



# Constraints on Private Conservation of Biodiversity

Commission  
Research Paper



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# Foreword

Conserving biodiversity is essential to maintain ecosystems to support life. It is also important for a range of economic, social and cultural reasons. However, biodiversity is under threat from a range of sources — some localised, others more pervasive.

Conservation of biodiversity is often seen as a public sector activity, confined to national parks and reserves. In practice, conservation can be undertaken by both the public and private sectors. Indeed, with private landholders managing more than 60 per cent of Australia's land mass, conservation of biodiversity could not be adequately addressed without private participation.

While private conservation activities have always played a role in Australia, and initiatives are continuing to emerge, their contribution has been constrained by various regulatory and institutional factors. This report seeks to identify those as a first step to considering appropriate policy responses in this important area.

The report is part of a wider Productivity Commission research program that is examining public and private roles in biodiversity, including who should bear the cost of conservation and an exploration of the application of a 'duty of care' for protecting biodiversity.

Gary Banks

Chairman

July 2001

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# Abbreviations

AARF	Australian Accounting Research Foundation
AASB	Australian Accounting Standards Board
ABARE	Australian Bureau of Agricultural and Resource Economics
ABHF	Australian Bush Heritage Fund
ACCC	Australian Competition and Consumer Commission
ACF	Australian Conservation Foundation
ACT	Australian Capital Territory
ANZECC	Australian and New Zealand Environment and Conservation Council
APT	Australian Plantation Timber Limited
ARC	Aviary Registration Certificate
ATO	Australian Taxation Office
ATSIC	Aboriginal and Torres Strait Islander Commission
AUSLIG	Australian Surveying and Land Information Group
AWC	Australian Wildlife Conservancy
BA	Birds Australia
CAR	comprehensive, adequate and representative (reserve system)
CGT	capital gains tax
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CPA	Competition Principles Agreement
CWP	Cleland Wildlife Park
DEH	Department for Environment and Heritage
DEST	Department of Environment, Sport and Territories
DNA	deoxyribo nucleic acid
ESL	Earth Sanctuaries Ltd

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GBE	government business enterprise
GST	goods and services tax
GTE	government trading enterprise
HRSCEH	House of Representatives Standing Committee on Environment and Heritage
IC	Industry Commission
IUCN	International Union for Conservation of Nature and Natural Resources
ILUA	Indigenous land use agreements
ITAA	Income Tax Assessment Act
JANIS	Joint ANZECC/MCFFA NFPS Implementation Sub-Committee (drafted criteria on which to base a CAR reserve system for Australia's forests)
MCFFA	Ministerial Council on Forestry, Fisheries and Aquaculture
NCC	National Competition Council
NCP	National Competition Policy
NFPS	National Forest Policy Statement
NHT	Natural Heritage Trust
PC	Productivity Commission
RBT	Review of Business Taxation
RFA PFRP	Regional Forest Agreement Private Forest Reserve Program
RIRDC	Rural Industries Research and Development Corporation
SEAC	State of the Environment Advisory Council
SGARAs	self generating and regenerating assets

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# Key messages

- The private sector can play an important role in the conservation of biodiversity. But a number of institutional arrangements — particularly aspects of the land tenure, competitive neutrality, native wildlife and taxation frameworks — can constrain otherwise desirable private conservation activities.
- The institutional frameworks are characterised by extensive and often complex legislation and regulation. At times, the interpretation or application of the frameworks, or of specific legislation or regulation may be uncertain. Further, the legislation and regulation may be applied inconsistently within or between jurisdictions.
- These factors can increase the relative costs and risks of private conservation activities compared with those of other viable land uses. This impact may influence investment decisions and lead to less efficient and less effective conservation outcomes.
- Removing or reducing existing constraints could have positive biodiversity benefits, although further analysis is required to assess the appropriateness or otherwise of specific policy responses.



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# Overview

Both the public and private sectors can conserve biodiversity. While not overlooking the important role the public sector must play, an efficient and effective framework for conservation should recognise that the private sector can add to public conservation and also alleviate some of the burden on the public sector. This report reviews some key institutional constraints to private conservation of biodiversity where it is the primary landuse activity: it is not exhaustive and other constraints may also exist. The relative merits of the public and private sectors providing particular conservation services is not explored in this report but will be considered in future research.

The private sector appears to be constrained from undertaking otherwise desirable conservation activities by elements of the land tenure, competitive neutrality, native wildlife and taxation frameworks. Inconsistent policy settings, a lack of complementary policy between jurisdictions in some regulatory areas, and interactions between constraints magnify these problems.

## **Land tenure issues**

Almost two thirds of Australia is managed by the private sector. Private land consists of freehold and Crown leasehold land. Crown leasehold land under private management makes up around 70 per cent of all privately controlled land and exists almost entirely as pastoral leases.

Conservation as a primary land use is poorly facilitated and can be constrained (or precluded) by pastoral lease conditions. First, no lease conditions recognise conservation as a primary land use in the way that pastoral leases recognise pastoralism. Second, pastoral lease conditions, including minimum stocking rates, access and resumption provisions, may not be consistent with some conservation activities. Each state and territory legislates and administers pastoral lease conditions. In all jurisdictions, the terms of a pastoral lease generally preclude activities other than pastoralism and activities associated with pastoralism, although some exemptions have been granted.

Central to a pastoral lease is the specification of minimum grazing or stocking levels for the lease area. Limited opportunities to alter the stocking provisions on

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pastoral lease properties appear to constrain biodiversity conservation. Destocking is usually at the discretion of the relevant minister or pastoral board, which can create uncertainty for landholders given the lack of explicit administrative processes or decision criteria. As with destocking, the addition of another purpose, such as ecotourism, to a pastoral lease is approved at the discretion of the responsible Minister or pastoral board.

Some conservation activities may require restricted access to parts or all of the leased land; for example, some conservation activities may rely on perimeter feral proof fences. However, this may not be consistent with access provisions that may require road or utility easement access. The Crown also retains resumption rights to pastoral leasehold land. This typically includes ownership of timber and soil and rights to resume the land for specified activities. Although infrequently exercised, resumption provisions can create uncertainty where individuals or groups are making decisions regarding longterm investment in both human and physical capital in pursuing conservation objectives.

Native title can create uncertainty over conservation activities on pastoral leases where native title is not extinguished. Under the *Native Title Amendment Act 1998*, only existing rights given in a lease prevail over those of native titleholders. Consequently, where native title is not extinguished, variations (any additional rights) to lease conditions (such as adding conservation or ecotourism activities) could be inconsistent with the rights of native titleholders.

Conservation agreements (covenants, easements and other agreements) are an important mechanism to facilitate conservation — most commonly on freehold land. The agreements formally recognise conservation values and bind those values to the land's title. However, the lack of facilitating arrangements in some jurisdictions may be impeding the uptake of these agreements. Three issues that need further examination are the role of conservation trusts to facilitate and manage conservation agreements, the establishment of conservation agreements on pastoral leases and the effect of Crown resumption provisions on the uptake of agreements.

Although legislation enables covenants and other agreements to be established on pastoral leases, as for freehold, the negotiation of agreements for pastoral leases is complicated by the division of the property rights among the Crown, lessees and traditional owners (where native title is applicable). Before a lessee can establish an agreement, the prevailing lease conditions must first be amended to recognise the conservation objectives for the land (see above).

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## Competitive neutrality arrangements

Private wildlife parks and reserves (sanctuaries) can face unfair competition from public sector businesses.

Under the 1995 Competition Principles Agreement, the Commonwealth and State governments agreed to a number of policy commitments, including that government businesses should not enjoy net competitive advantages over private sector competitors simply as a result of their public ownership. Despite the apparent broadness of this competitive neutrality principle, in practice it has a limited application to specific government businesses. Only businesses listed or considered ‘significant’ are obliged to implement competitive neutrality measures, leading some government businesses to be exempt. Few, if any, public sanctuaries have been listed as significant. Although jurisdictions have a complaints mechanism, in part to test the significance of public businesses, some do not allow additional businesses to be added to those already subject to competitive neutrality.

Although competitive neutrality can be implemented by a range of measures, the key mechanism — cost reflective pricing — can have a limited application to wildlife sanctuary businesses. In particular, it can require a business to have certain characteristics, including easily separable commercial and noncommercial activities and appropriately valued assets so an appropriate rate of return can be calculated. Further, cost reflective pricing may need to be balanced against the community service obligations required of the public business. In many cases these characteristics do not appear to be common to public sanctuaries, thereby making it difficult to apply competitive neutrality measures.

Despite the apparent limited application of competitive neutrality principles and measures to public wildlife sanctuaries, there has been one successful complaint — the Cleland Case in South Australia. However, this case demonstrates that in practice the implementation of competitive neutrality can be an uncertain and lengthy process.

While the competitive neutrality framework provides a method to establish fair competition between public and private providers of conservation services, there is also a broader issue of contestability — for example, whether private businesses can, and should, fully compete for the resources made available to public businesses. Given the emergence of private conservation providers, there may be scope for further research into the appropriateness of public sector provision of conservation services and the contestability of public resources to deliver conservation services.

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## Native wildlife regulatory frameworks

Extensive and often overly complex regulatory frameworks designed to conserve native wildlife (flora and fauna) may unduly constrain private conservation. Wildlife regulatory frameworks generally:

- operate on a ‘regulate by exception’ basis;
- do not always explicitly define property rights to native wildlife and their progeny, leading to uncertain ownership rights;
- lack consistent, coordinated licensing arrangements;
- lack clarity on what constitutes in ‘the wild’ or ‘captive’ native fauna; and
- have different regulatory approaches to the keeping and trading of native fauna.

Consequently, private conservation initiatives can have limited incentives to conserve native wildlife, operate under considerable management uncertainty and have increased operating costs.

Every state and territory has legislation that provides for the conservation of native wildlife in ‘the wild’. Some state legislation (for example, Queensland and Victoria) appears to be more complex than necessary and more complex than in other jurisdictions, such as South Australia. Property rights for native wildlife (including any progeny) are not always explicitly, consistently or fully defined across jurisdictions. Overall, there does not appear to be a consistent or coordinated approach to native wildlife conservation across jurisdictions.

The regulatory frameworks restrict the taking of native wildlife from ‘the wild’. The blanket protection approach of most native wildlife legislation may not adequately address conservation of biodiversity or provide suitable incentives for landholders to conserve native wildlife. The regulatory frameworks also go beyond regulating the taking of native wildlife to also regulate the keeping, use and trade of native wildlife, often through extensive licensing systems. There may be more efficient and effective solutions that specifically target the taking of native fauna from ‘the wild’ while reducing the regulation of other activities such as private conservation initiatives and the keeping and trade of captive-bred native fauna. Animal welfare issues would still need to be appropriately addressed. Desired outcomes for animal welfare should apply regardless of whether an animal is domestic, exotic or native, and such outcomes could perhaps be better achieved through overarching legislation.

Licensing criteria are not always clearly specified. This can result in unclear or *ad hoc* approval processes and the reliance on discretion and interpretations of the regulatory framework, which can lead to management and investment uncertainty



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for private conservation initiatives. Some jurisdictions, such as South Australia, appear to apply some discretion in considering applications, with more flexible processes to consider approvals for taking and using native fauna.

In some jurisdictions, emerging private conservation initiatives, especially for endangered native fauna, do not easily ‘fit’ within current licensing systems. This is because the licensing systems have often been designed to address and control specific end uses, such as recreational or commercial keeping, harvesting, demonstrating and exhibiting of native fauna. Further, most State legislation does not explicitly define ‘the wild’ or ‘captivity’, so different regulatory approaches may be applied to the keeping and release of native fauna in different jurisdictions creating some uncertainty for private conservation initiatives. Fenced conservation areas, for example, may lead to some uncertainty about whether the area is considered to be in ‘the wild’ — the answer may vary depending on the size and habitat of the conservation area, among other factors.

The restriction on international trade in native wildlife, along with the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* requirements for only approved scientific or zoological organisations to undertake limited trade in captive-bred native wildlife, would appear to exclude many private conservation initiatives from international trade in native fauna.

## **Taxation**

Existing tax arrangements may influence landholders’ decisions to undertake private conservation activities. Many jurisdictions offer some, albeit limited, assistance to particular organisations, industries or sectors through the tax system to encourage particular conservation activities. However, some tax arrangements can create disincentives that discourage otherwise desirable private conservation efforts.

Potential distortions can be created when tax arrangements treat similar activities, organisations or individuals inconsistently.

- Under existing gifting arrangements, donations of money to charitable organisations such as the Trust for Nature are tax deductible, as are donations of land valued over \$5000. In contrast, implicit ‘donations’ (for example, through conservation covenants) are either not allowed or are untested.
- Under existing arrangements taxpayers who manage their land solely for biodiversity conservation do not have access to a number of ‘up front’ deductions and concessions available to those who undertake ‘conservation’ expenditures on land used for commercial purposes, including primary production.

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When tax arrangements favour (or disadvantage) similarly placed activities or classes of taxpayer, they can potentially create perverse incentives for landholders. This may affect the relative costs of managing land for conservation as well as alter the relative risks and cashflows of alternative activities, and ultimately influence investment decisions over alternative land uses. The easier it is to switch between a taxed (yet perhaps more socially desirable) activity and tax-favoured (yet less socially desirable) activity, the greater the potential distortion. Remaining uncertainty about future rulings is also a concern.

Removing or reducing the distortions in existing tax arrangements may have positive biodiversity conservation benefits. However, the net effect of the policy change (including on other parts of the economy and on the community more broadly) must also be considered. The Commonwealth Treasurer recently announced amendments to address existing distortions arising from the capital gains tax treatment of payments for conservation covenants. It is beyond the scope of this report to assess the implications of this policy response. However, once the full effects of the new arrangements are clear, it may be useful to consider whether there are any remaining distortions and/or uncertainty regarding the (amended) capital gains tax provisions.

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# 1 Biodiversity and the private sector

Historically, conservation of biodiversity has been mainly provided by the public sector in Australia, but the private sector has been involved in various conservation activities for many years. The private sector can include commercial enterprises, landholders, not-for-profit non-governmental organisations and community groups operating independently or in partnership with the public sector. The private sector can directly address the conservation of biodiversity through establishing, managing and supporting dedicated conservation areas. The private sector can also indirectly address conservation of biodiversity when undertaking any use or development of natural resources.

This report focuses on factors affecting conservation of biodiversity by the private sector where land is managed primarily for conservation purposes. It does not address enhancing the conservation outcomes on land that is managed primarily for other purposes such as commercial production. These conservation activities are also important — substantial conservation initiatives can occur, for example, as part of broader agricultural and tourism developments.

In Australia, the private sector's philanthropic and commercial approaches to conservation include:

- using private funds to conserve native wildlife and habitat or to help solve environmental problems;
- donating land for placement under covenant or agreement to ensure conservation into the future (this may involve public assistance);
- sponsoring native wildlife conservation programs or campaigns to conserve particular endangered native species; and
- contributions to *ex-situ* conservation.

Examples of private sector involvement in biodiversity conservation in Australia include the Australian Wildlife Conservancy, Birds Australia, Bush Heritage Fund, and Earth Sanctuaries Ltd (appendix A).

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## 1.1 Threats to biodiversity

Biodiversity is broadly defined as the variety of the living world and consists of all plants, animals, micro organisms, the genetic diversity and the ecosystems they form (Saunders and West 2000). Biodiversity can be classified at three levels — genetic, species and ecosystem (SEAC 1996, Farrier 1995):

- genetic diversity occurs within a particular species, providing individual characteristics and influencing resilience or adaptability to change;
- species diversity refers to the various interactions between species to form ecosystems; and
- ecosystem diversity occurs at the level of entire biological communities such as wetlands, rainforests and grasslands, and also extends to include the entire biosphere.

Biodiversity safeguards the ecosystem processes that make life possible. Healthy ecosystems are necessary for maintaining and regulating atmospheric quality, climate, fresh water, marine productivity, soil formation, cycling of nutrients and waste disposal. Biodiversity provides ecosystems with resilience — the ability to recover from drought, fire, flood and climate change. The environment's assimilative capacity — the ability to absorb or deal with external pressures (such as emissions produced as a result of human activities) without leading to permanent and/or significant change — is directly dependent on the state of biodiversity (DEST 1996).

Biodiversity not only maintains the life supporting processes of ecosystems but it also underpins much of Australia's commercial production and may provide future goods and services such as medicines, foods and fibres. Conservation of biodiversity may also be important because of its contribution to cultural identity — for example, biodiversity is central to the culture of Aboriginal and Torres Strait Islander peoples. The aesthetic, existence, option and bequest values associated with biodiversity also contribute to the emotional and spiritual wellbeing of the Australian population (DEST 1996, SEAC 1996).

Australia is one of the twelve most biologically diverse countries in the world, a status owed to its size, long isolation and many climatic zones. Australia has a very high degree of endemism — that is, many of its plants, animals and micro organisms are not found elsewhere in the world. This is because they have evolved in isolation. The Australian State of the Environment Report considered the loss of biodiversity to be perhaps the most serious environmental problem in Australia. Widespread pressures such as unsustainable landuse, coastal development and habitat modification were impacting on biodiversity (SEAC 1996).

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Conservation of biodiversity refers to a range of actions that can involve:

- protection — such as the establishment and management of public and private national parks, reserves and sanctuaries;
- maintenance and management — undertaking activities in ways that do not lead to long term reductions in biodiversity (such as altering irrigation practices to reduce the water use and sustain water flows and aquatic habitat), refraining from activities that reduce biodiversity (such as clearing of native vegetation that has adverse impacts on ecosystems and native wildlife) and responding to threatening processes (such as undertaking pest and weed control);
- sustainable use — for example, of native forests, grasslands, crocodiles and kangaroos; and
- restoration and enhancement — such as replanting native vegetation.

Threats to biodiversity may be general and therefore prevalent across a wide range of biogeographic regions, or they may be specific to particular species and/or regions. While certain social and economic factors often generate specific isolated threats to biodiversity in particular areas, there are some wide-ranging threats that are common to many regions.

Pervasive or general threats to biodiversity conservation can include social pressures such as population growth and urban development, and economic pressures such as use and development of natural resources. In addition to these pressures, biodiversity may also be ‘threatened’ by factors that constrain conservation and sustainable landuse — for example, by lack of community awareness regarding the significance of biodiversity, and by institutional factors such as policies which may unintentionally reduce biodiversity, poorly defined or contested property rights, and inappropriate regulation.

Some threats to biodiversity can be highly localised, depending on the scale of the activity — for example, pest and weed invasion, land disturbance, clearance of vegetation, water pollution and fire can be ongoing or one off localised events that threaten biodiversity. These threats may contribute to adverse cumulative impacts on some species and ecosystems but, in particular, may threaten small populations of endangered species with extinction. Landholders and community groups can have important roles in responding to these localised threats to biodiversity by undertaking pest and weed control, using appropriate land management practices, reducing and controlling impacts of pollution on waterways and reducing and controlling the impacts of fire.

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## 1.2 The private sector can play a role

Historically, conservation in Australia has been predominantly provided by the public sector through the setting aside and management of public national parks and reserves, and the regulation of activities affecting biodiversity on private land. But many private voluntary conservation initiatives have occurred in the past and new initiatives continue to emerge. Given the extent of land under private management, there is further scope for private conservation of biodiversity.

The opportunity to increase the role of the private sector in biodiversity conservation in Australia was recognised by the 1998 Senate Inquiry into the commercial utilisation of native wildlife (including private conservation):

The Committee believes that the current and potential role of the private sector in biodiversity conservation is significant, but currently considerably undervalued. The Committee recommends that the Federal Government investigate ways in which private sector investment in biodiversity conservation can be supported and encouraged (Senate Rural and Regional Affairs and Transport References Committee 1998).

More than 60 per cent or 4820 thousand square kilometres of Australia's land area is classified as private land (table 1.1). Private land consists of freehold and Crown leasehold land. Crown leasehold land under private management makes up around two thirds of all privately controlled land and exists almost entirely as pastoral leases (see chapter 2). By comparison, only about seven per cent of land is designated as public national parks and reserves (AUSLIG 2001).

Table 1.1 **Land tenure in Australia, by lands category**  
thousand square kilometres

<i>Lands category</i>	<i>Area (thousand square kilometres)</i>	<i>Per cent of Australia</i>
Public	1767.9	23
Private	4819.6	63
Aboriginal & Torres Strait Islander	1094.8	14
Total	7682.3	100

Source: AUSLIG (2001).

Historically, the selection of areas for public national and state parks was based largely on the significant perceived natural beauty of their landscapes and their associated recreational values. Many national and state parks and reserves tend to reflect 'residual' land use where the opportunity cost of such land for agriculture and pastoral use was typically very low, and more productive land was held for commercial purposes (SEAC 1996, Curran 2000). While the public national reserve system has considerably expanded representation of pre-European ecosystems over

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the last twenty years, the national reserve system continues to be highly concentrated in regions not suited to agriculture or pastoralism.

Many species and habitats are poorly represented (or absent) from the public national reserve system. Bennett (1995) considers that many conservation reserves in Australia are not large enough (on their own) to maintain viable populations and the ecological processes necessary to sustain natural communities in the long term. The ecological limitations of the scale and distribution of the public national reserve system mean that additional initiatives are necessary to address long term conservation of biodiversity. An integrated system of parks and reserves on both private and public land could better address representation issues and conserve the many species that move across reserve boundaries, particularly if supported by sympathetic management on adjoining private lands.

