Assessing the Effectiveness of Local Government Planning Scheme Controls in Protecting Native Vegetation in the Port Phillip & Western Port Region

Report by Parson Brinkerhoff Australia Pty Ltd for Port Phillip and Westernport CMA

www.ppwcma.vic.gov.au
Assessing the Effectiveness of Local Government Planning Scheme Controls in Protecting Native Vegetation in the Port Phillip & Western Port Region

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Foreword

In 2007, the Municipal Association of Victoria (MAV) applied to the Australian Government’s Natural Heritage Trust (NHT) for funding to assess the application of planning scheme controls by local governments and other authorities relevant to native vegetation retention, protection and clearing. A project was funded for an investigation in the Port Phillip and Western Port region. The Port Phillip and Westernport Catchment Management Authority (PPWCMA) subsequently managed the project and a Steering Committee with representatives from the PPWCMA, MAV, Department of Sustainability and Environment (DSE) and the Australian Government helped plan, direct and oversee its delivery.

The project’s aims were:
- Assessing the effectiveness of the planning scheme controls across the region in respect to vegetation protection;
- Examining and identifying how planning scheme provisions are addressing the issue of the removal of native vegetation in some local government areas; and
- Assessing the relevance and robustness of these planning scheme provisions and controls when effectively applied.

A consultant team, which comprised of personnel from Parsons-Brinkerhoff Australia Pty Ltd, RMIT University and La Trobe University, was engaged to conduct the project. Their tasks included:
- Mapping and analysis of the planning provisions relating to vegetation applied by all local governments in their planning schemes across the region;
- Case study analyses of fifty planning permit applications for native vegetation clearance and other planning matters relevant to vegetation management at five local governments;
- Mapping and analysis of the extent and quality of vegetation coverage across the region; and
- Analysis of relevant decisions subject to review at the Victorian Civil and Administrative Tribunal (VCAT).

Following is the report provided to the PPWCMA by the consultant team. It is also available at the PPWCMA website (www.ppwcma.vic.gov.au).

David Buntine
CEO, PPWCMA
Assessing the effectiveness of local government planning scheme controls in protecting native vegetation in the Port Phillip and Westernport Region

November 2008

Port Phillip and Westernport Catchment Management Authority

in conjunction with

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La Trobe University Bendigo
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The project Team would like to thank Staff within DSE for their assistance with mapping data, staff of the five case study local governments and in particular Shane Scanlon and David Buntine of the PPWCMA for their support and assistance.
Assessing the effectiveness of local government planning scheme controls in protecting native vegetation in the Port Phillip and Westernport Region

Contents

Executive summary ......................................................................................................................................i
1. Introduction ..........................................................................................................................................1
   1.1 Aims of the project 2
   1.2 Method 3
2. Current state of native vegetation ......................................................................................................6
3. Data .....................................................................................................................................................13
4. Policy & Planning Tools ....................................................................................................................15
5. Commitment and capacity ................................................................................................................22
6. Method ................................................................................................................................................26
7. Monitoring ..........................................................................................................................................28
8. Conclusions .......................................................................................................................................29

List of figures
Figure 1 Modelled 2005 extent of vegetation and major water-based habitat in the region 7
Figure 2 Modelled condition of vegetation in the study area (DSE 2006) 8
Figure 3 Bioregional conservation status of native vegetation in the region (Government of Victoria 2002). Vegetation is classified according to level of depletion and present day threats. 9
Figure 4 Native vegetation loss and gain across the region categorised by bioregional conservation status between 1989 and 2005. 12
Figure 5 Proportion of vegetation by bioregional conservation status covered by different overlays, including the vegetation protection overlay (VPO), environmental protection overlay (ESO), significant landscape overlay (SLO) and design and development overlay (DDO). 19

List of tables
Table 1 Area and proportion of native vegetation remaining in each local government area (metropolitan area) and the area and proportion classified as endangered. 10
Table 2 Area and proportion of native vegetation remaining in each local government area (non- metropolitan area) and the area and proportion classified as endangered. 11
Table 3 Application of zone and overlay provisions by area (Ha) for the region 17
Table 4 Net loss and gain and vegetation cleared for each overlay and zone area 17
Table 5 Bioregional Significance of Vegetation – Proportional Area Covered by Specific Planning Scheme Overlay 19

List of appendices
1 - Local government Planning Provisions
   • A – Map – PPWCMA Municipalities
   • B – Map – Zones
   • C – Map – Overlays
2 – Local Government Case Studies
3 – Analysis of the Status, Protection and Change in Vegetation in the PPWCMA region
4 – Review of VCAT cases
5 – Integration of Land Use Planning Tools and Catchment Management for Vegetation Protection
Executive summary

The Victorian Government has been a pioneer in Australia in the protection and management of native vegetation. The first native vegetation protection legislation in regard to land in private ownership was introduced nearly two decades ago through planning scheme provisions and has seen a substantial reduction in the loss of native vegetation through clearing. In 2002 the government adopted the *Native Vegetation Management – A Framework for Action* (‘Framework’). The Framework’s main goal ‘is to achieve a reversal, across the entire landscape of the long-term decline in the extent and quality of native vegetation, leading to a net gain.’ Local governments can utilise local policies, planning provisions, schedules, strategies, zones and overlays in their planning schemes to recognise areas where native vegetation exists and control land use, development and clearing.

The Port Phillip and Westernport Catchment Management Authority (PPWCMA) commissioned this study because of growing concern about the apparent continuing loss of native vegetation in the region. Since European settlement approximately 61% of vegetation in the region has been cleared. On the best and most recently available data, there appears to be a continuing loss of native vegetation in the region and it is highly unlikely that net gain is being achieved.

The study aimed to:

1. identify the main reasons for native vegetation removal in the PPWCMA region;
2. assess the effectiveness of the planning scheme controls across the region in respect to vegetation protection;
3. assess the capacity of local governments to apply and better manage native vegetation controls;
4. examine and identify how planning scheme provisions are addressing the issue of the removal of native vegetation;
5. assess the relevance and robustness of these planning scheme provisions and controls when effectively applied;
6. develop a set of draft recommendations and proposals to implement the project findings.

The consultant team mapped and analysed the extent and quality of native vegetation across the region; conducted case studies of planning permit applications and other planning matters related to native vegetation management at five local governments; compiled an inventory of planning provisions relevant to native vegetation protection in local government planning schemes; and analysed relevant decisions subject to review at the Victorian Civil and Administrative Tribunal (VCAT).

The authors contend that a systematic implementation of the recommendations of this report would greatly assist in the effective achievement of the goals and stated outcomes of state policy and the Framework.
### Major findings

Data on the extent, condition and significance of native vegetation is not always readily available, easily interpreted, easily applied and up to date to enable informed decisions about planning scheme provisions and applications for native vegetation clearance.

There is an inadequate policy framework within local government planning schemes that effectively recognises and manages native vegetation in their municipality.

Planning scheme provisions and tools are inadequate and are not being applied in an appropriate and consistent way in respect to management and protection of native vegetation.

There is a lack of consistent commitment and capacity by relevant bodies to implement the key elements of the Framework.

### Recommendations

1. Department of Sustainability and Environment (DSE) assist local government planners and other relevant staff to access relevant native vegetation datasets and train them in its appropriate use for implementing the native vegetation planning scheme provisions.

2. Local governments review and if necessary update their internal GIS systems to ensure that the latest native vegetation data is available to planners and other staff.

3. DSE and local governments undertake a council-by-council gap analysis of native vegetation data requirements to be able to successfully apply the planning scheme provisions.

4. Department of Planning and Community Development (DPCD) work with DSE and local governments to establish a consistent statement of the importance of native vegetation in the region in the SPPF and its translation into the respective Municipal Strategic Statements (MSS) of the local government planning schemes.

5. DPCD initiate a review of the capacity of the range of zones and overlays available to implement the Framework in the region including giving explicit consideration to the use and application of an ‘Urban Conservation’ zone and the development and implementation of a ‘template’ to enable a comprehensive set of amendments to be made to current planning schemes to apply relevant Overlays to reflect up-to-date native vegetation information.

6. Use the outcomes of this review as the basis for an update of local government planning scheme provisions to reflect available information on the extent, quality and condition of native vegetation across the region.

7. The Minister for Planning direct local governments to update their planning schemes using the most recent native vegetation extent and quality data in conjunction with the provision of training/assistance tailored to the needs of local governments.

8. DSE, DPCD and local governments to provide on-going training and assistance to their staff who manage the implementation of the Framework and the processing of clearance permits and associated offsets.

9. Local governments institute a process of mandatory pre-application meetings for planning permit applications for native vegetation clearance.
<table>
<thead>
<tr>
<th>Major findings</th>
<th>Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>10. Local governments monitor the implementation of conditions forming part of planning permits for native vegetation clearance through a nominated vegetation/enforcement officer.</td>
<td>11. DSE, DPCD and local governments hold regular review sessions to keep each other informed of the recurrent issues with applications, the implementation of conditions and VCAT decisions.</td>
</tr>
<tr>
<td>The method to calculate and achieve net gain in native vegetation is complex and questionable when applied as an offset for clearing.</td>
<td>12. There needs to be ongoing evaluation of the effectiveness, applicability and outcomes of the calculation methodology applied by the Framework.</td>
</tr>
<tr>
<td>There is inadequate monitoring of applications for clearing permits, the outcomes of those applications, the amount and type of vegetation removed, and the offsets required and undertaken.</td>
<td>13. Further information on the methodology should be included as part of the training and education programs.</td>
</tr>
<tr>
<td>14. DSE and DPCD establish a record of all applications for native vegetation removal across the region, the outcomes of the applications, and a register of the offsets for use by local governments and DSE.</td>
<td>15. Failing the establishment of such a system the PPWCMA consider seeking formal referral powers under section 55 of the Planning and Environment Act (1987) so as to be able monitor applications for vegetation removal.</td>
</tr>
</tbody>
</table>
1. Introduction

The Victorian Government has been a pioneer in Australia in the protection and management of native vegetation. It is now nearly two decades since the first native vegetation protection legislation in regard to land in private ownership was introduced through planning scheme provisions. The implementation of that initiative has seen a substantial reduction in the loss of native vegetation across the state through clearing. It has also led to an enhanced understanding and appreciation of the value of native vegetation.

In 2002 the government adopted the Native Vegetation Management – A Framework for Action (‘Framework’). The Framework’s main goal ‘is to achieve a reversal, across the entire landscape of the long-term decline in the extent and quality of native vegetation, leading to a net gain.’ Net Gain is measured in terms of ‘habitat hectares’. A habitat hectare is a site-based measure of quality and quantity of native vegetation that is assessed in the context of the relevant native vegetation type. Net Gain is the outcome for native vegetation and habitat where there is an overall increase in the extent and quality of native vegetation.

There are three essential components to ensure an overall increase in the extent and quality of native vegetation:

1. A reduction in losses in the extent of existing native vegetation,
2. A reduction in losses in the quality of existing native vegetation due to threatening processes, and
3. The achievement of gains in extent and quality of native vegetation through its rehabilitation and revegetation with indigenous species for biodiversity conservation and land and water resource outcomes.

Net gain has ‘four guiding principles’:

1. ‘Retention and management of remnant native vegetation is the best way to conserve biodiversity.’
2. Conservation of native vegetation and habitat depends on the maintenance of catchment processes.
3. Costs should be equitably shared according to benefits that the landholder, community and region get.
4. A landscape approach to planning native vegetation management is required and priorities should be based on bioregions within Catchment Management Authority regions.’

The Framework applies ‘a three step approach’ to proposals in which land managers and owners are considering vegetation clearing - to avoid, minimise and offset impacts:

1. ‘Avoid adverse impacts, particularly through vegetation clearance;
2. If impacts cannot be avoided, minimise impacts by careful planning, design and management; and
3. If clearing must occur, the clearing must be offset. A planning permit is required to remove native vegetation and the three-step approach is an integral part of the decision making process relating to such permits.’

Offsets are designed to achieve net gain. Gains may be either required offsets for permitted clearing actions or as a result of landholder and government assisted efforts that are not associated with clearing.

The State Planning Policy Framework (SPPF), which is part of all local government planning schemes, sets out that it is mandatory for those preparing and administering planning schemes to ‘have regard to Victoria’s Native Vegetation Management – A Framework for Action.’ The SPPF goes on to state ‘if a permit is required to remove native vegetation, or an
amendment to this scheme or an application for subdivision could result in the removal of native vegetation, planning and responsible authorities should follow the three-step approach as defined in the Framework.’

Native vegetation removal is not a prohibited development. Removal of native vegetation from private land consistent with the provisions of a planning scheme or within the terms of a planning permit is a permitted development. It is a discretionary development activity under the provisions of all planning schemes across the State. In some instances the removal of small areas of native vegetation is exempted from the need for a planning permit for a particular purpose.

Victorian local governments are unable to apply a set of provisions in their planning schemes that would prevent the lodging of planning permit applications for the removal of native vegetation on private land. Nor are they able to include provisions in a planning scheme that would make such development prohibited. Local governments can utilise local policies, planning provisions, schedules, strategies, zones and overlays in their planning schemes to recognise areas where native vegetation exists and control land use, development and clearing. The identification of those areas and the wording of the provisions can indicate the significance of that vegetation and the matters that will be considered when an application for clearance is submitted to a local government.

The Victorian Auditor-General’s Office recent report, *Victoria’s Planning Framework for Land Use and Development* (VAGO, 2008), was based on a detailed assessment of six local governments (of which four were in the metropolitan area). In two-thirds of the local governments that were examined it was found that the assessments for planning permit applications did not give sufficient consideration to the *Planning and Environment Act (1987)* or planning scheme. In 78 per cent of cases, officer reports did not give adequate consideration to matters specified in the Act, planning scheme or both. The report noted that ‘considerable improvement in the quality assurance provided by senior local government planning staff over the accuracy and processing of permit applications is required.’ It should be noted that the Auditor-General’s report addressed a wide range of planning permit applications. However it is reasonable to assume that comparable findings could apply in respect to applications for native vegetation clearance that occurs across the region.

The Municipal Association of Victoria through an application to the Natural Heritage Trust initiated the original study concept. The PPWCMA region was chosen for a more targeted study because of growing concern about the apparent continuing loss of native vegetation in that region. The PPWCMA is acutely aware of the role and importance of native vegetation in its region. In particular there is a need to support the overall state government policy to protect and enhance that resource and to undertake actions that will produce a net gain outcome.

The information needs for permit applications and the conditions imposed on planning permits need to be practical and efficient and relevant to implementation by landholders who are potential applicants. The implementation of a number of the recommendations in this report are relevant to the matters referred to above and therefore should be the subject of further investigation.

### 1.1 Aims of the project

The PPWCMA commissioned this project report so as to:
identify the main reasons for continuing native vegetation removal in the PPWCMA region

- assess the effectiveness of the planning scheme controls across the region in respect to vegetation protection
- assess the capacity of local governments to apply and better manage native vegetation controls
- use a series of case studies drawn from representative local governments across the region to examine and identify how planning scheme provisions are addressing the issue of the removal of native vegetation
- assess the relevance and robustness of these planning scheme provisions and controls when effectively applied
- develop a set of draft recommendations and proposals to implement the project findings, and
- provide a draft set of enhanced provisions to planning schemes and local government administration of schemes that provides for the improved protection of native vegetation

1.2 Method

The consultant team undertook the following tasks in the preparation of this report.

1. Mapping and Analysis of the Planning Provisions Relating to Vegetation applied by all local governments in their planning schemes across the region (Appendix 1):
   a. Assessment of the Municipal Strategic Statement and the use of Local Planning Policies to identify the extent to which each local government had acknowledged the role and significance of native vegetation in their municipality.
   b. Use of zones and overlays in each planning scheme was mapped across the region and were presented in the form of a table. The use of zones and overlays was examined to determine the extent to which the local government had sought to apply additional provisions to identify vegetation and manage it through these means.
   c. The level of attention given to vegetation in each municipality was ranked into high, medium or low. This was undertaken without any specific reference to the extent and quality of native vegetation in the municipality. A separate later exercise addressed that element. That process enabled an analysis to be undertaken which identified the extent to which the planning provisions related to and reflected the extent of native vegetation in the municipality.

2. Case Studies of Fifty Planning Permit Applications for Native Vegetation Clearance and Other Planning Matters relevant to Vegetation Management at five local governments (Appendix 2).
   a. Five case study local governments were identified for a review of planning permit applications for native vegetation clearance. Selection of the local governments for case study was designed to provide a diverse range of local government areas with different circumstances relating to varying location, development issues and pressures and the extent and quality of native vegetation. Initially a pilot study was undertaken of one of the five local governments.
   b. Findings from the pilot study and a meeting with local government officers of all five local governments was used to develop a set of criteria for examination of the planning permit
Assessing the effectiveness of local government planning scheme controls in protecting native vegetation in the Port Phillip and Westernport Region

applications and a case study visit protocol. It was established that a variety of native vegetation permits should be reviewed.

c. These criteria were provided to each of the case study local governments who proceeded to collate a variety of planning permit application files relating to the removal of native vegetation that were examined by the consultant team.

3. Mapping and Analysis of the Extent and Quality of Vegetation Coverage across the region (Appendix 3).

a. Native vegetation extent and quality data was extracted from DSE Corporate Library datasets. One extent dataset distinguished between areas that were highly likely to have native vegetation (categorised as grassy, woody, structurally modified), those that were possibly native vegetation, those were likely to be exotic vegetation and areas that are unlikely to support native vegetation. This modelled vegetation extent layer was created from time-series between 1989-2005 (the latest available dataset) Landsat Imagery, ground-truthing points, other relevant spatial data and expert validation (DSE 2008). A map of the bioregional conservation status of vegetation in the region was prepared which took into account the level of depletion and current threats (DSE 2008). This enabled the preparation of a summary of the bioregional conservation status of vegetation in each local government area in the region.

b. Native vegetation loss and gain of extent trends were also extracted from a DSE Corporate Library dataset. In 2007, the DSE had undertaken an exercise to estimate loss and gain of woody vegetation and grasslands in Victoria since 1989. LandSat images from the Australian Greenhouse Office for the period 1989 to 2005 were analysed using neural network techniques (Fielding 1999) to determine key trends across Victoria. Probabilistic models of loss, gain and no-change for both woody and non-woody vegetation were created for the time series of images. Probability thresholds for likely loss and gain were established using field data. Potential spatial errors associated with pixel alignment issues and the coarse resolution of Landsat meant that loss and gain could be only be reliably predicted for areas of 0.5 ha or greater. Small scale changes, such as loss of paddock trees and young revegetation plantings, could not be detected.

4. Analysis of Relevant Decisions Subject to Review at the Victorian Civil and Administrative Tribunal (VCAT) (Appendix 4).

As part of the project a detailed assessment was undertaken of how VCAT has addressed the Framework as a decision making tool within Victoria’s planning processes. VCAT deals with decisions on applications for planning permits by Councils that are lodged for review. An analysis was undertaken of a number of significant cases that have been brought before VCAT that have established

5. Integration of land use planning tools and catchment management for vegetation protection (Appendix 5).

As part of the overall project a commentary and assessment was undertaken of the degree to which the land use planning tools that are available through the Victorian planning system have been utilised and integrated with the catchment management system to assist and implement native vegetation management.
In accordance with the brief this study is an assessment of the policies, role and activities of governments; state and local, to implement planning scheme provisions in protecting native vegetation in the region. It should be noted that it does not address the experiences or needs of landholders, who submit applications for planning permits for clearing. Landholders are required to submit information in support of such applications and to comply with the conditions that are attached to permits that are granted. These conditions can include matters such as establishing offsets, re-vegetation or improving the quality of existing vegetation on-site. The planning scheme provisions relating to native vegetation clearance,
2. Current state of native vegetation

Question – What is the current state of native vegetation in the Port Phillip and Westernport region?

The current extent, quality and bioregional conservation status of native vegetation in the Port Phillip and Westernport region was determined through analyses of the latest DSE Corporate Library GIS datasets (Fig 1, 2 and 3) (and see Appendix 3). Estimates of loss and gain in extent of native vegetation were also determined for the region for the period between 1989 and 2005.

Findings

- Approximately 61% of vegetation in the region has been cleared (Table 1)
- Some ecological vegetation classes have been completely eliminated, and numerous vegetation classes have been reduced to less than 10% of their original extent.
- The modelled condition of vegetation is highly variable, with substantial areas of high quality vegetation in the eastern part of the region and significant areas of poor quality vegetation, particularly in the west (Fig 2). There is a strong correlation between the bioregional conservation status and vegetation condition, with highly threatened vegetation types also predicted to have the poorest condition.
- There are important areas of threatened (endangered, vulnerable or depleted) vegetation types or Ecological Vegetation Classes, across the region (Fig 3 and 4 and Table 1). Some local government authorities have extensive areas of endangered vegetation types (Table 1), for example Brimbank, Greater Dandenong, Hume, Melton, and Wyndham.
- A significant proportion of threatened vegetation occurs outside of the reserve system in the region, for example 79% of endangered vegetation exists on private land.
- In the period from 1989 to 2005, approximately 7,681 hectares of native vegetation were cleared from the region, while vegetation gains totalled 558 hectares.
- In the same period a total of 6,618 hectares of the threatened vegetation types were lost; 3,779 hectares was endangered grassland.
- On the best and most recently available data, there appears to be a continuing loss of native vegetation in the region and it is highly unlikely that net gain is being achieved.
Figure 1 Modelled 2005 extent of vegetation and major water-based habitat in the region

Legend

Native Vegetation Description
- Artificial impoundment
- Exotic woody vegetation
- Highly likely native vegetation - grassy
- Highly likely native vegetation - structurally modified
- Highly likely native vegetation - woody
- Possibly native vegetation
- Unlikely to support native vegetation
- Wetland habitat

Boundary
- 2030 UGB
- CMA
- LGA

GDA94 Zone 56
Data: nv2005_extent; Supplied by DSE

Version 2 (Feb/06)
Figure 2  Modelled condition of vegetation in the study area (DSE 2006)
Figure 3  Bioregional conservation status of native vegetation in the region (Government of Victoria 2002). Vegetation is classified according to level of depletion and present day threats.
Table 1  Area and proportion of native vegetation remaining in each local government area (metropolitan area) and the area and proportion classified as endangered.

<table>
<thead>
<tr>
<th>Local Government Area</th>
<th>Metropolitan</th>
<th>Original area of native vegetation (ha)</th>
<th>Current area of native vegetation (ha)</th>
<th>% remaining</th>
<th>Total area of vegetation classified as Endangered</th>
<th>% of area of vegetation classified as Endangered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wyndham</td>
<td></td>
<td>54,083</td>
<td>14,174</td>
<td>26%</td>
<td>13,505</td>
<td>95%</td>
</tr>
<tr>
<td>Melton</td>
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<td>52,782</td>
<td>11,547</td>
<td>22%</td>
<td>9,100</td>
<td>79%</td>
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<td>Yarra Ranges</td>
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<td>165,008</td>
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<td>Kingston</td>
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<td>Boroondara</td>
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<td>241</td>
<td>99%</td>
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<td>11%</td>
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<td>90</td>
<td>100%</td>
</tr>
<tr>
<td>Darebin</td>
<td></td>
<td>5,347</td>
<td>83</td>
<td>2%</td>
<td>77</td>
<td>93%</td>
</tr>
<tr>
<td>Melbourne</td>
<td></td>
<td>3,389</td>
<td>144</td>
<td>4%</td>
<td>63</td>
<td>44%</td>
</tr>
<tr>
<td>Docklands</td>
<td></td>
<td>237</td>
<td>50</td>
<td>21%</td>
<td>46</td>
<td>92%</td>
</tr>
<tr>
<td>Port Phillip</td>
<td></td>
<td>2,040</td>
<td>57</td>
<td>3%</td>
<td>39</td>
<td>68%</td>
</tr>
<tr>
<td>Maribyrnong</td>
<td></td>
<td>3,125</td>
<td>35</td>
<td>1%</td>
<td>35</td>
<td>100%</td>
</tr>
<tr>
<td>Moreland</td>
<td></td>
<td>5,103</td>
<td>16</td>
<td>0%</td>
<td>16</td>
<td>100%</td>
</tr>
<tr>
<td>Stonnington</td>
<td></td>
<td>2,563</td>
<td>8</td>
<td>0%</td>
<td>8</td>
<td>100%</td>
</tr>
<tr>
<td>Bayside</td>
<td></td>
<td>3,698</td>
<td>70</td>
<td>2%</td>
<td>7</td>
<td>10%</td>
</tr>
<tr>
<td>Glen Eira</td>
<td></td>
<td>3,869</td>
<td>5</td>
<td>0%</td>
<td>3</td>
<td>60%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>875,631</strong></td>
<td><strong>330,091</strong></td>
<td><strong>38%</strong></td>
<td><strong>66,580</strong></td>
<td><strong>20%</strong></td>
</tr>
</tbody>
</table>
In total there is 66,580 ha of native vegetation in metropolitan Melbourne that is classified as endangered. Of that total over 50,000 ha is found in just six municipalities. Significantly in 16 municipalities the proportion classified as Endangered represents over 75% of their remaining vegetation.

