

“Native grasses have got to watch their backs...”¹

From ‘Native Grasses’: a poem by Jeanine Leane

This Newsflash delves a little further into protections for native grasses.

Native Grass Restoration Project

The Tasmanian Midlands is an ecologically distinctive and significant Australian landscape, owing to its mountainous surroundings and lower rainfall, which is at the same time one of the most under-protected landscapes in Australia. It is an important location for native temperate grasslands.² These native grasslands are generally found on valley floors. It is also home to 32 plant and animal species threatened nationally, and 180 plant and animals species threatened in Tasmania.



Image: Native grasses in the Tasmanian Midlands.

Changes and intensifications in farming practices left only 30% of native vegetation remaining, much of it degraded.

The **Midlandscapes Project** is a landscape scale conservation project within a working landscape designed to protect grassy woodlands, native fauna and temperate grasslands. The Project is a collaboration between Bush Heritage Australia and the Tasmanian Land Conservancy. At its core is the Midlands Conservation Fund, which received private donations exceeding \$3.7M since established in 2013.

Land owners who take part in the project are paid a fee for setting aside some of their land for conservation, and an annual payment for meeting conservation targets. The project emphasises co-operation and collaboration, not competition. It works to a clear vision and action plan, offering hope for protection of important native grasses³.

Victorian Planning Controls

Native grasses fall within the definition of ‘*native vegetation*’ in Victoria’s planning schemes:

“Plants that are indigenous to Victoria, including trees, shrubs, herbs, and grasses”⁴.

¹ Leane, Jeanine, 2020, *Native Grasses*, <https://kellehers.com.au/latest-news/heal-country/> (accessed 21 July 2021)

² Fitzsimons, James, Ian Pulsford and Geoff Wescott, eds., *Linking Australia's Landscapes: Lessons and Opportunities from Large-scale Conservation Networks* (CSIRO Publishing, June 2013), pp 85-94, 87.

³ <https://www.bushheritage.org.au/places-we-protect/tasmania/midlands> (accessed 21 July 2021)

⁴ Clause 73.01 *Victoria Planning Provisions* https://planning-schemes.api.delwp.vic.gov.au/schemes/vpps/73_01.pdf?qa=2.32863102.1576877253.1627015874-1677249173.1624519559 (accessed 21 July 2021)

A permit is required to remove, lop or destroy 'native vegetation', including indigenous grasses.⁵

Victoria classifies vegetation communities using the Ecological Vegetation Class (**EVC**) system. The EVC's geographical distribution and layout helps set Victorian bioregions., the relevant one for grasses is "patch". A "patch", as relevant to grasses is any of:

- a. an area of vegetation where at least 25 per cent of the total perennial understorey plant cover is native; and
- b. any mapped wetland included in the current wetlands map, available in DELWP systems and tools.⁶

The DELWP are to:

1. avoid the removal, destruction or lopping of native vegetation;
2. minimise impacts from the removal, destruction or lopping of native vegetation that cannot be avoided;
3. provide an offset to compensate for the biodiversity impact if a permit is granted to remove, destroy or lop native vegetation.⁷

The guidelines note that they are not the complete set of requirements:

*"Compliance with these guidelines alone does not ensure the meeting of all relevant planning scheme requirements regarding removing native vegetation."*⁸



Generally, when development interacts with native vegetation, two objectives are important:

- a. Ensuring the design responds to the existing site conditions, including landform, soil type, existing vegetation, natural drainage network and local climate; and
- b. Ensuring the design contributes to a sustainable environment. This includes the protection and enhancement of existing eco-systems, provision of habitat for indigenous species, improvement to watercourses and riparian areas and responding to the impact of climate change.

Development should respond to existing vegetation in a meaningful way.

⁵ Clause 52.17 Victoria Planning Provisions https://planning-schemes.api.delwp.vic.gov.au/schemes/vpps/52_17.pdf?_ga=2.37124064.1576877253.1627015874-1677249173.1624519559 (accessed 17 July 2021).

