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# Evaluating successes and challenges for effective governance of privately protected areas in Australia

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Australia has one of the world's largest privately protected area (PPA) estates and has been seen as a world leader in establishing PPAs, with significant growth since 2000. Despite the policy expectation that PPAs will continue to grow in Australia, there has been limited policy or academic consideration of the legal and governance arrangements that are best placed to enable this. This article uses adaptive governance as a conceptual framework for conducting doctrinal (to explore the legal rules) and socio-legal (to understand the implication and effects of the rules in practice) research to analyze the governance of conservation covenant regimes in Australia, with a particular focus on the State of Victoria. The article finds that Victoria's conservation covenant regime has the legal foundations to enable adaptive governance and that conservation covenants are expected to continue to be important in maintaining and establishing new PPAs, with opportunities for covenants to similarly deliver ecosystem restoration and climate adaptation objectives. Ongoing adequate public investment in the regime and the ability of the regime to attract new landowners in important landscapes without better financial incentives are identified as key challenges. The analyses and findings, while focused on the Australian context, are expected to have applicability to other jurisdictions that are focused on implementing the Kunming-Montreal Global Biodiversity Framework and policies related to protected areas, private land conservation, ecosystem restoration, and climate adaptation.

## KEYWORDS

conservation covenants, privately protected areas, private land conservation, adaptive governance, ecosystem restoration, climate adaptation, conservation agreements

## 1 Introduction

Nature is declining globally at rates unprecedented in human history. The rate of species extinction is accelerating (IPBES, 2019) and there is an increasingly common linking of the environmental problem of climate change, to biodiversity loss (Pörtner et al., 2022). Australia is a country that has more biodiversity than most (Chapman, 2009), much

of which is endemic to Australia, but it also has the highest loss of mammal species anywhere in the world (Woinarski et al., 2015). Dispossession of Aboriginal and Torres Strait Islander peoples and the application of English property tenure in Australia marks a particularly profound ecological shift for the Australian environment. Since European colonisation began, Australia has lost at least 100 endemic species (Woinarski et al., 2019), including three species since 2009 (Woinarski et al., 2017). Almost 2,000 plant and animal species are threatened with extinction, with dozens of reptile, frog, butterfly, fish, and bird and mammal species set to be lost forever without a step change in resourcing and conservation effort (Woinarski et al., 2017, p. 5) (Murphy & Van Leeuwen, 2022).

The key threats to biodiversity in Australia include impacts from invasive species (weeds, rabbits, foxes, pigs, deer, etc.); habitat loss (due to agriculture, urban development, and overexploitation); inappropriate fire regimes; pollution from agriculture (which is particularly problematic for fish and freshwater systems) (Kearney et al., 2019) and - increasingly - climate change which is exacerbating many biodiversity threats (Steffen et al., 2009) (Dunlop et al., 2013).

Increasing protected areas, ecosystem restoration, and climate adaptation are widely accepted as essential conservation strategies and have been featured in the newly agreed Kunming-Montreal Global Biodiversity Framework. The focus of this article is, through the lens of adaptive governance, to evaluate the governance of Australia's privately protected areas (PPAs) focusing on conservation covenant regimes, with a detailed evaluation of the Victorian regime. Adaptive governance is used as a conceptual framework to develop recommendations for how best to achieve effective governance of conservation covenant regimes moving forward, particularly in light of emerging international policy initiatives that relate to protected areas, ecosystem restoration, and climate adaptation.

Essentially, under the Australian conservation covenant regime, a landowner agrees to a series of restrictions imposed by the registered conservation covenant which embeds a long-term - normally in-perpetuity - conservation objective for the land and restricts property rights that are otherwise available. Most PPAs in Australia are established via a voluntary conservation covenant by conservation-minded landowners who wish to protect their land from future land use that may harm environmental values. The number of landowners participating in conservation covenant regimes has grown significantly since 2000 (Australia has one of the largest PPA estates in the world) (Fitzsimons, 2015, p. 41), with Australia seen as a world leader in establishing PPAs (Bingham et al., 2017, p. 48) (Bingham et al., 2021). As a regulatory tool that has evolved from property law, a conservation covenant is comparable to a conservation easement in the United States (although the governance regimes operate very differently).

Conservation covenant regimes in Australia are state-based systems with administrative differences across state jurisdictions. However, generally, the regime is overseen by a dedicated agency either within a state government department (as in Queensland), by a charitable entity acting according to a legislative mandate (as in Victoria), or by a statutory body that is fully funded and controlled

by the state government (as in NSW). Under each state regime, the registerable property agreements are referred to differently and include, for example, conservation covenants, conservation agreements, and nature refuges. For simplicity, this article uses the term 'conservation covenant' to capture all registerable instruments under Australian property law that can create a PPA as defined by the IUCN and which are eligible for inclusion as part of the Australian protected area estate known as the National Reserve System (NRS).

Previous studies from Australia have looked at the governance frameworks for PPAs and whether they can deliver both biodiversity and ecosystem services (Archibald et al., 2021), and suggested a new type of 'rolling covenant' that could operate in a rolling geographic area to keep pace with sea-level rise as a tool for coastal land management under climate change (Bell-James et al., 2022). Further, the adaptability of conservation easements to climate change has been considered in the literature from the United States (Rissman et al., 2015). Overall, however, there has been limited policy or academic consideration of the legal and governance arrangements that may be necessary to continue to grow the PPA estate in Australia.

