Environmental Justice Australia

Fixing Victoria's broken nature laws

A reform proposal for the Flora and Fauna Guarantee Act

www.envirojustice.org.au

About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect the environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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Executive summary

The existing legal framework for biodiversity protection in Victoria will not prevent further losses of biodiversity and is not safeguarding Victoria's environment for future generations.

The Victorian Government has committed to review the *Flora and Fauna Guarantee Act 1988* (**FFG Act**). Environmental Justice Australia, working within the parameters of the Government's review, has developed a proposal for reform of the FFG Act that focuses on how the tools currently contained within the FFG Act can be amended to ensure they are more effective and efficient in conserving and restoring biodiversity in Victoria.

Firstly, we believe that the foundations of the FFG Act – its purpose, principles and objectives – need updating to ensure the FFG Act reflects current priorities in biodiversity management and to include modern environmental goals such as **restoration** and the need for **resilient ecosystems in the face of climate change**. We also recommend that the FFG Act provisions would have greater effect across various spheres of government decision-making if the existing obligation with respect to public authorities were expanded so that public authorities were required to act consistently with the provisions of the FFG Act (including its purpose, objectives and principles and any regulation or instrument made under it).

Secondly, we recommend that landscape-scale conservation and restoration become a central focus to the FFG Act. A new part of the FFG Act should be introduced that is dedicated to the regulation and guidance of landscape-scale conservation and ecological restoration. The key components of this part of the FFG Act should include the incorporation of 20-year biodiversity targets across a range of biodiversity indicators, a comprehensive legislative governance framework for a 'Victorian Conservation and Restoration Strategy' and the use of landscape action plans for identified regional landscapes.

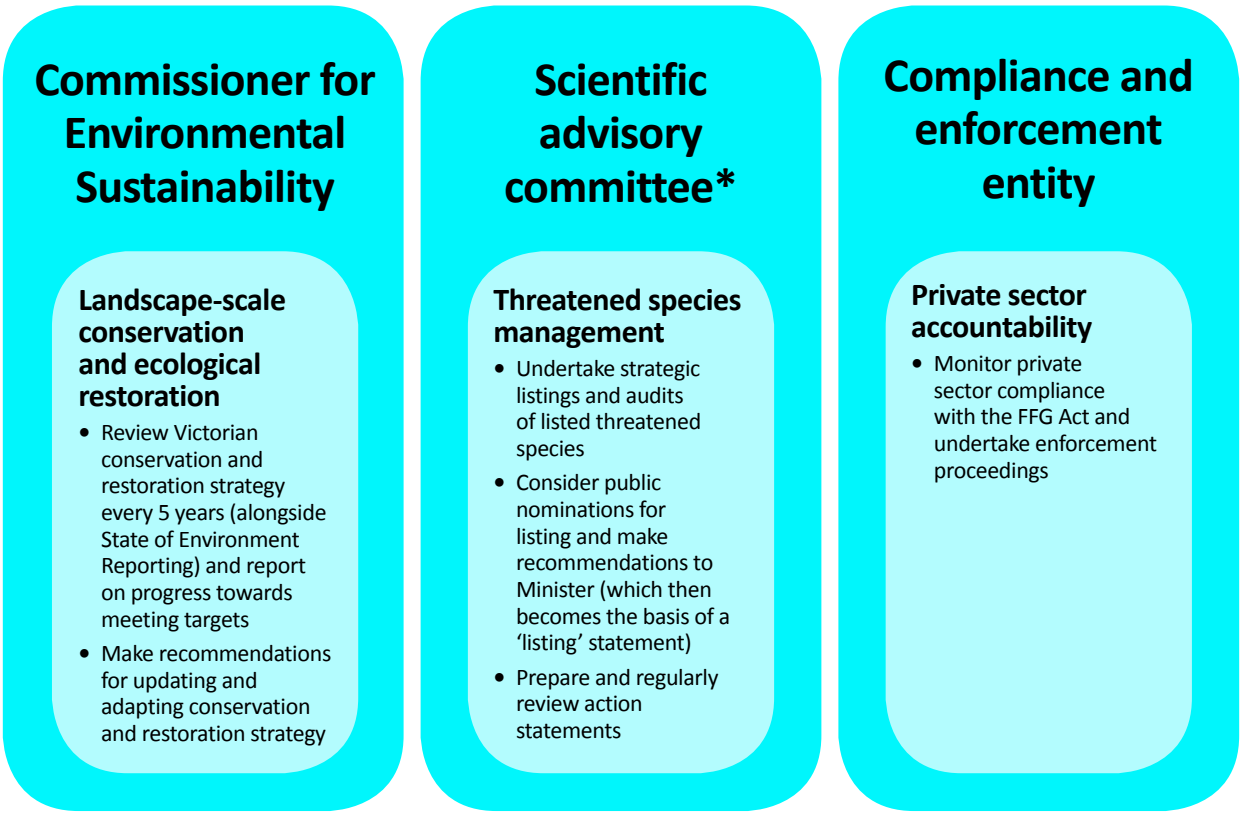
In addition to landscape-scale conservation and restoration, we recommend that the threatened species provisions of the FFG Act should be retained and overhauled so as to significantly improve their efficiency and capability to protect threatened species and reverse trajectories of decline and risk. We believe that this must include incorporating effective controls for the protection of habitat of listed flora and fauna such as mandatory obligations to designate critical habitat for listed threatened species, communities and populations. Further, current exemptions to existing controls and protection for protected flora need to be revoked so that controls are applicable to all sectors – including forestry – and are also 'cross-tenure' (i.e. they apply on private, as well as public land).

A number of our recommendations will result in the FFG Act being easier and more efficient to administer, such as our proposal to prepare a shorter form 'listing' statement which is to be accompanied by a reformed model of action statements based on 'best available information', and in appropriate circumstances for action statements to adopt *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) recovery plans or defer to landscape action plans. Government resourcing will also be streamlined by taking an approach to listing threatened species and communities that is consistent with IUCN standards and which mirrors the criteria and categories of lists used in the EPBC Act.

Finally, the compliance and enforcement mechanisms in the FFG Act need a major overhaul with respect to both public and private sector accountability. For private sector accountability, the FFG Act should include an effective civil enforcement regime that incorporates a scale of enforcement tools including sufficiently dissuasive penalties as well as options for criminal prosecutions for serious offences. We also recommend that a new entity be created that has a specific function to monitor and enforce the FFG Act. For public sector accountability, 'open standing' provisions are required as well as costs protections for environmental matters such as those exemplified by the Aarhus Convention. These should be complemented by provisions that require relevant environmental information to be made readily available in a timely and publicly accessible manner.

Institutional overview

Our proposal sets out a number of recommendations relating to institutional reform needed to make the FFG Act a more effective and efficient biodiversity law for Victoria. We set out for ease of reference a diagrammatic illustration of the proposed institutional reform. Each of the below recommended new/amended authorities will need to be suitably well resourced and be independent of the Department of Environment, Land, Water and Planning (**Department**) and the Minister for the Environment (**Minister**).



* We have also suggested that the Victorian Environmental Assessment Council is an alternative body that could undertake components of this work.

1 Introduction

Environmental Justice Australia welcomes the review of the *Flora and Fauna Guarantee Act 1988* (**FFG Act**). We submit that the existing legal framework for biodiversity protection in Victoria will not prevent further losses of biodiversity and is not safeguarding Victoria's environment for future generations.[1]

The purpose of this document is to discuss and present recommendations on how to make the FFG Act more effective, up to date with best practice thinking, and compliant with international and national standards as well as adhering to the principles of Victoria's Guide to Regulation. We build on prior bodies of work assessing the operation of the FFG Act[2] and bring together previous recommendations that Environmental Justice Australia has made regarding the poor implementation of the FFG Act.

We have previously recommended that in order to achieve effective landscape-scale conservation, an overarching biodiversity conservation law in Victoria is required, which consolidates the FFG Act, the *Wildlife Act 1975*, *Conservation Forests and Lands Act 1987* and the *Catchment and Land Protection Act 1994*[3]. The Department has not taken up our proposal to consolidate existing environmental laws. This paper therefore focuses solely on the review of the FFG Act and how the tools currently contained within the FFG Act can be amended to ensure they are more effective and efficient in conserving and restoring biodiversity in Victoria.

1 For previous work undertaken on this issue refer to: Environment Defenders Office (Vic) Ltd, July 2008 'Land and biodiversity at a time of climate change' Submission in response to the Green Paper; Environment Defenders Office (Vic) Ltd, March 2012 *Where's the Guarantee? Implementation and enforcement of the Flora and Fauna Guarantee Act 1988 & Wildlife Act 1975*.

2 Environment Defenders Office (Vic) Ltd, 2008 and 2012.

3 Environment Defenders Office (Vic) Ltd, 2008 pg.29, and Appendices 3 and 4.

2 Context – why the importance of nature laws

The FFG Act provides a framework to conserve and protect threatened species and ecological communities, and to manage processes that threaten native flora and fauna. It sets out a range of tools and measures that can be used to do so. The FFG Act operates in conjunction with the *Wildlife Act 1975* (**Wildlife Act**), which provides complementary procedures to promote the protection and conservation of wildlife and sustainable use of and access to wildlife. These procedures include the creation of reserves, the adoption of licensing and authorisation procedures, and the creation of offences. The FFG Act imposes controls and prohibitions on protected flora while the Wildlife Act imposes equivalent controls in relation to listed fauna.

The failings and implementation problems of the FFG Act are well documented.[4] The key problems we have previously identified are a failure to implement the procedures contained within the FFG Act (as a result of the duties contained within the Act being primarily discretionary) and a lack of publicly available information regarding implementation, compliance monitoring and enforcement.[5]

Further, since the establishment of the FFG Act, over 25 years ago, the *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) has now entered into force at a national level, and Australia has entered into new international conventions in relation to environmental conservation that must be implemented.[6] Biodiversity conservation laws have also been enacted across other Australian jurisdictions in this period and these laws provide important lessons and models for substantial revision of the FFG Act. Important state statutes for consideration in this review include, for example, the *Threatened Species Act 1995* (NSW), the *Native Vegetation Act 2003* (NSW), the *Natural Resources Management Act 2004* (SA), and *Nature Conservation Act 1992* (Qld).

Alongside developments in Australian and international biodiversity conservation law, new issues – most notably climate change – have emerged into prominence, which we were unaware of at the time of enactment of the FFG Act. Environmental laws must now be able to deal with challenges such as climate change, which includes building resilience into ecosystems.

All of these developments have meant that best practice thinking around the essential components of an effective and efficient environmental law has progressed significantly since the enactment of the FFG Act. For example, for the past 20 years, *ecologically sustainable development* (**ESD**) has been the main goal of Australian environmental law. The idea behind this goal is that we should use natural resources to achieve economic development, improve our quality of life and protect the environment, all at the same time.[7] However, environmental legal academic thinking is now focusing on moving beyond the goal of sustainable development to either 1) strive for more effective implementation of ESD or 2) develop alternative paradigms, based on the concept of ESD but recognising that concept is now insufficient to meet the challenges of biodiversity conservation. [8] While we believe it still remains appropriate to include the goal of ESD within the FFG Act, new emerging goals of environmental law should also influence the review of the FFG Act, as should new concepts such as resilience, adaptation, restoration and integrated natural resource management.

In addition to considerations regarding developments of biodiversity conservation laws, it is necessary to consider various approaches that can be taken through legislation to conserve biodiversity. As EDO NSW has identified in its comprehensive analysis of biodiversity laws in NSW[9] – drawing on the work of Bates[10] – the legislative approach to biodiversity conservation falls generally into three categories: the first designed to specifically manage biodiversity conservation; the second not specifically designed to protect biodiversity but with significant application to biodiversity conservation, such as planning laws; and the third being legislation not intended to protect biodiversity but the application of which may adversely affect biodiversity, such as mining, water, forestry, or energy legislation.

4 Victorian Auditor-General's Office, *Administration of the Flora and Fauna Guarantee Act 1988;* Environment Defenders Office (Vic) Ltd, March 2012; Australian Network of Environmental Defender's Offices, September 2014, 'Assessment of the adequacy of threatened species & planning laws'; Margaret Young, 'At the Crossroads: Protective Mechanisms for Victoria's Biodiversity' 1998 *Environmental and Planning Law Journal*, 15, 190; Sandra Edmonds and Jeff Giddings, 'Guaranteeing the Survival and Evolution of Endangered Species: An Analysis of the Flora and Fauna Guarantee Act (Victoria)', *Environmental and Planning Law Journal,* 421; Nicholas Croggon, 'Victoria's Flora and Fauna guarantee - its future?' 2011 *Park Watch*, 24.

5 For further details, see Environment Defenders Office (Vic) Ltd, March 2012.

6 Convention on Biological Diversity 1993; Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES) 1973; Convention on the Conservation of Migratory Species of Wild Animals 1985; Ramsar Convention on Wetlands 1971; UN Convention to Combat Desertification 1994; UN Framework Convention on Climate Change 1994; World Heritage Convention 1975; The Paris Agreement 2015.

7 Australian Panel of Experts on Environmental Law, 2015: 'The Next Generation of Australia's Environmental Laws' Introductory Discussion Paper, pg. 6 accessed 6 April 2016, www.apeel.org.au

8 Australian Panel of Experts on Environmental Law (2016) DRAFT: 'The Foundations for Environmental Law: Goals, Objects and Principles' Technical Discussion Paper (Stream 1).

9 EDO NSW *A Legal Assessment of NSW Biodiversity Legislation,* 2014, accessed 13 April 2014: http://www.edonsw.org.au/biodiversity_legislation_review.

