1 Foundations for reform

Introduction

Environmental Justice Australia welcomes the opportunity to provide feedback on the government's consultation paper.

The Act was rightly considered a landmark environmental law reform when it was introduced. However, the legislation never met its potential.

The FFG Act is now significantly out of date. Despite a number of attempts to reform the law over the past decade, and improve biodiversity conservation more generally in Victoria, none of them have succeeded. EJA has conducted and contributed to the previous reviews of the FFG Act and Victorian biodiversity law initiatives, and has again been involved in this current internal governmental review process through the government's stakeholder reference group It is critically important that the current review process delivers significant reform of the Act.

In August 2016, to inform the internal government review process that was underway, we produced a detailed reform proposal that presented recommendations on how to make the FFG Act more effective, up to date with best practice thinking and compliant with international and national standards[1]. That more detailed piece of work forms the foundation of our submission, while at the same time we take this opportunity to provide detailed responses to the government's proposals in the consultation paper.

This submission commences with some context about what EJA sees as the role of the FFG Act in the wider legislative framework in Victoria, and public expectations of a law such as the FFG Act. We then summarise our overarching response to the consultation proposals before providing a detailed responses to each of the proposals, as well as setting out what we think is currently missing in the consultation paper.

The importance of the FFG Act

The FFG Act is Victoria's key law that protects biodiversity. It sits in a complex web of State and National laws that may or may not be specifically designed to protect nature, but which will inevitably affect biodiversity in Victoria. Examples of laws not specifically designed to protect nature but with significant impact on the management of biodiversity include planning, mining, water, forestry and energy legislation.

It is a general expectation of society that – in addition to land-use planning laws mentioned above – there will be laws in place that specifically focus on conserving native plants and animals, particularly those that are threatened with extinction.

We submit that effective regulation needs to underpin biodiversity conservation. As we submitted in our response to the Victorian Government's Green Paper 'Land and biodiversity at a time of climate change',[2] although market-based instruments and voluntary agreements are certainly useful and effective in some instances, for these mechanisms to be effective they ultimately rely on a robust regulatory underpinning. Further, as part of a suite of policy instruments, direct regulation retains a particularly important role and is most likely to remain the most important tool in the context of the threat of irreversible biodiversity loss. It is therefore important that the FFG Act continue to focus on directly regulating biodiversity in Victoria and incorporating protections for threatened species.

1 Environmental Justice Australia, 'Fixing Victoria's broken nature laws', August 2016: www.envirojustice.org.au/broken

2 https://envirojustice.org.au/major-reports/biodiversity-white-paper-report-land-and-biodiversity-a-call-for-action

Threatened species laws can work – examples from elsewhere

There are examples from other countries of nature protection laws that have worked far more effectively than the FFG Act. Examples from other jurisdictions that successfully use regulation as their key mechanism to protect nature include the Birds and Habitats Directives[3] that operate though the European Union[4], and the Endangered Species Act[5] in the United States.

One of the key tasks for all EU countries under the Birds and Habitats Directives has been designating protected areas for threatened species known as the Natura 2000 network. The Natura 2000 network is subject to a rigorous permitting regime, which prevents any activity that may have an adverse effect on the site's integrity. This is the first test that is generally applied, before an application for a plan a project then progresses through the relevant land use planning law process that is specific to the jurisdiction of hat European country.

In addition to the designation of strictly regulated Natura 2000 sites, the Habitats Directive provides 'strict species protection' that prevents killing and disturbance of protected species. There are also provisions that relate to broader biodiversity management and an obligation for EU countries to, where necessary, adapt land use planning and development policies to encourage management of landscape features that are of major importance for wild fauna and flora.

Breaches by government authorities, including failures in implementation of the Directives, are subject to challenges by individuals and community groups in local courts (who are awarded costs protections under the Aarhus Convention and resulting national court procedure laws and regulations). The European Commission also independently monitors implementation of the Directives by each EU country and regularly takes enforcement action against EU countries (potentially resulting in very large fines).

Under the Endangered Species Act in the US, the designation of critical habitat is obligatory and the designation of critical habitat has been shown to contribute to the stabilisation and improvement in the situation of threatened species.[6] The Endangered Species Act also includes protections for threatened species, including prohibiting 'take' (which includes destruction of critical habitat) of threatened species.

Comparing these two nature specific laws from other jurisdictions to the FFG Act, it is apparent that the tools within the FFG Act have not been successful in setting a comparable standard of protection for biodiversity in this State. That is, unlike what occurs in Europe and in the US, there is virtually no mechanism in Victoria whereby a particular project will be refused[7] for reasons of nature protection. For example, although the FFG Act does have provisions that *enable* protection of critical habitat, they are discretionary in nature and over the past 30 years of its implementation, no critical habitat has been protected despite a growing list of species threatened with extinction. Similarly, effective legal protections to prevent the "taking" of species listed as threatened under the Act are missing or infectively applied. For example although there are protected flora controls which prohibits take of protected flora without a licence, and a permit should not be granted if to do so would 'threaten the conservation of the species', in practice, we understand that permits are rarely refused.

A series of interrelated questions arise from the above discussions with respect to the direction a reformed FFG Act should take. The first question is whether the state of nature in Victoria suggests that additional and stronger legal protections are needed – like those that exist in Europe and the US – to protect nature and allow for its recovery. If the answer to the first question is positive, then the next question is whether a state-based law – as opposed to national regulation – is the appropriate level of governance to provide that protection in Australia.

3 Council Directive 92/43 /EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206/7 22.7.1992) (the Habitats Directive); Council Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010) (the Birds Directive.

4 See a recent report commissioned by the European Commission which reveals that the EU Birds and Habitats Directives are 'fit for purpose' and are working effectively (although noting that these laws would benefit from improved implementation by European countries): European Commission 'Evaluation Study to support the Fitness Check of the Birds and Habitats Directive', March 2016.

5 Endangered Species Act of 1973, Title 16, Chapter 35, USC, § 1532 (1973).

6 See Centre for Biological Diversity 'A Wild Success: A Systematic Review of Bird Recovery Under the Endangered Species Act' June 2016; Martin Taylor, Kieran Suckling, and Jeffrey Rachlinski 'The effectiveness of the Endangered Species Act: A Quantitative Analysis' 2005 55 Bioscience 4 360.

7 The recent fracking ban introduced in Victoria is possibly one of the few exceptions to this, however this is a 'blanket ban' on a particular activity as opposed to a decision making framework that is applicable across all industries.

State of nature in Victoria – why reform is urgently required

According to the 2013 State of the Environment report, Victoria is the most widely cleared state in Australia with nearly two-thirds of Victoria's landscape modified for agricultural and urban purposes. Around half of Victoria's native vegetation has been lost. Continuing urban sprawl and intensification of agriculture, means that habitat loss continues, especially in in threatened woodland and grassland ecosystems.

The already highly altered state of Victoria's natural environment, combined with continuing pressures and resulting habitat loss, is obviously taking its toll on threatened species. The latest State of the Environment report notes the continuing decline of Victoria's threatened species, and states that the highest number of threatened species in any one region in Australia occurs in northwestern Victoria.

This all indicates that the current laws protecting and affecting nature are not working and additional legal protections are urgently required.

Appropriate level of protection for threatened species in Australia

Although historically, regulation of the environment was a matter for States, a series of cases confirmed that the Commonwealth does have wide-reaching powers with respect to the regulation of the environment. Despite this, the Commonwealth has tended to limit its intervention to big controversial projects. This is consistent with the premise of the national law designed to protect our biodiversity and threatened species, the Environmental Protection and Biodiversity Conservation Act (EPBC Act). Under the EPBC Act, the Commonwealth assumes responsibility for 'matters of national environmental significance'.

Given the Commonwealth assumes only partial responsibility for the environment, it is incredibly important for States to adopt a leadership role in protecting nature within their borders. Put another way, because national leadership is lacking, it is incredibly important that Victoria assume greater responsibility – and implements – strong laws that protect biodiversity at the State level.

We therefore conclude that it is entirely appropriate, and essential, that the FFG Act provides Victoria's threatened species and nature more generally, adequate protection through a strong standard of protection that is to apply in Victoria, and an array of well-integrated management tools.

Public expectations for a strong and effective Flora and Fauna Guarantee Act – getting the legislative foundations right

Accepting that the additional legal protections are required for nature in Victoria, and that a State based law is appropriate to provide these protections, it is necessary to consider the role of the FFG Act in Victoria's complex web of laws and society's expectations for a law such as the FFG act.

With respect to the ongoing role of the FFG Act, EJA anticipates that this law will be strengthened and continue to operate in the specific space of a biodiversity conservation law – and is likely to continue to be the only biodiversity conservation law that focuses on threatened species protection – in Victoria.

Currently, the FFG Act provides 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 also operates in conjunction with the Wildlife Act, which provides complementary procedures to promote the protection and conservation of wildlife and sustainable use of and access to wildlife. The FFG Act imposes controls and prohibitions on 'take' of threatened and protected flora, while the Wildlife Act imposes equivalent controls in relation to listed fauna.

