

FLORA & FAUNA GUARANTEE ACT 1988 REFORMS

Yarra Ranges Council would like to thank the Victoria Department of Environment, Land, Water and Planning for the opportunity to provide feedback on the proposed changes to the Flora and Fauna Guarantee Act 1988 (The Act).

The following submission outlines the Shire's position with regards to the proposed changes in the following format:

- 1) The proposed changes that we do support in principle
- 2) The proposed changes that we do not support
- 3) The content we believe to be deficient and/or absent

Since the initial implementation of The Act, it has been largely ineffective as a tool for environmental protection and conservation purposes in Victoria. We are remaining hopeful that the current review will lead to the strengthening of the Act's ability to uphold its conceived intent. It is evident that this will be highly dependent upon the review and the improvements that are considered for inclusion.

Aside from the strength of the act, it is imperative that the Act provides clear guidance for interpretation and implementation by all stakeholders. It is equally imperative that the Act aligns with and supports associated legislation, while addressing the ongoing loss of biodiversity across the State.

1) The proposed changes that we do support in principle

Victorian Government's proposed reforms	Section/ Page*	Discussion
<p>It is proposed that The Act could mandate:</p> <ul style="list-style-type: none"> - the inclusion of Statewide targets in the biodiversity plan; - an associated review period; and - a process for target development, including content requirements. 	<p>Sect. 4.3 Pages 37 & 49</p>	<p>This could work quite well, however it should be refined so that The Act provides a more detailed framework which would enable the biodiversity plan to act as an effective biodiversity conservation tool.</p>
<p>It is proposed that, <i>'Protecting, restoring and enhancing biodiversity so native flora and fauna improve in the wild, including genetic and habitat diversity and the ecological processes that support biodiversity'</i>, could become a new goal in the FFG Act as a result of reviewing its current objectives.</p>	<p>Sect. 4.1 Page 37</p>	<p>It is imperative that biodiversity protection, restoration and enhancement are made a key objective, however this goal relates to 'native flora and fauna in the wild'. This needs to be better defined. That is, important species can be found in a large range of locations that may not be considered 'the wild', such as local parks, private land, and so on.</p>
<p>It is proposed that the existing duty on public authorities – to enable a whole-of-government implementation of the Act – be clarified and strengthened.</p>	<p>Sect. 4.2 Page 42</p>	<p>In addition, the duty should require that public authorities act consistently with regards to The Act's provisions, and any regulations and plans that relate to it.</p>
<p>It is proposed that the IUCN criteria (Common Assessment Method) be adopted for listing purposes, for the creation of a single comprehensive list of threatened, species, communities and threatening processes.</p>	<p>Sect. 4.3 Pages 52–53</p>	<p>Applying the IUCN criteria to create a single list is an extremely important step forwards. Currently there are multiple threatened species lists in Victoria and the listing process is not strategic. We would like to suggest that strategic audits be completed every five years, as opposed to ten, in addition to State of Environment reporting.</p>
<p>It is proposed that the regulations incorporate the introduction of new criteria to broaden the concept of critical habitat so as to include areas that are important for ecological processes.</p>	<p>Sect. 4.4 Page 57</p>	<p>While the current FFG Act allows for the protection of critical habitat, this has not happened because of difficulties surrounding its identification (as per the discussion paper notes). For this part of the revised Act to be successful, steps must be taken to ensure that critical habitat can be clearly identified. A task that has been achieved in parts of the United States and Europe. An appropriate organisation should be employed by the State to deal with the identification task e.g. the Scientific Advisory Committee (SAC).</p> <p>The concept of 'critical habitat' should include:</p> <ul style="list-style-type: none"> - habitat needed to ensure the conservation/survival of a species/community, now and in the future; - habitat required for recovery; and - habitat that is expected to be required as a result of climate change.
<p>It is proposed that the Secretary may be required to establish a program that will identify and map proposed critical habitat on both public and private land.</p>	<p>Sect. 4.4 Page 57</p>	<p>We agree that correctly identifying and clearly mapping critical habitat is certainly a positive proposal. An organisation such as the Scientific Advisory Committee (SAC) would be well placed to carry out such a task.</p> <p>Following on from the mapping, there must be a requirement for a decision to be made by the Minister with regards to whether or not to declare the proposed areas as critical habitat, and an obligation to do so under certain circumstances.</p>
<p>It is proposed that existing regulatory controls for critical habitat be modified to require a permit for activities that may damage such habitat.</p>	<p>Sect. 4.4 Page 57</p>	<p>The main tool currently available to protect critical habitat is an Interim Conservation Order (ICO); these have never been applied, probably because of the difficulties previously experienced in identifying critical habitat. Once critical habitats are adequately identified, ICOs may become effective if applied. It may be enough to merely retain and apply ICOs, but improvements may be also necessary. Once this system is refined, the ICOs must prevail over other legislative schemes and Acts, including the Native Vegetation Clearing Regulations.</p>
<p>It is proposed that a new offence be established for damaging the habitat of threatened species without a permit, and higher maximum penalties for offences committed by a corporation.</p>	<p>Sect. 4.4 Page 57</p>	<p>It is noted that the newly proposed offence will complement the pre-existing offence, under the current FFG Act, to take (i.e. kill, injure, disturb or collect) protected flora or fauna without a permit. This appears to be a positive step forwards (as with the higher maximum penalties for offences committed by corporations), however, its needs to be applied broadly with few exemptions (certain industries and private land are often exempt). Some of the State's most important habitats can be found on private land.</p>

