



Briefing paper

Draft planning provisions and policy guidance regulating native vegetation clearance

Prior to Christmas 2016, the Victorian Government released proposed new regulations and policy on the clearing of native vegetation in Victoria. The documents include:

- proposed amendments to relevant Victorian Planning Provisions ('VPPs');¹
- new draft 'Assessment Guidelines' informing the planning controls;² and
- a report on the process of review of the existing native vegetation clearing controls ('Outcomes Report').³

The affected VPPs include clause 12 (policy framework) and clause 52.17 (native vegetation clearing regulation). These provisions and 'guidelines' are the principal controls under planning law regulating the clearing of native vegetation in Victoria, especially on private land. They are, in that respect, key measures to protect biodiversity and natural habitat.

This Briefing Note will outline some of the main proposed changes, as well as continued concerns in protection of natural habitat through the new regulations and policy. We also outline some ways the proposed system could be improved at this stage to create stronger protection for native vegetation.

The Department of Environment, Land, Water and Planning ('DELWP') documents and portal for submissions are [on the Engage Victoria site](#).

DELWP is receiving submissions on the proposed changes until COB 5 February 2017.

¹ DEWLP *Summary of Proposed Amendments to the Victorian Planning Provisions: Review of the Native Vegetation Clearing Regulations* (2016), https://engage.vic.gov.au/download_file/view/324/455

² DELWP *Native Vegetation Assessment Guidelines* (2016), https://engage.vic.gov.au/download_file/view/323/455

³ DELWP *Outcomes Report – Review of the Native Vegetation Clearing Regulations* (2016), https://engage.vic.gov.au/download_file/view/516/455

Background to the release of proposed new rules

The current native vegetation clearing regulations and policy have undergone a period of review that commenced in May 2015. The review was not intended as a ‘root and branch’ reform program but rather an exercise to ‘test’ how regulations ‘sensibly protect sensitive vegetation’. As distinct from other major reviews in this term of government, such as reviews of climate change legislation and the Environment Protection Act, this review (as with review of the Flora and Fauna Guarantee Act) has not been conducted by an independent body. These terms of reference and departmental approach may be relevant to the constrained outcomes of the review.

The review process included a stakeholder reference group (EJA was a member) and public comment on a consultation paper. More than 200 submissions were received on the consultation paper.

The main changes

The changes under the proposed VPP and *Assessment Guidelines* might be described as a series of adjustments to the current Permitted Clearing Guidelines, some more substantial than others. These are quite numerous and spelt out in some detail in the *Outcomes Report* (*Outcomes Report*, pp 12–14, Table 1). There are other changes to policy or practice that will roll out or be developed over a longer timeframe, such as management of compliance and enforcement or establishment of guiding principles for exemptions, signalled in the *Outcomes Report* (*Outcomes Report*, pp 15–17, Table 2).

The more significant changes include the following.

Assessment pathways

There is adjustment in the thresholds for determining how assessment for an application to clear native vegetation is to be treated (which ‘assessment pathway’ an application is allocated to). These are still based on location and extent of clearing but with the following changes:

- The categories of location relevant to how a permit application is assessed include:
 - all locations where removal of less than 0.5ha of vegetation could have a significant impact on a rare or threatened species (‘Location 3’),
 - locations mapped as endangered ecological communities or sensitive wetlands or coastal areas, other than in Location 3 (‘Location 2’), and
 - everywhere else (‘Location 1’).
- The quantitative triggers determining which assessment pathway an application is in change from a 1ha area (‘extent’) of native vegetation to 0.5 ha and/or whether large trees are present in each respective location.
- As noted, additional criteria have been added to how application are assessed, with endangered EVCs and sensitive wetland or coastal areas being included, alongside impact on rare or threatened species.

The table showing how an application is allocated to an assessment pathway is at Table 3 of the *Assessment Guidelines*.

Avoidance statements

For all applications new information will be required to be provided, in particular a statement on how clearing has been avoided and/or minimised and a statement identifying an offset strategy.

On-site assessments

There will be a greater reliance on online information provided by applicants with their applications. On-site assessments are currently required for all applications considered to have moderate or high-level impacts on biodiversity. This would no longer apply under the new *Assessment Guidelines*, under which only applications considered at the high-end of impacts (allocated to the 'Detailed' assessment pathway) would require an on-site assessment.

Policy objectives

Adjustment has been made to the policy objective so that planning ensures 'appropriate consideration of impacts on biodiversity and other values' from native vegetation clearing. There has also been a simplification of the language of the policy objective from 'no net loss in the contribution made by native vegetation to Victoria's biodiversity' to 'no net loss to biodiversity.'

The meaning of avoidance

Greater detail has been included on the meaning of the avoidance hierarchy.

The values represented by native vegetation

There will be a clearer distinction of 'biodiversity values' of native vegetation and 'other values' (e.g. land and water protection, Aboriginal heritage, landscape values), and a greater degree of parity between these categories in decision-making (e.g. avoidance/minimisation may be required where impacting on 'other values' even where not impacting on 'biodiversity values').

