Fragments of forest management, a private practice: an assessment of the implementation of the regional forest agreements on private land in the southern and the Eden regions of NSW

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Abstract
This article comprises a critical analysis of the implementation of Regional Forest Agreements ('RFAs') on private land in the Southern and the Eden RFA regions of NSW. It does this by discerning two key objectives for private land from the RFAs — the conservation of priority ecosystems and the promotion of Ecologically Sustainable Forest Management ('ESFM'), and evaluating the effectiveness of the RFAs in facilitating the achievement of these objectives. It maintains that RFAs have proven largely ineffective in achieving these objectives and have failed to provide a strategic approach to the management of private forests. It finishes by considering the potential for the recently implemented Native Vegetation Act 2003 (NSW) to build upon RFAs and overcome these failings, but concludes that this most recent attempt to manage native vegetation on private land comprises a completely separate management regime and appears highly unlikely to achieve the private land objectives derived from the RFAs.

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FRAGMENTS OF FOREST MANAGEMENT, A PRIVATE PRACTICE: AN ASSESSMENT OF THE IMPLEMENTATION OF THE REGIONAL FOREST AGREEMENTS ON PRIVATE LAND IN THE SOUTHERN AND THE EDEN REGIONS OF NSW

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This article aims to critically assess the extent to which the provisions of the Regional Forest Agreements (‘RFAs’) have been implemented on private land. RFAs are agreements entered into between the State and Commonwealth governments outlining the use and management of forests over a twenty-year period. The agreements were designed as an attempt to alleviate tension between State and Federal governments over forest responsibility, and to remove forests from the political agenda by providing long-term resource security for the timber industry, as well as purporting to conserve the biodiversity, old-growth, and wilderness values of forests. There are currently ten RFAs in effect in Australia, three of which are located in NSW. The NSW government has signed RFAs covering the North-East area of the state, the Southern region, and the Eden region. This article focuses on the RFAs covering the ‘Southern’ and ‘Eden’ regions of NSW, primarily because there has been less academic discussion of these than the North East RFA.

The RFAs provide little in terms of conservation for forests on private land. The documents aim to alleviate conflict over public forests rather than provide anything concrete for private forest conservation. At best, the RFAs are disjointed and piecemeal in their approach. However, through a close examination of the RFAs, it is possible to derive two distinct objectives for forests on private land: first, to conserve high value ecosystems on private land, known as priority ecosystems, and secondly to promote the Ecologically
Sustainable Forest Management ('ESFM') of private forests. This article builds on previous discussions of RFAs by undertaking a close analysis of the RFAs' stated intentions for private forests, and considering the practical implementation of these intentions. It follows this through with a discussion of the Native Vegetation Act 2003 (NSW), recognising its potential, yet noting its failure to overcome the problems associated with the implementation of RFAs on private land.

This body of the article comprises three main components. The first highlights the significance of forests located on private land. It discusses the history of forest management in Australia, which has generally been characterised by the neglect of private native forestry issues. It then considers the recent movement towards recognising the significance of private forests, evidenced through policies such as the National Forest Policy Statement ('NFPS') 1992 and the JANIS Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative [CAR] Reserve System for Forests in Australia (1997) ('the JANIS Report'). The second examines the development of the RFAs, as well as considering the legality and enforcement of the agreements. It also considers the NSW government's unilateral Forest Agreements, which largely mirror the RFAs. The third is concerned with the implementation of the RFAs on private land in the Southern and the Eden regions of NSW. It critically evaluates how effective the RFAs have been at facilitating the achievement of the two objectives detected in the agreements: the conservation of priority ecosystems and the promotion of ESFM on private land.

There is a variety of terms used throughout the article that, at the outset, demand definition. The focus of this article is an analysis of the effectiveness of RFAs in achieving two key aims: first, the conservation of priority ecosystems and secondly, ESFM. 'Conservation', as used throughout the article, denotes a management practice where the primary focus is on preservation, rather than utilisation, of the resource. This mainly involves leaving an area of forest to exist in a natural state, and any management practices that assist or enhance this. ESFM differs from conservation in that it involves the utilisation of forest resources. The concept of ESFM is scientifically complex. It involves the utilisation of forest resources while maintaining a range of forest values, including biodiversity, the productive capacity and sustainability of forest


2 While conservation may contemplate potential use of the area in the future, it does not involve use of the area in the immediate timeframe: D E Fisher, Australian Environmental Law (2003) 302.
ecosystems, forest ecosystem health and vitality, and the promotion of long-term social and economic benefits. Central to ESFM is the aim to maintain or increase the full suite of forest values for present and future generations. The term ‘forest’, as used throughout the article, is defined by the 2003 Commonwealth State of the Forests Report as:

(a) an area, incorporating all living and non-living components, that is dominated by trees having usually a single stem and a mature or potentially mature stand height exceeding two metres and with existing or potential crown cover of overstorey strata about equal to or greater than 20 per cent.

II THE HISTORY OF PRIVATE FOREST MANAGEMENT IN AUSTRALIA

A The Significance of Forests on Private Land

Forests located on private land compose a significant proportion of the native forest estate. Almost a quarter of Australia’s native forests occur on private land. In NSW this figure is higher, with 32 per cent of native forests being held in private tenure. In the Southern RFA region of NSW, 34 per cent of the native forest estate is in private ownership. In the Eden RFA region, 23 per cent of native forests are located on private land.

The significance of forests located on land in private ownership has historically been undervalued. However, over recent decades the importance of conservation on private land has become increasingly recognised. A report undertaken by the Independent Expert Working Group on ESFM in NSW identified one of the two most significant areas of biodiversity in the State as ‘forests on private land’. Approximately 85 per cent of high priority vegetation

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5 Ibid 38 (sourced from the National Forest Inventory (2003)).

6 Ibid.


9 IEWG, above n 3, 27.
in NSW occurs on private land. It has also been suggested that the 'greatest proportion of unreserved, poorly-reserved and threatened elements of forest biological diversity is found in private forests'. The significance of private land is such that the need ‘to provide more effective conservation management on private lands’ has been identified as one of the two major challenges facing nature conservation planning.

The significance of private land within each RFA region in NSW was highlighted by the RFA-making process: The RFA identified ecosystems on private land in each region that would be required to meet reserve targets. These reserve targets specify how much of each forest ecosystem is required to establish a comprehensive adequate and representative ('CAR') reserve system. The general target is 15 per cent of the distribution of each forest type in existence prior to 1750. Higher targets are set for old growth and wilderness forests as well as forest ecosystems that are identified as vulnerable, rare or endangered. The ecosystems located on private land that are necessary to enable CAR reserve targets to be met are labelled 'priority ecosystems'. The priority ecosystems were identified by an expert panel during the Comprehensive Regional Assessment ('CRA') that was undertaken in each region as an element of the RFA process. In the Southern RFA region, these were grouped into three classifications: 'Very High Priority', 'High Priority', and 'Moderate Priority'.

The classification of 'Very High Priority' was given to ecosystems which have a CAR reservation target of 100 per cent which has not been met, and there are substantial occurrences of the ecosystem on private land. 'High Priority' denotes those ecosystems that are considered vulnerable and have over 40 per cent of their extent already cleared, where a 60 per cent reservation target was set but not yet reached. 'Moderate Priority' ecosystems are those where a 15 per cent target was set but has not been met, plus over 40 per cent of the ecosystem has already been cleared.

References:
13 Known as the JANIS Criteria, contained within the JANIS Report 1997, above n 1.
14 The term 'priority species and ecosystems' was used in the JANIS Report 1997. RFAs use the term ecosystems that are 'private land priorities'. The term 'priority ecosystems' is adopted throughout this article.
Of the 81 different ecosystems identified as occurring on private land in the Southern RFA region, 34 were considered a priority for conservation, with 15 of these regarded as a ‘Very High Priority’. In the Eden RFA region, the priority ecosystems were classified as ‘High Priority’, ‘Moderate Priority’, or ‘Low Priority’. There were seven priority ecosystems identified on private land, with three of these listed as ‘High Priority’ for conservation.

The significance of private land in NSW is not restricted to conservation. Forests on private land contribute substantially to the timber industry. The NSW CRA/RFA Steering Committee report in 1999 recorded that one quarter of the total sawlog harvest in what was to become known as the Southern RFA region was sourced from private native forests in 1996/1997. Ten per cent of the industry wood supply in what was to become known as the Eden RFA region is sourced from private land. There is some expectation that the introduction of the RFAs and the associated restrictions on timber supply from public forests will increase the demand for timber from private forests in NSW.

