North East NSW Forestry Hub

# IDENTIFYING AND OVERCOMING LEGAL BARRIERS TO CULTURAL BURNING


**Dr Phillipa McCormack**
Research Fellow,
Adelaide Law School

**Dr Michelle McKemey**
Principal Melaleuca
Environmental

**Oliver Costello**
Director, Jagun Alliance
Aboriginal Corporation


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## Document Control

| | |
|---|---|
| Project name | NENSW-2023-09B.1 - Identifying legal barriers to cultural burning |
| Report name | Identifying and overcoming legal barriers to cultural burning |
| Date | 05/07/2024 |
| Status | FINAL Prepared by Michelle McKemey and Phillipa McCormack |
| Review | Reviewed by NE NSW Forestry Hub. Approved by Nick Cameron. |

## Acknowledgments

We acknowledge all First Nations Peoples and their Elders, past, present and emerging.
This report was commissioned by the North East NSW Regional Forestry Hub with funding provided by the Australian Department of Agriculture, Fisheries and Forestry. Part A of the report was written by Michelle McKemey, Part B by Phillipa McCormack. Oliver Costello reviewed the report and contributed to stakeholder interviews and workshops. Stuart Coppock provided independent legal advice. Maya Clarke provided support in the analysis of data and preparation of the report. Nick Cameron managed the project on behalf of the Forestry Hub.

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# Summary

The North East NSW Forestry Hub engaged Melaleuca Environmental Consultancy Services and University of Adelaide to undertake the project, *Identifying legal barriers to cultural burning*. This project seeks to examine the legal and policy constraints to implementing Aboriginal fire management practices in New South Wales public and private native forests. The aim of this project is to provide a pathway and process for removing any policy, legal and other identified barriers that are inhibiting the delivery of Aboriginal burning practices in New South Wales.

In Part A, we present the results of a literature review into Indigenous fire management, the evolution of Australia ecosystems, and contemporary fire management. This literature demonstrates the sophistication of cultural fire management frameworks deployed by Indigenous Australians across Australia, including in North East NSW. There is growing recognition that, at the time of colonisation, when *terra nullius* was first relied upon by British settlers, Australia's Indigenous peoples had curated landscapes across large areas of the continent using fire. Moderate fire plays a crucial ecological role in many Australian ecosystems, triggering life cycle processes such as germination, and mitigating extreme fire risks by managing the accumulation of fuel, especially in grassy and woodland ecosystems. Changing fire regimes is widely acknowledged to be an important threat to biodiversity, with both too-frequent fire and the absence of fire from fire adapted ecosystems both driving declines in species richness. When the Australian continent was colonised by British settlers, new laws suppressed the use of fire for cultural purposes. Cultural fire was directly prohibited, with penalties for burning at certain times, in certain places, and for cultural purposes. Cultural fire was also indirectly suppressed through attacks on Indigenous communities, forcible displacement from country and disruption to, or prohibitions on, cultural practices more generally.

Despite *terra nullius* having been rejected in Mabo, its characteristics are nevertheless apparent in the purposes, substance, procedure and implementation of native vegetation management and other laws relevant to cultural fire in NSW. The presumption at colonisation that Aboriginal people in NSW had no agency, laws, governance or political arrangements in relation to fire management has resulted in a legal regime that predominantly seeks to control the threat of 'uncontrolled' and 'unowned' fires.

The presumption that fires are 'unowned' and there was no fire-related law or governance at the time of colonisation was, and still remains, incorrect. Fire was actively applied, both as a cultural practice and a landscape management tool for thousands of years before British colonisation. It is also clear that more fire, in its moderate and managed forms, still needs to be restored to NSW landscapes to secure the health and function of fire-adapted native vegetation communities, many of which are in decline.

In Part B, we explore the diverse range of laws that are relevant to cultural fire management. Legislation can restrict, for example, when, how and where a fire can be lit, whether a proposed burn must be assessed and/or approved by a government agency, and whether, when, how and by whom smoke may be emitted. Overlaps and gaps in this regulatory system complicate cultural burning by allocating responsibility across many different

agencies, with different statutory priorities. None of these agencies has a statutory mandate to protect or promote the health of cultural landscapes or communities or to reinvigorate or sustain healthy, culturally-informed fire practices.

This complex muddle of legal instruments and agency oversight is important context for the analysis that follows.

There is widespread recognition that 'the law' can be a barrier to cultural burning. This proposition has been recognised overseas (e.g., Hoffman et al 2022; Clark et al 2021), and in Australia, including in the Royal Commission into National Natural Hazards Arrangements (2020) and the NSW Bushfire Inquiry Report (2020). For example, the Final Report of the NSW Inquiry into the 2019–20 bushfires, states:

> *There appears to be great opportunity for restoration and revitalisation of cultural practices in south eastern Australia and improvements in landscape health, along with benefits in managing bush fire risk. But wider implementation of traditional land management practices* ***will require review of policies and procedures, and potentially regulatory change****, clear acknowledgement of the cultural basis for the practices and Aboriginal ownership of knowledge, and a commitment from Government to invest in building knowledge and capacity for Aboriginal communities to have a greater role in land management, including planning and preparation for bush fire* (NSW Bushfires Inquiry 2020, 186, *emphasis added*).

There is also work underway by many different NSW government agencies, landholders, and practitioners, to tease out and begin to overcome the practical, financial and policy barriers to cultural fire in NSW (e.g. McKemey, various; Williamson 2021).

Despite this recognition, no research project to date has sought to specifically and exhaustively identify the barriers that stem from law; and there is no publicly available, comprehensive analysis of the ways that law hinders cultural fire in NSW. Diagnosing these barriers is an important step towards implementing the recommendations of the National Royal Commission and the NSW Inquiry.

This report responds to that gap. It identifies legal barriers from legislative instruments and case law, stakeholder interviews, a project workshop and academic and government literature. The project interrogates these legal barriers through the lens of important legal principles, including the principle that was used to justify the colonisation of the continent: *terra nullius*, describing what we now call Australia as a 'land belonging to no one'. The report develops the list of barriers into eight propositions, that articulate how, and perhaps even why, the law hinders cultural fire in NSW.

These barriers are substantial but not insurmountable. This report seeks to inform and support the development of practical reform pathways, to empower traditional owners and cultural knowledge holders to reclaim responsibility for cultural fire, and to better care for Country in NSW.

# Contents



# PART A
# Literature Review

# 1. Introduction

## 1.1 Project Brief

The North East NSW Forestry Hub ('the Hub') was established by the Australian Government to help deliver upon its forest industries commitments and to address priority issues such as 'climate change and adaptive stewardship of forests across the landscape' and 'new timber supply'. The Hub's role is to assess and determine the barriers and opportunities for the forestry and wood products sector in the north east region of New South Wales (Figure 1).

The North East NSW Forestry Hub engaged Melaleuca Environmental Consultancy Services and University of Adelaide to undertake the project *Identifying legal barriers to cultural burning*. This project seeks to examine the legal and policy constraints to implementing Aboriginal fire management practices in New South Wales public and private native forests. The aim of this project is to provide a pathway and process for removing any policy, legal and other identified barriers that are inhibiting the delivery of Aboriginal burning practices in New South Wales.

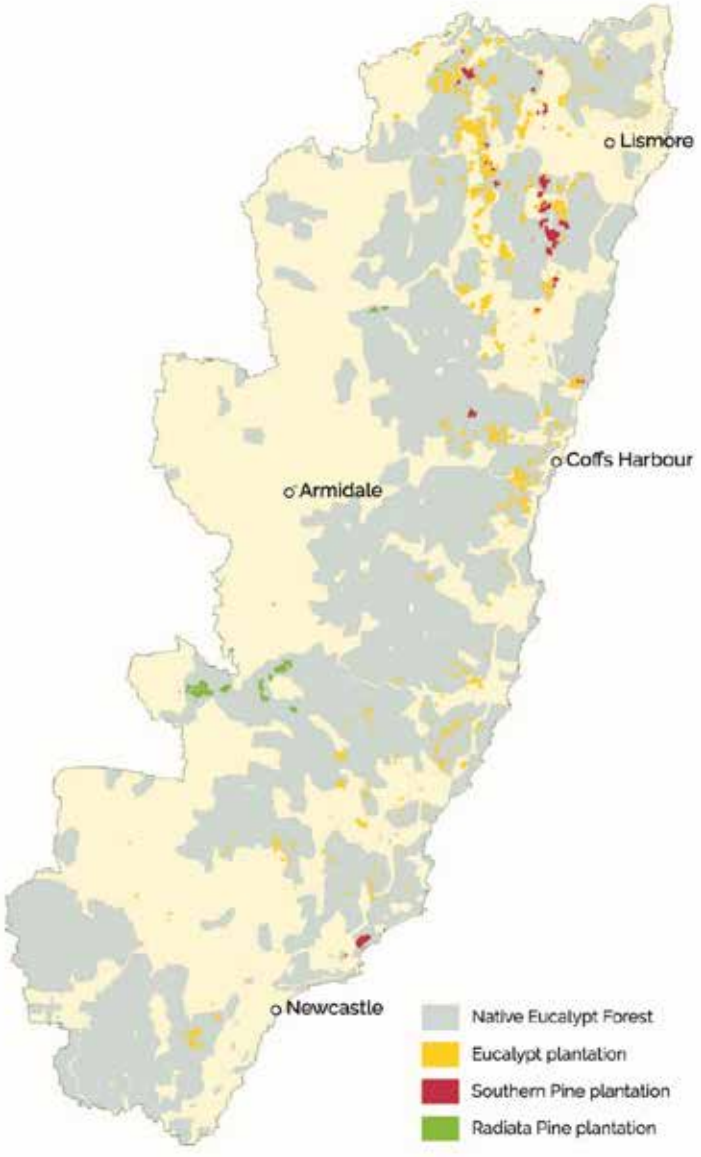


**Figure 1: North East NSW Regional Forest Map**

## 1.2 Background

### 1.2.1 Indigenous fire management

Through their relationship with fire over 65,000 years, Indigenous Australians developed a sophisticated cultural fire management framework resulting in a curated cultural landscape (Bowman 2003; Russell-Smith *et al.* 2009; Clarkson *et al.* 2017; Ens *et al.* 2017; Fletcher *et al.* 2021a). In the words of Indigenous leader Joe Morrison, 'Fire is, and always has been, part of the interwoven matrix of the relations between people, the physical and spiritual world' (Morrison 2020: 31). Fire is an important tool that is used by Indigenous peoples for a variety of purposes, including to: communicate; clear the ground; hunt and gather; regenerate and protect resources (totems, foods, medicines and materials); provide illumination; and for cooking, warmth and ceremony (Jones 1969; Pascoe 2014; Cahir and McMaster 2018). Indigenous cultural fire management is undergoing a revival globally, with the development of Indigenous savanna burning programs in northern Australia considered to be world-leading best practice (Ray *et al.* 2012; Russell-Smith *et al.* 2013; Sletto and Rodriguez 2013; Mistry *et al.* 2016; Lipsett-Moore *et al.* 2018; Ansell and Evans 2019; Moura *et al.* 2019; Dann and Woodward 2020; Nikolakis *et al.* 2020).

Australia was colonised by the British from 1788, which had widespread and ongoing impacts on Indigenous peoples, including frontier warfare, massacres, violence, disease, impoverishment, removal of Indigenous peoples from their traditional lands, the 'stolen generation' (children forcibly removed from their families), prohibition of cultural practices and languages, and transgenerational trauma (Blomfield 1992; McDonald 1996; Atkinson 2002; Elder 2003; Harris 2003; Hunter 2004; Roberts 2006; Clayton-Dixon 2019). Consequently, traditional Indigenous fire practices were disrupted and in some places prevented (Eriksen and Hankins 2014) although in some areas Indigenous peoples were able to maintain significant practice, ceremony and language (Gould 1971; Latz 1982; Haynes 1991; Russell-Smith *et al.* 1997; Bird *et al.* 2016; Bird 2019; Standley 2019). Some academics have concluded that in certain areas of Australia (e.g. southern Australia), the alienation of Aboriginal groups from their traditional lands means that repositories of traditional Indigenous fire management knowledge are mostly lost (Esplin *et al.* 2003). Others have suggested that although traditional Indigenous tools of fire management have changed (such as replacing burning on foot with helicopters), the traditional knowledge of how to burn has not, for example in relation to seasonality (Lewis 1985; McKemey *et al.* 2020). The latter view is supported by evidence in Arnhem Land where patterns of fine-scale, regular fire

use have been maintained or re-established by Indigenous communities (Yibarbuk *et al.* 2001; Gorman *et al.* 2007; Garde 2009). Indeed, the re-instatement of Indigenous cultural fire management has occurred across large portions of northern Australia (Robinson *et al.* 2016; Indigenous Carbon Industry Network 2021), stretching from the Kimberley in Western Australia (Legge *et al.* 2011; Vigilante *et al.* 2017), to central Australia (Edwards *et al.* 2008; Bliege Bird *et al.* 2012; Bird 2019) and Cape York in Queensland (Perry *et al.* 2018; Standley 2019).

Despite the severe impacts of colonisation described in the previous paragraph, NSW hosts Australia's largest (and growing) population of Aboriginal people (Australian Bureau of Statistics 2021) comprising many First Nations, as reflected by the diversity of Local Aboriginal Land Councils across the state (Figure 2; NSW Aboriginal Land Council 2023). In southeast Australia, renewal of cultural fire management is underway, and many Indigenous communities aspire to re-establish and grow cultural fire management (Robinson *et al.* 2016; Maclean *et al.* 2018; Smith *et al.* 2018; Darug Ngurra *et al.* 2019; Neale *et al.* 2019; Weir and Freeman 2019; Maclean *et al.* 2023; Rawluk *et al.* 2023). Contemporary cultural fire management in southeast Australia, including the area for which the Hub is responsible, is generally characterised by a holistic vision of burning that equates, in practice, to regular, low severity, patchy fires. However, the practice of Indigenous fire management across Australia, including in southeast Australia, is more diverse than this, depending on cultural, spatial and temporal variables (Thomson 1939; Thomson 1949; Lewis 1994; Altman 2009).

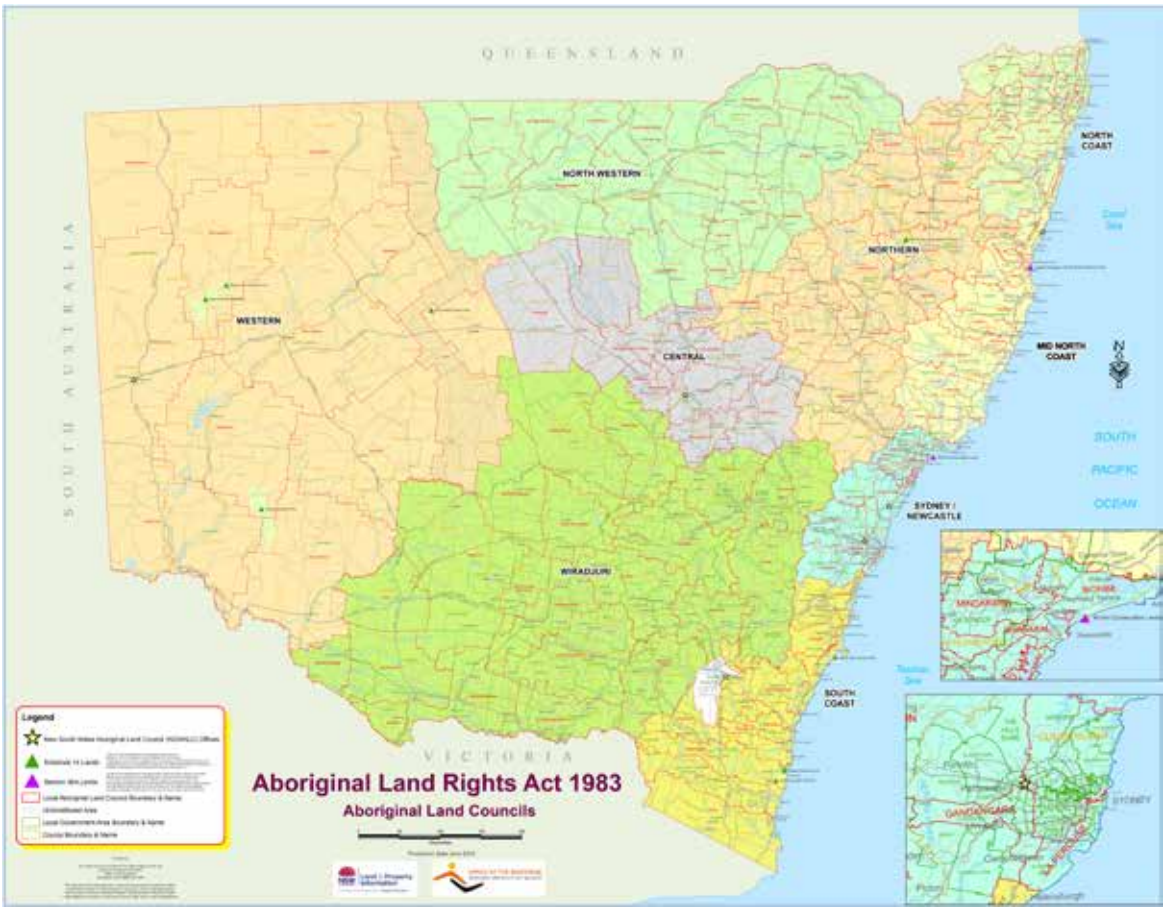


**Figure 2: Aboriginal Land Councils in NSW (NSW Aboriginal Land Council 2023)**

### 1.2.2. Fire, ecology and land management

Fire is a key driver of Earth's biodiversity (Bond and Keeley 2005; Bowman *et al.* 2009; Estes *et al.* 2011; He *et al.* 2019) and has been a major force shaping the distribution and form of Australian biodiversity and landscapes (Gill *et al.* 1981; Miller and Murphy 2017). Australia is among the most fire-prone of continents and fire is actively managed, either through firing or prevention, as an important tool to promote production and conservation goals (Pyne 1991a; Russell-Smith *et al.* 2007). Fire plays a vital role in the dynamics of many Australian ecosystems and often provides a critically important cue for regeneration of species, liberation of resources such as nutrients and light, and by creating disturbance and open space (Keith 2004). The Western scientific study of fire ecology has amassed a substantial body of literature, focussing on issues such as fire history, behaviour and regimes; plant, animal and community responses to fire; and fire management and policy (Whelan 1995; Bradstock *et al.* 2002; Lavorel and Garnier 2002; Cary *et al.* 2003; McKenzie *et al.* 2011; Bond and Van Wilgen 2012; Kozlowski 2012).

Ecosystems respond to and recover from fire in various ways, depending on factors such as climate, soil, topography, fire regime, human management and fire–vegetation dynamics (Miller and Murphy 2017). The frequency of fires, as well as their

intensity, type, season of occurrence and extent, are collectively known as the 'fire regime' (Gill 1975), and these have a substantial effect on ecosystems and biodiversity (Bradstock *et al.* 2002). Fire-response processes and functional trait groups influence organism persistence across four levels of ecological organisation (individual, population, community, landscape). Fire regimes (frequency, intensity, season and type) and their spatial patterns and climate regimes influence processes at all levels of organisation, and also influence each other through fire weather patterns, fuel accumulation rates and greenhouse gas emissions (Gill 2012; Keith 2012).

Inappropriate fire regimes are considered a key threat to biodiversity internationally, demonstrated by a global problem of biodiversity loss in fire prone temperate forests. Ultimately, judgements of fire regimes are based on the human values that drive- and are affected by- them, which can vary within society, as can the many variables which interact in complex ways to result in a pattern of fire occurrences and impacts (Thompson *et al.* 2017; Berlinck and Batista 2020). This challenge is also apparent in Australian woodlands and open forests (Catling 1991; Gill and Bradstock 1995; Whelan *et al.* 2002; Cary *et al.* 2003; Keith 2004; Whelan *et al.* 2009; Croft 2013). Inappropriate fire regimes are a key threat to ecosystems and biodiversity, with ecosystem modification (including the impacts of changed fire regimes) listed as a threat for almost three-quarters of threatened taxa in Australia (Kearney *et al.* 2019; Department of Planning Industry and Environment 2020). Too-frequent fire can reduce species richness in vegetation types, and 'high frequency fire resulting in the disruption of life cycle processes in plants and animals and loss of vegetation structure and composition' has been listed as a Key Threatening Process under the NSW *Biodiversity Conservation Act* (BC Act) (Department of Planning Industry and Environment 2020). Federally, 'Fire regimes that cause declines in biodiversity' is a Listed Key Threatening Process under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (Department of Agriculture 2022). While the NSW threat declaration recognises too-frequent fire, it overlooks the effects of lack of fire or long periods of no fire interspersed with intense wildfire, which can also reduce species richness (Ross *et al.* 2002); or that a regime of frequent, low intensity, patchy fires can support high species diversity (He *et al.* 2019). Viewing fire predominantly as a threat may overlook the regenerative and regulatory functions of appropriate fire regimes (Jurskis and Turner 2002; Jurskis 2015; Forestry Corporation of NSW 2020; Morgan *et al.* 2020).

Many years without fire can lead to the senescence or deterioration, and dwindling, of fire-dependent species (Williams and Gill 1995) or transformation of ecosystems (Baker 2021). The NSW *Guidelines for Ecologically Sustainable Fire Management* (Kenny *et al.* 2004) described fire interval domains for broad vegetation groupings and derives fire interval guidelines or thresholds based on broad ranging analyses of vital attribute information for vascular plant species known to occur in these vegetation groupings. For example, the dry sclerophyll shrub/grass forest formation consists of open eucalypt forests with sparse shrub stratum and continuous grassy

groundcover (Keith 2004). The domain of acceptable fire intervals for grassy dry sclerophyll forest was calculated as 5 to 50 years, while some intervals in the higher end of the range (c. 25 years) are desirable (Kenny *et al.* 2004). The proposed fire intervals, derived from floristic analysis, are proposed to be compatible with the requirements of threatened fauna with known fire response information (Kenny *et al.* 2004), although more data is needed. Fuel accumulation is rapid in dry sclerophyll forest, with fuel loads of c. 10 t/ha reached within 2–5 years of low intensity fire (Birk 1979; Raison *et al.* 1983; Morrison *et al.* 1996). Kenny *et al.* (2004) suggested that potential conflicts between management strategies for fuel reduction and biodiversity conservation in these forests can be resolved through careful landscape level planning, as discussed in Conroy (1996), Morrison *et al.* (1996), Bradstock *et al.* (1998) and Bradstock and Gill (2001). However, the fire guidelines were developed 20 years ago and need to be updated, with limitations being stated at the time of development (Kenny *et al.* 2004: p. 14): 'The guidelines presented in this document and the accompanying fire response databases are based on current, available data. There are significant gaps in this data… These guidelines will need to be reassessed in the future as new data becomes available. Interpretation of the guidelines for management should be done in association with local expert knowledge and monitoring programs.' There is inherent risk in specifying fire intervals as forests are complex ecosystems and every fire is different. In practice, basing the guidelines on the perceived needs of listed threatened fauna and flora can lead to overwhelming complexity, as there are over a thousand listed species, many of which do not have the same needs. This makes it unlikely that individual species' needs align with the broader needs of the forest ecosystem they inhabit, leading to difficulty in developing an applicable and acceptable fire management practice in diverse forest ecosystems. Indigenous fire practitioners argue that fire interval thresholds are useful considerations, but local biocultural indicators need to be used, which may signal when and how regular, low severity, patchy fire is better suited to certain ecosystems (McKemey *et al.* 2021a). And, while government fire guidelines take into account some ecological data, there appears to be no consideration of contemporary or historical Indigenous cultural fire knowledge or its influence on fire regimes. The application of the *Guidelines for Ecologically Sustainable Fire Management*, its 'fire return intervals' and its high-level recommendations for fire management has, at times, been a contentious issue which is discussed further in Part 2 of this report.

The vegetation, topography and local weather conditions during a fire generate a landscape with spatial and temporal variation in fire-related patches (pyrodiversity), and these produce the biotic and environmental heterogeneity that contributes to biodiversity dynamics across local and regional scales (He *et al.* 2019). The concept that 'pyrodiversity begets biodiversity' stimulates ongoing debate (Parr and Andersen 2006; Kelly *et al.* 2015; Bowman *et al.* 2016; Bliege Bird *et al.* 2018; Corey *et al.* 2019; He *et al.* 2019). However, Trauernicht *et al.* (2015) found local and global pyrogeographic evidence that Indigenous fire management creates pyrodiversity,

which has shaped fire-prone ecosystems and has allowed human societies to cope with fire as a recurrent disturbance over much of Australia.

Climate change and, in particular, warming and drying trends across southeast Australia, are changing fire regimes in these ecosystems, rendering catastrophic fire conditions both more common and more severe. These changes, which are described in more detail below, are likely to have severe implications for plant, animal, fungi and other biodiversity across Australia over coming decades. For example, fire naïve species are likely to be exposed more commonly to fire and to fire regimes that are severe and increasingly frequent, increasing the likelihood of extinction of these species (Nimmo *et al.* 2021). Even fire-prone species are likely to be exposed to fire regimes that exceed their capacity to adapt and persist. Evidence about the impact of changing landscape-scale fire regimes on biodiversity, including as a result of a changing climate has proliferated since the 2019-2020 bushfires (for example, see: de Bie *et al.* 2021; Department of Climate Change 2023; Rumpff *et al.* 2023).

### 1.2.3 Bushfire management

Prescribed fire is widely accepted as a conservation tool because fire is essential to the maintenance of native biodiversity in many terrestrial communities, such as in North and South America, Australia, Africa and Mediterranean Europe (Freeman *et al.* 2017). The intentional use of fire to conserve fire-prone ecological communities, is generally viewed as an ecologically and economically beneficial practice by scientists, policy makers and managers (Marshall *et al.* 2023). The practice is thought to maintain manageable fuel loads that decrease the risks and economic costs of bushfire while restoring or conserving native biota. To best achieve conservation goals, managers should seek to understand contemporary fire–biota interactions across trophic levels, functional groups, spatial and temporal scales, and management contexts (Freeman *et al.* 2017).

As described in their paper on adaptive prescribed burning in Australia, Russell-Smith *et al.* (2020) noted that the emergence of contemporary agency approaches to prescribed burning in Australia only slightly preceded the belated recognition of the significance of Indigenous landscape fire management. Russell-Smith *et al.* (2020) explained that several severe fires in valuable northern jarrah (*Eucalyptus marginata* ) forest (W.A.) in the late 1950s, followed by the devastating fires of 1961, catalysed the development of broadscale fuel reduction burning techniques (Rodger 1961; Underwood 2016), building on the pioneering fire behaviour research of McArthur (1962). Since that time, considerable advances have been and continue to be made in our understanding of landscape fire management requirements (Bradstock *et al.* 2002; Gill 2012; Australasian Fire and Emergency Services Authorities Council 2016; Russell-Smith *et al.* 2020). However, the contribution of Indigenous people's knowledge and practice has not been fully considered and until it is, a key piece of this puzzle will remain missing (Eriksen and Hankins 2014; Pascoe *et al.* 2023; Weir 2023).

The practical application of prescribed burning in Australia is increasingly administratively and logistically complex, often controversial, and climatically challenging, especially in high-fire-risk, more densely settled southern regions (Moritz *et al.* 2014; Russell-Smith *et al.* 2020). An increased likelihood of extreme fire weather and longer fire seasons (Bureau of Meteorology and CSIRO 2020) is driving increased pressure to manage fire through prescribed burning (Gill 2012), although this may primarily focus on strategic protection of assets. Fuel reduction burning can partially reduce risk to human life and economic assets, although trade-offs with risks to environmental assets such as biodiversity and ecosystem services are not well understood (Moritz *et al.* 2014; Hunter and Robles 2020). For example, Hislop *et al.* (2020) tested the effectiveness of fuel-reduction burning at a landscape scale in terms of its ability to reduce the severity of subsequent wildfire and found that, in approximately half the cases, there was a statistically significant decrease in fire severity in recently fuel-reduced areas. In their review of prescribed burning in Australia, Penman *et al.* (2011) found that: (1) prescribed burning can achieve a reduction in the extent of bushfires, but, at the required level, the result is an overall increase in the total area of the landscape burnt; (2) fuel reduction has less influence than weather on the extent of unplanned fire; (3) it is important to incorporate ecological values into prescribed burning programmes, and (4) an adaptive risk management framework combined with enhanced partnerships between scientists and fire-management agencies is necessary to ensure that ecological and fuel reduction objectives are achieved. Morgan *et al.* (2020) recommended a more comprehensive deployment of prescribed burning (rather than focusing resources on bushfire suppression) in southeast Australia to mitigate increasing risks to human lives, property, biodiversity and the environment associated with bushfire due to climate change.

In NSW, there is recognition that fire has important ecological role but that role is yet to be formally recognised within its environmental laws and policies. For example, fire is regularly viewed as a hazard that needs to be prevented, controlled and suppressed; and successful management of fire is demonstrated in the protection of human life, property and environments from harms caused by fire. Protecting Indigenous culture, cultural fire knowledge, and the ecological health and function of fire-adapted landscapes are generally not considered to be relevant purposes under this bushfire hazard reduction paradigm (discussed in Part 2 of this report).

The majority of fire-prone forests in NSW are located in national parks and state forests (Figures 3 and 4). Governments attempt to translate research into policy to guide fire management, such as the NSW Rural Fire Service's *Bush Fire Environmental Assessment Code* (Rural Fire Service NSW 2021) and the National Parks and Wildlife Service's *Living with Fire in NSW National Parks* and *Fire Management Manual* (Office of Environment and Heritage 2013; NSW National Parks and Wildlife Service 2023). The Forestry Corporation of NSW (FCNSW) manages the majority of commercial forests in northern NSW and implements a *Fire Management Policy* and *Fire*

*Management Plan* (Forestry Corporation of NSW 2019). These documents describe the systems developed to implement FCNSW fire management policies and strategies on State forests and other lands managed by FCNSW to meet its obligations and business imperatives. The Plan states that (Forestry Corporation of NSW 2019: p.4):

> *'FCNSW manages 2.19 million ha of native forest and plantations in NSW, with most of the softwood plantation and some of the eucalypt plantation being highly susceptible to severe damage by low to moderate intensity fires for their entire crop life and mortality from high intensity fires. The forest industry is valued at more than $2.4 billion within the State.*
>
> *The main risk to these assets is fire. FCNSW statutory obligations for fire management arise from the Forestry Act 2012 and the Rural Fires Act 1997. These Acts place a responsibility on FCNSW to:*
>
> *» protect life and property from wildfire;*
>
> *» minimise the spread of wildfire from State forests and other lands managed by FCNSW, and*
>
> *» protect State forests from the damaging effects of wildfire.*

Furthermore, FCNSW strives to conserve the qualities and attributes of places that have spiritual, historic, scientific or social value through Aboriginal Partnerships. The *Fire Management Plan* section 10.2.2 mentions cultural burning, stating that cultural burning operations should be planned according to the Bush Fire Environmental Assessment Code and managed in the same way as other prescribed burning (Forestry Corporation of NSW 2019). On their website, FCNSW states (Forestry Corporation of NSW 2023):

> *Regular cool burns, used by Aboriginal communities for thousands of years, helped forests develop a more open understorey and denser canopy. Forestry Corporation has been working with local Aboriginal communities throughout NSW to carry out cultural burning as part of our regular hazard reduction burning program. These partnerships are both continuing culture and lowering the risk of bushfire by reducing fuel levels on the forest floor.*

Federally, the *National Indigenous Forestry Strategy* (Australian Government 2005: p.1) is

> *Built around the vision of an expanding, competitive and ecologically sustainable forest and forest products industry (wood and non-wood) where participation by Australian Indigenous communities and peoples has grown to levels at which they enjoy demonstrably greater economic and social independence and standing in the wider community, while staying connected to their cultural values.*

Overall, opportunities for Aboriginal people to be involved in forest fire management have declined over the last twenty years, as general employment within Forestry Corporation has steadily fallen (Department of Primary Industries 2018). Until the 1990s, the Forestry Corporation employed gangs of forestry field workers to undertake fire management, suppress wildfires and to maintain an extensive road and fire trail network (McCaskill 2020). Many of these employees were local Aboriginal people who actively participated in the management of fire. With general declines in employment, these opportunities are no longer available (Workshop participant 2023). More recently, targeted initiatives 'to train and implement burning to keep communities safe' have been developed to partner with Aboriginal communities (Deans 2023).

Forestry operations have been implicated as a driver of fire behaviour, with Lindenmayer *et al.* (2023) synthesising a body of evidence that indicated there is significantly greater risk of high-severity fire in logged forests relative to undisturbed forest. They found that elevated logging-induced forest flammability can last for several decades after cutting and is a particular concern in areas subject to prolonged and widespread industrial forestry. Lindenmayer *et al.* (2023) recommended a cessation to widespread industrial logging in Australian native forests, including post-fire (salvage) logging, due to the links between logging and fire and their combined effects of flammability as well as on forest condition and biodiversity.

In general, timber harvesting creates a comparably low amount of disturbance in NSW forests, averaging 5% of annual disturbance, while wildfire accounts for 57% and drought 32% of average annual disturbances to forests (Hislop *et al.* 2021). Keenan *et al.* (2021) refute suggestions that past timber harvesting had a significant impact on the extent and severity of fires. Bowman *et al.* (2021) found that past logging and wildfire disturbance in natural forests had a very low effect on severe canopy damage, reflecting the limited extent logged in the last 25 years (7.8% in northern NSW). The most important variables determining severe canopy damage were broad spatial factors (mostly topographic) followed by fire weather. Timber plantations affected by fire were concentrated in NSW where 26% were burnt by the fires and >70% of the NSW plantations suffered severe canopy damage showing that this intensive means of wood production is extremely vulnerable to wildfire (Bowman *et al.* 2021). Keenan *et al.* (2021) stated that proposals that ceasing timber harvesting will reduce future fire risk are unfounded, and this policy option may have impacts on the capacity to prepare for, and respond to, future bushfires. International evidence suggests that appropriate timber harvesting can be part of active management practices to reduce future fire risk. Policies and practices to mitigate fire risk and impacts should be evidence-based, and they should integrate multiple models and different perspectives. Indigenous, local and professional fire knowledge, and the full breadth of evidence from bushfire research, should inform strategies for reducing fire impacts and making fire-prone Australian forests more resilient and human communities safer (Keenan *et al.* 2021).

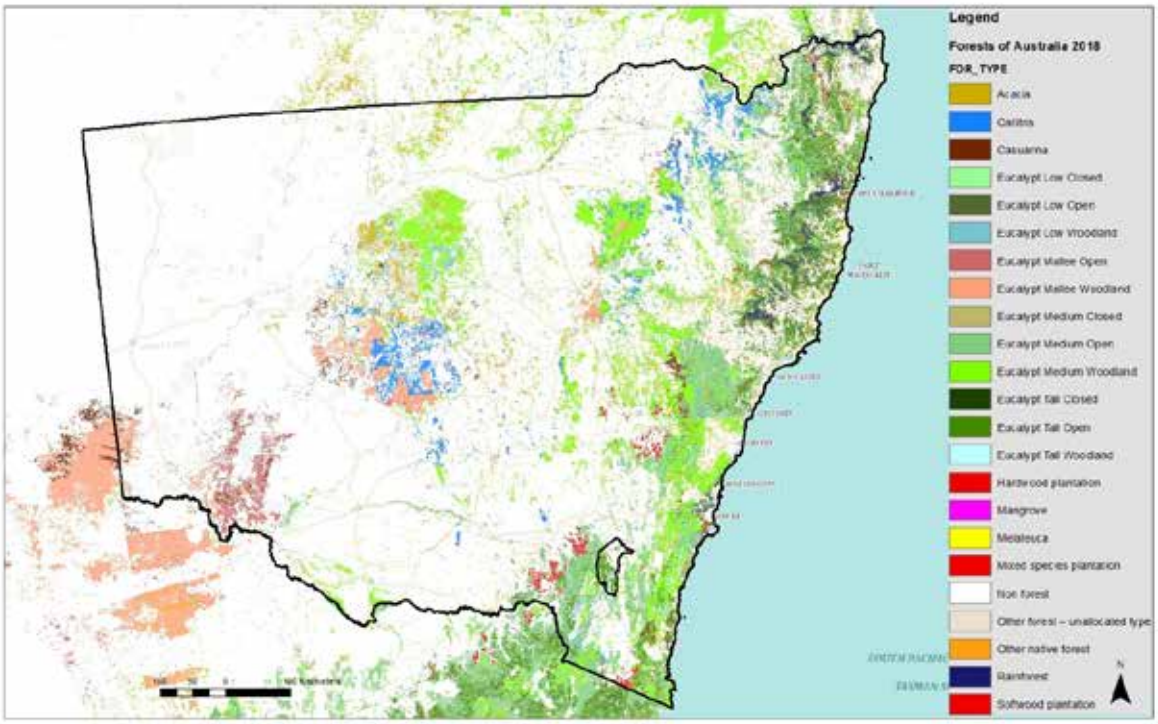


**Figure 3: Forests of New South Wales (Australian Bureau of Agricultural and Resource Economics and Sciences 2018)**

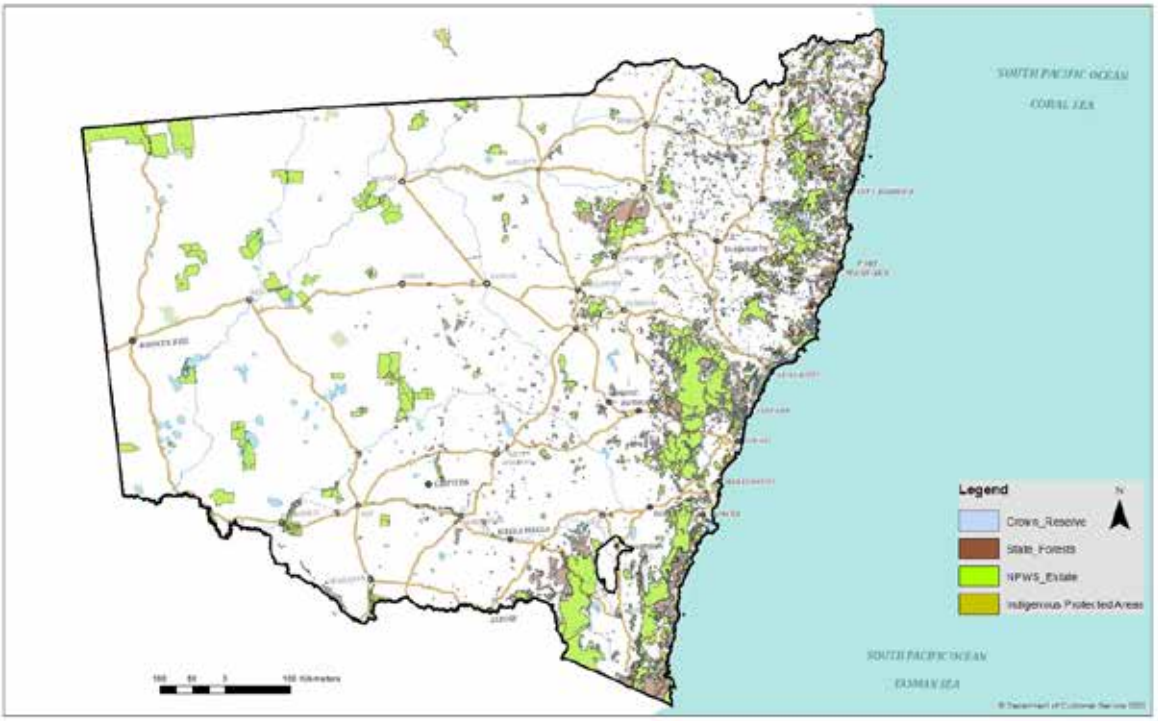


**Figure 4: National Park, State Forest, Crown Reserve and Indigenous Protected Area estates in New South Wales**

### 1.2.4 Interdependence of Aboriginal fire management practices and Australia's unique native vegetation

As eloquently explained by Russell-Smith *et al.* (2020), the use of fire in our contemporary environment for a variety of landscape scale management purposes has an ancient tradition in Australia. From the arrival of people at least 65,000 years ago (Clarkson *et al.* 2017), cultural burning was applied to modify habitats, facilitate hunting and for innumerable cultural activities (Russell-Smith *et al.* 2020). Indigenous burning has been implicated in the extinction of megafauna (e.g. Flannery (1994), Miller *et al.* (2005); Johnson *et al.* (2016), Saltré *et al.* (2016)) and altered habitat conditions (e.g. Singh *et al.* (1981); Miller *et al.* (2005)), although these alleged impacts need to be appreciated in the setting of volatile Late Tertiary climate variability (Price *et al.* 2011; Sakaguchi *et al.* 2013; Wroe *et al.* 2013; Cohen *et al.* 2015). Prehistoric burning practices, and the scales over which these were applied, have changed markedly through time (Russell-Smith *et al.* 2020). For example, given the changes in occupation patterns, population sizes, technological development and mobility apparent in the archaeological record since the mid-Holocene (i.e. the last ~5,000 years) (Adeleye *et al.* 2023; Constantine *et al.* 2023), the continental patterning and application of burning practices are suggested to have developed only over the past few thousand, especially the last 1500 years (Williams *et al.* 2015; Russell-Smith *et al.* 2020).

