



Review of the Flora and Fauna Guarantee Act 1988

Draft submission

February 2017

**Please note this is a DRAFT submission –
council feedback is welcome and encouraged on and any all content.
Thank you!**

© **Copyright Municipal Association of Victoria, 2017.**

The Municipal Association of Victoria (MAV) is the owner of the copyright in the publication [MAV Draft Submission – FFG Act Review From MAV CEO, Rob Spence: Flora and Fauna Guarantee Act consultation paper – DELWP briefing and draft MAV submission](#).

No part of this publication may be reproduced, stored or transmitted in any form or by any means without the prior permission in writing from the Municipal Association of Victoria.

All requests to reproduce, store or transmit material contained in the publication should be addressed to the MAV on (03) 9667 5555.

The MAV does not guarantee the accuracy of this document's contents if retrieved from sources other than its official websites or directly from a MAV employee.

The MAV can provide this publication in an alternative format upon request, including large print, Braille and audio.

[MAV Draft Submission – FFG Act Review From MAV CEO, Rob Spence: Flora and Fauna Guarantee Act consultation paper – DELWP briefing and draft MAV submission](#) has been prepared by the Municipal Association of Victoria (MAV) for discussion with member councils.

[MAV Draft Submission – FFG Act Review From MAV CEO, Rob Spence: Flora and Fauna Guarantee Act consultation paper – DELWP briefing and draft MAV submission](#)

Table of contents

1. <i>Introduction</i>	5
2. <i>Background</i>	6
2.1. The role of councils in biodiversity management.....	6
2.1.1. Landuse planning and biodiversity	6
3. <i>Response to potential improvements</i>	8
3.1. Setting the direction.....	8
3.1.1. Objectives.....	8
3.1.2. Principles.....	9
3.2. Coordination and integration across government.....	10
3.3. Strategic approach to biodiversity planning and species listing.....	11
3.3.1. Biodiversity Planning	11
3.3.2. Listing threatened species, communities and threatening processes	13
3.4. Habitat protection and regulation.....	14
3.4.1. Habitat protection	14
3.4.2. Regulation	15
3.4.3. Compliance and enforcement	17
3.5. Accountability and transparency.....	18
4. <i>Conclusion</i>	20

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. Landuse planning and biodiversity

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 landuse 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.

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

DRAFT

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 consultation paper as a possible focus for the revised objectives and the MAV's preliminary 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 native vegetation clearing regulations currently lists "no net loss" of biodiversity as an objective, which seems less ambitious than the 'restore and enhance' objective here.
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.
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 shift away from an individual species focus.
Supporting a collaborative approach to managing biodiversity across stakeholders.	Supported. Protecting and 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	Supported. The objectives of the current Act make no mention of Traditional Owners and we strongly

unique role in, and knowledge of, biodiversity conservation.	support their inclusion into 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.
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.
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.

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.

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.
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.

Potential Improvements – Coordination and integration across government	
Potential Improvement	MAV Comments
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.
6. Investigate providing powers for the Minister to: <ul style="list-style-type: none"> 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. b. Issue a ministerial direction to take action to address a listed threatening process. 	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.
7. Consider strengthening the existing duty on public authorities, for example by requiring <i>consistency</i> with the objectives and principles of the Act.	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.
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.	Supported. Expanding the extent to which biodiversity is considered across government has the potential to greatly increase the effectiveness of the Act.

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.
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.
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, 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.
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 shift from this approach.

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.
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.

Potential Improvements – Habitat protection

Potential Improvement	MAV comments
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 we recommend that councils be notified of any critical habitat determinations, regulatory interventions or voluntary management agreements occurring within their municipality
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.
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 focus on individual members of a species is a shortcoming in enforcement of the Act.
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
-----------------------	--------------

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.
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.

Potential Improvements – Regulation

Potential Improvement	MAV comments
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 for 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.

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.

Potential Improvements – Compliance and enforcement	
Potential Improvement	MAV comments
<p>4. Consider introducing a tiered suite of enforcement tools including:</p> <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.
<p>5. Improve the powers of authorised officers 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. 	Supported.
<p>6. Investigate introducing civil penalties for breaches of the Act.</p>	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.
<p>7. Provide the ability for the illegal removal of native vegetation to be enforced under the Act</p>	We strongly support this improvement. 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. 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
<p>1. Require a five-yearly independent public report on progress in achieving the statewide biodiversity targets.</p>	Supported.

