

Inquiry to examine Planning and Environment Act

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Terms of Reference Addressed:

1. The high cost of housing in the context of the planning system
2. Environmental sustainability and vegetation protection within the planning framework

2. Housing

(1) the high cost of housing in the context of the planning system, including but not limited to:

- (a) provision of social housing;
- (b) access for first home buyers;
- (c) the cost of rental accommodation;
- (d) population policy, state and local;
- (e) factors encouraging housing as an investment vehicle;
- (f) mandatory affordable housing in new housing developments;

Policy documents

Consider as relevant:

- *Homes for Victorians - Affordability, Access and Choice* (Victorian Government, 2017)
- *Apartment Design Guidelines for Victoria* (Department of Environment, Land, Water and Planning, 2017)

Clause 16

“Planning should provide for housing diversity, and ensure the efficient provision of supporting infrastructure.

Planning should ensure the long term sustainability of new housing, including access to services, walkability to activity centres, public transport, schools and open space.

Planning for housing should include the provision of land for affordable housing”.

16.01-1S Housing supply – Strategies

- *Ensure that an appropriate quantity, quality and type of housing is provided, including aged care facilities and other housing suitable for older people, supported accommodation for people with disability, rooming houses, student accommodation and social housing.*
- *Increase the proportion of housing in designated locations in established urban areas (including under-utilised urban land) and **reduce the share of new dwellings in greenfield, fringe and dispersed development areas.***

The underlined goal is being completely ignored as explained in my submission about native vegetation removal.

- *Encourage higher density housing development on sites that are well located in relation to jobs, services and public transport.*

This strategy is failing because the majority of new high-density inner-city development, i.e. apartment buildings is substandard, e.g. flammable cladding, no windows in bedrooms, no balconies etc. These buildings will soon become slums.

- *Identify opportunities for increased residential densities to help consolidate urban areas.*

This objective is not being implemented in accordance with a strategic plan. Developers decide where to build higher-density housing. The result is piecemeal, disorganised and distressing to existing residents. Hence the formation of Save Our Suburbs in the 1990s and the many VCAT appeals lodged by affected residents. There needs to be meaningful consultation as to the best locations for high density development.

- *Facilitate diverse housing that offers choice and meets changing household needs by widening housing diversity through a mix of housing types.*

This strategy is not being implemented in any meaningful way. Hence, rows and rows of wall-to-wall badly-designed houses all the same.

- *Encourage the development of well-designed housing that: Provides a high level of internal and external amenity. Incorporates universal design and adaptable internal dwelling design.*
- *Support opportunities for a range of income groups to choose housing in well-serviced locations*

The planning scheme's failure to implement these objectives is an environmental and social disaster. Australia has the largest houses in the world. House lots have halved on average from 800 sqm to 400 sqm. The ability to build right to the boundaries of these smaller lots has significantly expanded hard surfaces in residential areas. This, in addition to dark roofs, no eaves and minimal insulation means these houses increase greenhouse gas emissions (GHGs) due to the need for year-round air-conditioning.

The ABC article cited states: *"There are currently no controls in Clayton to regulate the removal of trees on private land, and some residents are noticing gardens being eaten up by this demand for higher-density housing."*¹ The loss of trees, gardens and grass lawns raises ambient temperatures from 4 to 10 degrees, which is exacerbating the heating effects of climate change. It is not just increased inner-city density but the conversion of thousands of hectares of farmland to housing which is adding to GHGs and pushing forecast temperature rises under climate change scenarios to the extreme.² This is not only an environmental issue but a human health concern. It is also an issue of equity: disadvantaged and new suburbs have less vegetation, poorly-designed houses and suburbs so experience higher temperatures. Hard surfaces also produce more stormwater runoff, which often contributes to flooding during storm events, also predicted to be more intense. By excluding eaves and insulation etc, developers transfer costs to the buyer who then pay high electricity costs to heat and cool the house. Note: ResCode standards are not mandatory so the avaricious developer is not required to implement them. Responsible authorities –some in cahoots with developers³ – have turned a blind eye to transgressions.

¹ <https://www.abc.net.au/news/2021-11-11/townhouses-development-heat-island-effect-australian-suburbs/100588334>;
<https://www.abc.net.au/news/2021-03-11/australians-face-unliveable-cities-less-greenspace-heat/13231068>.

² ABC RN Blueprint for Living, 8 Jan 2022, *The Australian nightmare: western Sydney's urban heat*.

³ Example: <https://www.theage.com.au/politics/victoria/i-ve-got-dirt-andrews-government-braces-as-casey-corruption-hearings-resume-20200229-p545li.html>.