Many of the tools within the FFG Act are discretionary, have not been implemented and are now out of date and in need of revision. Further, the prohibitions of protected flora in the FFG Act have been extremely limited in that they only apply on private land, exempt certain industries (like forestry) and have generally not been implemented in a way that establishes a standard of protection like we have seen in other jurisdictions.

The current situation regarding poor implementation of the FFG Act, and the declining state of threatened species and biodiversity more generally in Victoria means that it is incredibly important that the whole exercise of review and reform of the FFG Act does not put in place a legislative framework that merely normalises the current situation, aligning the legislative framework with the current practice of poor implementation. If the FFG Act has any chance of improving the existing state of affairs, it needs to put in place a strong standard of protection for threatened species and the habitat that threatened species rely on. At a minimum, a strong standard of protection is what society expects of a law such as the FFG Act.

In order to achieve a strong standard of protection, the FFG Act's foundations must firstly reflect the level of protection that is envisaged: the Act's overarching purpose, the principles that will underpin the design and implementation of the law, and the objectives. Secondly, the FFG Act must also contain a series of well-integrated tools that implement the standard of protection. Examples of tools that would establish a strong standard of protection within the FFG Act include a permitting process for activities that will damage habitat of threatened species that enables activities to be refused or altered, if they do not meet the agreed standard combine with mandatory recovery planning for threatened species and degraded landscapes. See our detailed recommendations below regarding establishing a strong standard of protection.

Once a framework for strong standard of protection is established within the FFG Act, in order to make it effective, it is necessary for decision-making that occurs under other schemes to be *consistent* with the core provisions and operations of the FFG Act. This means that the FFG Act must have a mechanism in place to enable an activity – although otherwise allowed under an existing framework such as the Planning and Environment Act (including the permitted clearing of native vegetation regulations) to be rejected or altered because of inconsistency with the FFG Act. In practice, this may mean that the relevant FFG Act test is applied primarily to any proposed new activity to determine if it can or cannot proceed (or can proceed in an amended way).

Currently, the situation described above does not occur and the provisions of the FFG Act are, in effect, 'trumped' by other decision-making processes.

There has been some attempt to address this situation in the consultation paper, through the proposed further clarifications around the public authority duty. This is a move in the right direction, however, continuing the already existing requirement in the FFG Act to 'have regard' to biodiversity, will not resolve the inherent problem that the FFG Act gets 'trumped' by other state policy and legislative frameworks. We return to this in further detail in our specific response to the recommendations proposed.

2 An overview of our response to the Consultation Paper

The consultation paper contains some welcome recognition of the issues with the FFG Act and some practical and innovative proposals for reform. In particular, we are supportive of proposed improvements to accountability and transparency. Many of these proposals work to address the first identified failure of the existing FFG Act, which is that there is a lack of publicly available information regarding implementation, monitoring and enforcement. We also submit that the proposal to expand standing to enable judicial review of decisions made under the Act, will greatly improve the operation of the FFG Act (although this could go further, as elaborated in Part 3). In addition, we are also supportive of the proposal to map critical habitat, however, this must be accompanied by a decision as to whether or not to *declare and protect* critical habitat.

On the other hand, the consultation paper also contains some suggestions for reform which we think are concerning. These can be summaries as follows:

1. The overall tenor of the reforms is to step back from the current legislated commitment represented by the guarantee. While we understand the complexity of the issues here, particularly in light of climate change, we remain strongly of the view that the Act needs to provide a strong and ambitious foundation for protecting nature in Victoria. We are concerned that many of the recommendations are more about aligning the legislation with the current underfunded and ineffective reality of conservation practice in Victoria than setting a legislative benchmark that meets public expectations.

2. Although commitments to landscape scale conservation are welcome and necessary, this should not be at the expense of recovery planning for species and communities. The current proposals do not strike an appropriate balance between the two.

3. The proposals could go further in providing effective legal protection for flora and fauna in Victoria by including more specific measures to achieve this and by reducing the discretionary (and therefore effectively optional) nature of many of the mechanisms in the current legislation.

4. Monitoring and accountability are central to effectiveness of the legislation and a key feature missing from the present Act. The current proposals need to go further in establishing mechanisms and institutional arrangements to remedy this accountability deficit.

Summary table of our response to the Consultation Paper

We set out a summary of each of our key submissions regarding the proposals in the consultation paper in the table below.

What's missing	*Consultation paper reference*
The overarching purpose of the FFG Act should clearly state that the FFG Act is intended to provide for the protection and restoration of biodiversity in Victoria.	Introductory text to Section 4
The FFG Act must clarify that environmental considerations will be fundamental in decision-making under the FFG Act and also incorporates the precautionary principle, the high environmental quality principle and best available techniques principle.	Section 4.1.2, Principles, pg. 38
Other important principles that should be incorporated into the FFG Act include a high environmental quality principle and the use of best available techniques principle.	Section 4.1.2, Principles, pg. 38
For PAMAs to become an effective and utilized management tool, a major overhaul is needed. We recommend that this could come in the form of an additional requirement to identify an additional protected area – known as a Site of Biodiversity Significance – which is managed through a PAMA or equivalent governance arrangement. Sites of Biodiversity Significance could contribute to the National Reserve System and would provide a new category of protected area under the FFG Act.	Section 4.2. Coordination and integration across government, pg. 39-42
DELWP should further explore options to incorporate a general environmental duty of care and a general duty to restore and rehabilitate harmed environments, which should extend to requirements to act consistently with conservation advices, biodiversity targets and not to exacerbate potentially threatening processes.	Section 4.2, Coordination and Integration across government, pg. 39-42
We submit that the existing permitting test in relation to offences of 'take' of threatened species should be maintained as it represents a strong standard of protection. However, we agree that consistency, accountability and transparency of the decision making process for granting of permits needs improvement, including a clarification of the level of harm that is considered unacceptable.	Section 4.4.2, Regulation, pg. 58-61
Division of controls for protected flora and fauna between the FFG Act and the Wildlife Act is nonsensical and must be addressed in this current review process.	Section 4.4.2, Regulation, pg. 58-61
A new independent entity to monitor and enforce the FFG Act is needed to ensure that the FFG Act is properly enforced and that there is independent monitoring of implementation.	Section 4.4.3, Compliance and Enforcement
Open standing provisions should also be accompanied by costs protections for public interest environmental legal proceedings in accordance with international best practice.	Section 4.5, Accountability and transparency
Change we support in principle	
Inclusion of goals that relate to restoration and enhancement of biodiversity will be an essential component to any reformed FFG Act, given how must biodiversity has already been lost in Victoria.	Section 4.1, Setting the direction, pg. 37
Proposed amendments to the duty on public authorities needs to go further to require the decision-making across government must be consistent with the provisions of the FFG Act, and any plans and regulations made under it. An amended duty must be complemented by the production of specific guidance on what the duty means, including referencing within the guidance the importance of key documents such as the Biodiversity Plan, action statements, conservation advices and landscape scale plans. Alternatively, similar to what has recently proposed in the Environmental Protection Authority review with respect to a general duty, public authorities should be required to prevent risks of harm to threatened species and biodiversity in the ordinary course of their operations.	Section 4.2, Coordination and Integration across government, pg. 39-42

We support the proposal for the FFG Act to incorporate a more detailed regulatory regime governing the preparation and review of the Biodiversity Plan, including a 5-yearly independent report on progress towards meeting targets, undertaken by the Commissioner for Environment and Sustainability. This proposals needs to be further developed to ensure that the proposed biodiversity targets focus on key ecosystems and are designed according to SMART principles.	Section 4.1, Setting the direction, pg.37 and Section 4.3.1, Biodiversity planning, pg. 46-49
We support the proposal to produce a conservation advice within a specified period following listing. We submit that the Scientific Advisory Committee (SAC) should prepare the initial conservation advice based on information that was provided to the Minister as part of the recommendation for listing.	Section 4.3.1, Biodiversity planning, pg. 47-49
We agree with the proposal to adopt the Common Assessment Method with respect to listing threatened species.	Section 4.3.2, Listing threatened species, communities and threatening processes
We support the proposal to incorporate a framework for landscape-based responses to biodiversity protection however; this must not come at the expense of individual species protections. Further, additional thinking is required around the role of landscape plans and the FFG Act must set out a detailed legislative regime for creating and producing landscape plans. Agreed landscape plans must be legally binding.	Section 4.3.1, Biodiversity planning, pg. 46-49
We support the proposals to provide criteria to define critical habitat in Regulations made under the Act, which includes broadening the concept of critical habitat.	Section 4.4.1, Habitat protection, pg. 54-57
We support the proposal to require the Secretary to establish a program to identify and map proposed critical habitat on both public and private land. In addition, we submit the Minister must then make a decision as to whether to declare the identified areas as critical habitat.	Section 4.4.1, Habitat protection, pg. 54-57
We support the proposal to require the Secretary to take all reasonable steps to enter into voluntary management agreements with owners of land containing declared critical habitat. Greater consideration is needed in relation to establishing an incentive and investment framework however, at a minimum, an incentive framework should not limit the permitting regime.	Section 4.4.1, Habitat protection, pg. 54-57
A new offence relating to damage of habitat of threatened species or communities without a permit is a good start, however this needs to go further so that it introduces a strong standard of protection that other land-use planning rules and regulations must comply with (like forestry, planning and mining) and applies on both public and private land.	Section 4.4.1, Habitat protection, pg. 54-57
Mapping habitat of rare and threatened species may be a useful exercise to build knowledge around habitat types that are not treated as native vegetation under planning controls, however it is not clear how this would result in protecting those habitat types. Ensuring that the new offence to damage habitat of threatened species or communities without a permit applies on both public and private land would be a more effective approach to provide protection of habitat of threatened species under the FFG Act.	Section 4.4.1, Habitat protection, pg. 54-57
In the absence of creating a new independent authority to enforce the FFG Act, we are open to the idea of the Department taking greater responsibility for habitat protection. We recommend that the most effective way for this to occur however, is for the FFG Act to become the key mechanism to protect native vegetation on both public and private land (i.e. the FFG Act becomes the key permitting framework for clearing native vegetation, as well as the framework under which breaches are enforced).	Section 4.4.1, Habitat protection, pg. 54 – 57

