



SUBMISSION BY NILLUMBIK PALS (Pro Active Landowners) ON THE REVIEW BY THE DEPARTMENT OF ENVIRONMENT, LAND, WATER AND PLANNING (DELWP) OF

VICTORIA'S NATIVE VEGETATION PERMITTED CLEARING REGULATIONS AND

VICTORIA'S BIODIVERSITY STRATEGY 2016 REVIEW

MARCH 2017

A once in a generation opportunity to redress imbalance in environmental control imposition

Nillumbik PALS present compelling information demanding that the primacy of human life and human safety be prioritised above environmental protection and imposition of land management restrictions - and that the Offset Scheme be overhauled or dismantled as a mechanism to impose compliance.

Nillumbik PALs - Pro Active Landowners

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1. INTRODUCTION

Environmental policy is an area where Government must consider responses that are in the best interests of the environment and of the community. To do this, it must be mindful of the specific characteristics of the environment it regulates and keep pace with the changing needs of communities. This submission on the Victorian Government's current review of the State's native vegetation permitted clearing regulations (to ensure they sensibly protect sensitive native vegetation), has been developed with consideration of both the intrinsic value of biodiversity and the fire prone nature of some of the landscape that these draft provisions purport and propose to regulate.

A legal system confers power upon executive agencies to regulate activities that produce consequences that society wishes to promote, such as biodiversity conservation. The acceptance, however, of an absolute environmental right in Australian law is rare. Conceptually, such a right would render all other matters – social impacts, economics, and equity – irrelevant. Instead, Australia applies a utilitarian approach to environmental law whereby decisions are meant to be made based on the welfare of the community at large – it is a balancing of equities as is reasonable under a given set of circumstances.¹ In this way the exercise of one power is limited by its almost inevitable conflict with other powers within the same legal system. Traditionally, in the realm of environmental law, this has been in relation to the owners of these lands or components of the environment as manifested in terms of a proprietary interest. The situation in the peri-urban region of Melbourne is however significantly more serious. It is not a case of private ownership rights vetted against the conservation of resources but, due to the potential for catastrophic fire events, includes also the discipline of human rights law. In this regard, under common law, public sector bodies retain a general duty of care in relation to the operational exercise of their statutory powers.²

Within Victoria, environmental protection vis-à-vis native vegetation clearing must consider the impacts it may have upon human rights in the context of bushfire vulnerability.

Human rights recognise the humanity and dignity of individual persons and under both our philosophical and legal systems are universal and unassailable.

These include the right to:

- Life, liberty and security of person;
- Equality before the law;
- To own property.³

¹ Fisher, *Australian Environmental law; Norms, Principles and Rules* (Thomson Reuters, Sydney, 2014).

² As confirmed by the High Court in *Sydney Water Commission v Turano* (2009) 168 GLERA 451.

³ *Universal Declaration of Human Rights* 1948, the *International Covenant on Civil and Political Rights* 1966, and the *International Covenant on Economic, Social and Cultural Rights* 1966.

2. REGULATION THROUGH VICTORIAN PLANNING PROVISIONS (VPP)

The draft Victorian Planning Provisions native vegetation clearing regulations seek to maintain high levels of biodiversity and limit the clearing of native vegetation.

Whilst an admirable goal, the prescriptive nature of these measures and interdisciplinary impacts mean that they should be subject to ongoing parliamentary scrutiny. Ministerial preparation and unilateral approval of VPP circumvents some of the tenets of democracy through a lack of open debate and scrutiny that standard legislative procedures provide. When originally introduced into parliament these provisions were passed under an expectation that “planning and responsible authorities will endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable use and development of the land.”⁴

The implementation of a policy through a legal system works to eliminate choice. In the context of land clearing regulations and bushfire this is an enormous responsibility as it asks for a value judgement of the importance of conservation against (in extreme environments) the loss of human life. The peri-urban area of Melbourne is unequivocally acknowledged as such an environment. It is essential in making such a judgement to give adequate consideration to the tenets of human rights.

Indeed, the above human rights are expressed also in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). A consequence of the native vegetation clearing regulations being created under VPP means that these changes are not subject to the trigger provisions under the *Charter of Human Rights and Responsibilities Act 2006* for a statement as per section 28. Irrespective, from a legal standpoint, under the *Charter of Human Rights and Responsibilities Act 2006* “it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.”⁵ A moral obligation also exists to ensure these Provisions do not violate these same principles of human rights.

“From an ethical standpoint, organisations involved in conservation share a responsibility to understand and address potential negative impacts of conservation action on people whose rights or livelihoods may be affected. Conversely, not being explicitly cognisant of the rights of all actors in an area can create or fuel conflicts over land, water and other resources which can undermine conservation efforts.”⁶

⁴ Introduction to the Victorian State Planning Policy Framework.

⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s23(1).

⁶ Springer and Campese (2011) “Conservation and Human Rights: Key Issues and Contexts” (IUCN) pp6.

Victoria's Biodiversity Strategy and Victorian Planning Provisions sit within the context of a whole of government role to protect and preserve human life first and foremost.

Within that context the Government of Victoria has a series of obligations related to planning, biodiversity, conservation and habitat protection. These include:

- primary responsibility for the 7.7 million hectares of public land in Victoria;
- to conservatively impose and impinge upon private property rights of private citizens;
- follow principles of intergenerational equity, sustainable development and a precautionary approach;
- develop a clear and coherent understanding of biodiversity and the effect different fire regimes have on the landscape;
- minimise the frequency and severity of fire events through land and fuel management strategies;
- are subservient proposed planning amendments to those covered by the Bushfire Management Overlay and properties covered by this overlay are excluded from the Biodiversity and Native Vegetation proposed amendments; and
- achieve a balance between human life and biodiversity conservation.

In response to the complexities inherent in this scenario, traditional views of the power to own and the power to regulate need to be replaced by the notion of responsive regulation.⁷ The current Victorian model is an antiquated command and control scheme of direct regulation. It places a negative duty on landowners, (through the prohibition of certain activities) and overlays this with the power to confer a permit for the prohibited activity as a rule of competence. Under such a regime, effective management is sacrificed in the name of regulation. The literature for over two decades has denounced this approach of negative regulation as an ineffective mechanism to affect vegetation clearing regulations.⁸

⁷ Fisher, *Australian Environmental law; Norms, Principles and Rules* (Thomson Reuters, Sydney, 2014). 8.30 p215

⁸ Farrier "Vegetation Conservation: the planning system as a vehicle for the regulation of broad acre agricultural land clearing" (1991) 18 MULR 26.

Instead, the promotion of the ethic of conservation must be paired with the practical necessity of a stewardship approach. Hereunder a positive duty is conferred upon landowners to conserve native vegetation. This, as occurs under the *Catchment and Land Protection Act 1994*, does not necessarily result in an unenforceable regulation. Rather it removes a substantial regulatory burden from both the bureaucracy and the landowner in that so long as they act within the law there is no necessary action, but as soon as the law is breached a series of triggers are activated whereby land use or management activities may become prohibited or regulated or particular rehabilitation actions required to be taken.⁹ In this way a statutory duty of care for the protection of biodiversity is created.¹⁰

3. BUSHFIRE IN THE NILLUMBIK CONTEXT

Rural Nillumbik was first permanently settled in the 1840's. At this time, the broader area was a mix of pasture and woodland, and was routinely deliberately burned by indigenous communities who then used the pasturelands as hunting grounds for kangaroo. More than 170 years later the area is still permanently settled, is a mix of pasture and woodland and is home to more than 19,000 people. Most of the area is covered by a Bushfire Management Overlay. The area is one of the most densely wooded, heavily populated most bushfire prone areas on earth.¹¹

In February 2009, bushfire caused the death of 173 Victorians including 125 residents and landowners in rural Nillumbik. A Royal Commission was appointed to investigate and report on the fires and this commission published their report findings and recommendations in July 2010. Recommendations included planning and building controls and the commitment by all levels of community and government to the protection of human life as being the overriding objective of government and agencies in Victoria.

On Black Saturday in February 2009, the Kangaroo Ground Incident Control Centre calculated a potential fatality estimate based on fire and weather behaviour on that day of thousands of members of the rural Nillumbik and South East Victorian community. This estimate was later reinforced by fire expert testimony in the Royal Commission.¹² Eight years on it is of the utmost concern and gravity to rural Nillumbik landowners and tenants that government emergency services action that provides for the safety of residents in high bushfire danger areas is deficient and public landholdings are not maintained with bushfire preparedness in mind.

⁹ As would occur via a land management notice, *Catchment and Land Protection Act 1994* (Vic), s37 & 38.

¹⁰ Bates, *A Duty of Care for the Protection of Biodiversity on Land*. Report to the Productivity Commission, (2001).

¹¹ Russell-Smith et al "Bushfires "down-under": Patterns and implications of contemporary landscape burning: *International Journal of Wildland Fires* 16 (2007); Bowman et al "Fire in the Earth System" *Science* 324 (2009);

¹² Royal Commission into the Victorian Bushfires of 2009 (2010).

Of equal gravity is that government environmental services propose to exacerbate the current risk to human life and property by imposing expansive, expensive and onerous permitting requirements on private landowners so that private landholdings will also not be able to be appropriately managed with bushfire preparedness in mind.

