



Review of the native vegetation clearing regulations

Submission

March 2017

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1 Introduction

The Municipal Association of Victoria (MAV) welcomes the opportunity to respond to the proposed policy and provision changes, released by the Department of Environment, Land, Water and Planning (DELWP), as part of the review of the native vegetation clearing regulations.

Local government acts as the primary regulator for the removal of native vegetation in Victoria through the administration of clauses 52.16 *Native Vegetation Precinct Plan* and 52.17 *Native Vegetation* contained in all planning schemes.

Councils have indicated that they are generally pleased with the proposed amendments to the provisions in terms of policy emphasis, better reflecting risk and improving consistency. However, there is a concern that the provisions remain administratively complex and place a considerable burden on both councils and applicants. The reform activities associated with this review will be crucial to providing councils with appropriate support going forward.

Councils are keen to provide input to the development of any additional material that will accompany the provisions prior to their finalisation.

2 Background

2.1. The MAV

The MAV is the peak representative and advocacy body for Victoria's 79 councils. The MAV was formed in 1879 and the *Municipal Association Act 1907* appointed the MAV the official voice of local government in Victoria.

Today, the MAV is a driving and influential force behind a strong and strategically positioned local government sector. Our role is to represent and advocate the interests of local government; raise the sector's profile; ensure its long-term security; facilitate effective networks; support councillors; and provide policy and strategic advice, capacity building programs and insurance services to local government.

2.2. Previous Submission

In April 2016 the MAV made a submission in response to a DELWP consultation paper as part of the review of the native vegetation clearing regulations. Key issues raised in the submission include:

- Significant loss of native vegetation occurs due to issues outside the scope of the review.
- Councils have multiple roles, some of them competing, in managing native vegetation.
- Concurrent reviews of the *Biodiversity Strategy* and the *Flora and Fauna Guarantee Act* present opportunities to fully explore co-regulation which have not yet been realised.
- The actions of bodies such as VicRoads, electricity distribution businesses and water businesses undermine confidence in the consistency and transparency of the existing regulations.
- The contribution to biodiversity from scattered trees is not adequately considered within the existing regulations.
- Councils often have trouble in justifying a refusal of permit within the existing regulations.
- The reduction of DELWP’s status from a ‘determining’ referral authority to a ‘recommending’ one, coupled with withdrawal of DELWP resources from rural areas, greatly reduces the support available to councils in decision making and compliance activity.

3 Analysis of core reforms

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3.1. Key elements

In our previous submission to this review, we outlined what we consider to be the core components of an effective native vegetation framework. This outline provides a useful starting point to analyse the proposed new provisions.

Component	Value	Assessment of new provisions
A co-regulatory approach supported by a clear statement of roles and responsibilities	The core elements are laid out simply and there is a clear commitment to co-regulation. Roles and responsibilities are transparent and resources can be negotiated.	Although a commitment has been made, there is no detail about the full co-regulatory framework (including the relationship between the provisions and the FFG Act) or any statement of roles and responsibilities. See section 3.1.

Component	Value	Assessment of new provisions
Sound policy with evaluation indicators	The policy sets out the key premises and principles to be observed in the drafting of planning controls. This enables evaluation of whether the intended outcomes of the policy are being achieved.	While commitments are made to post-implementation evaluation, indicators and monitoring processes have not yet been detailed and so it is unclear how well this will be achieved.
Proportionate controls	The regulatory standards/requirements to be complied with should be risk based to ensure the commensurate skills and efforts are applied.	The major differentiation between pathways appears to be between “basic”/“intermediate” and “detailed”. Only “detailed” pathway assessments will be subject to site-based assessment and specific offsets and this is reasonable in terms of balancing the burden placed on both applicants and responsible authorities, with managing the risk of impact on biodiversity.
Access to good information	It should be possible for an applicant to easily understand whether a planning permit is required and what the relevant policy is that guides decisions. Councils, as decision makers, should understand: <ul style="list-style-type: none"> • The ecological significance of the vegetation • The likelihood of rare or threatened species • The habitat value of the vegetation 	While the proposed changes generally improve the assessment process for both the applicant and responsible authority, there are elements which are still hard to navigate particularly regarding the provision of offsets. The changes largely strike a good balance between considering the whole value of native vegetation, rather than just its biodiversity value, and ensuring that applicants can reasonably understand policy.
Expert input	Independent expert evidence and advice should be readily available to councils where ecological significance is high or there is a high likelihood of rare or threatened species.	DELWP are listed as a ‘recommending’ referral authority for applications in the ‘detailed’ pathway. We are firmly of the view that DELWP should be listed as a ‘determining’ referral authority for applications in the ‘detailed’ pathway. It is important that DELWP have input into applications where there is deemed to be high likelihood for impacts on rare or threatened species. This is especially important for councils that have significant resource constraints.

