

1. Introduction

The Municipal Association of Victoria (MAV) welcomes the opportunity to respond to the Department of Environment, Land, Water and Planning (DELWP) 'Review of the *Flora and Fauna Guarantee Act 1988*' consultation paper.

The MAV is the statutory peak body for local government in Victoria. Formed in 1879, we have a long and proud history of representing and advancing the interests of all Victorian councils.

When introduced, the *Flora and Fauna Guarantee Act* (the Act) represented a major landmark in biodiversity legislation in Victoria and embodied worthy goals. The Act's actual contribution to the protection of Victoria's biodiversity, however, is questionable. Powers contained within the Act, such as critical habitat determinations and interim conservation orders, have largely gone unused. While this could be seen as a failure of the implementation of the Act rather than of the Act itself, it is important that these shortcomings be considered and addressed as part of the review. A truly effective Act should seek through design to ensure that it is implemented in the intended manner.

Best practice approaches to biodiversity have advanced significantly in the three decades since the introduction of the Act. It is widely accepted that consideration of biodiversity needs to occur at a higher level than the individual species. Climate change is better understood and more strongly represented within policy, and the ability of species to adapt to changing conditions must be considered. More comprehensive biodiversity and environmental frameworks now exist both at state and Commonwealth level around Australia, and a new Act should consider how it will interact with these. This review of the Act also provides a unique opportunity to consider best practice internationally and to replicate and embed key learnings in the Victorian legislative and regulatory framework.

The consultation paper sets out many and diverse 'potential improvements' to the Act. While we are generally supportive of the improvements as described, the paper provides little detail regarding the specific language to be included in the Act. We ask that DELWP continue to consult with the MAV, councils and other key stakeholders as the detail is developed and refined.

2. Background

2.1. The role of councils in biodiversity management

Local government is an important and active participant in the management, protection and enhancement of Victoria's biodiversity, including as a land manager and via its roles in:

- strategic and statutory land use planning;
- road (and roadside) management;
- parks and open space management; and
- partnering and supporting local community conservation groups.

Council activities that contribute to the health of Victoria's biodiversity are many and diverse and include weed and pest management; revegetation and renewal of sites; development and implementation of biodiversity strategies; strengthening of local planning schemes; vegetation condition monitoring; provision of private landowner incentive schemes; and community education and assistance.

Councils' capacity to support a healthy and biodiverse natural environment varies from municipality to municipality. Whereas some councils are highly urbanised and have limited land area in which to enhance biodiversity outcomes, several outer metropolitan councils and most rural councils have vast tracts of land to manage and only very limited resources to do so. The State's decision to impose a rate cap on councils has made it more difficult for councils to support initiatives specifically aimed at positive biodiversity outcomes.

2.1.1. Biodiversity on private land

While the current Act establishes controls for what may happen on public land, these controls largely do not apply on private land unless a critical habitat designation or interim conservation order has been issued. The State's reluctance to use the critical habitat and interim conservation order powers means that the Act has been ineffectual in influencing or preventing actions that result in negative biodiversity impacts on privately owned land.

At present, biodiversity impacts on private land are primarily governed by clauses 52.16 and 52.17 of planning schemes under the *Planning and Environment Act 1987* and by the *Wildlife Act 1975*. The *Wildlife Act* applies harsher penalties to prohibited actions if they involve listed species, while clauses 52.16 and 52.17 control the removal of native vegetation.

In reality, councils have become the predominant regulator of biodiversity impacts on private land via its powers and duties under the *Planning and Environment Act*. This leads to a range of issues, including:

- An unrealistic expectation that councils can and should be the primary protectors of biodiversity on private land via the land use planning system. The native vegetation

provisions are complex to administer and often the areas of land with the most valuable biodiversity assets fall under the jurisdiction of the most resource-constrained councils that have limited capacity to undertake complex assessments and to defend decisions.

- While decisions are guided by statewide modelling, implementation at the council level can be inconsistent and therefore impair adherence to a statewide strategy.
- Habitats that are not considered to be native vegetation essentially go unregulated on private land. Some councils use planning overlays to protect certain habitats but this approach is difficult, costly and time-consuming to achieve and is occurring inconsistently across the state.
- Regulation varies depending on the area of native vegetation being cleared on a given property, meaning in locations with small lot sizes significant native vegetation removal may occur with little to no regulation in place.
- There is little scope to include site-based observations of threatened species into the decision making process.
- Penalties for breaches of the native vegetation provisions are grossly inadequate and provide a perverse incentive to landowners to not comply with the regulations.