Scattered trees

There will be greater explicit recognition of the values of scattered trees within the calculation of the area of native vegetation and in offset requirements, although they are still accorded a deemed (low) value in assessment of condition of native vegetation.

Errors in online data and mapping

Site-based information (assessments) can be used to supplement online/mapped information relating to rare or threatened species in response to obvious errors or anomalies in mapped information. This information can be provided by a permit applicant or by any other person. This supplementary information is then used on the decision-making process.

Permissible alternatives to 'specific offsets'

Where an offset for a rare or threatened species cannot be found, alternative (albeit indeterminate) arrangements can be agreed with DELWP.

The main continuities

The basic approach to regulation of native vegetation clearing through the planning system would not alter as a result of the proposed changes in the VPPs and *Assessment Guidelines*. Indeed, the proposed arrangements continue certain important trends established in the existing Permitted Clearing Guidelines, such as reliance on mapped and modelled datasets, and on offsetting as a form of compensatory measure (in calculation of 'net' loss); and an expectation that native vegetation clearing can and should be managed and, in a regulated fashion, facilitated.

More specifically, key continuities in the proposed instruments include:

- retention of the ‘no net loss’ objective;
- retention of graduated pathways to decision-making (*Assessment Guidelines*, Table 3), representing levels of impact on native vegetation and its values, now termed ‘Basic’, ‘Intermediate’ and ‘Detailed’ pathways;
- heavy reliance on digital data (online mapping and modelling) to drive assessment of applications and decision-making;
- within the framework and models informing digital datasets (and hence assessment and decision-making), a primary focus on the habitat of rare or threatened species, as distinct from, for example, habitat quality in general. The strategic (Victorian-wide prioritisation) approach to valuing native vegetation is also significant;
- a strong focus on quantitative measures of the value of native vegetation (‘metrics’ or ‘scores’). These inform clearing decisions as well as ‘compensatory’ measures (offsets). They drive a highly technical approach to management and decision-making;
- inclusion of ‘avoidance’ principles (avoid, minimise, offset), with modifications (e.g. not applicable to the lowest decision-making pathway); and
- providing for a wide range of exemptions from operation of the regulations, under which a permit application is not required, including broad scope for the exemption of public agencies.

Key areas where the new provisions could be strengthened

At the present stage of the policy-making cycle, fundamental change to the new VPPs and *Assessment Guidelines* is unlikely. Nonetheless, we feel that there are certain areas in which measures can be further changed or ambiguities resolved to achieve stronger outcomes for the protection of native vegetation, as outlined below.

Objectives

Vary the proposed new objective of the regulations and policy to state that native vegetation management is ‘to ensure the protection and stewardship of native vegetation in Victoria, including through consideration of the impacts on biodiversity, ecological processes and other values from removal, destruction or lopping of native vegetation’. This wording tends to align the objective more expressly with the objective of planning at section 1(b) of the *Planning and Environment Act 1987* (Vic).

On-site assessments

Extend the requirement for on-site assessment of native vegetation (habitat hectare assessment) to the Intermediate Assessment Pathway, as well as the Detailed Assessment Pathway, with discretion on the decision-maker to require an on-site assessment in any circumstance in which there is a reasonable basis for concluding there are uncertainties or errors in information provided with an application.

Apply avoidance principles in all cases

Apply requirements to demonstrate avoidance and/or minimisation to all categories of application, including those in the Basic Assessment Pathway. As DELWP itself notes, more than 90% of clearing applications fall into this category of clearing (less than 0.5ha), hence the cumulative impact of that clearing is likely to be significant.

Other values to be expressly recognised

Decision guidelines, in considering the values of native vegetation, should also include, where appropriate and practicable (e.g. where studies or data are available), the value of native vegetation proposed for removal under an application in climate mitigation, such as carbon sequestration.

Unacceptable impacts

Clearly articulate the principles underpinning those circumstances in which removing native vegetation will have unacceptable biodiversity impacts, or impacts on other values identified. This is analogous to identifying those circumstances constrained by the limits of offsetting, such as where native vegetation contains values that are irreplaceable or the proposal overall will substantially exacerbate the vulnerability of rare or threatened species.⁴ Decision guidance under the Detailed Assessment Pathway should also establish a presumption against clearing, as a feature of precaution in the conservation of rare or threatened species of EVCs.

The value of scattered trees

There is better recognition of the value of scattered trees in the *Assessment Guidelines*, but in their allocation of a 'standard condition score of 0.20' (out of 1.00) continues to under-value their importance in heavily cleared landscapes. The clearing of scattered trees, especially large remnant trees, can have significant landscape and cumulative impacts. Their condition is relevant to their disproportionate importance (e.g. whether healthy, hollow-bearing). Criteria recognising the value of their condition, such as disproportionate values in heavily cleared landscapes, should be included in assessment processes and displace any standardised or deemed value (score). Given the effective irreplaceability of old trees, improved and more accurate representations of their values are a minimal requirement of their conservation.

