



Submission

in response to

Draft native vegetation clearing regulations and guidelines

prepared by

Environmental Justice Australia

20 February 2017

About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. We are independent of government and corporate funding. Our legal team combines technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to community-based environment groups, regional and state environmental organisations, and larger environmental NGOs, representing them in court when needed. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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Submitted to:

Department of Environment, Land, Water and Planning

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1. The scope of the review

Environmental Justice Australia (EJA) welcomes this opportunity to comment on the draft regulations and policy governing native vegetation clearing in Victoria. EJA has been involved in the current review process from its inception and we have maintained a strong and active interest in the regulation of native vegetation protection through the planning system for many years.

We note that the scope of the review was not necessarily to produce a fundamental reform program but rather to be an exercise to ‘test’ how regulations ‘sensibly protect sensitive vegetation.’ However given that – due to the weakness of the Flora and Fauna Guarantee Act – the native vegetation clearing laws are in fact a critical determinant of whether biodiversity is protected or destroyed, in our view the review should have been a more substantial exercise in biodiversity reform in conjunction with the review of the Flora and Fauna Guarantee Act. Additionally, we note that, with no disrespect to the departmental staff who have conducted the native vegetation review with diligence and skill, reviews of both the native vegetation regulation and FFG Act have not been conducted as independent reviews. This is distinct from the conduct of two other major reappraisals of environmental legislation, the Climate Change Act and the Environment Protection Act, as well as the prospective Yarra River Protection Act. The treatment of biodiversity legislation is anomalous in that respect.

The conclusion of this review of native vegetation regulation is that only minor adjustments to the VPPs and policy should occur. Although we believe that more significant reform is necessary and desirable (as outlined in our previous submission to this review) we note that the government has already decided that this will not occur. Notwithstanding, we submit that the changes that are being proposed by the government could, with some further minor changes, make the system more workable and robust. We therefore recommend a series of amendments to those instruments as follows.

2. Purposes

Vary the proposed purposes of the regulations and policy to state, prior to the first purpose under cl 52-17:

To ensure the protection and stewardship of native vegetation in Victoria, including through consideration of the impacts on biodiversity, ecological processes and other values from removal, destruction or lopping of native vegetation.

This wording aligns the purposes more expressly with the objective of planning at section 1(b) of the *Planning and Environment Act 1987* (Vic).

3. On-site assessments

Extend the requirement for on-site assessment of native vegetation (habitat hectare assessment) to the Intermediate Assessment Pathway, as well as the Detailed Assessment Pathway (in Assessment Guidelines, [4.2]), with discretion on the decision-maker to require an on-site assessment in any circumstance in which there is a reasonable basis for concluding there are uncertainties or errors in

information provided with an application. This latter provision would allow a decision-maker (responsible authority or referral authority) to respond to uncertainty or error in a manner guided by precaution.

Specifically in the text at [4.2]:

- delete ‘... and Intermediate Assessment Pathway...’ in the first sentence;
- add following second paragraph: ‘An on-site assessment can be sought from an applicant in any circumstance where there is a reasonable basis for concluding material uncertainties or errors are contained in biodiversity information provided with an application. See also provisions regarding supplementary site-based information at [6.1].’

4. Application of avoidance principles

Apply requirements to demonstrate avoidance and/or minimisation to all categories of application, including those in the Basic Assessment Pathway. It is noted that more than 90% of clearing applications fall into this category of clearing (less than 0.5ha), hence the cumulative impact of that clearing is likely to be significant. Application of avoidance principles to all application avoids inconsistency with the purposes of the planning provision.

Specifically, at [4.6.1], remove paragraph 1.

5. Broadening the potential scope of values to be accounted for

Decision guidelines, in considering the values of native vegetation, should take into account the potential for other values to be associated with, or intrinsic to, the native vegetation to be removed. Where appropriate and practicable (e.g. where probative evidence is available), the guidance should include scope for other values of native vegetation to be recognised and accommodated in decision-making. This may be the case, for instance, with the value of vegetation as carbon sinks or value to the amenity and well-being of local communities.