The planning policy failure is obvious and is producing cities and towns that are rapidly becoming environmental and social disasters.

d) Population Policy, State and Local

Melbourne 2030 Planning for Sustainable Growth [the Plan] was launched with much fanfare in October 2002. Don't be downhearted if you haven't heard of it because it has completely dropped off the planning radar, not mentioned in decades. Its vision was for population growth from 3.4 million to 4 to 4.65 approx. by 2030 and a plan to maintain Melbourne's "most liveable city" reputation.

*"To achieve sustainability, programs must be in place to minimise the 'ecological footprint' of the city, and to ensure that the inevitable growth in infrastructure matches demand yet does not damage the liveability for which metropolitan Melbourne is widely renowned."*⁴

However, the Commonwealth's massive immigration policy completely derailed the Plan. Melbourne's population is now over 5 million, nine years before 2030. The Plan has 9 policy directions promising "better planning careful management", a more compact, prosperous, fairer city, better growth management, better transport links including regional networks—above all: *great place to be*". Well, I don't have to tell you how well that worked out.

(e) Factors Encouraging Housing as an Investment Vehicle

Excessive reliance on immigration to "grow" the economy, taxation breaks e.g. negative gearing and allowing overseas interests to invest in residential property has directly led to escalating house and prices, rapid residential subdivision of peri-urban farming zone land, huge amounts of tree clearance with the result that Melbourne is no longer "Marvellous" having lost its "most liveable city" title in 2018.⁵

Homes for Victorians - Affordability, Access and Choice (Victorian Government, 2017)

None of the initiatives in this policy has increased home affordability. Abolishing stamp duty, grants for first-home buyers and subdividing more farmland for housing has not reduced prices because developers simply add the rebates to their prices. Nor has fostering houses as investments, not homes, reduced rental costs or availability.

The Housing Commission Victoria (1938-1984) was established to address the post-war housing shortage. The Commission built thousands of low rent houses and flats in Melbourne and in country towns for low-income families. Later, many of these families were able to buy these homes. While the Brutalist architecture of the concrete high-rise apartment towers in inner Melbourne broadcasts their residents' disadvantage, they are set in pleasant open parklike space and are close to social amenities, unlike housing in the outer suburbs. If only they had balconies to provide open air access and shade from the fierce west summer sun.

The Commission houses were small by today's standards—about 112 sqm. A small living room, kitchen, one bathroom and 2 or 3 small bedrooms. Children slept in bunk beds in one room. Yes,

⁴ Melbourne 2030, p15. <https://www.planning.vic.gov.au/policy-and-strategy/planning-for-melbourne/melbournes-strategic-planning-history/melbourne-2030-planning-for-sustainable-growth>.

⁵ [Melbourne loses most liveable city title to Vienna in Economist Intelligence Unit rankings - ABC News](#)

they were cramped but they were affordable. And, they did have roomy gardens, room for the Hills hoist, a vegetable garden and even chickens.⁶ However, some outcomes were not as rosy. The Government's urgent slum reclamation program during the 1960s-70s saw "*the displacement of low-income residents, living in boarding houses, cheap rental accommodation and public housing*". Many inner-Melbourne houses were demolished and their residents resettled elsewhere.⁷ Nevertheless, the policy did succeed where current policy has failed.

The current initiative, *Big Housing Build*, appears to replicate the former Housing Commission program. However, the plan is not without criticism.⁸ Apart from the Ministerial powers to exempt the need for planning permits, which is controversial in itself, whether the scheme will yield housing that low-income citizens can afford is debatable because, RMIT asserts, the VPPs define "*affordable as prices pegged at 80% of market rates, which in Melbourne is not affordable*".⁹ They also argued that the proposed \$5.3 billion could be better spent to increase the yield.¹⁰ The chronic and increasing number of homeless people in a wealthy Australia is shameful. The only way to solve this problem is for the government to fund special needs cheap and accessible housing in various forms, e.g. houses, apartments, units, group homes—not caravans in country towns and doss houses in the city. Every development must be required to allot a specified percentage to social housing, in the same way as the public open space contribution.

Recommendation: Amend the VPPs to facilitate strategic planning which is cleverly designed to be environmentally and socially sustainable, "*heat smart*", close to social amenities and avoids loss of farmland and native vegetation. This means well-designed high-rise buildings that occupy only 33%, of land. not 80%, as now, with 66% communal open space that provide cooling, airflow and recreation and will be liveable in future decades.¹¹ There are many examples of "green" development around the world.

Recommendation: Legislate a Social Housing Contribution as part of developer contributions.

Recommendation: Provide incentives for the construction of smaller, cleverly-designed houses.¹² Withdraw tax breaks and grants for large houses.

