Opportunity Denied

Review of the legislative ability of local government to conserve native vegetation

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Bushcare

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Disclaimer

This report was prepared for the general purpose of assisting with the development and evaluation of policies associated with the conservation of remnant vegetation. Every effort has been made to ensure that the information provided in this report is current at the time of publication. The participating organisations and persons associated with preparation of this report do not assume liability of any kind whatsoever resulting from the use of and or reliance upon its contents. In particular, this report does not purport or seek to provide a complete and comprehensive statement of all relevant legal obligations and legislation applicable to concerned parties. Independent professional advice on all matters discussed in this report should be obtained prior to using any instrument or making any decision based on information summarised in this report. The views expressed in this report should not necessarily be taken to represent the views of the participating organisations.

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About this project

Incentives for remnant vegetation conservation

This report forms a part of a larger project being undertaken by CSIRO Wildlife and Ecology which is identifying opportunities for the use of incentive-based instruments in the conservation of native remnant vegetation. The project is funded by Environment Australia and the Land and Water Resources Research and Development Corporation.

The report is one of five reports which have been prepared to date that evaluate the role of local government in conserving native vegetation. The other four reports are:

Motivating People: Using management agreements to conserve remnant vegetation. This report addresses the role of financial incentives and legally binding management agreements in promoting the conservation of native vegetation on private land. It develops a conceptual framework for the project by identifying the situations in which different types of financial incentive can be most effectively used to conserve native vegetation.

Beyond Roads, Rates and Rubbish: Opportunities for local government to conserve native vegetation. This report complements the legal analysis contained in Opportunity Denied by evaluating the key policy and financial opportunities and impediments to local governments playing an active in native vegetation management. It provides a synthesis of the findings of our work and puts forward policy guidelines for all levels of government.

Talking to the Taxman About Nature Conservation: Proposals for the introduction of tax incentives for the protection of high conservation value native vegetation. This report reviews the impact of Commonwealth taxes on the conservation of native vegetation. It finds that conservation activities can in certain circumstances be highly taxed and puts forward proposals to address these situations.

Conservation Hindered: The impact of local government rates and State land taxes on the conservation of native vegetation. This report evaluates existing exemptions from these taxes and the impact of different methods of land valuation. State and local taxes are shown to have widely varying impacts on conservation activities.

The aim of the project is to address the issue of conserving native vegetation in a way that is relevant and attractive to all spheres of government: Local, State and Commonwealth. It is only with each jurisdiction's active cooperation that the linkages between national policies for the conservation of native vegetation can be integrated with the economic, social and environmental interests of local communities.

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Executive summary

This report reviews the legislative framework within which local government operates and considers the legal capacity and potential for local governments to offer a range of innovative policy tools for sustainable vegetation management. The report concludes that a range of opportunities to manage native vegetation are being denied to local governments by the legislative framework within which they operate.

This executive summary draws together the findings of the report by describing the ability of local governments to use each of the following policy tools in each State:

- *revenue-raising tools* – including environmental levies that raise funds for environmental programs;
- *financial incentives* – including rate rebates and grants; and
- *property right mechanisms* – including revolving funds that purchase and sell conservation lands, and management agreements that secure conservation values through voluntary participation by landholders.

The policy tools evaluated in this report provide a range of mechanisms through which the costs of conservation can be shared by those who benefit, that is, share the cost among the broader community. A wide choice of policy tools is required if local governments are to successfully play an active role in encouraging native vegetation conservation.

These policy tools are a subset of the approaches that local councils can use to manage environmental issues and represent new approaches that complement more traditional methods, including land use planning. The report's companion document, *Beyond Roads, Rates and Rubbish* (Binning, Young and Cripps, 1999), contains a broader analysis of the policy and financial environment within which local government operates.

Each of the policy tools has been examined in relation to the legislative provisions in each State.[1] This allows for analysis and interpretation of the legislation to determine if it is within the scope of the power granted to local governments in that State to offer that policy incentive. In this way, it serves two purposes:

1. to help local governments identify what they can currently do; and
2. identify changes which will increase the options available to local governments.

The first of these is perhaps the most relevant to achieving immediate on-ground results by local governments. However, the second contains guidance to State governments, who are in the critical position of being able to provide both legal and policy support for an active role by local governments in managing native vegetation.

The remainder of this executive summary provides background and rationale for each of the policy tools outlined above and summarises the legal position in each State from the State chapters.

The report puts forward an agenda for legislative and policy support for local governments to conserve native vegetation. If this agenda is met by State governments, local governments will no longer be able to defend inaction in natural resource management by arguing that opportunities are denied to them.

Revenue-raising tools: Environmental levies

Environmental levies are charges which may be imposed on a household by a council. These charges give councils the ability to raise revenue from the local community for environmental programs. They can be used to supplement, but not replace, State and Commonwealth funding. Typically they are a flat charge of $15 to $40 per

1. The review of legislation contained within the report was up to date as of 30 June 1998. Any changes to legislation after this date have not been included.

household (see Binning, Young and Cripps, 1999). The money raised can be used to fund environmental projects such as the purchase and management of land of high conservation value. Where the money is spent in a transparent way on projects of high profile, the community is clearly able to see the benefits flowing from the levy.

Possible mechanisms for raising an environmental levy

Additional money to fund the environmental objectives of a local government could be raised in various ways. One would be an overall increase in rates imposed on landholders by the council. This increase, however, is prohibited in many States through rate capping, which prescribes the maximum level of rates that may be charged by a local government. The alternative, and perhaps more acceptable, way is to impose a separate environmental levy. This separate charge could then be administered in a more direct way, being available only for environmental projects and not linked in any way to other council income.

Table 1 outlines the ability of local governments to impose a separate charge for an environmental levy in each State. Suggested possible amendments are changes to legislation which would make it possible for a council to impose an environmental levy on ratepayers.

At present, environmental levies can only be imposed at the discretion of individual councils in Queensland, where the Local Government Act allows for the imposition of charges on rateable land. In some other jurisdictions, a Minister may be able to approve an environmental levy on an individual basis for a council. In New South Wales and Victoria, it may also be necessary for the rate cap to be removed, or amended so that environmental levies are excluded, as many local governments are already raising the maximum amount of funds through land rates.

Perhaps the simplest means to give local governments in all States the ability to raise environmental levies would be to extend the provisions within each Local Government Act that relate to charges for services such as water, sewerage and waste disposal to also allow for a general environmental service charge. This could be achieved in two ways: State Ministers could pass a regulation stating that the environment is a service for which a local government can impose a charge; or they could amend the definition of service within the respective Local Government Act to include the environment.

Policy options

If councils are to fund increased environmental expenditure, they will require greater revenue-raising capacity. To achieve this:

- the definition of a service within the relevant Local Government Act could be amended to include environmental services; and
- revenue raised through environmental levies could be excluded from rate capping.

Table 1: The ability of local governments to raise an environmental levy

State	Current position	Possible amendments
Tasmania	Environmental levies cannot be imposed	Amend definition of service in the Local Government Act (s93) to include environmental services, or pass regulation
Queensland	Local Government Act s563	N/A as environmental levies can already be charged
New South Wales	Environmental levies cannot be imposed	Amend definition of service in the Local Government Act (s501) to include environmental services, or pass regulation *
Victoria	Environmental levies cannot be imposed	Amend definition of service in the Local Government Act (s162) to include environmental services, or pass regulation
Western Australia	Environmental levies cannot be imposed	Amend definition of service in the Local Government Act (s6.38) to include environmental services, or pass regulation
South Australia	Environmental levies cannot be imposed	Amend definition of service in the Local Government Act (s177) to include environmental services, or pass regulation

* Amount of revenue which can be raised is limited by rate capping and therefore general rate increases are not possible.

Financial incentives: Grants to individuals and community groups

Grants are a way of providing a direct financial incentive for on-ground work. Grants are very flexible instruments and can be tied to particular actions, such as the erection of a fence, to protect remnant vegetation, or be untied to be at the grantee's discretion.

Grants can be targeted at a wide range of scales, ranging from grants from the Commonwealth government to States or local governments, to grants provided to individual landholders. Local governments may provide grants to either community groups or to individual land managers for the management of native vegetation. In many instances, in-kind assistance such as management advice will also be provided to landholders.

Possible mechanisms for providing grants

Whilst the approach to targeting and administering grant programs may vary, the legal mechanisms through which grants are provided are the same in either case, as outlined in Table 2. It is already possible for grants to be offered by local governments in each State, particularly for matters that will provide a benefit to the community, such as vegetation management.

In most instances, the approval of a council will be needed for the granting of funds. However, it would be possible for a council to approve the initial setting up of a scheme and the criteria against which the level of funding would be determined. It could then allow for the administration of the fund without the approval of council being needed for each grant. Local governments could also work in cooperation with other organisations involved in natural resource management within their region.

Councils can either fund grant programs from their own resources or apply to a range of Commonwealth and State programs for funding to implement a 'devolved grants' program. Often councils have limited resources and there are important opportunities for the costs of grant programs to be shared with State and Commonwealth governments.

Table 2: The ability of local governments to offer a grants scheme for vegetation conservation

State	Current position	Possible amendments
Tasmania	*Local Government Act 1993* (s77) – allows councils to make a grant to any person for a purpose it thinks fit	N/A as grants can currently be made by local governments
Queensland	Nothing prohibits the making of grants and therefore it would be within the power of local governments to do so	State could clarify this position through a policy encouraging local governments to purchase land of high conservation value and establish a grants scheme for conservation activities
New South Wales	*Local Government Act 1993* (s356) – councils can make a voluntary donation to a community group or individual	N/A as grants can currently be made by local governments
Victoria	*Local Government Act 1989* (s136) – councils have power to apply money to carry out any function or power	State could clarify that vegetation conservation, for example, fencing, is within the power of local governments
Western Australia	Nothing within the *Local Government Act 1995* prohibits the making of a grant, therefore, if it is for the good government of persons within the district it would be allowed	Clarify that grants for vegetation conservation are for the good government of persons within the district and are therefore within the power of local governments
South Australia	*Local Government Act 1934* (s154) – councils can spend the revenue they raise through rates and charges in any way they think fit	N/A as grants can currently be made by local governments

Policy option

Financial assistance for vegetation conservation could be made available through local governments. To achieve this:

- Commonwealth or State agencies could provide funding to establish grant programs for vegetation conservation within councils, for example, fencing assistance programs.

Financial incentives: Rate rebates and concessions

Rate rebates provide landholders with either a discount or exemption from rates on land that is managed for conservation. Rate rebates are generally tied to entering into conservation agreements. [2]

Rate rebates provide landholders with financial recognition of the public benefit they are providing through the conservation of vegetation on their land. Rate rebates, however, will have varying financial significance:

- in many rural areas a rebate on rates is likely to only provide a very small incentive as land values and rating percentages are relatively low; and

- in other areas, particularly near major urban centres where land values are high because of development pressure, a rebate on rates will provide a significant financial incentive.

Possible mechanisms for implementing rate rebates

The term 'rate rebate' is used in this report to include:

- differential rating based on different land use zones or rating categories;

- remission of or exemption from rates; and

- a rate rebate or discount of a proportion of the rate payable on land.

All these mechanisms achieve the same outcome – a decrease in the amount of rates payable on land. They are, however, achieved in different ways. In addition to these mechanisms, the actual value placed on the land could be altered through the valuation system.

Table 3 summarises the capacity of local governments to provide rate rebates in each State. The table shows that Queensland and Victoria are the only States where local governments have been given a specific power that allows rate concessions to be provided on environmental grounds. State government exemptions may be provided for land covered by a conservation covenant in New South Wales, Victoria and South Australia. Local governments in all States could potentially use differential rating to provide a concession on rates to land that is placed in a conservation or environmental protection zone.

Whilst rate rebates can be provided in all States, the strength of legislative basis differs. There would be benefit in providing a specific grant of power to provide rebates for land of conservation value in those States where this is not provided.

Policy option

All local governments could be given the legislative capacity to provide rate rebates or concessions for land of conservation value by:

- providing a specific provision for the exemption or discounting of rates for land of environmental significance.

Property right mechanisms: Revolving funds, acquisition and sale of land

Revolving funds are a way in which local governments can secure the conservation of high value sites of native vegetation without the ongoing liability of management. The operation of a revolving fund involves the purchase of land, placing that land under a covenant or environment

2. For a comprehensive treatment of this issue see Binning and Young (1999b) *Conservation Hindered: The impact of local government rates and State land taxes on the conservation of native vegetation*, National R&D Program on Rehabilitation, Management and Conservation of Remnant Vegetation, Environment Australia, Canberra.

protection zone, and then resale of the land. In this way a purchaser who is committed to managing the land in way that is consistent with its conservation is identified through the market place. Further, limited local government resources are not tied up in the ownership and ongoing management of the land.

Revolving funds are an important innovation in conservation management. However, there are some reservations about their use by local governments. Because councils are responsible for the regulation of land use and development approvals, they may be perceived to have a conflict of interest in the operation of a revolving fund. For this reason it is recommended that individual councils ensure that the operation of a revolving fund is at arm's length from the council.

Councils may also choose to simply acquire high value sites or sell land of low conservation value in order to purchase land of strategic conservation value.

Table 3: The ability of local governments to offer a rate rebate scheme

State	Current mechanisms available to local governments	Current mechanisms available to States	Comments
Tasmania	*Local Government Act 1993* (s107) – variation of rates, needs absolute majority of a council *Local Government Act 1993* (s90) – differential zoning	N/A as the State cannot offer a rate rebate scheme	*Local Government Act 1993* (s112) – rate relief of urban farm land, could extend this to conservation
Queensland	*Local Government Act 1993* (s562) – differential general rates based on classification of land as conservation land *Local Government Act 1993* (s627) – remission of rates for places of environmental significance	*Nature Conservation Act 1992* (s45) – conservation agreement may include financial assistance, eg, rate rebate	
New South Wales	*Local Government Act 1993* (s529) – sub-categories for rating, may include conservation *Local Government Act 1993* (ss585–591) – rate reductions; where rural land is zoned for subdivision but not subdivided only available for 1–2 years	*National Parks and Wildlife Act* 1974 (s69C) – land subject to conservation agreement is exempt from rates *Native Vegetation Conservation Act 1997* (ss42–44) – land subject to property agreement can receive financial assistance, could include rate rebate	*Local Government Act 1993* – categories for rating in legislation are farm land, residential, mining and business, could add sub-category of conservation
Victoria	*Local Government Act 1989* (s169) – local governments can grant rebate or concession to preserve places of environmental interest *Local Government Act 1989* (s157) – can use capital improved value to rate land	*Conservation, Forests and Lands Act 1987* (s70) – land subject to a management agreement can receive rate relief which is provided by a council and reimbursed by the Minister	*Local Government Act 1989* – farm land exempt from municipal charges, could extend this to exempt conservation land
Western Australia	*Local Government Act 1995* (s6.33) – differential general rates based on zoning and use of land	N/A as the State cannot offer a rate rebate scheme	Encourage rate rebate scheme
South Australia	*Local Government Act 1934* (s176) – differential rates based on use or locality of land, only available for a limited period *Development Act 1993* (s57) – remission of rates where enter into land management agreement with Minister or council.	*Native Vegetation Act 1991* (s23A) – remission of rates for land under heritage agreement and management plan	

Possible mechanism for implementing revolving funds

From a legal perspective, the operation of a revolving fund requires that councils have the ability to purchase and sell land and the ability to establish a binding management agreement over that land. Management agreements have been addressed earlier. In this section the ability of councils to purchase and sell land is addressed.

Table 4 summarises the capacity of councils to purchase and sell land in each State. The acquisition of land by local governments is generally permitted for public works. Land can either be purchased by agreement with a landholder, or compulsorily purchased. Only in South Australia is the ability of councils to acquire land unclear. Conversely NSW appears to be the only State where there are restrictions on the sale of land.

As noted above, whilst it may be legally possible for a local government to operate a revolving fund, this may lead to perceived conflicts of interest. On balance, a desirable model would be one where:

- local governments are in the position to purchase land of high conservation value and then manage that land for conservation; and

Table 4: The ability of local governments to acquire and sell land

State	Current position	Possible amendments
Tasmania	*Local Government Act 1993* (ss175 and 176) – councils have power to purchase land for the benefit of the community Nothing prohibits the sale of land by local governments	N/A as local governments can also buy and sell land
Queensland	Nothing prohibits the purchase or sale of land and therefore it would be within the power of local governments to do so	N/A as local governments can also buy and sell land
New South Wales	*Local Government Act 1993* (s186) – land can be acquired for the purpose of the exercise of the functions of local governments, but it appears that this land cannot be resold	Amend the provisions of the *Local Government Act 1993* so that land which is acquired can be resold
Victoria	*Local Government Act 1989* (s187) – enables councils to purchase land in connection to their functions; (s189) – provisions for the sale of land Nothing prohibits the sale of land by local governments	N/A as local governments can also buy and sell land
Western Australia	*Land Administration Act 1997* (s161) – allows for the taking of land, by agreement or compulsorily, for public work by local governments; public work includes the protection and preservation of indigenous flora *Local Government (Miscellaneous Provisions) Act 1960* (s278) – gives local governments the power to lease or purchase land Nothing prohibits the sale of land by local governments	N/A as local governments can also buy and sell land
South Australia	*Land Acquisition Act 1969* (ss10–17) – enables councils to compulsorily purchase land for the purpose of carrying out a project, which needs ministerial approval. However, the *Local Government Act 1934* (s154) gives local governments the power to spend the revenue they raise through rates and charges in any way they think fit Nothing prohibits the sale of land by local governments	Clarify that it is possible to purchase land for conservation

- local governments seek to cooperate with non-government bodies in the establishment and management of a revolving fund at arm's length from councils.

Policy options

To facilitate the protection of high conservation value sites, local governments could:

- be provided with the mechanisms and financial ability to purchase, protect and manage areas of high and local conservation value that are not of sufficient size or value to be purchased by the State; and
- be encouraged to develop partnerships with non-government organisations for the operation of a revolving fund.

Property right mechanisms: Management agreements

In broad terms, a management agreement is a contract or binding agreement between a landholder and a third party regarding the management of native vegetation on their property. In the case of remnant vegetation, an agreement would generally restrict land uses that are harmful, such as vegetation clearing and over-grazing, and prescribe the management actions required to sustain conservation values in the long term. This report considers two types of management agreement:

- *Land use agreements:* these are generally related to agreements under planning legislation and are binding on the current landholder. However, they are not registered on the title of land and may be amended through time.
- *Covenants:* these are registered on the title of land and hence are guaranteed of being binding on successive landholders and governments.

Management agreements may also be of a contractual or non-binding nature. Contractual agreements may be effective when a well-defined service, such as construction of a fence, is to be provided, but not in the case of regulating land use in the longer term. Non-binding agreements may be effective in securing landholder participation but obviously do not have legal status. These types of management agreement are not considered as they can be entered into by all local governments. Management agreements are often linked to financial incentives in order to encourage voluntary participation by private landholders.

Possible mechanisms for implementing management agreements

Table 5 outlines the capacity of local and State governments to enter into land use agreements. In all States except Queensland, the ability of a local government to enter into a land use agreement with a landholder is limited to entering into an agreement when the landholder seeks development approval or planning approval. In this way, a local government cannot actively enter into a land use agreement for land of high conservation value unless the council has received an application concerning that land.

Table 6 reviews the ability of local and State governments to enter into conservation covenants. Covenants can be of two types: a statutory covenant, which is created by statute; or a common law restrictive covenant, which can only restrict the activities that may occur on land, and can only be entered into by a landholder and a neighbouring person with an interest in the land. Local governments are generally not able to be a party to a covenant, and cannot enter into an arrangement which will be binding on title.

From the tables it can be seen that local governments have only limited capacity to enter into either category of management agreement. A case could be made to give this power directly to local governments. Alternatively, local governments could be encouraged to play a more active role in facilitating landholder participation in State government-based management agreement programs.

Policy options

Local governments could be encouraged to use management agreements for the conservation of native vegetation by:

- encouraging the use of existing management agreements linked to development applications;
- amending legislation to enable local governments to enter into both land use agreements and conservation covenants that are registered on title; and
- developing cooperative arrangements for more active local government participation in State agency management agreement programs.

Table 5: Management agreements, their availability to local governments and State agencies

State	Current mechanisms available to local governments	Possible action	Other management agreements
Tasmania	*Land Use Planning and Approvals Act 1993* (s71) – management agreement associated with planning approval	Clarify policy that this can be used for environmental management	*National Parks and Wildlife Act 1970* (s19) – management agreements for reserves under Act, made with National Parks and Wildlife Service *Threatened Species Protection Act 1995* (s29) – threatened species and critical habitat management plans
Queensland	*Local Government Act 1993* – nothing prohibits local governments from entering into an agreement	Policy support/ encouragement	*Soil Conservation Act 1986* (s17) – property plan *Nature Conservation Act 1992* (s45) – conservation agreement provides landholder choice in whether the agreement is registered on title
New South Wales	*Environmental Planning and Assessment Act 1979* (s91) – may require management plan as condition of development approval	Policy support/ encouragement Local governments could encourage management agreements with State agencies	*Threatened Species Conservation Act 1995* (s21) – joint management agreements *Forestry Act 1916* (s25A) – working plan *Native Vegetation Conservation Act 1997* (ss42–44) – property agreement *Wilderness Act 1987* (ss8 and 16) – wilderness protection agreement or conservation agreement
Victoria	*Planning and Environment Act 1987* (s171) – agreements concerning land use, and regulation of development	Policy support/ encouragement	*Flora and Fauna Guarantee Act 1988* (s21) – management plan *National Parks Act 1975* (s17) – management plans for parks *Victorian Conservation Trust Act 1972* (s3A) – management plans
Western Australia	*Town Planning and Development Act 1928* (Schedule 1) – agreements as a condition of development	Department of Conservation and Land Management and National Trust encouraged to work with local governments to develop scheme	*Conservation and Land Management Act 1984* (s16) – management agreement *Soil and Land Conservation Act 1945* (s30B) – agreements to reserve may also be registered on title
South Australia	*Development Act 1993* (s57) – land management agreements	Policy support/ encouragement	*Soil Conservation and Land Care Act 1989* (s13) – agreements for conservation and financial assistance or rehabilitation work

Table 6: The ability of local governments to be a party to a covenant

State	Position of local governments	Possible amendments	Covenants with other agencies
Tasmania	*Conveyancing and Law of Property Act 1884* (s90AB) – allows for the registering of a restrictive covenant	N/A as covenants can be entered into by local governments	*National Parks and Wildlife Act 1970* Part VA (ss37A–37H) – conservation covenants may apply to land for which a timber harvesting plan is sought
Queensland	Covenants cannot be entered into by local governments for conservation	Amend Property Law Act and Land Titles Act so that covenants can be registered on title	*Nature Conservation Act 1992* (s51) – conservation agreements can be noted in the administrative advice file
New South Wales	*Conveyancing Act 1919* (s87A) – allows the registration of a public positive covenant	Clarify that vegetation conservation could be included with a public positive covenant	*Native Vegetation Conservation Act 1997* (ss42–44) – property agreements can be registered on title *National Parks and Wildlife Act 1974* (s69C) – voluntary conservation agreement may also be registered on title as a covenant
Victoria	Covenants cannot be entered into by local governments for conservation	Include provisions similar to those within the *Victorian Conservation Trust Act 1972* to allow local governments to enter into a covenant with landholders	*Victorian Conservation Trust Act 1972* (s3A) – covenants can be entered into with the Victorian Conservation Trust *Conservation, Forests and Lands Act 1987* (s69) – land management agreements (ss71–72)
Western Australia	*Transfer of Land Act 1893* (s129BA) – allows for the creation of a restrictive covenant for the benefit of local governments	Clarify that this Act may be used to restrict the clearing of land and can be entered into without requiring the transfer of land	*Soil and Land Conservation Act 1945* (s30B) – conservation covenant and agreements can be registered. *Heritage of Western Australia Act 1990* (s29)
South Australia	Covenants cannot be entered into by local governments for conservation	Local governments encourage landholders to enter into heritage agreements under the *Native Vegetation Act 1991*	*Native Vegetation Act 1991* (s23) – heritage agreement *Soil Conservation and Land Care Act 1989* (s13) – property plans may be noted on title with the agreement of the parties and will then bind successive title holders. *Heritage Act 1993* (s34) – Heritage agreement must be noted on title

1. Introduction

This report reviews the legislative framework within which local government operates in each State. This review is undertaken from the perspective of understanding the roles and responsibilities of local governments in managing native vegetation and the legal capacity of local governments to use a range of policy instruments for the protection and management of native vegetation.

The report is the legal component of a larger study that has evaluated the role of local governments in conserving native vegetation. The results contained in this report are an interpretation of the legal framework and capacities of local governments. The report should be read in conjunction with its companion document, *Beyond Roads, Rates and Rubbish* (Binning, Young and Cripps, 1999), which places the legal analysis presented in this report in the context of the broader policy and financial environment in which local governments operate.

The legal framework in each State is reviewed, chapter by chapter. Structured in this way, State-by-State, the report is essentially a reference document. In addition to reviewing the general legislative environment, the report reviews each of the policy instruments outlined in Box 1 in relation to the legislative provisions in each State.[3]

The report paints the position as it currently stands in each State, and suggests ways to address the gaps where a particular policy tool is not available. In this way it does not consider the actual capacity of a local government to offer a policy tool, or the merits of that instrument. Instead, this report explores and identifies the options currently available to local governments and the restrictions. In this way, it serves two purposes:

1. to help local governments identify what they can currently do; and

2. to identify changes which will increase the range options available to local governments.

The first of these is perhaps the most relevant to achieving immediate on-ground results by local governments. However, the second contains guidance to State governments, who are in the critical position of being able to provide both legal and policy support for an active role of local governments in managing native vegetation.

The remainder of this introduction outlines the context within which each of the State chapters should be read.

1.1 Setting the context

As the level of government that is closest to the community, local government is in a unique position to promote the conservation of native vegetation. Mitchell and Brown (1991) and Young et al. (1996) suggest the following roles for local governments in environmental management:

- they can effectively implement and administer national and State policies in a way that takes account of regional circumstances;

- they can represent their local community in the formulation of policy by higher levels of government; and

- they can effectively integrate national/State objectives and regional considerations in approving development proposals.

The needs assessment undertaken for this study (Binning, Young & Cripps, 1999) supported these findings, particularly emphasising that local councils have a very strong belief in their capacity to deliver government programs 'on the ground' at a local level. Councils also demonstrated a strong understanding of the role of higher levels of government in developing strategic approaches to addressing natural resource management problems on a Statewide or national basis.

In relation to the role of local governments, Bates (1995) comments:

3. The review of legislation contained within the report was up to date as of 30 June 1998. Any changes to legislation after this date have not been included.

Box 1: Model policy tools for native vegetation management

Revenue-raising tools

Environmental levies

Environmental levies have been used in a number of jurisdictions to raise funds for environmental programs. They are typically a flat charge of $15–$40 per household. Funds from a levy may be used to fund land purchases, enter into management agreements with landholders, and provide grants to individuals and community groups undertaking on-ground conservation works.

Financial incentives

Grants to landholders and community groups

Local governments may provide funding to individuals or community groups to undertake conservation works. For example, a farmer may apply for fencing assistance to fence off a high value remnant. The provision of grants is a direct way of the community acknowledging that on-ground works have a public benefit in addition to private benefits. In this way grants and incentives can be considered 'cost-sharing' mechanisms for the conservation of native vegetation.

Rate rebates and concessions

A rebate on rates may be provided to landholders who have agreed to manage an area of remnant vegetation for conservation. In such a scheme, a discount or rebate on the rates payable on that land are given to the landholder.

Property right mechanisms

Land acquisition and revolving funds

Councils may move to acquire key sites of high conservation within the local government area. Rather than retaining these sites, a revolving fund which is used to purchase land on the open market, to place a covenant on the land and then resell the land has the potential to protect land cost-effectively. The covenant is usually one that links the owner and all subsequent owners to the covenant's conditions. As the property right is changed via the covenant, it is more likely that a landowner committed to vegetation management will purchase the land. In this way the market works to identify a landholder willing to manage the land for conservation.

Management agreements

In broad terms, a management agreement is a contract or binding agreement between a landholder and a third party regarding the management of native vegetation on their property. In the case of remnant vegetation, an agreement would generally restrict land uses that are harmful, such as vegetation clearing and over-grazing, and prescribe the management actions required to sustain conservation values in the long term.

This report considers two types of management agreement: land use agreements that are generally related to agreements or development approvals under planning legislation and which are binding on the current landholder; and covenants which are registered on the title of land and hence are guaranteed of being binding on successive landholders and governments.

> Because so many of the problems and solutions…have their roots in local activities, the participation and co-operation of local authorities will be a determining factor in fulfilling their objectives. Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and subnational environmental policies. As the level of governance closest to the people, they play a vital role in educating, mobilising and responding to the public to promote sustainable development.

The merit of a stronger role for local governments in environmental management, including native vegetation management, is now well recognised, both at an international level through the development of Local Agenda 21 (ICLEI, 1996) and at a national level through numerous policy statements, including the Inter-Governmental Agreement on the Environment (Brown, 1994).

1.1.1 Tools available to local government

The central purpose of this report is to evaluate the most effective ways in which local governments can fulfil the vision outlined above of being a key player in environmental management.

To do so they will require access to the full range of tools and policy instruments through which programs for, amongst other things, the conservation of native vegetation, can be successfully delivered. In the past, councils have only been given access to a relatively narrow range of planning tools for environmental management by State governments. However, a wider range of innovative approaches to environmental management, including the use of financial incentives, are beginning to be used by local governments.

In order to understand the mechanisms available to local governments to promote the conservation of native vegetation, it is necessary to understand the powers and functions of local governments. An overview of these powers and functions is provided below.

Powers of local government

Local governments are the third tier of government in Australia after the Commonwealth government and State governments. Interestingly, local governments are not recognised in the Australian Constitution. As a result, local governments are given their powers directly by the State government and, hence, they ultimately remain at the discretion of State legislation (Duncan, 1995; Mitchell and Brown, 1991). Perhaps the best recent example of the dependence of local government on State government is the recent restructuring and amalgamation of Victorian local governments directed by the State government.

Local governments have traditionally been given very restricted powers by States, essentially focused on maintaining local infrastructure. Local Government Acts have generally been structured in a way that means that a specific power has to be given to local government prior to the council undertaking new activities. If responsibility for an activity is not expressly given to local government within the provisions of the relevant Act, each council is effectively precluded from taking the action (Duncan, 1995). Indeed, the traditional role of local government is well summarised by the expression, 'Roads, Rates and Rubbish', which is still widely used today to describe the core functions of local government.

In more recent times, most States have moved to amend local government legislation to provide local governments with more general powers (Duncan, 1995). Queensland is an extreme case, where councils have been given powers as broad as the State, although State legislation still overrides local government laws and actions.

As a result of this broadening of powers, there are a wide range of functions that local governments could play in managing native vegetation. In understanding what roles local governments might play, a distinction can be drawn between the way in which 'core functions' of local governments affect the management of native vegetation and the

capacity for local governments to use other mechanisms which are 'discretionary functions' of local government.

The core functions of local government

Irrespective of a council's attitude towards environmental management, there are a range of important functions that local governments must undertake which have a direct impact on native vegetation. These are the 'core business' of local governments, as they must be undertaken irrespective of whether or not local governments take native vegetation management into account. They include the following roles of local governments.

Planning land use – Local governments are responsible for the development and implementation of detailed land use plans that regulate development within their boundaries by defining zones within which different land uses are permitted. Land use planning processes are the central mechanism through which urban and industrial development is regulated.

Granting development approvals – Development approvals are a central activity of local governments. A development application is required when new works on land are proposed, such as the erection of a building. Whilst projects of statewide or national significance can trigger environment impact assessment processes, it cannot be emphasised strongly enough that councils are directly responsible for a huge volume of smaller scale development approvals. It is councils that are the predominant land use decision-makers in Australia, particularly in urban settings.

Managing Crown lands – Local governments own and manage significant areas of Crown land that may be of high conservation value.

Managing environmental risks – Councils are responsible for the management of environmental risks, including flooding and fire, which may have a direct impact on native vegetation.

Enormous potential lies in encouraging councils to consider the conservation values of native vegetation when undertaking these functions. Indeed, where the main threats to native vegetation are related to these functions, for example, in rapidly developing urban areas, local governments may be in a position to lead the development of approaches to conservation.

The discretionary functions of local government

There are a wide range of other functions which local governments could undertake in managing native vegetation, although there is no requirement for them to do so. The discretionary functions are set out below.

- *Facilitating community involvement* – councils can support the work of community-based groups, such as landcare groups, to undertake on-ground works for native vegetation management.
- *Managing grant and incentive programs* – councils can introduce grant and other incentive programs, such as rate rebates, to promote vegetation conservation on private lands.
- *Providing financial and administrative support* – as councils have professional administrators, they are in a strong position to provide this form of support to regional groups. They act as a revenue collector and administrator of public funds.

Together these core and discretionary functions represent the toolkit available to local governments to conserve native vegetation. The distinction is important as the core functions represent those functions that local governments must perform, irrespective of their attitudes to environmental management. Hence it is critical that local governments perform these functions in a way that will not adversely impact on the achievement of conservation objectives. Whilst of equal importance, the discretionary functions are additional tools which local governments can draw on if they are committed to native vegetation management.

The legal framework within which these functions are performed is the subject matter of this report.

1.2 Overview of the legislative framework

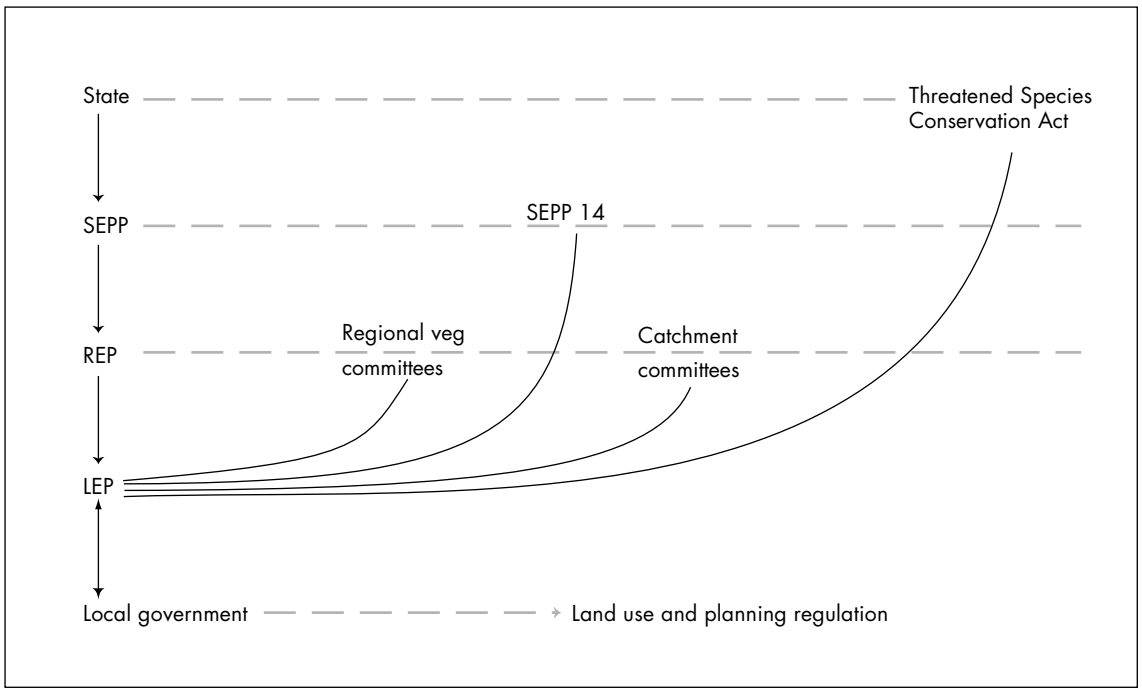
The legal framework within which local governments operate varies from State to State. In general, there is a Local Government Act which creates the local governments in a State and grants them certain powers. Other Acts may add to or restrict these powers. In many instances, local governments will have responsibility primarily under two Acts, the Local Government Act and the Act which addresses the issues of land use and planning. These will outline the core business of a council. Other pieces of legislation will then restrict these powers by removing certain decisions, or by requiring that the local government consult with a State agency. Further powers can be placed on local governments in this way, or through the delegation of State responsibilities to local governments.

All local governments will have some powers to make by-laws (or local laws). This power enables a local government to make a law, which will apply within its jurisdiction, concerning a matter for which a local government has responsibility. In most States this power could be used by local governments to make laws concerning the clearing of vegetation or regulation of clearing.

The land use and planning legislation generally provides for the regulation of land uses depending on the zone in which the land is classified. Land can be characterised as rural, residential, industrial, or as another zone, which may be prescribed by legislation or may be at the discretion of the council. Many councils can act within their land use and planning powers to create a conservation zone in which clearing of vegetation can be regulated.

On face value, the powers given to local governments are very broad-ranging. However, it is important to bear in mind that local government actions are generally constrained by State government policies and legislation. The following diagram indicates the way in which the power of local governments may be restricted by other legislation or State agencies. This diagram is based on the position in New South Wales. It shows the type of framework within which local governments operate. It is important to be aware of and understand this framework as it exists in each State before considering the incentives which a local government may be able to offer.

Figure 1.1: Restrictions on the capacity of local governments in New South wales to regulate land use



Local governments in New South Wales are responsible for land use and planning. In completing their local environmental policy, which is similar to a planning scheme, they must comply with the requirements contained in regional environmental plans and State environmental planning policies (SEPPs), as well as other State legislation. In some States the regional level is missing, however, local governments everywhere are bound by any requirements imposed by State agencies.

In effect, this description reinforces the fact that local governments are ultimately a 'creature of State Government'. As a result, councils are rarely able to undertake any actions which will not ultimately be supported by State governments. It should be noted that the degree of freedom that local governments have in decision-making varies considerably between jurisdictions, with local governments in New South Wales possibly being the most tightly regulated and those in Queensland having the most freedom in the actions they take.

1.3 State-by-State analysis

The following chapters review the legal position of local governments in each State.[4] These chapters outline the position of a council on a State-by-State basis, and include the background from which summaries on various policy instruments in the executive summary is drawn. The State chapters provide the substance for the report. They provide the interpretation and discussion of the legislation which has been relied upon.

The report is based on the legal position in each State as at 30 June 1998. The chapters on New South Wales and Queensland include the recent amendments following the introduction of the *Native Vegetation Conservation Act 1997* (NSW) and the *Integrated Planning Act 1997* (Qld). The chapters on Western Australia, Victoria and Tasmania also state the position including recent developments to the legislation in those States. South Australia is currently undertaking a review of its *Local Government Act 1934*, but only some information has been provided on these proposed changes, with the current position also outlined.

This report does not offer a strict or comprehensive legal interpretation of the legislation as it exists in each State. It offers an interpretation of the legislation focusing on maximising the ability of a local government to actively manage native vegetation. The legislation has generally been interpreted in the way that is most favourable to the desired outcome, that is, increasing the number of policy tools which local governments may offer.

In some instances this involves the interpretation of sections of an Act and the meaning of those sections in a manner beyond the current accepted definition, or where such an interpretation would involve a break with convention. In these cases the definition put forward may go beyond the boundaries of current practice and, therefore, such a definition may be considered unacceptable by the State or, indeed, by local governments themselves.

In this way, each of the State chapters represents the most optimistic reading of the current legislation. It is necessary to recognise that not all of these potential opportunities may be able to be realised in each jurisdiction, and that these interpretations may not be upheld in court. Hence strong policy support will be necessary, with State and Commonwealth governments encouraging local governments to take up new and innovative ways of conserving native vegetation. It may also be necessary for State governments to issue policy statements concerning the interpretation of legislation as it is understood by the government or to amend legislation where required.

The chapters are based on a reading of the legislation that applies in each State and discussions with people who work with that legislation. Drafts of the chapters on each State have been formally circulated to the local government or municipal association, the local government and environment departments in each State and several other interested parties for comment.

4. The Northern Territory and ACT have not been considered in this report, as they do not have established systems of local government.

This report concentrates on the legal capacity of a council. It does not address issues relating to the actual capacity of the council, such as the rate base, or the size of the municipality. These have been considered in a separate report, *Beyond Roads, Rates and Rubbish* (Binning, Young and Cripps, 1999), prepared as part of this study. These reports should be read together to obtain a true reflection of the role and position of local governments in Australia in relation to vegetation conservation.

2. Tasmania

2.1 Legislative framework

Tasmania has no legislative native vegetation clearance controls, and there are no requirements on local governments to consider issues associated with vegetation management. The primary role of local governments in relation to vegetation is as the planning authority for their municipality whereby they control development and zoning of land within their jurisdiction.

Vegetation conservation is addressed more directly through the *Threatened Species Protection Act 1995*. This Act is administered primarily by the Tasmanian Parks and Wildlife Service, however, local governments can also have a role by identifying threatened species within their municipality and encouraging the use of land management agreements under the Act.

Table 2.1 identifies the legislation associated with vegetation management and land use in Tasmania, and which jurisdiction has the primary role under each Act.

How the framework within the legislation outlined in the table influences or impacts on the capacity of local governments to manage native vegetation is illustrated in Figure 2.1. This figure shows the interaction of State and local governments in relation to statutory obligations, emphasising the overriding control of the State government. The primary pieces of legislation which grant local governments general powers and the power to control land use are the *Local Government Act 1993* and the *Land Use Planning and Approvals Act 1993*.

The Local Government Act establishes local governments and grants general powers in relation to rates and by-laws; other specific powers include the power to form joint authorities, purchase property and provide financial assistance. The Land Use Planning and Approvals Act places an obligation on local governments to control land use and development within their municipal area. The process by which a planning scheme is developed is outlined, and includes requirements that the planning scheme be consistent with any State policies, a period of public consultation be provided, and the planning scheme be approved by the Minister before it can become operational. Once implemented, a planning scheme will control all land use and development within the municipality.

