

NEW FRONTIERS IN AUSTRALIAN NATURE LAW: LEADERSHIP AND INSPIRATION FROM THE SUBNATIONAL JURISDICTION?

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Despite fraught reform processes for national environmental laws, some Australian states and territories have forged ahead with ambitious law reform to address the biodiversity crisis. Subnational approaches have differed, depending on unique political, economic, ecological and other contextual constraints. However, these subnational reforms have shifted statutory objects and purposes, and introduced entirely novel statutory mechanisms and institutional arrangements for administration and compliance. We chart these emerging frontiers in nature law. We reflect on their potential to address well-recognised legal shortfalls such as failures to arrest habitat loss and address cumulative impacts; and their value in responding to complex new imperatives such as climate resilience, empowering First Nations' biodiversity management, and strategic ecosystem restoration. Given limitations in recent Environment Protection and Biodiversity Conservation Act 1999 (Cth) reforms and the need to progress nature law reform across the federation, it is timely to stocktake subnational progress and emerging, potentially transformative, examples of change.

I INTRODUCTION

Across all Australian jurisdictions, pressures that affect biodiversity – such as climate change, urbanisation, land clearing, resource extraction, invasive species, and pollution – continue to increase, with only small signs of stabilisation or

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improvement. The cumulative effects of these pressures include ongoing decline in native species, ecosystem condition, and increasing signs of ecosystem collapse.¹ For example, of the five biodiversity-specific indicators tracked in the New South Wales ('NSW') Government's *NSW State of the Environment 2024* report, environmental status is largely assessed as 'poor', with all indicators 'getting worse'.² Similarly, in Victoria, where 42 biodiversity indicators are tracked, 26 are assessed as of 'poor' status, and 20 as 'deteriorating'.³

- 1 Ian Cresswell, Terri Janke and Emma Johnston, *Australia State of the Environment 2021* (Report, 2021) <<https://soe.dceew.gov.au/overview/pressures/climate-change-and-extreme-events>>. See also NSW Environment Protection Authority, *NSW State of the Environment 2024* (Report, 2024) <<https://www.epa.nsw.gov.au/sites/default/files/2025-05/NSWSE2024.pdf>> ('*NSW State of the Environment 2024*'); Commissioner for Environmental Sustainability (Vic), *Victorian State of the Environment 2023* (Report, November 2023) <<https://www.ces.vic.gov.au/soe2023/report>>; Office of the Commissioner for Sustainability and the Environment (ACT), *ACT State of the Environment* (Report, 2023) <<https://www.actsoe2023.com.au/OCSE/ACT-State-of-the-Environment-Summary-Report-2023.pdf>> ('*ACT State of the Environment 2023*'); Environment Protection Authority (SA), *State of the Environment Summary Report 2023* (Report, 2023) <<https://soe.epa.sa.gov.au/files/documents/SOER-Summary-Report.pdf>> ('*SA State of the Environment 2023*'); Department of Environment and Science (Qld), *Queensland State of the Environment 2020: Summary* (Report, 2021) <https://www.stateoftheenvironment.des.qld.gov.au/_media/documents/Queensland-State-of-the-Environment-2020-Summary.pdf> ('*Queensland State of the Environment 2020*'); Tasmanian Planning Commission, *State of the Environment* (Summary Report, 2024) vol 1 <https://www.planning.tas.gov.au/_data/assets/pdf_file/0008/782603/SOE-Report-2024-Vol.1_27-September-2024.pdf> ('*Tasmania State of the Environment 2024*'); National Environmental Science Program Earth Systems and Climate Change Hub (NT), *Climate Change in the Northern Territory: State of the Science and Climate Change Impacts* (Report, September 2020) <<https://environment.nt.gov.au/media/docs/climate-change-response/state-of-the-science-and-climate-change-impacts-final-report.pdf>>; Environmental Protection Authority (WA), *State of the Environment Report 2007* (Report, 2007) <<https://www.epa.wa.gov.au/state-environment-report-2007>> ('*WA State of the Environment 2007*'). Each jurisdiction employs different indicators to measure environmental status and trends, including in relation to biodiversity.
- 2 *NSW State of the Environment 2024* (n 1) 296–7. These indicators cover both environmental pressures and environmental conditions, and include plants (extent of native vegetation, clearing of native vegetation, habitat condition, ecological carrying capacity, number of threatened listed species); and animals (number of threatened species listed, population and distribution of native mammals, population and distribution of native birds, native fish communities, distribution and impact of invasive animal species). Only two indicators (number of threatened animal species listed and population and distribution of native birds) were assessed as moderate environmental status. All indicators were assessed as 'getting worse'. Information reliability across these indicators was generally considered reasonable.
- 3 Commissioner for Environmental Sustainability Victoria, *Victorian State of the Environment 2023 Report: Report Indicators* (Report, 2023) 2–3 <<https://www.ces.vic.gov.au/soe2023>>. In addition to the 20 assessed as 'deteriorating', eight indicators are assessed as 'stable', two as 'improving', and the remainder 'unclear': at 3. For evidence of similar decline in other states and territories, see *ACT State of the Environment 2023* (n 1) 164–77; *SA State of the Environment 2023* (n 1) 46–66; *Queensland State of the Environment 2020* (n 1) 21–36; *Tasmania State of the Environment 2024* (n 1). Western Australia ('WA') and the Northern Territory ('NT') are the only jurisdictions without a statutory requirement to conduct 'state of the environment' assessments. The latest WA report in 2007 (*WA State of the Environment 2007* (n 1)) demonstrated similar trends of decline, trends that are continuing, according to a recent audit. In the absence of continued monitoring and State of the Environment reporting, the current status of WA's environment is unclear: John Bailey, Trish Harris and Philip Jennings, 'State of the Environment Reporting in Western Australia: Law, Land and Beyond' (2018) 25(4) *Australasian Journal of Environmental Management* 371, 372 <<https://doi.org/10.1080/14486563.2018.1486238>>; Office of the Auditor General (WA), *Conservation of Threatened Ecological Communities* (Report No 23, June

There have been repeated calls for comprehensive reform of environmental laws to address ongoing biodiversity loss. At the national scale, a 2020 independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*'Commonwealth EPBC Act'*) found that it had overwhelmingly failed to achieve its objects.⁴ The *Commonwealth EPBC Act* includes an environmental impact assessment regime which governs activities that impact matters of national environmental significance including biodiversity,⁵ as well as processes for protecting nationally threatened species and ecological communities.⁶ Key flaws highlighted by the review included reliance on project-by-project assessment with insufficient regard for cumulative impacts, broad decision-maker discretion with a lack of focus on environmental outcomes, very high rates of project approvals with heavy reliance on poorly regulated offsets to 'compensate' for biodiversity loss, and insufficient monitoring and compliance.⁷ A raft of reforms were recommended.⁸

Since this 2020 review, the Australian Government has pursued environmental law reform in fits and bursts.⁹ In 2022, the newly-elected Labor government signed up to the *Kunming-Montreal Global Biodiversity Framework* (*'GBF'*) under the United Nations *Convention on Biological Diversity*, committing to the new global 'nature-positive' goal to halt and reverse biodiversity loss by 2030 and achieve full recovery by 2050,¹⁰ and setting out corresponding national targets for conservation

2025) 5 <<https://audit.wa.gov.au/reports-and-publications/reports/conservation-of-threatened-ecological-communities/>> (*'WA Conservation of Threatened Ecological Communities'*).

- 4 Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 43 <<https://www.dcccew.gov.au/sites/default/files/documents/epbc-act-review-final-report-october-2020.pdf>> (*'Samuel Review'*). The objects of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*'Commonwealth EPBC Act'*) include promoting 'ecologically sustainable development through the conservation and ecologically sustainable use of natural resources', promoting 'the conservation of biodiversity' and assisting in 'the co-operative implementation of Australia's international environmental responsibilities' (which includes Australia's commitments under various international environmental treaties): at ss 3(1)(b)–(c), (e).
- 5 The nine 'matters of environmental significance' under the *Commonwealth EPBC Act* (n 4) part 3 division 1 are actions which may affect: world heritage properties (sub-div A); national heritage places (sub-div AA); wetlands of international importance (sub-div B); nationally threatened species and ecological communities listed under the *Commonwealth EPBC Act* (n 4) (sub-div C); listed migratory species (sub-div D); Commonwealth marine areas (sub-div F); the Great Barrier Reef Marine Park (sub-div FA); water resources in relation to coal seam gas and large coal mining developments (sub-div FB); and nuclear actions including uranium mining (sub-div E).
- 6 Ibid ch 5. This chapter provides, inter alia, for listing threatened species and communities and their recovery planning, as well as Commonwealth protected areas.
- 7 *Samuel Review* (n 4) 42, 138–41.
- 8 Ibid 26–35. For example, the Review concluded that standards are needed to describe outcomes, management practices and decision-making processes and these should inform all actions and decisions under the *Commonwealth EPBC Act* (n 4) including the formation of policy, programs, and regional planning, as well as project assessment and approval.
- 9 For a summary, see Justine Bell-James et al, 'Groundhog Day: The *EPBC Act* Reform Process' (2025) 41(1) *Environmental and Planning Law Journal* 19, 20 ('Groundhog Day').
- 10 *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity*, UN Doc CBD/COP/DEC/15/4 (19 December 2022) (*'GBF'*). The *GBF* aims to halt and reverse biodiversity loss by 2030 on a 2020 baseline and achieve full recovery by 2050: at paras 4, 10–12. It sets out associated targets including to ensure, by 2030, at least 30% of terrestrial and aquatic areas are conserved and managed for conservation, and at least 30% of degraded ecosystems are under effective restoration (Targets 2 and 3).

and restoration of ecosystems.¹¹ The Government also released a national reform agenda – the *Nature Positive Plan* – which it started to progress in three tranches.¹² Tranche 1 introduced a national, voluntary biodiversity market under the *Nature Repair Act 2023* (Cth) to attract new private and philanthropic investment to nature conservation and repair.¹³ However, key reforms intended for Tranches 2 and 3, such as establishing an independent national environmental regulator and binding national environmental standards for decision-making, encountered significant political opposition and failed to progress during the last term of government.¹⁴ In late 2025, under new ministerial leadership, amendments to the *Commonwealth EPBC Act* were fast-tracked and did pass Parliament,¹⁵ with the resulting reforms largely seen as a pragmatic compromise.¹⁶ For example, a new national environmental regulator will now oversee compliance and enforcement, but will not make development approval decisions independently, as originally conceived.¹⁷ Once amending provisions commence, there will be a requirement that the Minister refuse a development proposal unless satisfied that it would not have an ‘unacceptable impact’ on protected matters; as well as a new statutory provision to consider the mitigation hierarchy,¹⁸ and a power for the Minister to make

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- 11 Biodiversity Working Group, *Australia's Strategy for Nature 2024–2030: Australia's National Biodiversity Strategy and Action Plan* (Report, 2024) 4, 16 <<https://www.dcceew.gov.au/environment/biodiversity/conservation/publications/australias-strategy-for-nature>>.
 - 12 Department of Climate Change, Energy, the Environment and Water (Cth), *Nature Positive Plan: Better for the Environment, Better for Business* (Report, December 2022) 36, 48 <<https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf>> (*'Nature Positive Plan'*).
 - 13 *Nature Repair Act 2023* (Cth) (*'Commonwealth Nature Repair Act'*).
 - 14 Bell-James et al, 'Groundhog Day' (n 9) 29–39.
 - 15 Seven bills were passed by Parliament on Friday 28 November 2025 including: Environment Protection Reform Bill 2025 (Cth); National Environmental Protection Agency Bill 2025 (Cth); Environment Information Australia Bill 2025 (Cth).
 - 16 Murray Watt, 'Roundtable Consensus Drives Fast-Tracking of EPBC Reform' (Media Release, 26 August 2025) <<https://minister.dcceew.gov.au/watt/media-releases/roundtable-consensus-drives-fast-tracking-epbc-reform>>; 'Environmental Law Draft Reform Package: Scorecard', *Environmental Justice Australia* (Web Page, 17 Nov 2025) <<https://envirojustice.org.au/environment-law-reform-scorecard/>>; Justine Bell-James et al, 'Long-Sought Environmental Law Reform Is Finally Here. But Will the Compromise Deal Actually Protect Nature?', *The Conversation* (online, 27 November 2025) <<https://theconversation.com/long-sought-environmental-law-reform-is-finally-here-but-will-the-compromise-deal-actually-protect-nature-270775>>.
 - 17 *National Environmental Protection Agency Act 2025* (Cth) ss 9–11, 13; *Environment Protection Reform Act 2025* (Cth) items 45, 64, 82 (*'Commonwealth Reform Act'*). Many of the *Commonwealth Reform Act* provisions commenced on 1 July 2026, including those that establish and empower the National Environmental Protection Agency to undertake compliance and enforcement: see at item 2. Please note however that on 1 July 2026, the Minister made two instruments of delegation which have delegated powers related to assessment and approval decisions to the Chief Executive Officer ('CEO') of the National Environmental Protection Agency: *Environment Protection and Biodiversity Conservation (Minister to Department and Director of National Parks) Delegation 2026* (Cth); *Environment Protection and Biodiversity Conservation (Minister to NEPA) Delegation 2026* (Cth).
 - 18 Where an action will or may have a 'residual significant impact' on a protected matter, 'the Minister must consider whether the designated proponent ... has taken appropriate measures (including through the location or design of the action) to avoid, mitigate or repair the impact or damage': *Commonwealth Reform Act* (n 17) sch 1 pt 1 item 230. Note that this provision is due to commence on 2 December 2026 unless a proclamation declares it to commence earlier: at item 2. Once commenced, this section will be *Commonwealth EPBC Act* (n 4) s 134(3F).

national environmental standards,¹⁹ to constrain development decision-making, which are underpinned by the no regression principle.²⁰ However, standards are yet to be finalised,²¹ and there are concerns about loopholes and weaknesses in the new statutory language.²² Little substantive progress was made in addressing the implications of climate change for biodiversity conservation,²³ nor in empowering First Nations Australians in biodiversity policy and management.²⁴

The *Commonwealth EPBC Act* is an important part of the legal framework for biodiversity conservation in Australia and these latest reforms will undoubtedly be the subject of considerable scrutiny in coming years. The focus of this analysis however is not on the reformed *Commonwealth EPBC Act*, but rather, on analysing recent developments in subnational nature laws in the broader context of nature law reform in our federal system. In Australia, state and territory governments have considerable law-making power in relation to the environment.²⁵ Indeed,

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- 19 *Commonwealth Reform Act* (n 17) sch 1 pt 1 item 237. Once commenced, this section will be *Commonwealth EPBC Act* (n 4) s 136A: ‘Approval must be consistent with prescribed national environmental standards’.
 - 20 *Commonwealth EPBC Act* (n 4) s 514YG, as inserted by sch 1 pt 1 item 571 of the *Commonwealth Reform Act* (n 17), under which the Minister must be satisfied, before varying or revoking a national environmental standard, that the variation or revocation does not reduce protections of the environment.
 - 21 Two draft standards were released for public consultation prior to commencement of the *Commonwealth Reform Act* (n 17): the *National Environmental Standard (Matters of National Environmental Significance) 2025* and *National Environmental Standard (Environmental Offsets) 2025* on which consultation closed 30 January 2026. Official statutory consultation was held from April–June on *National Environmental Standard (Matters of National Environmental Significance) 2026* and *National Environmental Standard (Environmental Offsets) 2026*. Draft standards for Data, Information and Community Engagement were also released in June 2026. It is unclear when additional standards will be released.
 - 22 For example, ‘unacceptable impact’ is defined in a lengthy table in the legislation, with separate definitions depending on the affected protected matter. Many of the definitions of ‘unacceptable impact’ require ‘Ministerial satisfaction’ that the anticipated impact will occur: see *Commonwealth Reform Act* (n 17) sch 1 pt 1 item 588. Once commenced, this section will be *Commonwealth EPBC Act* (n 4) s 527F. Similarly, proposed actions must be consistent with any national environmental standards unless the Minister is satisfied that any likely inconsistency is reasonably necessary to achieve the intended outcome of a ‘national interest proposal’: *Commonwealth Reform Act* (n 17) sch 1 pt 1 item 291. Once commenced, this section will be *Commonwealth EPBC Act* (n 4) s 157C. Section 292 of the *Commonwealth Reform Act* (n 17) will replace division 2 part 3 of the *Commonwealth EPBC Act* (n 4) with a new division creating a ‘national interest exemption’ – which the Minister can initiate or grant upon application – that empowers the Minister to exempt a proponent from the protective provisions in part 3 of the *Commonwealth EPBC Act* (n 4) if the Minister is satisfied that it is in the national interest to do so. The reforms establish two very broadly stated national interest grounds, ‘Australia’s defence or security; or a national emergency’: *Commonwealth Reform Act* (n 17) sch 1 pt 1 item 292.
 - 23 For example, climate change was not added as a matter of national environmental significance that would trigger assessment and approval requirements under the Act; however new coal and gas projects will not be able to use the new ‘streamlined assessment’ to fast track their approvals: see *Commonwealth Reform Act* (n 17) sch 1 pt 1 item 194. Once commenced this will be *Commonwealth EPBC Act* (n 4) s 87(5A).
 - 24 The role of the Indigenous Advisory Committee has been expanded to include contribution to the development of a First Nations Engagement standard and to incorporate cultural knowledge into threatened species and ecological community listing processes: see *Commonwealth Reform Act* (n 17) sch 1 pt 1 items 557, 571. However, beyond this, there has been little substantive change made to the *Commonwealth EPBC Act* (n 4). For example, there is no provision for free, prior and informed consent for development affecting Aboriginal land or cultural values and rights.
 - 25 While the environment is not explicitly captured by the express powers of the Commonwealth under the *Australian Constitution*, environmental matters can be extensively regulated by the Commonwealth

subnational laws currently govern most critical aspects of biodiversity conservation, either independently, or in conjunction with the *Commonwealth EPBC Act*.²⁶ Legal and institutional arrangements differ significantly across state and territory jurisdictions, as do historical land management legacies and the prominence of different drivers of biodiversity loss.²⁷ However, most jurisdictions have one or more core pieces of biodiversity-focused legislation, which provide, at a minimum, for listing and protecting threatened species and ecological communities, and listing threatening processes,²⁸ as well as laws that establish and provide for the management of protected areas (including, in most jurisdictions, on private land).²⁹ These biodiversity laws interact with environmental impact assessment and land use planning regimes which govern activities that may cause habitat modification and destruction, requiring some consideration of biodiversity in development

under other constitutional powers including the powers to make laws with respect to external affairs, trade and commerce, corporations and taxation. The states have residual powers relating to land and natural resource management. In practice, a cooperative federalism approach has been taken, whereby the Commonwealth has legislated in relation to a limited number of nationally significant environmental issues, preserving considerable space for state governments to regulate environmental matters: see discussion in Lee Godden, Jacqueline Peel and Jan McDonald, *Environmental Law* (Oxford University Press, 2nd ed, 2018) 108–22.

