



Land and biodiversity at a time of climate change

**Submission in response to the Green Paper prepared by
the Environment Defenders Office (Victoria) Ltd
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ENVIRONMENT DEFENDERS OFFICE

The Environment Defenders Office (Victoria) Ltd ('EDO') is an independent, not-for-profit, community legal service, specialising in public interest environmental law. Our activities include:

- providing the community with legal advice and representation on public interest environmental matters;
- developing and promoting community legal education programs; and
- contributing to environmental and planning law reform and policy.

The EDO made a submission in response to the Consultation Paper that led to the *Land and Biodiversity in a time of Climate Change* Green Paper ('the Green Paper'). In that submission, we focussed on identifying those areas where further investigation or review was required in the course of the development of the Green Paper. We identified overlaps and gaps in the legislative framework that deals with biodiversity and the lack of integration and co-ordination among the relevant agencies and legislative regimes. We specifically focussed on the *Flora and Fauna Guarantee Act 1988* and the *Planning and Environment Act 1987*.

We also prepared a report, *Land and Biodiversity – A Call for Action*, that examined more than 350 submissions received by the Department of Sustainability and Environment (DSE) in response to the consultation paper. The submissions came from individuals, environmental non-governmental organisations, community conservation groups, councils, catchment management authorities, academics and consultants as well as industry groups. Several common themes emerged from the review and there was a broad consensus across submissions about the issues the White Paper should address.

EXECUTIVE SUMMARY

Institutional arrangements and the importance of a good legislative framework

The Green Paper¹ has highlighted the inconsistencies, contradictions and inefficiencies in Victoria's legislative framework for biodiversity and land management. Our submission focuses on the need for change to the law as it relates to biodiversity and land management in Victoria. We highlight and examine some examples of the current deficiencies that are discussed in the Green Paper and some of the deficiencies in the Green Paper itself to support the argument for legislative change.

Good institutional arrangements are critical for meeting biodiversity and land management objectives. Institutional arrangements should be understood to include policies and laws as well as agencies and organisations responsible for their implementation.

A good legislative framework is the foundation for effective institutional arrangements. Amongst other things, a legislative framework should:

- a. Form a clear public statement as to the importance of biodiversity and land management as a government priority and confirm the commitment to properly resource this priority;
- b. Provide clear overarching principles and a framework for developing, implementing and evaluating strategies and plans at appropriate temporal and spatial scales;
- c. Ensure that different agencies and organisations are clear about their roles and responsibilities so as to avoid unnecessary duplication or gaps in functions;
- d. Guarantee evaluation and monitoring, accountability and public participation;
- e. Establish appropriate instruments and tools for implementation and enforcement of strategies and plans.

The current legislative framework for land and biodiversity in Victoria is fragmented and out of date and does not meet the objectives listed above. The framework represents the incremental accumulation of different legislative regimes rather than any attempt to consider how it should all fit together and work effectively. Important legislation such as the *Conservation Forests and Lands Act 1987* and the *Flora and Fauna Guarantee Act 1988* is now more than 20 years old. This and other legislation does not reflect contemporary thinking and policy on ecologically sustainable development, let alone provide a basis for dealing with the threat posed to land and biodiversity by climate change.

The Green Paper identifies many problems with the current institutional arrangements that need to be addressed. While the identification of specific issues (e.g. the need for better coordination

¹ Victorian Government Department of Sustainability and Environment, *Land and Biodiversity at a Time of Climate Change: Green Paper* (2008).

between Regional Catchment Strategies and the planning functions of local government) is welcome, these issues should not be considered in a piecemeal fashion. It is important that the issues identified be addressed in a manner that promotes a comprehensive and integrated approach. A piecemeal approach risks reinforcing rather than solving existing problems, such as confused lines of responsibility and lack of accountability.

Rather than simply foreshadowing the possibility of legislative review, the White Paper should set out some clear objectives for legislative reform in a manner similar to *Our Water, Our Future*.² This must include a commitment to establish a legislative framework that both consolidates some of the existing fragmented legislative framework and also introduces new principles and mechanisms necessary to properly account for and manage biodiversity, ecosystem services and ecological processes in the face of climate change.

The Green Paper focuses strongly on market based initiatives. The White Paper should focus on a strategic mix of instruments that emphasises not only economic efficiency but also the need for certainty in the face of irreversible biodiversity loss. Instruments and tools include incentive or market based mechanisms (e.g. Bush Tender), direct regulation (e.g. native vegetation removal permits) and mechanisms to facilitate voluntary conservation efforts (e.g. Conservation Covenants).

A good legislative framework is a necessary but not sufficient condition for meeting biodiversity and land management objectives. Political will and financial resources are essential. The *Flora and Fauna Guarantee Act 1988* was rightly acclaimed as a ground breaking piece of legislation when it was introduced. If it has been a disappointment, it is not because its objectives are unrealistic, as the Green Paper claims, but because the political will and the resources to implement it have not been forthcoming.

Outline of this submission

This submission further develops some of the ideas raised in our previous submission and expands on the arguments outlined therein. In particular, we focus on the Green Paper's discussion of the *Flora and Fauna Guarantee Act 1988* and the gaps, overlaps and inconsistencies in the broader legislative framework.

This submission is made up of 4 sections that build the case for an agenda for law reform. Section 1 provides an introduction to the main issues in the submission and the purpose behind a green paper/white paper process.

Section 2 critiques the vision, outcomes, underpinning goals, and "sub-outcomes" set out in Chapter 5 of the Green Paper. Many of these objectives are positive; however they appear to be ignored, contradicted or undermined by current policies or suggested approaches in the remainder of the

² Victorian Government Department of Sustainability and Environment, 'Our Water Our Future: Securing Our Water Future Together' (2004) DSE Water
<<http://www.dse.vic.gov.au/DSE/wcmn202.nsf/LinkView/0F296881DE2C2FF6CA256FFE000927FB16E9B1815F549080CA256FFF000B04E4>> at 30 June 2008.

Green Paper. This section analyses some examples of that apparent trend and discusses the need to focus on ecological processes as well as assets.

Section 3 provides the EDO's responses to specific issues in the Green Paper. These issues require individual attention and we discuss them in the broader context of biodiversity and land management in the face of climate change.

Section 4 outlines an agenda for law reform and identifies the specific principles that would inform the legislative drafting process needed to address the problems described in the Green Paper. The Green Paper clearly states that there is a confusing array of complicated legislation and we recommend consolidating and modernising Victoria's biodiversity laws.

1 INTRODUCTION

The White Paper should articulate a clear direction and defined targets for the management of biodiversity in Victoria, including a commitment to legislative review. The White Paper should not be simply a further discussion paper. The Green Paper has served this purpose.

A 'green paper' can be described as a government discussion paper, published and distributed as part of a public consultation process.³ It carries no commitment to action but generally leads to the production of a 'white paper' and can thus be seen as a first step in changing the law.⁴

A 'white paper' can be described as a parliamentary paper that clearly enunciates government policy and proposed action on a topic of current concern. A white paper generally signifies an intention on the part of a government to pass new law.⁵

A recent example is the *Securing Our Water Future* Green Paper that served as a discussion paper and sought submissions. The subsequent *Our Water Our Future* White Paper set out a strategic policy framework and legislative reform program to achieve the goal of creating a more secure, sustainable and efficient water system.⁶ The *Land and Biodiversity in a Time of Climate Change* Green Paper performs a similar role as *Securing Our Water Future* insofar as it aims to stimulate discussion and generate submissions that will inform the final content of the White Paper.

The Green Paper highlights some of the weaknesses of the current legislative framework for biodiversity conservation and land management. Many of these weaknesses can be addressed through consolidating parts of the existing environmental legislation.

As part of its plan to establish policy and program directions over the next 20 to 50 years,⁷ the White Paper should commit the Victorian Government to reforming and simplifying the legislative framework and set defined targets for implementation. By taking the initiative and designing a more streamlined and modern framework, the Victorian Government can encourage the wider community to be a part of environmental protection, the conservation of biodiversity and effective land management.

³ See Victorian Government Department of Sustainability and Environment, *Our Water Our Future: Securing Our Water Future Together* (2004).

⁴ The *Land and Biodiversity in a Time of Climate Change* Green Paper is described as an outline of issues and discussion of approaches that provides an opportunity for public input into policy; Victorian Government Department of Sustainability and Environment, *Land and Biodiversity in a Time of Climate Change - Home* (2008) DSE Conservation and Environment <<http://www.dse.vic.gov.au/DSE/nrence.nsf/LinkView/523B19576C368289CA2572C0007B3BEA554FC9C681B6CAB6CA2572C600036DB1>> at 30 June 2008.

⁵ The green paper/white paper process can be seen as established practice in Victoria, as well as at the Federal Government level (see for example Australian Government Department of the Prime Minister and Cabinet, *Securing Australia's Energy Future*, 2004) and internationally (see for example UK Government Department of Innovation, Universities and Skills, *Raising Expectations: Enabling the System to Deliver*, 2008).

⁶ Victorian Government, *Our Water Our Future*, above n 2.

⁷ Victorian Government, *Land and Biodiversity*, above n 4.

2 VISION FRAMEWORK AND PRINCIPLES

The proposed 50 year vision for land and biodiversity in Victoria is:

*Victorians actively conserving and restoring ecosystems to ensure our land, seas and waterways are healthy, resilient and productive.*⁸

To support the Vision there are four interrelated outcomes and underpinning goals. Each outcome and goal is complemented by a series of "sub-outcomes" directed towards achieving the long term goal and overall vision. The following section analyses some of these outcomes and underpinning goals and their relationship to the broader policy directions and proposals described in the remainder of the paper.

The first "sub-outcome" of Outcome One states that 'Ecosystems continue to produce important ecosystem services'. All ecosystem services are important, not just those that provide immediate economic benefits to the broader community. Those ecosystems where the service provided is not immediately apparent still require protection.