Table 2.1: Environmental and land use legislation and implementing jurisdiction

Legislation	Jurisdiction
Conveyancing and Law of Property Act 1884	State
Crown Land Act 1976	State and local government
Environmental Management and Pollution Control Act 1994	State
Forestry Act 1920	State
Forest Practices Act 1985	State
Land Use Planning and Approvals Act 1993	Local government
Local Government Act 1993	Local government
Local Government (Highways) Act 1982	Local government
National Parks and Wildlife Act 1970	State and local government
Private Forests Act 1994	State
Public Land (Administration of Forests) Act 1991	State
Roads and Jetties Act 1935	Local government
State Policies and Projects Act 1993	State
Threatened Species Protection Act 1995	State

However, other State legislation may override local planning decisions made under the Land Use Planning and Approvals Act. Situations where local governments are constrained in land use planning include those where land is:

- part of a critical habitat of a threatened species under the Threatened Species Protection Act;
- a private forest reserve under the *Private Forests Act 1994*;
- required by the Hydro Electric Commission for the provision of services; or
- removed from council control by regulation under the Land Use Planning and Approvals Act.

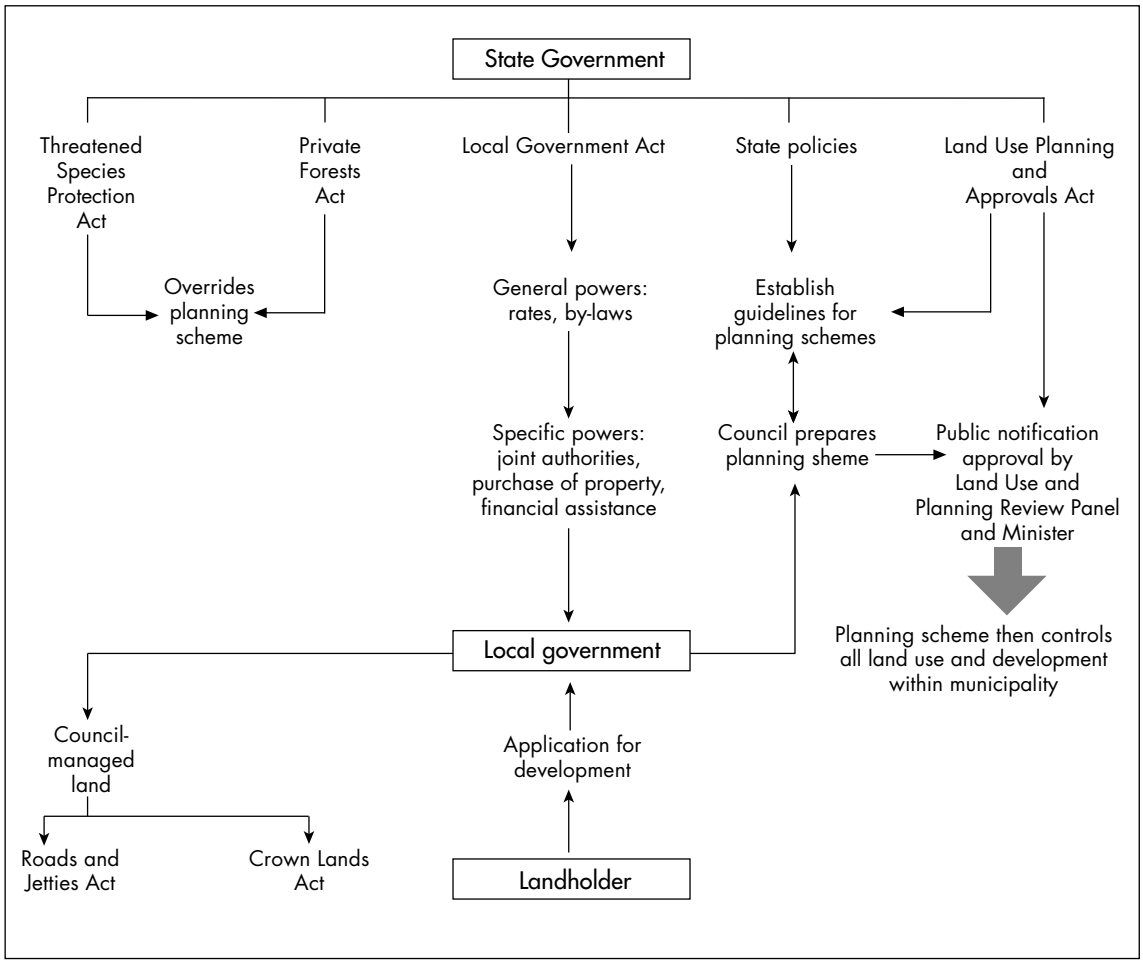
In the last case the State government will override the provisions contained in the planning scheme, and the area is effectively removed from the control of the local governments. Local governments also control areas of Crown land, under the *Crown Land Act 1976*, and have the responsibility to maintain roadsides under the *Roads and Jetties Act 1935*.

2.2 Powers of local government

2.2.1 *Local Government Act 1993*

The Local Government Act provides for the establishment of local governments or councils to plan for, develop and manage municipal areas in the interests of their communities. The Act deals with the formation and powers of councils, elections of councillors, and so on. Other aspects of the Act which are of particular relevance to the issue of native vegetation conservation include the establishment and control of joint authorities, the imposition of rates and charges, by-laws, powers relating to the purchase and lease of property, fencing and land repairs, and the general powers and functions of the council.

Figure 2.1: Role of local government in Tasmania



The general powers and functions of a council are stated in section 20,[5] and are relatively broad powers relating to planning, resource management and effective management of the municipal area. It is therefore possible that this broad grant of power may be used to enable councils to take action to conserve and manage native vegetation. It is, however, important to look at the more specific powers of councils as it is these specific powers which will guide the actions a council may take once it has resolved to act under its general grant of powers.

Establishment and control of joint authorities

Provision is made for two or more councils to establish a joint authority with the Minister's approval (s38). A joint authority can be established '(a) to carry out any scheme, work or undertaking; (b) to provide facilities or services; (c) to perform any function or duty of the councils under this or any other Act' (s38). A joint authority under this section is a corporate body, and has the powers specified in its rules. The rules must include provisions on membership, functions and powers (although these cannot exceed those given to the individual councils), rules of business conduct and financial transactions (s39). Joint authorities are a mechanism through which regional natural resource management planning could occur. *Joint authorities could be appointed to provide assistance and advice on vegetation conservation, manage fencing assistance schemes or manage public land for the purpose of conservation.*

Rates and charges

Section 73 states the ways in which local governments can raise funds. The first of these is '(a) by imposing rates, fees and charges'. In this context, rates are either a general rate, a separate rate, construction rate or service rate.

- A *general rate* is an annual rate which applies to all land, whether or not services are provided by the council. This amount can be based on the land value of the land, the capital value or the assessed annual value of the land (s90). The general rate can have two components: a fixed charge, and an amount based on the value of the rateable land. However, if this is done, the fixed charge must apply equally to all rateable land and cannot exceed a certain amount (s91).

- A *service rate* can be imposed for the provision of services such as water supply, sewage removal, fire protection and '(g) any other prescribed service' (s93). Again, the amount is based on the value of the land. It is also possible for a council to impose a service charge (s94), which is an annual charge for a service as identified in section 93 (that is, water supply, sewage removal, nightsoil removal, waste management, stormwater removal, fire protection and any other prescribed service), as long as that service is provided by the council. In particular, a service charge may be made in respect of the amount of water supplied by the council. The charge must be applied equally to all ratepayers, unless an absolute majority of the council agrees otherwise, based on the use, locality or zoning of the land (s94). *It may be possible to extend the definition of or concept of 'services' to include environmental services*. In this way, the service rate would be similar to an environmental levy, which may be imposed to provide funding for environmental projects. Alternatively, environmental services could be

5. Section 20 (1) 'The council of a municipal area has the following functions: – (a) to formulate, implement and monitor policies, plans and programmes for the provision of appropriate services and facilities to meet the present and future needs of the community; (b) to facilitate and encourage the proper planning and development of the municipal area in the best interests of the community; (c) to manage, improve and develop efficiently and effectively the resources available to the municipal area; (d) to develop, implement and monitor strategic plans for the development and management of the municipal area; (e) to provide for the health, safety and welfare of the community; (f) to represent and promote interests of the community; (g) to provide for the peace, order and good government of the municipal area. (2) In performing its functions, the council may do any one or more of the following either within or outside its municipal area: – (a) develop, implement and monitor programmes to ensure adequate levels of its accountability to the community; (b) develop, implement and monitor effective management systems; (c) develop, implement and monitor procedures for effective consultation between the council and the community; (d) inform the community of its activities and provide reasonable opportunities for involvement in those activities; (e) any other thing necessary or convenient.'

prescribed by regulation and could therefore be imposed under this section.

- A *separate rate* can be imposed 'for the purpose of planning, carrying out, making available, maintaining or improving any thing that is, or is intended to be, of particular benefit' to the land or occupiers (s100). Prior to the implementation of such a rate, there must be public notification, a period in which submissions may be made by ratepayers, and consideration by the council (ss101–106).

It is possible to allow for variation in general or service rates as they are payable by ratepayers. This can only occur if there is an absolute majority supporting the variation in council, and must be based on one or several of the following factors: '(a) the use or predominant use of the land; (b) the non-use of the land; (c) the locality of the land; (d) any planning zone; (e) any other factor approved by the Minister' (s107). *It would therefore be possible for there to be a variation in rates to assist in vegetation conservation. This could be through the land use provisions, or even by allowing the presence of threatened species to be a factor approved by the Minister.* A variation of rates may, however, be more complex to apply than it appears, requiring an absolute majority of the council, and requiring notification and objection processes to be complied with (ss108–109).

The Local Government Act provides for rate relief for urban farm land. It is possible that the concept of rate relief could be extended to apply to land which is covered by a conservation agreement, or is otherwise protected for its conservation value. Urban farm land is land which provides the principal means of livelihood for the landowner, and is used for substantial agriculture, horticulture and so on, and which is increasing in value due to factors of urban spread (s112). Once the land is declared to be urban farm land, it is revalued by the Valuer-General on the basis that the land will not be used for a purpose other than farm land (s115). As rates are based on the value of the land, the rateable amount payable for that land will be decreased. There are, however, requirements that the difference between the amount actually paid and the amount payable if the land was not farm land be paid when the land is sold to a person other than the landholder's family. This concept could be extended to cover land dedicated to vegetation conservation. For example, *if a landholder were to enter into a management agreement with the council, a condition could be that the land would be revalued on the basis that it would not be cleared, and would be maintained and managed purely for vegetation conservation.* The rateable value of the land would then be lower than if the land was not subject to a management agreement, and annual rate charges may be considerably less. This would account for the loss in value of the land from forgone production. This would be an attractive proposition for the conservation of vegetation on the perimeter of urban areas, however, it may not be an effective incentive where the land in question is already zoned as rural, and therefore the rating level is already low.

By-laws

Councils may make by-laws 'in respect of any act, matter or things for which a council has a function or power under this Act or any other Act' (s145). If breached, a by-law may attract a fine of up to $2000 and an infringement notice may be issued (s149). *Councils have powers in respect of land under their control, and could therefore pass by-laws prohibiting certain offences on public land,* such as prohibiting the removal, destruction or interference with native vegetation on public land.

Purchase and lease of property

Councils have power to acquire or purchase land for the benefit of the council or the community (ss175–176). A council can also lease public land to an individual (s179). It may be possible to use these provisions to purchase land for conservation areas, or to lease public land to conservation or other community groups to be managed for vegetation conservation. As these powers exist, it is also feasible that *local governments could establish a revolving fund, where land is purchased, a covenant is placed on it which restricts clearance, and the land is then sold*. However, it may be necessary to demonstrate that vegetation conservation is a public benefit.

Fencing and land repairs

Section 182 of the Local Government Act enables the council to require a landowner to fence their land if a dangerous operation is being carried out on the land, if the land or structures on the land are dangerous for people to enter, or if domestic animals are kept on the land. *It may be possible to amend this section to require a landowner to fence their land or part of their land where there is an area of native vegetation which requires conservation or is the subject of a management agreement*. A later section allows the council to carry out the work if the landowner does not comply with the fencing requirement within the specified time (s185). This, however, is placing the council in the role of a policing body, and it may be better to rely on this section only if a fencing requirement under a management agreement is not complied with.

Section 199 states that anything which is likely to be a fire risk can constitute a nuisance. A council can therefore issue an abatement notice requiring the landowner to clear vegetation it believes contributes to the fire risk. It is unlikely, however, that this would be used in a policy aiming to conserve native vegetation conservation unless it related to the selective removal of exotics.

Financial assistance

Section 77 provides that a council may make a grant or provide a benefit to any person for such purpose as it thinks fit. This power clearly allows for a council to provide grants to individuals or community groups for vegetation management, such as fencing assistance, or for a council to establish a joint authority to provide and administer such a scheme.

2.2.2 *Local Government (Highways) Act 1982*

Section 21 of the Local Government (Highways) Act imposes a *duty on local governments to maintain State highways within their municipality.* In order to carry out this duty, there is power granted which enables local governments to remove trees which may be a danger to traffic on a highway (s38).

However, there is no duty to manage these areas beyond the extent necessary to avoid danger to road-users. It may be possible to use this Act to impose an additional duty on local governments to *manage roadside areas for the purpose of vegetation conservation*. This would ensure that local governments not only maintain State roadsides for safety, but also conserve native vegetation on roadsides. The *Roads and Jetties Act 1935,* which applies to local roads as distinct from State roads, contains a similar provision which allows for the removal of trees. It would similarly be possible for a duty to be imposed on local governments to manage local roadsides for vegetation conservation. Such a duty would greatly expand the area managed for vegetation conservation in Tasmania, as all roadside areas would be the subject of a duty of care for conservation.

2.3 *Land use and planning*

Legislation which relates to land use control is based within the Resource Management and Planning System of Tasmania. The system comprises several pieces of legislation, the *Land Use Planning and Approval Act 1993, State Policies and Projects Act 1993*, *Environmental Management and Pollution Control Act 1994, Resource Management and Planning Appeal Tribunal Act 1993, Threatened Species Protection Act 1995* and the *Public Land (Administration and Forests) Act 1991*. This legislation is related by overarching principles of the system, which are included as a schedule to each piece of legislation. The objectives of the system are broad statements of policy[6] and, as in the case of the Land Use Planning and Approvals Act, are included by stating that: 'It is the obligation of any person on whom a function is imposed or a power is conferred under this Act to perform the function or exercise the power in such a manner as to further the objectives set out in Schedule 1' (s5, Land Use Planning and Approvals Act). These objectives recognise the role of local governments in protecting the environment, and allow for environmental issues to be relevant considerations in determining a planning or development application, and within a planning scheme.

2.3.1 *Land Use Planning and Approvals Act 1993*

The Land Use Planning and Approvals Act is the primary piece of legislation concerned with land use in Tasmania. The Act gives local governments the power to control development within their municipal areas, primarily through the development and implementation of planning schemes. It also provides that a planning authority may enter into management agreements with a landowner for specific matters, and this may enable these agreements to be used in relation to vegetation management.

Planning schemes

Planning schemes are developed by local governments according to the process described in the Land Use Planning and Approvals Act. They are perhaps the most important aspect of the land use and planning scheme in Tasmania. The term 'development', defined in section 3:

> includes:
>
> a. the construction, exterior alteration or exterior decoration of a building;
>
> b. the demolition or removal of a building or works;
>
> c. the construction or carrying out of works;
>
> d. the subdivision or consolidation of land, including buildings or airspace; and
>
> e. the placing or relocation of a building or works on land.

In turn, the term 'works' 'includes any change to the natural or existing condition or topography of land, including removal, destruction or lopping of trees and the *removal of vegetation* or topsoil, but does not include forest practices, as defined in the *Forest Practices Act 1985*, and carried out in State forests' (emphasis added). It is important to consider these definitions when considering the purpose for which a planning scheme can be developed and implemented.

Under section 20, a planning scheme may regulate or prohibit the use or development of any land, and provide that any use or development of land is conditional on an agreement being entered into with a relevant agency. It is therefore possible that a planning scheme, in the regulation of development, may be able to regulate vegetation clearance where it amounts to 'works'. Planning schemes generally provide for the zoning of land, and specify which land uses can occur in certain areas; it is also possible for a planning scheme to control lot size and restrict removal of trees. In general, there will be land in which certain types of uses are permitted, discretionary or prohibited. If the use is permitted or discretionary, development approval may still need to be sought from the council, and conditions on that approval may be imposed where the use is discretionary. In general, the determination of zones and the development of a planning scheme will initially be done by the council. However, public consultation and periods for public comment are required, and prior to entering into force, a planning scheme must be approved by the Land Use and Planning Review Panel, subject to ministerial approval (see ss20–30). Once a planning scheme is in place, it is possible to amend the scheme, and a process similar to that for developing a scheme must be followed.

6. Land Use Planning and Approvals Act, Schedule 1, Part I '1. The objectives of the resource management and planning system of Tasmania are – (a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and (b) to provide for the fair, orderly and sustainable use and development of air, land and water; and (c) to encourage public involvement in resource management and planning; and (d) to facilitate economic development in accordance with the objectives set out in paragraphs (a), (b) and (c); and (e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.' '2. In clause 1(a), "sustainable development" means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while – (a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and (c) avoiding, remedying or mitigating any adverse effects of activities on the environment.'

Where a landowner wishes to develop their land, a permit will usually be required.[7] If the development is discretionary, the council may approve the development, or approve it with certain conditions. *It would be possible to attach conditions regarding vegetation clearance or conservation to a development approval. Similarly, it would be possible for all planning schemes to make native vegetation clearance a discretionary development, and therefore ensure that vegetation clearance is controlled as a 'development'.*

A recent amendment to the City of Hobart Planning Scheme 1982 introduces controls over the clearing of vegetation and removal of significant trees. Approval is needed to remove or destroy vegetation on an area of over 500 square metres on any one lot within two consecutive years. Approval is also needed to remove any of the listed significant trees. These amendments clearly illustrate one way in which a local government can be actively involved in controlling vegetation clearance. Amendment to introduce control over all areas is possible.

Landowner agreements

Section 71 allows a planning authority (a local government authority or a marine authority) to enter into an agreement with a landowner concerning land within the area covered by that authority's planning scheme. It is possible, for example, for the Department of Environment and Land Management to enter into such an agreement jointly with the planning authority and landowner (s71(3)). The agreement is binding once it is executed and may provide for any one or more of the following matters:

a. the prohibition, restriction or regulation of use or development;

b. the conditions subject to which the use or development may be undertaken;

c. any matter intended to achieve or advance –
(i) the objectives listed in Schedule 1; or
(ii) any State Policy...; or
(iii) the objectives of the planning scheme or interim order…;

d. any matter incidental to any one or more of the matters referred to in paragraphs (a) to (c).

It is possible therefore for the agreement to relate to vegetation conservation and land clearing, either by relating it to the objectives of the resource management and planning system or by making it a condition of development.[8] An agreement may also require the payment of a certain amount in association with an undertaking to carry out the terms of the agreement, which may be forfeited if the landowner defaults on the agreement (s73). Such agreements may end on a specified date, on the cessation of a use or development (s74), or by the agreement of all parties. The agreement must not breach the planning scheme, and must be lodged with the Land Use and Planning Review Panel. The Land Use Planning and Approvals Act further provides that the planning authority may lodge an executed copy of the agreement with the Recorder of Titles, which will then be registered on the title of the land (s78) and will be binding on successive landowners, and enforceable by the Crown. The landowner can, however, apply to the Resource Management and Planning Appeal Tribunal to amend a proposed agreement (s80).

It may be possible to use this section where an application is made for development approval. For example, if a landowner wished to develop part of their property, *it may be possible for a council to grant approval subject to the condition that a management agreement be entered into under section 71; the agreement providing for the registering of a covenant on the title prohibiting clearing of the remaining vegetation.*

7. In some instances, the zoning of the land may provide that, for example, farm sheds may only require building approval where the land is zoned 'rural', and will not require additional development approval.

8. References in Hansard suggest that this section was initially intended to be used for agreements relating to the provision of infrastructure, however, it was acknowledged that it could be used for conservation agreements (House of Representatives, *Tasmanian Hansard*, 11 May 1993 at 2301).

2.3.2 *State Policies and Projects Act 1993*

The objectives of the Resource Management and Planning System of Tasmania are also included in Schedule 1 of the State Policies and Projects Act. The Act allows for the preparation and operation of State policies where there is a matter of State significance, where a consistent and coordinated approach is necessary throughout the State, and where the policy will further the objectives of Schedule 1. It is therefore possible that *a State policy could be developed in relation to vegetation conservation. Once a State policy is made, all planning authorities must amend their planning schemes so that they are consistent with the policy.* Any inconsistencies will be invalid to the extent of the inconsistency (s13). Effectively, a State policy will be the framework of policy considerations, which each planning authority must apply to their region. Provisions exist for enforcement of policies and fining of people who fail to comply with a policy.

The State Coastal Policy has been implemented under the State Policies and Projects Act. Its principles include recognising the importance of maintaining 'representative or significant natural ecosystems and sites of biological importance and the biodiversity of Tasmania's indigenous coastal flora and fauna…' It also recognises that the integrated management of the coastal zone is a shared responsibility, and that the outcomes of the policy are the protection of the natural and cultural values of the coastal zone, including ecological features, conservation of the diversity of species, management of exotics and protection of representative ecosystems. This policy therefore means that local planning authorities in coastal areas should have amended their planning schemes so that they provide for conservation of the diversity of species, management of exotics and protection of representative ecosystems.

In practice, planning authorities are able therefore to take actions, such as imposing conditions on development approvals, or rezoning land to protect representative communities to meet the objectives of the State policy. It is interesting to note that the Tasmanian Public Land Use Commission (1997a, p. 17) considers that the development of a State policy on rural land use 'would provide the best framework to address native vegetation management and sustainable development objectives, rather than the introduction of clearance legislation'.

A State Policy on Water Quality Management was approved in 1997. Although aimed primarily at water quality control, it contains some provisions which may be relevant to vegetation conservation. It is also interesting to note that it states economic instruments should be considered as a possible means of achieving the policy objectives. The incentives mentioned include rate relief and grants for innovation. The policy is more relevant to vegetation in its provisions concerning water run-off and erosion from land disturbance, requiring implementation of strategies to define and encourage retention of streamside buffer strips, with consideration of incentives to improve management of streamside vegetation. These provisions could easily be used to encourage conservation of native streamside vegetation.[9]

The State Policies and Projects Act also provides for the declaration of projects of State significance. Once a project is declared a State project, the administration of development and permit applications is removed from the local authorities, and the development application is considered by the Sustainable Development Advisory Council established under the Act, and the Minister administering the Act. However, the project will still be bound by the objectives of the Resource Management and Planning System and State policies, and would therefore still have to comply with a State policy on vegetation conservation.

2.3.3 *Crown Land Act 1976*

It is important to consider the position of Crown land, in particular Crown land which is directly managed by a local government or which has been leased by them for some purpose. Crown land is defined as 'land which is vested in the Crown ...'

9. There is also a draft State Policy for the Protection of Agricultural Land, which aims to ensure that prime agricultural land is not subdivided for purposes other than agriculture.

(s2). Section 46 outlines offences relating to Crown land, which include cutting, taking, removing or damaging any trees or vegetation. These offences are punishable by way of a fine. The Crown Land Act also makes provisions for the leasing of land for industrial, business, residential or other purposes, and rural purposes (s30 – industrial, residential, s31 – rural). These leases can contain conditions which, if breached, may lead to the termination of the lease (s36). It may be possible for clauses to be inserted into a lease pertaining to vegetation conservation.

There are also provisions under the Act for the declaration by the Minister of Crown land to be a reserve for several purposes, including for 's8 (1)(f) the preservation of water-supply and land conservation'. It is possible for the Minister to lease this land on such conditions as the Minister thinks fit, as long as it complies with the purpose for which the land was reserved (s8(2)). As these reserves can be created by a declaration by the Minister, they are relatively easy to create, however, they are less secure, requiring only a declaration to remove their reserve status. It would be possible to use this provision to declare Crown land a conservation reserve, for example, which would then restrict the types of activity which could occur on that land, and provide for additional offences for damage to the vegetation.

2.3.4 *Forestry Act 1920*

The Forestry Act allows for two main classifications of land, State forest and forest reserve. Any public land can be declared State forest, including land, which is covered by other legislation such as conservation areas and State reserves under the *National Parks and Wildlife Act 1970*. State forests can be declared multiple-use forest land, which means that it is available for timber production, or it can be declared deferred forest land, which means that logging is prohibited. Revocation of the status of State forest or the declaration of deferred forest land requires a proclamation to that effect by the Governor, based on the approval of both Houses of Parliament. Forest reserves can include State forests, and are areas that are set aside for public recreation, protection of aesthetic, scientific or other values, or the protection of flora or fauna. As with State forests, the approval of both Houses of Parliament is needed before this classification can be revoked.[10]

2.4 *Other relevant legislation*

2.4.1 *Conveyancing and Law of Property Act 1884*

Recent amendments to the Conveyancing and Law of Property Act allow for the creation of covenants in gross. A covenant in gross is a covenant between a landowner and the Crown or local authority. As stated in section 90AB:

> (1) ...a covenant...may be created in favour of the Crown or of any public authority or local authority constituted under any Act. (2) A covenant in gross is enforceable between the parties to it, and any person deriving title under any such party.

A covenant can be entered into by a landholder and will be binding on successive title holders. Once agreed to, a covenant can be registered on the title. Covenants are generally restrictive in nature, that is, they restrict clearance rather than allowing conservation.

2.4.2 *Forest Practices Act 1985*

The Forest Practices Act provides for the implementation of the Forest Practices Code, which sets the standards for forest practice on public and private land. The code addresses issues such as conservation and environmental protection provisions for soils, water quality, biodiversity and site productivity. The Act prohibits the harvesting of timber for commercial purposes from land where there is not an approved timber harvesting plan. The plan must be drawn up in accordance with the Forest Practices Code, which requires the conservation value to be taken into account, and provides for site remediation to avoid any significant degradation. Once a timber harvesting plan has been prepared, it must be submitted to the Forest Practices Board for approval. Part of the

10. For further discussion of these classifications, see Tasmanian Public Land Use Commission, *Inquiry into Areas to be Reserved under the Tasmania-Commonwealth Regional Forest Agreement, Background Report Part A*, July 1996.

approval process is to identify whether or not there are any significant conservation values or threats to sustainable management, which may be affected by the logging activities. If not, the plan will be approved. If it is not approved, it may require modification prior to approval, or may be completely rejected, in which case an application may be made for compensation under the National Parks and Wildlife Act.[11]

2.4.3 *Private Forests Act 1991*

A statutory authority, Private Forests Tasmania, is established under the Private Forests Act (s4) to provide advice to private forest managers on sustainable forest management, marketing and other such matters (s6). Private Forests Tasmania also processes applications for the declaration of land to be a private timber reserve for the purpose of growing and harvesting timber. Once declared a private timber reserve, the area is no longer subject to the requirements of the Environmental Management and Pollution Control Act and it is effectively removed from the regulation of local governments through the planning scheme. Local government authorities who have jurisdiction over the land or a person with a legal interest in the land can object to the declaration, and then will have a right of appeal from the decision. It may be possible therefore for a local government to object to the declaration of land as a private timber reserve on the basis that it would be contrary to the vegetation management policies of the council. Despite this, however, the role of local governments in relation to the management of commercial forests is limited.

The Private Forests Act also provides for financial assistance for the purpose of sustainable land management. An agreement which outlines the amount and terms of the assistance may include a covenant that the land is not to be used for purposes other than forestry, unless otherwise provided for in the agreement (s33). This would override a local government's control over the use of the land for the duration of the covenant.

2.4.4 *Public Land (Administration of Forests) Act 1991*

The Public Land (Administration of Forests) Act included the recent amendments to the Forestry Act, Forest Practices Act and National Parks and Wildlife Act. The Act also creates the Public Land Use Commission, with powers to review the system of land use in Tasmania. The commission has prepared several reports on land classification in Tasmania, which have included recommendations on the restructuring of the land classification system. These recommendations have yet to be implemented.

2.4.5 *National Parks and Wildlife Act 1970*

The National Parks and Wildlife Act provides for the creation of *reserves on Crown and private land*. Section 13 outlines the purposes for which land may be reserved, and includes 'the preservation or protection of the fauna or flora contained therein, or of any such flora or fauna'. The reserves proclaimed under the Act include conservation areas, local reserves, private reserves or game reserves. Further division is then possible, with up to nine different names for the reserve possible.[12] If the reserve is to be created on private land, the consent of the landowner is necessary (s14). Such a reserve, once it is proclaimed, must be registered with the Recorder of Titles on the title to the property. The proclamation and reservation of private land can be revoked by a declaration by the Governor. Reserves on Crown land are abolished in a similar way, except that the approval of both Houses of Parliament is required (s16).

The proclamation of an area to be a *private reserve* does not impose specific requirements on the landowner. This is different to public reserves,

11. For more detail on forest practices see Tasmanian Public Land Use Commission, *Inquiry into Areas to be Reserved under the Tasmania-Commonwealth Regional Forest Agreement, Background Report Part F*, November 1996, in particular, Figure 1, p. 40. Only basic details have been included in this review as the focus of the review is local government involvement and powers in relation to vegetation conservation, and the role of local governments in respect to forestry is limited.

12. Conservation area, State reserve, game reserve, nature reserve, national park, historic site, Aboriginal site, wildlife sanctuary and muttonbird reserve. For Department of Environment and Land Management definitions of these reserves, see Tasmanian Public Land Use Commission (1997a).

where National Parks and Wildlife Regulations apply.[13] For either type of reserve, however, the Act provides for the preparation of a management plan, which may regulate the use and development of the land (s19). The plan needs the approval of the Governor, and the consent of the landowner where it applies to privately owned land. A management plan may indicate the purposes for which the land is reserved, and indicate or restrict the ways in which powers relating to the land may be exercised, and may indicate the extent to which a private landowner may be bound by regulations relating to reserves (s21). It may be possible for a local authority to be involved and comment on a management plan, and the plan may affect the statutory powers of the authority, for example, by restricting land use, which would impose on a council's power to prepare planning schemes (s20(2A)).

The Tasmanian Public Land Use Commission discussion paper, *Mechanisms for Achieving Conservation Management on Private Forested Land: A Discussion Paper* (1996b, pp. 38–39), notes: 'the management plan provides management guidance for the sanctuary and for a binding management agreement on the land title and subsequent landholders'. And further, that 'currently there are 41 wildlife sanctuaries and nine of these have either statutory management plans or draft plans'.

The Public Land (Administration of Forests) Act contains substantial amendments to the National Parks and Wildlife Act. Part VA was inserted, which allows for the creation of *conservation covenants* in relation to land for which approval is sought for a timber harvesting plan under the Forest Practices Act. Where the timber harvesting plan is approved, with amendments to deal with the protection of an endangered species, or where a plan is rejected on the basis of the presence of an endangered species, the Minister, on behalf of the Crown, may enter into a conservation covenant in regard to that land. Such a covenant may include requirements for a management plan and other such provisions or restrictions on land use. Provisions for compensation can also be included in the covenant (s37B).[14] These conservation covenants are binding and can be enforced by any party or successive title holders. They can be discharged or varied by the Minister with the agreement of the landowner and, once they are registered on the title, they also become binding (ss37G–37H).[15]

2.4.6 *Threatened Species Protection Act 1995*

The Threatened Species Protection Act is primarily concerned with the *protection of species of flora and fauna which are classified as endangered, vulnerable or rare.* Once again, the powers under the Act must be exercised so as to further the objectives in Schedule 1, which include the objectives of the Resource Management and Planning System of Tasmania, and the objectives of the Threatened Species Protection System. The objectives of the latter system include educating the community on the conservation of native flora and fauna, and encouraging cooperative management of native flora and fauna. The more specific provisions of the Act provide for the protection of the critical habitat of the listed species. The critical habitat is the whole or any part of the habitat of a listed species which is critical for its survival (s23). The area is determined by the Director of Parks and Wildlife, and the owners of any private land which is included within the critical habitat must be notified. The Recorder of Titles will then record the area on the relevant titles (s23). There are also provisions under the Act for the preparation of a *land management plan to protect a listed species;*[16] such a plan must be prepared within a certain period of time of the determination of a critical

13. Anecdotal evidence, however, suggests that these are not consistently enforced.

14. As of September 1997, no conservation covenants had been entered into (Ashley Fuller, Tasmanian Public Land Use Commission, 1998, pers. comm.).

15. A flow diagram of the process which must be followed prior to entering into a conservation covenant is shown in Tasmanian Public Land Use Commission (1996b).

16. As of September 1997, two flora management plans were being negotiated under this provision (Ashley Fuller, Tasmanian Public Land Use Commission, 1998, pers. comm.).

habitat. The plan can specify actions to be taken by the landowner, the Director or any other person. The plan must be reviewed after five years (s29). The Director can then enter into an agreement concerning the carrying out of works, or in relation to compensation with the affected landowner. Agreements can also be made by the Director with a public authority, such as a local government, for the management of a listed species (s31). Although it is not stated in the legislation, it would appear that this section would apply in relation to Crown land.

This Act also contains measures for the issuing of *interim protection orders* to protect a species or its critical habitat. Such an order is made by the Minister and can include prohibitions or regulation of activities which take place on the land, or the use of the land (ss32–33). These orders do not have to be made with the approval of the landowner, but are only in force for a limited period of time (s32). An interim protection order prevails over the requirements of a planning scheme, and therefore removes the control of land use in this respect from local government (s39). Permits may be issued to undertake specified activities on land subject to an order.

There are provisions within the Act for the payment of compensation to a landowner who has suffered financial loss directly as a result of a land management agreement or an interim protection order (s45). An application for compensation must be made to the Minister, and is paid from a Threatened Species Fund which is established under the Act (s44).

The Act contains a potentially very broad section of offences relating to listed flora and fauna. Section 51 states that:

> a person must not knowingly, without a permit:
>
> a. take, trade in, keep or process any listed flora or fauna;
>
> b. disturb any listed flora or fauna contrary to a land management agreement; or
>
> c. disturb any listed flora or fauna that are subject to a conservation covenant made under section 37B of the *National Parks and Wildlife Act…*

Criminal sanctions are specified for these offences.

2.4.7 *Environmental Management and Pollution Control Act 1994*

The Environmental Management and Pollution Control Act may have some application in regard to vegetation conservation. The Act will generally apply where there is some form or threat of environmental harm, which is defined in section 5 as 'any adverse effect on the environment (of whatever degree or duration) and includes environmental nuisance'. Environmental harm is then divided into serious environmental harm and material environmental harm. Applications to councils relating to certain activities (which are classed as level 1, level 2, or level 3 activities) must comply to varying degrees with the requirements of the Act for assessment of possible harm. Approval may be granted on condition that the Board of Environmental Management and Pollution Control enters into an environmental agreement with the operator of premises or landowner (s28). *Environmental agreements* 'may be made in respect of individual operations, premises, areas or regions and may apply to industry or activity groups' (s28(2)). For example, they could be entered into with the operator of a mining operation, and could require revegetation of the site and protection of certain areas of vegetation. Although councils may request that an agreement be entered into by the board, and must pass applications in regard to level 2 and level 3[17] activities to the Board of Environmental Management and Pollution Control, they are otherwise excluded from the operation of the Act. The Director of the board may also require that level 1 activities be forwarded to the board for consideration (ss25–27).

17. Section 3 of the Act states that a level 1 activity 'means an activity which may cause environmental harm and in respect of which a permit under the *Land Use Planning and Approvals Act 1993* is required but does not include a level 2 activity or a level 3 activity;' a level 2 activity 'means an activity specified in Schedule 2;' for example, mines, quarries, woodchip mills, chemical works and so on; and a level 3 activity 'means an activity which is a project of State significance under the *State Policies and Projects Act 1993*'.

The Environmental Management and Pollution Control Act has limited relevance to local governments, beyond requiring them to pass certain types of applications for development onto the Board for consideration. It may, however, still be possible for the Act to be used to assist with vegetation conservation. *If the concept of environmental harm were interpreted to include clearing of native vegetation* (for example, in relation to loss of biodiversity), *then more applications would need to be considered by the board, and it may be possible to use this to require landowners to enter into environmental agreements to manage the native vegetation.*

2.5 Summary of opportunities

Most of the incentives considered in this report are already available in Tasmania under existing legislation.

The main recommendation, therefore, is for strong policy support and encouragement from all levels of government. In particular, local governments need to be encouraged to consider entering into management agreements with landholders as part of development approvals, and to offer grant schemes for vegetation conservation. Table 2.2 outlines these opportunities and the position of other powers of a local government which may influence vegetation conservation and management. By-laws and the formation of joint authorities provide ways in which native vegetation on council-owned and council-managed land can be protected, and planning for vegetation management can occur on a regional level.

It is clear that within existing legislation local governments in Tasmania are able to take a role in the conservation of native vegetation. However, it is equally important to recognise that legislative changes, such as those outlined above, would greatly increase the range of incentives which a local government may be able to offer.

Table 2.2: Opportunities available to local governments to offer incentives for vegetation conservation

Incentive	Amendment
Environmental levy	Amend definition of service in the Local Government Act (s93) to include environmental services; or pass regulation to make the environment a service within the meaning of section 93
Management agreement	Clarify that management agreements under the Land Use Planning and Approvals Act (s71) can be used for vegetation management Policy support/encouragement
Covenant	N/A as can already be offered by local governments
Grants to individuals and community groups	N/A as can already be offered by local governments
Rate rebates	Extend the rate relief scheme for urban farm land to conservation land under the Local Government Act (s112)
Acquisition and sale of land	Clarify that it is possible to resell land
By-laws	Encourage local governments to pass by-laws protecting native vegetation on council-owned and council-managed land
Joint authorities	Encourage local governments to form joint authorities for the purpose of vegetation planning on a regional level

3. Queensland

3.1 Legislative framework

The Queensland position on vegetation conservation and management shows a clear distinction between freehold and leasehold land. With 78% of the State being under lease, the provisions relating to leasehold land are significant. However, many important ecosystems are only found in the coastal regions, which are almost exclusively freehold and where the majority of the Queensland population live. It is therefore important to consider the provisions relating to both freehold and leasehold land.

The role of local government and its powers are broad and relatively undefined, for example, the *Local Government Act 1993* grants local government the jurisdiction to make local laws for, and otherwise ensure the good rule and government of, its territorial unit (s25). This includes the jurisdiction to make local laws with respect to any matter required or permitted to be prescribed under the Local Government Act *or any other Act,* or necessary or convenient to be prescribed or exercised for carrying out or giving effect to its local laws (s26). The only restriction on this grant of power is that a local government has no jurisdiction to do anything which the State also lacks the jurisdiction to do, or to make a local law that Parliament would not make. Any local law that is inconsistent with a State law will also be invalid to the extent of the inconsistency.

This broad grant of power enables local government to potentially have a dominant role in vegetation conservation and management. It must, however, be viewed in context. The actual extent of local government's work on these issues depends also on whether it is perceived to form part of the 'core business' of the local government, or whether it is seen as a discretionary 'extra'. Local governments have the power to encourage vegetation conservation through the implementation of incentive-based instruments, such as a differential rating system based on the conservation status of the land. However, this is a discretionary exercise of power and is not a requirement which must be implemented (Local Government Act, ss561–562 and 572–574).

It is useful to consider these distinctions when considering the position in Queensland. Table 3.1 identifies legislation important to vegetation management in Queensland and the jurisdiction, with the primary implementation role under the Act.

Table 3.1: Environmental and land use legislation and implementing jurisdiction

Legislation	Jurisdiction
Coastal Protection and Management Act 1995	State and local government
Environmental Protection Act 1994	State and local government
Forestry Act 1959	State
Integrated Planning Act 1997	State and local government
Integrated Resort Development Act 1987	State
Land Act 1994	State
Local Government Act 1993	Local government
Nature Conservation Act 1992	State
Soil Conservation Act 1986	State
State and Regional Planning and Development Act 1971	State
Transport Infrastructure Act 1994	State
Water Resources Act 1989	State

Queensland has recently reviewed their land use and planning legislation. This review culminated in the passing of the *Integrated Planning Act 1997,* which commenced operation on 1 April 1998.

3.2 Powers of local government

The Local Government Act provides the source for the powers granted to local governments. This is a broad grant of power, which may be restricted by provisions in other legislation.

3.2.1 Local Government Act 1993

The Local Government Act contains a broad and general grant of power to local governments in Queensland. A local government has jurisdiction to make local laws for the good rule of its territorial unit, and to otherwise ensure good rule and government (s25). This includes the jurisdiction to make local laws with respect to any matter required or permitted to be prescribed under the Local Government Act or any other Act, or necessary or convenient to be prescribed or exercised for carrying out or giving effect to its local laws (s26). The only limit on this jurisdiction is that a local government does not have any power to make a law that the Queensland Parliament could not make, or to do anything which the State government has no power to do (s30). Essentially, *local governments have the power to do anything that the State government can do and could, if desired, pass local laws enforcing or enacting vegetation conservation,* either directly or in relation to existing State legislation. This means that local governments could, if willing, introduce a broad range of incentives for promoting vegetation management and conservation. A range of councils in south-east Queensland are currently using incentive-based instruments to address native vegetation issues.

The above, however, must be clarified. The State government can override a local law where it is in the interests of the State to do so (s112), a local government can exercise State powers where these are delegated by legislation, and State law will override a local law to the extent of any inconsistency between a State and local law (s31).