Potential Improvements – Accountability and transparency

Potential Improvement	MAV comments
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.
7. Consider expanding standing for the community to: <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. 	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.

4. Conclusion

The MAV welcomes this review as it is an important and timely opportunity to modernize 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 shift in focus from individual species to habitat and communities 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 the MAV, councils and other stakeholders as the detail is developed.

Submission by Nillumbik Shire Council on the Review of the Native Vegetation Clearing Regulations

Overall Comments and Relationship to the Bushfire Management Overlay

Nillumbik Shire Council welcomes the opportunity to represent our community in responding to the Department of Environment, Land, Water, and Planning (DELWP) Review of the Native Vegetation Clearing Regulations. Nillumbik Council believes that protecting the environment is vitally important and indeed many residents live in Nillumbik because of the natural environment that surrounds them.

Our environment needs protection and as a green wedge shire, Council supports initiatives that do so. Protection for the environment must be balanced with the need to protect life from bushfire. The Native Vegetation Clearing Regulations must be considered in conjunction with the Bushfire Management Overlay (BMO). The BMO is being geographically expanded in Nillumbik and when properties have both the BMO and the Native Vegetation Clearing Regulations applied, there will be a number of properties for which permits may not be able to be granted. This includes new development as well as changes to existing buildings and/or land.

The two pieces of legislation can provide conflicting requirements with one regulation requiring vegetation to be removed while the other requires it to stay. The Review does not offer any clear or certain solutions to this problem of implementation for our rural community.

The Assessment Guidelines also place an economic burden on landowners wishing to develop, redevelop or manage vegetation on their land. Landowners are required to engage ecological consultants to assist in the preparation and lodgement of their planning applications without any certainty that they will receive a favourable planning decision at the end of the assessment process. This creates anxiety for landowners with the cost burden of their application and the uncertain planning outcome as well as frustration that they are not empowered to adequately manage the bushfire risk on their land. This social impact is heightened in certain parts of the Nillumbik community who were directly impacted by the 2009 bushfires.

The recommendations of the 2009 Victorian Bushfire Royal Commission gave priority to protecting human life and were designed to reflect the shared responsibility that governments, fire agencies, communities and individuals have in minimising the prospect of a future similar tragedy. The Commission identified that communities and their needs and safety must be at the forefront of government policy. Council does not believe that this has been the case with respect to the review of the Assessment Guidelines and regulations. Council would expect that these safety, economic and social concerns are identified and addressed in preparation of a

Regulatory Impact Statement before the revised Assessment Guidelines are approved in their final form by the Government.

Therefore, the Nillumbik Council urges three courses of action. First, DELWP should consider mechanisms to deal with those residents who purchased property under existing rules who may now be at a significant disadvantage. This could be some form of a grandfather clause or other means of reasonable compensation. It is recognised that those residents who have already submitted a planning application for consideration will not be subject to the new rules, but that exemption omits many owners who may now be significantly disadvantaged into the future.

Second, DELWP should review the implementation of both the Native Vegetation Clearing Regulations and the BMO and consult directly with the community and specifically with the property owners who may be disadvantaged.

Third, although the focus of the legislation is clearly on protecting the environment as it should be, this does not preclude stronger reference to the importance of bushfire protection measures and ultimately to human life in the clauses related to the strategic objectives in the Victorian Planning Provisions (VPP) and in the Assessment Guidelines. Residents of the Shire of Nillumbik have serious concerns over the interaction of the Native Vegetation Clearing Rules and the BMO and will want assurances that their ability to take basic protective action is covered. A detailed understanding of the regulations and knowledge of exemptions go some way to alleviating this concern; however, it is not obvious to the average person upon initial reading and it would help to make that point more clear. This is not intended to detract from the key messages contained within the VPP and Assessment Guidelines regarding the importance of protecting the environment, but rather, to reassure the public that DELWP understands their concerns.

Nillumbik Council believes that a holistic, integrated and simplified approach to these issues is required and encourages DELWP to consider the combined impact of regulations from the perspective of the resident while balancing the need to protect the environment. Our residents are passionate about the environment but deeply concerned about the risk of bushfires. We believe that this could be emphasised more in the VPP, the Assessment Guidelines and other communications.

Other Matters

Further to the above general comments, Nillumbik Council notes a number of changes that will negatively impact our residents.

