

At the hearing, the following matters were taken on notice:

1. Ms Bath: ‘...You mentioned EMV fire regimes, but also then at the other side you talked about Indigenous governance, heritage and ecosystem restoration. Now, I would like to think that there could be some synergies, to use your term. Could you expand on that? And I guess I am also using the knowledge that I have in relation to firestick practices and a particular person who we are seeing next week called Victor Steffensen. What is your knowledge around that?’
Prof Godden: ‘...There are significant opportunities, I think, for Victoria to work with First Nations, with traditional burning, in relation not only to its capacity for generation of less emissions when we do have burning but also in terms of a much more nuanced approach to the way in which ecosystem management occurs. So I would be happy again to draw on some of that research and make it available to the committee.’
2. ‘I might ask Professor Godden ... to provide us with just a couple more specifics. I was fascinated that you said we could do better to protect green spaces... but if it would be all right with you to have something on notice about that,’ Referred by Dr Bach as noted on page 23 of the transcript.

Could you please respond to the aforementioned question on notice by close of business **Friday, 14 May 2021**.

Question responses

1. Traditional Burning Practices and Ecosystem Management:

The research on Aboriginal Traditional Burning practices occurred as part of a wider project on climate mitigation, bio-sequestration and the impacts of these measures on Indigenous communities. The basic premise of the UN REDD+ scheme (and derivatives) is to capture carbon in forests and other vegetation and to prevent forest degradation which in turn creates positive biodiversity outcomes and biosequestration ‘credits’ for local communities that can then be exchanged for payments etc. The research looked at international law, carbon markets, human rights and governing International law around Indigenous peoples and the role of agreement-making. The analysis was supported by case studies in Malaysia, (Borneo) Vanuatu, Papua New Guinea and Northern Australia – all areas of high biodiversity value in our region but where e.g. illegal logging and clearance for agriculture (and palm oil in parts of this region) are leading to a rapid loss of biodiversity. In Northern Australia the research looked at traditional burning as Australia is not a party to the UN REDD+ scheme but there are important parallels to the REDD+ scheme in the way ‘carbon farming’ occurs under Commonwealth legislation. There was also the hope that the research on traditional burning, agreement making and carbon markets from Northern Australia might provide a case study for application in other contexts – ie the potential for traditional burning to form part of Victoria’s approach to ecosystem management and the suite of market measures used to promote conservation on private land e.g. stewardship payments). The model is also potentially applicable to public land management as well and could form part of natural resource agreements under the Traditional Owner Settlement Act if there were certain rule changes. Part of the research was published in M. Tehan, L. Godden, M. Young and K. Gover, *The Impact of Climate Change Mitigation on Indigenous and Forest Communities: International, National and Local Law Perspectives on REDD+* (Cambridge University Press) 2017. Awarded American Society of International Law, 2019 Certificate of Merit.

The following is drawn from chapter 9 of that book. I have given some updates around traditional burning practices and local application in Victoria. A proof copy of the book is appended, chapter 9 begins at 283.

Overview:

Australia is not a recipient of REDD+ funds, but the country has been a prominent supporter of the REDD+ scheme in international fora. Moreover, at a national level, Australia has developed sophisticated emissions-reduction models in the forestry and land-use sectors and bio-sequestration schemes of general application, ranging from trading to direct funding grant models.¹The Australian states (provincial governments) have enacted statutory schemes that provide an independent legal status for sequestered carbon and emissions reductions that form a distinct right, severable from the surrounding land and vegetation. Statutory carbon 'rights' of this type,²initially were designed to interact with national cap and trade credit schemes for mitigation of emissions through the promotion of bio-sequestration. Current models for carbon abatement and emissions reductions in the land sector focus on funding specific, voluntary emissions-reduction projects, and include unique programs to reduce emissions from the burning of savanna lands. Some Aboriginal and Torres Strait Islander peoples have participated in these REDD+ style schemes, including savanna-burning projects, that utilise traditional knowledge, but other groups have had minimal opportunities for involvement. In this chapter, we discuss how the various models that underpin indigenous peoples' tenures and rights in Australia determine the opportunities for Aboriginal and Torres Strait Islander peoples to participate in emissions-reduction and carbon-sequestration schemes.

