

**LAWYERS FOR FORESTS  
SUBMISSION TO THE REVIEW OF THE NATIVE  
VEGETATION CLEARING AMENDMENTS**

**8 March 2017**

## **SUBMISSION TO THE REVIEW OF THE NATIVE VEGETATION CLEARING AMENDMENTS**

1. Lawyers for Forests Inc (LFF) is a not for profit voluntary association of legal professionals working towards the protection and conservation of Australia's remaining old growth and high conservation value forests.
2. This submission addresses concerns with the proposed amendments to the native vegetation clearing regulations by reference to the draft Assessment Guidelines (November 2016), the Summary of Proposed Amendments to the Victoria Planning Provisions (November 2016) (VPP), the Draft VPP Clauses in Appendix A, and the *Planning and Environment Act 1987* (Vic) (the Act). However, we also refer to our previous submission on native vegetation clearing rules forwarded to the Department in 2016. This submission is attached.
3. As a preliminary point, LFF sadly notes that Victoria is the most cleared state in Australia, a lamentable situation. In the last few years it has also accrued the dubious honour of clearing the most native forest in per year, overtaking Tasmania who had long held this “distinction”:  
<http://www.smh.com.au/national/victoria-leads-logging-of-native-forests-20140808-1021qy.html>
4. LFF supports and endorses in its entirety the submission to this review prepared by Environmental Justice Australia (EJA).
5. In addition to the matters set out below and in the EJA submission, LFF is particularly concerned by the greater emphasis proposed on desktop assessments of native vegetation, including offsets. We understand much of the mapping of native vegetation in this State is erroneous to a large or small extent and, in LFF’s view, on-site, on-the-ground, detailed

surveys by expert ecologists or botanists of native vegetation should always be preferred and mandated. Our native flora is too precious for its protection to be dependent on often inaccurate desktop mapping software.

**Key questions to consider are:**

6. A Implementation:
  - Are the proposed changes to the regulatory system functional and able to be implemented?
  - Are there any issues that may impact on implementation?
- B Further Guidance:
  - Are there any other areas that need further guidance or clarification in addition to those outlined in the draft Assessment guidelines?
- C Glossary:
  - Are there any other words or terms used in the Assessment guidelines that should be included in the glossary?

## **A IMPLEMENTATION**

### **Verification of application**

7. As explained below in this submission, an applicant should be required to provide independently verified information in respect of an application under the Intermediate and Detailed assessment pathways.
8. Implementing such a requirement should assist in obviating the need to rely on the enforcement of penalties, which when it comes to the destruction of sensitive native vegetation, is too late to be of real benefit.

### **Functionality shortcomings of the proposed amendments**

#### **(i) Clause 12.01-2 objective**

9. A stated aim of the review into the VPP is to 'ensure that the regulations sensibly protect sensitive native vegetation.'<sup>1</sup> However, the proposed changes to the Native Vegetation Management Objectives in clause 12.01-2 do not go far enough towards satisfying that aim.
10. It is agreed that the proposed amendment to the clause 12.01-2 Objective, to 'ensure appropriate consideration of impacts from the removal, destruction or lopping of native vegetation', links clause 12 to the Assessment Guidelines and expressly makes them a relevant consideration when assessing a permit application. However, merely providing for appropriate consideration of impacts without an overarching Objective to guide that consideration places too much faith in the native vegetation offset regime, a critique of which follows in this submission.
11. It is submitted that a further, and overarching, Objective be added to clause 12.01, such as for example:

'To ensure the protection of native vegetation in Victoria, including through the prevention of significant impacts, and avoidance or minimisation of lesser impacts, to biodiversity from the removal, destruction or lopping of native vegetation.'
12. Decision-making should be guided by this overarching Objective with the application of offsets a secondary consideration.

**Clause 52.16-8 and clause 52.17-7: Table of exemptions**

13. In their current form, the exemptions in clauses 52.16 and 52.17 undermine the purposes of the VPP, Assessment Guidelines and the native vegetation offset regime. For example, a number of interest

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<sup>1</sup> Review of the Native Vegetation Clearing regulations – Summary of Proposed Amendments to the Victoria Planning Provisions [1.3].

groups have identified that 'the single largest sector responsible for land clearing is the State Government and its agencies, on Crown land.'<sup>2</sup>

14. The proposed exemption of Conservation work is subject to the condition that such work must demonstrate no net loss to biodiversity.<sup>3</sup>
15. It is submitted that the Crown land exemption also be subject to this condition, and furthermore, should be subject to the native vegetation offset regime (despite its current shortcomings, as be discussed below).

