

Where's the Guarantee?

Implementation and enforcement of
the Flora and Fauna Guarantee Act 1988
& Wildlife Act 1975

ABOUT THE ENVIRONMENT DEFENDERS OFFICE (VICTORIA) LTD

The Environment Defenders Office (Victoria) Ltd ('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.

In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest planning and environmental law.

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1. ABOUT THIS REPORT SERIES

This is the third report in a series, *Monitoring Victoria's Environmental Laws*, to be published by the EDO. The reports examine the extent and effectiveness of government's implementation and enforcement of key environmental laws in Victoria.

The EDO has witnessed how Victoria's environmental laws are implemented and enforced for over 20 years through our advice to and representation of the community on environmental law issues. Over that time we have become aware of countless environmental laws that are in force but are not effectively used by government to protect or improve the environment. Of further concern is the lack of publicly available information indicating how government regulators implement and enforce their laws. Public release of this information is vital to ensure government is accountable for the way in which it operates.

The *Monitoring Victoria's Environmental Laws* series has three main aims:

1. To empower the public by providing a consolidated source of information on whether regulatory agencies are implementing and enforcing their regulatory responsibilities under key environmental laws. The information will be a resource for the community for submissions or discussions with government, to encourage greater action and compliance by government.
2. To promote transparency and accountability by identifying what implementation and enforcement information is publicly available and, if that information is lacking, to inform government agencies of the type of information that should be publicly available.
3. To improve the implementation and enforcement of environmental laws by encouraging greater action and compliance by government agencies.

Ultimately we aim to ensure that Victoria's environmental laws are used to their greatest extent to protect and improve the environment.

Each report focuses on one area of environmental regulation. Each report will be updated and released every two years to provide an ongoing 'report card' of how environmental laws are being used. While we hope the 2011–12 reports will provide useful baseline data and recommendations for improvement, the full value of the reports will be seen over time through their ability to compare changes (and hopefully improvements) in the implementation of environmental laws over the next decade.

The reports are compiled using publicly available information, including information sourced from government agency websites, annual reports, and reports from review bodies such as the Auditor-General's and Ombudsman's offices. The EDO also requests information directly from the relevant regulating agency. Information is not always forthcoming and instances where information could not be found are highlighted in the report.

2. REPORT HIGHLIGHTS

This Report examines how effectively the Department of Sustainability and Environment (DSE) is implementing and enforcing the regulatory framework for the protection and management of Victoria's biodiversity under the *Flora and Fauna Guarantee Act 1988* (FFG Act) and the *Wildlife Act 1975* (Wildlife Act).

The FFG Act provides DSE with a framework to conserve and protect threatened species and ecological communities and to manage processes that threaten native flora and fauna. It sets out a range of tools and measures that can be used to do so. The FFG Act operates in conjunction with the Wildlife Act, which establishes procedures to promote the protection and conservation of wildlife and sustainable use of and access to wildlife, including the creation of reserves, the adoption of licensing and authorisation procedures and the creation of offences.

One of the important requirements under the FFG Act is the development of a 'Flora and Fauna Guarantee Strategy' (Biodiversity Strategy). The Brumby government committed to renewing the Biodiversity Strategy and a draft was released for public comment in June 2010. However since the change of government no progress has been made on it and it appears the Baillieu government has no plans to revive it.

The Victorian Auditor-General's 2009 performance audit of the administration of the FFG Act provides an important assessment of the administration and implementation of the FFG Act. The Auditor-General found that, as a general rule, the processes and measures available to conserve and protect flora and fauna have been abandoned by DSE, largely because of their perceived complexity and the difficulty of administering the provisions.¹ The Auditor-General also identified a lack of resources as a significant reason for DSE's poor implementation of the FFG Act.

Three years on, our report finds that the FFG Act remains very poorly implemented, with many of the legal measures to protect flora and fauna never used. Fewer than half of the 675 threatened species listed under the FFG Act have recovery Action Statements prepared, despite this being a mandatory requirement of the FFG Act, and only one new Action Statement has been developed in the past year.

By contrast, the procedures established under the Wildlife Act appear to be used by DSE. However it is extremely difficult to locate information about and decisions made under the Wildlife Act. Often, the only means by which to access key information – such as declarations of unprotected wildlife, State Wildlife Reserves, State Game Reserves and Nature Reserves – is through extensive and time-consuming searches of the Government Gazette. EDO considers that this information should be more readily accessible to the public.

This is not true only of the Wildlife Act. Publicly available data regarding DSE's compliance monitoring and enforcement activity under both Acts was very limited. DSE does not have an official compliance monitoring and enforcement policy or strategy. Nor does it report on compliance and enforcement activity separately for each Act; rather it gives the total activity across eight Acts. This is a significant weakness in DSE's implementation of both Acts. In this report, EDO makes a number of recommendations regarding the type of implementation and enforcement data that we consider should be publicly reported by DSE each year with respect to the FFG Act and Wildlife Act.

1. Victorian Auditor-General's Office, *Administration of the Flora and Fauna Guarantee Act 1988*, p 39.

KEY RECOMMENDATIONS

Improving implementation of the *Flora and Fauna Guarantee Act 1988*

- DSE should implement the recommendations made by the Victorian Auditor-General in his 2009 audit report, *Administration of the Flora and Fauna Guarantee Act 1988*.
- DSE should continue to improve its threatened species listing processes to ensure it has access to up-to-date scientific data and can complete listing in a timely manner, so that it can process the backlog of listings and implement the new national requirements.
- The Victorian Government should develop and consult on a new Biodiversity Strategy as a priority and provide clear goals for biodiversity protection including how those goals are to be achieved.
- The Victorian Government should make any proposed review of the FFG Act a public process, with opportunities for community and expert input.
- DSE should reconsider the use of critical habitat determinations, interim conservation orders and other conservation measures in the FFG Act, and develop a policy for when they can be used to most effect and at least cost so that they can be used to protect species, as the Act intended them to do.
- The Victorian Government should provide adequate resources to DSE to enable it to undertake the critical work of:
 - listing threatened species and ecological communities; and
 - development, review and implementation of Action Statements and other management processes and conservation and control measures.

Improving transparency and accountability

- DSE should make publicly available on its website:
 - data regarding protected flora and listed fish licences, permits, authorisations and clear details of government Orders.
 - numbers regarding offences with respect to the handling of protected flora.
 - information regarding permits relating to flora issued or renewed, or offences regarding other controls under the Act.
 - a current list of unprotected wildlife under the Wildlife Act, together with details of the declaration orders (period of declaration; and any conditions, limitations or restrictions).
- DSE or Parks Victoria should make publicly available on its website:
 - an up-to-date list of all State Wildlife Reserves and Nature Reserves.
 - management plans for each State Wildlife Reserve and Nature Reserve together with details of any reviews of the plans.
- DPI should make publicly available on its website an up-to-date list of all State Game Reserves.
- DSE should collect and analyse comprehensive licensing data under the Wildlife Act to better understand trends in wildlife use and exploitation. Full data should also be publicly available.

Improving monitoring and enforcement

- To improve the credibility of DSE's regulatory approach and processes, DSE should adopt and publish a compliance monitoring and enforcement policy as soon as possible.
- DSE should collect and annually report on its compliance and enforcement activity, including data on potential breaches, complaints received from the public, charges, investigations and prosecutions undertaken, and outcomes, as set out at Appendix A.

3. BACKGROUND

3.1 Biodiversity regulation and the Department of Sustainability and Environment

The Department of Sustainability and Environment (DSE) is the Victorian government department primarily responsible for monitoring, protecting and conserving biodiversity in Victoria.

DSE is responsible for administering a range of environmental laws. DSE performs the lead role in developing legislation, policy and programs to manage and conserve biodiversity. It also plays an extensive regulatory role in implementing, monitoring and enforcing biodiversity protection regulation.

The principal piece of legislation dealing with biodiversity conservation in Victoria is the *Flora and Fauna Guarantee Act 1988* (FFG Act). The *Wildlife Act 1975* (Wildlife Act) establishes a separate legislative regime for the protection and conservation of fauna. Much of DSE's responsibilities under the FFG Act and Wildlife Act are vested in the Secretary (Department head) of DSE. The FFG Act and Wildlife Act operate in conjunction with a range of other Acts that also affect the management and conservation of Victoria's biodiversity and natural resources, including:

- *Catchment and Land Protection Act 1994*
- *Conservation, Forests and Lands Act 1987*
- *Water Act 1989*
- *Forests Act 1958*
- *Sustainable Forests (Timber) Act 2004*
- *Land Act 1958*

The purpose of this report is to examine the implementation and enforcement of the regulatory framework established for the protection and management of Victoria's biodiversity under the FFG Act and Wildlife Act.

This report specifically aims to:

- assess, monitor and provide the public with information on whether DSE is carrying out its implementation and enforcement responsibilities under the FFG Act and Wildlife Act;
- promote transparency and accountability by identifying key information on implementation and enforcement that should be publicly available; and
- encourage greater implementation and enforcement of the FFG Act and Wildlife Act by DSE.

3.2 The role of the Minister

A number of provisions in the FFG Act and the Wildlife Act place responsibilities on the relevant Minister. Until recently, the Minister for Environment was responsible for administering the FFG Act and the Wildlife Act. After the 2010 election the Coalition Government changed administration arrangements so that responsibility for certain sections in both Acts were shared with the Minister for Agriculture and Food Security.² This change reflects the shift in view of natural resource management from the previous government to the current government, that being, from conservation objectives to resource use objectives.

² The sections that are now shared between the Ministers are: *Flora and Fauna Guarantee Act 1988* (Vic) section 5, Parts 3 and 5, and Divisions 1 and 2 of Part 6; *Wildlife Act 1975*: Parts I, III, IIIA, IIIB, VIIB, IX, sections 16, 20, 21, 35, 41–44, 53–56, 58–58E and 86–86C, and section 87 in so far as it relates to the effective management of hunting, including preserving good order among hunters of wildlife.

3.3 The Auditor-General's performance audit

In April 2009, the Victorian Auditor-General (**Auditor-General**) released a 'performance audit', the *Administration of the Flora and Fauna Guarantee Act*. The audit's objective was to review DSE's administration of the FFG Act and to assess how effective the processes and actions developed under the Act have been in preserving Victoria's native flora and fauna.³

The Auditor-General found that the FFG Act 'no longer provides an effective framework for the conservation and protection of Victoria's native flora and fauna.'⁴ The Auditor-General's report reveals a number of deficiencies in the management processes and the use of conservation and control measures and various powers under the Act. The Auditor-General was, however, unable to determine whether the Act is achieving its main objectives. This was due to a lack of comprehensive and reliable data on the conservation status of threatened species and the lack of an appropriate outcome and output performance measurement framework.⁵

The Auditor-General report is now nearly three years old, and despite the Auditor-General's damning findings, no action has been taken by DSE to address the failings identified in administering the FFG Act. The release of the report was welcomed by the then Minister for Environment, Gavin Jennings, who advised in a press release that he would ask the DSE Secretary to report on progress in implementing its recommendations within 12 months.⁶ As far as we can determine, this has not occurred.

3.4 The role of this report

Aside from the Auditor-General's report there is very little publicly available data on DSE's implementation and enforcement activity. The Auditor-General's report provides an important source of information on biodiversity regulation in Victoria and we have therefore relied greatly on the Auditor-General's findings in preparing this report. This report, however, expands on the Auditor-General's report by providing a framework for ongoing and systematic monitoring of biodiversity regulation in Victoria under both the FFG Act and the Wildlife Act. It also identifies implementation and enforcement data which is not currently publicly available and promotes public reporting of this information on a systematic basis.

One of the key features of the EDO report that sets it apart from other reports is our intention to revisit this data every two years to compare DSE's implementation and enforcement of its legislation. We hope that the value of the EDO report will be particularly evident in future years as a source of ongoing review and analysis of the improvement or otherwise in DSE's implementation of biodiversity legislation.

3 Victorian Auditor-General's Office, above n 1, p 1.

4 Victorian Auditor-General's Office, above n 1, p 1.

5 Victorian Auditor-General's Office, above n 1, p 1.

6 Minister for Environment and Climate Change Media Release 'Government Welcomes Auditor-General Report', 1 April 2009. <http://archive.premier.vic.gov.au/newsroom/6432.html>

4. FLORA AND FAUNA GUARANTEE ACT 1988

4.1 Regulatory objectives

The FFG Act governs the conservation of threatened species and ecological communities and the management of processes potentially threatening Victoria's native flora and fauna.

