

## What next on regional planning and related national environmental law reforms

Australia's environment is deteriorating and under increasing threat<sup>1</sup>. Professor Graeme Samuels' once-in-a-decade independent review found the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is ineffective and outdated<sup>2</sup>.

The Australian Government (**AG**) is planning reforms, including to replace the EPBC Act. Now stakeholder consultation is complete—comment closed on 30 March—the Nature Positive (Environment) Bill<sup>3</sup> (**NPE Bill**) could be presented to the Parliament as early as the 2nd quarter of 2024. Federal Environment Department (**DCCEEW**) documents explain the NPE Bill will refer to six National Environmental Standards (**Standards**). Assuming the Bill is enacted, the Standards will be made under the statute and embody the outcomes to be achieved for matters of national environmental significance<sup>4</sup> and that are expected from regulatory activities contributing to the achievement of those outcomes.<sup>5</sup>

- Since October 2023, DCCEEW has met in closed sessions on four occasions with small sets of stakeholders. Weeks after each of the first three 'lock up sessions', DCCEEW has published documents shown to those stakeholders. The published documents contain *draft* policies on a wide variety of topics as well as five of the *draft* Standards.<sup>6</sup>

The focus of this brief is one regulatory activity, regional planning. Regional planning could counter one criticism often directed at the EPBC Act, i.e., that the EPBC Act enables the approval of actions on a project-by-project basis *without* appropriate consideration of cumulative impacts. The documents in focus are the draft policy for Regional Planning (**RP Policy**)<sup>7</sup> and draft Standard for Regional Planning (**RP Standard**).<sup>8</sup> It is assumed regional planning and two related proposals will proceed as proposed. Concerns local conservation groups can raise, and actions that can be taken now to prepare, are identified.

### *What is regional planning?*

Central to the AG's new landscape scale approach will be a capacity for the Commonwealth, through the Environment Minister (**Minister**), to make 'regional plans' with state and territory governments.

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<sup>1</sup> *State of the Environment Report 2021*, <https://soe.dcceew.gov.au/>

<sup>2</sup> *The independent review of the EPBC Act 1999 (2020)*, [www.epbcactreview.environment.gov.au](http://www.epbcactreview.environment.gov.au)

<sup>3</sup> *Nature Positive Laws Consultation, February 2024*. <https://consult.dcceew.gov.au/australias-new-nature-positive-laws>, p. 1 (of the 107-page pdf document).

<sup>4</sup> *Nature Positive Laws Consultation, February 2024* n 3, pp. 84-89

<sup>5</sup> *Nature Positive Laws Consultation, February 2024* n 3, pp. 90-107. The Standards relate to: Restoration Actions and Contributions (pp. 90-94); Regional Planning (pp. 95-98); Data and Information (pp. 99-103); and Community Engagement and Consultation (pp. 104-107). The AG is also making a Standard for First Nations Engagement and Participation in Decision-making; this Standard is being developed through a collaborative process led by the Indigenous Advisory Committee. See: <https://www.dcceew.gov.au/environment/epbc/epbc-act-reform/standards>

<sup>6</sup> **Note:** Each draft policy and draft standard is labelled 'DRAFT FOR DISCUSSION – NOT GOVERNMENT POLICY'.

<sup>7</sup> *Nature Positive Laws Consultation, December 2023*. <https://consult.dcceew.gov.au/australias-new-nature-positive-laws>, pp. 25-41 (of the 121-page pdf document).

<sup>8</sup> *Nature Positive Laws Consultation, February 2024* n 3, pp. 95-98

The *Nature Positive Plan* states regional plans will “pre-identify areas for protection, restoration and sustainable development.”<sup>9</sup> Think of regional planning as a scaled-up version of ‘strategic assessments’, already possible under the EPBC Act.

