



DEPARTMENT OF  
THE ENVIRONMENT,  
CLIMATE CHANGE,  
ENERGY AND WATER

REVIEW OF THE  
*Nature Conservation Act 1980*

Enhancing nature conservation in the Australian Capital Territory

DISCUSSION PAPER  
*November 2010*

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# Making a submission

This discussion paper seeks input from the ACT and wider community into the review of the *Nature Conservation Act 1980*. It is intended to help individuals and organisations prepare submissions to the review. It is not intended to limit comment. Individuals and organisations are encouraged to provide information and comment on any issues that they consider relevant, in addition to the issues identified in this discussion paper. All ACT legislation, including the *Nature Conservation Act 1980*, can be found at <http://www.legislation.act.gov.au/>

## How do I make a submission?

Written submissions are preferred. However, not all interested parties are in a position nor have the resources to formally submit their views in this way. As such, comments may be provided verbally to the Review of the Nature Conservation Act secretariat.

In the case of written submissions the following guidelines apply.

- There is no fixed format or length for your submission. However, MS Word-compatible format is preferred.
- Email constitutes a valid written submission.
- You may use your submission to convey facts and opinions or to make arguments or recommendations.
- The above suggestions should be treated as a guide. You may provide any comments you consider relevant.
- It would be appreciated if submissions over 4 pages additionally contain a summary of issues raised in the text.

The ACT Government is unable to assist with any costs incurred by individuals or organisations in preparing their submission.

## Are submissions authenticated?

Anonymous submissions or comments will not be accepted. To enable your submission to be authenticated you should include details of:

- your name and address and (if available) your email contact
- whose views you are representing. If you are writing on behalf of an organisation you should clearly identify it and the position of authority within that organisation that you occupy. A submission may be rejected if it is deemed to fall outside the scope of the Review of the Nature Conservation Act.

A submission may be rejected if it:

- is purporting to be on behalf of an organisation, the authenticity of which cannot reasonably be established or
- contains potentially defamatory statements about named individuals or organisations.

## What happens to my submission?

All submissions will, subject to confirmation of authenticity, be considered in undertaking the review of the Nature Conservation Act. Submissions will be treated as public documents and displayed upon the Department of the Environment, Climate Change, Energy and Water website, [www.environment.act.gov.au](http://www.environment.act.gov.au).

All submissions received will be acknowledged. Handwritten submissions may be transferred into PDF format or transcribed into typed format so that they may be displayed on the website. Submissions will not be returned.

## What if I believe my submission is confidential?

You may indicate in your submission that you consider matters raised within the text to be 'Confidential' or 'Commercial-in-Confidence'.

You should clearly mark the top of each page of your submission to this effect. You should also provide a statement or explanation as to why the information may be damaging or why your views should not be subjected to public scrutiny.

All such claims will be considered. However, in the spirit of open and transparent consultation, it is far more effective and useful that all submissions be made available publicly.

## Contacting us

The Review of the Nature Conservation Act Secretariat is located within the ACT Department of the Environment, Climate Change, Energy and Water.

Submissions may be sent to:  
Senior Manager — Natural Environment and Resource Management, DECCEW,  
GPO Box 158 Canberra ACT 2601

Or emailed to: [environment@act.gov.au](mailto:environment@act.gov.au)

The Secretariat may be contacted via Canberra Connect on 13 22 81

Submissions received may be viewed at:  
[www.environment.act.gov.au/NatureConservationActReview](http://www.environment.act.gov.au/NatureConservationActReview)

**Submissions must be made by 18 February 2011.**



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# Executive Summary

## What does the *Nature Conservation Act 1980 (NC Act)* do?

The NC Act protects native plants and animals, and provides management authority for conservation lands. It provides the legal underpinning of nature conservation policy, management and action across the Territory.

Under the Act, it is an offence to kill, take, trade or keep most of the ACT's native animals without a licence; or to take or trade in protected native plants or native plants on unleased land. The Act also allows for the declaration of particular species that require special attention and protection (such as those close to extinction), or those such as the Galah or Crimson Rosella that can be kept as pets without the need for a licence. (However, it is illegal to take these birds from the wild).

The Act prohibits destructive activities within reserve areas and provides the powers by which the Act can be enforced. It also allows directions to be given to any land occupier to undertake actions on his or her land for the protection or conservation of native plants and animals or native timber.

The NC Act performs the functions that are often achieved under several different Acts in other jurisdictions, such as wildlife, wilderness, threatened species conservation, native vegetation conservation or national park legislation.

A review of the NC Act by Marsden Jacob Associates found that the major areas where the NC Act does not reflect current best practice is in its lack of integration and use of market approaches.

## What is the review of the NC Act trying to achieve?

This review of the NC Act provides an opportunity to review the objectives and operation of the Act and to consider what amendments are required to help with future conservation goals. Key questions to consider are:

- Is the purpose of the Act still valid?
- Does the Act achieve its stated purpose?
- Does the Act provide a 'best practice' approach to nature conservation?

This discussion paper provides background information and seeks to stimulate thinking and trigger submissions and input from the wider community.

## What is the past record of the NC Act and nature conservation in the ACT?

The ACT has established a comprehensive reserve network protecting areas of high conservation value. Today 54 per cent of the ACT is a part of the reserve network, which is a much higher proportion of reserved land than in any other state or territory. All ACT ecosystems and habitats of all threatened species are represented in the reserve network. A high quality of management applies to reserved lands.

The southern half of the ACT, the higher land above 750 metres, retains nearly all of its natural vegetation and lies almost entirely within Namadgi National Park and Tidbinbilla Nature Reserve. The sub-alpine, montane and wet forest communities that occupy this part of the ACT are part of a much greater continuous network of mountain and alpine parks that includes



Kosciuszko National Park and the Victorian Alps. The scale and connectivity of this reserve network does much to protect the ecosystem function and plant and animal diversity of the ACT's higher lands.

Around 60 per cent of the ACT's lowlands have been cleared. Key vegetation remnants have generally been retained as conservation reserves. However, ongoing urban expansion has fragmented these remnants and led to deterioration in their condition. Weed and exotic animal invasion, fire management and recreation pressures are significant factors. Climate change is likely to impose additional stresses.

Monitoring of ACT lowland birds, reptiles and mammals has revealed a dramatic decline in both wildlife abundance and species diversity. For instance, the marsupial mice, the Yellow-footed Antechinus (*Antechinus flavipes*) and Brown Antechinus (*A. stuartii*) were respectively commonly and occasionally recorded on Black Mountain and Mt Ainslie in the 1970s. They have not been recorded in these areas since the early 1990s.

Much of the lowland vegetation and several of the species for which it is habitat are listed by the Commonwealth as matters of national environmental significance. This means that most major activities to clear native vegetation need both approval under the NC Act and the Commonwealth's *Environment Protection Biodiversity Conservation Act 1999* (the EPBC Act). A recent review of the EPBC Act called for better integration of the EPBC and state and territory environmental legislation.

The majority of licences issued under the NC Act have been for the keeping of native birds, reptiles and amphibians, the shooting of kangaroos, wildlife research and the damaging of nests during urban tree removal or trimming. Each licence is subject to specified conditions.

There has generally been no major breaches of the NC Act, major destruction or damage of wildlife but minor apparent breaches, such as the use or parking of vehicles in restricted areas are common. There have been very few prosecutions or infringement notices issued under the NC Act. Warnings are issued and there is a sense among land managers that this is generally sufficient. Directions to landowners have only sparingly been applied to a few grassland areas, and generally the directions have not been subject to ongoing compliance monitoring.

Development applications are currently assessed and approved under the *Planning and Development Act 2007* (the Planning Act). Having an approved development application does not override the need to obtain a licence if the activity harms native wildlife. Actual administrative practice has been to refer significant planning and development projects to the Conservator (who oversees the application of the NC Act) for comment. Unless

there is a particular concern, licences have not been required if a development approval has already been granted.

## What key issues will be examined during the review?

Key issues for comment include the role that legislation can play in building ecosystem resilience; the role of the Conservator of Flora and Fauna; land management arrangements; community engagement requirements; compliance enforcement; and regulation of wildlife keeping.

### Ecosystem functioning and sustainability

In light of ongoing urban growth, the sustainability of wildlife in ACT's lowland woodland and grassland communities is a particular challenge. Innovative mechanisms for addressing urban expansion and sustainability of lowland wildlife will need to be considered within the framework of the ACT's objectives for both conservation and development. These could include identifying, protecting and enhancing areas of importance to ecological connectivity, increased options for off-reserve or private conservation and adopting a goal of no-net-loss of significant biodiversity values, implemented through a three-step process of avoiding and mitigating wildlife impact, and offsetting as a last resort.

Currently the NC Act has a focus on protecting individual plants, animals and their nests. However, it is increasingly recognised that nature conservation requires a whole-of-landscape or ecosystem approach. The current single entity focus of the NC Act could be widened by providing legal protection to native vegetation (particularly threatened vegetation communities) and/or by protecting threatened species habitat rather than just individual animals or their nests.

### Strategic application of licensing powers

The individual plant or animal focus of the NC Act is challenging. For example a licence is required for the taking of any native plant on unleased land. Administrative practice has been, in most cases, not to require licences where a development approval under the *Planning and Development Act 2007* has been obtained for the activity.<sup>1</sup> This limits 'red tape' duplication and there is an argument that the Conservator of Flora and Fauna, the authority responsible for licensing, should have primary responsibility for nature conservation in the ACT. An option suggested for comment is that the Conservator should be able to endorse a plan as meeting native wildlife conservation requirements and that activities consistent with this plan would not need subsequent licensing approval. Focusing the



Conservator's involvement in the development assessment process around native vegetation clearance would also clarify the Conservator's role.

### Land management

The NC Act guides management of national parks, nature reserves and wilderness areas. Comment is sought on whether the Act should apply to other public lands, such as special purpose reserves or water supply protection areas. Matters identified have included that the Act does not require bonds or direct restoration activities for non-conservation related developments on the nature conservation estate. Unlike other jurisdictions, the NC Act does not provide for commercial concessions (e.g., eco-tours, concerts) or for non-commercial activities (e.g., weddings) on the nature conservation estate.

The *Planning and Development Act 2007* also establishes a significant role for the Conservator in 'off-reserve' land management, such as:

- all Territory Plan variations (including 'non technical' variations) are referred to the Conservator for comment
- land management agreements on rural leases require the Conservator's approval
- the ACT Planning and Land Authority (ACTPLA) must not grant a licence to occupy or use an area of unleased territory land, or issue a lease on public land unless there is Conservator agreement
- the Conservator must be consulted with the drafting of plans of management, which are required for all public lands.

In a report on Lowland Native Grassland, the Commissioner for Sustainability and the Environment was of the opinion that the NC Act should cover all land matters. The Commissioner particularly recommended the establishment of a strong culture of compliance enforcement.

### Community engagement

A key direction of the *Australia's Biodiversity Conservation Strategy 2010–2030*<sup>2</sup>, released in October 2010 <http://www.environment.gov.au/biodiversity/strategy/index.html> is to encourage Indigenous peoples' involvement in maintaining Australia's biodiversity. This discussion paper seeks comment on the best way to engage and include Indigenous peoples in the management of public conservation lands.

### Compliance enforcement

Over the last 10 years there have only been two prosecutions and a handful of infringement notices issued under the NC Act. This may indicate general community compliance with the NC Act, and that prosecution is seen as an action of last resort. However, certain offences such as illegal vehicle access, littering and encroachment of adjoining properties onto a reserve area, physical disturbance to lands within reserves and hunting do occur. Compliance might be improved through:

- tiered enforcement options—where the level of investigation and penalty matches the level of offence
- review of the current fines so that they act as a serious deterrent
- use of strict liability offences
- changes to the powers of seizure, search and entry.

### Wildlife keeping

The NC Act establishes lists of animals which can be kept without the need for a licence and those for which a licence is required. These lists can be updated through regulation. Compared with other jurisdictions, the NC Act does not use self-reporting against compliance with animal-keeping licence conditions and there is limited scope for remedying non-



compliance with licence conditions. It is currently difficult to prove whether a wild animal has been bred in captivity or taken from the wild, the latter being an offence. The NC Act could be changed so that it is an offence to possess a wild animal unless it can be demonstrated that it was not taken from the wild. License fees in the ACT are below cost-recovery and that of other jurisdictions. Comment is sought on these matters.

### **What are the key questions that the review will need to consider and on which public input is sought?**

The challenge of the NC Act review is to improve on past nature conservation regulation while trying to achieve future conservation objectives as part of the ACT's broader environmental, social and economic objectives. Some key questions for the review are:

1. What are desired and realistic objectives for managing and protecting the ACT's native wildlife, vegetation and ecosystems?
2. What legislative framework is needed to achieve these objectives?
3. What should be the relationship between the ACT's planning and conservation legislation?
4. What can the ACT learn and incorporate from conservation legislation other jurisdictions?
5. How could ACT and Commonwealth legislative requirements be better integrated?
6. How can connectivity, resilience and viability of wildlife and ecosystem function best be protected and enhanced across the ACT?
7. Should the provisions that control public activities in reserved areas apply to other public land or should they continue to just apply to reserves, national parks and wilderness areas?
8. How could voluntary dedication of leased land for conservation occur in the ACT?
9. Are there particular on- or off-reserve land management issues that require legislative change to effectively address?
10. Are the current range of enforcement options and penalties adequate and appropriate?



# Introduction

The *Nature Conservation Act 1980* (the NC Act) was established to protect and conserve native animals and native plants and to reserve areas for those purposes. This review of the NC Act is a commitment of the ACT Government, which properly reflects the need to ensure legislation remains contemporary and relevant.

The review of the NC Act seeks to identify what legislative actions are required to deliver the ACT's nature conservation objectives, including a sustainable natural environment. *The Canberra Plan: Towards Our Second Century* sets the vision for Canberra to guide its growth and development. The vision sees Canberra recognised throughout the world as a truly sustainable and creative city and as a community that is socially inclusive.<sup>3</sup> A sustainable future for the ACT would safeguard our economic future and protect our natural and built environments. It would respond to external challenges such as climate change and meet social and community needs for high-quality and affordable services, facilities and housing.<sup>4</sup> Conservation objectives will have to be delivered within this broader context of sustainability set out by the Canberra Plan and other associated whole-of-government strategic sustainability policies.

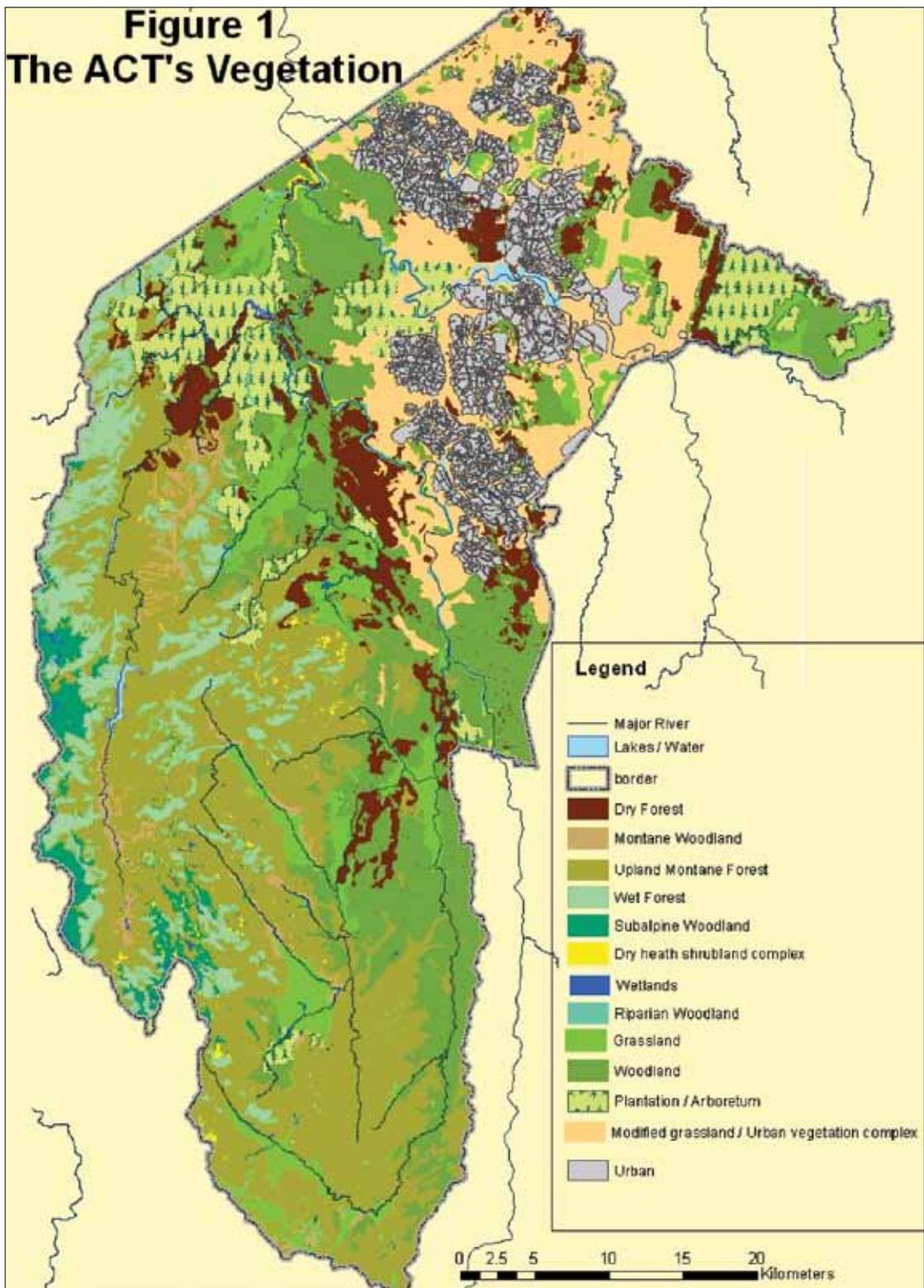
Since 1980 the science of conservation management has expanded and community conservation concern has increased. Recent Australian legislation and conservation policy has increased the focus beyond individual species and reserve management to a whole-of-landscape or ecosystem approach to restore and protect ecological functioning. The concepts of ecosystem sustainability and no-net-loss of biodiversity or vegetation are often primary aims.