The purpose of the Act is to:

*establish a legal and administrative structure to enable and promote the conservation of Victoria's native flora and fauna and to provide for a choice of procedures which can be used for the conservation, management or control of flora and fauna and the management of potentially threatening processes.*⁷

The 'flora and fauna conservation and management objectives' of the Act are to:

- *guarantee that all species (taxa) of Victoria's flora and fauna other than the species listed in the Excluded List can survive, flourish and retain their potential for evolutionary development in the wild;*
- *conserve Victoria's communities of flora and fauna;*
- *manage potentially threatening processes;*
- *ensure that any use of flora and fauna by humans is sustainable;*
- *ensure that the genetic diversity of flora and fauna is maintained; and*
- *provide programs that include community education programs, programs that encourage cooperative management of flora and fauna, and provide incentive to people in order to conserve flora and fauna.*⁸

The FFG Act provides that the Secretary of DSE 'must administer this Act in such a way as to promote the flora and fauna conservation and management objectives' listed above.⁹

Section 68 of the FFG Act requires DSE's Annual Report to contain a statement as to progress in implementing the flora and fauna conservation and management objectives. This seems to be routinely ignored. For example, DSE's 2011 report only reports on four measures under the category of biodiversity and none specifically relates to the implementation of the FFG Act, let alone progress in implementation of the flora and fauna management and conservation objectives.¹⁰ The report also contains a selection of case studies, but these seem to have been selected to demonstrate some of the work undertaken by DSE and do not amount to reporting on progress in implementing the FFG Act's objectives.¹¹

An important feature of the legislative regime is the establishment of a process to list threatened species and ecological communities, and potentially threatening processes.¹² For listed items, the FFG Act sets out a range of management processes and conservation and control measures that can be used to protect and conserve species and manage potentially threatening processes. However the Act is not just a mechanism for listing threatened species. It is intended to operate as a framework for a range of other measures, such as the development of a Flora and Fauna Guarantee Strategy.

Although some elements of the FFG Act have in effect been restricted in their application to public land (especially the protected flora controls, discussed below), the Act applies to both public and private land.

⁷ *Flora and Fauna Guarantee Act 1988* (Vic) s 1.

⁸ *Flora and Fauna Guarantee Act 1988* (Vic) s 4.

⁹ *Flora and Fauna Guarantee Act 1988* (Vic) s 7.

¹⁰ Department of Sustainability and Environment Annual Report 2011, p 54. The measures reported on are number of Native Vegetation Credit Tracking Agreements, number of presentations made and peer reviewed scientific journal articles produced, and compliance with timelines for Game and Wildlife licence renewals and native vegetation removal referrals. Accessed at <http://www.dse.vic.gov.au/about-dse/publications/annual-report-2011>

¹¹ Department of Sustainability and Environment Annual Report above n 10, pp 62–64.

¹² *Flora and Fauna Guarantee Act 1988* (Vic) s 10.

4.2 Flora and Fauna Guarantee Strategy (Biodiversity Strategy)

The FFG Act requires the Secretary to develop a Flora and Fauna Guarantee Strategy (**Biodiversity Strategy**), setting out how the objectives for conservation of flora and fauna under the Act are to be achieved.¹³

The Biodiversity Strategy must include proposals for:

- guaranteeing the 'survival abundance and evolutionary development in the wild of all taxa and communities of flora and fauna';
- ensuring the 'proper management of potentially threatening processes';
- developing an education program;
- improving 'the ability of all relevant people to meet the flora and fauna conservation and management objectives'.

A draft Biodiversity Strategy was developed and released in September 1992. However this draft lapsed with a change in the State government and it was not until 1997 that a Biodiversity Strategy was released which purported to fill the requirements of the Act. This Biodiversity Strategy, titled 'Victoria's Biodiversity Strategy', is now significantly out of date. In 2009, the Auditor-General found that the 1997 Biodiversity Strategy included 'aspirational goals' but failed to provide measurable objectives or provide adequate guidance on how to achieve these goals.¹⁴

The former State Government committed to a process of renewing the Biodiversity Strategy. An independent evaluation of the 1997 Biodiversity Strategy commissioned by DSE in 2007 recommended that the new Biodiversity Strategy be concise and clear, have a clearly articulated vision and involve a high level of stakeholder engagement.

Furthermore, it was recommended that the Biodiversity Strategy:

- address emerging issues and priorities such as climate change, marine biodiversity, fire management, indigenous values and capacity;
- improve implementation by:
 - creating a comprehensive implementation plan;
 - adopting a whole-of-government approach to biodiversity management;
 - implementing through partnerships with business and industry;
 - building capacity and supporting people to implement biodiversity outcomes;
 - building awareness of biodiversity in the general public;
 - promoting 'flagship projects'; and
 - investing in research, mapping and data integration; and
- be supported by an effective monitoring, evaluation, reporting and improvement framework for the revised Strategy.¹⁵

4.2.1 The current status of the Draft Biodiversity Strategy

A draft of Victoria's Biodiversity Strategy 2010-2015, **Biodiversity is Everybody's Business (Draft Biodiversity Strategy)**, was released for consultation in May 2010.¹⁶ It was developed in the context of the previous government's Land and Biodiversity White Paper, **Securing Our Natural Future (White Paper)**.¹⁷ Rather than being an entirely new strategy it was an amendment to the existing 1997 Biodiversity Strategy and described how the Biodiversity Strategy would be implemented from 2010 to 2015. The Draft Biodiversity Strategy was not approved before the change of government in 2010, and EDO has been advised that there is no set time frame for the Strategy's release. The Draft Biodiversity Strategy has now been removed from the DSE website and there is no indication the government is moving to adopt the existing draft or develop a new Strategy.

¹³ *Flora and Fauna Guarantee Act 1988* (Vic) s 17(1).

¹⁴ Victorian Auditor-General's Office, above n 1, p 27.

¹⁵ Clear Horizon, Evaluation of the Victorian Biodiversity Strategy Final Report November 2007 accessed at <http://www.dse.vic.gov.au/conservation-and-environment/biodiversity/victorias-biodiversity-strategy/evaluation-of-the-1997-strategy>

¹⁶ Department of Sustainability and Environment, Biodiversity is Everybody's Business – Victoria's Biodiversity Strategy 2010-2015 Consultation Draft, 2010. The document has been removed from the DSE website.

¹⁷ Department of Sustainability and Environment website: <http://www.dse.vic.gov.au/conservation-and-environment/land-and-biodiversity-white-paper-securing-our-natural-future>

The White Paper attempted to set the vision and policy agenda for biodiversity protection for the next 20 to 50 years. The Biodiversity Strategy should be a mechanism which further develops policy commitments, providing guidance on how to achieve those goals. The White Paper has been removed from the DSE website, and the website states that the government is reviewing it to determine which elements align with current government policy.¹⁸ The government's position with respect to the Draft Biodiversity Strategy is unclear, but it appears likely that it has no interest in developing it further.

The 1997 Biodiversity Strategy is now well out of date and needs to be reinvigorated.

A new Biodiversity Strategy should be developed as a priority and provide clear goals for biodiversity protection including how those goals are to be achieved.

4.3 The listing process

4.3.1 The process

As noted above, the FFG Act establishes a procedure to list species and ecological communities of native flora and fauna that are threatened, and processes which are potentially threatening. Anyone can nominate a species, community or potentially threatening process for listing under the Act.¹⁹

To be eligible for listing, a species or community must be in a demonstrable state of decline which is likely to result in extinction.²⁰ A potentially threatening process can be listed when it poses a significant threat to the survival or evolutionary development of a range of flora or fauna if not appropriately managed.²¹

Nominations are considered by an independent Scientific Advisory Committee (**SAC**), which make recommendations for listing to the Minister for Environment.²² The SAC prepares a preliminary recommendation in regard to each nomination, stating whether or not the nomination satisfies the listing criteria and is therefore supported or rejected by the SAC. This preliminary recommendation must be advertised and made available to the public for comment for a period of at least 30 days. The SAC must consider the public comments before making a final recommendation to the Minister for Environment.²³

The Act imposes a maximum time limit of three years from the period of nomination to final recommendation by the SAC.²⁴ The Auditor-General reports that DSE has established its own internal benchmarks, allowing the SAC a minimum of three weeks from receipt of nomination to preliminary recommendation and 31 weeks from receipt of nomination to final recommendation.²⁵

The Act requires the Minister to make a decision as to whether or not the item be listed within 30 days of receiving a recommendation from the SAC. The Minister must consider the comments of the Conservation Advisory Committee and the Victorian Catchment Management Council. If listing proceeds, it is brought into effect ('gazetted') by a government Order published in the Victorian Government Gazette.²⁶ A similar process applies to delisting items which no longer meet the listing criteria.

¹⁸ Department of Sustainability and Environment website: <http://www.dse.vic.gov.au/conservation-and-environment/land-and-biodiversity-white-paper-securing-our-natural-future>

¹⁹ *Flora and Fauna Guarantee Act 1988* (Vic) s 12(1).

²⁰ *Flora and Fauna Guarantee Act 1988* (Vic) s 11(1).

²¹ *Flora and Fauna Guarantee Act 1988* (Vic) s 11(3).

²² The SAC has developed detailed listing criteria which have been set out in the *Flora and Fauna Guarantee Regulations 2001*. See Schedule 1. These are based on the primary criteria in the Act and describe what must be taken into account by the SAC when making recommendations.

²³ *Flora and Fauna Guarantee Act 1988* (Vic) ss 14 and 15.

²⁴ *Flora and Fauna Guarantee Act 1988* (Vic) s 15(2).

²⁵ Victorian Auditor-General's Office, above n 1, p 19.

²⁶ *Flora and Fauna Guarantee Act 1988* (Vic) s 16.

4.3.2 Listing activity since commencement

The Auditor-General reported that from the FFG Act's commencement until 2008, over 800 nominations had been submitted for consideration by the SAC, with an average of 40 per year since 1991. Of those nominations processed, '90 per cent were supported for listing, 9 per cent were rejected and 1 per cent was supported for delisting'.²⁷

Figure 1 below from the Auditor-General's report shows that the number of nominations have varied across the 17 years, but dropped overall in the last five years.

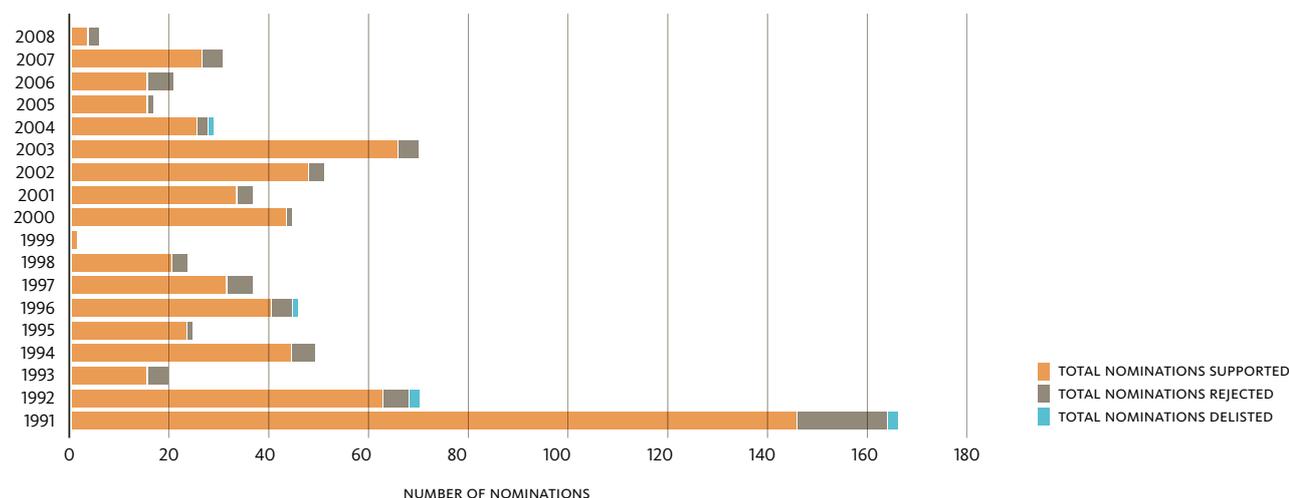
While DSE does not publicise details of nominators, its staff advised that DSE was actively involved in nominating species in the early years of the Act, employing FFG officers specifically to nominate threatened species and communities and potentially threatening processes. The majority of the nominations made in the early years of the Act were made by these officers. More recently, however, DSE advised that most nominations appear to be from individuals with a passion for the subject or with a very skilled knowledge base in a relevant area.

