

Submission

on the

Proposed Invasive Species Management Bill

prepared by

Environment Defenders Office (Victoria) Ltd

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About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd (**EDO**) is a Community Legal Centre specialising in public interest environmental law. Our mission is to 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. In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working to protect Australia's environment through environmental law.

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Summary of Recommendations

The EDO recommends:

1. The proposed Invasive Species Bill needs to comprehensively address not just the threat of invasive species to agricultural and economic values, but also to environmental values.
2. The principles of ecologically sustainable development need to be fully and explicitly incorporated into the proposed legislation.
3. The legislation should contain an overarching legislative duty of care with respect to invasive species control and management. This should clearly apply to both private and public land owners and managers.
4. Administration and governance arrangements for the new regime need to be clarified, and in particular the legislation needs to provide for the involvement of agencies with responsibility for environmental management, not just the Department of Primary Industries.
5. The need for a coordinated national approach to invasive species management should be emphasised.
6. The prospect of improved compliance and enforcement is welcomed. It should be supported by a clear legislative duty on the part of the responsible agency to enforce the legislation and complemented by legal requirement to develop and publish an enforcement policy. There should also be a requirement for the regular reporting of data with respect to compliance and enforcement activities.
7. Consideration should be given to including third party civil enforcement mechanisms in the legislation.
8. The degree to which the proposed scheme relies on subordinate instruments is a concern. The Bill should be developed on the basis of the principle that important duties and obligations are contained in the primary legislation. Where delegated legislation or other instruments such as Codes of Practice are to be developed later, there should be a legislative requirement for the Department to publish a program for their development, plus the requirement for community and industry engagement in the development of these subordinate instruments.

Introduction

The Environment Defenders Office welcomes the opportunity to make a submission with respect to the proposed Invasive Species Bill. This submission contains a range of suggestions as to how the current proposal might be improved; however in general we welcome the proposal for dedicated and comprehensive Invasive Species Legislation for Victoria.

The submission is focussed on matters within our core legal and policy expertise. It draws heavily on similar work that has been done in preparing submissions and proposals for invasive species legislation in other states, and in particular in NSW. We are also familiar with the position that the Invasive Species Council has put forward with respect to state based and national threatened species law and policy and support their views on these matters.

The Act Objectives and Principles of Ecologically Sustainable Development

The objective of the proposed legislation is: 'to provide a framework for effective management of the risks posed by invasive species to Victoria's economy, community and environment, including Victoria's land and water and including the means to control the entry, establishment, spread and impact of invasive species.'¹ We support the objectives of the proposed Bill, including addressing existing deficiencies in the current regime, such as inadequacies in relation to prevention and early detection of invasive species threats.

We submit that the proposed Bill needs to include very clear objectives and provisions relating to the threats posed by invasive species to the environment, and not just threats posed to primary production. We predict that this need will be strongly emphasised by others in submissions to this process. For example, the Invasive Species Council (ISC) states that current biosecurity systems were established to protect the relatively few cultivated species that are the basis of plant and animal industries, rather than the multitudes of species and complex interactions that constitute biodiversity. The ISC argues that Australia urgently needs a 'more ecological, coordinated and collaborative approach to environmental biosecurity facilitated by a national body...'²

We recommend that the new stand alone invasive species legislation be situated clearly as environmental law, including by its objects.³ A key means of achieving this would be to enshrine the principles of ecologically sustainable development (ESD) in the legislation's objects. ESD could be defined to include its four well-established elements: the precautionary principle; intergenerational equity; conservation of biodiversity and ecological integrity and improved valuation, pricing and incentive mechanisms.⁴ To ensure that ESD principles are meaningful, there must not be a significant gap between the rhetoric of ESD and its application. As is pointed out in the NSW ENGO submission:

Simply adding ESD to the objects won't improve practices unless it is made explicit how it is to be applied by incorporating it into provisions of the Act and policy, and ensuring it is enforceable. ESD

¹ Victorian Department of Primary Industries, 'Discussion Paper; Invasive Species Management Bill: Towards a stand-alone Invasive Species Management Act' (hereafter referred to as 'Discussion Paper'), August 2012, at p.6.

² The Invasive Species Council (ISC), *Keeping Nature Safe*, May 2012, at p.1

³ This argument is made in the NSW ENGO joint submission by Invasive Species Council, Nature Conservation Council of NSW, the Wilderness Society, National Parks Association of NSW, Total Environment Centre, North Coast Environment Council Inc., Blue Mountains Conservation Society and Colong Foundation for Wilderness, 'Statutory Review of the Noxious Weeds Act 1993', 24 February 2011 (hereafter referred to as 'NSW ENGO's Submission'), at p.5.