<p>It is proposed that the FFG Act may allow for the prosecution of illegal native vegetation removal.</p>	<p>Sect. 4.4 Page 63</p>	<p>Currently illegal native vegetation removal can only be prosecuted under the State’s Native Vegetation Clearing Regulations, unless it involves an EPBC listed species. Such a change would broaden The Act’s scope; however, it could prove ineffective if institutional support is not allocated. An independent regulator should be assigned, and improvements must be made with regards to enforcement, compliance and accountability.</p>
<p>It is proposed that improvements may be made to The Act with regards to compliance and enforcement, which could include:</p> <ul style="list-style-type: none"> - increased penalties; - civil penalties; - a tiered suite of enforcement tools, such as infringement notices, stop work and/or remediation notices; and - enforceable undertakings. 	<p>Section 4.4 pg. 63</p>	<p>The existing penalties within The Act have been largely ineffective, and include reliance upon criminal prosecution, which is not always appropriate and requires a high burden of evidence. As such, it is very promising that The Act’s compliance aspects may be strengthened, though a new independent authority should be developed for monitoring and enforcement purposes.</p>
<p>It is proposed that a tiered suite of enforcement tools be introduced (e.g. infringement notices, stop work notices, remediation notices, and enforceable undertakings), to allow for a flexible and more proportionate response to non-compliance. This could include improving the powers of authorised officers, so as to enable them to:</p> <ul style="list-style-type: none"> • seize plants or animals taken illegally (or other equipment used in the process). • release seized plants or animals to the wild. • require plants or animals to be retained pending further investigation. 	<p>Section 4.4 pg. 63</p>	<p>This appears to be a positive change; but only if adequate resources are allocated to enable the implementation of such enforcement activities. Changes such as these are essential if their implementation successfully supports the improved survival and welfare of plants and animals.</p>
<p>It is proposed that accountability and transparency will be improved under the FFG Act, including</p> <ul style="list-style-type: none"> - third party standing for judicial review relating to decisions made under the Act; - seeking injunctions to prevent/halt a breach of the Act, such as illegal damage to critical habitat; and - requirements to provide information publicly on the implementation of The Act. 	<p>Section 4.5 pg. 65</p>	<p>At present the public information available, regarding implementation of The Act, is scant. Consequently is it currently very difficult for the public to assist with enforcing or preventing breaches of The Act. The proposed changes are very welcome, as they would enable public engagement, and could play a major role in supporting the objectives of The Act. Further to this, standing rights should be extended to include a merits review of important decisions (not merely ‘internal merits’, as proposed), and should be accompanied by costs protection in accordance with international Best Practice.</p>

*This reference refers to the section/page that is being discussed within the following report:
Department of Environment, Land, Water and Planning (2017) Review of the Flora and Fauna Guarantee Act 1988 – Consultation Paper. The State of Victoria.

