

EDO Briefing Paper

Victoria's new native vegetation clearing laws

In December 2013 the Victorian Government brought in a new regulatory framework governing the clearing of native vegetation in Victoria.¹ This briefing paper provides an overview of the regulatory framework.² The Government made some changes to the scheme just before it came into force, which are included in this paper.

The reforms make significant changes to the intent, coverage and process of native vegetation clearing controls. The change of emphasis is clearly demonstrated by the change in name of the scheme from the 'native vegetation management framework' to the 'permitted clearing of native vegetation'.³

For comparison between the old framework and the new regulatory scheme the briefing notes previously co-published by the EDO and Victorian National Parks Association (**VNPA**) remain relevant.⁴ The VNPA has also produced some very useful background material.⁵

Structure of new arrangements

The new rules operate as part of Victoria's planning system. They are given effect by the *Planning and Environment Act 1987* (Vic) and subordinate legislation ('planning provisions' or **VPPs**) made under that Act. The legal basis of the new rules is the same as that of the previous native vegetation clearing controls operating under the *Native Vegetation Management Framework*.⁶

The scheme is underpinned by the policy document *Permitted clearing of native vegetation: Biodiversity Assessment Guidelines* (**Guidelines**). The Guidelines will be an 'incorporated document' within Victoria's planning system. This does not give them the force of law but informs how legal instruments will work and be interpreted.

1 The EDO made a submission to the Government's consultation paper and ran a series of workshops with the Victorian National Parks Association to inform Victorian communities about the reforms. See <http://www.edovic.org.au/edo-submission-victorias-native-vegetation-permitted-clearing-regulations-consultation-paper>

2 The package of changes can be found at the DEPI website: <http://www.depi.vic.gov.au/environment-and-wildlife/biodiversity/native-vegetation>

3 DEPI Permitted clearing of native vegetation: biodiversity assessment guidelines (2013), http://www.dse.vic.gov.au/_rework/environment-and-wildlife/biodiversity/native-vegetation/?a=180645

4 <http://edovic.org.au/summary-native-vegetation-law-proposals>

5 VNPA Victoria: State of decline – habitat trends and native vegetation (2013), <http://vnpa.org.au/admin/library/attachments/PDFs/Reports/Victoria-state%20of%20decline.pdf>

6 *DSE Victoria's Native Vegetation Management: A Framework for Action* (2002) ('Native Vegetation Framework')

The statutory basis of the changes operates through amended planning provisions applying across Victoria.⁷ Planning provisions are rules with legal effect.⁸ They are a form of delegated legislation (that is, Parliament has authorised a person or agency – in this case the Minister – to make laws that enable the Act to work and its purposes to be achieved).

Both the State Planning Policy Framework⁹ (which relates to planning decisions generally) and the ‘particular provisions’ (which relate to specific planning issues such as roads or coastal protection) have been changed. The most notable changes are those to the provisions regulating the need for permission to clear native vegetation and the circumstances under which permission can be granted.¹⁰

Finally, a range of other, supporting documents, such as technical manuals and digital mapping, have been developed and will be referred to in making decisions about clearing native vegetation.

Objectives and purposes

The formal and practical objectives and purposes of the new regulatory arrangements have changed significantly.

There has been a shift from the desire of clearing controls to achieve a ‘net gain’ in the quality and extent of native vegetation across Victorian landscapes.¹¹ The new objective is to achieve ‘no net loss in the contribution made by native vegetation to Victoria’s biodiversity’.¹²

This change is significant for two reasons. First, it amounts to an abandonment of the ambition to achieve widespread landscape improvement or enhancement, as distinct from avoiding ongoing degradation. Second, the focus (subject-matter) of the regulatory settings has been qualified and narrowed in scope.

The previous arrangements were aimed at addressing a number of environmental problems such as habitat protection, soil health, water quality, and salinity and erosion control. The new rules focus on ‘biodiversity’ which is an attempt to limit the scope of policy considerations addressed by the clearing controls. The rules will marginalise wider ecological considerations as well as consideration of social or cultural reasons for protecting native vegetation.

