gh), Canberra stated, ‘old-growth forest is ecologically mature forest where the effects of disturbances are now negligible’.

\(^{84}\) EPA NSW (1997) above 1 at 197.

\(^{85}\) Note that the Australian Heritage Commission Act 1975 has been repealed by the Australian Heritage Council Act 2003. See also Environment Australia (1999) Identification, Assessment and Protection of National Estate - Part A Natural Values: Upper North Eastern NSW CRA Region, a Project Undertaken for the Joint Commonwealth NSW Regional Forest Agreements Steering Committee As Part of the
ha was identified in the UNE region, including 134,786 ha on private land (even on the basis of a 100ha minimum patch size). This amounted to 21% of total OGF in the region (see Table 3). Further, of the total areas identified as having indicative national estate significance for remnant vegetation and rare OGF, 50.9% was on private land (see Table 5).

### TABLE 2: INDICATIVE AREAS OF NATIONAL ESTATE VALUE ON PRIVATE LAND IN THE UNE CRA REGION

<table>
<thead>
<tr>
<th>Forest attribute</th>
<th>Area (hectares) on private land</th>
<th>Percentage of total identified area on all tenures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indicative national estate significance for remnant vegetation and <em>rare</em> old growth forest</td>
<td>32,141</td>
<td>50.9%</td>
</tr>
<tr>
<td>Old-growth forest of indicative national estate value</td>
<td>134,786 (private land)</td>
<td>21% of total area</td>
</tr>
<tr>
<td></td>
<td>82,411 (leasehold Crown land)</td>
<td>12.8% on leasehold Crown land (82,411 ha).</td>
</tr>
<tr>
<td>National Estate centres of species endemism</td>
<td>255,937 hectares</td>
<td>41.2%</td>
</tr>
<tr>
<td>Environments important as refugia for the conservation of environmentally sensitive species</td>
<td>199,793 ha</td>
<td>38.5%</td>
</tr>
<tr>
<td>Areas important for species of fauna with disjunct populations</td>
<td>69,566 ha</td>
<td>36%</td>
</tr>
<tr>
<td>Indicative significance for vegetation community richness</td>
<td>51,002 ha</td>
<td>52.7%</td>
</tr>
<tr>
<td>National estate significance on the basis of Habitat richness</td>
<td>73,204 ha</td>
<td>38.8% of total area (being the majority land tenure for this category)</td>
</tr>
<tr>
<td>Significant national estate natural landscape values</td>
<td>364,489 ha</td>
<td>42.4%</td>
</tr>
</tbody>
</table>

The data in these tables contradicts the argument that only a small proportion of NSW

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NSW Comprehensive Regional Assessments, project numbers NA 59/EH, NA 65/EH, February, joint publication of RACAC & Forests Task Force, Department of Prime Minister and Cabinet, Sydney and Canberra.

86 Environment Australia (1999) above n 85 at 39-41, Table #15.
87 Environment Australia (1999) above n 85 at 21-24, Table #7.
89 Environment Australia (1999) above n 85, Table 17, at 44.
90 Environment Australia (1999) above n 85.
91 Environment Australia (1999) above n 85, Table 4, at 19.
private forests are of environmental significance.\textsuperscript{92}

### TABLE 3: LAND TENURE OF INDICATIVE NATIONAL ESTATE OLD-GROWTH FOREST\textsuperscript{93}

<table>
<thead>
<tr>
<th>Tenure</th>
<th>Approximate Area (ha)</th>
<th>Proportion of Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Park, PMP 1.3\textsuperscript{94} or Nature Reserve</td>
<td>229,155</td>
<td>35.7</td>
</tr>
<tr>
<td>State Forest</td>
<td>175,519</td>
<td>27.4</td>
</tr>
<tr>
<td>Private Land</td>
<td>134,786</td>
<td>21</td>
</tr>
<tr>
<td>Leasehold Crown Land</td>
<td>82,411</td>
<td>12.8</td>
</tr>
<tr>
<td>Other Crown Land</td>
<td>19558</td>
<td>3</td>
</tr>
</tbody>
</table>

### TABLE 4 : LAND TENURE OF INDICATIVE NATIONAL ESTATE CENTRES OF ENDEMISM\textsuperscript{95}

<table>
<thead>
<tr>
<th>Tenure</th>
<th>Approximate Area (ha)</th>
<th>Proportion of Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Park, PMP 1.3 or Nature Reserve</td>
<td>191,311</td>
<td>30.8</td>
</tr>
<tr>
<td>State Forest</td>
<td>116,190</td>
<td>18.7</td>
</tr>
<tr>
<td>Private Land</td>
<td>255,937</td>
<td>41.2</td>
</tr>
<tr>
<td>Leasehold Crown Land</td>
<td>38,850</td>
<td>0.3%</td>
</tr>
<tr>
<td>Other Crown Land</td>
<td>16,832</td>
<td>0.15%</td>
</tr>
</tbody>
</table>

### TABLE 5 : LAND TENURE OF INDICATIVE NATIONAL ESTATE REMNANT VEGETATION AND RARE OLD-GROWTH FOREST IN THE UPPER NORTH EAST RFA REGION OF NSW \textsuperscript{96}

<table>
<thead>
<tr>
<th>Tenure</th>
<th>Approximate Area (ha)</th>
<th>Proportion of Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Park, PMP 1.3 or Nature Reserve</td>
<td>9,823</td>
<td>15.6</td>
</tr>
<tr>
<td>State Forest</td>
<td>12,006</td>
<td>19</td>
</tr>
<tr>
<td>Private Land</td>
<td>32,141</td>
<td>50.9</td>
</tr>
<tr>
<td>Leasehold Crown Land</td>
<td>5,769</td>
<td>9.1</td>
</tr>
<tr>
<td>Other Crown Land</td>
<td>3,165</td>
<td>5</td>
</tr>
</tbody>
</table>

\textsuperscript{92} Statements made by Mott above n 80 in delivering paper; Similarly, Banks, (2001) “Forest Regulation - Acquisition of Property on Just Terms” in Country Conferences Pty Ltd, (ed). 2nd Australasian Natural Resources Law & Policy Conference (Focus on Forestry), Country Conferences Pty Ltd, Perth, WA. at 96, argues that only 3% of the private forests in SE Queensland are oldgrowth.

\textsuperscript{93} Environment Australia (1999) above n 85 at 23. According to the report these findings were based upon the CRA old-growth forest data set, being the version supplied to the Environment and Heritage Technical Committee. That data was not field validated at the time of writing the National Estate report. (p.11.)

\textsuperscript{94} “PMP 1.3” is the State Forests of NSW Preferred Management Priority Classification for areas reserved as Flora Reserves and Forest Preserves (Forestry Commission of NSW 1993).

\textsuperscript{95} Environment Australia (1999) above n 85 at 26.

\textsuperscript{96} Environment Australia (1999) above n 85 at 30.
POLICY OPTIONS FOR PRIVATE FOREST CONSERVATION

National policies for conservation of private forests were first articulated in the NFPS in 1992. That document expressed the goals of ensuring “that private native forests are maintained and managed in an ecologically sustainable manner, as part of the permanent native forest estate.”

Inclusion of private forests in reserve system

How are key forest types on private land to be conserved? A distinction must be drawn between reservation strategies and management based strategies which are implemented within a production context. This section addresses the question of reservation and quasi-reservation of private forests.

Reservation is defined here to include secure management agreement. The traditional definition of reservation only covers acquisition. The dictionary definition of reserve is of “a tract of public land set apart for recreation, or for a special purpose such as a nature reserve.” (*Macquarie Dictionary*, 1982).

Certain forest ecosystem types are ‘under-represented’ and ‘under-target’ within the public land estate, and therefore conservation of remnants of these forest types on private land are essential for the creation of the CAR reserve system. To meet the JANIS targets, the reservation of many ‘under-represented’ forest types on private land was necessary in Tasmania and in NSW, particularly the NE RFA regions, because of shortfalls in their reservation on publicly owned land. In the UNE, there were 56 forest ecosystem types identified as a priority for conservation on private land. In the

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99 Commonwealth of Australia and State of NSW (2000) *Regional Forest Agreement for North East NSW (Upper NE and Lower NE)*, March 2000, Table 1 “Percentage Reservation Status of Forest and Non-Forest Ecosystems in the Upper NE Region based on vegetation modelling to establish the pre-1750 extent of Forest Ecosystems in the Region” contained in Attachment 1(d) Comprehensive, Adequate and Representative Reserve System for Upper NE Region at pp.41-63. See also Table 1 “Private Land priorities for the Upper North East CAR Reserve System”, Table 2, “Private Land priorities for the Lower North East CAR Reserve System”, in Attachment 2, “Private Land Conservation”, at pp.70-73.
Lower North East (LNE), 85 such forest types were identified.\textsuperscript{100} In the Southern region most targets for conservation of around 200 forest types were met from public land with less need to examine the private estate.\textsuperscript{101} Still, 30 forest types were listed as a private land conservation priority following identification by an expert panel. In particular, 15 of these were listed as a ‘Very High Priority” with a 100% reservation target set, and not met on public land.\textsuperscript{102} In the Eden region, 7 forest types were listed as a private land priority.\textsuperscript{103} (A listing of these forest types is provided below in Tables 6, 7 & 8.)

Private forests conservation in the RFA process

The available policy options for private native forest management and conservation in Australia are politically constrained by the content of Regional Forest Agreements. Although not fully binding in a legal sense, these set the context for future policy making.\textsuperscript{104} First, in relation to the creation of the CAR reserve system, the RFAs suggest that private native forests should only be included within the reserve system after the option of filling reservation targets from public native forests has failed. This approach maintains the policy adopted in the NFPS of 1992.\textsuperscript{105} For example, the NE RFA states: “Provision is also made in the JANIS Reserve Criteria for inclusion of Private Land in the CAR Reserve System, with the agreement of landholders, where the Criteria cannot be met from Public Land.” [emphasis added]\textsuperscript{106}

Thus in the NSW RFAs, governments agreed that the private component of the reserve

\textsuperscript{100} Commonwealth of Australia and State of NSW (2000) above n 99, Attachment 2, “Private Land Conservation”, Table 1 “Private Land priorities for the Upper North East CAR Reserve System”, Table 2, “Private Land priorities for the Lower North East CAR Reserve System”, at pp.70-73.

\textsuperscript{101} Interview, Mr Paul Packard, Manager, Conservation Assessment and Data Unit, NPWS, Southern Directorate office, 23.1.01. (by telephone).

\textsuperscript{102} Southern RFA, Attachment 2, Table 1, pp. 57-58, Clauses 53-58 of Agreement. As a generalisation, the exception were certain rainforests, coastal swamp forests, riparian forests, tablelands dry shrub forests and South West Slopes woodlands where ecosystems such as white box woodlands were insufficient on public land to meet targets. Interview, Mr Paul Packard, Manager, Conservation Assessment and Data Unit, NPWS, Southern Directorate office, 23.1.01. (by telephone).

\textsuperscript{103} Eden RF-A, Table 1 of Attachment 12, p.76. Three of these forest types were listed as ‘very high priority’ for conservation.


\textsuperscript{105} Commonwealth of Australia (1992) above n 79 at 7-8.

\textsuperscript{106} North-East RFA, cl 2, Attachment 1(a), p. 41.
system should only be achieved using *voluntary* mechanisms of conservation.\textsuperscript{107} The primary tool envisaged for the completion of the private reserve system in the NE RFA was to place it “under secure management arrangement by [voluntary] agreement with private landholders”.\textsuperscript{108} The range of agreements specified included: “Voluntary Conservation Agreements; landholder initiated agreements; non-contractual voluntary agreements; fee for service; voluntary acquisition; fixed term common law contract; in perpetuity common law contract; community grants; property management plans; voluntary land and water management plans.”\textsuperscript{109} The mechanisms listed in the NE RFA are overwhelmingly voluntary and non-regulatory.\textsuperscript{110}

Back in 1992, on the question of acquisition of private property, the NFPS said that acquisition of private forest should occur “*preferably* by agreement of landowners”. This left the door open for compulsory acquisition as a last resort.\textsuperscript{111} The NFPS stated that “Purchase of private land for reservation purposes is appropriate in cases ... *where complementary management practices on those private lands are unlikely to adequately protect those conservation values...*”\textsuperscript{112} This implies that voluntary conservation approaches on private land may sometimes be insufficient to achieve a secure reserve system. However, the RFAs took a more reverent attitude to the acquisition of private property. The NE RFA states bluntly: “Both Parties agree that in complementing the CAR Reserve System on Public Land, conservation on Private Land can only be voluntary.”\textsuperscript{113}

This divergence in approach between the RFAs and the NFPS raises doubts about the adequacy of the private reserve system, which fall into three categories - inadequacy, delays, and impermanence of reserves. In terms of delay, a target was set in 1992 in the NFPS for conserving and managing old-growth forests, and forested wilderness was an agreed commitment by Governments to complete the reserve system on private land by

\textsuperscript{107} North-East RFA, Clause 56.
\textsuperscript{108} North-East RFA, clause 2, p.2.
\textsuperscript{109} North-East RFA, Attachment 2, clause 5 (pp.70-71).
\textsuperscript{110} North-East RFA, Attachment 2, Clause 5, p.70.
\textsuperscript{111} Commonwealth of Australia (1992) above n 79 at 9.
\textsuperscript{112} Commonwealth of Australia (1992) above n 79 at 7-8. [emphasis added]
\textsuperscript{113} North-East RFA, Attachment 2, Clause 2, p.70. Further Cl.56 of the agreement itself states: “All conservation mechanisms for the establishment of the Private Land component of the CAR Reserve System will be voluntary.”
1998. This objective has not been achieved at present. Further delay is likely also if the NPWS maintains a protocol of not approaching private landholders to purchase properties, but instead waiting for them to contact NPWS.

The text of the NSW RFAs tends to overlook the question of the permanence, security or quality of private land reservation. Yet concerns about the potential for impermanence and inadequacy of private reserves were expressed by a Commonwealth/State Committee on the implementation of the NFPS in 1996. This warned:

“a covenant should be binding on successors in title, and ... appropriate management intent should be demonstrated before the area concerned could be considered to be part of the CAR reserve system.”

The RFAs themselves appear to be the source of another constraint on the creation of adequate private reserves. For example, in the NE RFA, a promise was made as follows:

“New South Wales confirms that the CAR Reserve System has been established through this Agreement …and that conservation levels achieved in that reserve system will not subsequently be used as a basis for preventing timber harvesting being carried out on Private Lands.”

This clause inserts a contradiction into the RFA with its empty assertion that the reserve system had already been created. The clause prevents compulsory acquisitions to add to the private reserve system. The same clause later states “this is not to be interpreted as preventing voluntary conservation measures to protect CAR Values on Private Land.”

The impact of this clause on timber production areas on private land is open to interpretation. One view is that it is only applicable where timber harvesting is prevented by total exclusion of all harvesting from a parcel of land. On another interpretation it may mean that timber harvesting may not be significantly restricted by

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115 Unfortunately, space does not permit an examination of that question here.
116 Interview, Paul Packard, Manager, Conservation Assessment and Data Unit, NPWS, Southern Directorate office, 23.1.01. (by telephone).
117 Joint Australian and New Zealand Environment and Conservation Council (ANZECC) and Ministerial Council on Forestry Fisheries and Aquaculture (MCFFA) National Forest Policy Statement Implementation Sub-Committee (JANIS) (1996) Proposed Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative Reserve System for Forests in Australia, Department of Prime Minister and Cabinet (Cth), Canberra at pp.11-12.
118 North-East RFA, Clause 59.
environmental laws, as that would amount to ‘prevention’ of harvesting (for part of a site).

**PF conservation in production contexts**

In relation to those areas of native forest on private land *not selected for inclusion* in the CAR reserve system, the NFPS suggested a mix of policy and regulatory instruments: “Sustainable management of private native forests will be encouraged through a combination of measures that may include dissemination of information about and technical support for forest management, education programs, conservation incentives, land-clearing controls, harvesting controls, and codes of forest practice.”

The *National Biodiversity Strategy* suggested a non-regulatory approach - with priority given to “providing private forest owners technical advice… and offering incentives.”

Endorsement of a regulatory approach was evident in the NFPS’ agreement that Codes of Forest Practice for public native forests were to be made applicable to private forests in order to protect nature conservation values. On the other hand, the NFPS acceded to continued permanent vegetation removal on private land, in a statement inconsistent with its advocacy of a permanent forest estate. It stated:

> Governments acknowledge that private native forest owners may wish to clear native forest for a range of economic uses. They agree that land clearing can be permitted provided it complies with State and regional conservation and catchment management objectives, relevant planning schemes and legislation.”

In order to achieve such objectives the Statement did not *require* the application of regulatory controls. It was simply stated that the measures to protect conservation values from land clearing *“may include legislatively backed controls.”*

Similarly, a close examination of the NSW RFAs reveals that they do not contain measures to prohibit

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119 North-East RFA, Clause 59.
120 Would the application of a fauna protection prescription which involved exclusion zones violate this clause of the agreement? However clause 59 of the North-East RFA is expressed to be subject to clause 18 which states that the RFA cannot impose obligations which are inconsistent with international or Commonwealth or State laws.
122 Commonwealth of Australia (1992) above n 79 at 22. It was also agreed that the principles of forest practice established by the Australian Forestry Council should be applied to “all public and private forests in Australia, Australian Forestry Council (1991) “Forest Practices Related to Wood Production in Native Forests: national principles”, AFC Standing Committee, unpublished, attachment to Commonwealth of Australia (1992) above n 79 at 10.
permanent loss of forests to agriculture, or conversion of native forest to plantations.

The “basis” of the NE RFA was expressed to include “promoting the conservation and management of the private forest estate.”\textsuperscript{126} In it, the NSW government made a “commitment to the achievement of ESFM on Public and Private Land.”\textsuperscript{127} It also promised the “ongoing review and subsequent implementation of its legislation, policy, plans, Codes and Regional Prescriptions to ensure ESFM objectives can be achieved in a more efficient regulatory environment.”\textsuperscript{128} Yet the NE RFA spoke in terms of encouraging private land holders to improve practices, rather than regulating to ensure this. It was agreed that “[t]he Parties agree to encourage private forest owners to ensure that their management operations are consistent with ESFM practices.”\textsuperscript{129}

The main elements of government policy regarding PF conservation of the past decade contained in the RFAs and NFPS can be summarised as follows: (1) a broad emphasis on a voluntary, non-regulatory approach to inclusion within the CAR reserve system (2) a shrinking away from the stance of the NFPS that compulsory acquisition may be necessary to achieve a private land reserve system; (3) a recognition of the need for consistency between Codes of Forest Practice applying to public and private forests; (4) a commitment to ESFM in private production forests; but (5) a reluctance to state that a regulatory approach will be necessary in some instances.

\textsuperscript{125} Commonwealth of Australia (1992) above n 79 at 21.
\textsuperscript{126} North-East RFA, cl.7(d).
\textsuperscript{127} North-East RFA, cl. 46.
\textsuperscript{128} North-East RFA, clause 46, p.17
\textsuperscript{129} North-East RFA, cl.55.
NSW FOREST CONSERVATION PRIORITIES ON PRIVATE LAND

### TABLE 6  PRIVATE LAND PRIORITIES FOR THE UPPER NORTH EAST CAR RESERVE SYSTEM

<table>
<thead>
<tr>
<th>Priority for voluntary protection of Forest Ecosystems</th>
<th>Forests</th>
<th>Non-Forest</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 Alpine Gum</td>
<td>73 Lowland Red Gum</td>
<td>5 Banksia</td>
</tr>
<tr>
<td>15 Brown Barrell-Gum</td>
<td>74 Lowlands Scribbly Gum</td>
<td>77 Mangrove</td>
</tr>
<tr>
<td>17 Candlebark</td>
<td>79 Manna Gum-Stringybark</td>
<td>18 Casuarina Woodland</td>
</tr>
<tr>
<td>29 Central Mid Elevation Sydney Blue Gum</td>
<td>80 Manna Gum</td>
<td>96 Natural Grassland</td>
</tr>
<tr>
<td>21 Lowlands Grey Box</td>
<td>81 Messmate</td>
<td>66 Herbfield and Fjaeldmark</td>
</tr>
<tr>
<td>22 Coast Cypress Pine</td>
<td>85 Mixed Moist Hardwood</td>
<td>142 Swamp Mahogany</td>
</tr>
<tr>
<td>24 Clarence Lowlands Spotted Gum</td>
<td>87 Mixed Tableland Stringybark-Gum Open Forest</td>
<td>143 Swamp Oak</td>
</tr>
<tr>
<td>25 Coast Range Spotted Gum-Blackbutt</td>
<td>95 Montana Stringybark-Gum</td>
<td>144 Broad-leaved Stringybark-Gum</td>
</tr>
<tr>
<td>30 Dorrigo Stringybark-New England Blackbutt</td>
<td>100 Northern Grassy Sydney Blue Gum</td>
<td>145 Broad-leaved Stringybark-Gum</td>
</tr>
<tr>
<td>31 Doneglo White Gum</td>
<td>112 Paperbark</td>
<td>146 Broad-leaved Stringybark-Gum</td>
</tr>
<tr>
<td>36 Dry Grassy Tallowwood-Grey Gum</td>
<td>114 Peppermint-Mountain/Manna Gum</td>
<td>147 Broad-leaved Stringybark</td>
</tr>
<tr>
<td>45 Dunns White Gum</td>
<td>116 Red Gum-Stringybark</td>
<td>148 Broad-leaved Stringybark-Blackbutt</td>
</tr>
<tr>
<td>47 Escarpment Redgum</td>
<td>119 Richmond Range Spotted Gum-Box</td>
<td>149 Broad-leaved Stringybark-Gum</td>
</tr>
<tr>
<td>50 Wet Bangalow-Brushbox</td>
<td>120 River Oak</td>
<td>150 Broad-leaved Stringybark</td>
</tr>
<tr>
<td>61 Grey Box-Ironbark</td>
<td>123 Roundleaved Gum</td>
<td>151 Broad-leaved Stringybark-Blackbutt</td>
</tr>
<tr>
<td>62 Grey Box-Northern Grey Gum</td>
<td>126 Sandstone Spotted Gum-Blackbutt</td>
<td>152 Broad-leaved Stringybark-Gum</td>
</tr>
<tr>
<td>68 High Elevation Messmate-Brown Barrel</td>
<td>132 Snow Gum-Mountain/Manna Gum</td>
<td>153 Broad-leaved Stringybark-Gum</td>
</tr>
<tr>
<td>71 Ironbark</td>
<td>138 Steel Box/ Craven Grey Box</td>
<td>154 Broad-leaved Stringybark-Mountain/Manna Gum</td>
</tr>
<tr>
<td>72 Low Relief Coastal Blackbutt</td>
<td>142 Swamp Mahogany</td>
<td>155 Broad-leaved Stringybark-Gum</td>
</tr>
</tbody>
</table>

**Notes Accompanying Table 1**

1. The Forest Ecosystems listed and prioritised for the Upper North East Region in Table 1 have been identified as priorities for voluntary conservation on Private Land, based on the following criteria:

   - Identification by expert panels convened during the UNE and LNE CRA as Forest Ecosystems of concern on Private Land;
   - Ecosystems with 100% target set and not met, that have extant occurrences on Private Land;
   - Ecosystems with 60% target set and not met, that are ranked as highly vulnerable (CRA expert panel vulnerability rankings 1 and 2, based on key threatening processes) or are more than 50% cleared, and have more than 50% of their occurrence on Private Land;
   - Ecosystems with 15% target set and not met, that are ranked as highly vulnerable or are more than 50% cleared, and have more than 50% of their occurrence on Private Land.