Conclusion

Economic growth founded on stimulating investment in residential property is simply not sustainable. It is patently obvious that facilitating housing as an investment has only served to increase socioeconomic and intergenerational inequity as wealth is transferred to the already wealthy. The result is more poverty, more homelessness and more discontent, which is most politically undesirable. The planning scheme cannot remedy this crisis alone. It requires a national strategy. Some ideas include:

- Limiting the number of properties held taking advantage of negative gearing.

⁶ For more information: https://en.wikipedia.org/wiki/Housing_CommissionofVictoria.

⁷ Ibid. Footnote 35: Bruce Pennay (2006). *Making a City in the Country: The Albury-Wodonga National Growth Centre*. UNSW Press. ISBN 9780868409443. Retrieved 27 July 2008.

⁸ RMIT, November 2020, *Does the Big Housing Build address the housing crisis in Victoria?*

⁹ Ibid., p4.

¹⁰ Ibid., p5.

¹¹ Op cit. ABC RN Blueprint for Living.

¹² There are some excellent examples on programs such as *Grand Designs* (ABC TV).

- Allow tax deductions for the interest portion of mortgages for owner-occupied homes as, for example, in Canada.
- Legislate for long-term rental contracts, for example, in Japan and Europe. This way people could treat their rented property as a permanent home, adding personal improvements, having pets etc., which would induce a sense of pride in caring for the property.
- Prohibit non-citizens from buying residential property
- Curb population growth

2. Environmental sustainability and vegetation protection within the planning framework

The stated purpose of the Planning and Environment Act 1987 (PEA) is “to establish a framework for planning the use, development and protection of land in Victoria (PEA S4A). To this end, the Victoria Planning Provisions (VPPs) [aim to] “assist in providing a consistent and co-ordinated framework for planning schemes in Victoria [whereby a planning scheme]:

(a) must seek to further the objectives of planning in Victoria within the area covered by the scheme; and

(b) may make any provision which relates to the use, development, protection or conservation of any land in the area” (PEA S6).

The Act defines “conservation” as including the ‘preservation, maintenance, sustainable use, and restoration of the natural and cultural environment’; and “land” to include “(a) building and other structures permanently fixed to land, (b) land covered with water; and (c) any estate, interest, easement, servitude, privilege or right in or over land”, which generally accords with the English Law definition¹³. Other than “land covered with water”, the term “land” is wholly concerned with physical (manmade) structures and legal instruments. That being so, by extrapolation, the “conservation of land” has nothing to do with the concept of land as part of the environment and its values, such as natural assets, landscape, wildlife habitat, or the spiritual concept of “Country” held by Traditional Owners. This definition does not acknowledge that “land” is intrinsic to its ecological functions, one of which is to provide habitat for other species.

Environmental sustainability

Despite policy good intentions, environmental sustainability remains a subordinate consideration that is often disregarded. The triple bottom line, that is, economic, social and ecological “balance”, an arbitrary concept borrowed from business accounting, is an hierarchical proposition: never a level playing field. The VPPs priority is to facilitate development of “land”. As stated above: the “conservation of land” as defined in the Act privileges human activities over environmental sustainability. and, as even a cursory analysis of planning permit approvals shows, ecological assets are generally sacrificed.

State Planning Policy

VPP 12 Environment and Landscape Values

*“Planning **must** implement environmental principles for ecologically sustainable development [ESD] that have been established by international and national agreements”.*

¹³See, for example, Black law dictionary 7th edition defines **land** as “An immovable and indestructible three dimensional areas consisting of a portion of the earth’s surface the space above and below the surface and everything growing on or permanently affixed to the land”.

The National Strategy for Ecologically Sustainable Development [ESD] describes ESD as “Development aims to meet the needs of Australians today while conserving our ecosystems for the benefit of future generations.”¹⁴ Or, as the 1992 Overview stated “to improve the quality of life both now and in the future, in a way that maintains ecological processes on which life depends.”¹⁵

Principles are normally applied, so just how they are to be *implemented* is unclear. Nor do the VPPs offer any directions other than:

*“Planning **should** protect, restore and enhance sites and features of nature conservation, biodiversity, geological or landscape value.”* This objective must be mandatory.

Although all levels of government have signed up to the Precautionary Principle—a key aspect of ESD—it is missing from planning decisions, perhaps because it fails to get a mention in any of the 1028 pages of the VPPs.