Russell-Smith *et al.* (2020) stated that the historical and artistic record of early (late 18th–mid 19th Century) European settlement provides us with restricted, mostly localised, occasionally regional, typically tantalising glimpses of Aboriginal people's burning practices and native vegetation conditions at that time. Most prescient was the explorer Thomas Mitchell (1848: p. 412), who, after various expeditions through what is now central-western New South Wales, famously observed that 'fire, grass, kangaroos, and human inhabitants, seem all dependent on each other for existence in Australia' (Russell-Smith *et al.* 2020). Only in recent decades has the magnitude and complexity of Indigenous landscape management and modification have begun to be recognised (Nicholson 1981; Pyne 1991b; Bowman 1998), especially that associated with agricultural economies in prehistoric temperate south-eastern Australia (Benson and Redpath 1997; Gott 2005; Gammage 2011; Pascoe 2014; Jurskis 2015; Russell-Smith *et al.* 2020; Rawluk *et al.* 2023). For example, see *Case Study: Archaeological and ethno-historical records of Aboriginal fire management in the New England Tablelands, North East NSW*, which presents some of the evidence related to historical Aboriginal fire management in the region of this study (Godwin 1990; McKemey *et al.* 2021a).

Russell-Smith *et al.* (2020) opines that much of our present-day understanding of the cultural and ecological importance of Indigenous fire regimes is indebted to work by Rhys Jones (1969) in his ground-breaking paper, 'Fire-stick farming'. Jones queried the view predominant at that time that the Australian landscape was 'natural'; instead, he suggested that modern Australia has been substantially altered (farmed), particularly through the agency of fire. Congruent with widespread views concerning the importance of prescribed burning for managing fuel loads, the act of undertaking extensive Indigenous landscape burning can also be understood as an obligation for 'cleaning up the country' (Haynes 1985; Pyne 1991b; Lewis

1994; Russell-Smith *et al.* 2020). Russell-Smith *et al.* (2020: p. 306) summed up their review of adaptive prescribed burning with: 'we accept the lessons from antiquity and recent history that the use of prescribed fire in contemporary Australia is essential for addressing, although not always being able to deliver on, reducing wildfire risks and meeting a variety of societal and environmental needs.'

### 1.2.5 Contemporary fire management

Since the 1960s, prescribed fire for bushfire management has been developed and tested by various government agencies, with varying results. The effectiveness of these practices is often subject to close examination following catastrophic bushfire events. Since 1939, more than 50 public inquiries, reviews and royal commissions have been held into matters concerning the management of fire in landscapes, including prescribed burning (Morgan *et al.* 2020). Following the 'Black Summer' fires in 2020, the Australian Government launched a Royal Commission into National Natural Disaster Arrangements ('Bushfires Royal Commission') while state governments in southeast Australia initiated various bushfire inquiries.

The unprecedented 'Black Summer' megafires of 2019–20 in southeast Australia burnt almost 19 million ha (Figure 5), destroyed over 3,000 homes, killed 33 people directly and led to the death of approximately another 430 people through smoke pollution (Filkov *et al.* 2020; Nolan *et al.* 2020; Wintle *et al.* 2020; Rumpff *et al.* 2023). The 2020 Bushfires Royal Commission report (Binskin *et al.* 2020) highlighted the importance of cultural fire management and recommended that Australian, state, territory and local governments should 'engage further with Traditional Owners to explore the relationship between Indigenous land and fire management and natural disaster resilience' (Recommendation 18.1) and 'explore further opportunities to leverage Indigenous land and fire management insights, in the development, planning and execution of public land management activities' (Recommendation 18.2). The 2020 NSW Bushfire Inquiry final report (Owens and O'Kane 2020) made two recommendations (Recommendations 25 and 26) regarding Indigenous cultural burning, the most pertinent being 'Government commit to pursuing greater application of Aboriginal land management, including cultural burning, through a program … working in partnership with Aboriginal communities. This should be accompanied by a program of evaluation alongside the scaled-up application of these techniques.' This is in contrast to past bushfire inquiries, most of which have ignored the experiences, concerns, rights and interests of Indigenous peoples (Williamson *et al.* 2020). Some past bushfire inquiries have considered Indigenous fire management. However, they concluded that there was very limited scientific information available to inform its effectiveness for bushfire management, or focused on past Indigenous burning practices while overlooking the opportunities that exist today (Esplin et al. 2003; Environment and Planning Committee 2017; Neale et al. 2020).

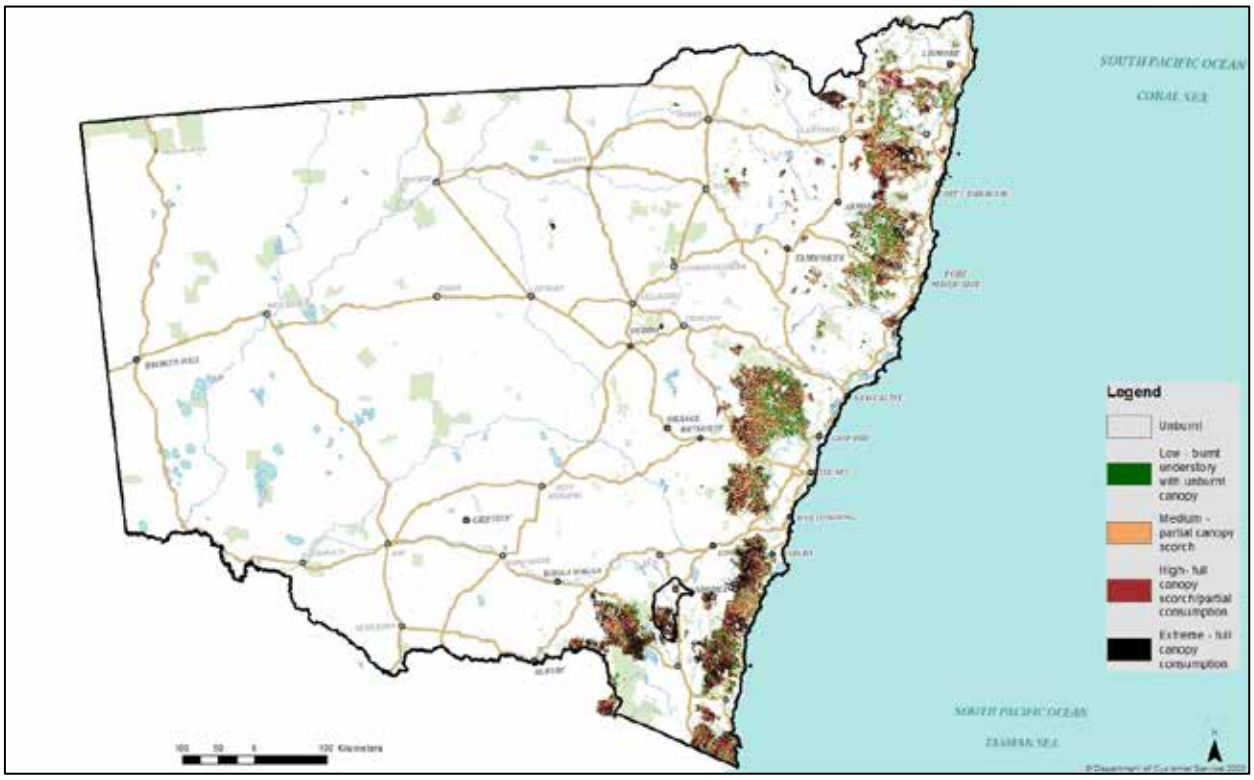


**Figure 5: Fire extent and severity of the 2019/20 Bushfires in New South Wales (Department of Planning and Environment 2020)**

Williamson et al. (2020) suggested that the most urgent forum where Indigenous people must have a strong presence is in the context of post-disaster inquiries and commissions, including any co-design of new policies and programs created in response to the disasters. In *Transformative actions for community-led disaster resilience*, Keating *et al.* (2022: p. 4) supported the call for Indigenous engagement in post-disaster inquiries and commissions, and found that:

> *Community-led disaster resilience building presents the opportunity for system changes that can break cycles of disadvantage and enhance long-term thriving… Community knowledge, skills and lived experience are a highly valuable but largely under-utilised resource. This includes Australia's First Nations peoples, whose custodianship of Country dates back tens of thousands of years. Disaster-affected communities across Australia are issuing a clarion call for their direct involvement as leaders in planning and decision-making toward disaster resilience, with the support of local governments, agencies and NGOs. Now is the time to unlock this under-utilised potential… if implemented, these actions would be transformative for our disaster resilience system, supporting community-led resilience efforts in every Australian community.*

Image: Jubullum community members and Firesticks practitioners light a cultural burn near Tabulum, northern NSW (photo: Michelle McKemey).

Since the Black Summer Bushfires, several papers have suggested that colonialism, disruption of cultural burning and conservation based on the concept of 'wilderness' drove these catastrophic bushfires (Fletcher *et al.* 2021b; Laming *et al.* 2022; Mariani *et al.* 2022; Mariani *et al.* 2023). In their paper, *Feeding the flames: how colonialism led to unprecedented wildfires across SE Australia*, Mariani *et al.* (2023) provide the first empirical evidence that the regional landscape before British invasion was a cultural landscape with limited tree cover as it was maintained by Indigenous Australians through cultural burning. They suggest that the removal of Indigenous vegetation management has altered woodland fuel structure and that much of the region was predominantly open before colonial invasion. The post-colonial land modification has resonance in bushfire occurrence and management under the pressing challenges posed by climate change (Mariani *et al.* 2023). In contrast, other papers have criticised these views (Feller 2023) or concluded that Aboriginal people did not change the fire regime after their arrival in Australia >50,000 years ago (Mooney *et al.* 2011; Constantine *et al.* 2023), or that the impact of climate change overwhelmed any modifications to fire regimes by Aboriginal landscape burning over geological time periods (Sakaguchi *et al.* 2013).

With increasing calls for action from Indigenous voices, the general public, academia and landholders, Indigenous cultural burning practices are being revived in southeast Australia (McKemey 2020). Simultaneously, the public is questioning the effectiveness of existing bushfire management strategies (Firesticks Alliance 2020). Some Indigenous leaders feel too little cultural burning has actually been implemented on the ground since the Black Summer Bushfires despite the overwhelming interest in Aboriginal cultural land and fire management (Bowring 2023).

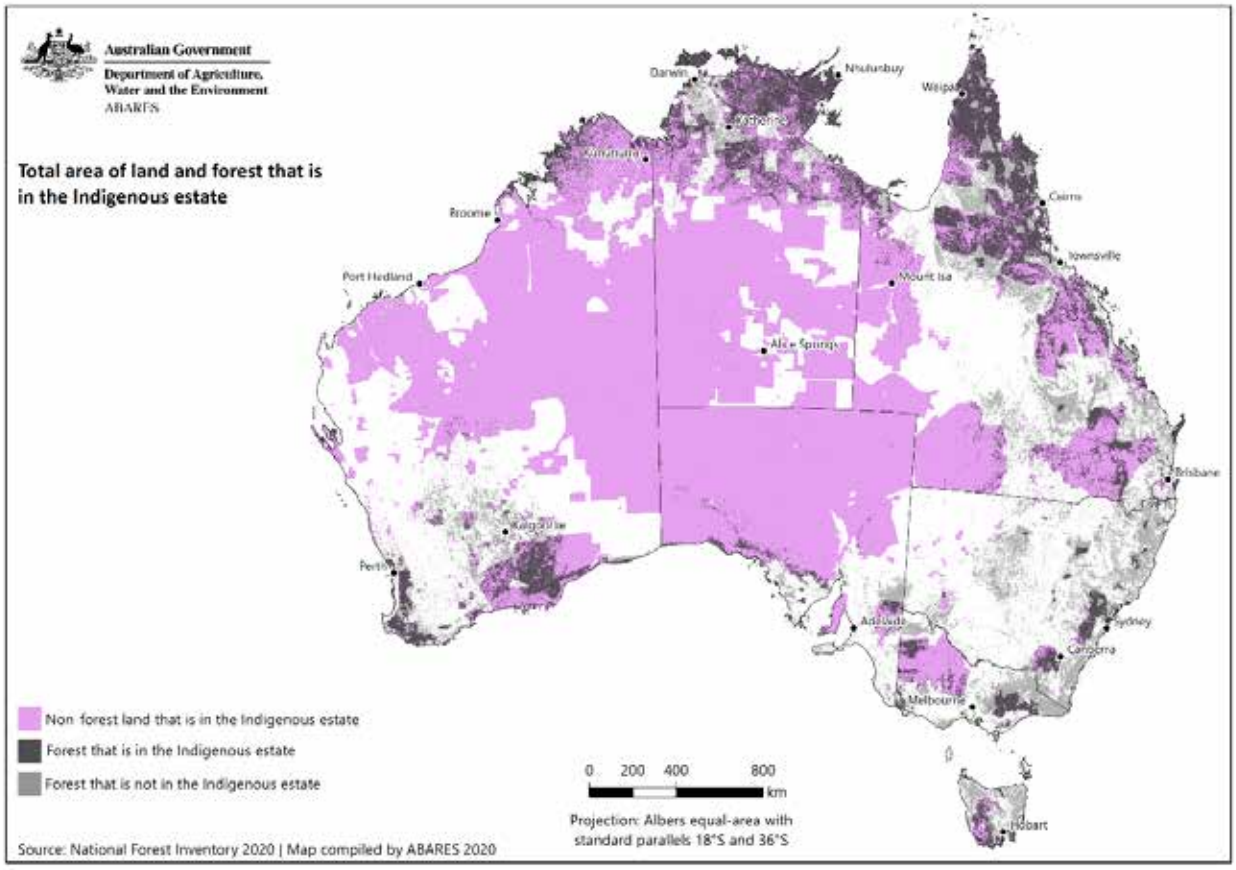


**Figure 6: Total area of land and forest that is in the Indigenous estate across Australia (Jacobsen *et al.* 2020)**

Indigenous communities have substantial interests in land across Australia, with the Indigenous estate defined as the total area of land over which Indigenous peoples and communities have either ownership, or management, or rights of use for customary purposes (ABARES 2023). Across Australia, the total area of land in the Indigenous estate is 438 million hectares (57%), and the total area of forest in the Indigenous estate is 70 million hectares (Figure 6; Jacobsen et al. 2020). Of these, NSW has the lowest proportion of total land area that is in the Indigenous estate, with 4,862,000 ha in the Indigenous estate, a proportion of 6.1% of total land area in NSW (80,131,000 ha). In comparison, other Australian states and territories have from 24% (Tasmania) to 77% (Northern Territory) of land that is in the Indigenous estate (Jacobsen et al. 2020). In NSW, 15% of total forest area

is in the Indigenous estate, a total area of 3,029,000 ha (of 20,368,000 ha total forest area in NSW) (Figure 7; Jacobsen et al. 2020). Again, NSW has the lowest proportion of forest area in the Indigenous estate, with other jurisdictions ranging from 24% (Tasmania) to 79% (Northern Territory) (Figure 8; Jacobsen et al. 2020). Large areas of NSW are under Native Title applications or determinations (Figure 9; Geospatial Services 2023). Despite NSW having the largest population of Aboriginal people in Australia, it has the smallest proportion of land and forest in the Indigenous estate.

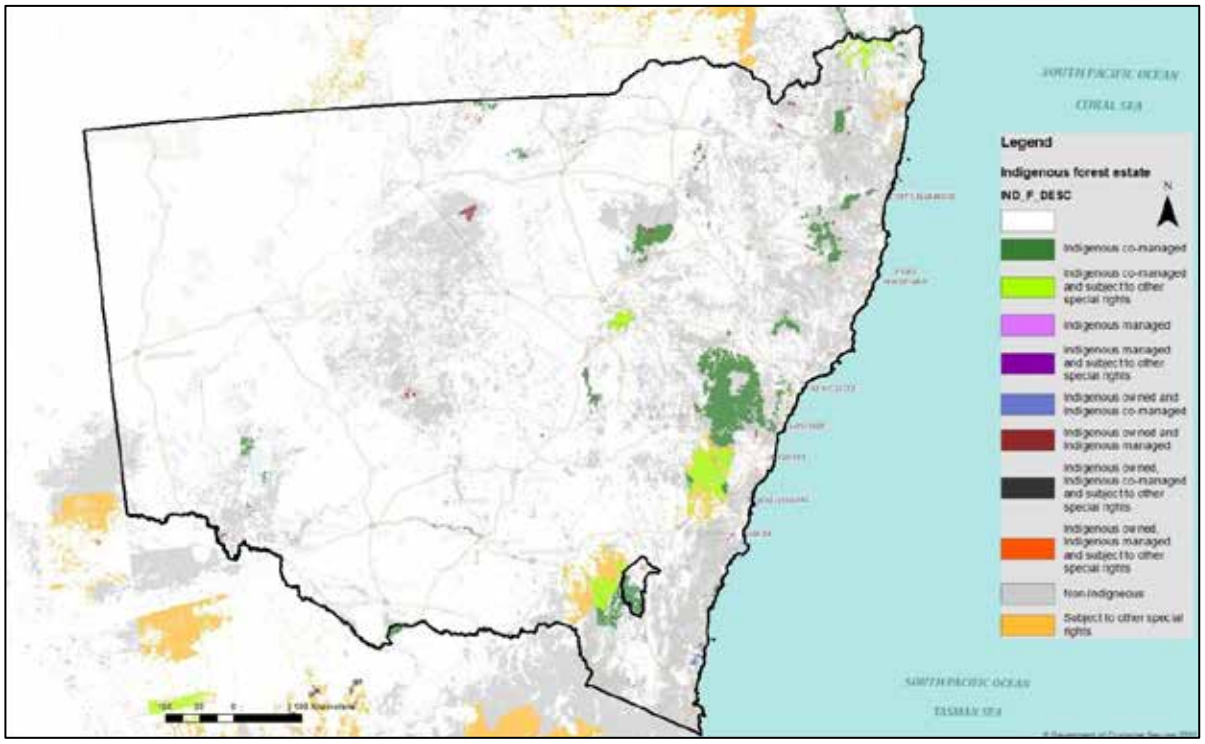


**Figure 7: Area of forest that is in the Indigenous estate in NSW, by separate Indigenous estate attributes (Jacobsen *et al.* 2020)**

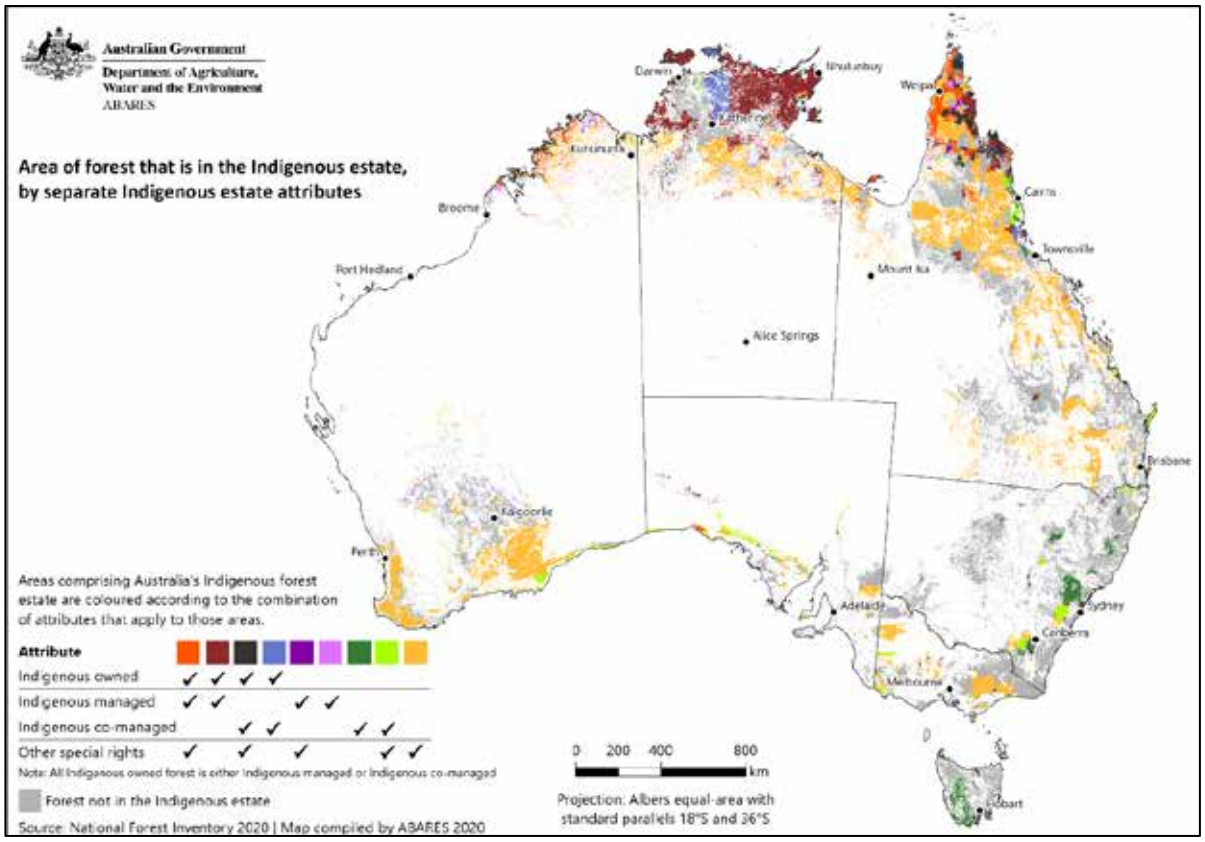


**Figure 8: Area of forest that is in the Indigenous estate across Australia, by separate Indigenous estate attributes (Jacobsen *et al.* 2020)**


**Figure 9: New South Wales Native Title Claimant Applications and Determination Areas as per the Federal Court (Geospatial Services 2023)**

This presents an opportunity to improve social, economic, cultural and environmental outcomes through the increased application of cultural burning across public and private lands in NSW (Owens and O'Kane 2020; Williamson 2021; Maclean *et al.* 2023; Rawluk *et al.* 2023). Pascoe and Gammage (2021: p 132) insist that we must 'start now'; we must 'learn to burn and burn to learn'. Investigating the impacts of wildfire on Indigenous cultural values, van Leeuwen and Miller-Sabbioni (2023) suggested that, as the owners of a vast and growing estate, Aboriginal people 'have the right to lead the decision making and implementation process for the management of their Country… Fire was and still is an efficient tool used with great skill and effect by Indigenous Australian land management practitioners; it is embedded in their stewardship of Country and entwined from time immemorial with normative customary traditions, cultural values, myths, rituals and lore.' In order to empower Indigenous leadership and participation in wildfire recovery, cultural burning and land management Robinson *et al.* (2023: p 430) found that:

- *[there are] persistent calls from Indigenous people to undertake cultural fire management and to support Indigenous leaders and fire practitioners to be involved in all aspects of landscape fire management, including planned burning and wildfire prevention, mitigation, response and recovery.*
- *Indigenous communities aspire to lead cultural burning and elements of wildfire recovery and related management activities, but continue to be hindered in their*

*efforts. Reasons for this include inadequate decision-making and resourcing, current regulatory and legal frameworks, disconnection with and lack of access to Country, conflicting views around fire regimes, fragmented partnerships, and a lack of information about Indigenous wildfire management.*

*• A key step in overcoming these constraints is to identify short-term goals to increase Indigenous leadership and capacity in fire management, as well as longer-term objectives that will establish a broader framework for empowering Indigenous decision making and involvement in all aspects of landscape fire management, including planned burning and wildfire prevention, mitigation, response and recovery*.

A key recommendation from the comprehensive review *Australia's Megafires: Biodiversity Impacts and Lessons from 2019–2020* was to 'Support Indigenous land management' (Woinarski *et al.* 2023: pp 458-459):

> *The 2019-20 wildfires showed that the management currently implemented in Australia may be inadequate to pre-empt and control the fires that are likely to characterise our future. As a community, we will need to also recognise and apply other fire knowledge systems and practices, in particular the long-honed and intricate knowledge held by First Nations people to care for Country. Limiting the spread of wildfire in the catastrophic weather conditions that will become increasingly common may remain a management challenge, but there is much to be gained from following Indigenous leadership to reset our relationship with fire, and its application for looking after and connecting with our country.*

The authors suggested the following course of action:

> *Enable the broader application of Indigenous-led wildfire planning and recovery, and Indigenous rights and authority to care for Country through fire and other management practices. This will require more support for increased capacity for planning, on-ground management and learning. It will also require the removal of barriers that currently impede such uptake, including current decision making frameworks and processes, insufficient resourcing, current regulatory and legal frameworks, disconnection with and lack of access to Country, conflicting views around fire and burning regimes, fragmented partnerships, and a lack of information about Indigenous wildfire management*.

One way to achieve this is outlined by Victor Steffensen (2020: 213), Aboriginal fire practitioner and leader, as his vision in *Fire Country*:

> *We need to work towards a whole other division of fire managers on the land, looking after Country in all the ways possible, which includes fire as well as other practices. A skilled team of Indigenous and non-Indigenous people that works with the entire community, agencies and emergency services to deliver an effective and educational strategy into the future. One that is culturally based and connects to all*

> *the benefits for community.*
> *To do that we need to draw on all of our Aboriginal expertise to train people and start upskilling the fire managers of the future. To allow Indigenous practitioners from all states to bring together their values and leadership. We need to see three-year training courses of learning out on Country to graduate our Indigenous fire practitioners… we need to start training the trainers, building the teams, getting people out there on the many different levels. Build from the foundation of Aboriginal knowledge as the practical knowledge base to work from, and adding the Western knowledge to support a stronger solution.*

These views are echoed more widely, such as through the broader public and Emergency Leaders. For example, in their *Australian Bushfire and Climate Plan*, Emergency Leaders recommended to (Mullins *et al.* 2020: p 13):

> *Develop an Indigenous-led National Cultural Fire Strategy focused on empowering Indigenous-led fire knowledge and practice to support Indigenous Communities with climate change, bushfire and natural disaster resilience. This should occur alongside immediate and long-term resourcing of Indigenous-led cultural fire and land management programs delivered on private and public tenure at landscape scales all year round.*

In their research into the native forestry industry's social licence to operate and potential opportunities to improve, Stollznow *et al.* (2023) surveyed key opinion leaders, local communities and the general public (>2,220 surveys undertaken). They found that the majority of participants (58%) agreed that Aboriginal peoples should be involved in the management of native forests in NSW. In every focus group, participants discussed their interest in having Indigenous involvement in managing the forest by use of fire. There was admiration and trust in the Indigenous approach and strategies. Participants collectively believed they would feel a greater degree of confidence if there was Indigenous involvement based on the understanding that this community had effectively managed forests prior to colonisation and should be given the opportunity to demonstrate their wisdom (Stollznow *et al.* 2023).

To summarise, there is overwhelming support for the empowerment of Aboriginal cultural land and fire management in NSW. Despite this general goodwill peaking following the Black Summer Bushfires, many barriers remain which have curtailed the implementation of a broadscale approach to Aboriginal cultural landscape management. In order to progress, concerted and coordinated efforts are required to identify and overcome the barriers to cultural burning.

# 2. Project Aim

In NSW, there is a large number of inter-related pieces of legislation, regulations, and policies that influence how cultural fire management is planned and implemented. The current complexity of legal requirements makes it difficult to understand and navigate the process to plan and implement cultural burning (McCormack *et al.* 2022; McKemey *et al.* 2023). Across the board, cultural burn practitioners, Aboriginal communities and government agencies all agree that a more streamlined process is needed to facilitate more widespread cultural fire management in NSW (McKemey *et al.* 2023).

The North East NSW Forestry Hub engaged Melaleuca Environmental Consultancy Services and University of Adelaide to examine the legal and policy constraints to implementing Aboriginal fire management practices in New South Wales public and private native forests. The aim of this project is to provide a pathway and process for removing any policy, legal and other identified barriers that are inhibiting the delivery of Aboriginal burning practices in New South Wales. Part A of this report has provided a literature review and background information on fire management in NSW. In Part B, we present the results of interviews with experts and a workshop with cultural fire managers; and the results of our analysis of the laws and policies of New South Wales that regulate the management of native vegetation and their effect on Aboriginal burning practice. Following this, we provide recommendations to address the laws and policies which may be inhibiting the delivery of Aboriginal burning practices and a concluding summary of this project.

# 3. Case Study 1

**Archaeological and ethno-historical records of Aboriginal fire management in the New England Tablelands, North East NSW (from McKemey (2020); McKemey et al. (2021a))**

The archaeological evidence discovered in the New England Tablelands region is relatively recent—dating from the last 9000 years—with most current archaeological dates within the last 5000 years. Eastern Australia was probably occupied much earlier but older sites have not yet been found in this region (Beck 2006). The archaeological consensus about the New England Tablelands is that prior to colonisation, Aboriginal occupation was sparse (Sonter 2018) and perhaps best summarised by Flood (1976: 47): '... in upland areas population decreases as the elevation increases and that population as a whole was lower than on the coast or inland plains' of NSW. Evidence suggests that although the New England Tableland was cold in winter it was not abandoned by Aboriginal custodians (Oxley 1820: 288–90 in Beck *et al.* 2015; Godwin 1990). The inhabitation was patterned, not random. Activities in the landscape were focused at places where people lived and worked (quarries, camp sites and ceremonial sites), with a preference for locales with clustered resources, such as lagoons, and also along tracks and pathways between sites used for both ritual and secular purposes (Beck *et al.* 2015). Food and material resources were exploited according to their availability, and people moved for social purposes as well. Some ceremonial places (such as bora grounds) were visited repeatedly by large groups of people (Gardner 1854), being parts of the landscape imbued with meaning (Beck *et al.* 2015).

Most analyses of ethno-historical records concluded that Aboriginal burning of the landscape was a regular practice in the New England Tableland during early settlement (Table 1). Fire was noted as being a tool for hunting macropods and arboreal mammals, facilitating access, maintaining the landscape (e.g. as grasslands or yam fields) and manipulating resources (e.g. attracting prey animals to freshly burnt ground; Table 6.2; Norton 1972; Godwin 1990; Benson and Ashby 2000; Sonter 2018. Norton (1972: 9) claimed that 'the pioneers discovered that New England was characterised by a relatively stable grassland community of savannah woodland with a park-like appearance'. He went on to suggest that colonial disruptions to traditional Indigenous fire regimes changed the Tableland from a park-like grassland, grazed by marsupials and frequently but irregularly burnt, to a mixture of brush and savannah grazed mainly by ruminants (introduced cattle and sheep) and periodically burnt, often on an annual basis. Godwin (1990) investigated whether Aboriginal firing was necessary to produce the 'parklands' and concluded that Aboriginal burning of the landscape did play a part in maintaining a certain mosaic of vegetation (such as grasslands), if not actually creating it. The New England Tableland is a complex of different vegetation types and Norton's (1972) comments were likely only applicable to the basaltic areas of the central plateau. Many parts of the Tableland could not have supported these open grassy woodlands and such 'parkland' areas could only occur in areas predisposed to such vegetation, such as in low-lying areas of cold air drainage and high water tables particularly on higher nutrient soils (Benson and Redpath 1997; Benson and Ashby 2000; Lunt and Morgan 2002; Hunter and Hunter 2016; McKemey *et al.* 2021b).

Banbai Aboriginal Ranger Kane Patterson lights a cultural fire in dry sclerophyll forest at Tarriwa Kurrukun Indigenous Protected Area, adjoining New Valley State Forest, in the New England Tablelands (photo: Michelle McKemey).

Based on limited explorers' notes, Benson and Ashby (2000) suggested that Aboriginal fire regimes in the New England Tableland may have reduced the number of saplings in the understorey, but there must have been sporadic regeneration events coinciding with appropriate climatic conditions. They stated that Aboriginal burning probably varied in different habitats and was probably less frequent away from access routes and in the rockier terrain of the granite regions. Today, these areas support a diverse shrub layer, many species of which require a variable regime of fires every 5 to 50 years to persist (Kenny *et al.* 2004). In an analysis of ethno-historical studies, Enright and Thomas (2008) presented evidence of the occurrence of both open forests and woodlands and dense shrubby vegetation communities during the early European settlement of southern Australia. They suggested that frequent Aboriginal burning may have been a feature of some ecosystems but not others across these landscapes, correlated with resource richness and Aboriginal population size at the time of European settlement. Some forests with an open and grassy understorey may have been natural, while others were maintained through the managed use of fire by Aboriginal peoples. Other forested areas had dense, shrubby understoreys and may have experienced fire regimes similar to those of today. Dry sclerophyll forest, the most common vegetation community in the New England Tablelands, had a low fuel load, low to moderate resource (water, plants, animals) level, an intermediate to long natural fire interval (30–100 years) and consequently an 'intermittent or not actively managed' level of use of managed fire by Aboriginal peoples in the pre-European period (Table 1 in Enright and Thomas 2008).

**Table 1: Ethnohistorical references to Aboriginal burning practices on the New England Tableland and adjacent gorge country (derived from Godwin 1990).**

| Source | Observation | Time of year | Location | Comment | Reference |
|---|---|---|---|---|---|
| Oxley (1820: 290) | 'The great number of fallen trees was in some measure accounted for by the men observing about a dozen trees on fire near this camp*, no doubt the more easily to expel the opossums, rats and other vermin which inhabit their hollows' | September | Limbri, Moonbi Ranges | Small scale burning associated with hunting on the tablelands<br><br>* Aboriginal camp of 8-10 men, plus women and children (Godwin 1990) | Oxley (1820); Godwin (1990); Norton (1972) |
| Oxley (1820: 310) | 'Numerous smokes arising from natives' fires announced a country well-inhabited' | Late September | Gorges | Refers to camp fires (?) in the gorges (Godwin 1990) | Oxley (1820); Godwin (1990) |
| Mitchell (1848: 413) | 'The omission of the annual periodical burning by the natives ... kangaroos are no longer to be seen there; the grass is choked by underwood; neither are the natives to burn the grass ... these consequences although so little considered by the intruders, must be obvious to the natives with their usual acuteness as soon as cattle enter their territory' | - | | | Sonter (2018) |
| Marsh (1851) | 'The great [summer] heat is sometimes increased by the burning grass, which is generally lighted by the aborigines carrying fire about with them; these fires, when there is a wind, will burn for days, but if there is no wind, there is almost always a dew at night, which often puts them out. The sight of fires at night is sometimes magnificent, as whole ranges of mountains are lighted up by them. They have a great effect on the character of the country, as they burn many of the young trees, and thus prevent the forest from being too thick. All the country, except when heavily stocked with sheep, is sure to be burnt at least every two to three years … young acacias spring up luxuriantly where the fires have been under the trees' | - | New England Tablelands | | McDonald (1994); Sonter (2018); Marsh (1867); Norton (1972) |
| Henderson (1851, vol. 1: 232) | 'At one time a distant fire led me to suppose that I was near… black camp (sic), but I soon found that the bush, had been on fire, and that the burning trees and logs were scattered all around' | June | | Not definitely attributable to Aborigines, but description similar to Oxley's observation: natural cause unlikely as lightning strikes uncommon at this time of year (Godwin 1990) | Henderson (1851); Godwin (1990) |



| | | | | | |
|---|---|---|---|---|---|
| Henderson (1851, vol. 2: 13) | 'Large tracts of country are also frequently burned by the natives sometimes in hunting, at others by accident, from the dropping of sparks from their fire sticks' | - | Refers to the upper reaches of the Macleay River (Godwin 1990) | | Henderson (1851); Godwin (1990) |
| Irby (1908: 72) | 'The country around three sides of [Bolivia] station is now on fire, and on some days we have it as dark here from smoke as you have from fogs in November. It is generally supposed that these large fires are caused by the natives dropping their fire sticks accidentally, and not from any design on their part of trying to burn the settlers out of their station. They sometimes burn the old grass off, in order that they may have a chance of killing the kangaroo when they go to feed on the young grass that springs up, and also when they think they are likely to be pursued they fire it to prevent their track being seen' | December 1842 | Bolivia Station (between Guyra and Tenterfield) | Large-scale firing of countryside, but only presumed to be by Aborigines<br><br>Definite use of fire for hunting purposes, but probably of a small scale nature (Godwin 1990) | Irby and Irby (1908); Godwin (1990) |

North East NSW Forestry Hub

THE UNIVERSITY of ADELAIDE

# PART B

## Legal and Empirical Research

**The second and third components of a report to the North East New South Wales Forestry Hub**

**4 July 2024**

make history.

# 4. Introduction

**"I'd like to think we were all on the same side, and the overarching picture of cultural fire is that it's good for everyone."**

*Participant – Ngii Ngii Workshop, 7 November 2023*

A diverse range of laws are relevant to cultural fire management. Legislation can restrict, for example, when, how and where a fire can be lit, whether a proposed burn must be assessed and/or approved by a government agency, and whether, when, how and by whom smoke may be emitted. Overlaps and gaps in this regulatory system complicate cultural burning by allocating responsibility across many different agencies, with different statutory priorities. None of these agencies has a statutory mandate to protect or promote the health of cultural landscapes or communities or to reinvigorate or sustain healthy, culturally-informed fire practices.

This complex muddle of legal instruments and agency oversight is important context for the analysis that follows.

There is widespread recognition that 'the law' can be a barrier to cultural burning.[1] This proposition has been recognised overseas (e.g., Hoffman et al 2022; Clark et al 2021), and in Australia, including in the Royal Commission into National Natural Hazards Arrangements (2020) and the NSW Bushfire Inquiry Report (2020).[2] For example, the Final Report of the NSW Inquiry into the 2019–20 bushfires, states:

> *There appears to be great opportunity for restoration and revitalisation of cultural practices in south eastern Australia and improvements in landscape health, along with benefits in managing bush fire risk. But wider implementation of traditional land management practices* ***will require review of policies and procedures, and potentially regulatory change****, clear acknowledgement of the cultural basis for the practices and Aboriginal ownership of knowledge, and a commitment from Government to invest in building knowledge and capacity for Aboriginal communities to have a greater role in land management, including planning and preparation for bush fire* (NSW Bushfires Inquiry 2020, 186, *emphasis added*).