Outcome One's second "sub-outcome" is that, 'Victoria has more and better quality native vegetation'. In order to achieve this goal, criteria for what actually constitutes 'better quality native vegetation' must be established. Objective standards for assessment must be outlined, in order to determine when this outcome is achieved for a particular section of land.

The sixth "sub-outcome" of Outcome One is that, 'Victoria's reserve system is relevant to a changing climate'. The Green Paper does not directly address the reserve system in Victoria, but does make mention of it in several sections, most notably in Chapter 6.7 - Enhancing Public Land Values.⁹ The Green Paper goes no further than to state that, 'Parks and forests will provide some of our best opportunities to respond to the threats posed to natural systems by climate change.'¹⁰ This does not address the potential challenges faced by our reserve system, nor does it suggest any appropriate management strategies for their mitigation.

The third "sub-outcome" under Outcome 2 is, 'Productivity is increased without environmental harm'. This ideal seems to be a recurring theme throughout the Green Paper and it relies on effective land management. The management of private land¹¹ is necessarily part of this. However, the Green Paper covers the incentives available to and responsibilities of private land holders in relation to native vegetation alone. Increasing productivity through innovative and alternative agricultural land practices is not explored within the Green Paper.

The Green Paper articulates a set of guiding principles to be considered when planning any actions to achieve the vision for Victoria's land and biodiversity. The EDO broadly agrees with the principles

⁸ Victorian Government, *Green Paper*, above n 1, 30.

⁹ *Ibid* 52.

¹⁰ *Ibid*.

¹¹ *Ibid* 54.

outlined in the Green Paper however there is frequently an apparent contradiction between the principle and the proposed action in the body of the paper. To illustrate the point, the following sections discuss a selection of these issues.

2.1 Ecological Principles

The ecological principles espoused by the Green Paper are as follows:

Decisions should:

- *allow ecological processes and functions to continue*
- *prefer the maintenance of species in natural habitats over relocation or ex-situ conservation programs*
- *protect what currently exists and enhance its condition before restoring what has been lost*
- *consider the complexity of natural systems, recognising that changes in one part of a system may affect another part*
- *be based on the best available knowledge and models*
- *not be avoided solely due to lack of scientific certainty¹²*

Preservation, protection and maintenance of ecological processes should be the foundation of the land and biodiversity vision for Victoria and as such, it is a sound ecological principle. Unfortunately, this is not addressed in the remainder of the paper other than an oblique reference to obtaining 'long-term and consistent data sets [that] are crucial to understanding ecological processes that operate over many years'.¹³ We recommend law reform that consolidates and modernises existing legislation and introduces a new overarching strategic planning framework that focuses on conserving biodiversity and on protecting, maintaining and restoring ecological processes. This is discussed in Section 4 of this submission.

Protecting what currently exists and enhancing its condition before restoring what has been lost is also a sound principle. However, the current policies that allow vegetation clearance to be offset by the protection of existing ecological assets do not follow this principle. Moreover, they are guaranteed to result in further loss of biodiversity. Schemes that allow trading the immediate loss of actual habitat for restoration projects that promise future habitat also run counter to this principle and will produce problematic time-lags or failure to achieve the offset at all.¹⁴

The final principle, that decisions should not be avoided solely due to lack of scientific certainty, is a basic summary of precautionary principle. Surprisingly, there is no mention of the precautionary principle in all of section 2 of the Green Paper and yet the paper purports to 'outline the Government's 50 year vision for Victoria's land and biodiversity'.¹⁵ The EDO advocates the adoption of modern principles and scientific concepts into the relevant legislation. The Precautionary Principle is one example and this is further discussed in Section 4.

¹² Ibid 37.

¹³ Ibid 67.

¹⁴ Sarah Bekessy et al, 'The Biodiversity Bank Cannot be a Lending Bank' *Ecological Economics* (forthcoming).

¹⁵ Victorian Government, *Green Paper*, above n 1, v.

2.2 Investment Principles

A range of investment principles are outlined in the Green Paper, including the following.

Investment should:

- *ensure value for money and effective use of taxpayer funds*
- *address causes, not just symptoms*
- *be transparent about trade-off decisions*
- *be coordinated and integrated as much as possible.*¹⁶

The EDO supports policies and legislative reform that promotes greater accountability. Providing for an independent body such as the Commissioner for Environmental Sustainability to audit and report on procedural compliance and environmental outcomes measured against targets is one such possibility. This would demonstrate adherence to the investment principles espoused in the Green Paper such as transparent decision making and ensuring value for money.

Building policies and legislation around ecological processes would address the causes of environmental degradation rather than the symptoms. The development of consolidated, simplified legislation may also engender a culture of integration and co-ordination.

2.3 Natural Resource Management Principles

A range of natural resource management principles are outlined in the Green Paper, including the following.

Natural resource management should:

- *focus on actions that contribute to the ongoing provision of ecosystem services*
- *take actions that increase the sustainable use of natural resources*
- *take an integrated approach and avoid negative impacts on other areas, people or resources*
- *integrate Indigenous peoples' skills, knowledge and perspectives into decision-making*
- *protect the interests of future generations.*¹⁷

The focus on action to protect the provision of ecological services demonstrates a profound bias towards protecting biodiversity for the sake of immediate human utility. This is reiterated in the statement of intent at 5.2: 'Government will invest in actions that provide a public benefit.'

It is unclear whether 'public benefit' includes the non-economic benefits of biodiversity. The primary ecological principle recognised in section 5.3 was that decisions should allow ecological processes and functions to continue. Focussing on protecting and maintaining the ecological processes that underpin the services provided by ecosystems would be a more effective means of ensuring the long term production of the ecological services and hence ensuring long term public benefit from biodiversity.

The meaning behind expression 'take actions that increase the sustainable use of natural resources' is unclear. It could be construed to imply an increase in use of resources or alternatively, increasing the sustainability of that use.

¹⁶ Ibid 38.

¹⁷ Ibid.

The EDO supports the idea that natural resource management decisions should be based on taking an integrated approach. We further support the principle of integrating Indigenous peoples' skills, knowledge and perspectives into decision-making and protecting the interests of future generations. However, whether or how these principles will be put into positive action is not explained in the Green Paper.

2.4 Ecological Processes

Ecological processes are fundamental to life. These processes include nutrient cycling, flows of water, dispersal of animals and seeds, local adaptations by species to changing climatic conditions, disturbance regimes associated with fires and flooding, and functional interactions between soils, plants and animals such as pollination, decomposition, predation and competition.

Ecological processes maintain our natural assets (species, vegetation communities, habitats or sites). If these processes are altered and degraded, then the species and habitats that depend on them may change or disappear. Therefore if we want to maintain natural values, as well as ecosystem services for humans, we must sustain and restore the ecological processes which support them.

However, a focus on ecological processes does not automatically protect individual species and places: both 'asset' and 'process' based approaches are needed. For example conservation of Red Gum wetlands requires both protection of the trees themselves ('assets') and provision of floodwater ('process'). We need to respond to threats facing assets and threats facing processes.

2.5 Summary of Principles

The principles discussed above are worthwhile and it is important that they are included in the legislative framework. However, the Green Paper contains no commitment or indication of how decision making would be informed by these principles.

The recent Public Health and Wellbeing Bill 2008 shows that such legislative incorporation of principles is now practice in Victoria. The relevant guiding principles have been 'enshrined'¹⁸ in the Bill with the explicit requirement that they be considered in the administration of the Act.¹⁹ The Minister for Health stated that by doing so, the principles would 'support informed and transparent decision making'.²⁰

The principles in the Green Paper and the insights into ecological processes similarly need to be incorporated into the relevant Acts such that they can inform the interpretation of legislation. Moreover, the various day to day mechanisms and decisions facilitated by the law (such as planning and clearing) must be informed by these principles.

¹⁸ Daniel Andrews, *Second Reading Speech, Public Health and Wellbeing Bill 2008*, 1733.

¹⁹ Public Health and Wellbeing Bill 2008, Part 2

²⁰ Andrews, above n 17.

3 SPECIFIC ISSUES ARISING FROM THE GREEN PAPER

For the purposes of this submission, we have identified some specific issues in the Green Paper that warranted further comment and discussion. We have primarily discussed these issues from a legal and policy perspective as this is our field of expertise.

Our analysis of submissions in response to the consultation paper identified a number of frequently recurring themes and some notable omissions. The primary theme was provision of adequate government funding and resources. This, in turn, informed many other issues such as research, control of invasive species and development of large scale bio-links. It was not simply inadequate funding that was an issue, it was also the short term nature of the funding that resulted in projects not being completed, followed-up or monitored.

Funding and resources are rarely mentioned in the Green Paper without reference to their finite nature and invoking the idea that additional spending in one area means a reduction in another. Aside from a vague mention of discussions with the federal government in relation to future funding arrangements, there appears to be no commitment to increasing government spending in order to protect, maintain and enhance Victoria's biodiversity. However, there is a commitment to identifying the resources required to undertake legislative reform and this is supported.²¹

Other issues such as invasive species, protection of remnant vegetation, research and scientific action and community involvement are discussed in the Green Paper. There was consensus amongst the submissions that large scale restoration and the need to look at the 'big picture' was a priority. This was discussed in Chapter 6.6 in the Green Paper and we support the initiatives to build connectivity and enhance ecosystem resilience.

We note that several issues were excluded from the discussion such as forestry and the commercial exploitation of flora and fauna generally.

3.1 Climate Change

As the Green Paper states, there is scientific consensus that climate change will have a significant impact on our environment. This impact has already begun and is well documented. The challenges posed by climate change predominantly take the form of exacerbation or worsening of problems already well known.

The issue of unsustainable land management practices and the perilous state of our biodiversity are not just a result of climate change. A changing climate exacerbates the legacy of past practices and more recent failures to address this legacy. Measured against their own goals, policy initiatives in the area of land management and biodiversity conservation over the last 20 to 30 years have had either mixed success or have been found wanting.

