

Review of the Native Vegetation Clearing Regulations: Consultation Paper

The Department of Environment, Land, Water and Planning (DELWP) recently released its consultation paper on the future direction of native vegetation clearing controls, *Review of the Native Vegetation Clearing Regulations: Consultation Paper* (**'Consultation Paper'**). This release was the culmination of an extended period of the review and engagement between DELWP and various stakeholders, including Environmental Justice Australia (EJA), commencing last year.

The review process was initiated by the incoming ALP Government, subsequent to its election in late 2014, and it is one of a series of reviews currently being undertaken by DELWP on inter-related topics. The other reviews of note concern preparation of a new Biodiversity Strategy, review of the *Flora and Fauna Guarantee Act 1988* ('FFG Act', a key Victorian biodiversity law), and review of the direction of water policy. Other than the FFG Act review, consultation documents have been released on all of these topics.

Before providing an overview of the native vegetation clearing regulations, it is worth making brief remarks on the links between the above documents. First of all, there is a linked timetable between these policy reviews, with the intention that much of the work on them is completed this year and, where necessary, legislative or regulatory reform is enacted later this year or early next year. Secondly, these processes seek to achieve a complex task – coordinating law and policy changes across these various instruments with a view to creating coherent and effective outcomes. Thirdly, documents such as the Biodiversity Strategy are 'high level' expressions of government preferences and intentions, whereas proposed changes to the native vegetation clearing regulations or the FFG Act are considerably more practical and concrete, as they will lead to legally binding tools and outcomes.

Native vegetation clearing regulations

Legal controls on the clearing of native vegetation operate under Victoria's planning system, through regulatory instruments called Victorian Planning Provisions. The key provision is contained in clause 52.17 of the Victorian Planning Scheme.¹ First introduced into planning regulations in 1989, a second version of these rules was produced in 2002 and guided by *Victoria's Native Vegetation Management – A Framework for Action*. This scheme was replaced in late 2014 by the current policy and accompanying planning provisions (regulatory instrument) referred as *Permitted Clearing of Native Vegetation – Biodiversity Assessment Guidelines* ('Permitted Clearing Guidelines').

¹ The general policy framework for biodiversity contained in VPP, cl 12.01, as well as an associated clause triggering the requirement for a permit to remove native vegetation (cl 52.16) and referral provisions (cl 66.02), are also within the scope of the review: see Consultation Paper, 2

EJA was a strong critic of the Permitted Clearing Guidelines approach.² Some of our central criticism included:

- The narrowed focus on protection, in effect, of rare and threatened species habitat values, rather than on native vegetation generally and broader land protection, aesthetic and social, and water quality values.
- Greater emphasis on clearing and offsetting native vegetation rather than avoiding its removal.
- Removal of 'like-for-like' criteria in the relationship between vegetation types cleared and where offsetting (compensatory actions) were to occur.
- Substantial reliance on modelling and mapping to determine decision-making pathways and removal of requirements for on-ground assessment of native vegetation proposed for removal. That mapping was shown to contain significant shortcomings in its application to this task.
- Weaknesses in the administration of native vegetation offsetting, including considerable uncertainty as to the performance of offset sites.
- Extensive provision for exemption from the clearing regulation, including by public authorities who have tended to operate under separate rules.
- Lack of accountability and monitoring of the performance of the regulatory system and continued problems with enforcement of the clearing controls.

EJA welcomed the Labor Government's commitment to review the Permitted Clearing Guidelines and improve the regulatory system. It is our view that, for the purpose of consistency, it would be preferable to include regulatory controls over the clearing of native vegetation in broad-based biodiversity or 'natural resources management' legislation. However, that has not been the Government's approach at this point in time.

The approach of the Consultation Paper

The approach of the Consultation Paper is to consider six key elements of the current policy and regulatory framework for the clearing of native vegetation. These elements are:

- general policy;
- the permit process and decision-making;
- biodiversity 'information tools', including mapping and scoring of values associated with native vegetation;
- offsets delivery;
- exemptions;
- compliance and enforcement.

There is a chapter in the Consultation Paper dedicated to each one of these discussion points.

Each chapter contains commentary on the main features under that topic and key issues identified, including in the course of the stakeholder discussions. A series of 'proposed improvements' is then articulated, including a rationale for them. In essence, each of these proposed improvements is a point of discussion, albeit a quite narrowly framed and directed theme for reform.

The state of biodiversity and native vegetation in Victoria – are clearing regulations still relevant?