The Commission is concerned that the State has maintained a minimalist approach to prescribed burning despite a number of recent official or independent reports and inquiries, all of which have recommended increasing the prescribed burning program. The State has allowed the forests to continue accumulating excessive fuel loads. Not dealing with this problem on a long-term and programmed basis means that fuel levels continue to increase, adding to the intensity of bushfires that inevitably eventuate and placing fire fighters and communities at greater future risk. Royal

In addition to the exacerbation of bushfire risk, of even greater concern are the “perfect storm” conditions being created by that exacerbation in concert with a realignment of the urban growth boundary and the realignment of the volunteer CFA boundaries where rural communities rely for vital bushfire protection, mitigation and vital surge capacity provided by the current CFA Command and control structure.

4. BUSHFIRE AND VEGETATION CLEARING AS PLANNING RESPONSIBILITY

Fire is a reducible risk. In the same way that building regulations in earthquake prone zones offer some protection, harm minimisation mechanisms can be applied to fire prone areas in Australia. Tentative steps that were taken towards this aim and anticipatory policy in Victoria in the wake of the 2009 bushfires seem to have stalled.

There is a constant and ongoing tension between managing the risk to human life and the environment. This has not changed. Perceived risk is not always the same as actual. As acknowledged by COAG, burns at the wrong intensity or frequency, or the accumulation of too much native vegetation of a highly flammable nature will prove detrimental to biodiversity.

“A range of threats to native vegetation can be dealt with through planning and management actions, such as fire. Many native vegetation communities rely on particular fire frequency, intensity and seasonality for their long-term health, recruitment and survival. Larger human populations living in fire-prone areas have increased pressure to establish artificial fire and fuel reduction regimes that provide increased protection from wildfire for communities living in fire-prone areas. Changed fire regimes, post-European arrival in Australia, have had varying effects on native vegetation cover, with fire affecting the species composition, vegetation coverage and fuel load present in natural areas.

Managing these areas presents region-wide challenges to protecting both ecosystem health and human safety and property.”¹³ Understanding and appreciating the varying effects of fires, especially of forest fires, on the environment, known as pyro diversity should be a key consideration in the development, formulation and review of any environmental regulation regime which may have the unintended consequence of exacerbating risk to human life from bushfire.

Bushfire is a part of life in rural Nillumbik. Taking personal responsibility for preparing properties appropriately each year encourages and develops a level of resilience in the local population, and creates a sense of local camaraderie that is a small but important part of rural and peri-urban living. It is important that government contributes positively towards this community resilience, and provides for the ongoing safety and resilience of these rural and peri-urban communities, as it does for all other Victorians. In this way, government can provide leadership and fulfill its obligations as the community seeks to fulfill personal responsibility and demonstrate community leadership.

Central to the context of these governmental roles is the “Australian” context within which they operate. That is, the way in which government policy exists in our environment and includes the concept of mutual obligation. This concept applies to environmental and bushfire policy. It maintains that citizens are not passive in the way in which government services evolve, citizens are in fact partners in the development, implementation and ongoing management of these services.

Within the context of bushfire preparedness and defence, this partnership applies to the preparation of public and private landholdings where government bears the primary responsibility for the management of public landholdings with regard fire preparedness, and private landowners bear the primary responsibility for the management of private landholdings with regards to fire preparedness.

This partnership is consistent with the methodology of co-design of government policy, strategy, legislation, regulation and services which is currently being incorporated into the Australian public sector at all levels of government.

Many Nillumbik residents would do little clearing of vegetation at all were they not terrified that the native vegetative undergrowth, much of which is not endemic to the region, will build up and result in a catastrophic fire event that will have catastrophic impacts on people, property, flora and fauna. Historically, the view of rural living has been that “whoever owns the fuel owns the fire”. This means that the landowner owns the fuel risk on their property, and is primarily responsible for determining whether a fire can spread, or how intense it will be.

¹³ COAG, *Australia's Native Vegetation Framework: A National Framework to Guide the Ecologically Sustainable Management of Australia's Native Vegetation*. (2012). Standing Council on Environment and Water.

They have a community duty and obligation to protect themselves and their neighbours. Regulatory removal of allowances for adequate clearing and fire preparedness shifts the burden of responsibility from the landowner, to state and local government. DELWP now own the responsibility for ground fuel and therefore fire.

The problem of this gradual shift in responsibility is that the power, control, obligation and ability of landowners is eroded and shifted to government, which then does not fulfill the responsibility it holds (as is evidenced by the failure to meet planned burn targets every year). In addition to this failure, landowners on rural and peri-urban acreage are disempowered and citizens are not able to protect themselves, their families, properties or communities as other Victorian citizens do.

Moreover a differential exists between Victorian Government policy and the practices of Victorian Government departments. Victorian Government Emergency Services policy supports the prioritisation of human life with a clear set of goals and objectives to demonstrate this – primarily relating to prescribed burns on public landholdings. These goals and objectives are consistently not achieved. At the same time Victorian Government Environment and Planning policy champions the importance of the environment and seeks to impose complex, administratively burdensome and expensive permitting requirements on private landowners for the routine fire preparedness activities on rural landholdings. The failure of emergency planning response on public landholdings coupled with the imposition of further regulation impacting upon the management of maintenance on private landholdings across rural Victoria creates the situation where neither public or private landholdings are appropriately fire ready.

This creates an un-necessary increased risk of frequent and severe fire events and an escalation in the risk of a loss of human life and property. The 2010 report of the Royal Commission into the 2009 Victorian Bushfires recommended a rolling 5% annual target for prescribed burns. This target has not been met since 2010, and has consistently not been met since the mid 1980's.

In February 2017 it was reported that the Victorian Government proposed the imminent restructure of the Country Fire Authority into two distinct Permanent and Volunteer Fire Services. If the full conditions of the proposed CFA-UFU Enterprise Bargaining Agreement are implemented with the Requirement that seven paid firefighters must attend an Incident before it is officially recognised, and if there is a rationalisation of Fire Stations based on the Standard Response Time, there is a possibility not only of the reduction of the number of brigades in rural Nillumbik from 13 to 4, but also in the mass desertion from the CFA of legions of volunteers, on whom rural Nillumbik residents and those in neighbouring Shires rely for bushfire protection and safety through their combined centuries of experience. A significant cross section of the rural Nillumbik are justifiably highly concerned at the "perfect storm" about to be wrought on our community by this systemic disruption to our largely volunteer CFA coupled with the strengthening of the native vegetation permitted clearing regulation and its compliance and enforcement regime.

It is only in recent years that the broader environmental community has felt comfortable openly acknowledging that there is an interface and sometimes conflict between human rights and conservation regulation. Whilst this has mostly centered on indigenous rights, it is equally applicable to communities that own private landholdings and live in high-risk natural disaster areas, like rural Nillumbik. This is especially so in light of human induced climate change and the impact this will have upon these areas.

The Climate Change Council 2017 Report,¹⁴

“Climate Change and the Victoria Bushfire Threat” provides an unequivocal warning to all Victorians about bushfire threat in Victoria. This warning is that even if the policy regime of 5% of public landholdings undergoing prescribed burns each year is met, and even if private landowners are able to prepare private landholdings with fire preparedness in mind, peri-urban and rural Victoria can expect that in future climate change effects in Victoria will include:

- Risk of fatalities and poor health outcomes due to bushfire
- Increase frequency, intensity and severity of bushfire
- Rapid ecosystem changes caused by bushfire
- Compromised city water infrastructure due to bushfire
- Longer fire season
- More pressure on emergency services resources to manage and then fight bushfire and
- Significant increase in the economic cost of bushfire.

This warning is not new, and all key findings are predictable. Consideration of climate change in Victoria's planning and regulatory processes under the *Planning and Environment Act 1987* are virtually mandatory¹⁵ due to plans and procedures to incorporate the issue of climate change into decision making.¹⁶ Such consideration is absent from these proposed native vegetation permitted clearing regulations and biodiversity strategy review (2016).

¹⁴ <https://www.climatecouncil.org.au/vicbushfires>

¹⁵ Fisher, *Australian Environmental law; Norms, Principles and Rules* (Thomson Reuters, Sydney, 2014).

¹⁶ VCAT determination on the allocation of groundwater resources referred to the relevance of the precautionary principle, the serious and potentially irreversible damage, scientific uncertainty and in particular identified as a key factor the influence of climate change. *Alanvale Pty Led v Southern Rural Water* [2010] VCAT 480.

5. NILLUMBIK PRO ACTIVE LANDOWNERS (PALS)

Nillumbik Pro Active Landowners (PALS) is a community based rural land owner & tenancy advocacy group in the northern Melbourne peri-urban region. PALS represent about 2,000 residents mainly from rural Nillumbik, which makes up about 30% of all rural Nillumbik properties and residents. PALS formed in May 2016 in response to a lack of community engagement by Nillumbik Shire Council ("NSC") on proposed planning scheme amendments C81 and C101, which were local embodiments of laws which were proposed to be similar in effect to the State Native Vegetation Permitted Clearing Regulations. It should be noted that both sets of planning amendments no longer exist and have been resoundingly rejected by the landowners on whom they would have had the greatest impact and imposition. The same appetite for rejection is demonstrated by this very submission made on behalf of the rural Nillumbik landowners, who harbour grave fears not only for locals but for all Victorians posed by the State Native Vegetation Permitted Clearing Regulations.