In some circumstances, landuse change may bring improved biodiversity outcomes and increase private sector returns. For example, Chisholm (1994) suggests that the wool industry as a whole could experience higher returns if significant areas of marginal rangeland were retired from wool production. An analysis by Fraser and Hone (2001) of the conversion of land from pastoral wool production to land management for conservation in the western New South Wales rangelands suggests that there could be significant net benefits from retiring land from pastoral use.

Individual private conservation initiatives on a broad scale can collectively contribute to addressing pervasive biodiversity threats. They can also individually address localised threats that, because of their nature, are beyond the scope of the public conservation system. Indeed, private sector conservation is necessary if conservation of biodiversity across all ecosystems is to be achieved.

### **1.3 Factors affecting conservation of biodiversity**

While conservation activities can be undertaken by both the private and public sectors, efficient and effective provision of conservation of biodiversity by both sectors is desirable. The private sector can play an important role in further complementing and supplementing conservation activities by the public sector, and where feasible, alleviating some of the burden on the public sector. This can both add to the resources used for conservation, and free up government resources for other purposes.

This report examines a number of factors that may constrain conservation of biodiversity on private land. They include policy or structural hindrances (including perverse incentives) and market failures (including poorly defined or contested property rights). The constraints may reduce the net private benefit that can be

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derived from actions to conserve biodiversity and lead to less than socially optimal provision of conservation of biodiversity by the private sector. The constraints may reduce the level of biodiversity conservation or even threaten existing biodiversity.

Property rights are the rights to own and/or use a particular resource, commodity or service. They may be held and exercised by individuals, groups, corporations, or government. Property rights enable the efficient exchange of a resource, commodity or service through a market. They need to be:

- clearly defined;
- completely and exclusively allocated (that is, holders of property rights should be guaranteed exclusive use);
- secure; and
- legally enforceable.

Without clear property rights, there is little incentive to manage, use or conserve a resource in a way that maximises its longer-term value.

A literature review and discussions with interested parties have highlighted that key factors affecting conservation of biodiversity on private land are likely to include:

- land tenure issues;
- competitive neutrality arrangements;
- native wildlife regulatory frameworks; and
- taxation arrangements.

Inconsistent policy settings and/or lack of complementary policy between jurisdictions (both vertically and horizontally) in these core regulatory areas may also constrain conservation related activities by the private sector.

This report only examines factors constraining private conservation on freehold and leasehold land where private conservation is the primary land use purpose (at least for an identifiable proportion of the land). The institutional framework for conservation of biodiversity is complex and there are many agencies, organisations and individuals involved.

Activities where conservation is not the primary landuse, and/or that are unlikely to have a significant impact on biodiversity, are not considered. For example, environmental management issues relating to commercial agriculture (such as Landcare programs and national water policy) or the commercial farming of native species (such as emus and kangaroos) are beyond the scope of the study. *Ex-situ* conservation activities such as zoos and captive breeding programs, and education



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and information roles performed by the private sector, are also considered only in passing.

Other constraints to the conservation of biodiversity, such as those arising from particular social attitudes, information deficiencies and a lack of public awareness about the importance of biodiversity, are not considered in this study. These constraints can reduce the demand for conservation and may also be responsible for practices that affect biodiversity. Some have also argued that the lack of incentive resulting from an absence of appropriate policies either to protect private resources from damage or to encourage conservation on private land can constrain conservation (see Binning and Young 1999a). While insufficient incentive could be an important factor affecting the extent of private conservation, it is beyond the scope of this study.

Chapter 2 reviews potential regulatory and administrative constraints to private conservation by individuals and groups on private leasehold and freehold land. Competitive neutrality between similar private and public conservation providers is examined in chapter 3. Chapter 4 considers how native wildlife regulatory frameworks can affect private conservation initiatives. Chapter 5 examines the implications of taxation arrangements on private conservation. The conclusions are presented in Chapter 6.



## 2 Land tenure issues

Regulatory and administrative arrangements relating to private land use can have important impacts on private conservation initiatives. This chapter reviews some of the arrangements that may constrain conservation by private individuals and groups on private leasehold and freehold land. Section 2.1 describes private land tenure in Australia and the property rights attached to freehold and leasehold title. Section 2 discusses the problems and challenges in undertaking private conservation on pastoral leases, while section 2.3 discusses administrative and institutional arrangements for facilitating conservation agreements on private land.

### 2.1 Private land tenure

More than 60 per cent of Australia's land area is classified as private land. Private land is either private freehold or private Crown leasehold land under the control of private landholders and resource managers (AUSLIG 2001) (table 2.1).

Table 2.1 **Private land, by category and jurisdiction**  
thousand square kilometres

<i>Jurisdiction</i>	<i>Private Crown leasehold<sup>a</sup></i>	<i>Private Crown leasehold/total private</i>	<i>Freehold</i>	<i>Total private land</i>	<i>Total private/total land</i>
		%			%
Queensland	939.8	60	627.2	1 567.0	91
New South Wales	308.9	43	405.5	714.4	89
Victoria	0.1	0	155.2	155.3	68
South Australia	418.4	73	158.4	576.8	59
Northern Territory	666.6	99	6.4	673.0	50
Western Australia	899.9	81	205.1	1 105.0	44
Tasmania	-	-	27.2	27.2	40
Australian Capital Territory <sup>b</sup>	0.9	100	-	0.9	38
<b>Australia/total</b>	<b>3 234.6</b>	<b>67</b>	<b>1 585.0</b>	<b>4 819.6</b>	<b>63</b>

- none <sup>a</sup> Does not include Aboriginal freehold and leasehold land held by designated Aboriginal communities, with special conditions attached to the titles. <sup>b</sup> All freehold land in the Australian Capital Territory has been resumed and vested in the Crown, preventing its sale or disposal as freehold land.

Source: AUSLIG (2001).

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Private Crown leasehold land makes up more than two thirds of all privately controlled land (table 2.1). In the Northern Territory, over 99 per cent of all privately controlled land is leasehold. Tasmania, the Australian Capital Territory and Victoria account for less than one per cent of total leasehold land.

Almost all private Crown leasehold land is held under pastoral leases. Pastoral leases encompass a large proportion of what is known as Australia's 'rangelands' — the arid and semi-arid areas and the tropical savannas.

The property rights to pastoral leases are shared by the lessee and the Crown and may also be shared by traditional owners (box 2.1). The Crown has the power to resume pastoral leasehold land for a wide range of purposes. Where native title is applicable, activities on the leased land need to be consistent with the *Native Title Act 1993* and the *Native Title Amendment Act 1998*.

**Box 2.1 Pastoral leasehold tenure**

Pastoral leasehold tenure is a limited form of property right that exists between a lessee and the Crown that gives lessees an exclusive right to conduct activities associated with pastoralism (including raising livestock and developing the infrastructure necessary for pastoralism). Activities not within the terms of the lease are subject to Crown approval and must also be consistent with native title, where applicable.

The system of pastoral leasehold tenure is unique to Australia and New Zealand. It evolved in the mid 1800s to provide pastoralists with some form of security of title. It also allowed governments to retain both flexibility and control over the vast tracts of land used for pastoral purposes.

Pastoral leases are governed by the relevant state government statutes which set out the rights of lessees. There is an extensive array of leases and lease conditions. For example, in Queensland, there are more than 70 forms of pastoral lease to which different rights and conditions may be attached.

More recently, the rights of traditional owners to pastoral leasehold land have also been formally recognised. In 1996, the High Court, in its Wik judgement, found that pastoral leases were not leases in the common law sense but were special interests created by statute and thereby do not automatically confer rights of exclusive possession. This ruling followed the earlier Mabo (1992) case and the *Native Title Act 1993* and was subsequently ratified in the *Native Title Amendment Act 1998* (see box 2.4).

Sources: Brennan (1997); Holmes (2000); Holmes and Knight (1994); NIWG (1997); O'Connor (1997).

Freehold land makes up about one third of all privately controlled land. The majority of this land is located in the eastern States (Queensland, New South Wales,

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Victoria and Tasmania), the south-east of South Australia and the south-west of Western Australia (table 2.1).

The property rights to private freehold land bestow relatively exclusive rights to the holder of the deed or title to the land. The Crown retains only limited resumption rights to the land (mainly for minerals resources) and there are fewer and less pervasive provisions with respect to native title (refer to *Native Title Act 1993* and *Native Title Amendment Act 1998*).

## **2.2 Private conservation on pastoral leasehold land**

Private groups pursuing conservation activities on pastoral leases have emerged in recent years, including non-profit groups such as Birds Australia (BA), the Australian Bush Heritage Fund (ABHF) and the Australian Wildlife Conservancy (AWC) and commercial groups such as Earth Sanctuaries Ltd (ESL) (see box 2.2). Appendix A discusses the operation of these groups in greater detail.

These groups face a number of potential constraints in pursuing conservation objectives on pastoral leasehold land. A central factor appears to be that pastoral leases are controlled and administered by a land tenure system designed to facilitate pastoralism with limited scope to alter the primary purpose of a lease to other activities such as conservation. Another factor is uncertainty surrounding property rights held by the Crown through resumption provisions, and by traditional owners through native title.

### **Adding/varying uses on pastoral leases to reflect conservation**

Each State and Territory has its own legislation that sets out and regulates the provisions and conditions governing pastoral leases (see Binning and Young 1997). In all jurisdictions, the terms of a pastoral lease generally preclude activities other than pastoralism and activities associated with pastoralism.

There is currently no privately held Crown lease that recognises conservation as the primary land use in the way that a pastoral lease recognises pastoralism. However, each State and Territory has the legislative ability to grant exemptions to the pastoral lease provisions or to add additional purposes to existing leases. Applications made by the lessee outlining the proposed change in land use are assessed by the Lands Minister in New South Wales, Queensland, Victoria, the Northern Territory and the Australian Capital Territory. In South Australia and Western Australia, a pastoral board assesses proposals and reports to the minister

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with its recommendations. In all cases, approval is granted at the discretion of the minister and/or pastoral board.

**Box 2.2 Private conservation activities on pastoral leases**

**Birds Australia**

BA has the lessee rights to two pastoral leases — Gluepot Station, a 54 390 hectare property in South Australia's Murray Mallee, and Newhaven Station, a 262 200 hectare property in the southern Northern Territory. Both properties are managed as conservation reserves.

**Australian Bush Heritage Fund**

The ABHF has recently purchased the lessee rights to Carnarvon Station, a 59 000 hectare pastoral lease in central Queensland. The property is to be managed as a conservation reserve.

**Australian Wildlife Conservancy**

The AWC (formerly the Fund for Wild Australia) has the lessee rights to three pastoral leases in Western Australia — Faure Island, a 5600 hectare Shark Bay property in a World Heritage Area; Mount Gibson Station, a 130 000 hectare property north of Perth; and Mornington Station, a 312 000 hectare property in the Kimberley region in the State's north-west. The properties are to be managed as conservation reserves and used for ecotourism.

**Earth Sanctuaries Ltd**

ESL has the lessee rights to Scotia, a 65 000 hectare pastoral lease in western New South Wales. The property is to be managed as a pastoral lease with conservation and ecotourism purposes.

*Sources:* Adams (2000); ABHF (2001); BA (2001a, 2001b); ESL (2000a); Fund for Wild Australia (2001); Woodford (2001).

*Destocking a pastoral lease*

An important constraint to private conservation on pastoral leases appears to be the limited opportunities that are available to alter stocking provisions.

All pastoral leases have some level of grazing or stocking provision attached to their title which requires the lessee to use the land for pastoral purposes unless an exemption is granted. Western Australia and South Australia have explicit provisions for minimum stocking rates on pastoral leases with the respective pastoral boards having the power to enforce these provisions and to impose penalties where rates have not been met. While minimum stocking rates exist in

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South Australia, they have not generally been enforced (South Australia Pastoral Board and Native Vegetation Council Secretariat, pers. comm., 11 December 2000). In contrast, Western Australia enforces stocking rates to ensure that a commercially sustainable pastoral enterprise is achieved (subject to ecological limits) (Western Australia Department of Land Administration, pers. comm., 11 December 2000).

BA has gained stocking exemptions for both of the properties to which it holds lessee rights (see box 2.2). In South Australia, approval was required from the pastoral board to destock the land on Gluepot Reserve. As discussed above, such a decision is made at the discretion of the pastoral board. A factor in favour of BA achieving an exemption was that the property was relatively marginal pastoral land and that conservation was to be the primary objective for the land. In its submission to the Industry Commission's (1998) inquiry into ecologically sustainable land management, the South Australian Government said:

The use of pastoral lease land is tightly controlled by the South Australian Pastoral Board and a change of land use other than grazing by sheep and cattle must be approved by the Board. Applications for a change of use that have been viewed favourably tend to be those with a high degree of conservation integrity (South Australian Government 1997, p. 3).

The ABHF is seeking greater control over the level of stock that it is required to graze on the recently purchased Carnarvon Station pastoral lease in central Queensland (see box 2.2). In Queensland, there is no pastoral board — the Minister for Natural Resources has sole responsibility for approving lease changes (refer to s. 154 of *Land Act 1994*). The lease for Carnarvon Station currently requires the property to be grazed 'sustainably'. ABHF has reduced grazing pressure and will establish grazing trials to help determine its management objectives for the property (ABHF, pers. comm., 14 May 2001).

A factor which may potentially influence approval to destock a pastoral property is the commercial productive capacity of that land. If the productive capacity is high, then the relevant minister or pastoral board may decide it is in the best interest of the State or Territory to not have this area lost to pastoral production.

#### *Adding an ecotourism purpose*

As well as seeking to change the stocking provision contained in a pastoral lease, lessees may also wish to add other land use purposes related to conservation, such as ecotourism. As for destocking a pastoral lease, approval to add an ecotourism purpose is made at the discretion of the responsible minister or pastoral board. Where applicable, this approval may also need to be consistent with native title (see box 2.4 below).

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ESL is seeking to add an ecotourism purpose to its lease of Scotia ‘Earth Sanctuary’ (see box 2.2) as well as continuing to manage a majority of the property as a pastoral lease. ESL has built a feral proof fence around 8000 hectares with this area serving as a wildlife and habitat sanctuary, and is in the process of eradicating feral animals and reintroducing native wildlife. Around this core sanctuary, an exterior perimeter fence is being built which will allow the remnants of a feral goat population to be grazed in the area between the two fences. The harvesting of these goats will provide ESL with an additional source of revenue and the grazing of the animals will create an additional firebreak. ESL is awaiting final approval for its proposed activities from the Department of Land and Water Conservation in New South Wales (Jackson, B., Earth Sanctuaries Foundation Inc., pers. comm., 20 February 2001).

### *Leases for other purposes*

Some provisions do exist for the granting of leases for other purposes, circumventing the need to amend existing pastoral leases for conservation purposes. For example, in Western Australia, under the *Land Administration Act 1997* (s. 79), there are provisions for the Minister responsible for lands to lease Crown land for any purpose. Where a pastoral lease is converted to a lease for other purposes, this may allow a native title claim to be made on the leasehold land. Uncertainty surrounding property rights held by traditional owners through native title may influence leasing arrangements and investment decisions in private conservation.

### *Access provisions*

As part of pursuing conservation as the primary purpose on a pastoral lease, lessees may wish to restrict access to parts or all of the leased land. For example, ESL’s activities rely on feral proof perimeter fences as a fundamental component of their activity. However, such actions may not be consistent with access provisions.

Access provisions regulate the ability of a lessee to restrict entry and passage (for example, via fencing and gates) by individuals and/or stock over a lease. Examples of access provisions include:

- South Australia, the *Pastoral Land Management and Conservation Act 1989* specifies arrangements for established public access (ungraded roads) and stock routes;
- Western Australia, the *Land Administration Act 1997* provides for access by the public to areas of recreational or tourist interest; and



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- New South Wales, the *Fisheries Management Act 1994* gives a person the right to fish on all established watercourses provided the person is in a boat on those waters or is on the bed of the river or creek.

Where native title is applicable, lessees also need to consider the access rights of traditional owners, for activities such as hunting and fishing, as provided for under the *Native Title Act 1993* and *Native Title Amendment Act 1998* (see below).

State and Territory legislation may provide some scope for exemptions for access in the same manner as for altering lease purposes, via ministerial or pastoral board approval.

### **Resumption provisions**

Under lease provisions in each State and Territory, certain property rights associated with pastoral leasehold land remain the property of the Crown. This typically includes ownership of timber and soil and to resume the land for specified activities. For example, under the *South Australian Crown Lands Act 1929*, the Minister may:

...resume lands included in the lease or agreement for roads, railways, tramways, sites for towns, park lands, mining purposes, or for any other purpose whatsoever.

Although infrequently exercised, resumption provisions can create uncertainty where individuals or groups are making decisions to invest both human and physical capital in pursuing conservation objectives. For example:

- In Queensland, the ABHF took into account the likelihood of resumption of a leasehold property (Carnarvon Station) before a decision to purchase the lessee rights was made (ABHF, pers. comm., 15 February 2001).
- In Western Australia, the AWC has the lessee rights to three pastoral leases which it intends to manage as conservation reserves. The AWC has expressed concern that the leases will be renewed subject to 'exclusion of areas from the existing lease that may be required for public works, conservation, national park, nature reserve or other Government purposes' (AWC, pers. comm., 8 March 2001).

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* does not prevent the resumption of a lease. However, after resumption, the Act can protect listed threatened species or a threatened ecological community from actions that may cause significant impacts (see box 2.3).

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**Box 2.3     The *Environment Protection and Biodiversity Conservation Act 1999* and resumption**

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* prohibits a person taking an action which will have, or is likely to have, a significant impact on a matter protected by the Act (for example, listed threatened species and ecological communities) without seeking the approval of the Minister for the Environment and Heritage. The resumption of a lease *per se* is not an ‘action’ of a type that is likely to have a significant impact within the meaning of the Act. Furthermore, the Act does not apply to an action that is a lawful continuation of a use of land occurring when the Act commenced in July 2000.

Source: Environment Australia, pers. com., 7 June 2001.

### **Consistency with native title**

Native title can also affect the pattern of land use activities on pastoral leases (see box 2.4). Aboriginal and Torres Strait Islander people have a strong connection with the land and individuals may also have special relationships with particular places. The connection between a local descent group or clan and the land involves both rights and duties — rights to use the land and any resources, and duties to tend for the land through undertaking ceremonies (ATSIC 1999).

Various private conservation initiatives acknowledge the relationships of Aboriginal and Torres Strait Islander people with particular areas of land. For example, BA (see box 2.2 and appendix A):

... acknowledges the links of Aboriginal traditional custodians to the land at Newhaven Station, Northern Territory, and is keen to work cooperatively with the traditional custodians to ensure the best outcomes for conservation management (Threatened Species Network 2000).

Where lessees wish to diversify their activities on a pastoral lease by altering lease purposes, for example, by adding purposes such as conservation and tourism, these must be consistent with the rights of holders of native title (Holmes and Knight 1994). Uncertainty about the effect of native title was noted by the Queensland Government’s Submission to the Industry Commission’s (1998) inquiry into ecologically sustainable land management:

Diversification into alternative activities on pastoral and grazing leases could involve native title considerations which would affect such activities (Queensland Government 1997, p. 16).

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The *Native Title Amendment Act 1998* increased the scope for diversification of activities on pastoral leases, such as for farmstay tourism, that do not require negotiation with traditional owners. However, the Act reserves the right of traditional owners to negotiate on other activities not related to pastoralism and not within the original lease conditions, including conservation and ecotourism (*Native Title Amendment Act 1998*).

#### Box 2.4      **Native title and pastoral leases**

Native title is the recognition by Australia's High Court of 'the common law rights and interests of Aboriginal and Torres Strait Islander people in land, according to their traditional laws and customs'. The question of native title was raised when the High Court decided in 1992 in favour of a land claim by the late Eddie Mabo, a Torres Strait Islander.

The High Court ruled that native title could exist where the particular indigenous people had maintained their traditional connection to the land and where their native title had not been extinguished by government actions.

The High Court has indicated that native title is extinguished by grants that are inconsistent with the continuing existence of native title. It was believed at that time that this included pastoral leases. Based on the comments made in the Mabo case it was understood that native title could only exist on vacant Crown land and other Crown land such as reservations and national parks, and on Aboriginal land.

**Native Title Act 1993:** The main purpose of the *Native Title Act 1993* was to recognise and protect native title. As it was widely assumed at the time that native title had been extinguished on pastoral leases and other non-exclusive tenures, the Act did not deal properly with the possibility that native title might co-exist with other rights on the same land.

**The Wik Decision, 1996:** The Wik people of Cape York asked the High Court to decide whether a native title claim could be made over pastoral leasehold land. In December 1996, the High Court decided that native title might survive on pastoral leases. It also said that the rights of pastoral lessees prevailed over any inconsistent rights that native titleholders may have. This decision made it imperative that the *Native Title Act 1993* be amended to regulate, in particular, the inter-relationship between native titleholders and pastoral lessees.

