Land and biodiversity at a time of climate change

Submission in response to the Consultation Paper prepared by the Environment Defenders Office

June 2007

Introduction

The Environment Defenders Office welcomes the commitment to the development of a land and biodiversity white paper and the opportunity to make a submission with respect to the consultation paper released in April 2007.

The EDO is a not for profit community legal centre specialising in environmental law. We are part of a network of EDOs in each State and Territory. Our work includes:

- Providing legal advice and representation to individuals, community groups and conservation organisations with respect environmental law issues. For example, we have provided legal representation or support to a number of individuals and environment groups in a significant number of Victorian Civil and Administrative Tribunal cases dealing with the implementation of the "net gain" policy for native vegetation.
- Providing training and education about environmental law and policy issues. For example over the past 18 months the EDO has provided run over 30 full day workshops attended all around Victoria on the native vegetation law and policy. The workshops have been attended by individuals working from councils, the Department of Sustainability and Environment, Catchment Management Authorities and other statutory authorities, consulting. firms, LandCare groups, Friends groups and community based conservation organisations.
- Pursuing policy and law reform. Examples of recent work of EDO Victoria and the Australian EDO network in this area includes:
    - Detailed submissions with respect to the reform and improvement of Victoria's environmental impact assessment system.
    - Contributing to the development of the yet to be released review of the exemptions to native vegetation clearing controls in Victoria.
    - Working with a range of environment groups on the reform of water resources law in Victoria and, more recently, the implementation of the Commonwealth Government's National Plan for Water Security.

- Ongoing scrutiny of the implementation of the Environment Protection and Biodiversity Conservation Act 1999.
- Preparation of a detailed submission regarding the development of an emissions trading system for Australia including consideration of the role of offsetting within such a system.

Reflecting our interest and expertise, our submission addresses the issue of institutional arrangements for managing land and protecting and restoring aquatic and terrestrial biodiversity.

In our view, suggesting detailed solutions or changes at this stage would pre-empt the process of developing a Green Paper. We focus on identifying those areas where we believe further investigation or review is required in the course of the development of the Green Paper over the course of the next six months.

Climate change and the extinction debt

As the consultation paper notes, there is scientific consensus that climate change will significantly impact our environment. In fact these impacts have already commenced and are well documented. However, while the impact of climate change presents a significant challenge in land management and biodiversity conservation, many of these challenges take the form of exacerbation or worsening of problems already well known.

To put it another way, the issue of unsustainable land use and the perilous state of our biodiversity are not just a result of the new challenges posed by a changing climate but also a legacy of past practices and more recent failures to address this legacy. Measured against their own goals, policy initiatives in the area of land management and biodiversity conservation over the last 20 to 30 years have had either mixed success or have been found wanting.

An example can be found in the case of native grasslands. As noted in the Consultation Paper, native grasslands have declined from covering 15% of the State to being officially endangered. This situation is not only a legacy of the history of agricultural development since European settlement, but also a reflection of continuing loss that has occurred in recent years. This loss has occurred and continues to occur despite Victoria being at the forefront of significant legislative innovations in the past 20 years including:

- the Planning & Environment Act in 1987 which included the objective of protecting natural resources and maintaining ecological processes and genetic diversity;
- the Flora and Fauna Guarantee Act 1988 which promised a guarantee that "all taxa of Victoria's flora and fauna . . . can survive, flourish and retain their potential for evolutionary development in the wild";
- the introduction of native vegetation retention controls in 1989 and, in 2002, the adoption "net gain" and associated policies in *Victoria's Native Vegetation, A Framework for Action.*
- A legislative framework for integrated catchment management since the introduction of the Catchment and Land Protection Act in 1994.

The widespread failure of these legislative initiatives to adequately address this legacy and to turn the situation around would have demanded a Land and Biodiversity White Paper even without the threat of climate change. Addressing the threat now posed by climate change does not diminish the need to the need

to continue to continue to focus on other underlying causes, particularly the "extinction debt" driving continued biodiversity loss.

In some areas the threat of climate change will require the development of novel policies and approaches to both mitigation and adaptation. In many instances, however, the threat of climate change simply increases the priority and heightens the urgency to address problems that are already well known, such as loss of native vegetation extent and condition and the fragmentation of habitat.

Institutional arrangements – a broader and deeper review required

The Consultation Paper identifies "institutional arrangements" as one of five key policy questions:

> *How well are the current institutional arrangements working and how could they be improved to deliver sustainable land, water and biodiversity outcomes?*

We welcome this emphasis on the importance of institutional arrangements. It is disappointing however, that the discussion of this policy question on page 14 of the Consultation Paper seems to assume that issue of institutional arrangements is restricted to a consideration of Catchment Management Authorities and their role in strategic planning and directing Commonwealth and Victorian investment.