10 Gerry Bates, *Environmental Law in Australia,* 6th Edition, LexisNexis Butterworths Australia.

The FFG Act falls within the first category. We envisage that a reformed FFG Act will also continue to operate in the specific space of a biodiversity conservation law. However, in order to be an effective piece of biodiversity legislation, it is necessary that decision-making that occurs under other existing schemes– such as for example decisions made under the *Planning and Environment Act 1987* (category 2) or the *Forests Act 1958* (category 3) – must be consistent with the core provisions and operation of the FFG Act. Our recommendations relating to application of the FFG Act (see section 4.4 for further details) would mean that an activity that may otherwise be allowed under an existing framework might need to be rejected or altered because of inconsistency with the FFG Act.

Other important characterisations of biodiversity conservation legislation in general, which are alluded to in this paper, include:

- a distinction in the construction of conservation duties between those implemented through the exercise of discretionary powers (for example by a Minister) and those the Legislature has made obligatory, and

- the treatment of biodiversity protection and conservation as considerations in official decision-making as against biodiversity considerations controlling or directing decision-making.

The common approach in Australia towards biodiversity legislation is to establish comprehensive and sophisticated measures for biodiversity protection and conservation, such as plans, strategies, lists, statements, regulatory instruments, notices, and so on. The prevailing approach is also to require these to be implemented or entered into legal effect through an exercise of official discretion, such as Ministerial, Cabinet or senior bureaucratic discretion (for example, where a Minister 'may' take some course of action). The utility of powerful and important conservation tools has been severely limited by this discretionary approach because of its failure to be exercise fully or at all. Critical habitat protection provides a useful example to illustrate this point. 'Critical habitat' protection, as the term suggests, is fundamental to the survival and conservation of threatened species. Many biodiversity laws contain strong regulatory tools for protection of the critical habitat of threatened species, including its identification as well as registration and legal protection. Invariably, measures to give regulatory effect to critical habitat protection (such as through registration) have not been widely used.[11] At best the identification of critical habitat in management plans and instruments is used to guide conservation and development activities. Under the FFG Act, comparable regulatory instruments such as interim conservation orders have also been rarely used. It follows that the discretionary nature of the FFG Act is widely perceived to be the key factor behind its failings. [12]

By comparison, jurisdictions in which regulatory measures are more obligatory in nature, rather than discretionary, such as under the US Endangered Species Act[13], have tended to have some success in limiting and reversing the decline and risks to listed threatened species. Strong legal controls for the protection, for instance, of critical habitat have contributed to the relative stabilisation and improvement in the situation of threatened species.[14] It is therefore a common theme throughout this paper that – in addition to developing a range of effective tools necessary for biodiversity conservation – any reformed FFG Act must create binding obligations that are enforceable, accountable and applicable across government.

11 See e.g. EDO NSW *A Legal Assessment of NSW Biodiversity Legislation*, 2014 pg. 26-27 in regards to *Threatened Species Act 1995* (NSW) (only 4 registrations of critical habitat have occurred). Similarly, despite 215 species listed as endangered or critically endangered (for which 120 Recovery Plans have been prepared) under the Commonwealth EPBC Act only 5 registrations of critical habitat have been made under section 207A of the EPBC Act.

12 Environment Defenders Office (Vic) Ltd, March 2012; Australian Network of Environmental Defender's Offices, September 2014, pg. 11-18.

13 *Endangered Species Act of 1973*, Title 16, Chapter 35, USC, § 1532 (1973).

14 See Centre for Biological Diversity 'A Wild Success: A Systematic Review of Bird Recovery Under the Endangered Species Act' June 2016; Martin Taylor, Kieran Suckling, and Jeffrey Rachlinski 'The effectiveness of the Endangered Species Act: A Quantitative Analysis' 2005 55 Bioscience 4 360.

3 Recommended framework for a reformed FFG Act

Successive *State of the Environment* reports document the continuing decline of Victoria's key environmental indicators as well as the many and varied threats to biodiversity in Victoria. [15] Some of the persistent problems include threats from climate change, land clearing (Victoria is the most cleared state in Australia), habitat fragmentation, inappropriate fire and land use regimes, and an epidemic invasive species problem.[16]

No isolated tool will provide adequate management and abatement of these threats, let alone allow for the restoration of degraded ecosystems. What is needed is an array of well-integrated tools that can manage cumulative threats and restore and build resilience in ecosystems and ecosystem functioning to combat climate change. The FFG Act is Victoria's primary piece of biodiversity legislation and must therefore provide the government and communities with these tools. Threatened species management should remain a discrete and specialised function of the Act, however much more is needed to halt the loss of biodiversity in Victoria than threatened species protection. That is, the FFG Act must deal with ecological processes generally and aim to strategically promote outcomes on a landscape scale.

The FFG Act should be restructured and split into four key parts that will provide the regulatory tools to conserve and restore biodiversity in Victoria, as follows:

1. foundations (purpose, principles, objectives);
2. landscape-scale conservation and ecological restoration;
3. threatened species conservation; and
4. environmental justice. and enforcement

An analysis of the necessary legislative components for the four parts we propose along with recommendations is presented in sections 4–7 of this document. Section 8 of this document presents a cursory examination of the funding commitments required from the Government to enable the FFG Act to operate.

15 For the most recent report see: Commissioner for Environmental Sustainability Victoria, 2013, *Victoria: State of the Environment, Science Policy People*, pg. 68 accessed 18 March 2016, https://www.ces.vic.gov.au/sites/default/files/publication-documents/2013%20SoE%20report%20full.pdf.

16 Commissioner for Environmental Sustainability Victoria, 2013.

4 Foundations (purpose, principles, objectives)

The current purpose and objective clauses of the FFG Act are out of date and require revision to incorporate current best practice in environmental legislative development. In addition to this, key rule-making principles need to be given legal status through their explicit incorporation into a new 'principles' clause in the FFG Act. This will ensure that such principles become mandatory considerations for government decision-making that affects the environment.

The Australian Panel of Experts in Environmental Law (**the Panel**) states that '[e]ffective and well-designed environmental laws need solid foundations in the form of clear, effective and efficient *goals, objectives and principles*'.[17] The Panel have provided a novel consideration of the 'core principles' that underpin environmental law and make proposals for a disciplined and focused approach to the drafting of goals, principles and objectives in environmental law making. We have attempted to adapt the Panel's identified categories of the underlying foundations for environmental law and their associated recommendations to inform our proposal for how the FFG Act's foundations (its purpose, principles and objectives) should be updated.

4.1 Purpose

The FFG Act sets out an overarching purpose which specifies what it is trying to achieve. That is, the purpose of the FFG Act sets out what the overall goal is for the Act. The goal of the FFG Act operates at the foundation level and is different from principles, which may elaborate or assist to give effect to the goal, but the principles of themselves cannot articulate the fundamental goal of the FFG Act.[18]

The purpose of the FFG Act is unique to the Act and plays a very important function because it clarifies the overarching legislative intent. In practice, the purpose provides guidance in relation to how the FFG Act is implemented and is likely to be referred to by the judiciary when faced with questions of interpretation regarding the specific provisions of the FFG Act. In addition to this, there is also scope to incorporate within the overarching purpose of the FFG Act the broader societal goal that will underpin the FFG Act. As stated in section 2 of this paper, we believe that the goal of ESD is appropriate for the FFG Act, while at the same time emerging goals and concepts should influence a reformed FFG Act.

The current purpose of the FFG Act is to '*establish a legal and administrative structure to enable and promote the conservation of Victoria's native flora and fauna and to provide for a choice of procedures which can be used for the conservation, management or control of flora and fauna and the management of potentially threatening processes*.'[19]

We believe this requires updating to reflect current priorities in biodiversity management including landscape-scale conservation and threatened species management. Related to this, it would also be beneficial for the purpose to incorporate emerging environmental goals such as restoration and the need for resilient ecosystems in the face of climate change.

We set out below a possible updated purpose for the FFG Act:

> *This Act is intended to provide for the protection and restoration of biological diversity and ecological integrity in the state of Victoria, taking into account the current and anticipated impacts of climate change. It provides for the expansion of existing and establishment of new institutions, the creation and use of tools for landscape-scale conservation programs; the protection and conservation of threatened species; and access to justice in environmental matters.*

RECOMMENDATION

The purpose of the FFG Act needs updating to ensure the FFG Act reflects current priorities in biodiversity management and to include modern environmental goals such as restoration and the need for resilient ecosystems in the face of climate change.

17 Australian Panel of Experts on Environmental Law, 2016 pg. 3.

18 Australian Panel of Experts on Environmental Law, 2016 pg. 15.

19 Section 1 *Flora and Fauna Guarantee Act* 1988 (Vic).

4.2 Principles

The inclusion of a statement of principles within an environmental law provides a broad statement of ambition and guidance that will underpin the design and implementation of the law itself, and at the same time establish rules that apply across government sectors in relation to biodiversity conservation more generally. As the Panel helpfully states, the difference between objectives – explained further below – and principles is that principles are 'essentially legally-required relevant considerations, whereas objects are an aid to the interpretation of particular parts of legislation where some ambiguity or doubt exists with respect to their meaning'.[20]

It is becoming more common to incorporate a clear legislative statement of principles within legislation itself, and indeed the Panel recommends that a clear statement of rule-based principles should be expressly provided for within environmental legislation. Recent state examples of laws that incorporate a clear legislative statement of principles include the *Public Health and Wellbeing Act 2008* and the *Environment Protection Act 1970.*

Further to these examples, the Panel has identified a number of best practice principles that should shape and underpin the next generation of environmental laws.[21] In particular, the Panel has identified two specific categories of environmental principles, according to their function: 'design- based principles' that guide how laws are designed and drafted; and 'directing' or 'rule-based' principles that impose a rule or direct how something must be done.

As stated above, the FFG Act does not currently include an articulation of 'rule-based' or 'directing' environmental principles that must be taken into account in the course of implementing the provisions of the FFG Act. To ensure that relevant directing principles have requisite legal status, it is important that they be included as a distinct list within the FFG Act (i.e. not within the objects clause). We recommend that the FFG Act contain a clear legislative statement of 'directing' principles of environmental law to underpin the design and implementation of the Act itself as well as providing a high level of guidance to apply across government and influence nature conservation more generally (including category 2 and 3 laws) in Victoria.

The directing principles that we recommend should be included within a separate 'principles' clause of the FFG Act are the following:

- the precautionary and prevention principles;
- the principle of inter- and intra-generational equity;
- principles for environmentally sustainable innovation, for example a highest environmental quality principle and use of best available techniques principle;
- principle of environmental restoration;
- indigenous stewardship and traditional knowledge (including as far as practicable co-management over natural resources).

Although not directly relatable to the Panel's identified categories of principles and objectives, we also suggest that in the specific context of the FFG Act, the first listed objective of the FFG Act – the 'guarantee' that all species can survive and flourish in the wild[22] – could instead be expressed as a directing principle for the Act.

The guarantee objective is presently expressed as a guiding goal for the FFG Act and we submit that it is an incredibly important guiding goal of the FFG Act that clearly demonstrates the Act's ambitions.[23] We believe that it could be strengthened even further if it were reformulated so that it becomes a rule-based principle that must be followed in the course of implementing environmental legislation. This would have the practical effect of elevating the 'guarantee' objective to a guiding principle giving it greater legal effect so that it must be taken into consideration across government decision-making.

20 Australian Panel of Experts on Environmental Law, 2016 pg. 36.

21 Australian Panel of Experts on Environmental Law, 2016 pg. 36.

22 Section 4(1)(a) *Flora and Fauna Guarantee Act* 1988 (Vic).

23 For further discussion on the need to retain the aspirational objective in the FFG Act see: Environment Defenders Office (Vic) Ltd, July 2008, pg.11-12.

RECOMMENDATIONS

- In accordance with the recommendations of the Australian Panel of Experts in Environmental Law and adopting the approach taken in the *Public Health and Wellbeing Act 2008*, the FFG Act should include a legislative statement of the key rule-making principles of environmental law that will guide nature conservation in Victoria.
- The guarantee objective should also be elevated to a guiding principle.

4.3 Objectives

The objectives of the FFG Act primarily do two things. Firstly, they build on the overarching purpose of the FFG Act and give legal effect to the goal that is envisaged within the purpose of the Act. Secondly, where they specifically relate to particular provisions of the FFG Act, they provide additional detail and precise guidance that will aid the interpretation of those parts in cases where ambiguity or doubt arises (for example through judicial interpretation). Put another way, the objectives of the FFG Act will collectively contribute to the achievement of the overall purpose (or goal) of the FFG Act and at the same time will further clarify its legislative intent.

The Panel states that '[i]f the objectives of environmental legislation……are inconsistent or flawed in terms of the level of protection that they envisage for the environment, then there is a clear recipe for failure'.[24] This highlights the importance of the objectives clause and the importance of getting the objectives right, whereby they accurately set the level of protection that the tools included within the FFG Act require in order to be successful in achieving the overarching goal of the Act.

The existing FFG Act objective clause does not currently do this as effectively as it could. We believe that the objectives of the FFG Act need to more accurately provide precise guidance to each key regulatory sphere of the Act as well as providing guidance as to how the FFG Act will endeavour to respond to the most pressing environmental issues of the current times (such as climate change).

4.3.1 Overarching objective

As stated above, we recommend that the first listed objective in the FFG Act is so important that it should be elevated to a guiding principle. In its place, we believe that the first listed objective of the FFG Act should be '*to give expression to a set of principles to guide nature conservation in Victoria*'.

4.3.2 Primary objective for biodiversity conservation

The second[25] and fifth[26] objectives of the FFG Act deal with biodiversity conservation generally. We recommend that these two objectives be revised into one broad and clear overarching statement relating to the conservation and restoration of biodiversity, which all the tools included in the FFG Act work towards.

We believe that it would also be appropriate to include reference to climate change in the primary objective of the FFG Act. Climate change is widely perceived to be the greatest environmental threat facing humanity today.[27] It is therefore imperative that the FFG Act should be updated to include an objective that refers to the management and mitigation of climate change.

