

Appendices

Set and forget: how offsets under national environmental law drive habitat destruction



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Appendix A: classification of conditions and analysis of mechanisms

Classification method for condition types

Types of conditions that required adequate protection	Types of conditions that did not require adequate protection
<ul style="list-style-type: none"> ✓ Condition contained words to the effect that the protection had to satisfy all three criteria of security, permanence and conservation purpose and did not specify how that was to be done ✓ Condition directed the approval holder to develop a plan and included words to the effect that the plan had to be implemented and provide for all three criteria of security, permanence and conservation purpose to be satisfied (including where a specific mechanism was required which would satisfy the three criteria) ✓ Condition specifically required a particular mechanism to be used in a way that satisfied all three criteria of security, permanence and conservation purpose 	<ul style="list-style-type: none"> ✗ Condition did not in effect require any kind of formal legal protection ✗ Condition contained words to the effect that the protection had to only partially satisfy the three criteria of security, permanence and conservation purpose and did not specify how that was to be done ✗ Condition directed the approval holder to develop a plan but did not require that plan to be implemented ✗ Condition directed the approval holder to develop a plan but did not require the plan to include any measures for the legal protection of the offset site ✗ Condition provided the approval holder with the option to pursue an alternative course of action that did not satisfy all three criteria of security, permanence and conservation purpose ✗ Condition directed the approval holder to develop a plan and included words to the effect that the plan had to partially but not fully satisfy the three criteria of security, permanence and conservation purpose ✗ Condition specifically required the use of a particular mechanism to be used in a way that did not satisfy all three criteria of security, permanence and conservation purpose

Cover. Googong, NSW
Photo. Peta Bulling

Mechanisms used to protect offset sites in the investigation (by jurisdiction)

Commonwealth (n=2)

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Capable of providing adequate protection if certain measures apply			
EPBC Act Conservation Agreement (Cth Environment Dept) n=1	s 305(1) of the <i>Environment Protection and Biodiversity Conservation Act 1999</i>	✓	The object of Part 14 of the EPBC Act is to enhance the conservation of biodiversity (ss 304(1) and 304(2)). This is a conservation purpose.
		Discretionary	The EPBC Act does not specify a minimum or maximum term for these agreements; as such, instruments can endure in perpetuity. The content may include duration therefore whether they will exist in perpetuity will depend on the detail (s 306(1)(g)). Conservation agreements are legally binding on successors to land (s 307(c)).
		Discretionary	Changes require intervention by Minister unless a manner for variations is specified in the agreement. Agreements can be varied by a variation agreement entered into by the Minister (s 308(1)). Agreements may be terminated by agreement between the Minister and the other party or in a manner specified in the agreement (s 308(3)). The Minister may unilaterally terminate or vary an agreement by order published in the Gazette if they are satisfied the agreement is not capable of achieving its purpose (s 308(4)). If varied by an order, the other party may terminate by giving written notice (s 308(7)).
Does not provide adequate protection			
Land protected within the Defence Estate (Cth Defence Dept) n=1	Defence land planning processes ¹	✗	Notwithstanding protected matters can be at high risk of localised loss, some Defence lands provide good sanctuary for native species which can benefit protected matters; however, where this occurs, those benefits are secondary. The areas are not protected 'for a conservation purpose'.
		✗	The permanence of a dedication of a patch of Defence land to conservation is uncertain.
		✗	The security of a dedication of a patch of Defence land to conservation is uncertain.

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Queensland (n=28)

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Provides adequate protection			
Dedication of land as protected areas (Qld Dept of Environment, Science and Innovation) n=3	s 29(1) of the <i>Nature Conservation Act 1992</i>	✓	The Act's object includes the conservation of nature (s 4); other objects do not conflict. Part IV tailors this overarching conservation purpose to each class of protected area through the prescription of bespoke 'management principles'.
		✓	The dedication of protected areas is permanent.
		✓	Protected areas are secure. In Qld, revocation would require a motion from the Legislative Assembly to be passed requesting that the Governor in Council revoke the protection by regulation (s 32). A lease or permit can be granted over a protected area by the chief executive under the Act, however it must be consistent with the management plan for the area. The chief executive has limited powers to grant authority for ecotourism facilities, with restrictions.
Capable of providing adequate protection if certain measures apply			
Nature Refuges (Qld Dept of Environment, Science and Innovation) n=4	ss 45 and 46 of the <i>Nature Conservation Act 1992</i>	✓	The Act's object includes the conservation of nature (s 4); other objects do not conflict.
		Discretionary	While normally permanent in practice, areas can become Nature Refuges for a limited term (ss 46(2)(b) and 47(1)). A declaration of nature refuge by regulation must specify 'the duration' of the declaration (s 46(2)(b)) – leaving non-permanent durations open.
		✓	Revocation is difficult. The Governor in Council may revoke the declaration by regulation (s 50). The quality of protection can be altered. A conservation agreement (which binds the landholder and can prevent certain activities inconsistent with conservation, ss 45 & 69) can be terminated at the landholder's request if the Minister is satisfied that the land is no longer required or not capable of achieving the declared management intent (s 47(2)).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Voluntary Declarations (Qld Dept of Resources) n=21	s 19F of the <i>Vegetation Management Act 1999</i>	✓	The Act's purpose is to regulate vegetation clearing in a way that conserves certain vegetation, prevents biodiversity loss, and allows for sustainable land use, by setting thresholds and criteria that apply when assessing development proposals, and regulating declared areas and particular regrowth vegetation (s 3). A landowner can request that the chief executive make a declaration in respect of the land by writing to the chief executive and providing a management plan with the management intent and outcomes for the area (s 19E). The chief executive may make the declaration under s 19F if satisfied that the management plan will aid conservation or prevent land degradation, and that the land possesses certain valuable conservation qualities (s 19G), at which point the land becomes a Category A area (s 20AL). For the period any <i>Voluntary Declaration instrument is in effect</i> , it appears 'Category A' sites are protected for a conservation purpose because they are not subject to the exemptions described below that apply to other categories of vegetation.
		Discretionary	The existence of the declaration and management plan must be recorded on the land's title (s 19K). A declaration may end by written notice of the chief executive if the declaration is not in the interests of the State, or once the management outcomes in the management plan have been achieved (s 19L) (for example, where regrowth vegetation has achieved remnant status). After a declaration ceases, the land is ordinarily categorised as a Category B area (remnant, per s 20AM). At that point, exemptions exist for certain clearing activities of Category B vegetation, ² most notably for development for extractive industries and infrastructure pursuant to the accepted development vegetation clearing codes (ss 19O and 19P), and development approvals involving clearing for a 'relevant purpose', which again extends to extractive industries and infrastructure (s 22A).
		✗	As above, a declaration can be ended at a bureaucratic level or pursuant to the terms of the management plan (s 19J), whether that be a date stipulation or an event-based trigger. Management plans can be amended by agreement of the landowner and chief executive (s 19I).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