COMPREHENSIVE REJECTION OF SIMILAR LOCAL LAWS

1. Proposed Nillumbik Shire Planning Scheme Amendment C101

A Nillumbik PALS member, Max Parsons of Kangaroo Ground, took legal action against NSC at VCAT and on 11 November 2016 VCAT declared in *Parsons v Nillumbik SC [2016] VCAT 1898*, as foreshadowed by Parsons, that NSC failed to comply with *s28 of The Planning and Environment Act 1987* in not notifying the Minister for Planning of the abandonment of by NSC of C101 – after a binding 5-2 vote of the NSC Policy and Services Committee seven months previously. The abandonment had come after landowners lobbied vociferously about the flawed development of the proposed amendment and about its potential for exacerbation of bushfire risk, amongst other concerns relating to the interference with landowner rights and to the imposition of controls regarding routine land management activities.

After a subsequent investigation commissioned by the newly elected Nillumbik Shire Council in late 2016 and presented in February 2017 by Christopher Wren QC, one of a series of serious recommendations made in the *Executive Summary of the Investigation into the abandonment of Nillumbik Planning Scheme Amendment C101* was:

“that consideration be given by the incoming CEO to a review of Council's vegetation offset programme in the context of the programme's transparency and accountability “

This, for an aspect of the environmental law development regime that was not an initial subject of the Terms of Reference of the Investigation. This flagged the vegetation offset programme as a concern for Nillumbik PALS at a local level, which has now expanded to a State level, as more attention has been drawn to it. It appears to be a source of prospective or actually rampant distortion, effective state sanctioned punitive extortion and corrupt administration.

2. Proposed Nillumbik Shire Planning Scheme Amendment C81

The other proposed planning amendment (C81) was refused approval by the Minister for Planning Richard Wynne MP on 12 February 2017 after going through years of planning scheme amendment development processes. In refusing to approve C81, which had gone through the entire planning amendment process and which had been passed to the Minister for Planning for final determination on 24 May 2016, the Minister delivered a scathing rebuke to the former Nillumbik Shire Council and in particular to its planning department, attributing his refusal to approve as follows:

“After careful consideration, I have decided to refuse to approve Amendment C81. The spatial application and content of the Schedules to the Significant Landscape Overlay are an inadequate application of the Victorian Planning Provisions with respect to the purpose, geographic application and form and content. Overall, I am not satisfied that the amendment would result in a good planning outcome because the amendment includes duplications, contradictions and inconsistencies with a number of existing provisions within the Nillumbik Planning Scheme.”

A copy of the letter from the Minister for Planning to the Mayor of Nillumbik is to be found at this link: <https://app.box.com/s/45nlt5wx25ssz74cmlkhy8xp8ppnkovo>

The refusal to approve attests to the poor planning outcomes and we assert that as the proposed planning scheme amendments C81 and C101 virtually mirror many of the details of the State Native Vegetation Permitted Clearing Regulations, the Victorian Government could not credibly nor responsibly impose similar regulation in the face of the rejections of C81 and C101 by the most fire prone, highly populated, highly vegetated zones on Earth.

It is apparent that the flaws in the initial consultation processes in which the Nillumbik Shire Council engaged while developing the now defunct local laws are also mirrored in the approach taken by DELWP in consulting with select environmental groups in the development of the State Native Vegetation Permitted Clearing Regulations. In fact it appears that the unbalanced, selective method of consultation demonstrated in Nillumbik seems to be endemic when it comes to the development of restrictive environmental controls. Those materially and personally impacted by proposed environmental laws seem to be deliberately excluded from or marginalised in the process. This exclusion illegitimises the entire regime and should lead to its complete dismantling and re-engineering.

It is also of concern to Nillumbik PALS that it understands that Nillumbik Shire Council planning and/or environmental officers who from the C81 and C101 experiences appear to demonstrate planning or procedural ineptitude – or possibly worse – were part of the reference group involved in the drafting of the State Native Vegetation Permitted Clearing Regulations. Given the proven problems with the entire suite of the similar Nillumbik local laws, it is highly unsatisfactory to have the same people involved in the State regime drafting.

ELECTORAL ACTION and SUBMISSION CONTEXT

Nillumbik PALS as a group has gained momentum as Nillumbik Shire Council repeatedly failed to act in the interests of rural residents and ratepayers. The era of those failures is coming to an end as in the 2016 Local Council elections, 5 of the 7 Councillors were elected on a platform that was supported by PALS.

At present PALS has five different active communication channels (meeting, phone, mail, email and Facebook) and has raised funds in excess of \$80,000, used to fund representation at a Planning Panel Directions Hearing and the successful Parsons VCAT challenge to the legality of NSC actions and decisions. Some funding raised was also used to produce a PAL's how to vote card at the recent local government elections. PALS experience is that collective action offers the only effective means of engagement.

Nillumbik Pro Active Landowners (PALs) is of the view that it is imperative that Victorian Government environmental policy:

1. supports and is consistent with Victorian Government emergency services policy;
2. recognises and reflects the core role of government being to protect and serve citizens first, as its highest priority; and
3. reflects the prioritisation of the safety of all Victorians (including water infrastructure) in all policy, strategy, and regulation.

This is the context within which the PALs submission is made.

6. VICTORIA'S BIODIVERSITY STRATEGY (2016 REVIEW)

PALs was formed at the end of the period of review of Victoria's Biodiversity Strategy in 2016. As a consequence we had no knowledge of a biodiversity strategy, or a review of a biodiversity strategy, were not consulted with, and had no appreciation of the likely impact that this strategy was planned to have on private landholdings in rural Nillumbik.

PALs recognise and support the intrinsic value of native vegetation and in particular endangered species. We do however have concerns as to the viability and intent of some aspects of these draft regulatory amendments. World class native vegetation laws should not be confused with highly restrictive native vegetation laws.

PALs are concerned that significant deleterious impacts on the community and the environment have been overlooked in the drafting of this strategy. The negative impacts are also reflected in our concerns regarding the composition of the stakeholder reference group. We are very concerned that the stakeholder reference group does not include the Country Fire Authority (CFA). Also, the stakeholder reference group does not include the emergency services. The stakeholder reference group does not include anyone tasked with representing green wedge peri-urban landowners. Given the extent to which this key stakeholder group is proposed to be impacted on, this lack of representation erodes and impugns the legitimacy of the development of the strategy and any resultant regulation or legislation.

It may be possible that such some meagre or cursory representation may have occurred at a workshop, however this appears to have been ineffective as the review does not adequately consider the needs, interests, priorities and preferences of rural Nillumbik landowners who are PALs members or most rural landowners in rural Nillumbik and the broader Green Wedge areas and other fire prone zones statewide. PALS believes that the desirability, practicality and implications of significantly increasing the burden of bureaucracy, administration, costs and level of mortal peril and personal injury on private citizens should be appropriately prioritised and considered.

The 2009 Victorian Bushfires Royal Commission (also known as the Black Saturday Royal Commission) recommended that “bushfire risk should be accounted for in the application of controls on clearing native vegetation”. The logical extrapolation is an intent that bushfire risk should also be considered in the drafting of any amended or new vegetation clearing controls. The creation of a biodiversity strategy with no real consideration of the impacts of fire on this region is negligent in terms of the impact on both the community and the environment. It is a strategy that pictures the environment as a static construct. It fails to account for the fluid nature of the environment and the role of pyro diversity, or the necessary management strategies and regulation that will reduce the likelihood of a catastrophic fire event. Any moves to protect non-endemic flora, and in so doing heightening the risk of bushfire in the region, needs to be assessed against the impact this may have on the region’s endemic biodiversity.

The Black Saturday Royal Commission acknowledged that although we live in a fire prone environment, differing fire regimes have different positive and negative impacts on native flora and fauna. It called for increased research on the inter-relationship between bushfire and biodiversity so that prescribed burns can also meet conservation objectives. These issues require consideration in the native vegetation permitted clearing strategy which PALS considers as fundamentally flawed to date.

The biodiversity strategy review appears inconsistent with current Commonwealth Government directions¹⁷, which seek to reduce duplication, bureaucracy, administration and costs on Australian citizens in rural areas. Moreover costing of this strategy and its impacts on local citizens and local government has been given inadequate attention in the review. It is understood that the Victorian Government (via the interface councils) has committed to not increasing the cost burden upon councils and to fully fund any legislative and regulatory changes that will have any impact on council. This does not appear to have occurred. Nillumbik is the highest taxed Shire in Victoria and rural residents and PALS members are concerned at the direct cost that this strategy will place on landowners, and also concerned at the hidden costs that may be imposed to comply with and administer these schemes and that these may be imposed upon us by further rates increases, consultant fees and permit application costs. In accordance with the commitment of the Victorian Government to Local Government, in particular the Interface Councils, a full costing of this strategy and a commitment by government to fund all increases in regulatory burdens should be undertaken and fulfilled prior to any changes occurring.