B History of Forest Law and Policy in Australia

Despite the extent of forests located on private land, together with both their conservation and commercial significance, the development of forest law and policy in both Australia and NSW has largely focused on public forests to the neglect of the private forest sector. This could partially be attributed to the history of forest conflict in Australia. Historically, forest issues have been characterised by acrimonious conflict between two seemingly opposed agendas, namely those advocating conservation of forests, and those supporting the utilisation of forest resources. This has occurred mainly in the public land context with issues of private native forestry receiving little government or public attention. The neglect of private native forests may also be due in part to their level of invisibility, being enclosed within private freehold land, and a political

16 Ryan et al, above n 7, 143.
18 NSW/CRA RFA Steering Committee, A report on forest wood resources for Southern NSW CRA Region, A report undertaken for the NSW CRA/RFA Steering Committee, Project No. NS19/ES (1999).
unwillingness to interfere with private land use rights. Historically, conservation has not involved private land but rather has focused on designating areas of public land as national parks or nature reserves.

Forest law and policy have perpetuated the general misconception that the focus of conservation should be on public land by continually neglecting issues of private native forestry. This neglect of private forests is widely recognised. Lane notes that despite considerable public and government attention being centred upon state reserves, ‘(f)orests and timber resources on private lands, by contrast, have largely escaped public scrutiny and regulation’. The Independent Expert Working Group report into ESFM in NSW states that despite there being a range of regulatory regimes in NSW which relate to the protection of forests on private land, there is ‘no clear commitment to managing private forests in an ecologically sustainable way’. Their report goes on to note that ‘management of private forests has been left to private landholders, with limited support from government’. The regulation of forests on private land has been alternatively described as ‘neglected’ and ‘ignored’ with the private forest estate regarded as ‘poorly documented in terms of its commercial and conservation significance’.

The neglect of private native forests by the law is also evident in local legislation. There is no single statute in NSW which specifically and comprehensively regulates or deals with forests on privately held land. Instead there is a myriad of laws that touch on the area, the most significant being the Native Vegetation Act 2003 (NSW), the Environmental Planning and Assessment Act 1979 (NSW) and the Threatened Species Conservation Act 1995 (NSW). The 1998 Independent Expert Working Group report on ESFM in NSW explains that, rather than being treated as a forestry issue, private native forestry is regarded as a form of vegetation clearing and is ‘generally exempt from any regulatory requirements’ if the land is not otherwise protected. The report describes the regulation of private forestry in NSW as ‘complex, confused and

21 Prest, above n 20, 7.
24 IEWG, above n 3, 35.
25 Ibid 41.
26 Prest, above n 20, 1.
28 Ryan et al, above n 7, 150.
29 Commenced 1 December 2005.
30 IEWG, above n 3, 51.
inconsistent'. Interestingly, this differs from the position in Tasmania where there is a comprehensive regulatory regime for private forests. The *Forest Practices Act 1985* (Tas) and the *Forest Practices Code 2000* (Tas) regulate forest activities on both public and private land.

C *The National Forest Policy Statement*

In recent years there has been a growth in the recognition of the significance of private forests. The National Forest Policy Statement ("NFPS") 1992, which establishes the framework for the CAR reserve system and the subsequent RFAs, offered the first real policy acknowledgment of the potential contribution of private forests to nature conservation. The NFPS was signed by the Commonwealth and State governments in 1992, excluding Tasmania which entered the agreement three years later. The NFPS has since provided the backbone for management of forests in Australia. It outlines general objectives that apply to forests across all land tenures but also deals specifically with forests on private land. The policy demonstrates a vision of 'ecologically sustainable management of Australia's forests', applying to *all* forests. Part 3 of the NFPS details a set of national goals to help achieve this vision of ecologically sustainable forest management. One of the goals is:

> to ensure that private native forests are maintained and managed in an ecologically sustainable manner, as part of the permanent native forest estate, as a resource in their own right, and to complement the commercial and nature conservation values of public native forests.34

The NFPS also establishes various objectives for nature conservation. The third objective aims to promote the 'management of private forests in sympathy with nature conservation goals'. It is clear through the use of the phrase 'in sympathy with nature conservation goals' that this objective is weaker than the concept of conservation as defined in this article, namely a management practice where the primary focus is on preservation of the resource. The document opens with a strong vision of ESFM for forests across all land tenures. However by

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31 Ibid.
34 Ibid 5.
36 Ibid 3.
Part 4.4 of the policy, which deals with private forests, this is weakened by a resolution to simply encourage the maintenance of the existing private native forest cover and to facilitate the ecologically sustainable management of such forests for nature conservation, catchment protection, wood production or other economic pursuits.37

Accordingly, there is no clear commitment evident throughout the policy to ensure the opening vision of ESFM of private forests, nor the conservation of representative forest ecosystems.

D The JANIS Criteria for the Establishment of a CAR Reserve System

The significance of private forests for nature conservation was also specifically recognised in the Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative [CAR] Reserve System for Forests in Australia (‘the JANIS Report’) which embodies the ‘JANIS criteria’.38 The JANIS criteria are a progression of the NFPS where it was agreed that a system of CAR reserves would be developed. The JANIS criteria provide specific details of the extent of forests the CAR reserve system is to conserve. Paragraph 4.2 of the JANIS Report states that:

\[(m)any\ of\ the\ most\ threatened\ forest\ species\ and\ ecosystems\ throughout\ Australia\ occur\ on\ private\ lands,\ especially\ in\ coastal\ areas\ and\ across\ agricultural\ lands.\ There\ is\ an\ urgent\ need\ for\ specific\ measures\ to\ address\ their\ conservation\ in\ the\ development\ of\ the\ CAR\ Reserve\ system\ as\ opportunities\ for\ their\ conservation\ are\ rapidly\ foreclosing.\]

Whilst the JANIS Report highlights the significance of private forests for nature conservation, it is still quite limited in its approach to conservation of forests on private land. The Report observes that land to be included in the CAR reserve system should first be selected from public land in accordance with the NFPS.39 It also recognised that the level of nature conservation on private land will be limited by the availability of resources, and indicated that conservation should be ‘highly focused’ on species and ecosystems identified as a priority for conservation.40 As a result of the difficulties associated with conservation on private land, key priorities in relation to such land were identified in the JANIS

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37 Ibid 26-7.
39 Ibid cl 4.2 ‘Private Land’.
40 Ibid.
Report. Private land was determined to be particularly significant in relation to ensuring the comprehensiveness of the CAR reserve system, and in providing protection for rare, vulnerable or endangered species and ecosystems. The Report suggested mechanisms which could be used to facilitate conservation on private land, including purchase of priority areas, the provision of incentives to landowners and covenants. It stressed, however, that the rights of landowners should be respected when attempting to facilitate conservation of private land.41

The JANIS criteria, which were agreed upon by the State and Commonwealth governments in 1997, were drawn predominantly from two reports:

(i) JANIS Technical Working Group, Broad Criteria for the Establishment of a Comprehensive, Adequate and Representative Forest Reserve System in Australia, Draft Report, (1995);


The Commonwealth Position Paper was devised by a panel of independent expert scientists.42 It placed more emphasis on the conservation of private native forests than does the JANIS criteria of 1997. The reluctance of the states to agree upon the criteria specified in the Commonwealth Position Paper, was reflected in the considerable negotiation and amendment that occurred before the JANIS criteria of 1997 were eventually agreed upon.43 The Commonwealth Position Paper clearly stated that the JANIS reserve targets should apply to land across all tenures, not just public land. It strongly emphasised ‘off-reserve’ conservation. The JANIS criteria of 1997 differed from the Commonwealth Position Paper in that it established reservation targets that should be met firstly from public land. If enough public land was not available to fulfil the targets, then conservation on private land should be encouraged. However, the JANIS criteria of 1997 did not mandate the use of private land to ensure the reservation targets were met. Kirkpatrick, who was a member of the panel of independent expert scientists that created the original reserve criteria, describes the differences between the Commonwealth Position Paper and the JANIS criteria as ‘critical’, suggesting that the JANIS criteria make it possible to do little about reservation on private land.44

41 Ibid.
43 Kirkpatrick, above n 11, 34.
44 Ibid.
The NFPS provided the framework for the creation of RFAs between the Commonwealth and State governments. The RFAs provided a means of implementing the goals and objectives agreed upon in the 1992 Policy Statement. The Commonwealth government entered into RFAs with the NSW, Victorian, Tasmanian and Western Australian State governments. The agreements were devised on a regional basis, rather than at a state level, in order to provide a regionally specific focus. At the time of writing, ten RFAs have been finalised, of which three apply in NSW.

The RFAs are twenty-year plans governing the use and management of forests. They aim to guarantee long-term resource security for the timber industry as well as provide protection for biodiversity, wilderness areas and old-growth forests. The main policy means of ensuring nature conservation is the CAR reserve system but provision is also made for off-reserve conservation. The agreements make all state forest areas outside the CAR reserve system available for logging. They provide resource security by establishing permissible harvesting quotas over public land within the twenty-year period.

