

Submission to the Review of the *Flora and Fauna Guarantee Act 1988*

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Executive Summary

1. The Flora and Fauna Guarantee Act 1988 (FFG) was a major advance in management and conservation of Victoria's biodiversity when the FFG was first passed in 1988.
2. Many features of the FFG are commendable and should be maintained.
3. However, the FFG has not led to a turnaround in the survival trajectory of most species of threatened flora and fauna, and has not provided the 'guarantee' of survival embedded in its title.
4. Changes are recommended. Amongst the most critical changes are (1) Legal Standing to oblige compliance with the Act (2) the facility of the FFG to bind the Crown. Other procedural changes are recommended.

Personal Background

Currently, Associate Adjunct Professor with the Centre for Environmental Management, Faculty of Science & Technology, Federation University, Mt Helen, PO Box 663, Ballarat, Victoria, 3350.

Formerly, Principal Scientist, Arthur Rylah Institute, Department of Environment, Land, Water and Planning¹, 123 Brown St., Heidelberg, Victoria, 3084. As a Departmental employee, my areas of interest focused on fire management and biological responses to fire,

¹ reference to DELWP, includes reference to its antecedents DSE, DEPI, CNR, NRE *et al.*

rare plants and their management, environmental weeds. I have an extensive scientific publication record (see the appendix).

I shall address the various issues in turn, starting with the features of the FFG that should be maintained and enhanced.

Features of the FFG that should be maintained

Listing Process – Listing of species, subspecies and other conventional taxa is a feature of the current FFG. This is a common approach in similar legislation throughout the country, at both a Federal level and a state/Territory level. The advantage of listing species, subspecies and the like is that these entities have explicit and relatively ‘tight’ definitions, and the definition is external to the operations of the FFG, and hence largely external to the political process. Listing species, subspecies and the like has proved to be largely uncontroversial and immune to political interference.

The process of listing, whereby comprehensive proposals are drafted and submitted to the Scientific Advisory Committee (SAC) for their consideration and recommendation has proven to be uncontroversial and an effective means of ensuring that science and knowledge drive the listing process. The process is somewhat long-winded but has been effectively implemented and should be maintained.

Not all threatened species are listed. The process of amassing data and knowledge on entities proposed for listing is arduous and has not been greatly assisted by the implementation of the Victorian Biodiversity Atlas (VBA), and the time and resources are beyond the capability of most members of the general public and members of interested organizations (such as the Field Naturalists Club of Victoria and the like).

***Recommendation I** – The Department of Land, Environment, Water and Planning (DELWP, as the responsible administering government department) should fund the preparation of Listing Proposals by relevant experts (whether in or external to DELWP), to ensure that all taxa recognized as threatened have been considered for listing under the FFG.*

The FFG has the capacity to list communities and populations. Some communities have been listed. The facility to list individual populations is valuable in limited, but important,

circumstances². THE SAC has wisely recognized that the EVCs data layer (composed as it is of poorly-defined and poorly-curated entities) is not a suitable basis for listing of communities (*c.f.* the SAC's reliance on conventional taxonomy for listing species and the like).

Categorization of listed entities – There have been numerous proposals, including FFG listing proposals, based on IUCN categories and criteria. The IUCN categorization is useful accessory information, but should not be determinative. The determination of the IUCN categories has proved problematic with many species with distinctive life history strategies. The two most problematic life history strategies are:

- Long-lived species – Most eucalypts and other species with long generation times come out of the IUCN categorization process as threatened in some way, regardless of their abundance and security within well-managed reserves.
- Episodic regenerators – Species which regenerate only after rare and unpredictable episodic events³, are difficult to categorize using the IUCN criteria and are often mis-categorized, and certainly misunderstood.

Informed opinion from experienced field workers and based on reliable science are likely to be better indicators of threats than relying solely on the IUCN categorization.

Scientific Advisory Committee – The SAC is appointed by the Minister and its expert composition is carefully maintained. The selection process (and the selected members) have managed to ensure that the SAC operates independently of the political process and has been most effective at ensuring that listing recommendations are considered solely on their scientific merit. The SAC processes should be maintained and supported. The existing secretariat to the SAC has proved exemplary.

Action Statements – Listing impels the production of 'Action Statements', which define what will/must be done to 'guarantee' survival and health of listed entities. To date, Action Statements have been prepared by officers of DELWP. However, the production rate of Action Statements has not kept pace with the listing of entities, and there is now a substantial

² for example, the population of Koalas *Phascolarctos cinereus* on the south-eastern fall of the Strzeleckis in South Gippsland, as the only population in the state not deriving from re-introductions from the Westernport islands. Further examples can be supplied, if requested.

³ such as Notostracan crustaceans of ephemeral pools and fire-dependant ephemeral plants

overhang of listed entities for which there are no Action Statements. Furthermore, recommended reviews of Action Statements have largely not occurred within the approved period.

***Recommendation II** – The SAC oversee the production of a generic and interim Action Statement, couched in terms appropriate to any and all listed entities. This generic Action Statement (which will bind the Crown) will come into effect if a specific Action Statement is not prepared within, say, three years of a proposal for listing being accepted by the SAC or by the Minister.*

Critical Habitat Determinations – There is facility under the FFG to declare certain limited areas as ‘Critical Habitat’ for a listed entity. This facility is potentially valuable as a ‘last ditch’ (? forlorn hope). To my knowledge, there has only been one Critical Habitat determination and that was immediately overturned by the Minister. Critical Habitat determination is potentially useful in very rare circumstances, where the implementation of the Action Statement has been ignored or has failed, but only as an interim measure to hold action until the Action Statement has been revised and implemented.