¹⁷ Productivity Commission inquiry into the regulation of Australian Agriculture (2016)

The review has failed to consider:

- the increase risk of a catastrophic bushfire event
- the increase in risk of fire event frequency
- the safety of rural residents
- the impact of regulatory and strategy change on human rights
- the impact of fire on indigenous flora and fauna
- appropriate stakeholder representation
- the increased cost burden and how this burden would be funded within the context of the Victorian Government committing to fully funding any strategies impacting upon interface councils (and assumedly their citizens) and
- the increased bureaucratic and administration burden, and how this would be accommodated within the context of the Commonwealth's commitment to reduce bureaucracy and administration for rural Australians

It appears that the strategy has a number of gaps that have yet to be addressed. PALs is concerned that proposed amendments to the Victorian Planning Provisions are likely to replicate the review failures, ignore current government directions and certainly, the Department of Environment, Land, Water and Planning proposed amendments to the Victorian Planning Provisions:

12 Environmental and Landscape Values

52.16 Native Vegetation Precinct Plan and

52.17 Native Vegetation, as they currently stand, support this view.

PALs are of the view that the protection of rural areas of Victoria that enjoy high levels of biodiversity and comprise high value native vegetation is best provided by citizens who reside in these areas. The Victorian Government appears to support this view, and Plan Melbourne (including Plan Melbourne Refresh) appears to support private landowners voluntarily listing their properties under heritage for nature as being an appropriate response to protect and preserve native vegetation and biodiversity.

Recognition of the interdependency between human rights and the environment requires the balancing of two valid objectives. We note that there is no consensus as to what the correct balance is, and to have functional and practical policy, both elements must be considered. We also insist that the current Victorian Government practice of attempting to separate safety and property rights from consideration of biodiversity and native vegetation is flawed. Ongoing actions and policies which undermine the safety and wellbeing of rural communities will lead, and already is leading to concomitant undermining of conservation objectives.

At a procedural level many of the requirements for the commissioning and substance of fauna reports detailing numerous requirements including but not limited to: variety of species, the level of vulnerability or endangerment of particular species, last reported sighting and prospect of inhabitation of a particular area and arcane calculation of a commercial value of various species of fauna, appear to have been specified in order to ensure the practical requirement to engage a range of ecological contractors as no lay person would have access to the required information to any realistic degree. The specification of the fauna listings is practically senseless in the actual protection of biodiversity and lacks any demonstrable scientific value or rigour.

7. FORCED REMOVAL FROM THE LAND

The issue of whether people should be permitted to reside in fire prone areas like rural Nillumbik is not relevant for the development of biodiversity and native vegetation policy, strategy and regulation. Rural Nillumbik has been continually settled for more than 170 years. The role of policy, strategy and regulation within this context is to provide for the safety of these communities, as indeed government provides and plans for the safety of all other Victorian communities. To ignore or mishandle this role borders on discrimination.

From a policy perspective it could be reasonably extrapolated that the goal of some native vegetation clearing regulations is to encourage the permanent departure of residents from properties in bushfire prone areas. It is these residents who protect much of suburban Melbourne, through their presence and maintenance of land, combined with the fact that they constitute the bulk of the critical and highly trained volunteer fire fighting force. Without such outlying communities, localities such as Eltham and Warrandyte would be situated at the fire front. The stealth removal of long resident population or complication of provisions that those in fire prone peri-urban areas of Melbourne consider to be vital is not a responsible goal for vegetation clearing legislation.

This is particularly the case as such provisions do not have the power to remove people from their land or give them any other options for livelihood, only to increase the risk they face from bushfire as imposed by increasingly stringent native vegetation clearing regulations. If lands were to be subsumed into public tenure then a robust democratic process would need to be followed, including engagement, assessment, discussion, debate, and evidentiary details contemplated, as occurred in the aftermath of Ash Wednesday.

Indeed the current system of zoning land as residential blocks of small farm holdings and the government's policy of still collecting taxation in the form of both stamp duty and rates acts as a default endorsement of the dwelling of people on these areas of land. The lack of any discussion of the purchasing of those lands is an overt display of the government's validation of these as residential parcels. Such an acknowledgement provides a concomitant responsibility to ensure that legislation protects the safety and human rights of people living in these areas in the same way as it does any other of its citizens.

8. OVERARCHING FEEDBACK* See Addendum

PALS is unable to support the Department of Environment, Land, Water and Planning review of the native vegetation and proposed regulations changes due to the many concerns we have. The current and proposed regulation and guidelines fail to appropriately promote human life as the core priority of government and in the context of a fire prone environment, they fail to meet the requirements of the statement of compatibility in the Victorian Human Rights legislation. All PALS members are impacted upon by current regime and by the proposed amended regulations and enhanced enforcement regime, if they become effective.

PALS did not exist at the time of the first stages of the review of the native vegetation permitted clearing regulations. Since becoming aware of it and starting to address it in the preparation of this submission, PALS has held discussions with stakeholders who have revealed disturbing facts in relation to the composition and management of the purported stakeholder workshops. It has been reliably reported and independently verified that (for example) in the Bendigo area (population approximately 95,000) there were 2 such workshops which had provision for 100 attendees. Places were difficult to secure. A straw poll was conducted of the attendees and it was found that the vast majority of attendees were from environmental groups. Landowner representation was scant. It was reported that the attendees from the "green groups" were present as a result of direct personal invitation from DELWP. No such invitations were reported to have been received by landowner groups. This lack of appropriate engagement of a wide cross section of potentially affected stakeholders illegitimizes the development and outcomes of the review. PALS are determined to work with affected stakeholders to see that a root and branch review is instigated to correct this perilous imbalance.

Victorian Planning Provisions (VPP) exist within the context of social, economic and environmental impacts on Victorians, and in particular within the context of the social, economic and environmental impacts of VPP on communities who will be impacted upon by them. There is no evidence impacted community assessment has been considered in the VPP proposed amendments and this needs to occur.

Strategy and regulation for the protection of biodiversity and native vegetation should:

- limit its impact and focus on the protection of areas that have high levels of biodiversity and high value native vegetation;
- acknowledge that there is a difference between protecting sensitive and high value native vegetation, which is the purpose of the proposed provision, and protecting virtually all native vegetation, which is the effect of the proposed provision.
- remove "minimum extent necessary" references to management and removal of native vegetation on crown land, emergency works, fire protection, pest animal burrows, road safety, surveying and utility installation and management.

The terminology “minimum extent necessary” has been included in clauses 52.16 and 52.17 in regard to the management and removal of native vegetation on crown land, emergency works, fire protection, pest animal burrows, road safety, surveying and utility installation and management, fencing, new buildings and works and dwellings in the Farming Zone and Rural Activity Zone, surveying and utility installation and management, personal use and weeds. This value (or potentially scientific) judgement is one informed not by the law but by the worldview of those adjudicating it. It is tautologous to the basic spirit of the exemptions provided and has no place in these regulations, providing only fodder for VCAT hearings and no functional benefit.

We are also concerned with the use of the “minimum extent necessary” terminology and its interface with other legislative burdens placed under other regimes. Areas requiring management of native vegetation have been long recognised to also need to “be managed to keep down weeds and pests and to control wildfires.”¹⁸ Such a need is recognised in, for example the *Catchment and Land Protection Act 1994* which creates a positive duty upon landowners to “take all reasonable steps to – ...(d) eradicate regionally protected weeds; (e) prevent the growth and spread of regionally controlled weeds; and (f) prevent the spread of, and as far as possible, eradicate, established pest animals.”¹⁹ There is a significant gap between the duty to act to the “minimum extent necessary” and the duty to “take all reasonable steps”.

Finally the VPP clauses and guideline need to be rewritten so that they do not read like a punishment imposed on landowners of property which has native vegetation on it. This is extremely important if the department is trying to protect, preserve and promote native vegetation recovery. As this currently reads, PALs may be forced to recommend members stop planting native vegetation locally, and support the planting of exotic plants to reduce the ongoing and long term burden of property management and maintenance costs and responsibilities experienced by landowners. This would, from the perspective of both residents and native vegetation, be disappointing, however it would have the effect of reducing costs and permit obligations into the future.

The key, core changes and areas to be addressed which PALs requires of the proposed native vegetation permitted clearing regulation review concern the areas of:

1. Fire management and rural/peri-urban community safety
2. Administrative strategy
3. Procedural development, particularly appropriate affected stakeholder consultation, and
4. Mapping and scientific accuracy.

¹⁸ Farrier “Regulation of Land Use: Coercion or Consensus? 1991 *Current issues in criminal justice* 95.

¹⁹ *Catchment and Land Protection Act 1994* (Vic), s20(1).

8.1 FIRE MANAGEMENT

The Victorian government has a responsibility to minimise the frequency and severity of fire events through land and fuel management strategies including prescribed and planned burns, the judicious use of fire breaks, the presence of sufficient appropriately skilled emergency services staff and equipment and the measured use of planning controls to ensure the appropriate siting and construction of homes in new areas. While not the appropriate forum for many of these activities, these regulations should act to ensure they do not impinge on the conduct of these other regimes.

Moreover these guidelines should recognise that inappropriate fire regimes are listed as a threat to native vegetation by the Commonwealth Government. COAG states that: "changed fire regimes have had varying effects on native vegetation, with fire affecting the species composition, vegetation coverage and fuel load. Native vegetation types differ markedly in response to fire and can be impacted if fires are inappropriately frequent or infrequent, unseasonal or of undesirable intensity or extent."²⁰

PALS request the following changes:

- Review the policy and procedural basis for the entire regime with a refocus on the primacy of human life over the protection of native vegetation.
- Review the stakeholder reference group to better reflect the diverse range of interest groups on whom the regulation will impact.
- Readvertise and arrange a State-wide program of additional stakeholder forums with attendance required by landowner and land management groups for regulatory development legitimacy to be assured. DELWP should be required to actively engage with landowners in relation to the regulation regime.
- Strategy and regulation to require road side reserves to be actively maintained by responsible agencies to provide for the safety of residents in areas covered by Bushfire Management Overlay. (The Shire of Nillumbik historically has not been good at clearing roadsides of noxious weeds or prosecuting people who allow noxious weeds to take over their property. In fact, it has routinely done the reverse and actually prosecuted people who attempt to "do the right thing" by removing noxious weeds from their property and improving fire prevention. The proposed changes to the Native Vegetation Permitted Clearing guidelines will make it even harder to remove noxious weeds and improve fire prevention.