**New Native Title Act:** The development of the *Native Title Amendment Act 1998* involved extensive discussion with States and Territories and with indigenous groups, pastoral, mining and resources industries.

The new Act includes proposals put forward by indigenous interests, such as the introduction of Indigenous Land Use Agreements. The Act also recognises and protects potentially co-existing native title rights on pastoral leases so native title claims can continue to be made over pastoral leasehold land.

Source: DFAT (2000).

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### *Negotiation and land use agreements*

Where native title claims are pending, lessees can negotiate directly with traditional owners to ratify Indigenous Land Use Agreements (ILUA) where consent is given to undertake certain activities on the land. ESL is in the process of negotiating an ILUA for its Scotia property which has a native title claim pending (Jackson, B., Earth Sanctuaries Foundation Inc., pers. comm., 20 February 2001).

Informal arrangements that recognise the land use objectives of both lessees and traditional owners are also emerging, particularly where lessees, such as private conservation groups, seek to respect, preserve and even rehabilitate the biological and cultural values of the land. For example, BA report having established a working relationship with the native title claimants of Gluepot Reserve (see box 2.2) by undertaking to pay for on-site assessments by traditional custodians to inspect any changes that are made to the land including land clearing for firebreaks and the building of any infrastructure (David Baker-Gabb, Gluepot Reserve Management Committee, pers. comm., 14 February 2001).

## **2.3 Voluntary conservation agreements and land tenure**

An important mechanism to facilitate the conservation of biodiversity on private land is the use of conservation agreements (covenants, easements and other agreements) that enable values associated with the conservation of biodiversity to be formally recognised and bound to land tenure.

There is a growing demand for such agreements in Australia from both individual landholders as well as conservation groups such as BA and the ABHF. The increase in demand highlights the need for efficient and effective administrative and institutional arrangements. Three emerging issues which need to be examined are the role of conservation trusts to facilitate and manage conservation agreements, establishing agreements on pastoral leases and the effect of Crown resumption provisions on the uptake of agreements.

### **Conservation agreements for the protection of biodiversity**

In broad terms, a conservation agreement is a legally binding contract or agreement between a landholder and a third party such as a government or conservation trust, regarding the use and management of a piece of land for a fixed term or in perpetuity (Binning and Young 1997). Agreements usually take the form of a conservation covenant or easement. Covenants place restrictions on the landholder's

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use of the land while easements confer the right to do something on another person's land or restrict the way in which the landholder can use the land (IC 1998).

Conservation agreements have been extensively used in several countries including New Zealand, the United Kingdom and the United States. In the United States, easements are facilitated and managed by land trusts to meet various land management objectives (box 2.5).

**Box 2.5 Conservation easements in the United States**

In the United States, landholders may agree to permanently limit uses of their land in order to protect its conservation values. Taxation arrangements provide incentives for landholders to place conservation easements on portions of their land. For example, the donation of land with easements to a land trust can provide substantial income tax deductions and estate tax benefits — the amount of the charitable donation is the difference between the land's value with the easement and its value without the easement.

Land trusts in the United States are private non-profit organisations that are organised at the national, regional and local level and have the ability to legally enforce a donated easement. These trusts, which number about 1200, promote, facilitate and manage the easements which, collectively, can be used to meet various land management objectives.

Land trusts are coordinated at the national level under the non-profit umbrella organisation, the Land Trust Alliance. The Land Trust Alliance provides a range of programs and services, including direct grants to land trusts, training programs, answers to inquiries for technical assistance, and mentoring to help land trusts develop their expertise to protect open space.

*Sources:* IC (1998); Land Trust Alliance (2001).

In Australia, each State and Territory has its own set of legislation that allows for conservation agreements to be established on private land. Agreements are made between the landholder and State and Territory contracting agencies that are empowered through the legislation to act in the name of the Crown (table 2.2). The different programs outlined in table 2.2 either use covenants or agreements with negotiated conditions being legally binding on all future owners or lessees. Most States also operate Land for Wildlife schemes — non-binding agreements that allow landholders to register their properties if areas within the property are actively managed for nature conservation (Binning and Young 1997).

**Table 2.2 State and Territory conservation agreements, as at March 2001**

<i>Jurisdiction</i>	<i>Form of agreement</i>	<i>Contracting agency</i>	<i>Term of Agreement</i>	<i>Number signed</i>	<i>Area hectares</i>
New South Wales	Conservation Agreements	New South Wales Parks and Wildlife	perpetual	96	7000
	Wildlife Refuges	New South Wales Parks and Wildlife	negotiated length	na	na
Victoria	Covenants	Trust for Nature	perpetual	359	15 186
	Land Management Cooperative Agreements	Department of Natural Resources and the Environment	negotiated length	na	na
Queensland	Nature Refuges	Queensland Parks and Wildlife	perpetual	55	16 000
South Australia	Heritage Agreements	Parks and Wildlife South Australia	perpetual or fixed	1200	600 000
Western Australia	Conservation Covenant	National Trust of Australia (Western Australia)	perpetual or fixed	21	1550
	Conservation Covenant	Department of Conservation and Land Management	perpetual or fixed	2	90
	Agreements to Reserve	Agriculture Western Australia	30 year	1100	45 000
Tasmania	Conservation Covenant	Department of Primary Industries, Water and Environment	perpetual	22	2144
Northern Territory	Conservation Agreements	Parks and Wildlife Commission Northern Territory	perpetual	2	11 000

na not available

*Sources:* Binning and Young (1997); IC (1998); Various State and Territory Departments.

The number of agreements varies significantly between jurisdictions. Table 2.2 shows that Heritage Agreements in South Australia and Agreements to Reserve in Western Australia account for a majority of Australian agreements. Earlier work by Binning and Young (1997) highlighted that a majority of these agreements were entered into as a result of remnant vegetation programs that tied fencing and other assistance to the signing of the agreements. Of the other jurisdictions, Victoria, with the Trust for Nature (see box 2.6), has the most agreements with over 350 covenants in place.

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### Box 2.6 Trust for Nature (Victoria)

The Trust for Nature, previously the Victorian Conservation Trust, is a non-profit organisation established under the *Victorian Conservation Trust Act 1972*. This Act empowers the Trust with authority to operate independently of government departments, to achieve its goals in conservation of native habitat and its wildlife and plants. In 1999-2000, the Trust received just over one third of its revenue through government grants, with the remainder consisting of donations and investments.

The Trust uses covenants on private land entered into on a voluntary basis by the landholder to conserve areas of ecological significance, wildlife or plants, sites of cultural significance or natural beauty. The covenants are placed in perpetuity under the *Victorian Conservation Trust Act 1972* — they are registered on the title of the land and remain in place irrespective of change of ownership.

The Trust also acquires land for conservation using a 'revolving fund'. The revolving fund is used to buy land which is then protected with a covenant and sold to private buyers who are sympathetic to the aim of the Trust. Receipts from land sale are returned to the fund and used to protect more land.

Sources: Looker (2001); Trust for Nature (1997, 2000a, 2001).

## The role of conservation trusts

The use of conservation trusts within Australia is growing. Apart from the Trust for Nature in Victoria, Western Australia established a separate conservation trust in 1997, as part of the National Trust of Australia (Western Australia) (table 2.2). New South Wales and Queensland are soon to establish similar organisations.

The Industry Commission (1998) noted several strengths of non-profit conservation trusts overseeing conservation on private land — such organisations are able to harness private funds for conservation as well as potentially avoiding some of the landholder distrust associated with government conservation agencies.

Conservation trusts such as the Trust for Nature can offer agreements with a range of terms and conditions. The Industry Commission (1998) identified that:

Landowners should be allowed to select the combination that best suits their circumstances and not to be expected to take only the terms and conditions governments believe they should accept (IC 1998, p. 344).

A central issue to any uptake of responsibilities by non-profit trusts in negotiating conservation agreements is public funding for such organisations given any shortfall from donations. One option is for public funding to be provided to trusts on a contestable basis by allowing them to compete for government funds allocated to

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conservation on private land (IC 1998). For example, the Trust for Nature has applied for and obtained funding from the Commonwealth Government's Natural Heritage Trust (NHT) (Trust for Nature 2000a).

Another mechanism whereby conservation trusts may raise funds is through the use of a 'revolving fund' (see box 2.6) as used by the Trust for Nature. The further development and successful use of revolving funds in Australia will rely on several factors including the extent to which it is possible to develop a market for conservation properties (Looker 2001).

### **Conservation agreements on pastoral leases**

Historically, conservation agreements have focussed on private freehold land, however, there is an emerging interest among holders of pastoral leases to establish such agreements. For example, BA and the ABHF have negotiated or are currently negotiating agreements in South Australia, Queensland and the Northern Territory.

This increase in demand is, in part, driven by the linking of NHT funding to the successful negotiation and ratification of conservation agreements. NHT funding may vary according to the level of commitment to conservation that individuals accept. Government funding for NHT programs, such as Bushcare, is often higher if landholders enter into a management agreement, and higher still for the greater degree of certainty delivered by a covenant (Bushcare, Canberra, pers. comm., 7 November 2000). BA's purchase of the Newhaven Station property in the Northern Territory was made jointly with National Reserve System funding under the NHT and was contingent on the negotiation and ratification of a conservation agreement for the property.

While there is legislation that enables covenants and other agreements to be established on pastoral leases, as for freehold, negotiating agreements for pastoral leases is complicated by the fact that property rights to the land are split between the Crown, lessees and traditional owners (where native title is applicable).

Even before a conservation oriented lessee, such as BA, can contemplate establishing an agreement for a property, the prevailing lease conditions must first be amended to recognise the conservation objectives for the land. Any changes to the lease conditions and pattern of land use may also need to be consistent with native title (see above).

Furthermore, while it may be possible to alter the lease conditions and have these recognised as part of a conservation agreement, the Crown still retains significant resumption rights for pastoral leases (see section 2.2 above). These may act to



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discourage lessees from committing to the process of negotiating an agreement (see below).

As for conservation agreements on private freehold, non-profit trusts may be well placed to facilitate conservation agreements on leasehold land and encourage interested lessees to undertake actions to promote conservation. They may also be able to better arbitrate and ‘bridge the gap’ between the Crown, lessees and traditional owners.

### **The effect of resumption rights**

The Crown retains resumption provisions for private land that cannot be removed by the binding of private land tenure to a conservation agreement. This may act to discourage landholders from entering into an agreement on the premise that the threat of resumption counters the purpose of the agreement. The Trust for Nature (2000b) in a submission to a Victorian Government Review of Proposed Amendments to the *Minerals Resources Development Act 1990* said:

... The fact that Trust for Nature covenanted land is not exempted from exploration in the *Minerals Resources Development Act*, as is the case for land that is a reference area under the *Reference Areas Act 1978*; land that is a National Park, Wilderness Park or State Park under the National Parks Acts ... is of the greatest concern to the Trust, its covenantors and potential covenantors. We have on file record of a covenant not signed on important habitat because of the land owners perception of the devaluation of the covenant due to the lack of this exemption in the act ... (Trust for Nature 2000b, p. 3).

The Trust for Nature recommended that conservation covenants should be exempted from mineral exploration in Victoria and that such reforms:

... would provide much needed surety in nature conservation on private land that recognises the contribution that conservation of private land makes to the whole of the community ... (Trust for Nature 2000b, p. 3).

## **2.4 Summary**

- More than 60 per cent of Australia’s land area is classified as private land and is either freehold or leasehold land under the control of private landholders and resource managers.
- Crown leasehold land makes up more than two thirds of all privately controlled land and exists almost entirely as pastoral leases.
- Pastoral leases are controlled and administered by a land tenure system designed to facilitate pastoralism, with limited scope for adding and/or amending lease conditions. There is currently no privately held Crown lease that recognises

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conservation as the primary land use in the way that a pastoral lease recognises pastoralism. An important constraint to private conservation on pastoral leases appears to be the limited opportunities that are available to alter stocking provisions. In addition, access provisions may sometimes be inconsistent with conservation objectives.

- Uncertainty surrounding property rights held by the Crown through resumption provisions, and by traditional owners through native title, may influence investment decisions in private conservation.
- Aboriginal and Torres Strait Islander people have a strong connection with the land and individuals may also have special relationships with particular places. Informal arrangements that recognise the land use objectives of both lessees and traditional owners are also emerging, particularly where lessees, such as private conservation groups, seek to respect, preserve and even rehabilitate the biological and cultural values of the land.
- An important mechanism to facilitate the conservation of biodiversity on private land is the use of conservation agreements (covenants, easements and other agreements) that enable values associated with conservation and biodiversity to be formally recognised and bound to land tenure.
- The growing demand for conservation agreements highlights the need for efficient and effective institutional arrangements. Three issues which need to be examined are:
  - the role of conservation trusts to facilitate and manage conservation agreements;
  - establishing conservation agreements on pastoral leases; and
  - the effect of Crown resumption provisions on the uptake of conservation agreements.

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## 3 Competitive neutrality

The public sector is the most prominent provider of conservation services — from the ownership and management of national parks, reserves, and wildlife parks to the delivery of environmental science and extension services. The public sector has designated natural areas, agencies, staff and budgets for the conservation of biodiversity. Private providers are emerging in the provision of some *in situ* conservation services, particularly wildlife parks and reserves (sanctuaries). A potential impediment for these providers is unfair competition arising from the public provision of similar ‘products’ by public sector businesses.

Competition policy may have a role to play in addressing such concerns. In this chapter competitive neutrality principles and measures are reviewed and their applicability to private conservation providers assessed. The opportunities for private businesses to compete for public resources to provide these services are also considered. Competitive neutrality principles and measures appear to have limited application to sanctuaries, thereby constraining the scope to address any unfair competition from public sector businesses.

### 3.1 Competition policy and the conservation sector

There appears to be an emerging market for private conservation businesses — one of the most apparent is the provision of private sanctuaries. Private sanctuaries operate in a number of jurisdictions and an important issue is how public sanctuaries compete with these businesses. In some cases the public sanctuaries are run by statutory committees at apparent ‘arms length’ from government while others are run by government agencies that also have responsibility for the regulation and management of native wildlife.

In April 1995, all Australian Governments agreed to implement a National Competition Policy (NCP) to accelerate and broaden progress on microeconomic reform in recognition of the benefits from sustained economic and employment growth. The Competition Principles Agreement (CPA) is one of the three intergovernmental agreements underpinning the NCP (box 3.1). Although the CPA has substantial implications for a broad range of industries, so far its application to the conservation sector appears to have been somewhat limited.

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### Box 3.1 The Competition Principles Agreement

The Competition Principles Agreement (CPA) addresses a number of competition policy areas including:

- **Prices Oversight of Government Business Enterprises:** The *Trade Practices Act 1974* was extended so that its prohibitions of anti-competitive conduct (such as the abuse of market power and market fixing) would apply to unincorporated businesses and State and Territory government businesses. The Australian Competition and Consumer Commission (ACCC) administers the *Trade Practices Act 1974* and the *Prices Surveillance Act 1983*.
- **Competitive Neutrality Policy and Principles:** Competitive neutrality policy aims to ensure that government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. The application of competitive neutrality in any particular situation is subject to benefits exceeding the costs, and some flexibility is provided to jurisdictions regarding the detailed implementation of competitive neutrality. Governments were required to prepare a policy statement on competitive neutrality (with an implementation timetable and complaints mechanism), and publish annual reports on the implementation of competitive neutrality.
- **Structural Reform of Public Monopolies:** Governments were able to establish their own agenda for the structural reform of public sector monopoly businesses.
- **Legislation Review:** Governments were required to review and, where appropriate, reform all laws that restrict competition unless the benefits of the restriction to the community as a whole outweighed the costs, and the objectives of the legislation could only be achieved by restricting competition.
- **Access to Services Provided by Means of Significant Infrastructure Facilities:** Commonwealth legislation would establish a regime for third party access to services by means of significant infrastructure facilities. This would enable competing businesses to use nationally significant infrastructure such as electricity networks and gas pipelines.

The application of these elements is determined on a case by case basis using a public interest assessment. Governments are required to consider a number of factors to determine what is in the public interest including ecologically sustainable development, social welfare and equity, economic and regional development and the efficient allocation of resources.

Sources: NCC (1998); NCC (2001).

This chapter considers the applicability of competitive neutrality to address unfair competition faced by private sanctuaries. Competitive neutrality requires that government businesses should not enjoy net competitive advantages over private sector competitors simply because of their public ownership status. However, competitive neutrality does allow jurisdictions the flexibility to pursue policy

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objectives they deem warranted (such as subsidising activities). Jurisdictions have progressively implemented competitive neutrality across a range of government businesses, but its application to sanctuaries appears to have been very limited.

### **3.2 Applying competitive neutrality principles**

Each jurisdiction established policy implementation guidelines that among other things, determine what characteristics constitute a government business for the purposes of the competitive neutrality agreement. The guidelines also specified a range of measures to be applied to eligible businesses to lead to competitively neutral outcomes. While these guidelines are broadly similar and consistent across jurisdictions, they can differ in their application of specific measures to certain types of businesses. Jurisdictions have listed significant businesses potentially subject to competitive neutrality principles and have nominated specific measures for each business to implement.

Each jurisdiction, as part of the competitive neutrality framework, also established a mechanism for interested parties to lodge complaints against government businesses believed to be competing unfairly against private businesses. If necessary, this can enable more effective competitive neutrality measures to be applied to non-compliant businesses or to have competitive neutrality measures applied to businesses previously not considered subject to competitive neutrality.

Despite the apparent broadness of the competitive neutrality principle, in practice it is limited to specific government businesses. Each jurisdiction has its own guidelines to determine what is a business for the purposes of competitive neutrality. For example, under competitive neutrality arrangements, the Commonwealth Competitive Neutrality Statement (CCNCO 1996) defines a business as having the following characteristics:

- user-charging for goods or services;
- an actual or potential competitor in either the private or public sector; and
- a degree of managerial independence in relation to the production or supply of the good or service and in its provision price.

Some government businesses are exempt from application of the principles on a case by case basis. For public conservation businesses such as sanctuaries, the applicability of competitive neutrality appears to be limited and unclear.

An important element of the competitive neutrality framework is that it is not intended to apply to all government businesses. Competitive neutrality principles and measures are not intended to apply:

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- to non profit, non business public sector activities;
  - to government businesses which are not considered ‘significant’; or
  - where the costs exceed the benefits (CCNCO 1996).

In general, non-profit, non-business government activities are characterised by their primary role in providing community service obligations or some other social, environmental or cultural policy objectives. Some examples include: environmental protection and national parks; sustainable management of natural resources; community health services; and police and emergency services. The activities listed (and others) are not necessarily exempt from application of competitive neutrality principles however. Where there is the possibility of alternative suppliers in competition with the government provider, or where competition is introduced in delivery of these services, competitive neutrality principles may be applicable to all or part of the government activity.

The Commonwealth considers a significant business to have a commercial turnover exceeding \$10 million per year. Government Business Enterprises (GBEs), other share-limited trading companies and business units are always considered significant, regardless of turnover. The test of significance varies somewhat across jurisdictions (table 3.1). For example, most jurisdictions specifically list the existence of an actual or potential competitor in the market as one criterion for assessing the significance of the government enterprise, although this is not explicitly stated in the case of Victoria, ACT and South Australia. Further, significance can be initially assessed on the commercial receipts of the business, and this can vary substantially between the jurisdictions. New South Wales, Western Australia and South Australia consider any public enterprise with commercial receipts over \$2 million to be significant, whereas the Commonwealth and Queensland do not consider the business to be significant until commercial receipts exceed \$10 million. In some jurisdictions, the significance of a business may be determined according to its position in the local market, rather than the extent of its commercial receipts.

In complaint cases, tests for significance have included factors such as whether the government business and the private business are direct competitors, the geographical location of the competing businesses, and customer profiles of the competing businesses. In one case, the significance test was determined according to the business market strength and ability to compete against private providers (Competition Commissioner 1998).

**Table 3.1 Criteria for assessing ‘significance’ of businesses**

<b>Jurisdiction</b>	C/wealth	NSW	Vic	Qld	Tas	SA	WA	NT	ACT
<b>Policy</b>									
GBEs	✓	✓	✓	✓	✓	✓	✓	-	✓
Trading companies	✓	✓	✓	✓	✓	✓	✓	-	✓
Business units	✓	✓	✓	✓	✓	✓	✓	-	✓
Statutory authorities	-	-	-	✓	-	-	-	-	✓
User-charging for goods and services	✓	✓	-	✓	✓	✓	-	-	✓
Actual or potential competitor	✓	✓	-	✓	✓	-	✓	-	-
Tendering	a	-	-	-	-	✓	-	-	-
Independent manager	✓	-	-	-	-	-	-	-	-
Only where benefits > costs	✓	-	✓	✓	-	✓	✓	-	-
Commercial receipts > \$2m	-	✓	-	-	-	✓	✓	-	-
Commercial receipts > \$10m	case by case	-	-	✓	-	-	-	-	-
Non-profit, non-business	✗	-	✗	✗	✗	✗	-	-	✗
Govt programs direct funding	✗	-	-	✗	✗	✗	-	-	-
Prime CSO/public policy function	-	-	-	✗	✗	✗	-	-	✗
Market share	-	-	case by case	case by case	case by case	case by case	-	-	-
Resources commanded	-	-	case by case	case by case	-	-	-	-	-
Effects of poor performance	-	-	case by case	-	-	-	-	-	-
Competitive impact in market	-	-	case by case	-	-	case by case	-	-	-

**a** All activities submitting in-house bids for competitive tenders are automatically subject to competitive neutrality regardless of size. ✓ considered ✗ not considered - not referred to

Sources: various Commonwealth and State Competitive Neutrality Policy Statements.