This article first establishes what aspect of governance for PPAs this article is interested in and explains why the conceptual framework of adaptive governance has been chosen to assess governance effectiveness for conservation covenant regimes in Australia. Next, the governance regime for conservation covenants in Australia - being the international, state, and local regulatory institutional landscape is summarized. Finally, how the various elements of the regime interact is explored, through a detailed review of the governance arrangements for Trust for Nature (Victoria). The discussion and conclusions consider what this means for the effectiveness of the governance framework in Victoria and how well-placed the regime is to simultaneously deliver protected area, ecosystem restoration and climate adaptation objectives. This article applies doctrinal research methods to review the state-based regulatory framework and socio-legal research to understand the implications and effects of the rules in practice. A document review of the Victorian template conservation covenant and management plan is undertaken to inform the analysis in Section 4 as well as publicly available information such as annual reports, strategic plans, media release etc.

The analysis indicates the Victorian conservation covenant regime is being used at a small scale to deliver a range of objectives in addition to conservation, such as ecosystem restoration, and as a tool to deliver environmental regulatory project approvals through biodiversity offsets. However, if conservation covenant regimes are to attract wider participation from more landowners and deliver restoration and climate adaptation objectives at a meaningful scale, conservation covenanting needs to become more financially viable for private landowners, and a change in governance policy settings is necessary to achieve this.

While focusing on the Australian context, and in particular the conservation covenanting regime in Victoria, the analysis in this article suggests a methodological framework to assess governance for PPAs which is expected to have applicability to other

jurisdictions that are focused on implementing the new Global Biodiversity Framework and policies related to private land conservation, ecosystem restoration, and climate adaptation.

## 2 Adaptive governance to guide a governance assessment for conservation covenant regimes in Australia

Governance is a very broad term and has been described by sociologist and social theorist Nikolas Rose as:

‘any strategy, tactic, process, procedure, or programme for controlling, regulating, shaping, mastering or exercising authority over others in a nation, organisation or locality’ (Rose, 1999).

Similarly, within environmental governance, and more specifically the field of protected area governance, governance has been defined as referring to issues of control being the structures, processes, and traditions that determine how power and responsibilities are exercised, how decisions are made, and how stakeholders have their say (Borrini-Feyerabend et al., 2013); (Graham et al., 2003; Worboys et al., 2015).

Academic scholarship, policy insights and guidance on governance – as opposed to management which is more about resourcing, development of plans, and implementation of actions – is relatively new for protected areas. This section of the article provides the conceptual framework for governance that is used for

this research, before applying those concepts to an analysis of the conservation covenant regimes in the State of Victoria in Australia.

To assess the governance of PPAs established via a conservation covenant, this article considers conservation covenants as a regime, being the totality of the governance arrangements for PPAs established via a conservation covenant (Young, 2012). The governance arrangements for conservation covenant regimes in Australia – for the purposes of this article - are summarised in Figure 1 and the analysis in the remaining sections of the article begins to consider how the various elements of the conservation covenant regime – both rules and institutional frameworks - interact together and what this means for adaptive governance and the ability of the regime to deliver protected area, ecosystem restoration and climate adaptation objectives. Importantly, a regime analysis demonstrates that conservation covenants – and indeed PPAs more generally – do not operate in a vacuum and are not expected to solve on their own, threats to biodiversity. By understanding how PPAs fit within an overarching regime, enables an analysis of how the different parts of the governance regime work together, where there are frictions, and importantly, assists in understanding opportunities and challenges to guide policy and legislative reform.

Conservation covenant regimes in Australia are one of many conservation initiatives on privately managed land that are influenced by new environmental governance (Lawson, 2019). New environmental governance is a conceptual framework that generally involves a collaboration between private, public, and nongovernment stakeholders who work together towards

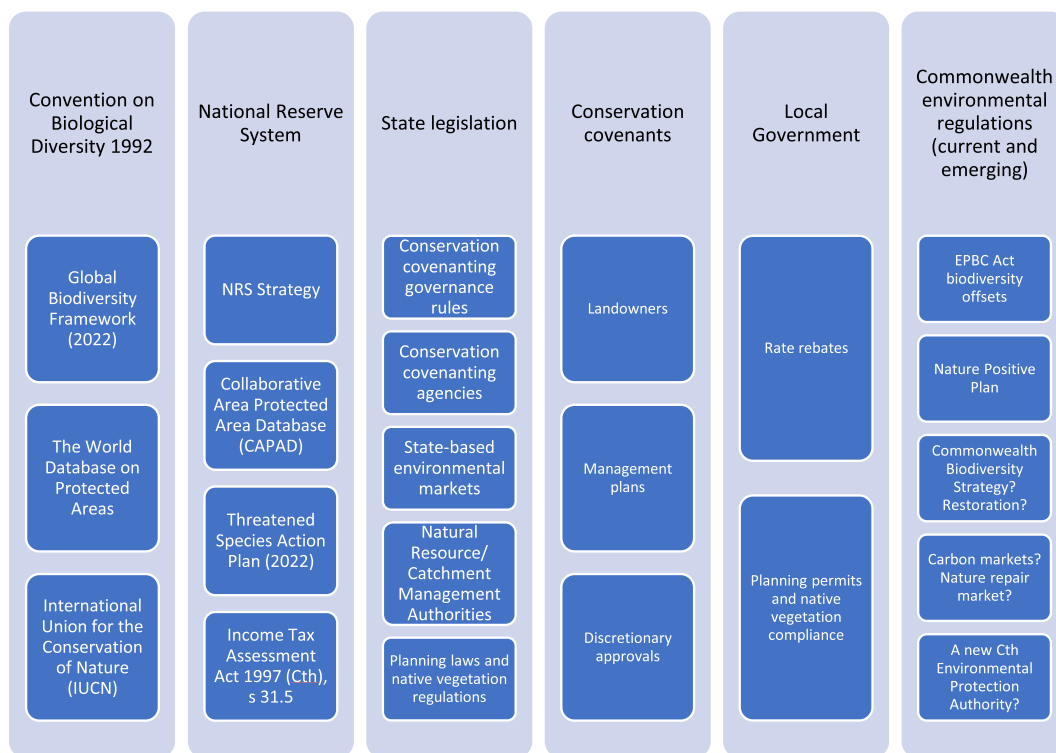


FIGURE 1 The governance framework of a conservation covenant regime in Australia.