**(ii) Clause 52.16-4 and clause 52.17-2: Application requirements**

16. Given the inherently problematic nature of relying on the enforcement of penalties post destruction of sensitive native vegetation, it is submitted that the application requirements listed under clauses 52.16-4 and 52.17-7 be required to be independently verified when making an application under both the Intermediate and the Detailed assessment pathways.<sup>4</sup>
17. Additionally, bullet point seven requires native vegetation that was permitted to be removed, destroyed or lopped on the same property with the same ownership within the last five years to be recorded in an application to remove native vegetation. Five years is a very short re-growth time frame for native vegetation. This period should be extended to 10 years.

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<sup>2</sup> Environmental Justice Australia - Draft planning provisions and policy guidance regulating native vegetation clearance, 5; also see Lawyers For Forests - Submission to the Review of Native Vegetation Clearing Controls, 29 April 2016, 12.2.1; Victorian National Parks Association website home page: vnpa.org.au

<sup>3</sup> Review of the Native Vegetation Clearing regulations - Summary of Proposed Amendments to the Victoria Planning Provisions, Appendix A: Draft VPP Clauses, clause 52.16-8 and 52.17-7.

<sup>4</sup> See Native Vegetation Clearing - Assessment guidelines, draft November 2016, [4].

**(iii) Native vegetation offset policy**

18. The policy of native vegetation offsets for significant native vegetation, such as large trees, fails to uphold the objects of the Act, fails to meet the stated rationale for the proposed amendments to the VPP and, as a matter of logic, is deeply flawed.
19. It is submitted that the policy does not adequately provide for the protection and conservation of sensitive native vegetation, especially large trees, when it expressly contemplates the destruction of 50% of native large trees in Victoria.
20. The Act provides a range of Objects, sometimes in tension with each other. Relevantly, these Objects include 'to provide for the *protection* of natural and man-made resources and the maintenance of ecological processes and genetic diversity'<sup>5</sup> and 'to enable land use and development planning and policy to be easily integrated with environmental, social, economic, *conservation* and resource management policies at State, regional and municipal levels'<sup>6</sup> [emphases added].
21. The Act defines *conservation* as including 'preservation, maintenance, sustainable use, and restoration of the natural and cultural environment.'<sup>7</sup>
22. The stated rationale for the proposed amendments to the VPP, include 'ensur[ing] that the regulations sensibly protect sensitive native vegetation.'<sup>8</sup>

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<sup>5</sup> *Planning and Environment Act 1987* (Vic) s 4(1)(b).

<sup>6</sup> *Planning and Environment Act 1987* (Vic) s 4(2)(c).

<sup>7</sup> *Planning and Environment Act 1987* (Vic) s 3.

<sup>8</sup> Review of the Native Vegetation Clearing regulations – Summary of Proposed Amendments to the Victoria Planning Provisions [1.3].

23. The Assessment Guidelines note that 'large trees are frequently the oldest component within an ecological system and cannot be replaced.'<sup>9</sup>
24. The policy provides that the destruction of a significant tree is consented to if another is quarantined from ever being removed.<sup>10</sup> Thus, the policy is expressly one which contemplates and condones a 50% reduction in significant native vegetation, especially large trees.
25. A policy which merely meets an objective of preserving half of the sensitive native vegetation, is not one which can sensibly be characterised as falling within the definition of *conservation*, and is therefore not one which meets the Objects of the Act nor the rationale for the proposed amendments to the VPP.

**(iv) Specific offsets**

26. The availability of Specific offsets appears to be fundamentally flawed.
27. In the case of sensitive native vegetation or habitat for a rare or threatened species, the availability of specific offsets is predicated on the basis that, despite the vegetation's rarity, age or vulnerability, the loss in biodiversity value caused by its destruction can be replaced by an equivalent biodiversity value offset.<sup>11</sup> This appears to be internally illogical. If such replacement is so simple, how did the native vegetation in question reach its state of sensitivity? How can it be considered to be significant if, in fact, it can be disposed of?
28. It is submitted that overcoming this internal inconsistency can only be achieved by a much higher level of protection for significant and

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<sup>9</sup> Native Vegetation Clearing – Assessment guidelines, draft November 2016, [5.1.3].

<sup>10</sup> Native Vegetation Clearing – Assessment guidelines, draft November 2016, [5.1.3].

<sup>11</sup> Native Vegetation Clearing – Assessment guidelines, draft November 2016, [see generally ch 5].

sensitive native vegetation, and that destruction of native vegetation classified as sensitive or significant should be prohibited.