VPP 12.01-1S *“To assist the protection and conservation of Victoria’s biodiversity...Ensure that decision making takes into account the impacts of land use and development on Victoria’s biodiversity, including consideration of: cumulative impacts; habitat fragmentation; the spread of invasive pest species into natural ecosystems.”*

This clause also requires that the policy document *Protecting Victoria’s Environment – Biodiversity 2037* be considered “*as relevant*”. Due to its ambiguity, it is unclear whether “*as relevant*” means “when relevant” or “because it is relevant”. Nevertheless, in all the VCAT cases I have read, I found no mention of this key policy document, especially its key acknowledgment that biodiversity not only “**has a right to exist**” but:

“Native plants and animals have an intrinsic right to exist, thrive and flourish. Multiple life forms contribute to biodiversity and have significant intrinsic value. Victorians have a duty to protect biodiversity, regardless of whether it provides tangible benefits to humans”.¹⁶

Moreover, the non-prescriptive language of the VPPs affords decision-makers considerable flexibility which means that protecting and/or enhancing geological and landscape values, ecosystems and biodiversity are conditional, not mandatory, objectives. In any event, principles are not Law and policy is a guide, not a control.¹⁷ As such, they are made to be broken. Moreover, protection and conservation generally applies to “high-value” biodiversity “*including important habitat for Victoria’s flora and fauna and other strategically valuable biodiversity sites*” (12.01). It is no surprise that nearly all the native vegetation to be removed, especially in urban and peri-urban areas, is never found to be “high value”. These “less important” sites are largely unprotected, even though they will still contain valuable habitat for other species and contribute to the sum total of Victoria’s native vegetation.¹⁸

¹⁴ National Strategy for Ecologically Sustainable Development

¹⁵ Dept of the Parliamentary Library, *An Overview of Ecologically Sustainable Development Processes in Australia 1990-1992*.

¹⁶ *Protecting Victoria’s Environment: Biodiversity 2037*, Department of Environment, Land, Water and Planning 2017, p6.

¹⁷ Example: *Petersson v Nillumbik SC [2021] VCAT 696* (29 June 2021), at 29.

¹⁸ *Skiba v Nillumbik SC [2021] VCAT 733* (8 July 2021) at 7.

Particular Provisions: Clause 52.17 Native Vegetation

Local government authorities are responsible for most of the planning decisions that affect their municipality. This work requires them to consider potential impacts on biodiversity, such as destroying native vegetation. Decisions are made in accordance with state-wide planning and local planning provisions. Clause 12.01-1S includes the consideration of cumulative impacts, However, planning proposals are decided on a case-by-case basis, so cumulative impacts are usually disregarded or downplayed because each application is treated in isolation.¹⁹

In *Hines v Cardinia*, Senior member, Jeannette Rickards found “*the minimum number of trees [163] proposed to be removed to accommodate the proposed dwelling and create defensible space... does not result in unacceptable biodiversity outcomes.*”²⁰ That the loss of 163 trees is acceptable is staggering but epitomises the dilemma. Like so many others, this application was to construct a dwelling in an area of bushfire risk, so the trees had to go.

In *Long v Yarra Ranges*, member Michael Nelthorpe found that issues of cumulative loss are best addressed at the strategic level”, i.e., through the application of relevant Zones and Overlays.”²¹ Very ironic, given a review of VCAT cases in 2021 and 2020 alone confirms that development rights in residential zones takes priority over native vegetation, even if the zone is a Rural Conservation (RCZ) and/or is covered by an Environmental (ESO), and/or Significant Landscape (SLO) and/or a Bushfire Management (BMO) overlay.²²

Therefore, as the *Parliamentary Inquiry into Ecosystems Decline in Victoria [Parliamentary Inquiry]* heard, “cumulative impacts typically fall through the cracks”²³ Bit by bit, habitat is whittled away. It is biodiversity and ecosystems death by a thousand cuts.

Victorian Civil and Administrative Tribunal (VCAT)

Numerous VCAT appeals have overturned councils’ refusals to grant permits to clear native vegetation. The general rationale goes something like that expressed by Member Harty in *Petersson v Nillimbik SC*: “*The policy discouraging residential development of small lots in the Nillumbik Green Wedge is meritorious, however, it is policy, not a control (my emphasis). Hence it provides guidance amongst a range of other policies in the planning scheme. I am required to integrate the range of policies, zone purposes, requirements, decision guidelines, overlay purposes and other decision guidelines of the planning scheme in forming a view with respect to achieving a net community benefit.*”²⁴ It is extraordinary that Member Harty rejected the “meritorious” local planning policy and dismissed the overlays—Rural Conservation (RCZ), ESO, BMO. Nor did he explain how his “view” that destroying nine trees to benefit one landowner achieved net community benefit for others, or how his decision met the National ESD goal of “*conserving our ecosystems for the benefit of future generations*”.

It should not be forgotten that VCAT is an unelected tribunal, answerable only to the Supreme Court on an error of law and the Minister for Planning who may exercise his “call-in” powers

¹⁹ *Matuschka v Glenelg SC* [2020] VCAT 1452 (23 December 2020), at 224. *Hines*

²⁰ *Hines v Cardinia SC* [2021] VCAT 179 (5 March 2021), at 37.