- 26 For example, in Victoria, environmental impact assessment for development that is capable of having a significant effect on the environment (including biodiversity) is conducted under the *Environment Effects Act 1978* (Vic) ('*Victorian Environment Effects Act*'). Under a bilateral agreement concluded in 2014, environmental impact assessment of development likely to significantly impact matters of national environmental significance under the *Commonwealth EPBC Act* (n 4) which occur in Victoria, can also be undertaken under the *Victorian Environment Effects Act* (with the Commonwealth Minister retaining discretion on the final decision).
- 27 For example, in Victoria, over 50% of land has been cleared and most land is private land. As such, remnant vegetation on private land is of high conservation significance: State of Victoria Department of Environment, Land, Water and Planning, *Protecting Victoria's Environment: Biodiversity 2037* (Report, 2017) 4, 48. In other states such as Queensland, historical clearing rates were much lower, however the majority of clearing in Australia in the last 40 years has occurred in Queensland, mostly for the establishment of cattle pasture: see, eg, Hannah Thomas et al, 'Poor Compliance and Exemptions Facilitate Ongoing Deforestation' (2024) 39(1) *Conservation Biology* e14354:1–18, 2 <<https://doi.org/10.1111/cobi.14354>>.
- 28 See, eg, *Nature Conservation Act 2014* (ACT) ('*ACT Nature Conservation Act*'); *Biodiversity Conservation Act 2016* (NSW) ('*NSW Biodiversity Conservation Act*'); *Territory Parks and Wildlife Conservation Act 1976* (NT) ('*NT Territory Parks and Wildlife Conservation Act*'); *Nature Conservation Act 1992* (Qld) ('*Queensland Nature Conservation Act*'); *Biodiversity Act 2025* (SA) ('*SA Biodiversity Act*') (although, until the *SA Biodiversity Act* comes into force, there is no statutory basis for threatened species listing in SA); *Flora and Fauna Guarantee Act 1988* (Vic) ('*Victorian Flora and Fauna Guarantee Act*'); *Biodiversity Conservation Act 2016* (WA) ('*WA Biodiversity Conservation Act*'). Note that older laws tend to focus narrowly on threatened species and not ecological communities, and sometimes protected areas, while more recent laws take a broader perspective and may also address native vegetation decision-making and private land conservation.
- 29 *National Parks and Wildlife Act 1974* (NSW) ('*NSW National Parks and Wildlife Act*'); *Wilderness Act 1987* (NSW); *NSW Biodiversity Conservation Act* (n 28); *Queensland Nature Conservation Act* (n 28); *National Parks and Wildlife Act 1972* (SA); *Wilderness Protection Act 1992* (SA); *Nature Conservation Act 2002* (Tas) ('*Tasmanian Nature Conservation Act*'); *National Parks and Reserves Management Act 2002* (Tas) ('*Tasmanian National Parks and Reserves Management Act*'); *Victorian Flora and Fauna Guarantee Act* (n 28); *National Parks Act 1975* (Vic); *Wildlife Act 1975* (Vic) ('*Victorian Wildlife Act*'). There are also Crown land statutes in each state and territory, which govern the creation and management of protected parcels of Crown land.

assessment and approval decisions.³⁰ States and territories also have a plethora of other laws which affect biodiversity, including laws that regulate natural resources such as freshwater and marine systems, forests, and native vegetation,³¹ laws that govern biosecurity and invasive species management,³² and laws that regulate pollution and waste.³³

Like the *Commonwealth EPBC Act*, there have been many critical reviews, audits and calls for reform of subnational nature laws over recent years.³⁴ While reform efforts nationally have been highly contentious and, most recently, have resulted in substantial compromises on proposed new environment and climate protections, several state jurisdictions have recently forged ahead with comprehensive, ambitious nature law reform. For example, the South Australian Parliament passed its *Biodiversity Act 2025* (SA) (*SA Biodiversity Act*) in June 2025, and NSW is currently progressing reforms to its *Biodiversity Conservation Act 2016* (NSW) (*NSW Biodiversity Conservation Act*) to contribute to ‘nature-positive’ goals at the

30 For example in the ACT, where a development is likely to have a ‘significant adverse environmental impact’ on a protected matter (eg, threatened species) listed under the *ACT Nature Conservation Act* (n 28), the proposal must be referred to the ACT Conservator of Flora and Fauna to provide advice about ways to avoid or minimise the environmental impact of the proposed development, an assessment of whether the proposed development is likely to have a significant adverse environmental impact on a protected matter and if so, advise about suitable offsets for the proposed development. This advice must be considered by the Territory Planning Authority in making final decisions to approve or refuse a development application under the *Planning Act 2023* (ACT) (*ACT Planning Act*): see at ss 170(1)(c), 186, 189–90; *ACT Nature Conservation Act* (n 28) ss 318(2)–(3).

31 See, eg, *Local Land Services Act 2013* (NSW) (*NSW Local Land Services Act*); *Vegetation Management Act 1999* (Qld); *Native Vegetation Act 1991* (SA); *Forest Practices Act 1985* (Tas); *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA). In Victoria and the ACT, native vegetation clearing is largely regulated through planning law frameworks: ‘Victoria Planning Provisions’ (Planning Scheme, 16 June 2026) ord 52.17 (*Victoria Planning Provisions*); Department of Energy, Environment and Climate Action (Vic), ‘Guidelines for the Removal, Destruction or Lopping of Native Vegetation’ (Guidelines, August 2025); *ACT Planning Act* (n 30) s 105(1)(a); *Planning (General) Regulations 2023* (ACT) sch 1 pt 1.2 item 17. For a recent overview, see Environmental Defenders Office, *Analysis of Vegetation Management Regulatory Frameworks in Australia* (Report, July 2023).

32 *Biosecurity Act 2023* (ACT); *Biosecurity Act 2015* (NSW); *NT Territory Parks and Wildlife Conservation Act* (n 28); *Biosecurity Act 2014* (Qld); *Biosecurity Act 2025* (SA); *Biosecurity Act 2019* (Tas); *Catchment and Land Protection Act 1994* (Vic) (*Victorian Catchment and Land Protection Act*); *Biosecurity and Agriculture Management Act 2007* (WA).

33 *Environment Protection Act 1997* (ACT); *Protection of the Environment Operations Act 1997* (NSW) (*NSW Protection of the Environment Operations Act*); *Environment Protection Act 2019* (NT); *Environmental Protection Act 1994* (Qld) (*Queensland Environmental Protection Act*); *Environment Protection Act 1993* (SA) (*SA Environment Protection Act*); *Environmental Management and Pollution Control Act 1993* (Tas); *Environment Protection Act 2017* (Vic) (*Victorian Environment Protection Act*); *Environmental Protection Act 1986* (WA).

34 See, eg, Environment and Planning Committee, Parliament of Victoria, *Inquiry into Ecosystem Decline in Victoria* (Parliamentary Paper No 297, December 2021) (*Inquiry into Ecosystem Decline in Victoria*); Victorian Auditor-General’s Office, *Protecting Victoria’s Biodiversity* (Parliamentary Paper No 266, October 2021) (*Protecting Victoria’s Biodiversity*); WA Conservation of Threatened Ecological Communities (n 3); Queensland Audit Office, *Conserving Threatened Species* (Report No 7, 13 November 2018); Queensland Audit Office, *Protecting our Threatened Animals and Plants* (Report No 9, 23 February 2023); Ken Henry et al, *Independent Review of the Biodiversity Conservation Act 2016* (Final Report, August 2023) (*Henry Review*).

national and international levels.³⁵ Through these reform processes, subnational jurisdictions are grappling with emerging and complex policy imperatives, including climate change resilience, empowering First Nations Australians in biodiversity management, and strategic landscape-scale ecosystem conservation and restoration – challenges for which most existing nature laws in Australia were not designed, and which have not been comprehensively addressed through recent national reforms. The result is, we suggest, a significant shift in state and territory biodiversity laws. We demonstrate that shift in reforms to statutory objects and purposes; innovative, sometimes entirely novel, statutory mechanisms and regulatory approaches to biodiversity conservation; as well as new institutional arrangements for administration and compliance.

Comprehensive law reform will not always be the answer to the wicked challenges that we face in conserving biodiversity, particularly as climate change accelerates. Pervasive shortfalls in resourcing, implementation and enforcement, for example, have hamstrung existing laws in ways that would not be simply fixed with new legislation.³⁶ Even so, there are insights to be drawn from the substantive legal innovations observed in subnational jurisdictions and the primary purpose of this article is to stocktake and reflect on the significance of these. While this article does not specifically comment on the division of roles and responsibilities for biodiversity conservation within the Australian federation, it does highlight the potential for subnational governments to innovate and lead in nature law development in a federal context.³⁷ Further, the analytical engagement with subnational reforms set out here provides a useful framework for future analysis of evolving environmental federalism in Australia. As the new *Commonwealth EPBC Act* reforms are embedded, and subnational reforms progress, it will be important to review and reconsider federal arrangements for biodiversity conservation to avoid fragmentation and incoherence.

In Part II we introduce recent and ongoing reforms to subnational nature laws in Australia. In Part III, we articulate a framework of statutory mechanisms, organised by purpose and function, to assist in identifying and analysing recent shifts in nature laws across jurisdictions. We then apply this framework to a subset of nature laws,³⁸

35 NSW Government, *NSW Plan for Nature: NSW Government Response to the Reviews of the Biodiversity Conservation Act 2016 and the Native Vegetation Provisions of the Local Land Services Act 2013* (Report, July 2024) 28 ('*NSW Plan for Nature*').

36 For similar discussions of poor resourcing and implementation of nature laws, see above n 34.

37 This mirrors the leadership shown by state and territory governments in developing climate change laws, policies and strategies over the past decade: see Peter Christoff and Robyn Eckersley, 'Convergent Evolution: Framework Climate Legislation in Australia' (2021) 21(9) *Climate Policy* 1190, 1191 <<https://doi.org/10.1080/14693062.2021.1979927>>; Anita Foerster et al, 'Paris at the Sub-National Scale? An Exploration of the Role and Potential of Framework Climate Change Laws' (2022) 45(3) *Melbourne University Law Review* 1045, 1091.

38 We use the term 'nature laws' in this article to refer to laws which have the conservation of nature or biodiversity at their core, and which interact with legal instruments which govern activities that may cause habitat modification and destruction (eg, environmental impact assessment, land use planning regimes, native vegetation laws). We acknowledge that many other legal instruments can and do affect nature, including pollution-focused laws (ie, environment protection statutes) and legal instruments that govern activities such as forestry, agriculture, mining and energy. While the concept of 'nature laws' could certainly

focusing on jurisdictions with active reform agendas, but referencing measures in other states and territories (and occasionally the Commonwealth), as relevant. In Part IV, we reflect on the significance of recent developments in nature law, both in terms of addressing well-recognised weaknesses in legal frameworks, such as failures to halt habitat loss and address cumulative impacts; as well as in responding to emerging, complex policy challenges and imperatives, including climate change, embedding First Nations approaches to caring for Country, and landscape scale restoration. We conclude in Part V with suggestions for further research to broaden and deepen this inquiry into new frontiers in Australia's nature laws.

II THE STATE OF PLAY: SUBNATIONAL NATURE LAW REFORM

Several Australian subnational jurisdictions have recently reformed their nature laws or have active reform processes underway.³⁹ These reforms respond to increasing evidence of the failure of environmental law to stem the biodiversity crisis, but also to emerging policy imperatives such as the *National Agreement on Closing the Gap*,⁴⁰ as well as the need to integrate consideration of climate change across all relevant policy areas.⁴¹ Some of these processes also explicitly reference international 'nature-positive' goals and Australia's commitments under the *GBF*, particularly recognising the imperative for landscape-scale conservation and restoration.⁴²

be broadened to reflect the full range of legal instruments that interact with biodiversity conservation, documenting and understanding these broader interactions is an exercise beyond our current scope. Our approach is consistent with longstanding approaches to biodiversity law: see, eg, Gerry Bates, *A Duty of Care for the Protection of Biodiversity on Land* (Consultancy Report, 2001) 7; Callum Brockett et al, 'Best Practice Mechanisms for Biodiversity Conservation Law and Policy' (2023) 1 *Cambridge Prisms: Extinction* e16:1–17, 3, 7 <<https://doi.org/10.1017/ext.2023.14>>; Phillipa C McCormack, 'Biodiversity Conservation Law and Climate Change Adaptation' (2018) 92 *Australian Law Journal* 839, 840–1.

39 Given the focus on recent nature law reforms in this article, our discussion centres on the jurisdictions of SA, NSW, Victoria and the ACT. Nature laws in the other states and territories have not been subject to substantial reforms in at least a decade and will not be discussed in detail in this article.

40 Closing the Gap, *National Agreement on Closing the Gap* (July 2020) <<https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap>>. This sets out priority reforms that focus on changing the way that governments work with Aboriginal and Torres Strait Islander Peoples, including a focus on strengthening and establishing formal partnerships and shared decision-making.

41 For a discussion of the policy imperatives for climate change mainstreaming: see Alice Bleby and Anita Foerster, 'A Conceptual Model for Climate Change Mainstreaming in Government' (2023) 12(3) *Transnational Environmental Law* 623 <<https://doi.org/10.1017/S2047102523000158>> ('A Conceptual Model for Climate Change Mainstreaming').

42 See *NSW Plan for Nature* (n 35); South Australia, *Parliamentary Debates*, House of Assembly, 14 May 2025, 12020 (Susan Close, Minister for Climate, Environment and Water) ('SA Biodiversity Bill Second Reading Speech'); ACT Government, 'Ten Year Review of the Nature Conservation Act 2014' (Discussion Paper, 2024) 8 ('Ten Year Review').

A South Australia

South Australia ('SA') is the first jurisdiction in nearly a decade to produce an entirely new biodiversity statute: the *SA Biodiversity Act* passed on 18 June 2025 and will come into effect over the next two years. Starting from scratch presented both an opportunity to rethink existing structures and processes and design a more effective law, but also a risk, politically and ecologically, including because this process 'opened up' conservation laws to detailed scrutiny and the potential to be watered down. The SA Government embraced that challenge, running detailed consultation processes and publishing a series of discussion papers to inform debate.⁴³ Perhaps most importantly, the imperative for ambitious reform came from the very top. When introducing the Biodiversity Bill 2025 (SA) to Parliament, Deputy Premier Susan Close, the State's Environment Minister, said:

Just as South Australia has led the way on climate action, committing to net zero emissions by 2050, we must now take the same ambitious approach to biodiversity. ... [This] crucial piece of legislation ... will modernise and strengthen protections for South Australia's biodiversity to benefit us and our future generations.⁴⁴

The *SA Biodiversity Act* incorporates provisions from two existing pieces of legislation: the *Native Vegetation Act 1991* (SA), which was brought across in largely similar terms, and the species and habitat components of the *National Parks and Wildlife Act 1972* (SA). There were major gaps in the existing Acts' protection for native species which have been filled through the new legislation, including specific provisions to implement the national collaborative approach to threatened species listings.⁴⁵

In addition to bringing together previously fragmented legal provisions under new objects and principles, the *SA Biodiversity Act* includes some genuinely novel statutory components that we explore further below, including a general duty for avoiding harm to biodiversity;⁴⁶ a unique and detailed approach to empowering First Nations and protecting culturally significant biodiversity;⁴⁷ and a global first, in the form of statutory obligations to conduct inquiries into endemic species extinctions and the collapse of endemic ecological communities.⁴⁸

43 'Biodiversity Act', *Department for Environment and Water (SA)* (Web Page) <<https://www.environment.sa.gov.au/topics/biodiversity/biodiversity-act>>.

44 SA Biodiversity Bill Second Reading Speech (n 42) 12020.

45 *Intergovernmental Memorandum of Understanding: Agreement on a Common Assessment Method for Listing of Threatened Species and Threatened Ecological Communities*, Commonwealth–New South Wales–Queensland–Victoria–Australian Capital Territory–Tasmania–South Australia–Western Australia–Northern Territory, signed 18 March 2024.

46 *SA Biodiversity Act 2025* (n 28) s 11.

47 Ibid ss 3, 8, 10, 20.

48 Ibid s 82. See also Phillipa C McCormack, 'Implications of Extinction in Law: Preventing, Declaring and Learning from Species Extinctions' (2023) 1 *Cambridge Prisms: Extinction* e21:1–9, 7 <<https://doi.org/10.1017/ext.2023.19>>.

B New South Wales

The NSW Government is also undertaking significant reforms, following a highly critical independent review of its *NSW Biodiversity Conservation Act*.⁴⁹ Similar to SA, the *NSW Biodiversity Conservation Act* was drafted from scratch.⁵⁰ A 2023 independent review of the NSW Act ('*Henry Review*') concluded that it 'is not meeting its primary purpose of maintaining a healthy, productive and resilient environment and is never likely to do so'.⁵¹ It highlighted a number of deficiencies including: that the Act's objectives lack primacy and are being undermined by a range of other legislation including laws which regulate native vegetation, land use planning, and native forestry; and that weaknesses in development controls and the associated biodiversity market rules are leading to ongoing loss and decline in biodiversity.⁵²

The *Henry Review* was particularly critical of the Act's offsets scheme. It pointed to an overwhelming failure to effectively implement the mitigation hierarchy, with insufficient attention given to *avoiding* adverse impacts on biodiversity, prior to resorting to offsets.⁵³ The *Henry Review* also echoed concerns raised by the NSW Auditor-General about a critical shortfall in biodiversity gains ('credit supply') to match growing demand to offset biodiversity losses caused by large scale developments.⁵⁴ This shortfall has meant that the Fund, established under the NSW Act to accept payments in lieu of developers securing direct offsets, has only met 20% of its offset obligations. That is, rather than rejecting development applications, the Fund has accrued approximately \$90 million,⁵⁵ and development is occurring without any offset activity to counterbalance it.

The *Henry Review* made 58 recommendations for a major overhaul of the Act – from its objects through to its enforcement provisions – to align with a 'nature-positive' objective focused on protecting, restoring, and improving biodiversity.⁵⁶ It also signalled the need for corresponding reform to intersecting legislation to

49 *Henry Review* (n 34). A concurrent review of the native vegetation provisions within the *NSW Local Land Services Act* (n 31) was also undertaken: see Local Land Services (NSW), *Statutory Review of the Native Vegetation Provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013* (Final Report, August 2023). Note that the Minister is required to review the *NSW Biodiversity Conservation Act* (n 28) to determine whether the policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives. This is to be undertaken as soon as possible after the period of 5 years from the commencement of the Act: ss 14.11(1), (3).

50 This was part of a Land Management and Biodiversity Conservation reform package which also included amendments to the *NSW Local Land Services Act* (n 31) (which provides flexibility in rural land management through a risk-based Land Management framework), particularly provisions regulating native vegetation clearing on rural land (pt 5A, schs 5A–5B).

51 *Henry Review* (n 34) 1.

52 *Ibid* 1, 13, 57–61.

53 *Ibid* 8 Recommendation 22.

54 *Ibid* 3.

55 Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (Performance Audit, 30 August 2022) 4, 19, 45 <<https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>> ('*Effectiveness of the Biodiversity Offsets Scheme*'); *Henry Review* (n 34) 24.

56 *Henry Review* (n 34) 6–10.

ensure that biodiversity considerations have the ‘primacy’ required to ensure nature-positive outcomes.⁵⁷

Most of these recommendations were accepted by the NSW Government in its 2024 *NSW Plan for Nature*.⁵⁸ Of note are commitments to: develop, implement, and report on a NSW Nature Strategy to guide public and private investment and action to protect, connect, and restore ecosystems and landscapes across tenures;⁵⁹ map areas of current and future high biodiversity values to guide decision-making on where biodiversity impacts should be avoided;⁶⁰ and broader use of regional planning approaches.⁶¹ There were also commitments to fix issues with the Biodiversity Offsets Scheme to ensure that offsets are a genuine last resort,⁶² and that obligations to secure upfront offsets are strengthened to reduce reliance on payments into the Fund.⁶³ The Government also committed to review other NSW legislation to identify opportunities to improve biodiversity outcomes.⁶⁴ Foregrounding these proposals was a strong commitment to co-design biodiversity legislation, policies, and programs with First Nations people.⁶⁵

The first round of statutory amendments, passed in December 2024, addressed some of the flaws in the Biodiversity Offsets Scheme.⁶⁶ This included enshrining the mitigation hierarchy in legislation,⁶⁷ and allowing regulations to specify classes of actions that cannot be offset simply by payment into the Fund.⁶⁸ Further reforms, including to associated legal frameworks which regulate land clearing on rural land,⁶⁹ are expected over the course of 2026.