At a practical level, the focus on ‘biodiversity’ is likely to mean that the actual focus of protective or conservation efforts will be on rare or threatened species habitat, as distinct from native vegetation generally, or habitat generally, or even ‘high conservation value’ habitat.¹³

The policy is, then, targeted in particular to threatened species habitat protection and restoration, combined with a generally available permission to clear native vegetation (albeit at a financial cost to the permit holder).

A further practical objective of the new rules is to deepen and expand the role of economic models in native vegetation management. In particular, the intention is to create a more ‘functional’ market in native vegetation offsets (the right to clear and obligation to compensate for, or ‘offset’, clearing by other actions).¹⁴ ‘Functional’ in this sense refers to the existence of fewer restrictions on the purchase of compensatory actions (offsets) from another landholder by a person seeking to clear native vegetation and seeking, at the same time, to meet compliance obligations under a permit to clear. The market will be more functional because the new rules are intended to facilitate a greater volume of these types of transactions, through market arrangements established to allow this to happen (for example, brokerage services between ‘buyers’ of compensatory habitat protection and restoration and ‘sellers’ of those ‘ecosystem services’). A more functional market, with more liberal clearing arrangements, will also likely generate expanding sources of revenue from offset compliance obligations, for investment in designated offset areas.

⁷ The changes have been brought in via amendment VC 105.

⁸ *Planning and Environment Act 1987* (Vic), Part 1A

⁹ Especially VPP, cl 12

¹⁰ Clauses 52.16 and 52.17 in particular

¹¹ *Native Vegetation Framework*, 14

¹² Guidelines, Ch 2

¹³ See Guidelines, 6, Table 2

¹⁴ DSE *Future directions for native vegetation in Victoria: review of Victoria’s native vegetation permitted clearing regulations – consultation paper*, 18-19, 29

The ‘risk-based’ approach to decision-making

The major change in the approach to the assessment and approval of native vegetation clearing lies in the use of ‘risk-based’ decision-making.

There are now three ‘pathways’ by which assessment and decision-making occurs – low risk, moderate risk, or high risk.¹⁵ Risk is assessed in relation to the ‘extent’ (size) and ‘location’ of clearing. ‘Location’ includes reference to the condition or quality of native vegetation in a particular place and its significance in the landscape.

The risk-based category will determine what information is required for assessment of applications¹⁶ and what factors and considerations will guide decision-makers.¹⁷ Low-risk categories will require less information and fewer decision-making considerations, as well as a reduction in factors and constraints applying to decision-making, such as fewer mandatory matters to take into account.

‘Risk’ establishes the manner by which biodiversity will be valued. Risk-based approaches concede that some threats, or level of threat, are acceptable. This includes a certain level of clearing of native vegetation (including individual scattered trees) outside areas calculated to be rare or threatened species habitat.

To facilitate this approach, there is extensive use of different ‘metrics’, or methods of calculating (‘scoring’) attributes and characteristics of habitat and landscapes. This includes, for instance, ‘condition scores’ and ‘strategic biodiversity scores’ in determining which ‘risk pathway’ an application to clear native vegetation is to be allocated to. Other forms of scoring are used for determining ‘equivalence’ between areas where native vegetation is to be cleared and offset sites.

The main sources of information for decision-making are online maps prepared by the Department of Environment and Primary Industries (**DEPI**) from ecological data and from modelling.¹⁸ Previously, all applications to clear native vegetation were required to be accompanied by on-ground ecological assessments. That requirement will now only apply in a minority of applications, either where an applicant voluntarily obtains on-ground assessment or in cases judged to be of moderate or high risk.¹⁹

In decisions allocated to ‘low-risk’ pathways, ecological information required to be submitted by a permit applicant will only be that acquired from online mapping and include mapped site condition scores (that is, quantified versions of ecological condition; for example, habitat hectares scores).²⁰ Even where the maps appear to be wrong, and threatened species are present on the ground but not included in the maps, DEPI’s instruction is that an on-ground assessment cannot be substituted for the mapped information.²¹

Facilitating clearing

As the above commentary suggests, a key intent of the new rules is to facilitate native vegetation clearing, albeit in a qualified and managed way. It should be noted that under the outgoing *Framework*, while little empirical evidence of its effectiveness was collected, the analysis that was undertaken suggested that overall clearing continued to occur, although at lower rates and less targeted to broad-scale land clearing.²² Arguably, the new approach will accelerate those trends. This is for a few reasons.