For these reasons we consider it critical that DELWP take a more prominent role outside of the land use planning framework to regulate impacts to biodiversity, regardless of tenure of land.

3. Response to potential improvements

3.1. Setting the direction

3.1.1. Objectives

As noted in the consultation paper, the inclusion of objectives in an Act is important because they help clarify the scope and aims of the Act and provide some guidance on how the Act should be applied. The MAV supports a revision of the Act's objectives. We consider it essential that the revised objectives align with and complement the content of the yet-to-be-finalised Biodiversity Plan and the native vegetation clearing regulations.

Set out in the table below are the areas identified in the consultation paper as a possible focus for the revised objectives, and the MAV's response:

Proposed focus areas for revised objectives	MAV comments
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.	Supported. We note that the native vegetation clearing regulations currently list "no net loss" of biodiversity as an objective, which seems less ambitious than the 'restore and enhance' objective here. The Act should draw specific attention to the contribution to biodiversity of elements underrepresented in other regulations, such as habitats occurring outside of native vegetation and non-listed species.
Halting the overall decline of threatened species and communities and securing the greatest possible number in the wild in the context of climate change.	Supported. The move to consider potentially vulnerable species at earlier stages is an important one as the current system can result in action being left too late to halt or reverse decline. Climate change represents a critical threat to many species and needs to be central to the Act.
Ensuring the use of native flora and fauna is sustainable.	Supported.
Managing the impacts of threats to biodiversity, including climate change.	Supported.

Proposed focus areas for revised objectives	MAV comments
Promoting a landscape or area-based approach to biodiversity planning and ensuring the delivery of conservation actions maximises benefits to biodiversity.	Supported. Councils welcome the incorporation of multiple approaches rather than the current sole focus on the individual species level. A landscape approach is well suited to acknowledging and protecting the significant cumulative effect that smaller reserves and connecting corridors can have to species viability.
Supporting a collaborative approach to managing biodiversity across stakeholders.	Supported. Managing biodiversity is a shared responsibility and as such genuine collaboration will be critical to our success.
Facilitating the involvement of Traditional Owners, acknowledging their connection to country and unique role in, and knowledge of, biodiversity conservation.	Supported. The objectives of the current Act make no mention of Traditional Owners and we strongly support their inclusion in the policy making process and in the operation and ongoing evaluation of the Act.
Improving the management of biodiversity by developing and sharing knowledge and monitoring biodiversity outcomes to enable adaptive changes to approaches are necessary.	Supported. Councils, conservation groups, academia and community members often have significant knowledge and experience in biodiversity management and this knowledge should be tapped into and shared to improve biodiversity outcomes. The State has an important facilitative role to play in this regard.
The role of the Act could include specifying: <ul style="list-style-type: none"> • a requirement to include the targets in the Biodiversity Plan • a review period and process for developing the targets • the matters that must be included in the targets • reporting against the targets. 	Supported. As noted in our submission to the draft Biodiversity Plan, local government is supportive of the setting of clear and measurable targets to help drive action and investment.

3.1.2. Principles

The consultation paper proposes the inclusion of a set of principles in the Act to help guide decision making and administration of the Act. It is noted that existing discretionary powers such as the power to designate critical habitats or issue interim conservation orders have largely gone unused possibly because of the lack of clarity around how and when these powers should be used. The MAV agrees that well-drafted and clear principles can be an important support to decision-makers and on that basis we support the inclusion of a set of principles within the Act.

Proposed principles (focus areas)	MAV comments
Integrating and balancing environment, social and economic objectives.	Supported. Decision makers will require further guidance in order to balance these often competing objectives.
Informed decision making – to ensure decisions are based on the best available information and scientific uncertainty and risk is properly accounted for.	Supported. There is a pressing need for the State to improve the accuracy of the mapping and the accessibility of the databases that decision makers rely on.
Primacy of prevention – to ensure appropriate weight is placed on preventing harm and avoiding impacts to biodiversity over the minimisation or mitigation of impacts.	Supported. Aligns with `avoid' emphasis of the native vegetation clearing regulations.
Shared responsibility – to provide a platform to use a range of mechanisms and work with a range of stakeholders to take action to prevent harm to, or restore, biodiversity.	Supported in principle.
Intergenerational and intragenerational equity – to ensure decision makers consider how decisions may affect specific parts of the community and future generations	Supported. It is also important to recognise the potential consequences of the failure to make decisions, particularly given the history of inaction under the current Act.