Establishment of joint authorities

Part 2 of the Local Government Act provides that joint local governments can be established by regulation. Where this is done, the joint local government has all the powers of an individual local government, except that it has no power to make a rate or levy payable on land (s51). It is possible for local governments to work together without requiring regulations to establish a joint local government. Section 59 provides that a local government can make arrangements with other local governments to extend its jurisdiction into other local government areas. These sections could be used *where a regional approach to vegetation conservation was needed, either with the local governments working together until the required regulations were passed or as an alternative until joint arrangement prescribed by regulation were determined.*

Rates and charges

When considering the issue of rates and charges, the importance and effect of land tenure becomes apparent. Section 533 provides that all land is rateable except:

- vacant State land;[18]
- land occupied by the State or a State entity, except land which is leased from a private person;
- land in a State forest or timber reserve other than land occupied under an occupation permit or stock grazing permit under the *Forestry Act 1959* or the *Land Act 1994*;
- Aboriginal and Torres Strait Islander land under Aboriginal and Torres Strait Islander land Acts other than land used for commercial or residential purposes;
- certain land under the *Transport Infrastructure Act 1994*; and

18. Crown land is referred to as State land in Queensland.

- land exempt from rating under an Act or regulation made under this Act, such as land used for religious or educational purposes.

This means that rateable land includes leasehold land which is used for residential or stock grazing purposes or occupied under an occupation permit, freehold land, and land occupied by the State which is leased from a private person.

Local governments can impose on rateable land a levy, general rate, differential general rate, separate rate or charge, special rate or charge, or a utility charge (s559). A rate or charge can only be made for a financial year and requires a resolution of the council at the local government's annual budget meeting (s560). The Act further requires that the local government must make a general rate or differential general rate for each financial year (s561).

Differential general rates are applied where land within a municipality is to be rated according to the classification of that land by the council, for example, rural land may be charged at one level, and urban land may be charged at another level. As far as we are aware, the classifications for rating do not have to be the same as the land use zoning provisions. Before these rates can be charged, the local government must have approved the classification of land into at least two categories (s562). *It may be possible to implement a differential rate on the basis of the conservation status of the land to encourage a landowner to conserve and manage the vegetation on their land.*

The Local Government Act also provides that a local government may remit the whole or part of unpaid rates, or accept another arrangement for unpaid rates (s627). This power may only be exercised in certain circumstances. One instance in which it may be exercised is for the preservation, restoration or maintenance of structures or places of cultural, environmental, historic, heritage or scientific significance to the local government's area. It can also be used for any factor prescribed by regulation. It would clearly be possible to use this power to *provide a rate rebate on the basis of the environmental value of the vegetation to the area. For example, the areas of vegetation which are protected by a management agreement, or a restrictive covenant on the use of the land, may be eligible for a rate rebate of a certain amount.*

In addition to differential rates, a local government can make and levy a *special rate or charge* on rateable land if the rate or charge is for a service, facility or activity and, in the opinion of the local government, the land has or will specially benefit from or will have special access to the service, facility or activity. A special rate or charge can be made and levied on the bases the local government considers appropriate, and the amount charged can vary depending on the extent to which land will benefit from the rate. Before such a rate or charge can be implemented, however, there must be a resolution of council making the rate or charge, and identifying the land to which it will apply (s567). *Environmental levies may possibly be levied under this section. It would have to be demonstrated, however, that the levy is for a service, facility or activity which provides a special benefit to that land.* A general environmental levy may not be able to fit this criteria. As levies are already imposed in some local government areas in Queensland, legislative amendment to clarify the position of a levy would be advisable. Alternatively, section 563, which allows a local government to identify rateable land for the purpose of making a levy in any way it considers appropriate, could be relied upon.

Roads

Section 497 grants local governments the control of all roads within their area. This includes the capacity to take all necessary steps for construction, maintenance and improvement of roads. Although there is no specific reference to the management of roadside vegetation, given the broad general grant of power to local governments, it would appear that this power, in conjunction with that granted by section 497, would be sufficient for *local governments to regulate the use of and impacts on roadside vegetation.*

3.2.2 *Transport Infrastructure Act 1994*

Section 26 of the Transport Infrastructure Act grants the Chief Executive of the Department of Transport

the same powers over State roads as local government has over local government-controlled roads. The State can also enter into an agreement with local governments to carry out work on a local road (s27), and a local government can exercise, for a State-controlled road in its area, all the powers that it may exercise for a local road within its area (s43). This would appear to mean that both the State and local government may exercise some control over the roads within a municipality. It may be possible for the State to use this power to implement a roadside vegetation conservation program, which could then be taken over by the local government, or continued by the State government where the local government lacks the resources to continue such a program.

3.3 Land use and planning

3.3.1 *Integrated Planning Act 1997*

The Integrated Planning Act was passed by Parliament in December 1997 and entered into force on 1 April 1998. This Act aims 'to seek to achieve ecological sustainability through coordinated planning, and the management of development and its effects on the environment' (s1.2.1). The Act repeals the Local Government (Planning and Environment) Act. It provides a basis for coordinating and integrating local, regional and State level planning into local government planning schemes, and therefore makes local planning schemes the central mechanism for planning control. The Act binds both State and local government and all other persons in Queensland (s1.5.1). This is important when considering the large areas of Queensland which are leasehold land.

It is interesting to note that the term 'development' used in the Integrated Planning Act does not include changes to the environment. It is primarily concerned with building works, plumbing, subdivision and operational work. Operational work is itself defined to include 'planting trees or managing, felling and removing standing timber for an ongoing forestry business' and specifically excludes removing or destroying vegetation. Vegetation clearance is therefore expressly excluded and vegetation management is not included within this Act. In effect, this will make it more difficult for local governments to act to conserve remnant vegetation.

The Act provides for protection of existing use rights and prevents retrospective legislation or regulations affecting those rights. Chapter 1, Part 4, states that an existing use, or existing right to a use, is protected and cannot be amended or removed by an instrument under the Act. Protection of existing uses is a standard provision within most planning law. For example, if a person applies for and is granted planning approval for a development which has commenced but not been completed, this approval will still exist even if a new planning scheme provides that the development is illegal in that area. However, the provisions under the Act go further than this, to protect the right to undertake a certain use on that land, even where that right has not yet been exercised. For example, if a block of land is zoned so that residential dwellings are permitted and a permit has been issued allowing the development, it will still be permitted even if the land is rezoned so that residential dwellings are discretionary, despite the fact that the building, and therefore the use, has not yet commenced. This right is protected for a period of four years, unless otherwise stated in the development approval.

There are also provisions concerning compensation which provide that a local government may be required to pay compensation to a landowner if a change to a planning scheme or planning scheme policy reduces the value of the landholder's interest or, because of such a change, the land can only be used for community infrastructure.

In summary, the new provisions relating to existing use rights and the right to compensation may well act as disincentives to local government involvement in vegetation management and conservation. The risks of rezoning land and the possibility of paying compensation to landowners may well encourage local governments to avoid such steps.

Concern has been expressed about the terms of this Act, with an overriding concern that the environment may be more adversely affected under the Act than it was under previous legislation. These concerns relate, in particular, to the impact

assessment provisions contained in the Act, which do not include specific reference to the impact of the development on the environment. These assessments are carried out by a local government, or the Minister if the development is outside the jurisdiction of a local government (ss3.5.5 and 3.1.7).

The Act provides for integrated planning at a local, State and regional level for the purpose of ecological sustainability (s1.2.1). Ecological sustainability includes the protection of biological diversity (s1.3.6).

The Act also provides for the preparation of State planning policies which deal with matters of State interest (s2.4.1). These policies will apply to all land within the State unless otherwise stated (s2.4.2). Local governments can also make local planning schemes, however, they must be consistent with the Act and integrate any State or regional matters. They can also include environmental objectives and performance indicators (s2.1.3). The core matters which can be included in a planning scheme include land uses and development, infrastructure, and valuable features such as 'resources or areas that are of ecological significance (such as habitats…places supporting biological diversity…)' (Schedule 1, s4).

Schedule 1 outlines the procedures which must be followed when preparing a planning scheme. This includes the following stages: preliminary consultation and preparation, consideration of State interests, final consultation and adoption.

Once a planning scheme has been accepted for an area, the Minister or local government may propose an amendment to the scheme. Where this is done, the same process as for making a planning scheme must be followed (s2.1.5).

When an application is made to a local government to approve a development, it may be either an exempt development, a self-assessable development or an assessable development (s3.1.2). Assessable and self-assessable developments are defined in Schedule 8 of the Act; exempt developments are all other developments. Part 3 of Schedule 8 lists those exempt developments which cannot be made assessable or self-assessable developments. It includes 'operational work associated with (a)…(b) weed control, pest control, fire hazard reduction and the conservation or restoration of natural areas, and (c)…' (Schedule 8, s13). It would therefore appear that local governments would be unable to make vegetation clearance a development requiring approval under this Act.

When determining a development application, an exempt approval does not require specific approval; a self-assessable development, if it complies with the codes applying to the development, does not require approval; and a development permit is only necessary for an assessable development (s3.1.4). This application will be determined by the assessment manager, usually the local government (s3.1.7). However, if a development concerns a State interest, the Minister can become the assessment manager for the application and decide on the matter (s3.6.7).

It is possible for conditions to be imposed on a permit. The only proviso is that the conditions must be relevant and reasonably required in respect of the development (s3.4.30).

A landholder can appeal a council decision concerning approval to the Planning and Environment Court.

The Act also provides that a failure to comply with a planning scheme, or with the conditions on approval, are offences (ss4.3.1–4.3.7).

As with most planning law in Australia, local government control over land use is based on the implementation of a planning scheme which has the approval of the State. *It would be possible to include a conservation zone in a planning scheme, in which most developments are prohibited, and require management of that land for conservation, if that is in accordance with the stated objectives of the planning scheme.*

Under the Act, a local government can also acquire land to help achieve the desired environmental outcomes as stated in its planning scheme (s5.5.1). In doing this, the local government must follow prescribed notice requirements, and compensation

may be available to landholders who lose their land under these provisions (Part 4).

Other material changes include:

- enabling the Minister to prepare a planning scheme where local government fails to do so;
- allowing a planning scheme to extend beyond a local government's boundaries into adjoining areas where the Minister has authorised it and imposed a condition to that effect (planning schemes can include local, regional and State dimensions);
- planning schemes must be reviewed every six years;
- the Minister may establish regional planning advisory committees;
- where a local government or the Minister designates land for community infrastructure, the designation may include an environmental management program;
- the Minister can only issue directions about the development application if the local government fails to do so, or the matter concerns a State interest;
- the Planning and Environment Court retains jurisdiction to hear matters arising from the Act, including appeals from development applications; and
- certain activities are offences under the Act and punishable by way of a fine.

3.3.2 *Land Act 1994*

The Land Act is one way in which statewide controls on vegetation management could be implemented. The Act essentially applies to all land in Queensland except land owned by the Commonwealth. The objects of the Act include sustainability, land evaluation based on land capability, cultural and social opportunities and values of the land, development, community purpose, protection of environmentally and culturally vulnerable and sensitive areas and features, and consultation and administration.

The Act allows the Governor in Council [19] to grant unallocated State land as freehold land (s14), and also allows the Governor to lease land, which may be subject to reservations and conditions (ss15 and 21). Unallocated State land may be dedicated as a reserve for community purposes by the Minister and can then be leased. However, the lease must be consistent with the purpose for which the land was reserved (s31). Such a reserve can be revoked by the Minister by issuing a notice to that effect in the Gazette.

A large proportion of land in Queensland is held as leasehold land. In July 1995, 78% of Queensland was leasehold land (Queensland Department of Natural Resources and Energy, 1997a). Because State land, although covered by a planning scheme, will not always be bound by the requirements of the scheme, it is important to consider the provisions in the Land Act which relate specifically to leasehold land and conditions which may be imposed on the use of leasehold land. Section 199 provides an overarching condition that the lessee, licence holder or permit holder has the responsibility for the duty of care for the land. The more specific conditions concerning vegetation which may be imposed include that all noxious plants must be kept under control (s200), and can relate to improvement or development on or to the land, sustainability and protection of the land, the provision of services and any other condition the Minister thinks fit (s203). If a condition of a lease is breached, and after the issuing of a remedial action notice there is still no compliance, the lease must be forfeited to the Crown (s214).

Covenants

Freehold and leasehold land can be subject to covenants, which may be registered on the title of the land or lease (*Land Titles Act 1994,* s97A, and Land Act, s373A). Under the Land Act, however, the covenant can only relate to the transferring of land,

19. The Governor in Council is the executive government comprising the Ministers and the head of government. It is essentially the same as Cabinet.

for example, that two parcels of land must be transferred together. Despite provisions in other States for the creation of conservation covenants, and attempts by Albert Shire Council to register 'environmental easements', which are, in fact, covenants, it remains clear that common law covenants cannot be used as a mechanism to protect vegetation in Queensland (*Property Law Act 1974*, s181, and *Land Titles Act 1994,* s97A).[20]

Tree management

The provisions within the Land Act relating to tree management were proclaimed on 24 October 1997 (SL 355). These provisions provide that *where land is held under a lease or licence, the destruction of trees without a permit is prohibited. A person must not clear a tree or allow a tree to be cleared on State or leasehold land unless a permit has been issued; the removal is part of routine management purposes* as outlined in sections 268–270; where the person is a trustee as outlined in the regulations; or for the clearing of trees for safety purposes along a transport corridor (as provided under the Transport Infrastructure Act). If a person clears without a permit, they are guilty of an offence, liable for a fine, and may need to cover the cost of remedial work.

An application for a permit must be made in writing to the relevant State authority and may need to be accompanied by maps outlining the areas to which the permit will apply. When considering an application to clear, the Chief Executive of the Department of Natural Resources and Energy must consider a series of 25 factors, including 'the protection of restricted vegetation types and areas of high nature conservation value, particularly riparian lands and areas of heritage values' (s262). A permit may be issued or refused. If issued, it will be subject to conditions that the person will not destroy, damage or otherwise interfere with trees to which the permit does not extend. The permit will also specify the manner in which the trees can be removed and other relevant conditions, including requiring compliance with a tree management plan. If, once a permit has been issued, there is evidence that the conditions attached to the permit have not been complied with, the permit can be cancelled and a fine imposed for a breach of the Act (s266).

The Land Act also includes provisions for the development of a tree management plan, broadscale tree clearing policies and routine management. Section 252 states that the objects of the tree management provisions are to:

> …manage trees on unallocated State land and on reserves, deeds of grant in trust, roads, licences, permits and leases on which the State owns the trees, consistent with the following principles:
>
> a. to maintain the productivity of the land;
>
> b. to allow the development of the land;
>
> c. to prevent degradation of the land;
>
> d. to maintain biodiversity;
>
> e. to maintain the environmental amenity values of the land;
>
> f. to maintain the scientific, recreation and tourism values of the land; and
>
> g. to ensure public safety.

A *tree management plan* must also identify several factors, including the major vegetation types and any planned revegetation or rehabilitation.

Broadscale Tree Clearing Policy

A Broadscale Tree Clearing Policy was approved by the Governor in Council in October 1997 and applies to leasehold land. The principles of the policy are to facilitate tree management consistent with several policies, including maintaining the productivity of the land, allowing the development of the land, preventing degradation of the land, and

20. There are additional provisions under the Nature Conservation Act which provide for the creation and registration of conservation covenants and, as these are statutory covenants, they are not prohibited from registration by the Property Law Act or the Land Titles Act. This power to enter into a covenant is only available to the State and is not available to local governments for the making of covenants on land which is classed as a nature refuge. See later comments on the Nature Conservation Act.

maintaining regional biodiversity. This policy contains three categories of vegetation types which must be considered when developing local guidelines:

- *Endangered and vulnerable* is the classification for vegetation where less than 10% of the pre-European distribution of that vegetation type remains undisturbed. The clearing of vegetation in this class is prohibited.
- *Of concern vegetation* is vegetation of which 10% to 30% of the pre-European distribution of that vegetation remains intact. Up to 50% of this vegetation on a property may be cleared.
- *Not of concern* vegetation is the class of vegetation where more than 30% of the pre-European vegetation remains. Up to 80% of this vegetation on a property may be cleared.

In addition to these restrictions, no clearing is to occur if to do so would move that vegetation type from one classification to another. The State is also divided into zones with more specific requirements as to the clearing of vegetation in those zones.

This policy has been adopted, with 34 local guidelines being approved by the Minister for Natural Resources and Energy (Queensland Department of Natural Resources and Energy, 1997a). The outcomes of these policies are yet to be determined, with a moratorium on issuing of permits for broadscale tree clearing on leasehold land in place until the legal implications of native title issues can be clarified (Queensland Department of Natural Resources and Energy, 1997a). Under the Land Act, the categories of the Broadscale Tree Clearing Policy will only apply to leasehold land, however, if they are adopted and local guidelines developed, these will then be binding on freehold land as council policy when councils consider a development application.

Comments on the current situation in Queensland

Vegetation clearance is a controversial issue, with broadscale clearing still occurring in Queensland. In 1995, permits to clear 551 700 hectares of land were issued, 72% of these being for regrowth. It is difficult to make an objective judgement about the impact of new clearing guidelines in Queensland, precisely because they are new. In the past, clearing permits were provided as a matter of course. The new guidelines provide a framework through which the values of native vegetation can be considered prior to issuing a permit. The guidelines will need strong support, implementation and enforcement if they are to be successful. It is also important to note that clearing on freehold land remains unregulated unless local governments deem vegetation clearance a development, as has been done by Brisbane City Council, or local laws are passed regulating clearance.

3.3.3 *Soil Conservation Act 1986*

The Soil Conservation Act is one of the older Acts concerning environmental protection. It specifically concerns soil erosion, which is presented as the main aspect of land degradation. The Act allows for the preparation of property plans to address issues of soil management on a property. There are provisions for offences arising from breaches of a property plan, and for the making of regulations relating to soil conservation. There are, however, no sections that directly refer to vegetation conservation. The Act considers soil conservation in isolation, and is therefore of limited application to the issue of vegetation conservation, despite the fact that vegetation management will influence soil conservation issues.

3.3.4 *Forestry Act 1959*

The Forestry Act applies primarily to State land. It concerns the classification, reservation and management of State forests and timber reserves, the control of forest products and the control and prohibition of fires. The Act defines State land as land which is held under the Land Act as a pastoral lease, stud holding, grazing homestead perpetual lease, special lease, development lease, and so on, or land that is held under a lease or licence prescribed in the regulations.

The Governor in Council can declare land to be a State forest, and any part of a State forest may then be declared a timber reserve (s25). A declaration can be revoked by a resolution of the State

Parliament. Timber reserves can be revoked more easily, requiring only a declaration by the Governor in Council to that effect. State forests are to be managed by the Primary Industries Corporation (a State body) for 'the permanent reservation of such areas for the purpose of producing their timber and associated products in perpetuity and of protecting a watershed therein.' In carrying out this objective, the corporation shall have regard to 'the benefits of permitting grazing in the area; the desirability of conservation of soil and the environment and of protection of water quality; the possibility of applying the area to recreational purposes' (s33). The corporation also has the power to regulate the use of State forests, and may grant permits to carry out certain activities such as camping, stock grazing and mineral exploration (s35).

As with the Soil Conservation Act, the Forestry Act applies to State land, and is therefore of limited importance to local governments.

3.3.5 *Integrated Resort Development Act 1987*

The Integrated Resort Development Act allows for integrated development approval by the State government. Approval by the State government overrides local planning schemes, and therefore overrides any local laws or policies. The Minister decides which projects are able to be considered for integrated development. Although the provisions of this Act remove the control from local governments, vegetation issues are not completely excluded, as legislation such as the *Nature Conservation Act 1992* can still bind the Crown.

3.3.6 *Coastal Protection and Management Act 1995*

The Coastal Protection and Management Act aims to provide for the protection, conservation, rehabilitation and management of the coast (s3). This is to be achieved by preparing coastal management plans that state principles and policies for coastal management; identifying key coastal sites and coastal resources in the coastal zone; planning for their long-term protection and management; and by declaring control districts in the coastal zone as areas requiring special development controls and management practices (s4). The coastal zone is defined as 'coastal waters and all areas to the landward side of coastal waters in which there are physical features, ecological or natural processes or human activities that affect, or potentially affect, the coastal resources' (s11). This means that the coastal zone could potentially extend large distances inland. The Act establishes a Coastal Protection Advisory Council to advise the Minister about the need for special coastal zoning, development of coastal plans, and preventive and remedial measures for coastal management. This would therefore include advice on the management and conservation of coastal vegetation. Regional coastal management plans can be developed with public consultation, and will be finally made by the Governor in Council. The Act also includes provisions for offences, and compensation provisions for the restriction on use of coastal land covered by a regional coastal management plan and development controls under the Act.

3.3.7 *Water Resources Act 1989*

The use of the Water Resources Act in relation to vegetation conservation is potentially wide-reaching. The Act specifies that the bed and banks of a water course or lake are to be vested in the Crown (s26), and also allows for regulations to be made specifying land use within a declared water catchment area, including subdivision, and the rezoning of land. These provisions could be used to great effect by the State to ensure that local governments manage catchment areas for vegetation conservation as well as for water supply. However, it would appear that this Act has been applied only in regard to the bed and bank of a water course and not to a catchment area.

3.4 Other relevant legislation

3.4.1 *Nature Conservation Act 1992*

The Nature Conservation Act has as its objective the conservation of nature through an integrated and comprehensive conservation strategy (ss4–5). The Act provides for community consultation and education, as well as for the management of protected areas and conservation (which is defined as 'the protection and maintenance of nature while

allowing for its ecologically sustainable use' (s9)). The Act comprises four main parts relating to protected areas, wildlife and habitat conservation, interim conservation orders, and management and conservation plans.

Protected areas

The protected areas to which the Act applies are national parks (scientific); national parks (Aboriginal land); national parks (Torres Strait Islander land); conservation parks; resources reserves; nature refuges; coordinated conservation areas; wilderness areas; World Heritage management areas; and international agreement areas (s14). These areas must be managed in accordance with the management principles outlined in the Act and the purpose for which the protected area was created (s15). The Governor in Council can declare by regulation that an area of State land is to be dedicated as a national park (scientific); national park; conservation park; or resources reserve (s29). Similarly, the conservation status of an area can be revoked by regulation (s32), however, the approval of Parliament is also needed to revoke the status of an area. Where the area is a national park, it is possible to carry out certain activities in that park if a licence or permit is granted, and the use is not inconsistent with the management of the area and is ecologically sustainable (s35). Land within a protected area may be leased, again with the proviso that the use of the land and lease provisions must be consistent with the management principles for the area, and ecologically sustainable.[21]

If a proposal for the declaration of freehold land to become a nature refuge is unable to be agreed upon by the landowner and the State, it is possible for the State to compulsorily declare the area to be a nature refuge. To do this, the Minister must give written notice to the landowner that a recommendation is to be made to the Governor in Council to compulsorily declare the area to be a nature refuge. Any objections to this which are received must be considered, and the Governor in Council may pass a regulation declaring the area to be a nature refuge and specifying the area covered by the declaration and the purpose of the refuge (s49). Compensation may then be sought by the landowner. Compensation paid through this mechanism is not subject to capital gains tax, while any voluntary sale of land acquired after 20 September 1985 is subject to capital gains tax.

It is possible to use this Act to *create nature refuges or coordinated conservation areas for the purpose of vegetation conservation* on freehold land. Such areas are to be managed under the terms of the conservation agreement by the private landholder to conserve the area's natural resources, and provide for the controlled use of the area's natural resources and the interests of the landholder; and to take into account the area's natural, educational and commercial values (ss22–23). A conservation agreement can then be drawn up which will be binding on the landowner (see below).

Conservation agreement

The Minister may prepare a proposal for a nature refuge, a coordinated conservation area or a wilderness area to be declared (s44). The proposal must outline the areas to be included and specify the purpose for the declaration. Once this proposal is made, each affected person with an interest in the land must be notified. In practice, landholders are encouraged to voluntarily enter into an agreement. If the Minister and the landowners agree that an area should be declared for the reasons specified in the proposal, the Minister, on behalf of *the State, can enter into a conservation agreement with the landowner* in relation to the area (s45). Before a conservation agreement can be entered into, the consent of everyone with an interest in the land must be received in writing. The agreement must be consistent with the conservation objectives of the nature refuge, and it can be binding on the State, the landowner and successive landowners. It can contain terms requiring the State to provide financial assistance and technical advice, or to carry

21. The Nature Conservation (Protected Areas) Regulation 1994 provides for the declaration and naming of protected areas. The Nature Conservation Regulation 1994 concerns the application for and consideration of the issuing of licences under the Nature Conservation Act, for example, stock cannot be grazed in a protected area unless a permit has been issued for that purpose.

out certain activities. It may similarly require the landowner to carry out certain activities, prohibit certain uses of the land, restrict the use or management of the land, and require the landowner to repay any money given by the State under the agreement if it is broken. A conservation agreement will remain in force for the period of time specified in the agreement. Alternatively, it may be revoked on the request of the landowner who entered into the agreement, in the terms stated in the agreement, provided that the Minister believes the area is no longer needed as a protected area (s49). An agreement may also be varied by agreement between the State and the landowner (s48).

Section 51 provides that a conservation agreement applying to a nature refuge may be recorded by the Registrar and, if this is done, it is binding on the landowner and successive title holders. Similarly, a conservation covenant, if registered, will be binding on successive title holders. Under section 134, the Registrar, upon receipt of written notification that a conservation agreement or covenant has been agreed upon, must maintain the records in such a way that a search of the register under any Act relating to land will show that a conservation agreement or covenant exists and is binding on that land. Strictly, this is different to registering the existence of such an instrument on the title of the property, as the information is noted in 'Administrative Advice Files'; however, the effect is the same.

Management and conservation plans are to be prepared for each protected area (except a nature refuge where the agreement says a management plan will not be prepared). The Minister must notify the public of an intention to prepare a plan, public submissions may be made which must then be considered, the final management plan must then be approved by the Governor in Council and, once it is approved, it will *have the status of a regulation* for that area. Local governments must then ensure that their decisions are consistent with the plan, and cannot issue a permit or give any approval which is inconsistent with the plan (s123).

Compensation

Where land is compulsorily declared a protected area, it may be possible for the landowner to seek compensation if their interests have been injuriously affected.[22] The State may be required to pay compensation for the restriction or prohibition of certain uses of the land (s67), or if the restriction already applies under another law. In considering whether or not compensation is payable, the Land Court must consider the capacity of the land to sustain the existing use, the change of value of the land because of the declaration, and the existence and terms of the management agreement. Compensation may also be available where a conservation plan is approved for an area and the landholder's interest in the land is injuriously affected by a restriction or prohibition contained in the plan (s126). However, it is not available if

22. The phrase 'injurious affects' is used in relation to compensation provisions contained in the Nature Conservation Act. A landholder suffering injurious affection may be eligible to claim compensation. Previous court interpretations of this phrase in other jurisdictions suggest that the injurious affects must relate to things done upon the actual land acquired and do not extend to losses consequent upon the carrying out of a larger public purpose. There is no right to compensation for injurious affects which are unrelated to restrictions in user enjoyment or development of the land concerned (see *McInnes v Commissioner of Highways* (1992) 58 SASR 563 and *Flokeston v Metropolitan Region Planning Authority* [1968] WAR 164). This interpretation suggests that the State may be liable to pay compensation in relation to the restriction of uses on that land, such as the loss of production from the land, but not for indirect costs such as the possible overall decrease in the value of the property due to the restrictions placed on the use of the land by the covenant. In *McInnes v Commissioner of Highways* (1992) 58 SASR 563, Matheson J stated that compensation for injurious affection is limited to things done upon the actual land acquired and does not extend to losses consequent upon the carrying out of a larger public purpose. This case concerned a claim for compensation for loss of business where the landholder had part of his land acquired for a bypass road, which consequently resulted in a loss of business. This consequential loss of business could not be compensated for. The second case also concerned the acquisition of land for a road, in that case the landowner claimed additional compensation for the resultant loss in the value of his property due to the neighbouring highway. In *Flokeston v Metropolitan Region Planning Authority* [1968] WAR 164, the court held that there is no right to compensation for injurious affection which is unrelated to the loss of land, and compensation does not extend to damage to land resulting from activities on the land which was acquired. These cases suggest that compensation would only be payable for the loss of land or the restriction of activities on the land which is the subject of the reserve.

compensation has already been paid for the restriction of prohibition.

Wildlife and habitat conservation

Part 5 of the Act concerns wildlife and habitat conservation. 'Wildlife' is defined as 'any taxon or species of animal, plant, protistta, procaryote or virus' (s7). The part is therefore directly relevant to vegetation conservation and management. There is a general provision (s73) that native wildlife (other than protected wildlife) is to be managed to:

(a) conserve the wildlife and its values and, in particular to:

(i) ensure the survival and natural development of the wildlife in the wild;

(ii) conserve the biological diversity of the wildlife to the greatest extent possible;

(iii) identify, and reduce or remove, the effects of threatening processes relating to the wildlife;

(iv) identify the wildlife's critical habitat and conserve it to the greatest possible extent; and

(b) ensure that any use of the wildlife

(i) for scientific study and monitoring;

(ii) or educational, recreational, commercial and authorised purposes; or

(iii) by Aboriginal people under Aboriginal tradition or Torres Strait Islanders under Island custom; is ecologically sustainable.

While these principles overarch the management of all wildlife, there are more specific requirements depending on the classification of the wildlife as either presumed extinct, endangered, vulnerable, rare or common. All protected plants and animals are the property of the State, except where the protected plant is found on private land[23] (ss83–84), until the plant or animal is taken under licence or permit. A person must not take a rare or vulnerable plant without a permit or licence (s89), and to do so may attract a heavy fine or up to two years imprisonment. If an area is outlined in a conservation plan as containing a critical habitat or an area of major interest, it is also an offence to take, use or interfere with the wildlife, other than under the conservation plan or under a licence or permit (s97).

Part 6 concerns the issuing of interim protection orders where rare or threatened wildlife is subject to a threatening process which is likely to have a significant and detrimental effect on that wildlife (s102).

Regulations

The Act provides for the Minister to make regulations concerning the use of land in protected areas, and the taking of animals or plants from protected areas.

Relevance of the Nature Conservation Act to local government

It may be possible for a local government to adopt the Nature Conservation Act as a framework for the protection of vegetation within its municipality, or to comment on the preparation of management plans for protected areas. This would, however, require that the State be actively involved in working with local governments under the Act. Alternatively, a local government could actively encourage and work with the State to implement the requirements of the Act.

3.4.2 *Environmental Protection Act 1994*

The Environmental Protection Act aims to provide for ecologically sustainable development, and to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (s3). The main provisions concern the

23. Private land is defined as freehold land, or land that is subject to a lease which contains an entitlement to a deed of grant in fee simple.

preparation of State environmental policies, preparation and implementation of environmental management programs, and environmental offences. The offences include the causing of serious or material environmental harm or environmental nuisance. Environmental harm is defined (s14) as:

> any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.

The provisions of this Act are aimed more towards pollution and other environmental damage, rather than addressing issues of vegetation conservation. It may, however, be possible to require that environmental management programs contain provisions relating to vegetation, as vegetation clearing is considered an adverse effect on the environment and therefore amounts to environmental harm.

3.5 Summary of opportunities

The legal powers granted to local governments in Queensland clearly allow them to take an active role in vegetation conservation. Such a broad grant of powers allows for all of the incentives, except for covenants, to be offered by local governments. In many instances, however, strong policy support and encouragement will be necessary to assist those councils who are not able or willing to offer these incentives. In order to maximise the range of incentives available, local governments require that conservation covenants be able to be entered into and registered on title.

In addition to the incentives considered in this report, the powers of a local government to make local laws and to form joint authorities have also been included in Table 3.2 to indicate the other powers which have been granted to local governments for general purposes which may be used for vegetation conservation. For example, local laws could be passed protecting native vegetation on council-owned and council-managed land, and joint authorities could be formed to allow for vegetation management and planning at a regional level.

Local governments in Queensland are in a position whereby they can lead by example. This should be strongly encouraged so that local governments consider vegetation management as part of their core business.

Table 3.2: Opportunities available to local governments to offer incentives for vegetation conservation

Incentive	Amendment
Environmental levy	N/A as can already charge levy
Management agreement	Policy support/encouragement
Covenant	Amend Property Law Act and *Land Titles Act 1994* so that covenants can be registered on title
Grants to individuals and community groups	Policy support/encouragement
Rate rebates	N/A as can currently be offered
Acquisition and sale of land	N/A as are available to local governments
Local laws	Encourage local governments to pass local laws protecting native vegetation on council-owned and council-managed land
Joint authorities	Encourage local governments to form joint authorities for the purpose of vegetation planning at a regional level

4. New South Wales

4.1 Legislative framework

The position in New South Wales is, in theory, similar to that which exists in other States. However, the New South Wales position shows a highly regulated system of local government, which differentiates it from other States. The *Local Government Act 1993* is regulatory and prescriptive, outlining the specific powers granted to local government and the ancillary powers granted to carry out prescribed activities. The effect of this is a myriad of requirements which must be met by local government.

Legislation defining the role of local government in vegetation conservation in New South Wales includes the Local Government Act and the *Environmental Planning and Assessment Act 1979*, and other more specific legislation such as the *Rural Fires Act 1997* and the *Coastal Protection Act 1979*. Table 4.1 outlines the relevant legislation, which may need to be considered by local government, and the jurisdiction with the primary responsibility for implementing the legislation.

These pieces of legislation not only grant certain powers to local government but also act either to limit the powers which may be exercised by local government under the Environmental Planning and Assessment Act or to impose additional requirements such as the referral of certain applications to State agencies. There are also several recent amendments to legislation which have changed the provisions. Amendments to the Environmental Planning and Assessment Act, and the introduction of the *Native Vegetation Conservation Act 1997* and the *Local Government Amendment (Ecologically Sustainable Development) Act 1997* are important in this respect. It is unclear exactly what the effect of these specific pieces of legislation will have on the potentially broad grant of power to local government under the Local Government Act.

Table 4.1: Environmental and land use legislation and implementing jurisdiction

Legislation	Jurisdiction
Catchment Management Act 1989	State
Coastal Protection Act 1979	State
Commons Management Act 1989	State
Conveyancing Act 1919	State
Crown Lands Act 1989 (Crown Lands Consolidation Act 1913)	State
Environmental Offences and Penalties Act 1989	State
Environmental Planning and Assessment Act 1979	State and local government
Forestry Act 1916	State
Local Government Act 1993	Local government
Local Government Amendment (Ecologically Sustainable Development) Act 1997	Local government
National Parks and Wildlife Act 1974	State
Native Vegetation Conservation Act 1997	State
Rivers and Foreshores Improvement Act 1948	State
Roads Act 1993	State
Rural Fires Act 1997	State and local government
Rural Lands Protection Act 1989	State
Soil Conservation Act 1938	State
Threatened Species Conservation Act 1995	State
Western Lands Act 1901	State
Wilderness Act 1987	State

The Local Government Act grants the power to carry out all the functions and duties imposed on local government under it and other legislation. This would seem to indicate that, unless there is a specific grant of power or the service to be provided is incidental to their duties, the power will not exist. Alternatively, the specific grants of power may merely indicate the types of powers which are available to local government. This is essentially a question of statutory interpretation for the courts, however, it is likely that the position requiring a specific grant of power, particularly for the regulatory functions of a council, will be adopted.

The large number of potentially relevant Acts clearly indicates that the amount of regulation is greater than that of other States. In addition to the above Acts and regulations, there are also State environmental planning policies (SEPPs), regional environmental plans, local environmental plans, development control plans and regional vegetation management plans which may operate in addition to planning scheme requirements in a particular area. Relevant SEPPs include:

- SEPP 14 Coastal Wetlands;
- SEPP 19 Bushland in Urban Areas;
- SEPP 26 Littoral Rainforests; and
- SEPP 34 Major Employment Generating Industrial Development.

There are many regional environmental plans and local environmental plans which are also applicable, however, they are determined primarily on a local government or regional scale, and therefore they will not be considered in detail here. SEPPs are statewide policies with which local environmental plans must comply. Regional environmental plans must also be complied with and local environmental plans are often viewed as the mechanism by which councils implement both the SEPPs and regional environmental plans. In addition to complying with these policies, other legislative requirements must be complied with, the effect of which is to render some local governments unable to adequately address existing requirements without paying special regard to vegetation matters.

4.2 Powers of local government

The powers granted to local government in New South Wales are primarily in the Local Government Act and the Environmental Planning and Assessment Act. These powers are, however, limited by other legislation and State and regional policies.

4.2.1 Local Government Act 1993

Section 21 of the Local Government Act grants to *local governments the powers conferred under this or any other Act.* These powers are of two main types: the power to carry out service functions, and the power to carry out regulatory functions. Councils also have ancillary powers, that is, the power to actions which are supplemental or incidental to, or consequential on, the exercise of its functions (s23). The service powers of a council are outlined in section 24, which states that:

> [a] council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law.

The regulatory functions extend to the requirements for building and development approval, and the provisions relating to the issuing of orders by the council to comply with a council regulation, for example. Initially these may appear to be a broad grant of power to local governments. However, the myriad of later legislation clearly restricts the role and influence local governments may have over native vegetation conservation within their municipality.

Once again, it is possible to draw a distinction between the core business of councils and the 'discretionary extras'. However, it becomes very clear that, once this is done, the discretionary extras are limited and controlled by State legislation, almost as much as the core business.

Public land

Section 25 states that all public land must be classified as either 'operational' or 'community' (s26). *Community land* may then be categorised as a natural area, park, sports ground or for general

community use. If it is classified as a natural area, it must then be further categorised into one or more of the following: bushland, wetland, escarpment, watercourse or foreshore, or into a category prescribed by regulation. Once classified, the council must prepare a management plan for the area which includes the objectives for the area and the means by which these objectives will be reached (s36). Once a draft plan of management has been prepared, public notice is given and a period for public comment allowed. Once the council has considered all public comments, it may amend the plan if it thinks fit, or can merely adopt the plan (s40).

Where land is classified as community land, the council has no power to sell the land, but the land may be leased or a licence granted over the land, where that lease or licence is in accordance with the plan of management for the land (ss45–46).

The council will have responsibility for other land which is not vested in any body, and public land which is proclaimed by the Governor to be under the control of the council (s48). Other public land which may be placed under the control of a local government includes roads, under the *Roads Act 1993*, and commons, under the *Commons Management Act 1989* (Stuckey, 1994, p. 22). This means that significant areas of public land are likely to be under the control of local governments.

Section 629 states that it is an offence to unnecessarily or unlawfully remove or disturb a plant from a public place. A public place is defined to mean a public reserve, road, Crown reserve and land vested in the council as public land. The maximum penalty for such an offence is five penalty units (currently $550). This section could be utilised in regard to the protection of vegetation on council-controlled land. *Local governments can use mechanisms such as this to ensure that vegetation is protected and to assist with enforcement of State legislative requirements.*

Grants

Under section 356 a local government has the power to make voluntary donations to a community group or individual. This requires a resolution of council to approve the grant. Assistance can also be given in kind, rather than as a monetary contribution.

Service functions

The service functions of council include those such as the provision of sewage treatment and water supply. These have minimal impact on the functions of council in respect to vegetation conservation and management but, if not managed properly, may cause severe environmental problems.

Regulatory functions

The regulatory functions of councils are generally the core business of local government. The regulatory functions can be divided into the granting of approvals and the issuing of orders to comply. A failure to obtain or comply with approval or failure to comply with an order are offences under the Act (ss626, 627 and 628). Appeals from a decision related to approvals or orders can be made to the Land and Environment Court (ss176 and 180).

Section 68 provides that a person may carry out the activities specified only with the prior approval of the council. The Crown does not need approval to construct a building, and a council cannot refuse to grant approval for a development proposed by the Crown unless the approval of the Minister is obtained in writing (ss69–70). This exception acts to remove any activities of the Crown from the control of the local council.

Where an application is made to council, the council must, in determining the application, take into consideration the environmental planning instruments, which include regional vegetation management plans applying to the area, consider public interest and the 'likely impacts of that development including environmental impacts on both the natural and built environment and social and economic impacts in that locality' (s79c). The Act contains additional specific requirements relating to the amendment of applications, the granting of approval and the right to appeal a decision.

Councils are granted the power to prepare draft local approval policies and draft local orders

policies (ss158–159). These policies can state the factors which will be considered by the council in the consideration of an application. Again, the policies must be put on public display and, after considering any public submissions, the council can decide to amend or adopt the policy. *It would be possible for a council to state that it will consider the importance of the vegetation for conservation reasons as a factor it would consider when determining an application.*

Approvals are issued on the basis that any *condition* imposed by regulation will apply. For example, if the regulations were to state that *development approvals* were subject to a condition that work is carried out in such a way as to minimise the impact on the native vegetation, then all development applications granted would be subject to this condition.

A council can order a person to do, or refrain from doing, an act as specified in the table referred to in section 124 of the Local Government Act. These orders refer to matters arising from public safety and health issues, and there are no matters directly relevant to vegetation conservation or management. *It may be possible for orders relating to the management and protection of vegetation to be added to those specified in the table. This would enable councils to issue orders preventing, for example, the clearing of areas of native vegetation.*

Acquisition of land

The power of a council to acquire land is an ancillary function. Land may be acquired for the purpose of the exercise of the functions of the council, including acquiring land that is to be made available for a public purpose which is zoned or reserved as such (s186). Land can be acquired by agreement or compulsorily in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*. For compulsory acquisition, approval of the Minister is required (s187). Land cannot be compulsorily acquired where it is to be resold. Although this power has been granted to councils, it can only be exercised 'for the purpose of exercising any of its functions' (s186). Therefore, unless there is a specific function conferred on a council to encourage or require vegetation conservation, it is unlikely that this power will be able to be exercised for the purpose of acquiring land for vegetation conservation.[24] As this power cannot be exercised where the land is to be resold, this would prohibit any possible use of this power for use in a revolving fund situation, where land is purchased and then resold with restrictions in place on land use and vegetation clearance.