At the same time there have been a number of legislative actions in the ACT, such as the passing of the *Planning and*

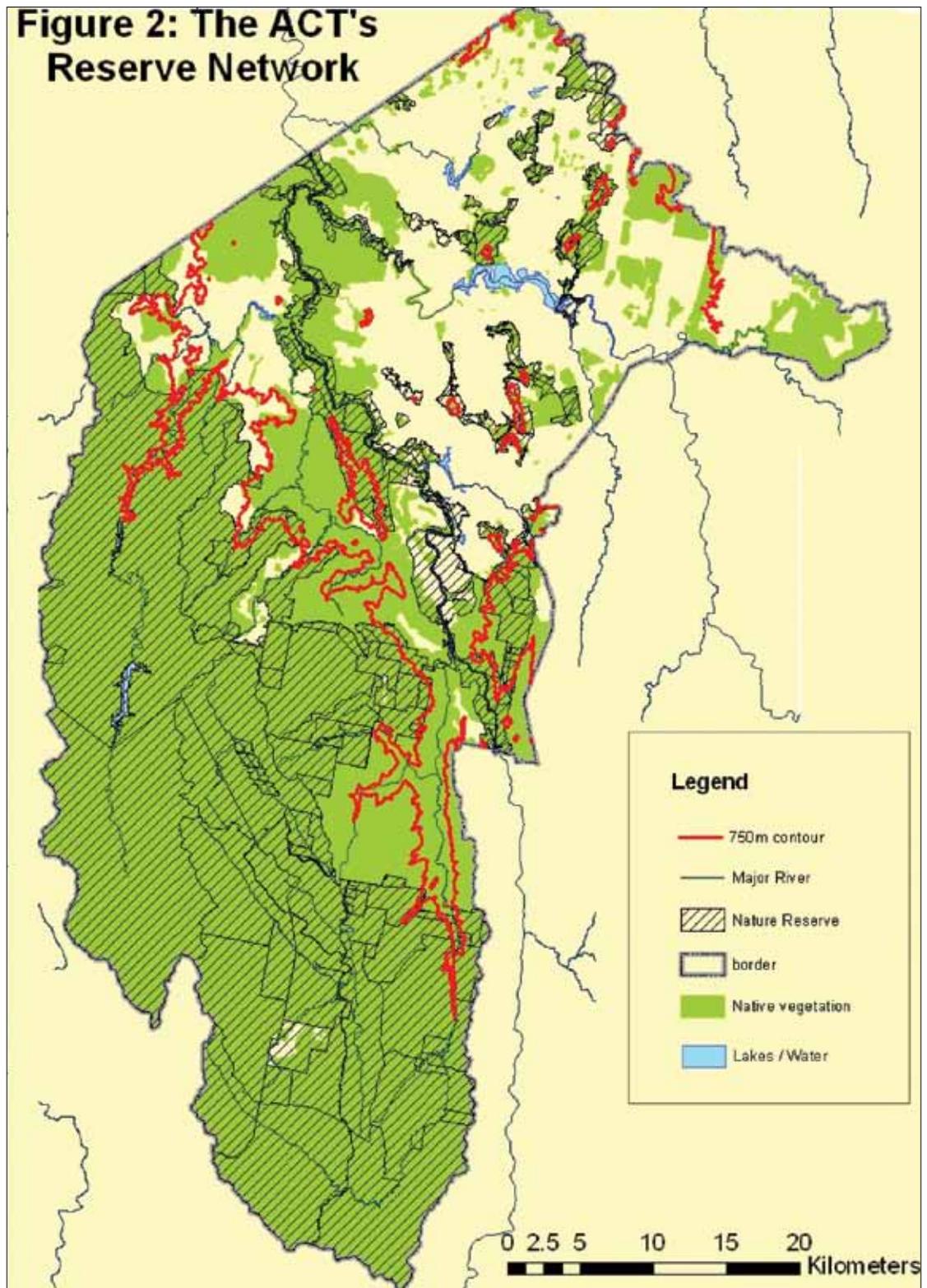
*Development Act 2007* and the *Tree Protection Act 2005*, which have both direct and indirect impacts on nature conservation in the ACT. This discussion paper considers legislative developments both inside and outside the ACT and suggests how legislation can best accomplish these key conservation aspirations within the context of overall government objectives. Legislative support for conservation may be through an amended NC Act or other relevant existing legislation.

The current nature conservation account of the ACT can be divided into mountains, lowland plains and rolling slopes. Roughly half of the ACT lies above 750 metres and the vast majority of this higher land is within conservation reserves and subject to a high standard of management. The key aspiration here is to continue effective and high-class conservation management.

About 60 per cent of the ACT lowland areas have been cleared. Less than 15 per cent of the ACT's former lowland vegetation is reserved, with many of the reserved remnants fragmented from each other. Both on-and-off reserves, weed and feral animal invasion, fire management and recreation pressure are causing further loss or degradation of the lowland vegetation communities. Wildlife monitoring has highlighted an escalating and dramatic loss of woodland bird, small mammal and lizard species from lowland reserves in the ACT. Urban development occupies about 20 per cent of the ACT lowlands. Urban expansion will require the clearing of further vegetation and wildlife habitat. The majority of the ACT's lowland vegetation is listed as endangered or critically endangered at both the local and national levels.



**Figure 2: The ACT's Reserve Network**





Like many Australian cities, a key question is how wildlife and key conservation areas can be maintained while allowing for Canberra's growth.

Expected climate change impacts are likely to place further stress on the lowland reserves, ecosystems and species. Predicted climate change in the ACT includes increasing temperatures, changing rainfall patterns, more extreme storms, more frequent and intense fires, more intense and prolonged droughts and reduced surface water flows.<sup>5</sup> Climate change will add to, and interact with, a range of existing threats in the environment that have already impacted on the ACT's biodiversity. For example, climate change may allow new or existing weeds and feral animal to flourish in the ACT resulting in increased threats to native species.

Under certain circumstances wildlife can adapt to environmental change. However, if environmental change is rapid and substantial, ecosystems may not be able to adapt. Failure to adapt can lead to reduced or changed geographic ranges, reduced population sizes and extinctions.<sup>6</sup> The ability for species to disperse away from intolerable environmental changes is hampered in cleared or fragmented landscapes such as the ACT lowlands and is constrained for some species that have slow or localised dispersal mechanisms (such as many of ACT's grassland animals). Species already at the end of an environmental gradient are particularly susceptible. For example, the Bogong Moth summer aestivation (hibernation) sites are already confined to the highest peaks in the Territory. Moths will either have to tolerate rising temperatures or spend summer outside the ACT.

In the face of climate change, management objectives will need to be focused towards building landscape resilience. Key features for building resilience include:

- improving the quality, variability, security and extent of native vegetation, particularly for remnants larger than 100 hectares
- addressing compounding pressures such as weeds and exotic animals
- improving connectivity between the larger remnants of native vegetation that allow movement across environmental gradients
- identifying, protecting or enhancing refuge areas (where species can concentrate and survive during times of stress), both at a regional and local scale. Local refuges may be creek lines or rocky outcrops on cooler southern slopes.

Part one of this discussion paper seeks the community's input into the big questions facing the next period of nature conservation in the ACT and options on how to address them. These questions reflect the key objectives of overarching conservation, planning and natural resource management strategies and plans. The first three of the documents cited

below are formal whole-of-government documents. The Nature Conservation Strategy and action plans are statutory documents prepared by the Conservator of Flora and Fauna, while the Bush Capital Legacy was prepared by an advisory committee. The stated conservation objectives in these key documents include:

- that Canberra becomes a fully sustainable city and region, where future developments are environmentally sensitive, the flora and fauna is maintained and protected; and there are responsive actions to the challenges of climate change (*The Canberra Plan: Towards our Second Century*)<sup>7</sup>
- maintaining reserves and the connectivity between them (*The Canberra Spatial Plan*)<sup>8</sup>
- making ecosystems more resilient to the effects of climate change by increasing their connectivity (*Weathering the Change, The ACT Climate Change Strategy*)<sup>9</sup>
- protecting biological diversity and maintaining ecological processes and systems (*The ACT Nature Conservation Strategy*)<sup>10</sup>
- that the ACT makes an outstanding contribution, regionally and nationally, to the conservation of lowland vegetation (*Woodland and Grassland Action Plans, 27 and 28*)<sup>11</sup>
- that the Murrumbidgee and Molonglo Rivers in the ACT and their major tributaries make an outstanding contribution to the conservation of aquatic and riparian ecosystems of the upper Murrumbidgee River catchment (*Riparian Zone Action Plan No 29*)<sup>12</sup>
- repairing and maintaining the (lowland) landscape of the ACT so that it is sustainable (*Bush Capital Legacy*)<sup>13</sup>
- halting biodiversity decline and sustainably managing vegetation to ensure resilient ecosystem functioning (*Bush Capital Legacy*).<sup>14</sup>

Without seeking to limit community input, major conservation issues identified in the first part of the paper include:

- how landscape connectivity across the territory can be protected and enhanced
- how to maintain and broaden the resilience and ecological functioning of the ACT's lowlands
- how to reduce and, where feasible, reverse the decline in the extent of the ACT's lowland vegetation and species diversity
- how to best encourage, monitor and regulate off-reserve conservation in the ACT
- what is required to minimise the biodiversity impacts at the urban-bushland interface
- how legislation can support the ACT to make an contribution regionally and nationally to the conservation of lowland vegetation
- how to best address past difficulties in on-reserve compliance enforcement, non-conservation uses of reserves and inconsistency in public land management.



Important social and economic considerations may at times conflict with conservation goals. Amendments to the NC Act should not restrict broader deliberation, but should ensure that biodiversity and ecological processes are considered appropriately within the triple bottom line of social, environmental and economic perspectives.

### Have your say

*What do you consider are the key issues for future nature conservation in the ACT?*

*How do you think conservation concerns can be balanced with social and economic interests?*

Part two of the discussion paper examines specific issues associated with particular provisions currently in the NC Act. These largely relate to addressing operational issues and provisions. Responses are sought to the proposed clarification of, or modifications to, existing provisions.

The NC Act is structured into thirteen parts. The major provisions of each part of the NC Act are detailed below.

- Part 1—names the Act and defines the relationship of the NC Act to the criminal code, the *Emergencies Act 2004* and environmental law.
- Part 2—establishes the Conservator of Flora and Fauna (the Conservator) and conservation officers and their powers under the Act.
- Part 3—has specific responsibilities in relation to the identification and declaration of threatened species and communities and establishes the Flora and Fauna Committee (the FFC), which advises the Minister. In addition, Part 3 of the NC Act provides for the preparation of a nature conservation strategy.

- Parts 4 and 5—provide protection to native plants and animals and control their taking, dealing, keeping, import and export.
- Part 6—allows the Conservator to prohibit the possession of pest or other organisms.
- Part 7—provides for the Conservator to give directions to all land occupiers for the protection or conservation of wildlife or native timber.
- Parts 8 and 10—provide management authority for national parks, nature reserves and wilderness areas.
- Part 9—allows the Conservator and private citizens to make an application to the court to seek injunction orders against a person who breaches the NC Act.
- Parts 11 and 14—provide for the administration and enforcement of licences and Act provisions.
- Part 12—allows for applications to the Administrative and Civil Appeals Tribunal for the review of decisions of the Conservator.

## Past amendments and review

1989

There was a comprehensive update of the NC Act in 1989. This included increased penalty amounts, redefinition of animals to include protected fish and protected invertebrates, the establishment of special protection status, some refinement of on-reserve offences, and a tightening of the wording associated with the sale, import and keeping of animals.

1990

Amendments were made to the way the NC Act dealt with management activities and offences within wilderness areas.

1994

Amendments to the NC Act introduced a requirement for the Conservator of Flora and Fauna to prepare a nature conservation



strategy for the protection, management and conservation of flora and fauna indigenous to the territory. A conservation strategy was adopted in December 1997. The conservation strategy is currently under review concurrently to the review of the NC Act. The amendments also established the Flora and Fauna Committee and a mechanism for identifying and declaring threatened species, ecological communities and threatening processes.

1995

Amendments were made to the offences dealing with the illegal felling of native timber.

1999

The ACT Government undertook a review of the NC Act as part of its obligations as a signatory to the Competition Principles Agreement to implement national competition policy reforms. The scope of that review was primarily related to the anti-competitive aspects of the NC Act. The reviewer recommended that:

- an objects section be included in the NC Act and that this should refer to the conservation strategy
- several of the schedules of protected and controlled animals were out of date, more restrictive than those in NSW, and in need of review
- licences to import and sell cultivated native fish are not necessary to conserve local biodiversity.<sup>15</sup>

The recommendations resulted in changes to the schedules.

2004

Amendments were also made to the NC Act in response to several issues raised as a result of an investigation into unauthorised clearing of native vegetation in Namadgi National Park as part of transmission line management. The amendments more broadly defined the meaning of clearing and damaging of land on reserves, substantially increased penalties for these offences, allowed for third party enforcement (Part 9) and established criminal liability of executive officers of corporations.

## This review

A first step of this review was the appointment of Marsden and Jacob Associates (MJA report) to provide advice on the form, scope, function, policy principles and objectives of contemporary best practice nature conservation legislation.<sup>16</sup> The MJA report had several key findings.

1. While the NC Act has been largely unchanged since 1980, the basic structure and content of the legislation is not radically different from what might be considered contemporary best practice legislation. Most contemporary wildlife protection and reserve management legislation is structured in the same

way as the NC Act and includes similar types of provisions (e.g., protection of native animals and specific responsibilities, such as those currently exercised by the Conservator).

2. There are a number of areas where the provisions of the NC Act could be enhanced (e.g., incorporating options for restoration orders instead of maximum financial penalties for illegal clearing of native vegetation).
3. The major areas where the NC Act does not reflect current best practice is in its lack of integration and use of market approaches. Market-like approaches range from cost-reflective licence fees through to the creation of sophisticated markets to manage the use of natural resources. These market approaches, particularly the use of environmental offsets, can be used as part of the development regulatory framework to simultaneously maintain environmental values and minimise the regulatory burden on the development sector.
4. The role of the Conservator and the Flora and Fauna Committee is not radically different from the role of the chief executive and ministerially appointed advisory committees established under legislation in other jurisdictions. However, there are a number of contexts in which the role, structure and operation of the Conservator and the Flora and Fauna Committee could be enhanced. These include:
  - broadening the skills base and scope of the Flora and Fauna Committee
  - updating and rationalising strategies, plans and reporting arrangements
  - avoiding duplication in roles and responsibilities of committees and accountable positions.
5. The major differences between the current compliance regimes under the NC Act and those in other jurisdictions include:
  - in other jurisdictions a greater onus is placed on licence holders to self-report on performance against licence conditions—this reduces the workload on existing staff and enables them to concentrate on higher priority issues
  - licence fees are being set in other jurisdictions that recover the cost of administering licence regimes as well as reflect the risks to the objectives of the legislation from licensed activities. The higher the risk the higher the fee.

The MJA report can be viewed or downloaded at: [www.environment.act.gov.au](http://www.environment.act.gov.au).

## Related legislation

### Planning and Development Act 2007

The *Planning and Development Act 2007* (the Planning Act) sets the management objectives for all public lands, including reserved lands. The Planning Act establishes the Territory Plan, which maps land use zones and defines 'prohibited', 'permitted' and 'permitted with assessment' uses for each zone. Reserved lands occur over a variety of zones in which various non-conservation uses are possible, but they must not compromise the primary conservation objective for reserved areas detailed in Schedule 3 of the Planning Act.

All Territory Plan variations are referred to the Conservator for comment, and the Conservator's comments are published as part of the variation when going out for public comment.

The Planning Act also establishes that management plans must be prepared for all public land and that all rural leases require a land management agreement. It is an offence to manage land under a rural lease other than in accordance with a land management agreement. Public land can comprise both leased and unleased territory land and may be reserved in the Territory Plan for one of 10 purposes. Of these a wilderness area, a national park and a nature reserve have conservation as their primary management objective. All management plans require input from the Conservator, while management agreements require the Conservator's approval. The Planning Act does not contain any offence provisions for actions contrary to management plans. However, it does require that any approval for development activities in areas covered by a plan ensure that the development is consistent with these documents. Controlled activity orders can be issued if a rural lessee is not complying with a land management agreement.

The Planning Act is the overarching legislation for assessing and coordinating input into development applications. It determines which activities require development approval and how to assess development proposals.<sup>17</sup> Developments can be assessed by a code, merit or impact track. Most developments on public land that has conservation significance would be assessed under the merit assessment track. This requires consideration of the objectives of the zone, plans of management and probable impact of the development. If a proposal was to clear more than 0.5 hectares of native vegetation, contribute to a threatening process, adversely affect the conservation status of a protected species or community, or have a significant impact on the management objectives of reserved land, an Environmental Impact Statement (EIS) is required. The EIS triggers are described under Schedule 4 of the Planning Act and are currently under review by the ACT Government and an exposure draft of the

Bill was released in August 2010. A notable feature of the proposed changes is a focus on better ascertaining whether there is a risk of significant adverse environmental impact from a development proposal. The Bill provides for a substantially increased role for the Conservator in determining this.

When a development requires an EIS, the Planning Authority prepares a scoping document that identifies all matters that are to be addressed by the proponent in the EIS. The Planning Authority must confer with entities on the content of the scoping document and the Conservator is one of the entities. If the Conservator requires certain information to be included in the EIS, that information forms part of the impact track assessment because the Planning Authority must consider the EIS when assessing the development application. Only impact track applications involve the preparation of an EIS, and the EIS must be prepared and completed (after consideration by the minister) before an impact track development application can be lodged.

In relation to consultation, the Planning Act is specifically designed to provide mechanisms for consultation with different affected parties and to consider competing aims and values in decision making. Mechanisms for substantial community and agency input apply, for example, to the making of Territory Plan variations, strategic environmental assessment and decisions on development applications. The Planning Act takes these views into consideration when making decisions within the context of the Territory Plan. The planning legislation therefore provides for the assessment and balancing of a broad range of social, environmental and economic perspectives and values in decision making.

The NC Act invites community input into overall conservation direction through the production of the Nature Conservation Strategy, but licences may be issued without broad community consultation. The Conservator has no development approval powers but is able to recommend what information is required for impact assessment on reserved, public lands or lands with conservation significance. In addition, development applications must be sent for the advice of the Conservator if they are being assessed in the impact track, or the merit track and the development relates to a declared site within the scope of the *Tree Protection Act 2005*.

Referral entities, including the Conservator have 15 working days to provide advice to the Planning Authority once a development application has been referred. Once this advice has been given, the Conservator must act consistently with this advice unless substantially new information arises.

Having an approved development application, or acting in accordance with a plan of management or land management agreement does not override the need for a licence to take or



kill certain native plants or animals, interfere with nests or fell timber under the NC Act. However, administrative practice is that unless there is a particular concern that warrants action then development activity that interferes with native plants and animals can be undertaken without a licence under the NC Act, consistent with the development approval. It would be appropriate that the NC Act be amended to reflect this practice and better define the relationship between the NC Act and the Planning Act.

The Planning Act resulted from a major planning reform program. This reform was partially intended to improve the efficiency and agency coordination of assessment processes and adopted an Australian best practice model for planning based on a tiered approach to assessment where the level of assessment is matched to the scale, complexity and level of impact. Any increased role for the Conservator would need to be consistent with the structure of the planning process and not work against the planning efficiencies recently gained.

### **Australian Capital Territory (Planning and Land Management) Act 1988 (Cwlth)**

The ACT has a dual planning regime. This Act ensures that Canberra is planned and developed in accordance with its national significance. The National Capital Plan sets out the planning principles and policies for Canberra and the territory as the national capital and detailed conditions of planning, design and development for designated areas. Designated areas have particular importance for the special character of the national capital, and include most of the foreshores of Lake Burley Griffin, the parliamentary triangle and the inner hills and ridges such as Mt Ainslie, O'Connor Ridge and Red Hill. The territory cannot do anything that is inconsistent with the National Capital Plan and this does not just apply to the planning system or planning related decisions and actions.