C Victoria

In Victoria, multiple independent reviews and audits over recent years have recognised that legal frameworks for biodiversity protection are outdated, overlapping, fragmented, and have been largely ineffective in stabilising or reversing biodiversity decline.⁷⁰ While inadequate resources for implementing

⁵⁷ Ibid 10 Recommendation 56.

⁵⁸ New South Wales Government, ‘NSW Plan for Nature Puts Biodiversity Protections, and Landholder Support Front and Centre’ (Media Release, 17 July 2024) <<https://www.environment.nsw.gov.au/news/nsw-plan-for-nature-puts-biodiversity-protections-and-landholder-support-front-and-centre>>. See also *NSW Plan for Nature* (n 35).

⁵⁹ *NSW Plan for Nature* (n 35) 10.

⁶⁰ Ibid 11. The report notes that this is not a “no-go” zone map’, but the ‘details will be incorporated into strategic planning processes and inform land-use and development decision-making’.

⁶¹ Ibid 12.

⁶² Ibid 12–14.

⁶³ Ibid 13.

⁶⁴ Ibid 8–9.

⁶⁵ Ibid 6.

⁶⁶ See *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Act 2024* (NSW) (‘*NSW Biodiversity Conservation Amendment*’) which is further discussed below in Part III.

⁶⁷ Ibid sch 1 item 14, inserting *NSW Biodiversity Conservation Act* (n 28) s 6.3A.

⁶⁸ *NSW Biodiversity Conservation Amendment* (n 66) sch 1 item 30, inserting *NSW Biodiversity Conservation Act* (n 28) s 6.30(2).

⁶⁹ *NSW Plan for Nature* (n 35) 22–3.

⁷⁰ *Inquiry into Ecosystem Decline in Victoria* (n 34); *Protecting Victoria’s Biodiversity* (n 34). See also Deborah Peterson et al, ‘Independent Review of the *Wildlife Act 1975*’ (Issues Paper, 28 April 2021).

existing laws is recognised as a persistent problem contributing to poor biodiversity outcomes,⁷¹ recent reviews have also recommended reform to core biodiversity legislation, including the *Flora and Fauna Guarantee Act 1988* (Vic) ('*Victorian Flora and Fauna Guarantee Act*'), and other intersecting laws.⁷²

Unlike SA and NSW, the Victorian Government has not implemented comprehensive reform and consolidation of nature laws. In 2019, some targeted amendments to the *Victorian Flora and Fauna Guarantee Act* were passed.⁷³ These introduced principles to guide decision-making under the Act, which now require proper consideration to be given to, inter alia, the rights and interests of Traditional Owners and the potential impacts of climate change.⁷⁴ Provisions for identifying, declaring and taking steps to protect critical habitat for threatened species and communities have been strengthened, including through a broader definition of critical habitat.⁷⁵ The statutory duty on Ministers and public authorities to consider biodiversity in the exercise of their functions under the Act (and any other Victorian legislation) has also been enhanced.⁷⁶

D Australian Capital Territory

The Australian Capital Territory ('ACT') Government is currently undertaking a 10-year review of the *Nature Conservation Act 2014* (ACT) ('*ACT Nature Conservation Act*') and the *ACT Nature Conservation Strategy* developed under that legislation.⁷⁷ The review commenced with a discussion paper which outlined a number of deficiencies in the current legislation.⁷⁸ These included the lack of a statutory basis for environmental offsets and the application of the mitigation hierarchy in development decision-making;⁷⁹ no statutory provision for private land conservation or biodiversity stewardship;⁸⁰ no statutory mechanism to support

71 *Inquiry into Ecosystem Decline in Victoria* (n 34) 316, 417; *Protecting Victoria's Biodiversity* (n 34) 41.

72 *Inquiry into Ecosystem Decline in Victoria* (n 34). Of the 74 recommendations, many address law reform opportunities, including in legislation beyond the *Victorian Flora and Fauna Guarantee Act* (n 28), including the *Planning and Environment Act 1987* (Vic) ('*Victorian Planning and Environment Act*'), the *Victorian Catchment and Land Protection Act* (n 32) and the *Victorian Wildlife Act* (n 29): see, eg, at Recommendations 4, 11, 16–17, 26, 29, 32, 35.

73 *Flora and Fauna Guarantee Amendment Act 2019* (Vic).

74 *Victorian Flora and Fauna Guarantee Act* (n 28) s 4A. With regard to Traditional Owners, section 4A(a) further provides that proper consideration should be given to

the rights and interests of traditional owners by:

- (i) acknowledging cultural and spiritual connections to land, biodiversity and resources through a relationship with country; and
- (ii) supporting participation in decision-making, planning and the development of policies, programs and processes; and
- (iii) facilitating access to biodiversity and providing opportunities for economic advancement.

75 *Ibid* ss 20–20A.

76 *Ibid* ss 4B–4C.

77 Section 371 of the *ACT Nature Conservation Act* (n 28) requires that the Act be reviewed by the Minister 'as soon as practicable after the end of the Act's 10th year of operation'.

78 See ACT Government, 'Review of the Nature Conservation Act', *Your Say Conversations* (Web Page, 2024) <<https://yoursayconversations.act.gov.au/Nature-Conservation-Act-Review>>.

79 'Ten Year Review' (n 42) 13.

80 *Ibid* 15.

protection of habitats without threatened species, nor areas important for landscape connectivity or ecosystem processes and functions;⁸¹ no operational provisions to support ecological restoration in line with a ‘nature-positive’ approach;⁸² little explicit provision for addressing the impacts of climate change on biodiversity;⁸³ limited provision for Traditional Owner participation or the reflection of First Nations knowledges and cultural values in nature conservation;⁸⁴ and no provision for financial mechanisms to fund biodiversity projects, including on privately-managed land.⁸⁵ A proposal for comprehensive law reform to address these shortfalls is expected later in 2025.

III A FRAMEWORK FOR ANALYSING NATURE LAW REFORM

Part II introduced progress in several subnational jurisdictions which are at various stages of nature law reform. In this Part, we build on that introduction by capturing key shifts in legislative objectives and the innovative, sometimes entirely novel, statutory mechanisms and regulatory approaches that are emerging through these recent reforms.

To frame this discussion and allow for comparison across jurisdictions, we articulate six broad categories of statutory mechanisms within nature laws (Table 1). Earlier analyses have distinguished between ‘principles’ and ‘mechanisms’,⁸⁶ essentially drawing a distinction between normative aspects of law, such as statutory objectives and purpose clauses, and operational mechanisms used to achieve these normative goals. We have expanded these categories to provide more granularity. The first category aligns with the concept of ‘principles’ in earlier literature, while the latter five are distinct types of operational mechanisms.

We use these six categories to frame our discussion of well-recognised weaknesses and limitations in Australia’s nature laws and their implementation, and to identify promising recent developments emerging through reform processes in each category. The discussion is not intended to comprehensively represent the legal framework in any jurisdiction, nor to capture every example of the category across all jurisdictions. Instead, we focus on examples of innovative practice, or ‘bright spots’⁸⁷ in select jurisdictions to illustrate shifts in the design and use of these mechanisms.

81 Ibid 16.

82 Ibid 17.

83 Ibid 19.

84 Ibid 20–1.

85 Ibid 24.

86 Brockett et al (n 38) 3.

87 This ‘bright spot’ method of analysis has been used in the conservation literature to identify examples of early success in a field, as an alternative to a comprehensive review of all practice: see, eg, Christopher Cvitanovic and Alistair J Hobday, ‘Building Optimism at the Environmental Science-Policy Interface through the Study of Bright Spots’ (2018) 9(1) *Nature Communications* 3466 <<https://doi.org/10.1038/s41467-018-05977-w>>; Megan I Saunders et al, ‘Bright Spots in Coastal Marine Ecosystem Restoration’ (2020) 30 *Current Biology* R1500 <<https://doi.org/10.1016/j.cub.2020.10.056>>; Justine Bell-James et al, ‘Upscaling Marine and Coastal Restoration through Legal and Governance Solutions: Lessons from

Employing these categories can enable learning across jurisdictional boundaries, even if the legal, ecological, and political context for these mechanisms differs across jurisdictions. That is, the categories are framed as universal groupings, within which any specific legal mechanism – such as an obligation, an institutional entity, or a form of penalty – may have developed in a way that is specific to its jurisdictional context but can still be described as part of that broader category. Thus, while the content, structure, and operation of the nature laws we analyse differ, legislation in every jurisdiction contains provisions that fall into each of the categories.

Table 1: Universal Categories of Legal Mechanisms in Australian Nature Laws

Category	Description
Framing provisions	Objects, principles, and duties on decision-makers
Operative provisions	Substantive and procedural legal protections for biodiversity
Enforcement and review provisions	Penalties for breach and provision for legal and merits review of decision-making
Financing provisions	Mechanisms to incentivise and finance land management for nature conservation
Institutional provisions	Entities, roles, and responsibilities for the administration of legislation
Learning provisions	Processes to enable learning from how legislation (or part thereof) has been implemented and whether it has achieved its objects

A Framing Provisions

Objects clauses are common in modern legislation, including environmental law. However, many older environmental statutes either have none, or have largely procedural objectives which are vague, contain no clear expression of desired outcomes, and include potentially conflicting goals.⁸⁸ The concept of ‘ecologically sustainable development’ (‘ESD’) also pervades the objects clauses of early environmental laws,⁸⁹ and is so broad as to justify almost any outcome.⁹⁰ Suggestions to improve objects clauses have centred around a need for greater clarity of expression, including a hierarchy of directives to avoid conflicts;

Global Bright Spots’ (2025) 163 *Environmental Science and Policy* 103962 <<https://doi.org/10.1016/j.envsci.2024.103962>>.

88 For example, the repealed *Threatened Species Conservation Act 1995* (NSW) specified objects including ‘to conserve biological diversity and promote ecologically sustainable development’: at s 3(a). See discussion in Justice BJ Preston, ‘Internalising Ecocentrism in Environmental Law’ (Speech, Griffith University, 16–18 September 2011) 2–3; Phillipa McCormack, ‘The Legislative Challenge of Facilitating Climate Change Adaptation for Biodiversity’ (2018) 92(7) *Australian Law Journal* 546 <<https://doi.org/10.1017/S2047102517000383>>.

89 Andrew Macintosh, ‘The Impact of ESD on Australia’s Environmental Institutions’ (2015) 22(1) *Australasian Journal of Environmental Management* 33, 40 <<https://doi.org/10.1080/14486563.2014.999724>>.

90 See, eg, Justine Bell-James and Craig Forrest, ‘Ecologically Sustainable Development and the Great Barrier Reef: A Delicate Balance of Interests’ (2019) 36(2) *Environmental and Planning Law Journal* 97.

outcomes-focused drafting (eg, ‘the object *is* conservation’ rather than ‘*is to encourage* conservation’); and specific directives to reduce discretion (eg, ‘in carrying out a function, the Minister must give effect to the objects of the Act’).⁹¹ ESD was most recently criticised in the *Henry Review* of the *NSW Biodiversity Conservation Act*, which described the framing as outdated and ‘no longer fit to address current and future biodiversity challenges’.⁹² That Review recommended instead an overarching ‘nature-positive’ objective to reverse biodiversity decline and align with international developments like the *GBF*.⁹³

Recent reforms in subnational nature laws (Table 2) reflect these recommendations to some extent, through more clearly articulated statutory objects. In some jurisdictions these revisions have been accompanied by the introduction of *directing principles* to guide the administration of legislation by explaining *how* its objects should be achieved;⁹⁴ and by statutory duties on public officers to ensure that relevant actions and decisions appropriately and adequately consider biodiversity and other relevant matters. Supporting statutory objects with directing principles and duties is significant as these types of provisions are potentially enforceable through judicial review.⁹⁵

Collectively, these new framing provisions also serve to introduce, elevate and legitimise new considerations for biodiversity conservation, such as First Nations knowledges and cultural values, that were previously absent from nature laws. They also signal a policy shift away from a narrow focus on threatened species protection towards maintaining and actively restoring ecological function and resilience across landscapes. Accordingly, there is increased emphasis on recognising and addressing the implications of climate change for biodiversity and opening new pathways for private land conservation and associated investment.

91 Jan Rohde, ‘The Objects Clause in Environmental Legislation: The *Nature Conservation Act 1992* (Qld) Exemplified’ (1995) 12(2) *Environmental and Planning Law Journal* 80, 93 (emphasis in original); *NSW National Parks and Wildlife Act 1974* (n 29) s 2A(3), as discussed in Preston (n 88) 2–4.

92 *Henry Review* (n 34) 12.

93 Ibid 41.

94 Rob Fowler et al, ‘The Foundations of Environmental Law: Goals, Objects, Principles and Norms’ (Technical Paper No 1, Australian Panel of Experts on Environmental Law, April 2017). See discussion of the difference between these kinds of principles, as a statutory mechanism, and other principles that guide the design of legal instruments and policies. Directing principles ‘involve the imposition of a legally enforceable duty imposed by legislation on decision-makers to seriously address particular prescribed matters when exercising their statutory functions’: at 39. These are rules-based in nature, required to be applied in the implementation of environmental law (both in making decisions and developing policies, plans and programs) and have a higher status than relevant considerations which are merely required to be taken into account.

95 For a recent example of an attempt to enforce a similar duty, set out in Victoria’s *Climate Change Act 2017* (Vic) (‘*Victorian Climate Change Act*’) (now the *Climate Action Act 2017* (Vic)): see *Environment Victoria Inc v AGL Loy Yang Pty Ltd* (2022) 71 VR 1. This case argued (unsuccessfully) that there had been a failure to consider climate change factors in line with sections 17 and 20 of the *Victorian Climate Change Act* (n 95), as part of a broader claim regarding the review of the grant of pollution licenses under the *Victorian Environment Protection Act* (n 33).

Table 2: Framing Provisions in Subnational Nature Laws

Framing Provision	Examples and Innovation
Statutory objectives	New objects clauses have been introduced to the principal nature laws in SA, Victoria and NSW. These variously include: • Strong recognition of First Nations knowledges and cultural values, the roles and contributions of Traditional Owners;⁹⁶ • Recognition of the need to support biodiversity conservation in the context of climate change,⁹⁷ the role of biodiversity in addressing climate change,⁹⁸ and the need to protect biodiversity for future generations;⁹⁹ • An emphasis on biodiversity repair and restoration, not just protection and conservation of threatened species;¹⁰⁰ • Some explicit emphasis on mitigating threatening processes,¹⁰¹ including through constraining development decision-making;¹⁰² • Some focus on expanding pathways to realise nature conservation objectives, including through private investment and private land conservation;¹⁰³ and • New emphasis on individual accountability and shared responsibility for biodiversity.¹⁰⁴
Directing principles	The <i>Victorian Flora and Fauna Guarantee Act</i> now requires that a decision, policy, program or process undertaken under the Act gives ‘proper consideration’ to, inter alia: • The rights and interests of Traditional Owners (by acknowledging cultural and spiritual connections to land, by supporting participation in decision-making, planning and policy development, and by facilitating access to biodiversity and providing opportunities for economic advancement);¹⁰⁵

96 See, eg, *SA Biodiversity Act* (n 28) s 7(b) which recognises and respects ‘that Aboriginal people are the enduring custodians of the lands and waters of the State and have a fundamental role in, and knowledge of, caring for Country, including in relation to conserving and restoring biodiversity’. See also *NSW Biodiversity Conservation Act* (n 28) s 1.3(c).

97 See, eg, *NSW Biodiversity Conservation Act* (n 28) s 1.3(d); *SA Biodiversity Act* (n 28) s 7(c).

98 See, eg, *SA Biodiversity Act* (n 28) s 7(f) which seeks ‘to ensure that biodiversity management takes into account the importance of biodiversity in addressing climate change’.

99 Ibid s 7(g).

100 See, eg, ibid s 7(c): ‘to protect, restore and enhance biodiversity such that there is an improvement in the state of biodiversity at all scales and to build the resilience of biodiversity, including resilience to slow the rate of biodiversity loss and conserve threatened species and ecological communities in nature’. See also *Victorian Flora and Fauna Guarantee Act* (n 28) s 4(c): ‘to protect, conserve, restore and enhance biodiversity’.

101 See, eg, *Victorian Flora and Fauna Guarantee Act* (n 28) s 4(d): ‘to identify and mitigate the impacts of potentially threatening processes to address the important underlying causes of decline’; *NSW Biodiversity Conservation Act* (n 28) s 1.3(h): ‘to support conservation and threat abatement action to slow the rate of biodiversity loss and conserve threatened species and ecological communities in nature’.

102 See, eg, *SA Biodiversity Act* (n 28) s 7(e): ‘to identify and prioritise biodiversity assets for conservation and restoration across the State to inform land use planning and decision-making frameworks’; *NSW Biodiversity Conservation Act* (n 28) s 1.3(k): ‘to establish a framework, reflecting the avoid, minimise and offset hierarchy, to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity’.

103 See, eg, *NSW Biodiversity Conservation Act* (n 28) ss 1.3(i)–(j), (m).

104 *SA Biodiversity Act* (n 28) s 7(a).

105 *Victorian Flora and Fauna Guarantee Act* (n 28) s 4A(a).

Framing Provision	Examples and Innovation
Directing principles (continued)	• The potential impacts of climate change;¹⁰⁶ • Best practicably available information relevant to biodiversity;¹⁰⁷ and • Enabling public participation.¹⁰⁸ The <i>SA Biodiversity Act</i> includes a similar list of directing principles.¹⁰⁹ In addition, a person administering the Act must also: ‘embrace new and transformative ways of thinking and acting to support the environment, culture, economy and wellbeing of the current generation and future generations’; recognise the community’s ‘right to know and participate in environmental decision-making’; give effect to the best available evidence, which expressly includes [Western] scientific, Aboriginal and local knowledges; and acknowledge the ‘historical and persisting impacts of colonisation’ on how Aboriginal people are engaged under the Act.¹¹⁰
Statutory duties on decision-makers	The <i>Victorian Flora and Fauna Guarantee Act</i> sets out a duty on ministers and public authorities to give ‘proper consideration’ to: the statutory objectives, any instruments made under the Act (including the Biodiversity Strategy, threatened species action statements and critical habitat determinations), and potential impacts on biodiversity, in performing any of their functions that may reasonably be expected to impact on biodiversity (including functions under the Act or any other Act).¹¹¹ The Minister may also request a public authority to provide information to ensure that the duty is being performed or to ensure that any action taken by a public authority does not threaten the persistence of threatened species or critical habitat.¹¹² The <i>SA Biodiversity Act</i> includes a specific duty on any person or body engaged in the administration of the Act to ‘as far as is practicable, seek Aboriginal knowledges and ... consider and apply the knowledges at all times respecting the sensitivity of the sharing of cultural knowledge’ in particular activities and processes under the Act.¹¹³

106 Ibid s 4A(b).

107 Ibid s 4A(c).

108 Ibid s 4A(e).

109 *SA Biodiversity Act* (n 28) s 8. Like the *Victorian Flora and Fauna Guarantee Act* (n 28), the principles set out in the *SA Biodiversity Act* (n 28) address public participation in environmental decision-making, respectful and mindful engagement with Aboriginal people, and use of best available evidence (including Aboriginal knowledge and local knowledge and in light of potential impacts of climate change). They also include a recognition that halting and reversing biodiversity loss ‘will require embracing new and transformative ways of thinking and acting to support the environment, culture, economy and wellbeing of the current generation and future generations’: at s 8(a).