With respect to the latter (amenity), the value of native vegetation at the local scale has been an oft-repeated concern of local communities. We note that Proposed Improvement 11 attempts to take account of locally important biodiversity through planning policy frameworks (strategic planning)¹. That is a requirement of decision-makers in any case. The greater weight can be accorded to this consideration by expressly including consideration of the value of native vegetation to local amenity in the purposes sub-clause. We recommend this inclusion.

Specifically, at [4.5.1], add under dot point 1 (following ‘The role of the native vegetation in preserving identified landscape values’), ‘The contribution made by the native vegetation to local amenity, including (but not limited to) with regard to the extent and quality of remnant native vegetation in the affected locality.’

¹ Outcomes Report, p 13.

6. Articulating unacceptable impacts

Clearly articulate the principles underpinning those circumstances in which removing native vegetation will have unacceptable impacts. This is analogous to identifying those circumstances constrained by the limits of offsetting, such as where native vegetation contains values that are irreplaceable or the proposal overall will substantially exacerbate the vulnerability of rare or threatened species.² The articulation of unacceptable impacts in relation to biodiversity or related values is ultimately qualified or framed by the wider ‘acceptable outcomes’ test required of planning decisions.

Add the following to 4.6.1 after the final paragraph on p 18:

‘An unacceptable impact on biodiversity values includes an impact that will or is likely to lead to the loss of biodiversity values that exhibit a high degree of irreplaceability, or an impact that will or is likely to exacerbate substantially the vulnerability of rare or threatened species or communities or substantially exacerbate the risk of extinction of a species or community in the wild.’

7. Operation of precaution in the Detailed Assessment Pathway

Decision guidance under the Detailed Assessment Pathway should expressly establish a presumption against clearing, as a feature of precaution in the conservation of rare or threatened species or EVCs or other related values. We propose addition of a fourth dot point under Assessment Guidelines, [4.5.3], which would read:

- The preference, in order to take a precautionary approach to impacts of native vegetation removal, for native vegetation not to be removed unless an applicant can demonstrate no adverse impacts to rare or threatened species.

8. Site-based information to supplement mapped information

Provisions providing for on-site information where errors, inaccuracies or shortcomings can be demonstrated in mapping data are welcome and, in our view, a necessary response to the limitation of relying on digital datasets to make decisions (*Assessment Guidelines*, [6.1]). It is simply good practice to require ‘ground-truthing’ in circumstances of error.

In our view, the requirement under [6.1] should also be attached to circumstances in which real risk of serious or irreversible harm can be demonstrated but uncertainty remains as to its nature, extent, or consequences. That is merely a precautionary approach. The current wording of dot point 2 at 6.2 of the *Assessment Guidelines* contains logical inconsistency. If on-site data can be considered in decision-making, the guidance that it can impose no additional obligations means that the additional, on-site information may effectively be disregarded. Obligations (e.g. to avoid, to offset) arising from

² See BBOP Resource Paper: Limits to What can be Offset (2012), www.forest-trends.org/documents/files/doc_3128.pdf

this information would otherwise be engaged. It may be a decision-maker in those circumstances is being directed to act irrationally, by failing to take into account a relevant consideration.

We propose the re-wording of dot point 2 at [6.1] to remove the second sentence and therefore read:

Providing for the consideration of rare or threatened species that have been observed on site when a habitat importance model has not been developed.

Further, to the extent site-based information, such as in the form of observations, is restrained administratively from being in the pool of information a responsible authority can consider (requiring approval from the Secretary, being part of an assessment by an accredited assessor), the guidance under [6.1] may also affect the lawfulness of a responsible authority's decision-making. That could occur, as above, where the authority is unable to take into account a relevant consideration which is open to it: see *Planning and Environment Act 1987* (Vic), subs 60(1A)(j). Similar complications may arise under dot point 1. They are less likely to arise under the last two dot points, which are seeking to amend offset credits.