Component	Value	Assessment of new provisions
Commitment to compliance and enforcement	<p>The general community understands the benefits of the retention of native vegetation and the native vegetation controls to a level that they know when to seek advice about permit requirements.</p> <p>The consequences for illegal clearing or lack of compliance with permits issued must be a significant deterrent.</p>	We recommend that a statewide and regional wide awareness campaign be implemented alongside the new regulations to improve community understanding of them. See section 3.8 for more detail.
A consistent and transparent approach to monitoring	An essential component to any framework is the ability to measure whether the policy goals are being achieved or not. Indicators established during policy setting part of the framework will assist with this.	While the issue of monitoring has been raised as important, no detail has been provided as to how this will occur or the implications to council resources. See section 3.3

3.2. Co-regulation

DELWP has committed to a co-regulatory approach in the native vegetation removal framework, and this is the favoured approach of local government. However, there is no detail as to what a co-regulatory approach would look like. We believe it is essential that DELWP consult with local government in order to develop an agreed statement of roles and responsibilities.

As part of a co-regulatory model, DELWP should be listed as a determining referral authority, rather than a recommending referral authority for applications within the detailed assessment pathway. DELWP makes a significant contribution to the assessment of applications within the “detailed” pathway and it is essential that the status of DELWP be raised to a determining authority and that this role is taken seriously and resourced appropriately. This is particularly important for resource constrained councils without in-house expertise.

Councils have also expressed concern over the removal of departmental resources from rural areas over time. This loss of resources seriously affects the ability of some councils to access advice and guidance to assist them to process native vegetation applications in a timely and accurate manner.

It is critical that all supporting material such as applicant toolkits and assessment guidelines be prepared in advance of the roll-out of the regulations. Given the significant role of councils in both assessing and operating within these guidelines there should be extensive consultation between DELWP and councils in developing these materials.

3.3. Monitoring

Reporting, monitoring and evaluation are critical components to the successful implementation of any policy. We note that DELWP also indicated this as important, but have not yet detailed a framework for monitoring and evaluation. There are significant opportunities for incorporating reporting into existing processes at a minimal cost, and it is critical that DELWP collaborate with the MAV and councils to develop a framework to be ready for implementation alongside the policy.

DELWP has expressed interest in gathering information on the amount of native vegetation cleared through exemptions. It is our view that for councils to report on this would place an unreasonable burden on them beyond their core duties. The nature of exemptions mean there is no trigger point for reporting clearance, and so it would require extensive and regular surveying of all native vegetation across a municipality. It is our understanding that DELWP has since adopted the approach that monitoring of clearance outside of the permit process will be as part of broader monitoring it conducts of levels of native vegetation throughout the state and we support this, although we request that DELWP clarify exactly how this will take place.

One suggested method for assisting in data collection for exemptions is the implementation of online self assessment tools, similar to Aboriginal Victoria's Planning Tool. In the event that illegal clearance is raised, such a tool would enable land owners to provide evidence that they considered the planning scheme and determined that they are exempt from requiring a permit before conducting vegetation clearance. This functionality could potentially be implemented in the existing NVIM tool.

At a higher level, it is important for DELWP to detail how they intend to measure the success or failure of the policy as a whole against its "no net loss" objective.

3.4. Accuracy of models

A central component of the native vegetation framework is the modelling carried out by DELWP to inform the NVIM and EnSym tools. This determines what pathway an assessment takes, what offsets are required, and how to provide for these offsets. Confidence in the accuracy of this modelling is therefore critical to confidence in the framework as a whole. We request that DELWP provides a commitment to maintain this model in an accurate and up-to-date condition, and that the details of how this will occur be provided for the sake of transparency. This would include the trigger points for when the model will be updated, whether updating is based upon a regular schedule or dependent on the size of data backlog.

3.5. Offsets

We agree that in order to provide a better standard of accountability and monitoring, third party offsets should be sourced through the credit register. Improvements could be made regarding education and awareness of the credit register as part of supporting the growth of the market.

We do have some concern with the complexity of providing first party offsets. This complexity can lead to situations where council officers are required to do much of the work in preparing an offset strategy for applicants. In addition to the impact on council resources that this represents, it also compromises the role of the officer.