²¹ Victorian Government, *Green Paper*, above n 1, 65

While climate change poses a challenge, it should not be used as an excuse to lower our expectations or reduce our conservation targets. The threat of climate change highlights the need and presents an opportunity for a renewed commitment to the conservation of biodiversity. Increases urgency of commitments already made.

Climate change should be seen as more than something that requires us to do better at what we have already committed to do. Much of our current legislative framework reflects an assets based approach to biodiversity and land management and is based on a view of ecosystems as relatively static. The fact of climate change and the likelihood of rapid change, together with the significant uncertainties about what it will mean for land and biodiversity, require an institutional framework that is more focussed on managing and responding to a dynamic system.

3.2 Flora and Fauna Guarantee Act 1988

The Green Paper suggests that the goal 'to guarantee that all taxa of Victoria's flora and fauna ... can survive, flourish and retain their potential for evolutionary development in the wild' will need to be 'revised to a more realistic objective' due to 'the magnitude of likely impacts of climate change'. That is, the Green Paper flags an intention to water down the guarantee.

There were four elements to the guarantee in the *Flora and Fauna Guarantee Act 1988* (FFG Act):

- a) A goal.
- b) Mechanisms to see that the goal is translated into ideas for action.
- c) Mechanisms to improve our capability to carry out these action ideas.
- d) Mechanisms to ensure that as far as possible, the action ideas actually are implemented.²²

The 'guarantee' is one objective of the Act amongst others contained in section 4. The designers of the Act saw the guarantee as a strong concept for the setting of goals because:

while there is no certainty that we can ever fully achieve the Flora and Fauna Guarantee goal, the employment of any lesser concept is to give advance warning of our intention to fail.²³

We believe that to reduce any of the force of this goal would be a mistake. The Act itself is already undermined by a lack of commitment and resources. Using the threat of climate change as an excuse to water down its primary guarantee will further undermine the Act.

The discussion in the Green Paper about watering down the FFG Act's objectives ignores the importance of the Act in the assessment of development impacts. Despite the lack of commitment to the FFG Act at the government level in terms of its funding and implementation, the Act does play an

²² P Sutton, 'Designing the Proposed Victorian Flora and Fauna Guarantee Legislation' (Paper presented at the Conference of the National Environmental Law Association, Melbourne, 1987) 7.

²³ Ibid.

important role in identifying and highlighting threatened taxa and communities and threatening processes that need to be addressed in assessing development proposals under the *Planning and Environment Act 1987* and the *Environment Effects Act 1970*. Watering down the FFG Act's objectives in the manner suggested in the Green Paper would be disastrous and would increase the tendency to see biodiversity protection as an optional extra rather than a fundamental requirement. The current "amber light" represented by listing under the FFG Act would become a "green light" as individual impacts are sought to be justified on the basis that some biodiversity loss is inevitable anyway.

In many instances, however, the threat of climate change simply increases the priority and heightens the urgency to address problems already identified such as loss of native vegetation extent and condition and the fragmentation of habitat. Therefore, to accept that an objective in the Act to guarantee the survival of all taxa in Victoria is 'beyond our management capacity' because of climate change is to underestimate the number of existing threats that can be managed, provided sufficient political will is exercised.

Watering down the FFG Act and refusing to maintain a commitment to the current legislative goals sends a clear message to decision makers that the legislature does not value biodiversity. Such a message provides for interpreting legislation in such a way as to place minimal value on biodiversity.

Any proposal to diminish the objectives of the FFG Act also fails to take account of the national and international policy context for Victoria's biodiversity legislation. Australia is party to a range of international agreements and strategies for creating and maintaining a sustainable environment, which are reflected in national policies and intergovernmental agreements. Watering down the FFG Act contradicts the intention behind these strategies and agreements.

A government committed to sustaining the state's flora and fauna could do a great deal using legislation as powerful as the FFG Act.²⁴ However, since its enactment, subsequent governments have failed to understand that the conservation of biodiversity is an integral part of ecological sustainability; they have not considered conservation efforts to be a measure of good government; and they have felt that the expansion of a conservation agenda may put off development interests and undermine the State economy generally.²⁵

Examples of the power inherent in the FFG Act are the capacity to make a critical habitat declaration and to issue an interim conservation order (ICO). However, a significant limitation on the use of the critical habitat and ICO provisions in the Act is the requirement under section 43 to pay compensation 'for the financial loss suffered as a natural direct and reasonable consequence of the making of an interim conservation order'. While this provision is not a complete explanation for why there has been only one critical habitat determination and no ICOs made in the almost 20 years of the Act's history, it has undoubtedly contributed to a general lack of political will to implement the Act.

²⁴ P Sutton, 'Has the Flora and Fauna Guarantee Act Achieved what we hoped for?' (2003) 120(6) *Victorian Naturalist*, 216, 223.

²⁵ *Ibid* 222-3.

This compensation philosophy needs to be reviewed in light of developments since its introduction. Even if some form of compensation can be justified, it should take account of the developing concept of a 'duty of care' or stewardship obligations that can reasonably be expected of all land owners.²⁶ Rather than a backwards looking focus on compensation for lost expectations, the basis for 'compensation' should also be forward looking and framed in terms of reasonable payment for the provision of 'ecosystem' services that go beyond that which can be expected under the duty of care.

A possible model for a revised approach can be found in recommendations by the Productivity Commission in the case of the Heritage Buildings. Recognizing the limitations of a scheme based upon paying owners of heritage buildings for preserving and maintenance of heritage buildings, the Commission has suggested an approach that restricts an entitlement to compensation to those who are able to establish exceptional or unreasonable costs as a result of having to comply with regulatory restrictions. ABARE has suggested that this approach may be applicable in the natural resource management context.²⁷

The key inconsistencies and inefficiencies identified in the operation of the FFG Act include:

- Lack of utilisation of key conservation powers;
- Problems with the content, implementation and review of its Action Statements and Management Plans;
- Protection of flora is severely limited, including a lack of protection for flora on private land;
- Lack of information available to the public.²⁸

By addressing these deficiencies through reform of the FFG Act or consolidated biodiversity legislation, the Government can:

- Create improved and specific mechanisms for enforcement, accountability, and integration with other legislation. These are necessary to decrease delays, and to invest the FFG Act with certainty and authority.
- Expand the role of ICOs and Critical Habitat declarations;
- Incorporate ESD principles into the Act;
- Incorporate principles of accountability and collaboration (as per the Public Health and Wellbeing Bill 2008).
- Expand the protection afforded to all flora and fauna, including invertebrates and non-vascular plants;²⁹
- Ensure that Victorian legislation is consistent with the IUCN Red List Categories and Criteria for classifying species at risk of extinction;³⁰

²⁶ In relation to the concept of stewardship in natural resource management and rural land management generally, see Alistair Phillips and Kim W Lowe, 'Prioritising Integrated Landscape Change Through Rural Land Stewardship for Ecosystem Services' (2005) 12 *Australian Journal of Environmental Management* 39.

²⁷ A Davidson et al, *Native Vegetation: Public Conservation on Private Land – Cost of Foregone Rangelands Development in Southern and Western Queensland*, ABARE Research Report 06.13, Canberra, 2006) 30–1.

²⁸ Andrew Walker, 'The Victorian Flora and Fauna Guarantee Act – A Toothless Tiger Quoll?' (2003) 120(6) *Victorian Naturalist*, 224, 227, 229.

²⁹ See Tom May et al, 'The Victorian Flora and Fauna Guarantee Act and the Conservation of Lesser Known Groups of Biota' (2003) 120(6) *Victorian Naturalist*, 248.

- Inform the operation of other legislation, and the processes of other government departments and non-governmental bodies; and
- Express to the public a statement of intent and an explicit commitment to biodiversity conservation and land management.

3.3 Catchment Management and Land Use Planning

Catchment management and land use planning is referred to several times in the Green Paper as an area of concern. It is a typical example of confusion of roles and responsibilities where greater integration and co-ordination is required. At 7.4 in the Green Paper, it is acknowledged that it is becoming increasingly important to consider the relationship between the planning system and natural resource management, sustainability and biodiversity objectives. At 6.3, the Green Paper refers to the need to clarify relationships between Regional Catchment Strategies, sub-strategies and other planning frameworks.

The introduction of the *Planning and Environment Act 1987* was a significant step in environment protection and marked a major shift away from the traditional view of land use planning as development facilitation, towards realising its potential to achieve conservation objectives. However, these early initiatives have been subsequently diluted with the introduction of the Victoria Planning Provisions (VPPs) in 1997. The introduction of the VPPs has emphasised development facilitation, not conservation, resulting in de-regulation and fewer restrictions on land use planning including the capacity of the planning system to deliver environmental outcomes.

There are significant limitations in the biodiversity planning tools that are available to Planning Authorities, particularly the lack of any planning tool that can be used to actually protect areas of vegetation or habitat identified as of strategic significance rather than simply impose a permit requirement. New tools such as Precinct Plans have some potential to fill this gap, however these are optional and no great enthusiasm has been demonstrated for their use since their introduction.

These problems are compounded by a general reluctance to enforce planning scheme conditions and permit requirements and a lack of resources and expertise in many councils to undertake the environmental planning functions available to them. Similarly, there are significant variations between Planning Schemes in the extent and thoroughness of the utilisation of planning tools that are available such as Environmental Significance Overlays and Vegetation Protection Overlays.

There is also a lack of coordination and linkage between the strategic planning functions of Catchment Management Authorities and land use and development planning by Municipal Authorities under the *Planning and Environment Act 1987*. The failure to translate priorities and actions identified at a catchment scale to local planning scheme policy and planning controls has been identified in several studies.

The role of Local Government and particularly the interaction or lack of it between their planning functions under the *Planning and Environment Act 1987* and the functions and responsibilities of

³⁰ Victorian Government, *Green Paper*, above n 1, 53.