A broader and deeper conception of "institutional arrangements" would include not just the composition and functions of entities such as CMAs, but the whole system of rules and policies that are intended to deliver land and biodiversity outcomes or impact on our ability to do so. Binning and Young, for example, describe institutional arrangements as follows:

> *By institutions we mean the ways in which we (humans) organize ourselves. Institutions have a profound impact on the ability of society to meet its objectives, for example wealth maximisation or sustainable natural resource management.*
>
> *Institutions are made up of formal constraints (rules, laws, constitutions), informal constraints (norms of behaviour, conventions and self imposed codes of conduct) and their enforcement characteristics. Institutions thus shape the incentives in human exchange, whether political social or economic.*[1]

The Water White paper which has inspired this White Paper included a thorough review of the institutional arrangements for conservation and management of Victoria's water resources and a detailed program for legislative reform to align the Water Act 1989 with the new policy framework.

The development of the Water White Paper was accompanied by an extensive and detailed review of the suitability of institutional arrangements to deliver water resource management objectives. This review lead to significant reforms in terms of legislative mechanisms (eg the Environmental Water Reserve), organisational structures and

[1] Binning and Young (2000) *Native Vegetation. Institutions Policies and Incentives* CSIRO

responsibilities (allocation of waterway management and Environmental Water Reserve responsibilities to CMAs) and statutory based planning processes (a statutory framework for regional water planning and long term water resource assessments).

The present White Paper should do the same for land and biodiversity and must include an appraisal of the present institutional arrangements in a broad sense and, as was the case with *Our Water, Our Future,* should detail a comprehensive platform for reform and improvement of these arrangements.

The development of the Green Paper should include a thorough and comprehensive review of current institutional arrangements for land management and biodiversity conservation. Particular attention should be paid to identifying the reasons for success or otherwise of existing institutional arrangements.

What should we expect from our institutional arrangements?

We submit effectiveness of existing institutional arrangements, the need for change to those arrangements, and the suitability of any proposed new arrangements should be based the following principles:

- An emphasis on a strategic approach to planning for outcomes at a landscape scale rather than ad hoc decision making on a permit-by-permit or grant-by grant basis. Such a strategic approach must be accompanied by effective mechanisms for the implementation of such plans. The limitations of Victoria's land use planning system are discussed in more detail below.
- The need for long term, measurable targets. Organisational arrangements, decision making processes and policy instruments used to delivery land management and biodiversity conservation policy should be based on clearly documented of long term targets. These long term targets can be adapted as new knowledge comes to hand, as conditions change, or as monitoring against interim targets suggests changes are required. One of the key initiatives of the Water White Paper was the development of a commitment to and a range of mechanisms for the long term planning of water resources.
- Accountability. Plans and policies must be accompanied by the necessary resources and mechanisms to ensure accountability for outcomes. Accountability mechanisms might include regular reporting and auditing of

outcomes, independent scrutiny of the implementation of programs and a greater commitment to monitoring and enforcement.

- A focus on developing institutional arrangements and ecological systems that demonstrate resilience (the ability to deal with variability and shocks) and adaptability (the capacity to develop and enhance resilience).
- An increased emphasis on restoration and enhancement of habitat accompanied by strong emphasis on the need to protect that which remains and to avoid further declines in its condition and extent.
- The availability of a suite of policy instruments which are effective both in terms of dealing with the actual or effective irreversibility of biodiversity losses and land health decline and which are cost effective in the sense of delivering maximum outcomes per unit of expenditure.
- Fairness. This incorporates not only the burden of the cost of public biodiversity and land health goals, but also the development of reasonable expectations of the contribution that can be expected by individual citizens and land holders to the broader public benefit outcomes from biodiversity conservation and land management.
- The ability to deal with "off-reserve" or "beyond reserve" conservation and land management issues, including, where appropriate, the integration of the management of different land tenures including different types of public land and private land.
- Allocation of the necessary resources so that organisations responsible for various functions can fulfil them and so that plans and strategies can be implemented.
- Public participation. Public participation can improve planning and decision making. Victoria has a reasonable record of drawing upon the considerable knowledge and expertise that resides outside of government departments and authorities in processes such as Victorian Environment Assessment Council inquiries or nomination of threatened species under the Flora and Fauna Guarantee Act 1988. Apart from fostering this contribution, participation in planning and decision making reflects the public interest nature of land management and biodiversity conservation and is consistent with the legal recognition of the right to "take part in public affairs" under Victoria's Charter of Human Rights and Responsibilities.