There is also work underway by many different NSW government agencies, landholders, and practitioners, to tease out and begin to overcome the practical, financial and policy barriers to cultural fire in NSW (e.g. McKemey, various; Williamson 2021).

Despite this recognition, no research project to date has sought to specifically and exhaustively identify the barriers that stem from law; and there is no publicly available, comprehensive analysis of the ways that law hinders cultural fire in NSW. Diagnosing these barriers is an important step towards implementing the recommendations of the National Royal Commission and the NSW Inquiry.

This report responds to that gap. It identifies legal barriers from legislative instruments and case law, stakeholder interviews, a project workshop and academic and government literature. The project interrogates these legal barriers through the lens of important legal principles, including the principle that was used to justify the colonisation of the continent: *terra nullius*, describing what we now call Australia as a 'land belonging to no one'. The report develops the list of barriers into eight propositions, that articulate how, and perhaps even why, the law hinders cultural fire in NSW.

These barriers are substantial but not insurmountable. This report seeks to inform and support the development of practical reform pathways, to empower traditional owners and cultural knowledge holders to reclaim responsibility for cultural fire, and to better care for Country in NSW.

[1] Here, 'law' is defined broadly to include legislation, regulations, policies, resourcing, agency staffing and operational plans, management, statutory interpretation and litigation rules.

[2] For policy and other barriers, identified in earlier research, see McKemey et al; Maclean et al. (2018); Neale et al. (2019a); Tamarind Planning (2017); (Weir and Freeman 2019); Robinson et al. (2016); Zander (2018); Smith et al. (2018); Hill (2003); Neale et al. (2020b).

# 5. The legal framework

There is a complex and intersecting framework of laws and policies that govern human interactions with purposeful fire, including cultural fire, in Australia. Relevant laws include fire-specific legislation that establishes the fire agencies and gives them power to assess and approve proposed fires at certain times of year; forestry and native vegetation management laws, that govern when fire can be used and when it must not be used; as well as laws about insurance, public health and air pollution, emergency management; and liability rules, for example, about actions that may amount to negligence or a public nuisance (Figure 1).

This legal anatomy is important for the work of this report. Cultural fire does not constitute an emergency, nor is it specifically supported in forestry or native vegetation management laws. However, the purposes and implementation of those other laws can, and do, act as a barrier to cultural burning. For example, land management laws that actively promote fire in some circumstances (most prominently, for hazard reduction), are typically silent on cultural fire. Environmental laws are, at least in theory, more closely aligned with the values of cultural fire management, such as fostering healthy ecosystems, but in practice, are often interpreted to exclude fire.

In this section of the report, we describe the relevant legislative frameworks, their underpinning purposes and their operation in relation to cultural fire in NSW. We highlight the ways in which these laws enable, prohibit and complicate cultural burning.


**Figure 1.** McCormack et al, 'An Anatomy of Australia's Legal Framework for Bushfire' (2022) 46(1) *MULR* 156.

## 5.1 Components of law

'The law' is made up of different components. Some are guiding principles, some are enforceable rules, and some impose consequences when 'things go wrong' with an activity such as cultural burning. Each of these components is relevant to our analysis, so we begin with a brief explanation of what they mean.

- **Legal purposes**: these are the goals or objectives of a legal framework. Legal purposes can be found in objects or principles clauses in legislation; in 'Second Reading Speeches' and documents such as Explanatory Memoranda that are tabled in Parliament at the time that legislation is passed. Legal purposes may also be identified and explained in judicial decision

making, when judges describe the purpose of a provision in legislation, or a whole statutory or common law regime, when deciding individual cases or conflicts.

- **Substantive rules**: these are provisions in legislation, or powers, duties or obligations derived from the common law (or, 'judge made law', in which general principles are developed over time as courts determine individual, specific cases) which, for example, define the decision-making powers of agencies such as the Rural Fire Service and Local Land Services and legal constraints on those powers, such as a requirement to consult or to take into account particular matters; and obligations on landholders or cultural fire practitioners to seek a permit and/or alert a neighbour before lighting a fire.
- **Procedural rules**: govern *how* decisions are made, including by defining when, where and by whom a decision is allowed to be made, and what steps they – or a person that proposes to light a cultural fire – need to take, to demonstrate that they have complied with the law.
- **Consequences**: there are also rules in legislation and at common law that govern whether and how someone can be held responsible for falling short of their substantive and procedural legal obligations. These include the rules of negligence, and civil and criminal penalties for not having the correct permit, not complying with an approval, or for lighting a fire in a way that causes harm.

Practical issues such as resourcing, agency culture and implementation of the laws is also critical for the outcomes that can be achieved. Some aspects of these practical issues are addressed in this report, particularly where they have been raised by participants. However, this work focuses primarily on the laws themselves.

## 5.2 Relevant laws and their intersection with cultural fire

We outline here the relevant legal frameworks for cultural fire in NSW, including: native vegetation management on private land, forestry, protected area, other biodiversity laws, Aboriginal cultural heritage laws and native title, and the legal rules for insurance and liability (Part c synthesises the key features of these laws).

### 5.2.1 Bush fire hazard reduction and fire permitting

The *Rural Fires Act 1997* establishes the Rural Fire Service (**RFS**) and the rules for undertaking bush fire hazard reduction, planning and emergency response in rural areas of NSW.[3] These rules include an assessment and permitting process for lighting fires for a hazard reduction purpose, which is an activity that 'reduces or modifies fuel' (*Rural Fires Act 1997*). The Act does not specifically mention cultural fire, and does not empower decision makers or create a process for assessing and approving fires that are for a cultural – rather than hazard reduction – purpose.

The objects of the Rural Fires Act are to provide—

> (a) for the prevention, mitigation, and suppression of bush and other fires in local government areas (or parts of areas) and other parts of the State constituted as rural fire districts, and
>
> (b) for the co-ordination of bush firefighting and bush fire prevention throughout the State, and
>
> (c) for the protection of persons from injury or death, and property from damage, arising from fires, and

[3] Fire & Rescue NSW operates in urban areas and its statutory framework is not dealt with in detail in this analysis, as it will be less common for Fire & Rescue to play assessment/approval roles in relation to proposed cultural burns.

(c1) for the protection of infrastructure and environmental, economic, cultural, agricultural and community assets from damage arising from fires, and

(d) for the protection of the environment by requiring certain activities referred to in paragraphs (a)–(c1) to be carried out having regard to the principles of ecologically sustainable development described in section 6(2) of the *Protection of the Environment Administration Act 1991*.

The overarching objects clauses and the substantive provisions of the *Rural Fires Act 1997* reveal a strong emphasis on the following ideas:

- fire is a hazard that needs to be prevented, controlled and suppressed; and
- successful management of fire is demonstrated in the protection of human life, property and environments from harms caused by fire.

To comply with the *Rural Fires Act 1997*, any person wishing to light a fire for the purpose of land clearance, including by way of a cultural burn, must:

- notify relevant people identified in the regulations (e.g., relevant authorities, neighbours), s 86(1);
- take any 'practicable steps' to prevent a bush fire and minimise the danger of a bush fire spreading from the land (ss 63, 98); and
- if the burn is during a fire danger period:
    - obtain a bush fire hazard reduction certificate or approval under *Environmental Planning and Assessment Act 1979* or any other law (s 89); and
    - obtain a fire permit (s 87), and
    - comply with any conditions set out in the permit (s 87); or
- at any other time of year, obtain either:
    - a bush fire hazard reduction certificate or
    - any approval/consent required under the *Environmental Planning and Assessment Act 1979* or any other law, s 86(1A).

Failure to comply with these requirements constitutes an offence and may result in financial penalties or, in the most extreme cases, may result in a period of imprisonment.

The RFS has developed a streamlined process for acquiring a bush fire hazard reduction certificate, governed by the Bush Fire Environmental Assessment Code (**the Code**) (*Rural Fires Act 1997*, s 100C). The Code allows someone to undertake hazard reduction (including by burning) on certain land, without needing to also apply for licences, approvals, permits or consents under the *Biodiversity Conservation Act 2016*, *National Parks and Wildlife Act 1974* and *Environmental Planning and Assessment Act 1979*. These certificates are, therefore, a faster, cheaper and easier way to receive approval for a proposed fire – as long as it is primarily for a hazard reduction purpose.

> There is a bit right up the front of the Code that says the Code is for hazard reduction work and it excludes things that are solely for the purpose of ecological burning, cultural burning and other things', '…if it is a hazard reduction activity that also has an ecological or a cultural purpose, it's still a hazard reduction activity and you can use the Code (I4).

Under the Code, the RFS can assess and approve proposed burns that are primarily for a hazard reduction purpose and issue a bush fire hazard reduction certificate. If a proposal may impact on issues of environmental concern, the applicant may be required to comply with specific conditions, or may be directed to apply through more detailed, costly and time-consuming processes such as the environmental impact assessment process under Part 5 of the *Environmental Planning and Assessment Act 1979*.

Regulatory authority for the range of other laws brought under the Code process – such as the authority to enforce obligations and sanction breaches – remains with the original regulator. For example, native vegetation clearing on private land that will result from a proposed hazard reduction activity can be authorised under the Bushfire Environmental Assessment Code, but a breach of the conditions of the Code in relation to that clearing will be enforced by Local Land Services, not by the RFS.

The Code incorporates a series of supporting documents that ensure that the process addresses key potential environmental risks from hazard reduction activities (Table 1), and a certificate may include detailed conditions that are drawn from these documents, to ensure that the activity – such as a proposed cultural burn – does not have a negative impact on environmental and heritage values.

| Supporting Document | Purpose/relevance to cultural fire |
|---|---|
| Fire Intervals for Strategic Fire Advantage Zones (SFAZs) and Land Management Zones (LMZs) (January 2022) | This document incorporates current knowledge about fire intervals for NSW vegetation classes into the Code. In particular, its purpose is to ensure that native vegetation is not burned too frequently, in a way that would undermine the conservation of native vegetation and animals. The document sets a minimum number of years that are required between fires, for key vegetation classes, with shorter fire intervals (i.e., fire allowed more frequently) in Strategic Fire Advantage Zones than in Land Management Zones. It is informed by the *Guidelines for Ecologically Sustainable Fire Management* (Kenny et al 2004).<br><br>**Implication for cultural fire**: if a fire is proposed for an area that has been burned more recently than the recommended fire interval (whether by bushfire or purposeful fire), the person proposing the cultural fire is unlikely to be able to use the streamlined Code to approve the proposed burn. |
| Threatened Species Hazard Reduction List (July 2021) | This document sets out pro forma conditions that must be adhered to when issuing a Bush Fire Hazard Reduction Certificate for activities at a site where terrestrial and aquatic threatened species, populations or ecological communities occur.<br><br>**Implication for cultural fire**: the conditions relating to fire provide for minimum fire intervals or seasonal and intensity constraints. These intervals and constraints have been developed at a coarse scale, by reference to available ecological evidence (though not, as far as we are aware, cultural evidence), and they are applied across the state and the mapping and conditions may not be consistent with the communities, conditions or requirements of specific sites. |
| Conditions for Hazard Reduction and Aboriginal Heritage (July 2021) | This document sets out the conditions that will be imposed in a Bush Fire Hazard Reduction Certificate, if the Aboriginal Heritage Information Management System (AHIMS) indicates that Aboriginal Heritage occurs at the site of the proposed fire. Its primary purpose is to minimise the impact of bush fire hazard reduction activities on Aboriginal Heritage.<br><br>**Implication for cultural fire**: low-intensity prescribed fire is identified in this document as ‘low risk’, and the preferred |

| | |
|---|---|
| | method for reducing bush fire hazards around three of the five categories of Aboriginal Heritage sites (1- artefacts and deposits; 4- fish traps and stone arrangements; and 5- ceremonial places). The EA Code may be used to issue a Certificate for low and medium risk methods. However, prescribed burning is categorised as 'high risk' for sites that include 'Aboriginal resource & gathering', 'habitation structures', 'modified trees' and 'water holes'. For sites with these features, for which prescribed fire is ranked as high risk, the streamlined EA Code may not be able to be used to approve the proposed burn. |

**Table 1**. Supporting documents under the NSW RFS Bush Fire Environmental Assessment Code 2021.

Protecting culture, cultural fire knowledge, and the ecological health and function of fire-adapted landscapes are not relevant purposes in these bushfire hazard reduction laws except in the (qualified) goal of protecting the environment, by requiring that 'certain' activities be carried out in a way that is consistent with the principles of ecologically sustainable development (**ESD**). ESD requires 'the effective integration of social, economic and environmental considerations in decision-making processes' which, in turn, emphasises the need to avoid environmental harm (presumably including harm from fire) and, among other things, the 'conservation of biological diversity and ecological integrity' (*Protection of the Environment Administration Act 1991*, s 6(2)).

In practice, the RFS commonly approves bush fire hazard reduction certificates for cultural burns, and many of the interviewees for this project recognised that the hazard reduction priorities of this legal regime, and the cultural priorities of cultural fire management, can be an awkward 'fit'. Nevertheless, certificates can provide a relatively streamlined legal pathway for approving a cultural burn, and the presence of RFS officers at cultural burns can provide some protection from liability (see viii).

**Barriers to cultural fire in hazard reduction laws include:**

- misunderstandings about cultural values and cultural safety, as well as cultural purposes for fire;
- rigorous risk management requirements are at odds with cultural fire management;
- the implementation of fire return intervals through the EA Code's supporting documents (Table 1) can mean that proposed cultural burns are not eligible to be assessed under the Code but must proceed through more complex environmental impact assessment pathways; and
- rigid timeframes for when hazard reduction burns can be approved and when no burning is allowed (e.g., fire permit periods, total fire ban days), mean that knowledge about Country sometimes cannot be used to inform the timing of cultural burns.

### 5.2.2 Native vegetation management on private land

A suite of laws operate to manage the negative impacts of land clearing and vegetation loss in NSW, including to prevent unauthorised clearing and protect certain threatened species and habitats. A very broad definition of 'clearing' in these laws means that native vegetation management plays an important role in governing all forms of purposeful fire, including cultural burning. These laws are unique in providing exemptions from statutory approval processes for cultural practices but, like other NSW laws, they do not apply specifically to cultural fire.

The following principles appear consistently across native vegetation management laws in NSW:

- the need to protect vegetation from disturbance and harm as a result of human intervention;
- priority for agriculture, in particular, and some other forms of industry (e.g., private forestry) as an allowable exception to protection; and

- an implication that cultural management falls into the category of clearing not protection.

Native vegetation clearing on private land is governed, for 'rural land' under the *Local Land Services Act 2013* (Part 5A and Sch 5A and 5B, **LLS Act**) and, on non-rural private land, under almost identical provisions in the State Environmental Planning Policy (Biodiversity & Conservation) 2021 (Ch 1, **SEPP**). The SEPP is implemented through the land use planning system under the *Environmental Planning and Assessment Act 1979.*

The purpose of these two legal instruments is to mitigate native vegetation loss by regulating land clearing, including of grasses, trees and other vegetation, as well as private native forestry or 'farm forestry' activities. Table 2.1.2 sets out the purposes of these instruments and definitions of clearing.

| | LLS Act | SEPP |
|---|---|---|
| **Purposes** | The objects of the Act relevantly include (s 3):<br>(e) to ensure the proper management of natural resources in the social, economic and environmental interests of the State, consistently with the principles of ecologically sustainable development,<br>(f) to apply sound scientific knowledge to achieve a fully functioning and productive landscape,<br>(g) to encourage collaboration and shared responsibility by involving communities, industries and non-government organisations in making the best use of local knowledge and expertise in relation to the provision of local land services. | Aims of the SEPP in relation to vegetation in non-rural areas (cl 2.1):<br>(a) to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and<br>(b) to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation. |
| **Definition of 'clearing' native vegetation** | Meaning of 'clearing' native vegetation (s 60C):<br>(a) cutting down, felling, uprooting, thinning or otherwise removing native vegetation,<br>(b) killing, destroying, poisoning, ringbarking or burning native vegetation. | Definition of 'clear' in relation to native vegetation (cl 1.3):<br>(a) cut down, fell, uproot, kill, poison, ringbark, burn or otherwise destroy the vegetation, or<br>(b) lop or otherwise remove a substantial part of the vegetation. |

**Table 2**. Purposes and definitions extracted from the LLS Act and SEPP.

The definition of clearing in these two instruments focuses on killing or destroying vegetation (e.g., cutting down, killing, poisoning), emphasising the focus of these instruments on preventing harmful activities that impact native vegetation in ways that are inconsistent with their statutory purposes to, e.g., 'ensure the proper management of natural resources' (LLS Act) and 'protect the biodiversity values of trees and other vegetation' (SEPP).

Of course, cultural fire management is not an activity that necessarily targets the destruction of vegetation. The purposes of cultural fire vary, but cultural fire practitioners involved in this project

emphasised the foundation of cultural fire as a responsibility to protect Country, including by promoting the health and diversity of landscapes, even though this may involve burning to remove some vegetation types so that others can flourish (i.e., removing woody vegetation to maintain a native grassland).

By including 'burning' in the definition of native vegetation clearing, these instruments bring cultural fire under a set of rules that were designed to minimise and manage the negative impacts of clearing. Despite the fact that cultural fire has been authorised and facilitated under these native vegetation rules, the governance regime is not a natural 'fit' for assessing and authorising cultural fire.

> "I think when someone goes through [the permitting process] that doesn't have much experience, and is trying to gain approval or look for pathways, **[then] to have their burning activity instantly put in that bag of something which is destructive**, […] t**hat's really problematic.**
> And I think maybe also when people are reviewing potential offences as well, I think just having it framed in that way is problematic."
>
> *Interview Participant, October/November 2023*

The purposes and definitions of the LLS Act and SEPP instruments are operationalised in similar ways. The starting point for both is that clearing native vegetation is prohibited without approval (e.g., s 60N LLS Act). However, both instruments also create a range of exemptions to that rule. For example,

- clearing will be allowed without approval if it is authorised under the planning scheme, or constitutes private native forestry; or
- in the case of the SEPP—is either necessary to protect life or property, or the vegetation is dying or dead and is not required as habitat for native animals; and
- in the case of the LLS Act—is authorised by the Land Management (Native Vegetation) Code 2018; or
- comes within the definition of an 'allowable activity' (see immediately below); and
- native vegetation clearing is also not prohibited as 'unauthorised' if it is authorised under a bush fire hazard reduction certificate or vegetation clearing work under s 100C(4) and Part 4 respectively, of the *Rural Fires Act 1997* (LLS Act, s 60O(ii)(d)); see 2.1.1, above).

Allowable activities are set out in Sch 5A of the LLS Act and are designed to address everyday land management activities associated with agriculture and rural land uses, such as securing fence lines or farm infrastructure. Relevant allowable activities that do not require LLS Act approval, include:

- 'traditional Aboriginal cultural activity, other than a commercial cultural activity' (cl 18 Sch 5A LLS Act; cl 2.7 SEPP); and
- 'environmental protection works' that are 'associated with the rehabilitation of land towards its natural state or any work to protect land from environmental degradation', including revegetation or bush regeneration, wetland protection, erosion protection, dune restoration 'and the like' (cl 19 Sch 5A LLS Act).

Qualifications to the allowable activity exemptions include that:

- a person conducting an exempt or allowable activity may nevertheless be required to provide notice of the proposed clearing (e.g., s 60X(1) for clearing under the Land Management (Native Vegetation) Code 2018);
- clearing for an allowable activity purpose is only conducted 'to the minimum extent necessary for that purpose' (cl 7 Sch 5A LLS Act); and



- clearing for traditional Aboriginal cultural activities is not an allowable activity on land mapped as category-2 sensitive or vulnerable regulated land (Sch 5A Pt 4 LLS Act).

The exemptions from requiring approval for native vegetation clearing have created an enabling framework for some cultural fire. However, we also heard in this research that the 'traditional Aboriginal cultural activity' clause in Sch 5A, in particular, has been used to support cultural burning on private land, allowing cultural fire practitioners to avoid the administrative and financial impediments of native vegetation rules. However, by excluding commercial activities from that exemption, the LLS Act excludes Aboriginal corporations and commercial enterprises from accessing its benefits, including streamlined processes for cultural burning on behalf of private landholders. Removing 'other than a commercial activity' from these provisions would be a relatively straightforward reform and is currently being considered by the LLS.

> "**The intent wasn't to stop us from doing cultural burning or paying somebody to do that. T**he intent was, when you're clearing country for an agricultural benefit, or for building your farming business or whatever it is, you can't use cultural fire to burn that country and clear it. Because there's a financial gain at the end of it.
> **And I understand that intent, but it's not working.**"
>
> *Interview Participant, October/November 2023*

LLS is also responsible for managing Travelling Stock Reserves, which are set aside to allow stock to rest and graze as they are moved around NSW. The LLS Act prohibits a person engaging in an activity that damages a Travelling Stock Reserve (s 72); and the Local Land Services Regulation 2014 (cl 63(d)) makes it an offence to light a fire in a Travelling Stock Reserve if fires are prohibited by LLS. However, LLS may issue reserve use permits, authorising a person to occupy, make use of, or engage in any activity in a travelling stock reserve (s 77); and has authorised some cultural fire managers to conduct burns on Travelling Stock Reserves in NSW.

**Barriers to cultural fire in native vegetation laws include:**

- defining cultural fire as clearing may demonstrate a mismatch between the purposes and beneficial aspects of cultural fire, and the purposes of native vegetation laws; and
- if a proposed cultural fire is not exempt or an allowable activity, it must be assessed and approved by the Native Vegetation Panel (Pt 5A Div 6 LLS Act), which requires, among other things, a biodiversity development assessment report about biodiversity impacts (s 60ZG) and details about other potential adverse impacts such as erosion and impacts on waterways.

**Box 1. Statutory review of native vegetation management in the *Local Land Services Act 2013***

The NSW Government is currently considering the final report of an independent statutory review of the native vegetation management provisions in the LLS Act: Local Land Services, *Statutory Review of the Native Vegetation Provisions of the Local Land Services Act 2013* (see here).
The independent panel identified Aboriginal land management and cultural heritage as 'key gaps in the existing Land Management Framework' (see pp. 35-6). Relevant findings and recommendations for cultural burning include:

- Finding: 'allowable activities' are not currently monitored and therefore, may contribute to unallocated clearing (p 10). Recommendation 3.3: LLS should ensure better monitoring and reporting of allowable activities through satellite imagery and ground-truthing. Implication: cultural burning undertaken as a cultural activity under Sch 5A could be subject to closer monitoring and oversight in future.
- Finding: Aboriginal cultural heritage and practices are not adequately incorporated in the current Land Management Framework. This does not correspond with the Government's commitments to supporting connections to Country under the national Closing the Gap Agreement. Recommendation 4.4: LLS engage with Aboriginal stakeholders and communities to support Aboriginal cultural heritage, practices and connections to Country throughout the provisions and implementation of the Land Management Framework. Implication: there is clear support and momentum as part of this reform process to improve the implementation of cultural burning in NSW under the LLS Act.

"*The Review recommends a culturally sensitive, landscape-scale approach to Aboriginal land management activities to support connections to Country. This must be informed by genuine engagement with Aboriginal stakeholders and communities to identify the most effective ways to strengthen Aboriginal cultural heritage and practices throughout the provisions and implementation of the Act. This engagement should be supported by consultation with the relevant government agencies, such as Aboriginal Affairs, NSW LALC and Crown Lands*" (p. 36, LLS Review final report).
LLS is also considering the final recommendations from an independent review of the *Biodiversity Conservation Act 2016*, which has implications for native vegetation management and cultural fire. See discussion on this review in Box 2, below.

### 5.2.3 Land Use Planning

Land use planning is a technical and detailed area of law and policy that incorporates a host of different instruments such as legislation and planning provisions, State Environmental Planning Policies and zoning, overlays and policies of local councils. We briefly highlight here the fact that, alongside State and Commonwealth laws and policies, the land use planning system as it is implemented at local scales can also explicitly or implicitly exclude purposeful forms of fire, including cultural burning.

For example, one interviewee for this research explained that planned burning in mapped coastal wetlands (what used to be described as 'SEPP 14 wetlands') requires development consent. If the proposed burn is not 'environmental protection works',

> [the activity is] actually classed as designated development that requires an EIA [Environmental Impact Assessment]. In this corner of the world, we've got these huge expanses of coastal wetland, floodplain and sandplains, that include coastal heath swamps and paperbark swamps that are all fire dependent. By and large, north of the Richmond River, they're all long overdue for fire. It's […] hardly worth considering going through the [approval] process. It's just too onerous. Development applications are one thing, but an EIA? That completely kills it. So […] cultural burns would require

> an EIA. That [affects] a huge area of culturally important and ecologically important landscapes for all coastal LGAs right up and down the New South Wales coast.
>
> …
>
> [T]here's proximity zones around coastal wetlands and proximity zones around littoral rainforest. There's also coastal environment area and coastal use areas […], and they all require, at the very least, if not a DA, a strong need to satisfy the consent authority that there won't be a significant impact. […] it's a huge disincentive to be returning fire to those places.

A more detailed analysis of the land use planning system in NSW is beyond the scope of this research project, but laws and policies that operate at local scales should be considered in efforts to address barriers to cultural burning across the state.

### 5.2.4 Forestry

The NSW Forestry Corporation is the state-owned corporation responsible for public native forestry in NSW, managing over two million hectares of public native forests and plantations. Native forestry is primarily regulated by the NSW Environment Protection Authority (EPA).

The regulation of native forestry in NSW is complex, involving multiple different legislative instruments including the *Forestry Act 2012*, *Biodiversity Conservation Act 2016* and the *Protection of the Environment Operations Act 1997,* as well as rules set out in Integrated Forestry Operations Approvals, to protect species and ecosystems when harvesting timber in State forests and on Crown timber lands. None of these laws mention, let alone specifically address, cultural burning on forestry tenure.

Where the Forestry Corporation's activities affect the environment, its principal objectives include conducting its operations in compliance with the principles of ecologically sustainable development, including integrating social, economic and environmental considerations in decision-making processes (s10(1)(c)). Other objectives include being a successful business, having regard to local communities, efficiently supplying timber and contributing to regional development (s 10(1)); and all of its objectives are of equal importance.

The Forestry Act explicitly identifies burning (though not cultural burning) as a core activity of the Forestry Corporation; defining 'forestry operations' as:

> ongoing forest management operations, namely, activities relating to the management of land for timber production such as thinning, *burning* and other silvicultural activities and *bush fire hazard reduction* (s 3, emphasis added).

The Act also identifies the functions of the Forestry Corporation, including to 'carry out measures on Crown-timber land for the protection from fire of timber and forest products on that land' (s 11(1)(f)). However, at present, there is no explicit statutory support for cultural burning in public native forestry areas, nor an exemption similar to the one provided under the LLS Act (above).

The Forestry Corporation has a *Fire Management Plan 2019* that guides its strategic use of fire, and its planning and response powers and procedures in relation to bush fires. The Fire Management Plan does do not include any objective or express specific support for reinstating cultural fire management in forestry areas, though it does indicate very briefly, in clause 10.2.2 of that Plan, that:

> Cultural burning operations should be planned according to the Bush Fire Environmental Assessment Code and managed in the same way as other prescribed burning.

Nevertheless, the Forestry Corporation does have fire-specific functions and expertise in assessing and conducting prescribed burning in forestry areas for fuel management. Prescribed fire may be authorised

under one of the following environmental approval pathways, as described in the Fire Management Plan (FCNSW 2019, pp. 27-30):

1. burning for site preparation for a plantation under the *Plantation and Reafforestation Act 1999*, under a bush fire hazard reduction certificate issued under the *Rural Fires Act 1997*;
2. prescribed burning for fuel reduction in compliance with the Bushfire Environmental Assessment Code, on land managed by the Forestry Corporation or multi-tenure burns with the consent of relevant land owners/managers (hazard reduction certificates for this pathway are assessed and approved internally, by the Forestry Corporation);
3. burning in compliance with an Integrated Forestry Operation Approval (IFOA) that has been issued by the Minister for the Environment and the Minister for Agriculture (the Coastal IFOA 2018 provides overarching authorisation for prescribed fire in certain areas and conditions); or
4. outside of the circumstances in #1-3, prescribed burning must be assessed and approved under Part 5 of the *Environmental Planning and Assessment Act 1979*, including for high intensity or frequent burning for specific habitat or forest health restoration purposes (the Forestry Corporation is unlikely to pursue a planned burn if an environmental impact assessment indicates that a significant impact is likely; Fire Management Plan 2019, 30).

The regulatory pathways described in #2, and #3 streamline the assessment of obligations that would otherwise be assessed under other legislation, including threatened species protections under the *Biodiversity Conservation Act 2016* and cultural heritage obligations under the *National Parks and Wildlife Act 1974* (Fire Management Plan, 6). However, the Forestry Corporation may be required to comply separately with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) to protect matters of national environmental significance, unless the forestry area is subject to a Regional Forest Agreement (activities under an RFA are currently exempt from the EPBC Act, though that may not continue to be the case under proposed, new national environmental laws (Plibersek 2022).

**Barriers to cultural fire in forestry laws include:**

- commercial-oriented priorities that may prevent Forestry Corporation from facilitating culturally-led fire management in commercial coupes;
- the absence of culture-specific objectives, alongside priorities for local communities, efficient timber supplies and regional development, complicating the promotion of cultural fire;
- regular cultural burns in forestry areas will face the same challenges as elsewhere, of having to comply with the fire return intervals adopted under the EA Code; and
- as with other areas of law, the resources and complexity involved a full environmental impact assessment of a proposed cultural fire is unlikely to be feasible.

**Box 2. NSW Audit Office Performance Audit of Native Forest Regulation**

In June 2023, the NSW Audit Office released an audit of native forest regulation in NSW, which assessed how effectively Forestry Corporation of NSW manages its public native forestry activities to ensure compliance, and how effectively the Environment Protection Authority regulates these activities (see here).
The Audit Office found that the 2019–20 bushfires "had a major impact on regional communities, and large areas of native forest. This heightened environmental risks and challenges in public native forestry. Five million hectares of New South Wales was impacted, including more than 890,000 hectares of native State Forests. This is over 40% of the coastal and tablelands native State Forests in New South Wales" (p. 10).
Despite recognising the dramatic impact of the 2019-20 bushfires on wood supply to the native forestry industry, the Audit Office report did not mention anything about fuel management, fire hazard reduction or cultural burning. As a result, the report is most notable for its neglect of any consideration of hazard reduction as a compliance and strategic, long-term performance measure, let alone the missed opportunity to integrate considerations of this legal framework with the recommendations for reform of the LLS native vegetation management arrangements (above) and the *Biodiversity Conservation Act 2016* (below).

### 5.2.5 Conservation laws

Participants in this research consistently highlighted the overlap and intersection between cultural and ecological protection.

> **"Cultural and ecological values need to be prioritised.** Environment should be at the top of the hierarchy, not people, and definitely not economic factors.**"**
>
> *Participant, Niigi Niigi Workshop, 7 November 2023*

## PROTECTED AREAS

All of the laws for the declaration and management of protected areas on private and public land in NSW include a focus on protecting environments from disturbance or harm, particularly by excluding harmful, human activities. To the extent that cultural fire is defined and understood as a human activity that may, potentially, harm or change environments, these laws may hinder cultural fire.

The separation of humans from nature, and the presumption that conservation laws should strive for nature to be maintained as 'pristine' or 'undisturbed' by human intervention is an issue that has gained prominence in academic scholarship in recent years. These presumptions clearly ignore the weight of evidence of First Nations land management in Australia and elsewhere around the world, along with the influence of cultural land management on native vegetation sensitivity to fire (Gleeson 2015).

### Public protected areas

NSW Parks and Wildlife plays an important role in managing native vegetation on public land such as protected areas and Crown land, including in relation to cultural, ecological and hazard reduction fires, operating under the *National Parks and Wildlife Act 1974*. The purposes of that Act are set out in s 2A(1) as follows—

(a) the conservation of nature, including, but not limited to, the conservation of—

(i) habitat, ecosystems, and ecosystem processes, and

(ii) biological diversity at the community, species, and genetic levels, and

(iii) landforms of significance, including geological features and processes, and

(iv) landscapes and natural features of significance including wilderness and wild rivers,

(b) the conservation of objects, places, or features (including biological diversity) of cultural value within the landscape, including, but not limited to—

(i) places, objects, and features of significance to Aboriginal people, and

(ii) places of social value to the people of New South Wales, and

(iii) places of historic, architectural, or scientific significance,

(c) fostering public appreciation, understanding and enjoyment of nature and cultural heritage and their conservation,

(d) providing for the management of land reserved under this Act in accordance with the management principles applicable for each type of reservation.

The Minister, Secretary and Service must give effect to the objects of the Act as well as the public interest in protecting the values of reserved land and its appropriate management; including by applying the principles of ecologically sustainable development (s 2A(2) and (3)).

The primary legal mechanisms through which the Parks and Wildlife Service facilitates cultural fire are:

- implementing the NPWS Cultural Fire Management Policy; and
- applying the Guidelines for Community (Low Risk) Cultural Burning on NPWS managed land (this guideline provides an endorsed approach to including Aboriginal communities in planned burning).

The Parks and Wildlife Service has developed the *Cultural Fire Management Policy 2016*, which applies to most land reserved under the *National Parks and Wildlife Act 1974*. The Policy was the first example of investment in, and support for, cultural land management practices by the NSW Government (Williamson 2021). It defines cultural fire management to include 'the full spectrum of Aboriginal community involvement in fire management', including consultation about community needs and values through to community participation in low risk cultural burning (cl 1.6) The Policy also undertakes to:

- *Provide opportunities for Aboriginal people to observe or participate in aspects of burn planning, training, preparation, conduct, monitoring or review, in a safe and rewarding way, for community (low risk) cultural burns.*
- *Provide opportunities for NPWS burn planners, fire managers and Aboriginal people to share knowledge about activities associated with fire management. This includes planning, training, safety and environmental assessment, preparation, conduct, review and monitoring before, during and after a burn.*

The Parks and Wildlife Service manages over 9% of land in NSW and, under the *Rural Fires Act 1997*, the Service is both a firefighting authority and a public authority, responsible for managing fire on all lands under its control. This includes detecting and suppressing fires and implementing risk management programs to protect life and property from fires (see *Fire Management Manual 2022-2023*, 6). The Fire Management Manual 2022-3 is the basis for consistent application of fire management under all relevant legislation, policy and procedures on Parks and Wildlife Service-managed land across NSW. The Manual is an integral component of a range of measures established to ensure the conservation of natural and cultural heritage.

The national EPBC Act may have a role to play in the management of public and private protected areas if cultural burning may have a significant impact on a nationally protected matter such as the character of a Ramsar wetland or the values protected within a World Heritage Area. A detailed analysis of the management and regulation of fire in nationally protected places is beyond the scope of this report but

may, particularly as national environmental law reforms progress, provide new opportunities for national and state collaboration and joint resourcing, to facilitate the return of cultural fire in some cases.

### Wilderness areas

The objectives of the *Wilderness Act 1987* are to provide for the permanent protection and proper management of wilderness areas, and to facilitate public appreciation, protection and management of wilderness, including through education (s 3).

Clearing vegetation in a wilderness area, including by conducting a burn, falls within the definition of 'development'. Development is prohibited in wilderness areas unless the person proposing the development has given written notice of the proposed development to the Minister and received the Minister's written consent. The Minister is not empowered to consent to the development unless the Minister is 'of the opinion that the proposed development will not 'adversely affect' the area' (s 15; the concept of an adverse effect is not defined in the Act).

A cultural burn may be able to be justified in a wilderness area, on the basis that it will not have an adverse effect. If community, agency and Ministerial support for cultural fire management continues to grow, obtaining Ministerial support for cultural fire in a wilderness area may not be a complete statutory barrier. However, the statutory regime is clearly expressed in such a way that human intervention and management is presumed to be excluded at present (for a more detailed discussion about management in wilderness areas, see McCormack et al 2019).

### Private protected areas

The Biodiversity Conservation Trust (**Trust**) is established in Part 10 of the *Biodiversity Conservation Act 2016*, for the purposes of protecting and enhancing biodiversity; including by: promoting public knowledge and appreciation of biodiversity, encouraging private landholders to protect and manage the natural environment on their land, and seeking strategic conservation offsets to compensate for biodiversity that is lost to other activities such as development (s 10.4). The Act does not mention cultural fire, or provide any requirement, support or constraint on the Trust's activities in relation to fire.

Nevertheless, the Trust has recognised a role for fire as a management tool in private protected areas in NSW. It has developed the *Guide to the Application of Fire as a Management Tool* (Biodiversity Conservation Trust 2022), to support the implementation of fire on land the subject of a private land conservation agreement. The guide assists landholders to determine whether burning may be an appropriate management action, including to achieve Aboriginal cultural outcomes, within a protected area on their land.

As with other tenures and contexts (e.g., forestry, public protected areas), there are two primary environmental planning approval pathways to assess and approve the environmental impacts of a proposed burn:

1. hazard reduction certificate issued in accordance with the Bush Fire Environmental Assessment Code under the *Rural Fires Act 1997*; or
2. planning approval under the *Environmental Planning and Assessment Act 1979*.

The first pathway may be less likely to be available in private protected areas, on the basis that such areas are more likely to be home to threatened species and ecosystems that prevent the application of streamlined assessment and approval under the Code.

The Guide outlines the following additional principles for conducting a burn in a private protected area:

- burning must be consistent with the terms of existing agreements;
- the Biodiversity Conservation Trust will support burning as a management action when it is used as a management tool to achieve Aboriginal Cultural and/or ecological outcomes;
- burn planning and implementation aims to minimise risk to priority species and habitats and achieve positive ecological and cultural outcomes based on traditional ecological knowledge and available scientific evidence; and
- burn planning and implementation acknowledges the presence of, and avoids negative impact to, cultural, heritage, ecological and built assets.

**Barriers to cultural fire in protected area laws include:**

- their priority on the conservation of vegetation from 'harm' or loss, meaning that fire return intervals and environmental impact assessments may weigh against approving cultural fire; and
- limited resources for protected area management more generally may mean that active management (including fire for purposes other than hazard reduction), is not prioritised for funding and so, not implemented.

**"Decisions about burning Country need to be about *reading* Country, not fire intervals, because bushfires will burn more often than that intervals say – it takes decisions out of your hands – you can't be stuck in that mindset"**

*Participant, Niigi Niigi Workshop, 7 November 2023*

## BIODIVERSITY CONSERVATION LAWS

### New South Wales biodiversity laws

The overarching purpose of the *Biodiversity Conservation Act 2016* (NSW) is to:

> maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development (cl 1.3).

Particular objectives under the Act include: conserving biodiversity at bioregional and State scales; maintaining the diversity and quality of ecosystems and enhancing their capacity to adapt including in the context of climate change; and, relevantly, *improving, sharing and using knowledge, including local and traditional Aboriginal ecological knowledge, about biodiversity conservation* (cl 1.3 (a)-(d), emphasis added).

In practice, the greatest impact that biodiversity laws have is through the operation of Environmental Impact Assessment and development laws. For example, if a proposed cultural burn cannot be assessed and approved or exempted under one of the streamlined processes described above (i.e., bush fire hazard reduction certificate under the EA Code, assessed by the RFS, Forestry Corporation or Parks and Wildlife; or as an allowable activity under the LLS Act/SEPP), the proposed burn must be assessed as an activity with a potential environmental impact (*Environmental Planning and Assessment Act 1979* (**EPAA**), s 1.5 and Div 5.1 'environmental impact assessment'). Part 5 of the EPAA requires a detailed environmental impact assessment, including an assessment of the significance of the likely environmental impact of the burn. If the likely impacts are assessed as significant, an environmental impact statement or species impact statement and a 'section 193 licence' must be issued by the relevant NSW department (formerly the Department of Planning and Environment, see EPAA, s 4.12-4.18).