3.2. Coordination and integration across government

Government departments and public authorities have a wide range of responsibilities with regard to biodiversity. In addition to their regulatory roles, public authorities own and manage large areas of land which is often of high biodiversity value.

It is pleasing that the consultation paper notes that there is a clear role for DELWP in leading efforts to achieve the objectives of the Act and that consistent statewide reporting by DELWP will be critical in tracking progress.

It is strongly in the interest of Victorian biodiversity for the Act to clearly set out the responsibilities of public authorities, including government departments. Role clarity is essential in order to ensure accountability under the Act.

Particular thought must be given to instances where responsibilities of public authorities under the Act may conflict with their responsibilities under other legislation. One such example is the *Catchment and Land Protection Act 1994*, which requires action to be taken to remove or restrict the spread of some declared noxious weeds. One such noxious weed is blackberry, which may serve as habitat for some species of small mammals and marsupials listed under the *Flora and Fauna Guarantee Act*. Direction should be given to public authorities on how to resolve these conflicts to avoid them being addressed in an ad hoc manner without strategic basis.

Potential Improvements – Coordination and integration across government

Potential Improvement	MAV Comments
1. Clarify and strengthen the existing duty on public authorities by setting out in the Act what the duty requires.	Supported. The current duty on public authorities under the Act is poorly understood. We support clarification of what the duty entails for local government.
2. Update the definition of a public authority to clarify that it applies to government departments as well as public authorities.	Supported.
3. Enable the preparation of ministerial guidelines.	Supported in principle. Public authorities require further information to clarify what the duty means in terms of their operations. Ministerial guidelines could help provide this clarity. It will be important however that the status of the guidelines is made clear, in terms of whether they bind public authorities to certain actions or approaches. It is also important that guidelines are responsive to advances in scientific understanding and changes in conditions.
4. Maintain the existing ability to enter into voluntary management agreements with public authorities. Clarify and consider expanding the scope and purpose of these agreements.	Supported in principle. There is currently no requirement for DELWP to enter into a management agreement. Due to this, we recommend a process be created by which a public authority can request the creation of a management agreement between DELWP and itself in order to simplify the discharge of its duty under the Act. These agreements should also be open to areas of public land under lease, licence or under management of a committee of management.
5. Enable the preparation of biodiversity standards.	Supported in principle. It's unclear from the consultation paper what the status of the standards would be in terms of public authorities being required to comply with the information provided. The MAV supports improved provision of clear information and guidance to public authorities, however an authority's capacity and capability to act in accordance with the standards will vary across the State and needs to be taken into consideration. Any standards developed would need to be adaptive and responsive to change in order to account for advances in our understanding as well as changing conditions.

Potential Improvements – Coordination and integration across government

Potential Improvement	MAV Comments
<p>6. Investigate providing powers for the Minister to:</p> <p>a. Request that a government department or public authority provides information to her/him as to how a particular listed threatening process or high value asset to biodiversity is being managed.</p> <p>b. Issue a ministerial direction to take action to address a listed threatening process.</p>	<p>Supported in principle. The capacity of public authorities to respond to a Ministerial direction should be considered when determining the content of the direction. Resource-constrained councils in particular may struggle to meet deadlines and provide or fund the on-ground expertise necessary. Clarity is sought on the triggers for a Minister to exercise these proposed powers.</p>
<p>7. Consider strengthening the existing duty on public authorities, for example by requiring <i>consistency</i> with the objectives and principles of the Act.</p>	<p>Supported. One of the chief criticisms of the current Act is that it has not been integrated into wider decision making. Expanding the extent to which biodiversity is considered across government has the potential to greatly increase the effectiveness of the Act. Given the scope of actions across government with the potential to affect biodiversity, compliance with the Act is a key step in achieving objectives.</p>
<p>8. Investigate options to further improve the consideration of biodiversity across government. This could be achieved with a schedule of relevant decisions under other legislation that must have regard to biodiversity, or by amending other legislation to add biodiversity as a consideration in decision making.</p>	<p>Supported. Expanding the extent to which biodiversity is considered across government has the potential to greatly increase the effectiveness of the Act.</p>

3.3. Strategic approach to biodiversity planning and species listing

3.3.1. Biodiversity planning

There is currently a lack of formalised process or defined timelines applied to much of the work which underpins the Act. This has contributed to a limited number of the listed species, communities and threatening processes being the subject of an action statement.