2. It should be noted that these are priorities only for protection by voluntary conservation mechanisms.

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130 North-East RFA, Table 1 “Percentage Reservation Status of Forest and Non-Forest Ecosystems in the Upper NE Region based on vegetation modelling to establish the pre-1750 extent of Forest Ecosystems in the Region” contained in Attachment 1(a) Comprehensive, Adequate and Representative Reserve System for Upper NE Region at pp.41-63. See also Table 1 “Private Land priorities for the Upper North East CAR Reserve System”, Table 2, “Private Land priorities for the Lower North East CAR Reserve System”, in Attachment 2, “Private Land Conservation”, at pp.70-73.
TABLE 7 PRIVATE LAND PRIORITIES FOR THE LOWER NORTH EAST CAR RESERVE SYSTEM

<table>
<thead>
<tr>
<th>Forests</th>
<th>Code</th>
<th>Forests</th>
<th>Code</th>
<th>Forests</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 Alpine Gum</td>
<td>87</td>
<td>Mixed Tableland Stringybark-Gum</td>
<td>Open Forest</td>
<td>68</td>
<td>Rainforest</td>
</tr>
<tr>
<td>3 Bailey's Stringybark</td>
<td>89</td>
<td>Moist Foothills Spotted Gum</td>
<td>174 Orange Gum-Tumbledown Gum-Apple</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7 Barrington Moist Blue Gum-White Mahogany</td>
<td>90</td>
<td>Moist Messmate-Gum</td>
<td>175 Orange Gum-New England Blackbutt-Tumbledown Gum</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8 Barrington Wet New England Blackbutt-Blue Gum</td>
<td>92</td>
<td>Moist Shrubby Stringybark-Gum</td>
<td>176 Orange Gum-Ironbark</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11 Blackbutt Sydney Peppermint-Smoothbarked Apple</td>
<td>93</td>
<td>Montane Stringybark-Gum</td>
<td>178 Outcrop Black Cypress-Tumbledown Gum</td>
<td></td>
<td></td>
</tr>
<tr>
<td>14 Brown Barrel</td>
<td>99</td>
<td>Needlebank Stringybark-Large Fruited Blackbutt</td>
<td>177</td>
<td>Outcrop Orange Gum-New England Blackbutt</td>
<td></td>
</tr>
<tr>
<td>17 Candlebark</td>
<td>99</td>
<td>New England Stringybark-Blakelys Red Gum</td>
<td></td>
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<tr>
<td>19 Central Mid Elevation Sydney Blue Gum</td>
<td>105</td>
<td>Nympheida Tallowwood-Turpentine</td>
<td>182 Apple-Black Cypress</td>
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<td>21 Lowlands Grey Box</td>
<td>112</td>
<td>Paperbark</td>
<td>184 Tumbledown Gum-Ironbark</td>
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<td>26 Coastal Flooded Gum</td>
<td>113</td>
<td>Peppermint</td>
<td>186 Open Tumbledown Gum-Black Cypress-Orange Gum</td>
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<td>28 Cool Moist Messmate</td>
<td>114</td>
<td>Peppermint-Mountain/Manna Gum</td>
<td>189 Silverleaved Ironbark-Cypress</td>
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<td>31 Dorrigo White Gum</td>
<td>116</td>
<td>Red Gum-Stringybark</td>
<td>190 Yellow Box-Grey Box-Red Gum</td>
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<td>32 Dry Foothills Blackbutt-Turpentine</td>
<td>117</td>
<td>Red Mahogany</td>
<td>195 Apple-Manna Gum woodland</td>
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<td></td>
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<tr>
<td>33 Dry Foothills Spotted Gum</td>
<td>120</td>
<td>River Oak</td>
<td>196 Broad-leaved Stringybark-Apple Box</td>
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<td></td>
</tr>
<tr>
<td>34 Dry Grassy Blackbutt-Tallowwood</td>
<td>122</td>
<td>Rough-barked Apples</td>
<td>197 Broad-leaved Stringybark</td>
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<td></td>
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<tr>
<td>41 Dry Open New England Blackbutt</td>
<td>123</td>
<td>Roundleaved Gum</td>
<td>198 Silvertop Stringybark</td>
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<td></td>
</tr>
<tr>
<td>47 Escarpment Redgum</td>
<td>124</td>
<td>Roundleaved Gum-Turpentine</td>
<td>200 Broad-leaved Stringybark-Ribbon Gum</td>
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<td></td>
</tr>
<tr>
<td>48 Escarpment Scribbly Gum-Apple</td>
<td>132</td>
<td>Snow Gum-Mountain/Manna Gum</td>
<td>207 Hunter Spotted Gum-Ironbark</td>
<td></td>
<td></td>
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<tr>
<td>54 Grey Box-Red Gum-Grey Ironbark</td>
<td>134</td>
<td>South Coast Shrubby Grey Gum</td>
<td>208 Hunter Roughbarked Apple-Red Gum</td>
<td></td>
<td></td>
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<tr>
<td>56 Granite Mallee</td>
<td>135</td>
<td>South Coast Tallowwood-Blue Gum</td>
<td>224 Coastal Apple-Stringybark-Scribbly Gum</td>
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<td></td>
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<td>57 Highland Granite Stringybarks</td>
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<td>Stringybark-Apple</td>
<td>225 Wyong Apple-Scribbly Gum</td>
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<td>58 George Grey Gum</td>
<td>142</td>
<td>Swamp Mahogany</td>
<td>232 Watagan Spotted Gum-Ironbark-White Mahogany</td>
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<td></td>
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<tr>
<td>70 High Elevation Open Spotted Gum</td>
<td>143</td>
<td>Swamp Oak</td>
<td>240 Roughbarked Apple-Redgum</td>
<td></td>
<td></td>
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<td>72 Low Relief Coastal Blackbutt</td>
<td>146</td>
<td>Tallowwood</td>
<td>241 Ironbark-Redgum</td>
<td></td>
<td></td>
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<td>73 Lowland Red Gum</td>
<td>149</td>
<td>Mallee-Peppermint mosaic</td>
<td>247 Coastal Bastard Mahogany Forest</td>
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<tr>
<td>79 Manna Gum-Stringybark</td>
<td>153</td>
<td>Wet Coastal Tallowwood-Brushbox</td>
<td>249 White Box-Ironbark-Red Gum</td>
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<td></td>
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<tr>
<td>80 Manna Gum</td>
<td>154</td>
<td>Wet Flooded Gum-Tallowwood</td>
<td>250 Banksia Heath-Scribbly Gum-Apple</td>
<td></td>
<td></td>
</tr>
<tr>
<td>81 Messmate</td>
<td>162</td>
<td>Whitetopped Box</td>
<td>251 White Mahogany-Apple-Redgum</td>
<td></td>
<td></td>
</tr>
<tr>
<td>82 Messmate-Mountain Gum Forest</td>
<td>163</td>
<td>Yellow Box-Blakely's Red Gum</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notes Accompanying Table 2

1. The Forest Ecosystems listed and prioritised for the Lower North East Region in Table 2 have been identified as priorities for voluntary conservation on Private Land, based on the following criteria:

- Identification by expert panels convened during the UNE and LNE CRA as forest ecosystems of concern on Private Land;
- Ecosystems with 100% target set and not met, that have extant occurrences on Private Land;
• Ecosystems with 60% target set and not met, that are ranked as highly vulnerable (CRA expert panel vulnerability rankings 1 and 2, based on key threatening processes) or are more than 50% cleared, and have more than 50% of their occurrence on Private Land;

• Ecosystems with 15% target set and not met, that are ranked as highly vulnerable or are more than 50% cleared, and have more than 50% of their occurrence on Private Land.

2. It should be noted that these are priorities only for protection by voluntary conservation mechanisms.

**TABLE 8 PRIVATE LAND CONSERVATION PRIORITIES FOR THE EDEN CAR RESERVE SYSTEM**

**Priorities for the CAR Reserve System** (Forest Ecosystems that require conservation on Private Land)

<table>
<thead>
<tr>
<th>Priority for voluntary protection of Forest Ecosystems</th>
<th>High Priority</th>
<th>Moderate Priority</th>
<th>Low Priority</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Forsts</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>20 Bega Dry Grass Forest</td>
<td>1 Dry Rainforest</td>
<td>22A Monaro Dry Grass Forest</td>
<td></td>
</tr>
<tr>
<td>21 Candelo Dry Grass Forest</td>
<td>71 Monaro Basalt Grass woodland</td>
<td></td>
<td></td>
</tr>
<tr>
<td>40 Riverine Forest</td>
<td>36 Dune Dry Shrub Forest</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Non-Forsts</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>23 Monaro Grassland</td>
<td>39 Northern Riparian Scrub</td>
<td></td>
<td></td>
</tr>
<tr>
<td>60 Floodplain Wetlands</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: *Eden RFA*, Attachment 12, at p.76.
Please see print copy for Appendices 5.2  5.3
APPENDIX 5.4
CORRESPONDENCE RELATING TO FOI REQUEST LODGED ON DLWC (NOVEMBER 1997)

Freedom of Information Coordinator
Legal Services
Department of Land and Water Conservation

22 November 1997

Dear

This is a request for access to documents in the possession, custody, and control of the Department of Land and Water Conservation pursuant to statutory rights of access created by the Freedom of Information Act 1989 (NSW). In addition to the details contained in this letter please refer to the attached covering application form.

Documents requested

Please provide access to documents (defined as widely as in the Act) which fit the following description:

Clearing on protected land
1. Documents which indicate the number of authorities granted “to destroy timber on protected land” under s.21D of the Soil Conservation Act 1938 during the course of commercial native forest harvesting on privately held lands classified as “protected land” for the following years 1990-1, 1991-2, 1992-3, 1993-4, 1994-5, 1995-6, 1996-7, 1997-8.

2. Documents containing discussion, debate or information about consideration of environmental factors, and the imposition of conditions on the grant of such authorities in the decision making process leading to the grant or refusal of such s.21D authorities in the private land logging context described in point 1.

3. Any documents containing consideration or discussion (most probably by DLWC or EPA) of the policy and technical matters relating to the regulation of logging activity on private land, where it would involve the use of ‘cable logging’ machinery (ie non-ground based harvesting techniques such as hi-lead or skyline logging) to log steep slopes.
This request category includes any documents from any source which discuss the application of the protected lands provisions of the *Soil Conservation Act* on proposed cable logging activity on private lands in NSW.

4. Documents which show the number of refusals of s.21D authority applications for logging operations on privately held land (since 1990-1). Any documents which show the reasons for those refusals, and documents which would indicate or from which could be calculated the percentage of refusals which were based on environmental factors as opposed to other factors.

5. Policy documents relating to any decisions to gazette exemptions to the general prohibition on timber destruction on protected lands, under s.21C(2)(b) *Soil Conservation Act 1938* made since 1 January 1991. Included in this category of documents requested is documents which contain consideration and discussion of the policy justifications and other issues related to creating exemptions to the prohibition on vegetation clearing on protected lands, where it relates to commercial logging activity on privately owned or held land.

6. Documents referring to, or containing discussion of, the triggering of the operation of the environmental impact assessment provisions of Part V of the Environmental Planning and Assessment Act 1979 (‘EPAA’), by reason of the fact of applications for s.21D authorities to clear protected lands under the SCA, during the course of commercial native forest harvesting on privately held lands classified as “protected land” since 1 January 1991.

7. Documents which indicate or from which can be calculated the total number of directions issued under s.15A of the *Soil Conservation Act 1938* relating to commercial logging operations on private land in the Central and Eastern Divisions, since 1 January 1991.

**SEPP 46 applications**

8. Documents which provide details of the formal consideration made by the Director-General of the DLWC in his role as consent authority considering applications for development consent under SEPP 46 to clear native vegetation on privately held lands during the course of non-plantation commercial native forest logging.

9. Documents which discuss SEPP 46 applications by the Forestry Commission of NSW (trading as State Forests) for development consent for native vegetation clearance on land acquired for the purpose of plantation establishment. The documents will discuss consent sought for clearing/logging activities on land either owned outright by State Forests or part owned by State Forests or managed by State Forests as part of a joint venture. [Documents in this request category do not relate to land falling within the category of Crown timber lands defined in the *Forestry Act 1916*.] (Refer Hansard 22 October 1997, p.1155)

10. Documents, graphs or tables containing statistics, or from which statistics can be compiled, which indicate the total number of SEPP 46 applications to clear made since the Gazettal of the SEPP (in its various incarnations). I am also seeking documents which indicate the purposes for which these applications related (eg for agriculture, forestry, mining, rural residential, golf course establishment, plantation establishment etc).

11. Documents which contain reference to DLWC refusals of consent to applications made under SEPP 46 to clear native vegetation during the course of commercial native forest harvesting on privately held or owned lands.
12. Access is sought to documents which refer to efforts made by DLWC to seek the concurrence of the NSW National Parks and Wildlife Service, and the response of NPWS in instances of applications made under SEPP 46 to clear native vegetation during the course of commercial native forest harvesting on privately held or owned lands which are affected by the operation of s.77A(2) Environmental Planning and Assessment Act 1979 (EPAA), and any associated instances of refusal of concurrence, or conditional concurrence by NPWS under s.79 EPAA.

13. Documents which indicate the DLWC’s role/consultative input in the Regional Forest Agreement process (where it affects areas within NSW), where such documents contain discussion of
- the Department’s views of the adequacy or otherwise of the regulatory regime applicable to private land native forest logging; and
- the DLWC’s input into governmental consideration of the issues surrounding the selection of private land areas for reservation in the Comprehensive Adequate and Representative reserve system. This may involve correspondence with Commonwealth agencies or with other State agencies.

14. Internal policy documents, guidelines, memos or manuals which indicate the criteria upon which DLWC officers should refuse or approve SEPP 46 applications for development consent for commercial native forest harvesting operations on privately held land.

15. Internal policy documents, guidelines, memos or manuals which assist departmental officers in the interpretation of the exemptions contained within SEPP 46 Amendment No.2, in particular exemption (I) relating to commercial private land native forest logging, which indicate the circumstances in which the exemption should be applied, and the circumstances in which it will not be applicable to that activity.

16. Internal policy documents which contain discussion of the application of SEPP 46 and NVCA to logging operations on privately owned and held land which provide raw material to supply industrial scale export woodchipping operations conducted by companies including Harris Daishowa, Sawmillers Exports Pty Ltd and Boral.

17. Any documents being, containing or discussing legal advice (either from Parliamentary Counsel, Crown Solicitor or in-house legal advice of DLWC or NPWS) on the interaction between SEPP 46 and the operation of the Threatened Species Conservation Act 1995 (TSCA). Such documents may indicate or discuss how the requirements of the TSCA and the EPAA affect the operation of SEPP 46 (in any stage of amendment). In particular please supply documents discussing the modification of clause 6 of SEPP 46 by s.77A(2) of the EPAA (relating to the additional consent requirement of concurrence of the D-G NPWS or the Minister administering the TSCA).

18. Any documents containing details of investigations, or reference to investigations, of alleged breaches of SEPP 46 in the course of forestry operations on private land. Documents containing discussion of options for restraint of ongoing breaches, and the Department’s options to prevent future breaches in the same or other locations. Documents containing consideration of prosecution under the provisions of the Part 6 of the EPAA for breaches of SEPP 46.

Other documents
19. The Department’s prosecution policy, being a document detailing the legal and policy considerations to be considered by the Legal Section of the Department in its
exercising its discretion to commence, defer or reject criminal prosecution as an option in instances of alleged licence breach or similar violation of an authorisation or other breach of environmental laws.

20. A listing or table or index of departmental file titles and numbers of active files held by the branch or division handling environmental law compliance and law enforcement matters, for all such files created and maintained since 1 January 1994.

Note on provision of documents
In order to assist the applicant and any Court or tribunal in the event of subsequent review proceedings, please indicate when supplying the documents which numbered paragraph of the request the documents relate to. Please provide a schedule indicating the document identified, author, decision upon access, and statutory grounds relied upon for refusal of access if any/if applicable.

Form of access sought
I request that you provide a photocopy of documents unless the estimated total of processing charges exceeds $500.00. In that event, then please provide access in the form of inspection (with liberty to make copies of documents).

Processing Charges
I seek a 50% reduction in processing fees and charges for the reasons outlined below.

This request is part of a wider research effort related to my postgraduate research studies in law, the results of which will be of interest to the general public and the academic community. I am a Master of Natural Resources Law (Hons) candidate at the Faculty of Law, Wollongong University.

My research project relates in general to the implementation of government policies on biodiversity conservation on privately held land in NSW and elsewhere. This research can generally be described as being ‘in the public interest’ for the following reasons:

• It is not being undertaken for private purposes;
• It is not being undertaken for profit making purposes;
• The subject matter is one of contemporary public policy debate, ie relating to the application of environmental laws for the conservation of native vegetation and the protection of the environment. This subject is a matter of considerable interest to the general public, and to the academic community in particular.
• The results of my research will be published and accessible to the general public. I have the capacity to make public the information sought. For example, previous academic research I have conducted has been published by the Australian Centre for Environmental Law based at the ANU.

I look forward to your decision on this application under the NSW FOI Act. If you require any clarification of any aspect of this request do not hesitate to call me.

Yours sincerely

BA (Hons), LLB (Hons)
Master of Natural Resources Law (Hons) Candidate.
Director-General Land and Water Conservation  
Department of Land and Water Conservation  

FAX  
Attention:  
Freedom of Information Coordinator  
Legal Services  

02 January 1998  

Dear  

RE : INTERNAL REVIEW OF FREEDOM OF INFORMATION DECISION  

I am writing to you to inform you of my decision to reduce the scope of my FOI request (received in your office on 25 November 1997).  

The background is as follows. I am writing in response to a telephone call of 13 January 1998 from of your office, and your letter of 2 December 1997 indicating your refusal of my request. Also relevant is my request for an internal review of the refusal decision (of 2 January 1998 by fax, with hard copy and cheque mailed later).  

During our conversation of 13 January 1998 asked that I withdraw my FOI request. I refused to agree to that request, but indicated my willingness to negotiate on the details of the request. I maintain that position.  

One of the grounds of refusal listed in that letter was the ‘substantial and unreasonable diversion of agency resources’ allegedly involved in servicing the request.  

In order to address that concern, I wish to advise you of my intention to delete seven of the twenty paragraphs of my Freedom of Information request. They are the paragraphs numbered as follows:  

- 2  
- 5  
- 7  
- 10  
- 12  
- 14  
- 17  

I look forward to your Department’s reconsideration of your decision on this FOI request. I request that the presently active internal review process take the contents of this letter into account.
Yours sincerely

BA (Hons), LLB (Hons), GDLP
LLM (Hons) Candidate, University of Wollongong.
Dr
Director-General Land and Water Conservation
Department of Land and Water Conservation

Attention:
Freedom of Information Coordinator
Legal Services

27 January 1998

Dear

RE : INTERNAL REVIEW OF FREEDOM OF INFORMATION DECISION

I refer to your letter of 6 March 1998.

I am writing to you to reiterate my request for internal review under s.34 of the Freedom of Information Act 1989 (NSW) of my FOI application on your Department relating to forestry on private land in NSW.

On 2 January 1998 I wrote to your Department seeking internal review of your decision - made on 2 December 1997 and received by me on 5 December 1997 - to refuse access to documents requested. My letter was duly accompanied by the standard internal review $40.00 application fee, in the form of a cheque.

One of the grounds of refusal listed in the Department’s letter of refusal of 2 December 1997 was, broadly, the ‘substantial and unreasonable diversion of agency resources’ allegedly involved in servicing the request.

I would like to make the following three points about my request:

1. You are aware that in order to address your concerns about the extent of the request, I deleted seven of its twenty paragraphs.

2. The discussion with , which took place on 15 January 1998, at Parramatta, whilst very useful, did not provide information of a sufficiently specific nature to meet the needs of my Postgraduate research; to enable, for example, the formulation of statistical data for publication.

3. I consider that the Department has failed to reasonably respond to my request to indicate the precise manner in which the scope of the request could be appropriately
narrowed in order to overcome your objection of “unreasonable diversion of agency resources”. For example, there has been no response to my specific request, made on 2 January 1998, to “give me greater practical assistance in amending my application [other] than to simply advise me to narrow the scope of the application. For example it would be of assistance if you were to advise me which three sections of the application are most likely to involve a substantial diversion of agency resources.”

In other words, if the Department were willing to indicate which particular paragraphs (of the remaining thirteen) are the most burdensome in terms of agency resources, I remain prepared to reconsider the terms of the request.

I look forward to your Department’s reconsideration of your decision on this FOI request.

Yours sincerely

LLM (Hons) Candidate, University of Wollongong.
APPENDIX 5.4 CORRESPONDENCE – FREEDOM OF INFORMATION REQUEST TO DLWC

Ombudsman (NSW)

15 April 1998

Dear

Complaint re Freedom of Information Request on DLWC

Pursuant to s.12 Ombudsman Act 1974, I wish to make a complaint about certain decision making by the Department of Land and Water Conservation (DLWC).

The decision making in question related to a request that I made recently to DLWC, pursuant to the Freedom of Information Act 1989 (NSW).

I ask that you subject the decisions in question to an investigation under s.13 and s.26 of your Act.

The essence of my complaint about DLWC’s handling of my request is as follows:

• There was unreasonable and perhaps unlawful resort to the ‘substantial and unreasonable diversion of agency resources’ exemption [s.25(1)(1a) FOI Act] as a means of justifying refusal to take substantial action to process my request.

• Negotiation over the scope of the request did not secure any concessions from the Department, despite reduction in the size of the request from 20 to 13 paragraphs.

• The Department’s use of the related provision, s.25(5) of the Act, was cursory and not genuinely directed at producing a win-win situation. In particular, subsequent to the applicant’s reduction in the scope of the request, there was a failure to respond to further and repeated requests to specifically communicate what else should be done to narrow the scope of the request in order to resolve the Department’s objections. This failure tends to give the impression that DLWC sought to abuse the exemption provision.

A chronologically ordered table of relevant documents is attached. Photocopies of the relevant documents are also attached (as Attachments A to H).

If you decide to initiate an investigation or inquiry into this matter, I am most willing to make verbal or written submissions. Please contact me on the numbers above for clarification of any point.
Yours sincerely
Complaint re Freedom of Information Request on DLWC

As indicated overleaf, the following is the detail of my complaint against DLWC.

Summary of complaint

1. Unreasonable refusal to give access to any documents, and refusal on spurious grounds;
2. Unreasonable failure to provide adequate reasons for (1);
3. Unreasonable refusal to grant fee remission on ground of public interest as claimed;
4. Unreasonable failure to provide reasons for (3).

Detail of Complaint

Preliminary requirements
I contend that the following situation exists, providing sufficient reasons for commencing an investigation:

• There are no circumstances justifying exclusion of an investigation [under s.12(1) Ombudsman Act]
• Some decisions were contrary to law [s.26(1)(a)]
• Some decisions were unreasonable and unjust [s.26(1)(b)]
• For some decisions reasons were not given [s.26(1)(f)].

BACKGROUND FACTS

1. On 21 November 1997, I made an FOI request to DLWC.
2. On 2 December 1997, DLWC replied saying my request was refused.
4. On 3 April 1998, DLWC replied saying that the result of the internal review was that the original determination had been upheld.
5. Additional correspondence took place between steps 3 and 4. In summary, this related to negotiations with the Department over the scale of the request, my decision to narrow the scope of the request, and discussion over whether and when the internal review process had commenced.
**APPENDIX 5.4 CORRESPONDENCE – FREEDOM OF INFORMATION REQUEST TO DLWC**

**DETAIL OF COMPLAINT**

**Complaint One**

It was (a) unlawful and (b) unreasonable for DLWC to refuse to provide access to (at least some) of the documents requested.

I have a legally enforceable right under s. 16 FOI Act to gain access to the agency’s documents (subject to other provisions of the Act).

My request was accompanied by the required application fee and in other ways met the requirements of s.17 of the FOI Act.

I believe that the Department’s application of s.25(1)(1a) FOI Act was unlawful and unreasonable for the reasons outlined below.

**Background**

On 2 December 1997, DLWC sought to refuse access on a number of grounds including s.25(1)(a1) of the Act ‘substantial and unreasonable diversion of agency resources’. The section reads as follows:

“the work involved in dealing with the application for access to the document would, if carried out, substantially and unreasonably divert the agency’s resources”

**Argument A**

It was unreasonable to make blanket treatment of the entire request as an ‘substantial and unreasonable diversion’.

Although this is a difficult matter of interpretation, (on which there is no reported NSW case law) I believe the correct interpretation of section 25(1)(1a) requires a paragraph by paragraph approach to be taken to a given request.

It is obvious that processing some paragraphs of any FOI request will involve more work than that required for other paragraphs.