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Jurisdictions were required to list the public sector businesses they considered to be significant and therefore subject to competitive neutrality. The types of businesses considered significant varied across jurisdictions and many were determined on a case by case basis. In some jurisdictions, there is an additional competitive neutrality classification called ‘other significant businesses’. Businesses not initially classified as ‘significant’ can be listed in this additional classification and be subject to competitive neutrality upon complaint. In some jurisdictions a complaint can be lodged against a business not listed as significant — an assessment can then be made of its significance and whether competitive neutrality measures should be applied. In Queensland however, the declared list of significant businesses cannot be altered by complaint — the list of significant businesses being embodied in the Act. Initially, few jurisdictions (with the exceptions of South Australia and Tasmania) nominated conservation services (including sanctuaries) as significant businesses subject to competitive neutrality measures.

Consequently, the application of competitive neutrality principles to public sanctuaries has been limited. The scope to apply competitive neutrality principles to public sanctuaries is also limited — in some jurisdictions a complaint cannot be brought and where one can be brought the complaint must be successfully upheld.

In nominating significant businesses subject to competitive neutrality, jurisdictions had to assess the benefits and costs of applying the competitive neutrality framework to individual businesses. In some cases, the costs of applying competitive neutrality to specific businesses were considered to exceed the benefits and consequently, the jurisdictions were not obliged to implement competitive neutrality measures to those businesses. In other cases (for example, Queensland), business activities were sorted into two categories — those considered significant and therefore subject to competitive neutrality, and those classified as candidates for competitive neutrality reform, pending an assessment of the costs and benefits of reform (Queensland Government 1996).

## **Competitive neutrality measures**

The competitive neutrality principle can be applied to relevant government businesses by implementing appropriate measures (box 3.2). Only government business activities that are considered significant are obliged to implement competitive neutrality measures.

Cost reflective pricing is the key instrument used to implement competitive neutrality. Cost reflective pricing requires government businesses to recover the full costs of the goods and service they provide. This discipline can help ensure that public sector resources are used in the most efficient manner. Other measures



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include corporatisation and commercialisation. The choice of appropriate measure depends on the nature of the business and the benefits and costs of alternative measures. For example, corporatisation is unlikely to be warranted on relatively small significant businesses.

While cost reflective pricing underpins competitive neutrality, it is also closely associated with a number of other competitive neutrality measures, often included broadly under commercialisation. Usually, cost recovery together with a mix of other measures are applied to non GBE significant businesses.

Requiring the businesses to earn a commercial rate of return, face commercial interest rates on debt and face similar regulatory regimes to private businesses is not uncommon. Such measures and requiring costs to be presented in a manner similar to the private sector, improves the transparency and accountability of the government businesses. The measures can provide managers with information to decide if the goods and services should indeed be provided by the government businesses or if alternative forms of provision are desirable.

**Box 3.2 Competitive Neutrality measures**

- Cost reflective pricing — requiring a businesses to fully recover costs of goods and services provided — is a cornerstone of the competitive neutrality framework. Although a competitive neutrality instrument in its own right, cost reflective pricing is an important element of the other instruments — corporatisation and commercialisation.
- Corporatisation — applies mainly to large businesses such as Government Business Enterprises. Corporatisation involves establishing clear and non conflicting objectives through measures such as separating policy and service roles, enhanced managerial responsibility and autonomy and effective performance monitoring.
- Commercialisation — is similar to, but not the same as, full corporatisation. It can involve applying a range of measures (not necessarily all), including: establishing performance targets, removing regulatory functions, paying all rates and taxes, being subject to commercial borrowing rates and requiring the business to earn a rate of return.

Where full corporatisation and commercialisation are not appropriate, cost reflective pricing can be implemented in isolation.

*Sources:* various Commonwealth and State Competition Policy Statements.

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## Applying competitive neutrality measures

The choice of which competitive neutrality measures to apply to a particular non-compliant government business depends on case specific circumstances. For example, factors such as the costs and benefits of alternate mechanisms, the organisational context, and the levels of resources used in the supply of the good or service may be important considerations.

Cost reflective pricing and other competitive neutrality measures can require a business to have certain characteristics. For example:

- cost reflective pricing requires commercial and non-commercial activities to be easily separable;
- generating an appropriate return on assets requires all assets to be appropriately valued; and
- cost reflective pricing may need to be balanced against community service obligations.

### *Defining and separating non-commercial activities*

One approach to competitive neutrality is to separate commercial and non-commercial operations. Commercial operations are then subjected to competitive neutrality measures while non-commercial activities are excluded.

While this approach may suit some government business activities, in practice, defining and separating a sanctuary's commercial and non-commercial activities can be difficult. Some sanctuary operations, such as cafeterias and souvenir shops, are clearly commercial, others such as education and wildlife recovery programs could be considered non-commercial. For example, sanctuaries play an important educative role by displaying wildlife in a seminatural habitat. This non-commercial function was observed by the Commonwealth Department of the Environment and Heritage (DEH 2000, p. 2):

Common species in captivity may have considerable educational or tourist value. In addition to their educational and tourist value, species that are in the low risk category may support research that will enhance an understanding of the animal in the wild ...

However, it can be difficult to separate some public good roles from core commercial activities. For example, a basic sanctuary operation such as the containment and display of endangered native wildlife is essentially a commercial revenue raising activity, but it also generates a public good through educating the public about conservation.

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### *Valuing assets*

Requiring a government business to earn a commercial rate of return can provide an incentive for managers to ensure the full costs of services are recovered. It also establishes a mechanism by which to assess whether the service might be better provided by the private sector, thereby freeing up public resources for use elsewhere.

Requiring government businesses to earn a commercial rate of return on assets may lead to more efficient outcomes provided that the assets are appropriately valued. Accurately valuing wildlife and habitat assets is difficult when there are no observable markets for these assets. Trade in native wildlife is regulated and usually constrained to transfers of animals between businesses for nominal relocation fees (see chapter 4).

In 1998, the Australian Accounting Research Foundation (AARF) and the Australian Accounting Standards Board (AASB) outlined a new approach for evaluating self generating and re-generating assets (SGARAs) (box 3.3). Australia is the first country in the world to develop and apply an accounting standard for SGARAs. All reporting entities will be required to apply the method from 30 June 2000 (Keys 1998). The accounting standard AAS 35 enables government businesses to use the SGARA method. However, a preliminary review of major public sanctuaries indicates that this standard is yet to be adopted by the public sector.

Earth Sanctuaries Ltd (ESL) is the first company in Australia to apply the new SGARA accounting standard (Booth 1999). Under the accounting standards, ESL values its SGARAs on replacement cost (cost to capture, relocate and re-establish species in the sanctuaries). The replacement values used by ESL range from \$1250 per animal for threatened species, to \$5000 per animal for endangered species (ESL 2000a). While the SGARA approach provides a valuation of one of ESL's key revenue generating assets, it is not without controversy. For instance, fauna replacement values and fauna populations are difficult to verify.

### *Community service obligations*

Sanctuaries provide a limited range of services and as a consequence have limited avenues to generate revenue. The major revenue source for most sanctuaries are admission charges to view wildlife — others can include the contracting out of scientific expertise, donations, sales of souvenirs and merchandise, and venue hire.

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Full cost recovery via these revenue sources may conflict with other government service provision objectives. Some public sanctuaries may be required to meet certain community service obligations (CSOs) that are allowable under competitive neutrality. For example, public sanctuaries have at times been required to discount admissions to particular community groups such as school children and senior citizens. On the other hand, it is not uncommon for private businesses seeking to increase revenues to price discriminate by discounting charges for senior citizens and students. In some cases, cost reflective pricing may be implemented and prices subsequently lowered in response to a CSO.

### **Box 3.3 Valuation of self generating and regenerating assets**

The value of self generating and regenerating assets (SGARAs) can be measured using Accounting Standard AASB 1037 and Australian Accounting Standard AAS 35. These accounting standards apply to all SGARAs unless they are held primarily for aesthetic, heritage, ecological, environmental or recreational reasons. Both standards apply where SGARAs are held primarily for profit.

Net market value is considered to be the best reflection of the economic benefits of SGARAs. Key guidelines affecting the valuation of SGARAs are:

- where markets exist for the SGARA, the observed market price should be used as a basis for valuation, from which selling costs should be deducted;
- where no market exists, valuations of SGARAs should be based on the net value that could be received from its sale using as an indicator the:
  - most recent net market price of similar assets;
  - net market value of related assets;
  - net present values of cash flows expected to be generated by the SGARA; and
  - cost.

SGARA standards may not strictly apply if the business is conducted for ecological or environmental purposes, rather than commercial purposes. However, the values so generated might still provide some indication of the value of the animals.

*Sources: AARF (1998); AASB (1998).*

## **3.3 Competitive neutrality complaints mechanism**

As part of the CPA, each jurisdiction established an independent agency to receive and investigate competitive neutrality complaints. Interested parties can make a complaint where they believe a public sector business activity in the jurisdiction maintains a competitive advantage due to government ownership on the grounds that:

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- organisations identified in the Commonwealth and/or State/Territory Competitive Neutrality Policy Statements are not complying with the competitive neutrality arrangements where required; or
  - other government organisations should be required to comply with competitive neutrality arrangements, notwithstanding that activities are smaller than the ‘significant’ criteria set out in the Competitive Neutrality Policy Statements.

This is true with the exception of Queensland, where the complaints process does not allow an objection to be brought against an entity not currently classified as ‘significant’ (Queensland Government 1996). In other jurisdictions, complaints may be brought against other public businesses for assessment against competitive neutrality principles.

There are no restrictions on who may lodge a competitive neutrality complaint, so long as the complainant is an interested party. Where an allegation of non-compliance is substantiated by the complaints body, the body does not have the power to make final determinations or to enforce its recommendations. Rather, such as is the case for the Commonwealth, there is a requirement for the Treasurer and the relevant portfolio Minister to determine whether competitive neutrality will be applied within 90 days of receiving the recommendations. Non-compliance with recommendations for competitive neutrality reform accepted by the Treasurer may result in NCP funding being withheld.

Despite the limited application of competitive neutrality principles and measures to public sanctuaries, one complaint against a public sanctuary — the Cleland Wildlife Park (CWP) in South Australia (box 3.4) — has been upheld.

In the Cleland Case, the South Australian Competition Commissioner considered the costs of legislative and regulatory amendments, management and cultural changes, and establishing and administering appropriate tax equivalents, debt guarantees and pricing principles. These were compared with the benefits derived from increased market contestability, performance benchmarking, and clarifying non-commercial objectives.

The Commissioner found the cost of implementing full cost recovery would be relatively small, but that significant benefits would occur from improved cost efficiency, management performance and maintenance of service quality. Thus, the necessary requirement for a complaint success — that the benefits of competitive neutrality reform outweigh the costs — was established. It is unclear whether similar rulings would be made for other sanctuaries in the same jurisdiction or in other jurisdictions, as rulings are made on a case by case basis.

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## Implementing competitive neutrality complaint decisions

Over and above whether competitive neutrality is applied to individual public sanctuaries, implementing and monitoring the measures can be an uncertain and lengthy process. Generally, implementation falls to the relevant government agency overseeing the business. Although broad jurisdictional compliance is overseen by the National Competition Council, a jurisdiction usually establishes compliance through its Treasury department or an agency dedicated for NCP issues.

### Box 3.4 Cleland Wildlife Park Case

Cleland Wildlife Park (CWP), like ESL's Warrawong Sanctuary, is located in the Adelaide Hills. In 1998, ESL lodged a competitive neutrality complaint alleging certain CWP commercial activities contravened the principles of competitive neutrality.

The South Australian Competition Commissioner found clear similarities between the operations of ESL and CWP and determined that the two entities were competing in the same market segment. For example:

- both had a strong conservation focus, displaying wildlife in bushland habitats;
- a significant number of species displayed at CWP were identical to Warrawong; and
- both sanctuaries were a similar distance from the city and a ten minute drive apart.

The Competition Commissioner deemed CWP a 'significant business' for competitive neutrality purposes. He found CWP held a much larger market share than ESL and possessed the market strength to act as a 'formidable' competitor to existing and potential private sector operators. CWP was found to be recovering a significant proportion of its operating costs from revenues generated from admission charges, the restaurant and souvenir shop. Direct cost recovery was estimated to be in the range of 60 to 90 per cent, which the Commissioner considered to be a 'significant proportion' of operating costs, even at the lower end of the estimate.

The Commissioner indicated that the application of competitive neutrality principles was likely to generate net benefits to the community, mainly through improving competition and contestability in the market. The Commissioner suggested that the appropriate competitive neutrality principle for CWP to apply was full cost reflective pricing, within a framework of commercialisation. The South Australian Department for Environment and Heritage would be required to establish CWP as a separate business unit within the department, necessitating the generation of separate financial statements. It was also required to undertake its own analysis to confirm the appropriate competitive neutrality principles to apply.

The Commissioner noted that community service obligations, such as discounted admissions to particular community groups, may affect the extent to which CWP could implement full cost recovery.

*Source:* Competition Commissioner (1998).

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In South Australia, the Department for Environment and Heritage (DEH) was required to confirm, via the South Australian Treasury, appropriate competitive neutrality principles to be applied to CWP. DEH stated that its approach towards CWP's business plan would be full cost recovery. The business plan estimates full cost recovery may be achieved in three years (Peter Alexander, pers. comm., South Australian Department for Environment and Heritage). When the plan is approved by the South Australian Government, Treasury will oversee its implementation. Some steps towards cost recovery have been made. CWP has been established as a ring fenced business unit. Revenues and expenses have been analysed and a financial model prepared to establish competitively neutral costs. Admission prices have increased and some staff functions have been eliminated. However, the plan does not seek to introduce wildlife or habitat asset valuations. A critical cost recovery question for the department is whether the education services provided by CWP should be recovered through admission charges or externally funded.

### **3.4 Contestability issues**

While the competitive neutrality framework provides a method by which to establish fair competition between public and private providers, there is also a question of whether private businesses can, and should, fully compete for the resources made available to public businesses.

Some conservation businesses also receive government funding to cover operating shortfalls and to facilitate projects. The Adelaide Zoo, for example, receives departmental financial assistance approximately equal to its entrance receipts and which cover half its total expenses. Similarly, in 1999-2000, the Victorian Trust for Nature (TFN) (previously the Victorian Conservation Trust) received almost a third of its operating revenue from grants (see Trust for Nature 2000a). TFN provides a brief case study of the contestability of public resources to a quasi government agency under competitive neutrality (box 3.5).

In general, the application of competitive neutrality principles is determined according to the commercial focus of the business — usually limiting their application to government run businesses and not to statutory authorities that are non profit entities and deliver public services. In some States, such as Victoria, public sanctuaries are operated via a quasi statutory authority — usually a zoological board comprised of private and public appointees reporting to a Minister responsible for environmental portfolio matters. Staff at these sanctuaries are usually public servants. These boards can receive government grants to supplement revenues earned from commercial operations. If the public sanctuary is considered a significant business, then these grants would need to be used to supplement the non

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business functions of the public enterprise or to assist in performing community service obligations to avoid triggering application of competitive neutrality principles. Alternatively, the grants would have to have been obtained through a competitive allocation process.

Given the emergence of private conservation providers, there may be scope for further research into the appropriateness of public sector provision of conservation services and the contestability of public resources to deliver conservation services.

### **Box 3.5 Trust for Nature (Victoria) and Competition Principles**

The Trust for Nature (TFN) was established under its own Act of Parliament (see box 2.6). While there are other private conservation entities undertaking similar functions to those of TFN (for example, the Australian Bush Heritage Fund, see appendix A), competition principles as currently formulated are unlikely to be applicable to this organisation.

Under the current guidelines for application of competition principles, it is acceptable for government agencies (and those such as TFN that are run at arms-length) to operate in the direct delivery of government programs or regulatory functions, without incurring application of competition principles, so long as these functions are not considered business activities (CCNCO 1996). Moreover, since the Trust is a non profit organisation, has no existing or potential competitors, and does not qualify as a significant business activity, it may be reasoned that competition principles are not relevant to the activities of the Trust.

The competition principles outlined in the NCP do not override legitimate provision of public goods or the establishment of government agencies to further social objectives. For example, it is legitimate (without triggering competitive neutrality) for government to set up an agency or statutory authority to undertake beneficial public activities such as conservation where it has the expectation that the body will receive government grants for undertaking such work (pers. comm. CCNCO 23 April 2001). If the agency is non profit and does not qualify as a significant business, competitive neutrality does not apply. The issue of contestability is relevant only in so far as it applies to other government programs and policies such as provision of education or healthcare.

The Industry Commission (1998) indicated one of the potential benefits of using an arms-length conservation agency in establishing conservation on private land was that it may reduce the potential for conflict between management and regulatory roles. This separation may also clarify the application of competition principles, since managerial functions of government should generally be subject to competitive neutrality and contestability criteria, whereas the regulatory functions of government should generally not. Separation of management from regulation may provide greater efficiency in both the oversight of conservation on private land and the regulation and management of national parks.

*Sources:* CCNCO (1996); Industry Commission (1998); NCC (1998, 2001).



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## 3.5 Summary

- The applicability of the competitive neutrality framework to public conservation businesses, such as sanctuaries, appears to be limited and uncertain until tested.
- Few jurisdictions initially nominated conservation services (including sanctuaries) as significant businesses subject to competitive neutrality measures, thereby limiting the scope for applying competitive neutrality principles to public sanctuaries. In some jurisdictions, additional businesses can be listed as ‘other significant businesses’ that are also subject to competitive neutrality upon complaint. However, in Queensland, for example, the declared list of significant businesses cannot be altered by complaint.
- Cost reflective pricing and other competitive neutrality measures can be difficult to implement by conservation businesses. For example: cost reflective pricing requires commercial and non commercial activities to be easily separable; and generating an appropriate return on assets requires all assets to be appropriately valued. Cost reflective pricing may also need to be balanced against CSOs. In some cases, cost reflective pricing may be implemented and then prices subsequently lowered in response to a CSO.
- Despite the limited application of competitive neutrality principles and measures to public sanctuaries, one competitive neutrality complaint against a public sanctuary — the Cleland Wildlife Park in South Australia — has been successful. It is unclear whether similar rulings would be made for other sanctuaries in the same jurisdiction or in other jurisdictions, as rulings are made on a case by case basis.
- Over and above whether competitive neutrality is applied to individual public sanctuaries, implementing and monitoring of the measures can be an uncertain and lengthy process.
- While the competitive neutrality framework provides a method by which to establish fair competition between public and private providers, there is also a question of whether private businesses can, and should, fully compete for the resources made available to public businesses.
- Given the emergence of private conservation providers, there may be scope for further research into the appropriateness of public sector provision of conservation services and contestability of public resources to deliver conservation services.



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## 4 Native wildlife regulatory frameworks

Private conservation initiatives can conserve native wildlife (native flora and fauna) through managing and restoring natural habitat. At times, private conservation initiatives may want to take native wildlife from ‘the wild’ to develop new native wildlife populations and conserve threatened native species. Private conservation initiatives may need to manage captive populations of native wildlife in conservation areas — this may involve transferring captive native wildlife to other conservation areas, and/or trading captive native wildlife with other conservation initiatives.

State, Territory and Commonwealth regulatory frameworks for native wildlife control such activities by the private sector. This chapter primarily examines the regulatory frameworks for the conservation of native fauna (animals, birds, reptiles and amphibians). Some elements of the regulatory frameworks for the conservation of native flora (plants) are also explored.

Section 4.1 briefly outlines the overarching framework for the conservation of native wildlife and identifies some of the limitations of the approach. Section 4.2 identifies a number of property rights related issues, and sections 4.3 and 4.4 then discuss a range of factors that may unduly constrain private conservation initiatives because of regulation of the taking, use, trade, and release of native wildlife.

### 4.1 The overarching framework

The design and implementation of native wildlife regulatory frameworks reflect the conventional view that conservation of native wildlife is primarily the responsibility of government. The frameworks generally operate on a ‘regulate by exception’ basis: that is, many actions are not permitted unless specifically approved via a licence or an exemption. The emerging and growing role of the private sector can be constrained, as demonstrated in this chapter, by the continuing ‘regulate by exception’ approach.

Another factor constraining private conservation initiatives is the extensive and complex regulatory frameworks that attempt to address a diverse matrix of objectives. Every State and Territory (hereafter referred to as State or jurisdictions)

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has legislation that provides for the conservation of native wildlife (native flora and fauna) in ‘the wild’. The legislation is supported by policies, strategies, guidelines, administrative procedures, and codes of practice for conservation of native wildlife. The legislation and other instruments are typically administered by State ‘parks and wildlife’ agencies.