29. Specific offsets should not be available to permit otherwise prohibited conduct.

## **B FURTHER GUIDANCE**

### **Native Vegetation Offsets**

30. In addition to the critique of the native vegetation offsets regime above, it is unclear how a register of offsets (or other mechanism) can properly be maintained. Further guidance on this aspect of the regime would be beneficial.

### **Complexity**

31. The Native Vegetation Clearing regime is complex. The disparate documentation and its current narrative form exacerbate this complexity. An applicant will require much more specific guidance, assisted by flow charts, which allow an applicant to easily navigate through the application process. The interrelationship between clauses 12, 52.16 and 52.17 of the Planning Scheme on the one hand, and the Assessment Guidelines and the mapping tools on the other, needs to be more clearly and expressly mapped.
32. For example, the location map referred to in the Assessment guidelines is not easily found or readily accessible online. Greater co-ordination between the online tools, the Assessment Guidelines and the relevant Planning Scheme clauses is needed.

## **C GLOSSARY**

33. There do not appear to be any words or phrases in the draft documentation that require definition by inclusion in the Glossary.

**LAWYERS FOR FORESTS  
SUBMISSION TO THE REVIEW OF NATIVE  
VEGETATION CLEARING CONTROLS**

29 April 2016

## **INTRODUCTION**

- 1 This submission is made by Lawyers for Forests Incorporated  
(**“LFF”**).
- 2 LFF is a not for profit organization. It was incorporated in October  
2000. It is an association of voluntary legal professionals working  
towards the protection and conservation of Australia's remaining  
old growth and high conservation value forests.
- 3 LFF welcomes the review (**“the Review”**) of Victoria’s native  
vegetation clearing controls, and the release of the consultation  
paper (**“Consultation Paper”**).<sup>1</sup>
- 4 In summary:
- 4.1 The proposed improvements set out in the Consultation  
Paper generally improve the native vegetation clearing  
controls, in that they tighten up the controls. As a result,  
the proposed improvements are generally a step in the right  
direction.
- 4.2 However, significant gaps remain in the regulatory  
framework.
- 5 It is anticipated that other environment groups will provide detailed  
submissions.
- 6 This submission therefore focuses on three issues of particular  
concern to LFF:
- 6.1 The “no net loss” and “net gain” objectives, and associated  
issue which arise.
- 6.2 The use of mapping tools to assess whether an application  
for a permit to remove native vegetation is subject to the  
low, medium, or high risk pathways, and associated issues  
which arise in the assessment of whether an application  
falls within the low, medium or high risk pathway.

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<sup>1</sup> Review of the native vegetation clearing regulations – Consultation Paper, Department of Environment, Land, Water and Planning, 2016.

- 6.3 The issue of local conservation reserves and offsets for native vegetation conserved in local conservation reserves and on other land.

## **ANALYSIS**

### Net gain

- 7 The change from “net gain” to “no net loss” as the overarching objective of the native vegetation controls was a significant change.<sup>2</sup> This change was introduced by the former Baillieu/Napthine liberal government, as part of its reform of the native vegetation controls introduced by the former Brumby/Bracks Labor Government.
- 8 LFF is disappointed that this “no net loss” objective is proposed to be retained.
- 9 Victoria has lost most of its pre-European native vegetation. A goal that there merely be no further loss is inadequate.
- 10 It is also difficult to ascertain how the “net gain” objective of the draft biodiversity plan would be achieved with a lesser objective of “no net loss” applying to the native vegetation clearing controls.
- 11 Further:
- 11.1 Net gain can only be achieved if the loss of native vegetation is avoided.
- 11.2 The existing controls, including the “Permitted Clearing of Native Vegetation – Biodiversity Guidelines”, September 2013, Department of Primary Industries (**“the Guidelines”**), do not seek to avoid the loss of native vegetation. In particular:
- 11.2.1 Low risk applications do not require demonstration of avoidance or minimisation steps. Instead, if in a low risk pathway, the default position is that the

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<sup>2</sup> See for example the discussion in *Aspinall Action Group Inc v Greater Bendigo City Council* [2015] VCAT 761 at [34] – [37]. See also *Kingston Residents Association v Kingston CC* [2015] VCAT 365 at [21] – [28].

vegetation can be removed, subject to an offset being provided.<sup>3</sup>

11.2.2 Even for the moderate risk pathway, the Guidelines anticipate that native vegetation can be removed if “reasonable steps have been taken to ensure that the proposed removal of native vegetation on biodiversity have been minimised.” And, amongst other things, the cost of retaining the native vegetation is a factor in the decision-making matrix.<sup>4</sup>

11.2.3 This:

(a) In effect, permits native vegetation to be removed if it is not convenient or cost effective for a landowner to retain the native vegetation.