Assessment pathways

The rules change the assessment pathways criteria and will require a significant amount of paperwork for even the basic pathway. The requirements for the basic pathway application are too burdensome. In theory, even the most minimal clearing

will require a complicated application in addition to current offsetting requirements. In actuality, this is likely to deter residents from doing the right thing and may result in more damage to native vegetation than the intended results of the legislation. Nillumbik Council urges the State to consider a simpler application process for the basic pathway and to re-examine the process for offsetting for the most basic of clearing permits. Local residents would appreciate the opportunity to be engaged in the development of any application process.

Reduction in clearing threshold

The reduction in the clearing threshold from 1ha to 0.5ha for the determination of the assessment pathway will bring many more properties under higher assessment pathways. In conjunction with changes to the assessment pathway noted above and the extension of the BMO, the issue is exacerbated. As above this is likely to deter residents from doing the right thing and may result in more damage to native vegetation than the intended results of the legislation. Consequently, Nillumbik Council urges DELWP to reconsider the change to the threshold thereby leaving it at 1ha unless other changes are made to simplify the process for the basic pathway.

Positive Aspects

There are a number of positive aspects that will assist in protecting the environment while simplifying the process. While submissions have not been asked to provide this information, we believe it is important to highlight the positive aspects and to acknowledge the efforts of DELWP to simplify and to add flexibility.

Differentiation between large and small trees

The existing Assessment Guidelines treat all trees the same regardless of size. All scattered trees were assigned a default extent of 0.071ha. This was often an overstatement of the extent relevant to the specific tree in question. The proposed amendments differentiate between large and small trees and provide a more accurate assessment.

Extent of scattered trees

The existing Assessment Guidelines apply an extent of 0.071 to each scattered tree regardless of overlapping canopy. The proposed amendments allow the extent of two or more overlapping trees that do not qualify as a patch to be determined as the actual extent of the canopy. This is a more accurate reflection of the local circumstances.

Information requirements

Applications in the basic and intermediate categories will not require an accredited native vegetation assessor. While in theory this is a positive outcome, the complicated nature of the information required is likely to mean that the average

person will require assistance through such an assessor. As noted above, a simplified application for the basic pathway would assist.

Flexible arrangements for assessing species impact

DELWP modelled data is used to determine the presence of threatened species habitats. Under the current regulations, there are situations in which the site has been reviewed by an accredited assessor who has demonstrated that the data was incorrect; that is, that the site was not a suitable habitat for that species. Despite the assessment, an offset requirement would still be triggered. The proposed amendments provide some flexibility around this issue based on a qualified assessment and therefore allow for a more accurate assessment of the site.

Retention of exemption to remove Burgan and clarification of technical name

The retention of Schedule 1.0 to Clause 52.17 which lists native vegetation for which residents in the Shire of Nillumbik do not require a permit to remove, destroy or lop is welcomed and is an important reassurance to residents that certain fire prone vegetation or other invasive native vegetation can be removed. Nillumbik Council understands that some technical clarifications to the proper botanical name for Burgan will be made.

Flexibility with offset sites

The proposed amendments will allow applicants to source their offsets under current requirements or through an offset exchange. In addition, applicants will be able to source their offset at a site with a lower strategic biodiversity value (to a limit) if the offset secured includes protection of at least ten per cent more biodiversity units, or at least two large old trees for every large tree removed. This will provide greater flexibility in sourcing offset sites and will result in more offset locations available.

Conclusion

Although DELWP has not requested commentary on the general rules, recent elections in which the voters sent a clear message to Nillumbik Council necessitate the broad submission made here. Nillumbik Council believes that the overall regulatory regime including Clause 12, 52.16, 52.17 and 66.02 (which are the primary clauses in the VPP subject to the proposed amendments), should be comprehensively reviewed to better reflect the needs of our residents while still protecting the environment.

The planning application process for proposals which require assessment against the Assessment Guidelines should not be solely dependent on the expertise of Council's Environmental Planner to explain to permit applicants and other stakeholders in the planning application process the documentation requirements and assessment process. The complexity and technicality of the various regulations do not support the principles of simplicity, transparency and certainty which should underpin the assessment process.

As noted above, Council strongly encourages DELWP to review the proposed changes, directly consult with those residents most impacted, and adopt an integrated approach to all of the regulations.