



THE LAW SOCIETY
OF NEW SOUTH WALES

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25 September 2019

Alex O'Mara
Group Deputy Secretary
Place, Design and Public Spaces
Department of Planning, Industry and Environment
GPO Box 39
SYDNEY NSW 2001

By email: Alex.OMara@dpie.nsw.gov.au

Dear Ms O'Mara,

Offences for the unlawful removal/lopping of trees which does not require consent

It has been brought to the attention of the Law Society by our members that there is a lack of certainty in relation to the ability to prosecute for the unlawful removal/lopping of trees where such an activity would require a permit under the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* ("Vegetation SEPP"). The Law Society's comments are informed by its Environmental Planning and Development Committee.

Offences

When the *Environmental Planning and Assessment Act 1979* ("Act") was amended from 1 March 2018, section 125(1) was repealed. It provided:

Where any matter or thing is by or under this Act, other than by or under the regulations, directed or forbidden to be done, or where the Minister, the Secretary, a council or any other person is authorised by or under this Act, other than by or under the regulations, to direct any matter or thing to be done, or to forbid any matter or thing to be done, and that matter or thing if so directed to be done remains undone, or if so forbidden to be done is done, a person offending against that direction or prohibition shall be guilty of an offence against this Act.

There is now no "catch all" provision in the Act which describes an offence. Rather, an offence against the Act only arises if the relevant provision that has been contravened or not complied with has Tier 1, Tier 2 or Tier 3 specified in the provision as the maximum penalty (section 9.51).

The Act does not contain any provision which creates an offence for a breach of the Vegetation SEPP, nor does it provide for any offence of carrying out an activity in the absence of a permit (unlike in the case of development requiring consent – see section 4.2(1) of the Act).

Position of the Department of Planning, Industry and Environment

We understand that this perceived lacuna in the legislation has been brought to the attention of the Department previously, but it is the view of the Department that the legislation does not require amendment on the basis that there is a prohibition which can be enforced by the giving of a penalty notice for clearing without a permit.

The Department's website includes a document entitled "Vegetation SEPP – Additional frequently asked questions for councils" ("FAQ document") which was updated in August 2018. Under the heading "Who enforces the Vegetation SEPP?" the FAQ document states:

Clearing vegetation without a permit under the Vegetation SEPP is prohibited, and prohibited development can be enforced by penalty notice under the Environmental Planning and Assessment Amendment Act 2017 (EP&A Act). Councils can continue to enforce vegetation clearing through the issuing of a penalty notice under the EP&A Act after taking into account all relevant considerations, including appropriate enforcement mechanisms, before commencing any enforcement action.

Although it is not specifically stated in the FAQ document, we understand that the Department's position relies on the removal of trees being classified as development that is prohibited under section 4.3 of the Act as amended.

Section 4.3 provides:

If an environmental planning instrument provides that:

- (a) specified development is prohibited on land to which the provision applies, or
- (b) development cannot be carried out on land with or without development consent,

a person must not carry out the development on the land.
Maximum penalty: Tier 1 monetary penalty.

The Vegetation SEPP does not specify development that is prohibited on land to which it applies. Accordingly, section 4.3(a) cannot be relied on to define the removal of vegetation as "development that is prohibited".

The Vegetation SEPP does not explicitly provide that development cannot be carried out on land with or without development consent. Rather, the Vegetation SEPP specifies the conditions under which certain tree removal may occur, namely once a permit has been issued. Clause 25 of the Vegetation SEPP recognises that some clearing of vegetation may require development consent.

Clause 25 provides:

(1) This clause applies to the clearing of any vegetation in a non-rural area of the State that is not ancillary to the carrying out of other development and that:

- (a) does not require a permit under Part 3, and
- (b) does not require an approval under Part 4, and
- (c) is not a heritage item or located in a heritage conservation area, and
- (d) is not an Aboriginal object or located in an Aboriginal place of heritage significance.

(2) The clearing of any such vegetation is permitted without development consent.

The Vegetation SEPP recognises that consent may be required for the clearing of vegetation ancillary to carrying out of other development, if it is the subject of a heritage item or located in a heritage conservation area or if it is an Aboriginal object or located in an Aboriginal place of heritage significance.

The clearing of vegetation which requires a permit under Part 3 of the Vegetation SEPP is not development that is prohibited under section 4.3 of the Act, but rather development that does not need consent under section 4.1 of that Act (except in cases where such consent is required, such as for trees that are heritage items).

It is important to note that “development consent” is a defined term in the Act and means “consent under Part 4 to carry out development...”.

The term “permit” is not defined in the Act.

Section 3.14(4) of the Act provides that an environmental planning instrument that makes provision for or with respect to protecting or preserving trees or other vegetation may make provision, among other things, for requiring a permit, approval or other authorisation to remove or otherwise affect trees or other vegetation granted by the council (or other person or body).

The Act recognises a permit for the removal of vegetation as a type of authorisation which may be required to be obtained under an environmental planning instrument. The Act does not include the term “permit” in the definition of “development consent” and the term “permit” does not otherwise meet the requirements of the definition of “development consent” namely, that a development consent is a consent granted under Part 4 of the Act.

Effect on Enforcement Action

Our members inform us that the current state of the law means that some councils do not consider that they can prosecute for breach of the Vegetation SEPP. This issue does not appear to have been tested as we are not aware of any reported prosecutions for tree removal under the Vegetation SEPP in the Land and Environment Court.

Members have reported that land owners and developers who are aware of this uncertainty are taking advantage of the current state of the law and removing trees without obtaining a permit where a permit is required.

Possible solutions


There are a number of ways the legislation could be amended to restore or clarify the power to prosecute for the removal/lopping of trees without obtaining a permit where a permit is required.

One option would be to amend the *Environmental Planning and Assessment Regulation 2000* to specify a penalty (eg. Tier 2) for a breach of the Vegetation SEPP.

The Law Society requests that the Department, at the very least, take action to clarify the power under which the appropriate authorities may undertake prosecutions and make this clear on the Department’s website.

If you have any questions in relation to this submission, please contact Liza Booth,
Principal Policy Lawyer at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Elizabeth Espinosa". The signature is written in a cursive style with a large initial 'E'.

Elizabeth Espinosa
President