2) The proposed changes that we do not support

Victorian Government’s proposed reforms	Section/ Page*	Discussion/Concerns
<p>It is proposed that the guarantee be abandoned, as it is too ambitious to commit to ensuring that all species of flora and fauna in Victoria survive and flourish in the wild.</p>	<p>Sect. 4.1 Page 36</p>	<p>Withdrawal of The Act’s guarantee represents a decline in the State’s commitment to biodiversity conservation. It is common for Best Practice objectives to include both visionary and outcomes-based objectives. Furthermore, it is possible to reflect and support changes to conservation approaches required to address climate change, while simultaneously retaining an ambitious outlook in relation to the continued long-term survival of all Victorian native taxa.</p>
<p>It is proposed that the mandatory requirement for action statements, for all listed threatened species, be removed.</p>	<p>Sect. 4.3 Pages 47 & 49</p>	<p>Action Statements are the State’s version of ‘Recovery Plans’ for threatened species. They hold key information with regards to adequate recovery planning for threatened species, and species specific plans often encourage community engagement in local recovery projects which are critical for the survival of those species. At present, Action Statements are the only binding action that the government must take in order to protect listed threatened species. It is crucial that they be retained within the legislative framework.</p>

It is proposed that a list of priority actions be published for each listed threatened species, suggesting that it may be used in place of single-species protection.	Sect. 4.3 Pages 47 & 49	It is of concern that prioritising necessary actions may not be possible when a comprehensive action or recovery plan is not available. Developing priority actions would, for the most part, rely on existing DELWP databases which are not always up to date and does not incorporate all necessary information. Action Statements for individual species, as discussed, are a better tool overall, particularly for encouraging community involvement with regards to local species conservation.
It is proposed that the current requirement for permits, for the destruction of flora in many cases (where required for works such rail construction), be removed.	Sect. 4.4 Pages 58 & 61	While parts of page 61 are ambiguous, it is clear that we do not agree that any regulatory controls for threatened species should be removed. Conversely, protected flora controls should be broadened so that no permit will be granted if a project threatens the conservation of a threatened taxon.

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3) The content we believe to be deficient and/or absent

Council's suggested changes	Section/ Page*	Discussion/Reasoning
It is recommended that the State express incorporation of the precautionary principle into The Act.	Section 4.1	This principle is a key ingredient of modern environmental law. It ensures that insufficient scientific certainty cannot be considered reliable reasoning for postponing appropriate prevention measures for serious or irreversible loss or damage. This is particularly pertinent when considering the effects of climate change, and when regulating activities within critical habitat. Furthermore, it would be beneficial to incorporate the principle of environmental restoration into the reformed FFG Act.
It is recommended that a more comprehensive enabling framework be established for the creation of landscape action plans.	Section 4.3	Such a framework should include an incentives framework and legislative guidance with regards to landscape plan contents. It is imperative that landscape-scale conservation does not come at the expense of individual species protection, but rather supplements it.
It is recommended that the Minister be given the responsibility to make mandatory decisions with respect to designating 'critical habitat' within mapped habitats.	Section 4.4	The ability to clearly identify critical habitat is essential for threatened species survival. In addition to the Minister declaring critical habitat following mapping, The Act should outline the circumstances under which such a declaration should be made. This process should be made consistent with the decision to list a species as threatened under The Act.
It is recommended that amendments are made to ensure that protective controls apply to both public and private land, as well as all industries.	Section 4.4	The current FFG Act has neglected to provide protection to threatened species across vast areas of the State since its inception, as it only applies to public land and include exemptions for certain industries. Given the ongoing decline of the State's biodiversity, and the imminent threat of climate change, no exemptions to conservation should be considered for inclusion in the revised FFG Act.
It is recommended that the division of controls for protected taxa, between the FFG Act and the Wildlife Act, be reviewed.	Section 4.4	Currently the division of controls between the two Acts is incongruous.
It is recommended that a new, independent entity be established to monitor and enforce The Act, and carry out prosecutions.	Section 4.5	The establishment of such an entity would help to ensure that The Act is made meaningful and effective via enforcement and independent monitoring.
It is recommended that the review takes clarity and simplicity into consideration.	ALL	Stakeholders should be able to easily understand what they can and can't do, and where to go for information. The Act's interaction with associated legislation needs to be very clear, so as to avoid any issues that may result from mis-interpretation.

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