Listed items covered by action statements (As of January 2017)

Category	Listed items	Items covered by action statements	Percentage
Mammals	40	30	75%
Birds	80	42	52%
Reptiles	30	13	43%
Amphibians	12	6	50%
Fish	32	15	47%

Invertebrates	72	28	39%
Plants, Fungi and Lichen	401	152	38%
Communities	40	17	42%
Threatening processes	43	14	33%
TOTAL	750	317	42%

Potential Improvements – Biodiversity Planning

Potential Improvement	MAV comments
1. Require the Biodiversity Plan to specify statewide biodiversity targets. Require a five-yearly evaluation and 10-yearly renewal or re-endorsement of the plan.	Supported. Clearly defined targets and evaluation / review periods are essential to drive action and improve accountability for biodiversity outcomes. In addition to statewide targets, more focused targets should be included as required. Urban, peri urban, coastal and inland areas for example all present very different challenges to enhancing biodiversity.
2. Require publication of a conservation advice for each listed threatened species, community and threatening process within a specified period following listing. A transition process will be needed for items already listed under the Act.	Supported in principle. The introduction of timeframes for the provision of advice is strongly supported. As shown in the table above, the number of items currently the subject of an action statement is less than half those listed under the Act. The lack of information about a listed item is a considerable barrier to appropriate management. It will be essential that DELWP has sufficient resources to meet its obligations under the Act. In order to better facilitate the consideration of conservation advice and priority actions in decision making, the Act should require that spatial data be provided.
3. Require priority actions to be made publicly available for each listed threatened species and community within a specified period following listing. Priority actions would be published following the publication of conservation advices.	Supported. As above, we strongly support the inclusion of time frames for the preparation of conservation advice and priority actions. We support the change in focus from action statements for each individual item to priority actions which cover a range of species, threats or locations.
4. Enable preparation of management advices for specific species or threats where warranted.	Supported. We recognise that some species or threats require individual consideration and support the preparation of management advices for these species or threats.

Potential Improvements – Biodiversity Planning	
Potential Improvement	MAV comments
5. Require a landscape or area-based response to the Biodiversity Plan.	Supported. Multi-stakeholder cooperation and collaboration will be critical to achieving positive biodiversity outcomes. In preparing a landscape or area-based response, we recommend that consideration also be given to non-listed items which may be important to the ecosystems present in an area.
6. Investigate establishing an independent conservation advisory committee or expand the functions of an existing body to provide advice in response to environmental change. Enable the Minister to request advice from this body on how to respond to environmental change or emergency events that significantly affect biodiversity.	Supported in principle. It is our preliminary view that consideration should be given to expanding the role of the existing Scientific Advisory Committee to provide these functions.
7. Investigate establishing criteria to guide when the Minister may seek advice from the independent conservation advisory committee. This could include thresholds, such as an imminent threat to the survival of a species, which would trigger mandatory action from the Minister to seek advice from the committee or take other action.	See comment above. Determining the thresholds that would trigger mandatory action for the Minister will be key and would likely benefit from advice from the Scientific Advisory Committee.

3.3.2. Listing threatened species, communities and threatening processes

A move to a common model for listing of species provides several potential benefits. The IUCN model has a significant history of practical application behind it, would better allow the transfer of knowledge between jurisdictions, and enables more meaningful comparison of results between jurisdictions.