New South Wales (n=42)

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Provides adequate protection			
Dedication of land as protected areas (NSW Dept of Planning and Environment) n=7	s 30A of the <i>National Parks and Wildlife Act 1974</i>	✓	Objects of the Act consistent with conservation purpose (s 2A). Purpose of each form of protected area is clearly for identification, protection and conservation of values (Part 4, Division 2). National parks Existing interests such as leases, authorities and permits cannot be extended or renewed without approval from the Minister (except for mining, offshore petroleum or minerals, and fisheries) (s 39). Any grazing permits must be approved by the Minister (s 40). Prospecting requires express authorisation by Parliament (s 41) and forestry is excluded (s 42) unless an existing permit or licence has not yet expired (s 42(2)). State conservation areas A mining interest cannot be granted, extended or renewed without Ministerial approval (s 47(3)). Mineral claims are excluded (s 47(6)).
		✓	Protected areas are permanent. The duration is not decided in a subsequent plan or decision. There is no mention of expiration or duration in the relevant parts of the Act.
		✓	Protected areas are secure. National parks, state conservation areas, regional parks and nature reserves (protected areas) can only be revoked by an act of the NSW Parliament and cannot be compulsorily acquired (Pt 4, Div 3-6).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate
Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Provides adequate protection			
Biodiversity Stewardship Agreements (BSAs)³ (NSW Dept of Planning and Environment) n=4	s 5.5 of the <i>Biodiversity Conservation Act 2016 (NSW)</i>	✓	Although the BC Act's purpose includes conserving biological diversity, this is to be achieved 'consistent with the principles of ecologically sustainable development' (meaning economic considerations can be relevant to decision-making processes) (s 1.3). The discretionary content of BSAs provided at s 5.6 details management actions, exclusion of development and the generation of biodiversity credits.
		✓	The discretionary content provided at s 5.6(e) specifies a requirement for owners to undertake management in perpetuity unless otherwise specified. S 5.10 is explicit that a BSA has effect in perpetuity unless it is terminated by the consent of the Minister and owners or is unilaterally terminated by the Minister. S 5.13 provides that the agreement is registered on title and binds successors.
		○	Subject to the retirement of credits, see below S 5.10 is explicit that a BSA has effect in perpetuity unless it is terminated by the consent of the Minister and owners or is unilaterally terminated by the Minister. The Minister must not consent until required measures are taken to remedy any negative impacts. Voluntary termination is only available within 3 months of entering the agreement or, if after 5 years of the agreement, no biodiversity credits have been created or credits have been created and none have been retired. BSAs can only be varied with the involvement of the Minister, who may only agree to a variation if it will not negatively impact the protected biodiversity values or other measures will remedy those impacts (s 5.11). The Minister can unilaterally terminate a BSA if a mining or petroleum authority has been granted over the site and the Minister may require the holder of the authority to retire the relevant number of biodiversity credits (s 5.18(1)), or to make an equivalent payment to the Biodiversity Conservation Fund (s 6.30).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate
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Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Provides adequate protection			
Retirement of biodiversity credits (NSW Dept of Planning and Environment) n=5	Above	✓	BSAs provide the infrastructure for the retirement of biodiversity credits. Credit retirement removes the credits from the market to reflect that the biodiversity values that initially generated the credits will be lost to development. Hence, credit retirement is the crucial step in 'offsetting' the consequential biodiversity loss.
		✓	BSAs provide the infrastructure for the retirement of biodiversity credits.
		○	BSAs provide the infrastructure for the retirement of biodiversity credits. Retirement of credits do not affect the ongoing requirements under BSAs. Once a credit is retired on a site, the BSA can no longer be voluntarily terminated. As above, the Minister can unilaterally terminate for mining or petroleum interests.
Capable of providing adequate protection if certain measures apply			
Conservation Agreement (NSW) (NSW Dept of Planning and Environment) n=7	s 5.20 of the <i>Biodiversity Conservation Act 2016</i>	✓	Although the BC Act's purpose includes conserving biological diversity, this is to be achieved "consistent with the principles of ecologically sustainable development" (meaning economic considerations can be relevant to decision-making processes) (s 1.3). S 5.20 is clear that the agreement is made for a conservation purpose or to study biodiversity. Content that may be included, per s 5.22, includes restricting development and activities for conservation.

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Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Capable of providing adequate protection if certain measures apply			
<i>continued from previous page</i> Conservation Agreement (NSW) (NSW Dept of Planning and Environment) n=7 ⁴	s 5.20 of the <i>Biodiversity Conservation Act 2016</i>	Discretionary	Conservation agreements have a presumption of permanent protection which can be undermined explicitly in the terms of the agreement. S 5.23(3) provides that an agreement has effect in perpetuity unless the agreement specifies a limited term, or the Biodiversity Conservation Trust (BCT) and all landowners agree to terminate the agreement, or the agreement is terminated in a manner set out in the agreement . S 5.23 also provides that the BCT can unilaterally terminate an agreement if it is no longer capable of or needed to deliver its purpose. The Minister may also unilaterally vary or terminate the agreement if a mining or petroleum authority is granted (s 5.23(7)). S 5.13 (per s 5.24) provides that agreements are to be registered on title and bind successors to the land.
		○	Changes to an agreement require political level of intervention or for the Biodiversity Conservation Trust to consent (per above). The Minister may consent to development by a public authority on land subject to a conservation agreement if it will not adversely affect the management of the site or its biodiversity, if there is no practical alternative to the development or if the development is essential for public purposes (5.25). The Minister can unilaterally direct the BCT to vary or terminate an agreement in these circumstances. A conservation agreement does not exclude mining or petroleum authorities being granted and does not exclude mining or petroleum activities from taking place (ss 5.23(7) and 5.26).