CMAs need to be reviewed and improved. The CFA have produced a Wildfire Management Overlay that can be incorporated into planning decisions by local authorities. This provides a template for CMAs to do the same to produce consistent catchment-wide outcomes.

Possibilities that could be considered include reallocation of some responsibilities under the *Planning and Environment Act 1987* to CMAs, better resourcing of local government (particularly the smaller and less well resourced rural shires) and building on existing initiatives such as the Municipal Association of Victoria's project Integrating Local Land Use Planning and Integrated Catchment Planning.

However, it also needs to be recognised that these solutions may not be suitable to the task of the large scale bio-link and landscape restoration planning that might be required in the face of climate change. The White Paper should include not only a review of existing institutional arrangements for linking catchment level natural resource planning with planning for land use and development but an exploration of other options for the development and implementation of plans at a larger scale.

Statutory Authorities including CMAs, Parks Victoria, Coastal Boards and Water Corporations as well as local governments contribute to strategic planning and implementation of a number of natural resource management programs and advisory bodies provide specialist advice to Government. Community groups, landholders and volunteer organisations have a critical role in articulating local priorities and are often primary agents for on-ground implementation.

All of these partners make important contributions to catchment management in Victoria, however, the number of responsible organisations and, in some cases, unclear or overlapping responsibilities, makes catchment management complex and reflects a compartmentalised approach of the past.

The principles of integrated catchment management are: sustainable development; effective community engagement; integrated management; targeted investment; accountability; and efficiency of land and water management programs. Each of these core principles have been partly satisfied however, there are weaknesses in accountability which is in part due to the number of organisations responsible. A more integrated and efficient approach is required to respond to current and future challenges.

Other problems with the management of the catchment areas include the lack of links between the coastal and marine management and upper catchment activities resulting in processes often being duplicated or inefficient, along with unclear arrangements between land managers. More consistency between CMAs needs to be reached and increased opportunities for community involvement provided, especially to Indigenous people.

Finally, it is submitted that CMA boards should be appointed on the basis of expertise in governance and natural resource management. While this expertise will frequently be found amongst those whose "principal occupation is primary production", the current requirement imposed by section 15(3) of the *Catchment and Land Protection Act 1994* for more than half of the Board members to meet this description is unduly restrictive, contrary to sound governance and fails to recognise the broad functions and responsibilities of CMAs.

3.4 Riparian Land Management and Wetlands

At 6.5 the Green Paper flags an intention to revise the Victorian River Health Program with increased number of private land wetlands managed for environmental values. The EDO supports the protection of wetlands on private property and their management for conservation.

The Green Paper also notes that in the field of inland water management the DSE has main control of Crown frontages, but CMAs, local government and Parks Victoria all have interests and responsibilities. This overlapping of rights and responsibilities is one of the concerns that should be examined to improve statutory and administrative instruments that relate to the management of riparian zones.

In the same section, the Green Paper proposes a review the Crown frontage licensing process for the 2009 licence renewals to better reflect broader environmental outcomes. The licence renewal process provides a timely opportunity and adds to the urgency for a review the management of riparian land that cannot wait for the development and acceptance of the White Paper.

In some ways, the management of riparian land remains mired in a 19th century framework where the owner of the land abutting the river or stream is treated as having an automatic and inalienable right to use the frontage and the water. Changing management practices on riparian land can have multiple, broad scale environmental impacts across the state, including improved water quality and ecosystem connectivity (see Ch 6.6).

The EDO supports the recommendations put forward by the Public Land Consultancy in their paper *A Review of the Management of Riparian Land in Victoria 2008*.³¹ As a priority, the EDO supports the recommendation that unreserved Crown land be immediately reserved for 'public purposes – protection of riparian environment'.³²

The EDO further supports the suggestions in the Green Paper related to management of aquatic ecosystems, through:

- Creation of more appropriate marine and wetlands legislation;
- The development of clearer and shared priorities across different marine managers, advisory bodies, industries, scientists and the general community.³³

3.5 Market Based Initiatives.

Market Based Initiatives (MBIs) are consistently and frequently mentioned in the Green Paper. The EDO generally supports the potential for MBIs to provide a lateral and flexible tool for the management of land and biodiversity.

³¹ The Public Land Consultancy, 'A Review of the Management of Riparian Land in Victoria', Victorian Government Department of Sustainability and Environment (2008).

³² Ibid.

³³ Victorian Government, *Green Paper*, above n 1, 65.

However, to achieve the economic advantages promised, MBIs, as alternative policy mechanisms, still rely on significant regulatory underpinning to increase their dependability and to decrease uncertainty and irrationality.³⁴ Gunningham and Young state that 'financial instruments are rarely adequate on their own and often need to be reinforced by precautionary instruments and, ultimately, by a regulatory safety net to address recalcitrant resource users'.³⁵ As such, they suggest that dependability can be increased through a combination of instruments including regulation, voluntary management agreements and property rights mechanisms. Such a combination helps to overcome the weaknesses inherent in each instrument.³⁶

As part of a suite of policy instruments, direct regulation retains a particularly important role and may still be the most appropriate tool in the context of the threat of irreversible biodiversity loss. In some cases, regulation may be the only technique capable of exerting pressure and compelling resources users and others to protect biodiversity. Thus, 'even those who do not behave with economic rationality or respond to economic instruments can still be persuaded to halt destructive practices'.³⁷ For example, it is difficult to see the opportunity for payment for such services being an effective tool to deal with the maintenance and preservation of grasslands under threat from urban or agricultural development where the payment offered cannot match the opportunity costs of foregoing development. Such an outcome might be economically efficient but ecologically disastrous.

It is also important that voluntary activity is not 'crowded out' by regulation or by MBIs. The use of incentive based agreements or regulation to ensure the provision of certain conservation services runs the risk of creating a simultaneous disincentive for voluntary delivery of the same services. This applies in the context of both volunteers per se and those that carry out services based on an informal duty of care such as land owners. Effectively, such crowding out can result in the incursion of costs for services that were previously being delivered for free. The Green Paper acknowledges the potential to boost community work in the context of its social, monetary and health value,³⁸ no attention has been paid to this potential problem.

The law must also provide for transparency and accountability of the MBI program.³⁹ Any move to widespread payment for ecosystem services or auctions for conservation contracts should be backed by a legislative framework clearly defining responsibilities and functions, providing the necessary legislative tools for implementing agreements and securing outcomes and ensuring proper auditing of the operation of the scheme. Although incentive based contracts for conservation services may avoid some of the problems with the enforcement of command based regulatory approaches, there is still a need to ensure that outcomes are monitored and, where necessary, sanctions other enforcement action are pursued.

³⁴ Neil Gunningham and Mike D Young, 'Toward Optimal Environmental Policy: The Case of Biodiversity Conservation' (1997) 24 *Ecology Law Quarterly* 243, 276-7.

³⁵ *Ibid* 278.

³⁶ *Ibid* 277.

³⁷ *Ibid* 278.

³⁸ Victorian Government, *Green Paper*, above n 1, 73.

³⁹ In relation to the appropriate design and application of MBIs for the provision and protection of ecosystem services see Stuart M Whitten et al, 'Putting Theory into Practice: Market Failure and Market Based Instruments (MBIs)' (Working Paper 2007-02, CSIRO Sustainable Ecosystems, 2007).

Any proposal to extend the use market based instruments should take account of the following:

- The need to review and then clearly define the baseline legal responsibilities or duty of care over and above which payment for services will be offered. Initiatives such as the Bush Tender scheme have not been preceded by a review of the appropriateness or otherwise of the current mix of legal responsibilities.
- The need for a least a safety net of regulatory protection for threatened species and communities.
- The potential for market based approaches to undermine or 'crowd out' voluntary conservation activities.
- The continuing need for monitoring and enforcement.
- The need for accountability and transparency in tender and contract processes.
- Attention should be given to linking initiatives with broader strategic objectives. The auctioning of conservation contracts, for instance, might be well suited to securing the most economically efficient outcome, but will not, of itself, be a substitute for the initial identification of conservation priorities.

At 6.2, the Green Paper refers to the removal of barriers that limit public land in carbon offset markets and as the carbon offset market expands, the Government is considering the role it could take in verifying claims of biodiversity improvements undertaken in Victoria. There are two issues here. Firstly, there is the broader role of verification, monitoring and auditing across all programs. Secondly, there is the specific issue of DSE's role in native vegetation trading schemes such as BushBroker as both trader and assessor.

Across all programs the need for independent auditing is paramount. The monitoring and verification of programs should be undertaken by an independent body; however, in the event that this is unviable, an independent audit process should be the minimum requirement.

More specifically, the assessment role in verifying biodiversity claims and in assessing native vegetation trade-offs needs to be filled by an independent body, not a government agency. In either case, the role of the 'trading floor' and 'the ledger' need to be separated. Trust for Nature or a similar independent body could be used to validate the native vegetation in a scheme such as BushBroker to provide the scheme with greater integrity. It is important to be seen to be independent as well as demonstrate actual independence.

Additionally, the Green Paper flags the need to establish firm obligations for land managers and decision makers to account for broader environmental impacts in regards to biosequestration.⁴⁰ This acknowledgement highlights the need for the optimism about the potential for carbon offsets to contribute to biodiversity conservation needs to be tempered by the fact that effective biodiversity conservation objectives will require some mechanism to ensure that resources are allocated to biodiversity priorities (e.g. restoration of grasslands), rather than other more commercially attractive activities such as plantation establishment.

⁴⁰ Victorian Government, *Green Paper*, above n 1, 43.

Staking our faith in carbon markets may be unwise given the development of an emissions trading scheme (ETS) is outside the control of the Victorian Government. The immediate imperative should be to preserve, restore and enhance our biodiversity within the existing institutions and frameworks of policy and legislation that can be influenced by the Victorian Government.