Table 2  

Area and proportion of native vegetation remaining in each local government area (non-metropolitan area) and the area and proportion classified as endangered.

<table>
<thead>
<tr>
<th>Local Government Area NON - METRO</th>
<th>Original area of native vegetation (ha)</th>
<th>Current area of native vegetation (ha)</th>
<th>% remaining</th>
<th>Total area of vegetation classified as Endangered</th>
<th>% of area of vegetation classified as Endangered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moorabool</td>
<td>116,844</td>
<td>61,309</td>
<td>52%</td>
<td>9,075</td>
<td>15%</td>
</tr>
<tr>
<td>Baw Baw</td>
<td>70,192</td>
<td>27,136</td>
<td>39%</td>
<td>4,350</td>
<td>16%</td>
</tr>
<tr>
<td>Macedon Ranges</td>
<td>99,782</td>
<td>35,009</td>
<td>35%</td>
<td>4,248</td>
<td>12%</td>
</tr>
<tr>
<td>Greater Geelong</td>
<td>25,071</td>
<td>7,851</td>
<td>31%</td>
<td>3,069</td>
<td>39%</td>
</tr>
<tr>
<td>Bass Coast</td>
<td>40,965</td>
<td>8,830</td>
<td>22%</td>
<td>2,823</td>
<td>32%</td>
</tr>
<tr>
<td>South Gippsland</td>
<td>26,421</td>
<td>4,923</td>
<td>19%</td>
<td>1,713</td>
<td>35%</td>
</tr>
<tr>
<td>French Island</td>
<td>16,959</td>
<td>12,463</td>
<td>73%</td>
<td>1,129</td>
<td>9%</td>
</tr>
<tr>
<td>Mitchell</td>
<td>24,004</td>
<td>8,917</td>
<td>37%</td>
<td>789</td>
<td>9%</td>
</tr>
<tr>
<td>Golden Plains</td>
<td>258</td>
<td>246</td>
<td>95%</td>
<td>177</td>
<td>72%</td>
</tr>
<tr>
<td>Murrindindi</td>
<td>2,994</td>
<td>2,181</td>
<td>73%</td>
<td>2</td>
<td>0%</td>
</tr>
<tr>
<td>Hepburn</td>
<td>1,712</td>
<td>1,154</td>
<td>67%</td>
<td>-</td>
<td>0%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>425,202</td>
<td>170,019</td>
<td>42%</td>
<td>27,375</td>
<td>16%</td>
</tr>
</tbody>
</table>

In total there is 27,375 ha of native vegetation in the region outside of the metropolitan Melbourne area that is classified as endangered. Significantly that area is considerably less than the amount of land in the metropolitan municipalities classified as endangered. Of that total over 23,000 ha is found in five municipalities. In contrast to the metropolitan area the proportion classified as endangered represents a relatively small proportion of their remaining vegetation.
Figure 4  Native vegetation loss and gain across the region categorised by bioregional conservation status between 1989 and 2005.

Notes

*Bioregional Significance of Vegetation* relates to Biological Conservation Status of Native Vegetation

*Endangered* – refers to Endangered other than Grasslands
3. Data

Question – Is there readily available, easily interpreted, easily applied and up to date data on the extent, condition and significance of native vegetation to enable informed decisions about planning scheme provisions and applications for clearance?

The ready availability and ease of application and use of up to date data on native vegetation type, extent, condition, quality and conservation status is vital for the preparation of appropriate planning scheme provisions. It is also critical to assist local governments in the assessment and determination of planning permit applications for the clearance of native vegetation.

Findings

- Local governments had difficulty in easily accessing, interpreting and/or applying up-to-date and suitable data on the extent, type and quality of vegetation in terms of their planning scheme provisions or in the processing of applications for vegetation removal. A critical issue is that mapped information is available at a scale that can be readily applied to planning scheme maps. In urban areas for instance the map scale is usually 1:5,000, if vegetation mapping is not at a comparable scale then it cannot be translated onto a usable planning scheme map base. Councils reported that where mapping was at an insufficient scale to be translated into planning provision in the scheme that there was insufficient strategic justification to support those changes.

- Problems around access to and understanding data were are exacerbated by internal issues, such as lack of GIS support, continuing staff turnover and loss of corporate knowledge.

Evidence

- All five local governments contacted reported issues about where to access and source data, how to interpret and apply available data and where to seek assistance in relation to data. It was also clear that data is not being consistently applied in the formulation of planning policies and provisions and in the application of data to planning applications.

- Council officers raised the following concerns and issues about accessing and using the DSE Corporate Library on native vegetation:
  1. Unsure about who to contact within DSE
  2. Delays in hearing back from DSE
  3. Unclear as to what datasets exist so unable to make a specific request
  4. Unsure how to use and interpret datasets.

- Local government personnel commonly reported that the lack of appropriate data was affecting their ability to formulate strategic vegetation management plans, apply appropriate zones and overlays and effectively process applications for native vegetation removal.

Recommendations

1. DSE assist local government planners and other staff to access relevant native vegetation datasets and train them in its appropriate use for implementing the planning scheme provisions.

2. Local governments review and if necessary update their internal GIS systems to ensure that the latest native vegetation data is available to planners and other staff.
3. DSE and local governments undertake a council-by-council gap analysis of native vegetation data requirements to be able to successfully apply the planning scheme provisions.
4. Policy & Planning Tools

Question – Is there a satisfactory policy framework within local government planning schemes that effectively recognises and manages native vegetation in their municipality? Are the planning scheme provisions and tools adequate and are they being applied in an appropriate and consistent way in respect to management and protection of native vegetation? Does the land use planning system adequately integrate with the catchment system in respect to native vegetation management?

The Victorian planning system through the Victoria Planning Provisions (VPP) provides a State Planning Policy Framework (SPPF) that sets out state wide policies in respect to native vegetation. As part of the Local Policy Planning Framework (LPPF), local governments then construct a Municipal Strategic Statement (MSS) to specifically address key land use planning and development issues in their municipality. Local governments then select zones and overlays from an available suite to implement those strategies. Local Policies can be included in the scheme to assist in decision making. The development of the MSS, the choice of zones and overlays and the use of Local Policies are dependent on the availability of information and the commitment and capacity of local governments to apply that information.

In summary this structure is

*State Planning Policy Framework (SPPF)*

Set by state government – included in all planning schemes – all local provisions and the application of zones and overlays must be consistent with the SPPF

*Local Planning Policy Framework (LPPF)*

Prepared by the planning authority – usually the local council. Comprises a Municipal Strategic Statement (MSS) and can include Local Planning Policies. The Minister for Planning approves the LPPF. The LPPF must be consistent with the SPPF.

*Zones and Overlays*

The planning authority chooses and applies a suite of zones and overlays that implements the MSS. The Minister for Planning approves the application of zones and overlays.

In respect to addressing native vegetation protection there are a number of planning tools available.

The Vegetation Protection Overlay (VPO) is specifically designed to protect significant native and exotic vegetation and can be applied to individual trees, stands of trees or areas of significant vegetation (DPCD 1999).

The Environmental Significance Overlay (ESO) is described in the Victoria Planning Provision Practice Notes in the following way: “Where there are environmental constraints on development or other important ecological values are identified, such as in coastal or riparian habitat, the use of an ESO may be appropriate. This overlay is applied if vegetation protection is part of a wider objective to protect the environmental significance of the area. The ESO has broader applicability than the VPO. The ESO may contain requirements for the construction of buildings and the carrying out of works as well as fence construction. It can also include requirements for subdivision and the removal, destruction or lopping of vegetation” (DPCD 1999).
The Significant Landscape Overlay (SLO) is described in the Victoria Planning Provision Practice Notes in the following way: “The SLO also has broader applicability than the VPO. Its function is to identify and conserve the character of a significant landscape. The SLO is appropriate when vegetation is primarily of aesthetic or visual importance in the broader landscape and should be used where vegetation is identified as an important contributor to the character of an area. The SLO also includes permit requirements for building and works which can be applied where appropriate to assist in vegetation protection. In the SLO, the schedule to the overlay must specify a permit requirement for the removal, destruction or lopping of vegetation” (DPCD 1999).

The Design and Development Overlay (DDO) is described in the Victoria Planning Provision Practice Notes in the following way: “The Design and Development Overlay (DDO) is not a tool to protect vegetation and is not appropriate for that purpose. The schedule may, however, contain specific landscaping requirements to ensure that a new development is respectful of the landscape character of the neighbourhood” (DPCD 1999).

The Rural Conservation zone (RCZ) is applied where the primary purpose of land use is to conserve a nominated environmental feature or natural resource.

Native Vegetation in Urban Areas

The project addresses native vegetation across the whole region, this embraces the built up urban areas of Melbourne and other cities and towns in the region, land in the green wedges around the metropolitan area and large parts of what is generally referred to as peri-urban Melbourne which lies outside the metropolitan Melbourne area and the area covered by Melbourne 2030. While the Framework does not discriminate between metropolitan Melbourne and the rest of Victoria or between urban and non-urban areas the reality is that the vast bulk of Victoria’s native vegetation is located in non-metropolitan Victoria and in non-urban areas. Understandably the type and detail of the provisions reflect that situation. However the result has been that it is not practicable to apply the set of provisions from the VPP to native vegetation in an urban setting. An Overlay is placed over the top of an underlying zone. The zone provides the purpose for which the land is to be used. Where that purpose is residential, industrial, business etc then that use purpose takes precedence over the recognition of the vegetation attributes. They are secondary because the use has been designated. In non-urban areas while the zone may be Farming or Rural Living there is recognition in the purpose statement for the zone that there may well be environmental qualities of the land that need to be provided for or accommodated in the determination of the use of the land. Further in non-urban areas Councils have the choice to apply the Rural Conservation zone, which explicitly identifies that the prime purpose of the zone is to recognise and protect specified environmental attributes. To date Councils that have sought to apply the Rural Conservation zone in an urban setting as a means of seeking to protect native vegetation in urban areas have been instructed by DPCD that the Rural Conservation zone is not to be applied in urban areas. Because there is no equivalent Urban Conservation zone it means that Councils have to rely upon Overlays imposed on zones that implement development incompatible with vegetation protection. It is a weakness in the current VPP and strong consideration needs to be given to an Urban Conservation zone. Essentially it means that short of purchase of land, or designation as National Park or permanent Reservation all vegetation in urban areas has limited protection. Based on DSE and Council experience and the outcomes from some VCAT cases the most effective native vegetation protection method on an urban area is the application of the ESO in association with a native vegetation precinct plan. However these are resource intensive and still do not provide certainty in terms of retention of vegetation.
Table (3) below sets out the use and application of relevant zones and overlays for the region by the amount of land that each applies to.

### Table 3  Application of zone and overlay provisions by area (Ha) for the region

<table>
<thead>
<tr>
<th>CMA Region Boundary Area (Ha)</th>
<th>1,277,142</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vegetation Protection Overlay (VPO)</td>
<td>70,890.65</td>
</tr>
<tr>
<td>Environmental Significance Overlay (ESO)</td>
<td>519,441.74</td>
</tr>
<tr>
<td>Significant Landscape Overlay (SLO)</td>
<td>204,341.95</td>
</tr>
<tr>
<td>Design and Development Overlay (DDO)</td>
<td>108,135.19</td>
</tr>
<tr>
<td>Rural Conservation Zone (RCZ)</td>
<td>118,686.58</td>
</tr>
<tr>
<td><strong>Total - Overlays and RCZ</strong></td>
<td><strong>1,021,496.11</strong></td>
</tr>
</tbody>
</table>

Note: some land is covered by more than one overlay.

It could be expected that the extent, significance and quality of vegetation across the region would be broadly represented in the zones and overlays applied in the respective local government planning schemes. In terms of zones the most relevant is the Rural Conservation zone (RCZ), however this designation lacks an equivalent zone in urban areas. There has been some suggestion that an Urban Conservation zone is needed that could be applied within built up areas. In terms of overlays the most readily apparent overlay is the Vegetation Protection overlay (VPO) because this overlay specifically only relates to vegetation. However, the Environmental Significance overlay is commonly preferred because it can encompass the wider range of elements that are frequently associated with vegetation such as habitat. It is apparent from the mapping work undertaken for this project that there are significant areas of endangered, vulnerable or depleted ecological native vegetation classes across the region (Appendix 3). The extent varies from a few hectares in some ‘urban’ local governments to hundreds and even thousands of hectares in some municipalities. Local governments need to be able to draw upon a suitable and relevant set of provisions from the suite of zones and overlays supplied in the VPP so as to reflect the significance of native vegetation in their municipality.

Table 4 below sets out for each overlay and zone the amount of native vegetation that has been cleared by grassland and other native vegetation and the total net loss and gain.

### Table 4  Net loss and gain and vegetation cleared for each overlay and zone area

<table>
<thead>
<tr>
<th>Overlay or Zone</th>
<th>Total area (ha)</th>
<th>Clearing of Native Grassland (ha)</th>
<th>Other Native Vegetation Loss (ha)</th>
<th>Net loss/gain (ha)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vegetation Protection Overlay (VPO)</td>
<td>70,890.65</td>
<td>21 (0.6%)</td>
<td>62 (1.6%)</td>
<td>-71</td>
</tr>
<tr>
<td>Environmental Significance Overlay (ESO)</td>
<td>519,441.74</td>
<td>112 (3%)</td>
<td>624 (16%)</td>
<td>-637</td>
</tr>
<tr>
<td>Significant Landscape Overlay (SLO)</td>
<td>204,341.95</td>
<td>15 (0.4%)</td>
<td>342 (8.8%)</td>
<td>-294</td>
</tr>
<tr>
<td>Design and Development Overlay (DDO)</td>
<td>108,135.19</td>
<td>120 (3.2%)</td>
<td>90 (2.3%)</td>
<td>-176</td>
</tr>
<tr>
<td>Rural Conservation Zone (RCZ)</td>
<td>118,686.58</td>
<td>28 (0.7%)</td>
<td>417 (10.7%)</td>
<td>-400</td>
</tr>
<tr>
<td>No Overlay or RCZ</td>
<td>366,364.02</td>
<td>3,483 (92%)</td>
<td>2,367 (60.7%)</td>
<td>-5,545</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>1,387,860.13</strong></td>
<td><strong>3,779</strong></td>
<td><strong>3,902</strong></td>
<td><strong>7,123</strong></td>
</tr>
</tbody>
</table>
Findings

- All 38 local governments across the region have recognised the importance of native vegetation in the LPPF in their planning scheme and most have applied some zones and particularly overlays from the VPP to recognise areas of native vegetation.
- The relevant available zones and overlays in respect to native vegetation have generally not been appropriately or adequately applied in many municipalities.
- The region’s vegetated areas are inadequately represented in zones and overlays in MSSs. This is considered to be a major finding from this project.
- In many instances the most significant vegetation in some municipalities has no or very modest protection through planning provisions.
- Many areas of native vegetation of relatively low significance are much better recognised and protected in terms of the planning scheme provisions than areas of high value.
- The lack of or awareness of readily available and useable mapped data would appear in the first instance to be a substantial explanation for this under representation.
- The poor representation of the region’s vegetated areas in zones and overlays is an impediment to good quality planning decisions for planning permit applications for native vegetation removal.

Evidence

- The planning provisions (zones and overlays) in the respective planning schemes across the region bear very little relationship to the known and mapped information on the extent of native vegetation (Appendix 3).
- The only obvious recognition of vegetation extent through the use of Overlays or the Rural Conservation Zone occurred in Yarra Ranges, Nillumbik, Mornington Peninsula, Macedon Ranges, Manningham and Moorabool.
- The VPO is specifically designed to protect vegetation but is very poorly utilised by local governments in the region (Appendix 1). Nineteen of the 42 local governments have chosen not to use the VPO. It has been applied to less than 5% of endangered vegetation and less than 10% of vulnerable vegetation in the region (Fig. 5). The result is similar for areas where an ESO has been applied. There is little relationship between the conservation status of the vegetation and the application of the Overlay.
- Experience at VCAT indicates that the ‘best’ protection for native vegetation is where an ESO has been applied in conjunction with the use of a native vegetation precinct plan.
- Conversely the use of SLOs and DDOs is more common than expected. It is concerning that some local governments appear to have used these types of Overlay to protect highly threatened vegetation, a purpose for which they were not intended.
Figure 5  Proportion of vegetation by bioregional conservation status covered by different overlays, including the vegetation protection overlay (VPO), environmental protection overlay (ESO), significant landscape overlay (SLO) and design and development overlay (DDO).

Table 5  Bioregional Significance of Vegetation – Proportional Area Covered by Specific Planning Scheme Overlay

<table>
<thead>
<tr>
<th>Overlay</th>
<th>Endangered</th>
<th>Vulnerable</th>
<th>Rare</th>
<th>DePLETED</th>
<th>Least Concern</th>
<th>No Veg.</th>
</tr>
</thead>
<tbody>
<tr>
<td>VPO</td>
<td>4%</td>
<td>9%</td>
<td>0%</td>
<td>19%</td>
<td>1%</td>
<td>6%</td>
</tr>
<tr>
<td>ESO</td>
<td>32%</td>
<td>47%</td>
<td>11%</td>
<td>29%</td>
<td>55%</td>
<td>21%</td>
</tr>
<tr>
<td>SLO</td>
<td>12%</td>
<td>23%</td>
<td>17%</td>
<td>27%</td>
<td>23%</td>
<td>11%</td>
</tr>
<tr>
<td>DDO</td>
<td>10%</td>
<td>7%</td>
<td>0%</td>
<td>6%</td>
<td>1%</td>
<td>11%</td>
</tr>
<tr>
<td>No Overlay</td>
<td>56%</td>
<td>37%</td>
<td>79%</td>
<td>50%</td>
<td>39%</td>
<td>63%</td>
</tr>
</tbody>
</table>

Notes in relation to Table 5 above

The percentages in each column add to more than 100% because some areas of vegetation are covered by more than one overlay.

The apparent application of overlays to areas designated as with ‘no vegetation’ can be explained in one of three possible ways. Firstly It is possible that the ecological vegetation class mapping exercise did not detect small remnants of vegetation and that some Local Government Areas (LGAs) have finer resolution data upon which to base their decisions. The metadata for the nv2005 layer (the EVCBCS layer) suggests that this is a landscape scale dataset, Site verification is required for site based projects. Secondly, LGAs may be applying overlays to protect vegetation remnants that have since been cleared. Thirdly It is also possible that errors in the application of overlays by LGAs mean that some sites are covered despite the absence of vegetation.
The application of provisions in planning schemes that recognise and seek to implement protection for mapped and known areas of vegetation is not consistent. There is little likelihood that the current planning scheme provisions adequately correspond to mapped information in all but a handful of Councils. Even accounting for some methodological issues and data shortfall that has been used to construct Table 5 it is evident that there are very large areas with important native vegetation that have no specific planning provision that recognises that vegetation. In fact the current situation does not reflect what perhaps could have been expected. It could be expected that areas of only moderate vegetation significance in terms of rarity would have had minimal recognition in planning schemes compared with areas of vegetation that is more highly classified in terms of Endangered and Rare. Ironically the current situation is is the other way around. Generally where there is endangered vegetation (largely comprising grasslands) one is more likely to identify that there is no explicit recognition in the planning scheme through the use and application of an Overlay. It is highly likely that this situation the lack of a Zone or Overlay control that has any relation to the significance of the vegetation has led to significant vegetation clearance. It should be noted that the specific Overlay controls from the VPP that are relevant to recognising native vegetation and that are listed were not implemented in new format planning schemes until the late 1990s. It is evident that the use of the relevant overlays VPO and ESO are no guarantee that vegetation will be retained nor is the application of the Rural Conservation zone. However it is evident that where there are no specific provisions relating to vegetation the losses have been substantial.

It is apparent from the range of provisions in the planning schemes across the region that there has not been an accepted, agreed or consistent process for the sourcing and application of vegetation mapping information by local governments. It is evident that as part of the preparation of those schemes, as part of the process of information input by DSE and in the approval of schemes and amendments by DPCD that there has not been a consistent approach in respect to native vegetation.

There are clearly different levels of capacity within and between local governments in regard to resources, information and the implementation of planning tools. The ‘burden’ of implementing the framework has fallen disproportionately on Councils depending on the extent and quality of native vegetation that they have inherited.

Recommendations

4. Department of Planning and Community Development (DPCD) needs to work with DSE and local governments to establish a consistent statement of importance of vegetation in the region in the SPPF and its translation into the respective MSS of the local governments.

5. DPCD initiates a review of the capacity of the types of zones and overlays available to implement the Framework in the region including giving explicit consideration to the use and application of an ‘Urban Conservation’ zone and the development and implementation of a ‘template’ to enable a comprehensive set of amendments to be made to current planning schemes to apply relevant Overlays to reflect up-to-date native vegetation information.

6. The outcomes of this review are used as the basis for an update of local government planning scheme provisions to reflect available information on the extent, quality and condition of native vegetation across the region.

7. The Minister for Planning direct local governments to update their planning schemes using the most recent native vegetation extent and quality data in conjunction with
provision of training/assistance tailored to the needs of local governments. A Ministerial Amendment could be used to implement updated planning scheme provisions.
5. **Commitment and capacity**

*Question – Is there consistent commitment and capacity by relevant bodies to implement the key elements of the Framework?*

The implementation of the Framework requires an across the board commitment by the key stakeholder bodies. This applies to processes in place in respect to planning scheme provisions, in the processing of planning permit applications and in decision making on those permits.

Applications for clearance of native vegetation that are listed in Clause 66.02-3 of all planning schemes must be referred to DSE. As a statutory referral authority under Section 55 of the *Planning and Environment Act (1987)* if DSE objects to the application, the respective local government must refuse the application.

As part of this project a review was undertaken of fifty permits for native vegetation clearance across five case study local governments (Appendix 2). It should be noted that the Victorian Auditor-General’s Office (VAGO, 2008) did not examine any of the five case study local governments that this project studied.

Planning permit application decisions that are taken to VCAT for review result in decisions that establish principles and precedents in the interpretation of Framework and of the native vegetation provisions in planning schemes (Appendix 4).

The range of planning permit applications reviewed covered a time period that included pre- and post- March 2006. March 2006 was the date of the release of the “Whole of Landscape” approach to native vegetation that was implemented by DSE. The Whole of Landscape Approach introduced a series of progressive changes that were made to the process and application of the Framework. Nine percent of the applications were lodged prior to the Framework becoming part of the Victoria Planning Provisions; 26% percent were lodged and processed pre-March 2006;15% were lodged pre-March 2006 but processed after this date and therefore transition provisions were applied; and 50% were lodged and processed post-March 2006.

**Findings**

- While the planning permit process regulates native vegetation clearance and provides for offsets the system does not necessarily ensure the retention of vegetation or its maintenance.
- The first two steps in the Framework, avoid and then minimise, are not often applied in the planning permit application process.
- The proposed extent of removal of vegetation is sometimes reduced through negotiations and discussions with local government and/or DSE (i.e. further avoidance and minimising).
- It is clear that the majority of applicants approach the issue of native vegetation removal from the perspective of ‘how can I offset the vegetation?’
- In some instances local governments and DSE (as a referral authority) have accepted offsets up-front as the response to the application without utilising the process of avoid and minimise first.
- Pre-application discussions between potential applicants and DSE and local government planners were identified as an important way of reducing the number of unwarranted permit applications.
While local governments and DSE have devoted and are required to allocate extensive resources to the processing of and decision making on permits, there are often few resources or processes in place to ensure implementation of the permit requirements.

The case study local governments report that it is common for considerable non-compliance with conditions on clearing permits.

DSE’s overall approach in evaluating referred applications is important because it sends clear messages to local governments and prospective applicants.

VCAT takes a pragmatic, case-by-case approach to application of the Framework. It views net gain as one of many competing policy objectives within the planning scheme that must be balanced for achievement of net community gain and sustainable development.

The Framework is essentially viewed as focused on and applicable to non urban situations, as reflected in VCAT decisions and zone provisions of the VPP.

A number of key legal principles have emerged from decisions on VCAT cases in relations to overlays/zones, exemptions in the VPP, enforcement and the Framework in general.

There is considerable inconsistency in the processing of applications for vegetation removal within and between local governments across the region.

There are different levels of capacity between local governments, in respect to resources, information and the implementation of planning tools. The report notes considerable shortcomings in respect to the operation and implementation of the Framework including by respective local governments. The Steering Committee and the consultants acknowledge and recognise that a substantial shortcoming of the current operating system is the constraints on the resources of local governments to manage the Framework, the disproportionate burden that falls on some Councils because there are extensive areas of native vegetation within their municipality, that there is a lack of trained, experienced staff at local government level to administer the Framework over the last decade or so.