The Department’s responses show a failure to differentiate between the impact of different portions/aspects/paragraphs of the request (Attachments B,F,H).

It is my contention that processing, for example, paragraphs 19 and 20 would have been relatively straightforward, and would not have involved much effort. Therefore the Department could, at the least, if it were acting reasonably, have considered providing access to paragraphs of this nature.

It is necessary to interpret specific sections of the Act such as s.25(1)(1a) against the overall purpose of the Act, of providing government information to the public, etc. Further, this section must be interpreted against the requirements of s.25(5). [Discussed in further detail below at pp.5-6.]

In order for the Department to establish that it had met the requirements of s.25(5) would at least have involved indicating to the applicant which paragraphs of the request were most
objectionable. The logical way to communicate this information would have been to tabulate the response of the Department to the various paragraphs, indicating which paragraphs of the request most severely had the potential to offend the requirements of s.25(1)(1a) of the Act.

Argument B

Even if it is found that s.25(1)(1a) requires a blanket approach to an FOI request, the decision maker remains obliged to establish that the diversion of resources would have been both substantial AND unreasonable.

Thus even if it DLWC had envisaged the diversion as ‘substantial’, the onus was on DLWC to show that the scope of the request, as revised (reduced in scope by 35%, when judging by the reduction in the number of paragraphs) remained ‘unreasonable’.

In my opinion, there was insufficient evidence provided by the Department to establish that providing access to all documents within the ambit of the request would involve that type of diversion of resources.

The possibility exists that the DLWC attempted to abuse section 25(1)(1a) as a means of refusing to even commence the processing of request, and the process of identifying documents.

There is a high probability that sufficient facts did not exist to justify reliance upon s.25(1)(1a). No concrete evidence of the ‘unreasonableness’ of the request was provided in DLWC’s correspondence. On the other hand, the Department provided:

- no evidence of efforts to contact regional offices.
- no evidence of attempts to search file registers or indexes at head office or regional offices.
- no effort to estimate the number of files involved.
- no effort to compile a list of the titles of possibly relevant files.
- no estimate of the number of folios on those files.
- no provisional estimate of the staff hours or costs to the Department likely to be involved, even following the 35% reduction in scope of the request.

It is useful at this point to refer to the FOI case law from other jurisdictions in relation to similar provisions. In Re Shewcroft, relating to the Commonwealth Act, the agency in question was only able to uphold a claim of unreasonable diversion, after having made a genuine estimate of the number of items and folios involved, and the likely time involved in examining these, as well as the likely consultation time involved in considering any exemptions.1 In Re SRB, the Commonwealth AAT only found an instance of unreasonable diversion, upon evidence of there being 300 relevant files containing 22,500 folios.2 In my opinion the DLWC has failed to provide similar evidence of such a resource effort required in this instance, and cannot therefore reasonably rely upon s.25(1)(1a).

In order to discern the reasonableness or otherwise of the likely effort required of the Department the case law suggests an approach of a weighing up of certain factors.3 Some factors that I believe are relevant are outlined below:

---

1 Re Shewcroft and Australian Broadcasting Corporation (1985) 2 AAR 496 at 499.
2 Re SRB and Department of Health, Housing, Local Government and Community Services (1994) 19 AAR 178.
3 Re Shewcroft at 501.
(a) The scope and purpose of the Act in providing open government
The Section 25(1)(1a) must be read against the statements in the objects clause which weigh in favour of access to documents, such as s.5(1)(a) and 5(3)(a) and 5(3)(b), including the statement: “This Act shall be interpreted and applied so as to further the objects of this Act.”

(b) The size and resources of the Department
The Department’s claims that my request will substantially divert its resources must be weighed against the fact that it is a large department by any person’s standards. According to the 1995-6 Annual Report it employs in excess of 4000 staff and expends an annual budget of $600 million.(Annual Report 1995-6, p.11). Furthermore, it is apparent that the Department has a stand-alone legal section with the capacity and staffing to deal with FOI applications.

(c) The scope of the request
It is not the case that the request involves unduly complex matters spanning the length and breadth of the Department’s portfolio responsibilities. Rather the request relates to a narrow aspect of administration of two particular statutes. The request is not expressed in terms of requiring “all” documents relating to the subject of protected lands provisions of the Soil Conservation Act 1938 and former State Environment Planning Policy 46. On the contrary, it is for a very narrowly defined subset of documents relating to this subject matter: specific numbers of authorities and approvals and consents granted under the above legislation, only in relation to commercial native forest harvesting on privately owned land in NSW.

(d) The nature of the request
The request (Attachment A) is neither unintelligible, illegible nor is it vague or unspecific. I believe that its targeted nature is a factor in favour of a judgement of ‘reasonableness’ of the request. Accordingly, the effort involved for the Department in dealing with the request, would, all other things being equal, would tend to be less than that involved in processing less clear or specific requests.

(e) Purported difficulties arising from the nature of the Department
In the letter of 3 April 1998, the DLWC refer to the difficulties involved in obtaining documents from regional offices (Attachment H).
I consider this to be a spurious argument. As a Department with regional offices, the DLWC must logically be equipped to cope with logistical and record keeping demands arising from its day to day operations, not to mention its statutory obligations to comply with FOI and other legislation.

(f) Rebuttal of potential argument relating to the relevance of information requested
It may be argued by DLWC that any information relating to the administration of the protected lands provisions of the Soil Conservation Act 1938 and former State Environment Planning Policy 46 (“SEPP 46”) is now of little value. This is because the ‘protected lands’ provisions have been transferred to the Native Vegetation Conservation Act 1997 (“NVCA”), and SEPP 46 has been repealed by that same Act.

However I believe that such an argument is of dubious value. This is because my postgraduate research is a study of the administration of such legislation. As the NVCA is new legislation, enacted in December 1997, there is unlikely to be a lengthy record of how successfully that legislation has functioned. Therefore in order to examine the record of performance of legislation administered by the Department it is essential to examine the documentation relating to the legislation it formerly administered. Furthermore the new legislation, the NVCA, essentially incorporates many of the same provisions and mechanisms as the former legislation.
Therefore the performance of the previous legislative regime will provide a good guide as to the likely performance of the new regime.

(g) Motives of the applicant, public v private interest
In *Re Shewcroft*, the Commonwealth AAT expressed a view that in determining whether the diversion of resources was unreasonable, relevant factors included whether there existed personal interest, a general public interest, or a clearly established “proper” motive. I believe there is firstly evidence of a request in the public interest, based on university postgraduate research, and secondly, I believe there is no question of any allegation of improper motives.

The inadequacies of the negotiations over scope
*As a matter of fact, it would not be reasonable for the Department to claim that it had met the requirements of s.25(5) of the Act as justification for its reliance upon s.25(1)(1a) to refuse the application.*

Subsection 25(5) obliges an agency to undertake efforts to negotiate with an applicant prior to resorting to s.25(1)(1a). It is evident from Attachment B that the DLWC sought to rely upon s.25(1)(1a) in its refusal letter of 2 December 1997 prior to commencing negotiation. I put the Department on notice of this in my letter of 2 January 1998 (Attachment C).

The following is a summary of relevant facts, some of which may be referred to in the supporting documents:
The Department and I engaged in a process of negotiation involving both correspondence and telephone conversations, over the scope of the request.
The DLWC suggested a meeting with Dr Hannam.
The meeting with Dr Hannam took place 15 January 1998 at DLWC’s Parramatta office.
No representatives of the Legal Section attended that meeting.
At no stage in that meeting did Dr Hannam indicate that he was acting on behalf of the Legal Section in relation to the FOI matter.
During the meeting I asked Dr Hannam to provide me with copies of the documents listed in the request. Dr Hannam stated that that was not possible.
That meeting, whilst useful, bordered on the general, and failed to provide sufficient specific information of a nature which in my opinion would justify withdrawal of the request.
Although Dr Hannam did provide me with certain papers, these were copies of Hansard and copies of articles he has published. However these items did not contain the specific information that was requested in the FOI request.
Following the meeting, I reduced the scope of the application by seven paragraphs of twenty (Attachment E).
The Department advised me that despite the narrowing of the request, in their opinion, the request would involve a substantial diversion of agency resources. (Attachments F, H)

(I am prepared to sign a statutory declaration to the effect of the above.)

Further steps which I took in the negotiation process involved requesting that the Department indicate to me the nature of the actions required in order to make the request less objectionable. On 2 January 1998 I wrote to the Department as follows:

“I consider that the Department has failed to reasonably respond to my request to indicate the precise manner in which the scope of the request could be appropriately narrowed in order to overcome your objection of ‘unreasonable diversion of agency resources’. For example, there has been no response to my specific request, made on 2 January 1998, to ‘give me greater practical assistance in amending my application [other] than to simply advise me to narrow the scope of the application. For example it would be of assistance if you were to advise me which
three sections of the application are most likely to involve a substantial diversion of agency resources."

However, as can be seen from attachments D, F, and H there was a complete failure by DLWC to respond to my request to identify which were the most onerous paragraphs in order that I might consider deleting them from the request. Nor was there a response in terms of the extent of scaling back of the request required – in terms of my request for the DLWC to indicate the percentage to which the request must be cut.

On 20 March 1998 I reiterated this argument, writing:

In other words, if the Department were willing to indicate which particular paragraphs (of the remaining thirteen) are the most burdensome in terms of agency resources, I remain prepared to reconsider the terms of the request.

As can be seen from the reply of DLWC of 3 April 1998 there was no response to this request. Accordingly, I believe that it would be unreasonable for the DLWC to assert that it has satisfied the requirements of s.25(5) to negotiate with the applicant.

Other efforts at negotiation on my part
An additional effort that I made in order to lessen the burden of compliance for the Department was my initial offer to accept access in the form of inspection if there was to be substantial cost of compliance (Attachment A, p.4).

If the nature of the diversion involved in processing the request was related to photocopying work, then provision of access in the form of inspection would have removed the need to expend staff hours in photocopying documents.

However there was a complete failure to respond specifically to my request to provide access in the form of ‘inspection’.

Complaint Two
There was an unjust failure to provide adequate reasons for the initial determination to refuse to grant access to documents.

In order to examine this point it is necessary to work out when the formal refusal took place. It appears that two refusals actually occurred. It is evident from the documents that one refusal took place on 2 December 1997, and another on 6 March 1998.

Even if the entire package of DLWC correspondence is taken together, it is not clear to me that the Department adequately communicated its reasons in compliance with s.28(2)(e)(ii), in communicating… “Findings on any material questions of fact underlying those reasons together with a reference to the sources of information on which those findings are based.”

It is my view that it did not do so because it had not commenced the process of making a list of files and where those files were held.

In relation to the internal review determination, (Attachment H), again I contend that the DLWC failed to provide adequate reasons for its decision. The letter of 3 April 1998 contains no indication of what in particular was done in the internal review, apart from the act of writing the determination letter. There is no evidence that any genuine additional effort was made to reconsider the matter.
Complaint Three
There was an unreasonable and unjust refusal to grant fee remission on claimed ground of public interest.

The DLWC stated in letter of 2 December 1997
“No public interest benefit has been disclosed in the application as a basis for providing the information therefore we cannot grant a reduction in fees for this application.”

I quote from my letter of 21 November 1997:
“...My request can generally be described as being ‘in the public interest’ for the following reasons:
It is not being undertaken for private purposes;
It is not being undertaken for profit making purposes;
The subject matter is one of contemporary public policy debate, ie relating to the application of environmental laws for the conservation of native vegetation and the protection of the environment. This subject is a matter of considerable interest to the general public, and to the academic community in particular.
The results of my research will be published and accessible to the general public. I have the capacity to make public the information sought. For example, previous academic research I have conducted has been published by the Australian Centre for Environmental Law based at the ANU."

It appears that the DLWC provided no counter-argument or evidence to suggest why these reasons would not justify ‘public interest’ status.

A further error was the Department’s failure to answer my request for 50% remission of the internal review fee (Attachment C). Nor were reasons provided for this decision not to answer this request (Attachment H).

Complaint Four
There was an unlawful and unjust failure to provide reasons for refusing to grant a fee remission on the grounds of public interest.

I refer to arguments above under the heading ‘Complaint Three’.

Complaint Five Additional errors and potential defects in DLWC decision making.

Defective internal review determination
The internal review determination (Attachment H) contains errors of fact. It inaccurately states that only five paragraphs were deleted from the request, when in fact, seven were deleted (Attachment E).

2. Potential instance of lack of authority to make decision
The Act requires that internal review be conducted by the CEO of the organisation, or his/her delegate. There is no indication in DLWC’s letter of 3 April 1998 that the Director of Legal Services was the lawful delegate of Dr Bob Smith for purposes of internal review under the FOI Act.
## Schedule of Documents

**FOI request on DLWC**

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APPENDIX 5.5
CORRESPONDENCE RELATING TO REQUEST FOR
INFORMATION LODGED WITH THE NSW NATIONAL PARKS AND WILDLIFE SERVICE UNDER THE FREEDOM OF INFORMATION ACT 1989 (NSW)

Freedom of Information Coordinator
National Parks and Wildlife Service

Dear

This is a request under s.16,17 of the Freedom of Information Act 1989 (NSW) for access to documents in the possession, custody, and control of the National Parks and Wildlife Service (‘the Service’) and the Director-General of the Service.

Documents requested
This request does not apply to documents created by or in the possession of regional offices within the Central or Western Zone, or to documents created prior to June 1991.

Note that I am not seeking access to any documents which are already publicly accessible (eg held in public libraries or available for sale).

Please supply copies of documents (defined as widely as in the Act, ie including electronic mail messages, file notes, correspondence, Ministerial and internal briefings, memoranda and circulars, minutes of meetings, etc) which fit the following description:

1. Documents which indicate, discuss or refer to the Service’s policy, proposed policy, or policy options as to how the Threatened Species Conservation Act 1995 applies to, or should be applied to, commercial scale forestry operations in native forest on privately owned land in NSW, including the clearance of native forest and woodland in order to establish plantations of native or non-native species (referred to hereafter as ‘private land forestry’).
2. The following category of documents sought refer directly or implicitly to situations in which development applications were made for private land forestry where the consent authority under Pt IV *Environmental Planning and Assessment Act 1979* (‘EPAA’) was a local government authority:

2.1 Those documents which refer to ‘concurrence’ of the Director-General of NPWS (under s.79B EPAA) being sought by consent authorities, for development applications which related to private land forestry.

2.2 Those documents which contain reference to, or from which the following may be calculated, in relation to development applications for private land forestry:
- The number of instances where the concurrence of the D-G NPWS was granted unconditionally;
- The number of instances where concurrence was granted subject to conditions;
- The number of instances where concurrence was refused under s.79B(8) EPAA.

2.3 Documents containing reference to consideration of the factors listed in s.79B(5) EPAA by the Director-General of NPWS during the course of concurrence decision making regarding private land forestry proposals.

3. The following category of documents sought refer directly or implicitly to situations in which development applications were made for private land forestry where the consent authority under Pt IV EPAA was the Minister for Land and Water Conservation, in relation to applications for development consent for the clearance of native vegetation under the *Native Vegetation Conservation Act 1997*:

3.1 Documents which refer to, discuss, describe, or document instances in which consultation with the Environment Minister was made under s.79B EPAA by the Minister for Land and Water Conservation, regarding development applications for private forestry proposals.

3.2 In such instances of Ministerial consultation, any documents regarding the making of statutory recommendations by the Director-General and the rejection (if any) of such recommendations (if any), and the reasons for such rejection, made in accordance with s.97C(6) EPAA.

4. Correspondence between NPWS and any Part IV consent authorities which discusses private land forestry proposals. This category of documents may include documents which refer to the conduct of the ‘8 part test’ regarding threatened species (etc.) under s.5A EPAA.

5. Documents which contain reference to or discussion of the grant of s.91 licences (under the *Threatened Species Conservation Act 1995* (‘TSCA’)) to individuals or corporations (‘persons’) engaged in private land forestry.

5.1 Documents which show, refer to, or from which may be calculated, the number of s.91 licences granted to persons engaged in private land forestry and the number of instances in which licence applications were refused.

5.2 Documents which show, contain, discuss, or refer to licence conditions imposed upon the grant of s.91 licences to persons engaged in private land forestry.
5.3 Copies of s.91 licences granted to persons involved in private land forestry.

5.4 Documents which contain reference to or discussion of the grant of s.95 TSCA certificates to persons engaged in private land forestry (to indicate that an activity was not considered likely to significantly affect threatened species) (and therefore that an Species Impact Statement (‘SIS’) was not required).

5.5 Documents in relation to private land forestry, which contain reference to, or discussion of, ‘determinations’ by the Director-General under s.95 TSCA (and notification of such determinations) that proposed ‘actions’ by an applicant for a licence are likely to significantly affect threatened species, populations or ecological communities, or their habitats.

6. Documents which refer to the issuing of, or contain, ‘Director-General's requirements’ regarding preparation of SIS (to accompany s.91 licence applications or Pt IV EPAA development applications) in relation to private land forestry.

Copies of any SIS prepared by, or on behalf of, companies and individuals engaged in private land forestry.

7. Documents which discuss, debate, consider or refer to the awareness of the private land forestry industry regarding its obligations under the Threatened Species Conservation Act 1995, and the question of conducting an industry wide education campaign regarding this matter.

8. Documents which discuss or consider the definition of ‘routine agricultural activity’ under the Threatened Species Conservation Act 1995 in relation to private land forestry. Such documents may refer to discussion of which circumstances in which this exemption is legitimately available to private land forestry.

9. Documents which discuss or consider or refer to the impact of Regional Vegetation Management Plans under the Native Vegetation Conservation Act 1997, where their content relates to private land forestry.

10. Documents which discuss, consider, or refer to NPWS contributions to the making of any code of practice or proposed code, to be made under the Native Vegetation Conservation Act 1997, in order to regulate private land forestry.

11. Any documents being containing or discussing legal advice (either from Parliamentary Counsel, Crown Solicitor or in-house legal advice of DLWC or NPWS or other legal advisers) regarding legal issues involving or affecting private land forestry. These documents may include discussion of the Native Vegetation Conservation Act 1997 and the operation of the Threatened Species Conservation Act 1995, and the Environmental Planning and Assessment Act 1979.

**Note on provision of documents**

In order to assist the applicant and any review body in the event of subsequent review proceedings, please indicate when supplying the documents, which numbered paragraph of this FOI request the documents discussed relate to.

**Form of access sought**
By photocopy; unless the estimated total of processing charges exceeds $200.00. In that case, I seek access by inspection, with liberty to copy documents.

**Processing Charges**
I enclose a $30.00 cheque to cover the initial application fee.

Pursuant to s.67 of the Act, and the Gazetted guidelines made under that section, I seek a 50% reduction in processing fees and charges for the following reasons: (1) financial hardship and (2) public interest.

**Financial hardship:**
The imposition of fees in excess of $200 would be likely to cause me financial hardship as my income (an Australian Postgraduate Award Scholarship) is only $300 per week, which leaves me a low disposable income. Further details can be supplied upon request.

**Public interest:**
This request is part of a wider research effort related to my postgraduate research in Law. This is a topic of interest to the general public and the academic community. I am a Master of Natural Resources Law (Hons) candidate (100% by research) at the Faculty of Law, Wollongong University.

My research relates to the implementation of environmental laws and government policies for biodiversity conservation on privately owned land in NSW and elsewhere. This research can be described as being in the public interest for the following reasons:
- It is not being undertaken for private purposes;
- It is not being undertaken for profit making purposes;
- The subject matter is one of general policy debate, ie the conservation of native vegetation and the protection of the environment through the application of environmental laws, which is a matter of considerable interest to the general public, and to the academic community in particular;
- The results of my research will be published and made accessible to the general public. For example, previous academic research I have conducted has been published by the Australian Centre for Environmental Law at the Australian National University.

**Conclusion**
I look forward to your decision on this application under the FOI Act.

If you require any clarification of any aspect of this request do not hesitate to call me.

Yours sincerely

Master of Laws (Hons) Candidate
Centre for Natural Resources Law and Policy
BY FAX – (with original and cheque by mail)

9 July 1999

Dear

Re: Internal review of decision to refuse FOI request relating to private land forestry.

This letter seeks an internal review of decision making of 29 June 1999 by Acting Manager, Executive and Strategic Services, to refuse access to documents requested under the Freedom of Information Act 1989 (NSW) on 31 May 1999, (addressed to Ms Janece Whalan, FOI Coordinator).

I seek an internal review under s.34 of the Act, and I enclose a cheque for $40.00 to facilitate that review.

The purported basis for refusal was s.25(1)(a1) of the Act, of substantial and unreasonable diversion of agency resources.

As a gesture of good will and willingness to negotiate with the NPWS, at this point, I wish to indicate:

(1) my availability to discuss the content and scope of this request at any time, either by telephone or in person;
(2) my willingness to delete paragraphs 1, 5.3, 7, 8, 9, 10,11 of the request in order to narrow its scope. Further, I wish to narrow the scope of the request by amending paragraph 4 to insert the words “within the Northern Zone of NPWS” immediately after the words “Part IV consent authorities”.

Centre for Natural Resources Law and Policy
Faculty of Law

Director-General
National Parks and Wildlife Service
Therefore the only remaining paragraphs which I wish to access at this stage are 2 (in full), 3 (in full), 4 (as modified), 5 (as modified), 6.

Further, I intend to narrow the scope to only include documents which relate to either legal or policy matters which are of State-wide application, and those documents relating to private land native forestry operations within the Northern Zone of NPWS. Therefore this narrowing of scope relates to the content of documents sought and not their physical filing location [Which is most likely to be either at Head Office or within offices of the Northern Zone].

In reducing the scope of the request I wish to retain the definition of ‘private land forestry’ previously contained in Paragraph 1 of the request. This stated that the overall scope of the request was in relation to the administration of the Threatened Species Conservation Act 1995 as it applies to, commercial scale forestry operations in native forest on privately owned land in NSW, including the clearance of native forest and woodland in order to establish plantations of native or non-native species.

At this point I wish to raise two additional matters relating to this request.

First is the failure of the FOI Coordinator to comply with obligations under s.25(5) of the Act which “do not permit” an agency to refuse access “without first endeavouring to assist the applicant to amend the application so that the work involved in dealing with it would, if carried out, no longer substantially and unreasonably divert the agency’s resources.[etc].”

At no point to date has the FOI Coordinator approached me, either by telephone or by letter to attempt to have me revise the application. In other words, it is arguable that there is no legal basis for the refusal of the request at this stage. In addition to the statutory obligation I refer the Service to the Ombudsman’s Guidelines on FOI which refer to the obligation of the agency to assist the applicant with their application.

Second is a matter of a more minor nature - the failure of the FOI Coordinator to notify me of a decision within the required statutory time period for reply. The Act (s.24(2)) sets out an obligation on an agency to make a determination within 21 days of receipt. However, even assuming three business days for delivery of the letter, which was sent on 31 May, the reply was due on 24 June 1999. Instead the reply arrived 30 June 1999, six days overdue. This, in accordance with s.24(2) of the Act in effect amounted to a deemed refusal of the request.

In relation to public interest considerations and arguments for the release of the documents, I refer you to my letter of 31 May 1999.

Conclusion
I look forward to your decision on this application under the FOI Act.

If you require any clarification of any aspect of this request do not hesitate to call me.

Yours sincerely
File note: phone conversation with FOI officer NPWS Hurstville
3.9.99

1. stated that no submission had yet gone to the DG. I warned him of my
   willingness to proceed to the tribunal next week if no reply by Wednesday. He promised a
   reply by then.
2. He stated that he will be arguing in the submission for a 50% remission on the grounds of
   public interest on processing fees, having reviewed the file and the case law.
3. B further made an informal offer of his willingness to trial the option of inspection of
   documents at Coffs Harbour and that I could be given liberty to tag those files in which I
   was interested.
4. We discussed the element of consultation involved with 3rd parties in this request and I
   Indicated to him that in my estimation there were approximately 40% of documents which
   would involve consultation with local councils. He indicated that many councils had a
   poor relationship with NPWS and would be likely to cause delay during the consultation
   process. This raised for me the importance of approaching councils directly, either through
   FOI or through a simple letter.
1. Having received Barrack’s letter dated 6.9.99, at the Faculty office on Mon 13 September in hard copy, I decided to call to discuss the contents.