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Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Reservation of Crown Land (NSW Dept of Planning and Environment) n=3	s 2.8 of the <i>Crown Land Management Act 2016</i>	○	The CLM Act's purpose or object is to provide for the ownership, use and management of the Crown land of NSW (s 1.3(a)). While some Crown Land reservations are 'for Conservation', others are not. It is also noteworthy the same land can be reserved for multiple purposes (s 2.12). There is no specific mechanism providing an exclusive conservation purpose.
		○	There is no provision for specifying the duration of a reservation, though their low security (below) affects their permanence.
		✗	The reservation can only be revoked through the Minister, by notice published in the Gazette (s 2.11). The Minister also has the power, by notice in the Gazette, to remove a 'purpose for dedicated or reserved Crown land' if the Crown Land involved has been dedicated or reserved for use for 'more than one purpose' (s 2.16). If a reserve has multiple purposes, its conservation purpose is vulnerable to revocation. The Minister has a special power to grant an authority, including a license, permit or easement for any purpose the Minister sees fit provided the relevant agencies and land manager are consulted, a notice is made public and the Minister is satisfied that it is in the public interest (s 2.18).
Condition attached to a mining lease (NSW Mining, Exploration and Geoscience) n=1	s 238 of the <i>Mining Act 1992</i> (NSW) (s 238 has been repealed)	✗	The Act's purpose or object is to encourage and facilitate the discovery and development of mineral resources in NSW (s 3A). This is not a 'conservation purpose'.
		✗	A condition in a lease providing for an offset is not permanent. Mining leases expire after a maximum of 21 years other than in exceptional circumstances (s 71, 2012 version of the Act).
		✗	The effect of the repeal of s 238 on 1 March 2016 is unclear.

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

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Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Restriction on the use of land, and Positive Covenants (Office of the Registrar General) n=11	s 88BA-88E of the <i>Conveyancing Act 1919</i>	✗	The Act's long title states that it consolidates property and simplifies and improves the practice of conveyancing. The positive covenant provided at s 88BA and restrictions provided at ss 88D and 88E do not disclose a conservation purpose (for example, positive covenants can, at times, require development rather than restrict it).
		✓	Positive covenants and restrictions are registered on title (binding successors, per s 88F) and no provision provides for duration or expiration (therefore they are permanent).
		✗	Positive covenants can be released or varied through a dealing or deed of release or variation (s 88BA(6)). The instrument releasing or varying the covenant must be executed by the parties entitled to enforce the covenant and the parties subject to enforcement of the covenant (s 88BA(7)). A prescribed authority (such as a statutory authority) may vary or rescind a restriction on land held by a prescribed authority by lodging an order with the Registrar-General (s 88D(12)) and can vary it by agreement in writing between the person on whom the restriction is imposed and the prescribed authority (s 88D(13)). A prescribed authority can release or vary a restriction on land not held by a public authority through a memorandum of release or variation, or by a deed of release or variation, with the written consent of parties against whom the positive covenant is enforceable (s 88E(7)).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

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Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Planning Agreement (Local Councils) n=4	S 7.4(1) of the <i>Environmental Planning and Assessment Act 1979</i> (Current provision, previously was s 93F)	Discretionary	Agreements are not exclusively for a conservation purpose. The Act's purpose or object includes facilitating ecologically sustainable development (s 1.3(b)). Planning agreements are defined as having a public purpose, which includes the conservation or enhancement of the natural environment (s 7.4(2)(f)) among other potentially conflicting purposes (like public amenities or transport). The form of a planning agreement required in the Regulations does not specify that the public purpose must be stipulated (s 25B, <i>Environmental Planning and Assessment Regulation 2000</i>).
		○	The Act and Regulations do not expressly provide for a planning agreement to expire or to include a specified duration or to exist in perpetuity. Agreements are binding on successors to land when all parties with an interest in the land agree to registration (s 7.6(3)). Planning agreements are capable of existing in perpetuity however the omission of expiration or duration in the Act is likely because the mechanisms are easily changed, as discussed below.
		✘	A planning agreement can be revoked or amended through the same mechanism for registering an agreement – all parties with an interest in the land must agree (s 7.6(4)) and public notice must be given of the proposed revocation or amendment (s 7.5).

✓ adequate ○ broadly adequate (with limitations) ✘ inadequate
Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Victoria (n=25)

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Provides adequate protection			
Conservation Covenant Trust for Nature (Victoria) n=8	s 3A of the <i>Victorian Conservation Trust Act 1972</i>	✓	The Act's objects include the preservation of areas which are ecologically significant (s 3(1)(a)(i)). This object is conservation; other objects do not conflict.
		✓	The Act provides for the registration of these covenants to bind successors in title (s 3A(11)).
		○	With the approval of the Minister, a covenant can be varied or revoked by the Trust (implying that the Trust's agreement is also required). The legislation does not specify the parameters for when such variation or revocation can occur, though the Act's purpose may affect the Minister's decision. Where a landowner who themselves entered into a covenant seeks to have it revoked, the Governor in Council determines the matter if the landowner and Trust cannot agree.