Within each defined ‘regional plan area’ there will exist two regulatory zones, a ‘Development Zone’ (DZ) and a ‘Conservation Zone’ (CZ)<sup>10</sup>:

- In DZs, subject to no more than registration with Environment Protection Australia, developers will be authorised to proceed with “priority development actions” *without* the need for individual project-based environmental impact assessment<sup>11</sup>.
- Referring to the protection and restoration of CZs, the *Nature Positive Plan* states “Regional plans will ... identify priority areas for action and investment and help ensure Australia meets its biodiversity outcomes including [its protected area] target.”<sup>12</sup>

There is much at stake with this complex reform proposal, so it is important lawyers from Places You Love alliance member organisations have and continue to provide detailed criticism to the AG.<sup>13</sup>

For more, see (in this brief): [What regional planning will look like in practice.](#)

*What are the related proposals?*

The two related reform proposals are the AG’s moves to:

- recognise ‘conserved areas’ where landholders are delivering ‘Other Effective Area-Based Conservation Measures’ (OECMs), *outside* Australia’s ‘protected areas’, as contributing to Australia’s protected area target<sup>14</sup> (being to “ensure at least 30 per cent of terrestrial, inland water, and of coastal and marine areas are effectively conserved and managed”<sup>15</sup>)
- establish a nature repair market (NRM) enabling private investment in projects where landholders can conduct registered projects that will enhance or protect biodiversity found in Australia’s land or inland waters<sup>16</sup> (NRM project areas).

*What is the concern?*

The primary concern is neither the RP Policy nor the RP Standard confirm all of Australia’s existing and future public and private protected and conserved areas, offset sites and NRM project areas will always be in CZs. The NPE Bill must be clear, if/when any regional plan is made, *all* these sites must only be in CZs. For detail, see (in this brief): [CZs: the list of what \*must\* be included.](#)

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<sup>9</sup> *Nature Positive Plan* (2022). [www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf](http://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf), p. 3.

<sup>10</sup> *Nature Positive Laws Consultation, February 2024* n 3, p. 95

<sup>11</sup> *Ibid*

<sup>12</sup> *Nature Positive Plan* n 9, p. 3

<sup>13</sup> For example, see: Humane Society International (2023) *Are our proposed new national nature laws on track?* copy and paste: <https://hsi.org.au/wp-content/uploads/2023/12/231221-HSI-Policy-Brief-2nd-EPBC-Lock-Up.pdf>

<sup>14</sup> *National Other Effective area-based Conservation Measures Framework (Draft)* (2024), <https://consult.dcceew.gov.au/draft-national-other-effective-area-based-conservation-measures-framework> (consultation on the framework is open until 17 April 2024); See also *Consultation on draft principles to guide recognition of OECMs* (2023), <https://consult.dcceew.gov.au/consult-draft-principles-for-oecms-in-australia>

<sup>15</sup> DCCEEW (online) *A New Global Biodiversity Framework*, [www.dcceew.gov.au/environment/biodiversity/international/un-convention-biological-diversity/global-biodiversity-framework](http://www.dcceew.gov.au/environment/biodiversity/international/un-convention-biological-diversity/global-biodiversity-framework), Target 3; CBD Secretariat (December 2022) [www.cbd.int/article/cop15-final-text-kunming-montreal-gbf-221222](http://www.cbd.int/article/cop15-final-text-kunming-montreal-gbf-221222), Target 3

<sup>16</sup> DCCEEW (online) *Nature Repair Market*. [www.dcceew.gov.au/environment/environmental-markets/nature-repair-market](http://www.dcceew.gov.au/environment/environmental-markets/nature-repair-market)