The primary objective for the FFG Act that focuses on biodiversity conservation in general and that references climate change mitigation could be drafted as follows:

24 Australian Panel of Experts on Environmental Law, 2016 pg.35.

25 Section 4(1)(b) *Flora and Fauna Guarantee Act* 1988 (Vic).

26 Section 4(1)(e) *Flora and Fauna Guarantee Act* 1988 (Vic).

27 See Stern, Nicholas, 'The Economics of Climate Change: The Stern Review', 2007 Cambridge University Press; Intergovernmental Panel on Climate Change (IPCC), 2013 Fifth Assessment Report (AR5).

'The primary object of this Act is to protect, conserve and restore biological diversity and ecological integrity in Victoria, taking into account current and anticipated impacts of climate change.

Within this framework two dimensions to the consideration of climate change would need to be expressed in the substance of the legislation: that biodiversity protection and conservation contributes to mitigation of climate change, and that climate change needs to be considered in regulatory and administrative decision-making.

4.3.3 Landscape management and planning

An additional objective that specifically relates to our proposals for broader landscape management and planning should also be included. This would provide precise legislative guidance for what the new landscape management Part of the FFG Act is trying to achieve. An example of an overarching objective for this Part could be:

To reverse the continuing decline of natural assets and to meet the goal of improving the integrity of ecological processes.[28]

4.3.4 Threatened species management

An additional objective should be adopted that specifically relates to threatened species management to provide precise legislative guidance for this regulatory sphere of the FFG Act. This 'threatened species' objective should focus on protecting threatened species and managing them in such a way so that their inclusion on lists of threatened species is no longer required. That is, the objective should focus on reversing the trajectories of decline.

The language of the US Endangered Species Act[29] provides a good working example. Potential wording for this objective is as follows:

To provide for the conservation and survival of endangered species and threatened species listed pursuant this Act, to the extent that their listing is no longer necessary under this Act.

This is an appropriate and ambitious objective for the FFG Act – the intent of threatened species legislation should ultimately be to remove the conditions of threat to extinction and, as the FFG Act objectives currently seek, allowing such species to flourish.

Further to this objective, the language and scope of the threatened species part of the FFG Act should be revised to encompass populations of species and ecological communities, as well as species per se. The threatened species provisions are intended to take an ecosystem-level approach to this form of risk-based ecological management; this is now the general approach to equivalent legislation in other jurisdictions.

RECOMMENDATION

The objectives need updating to set a high level of protection that the FFG Act tools must adhere to.

4.4 Achieving public sector compliance

When the FFG Act was first introduced in April 1988, it was the centrepiece of Victoria's biodiversity protection and conservation. For the first time in Victoria – and arguably in Australia – an emphasis was given to habitat protection, the protection of flora and fauna, and the management of threats that give rise to extinction. At its time of introduction, the FFG Act was considered to be a landmark piece of Australian conservation legislation. The mechanisms and regulatory tools that the Act incorporates, if implemented, are powerful – such as the designation of critical habitat protection and

28 This is based on a recent recommendations for a 25-year plan for nature in the UK from the Natural Capital Committee: Natural Capital Committee, 2014 *The State of Natural Capital: Second report to the Economic Affairs Committee,* accessed 18 March 2016: http://web.archive.org/web/20160113172625/http://www.naturalcapitalcommittee.org/state-of-natural-capital-reports.html.

29 *Endangered Species Act of 1973*, Title 16, Chapter 35, USC, § 1532 (1973).

interim conservation orders. However, the effectiveness of the FFG Act has been undermined by a failure to fully realise its potential on a number of levels. Firstly, and as referred to above in section 2, implementation of the tools contained within the FFG Act are largely discretionary and have not been utilised by successive governments. Secondly, as discussed further below, the biodiversity strategy that must be created under the FFG Act has been of limited utility, is considerably out of date and is lacking in detail and content. And finally, although section 4(2) of the FFG Act requires a '*public authority to be administered so as to have regard to the flora and fauna conservation and management objectives*', in practice, the application of laws that impact biodiversity but which are not specifically designed to protect biodiversity (category 2 and 3 laws) are applied in such a manner so that they 'trump' the FFG Act.

This has all meant that the FFG Act has been largely ineffective in conserving biodiversity in Victoria.

Critically, section 4(2) of the FFG Act has not worked to relieve the tensions between the general land use planning system and licensing process and biodiversity conservation laws. To fix this, the FFG Act needs to again be elevated to become the centrepiece of Victoria's biodiversity conservation laws, in the role that it was originally intended to fill.

The *US Endangered Species Act 1973* provides a comparable but more effective approach to the FFG Act's section 4(2). The Endangered Species Act provides that all federal agencies must ensure that actions authorised, funded or carried out by them are not likely to jeopardise the continued existence of a listed endangered species or 'result in the destruction or modification of habitats' of such species.[30] To adopt the approach taken in the Endangered Species Act and build on the existing provision included in section 4(2) of the FFG Act, we recommend that a stronger obligation is needed to require that public authorities act in accordance with the provisions of the FFG Act, including its purpose, objectives, principles and any regulations or instruments made under the Act (such as for example action statements). We believe that this would go some way to relieving tensions between the application of biodiversity conservation laws and other licensing and planning processes.

RECOMMENDATION

To ensure that provisions of the FFG Act apply across whole-of-government decision-making, the FFG Act could include an obligation as follows:

> *'Any decision made, action taken or discretion exercised by public authorities in carrying out their functions must be consistent with the provisions of the FFG Act, including its purpose, objectives, principles and any regulations or instruments made under it.*

This approach would be intended to establish a substantial overarching obligation on public agencies to contribute to biodiversity conservation and the effectiveness of biodiversity law and policy. It is intended to be widely applied. It is also intended, as with other legal instruments employing the technique of consistency in application and interpretation, to require application of the presumption that the FFG Act and other laws and provisions under which public authorities are acting be read 'cumulatively' and in a manner that would reconcile them.[31] This is a preferable and, for the purposes of biodiversity conservation, more effective exercise than alternative approaches to recognition and 'integration' of biodiversity protection and conservation provisions. The common alternative is, at best, to mandate *regard* for biodiversity provisions (such as objectives, goals or principles) in decision-making under other Acts. This will or may operate as a condition on the exercise of powers rather than an obligation to exercise a power in a particular way (that is, 'cumulatively').

30 Section 7 *Endangered Species Act of 1973*, Title 16, Chapter 35, USC, § 1531 (1973); US Fish and Wildlife Service (1996) "History and Evolution of the Endangered Species Act of 1973"; and Christman J and Albrech V "The Endangered Species Act Overview" 1999, Hunton & Williams.

31 See *Wain v Maroondah City Council [2000] VCS 540; South Australia v Tanner* (1989) 166 CLR 161.

5 Landscape-scale conservation and ecological restoration

Threatened species provisions are not sufficient tools on their own to halt the loss of, or restore biodiversity. The FFG Act must therefore deal with ecological processes generally and aim to strategically promote conservation and ecological restoration outcomes on a landscape scale. We would like landscape-scale conservation and ecological restoration to become a more central focus of the FFG Act, with threatened species protections operating as an 'inter-operable' safety net for listed threatened species and communities. The imperative of environmental management and planning at the landscape scale is now widely recognised as essential to viable and effective biodiversity conservation.

We propose a distinct Part of the FFG Act be introduced that is dedicated to the regulation and guidance of landscape management.

5.1 Existing requirements for an FFG or 'biodiversity' strategy

The existing obligation to develop the 'Flora and Fauna Guarantee Strategy' in the FFG Act[32] (**FFG Strategy**) was originally intended as a means to achieve broader, state-wide conservation outcomes beyond threatened species protection. However the operation of the biodiversity strategy to date has proved to be of limited utility and the strategy itself – produced in 1997 – is considerably out of date.[33] The strategy is limited in required detail and content. It expresses policy preferences only, not binding law. A new draft 'biodiversity plan' – which is intended to replace the current biodiversity strategy – was recently released by the Victorian Government and was part of a public consultation process. [34] We believe that this draft plan also fails to set out a precise policy position with a commitment to certain actions.

We believe that the existing legislative provisions within the FFG Act to provide a FFG Strategy are not sufficient to ensure that an effective biodiversity strategy is produced that will achieve stabilisation, protection and restoration of biodiversity and ecological health at the landscape scale. In short, mere preparation of a biodiversity plan or strategy as guidance to decision-makers or legislators is not enough.

5.2 A principled approach

The FFG Act should include guiding principles for landscape management. Following on from our discussion in section 4.2 of this paper, the intention behind incorporating such principles would be to establish rule-based principles that must be taken into account when implementing the landscape-scale conservation provisions.

Various approaches to the drafting of principles for landscape conservation have been undertaken in the academic literature.[35] These provide some instructive guidance. Key principles could include that landscape management:

- recognises that landscapes are socio-ecological features;
- maximises socio-ecological resilience;
- endeavours to protect and restore significant ecological places, assets and processes;
- seeks to protect and improve connectivity in landscapes;
- aims to halt and reverse cumulative threats and impacts;
- enhances cumulative benefits;
- includes multi-tenure and scaled ('nested') planning and management as necessary;
- prioritises community capacity and will to deliver conservation plans and outcomes;
- uses an optimal mix of conservation tools and strategies; and
- uses best practice monitoring, assessment and valuation of ecosystem services across landscapes.

32 Section 17-18 *Flora and Fauna Guarantee Act 1988* (Vic).

33 Environment Defenders Office (Vic) Ltd, March 2012, pg.8.

34 For further information, see here: http://haveyoursay.delwp.vic.gov.au/biodiversity-plan.

35 See for example Joern Fisher, David Lindenmayer and Adrian Manning 'Biodiversity, ecosystem function and resilience: ten guiding principles for commodity production landscapes', 2006 4 Frontiers in Ecology and the Environment 2 80; Sarah Lovelll and Douglas Johnston 'Designing landscapes for performance based on emerging principles in landscape ecology', 2009 14 Ecology and Society 1 44; David Lindenmayer and Saul Cunningham 'Six principles for managing forests as ecologically sustainable ecosystems', 2013 28 Landscape Ecology 6 1099.

5.3 The current draft biodiversity plan

The Victorian Government has already committed to develop an 'ambitious new twenty-year plan for the state' and as stated above, a draft plan was released earlier this year and has been the subject of public consultation. We believe that if this plan is to achieve quantifiable outcomes on a landscape scale – as is required – then the FFG Act must set out biodiversity targets and a governance framework that will guide the content of the plan and ensure that it effectively implements broader conservation tools and policies.

While we welcome the Government's commitment to establish a new biodiversity strategy for Victoria, we believe that further detail should be incorporated into the draft plan if it is to become a useful and effective instrument that achieves landscape-scale approaches to conservation across Victoria. As we set out in our submission to the public consultation regarding the draft biodiversity plan, we do not believe that the current vision, goals, objectives and priorities that are proposed in the draft plan provide a sufficient framework that will lay the foundations for a successful plan. The draft plan is also lacking in a high level of policy detail, which we would expect to see in the FFG Strategy, and which is required for the plan to result in meaningful actions on the ground. Further, a commitment to specific actions is not sufficiently developed within the draft plan. In addition to this, the plan will not be a legally binding document under which the Department can be held to account for not delivering on its content.

We believe that if our below recommendations are incorporated into the FFG Act legislative framework this would enable the draft plan to become a more detailed and focused 'Victorian Conservation Strategy' (the **Strategy**), for which progress towards targets and goals is more readily measured. The Strategy itself would still not be legally enforceable in its own right, however failure to achieve the biodiversity targets and comply with the legislative framework governing the strategy (further details set out below) would be legally enforceable.

From a practical point of view, we recommend that the draft plan be reviewed following reform of the FFG Act and updated accordingly so that it is brought into conformity with our proposed legislative provisions for the FFG Act. There would need to be a clear legislative process for updating the interim plan and also legislative timetables incorporated for when this would need to occur by.

5.4 Embedding biodiversity targets in the FFG Act

As set out above in section 4.3, we recommend that the FFG Act adopt an overarching biodiversity objective for broader landscape management and planning. We also recommend that the FFG Act establish specific legislative long-term (20-year) targets across a full range of biodiversity indicators and key ecosystems for Victoria. The adoption of biodiversity targets provides a quantifiable measure to assess progress that is being made under the landscape-scale approach. That is, progress towards meeting the targets will be measured and assessed every five years (see further below), and it is therefore through the incorporation of targets that the status of individual species, communities and ecosystems becomes a performance measure, rather than a driver for controls and protections. This is the inverse to the threatened species part of the FFG Act, which we see as providing a 'safety net' for anything that needs additional protections to the measures that are introduced in order to meet the biodiversity targets.

The key benefit behind the adoption of a series of long-term, Victorian legislative biodiversity targets across a range of natural indicators within the FFG Act is that they become legally binding. That is, biodiversity successes and losses must be measured against the agreed targets, helping to ensure that implementation of the Strategy becomes accountable. Further, the creation of legal duties on the government to achieve certain targets by certain deadlines is very politically persuasive and binds successive governments to action, both legally and politically. The initial process of agreeing the targets – especially where they are underpinned by respectable scientific reports – is also a process in which politicians and civil society can actively engage and which can help to ensure a successful reform of the FFG Act.

We recognise there will be difficulties in creating precise and clear targets across a range of natural assets and ecological processes, however we believe that it is possible to create a series of quantifiable targets that are based on a combination of scientific knowledge and independent expert advice. As we submitted in our response to the consultation regarding the biodiversity plan, we believe the targets need to be specific, measurable, attainable, realistic and timely (**SMART**), and should relate to the ability to restore and recover species and ecosystems. We also recommend that targets be linked to existing state biodiversity targets, national Biodiversity Conservation Strategy Targets and Aichi Biodiversity Targets under the Convention on Biological Diversity.