Evidence

The evaluation of fifty planning permits from the five case study local governments across the region indicates that:

- The common approach by applicants was to propose the offsets in the first instance. In only a small minority of cases did an applicant set out the three step process prior to proposing the offset. In the majority of cases the documentation to demonstrate a process of avoid, then minimise then offset is lodged after the initial application. This was typically the case with large scale development proposals.
- Local governments and DSE have sometimes approached applications on the basis that simply securing existing on-site vegetation provided net vegetation gain. This could be consistent with the Framework if there is revegetation or a quality improvement gain. However it was not apparent that this was the basis of these applications. About 15% of the 50 applications examined involved DSE settling for payment or ‘management of reserve areas’ comprising retained trees on site as the basis for offsets.
- In two or three applications it was clear that quantitative assessments had not been completed in order to identify correct areas of offsets. These cases occurred pre-March 2006, prior to substantial changes to systems and processes.
- A range of factors characterise the experience of Local Government Planners and Environment Officers, they include:
frustration with the paucity of information about native vegetation upon which to make decisions

- inadequate levels of experienced and skilled staffing
- high levels of staffing turnover
- inadequate knowledge and capacity to manage complex issues associated with vegetation removal
- difficulties in coping with referral agency responses
- limited guidance and training in how to process applications.

Local government officers from the five case study local governments noted that most permits that have been issued for vegetation clearance that include specific conditions relating to management and offset subsequently have some level of non-compliance. For example only part of the offset is completed.

- It was further reported by case study local governments that trees and other vegetation that are to be retained as part of the conditions on a permit are subsequently removed, fail to survive works that are undertaken on the site or simply cannot regenerate.

- While it was difficult to gauge the level of pre-application discussions from an examination of the local government files, local government officers commented that these were generally beneficial in achieving an outcome that limited the removal of native vegetation.

Major findings from the review of VCAT cases were:

- VCAT takes a pragmatic, case-by-case approach to application of the Framework views net gain as one of many competing policy objectives within the planning scheme that must be balanced for achievement of net community gain and sustainable development.

- It has been established that native vegetation located on land zoned Residential 1 (RES1) cannot be used for offsets for net gain as it is neither the purpose nor intent of this zone to preserve native vegetation.

- The purpose, objective and intent of each planning control is considered significant and can be determinative.

- Single, misapplied or content poor planning provisions that trigger consideration of native vegetation and/or the Framework do not guarantee protection of native vegetation.

- Planning controls, such as the Heritage Overlay or Design and Development Overlay, which trigger consideration of native vegetation for reasons other than preservation of biodiversity or conservation values are of significant influence.

- The Framework may be interpreted to permit harvesting of native vegetation (with conditions) upon private land recognised to be of high conservation significance, and where two or more planning controls exist, if harvesting is already permitted on publicly owned land within the same bioregion.

A number of key principles have emerged from VCAT’s interpretation of the Exemptions Clause 52.17:

- For the construction of buildings and related works, where there are no site specific planning controls in addition to cl. 52.17, which provide additional protection for native vegetation, a proposal may be exempt from requiring a permit to remove the vegetation.
The conservation significance of the vegetation appears to be of no consequence if an exemption is permitted.

Section one of a zone lists uses permitted in that zone that do not require a permit. The as of right use can result in the development of buildings and other construction that triggers an exemption for the removal of native vegetation.

An exemption is linked to the proposed development (e.g., a tennis court), not to the precise place the development will be built on the subject land nor the amount of vegetation to be removed. Therefore, as long as the 'minimum' necessary vegetation is removed to allow for a proposed exempted development, it may occur in any position on the subject lot (provided, of course that the chosen location is otherwise legal).

- A number of key principles have also emerged from VCAT decisions on applications for enforcement orders in relation to removal of native vegetation:
  - The Responsible Authority, through appropriate use of planning controls, must clearly demonstrate how their Planning Scheme has been or will be contravened.
  - The Tribunal views enforcement orders as restorative rather than punitive.
  - Enforcement orders are linked to the subject land, and the Planning and Environment Act (1987) has been interpreted so that an enforcement order cannot require restorative action on other land.
  - The tribunal will not devolve open-ended power to a Responsible Authority to decide and control the specific content of an enforcement order at some future date. The tribunal either decides the specific content itself or requires the relevant parties to submit restorative plans for assessment.

**Recommendations**

8. DSE, DPCD and local governments to provide on-going training and assistance to their staff who manage the implementation of the Framework and the processing of clearance permits and associated offsets.

9. Local governments institute a process of mandatory pre-applications meetings for each clearance application

10. Local governments monitor the implementation of condition of a clearance permit through an appointed vegetation/enforcement officer.

11. DSE, DPCD and local governments hold regular review sessions to keep each other informed of the recurrent issues with applications and VCAT decisions
6. Method

Question - Is the method to calculate and achieve net gain in native vegetation complex and questionable when applied as an offset for clearing? Does the use of various forms of planning control produce potentially different planning outcomes in respect to native vegetation protection and management?

Findings
The mathematical calculations to achieve net gain are difficult and complex.

It is unclear if the current ‘rules’ for calculating offsets as applied under the current planning provisions will achieve net gain.

Evidence
- Local government comments and VCAT reports both indicate that the application of Framework (eg assessment of Ecological Vegetation Classes and Habitat Hectares; determination of EVC Conservation Significance; calculations of offset requirements) is highly complex and difficult to understand.
- There has been no study to determine if the current ‘rules’ for calculating offset requirements as applied under the current planning provisions will achieve net gain.
- The Vegetation Protection Overlay (VPO) requires a permit to remove vegetation though not to subdivide land. The use of the Environmental Significance Overlay (ESO) is more effective because an ESO requires a permit to build, subdivide and to clear. A Significant Landscape Overlay (SLO) rarely triggers net gain. The VPO and ESO could provide a significant additional level of protection by using Ecological Vegetation Classes (EVCs) to identify important vegetation types and to apply the overlay control to these mapped remnants. Statewide mapping based on 1989-2005 data is now available from the Department of Sustainability and Environment at 1:25,000 scale. Each EVC is assigned one of five classes of Bioregional Conservation Status within a bioregion. These classes are: endangered, vulnerable, rare, depleted, and of least concern. Vegetation is increasingly threatened from least concern to endangered. The use of overlays continues the discretionary approach applied in the Victoria Planning Provisions through the use of the permit system or optional measures such as overlays. There are no prohibitions for native vegetation clearance.
- The system of planning measures to protect vegetation is multi-layered, complex, discretionary and often ineffective. This complexity makes it difficult and costly to interpret and apply the Framework, leads to inconsistent decision making particularly by local councils and VCAT, and the loss of vegetation. The Framework contains many qualified general statements which add to interpretation difficulties. The extensive list of exemptions allows unregulated clearing to continue. Many exemptions in clause 52.17 were broadly worded and difficult to monitor or enforce, though these shortcomings may have been partially addressed in new exemptions released in September 2008.
- The adoption of the principle of net gain through offsets may lead to the loss of low value and even medium value vegetation. The use of inherent site condition as one criteria for assessment may lead to clearing particularly when linked to the use of offsets. While such issues are explored elsewhere in this report, there are some other fundamental practical concerns about offsets. Incorrect interpretation and application of the planning scheme controls coupled with the lack of enforcement of clearing permit conditions and offset management plans makes the achievement of net gain difficult.

Recommendations
12. There needs to be ongoing evaluation of the effectiveness, applicability and outcomes of the calculation methodology applied by the Framework.
13. Further information on the methodology should be included as part of the training and education programs referred to in earlier recommendations.
7. Monitoring

*Question* – Is there adequate monitoring of applications for clearing permits, the outcomes of those applications, the amount and type of vegetation removed, and the offsets required and undertaken?

*Findings*
- There is no central publicly available monitoring system in respect to the various stages in the native vegetation clearance process.

*Evidence*
- There is no apparent evidence of any systematic public process or structure in place across the region to monitor, review, or evaluate the effectiveness of the implementation of the Framework through planning schemes. At the time of writing this report, the authors were aware of a permit tracking database being implemented for DSE referred clearing permits to be viewed by DSE staff. While a good first step the authors believe that a much broader permit and offset tracking system capturing local government processed applications and viewed by local government staff is required.

*Recommendations*
14. DSE and DPCD establish a record of all applications for native vegetation removal across the region, the outcomes of the applications, and a register of the offsets for use by local governments and DSE.
15. Failing the establishment of such a system the PPWCMA consider seeking formal referral powers under section 55 of the Planning and Environment Act (1987) so as to be able monitor applications for vegetation removal.
8. Conclusions

On the best available data this study has found that there is a continuing loss of native vegetation across the region and that net gain has not been occurring.

- Unless substantial initiatives are urgently undertaken further significant vegetation loss in the region is most likely to occur.
- The implementation of the Framework in the region has not to date delivered the overall outcomes stated in government policy in respect to native vegetation protection and net gain.
- The reality is that local government, under the current arrangements and system, is unlikely to be able to lift its performance and operation to effectively implement and achieve the goals and stated outcomes of state policy and the Framework.
- One of the most important findings of the project is that overall there appears to be an inefficient and ineffective use of resources to achieve the stated outcomes of the Framework. This refers to the fact that significant resources are being employed to process and determine applications. But in many cases the cost and effort is not commensurate with the benefit gained in terms of retention of vegetation. For instance the failure of monitoring and enforcement means that the conditions of some permits are not followed through and net gain is not achieved.
- The level of work and resources required to implement the system are often disproportionate to the level of native vegetation retention let alone net gain.
- In terms of planning scheme content, consideration of applications and compliance with permit requirements the system is resource demanding.
- A number of local government officers expressed frustration that given the scale and complexity of the system little seems to have been achieved and that the outcomes of the current system appear to have limited consistency with the stated outcomes of the Framework.
- The case study local governments reported that there were substantial resources devoted to dealing with enquiries relating to clearance and in pre-application meetings – which in some instances resulted in an application not being made. In a number of cases study applications it was evident that the consideration of the application had consumed substantial local government resources over an extended period. Those resources were well in excess of any reimbursement through fees for a planning permit application.

The systematic implementation of the recommendations of this report would greatly assist in the effective achievement of the goals and stated outcomes of state policy and the Framework.
Report Limitations Statement

Scope of services and reliance of data
This report has been prepared in accordance with the scope of work/services set out in the contract, or as otherwise agreed, between PB and the client. In preparing this report, PB has relied upon data, surveys, analyses, designs, plans and other information provided by the client and other individuals and organisations, most of which are referred to in the report (the data). Except as otherwise stated in the report, PB has not verified the accuracy or completeness of the data. To the extent that the statements, opinions, facts, information, conclusions and/or recommendations in this report (conclusions) are based in whole or part on the data, those conclusions are contingent upon the accuracy and completeness of the data. PB will not be liable in relation to incorrect conclusions should any data, information or condition be incorrect or have been concealed, withheld, misrepresented or otherwise not fully disclosed to PB.

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PB will not be liable to update or revise the report to take into account any events or emergent circumstances or facts occurring or becoming apparent after the date of the report.
Appendix 1

Local government Planning Provisions

Map A – PPWCMA Municipalities
Map B – Zones
Map C - Overlays
# Port Phillip Westernport CMA – Vegetation Protection Reference in Council Planning Schemes

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<thead>
<tr>
<th>Banyule</th>
<th>MSS</th>
<th>LPFF</th>
<th>VPO</th>
<th>ESO</th>
<th>SLO</th>
<th>DDO</th>
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<tr>
<td>High</td>
<td>21.02 – Municipal Profile</td>
<td>High quality vegetation and landscape</td>
<td>VPO1 – Plenty River East area</td>
<td>ES01 – Yarra River, Plenty River and Darebin Creek</td>
<td>SLO1 – Watercourse Environ</td>
<td>DDO1 – Darebin Parklands and Rockbeare Park Environ</td>
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<td></td>
<td>21.03 – Vision Environmental management</td>
<td>Environment Policy</td>
<td>VPO2 – Loyola Seminary Precinct</td>
<td>ESO2 – Macleod Red Gum area</td>
<td>SLO2 – Yarra Valley Landscape Area</td>
<td>DDO3 – Macleod Primary School Area</td>
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<td>22.01 – Middle Yarra Environ Policy</td>
<td>VPO4 – Elliston Estate</td>
<td>ES04 – Significant trees and areas of vegetation</td>
<td>ESO5 – Streeton Views Estate</td>
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<th>Bass Coast</th>
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<td>21.03 Key Issues Environment</td>
<td>Environment – biodiversity, vegetation</td>
<td>VPO1 – Significant Remnant Vegetation</td>
<td>ES01 – Coastal Areas</td>
<td>SLO1 – Bass Valley</td>
<td>DDO1 – Residential Areas near the Coast</td>
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<td>21.05 Objectives, Strategies, Implementation Environment – conservation and enhancement of natural resources</td>
<td>22.03 Environment Removal of native vegetation; Use and development of land for conservation purposes</td>
<td>VPO3 - Inverloch</td>
<td>ES03 – Significant Flora and Fauna Habitats</td>
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<td></td>
<td>22.08 – Hilltop, Ridgeline and Prominent Coastal Landform Protection Policy</td>
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<th>Baw Baw</th>
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<td>Medium</td>
<td>21.06 Factors Influencing the Future Planning of Baw Baw Shire Natural resource base and natural environment</td>
<td>22.03 Environment Removal of native vegetation; Use and development of land for conservation purposes</td>
<td>VPO1 - Rokeby</td>
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<td>SLO1 – Strzelecki Ranges</td>
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Appendix 1 – Council Planning Scheme Controls
<table>
<thead>
<tr>
<th>Location</th>
<th>Major Strategic Planning Themes</th>
<th>Environment and quality of life</th>
<th>Strategies and actions</th>
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<tr>
<td>Bayside</td>
<td>21.04 – Vision and overarching goals</td>
<td>Sustainability as one goal</td>
<td>VPO1 – Coastal areas</td>
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<td>21.11 – Open Space Remnant bush land areas as one element</td>
<td>VPO2 – Bushland areas</td>
<td>VPO3 – Beaumaris and Black Rock native vegetation areas</td>
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<td>Boroondara</td>
<td>21.06 – Environment Flora and fauna mentioned</td>
<td>22.13 Yarra Valley Environ Policy</td>
<td>VPO1 – Willsmere Vegetation Protection area</td>
<td>ESO1 – Yarra River Environmental Significance area</td>
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<td>VPO2 – Kew Residential Services Significant Vegetation Protection</td>
<td>ESO2 – Beckett Park Environmental Significance area</td>
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<td>ES01 – Yarra Bend Park and Yarra Boulevard Significant Landscape area</td>
<td>SLO1 – Yarra Bend Park and Yarra Boulevard Significant Landscape area</td>
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<td>Brimbank</td>
<td>21.05 A vision for the future Environment an element</td>
<td>22.01-3 Urban Design – Landscaping</td>
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<td>ESO1 – Sydenham Road Transmission Environmental Significance area</td>
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<td>21.11 Environment Maribyrnong catchment</td>
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<td>ESO2 – Sydenham Road Transmission Environmental Significance area – Round Hill</td>
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<td>21.14 Werribee catchment</td>
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<td>ESO3 – Baldwin Ave/Solomon Heights</td>
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<td>SLO2 – Yarra Valley Significant Landscape area</td>
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Appendix 1 – Council Planning Scheme Controls
<table>
<thead>
<tr>
<th>Location</th>
<th>Regional context and key issues</th>
<th>Environmental Significance area</th>
<th>Significant Sites</th>
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<td>Cardinia High</td>
<td>Dandenong Ranges</td>
<td>VPO1 – Low Density Residential</td>
<td>ESO1 – Northern Hills</td>
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<td>VPO2 – Hills Townships</td>
<td>ESO2 – Western Port</td>
<td>SLO1 – Puffing Billy Tourist Railway Scenic Corridor</td>
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<td>VPO3 – Interim Vegetation Control for Emerald Town Centre</td>
<td>ESO3 – Other Significant Sites</td>
<td>SLO2 – Western Port</td>
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<td></td>
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<td>SLO3 – Lang Lang/Heath Hill</td>
<td>SLO4 – Menzies Creek Valley</td>
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<td>Casey High</td>
<td>Ramsar, the foothills</td>
<td>VPO1 – Brookland Greens – Native Vegetation</td>
<td>ESO1 – Coastal Environments</td>
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<td>The Foothills</td>
<td>VPO2 – Cardinia Creek Parklands Environ</td>
<td>ESO2 – Royal Botanic Gardens, Cranbourne</td>
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<td>Natural and built assets</td>
<td>VPO3 – Mount Cooper, Bundoora</td>
<td>ESO3 – Royal Botanic Gardens, Cranbourne Environ</td>
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<td>ESO4 – Cranbourne South conservation area</td>
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<td>ESO5 – Royal Botanic Gardens, Cranbourne Environ (Marnebeck Estate)</td>
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<td>Darebin Medium</td>
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<td>VPO2 – Former Kingsbury Centre – Significant Vegetation</td>
<td>ESO1 – Merri Creek and Environ</td>
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<td>VPO3 – Mount</td>
<td>ESO2 – Darebin Creek and Environ</td>
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<td>Cooper, Bundoora</td>
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<td>Location</td>
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<td>Indigenous Flora and Fauna Policy</td>
<td>ESO1 – Areas of Botanical or Zoological Significance</td>
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<td>Frankston High</td>
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<td>21.03 Vision</td>
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<td>Objectives - Strategies - Implementation</td>
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<td>21.10 Environmental Management</td>
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<td>21.11 Protection of Catchments, Waterways and Groundwater</td>
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<td>21.13 Coastal Areas</td>
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<td>21.14 Conservation of Native Flora and Fauna</td>
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<td>Environmental Management</td>
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**Hepburn**

- **Medium**
  - 21.02 Key Influences Environment and Heritage
  - 21.03 Vision and Strategic Framework
  - Environmental management
  - 21.09 Environment and Heritage

- **Hobsons Bay**
  - **Low**
    - 21.02 Profile of Hobsons Bay Vegetation – The Natural Environment
    - 21.12 The coast

- **Hume**
  - **Medium**
    - 21.02 Vision for Hume Environmental sustainability
    - 21.03 Objectives and Strategies
    - Natural environment elements

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<tr>
<th>Grove – Vegetation Protection Area</th>
<th>ESO2 – High Value Wetlands and Associated Habitat Protection</th>
<th>the Brisbane Ranges and Anakie SLO6 – Wallington Road, Ocean Grove SLO7 – Ocean Grove Coastal Area SLO8 – Barwon Heads Semi-Bush Significant Landscape Area</th>
<th>RCZ 6 RCZ 7 RCZ 8 RCZ 9 RCZ 10 RCZ 11 RCZ 12 RCZ 13 RCZ 14 RCZ 15</th>
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<td>VPO1 – Roadside Conservation and Remnant Vegetation</td>
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<td>SLO1 – Volcanic Peaks Landscape Area, Ridges and Escarpments Area and Sites of Geological Significance (Vegetation protection)</td>
<td>DDO4 – Lake Daylesford and Surrounds</td>
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<td>VPO2 – Burke Hill Shrubland</td>
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<td>VPO3 – Kalkallo Grasslands</td>
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<td>VPO4 – Greenvale Rise – River</td>
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Appendix 1 – Council Planning Scheme Controls  6
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Appendix 1 – Council Planning Scheme Controls
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<td>VPO3 – Native Grassland Areas</td>
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<td>VPO6 – Wildlife Corridors</td>
<td>SLO2 – Yarra Valley Backdrop</td>
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<td>VPO7 – Yarra Gums</td>
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<td>VPO8 – Cobaw Biolink</td>
<td>ESO6 – Calder Buffer Zone, Woodend</td>
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<td>21.04-2 Key Land Use Theme - Natural Environment; Enhancing Environment and Liveability</td>
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<td>(All make reference to the retention of native veg)</td>
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<td>Planning Visions and Objectives</td>
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<td>Location</td>
<td>Key Issues and Trends</td>
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<td>Enhancing Environmental Assets</td>
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<td><strong>Low</strong></td>
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<td>Municipal Overview and Regional Context</td>
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<td>Nillumbik</td>
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<td>Site of botanical significance</td>
<td>SLO1 – SLO21 Yarra Ranges significant landscapes</td>
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<td>21.07 The</td>
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<td>Sites of zoological significance</td>
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**High** – Detailed reference and controls relating to native vegetation within the Planning Scheme (extensive utilisation of MSS/LPPs/Overlays)

**Medium** – Some reference and controls relating to native vegetation within the Planning Scheme (moderate utilisation of MSS/LPPs/Overlays)

**Low** – Minimal to no reference and controls relating to native vegetation within the Planning Scheme (limited to no use of MSS/LPPs/overlays)
Vegetation Protection Reference in Council Planning Schemes

- **High**
- **Medium**
- **Low**
Appendix 2

Local Government case studies
Detailed Assessment Findings

Case Study A - Council

- Total of 7 applications reviewed
- **Type of applications reviewed** – veg removal for industrial and residential subdivision; road widening and veg removal (majority of veg removal was for grasslands)
- **Internal referral** – common practice to refer to Landscape architect
- **DSE referral** – 6 out of 7
- **Overlays** - ESO control (1/7)
- **Decision made** – some made by Council, some by delegate; in each case Council supported the delegates recommendation for approval; **all applications were approved** – 1 was originally refused based on application not adhering to 52.17 – another lapsed and was reapplied for (they did not provide further info relating to native veg in time)
- **Decisions made by VCAT** – 1 case went to VCAT (Council approval) - VCAT approved the application with varied conditions (not relevant to veg)
- **Conditions on permit** - Generally approval of an offset plan was a standard planning permit condition; common use of Section 173 Agreements to achieve net gain; some cases of agreements (not necessarily Sec 173) between Council / applicant / DSE relating to funding / management plans / suitable offset sites
- **Decision time** – Insufficient information
- **Other comments**
  - Some usage of Council owned / managed land for offsets
  - Common practice for Council to engage an ecology consultant to peer review an applicant’s native vegetation reports
Case Study B - Council

- Total of 15 applications reviewed
- 1 application was pre-planning advice
- Internal referral – Environment (12/14), Arborist (3/14), only 2 applications not referred
- DSE referral – 11 out of 14
- Type of applications reviewed – removal of native vegetation for timber production; residential rezoning, subdivision and vegetation removal; re-subdivision and vegetation removal; dwelling/dwelling extension/dwelling outbuildings, dam and vegetation removal
- Overlays - ESO control (5/14), SLO control (3/14), EMO control (8/14), WMO control (7/14)
- Decision made be delegate – Approved (7/14), Compliance matters (2/14)
- Decisions made by Council – Refused (1/14 – went to VCAT)
- Decisions made by VCAT –
  - Failure to determine (3), Council refusal (1) - VCAT approval (4/4 - all)
  - (Council advised that had they the chance they would have refused at least two of the failure to determine cases)
- Conditions on permit – Required offset planting (11), this was not required in the case of timber production and in a case where the amount removed was considered not significant, also another application was withdrawn; Require Sec 173 Agreement for vegetation protection (2)
- Pre-approval discussion – Dealt with under Clause 53 with 52.17 also referred to (6); Number of applications where amount trees for removal was reduced through application discussions (3), only 1 of these was that decided at VCAT; Native vegetation information was not sufficient applicant asked to provide more (3 – 2 of which ultimately reduced amount of veg to be removed); Relevant objections lodged (2 – both decided in VCAT, 1 failure to determine, 1 refusal)
- Decision time – Delegate decision between 5 months & 4 years (Average 6-12 months); Compliance – 2 months; applications involving VCAT, minimum 14 months
- Pre-application permit – Lodged for a rezoning from RLZ to R1Z and subdivision (6ha site), remnant native vegetation throughout the site of varying quality. Council advised that the proposal does not comply with the NVMF and that there would be a net loss of native vegetation that cannot be offset. Partial site exclusion and preparation of a revised ecological report for recommended. The matter did not proceed
- Withdrawn application – Lodged for an addition to an existing residence in an LDRZ area. The application was withdrawn after Council advised that the proposal did not attempt to minimise vegetation removal and was contrary to many aspects of the Planning Scheme
Compliance matters (2) – 1. Council required applicant to seek amendment to a permit where small amount of vegetation was removed without permission. Council saw the breaches as minor. 2. Unauthorised vegetation removal occurred on adjoining owners property after permission for some removal granted for powerlines. Council required offsets on the original applicants or the adjoining owner property.
Case Study C - Council