²¹ *Long v Yarra Ranges SC* [2021] VCAT 1372 (16 November 2021), at 35.

²² Example: *Hines v Cardinia SC* [2021] VCAT 179 (5 March 2021).

²³ Professor Lee Godden, Director, Centre for Resources, Energy and Environmental Law, University of Melbourne, Public hearing, Melbourne, 20 April 2021, *Transcript of evidence*, p. 24 [cited in *Parliamentary Inquiry into Ecosystems in Victoria*, p63/780.

²⁴ *Petersson v Nillumbik SC* [2021] VCAT 696 (29 June 2021).

under Section 97 of the PEA. In the absence of mandatory rules, decisions very much rest on the member's individual "view", i.e. opinion, as to which requirements take precedence. This is not the member's fault. Although the VPPs are described as hierarchical descending from state to local policy, the many objectives and strategies are themselves not prioritised, and often conflict, especially when it comes to development versus environment. The member must reach a compromise that delivers both net community benefit, for present and future generations **and** ecologically sustainable development.²⁵ Outcomes should be acceptable, not ideal.²⁶ For applicants and objectors alike, it is fair to say that the planning process is very much a game of chance. This is not democratic. But the biggest loser is the environment.

On a more positive note, more recently, VCAT has sometimes taken a firmer stand when it comes to protecting native vegetation. For example:

In *Watermark v Mornington Peninsula SC*, VCAT upheld council's refusal to grant a permit for a development in the Tootgarook wetlands because it disagreed with the applicant's case that "*the removal of all ecological values on the land to be developed is acceptable because the loss of native vegetation and habitat can be offset on the balance of the land that will be protected from development. This fails to address the first question, being why the vegetation should be lost*" (my emphasis). But, in this case, the Environment Significant Overlay over the wetlands strengthened refusal.²⁷

Likewise, *Reeve v Hume CC*, which dealt with Residential 1 Zone [Rz1] subdivision of land containing native vegetation with "*high and very high conservation significance and other significant biodiversity values*". Here Member Potts concluded that due to "*the various amendments to Clause 52.17, there has been a shift in the priority to be given to native vegetation values and the outcomes being sought by state policy, particularly the NVMF*".²⁸ *The shift is toward the conservation of native vegetation and first two steps of avoiding and minimising losses, but more particularly to avoiding losses.* [my emphasis]. *In recognising such a shift, the starting point in contemplating a subdivision (or development) proposal should be to ask the question why such vegetation should be lost rather than how can the loss be offset. The proper approach is to consider first the native vegetation's conservation significance and any associated biodiversity values*". Nor, he added, should the RZ1 zoning afford any automatic expectation that development can, or should, occur when "vegetation loss with "all its subsequent losses" will result."²⁹ However, he did not mention the "*relevant*" *Biodiversity 2037* policy.

Even so, many permit applications do not get to VCAT. Due to the case-by case assessment, there is no consistency in either VCAT's or councils' decisions. Councils, the responsible authorities in most cases, are keen to facilitate development thinking it adds to rate revenue. Given 67 per cent of Victoria is private land, private landholders play a huge role in causing and stopping ecosystem decline.³⁰ "The Victorian Environmental Assessment Council states that the vegetation on private land provides a habitat for at least 30 per cent of Victoria's threatened species populations."³¹

²⁵ See, for example, *Foster v Mornington Peninsula SC* [2021] VCAT 285 (2 March 2021) and *Petersson; Skiba v Nillumbik SC* [2021] VCAT 733 (8 July 2021) at 10.

²⁶ *Rozen v Macedon Ranges SC & anor* [2010] VSC 583 is the authority for this proposition.

²⁷ *Watermark Village Pty Ltd v Mornington Peninsula SC* [2016] VCAT 1853 (14 November 2016), at 215.

²⁸ Victorian Native Vegetation Management Framework: A Framework for Action (Department of Natural Resources and Environment 2002).

²⁹ *Reeve v Hume CC* (includes Summary) (Red Dot) [2009] VCAT 65 (16 January 2009, at 85).

³⁰ Parliamentary Inquiry into Ecosystems Decline in Victoria, p327 (403/780).

³¹ VAGO, October 2021, *Protecting Victoria's Biodiversity*, p58-59 (63/79).