Although specific regional and state-wide targets were not included in the draft biodiversity plan that was recently consulted on, the draft plan stated that these will be set in the final version. We also understand that a panel of experts is still in the process of determining what those targets could be. We look forward to seeing the results of that work and having the opportunity to comment on it. We submit that the work being undertaken for targets to be included within the biodiversity plan could form the precursor to developing targets within the FFG Act.

We set out below some examples of how we think long-term state-wide legislative targets should be framed within the legislation. The targets that we set out for illustration purposes below incorporate a range of key habitats and ecosystems that have been identified as being in most need of protection in Victoria – coastal, wetlands, riverine, estuarine, urban ecosystems and native vegetation. The proposed targets are necessarily broad – they must be relevant to the whole of Victoria – but are also specific and measurable in accordance with the SMART principles. The quantitative aspects – that is, the percentages – will need to be informed by robust scientific research in combination with independent expert advice. These elements of the targets have been included in square brackets, purely for illustration purposes. Scientific research and expert advice will determine whether they are attainable and realistic. Civil society and politicians will determine the ambition.

Of particular importance to chosen targets are the baselines and status assessment tools that will be implicitly incorporated within some targets, or which are expressly mandated as needing development. It will be necessary for the Strategy (see further below) to provide further guidance and policy detail on the baseline data and assessment methodology that targets are being reported against.

Examples of long-term state-wide biodiversity targets

1. **Wetland target**:	Over [70%] of Victoria's high value wetlands are in good or excellent condition and over [60%] of Victoria's representative wetlands are in good or excellent condition (applying index of wetland condition).
2. **Healthy rivers target**:	Over [30%] of rivers in Victoria are in good or excellent condition (applying index of stream condition) and there is a [20%] increase in the number of native species living in riverine ecosystems.
3. **Urban ecosystems target**:	20 threatened species have an improved conservation status in urban environments and 20 urban dwelling native species have been re-established in urban environments using sound, scientifically robust rewilding techniques.
3. **Estuarine target**:	The index of estuarine condition has been finalised and a baseline condition established for Victoria's estuarine habitats, from which a long-term target can be developed.
4. **Oceans target**:	Data on the condition of coastal land and marine and coastal ecosystems is gathered in a comprehensive manner and a baseline condition established for the condition of coastal and marine ecosystems, from which a long-term target can be developed.
5. **Native vegetation**:	There has been no downgrading of bioregional conservation status for any ecological vegetation class (EVC) and the bioregional conservation status of EVCs is improved for at least [30%] of EVCs in all bioregions. That is, at least [30%] of EVCs for all bioregions have an improved bioregional conservation status.

In relation to regional targets, we agree with the proposal in the draft biodiversity plan that more specific regional long-term targets should also be developed. We recommend that regional long-term targets could be included within the Strategy, and in addition to this, where regional targets do not immediately relate to a landscape action plan, they will need to be developed specifically to guide landscape action plans (see section 5.6.2 below). We envisage that these regional targets will complement the state-wide targets that are included within the FFG Act. They should also be linked to already developed local catchment targets and could, for example, relate to for carefully chosen individual species and/or communities that are known to be particularly important keystone species for the particular region.

In addition to this, we recommend that shorter-term (five-year) targets are included within the Strategy (see section 5.6.1 below).

5.5 Delivering on biodiversity targets

The employment of 'outcomes-based' regulation, as proposed in legislated targets, is of limited utility without well-designed and well-informed means to achieve those outcomes. To support delivering the agreed biodiversity targets, the FFG Act should set out a governance framework detailing the process to develop the Strategy and the required contents of the Strategy, and should also include an additional regulatory tool in the form of landscape action plans that will work towards achieving the targets. Landscape action plans and the Strategy are both explained further below.

5.5.1 A Victorian Conservation Strategy

Best practice in conservation planning, we submit, requires more than the provisions and requirements for the FFG Strategy as currently contained in the FFG Act.

The use of strategic or planning instruments as *guidance or policy* in conservation management is commonplace in environmental and natural resources law. Key instruments in Victoria include Regional Catchment Strategies,[36] Sustainable Water Strategies,[37] and Biodiversity (or FFG) Strategies. Other forms of plan or strategy can be given greater binding force. For instance, public decision-makers, such as Ministers, public authorities and committees of management, are required under the Coastal Management Act to take all reasonable steps to give effect to Coastal Action Plans[38] and the Victorian Coastal Strategy.[39] Finally, there are other forms of plan or strategy that do have the direct force of law. Planning schemes administered by local government are an example. Water planning as it operates and is intended in the future to operate under the Commonwealth Water Act is also a key example of legally binding plan- or strategy-making under natural resources law,[40] including the key dynamic of 'nested' and inter-related plans and instruments – that is, the making of planning instruments that operate at different but interconnected scales, as well as accounting for adjacent geographic areas and issues.

Articulation of landscape conservation principles in the FFG Act would be one element of a wider legislative device to consolidate and advance landscape approaches to conservation across Victoria. Those principles would be part of and contribute to the overarching Strategy. The distinctive feature of this proposed Strategy would be that it is part of a framework of statutory and binding measures, including:

- medium- and long-term biodiversity targets for Victoria and for identified landscapes across Victoria; and
- requirements to prepare statutory landscape action plans for identified landscapes across Victoria.

The necessary components of the Strategy and process to be followed in relation to assessment and revision of the Strategy would also need to be clearly set out within the FFG Act.

36 Section 25-26 *Catchment and Land Protection Act 1994 (Vic)*.

37 Section 22G *Water Act 1989 (Vic)*.

38 Section 29 *Coastal Management Act 1994 (Vic)*.

39 Section 21 *Coastal Management Act 1994 (Vic)*.

40 See Part 2D *Water Act 2007 (Cth)*.

5.5.1.1 **Process for preparing and regularly reviewing the Strategy**

We believe that the FFG Act should include further details around the process and governance framework for the Strategy. Accordingly, we recommend that the FFG Act should stipulate that the Strategy is:

- the joint responsibility of both the Premier and the Minister;
- developed in consultation with local government, the community and business;
- tabled in Parliament for maximum transparency;
- reviewed by the Commissioner for Environmental Sustainability every five years (i.e. progress towards meeting the long-term targets will be measured every five years with new five-year targets set, policies and plans adapted as necessary); and
- updated every five years following independent review.

The draft 20-year biodiversity plan currently contemplates that every five years it will be reviewed and the Commissioner for Environmental Sustainability will report on progress towards targets and goals, in conjunction with five yearly State of the Environment reporting. We support this proposal and agree that the Commissioner for Environment and Sustainability is well placed to report on progress of meeting goals and targets. The key difference between what is contemplated in the draft plan and our recommendation is that the five-yearly review process that is to be undertaken by the Commissioner for Environment and Sustainability must be detailed within the FFG Act itself, and the FFG Act must set out a requirement for the Strategy to be updated and adapted according to the outcomes of the findings of the review.

5.5.1.2 **Content of the Strategy**

Provisions within the FFG Act should be included that detail the mandatory requirements for what must be included within the Strategy. We recommend that this should include the following:

- interim five-yearly targets that demonstrate what progress in meeting the longer-term targets is expected over that five-year period;
- clearly articulated baseline data that is being used to report on progress towards meeting longer-term targets and develop interim five-yearly targets;
- a summary of the Government's policies and actions for meeting the interim targets for that period;
- a pledge from each Victorian Government department confirming its intention to meet its share of the interim target; and
- specification of the roles and responsibility of the State and local governments for achieving the interim biodiversity targets, as well as identifying the opportunities for private sector involvement.

It should also be optional whether regional targets are developed within the Strategy.

5.5.2 Landscape action plans

As a complementary mechanism to the plans and policies that will be detailed in the Strategy, we recommend that a legislative framework be established to enable the creation of statutory landscape action plans for nominated landscapes. Landscape action plans will also work towards meeting the biodiversity targets and would fall within the legislative framework governing the Strategy (i.e. the landscape-scale management and ecological restoration part of the FFG Act).

Landscape planning and management approaches can vary considerably, especially given the range of possible approaches to collaboration and governance. The Nature Conservancy has developed a model approach that focuses in particular on the socio-ecological character of the exercise.[41] This model has been adopted across many landscape

41 The Nature Conservancy *Conservation Action Planning Handbook: Developing Strategies, Taking Action and Measuring Success At Any Scale*, 2007 accessed 18 April 2016: https://www.conservationgateway.org/Documents/Cap%20Handbook_June2007.pdf.

restoration projects. We do not suggest the direct or uncritical translation of this particular model into a legislative scheme, as it has been prepared for the circumstances of the nongovernmental and private sector in particular. However, the landscape action plan approach contains key elements of landscape-scale and socio-ecological planning and management that should be adopted into the statutory scheme of this landscape Part of the FFG Act. Within the framework of the Strategy, the Act should provide for the establishment of landscape action plans across Victoria.

One of the main points of departure from the Nature Conservancy model and a legislated scheme is that the former is primarily orientated towards non-binding and voluntary approaches to landscape management. A preferred legislated approach would firstly include an enabling framework for communities to develop landscape action plans; secondly, ensure that landscape action plans are given legal force; and finally include provisions that require the Minister to mandate legally binding landscape action plans in exceptional circumstances.

5.5.2.1 **Enabling framework**

The creation of a legislative framework for landscape action plans for identified communities and landscapes in Victoria is not dissimilar to the 'regional and community level conservation planning process' that is proposed within the draft biodiversity plan that was recently consulted on. For example, the draft biodiversity plan identifies the need for a collaborative governance model, which would be co-ordinated by regional government agencies, such as the Catchment Management Authority or the Department. The regional government agency is proposed to be responsible for:

1. creating incentives so that the right parties come to the table;

2. leading community engagement in developing a plan to deliver on regional targets; and

3. delivering government financial contributions to regional targets via a sustainable funding model for Victoria's biodiversity.

This is a good starting point for the landscape action planning section of the FFG Act, however as with biodiversity targets, we believe that in order for these programs to have the best chance of longevity and success, a legislative framework to govern these processes needs to be incorporated into the FFG Act.

We also believe that the biodiversity plan does not adequately acknowledge the social dimension that is fundamental to landscape management.[42] The incorporation of guiding principles for landscape management in the FFG Act would go some way to addressing this, as would the adoption of the Nature Conservancy's model approach described above.

In addition, further legislative provisions within the FFG Act describing mandatory and discretionary components for landscape action plans at both regional and sub-regional scales would help to ensure that effective and detailed landscape action plans are established in communities where there is social capacity and will to deliver landscape action plans and outcomes. Further, we submit that landscape action plans, once agreed by key identified parties, should be formalised by Ministerial Order.

Mandatory elements of regional-scale landscape action plans to be included in the FFG Act should include for example:

- identification of the FFG Act targets(s) and regional targets that the plan is working towards;

- identification of what landscape the plan will cover and whether it is an international and nationally significant landscape (for example a Ramsar site), a state significant landscape (for example a wildlife corridor, biodiversity hotspot) or an important area of local significance;

- a list of the beneficial ecological processes that the plan will focus on;

- a list of processes threatening to the landscape;

42 See for example the following studies that highlight the importance of the social dimension in landscape management: Christopher Raymond and Gregory Brown, 'Assessing conservation opportunity on private land: Socio-economic, behavioural and spatial dimensions', 2011 92 *Journal of Environmental Management* 2513-2523; and Andrew Knight, Richard Cowling, Mark Difford and Bruce Campbell, 'Mapping Human and Social Dimensions of Conservation Opportunity for the Scheduling of Conservation Action on Private Land, 2010 24 *Conservation Biology* 5, 1348-1358; and Benjamin Cooke, William Langford, Asceling Gordon and Sarah Bekessy, 'Social context and the role of collaborative policy making for private land conservation', 2011 *Journal of Environmental Planning and Management*, 1-17

- identification of the key parties – including local community members, businesses, Victorian Government departments, local and regional government agencies – necessary to make the plan a success;
- a proposal to engage the key parties (through incentives or otherwise);
- management measures needed to maintain and restore ecological processes, places and assets;
- commitment for parties to take certain actions to further develop the plan within stipulated timeframes;
- a process and timeline for how and when the plan will be amended and management measures undertaken and adapted as necessary; and
- identification of potential funding including a plan to raise funding and resource management commitments.

5.5.2.2 **Legal force**

We submit that the landscape action plans, once agreed by all affected parties, should be made by Ministerial Order to provide them with the full force of law.

5.5.2.3 **A compelling framework**

In addition to the voluntaristic/incentivised framework, the landscape action-planning framework should also consider exceptional situations where discretion is provided to the Minister to invoke procedures intended to compel individual actors to participate in the creation of landscape action plans.

Situations where this might become appropriate would be the following:

1. the majority of identified key parties have developed a draft landscape action plan;
2. the engaged parties have repeatedly tried over a period of at least 18 months to engage an identified key party in the preparation of a landscape action plan;
3. that identified key party remains unengaged; and
4. the unengaged party's failure to participate is preventing the plan from progressing.

Or

1. the majority of identified key parties have developed a draft landscape action plan; and
2. due to disagreement between identified key parties, agreement on finalising the landscape action plan has not been made within two years from the date that the identified key parties started negotiating.

In such situations, a mechanism should be incorporated into the FFG Act so that the majority of identified key parties for a landscape action plan can make a formal request to the Minister to finalise the landscape action plan through Ministerial Order. The usual practice relating to compensation payments for financial loss resulting from the agreed management measures would be applicable.

Where the Minister has finalised the landscape action plan, it should be open to the parties who have participated in negotiating a landscape action plan to challenge the final form landscape action plan made by the Minister in the Victorian Civil and Administrative Tribunal.

In practice, we envisage that this 'compelling' discretionary power would be invoked rarely, if at all. However, we believe that it is an important measure to include within the legislation and, if nothing more, it provides further encouragement to relevant parties to participate in the creation of landscape action plans.

