

# Opportunity Denied

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

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# About this project

## ***Incentives for remnant vegetation conservation***

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

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

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

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

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

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

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

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## **Members of the Steering Committee**

Dr Phil Price (Chair)	Land and Water Resources Research and Development Corporation
Dr Jann Williams	Land and Water Resources Research and Development Corporation
Mr Andrew Campbell	Environment Australia
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Mr Peter Deddo	Commonwealth Treasury
Mr Marc Carter	Environment Australia
Mr Brian Whelan	Trust for Nature
Mr Rob Thorman	National Local Government Bushcare Facilitator

# Executive summary

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

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

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

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

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

environment within which local government operates.

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

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

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

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

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

## ***Revenue-raising tools: Environmental levies***

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

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

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

### **Possible mechanisms for raising an environmental levy**

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

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

At present, environmental levies can only be imposed at the discretion of individual councils in Queensland, where the Local Government Act allows for the imposition of charges on rateable

land. In some other jurisdictions, a Minister may be able to approve an environmental levy on an individual basis for a council. In New South Wales and Victoria, it may also be necessary for the rate cap to be removed, or amended so that environmental levies are excluded, as many local governments are already raising the maximum amount of funds through land rates.

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

### **Policy options**

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

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

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

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

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

### **Financial incentives: Grants to individuals and community groups**

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

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

### **Possible mechanisms for providing grants**

Whilst the approach to targeting and administering grant programs may vary, the legal mechanisms through which grants are provided are the same in

either case, as outlined in Table 2. It is already possible for grants to be offered by local governments in each State, particularly for matters that will provide a benefit to the community, such as vegetation management.

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

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

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

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

## **Policy option**

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

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

## **Financial incentives: Rate rebates and concessions**

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

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

- in many rural areas a rebate on rates is likely to only provide a very small incentive as land values and rating percentages are relatively low; and
- in other areas, particularly near major urban centres where land values are high because of development pressure, a rebate on rates will provide a significant financial incentive.

## **Possible mechanisms for implementing rate rebates**

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

- differential rating based on different land use zones or rating categories;
- remission of or exemption from rates; and
- a rate rebate or discount of a proportion of the rate payable on land.

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

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

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

## **Policy option**

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

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

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

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

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

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

Revolving funds are an important innovation in conservation management. However, there are some reservations about their use by local governments. Because councils are responsible for

the regulation of land use and development approvals, they may be perceived to have a conflict of interest in the operation of a revolving fund. For this reason it is recommended that individual councils ensure that the operation of a revolving fund is at arm's length from the council.

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

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

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

## Possible mechanism for implementing revolving funds

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

Table 4 summarises the capacity of councils to purchase and sell land in each State. The acquisition of land by local governments is generally permitted for public works. Land can either be purchased by

agreement with a landholder, or compulsorily purchased. Only in South Australia is the ability of councils to acquire land unclear. Conversely NSW appears to be the only State where there are restrictions on the sale of land.

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

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

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

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

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

### **Policy options**

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

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

### ***Property right mechanisms: Management agreements***

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

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

Management agreements may also be of a contractual or non-binding nature. Contractual agreements may be effective when a well-defined service, such as construction of a fence, is to be provided, but not in the case of regulating land use in the longer term. Non-binding agreements may be

effective in securing landholder participation but obviously do not have legal status. These types of management agreement are not considered as they can be entered into by all local governments. Management agreements are often linked to financial incentives in order to encourage voluntary participation by private landholders.

### **Possible mechanisms for implementing management agreements**

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

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

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

## Policy options

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

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

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

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

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

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

# 1. Introduction

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

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

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

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

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

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

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

## 1.1 Setting the context

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

- they can effectively implement and administer national and State policies in a way that takes account of regional circumstances;
- they can represent their local community in the formulation of policy by higher levels of government; and
- they can effectively integrate national/State objectives and regional considerations in approving development proposals.