Agriculture

Over half of Victoria's land area is used for agriculture. Rural and regional councils need to promote agriculture because it is a prime economic driver. Within the Farming Zone (FZ) agriculture and other land uses are permissible, but, as the member found in *Sporle v Mount Alexander SC [2021] VCAT 1374 (26 November 2021)*, "it is very relevant that the ability to use much of the land for agricultural production and other purposes must take account of the site's physical and biodiversity attributes." Nevertheless, substantial vegetation clearance has been permitted over the years, especially as large-scale agricultural activities have expanded the use of wider and larger machinery and centre irrigation pivots. Many scattered old trees with the hollows so critical for breeding have been destroyed in the process. Their loss is essentially irreversible because any offsets, if successful, will take one hundred years or more to replace them. "The historic scale of primary production, coupled with pressures that farming can exert on the environment, has contributed to declines in biodiversity values. So, conservation and restoration on private land is extremely important."³²

Offsets

The primary goal of the Victorian Native Vegetation Framework published in 2002, is to achieve Net Gain, **a reversal across the entire landscape of the long-term decline in the extent and quality of native vegetation** (my emphasis). In *Villawood (2005)*, a Red Dot case, members Gibson and Baird thought the Net Gain goal "a bold and worthwhile step" but concluded that offsets for vegetation removal in urban areas remains an appropriate remedy.³³ It is clear, however, that there is absolutely no adherence to the Net Gain objective; quite the reverse.

The three steps in the ***Guidelines for the removal, destruction or lopping of native vegetation*** – avoid, minimise, and provide offsets are designed to ensure that there is *no net loss to biodiversity resulting from the removal, destruction or lopping of native vegetation* (12.01-2S). Unfortunately, applications for clearing native vegetation largely focus on offsets. In addition, the exemptions, especially those related to removal for the construction, maintenance and fire protection of buildings inexorably results in ever-diminishing habitat and biodiversity.

The over-reliance on offsets to compensate for vegetation loss³⁴ is motivated by developers' desire for profit. Rather than "avoid and minimise" they leapfrog straight to offsets, the preferred and easier option.³⁵ Unfortunately, as Matt Ruchel, Executive Director of the Victorian National Parks Association, said: "offsetting arrangements are an economist's solution to an environmental problem [where the developer is the winner and] the environment wears the risk".³⁶

Offsets cannot produce Net Gain because they can never replicate mature vegetation lost, especially old trees. Offsets do not replace vegetation in the same place, so the ecological character of that area is compromised, often obliterated, especially in urbanised areas.

Species Offsets

The *Guidelines for the removal, destruction or lopping of native* also provide for species offsets:

³² Ibid., 8.3.1 Policy and Management Approaches, p328 (404/780).

³³ *Villawood Properties v Greater Bendigo CC (Red Dot) [2005] VCAT 2703 (20 December 2005)*, at 7-9.

³⁴ Op cit, p187 (p227/780).

³⁵ Op cit, p181, (p221/780).

³⁶ Op cit., p194 (234/780).

“A species offset is required when the removal of native vegetation has a significant impact on habitat for a rare or threatened species. Species offsets must compensate for the removal of that particular species’ habitat. As such, they must be located within an area known to be habitat for the affected species.”³⁷

What is overlooked is that native vegetation, especially mature trees, provide homes and food for wildlife. Clearing native vegetation destroys those homes and food sources displacing wildlife, reducing breeding rates and even killing them. In addition, while in theory biodiversity offsets sound workable, there is limited evidence that the many offset techniques do work³⁸ because many species do not relocate well. The offset option obliterates the intrinsic rights of other species to “*exist [let alone] thrive and flourish*”.³⁹

For a discussion of offsets implementation, impacts, and problems, please see the *Parliamentary Inquiry* report, Chapter 6 –in fact, please read the whole report. Many submitters, including local governments, criticised the offsets policy. Due to the flexible nature of planning decision-making and the desire for “balance”, compromise is the default. But, “*every compromise results in a degree of environmental damage which cumulatively drives decline*”.⁴⁰

Considering the treatment of native vegetation under the VPPs, the question posed in Reeve and Watermark is critical: when contemplating the need for native vegetation removal, the starting point should be to ask **why** such vegetation should be lost **not how** can the loss be offset.

The *Parliamentary Inquiry* Chair’s Forward states:

“Chapter 6 highlights the devastating impact of habitat loss and fragmentation on native species. It looks at the legacy of land clearing and the ways in which our remaining native vegetation is protected, through Victorian planning schemes and other legislation. We found that there is room for improvement in the native vegetation regulatory framework and how offsetting arrangements are provided for under Commonwealth legislation.”⁴¹ This is putting it very mildly.

The upcoming VAGO report, *Offsetting Native Vegetation Loss on Private Land* will determine how effective the policy of no net loss to biodiversity from permitted clearing really is. I expect the findings will confirm those of the *Parliamentary Inquiry* that, notwithstanding Victoria’s copious environmental legislation, ecosystems decline continues at an alarming rate.

Increased Bushfire Risks

In response to the 2009 fires, DWELP is seeking comment on its discussion paper: *Bushfire Planning made clearer: Options for Victoria’s Planning System*.⁴² Over the next two years, further changes will be made to clarify them.⁴³ The relevant clauses are:

13.02-1s – state policy: direct new or expanding settlements to low-risk locations.