Potential Improvements – Listing threatened species, communities and threatening processes	
Potential Improvement	MAV comments

Potential Improvements – Listing threatened species, communities and threatening processes	
Potential Improvement	MAV comments
1. Adopt the Common Assessment Method. This includes: <ul style="list-style-type: none"> • Using international standards for classifying the conservation status of species (e.g. critically endangered, endangered, etc.) • The capacity to adopt assessments made by other jurisdictions that are relevant to Victoria • Rationalising the listing of threatened species in Victoria by shifting to a comprehensive list under the Act and retiring the advisory lists. 	Supported. Adopting the Common Assessment Method should better enable the Victorian system to measure biodiversity performance against national and international benchmarks. It's important that, where a species in Victoria is in a higher risk category than it is in the national listing, that there is flexibility to allow the Victorian listing to reflect that higher risk level. It is critical that that the data and mapping relied upon to make classification and listing decisions is accurate and regular reviewed.
2. Establish a new requirement for DELWP to ensure the list of threatened species, communities and threatening processes is maintained in a comprehensive state.	Supported.
3. Investigate establishing criteria for defining threatened communities.	Supported.

3.4. Habitat protection and regulation

3.4.1. Habitat protection

Under the current Act, the primary focus is on protecting individual species rather than habitat or threatened communities. The consultation paper signals a welcome broadening of this approach.

A crucial factor in habitat protection remains the tenure of land upon which that habitat occurs. Under the current operation of biodiversity regulations, protection of habitat on private land is left almost solely to native vegetation clearing regulations under the planning system. As noted earlier in this submission, reliance on the planning system is problematic for multiple reasons, including the inadequacy of penalties for breaches of the native vegetation provisions and the absence of any consideration of non-native vegetation habitat. While the proposal for the State to have enforcement powers for native vegetation clearing under the Flora and Fauna Guarantee Act is welcome, it is our strong preference that the weaknesses of the native vegetation regulations be dealt with through amendments to the Planning and Environment Act.

The process for declaring critical habitats must be transparent and it is essential that the power is actually exercised where appropriate. This is particularly important for the protection of listed species whose habitat is not native vegetation. Under the current system the only method of protecting habitat for these species on private land is by introducing bespoke Environmental

Significance Overlays, which is a costly process many councils are not equipped to deal with, and open to local political pressure which may compromise broader biodiversity objectives.

Potential Improvements – Habitat protection	
Potential Improvement	MAV comments
1. Provide criteria to define critical habitat (these would be prescribed in Regulations made under the Act). Consider broadening the concept of critical habitat to include areas important for maintaining ecological processes.	Supported. The power to declare critical habitats has been vastly underused since the introduction of the Act. Consideration should be given not only to the mechanism for identifying critical habitat, but also to how landowners' concerns relating to a declaration might be fairly and adequately responded to.
2. Require the Secretary to establish a program to identify and map proposed critical habitat areas across the state on public and private land.	Supported. This is a key action that should be done as a matter of priority. We would welcome inclusion of a timeframe in which the mapping must occur and also the setting of regular review periods of the mapping.
3. Modify the regulatory control for critical habitat to require a permit for activities that may damage the habitat. Investigate replacing interim conservation orders with alternative compliance mechanisms.	Supported. Any review of interim conservation orders (ICOs) should keep in mind that the lack of critical habitat declarations under the current Act has prevented ICOs from being deployed.
4. Require the Secretary to take all reasonable steps to enter into voluntary management agreements with owners of land containing declared critical habitat.	Supported. In order to assist with accountability and cross-agency cooperation councils should be notified of any critical habitat determinations within their municipality, and should have the option to be involved in preparing management agreements.
5. Provide the ability for the illegal removal of native vegetation to be enforced under the Act.	Supported. A major barrier to the effectiveness of the current native vegetation clearing regulations is that penalties are an insufficient deterrent. Allowing enforcement of native vegetation regulations under the Act may also address the problem of resource constrained councils being unable to pursue enforcement actions under the planning system. We note however that seeking to address the weaknesses of one Act via another Act is not good regulatory practice and is likely to be difficult to communicate to key stakeholders, particularly land owners. Communication by DELWP and resourcing within DELWP will be important.
6. Investigate establishing an offence to damage habitat of threatened species or communities without a permit (that would operate in conjunction with the existing offence relating to take of individual species).	Supported. The current sole focus on individual members of a species is a shortcoming in enforcement of the Act.

Potential Improvements – Habitat protection

Potential Improvement	MAV comments
7. Require the Secretary to publish and periodically update habitat importance maps for rare and threatened species, showing the locations of important habitats for these species. These are proposed to include the most important locations for species that rely on habitats that are not vegetation or do not meet the definition of native vegetation under the planning system.	Supported.

