

Local government issues

This Info Sheet provides an overview of aspects of the *Native Vegetation Act 2003* and the *Native Vegetation Regulation 2005* of particular interest to Local Government. It has been prepared by the Department of Natural Resources (DNR) in consultation with the NSW Local Government and Shires Associations (LGSA) and Catchment Management Authorities (CMAs).

On 1 December 2005, the *Native Vegetation Act* came into force. The objectives of the *Native Vegetation Act* include the prevention of broadscale clearing unless environmental outcomes are improved or maintained. Applications to clear native vegetation under the *Native Vegetation Act* are assessed by CMAs.

Local councils have a range of development assessment and approval functions under the *Environmental Planning and Assessment Act 1979*, which includes in its objectives the proper management of natural resources, and the promotion of orderly and economic development of land.

There will be instances where development involving clearing of native vegetation requires approval from both a CMA under the *Native Vegetation Act* and from the local council under the *Environmental Planning and Assessment Act*. The term clearing is defined in the *Native Vegetation Act* as: cutting down, felling, thinning, logging or removing native vegetation; or killing, destroying, poisoning, ringbarking, uprooting or burning native vegetation.

Where there is overlapping jurisdiction it will be beneficial for councils and CMAs to liaise and develop information-sharing protocols to achieve the best natural resource management outcomes and more efficient administration. An example of an information sharing protocol is given in the case study in this Info Sheet.

This Info Sheet has been prepared on the understanding that councils may continue to apply existing local environmental plans (LEPs) for some time, but these will be replaced within a period of up to five years by LEPs that conform to the new standard LEP template. The info sheet contains some information that applies equally to existing LEPs and LEPs prepared in accordance with the standard template. Please note that information dealing with dual consent does not apply to standard template LEPs due to the effect of clause 34 of the standard template.

General information about the native vegetation reforms is provided in other Info Sheets, which are available from CMAs and on line at www.naturalresources.nsw.gov.au/vegetation, or www.nativevegetation.nsw.gov.au

1. What is the relationship between the *Native Vegetation Act* and the *Environmental Planning and Assessment Act*?

Dual consent

The *Native Vegetation Act* does **not** remove the requirement for a landholder or developer to obtain development consent under a LEP for:

- Any clearing of native vegetation requiring consent under any specific clause within the LEP (including under an existing Tree Preservation Order); or
- Any clearing of native vegetation that is ancillary to local development that requires development consent under the LEP; or
- Any removal of trees or vegetation that is identified in a council development control plan (DCP) as requiring development consent or a permit from council.

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Where a LEP requires consent from council, the owner or developer of the land may also require approval under the *Native Vegetation Act*.

Approval under the *Native Vegetation Act* **will** be required unless:

- the land is excluded from the Act
- the clearing is excluded from the Act
- the clearing is permitted clearing or a permitted activity under the Act.

See also Section 8 “What effect do LEPs have on PVPs and development consents granted under the Native Vegetation Act?”.

Excluded land

Schedule 1 of the *Native Vegetation Act* (as amended by clause 44 of the *Native Vegetation Regulation*) lists land that is excluded from the Act. No approval under the *Native Vegetation Act* is required for clearing on such land. Excluded land includes:

- National park estate and other conservation areas
- State forestry land
- Listed local government areas
- Land zoned in an environmental planning instrument as residential (but not rural residential), village, township, industrial or business, or, having regard to the purpose of the zone, having the substantial character of a zone so designated. The substantial character of a zone is determined by reference to the zoning description and, in particular, the objectives of the zone.

Note that the *Native Vegetation Act* applies to land covered by State Environmental Planning Policies (SEPPs) No 14, 26 and 44, as a result of the amendments made to Schedule 1 of that Act by clause 44 of the *Native Vegetation Regulation*. This means that these lands are subject to regulation by both the SEPP and the *Native Vegetation Act*.

Excluded clearing

Excluded clearing is listed in section 25 of the *Native Vegetation Act* and includes activities assessed under Part 5 of the *Environmental Planning and Assessment Act* and development that is designated development for which consent has been granted. Such activities may include sewerage treatment plants, water supply works, large quarries, intensive agriculture and similar activities.

Permitted clearing and activities

Permitted clearing and activities are set out in sections 19 to 24 of the *Native Vegetation Act* and include clearing for Routine Agricultural Management Activities (RAMAs). Other types of clearing that do not require approval under the *Native Vegetation Act* are certain clearing that forms part of an approved project under Part 3A of the *Environmental Planning and Assessment Act* and certain clearing permitted by a bush fire hazard reduction certificate under the *Rural Fires Act 1997*.

Refer to *the Native Vegetation Management in NSW* Info Sheets 6, 7a, 7b and 7c for detailed information about excluded and permitted clearing.

Dual consent scenarios

The following table illustrates the application of dual consent.

