

# A Framework for Action?

Implementation and enforcement of  
Victoria's native vegetation clearing controls

# ABOUT THE ENVIRONMENT DEFENDERS OFFICE (VICTORIA) LTD

The Environment Defenders Office (Victoria) Ltd ('EDO') is a community legal centre specialising in public interest environment law. We support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment, and support this vision through the provision of information, advocacy and advice.

In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest planning and environmental law.

## **For further information contact:**

Nicola Rivers, Law Reform Director  
Environment Defenders Office (Vic) Ltd

## **Telephone:**

03 8341 3100 (Melbourne metropolitan area)  
1300 EDOVIC (1300 336842)  
(Local call cost for regional callers)

**Facsimile:** 03 8341 3111

**Email:** [edovic@edo.org.au](mailto:edovic@edo.org.au)

**Website:** [www.edovic.org.au](http://www.edovic.org.au)

**Post:** PO Box 12123, A'BECKETT STREET VIC 8006

## **Address:**

Level 3  
The 60L Green Building  
60 Leicester Street, Carlton

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# 1. ABOUT THIS REPORT SERIES

This is the fourth report in a series, *Monitoring Victoria's Environmental Laws*, to be published by the EDO. The reports examine the extent and effectiveness of government's implementation and enforcement of key environmental laws in Victoria.

The EDO has witnessed how Victoria's environmental laws are implemented and enforced for over 20 years through our advice to and representation of the community on environmental law issues. Over that time we have become aware of countless environmental laws that are in force but are not effectively used by government to protect or improve the environment. Of further concern is the lack of publicly available information indicating how government regulators implement and enforce their laws. Public release of this information is vital to ensure government is accountable for the way in which it operates.

## **The *Monitoring Victoria's Environmental Laws* series has three main aims:**

1. To empower the public by providing a consolidated source of information on whether regulatory agencies are implementing and enforcing their regulatory responsibilities under key environmental laws. The information will be a resource for the community for submissions or discussions with government, to encourage greater action and compliance by government.
2. To promote transparency and accountability by identifying what implementation and enforcement information is publicly available and, if that information is lacking, to inform government agencies of the type of information that should be publicly available.
3. To improve the implementation and enforcement of environmental laws by encouraging greater action and compliance by government agencies.

Ultimately we aim to ensure that Victoria's environmental laws are used to their greatest extent to protect and improve the environment.

Each report focuses on one area of environmental regulation. Each report will be updated and released every two years to provide an ongoing 'report card' of how environmental laws are being used. While we hope the 2011–12 reports will provide useful baseline data and recommendations for improvement, the full value of the reports will be seen over time through their ability to compare changes (and hopefully improvements) in the implementation of environmental laws over the next decade.

The reports are compiled using publicly available information, including information sourced from government agency websites, annual reports, and reports from review bodies such as the Auditor-General's and Ombudsman's offices. The EDO also requests information directly from the relevant regulating agency. Information is not always forthcoming and instances where information could not be found are highlighted in the report.

## 2. REPORT HIGHLIGHTS

This report investigates how effectively *Victoria's Native Vegetation Management – A Framework for Action (the Framework)* and associated regulations are being implemented and enforced by responsible authorities (local councils) and the Department of Sustainability and Environment (DSE).

The Framework provides an invaluable system for the protection and management of native vegetation in Victoria. Its central purpose is to achieve a 'Net Gain' in native vegetation, by reversing, 'across the entire landscape, the long-term decline in the extent and quality of native vegetation'. Regulatory controls on native vegetation clearing are an important component of the system established by the Framework. Under the Framework the regulatory system requires a three-step 'avoid, minimise and offset' approach to be applied to applications for vegetation removal. Decision-making is supported by a system of vegetation classification and vegetation quality assessment that prioritises vegetation by reference to its conservation significance.

If adhered to, the Framework would provide a robust system for native vegetation classification, protection and management. However, its objectives are not being realised in practice. In particular, the goal of Net Gain is not being achieved.

Perhaps most troublingly, the first two steps in the three-step Net Gain approach are regularly passed over in favour of offsetting. Only some 3.5% of applications to remove native vegetation are refused altogether. This is in spite of the fact that the native vegetation proposed to be removed is often of 'high' or 'very high' conservation significance, which according to the Framework should only be removed in exceptional circumstances.

Further, the system for measuring Net Gain – calculated on the basis of 'gains' achieved through government investment and voluntary measures, and 'losses' as a result of exempted and illegal clearing – is very poorly documented and so does not serve as an adequate tool for measuring Net Gain. In addition, it is unclear if, and how, 'gains' are secured in the long run. While an inexact system for calculating gains and losses is preferable to no system, there is a clear need to improve methods for measuring this integral component of the Net Gain matrix.

It would also appear that the Victorian Civil and Administrative Tribunal (VCAT) has not been a strong ally of the Framework since its introduction in 2002. Where a responsible authority has refused to grant

a permit to clear native vegetation and that decision has been challenged in VCAT, VCAT has overturned the original decision in some 70% of cases, granting a permit, generally with conditions to offset. This suggests a disconnect between policy and implementation: the original intent of policy-makers to achieve a binding and enforceable instrument has become in implementation one policy among many, to be given 'consideration' but no special or legal force.

Another major limitation of the Framework's implementation has been the failure to effectively monitor native vegetation offsets (and other conditions arising from a permit). Measures endorsed under the Framework, as well as by the Planning Enforcement Officers Association, such as auditing new and existing use and development, and establishing a reliable (ideally automated) system for monitoring compliance, are not in force.

Rather, the vast majority of enforcement activity, undertaken by local councils who are responsible for enforcement, is reactive rather than proactive. As a result, most contraventions go undetected. Even where breaches are identified (via ad-hoc measures), enforcement action is limited. This leads to many potential gains being undermined with a prevailing expectation on the part of applicants that their planning conditions will not be followed up.

Given that basic requirements are not being met, it is unlikely that more complex monitoring situations such as transfers on property ownership, obligations that extend over many years or in perpetuity, and failures of offsets through drought or fire are being managed consistently or effectively.

Finally, while the 'Native Vegetation Tracking' system established and operated by DSE provides substantial data in relation to native vegetation clearance activity, this is not made available (beyond a very brief 'overview') to the public, or indeed to local councils. The latter in particular would benefit from this information, not to mention the opportunity to share the tracking software and so expand the database substantially.

With Victoria the most cleared state in Australia, the Framework plays an important role in protecting our remnant native vegetation, and the complex ecosystems that depend on it. In theory, it provides a strong basis to do so. In practice, however, due to failures in implementation, monitoring and enforcement, the Framework continues to punch under its weight.

## KEY RECOMMENDATIONS

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### Implementation

- DSE should reinforce, through very clear guidance, that the three-step approach is a sequential process, and that offsetting is only a satisfactory response once options for avoidance and minimisation have been exhausted.
- Responsible authorities should ensure that offsets are to be as close as possible in vegetation type to the lost vegetation, in accordance with the principle of 'like-for-like'.
- The Government should declare areas of very high conservation significance as off limits for clearing and give those areas strong support through schemes like BushTender.
- DSE should develop a mechanism to address the 'disconnect' in decision-making between responsible authorities and referral authorities, to avoid unwanted complexity and fragmented decisions.
- The Government should provide adequate resources to local councils to enable them to effectively implement the Framework, native vegetation regulations and policy.
- DSE should develop a more effective matrix for measuring 'gains' in native vegetation from voluntary activity and 'losses' from clearing without a permit and other activities.

### Monitoring and enforcement

- The Government should follow through with the previous Government's commitment to 'develop a strategy to monitor and enforce compliance with the native vegetation regulations and offset agreements'.
- The Government should provide adequate resources to local councils to enable them to effectively monitor and enforce the Framework, native vegetation regulations and policy. In particular, funding should reflect an explicit recognition of the unique skills and specialist knowledge required to monitor and enforce the Framework.
- DSE should develop a clear policy for protecting offsets in the long term. This should ensure obligations that extend over many years or in perpetuity are upheld, as well as funding long-term management.
- DSE should assist with the development of a culture of compliance and enforcement at local government level.
- Responsible authorities should establish coordinated, proactive auditing regimes to monitor compliance with the Framework. DSE should assist in the development of these regimes.

### Data collection and publication

- DSE should make the Native Vegetation Tracking System (NVT) available to all relevant authorities, in particular local governments, to ensure that all native vegetation transactions are registered and dealt with in a consistent and reliable manner.
- DSE should report on and publicise all data obtained through the NVT. Information regarding permits issued or renewed, offset conditions and breaches should be gathered and made publicly available.
- DSE should provide assistance and training to local government planners and other relevant staff to access and use the NVT as well as existing datasets.

### Legal recognition

- The Government should establish a separate legislative regime for native vegetation removal that entrenches the requirement for 'Net Gain' rather than continuing to graft the system onto a planning approvals regime that is increasingly ill suited to dealing with biodiversity issues.

# 3. REGULATORY AND POLICY CONTEXT

## 3.1 The Native Vegetation Management Framework

Released in 2002, the Framework governs the protection and clearance of native vegetation in Victoria. It sets out principles for determining when native vegetation can and cannot be cleared, and on what conditions, consistent with the overarching objective of Net Gain: ‘the reversal, across the entire landscape, of the long term decline in the extent and quality of native vegetation, leading to a net gain.’<sup>1</sup>

Net Gain is intended to be achieved by taking into account:

- gains in native vegetation (voluntary and government-assisted management and revegetation);
- losses in native vegetation (clearing on public or private land that is not subject to offset requirements, incremental losses in quality and illegal clearing); and
- losses and gains in native vegetation, intended to be balanced over time (natural and semi-disturbances, clearing by permit and related offset requirements).<sup>2</sup>

Approved clearing on private land employs the ‘three-step approach’, requiring that native vegetation clearance should first be avoided; and if that is not possible, minimised; and if that is not possible, offset. It also introduces a framework for determining which of these three options is most appropriate, based on the conservation significance of the native vegetation. Finally, it establishes a system for measuring offsets based on ‘habitat hectares’ — a combined measurement of native vegetation quantity and quality.<sup>3</sup>

The Framework is implemented through planning schemes made under the *Planning and Environment Act 1987* (Vic) (**P&E Act**). Clause 52.17 of the Victoria Planning Provisions (**VPPs**) requires applicants to obtain a permit to remove, destroy or lop native vegetation, subject to fairly extensive exemptions. Clause 52.16 requires a permit in similar circumstances, in the context of Vegetation Precinct Plans.

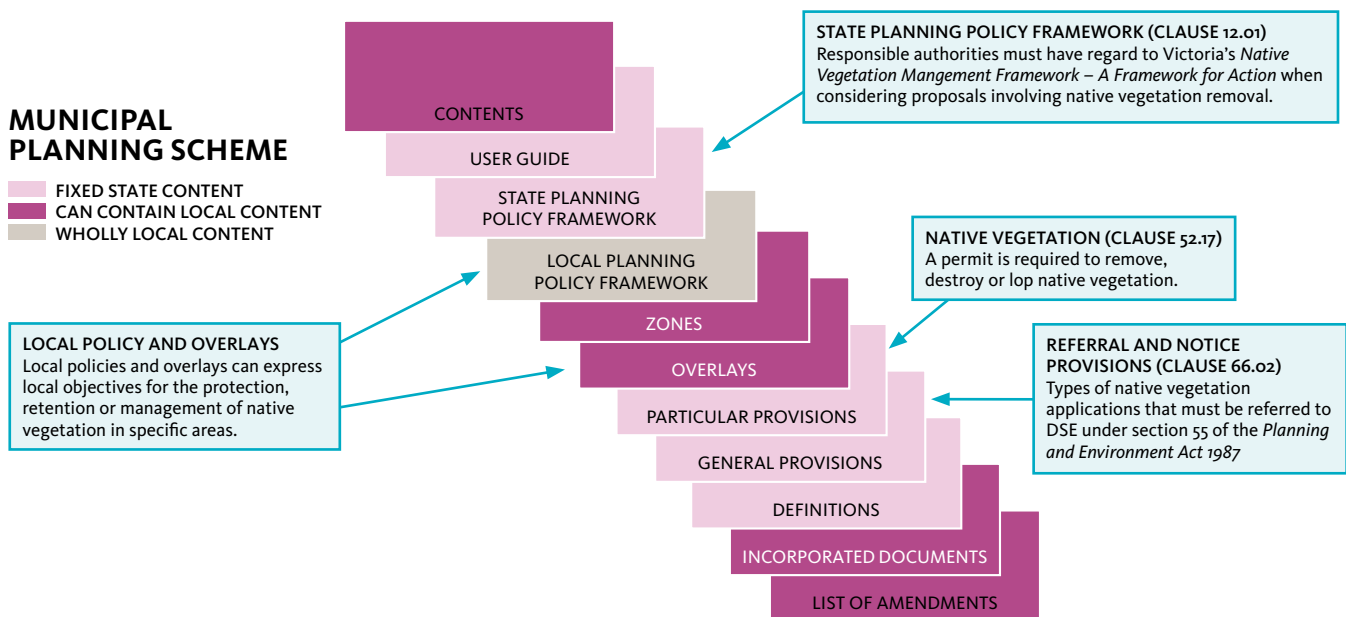
In deciding whether or not to grant a permit that involves the clearing of native vegetation, the responsible authority (local council) and in some cases the referral authority (generally the Department of Sustainability and Environment) must have regard to the Framework (according to cl 12 of the State Planning Policy Framework) and take native vegetation into account in various other respects (according to cl 65 of the VPPs). There is also a broad legislative requirement to consider the environment in planning decisions under section 60 of the P&E Act.