⁴ For a discussion of ESD principles and definitions see: Bates, Gerry 'Protecting biodiversity: property rights and the duty of care', Proceedings of the Conference on Rural Land Use Change, published by State of Victoria (DSE) 2003, at pages 3-5.

*and its principles should be clearly defined in the Act and reference made to them where they are applicable in specific provisions.*⁵

An intention to explicitly include ESD principles in the new legislation is not apparent from the discussion and framework outlined in the Discussion Paper. While it is perhaps arguable that much of the content of ESD principles will be implicit in the proposed new legislation, we submit that these ought to be made explicit.

Some examples of how ESD principles could be incorporated in the development of a comprehensive invasive species management framework for Victoria are as follows:⁶

1. *The precautionary principle*

This principle should be applied to risk assessments and decisions as to species declaration, as there is often scant information about the potential invasiveness of a species and the potential for harm, particularly if it is new to cultivation. An effective 'permitted list' approach would require prohibit the introduction of plant species *unless* they were assessed as low risk. This is a preferable approach to the proposed declaratory approach outlined in the Discussion Paper. The permitted list approach is inherently precautionary in nature and clearly appropriate given the increased uncertainty about future weed impacts due to climate change.

2. *Intergenerational equity*

Deficiencies of existing control programs and restrictions will lead to a greater invasive species burden for future generations. Incorporating intergenerational principles in the management of invasive species is important as the full impacts of escaped species are unlikely to be observed for generations. For example, Governments have traditionally been reluctant to ban or restrict the use of invasive plant species with current commercial value, and typically discount future economic costs associated with control or management of escaped species. Potential future impacts could be incorporated in penalties for breaches of the Act. Further, if the proposed Industry Funded Scheme is adopted as a mechanism to enable producers/industries to self-determine invasive species priorities at a whole-of-industry level, principles of intergenerational equity should be articulated to ensure that the focus of action is not merely short-term.⁷

3. *Conservation of biodiversity and ecological integrity*

It is unclear from the Discussion Paper the extent to which conservation of biodiversity and ecological integrity principles will be incorporated in the development of reasonable and practical measures to prevent or minimise invasive species risks. Further consideration needs to be given as to how the emphasis on environmental threats can be properly emphasised in the legislative provisions and also the institutional arrangements for listing, enforcement and the like. Appropriate priority should be accorded to invasive species which threaten biodiversity and ecological integrity.

The application of this principle would involve taking a landscape approach; considering ecosystem processes, cumulative impacts and interactions with other threats (including climate change); regulating land management that exacerbates invasive species threats and ensuring that particular control methods do not themselves threaten biodiversity or exacerbate ecological harm. One example of the latter issue is the proposed widespread aerial baiting of feral dogs in Gippsland. This

⁵ Ibid. p.6.

⁶ This analysis of the potential application of ESD principles to the development of an effective invasive species management framework is taken from the ENGO submission, Op. cit., n.3, at p.6-7.

⁷ See Discussion Paper, at p.23 for an outline of the proposed 'Industry funding schemes'.

non-targeted approach is likely to have undesirable impacts on native fauna in the region but is understood to be an approach endorsed by local farmers.

4. *Improved valuation, pricing and incentive mechanisms*

ESD requires the internalisation of environmental costs and highlights the value of using economic instruments to promote responsibility. The implementation of the 'polluter pays' principle for the spread of invasive species, would ensure that, where appropriate, those responsible for the spread would share the costs of control, and would act as an economic incentive to responsible behaviour.⁸

As noted in the NSW ENGO submission, as it can be difficult to trace responsibility for invasive species spread to a particular person, it may be more effective to focus on risk-creating behaviours and marrying this with a 'risk creator pays' approach.⁹ This approach would require that anyone engaging in activities that involve a high risk of invasive species spread is required to bear the costs of managing that risk. The types of administrative provisions foreshadowed in the Discussion Paper include the ability to 'set, demand, levy, recover, receive charges and fees or bonds'¹⁰ are financial mechanisms that could be used to this effect.

An Environmental Duty of Care

Consideration should be given to whether broad environmental duty of care principles should be included in the proposed Bill. This could be achieved by requiring a positive obligation on landowners and managers (including public land managers) with respect to the control and management of invasive species.¹¹ Incorporating a broader concept of environmental duty of care would not be a substitute for specific responsibilities with respect to designated pest plants and animals; it would, however, promote widespread attitudinal change and motivate a more serious approach to the management of invasive species.¹² This broad statement of a duty of care would be a useful framework within which to develop specific responsibilities in the legislation and in particular in the subordinate instruments which it appears the proposed regime would rely on heavily.