### **Commissioner for the Environment Act 1993**

This Act establishes the Office of the Commissioner for the Environment (now known as the Commissioner for Sustainability and the Environment), who oversees environmental matters and prepares the State of the Environment report. The Commissioner is an independent authority who can investigate complaints on the management of the environment by the territory or a territory authority. These complaints can relate to actions undertaken under the NC Act. The Commissioner can, on their own initiative also investigate actions of an administrative unit or a prescribed authority that may substantially affect the environment. Currently there is a review underway to better define the Commissioner's extended role regarding sustainability.

### **Domestic Animals Act 2000**

This Act provides for the control and regulation of domestic animals, such as areas where cats must be contained. It also establishes areas in which dogs are prohibited at all times, dogs are permitted on a leash or dogs are allowed off leash. Under the NC Act written consent (often taken to be acting consistently with a plan of management) is required for a person to take a domestic animal into a reserve. It is possible that taking a dog or cat into a reserve area would be an offence under both the NC and Domestic Animals Acts. It may make administrative sense to address this overlap to clarify which Act has the primary role in reserve areas.

### **Pest Plants and Animals Act 2005**

This Act provides for the declaration of pest plants and animals and the actions necessary to contain or control them. This Act makes Part 6 of the NC Act—where the Conservator can declare particular organisms prohibited or controlled—somewhat redundant. Review to remove unnecessary duplication may be appropriate.

### **Fisheries Act 2000**

This Act aims to conserve native fish and their habitats, while sustainably managing ACT fisheries and providing for high-quality and viable recreational fishing. The definition of 'animal' under the NC Act is such that it allows fishing, except of prohibited species such as endangered fish.

### **Tree Protection Act 2005**

The NC Act and *Tree Protection Act 2005* are complementary pieces of legislation. *The Tree Protection Act 2005* protects registered trees (specific trees listed as of particular significance) across the urban area and regulated trees (trees above a certain size, canopy width or tree-trunk diameter) on leased land in the urban area. The NC Act protects any native tree (or plant) on unleased land and any native timber (including living trees) on leased land outside the urban area. Other than certain trees, the *Tree Protection Act 2005* does not protect native vegetation.

### **Roads and Public Places Act 1937**

This Act allows for the management of roads and public lands. It establishes as an offence for any person to wilfully or negligently damage, or excavate any public place (including unleased reserved land), without the permission of the Minister. Repair costs can be recovered by the territory, or the offender can be ordered to make good the damage. This Act also regulates the



exhibition of any advertisement or notice on unleased territory land, and provides for the removal of illegal signs, abandoned cars or other objects from public places.

### **Trespass on Territory Lands Act 1932**

Under this Act public access to particular territory lands can be prohibited. It is also an offence to camp; allow stock; leave gates open; damage fencing or damage or destroy trees, plantation or an afforestation area; plant or garden on unleased territory land or land occupied by the territory.

### **Lakes Act 1976**

This Act provides for the administration, control and use of certain lakes, ponds and the Molonglo Reach.

### **Heritage Act 2004**

This Act establishes a system to recognise, register and conserve natural and cultural heritage places and objects, including Aboriginal places and objects. Any place or object of heritage significance in the ACT can be listed in the Heritage Register. It is an offence to diminish the heritage significance of a listed place or object. A direction can be made to a public authority to prepare a management plan for any heritage place or object for which it is responsible.

### **Environment Protection and Biodiversity Conservation Act 1999 (Cwlth)**

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the key environmental legislation of the Commonwealth Government. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places, defined in the EPBC Act as matters of national environmental significance. Activities that could significantly affect matters of national environmental significance need to be referred to the Commonwealth for consideration and possibly approval. Actions that could have a significant effect on the environment of Commonwealth land also have to be referred to the Commonwealth. If an approval under ACT legislation could compromise conditions or restrictions placed under the EPBC Act, the EPBC Act takes precedence.

### **NC ACT review process**

This review involves five stages:

1. The commissioning of an initial report by Marsden Jacob Associates, completed in July 2008.
2. The release of this discussion paper to seek from stakeholders and the public written comment on issues raised in the paper. This stage will also involve further face-to-face meetings with key stakeholder groups.
3. The government will consider the comments received and approval will be sought for the preparation of an Exposure Draft Bill.
4. Formal community comment and consideration of the Exposure Draft Bill.
5. Preparation of final Bill and presentation to the Legislative Assembly.





This discussion paper first considers broader conservation issues and the possible role the NC Act may have in addressing those issues. Wider options for addressing an issue are discussed, and these options are not necessarily mutually exclusive. The discussion paper then looks at the individual sections of the current NC Act and raises and discusses issues that have become apparent, either during the operation of the NC Act or in comparison with contemporary conservation legislation elsewhere in Australia.

This discussion paper poses a series of questions relating to specific issues. These questions are designed to help frame submissions to the review of the NC Act. Responses do not need to be limited to these questions. See pages i–iii of this discussion paper for details on how to make a submission to the review.



# Part One: Major conservation issues

## 1. Connectivity and landscape functioning

### 1.1 The issue

The ACT's lowland landscapes are highly fragmented and this is threatening their sustainability.<sup>18</sup> In general, the larger the remnant patch of vegetation and the more connected this patch is with other patches the greater the opportunity for wildlife to survive and reproduce.<sup>19</sup>

A large proportion of the territory's land above 750 metres is reserved and reservation is at a scale that can protect ecosystem function of the higher lands and mountains.

Vegetation clearance has been concentrated in lowland areas. These lowland areas support endangered woodland and grassland and most of the ACT's threatened species. It is estimated in action plans 27 and 28<sup>20</sup> that before European settlement there were 32 000 hectares of Yellow Box-Blakely's Red Gum Woodland in the ACT and 20 000 hectares of native temperate grassland. Today around 23 per cent of these endangered communities remain in a good or moderate condition and another 14 per cent in a poor condition. Around 14 per cent of the original extent of woodland and 4 per cent of grassland is reserved. Both on and off reserves, weed and feral animal invasion, fire management and recreation pressure is causing further loss or degradation of the grassland and woodland communities. Urban expansion may result in further pressure on native vegetation with important conservation value, while climate change is likely to be an additional stress.

The natural temperate grassland and box gum woodland of the NSW Southern Tablelands region has been extensively cleared

and fragmented so that remnants greater than 10 hectares are regarded as large. This is not particularly significant in an ACT context, but may be viewed as such from a regional or national scale because of the higher levels of clearing and fragmentation elsewhere. On one hand this means that the ACT has a higher level of reservation of lowland vegetation than surrounding areas. On the other hand the level of clearance of box gum woodland outside of the ACT has reached a level where impacts on biodiversity are significant and further clearing is considered unsustainable.

It is likely that biological losses will continue without enhancement of the ACT's lowlands, as there is a relationship between reduction in overall biodiversity and the degree of clearance across a landscape.<sup>21</sup> The threshold below which wildlife movement across the landscape are affected is at a clearance level of between 30 per cent and 70 per cent (e.g. McIntyre et al. 2000).<sup>22</sup>

The ACT lowlands have suffered clearance levels of about 60 per cent, although an accurate calculation is yet to be made. Much of the vegetation in the lowland areas occurs on rocky and steep hills and ridges. The vegetation on these poorer sites is less productive in terms of leaf growth, nectar flow and insect populations than vegetation located on nutrient rich, deep and relatively moist valley flats. Trees lower in the landscape also tend to be bigger and contain many more hollows. Prime fauna habitat has been heavily cleared. Extensively cleared paddocks still support a large proportion of the large productive hollow-bearing trees found in the ACT, while lower areas also support a significant proportion of the Canberra region's creek lines. Across a wide range of habitats, riparian areas and drainage lines tend to be the most productive for biodiversity and play an important refuge role (e.g. Seddon et al. 2002).<sup>23</sup>



The size of remnant patches of native vegetation within a landscape is also crucial to retain biodiversity. For example, Seddon et al. (2001)<sup>24</sup> surveyed 36 woodland remnants that ranged in area from 1 to 1376 hectares and found a significant logarithmic relationship between the size of remnant area and the total number of bird species recorded in that remnant. Some woodland birds like the Hooded Robin and the Brown Treecreeper require large territories to breed successfully. The maintenance of viable populations is only possible in large remnants or areas where small remnants are well connected.

The *ACT Climate Change Strategy*<sup>25</sup> recognises that natural systems are inherently complex and it is very difficult to predict how communities and species will respond to climate change. Key actions required by the climate change action plan are the protection of areas of high conservation value and the development of an ecosystem connectivity map. Management approaches that want to maintain current spatial arrangements of species will be very difficult to implement under a changing climate, and could well become counterproductive. Management objectives will need to be reoriented from preserving all species in their current locations towards maintaining the provision of ecosystem services through a diversity of well-functioning and connected ecosystems.<sup>26</sup>

The ACT Commissioner for Sustainability and the Environment has also called for better connectivity between core nature conservation areas when planning greenfield and urban renewal developments and major infrastructure projects.<sup>27</sup>

An Inquiry of the Legislative Assembly Standing Committee on Planning and Environment into wildlife corridors concluded that wildlife corridors:

... contribute to the conservation of biodiversity by enabling species to move across landscapes to feed, breed, disperse and colonise preferred habitat. Movement may be seasonal, and can also assist species to adapt to climate change. Wildlife corridors can also provide buffers against disturbance (human and natural) and enable populations of species to maintain their natural patterns of distribution and abundance. Wildlife corridors are particularly effective if they are short and linked to large core areas of relatively undisturbed natural vegetation. Where landscapes are highly fragmented, corridors can help reduce possible extinctions caused by 'islanded' areas.<sup>28</sup>

Wildlife corridors are continuous links of native vegetation that join larger patches. Connectivity is a wider concept that includes wildlife corridors and also patches that act as stepping stones and landscapes that are permeable to wildlife.

Ecological connectivity is increasingly recognised as a key element in planning and management for wildlife conservation.

In the ACT connectivity can be considered at three levels:

- regional (ACT and NSW Southern Tablelands)—encompassing the two bioregions that cover the ACT—the Australian Alps and South-eastern Highlands
- territory-wide (or habitat scale) relating largely to major rivers and large blocks of vegetation
- local (or block or patch scale), individual trees or small areas of vegetation.<sup>29</sup>

Neighbouring NSW local government areas, such as Palerang, Queanbeyan and Cooma–Monaro have already identified, or are likely to identify wildlife corridors and areas of conservation significance as part of their planning instruments.<sup>30</sup> Regional wildlife corridors that cover parts of the ACT have already been identified in documents such as the *ACT and Sub-Region Planning Strategy* (1998)<sup>31</sup> and in *A Planning Framework for Natural Ecosystems of the ACT and NSW Southern Tablelands* (2002).<sup>32</sup>

Territory-wide corridors have been identified in Action Plans 27, 28 and 29 and the *Canberra Spatial Plan* (2004).<sup>33</sup> The protection and enhancement of local corridors is recognised in *Design Standards for Urban Infrastructure* (design standard 14—urban open space).<sup>34</sup>

The ACT Government and Australian National University are currently working on a joint project to identify areas of importance for connectivity and ecosystem sustainability across the ACT and neighbouring region. Figure 3 indicates those lands likely to be identified as important to ecological connectivity and sustainability in the ACT, although the final research product will have many differences. Figure 3 is based on the mapping of box gum woodland and natural temperate grassland as well as corridors identified by the ACT and Sub Region Planning Committee (1996)<sup>35</sup>, the *Canberra Spatial Plan*<sup>36</sup> and Environment ACT (2004).<sup>37</sup>

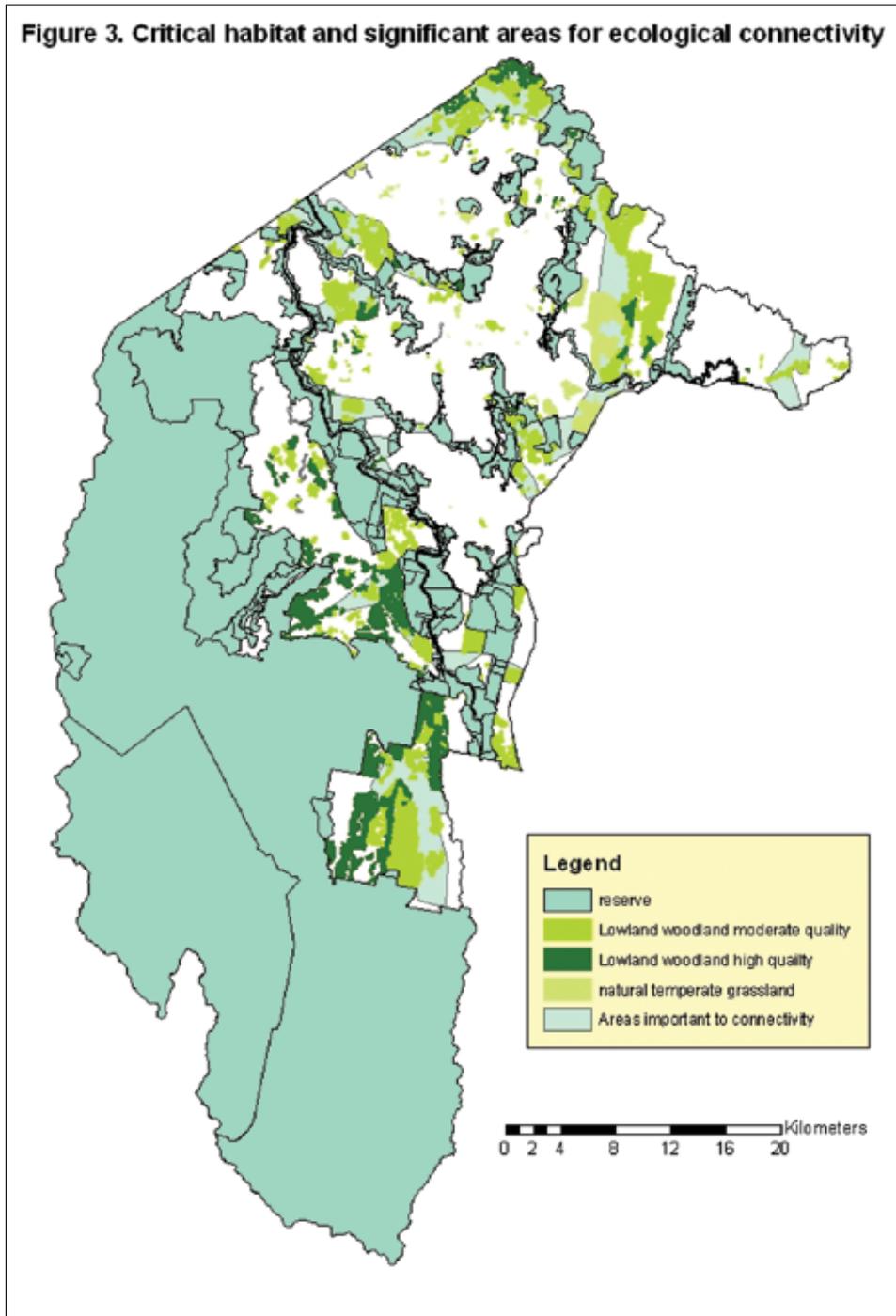
It is important to note that improving connectivity does not mean re-vegetating long, large-scale corridors; rather it may involve providing stepping stones of habitat or protecting and rehabilitating important habitat areas such as the banks of rivers or streams.

The mapping of an area as important for connectivity does not necessarily preclude developing that area. It identifies connectivity as an issue that should be considered as part of a development assessment or other activity and which may be retained by careful design or compensatory measures on site or elsewhere.

As shown in figure 3, about 12 per cent (27 411 hectares) of the ACT supports lowland woodland or grassland, that is of potential importance to lowland connectivity or is already a reserve within an area important to lowland connectivity.

## 1.2 Options for addressing connectivity and sustainability

It should be possible to further develop a map of critical habitat and ecological connectivity and use this mapping to identify areas important as part of a bioregional plan for conservation.





### 1.2.1 Territory Plan

The Canberra Spatial Plan includes actions to ensure wildlife corridors are maintained primarily for wildlife movement.<sup>38</sup> The implementation framework for the Canberra Spatial Plan indicates that corridors could be included in reserves through using the public land reservation provisions of the Planning and Development Act.

### 1.2.2 Strategic environmental assessments

Connectivity, at least for parts of the ACT, could also be protected and potentially enhanced as part of strategic environmental assessment processes under the Planning Act. A strategic environmental assessment is a comprehensive environmental assessment, suited to proposals in major policy matters rather than individual development proposals. Examples of when a strategic environmental assessment may be prepared include a major land-use policy initiative, or a major variation to the Territory Plan.

### 1.2.3 Nature conservation strategy

Another option would be for the critical habitat and ecological connectivity overlay to be included within a revised Nature Conservation Strategy (1997).<sup>39</sup> This is a statutory document established under the NC Act, and could act as a guide as to what areas should be protected to maintain connectivity and how they could be managed.

### 1.2.4 Expansion of the reserve system

Alternatively, it could be considered that connectivity is such a key issue to the sustainability of the ACT's biodiversity that areas crucial for connectivity should become part of the formal reserve network. This could involve a comprehensive review of both future urban growth and conservation needs. An advantage of this is that it would necessitate clear decisions about not only connectivity but a whole-of-government decision on offsets and trade-offs to maximise sustainability of outcomes for development and conservation.

### 1.2.5 NC Act changes

Connectivity could also be addressed by amending the NC Act to expand s38, which declares threatened species, communities or threatening processes. It could be expanded to declare key areas for connectivity and sustainability. This would also require an action plan detailing how these areas should be managed. Careful consideration would need to be given to how this could work within the overall strategic planning framework for the ACT.

Ecosystems will vary over time. In particular the distribution and condition of communities and habitat may change, as may our knowledge of these systems. Providing a comprehensive and up-to-date map of areas of ecological significance is therefore problematic. The ability to update any map produced would be imperative. It should not be assumed that any area outside of that mapped has no conservation value, but would need to be carefully balanced with other key community needs.

The draft ACT biodiversity assessment and offset approach, currently under separate development, will also seek to enhance landscape connectivity.

### 1.2.6 ACT NRM Plan

*Bush Capital Legacy: The ACT Natural Resources Management Plan* (2009) summarises its task as 'about repairing and maintaining the landscape of the ACT so that it is sustainable.'<sup>40</sup> Restoration can have dramatic environmental effects, particularly when it is focused on improving condition, reducing fragmentation and increasing remnant size. Much of Canberra Nature Park, including parts of Aranda Bushland, Mt Painter, Red Hill, Mt Ainslie, Mt Majura, Mt Taylor and Farrer Ridge, have been transformed within the last 20 years from areas dominated by exotic woody weeds to areas now dominated by native understorey. There has also been significant natural regeneration after the 2003 fires. Greening Australia<sup>41</sup> has also recorded significant success in bringing back small insectivorous birds to landscapes in the capital region following revegetation activities.

Landscape restoration not only halts decline, but also brings back or increases some local wildlife.

## Case Study: Restoration activities around Albury

Since 1975 the Albury-Wodonga Development Corporation has planted trees and shrubs in agricultural and semi-urban land before residential expansion. Most of these plantings were done in paddocks of improved pasture with isolated paddock trees and small tree clumps. Twenty to thirty years on, the plantings support a predominantly native understorey, albeit of low diversity. More significantly, the combination of large mature trees and understorey plantings is now a significant habitat for many animal species listed as threatened in NSW including the Squirrel Glider (largest known population in NSW), Speckled Warbler, Diamond Firetail, Regent Honeyeater, Black-chinned Honeyeater, Swift Parrot (largest flocks recorded in the Murray Catchment) and Hooded Robin. All but the Swift Parrot

breed in areas subject to restoration.<sup>42</sup> Apart from the Speckled Warbler, these species are not found in the steep and rocky wooded hills above Albury, although the hills support a large box-gum woodland/forest. The present and future development of these residential expansion areas has been planned to provide for the sustainability of wildlife present, with management funding provided to continue the improvement of biodiversity within retained plantings.