Rates and charges

Chapter 15 of the Local Government Act deals with how councils are financed. The main sources of income for a council are rates; charges; fees; grants; borrowing; income from land, business activities, other investments; or the sale of assets. The first two mechanisms, rates and charges, are the only ones relevant to vegetation conservation issues.

There is no clear grant of power under the Local Government Act which would allow councils to impose an environmental levy. Section 501 allows a council to make a charge for the provision of any service prescribed by regulation, and if it were possible to regulate to allow the imposition of charges for providing an environmental service, this section would be the enabling section.

The Act provides that all land is rateable except land owned by the Crown which is not under lease; land within a national park or nature reserve under the *National Parks and Wildlife Act 1974*; land within a special area (land within the control of the Sydney Water Corporation or the Hunter Water Corporation); land that belongs to a religious body and is used or occupied for public worship or as the minister's residence; land that belongs to a school; and a playground connected to a school and other such exceptions (ss336, 555 and 556).

Rates can be of two types: ordinary rates and special rates (s492). A council must make an *ordinary rate* each year, with the amount of rate

24. See previous comments on the granting of power to local governments in Section 5.1. The approach has been adopted that, unless there is a specific grant of power, the general powers granted under the Local Government Act will not extend to non-specified powers.

being determined by four main categories: farm land, residential, mining and business (ss514–518). These categories can be divided further by the council,[25] and the amount charged for the ordinary rate will depend on the classification of the land by the council (s493).

Special rates may be charged by councils to help meet 'the cost of any works, services, facilities or activities provided or undertaken, or proposed to be provided or undertaken, by the council' (s495). A special rate can be levied on land which, in the opinion of the council, will benefit from the works, services, facilities or activities. It may be within the scope of this section for a council to impose an 'environmental rate', however, this would depend on the definitions given to services and facilities within this section. In addition, it may be necessary to show that the land would benefit from the conservation of native vegetation.

It may therefore be more feasible to use the ordinary rate for the purpose of encouraging vegetation conservation. If there were to be a sub-category for conservation within each category of land, it may be possible to vary the base amount of the rates for that area. For example, if land were classified as farm land, a council could establish a sub-category of farm land – conservation. It would then be possible to prescribe a lower base rate amount to reflect this classification, with the additional *ad valorem* amount.[26] The Act does, however, list several criteria which must be considered when determining the base amount, but there is no indication that high conservation status should form the baseline.

Rate reductions: The Local Government Act provides that concessions may be granted with respect to rates in certain circumstances. Payment of rates can be postponed for one or two years where the land is used for a purpose other than that for which it is zoned. The three situations in which this section may be invoked are when there is a single house on land zoned to have industry, commerce or residential flat buildings; land where there is a single house and the land is zoned for subdivision; and rural land which is zoned for another use, including subdivision. In any of these situations, an application may be made by the landowner to the council to have the land revalued according to its actual use. The council must then postpone the payment of rates, or payment of part of the rates, to reflect the value of the actual use and not the zoned use (ss585–591).

It may be possible to invoke this section as it currently exists to encourage vegetation conservation by discouraging a change of land use. For example, where land is zoned for subdivision and the land contains vegetation of conservation significance, it would be possible to have the land revalued on the basis of it being rural land. This may act, in the short term at least, to encourage the landowner not to subdivide the land. This could not be utilised to provide any long-term security, however, as it can only apply for one or two years, but this may be sufficient time for additional security such as a *voluntary conservation agreement under the National Parks and Wildlife Act to be entered into. Where land is subject to a conservation agreement under this Act, the Local Government Amendment Act 1997* provides that land subject to such an agreement is exempt from all rates and charges. *It may be more effective, however, if an additional conservation category for the postponement of rates were added.* For example, where land currently has areas of high conservation value, and where the land is zoned for a different use, it may be useful to allow postponement of rates if the land remains uncleared. Such a change could be done by amendment to the Local Government Act, or to another Act such as the Environmental

25. Section 529 states the way in which this can be done as follows: 'A sub-category may be determined: (a) for the category "farm land" according to the intensity of land use or economic factors affecting the land, or (b) for the category "residential" according to whether the land is rural residential land or is within a centre of population, or (c) for the category "mining" according to the kind of mining involved, or (d) for the category "business", according to a centre of activity.'

26. *Ad valorem* is the amount in the dollar determined for a specified year and expressed to apply to the rateable land. For example, the *ad valorem* amount will be determined depending on the value of the land by the Valuer-General and the set amount, that is, the value of the land x the amount per $. For example, land value $100 000, *ad valorem* amount is $0.06 x $100 000 (where $0.06 is the standard amount) = $6000.

Planning and Assessment Act, in a similar way to the exemptions or postponements under the *Heritage Act 1977*.

4.2.2 *Local Government Amendment (Ecologically Sustainable Development) Act 1997*

The Local Government Amendment (Ecologically Sustainable Development) Act amends the Local Government Act to include the principle of ecologically sustainable development. The Local Government Act is amended to require that councils 'have regard to the principles of ecologically sustainable development in carrying out their responsibilities' (Local Government Act, s7(e)). When determining an application before council, the principle must also be considered (Local Government Act, s89(1)(b)). In the preparation of a draft plan relating to a council's work and activities, these activities must be undertaken in a way which is consistent and promotes ecologically sustainable development (Local Government Act, s403(2)). Ecologically sustainable development itself does not, however, require that environmental considerations will override others. Instead, it requires 'effective integration of ecological and environmental considerations in decision making processes'. This can be achieved by the implementation of the precautionary principle, conservation of biological diversity and ecological integrity, intergenerational equity and improved valuation of costs to include environmental costs and incentives (Local Government Act dictionary).

These amendments clearly recognise the importance of an ecologically sustainable approach, and these requirements will encourage, and in some respect force, councils to consider the environmental effects of their decisions. It is, however, not necessarily going to alter the final outcome, as councils merely have to 'have regard to' ecologically sustainable development. They are not bound to place more weight on environmental rather than non-environmental considerations.

4.3 *Land use and planning*

4.3.1 *Environmental Planning and Assessment Act 1979*

Land use in New South Wales is primarily regulated by the Environmental Planning and Assessment Act. The Act provides for the preparation and implementation of various planning instruments. An indication of the extent of regulation of land is given by considering the number of instruments which may need to be consulted to determine the permissible uses of an area of land. These include:

- State environmental planning policies (SEPPs);
- regional environmental plans;
- regional vegetation management plans;
- local environmental plans;
- development control plans;
- council policies/council codes;
- directions under section 117(2) and section 71 of the Environmental Planning and Assessment Act; and
- Department of Planning and Urban Affairs circulars.

SEPPs, regional environmental plans, local environmental plans, development control plans, and directions under sections 117(2) and 71 all stem from the provisions of the Environmental Planning and Assessment Act. Regional vegetation management plans stem from the Native Vegetation Conservation Act. It is therefore important to understand the Environmental Planning and Assessment Act and how the various planning instruments work together to control land use and planning in New South Wales. The area controlled by the Western Lands Commission is, however, excluded from the provisions of the Environmental Planning and Assessment Act as far as it relates to the zoning of land, and is covered by the provisions of the *Western Lands Act 1901*.

The objects of the Environmental Planning and Assessment Act are stated in section 5 as including:

> (a) (i) to encourage the proper management, development and conservation of natural and man-made resources, including agricultural land, natural areas ... (vi) the protection of the environment, including the *protection and conservation of native animals and plants,* including threatened species, population and ecological communities, and their habitats;
>
> (b) to promote the sharing of the responsibility for environmental planning between the different levels of government; and
>
> (c) (vii) ecologically sustainable development.

These objectives, which should be considered when looking at the provisions of the Act, include the protection of the environment and the conservation of native flora.

The powers granted under the Environmental Planning and Assessment Act might appear to be very broad and similar to those exercised by local governments in other States. However, the Act and other legislation also impose a wide range of regulations and policies which must be considered by local governments in the exercise of their powers. The constraints imposed by the Environmental Planning and Assessment Act and other legislation are outlined below.

It is important to remember that the following comments relate primarily to *the legal capacity of local governments and do not necessarily indicate the practical role of local governments.* The practical aspect is harder to determine, as it depends on the capacity of a local government to act. This, in turn, depends on the resources available to the council, and the particular attributes of each region.

Role of local government under the Environmental Planning and Assessment Act

Under the Environmental Planning and Assessment Act, local governments are the primary body responsible for the on-ground implementation and control of land use, and for determining development applications. These responsibilities are mainly exercised through the implementation of local environmental plans prepared by councils.

The Environmental Planning and Assessment Act allows for a variety of different mechanisms to be used and processes to be followed in relation to land use and planning issues in New South Wales. It is important to understand the structure of the planning system and to be aware of the roles that various types of environmental planning instruments may play. This is discussed in the following sections.

Local environmental plans

Local environmental plans are prepared by local governments, either on their own initiative or under direction from the Minister. *The Minister ultimately makes the local environmental plan for each council, after it has been prepared by the local government.* The scope of a plan is not limited to addressing issues of local concern, and it is possible to incorporate the provisions of SEPPs, regional environmental plans and regional vegetation management plans so that all planning policies are included in one document. A local environmental plan may even contain stricter provisions than a regional environmental plan, SEPP or regional vegetation management plan. Two or more councils may even act together to prepare a local environmental plan which applies to their joint area (ss54–55).

Local environmental plans carry the force of law and are similar to planning schemes of other jurisdictions. They may contain zoning provisions which specify permitted uses and state the classification of uses, and may also state the objectives of each zone.

Once it has been decided by council to prepare a local environmental plan, or the Minister has issued directions to that effect, an environmental study may be required. Section 62 requires the council to consult with public authorities which may be affected by the proposed plan, and other local governments with jurisdiction over land adjoining the land to be covered by the local environmental plan. Once this is done, a draft plan may be

prepared, in accordance with any direction which may have been issued by the Minister and the outcomes of an environmental study if one was completed. The directions issued by the Minister under section 117(2) may relate to the structure and subject matter of the local environmental plan, and potentially allow for a large degree of influence by the Minister.[27]

Once a draft has been prepared, a copy must be forwarded to the Secretary of the Department of Urban Affairs and Planning (s64), who may issue a certificate enabling the council to place the draft local environmental plan on public exhibition (s65). In deciding whether to issue a certificate, the Secretary must consider the extent to which the *local environmental plan complies with SEPPs, regional environmental plans and regional vegetation management plans* which may be applicable to the area. Once a section 65 certificate has been issued, the draft local environmental plan is placed on public exhibition and public submissions can be made. The council must consider the submissions and amend the local environmental plan if necessary, and then once again forward it to the Secretary. The Director of the department must then prepare a report on the plan and its compliance with regional environmental plans, SEPPs and regional vegetation management plans under the Native Vegetation Conservation Act, and public comments, prior to submission to the Minister.

On receipt of the local environmental plan and report, the Minister may make the plan in accordance with the draft plan which was submitted, make it with alterations, or decide not to proceed (s70). If the draft was substantially amended after the period of public consultation, the Minister may require it to be placed back on public display and the process must then proceed from there. The input of the Minister is purely at the Minister's discretion, and is likely to vary from council to council. In some cases, the input would be minimal, however, it may easily be used to override the provisions prepared by a local government if the Minister felt it was necessary to do so.

Zoning provisions of local environmental plans

Local environmental plans are required to include the intent of each zone and any use which is compatible with that intent.[28] It is possible to have restrictive zoning, and it may be utilised to restrict vegetation clearance. When considering the actual application of zoning, it may be necessary to consider the definition of 'development'. For example, is a certain activity a development which will be regulated by the zoning provisions.

'Development' is defined in section 4(1), in relation to land, as:

> 'a. the use of land;
>
> b. the subdivision of land;
>
> c. the erection of a building;
>
> d. the carrying out of work; and
>
> e. …
>
> f. any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.'

An activity such as the clearing of vegetation would therefore need to be included in the definition of development as a 'carrying out of work' or as a matter controlled by an environmental planning instrument. Work is itself defined as including 'physical activity in relation to land that is specified by a regulation to be work for the purposes of' the Environmental Planning and Assessment Act (s4(2)). Therefore, if the regulations were to define vegetation clearance as work, or if a local environmental plan were to contain a similar provision, local environmental plans would be able

27. A Conway, Department of Urban Affairs and Planning, New South Wales, 1998, pers. comm.

28. Ministerial direction under section 7, Environmental Planning and Assessment Act, 17 January 1983. See also Department of Planning Circular C4, issued 17 March 1989.

to address issues relating to land clearance, but this would only be necessary where a regional vegetation management plan did not exist.

Local environmental plans – specific orders

Local environmental plans may also include specific orders, and provisions for implementation and enforcement. The most relevant and widely used order is a *tree preservation order.* Such orders prohibit the destruction of the tree. Most tree preservation orders are included in local environmental plans on the basis of the model provisions for plans.[29] This means that councils have the power to issue a tree preservation order by resolution, and the order must then be published in the Gazette. The *order can require that council consent be sought prior to the removal of trees, either within a specified area or for specified trees.* Tree preservation orders can apply to trees on Crown land and private land, with trees in State forests and timber reserves exempt. If a tree which is the subject of a preservation order is destroyed or removed by a person, that person can face fines of up to $100 000.

The aims of tree preservation orders as outlined in the model provisions are for amenity, rather than vegetation conservation. Councils may adopt a similar aim, however, they may also use the orders as a mechanism for vegetation conservation.

Council policies/council codes

Councils may also have additional policies or codes on how they will address certain issues. These are merely policies and have no legal basis, although their requirements will generally be taken into account when determining an application. These policies are unique to each council and often involve directions or a process by which to consider development applications.

Development control plans

Development control plans can be made under the provisions of section 72. They allow for more detailed provisions than a local environmental plan, and they can also be made in relation to a regional environmental plan. Development control plans are not legally binding, they merely include factors which must be taken into account before a decision is reached. They generally include provisions such as development standards and may refer specifically to developments in certain areas, such as foreshore development and car parking. *Development control plans comply with relevant SEPPs, local environmental plans and regional environmental plans, however, unlike regional environmental plans and local environmental plans, they are made by the council and not by the Minister.*

Development applications

Once a development application has been made to council,[30] a council must consider the factors included in section 79(c).[31] These factors include:

- the provisions of an environmental planning instrument, development control plan, or any matter prescribed by regulation;
- the likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality;
- the suitability of the site for development;
- submissions made under the Act; and
- public interest.

29. Section 33 of the Environmental Planning and Assessment Act provides that councils may adopt model provisions developed by the government in regard to local environmental plans. A later ministerial direction under section 117(2) stated that draft local environmental plans must adopt the model provisions as far as they are relevant.

30. The consent authority may be a body other than the local council, for example, in SEPP 34 the Minister for Urban Affairs and Planning is named as the consent authority for matters classified as major employment generating industrial development.

31. The Environmental Planning and Assessment Act has been amended by the *Environment Planning and Assessment Amendment Act 1997*. These changes came into effect on 1 July 1998. Until that time, the factors as outlined in section 90 prior to the passing of the amending Act in 1997 applied.

These matters are general in nature and are to be supplemented by guidelines prepared by the Department of Urban Affairs and Planning. They do, however, require consideration of regional vegetation management plans. Where a development is a complying development, an application need not be made, however, a complying development certificate must be sought. Complying developments, although they are not individually assessed by the council, will inherently have minimal impacts on the environment or they will not be able to be complying developments and would require local government approval. Significant State developments will also be excluded from the control of local government, and will be subject to wider scrutiny and public consultation.

State environmental planning policies

SEPPs are made by the Minister to address planning issues which are of significance to the State. SEPPs can provide for protecting, improving or utilising the environment to the best advantage (s26(2)). They can address issues ranging from the control of development and reservation of land for public purpose; to control of advertisements providing for the protection of trees or vegetation (s26); reserving of land for public open space; and management of land reserved under the National Parks and Wildlife Act. Where land is to be reserved for a public purpose, the instrument reserving the land can include provisions for the purchase of that land by a public authority, unless it is owned by another public authority (s27).[32]

SEPPs, despite their name, do not need to have uniform statewide application, with some being site-specific (for example, SEPP 3, which amended the Penrith Planning Scheme Ordinance to exclude land to which the SEPP applied). Others are broader in their application (for example, SEPP 4, which concerned the need to seek development approval from local governments in some circumstances such as alterations to existing buildings) and can cover issues such as modifying development standards and allowing prohibited developments. SEPPs are prepared by the State government, either by the Director of Urban Affairs and Planning, or on direction from the Minister. They must relate to matters which are of 'significance for the environmental planning of the state' (s37(1)). Once a draft SEPP is prepared, the Minister has discretion as to whether to allow a period for public consultation. The Minister then forwards the draft SEPP on to the Governor, who makes the SEPP (s39). SEPPs are generally then implemented by local governments.

Section 36 provides that *SEPPs do not automatically prevail over local environmental plans and regional environmental plans, rather, the most recent instrument will prevail*. It is, however, possible for a SEPP to include a clause to the effect that it will prevail if there are any inconsistencies between the SEPP, local environmental plan or regional environmental plan.

SEPPs, like local environmental plans and regional environmental plans, are legally binding instruments. Local environmental plans are drafted subject to the content of SEPPs, and any discrepancies between SEPPs and the draft local environmental plan must be justified by the council prior to the approval of the local environmental plan.

The provisions of relevant individual SEPPs are outlined below.

Key SEPPs and other policies

SEPP 14 Coastal Wetlands

SEPP 14 applies to coastal areas outside the Sydney metropolitan area which are not covered by the National Parks and Wildlife Act. It applies to development within coastal areas, and states that *development consent is required for certain activities including land clearing* (that is, the destruction or removal of native plants) and filling and land draining. These activities are classed as designated developments and, when considering an application, the Director of Land and Water Conservation must take into account habitat conservation and possible alternatives. This SEPP

32. For example, a council could buy land for a public reserve, but not if it is already owned by another public authority such as the railways.

works in conjunction with the Coastal Protection Act, with both requiring consent prior to the clearing of vegetation. However, if there are any inconsistencies between the provisions, the Coastal Protection Act would apply.

SEPP 26 Littoral Rainforests

Littoral rainforest is rainforest which has specifically adapted to coastal conditions. SEPP 26 outlines a method for determining the impact of a proposed development on littoral rainforest, with the object of preserving such areas. The area covered by the SEPP includes a 100-metre buffer zone. Once again, land use and vegetation disturbance are defined as designated developments. *Local governments therefore have a limited role, only being able to consider an application for development within such an area if there is no other place where the development can occur.* In such a circumstance, and in all other cases where development approval is sought, permission must also be granted by the Minister or the Director of Urban Affairs and Planning.

SEPP 19 Bushland in Urban Areas

Where an area is zoned or reserved for public open space, and is within the listed local government areas, the requirements of SEPP 19 apply. SEPP 19 provides that *development consent must be sought before bushland in urban areas can be disturbed.* In this context, disturbance includes changes in the natural ecology which may result in degradation. The development proposal must be advertised and councils must consider various factors prior to the granting of consent. These include an assessment of the need to protect and preserve the bushland, and that the disturbance must be essential and the amount disturbed at a minimum. Even where the council owns or controls the land and proposes the development, public consultation processes must occur. The SEPP also includes a *presumption in favour of retaining the status quo and refusing the permit.* SEPP 19 is limited in its application as it only applies to land zoned public open space and land within a limited number of local government areas.

Regional environmental plans

Regional environmental plans are prepared by the State government where the Minister is of the opinion that the issue which will be addressed in the *regional environmental plan will concern a matter of environmental planning for a region* (s51(2)). Although prepared by the State, regional environmental plans can be initiated by local governments or the Minister. They can address issues such as:

- protecting, improving or utilising the environment to the best advantage;
- controlling development;
- reserving land for public purpose (including reserves); and
- protecting and conserving native animals and plants, including threatened species, populations and ecological communities and their habitats (s26).

In many ways regional environmental plans are the same as SEPPs, except that regional environmental plans must be available for pubic comment prior to being approved by the Minister.

A region may be an area which covers more than one local government area, although some regional environmental plans only apply to part of a local government area. Section 51A allows for regional environmental plans to have a more direct influence than SEPPs, with the Director of Urban Affairs and Planning able to prepare a development control plan for land that is the subject of a regional environmental plan. After the need for a regional environmental plan has been identified, an environmental study may be required (see below). Once an environmental study has been completed, a draft regional environmental plan will be prepared. The draft regional environmental plan and the environmental study (if carried out) must be put on public exhibition, with a period for public consultation and consideration of public submissions. The Minister will then consider the draft regional environmental plan and may make such alterations as 'he thinks fit' (s51), or can

require re-exhibition, decide not to proceed, or make the plan.

When making a regional environmental plan, it is a requirement that consultations be held with each affected local government. However, the plan is ultimately made by the Minister.

Environmental studies

Section 41(1) requires the Director of Urban Affairs and Planning to prepare an environmental study of the land to which the draft regional environmental plan is to apply. Section 74(2)(a) clarifies this further by stating that it is only required where the proposed regional environmental plan is the first environmental instrument to apply to the area. The Minister has a broad discretion in deciding what issues should be covered in an environmental study and is not bound by any recommendations, but is merely required to have regard to the outcome of the study. An environmental study is generally similar to an environmental impact statement, however, it will have a focus on the state of the environment as it currently exists to help support the need for the regional environmental plan.

Designated development

Section 29 of the Environmental Planning and Assessment Act allows an environmental planning instrument to declare any class or type of development to be designated. If designated, an environmental impact statement must accompany the development application (s77). The application must then be advertised and put on public display prior to consideration of the application by the council. Designated developments do not have to be a project of State significance.

Directions under the Environmental Planning and Assessment Act

Section 117(2) could be used by the Minister to limit or expand the scope of a local environmental plan. The Minister can issue a direction requiring the council to prepare a local environmental plan in accordance with principles stated in the direction. Examples of directions, which have been issued, include prohibiting Warringah Shire Council from increasing areas zoned as residential until there is an increase in employment opportunities or improved transport infrastructure (Farrier, 1993).

Section 71 allows the Minister to issue a direction as to the 'format, structure and subject matter' of a local environmental plan.

These provisions can be used by the Minister to restrict or control the subject matter of local environmental plans, even after they have come into operation.

Department of Urban Affairs and Planning circulars

These are issued by the department to assist with the interpretation of legislation. They have no legal status and may not even be factors which have to be considered. They are more of a policy statement. However, they may be a useful mechanism by which to influence council policy about a particular issue. The Department of Urban Affairs and Planning has also prepared a set of guidelines for developments, which include specific consideration of issues such as vegetation clearing consent and management.

Regional vegetation management plans

These are discussed under Part 3 of the Native Vegetation Conservation Act and are, by virtue of that Act, environment planning instruments for the purpose of the Environmental Planning and Assessment Act (see Section 4.3.4 below).

4.3.2 *Western Lands Act 1901*

The Western Lands Act applies to the Western Division of New South Wales. The western third of this division is not within a local government area, and is solely under the control of the Western Lands Commissioner. The division is divided into administrative districts, with a local land board being established to administer each district (s9). Virtually all land within the division is Crown land held on leasehold. Part 5 of the Act covers the conditions which may be imposed on leases. Section 18A provides for a condition requiring the fencing of the boundary of the property.

The Act further states that: 'It is a condition of any lease to which this section applies that any native vegetation on the land the subject of the lease, and any part of that land that is protected land, must not be cleared except in a accordance with the *Native Vegetation Conservation Act 1997*' (s18DB(3)). This does not, however, apply in relation to clearing to obtain timber for building, fencing or firewood (s18DB(4)).

The Commissioner also has the power to charge rent on land leased within the division, with the amount being determined according to the carrying capacity of the land. It may be possible to use the provisions relating to rent to reflect the conservation status of the land, in much the same way as a rate rebate could be offered in respect of freehold land.

The Native Vegetation Conservation Act also applies to the Western Division so that the same vegetation conservation provisions will apply statewide in New South Wales.

4.3.3 *Crown Lands Act 1989*

Crown land is that land which is vested in the Crown but does not include land dedicated for a public purpose (s3(1)). The Crown Lands Act concerns the management, development and conservation of Crown land, and the issuing of leases and licences over Crown land (s10). The principles which govern the management of Crown land include the observance of environmental protection principles, the conservation, wherever possible, of the natural resources, including flora, and the public use and enjoyment of Crown land. Crown land can be leased and it may be possible for the Minister to impose conditions on the lease in relation to vegetation conservation.

The Act is, however, of little importance to local government in New South Wales, as the only Crown land within the control of local government is that dedicated for a public purpose under the Local Government Act, and land where the responsibility is given to local governments under the Roads Act. In those cases, other legislation outlines the management requirements for the land.

4.3.4 *Native Vegetation Conservation Act 1997*

The Native Vegetation Conservation Act has recently been passed by Parliament and entered into force on 1 January 1998. It aims to provide a coordinated approach to vegetation conservation and management across New South Wales. The Act provides for regional vegetation management plans, property agreements, the formation of a Native Vegetation Advisory Council and a Native Vegetation Management Fund. Regional vegetation management plans will promote sustainable vegetation management and clearing controls on a regional basis. In addition to this regional approach, the Act also allows for landowners to enter into voluntary property agreements with the Department of Land and Water Conservation. Where there is an application for development which requires clearing which is not permitted under the regional vegetation management plan for an area, the Minister will be the consent authority and have the overriding power to refuse or grant development permission. These provisions are clearly of great assistance in developing and maintaining a regional approach to vegetation management. They do, however, reduce the potential role of local government, as issues will be addressed on a regional level, and not on the basis of local government boundaries.

It is important to consider the Native Vegetation Conservation Act in detail in order to determine how it will work in practice, and what the possible effects will be.

Section 3 states that the objectives of the Act are:

(a) to provide for the conservation and management of native vegetation on a regional basis;

(b) to encourage and promote native vegetation management in the social, economic and environmental interests of the State;

(c) to protect native vegetation of high conservation value;

(d) to improve the condition of existing native vegetation;

(e) to encourage the revegetation of land, and the rehabilitation of land, with appropriate native vegetation;

(f) to prevent the inappropriate clearing of vegetation; and

(g) to promote the significance of native vegetation, in accordance with the principles of ecologically sustainable development.

These objectives are clearly overarching statements of principle. The extent to which the Act will meet these objectives is, however, unclear.

'Native vegetation' is defined (s6) to mean:

any of the following types of indigenous vegetation:

(a) trees;

(b) understorey plants;

(c) groundcover; and

(d) plants occurring in a wetland.

The Act allows the Minister for Lands to declare land to be State protected land if it is land which has a slope greater than 18 degrees, is within 20 metres of the bed or bank of a river or lake, or land that is environmentally sensitive and affected, or likely to be affected, by soil erosion, siltation or land degradation (s7). Where land is declared State protected land, it is an offence to clear that land, except in accordance with development consent granted under the Act (s22). 'Clearing' is defined (s5) as:

a. 'cutting down, felling, thinning, logging or removing native vegetation';

b. 'killing, destroying, poisoning, ringbarking, uprooting or burning native vegetation';

c. 'severing, topping or lopping branches, limbs, stems or trunks of native vegetation'; and

d. 'substantially damaging or injuring native vegetation in any other way'.

However, clearing does not include sustainable grazing (s5).

The Minister is to declare areas as regions for the purpose of this Act. These regions may comprise one local government area, several local government areas or parts of several areas, but cannot be part of a single local government area (s8).

Exclusions

The Act, despite claiming to provide for comprehensive and statewide regulation of vegetation, does not apply to all of New South Wales. Section 9 lists 12 types of land which are excluded from the operation of the Act:

- land zoned residential, village, township, industrial or business;
- land covered by SEPP 14 Coastal Wetlands;
- land covered by SEPP 26 Littoral Rainforests;
- land under the *Forestry Act 1916* which is a State forest, national forest, flora reserve or timber reserve;
- and dedicated or reserved under the National Parks and Wildlife Act;
- land acquired under section 145 of the National Parks and Wildlife Act for the purpose of a reserve for the protection of Aboriginal places or religion;
- land subject to a conservation agreement under the National Parks and Wildlife Act;
- land subject to an interim protection order under the National Parks and Wildlife Act;
- land subject to a conservation agreement under the *Heritage Act 1977*;
- land that is critical habitat;
- Lord Howe Island; and
- those local government areas excluded in Schedule 1 (s10).[33]

It is reasonable that these areas are excluded from the operation of the Act as they are already adequately protected. However, it means that the Act will not be applied consistently across New South Wales. This would, however, only be a problem if the land which is excluded is not adequately protected. This does not appear to be the case, and therefore the Act is merely complementing existing provisions.

There are further exclusions within the Act. The Act does not apply to clearing for several purposes, namely:

- clearing authorised by a licence issued under the Act;
- clearing authorised under the Rural Fires Act or the *State Emergency and Rescue Management Act 1989*;
- clearing according to a bushfire management plan under the Rural Fires Act;
- clearing authorised under the Noxious Weeds Act;
- clearing in accordance with a property management plan approved under the *Threatened Species Conservation Act 1995*;
- clearing for a designated development under the Environmental Planning and Assessment Act;
- clearing authorised under the *Fisheries Management Act 1994*;
- clearing in accordance with a licence issued under the National Parks and Wildlife Act;
- clearing authorised under the *Mining Act 1992*;
- clearing authorised under the *Petroleum (Onshore) Act 1991*;
- clearing in accordance with an approved timber harvesting plan;
- clearing under the provisions of the Roads Act;
- clearing under a permit issued under the Rivers and Foreshores Improvement Act; and
- any clearing authorised under the *Water Act 1912*.

Regional vegetation management plans

The Act minimises the role of local government in relation to development approvals. The Minister is the consent authority and a regional vegetation management plan is an environmental planning instrument for the provisions of the Environmental Planning and Assessment Act. This means that where a regional vegetation management plan provides that clearing cannot occur without development consent, consent must be sought from the Minister (s18). If the vegetation management plan provides that clearing can occur without approval, then it must occur in accordance with the provisions specified in the Act. Similarly, a person cannot clear a protected area without consent (s19). Further, if consent is needed, other legislative requirements cannot be used to restrict this right further, however, additional licences may still be required (s20).

The Act contains an important provision that the 'regional vegetation management plan prevails over any other environmental planning instrument, whether made before or after the plan, to the extent of any inconsistency' (s36).

Part 3 provides for the development of regional vegetation management plans. The Minister can require anyone to prepare a regional vegetation management plan, including the Regional Vegetation Committee in that area. The plan may state whether or not development approval is needed for clearing, specify ways in which the vegetation is cleared, adopt or incorporate the provisions of a code of practice which may apply to vegetation clearance, and include strategies to meet the objectives of the Act. The plan is to be prepared

33. These areas are primarily within the Sydney region and therefore would have only limited areas of native vegetation remaining. There are, however, large areas of native vegetation, particularly within the Hornsby, Ku-ring-gai, Lane Cove, Sutherland Shire and Hawkesbury local government areas. These areas are probably protected adequately in other ways, for example, the Lane Cove National Park and Sydney REP 20 – Hawkesbury/ Nepean River.

by the Regional Vegetation Committee in consultation with the Director-General of National Parks and Wildlife (s25). It should deal with several matters, including the conservation of native species and their habitat; the conservation of soil and water resources; the social and economic aspects of land uses; other legislative requirements dealing with vegetation; and any other relevant issue (s27). There is a period for public exhibition and consultation, as well as consultation with local government (ss28–30). Submissions can be made, and these, together with the draft plan and responses to the comments, must be submitted to the Minister. Consultation with the Environment Minister is required and then, once these requirements have been completed, the Minister may make the regional vegetation management plan for the area (ss31–33). A regional vegetation management plan will remain in force for 10 years, unless otherwise reviewed (s34).

Native vegetation codes of practice can be developed under the Act, and they can be incorporated into the regional vegetation management plans and address the clearing of vegetation (ss37–39).

Property agreement

The Act also provides for the making of a property agreement between the landholder and the Director-General of National Parks and Wildlife. The agreement can provide for the conservation of certain areas, and the provision of financial and other services for that purpose. Once agreed to in writing, an agreement can be registered on title and will then be binding on successors in title (ss42–44).

Regional vegetation committees

Regional vegetation committees are established to prepare the regional vegetation management plan for an area, and review and monitor the plan (s51). The committee must include a representative of local government interests (s52). Apart from this reference to local government, local governments have virtually no responsibilities under the Act, except to ensure that development applications be passed onto the Minister for approval. There is also a Native Vegetation Advisory Council, which must have a representative of local government interests (s54), and acts to advise the Minister as to the status of native vegetation throughout New South Wales. A Native Vegetation Management Fund is established, and the money in the fund is to be allocated by the Minister (s56).

Regional vegetation management plans are to be developed which will designate vegetation clearance as a development, requiring the approval of the Minister. This will only be necessary where the clearing is not permitted and a licence obtained to clear under another Act.

Interim measures

The Act also contains provisions for interim measures and for the continuation of interim management plans developed under SEPP 46. These plans, if in force immediately before the Act comes into force, will remain in force, and will be a regional vegetation management plan under the Act. If the process for the preparation of an interim plan is under way, then the process can continue under the new legislation and the resulting plan will be a regional vegetation management plan.

Table 4.2: Summary of difference between previous and new arrangements for native vegetation clearance in New South Wales

Position prior to 1.1.98	Interim measures	Native Vegetation Conservation Act
SEPP 46, Soil Conservation Act and Western Lands Act	SEPP 46 and Native Vegetation Conservation Act	Native Vegetation Conservation Act
Applies to all land except: • land zoned residential, township or village • State forest, national forest, flora reserve or timber reserve • land subject to a clearing licence under the Forestry Act • protected land under the Soil Conservation Act • land under the Western Lands Act • land covered by SEPP 14 Coastal Wetlands, or SEPP 26 Littoral Rainforests	Applies to all land except: • land zoned residential, township or village • State forest, national forest, flora reserve or timber reserve • land subject to a clearing licence under the Forestry Act • protected land under the Soil Conservation Act • land under the Western Lands Act • land covered by SEPP 14 Coastal Wetlands, or SEPP 26 Littoral Rainforests	Applies to all land except: • land zoned residential, township, village, industrial or business • State forest, national forest, flora reserve or timber reserve • land covered by SEPP 14 Coastal Wetlands, or SEPP 26 Littoral Rainforests • land dedicated or reserved under the National Parks and Wildlife Act • land acquired under section 145 of the Act for the purpose of a reserve • land subject to a conservation agreement or interim protection order under the National Parks and Wildlife Act • land subject to a conservation agreement under the Heritage Act • land that is critical habitat • Lord Howe Island • local government areas listed in Schedule 1, mainly Sydney and surrounds
Must seek development consent for the clearing of vegetation from the Director-General of the Department of Land and Water Conservation	Must seek development consent for the clearing of vegetation from the Director-General of the Department of Land and Water Conservation or clear in accordance with regional vegetation management plan	Clear in accordance with regional vegetation management plan; if clearing not permitted under the regional vegetation management plan, then must seek consent from the Minister
'Clearing' is directly or indirectly killing, destroying or burning native vegetation, removing native vegetation, or substantially damaging native vegetation	'Clearing' is directly or indirectly killing, destroying or burning native vegetation, removing native vegetation, severing or lopping branches, limbs, stems or trunks of native vegetation, or substantially damaging native vegetation	'Clearing' is cutting down, felling, thinning, logging or removing native vegetation, killing, destroying, poisoning, ringbarking, uprooting or burning native vegetation, severing, topping or lopping branches, limbs, stems or trunks of native vegetation, [or] substantially damaging or injuring native vegetation in any other way
Consent valid for 12 months	Consent valid for two years	No time limit on consent issued by Minister

Table 4.2: Summary of difference between previous and new arrangements for native vegetation clearance in New South Wales (continued)

Position prior to 1.1.98	Interim measures	Native Vegetation Conservation Act
Consent is not required for: • clearing up to two hectares per annum • cutting of no more than seven trees per hectare per year • stock fodder • mistletoe control • rural constructions such as dams • burning control • planted native vegetation • private native forestry • vermin control • public utilities • noxious weeds	Consent is not required for: • clearing up to two hectares per annum • cutting of no more than seven trees per hectare per year • stock fodder • mistletoe control • rural constructions such as dams • burning control • planted native vegetation (under 10 years old) • private native forestry • public utilities • noxious weeds • clearing under a mining lease under the Mining Act	Consent is not required for: • clearing permitted under a regional vegetation management plan • clearing authorised under the Rural Fires Act or the State Emergency and Rescue Management Act • clearing according to a bush fire management plan under the Rural Fires Act • clearing authorised under the Noxious Weeds Act • clearing in accordance with a property management plan under the Threatened Species Conservation Act • clearing for a designated development under the Environmental Planning and Assessment Act • clearing authorised under the Fisheries Management Act • clearing in accordance with a licence issued under the National Parks and Wildlife Act • clearing authorised under the Mining Act • clearing authorised under the Petroleum (Onshore) Act • clearing in accordance with an approved timber harvesting plan • clearing under the provisions of the Roads Act • clearing under a permit issued under the Rivers and Foreshores Improvement Act • any clearing authorised under the Water Act
Matters which must be considered when determining an application: • land and water degradation • remnant or corridor vegetation • whether vegetation type is adequately represented in the reserve system • whether vegetation is in unusually good condition • biodiversity of biota • whether species are isolated or near the edge of their geographic distribution	Matters which must be considered in determining an application: • land and water degradation, including soil erosion, salination, landslip, flooding, and so on • remnant or corridor vegetation and migratory route for wildlife • whether vegetation type is adequately represented in the reserve system • whether vegetation is in unusually good condition • biodiversity of biota • whether species are isolated or near the edge of their geographic distribution • likely social and economic impacts	Matters which must be considered when determining an application: • must determine application in accordance with Part 4 of the Environmental Planning and Assessment Act (s90 factors which are to be amended under the *Environmental Planning and Assessment Amendment Act 1997*)

Table 4.2: Summary of difference between previous and new arrangements for native vegetation clearance in New South Wales (continued)

Position prior to 1.1.98	Interim measures	Native Vegetation Conservation Act
Regional vegetation committees prepare draft regional vegetation management plan	Regional vegetation committees continue preparing draft regional vegetation management plan, but follow the Native Vegetation Conservation Act requirements from the date these enter into force	Regional vegetation committees prepare draft regional vegetation management plan following public consultation requirements in the Act
Regional vegetation management plan on public display, public submissions, ultimately made by Minister	Regional vegetation management plan on public display and so on, either under requirements of SEPP 46, or under Native Vegetation Conservation Act once that has entered into force, plan ultimately made by Minister	Regional vegetation management plan on public display as required by the Act, plan ultimately made by Minister

4.3.5 *Rivers and Foreshores Improvement Act 1948*

The Rivers and Foreshores Improvement Act imposes additional requirements on local government with respect to development on river banks and foreshore areas. This Act adds to the existing legislative requirements with which local governments must comply. The Act allows for the declaration of river and foreshore improvement districts within which additional development conditions may be imposed. If the area is within the definition of 'protected land' in the Act, there is also a requirement that a permit must be obtained before excavating in the area. This could potentially be used to control the vegetation clearance along rivers and foreshores, by imposing conditions on a permit to minimise the disturbance and loss of the vegetation. The same notion of 'respect' for native vegetation could be introduced into other legislation.

4.3.6 *Coastal Protection Act 1979*

The Coastal Protection Act applies to the coastal zone of New South Wales, as defined under the maps referred to in Schedule 1.[34] The Act establishes a Coastal Council of New South Wales, which is to give advice and information on the protection, maintenance and enhancement of the coastal zone (s28). The Act then proceeds to address the issue of development within the coastal zone. Development is defined to include the clearing or propagation of vegetation (s37). A local government is prohibited from granting development consent within the coastal zone without the concurrence of the Minister (s38). This is a major restriction on the powers of local governments in coastal New South Wales, however, it is important in respect to vegetation conservation. It effectively requires ministerial approval for the clearing of coastal vegetation. In areas where there are development pressures on the coast, this is an important second tier of approval. It could also operate in the opposite direction, with the Minister approving the clearing of vegetation which the local government would otherwise prohibit.

4.3.7 *National Parks and Wildlife Act 1974*

The National Parks and Wildlife Act allows for the creation of numerous types of reserves, including national parks and historic sites, State recreation areas, regional parks, nature reserves, State game reserves, karst conservation reserves, wilderness areas, Aboriginal areas, protected archaeological areas, wildlife districts, wildlife refuges and wildlife management areas. Provisions are also included concerning conservation agreements. The Act applies to Crown land or land acquired or dedicated by the Crown under specific provisions in the legislation (s145, 146 or 148). Once an area is declared a reserve under the Act, the control, care

34. Schedule 1 lists the map reference numbers for those areas which are included within the coastal zone. The maps showing the exact extent of the zone are held centrally by the Coastal Council.

and management of that land is vested in the Director-General of the National Parks and Wildlife Service (s33). This essentially *excludes land subject to provisions under the Act from any controls by local government.*

There are, however, some provisions under the Act which should be highlighted.

Schedule 13 of this Act contains a listing of flora subject to the provisions of Part VIII of the Act. These provisions are aimed at preventing the exploitation of native flora for commercial purposes. It is not an offence to pick native plants growing on private land with the permission of the landholder, or on leased Crown land (ss113 and 117). These exceptions mean that it is only possible to regulate flora exploitation on unleased Crown land. It is, however, an offence to sell native plants unless a licence is obtained (ss118, 131 and 132). A person found holding native flora on Crown land is presumed to have picked it, and will be guilty of an offence unless they are permitted to have it under a licence obtained under the Forestry Act or the National Parks and Wildlife Act.