commonly agreed goals based on the understanding that they will achieve more for the environment by working together, as opposed to acting individually (Holley et al., 2012). New environmental governance has also been argued to be able to cope better with the uncertainty and complexity of environmental problems than traditional regulation or market-based approaches (Holley et al., 2012, p. 5) (Chaffin et al., 2014, p. 22). Notwithstanding potential benefits, there has been criticism of new environmental governance approaches including that there can be gaps in accountability because of its adaptive and flexible approach (Biber, 2011, p. 81) and that it can be susceptible to abuse of power by management authorities (Doremus, 2007).

Conservation covenanting regimes are reflective of a new environmental governance model in their reliance on collaboration and voluntary participation from private landowners. However, conservation covenant regimes differentiate themselves from other conservation initiatives on privately managed land because they are underpinned by legislation that enables secure and permanent protection and restrictions on use rights over privately managed land. The enabling legislation empowers conservation covenanting bodies to – with the consent of the landowner – register a conservation covenant over a property's title, which satisfies the IUCN definition of a PPA and contributes to the Australian NRS.

Other new environmental governance examples of conservation initiatives on privately managed land from Australia – which include for example Land for Wildlife and planning agreements with local councils – generally do not meet the IUCN definition of a PPA (except for wildlife reserves managed by eNGOs, and in some cases a conservation covenant is also registered over such reserves).

In recent years there has been academic scholarship emerging on the principles of good governance for protected areas and this article and associated research is informed by Lockwood's articulation of seven principles of good governance and the associated outcomes related to each principle (Lockwood, 2010). Building on Lockwood's early governance focus for protected areas – which included resilience and flexibility as a core principle – adaptive governance theory has also become a popular conceptual framework for environmental governance scholarship (often from within the field of new environmental governance) where there is an overarching goal of achieving sustainable ecosystem functioning amidst the uncertainty of climate change and the current state of biodiversity loss. This is because adaptive governance is based on the concept of managing resilience (Garmestani & Benson, 2013) and social-ecological sustainability (Chaffin & Gunderson, 2016). Adaptive governance is described as 'flexible and responsive environmental governance' (The Australian Panel of Experts on Environmental Law, 2017) and as 'a range of interactions between actors, networks, organisations, and institutions emerging in pursuit of a desired state for social-ecological systems.' (Chaffin & Gunderson, 2016).

Arguably, PPAs need to be flexible and responsive to their dynamic context. This includes the dynamic properties of the environment, which are intensified with climate change such as more frequent and intense drought, fire, and floods as well as rising sea levels. The social values of landowners that commit to owning and managing a PPA, and expectations of the broader society in what PPAs should deliver also shift with time and may require a

change in higher or different environmental standards to be delivered by conservation covenant regimes. However, such flexibility needs to be balanced with caution about any change in standard that may be regressive, or which is intended to be a lower standard of environmental protection (The Australian Panel of Experts on Environmental Law, 2017). This is particularly important for conservation covenant regimes that establish secure, permanent, and in-perpetuity PPAs on private land. Similarly, there is also tension for legal frameworks in achieving flexibility because while legal systems adapt and change over time in response to the values of society, legal systems are also purposely structured to provide a stable framework. Legal frameworks can therefore serve to hinder adaptation (Cosens et al., 2017).

This article applies the legal guidelines for adaptive governance developed by Cosens et al. (Cosens et al., 2017) to try and navigate tensions between the perceived need for flexibility and their key differentiating factor, being their permanence and legal security. The guidelines have been tweaked slightly in the below analysis for heightened relevance to considerations of how law can facilitate adaptive governance for PPAs. Taking a similar approach to Cosens et al, in looking at the governance of conservation covenant regimes, this research focuses on laws that establish the structure, authority, and process for the governmental aspect of governance which includes how authority is distributed, the authority of agencies to act, and the processes that agencies are required to follow in acting. Based on this analysis, preliminary ideas are introduced for how the conservation covenant regime needs to evolve and adapt to ensure its ongoing effectiveness.

### 3 Current and emerging international and national settings for PPA governance in Australia

Table 1 sets out each Australian conservation covenanting regime and primary underpinning legislation that can create a PPA incorporated into the NRS. There has been steady growth of conservation covenanting practice in Australia since the 1970s (Hardy et al., 2017, 222) which predates the international legal frameworks and institutional biodiversity conservation focus that relate to private land conservation. For example, the signatories to the CBD only first formally recognised the contribution of PPAs as part of protected area management in 2014 (Conference of the parties to the Convention on Biological Diversity, 2014) which coincided with a seminal report published by the IUCN entitled 'The Future of Privately Protected Areas' (Stolton et al., 2014), and there are now IUCN guidelines for PPAs (Mitchell et al., 2018). As an increasing number of global and local environmental issues and challenges evolve, so does the regime within which conservation covenanting program sit. As demonstrated within Figure 1, there are now complex international and local interactions that influence conservation covenanting regimes in Australia.

Conservation easement practice was developing at a similar time in the United States, with the adoption of the *Uniform Conservation Easement Act* by the National Conference of

TABLE 1 Conservation covenant regimes that qualify as a PPA and are included in the NRS<sup>4</sup>.