There have been suggestions that the introduction of the RFAs was more concerned with politics than natural resource management. Lane argues that the central aim of the RFAs was to take forest issues off the political agenda, and that a further motive was to alleviate tension between the federal and state governments over forest responsibility. The RFAs were a means for the Commonwealth government to divorce itself from the forest debate and to give the States primary responsibility for forest resource management. The RFAs largely remove Commonwealth control over environmental matters in RFA regions. They exempt wood sourced from, or forestry operations undertaken in,
RFA regions, from various pieces of Commonwealth legislation. Any RFA-derived wood is removed from the list of ‘prescribed goods’ and can thus no longer be regulated by the Commonwealth under the Export Control Act 1982 (Cth). This Act had previously been triggered to regulate the export of woodchips, with the Commonwealth having the power to refuse permission for an export licence. The Commonwealth could refuse to grant an export licence if the harvesting of timber breached any of various Commonwealth Acts relating to the environment. Most forestry operations undertaken in accordance with an RFA are also exempt from the environmental approval process requirements in Part 3 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

There has been much criticism of the RFA process and the resultant agreements. There is a suggestion that the more powerful stakeholder groups may have controlled the negotiations to the exclusion of smaller interest groups, such as Indigenous Australians. According to this argument, the interests of the Indigenous community, the only group possessing ‘distinct proprietary rights’, had been marginalised by the prominence of the competing interests of the timber industry and conservation.

There has also been criticism of the scientific elements of the process. Mackey contends that the criteria of CAR reserve system have not been adequately applied in the RFAs. The original ‘full scientific criteria’ were modified in order to accommodate economic and social values. The credibility of the CRAs has also been questioned, with suggestions that the assessments undertaken were ‘inadequate’ and the evaluation of the information was fast-

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53 Regional Forest Agreements Act 2002 (Cth) s 6.
54 Woodchips were listed as ‘prescribed goods’ in the Export Control (Unprocessed Wood) Regulations 1986 (Cth).
55 Environment Protection (Impact of Proposals) Act 1974 (Cth); World Heritage Properties Conservation Act 1983 (Cth); Australian Heritage Commission Act 1975 (Cth); Endangered Species Protection Act 1992 (Cth), the first two Acts were replaced by the Environment Protection and Biodiversity Conservation Act 1999 (Cth).
56 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 11 states that ‘an action does not need approval if it is taken in accordance with Regional Forest Agreements’. This excludes forest activities within a property included on the World Heritage List or Ramsar wetland list (s 42). As a result, actions allowed under a RFA are not subject to the approval and assessment process under the Act.
57 Lane, ‘Decentralization or Privatization of Environmental Governance?’, above n 22, 290.
58 Ibid.
61 Ibid.
tracked. Further, there has been criticism of the lack of significance accorded to private land in the process.

Despite these evident problems, the process culminated in the signing of RFAs for three regions of NSW. The RFA for the Eden region was signed on the 26 August 1999, the first to be signed in NSW (see Figure 1, below). The North East (Upper and Lower) RFA followed on the 31 March 2000. The Southern RFA was signed on the 24 April 2001 (see Figure 2, below). This article focuses on the implementation of the Southern and Eden RFAs.

**Figure 1 Eden RFA Region**

Excerpt from Map of Eden Regional Forest Agreement Land Tenure and Zoning including Comprehensive Adequate and Representative (CAR) Reserve system, Department of Agriculture, Fisheries and Forestry © Commonwealth of Australia, reproduced by permission.

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63 Kirkpatrick, above n 11, 34.
A The Legal Status of the RFAs

The RFAs in NSW are divided into three parts. Parts 1 and 2 are not intended to be legally binding. Part 3, however, is intended to 'create legally enforceable rights and obligations'. Either party can terminate the agreement on certain grounds after taking part in a dispute resolution process. The Commonwealth is entitled to terminate the agreement for a number of reasons. One such instance is if the NSW government has failed to implement the CAR reserve system and to manage and conserve identified CAR values. The Commonwealth is also

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entitled to terminate if the NSW government fails to produce a code of practice for timber harvesting of native forest on private land by the first five-yearly review.68

The state government Forest Agreements were able to be enacted in NSW under the *Forestry and National Parks Estate Act 1998*. Part 3 of this Act legalised the making of Forest Agreements for a region of NSW.69 Following the breakdown of State-Commonwealth negotiations over the Eden RFA, the State government unilaterally declared a Forest Agreement for the Eden region, utilising this legislation.70 Accordingly, the first of the RFAs to be signed in NSW, the Eden RFA, was actually pre-empted by the introduction of a NSW State government Forest Agreement covering the same land area and, substantially, the same matters as the RFA that was eventually negotiated.71 A NSW Forest Agreement for the Southern Region was created after the conclusion of the RFA for the region.72 The role of NSW Forest Agreement for the Southern Region was to provide for the implementation of the RFA at a state level.73 It covered substantially the same content as the Southern RFA.

After numerous failed attempts,74 the RFAs were eventually enacted at the Commonwealth level with the passing of the *Regional Forest Agreements Act 2002* (Cth). The Act outlines its first object as ‘to give effect to certain obligations of the Commonwealth under Regional Forest Agreements’.75 In the

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69 *Forestry and National Park Estate Act 1998* (NSW) s 14(1).
71 Signed 5 March 1999 by the Ministers administering the *Environmental Planning and Assessment Act 1979* (NSW); *Forestry Act 1916* (NSW); *National Parks and Wildlife Act 1974* (NSW); *Protection of the Environment Administration Act 1991* (NSW); and the *Fisheries Management Act 1994* (NSW).
72 Signed 3 May 2002 by the Ministers administering the *Environmental Planning and Assessment Act 1979* (NSW); *Forestry Act 1916* (NSW); *National Parks and Wildlife Act 1974* (NSW); *Protection of the Environment Administration Act 1991* (NSW); and the *Fisheries Management Act 1994* (NSW).
73 NSW Govt, Resource and Conservation Assessment Commission, website <www.racac.nsw.gov.au> at 25 August 2004. RACAC no longer exists having ceased with the formation of the NSW Natural Resource Commission and Natural Resource Advisory Council. (‘NRAC’) However, for continuity this site remains under RACAC (at 28 April 2006).
74 The first attempt at passing a Bill to legitimise forest agreements between the State and Commonwealth governments was the introduction of the *Resource Security Act (The Forest Conservation and Development Bill) 1991* (Cth). This was followed by an unsuccessful attempt to enact the *Regional Forest Agreements Bill 1993*. This Bill was reintroduced in 1998. It passed in the Senate with amendments. However the House of Representatives refused to accept the amendments. An amended version of the Bill was introduced again in 2001 but no substantial debate emerged before the election of 2001 (Commonwealth, *Parliamentary Debates*, House of Representatives 21 March 03 2002, 1853 (Sid Sidebottom)).
75 *Regional Forest Agreements Act 2002* (Cth) s 3(a).
Second Reading Speech, the Minister for Agriculture, Fisheries and Forestry explained that the Act ‘provides legislative support and commitment to the outcomes of Regional Forest Agreements’ and ‘commits the Commonwealth unequivocally to the outcomes achieved in the 10 RFAs concluded’.76

B *Regional Forest Agreements — Are They Enforceable?*

Until the High Court directly considers the issue, it will not be clear whether the RFAs will be considered as legally enforceable agreements. Yet enforceability of an RFA, by one of the parties to the agreement, is potentially a key issue. This will become extremely relevant should a party fail to comply with its obligations. The most prominent case involving the enforceability of an agreement between the Commonwealth and a state government was the case *South Australia v Commonwealth* (1962).77 This case was brought before the High Court in an attempt to enforce the Railways Standardization Agreement that was entered into between the South Australian and federal governments. The full bench of the High Court was unanimous in its decision that, despite the intention of both parties to be bound by the agreement, the agreement was nevertheless one which could not be enforced by the law. The judgement of Windeyer J was most relevant to the current discussion, stating:

> [u]ndertakings that are political in character — using the word “political” as referring to promises and undertakings of governments, either to their own citizens or to other states or governments — are therefore often not enforceable by processes of law.78

In determining this, the Court looked primarily to the nature of the agreement. Windeyer J observed that in order for an agreement to be enforced, ‘the character of an agreement and the intentions of the parties to it as revealed by its terms must be regarded in order to see whether or not it is justiciable.’79 The Railways Standardization Agreement was not considered to be of a character considered enforceable by the Court.80

The courts have a history of rejecting attempts to enforce intergovernmental agreements. In the case of *John Cooke v Commonwealth* (1922),81 the High Court held that an arrangement between the Imperial government and the

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77 (1962) 108 CLR 130.
78 Ibid 154.
79 Ibid.
80 Ibid 141, 146 (Dixon CJ).
81 *John Cooke & Co Pty Ltd v Commonwealth* (1922) 31 CLR 394.
Commonwealth government was an ‘arrangement of a political nature’. It determined that it was not cognizable by Courts of law, creating no legal rights and duties and depending entirely for its performance on the constitutional relation between these governments and their good faith toward each other.