## Have your say

*How do you think connectivity and ecological sustainability across the ACT can best be protected and enhanced?*

## 2. Halting vegetation and habitat decline

### 2.1 The issue

Canberra's expansion has resulted in a steady decline in the ACT's lowland native vegetation. Nevertheless, the ACT maintains a considerable reserve network, which in a national context retains large areas of temperate grassland and woodland. While protecting high-quality vegetation is important, an ongoing loss of lower conservation value vegetation is pushing the ACT lowlands to a total clearance level where substantial species loss can be expected<sup>43</sup> and where ecosystem processes might be compromised. Long-term monitoring of lowland birds, reptiles and mammals has revealed a decline in both wildlife abundance and species diversity.<sup>44</sup>

It is recognised that large parts of Australia have had unsustainable levels of clearance over the past two decades with the extent and connectivity of vegetation so reduced that further species extinctions seems inevitable.<sup>45</sup> Other jurisdictions have tried to address this situation through legislative changes that impose tighter controls on further vegetation loss.

Tighter control of vegetation clearance across the ACT, through review of the NC Act, combined with restoration efforts would likely improve connectivity between the reserve network, to halt further biodiversity decline and enhance ecosystem function and resilience across the landscape. Any controls implemented would need to allow the attainment of social and economic sustainability goals and work with and be consistent with current planning legislation and practice.

If wider vegetation clearing controls were in place, it would be necessary to consider existing user rights, such as proposed clearing that had already received development approval. It is important that any new controls would not have retrospective affect on approved development.

The NC Act currently only controls the clearing of native vegetation within reserves (Part 8). Licences are required to take protected plants, individual native plants and timber on unleased land (Part 5). However, in practice licences have not been required for clearing that has approval under the Planning Act. Certain large urban trees and those with heritage significance are protected under the *Tree Protection Act 2005*. However, most of the ACT's habitat, native trees or native shrubs, grasses or other understorey plants are unprotected under the Tree Protection Act.

Neither the NC Act, the Planning Act nor the Tree Protection Act currently provides guidance on how to assess applications to clear vegetation or the habitat of threatened species. There is no overall goal of maintaining the current extent, quality or connectivity of vegetation, no formal offsetting arrangement or standard method to determine that the measures proposed actually equate to the loss occurring. It is also important to recognise that the ACT land release program has historically involved negotiated "offsets" in that higher conservation value areas have been set aside from development in the strategic planning for greenfield developments. Amendments to the NC Act could provide for such measures.

### 2.2 No net loss of significant biodiversity values

Legislation in other jurisdictions has tried to turn around habitat and vegetation decline by implementing the concept of no further net loss of biodiversity or vegetation. For example, the NSW *Native Vegetation Act 2003* prevents broad-scale clearing unless it improves or maintains environmental outcomes.

The South Australian *Native Vegetation Conservation Act 1991* seeks to prevent further loss in the quantity or quality of that state's vegetation, while Victoria seeks a net gain. Although the ACT has a significant proportion (54 per cent) of its total area protected in reserves, this is predominantly forest ecosystems. The ACT's woodlands and grasslands are not as secure in reserves, even though there is more reserved in the ACT than in surrounding NSW. A regional approach to preventing no net loss of this ecosystem would provide a better outcome from an environmental perspective, and ensure that protection in Canberra is mirrored in NSW. There may be scope for considering cross border, bioregional contributions for offsetting development between the ACT and NSW (and the Commonwealth).



No net loss or net gain aspirations require that any loss of vegetation from clearing is counterbalanced elsewhere by environmental improvement actions or offsets. A draft ACT biodiversity offset approach is currently in development. This approach, if adopted by the government, would require legislative changes to the NC Act to be effectively implemented.

A key aspect of the Commonwealth's acceptance of biodiversity offsets and their use in the ACT, is that offsets are a last resort—only employed after all prudent and feasible measures have been taken to avoid and minimise impacts.

**Figure 4: Using offsets to help address biodiversity loss**



After NSW Government (2002) *Green offsets for sustainable development*.

### Have your say

*What are your views on no net loss of significant biodiversity and its applicability to the ACT?*

*Does the ACT contribution need to be viewed in the broader regional context, and if so how could cross border offsetting considerations apply?*

### 2.3 Strategic assessments

Under section 146 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act), the Australian Government Environment Minister may agree to conduct a 'strategic assessment' of potential actions under a policy, program or plan. These may include, but are not limited to:

- regional-scale development plans and policies

- district structure plans
- local environmental plans
- large-scale industrial development
- fire, vegetation or pest management policies, plans or programs
- water extraction/use policies
- infrastructure plans and policies.

A strategic assessment happens early in the assessment process and is an alternative to the conventional referral/assessment/approval process under the EPBC Act. A strategic assessment may examine the potential cumulative impacts of actions in accordance with one or more policy, program or plan.

In September 2008 the Australian and ACT Governments agreed to conduct the first strategic assessment in Australia for urban development.<sup>46</sup> The assessment covers the proposed Molonglo North Weston development, which is proposed to provide housing for around 73 000 people.

Currently, licences are still required under the NC Act for taking native plants, killing native animals or interfering in nests of native animals within an area of an approved strategic assessment even if the assessment has prevented any significant impact and has appropriately offset any biodiversity loss. If wildlife and licensing requirements under the NC Act were considered as part of this assessment, it would improve the timely delivery of strategic environmental approvals. It would make the need to consider licensing issues on an individual or development-by-development basis unnecessary and deliver any offsets that may be required under the ACT biodiversity offset approach.

The NSW *Threatened Species Conservation Act 2005* has a similar situation, called biodiversity certification. Under biodiversity certification, the individual approvals for harming or damaging threatened species or communities are not required if actions are consistent with those allowed by a certified planning instrument. The Western Sydney Growth Centre was the first area granted biodiversity certification—with a proposed development of 181 000 new homes. This development will clear significant vegetation, but a \$530 million trust fund has been established to acquire and manage offsets.<sup>47</sup> However, some experts considered the certification process for the growth centre flawed because of a lack of scientific rigour and consideration for individual species, and because it will result in the clearance of nearly 1800 hectares of endangered woodland.<sup>48</sup> To gain community credibility any strategic assessment would need to include an open and transparent assessment process, which can demonstrate with a level of certainty that biodiversity extent, condition, connectivity and security are being maintained and improved.

## Have your say

*Should the ACT consider a similar approach to NSW biocertification to allow a better interface between the NC Act and the Territory Plan?*

*What are your views on including licensing provisions as part of strategic assessments to deliver maintained or improved biodiversity across a planning area?*

## 3. Off-reserve conservation

### 3.1 Private conservation reserves

Rural lands contribute in a substantial way to the sustainability of biodiversity in the ACT. Collaboration on the conservation of values is crucial. Direct costs to landholders may be involved and mechanisms that promote conservation and offset unreasonable costs to a lessee warrant investigation.<sup>49</sup>

There are currently no formal means in the ACT for declaration of private conservation areas. However, there are rural leases issued where the lease purpose clause is:

... to use the premises only for agriculture purposes that are managed so as to achieve environmental and heritage conservation outcomes in accordance with the approved Land Management Agreement.<sup>50</sup>

Leaseholders in the ACT may choose to dedicate all or parts of their land to conservation for altruistic reasons, as part of an offset agreement, or to qualify or increase the likelihood for incentive funding. Rural leaseholders already receive Commonwealth environmental funding. For example, the ACT Land Keepers Program provided economic incentives to several rural landowners to preserve biodiversity on their properties. Formal private reserves or longer term covenanting are not essential for incentive funding, but may facilitate such funding.

If the ACT Government decides to facilitate either biodiversity or carbon offsetting on rural leases, then the Commonwealth will require a binding covenant or agreement on land management from present and future lease holders to meet their offsetting principles for offsets to be established and secure over the long term (generally at least 99 years).

The Legislative Assembly Standing Committee on Planning and Environment called for the consideration of conservation leases in Central Molonglo and other areas of the ACT.<sup>51</sup> This

recommendation was supported by the government on 19 August 2008.<sup>52</sup> There are currently no provisions for conservation leases in the NC Act or the Planning Act. Potentially, the term 'conservation lease' could just be taken to be land management agreements that have a conservation focus, or it could require changes to legislation and the establishment of a class of land similar to that of private conservation covenants, as appears in the conservation legislation of other jurisdictions. The ACT Conservation Council sees a conservation lease as a rural zoning that specifically requires the lessee to manage the land for conservation purposes, and to undertake native vegetation management activities such as weed and feral animal control, regeneration and controlled grazing.<sup>53</sup> Nature conservation is a permitted use in rural broadacre zones. Public land reservation provisions of the Planning Act could be used to achieve conservation management outcomes within this zone.

Under the Planning Act a land management agreement, requiring the approval of the Conservator, must be prepared for all rural leases. However, nature conservation at present is not necessarily the focus of a land management agreement. The Commissioner for Sustainability and the Environment investigated the ACT's Lowland Native Grassland and found that enforcement of conditions in land management agreements in rural leases seemed lacking, possibly because it is too difficult given the current system. The Commissioner recommended that rural lease processes (including those for land management agreements) be simplified and responsibilities clarified. The Commissioner thought it appropriate for Parks and Conservation (Department of Territory and Municipal Services) to be fully responsible for administering land management agreements. The authority for this may need to be established under the NC Act. Lease management agreements can currently contain lease conditions relating to conservation. These lease conditions can be written to apply across the life of a 99-year lease.<sup>54</sup>

## Have your say

*Do you think voluntary dedication of leased land for conservation should occur in the ACT? If so, what would be the simplest and most effective mechanism for achieving this?*



### 3.2 Management trusts

A trust is currently being developed as an option to help manage the Mulligans Flat Woodlands Sanctuary and Jerrabomberra Wetlands. It may be appropriate for the NC Act to formally allow and regulate community, government and business partnerships in the form of trust management, or community title of land with conservation values. For example, when a new housing or industrial development abuts a potential corridor area requiring restoration works, the nearby householders may be in the best position and have the most desire to manage and undertake this restoration. It is possible to envisage a situation, like the current unit title arrangements for the management of community facilities at places like Wybalena Grove in Aranda, where this concept is expanded to include management of a designated area of bushland. Management trusts may be particularly suitable for areas that are currently isolated from the reserve network or where restoration is a key focus.

A potential problem with community management is that there may be a continual turnover of owners, with varying commitment to the management and use of the community land. The presence of the community land would have to be seen by new owners as a significant benefit, and this may be difficult to achieve beyond the benefits of living next to public land.

Provisions for a community trust to manage public or leased land of conservation value would also have implications to other government policy and legislation and may be complicated to implement.

Nevertheless, it is a possible way to encourage private lease conservation, and there is a long history of community trusts managing public lands in other jurisdictions, such as for Crown Reserves in NSW and for Travelling Stock Reserves across parts of Australia. Legislation could set the terms under which such trusts may operate and set objectives and restrictions on what can be done with the land.

Trusts can be set up under other legislation such as the *Civil Law (Property) Act 2006*, the *Financial Management Act 1996*, the *Associations Corporations Act 1991* or the *Trustee Act 1925*. Nevertheless, it may be appropriate for the NC Act to provide regulation and an oversight role for the Conservator for the private management of land with conservation value.

#### Have your say

*Do you think that private management trusts could be one way to encourage private lease conservation?*

*How else do you think private lease conservation could be facilitated?*

## 4. Managing the urban-bushland edge

One of the greatest impacts and threats on the ACT's native vegetation and habitat are when these areas adjoin suburban development. Bushland on the urban edge supports the greatest recreational use and is subject to a high level of disturbance from vehicle parking, adjoining construction, infrastructure development, fire protection measures and neighbours illegally extending their garden and storage areas onto public land. Urban areas are also a major source of weeds and support large populations of domestic and feral animals that spread into or roam bushland areas. Good management of these areas is complex and requires action across a range of legislation and policy areas.

### 4.1 Encroachment onto reserved lands

Amended legislation may be appropriate to deal with landowners treating part of the adjoining reserve as if it was their own land, including use of public land for private purposes such as landscaping, erection of sheds, animal runs and other structures, etc.

From a nature conservation point of view, these encroachments onto reserved land have been problematic, and in particular have created conditions favourable to both weed and feral animal establishment.

Under the NC Act offenders can be fined and prosecuted, but the Act does not provide for the removal of offending material or restoration of the reserve (unless an offender has been prosecuted in court for the clearing of native vegetation, which may have been a result of the extension, and the court orders remediation). Dealing with these issues can be cumbersome and may require action under three other pieces of legislation, or prosecution through the courts.

#### Have your say

*Does existing legislation have sufficient powers to deal with encroachments onto reserve land? What, if any, amendments should be made to the NC Act?*

## 5. Measures to help compliance with the NC ACT

### 5.1 Key issues

Since 2000, over 1500 potential offences under the NC Act have been reported. Of these, 354 were investigated resulting in 10 infringement notices and two prosecutions.

The lack of prosecutions and fines may indicate general community compliance with the NC Act, and prosecution arguably has been regarded as a last resort. However, it is possible the enforcement provisions are viewed as inadequate and the low level of prosecutions is undermining the ability of the NC Act's objects to be satisfactorily fulfilled.

The key issues of the review of the enforcement provisions of the NC Act are:

- potential use of a tiered approach where the level of investigation and penalty is tailored to the level of offence
- whether the penalties are sufficient to act as a serious deterrent when economic gain is a factor in a breach
- that there is a limited use of strict liability offences under the NC Act
- that powers of seizure, search and entry could be improved.

Any review of offences will need to be consistent with the *ACT Guide for Framing Offences* issued by the ACT Attorney General in May 2010.<sup>55</sup>

#### Have your say

*Are the enforcement options and penalties within the NC Act adequate?  
If not, what could improve them?*

### 5.2 Current remedies for offences under the NC Act

The options for dealing with offences under the NC Act include:

- the issuing of infringement notices under the Magistrates Court (Nature Conservation Infringement Notices) Regulation 2005 and
- criminal prosecutions.<sup>56</sup>

The NC Act also provides for the Conservator, or someone to whom the court grants standing, to apply to the Supreme Court for injunction orders when it is believed necessary to restrain a person from contravening the NC Act.

Under the NC Act, infringement notices may be issued as a first instance penalty and an alternative to prosecution. If an offender

does not pay the fine within the requisite 28-days (*Magistrates Court Act 1930*), they are served with a reminder notice. If payment is not received within 28 days of the reminder notice being served, the person may be prosecuted for the offence.

If a party objects to an infringement notice and wishes to defend the notice then the regulatory authority may lay an information (a formal accusation of a crime having been committed). As a matter of policy, and in procedural terms, this means the matter may be referred to the Director of Public Prosecutions (DPP) for prosecution. The DPP makes a decision whether to prosecute or not based on the evidence provided by the Department of Territory and Municipal Services.

Infringement penalties vary commensurate with the seriousness of the offence.

The maximum fine under the Magistrates Court (Nature Conservation Infringement Notices) Regulation 2005 is \$500. Offences incurring the maximum penalty include the killing of an animal with special protection status without a licence or selling a protected native plant without a licence. The minimum penalty (e.g., for illegally camping in a reserved area without the consent of the Conservator) is \$75.

There is some, albeit minor, scope under the NC Act for a court to order rehabilitation. The provision allows a court to order a person to, among others, mitigate the effect of damage caused and rehabilitate the land damaged as closely as possible to its condition before the damage.

However, such an order may only be made after a finding of guilt; that is, it only applies to criminal prosecutions. The provision is only relevant for offences resulting in damage causing serious harm to land in a reserved area.

### 5.3 Alternative remedies for compliance and enforcement of the NC Act

Compared with the enforcement and compliance provisions within the environmental legislation of other Australian and international jurisdictions, the NC Act is no longer contemporary best practice. Aside from the infringement notice provisions, the penalties it applies are at criminal law. Criminal penalties are punitive by nature and, in the case of the NC Act, use fines or imprisonment rather than civil remedies such as damages or restitution.

The burden of proof is, appropriately, greater in criminal matters. The burden of proof in civil cases need only balance the probabilities in favour of an accused's guilt, whereas in criminal matters the prosecution is required to prove the defendant's guilt beyond a reasonable doubt.



A civil penalty authorises a court to impose a financial penalty on an individual or company that is licensed or authorised to participate in a regulated industry. Civil penalties may only be created in a regulatory context. For a civil penalty to be justified, the companies or individuals liable for the penalty must be definitively on notice that they are liable if they choose to participate in the regulated activity.<sup>57</sup>

A broad range of civil compliance and enforcement options are available, and these generally fall into two main types - damages and remedies.

### 5.3.1 Damages

Damages are a financial remedy administered with the aim of providing an aggrieved party (e.g. the Conservator) with monetary compensation for losses resulting from the actions of another party. This can include a range of damages including general damages (e.g., the difference between the market value of a property immediately before the harm and its market value after the harm), and consequential damages (e.g. those incurred after the initial loss and when the full value of the loss is not represented in the calculation of market loss).

### 5.3.2 Restitutive remedies

Restitutive remedies are a form of damages used to prevent unjust enrichment by making the party responsible for a loss give up what was wrongly obtained from its actions. Restitution can include restitution in kind (e.g. repairing damage) as well as financial restitution, and may include a punitive element.

### 5.3.3 Coercive remedies—injunctions

A court issued injunction can require a party to act in a specified manner or time, or face subsequent penalties (e.g. fines or imprisonment). This includes temporary restraining orders and preliminary injunctions to prevent some irreparable harm or alleviate the threat of an imminent emergency.

### 5.3.4 Declaratory remedies

A court can make an authoritative statement of the parties' rights with no award of damages, restitution or injunction. This remedy may be useful when the parties to a contractual arrangement need to know their rights and obligations under the contract or when a citizen is confronted with regulation that may be beyond the power of the authorising Act to clarify the validity of the regulation.

## Case study: South Australia's Native Vegetation Act

South Australia's *Native Vegetation Act 1991* provides an example of how civil enforcement provisions can apply a comprehensive legislative regime to the assessment and application of damages—notwithstanding the fact that a specialist environment court deals with offences under the South Australian Act.

The *Native Vegetation Act 1991* (SA) empowers the court to, among others, order a party, who on the balance of probabilities has committed an offence, to:

1. make good the breach. This includes directing the offender to take any such action the court deems appropriate, taking into account the nature and extent of the original vegetation. For instance, the court may direct the offender to replant vegetation of species specified by the court and to nurture, maintain and protect the plants until they are fully established or as the court specifies.
2. pay damages. Noting that in assessing damages the court must consider:
  - a. the damage caused to the environment
  - b. the detriment to the public interest
  - c. any benefit (including financial benefit) the offender sought to gain by committing the breach
  - d. any other matter the court considers relevant and/or
3. pay into a fund the amount of financial benefit the offender gained, or could reasonably be expected to gain, by committing the breach and/or
4. pay into a fund an amount, determined by the court, for exemplary damages and/or
5. require the offender to take specified action to publicise the breach and the environmental and any other consequences flowing from the breach.