Covenantee agency	Governance type	Name of Program	Legislation	No. of Covenants, % protected areas	Total area under covenant; % land
NSW Biodiversity Conservation Trust	A statutory body, subject to direction and control of the government	Conservation Agreement and Biodiversity Stewardship Agreement Programs	<i>Biodiversity Conservation Act 2016</i> (NSW)	1243 <sup>4</sup> 2.58% of NSW protected areas	210,492 ha 0.26% of NSW
Trust for Nature (Victoria)	A statutory body, not subject to direction and control of government, independent charity	Trust for Nature Covenant Program	<i>Victorian Conservation Trust Act 1972</i> (Vic)	1593 1.85% of VIC-protected areas	74,365 ha 0.33% of VIC
Department of Environment and Science (Qld)	Government department	The Nature Refuges Program	<i>Nature Conservation Act 1992</i> (Qld)	561 28.65% of QLD-protected areas	4,375,857 ha 2.53% of QLD
Department of Environment and Water (SA)	Government department	South Australian Heritage Agreement Scheme	<i>Native Vegetation Act 1991</i> (SA)	1,583 3.42% of SA protected areas	1,015,726 ha 1.03% of SA
Department of Primary Industries, Parks, Water and Environment (Tas)	Government department	Tasmanian Protected Areas on Private Land Program	<i>Nature Conservation Act (2002)</i> (Tas)	848 3.50% of Tas-protected areas	101,199 ha 1.48% of Tas
The National Trust for Australia (WA)	Incorporated Association, independent charity	The National Trust for Australia (WA) Covenant Program	<i>The National Trust of Australia (WA) Act 1964</i> (WA)	172 0.02% of WA protected areas	16,167 ha 0.1% of WA
Parks and Wildlife Commission of the Northern Territory	A statutory body, subject to direction and control of the government	Conservation covenants	<i>Territory Parks and Wildlife Conservation Act 1976</i> (NT)	4 0.42 of NT protected areas	140,551 ha 0.10% of NT

Commissioners on Uniform State Laws in 1981, and modelled legislation was rapidly adopted by states (Johnson, 2014, p. 4). Converse to Australian practice, conservation easements are privately or self-regulated (through for example a land trust accreditation program) and the significant tax benefits available for a 'gift' of a conservation easement to a qualified organisation have undoubtedly grown private land conservation across the United States. Further, while the United States is a member of the IUCN, it is not a party to the CBD and so alongside domestic legislative differences, the United States operates under a different international regime and does not formally recognise a national protected area system (Clements et al., 2018, p. 5). Despite this, the Land Trust Alliance – which represents 950 member land trusts – reports that over 8 million hectares is protected under a conservation easement (Land Trust Alliance, 2020) and the United States has the most PPAs nationally (Clements et al., 2018, p.5).

Returning to the Australian context, the Commonwealth government while not directly involved in the state-based covenanting regimes, approves programs under the *Income Tax Assessment Act 1997* (Cth) that – in theory – provides income tax incentives for landowners with conservation covenants in Australia. However, unlike the income tax incentive that exists in the United States for conservation easements, eligibility of this Australian incentive

is very limited and there is little take-up (Shearing, 2006; Smith et al., 2016). The limited tax incentives available in Australia, in comparison to the United States, have long been assumed to be the reason that conservation covenanting practice in Australia has not had the broad participation as is evident in the United States (Smith et al., 2016).

The Commonwealth government also operates the Collaborative Area Protected Area Database (CAPAD) and collects data from state and territory governments and protected areas managers, which is publicly available. This data is used to report progress in meeting protected area targets under the CBD. In turn, CAPAD reports into the World Database on Protected Areas, a joint project between UN Environment Program and the IUCN. Table 1 demonstrates the conservation covenant regimes that have the legislative power to register and are responsible for ongoing stewardship of conservation covenants that create PPAs that are formally considered as part of Australia's NRS (Department of Agriculture Water and the Environment, 2022).

In summary, PPAs have a long history of being part of the protected area estate in Australia and are particularly important to achieving an effective and representative protected area estate (Bingham et al., 2017). However, despite being a world leader in establishing PPAs, less than 2% of privately managed land in Australia is within a PPA, and PPAs make up less than a 6% proportion of the NRS (Department of Climate Change, 2023b). It follows that biodiversity on privately managed land is at particular risk in Australia and between 70 and 90% of inadequately protected biodiversity distributed predominantly on private land and 88% of inadequately protected threatened ecological communities also occurring largely on private land (Ivanova & Cook, 2020, pp. 8-9).

<sup>4</sup> Note: These figures include NCT Agreements, Biodiversity Stewardship Agreements, Conservation Agreements, and Registered Property Agreements (as reported in CAPAD 2022).

Further, given the voluntary nature and lack of financial incentives available for conservation covenanting regimes to date, gaps in the representation of the NRS appear particularly in productive landscapes on privately managed land in NSW and Victoria (State of NSW and Office of Environment and Heritage, 2018, pp. 10-11) (Victorian Government, 2017, p. 48). In Queensland, mining poses particular challenges to conservation covenanting because where there is a mining interest over private land – noting that mining is the primary industry in Queensland – the mining interest must consent to the covenant. Further, even where conservation covenants are achieved, they cannot legally exclude mining from privately owned land and this has presented challenges for conservation covenant regimes in both Queensland and NSW (Nelson, 2021) (Ken Henry et al., 2023, p. 20). There therefore continues to be a significant need to further grow PPAs in Australia and adapt the regimes in which they operate.

This need fits within Australia's commitment to implement the newly agreed Global Biodiversity Framework protected area target (Target 3) to increase protected areas, to 30% of land, freshwater, and oceans by 2030 (commonly referred to as the 30 x 30 protected area target) (Department of Climate Change, 2022). Meeting this target in Australia will require a significant upscaling of the NRS which currently 22% of Australia's landmass, with additional coverage on private land being essential to achieving an effective and representative NRS.