The broad intent and approach of legislation can usually be identified through the ‘purposes’ and ‘objectives’ sections of an Act. For example, the purpose of the Victorian *Wildlife Act 1975* is ‘to establish procedures in order to promote: the protection and conservation of wildlife; the prevention of taxa of wildlife from becoming extinct; the sustainable use of and access to wildlife; and to prohibit and regulate the conduct of persons engaged in activities concerning or related to wildlife’ (s. 1A Victorian *Wildlife Act 1975*).

A clear policy objective for the conservation of native wildlife by the public and/or private sectors is not always apparent from the State native wildlife legislation (table B.1, appendix B). Most of the State legislation has no expressed purpose or objectives. Frequently, the only sense of the intent can be gained from the ‘long title’ of the legislation, and in some cases this only describes the content of the legislation. The lack of ‘purposes’ and ‘objectives’ sections in the State legislation may reflect the age and design of the legislation.

Native wildlife are often listed in schedules — for example, native species are listed as endangered, vulnerable, rare, or common native species — and each schedule may be subject to specific licensing controls. The controls on different native species in the schedules range from restricting taking and use of threatened native species to only approved licence holders in limited circumstances — to allowing taking and broad use for some common native fauna, at times without a licence. The controls can constrain or even prevent private conservation initiatives, and increase the cost of undertaking private conservation.

The general approach to the listing of protected native species in schedules in legislation has been criticised for being inadequate, partly because it only addresses the taking and/or use of known listed native species, rather than addressing ecosystem and habitat modification (Barns et al. (1993), Bradsen (1992), Curran (2000), and Farrier (1995)). In effect, no controls apply to native species not listed and declared protected. If the objective is to conserve native species in ‘the wild’, then allowing them to decline or be significantly affected by threats before taking action and listing the native species may be counter-productive.

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## 4.2 Native wildlife and property rights

Clear specification of property rights for native wildlife may improve the incentives for conservation of native species and their habitat. However, property rights for native wildlife are not always explicitly, consistently or fully defined.

The Commonwealth Department of the Environment, Sport and Territories in its submission to the Senate Inquiry into the commercial utilisation of native wildlife identified that:

[t]he greatest environmental benefit of the commercial use of wildlife is the potential for it to act as an incentive for the maintenance and management of native vegetation on private lands, as well as a means of generating the financial resources required to manage the species involved and their habitats (quoted in IC 1998, p. 311).

The level of private incentive for conservation or use of native wildlife may depend on the value given to the particular native species and/or ecosystems. If less valued native species were neglected in favour of higher value native species, that could adversely affect overall conservation of biodiversity (Clough 2000). A private conservation initiative, for example, may focus on popular native species such as koala which may attract greater revenue from visitors. Large populations of some native species may have adverse impacts on other native species, particularly plant species, and affect ecological balance. Property rights for biodiversity may need to be supported by other measures such as a ‘duty of care’ to the environment (Bates 2001), and/or arrangements for sharing the public and private costs of conservation of biodiversity (Aretino et al. 2001).

In some instances, property rights for native wildlife are explicitly defined in State native wildlife legislation, but some property rights may be implicitly specified by State licensing arrangements for native flora and fauna (section 4.3).

The New South Wales, Northern Territory, Queensland and Western Australian native wildlife legislation, for example, defines some property rights for native fauna:

- Queensland legislation specifies that ‘all protected animals are the property of the State’. The New South Wales legislation specifies that any ‘protected fauna’ other than certain ‘prescribed fauna’, until captured or killed, is the property of the Crown. Western Australian legislation specifies that property in fauna, until lawfully taken, is vested in the Crown; and
- Northern Territory and Queensland legislation specifies that protected native fauna that is taken from ‘the wild’ under licence becomes the lawfully taken property of the holder of a licence, and this also applies to any progeny. However, New South Wales legislation specifies that ‘protected fauna’ remains

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the property of the Crown if taken or obtained under licence, and any progeny of the ‘protected fauna’ is also the property of the Crown.

In contrast, the Australian Capital Territory, South Australian, Tasmanian and Victorian native wildlife legislation does not explicitly define any property rights for native fauna (including any progeny) in ‘the wild’, lawfully taken under licence, or lawfully kept and traded. However, these jurisdictions use licensing systems to regulate the taking and use of native wildlife.

A particular issue for private conservation initiatives is that property rights for captive native fauna that are lawfully kept, bred and traded, possibly interstate, are not explicitly addressed in most native wildlife legislation. The ownership of captive native fauna held under licence may be uncertain, and some property rights that could be conferred by their ownership appear to be untested. Where captive native fauna are moved interstate, the licensing rights and responsibilities pass from one State to the other. This may create further uncertainty for a licence holder when property rights conferred by licence administration arrangements differ between jurisdictions.

Most native wildlife legislation does not specifically address property rights for native flora. For example, the Australian Capital Territory, New South Wales, South Australian, Tasmanian, and Victorian legislation does not specify property rights for native flora in ‘the wild’, native flora that has been declared protected, or protected native flora taken under licence. In contrast, Queensland native wildlife legislation specifies that all protected plants — a plant prescribed in the legislation as rare or threatened wildlife, and in ‘the wild’ — other than those on private land, are the property of the State, and that a protected plant taken under licence is the property of the licence holder.

Property rights for native flora and fauna (including any progeny) are not always explicitly, consistently or fully defined in native wildlife legislation. Property rights can vary according to the jurisdiction and licensing system. The inconsistent approaches between jurisdictions and lack of clear specification of property rights for native flora and fauna may create a disincentive for private conservation initiatives.

Senator Hill, Commonwealth Minister for the Environment and Heritage has commented that:

One key area highlighted by the Report [Senate inquiry into commercial utilisation of native wildlife] as requiring attention is the issue of property or access rights to native wildlife. It notes a lack of clarity as to what constitutes rights (including indigenous or Native Title rights) in native wildlife, and that these rights are in practice difficult to define and are not consistent across Australia. (Hill 1999, p. 11 463)

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Even if a private conservation initiative ‘owned’ native fauna in a particular conservation area, the initiative would still be bound by a regulatory framework specifying how the native fauna could be managed and used. The extensive licensing systems and general restrictions on use and trade may be a more significant constraint on private conservation than ownership *per se*.

### **4.3 Licensing arrangements for native wildlife**

Private sector conservation generally, and commercial operations in particular, appear to be constrained by the extensive, and often overly complex, regulatory frameworks to conserve native wildlife.

#### *Different licensing systems are used*

While broadly similar, there are some significant differences between the licensing systems that apply in each State. Some jurisdictions, such as South Australia have a more flexible and non-restrictive system where applications can be made to keep any native fauna. Other jurisdictions such as Queensland and Western Australia, have more restrictions and controls which appear to be more complex than necessary and may unduly constrain private conservation initiatives.

The Senate Inquiry into the commercial utilisation of native wildlife (that included private conservation) was concerned that ‘duplicated and onerous administrative procedures were unnecessarily hindering legitimate industries in Australia’. The Inquiry recommended ‘that State and Federal Governments together review all administrative procedures relating to commercial utilisation of native wildlife in Australia with a view to increasing their efficiency’ (Senate Rural and Regional Affairs and Transport References Committee 1998).

There is also a lack of a consistent and coordinated approach across jurisdictions for private conservation initiatives to source, keep, move and trade native fauna. State native wildlife legislation applies different approaches to some issues, has similar provisions for other matters, and may or may not define criteria and assessment provisions for discretionary processes and approvals. This can increase operating costs and create uncertainty for private conservation initiatives that operate in several jurisdictions. The Rural Industries Research and Development Corporation (RIRDC) has observed that:

There are strong arguments for [a] complementary, if not uniform, licensing system throughout Australia. Achieving it requires Commonwealth coordination. It would make the regulatory task much less frustrating and use resources more efficiently and effectively. (RIRDC 1997, p. 97)

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Different jurisdictions use different licensing systems that, at times, are extensive and often complex. The number and type of licences and permits for native fauna varies in each jurisdiction. For example, Queensland has eleven different categories of licence, eight categories of permit and eight different schedules of native wildlife. Victoria has 17 categories of licence for specific activities in association with certain listed native species and, in addition, has a general authorisation for use of any native wildlife where certain criteria are satisfied.

The Victorian Environment and Natural Resources Committee Inquiry into the utilisation of Victorian native flora and fauna concluded that:

The current [Victorian] wildlife licensing system in particular appears to be overly complex and administratively onerous for reasons that are not obvious to the Committee. Licensed use of biota is encompassed by three Acts, with the provisions for flora and fauna (other than fish) having similar objectives but are under two completely separate Acts. (Environment and Natural Resources Committee 2000, p. 371)

In contrast, South Australia classifies native fauna as either ‘unprotected’, ‘exempt’ from requiring a permit, ‘basic’ or ‘specialist’. A permit is required to keep and use both ‘basic’ and ‘specialist’ native fauna and the different categories relate to the required level of expertise to keep and care for the native fauna. There is no prohibited list of native fauna that cannot be kept in South Australia.

#### *Licensing systems often regulate specific end uses*

Licensing systems have often been designed to address and regulate specific end uses, for example, recreational or commercial keeping, harvesting, demonstrating and exhibiting of native fauna (box 4.1). However, in some jurisdictions, this regulatory approach can result in emerging private conservation initiatives, especially for threatened native fauna, not easily ‘fitting’ the existing licence system.

If regulation is necessary, the preferred focus should be to specify the desired outcomes that are to be achieved rather than prescribing the end use. The desired outcomes should be specified according to criteria that address the effects of the conservation and use of native wildlife.



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#### Box 4.1 Queensland licensing arrangements for native fauna

The Queensland native wildlife legislation has eleven licences and eight permits for specific purposes — for example, recreational or commercial keeping of native wildlife, and exhibition of native wildlife. It would appear that the only way that private conservation initiatives may apply to ‘take and keep’ threatened native fauna would be through an application for an educational or scientific permit — other licences or permits would not enable these activities. There are also significant restrictions on the granting of these permits:

- the educational or scientific purpose for which the wildlife is proposed to be taken, used or kept has to be a genuine educational or scientific purpose; and
- an applicant for a scientific permit would need to demonstrate that either:
  - they are associated with a recognised scientific organisation, or a professional organisation involved in scientific research or ‘a non-profit community organisation with a genuine interest in the conservation of wildlife’; or
  - is completing postgraduate training in scientific research or has achieved a satisfactory level of competence in scientific research (r. 113 Queensland *Nature Conservation Regulation 1994*).

These restrictions may make it difficult for a private conservation initiative to qualify for a scientific or educational permit for taking and keeping threatened native fauna and, in effect, prevent private conservation activities.

The Queensland Parks and Wildlife Service is reviewing aspects of the Queensland native wildlife legislation.

### Taking of native wildlife from ‘the wild’

Native fauna may need to be taken from ‘the wild’ to develop a conservation initiative and further conservation of biodiversity via a recovery and captive breeding program. Native wildlife legislation restricts the taking of native fauna from ‘the wild’. Taking may be allowed under licence in a limited range of circumstances, or where the native fauna is sufficiently ‘common’ or a pest species to be declared to be unprotected or exempt from licensing requirements.

The ‘blanket protection’ approach of most native wildlife legislation that prevents the taking of most listed native fauna without a licence has been criticised for not adequately addressing conservation of biodiversity or providing suitable incentives for landholders to conserve native fauna. For example:

To date, management of the red-tailed black cockatoo throughout Australia has been restricted to simple protection, ie. it is illegal to kill or capture the species without special permission. This is a passive or ‘do-nothing’ approach, which is unaccompanied by any research, monitoring or reporting. It ignores the steady erosion of native habitats

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and outlaw activity. It converts a conservation problem to a law enforcement one. However, law enforcement has proved incapable of preventing the destruction of habitat and smuggling as it lacks the resources and technology to do so. Current policy encourages habitat destruction by preventing landowners from realising any of the benefits from conserving it. (Vardon, Noske and Moyle 1997, p. 89)

Similar provisions apply to the taking of protected native flora. In general, the taking of native flora from public land such as national parks and reserves is prevented unless authorised by a licence. Where a plant has been declared to be protected, whether on public or private land, a licence may be required. For example, in South Australia, a person must not take a native plant of a prescribed species (a listed endangered, vulnerable or rare plant) on private land without a licence, and the consent of the landowner. In contrast to the native fauna provisions, a landowner does not require a licence to take native flora for non-commercial use on private land where the flora has not been specifically protected.

A new avenue for obtaining native fauna has developed in Western Australia that involves contracts between that State and approved private sanctuaries (box B.1, appendix B). Other jurisdictions do not have a similar formal arrangement for private conservation initiatives and this may constrain private conservation activities.

Western Australia has also supported a partnership between the public and private sector that has enabled the taking and keeping of five threatened native bird species to reduce pressure on wild populations from illegal taking. This has helped develop a captive-bred population and improve knowledge about the different species (Senate Rural and Regional Affairs and Transport References Committee 1998). Other jurisdictions have yet to develop similar arrangements.

### *Recovery plans and research*

If a private conservation initiative is not part of an approved Commonwealth or State recovery and captive breeding program for a particular threatened species, or where no approved recovery program has been developed, access to threatened species from ‘the wild’ may be limited — this may potentially constrain a private conservation initiative. For example, in Queensland any taking and use of ‘rare native wildlife’ for exhibition purposes may be permitted only if it is for an approved captive breeding program’.

Private conservation initiatives may be dependent on the level of government research into threatened native species and the timely development of approved recovery and captive breeding programs for all threatened native species — as any private recovery program may not be recognised as an approved program. A

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possible role for government, in addition to undertaking basic research, may be to develop appropriate recovery programs that allow a number of providers, both public and private, to undertake suitable conservation activity within the defined framework.

Another factor that a private conservation initiative would need to consider is the involvement of traditional owners with native wildlife recovery programs and possible cultural restrictions on the movement of native wildlife. Aboriginal and Torres Strait Islander people may be involved with native wildlife recovery programs in recognition of their special relationship with the land and native wildlife. For example, the endangered mala or rufous hare-wallaby is a significant totemic animal to the Aboriginal people of central Australia who are the custodians of the mala dreaming. The Aboriginal people of central Australia have been partners in the mala recovery program since its inception, and have given their approval for, and support to, the movement of some mala to new locations in Western Australia to develop new populations (Langford 1999).

### **Keeping, use, trade and movement of native wildlife**

State native wildlife legislation goes beyond regulating taking of native wildlife to also regulate keeping, use, trade and movement. In general, native wildlife legislation restricts the keeping, use, trade and movement of native fauna unless it is in accordance with a licence, or the native fauna has been declared unprotected or exempt from the provisions — for example, a licence is usually not required to keep or breed certain common native fauna (for example, galahs, budgerigars and cockatiels). Applicants for a licence to keep native fauna are usually required to demonstrate appropriate knowledge and experience in the keeping of native fauna.

The extensive licensing systems and broad range of regulatory controls on keeping, use, trade and movement of native wildlife may not be necessary to address conservation of biodiversity and may constrain private conservation initiatives (for example, box 4.2). There may be more efficient and effective solutions that specifically target the taking of native fauna from ‘the wild’ while reducing the regulation of other activities such as private conservation initiatives, and the keeping and trade of captive-bred native fauna.

Additional regulatory requirements for keeping of native fauna may have originally been intended to meet other goals such as animal welfare. It is not clear that the native wildlife legislation is the most appropriate mechanism to address such issues. For example, it is argued that desired outcomes for animal welfare should apply regardless of whether an animal is domestic, exotic or native, and such outcomes could perhaps be better achieved through overarching legislation.

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#### Box 4.2 Keeping of native fauna: Victoria and Queensland

In Queensland, the Nature Conservation Regulation 1994 provides a framework for the keeping and use of birds via a series of exemptions, and controls on recreational and commercial licences ('Chapter 3, Part 2, Licences for birds'). Specific controls on the keeping and trading of birds include:

- a licence may be granted only if the Parks and Wildlife Service is satisfied 'the proposed activity is not likely to adversely affect the ecological sustainability of the wildlife stated in the application for the licence, either generally, or in a particular locality or ecological system';
- a licence may be granted only if the Parks and Wildlife Service is satisfied the place where the birds are to be kept has permanent facilities for keeping the birds, including permanently roofed areas and cages;
- a commercial licence holder must not sell certain birds to a person without an appropriate licence and any changes in the number or species of birds that are kept must be recorded by a commercial licence holder and a 'return of operations' must be submitted annually; and
- restrictions on the number and type of birds that may be kept under a recreational licence and a general restriction on displaying birds for trade or commerce.

Victoria has seventeen categories of recreational and commercial licences for specific activities with certain listed species. Different categories of licence have specific regulatory controls, for example:

- a holder of a commercial wildlife displayer licence must display wildlife for at least six hours per day during the daylight hours of at least 50 days in a six month period ending on 31 March and 30 September in each year;
- a commercial wildlife dealer licence authorises the holder to possess, keep, breed, buy, sell and dispose of those taxa of wildlife listed in the schedule for that licence. The holder must not charge a fee for the display of the wildlife; and
- all licence holders must 'enter clearly and legibly and in ink all the information required by the Secretary into the record book' and periodically make returns.

#### *Jurisdictions have different keeping and trading regulatory controls*

Different jurisdictions have different regulatory controls and licence requirements for keeping and trading native fauna. In some jurisdictions it is difficult to get approval to keep certain native fauna — for example, in practice, native mammals are not allowed to be kept in Western Australia. This is in contrast to other jurisdictions such as South Australia.

In most jurisdictions a licence is required to keep native birds except for common species, for example, galahs or budgerigars, or species that are easily kept in

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captivity. For example, in Queensland, a licence is not required to keep or use some common captive-bred bird species if the birds were lawfully obtained, but there are limits on numbers that can be traded within a defined period.

New South Wales has adopted a different approach to the keeping of native birds compared with other jurisdictions. Although all native birds are protected in the State, 42 common native bird species may be bought, sold or kept without a licence or Aviary Registration Certificate (ARC). Except for exempt species, the keeping of more than 19 protected native birds or the sale of a protected native bird requires an ARC, and any native bird offered for sale must have been legally obtained.

There are stark differences in approaches to the conservation of native plants and animals. For example, in 1994 the Wollemi pine was discovered in Wollemi National Park, west of Sydney. The pine is of a genus whose nearest relative died out around 150 million years ago. Following discovery, the pine was artificially propagated to make it commercially available. RIRDC observed that if the discovery had been of a native animal or bird then ‘the policy response would not have been to secure it by making it available for commercial sale. ... Private ownership of animals is usually prohibited and intensive propagation is given a lower priority’ (RIRDC 1997, p. 106).

State native wildlife legislation generally prevents the movement and interstate import and export of native fauna without a licence, although there may be some exemptions for common native fauna. The movement of native wildlife may be required to be in accordance with any State or Commonwealth recovery plan or recovery program for a particular species, and any guidelines on translocation or reintroduction of native wildlife such as those prepared by the World Conservation Union (IUCN 1987 and 1996). As previously discussed, the lack of approved recovery plans may restrict private conservation activity.

### **Release of native fauna**

There is some uncertainty as to whether native fauna that are contained in conservation areas are considered to be in ‘the wild’ in terms of regulation of the keeping, display and release of native fauna. This creates uncertainty when a conservation initiative wishes to release native fauna into conservation areas, or move native fauna between areas. The answer may vary depending on the size and habitat of the conservation area, among other things. A small fenced conservation area that has reintroduced native wildlife, predator control, and artificial watering holes may not be viewed as ‘the wild’ and therefore require a licence. The classification of larger fenced enclosures may be more ambiguous and different

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release regulations may apply to the keeping of native fauna in different jurisdictions.

Native wildlife legislation usually prevents the release of native wildlife into ‘the wild’, either from captivity or from ‘the wild’ (for example, translocation from one region in ‘the wild’ to another) unless by a licence. This is to protect wild populations from the potential biological impact of captive-bred populations should they escape into ‘the wild’, and pollute wild populations either genetically or with disease. However, legislation does not usually explicitly define in ‘the wild’ or ‘captivity’. Consequently, different regulatory approaches may be applied to the keeping and release of native fauna in different jurisdictions creating further uncertainty for private conservation initiatives. Licence holders may also be required to have an appropriate release and management plan agreed to by the relevant jurisdiction.

### **Licence administration**

Licensing criteria are not always specified in State native wildlife legislation and this can result in unclear or *ad hoc* approval processes, and reliance on ministerial and administrative discretion and interpretation of the regulatory framework. Unclear licensing criteria and *ad hoc* processes can lead to management and investment uncertainty for private conservation initiatives.

In some jurisdictions, such as South Australia, it would appear that discretion may be applied to the consideration of applications with more flexible approval processes for the taking and use of native fauna. For example, Earth Sanctuaries Ltd (ESL) reports being granted permission to enclose *in situ* a colony of yellow footed rock wallabies (Jackson, B., Earth Sanctuaries Foundation, pers. comm., 11 January 2001). ESL has obtained some native fauna from other jurisdictions on a case by case basis, often involving ministerial discretion and outside more formal exchange and translocation programs for native fauna.

A conservation initiative currently requires different licences for the taking, keeping, displaying, trading and movement of native fauna. There is limited use of master licence systems that would give general authorisation for the above activities in accordance with specified outcomes, rather than having a separate licence for each activity. There is scope for investigation of the application of these master licence systems to the conservation of native wildlife.