2. I indicated to my unhappiness with the estimation of fees contained in that letter ($1270), stating that I would like to see a more detailed description of the documents available.

3. I indicated my congratulations to for having decided to grant a 50% remission on the grounds of public interest.

4. As I was actively considering the option of proceeding to the Tribunal I asked if the offer of an on-site inspection of documents was still on offer. Although his reply was vague and wandering, stated that the offer was no longer available, with words to the effect that such an approach was no longer practicable.

5. admitted during this telephone conversation that the Service had experienced some difficulty in coming to a decision regarding this matter because of words to the effect that “we haven’t had the detailed documentation on hand here at the Ministerial Office in order to make a decision and for the Director-General to look at..” I asked for clarification of whether this was because had not sought copies of the documents to be sent to head Office at Hurstville. stated that this was the case, that all of the documents were at Northern Zone office in Grafton, and further admitted that he had not travelled to Grafton in order to inspect the files himself.
File Note: telephone conversation with Acting Manager, NPWS Northern Zone.
24 September 1999.

1. I rang to attempt to negotiate access to the documents. He wasn't aware of the matter and he stated that he would have to discuss it with his staff. Nevertheless, I informed him of the details of where the matter it is at, at present.

2. In particular, I indicated to him my willingness to negotiate on this matter. I stated my willingness to discontinue the litigation if NPWS was to provide satisfactory information. I indicated to him that the easiest way to resolve this whole matter was for him to provide me with the documents. This way it would be a win win situation. I also raised with him the option of me inspecting documents in person, as I stated that I would be in Coffs Harbour twice during the next fortnight.

3. I indicated that he had to discuss the matter with his staff, and could not provide any guarantees. However, my impression was that it was a cordial and productive conversation.
University of Wollongong  
Wollongong NSW 2500

Freedom of Information Coordinator  
National Parks and Wildlife Service

30 September 1999

BY FAX

Dear

RE: SCOPE OF FOI REQUEST RE PRIVATE LAND FORESTRY

Further to our recent telephone conversations, I am supplying with this letter a modified copy of my request under the Freedom of Information Act 1989 which shows in a single document all the deletions and clarifications in scope made to the request originally made on 31 May 1999. That document is attached to this letter, which is being sent by fax.

I trust that this action will simplify the task faced by NPWS in processing the request.

Yours sincerely,

[Signed]
[30 September 1999]

University of Wollongong

Freedom of Information Coordinator
National Parks and Wildlife Service

31 May 1999 [SHOWING AMENDMENTS AS AT 30.9.99]

Dear

This is a request under s.16,17 of the Freedom of Information Act 1989 (NSW) for access to documents in the possession, custody, and control of the National Parks and Wildlife Service (‘the Service’) and the Director-General of the Service.

Documents requested
This request does not apply to documents created by or in the possession of regional offices within the Central or Western Zone, or to documents created prior to June 1991.

Additional clarification of scope supplied 9 July 1999: “only include documents which relate to either legal or policy matters which are of State-wide application, and those documents relating to private land native forestry operations within the Northern Zone of NPWS. Therefore this narrowing of scope relates to the content of documents sought and not their physical filing location [Which is most likely to be either at Head Office or within offices of the Northern Zone].”

Additional clarification of scope supplied 23 July 1999
“Where the request refers to documents discussing ‘private land forestry’, I seek only those documents which refer to or discuss “commercial scale harvesting and removal of timber from native forests on privately owned land which falls within the Northern Zone of operations of the NPWS. “ In other words, the focus of the request is on logging, not the broader range of activities which may fall under the heading of ‘forestry’.”
Additional clarification of scope supplied 23 July 1999

I am no longer seeking access to any documents which refer directly to applications under the TSC Act (or related provisions of the EP&A Act) in relation to the logging of native forest as an adjunct to the establishment of, or activities within timber plantations (either hardwood or softwood) on privately owned land in NSW.

Note that I am not seeking access to any documents which are already publicly accessible (eg held in public libraries or available for sale).

Please supply copies of documents (defined as widely as in the Act, , file notes, correspondence, Ministerial and internal briefings, memoranda and circulars, minutes of meetings, etc) [BUT NOT including electronic mail messages, [deleted 23.7.99]] which fit the following description:

1. [Deleted].

2. The following category of documents sought refer directly or implicitly to situations in which development applications were made for private land forestry where the consent authority under Pt IV Environmental Planning and Assessment Act 1979 (‘EPAA’) was a local government authority:

[Pars 2-2.3 Amended - 23.7.99] The request is narrowed to apply only to NPWS administrative role in relation to concurrence or consultation regarding Part IV consents in those local government areas falling within or partly within the Northern Zone of NPWS administration in which in logging or intensive silvicultural management requires development consent under the Local Environment Plan or Tree Preservation Order made under the LEP, particularly where those councils require consent within the Rural 1(a) Zone. These councils include: Bellingen, Byron, Severn, Maclean, Nambucca, Hastings, Cessnock, Great Lakes, Uralla, and may include Kempsey, Coffs Harbour.

2.1 Those documents which refer to ‘concurrence’ of the Director-General of NPWS (under s.79B EPAA) being sought by consent authorities, for development applications which related to private land forestry.

2.2 Documents sufficient to identify in relation to development applications for private land forestry:

- The number of instances where the concurrence of the D-G NPWS was granted unconditionally;
- The number of instances where concurrence was granted subject to conditions;
- The number of instances where concurrence was refused under s.79B(8) EPAA.

Summary statistics are sought rather than the full detail of every matter relating to each application.

Summary statistics showing Name
[To provide within 28 days///]

2.3 Documents containing reference to consideration of the factors listed in s.79B(5) EPAA by the Director-General of NPWS during the course of concurrence decision making regarding private land forestry proposals.
APPENDIX 5.5 FREEDOM OF INFORMATION REQUEST CORRESPONDENCE WITH NPWS

[Not Pressed at this stage – NPWS to provide relevant file list and brief indication of number of folios captured at this stage.]

3. Documents relating to Native Vegetation Conservation Act 1997
The following category of documents sought refer directly or implicitly to situations in which development applications were made for private land forestry where the consent authority under Pt IV EPAA was the Minister for Land and Water Conservation, in relation to applications for development consent for the clearance of native vegetation under the Native Vegetation Conservation Act 1997:

Sufficient to identify
Who by
Date of decision

3.1 Documents which refer to, discuss, describe, or document instances in which consultation with the Environment Minister was made under s.79B EPAA by the Minister for Land and Water Conservation, regarding development applications for private forestry proposals.

Summary statistics are sought rather than the full detail of every matter relating to each application.
Summary statistics showing Name
[To provide within 28 days///]

3.2 In such instances of Ministerial consultation, any documents regarding the making of statutory recommendations by the Director-General and the rejection (if any) of such recommendations (if any), and the reasons for such rejection, made in accordance with s.97C(6) EPAA.

4. [ /////]
Correspondence between NPWS and any Part IV consent authorities [within the Northern Zone of NPWS] which discusses private land forestry proposals. This category of documents may include documents which refer to the conduct of the ‘8 part test’ regarding threatened species (etc.) under s.5A EPAA.

5. [Deleted, 23.7.99 and 24.9.99]

5.1 [Deleted 23.7.99 and 24.9.99]

5.2 [ Deleted 23.7.99 and 24.9.99]

5.3 [Deleted 23.7.99 and 24.9.99]

5.4 [Deleted 23.7.99 and 24.9.99]

5.5 [Deleted 23.7.99 and 24.9.99]

6. Documents state the number of instances in which refer to the issuing of, or contain, ‘Director-General’s requirements’ regarding preparation of SIS (to accompany s.91 licence applications or Pt IV EPAA development applications) in relation to private land forestry.
Copies of any SIS prepared by, or on behalf of, companies and individuals engaged in private land forestry.

7. [Deleted 9.7.99].

8. [Deleted 9.7.99].

9. [Deleted 9.7.99].

10. [Deleted 9.7.99].

11. [Deleted 9.7.99].

**Note on provision of documents**

In order to assist the applicant and any review body in the event of subsequent review proceedings, please indicate when supplying the documents, which numbered paragraph of this FOI request the documents discussed relate to.

**Form of access sought**

By photocopy; unless the estimated total of processing charges exceeds $200.00. In that case, I seek access by inspection, with liberty to copy documents.

**Processing Charges**

*[Further paragraphs as per original letter of 31.5.99]*

**Conclusion**

I look forward to your decision on this application under the FOI Act. If you require any clarification of any aspect of this request do not hesitate to call me.

Yours sincerely

[Signed]

Master of Laws (Hons) Candidate
Centre for Natural Resources Law and Policy
Administrative Decisions Tribunal of New South Wales

GENERAL DIVISION

Administrative Decisions Tribunal Act 1997

Freedom of Information Act 1989 (NSW)

Application for review of decisions under the Freedom of Information Act 1989 (NSW)

FILE NO. [ ]

APPLICANT:

RESPONDENT: (MR BRIAN GILLIGAN) DIRECTOR-GENERAL, NATIONAL PARKS AND WILDLIFE SERVICE NSW

DATE OF APPLICATION: 20 SEPTEMBER 1999

ADDRESS FOR SERVICE:

UNIVERSITY OF WOLLONGONG
WOLLONGONG NSW 2500
ADMINISTRATIVE DECISIONS TRIBUNAL OF NEW SOUTH WALES

GENERAL DIVISION

Application for review of decisions under the Freedom of Information Act 1989 (NSW)

FILE NO. []

APPLICANT:

RESPONDENT: DIRECTOR-GENERAL, NATIONAL PARKS AND WILDLIFE SERVICE NSW

DATE OF APPLICATION: 20 SEPTEMBER 1999

TABLE OF ATTACHED DOCUMENTS

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<th>WHAT</th>
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Application for review of decisions under the Freedom of Information Act 1989 (NSW)

FILE NO. [ ]

APPLICANT:

RESPONDENT: DIRECTOR-GENERAL, NATIONAL PARKS AND WILDLIFE SERVICE NSW

DATE OF APPLICATION: 20 SEPTEMBER 1999

ADDRESS FOR SERVICE:

UNIVERSITY OF WOLLONGONG
WOLLONGONG NSW 2500

EMAIL:

6. DECISIONS TO BE REVIEWED

A. Deemed refusal of application for internal review, or alternatively, failure to make a decision on the application for internal review within the required time period.
APPENDIX 5.5 FREEDOM OF INFORMATION REQUEST CORRESPONDENCE WITH NPWS

Date of decision: 6 September 1999, as admitted by the respondent in its correspondence of that date.
Decision maker: Freedom of Information Coordinator, NPWS.
Relevant attached document identifier label code: G
Relevant provision: s.34(6)

B. Failure to provide reasons for failure to make internal review decision within the statutory deadline.
Date of decision: 6 September 1999, as omitted from the correspondence of the respondent of that date.
Decision maker: Freedom of Information Coordinator.
Relevant attached documents: G
Relevant provisions: s.34(6), 28(2(e).

C. Failure to adequately search for, locate, identify, collate, and communicate regarding documents (ie to specify and tabulate them), being documents the subject of the application for access and now being the subject of the application for internal review.
Date of decision: 29 June 1999 and 6 September 1999.
Decision makers: Acting Manager, Executive and Strategic Services, NPWS (29 June 1999); Freedom of Information Coordinator (6 September 1999).
Relevant attached documents: B,G.

Further particulars:

Failure to conduct an adequately rigorous search for documents; in that there was an apparent failure to:
• specify file names and file identifier numbers of relevant files that were located.
• indicate the total number of relevant files.
• Indicate the total number of relevant folios.
• List the title and date of production of folios falling within the scope of the request.
• indicate amount of time spent on search for relevant documents.
• indicate methods used to search for documents.
• Indicate efforts made to consult with other relevant agencies regarding relevant documents.

D. Decision to charge a processing deposit of $1270.00 (despite belated 50% remission on grounds of public interest) arising from a failure to base the estimate of processing time on a rigorous search for relevant documents.
Date of decision: 6 September 1999.
Decision maker: Freedom of Information Coordinator.
Relevant provision: s.34(7)(a)(iv),s.53(3)(a)(iv)
Relevant attached documents: G.

Further particulars:

The estimate of processing time, and therefore the advance processing deposit demanded by the respondent, was unreasonable, in that it was based on a failure to conduct an adequately rigorous search for documents; in that there was:
• an apparent failure to specify file names and file identifier numbers of relevant files that were located.
APPENDIX 5.5 FREEDOM OF INFORMATION REQUEST CORRESPONDENCE WITH NPWS

- an apparent failure to indicate the total number of relevant files.
- an apparent failure to indicate the total number of relevant folios.
- A verbal admission by the FOI Officer that Northern Zone staff had not attempted or commenced the process of actually ‘tagging’ and identifying documents.

This failure to conduct an adequate preliminary search caused an overestimation of likely processing charges.

E. Unreasonable decision to charge a processing deposit representing the entire amount (100%) of the estimated processing charges, and failing to take into account in that decision either the limited financial means of the applicant or the public interest nature of the application.

Date of decision: 6 September 1999.
Decision maker: Freedom of Information Coordinator.
Relevant attached documents: A, G.
Relevant provision: s.53(3)(a)(iv), Under s.34(7)(a)(iv) of the Act, the processing charges required are unreasonable.

F. Decision to refuse access to the documents requested on the grounds of s.25(1)(1a) of the Act (i.e. alleged ‘substantial and unreasonable diversion of agency resources’)

Date of decision: 29 June 1999
Decision Maker: Acting Manager, Executive and Strategic Services, NPWS.
Relevant attached documents: B
Relevant provision: 34(7)(a)(i), 53(3)(a)(i).

Related sub-decision:

Failure at a later stage to review or overturn the decision to refuse access on this ground, despite multiple reductions in the scope of the request made by the applicant.

Date of decision: 6 September 1999.
Decision maker: Freedom of Information Coordinator.
Relevant attached documents: D,E,G.

G. Failure to adequately observe the requirement contained in s.25(5) of the Act to assist or consult the applicant to seek alteration of request prior to refusing the request on 29 June 1999 on the basis of s.25(1)(1a) of the Act.

Date of decision: 29 June 1999
Decision Maker: Acting Manager, Executive and Strategic Services, NPWS.
Relevant attached documents: B, D.
Relevant provisions: s. 25(5).

H. Refusal to offer a 50% remission of the initial application fee, despite application on grounds of public interest and financial hardship.

Date of decision: 29 June 1999
Decision Maker: Acting Manager, Executive and Strategic Services, NPWS.
Relevant attached documents: B
Relevant provision: s.53(3)(a)(iv).

I. Failure to supply reasons for refusal to offer a 50% remission of initial application fee.

Date of decision: 29 June 1999
Decision Maker: Acting Manager, Executive and Strategic Services, NPWS.
Relevant attached documents: B
Relevant provisions: s.28(2)(e), 34(7)(a)(iv),(v).

J. Failure to offer a 50% remission of the internal review fee paid by the applicant.
Date of decision:  6 September 1999.
Decision maker:  Freedom of Information Coordinator.
Relevant attached documents: G
Relevant provisions: s. 34(7)(a)(iv),(v).

K. Failure to supply reasons for that refusal to grant a 50% remission of the internal review fee paid by the applicant.
Date of decision:  6 September 1999.
Decision maker:  Freedom of Information Coordinator.
Relevant attached documents: G
Relevant provisions: s.28(2)(e).
7. **REASONS FOR APPLICATION:**

Global reasons for application:

Section 6 of this application ‘Decisions to be Reviewed’ sets out a number of grounds on which this application is based.

The reasons of the applicant for seeking review of the decisions specified above include, but are not limited to the following:

1. To challenge the unreasonable refusal of the respondent to provide access to documents on the basis of s.25(1)(1a) despite the substantial reductions in the scope of the request made by the applicant during the negotiating period.

2. To challenge the unreasonable failure of the respondent to provide adequate reasons for its failure to provide access to documents described in the request.

3. To challenge the Respondent’s error of law inherent in its failure to abide by statutory processing deadlines imposed by the Act, i.e., that procedures that were required by law to be observed in connection with the making of the decision were not observed.

4. To challenge the failure of the Respondent to take account relevant considerations in exercising its decision making powers under the FOI Act; including:
   i. the public interest in release of the documents (including as argued in the original application of 31 May 1999);
   ii. the scope, purpose and objects of the Act, which include the extension as far as possible the rights of the public to obtain access to information held by Government,
   iii. the objects of the Act, which include the need to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information held by Government;
   iv. the need to pursue the objectives of the Act including the objective that the Act be interpreted and applied so as to further its objects;
   v. the purpose for which the legislation was enacted, as specified in the Second Reading Speech, including the objectives of enshrining and protecting “three basic principles of democratic government, namely openness, accountability, and responsibility…”

5. Enforcement of the applicant’s statutory and legally enforceable right of access to government documents held by the Respondent that is generated by the *Freedom of Information Act 1989*, in particular by subsections 5(1)(a), 5(2)(b), 5(3), and 5(4) of that Act.

6. That the decision of the Respondent to require payment of a substantial processing deposit of $1270.00 is harsh and oppressive, having regard to its magnitude and the limited means of the applicant, and unreasonable having regard to the inadequate nature of the means used to derive the estimate of likely processing costs. Further, that the decision of the Respondent to require this amount as an advance processing deposit may have been designed to persuade the applicant to withdraw or suspend the request.
7. Failure of the Respondent to provide reasons for its decisions which include findings on material questions of fact, and reference to the sources of information on which findings are based which contain sufficient or adequate particularity. For example, failure to adequately describe the documents held by the Respondent which are relevant to the scope of the request, by including file names and numbers, and adequate descriptions of folios or documents contained on those files, including dates, authors, addressees, etc.

8. The applicant reserves the right to provide additional reasons for the application and further and better particulars of the reasons set out in this application and any other reasons, as this matter progresses towards hearing, and at the time of hearing of this matter.
Orders of the Tribunal sought:

1. That the Tribunal set aside the decision of the respondent agency on the internal review matter (the decision of 6 September 1999) and also the decision of the respondent agency on the initial application (the decision of 29 June 1999), and to substitute its own decisions which it considers correct and preferable.

2. That the Tribunal require the respondent to, within a reasonable period of time, being 14 days from the date of its decision, adequately search for, locate, identify, collate, and communicate to the applicant regarding relevant documents (ie to specify and tabulate them), being documents the subject of the amended application for access.

3. That the Tribunal require the respondent to, within a reasonable period of time, being 14 days from the date of its decision, provide access to the documents which are the subject of the amended application for access to documents, either by inspection in person at the Head Office of the NPWS, Hurstville, or by provision of photocopies of documents, subject to such other exemptions and requirements for consultation with third parties set out in the Act as are reasonable.

4. That the Tribunal make such general and specific declarations as are appropriate regarding the obligations of an agency subject to the Act to assist an applicant in regards to narrowing the scope of a request that an agency believes falls within s.25(1)(1a) of the Act, in terms of communicating with an access applicant the aspects of a request which require most amendment so that an application no longer attracts the operation of that subsection of the Act.

5. That the Tribunal make such general and specific declarations as are appropriate regarding the obligations of an agency subject to the Act to locate and identify documents the subject of a request in such circumstances as apply in paragraph 4 above.

6. That the Tribunal make such declarations as are appropriate regarding the obligations of an agency subject to the Act to respond in a timely manner to applications for access to documents under the Act, and applications for internal review under the Act, within the time periods required by the Act, having regard to s.5(3)(b) of the Act.

7. That the Tribunal make such declarations as are appropriate regarding the entitlement of an agency to demand payment of processing deposits under s.21 of the Act, in particular regarding the magnitude of such deposits relative to the estimated final processing charges.

8. That, having regard to Document B in particular, the Tribunal make such declarations as are appropriate regarding the obligations of an agency to endeavour to make accurate estimations of processing charges so that the potential for agencies to employ inflated estimations of processing charges for inappropriate and collateral purposes of unreasonably dissuading bona fide applicants from continuing with their requests for information is reduced.
9. That the Tribunal make such declarations as are appropriate regarding the obligations of an agency to provide an adequate statement of reasons for decisions made under the Act, in particular such declarations as are appropriate regarding what type of statement will constitute an adequate statement of reasons.

10. Such other declarations regarding the achievement of the objects of the Act, including the enforcement of the rights of access of the public to information at the lowest possible cost, having regard to s.5(3)(b) of the Act.

11. Such additional orders as the Applicant may seek during the hearing of this matter.

12. That the Tribunal make an order requiring the respondent to pay the applicant his reasonable costs in making this application and bringing these proceedings.

13. Such additional orders that the Tribunal sees fit to make.
Submissions on Jurisdiction of the Tribunal to hear the application.

Summary

The application for review by the Tribunal is valid in that the following preconditions have been met, and the Tribunal has jurisdiction to hear the matter.

1. The preconditions relating to a valid application under s.17 of the Act have been met.

2. The preconditions relating to a valid application for internal review under s.34(2) have been met.

3. The preconditions relating to a valid application for review by the Administrative Decisions Tribunal under have been met (s.53,54)

Further particulars

1. Section 53(1) of the FOI Act 1989 provides jurisdiction upon the Tribunal to hear this matter.

2. This application to the Tribunal is made within the time period required by s.54(a) of the Freedom of Information Act 1989. That section requires that application be made within 60 days after notice of the decision is given to “the access applicant”.

3. As the decision to be reviewed is a deemed refusal of the application for internal review, no actual notice of the decision has been given to the application. However, for the purposes of this application, it is submitted that deemed refusal of the application took place on 23 July 1999, fourteen days after the date of application, being 9 July 1999, following s.34(6) of the Act.

4. If this approach to construction of s.54(a) is taken, the application to the Tribunal is required to take place by or on the 21 September 1999, 60 days after the 23 July 1999.

5. This application was prepared on 20 September 1999 and was sent by courier to reach the Tribunal on 21 September 1999 accompanied by the required filing fee of $50.00.

Signed

20 September 1999
ATTENTION: FOI COORDINATOR

BY FAX

24 September 1999

Dear

Re: Matters relating to FOI request relating to private land forestry.

This letter seeks to accomplish two main objectives, being:

A. Notification of a third round of reductions in scope of request made by Applicant.
B. Notice of Application to the Administrative Decisions Tribunal for review of deemed refusal to grant access to documents.

(A) Notification of a third round of reductions in scope of request made by Applicant.

I wish to advise of a further reduction in the scope of the Freedom of Information request as set out in letter of date 31 May 1999 and modified by my correspondence of 9 July 1999 and 23 July 1999.

Please note that this is the third reduction in the scope of the request so far, and goes some way to remedying the situation caused the National Parks and Wildlife Service to form the view that it was necessary to apply s.25(1)(1a) of the Act (ie ‘substantial and unreasonable diversion of agency resources’).
The reduction in scope is, in essence, to remove from the request all material relating to s.91 licensing under the TSC Act 1995.

Therefore the following paragraph copied from my previous letter advising of reductions in scope of this application is removed from the request. That paragraph read:

“In relation to paragraphs 5-5.5 which seek documents relating to the administration of the licensing provisions of Part 6 of the TSCA as they apply to private land forestry. The request is further narrowed to involve only those documents which refer to applications under the TSCA for s.91 licences or s.95 certificates relating to the granting of:

(i) licence NZ06 (or TS06) to Mr Peter Mather, relating to the ‘selective logging’ operations on Portion 13, Iluka Rd, Woombah.

(ii) Documents relating to the granting of a s.95 TSCA certificate (No. NZ 025) to Mr S. Williams for ‘selective logging under NVC exemption’, address stated: 285 Shephards Lane, Coffs Harbour.”

Having regard to the reductions in scope of the request contained in this letter, I request that NPWS agree to a reduction in the size of the advance deposit required by that letter. In addition I request that you have regard to the objects of the Act, in particular s.5(3)(b).

In addition, in order to more readily facilitate your granting access to the documents, I am prepared – if requested - to devise a document which will indicate the scope of the entire application as modified to date, i.e. a document which reflects all the reductions in scope that have made as a concession to NPWS demands.

(B) Notice of Application to the Administrative Decisions Tribunal for review of deemed refusal to grant access to documents.