## What can you do?

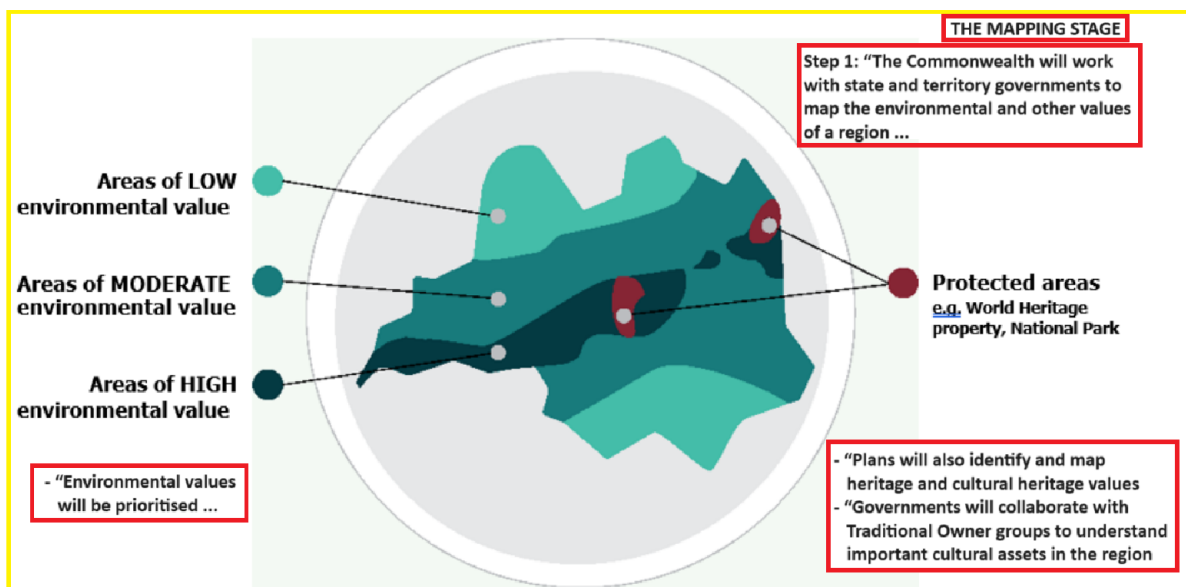
While all these reforms pan out, local conservation groups are encouraged to: engage with and where appropriate support the proposed reforms (we need to be heard!); and continue or begin work now to help ensure the places we love will be in CZs. See (in this brief): [What local conservation groups can do](#)

## Further Information

### What regional planning will look like in practice

The AG policy on 'Decision making at the landscape and/or seascape scale' reveals how regional planning will work at fine scale<sup>17</sup>. The base images in the two figures below are extracted from in this policy. The words in red rectangles are quotes from the same policy, added here for the purposes of this brief.

In step 1, the mapping stage, "the environmental and other values of a region" will be mapped ([Figure 1](#)). Acknowledging alternative classification systems could also be adopted<sup>18</sup>, it is expected any identified region's values will be classified as being of low, moderate or high environmental value. Heritage and cultural heritage values will be identified and mapped.



[Figure 1](#): The mapping stage

<sup>17</sup> *Nature Positive Laws Consultation, December 2023* n 7, pp. 42-44

<sup>18</sup> *Nature Positive Laws Consultation, December 2023* n 7, p. 43; *Nature Positive Laws Consultation, February 2024* n 3, p. 96

During a subsequent planning stage (step 2), the two regulatory zones (CZ and DZ) will be identified within a *proposed* 'regional plan area'. In [Figure 2](#): A single CZ is shown with green dots while a DZ in two separate areas is shown with white dots.

- Note the CZ includes all the high environmental value area but not all the moderate environmental value area.
- Like Swiss cheese, the CZ has a hole in it, over the moderate environmental value area.