The common law concept of environmental duty of care is based on the common law tort of negligence. Under common law, environmental duty of care refers to the actions of one person that causes harms to the interests or to the property of another. Failure to comply with the general environmental duty is not sufficient to give rise to civil liability.¹³ A major limitation of the common law concept is that it recognises that an environmental duty of care may be owed to people or property, but not to the environment per se. Statutory environmental duty of care principles are more of a public interest in nature, as opposed to private interest focused. A preventative focus means that the standard of care is higher than that under common law duty of care principles.

The *Catchment and Land Protection Act 1994* (CaLP Act) embraces concepts of environmental duty of care, with its requirement that landowners take all reasonable steps to avoid contributing to land degradation that causes or may cause damage to the land of another landholder; and to take reasonable steps to prevent the spread of regionally prohibited weeds (among other requirements).¹⁴ It is unclear from the Discussion Paper whether these types of duties and requirements are to be included in the proposed invasive species legislation. We submit that, at a minimum, these landowner requirements be

⁸ NSW ENGO, p.15.

⁹ Refer to NSW eNGO Submission, *ibid*.

¹⁰ Discussion Paper, p.24.

¹¹ This is suggested as a possible prescribed environmental duty of care principle in the DSE paper, p.11.

¹² A wide duty of care is found in the Queensland Biosecurity Bill, 2011 (now lapsed), Chapter 2.

¹³ Victorian Department of Sustainability and Environment, "Land Stewardship – Duty of Care: An Instrument for Increasing the Effectiveness of Catchment Management" 2003, at p.9.

¹⁴ S.20(1)(a) and s.20 (2) CaLP Act.

included in the new invasive species regime, in addition to the generic and specific obligations outlined in the Discussion Paper. For example, the Discussion Paper proposes that the legislation will contain a number of generic obligations and specific obligations pertaining to each declaration category and to carriers. These obligations are to be contained in subordinate instruments.¹⁵ The proposed 'Category 2' obligations requires: 'that a person must take 'all reasonable steps to prevent the increase and spread of a category 2 invasive species on land (and water) managed by that person and to prevent spread from that land (or water)'¹⁶

For an environmental duty of care to be effective in the invasive species management context, definitions and examples of what is required under the duty and information about options for compliance should be provided. The inclusion of a broad environmental duty of care in the invasive species management legislation would therefore need to be complemented by other instruments - such as regulations, codes of practice and guidelines - that detail how the duty may be fulfilled.¹⁷ Where the risks or potential for harm is high, regulation is preferable; codes of practice may be the best approach where there are multiple ways to manage risk and where compliance is likely to be high.¹⁸

In requiring positive management duties of landowners, a greater reliance on codes of practice and other subordinate instruments would be required in determining the reasonableness or otherwise of a landowner's actions with respect to invasive species management. This regulatory approach is foreshadowed by the Discussion Paper's consideration of the role of Management Plans under the proposed scheme in terms of providing flexibility and clarity around standards to landowners (though note that these managements plans would be entered into voluntarily).¹⁹

As noted by Bates, standards of care 'define the boundaries of what is reasonable and practical under the statutory scheme..[and] should be expected to reflect best practice for a particular industry of activity.'²⁰ There needs to be careful analysis of what constitutes 'reasonable and practical' and these concepts should be responsive to circumstances. For example, what is a 'reasonable and practical' response to the escape of a particular plant species would depend on the level of risk it posed. It may range from notification of authorities to paying for eradication and implementing measures to prevent future escapes, and may vary depending on whether the land manager was operating a commercial enterprise.²¹

Further, the regulatory authority should be given discretion to apply such standards in a flexible manner in pursuing best practice environmental outcomes with respect to invasive species management. This approach is consistent with the objectives of the proposed Bill in relation to having a high level of regulatory efficiency and flexibility, and the capacity to adapt to new and evolving invasive species threats.²² This shifting of responsibility to the duty holders means that landowners can choose how they will comply with the obligations, with the advantage of potentially reducing compliance costs.²³ In this way, incorporating a broad environmental duty of care is an efficient means of defining the role that a landowner plays in providing public environmental benefits.

Finally, we support the NSW eNGO submission regarding the application of duty of care obligations to government agencies and public authorities with land management responsibilities: namely, that the new invasive species framework should require government agencies and authorities to demonstrate compliance with their duty of care via compliance with approved codes of practice and other land

¹⁵ Discussion Paper, p.19.

¹⁶ Discussion Paper, p.19.

¹⁷ For further explication of best practice and defining a statutory duty of care for biodiversity conservation, see Bates, *op. cit.*, at pages 7 -10.