Native vegetation across Victoria has been extensively cleared over nearly two centuries of European occupation and much of what remains is now contained on public lands, including national parks and other conservation reserves. Broad-scale clearing of native vegetation largely ended in the 1970s. The focus of native vegetation clearing controls, since their inception, has mainly been on reducing incremental losses and degradation of habitat quality or condition. Native vegetation clearing regulations are principally of importance to management of native vegetation on private land, although they do touch on public land management in some circumstances such as through Crown land exemptions.

² EDO Victoria's *New Native Vegetation Clearing Laws* (Briefing Paper, 2014), https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/native_vegetation_changes_briefing_2014.pdf; EDO *What's the risk? Maps, modelling and realities in the new native vegetation clearing rules* (2013), <https://envirojustice.org.au/blog/what%E2%80%99s-the-risk-maps-modeling-and-realities-in-the-new-native-vegetation-clearing-rules>

The most recent Victorian *State of the Environment Report* of 2013 found that incremental native vegetation losses and degradation are still occurring.³ The problem is greater on private land than public land.⁴ Habitat damage and loss, including through native vegetation decline, remains one of the most significant threatening processes for flora and fauna in Victoria.⁵ Fragmentation of habitat and vulnerabilities associated with this phenomenon is greatest on private land.⁶ Losses of native vegetation in circumstances where native vegetation clearing regulations do not apply (such as through exemptions) can be significant, such as in logging operations, post-fire 'salvage', bushfire management, and clearing on Crown lands such as roadsides.⁷

These findings indicate that regulatory controls on the clearing of native vegetation remain important to biodiversity management in Victoria.

The general direction of policy and regulation proposed

There is a degree of continuity between the overall approach contained in the Consultation Paper and the current Permitted Clearing Guidelines. Some of more significant elements of this continuity include:

- A primary focus on the biodiversity values of native vegetation, for which rare and threatened species habitat is the key proxy, as distinct from other native vegetation values.
- Continued emphasis on the use of online mapping and modelling as a means of assessment and to inform decision-making and drive the regulatory arrangements in practice.
- Continued emphasis on complex and opaque biodiversity scoring methods (focusing on rare and threatened species habitat) developed for the existing Permitted Clearing Guidelines policy and a proliferation of quantitative tools (for instance, habitat importance scores, strategic biodiversity scores, general biodiversity equivalence units, specific biodiversity equivalence units).
- A continued strong emphasis on offsetting as a technique for native vegetation management, in the absence of compelling evidence that offsetting is sufficient in practice or in principle to achieve native vegetation management objectives. Use of 'market' schemes for offset delivery is also a central feature of existing and proposed arrangements.
- Extensive categories of exemption from the application of the permit requirements under the regulations.

However, this is qualified by incremental improvements and shifts on some topics, such as:

- Generally, that the regulatory system should be informed by principles of good regulation including effectiveness, transparency, consistency, accountability, and decisions subject to appeal.
- Obligations to first avoid clearing in all cases.
- Reducing thresholds for those decisions in which applications for a permit to clear can proceed through a fast-tracked 'lower assessment' pathway.
- Requiring greater justification and principled bases for exemptions from requirements to obtain a permit.
- Greater scope for the use of 'on-ground' information and assessments.
- Development of higher, more transparent standards to the delivery of offsets.
- Recognition of the need for far greater effort and effectiveness in compliance and enforcement in native vegetation management, including support to Councils where resources can be highly uneven.

Overall, regulation of native vegetation clearing would remain complex. The system is not ultimately intended to prohibit clearing but to regulate it – an approach once referred to as an 'amber light of caution' not a 'red light' to clearing,⁸ even where threatened species are concerned. The proposals contained in the Paper suggest improvements in policy, and tools intended to give effect to the policy, which may better protect native vegetation (and habitat associated with it) and deliver compensatory measures (offsets). However, those proposals are frequently drafted in broad or indeterminate language. Consequently, there is often uncertainty about what is precisely proposed in the 'proposed improvements' or what the effect of the proposal might be in practice. Arguably, then, there is scope for interested groups and individuals not only to query the intent or effect of some of the proposals but, more positively, to propose improvements or alternatives to DELWP suggestions or indeed to propose entirely different improvements which would allow these planning provisions to better safeguard native vegetation.

³ Commissioner for Environmental Sustainability *State of the Environment Report* (2013), 88-96

⁴ *Ibid*, 92

⁵ *Ibid*, 86-87

⁶ *Ibid*, 92

⁷ *Ibid*, 88-89, 92, 95-97

⁸ See *Reeve v Hume CC (Red Dot)* [2009] VCAT 65 (16 January 2009), [57]

Specific proposals

Policy – Chapter 1 (pages 12-17)

Proposal 1 provides the main change in this Chapter, restating that avoiding native vegetation clearing is a primary objective of the regulations. While an improvement, the proposal also contains the ambivalent proviso that clearing should be avoided ‘where possible’. Ambivalence in the language of proposals recurs throughout the document.