Interim protection orders can be made by the Minister in relation to land of natural, scientific or cultural significance, or land on which actions are being taken to protect native plants (ss91A and 91B). Such an order can require a landowner to modify their use of the land so that the flora is no longer subject to the threatening process. This is one way in which the National Parks and Wildlife Act can extend to privately owned land and will therefore *place additional requirements on any imposed by local government.*

The Act also provides for *voluntary conservation agreements* between the Minister for the Environment and the landholder. Such an agreement can be for the purpose of the preservation of flora and can impose positive management arrangements on the landholder (s69C). The agreements can be registered, and will then be legally binding on successive landholders (s69E). The only assistance, which can be given by the Minister, is advice and assistance, including some financial incentive (s69C). It is possible that this assistance will not be sufficient to encourage a landowner to enter into such an agreement, unless they wish to protect their land for other reasons.

Where a voluntary conservation agreement exists, it must be taken into account by councils when deciding whether development consent should be granted under the Environmental Planning and Assessment Act. The agreement can be terminated with the agreement of both parties, or if it is unnecessary or incapable of achieving its purpose (s69H).

4.3.8 *Forestry Act 1916*

The Forestry Act primarily applies to Crown land in New South Wales. The Act allows the Minister to declare areas to be State forests, timber reserves or flora reserves, and also extends to all Crown-timber land.[35] This control does not extend to privately owned land which is covered by the provisions of the Environmental Planning and Assessment Act, nor does it extend to areas under the National Parks and Wildlife Act. The Act establishes State Forests of New South Wales, which has powers of control and management over timber on Crown land. These powers extend to the taking of timber, even from within a flora reserve, and the entering into agreements concerning the taking of timber, including privately owned timber (s11). Anyone who takes timber without such an agreement or a licence granted under the Act is guilty of an offence (s27). Licences can be issued for several purposes, and are referred to as timber licences, clearing licences or products licences, with the people who actually carry out the work requiring a contractor's licence and operator's licence. Clearing permits cannot, however, be issued for flora reserves.

State Forests of New South Wales has the responsibility for classifying land. Section 17 outlines factors to be considered in the declaration of land as State forest, including the promotion of effective and economic control and management of forests for timber production. The Governor

35. Crown-timber land includes vacant Crown land and Crown land which exceeds two hectares and is under lease or licence under the Crown Lands Act.

ultimately declares areas of Crown land to be State forest (s18). State forest may then be further declared a national forest (s19A). Similarly, the Governor, by notice in the Gazette, can set aside land as a flora reserve for the purpose of the preservation of native flora (s25), although the concurrence of the Minister is also needed. Once an area is declared a flora reserve, State Forests of New South Wales must prepare a working plan of the operations it proposes to undertake in the reserve, and this plan also requires ministerial approval. The working plan may authorise the local government within whose boundaries the flora reserve exists to undertake operations in the reserve as specified in the plan.

Although areas covered by the Forestry Act may also be covered by the provisions in environmental planning instruments, they are usually zoned as forestry, and any development or activities carried out by State Forests of New South Wales are removed from local government control. Unless authorised under the working plan, local governments have no responsibility or opportunity to control activities on land covered by the Forestry Act.

4.4 Other relevant legislation

4.4.1 *Roads Act 1993*

The Roads Act provides that the interests of safety will override any other issue. Section 88 allows for the removal or lopping of any tree or other vegetation that is overhanging a public road and/or causing a traffic hazard. The Act also provides that a Crown road may be transferred to the control of council, as can any road under the control of the Road Transport Authority. Apart from section 88, there are no other provisions in the Act relating to the management of roadside vegetation, even though many of the State's more valuable remnants exist on roadsides. *It would therefore appear that local governments will be free to manage roadsides in accordance with any policies they may have on vegetation conservation.*

As roadsides are an important area for native vegetation, particularly remnant vegetation, it is important that local governments be encouraged to manage these areas according to vegetation conservation principles. In this regard, the New South Wales Roadside Environment Committee has prepared information on managing roadsides. The committee comprises representatives of State and local government and other relevant bodies. The committee has compiled information on aspects of the effect of road construction on the vegetation through to the management of existing roadside vegetation. It is important that information like this continues to be freely available to local governments, and they are encouraged to follow any recommendations with regard to vegetation management. It may also be possible to impose a duty on local governments to manage roadsides in accordance with the principles outlined by the New South Wales Roadside Environment Committee.

4.4.2 *Rural Lands Protection Act 1989*

The Rural Lands Protection Act has only minimal relevance to the issue of native vegetation conservation and management. It is primarily concerned with livestock issues. It does, however, contain some references to noxious weeds and the control of such weeds, including the levying of a noxious weed control rate (s54A), and contains provisions for the management of travelling stock routes, which contain many areas of remnant vegetation. *Rural Lands Protection Boards are established which appear to exercise controls, which may impose additional controls over those imposed by local government,* for example, in respect to grazing of stock.

4.4.3 *Rural Fires Act 1997*

The Rural Fires Act replaces the *Bushfires Act 1949* and is primarily concerned with bushfire fighting and prevention. It is, however, important in that it addresses the issue of risk management associated with bushfires. Much of the Australian vegetation has evolved in accordance with the natural fire regime. This Act, in addressing the issues of bushfire hazard reduction, may well lead to a change in the natural fire frequency of an area, and consequently affect the type of vegetation present. The Act *imposes a duty on public authorities and councils:*

to take the notified steps (if any) and any other practicable steps to prevent the occurrence of bush fires on, and to minimise the danger of the spread of a bush fire on or from any land vested in or under its control or management, or

a. any highway, road, street, land or thoroughfare, the maintenance of which is charged on the authority (s 63).

A local authority may also issue a notice to a landowner requiring them to take steps to reduce the bushfire hazard on their property (s66). This will, however, be subject to the provisions of the Threatened Species Conservation Act. Thus a landowner is not permitted to remove a tree, for example, to comply with an order under the Rural Fires Act if to do so would amount to a breach of the Threatened Species Conservation Act. It is, however, clear that, in respect to other vegetation management plans or conservation policies, the provisions of the Rural Fires Act would appear to override any other provisions. The possible effects of this legislation on vegetation management are wide-reaching. To comply with the duty imposed on them by the Act, local governments may be required to undertake hazard reduction burns at a higher frequency than would naturally occur in that environment. This may lead to changes in the habitat and species composition in the area. This is clearly not in line with vegetation conservation principles.

4.4.4 *Catchment Management Act 1989*

Another set of committees is established under the Catchment Management Act. These committees are to promote an integrated approach to catchment management, advise on management of catchment areas, monitor, evaluate and report on progress, and assist with other activities related to management of the catchment. Although of limited direct impact on local governments and vegetation management, *catchment management committees could play an important role in the promotion of vegetation conservation*. They are in the ideal position to establish and promote an integrated vegetation conservation strategy for a catchment area, and could successfully use this position to assist local governments in incorporating such a strategy into their local decision-making. A member of a catchment committee must be a member of a regional vegetation committee, and in this way could potentially integrate vegetation management over the area of a catchment.

4.4.5 *Environmental Offences and Penalties Act 1989*

The Environmental Offences and Penalties Act, as its name suggests, provides for criminal sanctions for environmental offences. Three tiers of offences exist: those minor offences which attract an on-the-spot fine; the second tier of offences, which include breaking air pollution standards and failing to obtain the necessary permits or licences; and the third tier of offences, which concern actions without lawful authority which wilfully or negligently lead to environmental harm. Harm is defined to include 'any direct effect of degrading the environment' (s4(1)); and the environment is defined to include land, water, atmosphere and plants. The Act may therefore be used by the State where a person causes harm to the environment which may in fact extend to native vegetation loss. It is, however, of little importance to local governments, except that they may be prosecuted under the Act.

4.4.6 *Soil Conservation Act 1938*

The only reference in the Soil Conservation Act to local government authorities is that the Soil Conservation Commissioner should have regard to coordinating the policies and activities of local authorities in regard to the objects of the Act (s4C). The objects of the Act are to provide for the conservation of soil resources and for the mitigation of erosion. The Act provides for a Soil Conservation Commissioner to oversee actions taken under the Act. Such actions include the issuing of soil conservation notices, provisions with respect to protected areas and the mitigation of erosion. The Act binds the Crown and will therefore be binding on local governments and override any activities they may approve. The Act allows the Minister to declare an area a protected area if it is land within a catchment area with a slope of greater than 18 degrees from the horizontal; land which is within 20 metres of the bed or bank of a river or lake; and

land which, in the opinion of the Commissioner, is environmentally sensitive and is likely to be affected by land degradation (s21B). Once declared a protected area, it is an offence to destroy trees in that area except in accordance with section 21D, which allows the Commissioner to give authority to carry out an otherwise prohibited act (s21C).

4.4.7 *Wilderness Act 1987*

The Wilderness Act aims to provide for the permanent protection and proper management of wilderness areas (s3). A wilderness area is an area which 'is, together with its plant and animal communities, in a state that has not been substantially modified by humans and their works or is capable of being restored to such a state ... [and] ... is of a sufficient size to make its maintenance in such a state feasible ...' (s6(1)). Any person, including a local government, may submit a written proposal to the Director-General of National Parks and Wildlife to have an area declared a wilderness area (s7). This application is assessed by the National Parks and Wildlife Service. The Minister, after consultation with Cabinet, may then declare any land to be subject to a wilderness protection agreement or conservation agreement (s8), and then declare it a wilderness area. A landholder must consent in writing to an area of land being subject to a wilderness protection agreement. Such agreements can also apply to Crown land and land under the control of a statutory authority (s10). Proposed agreements must go through a process of public exhibition and comment before being formally entered into by the Minister (s11). Such agreements can restrict the use of an area, or can require a statutory authority to refrain from permitting certain activities on the land. It can also contain provisions relating to plans of management (s12). A register of all agreements must be kept by the Director-General.

Local governments are bound by the provisions of this Act, not only by what activities they can approve in wilderness areas, but also in relation to developments they may wish to carry out in a wilderness area. A local government must give notice in writing of a proposed development to the Minister, who must give written consent to the council, but can only do so where he/she is 'of the opinion that the proposed development will not adversely affect the area' (s15). This may easily act to prevent vegetation clearance, particularly as wilderness areas must be areas where there has been minimal human interference.

The Act also provides that conservation agreements, as provided for under the National Parks and Wildlife Act, can be entered into in relation to wilderness areas declared under the Act (s16).

Local governments must therefore be aware of the provisions of the Act and possible restrictions which may be placed on their ability to approve development in areas declared wilderness areas under the Act.

4.4.8 *Commons Management Act 1989*

The Commons Management Act applies to the establishment and management of commons by trusts established under the Act. A common is a parcel of land which has been set aside by the Governor or Minister as a common, or for pasture for the use of inhabitants in a specified locality (s3). A local authority can manage the affairs of a trust which is established for a particular area (s7); a local authority can, after giving six months written notice to the Minister, withdraw from the management of the common. In managing the affairs of a trust, a local government has responsibility for the control and management of the common and can make by-laws in respect of that common, including by-laws adopting the provisions of a management plan (s9). This extends to 'protecting trees, shrubs and other vegetation' (s9(g)). The Act also provides the trust with powers to purchase land for use in connection with the common.

Local governments can therefore use the Commons Management Act to extend their control and management of commons and could use these powers for the management of native vegetation on commons.

4.4.9 *Conveyancing Act 1919*

The Conveyancing Act allows for the creation of a public positive covenant by local authorities. A

public positive covenant is defined (s78A) to include:

> a covenant which imposes obligations requiring:
>
> (a) the carrying out of development on or with respect to the land, within the meaning of the *Environmental Planning and Assessment Act 1979*;
>
> (b) the provision of services on or to the land or other land in its vicinity, or;
>
> (c) the maintenance, repair or insurance of any structure or work on the land, or imposes any term or condition with respect to the performance of or failure to perform any such obligation.

It is possible for conservation covenants to fall within this definition, for example, as the clearing of vegetation can amount to a development as it is the 'the carrying out of a work in, on, over or under' land (Environmental Planning and Assessment Act, s4(1)). Section 88E of the Conveyancing Act states that a local government may 'impose public positive covenants on any land vested in the authority, so that the restriction or public positive covenant is enforceable by the authority'. This clearly allows *local governments to impose covenants on land, which will be binding on the landowner in relation to vegetation conservation*.

The main way, however, that conservation agreements are entered into is through the voluntary conservation agreement provisions under the National Parks and Wildlife Act, between the landowner and the National Parks and Wildlife Service.

4.4.10 *Threatened Species Conservation Act 1995*

The Threatened Species Conservation Act aims to conserve biological diversity, promote ecologically sustainable development, and encourage the protection of the critical habitat of threatened species. The Act allows for the listing of species as endangered, extinct or vulnerable, and for the listing of endangered populations and endangered ecological communities (s6). Species are eligible to be listed if they meet certain criteria, and may be nominated for consideration by the Scientific Committee established under the Act by any person, including local government (s18). There are set procedures outlined in the Act. The critical habitat of an endangered species can also be declared by the Minister, following recommendations from the Director-General and Scientific Committee. This can only occur, however, after a period of public notification and submissions (ss38–48). Section 50 provides that a public authority must 'have regard to the existence of critical habitat: (a) in relation to use of land that it owns or controls that is within or contains critical habitat, or (b) in exercising its functions in relation to land that is within or contains critical habitat'. *Regulations and the requirements concerning the protection of the critical habitat of a species must therefore be considered by a local government.*

The Act also provides mechanisms for the management of threatened species through recovery plans (Part 4), and threat abatement plans (Part 5). The issuing of licences and preparation of species impact statements is covered in Part 6. *Where a proposed development under the Environmental Planning and Assessment Act will impact on the critical habitat of a species, a species impact statement must accompany the application and a licence must be sought* under the Threatened Species Conservation Act.

The Act also allows for the Director-General to enter into a joint management agreement with one or more public authorities for the 'management, control, regulation or restriction of an action that is jeopardising the survival of a threatened species, population or ecological community' (s21). Such an agreement is, however, void 'to the extent to which it fetters any discretion of the council or consent authority in the granting or refusal of a consent or approval' under the Environmental Planning and Assessment Act or the Local Government Act. This section appears to mean that a council will not be bound in its decision-making process to the provisions of a joint agreement. However, if a proponent fails to get the necessary licences and permits under the Act, they will still be committing offences under the Act.

The Threatened Species Conservation Act operates in conjunction with the provisions of the National Parks and Wildlife Act and the Environmental Planning and Assessment Act. *A local government must have regard to the provisions of this Act when considering a development application. A development proponent will not be required to seek approval from the State under the Threatened Species Conservation Act if approval under the Environmental Planning and Assessment Act has been received, as approval under the latter Act is a defence for any breach of the Threatened Species Conservation Act.*

4.5 Summary of opportunities

Table 4.3 outlines the incentives available in New South Wales, and the legislative amendments necessary to offer these incentives where they are not currently able to be offered by local governments. In many instances a simple legislative amendment or clarification of the existing legislation is all that is required to increase the number of incentives which may be offered.

The table also includes reference to section 124 in the Local Government Act, which is an existing mechanism which would allow local governments to prohibit damage to vegetation on council-managed or owned land by issuing an order under this section.

If the above amendments were allowed, the position, combined with the new Native Vegetation Conservation Act, would allow for comprehensive vegetation management by the State, which would be complemented by local government incentives.

Table 4.3: Opportunities available to local governments to offer incentives for vegetation conservation

Incentive	Amendment
Environmental levy	Amend definition of service in the Local Government Act (s501) to include environmental services, or pass regulation defining the environment a service for the purpose of section 501 Revenue raised through environmental levies should not be subject to rate capping
Management agreement	Policy support/encouragement
Covenant	Clarify that vegetation conservation could be included within a public positive covenant under the Conveyancing Act (s87A)
Grants to individuals and community groups	N/A as grants can currently be made by local governments
Rate rebates	Amend categories for rating in the Local Government Act (s529) to include a category of conservation
Acquisition and sale of land	Amend the provisions of the Local Government Act so that land which is acquired can be resold
Orders	Amend the table referred to in section 124 of the Local Government Act to include orders relating to the protection of native vegetation

5. Victoria

5.1 Legislative framework

Local governments in Victoria have been granted relatively broad powers with relation to environmental control, protection and conservation. Their functions include the control of plants and, through this, provision for the conservation of native vegetation as outlined in Schedule 1 of the *Local Government Act 1989*. Under the *Planning and Environment Act 1987*, local governments have responsibility for the control of land use and planning within their municipalities. Local governments are, therefore, responsible for land use and planning and, in exercising their functions under the Local Government Act, they can act with regard to vegetation conservation and protection. In this respect, the position of Victorian local governments is similar to those in other States. However, the extent to which their powers may be exercised is limited by other legislative requirements, in particular the *Flora and Fauna Guarantee Act 1988,* the *Alpine Resort (Management) Act 1997*, the *Catchment and Land Protection Act 1994*, the *Coastal Management Act 1995*, the *Conservation, Forests and Lands Act 1987* and the *National Parks Act 1975*. These Acts remove certain areas from the jurisdiction of local governments, impose additional requirements for land use and planning which override those imposed by local governments, and may require that local governments consider issues relating to vegetation clearance within their planning schemes.

The primary mechanism for vegetation management by local government is the planning and land use system. Local governments are responsible for developing and enforcing a planning scheme for areas within their jurisdiction. The planning scheme sets out policies and requirements for the use, development and protection of land. There is a planning scheme for every municipality in Victoria. They state which activities, developments or uses of land require the granting of a permit or development approval by the council. In issuing these, a council must consider the environmental impact of the proposal.

The format of the planning scheme must follow the structure of the Victoria Planning Provisions, which include State and Local Planning Policy Frameworks as well as zone and overlay provisions, particular provisions, general provisions and definitions.

The particular provisions contain specific provisions relating to the protection and conservation of native vegetation to reduce the impact of land and water degradation and to provide habitat for plants and animals (s52.17). In general, a permit is required to remove, destroy or lop native vegetation from a landholding greater than 0.4 hectares. This, with State and local planning policies, is the main method for the control of vegetation clearance.

The Victoria Planning Provisions also include standard overlays with schedules in which local provisions can be inserted. The specific provisions within a planning scheme can be supplemented in this way, for example, by use of a Vegetation Protection Overlay. In addition, further requirements may be placed on local government through State and regional agencies, which aim to ensure consistency and coordination of policy across regions.

The influence of State and regional bodies on the discretion available to local governments is clearly illustrated in the following table, which outlines the relevant legislation and the primary jurisdiction responsible for its implementation.

5.2 Powers of local government

5.2.1 Local Government Act 1989

Section 8 of the Local Government Act states that:

> (3) A Council has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions and to enable it to achieve its purposes and objectives.

The purposes of a council are set out in section 6, the objectives of a council are contained in section 7 and section 8 outlines the functions and powers of local governments. Further specific grants of restrictions on power can occur within the Act itself, or within any other Act.[36]

Table 5.1: Environmental and land use legislation and implementing jurisdiction

Legislation	Jurisdiction
Alpine Resort (Management) Act 1997	State and regional agencies
Alpine Resorts Act 1983	State and regional agencies
Catchment and Land Protection Act 1994	State and regional agencies
Coastal Management Act 1995	State and regional agencies
Conservation, Forests and Lands Act 1987	State and regional agencies
Crown Land (Reserves) Act 1987	State
Environment Effects Act 1978	State
Environment Protection Act 1970	State
Flora and Fauna Guarantee Act 1988	State
Forests Act 1958	State
Heritage Act 1995	State
Land Act 1958	State
Land Conservation Act 1970	State
Local Government Act 1989	Local government
National Parks Act 1975	State
Planning and Environment Act 1987	State
Reference Areas Act 1978	State
Urban Land Authority Act 1979	State
Victorian Conservation Trust Act 1972	State
Water Act 1989	State

Local laws

A council has the power to make local laws 'for or with respect to any act, matter or thing in respect of which the Council has a function or power under this or any other Act'. A local law will be valid unless it is inconsistent with any Act or regulation (s111). This broad grant of power extends to allow a council by resolution to impose a 'fee, charge, fare or rent in relation to any property, undertaking, goods, service or any other act, matter or thing'. This power also allows a council to require that a permit or licence be sought for certain acts, and may also allow for the reduction or refund of a fee (s113). *These broad powers may allow local governments to offer incentives for the conservation of native vegetation*. For example, the council could impose, by way of a local law, an *environmental levy* on ratepayers. Similarly, the council could offer *rate rebates* in specified circumstances, such as when an area of land is retained for vegetation conservation (s113(3)). Such an unfettered grant of power can easily be utilised for vegetation conservation by local governments.

In order to pass a local law, the council must meet the requirements contained in section 119. It must give public notice in the Gazette of the purpose of the law and allow for persons affected by the proposed law to make submissions to council concerning the law. Once the law has been made, notice must be given in the Gazette and a copy of the law must be sent to the Minister. The only restriction on this is the Governor in Council's

36. Section 8 refers to the functions of a council as contained in Schedule 1. It is interesting to note that these extend to animal control, protection and conservation, and to plant control, but do not extend to plant protection or conservation. There is also a function of council which includes environment control, protection and conservation. Although there is no specific reference to plant conservation or vegetation conservation, they would reasonably be expected to fall within the functions that are stated, as they fall in environment control, protection and conservation, and therefore would be part of the functions of local government.

power, on the recommendation of the Minister, to revoke all or part of a local law. The Governor in Council may do this if the local law breaches the provisions of Schedule 8 of the Local Government Act (which deals with the scope and fairness issues in relation to local laws), if the law should more appropriately be contained in a planning scheme, or for any other reason considered appropriate by the Minister. This means that the Minister, in effect, has a right to veto local laws, but there is no need to gain the Minister's approval prior to making a law.

Grants to individuals and community groups

For a council to be able to offer financial assistance to an individual or community group for the purpose of vegetation conservation, such as providing *fencing assistance, it must be associated with a function or power conferred on the council by the Local Government Act or any other Act*. Section 136 states that a council may apply any money to '(a) enable the Council to perform the functions and exercise the powers conferred on the Council by or under this Act or any other Act'. If, however, the money which is to be utilised is from a specific purpose fund, the approval of the Minister is necessary before those funds can be used for another purpose (s152). *As councils have responsibility for plant control, it would therefore appear that it is within the powers granted to local governments to offer financial assistance for vegetation conservation*.

Rates and charges

Section 154 defines rateable land. In general, all land is rateable, except for unoccupied Crown land, Crown land and other land that is vested in a public authority or council and is used exclusively for public or municipal purposes, land that is used exclusively for charitable, religious or mining purposes, and land that is used exclusively by a club or memorial for people who served Australia in the armed forces. A council can declare general rates, municipal charges, service rates, service charges, special rates and special charges which will apply to rateable land (s156). *Councils may base their rates on the net annual value, the capital improved value or the site value of the land* (s157).

A *municipal charge* can be imposed to cover some of the administrative costs of a council, but it must not be over 20% of the total revenue from the charge and general rates per year (s159). Certain land may be exempt from this charge, including farm land which forms part of a single farm enterprise, providing an exemption is not claimed in respect of one rateable property which forms part of the enterprise, and is within the meaning of the *Valuation of Land Act 1960* (s159). *It may be possible for land which is retained for conservation to also be exempt under this provision. However, this would require either that the definition of farm land under the Valuation of Land Act were to include land maintained for vegetation conservation purposes, or an amendment to the Local Government Act, so that conservation land could also be exempt*.

General rates are determined by multiplying the value of the land as determined by the council by the percentage rate, which is set as the general rate level by the council (s160). If the council were to use the capital improved value of the site as the basis for the valuation, *land that is maintained for vegetation conservation would benefit through lower rates, as it would have a relatively low capital improved value*.

Alternatively, a council can impose a *differential rate* if it uses the capital improved value system and it considers that the differential rate 'will contribute to the equitable and efficient carrying out of its functions' (s161). If the council so determines, a differential rate can be used in relation to vegetation conservation if it can be shown that the land on a particular title will not require access to services and, therefore, will place a lower burden on council infrastructure than other land. *If a differential rate is to be used, the council must define the classes of land which are subject to the rate, the reasons for that, and the level of the rate for those classes*.

A council can impose a *service rate* or *service charge* for the provision of specified services. These services include the provision of a water supply and sewage services, disposal and collection of rubbish, and any other prescribed service (s162). As in other jurisdictions, this section would be able to be used to allow councils to charge an *environmental levy*

for environmental services *only if environmental services were prescribed as a service for the purpose of this section, or if the legislation were amended to include the environment as a service for which a charge could be imposed.*

Special rates and *charges* can only be used for the limited purpose of repaying any debts incurred by the council and to offset any debts incurred for which the person paying the rate has received special benefit (s163).

Section 169 is perhaps the most important section as far as rates are concerned. This section allows a council to 'grant a rebate or concession in relation to any rate or charge…(b) to preserve buildings or places in the municipal district which are of historical or environmental interest…' This section clearly allows for rate rebates where the land is important for the conservation of native vegetation. It also allows for the full amount of rates to be paid if the terms on which the rebate or concession was granted were not complied with. This would enable councils to require that an area of vegetation be maintained for the purpose of conservation for a set period of time; if this condition is breached, then the amount of unpaid rates would become an amount owing.

The Minister has an overriding power to limit the amount of funds that can be raised by a council through rates and charges in a single financial year (s185B). This may only be a limit where a council increases the maximum amount possible through its rating system and wishes to impose an additional environmental levy, but cannot satisfactorily justify an increase.

Land acquisition

A council has the power to 'purchase or compulsorily acquire any land which is or may be required by the Council for or in connection with or as incidental to, the performance of its functions or the exercise of its powers' (s187). The *Land Acquisition and Compensation Act 1986* applies in respect to the procedures for purchasing land. If a council also wishes to sell land, it can only do so in accordance with the provisions in section 189. These requirements are for public notification and for valuation of the land prior to the sale. It would be possible for councils to acquire and sell land of high conservation value using a revolving fund, as long as it can be established that the transactions were in connection to or incidental to the performance of the functions and powers of the council. As the protection and conservation of plants is a function, it would appear that land could be acquired for conservation purposes.

Roads and crown land

Section 203 states that a *public highway* is vested in the council within whose jurisdiction it is found. This section does not, however, apply to declared roads under the *Transport Act 1983*, roads on Crown land, and roads vested in a Minister or other public authority. *Crown land* and *roads on Crown land* are the sole responsibility of the Crown and will not be the responsibility of the council within whose jurisdiction they are found. Schedule 10 of the Local Government Act outlines the powers of councils over roads. Roads are defined as any land reserved or proclaimed as a street or road under the *Crown Land (Reserves) Act 1987* or the *Land Act 1958*. This would cover roadside vegetation, as it would occur within the area dedicated as a road. It does not, however, require that roadsides be managed for native vegetation.[37]

5.3 Land use and planning

5.3.1 Planning and Environment Act 1987

The purpose of the Planning and Environment Act is planning for the use and development of land in Victoria (s1). The Act states its objectives, which include establishing a system of planning schemes based on municipal districts as the main way to control land use, and to ensure that the effects on the environment of a proposed development are considered and to do this through a single

37. Schedule 1 outlines the functions of council, which include roads and nature strips. It is unclear from this whether the term 'nature strip' is meant to include roadside areas outside town boundaries or whether it is restricted to the 'contemporary' nature strip.

authority (s4). Local governments are responsible for the management of land use and planning within their jurisdiction through planning schemes, and are the primary body with responsibilities under this Act.

Planning

The Minister can prepare and approve standard planning provisions, referred to as the Victoria Planning Provisions (s4A). These can be amended or varied according to the legislation and come into effect as stated in the Act (ss4B–4I). An amendment to the Victoria Planning Provisions can also provide for an amendment to a planning scheme (s4J) and will be effective as if it were an amendment to the planning scheme itself.

New Victoria Planning Provisions came into force in December 1996 and apply to all new planning schemes. They are progressively replacing the previous provisions within the Planning Scheme State Section that were in force prior to December 1996.

Planning schemes

Planning schemes are the primary method for land use planning and development control. A planning scheme must seek to further the objectives of planning in Victoria, as in section 4, must contain a municipal strategic statement and may make provisions relating to the 'use, development, protection or conservation of any land in the area'. It may 'regulate or prohibit the use or development of any land', or provide that certain uses or development can only occur once an agreement has been entered into with a responsible authority (s6). A planning scheme cannot regulate or require the removal of a covenant entered into under the *Heritage Act 1995*, or the *Victorian Conservation Trust Act 1972* (s7). This ensures that *a planning scheme cannot override a specific agreement entered into by the landholder and the Victorian Conservation Trust or the Heritage Commission.* In this way, the principle of subsidiarity is operating, with the more restrictive arrangements overriding the general.

A planning scheme must contain local provisions and Statewide standard provisions, which together are known as the Victoria Planning Provisions. These State provisions include provisions relating to vegetation clearance. These act to 'restrict clearance of native vegetation throughout Victoria without a permit from local councils'.[38] The local provisions themselves include a municipal strategic statement and provisions to be included on the direction of the Minister. Planning schemes can be prepared by a municipal council or the Minister (s8). These are referred to as planning authorities or responsible authorities. The Act specifies what must be taken into consideration by a planning authority when preparing a planning scheme (s12).

A council must prepare a municipal strategic statement to be included in its planning scheme (s12A). This statement must contain the strategic planning, land use and development objectives, and strategies for achieving these objectives. It must be reviewed triennially (s12A). It is then the duty of the council to administer and enforce the planning scheme and to implement the objectives of the scheme (s14).

Where a planning scheme is to be amended, notice of that proposed amendment must be given to all persons who have an interest, which may be affected, and in a newspaper circulating in the area (s19). Submissions can be made under section 21. These submissions must be considered by the council (s23) and a panel, with hearings if required (s24). The panel must then prepare a report for the planning authority, which is to be publicly available. This report must be considered by the planning authority (s27) and the amendment can then be submitted to the Minister for approval (s35). Once approved, the amendment must be placed before each House of Parliament where it can be revoked by Parliament within 10 sitting days (s38). The amendment will come into force on the day specified, unless it has been revoked.

38. See also Cornwall, A (1993), 'Protecting Victoria's flora and fauna', *Law Institute Journal,* No. 67. September 1993: 847–9.

Section 46 states that a planning scheme may apply to land reserved under the Crown Land (Reserves) Act. It can regulate or prohibit the use or development of land. This is one way in which local governments can exercise some control over Crown land. However, several Acts, such as the Alpine Resort (Management) Act, exclude land from this provision and therefore the control of local governments completely.

Victoria Planning Provisions

The Victoria Planning Provisions contain general and more specific provisions relating to the control of vegetation clearance.

The general policy is contained in the State Planning Policy Framework. It requires, for example, that planning authorities must have regard to the relevant aspects of regional catchment strategies under the Catchment and Land Protection Act (ss15.01–2) and the conservation of native flora and fauna (ss15.09-1). These policies secure the objectives and principles that should guide the preparation of planning schemes. In particular, subsection 15.09–1 requires:

> If native vegetation must be removed as part of a development proposal, planning and responsible authorities should require, where possible, the replacement of lost native vegetation by regeneration or replanting at least an equivalent area of vegetation.

More specific provisions are contained in subsection 52.17, which requires a permit to remove, destroy or lop native vegetation. A range of exemptions are provided. Examples of some of the most significant exemptions include:

- land, which together with all contiguous land in one ownership, has an area of less than 0.4 hectares;
- removal for fire fighting measures including the removal of ground fuel within 30 metres of a building;
- native vegetation that has been planted for timber production; and
- regrowth that is less than 10 years old and if the land is being re-established or maintained for cultivation or pasture.

Tighter controls can be applied through specific planning overlays that identify sites of particular value or interest. Relevant examples include Environmental Significance Overlay (ss42.01), Vegetation Protection Overlay (ss42.02) and Significant Landscape Overlay (42.03). Clearing of vegetation within areas covered by an overlay also requires a permit. The range of exemptions provided are significantly narrower than under the general native vegetation provisions (ss52.17).

Local governments are the responsible authority for issuing permits. They are, however, required to refer applications to clear native vegetation to the Secretary of the Department administering the Flora and Fauna Guarantee Act in a number of cases (ss66.04), including if the area to be cleared is 10 hectares or greater or if it is Crown land. In other cases, the local council will determine the application, unless this responsibility is delegated under the planning scheme in relation to certain provisions of the Planning and Environment Act (s13). Local councils have used this mechanism and included a provision that an application may be referred to the Secretary of the Department administering the Flora and Fauna Guarantee Act. The result is that many applications for small areas, which may be contentious, are, in fact, referred to the Department for their comment.

When deciding on a permit application, councils must consider the various guidelines contained in the relevant provision. These include:

- the effects of the proposed activity on the vegetation;
- the role of the area for vegetation conservation;
- protection of rare species and wildlife corridors;
- protection of vegetation where the slope of the ground is above a set limit;
- protection of vegetation within 30 metres of a watercourse; and

- protection of vegetation where the land may become unstable or subject to salinisation if it is cleared.

The guidelines vary between the various provisions outlined above. Guidelines for protection overlays are more tightly applied than those for the general native vegetation provisions.

These provisions provide a direct way in which a local government can regulate vegetation clearance within its planning scheme. It is useful in that it provides Statewide regulation through planning schemes.

Section 52.17 of the Victoria Planning Provision states that, in determining an application for clearing, the regional vegetation plan for the area should be considered by the council. These regional vegetation plans are currently being prepared by each Catchment Management Authority and must be formally approved before they can be considered.

Levies

A planning scheme may include *development contributions plans* which can provide for '(a) the imposition of a development infrastructure levy; (b) the imposition of a community infrastructure levy in relation to the development of land in the area to which the plan applies' (s46J). These are therefore limited to infrastructure levies and, as such, are unlikely to be of use to a council that wishes to impose an environmental levy. *It may be possible, however, to impose a community infrastructure levy to cover the cost of fencing a remnant area of native vegetation where that remnant needs to be protected from the impacts of an approved development* and there is a clear nexus between the need to fence the vegetation and the impact of the development. Section 46L also limits this by specifying the maximum amount that can be raised in this manner. Development contributions plans can also be prepared, and can include a development infrastructure levy as a condition on development approval (s46N). Money raised by levies must be managed by a local government in such a way that it is only used for the activities for which it was raised (s46Q).

Permits

A planning scheme may require that a permit be sought for specified uses or development of land or for subdivision of land (s47). Applications must be accompanied by the required information and, where a referral authority is specified in the planning scheme, that authority must be given a copy of the application (s55). A referral authority must consider all applications which are forwarded to it and must tell the responsible authority (usually the council which first received the application) whether it objects to the application, does not object if certain conditions are imposed, or does not object to the granting of the permit (s56). Other people who may be affected by the application if it were to proceed may also make written submissions to the council (s57). All submissions received must be considered by the council when making its decision. The council must also consider any decision or comments from the referral authority, and any significant effects on the environment flowing from the development. It may also need to consider strategic plans, policy statements, the social and economic impacts of a development, and any other relevant matter (s60). It is interesting to note that a council *must* consider any significant effects on the environment, however, it *may* consider the social and economic impacts only if required by the circumstances. Therefore, a council must consider the environmental impacts of an application but it has discretion as to whether or not it considers the economic affects.

In making its decision, a council may *grant the permit, refuse to grant it 'on any ground' or grant it with conditions.* If a referral authority objects to the granting of the permit, then the permit must not be granted (s61). In *placing conditions on a permit,* those conditions required by the referral authority or the planning scheme must be placed on the permit. Any other conditions[39] may also be placed on the permit, including that a management

39. For comments on the validity of conditions see Bryany, T, (1992) 'The validity of imposing development levies in Victoria under the *Planning and Environment Act 1987*', *Environment and Planning Law Journal* 9(6), December 1992: 411.

agreement be entered into under section 173, or a heritage agreement be entered under the Heritage Act (s62).[40] A permit, once issued, will be valid for a period of two years unless otherwise stated in the permit (s68), and the development must be commenced within that time.

Where land is owned by a responsible body (that is, a council), a permit must be obtained from the Minister before carrying out a use or development for which a permit is required under the planning scheme (s96).

The Act also provides that *a landholder has a right to compensation where land is required for a public purpose.* This has been extended so that an owner may claim compensation from a council for 'financial loss suffered as the natural, direct and reasonable consequence of a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land is or will be needed for a public purpose' (s98(2)). *This section may act to discourage a local council from declaring land for a public purpose where it will impact on other landholders, as this may leave it open to compensation claims.*

Management agreements

Section 171 outlines the powers of a responsible authority – generally a council, but where the responsible authority is the Minister, the Minister can delegate power to a municipal council (s190). All the powers necessary for the purpose of carrying out functions and duties under the Act or for carrying out the objectives of a planning scheme are granted to a council. *A council also has the power to enter agreements and to purchase and sell land, and has other powers as listed.* Section 173 further outlines the power to enter into agreements with a landowner. Such an agreement can deal with issues relating to the *'prohibition, restriction or regulation of the use or development of land'* and conditions relating to the development of the land and any other incidental matter. Once an agreement has been entered into, a copy must be lodged with the Minister (s179). The responsible authority can also apply to the Registrar of Titles to register an agreement (s181). *Once registered, the agreement is a covenant on the land, and it will bind successive landholders* (s182). This means that local governments are able to enter into management agreements relating to development control, which are binding on title.

5.3.2 *Urban Land Authority Act 1979*

The objectives of the Urban Land Authority Act are stated in section 4 and include providing allotments for development, facilitating the disposal of surplus land held by the Crown and public statutory bodies (including councils), and assisting in the implementation of State urban planning policies and major State projects. In order to do this, the Urban Land Authority is established (s3). The necessary powers are granted to the authority, including the power to sell land. Where land is sold, it may be subject to a covenant which binds the purchaser 'as to the manner and method of and the time within which the land will be developed or redeveloped or as to the manner in which the land will be used' (s14). This section may be used in order to enter a *covenant restricting the change of use of land. In particular, it may limit or restrict the clearance of native vegetation on that land. Such a covenant, if entered into, is registrable, and can be binding on title as an in perpetuity covenant* (s14).

The only way in which this Act is directly relevant to local government is through section 18, which allows the Urban Land Authority to enter into an arrangement with a council over the carrying out of work or the provision of a service facility.

5.4 *Other relevant legislation*

5.4.1 *Flora and Fauna Guarantee Act 1988*

Section 1 of the Flora and Fauna Guarantee Act clearly states that the purpose of the Act is to establish a legal and administrative structure to promote flora and fauna conservation, and to provide for a choice of procedures which would encourage and enable this process. The objectives of the Act reinforce the idea of introducing

40. See the following discussion on management agreements and the Heritage Act.

incentives, with section 4(1)(f) stating that the flora and fauna conservation and management objectives of the Act are:

> to provide a program:
>
> i. of community education in the conservation of flora and fauna;
>
> ii. to encourage co-operative management of flora and fauna through, amongst other things, the entering into of land management co-operative agreements under the *Conservation, Forests and Lands Act 1987*; and
>
> iii. of assisting and giving incentives to people, including landholders, to enable flora and fauna to be conserved…

This clearly indicates a recognition of the need for incentives to encourage vegetation conservation.

The Act is to be administered by the Director-General as established under the Conservation, Forests and Lands Act (s7).

The Act allows for the *listing of threatened species and potentially threatening processes* (s10). To be eligible for listing, the species must be 'in a demonstrable state of decline which is likely to result in extinction or…significantly prone to future threats which are likely to result in extinction' (s11). Once listed, a species is then treated as a threatened species under the Act.

The Director-General is responsible for preparing a *Flora and Fauna Guarantee Strategy* stating how the flora and fauna conservation and management objectives are to be achieved (s17). The Director-General may also make a management plan for any species or community of flora, or for a potentially threatening process (s21). A *management plan must be prepared in consultation with any landholder or water manager whose interests may be directly and materially affected by the plan* (s21). Public notice of a draft management plan must be given and a period for submissions allowed. The Director-General may also enter into an agreement with a public authority (including a local government) for the management of a threatened species or community, or for the management of a potentially threatening process (s25). *It may be possible for the Director-General to use this agreement process to encourage local governments to actively manage their land for vegetation conservation.*

Interim conservation orders (ICO) can be issued by the Minister to conserve the critical habitat of a listed species on Crown or private land (s26). An ICO can provide for the prohibition of any activity or use of the land in question (s27). Such an order will operate for a maximum of two years (s32) and is, therefore, a potentially powerful order. As soon as possible after the making of an interim conservation order, the Director-General must notify the relevant planning authority (s37). Any permit or licence which would allow a person to act contrary to an ICO, such as development approval for the clearing of vegetation, may be revoked by the Minister after consulting with the body who issued the licence (s38). Where there is a conflict between an ICO and a planning scheme, the order will prevail (s39).

These provisions appear to make ICOs an attractive and useful mechanism for the protection of threatened flora. Section 43, however, enables a landholder or water manager to seek *compensation for financial loss* 'suffered as a natural direct and reasonable consequence of the making of an ICO' (s43(i)). The holder of a licence or permit, which is suspended by the Minister under section 38, can also seek compensation. This extends to cover the costs associated with seeking compensation. The compensation is to be paid by the Director-General (s43).

The Act is similar to other threatened species legislation, as it creates offences relating to the taking, keeping or trading of protected flora without a licence or permit (s47). Where a person is found guilty of an offence, they may be required to carry out restoration work to the site (s61) or pay compensation to the Director-General (s62).

5.4.2 *Alpine Resort (Management) Act 1997*

The Alpine Resort (Management) Act amends the *Alpine Resorts Act 1983*, and entered into force on 30 April 1998. The main changes that have been made relate to the establishment of an Alpine Resorts Co-ordinating Council and Alpine Resort Management Boards.

The Alpine Resort (Management) Act established the Alpine Resorts Co-ordinating Council and Alpine Resort Management Boards (ss1 and 34) to carry out the land use and planning functions of a local government within the alpine regions of Victoria. The Alpine Resort Management Boards are established as committees of management under the Crown Land (Reserves) Act (s4), and are a municipal council for the purpose of the Planning and Environment Act (s5). This is a very broad grant of power to these bodies. It acts to remove any areas constituting an alpine resort under the Act from the control and jurisdiction of the local government in the area. This is confirmed by section 21, which states that 'all Crown land in alpine resorts shall be deemed to be Crown lands permanently reserved as alpine resorts', however, section 46 of the Planning and Environment Act does not apply. While section 46 of the Planning and Environment Act provides that a planning scheme may apply to Crown lands, section 21 of the Alpine Resort (Management) Act excludes this section. The result is that a planning scheme will not apply to alpine resorts. In addition, section 68 specifically states that any land which is in an alpine resort is deemed not to be part of any municipal district within the Local Government Act, and cannot be added to a district.