5.5.2.4 **Scale**

An important component of the landscape action-planning framework is the scale in which it is intended to operate. We envisage that landscape action plans will be identified for landscapes on a regional scale to begin with. It will then be necessary to incorporate provisions that will provide guidance for sub-regional plans that will sit underneath the regional landscape action plans. Regional targets that have been set out in the Strategy should guide landscape action plans. Where relevant regional targets have not been identified within the Strategy, consideration will need to be given as to whether they should be developed for and incorporated into the landscape action plan.

5.5.2.5 **Incentives and funding**

An equally important component of this part of the landscape-scale planning is creating financial and other forms of incentives to motivate communities, business and local government to invest time and resources into landscape action plans. As stated above, where a landscape has been nominated by a community and a landscape action plan developed, the plan needs to specify resourcing needs and there needs to be consideration of how funding will be raised. Innovative solutions such as co-investment in the creation of landscape action plans should be considered (i.e. a commitment for the State Government to match funding raised by local communities and businesses), as well as the use of conservation finance tools such as interest-free loans and green bonds for community conservation projects.

Essentially, however, this requires a commitment from the Government towards incentives programs and/or a clear proposal for how funding is to be raised. We are concerned that the review of the FFG Act has not been accompanied by a commitment of funding to support incentive schemes or government investment programs. We briefly return to this in section 8 of our proposal.

5.5.2.6 **Replacement of Management Plans, PAMAs and interaction with action statements**

We submit that landscape action plans would replace management plans[43] and public authority management agreements (PAMAs).[44] Management Plans and PAMAs are both tools that the FFG Act makes available on an entirely discretionary basis, but which are not used (no management plans have been prepared to date and no PAMAs have been entered into in the last ten years). We submit that the legislative framework we are recommending to guide landscape action plans would ensure that landscape action plans are more routinely used and invoked to enable landscape-scale conservation and ecological restoration.

It should also be made available within the FFG Act framework for action statements to defer to landscape action plans in circumstances where the latter substantially covers a listed species. An example of where an action statement could defer to a landscape action plan is if a landscape action plan was developed for the Red-tailed Black Cockatoos (South-eastern sub-species) and that plan substantially covered the key habitat area for the South-eastern Red-tailed Black Cockatoos.

43 Section 21 *Flora and Fauna Guarantee Act 1988 (Vic).*

44 Section 25 *Flora and Fauna Guarantee Act 1988 (Vic).*

RECOMMENDATIONS

- A new Part of the FFG Act should be introduced that is dedicated to the regulation and guidance of landscape management.
- Principles for landscape management should be introduced to guide the landscape management Part of the Act.
- Long term targets across a full range of biodiversity indicators need to be incorporated into the FFG Act.
- A Victorian Conservation Strategy could form part of the landscape Part of the FFG Act however the distinctive feature of this proposed Strategy would be that it is part of a framework of statutory and binding measures, including:
    a. medium- and long-term biodiversity targets for Victoria and for identified landscapes across Victoria;
    b. the necessary components of the Strategy and process to be followed in relation to assessment and revision of the Strategy are clearly set out within the FFG Act; and
    c. requirements to prepare statutory landscape action plans for identified landscapes across Victoria.
- The draft biodiversity plan currently being developed by the Department should be updated and brought into conformity with the new FFG Act provisions for the Strategy in accordance with an agreed legislative timeframe.
- Progress towards meeting the targets should be reviewed by the Commissioner for Environmental Sustainability every five years and the Strategy updated accordingly. To align with this, the Strategy should set out interim five-yearly targets that demonstrate what progress in meeting the longer-term targets is expected over that five-year period.
- A legislative scheme for landscape action plans should be introduced and incorporate the key elements of landscape-scale and socio-ecological planning.

6 Threatened species management

The FFG Act threatened species provisions are a discrete and specialised function of the Act that while inadequate in their current form[45] need to be retained, but overhauled so as to significantly improve their capability to protect threatened species and reverse trajectories of decline and risk. This section examines the existing framework for threatened species management in the FFG Act and sets out a number of key recommendations for how to improve that framework so that it is more effective in providing protection to, and enabling restoration of, listed species and communities. Our key recommendations are that there needs to be a more strategic approach to listing threatened species and that management action needs to become obligatory.

Our recommended approach recognises that there are limitations to an approach to biodiversity conservation focussed solely on threatened species. At the same time however, we understand that a strong threatened species component is critical to 'holding the line' on the preservation of threatened species. A recent example from the Unites States for example, demonstrates that strong threatened species laws have been essential to saving threatened species from extinction.[46] Threatened species protections therefore remain a keystone of biodiversity conservation and are strongly supported by community expectations as to what biodiversity protection laws should do.

6.1 Scope of threatened species management

As noted above, the concept of threatened species under the FFG Act should be expanded to come into line with contemporary approaches to threatened species management. In particular, the Act should be 'modernised' to include recognised categories of legal status, which are generally adopted from the IUCN Red List framework, such as extinct, critically endangered, endangered, and so on.

Further, the FFG Act should apply not only to threatened species, but, as for instance the NSW *Threatened Species Act 1995* does, to categories of threatened species population and ecological communities. The listing of threatening processes should remain.[47] We take 'threatened species' here to include threatened populations and threatened ecological communities.

RECOMMENDATIONS

- Threatened species provisions should be modernised to include IUCN RED List categories of threated species (extinct, critically endangered, endangered etc).
- The FFG Act should apply to categories of threatened species populations and ecological communities.
- The listing of threatening processes should remain.

45 Environment Defenders Office (Vic) Ltd, July 2008; Environment Defenders Office (Vic) Ltd, March 2012 '; Australian Network of Environmental Defender's Offices, September 2014.

46 Centre for Biological Diversity 'A Wild Success: A Systematic Review of Bird Recovery Under the Endangered Species Act' June 2016.

47 See e.g. *Threatened Species Act 1995* (NSW), Part 2 Div 2.

6.2 Listing processes

6.2.1 Criteria for listing

The FFG Act sets out criteria for listing species, communities and threatening processes.[48] These criteria are not replicated elsewhere (state, national or international) and, unlike the internationally recognised standard set by IUCN, there are no categories of listing under the FFG Act (critically endangered, vulnerable etc). It would be appropriate and logical to update the criteria for listing so that the system is consistent with IUCN standards and mirrors the criteria and categories of lists used in the EPBC Act. In addition, other state threatened species lists – such as Victoria's Advisory List – should be consolidated into a new list under the FFG Act. This would ensure a streamlined approach resulting in greater clarity and efficiency.

Despite harmonisation of criteria for listing, it is important to retain a separate 'state' list under the FFG Act, especially in relation to conservation of species at the edge of their range.[49] We also recommend that a mechanism be introduced so that the state list is inter-operable at a catchment scale. This would provide better opportunities for integration of the listing process with the planning process.

6.2.2 Public nomination for listing

Anyone can nominate a species, community or potentially threatening process for listing under the FFG Act.[50] Nominations are then considered by an independent Scientific Advisory Committee (**SAC**), which makes recommendations for listing to the Minister. The Minister must make a decision as to whether or not the item is listed within 30 days of receipt of recommendation of the SAC and in doing so, must consider the SAC's recommendation, and comments of the Conservation Advisory Committee and the Victorian Catchment Management Council. In practice it is not clear the extent to which – if at all – the Minister considers comments of the Conservation Advisory Committee and the Victorian Catchment Management Council.

Listing is an exercise of discretion by the Minister and Cabinet.

The ability for anyone to nominate species or communities should remain, as should the expert mechanisms for dealing with nominations, described above.

We suggest two reforms in respect of the listing process:

- the Minister must, in accordance with best available scientific information (which may include indigenous traditional ecological knowledge) and to the maximum extent prudent and determinable, amend and revise lists of threatened species and threatening processes; and
- recommendations and advice (from SAC and other identified bodies) must be based on best available scientific information.

These proposed approaches should also be applied to our recommendations regarding strategic listing and auditing below.

The obligatory character of listing (including repealing and revising listings), use of best available scientific information as an objective basis for listing, and application of prudence and uncertainty ('maximum extent determinable') all mirror the best practice example contained in the Endangered Species Act.[51]

48 Section 11 *Flora and Fauna Guarantee Act 1988 (Vic).*

49 See for example: Fraser, David 'Species at the Edge: The case for listing of Peripheral Species' at http://www.env.gov.bc.ca/wld/documents/bl02fraser3.pdf; Lesica, P. and Allendorf, F. W., 1995 'When Are Peripheral Populations Valuable for Conservation?' Conservation Biology, 9, pg 753–760

50 Section 12-15 *Flora and Fauna Guarantee Act 1988 (Vic).*

51 Section 4(b) *Endangered Species Act of 1973*, Title 16, Chapter 35, USC, § 1531 (1973).

6.2.3 Strategic listing and audits

Another concern with the current listing process is that there is no strategic approach to listing or audits undertaken to obtain up-to-date scientific information on listed species.[52] Therefore, to encourage a strategic approach to listing, in addition to open nominations, there is a need for a program that systematically audits and investigates threatened species and that also enables proposals for listing to flow on from such a program. A strategic approach to listing should be adopted in addition to public nominations. A strategic approach would also assist in managing the nomination biases that can become evident in listing, such as toward 'charismatic' species.[53]

One possible option would be to introduce obligations on an authority to undertake strategic regional assessments of 'biodiversity assets' as a way to audit listed species and to also propose new listings. An obligation should then be placed on the Minister to consider the proposals for new listings in accordance with the provisions governing the basis and timeframes for Ministerial decisions (i.e. the existing section 16(1) as amended).

Such assessments would need to take place regularly to remain effective – for example every five years – and the results would need to be made publicly available and the information gathered, should enable the Department – and the wider public – to evaluate the effectiveness of the listing process. The SAC or the Victorian Environmental Assessment Council (**VEAC**) would both be examples of independent authorities that could undertake this work, provided they were appropriately funded and their new functions were appropriately addressed within a reformed FFG Act.

6.2.4 Emergency Listing

The FFG Act currently lacks a mechanism for emergency listing of threatened species or communities or threatening processes. Although there is nothing the Act that would prevent the usual listing process from being accelerated, there are still time frames that would need to be met. In our view it would be desirable to include a specific emergency or interim listing mechanism in the Act to enable listing decisions to occur quickly in certain circumstances. This would provide a formal mechanism to prioritise the conservation of species close to extinction.

Emergency listing Models for such a mechanism can be found in proposed reforms to the EPBC Act following recommendations in the ten year Independent Review of the *EPBC Act* (**Hawke Report**)[54], and in the Threatened Species Conservation Act (NSW). In the Hawke Report for example, it was recommended that the Minister be given the power to make emergency listings of threatened species and ecological communities, provided that the Minister believes that the native species or ecological community meets the relevant criteria and there is a threat that is severe and imminent.[55]

It is important that in situations where an emergency listing is deemed necessary, there are specific management actions that must immediately flow from the emergency listing. We discuss this further under section 6.3 of this paper.

6.2.5 Preparation of a Listing Statement

We understand that the Department perceives the current listing process and drafting of action statements (see below) to be resource intensive. To improve efficiencies, additional statutory requirements should be developed for the information that is to be included in the final recommendation on a nomination for listing document, prepared by SAC. Presently the Flora and Fauna Guarantee Regulations provide some level of detail regarding what information should be included.[56] We believe that the documents that are ultimately presented to the Minister are comprehensive documents that contain considerable information. We understand however, that this background information is then again compiled by the Department and a degree of duplication often occurs in the preparation of action statements.

This duplication could be avoided by including further requirements within the FFG Act regarding the information that is required to be presented to the Minister when the SAC makes its final recommendation for listing. This would work to further standardise the categories of information already ordinarily included. The information requirements should be based on that which is currently stipulated in the Flora and Fauna Regulations, and in addition should include:

52 See Environment Defenders Office (Vic) Ltd, March 2012, pg. 10.

53 See for example Hugh Possingham, Sandy Andelman, Mark Burgman, Rodrigo Medellin, Larry Master, David Keith 'Limits to the use of threatened species lists' 2002 *Trends in Ecology and Evolution* 17 11 pg. 503-7.

54 Australian Government Department of the Environment, Water, Heritage and the Arts, October 2009 'The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999', Final Report.

55 Australian Government Department of the Environment, Water, Heritage and the Arts, October 2009, p 31.

56 Schedule 2 *Flora and Fauna Guarantee Regulations 2011 (Vic)*; see also *EPBC Regulations 2000* (Cth, reg 7.04-7.06

- a detailed description of the species/community;
- its population(s) and distribution, including any populations under particular pressure;
- its critical habitat (including critical habitat needs in the context of climate change, as far as relevant and determinable);[57]
- key threats; and
- evidence that criteria for listing is satisfied, based on the best available information.

Once a listing is made, the final recommendation document should be approved and become a formal instrument titled a 'listing statement'. This will avoid duplication between the listing process and the drafting of action statements, to streamline both processes and maximise each of their utility.

Another key requirement will be to embed in the legislation that listing statements are to be made publicly available.

RECOMMENDATIONS

The threatened species listing provisions in the FFG Act should be amended as follows:

- The criteria for listing should be updated to create an approach that is consistent with IUCN standards and mirrors the criteria and categories of lists used in the EPBC Act.
- Pre-existing state lists of threatened species, such as Victoria's Advisory List, should be consolidated into a new list under the FFG Act to avoid duplication.
- The public nominations should remain, as should the expert mechanisms for dealing with nominations. In addition, an obligation placed on a public authority – such as the SAC or VEAC – to regularly undertake audits (say five yearly) and to make proposals for listings, which must then be considered by the Minister.
- If the SAC and/or VEAC are utilised for the purposes of carrying out the new strategic advisory functions of the FFG Act, additional powers will need to be incorporated into the FFG Act, and sufficient resources provided to that organisation, to enable the new provisions to be carried out effectively.
- Ministerial decision regarding listings, as well as recommendations and advice (from the SAC and other identified bodies) must be made on the basis of 'the best available scientific information'.
- A specific emergency or interim listing mechanism should be included in the FFG Act to enable listing decisions to occur quickly in certain circumstances.
- The FFG Act should include the matters that are to be contained in the final recommendation on a nomination for listing, including a detailed description of the species/community, its distribution, threats and evidence as to eligibility and the criteria for listing that are satisfied.
- Upon the Minister accepting the recommendation and making a listing, the final recommendation document should be formally approved and become a publicly available legislative instrument – the listing statement.

