



VICTORIAN
DIVISION

27 March 2017

Review of the FFG Act
Regulatory Strategy and Design
Department of Environment, Land, Water and Planning
ffg-act.review@delwp.vic.gov.au

Dear review team

FLORA AND FAUNA GUARANTEE ACT REVIEW

MCA Victoria welcomes the opportunity to provide comment on the *Review of the Flora and Fauna Guarantee Act 1988 Consultation Paper* (the paper). This submission focuses on two aspects of the paper: the regulatory context and the overlap with the *Environment Protection and Biodiversity Conservation Act 1999*.

MCA Victoria represents the interests of member companies operating, exploring and providing services to the minerals industry within the state. It is part of the Minerals Council of Australia, the peak industry organisation representing Australia's exploration, mining and processing industries.

Biodiversity conservation practices are well established within Victoria's mining industry. Consistent with the MCA's [enduring value principles](#) members seek to contribute to conservation of biodiversity and integrated approaches to land use planning.

This submission should read in conjunction with the MCA Victoria's submission to the [native vegetation permitted clearing regulations](#) review and draft [biodiversity 2036 plan](#).

Review and regulatory context

A complex and duplicative regulatory context

The Victorian minerals industry operates within an extensive and complex regulatory framework administered by various local, state and Commonwealth agencies. This framework includes the *Minerals Resources (Sustainable Development) Act 1990* as well as the *Environment Effects Act 1978*, *Environment Protection Act 1970* and *Flora and Fauna Guarantee 1988*.

As noted in the paper, introduction of new legislation and amendments to existing acts without consideration of the broader Victorian regulatory context has resulted in a cumbersome and duplicative environmental framework. Navigating this web of local, state and Commonwealth policies is a significant challenge for minerals industry proponents.

Regulatory uncertainty and duplication deters minerals investment and the resulting growth and business opportunities. This impact is noted in the 2016 Fraser Institute Survey of Mining Companies (regarded as

the premier survey of mining sentiment in the world), which ranked Victoria 57 out of 104 global destinations for minerals investment. Victoria was the second least attractive destination in Australia.¹

Survey data also identified factors that key areas for investor concern were regulatory uncertainty and inconsistency and uncertainty concerning environmental regulation and protected areas.²

As noted by other stakeholders, reform is required to streamline this web of local, state and Commonwealth regulatory processes. Establishment of a 'one-stop shop' for all environmental approaches is an option supported by various stakeholders, including the minerals industry.

The MCA Victoria's preferred form of one-stop shop differs from that described in the paper and involves a single point agency for coordination of all environmental (and biodiversity) approvals. This could be supported by consolidation of state-based legislation or through improved coordination between various government agencies.

Potential improvements

Objectives

MCA Victoria cautiously supports the objective to 'protect, restore and enhance biodiversity'. This aligns with feedback from other stakeholders about the need to focus on species with a higher chance of survival. The Victorian Environmental Assessment Council (VEAC) made a similar point in 2011, noting the importance of 'capitalising on the best opportunities to improve ecological connectivity' given resources will usually be limited.³

Principles

Consistent, timely, fair and balanced decisions depend on decision-makers having access to clear guidance. Decision-making principles in the Act should emphasise:

- Informed decision-making with decisions made on credible, sound scientific information
- Balancing of environment, social and economic objectives, acknowledging the primacy of social and economic outcomes
- Regulatory efficiency and transparency.

Overlap with Environment Protection and Biodiversity Conservation Act 1999

The paper rightly notes overlap between the Commonwealth EBPC Act and Victoria's Flora and Fauna Guarantee Act. Both acts 'include requirements to consider the impacts of activities on threatened species.'⁴

The paper states that 'there is a strong expectation from the Victorian community that threatened species and communities occurring within the state should be provided with specific protection under Victorian legislation.'⁵ It is unclear why these stakeholders believe there is only one way to achieve the same outcome.

The MCA Victoria agrees with stakeholders that 'consider a state list unnecessary, and that national perspective is most important.' This approach provides a more accurate assessment of species status.

¹ Fraser Institute, *Annual Survey of Mining Companies 2016*, Canada, Figures and Tables.

² Ibid.

³ State of Victoria, [Remnant Native Vegetation Final Report](#), Victorian Environmental Assessment Council, Melbourne, Victoria, 2011.

⁴ State of Victoria, *Flora and Fauna Act Review Consultation Paper*, Department of Environment, Land, Water and Planning, Melbourne, Victoria, 2017.

⁵ Ibid, p. 19.

MCA Victoria supports work by commonwealth, state and territory governments to agree on a common approach to assessing and listing nationally threatened species. The common assessment method provides clarity for industry and reduces administration burden through a streamlined assessment process.⁶

Potential expansion of the Act to include native vegetation

MCA Victoria does not support the use of the Flora and Fauna Act to enforce the illegal removal of native vegetation. Victoria's land use and development legislation is the *Planning and Environment Act 1987*.

Amending one Act to enforce an aspect of another is not good practice. It sets a precedent to further confuse an already complex regulatory system. Furthermore the change is not required as penalties for illegal clearing are already provided under the Planning and Environment Act.

Considering judicial review

The MCA Victoria is highly concerned that a potential improvement relates to 'improving the community's ability to challenge administrative decisions made under the Act and to enforce the Act, such as by expanding standing for community members to seek review by the courts.'

The consideration is discussed in the context of accountability and transparency. Yet no reasonable justification is provided in the paper as to why expansion of third party standing can assist to achieve this. It would be a sad indictment on Victoria's public sector if the only way to ensure accountability and transparency in decision-making was to devolve responsibility to third parties.

There is ample evidence of expansions of third party standing in other states being misused by individuals or organisations seeking to achieve a particular outcome. It has become a common tool for anti-development activists to use expanded third party standing to delay or attempt to derail projects. 'Lawfare' strategies, like that engaged by the anti-coal movement, tie up judicial resources and create uncertainty for private landholders, industries and other organisations operating with respect for due process.⁷

Next steps

As noted previously, the minerals industry operates within a complex and duplicative regulatory framework. The MCA Victoria therefore seeks additional information from the Victorian Government as to how it will ensure reviews of the Flora and Fauna Act and native vegetation permitted clearing regulations result in a streamline, more efficient regulatory system.

More information

The MCA Victoria looks forward to providing further input into the review of the Flora and Fauna Act. Please contact Jillian D'Urso, Policy Research Officer, on 8614 1805 or at jillian.d'urso@minerals.org.au for more information about this submission.

Kind regards



EXECUTIVE DIRECTOR VICTORIAN DIVISION

⁶ State of Victoria, [Review of Flora and Fauna Guarantee Act 1988](#), Department of Environment, Land, Planning and Water, Melbourne, Victoria, 2016, p. 51.

⁷ John Helpburn (Greenpeace), Bob Burton (Coalswarm) and Sam Hardy (Graeme Wood Foundation), *Stopping the Australian Export Coal boom: Funding Proposal for the Australian Anti-coal Movement*, November 2011