The Alpine Resorts Co-ordinating Council is established under section 14. Its role includes providing recommendations to the Minister relating to the provision and improvement of services and facilities in alpine resorts, and the promotion of resorts and attraction of investment to improve the resorts (s18).

The Alpine Resort (Management) Act removes areas of alpine Crown land and declared alpine resorts from the control of municipal councils. Councils may still be involved in the provision of services on a contractual basis, but land use and planning responsibilities are removed and vested in the Alpine Resorts Commission.

5.4.3 *Catchment and Land Protection Act 1994*

The objectives of the Catchment and Land Protection Act are stated in section 4 as being:

(a) to establish a framework for the integrated and co-ordinated management of catchments which will:

- maintain and enhance long-term land productivity while also conserving the environment; and
- aim to ensure that the quality of the State's land and water resources and their associated plant and animal life are maintained and enhanced…

This obviously will have some impact on the management of native vegetation in Victoria.

The Act establishes a Victorian Catchment and Land Protection Council (s6), whose functions include facilitating the operation of Regional Catchment and Land Protection Boards (s8). The Governor in Council may make an order under the Act declaring areas to be catchment and land protection regions (s10), and a Regional Catchment and Land Protection Board can then be established for that region (s11). Victoria has been divided into 10 regions, 9 of which have Catchment Management Authorities which have succeeded the Catchment and Land Protection Board. One region still has a Catchment and Land Protection Board. The board should have a member with experience and knowledge of local government (s12). Section 13 outlines the functions of these regional boards, which include preparing a regional catchment strategy and coordinating and monitoring its implementation.

Section 20 imposes an obligation on landowners to take 'all reasonable steps to: (a) avoid causing or contributing to land degradation, which causes or may cause damage to the land of another landowner'.

The Act provides for regional catchment strategies. A *regional catchment strategy* must, among other things, '(b) assess the nature, causes, extent and severity of land degradation of the catchments in the region and identify areas for priority attention…' (s24(2)(b)). A strategy may also *provide for land use planning and incentives for better land management* (s24 (3)). Once a Regional Catchment and Land Protection Board or Catchment Management Authority has prepared a catchment strategy, *it can recommend to the planning authority, usually a local council, amendments to a planning scheme to give effect to the strategy* (s25). Section 26 further provides that:

> In carrying out a function involving land management:
>
> a. on behalf of the Crown; or
>
> b. under an Act – a Minister or public authority must have regard to any regional catchment strategy applying to the land.

This section could greatly reduce the options available to a local government in assessing a development application. For example, if an application was received for an area and the regional strategy included a recommendation prohibiting any change in the use of the land, the council, in assessing the application, would have to consider this recommendation and would be less likely to approve the development. Clearly, this could be of great assistance if vegetation management and conservation of native vegetation were included within the strategy. However, it may also work in the opposite way, reducing the likelihood of a local government imposing stricter requirements when a development would be allowed under the regional strategy.

A board may recommend to the Minister that certain land be declared a special area (s27). This, if successful, allows for the development of a special area plan, which may specify the most suitable land uses for that area (s30). As with regional catchment plans, the board or Catchment Management Authority can recommend changes to a planning scheme (s31), and a public authority must have regard to the plan when undertaking land management activities (s32). A special area plan may also allow for a document outlining land use conditions to be served on the landowner (s33). Such conditions are binding on the landowner on whom they have been served (s34). It is an offence to disobey such a condition (s35), however, it is possible for a landowner to request that it be revoked (s36).

This Act reduces the autonomy of local governments in regard to catchment management, as regional catchment plans must be included as an additional consideration within a planning scheme.

5.4.4 *Coastal Management Act 1995*

The Coastal Management Act also provides an extra layer of control. It aims to provide for coordinated and strategic management of the Victorian coast, to provide for the preparation and implementation of management plans for coastal Crown land, and 'to provide a co-ordinated approach to approvals for the use and development of coastal land' (s1). It is narrower than the Catchment and Land Protection Act in operation, as it applies only to coastal Crown land. Coastal Crown land is defined as any land reserved under the Crown Land (Reserves) Act and Crown land within 200 metres of the high water mark of the coastal waters or any sea (including bay, inlet, estuary and any waters within the ebb and flow of the tide) within the boundaries of Victoria (s3).

Under this Act, 'development' is defined to include 'works', which itself 'includes any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil' (s3).

The Act aims to 'protect and maintain areas of environmental significance on the coast including its ecological, geomorphological, geological, cultural and landscape features'. This and other objectives are stated in section 4.

The Victorian Coastal and Bay Management Council is established under the Act (s6). It is to undertake Statewide strategic coastal planning, to advise the Minister on coastal planning issues, 'prepare and publish guidelines for the planning and management of the coast', and 'to liaise with and

encourage the co-operation of…Municipal councils…involved in the planning, management and use of the coast in furthering the objectives of this Act' (s8).

The coast of Victoria can be divided into coastal regions (s9) and a Regional Coastal Board appointed for each region by the Minister (s10). The functions of these boards are outlined in section 12 and include developing coastal action plans for the region, advising the Minister and the Victorian Coastal and Bay Management Council on coastal development, and liaising with and encouraging municipal councils in planning and management for developing and implementing strategic solutions for the conservation and use of the region's coast.

The Act also requires the development of a Victorian Coastal Strategy by the council to 'ensure the protection of significant environmental features of the coast', and to provide direction for the future sustainable use and development of the coast (s16). This strategy must be subject to public notification prior to endorsement by the Minister and tabling in Parliament (s19). Once the strategy has been approved, the Minister, council or committee of management of reserved Crown land must take all reasonable steps to give effect to the strategy (s21).

Coastal action plans can also be prepared by Regional Coastal Boards. Again, they must be endorsed by the Minister, and a municipal council must take all reasonable steps to give effect to the plan (ss22–29). *Approved management plans can be prepared for areas of coastal Crown land, and these too must be put into effect by local government* (ss30–36). The Act further provides that *coastal Crown land cannot be used or developed without prior written consent from the Minister* (s37). It may be that where a local council is the planning authority for a region, the planning scheme may require that the council refer an application for development of coastal Crown land to the Minister for approval (s38).

This Act again reduces the independence and role of local government in coastal areas. It does, however, apply only in respect of coastal Crown land, and not privately owned coastal land.

The land use and planning responsibilities of a council in respect of Crown land are subject to various plans and strategies developed under the Act. They allow a council to refer an application to the Minister for approval, with councils merely acting in accordance with the strategies under the Act.

5.4.5 *Conservation, Forests and Lands Act 1987*

The Conservation, Forests and Lands Act aims 'to provide a framework for a land management system and to make necessary administrative, financial and enforcement provisions; to establish a system of land management co-operative agreements…' (s1). It does this primarily through the Director-General of Conservation, Forests and Lands, who is granted certain powers under the Act, including the power to enter land management cooperative agreements.

The Act outlines several types of activities, which cannot be undertaken without a plan for the work being submitted by the public authority or local council to the Director-General for comment and advice (s66). These activities include work requiring the disturbance of soil or vegetation above 1 220 metres in altitude, construction of dams or other structures in or across waterways which potentially interfere with the passage of fish or the quality of the aquatic habitat, and the carrying out of a development within a critical habitat listed under the Flora and Fauna Guarantee Act (s66 and Schedule 3). It is an offence for the public authority to then act contrary to such advice unless there is no prudent or feasible alternative (s67).

Land management agreements can relate to 'the management, use, development, preservation or conservation of land in the possession of the land owner or otherwise to give effect to the objects or purposes of a relevant law in relation to land in the possession of the land owner' (s69). The Director-General, with the approval of the Minister, can grant or lend money to a landowner, or provide other assistance with such conditions as approved by the Minister 'to encourage land owners to follow good land management practices or otherwise to give effect to the objects or purposes of a relevant law' (s68). These agreements can easily be used to

encourage vegetation conservation. They can contain terms which *restrict the use of the land, require the landowner to refrain from certain activities which may adversely affect the land,* require the landowner or Director-General to carry out specified works for the management and conservation of fauna or provide financial assistance, and can include a requirement for the Director-General to pay the landowner either part or all of the amount of *rates* payable in respect of the land (s70). Such an agreement is binding on and enforceable by the Director-General and the landowner. It may also be stated to be binding on the landowner's successors in title and, as such, will be registered on title as an *in perpetuity agreement* (ss71–72). These agreements are therefore similar to and have the same effect as a binding covenant and can only be revoked by an order of the Supreme Court (s72).

As well as providing for financial assistance within the agreement, section 75 is included to refer specifically to *rate relief.* Section 75 states that, if under the terms of an agreement 'a land owner is required to preserve land in its natural present state and in the Minister's opinion it is not economically feasible to do so unless rate relief in respect to the land is provided, the *Minister may recommend to a rating authority that the whole or part of the rates payable in respect to the land be remitted'.* The Minister may then reimburse the amount of rates to the rating authority (s75). This would encourage local government to provide rate rebates as they can do so under this Act without decreasing their income from rates.

5.4.6 *Crown Land (Reserves) Act 1987*

The Crown Land (Reserves) Act deals with the provisions relating to reserving of Crown land for public purposes. Public purposes include the 'preservation of areas of ecological significance', 'the conservation of areas of natural interest or beauty' and 'the preservation of species of native plants' (s4(1)). Land which is currently owned by the Crown could be reserved for vegetation conservation. Alternatively, the Minister may purchase the land for reservation as Crown land for a public purpose. In compulsorily acquiring land, the provisions of the Land Acquisition and Compensation Act will apply (s5).

The reservation of land under the Act, can be reversed by the Governor in Council, with a notice published in the Gazette (s10). Land is reserved by the Minister (s4) after public notice has been given of the proposal, or the Governor in Council may order land to be reserved under the Act (s4).

Regulations can be made in respect to land reserved under the Act, in particular relating to the care, protection and management of the land (s13). A committee of management can be appointed for a reserve by the Minister (s14) and can consist of a municipal council, or three or more people. A *committee of management, once appointed, is under a duty to 'manage, improve, maintain and control the land for the purpose for which it is reserved* and for that purpose may employ officers servants and workmen…' (s15). A local government can also have land vested in it by the Governor in Council, on trust, for the purpose for which the land was reserved (s16). There does not, however, appear to be provisions in relation to funding arrangements for a committee of management. This means that councils may be expected to fund committee of management expenses from their own resources.

A management committee can grant licences to enter and use land in accordance with the purpose for which it was reserved, as well as enter into agreements for the provision of services (s17). The Act specifies further provisions for leases and licences for acts not consistent with the objectives for the reservation of the reserve.

The management and control of land under the Act can be, on the recommendation of the Minister, vested by the Governor in Council in the Director-General of Conservation, Forests and Lands, or another similar body. Such an order will override other orders in relation to the management of that land (that is, ss13–17). This is likely to be invoked where, for example, the appointed management committee is not controlling the use of, or managing the reserve in a manner consistent with the objectives for, the reserve under the Act.

5.4.7 *Forests Act 1958*

The Forests Act applies to the State forests of Victoria. The Act prohibits the cutting or removal of timber or any forest produce within State forests (s7) unless under a permit or licence issued in accordance with the Act. The *control and management of State forests is vested in the Director-General* (s18), and areas under the control of an authority under the Water Act can also be vested in the Director-General for management purposes (s19). The Director-General of Conservation, Forests and Lands must prepare a *working plan* for those areas under his control. The plan must address issues such as maintenance, improvement, protection from fire and the removal of forest produce (ss22D–G).

Areas of Crown land not currently declared to be part of a State forest can be dedicated as a reserved forest by the Governor in Council on the recommendation of the Minister. Areas of privately owned land may be acquired by the Governor in Council with the authorisation of Parliament, and may then be dedicated as reserved forest. There is, however, a maximum of $3 million which can be spent in this way per financial year, unless Parliament expressly authorises the purchase of more land (ss47–48).

Where land is dedicated as a *reserved forest,* the Governor in Council can declare it to be a flora reserve, State park, roadside reserve, or otherwise as stated in section 50. *A municipal council or other body may be appointed as the management committee or the advisory committee to a reserve by the Minister* (s50). Regulations can also be made under section 50 concerning the use and activities, which may be undertaken in that reserve. Reserved forests can be leased subject to conditions (s51), and licences and permits must be sought for the grazing of stock and the taking of farm produce (s52). It is only when appointed as a management or advisory committee that a municipal council will have any responsibility under the Act.

Unoccupied Crown land may alternatively be proclaimed as a *protected forest* by the Minister (s58). Any tree or class of tree can be declared a *reserve tree* or *reserved class of tree* (s60). A licence or permit is required to injure, remove or destroy any growing tree or timber which is reserved under section 60 (s59).

Where Crown land is not part of a State forest or National Park, it is possible for that land to be declared *protected public land* by the Governor in Council. Section 62 states that 'it shall be the duty of the Director-General to carry out proper and sufficient work for the prevention and suppression of fire in every State forest and national park and on all protected public land…' A private landowner within 15 kilometres of the boundary of a State forest can have written notice served requiring the removal or abatement of a fire hazard on that land (s65). Failure to comply with a notice is an offence (s68).

The Forests Act is primarily within the jurisdiction of the State, and the role of local governments under the Act is minimal. It is only through the appointment of a council as the management or advisory committee for a reserved forest that a council will have responsibility for land covered by the Act. This would, however, be unlikely because State forests are generally managed by the State for timber products. The only other way in which this Act may impact on the management of native vegetation by a council is where a council owns and manages land within a 15-kilometre radius of a State forest. This land must be managed so that there is no risk or fire hazard, which may potentially affect areas of State forest. This may be in conflict to the conservation requirements for the vegetation in that area.

5.4.8 *National Parks Act 1975*

The objectives of the National Parks Act are to make provisions in respect of national parks, State parks and wilderness parks for the protection and preservation of the natural environment, including the indigenous flora and fauna (s4). The Act establishes the position of the *Director of National Parks* (s5), *who has responsibility for the management of parks under the Act*. National parks and State parks must be managed in accordance with the objectives of the Act, and they are also to be managed in a manner that will 'preserve and protect indigenous flora and fauna in the park'

(s17(2)(ii)). *Management plans must be prepared for each park. Wilderness parks* must also be managed in accordance with the objectives of the Act, and this includes taking measures '(a) to preserve and protect (i) the natural environment including indigenous flora and fauna features of ecological, geological or scenic significance…' (s17A(2)(a)). Management plans must also be prepared in respect of wilderness parks (s17B). Other parks listed in Schedule 3 must also be managed by the Director in accordance with the objectives of the Act, and in a manner that is appropriate to the park to 'preserve, protect and re-establish indigenous flora and fauna' (s18(2)(a)).

Where land is owned by the Trust for Nature (Victoria), section 19A provides that the Minister may enter into an agreement with the trust for that land to be managed by the Director. Such land is to be managed as if it were a park under the Act. This avoids the requirement for the trust to ensure the ongoing management of land, and therefore enables the trust to direct more energy to the acquisition and protection of other land of conservation value.

Similarly, land which is temporarily or permanently reserved under section 4 of the Crown Land (Reserves) Act can also be managed and controlled by the Director. Land, which is vested in or controlled or managed by a public authority, including a council, may, by agreement, be managed by the Director (s19C). Again, the land is to be managed as though it were a park under the Act.

The National Parks Act contains few sections of importance to local governments. The only relevant section may be section 19C, which *allows councils to enter an agreement with the Minister for the Director to manage land owned by a council.* Such land would then be managed in accordance with the objectives of the Act, which include management for the preservation and conservation of native vegetation.

5.4.9 *Water Act 1989*

The Water Act concerns the supply of water and the protection of water sources, the issuing of licences for the use of water, and the establishment of water authorities. Section 64A provides for the development of a water resource management plan. Licences sought under the Act to undertake works or for the use of water can contain conditions regarding the protection of the environment and, in particular, the riparian (riverbank) environment. The Minister can appoint a water authority for a particular area. Where this is to be done, it is necessary to obtain the approval of the local council in whose jurisdiction the authority will operate (s100). This is because the authority is responsible for the issuing of licences and will control and manage land associated with the water source in that region. In addition, where land is under the control of a water authority, the Minister may declare that area to be an environmental area or a recreation area (s107). If this is done, *the water authority then has the power to make by-laws for the area concerning specified things, including the conservation and preservation of the flora and fauna of the area* (s107). Section 131 allows Crown land to be placed under the management and control of any authority under the Act and, therefore, allows for by-laws to be made for these areas.

At the date the Act was passed (5 December 1989), there were 172 authorities under the Water Act. These authorities were responsible for irrigation districts, sewerage districts, waterway management districts and water districts. These would effectively cover large amounts of land within the jurisdiction of local governments and, therefore, *remove certain aspects of the management of this land, which impacts on water management from local government.*

5.4.10 *Environment Effects Act 1978*

The Environment Effects Act requires that special consideration be given to the effects on the environment. The Minister may require an Environment Effects Statement for development proposals capable of having a significant effect on the environment, and this may include the effects on vegetation.

5.4.11 *Environment Protection Act 1970*

The Environment Protection Act is similar to environmental protection legislation in other States, which concerns the granting of development approval to certain 'scheduled' activities or land uses. The Act establishes the Environment Protection Authority (s5) which, under section 13, is responsible for issuing works approvals, licences and permits, and imposing and collecting an environment protection levy in accordance with the Act (s24A). *The Act is only relevant in regard to the listed uses of land,* such as sewage treatment works, chemical storage facilities and timber treatment works, and deals mainly with waste disposal, water and air pollution and land reclamation issues when environmental impact assessment procedures must be followed prior to the granting of development consent.

5.4.12 *Heritage Act 1995*

The Heritage Act *primarily concerns areas which are of cultural significance* (it does not appear to extend to areas of natural or environmental heritage except where they are culturally significant, for example, memorial avenues of trees, which could be registered). It is, however, relevant to vegetation conservation as *it defines the removal of any vegetation on a site listed under the Act as 'work'.* 'Works' on listed sites need the *approval of and a permit issued by the Heritage Council.* In addition to requiring a permit to remove vegetation, a place, once listed on the register, will have this noted on the title, and the Minister must prepare and approve an amendment to the planning scheme to reflect the presence of a listed place on the Heritage Register. The Act also allows for the owner of a registered place to enter into a *covenant with the Heritage Council.* These covenants bind the owner as to '(a) the development or use of the place or land on which the registered place is situated; or (b) the conservation of the place and any registered object at that place' (s85(1)). Alternatively, an owner can enter into a *binding covenant with the National Trust* (s86). *A covenant of either type can be registered on title and will run with the land as a covenant in perpetuity* (ss91–92).

Where a place is listed, this will override the controls, which a local government may exercise under its land use and planning powers. The Act requires that a planning scheme be amended to take account of a listing on the Heritage Register. In this way, the State is overriding a local government.

5.4.13 *Land Act 1958*

The Land Act concerns the *sale and occupation of Crown land.* It allows for the acquisition of land for a public purpose and the reservation of that land under the Crown Land (Reserves) Act (s12A). Similarly, the Act allows the Minister to sell land to a public authority, including a council, if that authority requires the land for a public purpose (s99).

Crown land can be *leased* for agricultural purposes on such terms, conditions, covenants and exceptions as the person granting the lease thinks fit (s121). The Act also specifically allows for a *condition for the retention or clearance of native vegetation* (s124(K)) or the clearing of land (s130AC).

Section 181 allows the Governor in Council to proclaim any Crown land to be a *common* and to place it under the management of the municipal council. A council would then be able to manage that area for the conservation of native vegetation.

The Land Act provides a way in which a council may be appointed the manager of Crown lands which are proclaimed a common. It also allows the Minister to sell land to a council for a public purpose. *If vegetation conservation were considered to be a public purpose, then this Act would provide the way in which a council could manage Crown land for the conservation of its vegetation.*

5.4.14 *Land Conservation Act 1970*

The Land Conservation Act deals primarily with *the management and conservation of public land.* It is of little relevance to local government, as public land is defined to be land within certain metropolitan municipal areas, which is unalienated Crown land and vested in a public authority other than a municipal council (s2). Such land is managed by the Land Conservation Council (s3), which is to

advise the Minister as to the management of the land (s5). In doing so, the Land Conservation Council must have regard to the 'preservation of areas, which are ecologically significant…, the preservation of species of native plants…' and other factors listed in section 5.

5.4.15 *Reference Areas Act 1978*

The Reference Areas Act works to conserve certain areas as a point of reference for other areas of the same ecological community. Section 3 states that where the Minister is of the opinion that:

> any area of public land should be preserved in its natural state as far as is possible because the area is of ecological interest and significance, he may recommend to the Governor in Council that the area be proclaimed to be a reference area.

The Governor in Council can proclaim an area to be a reference area by notice in the Gazette. The Minister can then publish directives for the protection, control or management of the reference area (s6). However, except as provided for in a directive, 'the declaration of an area to be a reference area will not affect the exercise of any rights, powers or duties by any person or body which is responsible for the protection, control or management of the land or the reference area' (s7). When considering management issues and the making of a declaration, the Minister will act on the advice of a committee established under the Act (s5), and the advice of the Land Conservation Council, when declaring an area to be a reference area (s3). This Act is relevant to local governments where they have control and management of public land.

5.4.16 *Victorian Conservation Trust Act 1972*

The *Victorian Conservation Trust* is established under section 2 of the Act. The objectives of the trust are stated in section 3 as the encouragement and assistance of the preservation of wildlife and native plants, and the preservation of areas which are ecologically significant or of natural interest. The trust has the 'power to do all things that are necessary or convenient to be done for or in connection with the carrying out of the objects' (s3(2)). This includes the *power to hold, buy and sell real property, and the power to enter a binding covenant with a landholder.* A covenant can be entered only with the *Minister's approval,* and can *bind the landowner* 'as to the development or use of the land or any part thereof or the preservation or care of any bushland trees, rock formations…' (s3A(1)). Once notice of the proposed covenant has been sent to the Minister and published in the Gazette, the covenant can be registered on title, and will be binding on successive titleholders (s3A).

The use of this power by the trust is one way areas of high conservation significance can be protected. They can be *purchased by the trust,* and then managed by the National Parks Service under the National Parks Act, or a *covenant* can be entered on title restricting the use of the land, and even specifically preventing the clearing of certain vegetation, and the land then sold. Areas of land owned by local governments could also be managed in this way, so that they would be permanently protected for conservation.

There is no formal role for local government, although the trust in recent years has sought to increase its involvement and cooperation with local government.

5.5 *Summary of opportunities*

The position in Victoria in relation to the incentives, which may be offered by a local government, is summarised in the table below. In many instances, clarification of the existing legislation, or a minor amendment, for example, to a definition within legislation, is all that is required to allow the full range of incentives to be available.

The table also includes reference to local laws. This has been included, as it is another way in which local governments can act to protect native vegetation on council owned or managed land. In this way, local governments can offer incentives to landholders and lead by example in the management of land in their control.

Table 5.2: Opportunities available to local governments to offer incentives for vegetation conservation

Incentive	Amendment
Environmental levy	Amend definition of service in the Local Government Act (s162) to include environmental services, or pass regulation defining the environment as a service for the purpose of section 162 Revenue raised through environmental levies should not be subject to rate capping
Management agreement	Policy support/encouragement
Covenant	Include provisions similar to those within the Victorian Conservation Trust Act in the Local Government Act to allow a local government to enter into a covenant with a landholder
Grants to individuals and community groups	Clarify that vegetation conservation is within the functions or power of local governments
Rate rebates	Encourage use of rebates and concessions under the Local Government Act (s169) Extend exemption from municipal charges from farm land to include conservation land
Acquisition and sale of land	Not applicable as council can buy and sell land
Local laws	Encourage local governments to pass local laws protecting native vegetation on council owned or managed land

6. Western Australia

6.1 Legislative framework

A local government in Western Australia is granted general powers relating to the 'good government' of its district. This power is then expanded and restricted by various pieces of legislation, as set out in Table 6.1.

The role of local government is defined through the *Local Government Act 1995* and the *Town Planning and Development Act 1928*, and extends to the making of local laws and the control of land use and development through a local planning scheme. It is, however, limited by the provisions of other Acts, including the *Wildlife Conservation Act 1950* and the *Country Areas Water Supply Act 1947*. This latter Act allows clearing and controls permits for the clearing of vegetation for designated catchment areas. These Acts are regulated by State agencies, thus limiting the powers and ability of local governments to play a major role in vegetation management and conservation.

6.2 Powers of local government

6.2.1 Local Government Act 1995

The Local Government Act contains a broad and general statement of the functions of a local government, stating that the general function is to *'provide for the good government of persons in its district'. This function is to be interpreted liberally, but is to be interpreted in light of other functions imposed by other legislation or limits imposed on the functions by other legislation* (s3.1). The general function includes both legislative and executive functions (s3.4). In this respect, a local government may make *local laws* 'prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act' (s3.5).

Table 6.1: Environmental and land use legislation and implementing jurisdiction

Legislation	Jurisdiction
Aboriginal Affairs Planning Authority Act 1972	State
Bush Fires Act 1954	State
Conservation and Land Management Act 1984	State
Country Areas Water Supply Act 1947	State
Environmental Protection Act 1986	State
Heritage of Western Australia Act 1990	State
Land Acquisition and Public Works Act 1902	State
Land Administration Act 1997	State
Local Government (Miscellaneous Provisions) Act 1960	Local government
Local Government Act 1995	Local government
Main Roads Act 1930	State
Metropolitan Region Town Planning Scheme Act 1959	State
Parks and Reserves Act 1895	State
Rates and Charges (Rebates and Deferments) Act 1992	State
Soil and Land Conservation Act 1945	State
Town Planning and Development Act 1928	Local government
Transfer of Land Act 1893	State
Water and Rivers Commission Act 1995	State
Western Australian Planning Commission Act 1985	State
Wildlife Conservation Act 1950	State

It is possible for a local law to extend to areas outside the jurisdiction of the local government, as long as it does not apply within the jurisdiction of another local government, although ministerial approval is needed for such laws (s3.6). A local law will not be valid to the extent that it is inconsistent with any other Act (s3.5). Local laws can make certain acts an offence punishable by fine (s3.1). In making a local law, public notice must be given, submissions may be received and, when considering a proposed law, all submissions must be considered by council. A special majority is required to pass the law. Once it has been passed, the Minister must be given a copy of the law, and notice given in the Gazette (s3.12). Once passed, the law may be amended or repealed by the Governor (s3.17).

Council-controlled land

If a local government has the control of land vested in it under the *Land Act 1933*, the local government may do anything for the purpose of controlling or managing that land that it could do as a board appointed under the *Parks and Reserves Act 1895* (s3.54). This means that local governments are under a duty to control and manage land under their control and may do so for various purposes, including vegetation conservation.

Regional local government

Section 3.61 provides that two or more local governments may, with the approval of the Minister, establish a regional local government 'to do things…for any purpose for which a local government can do things under this Act or any other Act'. A regional local government can be wound up at the direction of the Minister or as agreed when established (s3.63). *A regional local government will have all the powers of a single local government,* except that where local laws made by the regional local government are inconsistent with those made by the local government, the laws of the local government will prevail (s3.67). This allows for a regional local government to be established to address environmental issues on a regional scale, and for vegetation conservation to be managed by local governments on a regional level.

Rates and charges

Rateable land: All land is rateable except for land which is owned by a local government or regional local government and is not used for a trading purpose; land held exclusively by a religious body as a place of worship; land used for the purpose of a school for the teaching of religion, or a private school; land used for charitable purposes; land used for the storage of grain by a specified company; or land exempt by other law;[41] and all Conservation and Land Management reserves or land declared by the Minister as exempt from rates (s6.26).

It is the responsibility of the Minister to determine the method of *valuation of land,* which is to be used as a basis for rating. In determining this, the Minister must take account of the general principle that *where land is predominantly used for rural purposes, the unimproved value of the land is to be used, and where land is used predominantly for non-rural purposes, the gross rental value of the land is to be used as the basis for rating*. Once the method to be used has been determined, it must be published in the Gazette (s6.28). There are provisions which allow for the rating of the land to be based on the unimproved value of the land, but this only occurs where the land is held subject to a government agreement which expressly makes provision to that effect (s6.30). *It would be possible to extend this provision so that the unimproved value could be used where land is subject to a conservation agreement,* and not used primarily for rural purposes. The effect of this would be a lower valuation and, therefore, a reduction in the amount of rates which would be payable.

When adopting the annual budget, a local government may impose a general rate, a specified area rate, a minimum charge or a service charge. An absolute majority is required for these rates or charges to be imposed.

General rate: A general rate may be imposed, either uniformly or differentially, on all rateable land.

41. Department of Conservation and Land Management (CALM), (1998, pers. comm.).

Where a rate is to be imposed, a local government must state the rate per dollar of the gross rental value or the unimproved value of the land. In the case of an emergency, a local government may be able to impose a supplementary general rate or differential rate; this also requires an absolute majority (s6.32).

Differential rates: Differential general rates may be imposed on the basis of the purpose for which the land is zoned; the predominant purpose for which the land is held or used, as determined by the council, and any other characteristic or combination of characteristics prescribed. This may be specified by regulation. If the use of the land or other basis on which the differential rate is determined is to change during a year, the council is not able to reassess the land on the basis of that change (s6.33). *These differential rates are currently being used to allow for differential rating of land of high conservation value,* with land which is subject to a conservation agreement being a class for which a lower level of rates is payable.

Unless the approval of the Minister is given, the amount expected to be raised through all types of local government rates must be within 90% to 110% of the deficiency of the budget (s6.34). This acts to limit the amount that may be raised by rates, but only in proportion to the expenditure by the local government, and not in the manner of a set cap on the maximum level of income which can be raised through rates.

Minimum payment: A council may impose a minimum rate payment on land, which is greater than the general rate that would otherwise be due on that land. The amount payable may be varied, subject to certain conditions, depending on the rating base of the land or the differential rating capacity of the land (s6.35). Public notice must be given two months prior to introducing a payment in this way, and public submissions must be considered.

Specified area rates: A specified area rate may be imposed on land within a certain area of a municipality for the purpose of meeting the costs associated with a specific work, facility or service which will benefit the ratepayers of the area. The money raised in this way is only available to be used for that service or facility (s6.37).

Service charges: A council may impose a service charge on a landowner or occupier to meet the cost of providing a prescribed service for the land. Again, the money raised in this way is only available to be used for the provision of that service (s6.38). It is not possible to use this section to introduce an environmental levy or charge, as the definition of service does not appear to extend to include environmental services. However, it may be possible to include the environment within this definition by regulation, and then use the money to acquire and maintain areas of high conservation value.

In conclusion, and given current powers, the most effective means for local government to provide a rate rebate in Western Australia would be through the creation of a conservation zone for areas of high conservation value land, and the application of a lower differential rate to this land. There is no power for local government to issue rate rebates for conservation where, for example, a conservation covenant is attended to a title.

6.2.2 *Rates and Charges (Rebates and Deferments) Act 1992*

The Rates and Charges (Rebates and Deferments) Act provides the mechanism through which pensioners and holders of certain Commonwealth or State concession cards can obtain a rate rebate, or a deferral of rates or charges which are due under either the Local Government Act, the *Soil and Land Conservation Act 1945*, the *Water Boards Act 1904*, the *Health Act 1911*, or the *Water Authority Act 1984*. Essentially, there are provisions for means testing, setting the percentage of rebate, and for the reimbursement of rebates to the local government authority or other body by the Treasurer. Although rebates are not available for vegetation conservation, this Act *provides a framework which could be adopted if rebates for vegetation conservation were to be made available by the State.*

6.2.3 *Local Government (Miscellaneous Provisions) Act 1960*

The Local Government (Miscellaneous Provisions) Act includes provisions relating to the power of councils to make *by-laws,* and the process by which this is done (s190), including the power to make by-laws requiring the clearing of vacant land (s202). Section 278 also gives local government the power to purchase or lease land, which would allow a council to purchase land of high conservation value.

6.3 *Land use and planning*

Land use and planning within Western Australia is primarily found within the provisions of the Town Planning and Development Act and the *Metropolitan Region Town Planning Scheme Act 1959*. The Town Planning and Development Act provides for the making of State policies and the preparation of planning schemes by local government. The Metropolitan Region Town Planning Scheme Act applies only to areas within the metropolitan region of Western Australia, and requires that local governments amend their planning schemes so they are consistent with the Metropolitan Region Scheme. The *Land Administration Act 1997* is also relevant and deals with Crown land and the leasing of Crown land.

6.3.1 *Town Planning and Development Act 1928*

The Town Planning and Development Act deals with land use and planning issues, particularly statements of planning policy and the provisions relating to the development and implementation of local government planning schemes.

The Western Australian Planning Commission is, with the approval of the Minister, able to prepare *statements of planning policy,* which can concern any matter that may be addressed in a town planning scheme (s5AA). These statements of planning policy are to cover issues of a broad and general nature, and can apply to a particular class of matter, or Statewide or to a specified part of the State. For example, the Peel Harvey Statement of Planning Policy, which includes remnant vegetation.

In preparing a policy, the commission must have regard to:

a) 'demographic, social and economic factors and influences';

b) 'conservation of natural or cultural resources for social, economic, environmental, ecological and scientific purpose'; and

c) 'characteristics of land'.

These clearly allow for the consideration of factors influencing and affecting vegetation management and conservation. A planning policy must be prepared in consultation with affected local governments, and must be approved by the Governor prior to having any effect. Only ministerial approval is required prior to amending or repealing a policy (s5). Planning schemes prepared by a local government will then be required to be consistent with these planning policies.

Planning schemes

Planning schemes can be made with respect to any land, with the general purpose of

> improving and developing such land to the best possible advantage, and of securing suitable provision for traffic, transportation, disposition of shops, residences, factory and other areas, proper sanitary conditions and conveniences, parks, gardens and reserves, and of making suitable provision for the use of land for building or other purposes and for all or any of the purposes, provisions, powers or works contained in the First Schedule (s6).

This does not specifically provide for conservation or other environmental considerations except for the provision of reserves. A planning scheme is therefore not required to address environmental and conservation issues, however, such issues may still be included within a scheme.

A local government may prepare a planning scheme in accordance with the Act. Once prepared, the planning scheme must be available for public inspection, and then submitted to the Minister for

approval. The Minister may approve a planning scheme which has been submitted, or may require the local government to modify the planning scheme before it is resubmitted for approval, or may refuse to approve the planning scheme. Once approved, and published in the Gazette, a planning scheme has the full force of law. Such a planning scheme is able to be revoked or amended by a local government, but, again, this will require the approval of the Minister and publication in the Gazette. *A local government, in preparing a planning scheme, must have due regard to any approved statement of planning policy* prepared under the Act. A statement of planning policy can be included within a planning scheme, and will be regarded as part of the planning scheme. Where an area within the proposed planning scheme is listed on a register under the *Heritage of Western Australia Act 1990*, the advice of the Heritage Council must be sought prior to preparing the planning scheme (s7).

Section 7A1 requires that a local government, when preparing a planning scheme or an amendment to a planning scheme, must give written notice to the Environmental Protection Authority. An *environmental review of the proposed planning scheme may be required in accordance with the Environmental Protection Act 1986* (s7A2). The expenses incurred in conducting the review may be recovered under the Environmental Protection Act (s7A2).

A planning scheme must be reviewed on the request of the Minister, or every five years (s7AA). If the scheme is still appropriate, the Minister can declare it acceptable, and therefore a review of the scheme is not necessary.

Section 8 allows the Minister to prescribe a set of *general provisions* for the carrying out of the general objectives of a town planning scheme. These general provisions must be included within a planning scheme, and may relate to any matter specified in the First Schedule, which *includes parks and open spaces, tree preservation, and preservation of places of scientific interest.* There are, however, *no specific provisions relating to the conservation of vegetation, or environmental conservation issues.* The general provisions will have effect under a planning scheme to the extent that they relate to the area covered by the planning scheme and unless otherwise provided for within the planning scheme (s8).

If a local government fails to prepare or review a planning scheme as required under the Act, the Minister may serve notice on the local government, ordering it to comply with the Act (s18A).

If a person has land or property which is injuriously affected by the making of a town planning scheme, that person may make a claim for *compensation* from the local government, subject to certain specified provisions (s12). *This may act as a disincentive for a council to zone land for conservation.* For example, this could limit the development rights of the landowner and amount to an injurious effect on the rights of that landholder. In particular, zoning land so that it can only be used for a public purpose would clearly allow for compensation to be sought.

A local government has the power to purchase or compulsorily acquire land for the purpose of the planning scheme (s13). Where land is owned by a local government, it has all the powers of a landowner with respect to that land (s14). Section 16 provides that a local government, with the consent of the Governor, may borrow money for the purposes of the Act. It would appear that this section would enable a local government to borrow money to purchase land for a public purpose. If vegetation conservation were to be considered a public purpose, then it would be possible to use this section to borrow money to cover the cost of purchasing land of high conservation value.

Section 18C provides that, where land is within a place listed on the register under the Heritage of Western Australia Act, and approval is sought for development of that land, approval must be sought from the local government responsible for the planning scheme which applies to the place, or from the commission. To carry out development on such land without approval is an offence, and can attract a fine of up to $50 000. However, the Heritage of Western Australia Act only applies to cultural heritage, and will only be of use for vegetation conservation to the extent that areas of

high conservation value are also areas of cultural heritage and are therefore listed on the register.

Local laws

The Governor may make uniform general local laws on any matter contained in the Second Schedule (s31). The Second Second includes matters such as classifying or zoning land and prohibiting certain acts in those zones, and prescribing conditions for building densities and conditions for subdivisions. The Minister and Governor may also make further regulations necessary to give effect to the provisions of the Act (s34). This allows the Governor to make general local laws, which may address conservation issues. For example, a general local law allowing for the creation of a conservation zone would then require that all planning schemes include such a zone.

6.3.2 *Metropolitan Region Town Planning Scheme Act 1959*

The Metropolitan Region Town Planning Scheme Act operates in conjunction with the Town Planning and Development Act; where there is an inconsistency between the provisions of these Acts, the Metropolitan Region Town Planning Scheme Act prevails. This Act provides for *planning schemes for the metropolitan region of Western Australia* (as outlined in Schedule 3 of the Act).

It provides for the establishment of district planning committees for various groups of local governments and the Municipality of the City of Perth (s23). These committees are responsible for inquiring into, reporting on and making recommendations concerning the Metropolitan Region Scheme as far as it relates to each district (s24). The Western Australian Planning Commission is able to make regulations to apply to all or parts of the metropolitan region. A breach of the regulations attracts a fine of up to $500 and $50 for each day that the breach continues (s26).

The Metropolitan Region Planning Authority (established under section 7) is responsible for making the Metropolitan Region Scheme with respect to all or part of the metropolitan region. This is essentially *similar to a planning scheme, which applies to the region, rather than just a municipality, and therefore is more general in its provisions.* A Metropolitan Region Scheme, prior to its implementation, must follow the procedures outlined in the Act, which include ministerial approval, public notification, submissions, public hearings, if necessary, and tabling in both Houses of Parliament (ss31–32). Once implemented, the scheme may be amended, and once again a procedure for doing this is outlined in the Act (ss33 and 33A). It is also possible for a scheme to be consolidated on the request of the Minister (s33D).

Where a Metropolitan Region Scheme exists, a town planning scheme made under the Town Planning and Development Act will not be approved by the Minister unless the scheme and by-laws are in accordance with the regional scheme (s34). In this way, regional provisions override the local government planning scheme to the extent that there are any inconsistencies.

Part IVA relates to *planning control areas.* The Western Australian Planning Commission is able, with the approval of the Minister, to declare that land is part of a planning control area, if that land may be required for a purpose as stated in Schedule 2. Schedule 2 allows land to be required for the *purpose of providing parks and recreation areas, State forest, cultural heritage conservation, and water catchments.* Once an area is declared a planning control area, *a person must not commence a development in that area without prior approval* (s35D). Approval must be sought from the local government, which must then forward the application to the commission for determination (s35E). The commission can approve or refuse the development, or approve it subject to conditions (s35E). This would allow for areas of high conservation value to be declared a planning control area. Again, local government discretion is overridden in regard to these areas.

Under section 37A, the Western Australian Planning Commission can acquire land where the land requires rehabilitation, clearing, development or other work to be undertaken on it for the purpose of advancing the planning, development and use of the land. If such a recommendation by the commission to the Minister is accepted by the

Governor, that land can even be compulsorily acquired by the commission (s37A).

If a person carries out a development on land subject to the Metropolitan Region Scheme which is not in accordance with the provisions of the scheme, then the person is guilty of an offence and may be liable to a fine of up to $50 000 and a further $5000 for each day the offence continues.

6.3.3 *Land Administration Act 1997*

The Land Administration Act deals with the *use and management of Crown land, and the issuing of pastoral and other leases over Crown land.* Crown land is defined as 'all land, except for alienated land' subject to certain provisions relating to coastal land (s3). The Minister must, unless impracticable, *consult with the local government* of the district in which the Crown land is found, if the Minister is to exercise any power in relation to that Crown land (s14).

Section 15 allows for *covenants to be registered on Crown land* when it is transferred to freehold land. A covenant may, for example, provide that the land not be subdivided or that it be conserved. Thus it may be a positive or negative covenant (s15).