Threatened species conservation intersects with cultural fire through what is commonly described as the 'fire return intervals', as set out in the *Guidelines for Ecologically Sustainable Fire Management 2004*. The Guidelines are implemented through the operation of both the Bushfires Environmental Assessment

Code discussed above, and the more detailed environmental impact assessment process under the EPAA. The Guidelines set 'fire return intervals' for different vegetation types, which then operate as thresholds to avoid fire-sensitive species being lost as a result of inappropriate fire regimes. The Guidelines are not an enforceable instrument but a decision support tool.

> [W]hat the intervals are doing is looking at all the potential components of that veg community. And it looks at each – plant types are all split up into functional groups. And so those that are most sensitive to frequent fire, they're the sort of plants that are killed by a fire, [and] reliant on recruiting from seed. Therefore, you need a long enough interval for those plants to have grown up from seed to flowering, to producing a seed bank so that they can be replaced. The problem with burning more frequently than that is that you will lose plants that have a longer maturity time than what your fire interval is. So, […the fire interval looks at that community or species and] the intervals are set by those that are in the higher range of maturity needs, [that is, they are] amongst the most sensitive species.

Biodiversity laws are designed to protect threatened species and critical habitat, including through recovery plans and threat abatement. However, the statutory tools that are used to govern biodiversity conservation can affect, and sometimes hinder cultural fire. For example,

> We know we can't do that more frequent interval. That is what is required culturally… At the moment, though, and some of those places, we could only come back every 10 years, but it's *just* enough. It's just enough to keep the soil okay and keep the forest health okay. It's those big intervals where you start hitting up to the 20 years plus that you really hurting the forest.

Another interviewee commented that fire interval thresholds can undermine positive long-term collaborations, including burning that is funded by and implemented in collaboration with industry, within the culturally appropriate timeframes.

In addition, interviewees noted that, despite being implemented for conservation purposes, the fire return intervals have failed to protect some environmental values effectively, and have even caused environmental declines in some circumstances. For example,

> I would say the guidelines work well in lots of places, but for some areas at climatic extremes… So, for example, the northeast New South Wales is really warm and wet and productive, so stuff grows really fast. And so, having thresholds that have been set with a lot of data from other parts of the state, results in suggested frequencies that just don't work for somewhere where everything grows really fast.

Nevertheless, changing fire regimes have been listed as a 'key threatening process' in both NSW and under Commonwealth law (see Part 2.2.6, below). In NSW, Schedule 4 of the *Biodiversity Conservation Act 2016* contains a list of key threatening processes. Listed processes include clearing native vegetation, and 'high frequency fire resulting in the disruption of life cycle processes in plants and animals and loss of vegetation structure and composition'. Key threatening processes must be taken into account when determining whether an action (such as a proposed cultural burn) is likely to significantly affect threatened species or ecological communities (see s 7.3).

> The federal [key threatening process] is much, much broader wording than the New South Wales one. The New South Wales one is very specifically just about high frequency [fire].

Listing damaging or too-frequent fire regimes under these conservation laws may increase decision-makers' resistance to approving cultural burning in threatened species' habitats or communities. However, it remains open to decision makers to interpret both state and Commonwealth biodiversity conservation laws in ways that could – at least in some circumstances – support cultural fire, including as a management tool to mitigate against biodiversity loss or decline from more ecologically damaging

fire regimes, perhaps including high-intensity hazard reduction burns. Achieving support for cultural fire despite these key threatening process listings may require improvements to the translation of Indigenous Ecological Knowledge about fire into biodiversity databases (see Box 3 and 'Proposition 4', below); and a more detailed and nuanced understanding by decision makers about the purposes, effects and possibilities of cultural fire across NSW ecosystems (see Priority Barriers, below).

### Commonwealth environmental law

At the national scale, the overarching purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) includes protecting matters of national environmental significance, including in collaboration with Australia's Indigenous peoples.

A proposed cultural fire that has, or is likely to have, a significant impact on a matter of national environmental significance, such as a nationally-listed threatened species, a World Heritage Area or a Ramsar-listed wetland, is prohibited unless it is exempt (see below) or has been approved by the Commonwealth Minister under the EPBC Act. If the Minister decides that the proposed cultural burn is a 'controlled action' under the Act, they must assess the relevant impacts of the action (s 82) and determine whether it will be approved. The Minister may decide to assess the proposed burn by way of an environmental impact statement or another accredited assessment process under section 87, and must decide whether to grant approval (s 130), with or without conditions (s 134), or refuse to grant an approval.

After the 2019-2020 bushfire season, the Australian Government funded extensive research into the impact of the bushfires on matters of national environmental significance, and developed a factsheet about how national environmental laws apply to fire suppression (response) and prevention (hazard reduction). Relevantly, the factsheet explains that '[n]ot all fire-related activities that have the potential to have a significant impact on nationally protected matters are regulated by national environment law'. The factsheet notes that some activities are unlikely to amount to a 'significant impact', including (among other things): 'routine fuel reduction burns' conducted in accordance with state laws and 'routine maintenance of existing fire breaks'.

Other activities will be exempt from the requirement for assessment and approval. The factsheet explains the operation of two forms of exemption that are particularly relevant to this research:

(a) 'grandfathering', by which the Australian Government accepts that activities underway at the time that the EPBC Act was passed are entitled to continue without having to seek new approval, provided that they do not expand or increase in their impact. These include 'activities done cyclically over long periods of time such as works to reduce the fire risk', such as 'doing routine, controlled burns of the type that have occurred in the past'; and

(b) activities undertaken in accordance with an accredited plan, agreement or decision. These activities will not require separate or additional approval from the Australian Government, and include:
- forestry operations done in accordance with a Regional Forest Agreement (as defined in the *Regional Forest Agreement Act 2002*);
- activities done in accordance with an endorsed strategic assessment policy, plan or program under national environment law;
- activities that are declared not to need approval in an approved conservation agreement under national environment law; and
- activities otherwise declared by the federal environment minister not to require approval.

Available at: www.dcceew.gov.au/environment/epbc/publications/factsheet-bushfire-management-and-national-environment-law (accessed 10 May 2024)



At present, there is no formal accredited policy, plan, program or declaration in place for cultural burning. However, the mechanism for such an accredited instrument does exist, providing an opportunity to alleviate any administrative burden that arises from overlapping legal obligations under national and state laws. We discuss opportunities available from national accreditation in Part 6.3, below.

Under the EPBC Act, 'Fire regimes that cause declines in biodiversity and land clearance' are listed as a key threatening process. A key threatening process is a process that threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community (s 188(3) EPBC Act). As with the NSW listing described above, there is no threat abatement or management plan associated with this national key threatening process, so it is not clear precisely how decision makers should be taking this key threatening process into account in decisions relevant to cultural burning.

If a threat abatement plan for this process is adopted by the Australian Government in future, the national Environment Minister will not be entitled to make decisions that are inconsistent with the threat abatement plan. Any proposed cultural burn that triggers assessment under the EPBC Act must demonstrate in its environmental impact assessment that it is not inconsistent with any such threat abatement plan.

A recent case decided by the Federal Court raised the issue of 'too-frequent fire' in the Strathbogie State Forest in Victoria. The case was brought under the EPBC Act in an attempt to prevent the relevant state government department from conducting a hazard reduction burn in the area of state forest, on the basis that it would affect listed threatened species including greater gliders. The Commonwealth Minister for the Environment had determined that the matter did not require assessment under the EPBC Act and the Court upheld that decision. The case centred on an interpretation of the EPBC Act's assessment and approval provisions but represents the first time that hazard reduction burning has been the subject of litigation. We are completing a more detailed analysis of this case. However, it demonstrates that litigation is not out of the question for future cultural burns, particularly if they are proposed in ecosystems such as alpine forests that are highly-politicised and their management, heavily-contested.

**Barriers to cultural fire in state and Commonwealth biodiversity and broader environmental laws include:**

- an emphasis on protecting listed, threatened, native species on a species-by-species basis, rather than at the scale of communities, ecosystems and landscapes. This focus can impede holistic, landscape-scale management and ecological restoration;
- fire return intervals may be applied too strictly and/or may be inaccurate or not informed by Indigenous Ecological Knowledge; and
- Changing fire regimes listed as a threatening process in NSW and Commonwealth laws may place too great an emphasis on fire return intervals without sufficient attention to the positive implications of cultural fire for biodiversity more broadly.
- the time, cost and complexity of navigating environmental impact assessment processes under state and Commonwealth laws have been identified by many of the participants in this research as a barrier (resourcing and complexity) to cultural burning;
- there may be limited information on the public record about environmental benefits of cultural burning, to balance against information about fire risks to biodiversity (i.e., fire return interval guidelines); as such, risks may be given more weight than benefits in an assessment; and
- the complexity and time involved in completing an environmental impact assessment may mean that the opportunity to conduct a cultural burn is lost (i.e., if the fire was required at a particular time of year, under particular ecological conditions, or in association with a community or family event).

**Box 3. Statutory review of the *Biodiversity Conservation Act 2016* (NSW)**

The NSW Government recently completed the first independent statutory review of the Biodiversity Conservation Act: NSW Department of Planning and the Environment (DPE), *Final Report: Independent Review of the Biodiversity Conservation Act 2016* (August 2023, see here).
The independent panel consultation paper identified a range of issues for Aboriginal people and cultural practices (described as 'messages we've heard to date'), including a significant concern about the need to better integrate Aboriginal cultural and ecological knowledge and values in biodiversity conservation across the board. Other reflections in the consultation paper include that:

- the review should consider better integration of Aboriginal knowledge and aspirations in biodiversity conservation;
- there is no systematic process for incorporating Aboriginal ecological knowledge into the Threatened Species Scientific Committee assessment process;
- there is a desire to recognise Aboriginal cultural values that are associated with biodiversity in private land conservation (or 'PLC');
- parts of the Act impact Aboriginal people's ability to practice culture and undertake economic activity on Aboriginal land; and
- there is a need for more opportunities for public participation in conservation programs and decision-making to draw on local and Aboriginal communities' knowledge and expertise, keep people informed and support government accountability.

(NSW DPE, *Consultation Paper: Independent Review* (February 2023, see here)).
The final report found that:
"*The involvement of Aboriginal people in program design and on-ground implementation is not well developed. - There is a need to recognise the intrinsic relationship between biodiversity and Aboriginal culture, and embed Aboriginal participation at all levels – advisory, decision-making, implementation and delivery. - The Act does not adequately recognise the rights, culture and economic aspirations of Aboriginal people and communities… [and] The failure of the Act to achieve its principal purpose… impacts the wellbeing of all citizens of NSW, particularly Aboriginal people and communities, for whom the loss of biodiversity presents as a loss of cultural integrity*" (p. 3).
The final report recommended the following, relevant to cultural burning:

- Aboriginal people should be fully involved in the design and implementation of policy and programs designed to conserve and restore biodiversity;
- Recommendation 3: Tailored engagement with Aboriginal people and organisations should be a priority for government when responding to this review report.
- Recommendation 5: The Act should establish processes for: • incorporating traditional Aboriginal culture and knowledge in developing and maintaining the Nature Positive Strategy…;
- Recommendation 9: The Act should establish processes for developing and maintaining the tool, including: • incorporating traditional Aboriginal ecological knowledge…;

### 5.2.6 Aboriginal cultural heritage in NSW

Cultural heritage in NSW is governed under the *National Parks and Wildlife Act 1974*. That Act includes provisions for reserving land as an 'Aboriginal area' if it is: (a) of natural or cultural significance to Aboriginal people, or (b) of importance in improving public understanding of Aboriginal culture and its development and transitions (s 30K(1)). The NSW Aboriginal Land Council (**NSWALC**) has, as one of its functions: 'to submit proposals for the listing in Schedule 14 to the NPW Act of *lands of cultural*

*significance* to Aboriginal persons that are reserved under the NPW Act' (*Aboriginal Land Rights Act 1983*, s 106(2)(c), emphasis added).

'Aboriginal areas' that are reserved under the Act are managed according to principles that include: '(a) the conservation of natural values, buildings, places, objects, features and landscapes of cultural value to Aboriginal people in accordance with the cultural values of the Aboriginal people' to whom those values belong, and '(c) allowing the use of the Aboriginal area by Aboriginal people for cultural purposes' (s 30K(2)). These management provisions appear to be broad enough to support the protection of culturally significant landscapes that have shaped by cultural fire; as well as fire practices and knowledge in their place-based context, and the transfer and stewardship of cultural fire knowledge and practice over time. However, in this research project, we heard from participants that cultural fire has not been facilitated through the cultural heritage provisions of the Act.

Cultural fire knowledge and the practice of cultural burning does not appear to be protected or governed in any way under cultural heritage laws in NSW. In fact, in practice, the presence of cultural heritage in an area may hinder the application of cultural fire, by triggering the requirement for a full assessment under planning laws or complicating an assessment under the Bushfire Environmental Assessment Code by triggering the provisions of the *Conditions for Hazard Reduction and Aboriginal Heritage* supporting document (see Part 2.2.1, above). One interviewee noted that,

> The cultural heritage section is both European and Aboriginal cultural items, but it's only looking at items that come up on a search. So, I think people have to do an AHIMS search [separately]. […] Anything that comes up on those searches will be considered and conditions will be put around that.

Despite serious shortfalls in the comprehensiveness of cultural heritage databases across Australia, this approach raises two issues. First, heritage will only be considered if it is listed in the database, even if it is recognised by Aboriginal communities and requires cultural fire for its protection. Second, listed items may prevent access to streamlined processes applied by RFS, Parks & Wildlife, and Forestry, but also approval under more detailed environmental assessment processes.

Emergency response across Australia prioritises human, property and ecological values over the protection of cultural sites, and typically excludes input from Aboriginal people with crucial cultural knowledge. Exclusion may occur because emergency decision contexts are culturally unsafe. For example, workshop participants described experiences in which emergency responders destroyed cultural heritage while responding to a bushfire:

> Participant 1: "[There is] no information [in the databases available to Incident Management Teams] apart from 'IS' (indigenous site). **No welcome, no smoking ceremony, no cultural safety. People are being forced to break cultural protocols**".
> Participant 2: "This happened at [bushfire] too. I wanted to be in the Incident Management Team (IMT). **They bulldozed cultural sites (scar trees) to protect environmental habitat**".
>
> *Niigi Niigi Workshop, 7 November 2023*

There is widespread recognition that the cultural heritage laws in NSW are not fit-for-purpose. NSW Governments have periodically sought to reform these laws, including by proposing the creation of a stand-alone Cultural Heritage Act, but these efforts at reform have been unsuccessful to date (ANTAR 2022). New cultural heritage legislation must be designed in a way that facilitates, or at least does not create additional barriers to, future arrangements for cultural fire in NSW.

**Barriers to cultural fire in cultural heritage laws include:**

- Laws for cultural heritage protection in NSW are extremely out-of-date and do not effectively protect static, cultural heritage sites in the state, let alone cultural knowledge and practices; and
- Decision making processes are not necessarily safe places for Indigenous people in NSW to participate or contribute cultural heritage knowledge.

### 5.2.7 Aboriginal owned and managed land

#### Native title

Native title recognises the cultural rights and interests of Traditional Owners in their Country. A native title determination gives Traditional Owners of that area, through a representative body such as a prescribed body corporate, the right to speak for and be consulted about activities within the area of the determination, and authority to continue to practice the cultural activities and customs that are recognised in the determination.

Despite heavy criticism of the limitations of native title, including the high threshold for recognising connection to Country and the extraordinary delays and costs in navigating and ultimately reaching a determination by the Federal Court, native title has been determined across significant areas of NSW and is claimed across a great deal more of the state's land and waters (see Report Literature Review).

Native title originated in the High Court decision of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (see Part 3, below). For current purposes, cultural burning is not protected as a native title right or interest unless it is listed as such, in a determination. For that to be the case, cultural fire management must be associated with an identifiable community of Indigenous people, on their Country, and practiced consistently since 'time immemorial' (defined as preceding colonisation). One interviewee noted that many consent determinations include,

> a right to camp (which could possibly include campfires, except when it's a declared fire danger day etc. I […] have my doubts as to whether a 'right to conduct cultural burns' would end up in a consent determination of native title. In some states, there are 'exclusive' native title determinations which don't specify particular rights and interests, merely 'the right to possession, occupation, use and enjoyment of the Exclusive Area to the exclusion of all others'. This suggests that this could include the ability to conduct cultural burns. However, even exclusive determinations are […] 'subject to the laws of the state or the Commonwealth' so this is likely to preclude cultural burns unless relevant state laws allow for it.

We searched for native title determinations in the National Native Title Register and on the database, *Westlaw*, to identify any determinations that mention the words 'fire' and/or 'burn'. We found that the right to light fires in existing native title determinations is always qualified with a clause such as 'for domestic purposes only, and not the clearance of native vegetation'. Clearing native vegetation with fire, through cultural burning, is typically explicitly excluded as a native title right in NSW.

Aside from rights and interests recognised in native title determinations, other legal requirements for cultural burning on land that is the subject of a native title determination will depend on the underlying tenure of the land (i.e., unallocated Crown land, land managed by Parks and Wildlife or a land council).

#### Aboriginal Land Rights

The *Aboriginal Land Rights Act 1983* (NSW) seeks to compensate Aboriginal people for dispossession, and support economic self-determination, by returning land to the ownership or co-management of Local Aboriginal Land Councils (**LALCs**). LALCs have functions under the Act that include acquiring and managing land on behalf of Aboriginal communities, protecting and promoting the culture and heritage of

Aboriginal persons within the LALC's area (s52(2), (4)) and achieving long-term economic outcomes including by providing community benefit schemes such as education and training, cultural activities and scholarship (s 3). The terms 'culture' and 'heritage' are not defined in the Act. These terms could, as a result, be defined more broadly and inclusively than the definitions of those terms in cultural heritage laws (see vi, above).

The NSW Aboriginal Land Council (**NSWALC**) is, as a result of the operation of the *Aboriginal Land Rights Act 1983*, one of the most significant landholders in the state, despite the fact that there remain many unresolved land claims across NSW (see maps in the Report Literature Review). As a land holder of large areas of NSW, empowered to undertake land management, including cultural burning, the NSWALC and LALCs are well-placed to investigate cultural burning across these areas. While the Act has been in place for 40 years and has not yet achieved widespread, practical changes in access to cultural fire, the NSWLAC has a permanent seat on the recently reformed NSW Bushfire Coordinating Committee (*Rural Fires Act 1997*, s 47(1)(m)). We understand that the NSW Government is currently working on a pathway to facilitate cultural burning on NSWALC and LALC lands.

#### Indigenous protected areas

Indigenous Protected Areas (**IPAs**) are areas of land or sea country managed by Aboriginal communities (such as LALC land or areas the subject of a native title determination). IPAs are managed under voluntary management agreements with the Commonwealth government, which can be the subject of national funding under the IPA program and the Indigenous Ranger Program (although, many of the 19 registered IPAs in NSW do not include funding for Indigenous Rangers, Williamson 2021, 10). Management plans are developed by the Traditional Owners or custodians of the IPA in consultation with the Commonwealth Government and may include cultural fire management. Williamson (2021, 10) observed that:

> One of the longest running and most successful cultural land management programs is the Wattleridge IPA and Rangers in the NSW northern tablelands (National Indigenous Australians Agency, 2021c; Patterson & Hunt, 2012). The Wattleridge Rangers emerged after decades-long local leadership from Banbai people wanting to reconnect with Country and provide opportunities for young people to learn about culture and provide employment and development opportunities for their community (Patterson & Hunt, 2012). A key pillar in Banbai peoples' cultural land management aspirations included re-learning cultural burning practices and techniques to protect against bushfires and promote ecosystem services (Patterson & Hunt, 2012).

Cultural burning on an IPA must be consistent with the IPA management plan and any obligations associated with funding, e.g., under the Indigenous Ranger Program. Other legal requirements will be determined by the underlying tenure. That is, if the land is owned and/or managed by a LALC, the assessment or approval obligations for cultural fire will be those that apply to LALC land (see above). IPA management plans offer valuable opportunities to guide and inform cultural fire on IPAs. For example, the *Banbai Whole of Country Plan 2023-33* explains that:

> Cultural burning makes our people healthy – it makes us empowered and emotional (we cry and it makes us happy), it connects us with people and Country. It is a way to protect our Country. It relaxes our minds and gives us a sense of ease. Getting back on Country and reintroducing cultural winba (fire) management to our IPAs [including Wattleridge and Tarriwa Kurrukun IPAs] has been really beneficial for Country and people. We have learned from others, and in turn, we are teaching others (Patterson et al 2023).

The only other publicly-available IPA management plan that we have identified for North Eastern NSW is the *Ngunya Jargoon IPA Management Plan 2013*, prepared in consultation with the RFS and Hotspots.

The IPA management plan references a document produced as part of a Hotspots Fire Project, the *Jali Wardell Lands, Fire Planning Strategy 2010-2020*; and includes the following provisions:

- Key species within the IPA that can be regenerated by fire, such as the heath leafed banksia. If the landscape is not burned, the plan notes that these banksias die out after 20-30 years and the heath reverts to woodland.
- Burning should be excluded in certain areas and conduct targeted, controlled burns in others, related to specific vegetation types.
- Fire projects should be subject to monitoring and evaluation objectives.

Cooperating with the RFS Hotspots program may reduce the administrative burden on cultural land managers that are seeking to reinstate cultural burns on their land and help to overcome some of the legal barriers described, above.

**Barriers to cultural fire in the management of Aboriginal land include:**

- Excluding the right to undertake cultural burning on native title land from determinations means that, even in areas where Aboriginal people are recognised as Traditional Owners, they must nevertheless seek the approval of government agencies to fulfil their cultural responsibilities to Country; and
- Neither Aboriginal Land Rights owned and managed land nor IPAs necessarily include funding and other resources to effectively ensure the management of Country according to cultural obligations, responsibilities and practices.

### 5.2.8 Insurance, civil and criminal liability

Legal frameworks govern activities to prepare for, respond to and recover from adverse events. These frameworks may operate as incentives or barriers (and sometimes both) to the practice of cultural fire. Relevant areas of law include the following:

- Insurance law
- General, civil liability (negligence, nuisance)
- Civil and criminal liability under fire statutes
- Coronial inquiries or inquests (process, outcomes)

Each of these areas of law are the subject of detailed research, legislation, policy, and case law. In this section, we provide very high-level summaries of the key issues and implications of the first three of these areas of law for cultural burning in NSW. The role and implications of inquiries and inquests is beyond the scope of this report.

#### Insurance law

Cultural burn practitioners require insurance to protect themselves from liability when burning on or near land that they do not own. Public liability and professional indemnity insurance for cultural burn organisations can protect against claims for property damage or injury arising from fire in the event of an escaped burn, or from smoke (Godwin 2022). This is especially important when cultural burns take place in areas with elevated risk, including near people's homes and other infrastructure or property.

The absence of specific, enabling laws for cultural fire means that there is no legal instrument or permit to demonstrate to an insurer that an activity complies with the law. Because there is no government support that is explicit in legislation for cultural fire, insurers do not necessarily have the comfort of a government-endorsed activity and may elect not to be exposed to what could otherwise be an unquantified risk. With no explicit exemption or limitation on liability, insurers may face the full costs of any damage that may be

caused by a cultural fire, in a way that they will not be exposed to the consequences of a hazard reduction burn by fire agencies that 'goes wrong'.

At an individual level, without insurance, cultural burn practitioners may be held personally liable to cover the costs of any harm caused by an escaped burn, including injury, or damage to third party property. They may be required to pay out of pocket for damages and other expenses. Any such harms, particularly if they are uninsured and cannot be recovered from the practitioner, may also increase 'public fear and scepticism' around cultural burning (Parajuli et al 2019), and place the reputation of practitioners and organisations carrying out cultural burns at risk.

When risks are heightened, the Insurance Council of Australia (n.d.) has observed that many insurers 'place embargoes on insurance policies to prevent people buying insurance'. Cultural fire practitioners around Australia have also suggested that the cultural aspects of burning, including the participation of Elders and young people in burns 'can go against existing agency/regulatory risk frameworks' (Costello et al 2021). Insurance was specifically identified as an emerging issue for hazard mitigation and effective land management in the final report of the National Natural Hazards Royal Commission. This is despite research showing that an extremely low percentage of beneficial burns escape, and when they do they cause 'negligible damage' (Parajuli et al 2019).

As a result of constraints on accessing (affordable) insurance, cultural burns in New South Wales are often conducted under the insurance cover of government agencies such as the RFS and Crown Lands (Robinson et al 2021). These agencies can indemnify cultural burn practitioners carrying out the burns on their behalf through the NSW Treasury Managed Fund, the NSW Government's self-insurance scheme (Crown Land NSW n.d.). In those circumstances, if a cultural fire were to escape and cause damage, the cultural burn practitioner's actions would be insured provided they fell within the scope of the government-led activity (although, only eligible Crown Land Managers are insured under this scheme when working on Crown Lands). This form of insurance is limited, and non-eligible Crown Land Managers must obtain insurance at their own costs (Crown Land NSW n.d.).

Many participants in our project spoke to us in general terms about insurance being increasingly difficult to obtain, either because insurers have taken a conservative approach to fire-related risks and have chosen not to insure cultural burning, or because policies that cover cultural fire management are too expensive (Insurance Council of Australia 2022). For some cultural fire practitioners, challenges with insurance have already resulted in decisions not to conduct cultural fire – on particular occasions, or times of year, or at all (Robinson et al 2021). For others, the unavailability of insurance may have meant that they have undertaken cultural burns without the necessary insurance in place. Shortfalls in insurance increase the risk that, in the (extremely unlikely) event that a cultural burn escapes and causes harm, that harm will not be insured. As already noted, that scenario is a risk for individual cultural fire practitioners but, depending on the circumstances, may also affect community support for cultural burning more generally.

> "**I had to be kind of careful even talking to brokers, because you mention the word fire, they just hang up on you.**"
>
> *Interview, Cultural Fire Practitioner, March 2024*

Williamson (2021, 14) has observed that:

> [i]n order to support Aboriginal people to self-determine cultural land management and be fully supported to conduct these activities, the NSW Government may need to create specific provisions to insure and protect Aboriginal people. Having adequate and fit-for-purpose insurance has been identified as a barrier to cultural land management activities. Whether real or imagined, many Aboriginal groups feel they cannot, or are unable, to afford the premiums to cover their activities (Hunt, 2012, p. 111; Weir & Freeman, 2019, p. 13). Insurance concerns are set to become even more pronounced given the impacts of the 2019–20 summer bushfires and the significant increase in insurance premiums to cover land management activities and in particular, burning activities (Collins, 2021).

We understand that cultural fire expert, Rachael Cavanagh, is in the process of finalising a detailed, national and state-by-state review of insurance arrangements and the implications of these arrangements for cultural fire around Australia. That report will be a valuable source of information and recommendations for reform.

### Liability

Limitations in the availability and accessibility of insurance is a major barrier to expanding the practice of cultural burning outside of government-led burns, as well as a barrier to ensuring that cultural burn practitioners are protected from liability (Costello et al 2021). However, in practice, the risk of liability for a cultural burn that escapes and causes damage to life or property is likely to be extremely low.

Just over a decade ago, Michael Eburn and Stephen Dovers (2012) reviewed post-bushfire litigation in Australia and claims for compensation against the NSW RFS. They found that:

> Although the data are incomplete and likely to underestimate the actual claims history, analysis of the available data does show that the number of claims for compensation is small given the very large number of fires and hazard reduction burns across Australia. There is no evidence of extensive post-fire litigation or of fire agencies or firefighters being held liable for actions taken in the course of firefighting The evidence does not support assertions that there is an 'increasing flood' of legal claims arising from firefighting. Post-fire litigation is compared with other proceeding such as Royal Commissions and coronial inquiries. It is argued that it is not liability, but the lengthy post-event inquiry process and the risk of personal criticism that should be the concern of fire managers and firefighters.

The findings reported in that research are supported by the feedback that we received in interviews and at the project workshop. For example, one workshop participant acknowledged that:

> "**Liability is an overestimated issue – there is not much damage**"
>
> *Participant – Niigi Niigi Workshop, 7 November 2023*

As noted above in relation to insurance, cultural burns are sometimes conducted with support from the RFS (particularly where a cultural burn receives approval from the RFS, in the form of a permit or bush fire hazard reduction certificate under the Code, but also on occasions, when requested by the person or community conducting the cultural burn).

> "Now the other thing that also sits with cultural burning is that we do have brigades that assist with them as well sometimes…We'd still need permits for burns in the bushfire danger period, but the brigades can facilitate that process and the brigades often issue the permits themselves. So, there's added, obviously, safety by having an appliance and people with training at an event."
>
> *Government participant, Project interview #8, October 2023*

Where the RFS attends a cultural burn or participates in some way, the burn may be covered by the liability provisions of the *Rural Fires Act 1997* and benefit from the protections for firefighters and volunteers that are discussed in Eburn and Dovers (extracted above).

However, in practice, cultural fire is even less likely than the RFS to face litigation based on harm caused. Despite limited data about investigations and prosecutions, court decisions between 2011 and 2023 support Eburn and Dovers' findings that liability is, in fact, rarely imposed on those that light prescribed fires. We conducted a comprehensive search of the legal databases and we were unable to identify a single example of litigation based on a cultural burn escaping and causing damage. This was backed up by comments in the project interviews and workshop for this research, including the following:

The threat of civil liability (negligence, nuisance) or criminal liability (e.g., arson) does not appear to be a direct barrier in the law, in the sense that there has been no litigation anywhere in Australia that has resulted in a cultural fire practitioner being found liable (civil or criminal) for a cultural fire escaping. However, the risk of liability in theory may be enough to prevent cultural burning by some people, in some places, and at some times. That is, concern about liability may have a chilling effect on cultural burns.

Clear and specific limitations on liability could have positive implications for both insurance costs and the

> **"We've got to be allowed to make mistakes. We're all still learning**. We can't have [cultural fire] taken off us because one thing went wrong. So much has been lost. In spite of all that, we're still laughing and trying to heal Country."
>
> *Participant – Niigi Niigi Workshop, 7 November 2023*

practical implementation of cultural burning, on the ground.

**Barriers to cultural fire in insurance, negligence and nuisance laws include:**

- Perceptions of risk and, perhaps, shortfalls in evidence of safety and statutory and government support, are likely increasing the costs of insurance and the likelihood that insurers choose not to insure cultural fire;
- Insurance that is accessible and affordable appears to be difficult to obtain, preventing cultural burning in some circumstances and making it more risky for practitioners in others; and
- Perceptions of a risk of liability may have a chilling effect on cultural burning, despite evidence that no cultural fires have been the subject of litigation in Australia, to date.

### 5.2.9 Other areas of law that may complicate or prevent cultural burning

A host of other areas of law may be relevant in seeking and obtaining approval for a cultural fire, depending on the tenure, circumstances and potential effects of a proposed burn. These other areas of law may include: pollution management such as air quality and public health laws; legislation for

protecting freshwater, riparian habitat, erosion control, water quality and water catchments; and biosecurity laws including to control the introduction and spread of pests and weeds. Some of these laws, particularly air pollution controls in relation to smoke, have been identified as important legal barriers to cultural fire management overseas (Clark et al 2021).

Each of these areas of law was raised as a potential barrier in the project interviews. In some very rare cases in NSW, these laws may complicate the process of applying for a permit, certificate or other approval for a proposed cultural burn. However, we have not described them in detail here because they are significantly less-likely to be triggered by cultural fire than they are by prescribed burns and other kinds of fire and, these potential barriers were raised by no more than one interviewee, and not raised at all at the project workshop.

## 5.3 Synthesis of legal and institutional arrangements for cultural burning

In this section, we synthesise the legal framework described above in an easy-to-read, graphical format. We summarise the enabling conditions, legal prohibitions on cultural fire, permitting and exemption arrangements, institutional frameworks, and relevant policy instruments for cultural fire in NSW.

# FIRE & NATIVE VEGETATION MANAGEMENT IN NEW SOUTH WALES

## EXEMPT

**In some circumstances lighting a fire and removing vegetation will not be assessed and does not need to be permitted/reviewed.**

### Private land/Aboriginal freehold

A cultural fire may be exempt from any formal, legal process if it takes place on private land (including Aboriginal land held by the NSW/Local Aboriginal Land Council), outside the fire permit period, and if nothing goes wrong. The bushfire danger period commences on 1 October and ends on 31 March the following year. Lighting a fire outside this time does not require a Fire Permit.

### Native Title / Aboriginal Management

Some cultural activities can take place on land the subject of a native title determination, on Indigenous Protected Areas and in areas co-managed by Traditional Owners, provided they are consistent with a Determination or Management Plan.

### Local Land Services Act 2013

**Part 5A Division 4 – Allowable activities**

Schedule 5A sets out clearing activities that are allowed without approval or any other authority. These allowable activities may only be carried out by/on behalf of landholders (s 2), within the allowable activity zones under section 3. The clearing of native vegetation is only authorised to the minimum extent necessary (s 7).

**Clearing for traditional Aboriginal cultural activities other than commercial activities (s 18)**

Clearing native vegetation for a traditional Aboriginal cultural activity (other than a commercial cultural activity).

**Clearing for public works (s 20)**

Clearing native vegetation for the construction, operation or maintenance of infrastructure by a public or local authority in the exercise of its land management activities. Not allowable where the native vegetation is a threatened species, part of a threatened ecological community or the habitat of a threatened species (s 20(2)).

**Clearing for environmental protection works (s 19)**

Environmental protection works means works associated with the rehabilitation of land towards its natural state or any work to protect land from environmental degradation, and includes re-vegetation or bush regeneration works, wetland protection works, erosion protection works, dune restoration works and the like, but does not include coastal protection works

**Clearing for firebreaks (s 27)**

Clearing native vegetation for the purpose of creating a firebreak to a maximum distance of 100 metres where the native vegetation comprises mostly mallee species.

# PERMITTING OBLIGATIONS

**Certain approvals and/or licences may be required before a landowner or agency may burn native vegetation. These requirements are found across multiple pieces of legislation in New South Wales. What authorisation is needed and the conditions that attach depend on factors such as the amount of vegetation being burned, what type of land the approval is being sought for and what time the proposed burn is planned for.**

## Local Land Services Act 2013

This Act regulates land in rural zones. Schedule 5A sets out clearing activities that are allowed without approval or any other authority. These **allowable activities** may only be carried out by or on behalf of landholders. Clearing of native vegetation for a traditional Aboriginal cultural activity is generally authorised. If clearing is not automatically allowable, it may fall under **code-based clearing** under the Land Management (Vegetation) Code 2018 or it may require **approval from the Native Vegetation panel**.

## Biodiversity Conservation Act 2016

An activity or development that is likely to significantly affect the environment under the *Environmental Planning and Assessment Act 1979* ('Planning Act') is one that is likely to significantly affect a threatened species. Proposals for activities or developments under Part 5 of the Planning Act that reach this threshold must be accompanied by a **species impact statement**, and if the applicant elects, a **biodiversity assessment report**. Higher impact clearing that is not an allowable activity under the *Local Land Services Act 2013* or under the code triggers the biodiversity assessment requirements under Part 7 of the Act

## Rural Fires Act 1997

A person who lights a fire for the purpose of land clearance is guilty of an offence unless a bush fire hazard reduction certificate has been issued or other consent or authority under another Act.

**Hazard Reduction Certificates** authorise the carrying out of burns for the purpose of bush fire hazard reduction. Any owner of private land may apply for a certificate, or a public authority for burning on Crown land

**Fire Permits** are required for burns proposed to be carried out during the bush fire danger period, which is generally from October 1 to March 31 (s 81), unless the bushfire danger period is brought forward or extended due to regional weather conditions, and you must comply with any conditions on the permit. A hazard reduction certificate must have already been issued. Total fire bans may be declared in the interests of public safety and fire permits are suspended (that is, you cannot burn) for the duration of a total fire ban.

## Environmental Planning and Assessment Act 1979

Part 5 of this Act requires an **Environmental Impact Assessment / Review of Environmental Factors** to be conducted prior to an authorisation being granted to undertake an activity that is likely to significantly affect the environment on Crown land or land managed by a public authority. An 'activity' includes the use of land and the carrying out of works, which can capture the removal of native vegetation by burning. Clearing for a purpose that does not require development consent or activity approval under this Act may require permission from the Native Vegetation Panel if not allowable or code based under the *Local Land Services Act 2013*.

## Forestry Act 2012

Clearing activities in state forests or on Crown timber land require a clearing licence issued by a forestry corporation under section 43 of this Act. This licence authorises the holder to ringbark, kill or destroy trees as is specified in the licence on the land specified in the licence. There are four Integrated Forestry Operations Agreements in NSW which authorise the carrying out of forestry operations: Brigalow Nandewar, South-Western Cypress, Riverina Red Gum and Coastal IFOA. These agreements set out Forestry NSW's obligations in relation to a burning operations management plan for the area.



### Land Management (Vegetation) Code 2018

This code applies to all rural zoned land under Part 5A of the *Local Land Services Act 2013*. The Act provides that clearing is authorised without any approval where it is carried out by or on behalf of a landowner in accordance with the code. Certain types of clearing, such as clearing which has a moderate impact on invasive native species, require a **mandatory code compliant certificate** to be issued.

### Bush Fire Environmental Assessment Code

This code applies to the clearing of native vegetation for the purpose of bush fire hazard reduction. The clearing may also have an incidental purpose such as a cultural or ecological purpose. The code provides a streamlined environmental assessment process meaning that a hazard reduwwction certificate can be issued and the assessment processes under the *Environmental Planning and Assessment Act 1979* do not have to be undertaken.

### Rural Boundary Clearing Code

Clearing can only be undertaken under this code with consent of the landowner. Landowners may clear vegetation within 25m of their property without a permit or approval if undertaken in accordance with the code to prevent the spread of bush fires. The Code does not provide approval, but a defence to an offence of clearing vegetation. Overrides environmental assessment and approval requirements in the *Biodiversity Conservation Act 2016* and the *Environmental Planning and Assessment Act 1979*.

### State Environmental Planning Policy (Biodiversity & Conservation) 2021

This policy applies to the clearing of native vegetation in urban areas not covered by the *Local Land Services Act 2013*. Clearing of this kind is generally prohibited without authorisation. A private landowner must not clear native vegetation without council approval. In some local government areas, approval may be required from the Environment Protection Authority. A permit or approval is not required for clearing for a traditional Aboriginal cultural activity, other than a commercial cultural activity.

### Environmental Planning and Biodiversity Conservation Act 1999 (Cth)

Clearing of native vegetation would only require federal authority under this act if it was likely to have an impact on one of the nine matters of environmental significance. These include world heritage and national heritage areas, RAMSAR wetlands and listed threatened species. If a person thinks their proposed activity might have an impact, they have an obligation to refer action to the Commonwealth minister. This then triggers the environmental assessment and approval provisions of the Act.

# PROHIBITIONS

**Under what circumstances is the burning of native vegetation totally prohibited in New South Wales?**

### National Parks and Wildlife Act 1974

It is prohibited for a statutory authority to carry out a development, including clearing native vegetation in a nature conservation area managed by NSW Parks and Wildlife without written notice of the Minister for the Environment and Heritage consenting to the development. It is not permitted to harm vegetation without authority in conservation areas.

### Rural Fires Act 1997

Lighting a fire during a total fire ban is prohibited and all fire permits are suspended for the duration of the ban.