PROPOSAL TO CLEAR NATIVE VEGETATION	TYPE OF CONSENT REQUIRED
<ul style="list-style-type: none"> > Consent required under the EP&A Act > Permitted activity/clearing under NV Act, or clearing/land is excluded from NV Act 	→ Council Consent only
<ul style="list-style-type: none"> > Consent not required under EP&A Act > Consent / PVP required under NV Act 	→ CMA Consent / PVP only
<ul style="list-style-type: none"> > Consent required under EP&A Act > Consent / PVP required under NV Act 	→ Council Consent and CMA Consent / PVP
<ul style="list-style-type: none"> > Where clearing is for the erection of a single dwelling (NV Reg, clause 6) > Consent required under EP&A Act 	→ Council Consent only , provided that clearing is to the minimum extent necessary to carry out the development (consent is deemed to have been granted under the NV Act)

The types of development most likely to involve dual consent requirements include dual occupancies, rural and rural residential subdivision, and rural tourism ventures.

2. What are the considerations for approval under the *Native Vegetation Act*?

Approval for clearing under the *Native Vegetation Act* may be obtained through either a property vegetation plan (PVP) or development consent. Both PVPs and consents are granted by CMAs. The considerations for both types of approval are the same.

Approval cannot be granted unless the proposed clearing will improve or maintain the environment, as outlined in the *Native Vegetation Regulation*. The Environmental Outcomes Assessment Methodology, which is prescribed in the *Native Vegetation Regulation*, sets out the circumstances in which clearing proposals will be deemed to meet the “improve or maintain” test in respect of water quality, biodiversity (including threatened species), soils and salinity. This test can include consideration of offsets in the case of a PVP, but not for development consents.

When considering a clearing proposal, the CMA must also have regard to any relevant provisions of its Catchment Action Plan (CAP).

While PVPs may provide information regarding social and economic impacts, this information is not to be used in assessing whether proposed clearing improves or maintains environmental outcomes.

3. Are applications for approval to clear under the *Native Vegetation Act* integrated development?

No. Under section 91(1) of the *Environmental Planning and Assessment Act*, the *Native Vegetation Act* is not one of the Acts under which applications are treated as integrated development.

PVPs under the *Native Vegetation Act* are not determinations in the normal sense, but are developed instead through a process of negotiation. This means that there are limits to the information that can be made available to councils prior to their finalisation and also that PVPs cannot be appealed. The normal processes for integrated development assessment therefore cannot be applied.

4. What is the position regarding rezoning?

The *Native Vegetation Act* does not apply to rezoning, although clearing of native vegetation following rezoning may require approval, depending on whether the new zone falls within the scope of the *Native Vegetation Act* or is excluded from it.

The Department of Planning generally requires councils to support rezoning applications with strategic justification and an environmental study that will reflect any relevant regional strategy and CAP targets. This will include an assessment of the impacts of the proposed rezoning on native vegetation. Rezoning has the potential to affect the extent and the quality of native vegetation in a CMA area.

When rezoning is proposed, or when a new principal LEP is prepared, section 62 of the *Environmental Planning and Assessment Act* requires councils to consult with relevant statutory authorities, including CMAs, DNR and the Department of Environment and Conservation. These authorities will have an opportunity to formally object to the proposed rezoning.

A Development Control Plan (DCP) provides an appropriate planning tool that councils may use to assist in addressing the issue of impacts to native vegetation following rezoning. A DCP that provides guidance in relation to building envelopes, site layout and buffer zones could mitigate impacts of rezoning on native vegetation. A DCP could also assist in quantifying these potential impacts and allow CMAs to provide advice about the anticipated effects of rezoning proposals on the relevant targets in their CAPs.

This process is likely to encourage greater innovation in rural subdivision design, for example by retaining native vegetation in community parks and along river foreshores.

Note that restrictions imposed by a PVP under the *Native Vegetation Act* will continue to apply even when rezoning results in the *Native Vegetation Act* being excluded from the land. Restrictions could include the identification of vegetation as protected regrowth or the creation of offsets lasting in perpetuity.

5. What approvals are required for subdivisions?

The information in section 1 relating to dual consents will also apply to subdivision proposals. Where a proposed subdivision involves the clearing of native vegetation, approval may be required under the *Native Vegetation Act* as well as under a LEP. Some clearing for subdivisions may be permitted under the *Native Vegetation Act*, for example by using the RAMAs. However this does not include large subdivision access roads. It is also not possible for developers to utilise the single dwelling exemption (see Section 6 “What about consent to erect a single dwelling?”), because this provision specifically relates to council development consents granted for only one dwelling.

If a PVP is granted prior to the subdivision commencing, the PVP will continue to apply to the subdivided land because PVPs are binding legal agreements that run with the land. CMAs can request that a developer prepares new PVPs for all the subdivided blocks, which may show the rights and obligations more clearly. However if the CMA does not request this, the original PVP continues to apply to the subdivided blocks.

