



Briefing paper

Public consultation now open on reform of the *Flora and Fauna Guarantee Act 1988*

The Victorian government has just released a consultation paper on possible reforms to the *Flora and Fauna Guarantee Act 1988*. The government is calling for submissions by 13 March 2017.

Why is reform necessary

The Flora and Fauna Guarantee Act (FFG Act) is the key law protecting nature in Victoria. It has failed to protect nature in Victoria over the past 30 years. Victoria is the most cleared state in Australia with the majority of native plants and animals considered threatened with extinction. The failings and implementation problems of the FFG Act are well documented. Victoria needs a threatened species law that actually protect threatened species and looks to conserve and restore Victoria's special places.

Background to reform of the FFG Act

The FFG Act has never been significantly amended, despite over a decade of critique and review.

In Victorian Labor's 2014 election policy, a commitment was made to 'review the Flora and Fauna Guarantee Act' and the ALP Platform 2014 committed to 'modernise threatened species protection to adopt world's best practice'.

The FFG Act has undergone a period of internal government review that draws on previous external reviews of the Act. A portfolio reference group and stakeholder reference group – of which EJA was a part – have also been providing input into the review.

Related, but separate, to the FFG Act review is the development of a new 25-year plan for halting the decline of Victoria's

biodiversity (Biodiversity Plan), and the more narrow review of the native vegetation clearing regulations that is currently underway. Feedback from stakeholders regarding the development of the Biodiversity Plan and review of native vegetation clearing regulations have also informed the FFG Act review.

On 30 January 2017, the Department for Environment, Land, Water and Planning (DELWP) released their consultation paper seeking feedback on the proposed 'suggestions for how the Act could be improved' contained in that paper. The consultation paper states that 'suggestions' are not final policy positions and the government is now seeking feedback from the public on those suggestions, as well as other ideas for reform.

Summary of EJA's response to government's proposal

Although we recognise that there are some proposals contained in the consultation paper that could help to improve implementation of the FFG Act – like improvements to accountability and transparency and the proposal to map critical habitat – overall, we are concerned with the direction that the review of the FFG Act is taking.

We believe that the loss of guarantee combined with a seeming weakening of the already limited habitat controls and move away from individual species protection (i.e. loss of mandatory action statements) represents a backwards – not forwards – step for nature conservation in Victoria.

We will be urging the Victorian government to reconsider those key elements of the consultation paper before the review is further progressed.

Call for action

The current public consultation represents a **critical moment** for nature protection law in Victoria and presents a **once-in-a-generation opportunity to improve the laws that protect Victoria's natural environment**. To date, the review process has not been widely publicised and many Victorians have been unaware that it is underway. It is now crucial that as many Victorians as possible make their voices heard by responding to the consultation and telling the government their views for the future of nature protection laws in Victoria.

The consultation can be found here: <https://engage.vic.gov.au/review-flora-and-fauna-guarantee-act-1988>.

The consultation closes on **Monday 13 March 2017**.

Would you like further detail?

This briefing and our initial analysis of the details of the consultation paper (see below) can be used to guide submissions from members of the public and community groups who wish to respond to the consultation. We also encourage individuals and groups preparing submissions to tell the government about how the potential changes may relate to their specific concerns (perhaps special to a particular region, local areas etc) and/or to submit any additional ideas about how the Act could be improved.

We will also be publishing a full response to the government's consultation in coming weeks.