Permission to light a fire will not be granted if fire thresholds are exceeded for particular vegetation types.

### Wilderness Act 1987

'Development' under this Act includes the clearing of native vegetation. Any development by a statutory authority that "will adversely affect" a wilderness area is prohibited without written notice of the Minister consenting to the development.

### State Environmental Planning Policy (Biodiversity & Conservation) 2021

This policy applies to the clearing of native vegetation in urban areas not covered by the *Local Land Services Act 2013*. Clearing of this kind is generally prohibited without authorisation. A private landowner must not clear native vegetation without council approval. In some local government areas, approval may be required from the Environment Protection Authority. A permit or approval is not required for clearing for a traditional Aboriginal cultural activity, other than a commercial cultural activity.

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# PENALTIES FOR HARM

**What are the penalties for causing harm to native vegetation in contravention of a permitting obligation or other law?**

### Fines

Large fines may be issued for clearing native vegetation by burning without the appropriate authorisation. For example, under the *Rural Fires Act 1997,* fines of up to $110,000 may be issued if an individual lights a fire unlawfully on private land or land owned by a public authority, and the fire causes damage or injury. Fines may also be imposed for failure to give notice of vegetation clearing under the Codes.

### Criminal Prosecution

Some legislation in this area makes it a criminal offence to harm native vegetation. Intentionally causing harm to native vegetation can attract larger penalties than recklessly causing harm. For example, under the *Biodiversity Conservation Act 2016* it is a criminal offence to harm threatened species or habitat. This offence can attract a large financial penalty, imprisonment, or both.

### Civil Penalties

Civil enforcement proceedings may be initiated in the NSW Land and Environment Court for breaches of the vegetation clearing rules in the *Local Land Services Act 2013*. Civil proceedings only require the breach to be proved on the 'balance of probabilities', rather than the standard of proof of 'beyond reasonable doubt' for criminal proceedings. Civil penalties are not just monetary. Rather, the Court has power make orders that the harm be remedied or that the clearing is stopped.

### Licence Action

In the event of non-compliance with native vegetation management legislation such as the *Local Land Services Act 2013* or the *Biodiversity Conservation Act 2016,* the NSW Office of Environment and Heritage has power to vary, suspend or cancel any licence or permit issued for the clearing of native vegetation.

### Civil Liability Act 2002

Harm under this Act means damage to property or personal injury. Individuals or organisations undertaking burning activities may be liable in negligence for harm caused. The affected person(s) or corporation(s) would need to prove that loss flowed from inadequate precautions being taken during the burn. Damages for loss may be awarded if negligence is proved. Section 5B of this Act sets out the general principles of negligence. The Act fixes the quantum of damages that may be awarded

# INSTITUTIONAL FRAMEWORK

**Particular agencies have the authority to conduct or approve burns on specific types of land. The liabilities facing each agency may be different.**

### Rural Fire Service

Section 128 of the *Rural Fires Act 1997* protects members of the RFS from liability in carrying out provisions of the Act in good faith. This protection extends to the Commissioner, members of bushfire management committees, the Forestry Corporation when acting under the Act and other entities defined as 'protected persons or bodies'. However, in *Woodhouse v Fitzgerald and McCoy (No 2)* [2020] NSWSC 450, the RFS was found to be proportionally liable in negligence as concurrent wrongdoers (s 34(2) pt. 4 *Civil Liability Act 2002*) when a hazard reduction burn conducted by the RFS and requested by the respondents damaged the applicant's property causing $1.2 million of damage. The RFS failed to properly educate the respondent about the risks associated with a burn and undertook a hazard reduction burn knowing the landowners would not be there to manage the risk of reignition.

### Department of Climate Change, Energy, the Environment and Water

This Department (also known as DCCEEW) is responsible for enforcing compliance with Part 5A of the *Local Land Services Act 2013.* This includes the investigation of unauthorised clearing of native vegetation in contravention of the Act. Unlawful clearing is detection through public notifications, investigations and audits and remote surveillance. The enforcement options open to the Department include stop work orders, penalty notices, criminal prosecutions, and licence action.

### Local Land Services

The *Local Land Services Act 2013* is administered by Local Land Services. LLS assesses proposals under the Land Management (Vegetation) Code and issues certificates of compliance for native vegetation clearing. LLS maintains a public register with notifications and certificates of clearing under the Code, however allowable activities do not need to be reported when they are carried out by landholders.

### Aboriginal Corporations and Cultural/ Commercial Cultural Burning Enterprises

Aboriginal corporations with the purpose of facilitating cultural burning and education are not afforded the protection of exemptions for traditional Aboriginal cultural activities under instruments such as the *Local Land Services Act 2013* and the State Environmental Planning Policy (Biodiversity & Conservation) 2021 as their operations are commercial and therefore require authorisation. Protection from liability under the *Rural Fires Act 1997* is only afforded to those defined as 'protected persons or bodies', which is a closed category.



### Aboriginal Land Councils and Organisations

The New South Wales Aboriginal Land Council (**NSWALC**) oversees Local Aboriginal Land Councils (**LALC**) that represent Aboriginal people in New South Wales. NSWALC can, on its own behalf or on behalf of a LALC, acquire land, make claims on Crown land, and make grants, lend money or invest money on behalf of Aboriginal people, amongst other powers granted under the *Aboriginal Land Rights Act* (1983).

### Biodiversity

The Biodiversity Conservation Trust enters into private land conservation agreements with landholders. The proposed purpose of these agreements is to conserve biodiversity in New South Wales and very limited clearing may occur on land subject to an agreement. The Trust provides financial incentive to landholders to preserve vegetation and limit clearing on their land. Land subject to these agreements counts for just over 2.8% of land in New South Wales.

### Local Government

Local councils are responsible for approval of native vegetation on urban land under the SEPP, that is land not covered by the *Local Land Services Act 2013*. Exemptions from approval under the SEPP for clearing for a traditional Aboriginal cultural activity do not apply to commercial operations. Therefore, Aboriginal organisations may require council approval to conduct burns. Under section 733(3)(f1) of the *Local Government Act 1993,* local councils are not liable for any action or omission relating to the likelihood of any land being subject to the risk of bush fire. This applies to the carrying out of bushfire hazard reduction works.

# POLICIES AND GUIDELINES

**Agencies may comply with and look to key burning policy documents for guidelines on whether/how burns take place. However, while policies may provide useful principles, they contain no legally binding obligations.**

### National Parks and Wildlife Service 'Cultural Fire Management Policy 2016'

Applies to all lands managed under the *National Parks and Wildlife Act 1974.* Provides that NPWS will promote opportunities for cultural fire management. This includes allowing for Aboriginal communities to inform burns conducted by NPWS and participate in low-risk burns, as well as inform other aspects such as training, preparation and monitoring.

### Biodiversity Conservation Trust 'Guide to the Application of Fire as a Management Tool 2022'

Aims to support the use of fire as a management tool within private protected areas. Designed to assist landholders to make a choice as to whether burning is an option for managing their land. This policy states that the Biodiversity Conservation Trust will support burning as a tool when used to achieve Aboriginal cultural and/or ecological outcomes.

### Local Land Services 'Aboriginal Engagement Strategy 2020'

The goals of this policy include allowing Aboriginal communities greater access and control over the management of their Country and its resources. The strategy states that Local Land Services will collaborate with Aboriginal communities and engage in the sharing of cultural knowledge to enhance contemporary land management practices.

### Rural Fire Service 'Aboriginal Communities Engagement Strategy NSW 2018'

The main goal of this strategy is to reduce the impact of fire on Aboriginal communities by engaging Aboriginal people in rural fire management. Initiatives to achieve this include supporting communities to develop local solutions to bushfire risks and partnering with Traditional Owners who wish to maintain cultural burning practices to reduce the risk of bush fires.

### Department of Planning and Environment 'Our Place on Country: Aboriginal Outcomes Strategy 2020-2023'

Promotion of greater access and control by Aboriginal Communities over land, waters, and resources. The strategy includes providing support to Aboriginal organisations and businesses as well as increasing the Aboriginal workforce within the Department of Planning and Environment.

# 6. Research Results: Priority barriers and enablers in NSW laws

Across the course of the project so far, we have identified a range of barriers, including from the literature review, interviews, workshop and legal analysis. In the tables and charts in the remainder of this section, we synthesise the data that we have collected from the project workshop and interviews. The two charts immediately below, demonstrate the themes that were identified in our key stakeholder interviews. The '**count of category**' in each chart indicates the number of different issues that were raised, that came under the general category heading. For example, under the general category of 'legal rigidity' we grouped different but related issues such as: 'constrained burn windows do not accord with cultural seasonal calendars', and 'legal and policy frameworks do not recognise the cultural and spiritual values of fire'. The '**sum number of refs**' in each chart indicates the number of interviewees who referenced that particular category of barrier in their interview.

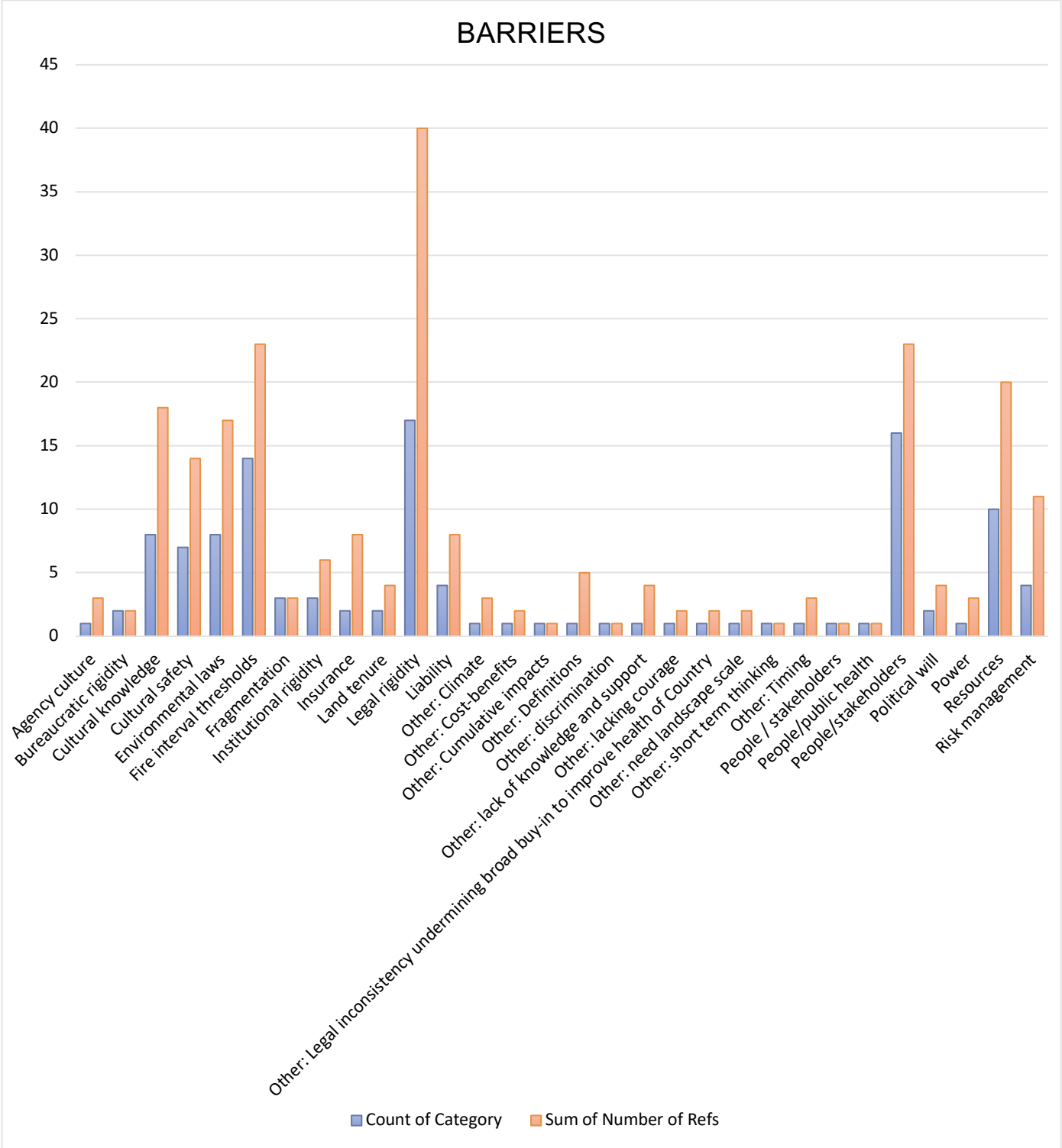
A full list of the coded interview data is set out in the Appendix. We draw on these results in the legal analysis and reform pathway discussions that follow.

Below those charts, in Table 3, we have taken the most commonly identified barriers to cultural fire ('barriers' column) and included a brief description of how each example operates to hinder or prevent cultural burning. We invited workshop participants to prioritise the top barriers from this list, and the results of that prioritisation activity are also summarised in Table 3 ('priority' column). Flames indicate the number of votes for the significance of each listed barrier at the project workshop. Each participant was given three stickers: one red (to place against the highest priority barrier) and two yellow (to place against the barriers that they considered to be second and third priority).

Interview participants spoke about these priority barriers too, and we have extracted quotes from both interview and workshop participants to explain how each barrier operates and its impact on cultural burning, in the right column of Table 3.

In addition to the law-specific barriers set out in Table 3, project interviewees and workshop participants (together, 'participants') also highlighted the following contextual barriers relating to policies, implementation and resourcing of legal instruments, impeding both cultural burning and opportunities for reform to facilitate cultural fire in NSW:

- Lack of trust
- Progress too slow / Unwillingness to change
- General lack of cultural awareness / support
- Lack of cultural safety
- Colonialism, power imbalance
- Racism
- Risks of misappropriation of knowledge / practice


BARRIERS
45
40
35
30
25
20
15
10
5
0
Agency culture
Bureaucratic rigidity
Cultural knowledge
Cultural safety
Environmental laws
Fire interval thresholds
Fragmentation
Institutional rigidity
Insurance
Land tenure
Legal rigidity
Liability
Other: Climate
Other: Cost-benefits
Other: Cumulative impacts
Other: Definitions
Other: discrimination
Other: lack of knowledge and support
Other: lacking courage
Other: need landscape scale
Other: short term thinking
Other: Timing
People / stakeholders
People/public health
People/stakeholders
Political will
Power
Resources
Risk management
Other: Legal inconsistency undermining broad buy-in to improve health of Country
Count of Category
Sum of Number of Refs

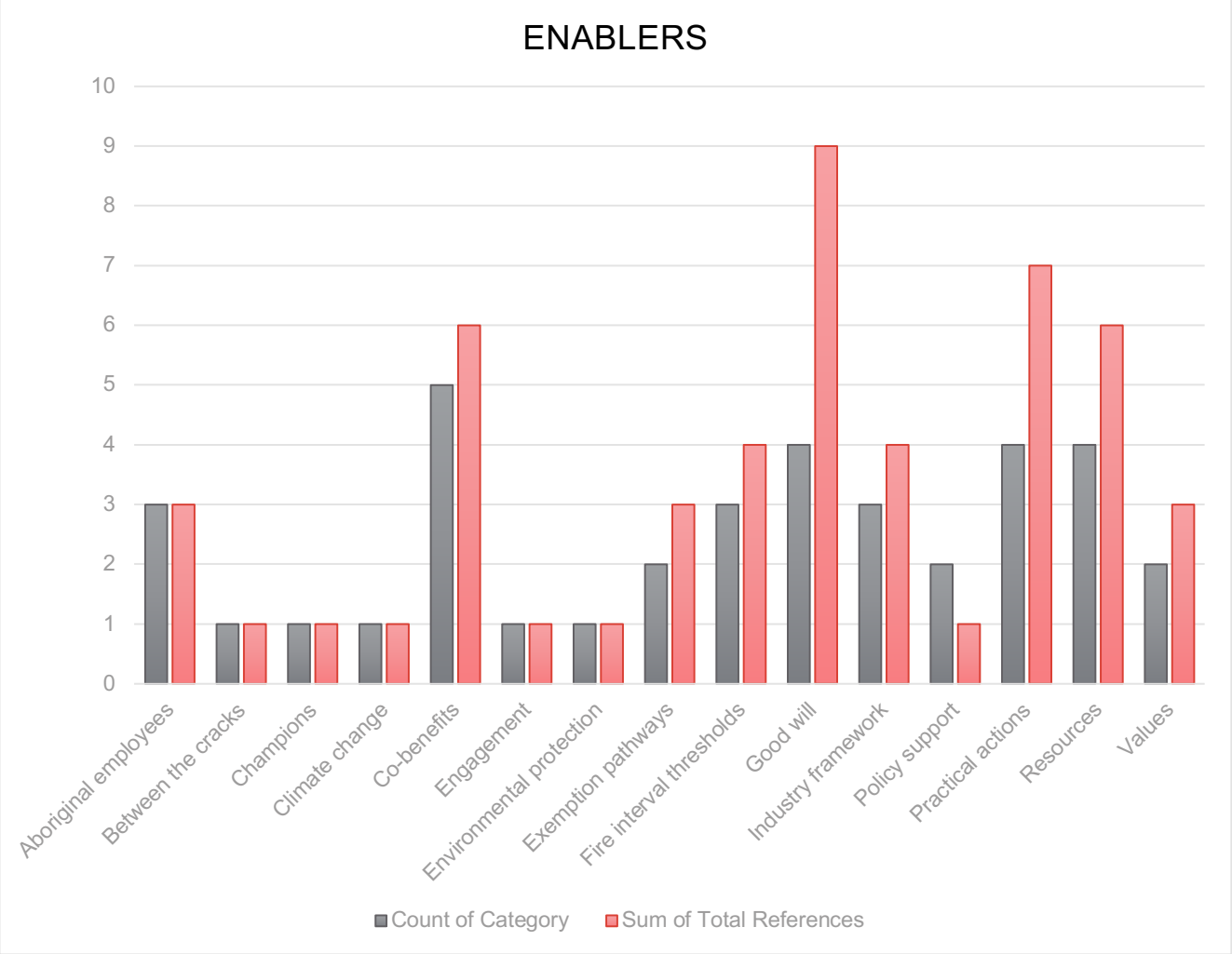



**Table 3. Barriers to cultural fire**

| Barrier | Explanation of barrier | Priority | Participant quotes |
|---|---|---|---|
| Lack of understanding (especially decision-makers / people in power) | This barrier underpins most of the others in the list. It can result in legal provisions that are open to interpretation, being interpreted in a way that hinders or prevents cultural fire being approved, and may extend the delay and cost of assessment processes for cultural fire even if they are ultimately approved.<br><br>This barrier is consistent with the findings of Hoffman et al 2022 about barriers to cultural fire in Canada. | | Workshop participants:<br><br>'We need the Ministers to come out on Country. They are the people who need to be here'<br><br>'The political leaders need to be here and listen'<br><br>'The biggest barrier is lack of understanding'<br><br>'The government doesn't listen. Elders are not part of the decision-making process. Our knowledge is not recognised. It needs to be the right people. We are never there, never part of the process.'<br><br>'Put the right people in these roles. People who are willing to listen' |

| Barrier | Explanation of barrier | Priority | Participant quotes |
|---|---|---|---|
| Insurance (too costly/too complex) | Insurance provides important protection from financial impacts and the costs of potential liability in the extremely unlikely scenario that a cultural burn escapes. Cultural burners may also need insurance before they can conduct a burn on certain tenures, or collaborate with certain landholders, and appropriate insurance may be required as a condition on a permit or approval. |  | Interviewee:<br>'You know, I've had different land councils tell me they're insured. […] I don't have to certify that for them, or doubt them, but I've said to them, 'are you really confident you're insured?' So, if I said under the Rural Fires Act section 63 of the Act, if the fire leaves your property, you are liable. So, if you are burning and the fire escapes your property, it impacts your neighbour burns their $2 million house down. Are you really insured? And I've just seen that look of doubt in their eyes, I suppose. Because I think probably insurance people can also do a good job saying, 'oh, absolutely, you have liability protection, you got this, you got that'. But if they work through every scenario, and because where I come from with it, and I'm not an expert in the insurance industry, or liability, but I know we have farmers in New South Wales now saying, I can't afford insurance for fire, not only of damage on my property, but in case I do something, and it escapes on multimillion dollar farms'. |
| Fire interval guidelines are applied too strictly or are inaccurate | The fire interval guidelines are significant, because they are integrated into the streamlined assessment processes (e.g., bush fire hazard reduction certificates under the Bushfire Environmental Assessment Code) and a core component of a full environmental assessment under State and Commonwealth environmental impact assessment processes.<br>The current guidelines are old (published in 2004) and will be replaced very soon with new guidelines (publication anticipated in 2024).<br>We understand that the new guidelines have been developed without extensive input from cultural fire knowledge holders or Traditional Ecological Experts in NSW. The implications of the new guidelines for assessment and approval processes for cultural fire remains to be seen. |  | Interviewees:<br>'When […] a cultural burn comes to us and we want to use the hazard reduction certificate, very often the fire frequency threshold is the thing that stops us there'.<br>'The Local Aboriginal Land Council did a cultural burn… It was a beauty and they ended up doing nearly 2,000 hectares of cultural burning in patches, which was probably the biggest one in Australia at the time and they taught us, as we taught them our way. A couple of years later, they came back and said, right, can we go back? And we went 'no'. The return time framework legally under the Bush Fire Assessment Code is a really big problem, whereas normally they would go back in to burn it more frequently. That is the real problem'.<br>'Some of those places, we could only come back every 10 years, but it's just enough. It's just enough to keep the soil okay and keep the forest health okay. It's those big intervals where you start hitting up to the 20 years plus that you really hurting the forest'.<br>No exceptions to the fire intervals in the HR Certificates: 'That is strictly applied. Yeah. So, as I said, the certificate is about an easy tick. The easy tick is you must meet that interval for that broad community. If you are wanting to burn more regularly than that, then |

| Barrier | Explanation of barrier | Priority | Participant quotes |
|---|---|---|---|
| | | | you need to go to a review of environmental factors and you would need to have a really good justification of why you were burning more frequently than that'.<br><br>Workshop participant:<br><br>'The fire interval thresholds are very bad, they need to be fixed' |
| Limitations in land access (across tenures) | Some programs, such as the RFS Hotspots program, facilitate cross-tenure burns that may include cultural expertise. However, most assessment processes are conducted either for private land (e.g., the EA Code by RFS; LLS approval and exemption processes) *or* public land (e.g., EA Code assessments by NSW Forestry Corporation or Parks and Wildlife). |  | Workshop participant:<br><br>'Why can't fire come under its own heading? It shouldn't have to answer to other laws. We still have to get permission from the landholder- there are many, varied tenures. Too many people are having a say about fire'. |
| Streamlined processes are not designed for cultural fire | While streamlined assessment processes may be used to assess and approval cultural fire, they all designed either for hazard reduction (e.g., the EA Code) or for cultural activities in general, rather than fire (e.g., LLS Act allowable activities), so no existing process is specifically fit-for-purpose. |  | Interviewees:<br><br>'A lot of the activities with cultural burning are… we sometimes are trying to find how to fit a square peg in a round hole. Sometimes we can enable it and others not. I think particularly when it comes to the point of environmental approvals, we have a statutory mechanism to allow for *essential hazard reduction* activities. It's not for land management practices'.<br><br>'In some cases, there are things in place that for some activities [that] we can enable, but it's not universal and it's not the primary purpose. It would be more optimal if there was a mechanism that you didn't need to use other ways. Its not illegal or inappropriate, but it's just not optimal'. |
| Fear of liability | Despite the absence of litigation for escaped cultural burns, the prospect of potential liability may have a chilling effect on cultural burning. |  | Interviewees:<br><br>'With all the people moving in around the boundaries of the forests everywhere, if you accidentally burn someone's place, you're in court'.<br><br>'Insurance and liability is an important thing to think about where cultural burns are being undertaken, if things do get away'. |
| Risk management | Risk management arrangements prioritise harm from fire not protection of culture (i.e., PPE and other safety arrangements may impede cultural experience). |  | Interviewee:<br><br>'Well, you can see that we haven't got safety now. We've got rules and regulations that prevent a safe landscape. And the reason that people are losing homes and losing lives is because the current situation is unsustainable… largely as a function of those |

| Barrier | Explanation of barrier | Priority | Participant quotes |
|---|---|---|---|
| | Risk management protocols may exclude key cultural fire participants (e.g., elders, children) | | rules and regulations that are supposed to make it safe'. |
| Commercial cultural activities are not exempt from LLS Act | Excluding commercial activities from LLS Act 'allowable activities' means that cultural fire practitioners cannot access this streamlined pathway if they will be paid to conduct a cultural burn. This is criticised as inappropriately excluding Aboriginal businesses from clear pathways to burn. |  | Workshop participants:<br>'It's very frustrating working between the LLS and RFS Acts. Navigating these systems is really difficult' |
| Lack of resources | Aboriginal communities that are keen to participate in cultural fire may be prevented from doing so by a lack of experience in navigating legal assessment and approval pathways, and by a lack of resources to pay for expert reports, certificates or approvals, and insurance products for cultural fire. |  | Interviewee:<br>'The rules weren't like what they are now. And way the burn plan was, I could do it the afternoon before. And I think very much there's been a real loss of Aboriginal people from the forestry industry. We know that they were present in the 60s and 70s. We know a lot of them were our logging contractors, our pole cutters, or they work for the forestry and with increasing mechanisation this or the loss of those people, I think when I started in the 80s and I'm sure that pretty much a lot of our traditional burning techniques that we got taught came from those Aboriginal people who'd been in the forest working with us. And that's exactly what we did'.<br>Workshop participants:<br>'30 years ago, we would light a fire, we were given 30 boxes of matches and sent out into Forestry land to light the fires. We had people on the ground lighting the fires, we were burning at the right time of year. We had crews of 6 people in each area. Now there is only 1 person on the ground'.<br>'Fire is an economy – cultural way is one type of fire economy. Wildfire and destruction is another type of fire economy'. |
| Fuel loads are too high | Long absence of fire from otherwise-fire-adapted ecosystems can render ecosystems more flammable, and cultural burning activities far more risky, than they would ordinarily be if Country was healthy. |  | Interviewee:<br>'It's getting much harder because of climate change. So you've got much, much narrower windows of opportunity to burn… If you've got a forest that hasn't been burnt with elevated fuels 15 metres high, then you stuck with trying to get it in into a narrow window'. |
| High costs (money, time) and complexity of the legal | • permit costs are compounded by requirements for detailed evidence that is not necessarily readily available for cultural fire |  <br>No stickers were | Interviewee:<br>'You're looking at $35,000 for a consultant to do an REF [Review of Environmental Factors] to do that country to successfully |

| Barrier | Explanation of barrier | Priority | Participant quotes |
|---|---|---|---|
| system – with a particular focus on full-length assessment processes such as environmental impact assessment and review of environmental factors processes. | • lack of support to assist First Nations peoples in negotiating these barriers.<br>E.g., if a proposed fire is not exempt or subject to a streamlined process, Environmental Impact Assessments / Reviews of Environmental Factors involve time, costs and potentially expert reports and detailed evidence. | allocated to this barrier at the workshop. This does not mean it is not an important barrier, only that it was not the top priority for participants. | burn it... or sometimes it could be double that cost like $60,000 - $70,000'. |
| *The remaining barriers in this table were raised in the workshop discussion, literature review or project interviews, but not put to workshop participants for the ranking activity, either because they were raised after the activity was designed (i.e. in the workshop discussion) or because they were only raised by one interviewee (project interviews) or in very general terms (literature review). This is not to suggest, however, that these barriers are not significant or important.* | | | |
| Complexity of the legal system | Involving multiple agencies and diverse legal instruments. Workshop participant comment [*quote about how there are heaps of whitefella laws but in Aboriginal culture it's much more straightforward'*] | n/a | Interviewees:<br>'In the rules and regulations, the Act works against people using the right principles and common sense. And, you know, it's all about writing pages and pages of plans and ticking heaps and heaps of boxes. And it's having perverse outcomes'.<br>'One of the [priority barriers] is the authorising environment. It's just as clear as mud'.<br>Workshop participants:<br>'This legislation is like a hedge of invasive species. We need stand-alone Indigenous cultural fire management legislation and authority. Like the Cultural Heritage Act, it is never going to happen'.<br>'Under Lore, fire is fire. Murder is murder. Straightforward. White laws are too complicated'. |
| Indigenous knowledge and expertise is not valued in legal instruments/ processes | This barrier is discussed in Part 4, below, as a key proposition for this research. | n/a | Workshop participants:<br>'Cultural values are not just a dot on a map, the surroundings are important too. Everything is linked'.<br>'There is no procedure for cultural heritage review. Early consultation is needed'.<br>'For a section 44 fire, there is no information apart from IS (indigenous site). There's no welcome to Country, no smoking ceremony, no cultural safety. People are being forced to break cultural protocols'.<br>'NPWS has a Cultural Fire Management Policy, Qld Parks has a Cultural Fire |

| Barrier | Explanation of barrier | Priority | Participant quotes |
|---|---|---|---|
| | | | Management Policy, but these are not implemented or resourced'.<br><br>'There is systemic racism. In the chain of command, there might be 10 people and only 1 person is Aboriginal. The Aboriginal person is always down the bottom. If I speak up then I am a trouble maker. There's no opportunity for career progression – we can't break Senior Field Officer level. No Aboriginal managers or directors. The directors are like mirrors: 'I'll look into it'. Have been arguing the same story for 20 years'. |
| Lack of representation/participation from the right people in Aboriginal communities | Workshop participant comment [*quote about needing more 'white shirts' to be Aboriginal people – more than just consultation but actually as decision maker*] | n/a | Workshop participants:<br><br>'For the bushfire risk management process, we have a voice through this committee to recognise cultural assets. We need our voices heard. Everything is all connected. We must have the right people in the right place. We never quite get there'.<br><br>'We need to change the people, we need fresh ideas and ways of thinking. Otherwise we will be stuck with the status quo'.<br><br>'The government put blackfellas on who are 'yes' people. They don't agree with their own community'.<br><br>'There is misappropriation of knowledge. The wrong blackfellas are being appointed to roles. The industry is now doing cool burning but Aboriginal people have been taken out – this is 'black cladding'. It is hard for people in these roles to speak up… many cultural fire practitioners are not recognised or allowed to burn'. |
| Inappropriate or overwhelming training requirements | | | Interviewees:<br><br>'Intensive and time-consuming training courses which attempt to teach the [legislative and planning requirements for fire management,] it's all good stuff but it's not how we would do it as Aboriginal people'.<br><br>'How do you build this capacity to do cultural burning? You need funding and people prepared to do it. They do, but sometimes that creates division in local communities as well. But if someone doesn't do it, that whole liability thing, we're never going to fix it. Because how do you know that people have the – unfortunately that's our world – have that connection and the capability to do it?'. |

**Table 3**. *Legal barriers to cultural burning.*



### Key perspectives on two of the most contested issues raised by interviewees

We observed a host of different perspectives about Hazard Reduction Certificates under the existing Bushfire Environmental Assessment Code, including whether the streamlined hazard reduction process is an appropriate 'fit' for cultural fire approvals. For example, interviewees told us that:

- 'In some cases, there are things in place that for some activities [the Bushfire Environmental Assessment Code] can enable, but it's not universal and it's not the primary purpose. It would be more optimal if there was a mechanism that you didn't need to use other ways. It's not illegal or inappropriate, but it's just not optimal';
- 'Those exemptions that are linked to streamlined environmental assessments or landholder self-assessments is really the way forward';
- '[Hazard reduction certificates] are not 'for' cultural purposes primarily but if you're managing a fuel [with cultural fire] then you are probably having a hazard reduction effect so does it really matter that much?'; and
- '[I]t matters, because if you get an HR Certificate and say in there that you're cultural burning, then if you do not undertake the hazard reduction that is promised in the certificate, the Rural Fires Act says that the RFS can go in an undertake the hazard reduction for you… but they can't burn in a *culturally* appropriate way, so the mismatch between HR and culture is actually more than just semantics'. 'From a regulatory perspective, [if] a bushfire risk management plan says that, 'we'll reduce the risk in this area through cultural burning', then the statutory obligation on [the RFS] in five years, when you haven't, is [that they will] just go and do it for you'.

Similarly, different interviewees had very different views on the extent to which the environment, and environmental laws, are the primary barrier to preventing hazard reduction and cultural burning or whether environmental values were equally underrepresented in decision making. For example:

- '…the first thing was people complaining about escapes and, you know, the fear of litigation. And the second thing was the tree changers – people that didn't understand fire [and were] afraid of fire. And then the environmental movement, and the academics attached to it, they sort of brought that fear of fire into policy and legislation';
- 'there's going to be, then, the biggest issue that comes along is everyone goes, 'our bloody environment stops us from doing our works!' You'll hear that comment. It's actually wrong, but it's a perception';
- 'there's a lack of understanding and training and knowledge in the general public about fire regimes and fire ecology. And so, then it defaults to this dichotomous thinking that is really unhelpful and kind of disabling, because they're both equally wrong'; and
- 'I think a lot of the environmental protection laws, for want of a better word, […] is where […] a lot of the management of vegetation and fire comes to, where fires are [inappropriately] framed as destructive rather than as a key ecological or cultural process, [because], you know, burning's defined as clearing […] to cut down, fell or uproot, kill, poison, ring bark, or burn or otherwise destroy'.

# 7. The principle of *terra nullius* and its significance for cultural burning

The principle of *terra nullius* is not technically a principle that 'applies' in domestic Australian laws because it is a principle of international law that justifies the acquisition of sovereignty over land (in Australia's case, the point at which British sovereignty was claimed and the continent colonised). However, the principle of *terra nullius* has been described in Australian case law as a principle with specific repercussions for the way that Australian laws recognise and protect cultural values and practices (Lavery 2019).

> **"Terra nullius is insidious through everything"**
>
> *Participant, Niigi Niigi Workshop, 7 November 2023*

In this research project, we focus specifically on fire as an expression of cultural values and practices. The literature that we have synthesised in Part 1 demonstrates the sophistication of cultural fire management frameworks deployed by Indigenous Australians across Australia including in North East NSW. There is growing recognition that, at the time of colonisation, when *terra nullius* was first relied upon by British settlers, Australia's Indigenous peoples had curated landscapes across large areas of the continent using fire (Part 1.2.1). Moderate fire plays a crucial ecological role in many Australian ecosystems, triggering life cycle processes such as germination, and mitigating extreme fire risks by managing the accumulation of fuel, especially in grassy and woodland ecosystems. Changing fire regimes is widely acknowledged to be an important threat to biodiversity, with both too-frequent fire and the absence of fire from fire adapted ecosystems both driving declines in species richness (Part 1.2.2).

When the Australian continent was colonised by British settlers, new laws suppressed the use of fire for cultural purposes. Cultural fire was directly prohibited, with penalties for burning at certain times, in certain places, and for cultural purposes. Cultural fire was also indirectly suppressed through attacks on Indigenous communities, forcible displacement from country and disruption to, or prohibitions on, cultural practices more generally.

In the discussion that follows, we examine the characteristics of the international legal principle of *terra nullius*, and trace its 'echoes' through national and state laws for managing native vegetation, biodiversity and fire. We demonstrate that, despite substantial changes in the laws that govern fire and native vegetation, settler state laws continue to prevent or hinder cultural burning in NSW, today.

## 7.1 Terra nullius in international law

### 7.1.1 The origin of the principle in international law

At international law, there multiple methods of acquiring sovereignty over land, including conquest, cession, occupation or settlement, accretion and prescription (Simpson 1993; Chinkin 2008). The principle of *terra nullius*, literally defined as 'land belonging to no one' or, 'no one's land', was originally used to justify the occupation of territories, but only 'where occupation was of uninhabited and empty land that had never before been occupied by other people and no one or any other authority claimed it' (Ooko Nyangaga 2022; Simpson 1993, 198).

**Box 4. At international law, the principle has been described in the following ways**
Land that has never belonged to any state, or where its previous sovereign has stopped exercising authority over it with the intention of abandoning it. Such land is subject to claim, and its sovereignty may be acquired only through occupation and control amounting to first possession of the territory. *Island of Palmas Case (United States v The Netherlands)* (1928) II RIAA 829.
Land inhabited by peoples who have a social and political organisation is not terra nullius. *Western Sahara Advisory Opinion* [1975] ICJ Rep 12.

In a number of jurisdictions, including Australia and Canada, the practice of colonising states occupying colonial territories 'deviated from the classical practice… [and progressed] over time into forceful occupation' (ooko Nyangaga 2022). However, alternatives to the approach taken in Australia (described in more detail below), continued to exist. For example, treaties, which are agreements between two sovereign states or, within a nation, between the national government and First Nations peoples, were signed with the Māori people of Aotearoa/New Zealand. Multiple treaties were also signed with different First Nations peoples of Canada from 1534 onwards (Government of Canada, n.d.) and in the United States (US National Archives n.d.).

### 7.1.2 The principle of *terra nullius* in analogous overseas jurisdictions

The 'Doctrine of Discovery', which is an international law doctrine that includes *terra nullius* as a core principle, has been used to justify the claims of sovereignty by British colonisers in what is now Canada and the United States (Beaulieu 2020; Pike 2022). Legal reform in those jurisdictions has typically taken the form of formal treaties between the national government and Indigenous groups rather than statutory reform or litigation challenging the principle of *terra nullius* (Pratt 2004). The principle of *terra nullius* was also claimed to have played a role in the colonisation of South Africa, though the significance of the principle in that country is the subject of strong debate (Miller 2010; Boisen 2017). The legal role and status of the principle in these countries is summarised briefly in the following table.

| Country | How the principle was invoked | Current status of principle |
|---|---|---|
| Canada | Evidence of the 'Doctrine of Discovery', of which terra nullius is a core principle, was used as justification for colonisation of what is now Canada.<br>The Royal Proclamation of 1763 recognised Aboriginal title during European settlement of Canada, | The principle has been described and applied inconsistently across Canadian jurisdictions but, surprisingly, was only raised in Canadian case law after the Mabo decision in Australia (Pike 2022).<br>***Tsilhqot'in Nation v British Columbia*** [2014] 2 SCR 257 [69]: 'The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed |

| | | |
|---|---|---|
| | which could only be extinguished by treaty with the Crown.<br><br>Treaties were entered into in many provinces, except across most of British Columbia, hence recent case law. | by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown'.<br><br>*cf*<br><br>The 'present structure of Canadian legislation continues to be founded upon discriminatory concepts such as the Doctrine of Discovery and terra nullius', making it 'impossible for Indigenous peoples to exercise their rights as a distinct, separate governing authority completely separated from the present provincial and federal governing bodies' (Beaulieu 2020). |
| United States | Evidence of the 'Doctrine of Discovery', of which terra nullius is a core principle, was used to justify claims over the lands of North American Indigenous people (Miller 2010). | ***Johnson v M'Intosh* 21 U.S. 543:**<br><br>"The essence of the M'Intosh holding is that because the Indians did not use the land as Europeans did, full legal title vested in the discovering nation. Only the discovering nation or its successor had the absolute right to extinguish aboriginal title and to grant the land' (Miller 2010).<br><br>Discovery and *Johnson v M'Intosh* are still fundamental principles of federal US Indian law and there does not appear to have been a judicial rejection of *terra nullius* in the context of US sovereignty. 'The US continues to hold the dominant position in Indian affairs and exercises enormous control over tribal political, commercial, and land issues. The Doctrine of Discovery continues to be the controlling legal precedent for federal interactions with Indian nations' (Miller 2010). |
| South Africa | Whether the colonial settlers treated Africa as terra nullius at the time of occupation is debated (Boisen 2017).<br><br>'For the Apartheid regime in particular, it became a convenient way to retrospectively legitimise European settlement by claiming that South Africa had been empty prior to the arrival of Europeans and Africans – both having arrived roughly at the same time; that is, around the time Jan van Riebeeck landed at what would become Cape Town in 1652' (Boisen 2017). | It is difficult to identify a uniform principle by which colonisation was justified in South Africa. |

***Table 4**. Terra nullius in analogous overseas jurisdictions*

Forceful occupation or colonisation of territory is prohibited at international law (Article 2(4) of the United Nations Charter 1945); and there are few, if any, 'empty territories' remaining around the world today. As a result, the principle of *terra nullius* is now generally considered obsolete.