Getting beyond plans and strategies - the need for accountability for implementation and outcomes

When it comes to biodiversity policy we are strategy rich but outcome poor. Increased emphasis on ecologically sustainable development in the last 10 to 20 years has seen a plethora of national and Victorian plans and strategies, a review of which demonstrates a tendency to identify the similar priorities and actions again and again. Those that deal directly with biodiversity and land management include:

- Intergovernmental Agreement on the Environment (IGAE) (1992)
- The National Strategy for Ecologically Sustainable Development (1992)
- The National Strategy for the Conservation of Australia's Biological Diversity (1996)
- The National Objectives and Targets for Biodiversity Conservation 2001-2005
- National Biodiversity and Climate Change Action Plan 2004 – 2007
- National Framework for the Management and Monitoring of Australia's Native Vegetation (2001)
- National Weeds Strategy (1997, 2006)
- Victoria's Biodiversity Strategy (1997)
- Victoria's Native Vegetation Management: A Framework for Action (2002)
- Victorian Greenhouse Strategy (2002)
- Victoria's Environmental Sustainability Framework: Our Environment, Our Future (2005)

In the main, these and other plans and strategies such as Regional Catchment Strategies and Native Vegetation Plans developed by CMAs are comprehensive, well thought out plans and strategies which if thoroughly implemented would have had a significant impact on the Victorian landscape. However the repeated identification of similar priorities and the specification of similar actions demonstrates a tendency for incomplete implementation and a lack of accountability for actions identified in these strategies.

The impacts of climate change on biodiversity, for instance, have been the subject of policies and strategies for many years and some of the important strategies and actions that have been identified are listed in the table below. While not wanting to diminish the importance of such strategies and policies and the current White Paper initiative, it is important that the current process should be informed by an thorough appraisal of why these strategies have not translated into outcomes.

Year	Strategy / Initiative	What happened?
1989, 1991	Introduction of Native Vegetation Retention controls. Panel Investigation endorses need to halt native vegetation loss for a number or reasons, including climate change.	Despite various iterations of policy objective (halting vegetation loss, no net loss, net gain) we still seem to be going backwards.
1988, 1992	Flora and Fauna Guarantee Act introduced in 1988, draft Flora and Fauna Guarantee Strategy in 1992 identifies climate change as a key threatening process for Victorian flora and fauna. "Action" identified need to "Investigate priorities for the management of species and ecological communities which are unable to respond sufficiently to climate change". Also identifies the need to define biolinks at a state wide level.	Draft strategy abandoned and replaced by the Victorian Biodiversity Strategy.
1996	The National Strategy for Conservation of Australia's Biological Diversity. Includes the objective "Plan to minimise the potential impacts of human-induced climate change on biological diversity."	
2002	Victorian Greenhouse Strategy. Strategies include: • Enhancing corridors linking remnant vegetation as identified through a bioregional planning process; and • Preparing a FFG Act Action Statement on management actions to reduce threats to Victoria's flora and fauna from climate change	Successful "Carbon-Tender" program, however contribution to corridors and links unclear. No Action Statement.

2004	National Biodiversity and Climate Change Action Plan. 2004-2007 Victoria "led the development"[1] of this comprehensive three year plan in which includes actions such as: • Identify and implement opportunities to re-establish native vegetation and enhance habitat for vulnerable species on private land through revegetation, vegetation management and land use change programs (5.1.4, to completed by 2007) • Review new land-use and reserve planning policies, strategies, programs and planning instruments to take into account current and future impacts of climate change on biodiversity and make provision for adaptation to occur (7.2.1, to be completed by 2006) • Include in recovery plans for species and ecological communities threatened by climate change: - an assessment of adaptation requirements - a list of priority actions appropriate to circumstances which may include ex situ conservation, vegetation linkages, reservation, and to reduce the threat of fire and invasive species management (7.3.2, to be completed by 2007)	? ? Limited progress.[2] Climate change listed as a threatening process under the EPBC Act, still not listed under the Flora and Fauna Guarantee Act.
2006	Sustainability Action Statement 2006 Announces Biodiversity and Land White Paper to include: • "renewing the Victorian Biodiversity Strategy and regional catchment strategies to take account of current priorities such as climate change…" • "exploring use of biolink zones to assist biodiversity's adaptation to climate change and broad-scale land scape change"	

[1] See Victorian Greenhouse Strategy Update (2005) at 27.
[2] See for example Westoby and Burgmann (2006) Climate change as a threatening process. *Austral Ecology* 31, 549-550.