Other proposals under this Chapter include:

- Consolidation of policy guidance (**proposal 2**). A key focus of this proposal would appear to be the provision of greater detail to Council decision-makers on how considerations other than biodiversity (for example, land protection functions or landscape considerations) should be considered. While useful, this proposal does not intend that the multiple values of native vegetation – in addition to biodiversity/habitat values – are given comparable weight in the regulatory and decision-making process. This policy approach is reflected in the practical machinery of the regulatory system – in particular, the valuation of native vegetation through scoring continues to be limited to proxies for habitat values and there are no scoring methods for other values (for example, water quality, erosion or salinity control, amenity).
- Preparing guidance on the interactions between native vegetation management and strategic planning by Councils (**proposal 3**).
- Improving monitoring and reporting on the performance of the native vegetation management system (**proposal 4**). This is an essential improvement to supply key information on the regulatory system. Categories of monitoring and reporting are included in the proposal. Further points of improvement should include monitoring and reporting on the extent and condition of native vegetation per se and fixed timeframes for reporting and review.

Permit and decision-making – Chapter 2 (pages 18-25)

Key proposed changes in this chapter include:

- **Proposal (5)** to lower the ‘extent’ threshold for assessing applications as ‘low risk’ (i.e. in low risk mapped areas) to 0.5 hectares or 7 scattered trees. This would mean, for instance, wider use of on-ground assessments in ‘low risk’ areas and possibly less use of ‘fast-tracked’ decisions based solely on mapped/modelled information.
- A shift (**proposal 9**) from 3 ‘risk-based’ pathways to 2 pathways, effectively merging categories of moderate and high risk assessments. This moves further away from multiple categories of classification of native vegetation according to value, as occurred for instance under the 2002–2013 Native Vegetation Framework (‘conservation significance’). EJA argued for more, not fewer, categories, to capture the more complex nature of values (as conservation significance had attempted to do), including a ‘no go’ category under which clearing would not be permitted.
- Policy (**proposal 11**) that would allow Council decision-makers to take into account locally important biodiversity in decision-making. The current primary focus is on native vegetation of state-wide significance.
- Other technical and administrative changes, such as requirements for a statement on avoidance of clearing and an offsetting strategy for all applications (**proposals 7 and 8**); updating mapping of habitat to include finer mapping of highly localised habitats (**proposal 6**); and clearer guidance to Councils on when applications can be refused (**proposal 10**).

Biodiversity information tools and offset rules – Chapter 3 (pages 26-31)

This chapter includes proposals to contend with the criticisms associated with substantial reliance on mapped and modelled information including:

- Supplementing mapped and modelled data with ‘ground-truthed’ information (**proposal 12**). This proposal contains important provisos, notably that use of such on-ground habitat information would be permissive only (not obligatory), the ‘circumstance’ in which this would be permitted is unclear, and this information would be intended to supplement maps used for ‘higher’ pathway proposals (‘habitat importance maps’) not all mapping or applications.
- Improving information and transparency of the mapping platforms and tools (**proposal 13**).
- Using more detailed information on habitat for dispersed species in decision-making and offset rules (**proposal 14**). This would allow, for instance, greater recognition of ecological processes such as breeding or roosting sites, in the information used in decision-making. It is unclear how (other than in modifications to mapping tools) these values would be included in decision-making (for example, whether obligations to protect hollow-bearing trees would be included in decision-making rules).
- Improve the values of scattered trees in decision-making by requiring recognition of the value of discrete trees (**proposal 15**). This proposal is effectively a retreat for current practices to deem values for scattered old trees, such as remnant paddock trees.