We suggest that for the matters under dot points 1–2 any requirement for DELWP (Secretary) approval be removed.

9. Scattered trees

There is better recognition of the value of scattered trees in the *Assessment Guidelines*, but in their allocation of a 'standard condition score of 0.20' (out of 1.00) continues to under-value their importance in heavily cleared landscapes. The clearing of scattered trees, especially large remnant trees, can have significant landscape and cumulative impacts. Their condition is relevant to their disproportionate importance (e.g. whether healthy, hollow-bearing).³ Criteria recognising the value of their condition, such as disproportionate values in heavily cleared landscapes, should be included in assessment processes and displace any standardised or deemed value (score). Given the effective irreplaceability of old trees, improved and more accurate representations of their values are a minimal requirement of their conservation.

10. Offsets

At a minimum:

- the location of general offsets should be within in the same municipal district and preferably within the same locality, not with much wider catchment management authority administrative boundaries.
 - Amend [5.1.3] sub-heading 'Vicinity' to reflect this outcome.
- the strategic biodiversity score (Victoria-wide value) of the offset should in no circumstances be discounted below the same score of the vegetation to be removed. This discount presently occurs – and is proposed to continue – for general offsets (20% discount) and be extended in fragmented landscapes (a further 10%: *Assessment Guidelines*, p 23). These

³ Joern Fisher, Jenny Stott and Bradley Law 'The disproportionate value of scattered trees' (2010) 143 *Biological Conservation* 1564

discounts undermine further the already problematic concept of 'equivalence' in the offsetting system and weaken the purported value of 'strategic' biodiversity scoring to protecting vegetation at wider (e.g. landscape) scale.

- Specifically, it is our view [5.1.3] sub-heading 'Minimum strategic biodiversity value score' should be deleted.
- offsetting provisions for large trees will in effect contribute to the ongoing, incremental loss of large old trees in landscapes. Their irreplaceability is acknowledged (*Assessment Guidelines*, p 23). Require, unless clearly impractical, offsetting of scattered trees into affected local landscapes, in order to minimise landscape impacts of losses.
 - Amend [5.1.3] sub-heading 'Large trees' to read (additions in italics):
'when an application includes the removal of large trees the offset secure must include protection of at least one large tree for every large tree to be removed. This requirement is in addition to the number of general biodiversity units required and the vicinity and strategic biodiversity value score requirements. *Having regard to large trees in local landscapes and ecosystems, an applicant must take and demonstrate they have taken all reasonable efforts to identify and secure large tree offsets within the locality affected by the removal of large trees.* If the proposed offset site does not contain the required number of large trees additional trees...'

Offsets continue to be employed as a device to do much of the 'heavy lifting' in the notional task of achieving a 'no net loss' outcome. This is despite the considerable volume of commentary that the claimed compensatory characteristics of offsets are at best uncertain, at worst dubious or misleading. Further, we still have no meaningful accounting for the outcomes of native vegetation offsets and this transactional approach to clearing policy across Victoria. For these reasons, offsetting should be approached with a greater degree of caution, if not scepticism.

11. Crown land exemptions

As far as we know, the single largest sector responsible for land clearing is the State Government and its agencies, on Crown land. Crown land exemptions apply under the proposed regulation, as they do under the current regulations, where this is land managed by DELWP or under an agreement with DELWP (e.g. road reserves). The Assessment Guidelines intend to tighten up the way in which activities occur under the exemption and agreements, such as by prescribing clearing under an exemption must be 'to the minimum extent necessary'.

However, it would be far preferable for government agencies in general not to be exempted, unless there is specific reason to exempt their conduct (e.g. emergency management, biodiversity managed under other legislative schemes). Those reasons are often covered by other exemption categories. Where agreements are entered into under the auspices of the Crown land exemption (e.g. with VicRoads), no actions or conduct occurring under them is reviewable or enforceable in the same manner as a person clearing under a planning permit. This is entirely unsatisfactory, as it can exclude government agencies from the same accountability mechanisms (e.g. VCAT review) as ordinary citizens and private landowners face.