At the time of preparation of this report there were 675 species, communities and processes listed. DSE maintains an updated list of threatened species and communities and threatening processes on their website (**Threatened List**). According to its website, DSE endeavours to update the list within five working days of any new listing. The latest list is dated October 2010.²⁸

As the Auditor-General's report demonstrates there are a number of limitations with respect to the listing process.

The Auditor-General found that the listing process, while conforming to timeframes under the Act,²⁹ is compromised by a lack of up-to-date scientific data. Information available on threatened species is over 20 years old, while information on marine invertebrates is not readily available. The Auditor-General also found the listing process to be compromised by limited stakeholder participation and dilution of expertise in biodiversity as a result of reductions in research staff. The report concluded that 'in the absence of complete, reliable measurable information, the department does not have a clear picture of what is happening to many threatened species, and cannot be assured its decisions are soundly based'.³⁰ As the Auditor-General notes in his report, the effectiveness of the listing process relies on the quantity and quality of information that underpins listing decisions.

**FIGURE 1:
YEARLY BREAKDOWN OF NOMINATIONS RECEIVED (1991–2008) AND
THE FINAL DECISIONS MADE REGARDING THOSE NOMINATIONS**



Source: Auditor-General's Report: *Administration of the Flora and Fauna Guarantee Act 1988*, p18

27 Victorian Auditor-General's Office, above n 1, p 18.

28 FFG Act – Listed Taxa, Communities and Potentially Threatening Processes. The current list was made 21 October 2010: <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/threatened-species-and-communities/listed-items>

29 The time taken to list an item was within the three-year (156 weeks) time frame specified under the FFG Act, but continues to exceed the department's internal benchmark of 31 weeks. At page 20 of the report, it states: 'This experience over a long period indicates that the internal benchmarks set by the department are not realistic, given current processes and resources. The unrealistically short timeframes in an effort to address the backlog of nominations may compromise the listing process by creating pressure to forgo some process and rush decisions'.

30 Victorian Auditor-General's Office, above n 1, p21.

The Auditor-General recommended that lists should be improved through the incorporation of up-to-date scientific knowledge to increase their usefulness in biodiversity conservation.³¹ The Auditor-General notes that DSE has commenced significant updating and integrating of information systems to address current failings.³²

The Auditor-General also found that duplication between the State and the Commonwealth Government listing processes has created inefficiencies in deploying already scarce resources.³³ To eliminate duplication, the Auditor-General recommended collaboration on conservation activity with the Commonwealth Government.³⁴ The Commonwealth Government has recently announced it will move towards a single national list of threatened species through establishment of national listing criteria and accreditation of State processes that meet the criteria.³⁵

In addition to the Threatened List under the FFG Act, DSE maintains several 'advisory lists', which contain over 2,200 species. The advisory lists are informal lists of species that have not yet made it into the Threatened List and have no status under the FFG Act. The Auditor-General reported that many of these are likely to meet the criteria for listing under the FFG Act, with the advisory lists compensating for 'the non-comprehensive nature of the Act's list and the slow rate of listing'.³⁶

Efforts to maintain DSE's advisory lists are also reported to be consuming significant departmental resources. According to the Auditor-General, 'consolidating the separate listing processes, using similar criteria and classification, would be more efficient and cost effective'.³⁷

No doubt the new Commonwealth requirements will prompt a review of the Victorian listing criteria. DSE should continue to review its listing processes to ensure it has access to up-to-date scientific data and can complete listing in a timely manner, including processing the backlog of listings. It will also need to ensure it has the capacity to implement the new national requirements.

4.4 Management processes

As noted above, once an item has been listed, the FFG Act sets out a range of management processes that can be used to protect and conserve species and manage potentially threatening processes. Table A below sets out the key tools.

The Act requires the DSE Secretary to prepare Action Statements for species, communities and threatening processes 'as soon as possible' after they are listed; however, implementation of the other management processes or conservation and control measures is not a mandatory requirement and relies on the exercise of discretion by DSE.

TABLE A: KEY MANAGEMENT PROCESSES IN THE FFG ACT

MANAGEMENT PROCESS	RELEVANT SECTION OF THE FFG ACT	WHAT DOES IT DO?
Action Statements	s19(1)	Sets out the management actions to protect threatened species and communities and manage threatening processes.
Flora and fauna management plans	s21(1)	Plans for the conservation and management of threatened species and communities and management of threatening processes.
Critical Habitat Determinations	s20(1)	Declares areas of habitat critical to the survival of a species or community.
Public authority management agreements	s(25)(1)	Establishes agreements with public authorities to provide for the management of species, communities and threatening processes.

31 Victorian Auditor-General's Office, above n 1, p23.

32 Victorian Auditor-General's Office, above n 1, p14.

33 Victorian Auditor-General's Office, above n 1, p22.

34 Victorian Auditor-General's Office, above n 1, p23.

35 Commonwealth of Australia 2011, Australian Government response to the Report of the independent review of the EPBC Act 1999, p 13 accessed at <http://www.environment.gov.au/epbc/publications/epbc-review-govt-response.html>

36 Victorian Auditor-General's Office, above n 1, p22.

37 Victorian Auditor-General's Office, above n 1, p22.

4.4.1 Action Statements

The Act requires DSE to develop an Action Statement for species, communities and any potentially threatening processes 'as soon as possible' following listing.³⁸ The Action Statements must set out what has been done to conserve and manage that species or community or process and what is intended to be done. It may include information on what needs to be done in relation to the species, community or process.³⁹ Action Statements do not create any legally enforceable obligations on DSE.

DSE describes Action Statements as 'brief management plans' which are 'designed to apply for three to five years, after which time they will be reviewed and updated.'⁴⁰ They are available on the DSE website.⁴¹

DSE has developed a web-based information system, Actions for Biodiversity Conservation (**ABC**), that has been designed to store information on threatened species, communities and threatening processes across Victoria. The system is used to track the progress of management actions documented in Action Statements under the FFG Act and in Recovery Plans prepared under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The DSE website reports that the 'ABC currently holds information on more than 400 species and communities and over 14 000 management actions at approximately 2000 locations across Victoria'.

Development of Action Statements

While the Auditor-General concluded that Action Statements were the primary tools for protecting and conserving threatened flora and fauna, he found a significant discrepancy between the number of species, communities and processes listed and the number of Action Statements developed, with the rate of listing significantly outpacing the rate of Action Statements development.⁴² At the time of the Auditor-General's report, fewer than half of the 653 species, communities and threatening processes listed under the Act had associated Action Statements.⁴³

Three years on, the EDO has found that the development and finalisation of Action Statements continues to be protracted. In fact, the situation has not improved at all. As Table B illustrates, of the now 675 species, communities and threatening processes currently listed under the Act, it still remains that despite the preparation of Actions Statements being a mandatory obligation under the Act, fewer than half have completed Action Statements.

TABLE B: ACTION STATEMENTS COMPLETED FOR CURRENT LISTINGS UNDER THE FFG ACT⁴⁴

LISTING TYPE	NUMBER ON THREATENED LIST	COMPLETED ACTION STATEMENT
Mammals	38	27 (71%)
Birds	77	40 (52%)
Reptiles	28	11 (39%)
Amphibians	11	4 (36%)
Fish	24	12 (50%)
Invertebrates	73	28 (38%)
Plants	348	148 (43%)
Communities	37	17 (46%)
Listed potentially threatening processes	38	14 (37%)
TOTAL	675	301 (45%)

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

39 *Flora and Fauna Guarantee Act 1988* (Vic) s 19(2).

40 FFG Act : Action Statements <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/threatened-species-and-communities/action-statements>

41 <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/threatened-species-and-communities/action-statements>

42 Victorian Auditor-General's Office, above n 1, pp 9–30.

43 Victorian Auditor-General's Office, above n 1, p 13.

44 Table B is compiled using information available on the DSE website. See *Flora and Fauna Guarantee Act – Listed Taxa, Communities and Potentially Threatening Processes*, available at <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/threatened-species-and-communities/listed-items>; *Flora and Fauna Guarantee Act: Index of Approved Action Statements*, available at <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/threatened-speciesand-communities/action-statements/flora-and-fauna-guarantee-act-action-statements-index-of-approved-action-statements>

It was estimated in the Auditor-General's Report that, at the rate applying at the time, it would take 22 years (until 2031) for DSE to develop Action Statements for all remaining listed items.⁴⁵ This timeframe did not take into account the development of Action Statements for any additional species listed as threatened beyond 2008.⁴⁶ In the past year there has only been one draft Action Statement ready for public comment.⁴⁷

The lengthy delay in the preparation of Action Statements appears to reflect a broader problem in DSE's approach to implementation of the FFG Act. This is shown in the evidence of Gregory Wilson, Secretary of DSE, to the Bushfire Royal Commission in February 2010. During questioning regarding the Action Statement with respect to the listed potentially threatening process 'inappropriate fire regimes' and his obligations with respect to the FFG Act, Mr Wilson was unaware of the Auditor-General's performance audit of the Act, including his requirement as the Secretary of DSE to report to the Minister for Environment within 12 months as to the progress in implementing the recommendations arising from the audit. He was also unaware of the government's response to the audit report.⁴⁸ He did agree, however, that the lengthy period it had taken to develop the Action Statement did not meet the requirements in section 19 of the Act for it to be developed 'as soon as possible'.

The audit report is now three years old and despite the Auditor-General's damning findings no action has been taken so far to address the significant issues with Action Statements.

Implementation of Action Statements

As the Auditor-General highlights in his Report, listing is only of value if the conservation and management actions that are meant to follow from the listing process are implemented and their impacts evaluated.

The Auditor-General noted the lack of legislative power to compel DSE and other agencies to complete directives within Action Statements⁴⁹ and to review Action Statements once they have been prepared.⁵⁰

The Auditor-General found that 'there has been no systematic assessment of action statements to assess their effectiveness.'⁵¹

The Auditor-General reported that despite DSE's plan to review and revise the effectiveness of Action Statements at least every five years, as at April 2009 only 15 of the 278 approved Action Statements had been reviewed and updated, and 80 had been identified for review.⁵²

The Auditor-General's recommendations

The Auditor-General made a number of recommendations regarding the development and implementation of Action Statements, including:

- assess the resources applied to developing, monitoring and reviewing Action Statements;
- develop a prioritised action plan in order to assess the listed items with no Action Statements;
- develop new and revised Action Statements which detail how progress will be monitored and how the effectiveness of each initiative within Action Statements will be evaluated; and
- assess conservation efforts by monitoring output efficiency and outcome effectiveness measures.⁵³

EDO believes that DSE should implement the Auditor-General's recommendations as a priority.

DSE responded to the Auditor-General's findings by indicating that it would give consideration to reducing the number of separate Action Statements by extending the Action Statement provisions to allow for region-based plans that cover all threatened species and communities within a given region.⁵⁴

Government responses

In the White Paper, the previous Victorian Government committed to reviewing the Action Statement provisions in the FFG Act to 'optimise efforts for threatened species and ecological communities'.⁵⁵

45 Victorian Auditor-General's Office, above n 1, p 30.

46 Victorian Auditor-General's Office, above n 1, p 30.

47 Flora and Fauna Guarantee – Draft Action Statements for Public Comment, available at <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/threatened-species-and-communities/action-statements/drafts-for-public-comment>

48 2009 Victorian Bushfires Royal Commission, Transcript of proceedings, Friday 19 February 2010, p 15, p 142.

49 Victorian Auditor-General's Office, above n 1, p 25.

50 Victorian Auditor-General's Office, above n 1, p 31.

51 Victorian Auditor-General's Office, above n 1, p 25.

52 Victorian Auditor-General's Office, above n 1, p 31.

53 Victorian Auditor-General's Office, above n 1, p 39. (Recommendation 5.1).

54 Victorian Auditor-General's Office, above n 1, p 5.

55 Department of Sustainability and Environment, above n 17, p 85.

DSE staff advised that the previous government intended to give effect to these commitments through a proposed new Act, the Biodiversity Conservation Act. It appears unlikely that this will be a priority for the current government.

We understand, however, that the current government will be conducting a review of threatened species management in Victoria over the next 12 months. The review, which will consider tools used under the FFG Act, is expected to address the Auditor-General's recommendations. EDO has been advised that at this stage the review is intended to be an internal review by DSE, with no public consultation.

EDO strongly believes that any such review should be a public process, with opportunities for community and expert input.

4.4.2 Flora and Fauna Management Plans

Under the Act, the DSE Secretary may make a management plan for any species or community of flora or fauna or potentially threatening process.⁵⁶ Where the interests of a landholder or water manager may be directly and materially affected by the management plan, the Secretary must make a draft management plan and consult with affected persons.⁵⁷

No management plans have been prepared to date.⁵⁸

The Auditor-General reports that DSE sees management plans as 'more detailed action statements'. They require only minimal additional information and therefore are perceived as having 'little additional value'. Accordingly, DSE has placed a higher priority on the development of Action Statements than the development of flora and fauna management plans.⁵⁹

In our view this reported explanation lacks credibility.