The Global Biodiversity Framework also includes a restoration target – which aims for 30% of degraded ecosystems to be under effective restoration by 2030 (Target 2) – and a climate adaptation target to minimize the impact of climate change on biodiversity and increase resilience through climate adaptation (Target 8). Also related to these targets are that this current decade is recognised by the UN General Assembly as the 'Decade on Ecosystem Restoration' (United Nations General Assembly, 2019) and the climate adaptation target under the Paris Agreement which aims to significantly strengthen climate adaptation efforts (Article 7). These international targets are likely to influence the overarching regime in which conservation covenants operate.

The following paragraphs provide a more in-depth summary of the laws that establish the structure, authority, and process for the governmental aspect of governance for the Victorian conservation covenanting regime. After providing an overarching summary, this information is then assessed through the lens of adaptive governance, which inform the conclusions of the article.

## 4 Trust for Nature (Victoria)

### 4.1 Summary of governance

The Victorian conservation covenanting regime is primarily governed under the *Victorian Conservation Trust Act 1972* (Vic) (the **Act**) and Trust for Nature (Victoria) (the **Trust**) is established under the Act.

Victoria has the highest number of registered conservation covenants than any other State jurisdiction – over 1567 – and this grows by around 40 new voluntarily registered conservation

covenants every year (Trust for Nature (Victoria), 2022a). However, the total land protected by conservation covenants is relatively small for Australia, covering a total of 74,365 hectares which is only 1.85% of Victoria's protected areas and only 0.33% of Victoria (Department of Climate Change, 2023a). This is reflective of the smaller private freehold land parcels across the State of Victoria (especially in comparison to other states such as Queensland which has much larger pastoral leasehold land).

The Trust is granted broad powers under s3(2) of the Act that include 'all things that are necessary or convenient to be done' in connection to carrying out the overarching conservation objectives. These powers include without limitation, the power to demise, sell, transfer, convey and otherwise-dispose of real property. This means that the Act governing the Trust is an enabling framework that empowers the Trust to adapt and incorporate contemporary approaches to First Nations rights and interests and conservation which are aligned with contemporary science, the CBD, IUCN best practice and the NRS (Trust for Nature (Victoria), 2021a), despite these matters not being specifically included in the Act.

Section 3A establishes the process for the Trust to enter conservation covenants with landowners and register them against a property's title. The relevant government Minister must approve all conservation covenants and covenants can only be released or altered with approval from the Minister and by agreement between the Trust and the landowner. The registration of a covenant is therefore very secure and there are very few known cases where a conservation covenant has been released in Victoria (Hardy et al., 2017).

The Trust runs a stewardship program that monitors compliance, assesses the environmental condition of the covenanted land, and provides ongoing land management support for participants with the conservation covenant regime. The Trust's conservation work is guided by its Statewide Conservation Plan (Trust for Nature (Victoria), 2021a) and landowners can directly approach the Trust if they would like to voluntarily participate in the conservation covenant regime. Acceptance into the regime will depend on the Trust's strategic priorities which are limited by the internal funding capacity to administer the program (Trust for Nature (Victoria), 2022b).

In general, under the Victorian conservation covenanting regime, landowners have not received ongoing funding or financial incentives. Some landowners may receive a one-off payment to enter the conservation covenant and/or the Trust seeks to negotiate project-based funding that can incentivize and support landholders' conservation efforts, including for fencing, weeding, and revegetation works. However, such one-off payments or project-based funding is generally not equivalent to the ongoing financial contribution of landholders actively managing and improving their conservation assets (Selinske et al., 2022). The Victorian Government has recently introduced a land tax exemption for conservation covenants, which will sit alongside a longstanding exemption in place for primary producers (Trust for Nature (Victoria), 2023). This will come into force on 1 January 2024 and will remove what was otherwise a perverse incentive when taking land out of primary production to meet a conservation covenant objective. For council rates, some local Councils in

Victoria will offer full or partial council rate rebates for landowners with conservation covenants, and this is at the discretion of each local Council and varies across the state.

A small sub-set of landowners with covenants have 'offset conservation covenants' as part of the native vegetation and biodiversity offset markets regulated by the Victorian and Commonwealth governments. A landowner with an offset conservation covenant receives yearly payments for 10 years for the management of the offset site which is protected in-perpetuity by the covenant (Trust for Nature (Victoria)). In comparison to the around 40 voluntary conservation covenants registered each year by the Trust (approximately an increase of 2,500 hectares of PPAs per annum), there are only around 7 offset conservation covenants registered each year.<sup>1</sup> While not a significant component of the Trust's covenanting practice, in terms of establishing a tested model for restoration and climate adaptation, offset conservation covenants incorporate more active land management obligations in accordance with the biodiversity offset objectives and for which there are often significant yearly payments payable to landowners to fund offset management activities (up to a ten-year period). This model is returned to in the conclusions of this paper.

Conservation covenants are also a part of the Victorian government's new restoration program known as BushBank (Victorian Government, 2022). Under BushBank, landowners will be eligible for restoration and protection costs, and in some cases, additional financial incentives (Cassinia Environmental & Victoria State Government, 2023). The program is in its early stages and is due to commence in 2024. The level of funding available for landowners is therefore not yet clear with \$30 million of public money expected to be leveraged with private carbon and restoration investment and its goal is to achieve 20,000 hectares of restoration of privately owned degraded lands.

Section 3(2) of the Trust's Act also enables the Trust to buy and sell land. In exercising these powers, the Trust operates a revolving fund that acquires private land for the purposes of conservation. The Trust then on-sells the land with a condition of sale that the new owner must enter a conservation covenant.