## 7.2 Terra nullius in Australian law

British settlers relied on the international legal principle of *terra nullius* to justify the British claim to sovereignty over the Australian continent on the basis that the land was unoccupied and unowned. Aboriginal and Torres Strait Islander Nations were portrayed as ungoverned, with no formal mechanisms for managing or coordinating political, legal or social arrangements. Justice Brennan of the High Court of Australia described the principle's application as follows:

> …the theory which underpins the application of English law to the Colony of New South Wales is that English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the law of England including the common law became the law of the Colony (*Mabo v Queensland (No 2)* (1992) 175 CLR 1, 38 (**Mabo**)).

However, even at the time of colonisation, it was abundantly clear that Australia was not, in fact, *terra nullius*. Justice Brennan later observed that, in fact:

> [t]he evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and as remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is shown in the evidence before me (Mabo, citing Blackburn J in *Milirrpum v Nabalaco Pty Ltd* (1971) 17 FLR 141).

Prior to the High Court's decision in Mabo, courts had redefined the principle of *terra nullius* multiple times, expanding the category 'to include the prevailing characterisation of pre-settlement Australia, and accommodate fresh insights about the structure of Aboriginal society' (Simpson 1993, 202). For example:

- in *Cooper v Stuart (Privy Council)*: the court held that occupation remained possible where land was inhabited but only by 'primitive groups'; and
- in *Milirrpum v Nabalco; Coe v Commonwealth*: 'the Courts held that occupation was possible even where the land was inhabited by groups possessing a form of social organisation and a legal system, providing these structures were not European in style' (Simpson 1993, 202).

The principle of *terra nullius* was, however, consistently accepted as a practical fact as well as the legitimate basis for British acquisition of sovereignty until the High Court decided the case of Mabo. In Mabo, the High Court rejected the proposition that Australia was, in fact, *terra nullius* at colonisation. Justice Brennan held that the theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land 'depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs', and held that the basis of that theory was 'false in fact' (Mabo, 25), with 'no place in contemporary law of this country' (Mabo, 40).

Instead, in Mabo, the High Court held that native title – title to land based on traditional rights and interests and responsibilities held by Aboriginal and Torres Strait Islander peoples – had existed at the time of colonisation, and could survive the acquisition of sovereignty by the British. Native title was recognised in Australian law as a form of title that:

> has its origins in and is given context by the traditional laws acknowledged by and the traditional owners observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs (Mabo, 39).

Native title was then enshrined in the *Native Title Act 1990* (Cth), providing a new, statutory pathway for recognising ongoing Aboriginal and Torres Strait Islander sovereignty. Recognition of sovereignty involves recognising a form of a 'bundle' of different rights and interests in land and water by traditional custodians, and the continuation of cultural traditions and customs, provided those traditions and customs can be translated into common law rights and interests that are directly related to the land, e.g. in restricting access to particular sites or areas (*WA v Ward* (2002) 213 CLR 1).

In Australian law, actions that are inconsistent with the assertion of native title can extinguish that title, along with any claim to the associated native title rights and interests (Mabo, [25]; see Part 3.3, below). When the Crown validly alienates land by 'granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title', native title is extinguished to the extent of the inconsistency. For example, the grant of freehold and some leases extinguish native title but the grant of 'lesser interests' such as mineral exploration licences will not necessarily extinguish native title, and pastoral leases do not extinguish native title because they do not confer exclusive possession (*Wik Peoples v Queensland* (1996) 187 CLR 1). Similarly, where the Crown has 'validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title', native title will be extinguished to the extent of the inconsistency. For example, roads, railways, post offices and other permanent public works are inconsistent with the continuing, concurrent 'enjoyment of native title', but the same is not true for land set aside as a national park (Mabo, 69-70). Native title may also be extinguished if an Aboriginal or Torres Strait Islander community ceases to acknowledge relevant laws and ceases to observe (as far as practicable) its traditional customs and laws, or if the group loses its connection with the land (Mabo 71).

While the application of the principle of *terra nullius* to the Australian continent and its peoples was rejected in the Mabo decision, Australian jurisprudence still recognises an 'enlarged notion' of *terra nullius*, as the way in which the British Crown validly acquired sovereignty over Australia (see Lavery 2019). Justice Brennan noted that:

> …recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system [Mabo 43]…It is far too late in the day to contemplate an allodial or other system of land ownership. Land in Australia which has been granted by the Crown is held on a tenure of some kind and the titles acquired under the accepted land law cannot be disturbed [Mabo 47].

There is, therefore, a juxtaposition in the rejection of the *terra nullius* principle: Australian law recognises that the continent was not *terra nullius* at the time of colonisation, but nevertheless upholds the principle in law, to the extent that provides a 'valid' foundation for Australia's current legal system (for strong criticism of this position, see Lavery 2019; Hepburn 2005). This proposition has been reiterated in recent case law in both state and federal courts (e.g., *Sansbury v SA* [2023] FCA 196; *Prior v SW Aboriginal LSCAC* [2020] FCA 808; *Markan v Bar Association of Queensland (No 3)* [2014] QSC 225).

## 7.3 The characteristics of terra nullius and the relationship of those characteristics to sovereignty and cultural fire management

> Cultural fire is an expression of **"cultural *values*, cultural *assets* and cultural *responsibilities* or *obligations*".**
>
> *Participant, Niigi Niigi Workshop, 7 November 2023*

The principle of *terra nullius* is intimately connected with the concept of sovereignty. It is characterised by a presumption of that land is unoccupied, not subject to control, use or exploitation in the agricultural and industrial forms with which the colonisers were familiar, and not governed by any form of recognisable laws. As described above, *terra nullius* was – and, uncomfortably, remains – the justification for the British acquisition of territorial sovereignty across the Australian continent.

In describing the related concept of *aqua nullius* or 'no one's water', one interviewee explained that the assertion by colonial powers that water was unowned and unmanaged:

> …was a way, not only that they could understand and recognise existing water uses, but they could also kind of 'approve' of [them]. [T]here is a very normative element in defining the way in which that water is being used…But I think the more important lens, the more foundational one, is the understanding that there were systems of law and governance that were not necessarily predicated on water ownership, but that [nevertheless] defined the relationship between water and people that regulated that relationship. So, what the settler state legislation now does is basically vests that ability to regulate the relationship between people and water in the Crown, and it does so on the basis that nobody else had already had that right to regulate that relationship.

This resonates with what we have identified about cultural fire in NSW. While no Aboriginal person that we have engaged with for this research has (and arguably, ever would) describe their relationship with fire as one of 'ownership', they have nevertheless described deep, rich relationships of responsibility for fire as a tool to manage and care for Country that pre-existed settler state laws about fire, native vegetation and land management.

In contrast to the characteristics of *terra nullius*, the practice of cultural fire is characterised by values such as:

- decision making and agency by First Nations people
- reciprocity and relationship within community and between community and Country
- primacy of Country, family, community, and culture
- handing on and lifting up knowledge and culturally practices, through cross-generational engagement (passing on knowledge, practice, care)
- environmental health as an expression of cultural health and responsibility to Country

The conflict between these characteristics of *terra nullius* and cultural fire management highlight the need for fire sovereignty for First Nations, in terms that encompass both political and spiritual or Indigenous sovereignty.

There is a variety of ways to define and understand the concept of sovereignty but Professor Emerita Anne Twomey (2023) has defined sovereignty to include the following different ideas:

- **Legal sovereignty** – the concept described by the High Court in the Mabo decision and later cases; the British arrival, followed by what is now the 'popular sovereignty' of the Australian people through the work of representative democracy.
- **Political sovereignty** – commonly defined in terms of concepts such as self-determination, or the ability for a group of people within Australia to have greater control over their own lives.
- **Spiritual or Indigenous sovereignty** – the ancestral tie between the land or 'Mother Nature' and Aboriginal or Torres Strait Islander peoples.

The Uluru Statement from the Heart (2017) uses the concept of sovereignty in that third sense, stating that spiritual sovereignty co-exists with the sovereignty of the Crown because they are two different ideas and not mutually exclusive (Uluru 2017; Twomey 2023).

Legal sovereignty is complex and, in Australian law, both contested and unchallengeable. However, spiritual or Indigenous sovereignty could be argued to co-exist for cultural fire alongside the settler state's legal sovereignty for fire management in a way that might inform responses to the legal barriers that we investigate in this report. As we propose in Part 6, below, political sovereignty may also be able to be restored or enhanced in relation to cultural fire in NSW and across Australia. However, to achieve that restoration, we must overcome the 'echoes' of *terra nullius* in land management laws that hinder cultural fire management by Aboriginal people in NSW. We identify and examine those 'echoes' through the lens of seven key propositions.

# 8. Propositions: *terra nullius* in legal barriers to cultural burning in NSW

Despite *terra nullius* having been rejected in Mabo, its characteristics are nevertheless apparent in the purposes, substance, procedure and implementation of native vegetation management and other laws relevant to cultural fire in NSW. The presumption at colonisation that Aboriginal people in NSW had no agency, laws, governance or political arrangements in relation to fire management has resulted in a legal regime that predominantly seeks to control the threat of 'uncontrolled' and 'unowned' fires.

As the literature review in Part 1 clearly illustrates, the presumption that fires are 'unowned' and there was no fire-related law or governance at the time of colonisation was, and still remains, incorrect. Fire was actively applied, both as a cultural practice and a landscape management tool for thousands of years before British colonisation. It is also clear that more fire, in its moderate and managed forms, still needs to be restored to NSW landscapes to secure the health and function of fire-adapted native vegetation communities, many of which are in decline.

NSW laws do not acknowledge the existence of an Indigenous framework of fire law or governance. Instead, these laws typically exclude values, priorities and practices that are consistent with a cultural fire paradigm, and *terra nullius* persists, influencing the expression and operation of fire management in NSW.



In the propositions that follow, we demonstrate the ways in which our ecological, legal and empirical analyses intersect with the characteristics of the principle of *terra nullius*.

## 8.1 Cultural fire does not have a formal, explicit place in the legal framework

Cultural fire *is* implemented under existing laws. However, the opportunity to approve cultural fire is always implied, by equating cultural fire to a development or management intervention with an acceptable impact on environments (Bushfire Environmental Assessment Code), or by categorising it as a general cultural activity (LLS Act), rather than a fire-*and*-culture specific intervention.

The absence of specific goals, powers and provisions relating to cultural fire is evident in the silence of legislative objects clauses on cultural fire (Part 2.1, above). For example, there is no mention of fire in the overarching objectives of biodiversity laws in NSW (i.e. the *Biodiversity Act 2016*, *National Parks and Wildlife Act 1974*). Fire is more readily defined under those statutes as a threat, a harm or a disturbance than an important conservation tool, let alone a cultural practice. There are also no substantive legal mechanisms such as permits, authorising powers, incentives and decision-making arrangements that focus specifically on cultural fire. For example, there is no 'cultural burn permit' or agency responsible for planning and creating strategies for, or being funded to, in fact, implement cultural fires across tenures in NSW, in the way that, e.g., Hotspots does for fire and conservation on private land, and the RFS does to meet the government's state hazard reduction target.

The legal provisions that allow cultural burns to take place are either not specific to fire (e.g., LLS allowable activities), or not specific to culture (e.g., RFS hazard reduction certificates). As a result, and consistent with the characteristics of *terra nullius*, cultural fire is 'subordinated to other forms of property rights and laws' (Davis 2006) and shoehorned into decision making processes that are not fit-for-purpose.

> "**Why can't fire come under its own heading?** It shouldn't have to answer to other laws. Still have to get permission from landholder – many varied tenures. Too many people having a say about fire."
>
> *Participant, Project interviews, October/November 2023*

Both the Commonwealth Royal Commission and NSW Government Inquiry following the 2019-2020 fires recommended 'investigating the possibility' of establishing a specific place in the legal framework for cultural fire.

Creating an overarching, enabling legal environment for cultural fire could create opportunities and a context for incentivising cultural fire management on public and private tenures. On that issue, Williamson (2021, 13) has argued that:

> Incentivising private land holders to engage with Aboriginal groups to conduct cultural land management and cultural burning can provide significant opportunities and mutual benefit. Queensland provides a case study in how government can be a leader in brokering partnerships and supporting both private land holders and cultural land management groups

> to come together and conduct land management activities. But any such program must be sufficiently resourced and staffed with people capable of navigating intercultural exchanges and partnerships. Further, I note the role of philanthropic interests and encourage regulatory and practical arrangements to support such engagements.

Providing opportunities for knowledge brokering, partnerships between private landholders and cultural fire practitioners, and philanthropic investment, could all be developed and rapidly up-scaled if regulatory and practical arrangements in law and policy supported them.

In project interviews, we heard about a host of complex challenges for developing a cultural fire-specific legal instrument, including the limitations of existing statutory mandates (e.g., that the *Rural Fires Act 1997* is about bushfires and hazard reduction, and the *National Parks and Wildlife Act 1974* is about conservation). Overarching objectives inform where some of the challenges are most pronounced. We will investigate these challenges and opportunities to overcome them in the final iteration of this report.

## 8.2 'Practicing culture' is not recognised in law as a reason to light a fire

Unlike fire for waste management and especially hazard reduction purposes, maintaining cultural practices and ecologically healthy landscapes is not a goal for which fires can be lit and managed in existing laws. As a result, cultural fires are often assessed and approved as hazard reduction burns. While they may achieve hazard reduction as a subsidiary goal, this is rarely the primary purpose of a cultural fire.

The failure to recognise cultural purposes for burning means that certain purposes or ideas cannot be reflected or acknowledged in NSW laws, including:

- engaging children, young people and Elders as important participants in cultural burning;
- acknowledging that cultural purposes may overlap with, or may be completely separate from, other 'authorised' purposes for fire; and
- the incorrect presumption that emergency and native vegetation laws filled a void in land management governance – because there was no traditional law, governance or cultural framework around fire at the time of colonisation.

The failure to recognise culture as a reason to light a fire is also a barrier to cultural burning for other reasons. First, because of 'who gets to decide'. Currently, the relevant decision makers are not cultural knowledge holders, nor elders or cultural fire practitioners. Rather, it is decision makers in the emergency management sector (e.g., RFS) or in public land management agencies (e.g., Forestry Corp, Parks and Wildlife, DPE). Second, because the primary legal purpose to light a fire is hazard reduction — a core component of the 'prevention' limb of the emergency management cycle — cultural burning must often involve detailed risk assessments, excluding children from the fire ground, requirements to wear Personal Protective Equipment or 'PPE', and a focus in design and planning on reducing fuel loads not health, wellbeing, family, knowledge, relationship or reciprocity with Country.

Existing laws do not appear to be interested in relationships between people participating in a burn and between those people and the area being burned – just as the principle of *terra nullius* was applied to indicate the absence of relationship in spite of rich and flourishing Aboriginal laws and relationships with Country.

## 8.3. Decisions about cultural fire are not made by cultural knowledge holders

Having the power to decide when, where and how to burn is core to an effective and respectful cultural burning framework. Existing laws explicitly exclude this capacity by allocating the power to make decisions about bush fire hazard reduction certificates, fire permits and approvals related to environmental impact assessment, in the hands of government departments and agencies. In this way, Aboriginal people in NSW are 'excluded from forming their own solutions to their own community issues and generally excluded from decision making processes regarding their rights, including land rights' (Davis 2006, describing the implications of terra nullius for First Nations peoples).

The British reliance on *terra nullius* and its resulting claim to sovereignty justified the acquisition of decision making power not only of land, but also of water and the use and management of fire. This is important because the legal barriers to cultural fire management set out above are not just barriers to lighting a fire, *per se*. Cultural fire involves more than the exercise of 'permitted' forms of purposeful fire, but rather, requires sovereignty over fire, as an expression of responsibility for burning (and *not* burning), according to what Country needs. So, the laws set out above can also be barriers because they prevent access to decision making power – to sovereignty, both legal and spiritual – in relation to fire.

Participants in the project interviews acknowledged that government agencies are not appropriate authorities to authorise cultural practices or adjudicate whether a proposed activity is culturally appropriate or required. However, they noted that – at least for the RFS, with its statutory mandate for fire safety – some aspects of cultural fire may always have to be approved by the RFS. For example:

> But [the RFS does] have a greater community responsibility, […] to that community, but also the broader community. So that's where things like, people have said before: 'we shouldn't have to get a fire safety permit because [that] interfere[es] with a cultural practice on land'. […] but, if it gets off that land, and then another community is threatened, it's one thing to accept the risk to your own community, but […] at a landscape level, [it's] not just that piece of land and that particular community. (I-7)

Despite this constraint, participants generally agreed that other aspects of cultural fire could be permitted or exempted in ways that are more consistent with cultural pathways and community responsibilities than are currently the case, and in those pathways, cultural fire knowledge holders need to be able to participate in or even – wherever possible – hold responsibility for making decisions about cultural fire.

## 8.4 Cultural knowledge is not recognised as 'evidence' or 'information' in deciding appropriate fire regimes or assessing individual proposed burns

A failure to recognise cultural knowledge as evidence means that this rich knowledge cannot easily be relied upon to improve outcomes but, just as problematic, it cannot easily be protected from misuse and misappropriation.

Watson (2014) illustrates the nature of this barrier in her description of the implications of terra nullius, as including a requirement for First Nations people to:

> negotiate the dominant colonial paradigm within which the colonial state either denies Indigenous knowledge or, if it acknowledges it at all, treats it within Western social sciences as culture or history…[noting too, that] Indigenous knowledges are viewed as old, static, traditional, rather than "constant", "alive" and contemporary, not locked in a time pre-terra nullius. [On this view, Indigenous knowledges are viewed as] irrelevant, irrational, unscientific, uncivilised… [and] there is a homogenisation of Indigenous knowledges and views despite their diversity (Watson 2014).

### 8.4.1 Cultural evidence as a decision making 'input'

Evidence from Aboriginal people about when fire is needed and when it ought to be excluded is not a mandatory input when deciding whether fire can be introduced to an area or in a particular way. For example, oral evidence, demonstrating 'unhealthy' or 'orphan' Country in the absence of regular cultural fire is not required in deciding whether, when and how to burn. Such evidence does not trump, or even parallel, evidence from ecologists, fire behaviour models and other western scientific evidence.

This demonstrates a presumption that Aboriginal people do not know when fire 'should' be introduced into the landscape to protect healthy landscapes and ecosystems; or perhaps, do not 'know' in a way that is rigorous, scientifically robust and reliable. However, during the project workshop, participants indicated clearly that they see cultural fire as a critical component of the landscapes and systems that are supposed to be protected under NSW conservation laws. They suggested that the indicators that are currently being used to determine conservation

> **"Good indicators centre Country". Good indicators include kinship (storylines, pathways) and relationships. Cultural indicators include environmental health, and that's why local things and local scales are so important**.
>
> *Participant, Niigi Niigi Workshop, 7 November 2023*

management, are wrong.

We were told about one particularly significant example in which one of the regional bushfire management committees covers seven different LALCs and,

> whereas say a farmer is paid to go to those meetings, Aboriginal people aren't. So, they're being discriminated against there. Plus, they've got to go to seven of these because […] their LALC areas cover so many different boundaries and so many different bushfire management committees.

When asked why Aboriginal people representing the LALCs were not paid to attend even though other participants were paid, the interviewee (with some exasperation) responded:

> I think it's because […], generally they felt Aboriginal people don't have a place in bushfire planning. And you, 'you've got nothing to offer yet'. […] Yet they're some of the largest landowners or in control of some of the largest [parcels of land…] there's just this, people don't appreciate how much land Aboriginal people actually have either [own or have] joint management over. […] They're neighbours just like everyone else. Like this whole planning's meant to be all neighbours come together, talk about what we can do together. (I-14)

Interview participants generally acknowledged that cultural fire knowledge and experience has been lost in some places, entirely or in part, but in others, knowledge has been sustained over time.

Importantly, all of those participants acknowledged that cultural fire knowledge could be re-acquired and renewed if Aboriginal communities were empowered to learn and practice cultural fire.

We investigated the process for contributing new information to the thresholds, and identified that, if you wish to burn more frequently than the fire interval thresholds, you must demonstrate ('with really solid justification', I-4), that the native vegetation communities and species, considered at a fine scale, would not be negatively impacted. There is limited opportunity within that process to bring cultural evidence about burn patterns and burn history and, when asked, interviewees implied that cultural knowledge would need to be verified by an ecologist or botanist before inclusion.

> Look, I think if you were going outside the guidelines, the way they've been developed, you would need to have reasons and evidence for that. The easiest would be to have an ecologist do a thorough flora assessment so that you know exactly what plants are there and what potentially are expected to be there. Because sometimes plants are only present in the seed bank. They're not necessarily obvious above ground. […]
>
> There would be scope to bring in information that's not in the database because there's plenty of gaps. […] So, if a local ecologist has then data, that helps add to that picture, that would be a good part of that assessment as well. […] some of the data that's in there is quite anecdotal. It's from veg surveys that have just recorded, 'oh, we've seen this plant flowering at this time since fire'. […] But certainly, as an ecologist doing something local, you would pull it together, that information that's already been collated, and you would pull together anything else that you had picked up locally – what evidence you had picked up [from] doing a local study of different times since fires. [For example], we've seen this species reach seeding maturity at these different times. And that could be cultural evidence. (I-4)

Despite its strong recommendations about tailored engagement with Aboriginal communities and better integration of Aboriginal knowledge in the conservation of biodiversity in NSW, even the Independent Review of the *Biodiversity Conservation Act 2016* made no mention of Traditional Ecological Knowledge in its discussion of 'Data-informed decision making' (DPE 2023, 36-38). For example, the Review Panel noted the important role of the Biodiversity Indicator Program or 'BIP' as a tool for meeting the Biodiversity Conservation Act 2016 requirement to collect, monitor and assess information about biodiversity. The Panel noted (at 37) that:

> The BIP reports on the status and trends in biodiversity, assisting an understanding of the extent and condition of biodiversity and informing management interventions. These indicators also provide data on the resilience of ecosystems and their ability to adapt to climate change. While the BIP offers a sophisticated approach to understanding biodiversity across NSW, the Review Panel considers there are opportunities to improve the integration, accessibility and comprehensiveness of the biodiversity status assessment by enhancing the suite of indicators.

The Panel's overarching recommendation that 'Aboriginal people should be fully involved in the design and implementation of policy and programs designed to conserve and restore biodiversity' creates an opportunity to refine and improve the BIP by reference to cultural knowledge and the health of Country. If the NSW Government engages with Traditional Owners in the way that the Review Panel anticipated, cultural knowledge may be able to be incorporated into this legal tool, recognising the critical role for cultural fire in effective biodiversity conservation and creating new opportunities to facilitate cultural fire in NSW.

### 8.4.2 Cultural Intellectual Property

The absence of clear and reliable protocols for protecting cultural intellectual property may be a barrier to Traditional Owners contributing knowledge about fire, and speaking openly about cultural fire practices. Williamson (2021, 15) described cultural intellectual property as:

> a strategic resource for Aboriginal peoples and there exist long-standing protections and protocols to safeguard such knowledge within Aboriginal peoples' systems of cultural governance and law. This is particularly important when dealing with knowledge of ecologies, cultural sites and landscapes including through the application of fire.

The absence of strong and transparent protections for cultural intellectual property may be more likely to be a barrier when it is combined with a lack of trust, limited uptake of the outcomes from past consultations, a concern about the potential misappropriation of knowledge, and the absence of designated processes and resourcing to build long-term practices and expertise in cultural burning.[4]

Williamson (2021, 15) noted that the *Aboriginal Affairs NSW Aboriginal Cultural and Intellectual Property Protocol* provides a starting point in NSW, but urged the NSW Government to achieve stronger and clearer protections in a dedicated cultural fire strategy, such as the *Victorian Traditional Owner Cultural Fire Strategy* (Victorian Government 2020). Such a strategy would need to ensure that Aboriginal people themselves:

> …determine what is and is not public and/or private knowledges. This insulates against extractive relationships that separate people from their knowledge, undermine Aboriginal peoples' governance, and undermine relationships with the public sector.

## 8.5 Existing laws fail to acknowledge the need *for* fire in many ecosystems

Objects clauses and management arrangements in conservation laws imply a resistance to human impacts on ecological values. That implication appears to be hindering both cultural and ecological fire, as purposeful interventions for ecosystem management.

"**In this corner of the world, it's the absence of fire which is the biggest detrimental factor in those ecosystems**. Yet, here if we've got a process – if we want to restore that thing that's so much in need – it's virtually impossible or extremely onerous."

*Non-government Participant, Project interviews, October/November 2023*

Legal principles are intended to represent social agreement or aspirations about how relationships will be governed between, for example, individuals in communities (i.e., to prevent negligent actions from harming a neighbour), between communities and governments (i.e., to ensure that governments protect culturally significant places from harm), or between people and nature (i.e., to prevent the destruction of important, rare or valuable species and ecosystems).

However, the purposes of a legal framework may not be to represent a social agreement or an agreed aspiration of a community or may not continue to represent that agreement over long

[4] This was briefly discussed at the Project Workshop on 7 November 2023.

periods of time. For example, our understanding about effective and appropriate fire management and behaviour and ecological health and resilience have developed rapidly over time, and instruments designed to protect nature from inappropriate bushfire hazard management 20 years ago, such as the current fire interval guidelines, were identified in project interviews and at the project workshop as serious barriers to the effective use of cultural (and ecological) fire.[5]

One interviewee reflected on their decades of advocating for the return of ecological and cultural fire to landscapes in northern NSW. While acknowledging that awareness of the importance of fire is growing rapidly today they observed that, in the past, and still sometimes today:

> "**Everyone just seem[ed] to see fire as the boogeyman**"
> *Non-government Participant, Project interviews, October/November 2023*

The project interviews demonstrated a wide diversity of views about whether conservation laws are a barrier to cultural fire. Ecological experts emphasised the risks of too-frequent fire for some ecosystems though all of the ecologists interviewed for this research acknowledged that the absence of fire can be equally harmful for fire-adapted ecosystems and species. We did not identify express prohibitions on cultural fire in conservation laws. Rather, the barriers in conservation laws arise because there is no express place for cultural fire, and assessment and approval processes for cultural burning are complex, expensive and time-consuming. These costs and delays are exacerbated by the rigid application of instruments such as the fire return intervals (implemented through the Bushfire Environmental Assessment Code) and agency guidelines , and the absence of effective resourcing and institutional support, e.g., for burning in protected areas. While not express in the legislation, these barriers in the law are very real. Many cultural fire practitioners are not equipped or resourced to engage consultants, complete the required volume of complex paperwork or pay the required fees. Waiting until these approvals are in place can also prevent burning at culturally and ecologically appropriate times, when the indicators are right and Country is ready.

For example, when considering the implications of high frequency fire being listed as a key threatening process ('KTP'), one interviewee emphasised the interpretation and application of that listing rather than the listing itself. They said:

> "Anyone […] who is asked to do a fire assessment which might lead to recommendations for doing cultural or ecological burning, if they don't have much experience, they do a quick search, they find out about the high frequency fire KTP, and I find that they're quite strongly influenced by that. I've actually done quite a few reviews of fire assessments and management plans and […] there's a standard formula. **They identify high frequency fire as an issue. They identify that there's evidence of a bushfire somewhere in the past – 'we saw scarred trunks' – and they recommend keeping fire out, even though it's predominantly a fire dependent ecosystem**."
> *Non-government Participant, Project interviews, October/November 2023*

[5] This was a subject of discussion in many of our project interviews and we acknowledge that a great deal of work has been done by NSW DPE in recent years to produce a new guideline for fire return intervals. However, it remains to be seen whether cultural fire is better accommodated in the interpretation and implementation of the newest iteration, and whether cultural knowledge will be incorporated as a form of evidence in future iterations.

## 8.6 Cultural fire practitioners are not expressly protected from liability

As a result of cultural burning not having a formal place in the legal framework, cultural fire practitioners are not protected from liability in the way that fire brigades, fire agencies and volunteers are protected.

This is being approached differently in the United States, where advocates are working to reform legislation to protect 'Indigenous Burn Bosses' from liability alongside other fire practitioners (McCormack et al 2023). There are opportunities to take a different approach to this question of liability in NSW, particularly given that no interviewee could identify a case of a cultural burn escaping and causing harm, and we could not find any examples of liability for cultural burning in legal databases.

In fact, judicial decisions about liability in the context of prescribed fires, more generally, demonstrate a trend to acknowledge the substantial benefits of prescribed fire in managing risks across large areas of land, and protect landholders and volunteers from liability where they comply with the terms of an approval and are otherwise diligent and attentive to the amplified risks of lighting and managing a fire.

## 8.7 Legal barriers to cultural fire are difficult to articulate, and thus to challenge

Barriers to cultural fire are intertwined in complex ways with statutory principles that cross multiple legal instruments and governance scales. These barriers are rarely explicit. Instead, they are implied, procedural and/or resource-related. As a result, legal barriers to cultural burning are difficult to identify and articulate with precision, in a way that would allow them to be overturned. This is similar to Hepburn's (2005) observation, that the High Court's decision to maintain *terra nullius* as the justification for 'assuming complete sovereignty and control *without regard* to the interests of the indigenous occupants' is an 'ingrained perspective [that] is difficult to eradicate'.

We suspect that, while litigation may prompt reforms to better support purposeful fire in law, it is unlikely to be able to effectively and coherently dismantle the implications of *terra nullius* and its echoes in the foundations and objectives of legislative instruments, including the presumptions that they contain about the risks of fire. Litigation is also unlikely to be able to easily change or suddenly improve understanding, cultural safety and respect for cultural fire knowledge.

# 9. Overcoming legal barriers to cultural burning

There is political, community and agency momentum now, in a way that has not always existed. If a clear, coherent and accurate account of the legal barriers to cultural burning can be articulated and presented – including in compelling submissions and active advocacy to all levels of government, and through internal agency pathways by internal 'champions' – there is a real opportunity for change.

Participants at the project workshop expressed deep frustration that barriers to cultural fire have been the subject of discussion for years, even decades, and yet they remain in place, unmoved. There was an urgency expressed at the workshop, in comments recognising that even though there are some things that remain unknown, there is no time to waste in accelerating cultural burning across the landscape.

Most government participants interviewed for this project also expressed strong support and a sense of urgency, pointing to examples of goodwill, efforts already underway, and a sense of optimism that legal and practical barriers can be overcome.

**"Start now, learn as you go. But we need to get started".**

*Traditional Owner, Niigi Niigi Workshop, 7 November 2023*

In the discussion that follows, we have identified a range of pathways for reform and options for overcoming the barriers set out above, including by responding to the propositions that we've drawn from our empirical research.

**"I just, I really do believe we're on the cusp of something, but I know we have to get it right now. because if we don't get it right now, we'll set it back again. [**What] I'm really sure about is – the answer of just saying, 'people just need to let us do more cultural burning' […] isn't actually the answer either. [We need to] set the right foundations, so that this can exist harmoniously […], not as a 'quick fix'."

*Government Participant, Project interviews, October/November 2023*

## 9.1 Values are a crucial context for reform about cultural practices

Values in land management and our relationships with fire and Country can change across landscapes and across time. Some of these values are articulated in law and influence the way that the law operates. They are also influenced *by* law. Responsibilities and values are intimately connected.

> Fire might look similar in similar vegetation but the values that underpin reintroducing fire to Country are not homogenous across different landscapes. As a result, cultural fire is not going to be the same in every different place. In some places you can't burn or take the trees, you can just plant and move things around if you don't understand the kinship because otherwise you might solve some problems and create plenty of others and you can see that in places where people have had a crack and got it wrong. Fire will not always be applied to Country in the same way because Country is different and needs different things from fire at different times. (Workshop participant)

Project participants emphasised the need to clearly and explicitly articulate the values that underpin decisions about fire, as a crucial starting point for legal reform, arguing that, "[w]hen we think about creating new laws we need to come back to those fundamental processes".

**"We need to start by asking: 'why do we burn?'"**

*Cultural Fire Practitioner, March 2024*

Answering this question about ‘why we burn’ can reveal important considerations about who the right people are to make decisions in any given context, what kind of evidence is important, and how legal and policy reform can better support the underlying values of cultural (and ecological) fire across NSW landscapes.

Better understanding the values that underpin different kinds of fire can also highlight different ways of implementing fire, that has implications for the legal power, incentives and constraints that might be necessary. For example, as one interviewee noted, ‘hazard reduction tends to focus more right along that urban interface. Whereas I think both cultural and ecological fire need to happen much more broadly across the landscape’. The different scales and locations that are important for these forms of fire may illuminate new opportunities for reform including, for example, the particularly important role that Local Land Services may need to play in regional areas where cultural fire may be a primary use of fire, with hazard reduction outcomes forming a subsidiary benefit in cultural burns.

Values and responsibilities are also intimately connected with the concept of power. Asking, ‘whose values and responsibilities are represented in existing laws’ demonstrates clearly that it is not the values associated with the characteristics of cultural fire and the relationships that First Nations peoples have with fire. The values that underpin laws about fire also often fail to prioritise nature, whether that is framed as ‘healthy Country’ or positive ecological outcomes for threatened species. One interviewee noted, for example, that:

> I think we should be supporting Indigenous led stuff at absolutely every opportunity […and] my dream is to see teams of Indigenous practitioners paid for doing all this wonderful work until there's no more left to pay. That would be amazing. But at the end of the day, Country is what really needs this fire […] to be restored. And I think it needs all hands on deck for the sake of Country.

Answering the question about ‘why we burn’ also highlights the inherent difficulty of 'resolving’ the barriers that we have identified to cultural fire, because they are often values-based and sometimes politicised. As one interviewee noted:

> “**Both fire ecology and fire behaviour are extremely nuanced things and people want really simple answers. And it’s really difficult to give a simple answer to two things that are very complex. And then the overlay of that is humans and their values and their stupid politics.**”
>
> *Government participant, Project interviews, October/November 2023*

Underpinning all of the opportunities that we have identified below for reform, is the need to clearly articulate the values that underpin those reforms. In pursuit of reconciliation, and in recognition that the existing system is not achieving healthy landscapes and safe communities, reforms to facilitate cultural burning must begin from a position of re-evaluating and negotiating new values to underpin our relationship with fire.

## 9.2 New partnerships with new values alignments

Research required to do justice to this is beyond the scope of this current project. However, this concept of pursuing new partnerships offers critical opportunities to progress cultural fire in NSW,

even though it involves groups, agencies and policy priorities that typically have nothing to do with fire. For now, we note that:

- Other agencies and partnerships offer opportunities to shift the conversation closer in terms of the values alignments – for example, with the Department of Health bringing people back into healthy pathways.
- Transport for NSW is working with Forestry Corp to keep critical infrastructure pathways open during fires.
- Transport for NSW is:
  …wanting to burn the sides of the roads where the highways a danger point […]. And they're talking about using cultural burning because of less smoke, more gentle so the road doesn't have to close while they're doing it. That sort of thing. And also, because cultural burning's about pushing out, in many cases, we're taking the hot fire plants out to allow the less flammable plants a chance, because they're putting in a different fire regime to hopefully make it a less flammable area. So, if a big fire does come, there's a, what a better way, you know, it's not fire encroaching. (I-14)
- Department of Justice could play a crucial role in getting people back on Country.
- Department of Health is working to shift Aboriginal communities on to healthier pathways, which include connecting with Country and fulfilling cultural responsibilities through burning, but could also include promoting the public health implications of lower smoke loads from smaller, cooler burning.
- There are sure to be other institutions, agencies or other governance arrangements that could help to coordinate, facilitate, resource and/or empower cultural burning.

## 9.3 Enhancing existing enablers and mapping 'pathways through'

In the absence of wholesale reform, there is a range of activities that are emerging – many in their infancy – that have the potential to begin to enable cultural fire and support 'pathways through' some of the barriers that we have identified. One is simply to provide better agency support and buy-in to reduce the administrative load on people who apply to conduct a cultural burn.

"**It's quite possible and feasible for cultural burning to currently occur. It's just that it's very hard for them to navigate and get through to the right person. And if they do, they might get guided back elsewhere.** So, unless there is a whole of government approach to guiding people…. It's actually educating those agencies as well as them collectively educating those who want to use such a process."

*Government Participant, Project Interviews, October/November 2023*

In this section, we briefly identify agency activities that are emerging and are directed at addressing, or at least allieviating, some of the barriers we have identified. Most of these initiatives do not rely on legislative reform, which means that the legislative framework within which they are being pursued continues to be based on the propositions set out above, including the negligible role for cultural knowledge in decision making. 'Champions' within these agencies – people who choose to facilitate cultural burning with whatever legal and policy tools they have available to them inside the administrative system – and Aboriginal communities themselves, continue to be

some of the most consistent drivers for cultural burning in practice. This is consistent with recent research by Smith, Neale and Weir (2021), which noted that:

> In the absence of institutional clarity, established networks and accreted experience these practitioners work to generate enthusiasm, stabilise Aboriginal peoples' environmental authority and nullify pervasive societal fears surrounding the risk of fire. The case study demonstrates the significance of interpersonal factors in the emergence and maintenance of fraught intercultural collaborations. Despite global optimism, such insights highlight how the revival of Indigenous fire management in nations such as Australia is highly contingent and depends upon routine persuasive labour and fragile intercultural diplomacy.

While they demonstrate the growing interest and support for cultural burning, these existing and emerging enablers do not overcome the administrative inertia and continue to demand a great deal of energy and resources from First Nations people.

### 9.3.1 Enhance existing enablers to chart more secure, reliable and well-resourced pathways

Efforts to address the national and NSW inquiry recommendations that could be accelerated and prioritised in the short term, include:

#### Updates to the fire return interval thresholds

We heard that the Science Division in the Office of Climate Change is working on finalising a revised version of the fire return interval thresholds. It has been more than ten years since the thresholds were first revised and a great deal of new information (as well as changes to fire regimes and native vegetation) have developed since 2013. The thresholds were identified as a critical barrier to cultural burning by many participants, though others working with the thresholds, including as ecologists, have suggested that some of the conflict is overstated or misunderstood. It remains to be seen whether the new fire return interval thresholds reflect concerns about ecological decline in fire-dependent ecological communities and the rigid application of these thresholds that were developed to be a guide, not a rule.

#### Fire and Cultural Science Team (DEECCW)

We heard about the work of the Fire and Cultural Science Team, which is responsible for implementing the Applied Bushfire Science Program, as a core measure to respond to the New South Wales Bushfire Inquiry in 2021. The group is working to shift hazard reduction targets away from a hectare-specific measure to focus on outcomes, bringing NSW into line with some other Australian jurisdictions and, at least in theory, creating an opportunity to consider culturally and ecologically appropriate outcomes rather than an exclusive focus on risk reduction, though it remains to be seen what form these reforms will take.

The Team is also working to address procedural issues and capability barriers in Regional Bushfire Management Committees, to improve cultural safety for Aboriginal people and LALC representatives so that they can attend committee meetings and advocate for the protection of cultural assets, including through the use of cultural fire. This work is also at an early stage. The Team is also coordinating a pilot cultural burn project on LALC land, seeking to demonstrate that the barriers and risks to cultural burning are not insurmountable.