I wish to advise of my application lodged 21 September 1999 at the Registry of the NSW Administrative Decisions Tribunal for review of decisions made by the NPWS in relation to my Freedom of Information application. A full set of documents relating to this application will be sent with the copy of this letter sent by post.

I would like to express my sincere regret at having to resort to proceeding to the Tribunal, and wish to state that it is not my intention to engage the Service in a confrontation, as I would like to gain access to the documents with the minimum of inconvenience to all parties. From my viewpoint, I consider that I am seeking information which many would regard as relatively simple statistical information which arguably should be compiled by the agency in any event, if only for its own planning and review purposes.

I would ask that you note my genuine efforts to negotiate this matter, which included an offer to delay commencement of proceedings in the Tribunal (made on 23 July 1999 at a meeting with NPWS officers at Hurstville, including Paul Packard) pending attempts to resolve the matter by negotiation. Such efforts at negotiation, my willingness to reduce the scope of application, and availability for negotiation (which has included making my mobile number available and email available), indicate that I am not fixed on a particular course of action.

Nevertheless, I have reluctantly decided to I have decided to exercise my rights under the legislation to take this action as I believe the response of NPWS to concessions that I have
made so far have been inadequate and insufficient to convince me that NPWS is making a genuine effort to find a way to resolve this matter so that both parties get their objectives met at minimum cost in terms of time and resources.

In particular, I have decided to apply for review of decisions made, to the Administrative Decisions Tribunal, because of:

(1) the insistence on a large processing deposit based on what appear to be “back of the envelope calculations” not based on a genuine attempt to locate and identify materials, resulting in an over-estimation of processing time.

(2) the requirement to pay 100% of estimated processing charges as a deposit before further action;

(3) the apparent withdrawal of the offer made by telephone by Mr Bart Barrack, FOI Coordinator, NPWS, on 3 September 1999 to provide access to the documents in the form of inspection at the Coffs Harbour Northern Zone Office of NPWS (refer to file notes made by the applicant);

(4) the failure of the NPWS to respond to this relatively simple request for statistical information in a timely fashion, or at least by the date required by the legislation.

Further and better particulars of my application to the Tribunal (in addition to those supplied with this letter) will be provided closer to the hearing date.

The option remains open for the NPWS to contact me by telephone to discuss this matter.

Yours sincerely

BA(Hons), LLB(Hons), G.Dip. Legal Practice

1. returned my call in relation to my request that the internal review process be commenced.

2. stated that there was a problem in determining the internal review. He admitted "we have a deemed refusal".

3. stated words to the effect that "we don't have detailed documentation on hand down here for the DG to look at", indicating that there was a problem in devising a ministerial submission or at least a submission to the DG because the documents were in possession of the Northern zone office. To me this indicated that no comprehensive search for documents had yet been carried out. If some kind of search had been carried out, there would at least have been a table of documents for the DG to examine.
ADMINISTRATIVE DECISIONS TRIBUNAL OF NEW SOUTH WALES

GENERAL DIVISION

Application for review of decisions under the Freedom of Information Act 1989 (NSW)

FILE NO. [993217]

APPLICANT:

RESPONDENT: DIRECTOR-GENERAL, NATIONAL PARKS AND WILDLIFE SERVICE NSW

DATE OF APPLICATION: 20 SEPTEMBER 1999

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conv with J. Whalan of NPWS documenting request for summary statistics and offer to further reduce scope of request.
NOTICE OF DISCONTINUANCE

Please be advised that on the initiative of the applicant, the application which forms the subject of these proceedings is discontinued immediately. The application referred to is the application made to Administrative Decisions Tribunal on 20 September 1999 for review of decisions made by the Respondent.

Signed

Date: 26 October 1999
APPENDIX 5.6

LIST OF INTERVIEWS CONDUCTED

Anonymous DLWC officer, Head Office, in person, 6.10.00.

Anonymous DLWC Vegetation Management Officer, Hunter Region (Taree Office), 23.3.00, by telephone, notes with author.

Anonymous high ranking Northern Directorate staff member, 22.10.99.

Anonymous officer, Threatened Species Unit officer, Northern Directorate, NPWS, Coffs Harbour, by telephone, 23.1.00.

Anonymous high ranking Southern Directorate staff member, 8.6.00;


Anonymous, ex-DLWC officer, Parramatta, 27.9.00, notes on file with author.

Commonwealth officers

Cameron Slatyer,

Alf Said, NSW Office of Private Forestry.

Jonathon Clark, Office of Private Forestry NSW, 19.10.01 (by telephone).

Andrew McIntyre, Threatened Species Unit Manager Northern Directorate, 22.10.99.

Anonymous Vegetation Management Officer, Hunter Region, 23.3.00,

Bob Attwood, Vegetation Resource Manager, in person, Grafton DLWC Office, 5.10.99, 13.10.99, 24.4.00., 23.11.00. 29.11.00, (in person, notes on file).

Bruce Thompson, Voluntary Conservation Agreements Officer, Department of Land and Water Conservation, Parramatta, by telephone.) 31.8.99,

Dan Lunney, NPWS, Hurstville, 30.12.01 (by Telephone, notes on file with author).

Dr Gül Izmir, Deputy-Director General, DLWC.

Dr Ian Hannam, DLWC, Parramatta Office, in person. 15.1.98, Notes with author.

Gary Davey, Northern Directorate Manager, Coffs Harbour, formerly Threatened Species Unit Manager, NPWS Northern Zone. 30.4.98, 10.10.99, 22.10.99; 25.10.99, 18.10.02.

Mr Andrew McIntyre, Mr John Martindale, NPWS. Northern Zone TSU staff, 25.10.99.

Andrew Steed
NPWS
Northern Zone, 16.6.00, Armidale.

Hugh Daneke, Joint Venture plantations officer, State Forests of NSW, in person, ANU Farm Forestry Symposium, 28.2.00.


Jonathon Clark, Office of Private Forestry (NSW), 19.10.01, by telephone.

Stuart Little
Senior Environmental Planner, Natural Resources Planning Branch, DUAP/DIPNR

Juliana Matthews, DUAP Queanbeyan 1.8.97

Leanne Wallace, DLWC Executive, Bridge St., 18.6.02, 26.6.02
Lisa Corbyn, Deputy Director-General, Environment Protection Authority, NSW, 21.9.98. notes on file with author.

Dave Robson, NPWS regional TSU manager, 18.6.01, by telephone.

Phil Redpath, DLWC North Coast Region (Grafton), 31.3.99

Peter Wright, DLWC, 29.6.00, following discussions with Mr Peter Houghton, Manager, Land and Vegetation Unit, Sustainable Land and Coastal Management (Information and Planning), DLWC.

Paul Packard, Manager, Conservation Assessment and Data Unit, NPWS, Southern Directorate office, 23.1.01. (by telephone).

Phil Craven, Project Officer, NPWS, Southern Directorate, Queanbeyan, 14.4.00.

Phil Gibbons, Conservation Assessment and Data Unit, NPWS Southern Directorate, 23.1.01. by telephone.

Phil Redpath, ecologist, DLWC Grafton (North Coast Region Office), 31.3.99, 13.10.99.

Robert Adam, Resource Officer (Program Coordination), Sydney/South Coast Region, 1.3.01, 14.4.00.


Steve Gowland, DLWC Hunter, 17.3.00.

Tanya Stacpoole, ex-NPWS Southern Zone, telephone, 26.6.97, 17.4.98; 22.9.03.

Mitch Tulau, DLWC, Kempsey, numerous.

Tim Wilkinson DLWC SEPP 46 officer, 7.10.97, Sydney-South Coast region, Wollongong office.

Local government

A. Alliston, Planner, Dungog Shire Council, 31.3.98.

B. Webster, 31.3.98, Uralla SC.

Brian Gibson, Senior Planner, 4.1.02, Muswellbrook

Bruce Heise, Planner, Gloucester SC, 31.3.98, by telephone, notes on file with author.


Craig Filmer, Strategic Planner, Harden SC, 4.11.99.

Daniel McNamara, Senior Town Planner, Bellingen Shire Council, 28.9.99.

Daris Olsauskas, Senior Town Planner, Bellingen Shire Council, 3.4.98.

David Casson, Manager, Land Use Planning, Scone SC, 5.11.99.

David Kitson, Town Planner, Ballina Shire Council, 3.4.98.

David Seymour, Strategic Planner, 4.1.02 (by telephone). Eurobodalla

Elizabeth Downing Strategic Planner, Shoalhaven City Council, 4.1.02, by telephone.

Felicity Saunders, Strategic Planner, Wingecarribee SC, 5.11.99.

Gerard Tuckerman, Environment Officer, Great Lakes Council, Forster, NSW, 5.9.97, 16.7.02.

Glen Handford, Great Lakes Shire Council, 5.10.99.

Jim Robinson, Strategic Planner, Severn Shire Council, 31.3.98

K. Maguire, Planner, Coffs Harbour City Council, 31.3.98.
APPENDIX 5.6 LIST OF INTERVIEWS CONDUCTED

Ken Trethewey, Director, Environment and Community Services, Cootamundra, 4.11.99.

Leanne Fuller, Development Control Planner, Hastings Shire Council, by telephone, 31.3.98.

Mark Innes, Strategic Planner, Kempsey Shire Council, 30.1.02.

Bo Moshage, Planner, Port Stephens Shire Council, 3.4.98.

Dennis Spur, Manager, Environmental Services, 5.11.99. (Hume SC)

Paul Johnston, Strategic Planner, Yass SC, 4.11.99.

Paul Montgomery, TPO Officer, Byron Shire Council, 16.4.98.

Peter Reynders, Strategic Planner, Snowy River Shire Council, 3.4.98.

R. Forbes, Planner, Cessnock Shire Council, 31.3.98.

Rob Pitt, Strategic Planning/Development Control Co-Ordinator, Environmental Services, Kempsey Shire Council, by telephone, 5.10.99, 5.3.02, notes on file.

Scott Turner, Director, Planning and Environment and Community Services, Kyogle Shire Council, 31.3.98, 24.9.99.

Sean Meyers, Manager, Planning Services, Parry SC.

Sharon Cooper, Strategic Planner, Shellharbour SC, 4.11.99.

Steve Enders, Strategic Planner, Hawkesbury 4.11.99.

Tim McLeod, Strategic Planner, Wollondilly SC, 4.11.99.

Tony Jones, Environmental Services Manager, Barraba SC, 4.11.99.

W. Burgess, Strategic Planner, Greater Taree, 31.3.98.

Wayne McDonald, Strategic Planner, Cowra SC, 5.11.99.

Conservationists

Greg Hall, NCC NSW representative on Manning RVMC, Elands, by telephone, 13.2.01, 27.11.01, by telephone.

Tim Holden, Policy Director, NSW EDO, member of NVAC, 27.11.01, by telephone (notes with author).

Jim Morrison, resident in Casino area, by telephone, 11.2.98 (re Mr Pickapene).

Noel Plumb, NPA, 23.7.97

Indra Esguerra, Mt Jerrabomberra Preservation Society, Canberra, 21.2.2000, 12.4.00.


Margaret Blakers, former staff member Office of the Commissioner for Environment, Victoria, 10.11.99.

Alec Marr
The Wilderness Society, Canberra, 23.11.99

Anne Reeves, NPA, 16.9.97

John Corkill
NEFA, 2.12.97.

Jim Morrison
NEFA

Paul Kravcenko
NCC

Dailan Pugh
NEFA

Kathy Ridge
NCC

Academics

Dr Fiona Haines
Senior Lecturer Department of Criminology, Faculty of Arts, University of Melbourne

Prof Errol Meidinger
Law Faculty
University of Buffalo, NY

Carl Binning,
APPENDIX 5.6 LIST OF INTERVIEWS CONDUCTED

Principal Research Economist, CSIRO Sustainable Ecosystems

Dr Ross Florence Visiting Fellow School of Resources Environment and Society, ANU (formerly ANU Forestry)

Dr Jürgen Bauhus Senior Lecturer School of Resources Environment and Society, ANU (formerly ANU Forestry) 14.2.01, 24.5.02, 7.6.02, 18.6.02.

Prof Tim Bonyhady CRES, Humanities Research Centre, ANU

Dr Peter Kanowski Head of Department School of Resources Environment and Society, ANU (formerly ANU Forestry)

Dr John Dargavel ANU Visiting Fellow School of Resources Environment and Society, ANU (formerly ANU Forestry)

Dr Andrew Hopkins Sociology, School of Social Sciences & member RegNet, ANU

NSW Forestry interests

Robert Dyason Australian Forest Growers, 18.6.02

Gaine Cartmill NSW Forest Products Association, 7.6.02.

Geoff Wilkinson Timber Communities Australia, 7.6.02.

Bronwyn Petrie, NSW Farmers’ Association, 18.6.02.

Ken O’Brien, Riverina Forestry Management Group, 24.5.02.

Tasmanian interview subjects

Alistair Graham, Tasmanian Conservation Trust.

Dr Hans Drielsma, CEO, Forestry Commission of Tasmania, 9 March 2001, Perth.

Evan Boardman, Environment Resource Officer, Local Government Association, Tasmania, 22.9.98.

Geoff Law, Office of Senator Bob Brown, 3.11.98, Hobart.

Graham Wilkinson, Chief Forest Practices Officer, Forest Practices Board, 6.11.98

Ian Whyte, Chief Executive, Forest Industries Association Tasmania, 12.11.98, Hobart.

Kim Booth, Deputy Mayor, Meander Valley Council, 29.9.98;

Michael Lynch, Tasmanian Conservation Trust, Hobart.

Michael Stokes, Faculty of Law, University of Tasmania, 16.8.98.

Naomi Lawrence, Botanist, Threatened Species Unit, Tasmanian Parks and Wildlife Service, 6.11.98, Hobart.

Peg Putt, Green MHA for Denison, 6.11.98, Hobart.

Peter McGlone, Threatened Species Network.

Peter Taylor, Private Forests Tasmania, Hobart, 6.11.98.

Prof. Gerry Bates, Faculty of Law, Univ. of Sydney, 16.8.98.

Stuart Kaye, Lecturer, Faculty of Commerce and Law, University of Tasmania, 8.10.98, 9.10.98.

Susan Gunter, Principal Lawyer, Environment Defender’s Office Tasmania, 6.11.98, 13.11.98.

Tim Cadman, Native Forest Network, Deloraine, 8.10.98, 10.11.98.
APPENDIX 6.1 MAP OF DLWC REGIONS

APPENDIX 6.2
REVISED PNF EXEMPTION IN RIVERINA HIGHLANDS RVMP

Schedule 4 - Description of exemptions

11 Private native forestry
(1) The clearing of native forest dominated by Alpine Ash (Eucalyptus delegatensis), Mountain Gum (E. dalrympleana), Ribbon Gum (E. viminalis), Eurabbie (E. globulous ssp. bicostata), Red Stringybark (E. macrorhyncha), Broad Leafed Peppermint (E. dives) or Narrow Leafed Peppermint (E. radiata) in the course of its being selectively harvested on a sustainable basis or managed for forestry purposes (timber production) consistent with the Guidelines For Sustainable Harvesting of Dry to Moist Open Sclerophyll Forest within Riverina Highlands of New South Wales, available from the Department of Land and Water Conservation.
(2) The minimum forest tree crown cover, after harvesting, must be at least 40% of what would be expected for an undisturbed site characterised by similar tree species and in a similar location.
(3) The volume harvested must not exceed the equivalent of an average of 3 cubic metres per hectare per annum over a period of 20 years or more.
(4) This activity may be carried out without consent only if the Department of Land and Water Conservation has been given notice of the proposed clearing prior to the commencement of clearing.
(5) Where the volume harvested will be more than 500 cubic metres of product in total on any contiguous landholding in any one year period, this activity may be carried out without consent only if a forestry management plan documenting forest management practices and harvesting operations has been prepared. If a forestry management plan is required for any clearing but is not produced at the request of the Director-General of the Department of Land and Water Conservation, this item does not allow the clearing until after it is produced.
APPENDIX 7.1
INTENDED LAND USE ACTIVITY AFTER CLEARING BY REGION
FOR CLEARING CONSENSUS - YEARS 2000, 2001, 2002 -
HUNTER, NORTH COAST, AND SYDNEY SOUTHEAST-COAST
APPENDIX 7.2
PROPORTION OF CLEARING APPLICATIONS INVOLVING FORESTRY OR PLANTATION DEVELOPMENT IN NORTH COAST, HUNTER AND SOUTH COAST REGIONS

Percentage Of Total Clearing Applications Where Forestry Or Plantation Development was the Intended Post-Clearing Land Use In Year 2000 (Only)

<table>
<thead>
<tr>
<th>DLWC Region</th>
<th>Logging/Forestry</th>
<th>Hardwood plantation</th>
<th>Softwood Plantation</th>
<th>Percentage of total applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Coast Region</td>
<td>53.77%</td>
<td>33.73%</td>
<td>0.06</td>
<td>87.5</td>
</tr>
<tr>
<td>Hunter Region</td>
<td>57.15</td>
<td>23.4</td>
<td>0.0</td>
<td>80.56</td>
</tr>
<tr>
<td>Sydney-South Coast</td>
<td>7.81%</td>
<td>6.74%</td>
<td>70.64</td>
<td>85.19</td>
</tr>
</tbody>
</table>


Percentage Of Total Clearing Applications Where Forestry Or Plantation Development was the Intended Post-Clearing Land Use In Year 2001 (Only)

<table>
<thead>
<tr>
<th>DLWC Region</th>
<th>Logging/Forestry</th>
<th>Hardwood plantation</th>
<th>Softwood Plantation</th>
<th>Percentage of total applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Coast Region</td>
<td>55.36</td>
<td>23.94</td>
<td>5.16</td>
<td>84.86</td>
</tr>
<tr>
<td>Hunter Region</td>
<td>40.63</td>
<td>16.27</td>
<td>0.0</td>
<td>56.9</td>
</tr>
<tr>
<td>Sydney-South Coast</td>
<td>44.31</td>
<td>0.0</td>
<td>45.01</td>
<td>89.32</td>
</tr>
</tbody>
</table>

### Percentage Of Total Clearing Applications Where Forestry Or Plantation Development was the Intended Post-Clearing Land Use In Year 2002 (Only)

<table>
<thead>
<tr>
<th>DLWC Region</th>
<th>Logging/Forestry</th>
<th>Hardwood plantation</th>
<th>Softwood Plantation</th>
<th>Percentage of total applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Coast Region</td>
<td>81.22</td>
<td>0</td>
<td>0</td>
<td>81.22</td>
</tr>
<tr>
<td>Hunter Region</td>
<td>52.77</td>
<td>0</td>
<td>0.0</td>
<td>52.77</td>
</tr>
<tr>
<td>Sydney-South Coast</td>
<td>49.78</td>
<td>0.0</td>
<td>0</td>
<td>49.78</td>
</tr>
</tbody>
</table>

## Appendix 8.1

### Table of Prosecution Results Under SEPP 46

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Area Cleared</th>
<th>Plea</th>
<th>Conviction</th>
<th>Fine/Penalty</th>
<th>Consent Orders or Property Agreement</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Locke &amp; Harrison</td>
<td>100ha</td>
<td>Guilty.</td>
<td>Yes (s.556A Crimes Act)</td>
<td>Nil</td>
<td>No</td>
<td>$12,000</td>
</tr>
<tr>
<td>Nunkeri Pastoral Pty Ltd</td>
<td>180ha of Coolabah and Blackbox woodland near Walgett</td>
<td>Guilty.</td>
<td>Yes</td>
<td>$10,000 fine, regarded by judge as “lenient”, consent orders for creation of wildlife corridors of an area twice that cleared.</td>
<td>Consent orders for remediation</td>
<td>$8525</td>
</tr>
<tr>
<td>Pye</td>
<td>64.5ha plus 171.2 ha clearing of shrubs through blade ploughing and burning.</td>
<td>No</td>
<td>Discussion of onus of proof regarding exemptions.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bungle Gully Pty Ltd</td>
<td>275 ha of mainly Coolabah woodland near Walgett.</td>
<td>Guilty</td>
<td>Yes</td>
<td>$20,000 (reflecting a 50% reduction on mitigating grounds including submission to remediation order)</td>
<td>Consent orders for remediation</td>
<td>$40,000</td>
</tr>
<tr>
<td>Ramke</td>
<td>23.5ha forested vegetation near Kempsey by bulldozing.</td>
<td>Guilty</td>
<td>Yes (s.556A)</td>
<td>Nil.</td>
<td>Consent orders for revegetation and remediation.</td>
<td>$35,000</td>
</tr>
</tbody>
</table>

---

1 Sources: Original text of court judgments as reproduced at <www.austlii.edu.au>; DLWC, Review of the Native Vegetation Conservation Act 1997 Exemptions (Internal Draft Report), (2000), at 9; table prepared by Dr Ian Hannam, Director Soil and Vegetation Compliance.

2 Director-General DLWC v Nunkeri Pastoral Pty Ltd [1998] 98 LGERA 139, Land and Environment Court, No.50095 of 1996, Bignold J.


4 Director-General Department of Land and Water Conservation v Bungle Gully Pty Ltd & Ors, unreported No.50081,50082,50083 of 1996.

5 Director-General Department Land and Water Conservation v Ramke [1999] NSWLEC 22., No.50071 of 1998, Talbot J, Land and Environment Court, unreported. At paragraph 21 of the judgement, His Honour ruled: “In this case the Court finds that the environmental harm and consequences have been elevated by the prosecutor and at least two of its witnesses to a level which tends to suggest a seriousness beyond that justified by an objective assessment.”. In relation to the penalty imposed: “The evidence of the defendant that he has no cash resources and that there is no real prospect of him entering into any permanent gainful employment has not been disputed by the prosecutor. The means of the defendant and his ability to pay what otherwise might be an appropriate fine is a relevant factor to be taken into account in determining the level of penalty.” At paragraph 56 the court held “Rather than moving to impose a token or nominal penalty, the charge will be dismissed pursuant to s 556A of the Crimes Act. The dismissal is not to be seen as a lack of recognition of the seriousness of the offence. The defendant will nonetheless suffer a severe punishment by the effect of the consent orders and the payment of costs.”