Reserves and roads

Crown land may be reserved for a public purpose by the Minister (s41) in accordance with Part 4. There are various types of reserves. Class A reserves are those reserves which are proclaimed as a reserve for a certain purpose, such as a nature reserve for a certain species (s42). A proposal to reserve land as a Class A reservation or to change the boundaries of such a reserve is to be notified publicly. The approval of both Houses of Parliament is also needed (s43). Section 46 allows the Minister to make an order placing one or more persons in a position where they have 'the care, control and management of a reserve for the same purpose as that for which the relevant Crown land is reserved under section 41 and for purposes ancillary or beneficial to that purpose…' A *management body,* on the request of the Minister, or without such a request, may prepare a *management plan for the reserve,* and submit the plan to the Minister for approval (s49). Before submitting a plan, the management body must consider 'any conservation, environmental or heritage issues relevant to the development, management or use of the Crown land in its managed reserve for the purpose of that management reserve…' (s49). The management body may then develop and manage the reserve in accordance with a management plan which has been approved by the Minister (s49). *It would appear possible for a local government to be appointed a management body for Crown land under this Act.*

Where a reserve is not under the management of a management body or person, then the Minister may grant a lease in respect of that land in accordance with the purpose for which the land is reserved (ss47–48).

A local government may request that the Minister acquire any land which is held by a local government for a public purpose and hold this land as Crown land. The Minister has discretion as to whether to acquire the land. If such a request is made, there is a procedure detailed in section 52, including public notification and submissions, which must be followed prior to the acquisition of that land.

Part 5 of the Land Administration Act deals with *roads,* and operates in conjunction with the *Main Roads Act 1930.* Where there is any inconsistency between the two Acts, the Main Roads Act prevails (s53). Section 55 provides that *land which comprises a road is vested in the Crown, and the local government within whose jurisdiction a road exists has responsibility for the care, control and management of that land, subject to the Main Roads Act* (s55). Local government may therefore be responsible for roadsides and may be able to manage those areas for conservation.

Apart from existing roadside vegetation, there are large areas of remnant vegetation found on unused roads in agricultural areas which could be managed as vegetation corridors.

Sale, leasing and licensing of Crown land

Provisions relating to the *sale, lease and licensing of Crown land* are in Part 6 of the Act. Section 74

allows the Minister to sell Crown land. The Minister can also transfer land, and may do so subject to conditions (s75). The Minister may also grant a lease of Crown land for any purpose, and may do so, subject to conditions or a performance bond, and subject to the payment of rent (s79). Conditional purchase leases may also be granted. On the payment of the full transfer price and the meeting of the conditions, the land will be transferred to the lessee (s80). The Minister may also grant a licence for any purpose in respect of Crown land and may set the period of time and conditions for such a licence (s91). The Minister may sell or lease Crown land to a local government under section 86.

Pastoral leases

Pastoral leases are dealt with independently of other licences and leases. A pastoral lease is one for pastoral purposes which are defined (s93) as

> (a) the commercial grazing of stock; (b) agricultural, horticultural or other supplementary uses of land inseparable from, essential to, or normally carried out in conjunction with the grazing of stock, including the production of stock feed; and (c) activities ancillary to the activities mentioned in paragraphs (a) and (b).

The Pastoral Lands Board of Western Australia is established under section 94. Its functions include administering pastoral leases, ensuring that *leases are 'managed on an ecologically sustainable basis;* to develop policies to prevent the degradation of rangelands; [and] to develop policies to rehabilitate degraded or eroded rangelands and to restore their pastoral potential' (s95). The Minister can grant a pastoral lease over any Crown land, but must not grant a lease unless the Pastoral Lands Board is satisfied that the land is able 'to be worked as an economically viable and ecologically sustainable pastoral business unit' (s101). The Minister, in consultation with the board, may include any conditions or terms which are consistent with the Act (s103), and its term for a new lease may not exceed 50 years (s105). Land subject to a lease must not be used other than for pastoral purposes, except where a permit is issued to do so under this Act (s106).

The holder of a pastoral lease must:

> at all times manage and work the land under the lease to its best advantage as a pastoral property…[and] must use methods of best pastoral and *environmental management practice,* appropriate to the area where the land is situated, for the management of stock and for the management, conservation and regeneration of pasture for grazing.

The indigenous pasture and other vegetation must also be maintained (s108). A permit must be sought to clear pastoral land. Where this occurs without a permit, a penalty of $10 000 exists, and the vegetation must be restored to the condition it was in before the offence was committed (s109). It is also an offence to sow or cultivate non-indigenous pasture unless a permit is obtained, and the same penalty exists (s110). The board can also determine the maximum and minimum number of stock which can be carried on land subject to a lease. Again, there is a penalty of $5000 for a breach of this number, with a daily penalty of $500 (s111). This determination is, however, subject to the provisions of any soil conservation notice issued for the land. The provisions of such a notice override those issued by the board (s112). The Act also provides that if a lessee fails to maintain indigenous pastures and other vegetation on their land and fails to comply with a default notice, they may be liable to a fine of up to $10 000 (s130). These are potentially very powerful provisions, which can be used to ensure that rangeland ecosystems are sustainably managed.

The rent payable under a pastoral lease is determined by the Valuer-General and is the amount 'of ground rent that the land might reasonably be expected to realize in good condition, for a long term lease for pastoral purposes…' (s123). Rent relief may be sought from the board where the land subject to the lease has been 'adversely affected by drought, fire, cyclone, flood or other disaster;' or where the lessee 'is suffering financial hardship as a result of poor economic conditions in the pastoral industry' (s128). These sections may encourage farmers to continue farming on degraded land. However, they could

also be used to provide a discount for land that is managed to maintain conservation values.

Clearing on Crown land

A *permit to clear Crown land* may be sought under section 118. A permit may be issued to 'remove specified trees or clear specified areas of scrub or other vegetation for the purpose of promoting the growth of indigenous pasture…' (s118). Prior to issuing a permit, the board must consult with the Commissioner of Soil and Land Conservation, and a permit must not be issued unless the board is satisfied of compliance with any provisions arising from the Environmental Protection Act, the Soil and Land Conservation Act and the Wildlife Conservation Act, and any other applicable law (s117). A permit may also be sought to use specified land for 'crop, fodder, horticultural or other specified kind of agricultural production' (s120).

Offences relating to Crown land

There are also *offences created for certain acts committed on Crown land*. Section 267 provides that if a person, without permission, 'clears, encloses, cultivates or causes or allows stock to graze on Crown land...[or]…removes from Crown land any plant (whether alive or dead) or such other thing of any kind as is prescribed', they commit an offence and are liable to a penalty of up to $10 000 and, where appropriate, a daily penalty of $200. Where a condition in respect of Crown land is breached, a person is liable to a penalty of $1000 and an additional daily penalty of $100, where appropriate (s269).

Acquisition of land for public work

The Act also extends to cover the *taking of freehold land for public work by the Crown or a local government* (s161) and the Minister is also able to take land in the *public interest* (s11). If land is taken, the landholder is able to seek compensation from the body who took the land (s202); however, *compensation* must be sought within six months of the taking of the land (s207). Again, these compensation provisions may act as a disincentive for local government to purchase land of high conservation value under this Act.

6.3.4 *Land Acquisition and Public Works Act 1902*

Public work is defined in the Land Acquisition and Public Works Act to include work authorised to be undertaken by any local government and includes work relating to (s14A) 'the *protection and preservation of indigenous flora and fauna'.* The Act allows for the taking of land for the purpose of public works. It would therefore appear to be within the scope of the powers conferred under this Act for *a local government to acquire land for the purpose of the preservation and protection of indigenous flora*.

Section 17 of the Act outlines the procedure for taking land. This includes giving a notice of intention to acquire land and allowing time for public objections. If the Minister, after considering any objections, still decides to proceed, then the Minister can take the land (s17). Once notice is published that the land is taken, title to that land will be vested in the Crown or the local authority (s18). Alternatively, the Minister or local authority may enter into an agreement with a landholder to purchase the land (s26). If the land is taken, the landholder is entitled to compensation from the Minister or local authority (s34). The amount of compensation will be determined by agreement between the parties or by the Compensation Court, established under the Act (s50).

This Act clearly would allow a local government to take or purchase an area of high conservation value for the purpose of the protection and preservation of indigenous flora; however, the cost of purchasing the land or the compensation that may become due may limit the financial ability of a local government to exercise these options.

6.3.5 *Main Roads Act 1930*

Under the Main Roads Act, *all main roads and highways are vested in the Crown.* Local government has minimal involvement and responsibility in this area. This extends to a local authority committing an offence under section 15A if they or an officer of the council were to:

> cut, break, bark, root up or otherwise damage, destroy or remove the whole or any part of any

> timber, tree, sapling, shrub, undergrowth, or wildlife in or upon any highway or main road without the prior consent in writing of the Commissioner except when such action is taken to remove a hazard

This Act, however, operates in conjunction with the Land Administration Act and the provisions contained in that Act. The provisions of the Land Administration Act provide that, where land which comprises a road (but not a main road or highway which are the responsibility of the State under the Main Roads Act) is vested in the Crown, the local government within whose jurisdiction the road exists has responsibility for the care, control and management of that land. Local governments may therefore be responsible for some roadsides and may be able to manage those areas for conservation.

6.4 Other relevant legislation

The provisions of legislation outlined in this section are not directly related to local government, but such legislation is important as it establishes State bodies or provisions which constrain a local government's role in vegetation conservation.

6.4.1 Regulation of clearing under the *Soil and Land Conservation Act 1945* and *Environmental Protection Act 1986*

In 1995, a decision was made by Cabinet to strengthen the protection of vegetation. This decision resulted in the signing of a Memorandum of Understanding in March 1997. This was signed by the Commissioner of Soil and Land Conservation, the Environmental Protection Authority, the Department of Environmental Protection Agriculture Western Australia, the Department of Conservation and Land Management and the Water and Rivers Commission (Government of Western Australia, 1997).

The Memorandum of Understanding applies to rural zoned lands in southern Western Australia. Land zoned for other purposes is considered through the statutory planning process. The memorandum requires that all landholders proposing to clear more than 1 hectare of indigenous vegetation are required to submit a Notice of Intent to Clear to the Commissioner of Soil and Land Conservation and to advertise in main newspapers their intention to clear.

Proposals are considered against assessment criteria agreed in the memorandum, which include: the likelihood of land and water degradation, waterway and wetland protection, water resource protection, biological diversity, geological importance, European heritage and Aboriginal heritage. Proposals to clear are reviewed through the following four-level process (Schedule 5):

- *Level 1: Desktop review* – If the proposal is within a local government area where less than 20% of the original native vegetation remains, or the proposal clearly fails to meet the criteria, the Commissioner of Soil and Land Conservation will formally object to the proposal. Otherwise it is referred to level 2.

- *Level 2: On-site inspection and review* – The proposal is reviewed through evaluation, on-site inspection and report. At this stage the Commissioner of Soil and Land Conservation either formally objects to the proposal or it is referred to level 3.

- *Level 3: Working group review* – An inter-agency group of officials provides advice to the Commissioner of Soil and Land Conservation, who may either decide to accept the proposal with or without amendment, formally object to it, refer it to other agencies, or refer it for review at level 4 because the issues of concern are beyond the powers of the Commissioner.

- *Level 4: Formal assessment by Environment Protection Authority* – Formal assessment is made under the Environmental Protection Act, which is broader in scope than the Soil and Land Conservation Act.

Levels 1 through 3 are undertaken by the Commissioner of Soil and Land Conservation under the powers of the Soil and Land Conservation Act and the Land Act. If the Commissioner objects to a proposal, the landholder may appeal to the Minister for Primary Production. If this appeal is successful,

the proposal will be referred to a level 4 assessment under the Memorandum of Understanding. The memorandum provides for limited financial assistance to landholders adversely affected (Schedule 6).

The Memorandum of Understanding clearly restricts the ability of landholders to clear land within agricultural regions. It restricts the powers of local government, although it should be emphasised that it only applies to lands that are zoned rural. Other lands come under the statutory planning process, in which local governments play a central role.

6.4.2 *Soil and Land Conservation Act 1945*

Land degradation is defined in the Soil and Land Conservation Act to include *'the removal or deterioration of natural or introduced vegetation* where it diminishes the future use of the land' (s4).

The *Soil and Land Conservation Council* is established under section 9 of the Act. The council has one local government representative and 10 other members, including the *Commissioner of Soil and Land Conservation* (s9). The functions of the Commissioner include 'the prevention and mitigation of land degradation; [and] the promotion of soil conservation' (s13). The role of the Soil and Land Conservation Council includes advising the Minister on soil and land conservation and promoting awareness of land degradation and conservation (s16).

Section 19A states that where the Commissioner finds that compliance with the provisions of a covenant, condition or term of a lease under the Land Act would cause land degradation, the Commissioner can notify the Minister administering the Land Act and seek to have the relevant clause altered or revoked.

Part IIIA concerns *land conservation districts*. The Governor, by Order in Council, as recommended by the Minister, may declare areas of the State to be a conservation district for the purpose of the Act. Before the Minister makes such a recommendation, they must consult with the local government in whose jurisdiction the land is found (s22). *Where a land conservation district is declared, the Governor can make regulations applying to that area which concern the lighting of fires, regulating or prohibiting the clearing of or interference with vegetation, or controlling the use of that land* (s22). Once an area has been declared a land conservation district, the Governor, by Order in Council, may establish a *Land Conservation District Committee* for that area (s23). Once again, a representative of local government must be included as a member of the committee (s23). The functions of a Land Conservation District Committee are outlined in section 24 and include the *management of projects and the carrying out of work 'for preventing, remedying or mitigating land degradation and for promoting soil conservation and reclamation'*, and providing advice to the Minister and commission on matters relating to land use and land degradation in that area.

The Act allows for the *imposition of rates* by the Minister on the recommendation of the Land Conservation District Committee (s25A). The rates may be applied to all land within the district, or to some areas only. The amount payable is assessed on the gross rental value or the unimproved value of the land, as determined for the imposition of council rates (s25A). The Act also limits the amount of rates which may be payable to a certain amount per dollar of the value of the land (s25A). Prior to introducing rates, the Minister must consult with the local government in the district (s25A). Arrangements can be made for the local government to include with the local government rates a notice about the soil conservation rates payable (s25B). These soil conservation rates, and other funds from the government shall form the Land Conservation District Fund (s25C), and these *funds can be used for the construction of soil conservation works, the promotion of soil conservation, and other actions which will benefit the soil conservation district* (s25C). Section 29 provides that soil conservation works such as the building of fences on soil conservation reserves are public works.

Part IVA deals with conservation covenants and agreements to reserve. Section 30B allows a landowner to enter a covenant with the Commissioner to set land aside for the protection and management of vegetation. Such a covenant or

agreement can be registered on title by a memorandum registered by the Commissioner. A covenant or agreement entered in this way binds the person who consented in writing, and will bind successive owners while the memorial of the covenant remains registered (s30C). If a landowner is to sell land which is subject to a covenant memorial or agreement, the landowner must notify the prospective owner in writing of the existence of the covenant or agreement and a failure to do so may attract a fine of $2000 (s30D). The difference between an agreement and a covenant is that an agreement may be discharged by the Commissioner when it is no longer necessary, or where the Commissioner agrees to an application by the landholder (s30E). By comparison, a conservation covenant is irrevocable and therefore cannot be discharged (s30B).

Where the Commissioner is of the opinion that land degradation is occurring, the Commissioner may issue a *soil conservation notice.* A soil conservation notice may direct a person to change their agricultural methods, refrain from clearing land, refrain from cutting down or destroying any grass shrub or other plant, or take any other action (s32). A soil conservation notice binds each person on whom it is served and, if a memorial of the existence of the notice is registered on title, it will bind all successive owners and occupiers (s32). The Minister may vary or revoke a soil conservation notice under section 33, and a person may appeal to the Minister within 30 days of the receipt of a notice (s34). If a person fails to comply with a soil conservation notice, they commit an offence and are liable to a fine of up to $3000 (s35). Any person who interferes with or damages any work undertaken by the commission is also guilty of an offence and may be liable to a fine of up to $1000.

Section 48 states that the Governor may make additional regulations relating to the Act, including measures to be taken for preventing and mitigating land degradation.

This Act clearly establishes mechanisms at a State level for vegetation conservation and therefore influences the role local government may play in administering and complementing these provisions at a local level.

6.4.3 *Environmental Protection Act 1986*

The Environmental Protection Act is similar to its counterparts in other States. It establishes the *Environment Protection Authority* (s7), which has the objectives of protecting the environment and preventing, controlling and abating pollution (s15). The functions of the Environment Protection Authority include to conduct environmental impact assessments for certain proposed developments, and to '(k) publish for the benefit of planners, builders, engineers or other persons guidelines to assist them in undertaking their activities in such a manner as to minimize the effect on the environment of those activities or the results thereof…' It is clear then, that *the Environment Protection Authority has some role to play in providing information to local governments, in their role as planners, of the effect of certain types of development on vegetation and other aspects of the environment.*

Part IV of the Act deals with the *environmental impact assessment processes* and states that if it appears that a proposed development is likely to have a significant effect on the environment, or it is one of a certain class of proposals, then the local government must refer that application to the Environment Protection Authority for its consideration (s38). This *removes the responsibility for decision making in such circumstances from local governments although, in practice, the two bodies may work together.*

6.4.4 *Parks and Reserves Act 1895*

The Parks and Reserves Act establishes *Boards of Parks and Reserves* (s3) These boards have a *duty to control and manage all parks and reserves committed to them* (s4). This includes the power to fence, clear and plant within a park or reserve (s3). Clearly, it would be *within the power granted to the board to fence areas of high conservation value, or to revegetate an area which has been degraded by introduced weeds.* It is also within the power of the board, with the approval of the Governor, to make *by-laws* with respect to parks and reserves, including to prohibit 'damage or injury to and destruction of trees, shrubs, plants and flowers in

the park lands and reserves' (s8(1)). This Act operates independently of local governments and is therefore of little importance to them; however, it is important in the protection it provides to Crown land reserves.

6.4.5 *Wildlife Conservation Act 1950*

The Wildlife Conservation Act is similar to the threatened species legislation of most States. It is linked to the *Conservation and Land Management Act 1984* in various ways. The Act provides that the Crown is bound by the provisions in the Act which relate to flora (s9). Where a matter arises under the Act with respect to a right or power of a local government or government department, the Minister of the respective department or the Minister responsible for the administration of the Local Government Act may consult with the Minister responsible for this Act and, where the Ministers do not agree, the matter must be referred to the Governor, who will decide on the matter in question (s9).

Section 6(6) allows the Minister, by notice in the Gazette, to declare a class or description of flora in all or part of the State to be *protected flora* for the purpose of the Act.

Section 23A provides that flora, which is protected under the Act, and which is on Crown land, is the property of the Crown unless it is lawfully taken in accordance with the Act. Section 23B states that it is an offence for any person to take protected flora from Crown land, unless it is in accordance with a licence issued under the Act, and section 23E further states that a person must not sell any protected flora, except as provided for in the Act. A person may apply for a licence to take protected flora for commercial or scientific purposes or for any other prescribed purpose. The Minister may issue or refuse to issue such a licence and can specify conditions relating to the area from which the flora can be taken and the time at which it can be taken. A licence is valid for a period of 12 months, unless revoked by the Minister in writing (s23C).

In the case of private land, a person shall not take protected flora unless they are the owner or occupier or have the permission of the owner or occupier. This protected flora cannot be sold unless licensed under the Act as a commercial producer or nurseryman and the flora is taken in accordance with a licence issued under the Act (s23D). Applications for such a licence can be made under the Act according to the provisions contained in section 23D. Once issued, a licence is valid for 12 months (s23DA).

Flora protected under the Act can also be declared by the Minister to be *rare flora* if it is 'likely to become extinct or is rare or otherwise in need of special protection'. This flora cannot be taken without the written consent of the Minister, even if a licence is held to take protected flora (s23F). A breach of this section makes a person liable to a fine of up to $10 000. Where an owner or occupier of land has sought permission to take rare flora and this permission has been refused, compensation may be payable for the loss of the use or enjoyment of that land (s23F).

This Act is of little importance to the role of local governments in vegetation conservation except in their role as land manager. Local governments are responsible for 124 000 kilometres of roads and 21% of threatened flora populations in the State. The only other input a local government may have is where a question arises concerning a right or power of a local government. However, in such a case it is the Minister for Local Government who will be consulted and not the local government itself.

6.4.6 *Conservation and Land Management Act 1984*

The Conservation and Land Management Act aims to improve the provisions for the better use, protection and management of certain public lands and the flora and fauna on those lands (long title). The land covered by the Act includes State forests, timber reserves, national parks, conservation parks, nature reserves, marine parks, marine nature reserves and any land placed under the Lands and Forests Commission (s5) or the National Parks and Nature Conservation Authority.

Section 7 states that a State forest or timber reserve is vested in the Lands and Forests Commission.

Land reserved for the purpose of a national park or for the conservation of flora or fauna is vested in the National Parks and Nature Conservation Authority, unless otherwise provided in the reservation order.

Any Crown land can be declared a *State forest* by the Governor. This order must be published in the Gazette and must be placed before each House of Parliament. If both Houses pass a resolution to the effect that the order not be allowed, then the order and declaration by the Governor will not take effect (s8). Once a State forest, the land will continue to be a State forest unless an Act is passed by Parliament or a resolution is passed by both Houses of Parliament to the effect that the land is no longer a State forest. The land will then become Crown land (s9). Crown land can also be declared a *timber reserve* by the Governor (s10). In this respect, Crown land is land reserved under Part III of the Land Act or Part 4 of the Land Administration Act, and includes land over which a pastoral lease has been granted and land held subject to a mining tenement (s11).

Land can be compulsorily acquired under the Act if it is considered by the Governor to be 'required for the purpose of, or incidental to, a State forest, timber reserve, national park, conservation park, [or] nature reserve…' This land may be taken in accordance with the Land Administration Act or it may be purchased or exchanged for other Crown land (s15).

The Executive Director of the Department of Conservation and Land Management may enter an *agreement* with the owner, lessee or licensee of land for the *management of that land as a State forest or other reserve land, such as a nature reserve or national park, by the department*. Such an agreement cannot be entered until approval in writing is given by the landowner, notification is given to the local government within whose jurisdiction the land is located, and the local government has been given time to make written submissions in regard to the proposal (s16).

The *Lands and Forests Commission* is established under the Act (s18). The functions of the commission are outlined in section 19 as including monitoring and carrying out management plans entered under the Act, providing advice to the Minister, and providing advice on matters relating to land vested in it, if it is in the public interest and practicable for the commission to provide that information.

The *National Parks and Nature Conservation Authority* is also established under the Act (s21). The authority will have vested in it national parks, conservation parks and nature reserves. It is responsible for developing policies for the 'preservation of the natural environment of the State and the provision of facilities for enjoyment of that environment by the community' and 'for promoting the appreciation of flora and fauna and the natural environment' (ss22(1)(b)(i) and (ii)). The authority must also develop and implement *management plans* in respect of land which is vested in it and must 'advise the Minister on the development of policies for the conservation and management of the flora and fauna of the State, whether on public land or private land' (s22(1)(f)). The authority must inform a local government of a proposal to recommend land within the local government's jurisdiction for declaration as a *national park*. This must occur before advising the Minister on the recommendation (s22(5)). The authority itself is to comprise 15 members, two of whom must be councillors from local government (s23).

The Act also establishes the Forest Production Council (s24), which is to give advice to the Minister on matters relating to the management and production of timber in State forests and timber reserves (s25).

The *Department of Conservation and Land Management* is ultimately responsible for the management of land to which the Act applies. Its functions also include (s33(11)) to:

- promote and encourage the use of flora for therapeutic, scientific or horticultural purposes for the good of people in this State or elsewhere, and to undertake any project or operation relating to the use of flora for such a purpose;

- …be responsible for the *conservation and protection of flora* and fauna throughout the State…; and

- to carry out or cause to be carried out such study or research of or into – (i) the management of land to which this Act applies; (ii) the conservation and protection of flora and fauna…

Part V concerns the *management of land under the Act*. The Lands and Forests Commission or the National Parks and Nature Conservation Authority must prepare a *management plan* for land under their control (s54). The management plan must contain a statement of policies or guidelines and proposed operations. The management plan for a State forest must also state the purpose for which the land is reserved (s55). The objectives for the management of land must include the purpose for the reservation and must be designed to meet those purposes and, in the case of a *national park or conservation park,* must fulfil the demand for recreation by the public as well as protection of indigenous flora (s56). The management plan for a *nature reserve* must maintain and restore the natural environment and protect, care for and promote the study of indigenous flora (s56). These management plans must be available for public inspection and public submissions according to section 58. The plan may also be submitted to other bodies if this is appropriate, and must be submitted to the local government in the area for comment (s59). Once the submissions have been considered, the plan must be submitted to the Minister for approval (s60). The Minister can approve or modify the plan and, once approved, notice of the approval will be published in the Gazette (s60).

Land which is under the control of one of the bodies established under the Act may be classified by the Minister on the recommendation of that controlling body. Land can be classified as a wilderness area,[42] a prohibited area, a limited access area, a temporary control area, a recreation area, or as otherwise recommended. Where land is classified as a temporary control area, this is only done for the purpose of public safety or for the protection of flora and fauna and will have effect for a maximum period of 90 days (s62). The Act also allows for the issuing of a permit or licence by the Executive Director for the sale or taking, removing or cutting of forest produce; however, a licence or permit can only be issued if there is a management plan in force for that land (s88). A permit will be valid for a maximum period of 10 years, and a licence for a maximum of 15 years (s91). The permit or licence can be cancelled for a breach of a condition or for a failure to pay any fees or charges due under the Act (s95). Similarly, licences can be issued for the use of other land, and land can be leased subject to those terms and conditions imposed by the Executive Director (ss100–101).

The Governor is granted the power to make regulations prescribing matters that are necessary or convenient to give effect to the purposes of the Act (s126).

6.4.7 *Water and Rivers Commission Act 1995*

The Water and Rivers Commission Act is only relevant in that it establishes the *Water and Rivers Commission* (s4), which has vested in it, by legislation, various powers (s10), including the *administration of a scheme for issuing clearing licences for certain controlled land under the Country Areas Water Supply Act.*

6.4.8 *Country Areas Water Supply Act 1947*

The Country Areas Water Supply Act deals with water supply and control. The Governor may, by an Order in Council, declare certain areas to be a *water catchment area* for the purposes of the Act (s9). Land within a catchment area is then referred to as *controlled land, and it is an offence to clear vegetation on controlled land* (s12B). In this sense, clearing includes 'to cause or permit the indigenous undergrowth, bush, or trees on the land to be removed or destroyed, or so damaged as to eventually be destroyed, or to cause the removal from the land of vegetation not under cultivation…' (s12AA). If land is cleared without a permit and the

42. Only two wilderness areas exist in Western Australia (pers. comm., K Bradby, Agriculture WA, 1998).

clearing is not to comply with a statutory obligation under the *Bush Fires Act 1954*, or is not a necessary emergency act (s12C), the offender is guilty of an offence and liable to a fine of up to $2000, and may be required to revegetate the land in accordance with a court order (s12B). The Minister may apply to the Supreme Court for an injunction to restrain a person from action that would breach the provisions of section 12B (s12BE). A person may, however, clear land in accordance with a clearing licence issued under section 12C of this Act. If a person wishes to clear land within a catchment area, or clear in order to fulfil a statutory requirement, then *a licence may be sought from the Commissioner of Soil and Land Conservation* (s12C). A licence may be issued subject to conditions; if a licence condition is breached, the holder is guilty of an offence and will be liable for that act, and the licence may be cancelled (s12C). In assessing an application for a licence and when determining whether or not compensation is payable for a refusal to issue a licence, the Act requires that the commission or the Supreme Court consider the fact that *at least 10% of the land must have tree and undergrowth cover maintained on it for good agricultural and conservation practices,* and there is no right for compensation where an application was made to clear more than this amount (s12E).

6.4.9 *Bush Fires Act 1954*

The Bush Fires Act is concerned primarily with establishing mechanisms and bodies for *preventing, controlling and extinguishing bushfires.* Within this framework, a local government may require an occupier or owner of land to plough or clear a firebreak on their land. A local government may make local laws in respect to clearing or fire controls (s33). *It may be possible to use this power to implement clearing controls that extend beyond clearing for fire control.*

Section 34 relates to *landowners whose land is adjoining Crown land*. This section allows a landowner to enter that Crown land (except for forests and roads) and clear a firebreak of a maximum of 3 metres wide, not more than 200 metres from the boundary, and to burn the bush between the firebreak and the boundary. This, however, can only be done once a permit to burn has been obtained from the local government. This section, if interpreted literally, may allow for the clearing of vast amounts of Crown land. This may, in turn, affect the ability of a reserve to provide adequate protection for the species found within it.

The Bush Fires Act may be used by local governments in a way that is detrimental to, or of assistance to, vegetation conservation. The sections allowing local governments to make by-laws regarding clearing could easily be used for permits for clearing in relation to vegetation conservation as well as for fire prevention. However, the section which allows for the clearing of firebreaks on Crown land may allow for relatively uncontrolled clearing of Crown land.

6.4.10 *Heritage of Western Australia Act 1990*

The Heritage of Western Australia Act *primarily provides for the conservation of places which are of cultural heritage significance.* As it relates only to cultural heritage, it is of little importance to vegetation conservation, but it is interesting to note the incentives which are offered within the Act.

Section 11 places all public authorities under a duty to assist in the conservation of places listed on the Heritage Register, and a decision-maker cannot make any decision which will adversely affect a registered place or a place subject to a *heritage agreement* unless the Heritage Council has been consulted. A heritage agreement may be entered into by a local government with a landowner with the approval of the Minister. Such an agreement may be 'for the purpose of binding the land or affecting the use of the land or building in so far as the interest of that owner or occupier permits, and may be expressed to relate to a specific period or to be of permanent effect' (s29). It may also include a *covenant* which will bind subsequent owners, and can relate to the use of the land (s29). This may, in effect, restrict the *clearing of land,* or require that land be maintained for conservation purposes. Under section 33, the Heritage Council can arrange for *financial, technical or other assistance,* and can include a recommendation for the *remission of rates. Such incentives could easily be extended to*

apply to the conservation of areas of natural heritage and, therefore, the conservation of vegetation.

6.4.11 *Western Australian Planning Commission Act 1985*

The Western Australian Planning Commission Act establishes the *Western Australian Planning Commission* (s4). The functions of the commission include giving advice to the Minister in relation to the coordination and promotion of urban, rural and regional land use planning and development (s18). It would therefore be possible for *this body to recommend additional steps to improve vegetation conservation, if this was required through State legislation.*

6.4.12 *Aboriginal Affairs Planning Authority Act 1972*

The Aboriginal Affairs Planning Authority, Commissioner for Aboriginal Planning and an Aboriginal Advisory Council are established under the Aboriginal Affairs Planning Authority Act. These bodies are concerned with the economic, social and cultural advancement of Aboriginal peoples. The Aboriginal Lands Trust is also established to hold real and personal property (s20). As such, it is a landholder and manager in a manner similar to other landholders, but, where land is reserved, the Aboriginal Affairs Planning Authority must be consulted where an application concerning a licence or right to the land is made (s30). *Local government may therefore, in some circumstances, be required to consult with the Aboriginal Affairs Planning Authority prior to deciding on an application.*

6.4.13 *Transfer of Land Act 1893*

Section 129BA of the Transfer of Land Act allows for the making of a restrictive covenant between a landholder and local government. The covenant, once it has the consent of both parties, can be registered on a title. This would allow for the creation of a covenant which, for example, prohibits the clearing of vegetation on land subject to the covenant.

6.5 *Summary of opportunities*

Many of the incentives for vegetation conservation outlined in this report are able to be offered by local governments in Western Australia. However, more encouragement and policy support and some minor amendments to legislation would enable wider use of the incentives. Table 6.2 summarises the steps that would be required to allow each incentive to be offered by local governments. In addition, the table includes reference to by-laws and the formation of regional local governments where existing powers of local governments are able to be utilised in relation to regional vegetation conservation. By-laws that protect native vegetation on council-owned and council-managed land could be passed, and regional local governments could be established to provide for the management of native vegetation on a regional level.

If the range of incentives available to local governments in Western Australia were increased, local governments would then be in a position, not only to lead by example with the management of their own land, but also to offer incentives for all landholders to make a contribution to the management and conservation of native vegetation.

Table 6.2: Opportunities available to local governments to offer incentives for vegetation conservation

Incentive	Proposed amendments
Environmental levy	Amend definition of service in the Local Government Act (s6.38) to include environmental services, or pass regulation defining the environment as a service for the purpose of section 6.38 Revenue raised through environmental levies should not be subject to rate capping
Management agreement	Policy support/encouragement
Covenant	Clarify that the Transfer of Land Act (s129BA) may be used to restrict the clearing of land, and can be entered into without requiring the transfer of land
Grants to individuals and community groups	Clarify that grants for vegetation conservation are for the good government of persons within the district and are therefore within the power of local governments
Rate rebates	Encourage use of differential general rates to reduce rates payable on land held for conservation Implement a rate rebate scheme, with land held for conservation exempt from, or charged a reduced level of, rates
Acquisition and sale of land	Clarify that it is possible to resell land
By-laws	Amend the Local Government (Miscellaneous Provisions) Act (s202) to include the power to make by-laws for the protection of native vegetation on council-owned and council-managed land
Regional local government	Encourage the establishment of regional local governments under the Local Government Act (s3.61) to provide regional vegetation planning

7. South Australia

7.1 Legislative framework

Native vegetation conservation in South Australia has been addressed in legislation since the 1970s. Before then, clearance was encouraged and was in fact a standard condition on leases of Crown land. In 1976, investigations found that over 75% of land in agricultural regions had been cleared. To try to limit any further clearance, the State government introduced the South Australian Heritage Agreement Scheme in 1980. This scheme was strengthened with the introduction of planning controls over vegetation clearance in 1983 and controls under the *Native Vegetation Management Act 1985,* which provided financial assistance to landholders who were refused clearance consent on condition that they also entered heritage agreements. This Act has since been replaced by the *Native Vegetation Act 1991*, which retains the Heritage Agreement Scheme, but removes the guaranteed right to financial assistance. Over 550 000 hectares are now covered by heritage agreements (Binning and Young, 1997a). This legislation remains the primary method for vegetation conservation on private land. Local governments have only a limited role under this legislation. In the case of Crown land, leases can include conditions relating to vegetation conservation, and Crown land can be managed or reserved for conservation.

The Local Government Act provides a broad grant of power that allows local government to actively promote vegetation conservation and management. Other State legislation does, however, limit this grant of power. Where State agencies are established, the broad discretion a local government may otherwise have may be removed and, instead, the local government be required to abide by the decision of the State authority.

The following table outlines the legislation that may be relevant to the issue of local government and vegetation conservation. This legislation has been examined in relation to the powers it grants to local governments and the limits it places on these powers.

Table 7.1: Environmental and land use legislation and implementing jurisdiction

Legislation	Jurisdiction
Animal and Plant Control (Agricultural and Other Purposes) Act 1986	State
Coast Protection Act 1972	State
Country Fires Act 1989	State
Crown Lands Act 1929	State and local government
Development Act 1993	State and local government
Environment Protection Act 1993	State
Forestry Act 1950	State
Heritage Act 1993	State
Land Acquisition Act 1969	State
Local Government Act 1934	State and local government
Local Government (Forestry Reserves) Act 1944	Local government
National Parks and Wildlife Act 1972	State
Native Vegetation Act 1991	State
Pastoral Land Management and Conservation Act 1989	State
Soil Conservation and Land Care Act 1989	State
South Eastern Water Conservation and Drainage Act 1992	State
Water Conservation Act 1936	State
Water Resources Act 1997	State
Wilderness Protection Act 1992	State

7.2 Powers of local government

7.2.1 *Local Government Act 1934* [43]

Section 36(3) of the Local Government Act states that a council 'has the powers, functions and duties conferred on it by or under this or any other Act…[and] has power to do anything else necessary or convenient for, or incidental to, the exercise, performance or discharge of its powers, functions or duties under this or any other Act'. This is a relatively broad power; however, it is not as wide a grant of power as the grant to local governments in Queensland. It is limited to the power necessary to carry out the duties and functions delegated to it by the State government.

The functions of a council are stated in section 196(1) as including the following:

(a) to provide for the development of its area;

(b) to provide services and facilities that benefit the area, its ratepayers and residents and those who resort to it;…

(e) to represent and promote the interests of its ratepayers and residents;

(f) to establish or support organisations and programs that benefit people in its area or local government generally;

(g) to protect the environment and improve amenity;

(h) to provide the infrastructure for industry; and

(i) any other function approved by the Minister.

A council therefore has the power to carry out, or do anything else convenient or incidental to, any of these function. *It is clearly within the powers of local government, therefore, to protect the environment and, incidental to this, if not directly as a result of this, to manage and conserve native vegetation.*

To perform its functions, a council can raise revenue by imposing rates and charges in accordance with the provisions of the Act (s152). *Revenue raised can then be spent as the council thinks fit, and is not tied to specific expenses* (s154).

Rates and charges

Under section 167, a 'council may impose general rates, separate rates, service rates or service charges on land within its area'. All land is rateable except that specified in section 168(2).[44] The amount charged as a rate must be based on the value of the land (s169).

A *general rate* can be composed of two separate parts: an amount based on the value of the rateable land and an amount which is a fixed charge (s169). After considering and adopting its budget, a council may declare a general rate or a differential general rate on land (s174). There is, however, currently a *cap on the amount raised by general rates for the 1998–99 financial year,* limiting the amount to that raised in the 1995–96 financial year plus adjustments to reflect the consumer price index (s174A).

A *separate rate* may only be imposed after the Minister has approved. It may be declared on 'some basis other than the value of the land subject to the rate' (s169). The value of the land, on which the rate is based, is generally the capital value of the land (s170); these base valuations are those made by the Valuer-General or a council valuer (s171).

A council can declare a separate rate or differential separate rates on land 'for the purpose of planning,

43. The Local Government Act is currently under review and focuses on three strategies: boundary reform, legislative reform and functional reform. These proposed changes have not been included, and the current position is that covered in this review.

44. Land which is not rateable under 168(2) includes unalienated Crown land, land used or held by the Crown or an instrumentality of the Crown for a public purpose, except land which is held or occupied under a lease or licence, or that constitutes a domestic premises, a church/chapel and its grounds, land used solely for religious purposes, public cemetery, land (not including domestic premises) occupied by a university, college of advanced education, or other tertiary educational institution, land used exclusively for educational purposes (but not if fees are charged), land occupied by a library, hospital, rehabilitation centre, land under the care or control of the Royal Zoological Society of South Australia Incorporated, recreation grounds, land occupied by the council, and land exempt under any other Act.

carrying out, making available, maintaining or improving a project that is, or is intended to be, of particular benefit to the land, or the occupiers of the land' (s175). Section 155 states that if the money raised in this way is not used, it must be refunded to the ratepayers or credited against future liability for rates.

Both general and separate rates may be differential, that is, they may vary according to the use of the land, the locality of the land, or both, or on some other basis determined by the council (s176). It would appear possible from this section that another basis could be the conservation status of the land, but section 176(2) states that the 'some other basis' provision can only be used where the council is a new council, where there has been an amalgamation of councils, or where the boundaries of a council have been altered, and such a rating can only apply for a period of five years. It would appear, therefore, that this section could only allow for differential rating on the basis of the use of the land. This must be approved by regulation, as a factor appropriate for differential rating (s176(4)). Therefore, the conservation status of the land would need to be reflected in its dominant use. The Local Government (Land Use) Regulations 1989 prescribe nine categories of land use that are permissible differentiating factors, but there is no specific category that would reflect the conservation status of the land specifically.

It may be possible for a local government to offer some rating incentives, either by imposing a separate rate or a differential separate rate. This rate could be based on the dominant use of the land, so that where land was maintained for conservation, a lower rate would be imposed. Ministerial approval is, however, necessary before this could be achieved.

Service rates can also be imposed by a council. Such a rate can only be charged in relation to the provision of a water supply, septic tank effluent disposal and 'any other service approved by the Minister'. For this rate to be incurred in the form of an environmental levy, for example, it would be necessary for the Minister to approve the imposition of the levy for an environmental service able to attract a service rate under section 177.

Acquisition of land

Local governments have the power, with the approval of the Minister, to acquire land under the *Land Acquisition Act 1969* for the purposes of carrying out a project (s198). 'Project' is defined to include '(a) any form of scheme, work or undertaking; (b) the provision of facilities or services; (c) any other activity' (s5). It would, therefore, appear possible for *local governments to purchase land of high conservation value if it is necessary to ensure the proper management of the area.* Ministerial approval would, however, be necessary.

Joint authorities

Section 200(1) states that

> two or more councils ('the constituent councils') may, with the approval of the Minister, establish a controlling authority (a) to carry out any project on behalf of the councils; or (b) to perform any function or duty of the councils under this or any other Act.

This section would allow for *the establishment of bodies to provide for regional vegetation management through local governments.* Council Controlled Land Section 450 of the Local Government Act states that '[a]ll park lands and public squares within an area are, for the purposes of this Act, under the care, control and management of the council of the area'. The Act further provides (s453(1)) that if

> any land is dedicated and set apart for the use and enjoyment of the inhabitants of the area or any part of it, the council may, by resolution, assume the care, control and management of the land as if it had been conveyed or transferred in fee simple to the council and the land must then be maintained by the council for the use and enjoyment of the inhabitants.

Therefore, the council will have control and responsibility for the management of all land, within its jurisdiction, that is park land, public land,[45] road or land dedicated for the use and enjoyment of the inhabitants of an area. The council has the power to fence or improve and 'ornament' such areas of land for the purposes of public recreation and enjoyment

(s454). Park land and reserves can also be leased for a maximum of 21 years, but ministerial approval is needed to lease an area over 6 hectares. Councils also have the power to plant trees, shrubs or grasses on foreshore under its care, control and management (s479).

These sections, although not specifically referring to native vegetation management, clearly allow a council to manage public land and park land for native vegetation conservation and to rehabilitate areas, where necessary. They may also, however, allow councils to develop land for recreation and to not take into account the conservation value of that land.