The Fire and Cultural Science Team is currently updating the Threatened Species Hazard Reduction List – one of the key instruments that feeds into the fire return interval thresholds, with a new version due to be published in 2024. We understand that this new document is intended to be updated annually, replacing what has become a 'static spreadsheet' that is applied rigidly and misses the nuance in conservation goals and the value of cultural fire knowledge. The project, if successful, could directly tackle some of the barriers that we have identified in this research about fire return intervals (see Part 4, above) though this updated list, when complete, would need to be implemented with care to avoid a rigid and conservative interpretation acting as another mechanism for limiting cultural and ecological fire in fire-dependent ecosystems.

**"[If we could] adapt the methodology and have traditional ecological knowledge in there [… and] bring in fire severity so that people know when we're not talking about *all* fire, we're talking about a certain *type* of fire, i.e., a hot fire".**

*Participant, Project Interviews, October/November 2023*

For example, fire return interval thresholds could be interpreted in more holistic ways, at landscape scales, if the Team can successfully incorporate fire severity as a threshold:

> and you say, well if you're doing a low severity fire, you can do that whenever you want. Just don't allow it to get into canopy, and you can see then that opens up things for cultural burning' (participant).

The same interviewee explained that, in practice,

> …at the moment they're saying put a 20km buffer on black cockatoo habitat. A 20km buffer is actually not even achievable. But what they're [really] saying is, 'hey, within this 20kms [the cockatoos are] probably around here. So, if you're doing a low severity fire where you're walking with the fire and you're really taking notice of your Country, you're going to notice if it's a nesting tree and make sure nothing happens to it anyway.

These adjustments to the scientific methodology that sits behind the Bushfire Environmental Assessment Code do not require legislative reform or revisions to the Code itself, but they will require whole-of-agency buy-in, and clarity and support for decision-makers to shift their practice in favour of cultural and ecological fire.

### Cultural Fire Management Unit (DCCEEW)

The Cultural Fire Management Unit is a high-level cross-agency unit, housed in what was formerly the DPE (now DCCEEW), has representatives from agencies including Parks and RFS, and has been working to identify legal barriers to cultural fire (as explained by many participants in this research project). We understand that a policy or strategy to guide a whole-of-government approach to cultural fire is being negotiated within that group but is not yet publicly available (workshop participants).

### Local Land Services

LLS is the process of implementing the recommendations from a review of the *Local Land Services Act*. That review has included close attention on the commercial restriction on cultural practices in Schedule 5A (discussed in detail, above). LLS is also working to implement the outcomes of Ken Henry's independent review of the *Biodiversity Act 2016*, and recommendations

relating to the management of native vegetation in NSW, including to provide greater input and opportunities for agency to First Nations people.

We were not able to interview any local government employees in this research, but we note that the same restriction on cultural activities for commercial purposes will also need to be removed from the Biodiversity SEPP to avoid increasing the complexity of different legal arrangements for the same activity across tenures.

#### Insurance Council of Australia

Rachael Cavanagh, a cultural fire expert, is working with the Insurance Council of Australia to examine the role of cultural fire in bushfire mitigation services, including through a national project on barriers in insurance arrangements to cultural fire. Work to achieve reform, and to support cultural fire, is already under way in many places. However, these efforts have not yet resulted in a cultural fire-specific process.

#### Rural Fire Service

We set out progress that is, or could readily be, taken by the RFS in Part 6.3.2 below. The RFS has committed to improving its engagement with Aboriginal people, and we heard in our interviews that the RFS is intending to develop new guidelines for Aboriginal engagement.

#### National Parks & Wildlife Service (NPWS)

We understand that the Cultural Fire Unit Strategic Plan, a project led by Vanessa Kavanaugh within the NPWS, has been working to improve the way that Parks plans, coordinates and undertakes cultural burns on Parks tenure. We also heard in our interviews that NPWS in north eastern NSW has been encouraged to adopt bioregion guidelines for burning from Southeast Queensland. The NPWS Fire Management Manual has, in the past, contained a clause that allowed NPWS to use evidence-based biodiversity thresholds for a specific region, if they are available, rather than relying on the NSW fire return intervals discussed above. However, revisions to the Manual in 2021 removed that reference to regional guidelines and that mechanism is no longer available to facilitate downscaled, evidence-based and regionally specific fire regimes. While re-inserting that provision into the Manual would not overcome challenges with resources and other barriers, it could open up opportunities for cultural and ecological burning that is better adapted to local vegetation requirements and fire regimes.

#### Aboriginal cultural heritage

Heritage NSW and the Aboriginal Cultural Heritage Advisory Committee are responsible for implementing cultural heritage laws and advising NSW government ministers on cultural heritage issues. As noted above (2.2.6), Aboriginal cultural heritage is governed under the *National Parks and Wildlife Act 1974* (NSW). All project participants that raised cultural heritage laws (in interviews and the workshop) acknowledged that the legal arrangements in NSW are desperately overdue for reform. Multiple attempts at reform have been unsuccessful in recent years, but legal reform is inevitable because the NSW laws are so dated, ineffective and out of step with every other jurisdiction in Australia.

When the NSW Government embraces the task of drafting new, stand-alone legislation for protecting Aboriginal cultural heritage, it will have an opportunity to consider broadening the terms of these laws to encompass more than simply the protection of places and items of cultural significance, to include intangible cultural knowledge, and the transfer and stewardship of cultural



fire knowledge and practice over time – as expressions of a living heritage, evolving cultural knowledge and practice, and the protection of culturally significant relationships including with land and fire.

In addition to new legislation to protect a broader range of Aboriginal cultural heritage, more effectively; the development of new legislation will create an opportunity to reconsider the structure and operation of Heritage NSW. These institutional arrangements deserve particular attention because a government body staffed by NSW Aboriginal people and governed in culturally defined ways may be better placed than existing agencies to implement legal instruments for cultural burning across the State, such as the permits, exemptions and approvals described below.

### 9.3.2 Provide legal or policy guidance to ensure that Key Threatening Processes are implemented in ways that support fire regimes that are both culturally and ecologically beneficial

Both NSW and Commonwealth environmental laws include a key threatening process about changing fire regimes ('too-frequent fire' in NSW). These KTPs should not be interpreted as absolute barriers to fire but, like the fire return interval thresholds discussed above, KTPs should provide a guide to decision makers to ensure that fire regimes are consistent with ecological needs for a specific area or region. Increasing flexibility in the interpretation and implementation of these provisions may require more rigorous data but could be expressly supported in the relevant legislation or subsidiary instruments. For example, legislation, Codes and Practice Manuals could create a 'rebuttable presumption', where the intervals are expected to be followed unless more up-to-date, regional, or ecologically and culturally rigorous information is available. Reforms such as the inclusion of a 'severity' measure in the intervals – if implemented – could also help to alleviate rigid implementation of these tools.

#### Example: management prompts in fire management strategies for protected areas

Fire management strategies are not legislative instruments, but guide the implementation of Parks priorities for fire in protected areas. These strategies implement the fire return interval thresholds but also incorporate 'management prompts' to assist staff. One interviewee explained that these management prompts are:

> heavily skewed towards long fire intervals. So, the basic concept [is that] you have a period where it's too early to burn […including] because it is likely to cause biodiversity decline. Then there's the period where [a proposed fire is] 'within threshold', where it's believed that biodiversity will be maintained if fire is applied within that window. And then you go beyond that window where it's expected biodiversity will decline if fire is applied after the window. Natural prompts would be along the lines of: when it's too early, don't burn yet; when you're within the window burn now. And then when you're beyond the window, consider burning with some urgency.

> [In practice,] we're kind of beyond [the window now.] We're getting decline. We should be really prompting it. However, the language that's used is diabolical. I think. […] Then when we're into the real red zone, where we've gone beyond and we're expecting decline, it says a prescribed burn 'may be advantageous', [so] consider allowing unplanned fires to burn. So, even once we're in what I would say is the alarm phase – we've missed our window and we're getting decline – they're still beating around the bush.

"[A] ranger looking at that – who's processing the likelihood of that burn going ahead, [and determining] if it's within threshold – they might say, 'that's all fine. There's no need for a fire there'. And instead, point [a person wanting to implement a cultural burn] to an area that's long overdue, which comes with its own set of problems. […] I can see pathways where that would definitely create impediments to cultural burning. Rather than someone who's processing the application to do a cultural burn on park, rather than seeing this map where there's all this opportunity, they're looking at a map and seeing only limited opportunity."

*Non-government Participant, Project Interviews, October/November 2023*

In this way, management prompts implement the presumption that flows from the legislation, that fire is generally harmful. That is, they are the outworking of legal definitions of fire as 'land clearing', a 'disturbance' or a 'threatening process'. In the short term, without legislative reform, management prompts for fire in protected areas could nevertheless be revised to prioritise cultural and ecological burns that prevent fire-adapted vegetation from declining, in the absence of fire. Management prompts could also emphasise the importance of not waiting until an ecological window has passed before burning. In practice, however, revising these management prompts will only achieve different results if greater resources are dedicated to burn programs in protected areas.

### 9.3.3 Use the Code and Hazard Reduction Certificates in different ways to maximise mosaic burning

We heard about ways to maximise the flexibility of hazard reduction certificates issued by the RFS while also achieving cultural purposes, even though the certificate is not the optimal instrument for cultural burning. As noted above, the Code is one of the primary existing streamlined approval processes, and could be used more effectively to maximise outcomes without legal reform.

For example, one interviewee suggested that cultural fire practitioners could apply for HR Certificates over a large area, providing as much information as possible about their plans for burning small patches of that area progressively over a period of time. Provided they did not burn the same patches multiple times, and as long as they recorded the actual burns effectively, they may only need to apply for the one certificate to achieve multiple, ongoing cultural fire activities across that large area. While this approach will only apply to large landholders, it circumvents the barrier that the fire return interview thresholds present while still allowing some agency for selecting where to burn and when, and reducing the administrative burden of having to re-apply for a certificate before every burn.

> Cultural burning is often burning little patches and you might be burning a different little patch each time. And so, if you actually looked at that and mapped it out, how frequently are you burning one patch? Are you burning it at less than the, say, seven-year interval? Or aren't you? Because realistically, we talk a lot about landscape mosaic burning, which is what's best

> from a biodiversity point of view – that you have as much variability in fire regimes as possible because you've got a wide range of species that you're trying to meet the needs of. Some things need short intervals, some things need long intervals, a lot of things are somewhere in between.
>
> […] it would depend on how you're applying for the certificate and who is assessing it, but the more information you give in applying for the certificate about exactly what you're planning to do, then the better suited that certificate can be written to meet those needs. […] There's nothing in the legislation stopping you from doing that, but there might be things at an implementation local level that are making that difficult for you. My advice would be: 'be as explicit in your planning [as you can be] and document your planning in a way that shows that you can do that and meet the guidelines'.]

An important challenge with using Hazard Reduction Certificates in this way is that – as noted above - the instrument is not designed to acknowledge the specific characteristics and purposes of a cultural burn. In practice, this matters because:

> …if you get an HR Certificate and say in there that you're cultural burning, then if you do not undertake the hazard reduction that is promised in the certificate, the Rural Fires Act says that the RFS can go in and undertake the hazard reduction for you… but they can't burn in a culturally appropriate way, so the mismatch between HR and culture is actually more than just semantics. […] From a regulatory perspective, [if] a bushfire risk management plan says that, 'we'll reduce the risk in this area through cultural burning', then the statutory obligation on [the RFS] in five years, when you haven't, is [that they can – and might need to] just go and do it for you.

It unclear whether, in practice, the RFS would step in in this way and complete a burn that was intended to be a cultural burn. Nevertheless, the statutory authority to do so means that this approach – reinterpreting the existing Code in a way that supports cultural burning – is unlikely to be a secure, long-term response to the barriers to cultural burning that we have identified in this report.

### 9.3.4 Pursue Commonwealth accreditation of state government actions under the *Environment Protection and Biodiversity Conservation Action 1999*

The Commonwealth and the states are able to enter into bilateral agreements under the *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) for a number of purposes including protecting the environment, promoting conservation and streamlining assessment and approval processes (s 45(a), s 29). Bilateral agreements can declare that some actions do not need to be assessed or approved under Part 9 of the EPBC Act and can instead be approved in line with accredited arrangements and processes enacted by state law (s 47(1)).

The Minister may accredit an arrangement or process if they are satisfied there has been or will be adequate assessment of the impacts of the approved actions on matters of national environmental significance and that it is not inconsistent with Australia's obligations under relevant environmental conventions (s 46(3)). For agreements relating to threatened species and ecological communities, the Minister must be satisfied that the accredited arrangement or authorisation process will promote the survival of each species or community to which it relates, and that it is not inconsistent with any recovery plan or threat abatement plan (s 53(2)(b)-(c)).

Another way in which actions can circumvent approval under Part 9 is by declaration of the Minister that the actions will be taken in line with an accredited arrangement or authorisation

process enacted under Commonwealth law (s 46(4), s 33(4)). Management arrangements and authorisation processes under both bilateral agreements and ministerial declarations must be tabled before parliament prior to receiving accreditation (s 46(4), s 33(4)).

The Independent Review of the EPBC Act found that despite attempts from governments, there are no bilateral agreements currently in operation that give states power to approve actions on behalf of the Commonwealth (Graeme 2020, Ch 5). Instead, agreements only exist which allow the states to complete assessment on behalf of the Commonwealth. For example, under the New South Wales Bilateral Agreement, NSW's Department of Climate Change, Energy, the Environment and Water prepares an assessment report for certain actions, which is then considered by the Commonwealth (NSW Environment and Heritage n.d.). The final approval decision remains that of the Commonwealth (DCCEEW NSW n.d.). The Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 was introduced to expand provisions allowing for delegation of approval powers, but did not proceed (Parliament of Australia 2020).

Regional Forest Agreements (RFAs) are formal agreements between the states and the Commonwealth, and they are not an example of a bilateral approval agreement. Part of the process of establishing the RFAs was to undertake a comprehensive assessment of ecological values, and to set aside from forestry activities, a comprehensive, adequate and representative selection of unique and threatened forest communities. As a result, forestry activities are exempt from the day-to-day operation of the EPBC Act if they are undertaken in accordance with an RFA (s 38). The EPBC recognises the operation of the *Regional Forest Agreements Act 2002* (Cth), under which RFAs are made. The independent review of the EPBC Act recommended that the exemption for RFAs should be replaced with the ability for RFAs to become accredited, to keep them in line with national environmental standards and improve Commonwealth oversight (Grame 2020, Ch 6.1).

### 9.3.5 Establish a new State Government verification process

We note that the NSW Government could develop a verification process that involved resourcing and accelerating opportunities for cultural burning under existing verification frameworks. Assessing this option in detail is beyond the scope of this report, but we note that this option could be pursued without substantial statutory reform.

## 9.4 Forcing change: the possibilities and risks of strategic litigation

Strategic litigation involves the use of court action to achieve systemic change. The aim of strategic litigation is to advance broader law reform or policy change initiatives beyond the scope of the remedies courts may award individual litigants (Peel and Markey-Tower 2021, 1485). This may include raising public awareness about an issue or forcing governments to act in a desirable direction.

Strategic cases are growing in the areas of climate change and human rights, with applicants using innovative arguments and existing legal frameworks such as tort law and administrative law to instigate change in corporate and government behaviour (Peel and Markey-Tower 2021, 1485). The Federal Court case of *Sharma v Minister for Environment (Sharma)* [2021] FCA 560 although overturned on appeal, used novel legal argument to bring the Minister before the Court prior to approving a new coal mine expansion. By arguing that the Minster owed Australian young people

a duty of care, the applicants were able to circumvent the constraints of judicial review processes and have evidence of the impacts of coal mine expansion on the environment heard in court prior to a decision being made. *Sharma* is evidence that 'obtaining a judgment is not an end of itself', but rather 'just one element of a broader plan oriented towards the ultimate aim of attaining lasting change' (Peel and Markey-Tower 2021, 1487).

This case and other similar strategic litigation cases demonstrate the necessary elements for successful strategic litigation. Firstly, the appropriate applicant to bring the action must be chosen. The applicant must satisfy any standing test at law, for example being a 'person aggrieved' by an administrative decision. The applicant should also be one able to further 'the broader strategic narrative pursued in the litigation' (Peel and Markey-Tower 2021, 1487). In the context of cultural burning, this may be a cultural burn practitioner or authority.

The applicable test for standing depends on the cause of action chosen. This could include identifying that the government has not fulfilled a certain obligation or has breached a prohibition under legislation or international convention. It may also involve arguing a novel substantive right held by, or duty of care owed to a specific class of people to which the applicant belongs, like in *Sharma*. Other steps involved in bringing a successful strategic action include identifying the correct forum in which to initiate the action, whether at the state or federal level, and securing funding to cover the costs involved.

Areas in which strategic litigation may offer promise include:

- Native Title Future Acts where, for example, strategic litigation may secure rights to undertake cultural burning on native title determined areas;
- Climate litigation such as the successful action brought by the Bushfires Survivors to, for example, hold the NSW Government liable for emissions from extreme bushfires as a result of suppressing cultural burning practices in the state; and
- Litigation drawing on obligations in environmental law, to protect biodiversity, ecosystems and threatened species from decline and extinction – working to drive changes to legislation, policy, practice or other governance arrangements to undertake cultural forms of burning for its ecological (co-)benefits.

## 9.5 Statutory reform: designing novel legal provisions to enable cultural fire

Developing a novel statute or new legal provisions offer the opportunity to 'start from scratch' and address, in purposeful ways, the barriers that have been identified above. This approach may involve a combination of new legal instruments (i.e. new delegated legislation such as Codes or State Planning Policies that simply require an enabling provision in legislation – which may already exist); new statutory tools that require new legislative arrangements as well as delegated legislation (i.e. a bio-cultural regional approach or new land use planning arrangements); and procedural reform to explicitly incorporate Indigenous knowledge and expertise in decision making.

It is important to observe at this point that, in NSW as in many other parts of Australia, there is a strong case for legal reform to support multiple forms of beneficial fire, including cultural fire but also ecological burning to enhance conservation outcomes in fire-adapted ecosystems, and more effective, evidence-based and well-resourced prescribed fire for hazard reduction. In the reform proposals that follow, we focus on cultural burning – consistent with the focus of the report as a

whole. However, many of these proposed reforms could be integrated into a broader legal and policy agenda to promote beneficial fire in general, and some could be advanced in parallel with mirroring reforms for ecological fire (e.g., ecological fire certificates and accreditation processes for ecological burning).

### 9.5.1 Design a state-based verification or accreditation process

For identifying cultural fire authorities or practitioners with authority to burn in the landscape – when a cultural group identifies a burner they could put out an EOI to assessors to provide feedback/be consulted on a proposed cultural burn (a kind of cultural peer review process that can be signed off as a process and then evaluation could take place periodically or on occasions rather than having government sign off).

Three analogies from existing legal arrangements that could be used to inform the development of this kind of verification or accreditation process include:

(1) **Industry code of conduct**: An instrument modelled on industry codes of conduct, where a process is negotiated and then accredited, and government provide (limited) oversight, would address common recommendations from interviewees in this project, to shift the primary source of authority for cultural fire assessment and approval from centralised government agencies to a peer-to-peer, community arrangement, ensuring that reforms do not have a negative impact on cultural pathways. This code of conduct approach may, for example, include accreditation of a new cultural assessment body, to oversee cultural burning undertaken in accordance with a set of agreed guidelines, principles or standards.

(2) **Accredited, self-assessment code**: extend and/or replicate the format of existing self-assessment codes under the *Local Land Services Act* to facilitate cultural burning across the full range of tenures in NSW – not for all forms of native vegetation clearing but specifically for cultural burns, conducted in accordance with clear, strict guidelines or standards.

(3) **Alternative accredited body to assess/approve applications under an RFS Code**: this would involve extending the same framework for self-assessment and approval under the Bushfire Environmental Assessment Code that applies to Parks and Forestry, to a culturally appropriate oversight body – an alternative, government endorsed assessment pathway with greater flexibility and less direct oversight from RFS for the cultural practice component of burning than existing arrangements.

This approach does raise some challenges, in particular, about funding (for a brief discussion of new markets for funding, see below). However, other benefits include a clearer pathway for knowledge sharing and improved cultural burn practice – tenure blind, statewide. Another challenge is that this kind of mechanism would require new statutory authority, given that LLS does not have consent authority (LLS administers approval/exemption pathways), and other authorities do not necessarily have power to decide across tenures (e.g. Parks) or beyond hazard reduction (e.g. RFS).

### 9.5.2 Designing a state-based cultural burning code + certification scheme

A new legal mechanism that is dedicated to cultural burning would provide an explicit, streamlined enabling framework that focused on fire as a cultural activity and brought together all of the different relevant legal obligations into one place. This is unlikely to require a new statute. Rather,

a delegated instrument that sits under existing legislation could be designed to focus specifically on permitting cultural burns or exempting cultural burns from other legal frameworks.

The RFS administers enabling frameworks like this already. In particular, it administers the Bushfire Environmental Assessment Code, which brings together a range of different legal obligations and permitting provisions and offers a streamlined approval mechanism for hazard mitigation activities. Other examples of codes in NSW laws include exemption codes such as the '10/50 Code' administered by the RFS, and the Rural Boundaries Clearing Code administered by Local Land Services.

Allowing more ready access to the existing Bushfire Environmental Assessment Code was raised as an opportunity to support cultural burning by some participants in this research, though others working closely with the Code observed that, because its purpose is hazard reduction, this is not an ideal tool for facilitating cultural burning.

A new, Cultural Burning Code could be designed in a way that draws on lessons from these other codes, to offer a dedicated approval or exemption process for the plethora of legal obligations relevant to cultural fire, in a single, streamlined assessment. This concept was raised by multiple interviewees as a potential option, and we examine here some of the key considerations for developing a code of this kind.

#### *Which model of Code – exemption process, or an approval or permitting process?*

There is a range of different approaches that could be pursued in designing a new Code. The NSW Bushfire Environmental Assessment Code, for example is a streamlined permitting framework that:

> …requires people to go onsite […] and make judgements and assess that. So, it has a whole lot of resources attributed to that… staff that are trained [in conducting onsite assessments, and there is] a very large, complicated, expensive, online system to enable that as well. (I-11)

This is distinct from the operation of other exemption frameworks, including other codes in NSW such as the Rural Boundary Clearing Code and Ten-Fifty Code. Each of these codes provides exemptions from native vegetation protections, allowing landholders to self-assess online and decide how to act on the basis of their own interpretation of the rules. Some participants supported this kind of approach noting, for example, that an exemption-based process is less onerous and can be rigorous, provided it is accompanied by clear, strict guidelines for users.

While an exemption approach may be more 'streamlined' from a regulatory perspective, it does not allow trained and expert assessors to support and protect the values present on the land on which activities are proposed. This is something that other participants highlighted as particularly important.

A new cultural burning code could be permit-based or exemption-based but, as one of our interviewees noted, there are similar challenges with identifying who will be entitled to carry out a cultural burn because the RFS (or other relevant authorising body) will:

> still need to make a determination as to [when] the exemption […] applies so that someone knows that they're meeting that exemption. Because sometimes agencies will go, 'I'll call it an exemption, and then I don't have to worry about it'. Well, that's not the case. You then have to make a determination as whether what someone is doing is meeting that exemption. And then, if you come up with another model such as code, then you need to have those who speak for country part of that, and then somehow look at the environmental impacts.

For an exemption-based approach Code to work effectively,

> …it needs someone to maintain the systems for people to use and pull off records, but it doesn't track anything. It just relies on the individual making that judgment. And then it's left up to the regulatory authorities to then go and inspect and investigate and make sure that something was in accordance with it, because they don't know.

Another alternative could be to combine aspects of each, allowing some online self-assessment, but with oversight from a dedicated, trained officer or separate accredited body (which might include Aboriginal Land Councils, a substantially reformed Aboriginal Heritage agency, or an entirely new, separate body), who could provide assurance that the applicant is entitled and equipped to conduct a *cultural* burn as opposed to any other kind of burn. The value of oversight was highlighted by one interviewee, who observed:

> [S]omeone needs to make a judgment, otherwise what's to stop anybody doing it? […] So, you know, Betty and Bob up the road, they use it. Who's going to go and say, 'are you Aboriginal or not?' No one's going to ask that.

### *Who would be in charge of assessments?*

The Bushfires Environmental Assessment Code provides a useful example of how multiple statutory mandates (conservation, fire safety, land use planning, heritage) can be incorporated into a streamlined decision-making model. Indeed, some aspects of the process could be adopted wholesale from the existing RFS Code, such as the list of relevant documents to consider, and the process for engaging referral agencies. Other aspects of the process are far less certain, such as the appropriate agency or decision maker to hold the responsibility for signing off on an application (i.e. issuing a cultural burn certificate) and coordinating referral bodies and other expertise such as RFS and threatened species protections.

Many interviewees emphasised the mismatch between the role and statutory mandate of the RFS, which centres on fire safety and hazard reduction, and the role for an authorising body for a cultural burning certificate analogous to the hazard reduction certificate. For example, multiple interviewees asked:

> '[H]ow can the RFS as a government body, which has got certain tasks attributed to it, how can it speak for, on behalf of, or be a judge of what is cultural burning?'.

It is critically important than any enabling legal instrument has the authority and cultural legitimacy to assess cultural practices – rather than fire, per se – because otherwise the legal framework risks continuing to sideline those cultural considerations which are, in reality, at the heart of the practice of cultural burning. However, no such agency appears to exist at present, and interviewees were divided on where the authority should rest to assess and approve applications for a cultural burn certificate.

While there was general agreement that there are complications with the RFS holding responsibility for the assessment and approval of a cultural activity, multiple interviewees also raised the issue that the RFS does retain legislative responsibility for safety and fire rescue, so it will likely need to retain some kind of role in the process – perhaps as a referral authority. The appropriate extent of that role is under investigation by the Cultural Fire Management Team within RFS but is also something that deserves detailed attention beyond the RFS.

***How would evidence be gathered, assessed and made accessible to communities?***

This consideration was not raised in our interviews but will be essential to address the absence of Traditional Ecological Knowledge being integrated in just and respectful ways into decision making about the practice of cultural burning. Moreover, cultural fire raises important intellectual property considerations that may not be appropriately entered into an online database or examined or assessed except by culturally appropriate people. These considerations are relevant to the decision about who is the appropriate decision-making authority, if such a code was to be implemented (as discussed above).

### 9.5.3 Design a cultural-regional planning approach (modelled on bioregional planning)

While it was not raised by participants in this project, other projects have proposed a regional planning approach to cultural fire that would allow proactive assessment and approval processes for cultural fire and other forms of beneficial fire such as ecological fire, within a designated cultural-bioregional area (e.g. Karuk Tribe 2024). This is similar to the Bioregional Planning tool in the EPBC Act and may offer a familiar legal mechanism for tackling more strategic, cross-tenure approaches to cultural fire. This approach would face similar questions to the streamlined, cultural burning code described above, including in terms of how to identify and designate appropriate cultural fire knowledge holders, and how agencies should be involved in key statutory tasks such as fire safety, for the RFS.

A detailed analysis of this approach is beyond the scope of this report. However, in summary, a cultural-bioregional approach has the benefit of catalysing specific engagement about cultural fire in an area over a longer period of time than existing hazard reduction certificates. This kind of plan could be examined and signed off by agencies, while still allowing primary responsibility for choosing precisely when and how to burn in the hands of cultural fire knowledge holders and communities. In so doing, it offers a response to key propositions about elevating the significance of Traditional Ecological Knowledge, placing responsibility for decision making in the hands of Indigenous peoples, and creating explicit legal pathways for cultural fire practices across tenures.

## 9.6 Overcoming financial barriers with new market mechanisms

Project participants identified resourcing as a major hurdle for cultural burning in NSW. Interviewees told us that sustainable sources of funding are difficult to find, but also crucial, to allow cultural fire practitioners to build capacity so that when opportunities arise to burn on Country, Aboriginal people are equipped to take up those opportunities and undertake those activities in culturally appropriate ways.

We heard that, at present, the majority of funding for cultural burning is coming through Aboriginal communities or organisations, who fund cultural fire as a subsidiary activity or co-benefit for funded community and environment projects – saying, for example,

> I've got a threatened species thing for sugar glider, and the community wants to do a cultural burn and protect it. Here's ten grand to do that work. So, it's getting […] built in as side objectives to other environmental programs. And I'll say it is mostly environmental programs funding it not social or economic growth type [funding] (I-14).

As other programs – notably including the Fire and Cultural Science Team – work to build capacity, expertise and a more supportive governance environment, novel sources of funding offer

the potential for future resilience and independence. Secure sources of funding will need to be developed alongside legal and policy reform to support cultural fire.

Funding for cultural fire as well as ecological burning to facilitate biodiversity conservation may become available in future under the operation of the new, national, *Nature Repair Market Act 2023* (Cth). That Act establishes a statutory framework for producing and selling the benefits of projects that enhance and protect biodiversity around Australia (with the 'benefit' represented as a tradable 'certificate'). Methodologies to measure biodiversity gains are yet to be developed, but input from cultural fire experts during that development could help to ensure that new methodologies accommodate and reward biodiversity benefits that are generated from cultural burning. At present, the nature repair market is a voluntary market, made up primarily of corporate buyers enhancing their 'green' credentials. However, future regulatory reforms may bring a far wider and larger set of buyers to the market, to account for the impacts of their activities and operations on biodiversity. If cultural burning could generate certificates to sell on the nature repair market, that trade may, in future, offer new sources of funding for cultural fire in NSW.

New methodologies to recognise emissions abatement from cultural fire practices have also been proposed under the national Australian Carbon Credit Unit Scheme, which is one of the core components of Australia's legal framework for climate change mitigation. That Scheme allocates an Australian Carbon Credit Unit (**ACCU**) for every ton of carbon dioxide equivalent that is sequestered or prevented from being emitted. The ACCU Scheme already allocates ACCUs for some savannah burning activities by First Nations in northern Australia but does not currently recognise climate mitigation effects from similar cultural burns (or any other form of fire) elsewhere in Australia. There is a great deal of work yet to do, to properly account for the different carbon dynamics with fire in southern forest ecosystems, and there are many methodological hurdles. Nevertheless, building cultural burning into that ACCU Scheme model could generate tradeable credits that help to fund cultural fire in NSW.

## 9.7 Insurance

Active intervention by governments will be required to address shortfalls (and perceived shortfalls) in the availability of affordable insurance and protection from liability. We understand that work on this issue is underway, in particular in a report for the Insurance Council of Australia by Rachael Cavanaugh, which we anticipate will be published later in 2024.

In the meantime, the question of whether insurance can be made available for cultural burning has been tackled in at least one instance, by the Batemans Bay Local Aboriginal Land Council, which accessed an insurance product from an overseas insurer, based in the UK. The LALC was required to provide tangible evidence to show that risk mitigation or risk thinking had been part of the planning process – a task that could have been far more straightforward if state and local government risk planning explicitly articulated how governments intend to work with cultural fire practitioners to facilitate cultural burning. Clear Government planning could provide comfort to an insurer and allow applicants for insurance to point to the ways in which their proposed activities fit within and contribute to the goals of that government plan.

### 9.7.1 Regulatory and Risk Framework Reform

Current insurance regulatory and risk frameworks require reform in order to properly take into account the controlled nature and low risk of cultural burning. As stated, current frameworks also

do not consider the cultural aspects of cultural burning, including allowing for Elders, young people and other community members besides the practitioners themselves to be involved. This results in high insurance premiums and excess, making insurance unaffordable.

South Australian data shows that less than 3% of prescribed burns conducted by the National Parks and Wildlife Service have escaped since 2013, and in all cases the escaped burns were managed (SA DEW n.d.). An American study showed that out of the 23,050 prescribed burns included in the survey, one insurance claim of the value of less than $5,000 was made and no legal claims were filed (Parajuli et al; Weir et al 2018). Cultural burns (and some other forms of burning such as ecological burns) are typically conducted at a lower intensity than prescribed burns for hazard reduction (Dossetto et al 2024). Reform of the regulatory and risk frameworks may include insurers offering specialised policies to cultural burn practitioners that take into account the actual risk of these forms of fire, and tailor themselves to cultural and ecological purposes.

### 9.7.2 Government Insurance Fund for Cultural Burn Practitioners

Governments may consider legislating to give cultural burn practitioners more autonomy. A pilot Prescribed Fire Liability Claims Fund was introduced in California in September 2022 (California Task Force n.d.). The fund, administered through the California Department of Forestry and Fire Protection, is able to provide up to $2 million in coverage for non-government prescribed and cultural fire practitioners. Tribes may apply to the fund to seek coverage for burns that have an ecological or ceremonial purpose (Blow 2023). The pilot program will be in operation until 2028, with a total of $20 million allocated (California Task Force n.d.). The purpose of the fund is to make insurance more affordable for beneficial fire practitioners, and to demonstrate the positive outcomes of beneficial fire (California Task Force n.d.). Lenya Quinn-Davidson of the University of California who worked to develop the fund states that ‘fire management must be viewed as a public service that benefits people and their environments’ and therefore ‘governments must help fund it’ (Blow 2023).

### 9.7.3 Abolition of Taxes on Insurance

Another broad measure that could be taken to help improve the accessibility of insurance to cultural fire practitioners is to abolish state taxes on insurance. This measure would also benefit other forms of beneficial fire. The Insurance Council of Australia specifically recommended this in their Insurance Catastrophe Resilience Report 2021-2022 as ‘an immediate measure that governments can take to make insurance more affordable’ (Insurance Council of Australia, 18). This includes abolishing stamp duty and the emergency services levy on insurance in New South Wales. Governments should take up this recommendation to partly alleviate the rising costs of insurance premiums resulting from the effects climate change.

## 9.8 Progress on a state-based Treaty

> "I have a lot of views on treaty. […] I know that's more of a cultural pathway to take. So, I would tend to think that you'd have more success at that – if you had treaty. One would have thought we'd have that if we had land rights, or we had native title, but both of them are so convoluted and complicated. **But treaty might be another way. A possibility here."**
>
> *Indigenous Participant, 2024*

A treaty is a legal instrument that 'acknowledges Indigenous peoples are a distinct political community… [as] the only group of Australians who owned, occupied and governed the continent before colonisation. This recognition also acknowledges the historic and contemporary injustices that invasion has caused' (Hobbs, Norman and Walsh 2023).

A state treaty could redefine the relationship between the NSW State and First Nations people. Treaty can be a vehicle to bring about a shift in decision-making power in many areas such as land rights and environmental policy and could underpin a new way of thinking about the intersection between law and cultural responsibilities for fire. In so doing, treaty could help to achieve a shift in values about fire, while addressing key propositions such as the need to elevate Traditional Ecological Knowledge in decision making, and establish explicit recognition for cultural practices such as burning.

The New South Wales government is the last of the state governments to initiate a process towards a treaty with its First Nations peoples (Butler and Kelloway 2023). In 2017, the New South Wales Aboriginal Land Council announced that the negotiation of a treaty was one of the key priorities of its five-year Strategic Plan from 2018-2022 (Wright and Luckylyn 2022, 4). The previous Liberal government's position on treaty was that any treaty should be negotiated at the federal, rather than state level (Australians for Native Title and Reconciliation 2019).

The New South Wales Labor government was elected in March 2023 and campaigned on a commitment to initiating the treaty process. The party pledged $5 million towards a consultation process to begin after the federal voice referendum, 'regardless' of its outcome (Rose, April 2023). This $5 million was promised for the initial steps to consult communities about what a treaty would look like (Rose, April 2023). Speaking in April 2023, Minister for Aboriginal Affairs and Treaty, David Harris announced that the government planned to appoint commissioners to oversee consultation with community. The commissioners would report to parliament, 'and then we will then work to set up a process that conforms to the views that we see' (Cross 2023).

Following the unsuccessful outcome of the referendum in October 2023, Premier Chris Minns clarified that the government would not be progressing past the consultation stage until after the next election (Rose, October 2023). He stated that the government was 'not planning' to have a treaty proposition ready at the next election.

In early April 2024, the government announced that applications for three commissioner positions will open until 8 May 2024 (Aboriginal Affairs 2024). The commissioners will be appointed for a fixed term of two years. During their term, they will undertake consultation with Aboriginal communities across New South Wales regarding whether 'a formal agreement-making process would be desirable, and secondly what this could look like' (Aboriginal Affairs 2024). A report will be delivered to parliament by the end of this parliamentary term.



The New South Wales government is in the very formative stages of the treaty process. Australians for Native Title and Reconciliation (ANTR) note that treaties must be negotiated fairly, arguing that consultation is a 'one-way process', whereas negotiation involves 'parties coming to the table as equals working towards a mutually beneficial resolution' (Wright and Luckylyn 2022).

Prior to the national referendum in 2023 on establishing a Voice to Parliament, expectations were high that the Australian Government would soon commence a truth-telling and treaty-making process at the national level (Hobbs, Norman and Walsh 2023). However, after the referendum was unsuccessful, national negotiations for treaty are likely to be on hold for the near future. Nevertheless, a national treaty could underpin significant changes to legal regimes for cultural practices, particularly to overcome shortfalls in Native Title, national cultural heritage protections, engagement of First Nations peoples with environmental protections at the national level, interventions related to emergencies and disasters, and support for cultural burning as a land management practice and cultural responsibility.

# 10. Concluding thoughts

In recent years, the proposition that land, at the point of colonisation by Europeans, 'belonged to no one', has been extended to interrogate the colonisation of water management, and cultural rights to water. Drawing on the characteristics and history of the concept of *terra nullius* in Australia, Dr Virginia Marshall has coined the phrase 'aqua nullius' to describe the way in which water, too, was designated (incorrectly) as belonging 'to no one' (Marshall 2017).[6] The implications of that presumption have resulted in serious cultural and ecological harm, discrimination, and mismanagement of water systems.

The Hon. Michael Kirby, a former Judge of the High Court of Australia, described the Mabo decision in relation to land, and its potential to extend to water, in the foreword to Dr Marshall's book, observing that:

> What the judges in 1847 had declared [that is, that the continent was terra nullius], the judges in 1992 could revise and re-declare [that the continent was *not* terra nullius]. Which is what they did. And although the new declaration was expressed in terms of 'land', to the extent that evidence, and factual analysis, demonstrated that the same considerations were true, at least in some cases, of 'water', the same conclusions would necessarily follow as a simple matter of logic and consistent principle.

While the context is distinct, a similar analogy may be able to be drawn in relation to fire. For example, there is ample evidence that, at the point of colonisation, land, water and fire were each the subject of clear cultural rights, responsibilities, practices and laws, across the Australian continent. To the extent that land was determined to 'belong to no one', and thus amenable to British claims for sovereignty, both water and fire were also deemed to be 'aqua nullius' and – in our view, at least – 'pyro nullius'. That is, the law has presumed that fire, as a critical management tool, cultural responsibility and life-giving force, is 'no one's fire', and has regulated it accordingly.

In the final iteration of this report, we have investigated ways in which that idea might direct priorities for legal reform – to support the development of legal and institutional mechanisms that place responsibility for fire management into the hands of cultural fire knowledge holders and experts.

[6] A concept that has continued to be developed in legal scholarship by Marshall (2017), and O'Donnell and O'Bryan, various.