<table>
<thead>
<tr>
<th>Name</th>
<th>Offence Description</th>
<th>Guilty/Not Guilty</th>
<th>Yes/No</th>
<th>Fine/Sanction</th>
<th>Consent Orders Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cameron</td>
<td>35ha Coolabah woodland vegetation.</td>
<td>Guilty</td>
<td>Yes</td>
<td>$10,000</td>
<td>Consent orders for rehabilitation. $15,000</td>
</tr>
<tr>
<td>Jones</td>
<td>35ha of Coolabah woodland</td>
<td>Guilty</td>
<td>Yes</td>
<td>$3000</td>
<td>$7000</td>
</tr>
<tr>
<td>Greentree &amp; Co.</td>
<td>650ha of woodland vegetation near Moree.</td>
<td>NA</td>
<td>Charges dropped by negotiation.</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Prime Grain Pty Ltd</td>
<td>As above</td>
<td>Guilty</td>
<td>Yes</td>
<td>$7,000</td>
<td>Property agreement and consent orders $52,000</td>
</tr>
<tr>
<td>Limthono Pty Ltd</td>
<td>As above</td>
<td>Guilty</td>
<td>Yes</td>
<td>$7,000</td>
<td>$7000</td>
</tr>
<tr>
<td>Windouran Pastoral Company Pty Ltd</td>
<td>Clearing 240 ha of native grasslands by ploughing (near Moulamein)</td>
<td>Not Guilty</td>
<td>Yes</td>
<td>$10,000</td>
<td>Consent orders for revegetation and remediation Agreements (approx. $100,000).</td>
</tr>
<tr>
<td>Harris</td>
<td>As above</td>
<td>Not Guilty</td>
<td>Yes</td>
<td>$2,000.</td>
<td>Consent orders. No.</td>
</tr>
<tr>
<td>Crawford</td>
<td>As above</td>
<td>Not Guilty</td>
<td>Yes</td>
<td>$10,000.</td>
<td>Consent orders. No.</td>
</tr>
<tr>
<td>Rial</td>
<td>As above</td>
<td>Not Guilty</td>
<td>Yes</td>
<td>$5,000.</td>
<td>Consent orders. No.</td>
</tr>
<tr>
<td>Dettman</td>
<td>13.75 hectares for olive plantation</td>
<td>Guilty</td>
<td>Yes. (Clearing contractor)</td>
<td>$5,000.</td>
<td>Consent orders $5,000 costs.</td>
</tr>
<tr>
<td>Ashenden</td>
<td>As above</td>
<td>Guilty</td>
<td>Yes.</td>
<td>No fine, entry into remediation order and Consent orders $10,000.</td>
<td></td>
</tr>
</tbody>
</table>

---

8 Director General Dept Land and Water Conservation v Cameron, Land and Environment Court, Pearlman J., unreported No.50066 of 1997.
10 Director General Dept Land and Water Conservation v Prime Grain Pty Ltd & Ors, unreported 50035,50036,50037,50038 of 1997.
11 Director-General Dept Land and Water Conservation v Prime Grain Pty Ltd & Ors, unreported 50035,50036,50037,50038 of 1997.
12 Director-General Dept Land and Water Conservation v Prime Grain Pty Ltd & Ors, unreported 50035,50036,50037,50038 of 1997.
13 Director-General DLIFC v Harris, unreported No.50044 of 1996 Land and Environment Court, Talbot J.
14 Director-General DLIFC v Crawford, unreported No.50045 of 1996, Land and Environment Court, Talbot J.
<table>
<thead>
<tr>
<th>Landowner</th>
<th>Action</th>
<th>Guilty</th>
<th>Payment of prosecutor's costs considered in mitigation.</th>
<th>Appropriate penalty.</th>
<th>Entry into remediation order by consent.</th>
<th>As agreed or taxed.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robson</td>
<td>7 hectares coastal vegetation in Richmond River Shire Council area, Northern NSW.</td>
<td>Guilty</td>
<td>Yes.</td>
<td>No fine.</td>
<td>Entry into remediation order by consent.</td>
<td>As agreed or taxed.</td>
</tr>
<tr>
<td>Newman</td>
<td>As above.</td>
<td>Guilty</td>
<td>Yes. (s.556A)</td>
<td>na.</td>
<td>No</td>
<td>No costs order</td>
</tr>
<tr>
<td>Newman Quarrying</td>
<td>As above.</td>
<td>Guilty</td>
<td>Yes. (s.556A)</td>
<td>na.</td>
<td>No</td>
<td>No costs order</td>
</tr>
<tr>
<td>Holcombe</td>
<td></td>
<td>Guilty</td>
<td>Yes. (s.556A)</td>
<td>na.</td>
<td>Costs as taxed.</td>
<td></td>
</tr>
<tr>
<td>Hunter (see Waroo Lands)</td>
<td></td>
<td>Guilty</td>
<td>Yes. (s.556A)</td>
<td>na.</td>
<td>Costs as taxed.</td>
<td></td>
</tr>
<tr>
<td>Ikaro Pty Ltd</td>
<td>No.</td>
<td></td>
<td>Case at lowest end of spectrum of seriousness – mitigating circumstances-charge dismissed.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Orlando Farms Pty Ltd &amp; Ors</td>
<td>Yes</td>
<td></td>
<td>$35,000 fine.</td>
<td></td>
<td>$35,000 costs.</td>
<td></td>
</tr>
<tr>
<td>Waroo (Lands) Pty Ltd</td>
<td>329 hectares</td>
<td>Guilty</td>
<td>Yes</td>
<td>$2,500</td>
<td>No.</td>
<td>$45,000</td>
</tr>
</tbody>
</table>

---

21 D-G DLIFC v Ikaro Pty Ltd [1998] NSWLEC (8 December 1998), Bignold J.
22 D-G DLIFC v Ikaro Pty Ltd [1998] NSWLEC (8 December 1998), Bignold J.
## Appendix 8.2
### Selected Results of Prosecutions under the Protected Lands Provisions of the Soil Conservation Act (NSW) Relating to Private Native Forestry

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Prosecuted Under</th>
<th>Area Cleared</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hannam v O’Connor &amp; Veness (1995)</td>
<td>Soil Conservation Act 1938, s.21C</td>
<td>240 trees on protected land in small scale timber felling by professional timber cutter and associate.</td>
<td>$3000 and $1000 fines respectively, payment of prosecutors costs $8000.</td>
</tr>
<tr>
<td>Hannam v De Wyse (1998)</td>
<td>Soil Conservation Act, s.19C</td>
<td>Destruction of 24 trees on protected land by fire.</td>
<td>Offence proved, no penalty (s.556A), Consent order for revegetation and fencing off, payment of prosecutors costs of $10,000.</td>
</tr>
<tr>
<td>Simpson v Gatacre (1992)</td>
<td>Soil Conservation Act s.21C</td>
<td>Commercial river redgum logging operation</td>
<td>$10,000 total fines for four offences of breaching conditions attached to authority to log protected lands, plus prosecutor’s costs.</td>
</tr>
</tbody>
</table>

APPENDIX 8.3

EXAMPLE OF ENFORCEMENT DIFFICULTIES UNDER THE
NATIVE VEGETATION CONSERVATION ACT 1997

Email to author from anonymous DLWC officer 17.6.02

“I went out to a suspected breach out near Crescent Head the other day. It looked just appalling, like they were building an airport out there, except that it included some steepish slopes. They had cleared Crown Land and taken liberties along about 5 km of fencelines, like about 30 m worth of liberties, including large trees that would definitely be 200+ years old. We found these three guys responsible on horses, and they were like extras out of Deliverance - I could almost hear the banjoes playing in the background. The trouble is that DLWC would never hassle them about fencelines when the Act says ‘to the minimum extent necessary’, which is maddeningly vague. Plus even if they went a bit too far, they can then add their 2 ha on top of that, plus whatever other exemptions they can think of, and get a huge amount of clearing done. This one was probably still a marginal breach of NVCA, plus Crown Lands Act, and probably Rivers and Foreshores Improvement Act 1948.

But when we wouldn't even take on Mr X’s [name omitted] breach in upper Pappinbarra, which was a massive 20 ha including rainforest and wet sclerophyll on very steep slopes…[sic]. There, it was argued that various exemptions cut the area down to ~15 ha, but it was still a breach no matter which way you look at it. And of various Acts including NVCA and RFI Act. Various blokes from this office went out to prepare a remediation plan, and Mr X said, well you can stick that up your ----. And now we've apparently missed the 2 year court registration limitation. The blokes here can't believe that nothing was ever done, but I heard that “all of the Department’s legal resources were being consumed by [the] Greentree [litigation].” In that context there's no way that we are going to be interested in one like the Crescent Head matter that I mentioned earlier.

On the issues of exemptions, one that concerns us is the 2ha exemptions should not apply to certain forest types, such as rainforests and wet sclerophyll. The other thing we are having trouble with is the 2 ha exemption in rural residential zoned land, where they are taking out wildlife corridors and all sorts of things on this exemption. Because most local government TPOs don't extend to [land zoned] rural-residential.”
## Appendix 9.1 Local Government LEP Requirements for Private Forestry in Rural 1(a) Zone

<table>
<thead>
<tr>
<th>Council (by DUAP regions, 1999)</th>
<th>Is consent required for Forestry in Rural 1(a) Zone?</th>
<th>Caveats, exemptions and provisos</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Coast Region²</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ballina</td>
<td>Yes³</td>
<td>Consent is not required for forestry development within the Zone No 1(b) Rural area.</td>
</tr>
<tr>
<td>Bellingen</td>
<td>Yes⁴</td>
<td>Consent required even for small farm forestry operations. Specific conditions have been produced for protection of habitats of particular threatened species.⁵ Tree preservation order in place, plus specific clause in LEP.⁶</td>
</tr>
<tr>
<td>Byron</td>
<td>No⁷</td>
<td>Consent is required in 1(e) Extractive Resources Zone, 7(c) water catchment zone, and 7(f1) Coastal land zones. In addition a TPO is in force setting out strict clearing controls which has been adopted by the LEP.⁸</td>
</tr>
<tr>
<td>Casino⁹</td>
<td>No¹⁰</td>
<td>No changes under draft LEP 1999.¹²</td>
</tr>
<tr>
<td>Coffs Harbour</td>
<td>No¹¹</td>
<td>No changes under draft LEP 1999.¹²</td>
</tr>
<tr>
<td>Copmanhurst</td>
<td>No¹³</td>
<td>Clearing of vegetation in 7(a) wetlands zone (the only EP zone) requires special consent.</td>
</tr>
</tbody>
</table>

¹ Data for this table was collected using a combination of an examination of hard copies of LEPs at DUAP’s head office, through interviews conducted in person, and by telephone, to key officers addressed to strategic planners of relevant councils, and by search conducted of LEPs available on Internet sites. The table is organised according to the regional boundaries applied by DUAP. A copy of a map showing the boundaries is contained in Appendix 8.2. The key issue is that the regional boundaries used by DUAP are not consistent with the regional boundaries employed by DLWC, which again are not consistent with the organisational boundaries or zones employed by the NPWS. Maps indicating the DLWC and NPWS regional boundaries are reproduced at Appendix 5.1 and 9.1 respectively. When seen together, this is another clear indication of the lack of coordination between the approach taken by DLWC, NPWS and DUAP, and raises the question of why one set of boundaries could not be employed by all three agencies.

² Includes areas to which the North Coast REP applies, as defined in cl.3, North Coast REP 1988.

³ Ballina LEP 1987, cl. 8. Consent is required for forestry (falling within innominate use category) in both variants of the 1(a) zone: (a1) Rural (Placentic Lands Agriculture) Zone and Zone No 1 (a2) Rural (Coastal Lands Agriculture) Zone. Version of LEP updated 20 October 2001. Accessed at <www.austlii.edu.au> on 7.12.01. Also: Interview, Mr David Kitson, Town Planner, Ballina Shire Council, 3.4.98. (Indicated that at that time, consent was not required).

⁴ Bellingen LEP 1990, cl.9. ‘forestry’ requires consent in Rural 1(a) Zone. Interview, Mr Daris Olsauskas, Senior Town Planner, Bellingen Shire Council, 28.9.99, in person, at Bellingen SC Chambers. There is a TPO in force in the Shire applicable to 1(a) lands, as well as a specific clause in the LEP designed to protect native vegetation from inappropriate clearing. The TPO only applies to trees in excess of 3 metres height.

⁵ Interview, Mr Daniel McNamara, Senior Town Planner, Bellingen Shire Council, 28.9.99, in person, at Bellingen SC Chambers. There is a TPO in force in the Shire applicable to 1(a) lands, as well as a specific clause in the LEP designed to protect native vegetation from inappropriate clearing. The TPO only applies to trees in excess of 3 metres height.

⁶ Cl.34 requires consent for clearing within 50m of permanent streams.

⁷ Byron LEP 1988, cl.9. ‘forestry’ permitted without consent in Rural 1(a) Zone. However consent is required in 1(e) Extractive Resources Zone, 7(c) water catchment zone, and 7(f1) Coastal land zones. In addition a TPO is adopted by the Byron LEP 1988. Letter to author, Mr. D. Kanaley, Director, Environmental Planning Services, Byron SC, 22.10.99.

⁸ Interview, Paul Montgomery, TPO Officer, Byron Shire Council, 16.4.98.

⁹ Note that the Richmond River and Casino LGAs were recently amalgamated to form the Richmond Valley LGA.

¹⁰ Casino Local Environment Plan 1992, cl.9, ‘forestry’ permitted without consent in Rural 1(a) Zone.

¹¹ Coffs Harbour City Local Environment Plan 2000, cl.9, ‘forestry’ permitted without consent in Rural 1(a) Zone.

¹² Originally it was proposed that consent would be required for forestry in areas identified regionally significant vegetation or koala habitat. Interview, K. Maguire, Planner, Coffs Harbour City Council, 31.3.98. However, in a letter to the author dated 22.9.99, Council indicated that forestry is permissible without consent in the 1(A) zone under the Draft LEP of 1999.

¹³ Copmanhurst LEP 1990, cl.9. Development consent is not required in Zone No 1(a) Rural (General). Zonal objectives include “to encourage the protection and conservation of … forests of commercial value for timber production.”
<table>
<thead>
<tr>
<th>Location</th>
<th>Status</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Glen Innes</td>
<td>No 14</td>
<td>“Forestry” is permitted without consent in the Rural 1(a) Zone.</td>
</tr>
<tr>
<td>Grafton</td>
<td>No 15</td>
<td>“Forestry” is permitted without consent in the Rural 1(a) Zone.</td>
</tr>
<tr>
<td>Greater Taree</td>
<td>No</td>
<td>No program of shire-wide vegetation mapping.</td>
</tr>
<tr>
<td>Hastings</td>
<td>No 17</td>
<td>Steep land zonings require consent for forestry, forestry prohibited in habitat protection zone.</td>
</tr>
<tr>
<td>Kempsey</td>
<td>Yes</td>
<td>However, consent not required to carry out forestry where in accordance with a plan of management approved by State Forests of NSW. A TPO is in force but does not apply to Rural 1(a) zone. Forestry is prohibited in 7(b) Habitat protection and 7(d) Scenic protection zones.</td>
</tr>
<tr>
<td>Lismore</td>
<td>No 23</td>
<td></td>
</tr>
<tr>
<td>Maclean</td>
<td>No 24</td>
<td>Clearfelling requires consent. Clearing in 7(b) EP (Conservation/Habitat) zone permissible with consent, forestry is prohibited. Forestry permissible with consent in 7(e) EP (Escarpment/Scenic) Zone.</td>
</tr>
<tr>
<td>Nambucca</td>
<td>No</td>
<td>However, 4 caveats apply: In the environment protection (vegetation conservation) zone 7(b) forestry is permitted without consent in the Rural 1(a) Zone.</td>
</tr>
</tbody>
</table>

14 Glen Innes LEP 1991, cl.9. “Forestry” is permitted without consent in the Rural 1(a) Zone.
15 Grafton LEP 1988, cl.9. “Forestry” is permitted without consent in the Rural 1(a) Zone.
19 Letter from Kempsey Shire Council, 24.9.99 to author, on file with author. In an interview, 5.10.99, Mr Rob Pitt, Environment Manager of Council stated that the requirement for consent was partly related to concerns that private forests would be logged more intensively as restrictions on wood supply on public forest estate were progressively tightened. Further, plantations are considered a form of “agriculture” and do not require consent, although DA’s are encouraged for both planting and harvesting in order to provide plantation owners with a guarantee of harvesting. Council does not require s.94 contributions for PNF operations, and is prepared to recognise existing use rights in the forestry context.
20 Interview, Mr Mark Innes, Strategic Planner, 30.1.02, Kempsey Shire Council.
21 Interview, Mr Mark Innes, Strategic Planner, 30.1.02, Kempsey Shire Council.
22 Interviews, Mr Scott Turner, Director, Planning and Environment and Community Services, Kyogle Shire Council, 31.3.98, 24.9.99. No LEP is in place at time of writing and IDOs from 1976 and 1967 apply to all or part of the area. One explanation given for not requiring consent was that such a step would be perceived as the first step towards the politically unpalatable option of requiring development consent for agriculture.
23 Lismore LEP 2000, cl.30.2
24 Maclean LEP 2001, cl.43. “Forestry” is permitted without consent in the Rural 1(a) Zone; However cl.40(1) states that both clearfelling and clearing of trees protected by a TPO require consent in this zone.
25 Letter from Maclean Shire Council, 29.9.99, on file with author. The definition of forestry employed is that contained in the Model Provisions.
26 Maclean LEP 2001, cl.57.
27 Nambucca LEP 1995, cl.18. Consent must be obtained if slope exceeds 1:3, land identified as wildlife corridor or DCLM mapped vegetation, or scenic backdrop, or within 300m of an identified watercourse. Consent must be obtained for vegetation clearance or forestry on land within zones other than 1(a), 1(a2), 1(a3), 1(a4), 1(d). Clause 18(5) states that in other zones, consent must not be granted unless council is satisfied of a number of economic and environmental matters.
<table>
<thead>
<tr>
<th>Location</th>
<th>Consent Required</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nymboida</td>
<td>No</td>
<td>Prohibited but vegetation clearing is permissible with consent. 28</td>
</tr>
<tr>
<td>Richmond River</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Tweed</td>
<td>No</td>
<td>Vegetation mapping is in progress, as are amendments to LEP. 33</td>
</tr>
<tr>
<td>Ulmarra</td>
<td>No</td>
<td>(3/19 require consent)</td>
</tr>
<tr>
<td><strong>Hunter and Central Coast Region</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cessnock</td>
<td>No</td>
<td>Exemptions permit clearing. 27</td>
</tr>
<tr>
<td>Dungog</td>
<td>No</td>
<td>Forestry is addressed in 1(b),(c),(d). 38</td>
</tr>
<tr>
<td>Gloucester</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Great Lakes</td>
<td>Yes</td>
<td>Except where clearing for bushfire hazard reduction. 40</td>
</tr>
<tr>
<td>Greater Taree City Council</td>
<td>No</td>
<td>Forestry requires consent in environment protection zones. 41</td>
</tr>
<tr>
<td>Maitland</td>
<td>Yes</td>
<td>Tree preservation clause within LEP, consent required. 42</td>
</tr>
<tr>
<td>Merriwa</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>

28 Nambucca LEP’s Environment protection - vegetation conservation zone 7(b) - permits the “clearing of native vegetation” if development consent is obtained. In this zone forestry (as defined in the Model Provisions) can also proceed if development consent is obtained. Nevertheless an additional control exists in the form of a specific clause of the LEP relating to vegetation protection. Clause 18 permits native vegetation clearance associated with forestry and agriculture in all of the rural zones without consent except where (in summary) the land is steep, comprises a wildlife corridor, or has particular scenic values. In these areas consent is required, but council’s discretion to grant that consent is constrained by mandatory consideration of specified environmental factors.

29 Note that Nymboida SC and Ulmarra SC were amalgamated in 2002 to form the Pristine Waters LGA. However a check of Parliamentary Counsel’s NSW Legislation in Force <www.legislation.nsw.gov.au> on 25 November 2003 indicated that the Ulmarra LEP and Nymboida LEPs were still both in force at that time, and that no specific Pristine Waters LEP had yet been made. Both plans at that date did not require consent for PNF in the 1(a) zone.

30 Nymboida LEP 1986, cl.9.

31 Note that the Richmond River and Casino LGAs were recently amalgamated to form the Richmond Valley LGA.

32 Richmond River LEP 1992, cl. 9. “Forestry” is permitted without consent in the General Rural Zone No.1(a). Clearing controls are provided in cl.17, 18 restricting clearing within Zones 7(b),(c).

33 Tweed LEP 2000, cl.11. (internet version accessed 18.2.01), also permissible without consent in rural 1(a) zone and rural 1(b) agricultural protection zone.

34 Note that Ulmarra SC and Nymboida SC were recently amalgamated to form the Pristine Waters LGA.


37 Clearing is permitted without consent for bushfire hazard reduction, clearing along fence-lines. Interview, R. Forbes, Planner, Cessnock Shire Council, 31.3.98.


40 Interview, Mr Glen Handford, Great Lakes Shire Council, 5.10.99. Despite criticism from the industry, council requires consent, and encourages land holders to lodge a DA partly in order to secure the right of future harvesting of trees. Council does levy s.94 contributions for haulage of logs, and imposes requirements to conduct pre-logging surveys for threatened species. See also Great Lakes LEP 1996, cl.8. Clause 10 provides for the making of tree preservation orders. Also refer letter to author on file from Mr EJ Watts, Manager Business Support, Planning and Environmental Services, date 29 October 1999: Three applications were received for PNF since January 1996 and all three were granted consent subject to the imposition of special conditions. There was no finding of likely significant effect on threatened species and accordingly no SIS was required and concurrence of the DG of NPWS was not sought.

41 Interview, 12.7.02, Mr Bruce Byatt, Strategic Planner, Greater Taree City Council, by telephone, notes on file. Council covers 37,000km², the majority of which is rural area.

42 Maitland LEP 1993, cl.9, Accessed at www.austlii.edu.au on 4.1.02. Under cl.29, consent required to clear trees greater than 3m in height.
### APPENDIX 9.1 LOCAL GOVERNMENT CONSENT REQUIREMENTS FOR PNF

<table>
<thead>
<tr>
<th>Location</th>
<th>Consent Required</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murrurundi</td>
<td>No</td>
<td>No TPO applies in rural areas.</td>
</tr>
<tr>
<td>Muswellbrook</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Nundle</td>
<td>Yes</td>
<td>TPOs in force restricting vegetation clearance.</td>
</tr>
<tr>
<td>Port Stephens</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Scone</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Singleton</td>
<td>No</td>
<td>(5/13 councils require consent)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Illawarra and South Coast Region</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bega Valley</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Bombala</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Cooma-Monaro</td>
<td>Yes</td>
<td>Tree Preservation Order may be made. Council advises parties to obtain consent in any case.</td>
</tr>
<tr>
<td>Eurobodalla</td>
<td>Yes</td>
<td>Consent not required for forestry in 1(a) zone on Crown timber land under the Forestry Act 1916. Clearing of native vegetation in all zones requires consent.</td>
</tr>
<tr>
<td>Kiama</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Mulwaree</td>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>

---

44 Murrurundi LEP 1993, c.9. “Forestry” is permitted without consent in the General Rural Zone No.1(a).
45 Muswellbrook LEP 1985. Interview, Brian Gibson, Senior Planner, 4.1.02. Forestry is restricted in environmental protection zones. LEP is under review and amendments projected to be in place September 2002.
46 Nundle LEP 2000, cl.9.
47 Port Stephens LEP 2000, cl.11.
48 Interview, Mr Bo Moshage, Planner, Port Stephens Shire Council, 3.4.98.
49 Forestry in the 1(a) zone requires consent, as would any such activities in the 7(a) environment protection zone. Scone LEP 1986, zoning table. There is no TPO in place, and there are no specific rules applicable to either firewood logging or clearance of native vegetation for plantation establishment. A new LEP is on exhibition which will remove the requirement for development consent for forestry, including plantation forestry in the 1(a) zone. Interview, 5.11.99, Mr David Casson, Manager, Land Use Planning.
50 Singleton LEP 1996, cl.16.
51 Bombala LEP 1990, cl.9, Clause 12 is a special provision relating to clearing and forestry. Subclause 12(2) provides that land may be cleared for the purpose of agriculture or forestry without consent. Subclause 12(6) indicates that this rule prevails over any content of clause 9, the zoning table which at first instance appears to suggest that forestry in the Rural 1(a) Zone would require consent. However, this subclause requires that the freedom from consent requirements depends on satisfactory arrangements being made with council regarding control of soil erosion and bushfire and maintenance of public roads.
52 Cooma-Monaro LEP 1999 (Rural), cl.8, consent is required in the Rural 1(a) zone and Rural Smallholdings zone 1(c).
53 Cooma-Monaro LEP 1999 (Rural), cl.10 (TPOs).
55 Eurobodalla (Rural) LEP 1987, cl.11. Interview, David Seymour, Strategic Planner, 4.1.02 (by telephone). A TPO exists but it only applies in Urban areas under the Eurobodalla (Urban) LEP.
56 Kiama Local Environment Plan 1996, cl.9; development consent is required for forestry in the Rural 1(a) Zone “tree plantations and harvesting” require development consent, and vegetation clearance is prohibited in the 7(d) Zone : Rural Environment Protection (Scenic). Similarly, “tree plantations and harvesting” and “clearing of vegetation” require development consent in the 7(e) Rural Environment Protection (Hinterland) Zone.
## APPENDIX 9.1 LOCAL GOVERNMENT CONSENT REQUIREMENTS FOR PNF

<table>
<thead>
<tr>
<th>Local Government Area</th>
<th>Consent Required</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shoalhaven</td>
<td>Yes(^{58})</td>
<td>TPO applies to all trees &gt;3m in rural areas, and all red cedars of any size.(^{50})</td>
</tr>
<tr>
<td>Shellharbour</td>
<td>Yes(^{60})</td>
<td></td>
</tr>
<tr>
<td>Tallaganda</td>
<td>Yes(^{61})</td>
<td></td>
</tr>
<tr>
<td>Tumbarumba</td>
<td>Yes(^{62})</td>
<td></td>
</tr>
<tr>
<td>Tumut</td>
<td>Yes(^{63})</td>
<td></td>
</tr>
<tr>
<td>Wingecarribee</td>
<td>Yes(^{64})</td>
<td></td>
</tr>
<tr>
<td>Wollongong</td>
<td>Yes(^{65})</td>
<td></td>
</tr>
<tr>
<td>Yarrowlumla</td>
<td>No(^{66})</td>
<td>(12/14 councils require consent)</td>
</tr>
<tr>
<td><strong>Western Region</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Balranald</td>
<td>No(^{67})</td>
<td></td>
</tr>
<tr>
<td>Barraba</td>
<td>No(^{68})</td>
<td></td>
</tr>
<tr>
<td>Bathurst</td>
<td>Yes(^{69})</td>
<td></td>
</tr>
<tr>
<td>Berrigan</td>
<td>No(^{70})</td>
<td>Consent required for pine plantations</td>
</tr>
<tr>
<td>Bingara</td>
<td>No(^{71})</td>
<td></td>
</tr>
<tr>
<td>Blayney</td>
<td>No(^{72})</td>
<td>Consent required for pine plantations</td>
</tr>
<tr>
<td>Boorowa</td>
<td>No(^{73})</td>
<td></td>
</tr>
<tr>
<td>Cabonne</td>
<td>No(^{74})</td>
<td>Consent req. for “plantation forestry”(^7)</td>
</tr>
<tr>
<td>Conargo</td>
<td>Yes(^{75})</td>
<td></td>
</tr>
</tbody>
</table>

\(^{57}\) Mulware LEP 1995, cl. 9. Development consent is required for forestry in the Rural 1(a) Zone. However “tree planting (including planting for the purpose of growing farm woodlots up to 10ha each, but not including planting for the purpose of forestry)” does not require consent.