A PVP may identify offset provisions for clearing native vegetation within a subdivision. It may be possible for these offsets to be managed by a third party, including a council, or by a horizontal strata arrangement. Community title subdivisions may allow such offsets to be managed as common property and fees collected to fund implementation of a management plan.

6. What about consent to erect a single dwelling?

Clause 6 of the *Native Vegetation Regulation* allows clearing of native vegetation where a council has granted consent for the purpose of erecting a single dwelling, and that consent is still valid. This exemption also permits any ancillary clearing to the minimum extent necessary, including clearing for access, on-site effluent disposal, or Asset Protection Zones for bush fire protection (under the NSW RFS Planning for Bushfire Protection Guidelines) where these are approved by council as part of the development consent.

7. Where there are dual consent requirements, should the first application be to the CMA or to the local council?

Where there are dual consent requirements, both approvals must be obtained prior to clearing taking place. For example, if a council grants consent to clear native vegetation but approval is refused under the *Native Vegetation Act* the clearing cannot legally take place.

There are no legal requirements as to which application should be submitted first. It would often make sense for an applicant to apply under the *Native Vegetation Act* before applying to the council, because the environmental test under the *Native Vegetation Act* is specifically focused on the maintenance and improvement of native vegetation.

Councils and CMAs should establish working protocols to establish the most sensible referral processes across their areas.

Note that where the single dwelling exemption applies only a single consent, from council, is required.

8. What effect do LEPs have on PVPs and development consents granted under the *Native Vegetation Act*?

When a CMA determines an application for clearing native vegetation in non-urban areas, clause 4 of the *Native Vegetation Regulation* excludes consideration of the criteria in section 79C of the *Environmental Planning and Assessment Act*. This means that there is no legislative requirement for the provisions of environmental planning instruments (such as LEPs) to be considered by CMAs when assessing vegetation clearing proposals.

When deciding whether to approve a PVP or grant development consent under the *Native Vegetation Act*, CMAs are only required to have regard to the “improve or maintain” the environment test, and their own CAP. However, CAPs can make reference to an environmental planning instrument, and in such cases it may be necessary for CMAs to consider the relevant provisions of these instruments.

Any change to an environmental planning instrument made subsequent to clearing approval granted under the *Native Vegetation Act* cannot prohibit, restrict or otherwise affect an approved PVP or existing development consent.

9. How will councils know whether land is subject to a PVP or development consent?

Clause 12 of the *Native Vegetation Regulation* specifies what information is publicly available regarding PVPs and development consents.

Information available on the internet

- The GPS coordinates of land subject to a PVP or development consent that provides for broadscale clearing or that changes the regrowth date based on long term rotational farming practices
- The area of land approved for clearing
- The area of land approved for offsets

Information available from the CMA

- Detailed information about clearing authorised under a PVP or development consent
- Detailed information about offsets contained in a PVP or development consent
- A changed regrowth date specified in a PVP

Note: Detailed information about clearing and offsets includes whether the clearing involves invasive native scrub, or thinning or other types of clearing, and all management actions and specifications for clearing and offsets.

Information available only to bona fide prospective purchasers

- Details of provisions in a PVP relating to financial incentives

As well as having access to the information listed above, CMAs will automatically advise the relevant local council electronically when they approve a PVP or give development consent. This advice will include the date and case number, and the Lot/DP affected.

10. Are PVPs included in section 149 Certificates?

The *Environmental Planning and Assessment Regulation 2000* was amended in December 2005 to require approved PVPs to be included in section 149 (2) planning certificates.

Councils will know when a particular Lot/DP is subject to a PVP or development consent, because of the notification received from CMAs.

Where land that is subject to a PVP is later subdivided, councils will need to include PVPs on the parent Lot/s in section 149 certificates relating to the child lots.

11. CMA and council liaison

CMAs and local councils are developing complementary processes, including the sharing of natural resource information and coordination of their respective roles and investments in natural resource management.

Case Study

Southern Rivers CMA has been working with the LGSA to develop an information sharing protocol for collaboration between CMAs and local councils for the implementation of the *Native Vegetation Act*. Amongst other provisions, the draft protocol suggests mutual notification of applications involving clearing of native vegetation within 7 days of receipt of an application by either the CMA or a local council.

It is intended that the protocol should be used as a model in other areas, although a flexible approach is required because local councils and CMAs in different parts of the State have varying concerns and priorities.

Councils and CMAs may also wish to work together to prepare joint information sheets advising the community about information sharing procedures in relation to the *Native Vegetation Act*.

For more information:

Contact your local CMA office, details are at www.cma.nsw.gov.au, or you may also:

Visit: www.naturalresources.nsw.gov.au/vegetation; or www.nativevegetation.nsw.gov.au

Email: info@nativevegetation.nsw.gov.au **Freecall:** 1800 237 012

Note: This information does not constitute legal advice. Please seek specific advice from your local CMA before undertaking any clearing.