57 Section 13(s) *Nature Conservation Act 1992 (Q)*: 'A critical habitat may include an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife.'

6.3 Management processes

Once an item has been listed, the FFG Act sets out a range of management processes that can be used to protect and conserve species and manage potentially threatening processes. These include action statements, flora and fauna management plans, critical habitat determinations and public authority management agreements.[58] The main problem that has been identified with these processes are that they are discretionary in nature and as a result have not been adequately resourced or effectively utilised by successive governments.[59] We set out some recommendations below for how to improve this.

6.3.1 Listing statements and action statements

As the Victorian Auditor-General's 2009 performance report of the administration of the FFG Act noted, listing is only of value if the conservation and management actions that are meant to follow from the listing process are implemented and their impacts evaluated. [60]

Currently, action statements – as the only mandatory recovery-planning tool included in the FFG Act – are the primary mechanism by which recovery planning is achieved. Action statements must be produced as soon as possible after a species, community or threatening process has been listed.[61] Action statements are *fundamental* in establishing adequate recovery planning for threatened species, communities and threatening processes. It is essential that they are retained as a *mandatory* recovery-planning tool.

However, the action statement provisions of the FFG Act can be significantly improved. Importantly, despite the requirements to produce action statements *as soon as possible,* fewer than half of the species, communities and threatening processes listed under the FFG Act have completed action statements.[62] Many of those prepared have not been reviewed regularly, if at all. There is also very limited guidance within the FFG Act as to what is to be included in an action statement.[63]

The Auditor-General noted the lack of legislative power to compel the Department and other agencies to complete directives within action statements and the lack of systematic assessment regarding the effectiveness of action statements[64]. As a result of its findings, the Auditor-General made a series of recommendations regarding development and implementation of action statements.[65]

We recognise the challenge in implementing comprehensive recovery planning for every listed species, community or threatening process. We propose two principal forms of management instrument at the species/population/community scale – a listing statement (noted above) and a reformed model of action statement – to be accompanied by a reformed regulatory framework. We believe this will ensure that adequate recovery planning is achieved in an efficient manner.

Action statements presently include information duplicated in the SAC final recommendation on a nomination for listing document, as set out above. At the same time, many action statements fail to include specific actions that are required to halt the decline of the species. The focus of action statements should be squarely on the latter. Many action statements also fall into a trap of setting out plans to make plans, without including specific actions, rules or tasks that are necessary to halt decline (such as descriptions of types of habitat that, if found in the field, must be protected, or the size of protected areas that must be put in place upon detection of the species).

The FFG Act review process provides an opportunity to systematically address the failings identified by the Auditor-General's 2009 report and for action statements to remain a fundamental component of recovery planning. Our recommendation relating to application of the FFG Act (see section 4.4) will go some way to compel the Department and other agencies to complete directives within action statements. Additional recommendations that relate specifically to action statements are set out below.

58 Section 19-25 *Flora and Fauna Guarantee* Act *1988 (Vic).*

59 Environment Defenders Office (Vic) Ltd, July 2008 and March 2012.

60 Victorian Auditor-General's Office, *Administration of the Flora and Fauna Guarantee Act 1988,* p 31.

61 Section 19 *Flora and Fauna Guarantee Act 198 (Vic).*

62 For further discussion see: Environment Defenders Office (Vic) Ltd March 2012, pg.11-13.

63 Section 19 *Flora and Fauna Guarantee Act 1988 (Vic).*

64 Environment Defenders Office (Vic) Ltd March 2012, pg.25.

65 Environment Defenders Office (Vic) Ltd March 2012, pg.13.

6.3.1.1 **Distinguish between listing statements and action statements**

Listing statements should be prepared with regard to description of the current status of a listed species/population/ community and its protection. This would mean that listing statements are then more in the nature of advisory documents. This is similar to the way in which a 'conservation advice' is prepared at the time of listing under the EPBC Act[66] and is used as a working statement of conservation requirements until such time as a more comprehensive recovery plan is prepared.

Action statements are to be prepared as a longer-term recovery and conservation planning document. Precise guidance as to the content and nature of action statements should be included in the FFG Act establishing, in as much detail as is practicable, measures and timeframes for conservation and recovery programs.

Duplication of information in listing material could be removed by the altered listing process recommended above and by removal of the requirements to detail distribution and threats in the action statement.

6.3.1.2 **Statutory timeframes for preparation of listing and action statements**

Given the lengthy delay in the Department's preparation of action statements, we recommend that the legislation include statutory timeframes for the preparation of listing statements and action statements, the former timeframe being shorter (we propose three months from the date of listing) and the latter longer (we propose two years from the date of listing). Provision for application for extension to those timeframes might be included in the FFG Act, although the circumstances for extension should be limited. The shorter timeframe for preparation of listing statements should be feasible given that most of the information to be included in a listing statement would be included in a nomination and/or recommendation. The three-month period between listing to the publication of a listing statement merely allows for any necessary adjustment, refinement or consolidation of contents. The longer timeframe for action statements would allow these instruments to be prepared as a form of recovery plan, including negotiation and collaboration with other partners/actors, preparation of ongoing management arrangements and integration with other instruments as necessary.

6.3.1.3 **Action statements based on best available science, independently prepared and regularly reviewed**

We submit that the content of action statements, like listing statements, should also be prepared by an independent authority – such as the SAC or VEAC – and that there should be an obligation included within the FFG Act for regular review of action statements and for them to be updated according to new information.

An obligation also needs to be incorporated into the FFG Act to require that action statements be prepared according to the best scientific information available: that is, lack of scientific certainty should not prevent the creation of an action statements. The regular review process will allow for action statements to be amended based on the most accurate and up-to-date scientific research.

6.3.1.4 **Content of action statements**

As noted above, action statements should be recast as conservation instruments, building on the contents of listing statements. That is, action statements would be cumulative and, in addition to the listing statement contents, they should:

- prescribe measures that would reasonably be expected to –
    - protect the species or community;
    - halt the decline of the species or community; and
    - enable the recovery of the species or community such that listing is no longer necessary.
- identify any further research, studies, breeding programs or planning required.
- summarise any previous management actions including an assessment of their effectiveness in protecting, conserving and enabling the recovery of the species/population/community.

66 See section 266B *Environment Protection and Biodiversity Conversation Act 1999 (Cth).*

6.3.1.5 Action statements defer to EPBC Act recovery plans and landscape action plans in some circumstances

In cases where a recovery plan for the threatened species already exists under the EPBC Act, to the extent that it is relevant to the Victorian population or habitat and complies with the legislative requirements of an action statement detailed above, then this could be adopted into an action statement required by the FFG Act. This corresponds with the ability for the federal Minister for the Environment to adopt a state 'Recovery Plan' under the EPBC Act.[67]

Further, and as set out above in the landscape-scale conservation and ecological restoration framework, it could be permissible in some circumstances for action statements to defer to landscape action plans, where such plans substantially cover the range of that listed species and where the landscape action plan is already doing the work envisaged for the action plan.

6.3.1.6 Emergency listings

We recommend that where a species or ecological community has been listed under the emergency listing provisions, an emergency interim statement be prepared that proposes immediate management measures to address the imminent threat. The usual preparation of a listing statement within three months and an action statement within two years should then follow.

RECOMMENDATIONS

The statutory requirements relating to action statements should be amended as follows.

- Listing statements and action statements should be distinguished. A listing statement will describe the current status of a listed species/population/community and its protection. An action statement will be a longer-term recovery and conservation planning document.
- A statutory timeframe for completion and review of listing statements and action statements is necessary. We recommend that listing statements be approved within three months from the date of listing. Action statements should be prepared within two years from the date of listing.
- Prescriptive legislative instructions should be included that require each action statement to prescribe measures that would reasonably be expected to protect the species or community, halt the decline of the species or community, and enable the recovery of the species or community such that listing is no longer necessary. Action statements should also identify further research as required, summarise previous management and analyse the effectiveness of previous management.
- It should be possible in some situations for action statements to defer to landscape action plans where the latter substantially covers the key habitat for the listed species and is already doing the work envisaged for the action statements.
- An independent authority – such as SAC or VEAC – should complete and regularly review action statements.

67 Section 269A(7) and 277 *Environmental Protection and Biodiversity Conservation Act 1999.*

6.3.2 Critical habitat and interim conservation orders

6.3.2.1 **The significance of critical habitat and its protection**

Critical habitat protection is a key tool in the FFG Act threatened species provisions because habitat loss is one of the main causes of species decline.[68] Further, identification of critical habitat is one of the few tools that can lead to strict legal protection for species. Critical habitats can also potentially mitigate the impacts of climate change by providing climate refuges.

Determination of critical habitat under the FFG Act is entirely at the Minister's discretion and has not worked.[69] There is currently no critical habitat for listed species.

Interim conservation orders (**ICOs**) are regulatory instruments intended to provide legally binding conservation measures to protect listed threatened species. They apply to areas that have been declared critical habitat and can operate for up to two years. The failure to use ICOs – or to use binding regulatory tools for protection and conservation – is a key failure of the FFG Act.

It is commonplace across Australian jurisdictions for legislation to require some form of identification of critical habitat and, as far as establishing regulatory measures for its protection and conservation is concerned, making that step subject to official discretion, such as registration on a critical habitat register. That discretion is rarely exercised. Hence, legal protection of critical habitat of threatened species is largely a failure.

6.3.2.2 **Alternatives to discretionary protection and conservation of critical habitat**

Establishing legally enforceable regulation or controls over critical habitat can be achieved in a variety of ways.

EPBC Act

One alternative approach to registration of critical habitat is provided under the EPBC Act. Through the process of preparing and approving recovery plans under that Act a form of indirect protection of critical habitat operates. A recovery plan must include identified critical habitat to the extent it is practicable to do so.[70] In decision-making regarding approvals impacting on threatened species, there is an obligation on the Minister (decision-maker) not to act inconsistently with a recovery plan.[71] In this manner, protection or conservation of critical habitat is not directly enforceable but can form obligatory guidance and control on a regulatory instrument (an approval).

Endangered Species Act and the EU Habitats Directive

Other key models of critical habitat protection can be seen in the US Endangered Species Act and the EU Habitats Directive[72].

Under the Endangered Species Act, the designation of critical habitat is obligatory, along with listing, to the 'maximum extent prudent and determinable', critical habitat for a listed species and doing so by regulation (i.e. by legally enforceable means).[73] There are exceptions for national security purposes.[74]

Under the EU Habitats Directive it is mandatory to establish critical areas for listed species and communities (which were agreed before commencement of the Directive and listed in an Annex) within six years from commencement of the Directive.[75] These areas form part of the 'Natura 2000 network' with the overall objective being to enable the listed species and communities to be maintained, or where appropriate, restored to, 'favorable conservation status'.[76]

68 Commissioner for Environmental Sustainability Victoria 2013, *Victoria: State of the Environment, Science Policy People*, p 68 accessed 18 March 2016, https://www.ces.vic.gov.au/sites/default/files/publication-documents/2013%20SoE%20report%20full.pdf.

69 Environment Defenders Office (Vic) Ltd, March 2012, pg. 14.

70 Sections 270(2)(d) and 270(2A) *Environment Protection and Biodiversity Conversation Act 1999 (Cth).*

71 Section 139 *Environment Protection and Biodiversity Conversation Act 1999 (Cth).*

72 Council Directive 92/43 /EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206/7 22.7.1992) (the Habitats Directive).

73 Section 4(a) *Endangered Species Act of 1973*, Title 16, Chapter 35, USC, § 1531 (1973).

74 Section 7(j) *Endangered Species Act of 1973*, Title 16, Chapter 35, USC, § 1531 (1973).

75 Article 4(3) Habitats Directive.

76 Article 3(1) Habitats Directive.

The Habitats Directive requires the use of 'statutory, administrative or contractual measures'[77] to achieve ecological outcomes across all annexed (scheduled) 'natural habitat types'.

It is important to note that the Natura 2000 network is not a system of strict nature reserves from which all production activities are excluded. The majority of sites exist on privately owned land and support human activity, such as farming. Saying that, the Natura 2000 network is strictly regulated with, firstly, obligations to *prevent harm* to the protected species or communities.[78] Secondly, if a proposed '*project or plan'* is likely[79] to have a '*significant effect'* – taking into account cumulative effects – then there must be an assessment undertaken and the project not approved unless the assessment shows the proposed plan or project will not '*adversely affect the integrity of the site'*.[80] The *precautionary principle* is a key feature of these two requirements.[81] There is also an 'imperative reason of overriding public interest' exception that can be invoked, provided there are no alternative solutions and compensatory measures must be undertaken.[82]

Australian jurisdictions

In Australian jurisdictions, some relevant approaches include the making of Property Vegetation Plans under the *Native Vegetation Act 2003*[83] which, although relying on discretionary Ministerial approval as well as landowner willingness to enter into them, do provide for a legally binding instrument attached to land. More recently, proposed biodiversity legislation in Western Australian includes a 'Habitat Conservation Notice',[84] a proposed instrument which may be issued to landowners and to other persons to require the protection of habitat.[85] ICOs under the FFG Act, were they used, would be powerful regulatory controls. For instance, ICOs can function to prevail over planning schemes and over other licences, approvals or authorities. A primary focus of an ICO is protection of critical habitat[86] and its effect may extend by notice outside the scope of identified critical habitat.[87] As noted above, registration of critical habitat, such as under the EPBC Act or Threatened Species Act in NSW, is another approach to regulatory protection of critical habitat.