Firstly, as the discussion above demonstrates, the development of Action Statements has not been given sufficient priority resulting in a situation where many listed matters do not have an Action Statement or a Management Plan.

Secondly, it is clear from the Act that Management Plans are intended to have a more specific function than Action Statements, and in particular are intended to guide the actual implementation of management actions for a listed matter, particularly on private land. Public consultation is required in their development and there is a specific obligation to review their implementation.

Failure to use this mechanism is in our view a symptom of a more widespread failure to implement the Act rather than the duplication and redundancy claimed by DSE.

4.4.3 Critical Habitat Determinations

The FFG Act allows the Secretary of DSE to make a 'Critical Habitat Determination' to protect the whole or any part or parts of the habitat of any species or community of flora or fauna that is critical to the survival of that species or community.⁶⁰ Once a Critical Habitat Determination is made, other conservation measures can be put in place in that area to protect species.

The only Critical Habitat Determination made to date was revoked soon after. DSE has indicated to the Auditor-General that it does not use Critical Habitat Determinations for the following reasons:

- *Assessing critical habitats is scientifically challenging and resource intensive*
- *Information on critical habitats is scarce*
- *It is difficult to set boundaries for the habitat*
- *There is a tendency for a critical habitat determination to escalate public conflict in regard to the use and development of land and water*
- *Boundaries cannot be clearly defined which means that any critical habitat could be subject to legal challenge by property developers and others wanting to use the land.*⁶¹

Given the failure to even try to use Critical Habitat Determinations (apart from the single instance noted above) it is difficult to evaluate these claims on the basis of any evidence. In the circumstances we believe it is reasonable to conclude that the claims represent an attempt to rationalise the failure to utilise the mechanism, rather than real obstacles to making determinations in appropriate circumstances.

⁵⁶ *Flora and Fauna Guarantee Act 1988* (Vic) s 21.

⁵⁷ *Flora and Fauna Guarantee Act 1988* (Vic) s 21(2).

⁵⁸ Victorian Auditor-General's Office, above n 1, p 32-39.

⁵⁹ Victorian Auditor-General's Office, above n 1, p 32.

⁶⁰ *Flora and Fauna Guarantee Act 1988* (Vic) s 20.

⁶¹ Victorian Auditor-General's Office, above n 1, p 34.

The failure of DSE to use Critical Habitat Determinations is a great failing of DSE's implementation of the Act. They are a key tool to protect species and communities that are at threat, and one of the few tools that lead to legal protection for species. Without Critical Habitat Determinations, the Act is substantially weakened, particularly as it relates to private land. All of the reasons listed above could be overcome if there were Departmental and political will to do so. DSE should re-consider the use of Critical Habitat Determinations and develop a policy for when they can be used to most effect and at least cost so that they can be used to protect species, as the Act intended them to do.

4.4.4 Public Authority Management Agreements

Under the FFG Act there is provision for Public Authority Management Agreements. Such agreements can be entered into with public authorities involved in the conservation of native flora and fauna to provide for the management of any species, community or potentially threatening process.⁶² The Secretary must publish notice of the making of the agreement in the Government Gazette (**gazette**).⁶³

The Auditor-General reported that, up to April 2009, DSE had 'developed nine agreements that have been approved by the Secretary and gazetted; two agreements have been signed but not yet gazetted; and one has been prepared but not yet approved by the Secretary. One agreement is on hold'.⁶⁴

The Auditor-General's report provides the summary in Table C of the Public Authority Management Agreements developed by DSE. This information is not available on the DSE website. The only other way to access this information is to conduct a time-consuming search of the notices published in the Government Gazette.

62 *Flora and Fauna Guarantee Act 1988* (Vic) s 25(1).

63 *Flora and Fauna Guarantee Act 1988* (Vic) s 25(2).

64 Victorian Auditor-General's Office, above n 1, p 32.

65 *Flora and Fauna Guarantee Act 1988* (Vic) s 26(1).
An important limitation is that on private land ICOs can only apply to listed or nominated taxa on private land, not communities (See s26(1)(c) and (d))

66 *Flora and Fauna Guarantee Act 1988* (Vic) s 27.

67 *Flora and Fauna Guarantee Act 1988* (Vic) s 32.

68 *Flora and Fauna Guarantee Act 1988* (Vic) s 26(1).

69 *Flora and Fauna Guarantee Act 1988* (Vic) s 43(1).

70 Victorian Auditor-General's Office, above n 1, p 35.

71 *Environment East Gippsland Inc v VicForests* [2010] VSC 335 (11 August 2010).

72 Victorian Auditor-General's Office, above n 1, p 35.

4.5 Conservation and control measures

The Act establishes conservation and control measures to enable the DSE to protect listed items. The main conservation and control measures are Interim Conservation Orders (**ICOs**) and controls over the handling of protected flora and listed fish.

4.5.1 Interim Conservation Orders (ICOs)

Under the Act, the Minister can issue an Interim Conservation Order (**ICO**) to conserve the critical habitat of a listed or nominated species of flora and fauna.⁶⁵ This order can prohibit or regulate any activity or process that takes place in that habitat, or, if it adversely affects that habitat, any activity that takes place outside that habitat.⁶⁶ An ICO only applies in areas that have been declared to be 'critical habitat'⁶⁷ and can operate for up to two years.⁶⁸ A landholder is entitled to compensation for financial loss suffered as a consequence of an ICO.⁶⁹

No ICOs have been issued to date.⁷⁰ This is primarily based on a reading of the Act which suggests that ICOs apply only in areas that have been declared to be critical: as there are no critical habitat determinations, no ICOs have been issued. This reading of the Act has recently come into question in the *Environment East Gippsland Inc v VicForests*⁷¹ case. Counsel in that case was of the view that a Critical Habitat Determination was not a necessary prerequisite to the issuing of an ICO.

DSE has cited the cost of preparing orders as a reason that no orders have been made.⁷²

This is a further significant failing in the implementation of the FFG Act. ICOs are the only legally binding conservation measure to protect threatened species. Although they are not designed to be used as the sole conservation measure for species protection, they are an important tool at the government's disposal which it is failing to use. As with Critical Habitat Determinations, DSE should review its refusal to use ICOs as a conservation tool and should instead develop a policy for when they can be used to most effect and at least cost.

TABLE C: PUBLIC AUTHORITY MANAGEMENT AGREEMENTS

LOCATION	AGREEMENT MADE WITH	SUBJECT	STATUS
Gippsland- Traralgon	City of Morwell	Eucalyptus yarrensis	Completed Gazetted 24 Jun 1993
Gippsland – Yarram	Trustees of Alberton Cemetery	Plains Grassland (South Gippsland) Community	Completed Gazetted 25 November 1993
South West – Portland	Shire of Heywood	Caladenia hastate – Limestone Spider-orchid	Completed Gazetted 17 Mar 1994
Gippsland – Orbost	Shire of Orbost (Marlo Aerodrome)	Diuris punctata – Purple Diuris	On hold
North West – Mildura	Trustees of Mildura Cemetery	Mixed eucalyptus woodland	Completed Gazetted 1 Dec 1994
Port Phillip – Melbourne	Whittlesea Shire	Western Basalt Plains Grassland	Completed Gazetted 15 Jul 1995
	Trustees of Merbein Cemetery	Mixed Eucalypt Woodland Community	Completed 17 Apr 1997
North West – Eppalock	Goulburn Murray Water (Lake Eppalock)	Delma impar – Striped Legless Lizard Basalt Plains Grassland	Completed Gazetted 13 Aug 1998
Port Phillip	Wyndham Cemetery Trust (Truganina Cemetery)	Native Grassland Community Rutidosia leptorrhynchoides – Button Wrinklewort	Completed Gazetted 6 Sep 2001
Gippsland – Dawson	Gippsland Plains Rail Trail	Central Gippsland Plains Grassland Community Forest Red Gum Grassy Woodland Community Diuris punctata – Purple Diuris	Signed 20 Aug 2003 Not gazetted
Gippsland – Sale	Wellington Shire	Central Gippsland Plains Grassland Community	Signed 22 Aug 2005 Not gazetted
South West – Portland	Glenelg Region Water Authority (Dunkeld Waste Water Treatment Plant)	Amphibromus pithogastrus – Plump Swamp Wallaby-grass	Unsigned; however, the Sewerage Authority uses the draft agreement to manage the site
Port Phillip	Queenstown Cemetery Trust	Native Vegetation of high regional significance (Grassy Dry Forest, Valley Grassy Forest and Swampy Forest)	Completed Gazetted 7 Aug 2008

Source: Victorian Auditor-General's report *Administration of the Flora and Fauna Guarantee Act 1988*, Figure 5D, p 33.

4.5.2 Protected Flora

The FFG Act establishes controls for the handling of protected flora. This includes flora declared to be protected under the Act and flora which is part of a listed species or community.⁷³ DSE maintains a list of protected flora on its website.⁷⁴

Under the Act, it is an offence to take⁷⁵, trade in, keep, move or process protected flora without a licence, permit or authorisation.⁷⁶ This sounds rigorous but in fact there are extensive exceptions both in the Act and in Orders made under the Act.

Exceptions to the controls

The controls under the Act do not apply to the taking of flora if the taking is accidental (and reasonable care has been exercised not to take that flora).⁷⁷ In the case of private land, the controls do not apply where the flora is taken by the owner or lessee of private land (or a person that the owner or lessee has allowed) as long as the flora is not taken from critical habitat nor taken to be sold.⁷⁸ Furthermore, the controls do not apply to flora propagated from flora which has been lawfully obtained and kept.⁷⁹

The Victorian Government has also made Orders with respect to the taking, trading in, keeping, moving and processing of protected flora. Orders are legally binding instruments made under the Act which set out exemptions or additional requirements that must be complied with. Thus they are very important, but they are not currently readily available. The following list of Orders made is the result of a time-consuming search of the Government Gazette.

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

74 FFG Act Protected Flora List (October 2010). Available at <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/threatened-species-and-communities/listed-items>

75 Take is defined to include killing, injuring or disturbing (FFG Act, s3).

76 *Flora and Fauna Guarantee Act 1988* (Vic) ss 47 and 48.

77 *Flora and Fauna Guarantee Act 1988* (Vic) s 47(2)(a).

78 *Flora and Fauna Guarantee Act 1988* (Vic) s 47(2)(b) and (c).

79 *Flora and Fauna Guarantee Act 1988* (Vic) s 47(2)(c).

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

81 Published in Government Gazette No. G39 on 23 September 2004.

82 Government Gazette No. G39, above n 81, clause 6.

83 Government Gazette No. G39, above n 81, clause 7.

ORDERS FOR PROTECTED FLORA

Flora and Fauna Guarantee (Forest Produce Harvesting) Order No. 2/2004.⁸⁰

This Order authorises, subject to certain terms and conditions, the taking of protected flora in State forest and Crown land where the taking is a result of or incidental to forest produce (including timber) harvesting operations or associated road works authorised under the *Forests Act 1958* or timber harvesting operations authorised under *Sustainable Forests (Timber) Act 2004*. The Order however does not authorise the taking of protected flora from critical habitat or the taking of tree ferns, grasstrees or sphagnum moss for the purpose of sale.

Flora and Fauna Guarantee (taking, trading in, keeping, moving and processing protected flora) Order 2004.⁸¹

The cases of taking, trading in, keeping, moving and processing certain flora authorised under the Order include:

- the taking of protected flora (other than tree ferns, grasstrees or sphagnum moss) from private land, for the purpose of sale provided that the landholder has authorised the taking of protected flora from that land, the flora is not taken from critical habitat and is not taken for the purpose of controlling.⁸²
- the trading in, keeping, moving or processing of protected flora (subject to the trading conditions in the Order) if the protected flora has been taken and obtained in Victoria in accordance with the FFG Act or a permit, licence or Order under the Act; or taken and obtained lawfully outside Victoria and brought into Victoria; or propagated from flora which has been lawfully obtained and kept.⁸³

As there are no Critical Habitat Determinations in place, the exemption under the Act and the authorisation under the Flora and Fauna Guarantee (taking, trading in, keeping, moving and processing protected flora) Order 2004 effectively mean that protected flora receives no protection on private land.

A further problem with the protected flora controls under the Act is that the effective limiting of the application of the controls to public land gives rise to a frequently made assertion by DSE staff that the FFG Act only applies to public land.