In *PJ Magennis v Commonwealth* (1949), the Court described an agreement between governments in a similar manner:

> the general tenor of the document suggests rather an arrangement between two governments settling the broad outlines of an administrative and financial scheme than a definitive contract enforceable at law.

A more recent case in the Supreme Court of the Australian Capital Territory, *Lissner v Commonwealth* [2002] reinforced this view. It held that an agreement between governments was ‘not capable of creating legally enforceable obligations’. The court in this instance did not follow the reasoning in previous cases. It failed to consider the nature of the particular agreement or the intent of the parties, but rather concluded generally that agreements between governments were not legally enforceable. These cases lend support to the view that bilateral agreements between state and Commonwealth governments would generally not be enforceable by the courts.

With further analysis, *South Australia v Commonwealth* could also be interpreted as supporting the proposition that RFAs are legally enforceable agreements. Windeyer J stated that an agreement might not be enforceable as

> [t]he circumstances may show that (the parties) did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts.

The RFAs in NSW clearly state that it is the intention of the Parties that Part 3 of the agreements ‘create legally enforceable rights and obligations’. This suggests

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82 Ibid 416 (Knox CJ).
83 Ibid.
84 *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382.
85 Ibid 409 (Dixon J).
86 [2002] ACTSC 53 (Unreported, Master Connolly, 7 June 2002).
87 Ibid 8 (Connolly).
89 (1962) 108 CLR 130.
90 Ibid 154.
that the NSW and Commonwealth governments intended their agreements to be ones that could be enforced legally.

Windeyer J listed further reasons why an agreement between governments may not be enforceable by stating:

The status of the parties, their relationship to one another, the topics with which the agreement deals, the extent to which it is expressed to be finally definitive of their concurrence, the way in which it came into existence, these, or any one or more of them taken in the circumstances, may put the matter outside the realm of contract law.\(^92\)

The NSW RFAs are expressed in terms which are clearly 'finally definitive' of the concurrence of the parties, at least for a period of five years, that is, until the first review is undertaken. The manner by which the RFAs came into existence, through a long period of negotiation, would also indicate that they were intended to be enforceable agreements. The topic of the agreements, and the relationship between the two states, does nothing to undermine the proposition that they were intended to be enforceable at law.

In a discussion of the possible enforceability of the Tasmanian RFA, Tribe argues that Windeyer's description of political agreements as 'often not enforceable by processes of law' lends support to the suggestion that they may still be enforceable, depending upon their character.\(^93\) One of the reasons the Railways Standardization Agreement was held not to be enforceable was that it did 'not state when any particular part is to be begun or in what order the various parts should be done'.\(^94\) As Tribe argues, the RFAs contain specific provisions outlining time frames for individual components of the agreement.\(^95\) For example, the NSW RFAs establish that a code of practice for timber harvesting of native forest on private land should be in place by the first five-yearly review.\(^96\) Further, Tribe states that legal counsel for both state and Commonwealth governments are now in agreement that it is possible to create contractual relationships between the Commonwealth and state governments.\(^97\)

Despite the suggestion that either the Commonwealth or NSW governments may in fact enforce the NSW RFAs, this is unlikely to happen in practice. It is more likely that political pressure would be applied in order to obtain compliance.\(^98\) The Commonwealth government has established an RFA

\(^{92}\) (1962) 108 CLR 130, 154 (Windeyer J).


\(^{94}\) South Australia v Commonwealth (1962) 108 CLR 130, 152–3 (Windeyer J).

\(^{95}\) Tribe, above n 93, 145.


\(^{97}\) Tribe cites personal correspondence: above n 93, 145.

\(^{98}\) McGrath, above n 88, 486.
Monitoring Unit within the Department of Agriculture, Forestry and Fisheries. This unit monitors the RFAs through the annual reports submitted by the NSW government for the first five years, and thereafter through the five-yearly reviews. It also monitors via informal observation of government policies. The position of the Commonwealth government is that its 'capacity to directly influence NSW forestry operations is limited under the Australian Constitution'. However, it has an expectation that the NSW government will fully implement the RFAs. If the Commonwealth believes the State government had failed to do this, it will initiate discussions with the government or, as a last resort, consider the dispute resolution mechanisms provided for in the RFAs.

There is no provision made under the RFAs for third party enforcement of the agreement. The NSW Forest Agreements prevent third parties from initiating proceedings to remedy or restrain a breach of the agreements. Unlike many other statutes, section 40 of the Forestry and National Parks Estate Act 1998 (NSW) removes third party rights to initiate proceedings which existed under other Acts. This prevents individuals or, more likely, non-governmental environmental organisations, from attempting to ensure that both the NSW and Commonwealth governments are fulfilling their obligations under the agreements. Instead, the five-yearly reviews that are to be undertaken jointly by both governments for the RFAs will include opportunity for public comment on the agreements' performance. However, the reviews do not open the RFAs up for renegotiation but rather allow only for minor modifications to be undertaken. Nor do they stipulate what consideration has to be given to submissions from the public.

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99 Email from Michael O'Loughlin, Manager, Sustainable Forest Management Section, Commonwealth Department of Agriculture, Forestry and Fisheries to Holly Park, 20 September 2004.
100 Ibid.
101 Ibid.
102 Environmental Offences and Penalties Act 1989 (NSW) ss 219, 252, 253; Protection of the Environment Operations Act 1997 (NSW) ss 25, 13(2A); there is also a general clause removing third party rights under s 40(1)(b) 'a provision of an Act that gives any person a right to institute proceedings in a court to remedy or restrain a breach (or a threatened or apprehended breach) of the Act or an instrument made under the Act, whether or not any right of the person has been or may be infringed by or as a consequence of that breach'.
103 Regional Forest Agreement for Southern NSW (2001) cl 38(c); Regional Forest Agreement for the Eden Region of NSW (1999) cl 38(c).
105 Regional Forest Agreement for Southern NSW (2001) cl 38(c); Regional Forest Agreement for the Eden Region of NSW (1999) cl 38(c).
IV THE IMPLEMENTATION OF THE SOUTHERN AND EDEN RFAS ON PRIVATE LAND

This section of the article aims to assess whether the RFAs have been implemented on private land in the Southern and Eden regions of NSW. In order to do this, features of the RFAs and Forest Agreements that address the management of forests on private land have been identified. As noted previously, it is possible to derive two objectives for private forest management from the agreements: first, to encourage the conservation of priority ecosystems, and, secondly, to promote ESFM of private forests. This discussion critically analyses the implementation of the relevant elements of the RFAs on private land. It also attempts to evaluate the potential effectiveness of these elements at promoting ESFM and the conservation of priority ecosystems.

Both the State-Commonwealth RFAs and the State government Forest Agreements contain a number of elements relevant to the management of private native forests. The RFAs address private forests mainly through an attachment dedicated to 'Private Land'. This attachment outlines a range of conservation mechanisms which are applicable to private land. This article focuses on three of these mechanisms that the author has selected as potentially valuable tools for implementing the RFAs, either by encouraging the conservation of priority ecosystems or promoting ESFM. These comprise voluntary land acquisition, voluntary conservation agreements, and property management plans. Another significant component of the 'Private Land' attachments is a commitment on the part of the NSW government to establish Regional Vegetation Committees in each RFA region and 'provide them with funding for the conservation of Forest Ecosystems that are rare or non-existent on Public Lands'. A further important obligation is contained within the body of the RFAs. It involves a commitment by the State government to produce a code of practice for harvesting of native timber on private land by the first five-yearly review. There is also an element of the State government Forest Agreements which is particularly significant for the conservation of priority ecosystems. The Forest Agreements stipulate that the

107 These include: conservation agreements, landholder initiated agreements, noncontractual 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, and other mechanisms that may be developed to suit individual landholders or situations.
State government will undertake a report and establish a committee to ensure the protection of high conservation value private land.\textsuperscript{110}

The following discussion of the elements of the RFAs and Forest Agreements relevant to private land is divided into a discussion of firstly, those that encourage the conservation of priority ecosystems and secondly, those that promote ESFM.