In the event that biosequestration is able to supplement this as part of an ETS, then this becomes an extra incentive to invest in broad scale revegetation. Whether this will have a positive impact on protecting, enhancing and restoring biodiversity will depend on the framework of the scheme. The Managed Investment Schemes (MIS) that relied on a tax advantage and a capital return upon sale resulted in broad scale planting of single species plantations with some limited biodiversity benefits. However, it is important to note in any comparison, that the capital return at harvest was also a crucial component in the attraction of the schemes. Investment in biosequestration may not offer the same incentive.

At 6.5 the Green Paper refers to possible incentive schemes and market based instrument for coastal and marine management. There is insufficient detail provided in relation to this policy direction. It raises more questions than it answers. The EDO cannot support the use of MBIs across all ecosystems without further detail provided.

3.6 Prioritisation

At 6.5 of the Green Paper a suggested approach is to protect priority habitats by developing an assets approach to allow systematic assessment of habitat and identification of priority management actions. Moreover, at 7.1 the Green Paper states:

Prioritising will inevitably mean that we will sometimes be required to take no action to protect certain assets

The EDO understands the need to prioritise however, there needs to be transparency in the process and, if the intention is to implement a triage system, stakeholders need an opportunity to have input into the policy development process.

One side effect of prioritisation is that it can lead to implicit acceptance that there are certain species that will be allowed to become extinct because it is considered too hard or too expensive to maintain their viability. While this may be unavoidable in certain circumstances, an interim step may be to nominate the critical habitat or to obtain advice from the scientific advisory council before acting or not acting.

3.7 Duty of Care

At 7.3 the Green Paper identifies that there is significant confusion regarding what the duty of care requirements mean for landholders on a practical level, and that there is an 'opportunity' for the duty of care legislation to be reviewed or refined to overcome this confusion. The examples used in reference to 'duty of care' primarily relate to invasive species and bush tender, not biodiversity

conservation generally. However, more broadly, the Green Paper sees the need to clarify the rights and responsibilities of land owners in natural resource management and biodiversity conservation and understanding the concept of duty of care is part of this.

The concept of a duty of care is the basis for the tort of negligence. A legal remedy may exist (that is, you might be able to sue someone) where it can be established that a duty existed to look out (within reason) for the safety, health or well being of another, the defendant failed to meet the standard of care required in the circumstances and damage was caused as a result of that failure.

This introduces several challenges if a landowner is held to have a duty of care to protect the environment generally. Firstly, the landowner must be able to reasonably foresee the environmental consequences of their actions and take reasonable steps to reduce the risk of any harm. It is notoriously hard to define how far a person must go to mitigate this risk. The *Environment Protection Act 1994* (Qld) requires adherence to a series of Codes of Practice to demonstrate compliance with the standard of care expected of an individual landowner.

The concept of a duty of care is seen as useful because it can move with the times. That is, as the community's expectations change over time so does the nature of the duty. This dynamic nature (although it must be said the law is often very slow to catch up with the community) is one of the great virtues of the common law system.

One problem with a common law duty of care is that the environment per se can not be considered to be a plaintiff or injured party. However, despite this issue of standing, there remains a common law duty of care that exists to prevent damage from one person's land affecting their neighbours or their land. This remains a safety net of sorts.

This duty is supported by regulation (and in some cases prohibition) of a range of activities including and would add a layer of uncertainty to the process rather than enhance the performance of those activities in accordance with the duty. Where the landholder has entered into an agreement to manage certain parts of their property to enhance or maintain biodiversity, the agreement itself will define the scope of the duty, without the need for a supporting statutory duty of care.

If any additional regulation is required, providing standing to members of the public or interested parties to pursue government agencies or other parties who have failed to fulfil their statutory obligations would be a preferable path. This would provide the same level of protection for the environment but more certainty for landholders than a statutory 'duty of care' owed to the environment.⁴¹

3.8 Accountability

Victoria's biodiversity legislation does not provide for regular review, nor impose stringent reporting requirements on government departments to critique their progress in implementing strategies and policies.

⁴¹ In relation to the incorporation of a regulatory duty of care in land management generally, see Gerry Bates, *Environmental Law in Australia* (6th ed, 2006) 464.

Accountability is an important tool for ensuring public confidence in, and awareness of, government actions. Yet, at present, there are insufficient accountability mechanisms for the achievement of Victoria's biodiversity goals. Victoria's biodiversity legislation needs to be strengthened in order to have adequate effect in achieving its objectives. The legislation can be strengthened by the inclusion of a variety of mechanisms. These include:

- incorporating interim targets, goals and specific timelines into biodiversity legislation;
- including regular review provisions and reporting requirements,
- articulating the role and responsibility of an independent auditor (eg. Commissioner for Sustainability)
- public reporting of the auditing process and auditing to assess whether policies and strategies are meeting their targets; and
- legislation that calls for stronger public participation.

3.9 Public Standing and the Ability to Enforce Environmental Obligations

In the context of legislative frameworks, Victoria lags behind other jurisdictions in failing to provide for public standing to review and challenge administrative decision making and to secure compliance with legislation.⁴²

At a federal level, individuals and organisations can enforce breaches of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) by applying for an injunction under section 475. This section extends the definition of an 'interested person' to include individuals engaged in protection or conservation, or research into, the environment, providing they have been engaged in such work for a period of two years prior to the action.

The *Planning and Environment Act 1987* already contains some third party rights. Third party standing provisions apply under environmental legislation in Queensland and New South Wales. Experience in these States and under the EPBC Act has shown that these provisions are rarely abused. There has not been a flood of organisations or individuals bringing trivial, vexatious or nuisance applications. On the contrary, experience has demonstrated the importance of these extended standing and enforcement provisions in increasing accountability for decision-making which contributes to public confidence in the commitment of governments and agencies to maintaining and conserving biodiversity.

3.10 Invasive Species.

At 6.11, there is a proposal for a review of current legislation regarding its effectiveness in preventing and containing incursions of weeds and pests. In the past, there has been a focus on pest plants and

⁴² McGrath notes that standing has generally been 'major constraint on public interest litigation to protect the environment'; Christopher McGrath, *How to Evaluate the Effectiveness of an Environmental Legal System* (PhD thesis, Queensland University of Technology, 2007) 106. See also Ibid 146–7.

animals that impact on production, rather than environmental weeds. We support the statements in the Green Paper that suggest that focus of the Victorian Government will be on managing invasive species on public land and providing support for community action on private land.⁴³

One gap in the Green Paper is invasive pathogens, which are barely mentioned but are causing significant environmental harm. Dieback fungus (*Phytophthora cinnamomi*) kills native plants, and chytrid fungus threatens frogs. It is also important to focus specifically on invasive species threats to marine and aquatic environments, as they are often ignored in invasive species policies.

The EDO supports an improved legislative framework for responding to the threat posed by invasive species, not just to primary production but to biodiversity and natural ecosystems. As part of a strategic approach to the management of invasive species, we need to undertake a gap analysis, review legislative models from elsewhere and clarify the roles and responsibilities of different agencies, community groups and individuals.

3.11 Native Vegetation Regulation

The protection and enhancement of native vegetation is important to both mitigating and also adapting to climate change. Native vegetation contributes to multiple objectives central to the White Paper including biodiversity conservation, carbon sequestration, water quality management and other ecosystem services. The strategy *Victoria's Native Vegetation Management - A Framework for Action*⁴⁴ has assisted in the development of policies to recognise, protect and restore Victoria's native vegetation.

However, there are significant deficiencies in the implementation of native vegetation regulation in Victoria that undermine the strategy. Key issues that need to be addressed include:

- The lack of monitoring and enforcement.
- The uncertainties generated as a result of the implementation of the Framework as one policy amongst many under the Victoria Planning Provisions. In almost every instance that the preservation of very high conservation significance vegetation has been considered at the Victorian Civil and Administrative Tribunal (VCAT), the Tribunal has either granted a permit to clear the vegetation or indicated that it would be prepared to do so, principally because of the need to 'balance' the Framework against other competing planning policy objectives. The general failure to translate the strong policy outcomes promised by the Framework into the regulatory outcomes seriously undermines its objectives.
- A continuing lack of emphasis on the priority given to avoiding the clearing of native vegetation.
- The lack of capacity and political will on the part of some Council's in implementing the Framework.

⁴³ Victorian Government, *Green Paper*, above n 1, 56.

⁴⁴ Victorian Government Department of Natural Resources and Environment, *Victoria's Native Vegetation Management – A Framework for Action* (2002).

- A series of exemptions which in the main have not been revised since they were initially introduced in the early 1990s. These exemptions were reviewed by an Advisory Committee which delivered a report to the Minister 18 months ago. Despite the considerable amount of work involved in this review, the Advisory Committee's report has not been released and the issues identified by the Committee remain unaddressed.
- The lack of effective tools for a more strategic approach to native vegetation regulation and the lack of integration of Framework policy objectives at the crucial strategic planning stage. Precinct planning could make some contribution in this regard, however as noted below, there are some significant problems with the manner in which precinct planning has been implemented under clause 52.17 of the Victoria Planning Provisions and in any event the preparation of a precinct plan will not be appropriate in all circumstances. Precinct planning is no substitute for the more comprehensive regional or state wide approach required.
- Precinct planning, as currently provided for under clause 52.17-3 of the Victoria Planning Provisions has significant problems that need to be remedied by an amendment to the Victoria Planning Provisions. In particular, clause 52.17-3 is unsatisfactory as a basis for a comprehensive precinct plan because it effectively operates as an additional exemption. This problem was recognized and highlighted by the Responsible Authority and DSE in the course of the preparation of the first Native Vegetation Precinct Plan as part of Amendment C87 to the Greater Dandenong Planning Scheme and needs to be addressed.
- The development of guidelines for assessing gains from management activities and in the form of security gains without a review of the appropriateness or otherwise of the existing regulatory baseline. For example, preservation of standing dead vegetation or weed management activities can count as a gain. The system takes current legal exemptions and obligations as a given. It has not been informed by a review of the appropriateness of the current regulatory exemption for dead vegetation or the inclusion or exclusion of certain weeds from the legal responsibilities contained in the *Catchment and Land Protection Act*.
- The complex system of vegetation classification and assessment (EVCs, habitat hectares, bioregional conservation status etc). Some level of complexity is inevitable given the appropriate objective of basing decisions on not just vegetation extent but type, status and quality. However, it is our experience that the complexity of the present system tends to undermine its implementation, particularly in circumstances where decision makers in Councils and VCAT do not have a sufficient understanding of the process.
- The administration of the BushBroker scheme by DSE creates an unsatisfactory conflict of interest within the department. The role of regulatory oversight and implementation of the Native Vegetation Framework should be separated from the brokering of offsets. One method for doing this would be to give Trust for Nature or another independent authority the responsibility for BushBroker. This should be done on the basis of a more precautionary approach towards habitat trading, possibly expressed through a biodiversity 'savings' bank, whereby habitat is traded for actual, not merely promised, assets.⁴⁵

The system of offsetting has some potential to act as a disincentive to clearing in the first instance and can assist in extracting some mitigation should clearing be permitted.