3.4.2. Regulation

There is considerable scope for reforming the biodiversity regulatory framework to improve overall efficiency and ensure that regulatory effort is being allocated appropriately.

Potential Improvements – Regulation

Potential Improvement	MAV comments
1. Retain the ability to declare and maintain a list of flora that is not threatened. Consider specifying categories of declared flora and establishing eligibility criteria for each category.	We recommend that in addition to this, communities may be declared similarly to the way in which threatened communities are listed. Communities as well as individual species may not be threatened, but still critical to driving ecosystems and maintaining biodiversity across an area. These lists would also be well suited to protecting species about which not enough detail has been gathered to determine a conservation status.
2. Amend the regulatory controls for protected flora so that flora subject to commercial harvesting and domestic use is regulated separately to any other categories of declared or threatened flora. Consider enabling some low risk commercial harvesting to operate under an enforceable code of practice.	Supported. The reasons for regulating flora subject to commercial harvest are different to the reasons to regulate other listed and declared species. It follows that the controls applied to them should also be different.
3. Review the current protected flora list and place flora on the list in their relevant new categories.	Supported.
4. Establish decision making criteria to guide the consideration of permit applications.	Supported. Criteria listed within the Act should serve to make decisions which are more consistent and better follow the intent of the Act.

Potential Improvements – Regulation	
Potential Improvement	MAV comments
5. Provide clear guidance for applicants on the information that is required to support a permit application. Consider specifying application criteria in the Act or Regulations.	Making available information on how to prepare an application has a number of benefits. It reduces the workload of applicants and regulators, increases the likelihood of compliance and make for a more transparent process.
6. Introduce a strategic mechanism under the Act that enables the assessment and approval of the impacts and benefits of multiple or on-going activities under a policy or program.	Formation of agreements which cover a range of activities is supported, as these would enable biodiversity to be managed while reducing the burden on both applicant and regulator of dealing with multiple similar permits.
7. Clarify the Governor in Council Order process, including the role of these orders in supporting the proposed strategic mechanism.	Governor in Council Orders are currently scattered throughout the Act. We recommended that either in the Act or supporting material a list is created of the potential powers under a Governor in Council Order, the requirements for using these powers, and the intent of each power to evaluate whether their actual use matches the intended use.
8. Investigate the suitability of using an ‘earned autonomy’ approach to regulating activities under the Act.	We support the idea of ‘earned autonomy’ but transparency and accountability must be emphasised in order to maintain both the perceived and actual integrity of the process. Local government should be consulted in order to better develop what ‘earned autonomy’ may mean to councils and how they should achieve it.

3.4.3. Compliance and enforcement

The current Act provides few tools for compliance and enforcement and authorised officers have limited power to prevent the resumption of illegal activities. Current penalties are not severe enough to act as an effective deterrent.

While considerable thought has been given to enforcement, there is little room in the consultation paper given to compliance. Due to the difficulty in remediating damage which has occurred, compliance should be a priority for the Act. Incentives are mentioned, but there is a lack of detail as to what form these may take beyond a potential ‘earned autonomy’ program. Education is another important aspect of compliance which is missing from the paper, and needs to be addressed as part of the review. Currently there is little community awareness of the existence of the Act, and this presents a major hurdle to compliance.

Potential Improvements – Compliance and enforcement	
Potential Improvement	MAV comments
1. Increase penalties for breaches of the Act to bring them into line with those in similar laws in Victoria and interstate.	Supported.
2. Introduce higher maximum penalties for offences committed by a corporation. The standard approach in Victoria is for maximum penalties for body corporates to be five times higher than for individuals.	Supported.
3. Introduce imprisonment as a penalty for the most serious breaches, consistent with related legislation such as the Wildlife Act.	Supported.
4. Consider introducing a tiered suite of enforcement tools including: <ul style="list-style-type: none"> • Infringement notices • Stop work notices • Remediation notices • Enforceable undertakings. 	Supported. The establishment of an 'enforcement toolbox' would allow regulators to better respond to breaches in a commensurate and efficient manner.
5. Improve the powers of authorised officers to enable them to: <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. 	Supported.
6. Investigate introducing civil penalties for breaches of the Act.	Supported in principle. We question whether this would free resources to pursue more breaches, or whether the burden of proof required in a criminal case has contributed to the failure to penalise suspected breaches in the past.
7. Provide the ability for the illegal removal of native vegetation to be enforced under the Act	Supported in principle. A major barrier to the effectiveness of current regulation for the removal of native vegetation is that penalties under the <i>Planning and Environment Act</i> are an insufficient deterrent. As noted above, it is our strong preference that this weakness be addressed by strengthening the penalties under the <i>Planning and Environment Act</i> . We recommend that this improvement also be accompanied by empowering DELWP staff to enforce these regulations, as councils are often unable to pursue enforcement due to resource constraints.