✓ adequate ○ broadly adequate (with limitations) ✘ inadequate
Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Capable of providing adequate protection if certain measures apply			
Reservation of Crown Land (temporary or permanent) (Parks Victoria, Vic Dept of Energy, Environment and Climate Action) Permanent: n=1 Temporary: n=2	s 4 of the <i>Crown Land (Reserves) Act 1978</i>	Discretionary	<p>The Act provides for the Reservation of Crown Lands for certain purposes and for the management of Reserves. S 4 allows for Crown land to be reserved for public purposes (including combinations of public purposes). Public purposes include the preservation of ecological significance (s 4(1)(l)) and other potentially conflicting purposes such as municipal buildings (s 4(1)(i)), making it important that that reservation is exclusively for one purpose: the preservation of ecological significance.</p> <p>The Fifth Schedule of the Act provides a list of nature conservation reserves which are explicitly permanently protected for nature conservation purposes (s 44 Fifth Schedule, Pt 1), natural heritage (s 45 Fifth Schedule, Pt 2) or natural features (s 46 Fifth Schedule, Pt 3), for example.</p> <p>The Minister may, subject to certain constraints, grant a short lease over land reserved to preserve its ecological significance (s 17D(2)(a)), but is prevented from granting a long lease on land reserved pursuant to s 4(1)(l) or listed in the Fifth Schedule for nature conservation purposes or for its natural features (s 17CA(3)).</p>
		Discretionary	S 4 provides for either temporary or permanent reservation.
		✔	<p>Both temporary and permanent reservations are difficult to change while in effect. S 10 provides that a temporary reservation may only be revoked by the Governor in Council publishing an order in the Government Gazette. S 9 provides that a permanent reservation can only be revoked pursuant to s 11. S 11 does not provide a revocation mechanism for conservation reserves.</p>

✔ adequate ○ broadly adequate (with limitations) ✘ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Land Management Cooperative Agreement (Vic Dept of Energy, Environment and Climate Action) n=1	s 69 of the <i>Conservation Forests and Lands Act 1987</i>	✔	Paraphrasing, the Act's object is to establish a framework for the conservation of the State's lands, waters, flora and fauna, and to make provision for its productive use (s 4(a-b)). Agreements can provide for restrictions on the use of land and management activities for conservation purposes (s 70).
		Discretionary	The agreement is binding on the parties and binding on successors to the land where the agreement specifies this (s 71). No duration or expiration provision, so an agreement will persist until revoked.
		✘	The agreement can be varied or terminated by agreement between the Secretary and the landowner, in a manner provided for in the agreement, by order of the Minister, by order of VCAT or by order of the Supreme Court (s 76). The Supreme Court can make an order upon application by the landowner in circumstances including when continued performance is impossible (s 72(4)).
s 173 Agreement (Local Councils) n=11	s 173 of the <i>Planning and Environment Act 1987</i>	Discretionary	The Act's purpose is planning-focused, concerned with the use, development and protection of land in Victoria (s 1). The 'planning objectives' include minimal reference to conservation purposes, such as 'the protection of natural resources' (s 4). Agreements can have a broad scope and can include restrictions on use of the land or positive obligations to protect the environment (s 174(2)).
		Discretionary	The agreement is binding and registered on title (unless Crown land), binding successors (ss 174(1), 181(1) and s 182). Its duration, however, depends on its terms. The trigger for an agreement's end can be the cessation of the use or the development of the land or any part of the land for a specified purpose (s 177(1)).
		✘	An agreement can be amended or terminated by agreement between the responsible authority and the party bound by the agreement (ss 177(2) and 178). The responsible authority must have regard to the purpose of the agreement and specific persons have a right to be notified of and object to any proposal, and they can apply to VCAT for a review of the decision (ss 178B, 178C, 178E, 178F and 184).

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Local government land-use zoning (Local Councils) n=2	Various local planning schemes made under the <i>Planning and Environment Act 1987</i> ⁵	Discretionary	As above, the purpose of the overarching legislation is planning-focused – conservation is but one of many ‘planning objectives’. Subject to the Victoria Planning Provisions ⁶ and other state-wide planning controls, Councils can make provisions for particular land within a zone with the use of an ‘overlay’ (such as a Vegetation Protection Overlay) and a ‘schedule’ in a planning scheme that describes the unique application of the overlay to the land. A local planning policy can also set out further specifics that guide decision-making in relation to the land. ⁷ The protection afforded depends on the nature and application of these planning tools in each case within the context of the particular planning scheme.
		○	In general, Council land-use zoning and overlays do not have an end date, though provisions of planning schemes (such as maps and overlays) are routinely amended via a statutory process involving ministerial authorisation and public exhibition.
		○	As above, provisions of planning schemes (such as maps and overlays) can be amended via a statutory process involving ministerial authorisation and public exhibition. The security of a particular place’s protection is very context specific and there may be little or no limits on a Council removing the protection via the amendment process.

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Tasmania (n=8)