We submit that the existing permitting test in relation to offences of 'take' of threatened species should be maintained as it represents a strong standard of protection. However, we agree that consistency, accountability and transparency of the decision making process for granting of permits needs improvement, including a clarification of the level of harm that is considered unacceptable.	Section 4.4.2, Regulation, pg. 58-61
We agree with the proposed improvements around increased penalties as well as a tiered suite of enforcement tools and the proposal to consider the inclusion of a civil enforcement regime to accompany criminal prosecutions.	Section 4.4.3, Compliance and Enforcement
We agree with the proposed improvements around improved access to information and moves towards expanding standing to enable judicial review of decisions made under the Act and seeking injunctions to prevent/stop a breach of the FFG Act.	Section 4.5, Accountability and transparency, pg. 64-65
What we do not agree with	
We caution the Victorian government in taking a similar approach to the recent de-regulation of NSW biodiversity laws with respect to legislative objective making. We submit that the FFG Act should retain a high level of ambition – in the form of a guarantee – while acknowledging the current and anticipated impacts of climate change.	Section 4.1.1, Objectives, pg. 36-37
The FFG Act needs to include an acknowledgement that biodiversity conservation and ecological restoration mitigates climate change and better enables adaption to climate change impacts.	Section 4.1.1, Objectives, pg. 36-37
The consultation paper's analysis of the prevention principle is not reflective of what this principle is generally accepted to mean. The prevention principle needs to be incorporated into the FFG Act in accordance with best practice thinking on what this principle means and it should be clarified that this is the 'preferable' measure to be taken.	Section 4.1.2, Principles, pg. 38
Public authorities should be obliged to provide information about all matters relevant to the FFG Act in accordance with international best practice. The provision of such information should not be dependent on whether the Minister asks for it.	Section 4.2, Coordination and integration across government, pg. 39-42
A strong duty on all public authorities to comply with the provisions of the FFG Act – as set out above- would be much more effective than a limited list of decisions that must only *consider* biodiversity (but can then ignore it).	Section 4.2, Coordination and integration across government, pg. 39-42
The proposal to produce priority actions, without a comprehensive action plan, and which are based on a database that does not have the public's support, is problematic.	Section 4.3.1, Biodiversity planning, pg. 46-49
The preparation of action statements must remain mandatory. We submit that in certain circumstances, there may be an exception to production of an action statement because it can be shown that there is an adequate plan in place elsewhere (i.e. a landscape plan contains sufficient recovery planning detail for a listed threatened species). In circumstances when an action statement is deemed unnecessary, there must be transparency around the reasons and decision not to prepare an action statement	Section 4.3.1, Biodiversity planning, pg. 46-49
We caution against the proposals that relate to strategy approaches and 'earned autonomy approaches', until such a time that it is clear that the FFG Act is going to incorporate an enforceable and high standard of protection for biodiversity across all land tenures and that affects all decision making spheres**.**	Section 4.4.4, Regulation, pg.58-61
As an alternative to the proposed internal merits review of some important decisions made under the FFG Act, we recommend that this needs to be undertaken by an independent tribunal (such as VCAT).	Section 4.5, Accountability and transparency, pg. 64-65

3 Detailed responses to the Consultation Paper

Section 4.1: Setting the direction

Clarifying the role of FFG Act

The introductory text to section 4 of the consultation paper confirms that it is the ongoing intention of the government that the FFG Act will operate as Victoria's main biodiversity conservation law. That is, it will continue to operate in the specific space as a biodiversity conservation law for Victoria. We welcome this clarification in the consultation paper however we submit that this should be clarified in the overarching purpose of the FFG Act.

The overarching purpose of the FFG Act should clearly state that the FFG Act is intended to provide for the protection and restoration of biodiversity in Victoria.

Objectives

As set in the consultation paper on page 36, we agree that the current objectives of the FFG Act need revision to incorporate current best practice in environmental legislation. However, we do not agree with some fundamental components of how it is proposed this should occur.

Firstly, we do not agree that the 'guarantee' objective – the guarantee that all species can survive and flourish in the wild – should be replaced. Nor do we agree that the guarantee prevents a conservation approach that enables a long-term turn-around of biodiversity decline across many species, as is suggested in the consultation paper. Instead, we believe that conservation efforts can and must focus on ensuring that no species becomes extinct, while at the same time also being proactive in ensuring that species do not become threatened in the first place. The key objective for any biodiversity conservation law must always be to prevent extinctions. Zoos Victoria provides a visionary example of such a goal which we recommend the Victorian government replicates, namely that 'no Victorian terrestrial vertebrate species will go extinct on our watch'.[8]

Given what Victoria has already lost (see our comments above in relation to the state of nature in Victoria), the second proactive component of the FFG Act objectives, must focus on restoration of habitats through reforestation, re-establish wetlands and wildlife corridors.

We also submit that it is 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.

One of the issues with the consultation paper is that it assumes that legislative objectives need to be 'clear and measurable', or something like SMART goals or targets (specific, measureable, attainable, realistic and timely).

We submit that SMART targets are very useful for planning purposes and the like – and are appropriate to guide biodiversity targets like that which are to be included in the Biodiversity Plan, see further below – but that this is not the correct approach to take when developing legislative objectives which typically contain a range of considerations. We feel that a more balanced approach that is a better representation of best practice in modern environmental law making, are the recommendations put forward by the Australian Panel of Experts in Environmental Law (APEEL). [9]

As APEEL notes, objectives are a set of statements about what the legislation aims to achieve and they serve as an aid in interpretation to the provisions of the Act. That is, objectives should clearly set out the level of ambition that the law envisages for the environment, but they do not need to be 'measureable' statements as such.

If the FFG Act is able to establish a high standard of protection for the environment, it is essential that the FFG Act retains ambitious objectives. We believe that the guarantee is an incredibly important guiding goal of the FFG Act that clearly demonstrates the Act's ambitions. While we accept that the guarantee objective may not be achievable in all cases, we do

8 Zoos Victoria 2014-2019 Wildlife Conservation Plan.

9 For further information on APEEL, see here: http://apeel.org.au/. The final versions of each technical paper are expected to be released on 1 April 2017.

not accept that this means that the guarantee should be replaced with a lesser set of objectives that reduce the level of ambition contained within the FFG Act.

An alternative approach could be to retain the guarantee that all species will survive and flourish in the wild, but to clarify that the guarantee will take into account the current and anticipated impacts of climate change.

These approaches can be readily incorporated into a legislative framework using contemporary drafting techniques. For example, the recently passed Climate Change Act contains a preamble, statement of purpose, objectives including policy objectives, and guiding principles. An approach that uses this full suite of approaches to legislative drafting could readily accommodate something in t the nature of a refreshed and renewed "guarantee".

With respect to the manner in which the consultation paper attempts to address climate change through the objectives, we suggest that the objectives acknowledge the need to build resilient ecosystems and incorporate adaptive management approaches in response to climate change. In addition to this, the FFG Act also needs to acknowledge that biodiversity protection and conservation *contributes* to mitigation of and adaption to climate change (for example, through acting as carbon sinks). That is, the important ameliorative function of biodiversity and ecological restoration in responding to climate change should be expressly acknowledged in the FFG Act.

The analysis at page 36 of the consultation paper does not currently provide this direction.

We submit that the FFG Act should retain a high level of ambition while acknowledging the current and anticipated impacts of climate change.

The FFG Act needs to include an acknowledgement that biodiversity conservation and ecological restoration mitigates climate change and better enables adaption to climate change impacts.