- Total of 13 applications reviewed
- 1 application was unfinished; 1 did not involve veg removal but outcome was due to location of veg (old quarry site)
- Internal referral – Environment (10/13)
- DSE referral – 10 out of 13
- Type of applications reviewed – rezoning (old quarry site outside UGB – part to RCZ, part to R1Z); tree pruning; dwelling and veg removal; dwelling and veg removal in a subdivision where veg has been retained; roadside veg removal for footpath/and for road; school building and veg removal; subdivision and veg removal; multi-unit development and veg removal; second stage of subdivision (post amendment) and veg removal
- Overlays - ESO control (8/13), SLO control (7/13), EMO control (0), WMO control (0)
- Decision made be delegate – Approved 8
- Decisions made by Council – Approved 2 (1 – went to VCAT and was approved)
- Minister for Planning – Approved 1
- Decisions made by VCAT – Failure to determine (2) – both settled outside VCAT by DSE through more veg protection, Council approval (1) – VCAT approved
- Conditions on permit – Section 173 Agreements (1 – and a bushland environmental management plan), Offsets (7), Council enter into a ‘statement of understanding’ with DSE to ensure offset site is protected (1)
- Decision time – Between 2 months & 3 years (Average 12 months)
- Compliance matters – 1 permit also included an enforcement issue wither a Sec 173 was not completed prior to development and where a minimum of 30 trees required for protection all were removed. Council required applicant to submit a revised net-gain assessment and offset planting was required in a reserve by Council at cost to the applicant
- Other comments -
  - 3 applications resulted in a reduction in the amount of vegetation to be removed due to Council and DSE discussions during the assessment process
  - DSE told Council to make an assessment using the NVF on two occasions (prior the DSE – Council streamlining process)
  - In a staged school development DSE advised that all veg removal should be dealt with at the outset rather than through the stages of development
- Council officer comments –
  - Often a loss of trees post subdivision negotiations – trees that were planned to be retained are being removed once the houses begin
- Applications are never referred to the CMA
- Some examples of DSE settling for payment or just 'management of reserve areas' that are made up of retained trees on site, is being permitted as offsets – rather than more new planting and actual quantitative requirements
- DSE are asking for plans to be inline with CFA requirements and then they will deal with them, sometimes this vegetation removal is then required to be offset often where an ESO/SLO control exists
- Section 173 Agreements are very common for vegetation protection
- Often permits have some level of non-compliance, e.g. they do part of an offset only
Case Study D - Council

- Total of 9 applications reviewed
- 1 application was pre-planning advice
- Internal referral – (6/9)
- DSE referral – All, 9 out of 9
- Type of applications reviewed – removal of native vegetation for road duplication; veg removal for industrial development; veg removal in stages of residential subdivisions; native veg removal (no-development); Development Plan approval (existing ODP for site); pipeline and veg removal
- Overlays - ESO control (0), SLO control (1)
- Decision made be delegate – Approved (4)
- Decisions made by Council – Approved (5)
- Decisions made by VCAT – 0
- Conditions on permit – native veg agreement between applicant and Council (2); environmental management plan (2); detailed flora and fauna assessment required (1); offset management plan (1); (development plan approval) – native veg removal to be addressed under environment and offset plan (1)
- Decision time – Between 3-12 months
- Other comments –
  - Discussion held as part of the approval process resulted in changes to veg removal requirements in 2 cases – the development plan area was extended on one application to ensure a more holistic assessment; a subdivision was realigned to avoid veg
  - 2 applications involved the use of offsets on sites in other Councils – use of a Council reserve with money paid to Council from applicant; – use of vegetation/planting in another subdivision by the same applicant
  - DSE responded to 3 applications that involved development plans for the site (large subdivisions) that they did not need to deal with veg removal as it was already dealt with through the development plan process
  - The extent of clearance for 1 application was to minor to warrant a net gain assessment and offset
  - 3 applications required further information relating to vegetation
Case Study E - Council

- Total of 9 applications reviewed
- Internal referral – Environment (6/9), Parks, landscape planner (3/9)
- DSE referral – 3 out of 9
- Type of applications reviewed – removal of trees in road reserve, enforcement issue, residential subdivision and vegetation removal, planning scheme amendment (subdivision and vegetation removal), development of warehouse and removal of trees
- Overlays – VPO (1/9)
- Decision made be delegate – Approved (8/8)
- Decisions made by Council – NA – not for files reviewed
- Decisions made by VCAT – NA – not for files reviewed
- Conditions on permit – Offsets, in the form of a habitat plan of conservation management plan required for applications (6). Protection of retained trees (1). Translocation required of significant species (1). Planting of canopy trees around carparking (1).
- Decision time – Between 2 weeks and 2 ½ years
- Pre-application – Insufficient information. Evidence of pre-application meeting with one application.
- Compliance matters – A compliance/enforcement case reviewed related to a permit for warehouse/factory. The results were that translocation of trees in accordance with a translocation plan was required by Council, along with payment of a fine (~$20,000) and a bond (~$10,000).
- Council officer comments –
  - A number of applications with extensive pre-app discussions that result in no permit application being lodged
  - Individual tree retention in subdivisions, overtime they die/can’t regenerate/people want to remove them
  - Council are coming up with a plan to manage one-off offsets for people who don’t have the provisions on their own land
  - Several issues with Clause 52.17
Appendix 3

Analysis of the status, protection and change in Vegetation in the PPWCMA region
APPENDIX THREE  ANALYSIS OF THE STATUS, PROTECTION AND CHANGE IN VEGETATION IN THE PORT PHILLIP AND WESTERN PORT CATCHMENT MANAGEMENT REGION

Sarah A Bekessy and Alex Lechner

Summary

This report presents an analysis of the current extent, status and condition of vegetation in the Port Phillip and Western Port Catchment Management region. Trends in vegetation loss and gain are analysed using Landsat data and a recent modelling exercise that captured losses and gains of both trees and grasslands. An analysis of the relationship between current planning overlays and the significance of vegetation in the region is also presented. Recommendations are made for appropriate management and monitoring of vegetation in the region.

Key findings:

1. Significant vegetation remnants exist within the Port Phillip and Western Port Catchment Management region, with important areas of endangered, vulnerable or depleted ecological vegetation classes. Some local government authorities are responsible for extensive areas of highly endangered vegetation types.

2. The modelled condition of vegetation within the CMA is highly variable, with substantial areas of high quality vegetation in the east of the study area and significant areas of poor quality vegetation, particularly in the west of the study area. There is a strong correlation between conservation status and vegetation condition, with highly threatened vegetation types also predicted to have the poorest condition.

3. A comparison with pre-1750 modelled vegetation extent reveals that approximately 67% of vegetation in the CMA has been cleared. Some ecological vegetation classes have been completely eliminated, and numerous vegetation classes have been reduced to less than 10% of their original extent.

4. In the period 1989 to 2005, approximately 7681 hectares of native vegetation were cleared from the study area, while vegetation gains totalled 558 hectares. Substantial losses occurred in endangered, vulnerable, rare and depleted ecosystems (total 2839 hectares) and a significant area of endangered native grassland was also lost (3779 hectares), further reducing the extent of this highly depleted vegetation type.

5. The continuing loss of vegetation in the Port Phillip and Western Port Catchment region can be partly explained by the failure of the planning system to appropriately protect threatened remnants. The application of overlays across local government authorities in the study area is inconsistent, and is unrelated to the conservation significance of vegetation. The vegetation protection overlay (VPO) is poorly utilised, covering less than 5% of endangered vegetation and less than 10% of vulnerable vegetation in the study region. A substantial proportion of threatened vegetation types are inappropriately covered by development overlays. An analysis of vegetation loss that has occurred under various overlays indicates that the VPO is the most effective mechanism to protect vegetation.

6. The continuing loss of vegetation in the region points to the ineffectiveness of clearing control measures. This failure is likely due to the poor and inconsistent application of existing tools, possibly because local government authorities often do not have access to up-to-date data and lack skills needed to interpret vegetation information. Unregulated clearing under a range of exemptions is also a possible cause. Failure to effectively utilize clearing controls also stems from the lack of integration of policy implementation across the Department of Sustainability and Environment, the Department of Planning and Community Development, the catchment management authorities and local government authorities.

7. Recommendations include (i) increasing investment in data collection, collation and storage in order to enable systematic planning for threatened vegetation in the Port Phillip and Western Port CMA and to monitor trends in extent and condition over time (ii) supporting councils to revise and improve the vegetation controls by providing up-to-date data and interpretation (iii) recording vegetation cleared under exemptions and tightening those that result in significant losses (iv) developing clearer, cross-Government guidelines regarding expectation of the use of planning tools.
Extent, Status and Condition of Vegetation

Vegetation Extent

Figure 1 presents the modelled extent of vegetation and major water-based habitat in the Port Phillip and Western Port Catchment region showing the likely location of native vegetation (grassy, woody, structurally modified), the possible location of native vegetation, likely location of wetlands and exotic vegetation and areas that are unlikely to support native vegetation (DSE GIS Corporate Library). The modelled vegetation extent layer was created from time-series (between 1989-2005) Landsat Imagery, ground-truthing points, other relevant spatial data and expert validation (DSE 2008). Table 1 presents a summary of the area represented by each category. Figure 2 presents a map of the study region showing predicted cover by ecological vegetation classes in 2005 (DSE GIS Corporate Library).

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<td>Total</td>
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Conservation Status of Vegetation

Figure 3 is a map of the bioregional conservation status of vegetation in the Port Phillip and Western Port Catchment region, which takes into account the level of depletion and current threats (Government of Victoria 2002). Table 2 presents a summary of the areas of vegetation within each bioregion classified into bioregional conservation status. Table 3 presents a summary of the bioregional conservation status of vegetation in each local government authority.

Substantial values exist in the area, with sizeable areas of endangered, vulnerable and depleted ecosystems. Some local government authorities are responsible for extensive areas of highly endangered vegetation types, whereas other authorities have little vegetation cover.

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### Table 3. Total area of vegetation (hectares) in each local government authority by bioregional conservation status

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Vegetation Condition

Figure 4 is a map of the modelled condition of vegetation in the study region. The modelling approach used to predict condition of vegetation was based on statistical relationships between information from a range of sites with known vegetation condition and a suite of mapped data (including vegetation type, geology, climate and tree density) (DSE 2006; DSE GIS Corporate Library).

Trends in Vegetation

Broad changes in vegetation since 1750

Figure 5 presents a map of the study region showing predicted cover by ecological vegetation classes in 1750 (DSE GIS Corporate Library). Figure 2 presents the same area today, revealing substantial losses in vegetation in some regions. Whilst the region has clearly experienced high levels of historical clearance, the landscape today has considerable potential to deliver important biodiversity values.

Approximately 67% of vegetation in the CMA has been cleared with some ecological vegetation classes completely eliminated from the study area and numerous vegetation classes reduced to areas of less than 10% of the original extent. Appendix 1 summaries the current extent of each ecological vegetation class in the study area and the depletion of each class compared with the modelled 1750 extent.

Vegetation loss and gain

In 2007, the Department of Sustainability and Environment undertook an exercise to estimate loss and gain of woody vegetation and grasslands in Victoria since 1989. LandSat images from the Australian Greenhouse Office for the period 1989 to 2005 were analysed using neural network techniques (Fielding 1999) to determine key trends across Victoria (Matt White, pers comm.). Probabilistic models of loss, gain and no-change for both woody and non-woody vegetation were created for the time series of images. Probability thresholds for likely loss and gain were established using field data. Potential spatial errors associated with pixel alignment issues and the coarse resolution of Landsat meant that loss and gain could only be reliably predicted for areas of 0.5 ha or greater - small scale change such as loss of paddock trees could not be detected.

Figure 6 presents loss and gain in tree cover and native grasslands in the study area between 1989 and 2005. The total area of vegetation loss in the area totals 7681 hectares. Gains in vegetation total 558 hectares with no gain in native grassland during that time period.

Figure 7 summarises loss and gain in vegetation in the study area between 1989 and 2005, categorised by bioregional conservation status. Substantial losses have occurred in endangered, vulnerable, rare and depleted ecosystems (total 2839 hectares). A significant area (3779 hectares) of native grassland has been lost between 1989 and 2005, further reducing the extent of these already highly depleted vegetation types. While native grasslands once covered around one third of Victoria, less than 1% of these native grassland communities remain today (Barlow 1998). Of the native grasslands that are left, approximately 75% of remnants are found on private land (Barlow 1998).
Figure 7. Loss and gain in vegetation in the study area between 1989 and 2005. The data is separated into loss and gain for endangered native grassland and other vegetation categorised by bioregional conservation status.

Adequacy of Planning Overlays

An analysis was conducted of the adequacy of the planning system to protect and manage vegetation in the Port Phillip and Western Port Catchment region. Figure 8 presents the proportion of vegetation by bioregional conservation status covered by different planning overlays, including the vegetation protection overlay (VPO), environmental protection overlay (ESO), significant landscape overlay (SLO) and design and development overlay (DDO).

Application of overlays across the 43 local government authorities (LGAs) is inconsistent, and is unrelated to the conservation significance of vegetation. The vegetation protection overlay is poorly utilised, covering less than 5% of endangered vegetation and less than 10% of vulnerable vegetation in the study region. A substantial proportion of threatened vegetation types are inappropriately covered by development overlays. A more detailed analysis of the application of each overlay within local government authorities is provided below.

The application of overlays to areas with ‘no vegetation’ can be explained one of three ways. It is possible that the ecological vegetation class mapping exercise did not detect small remnants of vegetation and that some LGAs have finer resolution data upon which to base their decisions. Alternatively, LGAs may be applying overlays to protect vegetation remnants that have since been cleared. It is also possible that errors in the application of overlays by LGAs mean that some sites are covered despite the absence of vegetation.
Figure 8. Proportion of vegetation by bioregional conservation status covered by different overlays, including the vegetation protection overlay (VPO), environmental protection overlay (ESO), significant landscape overlay (SLO) and design and development overlay (DDO).

**Vegetation Protection Overlay**

The vegetation protection overlay (VPO) is specifically designed to protect significant native and exotic vegetation and can be applied to individual trees, stands of trees or areas of significant vegetation (DPCD 1999). Figure 9 presents current vegetation protection overlays analysed for each local government authority by the bioregional conservation status of the vegetation (Government of Victoria 2002).

Figure 9 shows that the vegetation protection overlay does not provide adequate protection for threatened ecosystems in the study area. A low proportion of the total area of remnant vegetation in the region is protected by the vegetation protection overlay. The VPO is inconsistently applied across local government authorities with only 24 of the 43 LGAs utilizing the overlay. Many councils (for example, Wyndham City Council) apply the VPO to a very low proportion of threatened vegetation and others apply the overlay to a substantial proportion of threatened vegetation. For all LGAs, there is little relationship between the bioregional conservation status of vegetation and application of the overlay, with poor protection of endangered and vulnerable vegetation across the board.

**Environmental Protection Overlay**

The environmental protection overlay (ESO) is described in the Victorian Planning Provision Practice notes in the following way: “Where there are environmental constraints on development or other important ecological values are identified, such as in coastal or riparian habitat, the use of an ESO may be appropriate. This overlay is applied if vegetation protection is part of a wider objective to protect the environmental significance of the area. The ESO has broader applicability than the VPO. The ESO may contain requirements for the construction of buildings and the carrying out of works as well as fence construction. It can also include requirements for subdivision and the removal, destruction or lopping of vegetation” (DPCD 1999).

Figure 10 presents current environmental protection overlays within the Port Phillip and Western Port Catchment region analysed for each local government authority by bioregional conservation status of the vegetation (Government of Victoria 2002). 33 of the 43 LGAs utilize the ESO to some extent. Some LGAs have applied ESOs to the majority of threatened vegetation, whereas others have applied the overlay to small areas. For all LGAs, there is little relationship between the bioregional conservation status of
vegetation and application of the overlay, with poor protection of endangered and vulnerable vegetation in many LGAs.

**Significant Landscape Overlay**

The significant landscape overlay (SLO) is described in the Victorian Planning Provision Practice notes in the following way: “The SLO also has broader applicability than the VPO. Its function is to identify and conserve the character of a significant landscape. The SLO is appropriate when vegetation is primarily of aesthetic or visual importance in the broader landscape and should be used where vegetation is identified as an important contributor to the character of an area. The SLO also includes permit requirements for building and works which can be applied where appropriate to assist in vegetation protection. In the SLO, the schedule to the overlay must specify a permit requirement for the removal, destruction or lopping of vegetation” (DPCD 1999).

Figure 11 presents current environmental protection overlays within the Port Phillip and Western Port Catchment region analysed for each local government authority by bioregional conservation status of the vegetation (Government of Victoria 2002). 22 of the 43 LGAs utilize the SLO to some extent. Some LGAs have applied SLOs to the majority of threatened vegetation, whereas others have limited the overlay to small areas of remnant vegetation. Considering that the SLO is not intended to protect vegetation of high conservation significance, it is concerning that some LGAs appear to rely on the overlay to protect highly threatened vegetation.

**Design and Development Overlay**

The environmental protection overlay (DDO) is described in the Victorian Planning Provision Practice notes in the following way: “The Design and Development Overlay (DDO) is not a tool to protect vegetation and is not appropriate for that purpose. The schedule may, however, contain specific landscaping requirements to ensure that a new development is respectful of the landscape character of the neighbourhood” (DPCD 1999).

Figure 12 presents current environmental protection overlays within the Port Phillip and Western Port Catchment Management region analysed for each local government authority by bioregional conservation status of the vegetation (Government of Victoria 2002). 34 of the 43 LGAs utilize the DDO in areas containing vegetation remnants. Some LGAs have applied DDOs to the majority of threatened vegetation, whereas others have limited the overlay to small areas of remnant vegetation. Considering that the DDO is not a tool to protect vegetation, it is concerning that some LGAs have applied the overlay in areas containing highly threatened vegetation.
Figure 9. Percentage of vegetation by bioregional conservation status (Government of Victoria 2002) protected by vegetation protection overlays in each local government authority. The figure is split to allow easier comparison between local government authorities.

a

b
Figure 10. Percentage of vegetation by bioregional conservation status (Government of Victoria 2002) protected by environmental significance overlays in each local government authority. The figure is split to allow easier comparison between local government authorities.

![Graph showing percentage of vegetation protected by bioregional conservation status in each local government authority.](image-url)

(a) Percentage of vegetation protected by environmental significance overlays in each local government authority for different bioregional significance categories.

(b) Percentage of vegetation protected by environmental significance overlays in another set of local government authorities for different bioregional significance categories.
Figure 11. Percentage of vegetation by bioregional conservation status (Government of Victoria 2002) covered by landscape significance overlays in each local government authority. The figure is split to allow easier comparison between local government authorities.

Figure 12. Percentage of vegetation by bioregional conservation status (Government of Victoria 2002) covered by design and development overlays in each local government authority.
Vegetation change under protection overlays between 1989 to 2005

Table 4 summarises the loss and gain of vegetation covered by various planning overlays between 1989 and 2005. The least clearing occurred in areas covered by the vegetation protection overlay, though over 80 hectares of vegetation were still cleared during that period. Significant clearing occurred under the environmental significance, significant landscape and design and development overlays as well as under the rural conservation zone.

Table 4. Vegetation loss and gain from 1989 to 2005 within the Port Phillip and Western Port Catchment Management region in areas covered by various planning overlays. Figures are also given for the rural conservation zone.

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<th>Other Native Vegetation Loss (ha)</th>
<th>Native Vegetation Gain (ha)</th>
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<td>Design and Development Overlay</td>
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Discussion and Key Recommendations

Substantial vegetation values exist within the Port Phillip and Western Port Catchment, with important areas of endangered, vulnerable or depleted ecological vegetation classes. Despite the introduction of vegetation clearance controls in 1989 and the implementation of the Victorian Government’s Native Vegetation Management Framework (Government of Victoria 2002), substantial areas of vegetation continue to be cleared. In the period 1989 to 2005, approximately 7681 hectares of native vegetation were cleared from the study area, while vegetation gains totalled 558 hectares. The low condition ranking of threatened vegetation types and their over-representation in cleared areas is cause for concern. Native grasslands continue to experience rapid depletion, with 3779 hectares lost since 1989. These ecosystems are also among the most threatened in the State and the least represented in reserve systems (Barlow 1998).

The continuing loss of vegetation in the region points to the ineffectiveness of clearing control measures. This can be partly explained by the failure to utilise the full range of existing planning measures available for use in the Victorian Planning Provisions. The application of overlays across local government authorities in the study area is inconsistent, and is unrelated to the conservation significance of vegetation. The vegetation protection overlay (VPO) is poorly utilised, covering less than 5% of endangered vegetation and less than 10% of vulnerable vegetation in the study region. Yet, our analysis of vegetation loss that has occurred under various overlays indicates that the VPO is the most effective mechanism of available tools to protect vegetation. A substantial proportion of threatened vegetation types are inappropriately covered by significant landscape and development overlays, which do not afford adequate protection.

The failure of the planning system to adequately protect vegetation is likely due to the poor and inconsistent application of existing tools, possibly because local government authorities do not have access to up-to-date data and lack skills needed to interpret vegetation information. Failure to effectively utilize clearing controls also stems from the lack of integration of policy implementation across DSE, DPCD, CMAs and local government authorities. Vegetation loss in the region may also be the result of unregulated clearing under a range of exemptions.

We make the following recommendations

(i) **Increasing investment in data** collection, collation and storage in order to enable systematic planning for threatened vegetation in the Port Phillip and Western Port CMA and to monitor trends in extent and condition over time. Conservation decisions in the region appear to be made in an ad-hoc way at a local level without reference to broader region and State contexts. There is an urgent need for coordination of conservation planning and data collection and storage at a broader scale to ensure that planning is strategic and efficient and does not overlook important values. An example is the failure to coordinate and standardise vegetation information and conservation overlays. At present, every council has different data availability, and prioritises conservation actions in different
ways. Vegetation protection overlays appear to have been generated in an ad-hoc fashion and are likely to overlook important habitat for listed threatened species, thereby possibly failing legal obligations. There is an urgent need for substantial State investment in the collection and collation of base-line vegetation and biodiversity data for use in conservation and strategic planning at the local government level. Such data are also critical in forming the basis of a systematic region-wide monitoring program for detecting trends and evaluating conservation investment performance.

(ii) **Supporting councils** to revise and improve vegetation overlays by providing up-to-date data and interpretation.

(iii) **Recording vegetation cleared** under exemptions and tightening those that result in significant losses. At present there is no systematic monitoring of biodiversity or vegetation change in the study area, making it impossible to discern important changes or to evaluate environmental management performance. Small areas of native vegetation on private land serve an important ecological function as they often exist on otherwise cleared land types. The establishment of a database to record fine scale native vegetation losses needs to be established as a priority. This would involve the integration of council clearing permit records and remotely sensed data (Peter Woodgate, pers comm.). Recording clearing activities under permit in a GIS database is the most important first step toward monitoring vegetation loss. Requiring landholders to notify council when they clear vegetation that is exempt from clearing permit requirements is also a important step toward adequate monitoring of vegetation loss.

(iv) **Governance**: developing clearer, cross-Government guidelines regarding expectation of the use of planning tools. Cross-sectoral policy implementation is required between DSE, DPCD, CMA’s and councils, who need to work together, share data and implement planning policy in a much more integrated manner.
Figure 1: Modelled 2005 extent of vegetation and major water-based habitat in the study area

Native Vegetation
Modelled Extent 2005

Legend

Native Vegetation Description
- Artificial impoundment
- Exotic woody vegetation
- Highly likely native vegetation - grassy
- Highly likely native vegetation - structurally modified
- Highly likely native vegetation - woody
- Possibly native vegetation
- Unlikely to support native vegetation
- Wetland habitat

Boundary
- 2030 UGB
- CMA
- LGA

GOAS4 Zone 55
Data: nv2005_extent; Supplied by DSE

Version 2 (Feb/08)
Figure 2: Predicted cover by ecological vegetation classes in the study area in 2005 (legend provided on next page)
Figure 3: Bioregional conservation status of vegetation in the study area (Government of Victoria 2002). Vegetation is classified according to level of depletion and present day threats.
Figure 4: Modelled condition of vegetation in the study area (DSE 2006).
Figure 5: Modelled pre-1750 vegetation in the study area, categorized by ecological vegetation classes (legend provided on next page)
Figure 6. Modelled loss and gain in vegetation in the study area between 1989 and 2005. Categories include clearing of native grassland, clearing of other vegetation, gain in native vegetation and areas of no significant change.
Acknowledgements

We are very grateful to Kim Lowe, James Todd, Matt White and Fiona Ferwerda (Department of Sustainability and Environment) for providing spatial data and advice.

References


### Appendix 1. Extent of each ecological vegetation class present in the Port Phillip and Western Port CMA compared with predicted extent in 1750.