Supplementing and extending this process at local council level is the system of overlays,<sup>4</sup> which may give emphasis to local environmental values and priorities.

Figure 1 provides an overview of where the Framework sits in the context of the planning scheme.

**FIGURE 1: PLANNING SCHEME PROVISIONS THAT APPLY TO PROPOSALS INVOLVING THE REMOVAL OF NATIVE VEGETATION**

Source: DSE, *New native vegetation provisions in planning schemes*, March 2006, p2.



1 Department of Sustainability and Environment, *Victoria's Native Vegetation Management – A Framework for Action*, 2002, p 14.

2 Department of Sustainability and Environment, *Native Vegetation Net Gain Accounting: First Approximation Report*, 2008, p 2.

3 The Framework, above n 1, pp 18, 23, 54.

4 See for example cl 42 and cl 44 of the Victoria Planning Provisions, which deal with Environmental Significance Overlays, Significant Landscape Overlays, Erosion Management Overlays and Salinity Management Overlays.

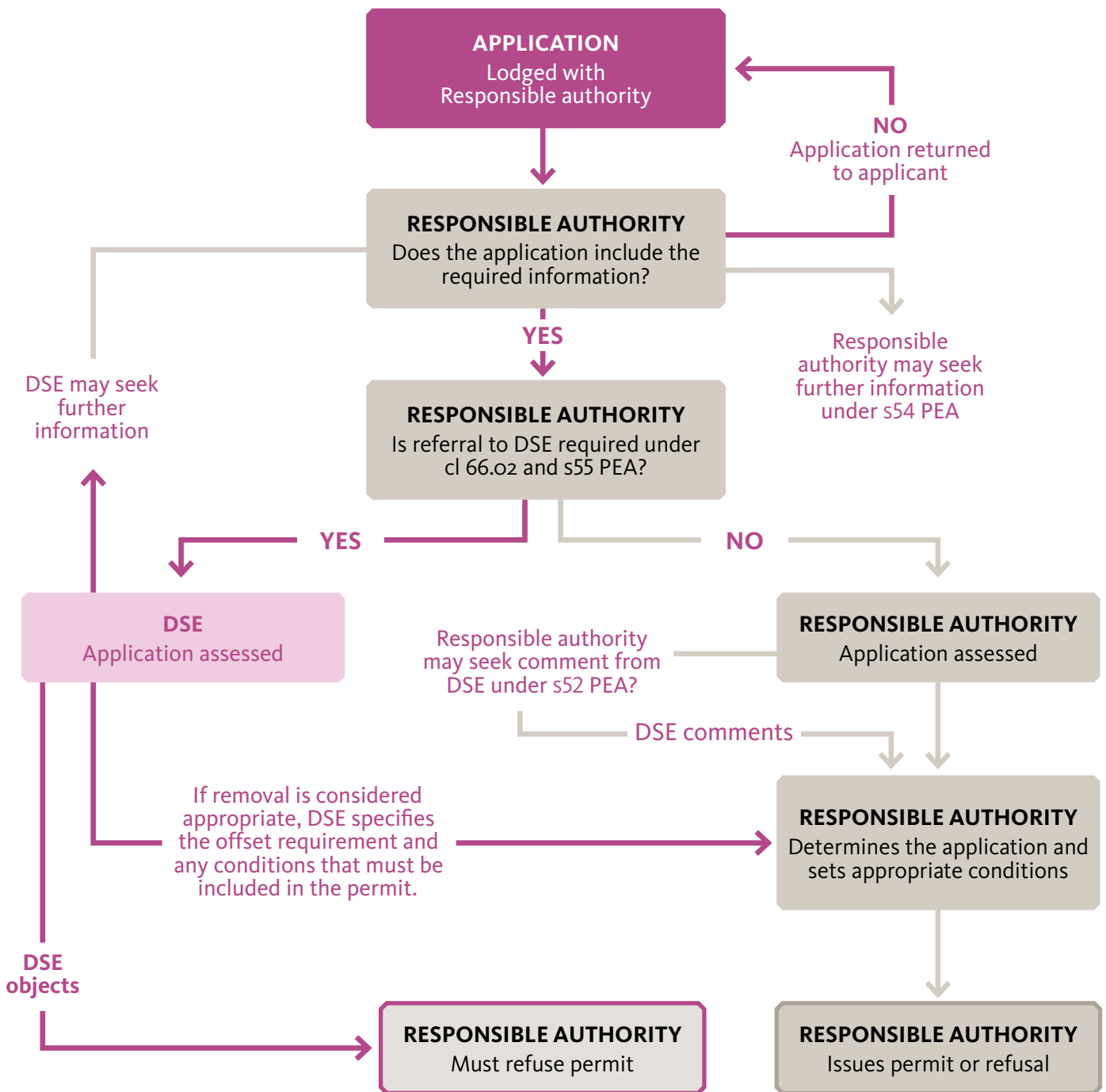
The responsible authority must also consider:

- the role of the native vegetation in protecting water quality and riparian ecosystems, preventing land degradation and adverse effects on groundwater; and
- the conservation status of the vegetation (that is, its 'Ecological Vegetation Class'), including whether it is a threatened community, or provides habitat for threatened fauna or flora (according to the *Flora and Fauna Guarantee Act 1988* (Vic)).<sup>5</sup>

Figure 2 sets out the process by which a permit to remove native vegetation is made.

**FIGURE 2:  
PROCESS FOR A PERMIT APPLICATION TO  
REMOVE NATIVE VEGETATION**

Source: DSE, New native vegetation provisions in planning schemes, March 2006, p 3.



<sup>5</sup> Victoria Planning Provisions, cl 52.17.



### 3.2 Legal status

All obligations relating to native vegetation that are contained in the VPPs or the P&E Act are legally binding. However, this essentially amounts to a requirement to undertake a balancing exercise between the Framework and other (pro-development) planning considerations.

In other words, while the Framework is included in the VPPs in full, as an incorporated document,<sup>6</sup> its legal status is that of a policy or guideline rather than a statutory (or binding) document.<sup>7</sup> This means that it must be taken into account when making a decision about a planning permit application, but does not carry special weight, create rights or impose liabilities in itself.

This non-binding status is potentially at odds with the strong language used in the Framework directed at achieving concrete outcomes for native vegetation, and leaves it competing and possibly conflicting with various other priorities which are ultimately the subject of discretionary decision-making. This results in important elements of the Framework being undermined or underutilised, reflecting a disconnect between policy and implementation: what appears to have been a clear intention on the part of policy makers to achieve a binding and enforceable instrument administered by DSE has become in implementation one policy among many, with a view to balancing environmental, social and economic factors for 'net community benefit',<sup>8</sup> administered by the Department of Planning and Community Development.

This problem would best be resolved through the development of a separate legislative framework for native vegetation controls that is independent of the Planning and Environment Act and gives legal force to the principles in the Framework.

### 3.3 Relevant players

#### Department of Sustainability and the Environment

The Government agency with primary responsibility for the Framework is the Department of Sustainability and Environment (**DSE**). DSE developed the Framework and, while applications for permits to clear native vegetation are made to the local council, in many cases they are referred to DSE to make the final decision.<sup>9</sup>

DSE also publishes extensive guidance on the detailed requirements of the Framework to inform councils and permit applicants, and advises the Minister for Environment and Climate Change (**the Minister**) on native vegetation management policy generally.<sup>10</sup>

DSE also administers two schemes that play an important role in the operation of the Framework – Bushtender and BushBroker. Bushtender is an auction-based system whereby landowners tender for contracts with DSE to manage and improve native vegetation on their land in return for payment. BushBroker provides a service to match permit holders seeking native vegetation offsets with landowners providing them. The 'Native Vegetation Exchange' (an automated online system that matches buyers and sellers of native vegetation credits) is currently being trialled and will build on the BushBroker scheme.

<sup>6</sup> An incorporated document is a document that affects the operation of the planning scheme and so is incorporated pursuant to cl 81.01 of the VPPs. The document must be read as part of the scheme.

<sup>7</sup> Moran Logging Company Pty Ltd v Yarra Ranges SC [2006] VCAT 1861.

<sup>8</sup> Cl 10.02 of the State Planning Policy Framework.

<sup>9</sup> Section 55 and 52(1)(c) of the Planning and Environment Act 1987 (Vic) and cl 66.02-3 of the Victoria Planning Provisions.

<sup>10</sup> See Department of Sustainability and Environment website:

<http://www.dse.vic.gov.au/land-management/land/native-vegetation-home>.

## Local councils

As responsible authorities for planning in their local government area, local councils are directly responsible for administering the Framework and the planning scheme of which it is a part. They also contribute to achieving a net gain in native vegetation through the management of native vegetation in parks, bushland reserves and roadsides; raising public awareness; and strategic planning.<sup>11</sup>

Applications for permits to clear native vegetation are made to the local council. Although the local council will often refer the application to DSE for assessment, it is still the council who manages the application process, and ultimately is responsible for enforcing and monitoring the permit.

## Catchment Management Authorities

Victoria is divided into ten catchment regions, with a Catchment Management Authority (**CMA**) for each. CMAs operate at State level and report to the Minister for Environment and the Minister for Water. Under the Framework, CMAs are required to develop customised implementation plans for the Framework in the form of Native Vegetation Plans (**NVPs**), to guide the regional implementation of the Framework.<sup>12</sup> Most CMAs have had NVPs in place since around 2005, however the degree to which these influence decision-making with respect to native vegetation removal applications is unclear.

## 3.4 Other native vegetation protection policies and laws

The Framework (together with clause 52.17 and relevant overlays) is the principal instrument for protecting native vegetation in Victoria, particularly on private land.<sup>13</sup> It is informed by, and informs, a slate of policy and legal documents, reports and strategies, including Victoria's Biodiversity Strategy and the National Framework for Management and Monitoring of Australia's Native Vegetation.

<sup>11</sup> Department of Sustainability and Environment, 'Guide for assessment of non-referred planning permit applications to remove native vegetation', 2011, 1  
<sup>12</sup> The Framework, above n 1, Principle 4.

<sup>13</sup> While other laws affect native vegetation policy, such as the Flora and Fauna Guarantee Act 1988 (Vic) and the Catchment and Land Protection Act 1994 (Vic), these have little meaningful application to activities on private land.

## 4. REGULATORY AND POLICY OBJECTIVES

### 4.1 Primary objective: Net Gain

The Framework's primary goal for native vegetation management in Victoria is to achieve 'a reversal, across the entire landscape, of the long-term decline in the extent and quality of native vegetation, leading to a Net Gain.'<sup>14</sup> The goal of 'Net Gain' is a vital element in the proper management of native vegetation clearance in Victoria.