⁴⁵ Ibid.

However, the present process of off-setting vegetation for has several fundamental problems, including:

- Policies that allow vegetation clearance to be offset by the protection of existing ecological assets are guaranteed to result in further loss of biodiversity.
- Schemes that allow trading the immediate loss of actual habitat for restoration projects that promise future habitat will, at best, result in problematic time-lags, and at worst, in failure to achieve the offset at all.⁴⁶
- The lack of clarity about the role of BushBroker, third party offset providers and payments in lieu of actual offset provision. This lack of clarity and consequent lack of transparency is compounded by the absence of a legislative framework such as that which covers the BioBanking scheme in NSW.

Review of the effectiveness of the Framework is made difficult by the lack of monitoring of its implementation. Despite considerable time and expenditure apparently being devoted to developing a permit tracking system, this appears not to have been implemented. The range of exemptions from the need for a permit to clear native vegetation must be urgently reviewed.

Similarly, increasing the extent and quality of native vegetation was a key policy commitment in Growing Victoria Together under the headline 'Protecting the environment for future generations'. It is now six years since this commitment was made however the 2006-2007 progress report makes it clear that there is still insufficient data to assess whether this commitment is being met.

3.12 Meeting Our Knowledge Needs

Chapter 8 of the Green Paper discusses meeting our knowledge needs. Legislative reform, as part of broader institutional change, may result in better coordination between different agencies. Developing a clearer, simplified legislative framework will better provide for expanding our knowledge base and equally sharing current knowledge. Specifically, legislative reform that provides for greater and clearer accountability and enforceability (for example by provisions relating to public standing) may create greater incentives to target research and share knowledge.

At 6.7 in the Green Paper, the suggested approach to enhancing public land values includes simplifying and integrating public land legislative and administrative arrangements. We support this approach.

There are complex cultural differences between Indigenous and non-Indigenous approaches to the notion of the 'environment' as a whole, its protection and management that need to be considered. To date, Indigenous capacity for participation in biodiversity conservation, land and heritage management has not been well recognised, and has been frequently symbolic rather than substantive.

⁴⁶ Bekessy et al, above n 13.

Apart from the moral imperative to address this situation, the legal recognition of the cultural rights of Aboriginal people under the Charter of Human Rights and Responsibilities means that the White Paper must include thorough consideration of these issues.

Governance models for implementation of Indigenous involvement in land and biodiversity need to be explored to expand participation from mere consultation to direct decision-making. Well-known models at the federal level include jointly managed national parks such as Kakadu, and Indigenous Protected Areas.

There are also several international legal developments relating to Indigenous involvement in biodiversity conservation, including the World Heritage Convention, the Conservation on Biological Diversity and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The last of these specifically recognises traditional knowledge as a source of intangible and material wealth, and its contribution to sustainable development. These instruments provide a solid foundation on which to build both nationally, and in Victoria.

Lastly, the Indigenous approaches to conservation should not be seen as competing with Western scientific models. Rather than adopting a singular technical and legislative approach, Indigenous or non-Indigenous, it should be recognised that both have much to contribute to effective biodiversity conservation. In accordance with international trends, and some recent legislative and policy developments in Australia, Indigenous participation must now be approached as an essential consideration in Victorian environmental, heritage and planning legislation and policy, within a reconciliatory model of 'caring for country'.

Within the context of the discussion above, we support the inclusion of traditional owners in knowledge collection, storage and use while giving them a formal role in management of land at both a strategic and operational level. Indigenous participation should not be seen as a means to simply access their knowledge; it must now be approached as an essential consideration in Victorian environmental, heritage and planning legislation and policy, within a reconciliatory model of 'caring for country'.

3.13 Biodiscovery

The issue of biodiscovery, access to biological resources and traditional knowledge and ownership and exploitation rights is briefly raised in two paragraphs in Chapter 6.1 of the Green Paper. This issue is too complex to be dealt with in this cursory fashion. Arguably, the White Paper is not the ideal vehicle for policy development and discussion of this morally and legally complex issue. This issue warrants greater exploration and discussion through another forum.

3.14 Integration and Coordination.

An underlying theme of the Green Paper is that the complex processes and interactions of both government and non-government bodies and agencies need reform. Broad institutional change is the long term solution to these issues. As part of this institutional change, well constructed and

responsive legislation can provide the framework and impetus for greater integration and coordination.

The EDO supports an integrated approach among governments and thus Victoria's continued and effective cooperation with the Australian Government, as foreshadowed in the Green Paper.⁴⁷ Since the 1980s and particularly the Franklin Dams case in 1983,⁴⁸ Commonwealth governments have taken an increasingly prominent role in developing national environmental strategies and policies, consolidating the Commonwealth's interest in and control over environmental issues that were once the domain of states.⁴⁹

Although cooperative approaches have been emphasised, such emphasis has often been nominal and attempts at integrated approaches have not necessarily been effective.⁵⁰ Notwithstanding this historical approach, a substantial proportion of funding for biodiversity conservation and land management flows directly from the Commonwealth. This, along with the inevitably cross-jurisdictional nature of many environmental issues, necessitates that Victorian legislation aim for an integrated approach to all decision making in respect of natural resource management. The EDO supports integration that includes, but is not limited to, alignment with Commonwealth legislation such as the EPBC Act and with international obligations. This is in line with the natural resource management principles espoused in 5.3 of the Green Paper.

4 AGENDA FOR LAW REFORM

The EDO recommends that the White Paper employs a broad approach of institutional change, starting with legislative reform, in order to successfully address the many issues raised in the Green Paper. In order to be productive and capable of implementing change, government agencies must have appropriate legislative and policy tools at hand.

The legislative framework for land and biodiversity in Victoria is complex and confusing (see the "mindmap" at Appendix 1). This framework reflects the piecemeal accumulation of different pieces of legislation. It lacks any integration, both in terms of clarity about roles and responsibilities, and also in terms of common overarching objectives. Rather than attempt to review and consolidate all existing legislation, we recommend an approach based on the integration of key legislative regimes together with the introduction of a core set of principles and an overarching framework for developing a comprehensive plan or strategy with a legislative foundation.

⁴⁷ Victorian Government, *Green Paper*, above n 1, 75.

⁴⁸ *Commonwealth v Tasmania* (1983) 46 ALR 625.

⁴⁹ For a discussion of consolidation of environmental power at the Commonwealth level, see K Crowley, 'Environmental Federalism: The Conservative Howard Legacy' (Paper presented at the John Howard's Decade Conference, Canberra, 3-4 March 2006); see also Papadakis and Grant, 'The politics of light-handed regulation: New environmental policy instruments in Australia' (2003) 12(1) *Environmental Politics*, 27.

⁵⁰ See for example Bates, above n 40, 57. See also the development of Australia's Oceans Policy which, despite the central objective of integration, has been gradually subsumed by Commonwealth decision-making such that integration between governments is largely precluded; see Australian Government, Department of the Environment, Water, Heritage and the Arts, *Australia's Oceans Policy* (2008) DEWHA Coasts and Oceans <<http://www.environment.gov.au/coasts/oceans-policy/index.html>>.

4.1 Institutional Change

Institutions are not simply government departments or organisations. Institutions are the 'rules of the game' that emerge from formal laws, informal norms and practices, and organisational structures in a given setting. Institutions overlap with but are not synonymous with organisations, and they are broader in scope and less subject to frequent change than policy frameworks.⁵¹

The forthcoming White Paper should include an appraisal of present institutional arrangements and detail a comprehensive platform for reform and improvement.

While the focus of this submission is to lobby for legislative reform, this is merely one part of the broader institutional change that is necessary to integrate biodiversity conservation into broader governmental and societal dialogue. Some specific legislative reforms raised in the Green paper have been addressed above. To engender more fundamental institutional reform, the Victorian Government should assess the management of land and biodiversity against the following principles:

1. Take a strategic approach to planning to provide outcomes at a landscape scale (rather than ad hoc decision making on a permit-by-permit basis).
2. Provide a clear statement of long term, measurable targets that can be adapted as conditions change, or as monitoring of interim targets suggests changes are required.
3. Incorporate publicly accessible and independent auditing of program implementation and outcomes, to demonstrate a commitment to monitoring and enforcement.
4. Focus on developing institutional arrangements that demonstrate resilience and adaptability.
5. Increase emphasis on restoration, protection and enhancement of habitat.
6. Employ a mixture of policy tools that include regulation, enforcement and market based initiatives.
7. Equitably distribute public and private costs and benefits of land management and biodiversity conservation.
8. Integrate biodiversity conservation and land management across tenures of both public and private land.
9. Appropriately allocate resources to enable organisations to implement strategies broadly, as opposed to in a piecemeal fashion.
10. Draw upon the considerable knowledge expertise that resides outside of government departments (eg community groups and Indigenous people) to improve planning decisions.