There is a pressing need to ensure that the Biodiversity Strategy takes account of "current priorities" such as climate change, and "exploring the use of biolink zones to assist biodiversity's adaptation to climate change" is a worthwhile initiative. However these are not new ideas and strategies. Making sure that they are translated into outcomes must include more emphasis upon accountability for implementing actions already committed to or that are identified as a result of this White Paper proc

Apart from the obvious point that proper funding is required to implement these plans and strategies, some mechanisms for better accountability that should be considered include:

- Clearer definitions of the roles and responsibilities between decision-makers, stakeholders, and government and non-government organisations involved in the delivery of biodiversity and land management programs.
- More emphasis on building public reporting and auditing requirements into legislative frameworks and programs.
- Enhancing public participation in the monitoring and where necessary enforcement of the implementation of plans and the exercise of responsibilities. This should include review and appeal rights along the lines of those available under the Environment Protection and Biodiversity Conservation Act and under NSW environmental legislation. Standing provisions are discussed further below.
- Independent auditing and oversight of the implementation of strategies, plans and programs and of the effectiveness of legislative frameworks.
- More effective monitoring.
- Greater emphasis on enforcement, particularly of native vegetation retention controls and weed management responsibilities.

The need for independent oversight of implementation and effectiveness of policies and programs

There is a need for independent oversight of the implementation and effectiveness of land management and biodiversity conservation policy.

The need for these functions has been recognised under different legislative frameworks and various bodies or organisations exercise this function at the

moment or at least have the capacity to do so. These include the Victorian Catchment Management Council under the Catchment and Land Protection Act 1994, and the Conservation Advisory Committee under the Conservation Forests and Lands Act 1987. The potential role of both of these is recognised under the Flora and Fauna Guarantee Act 1988, which also establishes the Scientific Advisory Committee which can also act as a source of advice and technical expertise. The White Paper should include a review of the effectiveness and responsibilities of these bodies.

More recently, the Sustainability Commissioner established under the Sustainability Commission Act 2005 has been given responsibility with respect to sustainability reporting and other matters referred by the Minister. A much more substantial role was initially promised:

> *To assist in delivering an accountable and transparent environmental management regime for Victorians, the Government will legislate to establish a Commissioner for Ecologically Sustainable Development, who will be responsible for tabling the State of the Environment Report in Parliament. The Commissioner will also audit compliance with environmental legislation, including the Flora and Fauna Guarantee Act 1988 and native vegetation retention controls, and provide an Ombudsman type role for considering public complaints.*[2]

In our submission, there is a need for these audit and ombudsman functions and it is within the ambit of the present process to consider this option. The White Paper should give consideration to the establishment of a single overarching body with sufficient independence from implementation agencies, adequate resources, and statutory powers and technical expertise to oversee the implementation and effectiveness of biodiversity and land management policies and programs.

[2] Government response to the Public Accounts and Estimates Committee Thirty-First report to Parliament, *Interim Report of the Inquiry into Environmental Accounting and Reporting,* p.2.

Review and improve the regulatory framework for biodiversity and land management in Victoria

An effective and up to date regulatory framework is critical to biodiversity conservation and land management. Amongst other things, our regulatory framework:

- Provides a set of overall objectives and principles for land management and biodiversity conservation;
- Creates rights and responsibilities with respect to private land;
- Establishes a system of public land reservation and management;
- Determines responsibilities of different levels of government, agencies and authorities for various land and biodiversity related outcomes;
- Provides a framework for strategic planning functions at the local government, catchment and state wide scale;
- Provides for decision making processes and the assessment of impacts with respect to development proposals;
- Creates a system of rights and responsibilities for specific issues including the exploitation of natural resources and the management of pest and plants and animals;
- Provides for various tools and instruments necessary to achieving land management and biodiversity objectives; and
- Provides mechanisms for monitoring and enforcement and accountability.

Recognition of the limitations and weaknesses of "command and control" approaches to land management and biodiversity conservation have lead to increasing enthusiasm for other policy instruments, particularly market based mechanisms. However, even with the enthusiasm for alternative policy mechanisms, attention to the regulatory framework is still important because:

a. Direct regulation is widely recognised as continuing to have an important role to play as part of a mix of policy instruments. For example, direct regulation may be the most appropriate tool in many circumstances, for example in the context of the threat irreversible biodiversity loss.

b. Rights and responsibilities set out in the legislative framework effectively form the basis for a "duty of care" and the baseline for the purchase of services through incentive or market based schemes.

c. Market and incentive based approaches should still be based on a firm legislative foundation that provides the necessary certainty and security for the operation of such policy instruments, transparency and accountability for their operation and achievement of objectives.