<table>
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<th>Ecological Vegetation Class</th>
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<td>Aquatic Herbland</td>
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Appendix 4

Review of VCAT cases
Victoria's Native Vegetation Management – A Framework for Action (Framework) was incorporated into Victoria's Planning Schemes in 2003 and is now a decision making tool within Victoria's Planning Process. It has, along with other native vegetation planning controls, been applied in numerous planning permit applications and has been subjected to multiple levels of interpretation so that a number of key legal principles have emerged.

This report is the culmination of a critical examination of a number of legally significant cases that have been brought before the Victorian Civil and Administrative Tribunal. These case studies appear to indicate that native vegetation located in non-rural areas is best protected through a network of site specific and current planning controls that provide layers of supporting objectives, purposes and strategic planning detail over the subject land. In summary, the key legal principles distilled from these case studies show that:

- The tribunal takes a pragmatic, case-by-case approach to application of the Framework and views net gain as one of many competing policy objectives within the Planning Scheme that must be balanced for achievement of net community gain and sustainable development.

- It has been established that native vegetation located on land zoned Residential 1 (RES1) cannot be used for offsets for net gain as it is neither the purpose nor intent of this zone to preserve native vegetation.

- The purpose, objective and intent of each planning control is considered significant and can be determinative.

- Single, misapplied or content poor planning controls that trigger consideration of native vegetation and/or the Framework do not guarantee protection of native vegetation.

- Planning controls, such as the Heritage Overlay or Design and Development Overlay, which trigger consideration of native vegetation for reasons other than preservation of biodiversity or conservation values are of significant influence.

Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
• The Framework may be interpreted to permit harvesting of native vegetation (with conditions) upon private land recognised to be of high conservation significance, and where two or more planning controls exist, if harvesting is already permitted on publicly owned land within the same bioregion.
Victoria's Native Vegetation Management – A Framework for Action (Framework) was incorporated into Victoria’s Planning Schemes in 2003 and is now a decision making tool within Victoria’s Planning Process. The primary goal of the Framework is the achievement of net gain for the environment.

Through the legal prism of Victorian Civil Administration Tribunal (VCAT), the Framework, and other native vegetation planning controls, have been further scrutinised and interpreted so that a number of principles and precedents have now been made with regards to permit applications that involve native vegetation. In this report, key principles with regards to planning controls that impact native vegetation (focussing mainly upon urban and peri-urban areas) will be highlighted. Case studies have been used to draw attention to revealing aspects of interpretation and principle.

**Key principles established by VCAT**

- A pragmatic approach is necessary for determining permit applications requiring consideration of net gain within the urban context because:
  - the Framework is designed for application to non-urban land,
  - the Framework contains highly complex methodology,
  - Framework net gain outcome measure, Habitat Hectares, is considered an uncertain measure.
  - Department of Sustainability and Environment (DSE) responses to permits do not provide consistency.
- Net gain is therefore one of many, possibly competing, policy objectives that must be balanced with other strategies in the Planning Scheme to achieve net community benefit and sustainable development.
- Therefore other than for permits for native vegetation removal under Clause 52.17 of the Planning Scheme, the necessity for and detail of offsets for the purpose of net gain must be considered on a case-by-case basis and be dependent on the purpose of the planning control.
- The Framework’s methods of assessing and achieving appropriate offsets are so complex and demanding of resources, that outcomes are uncertain. Thus preference has been shown for offset plans to be provided to, and approved by, the Responsible Authority and/or DSE as a condition of permit.
- Conservation significance is a determinative factor in deciding upon native vegetation removal and precedence has been set for looking beyond the Framework to assist in assessment of this factor. The regional native vegetation plans of relevant Catchment Management Authorities, for example, have been utilised.
• The purpose of the planning control must be considered when deciding whether it is appropriate to have regard to clause 15.09-2 of the State Planning Policy Framework, which requires consideration of the Framework and a net gain outcome.
  o The purpose and intent of zones must be considered when determining net gain. For example:
    ▪ Native vegetation retained on land zoned residential cannot be used to achieve offsets and ensure preservation of native vegetation because it is not the intent or purpose of this zone to be used for this purpose.
  o Overlay objectives must be considered relevant when determining net gain. For example:
    ▪ If the Vegetation Protection Overlay (VPO) objective was to protect recreational assets then this would not trigger the need for consideration of net gain, but if the objective was to protect conservation significance then net gain might be considered relevant.
• The appropriateness and decision guiding capacity of the overlay(s) and the accompanying local planning policies must be considered. Planning controls that do not address local peculiarities or are inappropriate to the specific area, especially those that accompany an urban zoning for the same site, do not provide protection for native vegetation. For example, a site zoned Residential within a Significant Landscape Overlay which addresses the issue of local vegetation in neighbourhood character terms, and that are found to be incongruous with local realities, will not provide assurance for protection of native vegetation.
• However, overlays, especially single overlays, which address issues of conservation and native vegetation protection, are insufficient to ensure achievement these outcomes if unsupported by the zone, additional overlays addressing environmental and non-environmental values, Framework and/or other local or government department planning.

Conclusion

Principles set by VCAT seem to indicate that native vegetation located on non-rural areas is best protected through a network of planning controls that provide layers of supporting objectives, purposes and strategic planning detail over the subject land.

From analysis of a number of VCAT outcomes it would also appear that planning controls which are not directly connected to protection of native vegetation for its biodiversity or other environmental values, such as Design and Development Overlays and Heritage Overlays, have provided determinative support for native vegetation protection or have achieved it as an indirect outcome of their application in cases where native vegetation controls were weak or were not considered.
In conclusion, it appears that the uncertainty surrounding application of the Framework, and the conclusion that net gain is one of many policy objectives to be considered in a case-by-case approach, could inject an unintended measure of further uncertainty into decision making, and could require increasing investment of Councils’ limited resources in Planning Scheme amendments and updates.
The exemption question

Clause 52.17 Native Vegetation, contains a number of planning permit exemptions. Within a non-rural setting, and without additional Planning controls, this clause contains a number of provisions that can exempt a proposal from requiring a permit for the removal of native vegetation - no matter the conservation significance of the vegetation. The tribunal has interpreted the exemptions a number of key legal principles have emerged:

1. For the construction of buildings and related works, where there are no site specific planning controls in addition to cl. 52.17, which provide additional protection for native vegetation, a proposal may be exempt from requiring a permit to remove the vegetation.
2. The conservation significance of the vegetation appears to be of no consequence if an exemption is permitted.
3. Section one permits of a zone, that permit the development of buildings and other construction as as-of-right development can trigger an exemption for the removal of native vegetation.
4. An exemption is linked to the proposed development, e.g. a tennis court, not to the precise place the development will be built on the subject land not the amount of vegetation to be removed.

Therefore, as long as the 'minimum' necessary vegetation is removed to allow for a proposed exempted development, it may occur in any position on the subject lot (provided, of course, that the chosen location is otherwise legal).

Case studies

Best v Maribyrnong CC [2006] VCAT 1239

1. Application: To develop the subject land with industrial buildings and associated car parking
2. Tribunal considers an application under s.82 of the Planning and Environment Act 1987 (PE Act) for review of a decision of the Responsible Authority to grant a permit.
3. It considers whether the development proposal is exempt from the provisions of Clause 52.17 NATIVE VEGETATION of the Maribyrnong CC Planning Scheme.
4. Responsible Authority: Maribyrnong City Council
5. Applicant to VCAT: F. Best
6. Respondents/Applicant: Costa Constructions Pty Ltd
7. Land affected by following Planning Scheme controls: Industrial 1 Zone (I1Z), Industrial 3 Zone (I3Z) and a Development Contributions Overlay (Schedule 6) (DCO-6).
8. Outcome: the Responsible Authority and DSE supported the permit application with conditions. The Tribunal found that the proposal was exempt from cl. 52.17 and thus native vegetation removal was permitted without the necessity for a permit, to make way for the development.
**Key Principles and Observations:**

- The subject land is vacant but has a remnant of grass land vegetation that was accepted to be of high or very high conservation status under the Framework for Native Vegetation Management Policy.
- The subject land is zoned for industrial development and is surrounded by industrial land and development.
- In the first case: Dr Best says no and her primary reason is that there are three patches of remnant native grass land. These remnants are said to be of high or very high conservation significance. They are dominated with Themeda triandra (kangaroo grass) although there are said and thought to be some less significant but nevertheless interesting and important other remnant species of grass in those clumps.
- DSE did not object to native grass removal because:
  - the surrounding land was already developed,
  - the patches were small and isolated and
  - offsets can be sought.
  - The Tribunal agreed with DSE that avoidance of native vegetation removal was not practical on this site because the land was intended for industrial development.
- VCAT determined that a permit was not required to remove the native vegetation because it was exempt from cl.52.17. This is because:
  - The exemption in fact relied upon comes under the heading “Buildings”. There are several provisions under this sub-heading but the essentially relevant bit is that there is exemption in relation to the removal, destruction or lopping of the minimum extent of native vegetation necessary for the construction of any building including utility services or vehicle access ways which are ancillary to the building (21).
  - The Tribunal considered the provision of car parking to be included in this exemption.
  - The Tribunal also considered that cl. 52.17 is ‘generally and usually expected to apply to rural, country, or bushland areas rather than a site like this one deep in the urban part of greater Melbourne surrounded for miles with long established residential, industrial and other developments’ (20), and thus a more detailed and find analysis has been required in this case than would be relevant for a non-urban environment (28).
- The Responsible Authority did not oppose this interpretation of the clause’ exemption nor that it applied for this proposal (22).
- The Tribunal then concluded that no planning permission was required to remove the native vegetation on the subject land for the development of the buildings, drive way and car parking (29), and that this exemption applied to the whole of the subject site.
- Therefore, no offset or other arrangements can be required of the applicant proposing development and use of the subject land (29).
- The Tribunal noted that:
The land was surrounded by established industrial and residential developments.

- The subject land is zoned for industrial purposes.
- No other zoning or overlay provisions are in place to protect native vegetation.

**Pisoteck v Manningham CC [2006] VCAT 2374**

1. Application: to construct a dwelling and to remove vegetation associated with the dwelling, vehicular access and ancillary areas.
2. Tribunal considers whether or not the exemptions in clause 52.17 apply so as to exempt this proposal from obtaining a permit under clause 52.17 for removal of native vegetation.
3. Responsible Authority: Manningham City Council
4. Applicant to VCAT: DM & SO Pisotek
5. Referral Authority: Department of Sustainability and Environment
6. Land affected by following Planning Scheme controls: Low Density Residential Zone (LDRZ) and a Significant Landscape Overlay 1 (SLO1).
7. Outcome: The Responsible Authority initially refused the permit because, amongst other reasons, the removal of the native vegetation from outside the building envelope would be detrimental to the surrounding landscape significance and character. The tribunal found that as construction of a dwelling is a section 1 permit in the LDRZ, and if the vegetation to be removed is the minimum necessary for construction of the dwelling, that the exemptions of cl 52.17 are applicable. Thus the decision of the responsible authority was ordered to be set aside and a permit granted.

**Key Principles and Observations:**

- This is an application to review the decision of the responsible authority to refuse permission for the construction of a dwelling and the removal of vegetation at 632-634 Ringwood - Warrandyte Road, Park Orchards. The responsible authority issued a Notice of Refusal to Grant a Permit for the following reasons (1) (reasons listed are those concerning native vegetation only):
  i. 2. The proposed development constitutes excessive buildings and earth works outside the building envelope, to the detriment of the landscape significance and character of the area.
  ii. 3. The proposed removal of trees from outside the building envelope will be detrimental to the surrounding landscape character of the area.

- Do the exemptions within cl.52.17 apply:
  i. Senior Member Horsfall has determined that as a matter of law the exemptions in clause 52.17 do not apply so as to exempt the proposal from obtaining a permit under the SLO1 (61).
  ii. The tribunal was satisfied that the removal of native vegetation in this case is to the minimum extent necessary.
for the construction of the dwelling and a permit is not required under this provision of the planning scheme. It reached this conclusion on the basis that the vegetation which is proposed to be removed is limited to that which is needed for the construction of the dwelling, ancillary buildings and works and services associated with the dwelling and access to the dwelling. Vegetation which is not required to be removed for these buildings and works is to be retained (63).

iii. It was submitted by the Council that the level of vegetation proposed to be removed is excessive because of the siting, size and layout of the dwelling and associated buildings and works, and that the exemption is therefore not applicable. A dwelling however is a section 1 permit not required use in the Low Density Residential Zone and the provisions of Clause 52.17 are not intended to control the siting, size and layout of a dwelling and associated buildings and works and they cannot be used to do so. The provisions of Clause 52.17 are concerned with the removal of native vegetation, except where the removal of vegetation is to the minimum extent necessary, required for the construction of a dwelling. Provided the removal of vegetation is limited to that which is required for the construction of the dwelling and ancillary buildings and works, the exemption provisions of Clause 52.17 are applicable (64).

Maino v Nillumbik SC [2007] VCAT 1155

1. Application: for the construction of a private tennis court as ancillary works to an existing dwelling.
2. Tribunal considers the interpretation of cl. 52.17-6 for the construction of a tennis court in Residential 1 Zone land subject to an Environmental Significance Overlay.
3. Responsible Authority: Nillumbik Shire Council
4. Applicant to VCAT: Raymond John Maino
5. Land affected by following Planning Scheme controls: Residential 1 Zone (R1Z), a Wildlife Management Overlay (WMO), a Development Plan Overlay Schedule 2 (DPO2), and a Development Contributions Plan Overlay Schedule 2 (DCP2), Environmental Significance Overlay Schedule 1 (ESO1) over half of the subject land.
6. Outcome: Removal of vegetation for the construction of a tennis court as ancillary works to a dwelling is exempted from requiring a permit under cl.52.17. Therefore, the tribunal found that construction of the tennis court does not require planning permission under the Nillumbik Planning Scheme provided that the court is constructed outside of the ESO1.

Key Principles and Observations:
• The tribunal considers the principle issue as the interpretation of cl. 52.17-6.

• The responsible authority interpreted this clause to mean that planning permission is required for construction of the tennis court because it considered the proposed position of the tennis court on the subject land would require greater than the minimum removal of native vegetation.

• The tribunal found that the cl. 52.17 exemption does not permit the Responsible Authority to decide where on the subject land construction of the court can occur because it is the tennis court, as ancillary works to the dwelling, which is the trigger for the exemption, not the amount of vegetation to be removed (25).

• The Tribunal went on to state: “The words ‘the minimum extent ... necessary’ relate to the ‘vegetation to be destroyed’ on whichever part of the land that takes place, and the destruction can take place anywhere on the land, provided the purpose of the destruction is for the construction of a dwelling and its ancillary amenities, in this case a tennis court.” (26)

• And “But once that piece of land is earmarked for the tennis court, wherever on the land that may be (all other things being equal[2]), then only the minimum extent of vegetation necessary to be destroyed in order to construct the tennis court is exempt from planning permission.” (27).
References


Enforcement and illegal native vegetation removal

The tribunal has heard a number of applications for enforcement orders in relation to removal of native vegetation and a number of key legal principles have emerged:

1. The Responsible Authority, through appropriate use of planning controls, must clearly demonstrate how their Planning Scheme has been or will be contravened.

2. The tribunal views enforcement orders as restorative rather than punitive.

3. Enforcement orders are linked to the subject land, and the Planning and Environment Act 1987 has been interpreted so that an enforcement order cannot require restorative action on other land.

4. The tribunal will not devolve open-ended power to a Responsible Authority to decide and control the specific content of an enforcement order at some future date. The tribunal either decides the specific content itself or requires the relevant parties to submit restorative plans for assessment.

Case studies


1 Application: in two parts
   i. By the permit applicant against Council for failure to determine a planning permit for removal of native vegetation and the construction of a driveway
   ii. By Council against the permit applicant for removal of native vegetation without a permit. Council seeking an enforcement order against permit applicant.

2 Tribunal considers both applications in order – firstly whether a permit should be issued for construction of the driveway and native vegetation removal, and then the issue of the allegedly illegal removal of native vegetation and the granting of an enforcement order.

3 Responsible Authority: Nillumbik Shire Council
4 Permit applicant: S. Irvine
5 Respondents: Individual nearby property owners, a local community group
6 Land affected by following Planning Scheme controls: Low Density Residential Zone, Significant Landscape Overlay (Schedule 2) (SLO2), Wildfire Management Overlay (WMO).

7 Outcome: tribunal refuses permit for construction of the driveway and removal of native vegetation. Tribunal finds permit applicant has removed native vegetation in contravention of the Planning Scheme and
grants enforcement order against the permit applicant for restorative planting.

**Key Principles and Observations:**

- Subject lot and adjacent lots all zoned Low Density Residential, and all are well vegetated with native vegetation.
- Application against Council for failure to determine permit:
  - The following planning scheme controls require a permit to be granted for the construction of the driveway and removal of native vegetation: SLO2 and Clause 52.17.
  - Site visit confirmed the continuing significance of native vegetation to the landscape of the subject site and greater area, i.e. tribunal was able to verify the accuracy and continuing relevance of the Overlay and Schedule.
  - Tribunal finds that the driveway proposal is unacceptable in terms of the objectives and decision guidelines of SLO2.
  - Because the tribunal had already found that the proposal was unacceptable and that it was not the only possible alternative location and design for the driveway, it did not consider that it had to make a decision with regards to Clause 52.17.
- Application for enforcement order:
  - A site visit and expert technical evidence was able to show that removal of living native vegetation had occurred without the necessary permit, in contravention of SLO2.
  - The tribunal found that no exemptions were applicable.
  - An enforcement order was made against the permit applicant to undertake specific replanting of the areas where the native vegetation was removed.

**RED DOT Whittlesea CC v Ozimek and Plenty Living Pty. Ltd. – hearing conducted over 5 sessions during 2006.**

1. Application: Responsible Authority application for enforcement order for removal of native vegetation on the subject land in contravention of the Planning Scheme.
2. Tribunal considers two questions of interpretation of the Planning and Environment Act 1987 regarding enforcement orders.
3. Responsible Authority: Whittlesea City Council
4. Respondent: Ozimek and Plenty Living Pty Ltd.
5. Land affected by following Planning Scheme controls: Rural Zone/Farm Zone, vegetation protection overlay 2 (VPO2)
6. Outcome: tribunal allows the enforcement order.

**Key Principles and Observations:**
**Background**

Respondent fined $14,000 in magistrate’s court for removal of red gum trees on subject property.

Responsible Authority applied to VCAT for an enforcement order requiring Respondent to provide off-sets to compensate for the illegal removal of native vegetation.

**Hearing 1**

- Respondents admit contravention as alleged in first hearing.
- Responsible Authority submitted an application for an enforcement order that was open ended and would permit the Authority to decide the specific content of the order at an unspecified future time. The tribunal disagreed with this delegation of power to one of the two parties appearing at the hearing.
- The hearing was adjourned to permit a specific rectification plan to be prepared by the respondent and submitted to Council.

**Hearing 2**

- Respondents did not comply with directions to provide a rectification plan. Hearing adjourned again to allow plan to be provided as originally directed.

**Hearing 3**

- Respondent posed two questions:
  - Whether the Tribunal can make an order under the enforcement provisions of the Planning and Environment Act 1987 requiring offsets to occur on land other than land the subject of the enforcement application? and/or
  - Whether a generic plan can be required to be prepared for offsets to occur anywhere?
- The hearing was adjourned to a later date

**Hearing 4**

- In response to the first question posed:
  - The tribunal considered section 119 of the Planning and Environment Act 1987.
  - The Respondent interpreted s.119 (b) (iv) (A) that enforcement orders are restricted to the subject land.
  - The Responsible Authority asserted that s.119 (b) (iv) (B) refers to complying with the Planning Scheme and so an enforcement order...
could then apply to other land as well as long as the Scheme was enforced.
  - The tribunal finds that an enforcement order runs with the subject land and that the provision of Part 6 Division 1 of the Planning and Environment Act 1987 confines it to consideration of only the subject land associated with the contravention of the Planning Scheme [25].
  - Therefore, off site off-sets cannot be part of an enforcement order.
  - In response to the second question;
    - Answered by the first question – the enforcement order cannot so direct this.
    - However, a s.173 agreement between the two parties to arrange such an outcome this was considered acceptable by the Tribunal.
  - The enforcement order application was then adjourned to provide enough time for the Respondent to provide the requested restoration plan.

**Hearing 5**

- Respondent’s restoration plan was not deemed sufficient because:
  - It did not comply with the total area of replanting required, and
  - it was still attempting to accommodate future development of the site despite the fact that the Responsible Authority already refused a permit application for part of the planned development.
- Respondent argued that: relevant Responsible Authority strategic planning, that was to protect the removed red gums, was not yet complete and so could not apply, and that the land, though currently zoned Farm Zone was likely to be urban in the future.
- The tribunal did not accept these arguments as the pertinent fact was the approval had not, and was not, granted neither for the removal of the native vegetation nor for any further development of the land.
- The tribunal amended the restoration plan to meet its previous requirements and granted the enforcement order to the Responsible Authority.
References


Key Case Studies

5. Sweeney v Maroondah CC [2007] VCAT 1575 (23 August 2007)

Additional Case Studies


Key Case Studies

1. **Villawood Properties v Greater Bendigo CC (Red Dot) [2005] VCAT 2703 (20 December 2005)**

   - Application: for residential subdivision at Maiden Gully on the outskirts of Bendigo.
   - Applicant case: off site offsets required as a permit condition by DSE are unfair as native vegetation will be retained onsite and should be allowed to be used to contribute towards offset requirements.
   - Tribunal considers principles for implementation of the net gain approach to native vegetation management as per the Framework.
   - Respondents: DSE and Greater Bendigo City Council.
   - Land affected by following Planning Scheme controls: Residential 1 Zone (RES1), Environmental Significance Overlay (ESO2), Vegetation Protection Overlay (VPO2), Incorporated Plan Overlay (IPO2), Clause 52.17.
   - Outcome: decision of the responsible authority is varied to require off site offset plans to be approved by DSE and Responsible Authority.

Key principles and observations:

Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
Key Principles:

- Tribunal accepted DSE and Council’s experience that preservation of native vegetation retained on residential land cannot be guaranteed. And that, for the purposes of achieving net gain, all native vegetation on newly created residential lots should be considered lost and offsets sought off site.

- Zones: the purpose and intent of the zone is an important factor when considering an offset plan to achieve net gain. Land zoned Residential cannot be considered an appropriate location for native vegetation retained for purposes of achieving net gain as it cannot be reasonably expected that future owners of this land will continue to retain the vegetation or that portions of this land can be fenced off in perpetuity – vegetation retention is not the purpose or intent of this zone.

- Overlays: objectives of the overlay are important for creating an appropriate trigger. For example, if the Vegetation Protection Overlay objective was to protect recreational assets then this would not trigger the need for consideration of net gain, but if the objective was to protect conservation significance then net gain might be considered relevant [Paragraph 81]. That is: the purpose of the control must be considered when deciding whether it is appropriate to have regard to clause 15.09-2 of the State Planning Policy Framework, which requires consideration of the Framework and a net gain outcome [Paragraph 80].

- The tribunal considers that a pragmatic approach to the application of net gain is necessary. This is because it considered net gain to be one of many, sometimes competing, policy objectives in the Greater Bendigo Planning Scheme; one that must be balanced with other strategies to achieve net community benefit [Paragraph 54] (see Appendix 1). The Tribunal took this view because a), the Framework draws no distinction between offsets that should apply on a rural property or land that is zoned for urban purposes [Paragraph 52]; b) methods of assessing and achieving appropriate off sets are so complex and resource intensive that outcomes are uncertain; and c) there is inconsistency in DSE’s permit conditions in relation to native vegetation removal, protection and offset plans, and so the permit conditions given in reference to the Framework do not yet provide certainty (see Appendix 2).

- Tribunal considers there will be more certainty if offset plans are provided to and approved by DSE and the Responsible Authority rather than relying on the Framework’s offset calculation methodology.

- The Framework is unclear, so other than for permits for native vegetation removal under Clause 52.17, the necessity for and detail of off sets must be considered on a case-by-case basis and be dependent on the purpose of the planning control.

Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications

1. Applicant: Review of a failure to grant a permit within the prescribed time. Permit application for the expansion of the Lorne golf course with native vegetation removal.
2. Respondents: Council, DSE and others – Council reported that they would have refused the application due to the quality of the native vegetation to be removed and unachievable offsets proposed [Paragraph 3].
3. **NOTE: DSE acted as an objector, not a referral authority.**
4. Land affected by following Planning Scheme controls: Public Park and Recreation Zone (not publicly owned), Wildfire Management Overlay. **Note:** in addition to the usual purpose of implementing the State and Local Planning Policy Framework, the stated purpose of the Public Park and Recreation Zone is to recognise areas for public recreation and open space, to protect and conserve areas of significance where appropriate and to provide for commercial uses where appropriate [Paragraph 10].
5. Very High Conservation Significance Grassy Dry Forest Ecological Vegetation Class (EVC) found on site.
6. Outcome: Permit granted with conditions including native vegetation plans with offsets, to be submitted for approval to Council in consultation with DSE.