The chapter describes the complex Indigenous land tenures and resource rights including native title that operate in Northern Australia – if traditional burning was to be more extensively adopted in Victoria some consideration of the tenure or rights basis would need consideration as it is a very different situation to northern Australia. 'A critical factor in determining the access of particular indigenous communities (and groups within communities) to REDD+-style projects, and any attendant benefits, is the coverage of the legal models and classificatory systems for emissions reductions that are developed. Where Aboriginal and Torres Strait Islander peoples have not had their claims to land and waters recognised by the state, the adoption of a REDD+-style scheme—even with 'safeguards' in place—is unlikely to occur.

First, Australia is highly dependent on its land sector—economically and culturally. This dependency is evident in the prominence of land sector responses in its nationally determined contributions under the Paris Agreement.⁶ Further, the importance of the land sector to Australia has generated extensive experimentation with statutory schemes for the management of carbon and emissions reduction in forest and savanna lands. While there has been a recent rollback of these schemes, Australia has developed a number of emissions-reduction and avoided deforestation projects, many of which have been implemented and continue to operate. Indeed, Australia is one of few jurisdictions with an established land-use framework for carbon management and emissions reductions with links for offsets—as set out in the Commonwealth's Carbon Credits(Carbon Farming Initiative) Act 2011 (Cth) as amended by the Carbon Farming Initiative Amendment Act 2014 (Cth). There are state based equivalents that link to the national scheme.

The third significant factor is the development of models which directly incorporate indigenous traditional knowledge and practices in the savanna-burning projects. Australia developed a 'methodology' for determining emission credits that combines traditional knowledge and scientific measures. There is potential to consider how these schemes, which blend traditional practices and ecosystem-services models, could be adapted to other regions where the customary [and controlled] burning of vegetation takes place.⁸ Australian experience with savanna burning also provides well-established models that offer useful guidance on how indigenous governance, ...

interfaces with REDD+ style schemes when evaluating the implementation of projects at national and provincial scales.

The remainder of the chapter is very much related to the native title and tenure model for northern Australia, but the general concept has possible application to Victoria around a cultural economies model and in the context of a range of carbon offset mechanisms.

The following from chapter 8 provides an outline of the type of models that operate in northern Australia.

Agreement-Making for Indigenous Tenure as an Alternative to Native Title

One consequence of more than twenty years of operation of the native title scheme is the changing culture amongst governments, resource companies, other land users and native title-holders. An emerging culture of agreement-making¹¹⁴ has seen negotiation, whether mandated under the Act or otherwise, as the dominant mode of interaction between native title-holders and others.¹¹⁵ This mode of decision-making about land access and resource use operates in parallel to and in the shadow of the statutory frameworks. Agreements are a feature of the savanna-burning examples referred to below. Negotiation and agreement-making might encourage stronger indigenous engagement in carbon management projects. Yet, while agreement-making has allowed native title-holders (In Victoria see Traditional Owner Settlement Act as well as native title settlements) to be involved in decision-making, it has been criticised as reinforcing inequities in bargaining power and resources, resulting in variable and often unfavourable outcomes for native title-holders.¹¹⁶ This experience suggests that power imbalances are a key consideration in agreement-based regimes.

The tendency towards agreement-making is evident in the Traditional Owner Settlement Act 2010 (Vic) which arose in response to deficiencies in the native title processes.¹¹⁹ This regime enables the state (provincial) government to negotiate outcomes with groups of traditional owners (including those that may not be able to prove native title), and results in an Indigenous Land Use Agreement. This umbrella agreement can subsume other agreements relating to fee simple title to land for economic or cultural purposes, governance mechanisms, land use and natural resources.¹²⁰ The Act makes direct provision for traditional owners to enter into carbon agreements with the state.¹²¹ The legislation provides a trigger of procedural rights for traditional owners to be engaged when a carbon sequestration right is created, and a Land Use Activity Agreement is to be negotiated with the group. While the legislation creates a robust example of an agreement-based approach to involving indigenous communities in carbon management, it is strongly dependent on the specific scheme that is cognisant of indigenous 'carbon' interests and a government willing to negotiate in good faith with indigenous landholders (for Victoria we might better nominate this term as Indigenous interests).

