

EDO Briefing Paper

Forestry Code changes endanger threatened species

Introduction

The Victorian Government is proposing to amend the *Code of Practice for Timber Production 2007* (**the Code**). The Code is a key pillar of the legal regime that protects Victoria's forests. The proposed variation will weaken an important protection for threatened species habitat, and install a process that lacks transparency and accountability. It will further undermine Victoria's already too-weak legal framework for biodiversity protection.

A lack of protection

The proposed variation will allow the Secretary of the Department of Sustainability and Environment (**DSE**) to override a Flora and Fauna Guarantee Action Statement (**Action Statement**) for any given forest coupe. In other words, it empowers the Secretary to clear threatened species habitat that would otherwise have been protected.

This effectively takes the only readily enforceable part of the *Flora and Fauna Guarantee Act 1988* (Vic) (**FFG Act**) and allows the Secretary to make it unenforceable. It breaks the legal chain that made promising cases like *Environment East Gippsland v VicForests* [2010] VSC 335 ('Brown Mountain') possible, and afforded species like the Long-footed Potoroo a rare measure of real legal protection.

The Government has justified the proposed variation on the grounds that an area protected by an Action Statement may be unnecessary, because the threatened species that resides there is already adequately protected in other reserves elsewhere in the State. This justification, while at first glance appealing, rests on some very shaky ground.

How will the Secretary know whether or not a threatened species is adequately protected elsewhere in the State? It would be hard for the Secretary to compile an accurate inventory of threatened species and their existing protected habitat with any certainty, given the difficulty in accounting for these species. The proposed variation includes a commitment to 'a significant new investment in enhancing our knowledge of threatened species', but does not go on to spell out what this actually entails.

Besides, the process of developing an Action Statement should have made that calculation already. The purpose of a FFG Act Action Statement is to collect information about a species, 'including its description, distribution, habitat...', and 'state

what has been done to conserve the species and what will be done in the future'.¹ The actions that the Action Statement prescribes should therefore have already taken the protection provided by existing habitat into account.

To the extent that there is uncertainty, the Government should err on the side of caution. The Precautionary Principle (which is still in the Code) requires that scientific uncertainty not be an obstacle to taking proportionate measures to prevent serious and irreversible environmental damage.² When the consequence of erroneously estimating the extent of a species' existing protection is the irreversible extinction of that species, a 'no regrets' approach is sensible.

Further, the proposed variation is at odds with the objectives of the FFG Act. The FFG Act aims to ensure that 'all taxa of Victoria's flora and fauna...can survive, flourish and retain their potential for evolutionary development in the wild'.³ Allowing the Secretary to disregard the FFG Action Statements and gamble with the safety and survival of threatened species is not consistent with that objective. Nor is it consistent with a credible framework for Victorian biodiversity law.

A lack of transparency

Any credibility that the justification for these exemptions may have had is undone by the exceptional lack of transparency and accountability in the way those exemptions are made.

The determination to exempt a forest coupe (or coupes) from the FFG Action Statement is made by the Secretary and the Secretary alone. The Secretary:

- does not have to explain or publish reasons for their decision;
- does not have to provide any evidence for the decision;
- does not have to consult the public (nor indeed anyone) in making their decision; and
- does not have to notify anyone once they have made their decision.

The determination of the Secretary cannot be reviewed. It cannot be challenged on the merits, either by appeal to the Secretary or by appeal to the Victorian Civil and Administrative Tribunal (**VCAT**). Further, there is very little scope to apply for judicial review of the Secretary's determination, because of the wide and unqualified discretion they have to make that determination, and because none of the information needed to run the case is publicly available.

The way the proposed variation is currently drafted, the Secretary can exempt virtually any forest coupe from the FFG Action Statement, for virtually any reason, and avoid virtually all scrutiny and review. As a process for government decision-making it is far from best practice. It does not accord with the platform of the current government, when it came to office, of restoring government integrity, transparency and accountability.

What should the Government do?

For the reasons above, the proposed variation should be abandoned in its entirety.

What should you do?

The Government is seeking public comment on the proposed changes. Why not let them know what you think? See the [DSE website](#)⁴ for more information, and send your comments to forestry.code@dse.vic.gov.au.

.....

1 DSE, Proposed variation to the Code of Practice for Timber Production 2007, 1.

2 Code of Practice for Timber Production 2007, pp 21, 78.

3 Flora and Fauna Guarantee Act 1988 (Vic) s 4.

4 <http://www.dse.vic.gov.au/forests/publications/code-of-practice>

About the Environment Defenders Office (Victoria) Ltd (EDO)

The EDO is a community legal centre specialising in public interest environment law. We support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

Environment Defenders Office (Vic) Ltd

Telephone: 03 8341 3100 (Melbourne metropolitan area)
1300 EDOVIC (1300 336842) (Local call cost for country callers)
Facsimile: 03 8341 3111
Email: edovic@edo.org.au
Website: www.edovic.org.au
Post: PO Box 12123, A'Beckett Street VIC 8006
Address: Level 3, the 60L Green Building, 60 Leicester Street, Carlton

How you can help the EDO and our work

We are the only public interest environmental legal service people can turn to, but we need public support to enable us to do all the work we do. If you would like to help, you can make a tax-deductible, secure donation online – it only takes a few minutes to support our work.

Donate at: www.givenow.com.au/edovic

What can your donation achieve? With your help we are:

- providing critical resources to individuals and groups at the front line
- ensuring the community is represented at significant, long-term legal cases
- helping create and strengthen laws and policy that protect the environment
- guaranteeing an outspoken and independent voice for Victorians and their environment
- mentoring tomorrow's legal advocates for the environment
- helping communities frame potent submissions
- holding the government to account on important environmental issues
- fighting in court to protect our environment.

SEEK LEGAL ADVICE REGARDING SPECIFIC CASES

While all care has been taken in preparing this publication, it is not a substitute for legal advice in individual cases. For any specific questions, seek legal advice.

Produced & published by Environment Defenders Office (Victoria) Ltd
ABN 74 052 124 375

Publication date: 30 November 2011

Legal Services **BOARD**

Funded through the Legal Services Board Grants Program