The details

Changes we support in principle

Reforms proposed by the government	Reference	Further detail/commitment required
<p>Inclusion of goals that relate to restoration and enhancement. The current objectives of the FFG Act need revision and the discussion paper suggests that ‘protecting, restoring and enhancing biodiversity’ could become a new goal in the FFG Act.</p>	Section 4.1 pg. 37	<p>Given the highly altered state of Victoria’s environment, we agree that restoration must become a key objective for a reformed FFG Act.</p> <p>However, this must not come at the expense of conserving what is left.</p>
<p>Clarification and strengthening the existing duty on public authorities to enable a whole-of-government implementation of the Act. The FFG Act already includes an obligation for public authorities to ‘have regard to the objectives of the FFG Act’. This has not been effective and so the discussion paper suggests clarification to the definition of ‘public authority’ as well as additional provisions to clarify expectations arising from the duty.</p>	Section 4.2 pg. 42	<p>This needs to go further than what is proposed and the duty could simply be amended so that public authorities are required to act consistently with the provisions of the FFG Act, and any plans and regulations made under it.</p>
<p>Incorporation of targets into the biodiversity plan. The discussion paper proposes that the FFG Act could mandate that biodiversity targets are included in the biodiversity plan, and that the FFG Act could set out a review period and process for developing the targets, as well as the matters that must be in the targets.</p>	Section 4.3 pg. 37 & 49	<p>We are supportive of this idea; however, it needs to be further developed so that the FFG Act includes a more detailed legislative framework that enables the biodiversity plan to become a more detailed and focused biodiversity conservation strategy. This should include regulatory targets that are designed according to SMART principles.</p>
<p>Adoption of common assessment methodology – based on IUCN criteria – for listing and obligation to maintain a single comprehensive list of threatened, species, communities and threatening processes. The current listing process is not strategic and multiple threatened species lists exist in Victoria. The proposal would ensure only one single comprehensive list is maintained by the government and that it adopts IUCN standards for classifying conservation status of species.</p>	Section 4.3 pg. 52–53	<p>Strategic audits should take place every 5 years (not 10), alongside State of Environment reporting.</p>
<p>Introduction of new criteria to broaden the concept of critical habitat in Regulations. The discussion paper suggests that new criteria would clarify that the concept of critical habitat could be broadened to include areas important for ecological processes (pg.57). Although critical habitat can be protected under the FFG Act, this has not happened. The discussion paper notes that government has found identifying critical habitat problematic.</p>	Section 4.4 pg. 57	<p>Other jurisdictions – like in the United States and in Europe – have been successful in identifying critical habitat for threatened species. This indicates that identification of critical habitat is indeed possible. We suggest that the Scientific Advisory Committee (SAC) may be the most appropriate body to undertake the task of identifying critical habitat (see below).</p> <p>Further, in addition to the government’s proposal, the concept of critical habitat should also include habitat currently needed to ensure the survival and conservation of the species or community, habitat needed for recovery, and as far as relevant, habitat needs as can be anticipated in the face of climate change.</p>

Reforms proposed by the government	Reference	Further detail/commitment required
<p>Require the Secretary to establish a program to identify and map proposed critical habitat on both public and private land.</p>	<p>Section 4.4 pg. 57</p>	<p>We submit that this is a move in the right direction towards critical habitat determination and that the SAC would be best placed to undertake this mapping exercise.</p> <p>Further – as set out above – following the mapping of critical habitat, there <i>must</i> be a requirement for the Minister to make a <i>decision</i> as to whether or not to declare the proposed areas as critical habitat. And there must be an obligation to declare critical habitat in certain circumstances (this process could be consistent with the decision as to whether to list species as threatened under the FFG Act).</p>
<p>Include a permitting regime for activities that may damage critical habitat. Interim Conservation Orders are the main regulatory tool currently available to protect critical habitat however they have never been used.</p>	<p>Section 4.4 pg. 57</p>	<p>We recommend this be based on a ‘maintain or improve test’ and which must prevail over other schemes and Acts, including the Native Vegetation Clearing Regulations.</p>
<p>Establish a new offence to damage habitat of threatened species or communities without a permit (pg. 57). This would complement the already existing offence to take (meaning kill, injure, disturb or collect) protected flora without a permit under the FFG Act.</p>	<p>Section 4.4 pg. 57</p>	<p>Perhaps this would result in better implementation of protected habitat controls, however if it is continually narrowly applied (i.e. exemptions for private and certain industries) then it will be of little value.</p>
<p>Illegal removal of native vegetation to be prosecuted under the FFG Act (pg.63). Currently, illegal removal of native vegetation can only be prosecuted under the native vegetation clearing regulations, which are generally agreed to be ineffective in deterring illegal clearing. The proposed change would enable a breach of the native vegetation clearing regulations to be enforced under the FFG Act.</p>	<p>Section 4.4 pg. 63</p>	<p>This may help to broaden the scope of the FFG Act, however will only be effective with institutional reform, including the creation of an independent regulator and accompanied by proposed enforcement, compliance and accountability improvements (see below).</p>
<p>Proposed improvements to compliance and enforcement of the FFG Act habitat controls which includes increased penalties, tiered suit of enforcement tools and possibly, a civil enforcement regime (pg.63). Existing penalties under the FFG Act are not sufficiently persuasive and there is a reliance on criminal prosecutions, which is not always appropriate and requires a high burden of evidence.</p>	<p>Section 4.4 pg. 63</p>	<p>In addition, there needs to be a new independent authority to monitor and enforce (see above).</p>
<p>Proposals to improve accountability and transparency under the FFG Act including third party standing for judicial review and seeking injunctions, as well as requirements to provide information on implementation of the FFG Act publicly (pg. 65). Currently, there is very little public information available with respect to implementation of the FFG Act and it is very difficult for the public to help enforce or prevent breaches of the Act.</p>	<p>Section 4.5 pg. 65</p>	<p>This will enable public engagement in processes under the FFG Act. Standing rights should also be extended so that they include merits review of important decisions (not internal merits review as proposed) and accompanied by costs protections in accordance with international best practice.</p>

What is missing?