### 5.3.5 Enforceable undertakings

An enforceable undertaking is a binding agreement between a person and the responsible authority where the person undertakes to carry out certain activities in a matter relating to a breach or alleged breach of the Act or regulations.

Enforceable undertakings are used extensively by the Australian Competition and Consumer Commission (ACCC) to formalise decisions to forgo enforcement litigation on the basis that offenders will correct their misconduct and comply in the future. Enforceable undertakings are increasingly seen as a valuable restorative justice tool for the breach of environmental laws.

The NSW Department of Environment, Climate Change and Water has recently entered into enforceable undertakings



with several companies guilty of pollution events. Enforceable undertakings have included payment to produce and implement remediation actions, undertake weed control, re-snag a river (from which submerged timber was removed) and undertake an audit and change in practices as well as fund bush regeneration activity.<sup>58</sup>

Once an enforceable undertaking is entered into and while it remains in force, the responsible authority cannot prosecute that person or subject them to penalty infringement notices for the conduct relating to the undertaking. Failure to comply with an enforceable undertaking may, however, result in legal action to enforce the undertaking. Enforceable undertakings include a commitment that the person will stop the particular conduct or alleged breach that led to the undertaking, and not resume that conduct. The main advantage of enforceable undertakings is that they can be tailored to address the conduct in question. Enforceable undertakings are offered as a voluntary option, with the responsible authority making the final decision about whether it is an appropriate method of enforcement.<sup>59</sup>

### Have your say

*Is it appropriate for the NC Act to contain civil penalties similar to that used in other jurisdictions? If so, to which matters under the NC Act could these most usefully apply?*

### 5.4 Level of penalties

The maximum penalties for offences under the NC Act for the protection of animals, fish and plants range from 5 to 100 penalty units, with 50 penalty units being the most commonly applied maximum. Fifty penalty units equate to a fine of around \$5500. Under the NC Act, offences against protected plants or animals may also result in a maximum of one year imprisonment or six months in other cases. Offences in reserve areas typically carry a maximum fine of less than \$5500. The exceptions are clearing or damage to land that causes serious harm (up to five years imprisonment or a \$220 000 fine), or material harm (up to two years' imprisonment or a \$110 000 fine), or clearing or damage generally (up to \$11 000 fine). These particular penalties were increased in 2004 in response to issues that arose from significant clearing of native vegetation in Namadgi National Park. However, there was not a general review of penalties at that time.

In many cases the maximum fine does not match the damage or act as a financial deterrent. For example, an offender could face a maximum penalty of \$5500 for damage to heavy duty gates, locks, fencing or toilet blocks, but the replacement costs may be significantly more than that. Such activity may also be a criminal offence under the provisions of the *Crimes Act 1900*. Similarly, there have been instances where native timber was felled without authority on unleased land where the value of timber removed was more than the maximum \$5500 fine.



**Table 1: Comparison of penalties in ACT with those of NSW and Victoria**

Offence	Penalty, ACT	Penalty, NSW	Penalty, Victoria
Harming threatened species	\$11 000 and/or 1 year in prison	\$200 000 and/or 2 years in prison <sup>60</sup>	\$24 000 and/or 2 years in prison <sup>61</sup>
Selling native animal	\$5500 and/or 6 months in prison	\$10 000 and/or 6 months in prison <sup>62</sup>	\$5000 + \$500 per head of animal sold and/or 6 months in prison <sup>63</sup>
Lighting fire in reserve	\$5500	\$100 000 or 5 years in prison, <sup>64</sup> but \$3000 for specific park offence <sup>65</sup>	\$2000 + provision to make good damage <sup>66</sup>
Significant clearing of vegetation			
on-reserve	\$220 000 and/or 5 years in prison	\$3000 <sup>67</sup>	\$2000 + provision to make good damage <sup>69</sup>
off-reserve	\$5500 (in some cases)	\$1 000 000 plus direction for remedial action + \$10 000 a day that remedial action is not taken <sup>68</sup>	\$120 000 plus ability to make good damage <sup>70</sup>

As indicated in table 1, the maximum possible penalties imposed by the NC Act are generally less than those contained in similar NSW and Victorian legislation, except for significant damage within the park estate.

Under the NC Act it is unclear whether the penalty to take, harm or sell a native animal or plant is for the overall offence committed or for each unit of animal or plant. This uncertainty was evident in a case where 22 kangaroos were shot in Namadgi National Park. Other legislation such as the *Wildlife Act 1975* (Vic) and the *National Parks and Wildlife Act 1974* (NSW) have penalties that apply to each individual animal affected, or have a set amount for an offence and then an added amount for each animal involved.

### Have your say

*Are the levels of penalties available under the NC Act appropriate?*

## 5.5 Wider application of strict liability offences

A strict liability offence is one in which a person will be presumed to have intentionally committed the offence unless they can reasonably and honestly demonstrate their innocence.<sup>71</sup>

Currently strict liability offences under the NC Act are limited to

those that involve clearing of vegetation or damaging of land on reserved lands. Expanding the use of strict liability offences would allow issuing of infringement notices for such activities as illegal access to reserves, keeping wild animals or collecting firewood.

The Legislative Assembly Standing Committee on Legal Affairs, in its Scrutiny Report no 38 of the Fifth Assembly<sup>72</sup> expressed concern that application of strict liability may impinge on human rights, particularly if a person is imprisoned for an offence. Strict liability offences are therefore seen as only suitable for lower level offences that do not have penalties of imprisonment or fines in excess of 60 penalty units (\$6600). The committee restated that for an offence to qualify as strict liability it must be demonstrated:

- why a no fault element should be required for the offence
- why, if a no fault element is required, a defendant should not be able to rely on some defence and, in particular, one of having taken reasonable steps to avoid liability.<sup>73</sup>

The committee considered that strict liability should be introduced only after careful consideration on a case-by-case basis of all available options and that it would not be proper to base strict liability on mere administrative convenience or on a rigid formula.<sup>74</sup>

In May 2010 the ACT Government provided a response to the Standing Committee's report on *Strict and Absolute Liability Offences*. There were two key aspects of the response. One was

the view that strict liability offences are a significant component of modern legal systems—they are not inherently wrong. Secondly, the government believes that the ‘licensing approach’ articulated in Canadian jurisprudence is the test that should be applied to determine whether a strict liability offence is justifiable. That is, strict liability may be justified if it applies to people who choose to engage in a regulated activity, or are on notice that they are engaging in a regulated activity.<sup>75</sup>

### Have your say

*Is there a case for the expansion of strict liability offences under the NC Act? If so what sort of offences?*

## 5.6 Powers of search and seizure

Compared with contemporary conservation and environmental legislation, the NC Act has limited powers of entry, search and seizure. For example under the ACT’s *Environment Protection Act 1997* (the EPA Act) authorised officers have powers to require an occupier of premises to answer questions or to make any record or document kept on the premises available if an offence is reasonably suspected.

Section 133 of the NC Act allows for the seizure of any animal, plant, substance or thing if it is reasonably believed that an offence was committed under the NC Act. A major issue is the unauthorised possession and/or use of keys to parks and reserves. Currently, such use is not an offence and authorised conservation officers have no powers to demand the return of unauthorised keys. Similarly, the cutting of fences, locks or gates is not specified as an offence under the NC Act, and therefore wire cutters or other such equipment cannot be seized. It would help compliance activities if it was also an offence not to surrender such equipment when asked to do so by an authorised officer.

### Have your say

*Are the current powers of search and seizure under the NC Act adequate?*

## 5.7 Application to Commonwealth land

The Australian Capital Territory (Self-Government) Regulations 1989 (Cwlth) identify the NC Act as a law of the territory that binds the Commonwealth. However, it is a complex situation, as the NC Act has no effect to the extent that it is inconsistent

with a Commonwealth law. A territory law is not inconsistent with a Commonwealth law simply because it requires a licence for an activity which is also required to be licensed under Commonwealth law.<sup>76</sup>

Accordingly, Commonwealth authorities and their employees, contractors and agents are required to be licensed under the NC Act to carry out any activity that requires a licence under the NC Act. However, if a Commonwealth law has approved or prohibited a particular activity then this decision would prevail over the NC Act.

The National Capital Development Authority refers to the Conservator most major activities by the Commonwealth that could affect the ACT’s biodiversity. However, the usual administrative practice has not been to issue licences under the NC Act or to undertake compliance auditing for activities on designated land, Commonwealth land, or activities undertaken by the Commonwealth.

Commonwealth land includes areas around Lake Burley Griffin such as Stirling Ridge (National Capital Authority), Government House, Yarralumla (Office of the Official Secretary to the Governor General), the Ginninderra experimental station (CSIRO) and the Belconnen Naval Transmission Station and Majura Training Area (Department of Defence).

## 5.8 Inter-relationship with Commonwealth environmental legislation

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the Australian Government’s central piece of environmental legislation. Dr Allan Hawke headed an independent review into the EPBC Act and its objectives. The final report of the review was publicly tabled on 21 December 2009. The Commonwealth is yet to formerly respond to the review. Nevertheless, the review includes several findings and recommendations on the relationship between the Commonwealth, states and territories regarding environmental regulation.

Of particular relevance to the review of the NC Act are proposals for:

- the Commonwealth, state and territory governments to move to a single national list of threatened species
- the introduction of ‘ecosystems of national significance’ as a new category and trigger for Commonwealth involvement
- streamlining approvals through earlier engagement in the planning process and greater use on strategic assessments and bioregional planning
- the development of a national biodiversity banking system, and in the interim, the accreditation of state and territory schemes.



In many cases, activities that clear native vegetation or habitat within the ACT need to be considered under both the NC Act and EPBC Act. This is because much of ACT's lowland vegetation is listed under the EPBC Act as being of national significance, while most lowland vegetation is also potential or known habitat of plants and animals considered to be of national significance.

The Hawke review calls for more integrated Commonwealth and state/territory considerations. The review of the NC Act will have to consider potential synergies in terms of potential changes to the EPBC Act and strive for more effective approval processes and conservation outcomes.

Potential new approaches raised elsewhere in the discussion paper that are consistent with the direction of the Hawke recommendations include:

- the ability of the Conservator to certify strategic planning exercises as fulfilling NC Act license requirements (section 2.2.1)
- review of the listing categories for special protected species (section 10)
- a shift of focus from single species conservation to that of landscape (section 2).

A separate policy on biodiversity offsetting (or banking) that aligns with Commonwealth Government principles is also being developed for consideration by the government.

### Have your say

*Are there further reforms required to better integrate Commonwealth and ACT nature conservation law?*

## 6. Consistent management of public lands

### 6.1 Extension of lands to which Part 8 of the NC Act may apply

The *Roads and Public Places Act 1937* applies to all territory public lands. This Act regulates damage and repair to public lands, construction and excavation, the use of signs and the removal of abandoned cars and other unauthorised objects. However, in comparison to Part 8 of the NC Act it has a fairly limited scope. Offences established under Part 8 of the NC Act (that is, no carrying of weapons, camping only in designated area, driving only on designated roads, not damaging natural or

constructed features etc.) currently only apply to nature reserves, national parks and wilderness. Public land managers think that they should also apply to other public lands such as special purpose reserves and protection of water supply, which are often embedded in reserve areas, and may have considerable conservation value.

The Lower Cotter Catchment, currently zoned Public Land—Water Catchment, provides a good example of why it may be appropriate for more consistent management provisions across public lands. This area is currently being restored from former pine plantation forest to native vegetation. Part of the overall catchment management program is dealing with public access and use, and a draft Recreation Strategy proposes to prohibit or limit some recreational activities to protect water supply values. However, there is only a limited basis for enforcing such restrictions on Public Land—Water Catchment. Legislation could be amended to provide such restrictions.

Many of the special purpose reserves are actually picnic areas within or adjacent to nature reserves or national parks and are managed in a unified manner. The boundaries and values between nature and special purpose reserves are often difficult to distinguish, both on the ground and by the extent of conservation values present. For example, the 14-hectare Pine Island Special Purpose Reserve supports significant vegetation and is the habitat of at least four threatened species. The fact that different legislative requirements apply to the Pine Island lands complicates management and in particular regulation enforcement. For example, the Conservator does not have the same powers to restrict access to special purpose reserves as are provided for under the NC Act. Schedule 3 of the Planning Act provides the management objectives for the different types of public lands. Whereas nature conservation is paramount in wilderness, nature reserve and national parks, recreational and educational community use is the management objective for special purpose reserves. Even though different management objectives apply, the offences provided by Part 8 of the NC Act are not ones that would unduly restrict recreational or educational pursuits.

The differences as to what public lands the NC Act applies to could have perverse outcomes for enforcement. A person clearing native vegetation on the slopes of Tidbinbilla (a reserve area) faces a maximum penalty of \$200 000 and/or 5 years' imprisonment, but if the same level of clearing in the same vegetation community of the same quality occurred in the valley (a special purpose reserve) the maximum penalty is \$5000 and/or 6 months' imprisonment.

There may be a case for the provisions of Part 8 of the NC Act to apply to all public land.



The values of the Canberra community have been canvassed for the various Neighbourhood Plans and the Community Value Statements prepared by the former Local Area Planning and Advisory Committees. In virtually all documents, people equate reserve and open space areas and place their protection as a key if not the most important issue of concern.

It is also relevant that under section 320 of the *Planning and Development Act 2007*, it is required that a management plan for all public land be prepared by its custodian, and that it has to be prepared with comment from the Conservator of Flora and Fauna, established under section 7 of the NC Act.

Other options to address the issue of inconsistency across public land management would be to expand the provisions currently available under the *Roads and Public Places Act 1937*, or to only expand the provisions to those lands in most need of the provisions such as special purpose reserves, protection of water supply, urban open space or lakes.

The Department of Territory and Municipal Services (TAMS) is of the view that a major impediment to legal enforcement is the lack of consistent enforcement powers across all land management legislation. A desirable goal of land management is that government agencies managing land are provided with a consistent, easy-to-use range of permissive and enforcement powers. It is possible that such powers would not necessarily sit under the NC Act, but could be placed in other land management legislation, such as the *Planning and Development Act 2007*, the *Lakes Act 1976* or the *Roads and Public Places Act 1937*.

### Have your say

*Should the provisions that control public activities in reserved areas be extended to public activities in open space and unleased lands generally?*

## 6.2 Non-conservation uses and activity in reserves, national parks and wilderness

Development within the reserve network has been relatively common, and at least some of this development has occurred when there may have been suitable off-reserve alternatives available.

The Planning Act and new requirements for impact assessment may improve the situation on reserves where it applies (that is, non-designated land).

Conservation legislation in other jurisdictions, such as the *NSW National Parks and Wildlife Act 1974*,<sup>77</sup> is much more prescriptive. For example, in NSW certain infrastructure developments will only be approved on NSW reserves if, among other considerations, there are no prudent and feasible alternatives off-reserve. Facilities have, wherever possible, been co-located with existing infrastructure or on existing disturbed land and the proposal disturbs the smallest possible area.<sup>78</sup>

Major use and management of the reserve network in the ACT, outside of Commonwealth designated land, is regulated by four requirements of the Planning Act:

1. A management plan must be prepared for all public land, and all activities on an area of public land must be consistent with the relevant plan of management.
2. There must be adherence to the overall management objectives for public lands, as detailed in Schedule 3 of the Planning Act. The Planning Act also makes provision for the Conservator to determine additional management objectives for a specific area of public land.
3. Licences or leases must be obtained, which on public land require the approval or agreement of the Conservator of Flora and Fauna.
4. Uses that are allowed (without assessment), allowed (with assessment) or prohibited for each zone under the Territory



Plan must be identified. Reserved land does not have its own specific zoning, but most reserved land falls within the Mountains and Bushland Zone, the Hills, Ridges and Buffer Zone or the River Corridor Zone under the Territory Plan. Under these zonings, on-reserve activities that include earthworks would need development approval and be assessed under the merit or impact codes, only if they constitute development as defined under the Planning Act and are not exempted by regulation.

Management plans tend to be broad overarching documents that set management principles, but do not provide specific guidelines on how to implement management. Currently this guidance is through internal departmental guides and policies, which may be open to differing interpretations. One option is for the NC Act to provide greater statutory management direction for reserved lands by establishing codes of practice as disallowable instruments. These could be general in nature or relate to specific issues such as kangaroo management. The NC Act could also mandate work plans for particular classes of activity on reserved lands.

The NC Act currently provides no guidance on the Conservator's consideration of licences and leases for non-conservation uses. Nor are there specific provisions for the Conservator to monitor licence compliance or enforce conditions or order remediation of environmental harm.

### Have your say

*Should the NC Act indicate how to determine the appropriate uses for reserved lands (or other types of public land)?*

*Should certain types of activities have regulated management requirements?*

#### 6.2.1 Implementation of non-conservation uses

The activities of authorities working within the ACT's reserved areas is of concern. In 2006 various Parkcare and community groups compiled a long list of impacts resulting from on-park activities by outside proponents.<sup>79</sup> These included causing a large erosion gully, the dumping of soil and building materials, excessive vegetation clearance and degradation to tracks and vegetation from heavy machinery operations in wet weather. Some of these disturbances lasted or have lasted for years without redress.

Provisions within the NC Act for regulating such activity have been under-used and problematical.

Part 10 of the NC Act allows the Conservator to propose to utilities and telecommunications entities that they voluntarily enter into management agreements where the agency's activities may conflict with land management objectives on public and unleased territory land. There are no provisions in the NC Act that relate to the management of other users, such as surveyors or builders who want to access a neighbouring property through the reserves.

If a utility or telecommunication entity declines to enter into such an agreement, the territory can recover reasonable costs for the repair of any damage caused by the entity's activities. Similarly, if a utility or entity acts in a manner inconsistent with a valid management agreement the territory can recover any cost reasonably incurred with the repair of any damage caused by activity inconsistent with the agreement.

Two management agreements currently exist, one with Transgrid (for its power line easements) and the other with Actew (for water reservoirs). A third agreement with ActewAGL to cover pipelines and electricity easements is in progress. This last agreement has taken years to develop, and during this time, there has been no ability to recover costs for damage done to the reserve network as part of pipeline and electricity line works. At the time of writing, no agreements have been entered into with telecommunication companies and no entity has refused to enter into an agreement.

The cost of establishing and monitoring management agreements is borne by the territory.

In other jurisdictions conservation managers are able to charge a developer fees for the conservation input of their staff (that is, expertise and time spent assessing developments). They are also able to charge up-front performance-based restoration bonds before any work starts. An example of the type of measures implemented elsewhere can be found at <http://www.environment.nsw.gov.au/resources/protectedareas/08370ProponentsREFGuide.pdf>.<sup>80</sup>

### Have your say

*Should the Conservator be able to issue orders for restoration work on reserved land and/or to cover the cost of reserve staff involvement in assessing the activity?*

# Part two: Specific issues—those that relate to a part of the NC Act

## 7. Part 1 of the Act—Preliminary

### 7.1 Objects of the NC Act

The NC Act, unlike more recent legislation, does not contain an objects clause. The only indicator of its purpose is the heading:

An Act to make provision for the protection and conservation of native animals and native plants and for the reservation of areas for those purposes.