First, the requirement on applicants under the previous *Framework* that they demonstrate how they have avoided and/or minimised clearing, prior to being granted any permission to clear and offset losses (the ‘avoidance hierarchy’ or ‘avoidance principle’), has been removed.

¹⁵ Guidelines, Ch 6

¹⁶ See Guidelines, Ch 7

¹⁷ See Guidelines, Ch 8

¹⁸ These map layers are available at <http://mapshare2.dse.vic.gov.au/MapShare2EXT/imf.jsp?site=bjm>

¹⁹ See Guidelines, 15, [7.3]; 16 [8.3]-[8.4]. On ground assessments are limited to habitat hectares assessments – no other on ground assessment is provided for.

²⁰ See Guidelines, 15, [7.2]; 16 [8.2]

²¹ See Guidelines, 16 [8.1]. However note that this is yet to be tested and is not supported by the planning provisions themselves.

²² See DSE *Native vegetation net gain accounting – first approximation report* (2008)

Under particular planning provisions applying to permit application decisions (statutory planning decisions), while the avoidance principle is retained in the purposes of the clause,²³ information to be supplied²⁴ no longer includes demonstration of avoidance or minimisation. Decision guidance²⁵ no longer requires consideration of avoidance and minimisation of clearing at all under the low-risk pathway. In moderate- and high-risk cases, a proponent is required to show, and a responsible authority (such as Council) is required to consider, how loss has been *minimised*. Demonstration and consideration of *avoidance* is no longer applicable under this aspect of any permit application.

Under the *State Planning Policy Framework*, strategic planning decisions (for example, amending planning schemes) will continue to require application of the avoidance principle.²⁶

Therefore for low-risk clearing, the only obligation on the proponent is to offset the clearing – provided this occurs they will be given permission to clear.

The second way in which clearing is facilitated is by reducing the threshold of the type of vegetation that is considered ‘valuable’ and therefore protected from clearing. DEPI has not provided clear information on how the threshold has been determined, however a significant amount of vegetation that was considered high value and protected from clearing under the *Framework* is now classified as ‘low risk’ and therefore ‘low value’ in the online maps, meaning it can be cleared as of right.

Finally, facilitation of access to permission to clear is achieved through the reduction in the amount and type of information a permit applicant needs to supply, and a comparable reduction in the considerations a decision-maker is required to take into account in making decisions about permits. Under the risk-based streams, the volume of information and considerations under low-risk pathways have been substantially reduced by reliance on digital mapping.

While the factors mentioned above intentionally facilitate clearing, there is additional feature of the scheme which appears to unintentionally facilitate clearing. Interrogation of the online mapping tools have revealed significant errors in the maps whereby significant valuable native vegetation is not recorded.²⁷ This includes instances of rare or threatened species which do not appear on the maps at all, and are instead categorised as ‘low risk’ and therefore allowed to be cleared with no further investigation. This is an ongoing concern with the scheme which DEPI has not addressed.

An additional and substantial change that was included in the scheme at the eleventh hour is the removal of DEPI as a binding referral authority for clearing permits. Previously it was a requirement that certain permits (generally those with higher environmental impacts) be referred to DEPI, and DEPI’s decision was binding on the relevant Council. In the new provisions, DEPI is listed as a ‘recommending referral authority’²⁸ rather than a ‘determining referral authority’ and therefore its recommendations are advisory only. Therefore rather than having a consistent State-wide approach to protection of high value native vegetation, Councils will be allowed to decide whether to allow clearing in local high risk areas.

Offsetting

The structure of offset rules has changed in some important ways under the new clearing rules.²⁹ Given the likely increase in volume of offsetting arising from looser clearing controls, a good deal of attention is paid to the organisation of offset arrangements and metrics (that is, the ways in which they are measured).