By-laws

Section 667 outlines the purposes for which a council has the power to make by-laws. These include:

- the prevention, suppression and speedy extinguishment of fires, creation and maintenance of firebreaks and the removal of inflammable grass, weeds, and so on;
- the planting, preservation and protection of trees, shrubs, lawns and gardens on any street, road or public place;
- the erection of fences, treeguards and other shelter supports;
- the protection of trees, shrubs, lawns and gardens growing in any place under the control of the council;
- the prevention of trees and shrubs overreaching or overhanging roads, and so on; and
- the proper management, control and preservation of all walks, roads and reserves and all plantations, trees, shrubs, plants, flowers and lawns.

It is therefore possible for councils to make by-laws regarding the protection, fencing and management of areas of native vegetation, and the control of exotics.

Other relevant powers

Some form of vegetation management exists through the nuisance provisions within the Local Government Act. This Act provides (s361(1)) that:

> if the layers, roots, branches, suckers, or seedlings of any tree, hedge, or plant encroach or grow on any street or road within the area, the occupier or the owner of the land on which the tree, hedge, or plant is growing or was growing must, within seven days after the council has given him or her notice so to do, remove the layers, roots, branches, suckers, of seedlings.

If this is not done, the council can do it and recover the cost from the landowner. These provisions are not specifically aimed at native vegetation conservation, but it may be possible to use them in some circumstances, for example, where the native vegetation is overrun by exotics which are also encroaching on a road.

Section 365A provides that the council has the power to authorise a landowner whose land adjoins a public road or street to plant natives along that road or street. The council may also require the landowner to enclose the area in a fence. The native plants must not, however, unduly obstruct the public. This section may assist councils to promote revegetation.

Sections 779 and 780 concern the removal or damaging of vegetation or collection of timber or stone from roadsides under the control of council. Such acts are prohibited and offenders may be fined. If a tree (taller than 4.5 metres) growing on any land under the care or control of a council is to be cut, a resolution of council is necessary (s880(a)).

45. Section 5 defines park land as 'land declared or set apart as a park or set aside for the use and enjoyment of the public'. A public place includes a road, street, alley, and any other area which the public is able to use. Public land would have a similar meaning.

7.2.2 *Local Government (Forestry Reserves) Act 1944*

The Local Government (Forestry Reserves) Act allows for the establishment and management of forests by councils on Crown land. The Governor, on the recommendation of the Conservator of Forests, may declare an area to be a *forest reserve* under this Act, and declare that it is *under the control of a council* (s3). Once declared a forest reserve, the land can only be used for forestry purposes and for purposes incidental to forestry purposes (s3). The council must then undertake to manage the land as a forest reserve (s6). The Governor, on recommendation of the Conservator of Forests, is also granted the power under the Act to make regulations pertaining to the management and use of the reserve. *Local government could play an active role in the management of forest reserves for native vegetation.*

7.3 *Land use and planning*

The land use and planning system in South Australia is similar to that of other States. The State develops Statewide planning strategies, which must then be approved by Parliament. Local governments may implement a development plan for their areas. This development plan must seek to promote the provisions of the planning strategy. It contains provisions relating to the uses permitted on certain lands and states the requirements for seeking development approval. Development approvals are generally considered by a local government, but, in some circumstances, other State agencies may limit this discretion. The following section outlines legislative provisions relating to land use and planning in more detail.

7.3.1 *Development Act 1993*

The Development Act is the primary piece of land use and planning legislation in South Australia. It applies throughout the State (s7). The object of the Act (s3):

> is to provide for proper, orderly and efficient planning and development in the State and, for that purpose:
>
> (a) to establish objectives and principles of planning and development;
>
> (b) to establish a system of strategic planning and development;
>
> (c) to provide for the creation of Development Plans
>
> i) to enhance the proper conservation, use, development and management of land and buildings;
>
> ii) to facilitate sustainable development and the protection of the environment;
>
> iii) to advance the social and economic interests and goals of the community.

Development approvals

It is important to know what actually constitutes the 'development' that is regulated by the Act. Section 4(1) defines 'development' as:

> (a) building work;
>
> (b) a change in the use of land;
>
> (c) the division of an allotment; or
>
> (d) the construction or alteration (except by the Crown, a council or other public authority…) of a road, street or thoroughfare on land…

or, in relation to a State heritage place or local heritage place, the demolition, removal, conversion, alteration or painting of, or addition to, the place, or any other work (except painting) that could materially affect the heritage value of the place; or mining operations or other activity declared a development by regulation. It is these activities which are controlled and addressed by the provisions of the Act. The only type of development directly applicable to the issue of vegetation conservation and management is that concerning the change in the use of the land;[46] for example, where land has been used for agriculture and the landowner wishes to use the property for a tourist development.

The Act establishes several bodies, including: the Development Policy Advisory Committee, which deals with the administration of the Act; and the Development Assessment Commission, which has a role in assessing development applications. Both these bodies are only required to have one person

with knowledge of, and experience in, local government affairs (ss8–11). There is, therefore, *minimal representation of local government at this important level of planning and decision-making*.

The *planning strategy* is a Statewide strategy outlining the main land use and planning objectives and policies for the State. It must be developed after public consultation and ministerial approval, and the approval of Parliament must also be sought. The process is the same as that required for the amendment and enactment of a development plan.

Councils can prepare a development plan for areas within their municipality. They can also prepare joint plans with other councils for areas that straddle their municipalities. Where they have a development plan, they must carry out *periodic reviews* of the plan to determine how appropriate it is, and whether or not it is still consistent with the planning strategy (s30). Section 23 states that a *development plan* 'should seek to promote the provisions of the Planning Strategy' and it may include planning or development principles relating to the 'natural or constructed environment and ecologically sustainable development; social or socio-economic issues'; management and conservation of land, and heritage areas; and management, conservation and use of natural and other resources. There is no specific requirement that a development plan should address issues relating to environmental management or environmental impacts. *A development plan can, however, designate a place of local heritage value if it displays or represents certain characteristics; this does not include environmental value* (s23).

The Act also provides that *'no development may be undertaken unless the development is an approved development'* (s32). Development applications are determined by a council where the proposed development is within the area of a council, or by the Development Assessment Commission, where the commission is the prescribed assessment authority for that type of development, where the proposed development is not wholly within the area of a council, where the council has a demonstrated conflict of interest, or where the council fails to deal with the application in the prescribed amount of time (s34).

Developments can be classified as complying or non-complying, according to the development plan or the regulations. Where a development is a *complying development,* provisional development consent must be granted, subject to any conditions specified in the development plan or the regulations. A *non-complying development* cannot be granted consent unless the council and the Development Assessment Commission (or, in circumstances where there is no council, just the Development Assessment Commission) concur in granting consent. In such a case, there is no appeal against a refusal of consent or against a condition imposed on consent (s35).

Developments are also classified into Category 1, 2 and 3 developments. Each category has specific public notification requirements and procedures that must be followed in determining an application (s38). In addition, where the proposed development is one of environmental significance, the *Environment Protection Act 1993* requires the preparation and assessment of an environmental impact study by the Environmental Protection Authority. Consent can be refused, granted with conditions, or granted without conditions by the relevant authority (s42). Offences are created for carrying out development without consent or contrary to conditions (ss43–44).

Where a *development is 'of major environmental, social or economic importance',* the Minister may, by notice given in the Gazette, state that the development must comply with the requirements of section 46. Section 46 includes provisions requiring the preparation of an environmental impact statement, and determination of the issue, not by the council, but by the Minister, on advice from the Major Developments Panel. The Major Developments Panel has one member nominated by the Local Government Association of South

46. The law surrounding a change in use of land is an area which has received some attention in South Australia, due to the case of *Dorrestijn v South Australian Planning Commission* (1984) 56 ALR 295. The case did, however, not completely clarify the position, leading to the inclusion of section 6 of the Act to define when the use of a land stops, and when it can be considered a continuing use.

Australia (s46A). This removes the development from council control completely, placing all responsibilities on the Minister and with the final approval granted by the Governor (s48).

Where a State agency proposes to undertake development, an application must be lodged with the Development Assessment Commission and, if it is proposed within the jurisdiction of a council, that council must also be given notice of the application. The council may make submissions to the commission on the development before the application is finally determined by the Minister (s49).

Land management agreements

The Act also provides for *land management agreements*. Section 57 states that the Minister or the council 'may enter into an agreement relating to the management, preservation or conservation of land within the area of the council with the owner of the land' (s57(2)). The agreement can be noted on the title and it will then be binding on the current owner of the land. The agreement can allow for the remission of rates and taxes payable on that land, but there can be a *remission of rates* only with the agreement of the council (s57). *A land management agreement may be taken into consideration when determining an application for a development*. It would appear that a land management agreement can extend to reserves, including council-controlled property, as it states that the '"owner" of land includes a person who has the care, control or management of a reserve' (s57). *It would be possible, therefore, for a council to enter a land management agreement with a landholder as a condition of development consent, and that agreement would then be binding on that landholder.*

The Development Act allows councils to make submissions in relation to a development application before the Development Assessment Commission, and prepare a development plan for an area. This plan is not legally binding; it is merely policy. The relationship between development plans and other legislative requirements that affect the approval of development, such as the *Native Vegetation Act 1991*, is not specifically stated and, in some circumstances, this may lead to uncertainty in the planning approvals process. In many instances, therefore, the role of local government in land use decision-making is limited.

7.3.2 *Native Vegetation Act 1991*

The Native Vegetation Act was enacted to repeal the provisions under the *Native Vegetation Management Act 1985* and to amend the *Heritage Act 1978*, which has since been replaced by the *Heritage Act 1993*. The Act was also passed to 'provide incentives and assistance to landowners in relation to the preservation and enhancement of native vegetation; to control the clearance of native vegetation' (long title). It does this through provisions for heritage agreements and other assistance to landholders, and the establishment of a *Native Vegetation Fund* to provide financial assistance. The Act also provides that the *clearing of vegetation, except in accordance with the Act, is prohibited*.

Section 4 provides that the Act applies to all of the State, except for the Metropolitan Adelaide areas included within the jurisdiction of certain local governments. These excluded areas can be extended further by regulations made by the Governor.

The objects of the Act are set out in section 6. They include:

(a) the provision of incentives and assistance to landowners in relation to the preservation, enhancement and management of native vegetation;

(b) the conservation of the native vegetation of the State in order to prevent further reduction of biological diversity and further degradation of the land and its soil;

(c) the limitation of the clearance of native vegetation to clearance in particular circumstances including circumstances in which the clearance will facilitate the management of other native vegetation or will facilitate the efficient use of land for primary production;

(d) the encouragement of research into the preservation, enhancement and management of native vegetation; and

(e) the encouragement of the re-establishment of native vegetation in those parts of the State that have been cleared of native vegetation.

The Act establishes a *Native Vegetation Council* with seven members appointed by the Governor. The role of the Native Vegetation Council is, in part, to determine applications for consent to clear native vegetation; to review the principles of clearance of native vegetation (as outlined in the Act); to encourage the re-establishment, preservation and management of native vegetation and to administer the Native Vegetation Fund (s14) which is established under section 21. One member of the Native Vegetation Council is a person nominated by the Local Government Association (s7). The existence of the Native Vegetation Council effectively removes direct responsibility for regulating the clearing of native vegetation from all areas covered by the Act. Within metropolitan areas there may still be a direct role for local government, as discussed below.

Heritage agreements and incentives

The Act provides that the Minister may enter into a *heritage agreement*[47] with a landowner. This agreement attaches to the land and is *binding on the owner to that land and successive owners and is registered on title and has the same effect as a covenant*. The consent of the Native Vegetation Council must be sought prior to entering, terminating or amending an agreement under the Act (s23). A heritage agreement can contain 'any provision for the preservation or enhancement of native vegetation' (s23A), including *restricting the use of the land; restricting or requiring specific work to be undertaken; providing for the management of the land, including the preparation of an agreed management plan* (that is, agreed to by the Minister and landowner); *providing for 'remission of rates or taxes in respect of the land'; providing for the Minister to pay 'to the owner of the land an amount as an incentive to enter the heritage agreement' and an amount representing the decrease in the value of the land due to the existence of the heritage agreement* (s23A). The Native Vegetation Council must keep all heritage agreements on a register, including a record of any alterations or terminations of an agreement (s23B). These agreements will override any council decision concerning the land to the extent that the decision is inconsistent with the approval. For example, the council cannot approve a development which would breach a heritage agreement.

Where a landowner has entered into a heritage agreement, they may apply to the Native Vegetation Council for *financial assistance for management of the land, preservation or enhancement of the native vegetation on the land,* or the undertaking of research in relation to the preservation, enhancement or management of native vegetation on the land (s24).

Regulation of clearing native vegetation

In relation to the clearing of native vegetation, Section 26 states that a 'person must not clear native vegetation unless the clearance is in accordance with' the Act. A breach of this section may attract a fine of up to (approximately) $40 000 or two years imprisonment. A similar fine may be imposed if a person breaches a condition specified on the clearing consent. 'To clear' is defined in section 3 as including 'to cause or permit the clearance of native vegetation'. Clearance is itself defined as:

(a) the killing or destruction of native vegetation;

(b) the removal of native vegetation;

(c) the severing of branches, limbs, stems or trunks of native vegetation; and

(d) the burning of native vegetation; and includes the drainage or flooding of land, or any other act or activity that causes the killing or destruction of native vegetation, the severing of branches, limbs, stems, or trunks of native vegetation or any other substantial damage to native vegetation.

47. The heritage agreements under the Heritage Act and the Native Vegetation Act are not the same, although they achieve the same purpose.

They are broad definitions and therefore cover actions which cause direct and indirect clearing or loss of native vegetation.

Consent may be granted by the Native Vegetation Council to clear vegetation, and native vegetation may be cleared if it is of a prescribed class or in prescribed circumstances (s27). Any application for consent must be accompanied by a vegetation management plan and any other information required by the Native Vegetation Council (s28).

In deciding whether or not to grant consent, the Native Vegetation Council must have regard to the Principles of Clearance of Native Vegetation as stated in Schedule 1 of the Act, which state that vegetation should not be cleared if, in the opinion of the Native Vegetation Council:

(a) it comprises a high level of diversity of plant species;

(b) it has significance as a habitat for wildlife;

(c) it includes plants of a rare, vulnerable or endangered species; [as listed in the National Parks and Wildlife Act];

(d) the vegetation comprises the whole, or part, of a plant community that is rare, vulnerable or endangered;

(e) it is significant as a remnant of vegetation in an area which has been extensively cleared;

(f) it is growing in, or in association with a wetland environment;

(g) it contributes significantly to the amenity of the area in which it is growing or is situated;

(h) the clearance of the vegetation is likely to contribute to soil erosion or salinity in an area in which appreciable erosion or salinisation has already occurred or, where such erosion or salinisation has not yet occurred, the clearance of the vegetation is likely to cause appreciable soil erosion or salinity;

(i) the clearance of the vegetation is likely to cause deterioration in the quality of the surface or underground water;

(j) the clearance of the vegetation is likely to cause, or exacerbate, the incidence or intensity of flooding…

These principles have effectively ruled out all broadscale vegetation clearance. The Native Vegetation Council in general must not consent to any clearance that is 'seriously at variance' with those principles. The only opportunity provided in the Act for the Native Vegetation Council to approve such clearance is where the vegetation comprises 'isolated plants', as defined in the Act. In this situation, the Native Vegetation Council can give greater weighting to the economic advantages to be gained by the clearance – but only if conditions are applied requiring revegetation elsewhere on the property, such that the environmental losses associated with the vegetation to be cleared are outweighed by the environmental benefits of the vegetation to be planted (s29). A right to appeal does not exist for a failure to grant consent, and consent, if granted, is valid for a period of two years, unless otherwise stated (s29).

The Native Vegetation Regulations 1991 provide a number of additional exemptions that outline several circumstances in which consent to clear is not needed. These are prescribed circumstances under section 27. The *regulations allow native vegetation to be cleared without consent* in the following circumstances:[48]

- where the clearance is authorised by another Act or regulation [subregulation 3(1)(a)];
- where the clearance is incidental to the erection of a building or other structure [subregulation 3(1)(b)];
- where the vegetation is situated within 20 metres of a dwelling [subregulation 3(1)(f)];
- where the purpose of the clearance is to reduce the risk of personal injury or damage to property [subregulation 3(1)(g)];

48. There are extra constraints which may limit these circumstances (1998, pers. comm.).

- where the clearance consists of burning for fire management purposes in conformity with an approved fire management plan [subregulation 3(1)(h)];
- for the purposes of providing fencing material or firewood [subregulation 3(1)(i)];
- for the purposes of fencing establishment or maintenance, or construction tracks for vehicles [subregulation 3(1)(j)];
- for the purposes of developing fire breaks [subregulation 3(1)(k)]; and
- road reserve management [subregulation 3(1)(l)].

An additional exception may be made if it can be proven that the clearing of native vegetation was not committed intentionally and 'did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence' (s40). Additional regulations in relation to the Act can be made by the Governor under section 41.

It has been recognised that these exemptions have allowed for considerable amounts of clearing, especially in rural–urban fringe areas, because the exemptions specified in the regulations limit the application of the principles regulating vegetation clearance in urban areas.[49] Hence, a significant issue is that the Act has only limited capacity to regulate the *clearing of native vegetation where urban development is encroaching on rural areas. Local government could have an important role in restricting vegetation clearance in these areas.*

7.3.3 *Crown Lands Act 1929*

The Crown Lands Act applies to *Crown land which is held under lease* (s3). Section 5 enables the Minister to sell or lease Crown land, and to dedicate Crown land for any of the purposes specified, including forest reserves, and, further, to declare (by notice in the Gazette) that any *dedicated lands shall be under the 'care, control, and management of any Minister, municipal or district council…'* (s5(f1)). Hence local governments could be given the responsibility of managing Crown land within their region. Section 288B provides that the Governor may grant ownership of any Crown land to 'a municipal or district council or a body corporate vested with the powers of a council'. In either case, the land will be excluded from the operation of the Crown Lands Act. Where dedicated lands have not been placed under the care, control or management of another body or person, the Minister has care, control and management of those lands (s250).

The Crown Lands Act is primarily concerned with the lease of Crown land and conditions of that lease. Section 249C states that:

> (1) Notwithstanding any provision to the contrary in this Act or any other Act, or in a lease or an agreement to purchase, a lessee or purchaser is not required to clear vegetation from the lands comprised in the lease or agreement.
>
> (2) Subsection (1) applies to a lease, or an agreement to purchase, under any of the *Crown Lands Act*, or any other Act dealing with the disposal of lands of the Crown.

Section 294C has been included, because in the past leases have generally included a section requiring landholders to clear a certain amount of land. Section 263 further attempts to alter any existing notions that clearing is necessary. It states that '… it shall be a condition of every lease or agreement granted or entered into, after the eighteenth day of December, 1912, that at least 2 hectares of every 100 hectares of the land comprised therein shall be set apart and reserved for the growth of timber, and that no timber trees growing thereon shall be destroyed'. This essentially requires compulsory conservation of at least 2% of a property which is leased from the Crown.

Section 275 makes it an offence to cut or remove trees in contravention of a covenant or condition in a lease or agreement. There is, however, only a minor penalty associated with this offence.

49. Department of Environment and Natural Resources, Review of Legislation Affecting Native Vegetation in South Australia, Report, Cole Associates Pty Ltd, October 1994

The Schedules to the Act outline further conditions which can be imposed on a lease agreement concerning Crown land. There are no specific provisions requiring the management and conservation of native vegetation. Such a condition could be stated in the Schedule and therefore included in all leases. These leases and conditions are outside the control of local government and are dealt with purely by the State.

7.4 Other relevant legislation

7.4.1 Soil Conservation and Land Care Act 1989

The Soil Conservation and Land Care Act aims to provide for 'the conservation and rehabilitation of the land' (long title). The Act is binding on the Crown (s4). Section 6 includes the objects of the Act which include:

> to recognise that the land and its soil, vegetation and water constitute the most important natural resource of the State and that conservation of that resource is crucial to the welfare of the people of this State;

and

> to ensure that conservation of land becomes an integral part of land management practice, and that land is used within its capability.

The Act imposes a duty on landowners 'to take all reasonable steps to prevent degradation of the land' (s8). This is a clear statement of duty and of the objects of the Act. A Soil Conservation and Land Care Fund is established under the Act (s9), as is a Soil Conservation Council (s14) whose duties include monitoring and evaluating the land of the State, and advising the Minister (s19). The Council can recommend that the Minister *compulsorily acquire land for the purposes of the Act,* in accordance with the Land Acquisition Act (s12), and the Minister can enter into *agreements with a landholder about carrying out conservation or rehabilitation works, or for financial assistance* (s13). There are no specific requirements for a member of the Soil Conservation Council to be a person representing local government (s14). There is, however, a specific requirement that where *Soil Conservation Districts* are declared, and a *Soil Conservation Board* is established to oversee the management of that area, that one member of the board is to be appointed by the local government of that area (s22 and 24). Soil Conservation Boards are responsible for implementing and developing support programs, promoting the awareness and understanding of conservation issues, and implementing and enforcing the Act (s29).

Where the area of concern falls outside a local government area, the Act provides that the Soil Conservator is to take over the role of the Soil Conservation Boards (s32).

Part 4 of the Act provides for the development of management plans for certain areas. *District plans* are to be established by Soil Conservation Boards, and are to identify:

- classes into which the land falls;
- the capability of the land;
- the preferred uses for the land;
- the current uses of the land;
- degraded areas;
- nature, causes, extent and severity of the degradation;
- steps for rehabilitation;
- land management and best practice for certain classes of land; and
- proposed undertakings of the Soil Conservation Board for the following three years (s36).

The Soil Conservation Boards can also enter into a *voluntary 'property plan'* with a landholder, identifying and establishing management practices for that land (s37). Provisions also exist for the making of *soil conservation orders* by Soil Conservation Boards, which may state, among other requirements, that the landholder 'plant specified vegetation or refrain from destroying specified vegetation' (s38). Part of the order can also be a requirement to enter a property plan with the board (ss38–39). Failure to comply with *a soil conservation order* is an offence under section 42; it is *binding on all successors in title while it remains in force,* and

will be noted on the title of the property (ss42–43). Property plans may also be noted on title at the request of the landholder, and they will then become binding on successive landholders (s45). They will also bind the local government to the extent that an approval to carry out an act inconsistent with a property plan will not override the plan.

The Soil Conservation and Land Care Act provides specific and comprehensive mechanisms to try to prevent and remedy land degradation in South Australia. *The role of local governments under the Act is minimal, with only one member of a Soil Conservation Board being required to be a local government officer. The Act fails to specify, however, the relationship between district plans and development plans (planning schemes). It is unclear from the Act whether a local government, in considering a development application, is bound by the district plan and cannot decide in a way inconsistent with the district plan, or whether a district plan is merely a factor which must be considered by local governments as part of their decision-making processes.*

7.4.2 *Water Conservation Act 1936*

The Water Conservation Act deals with the conservation and regulation of the use of water. The control and management of a watercourse can be vested solely in the Minister or the council of an area (ss13 and 53). If the council has responsibility for the management, there is a *duty on the council that it 'shall efficiently maintain in good order and condition the water conservation reserve and all waterworks thereon for or in connection with the conservation or supply of water'* (s53). *This is effectively imposing a duty on the council to stop erosion of land surrounding the watercourse and loss of soil and debris into the water supply.* Although not specifically stated, *this may extend to maintaining vegetation cover in the immediate vicinity of a watercourse.* There is, however, no requirement that the native vegetation of an area be retained. The Act also contains a provision that '[a]ny person who, without the written permission of the Minister…cuts, fells, or removes any trees or timber from any land leased by, under the control of, or vested in the Minister, shall be guilty of an offence' (s81). This section applies to council-managed watercourses as well as those areas under the control of the Minister. It is, however, a minor offence.

7.4.3 *Wilderness Protection Act 1992*

The Wilderness Protection Act is similar to the *National Parks and Wildlife Act 1972* in that it provides for *the establishment and protection of wilderness areas* in South Australia. In determining whether an area is wilderness, the Wilderness Advisory Committee, established under section 8 of the Act, will consider the following criteria (s3(2)):

> the land and its ecosystems must not have been affected, or must have been affected to only a minor extent, by modern technology; the land and its ecosystems must not have been seriously affected by exotic animals or plants or exotic organisms.

If an area of Crown land or privately owned land is considered to be wilderness, the Minister may, with the consent of all parties with an interest in the land, recommend to the Governor that the area be declared a wilderness protection area, or a wilderness protection zone, and once a resolution of both Houses of Parliament to that effect has been passed, the area will be protected under the Act (s22). As under the National Parks and Wildlife Act, local governments have no role in wilderness protection.

Heritage Act 1993

The *Heritage Act* is one of the more important pieces of legislation as it allows for the *establishment and registration of heritage agreements.* The Act establishes a State Heritage Authority to administer the Act; the authority has one of its seven members nominated by the Local Government Association (s4). The functions of the authority as outlined in the Act include providing advice and assistance to councils on heritage conservation matters, and 'to encourage all levels of government to provide incentives (apart from financial assistance) for heritage conservation' (s5). This is a clear recognition that incentives can be important in encouraging conservation.

Places considered to be of heritage value[50] can be nominated and may, if the nomination is successful, be placed on the Heritage Register. The register also includes places which are designated on a development plan as places of local heritage value, and records of heritage agreements (s14).

The Minister may enter a *heritage agreement* with a landowner of a registered place or a State Heritage Area. Such an agreement attaches to the land and is binding on the current owner (s32). An agreement can contain any provision 'to promote the conservation of registered places and State Heritage Areas and public appreciation of their importance to South Australia's cultural heritage' (s33). Provisions may include a restriction on the use of the land, and a remission of rates and taxes in respect of the land (a remission of council rates can only be included when the council is a party to the agreement) (s33). Once an agreement has been entered, it must be noted on the title of the land (s34). The Act then provides for offences for damaging a registered place, or for not complying with a stop-work order. Where such offences are committed, the Environment, Resources and Development Court can make an order prohibiting development on that land for up to 10 years. Such an order can, however, only be made after the council, in whose jurisdiction the land is located, is given the opportunity to make a submission to the court on the issue (s38).

Once again, this Act limits the ability of local governments to exercise their decision-making powers with respect to places listed on the register.

7.4.4 *Forestry Act 1950*

The Forestry Act provides for the creation and management of State forests in South Australia. The Governor can proclaim Crown land to be a *forest reserve* or, for 'purposes relating to the conservation, development and management of land supporting native flora and fauna, declare a forest reserve, or part of a forest reserve, to be a *native forest reserve'* (s3). Once an area is declared a forest reserve or a native forest reserve, the *Minister has full control and responsibility for its management* (s9). This removes the management of these reserves from the council if the council had responsibility for the land as Crown land. Section 17 provides that trees may be removed or cut down on any road adjoining a forest reserve to prevent fire, but if the road is a council road, the council must be given notice, and will then be able to make submissions on the matter (s17).

7.4.5 *Pastoral Land Management and Conservation Act 1989*

The Pastoral Land Management and Conservation Act provides for the management of land which is used for 'the pasturing of stock and other ancillary purposes' (s3). The objects of the Act, as stated in section 4, include the *monitoring of the condition of pastoral land, the prevention of degradation, and rehabilitation of land*. Pastoral land can be leased under the Act (s19), and the lessee is then under a *duty to prevent land degradation and carry out good land management practices* (s7). The lease can include certain specified conditions, although none specifically refer to vegetation management. However, as part of the conditions, it can be implied that management of the native vegetation is required (s22). Part of good land management practice should be the management of native vegetation. Only the land management conditions within a lease can be varied (s22), but the lessee must be given notice of the change in conditions at least four months before the variation takes effect (s26). If a breach of a condition occurs, the lessee may be fined (up to $10 000) or the lease may be cancelled (s37). The Act also creates an offence for cutting down, lopping branches from or otherwise damaging any live tree on pastoral land (s57). This

50. Section 16 states that 'A place is of heritage value if it satisfies one or more of the following criteria: (a) it demonstrates important aspects of the evolution or pattern of the State's history; or (b) it has rare, uncommon or endangered qualities that are of cultural significance; or (c) it may yield information that will contribute to an understanding of the State's history; or (d) it is an outstanding representative of a particular class of places of cultural significance; or (e) it demonstrates a high degree of creative, aesthetic or technical accomplishment or is an outstanding representative of particular construction techniques or design characteristics; or (f) it has strong cultural or spiritual associations for the community or a group within it; or (g) it has a special association with the life or work of a person or organisation or an event of historical importance.' Native vegetation is most likely to fall within the first or second category; however, it would be easier to bring vegetation within these sections if they were not restricted to places of cultural significance, and they included areas of environmental significance.

Act has little impact on the role of local government, as it concerns Crown land, which is outside the jurisdiction of local government.

7.4.6 *South Eastern Water Conservation and Drainage Act 1992*

As with the Pastoral Land Management and Conservation Act, there are no specific requirements for the management of native vegetation. They can, however, be implied within the Act, as the objects cannot be met without considering the native vegetation of the area. The objectives are stated in section 7 as:

> (a) the prevention or minimisation of damage to agricultural production and the natural environment caused by flooding within the South East;
>
> (b) the improvement of the soil quality and the productiveness generally of rural lands in the South East; and
>
> (c) the enhancement or development of natural wetlands and the natural environment generally in the South East.'

The native vegetation of an area is of great importance when considering drainage, soil run-off and erosion. The Act allows the South Eastern Water Conservation and Drainage Board, established under the Act, to levy contributions from landholders who own more than 10 hectares. The levy is, however, not able to be imposed on private landholders where their land is already subject to a heritage agreement under the Native Vegetation Act (s34A). This provision reinforces the fact that water management cannot occur without considering the vegetation of an area. It is unclear the extent to which a local government may work with, or be limited by, the actions of the board under this Act.

7.4.7 *National Parks and Wildlife Act 1972*

The National Parks and Wildlife Act primarily concerns the establishment and management of reserves on Crown land under State jurisdiction. The role of local government is minimal, but it is important to consider the types of reserves which can be created under the Act.

The Governor may, by proclamation, declare an area of Crown land to be a *national park*, if he/she considers it to be of 'national significance by reason of the wildlife or natural features of that land'. A resolution passed by both Houses of Parliament is also needed. Similarly, a proclamation and resolution is required to abolish a national park (ss27–28).

If the Governor considers an area should be 'protected or preserved for the purpose of conserving any wildlife or the natural or historic features of that land', it can be proclaimed, after a resolution of both Houses of Parliament, a *conservation park* (ss29–30).

Where, in the Governor's opinion, Crown land should be preserved for the conservation of wildlife and management of game, a *game reserve* can be proclaimed. Only if the reserve is to be abolished or its boundaries altered will a resolution of Parliament be necessary (ss31–32). Similarly, where Crown land should, in the Governor's opinion, be conserved and managed for public recreation and enjoyment, the area can be proclaimed a *recreation park* (s33–34).

Regional reserves can also be proclaimed for the purpose of conserving any wildlife or the natural or historical features of the land, while at the same time permitting the utilisation of the natural resources of the land (s34A).

Section 35 states that the Minister has the control and administration of all reserves under the Act (unless a trust has been established to manage the reserve), and title vests in the Crown. This power of management is then delegated to the Director of National Parks and Wildlife (s36). Objectives for the management of reserves are then specified in section 37.[51] Management plans have to be prepared which have regard to the development plan for that area (s38). It is through the development plans that councils have their only input into the management of reserves under the National Parks and Wildlife Act, as it is the local

government which prepares the development plan for an area.

The only other way that the provisions of the Act may impact on the role of local governments is through the provisions relating to *sanctuaries*. Section 44(1) states that:

> If the Minister is of the opinion that it is desirable to conserve the animals or plants for which any land is a natural habitat or environment and:
>
> (a) where the land is reserved for or dedicated to, a public purpose, the person to whom the care, control and management of that land has been committed has consented to a declaration under this section; or
>
> (b) where the land is private land, the owner and occupier of the land have consented to a declaration under this section, the Minister may, by notice in the *Gazette*, declare the land to be a sanctuary.

Where land is declared a sanctuary, it is then an offence for a person other than the owner of the land to take a native plant from the area, unless a permit is sought from and granted by the Minister (s45).

Section 47 allows for broader protection of native plants, stating that:

> a person must not take a native plant:
>
> (a) on any reserve, wilderness protection area or wilderness protection zone; on any other Crown land;
>
> (b) on any land reserved for or dedicated to public purposes; or
>
> (c) on any forest reserve

unless a permit is granted by the Minister under section 49. A breach of section 47 attracts a fine of up to $10 000 or two years imprisonment. The amount of the penalty varies according to the species taken; for example, if the species is listed as endangered in Schedule 7 to the Act, the maximum fine is $10 000, but where the species is listed as rare in Schedule 9, or vulnerable in Schedule 8, the penalty is less.

Regulations can also be made by the Governor restricting, regulating or prohibiting certain activity, as necessary for the purposes or objects of the Act (s80).

7.4.8 *Land Acquisition Act 1969*

The Land Acquisition Act outlines the procedures for the acquisition of land by the State or by a government authority such as a local government. It establishes a notification and objection procedure as well as outlining the factors for determining the amount of compensation to be paid to a landholder.

7.4.9 *Animal and Plant Control (Agricultural and Other Purposes) Act 1986*

The Animal and Plant Control (Agricultural and Other Purposes) Act provides primarily for the control of exotic plants and animals which are listed under the Act as controlled species. Control boards can be set up for a single council area, or can incorporate the area of several councils, to assist with the development and implementation of control plans. In regard to native vegetation, the only relevant section is section 64 which states that:

> 64. (1) A person shall, in taking measures for the destruction or control of animals or plants, take all reasonable steps to ensure
>
> (a) that no native trees or shrubs are destroyed or unnecessarily damaged;

51. The objectives of management are '(a) the preservation and management of wildlife [where wildlife is defined in section 5 to include native plants and native animals]; and (b) the preservation of historic sites, objects and structures of historic or scientific interest within reserves; and (c) the preservation of features of geographical, natural or scientific interest; and (d) the destruction of dangerous weeds and the eradication or control of noxious weeds and exotic plants; and (e) the control of vermin and exotic animals; and (f) the control and eradication of disease of animals and vegetation; and (g) the prevention and suppression of bush fires and other hazards; and (h) the encouragement of public use and enjoyment of reserves and education in, and a proper understanding and recognition of, their purpose and significance; and (i) generally the promotion of the public interest; and (j) in relation to managing a regional reserve, to permit the utilisation of natural resources while conserving wildlife and the natural or historic features of the land.'

(b) that damage to or destruction of native vegetation (other than trees or shrubs) is kept to a minimum; and

(c) in addition, in the case of measures taken on road reserve, that damage to or destruction of non-native vegetation (other than plants subject to destruction or control under this Act) is kept to a minimum. Penalty: $2,000.

Therefore, where pest control measures are in place, the control board and local government should not advocate acts which may cause unnecessary damage to, or destruction of, native vegetation.

7.4.10 *Water Resources Act 1997*

The Water Resources Act repeals the *Catchment Water Management Act 1995*. The Act deals primarily with the use and regulation of the use of water. Those people administering the Act must have regard for the need, amongst other specified requirements, 'to maintain or improve the quality of naturally occurring water with resulting benefits to other natural resources of the State including the land and its soil, native vegetation and native animals…' (s6(2)(b)(i)). It deals with the licensing and allocation of water; the management by the Water Resources Council, established under the Act, of a State Water Plan (ss50 –52); and the establishment of Catchment Water Management Boards (s53). It also imposes a *duty on local governments that, when carrying out their duties under this or other legislation, they do so in a way consistent with the local water management plan of the council* (s86). This section is the only one that may influence the decisions that need to be made by local governments. This duty may extend to *issues concerning vegetation management, as the clearing of vegetation near a watercourse or river may affect the flow of that river* and, therefore, the supply of water to others in the catchment area. In practice however, the link may not be important, and the Act may only be considered when the actions of a local government will directly affect the catchment and water supply of an area.

Catchment Water Management Boards must establish catchment water management plans for their areas (s92). These plans must address issues concerning the management of water resources, as well as identifying any changes which may be necessary to the development plan applicable in the area, and identify land adjoining or adjacent to a watercourse or lake which should be vested in the board. The plan must, however, as far as practicable, be consistent with any relevant development plan, management plan under the National Parks and Wildlife Act, guidelines under the Native Vegetation Act, district plan under the Soil Conservation and Land Care Act and management plan under the *Coast Protection Act 1972* (s92(7)). It would appear from this section that the other management plans will, where inconsistent with a catchment management plan, prevail. This will be of importance where native vegetation is proposed to be cleared for the making of a lake, and should encourage the protection of native vegetation along watercourses. Under the Act, levies can also be imposed for the provision of water.

7.4.11 *Coast Protection Act 1972*

The Coast Protection Act (s4) defines the coast as:

all land that is:

within the mean high water mark and the mean low water mark on the seashore at spring tides;

(a) above and within one hundred metres of that mean high water mark;

(b) below and within three nautical miles of that mean low water mark; or

(c) within any estuary, inlet, river, creek, bay or lake and subject to the ebb and flow of the tides; or

(d) declared by regulation to constitute part of the coast for the purposes of this Act.

This is a very broad definition and will include areas of coastal vegetation. It is therefore necessary to examine the provisions of this Act in relation to such areas and the impact of this legislation.

The Act establishes a Coastal Protection Board (s6), which has various duties, including the protection

and restoration of the coast from erosion, damage, deterioration, pollution and misuse (s14). *There is no specific mention of the protection of native vegetation, however, this can be inferred from these duties as a loss of vegetation will lead to erosion, damage and deterioration.*

The board will prepare a management plan for each coast protection district, and local councils whose areas fall within these districts will be notified of the draft plan and allowed to make representations in respect of the plan (s20). After a process of public consultation and hearings, the Governor may, by proclamation, declare the management plan which was submitted to him by the Minister to be an approved plan (s20). There are no requirements within the legislation stating the weight which must be placed on the management plan by a council if, for example, it was considering an application for development within a coastal protection district.

The Act contains provisions enabling a council to receive financial assistance from the board to acquire land for the purpose of protecting, restoring or developing the land (s32A). This would enable a council to receive some financial assistance where it wished to conserve native coastal vegetation.

7.4.12 *Environment Protection Act 1993*

The objectives of the Environment Protection Act are stated in section 10 as including promoting the principles of ecologically sustainable development and applying a precautionary approach to the assessment of the risk of environmental harm. The Act establishes the Environment Protection Authority (s10), whose functions include preparing environmental protection policies, monitoring the environment and environmental evaluation programs, and consulting with local governments in carrying out these roles (s13). Section 25 creates a general environmental duty: 'A person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes all reasonable and practicable measures to prevent or minimise any resulting environmental harm.'

Where a *proposed development is one of environmental significance,* it is an offence under this Act to carry out that activity except in accordance with a licence granted under the Act (s36). When an application for development approval is referred to the Environment Protection Authority under the Development Act, it must consider the application, having regard to the principles of ecologically sustainable development (s57).

The Act creates offences for causing serious environmental harm, material environmental harm and causing an environmental nuisance (ss79, 80 and 82). The Environment Protection Authority can also issue an environmental protection order to ensure compliance with the Act (s93).

This Act is important for local government in only minor ways: local government may be prosecuted for a breach of the Act, and must refer a development application which is of environmental significance to the Environment Protection Authority for consideration.

7.4.13 *Country Fires Act 1989*

The Country Fires Act imposes a duty on rural councils in regard to the prevention of fire. Section 41 states that:

> (1) A rural council that has the care, control or management of land in the country must take reasonable steps to protect property on the land from fire and to prevent or inhibit the outbreak of fire on the land, or the spread of fire through the land.
>
> (2) A rural council must, in acting under subsection (1), take into account proper land management principles.

The practical effect of this duty is that pressure can be placed upon councils to clear native vegetation on roadsides and other council-controlled areas.[52] If this is indeed the case, consideration should be given to subsection 2, which requires councils to take into account proper land management principles.

52. Neil Collins, South Australian Department for Environment, Heritage and Aboriginal Affairs (1998, pers. comm.).

7.5 Summary of opportunities

Some legislative amendments and clarification of the existing position would ensure that the maximum number of incentives are able to be offered for vegetation conservation by local governments in South Australia.

Table 7.2 outlines these in further detail. It also includes a reference to by-laws and joint authorities which can be established under the Local Government Act. These are important as they allow local governments to work under their current powers to pass by-laws to protect native vegetation on council-owned and council-managed land, and allow for the establishment of regional local governments to provide for vegetation management on a regional level.

As shown in Table 7.2, some incentives can currently be offered by local governments in South Australia. However, to increase the range of incentives which may be offered, steps may be taken by both State and local governments. There is a need for some legislative amendments, and clarification of State policies. It is also important that encouragement and support is available to local governments. The current review of the local government legislation is an opportunity whereby these issues can be addressed.

Table 7.2: Opportunities available to local governments to offer incentives for vegetation conservation

Incentive	Amendment
Environmental levy	Amend definition of service in the Local Government Act (s177) to include environmental services, or pass regulation defining the environment as a service for the purpose of section 177 Revenue raised through environmental levies should not be subject to rate capping
Management agreement	Policy support/encouragement
Covenant	N/A as are currently available
Grants to individuals and community groups	N/A as are currently available
Rate rebates	Encourage use of the Development Act (s57) to allow a remission of rates where a land management agreement is entered into by the landholder
Acquisition and sale of land	Clarify that it is possible to purchase land for conservation Clarify that it is possible to resell land
By-laws	Encourage the making of by-laws under the Local Government Act (s667) to protect native vegetation on council-owned and council-managed land
Joint authorities	Encourage the establishment of regional local governments under the Local Government Act (s200) to provide regional vegetation planning

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Appendix: People consulted

We would like to thank the many people who we have consulted in relation to this project. Some of the key individuals consulted in each State are listed below.

Tasmania

W Davy, Legal Officer, Local Government Association of Tasmania

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