Inclusion of goals that relate to restoration and enhancement of biodiversity will be an essential component to any reformed FFG Act, given how must biodiversity has already been lost in Victoria.

Principles

We agree that a reformed FFG Act should include a legislative statement of the key principles to guide nature conservation in Victoria.

In addition, given the FFG Act is Victoria's main biodiversity conservation law, it follows that the FFG Act needs to clarify that environmental considerations are to be the primary focus of the Act. That is, decisions made under the FFG Act should focus on environmental considerations, with economic and social considerations relevant, but secondary. The objectives and principles of the FFG Act need to reflect this. The proposals in the consultation paper do not clarify that environmental considerations will be paramount in implementation of the FFG Act. Instead, they suggest that environmental, social and economic objectives will all be given equal weight (page 38). This must be rectified.

The Environmental Protection and Biodiversity Conservation Act (EPBC Act), includes this to some extent by stating that the principles of ecologically sustainable development will apply – which includes economic, environmental and social considerations (section 3A(a)) – but then adds that 'conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making' (section 3A(d)).

We submit that the FFG Act needs to go further than this and confirm that environmental decisions will be paramount. This submission is consistent with APEEL's recent work.[10]

The consultation paper does not currently incorporate a comprehensive set of principles that are required to be applied in the implementation of the FFG Act. We set out below the key principles that we submit must be incorporated into any reformed FFG Act to support the elevation of environmental considerations in decision making under the FFG Act.

10 For a more detailed analysis of the competing interests of 'ecologically sustainable development' and moving beyond ecologically sustainable development see: APEEL Technical Paper 1 – The Foundations for Environmental Law: Goals, Objects, Principles and Norms

Precautionary principle

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 (see further below). Inclusion of the precautionary principle in a reformed FFG Act would be consistent with the following:

- other environmental laws in Victoria (for example, section 10(2) of the *Climate Change Act 2010* and Division 3 of the *Climate Change Bill 2016;* see also section 1C *Environmental Protection Authority Act 1970* and recommendation 5.4 of the Environmental Protection Authority Review, as supported by the Andrews Government) ;
- environmental legislation in other Australian jurisdictions (section 3A(b) EPBC Act);
- environmental law in Europe (see for example Article 191(2) Treaty on Functioning of European Union and Article 6(3) Habitats Directive (EU); and
- international environmental law more generally (Principle 15 Rio Declaration).

The inclusion of the precautionary principle in environmental laws is also recommended by APEEL.[11]

We submit that if the FFG Act is to be reformed into a modern environmental law, then it *must* include a legislative statement that incorporates the precautionary principle.

Prevention principle

Closely related to the precautionary principle, but different to, is the prevention principle. The prevent principle calls for action to be taken to prevent known risks of environmental harm from materialising. APEEL notes that the prevention principle 'seeks to address likely or anticipated risks through preventive measures, whereas the precautionary principle deals with uncertain or hypothetical risks by constraining possibly damaging activities.'[12]

The consultation paper includes an odd iteration of the prevention principle, referred to as 'primacy of prevention'. The 'primacy of prevention' was a term used in the independent inquiry into the Environmental Protection Authority (EPA). In using this term, the EPA review firstly confirmed – drawing on APEEL's work – that the prevention principle calls for action to prevent known risks of environmental harms from materialising, and secondly took an approach which was consistent to that which was taken in the Public Health and Wellbeing Act 2008, that the prevention principle should be framed as a 'preferable' measure.[13]

The consultation paper fails to define what the prevention principle means, and secondly talks about 'appropriate weighting' of prevention, but does not specify that this means prevention is 'preferable', consistent with the approach taken in the EPA review (and the Government's response to the EPA review) and also in the Public Health and Wellbeing Act.

This needs to be clarified and revisited.

High environmental quality principle

In addition to this, again drawing on APEEL's recent contributions, we recommend the inclusion of a high environmental quality principle could help to ensure that the environment considerations take priority over economic considerations (see above). APEEL suggests that this could be defined in such a way so that all decisions and actions are required to achieve a high level of environmental protection and biodiversity conservation, consistent with what is technically feasible in the particular circumstances.

11 APEEL Technical Paper 1 – The Foundations for Environmental Law: Goals, Objects, Principles and Norms

12 Ibid.

13 Independent Inquiry into the Environment Protection Authority, pg. 90.

Best available techniques principle (or innovation principle)

The use of best available techniques principle should also be incorporated into a reformed FFG Act. This would ensure that all decisions and actions are to be based upon the application of the best available techniques by mandating the application of up-to-date tools and methods suitable for protecting the environment and conserving biological diversity.

Some community groups have raised their concerns with us around the data that is currently being used by DELWP to inform management of threatened species and landscapes. A common theme of feedback that has been provided to us, is that the information that is informing management decisions is not always based on the most up-to-date data and that over-reliance on out of date data, without adequate truth checking, can lead to perverse environmental outcomes. We believe that the incorporation of a best available techniques principle would go some way to re-assuring the public that decisions and actions are being undertaken according to the most appropriate and up-to-date methods.

The FFG Act must incorporate the precautionary principle consistent with legislative practice across Victoria and elsewhere.

Other important principles that should be incorporated into the FFG Act include a high environmental quality principle and the use of best available techniques principle.

The consultation paper's analysis of the prevention principle is not reflective of what this principle is generally accepted to mean. The prevention principle needs to be incorporated into the FFG Act in accordance with best practice thinking on what this principle means and it should be clarified that this is the 'preferable' measure to be taken.

Section 4.2: Co-ordination and integration across government

As a general comment in relation to each of the proposals for change that are raised in the consultation paper under this section, they continue to provide discretions and options for the Minister to take certain actions, similar to the discretionary actions that are currently contained in the FFG Act. Each of the discretionary tools that are contained in the FFG Act have been shown to be ineffective over the past 30 years.

We submit that if the government is committed to changing the situation on the ground and reversing trajectories of decline of Victoria's threatened species, then the government's proposals need to reflect this and contain clear actions that the government intends to take in certain circumstances.

Duty on public authorities

We agree with the proposal to 'clarify and strengthen the existing duty on public authorities' to enable a whole of government response to implementation of a reformed FFG Act. We also support the proposed clarification that the duty is to apply to government departments, as well as public authorities.

We suggest that if the public duty is going to have a meaningful impact to whole-of-government decision-making, the duty should require public authorities to make decisions *consistent* with the provisions of the FFG Act, and any plans and regulations made under it (not just its objectives and principles as proposed). Our suggested re-phased duty is as follows:

> *'Any decision made, action taken or discretion exercised by public authorities in carrying out their functions must be consistent with the provisions of the FFG Act, including its purpose, objectives, principles and any regulations or instruments made under it.'*

To complement an amended duty on public authorities, we agree that the preparation of ministerial guidelines will help to 'provide clarity and certainty to public authorities on how to meet the duty' (pg. 42 of the consultation paper). However, we submit that the preparation of ministerial guidelines on what the duty means in practice will be *essential* and should therefore be mandatory in circumstances where a public authority has or is likely to have a material impact on Victoria's biodiversity in the ordinary course of its operations. Further, the guidelines need to state the importance of taking into account key FFG Act documents – such as the Biodiversity Plan, action statements, conservation advices and landscape scale plans – in a public authority's ordinary course of business. An alternative to making sure that public authorities act consistently with the provisions of, and instruments made under, the FFG Act could be to adopt a similar approach as that to which has been taken in the EPA reform proposal.

The independent inquiry into the EPA has recommended the introduction of an enforceable general duty 'to take reasonably practical steps to minimise the risks of harm to human health and the environment from pollution and waste'. Reasonably practical measures is something that is well established under Occupational Health and Safety law. It is anticipated that the EPA could then take action if business or individuals fail to take steps to prevent harm (whether or not the harm eventuates).[14]

Although a general duty is obviously much wider than a public authority duty, in that it is applicable to everyone, it may be possible to apply some of the thinking around the EPA reform proposal, to the FFG Act. For example, the FFG Act's public authority duty could require public authorities in the ordinary course of their operations, to 'take reasonably practical steps to minimise the risk of harm to threatened species and biodiversity.'

As set out in the EPA reform proposal, in order for a general duty to be effective, there needs to be strong organisational leadership to enforce the duty. With respect to the FFG Act public authority duty proposals in the consultation paper, it is not clear where this strong organisational leadership will come from, or that the duty in of itself, will be enforceable. We submit that the necessary leadership should come from the Department, supported by the Minister. Incorporating a requirement to produce guidance around what this duty means in practice, is one way for the Department and Minister to provide that guidance. We also recommend that this duty should be enforceable in its own right, and that this is accompanied by improved enforcement rights for community groups (as per the recommendations discussed in Section 4.5). We submit that providing community groups with a means to enforce the duty will also help to ensure that such leadership is forthcoming.