\textbf{A \ Conservation of Priority Ecosystems}

\textit{1 Land Acquisition}

The RFA for the Southern region of NSW makes provision for the acquisition of private property to ‘assist towards meeting conservation targets not already met on the formal dedicated reserve system and improve the management boundaries of these reserves’.\textsuperscript{111} A ‘one-off’ funding grant of AUD 1.2 million, was allocated from the NSW government’s Environmental Trust for the voluntary purchase of private lands. This money is controlled by the Forestry Structural Adjustment Unit within the then Department of Infrastructure, Planning and Natural Resources (‘DIPNR’).\textsuperscript{112}

The funds have been utilised to purchase eighteen properties covering a combined area of approximately 3500 hectares.\textsuperscript{113} In acquiring land, the focus was on improving the management boundaries of current reserves,\textsuperscript{114} rather than assisting toward meeting conservation targets by conserving priority ecosystems. Properties were purchased which would improve reserve design, or provide habitat linkages between reserved areas and unprotected remnants of forest.\textsuperscript{115}

Five of the properties purchased included ecosystems identified as a priority for conservation under the Southern RFA. They contain eight different priority ecosystems, one which was classified as a very high priority for conservation, three that were considered a high priority, and three a moderate priority for conservation.\textsuperscript{116}


\textsuperscript{112} Email from Denise Gonzales, Manager NSW Environmental Trust to Holly Park, 17 September 2004. The Forestry Structural Adjustment Unit is currently (May 2006) within the Department of Natural Resources (‘DNR’).

\textsuperscript{113} Department of Environment and Conservation (‘DEC’), Southern CRA Private Land Acquisitions (powerpoint presentation (circa mid 2004) obtained from Wil Allen, DEC, October 2004.

\textsuperscript{114} Interview, Wil Allen, DEC (telephone, 7 October 2004).

\textsuperscript{115} DEC, Southern CRA Private Land Acquisitions (powerpoint presentation), above n 113.

\textsuperscript{116} Email from Wil Allen, DEC, to Holly Park, 19 October 2004.
Whilst the acquisition of private property could be a means of effectively conserving priority ecosystems, it is greatly limited by the funding available. Clearly the allocation of AUD 1.2 million was grossly inadequate if any real attempt was to be made to assist in meeting conservation targets, as well as to improve management boundaries of current reserves. It is highly unlikely that ample funds would ever be made available to make land acquisition a viable means of conserving priority ecosystems under the RFAs. There are also practical problems associated with land acquisition. The agreements stipulated that all acquisition must be voluntary. This would limit the availability of land for purchase, impacting on the effectiveness of land acquisition to conserve priority ecosystems.

2 Voluntary Conservation Agreements

The ‘Private Land’ attachment to the RFAs provides for the use of voluntary conservation agreements as a mechanism to promote the conservation of private land. Voluntary conservation agreements (‘VCAs’) are instruments voluntarily entered into by landholders with the Minister for the Environment. They are governed by Division 12 of the National Parks and Wildlife Act 1974 (NSW). VCAs are primarily concerned with conservation. The Act establishes that VCAs can be entered into for a range of purposes, the most relevant being section 69C(1)(c) which states that a conservation agreement may be entered into ‘for the purpose of study, preservation, protection, care or propagation of fauna or native plants or other flora’.

VCAs are legally binding agreements signed by the landowners. They are accompanied by a Plan of Management for the property. The VCA establishes the management objectives for the land. It establishes how the area covered by the agreement can be used as well as what management practices the landholder needs to undertake. This is complemented by the Plan of Management which addresses a range of management issues and outlines the specific management activities required of the owner, including an agreed time-frame.

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117 National Parks and Wildlife Act 1974 (NSW) s 69B.
118 National Parks and Wildlife Act 1974 (NSW) s 69A-K.
119 National Parks and Wildlife Act 1974 (NSW) s 69B(1).
120 National Parks and Wildlife Service (NPWS), Information on applying to have a Voluntary Conservation Agreement or Wildlife Refuge Factsheet (2004 circa).
122 Including permitted development, biodiversity conservation, the control of non-indigenous flora, the control of feral animals, fire management, cultural heritage, the restoration of vegetation, domestic pets and livestock, and visitor use of the area. They may, for instance, mandate activities such as fencing, weed removal and control, sustainable grazing practices, monitoring visitor use of the area or installing habitat boxes: NPWS, Draft Plan of Management for Lands Subject to Voluntary Conservation Agreement between the Minister for
VCAs may also involve the provision of financial incentives, technical advice or other assistance. Tax deductions for costs of treatment and prevention of land degradation are available under the *Income Tax Assessment Act 1936* (Cth). Landholders who have a VCA over their property have also been exempted from paying rates under the *Local Government Act 1993* (NSW). Upon registration with the Registrar-General, VCAs become binding and enforceable in the Land and Environment Court, by or against successors in title to the property. Because of the stringent and legally binding nature of VCAs, there is much emphasis on their voluntary nature. Consensus and negotiation is an integral part of the process. Both the VCA and the Plan of Management are devised jointly by the Department of Environment and Conservation (‘DEC’), and the landholder, so that the final documents are acceptable to both parties. The landowner is advised to obtain independent legal advice, which is generally funded by DEC, and to take time to review the VCA and Plan of Management, and suggest any desired amendments. Once a VCA and Plan of Management are agreed upon and signed, DEC undertakes monitoring to ensure compliance with the VCA.

It has been difficult to establish the extent to which VCAs have been utilised to implement the Southern and Eden RFAs. There has been no specific change in DEC’s policy to target properties containing priority ecosystems in response to the suggestion in the RFAs that VCAs are an important conservation mechanism to implement RFAs on private land.

In one respect, VCAs appear to be potentially effective tools for implementing the RFAs, because of their ability to effectively provide for conservation of an area. They are focused primarily on conservation and contain specific management requirements for an individual property. They are legally binding agreements and, once registered, run with the land. But whilst VCAs are theoretically useful tools for conserving priority ecosystems, there are problems associated with their use. The focus of VCAs is on voluntary participation, largely because of the legally binding nature of the agreements. As voluntary

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126 *Income Tax Assessment Act 1936* (Cth) ss 51(1), 53, 54, 75B, 75D.
127 *Local Government Act 1993* (NSW) s 555(1)(b1).
129 The NPWS became part of DEC in September 2003.
130 NPWS, *Information on applying to have a Voluntary Conservation Agreement or Wildlife Refuge Factsheet*, above n 120.
131 NPWS, Draft Abutent VCA, above n 122.
132 Interview with Sally Ash, NPWS (telephone, 12 October 2004).
agreements, they are only suitable for landholders who are willing participants in
the VCA program, meaning they can not readily be used to target priority
ecosystems.

Another problem associated with VCAs is the extensive time and effort
required of DEC staff to develop the agreements.\textsuperscript{133} The legal nature of the
agreements also means there is significant expense involved. Legal officers from
DEC are involved in drafting the agreements and the Department generally pays
for the landholder to obtain independent legal advice. There are also issues
associated with monitoring and enforceability, with the monitoring of compliance
with VCAs being labour intensive. As a result, whilst in theory VCAs could be
highly effective at conserving priority ecosystems, their voluntary nature and
other problems mean they will not be widely applied and cannot generally be
used to target priority ecosystems.

3 Other Forest Conservation Projects on Private Land

The two RFAs studied outline that funding would be provided 'for the
conservation of Forest Ecosystems that are rare or non-existent on Public
Lands'.\textsuperscript{134} This funding was intended for Regional Vegetation Committees, which
were to be established under the \textit{Native Vegetation Conservation Act 1997
(NSW)},\textsuperscript{135} and whose main function was to prepare draft Regional Vegetation
Management Plans for their relevant regions.\textsuperscript{136} However, Regional Vegetation
Committees were never established in the Southern and Eden regions of NSW.
The reform of natural resources management in NSW has seen the introduction
of Catchment Management Authorities ('CMAs').\textsuperscript{137} CMAs are responsible for
natural resource management within a specified catchment area. They have
received funding from the NSW Government for projects to conserve native
vegetation on private land (see below). These projects have the potential to
implement the RFAs, mainly through attempting to conserve priority ecosystems.
The Southern and Eden RFA regions do not directly correlate with specific
catchment areas. They fall within the boundaries of the Southern Rivers,
Murrumbidgee, Murray and Hawkesbury-Nepean catchment areas. The
following discussion focuses on three projects being undertaken by the Southern
Rivers and Murrumbidgee CMAs.

\textsuperscript{133} Email from Les Mitchell, DEC Nowra, to Holly Park, 2 May 2005.
\textsuperscript{134} \textit{Regional Forest Agreement for Southern NSW (2001)} Attachment 2 ‘Private Land’ cl 8;
\textit{Regional Forest Agreement for the Eden Region of NSW (1999)} Attachment 12 ‘Private Land’
c1 8.
\textsuperscript{135} \textit{Native Vegetation Conservation Act 1997} (NSW) s 51(1). Now replaced by the \textit{Native
Vegetation Act 2003} (NSW).
\textsuperscript{136} \textit{Native Vegetation Conservation Act 1997} (NSW) s 52(1)(a).
\textsuperscript{137} Established under \textit{Catchment Management Authorities Act 2003} (NSW) s 6(1).
(a) Bush Incentives Program

The Bush Incentives program is a program funded by the Australian Government’s National Heritage Trust. The basic premise of the program is that a CMA project officer and a landholder devise a proposed management plan for an area of the landholder’s land. It focuses mainly on the site, but may also detail management practices to apply to the entire property. The landholder then needs to determine the extent of funding they require to manage their property and, specifically, the selected site in accordance with the devised management plan. This is submitted as a tender to the CMA, which assesses the bid by considering the conservation value of the site relative to the amount of money required by the landholder. If the tender is successful, a management agreement is signed between the property owner and the CMA for a period of either five or ten years.