Further to requiring the Minister's approval for a conservation covenant, the government is also responsible for appointing the Board of Trustees under section 4 of the Trust's establishing Act. The Board is responsible for appointing the CEO and setting its own strategic priorities (Trust for Nature (Victoria), 2021b). The Trust's conservation work is guided by its Statewide Conservation Plan (Trust for Nature (Victoria), 2021a) and its work is funded through a combination of government (approximately 50%), philanthropic funding (approximately 30%), provision of services (approximately 15%), and investments (Australian Charities and Not-for-profits Commission, 2023).

The Trust publishes an annual report every year in the form required by the Victorian Department of Treasury and Finance under the *Financial Management Act 1994* (Vic) which requires a high standard of accountability for all statutory bodies. The Trust is

known as a public sector entity within the Victorian public sector and public entities are intended to operate at 'arm's length' from Ministers (Victorian Public Sector Commission, 2023). Further, the Trust's financial statements are audited by the Victorian Auditor-General's Office (VAGO) which is the body responsible for auditing the public sector in Victoria (Trust for Nature (Victoria), 2022a).

Because the Trust is also a registered charity with the Australian Charities and Not-for-Profit Commission (ACNC), it must comply with the governance framework of registered charities as set out by the ACNC and the Trust also produces an annual report to the ACNC.

The key governance elements of the Victorian conservation covenant regime outlined above, are analysed through the lens of adaptive governance (Cosens et al., 2017) in Table 2 and in more detail below.

## 4.2 Applying an adaptive governance framework to Trust for Nature (Victoria)

The first key aspect of adaptive governance for legal systems requires regulatory and management system design that facilitates polycentricity, integration and persistence (Cosens et al., 2017). Simply put, polycentricity calls for multiple centres for authority. Essentially adaptive governance promotes the keeping of authority for decision making as close to the local scale as possible, while still operating within a larger governance framework that can build trust and knowledge and facilitate the flow of information and consistency of implementation (key elements of subsidiarity and nesting; (Clarvis et al., 2014; Cosens et al., 2017, pp. 6-7; Ostrom et al., 1961)).

The Trust has the legislative powers to administer its conservation covenant program, and employs regional staff to foster trusted local relationships with landowners and local environment managers. There are also several government agencies and partners at different levels of government that the Trust relies on to deliver their programs. Management and decision-making functioning, therefore, occurs at multiple scales and importantly for private land conservation, fosters strong local relationships with regional staff that live and work in local communities. Further, different agencies can intervene at the appropriate level. For example, if a landowner breached a conservation covenant and the Trust failed to enforce the covenant terms, a local Council offering a rate rebate may be inclined to revoke any rate rebate and thus intervene using their local powers available. If strategic and substantial issues and complaints about the Trust were raised at the state and Commonwealth levels and/or with philanthropic funders, there could be funding implications for the Trust which relies on these bodies for funding. Reputation and legitimacy are therefore likely to be a key concern for the Trust. The Minister is also responsible for approving conservation covenants and the Victorian Government is responsible for appointing the Trust's Board, providing the state government with a significant degree of oversight and influence.

Importantly for the Trust, in 2017, the Victorian Government committed to achieving an additional 200,000 hectares of new PPAs

<sup>1</sup> Based on a 5-year average from 2017 -2022 as reported in Trust for Nature (Victoria) Annual Reports.

TABLE 2 Summary of application of Cosens et al. Guidelines to the Trust.

Framework component	Applying the guidelines for assessment to the Trust
<b>Structure</b>	
Polycentricity	<i>Polycentricity is achieved in the conservation covenant regime through embedded local staff Ministerial and government oversight, and government agencies and partners at different levels, which have some powers and authority to intervene (i.e. local council) and other which are more a centre of influence (i.e. the IUCN).</i>
Integration	<i>The Trust has partnerships with various resource management across relevant sectors to reduce unintended consequences. Mining sector is however missing which poses a threat to PPAs in Australia.</i>
Persistence	<i>The Trust is a 50-year-old well-trusted conservation organisation that is delivering existing and emerging conservation initiatives.</i>
<b>Capacity</b>	
Adaptive	<i>The Trust's establishing Act successfully provides the Trust with the authority to adapt as necessary. Resourcing may be problematic.</i>
Participatory	<i>Although not included as a legal requirement within the Act, the Trust has a significant work stream committed to enabling self-determination for First Nations people. The Trust's covenanting processes also appear to facilitate participation from landowners. Further investigation from participants is needed to test assumptions here.</i>
<b>Process</b>	
Legitimacy	<i>The Trust has detailed annual reporting processes and is held accountable by government processes and the ACNC which is relevant to its transparency, accountability, and legitimacy. It is also stable (see further above). While not legally mandated, its Statewide Conservation Plan is an example of a science-based approach to decision-making. Further empirical investigation is needed to test assumptions.</i>
Procedural justice	<i>In addition to the transparency and accountability described above, the Trust is subject to several Victorian government-specific procedural justice frameworks including freedom of information requests and whistleblower protections.</i>
Problem-solving approach	<i>The Statewide Conservation Plan indicates a high level of sophistication to use science and the wide variety of partnerships referred to earlier enables the development of interest-based collaborative processes. Further, the arms-length/independence from the government is expected to assist in beneficial solutions.</i>
Reflection and learning	<i>Stewardship program offers a space for monitoring, feedback and consideration of new information. Amendments are made to the Management Plan that accompanies the covenant accordingly. Further evidence needed to understand whether this is sufficient/adequate to ensure response to change is not rote.</i>
Balance stability and flexibility	<i>The conservation covenant is stable and contains restrictions. However, there is also flexibility built into its terms, which is further supported by a management plan. Ultimately, the capacity to undertake sophisticated management techniques will depend on the capacity and resources of the landowner. There is a risk that this is scarce for many landowners.</i>
Dispute resolution	<i>The conservation covenant contains dispute resolution procedures.</i>

by 2037 in their biodiversity strategy (Victorian Government, 2017, p. 20). This state government policy commitment firmly places the Trust's work at the centre of the State's priorities. Alongside the creation of new PPAs, is a commitment from the state government to achieve 200,000 hectares of revegetation in priority areas for connectivity. The BushBank program is contributing to both these targets.