Since 2010, DSE has stated, by way of a fact sheet,<sup>15</sup> that Net Gain is intended to be achieved through three distinct types of contributions:

- 'no net loss' of native vegetation through implementation of the three-step approach of 'avoid, minimise and offset' (regulatory objective);
- improved quality (or 'Net Gain') of existing vegetation through government investment and voluntary measures (policy objective); and
- losses in the quality and extent of native vegetation arising from clearing that does not require a permit, and from other processes and practices (policy objective).

This construction of Net Gain is relatively new<sup>16</sup> – not necessarily widely known or understood – and seeks to clarify the meaning and application of Net Gain under the Framework.<sup>17</sup> Essentially, it distinguishes between the broader Net Gain objective, which is achieved through a variety of mechanisms (discussed above at 3.1), and the more modest objective for the regulatory system of 'no net loss'. The rationale is that while it is reasonable to expect landholders to avoid harmful activities, the community (by way of government and voluntary measures) should bear the cost of any improvements.<sup>18</sup>

In any case, Net Gain remains an integral overarching priority for the management of native vegetation, and the Framework plays a vital role in supporting this.

### 4.2 Subsidiary objectives

In addition to the primary goal of Net Gain, the Framework sets out a number of subsidiary objectives, including:

- biodiversity objectives (for example, maintaining and improving the diversity of ecological communities);
- land and water quality objectives (restoring and protecting ecological processes within catchments); and
- climate change objectives (significantly increasing Victoria's carbon sinks through revegetation and regeneration).<sup>19</sup>

<sup>14</sup> The Framework, above n 1, p 14.

<sup>15</sup> Department of Sustainability and Environment, The 'Native Vegetation: Policy and Planning' Fact Sheet, 2010.

<sup>16</sup> Appearing in DSE policy documents from 2010, this shift appears to have occurred following recommendations made by the Victorian Competition and Efficiency Commission in 'A Sustainable Future for Victoria: Getting environmental regulation right', 2009, Recommendation 6.1; and the Victorian Government Response to that report, Department of Treasury and Finance, 'Victorian Government's Response to Victorian Competition and Efficiency Commission's Final Report: A Sustainable Future for Victoria: Getting environmental regulation right', 2010, p 8.

<sup>17</sup> The Framework, above n 1, p 19. See for example dot point 4.

<sup>18</sup> See VCEC Inquiry 2009, pp 141-145 and Government response to VCEC Inquiry 2010, pp 8-9, above n 16.

<sup>19</sup> The Framework, above no 1, pp 14-15.

## 5. THE STATE OF NATIVE VEGETATION IN VICTORIA

Victoria is the most cleared State in Australia.<sup>20</sup> Since settlement, about 66% of Victoria's original native vegetation has been cleared for agricultural or urban development. Relevantly, clearing on private land is vastly greater than on public land, with 80% of original native vegetation cover now cleared (see Figure 3), and 60% of native vegetation types on private land threatened with extinction.<sup>21</sup>

Native vegetation includes all plants that are native to Victoria including trees, shrubs, herbs and grasses.<sup>22</sup> This is significant, in that some of the most threatened vegetation types are not trees, but native grasslands, ephemeral wetlands, alpine meadows and bogs and some coastal plant communities. These are more difficult to monitor – either directly or through satellite data – although improvements are occurring.<sup>23</sup>

The extent of clearing in Victoria varies widely across different regions. For example, in the far eastern Highlands only 6.3% of native vegetation has been cleared, whereas in the Victorian Volcanic Plain in Victoria's Southwest 84.4% of native vegetation has been cleared.<sup>24</sup> The rate at which native vegetation is cleared also varies between native vegetation types. In 2008 DSE estimated that about 1,600 hectares of woody vegetation is cleared each year, whereas 3,200 hectares of grassy vegetation is cleared each year.<sup>25</sup>

Quality and extent of native vegetation is measured using the site-based 'habitat hectares' (HHa) unit of measurement developed in the Framework, which discounts hectares of native vegetation according to the degree to which they have been degraded, based on a combined measure of the extent and quality of native vegetation.<sup>26</sup>

**FIGURE 3:  
BREAKDOWN (USING BROAD ESTIMATES) OF THE GAINS  
AND LOSSES IN NATIVE VEGETATION ON PUBLIC AND  
PRIVATE LAND IN 2008**

	PUBLIC LAND	PRIVATE LAND
Gains sub-total	+8,760 HHa/yr	+4,560 HHa/yr
Losses sub-total	-2,860 HHa/yr	-14,550 HHa/yr
Net Outcomes	+5,900 HHa/yr*	-9,990 HHa/yr*

\*due to significant uncertainties associated with the underlying assumptions, particularly about the amount of vegetation in each of the categories, these figures may be under- or over-estimates, possibly up to 20%.

Source: DSE, *Native Vegetation net gain accounting: first approximation report* (2008), p 11

As demonstrated in Figure 3, in 2008, DSE reported a net loss in native vegetation of 4,000 HHa per year (notably, losses to private land were substantial, at nearly 10,000 HHa). The biggest source of this decline was reductions (about 90%) in the quality of native vegetation, rather than losses in extent or coverage.<sup>27</sup> Indeed, loss of condition, or quality, rather than extent, is now the biggest threat to Victoria's native vegetation health.

Further, as demonstrated by Figure 4, much of the State's native vegetation is fragmented, and therefore vulnerable. Only 46.3% lies in 'largely-intact landscape' areas – defined as a contiguous area of native vegetation greater than 20,000 hectares – which generally support high quality vegetation and other species.<sup>28</sup> The remaining 53.7% of Victoria's native vegetation is in 'fragmented landscape', where native vegetation is interrupted by clearing. This native vegetation has a markedly poorer quality than native vegetation in largely-intact landscapes. It also has a far higher rate of clearing – in these areas, only 31.6% of Victoria's original native vegetation coverage remains.<sup>29</sup>

20 Victorian Environment Assessment Council, *Remnant Native Vegetation Investigation Discussion Paper*, 2010, p 1; Victorian Competition and Efficiency Commission, *Regulation and Regional Victoria: Challenges and Opportunities*, 2005, p 138.

21 See Department of Sustainability and Environment website: <http://www.dse.vic.gov.au/land-management/land/native-vegetation-home/what-is-native-vegetation>

22 Victoria Planning Provisions, cl 72.

23 For example, recent improvements in detection of native vegetation from satellite data have meant that the estimate of native vegetation extent is more precise. Commissioner for Environmental Sustainability, *State of the Environment Report 2008*, p 255.

24 Victorian Environment Assessment Council, above n 20, p 116.

25 Department of Sustainability and Environment, *First Approximation Report*, above n 2, pp ii, 18.

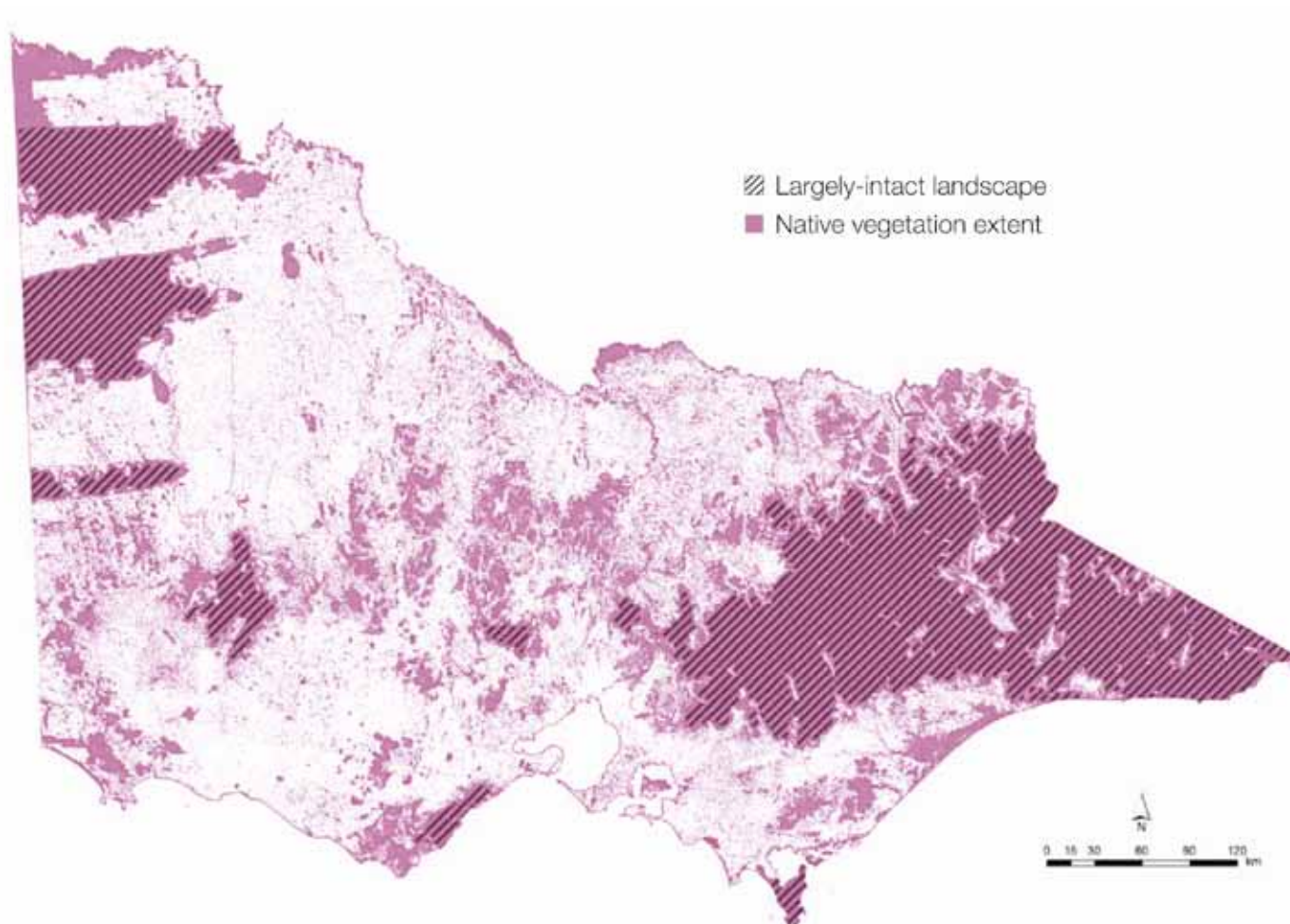
26 The Framework, above n 1, p 18.

27 Department of Sustainability and Environment, *First approximation report*, above n 2, pp ii, 17-8.

28 Victorian Environment Assessment Council, above n 20, p 11.

29 Victorian Environment Assessment Council, above n 20, pp 44-46.

**FIGURE 4:  
REMAINING NATIVE VEGETATION IN VICTORIA,  
INCLUDING 'LARGELY INTACT' LANDSCAPES**



Source: Victorian Environmental Assessment Council, *Remnant Native Vegetation Investigation Discussion Paper*, June 2010

It hardly needs saying that native vegetation provides a number of important ecosystem services – habitat provision; erosion protection; surface and groundwater movement regulation; water quality protection; and carbon sequestration, to name just a few. As such, the declining extent and quality of native vegetation has ‘profound biological implications’, with vegetation clearing being ‘the single biggest threat to terrestrial biodiversity in Australia’<sup>30</sup>. An effective native vegetation management scheme is therefore imperative.

<sup>30</sup> Commissioner for Environmental Sustainability, *State of the Environment Report 2008*, above n 23, p 254.

## 6. IMPLEMENTATION

The central tenet of the Framework and associated regulations is to achieve Net Gain. As noted in Part 4 above, this is achieved through three distinct types of contributions. First, 'no net loss' of native vegetation through implementation of the three-step approach of 'avoid, minimise and offset'; second, improved quality of existing vegetation through government investment and voluntary measures; and third, losses in the quality and extent of native vegetation arising from clearing that does not require a permit, and from other processes.<sup>31</sup>

Whether or not the Framework is being properly implemented can be measured by the extent to which it has achieved these goals. Other relevant indicators include whether an accounting system is in place that effectively measures Net Gain, so that decisions about native vegetation use are properly informed, and whether the extent and quality of native vegetation is adequately mapped, so that gains and losses can be accurately measured.