***Recommendation III** – The Critical Habitat facility be retained and be strengthened by requiring an ex parte meeting of the SAC (called at the sole discretion of the Chair of the SAC). For this meeting, the SAC will base its considerations substantially on the immediate and likely threats: Critical Habitat to be defined as an interim measure, necessitating immediate revision of the Action Statement. Once Critical Habitat has been determined, the SAC will advise the Minister and publish the SAC’s finding in the Government Gazette.*

Major Revisions of the FFG

The FFG has proven ineffective at ‘guaranteeing’ survival of listed entities. Simple proof is offered by there being no history of removal of listed taxa from the various lists of Rare and Threatened Species as a result of implementation of the Action Statements. The various lists of Rare and Threatened Species are all larger/longer than they were in 1988. It’s a simple, but telling, metric of the failure of the FFG. A couple of major revisions are here recommended.

Legal Standing – There is no explicit legal standing granted under the FFG.

Conventional legal interpretation thus applies in determining whether individuals or organizations can bring an action for compliance with the FFG. In nearly all situations relevant to the FFG, this legal convention excludes all private individuals and societies/corporations from being able to oblige compliance with the FFG. It falls to the Minister to decide whether there is a likely breach of compliance with the FFG, and in most cases that would mean the Minister would be deciding whether to bring an action against him/herself – a legal silliness.

The federal Environment Protection and Biodiversity Conservation Act 1999 (EPBC) explicitly provides standing to oblige compliance with that Act. As a result, the EPBC has proved far more effective at ensuring that proposed works do not threaten the survival of listed entities. For example, when employed by DELWP, I was directed to survey sites for the proposed Alpine Grazing Experiment in 2011/12. Altho this was a state political issue, I was directed to solely consider EPBC-listed entities and I was directed **not** to consider FFG-listed entities. This distinction was presumably due to the facility for external parties to oblige compliance with the EPBC, but not the FFG. The FFG was ineffective.

To avoid vexatious actions, it may be worthwhile to restrict legal standing to incorporated entities or entities with an Australian Business Number or representatives of the universities.

***Recommendation IV** – Explicitly grant legal standing to oblige compliance with the FFG within the (revized) FFG. Legal standing should be available to (a) incorporated entities and (2) holders of ABNs.*

DELWP Compliance – Whilst the FFG has proved very useful to DELWP employees who wish to raise the profile of threatened species and other entities (such as habitats), there has not been deep incorporation of the FFG thruout DELWP. Many parts of DELWP see compliance with the FFG as largely (or even solely) the responsibility of the Threatened Species and Communities sections within DELWP. Policy pronouncements to the contrary have not forced the realization that compliance with the FFG is the responsibility of each and every DELWP employee.

A single example will suffice⁴. *Astelia australiana* (Tall Astelia) is dramatic, tall lily endemic to Victoria (i.e. found nowhere else) in rainforest sites of the Beenak area, and a single population in the Otways. It is listed under the FFG and is rated as vulnerable in

⁴ further examples , from a variety of habitats, can be supplied if requested

Victoria and vulnerable in Australia. Its populations are subject to continuing decline, mainly as a direct result of fires (both wild fires and planned burns). Recent DELWP proposals to burn adjacent to and into the last remaining stand of Tall Astelia in the Yarra River catchment (at Tomahawk Creek, where the plant was formerly locally common) gave scant regard to this highly threatened species, nor to the requirements of the published Action Statement. Submissions by a number of naturalists and others did not remove this planned burning proposal and interested parties who made submissions believed their information, evidence and submissions had little impact on burning plans.

Planned burning across the state can generate similar stories for FFG-listed species likely adversely affected by fires having scant to no impact on the planned burning.

DELWP biologists and planners are either aware of these site-specific occurrences of threatened species, or have access to databases that can be interrogated for threatened species records. Depending on the attitudes of the local fire planners and other regional staff, threatened species occurrences may have a determinative impact on planned burning (rarely) or (more usually) have little impact on planned burning. There is no DELWP planning process that compels giving FFG-listed entities a high and determinative profile when planning burns. There are palliative statements regarding compliance with the FFG, including policy statements, but these have little impact when planning and applying burns.

Listing of inappropriate fire regimes as a Potentially Threatening Process under the FFG has had negligible impact on planned burning by DELWP.

Recommendation V –

- *Explicitly state that the FFG binds the Crown, including prospectively.*
- *Encourage the SAC to invite DELWP experts to contribute to discussions of particular proposals for listing by attending the relevant SAC meetings as an invited contributor.*
- *Empower the SAC secretariat to contact any DELWP section or region requesting whether the requirements of any entity proposed for listing or already listed has been properly considered in land management plans and actions, including in fire plans. If the response is inadequate, then the SAC is to advise the Minister and the Departmental Secretary.*

Appendix

Only publications in the scientific literature are included here. Other publications (e.g. popular articles for external magazines and newspapers, articles for Departmental web pages, brochures and other internal publications) are not listed here.

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