The Nature Conservation Strategy, prepared as a requirement of the NC Act, sets out the goals and objectives for nature conservation in the ACT.

The key objective is ‘to protect our biological diversity and maintain ecological processes and systems’. Individual goals incorporate ecologically sustainable land use and integration of a nature conservation network.

Documents containing the planning, conservation and natural resource management objectives are listed in the introduction to this paper. These objectives include maintaining ecosystem function and resilience as well as promoting ecologically sustainable development.

Goals also include enhancing or improving the condition, extent or diversity of wildlife and vegetation.

In addition to plants and animals, legislation in other jurisdictions often consider a wider range of conservation values such as geological, landscape or aesthetic cultural values. It may also specify that conservation is sought for communities, populations, genetic levels and habitat.

Other legislation dealing with the management of reserve areas may also have an objective of facilitating recreation or research that is compatible with conservation management.

Some jurisdictions also include Indigenous involvement in land management as an objective.

Examples of equivalent legislation with stated and broader objectives include the *National Parks and Wildlife Act 1974* (NSW), the *Threatened Species Conservation Act 1995* (NSW) and the *Flora and Fauna (Guarantee) Act 1998* (Victoria).

It can be argued that specific ecologically sustainable development (ESD) principles of intergenerational equity and conservation of biological diversity and ecological integrity are particularly relevant to the NC Act provisions that deal with protecting native plants and animals and their associated ecosystems, including reserved areas.<sup>81</sup>

Clearly spelt out objects may assist in the legal interpretation of the Act.

As detailed previously, conservation objectives from other ACT planning and resource management documents that could be relevant include:

- no-net-loss of significant vegetation or biodiversity
- maintaining and enhancing connectivity and ecosystem resilience
- reducing the degree of landscape fragmentation and repairing and maintaining the lowland landscape so that it is sustainable
- best practice management of the ACT’s reserve network
- the ACT reserve network continuing to make an outstanding conservation contribution to lowland vegetation both regionally and nationally.



## Have your say

*Should objects be incorporated in an objects section in the NC Act?*

*What do you consider would be appropriate objects?*

## 8. Part 2 of the Act—the conservator and flora and fauna committee

### 8.1 Role of the Conservator

Under section 7 of the NC Act, the Chief Executive must appoint a public servant as the Conservator of Flora and Fauna. The role is similar to that of the Chief Executive established under conservation legislation in other jurisdictions.

Section 11 of the NC Act provides for the Conservator to delegate functions to conservation officers.

In summary, the powers and the functions of the Conservator are:

- the preparation of a draft nature conservation strategy
- declaring protected and exempt flora and fauna
- preparing action plans—following declaration of vulnerable or endangered species, community or threatening process by the Minister
- licensing for the taking, dealing or keeping of wildlife
- declaring the prohibition of certain organisms
- giving conservation directions
- restricting access to, and activities conducted in, reserved areas
- entering into voluntary management agreements with utilities and telecommunications agencies.

The Conservator also has primary responsibility for approvals for the *Tree Protection Act 2005* and the *Fisheries Act 2000*.

The Conservator provides strategic advice to government on planning and nature conservation issues affected by development proposals and on the creation and management of nature reserves.

In relation to development applications and the approval process, the Conservator’s primary functions under the Planning Act involve the following.

1. **Leases.** The Conservator’s approval is required for the ACT Planning and Land Authority to grant a lease of public land. Leases cannot be granted over wilderness areas.

2. **Licences.** The Planning Authority must not grant a licence to occupy or use an area of unleased territory land unless the Conservator agrees in writing (Planning Act section 303(2)).
3. **Development applications (DAs).** If a DA is subject to merit or impact track assessment, the Planning Authority cannot issue a DA if a registered tree or declared site will be affected (as declared under the *Tree Protection Act 2005*) without the consent of the Conservator (sections 119(1)(c) and 128(1)(b)(iii) Planning Act).

All such DAs must be referred to the Conservator for advice, unless circumstances prescribed by section 148(2) of the Planning Act exist—that is, the Planning Authority is satisfied the entity has already been adequately consulted within the last six months, or the entity has already agreed in writing to the proposed development.

Once advice is provided the Conservator must act in accordance with that advice, unless significant new information arises. Thus, if the Conservator advised there were no concerns with a proposal that required a licence under the Act, the Conservator would be bound to issue a licence.

The Planning Authority must make a decision on a referred application consistent with the Conservator’s advice unless a contrary decision is necessary for consistency with the Territory Plan, and then only if all advice and guidelines have been considered and all reasonable design options considered.

The Planning Authority cannot make a decision contrary to the Conservator’s advice in relation to registered trees or declared sites.

#### 8.1.1 Development applications

There are currently areas where there is some lack of clarity on the relationship between approvals required under the NC Act, and development approval under the Planning Act, e.g. whether there is a conflict between the requirement to hold a licence, under section 43 of the NC Act, to interfere with a native animal nest on land the subject of a development approval under the Planning Act.

A person acting under a DA would not require a licence for an approved activity that involves clearing native vegetation on reserve land (section 80) or damaging reserve land (section 89). A person is able to fell or damage timber ‘with reasonable excuse’ (section 52). It is not clear whether the possession of a DA would constitute a reasonable excuse.

Because there is uncertainty about the relationship of actions requiring approval under the NC Act (and the Conservator’s role) and some decisions made under the Planning Act, it would be useful to consider providing for the Conservator to specify when

a licence will not be required because activity will be approved under a DA.

It would then be clear that the Conservator has primary responsibility for nature conservation in the ACT.

Care would be needed so the DA process is not affected by any changes to the NC Act or the way current provisions are implemented. In particular, that changes to the Act do not:

- increase overall assessment and approval time for development projects—through increases in processes and decisions
- reduce the ability for integrated processes and outcomes on development assessment
- remove the ability of the development assessment authority or its Minister to balance inputs that affect planning and reflect the triple bottom line of the Planning and Development Act's objects.

### 8.1.2 Land management

In a report on Lowland Native Grassland of the ACT,<sup>82</sup> the Commissioner for Sustainability and the Environment concluded that the territory's planning and nature conservation legislation needs to be streamlined. The Commissioner considered it appropriate for Parks and Conservation (TAMS) to be fully responsible for administering land management agreements and recommended that all land management matters be covered by the NC Act. The Commissioner questioned whether planning legislation is the appropriate vehicle for directing management planning of nature conservation areas.

However it is not clear that public land management plans produced under an amended NC Act would be different from those currently produced under the Planning Act. Given that the Planning Act establishes appropriate land uses and that developments must accord with plans of management it is appropriate that the planning authority continue to have involvement in approval of plans.

However, it is likely that the government's land management agency may be better able to establish, monitor and enforce management plans. In this context, the Commissioner recommended, in relation to land management agreements, that a formal monitoring, assessment and auditing process be established within a strong culture of compliance enforcement. This would require amendments to the NC Act.

### 8.1.3 Powers and delegations

Under section 11 of the NC Act, the Conservator can delegate any of its functions to a conservation officer. In practice

licensing, enforcement and reserve management powers are largely undertaken by conservation officers within the Department of Territory and Municipal Services. The Conservator has not delegated the power to issue conservation directions or to declare protected or exempt flora and fauna.

Further potential expansions of the Conservator's powers or duties are raised elsewhere in this paper. Key points for discussion include:

- application of Part 8 provisions to all or a wider range of public lands. Part 8 regulates access and other activities on reserve land and prohibits clearance and damage to land within reserves (see section 6.1)
- an ability for the Conservator to approve conservation agreements or other 'private' land conservation initiatives (see section 3.1)
- an ability to endorse strategic assessments that would remove the need for developers to apply for individual licences within a specified area (see section 1.2.2.)
- expanded powers to recover removal and restoration costs for illegal activities and encroachment and to allow for performance bonds (see sections 5 and 6.1).

The Commissioner for the Environment can investigate complaints made against the conservation management of the Conservator. Part 12 of the NC Act also allows for review by the Administrative and Civil Appeals Tribunal of many of the Conservator's decisions. The ACT Legislative Assembly also reviews all Conservator decisions that are in the form of disallowable instruments.

## Have your say

*Do you think that the current role of the Conservator is appropriate? If not, how could it be improved?*

## 8.2 Flora and Fauna Committee (FFC)

The Flora and Fauna Committee (FFC) is an expert committee established under the NC Act to provide scientific advice on conservation matters to the Minister for the Environment and to exercise powers as prescribed under the NC Act.

The committee's mandate is therefore broad ranging in relation to biodiversity conservation matters.

The committee must comprise seven experts in biodiversity and ecology, at least two of whom must not be public servants. Currently one public servant is a member.

A major task is to advise the Conservator on which species or





communities should be declared vulnerable or endangered in the ACT and what are threatening processes. The committee therefore requires people with expertise on the ecology of particular species and communities as well as broader expertise in ecosystem structure and function. The committee is also responsible for establishing the criteria by which a species or community will be judged as endangered or vulnerable. The Marsden Jacob Associates report recommended expanding the range of expertise of the Committee to ensure a greater understanding of broader threatening processes and risks, and how these are considered under other key decision making frameworks, especially land use planning.<sup>83</sup>

Under section 15 of the NC Act, the Conservator’s annual report must include any directions given by the Minister to the Flora and Fauna Committee about nature conservation and a statement about the actions taken to give effect to the Minister’s directions.

### 8.3 The Natural Resource Management Advisory Committee (NRMAC)

The Natural Resource Management Advisory Committee (NRMAC) is a non-statutory expert advisory committee that has been operating in its present form since 2006.

Appointments are ministerial appointments regulated by the relevant provisions (Chapter 19) of the *Legislation Act 2001*. The committee advises the Minister on natural resource management issues in the ACT and surrounding region. The type of advice provided requires expertise in ecosystems and landscape wide processes, including threats such as climate change, weeds, management of fires and feral animals.

In relation to giving expert advice, there is overlap between flora and fauna and natural resource management issues. Changes to the NC Act could mean it will have a greater focus on ecosystems and connectivity, increasing the likelihood of overlap.

There is, therefore, the potential to either merge the two advisory committees or to formalise both and their respective species and communities or landscape focuses.

The Department of Territory and Municipal Services (TAMS) has proposed that a merged FFC and the NRMAC may be called the Parks and Conservation Advisory Committee (PCAC) and given a statutory basis under the NC Act.

The NRMAC could expand its focus to provide advice and technical expertise to the Conservator and government on the management of parks and open space.

## Have your say

*Is it appropriate that the Flora and Fauna Committee and the Natural Resource Management Advisory Committee be merged?*

*Is there any advantage in the role of the Natural Resource Management Advisory Committee being legally established as a statutory committee?*

*Do you think the role of the Flora and Fauna Committee should be expanded?*

### 8.4 Mechanisms to seek community input

In addition to the role of expert committees, nature conservation legislation in other jurisdictions often provides for the establishment of formal community representative groups.<sup>84</sup> These can be either a collection of representatives from peak bodies that operate across the whole state or locals with an interest in a particular park.

Given the relatively small size of the ACT and other avenues for community input, there may not be the need for the NC Act to provide for formal representative bodies. In many circumstances it may also be desirable that consultation be flexible and responsive to particular needs rather than being tied by formal legislative requirements.

Wider community views are currently sought through informal ACT-based consultative groups, based around key stakeholder interests and non-government organisations such as recreational users, rural landholders or conservationists.

In addition, public consultation is required before the adoption of any public land management plan, action plan or conservation strategy. Typically, a variety of methods for engaging the community will be undertaken as part of this consultation, including formal workshop sessions and public forums as well as talks and departmental briefings with interested individuals and organisations.

It is also recognised that the broad strategic direction of land use planning in the ACT is important to conservation objectives, and the ACT government has put in place, through the Planning Act, a comprehensive public consultation process for variations to the Territory Plan

Guidance is provided by the *ACT Government Community Engagement Manual*,<sup>85</sup> which requires feedback to be provided to the community following community consultation. The

government also employs coordinators and facilitators who work with the community in conservation management. Many hundreds of people are involved in catchment groups: Park Care, Landcare, Waterwatch, ACT River Rescue and ACT Land Keepers. These groups are an avenue for the community to play an active role in reserve and natural asset management and allow focused input.

Both the Legislative Assembly Standing Committee on Planning and Environment<sup>86</sup> of the 6th Legislative Assembly and the ACT NRM Plan<sup>87</sup> have recognised that the experience and knowledge of Aboriginal people should influence the management of Namadgi National Park and the ACT's natural resources generally.

Such involvement should support the long-term social and economic advancement of the Aboriginal community, reconnect the Aboriginal community with their NRM heritage and build relationships that facilitate information sharing.<sup>88</sup>

A recent government proposal is to recognise the United Ngunnawal Elders Council (UNEC) as an Aboriginal Land Management Advisory Committee with a specific non-statutory role to provide advice on Aboriginal issues related to parks, open space and land management, including Namadgi. UNEC would provide advice directly to the Conservator and the Minister. A TAMS proposal is for UNEC to recommend a member to also be on the proposed PCAC. UNEC could also provide specific advice on Aboriginal perspectives to the PCAC.

The Labor Government's 2008 election commitments included that in consultation with the Ngunnawal people it would:

... explore the potential for developing cultural tourism opportunities in the ACT that are led and delivered by local Indigenous people, particularly in Namadgi National Park, over which the Ngunnawal people share management responsibility with the Territory.

ACT Labor's policy platform of 2008–09 included a commitment to 'negotiate a settlement with all ACT Indigenous native title claimants which includes (among other things) co-management of national parks with Indigenous people'.

The NC Act will need to contain a clause that allows the Minister and/or Conservator to cooperate with Aboriginal people about land management.

### Have your say

*What would be an appropriate model by which Indigenous groups were engaged under the Act?*

*Is there a need for a formal community consultation body representing conservation interests?*



## 9. Part 3 of the Act—Nature conservation and declarations

### 9.1 Nature Conservation Strategy

The ACT Nature Conservation Strategy, written in 1997,<sup>89</sup> provides a framework for a coordinated and strategic approach to protection of the ACT's biological diversity and the maintenance of underpinning ecological processes. The strategy represents a broad consensus on the territory's nature conservation priorities and what are the most effective ways of securing a sustainable environment.

A review of the strategy has begun and is expected to be completed by 2011.

The 1997 strategy reflected the goals contained in the National Strategy for the Conservation of Australia's Biological Diversity written in 1996. In October 2010 the Commonwealth released *Australia's Biodiversity Conservation Strategy 2010–30*. The Commonwealth's Strategy provides a guide for the ACT in developing its own revised Nature Conservation Strategy.

The current strategy has guided the development of current conservation policy and subsequent action. It has not generally directed considerations under the NC Act or been used in the consideration of DAs under planning legislation, but could be. For example, an Environmental Impact Statement could be required for any DA involving the clearing of native vegetation that could have a significant impact on land identified in a conservation strategy or action plan. However, it may be better to ensure that in dealing with key government land use and development strategies (such as land release) that these issues are dealt with at an early stage using strategic environmental assessment under the Planning Act. This could involve biodiversity certification similar to that recently adopted in NSW.

The strategy could also incorporate goals and targets from non-statutory conservation planning documents such as the *Bush Capital Legacy Plan for Managing the Natural Resources of*



the ACT or the *Kangaroo Management Plan*.<sup>90</sup> This would give the targets in these documents more weight as there is the possibility of legal recourse if they are not complied with.

Alternatively, amendments to the NC Act could be made to allow ACT-wide strategy or give statutory force to policy documents such as the *Kangaroo Management Plan*, provided due process is followed, as is required for the strategy. For example, the strategy could be released for comment or referred to the Standing Committee of the Assembly and finally the Assembly itself.

The NC Act contains no provision for amending the strategy. It may be useful for it to do so, particularly if the strategy played more of an active role such as in the identification of wildlife corridors (see section 1).

### Have your say

*Should the NC Act establish a formal mechanism and timeframe for reviews of the Nature Conservation Strategy?*

*How could the role of the strategy in defining areas that require landscape-wide consideration be better integrated with the ACT's strategic land use planning process?*

*Should the NC Act allow for amendments to the strategy? If so, given the potential impact on land use planning, should this adopt a transparent public process similar that used for Territory Plan variations?*

*Should the NC Act allow for some policy documents to be given statutory force? If so, which and why?*

## 9.2 Declaration of special protection status, protected and exempt species

### 9.2.1 Special protection status (section 33)

Declaration under this section by the Conservator gives the highest level of protection to migratory animals and native animal or native plant species. Special protection status (SPS) is the highest level of statutory protection that can be given, providing for increased penalties for unauthorised activities and tighter licensing constraints.

The Conservator declares the members of a species of native animal or plant to have SPS if:

- the protection of the species is the object or part of the object of an Act of the Commonwealth or of an international agreement entered into by the Commonwealth
- there are reasonable grounds to believe the species is threatened by extinction
- the Minister makes a declaration under section 38 that the species is endangered or vulnerable.

The current declaration under this section is Nature Conservation (Special Protection Status) Declaration 2005 (No. 1), DI2005–64. 6 May 2005 (<http://www.legislation.act.gov.au/di/2005–64/current/rtf/2005–64.rtf>).

Although many of the species on the list do not commonly occur in the ACT, their listing prevents the selling, dealing or keeping of them (either dead or alive) or parts of them in the ACT without a licence.

### 9.2.2 Declaration of protected and exempt flora and fauna (section 34)

Declaration under this section by the Conservator protects specified fish and invertebrate species (Schedule 1), exempts certain animal species (Schedule 2), and protects specified native Australian plants (Schedule 3) and protected native animal species (Schedule 4).

In making a declaration, subsection 34(2) states that the Conservator shall take into consideration:

- the need to protect native plants and animals and native plants generally in the territory
- the need to conserve significant ecosystems of the territory, NSW and Australia; and in respect of native fish or invertebrates, plants or animals, the specialised welfare and security requirements.

A native fish or invertebrate species is declared protected in Schedule 1 if any of the following apply.

- It is a special protection status (SPS) species declared under section 33 of the NC Act.
- It needs the same protection as a native plant or animal species—that is, protection from being taken or killed in the wild, and control of commerce in the species. These species are known as ‘species of concern’, which include threatened species, but also include species where commerce in them has the potential to place pressure on the wild populations of the species.
- It is on the ANZECC List of Threatened Fauna.

The ANZECC list has been replaced by the EPBC Act, which now provides for the listing of nationally threatened native species

and ecological communities, native migratory species and marine species. Given these changes, a review of species listed on the schedules is needed.

An animal species declared exempt may be a native species or an exotic species.

A native animal may be declared exempt in Schedule 2 if:

- it is a species bred in captivity whose keeping is not known to pose a threat to wildlife
- there is no public safety issue associated with the keeping or commerce of the species
- there is no administrative reason for having a licensing requirement for data collections or records management.

An exotic animal may be declared exempt in Schedule 2 if:

- it is considered unlikely to establish a wild population, exacerbating existing pest populations, or introducing a disease to wild populations
- keeping or commerce in the species will not pose a threat to wild populations of a native species
- there is no public safety issue in keeping or commerce of the species
- there is no administrative reason for having a licensing requirement for data collections or records management.

A native plant species is declared protected in Schedule 3 if:

- it is a special protection status (SPS) species declared under section 33 of the NC Act
- it is necessary to control commerce in the species to reduce pressure on the plant in the wild.