110 *SA Biodiversity Act* (n 28) s 8. This Act also includes the precautionary principle – that a lack of full scientific certainty does not justify postponing urgent protective measures to prevent harm to biodiversity. Unlike section 1.3 of the *NSW Biodiversity Conservation Act* (n 28), the *SA Act* does not include any other principle of ecologically sustainable development nor the term ESD itself.

111 *Victorian Flora and Fauna Guarantee Act* (n 28) s 4B.

112 Ibid s 4C.

113 *SA Biodiversity Act* (n 28) s 10. This is a more detailed example of similar (but less clear) provisions in the *Commonwealth EPBC Act* (n 4) and the *ACT Nature Conservation Act* (n 28) that ‘recognise Aboriginal and Torres Strait Islander Peoples’ role in and knowledge of biodiversity. The proposed Nature

B Operative Provisions

The *Convention on Biological Diversity*, which underpins Australia's nature laws, emphasised the need to identify important biodiversity and implement measures to conserve these components.¹¹⁴ Thus, nature laws have typically established processes and criteria for identifying threatened species and, more recently, ecological communities and threatening processes.¹¹⁵ Listing a species or community can trigger planning processes for conservation and recovery, such as action statements and threat abatement plans. While listing species and implementing recovery plans has been recognised in the literature as best practice,¹¹⁶ legislation tends to render both actions as discretionary,¹¹⁷ and poor resourcing has meant patchy implementation in practice.¹¹⁸ Many jurisdictions now also provide for the (discretionary) declaration of areas of critical habitat for threatened species and ecological communities,¹¹⁹ provisions which, again, are used sparingly in practice due to a lack of political will and procedural barriers.¹²⁰

Listing threatened species and ecological communities, or declaring critical habitat, has the effect of granting some legal protection to these matters. This is typically achieved through offence provisions for harming protected matters without permission,¹²¹ and associated requirements for assessment and approval of activities which would significantly impact these matters (eg, under planning and development laws). In these processes, decision-makers may be directed to avoid or minimise adverse impacts in line with the mitigation hierarchy, with

Positive (Environment Information Australia) Bill 2024 (Cth), which lapsed after it failed to pass the previous Parliament, did not include any provision that sought to redefine information, data or evidence nor to expand upon the diversity of information that can be relied upon in decision-making under the *Commonwealth EPBC Act* (n 4).

114 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) arts 7–9 ('CBD').

115 See, eg, *WA Biodiversity Conservation Act* (n 28) pt 2. See also Bates (n 38) 5.

116 Brockett et al (n 38) 6.

117 See, eg, Invasive Species Council, Bush Heritage Australia, BirdLife Australia, Australian Land Conservation Alliance, Humane Society International, *Averting Extinctions: The Case for Strengthening Australia's Threat Abatement System* (Report, 2022) 8; World Wildlife Fund and Environmental Defenders Office, *Bushfires, Bureaucracy and Barriers* (Report, March 2024) 15, 29 <<https://www.edo.org.au/wp-content/uploads/2024/05/240508-WWF-EDO-Critical-habitat-report-FINAL.pdf>> ('*Bushfires, Bureaucracy and Barriers*').

118 See, eg, Ben C Scheele et al, 'Continental-Scale Assessment Reveals Inadequate Monitoring for Threatened Vertebrates in a Megadiverse Country' (2019) 235 *Biological Conservation* 273 <<https://doi.org/10.1016/j.biocon.2019.04.023>>.

119 See, eg, *Victorian Flora and Fauna Guarantee Act* (n 28) s 20; *WA Biodiversity Conservation Act* (n 28) s 54; *SA Biodiversity Act* (n 28) s 84.

120 *Bushfires, Bureaucracy and Barriers* (n 117) 32; Environmental Justice Australia, *Using Law and Policy to Protect the Critical Habitat of Victoria's Threatened Species* (Report, 20 August 2021) 17 <https://envirojustice.org.au/wp-content/uploads/2023/11/1_Using-law-and-policy-to-protect-the-critical-habitat-of-Victoria.pdf>; James A Fitzsimons, 'Urgent Need to Use and Reform Critical Habitat Listing in Australian Legislation in Response to the Extensive 2019–2020 Bushfires' (2020) 37(2) *Environmental and Planning Law Journal* 143.

121 See, eg, *WA Biodiversity Conservation Act* (n 28) ss 40, 150, 171.

offsets available to ‘compensate’ residual impacts.¹²² In practice, such discretionary measures can result in no or inappropriate application of the mitigation hierarchy, with damaging activities consistently receiving approval, and heavy reliance on offsets to ‘compensate’ adverse impacts on biodiversity leading to ongoing net loss of biodiversity.¹²³

Nature laws almost never prohibit outright activities which would destroy significant habitat or adversely impact biodiversity. For example, in NSW, development can, in theory, be approved and offset even in areas of outstanding biodiversity value declared by the Minister under the *NSW Biodiversity Conservation Act*.¹²⁴ While a proposed development or activity that has ‘serious and irreversible impacts on biodiversity values’ must be refused for some types of developments, this restriction depends on how ‘serious and irreversible’ is defined, and does not apply at all to state significant development.¹²⁵

The operation of intersecting legislation can also undermine the strength and effectiveness of statutory protections for biodiversity. For example, broad exemptions for activities which impact biodiversity, such as land clearing, are often set out in native vegetation or planning law regimes. This means that many activities do not require assessment or approval or can be carried out in accordance with a standard or code with minimal oversight.¹²⁶ Serious concerns have long

122 See, eg, *SA Biodiversity Act* (n 28) s 50; ‘Victoria Planning Provisions’ (n 31) ord 12.01-2S; *Environmental Offsets Act 2014* (Qld). However, it is relevant to note that while some offsets frameworks are set out in legislation, many exist only in associated policies: see, eg, Department of Sustainability, Environment, Water, Population and Communities (Cth), ‘*Environment Protection and Biodiversity Conservation Act 1999: Environmental Offsets Policy*’ (Policy Statement, October 2012); Environment and Planning (ACT), ‘*ACT Environmental Offsets Policy*’ (Policy Statement, April 2015).

123 See, eg, *Effectiveness of the Biodiversity Offsets Scheme* (n 55).

124 *NSW Biodiversity Conservation Act* (n 28) ss 3.1–3.2.

125 Ibid ss 6.5, 7.16. The *Biodiversity Conservation Regulation 2017* (NSW) reg 6.7 (*‘NSW Biodiversity Conservation Regulation’*) sets out the meaning of serious and irreversible impacts on biodiversity values. The *Henry Review* (n 34) recommended further guidance around this exclusion. For example, Recommendation 15 proposed a requirement in the Act to publish reasons ‘for approving serious and irreversible impacts and maintain a statutory register of these decisions’: at 7.

126 See, eg, *NSW Local Land Services Act* (n 31) pt 5A, which regulates native vegetation clearing on rural land (for which no planning approval is required). The Act provides for the establishment of the NSW Native Vegetation Map which maps land in two main categories. Category 1 generally consists of land that has already been cleared, which contains low conservation value grasslands or groundcover, and which is exempt land for which no additional permit is required to clear native vegetation. Clearing must generally be undertaken in line with relevant self-assessable codes (which do require some areas to be set aside). Category 2 is land for which an additional permit may be required and includes subcategories of vulnerable regulated land (eg, steep or highly erodible land and riparian areas) and sensitive regulated land (eg, critically endangered species or ecological communities, Ramsar wetlands, coastal wetlands and rainforests). An area that has been declared as ‘an area of outstanding biodiversity value’ under the *NSW Biodiversity Conservation Act* (n 28) pt 3 must also be mapped as Category 2 sensitive regulated land: *Local Land Services Regulation 2014* (NSW) reg 108(2)(g). However, even within the vulnerable and sensitive categories, clearing activities are allowed to some extent with minimal oversight, either under exemptions (low-impact allowable activities) and/or in line with the applicable clearing code. In sensitive areas, rural land clearing that is not exempt will require approval and self-assessable codes will not apply: at reg 124. There are no prohibitions on clearing even in these high value/high risk areas.

been raised about the extent of cumulative losses of native vegetation, including threatened species habitat, occurring under these types of arrangements.¹²⁷

Even where there are substantive measures available to protect important biodiversity, these tend to be narrow and discretionary. For example, under the *Victorian Flora and Fauna Guarantee Act*, the Minister *may* make a habitat conservation order to conserve, protect or manage any critical habitat, where the Minister considers the order would be necessary to halt, prevent, or repair damage that has occurred, is occurring or is likely to occur to the critical habitat, or to manage the habitat so as to ensure its conservation or protection.¹²⁸ In Western Australia ('WA'), similar discretionary orders, once made, must be lodged on land title and can therefore bind successive owners and occupiers.¹²⁹ However, much like the initial declaration of critical habitat, these protective measures have been hardly used in practice.¹³⁰

Recent reforms in some jurisdictions evidence efforts to strengthen operative provisions for biodiversity (Table 3). For example, all states and territories are now transitioning to a common assessment method to underpin a coherent, nationally consistent listing process for threatened species, and reduce the risk that gaps in listing, particularly for species that are distributed across state borders, result in negative impacts on the species' conservation.¹³¹ Some jurisdictions have also broadened the scope of biodiversity matters that can be listed or otherwise recognised. Some of these reforms have important implications for improving climate change resilience, elevating First Nations knowledges, and restoring ecosystem function and resilience across landscapes. Recent innovations are also tightening provisions for recovery planning and, in some jurisdictions, broadening the scope of planning provisions beyond individual species and communities to encompass strategic conservation and restoration priorities to guide development decision-making and investment in conservation and restoration.

Substantive legal protection afforded to protected matters still typically remains discretionary. However, some jurisdictions, such as NSW, have also recently made

127 *Henry Review* (n 34) 45. The Review Panel observed that inconsistent standards apply to agricultural clearing. These exemptions have resulted in large blocks of native vegetation being cleared: David Keith et al, *Biodiversity Council Submission to the Statutory Review of the NSW Biodiversity Conservation Act 2016* (24 April 2023) <https://biodiversitycouncil.org.au/admin/uploads/Submission_Statutory_review_of_the_NSW_Biodiversity_Conservation_Act_2016_8707c09721.pdf>.

128 *Victorian Flora and Fauna Guarantee Act* (n 28) s 26. Habitat conservation orders prevail over measures set out in the planning scheme: at s 41; and can introduce requirements that interfere with existing use rights; however, compensation may be payable: at s 39.

129 Similar provisions are available in WA, where habitat conservation notices must be lodged with the Registrar and become binding on successive owners and occupiers: see *WA Biodiversity Conservation Act* (n 28) ss 63–4.

130 See, eg, Fitzsimons (n 120) 145; Department of Environment, Land, Water and Planning (Vic), 'Review of the *Flora and Fauna Guarantee Act* 1988' (Consultation Paper, January 2017) 38.

131 'Common Assessment Method', *Department of Climate Change, Energy, the Environment and Water* (Web Page, 24 October 2024) <<https://www.dcceew.gov.au/environment/biodiversity/threatened/cam#categories-and-criteria>>. This method adopts common threat categories drawn from the best practice standards developed by the International Union for Conservation of Nature (as used to create the Red List of Threatened Species) and includes vulnerable, endangered, critically endangered, extinct in the wild, extinct and conservation dependent.

attempts to tighten constraints on development decision-making in ways which may make it easier for decision-makers to refuse harmful development in the context of strategic conservation priorities. SA has also introduced a novel general biodiversity duty, which has the potential to underpin more specific substantive protections with a general requirement to take reasonable steps to prevent harm to biodiversity.¹³² General environmental duties are now common across pollution-focused environmental protection regimes in Australia,¹³³ however this is the first example of this mechanism to address biodiversity loss.

Table 3: Operative Provisions in Subnational Nature Laws

Operative Provisions	Examples and Innovation
Listing mechanisms	In addition to standard categories of threatened species and ecological communities, the <i>SA Biodiversity Act</i> now provides for listing other 'ecological entities' (yet to be defined), and 'culturally significant biodiversity entities' (defined as native species or ecological communities to which some or all Aboriginal persons attribute cultural value and which is critical to their relationship with, and adaptation to, Country).¹³⁴ Within six months of listing, the Minister must make a decision to either declare (or decide not to declare) critical habitat for that species, community or entity, and publish reasons for that decision.¹³⁵ NSW and SA also provide for provisional listing of species – eg, for newly discovered or newly taxonomically described native species, reintroduced ecological communities that are threatened, or for species or communities that have suddenly become threatened, eg, by an extreme event such as a bushfire or flood.¹³⁶

132 For discussion on the role that statutory environmental duties can play in Australia in the absence of constitutional protection of environmental norms: see Fowler et al (n 94) 47–50.

133 For example, the *Victorian Environment Protection Act* (n 33) provides that 'a person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as reasonably practicable': at s 25(1). The content of the duty is further spelled out in sections 6(1)(a)–(b) – this requires the person to eliminate risks of harm to human health and the environment as far as reasonably practicable, and if it is not reasonably practicable to eliminate risks, then to reduce those as far as reasonably practicable. To determine what is reasonably practicable, regard must be had to likelihood of risks eventuating, degree of harm that may result, what the person knows or ought reasonably to know about the harm, risks of harm and ways to eliminate or reduce risks, availability and suitability of ways to eliminate or reduce risks, and costs of eliminating or reducing risks: at ss 6(2)(a)–(e). Criminal and civil penalties are available for breaches of this duty: at ss 25(2)–(3). See also *Queensland Environmental Protection Act* (n 33) s 319; *SA Environment Protection Act* (n 33) s 25.

134 *SA Biodiversity Act* (n 28) s 72. Culturally significant biodiversity entities ('CSBE') are to be identified in accordance with the biodiversity policy relating to the identification, approval and management of CSBE and must be approved by the Minister: at ss 22(d)(ii), 175(4)(b).

135 The Minister must also consult widely before making this decision: *ibid* ss 84(4)–(6).

136 *Ibid* s 78(1); *NSW Biodiversity Conservation Act* (n 28) s 4.23. These provisional listings expire when a final determination is made, or two years after the provisional listing, whichever is earlier: *ibid* s 78(3); *NSW Biodiversity Conservation Act* (n 28) s 4.30.

Operative Provisions	Examples and Innovation
Listing mechanisms (continued)	Under the <i>NSW Biodiversity Conservation Act</i>, the Minister may declare areas of outstanding biodiversity value. This is broadly defined to include areas that are important for ecological processes or integrity, including for connectivity and climate refuges.¹³⁷ The Act also provides for the making of the Biodiversity Values Map, which identifies land with high biodiversity value, which is particularly sensitive to impacts from development and clearing. It will be used as the basis for planning approval decisions including requirements to provide biodiversity offsets to compensate for losses associated with development. The map may include habitat for threatened species at risk of serious and irreversible impacts, old growth forest, rainforest, coastal wetlands, riparian areas, Ramsar wetlands, and declared areas of outstanding biodiversity value, among other things.¹³⁸ The NSW Government recently committed to further develop this spatial tool by including areas of current <i>and future</i> high biodiversity value, and by incorporating the map into strategic planning processes to inform land use and development decision-making.¹³⁹ The <i>Victorian Flora and Fauna Guarantee Act</i> now employs a broader definition of ‘critical habitat’. It is no longer required that habitat be critical to the survival of a taxon or community; the area in question must instead ‘significantly contribute’ to the conservation of the taxon or community and can include areas that support ecological processes and ecological integrity, such as habitat corridors and climate refuges.¹⁴⁰ Under the <i>Biodiversity Conservation Act 2016</i> (WA) (<i>‘WA Biodiversity Conservation Act’</i>), it is possible to list <i>collapsed</i> ecological communities as well as <i>rediscovered</i> ecological communities.¹⁴¹ The <i>SA Biodiversity Act</i> has similar measures, distinguishing between lists for nationally and state-specific collapsed communities.¹⁴²

137 *NSW Biodiversity Conservation Act* (n 28) ss 3.1–3.2. Further criteria are set out in *NSW Biodiversity Conservation Regulation* (n 125) reg 3.1.

138 *NSW Biodiversity Conservation Regulation* (n 125) reg 7.3(3). See n 126 above, discussing the two categories of land in the NSW Native Vegetation Map.

139 *NSW Plan for Nature* (n 35) 11.

140 *Victorian Flora and Fauna Guarantee Act* (n 28) s 20.

141 *WA Biodiversity Conservation Act* (n 28) ss 32–3.

142 *SA Biodiversity Act* (n 28) ss 71(b)(i), 71(b)(v), 78(1)(d). If it is possible that an ecological community has collapsed in South Australia, section 82 provides for the Scientific Committee to conduct extinction inquiries (see further below).

Operative Provisions	Examples and Innovation
Planning mechanisms	Under the <i>SA Biodiversity Act</i>, the state government must make a State Biodiversity Plan to identify and map priorities for conservation and restoration (with measurable targets and indicators) and then report on its implementation.¹⁴³ This is accompanied by an unusually strong duty on any person or body engaged in the administration of the Act to <i>act consistently with</i>, and where appropriate give effect to, the State Biodiversity Plan, in making decisions under the Act.¹⁴⁴ The Act also seeks to support the timely and effective implementation of threatened species action plans and threat abatement plans, placing a duty on the Minister to take reasonable steps to implement the plans, and to report publicly on implementation and effectiveness.¹⁴⁵ The <i>NSW Biodiversity Conservation Act</i> already provides for various strategic planning mechanisms including a Biodiversity Conservation Program which consolidates planning for individual species and communities, allowing for more strategic and efficient responses;¹⁴⁶ and a Biodiversity Conservation Investment Strategy which may include a map of priority areas to guide investment in biodiversity conservation, particularly through the Biodiversity Conservation Trust.¹⁴⁷ The NSW Government has also committed to prepare and publish an integrated NSW Nature Strategy and make that strategy a legal requirement under the Act, although it is unclear whether the proposed amendments to the Act will include an obligation to review the Strategy or make the Strategy's implementation enforceable in any way.¹⁴⁸
Substantive protections	As recently amended, the <i>NSW Biodiversity Conservation Act</i> includes stronger provision for the mitigation hierarchy to guide development decision-making.¹⁴⁹ The NSW Government also committed to introduce a new public register to make the 'avoid' and 'minimise' measures for approved developments more transparent, as well as stronger, clearer guidance to support decision-makers in determining 'serious and irreversible' impacts on biodiversity, which may be grounds for refusing a proposed development.¹⁵⁰ The Government has also proposed to amend the <i>Local Land Services Act 2013</i> (NSW) ('<i>NSW Local Land Services Act</i>'), to tighten land clearing codes for native vegetation clearing on rural land and ensure greater scrutiny of higher risk clearing.¹⁵¹

143 Ibid s 173.

144 Ibid s 9.

145 Ibid ss 79(6), 81(5).

146 *NSW Biodiversity Conservation Act* (n 28) ss 4.35–4.36.

147 Ibid ss 5.1–5.4.

148 NSW Plan for Nature (n 35) 10. According to the Plan, the purpose of the Strategy will be to guide public and private investment and action to protect, connect, and restore ecosystems and landscapes across tenures, and to set goals and targets for conservation and restoration – including landscape restoration, species recovery and addressing threats to nature – and articulate NSW's contributions to national targets and commitments.

149 *NSW Biodiversity Conservation Act* (n 28) s 6.3A. See also amendments to the objects clause – 'to establish a framework, reflecting the avoid, minimise and offset hierarchy, to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity': at s 1.3(k). Section 6.4 was also amended to make it clear that the decision-maker should refer to the Mitigation Hierarchy as set out in section 6.3A.

150 *NSW Plan for Nature* (n 35) 13.