Proposed amendments to the duty on public authorities needs to go further to require the decision-making across government must be consistent with the provisions of the FFG Act, and any plans and regulations made under it. An amended duty must be complemented by the production of specific guidance on what the duty means, including referencing within the guidance the importance of key documents such as the Biodiversity Plan, action statements, conservation advices and landscape scale plans.

Alternatively, similar to what has recently proposed in the Environmental Protection Authority review with respect to a general duty, public authorities should be required to prevent risks of harm to threatened species and biodiversity in the ordinary course of their operations.

General duty

We also submit that DELWP should consider introduction of a general duty for the owners and occupiers of private land. As the consultation paper states, private landholders manage two-thirds of the land in Victoria and play a vital role in the conservation of biodiversity in Victoria.

Incorporation of a general duty would be consistent with the general duty that has recently been incorporated into the EPA reforms – as described above – and also consistent with APEEL's most recent work. APEEL's technical paper on the foundations of environmental law recommends that the next generation of environmental laws in Australia should incorporate general duties to incorporate a general environmental duty of care, and a general duty to restore and rehabilitate harmed environments.[15] We are supportive of APEEL's recommendations in relation to general duties.

Further to a general environmental duty of care and a general duty to restore and rehabilitate harmed environments, we recommend specifying that an FFG Act general duty require individuals:

- to act consistently with the achievements of biodiversity targets;
- not to jeopardise the survival or ecological integrity of a species/population/community described in a Conservation Advice; and
- not to exacerbate a potentially threatening process.

DELWP should further explore options to incorporate a general environmental duty of care and a general duty to restore and rehabilitate harmed environments which should extend to requirements to act consistently with conservation advices, biodiversity targets and not to exacerbate potentially threatening processes.

14 Independent Inquiry into the Environmental Protection Authority, pg. 221-235.

15 APEEL Technical Paper 1 – The Foundations for Environmental Law: Goals, Objects, Principles and Norms

Public authority management agreements (PAMA)

PAMAs have not been effective tools in managing biodiversity. Only one PAMA has been entered into in the last ten years (a PAMA between the Minister and Queenstown Cemetery Trust was made in 2008), and of the ten PAMAs that were entered into between 1992 – 2005, we believe they on the whole, they have been of limited value in conserving important species and habitats across Victoria.

PAMAs would need a major overhaul in order to be an effective alternative regulatory instrument. This consultation proposal with respect to PAMAs falls short of this. We recommend that PAMAs could become an effective regulatory instrument if the FFG Act put in place a greater incentives framework for public authorities to enter into PAMAs. Secondly, the FFG Act needs to establish a minimum standard of protection for which PAMAs must comply with. Finally, PAMAs should be subject to third party enforcement rights.

A possible means to overhaul the PAMA system and make them more effective biodiversity agreements could be through the introduction of an additional category of protected area be created under the FFG Act, known as Sites of Biodiversity Significance and for which PAMAs can play a key role in regulating, protecting and restoring the site.

Regulation of Sites of Biodiversity Significance could be based on the model that exists in England and Wales for Sites of Special Scientific Interest (SSSI) under the Wildlife and Countryside Act 1981 (England and Wales), as amended. In England and Wales, SSSIs are designated for 'flora, fauna, or geological or physiographical features'.

Similar to SSSIs, we recommend that Victorian Sites of Biodiversity Significance could also be designated based on special flora, fauna or geological or physiographical features and where the site does not otherwise have protected area legal protections. It could occur on both public or private land. For Sites of Biodiversity Significance on public land, the land should not already be protected and it is envisaged that the most appropriate areas would be located in State Forest or on Crown Land.

The FFG Act could establish a framework to identify Sites of Biodiversity Significance within a certain timeframe (practically, this could occur at the same time as critical habitat was being mapped). The next step is to put in place governance arrangements for management of these sites, through either a PAMA or equivalent. PAMAs would operate for sites that are located on land owned by the Crown or by statutory bodies.

It should be a requirement that the PAMA or alternative governance arrangement would need to enable the protected area to meet one of the six international classes of protected areas developed by the IUCN and also that the site contributes to the comprehensiveness, adequacy and representativeness (CAR) of the Australian National Reserve System (NRS). In this manner, Sites of Biodiversity Significance would contribute to the NRS.

Sites of Biodiversity Significance would most likely not be as strictly protected as critical habitat for example, but could be based on similar levels of protection that that provided to Sites of Special Scientific Interest under the *Wildlife and Countryside Act 1981* (England and Wales). For SSSIs, certain activities are prohibited/require authorization and there are legal duties concerning how the areas should be managed and protected. For example:

- It is an offence to damage, disturb or destroy land known to be an SSSI or the wildlife in an SSSI;
- Owners or occupiers of SSSI must obtain consent before carrying out any activity that may damage the SSSI; and
- Statutory bodies have a general duty to reasonable steps to further the conservation and enhancement of the special feature of the SSSI.

We suggest that these types of regulation could be adapted to a Site of Biodiversity Significance framework within the FFG Act.

Given that the level of protection is not envisaged to be as strict as critical habitat, critical habitat is therefore still a necessary tool to retain in addition to the operation of Sites of Biodiversity Significant.

We would be interested to explore this proposal further with DELWP.

For PAMAs to become an effective and utilized management tool, a major overhaul is needed. We recommend that this could come in the form of an additional requirement to identify an additional protected area – known as a Site of Biodiversity Significance – which is to be protected by a PAMA or equivalent governance arrangement. Sites of Biodiversity Significance should contribute to the National Reserve System.

Biodiversity standards

The proposal to prepare biodiversity standards to provide guidance on how to most effectively manage specific species, areas or threats, may be useful – particularly with respect to private land conservation and their use to guide eligibility for stewardship payments from government (pg.50 consultation paper). However, the use of biodiversity standards under the FFG Act is likely to be extremely limited unless a mandatory obligation to produce the standards is introduced.

We also submit that the biodiversity standards could be incorporated into the Sites of Biodiversity Significance framework set out above whereby biodiversity standards must be created for designated protected sites.

Preparation of biodiversity standards must be made mandatory (i.e. not at the discretion of the Minister).

Additional powers for Minister to support implementation of duty

With respect to the proposal to enable the Minister to request information from a government department about a particular listed threatening process or management of a biodiversity 'asset', we submit that a better approach would be to include a positive obligation on government departments to provide information on those matters. This is consistent with the obligations that public authorities comply with in Europe and in the UK in accordance with the Aarhus Convention. See further below in relation to accountability and transparency under the FFG Act.

Public authorities should be obliged to provide information about all matters relevant to the FFG Act in accordance with international best practice. The provision of such information should not be dependent on whether the Minister asks for it.

Other proposed options to improve considerations of biodiversity across government decision making

The consultation paper suggests that the government may further investigate options to improve the consideration of biodiversity across government. Options proposed in the consultation paper are that the FFG Act could incorporate a schedule that lists all relevant decisions made under other laws that should consider biodiversity (similar to what occurs under the *Climate Change Act 2017*), or that other legislation could be amended to add biodiversity as a consideration to decision making (pg. 42 consultation paper).

We submit that a preferable approach would be to amend the duty as set out above.

We note that the Climate Change Act includes a schedule of certain decision that must consider climate change, however our position is that the way that the Climate Change Act is drafted is pretty weak. Decision-makers only have to consider climate change, but can then ignore it when making a decision; plus the list of decisions that it applies to is very small and does not include for example, planning decisions.

We therefore caution the government in taking a similar approach to that, which has occurred under the Climate Change Act, and instead submit that a strong duty on all public authorities to comply with the provisions of the FFG Act – as set out above- would be much more effective.

A strong duty on all public authorities to comply with the provisions of the FFG Act – as set out above- would be much more effective than a limited list of decisions that must only *consider* biodiversity (but can then ignore it).

Section 4.3: Strategic approach to biodiversity planning and species listing

Biodiversity planning

Statewide biodiversity plan

We support the proposal for the Act to include a requirement to include targets in the Biodiversity Plan and to establish a review process and process for developing and reporting against the targets.

We suggest that this idea should be further developed so that the FFG Act legislative framework enables the Biodiversity Plan to become a more detailed and focused Victorian conservation strategy. In particular, we suggest that the Act specify that the Biodiversity Plan incorporate long-term (25 –year) biodiversity targets across a range of biodiversity indicators and key ecosystems for Victoria. We have suggested for example, targets relating to wetlands, rivers, urban ecosystems, estuarine environments, oceans and native vegetation. The legislation should ensure that the targets that are developed are SMART and relate to the ability to restore and recover species and ecosystems. They should also be linked to existing state biodiversity targets, national biodiversity targets and Aichi Biodiversity targets.

As set out in our longer FFG Act reform proposal, a legislative framework for targets – or outcomes based regulations- is of limited utility without well-designed and well-informed means to achieve those outcomes. We have suggested that a biodiversity target framework can be supported by a more detailed regulatory regime governing the preparation and review of the Biodiversity Plan itself, as well as an additional regulatory tool in the form of community developed landscape action plans that will also work towards achieving the targets.