### 6.1 Achieving 'no net loss': the three-step approach

The central tenet of the Net Gain methodology is the three-step approach of 'avoid, minimise and offset', with a view to achieving 'no net loss'. Gains and losses are determined in accordance with a defined methodology: by a combined quality–quantity measure and over a specified area and period of time.<sup>32</sup>

In spite of this rather modest aim, native vegetation continues to be lost at a substantial rate, with some 10,000 HHa lost on private land each year (Figure 3). This calls into question the effectiveness of the three-step approach specifically, and the Framework more generally. The following section will consider how the three-step approach is implemented, in theory and in practice, and assess the value of this process.

### Avoid and minimise

The Net Gain approach has as a priority the avoidance of future permanent losses of native vegetation through clearing. As such, the Framework establishes a comprehensive system which generally does not permit clearing in cases of 'high' and 'medium' conservation significance<sup>33</sup> and does not permit clearing on land with 'very high' significance unless exceptional circumstances apply. 'Exceptional circumstances' include where 'impacts are an unavoidable part of a development project, with approval from the Minister, or delegate, based on considerations of environmental, social, and economic values from a statewide perspective'.<sup>34</sup>

Guidelines have been developed to assist local councils and referral authorities with decisions about whether native vegetation removal can or should be avoided. Factors include the extent of vegetation removal proposed; the size and physical capacity of the site to accommodate development in a different form or location; existing and potential threats to the extent and integrity of the vegetation; and the intensity and scale of development.<sup>35</sup>

If the relevant authority decides that the removal of native vegetation cannot be avoided, the guidelines state that a consideration of whether the clearing can be minimised must follow. Factors to consider for minimisation include the size and layout of the proposed development; whether the project design and management minimise vegetation removal; and whether 'reasonable and practical measures' have been implemented to minimise vegetation loss.<sup>36</sup>

If the avoid and minimise steps have not been followed, the responsible authority, or DSE when the application is referred, can (and should) request further information or refuse the permit application. If the proposed vegetation removal is considered necessary or unavoidable, and the proposed removal has been minimised to the greatest extent practicable, then assessment of the application should proceed. This assessment should include consideration of appropriate offset options.<sup>37</sup>

<sup>31</sup> Department of Sustainability and Environment, 'Native Vegetation: Policy and Planning', above n 15, 1.

<sup>32</sup> For DSE-referred assessments, see Department of Sustainability and Environment, 'Guide for assessment of referred planning permit applications', 2007 and 'Vegetation Gain Approach – technical basis for calculating gains through improved native vegetation management and revegetation', 2006. For local government assessments, see Department of Sustainability and Environment, 'Guide for assessment of non-referred planning permit applications to remove native vegetation', 2011.

<sup>33</sup> The Framework, above n 1, Appendix 3.

<sup>34</sup> The Framework, above n 1, Appendix 4.

<sup>35</sup> See guidelines cited above n 32.

<sup>36</sup> Department of Sustainability and Environment, Guidelines for non-referred applications, above n 32, p 18.

<sup>37</sup> Department of Sustainability and Environment, Guidelines for non-referred applications, above n 32, p 18.

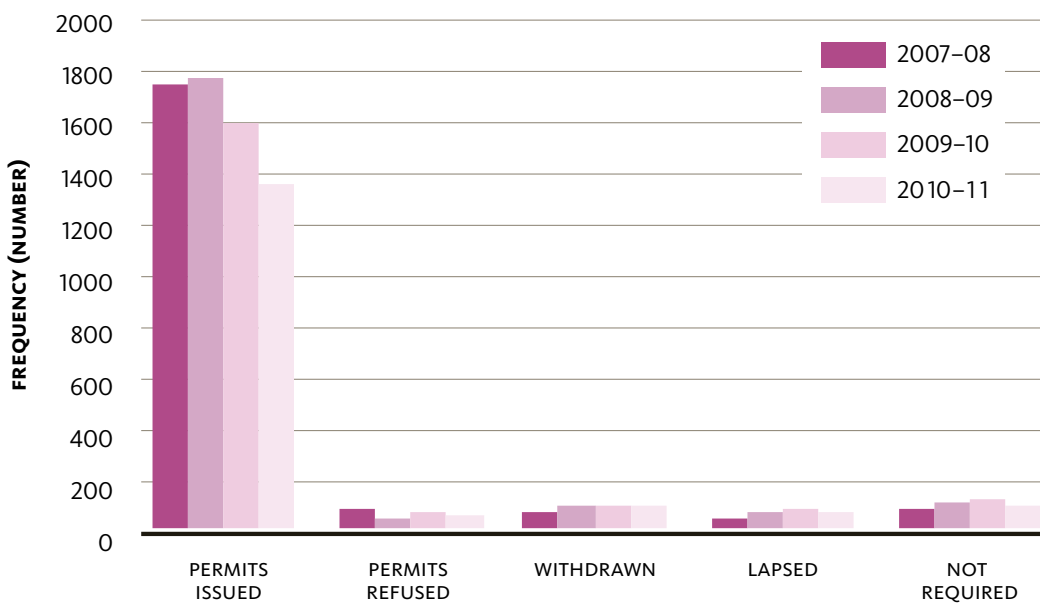
The Framework's criteria for avoidance and minimisation, if adhered to, are quite restrictive and would allow vegetation removal in only a very limited range of circumstances. However, these criteria are non-binding – at best they are 'considerations' in the decision-making process.<sup>38</sup>

Perhaps for this reason, in practice only a small proportion of permit applications to clear native vegetation are refused altogether. In 2010–11, for example, councils across Victoria received a total of 1,968 applications. Of these, only 71 (or 3.6%) were refused. A further 275 (or 14%) were withdrawn, lapsed or 'not required'; the remaining 1600 (or 81%) were approved (Figure 5).<sup>39</sup> These figures closely reflect permit activity in the preceding three years.

Of those applications approved, there is no available data on whether, and what, conditions may have been imposed, including whether minimisation or offsets of clearing were required.<sup>40</sup>

These figures are reflected in a case study conducted by the Municipal Association of Victoria (MAV) in 2007,<sup>41</sup> where only 2% of applications (one in 50) to clear native vegetation was refused outright by the local council.<sup>42</sup> Significantly, that one refusal was challenged in VCAT and overturned. The remaining permit applications were approved, with conditions, including offset plans, environmental management plans, flora and fauna assessments and retained tree protection.

**FIGURE 5:  
NATIVE VEGETATION PLANNING PERMIT  
APPLICATION ACTIVITY 2008–12**



Source: DPCD, *Planning Permit Activity Reporting in Victoria 2008-2011*.

<sup>38</sup> Victoria Planning Provisions, cl 52.17-5.

<sup>39</sup> The proportion of permits referred to DSE that are refused are similarly paltry (4.4% in 2010–11). Information provided by DSE on request, 16 December 2011.

<sup>40</sup> A DSE representative has sought to emphasise that 'there may be data' in unconsolidated form, for example in hard copy files and computer systems held by DSE or council (7 June 2012), however we query the value of such data, even if it does exist.

<sup>41</sup> Port Phillip and Westernport Management Authority, *Assessing the Effectiveness of Local Government Planning Scheme Controls in Protecting Native Vegetation in the Port Phillip and Westernport Region*, 2008, p i. The report was commissioned to address what the MAV called 'the apparent continuing loss of native vegetation' in the Port Phillip and Westernport Catchment region (comprising 42 local governments), despite the existence of the Framework and other planning instruments intended to protect that vegetation. The case study used a representative sample of cases across councils.

<sup>42</sup> Port Phillip and Westernport Management Authority, above n 41, Appendix 2. The case studies reflected 50 planning permit applications for native vegetation clearance at five local councils. The councils reflected a wide range of local government areas and circumstances.

Of course, evidence of avoidance and minimisation is not always easy to detect. For example, the figures cited in Figure 5 don't pick up instances where the proponent discussed the proposed clearing with council or a consultant at the pre-permit stage and decided not to proceed based on advice that it was unlikely to be approved, or where losses were minimised by modifying the plans before a formal application was submitted and approved. Nevertheless, while the figures cited may not be the complete picture, they are indicative of a trend: that avoidance and minimisation are not routinely the result of an application to clear native vegetation.

### Offset

A native vegetation offset is 'any works or other actions to make reparation for the loss of native vegetation arising from the removal of native vegetation'.<sup>43</sup> Offsets can include:

- an area of existing remnant vegetation that is protected and managed;

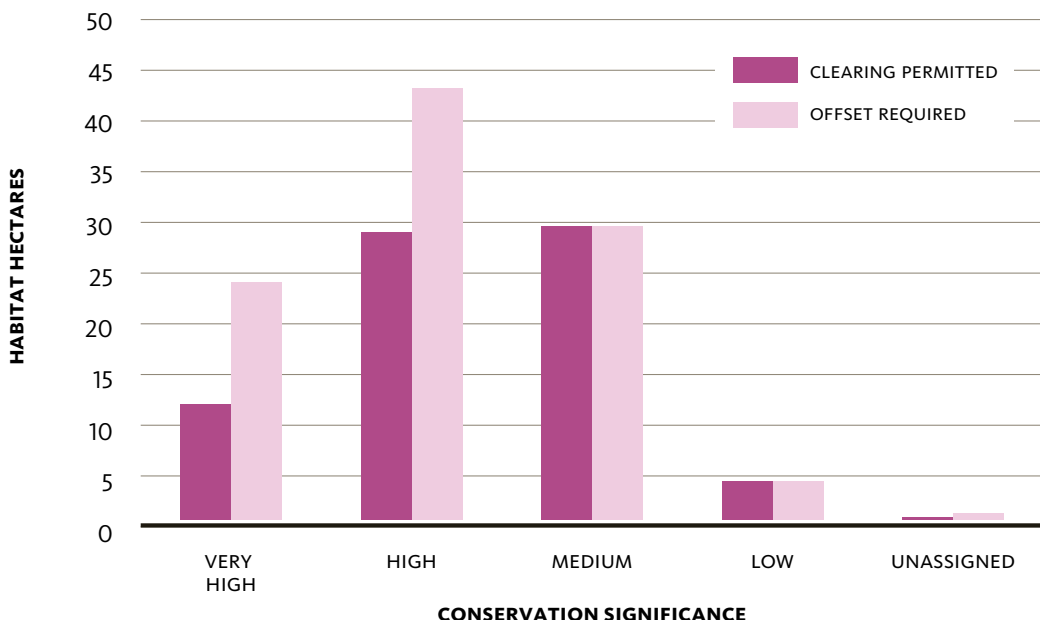
- an area that is revegetated and protected;
- an area that is set aside for regeneration or restoration; or
- any combination of the above.<sup>44</sup>

According to a VPP practice note on offsetting, an offset should always 'achieve a gain in the quality and quantity of native vegetation commensurate with the native vegetation lost, and be secure and ongoing'.<sup>45</sup> Figure 6 indicates that offsets required for clearing approved by DSE are at least commensurate with the native vegetation lost.

DSE has developed a complex 'gain score' method for measuring offsets,<sup>46</sup> the aim being to achieve a total gain score equal to the Net Gain target.<sup>47</sup>

A common method for sourcing offsets is through the BushBroker system, an initiative for registering and trading Native Vegetation Credits. These credits are listed on the BushBroker register and can be purchased and used as offsets for the removal of native vegetation.

**FIGURE 6:  
DSE OFFSET REQUIREMENTS FOR APPROVED CLEARING (2009-10)**



Source: DSE, NVT Annual Report 2009-10, p 21

<sup>43</sup> Victoria Planning Provisions, Practice Note: Native Vegetation Offsets, 2008, p 2 (<http://www.dse.vic.gov.au/land-management/native-vegetation-victorian-planning-provision-practice-notes>).

<sup>44</sup> Victoria Planning Provisions, Native Vegetation Offsets, above n 43, p 2.

<sup>45</sup> Victoria Planning Provisions, Native Vegetation Offsets, above n 43, p 2. The fact that this definition arises in a VPP practice note highlights the prevailing confusion around 'net gain' versus 'no net loss'.

<sup>46</sup> This method uses an online 'Gain Calculator', based on algorithms described in the Vegetation Gain Approach Manual, above n 32.