²⁰ COAG, *Australia's Native Vegetation Framework: A National Framework to Guide the Ecologically Sustainable Management of Australia's Native Vegetation*. (2012). Standing Council on Environment and Water.

- Reinststate the purpose that focuses on bushfire threat. On rural properties which are covered by Bushfire Management Overlays, the management of all vegetation, including native vegetation to manage bushfire risk to life and property is a key consideration and Clause 52.47 includes the minimum requirements of this activity, not the appropriate management provisions in areas of high bushfire risk. Planning provisions for all populated areas of Victoria must prioritise the protection of human life and property over all else. Planning Provisions would be superior by acknowledging that one strategy for protecting high value vegetation and biodiversity from fire risk in contemporary environmental management practice is the removal of some lower value vegetation.
- Include in the table of exemptions from the requirement for a permit, areas of low and medium levels of biodiversity, native vegetation that is of low and medium value, Bracken, Burgan, Blackberries, Hawthorn and Dog Wood, Bushfire Protection (VPP 52.47), vegetation in paddocks, domestic gardens, landscaped planting and the harvesting of wood to provide fuel for domestic use from private and crown land.

8.2 ADMINISTRATIVE STRATEGY

The conservation of the environment is to the benefit of all Victorians. To make a minority who are custodians of the land through the ownership of property pay for much needed conservation efforts is discriminatory. If the benefit is to all, then the contribution for achieving this through cooperation rather than regulation needs to be equally apportioned. This applies not only to the administration but also the accurate and scientific mapping of significant stands of vegetation.

Extant enforcement and regulatory burdens for land clearing regulations are too onerous and represent a system of punitive top down enforcement. Notwithstanding the broad recognition that legislation banning the clearance of native vegetation has major design flaws,²¹ these draft VPP however do nothing to progress this on a practical level. A practical model of cooperation, collaboration and stewardship must be engaged.

“it is one thing for government to restrict land use without offering anything in exchange. If, however, we want landowners not simply to forego development but to manage the land in a positive fashion for purposes which offer no immediate economic return to them, we must provide inducements, for reasons of practical necessity if not consideration of equity.”²²

²¹ Productivity Commission *Impacts of Native Vegetation and Biodiversity Regulations*. 2004 Report No. 28.

²² Farrier “Regulation of Land Use: Coercion or Consensus? 1991 *Current issues in criminal justice* 95.

In regard to specific administrative and practical burdens PALs requests the following amendments:

- Review the policy and procedural basis for the entire regime with a refocus on the primacy of human life over the protection of native vegetation.
- Review the stakeholder reference group to better reflect the diverse range of interest groups on whom the regulation will impact.
- Readvertise and arrange a State-wide program of additional stakeholder forums with attendance required by landowner and land management groups for regulatory development legitimacy to be assured. DELWP should be required to actively engage with landowners in relation to the regulation regime.
- Remove the requirement to apply for a permit to remove dead vegetation.
- Strategy and regulation to remain at one hectare - delete references to half a hectare
- Remove requirements that specify permit and other requirements for the removal, pruning or management in areas with low to medium levels of biodiversity and low to medium value native vegetation.

- Remove application requirements from the basic application pathway including:
 - (4) topographic and land information;
 - (7) details of other native vegetation;
 - (8) avoid and minimisation statement;
 - (9) Property Vegetation Plan;
 - (10) written statement of defensible space;
 - (11) offset requirement (if any); and
 - (12) offset statement

- Ensure that the funding and administrative burden is appropriately apportioned and distributed and within the capacity and capabilities of the allocated organisation or individual.
- Consider all the impacts this may have in an environmental, social and economic impact statement.

8.3 MAPPING

For a permitting process to function, the accuracy of the maps on which it is based is crucial. A major criticism of the last set of amendments to these provisions that were passed in 2013 and still stand true today²³ is that the technicality of the approval guidelines is not commensurate with the quality of mapping. So the application of these formulas needs to be reconsidered. Moreover, the burden of proof on the landowner is unfairly onerous in regard to the need to correct poorly collected and collated basic data. As with the onerous criminal law burden of proof which presumes innocence until guilt is proven, an established Crown responsibility, biodiversity assessment is a detailed, expert and costly process and similarly this process should be actively undertaken and accurately detailed by the Crown. It is impossible to validly apply a policy such as this when the base evidence relied upon is patchy and inconsistent.

Existing mapping of rural Nillumbik in proposed regulation and guidelines appears to find most of the rural Nillumbik Landscape to be of high value significance and biodiversity, reference <http://mapshare2.dse.vic.gov.au/MapShare2EXT/imf.jsp?site=bim>. Nillumbik PALs are fortunate to live in an environment of great beauty, home to a variety of native flora and fauna. Rural Nillumbik is certainly one of the most well documented areas of biodiversity in the world (certainly in a peri urban context), although much of this documenting is unfortunately done using computer modelling and aerial photography which makes species identification difficult and understory categorisation virtually impossible. As such PALs rejects the idea that managed pasture land and scrub land on private landholdings that makes up most of rural Nillumbik has more environmental value and significance to the state of Victoria than :

- Kinglake National Park
- Warrandyte State Park
- The Great Dividing Range
- Lake Eildon
- Philip Island
- Wilsons Promontory
- The Victorian Alps
- The Yarra Ranges
- The Victorian Riverina
- Strzelecki Ranges

²³ Yung En Chee "Hidden Flaws in Victoria's new Native Vegetation Clearing Rules (2013) The Conversation & WordPress.

There are three separate map series in the proposed regulation and guidelines, which are almost unintelligible, however according to this mapping those few areas of Victoria that are as significant to Victoria as rural Nillumbik appear to include the plains of Truganina/Tarneit towards Mt Cottrall (currently a series of new housing estates), and French Island, which is an island with a small permanent population and is isolated from mainland Victoria. It is unclear the basis upon which the significance of these areas is assessed.

Mapping would benefit from significant review prior to the imposition of any permit requirements, so that private landholdings in rural Nillumbik that are actively managed, with the exception of those very few heritage for nature properties, are appropriately valued within the Victorian context, including the Victorian public landholding context. Best available science and active pursuit and refinement of data must be undertaken to ensure that it meets a base minimum standard of accuracy.

Many areas of rural Nillumbik under the proposed provisions would be directed towards a detailed assessment pathway under the draft guidelines for activities that are routine property management, maintenance and bush fire preparation activities in rural Nillumbik. None of these activities should require a permit.

A distinction should be made between endemic and native vegetation, and an assurance made that a prohibition on clearing does not act to encourage the introduction or spread of pest species.

9. CLAUSE 12 ENVIRONMENTAL AND LANDSCAPE VALUES FEEDBACK

PALs do not support the DELWP VPP *Clause 12 Environmental and Landscape Values* proposed regulation change in its existing form. Clause 12 refers to its basis in the Intergovernmental Agreement on the Environment ("IGAE").

This document refers in 3.2 to "the effective integration of economic and environmental considerations in decision making processes, in order to improve community wellbeing and to benefit future generations."

Acknowledgment need to be given to the context within which vegetation exists on settled private landholdings, in particular those that are managed within bushfire management overlay areas. All PALs members are potentially impacted upon by the existing regime and by the proposed regulations if they were to become effective.

The primacy of human life has not been respected, it has been ignored or overlooked.

The key and core changes PALs requires of the proposed VPP Clause 12 are:

- **12 Preamble – paragraph 3:**
 - After the words “planning should” add the words “*inter alia*”
 - After the words “protect” add the word “high value sites” and delete the last two word of the sentence (“of value”) so that the protection is focused on areas of high value.
 - After the word “geological” delete “or landscape”
 - The sentence as a whole would read: Planning should *inter alia* protect high value sites for nature conservation and biodiversity and geological features.
- **12.01-1 Protection of Biodiversity – Strategies. Paragraph 2:**
 Include the word “high” before the word “biodiversity”. As paragraph one refers only to the identification of areas of high biodiversity, it would be logical and prudent for the related strategies to relate primarily to those same identified areas.
- **12.01-1 Protection of Biodiversity – Strategies. Dot point 1:**
 Avoiding impacts of extant land uses is problematic. In the case of rural Nillumbik (as noted above) white settlement occurred 170 years ago. Retrospective consideration of these impacts should be replaced by action relating to new land use and development.
- **12.01-1 Policy guidelines:**
 Add to these policy guidelines including 52.47 Planning for Bushfire and
- **12.01-2 Native Vegetation Management – Objectives, Paragraph 2:**
 Delete the “No net loss” concept as it is a complex one. It lacks practicality and is too ambitious.
- **12.01-2 Native Vegetation Management – Strategies. Dot point 1:**
 As per 12-01.1 above: retrospective consideration of these impacts should be removed by the addition of the word “new” prior to the words “land use and development”.
- **12.01-2 Native Vegetation Management – Strategies. Dot points 2 & 3:**
 PALs recognises the importance of vegetation corridors in endangered species protection and conservation relating to not only migratory pathways but interconnection of breeding diversity and a range of other facets. We are concerned however that the approach posited in these amendments is entirely reactive. A more positive approach would come out of the mapping of options and provision of incentives where native vegetation can be established, or offsets provided for landholders who wish to link two otherwise separate stands. Provisions could be provided via a fast track approval process or as a trading scheme between different properties where a landowner is willing.