6.3.2.3 **A regulatory model for permitted actions**

Our preferred approach is that critical habitat for a threatened species is not only identified but also given legally enforceable protection. This means that specific regulatory protections need to be established for threatened species and in particular for the protection and conservation of critical habitat.

Specific protection of critical habitat should be achieved through legally enforceable means, although what is required in this regard will need to balance protective measures and the rigour of the regulation-making process. That is to say, to give critical habitat protection a regulatory basis can be a protracted and unwieldy process, requiring the preparation of a regulatory instrument, ordinarily its exposure to public scrutiny, and in some cases tabling in Parliament. Even the making of ICOs will require passage through the ordinary process of Executive Government. In NSW and Queensland the protection of critical habitat is accompanied by regulation-making powers. In NSW, as with the Commonwealth, critical habitat can be placed on a 'critical habitat register'. Of itself, this provides limited protection in NSW (public authorities must have regard to it in decision-making) but fuller legal protection under Commonwealth jurisdiction (damage to critical habitat risks criminal sanctions).

Establishment of a critical habitat register is a good approach to the management of threatened species. The FFG Act should include provisions under which the registration of critical habitat must occur in the same timeframe as preparation of a listing statement. We recognise that to provide critical habitat with enforceable protection will require the making of a statutory or regulatory instrument giving effect to the identification and registration of critical habitat. To this end we

77 Article 6(1)Habitats Directive.

78 Article 6(2) Habitats Directive.

79 The EU courts have ruled that the 'likely' test is a de-minimus threshold (see the Attorney General's opinion at para 48 in Case C-258/11 *Peter Sweetman, Ireland, Attorney General, Minister for the Environment, Heritage and the Local Government v An Bord Pleanala* and the UK courts have equated the word 'likely' with that of a 'reasonable possibility' or risk of significant effect (see *Feeney v Secretary of State for Transport & Ors* [2013] EWHC 1238 (Admin) at paras 12-13; see also *Bagmoor Wind Ltd v The Scottish Ministers* [2012] CSIH 93 at para 45).

80 Article 6(3) Habitats Directive.

81 See Case C- 127/*02 Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse vereniging tot Bescherming van Gogels v Staatssecretaris van Landbouw, Naturbeheer en Visserij (Waddenzee)* at paras 56 and 57.

82 Article 6(4) Habitats Directive.

83 Part 4 *Native Vegetation Act 2003* (NSW).

84 Part 4 Div 2 *Biodiversity Conservation Bill 2015* (WA).

85 Similar to a covenant the Notice would also bind successors in title to land: Section 64 *Biodiversity Conservation Bill 2015* (WA).

86 Section 26 *Flora and Fauna Guarantee Act 1988* (Vic).

87 Notice may be given to person carrying out an activity or process that is likely to impact detrimentally on critical habitat. This may lead to amendment of an ICO: Section 35 *Flora and Fauna Guarantee Act 1988* (Vic).35

propose the Act be reformed so that:

- the Minister must make a ICO protecting critical habitat of a listed species as soon as practicable after its registration but not longer than one year after its registration;

- other provisions under sections 26 and 35 of the FFG Act (notice to persons acting outside critical habitat) could accompany this framework. For example, ICOs should operate, as necessary or appropriate, across tenures; and

- the ICO is reviewable after five years.

In the alternative to this approach, we suggest that there should be consideration of a range of other tools. This could include for example the 'Habitat Conservation Notice' provisions under the WA *Biodiversity Conservation Bill 2015*. Such notices can be issued by the government to private individuals in situations where it is reasonably believed that damage is likely to occur, or has been occurring, to critical habitat. The notice requires that damage, or further damage, to critical habitat does not occur and may also require specific restoration measures to be undertake. Breach of habitat notices could result in large fines of up to $500,000. We would recommend that if the option of using 'Habitats Conservation Notices' – or similar – is explored further, then the use of such notices would need to be mandatory in certain circumstances (not discretionary) and in addition to large fines for breach, there should also be options for criminal prosecution.

6.3.2.4 **Permitting and interaction with other schemes**

Permitting provisions currently exist under the FFG Act for activities for which a permit would be required under an ICO. Although unused, they indicate it is envisaged that actions, or uses and development of land or other conservation assets (for instance, waterway), can proceed under certain circumstances, presumably within strict confines of the intended objects and purposes of this type of instrument.

In our view, it is in a permitting process, rather than in the regulation-making or controlling processes, that any necessary balance and flexibility in the system of threatened species conservation can and should occur. A permitting framework under the FFG Act, however, should appropriately be proportionate to the aims and objects of the management of threatened species, including reversal of trajectories of decline and loss. It should therefore be a relatively rigorous process, premised upon high standards of stewardship. Given the protective character of critical habitat registration and regulation proposed above, it is our view that the permitting of actions or uses should be subject to an underpinning 'maintain or improve' test. Further, the appropriate trigger for permitting should be comparable to that set out in the EU Habitats Directive, namely that an action that will or is likely to have an 'adverse effect' on a critical habitat or otherwise on the integrity of a listed species, including cumulative impacts/effects, must only proceed under a permit. While a 'maintain or improve' test will be fundamental to the effectiveness of the legislation, assessment and decision-making in respect of permitting will need to accommodate social and economic considerations. These and other relevant considerations are already articulated in the FFG Act[88] and similar provisions operate in other threatened species laws.

Exceptions and grandfathering provisions are typical of threatened species laws elsewhere and, while it is our opinion that such provisions should be kept to a minimum, there are circumstances where they will be appropriate. The first of these is where the 'maintain or improve' test can or will be or is being met by other means, such as through conservation agreements or other programs. A second case for exemption or alternative approval is where an action is of 'overriding public interest'. In Victoria, this type of exemption is sometimes expressed as referring to actions 'of State significance'. Given what an exemption proposes is avoiding the 'maintain or improve' test we think that this should only occur in circumstances not only where 'State significance' can be shown but where that 'significance' is compelling or urgent.

Any permitting scheme must also clarify that permitting exemptions must not weaken existing protection that may apply to protected areas, for example those that exist under covenants entered into under the Victorian Conservation Trust Act or under the National Parks Act.

In all other respects, it is our view that the current provisions applying to ICOs that concern interactions with other statutory schemes and approvals should be retained. In particular:

- critical habitat protections should prevail over planning schemes; and

88 Section 40 *Flora and Fauna Guarantee Act 1988* (Vic).

- actions approved under other schemes/Acts which contravene an ICO must be suspended. We would add that this suspension should operate to the extent of inconsistency between the ICO and the other permit, approval or authority.

One key effect of this interaction between the FFG Act and other schemes would be to determine that the protections under ICOs would prevail over the Native Vegetation Permitted Clearing Regulations (or their successor rules). Indeed, given the construction of those Regulations, matters currently identified as falling within 'moderate' and 'high' risk pathways, for instance, would defer to protections under the FFG Act. We think this is appropriate. The FFG Act, as a primary biodiversity law ('category 1' law), is the preferable vehicle for this regulatory and management task. In particular, what the FFG Act and permitting procedures under it provide is a scheme under which weight is principally given to biodiversity conservation outcomes, as distinct from the necessary 'balancing' exercise of development and conservation considerations of planning law and frequent deference to the former. Protections under a reformed FFG Act do not, for example, operate merely in a 'cautionary' framework but in a restorative one. Furthermore, the FFG Act is able to provide more comprehensive and appropriate biodiversity protections to the extent they are not confined to the subject-matter of 'native vegetation'. For instance, FFG Act protections of critical habitat extend to water, rocks, soil and sub-surface environments as appropriate.

6.3.2.5 **Compensation**

Section 43 of the FFG Act requires compensation to be paid to a landholder or water manager 'for financial loss suffered as a natural direct and reasonable consequence of the making of an interim conservation order'. Compensation should continue to be considered where rights or property holders have suffered financial loss as a result of a FFG Act management measure. We also propose, however, that this approach needs to take into account policy and legal developments of the past quarter of a century.

Firstly, when the FFG Act was originally passed the legal landscape regarding obligations to compensate for regulatory controls on use or exercise of rights attached the property was arguably less certain that it is today. Unlike US constitutional 'takings' provisions, strict regulatory controls on the exercise of property-based rights under Australian law do not necessarily trigger constitutional protections on the acquisition (by law) of property on just terms. Mere regulation of activities for purposes of biodiversity protection is unlikely to equate to an 'acquisition' of property.[89] Nevertheless, as O'Connor notes,[90] payment of compensation for the 'sterilisation' of rights into respect of property (specifically land) is commonplace under state statutes. There is also often a political or moral imperative to provide such compensation, especially where land or resources are taken out of economic use or circulation.

A second consideration in relation to compensation policy is the intervening development and establishment of stewardship standards and approaches applicable to land and natural resources (an 'environmental duty of care').[91] Express stewardship duties are established for instance under the Catchment and Land Protection Act, and concepts of ecological stewardship are increasingly common in public policy.

Thirdly, more complex and sophisticated approaches to financing conservation have evolved since the FFG Act's introduction, including

- large-scale public funds such as the Natural Heritage Trust;
- market-based incentive schemes; and
- integrated and multifactorial ecosystem services payments schemes.

Hence we recommend that the compensation policy underpinning the FFG Act is considered as both a framework of compensation to directly affected persons, in the context of stewardship models, and a broader incentive and investment framework, such as those concerning biodiversity conservation on State, regional or landscape scale.

89 See *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; see also Pamela O'Connor 'The changing paradigm of property and the framing of regulation as "taking"' (2010) 36 *Monash University Law Review* 2 50.

90 Pamela O'Connor 'The changing paradigm of property and the framing of regulation as "taking"' (2010) 36 *Monash University Law Review* 2 50.

91 See Murray Raff 'Environmental obligations and the Western liberal property concept' (1998) 22 *Melbourne University Law Review* 657; Gerry Bates *A Duty of Care for the Protection of Biodiversity on Land* (Consultancy Report, Productivity Commission, 2001).

RECOMMENDATIONS

The following changes should be incorporated into critical habitat provisions under the FFG Act if they are to achieve real conservation outcomes for threatened species:

- The designation of critical habitat for listed threatened species and communities must become mandatory and given legally enforceable protection through specific regulatory protections.
- A 'critical habitat register' should be established and the following duties incorporated into the FFG Act:
  a. the Minister must make an ICO protecting critical habitat of a listed species as soon as practicable after its registration but not longer than one year after its registration;
  b. other provisions under sections 26 and 35 of the FFG Act (notice to persons acting outside of critical habitat) could accompany this framework. For example, ICOs should operate, as necessary or appropriate, across tenures; and
  c. the ICO should be reviewable after five years.
- Alternatively to the above, we suggest consideration of the proposed 'Habitat Conservation Notice' provisions under the WA Biodiversity Conservation Bill 2015, although with the further requirement that the use of such notices is mandatory, not discretionary.
- Critical habitat protections should prevail over planning schemes, and actions approved under other schemes/Acts which contravene an ICO must be suspended.
- Determination of critical habitat should include habitat currently needed to ensure the survival and conservation of the species or community, habitat needed for recovery, and as far as relevant, habitat needs as can be anticipated in the face of climate change (i.e. climate refuges).
- Compensation for critical habitat determinations over private land should take into account current thinking regarding stewardship obligations that can reasonably be expected of all landowners, and also the more complex and sophisticated approaches to financing that have developed over the past 20 years.

6.3.3 Protected Flora

The FFG Act currently makes it an offence to take, trade in, keep, move or process protected flora without a licence, permit or authorisation.[92] 'Take' is defined within the FFG Act as meaning 'to kill, injure, disturb or collect flora'. Since the prohibition to take also means not to disturb then arguably, the restriction to 'take' protected flora also applies to habitat destruction of protected flora. This provision has never been tested by the Courts, and in practice is not applied as such.

Another key failing of the general controls over protected flora is that there are extensive exceptions within the FFG Act – accidental taking, where reasonable care has been exercised, is exempt[93], as is taking by the owner or lessee of private land as long as the flora is not taken from critical habitat nor taken to be sold[94] – and also further extensive exemptions contained in Orders made under the FFG Act. These orders effectively mean that the protected flora controls only apply to public land.

92 Section 47-48 *Flora and Fauna Guarantee Act 1988* (Vic).

93 Section 47(2)(a) *Flora and Fauna Guarantee Act 1988* (Vic).

94 Section 47(2)(c) *Flora and Fauna Guarantee Act 1988* (Vic).

The following Orders set out further exemptions and additional requirements that must be complied with:

- Flora and Fauna Guarantee (Forest Produce Harvesting) Order No.2/2004;[95] and
- Flora and Fauna Guarantee (taking, trading in, keeping, moving and processing protected flora) Order 2004.[96]

The Forest Produce Harvesting Order listed above is an example of a category 3 law 'trumping' a biodiversity conservation category 1 law. This Order authorises, subject to certain terms and conditions, the taking of protected flora in State forest and Crown land where the taking is a result of or incidental to forest produce (including timber) harvesting operations or associated road works authorised under the *Forests Act 1958* or timber harvesting operations authorised under *Sustainable Forests (Timber) Act 2004*.

The second listed Order, combined with the situation that there are no critical habitat determinations in place, has effectively meant that protected flora receives no protection on private land.

RECOMMENDATIONS

- The controls to make it an offence to take, trade in, keep, move or process protected flora without a licence, permit or authorisation should be retained within the FFG Act.
- The extensive exemptions both within the Act and in Orders made under the Act need to be removed to ensure that flora controls prevail over other laws (such as forestry) and also apply over private land.