<sup>47</sup> Department of Sustainability and Environment, 'Vegetation Gain Approach - technical basis for calculating gains', above n 33.



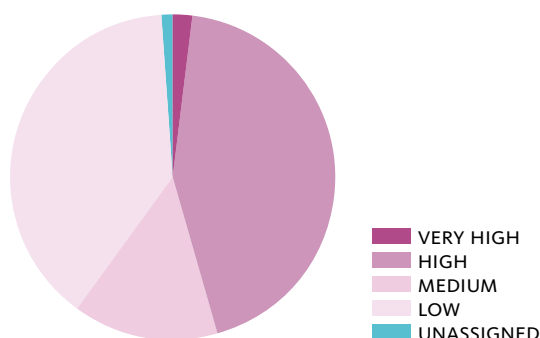
Offsets are secured by various means, including by imposing conditions on the permit (such as by an agreement under section 173 of the P&E Act<sup>48</sup>) or by way of an enforcement order.<sup>49</sup>

Key to finding an appropriate offset is meeting 'like-for-like' criteria. These criteria require the vegetation gains to be commensurate to the vegetation lost, based on the vegetation and habitat type, landscape role and quality.<sup>50</sup> While flexibility in procuring offsets is sometimes required,<sup>51</sup> the principle of like-for-like is extremely valuable for the integrity of the Framework. Fundamentally, it recognises that one ecological vegetation class is not substitutable for another.

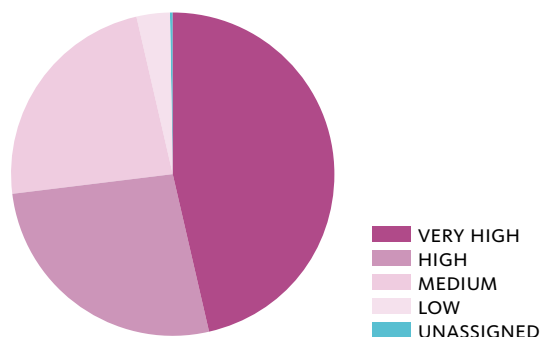
In practice, the very clear priority accorded by the Framework – that offsets for native vegetation clearing should only occur where clearing cannot be avoided, and in the case of vegetation of 'very high' conservation significance, only where exceptional circumstances apply – is not being achieved.

As noted above, it is difficult to ascertain when and where avoidance and minimisation have occurred, as there are numerous steps which take place before the permit is approved which are not reflected in the final figures (for example, the permit which is ultimately approved may allow less clearing than was sought in the original application). However, it is contended that offsetting is, as a rule, used regularly in favour of avoidance and minimisation. More than this, a large proportion of offsets concern native vegetation with 'high' or 'very high' conservation significance (Figures 7, 8 and 9), suggesting that the priority that the Framework gives to the retention of this vegetation is not being met.

**FIGURE 7:  
CONSERVATION SIGNIFICANCE OF DSE-APPROVED  
CLEARING BY SOURCE IN HHA (2009–10)**



**SCATTERED TREE CLEARING**



**REMNANT PATCH CLEARING**

Source: DSE, Native Vegetation Tracking: Annual Report 2009–2010, pp 7–8

Indeed, in the previous two financial years, where DSE has been the referral authority, a very large proportion of remnant patch clearing was of 'high' or 'very high' conservation significance (73.2% in 2009–10 and 80% in 2008–09).<sup>52</sup> Some 46% of scattered trees were of 'high' or 'very high' conservation significance in 2009–10 (Figure 7).<sup>53</sup>

Similarly, Figure 8 demonstrates that, in relation to major project approvals and native vegetation precinct plans, a staggering proportion (more than 99%) of clearing approved by DSE for remnant patch vegetation concerns vegetation of 'high' and 'very high' significance. More than half of clearing approved by DSE in relation to planning permit applications is similarly of 'high' or 'very high' significance.

For scattered trees, there is insufficient data for a complete picture. However, it is noteworthy that nearly 70% of planning permit applications approved by DSE to clear scattered trees are of 'high' or 'very high' conservation significance; 98% of approved clearing for precinct plans is of very high conservation significance.

48 In certain circumstances, such as when the vegetation that is approved for removal is of 'very high' or 'high' conservation significance, section 173 agreements will be more appropriate as they bind present and future landholders. Agreements can also be (and are increasingly being) made under s 69 of the Conservation, Forests and Lands Act 1987 (Vic) and the Victorian Conservation Trust Act 1972 (Vic).

49 Section 114 of the *Planning and Environment Act 1987* (Vic). Enforcement orders, once served on an owner or occupier of land, are binding on subsequent owners or occupiers (s 124). This mechanism is useful when the removal of vegetation was carried out without the necessary authorisation under the planning scheme.

50 Department of Sustainability and Environment, 'Native Vegetation Offsets: Conservation significance and like-for-like' (Fact Sheet 2, 2010), p 2; Department of Sustainability and Environment, Guide for assessment of referred planning permit applications, above n 32, p 24.

51 Where a like vegetation and/or habitat type cannot be found to offset the loss, it is possible to 'trade up'. For example, vegetation of medium conservation significance can be offset by protecting or creating a landscape of high conservation significance. In these cases, the vegetation or habitat type does not need to be like-for-like.

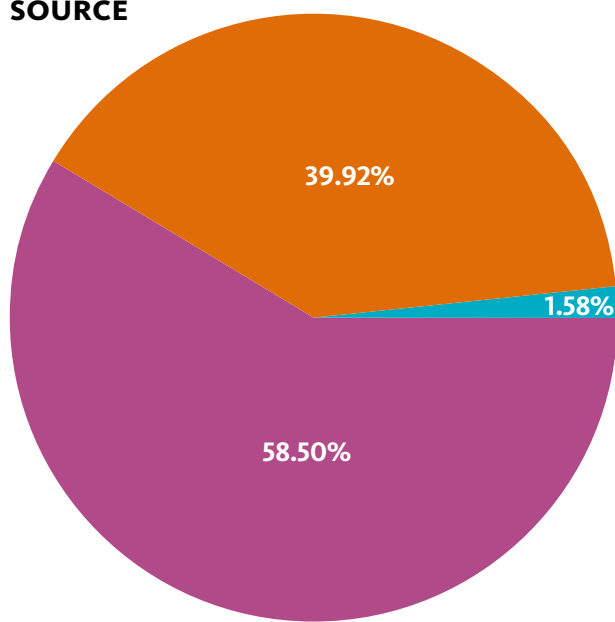
52 Department of Sustainability and Environment, 'Native Vegetation Tracking: Overview 2009–10', 2011.

53 Department of Sustainability and Environment, 'Native Vegetation Tracking: Annual Report 2009–10', (unpublished), p 8.

**FIGURE 8:  
CLEARING OF REMNANT PATCH VEGETATION BY  
SOURCE AND SIGNIFICANCE IN HHA (2009–10)**

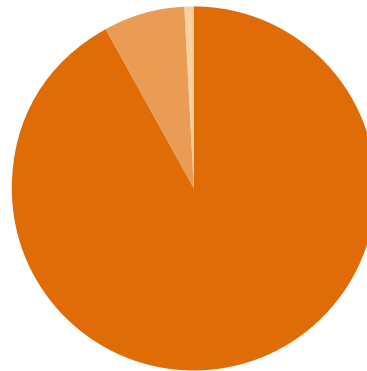
Source: DSE, NVT Annual Report 2009–10, p 6

**SOURCE**



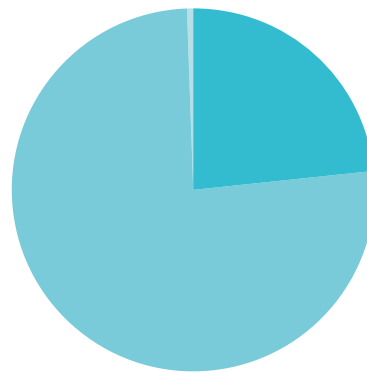
- MAJOR PROJECTS APPROVALS
- NATIVE VEGETATION PRECINCT PLANS
- PLANNING PERMIT APPLICATIONS

**CONSERVATION SIGNIFICANCE**



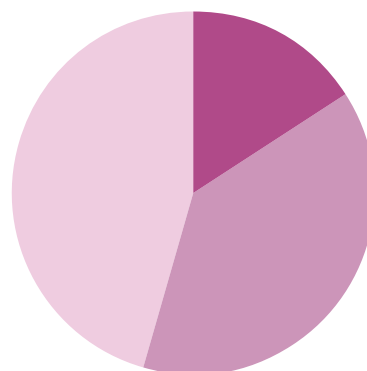
**MAJOR PROJECTS APPROVALS**

- VERY HIGH CONSERVATION SIGNIFICANCE
- HIGH CONSERVATION SIGNIFICANCE
- MEDIUM/LOW CONSERVATION SIGNIFICANCE



**NATIVE VEGETATION PRECINCT PLANS**

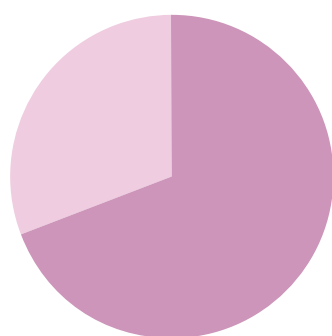
- VERY HIGH CONSERVATION SIGNIFICANCE
- HIGH CONSERVATION SIGNIFICANCE
- MEDIUM/LOW CONSERVATION SIGNIFICANCE



**PLANNING PERMIT APPLICATIONS**

- VERY HIGH CONSERVATION SIGNIFICANCE
- HIGH CONSERVATION SIGNIFICANCE
- MEDIUM/LOW CONSERVATION SIGNIFICANCE

**FIGURE 9:  
CLEARING OF SCATTERED TREES BY SOURCE (2009–10)**

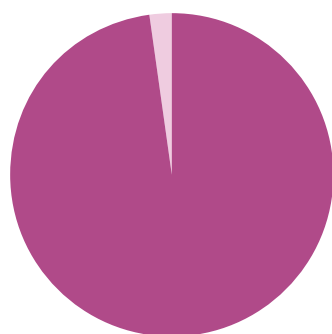


**PLANNING PERMIT APPLICATION**

- VERY HIGH CONSERVATION SIGNIFICANCE
- HIGH CONSERVATION SIGNIFICANCE
- MEDIUM/LOW CONSERVATION SIGNIFICANCE

**MAJOR PROJECT APPROVALS**

Due to manual reporting of clearing approvals related to major projects, scattered trees clearing approval data is not available.



**NATIVE VEGETATION PRECINCT PLANS**

- VERY HIGH CONSERVATION SIGNIFICANCE
- HIGH CONSERVATION SIGNIFICANCE
- MEDIUM/LOW CONSERVATION SIGNIFICANCE

Source: DSE, NVT Annual Report 2009–10, p 7

It is worth noting, of course, that these figures concern only those applications that were referred to DSE by responsible authorities. Arguably, these applications will by their nature concern vegetation of higher conservation significance, and so may produce results which are not representative of clearing activities across the board. In particular, figures may be distorted by the fact that a large proportion of applications occur in peri-urban areas, where habitat is already significantly fragmented and so of higher conservations status.<sup>54</sup>

However, the data still reveals a general propensity by DSE to approve, rather than avoid, clearing in the majority of cases. This suggests that the system of prioritisation is not working – while the Framework envisages that permits for clearing vegetation of very high conservation significance will only be granted in very limited circumstances, significant numbers of these permits are in fact being issued.

The fact that apparently significant amounts of very high and high conservation significance vegetation removal applications are approved suggests that very clear guidance is required to emphasise that the three-step approach is a sequential process – and that offsetting is only a satisfactory response once options for avoidance and minimisation have been exhausted. The scheme and its administration need to emphasise that offsetting is a last resort that is conditional on satisfaction of the requirement to avoid and minimise, not simply one of a range of equally valid options. This is particularly important in the biodiversity offset context, given that vegetation and habitat lost can never be directly ‘replaced’. As such, avoidance is a critical part of the scheme and must be upheld.

**6.2 Achieving Net Gain: gains and losses in quality and extent**

Where the three-step approach discussed in the previous section aspires only to achieving ‘no net loss’ of native vegetation, the overall objective of Net Gain is achieved through the following two additional measures.