At present, there is a diverse array of legislation in Victoria that relates to the protection of land and biological diversity. Victorian Acts of Parliament relevant to land and biodiversity include:

- Flora and Fauna Guarantee Act 1988
- Wildlife Act 1975
- Fisheries Act 1995
- National Parks Act 1975
- Forests Act 1958 and other forestry legislation
- Crown Land Reserve Act 1978
- Planning and Environment Act 1987
- Water Act 1989
- Heritage Rivers Act 1992
- Coastal Management Act 1995
- Catchment and Land Protection Act 1994
- Environment Protection Act 1978
- Conservation, Forests and Lands Act 1987.

Specific problems with the legislative framework that we recommend should be addressed as part of this White Paper process include:

- The lack of consistent, clear and overarching objectives to inform the administration of biodiversity and land management legislation in Victoria.
- A clear statement as to the principles to be applied in the administration of land and biodiversity legislation.
- Overlap or gaps between different legislative regimes.
- Areas where integration and coordination between different legislative regimes is lacking.
- A general lack of accountability mechanisms, particularly the absence standing provisions that allow for appeals or review of administrative decision making.

Objectives and principles

Objectives and principles inform the administration of legislative schemes. The objectives and principles in Victorian biodiversity and land management legislation reflect the thinking at the time of their introduction. While Victoria could justifiably claim to be leaders in the field at the time of the introduction of legislation such as the Planning and Environment Act or the Flora and Fauna Guarantee Act, the failure to review and update these legislative frameworks has meant that they have become dated.

These objectives and principles need to be reviewed to bring consistency with other jurisdictions and the national and international policy framework. For example, key Victorian legislation such as the Conservation Forests and Lands Act, the Planning and Environment Act and the Catchment and Land Management Act do not include well established incorporate principles of ecologically sustainable development.

In contrast legislation that has been introduced more recently (such as the Sustainable Forests (Timber) Act 2004 and the Sustainability Victoria Act 2005) or that has been subject to updating (eg the Environment Protection Act 1970) contains objectives that are consistent with the international and national emphasis on ESD.

ESD principles themselves may need to be modified or extended, particularly to ensure that objectives are appropriate to the threat posed by climate change.

These objectives and principles should include:

- A recognition of the need not only for protection and also restoration and enhancement;
- The need for adaptation and the development of resilience particularly in the face of climate change;
- Value of biodiversity from an ecosystem services perspective and from a non-utilitarian perspective;
- Recognition of the public interest in and shared responsibility for land health and biodiversity.
- Decision making should be based on best available science
- The precautionary principle and the irreversibility of biodiversity loss.
- The public interest in land management and biodiversity conservation and importance of community participation in decision making.

- The importance of transparency and accountability.

Overlaps and gaps between legislative regimes

In some areas the legislative framework is unnecessarily complex and piecemeal, which leads to inconsistencies in the implementation of policies, strategies and management of biodiversity. For example, while offences relating to protected flora are covered under the Flora and Fauna Guarantee Act, offences relating to protected fauna are contained in the Wildlife Act. There are many other examples of unnecessary complexities that can make it difficult to determine responsibility for particular functions or accountability for different plans and objectives. The conservation and management of freshwater aquatic ecosystems for example, might require consideration a diverse range of legislative schemes including the Flora and Fauna Guarantee Act 1988, the Water Act 1989, the Fisheries Act 1995, the Environment Protection Act 1970. Even with this range of legislation gaps in coverage arise such as the absence of any protection under Victorian legislation for wetlands.

Lack of integration and coordination between different legislative regimes

A related point is the lack of integration between different legislative regimes. This is particularly an issue, for example, with the lack of coordination between the strategic planning functions of CMAs under the Catchment and Land Protection Act 1994 and those of municipal authorities under the Planning & Environment Act 1987. This issue is discussed further below.

Accountability mechanisms including public standing provisions

The need for accountability has been discussed above. In the context of legislative frameworks, Victoria lags behind other jurisdictions in failing to provide for public standing to review and challenge administrative decision making and to secure compliance with legislation.

Individuals and organisations can enforce breaches of the Environment Protection and Biodiversity Conservation Act 1999 by applying for an injunction under section 475. This section extends the definition of an 'interested person' to include individuals engaged in protection or conservation, or research into, the environment,

providing they have been engaged in such work for a period of two years prior to the action.

Standing provisions also apply under environmental legislation in Queensland and New South Wales. Experience in these States and under the EPBC Act has not demonstrated any tendency for abuse of these provisions, for example by organisations or individuals bringing trivial or nuisance applications. On the contrary, experience has demonstrated the importance of these extended standing and enforcement provisions in increasing accountability for decision-making which contributes to public confidence in the commitment of governments and agencies in maintaining and conserving biodiversity.