Regulation – licences, permits and authorisations

While the DSE website describes the regulation of the handling of protected flora as ensuring that ‘any harvesting or loss is ecologically sustainable’,⁸⁴ as is directed by the objectives of the Act,⁸⁵ in practice permits and licences are rarely refused by DSE. This raises the question: what is the purpose of having a permit or licence system? There is also no publicly available data on the degree of compliance with the conditions of permits and licences, and it does not appear that DSE conducts any compliance monitoring of permits.

The DSE website does not provide information on the number of licences, permits or authorisations issued or renewed under the FFG Act or details of any Orders authorising the handling of protected flora.

The Victorian Competition and Efficiency Commission (VCEC) has included some data on the number of licences or permits issued or renewed under the FFG Act in its Victorian Regulatory System series of reports, which compiles basic information about major Victorian regulators. Based on information provided by DSE, VCEC reports that in the 2007–2008 period 82 licences or permits to take, trade in, keep, move or process protected flora were issued or renewed by DSE. Data for years prior to or following 2007–2008 was not supplied to VCEC.

The DSE website also does not provide any information on the number of offences with respect to the handling of protected flora.

The EDO considers that the above data regarding licences, permits, authorisations and clear details of Orders should be publicly accessible on the DSE website, as should numbers regarding offences with respect to the handling of protected flora. A full list of the information that DSE should report on each year is at Appendix A.

4.5.3 Controls over the handling of fish

The Act also establishes controls for the protection of listed fish.

Under the Act, it is an offence to take, trade in or keep any fish which is a member of a listed species or community of fauna without a licence or authorisation.⁸⁶

Again, the DSE website does not provide any information on licences issued with respect to the handling of fish or details of any Orders authorising the handling of listed fish. The website also does not provide any information regarding offences with respect to the handling of fish.

The DSE website states that in most cases, Orders provide exceptions for recreational fishing or aquaculture so that each individual does not have to get a licence⁸⁷. Only an extensive and time-consuming search of the Government Gazette will reveal any Orders authorising the taking, trading in or keeping of listed fish. A search of the Government Gazette revealed the following current Order:

Flora and Fauna Guarantee (taking, trading in or keeping of listed fish) Order No. 1/2009⁸⁸

Data regarding any licences, permits, authorisations and clear details of Orders should be publicly accessible on the DSE website.

4.6 Resources for implementation

The Auditor-General’s report clearly confirms that inadequate resources for implementation of the FFG Act is a fundamental problem underlying many of the shortcomings of the Act, including gaps in scientific data, capacity for assessing and listing nominated items, development and review of Action Statements and compliance and enforcement.

The ability of the FFG Act to promote conservation and management of threatened species and communities is highly dependent on the proper identification and listing of those species and communities.

It is critical that adequate resources are applied to improving knowledge of species and to ensuring that lists of threatened species and ecological communities contain all that are eligible for listing. Similarly, adequate resources must be applied to the development, review and implementation of Action Statements and other management processes and conservation and control measures under the Act. As a first step, DSE must make a cultural shift away from abandonment of the conservation and control measures of the Act, and instead develop policy on how the Act can be used to protect Victoria’s biodiversity.

Additional resources should be provided to DSE to undertake this critical work.

84 <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/threatened-species-and-communities/flora-and-fauna-guarantee-act/flora-and-fauna-guarantee-act-controls-over-protected-flora>

85 The objectives of the Act include: ‘prevention of taxa of wildlife from becoming extinct’ (s1A(ii)) and ‘sustainable use of and access to wildlife’ (s1A(iii)).

86 *Flora and Fauna Guarantee Act 1988* (Vic) s 52(1).

87 DSE website at <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/threatened-species-and-communities/flora-and-fauna-guarantee-act/flora-and-fauna-guarantee-act-controls-over-listed-fish>

88 Published in Government Gazette No. G12 on 19 March 2009.

5. WILDLIFE ACT 1975

As detailed above, the FFG Act imposes controls and prohibitions with respect to the handling of protected flora and listed fish. The FFG Act, however, does not contain provisions in relation to other protected fauna. Therefore, the operation of the FFG Act needs to be considered together with the Wildlife Act, which creates a range of offences with respect to the handling of other native fauna species.

5.1 Regulatory objectives

The Wildlife Act establishes procedures to promote the 'protection and conservation of wildlife' including the 'prevention of taxa of wildlife from becoming extinct' and the 'sustainable use of and access to wildlife'. The Act regulates the conduct of persons engaged in activities concerning or related to wildlife.⁸⁹ The protection of wildlife and wildlife habitat under the Act are subject to a system of licenses, permits and authorisations.

The Act defines 'wildlife' as 'any animal of a vertebrate taxon other than mankind which is indigenous to the whole or part or parts of Australia or its territories or territorial waters, whether or not it occurs elsewhere'⁹⁰ and 'all kinds of deer, non-indigenous quail, pheasants or partridges and any other species of animal which the Governor in Council by Order published in the Government Gazette declares to be wildlife for the purpose of this Act'.⁹¹ Wildlife also includes 'any taxon of terrestrial invertebrate animal which is listed under the *Flora and Fauna Guarantee Act 1988*'.⁹²

All wildlife is protected under the Wildlife Act, except for pest animals declared under the *Catchment and Land Protection Act 1994*, fish species as defined under the *Fisheries Act 1995*, and wildlife declared to be unprotected wildlife under the Wildlife Act itself.⁹³

The Act sets out to achieve its purported purposes largely through the creation of Reserves, the adoption of licensing and authorisation procedures, and the creation of offences.

5.2 Unprotected wildlife

Under the Wildlife Act, the Minister may by Order declare protected wildlife to be unprotected in an area of Victoria.⁹⁴ Since the commencement of the Act, government has declared five species to be unprotected. Table D details the species so declared as at October 2010 and provides details of the declaration, the period of the Order and any conditions, limitations or restrictions which apply.

This information is extremely difficult to access. The only publication of this data seems to be in the Government Gazette, so once again an extensive and time-consuming search of the Government Gazette was the only way to determine what declarations are in force.

Such information should be easily accessible to the public. A current list of unprotected wildlife together with details of the declaration orders (period of declaration and any conditions, limitations or restrictions) should be maintained on the DSE website.

89 *Wildlife Act 1975* (Vic) s 1A.

90 *Wildlife Act 1975* (Vic) s 3.

91 *Wildlife Act 1975* (Vic) s 3.

92 *Wildlife Act 1975* (Vic) s 3.

93 *Wildlife Act 1975* (Vic) s 3

94 *Wildlife Act 1975* (Vic) s 7A.

TABLE D: DECLARATIONS OF UNPROTECTED WILDLIFE

DATE/ GAZETTE	DECLARATION/ AMENDMENT	WILDLIFE DECLARED UNPROTECTED	DETAILS OF ORDER IN COUNCIL
1 August 1984, G84	Declaration	Wombat (<i>Vombatus ursinus</i>)	Declares wombats to be unprotected in the parishes specified in the Order.
4 July 1996, G26	Declaration	Long-billed Corella, the Sulphur-Crested Cockatoo and the Galah	(a) Declares the Long-billed Corella, the Sulphur-crested Cockatoo and the Galah to be unprotected wildlife throughout the whole of Victoria, during the whole of the year, subject to the conditions, limitations and restrictions listed; and (b) Revokes the Orders in Council – (i) dated 11 January 1983 and published in Government Gazette No. 6 and 19 January 1983 (pages 144 and 145) declaring Sulphur-crested Cockatoos and Long-billed Corellas to be unprotected wildlife in certain Shires of Victoria; and (ii) dated 11 October 1988 and published in Government Gazette No. 39 on 12 October 1988 (page 3103) declaring the Long-billed Corella to be unprotected wildlife within the Shire of Kaniva.
25 March 1999, G12	Amendment of Declaration dated 4 July 1996)	Long-billed Corella, the Sulphur-Crested Cockatoo and the Galah	After clause (2) of the Schedule insert – (3) In addition to the taking or destroying of those species by persons specified in paragraph (1) (a) by the means specified in clause (2), those persons may take or destroy those species by – (a) the use of a chemical in accordance with the Agricultural and Veterinary Chemicals (Control of Use) Act 1992; and (b) in accordance with the written authorisation of the Secretary under section 28A of the Wildlife Act 1975.
10 July 2003, G28	Declaration	Common Brushtail Possum (<i>Trichosurus vulpecula</i>)	Declares the Common Brushtail Possum (<i>Trichosurus vulpecula</i>) to be unprotected wildlife in the area being the whole of Victoria. Only Common Brushtail Possums living within buildings or in municipal parks and municipal gardens may be controlled and the only method of capture permitted is by the use of a cage trap.
1 October 2010, s399	Declaration	Dingo (<i>Canis lupus</i> subsp Dingo)	Declares Dingo (<i>Canis lupus</i> subsp Dingo), except when kept in captivity, unprotected wildlife on: (a) all private land in Victoria; and (b) public land within 3 km of any private land boundary in the land shown hatched in Schedule 1 of the proposed Order in Council; and (c) public land within 3km of a boundary of land subjected to a perpetual lease under section 53 of the Land Act 1958 for the purpose of protecting livestock shown hatched in Schedule 1 of the proposed Order in Council.

PERIOD	CONDITIONS, LIMITATIONS, RESTRICTIONS
Not specified	<p>The species may be taken or destroyed in the Parishes specified in the Order by landowners or occupiers who are engaged in rural production and the permanent employees of such landowners or occupiers.</p> <p>The species shall be taken or destroyed by the above-mentioned persons by the use of fumigants, traps or firearms only on freehold and leasehold property or on Crown land within one kilometre of such property in the Parishes specified in the Order (other than Crown land administered under the <i>National Parks Act 1975</i> or the <i>Wildlife Act 1975</i>).</p>
Not specified	<p>The following conditions, limitations and restrictions apply to the Long-billed Corella and Sulphur-crested Cockatoo and Galah:</p> <ol style="list-style-type: none"> (1) The Long-billed Corella, the Sulphur-crested Cockatoo and the Galah may be taken or destroyed by – <ol style="list-style-type: none"> (a) landowners or occupiers, their employees and members of their families; and (b) in the case of recreational reserves, members of committees of management – only where serious damage is being caused by those species to trees, vineyards, orchards, recreational reserves or commercial crops. (2) Persons specified in paragraph (1) may take or destroy these species by – <ol style="list-style-type: none"> (a) the use of firearms in accordance with the <i>Firearms Act 1958</i>; or (b) using trapping and gassing equipment approved by the Department of Natural Resources and Environment – only on the freehold or leasehold property on which the damage is occurring.
N/A	
Not specified	<p>The following conditions, limitations and restrictions apply in respect of trapping Common Brushtail Possums living within buildings:</p> <ol style="list-style-type: none"> (a) Common Brushtail Possums may only be trapped by home-owners or occupiers and members of their families, building managers or their staff and holders of a Commercial Wildlife (Wildlife Controller) Licence Type 1 endorsed for taking possums. (b) Possums may only be trapped in cage trap designed not to cause injury. (c) Trapped possums must be released on the property on which they are captured, up to a maximum of 50 metres from the capture site after sunset on the day of capture. (d) Where condition (c) above is not reasonably possible, possums must be humanely destroyed by a registered veterinary practitioner, at the trapper's expense, within 24 hours of capture. (e) Trapped possums must be protected from rain or wind, direct sun and domestic animals at all times. <p>The following conditions, limitations and restrictions apply in respect of trapping Common Brushtail Possums in municipal parks and municipal gardens:</p> <ol style="list-style-type: none"> (a) Common Brushtail Possums may only be trapped by holders of a Commercial Wildlife (Wildlife Controller) Licence Type 1 endorsed for taking possums. (b) Trapping may only occur with the express permission of the land manager and may only be conducted in accordance with a management plan that includes the use of non-lethal methods of damage control. (c) Possums may only be trapped in a cage trap designed not to cause injury. (d) Trapped possums must be protected from rain or wind, direct sun and domestic animals at all times. (e) Trapped possums must be humanely destroyed by a registered veterinary practitioner within 24 hours of capture. (f) Specimens not to be retained for humane destruction must be released within a maximum of 50 metres from the capture site after sunset on the day of capture.
3 years (until 1 October 2013)	<p>The following conditions, limitations and restrictions apply:</p> <ol style="list-style-type: none"> (1) Where unprotected, the Dingo can be taken or killed by the below methods: <ol style="list-style-type: none"> (a) traps and other device that comply with standards set in the Prevention of Animal Cruelty Regulations 2008; (b) Poisoned with registered baits in accordance with the <i>Agricultural and Veterinary Chemicals Act 1994</i> (Victoria); or (c) Firearms in accordance with the <i>Firearms Act 1996</i>; and (2) In the case of private land described in this Order, there are no restrictions on who may kill or take a Dingo; and (3) In the case of public land within 3km of any: (i) private land boundary; and (ii) boundary of land subjected to a perpetual lease under section 53 of the <i>Land Act 1958</i> for the purpose of protecting livestock on this property, described in this Order, employees of, and persons engaged to kill or take Dingoes in writing by, the Department of Sustainability and Environment, the Department of Primary Industries or Parks Victoria may kill or take a Dingo.