**Government investment and voluntary measures**

In addition to BushBroker (discussed above in the context of offsets), an important government incentive for improving the quality of existing vegetation is Bushtender. Bushtender is an auction-based system whereby landowners tender for contracts with DSE to manage and improve native vegetation on their land in return for payment.

Since its inception in 2001, the Bushtender scheme has managed some 26,000 hectares of native vegetation on private land, of which 7,800 hectares are permanently protected by covenants.<sup>55</sup> Since this time, \$11.92m (or \$1.3m on average per year) has been spent on the initiative. The expected yield, measured in habitat hectares, is around 100 HHa per year.

<sup>54</sup> See for example comment in Department of Sustainability and Environment, NVT Annual Report, above n 53, p 20.

<sup>55</sup> Department of Sustainability and Environment, Past Projects, available at: <http://www.dse.vic.gov.au/conservation-and-environment/biodiversity/rural-landscapes/bushtender/bushtender-past-projects>

Bushtender is a valuable initiative. However, at the level of individual agreements, the security of the gains achieved beyond the period of the initial funding is unclear. At the program level, the State of the Environment Report has suggested that 'there is no guarantee that funds will be available in the future or that contracts will be renewed'.<sup>56</sup> This calls into question how permanent some of the gains are. To address these concerns, government should allocate or pledge substantial additional funds for ongoing management of protected land in perpetuity.

Voluntary measures are incentives provided to landholders to voluntarily undertake conservation activities with the aim of securing the participation of those that already have some commitment to conservation management. Landcare grants, Victorian Trust for Nature Covenants and Greening Australia fencing assistance are examples of the types of voluntary activity that might be taken up by landholders and volunteers.

There does not appear to be a consistent or reliable methodology for measuring 'gains' in voluntary activity. Moreover, there does not seem to be an effective distinction made between agreements of differing security; for example, binding, in-perpetuity conservation covenants (such as those available through Trust for Nature) and non-binding programs (such as those available through Land for Wildlife). Once again, this calls into question how gains are reliably measured, and how permanent the purported gains are.

### Losses from clearing without a permit

A significant amount of vegetation is cleared as a result of legal but exempted activity, as well as through illegal activity (discussed further in Part 8 below). While some steps are being taken to monitor this via remote sensing activity, this approach does not comprehensively account for losses in native vegetation (see Part 6.3 below).

The failure to effectively measure these losses – together with the shortfalls in methodology for measuring and securing gains in native vegetation through government and voluntary activity – significantly undermines the Net Gain objective. Of course, an inexact system for calculating gains and losses is preferable to no system at all; this said, there is a clear need to improve methods for measuring this integral component of the Net Gain matrix.

<sup>56</sup> Commissioner for Environmental Sustainability, State of the Environment Report, above n 23, p 269-270.

## 6.3 Accounting and mapping of vegetation gains and losses

### Accounting for Net Gain

The Framework stipulates that an accounting system is essential to the implementation and management of native vegetation. In 2008, DSE launched the long-awaited Native Vegetation Tracking System (NVT),<sup>57</sup> a web-based information system currently used by DSE for recording removal, retention and offsetting of native vegetation in Victoria, where a permit has been referred to DSE as the referral authority.

The NVT is a useful tool in that it assists DSE to oversee the implementation of the Framework, collate information regarding timelines, location and type of offsets, and monitor clearing trends. It is a welcome addition to the native vegetation management regime: before its introduction DSE was significantly hampered in its ability to monitor and enforce the delivery and management of offset areas.<sup>58</sup>

However, the fact that NVT is not currently available to other state or local government agencies undermines its potential to realise a coordinated system of data collection and reporting.<sup>59</sup> It further compromises one of the purposes of the Framework, to 'support local government' through better access to DSE's natural resource management tools.<sup>60</sup>

Further, NVT data is not publicly available. DSE's two-page NVT 'Information Sheet', which tracks trends in native vegetation clearance approved by DSE, is the only information on the public record.<sup>61</sup> The information provided is high level and provides very little specific data. Moreover it provides no data in relation to council-approved clearance activity.

<sup>57</sup> The Native Vegetation Tracking System was implemented six years after the Framework came into force. This delay was the subject of substantial criticism.

<sup>58</sup> Commissioner for Environmental Sustainability, State of the Environment Report, above n 23, p 267.

<sup>59</sup> Various recent reports and submissions, including by the EDO, have recommended that all vegetation clearance be recorded on the NVT, including encouraging voluntary registration of exempt clearing by landholders. Commissioner for Environmental Sustainability, State of the Environment Report, above n 23, pp 267-8; Environment Defenders Office, 'Submission in Response to A Sustainable Future for Victoria: Getting Environmental Regulation Right', 2009.

<sup>60</sup> The Framework, above n 1, p35. The Department of Sustainability and Environment has stated that 'at this point in time there are not the resources available to roll-out NVT across all local councils and provide the user support that would be required'. Email from Department of Sustainability and Environment to EDO, 10 April 2012.

<sup>61</sup> Two have been published to date: Department of Sustainability and Environment, 'Native Vegetation Tracking: Overview 2008-09' and 'Native Vegetation Tracking: Overview 2009-10' (<http://www.dse.vic.gov.au/land-management/land/native-vegetation-home/native-vegetation-local-government#nvt>).

Notably, DSE provided EDO with a copy of its much more comprehensive, 37-page 'Native Vegetation Tracking Annual Report (2009–10)' on request. EDO queries why this report is not publicly available and encourages DSE to publish this and previous/subsequent reports on its website.

The Victorian Government has stated that it will use the NVT as an auditing tool for the processing of planning permits. In particular, it will enable 'comparison between officers and regions based on uniform criteria with a view to ensuring that the appropriate process has been applied and a high level of consistency of decision-making occurs'.<sup>62</sup> However, there is no evidence to date that the NVT is being used for this purpose, or to achieve these ends.

In conclusion, data on implementation of native vegetation removal permits remains incomplete, unavailable to the public, and at times unreliable. What is required is a coordinated recording and reporting system for native vegetation transactions, in particular for clearing permits and offsets.

### Mapping Net Gain

Various technologies have been developed to measure changes in Victoria's native vegetation extent and quality since 2002. These include:

- the publicly available Biodiversity Interactive Map, which displays flora and fauna data, including high-level vegetation quality and extent (it does not, however, provide a break-down of display vegetation types, clearance rates, or offset activity, nor is it sufficiently detailed for site-based assessments);
- the Catchment Activity Management System (CAMS), a web-based data management and reporting system that captures information on specific projects (its mapping capacity is basic, however, and it is only available on request); and
- various localised Graphic Information Systems (GISs) used by local government (not publicly available).

The absence of a single mapping tool for tracking native vegetation loss is an impediment to the effective implementation of the Framework.

In all its various current forms, mapping technology also remains limited. The detail of information relating to the landscape varies substantially but is, in the majority, based on 'very broad assumptions only'.<sup>63</sup> Until a more accurate and complete native vegetation mapping regime is implemented, a cautious approach is required when measuring progress in native vegetation coverage in Victoria.

## 6.4 Conclusions

The Framework provides a robust system for managing native vegetation in Victoria. However, due to failures in implementation, the goal of Net Gain is not being achieved.

Perhaps most troublingly, the first two steps in the three-step approach are regularly passed over in favour of offsetting. This is in spite of the fact that the native vegetation proposed to be removed is, in many cases, of 'high' or very high' conservation significance.

Further, the system for measuring Net Gain, calculated on the basis of losses and gains achieved through government investment, voluntary measures, and exempted activity is poorly documented and so does not serve as an adequate tool for regulating, or measuring the relative success of, Net Gain.

Neither DSE nor local councils maintain data that reflects permit activity – in particular, whether and when avoidance and minimisation is achieved; and when it is not, what conditions are imposed on permits, including offset conditions.

Finally, while the NVT system established and operated by DSE provides substantial data in relation to native vegetation clearance activity, this is not made available to the public, or indeed to local councils. The latter in particular would benefit from this information, not to mention the opportunity to share their own and so expand the database substantially.

Ultimately, while clearing rates have diminished in recent decades, overall, net losses continue to occur, particularly as a result of activities on private land. This suggests a failure not of the Framework itself, but of its implementation. It is vital that this failure be addressed.

<sup>62</sup> Victorian Government's Response to VCEC's Final Report, above n 16, p 16.

<sup>63</sup> Department of Sustainability and Environment, First approximation report, above n 2, p 13.

## 7. REVIEW OF PERMIT DECISIONS

### 7.1 VCAT's treatment of native vegetation permit appeals

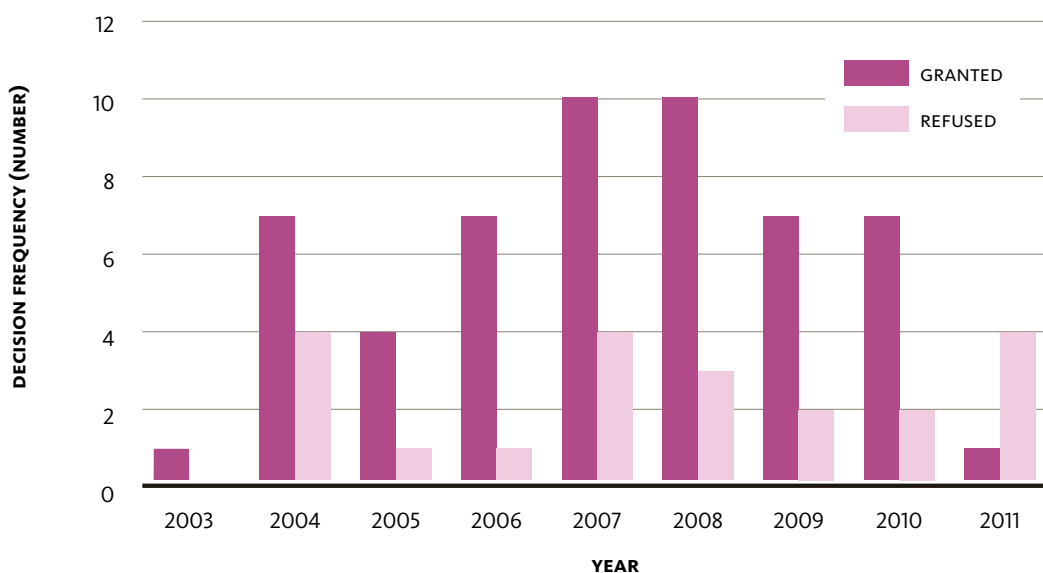
The decision of a responsible authority on a planning permit application may be appealed to the Victorian Civil and Administrative Tribunal (VCAT).<sup>64</sup> This appeal is 'on the merits': that is, VCAT makes the decision again as if it were the responsible authority.<sup>65</sup> Through this avenue of appeal, VCAT has had an important impact on the legal development of the Framework, establishing precedents as to what the Framework requires and how it must be applied.

Early VCAT decisions applying the Framework favoured allowing residential subdivisions, retaining key native vegetation and providing for offsets.<sup>66</sup> Some recent decisions, however, have emphasised the primacy of avoidance as an important first step in the Net Gain approach. Notably, in the 2009 decision of *Reeve v Hume City Council*,<sup>67</sup> the Tribunal established that the starting point for applying the Framework should be to ask:

- why native vegetation should be lost rather than how it can be offset;
- what conservation significance and other biodiversity values the affected native vegetation has; and
- what innovative measures can be applied that would enable the retention of significant native vegetation.

*Reeve* has been followed in several subsequent decisions in which permit applications to clear native vegetation in favour of development were refused.<sup>68</sup> However, these decisions are in the minority. Although there is a general acceptance at VCAT that the Framework is a relevant consideration in the decision-making process, in the significant majority of cases, VCAT grants permits to clear native vegetation, generally subject to offset conditions.<sup>69</sup>

**FIGURE 10:**  
REVIEW BY VCAT OF DECISIONS BY RESPONSIBLE AUTHORITY TO REFUSE A PERMIT TO CLEAR NATIVE VEGETATION



Source: Australasian Legal Information Institute (AustLII) online database

<sup>64</sup> *Planning and Environment Act 1987* (Vic), Part 4 Division 2.