This provision also needs to explicitly acknowledge the qualitative and quantitative variances that exist in the assessment of what is an area of “high conservation value”. A quantitative gain with an overall qualitative loss is of no benefit. No net loss as a theoretical principal enters difficult areas as it is quantitative assessment and in all reality vegetation quality and benefit is also a qualitative matter. This is inadequately considered in these proposed amendments.

- Dot point two should read
“Fragment native vegetation of high biodiversity value”
- Dot point three should read
“Lead to degradation of land of high conservation value and waterways.”
- *12.01-2 Policy guidelines:*
Add to these policy guidelines including 52.47 Planning for Bushfire and
This is of particular significance in relation to the negative impact that can occur from long segments of unbroken vegetation in relation to bushfires.
Reference to and consideration as relevant of this must be incorporated into the listed Policy Guidelines.

10. CLAUSE 52.16 NATIVE VEGETATION PRECINCT PLAN FEEDBACK

PALs do not support the DELWP VPP Clause 52.16 Native Vegetation Precinct Plan in its existing form. **We are concerned that the context within which native vegetation resides on private landholdings that are settled and managed, often within bushfire management overlay areas, has been ignored or overlooked. The primacy of human life has not been respected.**

The key and core changes PALs requires of the proposed VPP Clause 52.16 are:

- *52.16 Purpose, Paragraph 2:*
Previously Provision 52.16 dealt exclusively with native vegetation actions as falling under Precinct Plans. The inclusion of the Purpose “To consider the removal, destruction or lopping of native vegetation not in accordance with a native vegetation precinct plan incorporated into this scheme” may be misleading. As it reads, it suggests that areas not covered in a Precinct Plan can be governed by this Clause. As per Clause 52.16-1 this is clearly not the intention, and as such 52.16 new paragraph 2 should be clarified so as to be clear that it relates only to an area covered by an extant Native Vegetation Precinct Plan.

- *52.16 Purpose, Paragraph 3:**
 Recognition that Clause 12 to which this clause directly related deals with the concepts of biodiversity of “high” value,²⁴ “important” habitat,²⁵ “strategically valuable” sites.²⁶ As a consequence the focus of other areas needs to take into account that the focus of these amendments needs to focus also on areas of such high, important and strategically valuable biodiversity.
 Add “high value” before the words “native vegetation”.
- Terminology “lopping”:*
 It is essential that the term “lopping” is sensibly defined. The pruning of trees in paddocks and road sides is an appropriate and legitimate land management activity (particularly in bushfire prone zones) that should be exempt from the requirement to apply for a permit.
- *52.16 Purpose, Paragraph 5 – deleted, need to be replaced:* *
 The purpose “To manage native vegetation near buildings to reduce the threat to life and property from bushfires” should not be deleted.
 PALs would like to see this paragraph retained and an additional acknowledgement of the impact bushfires can have on biodiversity included in this provision. Suggested wording is. “To manage native vegetation clearing and prescribed burns in acknowledgement of the environment’s pyro diversity.”
- *52.16-2 Permit requirement - additional point**
 Include a new dot point which makes reference to the BMO Clause 52.47/48.
- *52.16-4 (previously -5) Application requirements**
 Application requirements are far too onerous. Application requirements that should be removed from the basic and intermediate application pathway include:
 - (3) maps and plans,
 - (4) topographic information,
 - (5) details of other native vegetation permitted to be removed within five years
 - (6) avoid and minimisation statements
 - (7) the requirement for a property vegetation plan
 - (8) written statement of defensible space
 - (10) offset requirement (if any) and
 - (11) offset statement.
- *52.16-5 Decision guidelines**
 These should be reviewed in accordance with deletions and changes to date.
 Also add dot-point – “The bushfire potential of the land.”

²⁴ 12.01-1 Strategies sentence 1.

²⁵ 12.01-1 Objective.

²⁶ 12.01-1 Objective.

- *52.16-8 Table of Exemptions**

Reinstate Clauses relating to:

- Ground fuel within 30 meters of a building and expand that distance in response to real science in relation to mortal danger distances from fire; (PALS understands that they are approximately 140m when inside a building and approximately 300m in the open.)

Include the following in the table of exemptions:

- any removal of less than one hectare of vegetation that is of low or medium value;
- include in the clause regrowth under "bracken" all varieties of Burgan, dog wood, blackberries, hawthorn and any re-growth under 10 years old.
- vegetation in paddocks;
- garden and landscaped areas;
- any property that is covered by a Bushfire Management Overlay and
- the harvesting of fallen or dead wood to provide fuel for domestic use from private and crown land; and
- Native vegetation planted by the landowner

In addition to our specific concerns PALs are conscious of the potential for these provisions relating to a Native Vegetation Precinct Plan to place an additional and unnecessary extra level of bureaucracy over the top of an already complex and multifaceted planning scheme.

Precinct plans as a concept are theoretically a useful tool but as they stand seem only to add complexity and duplication. We note that there is no compulsion for landowners to be consulted, informed or agree to such a plan being placed over their properties.²⁷ It may result in duplication of bureaucracy and administration. The cost impost of such plans is inadequately considered. Can the government or a local council compel such a plan be developed and can they recover costs of preparation from local landowners are questions that the provision for Precinct Plans raise but fail to answer. Where PALs sees these provisions could be beneficial is where a group of landowners in an area of significance see an advantage in voluntarily creating a long term program and certainty around their conduct.

²⁷ PPN50: Preparing a Native Vegetation Precinct Plan.

11. CLAUSE 52.17 NATIVE VEGETATION FEEDBACK

PALs do not support the DELWP VPP Clause 52.17 Native Vegetation in its existing form. We are concerned that the context within which native vegetation resides on private landholdings that are settled and managed, often within bushfire management overlay areas, has been ignored or overlooked. The primacy of human life has not been respected.

Where mirror Clauses or provisions appear as already above in Clause 52.16 enunciated these should apply also to Clause 52.17. These are highlighted * as applying also to these proposed amendments.

- *52.16 Purpose, Paragraph 3* -- *52.17 Purpose, Paragraph 1*
- Terminology "lopping"
- *52.16 Purpose, Paragraph 5* -- *52.17 Purpose, Paragraph 3*
- *52.16-2 Permit requirement* -- *52.17-1 Permit Requirements*
- *52.16-4 Application requirements* -- *52.17-2 Application Requirements*
- *52.16-5 Decision guidelines* -- *52.17-4 Decision guidelines*
- *52.16-8 Table of Exemptions* -- *52.17-7 Table of Exemptions*
- Terminology "minimum extent necessary"

Additional comments:

- *52.17-3 Property Vegetation Plans*
 The voluntary preparation of a Property Vegetation Plan is a choice that should be open to all residents, however there should at no stage be a requirement or compulsion to prepare a property vegetation plan. Such a provision would add an unnecessary level of bureaucracy and administration and burden of cost on landowners for no benefit.

OFFSET PROCESS CRITIQUE

The Native Vegetation Offset process underpins current (and future) Native Vegetation Guidelines. The current process for establishing and managing vegetation offsets is highly complex and lacks transparency, and this appears to inevitably lead to potential corruption of the process as the amounts of money moving through the system are very significant (and growing annually). Nillumbik PALS recommend a review of vegetation offset guidelines be formally incorporated into this review process to ensure:

1. Financial transparency (to demonstrate that all financial transactions and dealings between permit holders, brokers, and landowners are auditable and visible to the market);
2. Integrity of the evaluation process (by making it easier to understand to the layman, and less dependent on interpretation and subjective views of an assessor); and
3. Consistency of application (to demonstrate that all landowners are treated equally in the process).

12. CLAUSE 66.02 GENERAL PROVISIONS FEEDBACK

- A referral authority should only to be involved in the removal of native vegetation if it is:
 - vegetation that is not subject to an exemption; and
 - vegetation that is highly sensitive or of high value.
- Replace all references to native vegetation and biodiversity with the term high value native vegetation and high value biodiversity.

13. NATIVE VEGETATION CLEARING ASSESSMENT GUIDELINES FEEDBACK

PALS do not accept The Native Vegetation Clearing – Assessment Guidelines in their current form as it appears to focus on the management and maintenance of all native vegetation and in so doing creates a significant impost on all owners of land that contains native vegetation for no clear benefit.

We are concerned that the context within which native vegetation resides on private landholdings that are settled and managed, often within bushfire management overlay areas, has been ignored or overlooked. The primacy of human life has not been respected.

The guidelines are not a sensible way of protecting, managing and maintaining the removal, destruction and lopping of high value and highly sensitive native vegetation as they focus on all native vegetation rather than the specific level of vegetation they are seeking to protect and preserve.