Offsets are a combination of actions intended to deter further ecological degradation of native vegetation and/or to improve ecological functioning of native vegetation. Offsets activities include legally securing the land for environmental conservation purposes, removing damaging activities from subject land, and managing

23 New VPP, cl 52.17

24 New VPP, cl 52.17-3

25 New VPP, cl 52.17-5

26 New VPP, cl 12.01-1

27 See for example Yung En Chee, ‘Hidden flaws in Victoria’s new native vegetation clearing rules’, *The Conversation*, 3 October 2013 <http://theconversation.com/hidden-flaws-in-victorias-new-native-vegetation-clearing-rules-18516> and EDO Victoria ‘What’s the Risk?’ viewed 5 February 2014, <http://www.edovic.org.au/whats-risk>

28 New VPPs 62.02-2

29 Guidelines, Ch; compare Framework, Appendix 4 in particular

and improving the condition of native vegetation. These general principles remain the same under the new arrangements. Offset calculations previously were based on a combination of measures of size of the subject land on which clearing was to occur and a measure of condition (habitat quality) in habitat hectares. Under the outgoing *Framework*, 'like-for-like' restrictions applied which required the offset to be similar in ecological character to the vegetation to be cleared. This requirement will no longer exist.

Offset arrangements are now more complicated under the risk-based pathway process. Two types of offsets will operate: a 'general offset' and a 'specific offset'.

A general offset will be the more common form of offset, applicable in instances of low-risk clearing and moderate-risk clearing where a specific offset threshold is not met.

A specific offset refers to offset requirements targeted to rare or threatened species habitat and it will apply in circumstances of high-risk pathways and some moderate-risk pathway applications. It is a form of 'like-for-like' rule, but of much more limited application.

General offsets are not targeted in the same manner. General offset requirements are only that the offset makes an ecological contribution within the landscape and that it occurs within the boundaries of the same Catchment Management Authority in which clearing occurs.³⁰

The new arrangements provide some greater clarity on minimal requirements for offsets, including that they must provide additional protection or gains above existing obligations at law or under agreements. Also, the Guidelines provide that re-vegetation sites will generally not be eligible as offsets.

See the EDO's report on the native vegetation offsetting system for a detailed discussion of offsetting.³¹

Alternative arrangements for native vegetation management and clearing

The statutory planning (permit issuing) process also provides for native vegetation precinct plans to be developed and approved as part of wider strategic planning or local land-use planning.³² Rules around native vegetation precinct planning parallel those for permitted clearing as the reforms have revised the objectives and framework to be consistent with the 'no net loss' principle and biodiversity focus.

Other arrangements will operate for the clearing of native vegetation for timber harvesting.³³ These will parallel the general rules and modify existing controls.³⁴ General offsets will ordinarily be required. The offset scoring will be the same as for the permitted clearing under cl 52.17, except in the case of clearing a remnant patch of native vegetation for timber harvesting, in which case quantitative offset rules will apply to circumstances of clearfell and selective harvesting.³⁵

Uncertainty ahead?

There are a great many questions around the design and operation of the new native vegetation clearing rules. How the new regulatory and policy instruments will function in practice is not certain, especially given the heavy reliance on digitally mapped data which has been shown to be inaccurate. The new rules are a substantial change from the outgoing native vegetation framework and both Councils, as the main decision-making authorities, and

³⁰ Guidelines, [9.4.6]

³¹ EDO *Reforming native vegetation offset rules in Victoria* (2013), <http://www.edovic.org.au/law-reform/major-reports/reforming-native-vegetation-offsets>

³² These are contained in a revised version of VPP, cl 52.16

³³ Guidelines, 24-25

³⁴ VPP, cl 52.18

³⁵ See Guidelines, 25, Table 9

the Victorian Civil and Administrative Tribunal, which will be tasked with review of decisions, will be dealing with new goals and new decision-making frameworks. Finally, the process of change is not yet over, as DEPI will be undertaking further reforms to permit exemptions and to enforcement provisions in the next 12 months.

Native vegetation regulation is shifting ground. We will continue to watch this space.

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Produced & published by Environment Defenders Office (Victoria) Ltd
ABN 74 052 124 375

Publication date: 17 February 2014