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Provides adequate protection			
Conservation Covenant (Tas Dept of Natural Resources & Environment) n=5	s 34 of <i>Nature Conservation Act 2002</i>	✓	The Act provides for the conservation and protection of the fauna, flora and geological diversity of the State (long title). This is a conservation purpose. The Act also empowers the Minister to enter into conservation covenants where it is necessary or desirable to do so for a conservation purpose (s 34(1)). However, it is important to note that the Minister only considers conservation purpose for covenant variations in limited circumstances.
		✓	Instruments made via this mechanism are semi-permanent. Once registered, their protection runs with the land and is binding on successors (s 34(6)). Although each covenant technically continues in perpetuity, this protection is insecure (see below) as the Minister has a broad power to vary or discharge the covenant (s 35).
		○	These instruments are not completely secure, as the Minister can discharge or vary a covenant in favour of development. The Minister’s capacity to exercise this power is limited to an extent (see ss 35(2) to (4)); however could be further limited to make this form of protection fully secure.
Does not provide adequate protection			
Public Reserves (Director-General of Lands in Tasmania) n=2	s 3 of the <i>Crown Lands Act 1976</i>	Discretionary	The Act provides for the management, sale, and disposal of the lands of the Crown (long title). Land may be reserved for (among other things) conservation or sustainable development and use (s 8). The Minister can reserve land for a wide range of purposes.
		○	This protection is semi-permanent. Reservations of Crown land continue as long as the order reserving the land remains in force (s 8(3)). The Minister has the power to revoke the order either temporarily (s 8(5)) or permanently (s 8(4)).
		✗	This protection is not completely secure, due to the Minister’s broad powers to revoke (ss 8(4) and 8(5)).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Council zoning (Local Councils) n=1	<i>Land Use Planning and Approvals Act 1993</i>	✗	The objects of the Act are broadly to promote sustainable development (s 5; Schedule 1) and could conflict with a sole conservation purpose. The Tasmanian Planning Policies must set out the aims of the Tasmanian Planning Scheme and may relate to environmental protection, among other factors (ss 12B(1) and 12B(2)). The State Planning Provisions (SPP) flow from the Tasmanian Planning Policies and may contain provisions which set out the structure of Local Provisions Schedules (LPS) (s 14(1)). The LPS for each municipal area must be consistent with the SPP, bar exceptional circumstances, and delineates zoning for specific areas and provisions that apply to zones (s 32). The purpose of an LPS is contingent on the SPP and TPP, which are broadly about planning.
		✗	A planning authority must regularly review the LPS for its municipal area (s 35O(1)). A review must occur every five years (s 35O(2)). Reviews include consideration of whether the LPS must be amended, replaced or can continue (s 35P(3)(b)).
		✗	A person who is the owner of land or has the permission of the owner of land can request for an amendment of the LPS (ss 37(1) and 37(3)(a) to (b)). The planning authority must be satisfied that a draft amendment will meet the LPS criteria prior to agreeing to prepare a draft amendment (s 38). The Minister may direct a planning authority to prepare a draft amendment (s 40C). A planning authority may also prepare a draft amendment by its own motion (s 40D(b)). The public and relevant agencies must be notified and consulted (ss 40G and 40FA). After the exhibition period the planning authority must report to the Commission on the draft amendments and the Commission must hold a hearing if the report contains a representation (ss 40K to 40L). The Commission must consider whether the draft amendment is consistent with the LPS criteria (e.g. consistent with the SPP, objects of the Act and the TPP), among other things (s 40M). The Commission has discretion to approve, modify, substantially modify or reject the draft amendment (s 40N). An approval must be signed by the Chairperson of the Commission or a person with delegated responsibility under s 40R(2) (s 40R(1)).

South Australia (n=1)

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Provides adequate protection			
Heritage Agreement (Native Vegetation Council) n=1	<i>s 23 of the Native Vegetation Act 1991</i>	✓	The Act's objects include the conservation, protection and enhancement as well as the sustainable use of the native vegetation (s 6). It is clear the sections providing for the execution and administration of Heritage Agreements (s 23-23B) support instruments made for a conservation purpose.
		✓	A Heritage Agreement attaches to the land and is binding on the current owner of the land whether or not that owner was the person with whom the agreement was made (s 23(2)). An agreement can be registered on title (s 23B) and will continue in perpetuity until terminated.
		○	Instruments made under the mechanism are secure. The Minister may vary or terminate a heritage agreement but only in consultation with, and with the approval of, the Native Vegetation Council (ss 23(3) and 23(5)).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Western Australia (n=24)

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Provides adequate protection			
Conservation Covenant (WA Commissioner of Soil and Land Conservation) n=6	s 30B of the <i>Soil and Land Conservation Act 1945</i> (WA)	✓	The Act provides for the conservation of soil and land resources, and the mitigation of the effects of erosion, salinity and flooding (long title). This is a conservation purpose; however, there is a potential for object conflict given the statute is about the achievement of this purpose in the context of managing agricultural use (the Agriculture Minister administers the Act, per s 5). S 30B provides for covenants and agreements to be made between landowners and the Commissioner of Soil and Land Conservation that set land aside for the protection and management of vegetation.
		✓	Instruments can either have an end date or can be in perpetuity (s 30B(2)(a)). Irrevocable covenants are described as ‘conservation covenants’ and those not expressed as irrevocable are ‘agreements to reserve’ (s 30B(2)(b)). Agreements to reserve are addressed below. Covenants and agreements are binding on the landholder and successors to title for as long as they have effect (s 30C).
		✓	Once finalised, the Commissioner does not have statutory authority to vary or discharge Conservation Covenants. ⁸