The key and core changes PALs requires of the proposed guidelines are:

- Replace the terms native vegetation, biodiversity with high value native vegetation and high value biodiversity throughout the document so as to limit the impact on landowners to those areas that are of high value in the first instance.
- Significantly reduce the requirement to prepare a property vegetation plan and reduce the bureaucratic and administrative imposition of private landowners
- Significantly reduce the requirement to apply for a permit to remove, manage, lop or destroy native vegetation and reduce the bureaucratic and administrative imposition of private landowners of managing their landholdings, and in particular landholdings located in areas that are the subject of bushfire management overlay and bushfire protection VPP 52.47
- Ensure the value of native vegetation in local areas is current and accurate and delete all references to data that is not current and not accurate when considering the value of local vegetation and biodiversity. For example rural Nillumbik appears, for the most part, to be classified as high value in terms of its strategic biodiversity value, and according to mapping [//mapshare2.dse.vic.gov.au/MapShare2EXT/imf.jsp?site=bim](http://mapshare2.dse.vic.gov.au/MapShare2EXT/imf.jsp?site=bim) this appears to be due to more than 1200 surveys conducted since 1902. There appears to be one test site (past St Andrews) in the whole rural Nillumbik area, and there appears to be no current evidence that supports the current value rating of the rural Nillumbik area at all. With the exception of the 2 local surveys the map says have occurred in the past 5 years, there is no evidence supporting the high rating of most of rural Nillumbik, and as such the rating should be removed.
- The value of native vegetation does not exist in isolation, it exists within the context of land being owned privately, and landowners having perceived and actual rights and interests in their landholdings that government needs to consider.

The guidelines plan to significantly impact on private landholdings and landowners and guidelines must include consideration of the social and economic impact of guidelines on landowners and property managers. This is currently not included in the guidelines at all. Protecting high value Victorian native vegetation will only be achieved with the commitment of rural landowners and property managers.

If the significant cost of administering guidelines (including preparing property vegetation plans, completing applications, follow up, VCAT action etc.) is calculated, acknowledged, agreed and understood in the guidelines, there is more prospect of understanding and stakeholder acknowledgement.

- Victoria's planning system should minimise and avoid the requirement for landowners to apply for permits in the first instance by adopting a stewardship approach. The guidelines fail to acknowledge that the removal, lopping and destruction of native vegetation are routine land management and maintenance activities by landowners on all landholdings. The requirement to complete an application for a permit for these routine activities is farcical. When considered in a bushfire prone context it is simply perilous.
- VPP should focus on minimising impositions on landowners and property managers. Currently there is a requirement in some circumstances for land management plans, pest management plans, weed management plans, property vegetation plans and native vegetation plans. This creates a significant impost on landowners and property managers for no identifiable benefit. The requirement specifying half a hectare should be removed and replaced with a hectare. No such limits should apply to properties with a BMO – where human safety should be the abiding consideration.
- The purported simplification of assessment has not been delivered. Native vegetation information contained in the guidelines, including definition, measurements of biodiversity, sites, condition scores, landscape scale, value, decision making process and so forth are almost unintelligible to the average landowner and only possibly able to be understood by a professional native vegetation assessor. In the existing guideline this creates an undesirable burden of expense and complexity for landowners to ascertain if a permit is required at all, if so what the pathway is, and then progress with applications from there. The guideline would better serve the public interest by minimising the cost and complexity of compliance by minimising requirements in the first instance, making them simple and in plain English and minimising the cost and complexity of applying for a permit. The guidelines look at present to be an employment creation opportunity for ecologists but provide no benefit at all to landowners, and no evidence of there being a benefit for the environment. The guidelines are not consistent with government policy, direction and practice, which is to prioritise human life in the first instance.
- Guidelines should acknowledge the importance of transparency when dealing with native vegetation offsets, and develop a process for the public release of offset information so that those who receive cash to provide an offset are identified.

- The academic rationale for having offsets that provide for a multiple of 1.5 or 2 times the removed vegetation is not clear, and nor is the evidence base on which this is founded. The guidelines would better serve the community if evidence was provided to support the rationale and made available to inform landowners so that this was clear. If evidence and rationale is not clear, it should be reconsidered and the regime re-engineered.

14. KEY AND URGENT RECOMMENDATIONS BY NILLUMBIK PALS

14.1 EXEMPTION FROM NVPCR FOR ALL BMO SUBJECT LAND IN VICTORIA, EXTEND 10-30 RULE.

Nillumbik PALS insist that in order to appropriately recognise the primacy of human life in the formulation of regulation it is imperative that the State of Victoria does not regulate or legislate in a manner which flies in the face of the recommendations made by the *2009 Victorian Bushfires Royal Commission*, recommendations described by its chairperson *The Hon. Bernard Teague AO* in offering them *“to the Governor of Victoria and to the people of Victoria “ as “giv(ing) priority to protecting human life, and (they are) designed to reflect the shared responsibility that governments, fire agencies, communities and individuals have for minimising the prospect of a tragedy of this scale ever happening again.*

If the State of Victoria is intent on retaining the NVPCR regime, PALS call on the Victorian Government to respond to the priority of the protection of human life by immediately and comprehensively excluding the application of the NVPCR regime to any and all land in Victoria which is or may be subject to a Bushfire Management Overlay (“BMO”). Accordingly, no planning permit would be required for the lopping, removal or destruction of native vegetation on BMO affected land.

In addition and in recognition that the 10-30 rule does not effectively provide any genuine protection to landowners, residents and their visitors when faced with a fire emergency, PALS call on the Government to appropriately extend the 10-30 rule with a more science-based reference to “safe distance” for human survival in the case of fire. “CFA Neighbourhood Safer Place - Bushfire Place of Last Resort Assessment Guideline - June 2016” indicates that safe distances from the perimeter of a fire in the open air or inside a building are far greater than the 10-30 rule allows. Accordingly, in specifying the BMO exemptions above, it is recommended that new distances be specified within which landholders can clear native vegetation AS OF RIGHT.

14.2 COMPREHENSIVE REVIEW OF OFFSET SCHEME AS MECHANISM TO ACHIEVE GOAL

Nillumbik PALS have spent a year working via legal, political and practical means to have proposed Planning Scheme Amendments C81 (Significant Landscape Overlays) and C101 (Environmental Significance Overlays) eradicated (see section 5 above).

Both of those proposed Planning Scheme Amendments, both of which have been comprehensively rejected by the communities on which the greatest impact would have been wrought and neither of which are to be implemented, are effectively local law versions of the Victorian Native Vegetation Permitted Clearing Regulations.

C101 was being pursued by Council planners with such undemocratic fervour and in clandestine circumstances to the extent that the Nillumbik Shire Council eventually went as far as not complying with s28 of the Planning and Environment Act after landowners had vociferously expressed their outrage and opposition to C101, which prompted the alarmed Councillors to vote 5-2 to abandon C101 in its entirety. While Wren QC in the investigation commission post *Parsons v Nillumbik SC [2016] VCAT 1898* VCAT declarations, had terms of reference which aimed to disclose the reasons for the Nillumbik Shire's failure to comply with the Planning and Environment Act, the investigation revealed details of the mechanics of the Nillumbik offset scheme, (which is a key plank of the functioning of the NVPCR and its review), so troubling that Wren QC recommended "*review of Council's vegetation offset programme in the context of the programme's transparency and accountability*"

While it is clear that there are concerns around the offset scheme in the Shire of Nillumbik, including the inherent conflict which see the Shire as both the enforcement body imposing the purchase of offsets and the vendor of those same offsets, it is clear from the NVPCR review that the offset scheme is dysfunctional, opaque and deeply flawed across Victoria. Not only is it complex and impossible to comprehend, it is clearly riddled with probity and other operational issues, which accounts for the reviews emphasis on it in the outcomes report of November 2016:

Proposed improvement 8:

Require an offset strategy for all applications and consider this in decision making.

Implemented by amending the application requirements in Clauses 52.16 and 52.17 to include the requirement for an offset statement for all applications.

The Assessment guidelines outline that this statement would briefly describe how the offset will be secured e.g. **by purchasing an available credit** or establishing a new offset site.

Offset delivery Implementation approach

Proposed improvement 16:

Increase the use and functionality of the Credit Register.

Implement by clarifying the roles and responsibilities for participants, increasing the information recorded in the Credit Register and making this available to councils, offset purchasers, offset providers and government investment programs.

This includes: • increasing supply of offsets by registering potential sites before they are established so that offset providers do not incur the costs of setting up an offset site before they have a buyer • linking offset and permit information for greater transparency • recording first party offsets.

Proposed improvement 17:

Support the development of the market for low availability offsets. Implement by working with conservation groups (including Trust for Nature) and other stakeholders to develop programs that identify potential offset providers, initially focused on offset types or locations with low availability. Improve external access to species information to support identification of potential specific offsets. Increase use of over the counter agreements.

Undertake a native vegetation offset market review to identify opportunities to improve its operation. This will be done in conjunction with the Department of Treasury and Finance and the Department of Economic Development, Jobs, Transport and Resources and in consultation with relevant stakeholders.

This appears to indicate that the low availability of offsets is motivating a desire to increase vigilance or identification of offset types or locations, which presents the troubling prospect of the inappropriate classification of sites.

Proposed improvement 18:

Require that all third party offsets are registered on the Credit Register and meet its standards, including standards for securing the offset. Implement by requiring all third party offsets to be registered on the Credit Register, **in order to track the trading and use of credits** and so that the payment to the offset provider will be linked to the delivery of the offset management plan.

This appears to indicate that tracking of trading and use of credits is problematic.

Proposed improvement 19:

Redesign the revegetation standards to ensure desirable revegetation can occur.

Nillumbik PALS insists that the offset regime, while theoretically laudable is intractably flawed given:

- a) the introduction of pecuniary elements being available for satisfaction of compliance rather than purely vegetation replacement
- b) the availability of third party credits being available for satisfaction of compliance rather than purely vegetation replacement
- c) the trade of offset credits being permissible, which clearly introduces the prospect of corruptions of the regime itself.

