

## 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
<i>Catchment Management Act 1989</i>	State
<i>Coastal Protection Act 1979</i>	State
<i>Commons Management Act 1989</i>	State
<i>Conveyancing Act 1919</i>	State
<i>Crown Lands Act 1989 (Crown Lands Consolidation Act 1913)</i>	State
<i>Environmental Offences and Penalties Act 1989</i>	State
<i>Environmental Planning and Assessment Act 1979</i>	State and local government
<i>Forestry Act 1916</i>	State
<i>Local Government Act 1993</i>	Local government
<i>Local Government Amendment (Ecologically Sustainable Development) Act 1997</i>	Local government
<i>National Parks and Wildlife Act 1974</i>	State
<i>Native Vegetation Conservation Act 1997</i>	State
<i>Rivers and Foreshores Improvement Act 1948</i>	State
<i>Roads Act 1993</i>	State
<i>Rural Fires Act 1997</i>	State and local government
<i>Rural Lands Protection Act 1989</i>	State
<i>Soil Conservation Act 1938</i>	State
<i>Threatened Species Conservation Act 1995</i>	State
<i>Western Lands Act 1901</i>	State
<i>Wilderness Act 1987</i>	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.<sup>24</sup> 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,<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> 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,<sup>30</sup> a council must consider the factors included in section 79(c).<sup>31</sup> 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).<sup>32</sup>

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 public 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).<sup>33</sup>

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

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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: <ul style="list-style-type: none"> <li>land zoned residential, township or village</li> <li>State forest, national forest, flora reserve or timber reserve</li> <li>land subject to a clearing licence under the Forestry Act</li> <li>protected land under the Soil Conservation Act</li> <li>land under the Western Lands Act</li> <li>land covered by SEPP 14 Coastal Wetlands, or SEPP 26 Littoral Rainforests</li> </ul>	Applies to all land except: <ul style="list-style-type: none"> <li>land zoned residential, township or village</li> <li>State forest, national forest, flora reserve or timber reserve</li> <li>land subject to a clearing licence under the Forestry Act</li> <li>protected land under the Soil Conservation Act</li> <li>land under the Western Lands Act</li> <li>land covered by SEPP 14 Coastal Wetlands, or SEPP 26 Littoral Rainforests</li> </ul>	Applies to all land except: <ul style="list-style-type: none"> <li>land zoned residential, township, village, industrial or business</li> <li>State forest, national forest, flora reserve or timber reserve</li> <li>land covered by SEPP 14 Coastal Wetlands, or SEPP 26 Littoral Rainforests</li> <li>land dedicated or reserved under the National Parks and Wildlife Act</li> <li>land acquired under section 145 of the Act for the purpose of a reserve</li> <li>land subject to a conservation agreement or interim protection order under the National Parks and Wildlife Act</li> <li>land subject to a conservation agreement under the Heritage Act</li> <li>land that is critical habitat</li> <li>Lord Howe Island</li> <li>local government areas listed in Schedule 1, mainly Sydney and surrounds</li> </ul>
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
<p>Consent is not required for:</p> <ul style="list-style-type: none"> <li>clearing up to two hectares per annum</li> <li>cutting of no more than seven trees per hectare per year</li> <li>stock fodder</li> <li>mistletoe control</li> <li>rural constructions such as dams</li> <li>burning control</li> <li>planted native vegetation</li> <li>private native forestry</li> <li>vermin control</li> <li>public utilities</li> <li>noxious weeds</li> </ul>	<p>Consent is not required for:</p> <ul style="list-style-type: none"> <li>clearing up to two hectares per annum</li> <li>cutting of no more than seven trees per hectare per year</li> <li>stock fodder</li> <li>mistletoe control</li> <li>rural constructions such as dams</li> <li>burning control</li> <li>planted native vegetation (under 10 years old)</li> <li>private native forestry</li> <li>public utilities</li> <li>noxious weeds</li> <li>clearing under a mining lease under the Mining Act</li> </ul>	<p>Consent is not required for:</p> <ul style="list-style-type: none"> <li>clearing permitted under a regional vegetation management plan</li> <li>clearing authorised under the Rural Fires Act or the State Emergency and Rescue Management Act</li> <li>clearing according to a bush fire management plan under the Rural Fires Act</li> <li>clearing authorised under the Noxious Weeds Act</li> <li>clearing in accordance with a property management plan under the Threatened Species Conservation Act</li> <li>clearing for a designated development under the Environmental Planning and Assessment Act</li> <li>clearing authorised under the Fisheries Management Act</li> <li>clearing in accordance with a licence issued under the National Parks and Wildlife Act</li> <li>clearing authorised under the Mining Act</li> <li>clearing authorised under the Petroleum (Onshore) Act</li> <li>clearing in accordance with an approved timber harvesting plan</li> <li>clearing under the provisions of the Roads Act</li> <li>clearing under a permit issued under the Rivers and Foreshores Improvement Act</li> <li>any clearing authorised under the Water Act</li> </ul>
<p>Matters which must be considered when determining an application:</p> <ul style="list-style-type: none"> <li>land and water degradation</li> <li>remnant or corridor vegetation</li> <li>whether vegetation type is adequately represented in the reserve system</li> <li>whether vegetation is in unusually good condition</li> <li>biodiversity of biota</li> <li>whether species are isolated or near the edge of their geographic distribution</li> </ul>	<p>Matters which must be considered in determining an application:</p> <ul style="list-style-type: none"> <li>land and water degradation, including soil erosion, salination, landslip, flooding, and so on</li> <li>remnant or corridor vegetation and migratory route for wildlife</li> <li>whether vegetation type is adequately represented in the reserve system</li> <li>whether vegetation is in unusually good condition</li> <li>biodiversity of biota</li> <li>whether species are isolated or near the edge of their geographic distribution</li> <li>likely social and economic impacts</li> </ul>	<p>Matters which must be considered when determining an application:</p> <ul style="list-style-type: none"> <li>must determine application in accordance with Part 4 of the Environmental Planning and Assessment Act (s90 factors which are to be amended under the <i>Environmental Planning and Assessment Amendment Act 1997</i>)</li> </ul>

**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.<sup>34</sup> 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.<sup>35</sup> 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

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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