Material such as the first party general offset kit will need to be updated for compliance with the new framework, and this should be done with the input of local government to attempt to improve its usability.

We are pleased that DELWP has commenced work with councils to develop a standard section 173 agreement (under the *Planning and Environment Act 1987*) for first party offsets. This initiative will reduce costs for councils, increase consistency in approach across Victoria and provide a valuable tool for those councils that have limited resources or do not often deal with native vegetation applications or first party offsets.

3.6. Training

With the rollout of a significant change of policy there is a need for training. We request that DELWP consult with the MAV and local government on how best to deliver consistent training to councils across the State. It is appropriate to again emphasise the multiple roles that councils serve with regards to native vegetation and the need for training to provide information to all key vegetation interface staff, rather than just focusing on councils as regulators.

In addition to training of officers, it is important to inform Councillors about the importance of retaining native vegetation and the strategic basis underlying the policy. Councillors hold an important decision making role in the planning system and information sessions specifically designed for Councillors would assist in the implementation of these regulations across all levels of decision making.

3.7. Education

There is a general lack of awareness about the detailed rules and regulations associated with the removal of native vegetation. Councils report that illegal clearance is common across all municipalities.

A critical component of achieving compliance with regulations is community education. Messages must be simple and compliance easy to achieve. An important part of any compliance and enforcement strategy is the preventative component. It would be useful for councils if material could be prepared by DELWP, in consultation with councils, highlighting the value of native vegetation and need for approval, that could be distributed to ratepayers.

3.8. Compliance and enforcement

Councils have limited resources to devote to compliance and enforcement, and investigative action is prioritised based on risk to human life and complaints. Very few councils have the

resources to undertake proactive compliance. An enforcement and compliance strategy must acknowledge this and identify strategies to address stretched resources.

Currently the enforcement framework is complex and expensive, and is not acting as a sufficient deterrent to illegal vegetation clearance. In many instances it is cheaper to pay a Planning Infringement Notice fine than it is to comply with the regulations. The cost and time associated with seeking enforcement orders through VCAT is a barrier to councils pursuing enforcement action. Given that rectification is not an option with native vegetation clearance matters, councils would like there to be more opportunities to prosecute non-compliance rather than relying on VCAT enforcement orders. Councils consider that fines must also be commensurate with what is cleared.

Councils do not feel adequately supported by the State in relation to either compliance or enforcement particularly where vegetation has high or very high state-wide significance. As a starting point it should be possible for the new Flora and Fauna Guarantee Act to empower DELWP to undertake enforcement and compliance on private land with high value sites of state significance, or in response to particularly egregious breaches of the regulations. For this to be successful however, it would also require the commitment of resources by DELWP to ensure this enforcement action is undertaken where appropriate. A compliance and enforcement (co-regulation) agreement could usefully set out a statement of responsibilities of the parties and a risk based approach to enforcement.

It should be noted that seeking to address the weaknesses of one act via another act is generally not considered good regulatory practice and has the potential to cause confusion and further reduce clarity around landowners' obligations. Ideally the challenges associated with enforcement under the Planning and Environment Act should be addressed by amendments to the Planning and Environment Act, particularly the insufficient penalties for non-compliance. Public appetite for reform on this front is currently very strong given a number of high profile and flagrant breaches of planning regulations. Given the scope of this review however, we accept that enforcement through the Flora and Fauna Guarantee Act is a realistic outcome which should be of net benefit to the implementation of the regulations.

4 Response to the provisions and guidelines

In consultation with stakeholders, DELWP developed a set of proposed improvements it seeks to make to native vegetation clearing regulations. These are outlined in an outcomes report, and below is our assessment of how the proposed changes respond to these improvements.