\(^{58}\) Shoalhaven LEP 1995, cl9. Interview, Duty Planner, 19.2.01, by telephone.

\(^{59}\) Interview, Ms Elizabeth Downing, Strategic Planner, Shoalhaven CC. On 4.1.02, by telephone.

\(^{60}\) Under Shellharbour LEP 1987, zoning table. Interview, 4.11.99, Ms Sharon Cooper, Strategic Planner.

\(^{61}\) Tallaganda LEP 1991, cl.9. In the General Rural 1(a) Zone, forestry requires consent, but consent is not required for “tree planting, including planting for the purpose of growing farm woodlots or shelter belts of up to 10 hectares each, but not including planting for the purpose of forestry.”

\(^{62}\) Tumbarumba LEP 1988, cl.9.

\(^{63}\) Tumut LEP 1990, cl.9.

\(^{64}\) Forestry is permissible with consent. Wingecarribee LEP 1990, zoning table. A tree preservation order is also in place, but only applies to land in specific environment protection zones 7(a) or 7(b) and land mapped as an environmental heritage area. The TPO only applies to trees greater than 6m in height and diameter 150mm at 1.2 m height. Interview, 5.11.99, Felicity Saunders, Strategic Planner.

\(^{65}\) City of Wollongong Local Environment Plan 1990, Zone 1 (Non-Urban), development consent is required. Forestry is also permissible with consent in Zone 4(c) Extractive Industrial Zone, 6(c) Public Recreation Zone, 7(a) Special Environmental Protection Zone (but only after advertising and satisfaction of clause 11 relating to special considerations that must be satisfied prior to decision to grant consent.

\(^{66}\) Yarrowlumla LEP 1993, cl.10. “Forestry” and “tree farming” are both permitted without consent in the 1(a) Zone.

\(^{67}\) Balranald IDO, Interview Mr Roy Hetherington, Director, Infrastructure & Development, 28.10.03, by telephone. Agriculture and forestry are as of right uses in the rural zone.

\(^{68}\) Barraba LEP 1991, However ancillary dwellings and pine plantations do require development consent in the 1(a) Zone. There is no TPO in place either in the LEP or as a separate instrument. Interview, Tony Jones, Environmental Services Manager, 4.11.99.

\(^{69}\) Bathurst LEP 1997, s.6, <www.legislation.nsw.gov.au>, s.6; reviewed 28.10.03.

\(^{70}\) Berrigan LEP 1992, cl.9. Development consent not required in the Rural 1(a) Zone for forestry other than pine plantations. Reviewed at Austlii website 28.10.03.

\(^{71}\) Bingara LEP 1994, cl.9. Development consent not required in the Rural 1(a) Zone for forestry “other than ancillary dwellings and pine plantations.”


\(^{73}\) Boorowa LEP. There is no requirement for development consent for forestry in the 1(a) zone, nor is there a TPO in place. There are no specific requirements relating to firewood logging. Interview, Mr Colin Owers, Director, Works, Technical Services and Planning, 5.11.99.

\(^{74}\) Cabonne LEP 1991, cl.9 Development consent not required in the Rural 1(a) Zone for forestry other than “plantation forestry”. Reviewed at Austlii website 28.10.03.

\(^{75}\) Conargo LEP 1987, s.8 <development.legislation.nsw.gov.au>, 28.10.03.
<table>
<thead>
<tr>
<th>Location</th>
<th>Consent Required</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cootamundra</td>
<td>Yes</td>
<td>However, consent is required for pine plantations</td>
</tr>
<tr>
<td>Coolah</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Coonabarabran</td>
<td>No</td>
<td>However, consent is required for pine plantations</td>
</tr>
<tr>
<td>Coonamble</td>
<td>No</td>
<td>However, consent is required for pine plantations</td>
</tr>
<tr>
<td>Corowa</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Cowra</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Crookwell</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Culcairn</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Dubbo</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Dumaresq</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Gilgandra</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Greater Lithgow</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Griffith</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Gundagai</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Gunnedah</td>
<td>No</td>
<td>TPO applies, agro-forestry and woody weed clearance exempt.</td>
</tr>
<tr>
<td>Gunning</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Guyra</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>

---

76 Cootamundra LEP, Interview, 4.11.99, Mr Ken Trethewey, Director, Environment and Community Services. Forestry proposals in the 1(a) zone are permissible with consent following public advertising. The requirement is in place as forestry proposals would involve the use of chemicals outside normal agricultural practice. There is no TPO in place in the shire. There is no firewood logging on a commercial scale, as the shire was extensively cleared over 100 years ago. The issue of plantation forestry is not a live one in the area because it falls outside the normal rainfall limits, however it may become a possibility with the building of a new pulp mill at Tumut.


80 Corowa LEP 1990, forestry does not require development consent in the 1(a) zone, nor is there a TPO in place. Interview, 5.11.99, Mr Wayne McDonald, Strategic Planner.

81 Culcairn LEP 1998, Only “tree farming” is permitted without consent in the Rural 1(a) Zone. By implication other forms of forestry require development consent. Further the definition of forestry provided does not include the planting of trees for purposes incidental to farming such as the planting of trees for windbreaks or firewood. Clause 26(2)(a) prohibits development, for purposes including forestry and sawmills, on land mapped as “environmentally sensitive land”. Clause 26 prevents vegetation clearance on “environmentally sensitive land” by requiring development consent, and requiring that consent only be given if 6 specific heads of environmental concerns are adequately addressed.

82 Dubbo LEP 1997, Rural Areas cl.19, zone 1(a), consent is required for forestry, cl.31 zone 1(f) intensive agriculture, consent is required for forestry. Reviewed at Austlii website 28.10.03.

83 Note that Dumaresq and Armidale LGAs were amalgamated in 2001.

84 Dumaresq LEP No.1, cl.9. (As at 30.7.01) Accessed at <www.austlii.edu.au> on 7.12.01.


86 Greater Lithgow LEP 1994, cl.9. Forestry other than ancillary dwellings is free from requirements for development consent in the Rural 1(a) Zone.

87 Griffith LEP 2002, cl.10. Rural (1)(a), consent not required for forestry. Reviewed at Austlii website 28.10.03. Note that under LEP 1994, cl.10, consent was required for forestry in this zone. Reviewed at Austlii website 28.10.03.

88 Gundagai LEP 1997, cl.7.8. Only designated development requires consent and nothing else. Reviewed at Austlii website 28.10.03.

89 Gunnedah LEP 1998, Zoning Table: Zone 1(a). Further, clause 28 provides that a tree preservation order applies in the LGA, requiring consent for the removal of trees, however it is subject to a number of exemptions, including a specific exemption for agro-forestry projects.

90 Guyra LEP 1988, cl.9.
### APPENDIX 9.1 LOCAL GOVERNMENT CONSENT REQUIREMENTS FOR PNF

<table>
<thead>
<tr>
<th>Location</th>
<th>Consent Required</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harden</td>
<td>No 94</td>
<td></td>
</tr>
<tr>
<td>Hay</td>
<td>No 95</td>
<td></td>
</tr>
<tr>
<td>Holbrook</td>
<td>No 96</td>
<td>No TPO in force.</td>
</tr>
<tr>
<td>Hume</td>
<td>Yes 97</td>
<td></td>
</tr>
<tr>
<td>Inverell</td>
<td>No 98</td>
<td></td>
</tr>
<tr>
<td>Jerilderie</td>
<td>No 99</td>
<td>Consent required for pine plantations</td>
</tr>
<tr>
<td>Junee</td>
<td>No 100</td>
<td></td>
</tr>
<tr>
<td>Lockhardt</td>
<td>Yes 101</td>
<td></td>
</tr>
<tr>
<td>Manilla</td>
<td>No 102</td>
<td></td>
</tr>
<tr>
<td>Murray</td>
<td>No 103</td>
<td></td>
</tr>
<tr>
<td>Murrumbidgee</td>
<td>No 105</td>
<td></td>
</tr>
<tr>
<td>Narrabri</td>
<td>No 106</td>
<td></td>
</tr>
<tr>
<td>Narrandera</td>
<td>No 107</td>
<td></td>
</tr>
<tr>
<td>Oberon</td>
<td>No 108</td>
<td></td>
</tr>
<tr>
<td>Parry</td>
<td>Yes 109</td>
<td></td>
</tr>
<tr>
<td>Quirindi</td>
<td>No 110</td>
<td></td>
</tr>
<tr>
<td>Rylstone</td>
<td>No 111</td>
<td></td>
</tr>
<tr>
<td>Severn</td>
<td>No 112</td>
<td>However, consent is required for pine plantations. Vegetation mapping in progress, but only relating to roadside vegetation.</td>
</tr>
</tbody>
</table>

94 Harden SC presently operates under an Interim Development Order, under which consent is not required for forestry in the 1(a) Zone. However a Draft LEP in preparation is to propose that forestry in the 1(a) zone will require development consent. There is no TPO in force. Firewood logging in this area with only 2% remaining tree cover is controlled only informally by a policy of permitting cutting of fallen dead timber on road reserves, but prohibiting cutting of standing dead timber. Interview, 4.11.99, Mr Craig Filmer, Strategic Planner, Harden SC.

95 Hay LEP 1988, cl.9, General rural 1(a) zone, consent not required for forestry. Reviewed at Austlii website 28.10.03.

96 Holbrook LEP 1970, Zoning table. Interview, Brett McGuiness, Manager, Environmental Services, 4.1.02. (by telephone).

97 Hume LEP 2001, cl.15 (Rural (Agriculture), cl.16 Rural (Environment) zones. Accessed at <www.austlii.edu.au> on 7.12.01. Interview, Mr Dennis Spur, Manager, Environmental Services, 5.11.99. Stated that few applications, if any had been received in relation to PNF.

98 Inverell LEP 1988, cl.9.


100 Inverell LEP 1992, cl.10. Forestry (other than ancillary dwellings and pine plantations) are permitted without consent in the Rural 1(a) Zone.


102 Manilla LEP 1988, cl.9. Forestry (other than ancillary dwellings) is permitted without consent.

103 Mudgee LEP 1998, c.9. Forestry permitted without consent in the Rural 1(a) Zone.

104 Murray LEP 1989, cl.9. Forestry (other than pine plantations) is permitted without consent in the Rural 1(a) Zone. Reviewed at Austlii website 28.10.03.

105 Murrumbidgee LEP 1994, cl.9, Forestry in accordance with a “vegetation management plan” approved by DLWC (cl.5). Reviewed at Austlii website 28.10.03.

106 Narrabri LEP 1992, cl.9. Forestry is permitted without consent in the General Rural Zone No.1(a), (other than pine plantations). Reviewed at Austlii website 28.10.03.

107 Narrandera LEP 1991, cl.9, Forestry is permitted without consent in the General Rural Zone No.1(a), except pine plantations.


109 Parry LEP 1987, zoning table, development consent is required for forestry in the 1(a) zone. Forestry is defined as in the model provisions. There is no TPO in place. No immediate plans to require s.94 contributions relating to roads. Interview, Mr Sean Meyers, 5.11.99, Manager, Planning Services.

110 Quirindi LEP 1991, cl.9, Forestry is permitted without consent in the Rural Zone No.1(a). Reviewed at Austlii website 28.10.03.

111 Rylstone LEP 1996, cl.9. Forestry (other than ancillary dwellings or pine plantations) is permitted without consent in the General Rural Zone No.1(a). Clause 24 provides for a tree preservation order for vegetation within certain specified rural village lands.
### APPENDIX 9.1 LOCAL GOVERNMENT CONSENT REQUIREMENTS FOR PNF

<table>
<thead>
<tr>
<th>Location</th>
<th>Consent Required</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Snowy River</td>
<td>Yes²¹³</td>
<td>Argued that benefits for landholder may be associated with obtaining consent in any case.²¹⁴</td>
</tr>
<tr>
<td>Tenterfield</td>
<td>No²¹⁵</td>
<td></td>
</tr>
<tr>
<td>Uralla</td>
<td>Yes²¹⁶</td>
<td></td>
</tr>
<tr>
<td>Urana</td>
<td>No²¹⁷</td>
<td></td>
</tr>
<tr>
<td>Wagga Wagga</td>
<td>No</td>
<td>Not required other than for ancillary dwellings and pine plantations²¹⁸</td>
</tr>
<tr>
<td>Wakool</td>
<td>No²¹⁹</td>
<td></td>
</tr>
<tr>
<td>Walcha</td>
<td>Yes²²⁰</td>
<td></td>
</tr>
<tr>
<td>Weddin</td>
<td>Yes²²¹</td>
<td></td>
</tr>
<tr>
<td>Wellington</td>
<td>No²²²</td>
<td></td>
</tr>
<tr>
<td>Wentworth</td>
<td>No²²³</td>
<td></td>
</tr>
<tr>
<td>Windouran</td>
<td>No²²⁴</td>
<td>Consent required for pine plantations</td>
</tr>
<tr>
<td>Yallaroi</td>
<td>No²²⁵</td>
<td></td>
</tr>
<tr>
<td>Yass</td>
<td>No²²⁶</td>
<td></td>
</tr>
<tr>
<td>Young</td>
<td>Yes²²⁷</td>
<td>(16/59 councils require consent)</td>
</tr>
</tbody>
</table>

---

²¹² Under the LEP 1991, cl.10. Accessed at <www.austlii.edu.au> on 7.12.01, private forestry does not require consent in Zone 1(a) Rural (Agricultural Protection) Zone unless it is for a pine plantation. Also: Letter from Severn Shire Council General Manager, 6.10.99. No changes are proposed in present redrafting of LEP. However, in an interview, Mr Jim Robinson, Strategic Planner, Severn Shire Council, 31.3.98 suggested that development consent was required at that time for private forestry. Mr Robinson admitted that some PNF operators in the Shire are operating without development consent, but stated that Council lacks detection and enforcement resources.

²¹³ Snowy River LEP 1997, Clause 8(3).

²¹⁴ Interview, Peter Reynders, Strategic Planner, Snowy River Shire Council, 3.4.98.


²¹⁶ Two applications have been received since 1 January 1996, both were granted consent with conditions, and no SIS was required. Source: Letter from Uralla Shire Council, 30.9.99 in reply to letter from author. The Requirement for consent was suggested by consultants to council. Intensive agriculture requires consent. Main concern of planners is effect of increased truck traffic associated with forestry on road infrastructure. Interview, B.Webster, 31.3.98.


²¹⁸ In Zone 1 (Rural). Wagga Wagga Rural Local Environment Plan 1991, clause 9, (development control table). Reviewed at Austlii website 28.10.03.

²¹⁹ Wakool LEP 1992, cl.9., Forestry (other than pine plantations) is permitted without consent in the General Rural Zone No.1(a). Reviewed at Austlii website 28.10.03.

²²⁰ Walcha LEP 2000, cl.9. Interview, Mr Rob Calligan, Planner, 31.3.98. Proposed requirement for consent relates to environmental impact of plantation activity (eg. Use of herbicides), and to the impact on local infrastructure (esp. bridges) of increased truck traffic associated with forestry.

²²¹ Weddin LEP 2002, cl.10., consent is required for forestry within the rural 1(a) zone. Internet review of LEP at <www.austlii.edu.au> on 28.10.03.

²²² Wellington LEP 1995, cl.10. General rural 1(a) zone, consent not required for forestry. Internet review of LEP at <www.austlii.edu.au> on 28.10.03.

²²³ Wentworth 1993, cl.9, zoning table, general rural 1(a) zone, consent not required for forestry except for pine plantations. Internet review of LEP at <www.austlii.edu.au> on 28.10.03.

²²⁴ Windouran LEP 1999, s.9, <www.austlii.edu.au>, 28.10.03.

²²⁵ Yallaroi LEP 1991, cl.9. Forestry (other than ancillary dwellings and pine plantations) does not require development consent.

²²⁶ Yass LEP 1987, cl.9. Accessed at <www.austlii.edu.au> on 7.12.01. Also: interview 4.11.99, Paul Johnston, Strategic Planner, Yass SC, Development consent is not required for forestry in the Rural 1(a)n zone. A TPO is in place in the shire, but only applies to clear-felling (50%> tree canopy removal) of areas of greater than two hectares. The extent of operation of the firewood logging industry is unclear. Stated that in order to guarantee a right to harvest plantations or wood-lots in the future, individuals are referred to the TPHG Act. Some persons undertaking farm forestry have applied for development consent in any case, regardless of LEP requirements, in an attempt to safeguard harvesting rights.

²²⁷ Young Local Environmental Rural Plan 1993, cl. 9. Development consent is required for forestry in the Rural 1(a1) Zone. “Logging” requires development consent in the No.7(e) Rural Environmental Protection (Scenic) Zone.
APPENDIX 9.1 LOCAL GOVERNMENT CONSENT REQUIREMENTS FOR PNF

### Sydney Region

<table>
<thead>
<tr>
<th>Council</th>
<th>Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawkesbury</td>
<td>Yes 128</td>
</tr>
<tr>
<td>Wollondilly</td>
<td>Yes 129</td>
</tr>
</tbody>
</table>

**Footnote:**
The methodology of selection of councils for survey was as follows. The survey aimed to comprehensively review council provisions in the Eastern Division of NSW and to cover selected councils within the Central and Western Division known to have a significant PNF industry activity. Only 107 (i.e., 67.7%) of the total of 158 rural councils were reviewed. In particular, efforts were made to review council requirements in areas along the Murrumbidgee and Murray Rivers (due to the river red-gum industry) and Central West areas with cypress pine logging industry. A map is reproduced at showing the councils reviewed as shaded in green. Those not surveyed remain marked in white. The selection methodology was cross-checked by using overlay maps provided in the EPA’s NSW State of the Environment Report 2001, showing local government boundaries against Maps 2.13 “Native Vegetation Cover”, showing areas of forest and woodland (p.174), and Map 2.11 “Native Vegetation Disturbance in the intensive and extensive land use zones” (p.171) showing areas of vegetation cleared and uncleared. These maps showed the significant areas of remnant native vegetation in NSW.

This survey applies Regional Boundaries as were in use by DUAP in 1999-2000, as indicated on the map reproduced in Appendix 8.2. Note that the Regional boundaries applied by DUAP, the former Department of Urban Affairs and Planning have been replaced in late 2003 by those applied by its successor DIPNR the Department of Infrastructure Planning and Natural Resources. Those boundaries can be reviewed at <www.iplan.nsw.gov.au>.

The research methodology employed involved a combination of approaches. A visit to the DUAP Head Office library was conducted in 1998 and a number of LEPs were reviewed in hard copy. A later visit was conducted in 1998 to the DUAP office in Queanbeyan to review selected LEPs and associated maps. For others LGAs for which the LEPs were not available, it was necessary to conduct telephone interviews with strategic planners. Later in the study period, it became possible to cross-check the contents of LEPs as greater numbers of LEPs became available on-line at the Australian Legal Information Institute website <www.austlii.edu.au>, under “NSW Consolidated Regulations”, and also at the NSW Parliamentary Counsel's web publication of NSW Legislation in Force at <www.legislation.nsw.gov.au>.

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128 Hawkesbury LEP 1989, Zoning table. Interview 4.11.99, Mr Steve Enders, Strategic Planner. Development consent is required for forestry [standard definition from the model provisions] in the 1(a) zone and normally a flora and fauna survey would be required to be conducted and results lodged with DA. Note that Hawkesbury SC is exempt from the operation of the NVC Act, except for trees on protected land. A TPO applies to rural land, however this does not apply to clearing for agriculture, and only protects trees greater than 4m. However, a draft LEP is under consideration that will require development consent for clearance of all native vegetation, and therefore will protect understory species.

129 Development consent is required for forestry in the 1(a) Zone. Wollondilly LEP 1991, Zoning table. Interview, 4.11.99, Tim McLeod, Strategic Planner. In order to obtain consent an applicant would be required to pass standard DA requirements including conduct a flora and fauna assessment, consideration of visual impact, and issues relating to erosion and sediment control. Further, a TPO applies in the shire to rural vegetation clearance. However as a separate requirement applies for forestry, the TPO is only of relevance to other forms of vegetation clearance which are becoming over time increasingly disconnected from traditional agricultural land clearance. No SIS have been prepared for forestry but approximately 6-12 prepared for developments involving other forms of vegetation clearance.
Please see print copy for Appendix 9.2
Appendix 9.3
Copy of Letter Sent to Selected DUAP Northern Region Councils Regarding PNF

[University of Wollongong Letterhead]

Faculty of Law
University of Wollongong
Northfields Ave
Wollongong NSW 2522

Date

Dear [Title] [LastName]

Re: Consent Requirements relating to Forestry on Private Land

I am writing to you to seek your cooperation with research that I am conducting at the Centre for Natural Resources Law and Policy at the Law Faculty, University of Wollongong, into the question of consent requirements for forestry activities on privately owned land throughout NSW.

The question of private land forestry is gaining in policy importance given the ongoing expansion of the plantation timber industry and farm forestry throughout NSW and the possible expansion of the native forest harvesting industry on private land with restrictions on access to State Forests as a result of the RFA process.

The results of the research are likely to be of interest to policy makers in local government and selected State government agencies including DLWC, DUAP and NPWS.

Therefore, your assistance in gathering this information is greatly appreciated, not least because at present there is a lack of comprehensive information on the regulatory framework (and its administration) affecting the private land forestry industry applicable across NSW.

My research is under the supervision of Professor David Farrier, author of the Environmental Law Handbook, (3rd edition, 1999), and Director of the Centre for Natural Resources Law and Policy. I have attached a letter of introduction from Professor Farrier.
My particular requirements in relation to information relate to the decision making of your council under the Environmental Planning and Assessment Act 1979 and the Threatened Species Conservation Act 1995, in this particular context.

I have chosen to write to your council in particular, as I understand that as required by the Local Environment Plan in your region, commercial forestry (including logging or intensive silvicultural management) on privately owned land within the General Rural 1(a) Zone is a development requiring consent under Part 4 of the Environmental Planning and Assessment Act 1979.

The precise information that I seek is as follows:

1. A confirmation that private land forestry requires development consent under your LEP in the 1(a) Zone.

2. Please elaborate or specify council’s policy reasons for this requirement. Are they related to concerns over maintenance of roads and bridges, or over environmental matters such as threatened species issues, landscape planning, water quality, soil erosion control?

3. Since 1 January 1996, how many development applications have been received by your council for proposals involving timber harvesting on private land?

4. In how many of these cases was consent granted with standard conditions attached?

5. In how many cases was consent granted with the addition of conditions specific to the forestry context?

6. How many such development applications have been refused (if relevant)?

7. In how many of the above instances has council determined that production of an SIS was required (as a result of a finding of likely significant effect on threatened species following application of the ‘8 part test’)?