Land use planning under the Planning & Environment Act 1987

The introduction of the Planning and Environment Act 1987 was a significant step in environment protection and marked a major shift away from the traditional view of land use planning as development facilitation towards realising its potential to achieve conservation objectives. However, these early initiatives were diluted with the introduction of the Victoria Planning Provisions in 1997. The introduction of the VPPS has emphasised development facilitation, not conservation, resulting in de-regulation and less restrictions on land use planning including the capacity of the planning system to deliver environmental outcomes.[3]

There are significant limitations in the biodiversity planning tools that are available to Planning Authorities, particularly the lack of any planning tool that can be used to actually protect areas of vegetation or habitat identified as of strategic significance rather than simply impose a permit requirement. New tools such as Precinct Plans have some potential to fill this gap, however these are optional and no great enthusiasm has been demonstrated for their use since their introduction.

These problems are compounded by a general reluctance to enforce planning scheme conditions and permit requirements and a lack of resources and expertise in many councils to undertake the environmental planning functions available to them. Similarly there are significant variations between Planning Schemes in the extent and thoroughness of the utilisation of planning tools that are available such Environmental Significance Overlays and Vegetation Protection Overlays.

There is also a lack of coordination and linkage between the strategic planning functions of Catchment Management Authorities and land use and development planning by Municipal Authorities under the Planning and Environment Act 1987. The failure to translate priorities and actions identified at a catchment scale to local planning scheme policy and planning controls has been identified in several studies.[4]

The role of Local Government and particularly the interaction or lack of it between their planning functions under the Planning & Environment Act and the functions and responsibilities of CMAs need to be reviewed and improved.

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[3] *Ibid.,* p.1.

[4] See for example Alexandra and Associates (2002) *Landscape Change in the Goulburn Broken Catchment* and a report prepared as part of the Drivers of land use change project, Department of Sustainability and Environment (2004) *Land Use Policy.*

Possibilities that could be considered include reallocation of some responsibilities under the Planning & Environment Act to CMAs, better resourcing of local government, particularly smaller and less well resourced rural shires, and building existing initiatives such as the Municipal Association of Victoria's project *Integrating Local Land Use Planning and Integrated Catchment Planning.*

However it also needs to be recognised that these solutions may not be suitable to the task of the large scale biolink and landscape restoration planning that might be required in the face of climate change. The White Paper should include not only a review of existing institutional arrangements for linking catchment level natural resource planning with planning for land use and development but an exploration of other options for the development and implementation of plans at a larger scale.

The Flora and Fauna Guarantee Act 1988

At the time of its introduction, Victoria could justifiably claim the Flora and Fauna Guarantee Act to be a model for other jurisdictions. However the approach to implementation of the Act and the passage of time have resulted in a legislative regime inadequate to the task of providing a framework for biodiversity conservation in Victoria.

Problems with the Act include:

- Lack of political will to implement the Act.
- Lack of funding and resources for implementation.
- Lack of transparency and accountability for decisions made under the Act.
- A tendency to rely on less specific and effective mechanisms under other legislative frameworks in preference to those available under the Act (eg planning controls over the instruments provided for by the Flora and Fauna Guarantee Act).

The Act itself contains insufficient detail as to important details of implementation. For example:

- It lacks clear timeframes for making decisions and taking actions to implement the Act (eg. no timeframe for Minister to make decision based on the recommendation from Scientific Advisory Committee, no time frame for the preparation of Action Statements once listing occurs)
- There have been significant delays in preparing FFG Strategy and Action Statements for listed species, communities and processes take a long time to prepare if they are prepared at all.
- There is no provision for review of the Minister's listing decision and the Minister is not obliged to publish reasons for the decision.
- The important powers under the Act have not been utilised. For example only one determination of Critical Habitat has been made in the almost twenty years since the Act commenced and the facility to make interim conservation orders has never been utilised.
- Third parties are unable to bring action in relation to breaches of the offence provisions.

Other elements of the Act are simply out of date and need to be reviewed and modernized in light of developments since 1988. Two notable examples include:

- Listing categories. At present, the Act only provides for a generic "threatened" listing category for taxa and communities. Since its

introduction in 1988 IUCN categories criteria for listing have been developed and refined. These criteria form the basis for listing under the Environment Protection and Biodiversity Conservation Act 1999 and other biodiversity legislation in Australia and internationally. Non-statutory advisory lists published by DSE in Victoria are also based on these categories or at least adopt the same terminology. The framework in the Act itself and the listing criteria in the regulations need to be updated to ensure consistency.