151 Ibid 22–3.

Operative Provisions	Examples and Innovation
Substantive protections (continued)	Under the <i>Victorian Flora and Fauna Guarantee Act</i> , a declaration of critical habitat now triggers a requirement for the Minister to consider making a habitat conservation order to protect that habitat within two years of the determination. ¹⁵² Habitat conservation orders prevail over measures set out in the planning scheme, and can introduce requirements that interfere with existing use rights, however compensation may be payable. ¹⁵³ Further, all reasonable steps must be taken to enter into a conservation agreement with relevant landholders in respect of an area subject to a determination. ¹⁵⁴
General duties	The <i>SA Biodiversity Act</i> provides that 'a person must not carry out or undertake an act or activity that harms or has the potential to harm biodiversity unless the person takes all reasonable and practicable measures to prevent or minimise any resulting harm'. ¹⁵⁵ Failure to comply with the duty does not constitute a criminal offence, but civil penalties and court orders may be issued. ¹⁵⁶

C Enforcement and Review Provisions

A strong compliance regime is an important complement to robust listing mechanisms and substantive protections. Enforcement tools help to deter and address non-compliance, and decision review tools provide access to courts and tribunals which may be empowered to reconsider and, in certain circumstances, to remake administrative decisions.

Recent critique of the *Commonwealth EPBC Act*'s compliance regime illustrates some of the persistent challenges in compliance and enforcement.¹⁵⁷ While the Act contains some high maximum penalties,¹⁵⁸ these have rarely been utilised. Only

152 *Victorian Flora and Fauna Guarantee Act* (n 28) s 26.

153 *Ibid* ss 39, 41.

154 *Ibid* s 20F. This obligation is placed on the secretary of the department administering the Act: at s 20F(1).

155 *SA Biodiversity Act* (n 28) s 11(1). Subsections 11(2) and (3) set out considerations for determining what would be considered to be reasonable and practicable measures to prevent or minimise harm and enable the Minister to make further regulations or policy to provide further detail.

156 *Ibid* s 11(5).

157 See, eg, the most recent audit of the *Commonwealth EPBC Act* (n 4) regime in 2020: Australian National Audit Office, *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999* (Report No 47, 2020) 8 [8]–[9] <https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2019-2020_47.pdf>. Among other things, the audit observed at 9 [12]:

Arrangements for collecting and managing information on compliance with the *EPBC Act* are not appropriate. The department does not have an appropriate strategy to manage its compliance intelligence, limiting its access to the regulatory information necessary for complete and accurate compliance risk assessments. Key limitations include poor linkages between sources of regulatory information and a lack of formal relationships to receive external information.

In its response to this audit, the Department of Agriculture, Water and the Environment (Cth) undertook to implement all the Auditor-General's recommendations and committed to 'continuous improvement of its processes and procedures': at 11. However, it is not clear from outside the Department whether those audit recommendations have, in fact, been addressed. See also *Samuel Review* (n 4) 147–54.

158 See, eg, *Commonwealth EPBC Act* (n 4) s 12(1)(b), which specifies a maximum penalty for a corporation of 50,000 penalty units.

a few instances of wrongdoing have been addressed before a court, with heavy reliance on administrative measures to address non-compliance, raising questions about transparency.¹⁵⁹ Whilst administrative measures can lead to faster and cheaper enforcement, there is not always a clear connection between the wrongdoing and the consequence. For example, Novalee Nominees Pty Ltd unlawfully cleared 10 hectares of protected black cockatoo habitat in WA, and the Commonwealth Minister's delegate accepted an enforceable undertaking from the company in the form of a payment of \$250,000 to a museum.¹⁶⁰ The company was then free to continue works on the cleared site, with an expected profit of millions of dollars.¹⁶¹

Similar challenges have been observed at the subnational scale, where nature laws provide a range of penalties for breaches, including fines, imprisonment and remediation obligations, but in practice, penalties awarded have been low and insufficient to deter non-compliance. In some jurisdictions, penalties for harming nature are lower, and by implication, regarded less seriously than penalties for other types of environmental offences. For example in Queensland, the maximum penalty under the *Nature Conservation Act 1992* (Qld) ('*Queensland Nature Conservation Act*') for taking protected animals or plants is 3,000 penalty units,¹⁶² and has not changed since the Act's inception.¹⁶³ In contrast, maximum penalties under Queensland's pollution law have increased over time, with a maximum penalty of 6,250 penalty units now available for the most serious offences.¹⁶⁴ Similarly in NSW, the maximum penalty available under the *NSW Biodiversity Conservation Act* is \$1,650,000 for a corporation and \$330,000 for an individual,¹⁶⁵ whereas recent amendments have increased the maximum penalty under pollution legislation to \$10 million for corporations, and \$2 million for individuals.¹⁶⁶

159 *Samuel Review* (n 4) 147–50.

160 'Undertaking to the Minister for the Environment given for the Purposes of s 486DA of the *EPBC Act*' (Enforceable Undertaking, Department of Agriculture, Water and the Environment, 20 January 2022) <<https://www.dcceew.gov.au/sites/default/files/documents/enforceable-undertaking-balddivis-2022.pdf>>.

161 Peter de Kruijff, 'Perth Housing Estate Developers Fined \$250,000 for Clearing Black Cockatoo Habitat', *WAtoday* (online, 26 January 2022) <<https://www.watoday.com.au/national/western-australia/perth-housing-estate-developers-fined-250-000-for-clearing-black-cockatoo-habitat-20220125-p59r6f.html>>.

162 *Queensland Nature Conservation Act* (n 28) ss 88–9. The Act provides for a sliding scale of maximum penalty units: class 1 offence, 3,000 penalty units or 2 years imprisonment; class 2 offence, 1,000 penalty units or 1 year's imprisonment; class 3 offence, 225 penalty units; class 4 offence, 165 penalty units: at ss 88(2), (5), 89(1). The classes are defined according to number of animals/plants and their classification – for example, a class 1 offence involves 1 or more animals or plants that are extinct, extinct in the wild, critically endangered or endangered, 5 or more animals or plants that are vulnerable or near threatened, 1 or more echidna, koala or platypus, and 10 or more plants that are special least concern wildlife: at ss 88(6), 89(5). A penalty unit is currently \$166.90 (as of 1 July 2025): see *Penalties and Sentences Regulation 2025* (Qld) s 4. This means the maximum pecuniary penalty is \$500,700.

163 *Queensland Nature Conservation Act* (n 28), as at 19 December 1994.

164 *Queensland Environmental Protection Act* (n 33) s 437(1). This prescribes a maximum penalty of 6,250 penalty units or 5 years imprisonment for wilful serious environmental harm. This has increased from 4,165 penalty units in the first reprint of the Act in 1995: at s 120(1), as at 28 April 1995.

165 *NSW Biodiversity Conservation Act* (n 28) ss 13.1(1)–(2). Note that this penalty may be higher if the Act provides an additional daily penalty applies (extra \$165,000 per day) and an additional penalty per animal or plant applies (\$165,000 per animal or plant): at ss 13.1(2)(ii)–(iii).

166 *NSW Protection of the Environment Operations Act* (n 33) s 119, as amended by *Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Act 2024* (NSW) sch 9 items 27, 29.

Even where maximum penalties are high, the ability of governments to detect and address wrongdoing is hampered by a perennial lack of funding for monitoring and enforcement.¹⁶⁷ Studies have shown high rates of land clearing continuing in many Australian states even with statutory controls, suggesting widespread non-compliance.¹⁶⁸ The reasons for non-compliance are multifactorial, and may include a lack of awareness or understanding of legislative requirements,¹⁶⁹ or may be amplified by a culture of non-enforcement by regulatory agencies.¹⁷⁰

Recent reforms discussed below (Table 4), have attempted to address some of these pervasive issues. For example, the *SA Biodiversity Act* has focused on deterrence of future harm, including through the provision for ‘no development’ orders, which allows courts to order that no development can occur on illegally cleared land for up to 10 years. This type of order is essential for moving beyond environmental compliance measures being viewed as a transaction cost in business ventures but, to date, SA is the only jurisdiction to have implemented such a provision. SA has also introduced new targeted third-party enforcement rights,¹⁷¹ which may have the effect of empowering expert and representative groups while circumventing ideological concerns about litigation ‘floodgates’. In NSW, the focus has been on education and information. The Native Vegetation Regulatory Map is intended to guide landholders on statutory controls on land clearing, including for mapped critically endangered species or ecological communities under the *NSW Biodiversity Conservation Act*.¹⁷²

In addition to strong compliance and enforcement measures, decisions to approve actions that would harm biodiversity should be capable of scrutiny via judicial and, ideally, also merits review. Broad standing provisions for judicial review – such as those set out in the *Commonwealth EPBC Act* – have been identified as a legal mechanism that promotes the rule of law and allows development decisions to be considered in a balanced way, incorporating the interests of both the prospective developer and any objectors.¹⁷³ In practice however, the Minister has extremely

167 For a discussion of resource shortfalls in compliance and enforcement: see Megan C Evans, ‘Backloading to Extinction: Coping with Values Conflict in the Administration of Australia’s Federal Biodiversity Offset Policy’ (2023) 82(2) *Australian Journal of Public Administration* 228, 238 <<https://doi.org/10.1111/1467-8500.12581>>.

168 Thomas et al (n 27) 10.

169 Wendy Craik, *Review of Interactions between the EPBC Act and the Agriculture Sector* (Final Report, 28 September 2018) 27.

170 Thomas et al (n 27).

171 *SA Biodiversity Act* (n 28) s 116. Third-party enforcement rights in environmental laws are provided variously across Australian jurisdictions. For a recent overview, see Environmental Defenders Office, *Community Rights in Environmental Decision Making: Jurisdictional Analysis* (Report, 2022).

172 Department of Climate Change, Energy, the Environment and Water (NSW), ‘Guide to the Draft Native Vegetation Regulatory Map’ (Guide, December 2025) 27.

173 Australian Centre for Climate and Environment Law, Submission No 55 to Senate Standing Committees on Environment and Communications, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (18 November 2015). For a discussion of judicial review proceedings under the *Commonwealth EPBC Act* (n 4), see Nicola Silbert, ‘Challenging Decisions: Environmental Non-Government Organisations’ Use of Judicial Review under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)’ (2018) 35(6) *Environmental and Planning Law Journal* 714. In response to ongoing critique of the broad standing provisions as allowing ‘green lawfare’,

broad discretion under most of the substantive powers under the *Commonwealth EPBC Act*, making it very difficult to demonstrate a legal error in any given circumstance. Even where such errors are made out, the relief granted by courts is usually to revert the decision to the original decision-maker (ie, the Minister or their delegate), to be remade. Decisions that are remade after judicial review have typically been substantially similar, but with the decision-maker ensuring that, for example, they have followed correct procedures.¹⁷⁴

Merits review provides an opportunity to review decisions more holistically, rather than being constrained by the narrow, technical requirements of judicial review,¹⁷⁵ and can allow third parties to challenge decisions on the basis that they undermine conservation outcomes or are poorly adapted to achieving statutory objects. While some expansion to merits review was recommended in both independent reviews of the *Commonwealth EPBC Act*,¹⁷⁶ its availability remains limited to a very narrow range of decisions under the *Commonwealth EPBC Act*, not including ministerial decisions on proposed developments.¹⁷⁷

Many state and territory planning laws provide for merits review for a range of decisions,¹⁷⁸ although this availability differs across jurisdictions.¹⁷⁹ For example, merits review may only be open to third parties that have previously lodged an objection and is typically not available for major projects. It is also more restricted under other intersecting laws beyond planning regimes, such as those which govern native vegetation clearing or mining developments.¹⁸⁰ Recent subnational reforms have not made significant changes to review provisions under nature laws or relevant intersecting laws.

this study found that only 35 judicial review claims had been commenced since the *Commonwealth EPBC Act*'s (n 4) inception and none of these cases were found to be frivolous or vexatious: Silbert (n 173) 719.

174 Bell-James et al, 'Groundhog Day' (n 9) 24.

175 See generally, Environmental Defenders Office NSW, *Merits Review in Planning in NSW* (Report, July 2016) ('*Merits Review in Planning NSW*'). There is wide recognition of the role of merits review in rectifying individual decisions that were not originally 'correct and preferable' and in improving the quality and consistency of government decision-making and reducing review applications overall, including by highlighting areas for systemic improvement, particularly where legislation confers significant discretionary powers. See discussion in Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995); Department of the Prime Minister and Cabinet, 'Legislation Handbook' (Handbook, 2025) ('Legislation Handbook'). See also Independent Commission Against Corruption, *Anti-Corruption Safeguards and the NSW Planning System* (Report, February 2012), which highlights the role of merits review in safeguarding against government corruption.

176 *Samuel Review* (n 4) 11, 29. See also Alan Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Report, October 2009) 40 Recommendations 49, 50 ('*Hawke Review*').

177 *Commonwealth EPBC Act* (n 4) ss 206A, 221A, 243A, 263A.

178 See, eg, *Victorian Planning and Environment Act* (n 72) s 82(1), which provides for any person who has lodged an objection to a development permit to apply for merits review of a decision to grant the permit. This right may however be excluded by the relevant planning scheme: at s 82(2).

179 For a recent overview of jurisdictional differences, see *Merits Review in Planning NSW* (n 175).

180 *Ibid.*

Table 4: Enforcement and Review Provisions in Subnational Nature Laws

Enforcement and Review Provisions	Examples and Innovation
Penalties and reparation orders	The SA <i>Biodiversity Act</i> has introduced a range of new penalties and orders to address non-compliance: • Orders to urgently secure compliance with the Act;¹⁸¹ • Reparation orders to require a person to make good harm, or make a payment into a relevant fund;¹⁸² • Enforceable undertakings to the Minister, relating to an alleged breach of the Act;¹⁸³ • 'No development' orders – if a person is convicted of an offence related to native plant clearing, the court can, in addition to ordering a fine, order that no development of the land occur for a period not exceeding 10 years;¹⁸⁴ • If a person is found guilty of clearing native plants, the Clearance Assessment Committee must initiate civil proceedings to require the offender to make good the harm.¹⁸⁵ The NSW <i>Biodiversity Conservation Act</i> also sets out a range of administrative penalties including: stop work orders requiring the cessation of work that is likely to result in a contravention of the Act, interim protection orders to preserve, protect and maintain land, and remediation orders requiring a person to carry out specified remediation work.¹⁸⁶
Education tools	NSW introduced the <i>Native Vegetation Regulatory Map</i> (made under the NSW <i>Local Land Services Act</i>) to assist landholders to understand the regulatory constraints protecting biodiversity on their land to reduce noncompliance and has recently committed to finalise and continually update and refine this.¹⁸⁷
Third party standing for compliance and enforcement proceedings	The SA <i>Biodiversity Act</i> provides for third party standing to apply for injunctions to remedy a breach. In the case of unlawful clearance of native plants or unlawful destruction, damage or disturbance of critical habitat features, the Clearance Assessment Committee has standing; in the case of a breach involving a Culturally Significant Biodiversity Entity, any affected Aboriginal person or, with permission of the Court, an Aboriginal person who has a cultural or spiritual connection to the land that has been, or will be, affected by the breach, has standing.¹⁸⁸
Respect for culturally sensitive information in legal proceedings	The SA <i>Biodiversity Act</i> also allows a court, on the hearing of proceedings that involve culturally sensitive information; to dispense with any formalities it considers appropriate to facilitate the hearing of that information.¹⁸⁹

181 SA *Biodiversity Act* (n 28) s 111. Compliance orders can be issued administratively.

182 Ibid s 112. Reparation orders can be issued administratively.

183 Ibid s 115.

184 Ibid s 118.

185 Ibid s 123.

186 NSW *Biodiversity Conservation Act* (n 28) ss 11.3, 11.9, 11.15.

187 NSW *Plan for Nature* (n 35) 24–5.

188 SA *Biodiversity Act* (n 28) s 116.

189 Ibid s 142.

D Financing Provisions

As noted above, on signing the *GBF*, the Australian Government set new biodiversity targets, including to protect and conserve 30% of Australia's landmass by 2030, and to ensure that priority degraded areas are under effective restoration.¹⁹⁰ The strategy to achieve the 30% conservation target, agreed collectively by national and subnational governments, proposes strategically expanding the protected area estate (including on private land) from current levels of 22% of land mass protected, but also establishing a new network of 'conserved areas' (where permanent protection is not possible or desirable, and where land may be managed for multiple objectives including nature conservation).¹⁹¹ In line with these priorities, the Government also introduced a national Nature Repair Market, intended to attract new private sector investment to nature repair and restoration.¹⁹² Registered projects that enhance or protect biodiversity¹⁹³ in accordance with methods approved under the Act,¹⁹⁴ will yield tradeable biodiversity certificates.¹⁹⁵ While the initial policy intent was to link this market with the development approval and offsetting provisions in the *Commonwealth EPBC Act*,¹⁹⁶ late-stage amendments ensured that biodiversity certificates generated through the scheme

190 *Nature Positive Plan* (n 12) 10. These targets also extend to the marine environment.

191 Department of Climate Change, Energy, the Environment and Water (Cth), *Achieving 30 by 30 on Land: National Roadmap for Protecting and Conserving 30% of Australia's Land by 2030* (Report, 2024) 9. See also Department of Climate Change, Energy, the Environment and Water (Cth), *National Other Effective Area-Based Conservation Measures Framework* (Report, 2024). Conserved Areas differ from Protected Areas in terms of the nature and level of legal protection and the term of the arrangements – Protected Areas must be in perpetuity and are typically achieved via a conservation covenant on private freehold land; whereas Conserved Areas can be established by effective legal or other effective means such as contracts, and may have a commitment to 'in perpetuity conservation' or an intention for conservation in the long term: at 15, 34. In particular, the category of 'primary Conserved Area' appears to be relevant to rural leasehold arrangements in the ACT as it is applicable where there are impediments to applying formal Protected Area designation (such as leasehold arrangements which do not allow for a protective mechanism such as a covenant but do allow for conservation activities): at 8.

192 *Commonwealth Nature Repair Act* (n 13).

193 *Ibid* ss 7 (definitions of 'biodiversity project', 'registered biodiversity project'), 11(1).

194 Projects must satisfy the requirements of the *Nature Repair Act Rules 2024* (Cth) and the applicable Nature Repair Market Methodology Determination: *ibid* ss 45, 67(2)(b). 'Biodiversity outcome' is defined in section 7 of the Act as 'the enhancement or protection of biodiversity that the project is designed to achieve'. Further, biodiversity projects and credits will be listed on a public register operated by the Clean Energy Regulator. Biodiversity projects must also meet core integrity standards in relation to additionality, measurable, verifiable and evidence-based methods, with conservative estimations of outcomes: at ss 57(1)(a), (d)(ii), (e)(i), (g). Note that, to date, there has only been one methodology determination made – the *Nature Repair (Replanting Native Forest and Woodland Ecosystems) Methodology Determination 2025* (Cth).

195 Eligible projects will generate a biodiversity certificate, which constitutes personal property and represents a biodiversity outcome owned and traded separately from the underlying land: *Commonwealth Nature Repair Act* (n 13) ss 67, 70, 72, 161. The Act sets out three permanence periods that may be applicable to nature repair projects: 25 years, 100 years, and a permanence period determined in a particular method: at s 34.