<sup>65</sup> *Planning and Environment Act 1987* (Vic), s 85.

<sup>66</sup> See for example *Lorne Country Club Inc v Surfcoast SC* [2004] VCAT 260 and *Villawood Properties v Greater Bendigo CC* [2005] VCAT 2703.

<sup>67</sup> *Reeve v Hume CC & ors* [2009] VCAT 65.

<sup>68</sup> *TGM Group Pty Ltd v Surfcoast SC* [2009] VCAT 703; *North Burnside Pty Ltd v Melton SC* [2009] VCAT 1203; *Taylor v South Gippsland SC* [2009] VCAT 1851; *McKerrow v Hume CC* [2011] VCAT 1030.

<sup>69</sup> Counting only those decisions in which a decision was reached – that is, 158 cases.

This often involves overturning the original decision to refuse a permit to clear native vegetation. In fact, since the inception of the Framework in 2002, a substantial number of cases seek to review decisions made by a responsible authority where it has refused the granting of a permit to clear native vegetation. In 67, or an average of 70% of those cases, VCAT overturned the original decision, granting a permit, generally with conditions to offset (Figure 10).

These figures were compiled by undertaking a comprehensive review of cases reported in the Australasian Legal Information Institute (AustLII) between 2003 and 2011 that involved an application to clear native vegetation. The applications in the 96 cases in question were refused by the responsible authority at first instance, but then challenged in VCAT (generally by the proponent).

## **7.2 Conclusions**

Once again, these results are an example of the disconnect between the original intent of policy-makers to achieve a binding and enforceable instrument, and its implementation as one objective among many, to be given 'consideration' but no special or legal force. They may also suggest a development-friendly culture within VCAT – which would presumably place pressure on responsible and referral authorities to make development-friendly decisions at first instance – though this is more difficult to ascertain.

In any case, the treatment and interpretation by VCAT of the Framework reveals its tenuous position within the planning scheme. This problem would best be resolved through the development of a separate legislative framework for native vegetation controls.

## 8. MONITORING, COMPLIANCE AND ENFORCEMENT

The effective implementation of native vegetation regulation involves a number of important functions including sampling and analysis, enforcing the permit requirements, detecting and prosecuting illegal clearing, registering offsets, and monitoring and enforcing offset agreements. Without these mechanisms, the Framework's operation is undermined.

According to the Planning Enforcement Officers Association's Guide to Planning Enforcement in Victoria, the objectives of enforcement are to:

- ensure compliance with;
- avert or prevent threatened breaches of;
- stop existing breaches of; and
- punish for breaches of

the planning scheme, permits and their conditions and agreements made under s 173 of the P&E Act. The primary goal of enforcement should be to obtain compliance rather than prosecute offenders.<sup>70</sup>

A structured framework or policy to guide compliance and enforcement activity is essential for the achievement of these objectives.<sup>71</sup> Importantly, it should go beyond aspirational guiding principles; for example, by providing a detailed outline of how those principles will be implemented through the decision-making and enforcement process. Well-developed and clear systems assist both decision-makers and the regulated community in achieving compliance. They also act as an educational tool and a deterrent.

Further, it is extremely important that DSE and responsible authorities publicly report on their compliance and enforcement activity. Reporting compliance and enforcement action provides information to the community, including those regulated, about the impact and outcomes of regulation and promotes confidence that those who breach regulatory requirements are being held accountable for their actions.

### 8.1 Compliance monitoring of native vegetation activities

Councils are primarily responsible for monitoring vegetation management activities under the Framework, though CMAs and State government agencies also play a role. The Framework stipulates various measures and activities to ensure effective monitoring. These include:

- recording on-ground native vegetation activities using the Catchment Activity Management System (CAMS);
- using approved systems such as the National Vegetation Information System and Environmental Management Systems to ensure that monitoring activities are undertaken consistently and in accordance with minimum requirements;
- developing and implementing a Statewide Vegetation Quality Indicator (or mapping method) that contributes to an overall assessment of native vegetation activity;
- undertaking regular remote sensed mapping to monitor and detect illegal native vegetation clearance; and
- introducing a compliance auditing system for the *Code of Forest Practice for Timber Production* on private land.<sup>72</sup>

In practice, there is very little data available on the extent and/or success of compliance monitoring and enforcement regimes for native vegetation in Victoria. As a rule, this is because the data is simply not gathered – due to lack of resources, systems and/or commitment on the part of the responsible authority.

However, it is a widely accepted fact that there is 'limited or no monitoring of compliance with permit conditions in most councils, and limited enforcement action for breaches'.<sup>73</sup> This is one of the major limitations of the Framework.

<sup>70</sup> Planning Enforcement Officers Association, Guide to Planning Enforcement in Victoria, 2007, p 5.

<sup>71</sup> In particular, enforcement activity should be targeted, proportionate, transparent, consistent, accountable, inclusive, authoritative, and effective. See Stan Krpan, Compliance and Enforcement Review: A Review of EPA Victoria's Approach, 2011, available at: <http://epanote2.epa.vic.gov.au/EPA/publications.nsf/PubDocsLU/1368?OpenDocument> pp 206–208.

<sup>72</sup> The Framework, above n 1, chapter 9.2.

<sup>73</sup> Municipal Association of Victoria, 'Native vegetation management and local government: A report on the capacity of Victorian local government to undertake native vegetation management' (undated), p 30. This is reinforced by a sample survey conducted by MAV; for example, it would appear that most councils undertake limited or no monitoring of compliance with native vegetation permits, and limited enforcement of permit breaches.



It is worth noting at the outset that ‘councils vary considerably in their commitment, resources and skills in undertaking the enforcement of their planning schemes’.<sup>74</sup> For example, some (generally better resourced) councils might have several full-time planning enforcement officers engaged to meet their legislative requirements. They are well-managed, trained, and have well-developed guidelines, processes and systems. Others may have fewer but well-trained and experienced staff, such as a designated environmental planner and a compliance officer who work in close coordination with one another. Still others – particularly in less well-resourced (often rural) areas, may have only one planning enforcement officer tasked with managing compliance across the entire planning scheme. As such, the range in performance of monitoring and compliance obligations across the State is wide.

Even at their best, however, councils are failing to achieve effective monitoring of native vegetation activity. Measures endorsed by the Planning Enforcement Officers Association, such as auditing new and existing use and development, and establishing a reliable (ideally automated) system for monitoring compliance, are not in force. This has resulted in an expectation on the part of applicants that their planning conditions will not be followed up – leading to non-compliance.<sup>75</sup>

Given that basic requirements are not being met, it is unlikely that more complex monitoring situations such as transfers on property ownership, obligations that extend over many years or in perpetuity, and failures of offsets through drought or fire are being managed consistently or effectively.

EDO recommends that responsible authorities establish proactive auditing regimes for new and existing uses to assess compliance with the Framework. This need not be a resource-intensive process. For example, the responsible authority might:

- draw attention to permit conditions requiring further information and send reminder letters when such further information is still outstanding;
- periodically send out letters to permit holders seeking a report on their compliance;
- write to all permit holders announcing a random audit; or
- carry out targeted audits in areas of non-compliance.<sup>76</sup>

Not only would this shift community expectations in relation to enforcement (thereby leading to better compliance), it might also reduce future costs arising from reactive planning enforcement processes – particularly those involving legal action.

## 8.2 Enforcement

Where a person breaches the planning scheme, a permit or agreement, they have committed an offence under the P&E Act. There are a number of enforcement options open to responsible authorities to rectify a breach, including:

- negotiating informally with the alleged offender;<sup>77</sup>
- serving an official warning;<sup>78</sup>
- serving a planning infringement notice;<sup>79</sup>
- applying to VCAT for an enforcement order; and<sup>80</sup>
- prosecuting the offence in the Magistrates Court.<sup>81</sup>

Other enforcement options include payment in lieu (for permits requiring offsets) or actions in negligence for a breach of the duty of care to protect the land.<sup>82</sup>

<sup>74</sup> Guide to Planning Enforcement in Victoria, above n 70, p 5.

<sup>75</sup> This statement is based on discussions with a number of councils (November–December 2011).

<sup>76</sup> Guide to Planning Enforcement in Victoria, above n 70, p 7; also discussions with local council representatives.

<sup>77</sup> The benefits of this approach are that it is constructive, conciliatory and may avoid the need for formal action. It is generally the first step taken.

<sup>78</sup> *Infringements Act 2006* (Vic) ss 8-11.

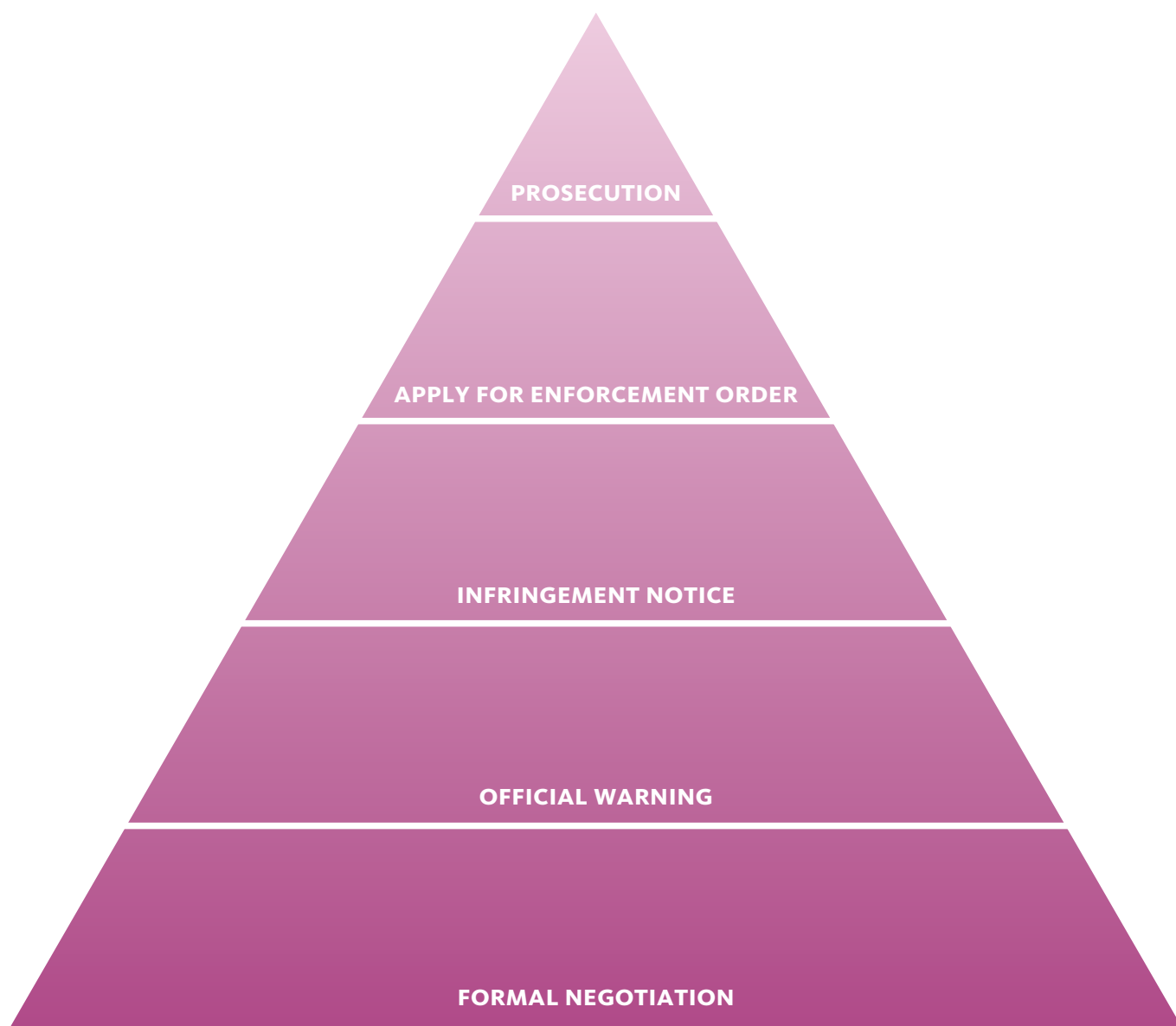
<sup>79</sup> *Planning and Environment Act 1987* (Vic) ss 130, 13(2A); *Infringements Act 2006* (Vic) ss 13, 16, 18, 19, 22, 32.