3.5. Accountability and transparency

The Act currently does not encourage accountability of those operating under the Act. There is a lack of transparency around what actions and decisions have been made, and the reasoning behind those actions and decisions. Review processes both for the Act as a whole as well as individual decisions made under it are, at best, weak.

Potential Improvements – Accountability and transparency	
Potential Improvement	MAV comments
1. Require a five-yearly independent public report on progress in achieving the statewide biodiversity targets.	Supported.
2. Reporting will be supported by a monitoring and evaluation framework under the Biodiversity Plan. This will ensure adaptive changes to conservation approaches (such as changes to priority actions or levels of investment) are implemented where necessary to ensure the targets are achieved.	Supported.
3. Require a 10-yearly review of the effectiveness of the Act.	Supported. There should be a commitment for this review to be an independent review and the resulting report should be released publically.
4. Specify consultation periods for important decisions made under the Act, such as: <ul style="list-style-type: none"> • Listing • Governor in Council orders • Critical habitat declarations. 	Supported. We recommend including the ability to issue interim orders in cases where the required duration of a public consultation period has the potential to cause unreasonable harm to a species.
5. Require key decisions made under the Act to be made publicly available online (subject to privacy considerations), such as: <ul style="list-style-type: none"> • Listing • Permits/licenses/authorisations • Governor in Council orders • Critical habitat declarations • Compliance and enforcement action taken. 	Supported. In addition to privacy considerations, consideration should be given as to whether public availability of a decision may cause unreasonable harm to a threatened or declared species.
6. Establish a mechanism to enable internal merits review of some important decisions made under the Act. This enables a person affected by a decision to have the decision reconsidered and made again by another decision maker within DELWP.	Supported in principle. This offers a method of remedying potentially incorrect decisions at a relatively low cost both to DELWP and the applicant for review. Safeguards will need to be put in place to ensure the internal process has integrity.

Potential Improvements – Accountability and transparency

Potential Improvement	MAV comments
<p>7. Consider expanding standing for the community to:</p> <ul style="list-style-type: none"> • Seek judicial review of decisions made under the Act, such as granting of permits/authorisations. • Seek injunctions in court to prevent/halt a breach of the Act, such as illegal damage to critical habitat. 	<p>Supported. One of the better functioning aspects of the current Act is the listing process, and part of this can be attributed to the community having standing to nominate items. We hope that by expanding the standing of the community in other areas of the Act, these same benefits will be realised. Further, we recommend that the Act incorporate the ability for the community to nominate critical habitats for consideration.</p>

4. Conclusion

The MAV welcomes this review as it is an important and timely opportunity to modernise and simplify the Act to ensure it reflects current best practice in biodiversity protection and management. As the multitude of benefits of healthy biodiversity become better understood and appreciated, it's critical that the overarching legislative and regulatory framework facilitates and enables action that measurably achieves positive results.

The move to consider habitat and communities in addition to individual species is an important one and supported by local government. We also welcome and applaud the introduction of timelines to ensure DELWP takes timely action around the provision of guidance and advice to ensure those performing management actions are well-informed and there is consistency across the state.

One of the key criticisms of the current Act is that it is overly administratively burdensome to implement and as a result many of the required actions have not been taken and many powers have gone unused. It's unclear to the MAV whether the changes mooted in the consultation paper will be any less administratively burdensome. It will be essential that DELWP is adequately resourced in order to meet its obligations under the Act and so that it is also able to be an exemplar of best practice and a facilitator and supporter of other agencies and individuals operating under the Act.

While the MAV supports the intention of clarifying the general duty it is unclear how this will be implemented and monitored, and what it will mean for councils as land managers, providers of community infrastructure and services, and responsible authorities under the Planning and Environment Act.

We call on DELWP to commit to continued engagement and consultation with the MAV, councils and other stakeholders as the detail is developed.