³⁷ Parliamentary Inquiry into Ecosystems Decline in Victoria, p185 (225/780).

³⁸ Example: <https://www.nespthreatenedspecies.edu.au/news-and-media/latest-news/learning-from-a-failed-biodiversity-offset>.

³⁹ Op cit, *Biodiversity 2037*, p6.

⁴⁰ Op cit, p194 (234/780).

⁴¹ Op cit, p xiv (14/780).

⁴² Consultation closes on 11 February 2022.

⁴³ DWELP 2021 *Bushfire Planning Made Clearer: Options for Victoria’s Planning System* (<https://engage.vic.gov.au/bushfire-planning-made-clearer-options-victorias-planning>).

44.06 – A purpose of the BMO is to ensure development is only permitted where bushfire risk can be reduced to an acceptable level.

53.02 – Bushfire planning – sometimes used to guide a planning scheme amendment or permit application outside the bushfire prone area.

52.12 – allows the removal and lopping of vegetation to create defendable space; exempts some dwelling applications from requiring vegetation offsets.

As urban development encroaches further into bushy areas, especially where a BMO exists, losses of irreplaceable native vegetation, wildlife, and biodiversity accelerates. Clause 52.12-5 can exempt the normal permit requirements for native vegetation removal to “*enable the construction of a dwelling, or the alteration or extension of an existing dwelling, and create its defendable space* if [there is a BMO, the land is zoned residential or other specified zone]”.⁴⁴

It is troubling that, in *Skiba v Nillumbik SC*, member Watson endorsed Council’s permit to redevelop a primary and secondary school on an existing school site in a Rural Conservation Zone with a BMO and an ESO. If prioritising human life, and in this case, children’s lives, was the objective, then the reasonable decision⁴⁵ would have been to move the school outside the bushfire prone area, as 53.2 allows. Note: the bushfire prone area also contains areas that are of significant bushfire hazard outside the Bushfire Management Overlay.⁴⁶ Instead, native vegetation had to be cleared to create defendable space, which also required a “suitably qualified wildlife handler or zoologist...to be present when felling trees/removing native vegetation, to ensure affected wildlife [were] not harmed.”⁴⁷

The 2019-20 catastrophic wildfires along the East coast show that as climate change worsens, the usual fire controls, e.g. fuel load management, defendable space and early evacuation, are no longer feasible.⁴⁸ Their fierce temperature, speed, and ability to create their own weather patterns meant these fires could not be controlled. Homes razed, livelihoods destroyed, people and billions of animals and plants killed. Financial losses were in the billions of dollars⁴⁹ and many people are still living in makeshift housing. In wildfire situations like this, defendable space, and measures such as the 10/30/50 rule, around buildings are ineffective. Even totally cleared areas cannot stop ember attack.⁵⁰

Large areas of bushfire prone land surround Metropolitan Melbourne.⁵¹ If, as DWELP’s discussion paper suggests, “*the 10/30/50 vegetation removal rule is applied to a broader range of contexts where vegetation clearing might be reasonably warranted (for example, places of assembly, education centres, child-care centres)*, then even more native vegetation clearance will occur in areas within and outside bushfire prone areas... *Increasingly, defendable space is included in*

⁴⁴ *James v Hepburn SC* [2021] VCAT 1506 (16 December 2021), at 11 and 12.

⁴⁵ Here “*reasonable*” refers to the Wednesbury principle.

⁴⁶ Op cit, DWELP 2021, p14/23.

⁴⁷ *Skiba v Nillumbik SC* [2021] VCAT 733 (8 July 2021), at 42.

⁴⁸ Op cit, DWELP 2021, p9/23.

⁴⁹ “As at May 2020, the Insurance Council of Australia estimated the total insurance loss attributed to the bushfires nationwide to be \$2.3 billion with over 38,000 claims” (<https://www.dtf.vic.gov.au/victorias-economic-bulletin-volume-5/economic-impacts-2019-20-bushfires-victoria#footnotes>). Add to this government costs of fire-fighting, recovery grants, infrastructure costs, business losses, etc.

⁵⁰ Op cit., DWELP 2021, p13/23.

⁵¹ Op cit, DWELP 2021, Figure 2, p10/23.