<sup>80</sup> *Planning and Environment Act 1987* (Vic) ss 14-16, 19, 122-123, 125.

<sup>81</sup> *Planning and Environment Act 1987* (Vic) ss 126-9.

<sup>82</sup> *Catchment and Land Protection Act 1994* (Vic) s 20.

**FIGURE 11: ENFORCEMENT PYRAMID FOR BREACHES TO THE PLANNING SCHEME, PERMITS OR AGREEMENTS**



*Pyramid based on EPA's 'hierarchy of EPA enforcement tools', in 'Compliance and Enforcement Review: A review of EPA's approach, Stan Krpan, 2011.*

In practice, given the absence of consistent and effective monitoring, enforcement generally relies on such ad hoc measures as ‘nosy neighbours and chance discovery’.<sup>83</sup> As stated by one council representative:

The only cases of illegal native vegetation removal that Council follows up on are those that are reported by someone or cases that have been issued a permit and are in places that are visible and/or located close to town or along regularly used roads.<sup>84</sup>

In other words, the vast majority of enforcement activity is reactive rather than proactive. As a result, most contraventions go undetected.<sup>85</sup> This appears to be accepted as a *fait accompli* by many councils. When asked what data was available on illegal clearing of native vegetation, one council stated that there was none, but even if there were:

I don’t know if I’d want to know – [enforcing those breaches] would be all I’d be doing!<sup>86</sup>

Another source reflected the same sentiment, suggesting that local and state governments are reluctant to even turn their minds to the problem, because of the can of worms that would be opened if they did.<sup>87</sup> This attitude was expressed repeatedly in our discussions with councils.

Where contraventions are pursued, they are generally dealt with by way of warnings, fines, requirements to enter into Bushbroker agreements, and occasionally, enforcement orders. This informal, more flexible approach has generally been preferred to criminal prosecutions (dealt with in the Magistrate’s Court), which are very rare, due, it would seem, to the time and expense involved in pursuing offences through the legal system.<sup>88</sup>

In spite of these concerns, it should be noted that there appears to be a growing appreciation of these issues among some local councils and DSE. We understand that the Local Government Native Vegetation Working Group, comprised of members of DSE and local councils, have discussed how the native vegetation monitoring and enforcement regime could be improved.<sup>89</sup>

83 Australian Institute of Criminology, ‘Environmental Crime in Australia’, 2010, p 91. This is supported by anecdotal evidence gathered from various councils across the State.

84 Pers. Comm. local council environment planner, November 2011.

85 It is likely that a very high proportion of clearing occurs illegally. While no studies have been conducted in Victoria, studies conducted in other States suggest that illegal clearance rates are as high as 40%. See Environmental Crime in Australia, above n 83, p 91.

86 Pers. Comm. local council compliance officer, November 2011.

87 Pers. Comm. November 2011.

88 This is based on anecdotal evidence given that Magistrates Court decisions are only reported in very limited circumstances. However, it corresponds with comparative data in other States. In NSW, between 2002 and 2006, 523 compliance actions resulted from illegal clearance. Of these, 69% were warning letters and only 2% of breaches were prosecuted. Similarly, in WA between 2005 and 2007 only 10 (or 1.8%) of 550 complaints were successfully prosecuted. Environmental Crime in Australia, above n 83.

89 Pers. Comm. Municipal Association of Victoria, November 2011.

### 8.3 Conclusions

The absence of an effective or comprehensive monitoring and enforcement regime is the biggest failure of the Framework. This problem is not new: the need to improve government’s performance in monitoring and enforcement of native vegetation regulation has been highlighted in numerous reports,<sup>90</sup> as well as in submissions by the EDO.<sup>91</sup>

Some important reasons for this failure include:

- insufficient funding (and the discretionary allocation of resources);<sup>92</sup>
- the absence of an enforcement culture;<sup>93</sup>
- the complexity of the regime and associated challenges of recruiting appropriate staff;
- the administrative ‘disconnect’ between the development of permit conditions by DSE on the one hand, and their enforcement by local government on the other;<sup>94</sup> and
- limited community education and engagement.<sup>95</sup>

While the Brumby Government indicated in 2010 that it ‘supports increased emphasis on compliance and enforcement’, and had pledged to ‘develop a strategy to monitor and enforce compliance with the native vegetation regulations and offset agreements’ by June 2010, the Baillieu Government has not followed these commitments.<sup>96</sup>

90 Most recently, State of the Environment Report, above n 23, Department of Sustainability and Environment, ‘Securing our National Future: Land and Biodiversity White Paper’, chapter 3; VCEC Inquiry, above n 18.

91 Environment Defenders Office, above n 59.

92 For example, the average revenue per application to remove native vegetation (\$0 – \$482) is dwarfed by the costs of administration and processing controls (\$712 – \$1152), VCEC Inquiry 2005, above n 20, p 191.

93 That is, ‘there must be a *willingness* to pursue enforcement’ [our emphasis]. Guide to Planning Enforcement in Victoria, above n 70, pp 5–6.

94 See for example the VEAC Report, above n 20, p 16. It has been proposed, and EDO supports the suggestion, that the division of responsibilities at State and local government level is clarified and streamlined. See Environment Defenders Office (Vic) [submission to VCEC 2009], above n 59.

95 See Natural Resource Management Ministerial Council, Australia’s Biodiversity Conservation Strategy 2010–2030, 2010.

96 Victorian Government Response to VCEC report, above n 16, recommendation 6.8.

## 9. TRANSPARENCY AND ACCOUNTABILITY

As reflected in the Victorian Government's Good Regulatory Design principles and highlighted in previous reports in this series, an effective regulator should demonstrate transparency and accountability.<sup>97</sup> Transparency and accountability both encompass timely, reliable, clear and relevant public reporting on the regulator's activities, operations and performance. These characteristics enhance the confidence of the community in the effectiveness and independence of the regulator and strengthen the credibility of the regulator.

The lack of a clear compliance and enforcement policy and diffusion of responsibility for administration of the Framework between the DSE and local councils result in a complex system for the regulation of Victoria's native vegetation. Consequently, all regulatory decisions made should be a matter of public record. This is in line with recommendations made in various reports to improve transparency and accountability or native vegetation regulation.<sup>98</sup> In its response to a report by the Victorian Competition and Efficiency Commission in 2009 the government undertook to 'develop a vehicle for performance monitoring and evaluation which is open and transparent'<sup>99</sup> however this is not yet in place, and there are no indications that such a vehicle is being developed.

The EDO has developed a table at Appendix A setting out the information we believe the DSE should report on under the Framework. The EDO recommends the DSE use this table to report against each financial year.

<sup>97</sup> Department of Treasury and Finance, Victorian Guide to Regulation, 2007, p3-2.

<sup>98</sup> State of the Environment Report, above n 23, p 252; VCEC Report, above n 16, recommendation 6.5.

<sup>99</sup> Victorian Government Response to VCEC report, above n 16, p 11.

## 10. CONCLUSIONS AND RECOMMENDED NEXT STEPS

The Framework is approaching its 10-year anniversary. In this time it has been the subject of a significant number of reviews and undergone some reform as a result. Since 2002, applications to clear native vegetation have reduced substantially, and overall clearing is on the decline (though reliable data is unavailable).

The Framework and associated regulations are a valuable tool for the protection and management of native vegetation, particularly on private land. The three-step 'Net Gain' approach is particularly valuable. However, in practice the Framework has underperformed. This is because, among other things:

- the first two steps in the three-step approach (avoid and minimise) are regularly bypassed in favour of offsetting;
- the system for measuring Net Gain (calculated on the basis of losses and gains achieved through government investment, voluntary measures, and exempted activity) is poorly documented and so is inadequate for regulating or measuring Net Gain;
- the Framework is poorly monitored and enforced;
- data essential to regulating the Framework is not collected, or unavailable to the public;
- the Framework is a weak and unenforceable instrument; and
- the Framework is under-resourced, particularly in relation to the ability of local councils to monitor and enforce permit conditions.

## KEY RECOMMENDATIONS

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### Implementation

- DSE should reinforce, through very clear guidance, that the three-step approach is a sequential process, and that offsetting is only a satisfactory response once options for avoidance and minimisation have been exhausted.
- Responsible authorities should ensure that offsets are to be as close as possible in vegetation type to the lost vegetation, in accordance with the principle of 'like-for-like'.
- The Government should declare areas of very high conservation significance as off limits for clearing and give those areas strong support through schemes like BushTender.
- DSE should develop a mechanism to address the 'disconnect' in decision-making between responsible authorities and referral authorities, to avoid unwanted complexity and fragmented decisions.
- The Government should provide adequate resources to local councils to enable them to effectively implement the Framework, native vegetation regulations and policy.
- DSE should develop a more effective matrix for measuring 'gains' in native vegetation from voluntary activity and 'losses' from clearing without a permit and other activities.

### Monitoring and enforcement

- The Government should follow through with the previous Government's commitment to 'develop a strategy to monitor and enforce compliance with the native vegetation regulations and offset agreements'.
- The Government should provide adequate resources to local councils to enable them to effectively monitor and enforce the Framework, native vegetation regulations and policy. In particular, funding should reflect an explicit recognition of the unique skills and specialist knowledge required to monitor and enforce the Framework.
- DSE should develop a clear policy for protecting offsets in the long term. This should ensure obligations that extend over many years or in perpetuity are upheld, as well as funding long-term management.
- DSE should assist with the development of a culture of compliance and enforcement at local government level.
- Responsible authorities should establish coordinated, proactive auditing regimes to monitor compliance with the Framework. DSE should assist in the development of these regimes.

### Data collection and publication

- DSE should make the Native Vegetation Tracking System (NVT) available to all relevant authorities, in particular local governments, to ensure that all native vegetation transactions are registered and dealt with in a consistent and reliable manner.
- DSE should report on and publicise all data obtained through the NVT. Information regarding permits issued or renewed, offset conditions and breaches should be gathered and made publicly available.
- DSE should provide assistance and training to local government planners and other relevant staff to access and use the NVT as well as existing datasets.

### Legal recognition

- The Government should establish a separate legislative regime for native vegetation removal that entrenches the requirement for 'Net Gain' rather than continuing to graft the system onto a planning approvals regime that is increasingly ill suited to dealing with biodiversity issues.

# APPENDIX A: INFORMATION THAT DSE SHOULD PUBLISH ANNUALLY

## 1 Native vegetation clearance data

- 1.1 Amount of native vegetation cleared in Victoria annually:
  - 1.1.1 in hectares and habitat hectares
  - 1.1.2 by vegetation type
  - 1.1.3 by region

## 2 Permit data

- 2.1 Number of applications made for permits to clear native vegetation
- 2.2 Number of applications referred to DSE
- 2.3 Number of permits granted to clear native vegetation:
  - 2.3.1 by responsible authorities
  - 2.3.2 by referral authorities (DSE)
- 2.4 Number of permits refused
- 2.5 Conditions applied to permits

## 3 Offset data

- 3.1 Proportion of cleared native vegetation that is offset
- 3.2 Types of offsets used

## 4 Government investment and voluntary activity

- 4.1 'Gains' in native vegetation (in HHa) achieved through:
  - 4.1.1 schemes such as Bushtender and BushBroker
  - 4.1.2 voluntary activity and the extent to which these gains are secure, and for how long

## 5 Losses from clearing without a permit

- 5.1 Amount of clearing that occurs without a permit
  - 5.1.1 from exempt activity
  - 5.1.2 from illegal clearing
  - 5.1.3 from 'other processes'

## 6 Precinct Plans

- 6.1 Number of Precinct Plans implemented

## 7 Monitoring activity

- 7.1 Number of permits audited during the term of accreditation contrasted with number inspected upon renewal

## 8 Enforcement activity

- 8.1 Number of complaints received from the community alleging a breach of native vegetation requirements
- 8.2 Number of complaints followed up by responsible authorities
- 8.3 Number of official warnings
- 8.4 Number of Planning Infringement Notices
- 8.5 Number of enforcement orders
- 8.6 Number of prosecutions and outcomes against corporations and individuals