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate
Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Capable of providing adequate protection if certain measures apply			
Creation of protected areas– Class A nature reserve (WA Department of Biodiversity Conservation and Attractions) Classed as nature reserves: n=3	s 42 of the <i>Land Administration Act 1997</i> (WA)	Discretionary	The Act’s purpose is to provide for the administration of Crown land. This is not a conservation purpose. Under s 42, the Minister may classify a reserve as a Class A reserve (the highest level of protection for reserves of Crown land created under the Act)—when this occurs it retains the purpose or multiple purposes (in the public interest) specified in the Order made by the Minister to initially create the reserve under s 41. Public interest purposes are not defined in the statute, however s 45 specifically contemplates class A nature reserves. Conceivably, a class A reserve could be created without a nature purpose or with multiple purposes, some of which are inconsistent with conservation.
		✓	No expiration or duration is provided in the Act and the difficulty to change a Class A reserve indicates it is a permanent mechanism. S 45(3) provides that a class A nature reserve will remain reserved for that purpose until an Act specifying otherwise is enacted.
		✓	Small changes to Class A reserves can be made by Order from the Minister (s 42(3)). Major changes—such as reducing or excising an area from a reserve (for reasons other than small adjustments), excising an area to create a road or cancelling or changing the purpose of a reserve—require a proposal to be laid before both Houses of the WA Parliament (s 42(4)). Such a proposal can be disallowed (s 43). S 45(2) provides that the Minister must obtain the consent of the Minister responsible for the Conservation and Land Management Act 1984 prior to making an order to make minor adjustments to a class A nature reserve (such as excising one hectare for the purpose of public utility services). If the Minister proposes to excise part of a class A nature reserve to create a road, a proposal must be laid before both Houses of Parliament (s 45(4)).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate
Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Capable of providing adequate protection if certain measures apply			
National Trust Covenant (National Trust of Australia (WA)) n=1 ⁹	s 21A of the <i>National Trust of Australia (W.A.) Act 1964</i>	✓	The Act's objects include the National Trust of Australia (WA) entering into agreements for the management, maintenance and preservation of any places of national or local importance (s 5q). This is a conservation purpose; other Objects do not conflict.
		Discretionary	Covenants can be permanent or for a specified period of time (s 21A(1)). Covenants are binding on successors to title unless a contrary intension is expressed (s 21A(4)).
		✓	The Act refers to mechanisms in the Transfer of Land Act 1893 (WA) for security (ss 21A(2) and (3)). The Transfer of Land Act provides for variations and terminations of restrictive covenants with the consent of both parties (s 129B). Any alteration would require the consent of the National Trust of Australia (WA). The National Trust of Australia (WA) is a statutory authority whose purpose is that of preserving places of national or local importance (see schedule).
Does not provide adequate protection			
Restrictive Covenant (WA Department of Biodiversity, Conservation and Attractions) n=1	s 129A & s 129BA of the Transfer of Land Act 1893 (WA), with s 15 of the Land Administration Act 1997	✗	The Act consolidates the law relating to the simplification of the title to and the dealing with estates in land. The mechanism provides for a restrictive covenant but does not specify a conservation purpose (s 129A).
		✓	Restrictive covenants are not explicitly described as permanent in the Act but also are described as including an expiry or duration. They will remain in force until they are altered through the mechanism described below.
		✗	S 129B of the Transfer of Lands Act provides for the discharge and modification of restrictive covenants with the consent of all parties affected. The agreement of all parties is the only requirement for the Commissioner of Titles to direct the Registrar to discharge or modify the certificate on title (s 129B(2)).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate
Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Agreement to Reserve (Commissioner of Soil and Land Conservation) n=4	s 30B of the <i>Soil and Land Conservation Act 1945</i>	✓	See 'Conservation Covenant' above.
		✗	As above, instruments not expressed as irrevocable are 'agreements to reserve' (s 30B(2)(b)). They are binding on the landholder and successors to title for as long as they have effect (s 30C).
		✗	The Commissioner can discharge an agreement by serving a notice (s 30E(1)). A person bound by an agreement can apply to the Commissioner to have their agreement discharged and s 39 provides for administrative review of a refusal decision (s 30F).
Reservation of Crown land (WA Dept of Planning, Lands and Heritage) n=5	s 41 of the <i>Land Administration Act 1997</i>	✗	The Act's purpose is the administration of Crown land. This is not a conservation purpose. Crown Land can be reserved for more than one purpose at a time (s 41). No conservation purpose is explicitly mentioned in the Act.
		✓	The Act does not provide for a duration or expiration of a reservation. It is not explicit about the mechanism existing in perpetuity however the protection will continue until changed per the mechanism below.
		✗	The Minister may by order cancel, change the purpose of, reduce the area of, excise an area from or amend the boundaries or location of a reserve (s 51(1)). No public interest criteria are required to be satisfied and there is no requirement to seek agreement or public comment.

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate
Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Land is vested in the Crown as a condition of subdivision (WA Dept of Planning, Lands and Heritage) n=1	s 152 of the <i>Planning and Development Act 2005</i> (WA) ¹⁰	✓	The Act's purposes include: providing for an efficient and effective land use planning system; and promoting the sustainable use and development of land in WA (ss 3 (1)(b) and (c)). S 152(1)(a) provides that the WA Planning Commission can make it a condition of a subdivision that land is vested in the Crown for conservation or protection of the environment. Land vested is taken to be reserved under s 41 of the Land Administration Act 1997 (see above).
		✓	See above.
		✗	Without further protection as a Class A reserve, this mechanism is not secure. See above.
Zoned consistent with a planning scheme for a region (WA Planning Commission) n=3	Region planning schemes made under s 53 of the <i>Planning and Development Act 2005</i> ¹¹	✗	Neither the Acts' purpose nor object is for conservation. Region planning schemes are not described in the <i>Planning and Development Act 2005</i> as having an environmental or conservation purpose (Pt 4). Region planning schemes can be made with the object of the improvement, development and use of land, and the planning, replanning or reconstructing of the region (ss 34(2) and 69(1)).
		✓	Region planning schemes are not time limited and will endure until amended per mechanisms below.
		✓	A region planning scheme may be amended or repealed by a subsequent region planning scheme or an instrument of repeal prepared by the Commission, approved by the Minister for Planning and published in the Gazette (s 37(2)). Proposed schemes or amendments to schemes must be referred to the EPA and the EPA can require an environmental review of the proposal or environmental assessment under Part IV Division 3 of the <i>Environmental Protection Act 1986</i> (ss 38 and 39). If the review has been undertaken in accordance with EPA instructions, the planning scheme proposal can be advertised (s 39(3)). Disputes between the Minister and the Minister for the Environment on whether or not a review has occurred in accordance with the EPA instructions are to be resolved by the decision of the Governor (s 48J of the <i>Environmental Protection Act 1986</i>). The Minister cannot refer the scheme to the Governor for approval without a decision from the EPA (s 50). A proposed scheme or amendment must be laid before both Houses of Parliament and are disallowable (s 56).

Northern Territory (n=1)

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Provides adequate protection			
Reservation of Crown Land (NT Dept of Infrastructure, Planning and Logistics) n=1	s 76(1)(c) of the <i>Crown Lands Act 1992</i>	✓	The Act provides for the administration, management and disposal of Crown land in the NT. This is not an Act made for a conservation purpose. Pursuant to s 76, the Administrator may by proclamation resume and reserve any Crown lands (except those that are the subject of certain pastoral or mineral leases) for the protection or conservation of wildlife (s 76(1)(a)(vii)), for conservation of native flora (s 76(1)(a)(ix)), or for national parks (s 76(1)(a)(x)), for example.
		✓	Reserves are not described as temporary, and no duration or expiration is explicitly provided for in the statute. A reservation will have effect until it is amended or revoked, per below.
		✓	Land which has been reserved for conservation per ss 76(1)(vii), (s 76(1)(ix)), or (s 76(1)(x) (and others) cannot be revoked unless the Minister recommends that course of action in writing to the Administrator (s 76(5)). The Minister cannot make such a recommendation unless it is approved by the Legislative Assembly (s 76(6)). S 76(8) provides that the Legislative Assembly can disapprove or defeat a proposed recommendation.