Proposed improvement	Comment
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Proposed improvement	Comment
<p>1. Clarify that the primary focus of the regulations is to ensure avoidance of native vegetation removal where possible</p>	<p>The proposed changes to the state policy effectively reposition the focus of the native vegetation requirements towards avoidance.</p> <p>While outside the scope of the review it should be noted that other controls such as bushfire management result in significant loss of vegetation, and the right balance between management and retention of vegetation must be struck.</p>
<p>2. Consolidate comprehensive policy guidance for native vegetation removal</p>	<p>The assessment guidelines provided are a good start, but significant supporting documents have not yet been seen.</p> <p>It is understood a handbook, applicant's kit, and assessor's kit will be produced and it is important that these documents all align in their advice and that local government can provide input into their development.</p>
<p>3. Develop guidance to support strategic planning relating to native vegetation protection and management</p>	<p>The proposed practice note for strategic planning has not been developed yet, but we support the intent to partner with local government in its development.</p> <p>We believe that state government should take a greater role in mapping and protecting vegetation of high state wide significance. If the intention is to reflect this through the planning scheme, resources should be provided at a State level to assist in running amendment processes, referral responses, leading VCAT appeals and monitoring.</p> <p>This is particularly important where significant vegetation crosses borders between multiple municipalities.</p>
<p>4. Improve monitoring to determine if the regulations are achieving their objective and make this information publically available.</p>	<p>Details of how this monitoring program will work have not yet been released. DELWP should work with local government to ensure that any burdens placed on councils are reasonable.</p>
<p>5. Reduce the low risk-based pathway threshold</p>	<p>This is a strength of the proposed changes. The exclusion from the Basic pathway based on the presence of large trees, listed coastal areas or wetlands, or endangered EVCs is strongly supported, as is the threshold being set at 0.5 hectares.</p>
<p>6. Replace the native vegetation location risk map with an updated map of highly localised habitats</p>	<p>The new model appears to be an improvement, although councils still have some concerns over the lack of ability to use site-based information in assessment.</p>

Proposed improvement	Comment
7. Require an avoid and minimisation statement for all applications and consider this in decision making	We believe that more information needs to be provided on how applicants can prepare this statement to avoid it becoming a de facto responsibility of council. We hope this emerges through the development of an updated applicant kit in collaboration with local government.
8. Require an offset strategy for all applications and consider this in decision making	<p>Similar to the requirement for an avoid and minimisation statement, there needs to be more detail on how to make this usable for applicants, particularly those pursuing first party offsets.</p> <p>The existing first party general offset kit is lengthy and complex, so any improvements to usability which can be made would be welcome.</p>
9. Change to two pathways, a 'lower assessment pathway' and a 'higher assessment pathway'	<p>We accept the reasons for not adopting this approach, and acknowledge that some of the motivation behind it has been incorporated into the new pathway system.</p> <p>We support only the "Detailed" pathway requiring specific offsets, as this should ensure that DELWP involvement can assist council in assessing these.</p>
10. Provide clearer guidance on when to refuse an application to remove native vegetation	<p>We believe that the current documentation does not provide for this. Councils have reported that in many cases they feel unable to refuse applications, and we consider this a high priority.</p> <p>There is currently a misalignment between the decision guidelines in the proposed changes to provisions and those in the assessment guidelines. This should be rectified.</p>
11. Include a decision guideline that allows councils to consider locally important biodiversity when assessing applications	<p>The consideration of the local planning policy framework into assessment guidelines is welcome, as is the need for applicants to assess their impact on identified landscape values.</p> <p>Some guidance would be appreciated with how the new provisions are to interact with overlays.</p>
12. Allow habitat characteristic information collected at the site to be used to supplement the maps of a species habitat in the permit application process and for offset sites	The scope for applying of site-level information is narrow outside the "detailed" pathway. While recognising that this is intended to streamline the system and help make decisions in line with state-wide biodiversity management, we recommend assessment guidelines make clearer where this site-level information may justify the refusal of a proposal.
13. Increase the information available about the maps used in the regulations and improve their accessibility	No details have been made available for how this will be implemented, but we wish to place particular emphasis on details of how modelling will be updated or amended.

Proposed improvement	Comment
14. Place greater emphasis on key areas of habitat for dispersed species in decision making and offset requirements	From the information available the updated modelling seems to achieve this improvement.
15. Differentiate between the biodiversity value of scattered trees for use in decision making and offset requirement determination	We strongly support the differentiation of tree size benchmarks between EVCs, the inclusion of small trees into consideration, the use of large trees to determine assessment pathways, and the offset requirements for protecting large trees.
16. Increase the use and functionality of the Credit Register	The Credit Register represents the best available tool for ensuring the accountability and ease of monitoring offsets. The proposal to link information between permits and their offsets is supported in particular.
17. Support the development of the market for low availability offsets	We support the intention of this, although more information is required about its implementation.
18. Require that all third party offsets are registered on the Credit Register and meet its standards, including standards for securing the offset	We believe that operating through the Credit Register increases the accountability and ease of monitoring offset outcomes and support the requirement present in the proposed changes.
19. Redesign the revegetation standards to ensure desirable revegetation can occur	We support the intent to encourage revegetation which will serve to create patches around scattered trees, and serve as links to remnant vegetation.
20. Create a framework for offsetting on Crown land	Limitations in the existing framework on the use of Crown land represent a significant loss of opportunity. We hope that the preparation of a Crown land offsetting policy will address this.
21. Formalise a set of exemption purposes and principles	<p>In the existing framework there is little capacity to assess whether exemptions are achieving their goals. The preparation of guidance detailing the purposes of exemptions and their underlying principles will help in addressing this.</p> <p>In particular, the inclusion of an exemption for conservation work is strongly supported. This will allow community groups to more effectively participate in conservation work, where the cost of permit applications and offsets is currently prohibitive.</p> <p>A number of councils have also indicated a desire that they have access to exemptions for making a strategic fuelbreak under the Fire protection exemption, and that this access be made clear in the provisions.</p>