¹⁸ NSW eNGO submission, *op. cit.*, p.13

¹⁹ Discussion Paper, p.22.

²⁰ Bates, *op. cit.*, p.8.

²¹ NSW ENG0 submission, p. 12

²² *Ibid.*, p.10.

²³ *Ibid.*, p.3.

management plans.²⁴ Invasive species management should be a reportable core business requirement of all government agencies and public authorities with land management responsibilities: standardised mapping and reporting systems could be utilised to provide sufficient information to the public to assess the effectiveness of the management strategies employed.²⁵

Administration and governance Arrangements

The CaLP Act is the main legislation governing noxious weeds and pest animal management in Victoria, and is administered jointly and severally by the Minister for Environment and Climate Change and the Minister for Water and the Minister for Agriculture and Food Security. However, the Minister for Agriculture and Food Security, through The Department of Primary Industries (DPI), is responsible for invasive plant and animal policy and direction setting and has delegated responsibility for the enforcement of the noxious weed and pest provisions of the CaLP Act.

The current proposal is to create stand-alone invasive species management legislation, with the Minister responsible for biosecurity policy having administrative responsibility for the legislation (Discussion Paper, p.13). The Bill proposes to remove pest plants and animals provisions from the CaLP Act. This appears to be relatively uncontroversial in the sense that DPI and the Minister for Primary Industries already administer the pest plant and animals provisions of the CaLP Act. However, as noted above, the current provisions in the CaLP Act form part of a broader set of provisions providing for a broader duty of care for all land managers and the separating out of invasive species management from the broader duty of care that presently exists warrants further consideration.

The institutional arrangements outlined in the Discussion Paper are a little unclear. Although DPI will have responsibility for administering the Act, whether or not the Victorian Catchment Management Council or something similar will have a continuing role in matters such as development and review of lists is unclear. The establishment of joint administrative arrangements between environmental and primary industries agencies - including local governments, state government agencies, public authorities and other state governments - should be adopted in the development of the management framework.

Decisions regarding declarations can be difficult particularly when harmful species are commercially or culturally valued.²⁶ Cross agency responsibility for declarations, compliance, and enforcement would be likely to lead to improved environmental outcomes. These decision-making processes would benefit from explicit guidance in the Act regarding factors that must be considered in accordance with ESD including: impacts on biodiversity and ecological integrity, interactions with other threats such as climate change, the anticipated long-term costs to future generations and the impacts of control.²⁷ There might be scope also to include some specific technical and community and industry advisory bodies for declaration decisions within the legislation rather than just leaving such things to less formal policy initiatives.

A coordinated national approach to invasive species management

Invasive species issues are inherently challenging in part due to the requirement for cooperation by a diversity of institutions and people and the requirement for dispersed responsibility.²⁸ As will no doubt be submitted by others, the significant environmental threat to biodiversity posed by invasive species warrants the development of optimal governance arrangements. As invasive species do not respect

²⁴ NSW ENGO Submission, p.20.

²⁵ Ibid.

²⁶ NSW ENGO, op. cit, p.19

²⁷ This approach is endorsed in the NSW ENGO submission, ibid.

²⁸ This position is put forward in NSW eNGO Submission, p.16.

borders and management responses benefit from a national approach or interstate cooperation, the requirement of interstate cooperation should also be included as an object of the proposed Act.²⁹

Part of the Biosecurity Strategy for Victoria involves strengthening collaborative relationships between government, industry and the community in the delivery of biosecurity outcomes. Collaborative relationship models developed according to the proposed legislation should appropriately balance the interests and perspectives of the agricultural industry, and associated economic concerns, in the interests of ensuring that biodiversity considerations are given sufficient weight in the development of appropriate regulatory frameworks and responses.

The Discussion Paper, with its focus on efficiency, flexibility and rapid response capacity makes only minimal reference to the broader biodiversity ramifications of invasive species management; in particular, the protection of threatened and endangered species. The absence of a coordinated or whole of government approach to the protection of biodiversity in the management of invasive species is a significant shortcoming of the proposed invasive species management framework.