⁶ Ibid.

⁷ https://www.environment.vic.gov.au/_data/assets/pdf_file/0021/91146/Guidelines-for-the-removal,-destruction-or-lopping-of-native-vegetation,-2017.pdf p. 4. (accessed 21 July 2021)

⁸ Ibid [73].

Interesting Native Grasses Cases

Conservation Groups

In 2021⁹, the Victorian Supreme Court granted standing to Kinglake Friends of the Forest to seek a permanent injunction restraining VicForests from engaging in certain timber harvesting operations in native forests.



Image: A forest in Kinglake National Park.

The Court:

“place[d] particular weight on the wildlife spotting nights and forest surveys conducted by Kinglake FF, and the events it organised for its members and other interested people in the forests. It is significant that Kinglake FF has directed considerable effort towards community engagement and education about its “mission” of preserving the State forests of the Central Highlands. It has notified the OCR of a large number of instances of alleged overharvesting by VicForests throughout the Central Highlands.”¹⁰

The case suggests that where an organisation’s activities depend on the existence of native vegetation, it will have an interest greater than the general public in preserving that vegetation.

Is preventing vegetation removal, a compulsory acquisition?

A 2018 Federal Court¹¹ decision capped off almost a decade of litigation. One Peter Spencer was prevented from clearing native vegetation on his land by a Native Vegetation Agreement (NVA) between the NSW and Commonwealth governments. He argued that, consequentially, the rights he could exercise over his property, and which are bound up with ownership, were effectively sterilised by the NSW vegetation clearance laws and this amounted to an acquisition of property under section 51(xxxi) of the Constitution, which required compensation on “just terms”.

The Federal Court¹² found that the NVA preventing clearing did not amount to an acquisition.

Unlawful vegetation removal can have multiple consequences

In 2015¹³, unlawful native vegetation clearing resulted in a fine. Manningham Council then ordered restoration of the vegetation under s114 PEA. Chief Justice Warren in the Victorian Supreme Court found that PEA did not intend to prohibit further proceedings and that s33(2)(b) of the *Infringements Act 2006* expressly acknowledged the possible co-existence of civil proceedings arising out of the same occurrence¹⁴.

⁹ *Kinglake Friends of the Forest (No 4)* [2021] VSC 70.

¹⁰ *Kinglake Friends of the Forest (No 4)* [2021] VSC 70 [54]

¹¹ *Spencer v Commonwealth* (2018) 262 FCR 344

¹² In (2015) 240 FCR 282, Mortimer J, at [3], rejected Spencer’s acquisition claim. In (2018) 262 FCR 344, Full Federal Court (Griffiths, Rangiah and Perry JJ), at [253], rejected Spencer’s acquisition claim.

¹³ *Page v Manningham City Council* [2010] VSC 267

¹⁴ *Ibid* paragraph [54].

DELWP Guidelines

In 2019, Osborn J¹⁵ of the Victorian Supreme Court considered the DELWP Guidelines. He noted that the PEA required regard to factors beyond just the guidelines. He referred to Ss 4, 60 and 84B PEA¹⁶, including the planning objective:

“to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity”.

His Honour found that in determining a planning application, it was mandatory to consider:

“any significant effects which the responsible authority considers the use or development may have on the environment or which the responsible authority considers the environment may have on the use or development”.

Multiple plants can form one prosecution

A 2017 South Australian case found that, even if many individual plants were cleared, a single charge could apply¹⁷.

Native Grasses

Protection and restoration of native grasses can be difficult or impossible.

Native grasses do indeed have to ‘watch their backs’, but law provides many protections.

¹⁵ *Gray v Minister for Energy, Environment and Climate Change* [2019] VSC 382

¹⁶ *Ibid* [66].

¹⁷ *Brinkworth v Dendy* (2007) 97 SASR 461