The Bush Incentives program has two main objectives. Firstly, to conserve what are labelled ‘priority vegetation types’, and, secondly, to reduce the fragmentation of conservation areas. The program targets ‘priority vegetation types’ rather than ‘priority ecosystems’ under the RFAs. Priority vegetation types were determined using the vegetation data compiled during the CRA for the Southern Region of NSW. Priority vegetation types consist of any vegetation communities where less than 30 per cent is managed for conservation within the region. This criterion aims to identify the vegetation communities which are most under represented in conservation areas in the Southern Rivers catchment area. Whilst it differs from criteria utilised to determine priority ecosystems under the RFAs, the priority vegetation types targeted in the Bush Incentives program encompass all the priority ecosystems identified under the Southern RFA. One hundred and twenty-five priority vegetation types are listed under the Bush Incentives program. The 30 priority ecosystems for the Southern Region are included within this list.

138 Southern Rivers CMA, Southern Rivers Bush Incentives Brochure (2006) 2 <www.southern.cma.nsw.gov.au/pdf/SRBI-Brochure.PDF> at 23 May 2006. It is currently in its second round and is operating around the Shoalhaven and Braidwood areas. At the time of originally obtaining this information, the program was operating around Braidwood and North East of Robertson.
139 Ibid 1.
140 Ibid.
141 See this article, Pt IIA, above.
142 Ibid.
143 Table of priority vegetation types received obtained from Donna Hazell, Project Officer Southern Rivers Bush Incentives program, compared with priority ecosystems identified in Regional Forest Agreement for Southern NSW(2001) Attachment 2 ‘Private Land’. (Attachment contained in email to Holly Park, 20 September 2004.)
Whilst the presence of priority vegetation types at the site is an important aspect of the program, other factors are taken into account when determining successful tenders. Of particular importance to conservation value is the condition of the site, addressing especially the number of species present, weed cover, the amount of bare ground present, the number of fallen trees and the cover of trees, scrub, and ground layer plants. A priority vegetation type is considered to be in good condition if 50 per cent or more of the species identified as occurring in that vegetation community during the CRA process are present on the site.\textsuperscript{145} In determining the acceptability of the tender, the CMA will consider what management activities the landholder is willing to undertake, and how much money they are requesting. The funding available is limited, so the sites which offer the highest conservation value and the most effective management practices for the money requested will be successful.\textsuperscript{146}

(b) \textit{Voluntary Biological Diversity Conservation Strategy for Private Lands}

The Voluntary Biological Diversity Conservation Strategy for Private Lands was introduced in the Eden RFA region in July 2002. It is funded via a AUD 2.4 million grant from the State Government Native Vegetation Management Fund.\textsuperscript{147}

The aim of the strategy is to encourage the protection of ecosystems that are poorly represented on public land through the provision of various incentives and the promotion of voluntary conservation measures. These ecosystems include the priority ecosystems identified under the Eden RFA as well as additional ecosystems that are considered vulnerable.\textsuperscript{148} The incentives available vary, with greater incentives accessible if the landuse is more focused on conservation. The incentives include council rate rebates, funding for fencing, funding for weed and pest control, and revegetation incentives.\textsuperscript{149} There are plans to extend the program to areas within the Southern RFA region, the Snowy Monaro RFA region by 2007, and the Eurobodalla RFA region by 2008.

\textsuperscript{145} Interview, Donna Hazell, Project Officer, Southern Rivers Bush Incentives program (telephone, 20 September 2004).


\textsuperscript{147} Interview, Justin Gouvement, CMA Eden (telephone, 24 September 2004).

\textsuperscript{148} Ibid.

\textsuperscript{149} DLWC, \textit{South East Catchment Blueprint: An Integrated Catchment Management Plan for the South East Catchment} (2002), Appendix 3 "Example Incentive Scheme - Eden Voluntary Biological Diversity Conservation Strategy".
(c) **Native Vegetation Incentives**

The Murrumbidgee CMA has introduced a program which offers a range of native vegetation incentives. The program was funded for 2003–2004 through a AUD 570 000 grant from the Commonwealth’s Natural Heritage Trust.\(^{150}\) Landholders can apply for incentive funding for fencing, the integration of production and biodiversity, feral animal and weed control, and revegetation.\(^{151}\) The project is not being managed directly by the CMA. Instead, it is being coordinated by a small, regionally-based private company, Natural Capital Pty Ltd, in conjunction with the CMA.\(^{152}\)

Of the three projects discussed, the Bush Incentives program arguably has the most potential to conserve priority ecosystems on private land in the Southern RFA Region, albeit indirectly. The correlation between the priority vegetation types under the program, and the priority ecosystems identified under the Southern RFA, means that the conservation of priority ecosystems is rated as ‘highly valuable’ when determining which tenders are successful. Also, participants in the Bush Incentives program operate voluntarily, and determine the level of funding required to manage their property in accordance with the management plan. This means that landowners are likely to willingly comply with the management arrangements. The Bush Incentives program has the ability to facilitate conservation for priority ecosystems for the duration of the agreements, that is, five to ten years.

The effectiveness of all of the programs as tools to implement the Southern and Eden RFAs on a large scale, however, is greatly limited for a range of reasons. First, the Bush Incentives program is currently confined to two specific areas within the Southern Rivers catchment area, both of which fall within the Southern RFA region. As a result, it currently operates only on a very small scale. There are plans, however, to extend the program to other areas of the Southern RFA region, the South Coast and Southern Tablelands, in the future.\(^{153}\) The Eden Conservation Strategy and the Native Vegetation Incentives Program already cover larger areas.

Secondly, the programs depend on the voluntary participation of the landholders. The programs are in a better position than VCAs because of the financial incentives involved. This means, however, that the programs are heavily reliant on the availability of funding to continue. The Bush Incentives

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\(^{150}\) Natural Heritage Trust 2. Interview, Michael Dunn, CMA Wagga Wagga (telephone, 20 October 2004).


\(^{152}\) Interview, Owen Whitaker, Director of Natural Capital Pty Ltd (telephone, 5 October 2004).

program is the only of the three programs which actually targets priority ecosystems, albeit indirectly. The Native Vegetation Incentives Program aims to protect and enhance high conservation value native vegetation. What constitutes high conservation value native vegetation in the catchment area was determined by the Murrumbidgee CMA Biodiversity Technical Working Group. It focused on communities that have a limited extent remaining within the catchment area and are not adequately conserved. The high conservation value vegetation communities identified in the region do not correlate with the priority ecosystems identified under the RFAs.\(^{154}\)

All of the programs lack effective monitoring and enforcement. One of the key features of the programs is the desire to promote voluntary action rather than enforce prescribed management practices. This means that the programs are not able to directly target priority vegetation communities. Rather, CMAs promote the various conservation programs available through the local media and field days.\(^{155}\) Whilst the voluntary nature of the programs means that the main focus is not on monitoring and enforcement, follow up monitoring visits can be conducted to ensure landowners are complying with the programs.\(^{156}\) Accordingly, whilst the Bush Incentives program is potentially effective at conserving priority ecosystems on a small scale over a short time period, the program is reliant on recurrent government funding. Furthermore, these small scale projects generally lack enforceability and monitoring and do not provide the widespread, strategic and integrated approach required to effectively conserve priority ecosystems under the RFAs.

4 **Obligations under the NSW Forest Agreements**

The NSW Forest Agreements largely replicate the RFAs in relation to private land. Part 2.9 of the Forest Agreement for the Southern Region and Part 2.8 of the Forest Agreement for the Eden Region are devoted to private land. An attachment to the agreements reiterates the conservation mechanisms suggested under the ‘Private Land’ attachments to the RFAs. There is no doubt, however, that the Forest Agreements go further than RFAs in a significant respect — they establish that the protection of high conservation values on private land may be facilitated by the Resource and Conservation Assessment Commission (‘RACAC’). The Forest Agreements outline that to assist RACAC, the former NPWS (now subsumed under DEC) was to identify forest ecosystems on private land that are a conservation priority for inclusion in the CAR reserve system by 30 June 2002. It further sets out that, by the same date, RACAC was to establish a committee to ensure agencies were promoting the protection of conservation


\(^{155}\) Interview, Justin Gouvernet, CMA Eden (telephone, 24 September 2004).