5.3 Regulations

The following regulations support the Wildlife Act:

- Wildlife (Game) Regulations 2001
- Wildlife Regulations 2002
- Wildlife (State Game Reserves) Regulations 2004
- Wildlife (Marine Mammals) Regulations 2009

These regulations automatically revoke ('sunset') 10 years after the day of making, unless revoked sooner.⁹⁵

Table E sets out the regulations currently in force, a description of them and the date on which they will sunset. The DSE website contains a list of major regulations administered by DSE, including the regulations under the Wildlife Act.⁹⁶

As can be seen from Table E, the Wildlife (Game) Regulations 2001 and Wildlife Regulations 2002 are due for review this year.

5.4 Reserves

Under the Wildlife Act, the Secretary of DSE is responsible for the management and control of both State Wildlife Reserves and Nature Reserves.⁹⁷

5.4.1 State Wildlife Reserves

State Wildlife Reserves are all lands that come under the management and control of the Secretary of DSE under the Act (other than Nature Reserves).⁹⁸

Such lands can be:

- land given over to the Secretary for the purposes of propagation or management of wildlife, or the preservation of wildlife habitat; or
- land reserved for the above purposes under the *Crown Land (Reserves) Act 1978* by government Order.⁹⁹

To date, there has been no land given over but there have been numerous lands reserved.

A consolidated list of State Wildlife Reserves is not publicly available. While a search of the Government Gazette reveals lands reserved under the *Crown Land (Reserves) Act 1978* for the above purpose, this is an immensely time-consuming task. Moreover, it is only the additions and revocations that appear in the Gazette rather than a consolidated list of current State Wildlife Reserves. It is also not possible to know with certainty whether the results of any Gazette search are exhaustive. An up-to-date list of all State Wildlife Reserves (and any further classifications) should be publicly accessible on the DSE or Parks Victoria website.

TABLE E: WILDLIFE REGULATIONS

REGULATION	AUTHORISING PROVISIONS OF WILDLIFE ACT 1975	DESCRIPTION	SUNSET DATE
Wildlife (Game) Regulations 2001	ss22A, 58C, 87	Deals with game licences, open and close seasons and bag limits; hunting methods; possession and use of game; hog deer tags; open season for ducks; and deer hunting areas	10 September 2012
Wildlife Regulations 2002	ss22, 87	Deals with licences and general matters such as taking or harassing wildlife	25 June 2012
Wildlife (State Game Reserves) Regulations 2004	s87	Deals with the management of State Game Reserves established under the Wildlife Act	30 November 2014
Wildlife (Marine Mammals) Regulations 2009	ss85A, 87	Deals with permits and general management of activities relating to marine mammals	24 November 2019

⁹⁵ *Subordinate Legislation Act 1994* s5.

⁹⁶ See <http://www.dse.vic.gov.au/about-dse/legislation/major-dse-regulations>
We note that the date for the Wildlife (State Game Reserve) Regulations is incorrectly published as 2006 instead of 2004 on the DSE website.

⁹⁷ *Wildlife Act 1975* (Vic) s 16 and 16A.

⁹⁸ *Wildlife Act 1975* (Vic) s 15(1) and 15(3).

⁹⁹ *Wildlife Act 1975* (Vic) s 14.

How State Wildlife Reserves protect and preserve

It is an offence to take or destroy wildlife in or upon a State Wildlife Reserve unless it is a State Game Reserve. It is also an offence to hunt or wilfully disturb wildlife in or upon a State Wildlife Reserve without the authority (in writing) of the Minister.¹⁰⁰

Other offences include:

- digging or removing sand, soil or other material from a State Wildlife Reserve (or a Nature Reserve);¹⁰¹
- depositing rubbish, debris or other materials in State Wildlife Reserves (or a Nature Reserve);¹⁰²
- interfering with or damaging any structure or interfering with the flow of water into or out of, or within a State Wildlife Reserve (or a Nature Reserve) unless authorised under the *Water Act 1989* to do so or without the authority in writing of the Secretary;¹⁰³ and
- taking, destroying, hunting, injuring or wilfully disturbing or damaging any native flora in a Nature Reserve without the authority in writing of the Secretary.¹⁰⁴

Protection of wildlife varies according to classification. State Wildlife Reserves may be further classified as:

- State Game Reserves;
- State Game Refuges;
- State Fauna Reserves;
- Game Management Stations; or
- other classifications as specified.¹⁰⁵

Hunting and killing of wildlife – State Game Reserves

State Game Reserves differ from the rest of the State Wildlife Reserves in that the hunting and killing of wildlife is allowed, and in fact encouraged, during certain times of the year.¹⁰⁶ State Game Reserves vary considerably in size from less than 10 hectares to hundreds of hectares. Some of the classifications are made for set periods of time; other State Wildlife Reserves have been classified as State Game Reserves without an end period being listed.

As with listings of State Wildlife Reserves, a search of the Government Gazette will reveal which State Wildlife Reserves are assigned classification as State Game Reserves, but this is a time-consuming process. Furthermore, as noted above, it is only the additions and revocations that appear in the Gazette rather than a consolidated list of current State Game Reserves.¹⁰⁷

The responsibility for managing Victorian game species has recently been transferred to a new body, Game Victoria, under the Department of Primary Industries (DPI). While a consolidated list of current State Game Reserves was not available from DPI, the DPI website contains several region-based site maps which identify 181 State Game Reserves.¹⁰⁸ The site maps, however, are not up-to-date lists of all game reserves. For example, in March 2010, Lake Cope Cope was classified as a State Game Reserve;¹⁰⁹ however, at the time of preparing this report the Lake does not appear on any of the DSE region-based site maps. Similarly, Reedy Swamp has been revoked as a State Game Reserve (and is now classified as part of the Lower Goulburn River National Park¹¹⁰), however it still appears on the reference map for the North-East Region.

100 *Wildlife Act 1975* (Vic) s 20.

101 *Wildlife Act 1975* (Vic) s 21(1).

102 *Wildlife Act 1975* (Vic) s 21(1).

103 *Wildlife Act 1975* (Vic) s 21(2).

104 *Wildlife Act 1975* (Vic) s 21(3).

105 *Wildlife Act 1975* (Vic) s 15(2).

106 See Victorian Government Department of Primary Industries' hunting information webpages and Victorian Hunting Guide 2012 accessed at <http://www.dpi.vic.gov.au/game-hunting/about-game-hunting>

107 A search of the Victorian Government Gazettes since 1991 revealed that changes to classifications appear to have been published in the Gazette in March of each year.

108 Victorian Government Department of Primary Industries website, <http://www.dpi.vic.gov.au/game-hunting/game/australian-water-fowl/duck-hunting-locations/state-game-reserve-maps>
DSE regions: South West, North West, North East, Gippsland and Port Phillip. All state game reserves are available for duck hunting during open season; sixteen for quail hunting and six for hog deer hunting.

109 Victorian Government Gazette, No. G11 (18 March 2010), p 570.

110 Victorian Government Gazette, No. G11 (12 March 2009), p 615.

Management Plans on State Wildlife Reserves

Under the Act, the Secretary of DSE is required to prepare a plan of management for each State Wildlife Reserve.¹¹¹ DSE advised that responsibility for the preparation of management plans for State Wildlife Reserves has been delegated to Parks Victoria.

Parks Victoria, however, does not generally prepare management plans for reserves. Instead management of reserves is guided by the Conservation Reserves Management Strategy and, where available, individual reserve statements.¹¹²

The Conservation Reserves Management Strategy establishes overarching management directions for Conservation Reserves. It sets directions and guides the management of activities undertaken in reserves. It also details information about environmental, historic and indigenous values and visitor facilities in reserves and identifies gaps in knowledge about the reserve estate.¹¹³

5.4.2 Nature Reserves

Nature Reserves are Crown lands set aside for public purposes (other than the propagation or management of wildlife, or the preservation of wildlife habitat) under the *Crown Land (Reserves) Act 1978*, and whose management and control is placed under the DSE Secretary by Order published in the Government Gazette.¹¹⁴

The Secretary of DSE is responsible for preparing a management plan for each Nature Reserve.¹¹⁵ DSE advises that responsibility for the preparation of management plans has been delegated to Parks Victoria.

As noted above, the management of reserves is guided by the Conservation Reserves Management Strategy and where available, individual reserves statements.

A consolidated list of Nature Reserves is not publicly available. As with listings of State Wildlife Reserves, listings of Nature Reserves can only be found by the extremely time-consuming method of searching the Government Gazette. Parks Victoria should publish on its website an up-to-date list of all Nature Reserves.

5.5 Licensing and authorisations

The DPI website describes the use of licensing under the Wildlife Act as a means of providing and ensuring 'sustainable..., humane, ethical and safe recreational hunting opportunities' and 'equitable sharing of game resources between stakeholders'; minimising the destruction of 'non-game' species; and protecting 'wildlife habitats'.¹¹⁶

Table F indicates the types of activities the DSE regulates through licensing and the number of licences issued by DSE each year for the financial years 2005–06 to 2009–10 (excepting 2008–09 where the data was not published). The licenses are largely issued under the Wildlife Act and its supporting regulations.

While the data in Table F indicates a significant drop in the number of licences issued/renewed in 2007–08 compared to previous years, and then an increase in 2009–10, DSE staff advised that the numbers are not an accurate representation of what is happening in any given year. This is because most licences are issued for a period of 3 years. Therefore a spike is often visible in one year followed by a lull in the following two years. A more useful indicator would perhaps be the number of licences current in any given year; however, that information is not publicly available.

Although no data is publicly available for financial year 2008–09, DSE advised that in the last couple of years there has been a significant increase in the number of licences issued/renewed – particularly game licences (hunting licences), as reflected in VCEC's published data for 2009–10. DSE suggested that the increase in licences issued for these years correlates to improved environmental conditions (for example, an easing of drought) that have created an abundance of wildlife, and hence offered better hunting and collection.

As can be seen above, there are huge gaps in licensing data held by DSE. Comprehensive data should be collected and analysed by DSE to better understand trends in wildlife use and exploitation. Full data should also be publicly available.

111 *Wildlife Act 1975* (Vic) s 18 (1)(a) & (b).

112 The Conservation Reserves Management Strategy is available from the Parks Victoria website: http://parkweb.vic.gov.au/_data/assets/pdf_file/0003/312186/21_1467.pdf

113 Conservation Reserve Management Strategy, above n 112.

114 *Wildlife Act 1975* (Vic) s 14(b)(ii) and *Crown Land (Reserves) Act 1978*, s18(1).

115 *Wildlife Act 1975* (Vic) s 18(1)(c).