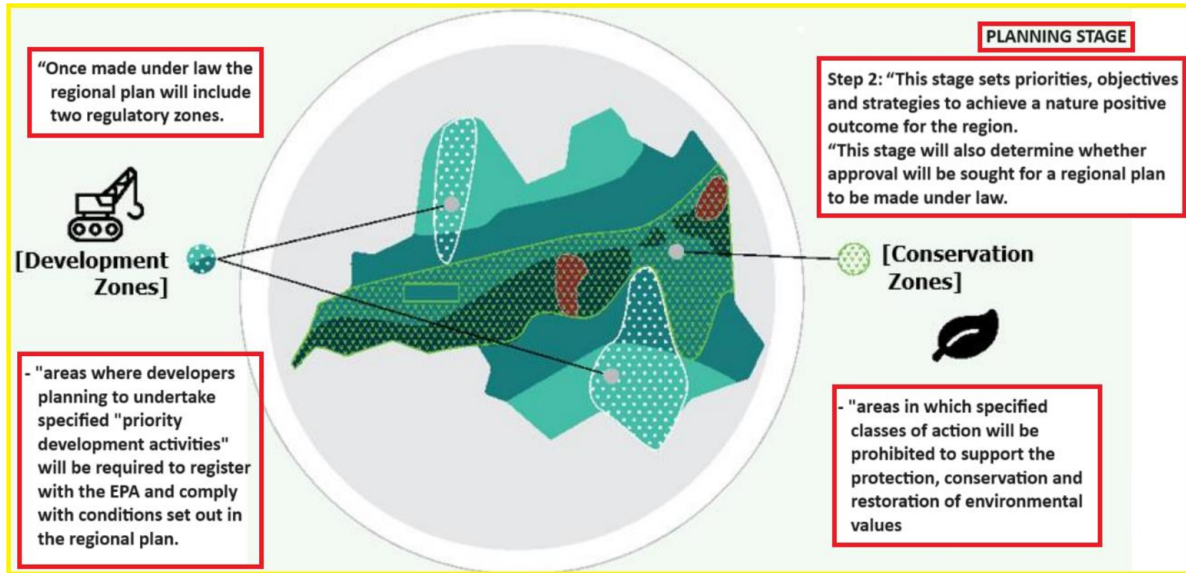


Figure 2: The planning stage

The RP Policy and RP Standard indicate:

- Before any regional plan is made (approved) by the Minister, the draft plan must: identify a person who has consented to be responsible for delivery of 'regional restoration measures' that will compensate for the impacts on protected matters of 'priority development actions' in the DZ; and impose conditions on the delivery of those regional restoration measures to 'more than compensate' for the impact of the priority development actions in the DZ<sup>19</sup>.
- The person consenting to be responsible for the delivery of 'regional restoration measures' must be a minister or other authorised representative of a state or territory government<sup>20</sup>.

After step 2, the Minister will decide whether to 'make' a regional plan that delineates one or more CZs and DZs within the identified region. The Minister must not approve the regional plan unless satisfied (among other things) that it "would result in, or be likely to result in, a net positive outcome for protected matters in the region".

There is no discussion in the RP Policy or RP Standard regarding what will occur if an action is proposed in the portion of the regional plan area that is neither a CZ nor a DZ. This begs important questions:

- Would such action, if proposed, be subject to assessment and approval on a case-by-case basis?
- If so, the action is referred, assessed as expected to have a residual significant impact and approved regardless outside the CZ and the DZ, would the regional restoration measures required in the regional plan area be taken as sufficient to still achieve a nature positive outcome, or would additional restoration actions or restoration contributions<sup>21</sup> be required?

<sup>19</sup> Nature Positive Laws Consultation, December 2023 n 7, pp. 27-28

<sup>20</sup> Nature Positive Laws Consultation, December 2023 n 7, p. 28

<sup>21</sup> See: Nature Positive Laws Consultation, February 2024 n 3, pp. 14-24, 90-94

## CZs: the list of what must be included

We identify and list six *area types* here that—we say—must all be located only within CZs.

However, from the AG's reform documents, the only area type that appears certain to be in any recognised region's CZ will be that region's:

1. 'critical protection areas' for threatened species and ecological communities, and migratory species (if any)
  - We know 'critical protection areas' will be mapped in 'conservation planning documents' like 'recovery strategies' to be continued or made under the NPE Bill.<sup>22</sup>
  - The RP Policy document states, where recognised in any regional plan area, that 'critical protection area' must not be in that region's DZ.<sup>23</sup>

Rather than state any critical protection area must not be in a DZ, it would be better to confirm all such areas must always be found only be in CZs.

The failure to refer specifically to every other area type found on Australia's land and inland waters suggests all those areas will need to be assessed and found to have at least moderate environmental or cultural or other heritage value, or a potential to achieve this, before it will be included in a CZ<sup>24</sup>.