Private conservation initiatives may also have to obtain licences that are not required by statutory and/or State-owned conservation initiatives. For example, the Victorian *Wildlife Act 1975* exempts State-owned zoological parks within the

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meaning of the *Zoological Parks and Gardens Act 1995* from the general requirement to obtain a licence to exhibit animals.

Private conservation initiatives may have to regularly apply for licences in some jurisdictions which may increase the costs of compliance with the regulation. In South Australia and the Australian Capital Territory, for example, various licences have to be renewed every year whereas in other jurisdictions, such as Victoria, a licence can be issued for up to three years. Queensland can issue certain wildlife ‘permits’ for the lifetime of the native wildlife. Short-term licences and renewal provisions may impose additional administrative and compliance costs on a private conservation initiative.

The potential cancellation, non-renewal, or change of conditions of a licence may also create uncertainty for a private conservation initiative. Jurisdictions typically reserve the right to cancel or not renew licences where there has been a significant breach of the native wildlife legislation or licence conditions. In addition, some jurisdictions reserve the right to cancel or not renew some licences — for example, Victoria may cancel an authorisation for keeping native fauna if ‘there are reasonable grounds to do so’. Some legislation specifies that compensation is not payable if a licence is later amended or cancelled (Queensland), or that ‘just compensation’ must be paid (Northern Territory). The lack of appropriate and consistent compensation provisions may again create uncertainty for a private conservation initiative and reduce the incentive to conserve native wildlife.

Licence holders are usually required to keep records and, at specified times, submit them to the State, often on an annual basis. There appears to be little analysis of these records and the reasons for the keeping and submitting of the records are not always apparent from the legislation. There may be more efficient and effective administration approaches — for example, the Australian Capital Territory is examining the simplification of the keeping and return of records to enable self-administration and targeted monitoring of compliance. There are opportunities for accreditation of the private sector and greater use of codes of practice with a consequent reduction in regulation.

## **4.4 International trade in native fauna**

The Commonwealth regulates international trade in native wildlife and related products through the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*. The export controls are to ensure that international trade in native wildlife and related products does not adversely affect a species survival, or the ecosystem in which it occurs (box B.2, appendix B).

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The restriction on international trade in native wildlife, and the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* requirements for only approved scientific or zoological organisations to undertake limited trade in captive-bred native wildlife, generally exclude private conservation initiatives from international trade in native fauna.

The appropriateness and extent of the restrictions on international trade in native wildlife has been questioned in several inquiries. For example, in 1998 the Senate Inquiry into commercial utilisation of native wildlife (that included private conservation) commented on the restrictions and recommended that other policy options should be examined. The Senate Inquiry was concerned that:

- in some cases, the Commonwealth Act provided stricter measures than were provided for by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- the prohibitionist approach to international trade did not work to protect native wildlife from illegal activities, although the extent to which it did not work was difficult to ascertain; and
- if exports were allowed, they should be derived only from captive-bred populations (accompanied by DNA identification) and not from ‘the wild’, and that each species should be considered on a case-by-case basis (Senate Rural and Regional Affairs and Transport References Committee 1998).

In an inquiry into ecologically sustainable land management, the Industry Commission (1998) recommended that ‘the Commonwealth, States and Territories should facilitate the commercial utilisation and exporting of live native fauna in a manner which builds public confidence that further utilisation will occur only if adequate and appropriate safeguards exist’. The Commission also recommended that Governments should agree to assess applications for the removal of controls on the export of live native fauna on a case-by-case basis. Any removal of controls should be conditional upon there being in place an appropriate code of practice or management plan, and suitable performance indicators.

## 4.5 Summary

- A clear policy objective for the conservation of native wildlife by the public and/or private sectors is not always apparent from the State native wildlife legislation — most of the State legislation has no expressed purpose or objectives.
- Property rights for native flora and fauna (including any progeny) are not always explicitly, consistently or fully defined in native wildlife legislation, and may



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vary according to the jurisdiction and any conditions of a licence. The ownership of captive native fauna held under licence in some jurisdictions may be uncertain and some property rights that could be conferred by their ownership appear to be untested.

- Private sector conservation generally, and commercial operations in particular, appear to be constrained by the extensive, and often overly complex, regulatory frameworks to conserve native wildlife.
- There is a lack of a consistent and coordinated approach across jurisdictions for private conservation initiatives to source, keep, move and trade native fauna. Licensing systems and administrative processes vary between jurisdictions which can increase costs and create uncertainty for private conservation initiatives that operate in several jurisdictions.
- State native wildlife legislation generally operates on a ‘regulate by exception’ basis: that is, most actions are not permitted unless specifically approved via a licence or an exemption. The extensive licensing systems and broad range of controls on keeping, use and trade in native wildlife may not be necessary to address conservation of biodiversity and may constrain private conservation initiatives.
- Animal welfare issues would still need to be appropriately addressed. Desired outcomes for animal welfare should apply regardless of whether an animal is domestic, exotic or native, and such outcomes could perhaps be better achieved through overarching legislation.
- Licensing systems have often been designed to address and control specific pre-conceived end-uses, for example, keeping or exhibiting native wildlife. If regulation is necessary, the preferred focus should be to specify the desired outcomes that are to be achieved, rather than prescribing the end use through discrete licence or permit categories.
- Legislation does not usually explicitly define in ‘the wild’ or ‘captivity’ and different regulatory approaches may be applied to the keeping, display and release of native fauna in large fenced enclosures in different jurisdictions, creating some uncertainty for private conservation initiatives.
- The potential cancellation, non-renewal, or change of conditions of a licence may create uncertainty for a private conservation initiative. The lack of appropriate and consistent compensation provisions may again create uncertainty for a private initiative and reduce the incentive to conserve native wildlife.
- The general restriction on international trade in native wildlife, in association with requirements for only approved scientific or zoological organisations to undertake limited trade in captive-bred native wildlife, generally excludes private conservation initiatives from international trade in native fauna.



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## 5 Taxation and biodiversity conservation

Existing tax arrangements may influence landholders' decisions to undertake private conservation activities — in particular, the amount and type of private conservation activities. Many jurisdictions offer some, albeit limited, assistance to particular organisations, industries or sectors through the tax system to encourage particular conservation activities. However, some tax arrangements can create disincentives that discourage otherwise desirable private conservation efforts.

This chapter briefly outlines a number of factors that underlie an effective tax system (section 5.1). It then reviews several existing tax arrangements and considers how these may potentially constrain desirable private conservation activities (sections 5.2, 5.3 and 5.4).

The focus is on tax arrangements that may potentially create distortions or disincentives to private conservation activities. Potential distortions can be created when tax arrangements treat similar activities, organisations or individuals inconsistently (for example, ACF 2000, Binning and Young 1999a and 1999b, The Ian Potter Foundation 1999). Tax treatments that favour (or otherwise assist) activities, organisations or individuals, can create perverse incentives that may result in unintended outcomes — resources may be diverted to activities that are not as highly valued from a national perspective and the community overall may be worse off.

One concern relates to the tax treatment of donations and part donations of high conservation value land under existing 'gifting' provisions (section 5.2). It has been argued that current arrangements influence the options available to landholders — discouraging landholders from placing conservation covenants on land with high conservation values. For example, while donations of money and land are currently tax deductible, it is unclear how gifting provisions treat the 'donation' of a conservation covenant (being any fall in the value of land as a result of entering a conservation agreement where no payment is received).

Another concern relates to the tax treatment of the costs of managing land for private conservation compared to the tax treatments of costs for other land uses (section 5.3, 5.4). Where differential tax treatments increase the relative costs of

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desirable private conservation activities compared to other viable land uses (say primary production) the amount of desirable conservation activity will be scaled back. This problem may be magnified by other government measures (such as agricultural assistance) and/or tax treatments that actively encourage other land uses that may impact on biodiversity. Similar concerns have been raised in terms of the perverse incentives caused by differential tax treatments applied at state and local government levels (including local government rates) (Binning and Young 1999a, IC 1998, Young et al 1996).

In addition, there is some concern that existing tax arrangements are unnecessarily complex and that the associated administrative procedures provide little certainty. As a result, compliance costs are widely perceived as excessive.

It has been suggested that the *lack of sufficient incentives* (including the lack of tax incentives and concessions available to landholders that undertake private conservation activities) inhibits private conservation efforts (for example, Binning and Young 1999a and 1999b, The Ian Potter Foundation 1999). However, considering whether taxation should be actively used to achieve private conservation goals, and whether existing arrangements provide sufficient incentives for landholders, is beyond the scope of this report.

Removing or reducing potential distortions in existing tax arrangements might have positive biodiversity conservation benefits, although the potential for such gains depends on the existence of other taxes, policies and circumstances. A strong case for change may exist if arrangements currently impose environmental and economic costs and if the change would improve environmental and economic outcomes or provide other benefits. It is less clear whether action should be taken when tradeoffs are required. For example, changes to the tax system may be made at, sometimes significant, costs to government revenues. When conflicts exist, there may be no uniquely acceptable trade-off between them and judgement must be exercised.

## **5.1 Tax arrangements — underlying principles**

Defining the major objectives of a tax system is an important first step in considering the implications for private conservation activities arising from existing tax arrangements — and, in particular, whether existing arrangements unnecessarily constrain private conservation activities. This is because different perspectives may lead to support for markedly different types of tax systems and tax arrangements.

Under the income tax benchmark used by the Commonwealth Treasury, a tax expenditure arises when some taxpayers are taxed differently to the standard treatment for all individuals (box 5.1).

### Box 5.1 **Government tax expenditures**

The Commonwealth Treasury (2001, p. 1) defines a tax expenditure as a 'tax concession that is designed to provide a benefit to a specified activity or class of taxpayer'. Tax expenditures can be provided through tax exemptions, deductions, or rebates, a reduced tax rate or by deferring a tax liability. The potential benefits of tax expenditures can sometimes instead be delivered by direct expenditures. This means the size and effectiveness of each should be considered to determine the most cost efficient use of government funds (Treasury 2001).

Defining the appropriate tax benchmark is an important first step in measuring the value of tax expenditures. However, this may sometimes be problematical:

Establishing an appropriate benchmark for determining tax expenditures often involves an element of judgement: benchmarks may vary across countries and within countries over time. (Treasury 2001, p. 13)

The starting point for the **Commonwealth Treasury income tax benchmark** is the Schanz-Haig-Simons definition of income — the net accretion in economic wealth between two points in time, plus consumption in that period. In this case 'consumption' includes all expenditures, except those incurred in the earning or production of income. Under this benchmark an expenditure on private conservation activities (that do not earn or produce income) is like any other expenditure by the taxpayer. Taxpayers choose to undertake private conservation activities in competition with all other purposes to which their funds could be put. Consequently, the revenue forgone from special provisions for conservation activities is considered to be a tax expenditure.

However, different (and at times arbitrary) definitions of consumption, and hence wealth, exist which may potentially alter the tax benchmark and consequently any conclusions about whether a particular deduction is a tax expenditure. One alternative may be that consumption includes all expenditures, except those incurred in the earning or production of income, or in maintaining or improving the natural resource base (an '**enhanced**' **environmental tax base**) (Robert Douglas, Taxation Policy Consultant, pers. comm., 6 May 2001). This may be appropriate because some portion of the benefits of private conservation activities accrue to the community (and not the taxpayer), and therefore do not contribute to the taxpayer's net gain. Under this benchmark, the revenue forgone from special provisions for conservation activities may not be considered a tax expenditure.

Once a tax base has been accepted, many deductions within the tax system are not considered to be 'concessions' — instead they are considered to be structural features of the tax system or are intrinsic to the operation of the tax system. For example, under the Commonwealth Treasury income tax benchmark, income tax is levied on net income, so allowing deductions for expenses necessarily incurred in gaining that income is not a concession. Income tax is also levied progressively so 'concessions' through reduced lower marginal tax rates for taxpayers on lower incomes are not identified as tax expenditures. In addition, some features of the tax system have been incorporated into the benchmark as a practical necessity (such as unrealised gains on a range of assets) (Treasury 2001).

*Sources:* Robert Douglas, Taxation Policy Consultant, pers. comm., 6 May 2001; IC 1995; Treasury 2001.

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Under this benchmark, some deductions for conservation activities (including accelerated depreciation for water management costs and landcare deductions and offsets) are considered to be concessions designed to provide a benefit to a specified activity or class of taxpayer (Treasury 2001).

A different view is that some of the available deductions for conservation activities should not be considered as concessional, but rather as a partial correction for the failure of existing depreciation provisions to recognise that items other than plant and articles devalue through use (Peterson 1995). Peterson (1995) observes that there are some expenditures on assets used by primary producers to prevent or address land degradation (which depreciate in value as they are used) for which no deductions would be allowed, but for the special provisions. Not allowing these items to be depreciated over their effective life may potentially distort investment decisions, since items qualifying for deductions may be favoured over those which do not qualify.<sup>1</sup>

Alternatively, it may be that the various deductions and exemptions available to improve conservation outcomes represent an appropriate adjustment of the tax base as a ‘matter of principle’ (for example, under an ‘enhanced’ environmental tax base (box 5.1)). Under this benchmark, the deductions and exemptions should not be considered to be tax concessions.

While recognising the significant practical difficulties associated with defining and determining the objectives of the tax system and consequently a ‘suitable’ tax benchmark, assessing the appropriateness of alternative benchmarks is beyond the scope of this report.

## **A framework for assessing tax arrangements**

The appropriateness of existing tax arrangements is often discussed in terms of economic efficiency, equity and fairness. Other desirable features may be that the tax system should be designed to minimise the scope for avoidance and evasion, and that there should be a high degree of certainty and stability in the arrangements.

The **efficiency** criterion suggests that, with some important exceptions, tax arrangements should aim to impart the smallest possible disturbance to the taxfree allocation of resources. Important exceptions potentially include the presence of market failures associated with pre-existing positive and negative externalities (Wood 1995).

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<sup>1</sup> This argument only applies to depreciation over the effective life of the asset, not the provision of accelerated depreciation.

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In many cases, tax ‘neutrality’ is consistent with an efficiency objective. ‘Neutral’ tax arrangements neither favour nor disadvantage similarly placed activities or classes of taxpayer and, consequently, do not distort their costs (and attractiveness) when compared with the taxfree relative costs (and attractiveness) of the same choice options. The Review of Business Taxation (RBT 1999, p. 105) suggested that in raising revenue for the government:

... the business tax system should be neutral in its impacts and thus not be a consideration in business decision making. Poorly designed tax systems can inhibit economic growth by distorting business decisions.

In terms of achieving the best use of Australia’s existing national (including natural) resources, taxes should neither favour nor disadvantage alternative land uses and/or alternative conservation activities unless there are explicit and sound policy reasons for doing so. In some cases, a tax can improve national resource allocation and environmental outcomes — for example, if it discourages activities that produce adverse external effects on others that are not taken into account by individual producers and consumers. A Pigouvian tax is a tax levied on a producer of a negative ‘externality’ so that their perceived private costs of undertaking the activity are equal to the social costs. If it is possible to identify and value the social cost of an activity and levy appropriate taxes on those causing the damage, the socially desirable environmental outcome may be achieved at the least cost to society.

The **equity** criterion is concerned with the ‘fairness’ of the tax. Under this criterion, people in similar positions should be treated similarly (horizontal equity) and people in different positions should be treated differently, with those who are better off bearing an appropriately heavier burden (vertical equity). ‘Equity, or fairness, is a basic criterion for community acceptance of the tax system’ (RBT 1999, p. 105), however there is a wide range of views on how to measure and assess fairness (Woellner et al 2001). For example, in terms of vertical equity, it is difficult to establish how much more tax should be paid by a person earning a higher taxable income.

It is also important that tax arrangements are practicable and administratively ‘**simple**’. With simple taxes, it is often easier and cheaper for taxpayers to pay the correct amount of tax owing (low compliance costs) and for governments to collect the revenue owed (low administration costs). However, simplicity is not always a good proxy for low administration and compliance costs. For example, land taxes (that are levied on the assessed value of land and are payable by the owner of the land at particular dates) are conceptually simple, but may be very costly to administer (Gabbitas and Eldridge 1998).

There is potential for tension or conflict between these objectives and it is likely that tradeoffs need to be made. For example, measures which might make the tax

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system more equitable may create economic distortions and/or require complex legislative provisions.

A key consideration is the potential conflict between the use of the tax system to generate revenue and its use in addressing broader socioeconomic goals (box 5.2). For example, existing arrangements provide a number of tax incentives for some landholders to carry out ‘conservation’ expenditures, including expenditures on the eradication of weeds and pests and certain types of fencing (see section 5.3). In 1999-2000, the value of accelerated depreciation allowances for water management costs and landcare deductions and offsets was estimated to be around \$21 million (Treasury 2001). These allowances provide, at least for those landowners with taxable incomes, an incentive for addressing land degradation measures. However, because the incentive effect of the deductions may not apply (or may apply less) to farmers with low taxable incomes, it is likely that desirable conservation activities are poorly targeted and do not achieve the maximum outcome per dollar of tax expenditure. In addition, such allowances may increase the complexity of the tax system and consequently inflate administration costs, and/or require additional revenue to be raised elsewhere in the tax system. Intentionally using the tax system to favour certain products or activities may also encourage numerous other demands to use the tax system to advantage particular groups (Hatfield Dodds 1999).

In some cases where existing market forces and institutional structures do not produce an optimal outcome, taxation may provide the best solution to the policy problem. However, this is not always the case:

... a worthwhile tax reform may have a substantial impact on behaviour and economic outcomes by removing distortions, including tax induced distortions. Where tax reform adds new distortions to counter the effect of poorly designed public policies the combination of policies and outcomes is usually sub-optimal. It is also inappropriate to develop a taxation policy change where another instrument of government policy may achieve the same outcome with fewer distorting side-effects at lower cost. (Wood 1995, p. 9)

Indeed, many environmental problems may be better addressed through:

- other economic instruments — including performance bonds, deposit refund systems and tradeable permit schemes;
- regulation — for example, that prescribes a specific level of pollution (or abatement) and/or the means of reducing environmental damage;
- suasive measures — for example, that educate and inform landholders and regional communities about the extent of particular environmental problems and how these can best be addressed; or
- a combination of these (for example, see ABARE 2001, HRSCEH 2001a).



## Box 5.2 Taxation: achieving conservation goals?

It is sometimes argued that taxation can achieve desirable conservation outcomes:

Taxation incentives are consistently raised by landholders as a primary means by which conservation measures can be promoted ... the provision of economic incentives can lead to increased co-operation by private landholders in the identification, protection and management of biodiversity. (ACF 2000, p. 4)

According to this argument, taxes (and tax concessions) integrate environmental values into everyday economic decisions, particularly decisions by landholders and producers. For example, a tax concession may reduce the cost and, consequently, increase the financial attractiveness of voluntary conservation activities. This may increase the amount of conservation undertaken. In terms of local government rates and State land taxes, Binning and Young (1999a) note:

A concession on rates and land tax may not be large in terms of the value of the land, but it may represent a large proportion of the annual cost of managing land for conservation. Annual costs will be a major consideration for landholders motivated to philanthropically invest in nature conservation. (Binning and Young 1999a, p. 43)

Tax incentives may also have a symbolic impact on landholders' decisions, maintaining and reinforcing any financial motivations to undertake conservation activities:

A related benefit is that the availability of financial benefits to landholders can lessen their hostility to regulation and make enforcement of land use restrictions easier. (ACF 2000, p. 4)

A decision by government to intervene (say to improve conservation outcomes) does not automatically imply that the tax system is the best policy instrument to achieve those outcomes. Tax incentives are often imprecise policy instruments and may be:

- less efficient than direct outlays in targeting intended recipients and ensuring their effective administration, especially when they affect a small number of taxpayers;
- inequitable — for example, if the tax concession is structured as a deduction, the greatest benefit (and hence largest incentive) will accrue to those with high marginal tax rates, irrespective of the amount of 'public benefit' of those activities; and
- difficult to control — government generally has limited scope to control the public money spent through open-ended concessions. Lack of transparency and rent seeking magnify this problem.

Tax incentives may sometimes have unexpected outcomes. For example, it is not clear whether tax concessions are effective in reversing land degradation — when the tax concession reduces the private costs of rehabilitation, some farmers may more intensively exploit their land (for discussion see Chisholm 1994, IC 1998).

The potential impacts on other products, industries or sectors must also be considered. As the Commonwealth Treasury notes:

Ultimately, in addressing these issues, it is a question of setting up the tax incentives so that they provide the appropriate level of support that government deems necessary but, at the same time, do not provide the perverse outcomes. (HRSCEH 2001b, p. EH 561)

*Sources:* ACF 2000; Binning and Young 1999a and 1999b; Chisholm 1994; HRSCEH 2001b; IC 1995 and 1998; Peterson and Warren 1995.

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## Potential constraints on private conservation activities

Tax arrangements and treatments that introduce unintended distortions may lead to unplanned and sometimes undesirable outcomes for conservation of biodiversity on private land (box 5.3).