116 DPI website, <http://www.dpi.vic.gov.au/game-hunting/environment-and-community/sustainable-hunting>

TABLE F: LICENCES ISSUED/RENEWED BY DSE

LICENCE TYPE	DESCRIPTION	ACT/ REGULATION	2005– 2006	2006– 2007	2007– 2008	2008– 2009	2009– 2010
Game licences	Authorises the holder to hunt, take or destroy game.	<i>Wildlife Act 1975, s22A</i>	12,073	15,926	5,529	NA	18,015
Private wildlife licences	Authorises the holder to: <ul style="list-style-type: none"> – Take or destroy wildlife; – Buy, sell, acquire, receive, dispose of, keep, possess, control, breed, process or display wildlife. 	<i>Wildlife Act 1975, s22;</i> <i>Wildlife Regulations 2002, regs 22(a), 22(b), 22(c)</i>	10,671	12,078	12,587	NA	13,191
Wildlife Shelter Authorisation/permit*	Authorises/permits the holder to operate a wildlife shelter	<i>Wildlife Act 1975, s22</i>	NS	324	NA	NA	77
Permit to conduct commercial activity in a state game reserve	Authorises the holder to enter and use an area of a reserve specified in the permit for commercial activity such as delivering public addresses of a commercial nature or taking of photography, film or video for commercial purposes.	<i>Wildlife (State Game Reserve) Regulations 2004, reg 35</i>	NS	NS	NA	NA	NS
Permit to conduct organised activities in a state game reserve	Authorises the holder to enter and use an area of a reserve to undertake organised activities such as sporting and recreational events, shows, tours, festivals, fetes, public meetings, demonstrations or training classes.	<i>Wildlife (State Game Reserve) Regulations 2004, reg 35</i>	NS	NS	NA	NA	NS
Assistant's licence	Authorises the holder to undertake activity involving wildlife (except taking wildlife from the wild) permitted under a commercial wildlife licence, while acting on behalf of the holder of the commercial licence.	<i>Wildlife Act 1975, s22</i> <i>Wildlife Regulations 2002, reg 22(o)</i>	141	145	163	NA	194
Authority to control wildlife*	Authorises the holder to control particular species of wildlife.	<i>Wildlife Act 1975, s28A</i>	<2,499	1,089	2,889	NA	1,723
Wildlife import/export licence*	Authorises the moving of wildlife into and out of Victoria from another State or Territory of the Commonwealth.	<i>Wildlife Act 1975, s50</i>	2,013	2,245	2,153	NA	NS
Scientific research permit*	Authorisation to acquire and utilise a range of flora and fauna for bona fide research purposes.	<i>Wildlife Act 1975, s28A</i>	475	NS	79	NA	471
Whale/dolphin sightseeing permit	Authorises holders to conduct a whale-/dolphin-watching tour from the aircraft or vessel specified in the permit.	<i>Wildlife Act 1975, ss83A and 91</i>	4	4	2	NA	7
Whale/dolphin 'swim tours'	Authorises holders to conduct whale/dolphin 'swim tours'.	<i>Wildlife Act 1975, ss83D and 90</i>	3	3	1	NA	4
Permit to take protected flora	Authorises holders to take, trade in, keep, move or process protected flora.	<i>Flora and Fauna Guarantee Act 1988, s48</i>	NS	NS	82	NA	NS
Pest animal permit	Authorises possession of declared pest animals.	<i>Catchment and land Protection Act 1994, s77</i>	153	153	NS	NA	NS

LICENCE TYPE	DESCRIPTION	ACT/ REGULATION	2005– 2006	2006– 2007	2007– 2008	2008– 2009	2009– 2010
Wildlife controller licence	Authorises the holder (subject to conditions) to take or destroy those types of wildlife listed in Schedule 7 of the Wildlife Regulations 2002 and specified in the licence which are causing demonstrated damage or present a risk to human safety.	<i>Wildlife Act 1975</i> , s22 Wildlife Regulations 2002, regs 22(d) and 22(e)	104	142	144	NA	Total 464 (incl. all below)
Wildlife dealer's licence	Authorises the holder (subject to conditions) to possess, keep, breed, buy, sell or dispose of a range of live wildlife on a commercial basis. There are two types of Dealer Licence; the only difference is the species of wildlife that may be traded.	<i>Wildlife Act 1975</i> , s22 Wildlife Regulations 2002, regs 22(f) and 22(g)	6	84	86	NA	#
Wildlife demonstrator licence	Authorises the holder (subject to conditions) to demonstrate wildlife to the public in travelling displays or demonstrations for the purpose of promoting an understanding of the ecology and conservation of wildlife at any location within Victoria.	<i>Wildlife Act 1975</i> , s22 Wildlife Regulations 2002, reg 22(h)	32	39	42	NA	#
Wildlife displayer licence	Authorises the holder (subject to conditions) to operate a 'wildlife park'. Displays of wildlife must have a clear conservation theme, promote wildlife conservation and provide wildlife education.	<i>Wildlife Act 1975</i> , s22 Wildlife Regulations 2002, reg 22(i)	52	45	43	NA	#
Wildlife producer licence	Wildlife Producer licence (type 1): authorises the holder (subject to conditions) to operate a Game Bird Farm, which involves the release of non-indigenous game birds listed in Schedule 6 (Part A) of the Wildlife Regulations 2002 for hunting. Wildlife Producer licence (type 2): authorises the holder (subject to conditions) to operate as a Wildlife Processor. This involves the processing of dead species listed below which have been lawfully acquired. As wildlife cannot lawfully be taken from the wild in Victoria for this purpose, processors acquire most species from lawful sources interstate and import these under permit to Victoria. Wildlife producer licence (type 3): authorises the holder (subject to conditions) to operate as an Emu Farmer.	<i>Wildlife Act 1975</i> , s22 Wildlife Regulations 2002, regs 22(j), 22(k), 22(l)	40	36	36	NA	#
Wildlife taxidermist licence	Authorises the holder (subject to conditions) to preserve, stuff or mount dead specimens of species which have been acquired from a lawful source.	<i>Wildlife Act 1975</i> , s22 Wildlife Regulations 2002, reg 22(m)	20	22	23	NA	#
TOTAL†			<28,286	32,335	23,859	NA	34,146

* The 2007, 2008 and 2009 VCEC reports indicate that no fees apply for a licence or permit authorising this activity.

† Care must be taken when comparing totals across years as not all data is available each year.

Source: VCEC, *The Victorian Regulatory System Reports 2007, 2008, 2009 and 2011*.¹¹⁷

¹¹⁷ For 2005–06 data, see Victorian Competition and Efficiency Commission (VCEC), *The Victorian Regulatory System 2007 Final Report*, p125; for 2006–07 data, see VCEC, *The Victorian Regulatory System 2008 Report*, pp117-118; for 2007–08 data, see VCEC, *The Victorian Regulatory System 2009 Report*, p172; for 2009–10 data, see VCEC, *The Victorian Regulatory System 2011 Report*, p203-204. Note VCEC did not publish a Victorian Regulatory System Report in 2010 with data for 2008–09.

6. DSE'S REGULATORY ACTIVITY

DSE's effectiveness in administering the FFG Act and the Wildlife Act largely depends on how well it ensures compliance with the provisions of each Act and, where there are breaches, appropriately penalises and prosecutes offenders.

6.1 Compliance monitoring and enforcement policy

DSE does not have a compliance monitoring and enforcement policy, though the EDO understands that DSE is considering developing one. At the Commonwealth level, the Department of Sustainability, Environment, Water, Population and Communities has a policy that guides its approach to enforcement of the EPBC Act.¹¹⁸

A clear compliance and enforcement policy is widely recognised as an essential mechanism for ensuring fair, transparent, accountable and consistent decision-making in enforcement. An independent review of Victoria's Environment Protection Authority's (EPA) approach to compliance and enforcement, undertaken by Stan Krpan in 2010 (Krpan review)¹¹⁹, discusses in detail the desirability of adopting a structured framework or policy to guide compliance and enforcement activity and identifies aspects of an effective compliance and enforcement policy.

A compliance and enforcement policy should also act as an educational tool and a deterrent. To this end, there should be a clear message about the intended compliance and enforcement approach to guide both decision-makers and the regulated community. This message should be set out in a way that goes beyond aspirational guiding principles; for example, by providing a detailed outline as to how those principles will be implemented through the decision-making and enforcement process.

It is important that DSE adopt and publish a compliance monitoring and enforcement policy as soon as possible. This will improve the credibility of DSE's regulatory approach and processes.

6.2 Compliance monitoring and enforcement activity

DSE has a dedicated Compliance and Enforcement Services Team which includes region-based compliance officers. Some of DSE's compliance and enforcement functions are undertaken in cooperation with other government agencies, including Victoria Police, Customs, Parks Victoria and the Department of Primary Industries.¹²⁰

DSE describes its compliance monitoring activities as including:

- patrolling;
- monitoring permit holders to ensure they abide by licence conditions;
- providing front counter advice; and
- supervising hunting licence tests.¹²¹

DSE describes its enforcement activities as involving:

- responding to public complaints;
- conducting investigations;
- imposing penalties; and
- undertaking prosecutions.¹²²

A lack of comprehensive publicly accessible data has prevented a proper assessment of DSE's compliance monitoring and enforcement activity. DSE provides very limited public data regarding monitoring activities, potential breaches, charges, investigations and prosecutions. The main source of public data is the Victorian Competition and Efficiency Commission (VCEC) annual 'Victorian Regulatory System' reports which compile basic information about all Victorian regulatory activity.

118 Department of Sustainability, Environment, Water, Population and Communities website, <http://www.environment.gov.au/about/publications/compliancepolicy.html>

119 Stan Krpan, Compliance and Enforcement Review: A Review of EPA Victoria's Approach, February 2011 available at: <http://epanote2.epa.vic.gov.au/EPA/publications.nsf/PubDocsLU/1368?OpenDocument>

120 Department of Sustainability and Environment, Compliance and Enforcement webpage, available at <http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/compliance-and-enforcement>

121 Department of Sustainability and Environment, Compliance and Enforcement webpage, above n 120.

122 Department of Sustainability and Environment, Compliance and Enforcement webpage, above n 120.

Based on the VCEC reports, Table G provides some high-level information regarding DSE regulatory activity. Unfortunately, the only enforcement data available is the combined data for all activity under the eight Acts¹²³ and 18 Regulations¹²⁴ administered by the DSE's Biodiversity and Ecosystem Service, Natural Resources and Parks Division. This data includes activity for the FFG Act and Wildlife Act but no breakdown in data between the eight different Acts is available.

Table G shows a considerable increase in the number of investigations conducted by DSE from the 2008–09 financial year. Of particular note is that Table G shows a significant increase in the number of penalties imposed by DSE in the period 2007–08, but DSE was not able to identify the reason for this nor how the penalties imposed were spread across the Acts. DSE did suggest that one possible explanation for the increase could be a correlation with poor environmental conditions. For example, during the drought a greater number of farmers unlawfully culled kangaroos from their land, resulting in a greater number of penalties. This is in contrast to when environmental conditions are good, and farmers are not as concerned about kangaroos grazing on their property and thus fewer offences are committed. DSE also suggested that there may have been a break up of a significant reptile trade operation involving numerous offenders and offences in that particular financial year.

Without a more detailed breakdown of the types of offences in relation to which the penalties were imposed, it is not possible to accurately identify the reason for the increase in penalties imposed. It is concerning that DSE does not appear to collect this information, does not know the reasons for increases or decreases in its own enforcement, and does not conduct any analysis of its enforcement activity.

As noted above, we believe that it is important that DSE publicly report on its compliance and enforcement activity. Reporting compliance and enforcement action provides information to the community, including those regulated, about the impact and outcomes of regulation. It promotes confidence that those who breach regulatory requirements are being held accountable for their actions. Information that EDO believes should be published is at Appendix A. This includes not only the number of penalties imposed during a given financial year, but details of the offences for which the penalties were imposed.

Overall, DSE's lack of attention to enforcement is concerning. The results of the Krpan review of the EPA would provide an excellent starting point for DSE to improve its compliance and enforcement program.

TABLE G: DSE ENFORCEMENT ACTIVITY

ACTIVITY	2005–06	2006–07	2007–08	2008–09	2009–2010
Complaints received about regulated firms and professionals	Not available	50	Not available	Not available	Not available
Investigations	Not available	100	80	298	369
Disciplinary action or proceedings commenced	150	Not supplied	112	104	83
Penalties imposed	422	Not supplied	709	227	259

Source: VCEC Regulatory System Report 2009 and 2011.¹²⁵

123 *Catchment and Land Protection Act 1994; Conservation, Forests and Land Act 1987; Flora and Fauna Guarantee Act 1988; Forests Act 1958; Planning and Environment Act 1987* (s52 Victorian Planning Provisions); *Sustainable Forests (Timber) Act 2004; Safety on Public Land Act 2004*; and the *Wildlife Act 1975*.

124 *Catchment and Land Protection Regulations 2002; Catchment and Land Protection (Register of Interest) Regulations 2006; Conservation, Forests and Lands (Contracts) Regulations 2000; Conservation, Forests and Lands (Infringement Notices) Regulations 2002; Flora and Fauna Guarantee Regulations 2001; Forests (Fire Protection) Regulations 2004; Forests (Licences and Permits) Regulations 1999; Forests (Miscellaneous) Regulations 2000; Forests (Murindindi Scenic Reserve) Regulations 2000; Forests (Stevenson Falls Scenic Reserve) Regulations 2000; Forests (Thomson River Forest Reserve) Regulations 2005; Forests (You Yangs Regional Park) Regulations 2000; Timber Harvesting Regulations 2000; Sustainable Forests (Timber Harvesting) Regulations 2006; Wildlife Regulations 2002; Wildlife (State Game Reserves) Regulations 2004; Wildlife (Whales) Regulations 1998; Wildlife (Game) Regulations 2001.*

125 Victorian Competition and Efficiency Commission, *The Victorian Regulatory System 2009*, p171, available at <http://www.vcec.vic.gov.au/CA256EAF001C7B21/0/6E3EA91660172374CA2573A2000DBD67?OpenDocument> and Victorian Competition and Efficiency Commission, *The Victorian Regulatory System 2011*, p203, available at <http://www.vcec.vic.gov.au/CA256EAF001C7B21/0/333B76BA9CA7359FCA25785B0000A181?OpenDocument>

6.2.1 Potential breaches

The DSE website reports that DSE receives more than 300 calls each year from members of the public with information regarding potential breaches of environmental legislation. These calls concern a range of issues including wildlife smuggling, keeping or selling native or high risk invasive species without a relevant permit, and the removal of native plants and animals from the wild.¹²⁶ Table H shows that the majority of calls received from the public over the last two financial years relate to wildlife offences.