**Key Principles and Observations:**

- At issue was the removal of native vegetation under clause 52.17.
- Tribunal interpretation of the Framework (see Appendix 4) is that even if native vegetation has been classified as having very high conservation significance, it may still be cleared if a state-wide perspective study so allows it. This interpretation went against the Council and DSE’s reading of the Framework that clearing is only permissible for projects of State significance.
- Tribunal supported applicant’s view that Council and DSE’s objections based on issues of native vegetation was too simplistic and that it was necessary to consider the range of other state and local planning policies. That: ‘As provided for at Clause 11 of the Scheme we must have regard to and attempt to integrate the whole range of applicable policies and where necessary balance conflicting policies in favour of net community benefit and sustainable development.’[Paragraph 35].
- The applicant was deemed to have tried to avoid and then minimise native vegetation removal, thereby satisfying the Framework.
- DSE incorrectly placed the subject site within the Otway Plains Bio-region rather than the Otway Ranges Bio-Region. This undermined their case and the offset conditions required by the Framework (like-for-like) were unlikely to be practicably achieved in the required Bio-region (due to the fact that most of the appropriate land was already publicly owned and not available) [Paragraph 44].
Due to this, secondary consent with the Responsible Authority was deemed necessary to locate appropriate offsets. The Tribunal noted that this consent would permit a review by VCAT if disputes arose over proposed offsets.

- No Vegetation Protection Overlay or Environmental Significance Overlay was applied to the subject site and zone objectives/purpose did not provide for native vegetation protection [Paragraph 49].


1. Applicant: failure to grant a permit within the prescribed time. Application for permit for timber production and native vegetation removal at Beenak.
2. Responsible Authority: Yarra Ranges Council. **Note:** Council reported that they would have objected to the granting of this permit (see below).
3. Respondents: DSE and others.
4. **Note:** DSE did not object to permit, but required permit conditions.
5. Land affected by the following planning controls: Rural Conservation Zone, Environmental Significance Overlay (ESO), Erosion Management Overlay and Wildfire management Overlay
6. **Note:** Threatened flora and fauna species present
7. Outcome: permit granted with conditions

**Key Principles and Observations**

- Council reported that they would have refused the permit because it:
  - Was in conflict with objectives of Rural Conservation Zone and ESO;
  - Would not have achieved requirements of framework regarding native vegetation removal;
  - Did not provide adequate protection for endangered flora and fauna;
  - Would have created an undesirable precedent for the removal of vegetation on sites of ecological and biological significance within the Shire of Yarra Ranges.
- **Note:** the relevant Yarra Ranges Planning Scheme zones and overlays require a permit to remove native vegetation [Paragraph 20].
- All parties agreed that the subject land was of high conservation significance.
- Under the ESO the environmental objectives to be achieved include [Paragraph 24]:
  - Ensure the long term protection of the wildlife habitat and other conservation values of sites of botanical and zoological significance.
  - Ensure that the habitat value of the sites is not diminished by the incremental removal of remnant vegetation or inappropriate development.
And related decision guidelines:

- The significance of any remnant vegetation that may be affected by the proposal, in terms of its rarity, variety or as a habitat for wildlife.
- The need to avoid the clearing of any remnant indigenous vegetation, especially on slopes greater than 20 percent or within 30 metres of a watercourse.
- The capability of the particular site to accommodate the proposed development without adversely affecting the environmental features of the site and its environs or causing soil erosion or other land degradation.

- **Note**: this ESO, considered amongst the other planning controls of the Planning Scheme and the Framework (see below), was not strong enough to protect habitat of the Powerful Owl from harvesting activity.

- Despite the high conservation significance rating, the Framework permits timber harvesting in areas where there are threatened species (See Appendix 5). In addition, the tribunal deemed that the Framework is one part of the suite of planning controls in a Council’s Planning Scheme that must be considered for achieving net community benefit and sustainable development. Further, harvesting can be permitted on private land, despite the high conservation significance, because according to the Framework, Appendix 5, harvesting has also been permitted on public land within the same bio-region [Paragraph 9, Reasons].
- Investigation of the site, and mitigating action by the applicant not to remove native vegetation in certain identified areas, as well as the declared aim to regenerate the native vegetation (so that its loss is not permanent), as well as logging occurring on public land within the same bioregion, means that the Framework was able to be interpreted to permit the timber harvesting activity in an area with threatened species present [Paragraph 56].


1. Applicant: application to review permit condition requiring consolidation of two proposed lots to protect remnant vegetation.
2. Responsible Authority: Mornington Peninsula Shire Council.
3. Referral Authority: DSE and others.
5. **Note**: Tribunal establishes that Framework permits use of Port Phillip and Westernport Native Vegetation Plan to establish conservation significance of the vegetation under consideration.
6. Outcome: Decision upheld. Tribunal supported larger lot sizes to accommodate native vegetation retention and the original decision.
7. **Note:** Council indicated that if DSE had not required the consolidation of lots, that they would have approved the original application for 6 smaller lots.

**Key Principles and Observations**

- Clause 56, requires among other requirements, that ‘natural features’ are protected [Paragraph 15].
- Port Phillip and Westernport Native Vegetation Plan upheld as permissible document for determining native vegetation conservation significance (see Appendix 8).
- **Note:** there are a significant number of planning controls within the Mornington Peninsula Shire Planning Scheme that require consideration of native vegetation:
  - Numerous Overlays, including the ESO25 and VPO1, support consideration of native vegetation [Paragraph 19 and 21] and were considered significant by the Tribunal. The Design and Development Overlay 3 requires a minimum subdivision lot size and thus the applicant proposed to clear native vegetation [Paragraph 19] in order to achieve this. However, this Overlay’s purpose is also (amongst other matters):
    - ‘To recognize areas where substantial vegetation cover is a dominant visual and environmental feature of the local area by ensuring site areas are large enough to accommodate development while retaining natural or established vegetation cover and to provide substantial areas for new landscaping and open space.’ [Paragraph 18]
  - The Heritage Overlay also requires some consideration of existing vegetation so that heritage values are not adversely impacted.
  - Subdivision clause at c65 requires consideration of the zone and overlay purposes (amongst other considerations).
- Thus the Tribunal considered the conservation significance of existing vegetation was fundamental to consider in this case (Appendix 6).
- It was considered that lot size may be a tool that could be used to permit development and retain native vegetation within non-rural areas.

5. **Sweeney v Maroondah CC [2007] VCAT 1575 (23 August 2007)**

1. Applicant: application to review a decision to refuse a permit for urban subdivision, native vegetation removal and removal of canopy trees.
2. Responsible Authority: Maroondah CC.
3. Referral Authority: DSE and others.
4. Land affected by following Planning Scheme controls: Residential 1 zone; Significant Landscape Overlay 4 (SLO4), Local policies concerning neighbourhood character, e.g. Planning Scheme Clause 22.03 (Maroondah Neighbourhood Character Policy), Melbourne 2030, Maroondah Planning Scheme.
5. **Note**: Council objected for reasons that include native vegetation removal. DSE did not object subject to implementation of net gain protection measures.

6. Outcome: Decision of Responsible Authority set aside and, among other actions, native vegetation removal permitted.

**Key Principles and Observations**

- The tribunal considered the key issues were the size of the proposed lots and whether or not there would be excessive loss of native vegetation if the proposed subdivision was permitted [paragraph 3].
- **Note**: tribunal also saw the issue of whether the proposal satisfies relevant objectives relating to protection of the existing neighbourhood character and landscape as important [paragraph 34].
- Native vegetation was located in a patch (Habitat Zone) of intact Valley Grassy Forest (EVC 47) and 18 remnant trees outside of this patch [paragraph 8].
- Planning Scheme Clause 42.03 – permit required to remove vegetation in an area where the SLO is applied.
- Planning Scheme Clause 52.17 – permit required to remove native vegetation.
- SLO4 objectives include conserving existing vegetation and ecosystems within the area and current appearance of the Maroondah landscape with regards to vegetation [paragraph 21]. Its purpose includes supporting Council’s neighbourhood character policies, which in turn, emphasise the importance of canopy trees to the city’s character [paragraph 18]. For example, the subject site is in Neighbourhood (character) Area 5 – Croydon Hills which includes requirements to retain native vegetation [paragraph 23] [paragraph 24].
- However, the tribunal notes that these planning controls have been applied despite the actual nature of the subject site and its immediate surrounds being of notably different character to the wider area [paragraph 10] [paragraph 11].
- Relevant planning policies were also deemed to be in competition with one another which required discretion to be used:
  i. Urban consolidation and increased housing choice (SPPF)
  ii. State and local policies regarding good urban design and various environmental objectives, including reference to the Framework.
  iii. Local policies and planning controls designed to acknowledge and protect the importance of native vegetation and canopy type vegetation in the municipality.
  iv. Melbourne 2030 – it was agreed that the subject site is suitable for more intense development consistent with the objectives of Melbourne 20303 (clause 12 of the Maroondah Planning Scheme) [paragraph 33].
- Tribunal adopted views of the tribunal in the Villawood Properties v Greater Bendigo CC in that native vegetation existing on urban land to be
subdivided should be considered as lost for the purposes of net gain and offsets as required by the Framework.

i. **Note:** tribunal found that the presence of an SLO cannot provide a basis for assuming that existing native vegetation on such a site can be retained for the purposes of calculating necessary offsets under net gain principles [paragraph 39].

- The tribunal concluded from its site inspection that existing canopy and native vegetation was not generally located on private land, that recent tree plantings on residential lots were generally not natives, were generally less than 3 to 5 metres tall and that some of the larger lots were characterised by the scarcity or absence of any recently planted, large canopy-type tree species [paragraph 45]. Thus, the actual character of the subject site and surrounds did not match the current planning policies and controls, nor did it match the reality of community values that demonstrably did not place importance upon native vegetation nor canopy trees (see Appendix 9).

- The tribunal did not find that the detail of the local planning policies to be adequate to guide their decision making process in regards to current and future direction for neighbourhood character (see Appendix 9).

- Despite this the tribunal considered larger lot sizes will have a greater chance of enabling retention of vegetation because more flexibility can be allowed to developers [paragraph 53]. Thus the tribunal required a reduced number of lots resulting from the proposed subdivision.

- Tribunal permitted native vegetation removal and required preparation of an offset plan to the satisfaction of the Responsible Authority.
Additional Case Studies


   1. Application: to remove vegetation to establish a practice fairway
   2. Tribunal considers the removal of native vegetation on land controlled by specific planning controls that exempt it from all overlays and part of the zoning controls.
   3. Responsible Authority: Mornington Peninsula Shire Council (supports permit)
   4. Respondents: Department of Sustainability and Environment (opposes permit)
   5. Land affected by following Planning Scheme controls: Green Wedge Zone, Environmental Significance Overlay (ESO), Vegetation Protection Overlay (VPO), Significant Landscape Overlay (SLO), Design and Development Overlay (DDO), Erosion Management Overlay (EMO).
   6. Outcome: Responsible Authority failed to respond to permit application within the prescribed time, but ultimately supported the application. The Tribunal found that the Planning Scheme in its entirety supported the application and thus the decision of the Responsible Authority was set aside and a permit was granted, with conditions, for removal of high quality native vegetation.

Key principles and observations:

- Key Principles
  - DSE objected to the proposal on the basis that it unreasonably failed to avoid the removal of native vegetation that was, in its opinion, of very high conservation significance.
  - The Tribunal recognised that the Council’s Planning Scheme provisions have in effect been tailored to recognise that the purpose of the land is for its development and use as a golf course.
    - Under the schedule to clause 52.03 the subject land is in an area subject to specific controls contained in the Incorporated Document “the National Golf Course and Cape Schanck Resort Development, October 2003”. Thus the land is exempt from the overlays listed under point 6 above, and is exempt from the first subclause of the Zone so that development requires permit, but use does not.
    - A permit is still required for removing native vegetation, because clause 52.17 still applies.
  - The precise classification of the native vegetation was accepted by the Tribunal as being in dispute. DSE was of the opinion that it was of very high conservation significance, but the ecologist appearing for the applicant asserted that this was still in dispute.

Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
between botanists. The Tribunal viewed the ecologist’s position was correct, but did accept that the native vegetation was of high quality.

- The Tribunal supported the permit application because:
  - the planning scheme provisions as a whole “place particular value on the development of a high quality golf course on the land” (19),
  - that the applicant has satisfied the 3-step approach to applying the net gain principles as required under clause 52.17.
    - that the existing fairway has been shown to be inadequate and that a new fairway cannot be established anywhere else except at the proposed location and thus native vegetation removal cannot be avoided.
    - that the applicant has sought to minimise vegetation clearing
    - that the applicant has proven track record with implementing net gain required by the framework.
  - Offsets can be provided and will be protected under section 173 and 181 of the Planning and Environment Act 1987.


1. Application: proposal to develop and use a dwelling and create an access road. Access road location would require removal of native vegetation from roadside reserve.
2. Tribunal considers the removal of native vegetation on roadside reserve in context of Macedon Ranges Planning Scheme planning controls and Native Vegetation Framework 3-step process for native vegetation removal.
3. Responsible Authority: Macedon Ranges Shire Council
4. Respondent Authority: Department of Sustainability and Environment (DSE)
5. Respondent: Mrs L Butler
6. Land affected by following Planning Scheme controls: Rural Conservation Zone 2 (RCZ2), Vegetation Protection Overlay 6 & 8 (VPO6 and VPO8 respectively), Wildfire Management Overlay (WMO)
7. Outcome: Responsible Authority's decision upheld and permit not granted.

**Key principles and observations:**

- Key Principles
Macedon Ranges Shire Council refused to grant the permit on the grounds that the proposal did not satisfy, or was contrary to, the Macedon Ranges Planning Scheme planning controls regarding native vegetation, that the proposal did not satisfy clause 52.17 of the Planning Scheme for implementation of the Native Vegetation Framework, and that it did not satisfy the VPOs.

DSE and Council objected to the granting of the permit.

The Tribunal considered the main issues of this review were:

- Whether use and siting of the dwelling is appropriate in the context of the planning controls; and
- Whether the proposed vegetation removal is consistent with the objectives and policies regarding native vegetation and habitat protection.

The Tribunal upheld the Council’s position because:

- The Planning Scheme has multiple supportive planning controls: zone, overlays, local planning policies and the Native Vegetation Framework, which together provide an “overwhelming objective to protect native vegetation and to establish a biolink between the Cobaw Forest to the north and the Macedon Ranges to the south” (paragraph 76) of which the disputed land is a part, and also provides specific grounds not to grant the permit (see in particular points: paragraphs: 25 to 31).
- The Tribunal was not satisfied that the removal of native vegetation was justified in terms of the VPOs, relevant local policies, nor the Net Gain Principles of clause 15.09 of the Planning Scheme.
- It supported the grounds of objection put forward by Council and DSE.


1. Application: for 2 lot subdivision with second dwelling to be constructed on lot 2. The 18 trees within the proposed building envelope to be removed.
2. Tribunal considers relocation of building envelope and changes to subdivision design to retain a significant and rare species of native tree.
3. Responsible Authority: Yarra Ranges Shire Council
4. Land affected by following Planning Scheme controls: Low Density Residential Zone. **No overlays**, Clause 53 of Planning Scheme.
5. Outcome: tribunal granted permit for subdivision, but deleted proposed building envelope so that this, and the removal of native vegetation, may be considered separately in a new application.

**Key principles and observations:**

- Key Principles
Applicant applied to VCAT to review permit condition to retain a tree within the proposed building envelope.

Clause 53 (Upper Yarra and Dandenong Ranges Region) of Planning Scheme requires permit to develop and remove vegetation when a new lot is developed (paragraph 9).

The tribunal concluded that the proposed removal of this tree was based on convenience and not on the contribution of the tree to the landscape and biodiversity, or conservation significance, i.e. it was not based on planning grounds. And thus that the 3-steps to promote conservation of native vegetation, as required by the Planning Scheme and the Native Vegetation Framework, has not been adequately considered by the applicant.

Alternative building envelope sites proposed require consideration of native vegetation removal, and there is not sufficient information to make any judgement on the alternatives at this time.

Tribunal thus varies the decision of the Responsible Authority to permit the subdivision, but not the proposed building envelope.


2. Tribunal considers the removal of native vegetation of high conservation significance in a Rural Conservation Zone after withdrawal of objection by two water authorities.
3. Responsible Authority: Macedon Ranges Shire Council (opposed application)
4. Respondents: Western Water and Southern Rural Water
5. Land affected by following Planning Scheme controls: Rural Conservation Zone 1 (RCZ1), Environment Significance Overlay 5 (ESO5), Vegetation Protection Overlay 9 (VPO9) (Living Forest), Wildfire Management Overlay (WMO).

**Key principles and observations:**

- **Key Principles**
  - Tribunal considers that there are two practical issues:
    - Location of proposed house and septic system,
    - Wildfire Management
  - Council objected on wildfire grounds and the proposed house location in the context of the Planning Scheme [paragraph 21]
  - During the review process the two water authorities reached agreement with the applicant and withdrew their objections subject to certain conditions. The conditions include relocation of
the dwelling and septic system that would require native vegetation removal.

- The decision of the two water authorities was a significant contributing factor in the tribunal’s decision.
- The tribunal then considered that it could not now refuse the permit on water catchment supply issues, which is the objective of ESO5.
- The native vegetation was accepted as being of high conservation significance.
- The tribunal acknowledged that the combination of VPO9 and RCZ1 together constituted “a fairly rigorous zoning/policy framework, with a clear intent that the environmental values of the locality be preserved.” (paragraph 24). Thus the tribunal considered that the degree of environmental sensitivity of the locality and whether the proposal would demonstrate a clear net environmental benefit were the two main practical issues (paragraph 25).
- The tribunal considered the following tips the balance in favour of the proposal and demonstrate that there will be net environmental benefit from the proposal. That:
  - the surrounding land uses: lifestyle properties, rural uses and a reservoir provide some expectation of use and demonstrate nearby existing development.
  - there is evidence of prior human activity on the land in question, which means that it is not pristine wilderness.
  - the applicant will clean up the rubbish and plant native vegetation on the existing access track
  - offsets can be achieved through conditions.
- In coming to these conclusions the tribunal placed significant weight on expert opinion provided by the applicant.
Appendix 1

Villawood Properties v Greater Bendigo CC (Red Dot) [2005] VCAT 2703 (20 December 2005)

52 The Framework draws no distinction between offsets that should apply on a rural property or land that is zoned for urban purposes. This places a substantial cost impost on the development of urban land. The intensity of development contemplated by the zoning may mean that much, if not all, vegetation will be removed, in which case offsets must be provided off site, either through acquisition of other land or revegetation or rehabilitation of publicly owned land. Depending on the significance of the vegetation lost, this will not necessarily translate into a one-for-one replacement of hectares cleared. The use of habitat hectares as the quality/quantity measure means that in many instances substantially more hectares will be required as offsets than will be cleared. This may prove to be not only costly but difficult to achieve due to the application of the complex criteria used to calculate offsets.

53 It may also lead to attempts by developers to quarantine areas of vegetation on the lots subdivided either as a means of reducing the habitat hectares of vegetation lost or providing offsets, which is what has occurred in the present case. There is no certainty that such attempts will be successful in the long term. They can run counter to land owners’ expectations of how they may reasonably use their land for normal residential, commercial or industrial purposes and the level of control and administration required on the part of councils in connection with such vegetation protection areas is time consuming and onerous and raises legitimate questions of whether the outcome is worth the effort involved.

54 These issues have led the Tribunal to take a more pragmatic view. It has taken the view that Net Gain is one of many, sometimes competing, policy objectives included in the planning scheme and that Net Gain must be balanced with other strategies to achieve a net community benefit.

55 For example, with respect to urban development, the government has imposed urban growth boundaries to curtail the spread of urban growth thereby limiting the supply of land for residential development. It is unreasonable to then expect that this land will not be developed for urban purposes at densities designed to optimise use of a scarce resource because vegetation on the land will be lost. If there is highly significant vegetation on the land that should be protected, then this part of the land should be brought into public ownership where its long-term management and protection can be assured. In larger subdivisions, the loss of vegetation can be minimised by designing subdivisions so that vegetation is incorporated into public open space. But in all other aspects it should be assumed that 100 percent of vegetation will be lost. In then calculating offsets to compensate for the vegetation lost, a realistic and practical offset plan should be approved to ensure that the costs associated with providing the offsets do not adversely affect other strategic planning objectives, such as affordability and urban consolidation.
We endorse this approach, which we consider is necessary in order to achieve the strategic intent found reflected in the state and local planning policy frameworks of the planning scheme. The Net Gain principle must be applied wherever native vegetation will be lost and where a permit is required for its removal. But any offset plan must be reasonable and practicable and, whilst based on the criteria contained in the Framework, should also take account of:

- the significance of the vegetation proposed to be removed and the complexities of the subject land;
- the extent of vegetation removal proposed;
- the purpose for which the land is zoned;
- the potential to achieve offset/Net Gain in terms of the physical capacity of the land (or other land/or by other mechanisms); and
- any demonstrated commitment to achieve offsets.

The consideration of these criteria may lead to different offsets being appropriate in different circumstances.

Appendix 2

Villawood Properties v Greater Bendigo CC (Red Dot) [2005] VCAT 2703 (20 December 2005)

Before responding to these issues, it is relevant to make some general observations. The Tribunal has had the opportunity on a number of occasions now to deal with the application of the Net Gain principle. Whilst some general principles are beginning to emerge from these cases, what is also emerging is the generally unsatisfactory and uncertain nature of conditions in permits relating to vegetation removal, protection and offset plans. We consider there is a need for DSE to develop a standard or model condition(s), which is (are) capable of adaptation to specific cases, and which can be universally and consistently used by all DSE regions when conditions are required by the referral authority. It is inefficient and inappropriate for different approaches to be constantly adopted, and to be subject to continued debate before the Tribunal.

There is also need for conditions and any subsequent plans that must be approved to the satisfaction of DSE and/or the responsible authority to be both certain and enforceable. This means that obligations which are created need to be quantifiable, measurable and specific in terms of identifying land and responsibility. Conditions and offset plans should avoid the need for extensive monitoring and regulatory intervention. The worth of the outcome needs to be commensurate with the resources required to achieve the outcome.

Finally, conditions and offset plans need to be understandable. The calculations in the application of criteria used in arriving at the actions to be undertaken may be extremely complex, but the actions themselves, which are
then embodied in a condition or offset plan, must be capable of straightforward implementation. Permit conditions and offset plans must remain comprehensible to people who may be responsible for implementing or enforcing them maybe years after they were first conceived.

Appendix 3

**Villawood Properties v Greater Bendigo CC (Red Dot) [2005] VCAT 2703 (20 December 2005)**

82 The Framework does not assist in resolving the dilemma of when it applies. We do not consider that the discussion in ‘Landscape Role’ at page 24 of the Framework assists in this respect. Elsewhere the Framework refers to the assessment of planning permit applications,[24] and although the discussion of ‘Statutory Protection of native vegetation’[25] focuses on applications under clause 52.17, it also states:

The approach advocated in this Framework, in conjunction with the information provided by the [regional] Native Vegetation Plans, will facilitate better adoption of planning tools to protect native vegetation (e.g. Zones, Overlays, Municipal Strategic Statement and local policies).

83 We consider, this lack of clarity reinforces our view that offsets must be assessed on an individual basis and it is not always appropriate to apply a rigid calculation of offsets in accordance with the criteria set out in Table 6 of the Framework. In deciding whether offsets should be required in connection with permits to remove native vegetation other than under clause 52.17, we can do no more than say it depends on the purpose of the control.

Appendix 4


23 In essence it was the Council and Dose’s position that because the Grassy Dry Forest EVC at this site has been rated as having very high conservation significance, clearing should not be permitted at all. Table No. 6 at Appendix 4 of Framework for Action - which provides a summary of responses and offset criteria, graded according to conservation significance - provides in relation to vegetation classed as having Very High Conservation Significance, that clearing is not permitted unless exceptional circumstances apply (i.e. impacts are an unavoidable part of a development project, with approval of the Minister for Environment and Conservation (or delegate) based on considerations of environmental, social and economic values from a State-wide perspective).

24 It was submitted by the Department and the Council that this response suggestion should be taken to mean that clearing is only permissible for projects of State significance. We disagree with this interpretation as the provision does
not say as much. Rather it requires an assessment of the stated values from a State-wide perspective that is to say bringing a State-wide perspective to a consideration of the costs and benefits of the project. We do say however that the drafting of this response is unclear, particularly the reference to the Minister for Conservation and Environment given that the Minister has no statutory status in any consideration under Clause 52.17.