EJA's proposal for change	Reference	Why this needs to be included in a reformed Act
Express incorporation of the precautionary principle.	Section 4.1	<p>The precautionary principle is a fundamental pillar of modern environmental law, which ensures that lack of full scientific certainty cannot be relied on as a reason to postpone appropriate measures to prevent serious or irreversible loss or damage. This is particularly relevant in the context of climate change and when regulating activities in critical habitat.</p> <p>We also recommend that the principle of environmental restoration should be included in a reformed FFG Act.</p>
A more comprehensive enabling framework to establish landscape action plans.	Section 4.3	<p>This should include an incentives framework and legislative guidance for what needs to be included in any landscape plan. Landscape-scale conservation cannot come at the expense of individual species protection, but could supplement it, and be deferred to in certain circumstances.</p>
A mandatory decision to be made by the Minister with respect to designation of mapped critical habitat.	Section 4.4	<p>Critical habitat protection is essential for the survival and conservation of threatened species. Following the proposed mapping of critical habitat, the Minister must make a decision as to whether the mapped critical habitat will be declared as such. We suggest that there must be certain circumstances set out in the FFG Act when a declaration should be made and that this process could be consistent with the decision as to whether to list a species as threatened under the FFG Act.</p>
Amendments to ensure that protected flora controls apply on both public as well as private land and apply to industries such as forestry.	Section 4.4	<p>FFG Act flora controls are severely limited in their current form where they only apply on public land and exempt certain industries like forestry. The situation needs to be improved.</p>
Division of controls for protected flora and fauna between the FFG Act and the Wildlife Act needs further consideration.	Section 4.4	<p>The current division of controls between these two Acts is nonsensical.</p>
The creation of a new independent entity to monitor and enforce the FFG Act, including undertaking prosecutions under the FFG Act.	Section 4.5	<p>This would help to ensure that the provisions of the FFG Act are enforced and that there is independent monitoring of implementation.</p>

Changes we don't support

Reforms proposed by the government	Reference	Why this is a concern
<p>Abandon the guarantee. The centrepiece of the current Act is the commitment to ensure that all species of flora and fauna in Victoria survive and retain their potential for evolutionary development in the wild. The discussion paper suggests this is objective is too ambitious and that it should no longer be included in the Act.</p>	<p>Section 4.1 pg. 36</p>	<p>Loss of the guarantee represents a downgrading of the government's commitment to nature conservation in Victoria.</p> <p>Best practice objectives include both visionary and outcomes-based objectives. It is also possible to reflect and support changes to conservation approaches needed to address climate change, while at the same time retaining a high level of ambition in relation to the long-term continued survival of all species in the wild.</p>
<p>Drop the requirement for action statements for all listed threatened species. Producing action statements – the Victorian version of recovery plans for threatened species – is currently the only binding action that the government must take to protect listed threatened species.</p>	<p>Section 4.3 pg. 47 and 49</p>	<p>Action statements are fundamental in establishing adequate recovery planning for threatened species. Action statements for specific species also inspire communities to protect their local places that are critical to the survival of individual species.</p> <p>We believe that it may be possible for specific species' action plans to defer to landscape plans in circumstances where the landscape plan substantially covers a listed species. However there are necessary elements that we submit need to be included within the legislative framework to make this effective (see what's missing below).</p>
<p>Publish a list of priority actions for each listed threatened species. This discussion paper states that priority actions 'would be developed from an analysis of synergies and efficiencies across multiple species, threats and locations' and suggests that the use of priority action lists will represent a move away from single-species protection.</p>	<p>Section 4.3 pg. 47 and 49</p>	<p>We understand there will be a reliance on existing DELWP databases to produce priority actions. This is problematic because of reliance on outdated data that does not incorporated new species detection etc.</p> <p>Further, we question how it will be possible to prioritise necessary actions when you don't yet have a comprehensive action or recovery plan? See also above in relation to the need for single-species action statements.</p>
<p>Remove the current requirement for permits for destruction of protected flora in many cases where currently required, such as road and rail construction.</p>	<p>Section 4.4 pg. 58 and 61</p>	<p>Although it is not immediately clear what is being proposed at pg. 61, we do not agree with the analysis of the problem with respect to regulatory controls for protected flora: that they should not apply to a broad range of activities like road, rail or utility works. If these activities are not regulated under the FFG Act permitting protected flora controls, then how are such activities being regulated in Victoria with respect to threatened species protection? We also submit that public land managers should be held to an equivalent, if not higher, standard than private citizens.</p> <p>We believe that protected flora controls should be broadened – with the current test that a permit must not be granted where it 'threatens the conservation of protected flora' retained – and better implemented (through guidance etc). We strongly urge the government not to further limit the application of these controls on public land.</p>

About Environmental Justice Australia

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

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

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

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Publication date: 13 February 2017