**TABLE H:
CALLS RECEIVED BY DSE FROM THE PUBLIC**

CALLS	2008–09	2009–10
Related to wildlife offences	253	222
Related to game-hunting offences	15	18
Related to high-risk invasive animals	19	8

Source: DSE website.¹²⁷

It is not possible to comment on the value of information received from the public in detecting contraventions, as DSE does not publish whether these calls lead to charges being laid, or investigations or prosecutions being undertaken. Nor does it publish how this information compares to information gathered through proactive compliance and enforcement activities undertaken directly by the department, such as patrols and licence checks.

Charges

The DSE website reports that in the past year, ‘the DSE laid 601 charges involving wildlife, forestry, marine and hunting offences in Victoria’.¹²⁸ DSE does not report on which Acts the charges were laid under, the proportion of charges that resulted in successful prosecutions, nor how this data compares to charges initiated in previous years.

Investigations and prosecutions

While DSE does not publish comprehensive data on the number of investigations and prosecutions it undertakes each year and the outcomes of these, it does publish occasional media releases of case studies of investigations and prosecutions undertaken by DSE for offences under various Acts, including the FFG Act and Wildlife Act. The publication of this information is intended to deter and reduce illegal activities. The case study regarding kangaroo deaths is an example.¹²⁹

CASE STUDY

DSE investigates alleged kangaroo deaths at Benalla (3 May 2010)

The Department of Sustainability and Environment (DSE) is investigating alleged serious breaches of the Wildlife Act near Benalla.

Senior Wildlife Officer, Leigh Murray, has confirmed that DSE and Victoria Police are investigating the alleged killing and harassment of kangaroos at the Golden Vale Golf Club.

‘Information we have received recently from concerned community members suggest that on multiple occasions kangaroos have been killed or harassed within the grounds of the golf club.

‘We understand that in some cases motorbikes have been allegedly used to chase down the kangaroos prior to their death.

‘We are also investigating allegations that the carcasses were then removed and used to feed domestic animals.

‘I would like to make it perfectly clear that these allegations are extremely serious and we are working closely with police and the community to gather additional information.’

It is illegal to interfere with or kill native wildlife and these types of allegations attract significant fines or even imprisonment. Kangaroos are protected under the Wildlife Act.

126 Department of Sustainability and Environment media release, <http://www.dse.vic.gov.au/about-dse/media-releases/victorians-urged-to-report-environmental-crime>

127 Department of Sustainability and Environment media release, above n 126.

128 Department of Sustainability and Environment, Compliance and Enforcement webpage, above n 120.

129 Department of Sustainability and Environment media release, <http://www.dse.vic.gov.au/about-dse/media-releases/dse-investigates-alleged-kangaroo-deaths-at-benalla>

7. TRANSPARENCY AND ACCOUNTABILITY

As reflected in the Victorian Government's good regulatory design principles and highlighted in previous reports in this series, an effective regulator should demonstrate transparency and accountability.¹³⁰

Both transparency and accountability encompass timely, reliable, clear and relevant public reporting on the regulator's activities, operations and performance. These characteristics increase the confidence of the community in the effectiveness and independence of the regulator and strengthen the credibility of the regulator.

The lack of a clear compliance and enforcement policy and the diffusion of responsibility for administration of FFG Act and Wildlife Act between DSE, Parks Victoria and DPI results in a complex system for the regulation of Victoria's biodiversity.

All regulatory decisions made should be a matter of public record. Biodiversity is an important community issue and the public need information about implementation, compliance and enforcement under the FFG Act and Wildlife Act to evaluate the regulatory performance of DSE in protecting Victoria's biodiversity.

The EDO has developed a table at Appendix A setting out the information we believe the DSE should report on under both the FFG Act and the Wildlife Act (and other Acts it administers). The EDO recommends that DSE use this table to report against each financial year.

8. CONCLUSIONS AND RECOMMENDATIONS

The Victorian Auditor-General's performance audit of the administration of the FFG Act revealed a number of deficiencies in DSE's administration of the Act. Among the conclusions, the Auditor-General noted that: the full range of management processes and conservation and control measures and various powers under the Act are not being used by DSE; the listing process is compromised by a gaps in scientific data and limited stakeholder participation; there is a significant backlog of listed items with no Action Statements; and there is lack of monitoring and review or revision of Action Statements. Three years on, our analysis of DSE's implementation of the FFG Act shows that little has changed.

While some of the procedures established under the Wildlife Act appear to be being used by DSE, it was extremely difficult to locate information and decisions made under this Act. Often, the only means by which to access key information – such as declarations of State Wildlife Reserves, State Game Reserves, Nature Reserves and unprotected wildlife – was through extensive and time-consuming searches of the Government Gazette. EDO considers that this information should be more readily accessible to the public.

Furthermore, DSE's failure to account for its performance and its lack of transparency is of significant concern. For instance, publicly available data regarding DSE's compliance monitoring and enforcement activity under the two Acts was very limited. DSE does not appear to have an official compliance monitoring and enforcement policy or strategy and does not publicly report on monitoring and enforcement activity under separate Acts.

A number of recommendations made in this report would assist DSE in improving implementation and enforcement of Victoria's key biodiversity legislation and in achieving greater accountability and transparency.

¹³⁰ Government of Victoria, 2007, *Victorian Guide to Regulation*, Department of Treasury and Finance, Melbourne, April 2007, p3-2.

KEY RECOMMENDATIONS

Improving implementation of the *Flora and Fauna Guarantee Act 1988*

- DSE should implement the recommendations made by the Victorian Auditor-General in his 2009 audit report, *Administration of the Flora and Fauna Guarantee Act 1988*.
- DSE should continue to improve its threatened species listing processes to ensure it has access to up-to-date scientific data and can complete listing in a timely manner, so that it can process the backlog of listings and implement the new national requirements.
- The Victorian Government should develop and consult on a new Biodiversity Strategy as a priority and provide clear goals for biodiversity protection including how those goals are to be achieved.
- The Victorian Government should make any proposed review of the FFG Act a public process, with opportunities for community and expert input.
- DSE should reconsider the use of critical habitat determinations, interim conservation orders and other conservation measures in the FFG Act, and develop a policy for when they can be used to most effect and at least cost so that they can be used to protect species, as the Act intended them to do.
- The Victorian Government should provide adequate resources to DSE to enable it to undertake the critical work of:
 - listing threatened species and ecological communities; and
 - development, review and implementation of Action Statements and other management processes and conservation and control measures.

Improving transparency and accountability

- DSE should make publicly available on its website:
 - data regarding protected flora and listed fish licences, permits, authorisations and clear details of government Orders.
 - numbers regarding offences with respect to the handling of protected flora.
 - information regarding permits relating to flora issued or renewed, or offences regarding other controls under the Act.
 - a current list of unprotected wildlife under the Wildlife Act, together with details of the declaration orders (period of declaration; and any conditions, limitations or restrictions).
- DSE or Parks Victoria should make publicly available on its website:
 - an up-to-date list of all State Wildlife Reserves and Nature Reserves.
 - management plans for each State Wildlife Reserve and Nature Reserve together with details of any reviews of the plans.
- DPI should make publicly available on its website an up-to-date list of all State Game Reserves.
- DSE should collect and analyse comprehensive licensing data under the Wildlife Act to better understand trends in wildlife use and exploitation. Full data should also be publicly available.

Improving monitoring and enforcement

- To improve the credibility of DSE's regulatory approach and processes, DSE should adopt and publish a compliance monitoring and enforcement policy as soon as possible.
- DSE should collect and annually report on its compliance and enforcement activity, including data on potential breaches, complaints received from the public, charges, investigations and prosecutions undertaken, and outcomes, as set out at Appendix A.

APPENDIX A: INFORMATION THAT DSE SHOULD PUBLISH ANNUALLY

FLORA AND FAUNA GUARANTEE ACT 1988

TYPE OF INFORMATION	RELEVANT SECTION OF ACT	DESCRIPTION OF INFORMATION THAT SHOULD BE PUBLICLY AVAILABLE
Auditor-General's review	N/A	Progress on recommendations.
Flora and fauna excluded from the Act	s5	Up-to-date list of species excluded from the Act.
Nominations and Listing		(1) For each financial year, the number of species, communities and processes nominated for listing or delisting, by nominee (for example – community member, DSE). (2) For each financial year, the number of species, communities and processes listed and delisted.
Action Statements	s19	(1) For each financial year, the number of Action Statements completed. (2) For each financial year, the number of Action Statements reviewed. (3) The total number of listed items with Action Statements.
Critical Habitat Determinations	s20	The number of Critical Habitat Determinations made each year.
Interim Conservation Orders	s26	The number of Interim Conservation Orders issued each year.
Handling of flora	s47	(1) For each financial year, the number of licences and permits issued to take, trade in, keep, move or process protected flora. (2) For each financial year, any Orders of the Governor in Council authorising the taking, trading, keeping, moving or processing of protected flora. (3) For each financial year, the number of offences committed with respect to the handling of protected flora.
Handling of fish	s52	(1) For each financial year, the number of licences issued to take, trade in or keep listed fish. (2) For each financial year, any government Orders authorising the taking, trading or keeping of listed fish. (3) For each financial year, the number of offences committed with respect to the handling of fish.
Other	s49	(1) For each financial year, the number of permits issued to abandon or release prescribed flora into the wild. (2) For each financial year, the number of offences committed with respect to abandoning or releasing prescribed flora into the wild. (3) For each financial year, the number of offences committed with respect to marking flora.

WILDLIFE ACT 1975

TYPE OF INFORMATION	RELEVANT SECTION OF ACT	DESCRIPTION OF INFORMATION THAT SHOULD BE PUBLICLY AVAILABLE
Unprotected Wildlife	s7A	Up-to-date list of unprotected wildlife.
State Wildlife Reserves	s15	Up-to-date list of State Wildlife Reserves and their classifications.
Nature Reserves	s16A	Up-to-date list of Nature Reserves under the management and control of DSE.
Management Plans for Reserves	s18	All management plans for reserves.
Traditional owner agreements	s18A	Number of agreements entered into with Traditional Owner Management Boards.
Licences	ss22-28	(1) For each financial year, the number of Wildlife Licences and Games Licences: – issued; suspended; cancelled. (2) Total number of current licences.
Authorisations	ss28A-28F	(1) For each financial year, the number of Authorisations: – issued; renewed; suspended; cancelled. (2) Total number of current Authorisations.
Authorisation Orders	ss28G-28K	Number of Authorisation Orders as to taking wildlife. Number of Authorisation Orders as to disturbing wildlife.
Wildlife Management Co-operative Areas	s32	Up-to-date list of areas declared Wildlife Management Co-operative Areas.
Prohibited Areas	s33	Up-to-date list of areas declared to be Prohibited Areas.
Wildlife Sanctuaries	s34	Up-to-date list of areas declared to be Wildlife Sanctuaries.
Order prohibiting possession	s49	Number of orders prohibiting possession of certain wildlife.
Offences/enforcement activity	ss20, 21, 25, 41-58E, 74M, 76, 77, 77A, 80, 83, 83C, 83I, 85B	Number of public complaints from the public received each year. Of the public complaints received, the number of charges laid, investigations conducted and successful prosecutions. For each offence, number of breaches committed each financial year. For each offence, number of prosecutions undertaken and the penalties imposed.
Protection of Whales	ss78-82	(1) For each financial year, the number of permits to interfere with or keep whales: – issued; varied; suspended; cancelled. (2) Total number of current permits.
	ss83-83GA	(1) For each financial year, the number of whale watching tour permits and whale swim tour permits: – issued; renewed; varied; suspended; cancelled. (2) Total number of current permits. (3) Number of limited permit area determinations. (4) Number of amendments or revocations of limited permit area determinations.
Protection of Seals	ss85B-85M	(1) For each financial year, the number of seal tour permits: – issued; renewed; varied; suspended; cancelled. (1) Total number of current permits.
Miscellaneous	s86	Number of hunting closure notices.
	s86A	Number of emergency hunting closure notices