\(^{156}\) Ibid.
values on private lands within the Southern region. This was qualified with a statement that the move would only occur subject to the availability of funding and approval.

Research failed to uncover any information on a committee ever being established to facilitate protection of private land by RACAC or any other State government department. RACAC has been abolished under the Natural Resources Commission Act 2003 (NSW), with its functions subsumed by the Natural Resources Commission. Inquiries were also made by the author as to the existence of the report that was to be undertaken by NPWS to identify forest ecosystems on private land that are a conservation priority for inclusion in the CAR reserve system. No such report appears to exist. Both of these provisions were subject to the availability of funding and approval. Presumably, these were never granted.

B Ecologically Sustainable Forest Management ('ESFM')

1 Property Management Plans

Property management plans are another of the conservation mechanism identified under the RFAs to facilitate the conservation of priority ecosystems on private land. The former Native Vegetation Conservation Act 1997 (NSW) provided for the use of property agreements to manage native vegetation on private property. However, as noted earlier, this Act has recently been replaced by the Native Vegetation Act 2003 (NSW). The new Act is based largely on recommendations of the Native Vegetation Reform Implementation Group ('NVRIG') and key stakeholders. It aims to reduce the complexity of native vegetation management across the state. The new Act takes a regulatory approach to the management of native vegetation on private land, with the introduction of property vegetation plans. The following discussion of property management plans will consider both property agreements and property vegetation plans.

157 Natural Resources Commission Act 2003 (NSW) sch 3, cl 2(1).
159 Inquiries undertaken by the author involved a search of the National Parks and Wildlife Service website (18 May 2006), a search of the National Parks and Wildlife Service library (18 May 2006) as well as email correspondence with Ian Pulsford, 8 September 2004.
160 Commenced 1 December 2005.
161 Known as the Sinclair Group.
163 Ibid.
(a) Property Agreements

The *Native Vegetation Conservation Act 1997* (NSW) allowed for the use of property agreements to manage native vegetation on private property. Property agreements were agreements entered into by the Director-General of DIPNR with a landholder. Their focus was on regulating the clearing of native vegetation rather than on conservation.

Under the *Native Vegetation Act 1997* (NSW) it was not mandatory for landholders to enter into property agreements over their property.\(^{164}\) Moreover, given the exemption of private native forestry activities from the regulatory requirements of the Act, there was scant incentive for a landholder to do so. Private native forestry is defined as ‘(t)he 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)’.\(^{165}\) Private native forestry was exempt from development consent requirements under former State Environmental Planning Policy (SEPP) 46.\(^{166}\) This exemption was carried over into the *Native Vegetation Conservation Act 1997* (NSW).\(^{167}\) Property agreements were not widely entered into and thus proved to be an ineffective means of promoting ESFM on private land.

(b) Property Vegetation Plans

Property Vegetation Plans (‘PVPs’) have been introduced to replace property agreements under the *Native Vegetation Act 2003* (NSW). PVPs are similar to property agreements in that they are management plans governing an individual property or group of properties. PVPs are to be developed by landholders with the assistance of their local Catchment Management Authority (‘CMA’).\(^{168}\) They require approval by the Minister, however this approval process has been delegated to CMAs.\(^{169}\)

PVPs differ from property agreements in that they are driven by command regulation. Under the new Act, in order to obtain consent to clear native vegetation, a landholder must submit either a development application to DIPNR

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164 *Native Vegetation Conservation Act 1997* (NSW) s 40(1).  
165 Former SEPP 46 ‘Protection and Management of Native Vegetation’ sch 3, cl 1.  
166 Former SEPP 46 ‘Protection and Management of Native Vegetation’ sch 3, cl 1.  
167 *Native Vegetation Conservation Act 1997* (NSW) sch 4 Savings and Transitional Provisions cl 3(2) carries the private native forestry exemption from SEPP 46 ‘Protection and Management of Native Vegetation’ sch 3, cl 1 over into the Act.  
169 The General Manager and Board of each CMA are delegated this power: DNR, ‘How do I get a Property Vegetation Plan?’ Information Sheet. avail at DNR website <http://www.nativevegetation.nsw.gov.au/fs/fs_03.shtml> at 23 May 2006.
or develop a PVP for their property. PVPs may be favourable for landholders as they can permit clearing of certain areas for up to 15 years without the need for further approval. This means that they can provide greater certainty for the owner regarding the future use of their land. The development of a PVP can also entitle the landowner to apply for incentive funding from CMAs. There will thus be a much greater incentive for a landholder to develop a PVP over their property, rather than a property agreement under the former Act. This approach under the new Act means that the government is in a much stronger position to encourage the creation of PVPs.

PVPs can include a range of management mechanisms. They can detail which existing farm activities will be continuing, what vegetation is to be cleared, and identify any ‘regrowth’ native vegetation which does not require approval to be cleared. As with property agreements, PVPs can be registered to run with the land. Once registered, they will be binding against all successors in title.

The new Act appears to tightly regulate private forestry activities, a stark difference from the position of exemption from regulation under the previous Act. Under the new Act, ‘broadscale clearing’, defined as the ‘clearing of native vegetation or protected regrowth’, will not be allowed unless it ‘maintains or improves environmental outcomes’. The only vegetation which will not need to meet this requirement in order to be cleared is unprotected regrowth. Accordingly, most private native forestry will fall within this definition of broadscale clearing. The need for broadscale clearing to ‘maintain or improve

170 Native Vegetation Act 2003 (NSW) s 12(1).
171 Native Vegetation Act 2003 (NSW) s 30(1).
173 Native Vegetation Act 2003 (NSW) s 28(e).
174 Native Vegetation Act 2003 (NSW) s 28(a).
175 Native Vegetation Act 2003 (NSW) s 28(b).
176 Native Vegetation Act 2003 (NSW) s 19(1).
177 Native Vegetation Act 2003 (NSW) s 31(1).
178 Native Vegetation Act 2003 (NSW) s 30(3).
179 Native Vegetation Act 2003 (NSW) s 8.
180 Native Vegetation Act 2003 (NSW) s 29(2).
181 ‘Regrowth’ is defined under Native Vegetation Act 2003 (NSW) s 9(2) as ‘any native vegetation that has regrown since (a) 1 January 1990 or (b) the date specified in a property vegetation plan for the purposes of this definition’. ‘Protected regrowth’ is defined under s 10(1) as ‘any native vegetation that is regrowth and that is identified as protected regrowth for the purposes of this Act in (a) a property vegetation plan, or (b) an environmental planning instrument, or (c) a natural resource management plan of a kind prescribed by the regulations, or (d) an interim protection order under this section’; or under s 10(2) as ‘any native vegetation that is regrowth and that has been grown or preserved (whether before or after the commencement of this Act) with the assistance of public funds granted for biodiversity conservation purposes’. Thus, unprotected regrowth is any vegetation which falls within the definition of ‘regrowth’, but not ‘protected regrowth’.
environmental outcomes’ is a difficult requirement to establish. It potentially grants the government substantial control over forestry operations on private land. The Regulations clarify how this requirement may be met,\(^{182}\) and substantially weaken the restriction on land clearing. Significantly, an Environmental Outcomes Assessment Methodology has been devised in conjunction with the Regulations to provide detailed guidelines for determining whether the clearing of native vegetation ‘improves or maintains environmental outcomes’.\(^{183}\) The methodology involves a complex assessment process taking into account water quality, biodiversity, threatened species and land degradation. Despite establishing a comprehensive assessment process to determine whether vegetation clearing will ‘improve or maintain environmental outcomes’\(^{184}\), and whilst vegetation clearing may, in theory, meet this criteria, in practice it remains to be seen whether the clearing of native vegetation can actually ‘maintain or improve environmental outcomes’.\(^{185}\)

If the proposed clearing of vegetation is not in itself considered to ‘maintain or improve environmental outcomes’, it may still be permitted through a system of offsets. A landholder may be allowed to clear native vegetation contrary to these Regulations if the clearing is offset by a positive management action. The PVP Developer program which was created in conjunction with the Regulations calculates the duration this positive management action requires in order to offset the detrimental effects of the vegetation clearing.\(^{186}\)

There are further circumstances under which broadscale clearing will be permitted, despite not meeting the criteria of maintaining or improving environmental outcomes. Clause 28 of the Regulations allows for ‘minor’ clearing to be undertaken at the discretion of the Minister. The Minister is given the power to create a policy permitting clearing of a minor nature, which does not meet the Environmental Outcomes Assessment Methodology.\(^{187}\) There are certain factors that the Minister must take into account when creating a policy that allows minor clearing. The long-term environmental benefits of the clearing must outweigh the short-term environmental impacts, and the clearing must be likely to improve the condition of, or prevent the long term degradation of, native vegetation on the land.\(^{188}\) Despite the need for the Minister to take these factors into account, this is a weaker criteria than the Environmental Outcomes Assessment Methodology. In accordance with this clause, minor clearing may

\(^{182}\) Native Vegetation Act 2003 (NSW) s 32(b).