Appendix 5

*Moran Logging Company Pty Ltd v Department of Sustainability and Environment [2006] VCAT 1861 (12 September 2006)*

52 The Framework for Action then goes on to make reference to Table 7 in Appendix 5 as a summary of offsets for harvesting native forest on private land. We note however, that Table 7 makes no reference to the qualification associated with the presence of threatened species. It is our view that the Framework for Action, as an incorporated document within the Yarra Ranges Planning Scheme, forms part of the overall suit of planning policy and provisions that we must have regard to in determining whether the proposal for Timber Production would create a net community benefit and be a form of sustainable development which in an overall sense would lead to an acceptable outcome.

(see also Attachment 1 (at the end of Appendices) : Moran Logging Company Pty Ltd Yarra Ranges SC (Directions re Question of Law) [2006] VCAT 1758 (23 August 2006)

Appendix 6

*Estate of WG Hiscock v Mornington Peninsula SC [2007] VCAT 546 (4 April 2007)*

To appropriately offset the loss of native vegetation.

40 Mr Cicero submitted that under the residential zone, and having regard to the Villawood decision[^16], urban densities should optimise the land because urban land is a scarce resource; it should be considered that up to 13 lots could be contemplated and by applying for six lots the avoid principle had been addressed; that Net Gain must be balanced with other strategic outcomes to achieve a net community benefit; and if the vegetation is highly significant it should be bought into public ownership.

41 I do not accept the argument pursued that the avoid principle has been applied in that the original consideration of 13 lots was reduced to six. Such an argument can only be pursued if it were accepted that a 13 lot subdivision had been tested and found to be a valid option for subdivision. A true reading of the “avoid principle” is that removal or other destruction of the vegetation has been avoided because of the regard made to its inherent ecological, landscape and/or catchment conservation values[^17].
42 It follows therefore that the conservation significance of the vegetation is a fundamental matter to consider.

Appendix 7

_Estate of WG Hiscock v Mornington Peninsula SC [2007] VCAT 546 (4 April 2007)_

49 It would be fair to say that the loss of vegetation values is not only about loss of individual trees. It is also about loss of understorey and other contributory vegetation such as grasses associated with the floristic community on which the value of the vegetation is rated. This was a proposition I put to which DSE agreed. The loss of such vegetation may not be just from intentional, physical removal. Pressure from people’s general activity on the land can and does disturb vegetation and reduce its distribution or habitat / ecological value. Thus the density of development and corresponding level of activity that may occur on a lot can influence the longer term viability of such vegetation. It follows that larger blocks of land may reduce the intensity of activity or otherwise allow for the management of activity away from more sensitive areas. The use of larger lots sizes may therefore be one way to maintain (and possibly contribute to an increase in) the ecological value of native vegetation communities in urban areas. Consideration of such matters within the decision making process are triggered under the applicable environmental and vegetation protection overlays (as I have set out earlier). Thus to allow residential development in areas of native vegetation is not an automatic death knell to this vegetation and one should have regard to the way the land can be set out and utilised to assist in achieving the aims of the Native Vegetation Management Framework within urban areas.

Appendix 8

_Estate of WG Hiscock v Mornington Peninsula SC [2007] VCAT 546 (4 April 2007)_

43 It was the evidence of Mr McMahon that the conservation significance of the vegetation (the Coastal Moonah Woodland) was not high enough to warrant the criteria of “Very High Conservation Significance” and the consequential highest degree of protection afforded under the Native Vegetation Management Framework that would follow from such a classification. He proceeded on the basis that the habitat hectare score of 0.35 (which he later conceded rounded to 0.4 on the convention of the framework adopting values to only one significant figure) and the EVC conservation status of “endangered” combined to provide for a “High” conservation classification and thus removal of some vegetation could be contemplated. He therefore proceeded to estimate a value of habitat hectare offsets based on the loss of vegetation from the whole of the lot (noting that only 5 trees were to be removed) to be applied on land other than the subject site.

44 Ms Heber however tendered the recently released (December 2006) Port Phillip and Westernport Native Vegetation Plan (PPW Native Vegetation Plan)
which confirms Coastal Moonah Woodland to have an endangered bioregional conservation status on the basis of its listing under the *Flora and Fauna Guarantee Act 1988.* This bioregional conservation status in combination with the (rounded) habitat hectare score of 0.4 translates to a “Very High” conservation status. Additionally listed communities under the *Flora and Fauna Guarantee Act 1988* are also to be considered as having “Very High” conservation significance under the revised convention contained in the PPW Native Vegetation Plan.

Mr Cicero challenged the applicability of the regional native vegetation plan as a reference document, as it has not been incorporated into the planning scheme. However I accept that reference is made to these plans within the Victoria’s Native Vegetation Management - A Framework for Action at Section 9 Implementation (see pages 32 to 33) and at footnote 2 to Table 5 of Appendix 3. This framework document is a reference document and further defers to these regional plans as they are developed. As such I am satisfied that weight can be given to this Vegetation Management Plan and the elevation of the conservation significance of the Coastal Moonah Woodland from “High” in Mr McMahon’s assessment to “Very High” under the regional vegetation plan.

It is therefore a matter of fact that the vegetation community on this portion of the site has a conservation significance of “Very High”. Under this conservation significance “clearing is not permitted unless exceptional circumstances apply” or “impacts are an unavoidable part of a development project with approval from the Minister.

### Appendix 9

*Sweeney v Maroondah CC [2007] VCAT 1575 (23 August 2007)*

46. The statement of preferred neighbourhood character for Neighbourhood Character Area 5 (Clause 22.03) is not so much that as a set of guidelines relating to such matters as setbacks, excavation, visibility of buildings on hill faces and upper slopes, parking areas and “encouraging the use of indigenous and/or native plans”. These don’t give much insight into the eventual landscape character that Council anticipates; a little guidance in this respect can be found in Clause 22.01, which sets out the general importance of canopy vegetation in the City. I have earlier noted the considerable difference in established and significant tree canopy in the areas north and south of the Quamby Road enclave and the Quamby Road enclave itself. I also agree with the Tribunal’s comment in its decision re 7-9 Quamby Road:

... the character of the Quamby Road area is not given any specific recognition in the Council’s urban character study and there is no preferred character statement for the area to differentiate it from the surrounding suburban context. Little guidance is therefore provided by Council’s residential character policies as to the outcomes sought to be achieved for this locality.

47. I note with interest, and agree with, the further observation by the Tribunal in the matter of *Australand Holdings Ltd v Maroondah City Council [*]
... The difference between green and leafy suburbs, and much more sparsely landscaped suburban environments is often unrelated to the size of lots, the size of dwellings, or the extent of paved services. Rather, the big difference is the culture which exists both in the private community, and within the municipality. If the municipality believes that the amenity afforded by substantial street tree planting outweighs the management costs involved, and if the residents of the community value trees within their environment, then a tree environment will be the outcome.

48. On this basis of my observations, the newer residents of the Quamby Road enclave and nearby areas are not demonstrating a strong preference to plant the type of trees envisaged in Council’s statement of preferred neighbourhood character. In due course, the remnant Eucalypts will inevitably decline. Consequently, the preferred neighbourhood character so strongly supported by Council’s strategies and policies does not appear to be sustainable in the longer term – except to the extent that Council itself might reinforce the planting of canopy trees in public places. In effect, there does not appear to be any strong evidence of a local culture amongst newer residents of planting of large canopy-type trees on private lots.

49. Returning to the subject site, we have a large site, moderately treed with remnant Eucalypts and some pines, in an unusual enclave that is atypical of the wider area, being characterised by large lots and retaining a strong background feature of canopy trees (whatever the future might hold). Although use of land for a dwelling does not require a permit, a permit is required to remove any significant trees and, consequently, construction of a single dwelling on this site would most likely be subject to a permit for tree removal, including conditions requiring the re-planting additional trees. In passing, I concur with Mr. Montebello’s point that an aboricultural assessment of trees is not the same as an assessment of their contribution to the landscape (other than, perhaps, with respect to their health and longevity).

50. The exhibited subdivision proposal did not include any building envelopes so it is not possible to determine, at this stage in the development process, how many or which trees would likely to have to be removed to allow residential development. Nevertheless, based on the type of residential development that is occurring in the locality I consider that I can safely draw certain conclusions in this respect. Houses will be large, whether single or two-storied (future choices with respect to one or two-storeys could be influenced by compromises about tree removal – a single storeyed dwelling fitting better within the tree canopy but removing more trees, and vice versa). The remnant native vegetation is not of a type that is valued by the local community (based on its demonstrated planting choices) and, it seems to me, will be at perpetual risk of poor management, particularly if space available for associated domestic activities around future dwellings is limited.
Attachment 1

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION
PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P3304/2005
PERMIT APPLICATION NO. YR-2005/225

CATCHWORDS
Application under section 79 of the Planning and Environment Act 1987 for review of the failure to grant a permit within the prescribed time – Interpretation of policy – Native vegetation Framework

APPLICANT Moran Logging Company Pty Ltd
RESPONSIBLE AUTHORITY Yarra Ranges Shire Council
RESPONDENTS Department of Sustainability and Environment
Friends of Hoddles Creek and ors
SUBJECT LAND 565 Thonemans Road, Beenak
WHERE HELD Melbourne
BEFORE Justice Stuart Morris, President
HEARING TYPE On the papers
DATE OF OPINION 23 August 2006
CITATION Moran Logging Company Pty Ltd Yarra Ranges SC (Directions re Question of Law) [2006] VCAT 1758

Opinion
My opinion on the question referred to me is set out in the following reasons.
Stuart Morris

President

Reasons

1 Moran Logging Company Pty Ltd has made application to review the failure of the responsible authority to grant a permit for timber production (timber harvesting from, and revegetation of, existing native vegetation) at 565 Thonemans Road, Beenak. The responsible authority ultimately decided that, had it not been for the application for review, it would have refused to grant a permit. During the course of the hearing before Senior Member Liston and Member Harty, the responsible authority raised an issue, which it characterised as a question of law, in relation to the proper interpretation of a policy known as *Victoria’s Native Vegetation Management – A Framework for Action* (“the Framework”).

2 This issue was subsequently formulated as follows:

   What is the appropriate response (ie *Harvesting generally not permitted or Harvest and regeneration may be permitted as part of sustainable land use option*) in terms of the Native Vegetation Framework to a proposal for timber harvesting on a site that has *High Conservation Significance* if that level of conservation significance was attained by way of threatened/rare species (in terms of table 5 at Appendix 3)?

3 Although the Applicant contested whether this issue was a question of law, the tribunal has referred the question to a judicial member pursuant to clause 66 of schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*. This was appropriate, as the question of whether a matter is a question of law is itself a question of law.

4 Parties have made written submissions about the matter, which I have read.

Assumed facts

5 For the purposes of this opinion I adopt the following facts.

   • The subject land is private land.

   • The applicant proposes to harvest timber from naturally established native forest on the land.

   • Pursuant to the Framework, the vegetation to be harvested has a “High” conservation significance.

1 Arguably I should refer to the publication as “a Framework”, but this is linguistically inconvenient.
• The reason why the vegetation to be harvested has a “High” conservation significance is that it forms part of the remaining 50% of habitat for a threatened species in the applicable bioregion, namely the Powerful Owl.

• Harvesting of native vegetation is currently allowed on public land within the same bioregion as the subject land in circumstances where that vegetation has a “High” conservation significance pursuant to the Framework.

The legal context

6 Clause 52.17 of the Yarra Ranges Planning Scheme provides that a permit is required to remove native vegetation. It also provides that before deciding on an application the responsible authority must consider, as appropriate, the Framework. This publication, which is incorporated in the scheme, is also referred to in various policies that form part of the scheme.

The Native Vegetation Policy

7 The Framework is a policy document, in the sense that it is intended to provide guidance in the making of decisions. It is not a statutory document, in the sense that it is intended to create rights, impose liabilities or determine the lawfulness of particular activities. This is so notwithstanding that it is incorporated in the planning scheme. Many documents incorporated into the scheme have the role of providing policy guidance rather than establishing rules or requirements.

8 Appendix 3 of the Framework contains a table which sets out a method of determining the conservation significance of vegetation, in terms of “Very High”, “High”, “Medium” and “Low”. Importantly a ranking might be assigned by reference to various biodiversity attributes: vegetation type, habitat for species, or some other attributes. For example, the quality and type of vegetation, if considered in isolation, might initially attract a “Medium” level of significance; but, because the vegetation provides significant habitat for an endangered bird or mammal, the vegetation might be attributed a “High” level of significance.

9 Appendix 5 of the Framework contains a table that applies to the harvesting of timber from naturally established native forest on private land. The table suggests that the appropriate response to a proposal to harvest such timber, where the conservation significance of the vegetation is “High”, is “harvesting generally not permitted”. However this statement is qualified by a footnote, which provides:

   Unless harvesting is currently allowed on public land within the same bioregion for areas of vegetation which have equivalent conservation values.

Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
The body of the publication explains the basis of this policy. It provides, relevantly:

The harvesting of naturally-established native forest has environmental consequences but is clearly a different level of impact to permanent clearing. In general terms, the approach to this activity on private land will reflect the approach on public land. However, an important difference with respect to environmental factors at the landscape scale is that private land timber stands are often neither as large in area nor as surrounded by extensive areas of other forest as stands on public land, and so there are often more limited options for “buffering” the impacts of harvesting in time and in space.

The Net Gain approach will complement the framework for sustainable forest management on public land. Consistency with the Net Gain approach means that utilisation of native vegetation for timber products (eg. selective harvesting, harvest and regeneration) on private land must be part of a sustainable forest management approach and will only normally be permitted in Low and Medium conservation significance categories. In some cases there are combinations of conservation status and quality of vegetation that result in a Very High or High Conservation Significance rating, but harvesting is currently allowed on public land under certain conditions (eg. silviculture prescriptions) within the same bioregion. In these circumstances harvesting followed by regeneration can be permitted on private land with similar conditions unless other criteria on the site warrant a Very High or High rating (eg. threatened species). However, the amount of harvesting will need to be determined on a site by site basis taking into consideration the need to buffer the impact of harvesting in time and in space. Appendix 5 summarises the offset criteria for harvesting timber from naturally-established native forest on private land.

The issue that has been referred to me centres on the differences between the content of the body of the Framework and Appendix 5 of the Framework.

Question of law

As the dispute centres on the meaning of a document, it raises a question of law. It is true that the document does not determine rights – the mandate in the planning scheme is only that the Framework be considered – but the meaning of a document might need to be ascertained if it is to be considered. This will not always be the case. It will often be unnecessary to determine the precise meaning of poorly expressed or ambiguous policy documents when this will make no difference to the exercise of the discretion, which would be the same regardless.
Meaning of the Framework

13 In my opinion Appendix 5 of the Framework is intended to be the principal articulation of the policy to be considered when considering an application to harvest timber on private land. I form this opinion having regard to the tabular manner in which the appendix is expressed and the apparent intention that it provide a day-to-day guide to planning officers about relevant scenarios. This is so notwithstanding that it is described as a “summary”; it would be odd if it was an incomplete or an inaccurate summary. By contrast, the body of the Framework is written in a narrative or explanatory style; it is not written as a set of clear guidelines that might be followed in particular cases.

14 The applicable response suggested by Appendix 5 of the Framework is “harvesting generally not permitted”. This statement stands on its own. (It is not materially different to the statement in the body of the Framework that harvesting will only “normally” be permitted in “Medium” or “Low” conservation significance categories.) Hence, even if the qualification in the footnote to Appendix 5 is inapplicable, the suggested response still allows for the possibility that the particular case under consideration may be an exception to a general rule. Further, even if the qualification in the footnote is applicable, it does not follow that it would be inappropriate to refuse a permit for the harvesting.

15 What, then, is the role of the statement in the body of the Framework to the effect that harvesting of vegetation on private land should not be permitted if the “High” ranking results from an attribute such as the vegetation forming the habitat of threatened species? In my opinion, this forms the role of a flashing amber light (not a red light), suggesting that close consideration be given to the question of habitat retention before any permission is granted.

16 It is important to understand that the Framework is not intended to determine rights or to dictate outcomes. It is intended to provide guidance. Common experience tells us that the appropriate decision will depend on many circumstances, which will often be unique to the particular case under consideration. It is a mistake to think that a document such as the Framework can provide all the answers, as if it is some form of digital supercomputer that provides an automated outcome based on a given set of inputs. The planning scheme intends that permit decisions be made by human beings (whether planning officers, councillors, Ministers or tribunal members). Human beings make discretionary decisions by considering all relevant factors and then exercising judgment. This is what is required in the present case.

Stuart Morris

President

Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
Sources


Graham v Macedon Ranges Shire Council [2006] VCAT 1744 (23 August 2006)


Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications 42
Victoria's Native Vegetation Management – A Framework for Action (DNRE 2002)


Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
The exemption question

Clause 52.17 Native Vegetation, contains a number of planning permit exemptions. Within a non-rural setting, and without additional Planning controls, this clause contains a number of provisions that can exempt a proposal from requiring a permit for the removal of native vegetation - no matter the conservation significance of the vegetation. The tribunal has interpreted the exemptions a number of key legal principles have emerged:

1. For the construction of buildings and related works, where there are no site specific planning controls in addition to cl. 52.17, which provide additional protection for native vegetation, a proposal may be exempt from requiring a permit to remove the vegetation.
2. The conservation significance of the vegetation appears to be of no consequence if an exemption is permitted.
3. Section one permits of a zone, that permit the development of buildings and other construction as as-of-right development can trigger an exemption for the removal of native vegetation.
4. An exemption is linked to the proposed development, e.g. a tennis court, not to the precise place the development will be built on the subject land not the amount of vegetation to be removed. Therefore, as long as the 'minimum' necessary vegetation is removed to allow for a proposed exempted development, it may occur in any position on the subject lot (provided, of course, that the chosen location is otherwise legal).

Case studies

Best v Maribyrnong CC [2006] VCAT 1239

1 Application: To develop the subject land with industrial buildings and associated car parking
2 Tribunal considers an application under s.82 of the Planning and Environment Act 1987 (PE Act) for review of a decision of the Responsible Authority to grant a permit.
3 It considers whether the development proposal is exempt from the provisions of Clause 52.17 NATIVE VEGETATION of the Maribyrnong CC Planning Scheme.
4 Responsible Authority: Maribyrnong City Council
5 Applicant to VCAT: F. Best
6 Respondents/Applicant: Costa Constructions Pty Ltd
7 Land affected by following Planning Scheme controls: Industrial 1 Zone (I1Z), Industrial 3 Zone (I3Z) and a Development Contributions Overlay (Schedule 6) (DCO-6).
8 Outcome: the Responsible Authority and DSE supported the permit application with conditions. The Tribunal found that the proposal was exempt from cl. 52.17 and thus native vegetation removal was
permitted without the necessity for a permit, to make way for the development.

**Key Principles and Observations:**

- The subject land is vacant but has a remnant of grass land vegetation that was accepted to be of high or very high conservation status under the Framework for Native Vegetation Management Policy.
- The subject land is zoned for industrial development and is surrounded by industrial land and development.
- In the first case: Dr Best says no and her primary reason is that there are three patches of remnant native grass land. These remnants are said to be of high or very high conservation significance. They are dominated with Themeda triandra kangaroo grass) although there are said and thought to be some less significant but nevertheless interesting other remnant species of grass in those clumps.
- DSE did not object to native grass removal because:
  - the surrounding land was already developed,
  - the patches were small and isolated and
  - offsets can be sought.
  - The Tribunal agreed with DSE that avoidance of native vegetation removal was not practical on this site because the land was intended for industrial development.
- VCAT determined that a permit was not required to remove the native vegetation because it was exempt from cl.52.17. This is because:
  - The exemption in fact relied upon comes under the heading “Buildings”. There are several provisions under this sub-heading but the essentially relevant bit is that there is exemption in relation to the removal, destruction or lopping of the minimum extent of native vegetation necessary for the construction of any building including utility services or vehicle access ways which are ancillary to the building (21).
  - The Tribunal considered the provision of car parking to be included in this exemption.
  - The Tribunal also considered that cl. 52.17 is ‘generally and usually expected to apply to rural, country, or bushland areas rather than a site like this one deep in the urban part of greater Melbourne surrounded for miles with long established residential, industrial and other developments’ (20), and thus a more detailed and find analysis has been required in this case than would be relevant for a non-urban environment (28).
- The Responsible Authority did not oppose this interpretation of the clause’ exemption nor that it applied for this proposal (22).
- The Tribunal then concluded that no planning permission was required to remove the native vegetation on the subject land for the development of the buildings, drive way and car parking (29), and that this exemption applied to the whole of the subject site.
• Therefore, no offset or other arrangements can be required of the applicant proposing development and use of the subject land (29).
• The Tribunal noted that:
  o The land was surrounded by established industrial and residential developments
  o The subject land is zoned for industrial purposes.
  o No other zoning or overlay provisions are in place to protect native vegetation.

_Pisoteck v Manningham CC [2006] VCAT 2374_

1 Application: to construct a dwelling and to remove vegetation associated with the dwelling, vehicular access and ancillary areas.
2 Tribunal considers whether or not the exemptions in clause 52.17 apply so as to exempt this proposal from obtaining a permit under clause 52.17 for removal of native vegetation.
3 Responsible Authority: Manningham City Council
4 Applicant to VCAT: DM & SO Pisotek
5 Referral Authority: Department of Sustainability and Environment
6 Land affected by following Planning Scheme controls: Low Density Residential Zone (LDRZ) and a Significant Landscape Overlay 1(SLO1).
7 Outcome: The Responsible Authority initially refused the permit because, amongst other reasons, the removal of the native vegetation from outside the building envelope would be detrimental to the surrounding landscape significance and character. The tribunal found that as construction of a dwelling is a section 1 permit in the LDRZ, and if the vegetation to be removed is the minimum necessary for construction of the dwelling, that the exemptions of cl 52.17 are applicable. Thus the decision of the responsible authority was ordered to be set aside and a permit granted.

**Key Principles and Observations:**

• This is an application to review the decision of the responsible authority to refuse permission for the construction of a dwelling and the removal of vegetation at 632-634 Ringwood - Warrandyte Road, Park Orchards. The responsible authority issued a Notice of Refusal to Grant a Permit for the following reasons (1) (reasons listed are those concerning native vegetation only):
  i. 2. The proposed development constitutes excessive buildings and earth works outside the building envelope, to the detriment of the landscape significance and character of the area.
ii. 3. The proposed removal of trees from outside the building envelope will be detrimental to the surrounding landscape character of the area.

- Do the exemptions within cl.52.17 apply:
  i. Senior Member Horsfall has determined that as a matter of law the exemptions in clause 52.17 do not apply so as to exempt the proposal from obtaining a permit under the SLO1 (61).
  ii. The tribunal was satisfied that the removal of native vegetation in this case is to the minimum extent necessary for the construction of the dwelling and a permit is not required under this provision of the planning scheme. It reached this conclusion on the basis that the vegetation which is proposed to be removed is limited to that which is needed for the construction of the dwelling, ancillary buildings and works and services associated with the dwelling and access to the dwelling. Vegetation which is not required to be removed for these buildings and works is to be retained (63).
  iii. It was submitted by the Council that the level of vegetation proposed to be removed is excessive because of the siting, size and layout of the dwelling and associated buildings and works, and that the exemption is therefore not applicable. A dwelling however is a section 1 permit not required use in the Low Density Residential Zone and the provisions of Clause 52.17 are not intended to control the siting, size and layout of a dwelling and associated buildings and works and they cannot be used to do so. The provisions of Clause 52.17 are concerned with the removal of native vegetation, except where the removal of vegetation is to the minimum extent necessary, required for the construction of a dwelling. Provided the removal of vegetation is limited to that which is required for the construction of the dwelling and ancillary buildings and works, the exemption provisions of Clause 52.17 are applicable (64).

Maino v Nillumbik SC [2007] VCAT 1155

1. Application: for the construction of a private tennis court as ancillary works to an existing dwelling.
2. Tribunal considers the interpretation of cl. 52.17-6 for the construction of a tennis court in Residential 1 Zone land subject to an Environmental Significance Overlay.
3. Responsible Authority: Nillumbik Shire Council
4. Applicant to VCAT: Raymond John Maino
5. Land affected by following Planning Scheme controls: Residential 1 Zone (R1Z), a Wildlife Management Overlay (WMO), a Development Plan Overlay Schedule 2 (DPO2), and a Development

Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
Contributions Plan Overlay Schedule 2 (DCP2), Environmental Significance Overlay Schedule 1 (ESO1) over half of the subject land.

6. Outcome: Removal of vegetation for the construction of a tennis court as ancillary works to a dwelling is exempted from requiring a permit under cl.52.17. Therefore, the tribunal found that construction of the tennis court does not require planning permission under the Nillumbik Planning Scheme provided that the court is constructed outside of the ESO1.