6.3.3.1 **Regulation – licences, permits and authorisations**

Under the existing provisions of the FFG Act, the Secretary of the Department may issue a licence or a permit to take, trade in, keep, move or process protected flora, provided that the licence or permit would not threaten the conservation of the protected flora.[97] Where a permit is issued for the purposes of controlling protected flora, the Secretary must be of the opinion that the flora is a serious cause of injury to property, crops, stock or listed flora or fauna.[98]

Our 2012 report which reviewed implementation and enforcement of the FFG Act and the Wildlife Act identified that in practice, licences and permits issued for takes of protected species under the FFG Act are rarely refused by the Department.[99] We believe that this demonstrates that the licencing and permitting scheme for protected flora under the FFG Act has been incorrectly implemented and we recommend that this be rectified immediately.

We also submit that a more detailed legislative regime that sets out the situations where permitted takes are necessary and appropriate would be one way to ensure that the controls for fauna had a meaningful impact and effect. That is, the FFG Act needs to incorporate an appropriate standard that will ensure an effective permitting scheme that is both accommodating to ensure that permits for takes of protected flora can be issued where it is deemed to be necessary, but which does not undermine the overarching objective of the FFG Act and the controls themselves.

Taking an example of an overarching standard from the Habitats Directive, European member state governments may derogate (i.e grant an exemption) to the strict species protections provided that there is *no satisfactory alternative* and the action will *not be detrimental to the favourable conservation of the species concerned*[100] (favourable conservation is the overarching objective of the Habitats Directive).

95 Published in Government Gazette No.S180 on 3 August 2004.

96 Published in Government Gazette No.G39 on 25 September 2004.

97 Section 48(1),(2) and (4) FFG Act.

98 Section 48(5) FFG Act.

99 Environment Defenders Office (Vic) Ltd, March 2012 *Where's the Guarantee? Implementation and enforcement of the Flora and Fauna Guarantee Act 1988 & Wildlife Act 1975*, p 18.

100 Article 16 Habitats Directive.

In addition to the above standard, governments can only grant an exemption in the following circumstances:

- in the interest of protecting wild fauna and flora and conserving natural habitats;
- to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;
- to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the listed species in limited numbers specified by the competent national authorities.

Further, member state governments must keep a list of all exemptions granted and extensively report on the circumstances of each exemption every two years.

We recommend that similar provisions be introduced in a reformed FFG Act.

RECOMMENDATIONS

- Implementation of the existing standard of the FFG Act permitting and licensing system should be correctly implemented.
- A reformed FFG Act should include a more robust licensing and permitting system that sets out in greater detail the general standard and process for situations where licenses and permits are necessary and appropriate.

6.3.4 What about protected fauna?

As stated in the section 2 of this paper, the Wildlife Act imposes equivalent controls to the FFG Act in relation to listed fauna. This division of controls relating to flora and fauna between the FFG Act and the Wildlife Act seems nonsensical. While we recognise that the provisions of the Wildlife Act go beyond the existing scope of the FFG Act review currently being undertaken by the Department, we believe that it is necessary to further consider potential solutions to resolve the division of controls relating to flora and fauna under these two Acts.

7 Environmental justice and enforcement

7.1 Private sector accountability: enforcement and offences

The compliance and enforcement mechanisms that relate to private individuals in the FFG Act need a major overhaul. Fundamentally, we would like to see the creation of a new entity that is established to monitor compliance and enforce the provisions of the FFG Act. This would include responsibility to undertake prosecutions. The new entity should be an independent authority that reports to the Minister for Environment. Practically, and from a resourcing perspective, we envisage that staff of the new entity could reside within the Department's existing offices.

In relation to the specifics of the enforcement regime, insufficient penalties in the FFG Act have been identified as a key failure in deterring offenders.[101] Therefore firstly, a civil enforcement regime needs to be introduced that includes sufficiently dissuasive penalties. In addition to this, the FFG Act is lacking a range of compliance and enforcement measures that can be applied according to the seriousness of the offence. For example, there should be a scale of enforcement tools such as warning notices, infringement notices, remediation and stop work orders and community environmental service orders. In addition, options for alternative dispute resolution, arbitration and tribunal determination should be provided in appropriate circumstances.

There should also be options for criminal prosecution for serious offences. The example of damage to critical habitat was provided above as an offence that attracts criminal prosecution under the EPBC Act. We recommend that this be incorporated into the FFG Act.

We have also previously identified the lack of a compliance monitoring and enforcement policy to be a major failing in ensuring fair, transparent, accountable and consistent decision-making under the FFG Act.[102] We recommend that the FFG Act include an obligation to create a compliance and enforcement policy. This is supported by the findings of the Krpan review from 2011 which looked into Victoria's Environment Protection Authority's approach to compliance and enforcement.[103]

RECOMMENDATIONS

The compliance and enforcement mechanisms in the FFG Act need a major overhaul to include the following:

- the creation of a new entity to monitor and enforce the FFG Act;
- an effective civil enforcement regime that includes a scale of enforcement tools ranging from warning notices to sufficiently dissuasive penalties and community environmental service orders as well as options for criminal prosecutions for serious offences; and
- an obligation to adopt a compliance monitoring and enforcement policy.

101 Victorian Government, Department of Environment, Land, Water and Planning, Draft Consultation Paper, 16 February 2016 *Review of the Flora and Fauna Guarantee Act 1988* pg. 32.

102 Environment Defenders Office (Vic) Ltd, March 2012, pg. 27.

103 Stan Krpan, 2011 *Compliance and Enforcement Review: A Review of the EPA Victoria's Approach*, accessed 20 March 2016 at: http://www.epa.vic.gov.au/~/media/Publications/1368.pdf.

7.2 Public sector accountability: open standing and costs protections

Access to justice is a crucial component of public confidence in environmental decision-making. Australia is a signatory to several international commitments promoting legal rights to participate in decision-making processes and to have access to the courts.[104] It is therefore critical that public sector decisions made under the FFG Act are accountable.

Provisions for open standing for judicial review in NSW environmental and planning laws have operated for the past 35 years with no evidence to suggest that open standing provisions open the 'floodgates' to litigation or increase the likelihood of vexatious litigation.[105] Further, the European Union has been a party to the Aarhus Convention since 2005 (and implemented similar standards since 2003), which establishes a right for European citizens to have access to administrative or judicial procedures to challenge acts and omissions by private individuals or public authorities which contravene provisions of that citizen's national laws relating to the environment.[106] These rights, which by virtue of ratification of the European Union of the Aarhus Convention are binding on all European Member States[107], have similarly shown no evidence that open standing provisions in environmental matters open the 'floodgates'.

It is already possible to judicially review decision-making under the FFG Act according to the rules established by common law, provided that the 'special interest' test can be satisfied,[108] a test that has generally been interpreted broadly by the Courts[109]. However, express incorporation of open standing in the FFG Act negates the need for challengers to prove 'special interest' and generally streamlines and makes clearer the process to be followed. Further, sometimes it is the risk of judicial review – rather than specific legal cases – that has the most meaningful impact in establishing legally robust decision-making. Open standing provisions therefore not only allow parties to more readily directly challenge public decision-making, they also bring to the forefront of the decision-maker's mind the ability of the public to do so, thereby indirectly creating a better decision-making framework.

The FFG Act should adopt best practice and provide open standing for any person to seek judicial review of public sector decisions.

In addition to open standing for judicial review, as a further accountability mechanism the FFG Act should adopt open standing for arms-length merits review of key decisions. This would mirror the provisions in NSW, which make available merits review for objectors to high-impact projects.[110] These provisions were supported in the Hawke Report and there have even been recent calls from the Independent Commission Against Corruption in NSW (ICAC) for further expansion of third-party merits review in NSW planning laws.[111]

Open standing provisions should also be accompanied by costs protections for public interest environmental legal proceedings. Both open standing and protective costs provisions in environmental matters represent international best practice, such as that subscribed to by the European Union under the Aarhus Convention[112] and the relevant EU Directive implementing the access to justice pillar of the Aarhus Convention.[113]The United Kingdom introduced protective costs rules in environmental matters in 2013 – although limited to judicial review proceedings only – in an attempt to become more compliant with the overarching EU Directives and the Aarhus Convention. Although 'opening the floodgates' concerns have from time to time been raised in the UK, it is generally accepted by the judiciary and legal profession that the requirement in judicial review proceedings to obtain the court's permission to bring a case (and the court will not grant permission if a case is frivolous or vexatious or is not properly arguable or unmeritorious) has prevented these concerns becoming a reality.[114]

104 *International Covenant on Civil and Political Rights*; the *Rio Declaration on Environment and Development* (1992).

105 The Hon Justice Peter McClellan, 'Access to Justice in Environmental Law – an Australian perspective', Commonwealth Law Conference 2005, London, 11-15 September 2005, p 2; see also Justice Jerold Cripps, 'People v the Offenders', Dispute Resolution Seminar, Brisbane, 6 July 1990.

106 Article 9 Aarhus Convention.

107 Article 216(2) of the Treaty on the Functioning of the European Union; see also settled EU case law that further confirms that 'the provisions of such an [international] agreement form an integral part of the Community legal order once the agreement has entered into force': Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39, paras 49 and 101; see also Cases C-181/73 *Haegeman v Belgium* [1974] ECR 449, paras 3–5; Case C-12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 7.

108 *Australian Conservation Foundation Incorporated v The Commonwealth of Australia (1980)* 146 CLR 493.

109 See for example: *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492 and *Environment East Gippsland Inc v VicForests* [2010] VSC 335.

110 Section 98 *Environmental Planning and Assessment Act 1979* (NSW).

111 EDO NSW, 2015 *EPBC Amendments - Protecting the Natural Environment: Improving Access to Justice, Community Engagement and Public Confidence,* pg. 2; See also NSW Independent Commission Against Corruption (2012) Anti-Corruption Safeguards and the NSW Planning System, p. 22.

112 Article 9 Aarhus Convention.

113 Directive 2003/35/EC

114 Indeed evidence obtained from the UK Ministry of Justice confirms that following the introduction of Aarhus costs rules in 2013, the number of environmental cases lodged annually in England and Wales did not increase, while the likelihood of success was far greater in environmental public interest litigation as compared to other judicial reviews: See Wildlife and Countryside Link Response to Ministry of Justice Proposals on Costs Protection in Environmental Claims, 2015 at: http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf, pg. 3.

RECOMMENDATIONS

The FFG Act should include the following access to justice provisions:

- 'open standing' for any person to seek judicial review consistent with the model adopted in NSW;
- 'open standing' for merits review for a limited set of key decisions as included in NSW planning and environmental law and supported by the Hawke Report; and
- costs protections for environmental matters such as those exemplified by the Aarhus Convention.

7.3 Public sector accountability: access to environmental information

Without making information regarding implementation of the FFG Act publicly available, it is not possible to assess the effectiveness of the FFG Act.[115] In an attempt to rectify the lack of available information on implementation of the FFG Act, provisions should be introduced into the FFG Act that require relevant information to be made readily available in a timely and publicly accessible manner. This should include provisions that provide for positive duties on the relevant public authority to collect and disseminate environmental information relevant to their responsibilities regarding implementation of the FFG Act. For example, where additional monitoring and enforcement obligations are introduced (see section 7.1), the relevant public authority must make public the findings of such activities in an easily accessible manner.

The Aarhus Convention again provides a good model for the types of obligations that public authorities should adhere to in relation to the dissemination of environmental information.[116] The webpage of the Joint Nature Conservation Committee, which is the UK's independent advisor for nature conservation, is also an example of a website that clearly publishes the most up-to-date information on implementation of environmental laws in the UK.[117] The relevant provisions in the FFG Act that mandate the dissemination of information relevant to the FFG Act should work to achieve such a public information-sharing platform.

RECOMMENDATION

Include provisions in the FFG Act that require relevant environmental information to be made available in a timely and publicly accessible manner.

115 For further discussion on lack of publicly available information relating to the implementation of these acts, see: Environment Defenders Office (Vic) Ltd, March 2012.

116 See for example article 4 of the Aarhus Convention.

117 http://jncc.defra.gov.uk/page-4.

8 At what cost?

This paper has attempted to address the legal requirements that would work to ensure biodiversity conservation is better prioritised across government decision-making. A number of our recommendations will result in the FFG Act being easier and more efficient to administer, such as our proposal to prepare a shorter form 'listing' statement which is to be accompanied by a reformed model of action statements based on 'best available information', and for action statements to adopt EPBC Act recovery plans or defer to landscape action plans, in appropriate circumstances. It is a political reality, however, that even if all of the above proposals were accepted by the Victorian Government, they would be meaningless without dedicated funding to implement and enforce the FFG Act. Although it is beyond the scope of this paper to consider policy questions of why biodiversity is not currently valued effectively, we recognise that funding is essential to ensure that any reformed FFG Act is effective.

This could be partly addressed through improving how the government values biodiversity when it makes decisions. In this respect, we agree with 'Priority 4' that was included within the recently released draft biodiversity plan: 'Be the first State in Australia to adapt the UN System of Environmental Economic Accounts as a way to embed environmental considerations into whole of government decision-making'. We believe that if this priority was adopted in a meaningful way by the Victorian Government – so that before approving any new policies, developments and plans in Victoria, the environmental costs and benefits of such policies, developments or plans must be taken into consideration by the decision-maker – then this would have a significant impact on biodiversity conservation in Victoria.

Of equal importance is determining how money will be raised by the State Government to finance the tools and mechanisms included in the FFG Act. As stated earlier in the paper, innovative conservation financing solutions should be considered such as co-investment from the government, communities and industry, and greater opportunities to use interest-free loans and green bonds for community conservation projects. Alongside innovative financing solutions, increases in more traditional means of funding including a commitment of resources from the State budget is urgently needed. This money will need to be allocated to resourcing government departments to carry out obligations under the FFG Act, such as threatened species management and enforcement and accountability of the FFG Act.

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