When you assess the current management regime and legislative framework against these principles, the intention and rhetoric may be in place but the reality of the implementation falls short. For example, CMAs were devised to aid in the implementation of landscape scale decision making.

⁵¹ The World Bank, 'Reforming Public Institutions and Strengthening Governance' (2000) <<http://www1.worldbank.org/publicsector/Reforming.pdf>>, xii.

However, the lack of integration between local government and the difficulty some councils and CMAs have in finding long term suitable employees⁵² has undermined the potential for this arrangement to produce effective outcomes.

Similarly, the current framework provides some limited opportunities to achieve results across differing tenures but there is little co-ordinated effort to drive this. An example is the failure to use the ICO powers and critical habitat determinations under the FFG Act.

Clear long term targets and auditing processes that are accessible to the public are absent. Biodiversity and land management policies vary across different tenures and strategies are implemented in a piecemeal fashion according to short term funding cycles.

The current arrangements provide ad hoc opportunities for enabling volunteers to do hands on conservation work but the benefits of giving some real power and authority to non-government organisations to manage discrete areas of land such as riparian land needs to be further explored. As the Green Paper acknowledges, government does not have all the answers. The key to enabling non-government groups to manage land is to ensure that they are properly resourced and that there are sufficient monitoring and auditing procedures in place to provide accountability

There are areas in which we are heading in the right direction. For example, the Green Paper indicates an acceptance of the need for a mixture of policy tools and articulates a commitment to incorporating community and Indigenous peoples' knowledge into decision making.

The critical elements that are absent relate to developing institutional arrangements that demonstrate resilience and adaptability and incorporating principles of accountability into those arrangements. The role of legislation is critical to institutional reform. It is a public statement of intent that shapes the incentives in human exchange, whether political, social or economic. It is enforceable, creates accountability, and promotes a framework for the integration and coordination of agency roles and responsibilities.

4.2 The Case for Legislative Reform

Victoria was once at the forefront of conservation legislation. However, legislation concerned with biodiversity conservation and land management has failed to incorporate concepts such as the precautionary principle.⁵³ Similarly, modern concepts such as the principles of Ecologically Sustainable Development (ESD) are evident in recent legislation such as the *Pipelines Act 2005* but they are not included in the *Catchment and Land Protection Act 1994*. Appendix 2 shows the Victorian Acts that refer to the ESD principles. Incorporation of these principles ensures that legislation is responsive to evolving environmental concerns, such as climate change.

⁵² Victorian Government, *Green Paper*, above n 1, 88.

⁵³ For a detailed analysis of the use of the precautionary principle, see Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (2005).

It is clearly time for review. The Green Paper refers to this need to modernize the legislative framework for protection of biodiversity.⁵⁴ The concerns raised in the Green Paper provide the impetus to reform and consolidate legislation that relates to biodiversity in Victoria.

One way of initiating this change is to develop 'overarching' legislation. Such legislation may inspire new and innovative approaches to protecting our environment. While the FFG Act had the potential to be such overarching legislation to protect Victorian flora and fauna, the political will to use the powers of the Act has been absent and its full powers have been underutilised.⁵⁵

The ultimate aim is not to develop one super Act that covers every possible issue that affects biodiversity. Rather, the overarching legislation would establish and clarify relationships and articulate the key principles that inform other, more specific Acts. Support for this proposal and a consequent strategic direction needs to be spelt out in the White Paper. The White Paper should set out clear objectives for legislative reform that include new principles and mechanisms necessary to properly account for and manage biodiversity, ecosystem services and ecological processes in the face of climate change.

There will be scope for some consolidation of the key land management and biodiversity conservation laws to clarify roles and responsibilities and reduce red tape. A consolidated Act may include aspects of the *Flora and Fauna Guarantee Act 1988*, *Wildlife Act 1975*, *Conservation Forests and Lands Act 1987* and the *Catchment and Land Protection Act 1994* and other relevant Acts.

The critical aims of the legislation should be to promote outcomes on a landscape scale and to promote positive biodiversity outcomes across different tenures. Using an integrated framework that is informed by some fundamental principles within an overarching Act can promote this consistency and vision.

This is in accordance with broader Victorian Government policy to reduce the compliance burden on business and regularly review legislation. Consolidating and clarifying legislation also has broader public good outcomes. One of the principles of natural resource management cited in the Green Paper is to 'recognise that government intervention should only occur where markets have failed or where public interest is not being served.'⁵⁶ In this instance, the public interest is being served by having enforceable regulation because the public value the assets biodiversity legislation is designed to protect. Where species or communities are approaching extinction, government intervention is clearly justified.

A suggested working title for consolidated legislation is the *Biodiversity and Ecological Processes Act*. A diagrammatic representation of the proposal for consolidated legislation is included as Appendix 3 and a basic structure of this proposed Act is included as Appendix 4. We emphasise that this is not the only possible solution to the issues that we have raised – the intention is that the proposals form

⁵⁴ Specifically, it states that, 'our understanding of the environment has grown and our objectives for natural resource management have become more holistic and outcome focussed. It is important that legislation recognises and enables this.' Victorian Government, *Green Paper*, above n 1, 65.

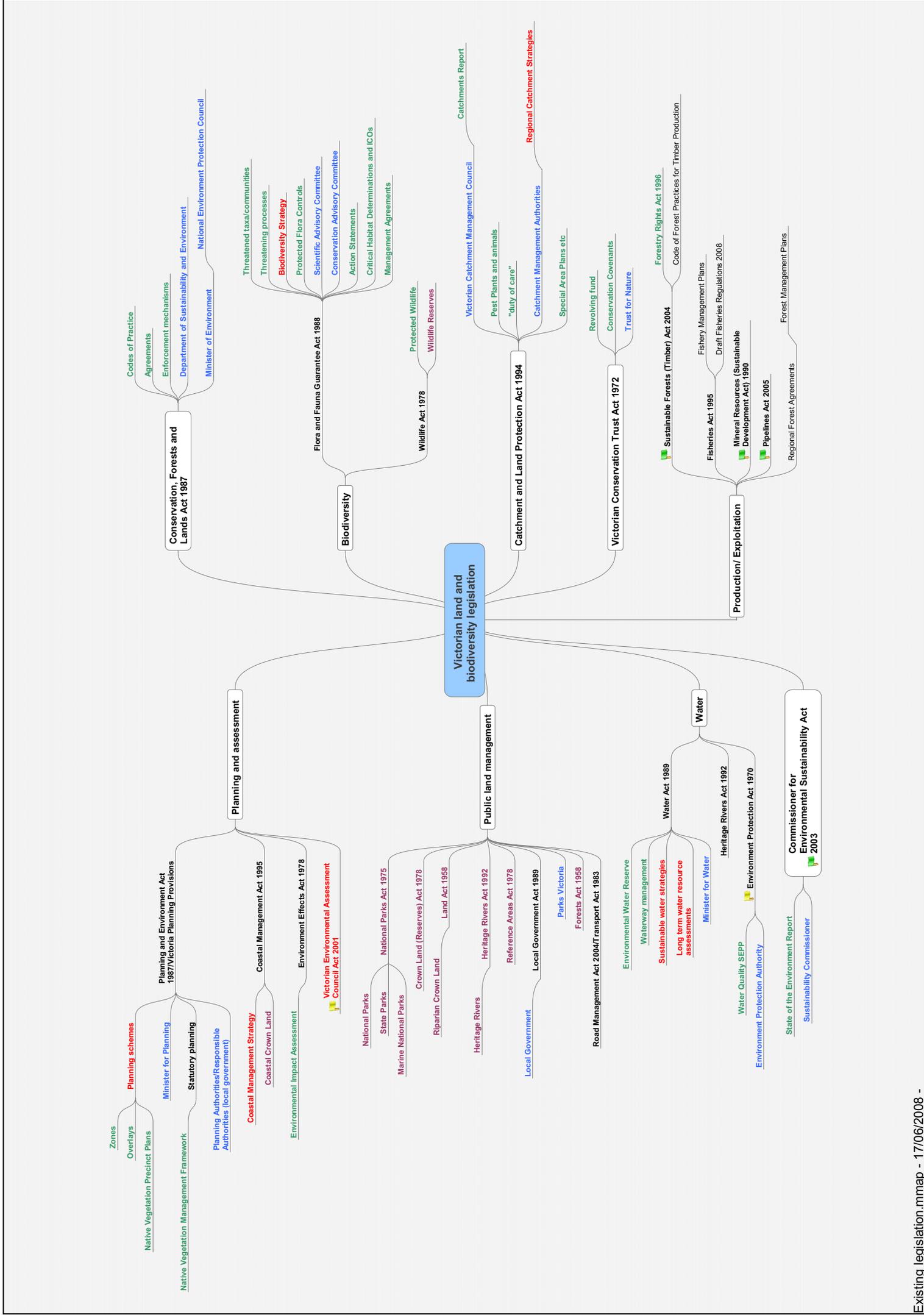
⁵⁵ It is well documented that no Interim Conservation Orders have been made and only one Critical Habitat determination was made only to be promptly withdrawn; see for example Sutton, 'Has the Flora and Fauna Guarantee Act Achieved...', above n 23, 218.

⁵⁶ Victorian Government, *Green Paper*, above n 1, 38.

a starting point for the Department's consideration and also for public debate and discussion about the legislative foundation for delivering land and biodiversity objectives in Victoria.

Special thanks to EDO winter interns Helen Fabinyi, Byron Webb and Suzie Howell for their valuable assistance in the preparation of this submission.