As referred to above, conservation covenants registered by the Trust are also included in the NRS and meet IUCN protected area criteria (most are IUCN Category II). The IUCN classification and reporting on it to CAPAD and the World Database on Protected Areas provides an international reference and standard to localised property specific protection. This brings an individual privately owned property into a larger network of national and international network of protection. Notwithstanding challenges (Clements et al., 2018), the regime interactions arguably allow for landscape-scale planning and establish trust and consistency in the standard of protection achieved by conservation covenant regimes.

The IUCN, NRS and state governance interactions mean the Trust is influenced by complex horizontal relationships which arguably achieves a degree of polycentricity which is supported through effective nesting of decisions and outcomes through subsidiarity. That is, the legal framework supports decisions to be made locally - allowing for innovation - while the NRS guidelines (which are informed by the IUCN criteria) ground and support local action.

It is also important to note that there are other less-utilised forms on-title conservation agreements that landowners could participate in, in Victoria (for example regulated by government Departments or local Councils), however these other forms of on-title agreements do not proactively recruit new landowners and tend to operate outside of the PPA and NRS governance frameworks (Fitzsimons, 2015; Brugler, 2020).

The Trust's high number of partnerships - which cross over resource sectors - is reflective of the Trust achieving integration across sectors that influence its work. In addition to the horizontal relationships already mentioned, key partners across sectors include for example, catchment management authorities, water authorities, First Nations groups, various state and federal government departments, and a variety of corporate partners including those in sectors relating to finance, forestry and agriculture (Trust for Nature (Victoria), 2022a). Notably missing is the mining sector, although unlike other states, issues of mining conflicting with the conservation covenant regime in Victoria have not been documented.

In relation to persistence, the Trust has been in existence for over 50 years and is understood to be Australia's oldest conservation covenanting organisation. Further, the modest but consistent increases in the yearly number of conservation covenants have - to date - ensured that conservation covenants remain relevant to emerging environmental initiatives, including for example the national and state biodiversity offsets market and the new restoration program in Victoria, BushBank. These factors potentially reduce response time to surprise.

The second key aspect of adaptive governance relates to the resources and authority of a regime to respond to change, this



encompasses participatory capacity and authority (Cosens et al., 2017). Despite not being specified in its governing legislation, the Trust appears to be prioritising self-determination with First Nations people through co-designing land management courses for First Nations people, working on Country with First Nations groups, and significantly, is pursuing land hand-backs to First Nations organisations of land that it owns and manages for conservation purposes.

Participation in the context of PPAs is also about the way in which a conservation covenant regime fosters and enables landowner participation, for those enrolled in the scheme. To maintain legitimacy, cooperation, and buy-in from landowners it is important for the Trust to continue to work in a consultative manner with landowners regarding the implementation of the conservation covenant, and for landowners to be granted rights within conservation covenants to have the power to negotiate and have a say on what is included in management plans and environmental strategies for the land. These rights are not embedded in the Act, however, the Trust's covenanting processes facilitate participation through its covenant terms, stewardship program and the flexibility offered in Management Plans. For example, the Trust's covenant deed, contains a definitive set of restrictions – including, for example, removing vegetation, use of livestock, introduction of non-indigenous fauna or domestic animals, removal of soil and minerals, use of fertilizer etc. however, discretion is provided to the Trust to allow a landowner to undertake certain activities otherwise prohibited by the covenant. Discretionary approvals are granted subject to conditions imposed by the Trust and can be revoked at any time should it become apparent to the Trust that the activity is adversely affecting the covenant objectives. This builds-in flexibility to the conservation covenant for evolving environmental management techniques and is more likely to meet landowner needs. To ensure that discretionary approvals do not undermine covenant objectives, the Trust needs to ensure it adopts a science-based approach to decisions with reference to ecological data. In terms of having the ability to encourage a larger number of landowners to participate in the regime, while covenanting has been attractive to a small number of conservation minded landowners, it would require a significant upscaling of investment into the organisation and its processes to be able to process more covenants in addition to being able to offer as financial incentives for landowners to make covenanting attractive to financially motivated landowners (see for example the level of investment in NSW's Biodiversity Conservation Trust, Elton & Fitzsimons, 2023).

The current participation of largely 'lifestyle' and increasingly absentee landowners to conservation covenants, is also potentially a barrier to achieving greater participation from landowners that rely on land for income. Further, concerns from current participants in Victoria about their resources and expertise in meeting conservation covenant objectives raise doubts about the ability of 'lifestyle' landowners to implement effective adaptive management (Bond et al., 2018) (Groce and Cook, 2022) (Selinske et al., 2019).

Finally, in relation to legitimacy and good governance, the Trust's regime is particularly transparent due to its multiple reporting obligations and well as being subject to several

Victorian government-specific procedural justice frameworks including freedom of information requests, conflicts of interests and declaration of gifts, and public interest disclosures regimes (which essentially protect whistleblowers). Further, the procedural elements outlined in the Act (for covenant approval and registration etc.) provides an avenue for administrative law judicial review if they are not followed. These aspects establish a high degree of legitimacy, accountability, and procedural justice which is necessary to identify unintended consequences, check corruption, and avoid uneven application of the burden of adaptation.