CASE STUDY - [REDACTED]

In the preparation of this submission, Nillumbik PALS has been in direct contact with [REDACTED] from near Maryborough, Victoria, who has shared his experience of the offset regime. He has provided the following information, which has confirmed many of the concerns which Nillumbik PALS and Christopher Wren QC have also had in relation to the offset regime and its operation:

In mid 2013, [REDACTED] had 2 prospecting licence applications granted numbers 1001 and 1002. They together constituted a land parcel 10 hectares in size.

A site meeting was arranged between all relevant regulatory parties and [REDACTED].

Present were:

Mines Department ("MD") [REDACTED]

DELWP, [REDACTED] and [REDACTED]

Central Goldfields Shire ("CGS") [REDACTED]

Northwest Catchment Management Authority ("NCMA") [REDACTED] X

At the site meeting, a condition proposed so as many large trees as possible could be retained was that works must be conducted within what was known as the tree zones (DELWP and government bodies through management for roads, tracks, and other things work within these zones everyday)

All of the parties present were in favour of the proposed project as the site itself was described by the environmental office as the most highly degraded weed infested site that these people had ever visited.

The weeds on the site were Hawthorne bush, Bryrerose, and Spiney Rush, all described by the State as nationally significant and requiring removal. [REDACTED] was then instructed by DELWP to undertake a tree count and survey of all trees 40cm and greater at a height of 1.3metres, which was done. The site had 620 such trees. In the meantime he developed a work rehabilitation work plan with the NCMA to reinstate a highly disturbed waterway with a series of wetlands and removal of weeds as part of the State's healthy waterways initiative. This was considered to be a highly innovative work program as described by the then CGS planning officer, NCMA and local landcare groups.

On submission of this work program to the environment office of DELWP, problems arose. Although the original people attending the site meeting were in favour of the project, it became quite clear that someone of higher authority from DELWP did not approve.

██████████ mining agent ██████████ tried on many occasions to resolve any issues via phone and email. A meeting was eventually held in the Bendigo office of DELWP on 6 February 2014.

Attendees:

██████████ and partner ██████████
██████████
MD (██████████ / ██████████)
DELWP (██████████ / ██████████ / ██████████).

██████████ provided an offset evaluation of \$1,250,000 (One million, two hundred and fifty thousand dollars) for the removal of an estimated 60 trees.

██████████ and his partner ██████████ were stunned.

From that date ██████████ sought a meeting with Mr Ryan Smith, then State minister for the Environment, which was held on 8 April 2014.

Attendees:

██████████ and partner ██████████
██████████
The Hon. Ryan Smith MP and an advisor to Minister for the Environment
██████████ (DELWP) office and
Several other industry stakeholders.

When the minister asked his advisor on specific issues for regional and country areas, his advisor disappointingly remarked that the rural communities unfortunately had not been taken into account when introducing policies in place at that time. From those comments and with positive feedback in relation to these issues from the Minister for the Environment, most left the meeting feeling that something may be done.

Shortly after this there was a change of State Government.

██████████ continued to seek responses and the new Minister for the Environment advised that he would have to start the entire process again. This was conveyed by DELWP in their office.

It was suggested by ██████████ and ██████████ of DELWP, that he pay offsets for the entire 10 hectare area and remove all trees. Extrapolation from the initial \$1.25 million offset for 60 trees indicated that, given that 620 large trees were on that site, the offset value would then be considered to be in the order of \$12,500,000 (Twelve million, five hundred thousand dollars)

Given the extremely high valuations, it was considered by ██████████ and his partner that the tree value was worth more than their estimated \$4.5 million dollars in gold value for their mine. As stated by DELWP previously, if the site was infested with weed species, the biodiversity values would be considered much higher.

In the time since, [REDACTED] and his partner have been undertaking the weed removal and CGS and DELWP office tried to stop it. [REDACTED] then took the issues to the media and proceeded with a biodiversity/habitat assessment on the two sites. He then obtained a price assessment from DELWP authorised bush brokers, if he was to lock the site up in perpetuity to qualify the site as an offset credit site. The values for the entire two sites (10 hectares) between \$80,000 to \$130,000, (see attachment - firewood value only)

Through the media campaign, [REDACTED] dealt with [REDACTED] of the Weekly Times. [REDACTED] apparently through his investigations of the bush broker system found that all or most were operated by ex DELWP employees, which caused [REDACTED] grave concern about the propriety and legality of the system.

DRAFT

Concepts, Definitions and References –

Australian Human Rights Commission www.humanrights.gov.au

Primacy of Human Life – the protection and preservation of human life takes priority over all other considerations²⁸.

Property rights – common law presumptions include presumptions that the Parliament does not intend to interfere with vested property rights, or to alienate property without compensation.

The Universal Declaration of Human Rights states (Article 17) that

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of their property.

These provisions are not reproduced in either the ***International Covenant on Civil and Political Rights*** (“ICCPR”) or ***International Covenant on Economic, Social and Cultural Rights*** (“ICESCR”). However, ICCPR Article 26 requires the “equal protection of the law”. This provision states “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” So the ICCPR provides wide ranging protection regarding discrimination affecting property rights.

²⁸ <http://files.em.vic.gov.au/Doctrine/Fund/Fundamentals-EMC1.pdf>, Fundamentals of Emergency Management, Class 1 emergencies Edition 1, Emergency Management Victoria. February 2015

3. There are also provisions regarding discrimination affecting property rights in the *International Convention on the Elimination of All Forms of Racial Discrimination* ("CERD") (Article 5), the *Convention of the Rights of Persons with Disabilities* ("CRPD") (Article 12.5), and *The Convention on the Elimination of All Forms of Discrimination against Women* ("CEDAW") (which refers to discrimination in "the political, economic, social, cultural, civil or any other field") and refers specifically to equality in the administration of property in Article 15. None of the human rights instruments subsequent to the Universal Declaration, however, refer to interference with property rights, outside of discrimination issues.²⁹

Australian Law Reform Council www.alrc.gov.au

Common law property rights³⁰ <https://www.alrc.gov.au/publications/conclusions-6>

8.137 The common law has long regarded a person's property rights as fundamental. Property rights find some protection from statutory encroachments in s 51(xxxi) of the *Australian Constitution*, through the principle of legality at common law, and in international law. Section 51(xxxi) provides that any 'acquisition' of property must be on 'just terms'.

8.138 Some Commonwealth laws may be seen as interfering with real property rights. These laws impose upon property owners in different contexts and in different ways. The laws that raised the most controversy and debate among stakeholders in this Inquiry—and in a series of cases, some of which have gone to the High Court—were provisions in environmental laws imposing restrictions on the use of land and water. For example, the prohibition of 'action' such as clearing, ploughing and sowing land which has or will have a significant impact on the ecological character of a declared Ramsar wetland.^[227] Concerns have been expressed that such laws may actually significantly reduce the commercial uses to which property can be applied.

Climate Change Council www.climatechange.org.au - Climate change and the Victorian Bushfire Threat (January 2017)

Emergency Management Victoria – Fundamentals of Emergency Management Class 1 Emergencies Edition 1 (2015)

Productivity Commission inquiry into the regulation of Australian Agriculture (2016)

Royal Commission Report into the 2009 Victorian Bushfires (2010)

Executive Summary of Report by C Wren QC into

²⁹ <https://www.humanrights.gov.au/common-law-rights-human-rights-scrutiny-and-rule-law>

³⁰ <https://www.alrc.gov.au/publications/conclusions-6>

COMMENDATION

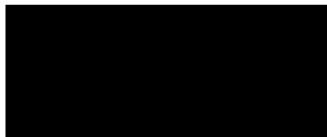
Nillumbik PALS commend this submission to the review.

Should any further information be required, or for clarification of any matters raised in this submission, please contact:

Damian Crock, Chair, Working Group, Nillumbik PALS

E: [REDACTED] or

M: [REDACTED]



Damian Crock
 Chair

Working Group
 Nillumbik PALS

E: [REDACTED]

February/March 2017

Addendum

INHERENTLY FLAWED "PUBLIC" AND KEY STAKEHOLDER CONSULTATION TREND

In the Wren QC report included at this link: <https://app.box.com/s/s8djptursqrftn73nmbvhmqc56boj52> it was found:

the "public" consultation that occurred in respect of Amendment C101 prior to its formal exhibition was conducted largely "inhouse" and in consultation with a small number of stakeholders i.e. Council's Environment Advisory and Agricultural Advisory Committees, a number of Government departments and various Presidents & Secretaries of Nillumbik land care groups and convenors of Nillumbik Friends of Groups. Council's communications strategy ought be reviewed as part of the overall governance within the Shire to try and address the level of distrust that is evident from the submissions received by the Investigation;

While Nillumbik PALS were always concerned at this flawed consultation we anticipated that it was a local phenomenon until we had similar concerns reported to us in relation to the stakeholder consultation conducted for the purposes of the Native Vegetation Permitted Clearing Regulation Review.

It has been reported that at meetings in Bendigo and Geelong, most of those in attendance were from environment groups. Their attendance was secured via personal invitations from DELWP.

We are concerned that this flawed consultation is typical when environmental laws are being formulated, developed or reviewed, to the exclusion of those people on whom those laws mostly impact - and in flagrant disregard for the consideration of the primacy of human life.