(b) Falls well short of “avoidance.”

11.2.4 Even for the high risk pathway, the Guidelines anticipate that the removal of native vegetation can be justified on a similar basis. Indeed, the only difference between the medium risk and high risk pathways is that the decision guidelines include consideration of whether the native vegetation proposed to be removed makes a significant contribution to Victoria’s biodiversity.<sup>5</sup>

11.2.5 This latter guideline is also problematic – in that it sets a very high threshold. In particular, native vegetation which is of local or regional significance, and which may merit protection, may not satisfy this high threshold. Further, is it really the case that we are only seeking to protect native vegetation that is significant at a State level?

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<sup>3</sup> Refer section 8.2 of the Guidelines. See also *Kingston Residents Association v Kingston* CC [2015] VCAT 365 at [21] – [28].

<sup>4</sup> Section 8.3 of the Guidelines.

<sup>5</sup> Section 8.3 of the Guidelines.

- 11.3 LFF supports the proposal that the native vegetation controls are revised to clarify that the primary focus of the controls is to ensure avoidance of native vegetation removal where possible.<sup>6</sup>
  - 11.4 However, the Guidelines as they stand are not consistent with this primary focus. Instead, they facilitate the removal of native vegetation, and the provision of an offset.
  - 11.5 The Guidelines therefore require a significant review to ensure that the overarching goal, that native vegetation removal be avoided where possible, is achieved.
- 12 Finally, it is not clear whether the target of “net gain” is being achieved:
- 12.1 According to the Consultation Paper, Councils do not uniformly keep records of the total number of permits issued and the extent of native vegetation cleared under permits issued under clause 52.17.<sup>7</sup>
  - 12.2 There are also a wide range of exemptions from the requirement to obtain a permit. The exemptions are significant, and include:
    - 12.2.1 Native vegetation removed pursuant to logging operations on Crown Land. And, given the significant amount of logging that occurs in old growth and high conservation value forests – a very large amount of native vegetation is removed pursuant to this exemption.
    - 12.2.2 Native vegetation removed for mineral extraction.
    - 12.2.3 Native vegetation removed to manage Crown Land.
    - 12.2.4 Native vegetation removed to facilitate the construction of a new building, or the use and maintenance of an existing dwelling.

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<sup>6</sup> Proposed Improvement 1.

<sup>7</sup> Discussion Paper at p.18.

**LAWYERS FOR FORESTS**  
**SUBMISSION TO THE NATIVE VEGETATION CLEARING**  
**REGULATIONS REVIEW**

- 12.3 Clearly, if a net gain target is to have any meaning, the extent of native vegetation that is cleared pursuant to these exemptions should be ascertained, and taken into account in calculations.
- 12.4 However, it is not clear whether there is a record or estimate of the native vegetation that is cleared pursuant to these exemptions.
- 12.5 Most tellingly, the logging of old growth and high conservation forest on Crown Land is exempt from the need to obtain a planning permit under clause 52.17, and:
- 12.5.1 There is no requirement that the loss of native vegetation, including native vegetation which makes a significant contribution to Victoria's biodiversity, be minimised, or avoided;
- 12.5.2 Logging operations on Crown Land are therefore given special treatment, and in particular:
- (a) Are not required to apply for a planning permit and therefore not subject to the transparent process that follows. That is - information provided in support of the application, assessment by an independent statutory body (generally the local Council or Department of Environment, Land, Water and Planning (**DELWP**)), third party notice and appeal and enforcement rights.
- (b) This is notwithstanding the destructive effect of logging on native vegetation and Victoria's biodiversity.
- 12.5.3 If the Government is serious about the "net gain" and "avoidance" objectives, it is difficult to ascertain why the logging industry should continue to receive this special treatment.

Mapping tools

- 13 LFF is concerned that mapping tools are a significant component of ascertaining whether a permit application is assessed on the basis of the low, medium, or high risk pathway. This is of particular concern given the low risk pathway leads to the default position that the native vegetation on the site can be cleared, subject to the landowner providing an offset.
- 14 In particular, maps do not necessarily reflect the native vegetation on the ground, or the ecological value of native vegetation as habitat for endangered species, or habitat value generally. Habitat evolves with time and climate. The initial mapping may not have been accurate, or may be out of date. In short, reliance on a map can never be a substitute for an up to date, site specific ecological survey.
- 15 Of course – this cuts both ways. Mapping can over or under estimate the ecological value of the native vegetation on site.
- 16 The Tribunal, in interpreting the revised clause 52.17, and the Guidelines, has stated that it does not have the discretion to review the Department’s assessment of whether an application falls within the low, medium or high risk pathway.<sup>8</sup>
- 17 However, the assessment of land as “low risk”, “moderate risk” or “high risk,” is primarily, or at least significantly, determined by reference to the Department’s mapping tool, together with a blunt assessment of the area of native vegetation and/or number of scattered trees proposed to be removed.
- 18 As a result, this assessment has the potential to lead to perverse outcomes:
- 18.1 In particular, a site specific survey could identify that:
- 18.1.1 The site in question has ecologically significant native vegetation, including native vegetation which is critical or important habitat for an endangered species recorded as being present on the site, and notwithstanding that the mapping shows the land