The above situation leaves what CZs will include wide open. We say the NPE Bill (or the National Environmental Standard for Regional Planning) must state clearly that all the following five area types must also be located only in CZs.

Certainty is needed that these *existing* area types will always be in CZs:

2. 'protected areas' on public land
  - The RP Policy does *not* confirm that Australia's public protected areas<sup>25</sup> located in any regional plan area must be in a CZ.
  - Figure 1 shows two fictitious areas shaded brown and labelled 'protected areas'. These areas are mapped as having high conservation value. The examples of protected areas included in the label in the original document are "World Heritage property, National Park". In Figure 2, both areas shaded brown are within the fictitious CZ.
  - Both 'World Heritage property' and 'National Park' are *public* protected area types.
  - From this fictitious example, reproduced in Figures 1 and 2, it appears *likely*—but it is not certain—that protected areas on *public* land will be in CZs.
3. protected areas on private land
  - These areas are managed for conservation and have formal legal protection, such as via a state or territory statutory conservation covenant, to the standards set out in *Australia's Strategy for the National Reserve System 2009–2030*<sup>26</sup>.
  - The RP Policy does *not* confirm that Australia's private protected areas<sup>27</sup> located in any regional plan area must be in a CZ.

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<sup>22</sup> *Nature Positive Laws Consultation, February 2024* n 3, pp. 73, 88

<sup>23</sup> *Nature Positive Laws Consultation, December 2023* n 7, p. 28

<sup>24</sup> *Nature Positive Laws Consultation, December 2023* n 7, pp. 42-44

<sup>25</sup> Australia's public protected areas are shown here: UNEP-WCMC (2024). *Protected Area Profile for Australia from the World Database on Protected Areas*, [www.protectedplanet.net/country/AUS](http://www.protectedplanet.net/country/AUS)

<sup>26</sup> Natural Resource Management Ministerial Council (May 2009) *Australia's Strategy for the National Reserve System 2009–2030*, <https://www.dceew.gov.au/sites/default/files/documents/nrsstrat.pdf>, pp. 42-44

<sup>27</sup> Australia's private protected areas are also shown here: UNEP-WCMC n 25

#### 4. existing offset sites

- Wherever the Minister has previously accepted an action will have residual significant impacts and approved it anyway under the EPBC Act, the Approval Holder has chosen to proceed with that approved project, and a condition attached to the approval has required that as compensation the Approval Holder establish, manage and securely protect a like for like offset site<sup>28</sup>, the whole of that offset site must only be in a CZ.
- The RP Policy does *not* confirm that Australia's offset sites<sup>29</sup> located in any regional plan area must be in a CZ.

Assuming the relevant reforms proposed proceed, certainty is needed that the following *future* area types will also always be found only in CZs:

#### 5. Other Effective area-based Conservation Measures (OECMs)

- The AG proposes, following individual site assessments, that the management of some clearly 'conserved areas' sites *outside* of protected areas will be recognised as contributing to Australia's protected area target, i.e., that suitable sites will be recognised as OECMs<sup>30</sup>.
- OECMs are sites where "formal protected area designation is not possible or supported" yet, at that same site, there is "a clear long-term intention for the continuation of management arrangements that deliver in-situ biodiversity conservation outcomes"<sup>31</sup>.
- This change is broadly consistent with international developments aimed at achieving large-scale conservation targets and mitigating biodiversity loss<sup>32</sup>.
- The RP Policy does *not* confirm that, when a regional plan is made, Australia's OECMs located in any regional plan area must be in a CZ.
- After any regional plan is made, if a new OECM is recognised in a DZ, the area of that OECM must with immediate and permanent effect be taken to be in that region's CZ.
- It would be offensive for any place counting toward Australia's protected area target to not be in a CZ.