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Australian Capital Territory (n=6)

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Protected area additions by way of amendment to the Territory Plan (ACT planning authority) n=4	s 45 of the <i>Planning Act 2023</i> (ACT) ¹²	○	The Act's object is to support and enhance the Territory's liveability and prosperity, protect its natural environment, and promote the well being of residents by creating an effective, efficient, accessible and enabling planning system (s 7(1)). Contents of the Territory plan must include outcomes to be achieved by the plan and requirements for development proposals, for example (s 48(1)(b)). The plan is not explicitly for a conservation purpose. Areas for protection can be delineated with an 'Overlay' on the Territory Plan map.
		✗	Periodic review of the plan is built into the statute in Part 5.4 of Chapter 5. The Minister must at least once every 5 years decide whether the plan should be reviewed (s 90(1)).
		✓	S 57 provides that an interested party may apply to have the plan amended. The territory planning authority must accept or reject the application within 3 months – in its consideration the authority must have regard to matters such as the planning strategy (s 58). After accepting a proposal, the authority must prepare a draft major plan amendment (s 59). The Minister or authority can initiate amendments as well (s 60). Amending the plan requires consultation with the national capital authority, conservator of flora and fauna, the EPA and the heritage council among other stakeholders (s 62). A draft major plan is to be provided to the Minister after the consultation period has ended (s 67(1)). The Minister must refer the draft plan to the relevant Assembly Committee (s 70), which is currently the Standing Committee on Planning, Transport, and City Services. The Committee can decide to prepare a report which includes a recommendation to approve the draft amendment or another recommendation about the amendment (s 71). The report forms a consideration in the Minister's decision to approve or reject the draft amendment (s 75(3)(b)). If approved, the Minister must present the plan to the Legislative Assembly – the Assembly can, by resolution, reject the plan (ss 77 and 78).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Protection mechanism (administering authority)	Legal foundation	Purpose (whether statute/provision conservation-related) Permanence (whether protected forever) Security (whether difficult to revoke or amend)	Notes from statutory interpretation
Does not provide adequate protection			
Land Management Agreement (ACT) (ACT planning authority) n=2	s 350(2)(a) of the <i>Planning Act 2023</i> ¹³	○	The Act's object is to support and enhance the Territory's liveability and prosperity, protect its natural environment, and promote the well being of residents by creating an effective, efficient, accessible and enabling planning system (s 7(1)). Every rural lease in the ACT must have a Land Management Agreement (s 350(2)). While rural leases cannot be granted without a Land Management Agreement first being signed by the Conservator of Flora and Fauna (s 350(2)(b)), the purpose of these agreements is to 'establish appropriate sustainable agricultural management practices and good farm biosecurity for the subject land while maintaining ecological and cultural values present on the land and protecting the environment from harm'. ¹⁴
		✗	A grant of rural lease, grant of a further rural lease, the variation of a rural lease, or the transfer or assignment of a lease cannot occur without a Land Management Agreement with the person to whom the lease is relevant (ss 350(1) and 350(2)). This means that every time the lease is transferred, the agreement will be altered or a new agreement will be created. The 2012 and 2020 versions of the Land Management Agreement Form provide that agreements ought to be reviewed no later than 5 years, though this does not necessarily occur in practice. ¹⁵
		✗	In addition to the 5-yearly review and replacement process and changes to a lease that trigger new / varied agreements, it appears agreements can also be varied by the parties' written agreement and by one party notifying the Territory of additional agricultural uses. ¹⁶ Agreements can also contain a provision allowing the agreement to be varied other than by agreement between the parties (s 350(3)).

✓ adequate ○ broadly adequate (with limitations) ✗ inadequate

Discretionary – has capacity to be inadequate or adequate, at discretion of parties.

Appendix A - footnotes

- ¹ For an overview of the process, see p 12 <https://www.defence.gov.au/sites/default/files/2022-12/GBTAAOffsetStrategy.pdf>
- ² See <https://www.qld.gov.au/environment/land/management/vegetation/clearing-approvals/exemptions>
- ³ Prior to 25 Aug 2017, BioBanking Agreements (BB Agreements) were made under Part 7A Division 2 of the Threatened Species Conservation Act 1995 (repealed). Here, BB Agreements and BSAs are considered together. Note critical findings on NSW offsets in: EDO (Oct 2020) *Devolving Extinction?*; and State of NSW and the Department of Planning and Environment (Aug 2023) *Independent Review of the Biodiversity Conservation Act 2016 – Final Report*
- ⁴ One of these offsets is for an ACT-based project. Prior to the commencement of the *Biodiversity Conservation Act 2016*, Conservation Agreements were made under other legislation. All offsets with NSW Conservation Agreements have been classed as adequately protected, though it was not possible to access the relevant detail in the conservation agreements to confirm this with total confidence
- ⁵ For an overview, see <https://www.planning.vic.gov.au/guides-and-resources/guides/guide-to-victorias-planning-system/planning-schemes>
- ⁶ The 2012 Planning Provisions are available via <https://planning-schemes.app.planning.vic.gov.au/Victoria%20Planning%20Provisions/histories/VC093>
- ⁷ https://www.environment.vic.gov.au/_data/assets/pdf_file/0014/91220/Planning-for-biodiversity-Guidance.pdf; https://www.planning.vic.gov.au/_data/assets/pdf_file/0031/630868/practitioners-guide-to-victorias-planning-schemes.pdf
- ⁸ <https://www.agric.wa.gov.au/land-use-planning/covenants-protect-native-vegetation-western-australia>
- ⁹ This offset site has been recorded as adequately protected
- ¹⁰ Amendments in 2018 did not affect the operation of this provision.
- ¹¹ The sections were effectively the same in 2012, though amendments have occurred.
- ¹² There were similar provisions in the 2007 equivalent legislation
- ¹³ There were similar provisions in the 2007 equivalent legislation
- ¹⁴ See, for example, https://www.audit.act.gov.au/_data/assets/pdf_file/0007/1697029/Report-No.-01-of-2021-Land-Management-Agreements.pdf
- ¹⁵ See p 44-45, https://www.audit.act.gov.au/_data/assets/pdf_file/0007/1697029/Report-No.-01-of-2021-Land-Management-Agreements.pdf; 2016 version of the approved form accessible via <https://www.legislation.act.gov.au/DownloadFile/af/2016-26/20160430-63367/PDF/2016-26.PDF>
- ¹⁶ See p 44-45, https://www.audit.act.gov.au/_data/assets/pdf_file/0007/1697029/Report-No.-01-of-2021-Land-Management-Agreements.pdf; 2016 version of the approved form accessible via <https://www.legislation.act.gov.au/DownloadFile/af/2016-26/20160430-63367/PDF/2016-26.PDF>