We suggest a 5-yearly independent review of the plan be required under the FFG Act, undertaken by – for example – the Commissioner for Environment and Sustainability. This would enable reporting on progress towards meeting targets in conjunction with the five yearly State of the Environment reporting.

We support the proposal for the FFG Act to incorporate a more detailed regulatory regime governing the preparation and review of the Biodiversity Plan, including a 5-yearly independent report on progress towards meeting targets, undertaken by the Commissioner for Environment and Sustainability. This proposals needs to be further developed to ensure that the proposed biodiversity targets focus on key ecosystems and are designed according to SMART principles.

Biodiversity planning framework

We are concerned about the direction that the proposed biodiversity planning framework is taking. Of particular concern is the move towards landscape scale conservation *at the expense* of individual species protection. We strongly urge the government against the proposal to replace mandatory recovery planning for individual species (action statements) with a very broad concept of a landscape or area-based response.

While we agree with landscape scale conservation and the need to incorporate this more effectively into the FFG Act – through biodiversity targets, an effective biodiversity plan and landscape action plans – this cannot come at the expense of individual species protection. We submit that strong threatened species protections are critical to 'holding the line' on the preservation of threatened species, as well as reversing trajectories of decline. Experience from the Unites States for example, demonstrates that strong threatened species laws have been essential to saving threatened species from extinction.[16] Threatened species protections therefore remain a keystone of biodiversity conservation and are strongly supported by community expectations as to what biodiversity protection laws should do.

We set out our position below on each of the four recommendations that form part of the biodiversity planning framework proposals.

Conservation advice

We are supportive of the proposal to, following listing within a specified period, firstly prepare a conservation advice, what we refer to in our reform proposal as a 'listing statement'. We submit that the Scientific Advisory Committee (SAC) should prepare the initial conservation advice.

16 Centre for Biological Diversity 'A Wild Success: A Systematic Review of Bird Recovery Under the Endangered Species Act' June 2016.

Presently the Flora and Fauna Guarantee Regulations provide some level of detail regarding what information the SAC needs to include in the final recommendation to the Minister about a nomination for listing document. We believe that the documents that are ultimately presented to the Minister by the SAC are comprehensive documents that contain considerable information. We understand however, that the Department then again compiles this background information and a degree of duplication often occurs in the preparation of action statements.

This duplication can be avoided by including further requirements within the FFG Act regarding the information that is required to be presented to the Minister when the SAC makes its final recommendation for listing. This would work to further standardise the categories of information already ordinarily included. The information requirements should be based on that which is currently stipulated in the Flora and Fauna Regulations, and in addition should include:

- a detailed description of the species/community;
- its population(s) and distribution, including any populations under particular pressure;
- its critical habitat (including critical habitat needs in the context of climate change, as far as relevant and determinable);[17]
- key threats; and
- evidence that criteria for listing is satisfied, based on the best available information.

We support the proposal to produce a conservation advice within a specified period following listing. We submit that the Scientific Advisory Committee (SAC) should prepare the initial conservation advice based on information that was provided to the Minister as part of the recommendation for listing.

Priority actions

We agree with the proposal to produce priority actions for each listed species, community or threatening process. However we do not agree that the production of priority actions is an appropriate alternative for detailed recovery plans or action statements for all listed species. Common sense dictates that it is not possible to 'prioritise' when you do not yet have a comprehensive plan of action. That is, we submit that comprehensive recovery plans or action plans are a necessary pre-requisite to producing priority actions.

Further, we understand from discussions with the department that the priority actions will be produced from an existing database that DELWP maintains but which is not publicly available (the Actions for Biodiversity Conservation database) and we have concerns about over-reliance on this data.

We are consistently receiving feedback from concerned community groups and individuals that the database that DELWP relies on is extremely limited, out of date, and does not accurately reflect the information on the ground. Reliance on this database in the implementation of other policies, for example in native vegetation clearing regulations and to also guide fire management programs, have left communities frustrated that areas that they have sighted and recorded protected threatened species, have not received the protection they deserve. Communities are increasingly feeling that this is as a result of blind reliance on an database in policy implementation and decision making. We submit that the ABC data base can be a useful starting point to inform actions, but that there must be a process in place to 'ground-truth' the data and incorporate new information not contained in ABC database (e.g. new species detection) into the proposed priority action.

We recommend that firstly, recovery plans should remain mandatory unless exceptional defined criteria are met such that a plan is not necessary. Priority actions can be produced based on the comprehensive management plan that has been prepared (see our comments below regarding situations where an action plan may not be necessary). Secondly, where the ABC data is being used to inform management decisions, requirements are included within the FFG Act to ensure that DELWP staff enquire into and interrogate the management proposals through a transparent and participatory process. This would include incorporating the most up to date information on the listed species or threatening process, scientific drafting and review, and a process of public enquiry and a targeted community consultation process.

17 Section 13(s) *Nature Conservation Act 1992 (Q)*: 'A critical habitat may include an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife.'

The proposal to produce priority actions, without a comprehensive action plan, and which are based on a database that does not have the public's support, is problematic.

Preparation of management advices for specific species or threats 'where warranted'

We submit the test for when an action statement/recovery plans are required, needs to be inverted from what is proposed in the consultation paper so that the default is that individual species recovery plans are required ***unless it can be shown that there are adequate plans in place elsewhere***. For example if a threatened species or a threat is sufficiently managed under a landscape scale plan, then it may not require an action statement/recovery plan. That is, we recommend that the preparation of action statements remain mandatory, unless exceptional defined criteria are met such that a plan is not necessary. In such instances where an action statement is deemed unnecessary, there must be transparency around the reasons and decision not to prepare an action statement.

In our view, action statements remain *fundamental* in establishing adequate recovery planning for threatened species in Victoria. Instead of moving away from single species protections, we suggest that a more detailed legislative framework should be included in a reformed FFG Act around the process of producing action statements and recovery plans. This would include requirements in the FFG Act in relation to time-frames for completion of action statements, as well as details on what needs to be included in action statements.

We also submit that the content of action statements, like the conservation advice (or listing statement) should be prepared by an independent authority – such as the SAC – be based on best available science, and regularly reviewed and updated.

The preparation of action statements must remain mandatory. We submit that in certain circumstances, there may be an exception to production of an action statement provided it can be shown that there is an adequate plan in place elsewhere (i.e. a landscape plan contains sufficient recovery planning detail for a listed threatened species or threatening process). In circumstances when an action statement is deemed unnecessary, there must be transparency around the reasons and decision not to prepare an action statement.

Landscape response to biodiversity plan

We are supportive of incorporating a landscape scale framework into the FFG Act, if this does not come at the expense of individual species protection and an overall weakening of the ambition contained in the FFG Act with respect to conservation and protection of Victoria's threatened species.

Further thinking is required as to the specific role of landscape action plans. For example, landscape action plans could themselves be a means to declare critical habitat, and/or give effect to action statement measures. They could also be used to inform regulatory and permitting decisions for threatened species management in the landscape that the plan covers. The consultation paper is currently quite vague around the specific role that landscape action plans will play in threatened species and biodiversity protection and this needs further clarification.

As set out above, we submit that in certain circumstances, action statements may not be required because a landscape plan substantially covers a listed species or a threatening process. However, there are necessary elements that we submit need to be included within the legislative framework to make this effective. Firstly, the FFG Act would need to establish an enabling framework for the creating of landscape action plans, as well as setting out mandatory and discretionary components for what is required to be included in any landscape plan. The content and focus of action plans will be dependent on further clarification around the role that landscape plans are expected to play however (see our comments above).

As a minimum, the mandatory elements of regional-scale landscape action plans to be included in the FFG Act should be:

- identification of the FFG Act targets(s) and regional targets that the plan is working towards;
- identification of what landscape the plan will cover and whether it is an international and nationally significant landscape (for example a Ramsar site), a site of biodiversity significance landscape (for example a wildlife corridor, biodiversity hotspot – see the proposal above in relation to PAMAs) or an important area of local significance;

- identification of the key parties – including local community members, businesses, Victorian Government departments, local and regional government agencies – necessary to make the plan a success;
- a proposal to engage the key parties (through incentives or otherwise);
- a list of the beneficial ecological processes that the plan will focus on;
- a list of processes threatening to the landscape (including incorporation of action statements of relevant threatening processes and how this should inform regulatory and permitting decisions for threatened species management in the landscape);
- management measures needed to maintain and restore ecological processes, places and assets (including exploring options around whether to an application should be made to the Minister to declare critical habitat);
- commitment for parties to take certain actions to further develop the plan within stipulated timeframes(including incorporation of relevant action statement contents);
- a process and timeline for how and when the plan will be amended and management measures undertaken and adapted as necessary; and
- identification of potential funding including a plan to raise funding and resource management commitments.

We also submit that landscape plans should, once agreed by all relevant parties, be legally binding and enacted by Ministerial Order.