In some cases these distortions may reflect *ad hoc* approaches to tax policy development — such as the granting of tax benefits to satisfy sectional interests and/or as a result of changes in government objectives and priorities:

Often perverse incentives occur because the government has intervened in the market to secure social or economic ends without fully understanding or considering their implications for biodiversity conservation. (Young et al 1996, p. 14)

Potential distortions occur when tax arrangements treat similar activities, organisations or individuals inconsistently. When tax arrangements favour (or disadvantage) similarly placed activities or classes of taxpayer, they can potentially create perverse incentives so that landholders and producers undertake activities to take advantage of (avoid) the differential tax treatments of that activity. The easier it is to switch between a taxed (yet perhaps more socially desirable) activity and tax-favoured (yet less socially desirable) activity, the greater the potential distortion.

Examples of potentially inconsistent tax treatments include:

- the inconsistent treatment of deductions for the various types of ‘donations’ to organisations undertaking private conservation activities (section 5.2) that can potentially influence the options available to landholders — and in particular discourage landholders from placing conservation covenants on high conservation value land; and
- the different treatments of ‘conservation expenditures’ by landholders who manage their land solely for biodiversity conservation compared to landholders who undertake ‘conservation’ expenditures on land used for commercial purposes (section 5.3). Existing concessions that lower the relative operating costs of commercial activities may make those businesses relatively more attractive and, consequently, draw more resources to them and, potentially, away from biodiversity conservation.

Until recently, differences in the capital gains tax (CGT) treatment of any financial ‘consideration’ received by landholders who place a covenant on land compared to landholders who harvest and sell the native forests on their land distorted the relative cost of conservation activities (section 5.4). Announced amendments to CGT provisions may reduce these distortions.

### Box 5.3 Australian Plantation Timber Limited

Australian Plantation Timber Limited (APT) is a diversified public company that specialises in the sale and management of eucalypt and pine timberlots as well as olive groves as managed investment schemes. APT also operates a number of related commercial activities including a seedling nursery, timber treatment facilities, a finance company, the provision of forestry services to external parties and is also a 50 per cent joint venture participant in a woodchipping facility.

APT owns over 100 000 hectares of land, with operations in Western Australia, Victoria, South Australia, New South Wales and the Northern Territory. Some of APT's land holdings have been identified as being of high conservation value.

APT has considered alternate management approaches for these areas, including:

- developing active management plans for remnant vegetation and unplantable areas;
- establishing conservation covenants over areas of high conservation value; and
- donating high conservation value areas to an environmental organisation and providing financial support for the active management of the areas.

As a listed company, APT has responsibilities to a range of stakeholders including shareholders, the local communities and the environment. APT considered the alternatives to determine which option provided the greatest benefit to *all* stakeholders.

The APT Board considered that it is inappropriate to commit to any approach given the perceived potentially significant costs and uncertain taxation implications — the decisions have been deferred and the land temporarily left as is. APT suggest that key considerations included that:

- there are limited financial incentives to develop active management plans — indeed, the required resources could potentially provide greater environmental, community or financial rewards on projects beyond APT's immediate boundaries;
- existing tax arrangements appear to provide limited financial provisions, at this stage, to compensate companies for the additional financial requirements of establishing conservation covenants;
- existing capital gains tax (CGT) tax arrangements trigger CGT on land gifted for environmental philanthropy whilst land gifted as cultural heritage and testamentary gifts are specifically exempted; and
- existing tax arrangements provide little certainty or guidance in terms of:
  - how areas of high conservation, or areas containing evidence of endangered species will be valued by the Australian Valuation Office, potentially being devalued if land can not be used for agricultural purposes; and
  - the valuation requirements of areas requiring subdivision prior to donating to an environmental organisation.

Source: APT, pers. comm., 23 May 2001.

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Removing or reducing the distortions in existing tax arrangements might have positive biodiversity conservation benefits, although this may not always be the case. For example, even with appropriate pricing and taxation treatments, biodiversity conservation may be a limited alternative land use to agriculture, if the land system has been severely affected by past farming practices. In addition, the net effect of the policy change (including on other parts of the economy and on the community more broadly) must be considered. An important issue is the potential revenue cost to government from changing the tax system. Assessing the revenue impacts of particular changes to the tax system is beyond the scope of this paper. Instead, this paper highlights areas where potential constraints to biodiversity may exist — further analysis is required to assess the implications of specific policy responses.

## 5.2 The treatment of deductions for donations

The tax treatment of donations and part donations is recognised as a fundamental driver of philanthropy, including private conservation activities (The Ian Potter Foundation 1999). Tax arrangements can encourage public support for certain organisations or initiatives by reducing the taxable income (and hence the tax payable) of individuals and organisations. This may be especially important if individuals and organisations are in a better position than government to make decisions about which causes deserve public support (IC 1995).

There are several important types of donations to organisations that undertake private conservation activities, including:

- cash donations from the public, corporations, philanthropic trusts and other charitable organisations;
- donations of land of high conservation value — including through the discounted sale of property to charitable bodies (‘bargain sales’);
- donations by the establishment of conservation covenants;
- donations of assets such as shares;
- donations of time for labour or professional expertise or services — for example, to draft conservation management plans; and
- bequests of assets or monies in a will.

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## Existing arrangements

The tax treatment of donations and part donations are outlined in the ‘gifting provisions’ of the *Income Tax Assessment Act 1997* (ITAA 1997). Under these provisions, gifts of cash donations and donations of property and (in some cases) land made to eligible organisations (including environmental organisations listed on the Register of Environmental Organisations) are deductible under certain circumstances (ITAA 1997, Div. 30).

Recent amendments to these provisions allow deductions for donations of property valued at more than \$5000 to eligible environmental and heritage bodies to be spread over five years (ITAA 1997, Subdiv. 30-DC). Remaining elements are under review by the Commonwealth Treasury, the Australian Taxation Office (ATO) and others (including the Prime Minister’s Community Business Partnership Committee).

## Potential constraints on private conservation activities

The treatments of different types of donations to environment and heritage organisations may distort private conservation decisions. For example, donations of money to charitable organisations such as the Trust for Nature are tax deductible, as are donations of land valued over \$5000. In contrast, implicit ‘donations’ (for example, through conservation covenants) are either not allowed or are untested. The different treatments may affect the relative costs (and therefore attractiveness) of alternative types of donations and may consequently influence the type and amount of ‘environmental altruism’ undertaken. In addition, remaining uncertainty regarding the tax treatment of these types of ‘donations’ potentially increases costs and further undermines private conservation activities.

### *Gift deductions for conservation covenants*

Conservation covenants and revolving funds are emerging as important mechanisms to achieve private conservation outcomes (see chapter 2). There are a number of significant administrative, legal and personal costs associated with entering conservation covenants. In terms of taxation, of direct relevance are:

- the potential differences between the treatment of gift deductions of conservation covenants and the treatment of other types of donations; and
- existing CGT arrangements, including recently announced amendments to existing CGT provisions (discussed in section 5.4).

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It is not clear whether existing gifting arrangements allow landholders to deduct the value of a voluntary donation of a conservation covenant to a registered environmental body or government agency.

Existing provisions allow deductions for gifts of ‘property valued by the Commissioner [of Taxation] at more than \$5000.’ These provisions generally relate to the donation of land, but may potentially allow for deductions related to donations of conservation covenants — within the broad meaning of property, the interest in land created by a conservation covenant could potentially be treated as property. However, the applicability of existing provisions to the donation of conservation covenants has not been tested under current taxation legislation (HRSCEH 2001a).

If a deduction is not allowed, the ‘gift’ of a covenant would be treated differently to other charitable gifts (including cash) that are in the public interest. This may distort the relative costs to the landholder of making different types of donations at the time of the donation — the overall cost to the landholder of donating a covenant of a given value would be greater than a cash donation of the same value, because the cash donation is deductible.

It has been suggested that donations of a conservation covenant over land of high conservation value should be tax deductible (for example, ACF 2000, Binning and Young 1999b, IC 1998, The Ian Potter Foundation 1999). This would mean that the tax treatments of different types of donations would be treated more consistently.

If such a deduction is allowed, a further issue relates to determining the ‘market value’ of the gift of the covenant (the allowable deduction). Hillyer and Atkins (2000, p. 9) note:

Determining the value of many kinds of gifts is relatively straightforward although it may require the services of a qualified appraiser. However, it may be more difficult to determine the fair market value of covenants and easements.

A number of alternatives exist, including:

- comparing the market value of the land immediately after the donation of the conservation covenant with the market value of the land immediately before the donation (less any incentive payment or consideration);
- using a fixed proportion of the land’s market value; and
- assessing the value the community (or environmental organisation) places on having the conservation covenant on the land (which may not be directly related to any reduction in the market value of the burdened land).

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It is not clear which method is preferable. For example, while the first approach may best reflect the financial value of the gift to the landholder (Binning and Young 1999b, Loukidelis 1992), it can potentially increase the complexity of this, and other, elements of the tax system — for example, calculating the capital gains on property following the sale of land with a covenant. An additional complication arises if the conservation covenant *increases* the property's value (for example, if the protection offered by the covenant increases the amenities offered by the property). In contrast, using a fixed proportion of the land's value may be administratively simple, but may bear little relation to the actual value of the gift being made.

### *Gift deductions for 'bargain sales' of land*

In some cases landholders may sell land to environment and heritage organisations at a discounted price (a so-called 'bargain sale'). The Ian Potter Foundation suggests that deductions for the 'donation' component of bargain sales (the difference between the full market value of the land and the concessional sale price) and corresponding capital gains tax exemptions for the portion of land value donated together is the 'single most effective private conservation instrument currently applied within the United States' (The Ian Potter Foundation 1999, p. 9)

Existing gifting arrangements do not allow a gifting deduction for the 'donation' component of bargain sales (HRSCEH 2001a). This potentially creates a distortion over choices between different donation types, especially for landholders unable to donate the land outright (The Ian Potter Foundation 1999).

It has been argued that allowing a deduction under existing gifting provisions for the 'donation' component of bargain sales (with a corresponding capital gains tax exemption) would make the tax treatment of different donation types more consistent — providing the same tax benefit to 'part donations' and 'full donations' of land (The Ian Potter Foundation 1999).

However, adopting this approach may create distortions elsewhere — for example, between bargain sales of land and bargain sales of other assets. It may also influence simplicity — potentially increasing the administrative complexity (and consequently administration and compliance costs) in terms of inflated deductions for sales of land and, if it sets a precedent for deductions over other transactions, for inflated deductions relating to sales of other assets at less than market value.

In addition, under certain circumstances existing CGT arrangements may, in effect, already 'allow' for such a deduction — the tax payer faces the same tax liability (a

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reduced assessable income) by reducing their net capital gain.<sup>2</sup> For example, under CGT arrangements, a landholder who sells land at a bargain price will reduce their capital gain (and consequently their assessable income) by the amount of the ‘donation’ if the transaction was made ‘at arms length’. In this case there is no apparent distortion — the tax position of the landholder is the same as if the land had been sold at the market price and the ‘donation’ gifted to an approved conservation group (and consequently allowed as a deduction under the gifting provisions) (Robert Douglas, Taxation Policy Consultant, pers. comm., 11 April 2001). An apparent distortion may exist if the parties are not dealing with each other ‘at arms length’ since the ATO may use the market value of the asset (not the discounted sale price) for capital gains purposes — the landholder is worse off as they do not reduce their capital gain and the gifting provisions do not apply.

### **5.3 Special exemptions and deductions for certain landholders**

Binning and Young (1999b, p. 16) suggest that the different tax treatments of expenditures on land managed for private conservation and for other uses (in particular primary production) remains one of the ‘prime causes of the loss of national natural environmental assets in Australia including sites of high conservation value’. Common concerns include:

- the different income tax treatments of expenses relating to the costs associated with ongoing management of land under a conservation agreement and land used to produce income (in particular primary production);
- the different goods and services tax (GST) treatments relating to the purchase price of property intended to be used for private conservation activities and continuing pastoral activities; and
- the different tax treatments applied at state and local government levels (for a detailed discussion of these see Binning and Young 1999a, IC 1998, Young et al 1996).

Each may unintentionally distort the cost of managing land for conservation activities (compared to alternative uses) in terms of the type and timing of allowable deductions and the ‘up front’ costs and cash flows of undertaking conservation activities. This potentially influences the relative risks of undertaking conservation activities and consequently decisions over alternative land uses.

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<sup>2</sup> The CGT rules affect a taxpayer’s income tax liability because their assessable income includes a net capital gain for the income year.



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## Existing arrangements — income tax deductions and concessions

The general deductions provisions in the ITAA 1997 allow a deduction for all losses and outgoings that have a relevant connection with income or business activities (ITAA 1997, s 8.1). Under these provisions a deductible loss or outgoing must have the ‘essential character’ of a business or income producing expense — it must be relevant and incidental to gaining an assessable income and/or a necessary part of the cost of trading operations to produce income (CCH 2001). In addition, existing arrangements provide some landholders with an outright deduction for expenditure on landcare operations (box 5.4).

### Box 5.4 Capital expenditure on landcare operations

Capital expenditure on landcare operations qualifies for an outright deduction in the year the expenditure is incurred (ITAA 1997, Subdiv. 387-A). Deductions can be made for expenditures relating to:

- erecting a fence to prevent land degradation where the fence separates different land classes and is erected in accordance with an approved land management plan;
- erecting a fence for the purpose of excluding animals from an area affected by land degradation:
  - to prevent or limit extension or worsening of land degradation in the area; and
  - to help reclaim the area;
- constructing a levee, or a similar improvement with a similar use, on the land;
- constructing drainage works to control salinity or assist in drainage control; or
- an operation primarily and principally for the purpose of:
  - eradicating or exterminating from the land animals that are pests;
  - eradicating, exterminating or destroying plant growth detrimental to the land; or
  - preventing or fighting land degradation (except by erecting fences on the land).

Expenditure on extending an operation, as well as the original operation itself, qualifies for a deduction. The amount of deduction may be reduced where the land is used for a purpose other than carrying on primary production or carrying on a business for the purpose of gaining assessable income.

The deduction applies to:

- taxpayers carrying on a primary production business on land in Australia; and
- taxpayers carrying on a business (other than primary production or mining or quarrying) for the purpose of gaining assessable income from the use of rural land in Australia.

*Source:* ITAA 1997 and amendments.

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Special tax concessions are also available in the ITAA 1997 for entities that carry out ‘primary production businesses’ (ITAA 1997, Div. 385, 387) including:

- a three year deduction for expenditure on water facilities, such as construction and installation of dams, underground tanks, bores, pipes, pumps and water towers or extensions to any of these;
- alternative special tax offsets for low income primary producers worth 30 per cent of the amount spent on water facilities and landcare (up to a maximum of \$5000 for each type of expenditure) between 1 July 1997 and 30 June 2001; and
- special provisions relating to abnormal receipts that allow the taxpayer to spread or defer the tax profit in certain circumstances (for example, from the forced disposal or death of livestock, say as a result of the destruction of pasture or fodder due to drought, fire or flood).

In the absence of the special provisions, many of the items may be depreciated at a lower rate under general provisions.

Under the ITAA 1997, the definition of a ‘primary production business’ requires that the entity’s activities constitute the carrying on of a business and that the business has the character of one of a number of defined activities. Whether or not specific activities amount to carrying on the business of primary production is often a ‘question of fact and degree’ in terms of a number of indicators (such as the size or overall scale of the activities, the likelihood of profit and whether the activities are similar to, or are carried on in the same way as those that characterise ‘ordinary trade’ in that line of business). No indicator is considered decisive — the weighting applied to each may vary according from case to case.

### **Existing arrangements — GST and the purchase price of property**

The Goods and Services Tax (GST) is a broad-based consumption tax which aims to tax ‘private final consumption expenditure’. Under existing GST provisions, the supply of some goods and services are ‘GST free’. For example, the supply of land held by the Commonwealth or a State or Territory is GST free. Subsequent supply of that land will be taxable under the general rules (Woellner et al 2001).

Under existing GST provisions, if a farm is sold as a going concern, the transaction is GST-free. The sale of farm land, even if it is not part of a going concern, will be GST free if:

- the seller has carried on a farming business on the land for at least five years before the sale; and

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- the buyer intends to carry on farming business on the land (*A New Tax System (Goods and Services Tax) Act 1999*).

A more limited concession applies where the farm land is subdivided and sold for residential purposes (*A New Tax System (Goods and Services Tax) Act 1999*).

When calculating the amount to pay the ATO, businesses can offset the GST paid on ‘creditable acquisitions’ through a GST input tax credit. In this way, tax will be collected only on the value added by each business in the production and distribution chain, with the tax being ultimately paid by the final consumer (Woellner et al 2001). For example, an organisation that buys a farm to undertake ecological tourism activities would be entitled to an input tax credit and effectively pay no GST on the purchase.

### **Potential constraints on private conservation activities**

There are key differences between the tax treatment of many expenditures on land used to generate income (including primary production) and land used for private conservation which generates no income.

These differences arise because the expenditures to manage land used for business are seen as business inputs and are tax deductible. In contrast, the expenditures to manage land used for private conservation activities (that do not generate income) are considered private consumption — taxpayers choose to undertake private conservation activities in competition with all other purposes to which their funds could be put. The distinction between types of expenditures is consistent with the Commonwealth Treasury income tax base but is not consistent with the ‘enhanced’ environmental tax base (box 5.1).

#### *Income tax deductions and concessions*

Under existing income tax provisions, the tax treatment of expenditures related to conservation activities (such as weed and pest control) on land managed for conservation purposes may be different to the tax treatment of identical activities undertaken by other businesses conducted on rural land (including primary production). This is because:

- ‘up front’ tax deductions for income or business related expenses and capital expenditure on landcare operations are only available if a business is carried out on the land — the deductions do not apply to landholders who only wish to protect the land (and do not use the land for the purpose of gaining assessable income); and/or

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- landholders who only wish to undertake private conservation activities may not have access to the special ‘concessions’ available to primary producers.

Instead these landholders can add all reasonable costs of land management, including the costs of interest payments on the purchase of land, to the cost base of the land and so can deduct these costs from any capital gain or loss at the time of sale of the property. This may create a disincentive for biodiversity conservation in terms of the type and timing of the allowable deductions — landholders undertaking private conservation activities do not have access to ‘up front’ deductions.

The arrangements distinguish between similar activities undertaken for different reasons, even when the communitywide benefits of the conservation activities do not depend on why the activity is undertaken. As a result resources may be drawn into (or may be discouraged from moving away from) those areas receiving tax-favoured treatment. This may affect the relative risk and cashflow of private conservation activities and deter landholders who are not involved in businesses (including primary production) from undertaking private conservation activities (Binning and Young 1999b).

There have been a number of calls to remove such anomalies by extending some, or all, of the existing deductions, exemptions and concessions related to the ongoing costs associated with land management available to primary producers to landholders who undertake private conservation activities (for example, ACF 2000, Binning and Young 1999b, The Ian Potter Foundation 1999). The Industry Commission (1998, p. 348) noted that:

... it is appropriate that costs related to land which is managed for the private enjoyment of the owner only, should not be eligible for a tax deduction. However, there are wider community benefits associated with land managed under conservation agreements. One of the Commission’s recommendations is that in recognition of the wider community benefit, in some situations, stewardship payments be made to landholders for the costs of conservation management over the period of the agreement. Such payments should be recognised as assessable income derived from the land. Similarly then for taxation purposes, any costs associated with earning that income will then be able to be claimable against that income.

The desirability, or otherwise, of various options is beyond the scope of this paper. However, it is clear that careful consideration of alternatives is required, in particular in terms of balancing the objective of maintaining the broad principles of tax policy and any potential benefits that these proposals may generate.

An important starting point is the consideration of the appropriateness of the chosen income tax benchmark (section 5.1). Under the Commonwealth Treasury income tax base (box 5.1) only *bona-fide* income earning businesses should be eligible for business and landcare related deductions — landholders undertaking private

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conservation activities (and not generating income) do not have access to these deductions. In contrast, if a different tax base were considered more appropriate (say, the enhanced environmental tax base (box 5.1)), then landholders undertaking private conservation activities could potentially deduct the costs associated with the management of their land within the broad objectives of the system.

### *GST and the purchase price of property*

The GST tax treatment of the purchase price of property for private conservation activities differs from the treatment of property bought with the intention of continuing pastoral activities (or subdivision for residential purposes). This may create perverse incentives that deter private conservation activities.

The arrangements may provide a cash flow advantage to particular groups, potentially at a cost to other organisations wishing to undertake private conservation activities who have to pay ‘up front’. If the land was sold as a going concern, the transaction would be GST free. In contrast, an organisation wishing to buy a farm to undertake private conservation activities will pay GST on the purchase of the property (and can then obtain a GST input tax credit for the land). For example, Birds Australia (BA) noted that they paid \$50 000 GST on the purchase of a perpetual pastoral lease in the Northern Territory. Two-thirds of the GST payable was paid by the Commonwealth Government’s Natural Heritage Trust under the existing BA funding arrangements (David Baker-Gabb, Gluepot Reserve Management Committee, pers. comm., 24 April 2001).

## **5.4 The capital gains treatment of conservation covenants**

Until recently, the capital gains tax (CGT) treatments of proceeds payable to landholders who place their land under a conservation agreement and land used to produce income (in particular through the harvesting of native forests) have differed. This distorted the cost of managing land for conservation activities — encouraging landholders to use land on the basis that an activity had a more favourable tax status even if this led to undesirable community outcomes:

Conservation covenants are a very important part of the Government’s approach to conservation on private land, but until now there has been a disincentive for landholders to enter into them. (Hill 2001)

Under the previous provisions, there may or may not have been a capital gain from entering into a voluntary conservation agreement.