A native animal species is declared protected in Schedule 4 if trade and commerce in the species has the potential to add pressure on species in the wild. These species are known as 'species of concern', which include threatened species, but also include species where commerce in them has the potential to place pressure on the wild populations—for example, species desirable to catch and easy to catch in the wild.

The current declaration under this section is Nature Conservation Declaration of Protected and Exempt Flora and Fauna 2002 (No. 2), DI2003–64, 9 December 2002 (<http://www.legislation.act.gov.au/di/2003-6/default.asp>).

The sections of the NC Act declaring special protection status, protection of native species and exempt fauna need to be updated to reflect changes in national species lists and improved knowledge of uncommon plants and animals in the ACT.

## Have your say

*Are any other changes warranted in relation to the declaration of protected and exempt species?*

### 9.3 Declaration of species, community or threatening process

#### 9.3.1 Criteria and guidelines for declarations (section 35–37)

The Flora and Fauna Committee has authority under section 35 of the NC Act to specify criteria for determining whether it should recommend the making of declarations under section 38.

In specifying criteria the committee has regard only to factors relevant to the conservation of a species or ecological community, or the ecological significance of a threatening process. The committee must undertake public consultation on proposed criteria and guidelines (section 37). The criteria, once specified, are made as a disallowable instrument and therefore need approval from the Legislative Assembly.

The current criteria and guidelines for declaration are specified in Nature Conservation (Criteria and Guidelines for Declaring Threatened Species and Communities) Determination 2008 (No. 1), DI2008–170, 4 July 2008 (<http://www.legislation.act.gov.au/di/2008-170/default.asp>).

The guidelines as specified invite any person to make a nomination for declaration for assessment by the committee.

The criteria and guidelines for declaration in DI2008–170 allow for declaration of a threatening process. However, while 32 vulnerable or endangered species and two endangered communities have been declared (see 9.3.2 below), no declaration of a threatening process has yet been made. By contrast NSW currently has over 30 declarations of threatening processes in place.

#### 9.3.2 Broadening the scope of declarations that can be made

*Providing protection to endangered ecological communities*

There is no direct protection of endangered communities in the NC Act. Action plans for endangered communities inform and guide development and planning. However, it is possible that a person might interfere with or damage an endangered community without committing an offence under the NC Act,



particularly where individual components of the community are not themselves endangered or protected.

The protection measures within NSW conservation legislation apply equally to species and communities. As an example, under section 118A of the NSW *National Parks and Wildlife Act 1974*, it is an offence for a person to pick any plant that is of, or is part of, a threatened species, an endangered population or an endangered ecological community.

The NC Act could be amended to include protection of endangered ecological communities.

#### *Ecosystem connectivity*

Part 1 of the discussion paper discusses the option of declarations being made under the NC Act to protect key areas for the maintenance of connectivity across the territory.

### **9.3.3 Declaration of a species, community or process (section 38)**

The current declaration is Nature Conservation (Species and Ecological Communities) Declaration 2010 (DI2010–194) (<http://www.legislation.act.gov.au/di/2010–194/>).

Section 38 of the NC Act declares a species as endangered or vulnerable or a community as endangered.

#### **EPBC listing of threatened species**

Part 13 of the EPBC Act defines the following categories for species:

- extinct
- extinct in the wild
- critically endangered
- endangered
- vulnerable
- conservation dependent.

The EPBC Act has the following categories for communities:

- critically endangered
- endangered
- vulnerable.

The EPBC Act has increasing penalties for offences associated with the differing categories, which reflect an increasing likelihood of extinction.

Currently the Commonwealth has listed one critically endangered community and three critically endangered species that occur in the ACT. Three species listed by the Commonwealth—Yellow Spotted Tree Frog [*Litoria castanea*], Green and Golden Bell Frog [*Litoria aurea*] and Warty Swamp Frog [*Litoria raniformis*]—may now be extinct in the ACT.

Given that the ACT has only 32 listed entities, in comparison to the more than 1000 listed by the Commonwealth for Australia, the current categorisation in the ACT may be sufficient. However, common categories and definitions of categories may reduce confusion and aid consistency and alignment of the lists. It is noted that the EPBC Act is currently under review, and there may well be discussion about the appropriateness of the current categories in the EPBC Act.

Ecological information on threatened species may be scarce, so that the basis for distinguishing which species should be allocated to which category can be arbitrary. This problem becomes amplified with multiple categories.

Although a species may be classified as critically endangered nationally, it does not necessarily mean that the situation in the ACT and region is as dire. For example, the Golden Sun Moth is relatively widespread in the ACT, whereas other species, such as the Brown Treecreeper, may be common nationally, but near extinction in the ACT. The FFC considers species from an ACT and regional perspective when assessing species status.

It may be worth considering one new category for the NC Act, that of regionally extinct. This would reinforce to the general community that threat categories are about extinction, and that the ACT has already lost many species from local habitats. To add the word 'regional' would clarify the meaning of an ACT extinct listing because, unlike the Commonwealth, the focus of the NC Act is regional. Given this focus, it may also be valuable to consider opportunities for greater consistency with relevant NSW nature conservation legislation.

However, regionally extinct is not a category of the International Union of Conservation and Nature (IUCN), so extinct, which would relate to extinct in the ACT, is perhaps the most appropriate term.

The regionally extinct category could also be linked to restoration. If a species is declared regionally extinct then the Conservator could approve management plans for the reintroduction of the species provided the plans demonstrate that the introduction has a reasonable chance of success—for example, that there is suitable habitat and protection from predation.

## Have your say

*Do you think section 38 of the NC Act should be amended to incorporate greater categorisation of threatened status, and should the new categories relate to IUCN categories?*

*Should the definitions and listing categories in the NC Act and the EPBC Act be better aligned?*

## 9.4 Action plans

### 9.4.1 Draft action plan (sections 40, 41 and 42)

The Conservator is required to prepare, with community input, an action plan for a species, ecological community or threatening process that is the subject of a declaration under section 38.

Section 40 provides that draft action plans ensure as far as practicable the identification, protection and survival of the species or the ecological community, or contain proposals to minimise the effect of any process which threatens them.

Action plans have been prepared for most threatened entities, and they have proved useful in reviewing and collating information about a particular species or community and in prioritising recovery actions.

The main regulatory role that action plans may have is providing information that would form a basis for deciding whether or not an Environmental Impact Statement is required for a development, i.e. whether a development proposal was likely to have a significant adverse environmental impact on species or communities. It is noted that the government has proposed changes to the Planning Act (including schedule 4) which would give a greater formal role to the Conservator in determining whether a development proposal is likely to have a significant adverse environmental impact and hence should trigger an EIS.

Under the existing schedule 4 of the Planning Act, if a development proposal met one or more of the following criteria, an EIS would be required:

- it is likely to adversely impact on the status of a threatened or protected species or community
- it is likely to contribute to a threatening process
- the clearing of vegetation could have a significant impact on land identified in an action plan.

As discussed in section 11.3, there is an argument for the NC Act to include an offence of destroying the habitat of a threatened and protected species or community. If this amendment was made then action plans could have a role of clearly defining habitat either through mapping or written descriptions of required habitat elements.

The NC Act does not currently specify that action plans should include monitoring provisions to gauge their success, although plans generally include such a provision. Similarly the NC Act does not include a requirement or process to monitor and report progress on implementing action plans at periodic intervals, although this is a task that the FFC has performed.

As an example of how monitoring specifications can be stated, the NSW *Threatened Species Conservation Act 1995* requires that recovery plans for threatened species or communities:

state performance indicators that are to be applied to measure whether the actions identified in the plan are being implemented and are successfully promoting the recovery of the species, population or ecological community.

## Have your say

*Should the NC Act include the requirement for action plans to have formal monitoring and review provisions?*

## 10. Parts 4 and 5 of the Act—Plant and animal offences

Under parts 4 and 5 of the NC Act, a licence from the conservator is required to:

- take or kill protected plants, any native animal—excluding non-listed fish and invertebrates—or any native plant on unleased land
- interfere with a nest in a way that places native animals in danger or stops them breeding
- fell native timber on unleased land or fell native timber on leased land outside the urban area.

Interpreted literally, these existing provisions mean that virtually any clearing of vegetation on unleased land—for example, slashing; removal or spraying of a woody weed containing a nest; and so on—requires a licence.

In practice, the NC Act is implemented predominantly through legitimate administrative decisions and actions taken by ACT Government officers. However, this practice lacks transparency,



so there is little opportunity for stakeholders to challenge decisions made.

Licences are routinely required for scientific research, the culling of kangaroos, the activities of utility companies on reserves, the felling of trees on unleased land in urban areas and the destruction of nests when this is done in conjunction with the removal of a significant urban tree under the *Tree Protection Act 2005*.

If the NC Act provided greater clarity on when a licence is required and focused this requirement on important matters it may improve the transparency and effectiveness of its operation. In particular the level of risk of an activity should be a key consideration in whether or not licensing is required.

In the last three years there have been 132 'licences to take' issued, with a large majority of these licences for reserve areas. There have also been 151 'licences to kill' issued. The majority of these licences would be for off-reserve kangaroo culling, but would include some licences for activities within the reserve system. For instance, licences were issued to Parks and Conservation (TAMS) to reduce kangaroo numbers in Canberra Nature Park in line with the Commissioner for Sustainability and the Environment recommendations.

Other licences were issued for scientific purposes which included research within the reserves. There have been relatively few prosecutions or infringement notices issued for people undertaking these activities without a licence.

In summary, contributing reasons why parts 4 and 5 of the NC Act have proved challenging to implement consistently include:

- the wording of these sections makes it difficult to discriminate between major and minor actions and offences
- development approval from the Planning Authority for an activity that will clear native vegetation or harm wildlife can be used as a defence against not having an approved licence from the Conservator.

### Have your say

*How do you think the protection of plants and animals in the ACT should be regulated?*

*Is there a greater role for self-reporting by licensees on compliance? Should fees reflect the full cost of administering licences?*

## 11. Part 4 of the Act—Protection of animals and fish

This part of the NC Act makes it an offence to destroy native animal nests or to kill, take, sell, import or export, or release from captivity native animals without a licence.

### 11.1 Definition of an animal and native animal

The definition of an animal contained in the NC Act dictionary may need refinement. It excludes most fish and invertebrates but includes all protected species and both dead and alive specimens.

It may be more appropriate for the Act to adopt a more scientifically defensible definition that encompasses all fauna—mammals, reptiles, amphibians, fish, birds and insects—and then single out particular types such as fish or invertebrates for which particular provisions do not apply.

Nevertheless, the NC Act currently protects any species of native fish or invertebrate through the ability to declare them a protected species or species of special protection status. Restrictions on the keeping or sale of pest fish can be applied through the *Pest Plants and Animals Act 2005*.

The definition excludes pest animals, as defined under the *Pest Plants and Animals Act 2005*. This conflicts with the reality that under different circumstances a native animal can be both a pest and ecological asset. For example, kangaroos, wombats and dingoes are keystone species that are essential to ecosystem function, but all can cause damage to agricultural assets and be regarded as pests.

The dingo is the only native animal currently listed as a pest under the *Pest Plants and Animals Act 2005*. The killing of a dingo or wild dog, anywhere in the ACT, does not therefore in itself require a licence under part 4 of the NC Act. This has the advantage that, where a dingo or wild dog is harassing stock, a landowner can lawfully take immediate action.

However, it is difficult, without licensing, to get accurate information about the number and location of problem dingoes and wild dogs and the effectiveness of control programs. Licences currently issued for the culling of eastern grey kangaroos, take into account animal welfare issues and regulate culling to the level required to reduce damage to acceptable levels.

To include pest native animals within the native animal definition would mean that a licence would be required to kill a dingo or other native animal listed as a pest.

Licences can be issued to cover an extended time period and



multiple shootings, so that a landowner facing the possibility of dingo or wild dog attack or the need to shoot other pest native animals can obtain a licence before a damaging event. The ability of landowners to take immediate action could also be addressed by changing the wording of section 44(2) of the NC Act to allow the killing of a native animal in circumstances in which the animal constitutes a danger to a person, or is a wild dog or dingo attacking or menacing stock.

### Have your say

*Should the definition of animal and native animal under the NC Act, or specific uses of these terms, be amended and how?*

#### 11.2 Onus of proof for the taking of an animal

It is often difficult to prove that a wild animal that has been taken and kept without a licence has actually been taken from the wild. The NC Act could deem that a captive wild animal has been taken from the wild unless the keeper provides contrary evidence.

This would mean that having a wild animal in your possession would amount to an offence under the NC Act unless it was shown that it was not taken from the wild.

Sufficient evidence might be a receipt with details of the seller and the details of the licence issued to that person under the NC Act. This might create difficulties for animals bred in captivity in that there may be no objectively verifiable proof of how they were obtained, especially if they are a few years old when detected.

Currently the offence of taking and keeping a wild animal must be established beyond reasonable doubt by the prosecution.

Where a law requires the defendant to prove or disprove an element of an offence, it is referred to as a reverse onus of proof, which must be viewed against the right to a presumption of innocence (*Human Rights Act 2004*, section 22(1)). The limiting of this right could only be justified if there is strong evidence that it is in the public interest.

### Have your say

*How can the origin of a captive wild animal be verified?*

#### 11.3 Killing native animals—should the focus be on habitat?

In many cases it is difficult to prove beyond reasonable doubt that an action that has destroyed habitat has actually killed an animal. For example, if York Park Grassland, a known habitat of many hundreds of Golden Sun Moths was ploughed up, it would be difficult to find a dead moth and prove that this protected animal had been killed.

Legislation in other jurisdictions makes it an offence to destroy habitat of protected species rather than focusing on the animals or plants. For example, the NSW *National Parks and Wildlife Act 1974* states that:

... a person must not, by an act or an omission, do anything to any habitat of a threatened species, endangered population or an endangered ecological community if the person knows that the land concerned is habitat of that kind.<sup>91</sup>



A habitat offence under the NC Act would likely be easier to prove than loss of individuals, particularly if action plans clearly defined areas of critical or important habitat.

### Have your say

*Should damage or destruction of known habitat (or identified critical habitat) be sufficient evidence for prosecution of an offence?*

#### 11.4 Invertebrates

The definition of native animals currently excludes invertebrates, which allows for the control of native pest invertebrates in residential and rural areas.

Invertebrate species are not protected, not even in a nature reserve, unless specifically declared. Therefore there is no legal impediment to severely depleting insects from a reserve using light traps year round. Collection of yabbies from dams in a nature reserve has also depleted an important food resource for several native species. Within the reserve context invertebrates may also be regarded as intrinsically worthy of protection.

### Have your say

*Should a provision be included that the taking of native animals and native invertebrates from reserved land requires a licence?*

## 12. Part 5 of the Act—Protection of plants

This part regulates the taking, preserving or dealing in native plants and timber. The wider issues of vegetation regulation and inappropriateness of current penalties are particularly relevant to this section.

#### 12.1 Infringement notice for firewood collecting

The Magistrates Court (Nature Conservation Infringement Notices) Regulation 2005 provides for the issuing of infringement notices for the majority of offences under the NC Act.

However, there is currently no provision to issue an infringement notice for the offence of removing fallen native timber under section 52(3) of the NC Act, which includes the collection of firewood.

Rangers report that they do occasionally have reports or come across people loading firewood into boots, utility trucks or trailers for private use. The only current options are to issue warnings or undertake prosecution.

### Have your say

*Should the removal of native timber incur the issuing of an infringement notice?*

#### 12.2 Taking of native weed plants

The definition of a native plant under the NC Act includes any plant indigenous to Australia that is not a pest plant. There are approximately 35 Australian plants, such as *Acacia decurrens* (Sydney Green Wattle), *Eucalyptus globulus* (Blue Gum), *Grevillea rosmarinifolia* and *Sollya heterophylla* (Bluebell Creeper), that are not indigenous to the ACT and have become weeds here.<sup>92</sup> Even where a plant species is native to other regions of Australia but not considered a weed in the ACT, it is generally inappropriate from a biodiversity perspective to give such plants protection under the NC Act.

Of these, only one, *Acacia baileyana* (Cootamundra Wattle), is listed as a pest plant. Removing most native environmental weeds from unleased land therefore currently requires a licence from the Conservator. It would be possible to update the listing of a protected plant, but it may be more efficient to change the definition of native plant to only include species indigenous to the ACT.

### Have your say

*Should the definition of native plant be changed to encompass only species indigenous to the ACT?*

## 13. Part 6 of the Act—Prohibited and controlled organisms

This part allows for the Conservator to prevent the possession or dissemination of an organism that poses a threat to wildlife and ecosystems.

To date this provision has not been used. The *Pest Plants and Animals Act 2005* has made this part of the NC Act virtually redundant as it is possible for the Minister to declare under that Act a pest plant whose propagation and supply is prohibited, or

to declare a pest animal whose supply or keeping is prohibited.

However, it may still be appropriate for the Conservator to make a similar decision purely on conservation criteria, or for the territory to maintain an ability to prohibit other organisms in addition to plants or animals. It would also be possible to amend the *Pest Plants and Animals Act 2005* so that it covers all organisms.

## Have your say

*Does the NC Act need to retain provisions relating to pest organisms?*

## 14. Part 7 of the Act— Conservation directions

This part of the NC Act sets the rules governing conservation officers' access to land. It also sets the directions the Conservator can make to any land occupier to ensure the protection or conservation of native animals, native plants and timber.

There is a 100 penalty unit maximum penalty for not complying with directions.

However, as detailed in section 5 of this paper, the Conservator is not currently able to undertake restorative actions. Directions cannot be issued for the specific protection of native vegetation communities or natural ecosystem functioning.

The Conservator has chosen to apply directions in limited circumstances. Between 2002 and mid 2007 six were issued in relation to parts of six rural leases. Four covered native grassland protection in the Jerrabomberra Valley. One applied to the ACT Public Cemeteries Authority to protect habitat of the Tarengo Leek Orchid (*Prasophyllum petilum*). The sixth aimed to protect Yellow Box–Red Gum Grassy Woodland, the small Purple Pea (*Swainsona recta*) and habitat for the Grassland Earless Dragon (*Tympanocryptis pinguicollis*).<sup>93</sup>

As discussed previously, it would seem that there are also circumstances when these directions may be issued to Commonwealth land occupiers. A person must comply with the directions given unless they have a reasonable excuse. What may constitute a reasonable excuse is not defined, but it may include having development approval (under either the territory or Commonwealth Planning Acts) for the action that is contrary to the Conservator's direction.

In a report on Lowland Native Grassland of the ACT, the Commissioner for Sustainability and the Environment found that 60 per cent of the territory's lowland native grassland sites need

urgent land management action. Given this, the Commissioner recommended the Conservator of Flora and Fauna have powers to direct, when necessary, that land management actions be undertaken.<sup>94</sup>

Section 60 of the NC Act requires that landowners be given at least 14 days to comply with directions. In circumstances where works should be stopped quickly, or where emergency remedial measures should be undertaken as a matter of urgency, it is possible under part 9, section 92, of the NC Act for the Conservator to apply for an injunction order from the Supreme Court.

Part 12, section 114 of the NC Act allows for a land occupier who is subject to a direction to apply to the Administrative and Civil Appeals Tribunal for a review of the direction. A complaint against a decision can also be made to the Commissioner for Sustainability and the Environment, who has the power to investigate and advise on the complaint.