- A significant limitation on the use of the critical habitat and interim conservation order provisions in the Act is the requirement under section 43 to pay compensation "for the financial loss suffered as a natural direct and reasonable consequence of the making of an interim conservation order". While this provision is not a complete explanation for why there has been only one critical habitat determinations and no interim conservation orders made in the almost 20 years of the Act's history, it undoubtedly has a significant chilling effect which contributes to the general lack of political will to implement the Act.

  The compensation for lost expectations approach embodied in section 43 needs to be reviewed in light of developments since its introduction. Even if some form of compensation can be justified, it should take account of the developing concept of a "duty of care" or stewardship obligations that can reasonably be expected of all land owners. Rather than a backwards looking focus on compensation for lost expectations, the basis for "compensation" should be forward looking and framed in terms of reasonable payment for the provision of "ecosystem" services that go beyond that which can be expected under the duty of care.

  A possible model for a revised approach can be found in recommendations by the Productivity Commission in the case of the Heritage Buildings. Recognizing the limitations of a scheme based upon paying owners of heritage buildings for preserving and maintenance of heritage buildings, the Commission has suggested an approach that restricts an entitlement to compensation to those who are able to establish exceptional or unreasonable costs as a result of having to comply with regulatory

restrictions.[5] ABARE has suggested that this approach may be applicable in the natural resource management context.[6]

[5] Productivity Commission (2006) *Conservation of Australia's Historic Heritage Places,* Report No 37, Canberra.
[6] Australian Bureau of Agricultural and Resource Economics. *Native Vegetation. Public Conservation on Private Land.* ABARE research report 06.13.

Native vegetation regulation

The protection and enhancement of native vegetation is important to both mitigating and also adaptating to climate change. Native vegetation contributes to multiplicity of objectives central to the White Paper including biodiversity conservation, carbon sequestration, water quality management and other ecosystem services. It is important that the development of the Green Paper be informed by a thorough review of the success of the implementation of the *Victoria's Native Vegetation, A Framework for Action.*

The *Framework* and associated initiatives have led to some significant advances including:

- The development of management and assessment tools in the form of reasonably comprehensive system of bioregional classification and EVCs and the habitat hectares methodology.
- Recognition of the importance of not just vegetation extent but also vegetation condition.
- A framework for assessing conservation significance and determining regulatory responses on the basis of this assessment.
- A system of offsetting which, despite some very significant limitations, does have some potential to act as a disincentive to clearing in the first instance and can assist in extracting some mitigation should clearing be permitted.

There remain, however, significant deficiencies in the implementation of native vegetation regulation in Victoria that undermine the "net gain" objective or even our ability to "hold the line". Key issues include:

- The lack of monitoring and enforcement.
- The uncertainties generated as a result of the implementation of the *Framework* as one policy amongst many under the Victoria Planning Provisions. It is notable that in almost every instance that the preservation of very high conservation significance vegetation has been considered at the Victorian Civil and Administrative Tribunal, the Tribunal has either granted a permit to clear the vegetation or indicated that it would be prepared to do so, principally because of the need to "balance" the framework against other competing planning policy objectives. The general failure to translate the strong policy outcomes promised by the *Framework* into the regulatory outcomes seriously undermines its objectives.

- A continuing lack of emphasis on the priority that the *Framework* gives to avoiding the clearing of native vegetation.
- The lack of capacity and political will on the part of some Council's in implementing the Framework.
- A series of exemptions which in the main have not been revised since they were initially introduced in the early 1990s. These exemptions were reviewed by an Advisory Committee which delivered a report to the Minister 18 months ago. Despite the considerable amount of work involved in this review, the Advisory Committee's report has not been released and the considerable range of issues identified by the Committee remain unaddressed.
- The lack of effective tools for a more strategic approach to native vegetation regulation and the lack of integration of *Framework* policy objectives at the crucial strategic planning stage. Precinct planning may be able to make some contribution in this regard, however it is an optional tool for which little if any enthusiasm has been demonstrated to date. Such a tool is no substitute for the more comprehensive regional or state wide approach required.
- The lack of clarity about the role of Bush Broker, third party offset providers and payments in lieu of actual offset provision. This lack of clarity and consequent lack of transparency is compounded by the absence of a legislative framework such as
  that which covers the BioBanking scheme in NSW.
- The development of guidelines for assessing gains from management activities and in the form of security gains without a review of the appropriateness or otherwise of the existing regulatory baseline. For example, preservation of standing dead vegetation or weed management activities can count as a gain. The system takes current legal exemptions and obligations as a given. It has not been informed by a review of the appropriateness of the current regulatory exemption for dead vegetation or the inclusion or exclusion of certain weeds from the legal responsibilities contained in the Catchment and Land Protection Act.