We support the proposal to incorporate a framework for landscape-based responses to biodiversity protection however this must not come at the expense of individual species protections. Further, additional thinking is required around the role of landscape plans and the FFG Act must set out a detailed legislative regime for creating and producing landscape plans. Agreed landscape plans must be legally binding.

Listing threatened species, communities and threatening processes

We agree with the proposal to adopt the Common Assessment Method and to mandate that the government manages a single threatened species list in a more comprehensive manner, whilst still maintaining the public nomination listing process.

We suggest that at the time of the five-yearly independent reviews of the Biodiversity Plan, it would be more efficient to require that an independent authority (for example the SAC) undertakes a strategic audit of Victoria's threatened species list to fulfill this obligation.

We agree with the proposal to adopt the Common Assessment Method with respect to listing threatened species.

Section 4.4: Habitat protection and regulation

Critical Habitat

'Critical habitat' protection, as the term suggests, is fundamental to the survival and conservation of threatened species. Many biodiversity laws contain strong regulatory tools for protection of the critical habitat of threatened species, including its identification as well as registration and legal protection. We note that jurisdictions in which regulatory measures contain obligatory protections with respect to critical habitat identification and protection, such as under the US Endangered Species Act, have tended to have some success in limiting and reversing the decline and risks to listed threatened species. That is, strong legal controls for the protection, of critical habitat have contributed to the relative stabilisation and improvement in the situation of threatened species. Better use of critical habitat protections will therefore be essential in any reformed FFG Act.

Critical habitat definition

We support the proposals to provide criteria to define critical habitat in Regulations made under the Act, which includes broadening the concept of critical habitat to include areas important for maintaining ecological processes.

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.

The consultation paper notes that the government has found identifying critical habitat is problematic. We note that other jurisdictions – for example 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.

Key submission (changes we support in principle): We support the proposals to provide criteria to define critical habitat in Regulations made under the Act, which includes broadening the concept of critical habitat.

Critical habitat mapping

We support the proposal to require the Secretary to establish a program to identify and map proposed critical habitat on both public and private land. We submit that this is a move in the right direction. We suggest that the SAC may be best placed to undertake this mapping exercise.

In addition to what is proposed in the consultation paper, following the mapping of critical habitat, there must be a requirement for the Minister to make *a decision* as to whether or not to declare the proposed area that has been mapped as critical habitat. It follows, that the FFG Act should set out certain circumstances where declaration of identified critical habitat is mandatory. This process could be consistent with the decision as to whether to list species as threatened under the FFG Act.

Key submission (changes we support in principle): We support the proposal to require the Secretary to establish a program to identify and map proposed critical habitat on both public and private land. In addition, we submit the Minister must then make a decision as to whether to declare the identified areas as critical habitat.

Permitting regime for critical habitat

We also support a modification of regulatory controls to require a permit for activities that may damage critical habitat. We suggest that given the protective character of critical habitat, the permitting of actions or uses could be based on the framework that governs the Natura 2000 sites across Europe.

Natura 2000 sites are protected areas that have been declared to establish critical areas for listed species and communities. The overall objective is to enable to listed species and communities to be maintained, or where appropriate, restored, to 'favourable conservation status' (Article 3(1)).

Although the Natura 2000 network is not a system of strict nature reserve from which all production activities are excluded – and the majority of sites exist on privately owned land and support human activity such as farming – proposals for any activities that may affect a Natura 2000 site are strictly regulated under Article 6 of the Habitats Directive.

Under Article 6 of the Habitats Directive, firstly includes an obligation to prevent hard to the protected species or communities. Secondly, if a proposed '*project or plan'* is likely[18] to have a '*significant effect'* – taking into account cumulative effects – then there must be an assessment undertaken and the project not approved unless the assessment shows the proposed plan or project will not '*adversely affect the integrity of the site'*.[19] The *precautionary principle* is a key feature of these two requirements.[20] There is also an 'imperative reason of overriding public interest' exception that can

18 The EU courts have ruled that the 'likely' test is a de-minimus threshold (see the Attorney General's opinion at para 48 in Case C-258/11 *Peter Sweetman, Ireland, Attorney General, Minister for the Environment, Heritage and the Local Government v An Bord Pleanala* and the UK courts have equated the word 'likely' with that of a 'reasonable possibility' or risk of significant effect (see *Feeney v Secretary of State for Transport & Ors* [2013] EWHC 1238 (Admin) at paras 12-13; see also *Bagmoor Wind Ltd v The Scottish Ministers* [2012] CSIH 93 at para 45).

19 Article 6(3) Habitats Directive.

20 See Case C- 127/*02 Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse vereniging tot Bescherming van Gogels v Staatssecretaris van Landbouw, Naturbeheer en Visserij (Waddenzee)* at paras 56 and 57.

be invoked, provided there are no alternative solutions and compensatory measures must be undertaken.[21]

An alternative option, could be incorporating a 'maintain or improve' test into the critical habitat permitting regime.

It is imperative that any permitting scheme must also clarify that permitting exemptions must not weaken existing protection that may apply to protected areas, for example those that exist under covenants entered into under the Victorian Conservation Trust Act or under the National Parks Act.

For any such permitting scheme to be effective, it must prevail over planning schemes (including for example the Native Vegetation Permitted Clearing Regulations) and actions approved under other schemes or Acts. In practice, this would mean that the critical habitat permitting framework would firstly be applied to determine whether an activity can proceed under the FFG Act, before proceeding to approval processes under another scheme or Act.

We submit, in respect to the proposal to replace Interim Conservation Orders with 'alternative compliance mechanisms', that the 'Habitat Conservation Notice' provisions contained in the *Biodiversity Conservation Act 2016* (WA) could be an example of an alternative option. However any such alternatives must be mandatory in certain circumstances and in addition to large fines for breach, there should be options for criminal prosecution.

We support a modification of regulatory controls to require a permit for activities that may damage critical habitat. We suggest that the permitting of actions or uses of critical habitat could be based on the framework that governs the Natura 2000 sites across Europe.

Critical habitat on private land

We agree with the proposal to require the Secretary to take all reasonable steps to enter into voluntary management agreements with owners of land containing declared critical habitat, however in addition to this, consideration needs to be given to an incentive and investment framework. This is alluded to on page 50 of the consultation paper but requires further consideration.

An incentive investment framework should not limit the permitting regime that should apply on both public and private land, and in this respect, consideration will need to be given to updating the compensation policy under the FFG Act.

We support the proposal to require the Secretary to take all reasonable steps to enter into voluntary management agreements with owners of land containing declared critical habitat. Greater consider is needed in relation to establishing an incentive and investment framework however at a minimum, an incentive framework should not limit the permitting regime.

Native vegetation

In order for enforcement of illegal clearing of native vegetation to be effective, institutional reform is necessary, including the creation of an independent regulator, accompanied by enforcement, compliance and accountability improvements (see further below). In the absence of creating a new independent regulator, we e are supportive of the idea that the Department is to take greater responsibility for habitat protection whereby it has available to it, its own enforcement mechanism for illegal removal of native vegetation, independent of the Planning and Environment Act. In accordance with our recommendations below about the enforcement proposals contained in the consultation paper, we submit that this enforcement tool should enable civil enforcement in VCAT as well as criminal prosecution in the magistrates court.

What is currently missing in the consultation paper, and what we see as the key to effectively enforcing illegal removal of native vegetation under the FFG Act, is to ensure that the role of the FFG Act is elevated so that it becomes the key mechanism through which native vegetation clearing approvals are granted on both public land, as well as on private land (this is further explored below). We submit that the FFG Act, as Victoria key biodiversity law, is best placed to play such a role, as opposed to the current situation which sees the native vegetation permitted clearing regulations doing the heavy lifting with respect to biodiversity protection. The native vegetation permitted clearing regulations are ill-equipped to enforce breaches and do not place adequate weight to environmental considerations in the decision making framework.

Once the FFG Act becomes the key mechanism to protect native vegetation on both public and private land, then illegal

21 Article 6(4) Habitats Directive.

removal of native vegetation can be enforced effectively under the FFG Act (provided that adequately reform to the FFG Act enforcement mechanisms are introduced).

In the absence of creating a new independent authority to enforce the FFG Act, we are open to the idea of the Department taking greater responsibility for habitat protection. We recommend that the most effective way for this to occur however, is for the FFG Act to become the key mechanism to protect native vegetation on both public and private land (i.e. the FFG Act becomes the key permitting framework for clearing native vegetation, as well as the framework under which breaches are enforced).

Other habitats and threatened communities

We support the proposal to establish a new offence relating to damage to habitat of threatened species or communities without a permit. This would operate in conjunction to the already existing 'take' offence which relates to take of individual protected species without a permit and we believe would help to improve the effectiveness of the regulation of threatened species and communities under the Act.

We submit that this needs to go further however.

Firstly, we recommend that the permitting regime could be incorporated into the proposed habitat of threatened species offence. The permitting regime should be subject to the same test as the current 'take' or protected flora controls, whereby a permit must not be granted if 'to do so would threaten the conservation of the taxon or community of which the flora is a member or part'.