In some cases, such as restoration activities or protection of specified features, conservation directions can be long term and ongoing. At the moment the Conservator's directions are made to the landowner. If that person sells the land, directions have to be reissued to the new owner. It could be more effective if the Conservator's directions were tied to the land with the ability to register them as an encumbrance on the title.

## Have your say

*In what circumstances do you think it would be appropriate for the Conservator to issue conservation directions?*

*What powers should the Conservator be allowed to exercise?*

*Should the Conservator's directions be tied to land title rather than to the landowner?*

*Should the leaseholder be compensated for any loss of amenity or commercial value that results from the directions?*



## 15. Part 8 of the Act—reserved areas

### 15.1 Restriction on activities in reserved areas

#### 15.1.1 Unauthorised vehicle use

Section 67 (1) of the NC Act allows only for the use of motor vehicles and vessels in designated areas. However, there are no specific restrictions on non-motorised vehicles, such as mountain bikes. The riding of mountain bikes in inappropriate areas can lead to significant environmental damage and track formation.

Under the NC Act it has been difficult to prosecute people for unauthorised motor vehicle access on reserved land as this is currently not a strict liability offence. First, a driver of a vehicle when stopped in a reserve can claim that they did not know they were in a reserve, while a number plate may be the only detail that a conservation officer may be able to observe of a speeding illegal vehicle. Including provisions similar to those under sections 36 and 37 of the *Road Transport (General) Act 1999* that deem the owner of a vehicle to be responsible for the misdeeds of the driver, unless otherwise established, would assist in the enforcement of illegal access.

#### Have your say

*Should the owner of a vehicle be held liable for the misdeeds of the driver, within a reserve area?*

*Should the NC Act allow for the restriction of non-motorised vehicles to certain suitable areas?*

#### 15.1.2 Hunting in reserved areas

Section 67 (2) of the NC Act prohibits the taking of native animals without a licence, and prohibits taking into a reserved area:

- a firearm
- a spear, spear gun, bow or arrow
- a trap, net snare or other device designed or capable of use for the taking or capturing of animals
- any substance that is capable of being used for the taking or capturing of animals.

It is also an offence under the *Firearms Act 1996*, section 43 to possess or use a firearm in a manner that is not authorised by a licence or permit. This offence carries a maximum penalty of five years' imprisonment.

The actual act of hunting is not an offence, nor is the use of hunting animals—for example, dogs or birds of prey—a specific offence. However, under section 68 of the NC Act it is an offence to take a non-native animal into a reserve area, and under section 133 the animal could be seized.

Illegal pig hunting is a significant issue within Namadgi National Park. It is an activity that can endanger park users and managers, disrupt control programs and have an adverse impact on biodiversity. Section 133 allows a conservation officer to seize any animal, plant, substance or thing in connection with which they believe, on reasonable grounds, an offence against the NC Act has been committed.

Thus, if hunting were an actual offence, then equipment that is associated with this activity but which is not currently prohibited, could be seized. This may include night goggles, maps or GPS equipment.

#### Have your say

*Should hunting without a licence be specifically listed as an offence?*

#### 15.1.3 Taking animals and plants into reserved areas

Section 68 of the NC Act prohibits entry of pest plants and non-native animals into reserved areas without the written consent of the Conservator. The exception is guide dogs for the vision impaired. For horse riding this written consent is taken to be provided by management plans, which only allow horses on approved horse routes.<sup>95</sup>

Division 2.5 of the *Domestic Animals Act 2000* already allows for the prohibition of dogs from reserved areas and requires that any dog be leashed, unless in a designated exercise off leash area.

The *Pest Plants and Animals Act 2005* allows the Minister to prohibit the movement of certain pest plants or animals within the territory. However, this is a restricted list of major pests and does not include all exotic species that could become invasive within the reserve network.

If a person wants to take an animal or plant into a reserved area—and the movement of the species is not already restricted by the *Pest Plants and Animals Act 2005*—there is currently no provision in the NC Act directing what form such an application should take. An application form would standardise the information received from applicants and make the decision about whether to grant consent less discretionary.

There is also currently no legal basis in the NC Act for the Conservator to make a decision to grant consent. Criteria for a decision could include the number of plants or animals for which consent is required, the species and breed of animal or plant and the purpose for the animal or plant needing to be in the reserve.

Nor does the Conservator have the power to give consent subject to conditions about potential environmental harm, the nuisance it may cause to other users or methods that will be employed to restrain the animal or prevent spread of plant seeds or material.

Rather than consent in writing, it may be more effective to amend the legislation so that licensing provisions apply.

### Have your say

*Should there be a licensing provision for the taking of non-native animals and pest plants into a reserved area?*

*Should the NC Act be amended so that it is clear that it is legal to take animals into a reserve in a way that is allowed by a management plan?*

#### 15.1.4 Commercial and non commercial concessions

Currently the NC Act makes no special provisions for on-reserve commercial or non commercial organised community activities.

Commercial operations could be those relying on the conservation resource, such as eco-tours, or they could be activities that have no direct conservation relationship such as concerts or markets.

Non-commercial activities could range from weddings to organised sports activities—such as orienteering or mountain bike racing—charity events or not for profit exercises like the EarthCare program.

The scope and general suitability of such activities can be detailed within a management plan, but this does not provide a mechanism to regulate such activities as they affect biodiversity values, the conservation and management of native species and communities, nor the enjoyment of other reserve users.

There may be substantial commercial benefits derived by commercial operators—for example, tour operators—from the use of reserves and other public land owned by the ACT. Similarly, it may be appropriate for the private use of a public

asset to result in a financial return to the public purse. However, increased non-conservation use of reserve areas can have a detrimental environmental impact, increase risks to natural assets and disrupt general public use.

Contemporary regulatory practice in most other jurisdictions has seen an emergence of licence fees charged to commercial operators for the use of reserves for commercial purposes (a charge based on usage). However, it should be realised that simply imposing a charge may have little impact on use levels and can provide an imprecise means to manage pressures on reserves by tourists.

A level of control can occur through measures such as limiting the size or positioning of car parks, or by specifying the size of commercial vehicles that can be used—that is, the number of passengers carried.

Another approach being used in some jurisdictions is to establish a maximum load—for example, number of visitors per day from commercial operations—and then allocate access rights as some form of concession specifying for example the number of visitors and time period.

The maximum load is determined by the capability of visitor services—for example, number of campsites—or the level above which visitation begins to degrade the natural or cultural values of a reserve.

Concession rights are typically distributed via market mechanisms—for example, a tender where operators bid for a share of the total available visitor load for a specific period.

This approach has two advantages over a straight charging regime. Firstly, physical loads—for example, visitor numbers—can be managed to ensure environmental risks are adequately managed. Secondly, the amount paid by tourism operators for a concession actually represents the commercial value to the operator. This avoids the need to second guess the value of concessions.<sup>96</sup>

### Have your say

*Should the NC Act provide guidance on the issuing of commercial concessions on reserved or possibly other public land and provide for the regulation of such activity as it affects biodiversity values, nature conservation objectives and general public enjoyment?*

*Do you support the provision of clauses in the NC Act that would allow regulation of private or community organisation use of reserved land?*



### 15.1.5 Restoration in reserved areas including wilderness

Section 72 of the NC Act requires restoration of excavation areas by permit holders in wilderness areas.

However, there does not appear to be any means to measure compliance. This creates a risk of non compliance and an inability to determine if the conditions of a licence for excavation have been met. There is even less ability to enforce restoration outside of wilderness areas.

Requirement of a restoration plan could form the basis of any compliance regime.

Requirement of a performance bond would be a positive incentive to undertake restoration in accordance with the NC Act and a restoration plan. The bond would be returned on completion of specified milestones within the plan.

Costs of preparing, administering and auditing of restoration plans should be borne by the beneficiary—that is, the party undertaking the excavation—and not by the regulatory authority.

#### Have your say

*Should the NC Act be amended to allow for the requirement of a restoration plan and/or performance based bond?*

### 15.1.6 Wilderness protection

In comparison to legislation in Victoria, South Australia and NSW, the NC Act has few specific wilderness protection measures.

Section 70 prohibits excavation—except in accordance with a licence, and licences can only be provided for archaeological excavation—or the establishment of a track or road. It limits vehicles to established tracks.

The determination of licensing criteria (Instrument No 47 of 2001) also prohibits a licence being granted for the felling or removal of timber from wilderness in the ACT.

The NSW *Wilderness Act 1997* requires a management plan for each wilderness area that restores and protects the unmodified state of the area. The South Australian *Wilderness Protection Act 1992* similarly requires a sympathetic management plan and allows for the prohibition of a wide range of potential activities. Under the Victorian *National Parks Act 1975*, all motorised vehicles, roads, structures, installations or commercial activity are prohibited from wilderness areas.

Wilderness protection also needs to recognise potentially

differing concepts in regard to European perceptions of wilderness and the view of local Indigenous groups.

#### Have your say

*What wilderness protection or restoration provisions do you think should be included under the NC Act?*

*Are the current management plan provisions under the Planning Act sufficient for the provision of wilderness management?*

### 15.1.7 Clearing and damaging native vegetation in reserved areas

Sections 75 and 76 define clearing that causes serious and material harm, while sections 84 and 85 define damage to land causing serious or material harm.

Increased levels of harm or clearing carry increased penalties.

It may be appropriate to review how these increased levels of harm are identified. For example, one of the criteria of serious harm is that the area cleared or damaged is greater than two hectares.

#### Have your say

*How should damage capable of causing serious or material damage be defined?*

*What thresholds should be used to distinguish between different levels of harm?*

## 16. Part 9 of the Act—Injunctive orders

This part mirrors similar provisions contained in the *Environment Protection Act 1997*, which allow private citizens to make applications to the court to seek injunction orders against a person who breaches the NC Act.

A person would only be able to make a case if they can persuade the court that the Conservator is not taking adequate action and that it is appropriate that the matter be brought before the court. This provision has not yet been used.

The Conservator is also able to apply to the Supreme Court for an injunction order that would restrain a respondent from contravening the NC Act.

## 17. Part 10 of the Act—Management agreements

Part 10 of the NC Act allows the Conservator to propose to utilities and telecommunications agencies that they voluntarily enter into management agreements when the agency's activities may conflict with land management objectives on public and unleased territory land.

Section 6.2.1 of this paper discusses how these agreements and non-conservation on-reserve works have proved to be problematic. It discusses several options and amendments to the NC Act, which may improve performance.

## 18. Part 11 of the Act—Licences

### 18.1 Key issues

Under the NC Act a range of activities are prescribed as prohibited without authorisation by a licence from the Conservator of Flora and Fauna.

They comprise the handling of plants and animals or related activities that have a potential to cause environmental harm.

Section 106 of the NC Act provides that the Conservator shall not grant a licence except in accordance with the licensing criteria established as a Disallowable Instrument under the NC Act. The objectives of licensing criteria are to allow prescribed activities to be managed in a way that will enhance conservation of the native plants and animals of the territory and contribute to regional, national and international nature conservation goals through the application of agreed guidelines and standards.

Section 105 of the NC Act allows for conditions to be imposed on a licence such as duration, requirements to comply with management plans or to restore or rehabilitate the site.

Currently 634 licences are used for the keeping of native birds, reptiles, amphibians and a small number of exotic species. Each licence—whether to keep native animals, fell timber or otherwise—issued under the NC Act is subject to a list of conditions. All specify reporting conditions.

In other jurisdictions there is an emerging trend towards requiring licence holders to provide regular performance or activity reports against specific criteria for licensed activities—for instance, selling native animals. In effect, the onus of reporting falls squarely on the shoulders of the licence holder. This reporting typically forms the fundamental basis of monitoring for contemporary compliance and enforcement regimes.

Aside from offences relating to record keeping and production of records on request, there is no offence provision for failing to

comply with other conditions specified by a licence. A penalty for failing to comply with licence conditions would seem desirable as, without it, meeting any conditions other than record keeping is not enforceable.

It is intended that the NC Act will be amended to create a penalty for not complying with licence conditions.

### 18.2 Licensing fees

Fees have not been comprehensively reviewed for several years and only minor price adjustments have been made—for instance, consumer price index adjustments.

Comparisons of the licensing fees applied under the NC Act indicate that the fees are often substantially lower than those charged by other jurisdictions for equivalent matters.

**Table 2: Comparative fee scales**

Licence	Cost ACT	Cost NSW <sup>97</sup>	Cost Vic <sup>98</sup>
To keep non-exempt animal	\$12.50	\$60	\$50
To keep protected native animal	\$32	\$240	\$136
Licence to import into or export from	Nil	\$20	\$50

Contemporary practice in other jurisdictions would indicate that, wherever possible:

- fees are charged on a cost-recovery basis. In effect, the fee structures are based on the premise that the entity applying to undertake an activity—for example, selling of animals—is likely to gain commercially from the activity, that is, an application of the 'beneficiary pays' principle. In establishing fees, consideration is typically given to both the fixed costs to the regulatory agency, such as establishing registers, as well as the variable costs, such as processing individual applications or undertaking annual evaluations
- fees are also being developed to provide a strong economic signal of the potential risks to the objectives of the relevant legislation associated with the activity. Generally this is being done by assigning risks against specific activities—for example, collection of seeds—where fees increase based on the relative risk of the activity and the amount of the activity undertaken.

Higher fees may encourage activity in breach of the regulatory framework. However, where sanctions and fines for





non-compliance are sufficiently high and compliance is adequately resourced, the financial risks are sufficient to encourage people to work within the regulated system, even under higher fee regimes.

### Have your say

*Should licensing fees reflect cost recovery?*

## 19. Part 12 of the Act—Review by the administrative and civil appeals tribunal

This part of the NC Act allows for certain decisions made by the Conservator to be appealed to the ACT Civil and Administrative Tribunal.

Those decisions that are appealable include:

- the Conservator’s directions
- restricting or prohibiting access to reserve areas, the granting or refusing of consent for on reserve activities or the taking of a plant or animal onto a reserve
- the granting or cancelling of a licence.

### Have your say

*Are the existing appeals mechanisms as they relate to the NC Act adequate?*

state. The Act also includes a compliance code and collection protocols for taking native biological material and appropriate monitoring and enforcement of compliance.

The NC Act does not currently provide for Crown ownership of wildlife and natural assets. However, a licensee is required to pay the territory royalties at a prescribed rate in relation to the sale or disposal of native animals, native plants or native timber.

Some jurisdictions, such as Western Australia, declare wildlife to be the property of the Crown. It is intended that the NC Act should provide for Crown ownership of native vegetation and wildlife.

Where a licence is granted for scientific purposes, a condition of approval can be that the results of related research are provided to the Conservator to be made public or to be used at the Conservator’s discretion.<sup>99</sup>

### Have your say

*Should the NC Act encompass the concept of royalties for biodiscovery?*

*Are current royalty provisions for native plants, native animals and timber sufficient?*

## 20. Part 14 of the Act—Miscellaneous

### 20.1 Ownership of genetic material

If a plant is found in a reserved area that has a compound that has strong potential to provide medicinal cures, should we ensure that the territory obtains a fair and equitable share in the benefits of biodiscovery?

In 2004 the Queensland Government introduced the *Biodiscovery Act 2004*. Under this Act any entity wanting to collect and use native biological resources from state lands or Queensland waters for research and analytical purposes is required to obtain a collection authority. A condition of approval is that the collecting entity enters into a benefit sharing agreement with the state. A benefit sharing agreement gives the entity the right to use native biological material for biodiscovery, while the entity agrees to provide benefits of biodiscovery to the



# Glossary

## **ANZECC**

Australian and New Zealand Environment and Conservation Council was a Ministerial Council that operated between 1991 and 2001 providing a forum for member governments to develop coordinated policies about national and international environment and conservation issues. It was replaced by the Natural Resource Management Ministerial Council and the Environment Protection and Heritage Ministerial Council in 2001.

## **Conservator**

In this paper, means the Conservator of Flora and Fauna as defined under section 7 of the *Nature Conservation Act 1980*.

## **Development application (DA)**

Means an application in relation to a development proposal made under chapter 7 (Development approvals) of the *Planning and Development Act 2007*.

## **EPA**

In this paper, *Environment Protection Act 1997*.

## **EPBC**

*Environment Protection Biodiversity Conservation Act 1999 (Cth)*

## **EPHC**

Environment Protection and Heritage Council. A Ministerial Council for member governments to develop coordinated policies about environment protection issues.

## **Exotic species**

An exotic species is outside its natural range. It may be a species that has been introduced to Australia or New Zealand from another country, or it may be an animal that has been translocated to another part of Australia or New Zealand.



## **FFC**

Flora and Flora Committee.

## **Leased land**

Land for which a person or authority has a licence to use or occupy the land. In the context of this paper it usually relates to rural leases.

## **NRMAC**

Natural Resource Management Advisory Committee. An ACT Government advisory committee which provides the Minister for the Environment expert advice on natural resource management issues.

## **NRMMC**

Natural Resource Management Ministerial Council. A Ministerial Council for member governments to develop coordinated policies about natural resource management issues.

## **Offsets**

Biodiversity offsets are environmental improvement actions designed to counterbalance the residual, unavoidable harm to biodiversity caused by developments or an activity, so as to ensure no net overall loss of biodiversity values.

## **Planning Act**

In this paper, the *Planning and Development Act 2007*.

## **Planning Authority**

ACT Planning and Land Authority (ACTPLA).

## **Public land**

Means land identified by the Territory Plan as public land, and includes a wilderness area, national park, nature reserve, special purpose reserve, urban open space, cemetery and burial area, protection of water supply, lake, sport and recreation reserve.

## **Reserved land**

Means (in the NC Act dictionary) an area of public land reserved under the Territory Plan as a wilderness area, national park or nature reserve.

## **Territory land**

Means all land in the Australian Capital Territory that is within the jurisdiction of the ACT Government (not national land, which is the responsibility of the Commonwealth).

## **The NC Act**

In this paper, the *Nature Conservation Act 1980*.

# Endnotes

- 1 Development applications are triggered in relation to 'development' as defined under the Planning and Development Act 2007 and which is also regulated in some way under the Territory Plan. Not all activities will constitute development and not all development is regulated by the Territory Plan. Some Development is specifically exempted from development applications by regulation.
- 2 <http://www.environment.gov.au/biodiversity/strategy/index.html>
- 3 Chief Minister's Department (2008), *The Canberra Plan—Towards our second century* p. 5.
- 4 *ibid.*, p. 88.
- 5 ACT Government (2007), *Weathering the Change, The ACT Climate Change Strategy 2007*. Department of Territory and Municipal Services. Canberra.
- 6 Steffen, W, Burbidge A, Hughes L, Kitching R, Lindenmayer D, Musgrave W, Stafford Smith M and Werner P (2009), *Australia's Biodiversity and Climate Change. A strategic assessment of the vulnerability of Australia's biodiversity to Climate Change. A report to the Natural Resource Management Ministerial Council*. Department of Climate Change. p. 82.
- 7 *ibid.*, p. 88.
- 8 Australian Capital Territory (2004), *The Canberra Spatial Plan*. Act Planning and Land Authority pp. 1 + 17.
- 9 Territory and Municipal Services (2007), *Weathering the Change. The ACT Climate Change Strategy. Action Plan 2007–2011 – Action 34*.
- 10 Environment Act (1997), *The ACT Nature Conservation Strategy* p. 8.
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