Review of the effectiveness of the *Framework* is made difficult by the lack of monitoring of its implementation. Despite considerable time and expenditure apparently being devoted to developing a permit tracking system, this appears not to have been implemented. Similarly, increasing the extent and quality of native vegetation was a key policy commitment in *Growing Victoria Together* under the headline "Protecting the environment for future generations". It is now

six years since this commitment was made however the 2006-2007 progress report for the implementation of *Growing Victoria Together* makes it clear that there is still insufficient data to assess whether it is being met.

Traditional owners, biodiversity conservation and land management – justice and human rights

There are complex cultural differences between Indigenous and non-Indigenous approaches to the notion of the 'environment' as a whole, its protection and management that need to be considered. To date, Indigenous capacity for participation in biodiversity conservation, land and heritage management has not been well recognised, and has been frequently symbolic rather than substantive.

Apart from the moral imperative to address this situation, the legal recognition of the cultural rights of aboriginal people under the Charter of Human Rights and Responsibilities means that the White Paper must include thorough consideration of these issues.

Governance models for implementation of Indigenous involvement in land and biodiversity need to be explored to expand participation from mere consultation to direct decision-making. Well-known models at the federal level include jointly managed national parks such as Kakadu, and Indigenous Protected Areas.

There are also several international legal developments relating to Indigenous involvement in biodiversity conservation, including the World Heritage Convention, the Conservation on Biological Diversity and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The last of these specifically recognises traditional knowledge as a source of intangible and material wealth, and its contribution to sustainable development. These instruments provide a solid foundation on which to build both nationally, and in Victoria.

Lastly, the Indigenous approaches to conservation should not be seen as competing with Western scientific models. Rather than adopting a singular technical and legislative approach, Indigenous or non-indigenous, it should be recognised that both have much to contribute to effective biodiversity conservation. In accordance with international trends, and some recent legislative and policy developments in Australia, Indigenous participation must now be approached as an essential consideration in Victorian environmental, heritage and planning legislation and policy, within a reconciliatory model of 'caring for country'.

Some comments on "market based mechanisms" and the promises and pitfalls of carbon offsets

The Consultation Paper reflects the developing optimism that market based approaches (including the demand for carbon emissions offsets) can make a significant contribution to biodiversity conservation and land management. We share this optimism and also recognise that incentive based approaches in general are an essential part of the mix of policy instruments. However we also submit that the mixed success in translating policy objectives into outcomes in the past means that careful scrutiny of the limitations of these new approaches is required. Initiatives such as Bush Tender and Carbon Tender are still at an early stage of development. The tendency compare the as yet untested promise of these initiatives with actual experience of traditional regulatory approaches may lead to an unrealistic assessment of the contribution that market based approaches can make.

In our submission, any proposal to extend the use market based instruments should take account of the following:

- The need to review and then clearly define the baseline legal responsibilities or duty of care over and above which payment for services will be offered. As discussed above in the context of the gain guidelines for native vegetation offsets, it is notable that initiatives such as the Bush Tender scheme have not been preceded by a review of the appropriateness or otherwise of the current mix of legal responsibilities.
- The need for a least a safety net of regulatory protection for threatened species and communities. Incentive or market based approaches are unlikely to be a suitable instrument for delivering the certainty required in the face of irreversible biodiversity loss. Similarly it is difficult to see the opportunity for payment for such services being an effective tool to deal with the maintenance and preservation of grasslands under threat from urban or agricultural development where the payment offered cannot match the opportunity costs of foregoing development. Such an outcome might be economically efficient but ecologically disastrous.
- The potential for market based approaches to undermine or "crowd out" voluntary conservation activities.
- The continuing need for monitoring and enforcement. Although incentive based contracts for conservation services may avoid some of the problems with the enforcement of command based regulatory approaches, there is

still a need to ensure that outcomes are monitored and, where necessary, sanctions other enforcement action are pursued.

- The need for accountability and transparency in tender and contract processes. Any move to widespread payment for ecosystem services or auctions for conservation contracts should be backed by a legislative framework clearly defining responsibilities and functions; providing the necessary legislative tools for implementing agreements and securing outcomes; and ensuring proper auditing of the operation of the scheme.
- Attention should be given to linking initiatives with broader strategic objectives. The auctioning of conservation contracts, for instance, might be well suited to securing the most economically efficient outcome, but will not of itself be a substitute for the initial identification of conservation priorities.
- Similarly, optimism about the potential for carbon offsets to contribute to biodiversity conservation needs to be tempered by the fact that effective biodiversity conservation objectives will require some mechanism to ensure that resources are allocated to biodiversity priorities (eg restoration of grasslands), rather than other more commercially attractive activities such as plantation establishment.