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<sup>8</sup> *Aspinall Action Group Inc v Greater Bendigo City Council* [2015] VCAT 761 at [37] – [38].

as “Location A” (in effect low value native vegetation).

18.1.2 Alternatively, native vegetation that is mapped as “Location C” (in effect high value vegetation) has little or no value.

18.2 A landowner could relatively easily manipulate the Guidelines and manufacture a “low risk” pathway outcome, by developing land in small stages.<sup>9</sup>

19 LFF therefore urges the Government to abandon the use of the mapping tool. Instead, if a permit is required under clause 52.17, then a permit applicant should be required to undertake a site specific survey.

20 An initial survey, prepared by an appropriately qualified expert, should ascertain whether the habitat on site is valued native vegetation, or is or is potentially valued habitat, and merits further study and/or field surveys.

21 An initial survey, prepared by a properly qualified expert, is not an unduly onerous burden to place on a landowner seeking to develop land which contains native vegetation, and having regard to the exemptions which apply (and would not impose this requirement on smaller scale developments).<sup>10</sup>

22 In any case, there should be provision for the permit applicant, Council and third parties to challenge the assessment of a permit application as low risk, medium risk or high risk, based on actual native vegetation quality and habitat value, and not by reference to

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<sup>9</sup> For example, a landowner seeks to develop 1.4 hectares of land which is “Location B” native vegetation. This would be assessed as a high risk pathway. However if the landowner developed in three stages, with each stage being less than 0.5 hectares, each application would be assessed as a low risk pathway.

<sup>10</sup> Of course:

1. The exemptions extend beyond small scale developments.
2. If necessary, additional exemptions could be added, excluding some other smaller scale developments from the requirement to obtain a planning permit to remove native vegetation. So, for example, there was previously an exemption when a site of less than 0.4 hectares in area was being developed. Although, any native vegetation removed should be considered in the “net gain” calculation.

habitat values as determined by reference to a map.

- 23 This will not open the floodgates to litigation. Permit applicants will have an incentive to challenge the risk assessment pathway if it is in their interest. Council and third parties have limited resources. It is therefore unlikely that they would challenge an assessment, unless there was a basis to do so.

Local Conservation Reserves.

- 24 LFF endorses the support for local Councils to undertake strategic work to ascertain native vegetation of local or higher significance.
- 25 LFF however doubts that Councils have sufficient resources to undertake this work, or alternatively prioritise this work.
- 26 Further, there is currently a lack of clarity around the offsets that Council and landowners are required to provide in the event that local conservation reserves are created.
- 27 For example, the Melbourne Strategic Assessment and program assessment has been undertaken for Melbourne's greenfield growth areas, pursuant to the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*. This process has set out the areas sought to be protected in Melbourne's growth areas. However:
- 27.1 Some Councils have sought to go beyond these requirements, and provide local conservation reserves, and/or protect locally significant native vegetation.
- 27.2 There has been considerable uncertainty regarding the question of whether offsets have to be provided for these additional local conservation reserves and locally significant native vegetation which is proposed to be retained.
- 28 There should be encouragement for Councils and landowners to establish local conservation reserves, and to protect native vegetation. The offset rules should be clarified to ensure that native vegetation which is preserved and properly managed within local conservation reserves or other land is an outcome that is encouraged, and that, if appropriate, no offset is required to be provided in these circumstances.

## **Conclusion**

- 29 LFF generally supports the thrust of the review, and improvements set out in the Consultation Paper, subject to the rectification of the major gaps as set out above.
- 30 In the circumstances, and given that there is a disconnect between the native vegetation controls as they stand, and the twin objectives of achieving “net gain” and the “avoidance of removal of native vegetation,” LFF believes that:
- 30.1 The native vegetation controls, and Guidelines require significant review to ensure that these twin objectives are achieved.
  - 30.2 A revised draft set of controls, and Guidelines should be prepared, advertised, and submissions invited. And LFF would appreciate the opportunity to comment on these draft revise controls and Guidelines.