The collaborative model put forward by the ISC should be given serious consideration in this regard. The ISC proposes the establishment of Environment Health Australia (EHA) body to facilitate, through 'partnerships, planning, research, monitoring and outreach...more effective ways to safeguard terrestrial and aquatic environments from invasive pathogens, weeds and pests'. The EHA would be a 'national body for environmental biosecurity with wide community, government research and business membership to foster ecological, coordinated and collaborative approaches to prevent and reduce environmental harm from invasive species'. (p.5)

Compliance and Enforcement

Monitoring, compliance and enforcement has been a significant issue with the CaLP Act. This proposal responds to these problems by adding some extra enforcement powers and by redesigning the system to make the obligations simpler and clearer and hence easier to enforce. This is welcome. However consideration could also be given to including the following matters:

- An overriding obligation on the part of DPI to enforce the legislation; and
- backing up the overriding obligation with an obligation to develop, publish and implement an enforcement strategy which DPI would be required to report against. The Environment Protection Authority has done quite a bit of work on strategic approaches to enforcement and this would provide a good model here.

Further, there is a brief reference to community management arrangements in the instruments table and some suggestion that these would be a vehicle for funding and perhaps supported by enforcement action. More detail is required as to what is proposed here and how it will work.

The Act should also contain obligations on the part of DPI to report on implementation of the Act annually (meaningful performance measures should be included in the legislation itself) and perhaps also to commission an independent external review of the legislation within a certain fixed period (for example, in 5 or 10 years).

Finally, we support the proposed increased powers to determine and undertake management activities in a manner similar to that of other Victorian biosecurity legislation.³⁰ These powers are to be scaleable

²⁹ See for example the NSW ENGO recommendation and proposed drafting of an object provision which promotes cooperation and participation across responsible governments and public bodies (op. cit. at p.7).

³⁰ Discussion Paper, p.24

according to the management opportunity presented, with 'higher level powers' for prevention and early intervention in addition to the 'generic powers' to manage day to day matters such as the management of established species.³¹

Third Party enforcement rights

The open standing provisions found in NSW environmental law should be appropriately adapted to Victoria's invasive species management framework. Wide standing provisions to allow for community enforcement is particularly appropriate to invasive species matters given the significant environmental impacts and public costs occasioned by weed invasions in particular, combined with the low rates of enforcement.³²

These provisions would presumably be used rarely³³ but having them there would be an important fall back and also a spur to action by DPI or whoever has principle responsibility for enforcement. Such provisions could be used by those with a direct financial interest (adjoining landowners), community groups, landcare groups and NGOs as well as perhaps Councils and other agencies in some circumstances.

We would be very happy to supply further details to the Department as to how such third party enforcement mechanisms have been implemented in environmental legislation in Australia and overseas.

Detail to be included in the Act rather than subordinate instruments

The proposal in the Discussion Paper is for much of the substance of the proposed regime to be delivered through subordinate instruments of various types. This might have the advantage of flexibility and responsiveness but it is imperative that critical obligations and objectives be included in the primary legislation rather than be left to be developed later (in particular, the obligations and objectives considered above).

We are concerned that the current proposal over relies on subordinate instruments to be developed at a later date. As a general principle we recommend that as much of the detail critical to the operation of the system be included in primary legislation. Where detail is to be left to subordinate instruments like delegated legislation or Codes of Practice it would be useful for the Act to include a requirement to consult about and develop a program for prioritising and developing these instruments. This would ensure that key elements of the regime are actually developed and implemented. The new legislation needs to avoid the problems with the ongoing failures to review and update pest plant and animal lists under the current CaLP Act regime.

Further, we submit that it would be useful for the legislation to include some specific requirements regarding consultation and community and industry involvement in the development of subordinate instruments. This could be achieved through inserting some generic requirements regarding consultation on draft proposals as well as through establishing legislatively mandated requirements for bodies such as reference or advisory groups.

³¹ Discussion Paper, p.20.

³² This argument is made by NSW ENGO submission, p.22.

³³ As noted in the NSW ENGO submission, open standing provisions in NSW environmental legislation did not 'open the floodgates' or lead to vexatious claims as was predicted by some commentators.

Other Issues

Responsibility for roadside weeds on local roads has been a vexed issue for some time. We understand that this is to be dealt with through amendments to the CaLP Act soon rather than waiting on the new Bill. Obviously any clarification inserted into the CaLP Act would need to be carried forward into the new legislation. Presumably this is intended, although the discussion paper appears to be silent on this point.

Conclusion

We reiterated that the proposed stand alone invasive species legislation should be characterised as a piece of environmental legislation, and that this must be demonstrated in the objectives and provisions of the draft Bill. The Act must ultimately seek to prevent and mitigate threats posed by invasive species to the natural environment, as well as those posed to primary production. This is not currently adequately dealt with in the Discussion Paper. More thought must also be given to governance arrangements, a co-ordinated national approach, compliance and enforcement, third party rights, and the heavy reliance that is currently being given to subordinate instruments in the regime.

EDO would be pleased to discuss the contents of this submission and the recommendations made at any time, and requests to be consulted in the future with regard to this law reform process.