Flora and Fauna Guarantee Act – keeping to the principles

Executive Summary

The *Flora and Fauna Guarantee Act 1988* has failed to meet its objectives in the past due to a lack of resources and responsibility upon public authorities. Increasingly, the duty to uphold biodiversity standards of the Act has been devolved to private land holders, with limited funding by Government.

The good will of private landholders is essential to delivering the "Biodiversity Strategy". The Cain-Kirner Labor Governments actively championed this partnership through the creation of Landcare and its principles of balancing what is good for the farm and good for the environment. Landcare was quickly followed by the establishment of the *Flora and Fauna Guarantee Act*, which was equally binding on the Crown as private landholders.

The *Act* allowed for the declaration of critical habitat on private land but also recognised the need to compensate the landholder for that declaration. In reality, this compensation mechanism has not been used but instead has manifested in the tightening of planning controls on private land. This seeks to impose land management outcomes through cumbersome regulatory barriers, without compensation for foregone land value and labour costs to land holders. This submission raises the following concerns:

- The review of *Flora and Fauna Guarantee Act* is premature to a review of the overarching *Biodiversity Strategy*
- Lack of resources for land management have failed to secure biodiversity outcomes on Crown land
    - Poor management has resulted in pest and weed spread to private property
    - Budget allocations have not been made to purchase land or to undertake detailed mapping to support targeted purchase and conservation.
    - Permit processes are belaboured and complex in overstretched councils
- The review fails to address VEAC recommendations regarding habitat shortage on Crown Land in some areas of the state
- Criteria for *critical habitat* protection should not be broadened to include data deficient species or functional roles for ecological processes (eg. water filtration)
- Third party appeal rights should not be envisaged in relation to private property
- Applicants should be able to have their case reviewed by another decision maker within DELWP.
- Penalties should relate to the nature of the offence within the enabling statute
- The introduction of civil penalties for non-compliance increases the 'stick' without addressing the conflict of landholders in performing the duties of their occupation

1. Transferred burden of land management to the private landholder

Further requirements on private land should not be prioritised over the proper management of biodiversity by the Crown.

The review calls for the Act to "support shared responsibility for achieving biodiversity outcomes by promoting co-ordination between government and other stakeholders in conservation efforts." We are concerned by the thinly veiled creep of responsibility this entails to the private land owner. It is our belief that primary producers increasingly are burdened at the cost of their personal time and labour, to preserve biodiversity existence values held by the wider public.

Many of the issues outlined in the Review stem from failure to resource the statute:

- Budget allocations have not been made to purchase land or to undertake detailed assessment and mapping to support targeted purchase and conservation.
- Departmental resources have been reduced so that clear guidance is not given to private land managers about their responsibilities, nor is assistance wholly available during permitting application processes.
- Permitting processes are belaboured and complex, and can be difficult to progress with local councils who are already over stretched.
- The standard of management has significantly declined for habitats on public land with reduced allocation of resources to crown land managers. Pest plants and animals are impacting on biodiversity and on the productivity of adjoining land.

Overall, the urgency of biodiversity loss has led to the perception that controls on private land is the only way to meet the Government's 'Guarantee.'

2. Third Party Appeal Rights

Third party appeals should not be envisaged in relation to private land holdings.

The VFF opposes the review to allow external third parties to challenge council permit decisions. While this is proposed as an "administrative" security, it increases uncertainty and cost for private landholders whose permitting may be delayed indefinitely by external objectors.

Victoria has a proud history of good governance and administration. If an administrative error was of a magnitude that required intervention by the courts, the existing process of seeking standing is appropriate. The outcome of further enabling third parties to challenge council decisions will undermine faith in administrative processes. It will also impact the efficient functioning of the courts which are already over-congested.

An impingement on property rights should be balanced by a fair system with expedient timeline. Costs should be awarded to applicants when a third party appeal is unfounded, to ensure the judicial system is not used as a delaying mechanism.

The VFF supports the reviews proposed mechanism to allow permit applicants to have their case reviewed by another decision maker within DELWP.