*planning permits wherever the hazard warrants it, irrespective of whether the Bushfire Management Overlay applies.*⁵²

The DWELP Discussion paper notes: “Amendment VC140 gazetted in 2017 updated the state policy Clause 13.02-S Bushfire planning (the policy) to emphasise that the protection of human life is to be prioritised in all planning decisions, including strategic planning matters and permit applications. **This objective will not change** [my emphasis].⁵³ Permitting the expansion of urban development in outer Metropolitan shires and around country towns into forested areas is highly dangerous to biodiversity and all life. If prioritising human life and ensuring ecological conservation is the aim, it is grossly irresponsible and, arguably, contrary to proposed planning policy.⁵⁴

None of Victoria’s environmental Acts is preventing biodiversity and ecosystems’ decline. In addition to the *Parliamentary Inquiry*, VAGO concludes that “DELWP cannot demonstrate if, or how well, it is halting further decline in Victoria’s threatened species populations.”⁵⁵ To be fair, historical underfunding has contributed to this devastating policy failure. However, in *The Village Building Company v Greater Dandenong CC* regarding an application for an amended permit DWELP, the relevant referral authority, did not oppose the proposed removal of 30 river red gums.⁵⁶ In other cases DWELP withdraws from involvement in VCAT appeals.⁵⁷ It is clear that, as the *Parliamentary Inquiry* found, DWELP’s responsibilities for environment and planning are conflicted.

Recommendation: If the Victorian Government is genuinely committed to biodiversity conservation, then the Native Vegetation Guidelines and planning regulations need urgent reform.

Recommendation: Amend the definition of “land” in the PEA to include its intrinsic ecological functions, one of which is to provide habitat and food for other species, flora and fauna.

Recommendation: Endorse the *Parliamentary Inquiry*’s Recommendation 48: That the Victorian Government establish a standalone Department of the Environment, with its own Minister, that has the sole purpose of protecting the environment, and particularly, native species.

Recommendation: Amend the PEA to legislate an environmental duty for responsible authorities that aligns with *Biodiversity 2037* policy that “Victorians have a duty to protect biodiversity, regardless of whether it provides tangible benefits to humans”.⁵⁸

Recommendation: Planning decisions must demonstrate compliance with *Protecting Victoria’s Environment – Biodiversity 2037* in accordance with the Inquiry’s Finding 29 that it “sets important goals around protecting and restoring threatened species in Victoria. However, the plan lacks the necessary funding for full implementation of its goals and actions”.

⁵² Op cit, DWELP 2021, p18/23.

⁵³ Op cit, DWELP 2021, p12/23.

⁵⁴ Op cit, DWELP 2021, Section 3, p12-13/23

⁵⁵ VAGO, October 2021, *Protecting Victoria’s Biodiversity*, p7 (5/79).

⁵⁶ *The Village Building Company v Greater Dandenong CC (Corrected)* [2020] VCAT 1147 (13 October 2020), at 69 and 63.

⁵⁷ Example: *Hines v Cardinia SC* [2021] VCAT 179 (5 March 2021), at 27 and 34..

⁵⁸ *Protecting Victoria’s Environment: Biodiversity 2037*, Department of Environment, Land, Water and Planning 2017, p6.

Recommendation: Endorse the *Parliamentary Inquiry's* recommendation 15, that when *applying the Guidelines for the removal, destruction or lopping of native vegetation. Caution should be taken not to further erode and fragment ecosystems by applying a piecemeal approach. A whole-of-ecosystem approach must be applied when making decisions.*"

Recommendation: Endorse the *Parliamentary Inquiry's* Recommendation 48: That the Victorian Government establish a standalone Department of the Environment, with its own Minister, that has the sole purpose of protecting the environment and, in particular, native species.

Recommendation: To ensure policy can be implemented, sufficient ongoing funding must be allocated in the State Budget.

Recommendation: Accounting for cumulative impacts of native vegetation removal be mandatory when deciding whether or not to grant a permit.

Recommendation: When contemplating the need for native vegetation removal, the starting question must why such vegetation should be lost not how can the loss be offset.

Recommendation: To comply with clause 13.02-1S protection of human life above all else, back zoning of land be immediately implemented to prohibit development in bushfire-prone areas, especially where there is a Bushfire Overlay, ESO and/or SLO in place. Stopping building in bushy areas is not only a human life safety issue but will halt biodiversity destruction in those areas which are unsafe for housing and other human activities.⁵⁹

Recommendation: The Precautionary Principle must be a fundamental requirement in the Native Vegetation and Bushfire planning provisions.

Conclusion

Reversing the terrible ecosystems' decline in Victoria requires urgent whole of government strategic action. It cannot be solved by the planning provisions alone. However, the only way to prevent further losses of native vegetation and biodiversity is by ensuring their protection takes precedence over development at all times, not merely where practicable. The duty of all citizens to protect biodiversity, regardless of whether it provides tangible benefits to humans must be paramount.

⁵⁹ See, for example: *James v Hepburn SC* [2021] VCAT 1506 (16 December 2021), at 76 and 77; and *Miles v Baw Baw SC* [2021] VCAT 807 (30 July 2021).