196 Revised Explanatory Memorandum, *Nature Repair Market Bill 2023* (Cth), 89 [501]–[502]. The *Commonwealth Nature Repair Act* (n 13) as originally proposed would have allowed biodiversity project proponents to elect whether the biodiversity certificates from their project could be used for offsetting in future.

would not be able to be purchased for an offsetting compliance purpose.¹⁹⁷ This limit has however been substantially reversed in the most recent round of the *Commonwealth EPBC Act* reforms, which will allow methodology determinations for biodiversity certificates to specify whether or not a certificate generated under that method can be used for offsetting.¹⁹⁸

At the subnational scale, compliance markets for biodiversity offsets have been operating for some time, including in jurisdictions such as Victoria¹⁹⁹ and NSW.²⁰⁰ These allow for the issue of credits for activities which enhance or restore native vegetation or broader biodiversity values. Credits can be purchased by parties that have offset obligations imposed as a condition of their development approval or approval to clear native vegetation. Some of the risks associated with tying conservation and restoration gains to losses through offset markets were highlighted in the *Henry Review* of the NSW Biodiversity Offsets Scheme. Demand for credits has far outstripped supply due to a failure to effectively implement the mitigation hierarchy in development decision-making, as well as increasing demand associated with large scale developments. Over-exploitation of flexibilities in the scheme have also allowed developers to pay into the Biodiversity Conservation Fund instead of securing like-for-like offsets upfront. This has effectively allowed development to proceed without securing offsets or other mitigation measures.²⁰¹ Reforms are underway to address some of these concerns (Table 5).

Subnational jurisdictions have also experimented widely over many years with programs to incentivise and finance conservation and ecological restoration on private land independently of offsets, including tenders for stewardship payments and conservation covenanting programs (with associated incentives including grants and tax concessions).²⁰² Common challenges with these programs include

197 *Commonwealth Nature Repair Act* (n 13) s 76A. An amendment moved by Greens Senator Sarah Hanson-Young removed this discretion from the final wording of the legislation as enacted by the Nature Repair Market Bill 2023 (Cth): Senate, 'Nature Repair Market Bill 2023: Schedule of the Amendments Made by the Senate' (Schedule of Amendments, 5 December 2023); Commonwealth, *Parliamentary Debates*, Senate, 5 December 2023, 6603, 6613–4 (Sarah Hanson-Young).

198 *Commonwealth Reform Act* (n 17) item 627, repealing *Commonwealth Nature Repair Act* (n 13) s 76A(1). See also Explanatory Memorandum, Environment Protection Reform Bill 2025 (Cth), 550–1 item 624.

199 Where an offset is required for clearing native vegetation (assessed under the 'Victoria Planning Provisions' (n 31) and the *Victorian Planning and Environment Act* (n 72)), third-party offsets can be procured from the Native Vegetation Credit Register. See overview in Department of Environment, Land, Water and Planning (Vic), 'Guidelines for the Removal, Destruction or Lopping of Native Vegetation' (Guidelines, December 2017) 26, 31.

200 *NSW Biodiversity Conservation Act* (n 28) pt 6, which, inter alia, establishes the Biodiversity Offsets Scheme Credit Supply Register.

201 *Henry Review* (n 34) 8 Recommendation 22; *Effectiveness of the Biodiversity Offsets Scheme* (n 55) 28.

202 For discussion of different approaches to incentivising and financing private land conservation in Australia, their effectiveness and limitations: see Matthew J Selinske et al, "'Splitting the Bill" for Conservation: Perceptions and Uptake of Financial Incentives by Landholders Managing Protected Areas' (2022) 4 *Conservation Science and Practice* e12660:1–14 <<https://doi.org/10.1111/csp2.12660>>; John Rolfe et al, 'The Australian Experience in Using Tenders for Conservation' (2017) 63 (April) *Land Use Policy* 611 <<https://doi.org/10.1016/j.landusepol.2015.01.037>>; James Fitzsimons and Benjamin Cooke, 'Key Questions for Conservation Tenders as a Means for Delivering Biodiversity Benefits on Private Land' (2021) 22(2) *Ecological Management and Restoration* 110 <<https://doi.org/10.1111/emr.12484>>.

sustaining changed management over sufficiently long time frames and expanding uptake at scale, beyond already conservation-minded landholders.²⁰³

NSW and Victoria have particularly well-established infrastructure in place to engage private landholders in conservation, through dedicated statutory entities, the NSW Biodiversity Conservation Trust and the Victorian Trust for Nature, and statutory provision for the establishment of associated funding arrangements.²⁰⁴ Recent reforms in SA have also introduced new dedicated funding arrangements for conservation and restoration, although these are also not completely decoupled from losses and offsets (Table 5).

Table 5: Financing Provisions in Subnational Nature Laws

Financing Provisions	Examples and Innovation
Tighter constraints on offset compliance markets	Recent amendments to the <i>NSW Biodiversity Conservation Act</i> have strengthened the statutory expression and application of the mitigation hierarchy (see above), and introduced an overall 'net positive' standard for the scheme. ²⁰⁵ New regulations can also now be made to specify when actions other than purchase of biodiversity credits (including payment in the Biodiversity Conservation Fund) will be permitted in order to satisfy offset obligations and may lead to restrictions on the use of this approach and a stronger requirement for like-for-like offsets. ²⁰⁶ There are also some new constraints on the use of funds paid in lieu of an offset, including a requirement that monies be acquitted within three years of the original biodiversity offset deposit to ensure a timely compensatory outcome. ²⁰⁷
Dedicated Restoration Fund	The <i>SA Biodiversity Act</i> establishes the Biodiversity Restoration Fund with the purpose of funding ecological restoration activities, including on public and private land, and potentially also the acquisition of land for ecological restoration. ²⁰⁸ Fees and penalties collected in response to plant-related offences under the Act, including native vegetation clearing conducted without approval, will be paid into the Fund. It is also anticipated to include funding from consolidated revenue, gifts, donations and bequests. The Fund can also receive payments in lieu of a requirement to achieve a significant environmental benefit (imposed in the way of an offset).

²⁰³ See generally above n 201.

²⁰⁴ The NSW Biodiversity Conservation Trust is established under the *NSW Biodiversity Conservation Act* (n 28) pt 10. Part 5 also provides for the development of an investment strategy, and details arrangements for different tiers of conservation agreement and associated stewardship payments. Trust for Nature Victoria is established under the *Conservation Trust Act 1972* (Vic) s 2. Section 3A deals with conservation covenants, while section 3B provides for associated land tax incentives.

²⁰⁵ *NSW Biodiversity Conservation Act* (n 28) s 6.2A(1). This provision states that the biodiversity offsets scheme will transition to net positive outcomes. Subsections (2)–(7) deal with making, reviewing and reporting on implementation of the strategy to transition to net positive outcomes. The strategy must include actions required, targets and timeframes.

²⁰⁶ *Ibid* s 6.4(2), 6.29A, 6.30, as amended by *NSW Biodiversity Conservation Amendment* (n 66) items 15, 29, 30.

²⁰⁷ *NSW Biodiversity Conservation Act* (n 28) s 6.31, as amended by *NSW Biodiversity Conservation Amendment* (n 66) item 31.

²⁰⁸ *SA Biodiversity Act* (n 28) ss 36, 99(a)–(f).

E Institutional Provisions

Incorporation of Western scientific knowledge into the administration of Australian nature laws is reasonably well-established. Independent scientific experts are allocated key functions which underpin the operation of the legislation, such as proposing and/or adjudicating on listings of threatened species and communities, and contributing to the development of associated recovery plans.²⁰⁹ Yet the functions and independence allocated to such experts do differ across jurisdictions. For example, in NSW, decisions on listing threatened species are made by the Threatened Species Scientific Committee, which is accorded relative independence in its functions.²¹⁰ In Victoria, a similar committee has an advisory role only,²¹¹ with the Minister required to merely consider the Committee's recommendation.²¹²

Beyond listing threatened species, decision-making about activities which can harm biodiversity (eg, under planning and development frameworks) is typically allocated to Ministers or their delegates, with less emphasis on independence and scientific expertise. Generally, planning and development legislation will require a proposed development with significant potential impacts on biodiversity to be referred to the Minister administering the biodiversity legislation (or their delegate) for their advice (and sometimes concurrence).²¹³ However, such advice may only need to be weighed against other mandatory considerations in discretionary development decisions,²¹⁴ a factor which may deprioritise biodiversity considerations, contributing to high levels of development approval, high reliance on biodiversity offsets, and ongoing cumulative loss of biodiversity.

209 See, eg, the Commonwealth Threatened Species Scientific Committee, established under the *Commonwealth EPBC Act* (n 4) ss 502–3; the NSW Threatened Species Scientific Committee, established under the *NSW Biodiversity Conservation Act* (n 28) ss 4.38–4.41; and the Victorian Scientific Advisory Committee established under the *Victorian Flora and Fauna Guarantee Act* (n 28) s 8. The WA legislation does not directly create a committee but does require the Minister to obtain and have regard to advice from scientific experts when making a listing decision: *WA Biodiversity Conservation Act* (n 28) s 37. To this end, under section 260(1), the Minister has established a Committee by Ministerial Declaration: Minister for Environment (WA), 'Procedures for Making and Assessing Public Nominations for Listing Species or Communities as Threatened Species or Threatened Ecological Communities, and or Listing Key Threatening Processes' (Ministerial Guideline No 1, 21 December 2018).

210 *NSW Biodiversity Conservation Act* (n 28) s 4.38(1). The Committee has 11 members appointed by the Minister, and there is an obligation to include a mix of government and university scientists: at s 4.41. That Committee is responsible for determining the listing of species and ecological communities: at s 4.9. A listing may be made of the Committee's own initiative or following a request from the Minister, or by nomination of any other person: at s 4.10. While the Committee may need to seek and consider the Minister's advice, it has power to make the final decision: at ss 4.13, 4.15.

211 *Victorian Flora and Fauna Guarantee Act* (n 28) ss 8(2), 16F(1).

212 *Ibid* s 16G(2).

213 See, eg, *NSW Biodiversity Conservation Act* (n 28) ss 7.11–7.12.

214 See, eg, *ACT Planning Act* (n 30); *ACT Nature Conservation Act* (n 28) discussed below. However, in some instances a biodiversity agency may have 'concurrence', meaning their approval must be obtained for a development to proceed: see, eg, *ibid*; *Environmental Planning and Assessment Act 1979* (NSW) s 4.13.

For example, under the *ACT Nature Conservation Act*, the Conservator of Flora and Fauna (‘Conservator’) is appointed as a senior public servant with general functions ‘to develop and oversee policies, programs and plans for the effective management of nature conservation in the ACT’.²¹⁵ Under section 170(1)(c) of the *Planning Act 2023* (ACT) (‘*ACT Planning Act*’), the Conservator also has functions where a development is likely to have a ‘significant adverse environmental impact’ on a protected matter. The proposal must be referred to the Conservator to provide advice about ways to avoid or minimise the environmental impact of the proposed development, an assessment of whether the proposed development is likely to have a significant adverse environmental impact on a protected matter and if so, advice about suitable offsets for the proposed development.²¹⁶ The Conservator’s advice must be considered by the Territory Planning Authority (‘TPA’) in making final decisions to approve or refuse a development application that has been referred under these provisions.²¹⁷ While the *ACT Planning Act* states that approval must not be given if it would be inconsistent with the Conservator’s advice,²¹⁸ the legislation also provides that the TPA may act *inconsistently* with the Conservator’s advice, as long as approval of the development would be consistent with the ACT Environmental Offsets Policy and would provide a substantial public benefit.²¹⁹

The low priority accorded to biodiversity considerations in the context of discretionary development decision-making, has led to calls for institutional reforms. For example, the *Samuel Review* observed that ‘the Commonwealth has a patchy history of demonstrating that it makes and enforces decisions according to the law, and in a way that achieves the objects of the *EPBC Act*’.²²⁰ It recommended establishment of an Environment Assurance Commissioner to oversee Ministerial decisions.²²¹ Initially, the Australian Government went further, recommending an independent Environmental Protection Agency (‘EPA’) be established with responsibility for decisions regarding development – a proposal that was progressively watered down and eventually failed to pass Parliament in 2024.²²² Indeed, Environment Minister Murray Watt announced before the 2025 reforms were put to the Parliament that the Government had no intention of establishing

215 *ACT Nature Conservation Act* (n 28) ss 20–1.

216 *Ibid* ss 318(2)–(3). The Conservator’s role is governed by a series of national and ACT instruments and guidelines. Additionally, the Conservator can give the TPA written advice where ‘satisfied on reasonable grounds that a proposed development is likely to have an adverse environmental impact’: at s 317.

217 *ACT Planning Act* (n 30) ss 186(1)(c), 189–90.

218 *Ibid* s 189(1)(c).

219 *Ibid* s 190(1). For projects involving protected matters, the TPA must be satisfied that the proposal is consistent with the offsets policy and would provide a ‘substantial public benefit’: at s 190(2)(c)(i). See also section 190(1), under which the TPA can approve a development even if inconsistent with Conservator’s advice for a territory priority project or for a project that does not involve a protected matter if satisfied that acting contrary to the advice will significantly improve the planning outcome to be achieved. ‘[S]ubstantial public benefit’ is not defined in the Act.

220 *Samuel Review* (n 4) 117.

221 *Ibid* 118.

222 See discussion in Bell-James et al, ‘Groundhog Day’ (n 9) 37. Though a (somewhat) independent EPA was included in the reinvigorated reform process at the national scale: see Murray Watt, ‘Roundtable Consensus Drives Fast-Tracking of *EPBC* Reform’ (Media Release, 26 August 2025) <<https://minister.dcccew.gov.au/watt/media-releases/roundtable-consensus-drives-fast-tracking-epbc-reform>>.

a national EPA with decision-making powers in its 2025 reforms.²²³ Had this eventuated, an EPA with responsibility for decision-making under nature laws would have been a novel development. While all states and territories, except Queensland, already have an EPA, their functions and powers differ, and these institutions do not typically exercise specific functions under core nature laws.²²⁴

Recent subnational reforms (Table 6) have broadened the types of expertise and the types of activities assigned to independent experts and stakeholder representatives, with a particular emphasis on First Nations knowledges and cultural values and increasing First Nations involvement in biodiversity conservation. In some cases, these new roles extend beyond providing advice, to the co-development of policy and decision-making about activities which adversely impact biodiversity. In Victoria, the Conservation Regulator – an institution with some independence from the Minister – has been delegated authority to issue certain licences and approvals under legislation such as the *Victorian Flora and Fauna Guarantee Act* and the *Wildlife Act 1975* (Vic) (*‘Victorian Wildlife Act’*), particularly in relation to forest management.²²⁵

Table 6: Institutional Provisions: Subnational Nature Laws

Institutional Provisions	Examples and Innovation
Expert advisory and policy-making bodies	The <i>SA Biodiversity Conservation Act</i> establishes new statutory bodies including: • Aboriginal Biodiversity Committee – with functions including to co-develop policies with the Minister, including a policy about considering and applying ‘Aboriginal knowledges in connection with the operation of the Act’; ‘a policy for identifying, approving and managing Culturally Significant Biodiversity Entities’; and ‘a policy about cultural burning of native plants undertaken by Aboriginal persons’.²²⁶ All members must be Aboriginal persons, appointed based on their environmental and cultural expertise, including a commitment to action to address biodiversity conservation, restoration and enhancement, and an understanding of the issues and impacts associated with biodiversity.²²⁷

223 Ronald Mizen, Tom Rabe and Jesinta Burton, ‘Environment Minister Watt to Retain Final Approval on Major Projects’, *Australian Financial Review* (online, 16 October 2025) <<https://www.afr.com/politics/federal/environment-minister-watt-to-retain-final-approval-on-major-projects-20251014-p5n2hb>>. However, recent ministerial delegations of decision-making power to the CEO of the National Environmental Protection Agency appear to reverse this position: see above n 17.

224 National Environmental Law Association, ‘NELA Issues Paper for Commonwealth Environment Minister National Independent EPA’ (Paper, 11 July 2023) app <<https://www.nela.org.au/s/NELA-Issues-Paper-National-EPA-FINAL.pdf>>.

225 ‘Conservation Regulator Laws’, *VIC.GOV.AU* (Web Page, 1 September 2025) <<https://www.vic.gov.au/conservation-regulator-laws>> (*‘Conservation Regulator Laws’*).

226 *SA Biodiversity Act* (n 28) ss 21–2.

227 *Ibid* s 21.

Institutional Provisions	Examples and Innovation
Expert advisory and policy-making bodies (continued)	• Biodiversity Council – which has a broad advisory role and particular responsibilities to keep under review the operation of key policies (eg, regarding the operation of the mitigation hierarchy), advise the Minister of any changes it considers are necessary or desirable,²²⁸ and engage the community about biodiversity conservation.²²⁹ The Council should be made up of members with expertise relevant to addressing the conservation, restoration and enhancement of biodiversity, including, inter alia, climate change adaptation, mitigation and Aboriginal knowledges. Two appointments must be members of the Aboriginal Biodiversity Committee.²³⁰ In progressing reforms to the <i>NSW Biodiversity Conservation Act</i>, the NSW Government has proposed to embed First Nations knowledges in the framing of reforms to the Act itself, recognising ‘the importance of co-designing biodiversity and land management legislation, policies and programs with Aboriginal people’.²³¹
Independence and expertise in development decision-making and compliance activity	The <i>SA Biodiversity Act</i> includes unique provisions to enhance the independence of its administration. It cannot be administered by the Planning Minister or any minister responsible for administering a mining statute.²³² The Act also brings native vegetation management under the purview of the Environment Minister, and under the objects and decision-making principles of a biodiversity-focused scheme, which prioritises conservation and restoration rather than resource management. The South Australian Act establishes a Clearance Assessment Committee, whose functions include making assessments and decisions regarding native vegetation clearing, including determining applications for consent to clear native plants and applications referred under the <i>Planning, Development and Infrastructure Act 2016</i> (SA) and initiating enforcement action relating to the unlawful clearance of native plants.²³³ Members of the Committee are appointed on the basis of their skills and expertise, and should include persons who can demonstrate a commitment to action to address biodiversity conservation, restoration and enhancement, and an understanding of the issues and impacts associated with biodiversity. One member must be an Aboriginal person.²³⁴

228 Ibid s 16(g).

229 Ibid s 16(j).

230 Ibid s 15(1)(b).

231 *NSW Plan for Nature* (n 35) 6.

232 *SA Biodiversity Act* (n 28) s 13.

233 Ibid s 19.

234 Ibid s 18(4).

Institutional Provisions	Examples and Innovation
Independence and expertise in development decision-making and compliance activity (continued)	The Victorian Conservation Regulator was introduced in response to concerns of regulatory capture in compliance oversight of forest management on public land. It is not an independent statutory entity like the Environment Protection Authority Victoria ('EPAV') but a statutory executive appointment of a Chief Conservation Regulator to which regulatory functions are delegated under laws regulating wildlife, biodiversity, public lands and forests. Its functions include issuing certain licences and approvals under legislation such as the <i>Victorian Flora and Fauna Guarantee</i> and the <i>Victorian Wildlife Act</i> . The role is supported by an independent regulatory advisory panel and stakeholder reference group. ²³⁵

F Learning Provisions

Gathering new information, including by monitoring and evaluating the effectiveness of an Act in achieving its objectives (and similarly, the effectiveness of subsidiary instruments such as management plans), is an essential precondition to adaptive decision-making.²³⁶ Legislative review clauses can help to ensure that nature laws do not become stagnant, that they integrate the best available information about conservation strategies and priorities, and that they are, in fact, equipped to achieve their objects and purposes.

Most Australian nature laws include a requirement that the statute be reviewed periodically but in some jurisdictions, nature laws have not been comprehensively reviewed or renewed for over a decade.²³⁷ Statutory review provisions differ by

235 'About the Conservation Regulator', *VIC.GOV.AU* (Web Page, 1 July 2026) <<https://www.vic.gov.au/about-us-conservation-regulator>>; 'Conservation Regulator Laws' (n 225).

236 The Australian Government's 'Legislation Handbook' suggests that, when drafting legislation, a department ought to consider creating a statutory review mechanism for the Act as a whole, either as a one-off or regular (periodic) review obligation, and specifying matters to be considered, such as whether the legislation: is operating in a way that is legally effective to implement government policy; has resulted in any unintended legislative consequences; remains relevant and clear; or contains any outdated or redundant provisions: at 'Legislation Handbook' (n 175) [5.26].