The model described above is northern centric in many ways as it is pivoted on Indigenous land holding or at least some form of legal or negotiated access to traditional lands to maintain a connection to country – a situation that is not replicated at any appreciable scale in Victoria, although there are agreement based models under TOS Act and e.g. the Yorta -Yorta Agreement in Northern Victoria. (Note these agreements operate over public lands).

In Victoria though it is possible to adapt the traditional burning /connection to country model e.g. through partnership arrangements with private landholders to allow access to privately held lands for traditional burning to occur; this has occurred with some NGOs and commercial organisations such as Bank Australia held lands. Access to public lands such as National Parks might also be expanded subject to e.g. via legislative reform or negotiated agreements – especially given the Treaty process in play in Victoria at the moment.

It is also possible that traditional burning practices could form a more formalised part of mainstream fire management regimes in Victoria including the 'controlled burning' requirements for reducing bushfire threat etc. This would require statutory reform if it was to be instituted on a widespread basis - and it would be an important way of clarifying the context in which traditional burning takes places and the various rights and responsibilities of various actors and authorities. A complex legal and policy would need to be addressed to provide a statutory framework, but arguably traditional burning could be accommodated within the range of responsibilities for fire authorities and other agencies involved in fire mangment. While this may involve additional capacity building etc, it might also be seen as a response to the un-precedented risks that climate change is posing to our conventional fire mangment techniques. As noted in evidence to the Committee, my view is that consideration of the inclusion of traditional burning should be regarded as part of an overarching responsibility of the state of Victoria for responding to climate change impacts ie as both a mitigation and adaptation/ disaster abatement response. Moreover, it is a fundamental recognition of a partnership between Victoria's Traditional Owners and Aboriginal Victorians in managing country and in assisting in arresting ecosystem decline.

The potential for liability for Traditional Owners and indeed other parties where traditional burning might cause damage or loss to third parties is a concern that has been raised. It is a clear risk that needs to be addressed but it should not form a barrier to adoption of such practices. Existing fire mangment regimes also pose a similar risk, but those risks are managed within a designated authority and responsibility structure. There are many high risk activities in our society that we accept as necessary while imposing requirements for risk reduction and the 'stick' of legal action if those procedures are not followed (I do not propose to canvas the forms of liability in these notes). Understandably, Victoria is very sensitive to fire risk after the 2019-20 bushfires and the 2009 Black Saturday fires. From the later situation - to take an example of another activity - electricity distribution and infrastructure [which according to the Victorian Royal Commission 2010] resulted in a large number of fires on Black Saturday - we have not stopped electricity supply to Victorian communities. Instead, we legal obligations and safeguards are in place to reduce risks from this essential service. Similarly, with traditional burning we can acknowledge risks and put in place safeguards and practices that reduce risks while bringing positive practices to bear that may reduce some of those fire risks through 'cool burning'.

This is not to underestimate the commitment necessary to bring this integration of traditional burning and fire and ecosystem management to fruition. It is also necessary to ensure that safeguards such as free prior and informed consent operate where traditional owners are involved in these practices as part of wider biodiversity management and agreements. There are opportunities to develop traditional burning alongside other traditional owner knowledges as contributing to culturally appropriate economic development and the retention of cultural heritage, including intangible cultural heritage.

2. Protection of Green Spaces in urban and suburban areas

There is considerable research on the potential for urban and suburban green spaces to contribute to addressing ecosystem decline - and to contribute to human health and well-being outcomes. Green spaces in cities might be thought of as 'green infrastructure', and they play a role in providing habitat for biodiversity. (See attached pdf - Cities Should respond to the biodiversity extinction crisis).

The association of urban planning with 'garden cities' in Melbourne is a long one – reaching back to garden city experiments in South Melbourne in the late 19th century. Much of the 'green wedge' model that is the skeleton of the green spaces that exist in the Eastern Metropolitan region of Melbourne (and other parts) were developed under the auspices of the Melbourne and Metropolitan Board of Works which was the central planning authority for much of the period from the 1960/70s through to the 1980s. The planning system under the Planning and Environment Act 1987 (Vic) has developed since then, with the purpose of establishing –

'...a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians'.