**Key Principles and Observations:**

- The tribunal considers the principle issue as the interpretation of cl. 52.17-6.
- The responsible authority interpreted this clause to mean that planning permission is required for construction of the tennis court because it considered the proposed position of the tennis court on the subject land would require greater than the minimum removal of native vegetation.
- The tribunal found that the cl. 52.17 exemption does not permit the Responsible Authority to decide where on the subject land construction of the court can occur because it is the tennis court, as ancillary works to the dwelling, which is the trigger for the exemption, not the amount of vegetation to be removed (25).
- The Tribunal went on to state: “The words ‘the minimum extent ... necessary’ relate to the ‘vegetation to be destroyed’ on whichever part of the land that takes place, and the destruction can take place anywhere on the land, provided the purpose of the destruction is for the construction of a dwelling and its ancillary amenities, in this case a tennis court.” (26)
- And “But once that piece of land is earmarked for the tennis court, wherever on the land that may be (all other things being equal[2]), then only the minimum extent of vegetation necessary to be destroyed in order to construct the tennis court is exempt from planning permission.” (27).
References


Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
Enforcement and illegal native vegetation removal

The tribunal has heard a number of applications for enforcement orders in relation to removal of native vegetation and a number of key legal principles have emerged:

1. The Responsible Authority, through appropriate use of planning controls, must clearly demonstrate how their Planning Scheme has been or will be contravened.

2. The tribunal views enforcement orders as restorative rather than punitive.

3. Enforcement orders are linked to the subject land, and the Planning and Environment Act 1987 has been interpreted so that an enforcement order cannot require restorative action on other land.

4. The tribunal will not devolve open-ended power to a Responsible Authority to decide and control the specific content of an enforcement order at some future date. The tribunal either decides the specific content itself or requires the relevant parties to submit restorative plans for assessment.

Case studies


1 Application: in two parts
   iii. By the permit applicant against Council for failure to determine a planning permit for removal of native vegetation and the construction of a driveway
   iv. By Council against the permit applicant for removal of native vegetation without a permit. Council seeking an enforcement order against permit applicant.

2 Tribunal considers both applications in order – firstly whether a permit should be issued for construction of the driveway and native vegetation removal, and then the issue of the allegedly illegal removal of native vegetation and the granting of an enforcement order.

3 Responsible Authority: Nillumbik Shire Council

4 Permit applicant: S. Irvine

Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
5 Respondents: Individual nearby property owners, a local community group
6 Land affected by following Planning Scheme controls: Low Density Residential Zone, Significant Landscape Overlay (Schedule 2) (SLO2), Wildfire Management Overlay (WMO).
7 Outcome: tribunal refuses permit for construction of the driveway and removal of native vegetation. Tribunal finds permit applicant has removed native vegetation in contravention of the Planning Scheme and grants enforcement order against the permit applicant for restorative planting.

Key Principles and Observations:

- Subject lot and adjacent lots all zoned Low Density Residential, and all are well vegetated with native vegetation.
- Application against Council for failure to determine permit:
  - The following planning scheme controls require a permit to be granted for the construction of the driveway and removal of native vegetation: SLO2 and Clause 52.17.
  - Site visit confirmed the continuing significance of native vegetation to the landscape of the subject site and greater area, i.e. tribunal was able to verify the accuracy and continuing relevance of the Overlay and Schedule.
  - Tribunal finds that the driveway proposal is unacceptable in terms of the objectives and decision guidelines of SLO2.
  - Because the tribunal had already found that the proposal was unacceptable and that it was not the only possible alternative location and design for the driveway, it did not consider that it had to make a decision with regards to Clause 52.17.
- Application for enforcement order:
  - A site visit and expert technical evidence was able to show that removal of living native vegetation had occurred without the necessary permit, in contravention of SLO2.
  - The tribunal found that no exemptions were applicable.
  - An enforcement order was made against the permit applicant to undertake specific replanting of the areas where the native vegetation was removed.

**RED DOT Whittlesea CC v Ozimek and Plenty Living Pty. Ltd. – hearing conducted over 5 sessions during 2006.**

1. Application: Responsible Authority application for enforcement order for removal of native vegetation on the subject land in contravention of the Planning Scheme.
2. Tribunal considers two questions of interpretation of the Planning and Environment Act 1987 regarding enforcement orders.
3. Responsible Authority: Whittlesea City Council
4. Respondent: Ozimek and Plenty Living Pty Ltd.
5. Land affected by following Planning Scheme controls: Rural Zone/Farm Zone, vegetation protection overlay 2 (VPO2)
6. Outcome: tribunal allows the enforcement order.

**Key Principles and Observations:**

**Background**

Respondent fined $14,000 in magistrate’s court for removal of red gum trees on subject property.

Responsible Authority applied to VCAT for an enforcement order requiring Respondent to provide off-sets to compensate for the illegal removal of native vegetation.

**Hearing 1**

- Respondents admit contravention as alleged in first hearing.
- Responsible Authority submitted an application for an enforcement order that was open ended and would permit the Authority to decide the specific content of the order at an unspecified future time. The tribunal disagreed with this delegation of power to one of the two parties appearing at the hearing.
- The hearing was adjourned to permit a specific rectification plan to be prepared by the respondent and submitted to Council.

**Hearing 2**

- Respondents did not comply with directions to provide a rectification plan. Hearing adjourned again to allow plan to be provided as originally directed.

**Hearing 3**

- Respondent posed two questions:
  - Whether the Tribunal can make an order under the enforcement provisions of the Planning and Environment Act 1987 requiring offsets to occur on land other than land the subject of the enforcement application? and/or
  - Whether a generic plan can be required to be prepared for offsets to occur anywhere?
- The hearing was adjourned to a later date.
Hearing 4

- In response to the first question posed:
  - The tribunal considered section 119 of the Planning and Environment Act 1987.
  - The Respondent interpreted s.119 (b) (iv) (A) that enforcement orders are restricted to the subject land.
  - The Responsible Authority asserted that s.119 (b) (iv) (B) refers to complying with the Planning Scheme and so an enforcement order could then apply to other land as well as long as the Scheme was enforced.
  - The tribunal finds that an enforcement order runs with the subject land and that the provision of Part 6 Division 1 of the Planning and Environment Act 1987 confines it to consideration of only the subject land associated with the contravention of the Planning Scheme [25].
  - Therefore, off site off-sets cannot be part of an enforcement order.

- In response to the second question:
  - Answered by the first question – the enforcement order cannot so direct this.
  - However, a s.173 agreement between the two parties to arrange such an outcome this was considered acceptable by the Tribunal.

- The enforcement order application was then adjourned to provide enough time for the Respondent to provide the requested restoration plan.

Hearing 5

- Respondent’s restoration plan was not deemed sufficient because:
  - It did not comply with the total area of replanting required, and
  - it was still attempting to accommodate future development of the site despite the fact that the Responsible Authority already refused a permit application for part of the planned development.

- Respondent argued that: relevant Responsible Authority strategic planning, that was to protect the removed red gums, was not yet complete and so could not apply, and that the land, though currently zoned Farm Zone was likely to be urban in the future.

- The tribunal did not accept these arguments as the pertinent fact was the approval had not, and was not, granted neither for the removal of the native vegetation nor for any further development of the land.

- The tribunal amended the restoration plan to meet its previous requirements and granted the enforcement order to the Responsible Authority.
References


Appendix 4 – Review of VCAT cases relating to native vegetation clearance applications
Appendix 5

Integration of land use planning tools and catchment management for vegetation protection
APPENDIX FIVE

Integration of land use tools and catchment management for vegetation protection

The integrated use of planning schemes and catchment management policies offers the potential to significantly improve the protection and management of remnant native vegetation. Improved integration requires action to improve both strategic and statutory planning processes.

Institutional integration

Inadequate integration of strategic and statutory decision making for vegetation protection and management has occurred between the CMA (administering the Catchment and Land Protection Act) and councils (administering the Planning and Environment Act). Unless planning schemes are guided by the framework provided by catchment scale strategies they will almost certainly not deliver adequately on catchment health. Catchment Management Authorities are responsible for identifying those aspects of catchment health which can strategically direct the land use planning system and for liaising with local councils on the effective implementation of these measures. Vegetation protection and management is one of the most important of these responsibilities. The Victorian land use planning system has inherent limitations as a means of achieving the objectives of catchment management. However, the full use of its provisions would assist the objectives of improved land and water management and biodiversity conservation. Variable use is made of these provisions by municipal councils in the study area, with no council using the planning provisions to their full potential. Similarly, the Regional Catchment Strategies (RCS) do not contain sufficient reference to the provisions, techniques and associated measures of the land use planning system as a means of implementing catchment management objectives, policies and measures.

The Planning and Environment Act 1987 provides the objectives and administrative structure for land use planning in Victoria. The objectives from the Act include:

- “To provide for the fair, orderly, economic and sustainable use, and development of land
- To provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity”.

The objectives of the planning framework include the objective “to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land”. The Act also seeks to achieve the integration of land use and development planning and policy with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels. This has important implications for integrating land use planning and catchment management. The Act also provided that municipal planning schemes are the principal means of regulating land use. Environmental impacts must be considered in decisions on land use whether through the issuing of planning permits or in planning scheme amendments.

Municipal councils can implement the objectives, principles, policies and measures outlined in a Catchment Management Strategy by concentrating on environmental and natural resource issues in the choice of overlays and schedules to overlays, choice of zones and schedules to zones, and through the LPPF.

The Catchment and Land Protection Act (CALP) 1994 contains a number of explicit and implied references to land use planning. It provides that a RCS must “set a program of measures to promote improved use of land and water resources and to treat land degradation; and state the action necessary to implement the strategy and who should take it”. These goals allow the use of land use planning measures to implement the objectives in the CALP Act aimed at the protection of the natural resource base, particularly land and water, and the maintenance of environmental processes.
The CALP Act 1994 also provides a structural connection between the work of CMAs and the land use planning system in that:

“An Authority that prepares a regional catchment strategy may recommend to a planning authority under the Planning and Environment Act 1987 amendments to a planning scheme to give effect to the strategy, and

‘Without limiting the Environment Protection Act 1987, a regional catchment strategy may be incorporated in a State environment protection policy, in whole or in part, and with or without changes’.

In addition, CMAs can initiate a Special Area Plan. Such a plan has the capacity to require, among other matters, the restoration of specified vegetation effectively to restore a habitat.

In its review of planning schemes, Maunsell ¹(2002:29) argued that:

Some planning schemes do in fact incorporate elements of the relevant RCS while others make mention of the documents. However none of the planning schemes examined provide for the consistent development of catchment/natural resource management issues...Essentially consideration of catchment/natural resource management issues is patchy with no clear logical structure...In addition many schemes do not implement RCS actions in the zones and overlays.

Similarly, RCSs do not adequately identify the means of implementing the RCS through planning tools. In their analysis of planning scheme-RCS relationships, Alexander and Associates (2003) argued for the need for supporting documents to the RCS and relevant sub strategies that identify issues, management and planning responses, specifying the type of land use tool, and the details of the measure required for each issue, with RCSs and planning schemes demonstrating how each can complement the other for specific issues. This would require the writing of specific area based policies matched to physical characteristics, and the specification of land use planning responses by identifying the appropriate planning provisions and the content of local policy. This kind of strategic and outcome focused work would progress the relationship between catchment and planning well beyond general cross references to both processes in RCSs and planning schemes. It would also require much closer interaction between the CMA and the planning departments of all councils in the region.

**Strategic planning**

Strategic integration will require agreement between local councils and the catchment management authority (CMA) on the most appropriate mix of land use planning tools for inclusion into planning schemes, and the coordinated use of CMA powers. The Victoria Planning Provisions (VPP) included a number of planning tools with potential for protecting remnant native vegetation.

Councils are required to make a number of strategic decisions in implementing the VPP through planning schemes. Councils can select the appropriate zones and schedules from the suite provided and apply them to land in the municipal district, make decisions on the content of schedules attached to some provisions, in particular for overlays and subdivision controls in zones, and the content of the Local Planning Policy Framework (LPPF) including the Municipal Strategic Statement (MSS). The LPPF was intended to provide the policies which would form the basis for discretionary decisions on uses and developments when applications for permits were being considered. The LPPF was intended therefore to provide a public strategic content for council decision making.

However, zones available for use in rural areas are sometimes misapplied. In particular, the zone with the strongest environmental controls, the Rural Conservation Zone, is used rarely by many councils and is often not applied to land containing remnant vegetation. Overlays contain purposes, permit requirements and decision guidelines, and provide a potentially significant addition to a responsible authority’s ability to control developments. However, their use is discretionary. Many councils have misapplied the appropriate overlays with potential for protecting native vegetation, or

used them rarely. There are 22 overlays available for use in the VPPs including three environment and landscape overlays, Environmental Significance (ESO), Vegetation Protection (VPO), and Significant Landscape (SLO). There are seven land management overlays including overlays for Erosion Management, Salinity Management, and Floodways.

The VPO requires a permit to remove vegetation though not to subdivide. The use of the ESO is effective because an ESO requires a permit to build, subdivide and to clear. An SLO rarely triggers net gain. The VPO and ESO could provide a significant additional level of protection by using Ecological Vegetation Classes (EVCs) to identify important vegetation types and to apply the overlay control to these mapped remnants. Statewide mapping based on 1989-2005 data is now available from the Department of Sustainability and Environment at 1:25,000 scale. Each EVC is assigned one of five classes of Bioregional Conservation Status within a bioregion. These classes are: endangered, vulnerable, rare, depleted, and of least concern. Vegetation is increasingly threatened from least concern to endangered. The use of overlays continues the discretionary approach applied in the Victoria Planning Provisions through the use of the permit system or optional measures such as overlays. There are no prohibitions for native vegetation clearance.

The government introduced new planning zones for Melbourne’s inner peri-urban zone as part of the implementation of Melbourne 2030. The government finalised new zones for Melbourne’s green belt (including its green wedges) when it passed legislation which introduced an urban growth boundary in 2004. It generally converted the Rural Zone to Green Wedge Zone (and Green Wedge A Zone) and the Environmental Rural Zone to Rural Conservation Zone. However, it also allowed the consideration of a range of large scale accommodation, major tourist and commercial uses in the Green Wedge Zone. Later restrictions on these uses have not eliminated the possibility of large scale inappropriate commercial uses in the Melbourne’s green wedges. As a result, the Green Wedge Zone, introduced to help protect Melbourne’s green belt, is weaker than the new Farming Zone applied across Victoria outside the green belt by allowing a wide range of non-agricultural commercial uses which the Farming Zone prohibits.

**Statutory decisions**

The issue of native vegetation protection and management illustrates the application of land use planning controls to the protection of natural resources. Woodgate and Black (1988) demonstrated the loss of Victoria’s forest cover to the late 1980s. Using satellite imagery they discovered that during the period 1972-1987 Victoria was clearing predominantly native forests at a rate of 15,392 hectares per year, totalling 230,874 hectares of native vegetation over the 15 year period of their study, of which 84 per cent was cleared from private land. Substantial reforestation occurred (69,380 hectares over the 15 year period), although this was almost entirely pine plantations, providing little biodiversity value. Woodgate and Black suggested that a hardwood industry and widespread agroforestry in Victoria were the most viable ways to address the problems created since European settlement in Australia. They suggested that if clearing continued at the rates they had witnessed in their study, no trees would remain on private land in Horsham and Mildura by 2029.

The study by Woodgate and Black coincided with the development of policies to end broad-scale clearing in Victoria, through the introduction of native vegetation protection provisions into the State Section of all Victorian planning schemes in 1989. These provisions provided a statutory policy context, required a permit from local councils for removing native vegetation on all lots over one hectare in size, and referral of applications to clear 10 hectares and above to the Victorian Department of Natural Resources and Environment, with some exemptions included. These provisions were aimed primarily at controlling native vegetation clearance on private land. Their effectiveness was monitored twice in the early 1990s in two reports by the Victorian Department of Natural Resources and Environment. These showed that vegetation clearance was reduced initially to about 2,200 hectares and then to about 1,900 hectares. Monitoring by the DSE (in various institutional forms) was reduced after 1993 and has been intermittently carried out since then on a national scale by the Australian Greenhouse Office.

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Native Vegetation Management Framework

More recently, the State government developed a Native Vegetation Management Framework to provide the policy and planning context for the protection or removal of remnant vegetation. A draft framework was released for public comment in August 2000 and the final Framework in 2002. The framework was incorporated into all Victorian planning schemes through the State Planning Policy Framework in July 2003 providing a statutory base for assessing planning applications under the Planning and Environment Act for clearing native vegetation. The framework goal is to reverse the long term decline in the extent and quality of native vegetation leading to net gain. In seeking to achieve net gain, the framework requires a reduction in losses in extent and quality of existing native vegetation and an increase in extent and quality through rehabilitation and revegetation. A three step approach is taken to applying the principle of net gain: avoidance of vegetation clearance; and if clearance cannot be avoided, minimisation of impacts and thirdly, offsetting losses. Net gain occurs where overall gains are greater than overall losses.

The framework is used to assess applications for a permit to clear vegetation and is applied through clauses 52.17 and 15.09 of planning schemes. Clause 15.09 of the State Planning Policy Framework provides the policy context where a permit is required to clear native vegetation and requires responsible authorities to have regard for the framework in making decisions on clearing applications. Clause 52.17 requires a planning permit for the removal, destruction or lopping of native vegetation subject to a range of exemptions. An extensive list of exemptions to the need to apply for a permit is contained in clause 52.17-6. These exemptions are designed to facilitate “normal domestic and rural practice” and allow clearing for this list of uses as of right (New exemptions in clause 52.17 were released by DPCD in September 2008, too late for consideration in this study).

Applications for clearing more than one hectare of vegetation which is depleted or of least concern, more than 0.5 ha of endangered, vulnerable or rare vegetation, or more than 15 trees smaller than 40 cm DBH or more than 5 trees bigger than 40 cm DBH, must be referred to the Department of Sustainability and Environment (DSE) in its capacity as a referral authority under the Planning and Environment Act. The responsible authority must refuse an application if the referral authority objects or must include any conditions specified by the referral authority.

In 2003, DSE developed the ‘habitat hectare approach’ as a method of assessing the quality of native vegetation (Parkes et al 2003). The habitat hectare method measures site condition and vegetation quality by multiplying the percentage of vegetation quality by the area, allocating a proportional score to a maximum of one habitat hectare for vegetation quality rated as 100 per cent. In determining the habitat hectare score, the quality of habitat is determined by assessing the site condition according to seven criteria (presence of large old trees, canopy cover, understory, regrowth, absence of weeks, litter and logs), and the ‘landscape context’ or viability of vegetation in a landscape (retention of broader ecological functions and linkages). The approach aimed to be rapid, objective, reliable and repeatable. There have been criticisms of the method and suggestions on ways to reduce the quantity and level of uncertainty around the approach. One concern is that it has proved to be more complicated and time-consuming than is practicable: a recent study by Lorimer (2008) indicated that the simpler DSE method for use on farms showed promise. With large datasets available and many years of experience by practitioners, it is perhaps time for a detailed review of the habitat hectare approach that will yield an improved method.

Both land protection and conservation significance criteria must be achieved in considering net gain. Land protection criteria include those for waterway protection, salinity, soil conservation, soil and land quality and productive capability. A range of criteria are used to assess the Conservation Significance native vegetation - the Bioregional Conservation Status of the EVC; the habitat hectare score; whether the vegetation is a threatened community or provides habitat for threatened flora or fauna; and other attributes for habitat or locations (eg sites with National Estate values, wetlands of

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Conservation Significance has 4 categories, “very high”, “high”, “medium” or “low”. For “very high” value conservation significance, clearing is not permitted unless exceptional circumstances apply; for “high” and “medium” clearing is generally not permitted; for “low” clearing may be permitted as part of an appropriate sustainable use.

If clearing is to be permitted, the following offsets must be provided: “substantial net gain” (ie at least 2 times the calculated loss in habitat hectares) for vegetation of “very high” conservation significance; “net gain” (ie at least 1.5 times the calculated loss in habitat hectares) of high significance; “equivalent gain” for medium and low significance. Offsets should follow the principle “like-for-like” offsets, that is, should not allow “inappropriate trade-offs” between high and low quality vegetation. For the loss of high quality vegetation, this approach is to be achieved by improving other high quality vegetation and generally allowing revegetation only for losses in low value vegetation. The framework also seeks “an adequate geographic link” between losses and offsets, such as the provision of an offset in the same catchment. The “like-for-like” principle is also applied through an assessment of the landscape role for vegetation.

Four types of offset gain have been identified (DSE 2006)5:

1. Prior management gain – ‘acknowledges actions to manage a freehold site since State-wide planning permit controls for native vegetation removal were introduced in 1989’
2. Security gain – ‘resulting from actions to enhance security of the on-going management and protection of native vegetation at the offset site, either by entering into an on-title agreement (eg Section 173) or by locating the offset on land that has greater security than the clearing site, or by transferring private land to a secure public conservation reserve’.
3. Maintenance gain – gain from commitments that contribute to the maintenance of the current vegetation quality over time (i.e. avoiding any decline) (eg foregoing rights to grazing or firewood collection)
4. Improvement gain – ‘gain resulting from management commitments beyond existing obligations under legislation to improve the current vegetation quality. Achieving improvement gain is predicated on maintenance commitments being already in place. For example, control of any threats such as grazing that could otherwise damage the native vegetation must already be agreed. Typical actions leading to an improvement gain include reducing or eliminating environmental weeds, enhancement planting or revegetation over a 10-year management period. If the vegetation is to be used as an offset, a commitment to then maintain the improvement gain (i.e. no subsequent decline in quality) will be required in perpetuity.’

Guidelines have been proposed by DSE for calculating their values on private and public land. Questions have arisen about the suitability and proposed application of some of these types of offset gain to contribute to overall net gain. Prior management gain, which is allocated 10% of the current habitat score, and security gain, which may attract 10-40% of the current habitat score depending upon the security arrangements, do not lead to a material contribution in quantity or quality of native vegetation on the ground as part of an offset ‘trade’. It is unclear if the other offset rules for Conservation Significance net gain ‘compensate’ and overall net gain is achieved. For example, for a medium to low Conservation Significance patch of vegetation where equivalent gain in habitat hectares is the target, it would be impossible to achieve ‘true’ gain because prior management and security gain (all offset sites must be secured formally) are only habitat hectares on paper. We recommend that DSE consider a study of the Framework and planning scheme controls and other guidelines (eg offset rules and requirements) to determine even if they were applied correctly would they lead to net gain and to what extent. This study would preclude the separate, but important issue, of applicability and enforcement of the rules to achieve net gain.

The adoption of the principle of net gain through offsets may lead to the loss of low value and even medium value vegetation. The use of inherent site condition as one criteria for assessment may lead to clearing particularly when linked to the use of offsets. While such issues are explored elsewhere

in this report, there are some other fundamental practical concerns about offsets. Incorrect interpretation and application of the planning scheme controls coupled with the lack of enforcement of clearing permit conditions and offset management plans makes the achievement of net gain difficult. Revegetation as an offset has widely recognised inadequacies, particularly the difficulty in recreating the original vegetation type (EVC) and the difficulties in maintaining replanted vegetation against long term threats (eg fire). Most local councils do not have the resources or access to systems to monitor agreements or permit conditions. Even if they did, there are hurdles to good management that need to be resolved. For example, offset sites can be proposed for local government areas other than the one that has the cleared site (ie within reason to be located anywhere inside a Bioregion). It is unlikely that a local council which issued permits has any jurisdiction to monitor and enforcement of agreements for offset sites located in another municipality. For these reasons, it is unlikely that the application of offset principles will lead to the achievement of net gain.

Catchment Management Authorities can contribute to the policy framework for the consideration of clearing applications through Catchment Management Strategies and Regional Native Vegetation Plans. Biodiversity Action Plans provide a more local level of policy. The State Planning Policy Framework requirement that responsible authorities should have regard to any relevant Regional Native Vegetation Plans when amending planning schemes and Municipal Strategic Statements and when considering a planning permit application under clause 52.17.

The system of planning measures to protect vegetation is multi-layered, complex, discretionary and often ineffective. This complexity makes it difficult and costly to interpret and apply the Framework, leads to inconsistent decision making particularly by local councils and VCAT, and the loss of vegetation. The Framework contains many qualified general statements which add to interpretation difficulties. The extensive list of exemptions allows unregulated clearing to continue. Many exemptions in clause 52.17 were broadly worded and difficult to monitor or enforce, though these shortcomings may have been partially addressed in new exemptions released in September 2008.

The Framework does not address institutional complexities, the difficulties in using the Framework, the inadequate use by local councils of the strategic planning tools available to them in the VPPs, and the inconsistent application of the Framework.