Offsets delivery – Chapter 4 (pages 32-35)

As with the current Permitted Clearing Guidelines, there is considerable emphasis on the role of offsets and market mechanisms (Native Vegetation Credit Register) to deliver offsets in these proposals. As noted, the tenor of both is toward a permissive approach to approving native vegetation clearing, if not a presumption in practice of approval. Interestingly, in survey data collected for the Review the argument is made that limits to offsets availability and cost are factors in constraining clearing. Among the **proposals (17)** actions and collaborations to further expand the offsets market are included. Significantly, the basic structures of offsets arrangements are intended to be continued – for instance, no return to ‘like-for-like’ criteria for most offsets (general biodiversity offsets) is proposed. Other proposals include:

- Increasing the transparency and use of the Native Vegetation Credit Register (**proposal 16**), which is the main administrative tool for transactions involving offsets, such as by increasing the information on the Register and making it available to Councils.
- Using the credit register to establish and impose standards on offset delivery and management (**proposal 18**). This proposal is significant partly because of lack of confidence and knowledge about delivery of offsets especially under agreements made between Councils and land owners under section 173 of the *Planning and Environment Act 1987*. The use of the Credit Register to set standards in this manner is a positive improvement. It parallels an approach that would have been implemented through native vegetation offsets legislation before the last Parliament but which was defeated.
- Including standards for revegetation to encourage preferred revegetation approaches, such as revegetating sites with scattered trees or with connectivity to other areas of remnant vegetation (**proposal 19**). This is generally a desirable approach, although the precise language and status of standards will be an important factor in their effectiveness.
- Establish rules (‘framework’) for offsetting on Crown land (**proposal 20**). If widely used this could be particularly problematic if it comes to be viewed as a means of funding public lands conservation, rather than this funding occurring through the State budget.

Exemptions – Chapter 5 (pages 36-38)

Native vegetation loss occurring outside the ‘permitted clearing’ system by way of exemptions from permit requirements is more extensive than that occurring under permit. Hence exemptions are a major contributor to legal clearing now. The central approach to the issue of exemptions under these proposals is to refine how they are governed, not to reduce, modify or minimise the categories of exemption. The proposals include:

- Establishing a set of purposes and principles to govern exemptions, in order to better rationalise and justify them (**proposal 21**). This is a welcome, although not fundamental, modification of the exemption categories.
- Clarify ambiguous language in some exemptions (**proposal 22**).
- Provide better guidance on application of exemptions, especially to councils (**proposal 23**).
- Create a new approach to the operation and construction of agreements referred to in exemptions that allows public authorities, in particular, to clear native vegetation outside the permitting system (**proposal 24**). This is probably the major proposal in this group, not least because it is speculated that native vegetation clearing by public authorities is the single largest contributor to clearing in the State. Currently, clearing under agreements (for example, Memoranda of Understanding between DELWP and an authority) is an obscure process, effectively producing a series of parallel clearing rules to those in cl 52.17 and the Permitted Clearing Guidelines. It may be that in some circumstances agreements provide for higher standards of habitat protection than apply under the Permitted Clearing Guidelines. It is likely other agreements provide for ‘fast-tracked’, expedient rules to facilitate clearing. The development of rules governing agreements should provide clear justification for alternative arrangements and application of the highest possible standards of habitat protection given the particular contingencies under the agreement is deemed necessary.

Compliance and enforcement – Chapter 6 (pages 40-43)

Compliance, monitoring and enforcement are notorious weaknesses in native vegetation clearing regulation (if not in environmental law generally). A considerable proportion of the effort of monitoring and enforcement falls on local government and the resources of this sector to undertake the task are highly variable across the State. Also, it is arguable that enforcement tools under the *Planning and Environment Act 1987* are not sufficient to the task – for instance, the levels of fines or penalties available to regulators are insufficient to deter illegal clearing. There are constraints, then, in the legislative scheme in which native vegetation management operates. This is recognised in **proposal 29** for example (‘review the overarching compliance and enforcement framework’). The proposals in this Chapter are high level and their delivery or effectiveness uncertain. They include:

- Preparing a compliance and enforcement strategy (**proposal 25**). This is a desirable proposal although its actual meaning and effect is uncertain at this stage.

- Provide guidance and training on enforcement to Councils and ‘third parties’ (this might include community groups) (**proposal 26**). Again, this is a good proposal in principle but quite general. More specific measures such as resources to retain expertise or mount enforcement actions (for example, establishing an Environmental Litigation Fund from which community groups could obtain resources) would be useful.
- Greater information gathering and knowledge of illegal clearing and non-compliance (**proposal 27**), with a view to for instance shifting norms and practices around native vegetation management.
- ‘Co-regulatory support’ (**proposal 28**). This would appear to propose greater coordination between DELWP and councils, other agencies and the Commonwealth, which is hard to disagree with in principle. To the extent greater resources and assistance are directed to local government areas with fewer resources and greater responsibilities (for example, rural Shires), this is to be welcomed.

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.

For further information on this briefing paper, please contact:

Environmental Justice Australia

T: 03 8341 3100

E: admin@envirojustice.org.au

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Publication date: 7 April 2015