Proposed improvement	Comment
22. Clarify wording of exemptions	<p>There are still a number of issues with the wording of exemptions in the proposed provisions, and we hope DELWP will continue to work with councils to resolve this.</p> <p>Currently, the wording of some exemptions such as the fencing exemption lists consent as required, we recommend this be clarified to be written consent in all instances.</p> <p>In addition to this, proposed changes to the fencing exemptions state a total width of 4m to be cleared. Existing exemptions under 52.17 and 52.48 allow for clearance of 4m width of native vegetation on either side of the fence.</p> <p>In order to prevent unintentional non-compliance attention should be brought to the fact that 52.17 fencing exemptions are in effect being halved and that they are no longer in line with 52.48 exemptions.</p>
23. Provide guidance on the intent and application of exemptions	<p>The preparation of guidance assisting in the use of exemptions should assist in achieving compliance.</p>
24. Adopt a consistent approach to agreements referenced in the exemptions	<p>The transparency of agreements must be improved. The intention to adopt a consistent framework and to make them publicly available is strongly supported. As it currently stands, local government is the focal point for much of the public response to native vegetation removal under agreement, over which it had little to no input.</p> <p>The current consultation with councils about agreements is welcomed.</p>
25. Develop a compliance and enforcement strategy	<p>Any strategy for compliance and enforcement should recognise the limited resources available to councils.</p> <p>There is significant potential to improve compliance through a state-wide education program as to the requirements and responsibilities when clearing native vegetation.</p>
26. Provide guidance and support materials for compliance and enforcement activities	<p>As above, this must recognise the resources available to councils.</p>
27. Improve information gathering for compliance and enforcement	<p>While we support this aim, no details have been provided and we are concerned about the potential for it to significantly draw on council resources.</p>
28. Promote co-regulatory support	<p>We support the intention of DELWP to work with councils in developing a co-regulatory framework for implementation of the regulations, and would be pleased to assist in this process.</p>

Proposed improvement	Comment
29. Review the overarching compliance and enforcement framework	We strongly support the concurrent review of compliance and enforcement frameworks, and other legislation and regulation which impacts native vegetation.

5 Moving forward

Councils are keen to have further involvement in the redrafting of native vegetation policy and provisions, as they will need to administer them on the ground. In particular, councils should play a role in drafting further supporting documentation such as the applicant kits. If a working group or select councils would be useful for testing the controls, the MAV would be pleased to coordinate or assist in any way we can.

The success of any changes to the regulations will directly relate to the resources applied to implementation. A significant amount of work is contemplated by the recommendations and councils would like to ensure that DELWP is able to commit sufficient resources to implementation and that any resource implications for councils are also considered.

The MAV believes the next step should be negotiating a co-regulatory approach and developing the statement of roles and responsibilities. An implementation plan and timeline for delivering the initiatives should be developed in consultation with councils as co-regulators. The MAV would be happy to discuss this matter further with DELWP.

6 Conclusion

This review of the native vegetation regulations is timely and, along with the Biodiversity Strategy and review of the *Flora and Fauna Guarantee Act*, has the potential to redress some framework issues that have inhibited a true co-regulatory approach.

Councils are predominantly pleased with the proposed changes of the framework and it is clear that councils have been heard in the early consultation processes. The priorities and aims expressed by DELWP so far in the review are largely in line with those of local government. In large part the concerns raised are about a lack of detail or certainty currently provided about

aspects of the framework. We hope this detail will emerge throughout the continuing process of the review, and would be pleased to continue working through these matters as appropriate.

The highest outstanding priority is for DELWP to work with local government to lay down the details of the co-regulatory system which will underpin the operation of the entire framework, and we hope this process will be undertaken soon.