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A capital gain (loss) occurs if the capital proceeds are greater than (less than) the incidental costs incurred by the landholder in entering the agreement. Capital proceeds include money or other property that a taxpayer receives as a result of entering the agreement. In terms of conservation covenants, the ATO treats any compensation payments (sometimes called ‘considerations’) as capital proceeds (being payment in return for the covantor granting rights in favour of the covantee) rather than as payments for the consequential loss of their rights:

The nature of the transaction is such that all of the consideration is in respect of the grant of the easement, that is, in respect of the disposal of an asset ... It is true that the amount which the grantor requires as consideration might take into account the effect the voluntary granting of the easement would have on the value of the land. However, this does not mean, in our view, that the consideration is not paid by the grantee in respect of the easement. (Commissioner of Taxation 1997, para 17).

Sometimes no payments (or payments in kind) are received on entering the agreement. In this case there is no capital gain and there may have been a capital loss if there are some incidental costs.

#### *Potential constraints on private conservation activities*

The Tasmanian Regional Forest Agreement Private Forest Reserve Program (RFA PFRP) (box 5.5) argued that the previous CGT treatment of conservation covenants discouraged landholders from managing the land for conservation activities (RFA PFRP, pers. comm., 3 April 2001):

Put simply, forests on private land, that would otherwise have become part of the national comprehensive, adequate and representative (CAR) reserve system, will not be managed for conservation and may be cleared – as a direct result of the application of capital gains tax.

Under the Tasmanian RFA PFRP landholders may receive a financial ‘consideration’ for placing a covenant on their property which is taxed as a capital gain. This provided a disincentive to some landowners who were otherwise wishing to participate in the program as it becomes relatively more costly to manage land for conservation purposes. For example, Smith (2001, p. 1) suggested:

Application of capital gains tax to financial considerations paid to landowners continues to be a significant barrier to participation by landowners, and is contrary to the Prime Minister’s policy of encouraging philanthropy in nature conservation.

Notwithstanding the previous tax disincentives for conserving native forests under the Tasmanian RFA PFRP, increasing numbers of landowners have expressed interest in establishing private forest reserves on their land and progress is being made towards the conservation targets (Tasmanian RFA PFRP, pers. comm., 3 April 2001, Smith 2001).

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This may be because any potential distortion is limited by other factors. For example, landholders may choose to place covenants on their property for other (nonfinancial) reasons:

In some cases, landowners could earn much more from timber, but chose to covenant their forests to achieve their personal vision for their property. (Tasmanian RFA PFRP, pers. comm., 3 April 2001).

#### **Box 5.5      Tasmanian RFA Private Forest Reserve Program**

The Tasmanian RFA Private Forest Reserve Program (RFA PFRP) was established in 1997. It is voluntary and aims to establish a system of private forest reserves as part of the national comprehensive, adequate and representative (CAR) reserve system. The aim is to protect 100 000 hectares of native forests on private land that cannot adequately be reserved on public land by establishing a long term management partnership between the landholder and the government. The Commonwealth Government has provided \$30 million (\$20 million from the Natural Heritage Trust).

The main mechanism to establish these reserves is through management agreements and perpetual conservation covenants on land title. The program targets specific forest types and bioregions that have been identified as being of high priority for conservation. Assessment of the suitability of properties is undertaken by conservation officers, and an independent scientific advisory group.

The scheme offers up-front payments to landowners as an incentive or 'consideration' for covenanting. The financial package negotiated is based on about one third of the market value of the land. This is in line with the amount paid by business utilities for placing a permanent 'easement' on land title, where landowners retain significant property rights. The scheme may also provide recurring stewardship or management payments to cover the cost of agreed management works.

Restrictive conservation covenants, management agreements and operations plans have been completed for 15 landowners and cover 1989 hectares at a cost of \$394 480 (average of \$198 per hectare). Ministerial approval has been given to covenant a further 42 properties to protect an extra 8000 hectares. Based on current progress, it is estimated that by December 2003, Ministerial approval will have been given to protect 100 000 hectares, and that all covenants to protect this area will have been secured by December 2004.

*Sources:* Tasmanian RFA PFRP, pers. comm., 3 April 2001; Smith 2001.

### **Announced amendments**

The Commonwealth Treasurer recently announced amendments to the CGT treatment of payments for conservation covenants (Costello 2001). Under these changes, a conservation covenant will be treated as a part disposal of the property — the landowner will divide up the cost base of the property between that part subject to the covenant and the remaining property. These amendments will be

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backdated to 15 June 2000, to apply to landowners who have already entered into covenants under the Tasmanian RFA PFRP.

In announcing these changes, the Commonwealth Treasurer noted that the amendments should:

... promote greater participation in perpetual conservation covenants and so enhance the protection of Australia's unique and fragile native ecosystems ... The change will be of immediate benefit to landowners who have negotiated covenants with the Tasmanian Private Forest Reserve Program, as well as being relevant to landowners throughout Australia. (Costello 2001)

If a consideration is received, CGT may be payable on the difference between the consideration received and the cost base apportioned to the covenant:

Unless the landowner can demonstrate that the market value of their property with a covenant in place has been reduced by an amount equal to or greater than the payment, they will be assessed as making a capital gain. (Tasmanian RFA PFRP, pers. comm., 21 June 2001)

However, capital gain exemptions and discounts may apply in particular circumstances. For example, if the land was bought before September 1985 the capital gain made from the covenant attracts the pre-CGT exemption, while any capital gain made from a conservation covenant placed on land owned for more than 12 months may attract a 50 per cent CGT discount (Costello 2001).

It is beyond the scope of this report to determine whether specific policy responses potentially reduce constraints on biodiversity conservation and improve conservation outcomes. However, once the full effects of the new arrangements are clear, it may be useful to consider whether there are any remaining distortions and/or uncertainty regarding the (amended) CGT provisions. For example, the Tasmanian RFA PFRP (pers. comm., 21 June 2001) note:

... the effect of the announced amendments means that landowners who voluntarily participate in the national CAR reserve system by placing a covenant on their land title will be liable to different taxation treatments depending on whether they acquired their land before or after September 1985, whether or not they operate a small business on their property, and whether or not they acquired the land within the previous 12 months.

It has also been suggested that the announced amendments provide little additional incentive for landholders to pursue conservation outcomes:

Unfortunately, taxation continues to be a disincentive to nature conservation on private land ... Under the announced amendments, any financial payment made to a landowner with post-1985 land, *as an incentive to protect native forests identified as being of high conservation significance*, will be assessed as capital gain ... Given that the landowner is giving up significant property rights when registering a perpetual conservation



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covenant on title, and in so doing reduces the market value of her property, the application of capital gains tax removes or reduces the incentive for conservation (Tasmanian RFA PFRP, pers. comm., 21 June 2001).

However, considering whether CGT treatments should be actively used to achieve private conservation goals, and whether existing arrangements provide sufficient incentives for landholders, is beyond the scope of this report.

## 5.5 Summary

- Existing tax arrangements may potentially influence the type and amount of private conservation activities undertaken. Tax arrangements are sometimes used to encourage particular conservation activities. However, some tax arrangements create distortions and disincentives that discourage otherwise desirable private conservation efforts.
- Potential distortions may occur when tax arrangements treat similar activities, organisations or individuals inconsistently.
  - Existing ‘gifting’ provisions may potentially influence the options available to landholders — and in particular discourage landholders from ‘donating’ conservation covenants.
  - The tax treatment of expenditures related to conservation activities on land managed solely for conservation purposes (such as weed and pest control) may be different to the tax treatment of identical activities undertaken for commercial purposes, including primary production.
- These distortions can potentially affect the relative costs of managing land for conservation as well as alter the relative risks and cashflows of alternative activities and therefore investment decisions. Remaining uncertainty about future rulings is also a concern to private landholders contemplating conservation initiatives.
- Removing or reducing the distortions in existing tax arrangements might have positive biodiversity conservation benefits. However an assessment of ways to improve these taxation arrangement would need to take account of other taxes and policies.



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## 6 Conclusion

There is an important, and growing, role for private sector conservation. While not overlooking the important role the public sector can play, the private sector can further complement and supplement public conservation activities, and also release public resources for other uses.

However, a number of elements of the regulatory frameworks for land tenure, competitive neutrality, native wildlife, and taxation affect conservation of biodiversity by the private sector.

- Extensive pastoral lease arrangements do not recognise conservation as a primary land use and some provisions — including stocking rates, access and resumption — may be inconsistent with some conservation activities. Changes to these provisions are discretionary and can lead to uncertain outcomes. The lack of mechanisms to facilitate conservation agreements in some jurisdictions may also constrain conservation activities.
- Despite their apparent broadness, competitive neutrality principles and measures appear to have limited application to public sanctuaries — consequently, public conservation activities may potentially benefit from net competitive advantages simply by virtue of their public ownership.
- Native wildlife regulatory frameworks vary between jurisdictions, at times are overly complex, and do not always explicitly, consistently or fully define property rights to native wildlife. The extensive licensing systems and controls on keeping, use and trade of native fauna may not be necessary to address conservation of biodiversity, and may constrain or prevent private conservation initiatives.
- Under existing tax arrangements, a number of implicit ‘donations’ (for example, through conservation covenants) are currently either not allowed or are untested. Remaining uncertainty regarding the tax treatment of these types of ‘donations’ may further undermine private conservation activities.
- Landholders who manage their land solely for biodiversity conservation do not have access to a number of ‘up front’ taxation deductions and special concessions available to those who undertake conservation on land used for commercial purposes, including primary production.

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Many of elements of the regulatory frameworks share similar design limitations — including legislation and regulation that is at times:

- overly complex;
- poorly targeted;
- unclear in its interpretation or application; and/or
- subject to differing, *ad hoc*, or inconsistent, interpretation or application.

Inconsistent policy settings, and lack of complementary policy across jurisdictions, may also affect private conservation of biodiversity.

These limitations may create perverse incentives and/or increase the relative costs and risks of managing land for conservation compared to other viable land uses. This ultimately influences investment decisions and can lead to less efficient and effective conservation outcomes — the community overall may be worse off.

Regulatory frameworks should not unduly constrain private sector involvement in conservation of biodiversity.

Removing or reducing existing unwarranted constraints could have positive biodiversity benefits, although the potential for such gains depends on the complex interrelationships between private sector incentive structures, conservation activities and biodiversity outcomes. Further analysis is required to assess the appropriateness or otherwise of specific policy responses.

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# A Private conservation groups

## **Earth Sanctuaries Ltd**

Earth Sanctuaries Ltd (ESL) is a publicly listed company (May 2000) that has conservation of wildlife as its primary goal (ESL 2000b). ESL's operational strategy is to acquire land and erect electrified feral (vermin) proof perimeter fencing. The company then removes feral animals from the land and attempts to re-introduce selected native species that occupied the area prior to European settlement (ESL 2000a). This strategy targets the threat to small native mammals (particularly marsupials), birds and reptiles that evolved in an environment devoid of exotic predators such as foxes and cats. ESL seeks to educate the public on biodiversity and environmental issues. It also undertakes research about habitats and the diseases affecting native species and uses this information to educate its visitors and the wider public (ESL 2000a), as well as for its own purposes in managing its business.

To fund its conservation work, ESL is involved in a number of income-generating activities. The most significant of these is ecotourism that occurs at several sanctuaries. The company also raises income through a variety of other activities such as the provision of consultancy and contract services (for example, the removal of feral species from private properties) and the sale of non-endangered captive animals.

ESL consists of 10 sanctuaries in three states, spanning around 90 000 hectares of land and several biogeographical regions.

## **Australian Bush Heritage Fund**

The Australian Bush Heritage Fund (ABHF) is a private non-profit conservation group. It protects highly threatened and ecologically significant examples of Australia's wildlife habitats and plant communities by purchasing properties and by receiving bequests of private land with significant environmental value. ABHF focuses on acquiring and preserving areas of habitat which are likely to be sold and developed (Wildlife Australia 2000).

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The ABHF is funded through donations of money or land from the public. It also uses volunteers, such as botanical experts, to assist in its work (ABHF 2001). As well as purchasing property through donations, a number of land purchases made by the ABHF have occurred using funds received from the National Reserves System Program (Wildlife Australia 2000).

ABHF is managed through financial members electing a ten person board of directors. A panel of experts appointed by the Fund's board identifies land to be purchased and assesses the conservation values of land bequeathed to the Fund. Decisions are made using a five point Land Assessment Process and this involves considering biodiversity, the representation of the community or species in other reserves, and the management costs, among other factors. In cases where land bequeathed to the fund does not meet the conservation criteria of the Fund, part or all of the land may be sold and the proceeds used to preserve the remainder of the land or conserve land with higher conservation values.

With 13 reserves nationally, ABHF has land holdings of over 60 000 hectares.

## **Birds Australia**

Birds Australia (BA) is a private non-profit conservation group. The organisation has been operating since 1901 when its predecessor, the Royal Australasian Ornithologists Union, was founded. The aim of Birds Australia is to contribute to the conservation, study and enjoyment of Australia's native birds and their habitats (BA 2000).

BA is funded through public donations but has also received funding for some of its work through the Commonwealth Government's Natural Heritage Trust. The Trust is intended to support environmental activities at local, regional and national levels through the provision of funding (NHT 2000).

BA holds the lessee rights to two pastoral properties in South Australia and the Northern Territory covering over 310 000 hectares in total (Adams 2000, BA 2001a, 2001b).

## **Australian Wildlife Conservancy**

Australian Wildlife Conservancy (AWC) (formerly Fund for Wild Australia) is a Perth based private non-profit conservation group that is seeking to enhance and protect biodiversity through the purchase and management of properties of high conservation value.

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AWC is funded mainly through public donations. It operates a gift fund that is independently audited and its accounts are reported annually to the Department of Environment, Sport and Territories (FFWA 2001).

AWC has two properties open to the public near Perth — Karakamia Sanctuary, a 250 hectare freehold property, and Paruna Sanctuary, a 2000 hectare freehold property. AWC also has the lessee rights to three leasehold properties, all in Western Australia and covering about 450 000 hectares, which it intends to manage as wildlife sanctuaries (FFWA 2001).





## B Native wildlife

Table B.1 Long title, purpose and/or object of native wildlife legislation

<i>Jurisdiction</i>	<i>Long title, purpose and/or object of wildlife legislation</i>
ACT: Nature Conservation Act 1980	Long title: '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'. No expressed purpose.
NSW: National Parks and Wildlife Act 1974	Long title: 'An Act to consolidate and amend the law relating to the establishment, preservation and management of national parks, historic sites and certain other areas and the protection of certain fauna, native plants and Aboriginal relics...'. No expressed purpose.
NT: Territory Parks and Wildlife Conservation Act	Long title: 'An Act to make provision for and in relation to the establishment of Territory Parks and other Parks and Reserves and the study, protection, conservation and sustainable utilisation of wildlife'. No expressed purpose but five principles for the management of wildlife including conservation of biological diversity, and sustainable use of wildlife and its habitat.
QLD: Nature Conservation Act 1992	Long title: 'an Act to provide for the conservation of nature'. The object of this Act is the conservation of nature (s 4). To be achieved by gathering of information, management of protected areas, protection of native wildlife and its habitat, use of protected wildlife and areas to be ecologically sustainable,...(s5). The Act also has principles for the management of wildlife.
SA: National Parks and Wildlife Act 1972	Long title: 'An Act to provide for the establishment and management of reserves for public benefit and enjoyment; to provide for the conservation of wildlife in a natural environment; and for other purposes'. No expressed purpose.
TAS: National Parks and Wildlife Act 1970	Long title: '...the establishment and management of National Parks and other reserves and with respect to the conservation and protection of fauna and flora of the State, ...'. No expressed purpose.
VIC: Wildlife Act 1975	Purpose: a) to establish procedures in order to promote: the protection and conservation of wildlife; the prevention of taxa of wildlife from becoming extinct; the sustainable use of and access to wildlife; and b) to prohibit and regulate the conduct of persons engaged in activities concerning or related to wildlife (s1A).
Flora and Fauna Guarantee Act 1988	Purpose: to establish a legal and administrative structure to enable and promote the conservation of Victoria's native flora and fauna and to provide for a choice of procedures which can be used for the conservation, management or control of flora and fauna and the management of potentially threatening processes (s1).
WA: Wildlife Conservation Act 1950	Long title: 'An Act to provide for the conservation and protection of wildlife'. No expressed purpose.
Commonwealth: Wildlife Protection Act 1982	Long title: 'an Act to further the protection and conservation of wildlife by regulating the export and import of certain animals, plants and goods, and for related purposes'. Stated object: '...to comply with the obligations of Australia under the Convention on International Trade in Endangered Species of Wild Fauna and Flora...' (s3).

Source: State, Territory and Commonwealth legislation.

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### Box B.1 Western Australia private sanctuaries program

The Western Australian Department of Conservation and Land Management introduced the Private Sanctuaries for Threatened Fauna Program in 1994. The program enables private landowners to restock (from the wild to the wild) predator protected land with threatened native wildlife. The objectives of the program are to:

- complement and enhance threatened species conservation on government managed lands;
- provide an avenue for private enterprise to play a major role in threatened species conservation on private lands; and
- provide a means for private individuals and firms to recover their conservation management costs through the operation of tours and recreational ventures compatible with conserving threatened wildlife.

To establish threatened fauna sanctuaries, proponents must submit a sanctuary concept plan for consideration which includes information about the purpose of the sanctuary, a site and development plan, and an indication of the wildlife currently present and those suitable for reintroduction. Proponents must also satisfy other requirements before approval can be given to introduce fauna. These include submission of a detailed fauna survey of the site and a management plan. Sanctuaries are approved only once a management plan and formal contract agreement have been concluded between the sanctuary owners and the state.

Contract conditions specify that fauna located within the sanctuary and any introduced fauna (including progeny) remain wildlife and the property of the state. However, the management plan establishes what are, in effect, partial property rights enabling the landowner to trap, capture, handle, feed and maintain the fauna in the sanctuary subject to licence requirements of the *Wildlife Conservation Act 1950*. Non-consumptive use of the wildlife, such as tourism, is permitted. However, consumptive use is not allowed.

There are currently two properties near Perth operating under this program with more approvals pending. Another sanctuary in Shark Bay (about 850 kilometres north of Perth) is under development with others in the early planning stages.

According to the Department of Conservation and Land Management, there has been considerable interest in the program. However, to date the costs of establishing and running such sanctuaries are high compared to the tourist revenue they generate. The department suggests this has not been an issue where the owners wish to make a significant contribution to threatened fauna recovery and do not require traditional financial returns on their sanctuary investment.

*Source:* Department of Conservation and Land Management (WA), pers. comm., 5, 11 December 2000.

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## Box B.2 Commonwealth controls on international trade in wildlife

The object of the Commonwealth *Wildlife Protection (Regulation of Exports and Imports) Act 1982* is to comply with the obligations of Australia under Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and further the protection of the wild fauna and flora of Australia, by the regulation of exports and imports of native fauna and flora, and any related products. 'Native wildlife' is not defined in the Act but is interpreted broadly to include all 'animal' and 'plant' species, and these terms are defined. The Act is administered by the Wildlife Australia branch of Environment Australia.

In general, live native (vertebrate) fauna cannot be exported. However, permits to export live native fauna may be issued for limited purposes in accordance with specified criteria. Live native fauna listed on Schedule 1 may only be exported if the specimens are captive-bred, and the export is a transfer between approved zoological organisations or is for the purposes of approved scientific research. Criteria to gain declaration as an approved zoological organisation include that the zoological organisation: is owned or administered by the Commonwealth or a State, is a learned zoological society, is non-profit making and primarily non-commercial, and the breeding or public exhibition of specimens is the major function.

The export of captive-bred native fauna between approved zoological institutions can only occur where the native fauna is of a species that is readily bred in captivity and where it is to be used for a breeding program. Native fauna would only be classified as being bred in captivity if breeding occurs: in a controlled environment, is part of an approved program for breeding live native fauna in captivity that has been established in a manner not detrimental to the survival of the species in 'the wild', is maintained without further augmentation from 'the wild', and is managed in a manner that has demonstrated it can reliably produce second generation offspring in a controlled environment.

Similar restrictions apply to live native fauna listed on Schedule 2 and other non-listed native fauna. There is an additional exemption for a small list of native birds (identified on Schedule 7) that may be exported as household pets if they meet strict qualification requirements. In addition to the CITES listings, the schedules contain native fauna considered to be threatened in Australia but not listed in CITES.

The commercial export of native plants may be permitted when the plants have been taken from an approved artificial propagation or harvesting operation. A management program or controlled specimen program may not be declared unless effective legislation relating to the protection and management of the species is in place in a State. This requirement can be waived in special circumstances for controlled specimens which are typically smaller operations. State flora management plans have been prepared in some jurisdictions and are under development in others.

Proposals to incorporate the existing wildlife trade laws within the *Environment Protection and Biodiversity Conservation Act 1999* are currently being considered.

Sources: Environment Australia (1996a); (1996b); (1996c); (1996d); (1997).



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