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

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

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

### **Box 1: Model policy tools for native vegetation management**

#### **Revenue-raising tools**

##### *Environmental levies*

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

#### **Financial incentives**

##### *Grants to landholders and community groups*

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

##### *Rate rebates and concessions*

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

#### **Property right mechanisms**

##### *Land acquisition and revolving funds*

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

##### *Management agreements*

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

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

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

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

### **1.1.1 Tools available to local government**

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

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

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

overview of these powers and functions is provided below.

### **Powers of local government**

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

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

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

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

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

### **The core functions of local government**

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

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

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

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

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

Enormous potential lies in encouraging councils to consider the conservation values of native vegetation when undertaking these functions.

Indeed, where the main threats to native vegetation are related to these functions, for example, in rapidly developing urban areas, local governments may be in a position to lead the development of approaches to conservation.

### **The discretionary functions of local government**

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

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

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

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

## 1.2 Overview of the legislative framework

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

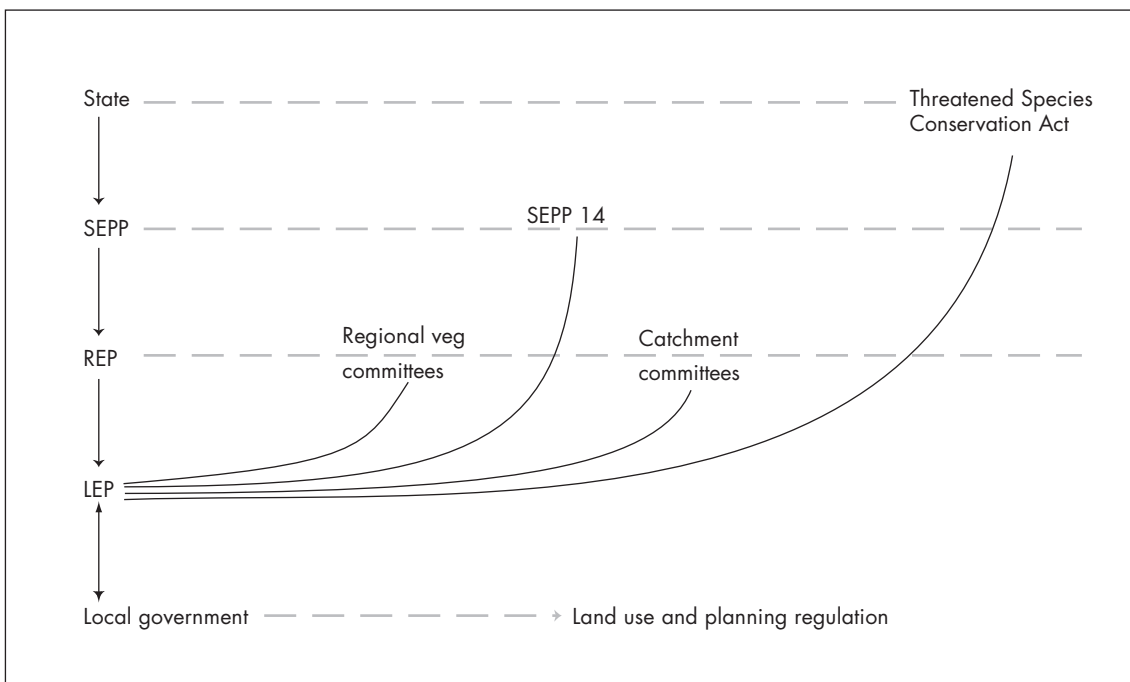
All local governments will have some powers to make by-laws (or local laws). This power enables a local government to make a law, which will apply within its jurisdiction, concerning a matter for which a local government has responsibility. In most States this power could be used by local governments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

make laws concerning the clearing of vegetation or regulation of clearing.

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

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

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



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

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

### **1.3 State-by-State analysis**

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

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

information has been provided on these proposed changes, with the current position also outlined.

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

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

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

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

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

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