The Act involves a complex set of planning instruments with 'standard' planning provisions, planning schemes and procedures for approval of developments in line with this system. There is also a section that specifically identifies Metropolitan green wedges -

Part 3AA—Metropolitan green wedge protection

Division 1—Introductory 46AA

What is a metropolitan fringe planning scheme?

46AC What is green wedge land?

The importance of green wedges was recognised by the insertion of these amendments by the Planning and Environment (Metropolitan Green Wedge Protection) Act 2003.

More recently, there are a number of municipal strategies and plans that seek to give effect to these green wedge protections, and which have a biodiversity focus, See for example, Manningham – “The Manningham Green Wedge is one of 12 Green Wedges around Melbourne as stated in the “Melbourne 2030” Strategy. Manningham’s Green Wedge is defined in the Planning Scheme as the area outside the Urban Growth Boundary (UGB), in the Rural Conservation Zone (RCZ), with the exception of the Wonga Park Township which is mostly Low Density Residential Zone (LDRZ) as shown in Figure 1. This Green Wedge Action Plan 2020 has been produced as part of the review of the Manningham Green Wedge Strategy 2004.”

While there are these protections in place for Green Wedges under the Act, in the light of climate change risks and the rate of ecosystem decline, there might be thought given to strengthening such protections and/or extending them beyond the current green wedge model to deal with e.g. smaller areas of remnant vegetation and habitat in urban areas that are vital biodiversity corridors. More recently, the value of green spaces in urban areas for residential amenity, recreational activities and for biodiversity protection have been acknowledged (see e.g. Croeser, Thami; Denham, Todd; Dorignon, Louise; Moradi Amani, Ali (2021): How green urban precincts can revitalise Melbourne post COVID-19. RMIT University. Report. <https://doi.org/10.25439/rmt.14273696.v1>).

The degree of protection of green spaces vis a vis the development of land to meet other urban uses such as housing needs etc, is an issue where there is a variety of stakeholder views and interests that need to be managed in Metropolitan Melbourne – and in many other major cities around the globe as we see rapid urbanisation occurring and population pressure on existing metropolitan areas.(see e.g. Bolleter J., Ramalho C.E. (2020) Why GOD? The Benefits of Greenspace-Oriented Development. In: Greenspace-Oriented Development. SpringerBriefs in Geography. Springer, Cham. https://doi.org/10.1007/978-3-030-29601-8_)

The adoption of green wedges and protection of green spaces within the metropolitan area also interplays with the Melbourne Growth Boundary concept and the adoption of polices to contain development within that boundary by intensifying urban densities. Melbourne's strategic development plan, Plan Melbourne 2017–2050, seeks to manage population growth through increased densification in the central business district (CBD) (and other metropolitan locations) and by increasing 'liveability' and 'sustainability'. Planning for Melbourne's green wedges and peri-urban areas is identified – 'Strengthen protection and management of green wedge land Protect and enhance valued attributes of distinctive areas and landscapes'. While environmental resilience is a general principle, biodiversity protection arguably is not comprehensively addressed in this plan as there are other Victorian strategies targeted to that function (primarily Protecting Victoria's Environment – Biodiversity 2037). That Strategy incorporates a Biodiversity Monitoring, Evaluation, Reporting and Improvement Framework that could be adapted to the urban green space context.

The gap between the strategy and the Metropolitan Plan is a 'silo' problem that has long characterised biodiversity protection laws where attention and planning/implementation is focused on rural and regional areas (ie as that is where much biodiversity is concentrated). As urban areas expand, there is a need to integrate biodiversity protections across urban, suburban and rural areas to ensure that we are utilising a full suite of opportunities for preventing ecosystem decline. It may be appropriate to strengthen cross references to urban green space ecosystem protections in any review of the Metropolitan Plan and Biodiversity Strategy. Similarly, it might be possible to reflect these type of synergies of green space for ecosystem/biodiversity protections in the planning system at the level of the Victoria Planning Provisions (s 4A Planning and Environment Act 1987) or in specific planning schemes, with appropriate references to key legislation such as the Flora and Fauna Guarantee Act 1988.