237 See, eg, *Tasmanian Nature Conservation Act* (n 29); *Tasmanian National Parks and Reserves Management Act* (n 29); *Queensland Nature Conservation Act* (n 28).

purpose,²³⁸ interval,²³⁹ and reviewing party.²⁴⁰ Many nature laws also provide for regular review of key instruments made under the legislation, such as regulations, threatened species lists, and management plans.²⁴¹

The *ACT Nature Conservation Act* stands out for its purposeful and broad scale integration of monitoring and evaluation obligations. Among other things, it requires the Conservator to design and implement a Biodiversity Research and Monitoring Program and monitor the effectiveness of the *ACT Nature Conservation Strategy*.²⁴² Regular data collection can support reviewing and improving the operation of laws and subsidiary instruments in practice. While beyond the scope of our current focus, the *Marine and Coastal Act 2018* (Vic) is also noteworthy in providing explicitly that learning must flow through into reform: '[i]t is a guiding principle for the management of the marine and coastal environment that decision-makers should learn from the outcomes of operational programs and, in light of that, change policies and practices'.²⁴³ More typically, nature laws require that a review take place and nothing more,²⁴⁴ or, at best, provide a discretion to vary statutory plans and instruments on completion of a review or as otherwise necessary.²⁴⁵

Some jurisdictions have recently introduced new requirements for reviews upon the occurrence of trigger events (Table 7). For example, the *SA Biodiversity Act* requires the Scientific Committee to conduct an extinction inquiry into possible

238 The *Commonwealth EPBC Act* (n 4) does not state the purpose of the review, whereas in SA it is to review the operation and effectiveness of the Act (*SA Biodiversity Act* (n 28) s 184(1)) and in the ACT it is to review the operation of the Act (*ACT Nature Conservation Act* (n 28) s 371). Other states are more prescriptive: in NSW the purpose is 'to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives': *NSW Biodiversity Conservation Act* (n 28) s 14.11. In WA, the Minister must consider the objects of the Act, the adequacy of penalties involved, and other matters that appear relevant: at *WA Biodiversity Conservation Act* (n 28) s 277. In Victoria, the Act itself is not required to be reviewed regularly, but there is a statutory requirement to review other instruments made under the Act including threatened species and communities lists, the biodiversity strategy, and management plans: *Victorian Flora and Fauna Guarantee Act* (n 28) ss 16K, 18E, 24.

239 Intervals range from an obligation to review legislation every 10 years (*Commonwealth EPBC Act* (n 4) ss 522A(1)–(2)), every five years (*WA Biodiversity Conservation Act* (n 28) s 277), at five years after commencement and then at least every 10 years (*SA Biodiversity Act* (n 28) s 184(1)), and at five years (*NSW Biodiversity Conservation Act* (n 28) s 14.11) and 10 years after commencement (*ACT Nature Conservation Act* (n 28) s 371).

240 The *Commonwealth EPBC Act* (n 4) is silent as to what skills the independent party must have, whereas the SA legislation states that the party must have, in the opinion of the Minister, extensive knowledge, skills and experience in relation to the management of biodiversity: *SA Biodiversity Act* (n 28) s 184(1). In contrast, in NSW, ACT and WA, the review is to be undertaken by the Minister themselves: at *NSW Biodiversity Conservation Act* (n 28) s 14.11; *ACT Nature Conservation Act* (n 28) s 371; *WA Biodiversity Conservation Act* (n 28) s 277.

241 *Victorian Flora and Fauna Guarantee Act* (n 28) ss 16K, 18E, 24. The *Commonwealth EPBC Act* (n 4) provides similarly for the review of threat abatement and species conservation plans: at ss 279(2), 294(2); and for the review of threatened species lists and section 184 gives the Minister a discretion to amend statutory lists.

242 *ACT Nature Conservation Act* (n 28) ss 26, 59, 108, 125.

243 *Marine and Coastal Act 2018* (Vic) s 14.

244 *ACT Nature Conservation Act* (n 28) s 371.

245 See, eg, *Commonwealth EPBC Act* (n 4) ss 279(3), 294(2)–(3); *Victorian Flora and Fauna Guarantee Act* (n 28) s 17(4).

extinctions of native species endemic to the State.²⁴⁶ The practical effect of these will depend on how they are conducted and accompanying reporting obligations (details to be set out in regulations). Yet these inquiries have considerable potential to support transparency around biodiversity loss and the effectiveness of recovery measures and, crucially, facilitate learning over time in a way that is typically absent in biodiversity laws.²⁴⁷

Table 7: Learning Provisions in Subnational Nature Laws

Learning Provisions	Examples and Innovation
Explicit support for learning	The <i>NSW Biodiversity Conservation Act</i> sets as one of its objectives: ‘to support collating and sharing data, and monitoring and reporting on the status of biodiversity and the effectiveness of conservation actions’. ²⁴⁸
Reviews upon occurrence of a trigger	In SA, if the Scientific Committee considers that it is possible that a native, endemic species has become extinct or an endemic ecological community has collapsed, it must conduct an inquiry and report on its findings. ²⁴⁹ The Committee also has a discretion to conduct a similar inquiry if a native (but not endemic) species becomes extinct or a non-endemic ecological community collapses. ²⁵⁰

IV IMPROVEMENTS AND ONGOING CHALLENGES

Drawing on the above survey of recent developments in Australia’s nature laws, we turn now to reflect on the potential of these observed shifts to address both well-recognised weaknesses in legal frameworks, such as failures to halt habitat loss and address cumulative impacts; as well as to respond to emerging complex policy challenges and imperatives, including climate change, valuing and integrating First Nations knowledges and values in biodiversity management, and landscape scale restoration.

A Climate Change Resilience

Climate change has long been acknowledged in scientific scholarship as a growing and critical threat to Australian biodiversity.²⁵¹ One of the most profound implications is that there is no ‘new normal’ to which biodiversity managers must adapt. Rapid, unpredictable and irreversible effects of climate change will

246 *SA Biodiversity Act* (n 28) s 82. Note that these are mandatory for native species endemic to the state, but discretionary for native species that are not endemic to the state.

247 On learning in biodiversity laws, and the role of extinction inquiries, see McCormack, ‘Implications of Extinction in Law’ (n 48).

248 *NSW Biodiversity Conservation Act* (n 28) s 1.3(e).

249 *SA Biodiversity Act* (n 28) s 82(1).

250 *Ibid* s 82(2).

251 See Will Steffen et al, Biodiversity and Climate Change Expert Advisory Group, *Australia’s Biodiversity and Climate Change: A Strategic Assessment of the Vulnerability of Australia’s Biodiversity to Climate Change* (Report, 2009).

introduce novel uncertainties and limit the utility of historical baselines. Complex, compounding and cascading climate impacts will become increasingly common,²⁵² meaning that experimentation, adaptive management, and iterative, ongoing learning are now essential.²⁵³

The implications for Australian nature laws are radical and have been discussed in more detail elsewhere.²⁵⁴ For example, to remain effective, these laws will need to provide for activities and situations that were not anticipated when most biodiversity legislation was drafted. This includes emergency interventions for biodiversity during and after extreme events such as bushfires and droughts; mechanisms to protect ecosystems that have been restored or engineered to reinstate lost ecological functions and processes; and provisions to conserve habitat as climate refugia as species' distributions shift, including potentially across jurisdictional boundaries.²⁵⁵

As outlined in Part III, Australia's nature laws have only recently begun to explicitly acknowledge the implications of climate change for biodiversity through framing provisions. The first mention was in the *NSW Biodiversity Conservation Act* objectives,²⁵⁶ an Act that also aims 'to support collating and sharing data, and monitoring and reporting on the status of biodiversity and the effectiveness of conservation actions',²⁵⁷ providing a crucial basis for learning over time. The most recent reforms in SA are more advanced, with statutory objects that recognise that nature must become more resilient to climate change impacts but also that nature is an important lever for climate change mitigation.²⁵⁸

Nature laws are also just beginning to set out operative provisions to respond to the impacts of climate change, and to establish new institutional arrangements which support more adaptive approaches. In NSW, 'climate refuges' are listed as a purpose for which an area can be protected for its 'outstanding biodiversity value', and 'anthropogenic climate change' is recognised in the law as a key threatening

252 Hans-Otto Pörtner et al, 'Summary for Policymakers' in Hans-Otto Pörtner et al (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Cambridge University Press, 2022) 3, 7 <<https://doi.org/10.1017/9781009325844>>.

253 Craig R Allen and Ahjond S Garmestani (eds), *Adaptive Management of Social-Ecological Systems* (Springer, 2015); Jan McDonald and Megan C Styles, 'Legal Strategies for Adaptive Management under Climate Change' (2014) 26(1) *Journal of Environmental Law* 25 <<https://doi.org/10.1093/jel/equ003>>; JB Ruhl, 'General Design Principles for Resilience and Adaptive Capacity in Legal Systems: With Applications to Climate Change Adaptation' (2011) 89(5) *North Carolina Law Review* 1373.

254 See, eg, Jan McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (2019) 10(1) *WIREs Climate Change* 1 <<https://doi.org/10.1002/wcc.555>>; McCormack, 'The Legislative Challenge' (n 88).

255 McDonald et al (n 253); Phillipa McCormack, 'Conservation Introductions for Biodiversity Adaptation under Climate Change' (2018) 7(2) *Transnational Environmental Law* 323 <<https://doi.org/10.1017/S2047102517000383>>. For an outline of 'climate-driven species redistribution', see Greta T Pecl et al, 'Biodiversity Redistribution under Climate Change: Impacts on Ecosystems and Human Well-Being' (2017) 355(6332) *Science* eaai9214:1-10 <<https://doi.org/10.1126/science.aai9214>>.

256 *NSW Biodiversity Conservation Act* (n 28) ss 1.3(b), 1.3(d), which aim to enhance ecosystems' 'capacity to adapt to change', and to 'support biodiversity conservation in the context of a changing climate'. See McCormack, 'The Legislative Challenge' (n 88).

257 *NSW Biodiversity Conservation Act* (n 28) s 1.3(e).

258 *SA Biodiversity Act* (n 28) ss 7(c), (f).

process.²⁵⁹ In SA, the Scientific Committee must include one or more members with climate adaptation and mitigation expertise;²⁶⁰ and the State Biodiversity Plan must identify priorities for, among other things, conservation and restoration, ‘having regard to future climate scenarios’.²⁶¹ The ACT law reform discussion paper indicates that climate change is a key consideration for the review and will likely feature in proposed reforms to the *ACT Nature Conservation Act* over coming months.²⁶²

In addition to climate-specific provisions, mechanisms that facilitate broader learning and adaptive approaches to conservation are important. For example, in Victoria, critical habitat can now be declared if an area ‘is likely to be needed by a taxon or community of flora or fauna *in the future*’.²⁶³ Even absent the express mention of climate change, this provision creates new flexibility for adapting and responding to climatic and environmental changes. Similarly, provisional listings for threatened species²⁶⁴ – while not expressly directed at climate change – can support rapid protection for nature immediately following climate-driven extreme events. In SA these new provisional protections may even extend to ecological restoration activities, for example, if species reintroduction forms part of a coastal or marine ‘blue carbon’ restoration project.²⁶⁵

The new obligation in *SA Biodiversity Act* to undertake an extinction inquiry,²⁶⁶ is, to our knowledge, the only legal mechanism that specifically facilitates learning from species extinctions and ecological community collapse.²⁶⁷ Where climate impacts and extreme events are the drivers for extinctions or collapse, these inquiries will highlight those drivers and, presumably, empower the Scientific Committee to propose new priorities and management approaches to mitigate the risk of future extinctions or collapses. Supporting regulations, yet to be written, will provide more detail about the conduct of these inquiries. The regulations could, for example, ensure that the Committee’s reports are publicly available, and require the Minister to not only respond to these reports but also take additional actions such as amending the State Biodiversity Plan to update its priorities or vest additional powers in statutory bodies such as the Aboriginal Biodiversity Committee or native vegetation Clearance Assessment Committee.²⁶⁸

B First Nations Knowledges and Values

In its submission to the Australian Government’s proposed ‘nature-positive’ law reforms in 2024, the Biodiversity Council highlighted the unique values and critical role for Aboriginal and Torres Strait Islander peoples in biodiversity

259 *NSW Biodiversity Conservation Act* (n 28) s 3.2, sch 4.

260 *SA Biodiversity Act* (n 28) s 15(2).

261 *Ibid* s 173(4)(b).

262 *Ten Year Review* (n 42).

263 *Victorian Flora and Fauna Guarantee Act* (n 28) s 20(3)(f) (emphasis added).

264 *SA Biodiversity Act* (n 28) s 78(3); *NSW Biodiversity Conservation Act* (n 28) s 4.30.

265 *SA Biodiversity Act* (n 28) s 78(1)(c).

266 *Ibid* s 82.

267 McCormack, ‘Implications of Extinction in Law’ (n 48) 7.

268 *SA Biodiversity Act 2025* (n 28) ss 17, 20.

conservation and potential mismatches between these values and role in existing legislative arrangements:

Traditional Custodians have a complex relationship with Country that extends through Lore, to kinship (spiritually and physically) with plants, animals, water, and ecological communities and which creates obligations to follow Lore through reciprocal care.

This can create additional responsibilities for some species and requires greater recognition of their significance (which may not fit within an threatened species listing process).²⁶⁹

Exclusion of First Nations peoples from decision-making and biodiversity management in Australia is clearly not a new policy challenge, but a harm that predates most biodiversity laws, and a fundamental expression of colonisation. Yet as we noted in Part III, recent reforms to subnational nature laws have sought to explicitly facilitate recognition of cultural connections, knowledges and responsibilities for Country, and to value the unique contributions of Aboriginal peoples in biodiversity management. Nature laws in Victoria, NSW and SA now include statutory objects and directing principles that require recognising and inviting participation by First Nations peoples, and in SA, the new *SA Biodiversity Act* expressly protects sensitive cultural information that is provided by cultural knowledge holders for the purposes of biodiversity conservation.²⁷⁰

SA's new legislation goes further than any other jurisdiction, embedding in the Act the importance of cultural knowledges and values (eg, identifying and managing Culturally Significant Biodiversity Entities) and establishing new institutional arrangements that amplify Aboriginal voices (eg, directing principles that require respectful engagement with Aboriginal peoples and a new Aboriginal Biodiversity Committee).²⁷¹ These provisions are reinforced by the duty on public authorities, to 'as far as is practicable, seek Aboriginal knowledges and, where available and endorsed by the holders of the knowledges, consider and apply the knowledges, at all times respecting the sensitivity of the sharing of cultural knowledge'.²⁷²

We anticipate that future nature law reforms around Australia will continue this trend towards explicit recognition and meaningful engagement with First Nations peoples and traditional ecological knowledges. In Victoria in particular, the commencement of a state-wide Treaty with First Peoples in November 2025,²⁷³ will likely have profound implications for how Aboriginal peoples, cultures and knowledges in that jurisdiction are empowered to guide conservation management and statutory reform.

269 Biodiversity Council, *Delivering on Nature Positive: 10 Essential Elements of National Environmental Law Reforms* (Report, 2023) 5.

270 *SA Biodiversity Act* (n 28) s 10. For more detail, see Part III above.

271 *Ibid* ss 22(d)(ii), 175(4)(b). See also ss 8(c), (d), 11(2)(f), 173(5)(a), (b).

272 *Ibid* ss 10, 20.

273 *Statewide Treaty Act 2025* (Vic).

C Strategic Landscape Scale Conservation and Restoration

Nature laws have long been criticised for their focus on assessment and approval of individual development projects which alone may not have a significant impact on the environment. However the cumulative impacts of these multiple projects can lead to the phenomenon of ‘death by a thousand cuts’ through their combined serious effects.²⁷⁴ This approach has also led to high reliance on biodiversity offsets, which have often failed to adequately compensate for biodiversity loss.²⁷⁵ Offsets have typically been acquitted in a fragmented, project-by-project manner, failing to achieve reversal of biodiversity decline at a wider landscape scale.²⁷⁶ Furthermore, offsets only aim to achieve ‘no net loss’ at the project scale – essentially, aiming to put the environment in the same position it would have been in had the development not occurred. This is not an appropriate mechanism to address a legacy of environmental loss and degradation.

Shifting to what is variously called ‘regional’, ‘landscape’ or ‘strategic’ planning was a key recommendation in both the first (2009) and second (2020) independent reviews of the *Commonwealth EPBC Act*.²⁷⁷ While the *Commonwealth EPBC Act* did previously provide for ‘bioregional planning’, these were not regulatory plans and did not bypass development assessment and approval requirements,²⁷⁸ and until recently, were not widely used. In its 2022 *Nature Positive Plan*, the Australian Government committed to invest in regional planning in collaboration with the states, to identify areas needed for conservation and restoration, and areas needed for strategic development.²⁷⁹ Pilot regional plans were progressed in Queensland, SA, Victoria and NSW;²⁸⁰ with progress most advanced in Queensland.²⁸¹ However,

274 Jessica T Dales, ‘Death by a Thousand Cuts: Incorporating Cumulative Effects in Australia’s Environment Protection and Biodiversity Conservation Act’ (2011) 20(1) *Pacific Rim Law and Policy Journal* 149; Emma Carmody et al, Wentworth Group of Concerned Scientists, *Preventing ‘Death by a Thousand Cuts’: Addressing Cumulative Impacts to Matters of National Environmental Significance (MNES) through Reforms to the EPBC Act* (Report, August 2023).

275 *Henry Review* (n 34) 1, 13, 57–60.

276 H Kujala et al, ‘Towards Strategic Offsetting of Biodiversity Loss Using Spatial Prioritisation Concepts and Tools: A Case Study on Mining Impacts in Australia’ (2015) 192 (December) *Biological Conservation* 513 <<https://doi.org/10.1016/j.biocon.2015.08.017>>; Martine Maron et al, ‘Biodiversity Offsets, their Effectiveness and their Role in a Nature-Positive Future’ (2025) 1 *Nature Reviews Biodiversity* 183, 184 <<https://doi.org/10.1038/s44358-025-00023-2>>.

277 *Hawke Review* (n 176) 29 Recommendation 6; *Samuel Review* (n 4) 10–11.

278 *Commonwealth EPBC Act* (n 4) s 176.

279 *Nature Positive Plan* (n 12) 3, 49. A draft National Environmental Standard for Regional Planning was subsequently released in early 2024 setting out further detail, including that regional plans achieve a ‘net positive outcome’ for matters of national environmental significance through avoiding and mitigating the impacts of priority development actions, and providing for regional restoration measures to repair and compensate for these impacts. This would be achieved through designating conservation and development zones for the region – priority developments could be fast-tracked in development zones, while certain actions would be prohibited in conservation zones to protect important environmental values. This standard was not implemented due to stalled progress on national reforms. See Department of Climate Change, Energy, the Environment and Water (Cth), *Consultation on National Environmental Laws* (Consultation Pack, 21–23 February 2024).

280 ‘Bioregional Planning’, *Department of Climate Change, Energy, the Environment and Water* (Web Page, 9 April 2026) <<https://www.dcceew.gov.au/environment/epbc/epbc-act-reform/regional-planning>>.

281 *Ibid*.

these were conceived as an informational input to decision-making, rather than a pathway to remove the need for development assessment.²⁸² It was not until late 2025 that the *Commonwealth EPBC Act* was amended to provide for regulatory bioregional plans and a new assessment pathway that will allow some developments to register to comply with a regulatory regional plan as an alternative to project level assessment and approval.²⁸³ As these new arrangements are implemented, achieving coherence with strategic planning already occurring at a subnational level (outlined above in Part III) will be important. For example, NSW already has a number of spatial planning tools which it has committed to improve and develop through recent reforms, including the Biodiversity Values Map and Threshold Tool, which identifies land with high biodiversity value to support offsetting frameworks.²⁸⁴ There is also a Biodiversity Investment Opportunities Map, required by statute, which identifies priority investment areas.²⁸⁵ Such existing spatial data could usefully inform a bioregional plan under the new national regime.