8. In these cases, what was the result of the concurrence process with the Director-General of NPWS? (ie was concurrence granted, with conditions, or refused?)

Your assistance in providing the above information is greatly appreciated. Again I wish to stress that the results of this research will be of interest to local government and selected State government agencies.

In order to assist your reply I have enclosed a self addressed envelope. If you require clarification of any aspect of the above, please do not hesitate to contact me by telephone on (02) 4221 4866 (w) or (0412) 417 546 (mobile).

Yours sincerely

James Prest
Candidate, Masters of Natural Resources Law (Hons) (by research)
APPENDIX 9.4  QUESTIONS POSED IN SEMI-STRUCTURED INTERVIEWING OF COUNCIL PLANNERS REGARDING REGULATION OF PNF

After locating the interview subject and introducing the researcher and the research project the following questions were posed.

Can you please state your name and role at the council ? Are you responsible for administering the LEP or aspects of it ?

Does council have an LEP in place or is it operating under an IDO?

Are you aware of any private forestry activity within your LGA?

What are council’s requirements for consent, if any, for forestry in the rural 1(a) zone?

Are there specific controls placed on pine plantations or plantation forestry as opposed to forestry?

What are councils reasons for requiring consent for PNF ( if that is the case)?

(If raised) Does council levy s.94 contributions for road maintenance associated with forestry?

What are council’s requirements for consent for forestry within environment protection zones?

If consent is required, are there any specific additional requirements of development applicants eg. site specific species survey? Flora and fauna assessment?

Has the LEP requirements in relation to forestry changed recently, or are there plans to change the LEP in this respect?

Does council have a TPO in place and how does this interact with requirements of the LEP?

Do additional provisions of the LEP in relation to environmentally sensitive or significant land affect or modify the basic provision of the Plan in relation to PNF?

(If raised) How many applications for PNF have there been recently? Have any proposals been required to complete an SIS (Species Impact Statement)? Does council have a programme of vegetation mapping in progress?

Can you describe any compliance or enforcement activity undertaken recently in relation to PNF? Does council have any education programme in place in order to inform private landholders in relation to LEP requirements for forestry?
APPENDIX 9.5. THE OUTCOME OF PROSECUTIONS UNDER S.76 EPAA BY LOCAL COUNCILS REGARDING UNAUTHORISED VEGETATION CLEARANCE

<table>
<thead>
<tr>
<th>Case name</th>
<th>Prosecuted Under</th>
<th>Area cleared</th>
<th>Penalty imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fry v Patterson <em>(1990)</em></td>
<td>Breach of TPO, offence under s.126(1) EPAA.</td>
<td>“Many many hundreds of significant and mature trees were felled”</td>
<td>Total of $18,000 fines (at a time when the maximum penalty was $20,000).</td>
</tr>
<tr>
<td>Ballina Shire Council v Darfast Pty Ltd</td>
<td>s.76 EPAA, carrying out of development works (for which consent is required) without consent.</td>
<td>1.78 hectares of coastal vegetation</td>
<td>$30,000 fine plus costs of prosecutor, plus a remediation order to satisfaction of council.</td>
</tr>
<tr>
<td>Bellingen Shire Council v North</td>
<td>EPAA, s.125, clearing without consent as required by LEP in 1(a1)zone</td>
<td>Clearing of native vegetation, windrowing, area not specified in judgement.</td>
<td>Plea of guilty by landowner, fine of $3000, costs of prosecutor.</td>
</tr>
<tr>
<td>Bellingen Shire Council v Wollard</td>
<td>Environmental Planning and Assessment Act, s.125, clearing without consent as required by LEP in 1(a1) zone.</td>
<td>Clearing of native vegetation, windrowing (same facts as North)</td>
<td>Plea of guilty by clearing contractor, convicted, $750 fine plus prosecutors costs ($5500).</td>
</tr>
<tr>
<td>Byron Shire Council v Vos</td>
<td>EPAA, s.76A(1), clearing in breach of TPO.</td>
<td>Clearing of 12 mature native trees in course of macadamia plantation establishment.</td>
<td>Plea of guilty by property owner, entry into consent order regarding revegetation, convicted, $10,000 fine, pay prosecutor’s costs.</td>
</tr>
<tr>
<td>Byron Shire Council v Sommerville</td>
<td>EPAA, s.76A(1), clearing in breach of TPO.</td>
<td>Clearing of 12 mature native trees in course of macadamia plantation establishment.</td>
<td>Plea of guilty by clearing contractor, convicted, $5000 fine plus prosecutors costs.</td>
</tr>
<tr>
<td>Byron Shire Council v Vigden CJ &amp; Donna’s Beach Pty Ltd</td>
<td>Facts not contained within judgement.</td>
<td>Facts not contained within judgement.</td>
<td>Prosecution failed. Permanent stay of proceedings due to</td>
</tr>
</tbody>
</table>

1Fry v Patterson, Land and Environment Court, unreported Nos.50076-50078 of 1990, 10 October 1990, Stein J.
6Byron Shire Council v Sommerville *(1999)* 97 NSWLEC unreported decision No. 50127 of 1999, 8 February 1999, Sheahan J.
7Byron Shire Council v Vigden CJ & Donna’s Beach Pty Limited *(1999)* NSWLEC 121 (1 June 1999).
## Appendix 9.5 Prosecutions by Local Government for Illegal Clearing

<table>
<thead>
<tr>
<th>Case</th>
<th>Act/Section</th>
<th>Offence Description</th>
<th>Penalty/Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cooper v Coffs Harbour CC⁸</td>
<td>EPAA, s.125</td>
<td>Breach of condition of development consent for retention of trees in course of subdivision.</td>
<td>Earlier penalty of $15,000 fine plus $52,331 costs reduced on appeal to $5000.</td>
</tr>
<tr>
<td>Ryde City Council v Calleija⁹</td>
<td>EPAA, s.125.</td>
<td>Felling of 15 mature riverfront trees.</td>
<td>Guilty plea, $15,000 fine, entry into consent order under s.126(3) EP&amp;A Act.</td>
</tr>
<tr>
<td>Ryde CC v Compagnon¹⁰</td>
<td></td>
<td>Breach of tree preservation order, offence under s.125 EPAA, plea of guilty.</td>
<td>Same facts as Calleija.</td>
</tr>
<tr>
<td>Penrith City Council v Mathie &amp; Camelot Grange Pty Ltd¹¹</td>
<td></td>
<td>Prosecution for unauthorised development (tree clearing), removal of over 240 trees, on 2.72ha area.</td>
<td>“offence is a serious one”, involving “flagrant disregard of the law, notwithstanding prior discussions with council officers,” penalty reduced due to cooperation with prosecution (guilty plea).</td>
</tr>
<tr>
<td>Penrith City Council v Re-Gen Industries Pty Ltd (2000) 107 LGERA 331, Talbot J.</td>
<td></td>
<td>Prosecution for unauthorised development (tree clearing without development consent), removal of over 240 trees, on 2.72ha area. Offence regarded as “not…trivial”.</td>
<td>Prosecution of landscaping/clearing contractor employed by property developer</td>
</tr>
<tr>
<td>Canterbury City Council v Saad¹²</td>
<td></td>
<td>Clearing of two large trees in breach of a</td>
<td>Fine of $5000 imposed.¹³</td>
</tr>
</tbody>
</table>

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⁸ Cooper v Coffs Harbour City Council, No 60/9751/96 (2 December 1997), Supreme Court of New South Wales Court of Criminal Appeal.
¹¹ Penrith City Council v Mathie & Camelot Grange Pty Ltd, Land and Environment Court (NSW), unreported, Nos. 50080 and 50082 of 1999, 25 February 2000 (judgment on sentence only).
¹² Canterbury City Council v Saad (2000) 112 LGERA 107, Land and Environment Court NSW.
¹³ Canterbury City Council v Saad (2000) 112 LGERA 107, Land and Environment Court NSW.
specific condition of development consent, in an urban context (townhouse development). recorded rejected. Offence characterised as neither technical nor trivial. Reference to “element of general deterrence in dealing with Significant breaches of the planning laws”

<table>
<thead>
<tr>
<th>Case</th>
<th>Offence</th>
<th>Fine Imposed</th>
</tr>
</thead>
</table>
| Kuringai v Gumland Property Holdings Pty Ltd | Felling of 69 trees in breach of a tree preservation order | Fine of $8000 was imposed.  
14 Kuringai Municipal Council v Beaini*6  
Clearing of 30 trees on urban fringe adjoining national park in breach of TPO. | Plea that no conviction be recorded under s.10 Crimes (Sentencing Procedure) Act 1999 rejected. | $6000 fine plus prosecutors costs of $6500.  
Significant effect on threatened species, populations or ecological communities, or their habitats

For the purposes of this Act and, in particular, in the administration of sections 78A, 79C (1) and 112, the following factors must be taken into account in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats:

(a) in the case of a threatened species, whether the life cycle of the species is likely to be disrupted such that a viable local population of the species is likely to be placed at risk of extinction,

(b) in the case of an endangered population, whether the life cycle of the species that constitutes the endangered population is likely to be disrupted such that the viability of the population is likely to be significantly compromised,

(c) in relation to the regional distribution of the habitat of a threatened species, population or ecological community, whether a significant area of known habitat is to be modified or removed,

(d) whether an area of known habitat is likely to become isolated from currently interconnecting or proximate areas of habitat for a threatened species, population or ecological community,

(e) whether critical habitat will be affected,

(f) whether a threatened species, population or ecological community, or their habitats, are adequately represented in conservation reserves (or other similar protected areas) in the region,

(g) whether the development or activity proposed is of a class of development or activity that is recognised as a threatening process,

(h) whether any threatened species, population or ecological community is at the limit of its known distribution.
APPENDIX 11.1
TASMANIAN PRIVATE FOREST COMMUNITIES OF INTEREST

This section provides detailed information about the forest communities being targeted by the Tasmanian Private Forest Reserves Program. The priority species to be considered for the CAR Reserve System are identified in Attachment 2 of the RFA.

Forest community reservation requirements, against JANIS criteria, on private land, following the Tasmanian RFA

<table>
<thead>
<tr>
<th>Forest Community Code</th>
<th>Forest Community Description</th>
<th>Private Land Area (ha) Required to meet Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>AD</td>
<td>E. amygdalina forest on dolerite</td>
<td>9133</td>
</tr>
<tr>
<td>AI</td>
<td>Inland E. amygdalina forest</td>
<td>13413</td>
</tr>
<tr>
<td>AS</td>
<td>E. amygdalina forest on sandstone</td>
<td>12419</td>
</tr>
<tr>
<td>BA</td>
<td>E. brookeriana wet forest</td>
<td>1720</td>
</tr>
<tr>
<td>BF</td>
<td>Acacia melanoxylon forest on flats</td>
<td>129</td>
</tr>
<tr>
<td>BS</td>
<td>Banksia serrata woodland</td>
<td>40</td>
</tr>
<tr>
<td>CR</td>
<td>Callitris rhomboidea forests</td>
<td>106</td>
</tr>
<tr>
<td>DSC</td>
<td>E. viminalis/E. ovata/E. amygdalina/E. obliqua damp sclerophyll forest</td>
<td>1565</td>
</tr>
<tr>
<td>F</td>
<td>King Billy Pine with deciduous beech</td>
<td>21</td>
</tr>
<tr>
<td>G</td>
<td>E. viminalis and/or E. globulus coastal shrubby forest on Holocene sand</td>
<td>452</td>
</tr>
<tr>
<td>GG</td>
<td>Grassy E. globulus forest</td>
<td>2336</td>
</tr>
<tr>
<td>KG</td>
<td>King Island E. globulus/E. brookeriana/E. viminalis forest</td>
<td>1808</td>
</tr>
<tr>
<td>ME</td>
<td>Melaleuca ericifolia forest</td>
<td>216</td>
</tr>
<tr>
<td>MO</td>
<td>E. morrisbyi forest</td>
<td>20</td>
</tr>
<tr>
<td>NP</td>
<td>Notelaea ligustrina and/or Pomaderris apetala forest</td>
<td>97</td>
</tr>
<tr>
<td>OV</td>
<td>E. ovata/E. viminalis forest</td>
<td>6868</td>
</tr>
<tr>
<td>PJ</td>
<td>E. pauciflora on Jurassic dolerite</td>
<td>439</td>
</tr>
<tr>
<td>PS</td>
<td>E. pauciflora on sediments</td>
<td>110</td>
</tr>
<tr>
<td>RI</td>
<td>E. risdonii forest</td>
<td>52</td>
</tr>
<tr>
<td>RO</td>
<td>E. rodwayi forest</td>
<td>1358</td>
</tr>
<tr>
<td>TI</td>
<td>Inland E. tenuiramis forest</td>
<td>25871</td>
</tr>
<tr>
<td>V</td>
<td>E. viminalis grassy forest</td>
<td>33669</td>
</tr>
<tr>
<td>VF</td>
<td>Furneaux E. viminalis forest</td>
<td>24</td>
</tr>
<tr>
<td>VW</td>
<td>Wet E. viminalis forest</td>
<td>3617</td>
</tr>
</tbody>
</table>

## Appendix 11.1 Under-represented Forest Types in Tasmania on Private Land

### Forest community *old growth* requirements on private land

<table>
<thead>
<tr>
<th>Forest Community Code</th>
<th>Forest Community Description</th>
<th>Old Growth Area on Private Land</th>
<th>Area required to meet target</th>
<th>% Private Land needed to meet Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>AD</td>
<td>E. amygdalina forest on dolerite</td>
<td>9150</td>
<td>3104</td>
<td>34</td>
</tr>
<tr>
<td>AI</td>
<td>Inland E. amygdalina forest</td>
<td>2600</td>
<td>2690</td>
<td>103</td>
</tr>
<tr>
<td>AS</td>
<td>E. amygdalina forest on sandstone</td>
<td>1550</td>
<td>1800</td>
<td>116</td>
</tr>
<tr>
<td>AV</td>
<td>Allocasuarina verticillata</td>
<td>510</td>
<td>72</td>
<td>14</td>
</tr>
<tr>
<td>BA</td>
<td>E. brookeriana wet forest</td>
<td>580</td>
<td>630</td>
<td>109</td>
</tr>
<tr>
<td>CR</td>
<td>Calitris rhomboidea forests</td>
<td>240</td>
<td>30</td>
<td>13</td>
</tr>
<tr>
<td>DSC</td>
<td>E. viminalis/E. ovata/E. amygdalina/E. obliqua damp sclerophyll forest</td>
<td>280</td>
<td>720</td>
<td>257</td>
</tr>
<tr>
<td>DT</td>
<td>Tall E. delegatensis forest</td>
<td>4780</td>
<td>4672</td>
<td>98</td>
</tr>
<tr>
<td>G</td>
<td>E. viminalis and/or E. globulus coastal shrubby forest on Holocene sand</td>
<td>740</td>
<td>392</td>
<td>53</td>
</tr>
<tr>
<td>M+</td>
<td>Callidendrous and thamnic rainforest on fertile sites</td>
<td>5360</td>
<td>1920</td>
<td>36</td>
</tr>
<tr>
<td>ME</td>
<td>Melaleuca ericifolia forest</td>
<td>120</td>
<td>156</td>
<td>130</td>
</tr>
<tr>
<td>OT</td>
<td>Tall E. obliqua forest</td>
<td>3500</td>
<td>5124</td>
<td>146</td>
</tr>
<tr>
<td>P</td>
<td>E. pulchella - E. globulus - E. viminalis grassy shrubby dry sclerophyll forest</td>
<td>31020</td>
<td>11624</td>
<td>37</td>
</tr>
<tr>
<td>PJ</td>
<td>E. pauciflora on Jurassic dolerite</td>
<td>450</td>
<td>590</td>
<td>131</td>
</tr>
<tr>
<td>R</td>
<td>E. regnans forest</td>
<td>370</td>
<td>1654</td>
<td>447</td>
</tr>
<tr>
<td>RI</td>
<td>E. risdonii forest</td>
<td>10</td>
<td>10</td>
<td>100</td>
</tr>
<tr>
<td>RO</td>
<td>E. rodwayi forest</td>
<td>550</td>
<td>590</td>
<td>107</td>
</tr>
<tr>
<td>SG</td>
<td>E. seiberti on granite</td>
<td>100</td>
<td>170</td>
<td>170</td>
</tr>
<tr>
<td>SO</td>
<td>E. seiberti on other substrates</td>
<td>380</td>
<td>870</td>
<td>229</td>
</tr>
<tr>
<td>TI</td>
<td>Inland E. tenuiramis forest</td>
<td>6180</td>
<td>3242</td>
<td>52</td>
</tr>
<tr>
<td>V</td>
<td>E. viminalis grassy forest</td>
<td>7580</td>
<td>7730</td>
<td>102</td>
</tr>
<tr>
<td>VW</td>
<td>Wet E. viminalis forest on basalt</td>
<td>30</td>
<td>40</td>
<td>133</td>
</tr>
</tbody>
</table>

APPENDIX 11.2
PRIVATE FORESTS RESERVE PROGRAM TASMANIA
- PROGRESS AT SEPTEMBER 2003

<table>
<thead>
<tr>
<th>Negotiations Successfully Completed</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Security</td>
<td>Number</td>
<td>Area</td>
</tr>
<tr>
<td>Properties Secured (purchased)</td>
<td>19</td>
<td>5118</td>
</tr>
<tr>
<td>Properties Secured (covenanted)</td>
<td>129</td>
<td>20695</td>
</tr>
<tr>
<td>Properties Secured (management agreement)</td>
<td>2</td>
<td>478</td>
</tr>
<tr>
<td><strong>Total properties secured</strong></td>
<td><strong>150</strong></td>
<td><strong>26291</strong></td>
</tr>
</tbody>
</table>

| Negotiations Continuing          |                |                |
| Activity                         | Number         | Area           |
| Under Assessment                 | 88             | ?              |
| Reviewed by CARSAG - not with negotiator | 16       | 2480           |
| Assigned to negotiator - before first contact | 14          | 747            |
| Negotiator first contact - no plan drafted | 23         | 2036           |
| Operations plan drafted - not yet agreed | 43         | 9041           |
| Operations plan agreed - no formal offer made | 7          | 736            |
| Formal offer made - not yet agreed | 5              | 810            |
| Formal offer agreed - not approved by AC | 1           | 13             |
| Approved by AC - not yet approved by Minister | 17        | 3775           |
| Approved by State Minister - not yet approved by C'wealth | 13 | 770 |
| Approved by C'wealth Minister - not yet secured | 13         | 1433           |
| **Total properties under continuing negotiation** | **240** | **21844** |

| Negotiations Not Continuing       |                |                |
| Reason                            | Number         | Area           |
| Owner not interested              | 231            | 24250          |
| Rejected by Unit - insufficient values | 169        | 5161           |
| Rejected by CARSAG - insufficient values | 20         | 2697           |
| Owner interested - not prepared to commit at this time | 63 | 13791 |
| Owner interested - no financial agreement possible | 40         | 4367           |
| **Total properties not under negotiation** | **523** | **50267** |

| Total Properties                  |                |                |
|                                  | **913**        | **98401**      |

Source: Private Forests Reserve Program, Tasmania
APPENDIX 11.3
DETAILED INFORMATION REGARDING PROPORTION OF TASMANIAN PNF OPERATIONS SUBJECT TO SITE SURVEYING BY FOREST PRACTICES BOARD SPECIALISTS

The percentage of PNF operations that have involved a notification to either FPB botanists or zoologists can be calculated from data in the FPB *Annual Reports*. There were 413 plans certified for PNF in 2000-1.¹

**Zoology**

In 2000-01, there were 313 notifications (advice requests) regarding zoological matters for PNF. (In other words 75.8% of operations requested advice from the Board regarding zoology.) However, only 15.2% of all PP logging operations received a zoological site visit from the FP Board.² A similar percentage received a botanical field survey.³

In 2002 there were 404 plans certified. There were 311 notifications (advice requests) regarding zoological matters for PNF. Approximately 30% of notifications were visited, thus 93 visits, so approximately 23.1% of all plans involved a zoological site visit.⁴

**Botany**

There were 63 field surveys conducted on private land in 2000-1 by botanists from the FP Board.⁵ There were 414 private native forest harvesting plans certified,⁶ and thus 15.2% of these PNF operations involved a survey. In the following year, 2001-02 there were 404 harvesting plans certified for private forest harvesting, and 40 botanical surveys took place, thus 10.1% of certified operations were subject to a botanical survey.⁷

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² Calculations from Forest Practices Board (2001), *Annual Report 2000-2001*, p.12, 36. (413 plans certified, 313 requests for advice. 20% led to a site visit, i.e. 62.6 visits, of total of 413 = 15.2%).
³ “About 90” field surveys were conducted by in 2000-1 by botanists from the FP Board, with 70% being on private land. Therefore 63 surveys related to private land. Of 413 certified operations on private land, this means 15.2% received a field survey from FPB Botanists. Forest Practices Board (2001), *Annual Report 2000-2001*, p.32.
⁵ Calculation from figures provided in Forest Practices Board (2001), *Annual Report 2000-2001*, p.32. A similar number of site visits (63, i.e. approx 20% of 313) were conducted by FPB zoologists in response to 313 requests for advice regarding private property operations. (p.36)
APPENDIX 11.4
LAW REFORMS TO TASMANIAN FORESTRY LAW SUGGESTED BY
EDO/PLANNING INSTITUTE CONFERENCE RESOLUTION, HOBART,
AUGUST 2002.

This conference calls upon the State Government to immediately reform the law regarding
forest practices in Tasmania, specifically by:

1. amending the definition of “works” in the Land Use Planning and Approvals Act 1993
   (LUPAA) to remove the exemption for forest practices as defined in the Forest Practices Act
carried out in state forests.

2. deleting Section 20 (7) (a) of LUPAA which exempts from planning control any forestry
   operations conducted on land declared as a PTR under the Forest Practices Act.

3. deleting Section 51 (3) of the Threatened Species Protection Act 1995 (TSPA) which exempts
   a person acting in accordance with a certified forest practices plan from requiring a permit
to kill, injure, catch, damage destroy or collect a listed taxon of threatened flora and fauna.

4. deleting Section 22 C (3) of the Forestry Act which allows that a forest management plan
   may prohibit or restrict the exercise of any statutory powers in relation to the land to which
   the plan applies.

5. amending the Forest Practices Act to reform the constitution or the Forest Practices Board
   to ensure membership includes three community representatives who possess expertise
   inland use planning, natural resource management and ecology.

6. amending the Forest Practices Act to remove the requirement for a separate Forest
   Practices Tribunal. The role of the FPT is to be taken over by the resource management
   and Planning Appeal Tribunal (RMPAT) appropriately resourced to undertake the
   additional work.

7. amend the Forest Practices Act to provide for full public consultation and third party
   appeal rights in relation to the PTR Reserve decision making process.

8. amending LUPAA by providing that forestry cannot be a permitted use, but only a
   discretionary use, in a planning scheme.

9. amending LUPAA to provide that no planning scheme can exempt forestry from that
   scheme.

10. that the Forest Practices Act be subject to the sustainable development objectives of the

11. within the State Policy for the protection of agricultural land the definition of
    agricultural land be amended to read "agricultural uses means animal and crop production
    and does not include intensive tree farming and plantation forestry.

Source: EDO/Planning Institute of Australia conference, Unlocking The Gates - Public
APPENDIX 11.5
PHOTOGRAPHS OF TASMANIAN PRIVATE NATIVE FORESTRY

NORTH FOREST PRODUCTS PLANTATION, MEANDER VALLEY, CENTRAL TASMANIA (J.PREST, NOV.1999)
APPENDIX 11.5
PHOTOGRAPHS OF TASMANIAN PRIVATE NATIVE FORESTRY

GUNNS PTY LTD SURREY HILLS BLOCK NORTH WESTERN TASMANIA PRIOR TO CONVERSION TO PLANTATION, SHOWING RAINFOREST (G. LAW)

GUNNS TREE PLANTATION, INVOLVING CLEARFELLING OF RAINFOREST, SURREY HILLS BLOCK NORTH WESTERN TASMANIA SOUTH OF BURNIE (G. LAW)