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<sup>28</sup> The relevant policy is the *EPBC Act Environmental Offsets Policy* which states offset sites "*should*" be "protected in an enduring way and actively managed to maintain or improve the viability of the protected matter" that is impacted at the impact site, [www.dcceew.gov.au/sites/default/files/documents/offsets-policy\\_2.pdf](http://www.dcceew.gov.au/sites/default/files/documents/offsets-policy_2.pdf), p. 18.

<sup>29</sup> Offset sites protected by conditions attached to development approvals granted under the EPBC Act are identified in DCCEEW's Offsets Register, <https://epbcpublicportal.awe.gov.au/offsets-register/>

<sup>30</sup> *National Other Effective area-based Conservation Measures Framework* n 14

<sup>31</sup> *Consultation on draft principles to guide recognition of OECMs* n 14, pp. 11, 15

<sup>32</sup> In 2018, Parties to the *Convention on Biological Diversity (CBD)* agreed guiding principles, common characteristics and criteria for the identification of OECMs. Today an OECM is defined by the CBD as "a geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in-situ conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socio-economic, and other locally relevant values".

Source: IUCN (online) *IUCN WCPA Other Effective Area-based Conservation Measures Specialist Group*. [www.iucn.org/our-union/commissions/group/iucn-wcpa-other-effective-area-based-conservation-measures-specialist#:~:text=What%20is%20an%20%27OECM%27%3F,WCPA%20Task%20Force%20on%20OECMs](http://www.iucn.org/our-union/commissions/group/iucn-wcpa-other-effective-area-based-conservation-measures-specialist#:~:text=What%20is%20an%20%27OECM%27%3F,WCPA%20Task%20Force%20on%20OECMs).

In 2022, Parties to the CBD adopted a revised protected area target as part of the *Kunming-Montreal Global Biodiversity Framework*. See CBD (Dec 2022) *Final Text: Kunming-Montreal Global Biodiversity Framework*. if link fails pls copy and paste: <https://www.cbd.int/article/cop15-final-text-kunming-montreal-gbf-221222> (Target 3).



## 6. NRM project areas

- The *Nature Repair Act 2023* (Cth) came into legal effect on 14 Dec 2023. The first-listed object is “to promote the enhancement and protection of biodiversity in native species in Australia”.<sup>33</sup>
- Once ‘rules’ and ‘methods’ (legislative instruments) have been made, the nature repair market will have been established enabling the registration under the Act of nature repair projects designed to achieve the Act’s objects in NRM project areas. Interested investors can then acquire tradeable biodiversity certificates that represent the biodiversity outcomes registered biodiversity projects following applicable methods are designed to achieve.<sup>34</sup>
- The RP Policy does *not* confirm that, when a regional plan is made, Australia’s NRM project areas located in any regional plan area must be in a CZ.
- To protect historic gains, all areas that have been but under the Nature Repair Act are no longer NRM project areas must be in CZs.
- After any regional plan is made, if a new nature repair project is subsequently registered over a new NRM project area in the DZ, that NRM project area must with immediate and permanent effect be taken to be in that region’s CZ.

### Additionality

The RP Standard will consider as a baseline “the likely condition of [matters of national environmental significance] in the absence of the priority development actions”.<sup>35</sup>

Recalling ‘regional restoration measures’ are “measures designed to more than compensate for the impacts on [matters of national environmental significance] of priority development actions in [DZs]”<sup>36</sup>, it follows that regional restoration measures to be recognised in regional plans *must* be additional to existing conservation measures, i.e., these measures compensate for impacts that will be additional to existing degradation.

Yet, there is no evidence any work has been done or is planned to make clear this ‘baseline’ from which additionality (and proportionality) will be measured. This is a problem given baselines will differ across jurisdictions and ecosystem types:

- Each landholder and leaseholder *already* holds a degree of responsibility to manage land to a minimum standard.
- All offset sites and protected areas, public and private, are *already* managed for conservation to specified minimum standards.
- The recognition of any OECM will implicitly acknowledge that the management of that site is *already* achieving conservation ends.

There is no suggestion here that regional restoration measures are not needed on any of the area types mentioned in the above dot points. The issue is, to ensure for the public good that nature positive outcomes are achieved, a clear baseline is needed identifying existing conservation efforts.