Appendix B – the process for and scope of this investigation

The empirical method for this investigation

Early in the investigation, it became apparent that the purpose, strength and duration of an offset’s legal protection was very much contingent upon:

1. The way the approval condition requiring the offset site was written;
2. The type of legal mechanism used and how it was applied in each case; and
3. The Department’s functions during the post-approval and monitoring stages, such as variations, delay and enforcement.

With these three factors informing the empirical process, the 218 offset sites that flowed from the approvals granted between 2008 and 2012 were analysed via the following process.

Firstly, each approval condition was classified by whether it required the adequate protection of the offset site. This classification method is summarised in Appendix A and the findings are discussed in section 4.1.1 of the report.

Next, it was generally necessary to identify the precise location of each offset site before its legal protection could be checked.

In some cases, finding the location of the offset site was straightforward because the approval or post-approval offset plan or compliance report set out the details needed (such as the lot/plan number for the relevant parcel of land). Other times, those documents contained partial information, such as a de-identified map or an address, that allowed searches to be conducted in government land and property information databases and geospatial mapping systems to verify the precise location. Where the location of an offset site was still unclear, information was made public through Senate scrutiny processes, and gathered via direct contact with approval holders, and contact with public authorities

who administer relevant land conservation programs or who are tasked with recording and mapping land information.

Once the location of an offset site was identified (where possible), the process of checking whether it is legally protected began with the Collaborative Australian Protected Area Database (‘CAPAD’), which is a time series record of protected areas in the National Reserve System.¹ The inclusion of an offset site in CAPAD, with additional verification such as a gazettal notice establishing that an offset site has been added to a protected area, signified that the offset site was (in almost all cases) protected in a way that satisfied the criteria for adequate protection. This is because, as discussed above, land can only qualify for inclusion in the National Reserve System and be shown in CAPAD if it is ‘*conserved forever, with effective legal means guaranteeing its perpetual conservation*’.²

If an offset site was not included in CAPAD, a certificate of title or survey plan was sometimes purchased via the state or territory lands registry – cumulatively, that cost thousands of dollars. In those documents, a reference to an instrument registered on title (such as a conservation covenant) confirmed that the offset site was in some way legally protected. If the offset site was supposed to be located on public land, searches were conducted in government gazettes and in regulations for declarations that the land had been in some way protected.

In short, we checked every available record of the Department’s and the approval holder’s and in many cases contacted the approval holder directly for further information and submitted freedom of information requests to the Department. However, despite going to these lengths, information about some offset sites was often impossible to obtain and very difficult to come by. There were many instances where the location of an offset site, or its legal protection, remains a complete mystery.



Where, after finding evidence that an offset site was in some way protected, the nature of that protection was assessed against what the approval requirement and any variations required. Particular attention was paid to the wording of each condition (see the classification method in Appendix A), and to timing – checking when projects were allowed to commence, when protection was required to be executed, recording how long it took to protect the offset site, evaluating how variations facilitated delay, and tracking when approvals expired.⁷⁵

Lastly, the nature of each offset site’s protection was assessed against the criteria for adequate protection. This required statutory interpretation (with the aid of independent legal advice) to analyse whether each mechanism was generally capable of providing secure and permanent protection for conservation purposes. However, as many of the mechanisms offer considerable breadth and discretion that affect their efficacy, the particular instrument that established the legal protection for each offset site was also evaluated against the criteria for adequate protection.

The analysis of mechanisms is available at Appendix A.

Some of the raw data collected during the investigation is available in [this spreadsheet](#).

¹ Department of Climate Change, Energy, the Environment and Water (2023) *National Reserve System protected area requirements*, at <https://www.dcceew.gov.au/environment/land/nrs/about-nrs/requirements>; National Reserve System Task Group convened under the Natural Resource Policies and Program Committee (2009) *Strategy for Australia’s National Reserve System 2009-2030* (pp. 42-43), at <https://www.dcceew.gov.au/environment/land/nrs/publications/strategy-national-reserve-system>.

² While data was collected in relation to whether the approval condition set a deadline for the offset site to be protected, that data was not factored in when conditions were classified by whether they required adequate protection – that exercise was confined to the three criteria of permanence, security and conservation purpose only.

Left. Googong, NSW
Photo. Peta Bulling

What this investigation was not: a note on scope and purpose

The purpose of this investigation was not to assess the logical or scientific underpinnings of offsetting as a method for dealing with environmental impacts. Whether the use of an offset was appropriate and whether the approved offset package correlated to and could compensate for the species or habitat impacted by the development was not assessed.

As is discussed below, all of the offset conditions analysed were imposed to compensate for permanent and irreversible environmental impacts. As such, this investigation did not consider offset requirements for environmental impacts that are only temporary.

Further, only one aspect of offsetting was investigated, that of legal protection. The assessment of management activities or their ecological outcomes for any of the offset sites was not within scope. When an offset site is required, typically two processes run alongside each other - a legal protection stream and a management stream. An example is provided below that illustrates how a covenant may be executed in parallel with the management of the offset site.

This investigation focused only on legal protection.

Legal protection stream



Offset management stream



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