While regional planning may go some way towards addressing the phenomenon of ‘death by a thousand cuts’, additional measures will be needed to support the extensive restoration needed to reverse past losses, in line with Australia’s new *GBF* targets. Repairing degradation is enormously expensive: although estimates differ wildly depending on methodology and metric used, research suggests a full suite of restorative interventions in Australia could cost anywhere from \$7 billion per year²⁸⁶ to more than \$500 billion per year.²⁸⁷

Given these high costs, the introduction of the Nature Repair Market²⁸⁸ to attract new private investment to biodiversity gains is, on its face, a positive development. Yet significant questions remain about the practical impact of this market. For example, demand for biodiversity credits from the private sector is highly uncertain. There appears to be an assumption that companies and investors will be motivated to purchase credits in the market to meet their nature-positive targets set

282 For example, the plans under development in Queensland were intended to ‘provide improved environment information to help inform early decision-making before actions are referred for assessment’: at ‘Bioregional Planning’, *Department of the Environment, Science, Tourism and Innovation* (Web Page, 12 January 2025) <<https://environment.desi.qld.gov.au/management/planning-guidelines/bioregional-planning>>.

283 See, eg, *Commonwealth Reform Act* (n 17) item 114, inserting *Commonwealth EPBC Act* (n 4) s 36H.

284 ‘Biodiversity Values Map and Threshold Tool’, *NSW Government* (Web Page, 13 March 2026) <<http://lmbc.nsw.gov.au/Maps/index.html?viewer=BOSETMap>>.

285 *NSW Biodiversity Conservation Act* (n 28) s 5.3.

286 Emma Carmody et al, Wentworth Group of Concerned Scientists, *Blueprint to Repair Australia’s Landscapes: National Case for a 30-Year Investment in a Healthy, Productive and Resilient Australia* (Synthesis Report, July 2024) pt 1, 6 <<https://wentworthgroup.org/wp-content/uploads/2024/07/Blueprint-to-Repair-Australias-Landscapes-Part-I-Synthesis-Report-Accessible.pdf>>. With the metric being to:

(1) repair the productive base of agricultural soils; (2) fix overallocated and fragmented river systems and rehabilitate degraded water catchments; (3) restore healthy native ecosystems to a minimum 30% of their pre-1750 extent (4) mitigate imminent extinction risk and ensure survival of Commonwealth-listed threatened species; and (5) maintain and improve the health of estuaries.

287 April E Reside et al, ‘The Cost of Recovering Australia’s Threatened Species’ (2025) 9(3) *Nature Ecology and Evolution* 425, 425 <<https://doi.org/10.1038/s41559-024-02617-z>>.

288 The Nature Repair Market is established by the *Commonwealth Nature Repair Act* (n 13).

as a result of nature-related financial risk assessment.²⁸⁹ Yet while companies and their directors certainly have legal obligations to identify, manage, and disclose nature-related risks that are material to their business,²⁹⁰ understanding of the financial risks posed by biodiversity loss is still developing and company reporting and risk management is in its infancy.²⁹¹ Without a mandatory disclosure standard, and significant pressure from shareholders, private sector engagement with the nature repair market towards corporate nature targets is highly uncertain.²⁹² Recent relaxation of limits on the use of biodiversity certificates for compliance offsetting may create additional demand in the market,²⁹³ yet any gains thereby achieved will be used to compensate losses, throwing into question the contribution of the market to nature restoration targets.

There are also uncertainties surrounding the supply of biodiversity credits to this market. Indeed, as outlined above, demand has far outstripped supply in similar state-level schemes such as the NSW Biodiversity Offsets Scheme.²⁹⁴ Recent research has underscored the numerous challenges and barriers that prevent landholders from engaging with environmental markets to provide ecosystem services, including complexity, high upfront costs of baseline survey work and ongoing monitoring, and concerns about opportunity costs and future regulation.²⁹⁵ Adding an additional market scheme only increases these complexities.

D Halting Habitat Loss

The independent review of the *NSW Biodiversity Conservation Act* singled out the lack of *primacy* for nature laws in relation to intersecting legal frameworks which regulate activities such as land clearing as a key factor in the failure of these laws to adequately constrain further loss of habitat.²⁹⁶ Some recent reforms discussed in Part III have taken small steps to address this – for example, tighter constraints on the use of biodiversity offsets, and strengthened provision for critical habitat declaration and management. Yet overall, there has not been political support for more far-reaching measures, and arguably more of a policy focus on investing in gains and restoration than in halting ongoing losses. This is evident for example in the NSW Government's *Plan for Nature* which distinctly rules out the identification of 'no-go' zones for development decision-making.²⁹⁷

289 *Nature Positive Plan* (n 12).

290 Sebastian Hartford-Davis and Zoe Bush, 'Nature-Related Risks and Directors' Duties' (Joint Memorandum of Opinion, 24 October 2023).

291 See, eg, Australian Conservation Foundation, *The Future of Food: Are Australian Food Companies Failing Nature?* (Report, July 2024) 19.

292 See further discussion in Anita Foerster and Ella Vines, 'Net Zero and Nature Positive: Mapping the Regulatory Impact and Interaction of Global Environmental Goals in Australia' (2026) 52 *Monash University Law Review* (forthcoming) <<https://doi.org/10.2139/ssrn.5362695>>.

293 See discussion of recent reforms above in Part III(D).

294 *Henry Review* (n 34) 8; *Effectiveness of the Biodiversity Offsets Scheme* (n 55).

295 See, eg, Stefan Kaufman and Julia Meis-Harris, *What Influences Farmers and Landholders' Participation in Environmental Markets? Report of Scoping Review of Literature and Practice Interviews* (Report, August 2022).

296 *Henry Review* (n 34) 1, 13, 57–60.

297 *NSW Plan for Nature* (n 35) 11.

It is also evident in the compromised outcomes achieved through the most recent *Commonwealth EPBC Act* reforms discussed above.²⁹⁸

Noting this limited progress in strengthening nature laws to halt habitat loss, we now consider the potential contribution of some of the novel measures which have been successfully introduced – such as Victoria’s biodiversity mainstreaming duty for public decision-makers²⁹⁹ and SA’s new general biodiversity duty.³⁰⁰ Experience with similar statutory mechanisms in other policy contexts is instructive in considering their potential to help constrain activities which lead to biodiversity loss.

For example, mainstreaming duties on public decision-makers are also part of Victoria’s legal framework for climate change.³⁰¹ An empirical study of the impact of these duties on government decision-making and activities found that they support the realisation of climate change mitigation targets and adaptation objectives in Victoria, but that considerable implementation effort is needed to fully realise this contribution. This includes implementing regulatory interventions (eg, developing authoritative guidance for decision-makers operating under a range of relevant statutory frameworks) as well as capacity and capability building activities (eg, engaging senior management and central agencies, developing decision-support tools).³⁰² Potential enforcement of the duty through judicial review, and test litigation, were also key factors spurring government efforts to discharge the duty.³⁰³

Compared to the climate mainstreaming duties, the biodiversity mainstreaming duty in the *Victorian Flora and Fauna Guarantee Act* is differently – and arguably less fully – specified in legislation, which may make it more difficult to operationalise and enforce. For example, there are no prescribed statutory decisions which must consider biodiversity, and, unlike the *Climate Change Act 2017* (Vic), the *Victorian Flora and Fauna Guarantee Act* does not establish clear,

298 For a discussion of weaknesses in statutory definitions of ‘unacceptable impacts’ and ‘national interest’ test in the reformed *Commonwealth EPBC Act* (n 4) see above n 22.

299 *Victorian Flora and Fauna Guarantee Act* (n 28) ss 4B–4C.

300 *SA Biodiversity Act* (n 28) s 11.

301 The *Victorian Climate Change Act* (n 95) sets out a general duty to ensure that government decisions, policies, programs or processes appropriately take account of climate change by having regard to the policy objectives and guiding principles of the Act: at s 20; and a more specific duty for certain decision-makers to have regard to climate change impacts and associated greenhouse gas emissions when making certain prescribed statutory decisions: at s 17, sch 1.

302 See, eg, Anita Foerster and Alice Bleby, ‘When Climate Mainstreaming is the Law: A Case Study of the *Climate Change Act 2017* (Vic)’ (2023) 45(4) *Sydney Law Review* 435; Bleby and Foerster, ‘A Conceptual Model for Climate Change Mainstreaming’ (n 41).

303 For example, in 2022, Environment Victoria, represented by Environmental Justice Australia (‘EJA’), challenged the legality of decisions made by the Environment Protection Authority Victoria (‘EPAV’) to renew operating permits for coal-fired power stations. EJA argued that by renewing the permits without including limits on greenhouse gas pollution, the EPAV had failed to consider climate change, as required under the *Victorian Climate Change Act* (n 95). While this case was ultimately unsuccessful, it was identified as a factor behind increased integration of climate change considerations into the permitting activities of the EPAV. See Anita Foerster and Alice Bleby, ‘Climate Change Mainstreaming: What Role for Legislation?’ in Amanda Kennedy et al (eds), *Re-imagining Environmental Law* (Edward Elgar Publishing, 2026) 22, 39–40.

concrete biodiversity targets to be addressed by decision-makers when considering the impact of their decisions on biodiversity. There do not appear to be guidelines to support decision-makers in discharging the biodiversity duty, despite statutory provision for this.³⁰⁴

The biodiversity mainstreaming duty does however require public authorities to consider a range of instruments made under the *Victorian Flora and Fauna Guarantee Act*, such as critical habitat determinations.³⁰⁵ Further, public authorities can be requested to provide information on how they are ensuring that their actions do not threaten the persistence of threatened species or critical habitat in line with the duty.³⁰⁶ These measures could potentially be quite impactful in ensuring critical habitat is taken into account in a range of different policy contexts (eg, emergency management and environmental protection regimes) and there is some early evidence to suggest that the duty has led to more explicit consideration of biodiversity in some decision-making contexts.³⁰⁷ However, as noted above, critical habitat measures are discretionary and remain largely unimplemented in Victoria. Without progressing these underlying substantive protections, the practical effect of this duty will be less than it could be.

SA's new general biodiversity duty has also been highlighted as an innovative addition to the legal framework, and the first explicit use of a general statutory duty to address biodiversity loss in Australia. Similarly framed environmental duties have been provided in catchment management and biosecurity legislation since the 1990s,³⁰⁸ and are now a common feature across most subnational environment protection regimes which regulate pollution and waste.³⁰⁹ This reflects a shift towards principles-based regulation, the anticipated advantages of which include

304 A one-page guidance note published in 2021, states that further guidelines are being prepared: Department of Environment, Land, Water and Planning (Vic), '*Flora and Fauna Guarantee Act 1988: Public Authority Duty*' (Guidance Note, 2021).

305 *Victorian Flora and Fauna Guarantee Act* (n 28) s 4B(2).

306 *Ibid* s 4C.

307 For example, the EPAV provides guidance on the biodiversity requirements that must be met by proponents when applying for various permissions under the *Victorian Environment Protection Act* (n 33), including authorisations to discharge or dispose of waste, new permissions, exemptions or amendments, and permit renewals. This guidance specifically notes that the EPA must consider biodiversity impacts related to certain applications as a result of the biodiversity mainstreaming duty in the *Victorian Flora and Fauna Guarantee Act* (n 28). See 'Biodiversity Requirements', *Environment Protection Authority Victoria* (Web Page, 28 October 2024) <<https://www.epa.vic.gov.au/biodiversity-requirements>>.

308 For an overview of the introduction of environmental duties from the 1990s, see Arie Freiberg, 'General Duties as Regulatory Tools in Environmental Protection: Principles, Practice, Problems' (2019) 36(1) *Environmental and Planning Law Journal* 40 ('General Duties as Regulatory Tools'). Note also, the explicit consideration of a general statutory biodiversity duty in 2001 in Bates (n 38).

309 See, eg, *Queensland Environmental Protection Act* (n 33) s 319; *SA Environment Protection Act* (n 33) s 25; *Victorian Environment Protection Act* (n 33) s 25. These duties differ in terms of their role within the statutory framework and their enforceability. For example, until recently Victoria was the only jurisdiction where a breach of the general environment duty attracted criminal penalties, however similar provisions have now been added to the *Queensland Environmental Protection Act* (n 33). Under the *Victorian Environment Protection Act* (n 33), the general duty can also potentially be enforced by third parties under section 309. See discussion of recent third-party enforcement action in Mark Beaufoy, Bridget Phelan and Simone Menz, 'Breach of the General Environmental Duty: The First Substantive Case under s 25 of the *Environment Protection Act 2017* (Vic)', *Mallesons* (Web Page, 8 October 2024) <<https://www.mallesons.com/au/en/>>.

a focus on preventing environmental harm (rather than reacting to harm once it has occurred), an ability to help address cumulative impacts occurring because of activities not directly regulated through permits, or indeed emerging threats not anticipated by existing standards. This style of regulation is also often advocated as more flexible for, and therefore more popular with, regulated entities.³¹⁰

However, as Arie Freiberg cautioned upon the introduction of *Victorian Environment Protection Act*, general environmental duties are not magic bullets and there are a range of significant implementation challenges that demand proactive, well-resourced regulators, as well as significant shifts in institutional practices and culture. For example, regulators must provide sufficiently detailed guidance for duty holders on what is expected in terms of reasonable steps to prevent or minimise risks in particular circumstances; they should actively encourage voluntary compliance and deter non-compliance including through targeted awareness and education campaigns; and they must detect potential non-compliance before harm occurs and ensure that breaches are adequately enforced. If duties are too broadly framed and not supported by authoritative guidance, they can be difficult to enforce, rendering them meaningless.³¹¹ While a comprehensive assessment of the impact of Victoria's new general environmental duty is not yet available, it is clear that the EPAV has invested considerable resources in supporting activities such as industry codes of practice³¹² and in seeking to proactively raise awareness and enforce breaches.³¹³

SA's new biodiversity duty is also positioned as a mechanism which can 'encourage individuals, businesses and governments to take all reasonable prevention or minimisation measures before engaging in activities that could harm biodiversity' and serve 'as an extra layer of protection, a failsafe for unanticipated harms', alongside existing offences which more directly regulate harm to protected matters.³¹⁴ The duty is broadly framed to apply to all persons and to encompass impacts on biodiversity generally – not just protected matters such as threatened species and critical habitat – and appears therefore to have the potential

insights/latest-thinking/breach-of-the-general-environmental-duty-the-first-substantive-case-under-s25-of-the-environment-protection-act-2017-vic.html>.

310 Arie Freiberg, *Regulation in Australia* (Federation Press, 2017) 233.

311 Freiberg, 'General Duties as Regulatory Tools' (n 308) 43–54.

312 Extensive guidance has been developed for different industry sectors to guide compliance with the duty. See 'Industry Obligations', *Environment Protection Authority Victoria* (Web Page, 7 April 2026) <<https://www.epa.vic.gov.au/industry-obligations>>.

313 For a recent example of a successful enforcement action, see 'Supreme Court order a \$650,000 win for EPA Victoria', *Environment Protection Authority Victoria* (Web Page, 9 December 2025) <<https://www.epa.vic.gov.au/supreme-court-order-650000-win-epa-victoria>>.

314 In introducing the SA Biodiversity Bill Second Reading Speech (n 42), Deputy Premier and Minister for Climate, Environment and Water, Susan Close stated at 12021–2:

The introduction of a general duty for biodiversity presents a unique opportunity to acknowledge and encourage best practice across a range of industries and the community generally. The bill allows for biodiversity policies to outline what constitutes reasonable measures, providing clear guidelines for compliance. By accrediting industry practices as compliant with the general duty, the bill gives land managers and others certainty that their actions align with government expectations. Accreditation of industry practices will also enable businesses to maintain access in export markets as global trade increasingly values nature-positive practices.

to influence and constrain a wide range of activities which contribute to habitat loss and degradation. The *SA Biodiversity Act* does provide however that there will be no breach of duty if a person is otherwise acting in accordance with the Act,³¹⁵ meaning that regulated and exempt activities such as land clearing would remain unaffected by the duty. Curiously, the only concrete example provided in explanatory material of activities that might be influenced by the new duty is agricultural use of pesticides.³¹⁶

In terms of enforcement, the SA biodiversity duty is less well supported than the Victorian general environmental duty which does impose criminal penalties for breach and permits third party enforcement. The *SA Biodiversity Act* anticipates that future regulations or a biodiversity policy may specify measures that will or will not be taken to constitute reasonable and practicable measures for the purposes of compliance with the duty.³¹⁷ Developing these measures, as well as investing resources in raising awareness and pursuing enforcement, will be critical to the effectiveness of this mechanism.

V CONCLUSION

This article has surveyed innovations emerging in Australian state and territory nature laws, demonstrating that subnational jurisdictions are fertile ground for innovation in nature laws in Australia. Of note are recent developments in framing provisions and institutional mechanisms to better address the impacts of climate change on biodiversity and to recognise and meaningfully integrate the knowledges and cultural values of Aboriginal and Torres Strait Islander peoples. In some cases, these are supported by improvements in listing and planning mechanisms which have the potential to protect a wider range of biodiversity features and functions, including climate refugia and future habitat needs, and which are underpinned by stronger enforcement and accountability measures.

However, the lack of primacy of nature laws in the context of intersecting regimes for land use planning, environmental impact assessment, and native vegetation management, remains largely unaddressed. Mechanisms to attract new investment to biodiversity conservation, including on private land, also remain largely tied to the ongoing loss of biodiversity through the operation of offset compliance markets, although there have been efforts in some jurisdictions to address this. Acknowledging that the interface between national and subnational nature law and policy around regional planning and financing nature repair is highly complex and dynamic, there nonetheless remains much work to be done in setting out a strategic context to identify no-go zones for irreplaceable areas

315 *SA Biodiversity Act* (n 28) s 11(4).

316 Department for Environment and Water (SA), *South Australia's First Biodiversity Bill* (Explanatory Guide, 2025) 11. The guidance suggests that 'there may be agricultural practices in relation to the appropriate application of insecticides which are considered best practice and could be recognised as compliance with the general duty'.

317 *SA Biodiversity Act* (n 28) s 11(3)(c).

of habitat features and giving this appropriate legal status in relevant decision-making, as well as in establishing legal frameworks which will deliver biodiversity gains which are independent of losses.

Further research is needed to deepen this high-level, point-in-time survey of recent developments in nature law. This includes research which empirically assesses the practical effect of the innovations outlined here, including experimentation with new measures to address climate change and empower First Nations Australians in biodiversity policy and management. Given the leadership shown by some subnational jurisdictions in these areas, the recent conclusion of *Commonwealth EPBC Act* reforms, and the fact that other subnational jurisdictions are not currently prioritising nature law reform, it is also timely to comprehensively compare and analyse the design and interaction of nature law frameworks across all Australian jurisdictions. Staggered progress and policy development on contentious policy issues across national and subnational jurisdictions within federal systems is common. While this can result in fragmented, suboptimal outcomes, it can also be re-framed as an opportunity for coordinated learning. The framework of statutory mechanisms set out in Part III can help to structure analysis and comparison across jurisdictions, and support the identification, prioritisation and strategic combination of legal reform interventions across different jurisdictional scales in the future. It can also serve as a useful basis for future (re)consideration of environmental federalism in Australia, including the roles of national and subnational jurisdictions in addressing the biodiversity crisis.