As a matter of principle, the standards and duties applicable to the Crown and public agencies in respect of managing native vegetation and environmental assets should be as high if not higher than

for the ordinary citizen. This is an extension of the Crown acting as a model authority in conduct of its activities. In the alternative, stronger habitat controls, particularly with respect to threatened species, need to be incorporated into the FFG Act. This would ensure that entities such as VicRoads, are meeting community expectations and complying to an appropriate standard established under the FFG Act. Further, in this scenario non-compliance would be reviewable under the FFG Act. Please refer to our FFG Act consultation response for further details.

12. The ongoing program of work

The *Outcomes Report* foreshadows ongoing work required to improve the management of native vegetation in Victoria. This is a program of work beyond the amendment of new VPPs and new policy guidance (the *Assessment Guidelines*). The issues foreshadowed include some of the most pressing dimensions of native vegetation management including:

- improvement to compliance and enforcement of clearing regulations;
- improvements to monitoring and assessment of native vegetation extent and condition;
- guidance on principles and purposes governing categories of exemption from planning controls; and
- reforms to the administration of the native vegetation offsets system.

While the *Outcomes Report* indicates preference for a ‘co-regulatory’ approach, this appears to be a reassessment of relationships between government actors, such as DELWP and local government. The often crucial role of community groups, environmental organisations, and concerned individual citizens in accountability and in protecting and conserving nature is minimised or absent in this approach. Achievement of strong outcomes in terms of monitoring, compliance, enforcement, and strategic planning will not occur without a prominent role for community and nongovernmental actors.

While encouraging compliance through education, information or guidance is a necessary part of ensuring law and policy is adhered to, greater emphasis does need to be given to monitoring and enforcement of unlawful clearing and failure to comply with conditions where clearing is permitted. Enforcement can have important deterrent functions. The *Outcomes Report* appears to downplay these functions. DELWP and councils have a responsibility to take leadership roles in this area. Compliance and enforcement capacity needs to be enhanced substantially.

EJA would welcome the opportunity to participate in the ongoing program of work to improve policy and practice in native vegetation management through the planning system.

13. Interaction with FFG Act

Review of the FFG Act provides an opportunity to revise biodiversity management in such a way that key features can effectively work together to strengthen both conservation (nature protection) and ecological restoration. Managing native vegetation in the context of land-use planning (as the planning system does) is one part of the puzzle. The FFG Act can provide other parts:

- effective threatened species conservation, aimed at arresting and turning around trajectories toward extinction;
- landscape-scale protection and restoration; and
- reformed biodiversity governance, institutions, and administration.

There are currently elements of this biodiversity management framework in the native vegetation clearing regulations. For instance, through mapping tools and ‘pathways’ the native vegetation regulations seek to apply ‘precaution’ to management of threatened species and (to a degree) landscapes. But operating through the planning system, with its competing priorities, tends to compromise the nature protection and conservation task. This is reflected in the ‘integrated decision-making’ approach, or ‘acceptable outcomes’ test, within land-use planning. Relevant tests within a primary biodiversity law, such as the FFG Act, are, appropriately, different and targeted toward conservation outcomes. Where those latter tests are effectively embedded in legislation, then real conservation gains are possible, such as the arrest and reversal of decline of threatened species.

Given the ongoing pressure on and decline of biodiversity in Victoria, the use of planning to achieve biodiversity gains will not be enough. An effective and reformed FFG Act is also going to be fundamental to arresting and reversing decline, and protecting and restoring healthy ecosystems. In respect of the management and reversal of threats to rare and endangered species and communities, in particular, a reformed FFG Act, representative of best practice, may displace a proportion of the work currently done by the native vegetation clearing regulations. That would be an appropriate outcome.