3. Declaring Critical Habitat and Threatened Species

Agricultural livelihoods cannot be the collateral damage of extreme cautionary principles in legislative design.

The VFF is alarmed by the potential expansion of listed protected species under the reforms. Global extinction rate has accelerated in the past century due to climate change, habitat destruction and urbanisation. However, the agriculture sector cannot be solely tasked with the responsibility of environmental rectification for damage largely inflicted beyond the farm gate.

Section 4.11 Direction

The revisions suggest an objective shift from protecting single species that may be irreversibly declining. While we support the shift from a single species to a holistic approach, this support is conditional on it not adding quantities of trigger species under the *Act*.

Section 4.3.2 Listing Threatened Species

The VFF does not support the revision to broaden the criteria for listed species or critical habitat to "include areas important for maintaining ecological processes." This would enable the functional role of habitats (eg. water filtration) to become criteria for protection.

The retained right to declare non-threatened species as protected is particularly alarming for 'data deficient' species. This extreme cautionary principle is likely to increase numbers of species listed, without basis or a defined timeline of when scientific deficiency will be addressed.

Under the streamlined proposition to combine national and state level protected list, the VFF would seek clarity on how species threatened at a *national,* but not *state level*, will be considered in an application.

Section 4.4.1 Habitat Protection

The review seeks to strengthen Interim Conservation Orders on both private and public land when critical habitat/species have been identified. These declarations could create difficulties where removal cannot be avoided without restricting production or safe machinery operation. In light of this, the review should clearly outline a manner of establishing compensation where management actions impact on biosecurity, safety and profitability of farm businesses. This should be fair and proportionate. The assurance of departmental assistance navigating the regulation framework *does not* constitute compensation to the applicant.

Section 4.4.2 Regulation

The statement to implement a risk-based approach in assessing non-compliance is welcome. Where protection status has been granted to non-threatened flora to reduce harvesting, damage incurred during farm operation should not trigger a breach since these activities are not being targeted by the regulation.

There seems to be no commitment to actioning repeated VEAC recommendations regarding habitat shortage on Crown Land in some areas of the state.

4. Penalties for Native Vegetation

Penalties for non-compliance should relate to the nature of the offence and the considerations within the enabling statute.

The VFF reiterates its position decrying the litigiousness of native vegetation removal in our recent submission to the review of the clearing guidelines.

As the penalties apply in the *Flora and Fauna Guarantee Act*, it is concerning that there is a proposal to utilise the *Planning and Environment Act* to implement Native Vegetation controls yet use a differing Act, the FFGA to enforce it.

The *Planning and Environment Act* is Victoria's land use and development legislation, *not* Victoria's land management legislation as it relates to biodiversity. Land management (biodiversity) should only be considered in direct relationship to the trigger and the decision making system needs to balance other issues.

The *Planning and Environment Act* is administered primarily by Councils who act as Planning Authorities or Responsible Authorities. In relation to native vegetation removal permits, this is the role of a 'Responsible Authority'. A Minister or an Agency may apply to be the 'Responsible Authority'. If DELWP wishes to enforce native vegetation controls then they need to apply to become the Responsible Authority for that class of application. It does not set a good precedent for a government to choose different legislation for different aspects of an issue.

The VFF is also concerned by the proposed introduction for civil penalties, which carry a lower burden of proof by the complainant than a criminal offence. The enabling of more flexible penalties measures increases the 'stick' for Act breaches without addressing the conflict between necessary clearing for safety, viable production and aspirations of the landholder for the business.

The main land management statute that binds both public and private landholders is the *Catchment and Land Protection Act*. Mention of this statute was absent in the review which is concerning as this legislation allows a Special Areas Plan to identify the land management issues to be undertaken; the costs and benefits of those actions; and who is responsible for bearing the costs.

Conclusion

The VFF has major concerns that the proposed revisions to the *Flora and Fauna Guarantee Act* do not address the reasons for non-compliance, or the failure to achieve outcomes in the past. These stem chiefly from lack of commitment and funding by Government to its agencies and departments, which has transferred disproportionate responsibility of managing the Act to the private landholder.