Secondly, this proposed new habitat offence – as well as the existing protected flora offence – should apply on both public as well as private land.

Finally, the protected flora controls as well as this new habitat offence, should apply across all regulatory decision making spheres. That is, the FFG Act threatened species controls should set a standard that the native vegetation clearing regulations, forestry, mining etc would also have to adhere to in respect to both private and public land management.

See also below in relation to our comments on why the FFG Act also needs to incorporate controls relating to protected fauna.

A new offence relating to damage of habitat of threatened species or communities without a permit is a good start, however this needs to go further so that it introduces a strong standard of protection that other land-use planning rules and regulations must comply with (like forestry, planning and mining) and applies on both public and private land

WHY THE FFG ACT OFFENCES AND ASSOCIATED PERMITTING REGIME NEED TO APPLY ON BOTH PUBLIC, AS WELL AS, PRIVATE LAND

As set out in the introductory remarks to this submission, the FFG Act is a specific environmental law that has at its primary purpose, protection of threatened species. It needs to be allowed to operate and provide protection for threatened species on private land, which as the consultation paper states represents two-thirds of all land in Victoria and contains some of the most important remaining examples of habitats for threatened communities.

Current practice in Victoria is to allow the native vegetation permitted clearing regulations to be the key regulatory tool for important habitat on private land, at the expense of applying FFG Act protections. This is an inherently flawed approach with respect to threatened species conservation because the native vegetation regulations fall under the planning regime which is not focused on protecting threatened species.

We submit that the FFG Act should be the key regulatory tool in Victoria that is used to set the standard of protection of threatened species and biodiversity protection more generally, and is to apply across all land tenures, and all decision making frameworks.

PUBLIC LAND

Although the FFG Act protected flora controls are currently implemented on public land, there are many exemptions (like they don't apply to forestry) and we do not believe that the permitting test is currently being adequately applied. The main reason for this is that FFG Act permits are routinely handed out and rarely refused. Of particular concern is clearing of roadside vegetation by Vic Roads and controlled burning carried out by the Department. And it is also important to note that there are exemptions to clearing of native vegetation on crown land in the native vegetation permitted clearing protections.

We understand that VicRoads is one of the biggest clearer of native vegetation in Victoria at the moment and the lack of regulatory oversight is particularly alarming.

Habitat importance maps

We agree with the proposal to incorporate an obligation on the Secretary to publish and periodically update habitat importance maps for rare and threatened species to capture habitat types that are not treated as native vegetation under planning controls. Further thinking is required around how the FFG Act then intends to protect these mapped areas. We refer you to our suggestions above responding to the PAMAs proposal and our submission that the FFG Act could incorporate a new framework for protected areas. Further development of this idea would provide greater relevance to the mapping exercise.

We also note that our proposal set out above with respect to establishing a new offence to damage habitat of threatened species or communities without a permit that applies on both public and private land, would go some way to providing protection of habitat of threatened species that are not treated as native vegetation under planning controls.

We submit that mapping habitat of rare and threatened species may be a useful exercise to build knowledge around habitat types that are not treated as native vegetation under planning controls. Ensuring that the new offence to damage habitat of threatened species or communities without a permit applies on both public and private land would be a more effective approach to provide protection of habitat of threatened species under the FFG Act as would the creation of a new class of protected sites under the FFG Act.

Regulation

Protected Flora

Following further discussions with the Department around the proposals relating to the protected flora controls, we can see that the proposals around retaining a separate protected flora list but incorporating processes to clarify why declarations are made are sensible.

We are also supportive of amendments to the regulatory controls for protected flora, provided that strong regulatory controls and a permitting regime with respect to threatened species is retained and improved in accordance with our recommendations.

Decision-making

As set out above, it is essential that the existing test in relation to the granting of permits is retained – whereby a permit must not be granted if 'to do so would threaten the conservation of the taxon or community of which the flora is a member or part' – as this incorporates a strong standard of protection into the FFG Act. In order to make this effective however, this permitting regime needs to apply on both public as well as private land and across all regulatory decision making spheres.

We submit that the permitting test has not been correctly applied and we agree that consistency, accountability and transparency of the decision making process for granting of permits needs improvement, including a clarification of the

level of harm that is considered unacceptable.

In this manner, we support in principle the proposal to establish decision making criteria under the FFG Act, but this must not be a means of weakening the current standard of protection. That is, the current permitting test must be retained, but we would welcome further clarification for decision makers around what this test requires in practice including guidance around in what situations permits should be refused.

We submit that the existing permitting test in relation to offences of 'take' of threatened species should be maintained as it represents a strong standard of protection. However, we agree that consistency, accountability and transparency of the decision making process for granting of permits needs improvement, including a clarification of the level of harm that is considered unacceptable.

We also submit that the permitting regime with respect to 'take' of threatened species, needs to apply on both public as well as private land and across all regulatory decision making spheres.

What about protected fauna?

The divisions of controls relating to protected flora and fauna between the FFG Act and the Wildlife Act, is nonsensical and we are disappointed this has not been incorporated into this review process. We see this is a key limiting factor to successful reform of the FFG Act. We submit that it is essential that further consideration must be given around potential solutions to resolve the division of controls relating to flora and fauna under these two Acts.

Division of controls for protected flora and fauna between the FFG Act and the Wildlife Act is nonsensical and must be addressed in this current review process.

Strategic approaches and improving performance

If the regulatory controls are strengthened and a high standard of protection incorporated into the FFG Act that applies across land tenures and to all decision making spheres, then it might be possible to consider the proposals that relate to strategic approaches and 'earned autonomy approaches'. Until such time, we caution against the proposals.

We caution against the proposals that related to strategy approaches and 'earned automy approaches', until such a time that it is clear that the FFG Act is going to incorporate an enforceable and high standard of protection for biodiversity across all land tenures and that affects all decision making spheres.

Compliance and enforcement

We agree with the proposed improvements to compliance and enforcement of the FFG Act habitat controls including in particular increased penalties as well as a tiered suite of enforcement tools and the proposal to consider the inclusion of a civil enforcement regime.

In addition to this, we recommend the creation of a new independent entity to monitor and enforce the FFG Act, including undertaking prosecutions under the FFG Act. The consultation paper does not consider this and we believe that this misses an opportunity to fundamentally reform the institutional arrangements that exist under the FFG Act.

We agree with the proposed improvements around increased penalties as well as a tiered suite of enforcement tools and the proposal to consider the inclusion of a civil enforcement regime to accompany criminal prosecutions.

We submit that a new independent entity to monitor and enforce the FFG Act is needed to ensure that the FFG Act is properly enforced and that there is independent monitoring of implementation.

Section 4.5: Accountability and transparency

Access to justice is a crucial component of public confidence in environmental decision-making. It is therefore critical decisions made under the FFG Act are accountable. It follows, that we agree with the proposals to improve accountability and transparency under the FFG Act including improved access to information and moves towards expanding standing to enable judicial review of decisions made under the Act and seeking injunctions to prevent/stop a breach of the FFG Act.

As a further accountability mechanism, the FFG Act also should adopt open standing for arms-length merits reviews of key decisions. The consultation paper suggests that an internal merits review process would be satisfactory however we do not agree with this and submit that such a review needs to be undertaken by an independent tribunal (such as VCAT) as opposed to an internal DELWP review process. This would mirror the provisions in NSW, which make available merits review for objectors to high-impact projects.[22] These provisions were supported in the Hawke Report and there have even been recent calls from the Independent Commission Against Corruption in NSW (ICAC) for further expansion of third-party merits review in NSW planning laws.[23]

In addition to what is proposed in the consultation paper, open standing provisions should also be accompanied by costs protections for public interest environmental legal proceedings in accordance with international best practice (see for example the Aarhus Convention[24] and the UK's protective costs rules). Further, the FFG Act should also include provisions for a court or VCAT to grant an injunction or restrain a breach of the Act, or any instrument made under the Act, or anticipated breach, or compel an action where there is a failure to undertake an action required by the FFG Act.

We agree with the proposed improvements around improved access to information and moves towards expanding standing to enable judicial review of decisions made under the Act and seeking injunctions to prevent/stop a breach of the FFG Act.

Open standing provisions should also be accompanied by costs protections for public interest environmental legal proceedings in accordance with international best practice.

As an alternative to the proposed internal merits review of some important decisions made under the FFG Act, we recommend that this needs to be undertaken by an independent tribunal (such as VCAT).

22 Section 98 *Environmental Planning and Assessment Act 1979* (NSW).

23 EDO NSW, 2015 *EPBC Amendments – Protecting the Natural Environment: Improving Access to Justice, Community Engagement and Public Confidence,* pg. 2; See also NSW Independent Commission Against Corruption (2012) Anti-Corruption Safeguards and the NSW Planning System, p. 22.

24 Article 9, Aarhus Convention.