## 5 Discussion and conclusions: where to next

The goal of this article has been to consider the international and national governance settings that influence conservation covenants in Australia, in order to evaluate the governance of Australia's conservation covenant regimes which are the primary legal tool that establish PPAs in Australia. Adaptive governance – and in particular the framework evaluating the role of law in environmental governance developed by Cosens et al. – is promoted as a conceptual framework to guide conservation covenant regimes to achieve effective governance through flexibility and being responsive to their dynamic contexts, while not sacrificing the permanence and security that is one of the key strengths of conservation covenants (in comparison to other environmental initiatives on privately managed land for example).

The above analysis of the conservation covenant regime in Victoria indicates that many of the legal foundations for an adaptive governance framework exist and that the Trust balances the stability and security of the permanently registered conservation covenant regime with flexibility that is needed for environmental and social change. Additional re-assurance in the legislative framework and/or the covenant deed that the Trust is making decisions based on best available evidence and science may help to re-assure stakeholders regarding its internal decision making processes where discretionary approvals are being granted to landowners.

The complex web of horizontal relationships in PPA governance demonstrates that the Trust has evolved to embed its local work within state, national and international targets for protected areas; it is now influenced by the Victorian Biodiversity Strategy, the Commonwealth NRS strategy as well as IUCN guidance and frameworks established under CBD. This has elevated the importance, trust, and consistency of implementation of the Trust's local work to a landscape level that is part of a global effort to achieve the 30 by 30 protected area target.

The key challenge that has been identified for the Victorian conservation covenant regime to continue to grow and evolve, relates to inadequate public financial investment for the conservation covenant administrative regime. This includes both adequately resourcing the covenanting body to enable it to strategically build relationships and recruit new landowners, while also providing effective stewardship to current landowners. This raises the question of whether the regime has adequate capacity to respond to change and has the resources to apply best practice

science and interest-based collaborative processes. The second key challenge that has been identified relates to providing sufficient financial incentives to landowners that are needed to effectively recruit landowners who can implement adaptive management on the ground. By comparison, New South Wales (NSW) has significantly increased its public investment in private land conservation and has moved towards a more market-based approach for conservation covenants. In NSW, since 2017, the NSW Biodiversity Conservation Trust has invested close to \$250 million of public money to establish/expected to establish 308,116 hectares (430 properties) of new conservation areas through conservation agreements (Henry et al., 2023, p. 19).<sup>2</sup> This is significantly vaster than what Victoria has delivered over its 50 year history and is a good benchmark for the scale of public investment that is required in each State jurisdiction. It should be noted that while the scale of funding and private land protected in NSW demonstrates recent successes for private land conservation in NSW (PPAs and otherwise), the overarching governance framework in which conservation covenants sit within in NSW, and in particular the very different standard for native vegetation clearing rules on agricultural land and the biodiversity offsetting scheme, has been the subject of significant criticism due to loss of habitat on unprotected private land overall, which has occurred since the new markets-based regulatory scheme was introduced in NSW 2016 (Henry et al., 2023, p. 4).

In looking forward to ideas for how to grow and evolve conservation covenanting regimes in Australia, the preliminary findings in this article demonstrate that the Victorian conservation covenant regime has a solid governance foundation to achieve effective governance of PPAs to continue achieve protected area targets. The legal governance foundations have demonstrated their capacity to support the national and state biodiversity offsets markets, which indicates that conservation covenant regimes are similarly well-placed to support the delivery of complementary objectives relating to climate adaptation and ecosystem restoration and be incorporated into these new policy initiatives, as is currently occurring in Victoria under the BushBank scheme.

Further, being part of ecosystem restoration and climate adaptation potentially opens new revenue streams for private land conservation (i.e. under Bushbank or a proposed Commonwealth Nature Repair Market) to cover the high costs of restoration activities. Such an approach would likely bolster conservation covenanting programs, increase the establishment of PPAs and at the same time, achieve security of investments and permanent protection for ecosystem restoration and adaptation projects. For conservation covenant regimes in Australia, this presents an opportunity for growth and evolution. A particular challenge in Australia will be to find financing that is not dependent on offset payments, which are regulatory payments for harm caused to threatened species and ecosystems. Continuing to rely on biodiversity offset payments will likely

undermine the overarching objectives of the CBD (to maintain and restore ecosystems and stop extinctions).

Finally, while there is likely to be a need for a range of policy and legislative instruments (both new and established) to assist in reversing the trajectory of biodiversity decline in a changing climate in Australia, based on these findings from Victoria, it is expected that conservation covenants will continue to have an important role to play in maintaining existing and establishing new PPAs. The findings in this article suggest that conservation covenant regimes have good governance frameworks to achieve effective governance and can continue to be used to achieve protected area targets in Australia, as well as – with the right policy levers – having the capacity to evolve and adapt to complement and support new regulatory initiatives such as ecosystem restoration and climate adaptation.

Given the voluntary nature of participation with conservation covenants, getting the right policy levers and incentives to encourage participation from landowners who agree to forgo property rights and commit to active land management to achieve restoration and climate adaptation objectives in degraded landscapes, is likely to be the biggest challenge.

## Data availability statement

Publicly available datasets were analysed in this study. This data can be found here: <https://www.dcceew.gov.au/environment/land/nrs/science/capad/2000>.

## Author contributions

SB: Writing – original draft, Writing – review & editing.

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## Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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<sup>2</sup> Note that these are understood to be a mix of fixed-term and in-perpetuity agreements (so not all will meet the definition of a PPA and be included in the NRS).

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