Offsets

At a minimum:

- the location of general offsets should be within in the same municipal district and preferably within the same locality, not with much wider catchment management authority administrative boundaries;
- the strategic biodiversity score (Victoria-wide value) of the offset should in no circumstances be discounted below the same score of the vegetation to be removed. This discount presently occurs – and is proposed to continue – for general offsets (20% discount) and in fragmented landscapes (a further 10%: *Assessment Guidelines*, p 23). These discounts undermine further the already problematic concept of 'equivalence' in the offsetting system and weaken the purported value of 'strategic' biodiversity scoring to protecting vegetation at wider (e.g. landscape) scale; and
- offsetting provisions for large trees will in effect contribute to the ongoing, incremental loss of large old trees in landscapes. Their irreplaceability is acknowledged (*Assessment Guidelines*, p 23). Require, unless clearly impractical, offsetting of scattered trees into affected local landscapes, in order to minimise landscape impacts of losses.

Crown land exemptions

As far as we know, the single largest sector responsible for land clearing is the State Government and its agencies, on Crown land. Crown land exemptions apply under the proposed regulation, as they do under the current regulations, where this is land managed by DELWP or under an agreement with DELWP (e.g. road reserves). The *Assessment Guidelines* intend to tighten up the way in which activities occur under the exemption and agreements, such as by prescribing clearing under an exemption must be 'to the minimum extent necessary'.

However, it would be far preferable for government agencies in general not to be exempted, unless there is specific reason to exempt their conduct (e.g. emergency management). Those reasons are often covered by other exemption categories. Where agreements are entered into under the auspices of the Crown land exemption (e.g. with VicRoads), no actions or conduct occurring under them is reviewable or enforceable in the same manner as a person clearing under a planning permit. This is entirely unsatisfactory, as it can exclude government agencies from the same accountability mechanisms (e.g. VCAT review) as ordinary citizens and private landowners face.

⁴ See BBOP Resource Paper: Limits to What can be Offset (2012), www.forest-trends.org/documents/files/doc_3128.pdf

The review foreshadows an ongoing program of work

In the *Outcomes Report*, DELWP foreshadows ongoing work required to improve the management of native vegetation in Victoria. This is a program of work beyond the amendment of new VPPs and new policy guidance (the *Assessment Guidelines*). The issues foreshadowed include some of the most pressing dimensions of native vegetation management including:

- improvement to compliance and enforcement of clearing regulations;
- improvements to monitoring and assessment of native vegetation extent and condition;
- guidance on principles and purposes governing categories of exemption from planning controls; and
- reforms to the administration of the native vegetation offsets system.

While the *Outcomes Report* indicates preference for a ‘co-regulatory’ approach, this appears to be a reassessment of relationships between government actors, such as DELWP and local government. The often crucial role of community groups, environmental organisations, and concerned individual citizens in accountability and in protecting and conserving nature is minimised or absent in this approach. Achievement of strong outcomes in terms of monitoring, compliance, enforcement, and strategic planning will not occur without a prominent role for community and nongovernmental actors. New approaches and institutions are also likely to be required. This is where reform of native vegetation management spills over into the need for wider reforms to biodiversity laws.

The interaction of review of native vegetation clearing controls and reform of the Flora and Fauna Guarantee Act

It has been said that native vegetation clearing controls operating through the planning system are an ‘amber light’ of caution, not a ‘red light’ of prevention or deterrence. Planning often seeks to contend with competing pressures of development and conservation in this context. In the history of using planning to manage the loss of native vegetation and its natural values, these provisions have had to do a great deal of heavy lifting – arguably an unreasonable amount of work in that regard. In significant part this has arisen because of weaknesses in Victoria’s primary biodiversity laws, in particular the *Flora and Fauna Guarantee Act 1988* (‘FFG Act’) and the *Wildlife Act 1975*. The FFG Act is currently being reviewed by the Victorian Government. The progress of that review is at earlier stages than the review of the native vegetation clearing regulations.

Review of the FFG Act provides an opportunity to revise biodiversity management in such a way that key features can effectively work together to strengthen both conservation (nature protection) and ecological restoration. Managing native vegetation in the context of land-use planning (as the planning system does) is one part of the puzzle. The FFG Act can provide other parts:

- effective threatened species conservation, aimed at arresting and turning around trajectories toward extinction;
- landscape-scale protection and restoration; and
- reformed governance and institutions.

There are currently elements of this biodiversity management framework in the native vegetation clearing regulations. For instance, through mapping tools and ‘pathways’ the native vegetation regulations seek to apply ‘precaution’ to management of threatened species and (to a degree) landscapes. But operating through the planning system, with its competing priorities, tends to compromise the nature protection and conservation task.

Given the ongoing pressure on and decline of biodiversity in Victoria, the use of planning to achieve biodiversity gains will not be enough. An effective and reformed FFG Act is also going to be fundamental to arresting and reversing decline, and protecting and restoring healthy ecosystems.

About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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