\(^{184}\) Native Vegetation Act 2003 (NSW) s 29(2).

\(^{185}\) Native Vegetation Act 2003 (NSW) s 29(2).


\(^{187}\) Native Vegetation Regulation 2005 (NSW) cl 29(1)(a).

\(^{188}\) Native Vegetation Regulation 2005 (NSW) cl 29(1)(c), (b).
not need to improve or maintain environmental outcomes to be permitted. It is also difficult to reconcile the concept of minor clearing with the definition of broadscale clearing. Broadscale clearing is defined as ‘clearing of any remnant native vegetation or protected regrowth’\(^\text{189}\). Surely clearing of a minor nature is also included within this expansive definition of broadscale clearing.

In order to conduct private native forestry, either a PVP or development consent will still be required. Prest argues that despite the new system removing the private native forestry exemption, the use of PVPs ‘still amounts to an exemption, albeit a more complex and involved exemption’ in that it provides a lawful means for landholders to avoid the need for development consent.\(^\text{190}\) Whilst PVPs avoid the need for development consent, they still form part of a ‘command and control’ regulatory system. They may potentially prove a more effective means of ensuring ESFM of private forests than requiring a landholder to obtain development consent as they involve the formulation of a vegetation management plan for the property.

PVPs are likely to be widely developed for private properties across the state following the recent commencement of the *Native Vegetation Act 2003* (NSW). They will avoid landholders having to repeatedly apply to CMAs for consent to clear vegetation. PVPs could have potentially been used to mandate ESFM for all forestry practices. They could, for instance, have established a range of specific silvicultural requirements that must be complied with to ensure private native forestry is undertaken in accordance with the principles of ESFM. However, PVPs are not required to address ESFM.\(^\text{191}\) Rather, they assess development against the Environmental Outcomes Assessment Methodology. There are also issues associated with monitoring and enforcement. Ensuring that PVPs are complied with and offsets are maintained is likely to be a resource intensive process. It is yet to be seen what resources will be made available to address issues of compliance.

2 **Code of Practice for the Harvesting of Native Timber on Private Land**

The Southern and Eden RFAs stipulated that a code of practice to govern the harvesting of native timber on private land would be produced by the first five-yearly review.\(^\text{192}\) This commitment is contained within Part 2, a non-legally binding part of the agreements. This obligation is reiterated, however, in Part 3,

\(^{189}\) *Native Vegetation Regulation 2005* (NSW) cl 8.

\(^{190}\) Prest, above n 20, 14.

\(^{191}\) *Native Vegetation Regulations 2005* (NSW) cl 8.

\(^{192}\) *Regional Forest Agreement for Southern NSW (2001)* cl 56; *Regional Forest Agreement for the Eden Region of NSW (1999)* cl 56.
the legally enforceable section of the RFAs. It is the only element of the RFAs relevant to private land that is contained within the legally binding part of the agreements. The first five-yearly review has yet to be undertaken for either of the regions, even though the review for the Eden region is currently due, and there is currently no time-frame for its commencement. The review is to be undertaken jointly by both the Commonwealth and State governments. A code of practice is in the process of being developed and was supposed to be released as part of the Regulations to the *Native Vegetation Act 2003* (NSW). To date, it has not been released and there is no indication of any release date. The Code of Practice has the potential to provide a comprehensive management regime for forests on private land in NSW to replace the current ad hoc style of management.

**V Conclusion**

This article has critically assessed the effectiveness of RFAs in fulfilling two objectives on private land in the Southern and the Eden regions of NSW, that is, the conservation of priority ecosystems and the promotion of ESFM. To date, RFAs have proven largely ineffective at conserving priority ecosystems or promoting ESFM on private land. This is due in part to the disjointed and indirect manner in which the RFAs approach the conservation of forests on private land. The diffuse nature of the starting point, the RFAs, has set the scene for a piecemeal and ineffective approach to private forest management. The focus throughout is on landowners’ rights. There is a strong emphasis on the voluntary nature of any conservation or ESFM on private land. The agreements do not

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193 *Regional Forest Agreement for Southern NSW (2001)* cl 106.9; *Regional Forest Agreement for the Eden Region of NSW (1999)* cl 95.7.

194 The author made inquiries in October 2004 and was informed that the review would take place in early 2005. The author has since made more recent inquiries in May 2005 and was informed that the review had not commenced, and a commencement date was unknown. Emails from Michael Davis, Natural Resources Specialist - Forests, DIPNR, to Holly Park, 6 October 2004, 4 May 2005.


ensure ESFM but simply 'encourage' ESFM of private forests. The RFAs thus fail to truly recognise the significance of private forests. The adverse political consequences of introducing a thorough management regime for forests on private land appears to outweigh the environmental significance of those forests.

The RFAs had the potential to implement a comprehensive regime of private forest management to overcome the historically ad hoc and fragmented approach. Instead, the suggested conservation mechanisms and the commitments contained within the RFAs have perpetuated this fragmented approach to private forest management. The general ineffectiveness of the RFAs to conserve priority ecosystems has been exacerbated by problems of implementation. The mechanisms suggested in the RFAs to provide for the conservation of priority ecosystems have proven reasonably ineffective. VCAs have not proven a viable means of targeting priority ecosystems, primarily due to their voluntary nature and associated problems. There has been no subsequent change in policy detailing how VCAs are to be used and promoted despite the suggestion under the RFA that they are an important mechanism for facilitating conservation on private land. Land acquisition is extremely limited by the availability of funding. The funding that was provided for land acquisition was grossly inadequate and used primarily to expand the boundaries of current reserves rather than improve the management of priority ecosystems. This is perhaps a reflection of political will or, arguably, the most practical use of such limited funding. The various forest conservation projects that are being coordinated by the CMAs have limited effect, mainly because of their ad hoc application, inability to target priority ecosystems, and lack of monitoring and enforcement. Property agreements have largely proven ineffective because they were not widely entered into. As a result, apart from the ad hoc application of relatively small scale, voluntary based forest conservation projects being coordinated by the CMAs, little has been done in response to the RFAs to conserve priority ecosystems in the Southern and Eden regions of NSW.

The Native Vegetation Act 2003 (NSW) and Regulations have the potential to provide a means for implementing the RFAs in the Southern and Eden regions of NSW, by promoting ESFM of private forests. PVPs are part of a 'command and control' regulatory based system, meaning the government is now in a far stronger position to encourage the creation of PVPs. Property owners are likely to enter into PVPs to avoid not only the need to repeatedly obtain development consent to clear vegetation, but also to provide a long-term plan for vegetation management on their property. PVPs may thus potentially be utilised as a tool to coordinate and centralise the range of incentives and management programs for private land, as well as inform landowners of their availability.

Despite this potential, neither the new Act nor the Regulations and Environmental Outcomes Assessment Methodology make any reference to the RFAs. Whilst the RFAs have done little to conserve priority ecosystems, or
ensure ESFM of private forests, the process of RFA development should have provided much of the groundwork for the management of forests on private land. Rather than building upon the work done in identifying priority ecosystems under the RFAs, the *Native Vegetation Act 2003* (NSW) does not provide for the protection of priority ecosystems on private land. In fact, there is no mention of these ecosystems at all notwithstanding the costly scientific research behind the identification of 'high priority' conservation areas. It appears that the *Native Vegetation Act* comprises a completely separate regime from the RFAs, the NFPS and the JANIS criteria. PVPs do not specifically mandate ESFM of private forests. Instead, the focus is on whether clearing vegetation meets the Environmental Outcomes Assessment Methodology. As a result, despite the potential for the Act and the Regulations to build upon the work done in the RFA process, and in effect to implement the RFAs, they comprise a discrete management regime.

The two objectives discerned from the agreements — conserving priority ecosystems and promoting ESFM of private forests — have clearly not been achieved. This is partially due to the disjointed nature of the documents in regards to private land conservation, with the overriding importance placed on public land. It is also due to the problems associated with implementation. Essentially, the RFAs have failed to provide a strategic approach to the conservation of forests on private land. The RFAs and their implementation have largely perpetuated the fragmented approach to private forest management. Despite the time and money invested, and the extensive research involved in the development of the RFAs, the new *Native Vegetation Act 2003* (NSW) and the Regulations fail to make any attempt to follow on from the RFAs or to provide for conservation of priority ecosystems and ESFM on private land, objectives that were set out in the RFAs but alluded to as early as the NFPS of 1992 and the JANIS Criteria of 1997. The newest attempt to manage vegetation on private land, the *Native Vegetation Act 2003* (NSW) and the Native Vegetation Regulations 2005 (NSW), do not remedy this, but rather completely neglect to address the conservation of high value priority ecosystems or mandate ESFM of private forests.