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# 10. Appendices

## 12.1 Project Workshop Outline

## 12.2 List of interviewees

## 12.3 De-identified, coded themes from project interviews

Identifying and overcoming legal barriers to cultural burning

## 10. Report Appendices

Project Workshop Outline

# *Agenda: Overcoming legal barriers to cultural burning*

## WORKSHOP, TUESDAY 7TH NOVEMBER 2023, 8.30AM – 3PM

**Niigi Niigi**, Forest Sky Pier, Sealy Lookout Dr, Coffs Harbour, NSW 2450* https://maps.app.goo.gl/KZicLYPqx2ChzL1EA

*This workshop aims to bring together Aboriginal cultural burning practitioners and those who work in native vegetation management to yarn, workshop issues and discuss preferred outcomes related to the legal pathways for cultural burning in NSW.*

| Time | Agenda |
|---|---|
| 8.30 | Arrive, registration, ethics consent form, refreshments |
| 9.00 | Welcome to Country |
| 9.30 | • Housekeeping<br>• Introductions<br>• Background to project<br>• Why are we here?<br>• Project findings to date<br>• Discussion and questions |
| 10.30 | **Workshop session 1: 'Looking back'**<br>***Activity 1: Getting the order right***<br>Aboriginal laws, practices and authority frameworks for fire preceded the colonial legal system. What are the important laws, practices and authorities that came first?<br>Resources: butchers' paper, coloured markers [OR whiteboard, markers]<br>Format: either whole group or smaller group discussions and then reporting back.<br>Time: ~30 mins |

| | |
|---|---|
| | ***Activity 2: This is what we've heard, have we missed anything?***<br><br>List the barriers that have been identified in previous research and in the literature review and interviews for this project on a sheet of butchers' paper (possibly make three the same so that people can spread out across the room to complete the activity?).<br><br>Every person is allocated four dots (1x red, 2x yellow, 1x green). In this activity, each person allocates each of their dots across four of the barriers on the list, as follows:<br><br>• red = priority/most important barrier;<br>• yellow = second and third (or equal second!) most important barriers; and<br>• green = this is *not* a barrier<br><br>*Note: participants should allocate the red and yellow dots but do not have to allocate the green dot if they do not want to.*<br><br>Bring everyone back together to talk about results of the activity, any concerns/highlights/key messages?<br><br>Resources: red, green and yellow dots; marker; butchers' paper (for listing the barriers we have identified);<br>Format: 3 groups each with their own copy of the barriers (groups do not rotate)<br>Time: ~10 mins for allocating dots, ~10 mins for discussion<br><br>***Activity 3: Enablers and current pathways***<br><br>Where are the overlaps between cultural fire management and colonial, NSW laws? Are there workarounds or 'pathways through' that we could improve on and strengthen?<br><br>Resources: whiteboard, markers<br>Format: group discussion, list on whiteboard and take a photo of the whiteboard at the end of the session to capture and report back later<br>Time: ~30 mins |
| 12.00 | Lunch |
| 1.00 | **Workshop session 2: Looking forward**<br><br>The purpose of this session is to consider what a legal framework might look like, if it holistically, respectfully and genuinely facilitated cultural fire management. This could be used in our final report to inform our recommendations about reform – supplementing the results of our conversation about 'enablers', above, and underpinning recommendations for First Nations'-led, holistic and transformative law reform.<br><br>Guiding questions/themes:<br><br>*If we had good, helpful laws and policies that supported cultural fire managers to burn Country, how would they deal with the following issues:* |

| | |
|---|---|
| | 1. ***Who should decide*** – institutions and(or) responsibilities for cultural fire, decision makers, authority, participation, engagement, authorising frameworks<br>2. ***How should decisions be made*** – defining cultural fire, processes for balancing different values (landscapes, culture, environment, safety), guiding principles for decision-makers<br>3. ***What do we need to protect and support cultural fire and cultural fire managers*** – insurance, liability, cultural leadership, family and community participation?<br><br>Resources: butchers' paper, sticky notes, markers<br><br>Format: 3 tables/sections of the room, each working on one of the 3 questions. After ~15 minutes on each question, rotate the groups, as follows:<br>• First rotation: each group brainstorms as many ideas as they can think of for the question/theme they are working on, writing each idea on a separate sticky note and putting it up on the wall (or on a big sheet of butchers' paper);<br>• Second and third rotation: on each new question/theme, groups add new ideas on sticky notes, and begin to organise/group sticky notes that seem to 'go' together or relate to similar ideas. Each group can set aside sticky notes that are unclear or which someone is not sure about or may not agree with, putting them in a section called "we wonder about this".<br>• After the third rotation, each group reports back to the whole room on the question that they ended on. This discussion can raise any of the ideas in the "we wonder about this" pile, to clarify, better understand and/or decide whether it belongs under that question, somewhere else, or should be recorded as something that not everyone agreed with.<br><br>Finish with reflections on the task with whatever time is left. Group discussion could focus on what was easy or difficult about this activity, what did participants feel certain about, and what were they conflicted about. |
| 2.00 | Yarning<br><br>Next steps and proposed outcomes of the project |
| 3.00 | Finish workshop and depart |

***If weather conditions are unsuitable**, back up location is: Ngiyambandigay Wajaarr Aboriginal Corporation, Unit 7/ 3-5 Engineering Dr, Coffs Harbour NSW 2450 https://maps.app.goo.gl/qC928wVZYNnosWMk6

***We will advise change of venue by 3pm Monday 6th, if required***

***Contacts: Oliver Costello 0422 223 478; Michelle McKemey 0437 350 597.***

## Engagement and interview of other stakeholders and experts

The names in the list below were interviewed for this research. Many more people were contacted to be interviewed but were unavailable or did not reply.

| Name | Role/expertise |
|---|---|
| Dr Erin O'Donnell | **Senior Research Fellow**, Melbourne Law School, University of Melbourne |
| Dr Katie O'Bryan | **Senior Lecturer**, School of Law, Monash University and former practitioner in native title law |
| Victor Jurskis | **Author, retired forester and ecologist**, independent |
| Dr Simon Heemstra | **Rural Fire Service**, Director, Community Risk |
| Liz Tasker | **NSW Dept of Parks and the Environment** |
| Dr Belinda Kenny | **Hotspots Project Ecologist**, Central, Nature Conservation Council of NSW |
| Peter McKechnie | **Deputy Commissioner Field Operations**, NSW Rural Fire Service |
| Tanya Eldridge | **Principal Policy Officer** Local Land Services |
| Graham Kelly | **Aboriginal Cultural Engagement Business Partner**, Local Land Services |
| Andy Baker | **Lecturer and consultant**, Southern Cross University |
| David Kington | **QLD Forestry and Parks**, retired |
| Den Barber | **CFM practitioner and leader**, consultant |
| Kathy Lyon | **Forestry Corporation NSW** |
| John Shipp | **Forestry Corporation NSW** |
| Stephanie Hunt | **HQPlantations Qld** |
| Andrew Dunn | **HQPlantations Qld** |
| Lloyd van der Wallen | **Rural Fire Service – policy** |

# Interviews: list of barriers, enablers and future options

| Barriers | # Ref | Category |
|---|---|---|
| 'Bureaucratic and social paralysis…is really a large player in why our fire management is failing. Not just traditional fire, that's fire across the Country' | x1 | Bureaucratic rigidity |
| Fire return intervals are only supposed to be a very, very rough guide but, 'unfortunately, you give a set of intervals to a government agency and they'll produce a spreadsheet, and then you'll go burning things by boxes'. | x1 | Bureaucratic rigidity |
| Legal and policy frameworks do not specifically facilitate cultural fire [*note 8 said it's not a barrier, but it's not optimal*] | x6 | Legal rigidity |
| Cultural heritage laws only recognise cultural sites such as scar trees, stone tool scatters etc but the whole of Australia's landscapes are cultural landscapes | x1 | Legal rigidity |
| Legal and policy framework do not recognise cultural and spiritual values in relation to water or fire | x2 | Legal rigidity |
| People are not allowed to use common sense | x1 | Legal rigidity |
| Rules create 'box ticking' exercise<br>[*Note: 3. 12 and 7 make this comment for very different reasons; 13 only references the concept in passing*] | x6 | Legal rigidity |
| Environmental checklist exercise means that no one can be blamed for anything – 'if I don't go and burn am I going to get in trouble? No. If I go and burn something and singe one koala, […] or a fence post or two…? My goodness'. | x1 | Legal rigidity |
| Legal prohibitions on burning in the past meant gaol for cultural fire being applied to the landscape, with a legacy for burning today | x1 | Legal rigidity |
| Constrained window of when you're allowed to light a fire – inconsistent with cultural seasonal calendars | x2 | Legal rigidity |
| Stretching a hazard reduction certificate to meet a cultural purpose might backfire one day<br>['Look, I haven't seen anywhere people have actually flaunted it, but it worries me that it's stretched.'] | x1 | Legal rigidity |
| State forestry licence – appendix on fire management and operations – dictates how forest companies manage fire | x2 | Legal rigidity |
| Permitting, resource, equipment and system requirements for beneficial fire are detailed and onerous | x2 | Legal rigidity |
| Forestry has been the subject of lots of litigation, so forestry management is 'over the top anal about checking every rule and regulation' | x1 | Liability |
| Fear of litigation | x4 | Liability |
| Aboriginal communities may not understand or be able to explain how landholders will be protected if everything 'goes wrong' | x1 | Liability |
| Only way around the fire interval thresholds is a full REF (review of environmental factors) | x3 | Legal rigidity |
| Liability profile for private companies is different to government (not covered by Civil Liabilities Act) | x2 | Liability |
| Complexity of locking in a new pathway for law reform to facilitate cultural burning (big questions: who authorises, how should other laws interact?) | x4 | Legal rigidity |

| Barriers | # Ref | Category |
|---|---|---|
| Cultural practices allowed under LLS Act & Biodiversity SEPP but cannot be for commercial gain – barrier to creating an industry or employment options around cultural fire | x3 | Legal rigidity |
| Fire agency (and statutory) mandates do not include facilitating or protecting culture | x3 | Legal rigidity |
| Land use planning – development consent needed for planned fire in mapped coastal wetlands (formerly SEPP 14 wetlands). If fire is not 'environmental protection works', it's classed as designated development that needs an EIA (but coastal wetlands – floodplains and sandplains – the heath swamps and paperbark swamps in those culturally and ecologically important landscapes are all fire dependent and overdue for fire) | x1 | Legal rigidity |
| Who gets to decide what the purpose is, of land management interventions and the application (or exclusion) of fire – rarely Aboriginal people | x1 | Legal rigidity |
| The assessment processes for Parks, Forestry etc are becoming more similar and less bespoke because RFS wants them all to load into the same system | x2 | Institutional rigidity |
| Assessment process for Parks (fire management strategies) the 'traffic light' approach promotes avoiding fire and has resulted in biodiversity decline (too soon indicates 'don't burn', biodiversity to be maintained 'could burn or not burn' – should say 'burn now!', then biodiversity will decline 'burn with urgency') – implements the presumption that fire is harmful | x1 | Institutional rigidity |
| State HR hectare targets mean burning at the wrong time/wrong way (undermine good will for cultural burns, too slow, too small) | x3 | Institutional rigidity |
| Abrogating responsibility for cultural impacts from hazard reduction burns – 'the idea that somehow or another we can box it, big patches of country, in hazard reduction without considering the importance of the cultural outcomes and the ecological outcomes of those fires? That, again, is fanciful.' | x1 | Fragmentation |
| State laws and codes cannot exempt you from national obligations so a streamlined process will always be constrained by whatever national laws apply | x1 | Fragmentation |
| Lack of clarity about the intersection between national and state laws, creating bureaucracy and additional administrative burden | x1 | Fragmentation |
| Challenges with accessing appropriate insurance (or hurdles for accessing insurance at all)<br>[*note: #17 I had to be kind of careful even talking to brokers, because you mention the word fire, they just hang up on you*] | x6 | Insurance |
| Limited understanding of what is protected by insurance | x2 | Insurance |
| Not enough resources being dedicated to hazard reduction<br>[*note: #8 describes as pragmatic – struggle to meet current targets*] | x2 | Resources |
| No resources ever left over after hazard reduction to do ecological burns, or specific burning for individual species – hazards are always prioritised | x2 | Resources |
| Reluctance to reallocate agency budget to cultural fire<br>[*note: #14 'People are having genuine cracks [at this], but no one's willing to give up their budget to shift to a different way'*]. | x2 | Resources |
| Not enough funding to support ongoing cultural learning and practising cultural fire (not enough to do it more than once) | x5 | Resources |

| Barriers | # Ref | Category |
|---|---|---|
| [*note: #14 describes a 'capability barrier within community'*] | | |
| Don't have enough people to meet hazard reduction targets [*note: #8 describes as pragmatic – struggle to meet current targets; #14 describes this as a 'capability barrier'*] | x4 | Resources |
| Fire assessors/decision makers are overwhelmed with paperwork and have limited capacity to investigate novel ways of working with cultural fire and communities | x2 | Resources |
| To light and manage a beneficial fire you need resources including PPE | x1 | Resources |
| Fire assessors/decision makers are overwhelmed with work and have limited expertise to challenge the fire interval thresholds (i.e. that plant actually *isn't* there, or reinterpret rules for applications requesting a different approach | x1 | Resources |
| Information is a resource but no one can access fire response information in the way that they can for ecological information – everyone should be able to | x1 | Resources |
| Aboriginal communities may not be equipped to participate in regional bushfire management committee meetings due to technical language, experience or lack of guidance for preparation ['*You've also got a capacity issue of Aboriginal community having to try and learn the language of bushfire planning*'] | x1 | Resources |
| Environmental regulations [*note: #4 and #14 raised this as a barrier that people identify, which is specifically wrong*] | x5 | Environmental laws |
| 'Frequent fire' listed as a 'key threatening process' in national environmental laws | x2 | Environmental laws |
| 'Too frequent fire' listed as a threat to 'endangered ecological communities' under state threatened species legislation | x2 | Environmental laws |
| Threatened species protections – particularly as they flow into the Bushfire Environmental Assessment Code [*note: #4 raised this but said that this rigidity still does not protect the environment effectively*] | x3 | Environmental laws |
| Define burning as vegetation clearing (fire is seen as destructive rather than key ecological or cultural process) [*note: #5 cited the definition for clearing – 'to cut down, fell or uproot, kill, poison, ring bark, or burn or otherwise destroy' – it's not necessarily a direct impediment but language is important*] | x1 | Environmental laws |
| Focus of wilderness on keeping people out conflicts directly with Country needs people | x1 | Environmental laws |
| Protected area management has often excluded fire – changing fire regimes, triggering biodiversity problems and harming cultural practices | x1 | Environmental laws |
| Fire has traditionally – in the conservation movement – been seen as a problem [*#5 particularly focused on rainforest conservation community*] | x2 | Environmental laws |
| Fire interval thresholds are 'not based on science' [*note: specifically contradicted by #4*] | x1 | Fire interval thresholds |
| Fire interval thresholds are often not appropriate at regional levels – in some regions, plant life cycles happen much faster than the thresholds presume including dying out without the necessary fire | x2 | Fire interval thresholds |

| Barriers | # Ref | Category |
|---|---|---|
| Policy support for downscaled decision making under the thresholds has been gradually dismantled (e.g. the National Parks and Wildlife Fire Management Manual used to say that if you have evidence-based biodiversity regional guidelines/thresholds, use them – and the Southeast Queensland bioregion guidelines were great and helpful - but that policy clause has just been removed. So, support for regional guidelines, if they're available as being slowly dismantled). | x1 | Fire interval thresholds |
| Implementation of fire interval thresholds has lost the nuance of the original science, which highlighted the most fire-sensitive plant species in an area and suggested using local knowledge to work out how best to protect it – now rigidly applied | x1 | Fire interval thresholds |
| The current thresholds are too coarse (defined at level of vegetation formation (state scale) not veg class, community type or climatic extremes)<br>[*note: new thresholds operates at veg class/community – finer scale for composition and spatially*] | x2 | Fire interval thresholds |
| The current thresholds only focus on frequency – ignoring intensity, patchiness and seasonality<br>[*note: new thresholds include severity but seasonality will be in the next revision*] [*note: work underway to incorporate intensity - same as severity? into the threshold methodology – I14*] | x1 | Fire interval thresholds |
| No ownership of the fire interval thresholds across government so huge gap between updates (2013 to 2024), lots missing | x1 | Fire interval thresholds |
| No mechanism in the thresholds at present for acknowledging and integrating Traditional Cultural Ecological Knowledge<br>[#14 *'what's also the traditional [knowledge], because it's also expert advice. So, both knowledges are side by side'*] | x1 | Fire interval thresholds |
| Fire interval thresholds set the wrong fire return interval for some vegetation classes (i.e. too long between fires or, less commonly, too short a time)<br>[*note: I4 observed this but pointed to the review and changes coming into play; I13 gives great example from bristlebirds*] | x5 | Fire interval thresholds |
| Fire interval thresholds wrongly indicate the presence of particular vegetation classes in some cases (that is, they do not match what is present in 'real life' in the landscape) | x1 | Fire interval thresholds |
| Fire interval thresholds can undermine positive long-term collaborations by preventing re-burning that is culturally required (i.e. can't repeat a great collaborative burn within the culturally appropriate timeframe) | x3 | Fire interval thresholds |
| Thresholds can prevent cultural fire from reburning small patches when they are ready | x1 | Fire interval thresholds |
| Fire interval thresholds prevent cultural burners from being able to consistently access the streamlined hazard reduction certificate process<br>[*note: I4 observed that this is its purpose- it's not for cultural burns*] | x2 | Fire interval thresholds |
| Intervals are just an excuse not to burn something – it should be based on condition of Country | x1 | Fire interval thresholds |
| Uncertainty about the right Aboriginal groups/people for groups wanting to facilitate cultural burning to engage with (native title | x3 | Cultural knowledge |

| Barriers | # Ref | Category |
|---|---|---|
| groups, Aboriginal Corporations, unrepresented groups, independent Elders) | | |
| Uncertainty about the right Aboriginal groups/people to put in charge of a different framework ('who speaks for Country'? - native title groups, Aboriginal Corporations, unrepresented groups, independent Elders) | x5 | Cultural knowledge |
| Aboriginal knowledge holders may resist sharing knowledge about cultural fire (without getting paid, or at all) | x1 | Cultural knowledge |
| Concerns about Aboriginal groups having the right expertise (safety, insurance, invoicing) to collaborate on cultural burns and readiness to 'deliver' on agreed outcomes | x2 | Cultural knowledge |
| Some (or all) knowledge about cultural fire may have been lost in some areas | x2 | Cultural knowledge |
| Aboriginal people may shoulder the blame for burning in culturally inappropriate ways in the past, as they gain knowledge and build expertise and recognise what Country needs at any given time | x2 | Cultural knowledge |
| Cultural fire practitioners will sometimes get it wrong | x2 | Cultural knowledge |
| Handing responsibility for fire management to Aboriginal people after the 2019-2020 fires palms some of the blame for our mistakes onto Aboriginal people – 'when the final analysis comes in for the 2025 Black Thursday or whatever the hell it's gonna be, they'll line up to get the kick in the head with the rest of us involved in fire management saying, 'oh, we didn't burn Country.' | x1 | Cultural knowledge |
| Some fire knowledge is secret but may still need brigade to be present just in case – i.e. male volunteer firefighters deployed to women's business and then told to sit in the truck – need to improve communication about collaboration on culture fire | x1 | Cultural safety |
| Cultural load / cultural safety – inability to speak for all mob across the state when informing cultural fire practice and policy [*note: recognition by I7 that this was done in ignorance in the past*] | x2 | Cultural safety |
| Lack of clarity about the extent to which an agency should take responsibility for training, accrediting and conducting cultural fire (e.g. some agencies can facilitate but should not train) | x3 | Cultural safety |
| Ensuring legislated safety requirements for cultural burning may require culturally inappropriate activities such as big fire breaks, high viz | x3 | Cultural safety |
| Payments for cultural fire as a service, rather than a cultural responsibility, can raise expectations for money but also incentivise burning at the wrong time and in the wrong way | x2 | Cultural safety |
| Regional Bushfire Management Committees have landholders, locals and Local Aboriginal Land Councillors but no specific procedure to make the meetings accessible and provide support for attendance and understanding | x1 | Cultural safety |
| Some Aboriginal communities (incl ranger groups, LALCs) have meeting fatigue – inviting them to participate in risk management and share information about cultural burning is exhausting | x2 | Cultural safety |
| Too many National Parks | x1 | Land tenure |
| Private land [*note: #17 'your cultural practice stops here at this line at this fence'*] | x3 | Land tenure |

| Barriers | # Ref | Category |
|---|---|---|
| Environment movement became involved in the conversation about fire (especially academics) [*note: I4 is that person, and has very different perspective on this*] | x1 | People/stakeholders |
| People object to smoke: 'I'm not sure that, globally or nationally, our society can cope with the fact that we need to have smoke everywhere most of the time.' | x1 | People/public health |
| Green academics 'capturing' concept of cultural fire | x1 | People/stakeholders |
| Researchers start from scratch and ignore old Forestry Commission research on soil and fire changes | x1 | People/stakeholders |
| Nature Conservation Council has a seat on the Rural Fire Act fire Committee | x1 | People/stakeholders |
| People complaining about fire 'escapes' | x2 | People/stakeholders |
| People complaining about smoke | x1 | People/stakeholders |
| Tree changers – people who do not understand fire and are afraid of fire | x3 | People/stakeholders |
| Tree changers – people who actively resist the idea that fire should be in the landscape at all, ever. [*note: I7 concerned that trying to introduce cultural fire would be challenging and maybe create serious conflict*] | x1 | People/stakeholders |
| Tree changers – people living on small blocks on the edges of the forest with no protection from bushfire | x2 | People/stakeholders |
| A lot more assets and people and fragmented landscapes increases risks and difficulty for beneficial fire | x1 | People / stakeholders |
| Multiple Aboriginal groups have different interest in engaging and different capacity to engage | x2 | People/stakeholders |
| Decision making is centralised – local people who know the conditions and the Country are marginalised | x1 | People/stakeholders |
| LLS and local councils do not always understand the operation of their own legislation, and sometimes send applicants for cultural burning to the RFS because they see the word 'burning' without recognising that it can be an allowable activity under the LLS Act and the SEPP | x1 | People/stakeholders |
| Long-experienced people have been forced out of the RFS | x3 | People/stakeholders |
| Struggling to get buy-in to reinstate fire regimes – most people struggle to recognise it as a problem outside of extreme bushfires | x1 | People/stakeholders |
| Aboriginal engagement can take a lot of time | x1 | People/stakeholders |
| Hysteria, with unsophisticated media reporting fanning and making things seem more controversial, undermining collaboration & trust | x1 | People/stakeholders |
| Resistance by govts to allow fire as a right/activity (except perhaps campfires) in native title negotiations/consent determinations | x1 | Political will |
| Resistance by govts to approve cultural fire policies and practices in their full character – still largely tokenistic | x3 | Political will |
| Despite good will at higher levels in the RFS, ground staff and regional managers sometimes refuse to do cooler burns – too slow | x3 | Agency culture |
| Aboriginal people need to control when/how to burn [*note: I7 says the RFS must retain some oversight over flames*] | x3 | Power |
| Safety, training, accreditation, walk test, PPE, all obligations on private companies and detract from cultural experience and priorities | x6 | Risk management |

| Barriers | # Ref | Category |
|---|---|---|
| At present, risk management planning, mapping and modelling do not include any cultural knowledge or culturally-specific options for mitigation | x1 | Risk management |
| More onerous requirements for cultural burning (particularly in Parks and on Crown Land) than farmers on private land | x3 | Risk management |
| 'Extreme risk aversion of governments and just the lack of tolerance of – in the media and in official requirements – [of risk]' | x1 | Risk management |
| Time periods for hazard reduction are not consistent with what Country needs – sometimes burning in the middle of winter is better, sometimes you have to skip a year | x3 | Other: Timing |
| Need to pay attention to cumulative impacts from approving a range of cultural burning that might be fine at small scales | x1 | Other: Cumulative impacts |
| Balancing values across whole landscapes for all people, ensuring that the adverse impacts do not outweigh the benefits<br>[*note: #6 emphasised the need for cultural burning beyond archaeological sites – that whole landscapes are cultural sites*] | x2 | Other: Cost-benefits |
| Climate change<br>[*note: #3 specifically said it's not climate change*]<br>[*note: #6 said climate change is real but we can't use that to sidestep what we've done to the country by removing fire*] | x3 | Other: Climate |
| Restricting narrative about regular fire as a land management tool to a cultural context<br>[*note: this is inconsistent with discussion about ecological fire I5, I6*]<br>[*note: I7 raised this in relation to a comment from someone else*]<br>[*I5, I6 and I12 strongly support indigenous-led fire but argue we need more burning from all perspectives to heal Country*] | x5 | Other: Definitions |
| One regional bushfire management committee zone on the south coast covers seven different LALCs but LALC members are not paid to go whereas a farmer is paid to go to those meetings, and the LALC members have to go to SEVEN because their LALC areas cover so many different boundaries and committees. | x1 | Other: discrimination |
| Lack of knowledge, understanding and support about fire behaviour and fire ecology and the impacts of fire on environments, defaults to dichotomous thinking that is unhelpful and wrong | x4 | Other: lack of knowledge and support |
| Ignorance of long-term land management – 'our society has a 240-year ceiling, we can't see back past that' to recognise that the only way extremely old trees in dry country can have survived is if the understory was carefully and actively managed. | x1 | Other: short term thinking |
| Cultural and ecological burns are treated inconsistently – Biodiversity SEPP allows traditional ecological activities but not environmental protection works, while the Byron Shire Local Environment Plan allows environmental protection works but not cultural activities | x2 | Other: Legal inconsistency undermining broad buy-in to improve health of Country |
| Hazard reduction tends to focus more on the urban interface, but cultural and ecological fire both need to happen much more broadly across the landscape | x2 | Other: need landscape scale |
| 'The legislation really is a reflection of the social condition of our society. And the social condition is such that no one does anything they can get into trouble for.' | x2 | Other: lacking courage |

| Enablers | # Ref | Category |
|---|---|---|
| The *Forestry Act 2012* (NSW) | x1 | Industry framework |
| Historically, lots of First Nations people working in the Forestry industry but have now left the industry (due to mechanisation, and other things) | x1 | Aboriginal employees |
| Parks & Wildlife has a policy to guide cultural burns on country within the Parks estate – checklist including participation ratios for crews | x1 | Policy support |
| Local Land Services exemption processes for agriculture, private forestry and cultural practices | x2 | Exemption pathways |
| Hotspots and Firesticks are examples of great information sharing and practical collaborative work | x1 | Practical actions |
| Generations of graziers that learned from Aboriginal communities have continued a practice reflecting cultural burning and maintained healthy Country in some places | x2 | Practical actions |
| More overlap and common ground between values – biodiversity, HR, cultural – even though there is definitely some conflict there [Note: #6 'the hazard reduction elements and the ecological and cultural elements of burning woodland, native forest and woodland country are not in conflict. They can all happen together'.] | x2 | Values |
| Local Government SEPP 46 does not incorporate environmental considerations in the same way, so the fire return interval thresholds may not be a barrier to local government burning in the way that it is perceived to be, under the RFS Code | x1 | Environmental protection |
| Fire is one of the most important weed management tools so offers opportunities to restore healthy Country from weeds | x1 | Co-benefits |
| Landholders who have seen cultural burning at work may improve the way that they do what would otherwise be a hazard reduction burn – cooler and less intense – as a result of having learned better practices [*NOTE not really an enabler, more a positive co-benefit*!] | x1 | Co-benefits |
| Champions to carry some of the administrative load makes it easier for mob [e.g. Council bushfire officer did most of the hard work to seek approvals for cultural burning for Council] | x1 | Champions |
| Having Aboriginal people with cultural fire knowledge in agencies who have the role/authority to guide and inform practices | x1 (implied) | Aboriginal employees |
| Changes to the fire interval thresholds introduced a new 'ignition management zone' for more-frequent-fire-than-the-thresholds | x1 | Fire interval thresholds |
| Changes to the thresholds will now focus on veg class not formation, allowing focus on smaller spatial and composition scales | x1 | Fire interval thresholds |
| Cultural heritage management – triggered engagement process | x1 | Engagement |
| If there are similarities in methods/techniques First Nations people might be willing to undertake prescribed fire operations for forestry companies | x1 | Co-benefits |
| Similarities (cultural/prescribed fire) do already exist – 'it's just different ways of reading and that's what I guess that's the difference. You [are] still coming up with the same results, but different ways of life?' | x2 | Values |

| Enablers | # Ref | Category |
|---|---|---|
| 'I'm trying to protect trees for timber, you gotta burn really slow and not get, you know, too much peat into them' | | |
| Desire to create meaningful opportunities for First Nations people to work on Country | x1 | Aboriginal employees |
| When First Nations people are fire accredited with the right gear (e.g. fire trucks) and ready to meet company/legal requirements particularly around safety | x1 | Resources |
| Corporate funding for engagement initiatives might support 'trial' approach to cultural burning to demonstrate commercial viability as a fee-for-service | x2 | Practical actions |
| Forestry corporations have some powers under Fire Service Act (at least in Qld) to do some things – e.g. light a fire put it out, go beyond the boundary to fight wildfires etc – so could provide oversight without needing other agencies involved. | x2 | Industry framework |
| Seeking sign off on a large area, burn patches and then say you're burning the unburnt patches next time | x2 | Fire interval thresholds |
| State Government support, good will and good intent (Royal Commission, internal agencies and statutory corporations) | x6 | Good will |
| Local government support in some places<br>[e.g. Windarribin Shire Council cultural burn strategy and actually implementing community-led cultural burns for cultural purposes] | x1 | Good will |
| Evidence of learning within agencies about how to facilitate cultural burning *better* | x2 | Good will |
| Paying First Nations to plan and conduct cultural burns<br>[*But note, 12 has serious reservations about this*] | x1 | Resources |
| Writing letters of support for Ranger groups to access federal funding for cultural burning on forested areas | x2 | Resources |
| Growing momentum in recent years to understand the important role for fire in ecosystems and for culture | x1 | Good will |
| Growing collaboration between cultural fire practitioners and ecologists recognising the need for fire – building momentum | x1 | Co-benefits |
| Native title areas – does cultural burning even require a plan?<br>[*Note: see 2 on this point, depends if fire is a determination activity*] | x1 | Exemption pathways |
| The 'grey spaces' in law can sometimes enable cultural fire – the absence of specific rules mean that you can achieve things that you might not be able to | x1 | Between the cracks |
| In overgrown, thick mid-storey forests, hazard reduction fires are too dangerous. Small, patchy cultural burns are the only option for hazard reduction | x2 | Co-benefits |
| Another major bushfire will kill the seedstock (i.e. in the mountain ash forests) so repeated burning is even more critical to protect against that future | x1 | Climate change |
| Brigades can facilitate permit processes (including issuing) | x1 | Industry framework |
| Brigades can provide back-up for containment and 'mop up' | x2 | Resources |
| So far, no cultural burns that anyone can think of that have 'got away'<br>[*note: more burning might change this, though I7*] | x2 | Practical actions |
| Cultural fire management committee has the potential to overcome the issue of decision makers not knowing the opportunities for cultural fire, including under their own Act (need a whole-of-government approach) | x1 | Policy support |

| Future options | # Ref | Category |
|---|---|---|
| Make it easy for overworked decision-makers to identify cultural burning and other culturally-respectful approaches to hazard reduction as an option that they are allowed to accept/approve | x1 | Government processes |
| Need framework to guide purposeful fire but cannot do that with existing restrictions (Environmental Assessment Code, Threatened Species Conservation Act, RFAct) | x1 | Government processes |
| Any streamlined code would need to ensure that it was shared across agencies and under different legislative mandates, including cultural heritage, RFS/fire, biodiversity conservation and smoke? | x1 | Government processes |
| 'Mainstreaming' cultural burning | x2 | Government processes |
| Transport and Planning want to start cultural burning on roadsides to mitigate risks and avoid road closures – new partnerships possible | x1 | New stakeholders |
| Bilateral assessment and approval process could be the subject of an agreement with the Commonwealth, to allow approvals for cultural burning to take place under state laws | x1 | Address fragmentation |
| Need to take a collaborative approach across land uses (e.g. councils, LLS) and jurisdictions (Cth, state, local), 'more than just the words. It's capacity building and knowledge sharing' | x1 | Address fragmentation |
| RFS re-writing engagement guidelines to improve engagement and capacity building for regional bushfire management committees | x1 | Engagement |
| 'Meeting in the middle' with a 'culturally informed burning' practice | x1 | Engagement |
| MUST be framed around and facilitating cultural responsibility – culture first, not employment, hazard reduction, ecology etc | x2 | Values |
| Must be community led with Aboriginal communities at the centre, not agencies and their mandates | x1 | Values |
| Need to be able to feed information about cultural values to decision makers so that culture can – at least sometimes – be prioritised over native species, e.g. in an application to cut out regen native trees to protect ancient trees that are 'big and old and associated with people' – the Elders watching over old campsites | x1 | Values |
| New strategies and approaches need to begin with truth telling about the impact of colonisation | x1 | Values |
| Rights for Nature | x1 | Model for reform |
| Use Hotspots and Firesticks as templates for new legislative instruments/legal or policy arrangements/resourcing – working at local scale, sharing information, capacity building, integrating ecological considerations with cultural fire | x1 | Model for reform |
| Change the definition of clearing in the Biodiversity SEPP and LLS Act so that it ***does not*** include fire – or, at least, not cultural and ecological fire | x1 | Tweaks |
| Introduce clear, robust exemptions from clearing rules for ecological and cultural burns - provisions that discriminate between the types of fire and allow beneficial fire more easily | x1 | Tweaks |
| An exemption-oriented approach, linked to streamlined environmental assessments or landholder self-assessments is really the way forward – quickest and most efficient | x3 | Tweaks |

| Future options | # Ref | Category |
|---|---|---|
| [*note: qualified support/questions from #7, 8, complexity - #11 has reservations about stepping out entirely, needs oversight*] | | |
| Exemption approaches need to include guidelines and standards to ensure the rigour of activities that are deemed exempt | x1 | Tweaks |
| Exemptions could be modelled on the exemptions available for bush regeneration works, which are presumed to be environmentally positive but involve just as substantial changes to native veg | x1 | Model for reform |
| Rely on cultural seasonal calendars rather than western science and legal rigidity to define when you can and cannot burn | x1 | Tweaks |
| Better use of existing enablers such as exemptions, permitting frameworks and streamlining<br>[*Note: permitting triggers challenges with who can speak for country, but exemptions do too, because you 'still need to make a determination as to the exemption as to when it applies so that someone knows that they're meeting that exemption'* (I11)] | x3 | New implementation of existing laws |
| Tweak the NSW key threatening process of 'altered fire regimes' that is limited to high frequency fire, to include the absence of fire as a threatening process | x1 | Tweaks |
| Get approval to burn a big area and then conduct small, cultural burns on small patches within that area | x1 | New implementation of existing law |
| Need to manage for the condition of country, not the strict application of fire return intervals in a spreadsheet | x1 | New implementation of existing laws |
| Embed fire in land management not environmental, emergency or cultural framework | x1 | New implementation of existing laws |
| Use Indigenous Protected Areas and joint management to introduce and facilitate cultural fire | x1 | New implementation of existing laws |
| Forest groups working with a kind of 'steering committee' of voices with different skills/insights but no actual connection to the managed land – independent voices about designing the process | x1 | Depoliticise |
| Don't try to put cultural burning into the national parks legislation | x1 | Avoid new complications |
| Don't abandon thresholds for a more complicated modelling approach - there's a lot of talk among academia to move away from these fairly simple thresholds for quite a complicated modelling approach but I don't trust that that's going to work out well and it won't be transparent […] I'm concerned that it'll be used to extend fire intervals. | x1 | Avoid new complications |
| Ecology should not be the priority in decision making about fire – 'we really need to make hard decisions about country and […] I'm sad to say from an ecological point of view, we've made single species decisions – 'what's rare and threatened in the area?' – which has driven us in a direction that's committed these areas and made them available and vulnerable to extreme fire.' | x2 | Who are the decision makers? |
| One of the big flick passes that occurred after 2019 wildfires – everyone looked around and said, 'Oh s#*t, what? Look, what happened! I know, we'll give it to the Aboriginal people to look after." What a bloody flick pass was that! Talk about poison chalice'. | x1 | No 'flick passes' |
| Creating a new structure for approving cultural burns risks creating 'new hoops to jump through' and more administrative burden | x1 | Avoid new complications |

| Future options | # Ref | Category |
|---|---|---|
| Dedicated ranger groups in land councils with enough work from Forestry and local landholders so that they can be self-sustaining, making training from Forestry (e.g. through Firesticks) worthwhile, creating sustainable jobs, and supporting communities, to better manage Country | x3 | Explicit support / commercial operations |
| Maybe don't have the right agency yet to approve cultural burning – but in an ideal world, it would be good to have both of those knowledge holders (cultural, ecological) to be involved in developing standards or guidelines for an exemption process | x2 | New agency |
| Setting up a research project alongside applications for funding for ranger groups, so that successes and failures are captured and demonstrated, and to show that fire return intervals are inappropriate or ill-equipped to promote health | x1 | Pilot/demonstration project |
| Test the new fire interval threshold 'ignition management zone' for cultural burning | x1 | Pilot/demonstration project |
| Establish a long-term pilot project (governance, practice, outcomes) ['[W]ouldn't it be great to find a piece of land […] and say we're going to manage it with cultural burning for the next 20 years and accept that it's going to take 20 years to really say, 'wow, look at what was achieved' […] we think, we will see it would prove something'.] | x1 | Pilot/demonstration project |
| Make your way through the processes and get it started – do cultural burns with partners and then people will see that it can work | x1 | Pilot/demonstration project |
| Statutory reform to create a funding stream so that if there's an official government plan, then there's resources to allow those works to occur through communities (could be incorporated in the next crack at Aboriginal heritage reform) | x2 | Resources |
| Need some continuity to support ongoing, long-term learning for cultural fire practitioners | x1 | Continuity |
| Hotspots and Firesticks should both be able to access long-term, guaranteed, sustainable funding | x2 | Continuity |
| Effective local-scale nuance in avoiding adverse environmental impacts from fire requires 'assessing as you go' and having 'people give others the benefit of the doubt and latitude and time to figure stuff out and be iterative' | x1 | Collaboration |
| Support hard decisions about prioritising pyrodiversity to achieve biodiversity – not the most diversity per square metre but sometimes 'it might be that that needs to be grass' | x1 | Pyrodiversity |
| Create some form of revenue/dedicated budget for mitigation works and cultural practices such as cultural fire on Aboriginal owned land (recognising that they do not have dedicated funding like Parks, RFS, Crown Land) | x1 | Resources |
| Working to incorporate fire severity as a threshold in the fire return intervals – 'if we can get fire severity in there and you say, well if you're doing a low severity fire, you can do that whenever you want. Just don't allow it to get into canopy'. Adjusting the scientific methodology does not require changes to the Code. | x2 | Underway |

| Future options | # Ref | Category |
|---|---|---|
| Working to incorporate new column for expert advice so that it's not just 'accountable officers' but also includes Traditional Cultural Ecological Knowledge as expert advice on fire return | x2 | Underway |
| Treat cultural and ecological burns more consistently – everyone needs to be able to pursue the health of Country, including with cultural and ecological fire (Biodiversity SEPP allows traditional ecological activities but not environmental protection works, the Byron Shire Local Environment Plan allows environmental protection works but not cultural activities) | x1 | Legal inconsistency |
| In the United States, the legal and policy language around fire is much more aligned with the need for fire as an ecological process – similar to wetlands – they acknowledge and talk simply and openly about just that importance for fire as this crucial process, recognising that the absence of fire is unravelling these systems | x1 | Model for reform |

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