Appendix 1 – Mindmap



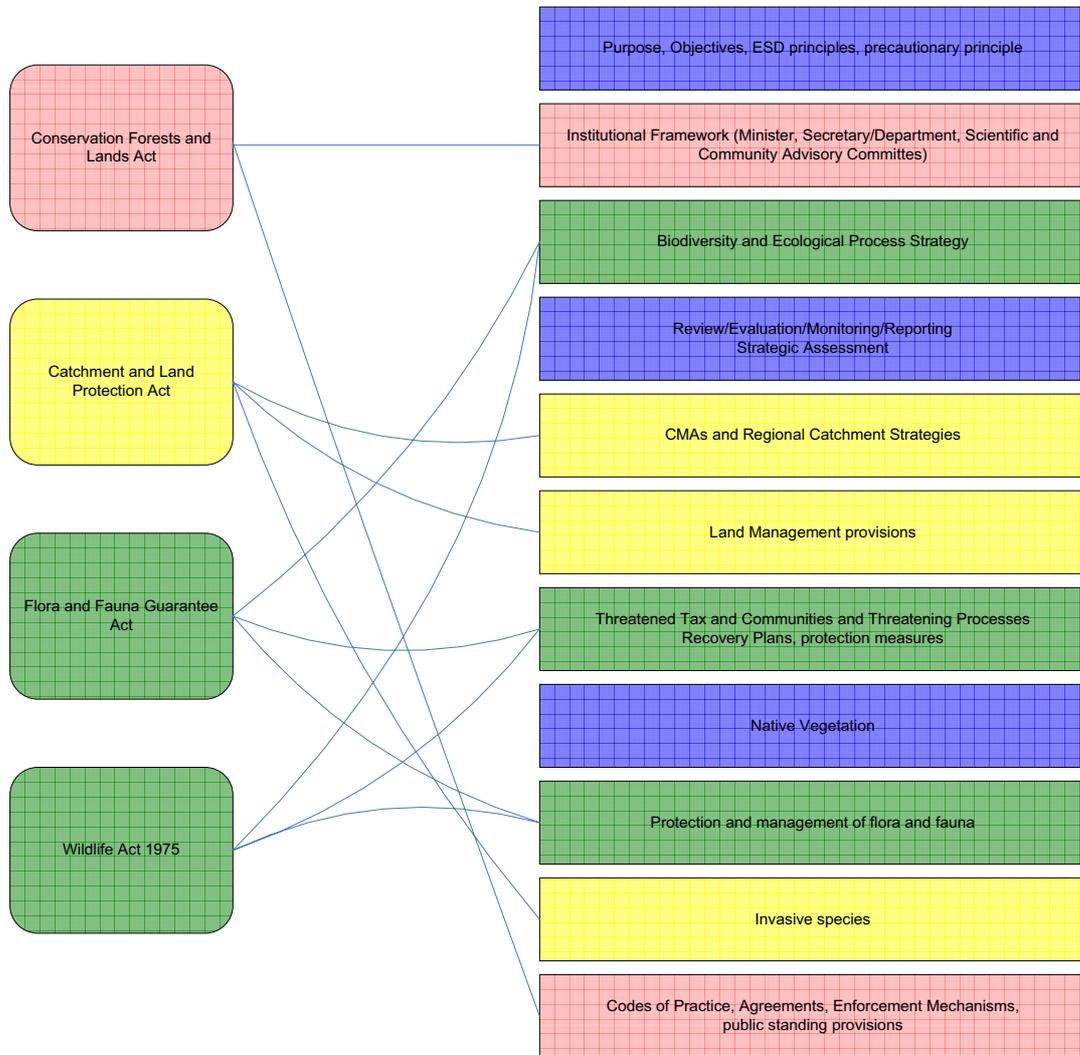
Appendix 2 – Acts that refer to ESD principles

Victorian Acts that refer to sustainable development

- *Pipelines Act 2005* - section 4 Principles of sustainable development
- *Sustainable Forests (Timber) Act 2004* - Section 5 Principles of ecologically sustainable development
- *Mineral Resources (Sustainable Development) Act 1990* - Section 2A Principles of sustainable development
- *Commissioner for Environmental Sustainability Act 2003* - Section 4 What is ecologically sustainable development?
- *National Environment Protection Council (Victoria) Act 1995* - SCHEDULE 2
- *Environment Protection Act 1970* - Section 1B Principle of integration of economic, social and environmental considerations

(Note that the last two Acts contain passing references to 'sustainable development', not an inclusion of the broader principles of ESD)

Appendix 3 – Diagrammatic Representation of Consolidated Legislation



The above diagram represents how an overarching Act could be developed. As shown by the connecting lines, there are certain elements of the four Acts on the left that could be incorporated into overarching legislation. The new Act could incorporate modern scientific principles into its purpose and objects, while issues not adequately covered in the existing legislative framework could also be included.

Appendix 4 – Draft Outline of Proposed Legislation

Purpose and objectives

1. To consolidate parts of the following legislation into an overarching legislative framework for the protection, management, restoration and enhancement of biodiversity and ecological processes in Victoria:
 - a. *Conservation Forests and Lands Act 1987* (CF&L Act)
 - b. *Flora and Fauna Guarantee Act 1988* (FFG Act)
 - c. *Catchment and Land Protection Act 1994* (CaLP Act)
 - d. *Wildlife Act 1975*
2. To establish an overarching set of objectives and principles consistent with other recent Victorian and Commonwealth legislation (and international commitments) including:
 - a. Ecologically sustainable development
 - b. The precautionary principle
 - c. Principle of evidence based decision-making
 - d. Principle of accountability
 - e. Principle of proportionality
 - f. Principle of collaboration (see Public Health and Wellbeing Bill 2008 (Vic))
3. To provide a framework for recognising the importance of and giving legislative effect to ecological processes.
4. To establish a framework for monitoring, evaluation and strategic planning and in particular the development and implementation of a Biodiversity and Ecological Processes Strategy.
5. To establish institutional arrangements that clarifies responsibilities for the development and implementation of the Strategy and other functions such as enforcement.

Institutional framework

1. The role of the Minister, the Secretary and the Department (see CF&L Act)
2. The "Committee" - modelled on the Conservation Advisory Committee under FFG/CF&L and the Victorian Catchment Management Council) – responsible for providing advice to the Minister.
3. The Scientific Advisory Committee – see FFG Act and perhaps also Water Act (Vic) – responsible for providing scientific and technical advice.
4. A Community Advisory Committee - See Water Act (Commonwealth) – a separate committee comprised of conservation, community, traditional owner, industry and primary production representatives.

5. Catchment Management Authorities – based on present CaLP Act with the significant difference that they the primary production qualification is removed – appointment is based on expertise in a range of areas – see Commonwealth Water Act Community Advisory Committee model.
6. Other possible roles that arise under other legislation but might be expanded by this Act:
 - 6.1. An increased role for the Commissioner for Environmental Sustainability:
 - 6.1.1. Note possible overlap and present between the State of Our Catchments report prepared by VCMC and the State of the Environment Report prepared by the Commissioner for Environmental Sustainability.
 - 6.1.2. Give the Commissioner for Environmental Sustainability some clear powers and an independent oversight role as originally envisaged. The Commissioner for Environmental Sustainability should report to Parliament and have the ability to decide to undertake their own investigations, similar to the Auditor General.
 - 6.2. EPA – environmental auditing and “peer review” role expanding on role already provided for with respect to forestry operations and Long Term Water Resource Assessments under the *Water Act 1989* (Vic).

The Biodiversity and Ecological Processes Strategy

The overarching strategic framework for the protection, maintenance and enhancement of biodiversity and ecological processes in Victoria.

Based on the Flora and Fauna Guarantee Strategy but expanded in terms of process and what needs to be contained in the Strategy.

See in particular the planning mechanisms under the *Water Act 1989* (Sustainable Water Strategies and Long Term Water Resource Assessments) as well the Basin Plan under the *Water Act 2007* (Cth).

Strategy should:

- be developed through a consultative process;
- be informed by science;
- have a long term horizon (eg 50 years) but also clear short term goals that are specific and measurable;
- be required to be developed within specified time frame and subject to regular review;
- be coordinated with national strategies; and
- act as a foundation for the State Planning Policy Framework in the Victoria Planning Provisions, Sustainable Water Strategies under the Water Act, the Victorian Coastal Strategy and Regional Catchment Strategies.

Regional Catchment Strategies

Based on the CaLP Act

Invasive species

Provide for separate Invasive Species Strategy

Listing and enforcement regime based on present CaLP Act provisions

Land management provisions

Based on CaLP Act

Managing threats to the Biodiversity and Ecological Processes Strategy

Based on updated threatened taxa/communities and threatening processes provisions of FFG Act.

Emphasis is on identifying species, processes and other threats that *might* undermine the Strategy if they do not receive specific attention.

- Integrated with/consistent with international principles and the EPBC Act.
- Critical Habitat or other "specific measures" can be nominated and considered by SAC, not just left to the initiative of the department/Minister.
- Interim Conservation Orders – either no compensation or alternatively the right to compensation is restricted to what is "fair and reasonable" having regard to duty of care, funding available from other sources.

The Part also needs to include some trigger and assessment mechanism to allow response to development threats and must be coordinated with the native vegetation material below.

Native vegetation

This part gives legislative implementation to the Native Vegetation Management Framework.

- Legislative authorities for the Framework and various guidelines
- independent permit and approval process that that is coordinated with planning system
- Statutory basis for Native Vegetation Precinct Planning in urban areas
- See NSW and Qld legislation.
- Statutory basis for BushBroker or some form of Trust that can also be used by local government that includes accountability measures and independent oversight
- Auditing role for EPA or other independent body

Environmental water management

Framework for CMAs environmental water and waterway management functions under the *Water Act 1989* based on existing provisions in the CaLP Act

Protection and management of Flora and Fauna

Based on existing provisions under the FFG Act Protected Flora Controls and the protection of Wildlife under the Wildlife Act.

Other possible parts:

- provision for strategic assessment based on present VEAC model but extending to private land and environmental matters generally
- provision for various conservation tools (particularly land management agreements (section 69 of the CF&L Act/Management Agreements under the FFG Act/Conservation Covenants
- Enforcement mechanisms
- Public standing provisions – see NSW legislation