The NPE Bill (or at least the National Environmental Standard for Regional Planning) must make clear what will be treated as *additional* regional restoration measures.

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<sup>33</sup> *Nature Repair Act 2023*, s 3

<sup>34</sup> *Nature Repair Act 2023*, s 4

<sup>35</sup> *Nature Positive Laws Consultation, February 2024* n 3, p. 98

<sup>36</sup> *Ibid*

## Where will regional restoration measures be taken?

Neither the RP Policy nor the RP Standard state regional restoration measures will only occur in CZs. To the maximum possible extent, regional restoration measures to be taken in any region should be taken in that region's CZ; otherwise, any gain made in any DZ will continue to be vulnerable to subsequent complete loss.

## Things local conservation groups can do

Local conservation groups should continue or begin work with state and territory government officials to identify *at fine scale* all places with important biodiversity values, and to assist where possible with documenting the conservation significance of each one.

Unless and until such work is completed, there is a high risk valuable places will be assigned to DZs.

As an example of what can be done, the Conservation Council ACT Region and Friends of Grasslands have proposed the establishment of a Biodiversity Network in the ACT to protect remnants of natural value not included in protected areas<sup>37</sup>.

The premise is best practice conservation depends on protecting and managing all these valuable remnants effectively, together with what lies inside the protected areas—i.e., across all tenures—under a unified legal and management framework.<sup>38</sup>

The Friends of Grasslands' website suggests ways local conservation groups can get involved:

In a collaborative arrangement between government, landholders, first nation representatives, community and scientific organisations:

1. Map and describe conservation areas outside the reserve system;
2. Provide protection to conservation areas through incorporating remnants into adjacent reserves or creating conservation areas on leased and unleased land outside the reserve system which are exempt from development but may be used for other compatible land uses;
3. Implement coordinated, consistent and best practice ecological management across land tenures; and
4. Improve engagement, cooperation and support between land managers, community, special interest groups and associated management and research professions.

A recent Committee of Inquiry in the ACT jurisdiction recognised this framework is ready and appropriate for adoption<sup>39</sup>. The 'biodiversity network' is proposed to include the small patches of remnant grassland and woodland "along roadsides, in urban open space, in green corridors between houses, or in rural or urban leases".<sup>40</sup> Many such sites have been mapped and their values documented. Work is continuing to map and document the value of additional sites.

Conservation groups also have a role to play in continuing to create urgency around all national environmental law reforms. While the AG has committed to them, the timeline has repeatedly blown out meaning it's becoming harder and harder to get Cabinet to prioritise these over other reforms.

The Minister has indicated she needs to hear more and see more from local conservation groups. Mobilisation to support the reforms could not be more important.

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<sup>37</sup> Conservation Council ACT & Friends of Grasslands (2022) *Briefing: Building a Biodiversity Network Across the ACT*: (if the link fails pls copy and paste the URL:) [https://conservationcouncil.org.au/wp-content/uploads/BRIEFING\\_BIODIVERSITY-NETWORK-\\_Final\\_Version\\_December.pdf](https://conservationcouncil.org.au/wp-content/uploads/BRIEFING_BIODIVERSITY-NETWORK-_Final_Version_December.pdf)

<sup>38</sup> Friends of Grasslands (online) Biodiversity Network. [www.fog.org.au/biodiversity\\_network.htm](http://www.fog.org.au/biodiversity_network.htm)

<sup>39</sup> Legislative Assembly for the Australian Capital Territory (Standing Committee on Planning, Transport and City Services) (March 2024) *Inquiry into the Territory Plan and other associated documents*, [https://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0005/2416190/Inquiry-into-the-Territory-Plan-and-other-associated-documents-report-CURRENT-version.pdf](https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/2416190/Inquiry-into-the-Territory-Plan-and-other-associated-documents-report-CURRENT-version.pdf), recommendation 20 on p. 99

<sup>40</sup> Conservation Council ACT Region and Friends of Grasslands n 37, p. 1