



**REVIEW OF THE
FLORA AND FAUNA
GUARANTEE ACT 1988
(VIC)**

This review is not, and is not intended to constitute legal advice. Comments are of a general nature only. Readers of this review should not act or refrain from acting on the basis of this review without first obtaining specific advice.

November 2002

CONTENTS

1	EXECUTIVE SUMMARY	1
1.1	Scope of the Review	1
1.2	Issues of concern	1
1.3	Recommendations for Reform	2
1.4	Conclusion	7
2	INTRODUCTION	9
2.1	Lawyers for Forests	9
2.2	Loss of biodiversity	9
2.3	LFF's Review of the Flora and Fauna Guarantee Act	9
2.4	Structure of Review paper	10
3	SUMMARY OF THE FFG ACT AND CONTROLS ON FOREST OPERATIONS	11
3.1	The FFG Act	11
3.2	Controls on logging in Forests in Victoria	12
4	KEY DEFICIENCIES IN THE FFG ACT AND ITS IMPLEMENTATION	13
4.1	Delays in implementation	13
4.2	Lack of utilisation of key conservation powers	14
4.3	Content of Action Statements and Management Plans	16
4.4	Review and Implementation of Action Statements and Management Plans	17
4.5	Conflicting priorities of NRE.	19
4.6	Protection of listed flora severely limited	19
4.7	Lack of protection for flora on private land	19
4.8	Exemption of logging activities from the application of the FFG Act	19
4.9	No offence of taking listed fauna	24
4.10	General lack of enforceability	24
4.11	Lack of information available to the public	24
4.11	Impact assessment/Lack of Requirement for FFG Act to	26

	be taken into account in decision making	
5	RECOMMENDATIONS FOR REFORM	27
5.1	Greater resourcing	27
5.2	Government Commitment to implementing the FFG Act and Greater Government transparency	27
5.3	Restructure of NRE	28
5.4	Integration with other legislation	28
5.5	Expansion of offences	30
5.6	Increase penalties	31
5.7	Third party rights	31
5.8	Expansion of the role of Critical Habitat declarations and ICOs	34
5.9	Preparation and implementation of Action Statements	35
5.10	Other changes	35
6	CONCLUSION	37
	GLOSSARY	39
SCHEDULE 1	OVERVIEW OF THE FFG ACT	42
SCHEDULE 2	OVERVIEW OF CONTROLS ON LOGGING	46
SCHEDULE 3	COOL TEMPERATE RAINFOREST	49
SCHEDULE 4	MYRTLE WILT	54
SCHEDULE 5	TIGER QUOLL	56
SCHEDULE 6	LEADBEATER'S POSSUM	60
SCHEDULE 7	POWERFUL OWL	64

1 EXECUTIVE SUMMARY

1.1 Scope of the Review

The Flora and Fauna Guarantee Act 1988, Victoria ("**the FFG Act**") is the principal legislation in Victoria aimed at protecting biodiversity. Fourteen years after its enactment, Lawyers for Forests, Inc. ("**LFF**") has undertaken a review of the FFG Act to examine its operation and implementation. LFF has focused on whether the FFG Act has been effective in achieving its objectives and, in particular, whether it has been effective in achieving what are arguably its primary objectives - to conserve listed endangered or threatened species, and to ensure that genetic diversity of flora and fauna is maintained.

In examining this question, LFF has focused on a major and critical source of biodiversity - Victoria's native forests. In doing this we have looked at the protection afforded to three listed species: the Leadbeater's Possum, the Powerful Owl and the Tiger Quoll; a threatened community: cool temperate rainforest and a threatening process: myrtle wilt.

1.2 Issues of concern

In carrying out this review, LFF has identified a number of deficiencies in the FFG Act and its implementation. These problems appear to be due to the following factors:

- Lack of political will for the implementation of the FFG Act.
- Lack of funding and resources to allow the Department of Natural Resources and Environment ("**NRE**") to effectively implement the Act.
- Objectives of the FFG Act being overridden by objectives and interests of bodies with conflicting agendas, such as the forestry industry.

A summary of the key areas of concern with the FFG Act and its implementation are set out below.

- (a) *Application of the FFG Act* – the FFG Act and the instruments under that Act do not need to be considered by other public decision makers or decision making bodies. Subject to two limited exceptions, offences created by the FFG Act for the protection of listed flora do not apply to the owners or lessees of private land. In addition, offences for the protection of listed flora generally do not apply to those undertaking logging operations or road works on State Forest or Crown land, subject to certain conditions. Those conditions are grossly inadequate to ensure the protection of listed flora.
- (b) *Offences for the protection of fauna* – there are no provisions for the protection of listed fauna. Offences in relation to fauna are contained in a separate piece of legislation, namely, the *Wildlife Act 1975 (Vic)* ("**the Wildlife Act**").
- (c) *Delays or lack of implementation of key documents required under the FFG Act* – the FFG Act lacks timeframes for making decisions and taking actions to implement the Act. As a result there have been significant delays in the preparation of key documents under the FFG Act, including the Flora and Fauna Guarantee Strategy and Action

Statements prepared for listed species. In particular, Action Statements have not been prepared for 78% of species, communities and threatening processes currently listed under the Act.

- (d) *Lack of utilisation of key conservation powers provided by the FFG Act* – there has only been one instance of land being determined to be Critical Habitat and this determination was later withdrawn. Another issue of concern is that the FFG Act does not allow for the public to make nominations for Critical Habitat. Lack of Critical Habitat determinations also means that no Interim Conservation Orders (“**ICOs**”) have been made, as these rely on the declaration of Critical Habitat. The ICO mechanism itself is also flawed for a number of reasons, one of which is its temporary nature.
- (e) *Content of Action Plans and Management Plans* – there are examples of Action Plans that contain management actions that are perceived to be ineffective in halting the continuing and recognised decline of the species they are supposed to protect.
- (f) *Review and Implementation of Action Statements and Management Plans* – there is no requirement to implement Action Statements in Forest Management Plans (“**FMPs**”). Action Statements are not revised on a regular basis and there is no system in place for the public to contribute to the revision or implementation of them.
- (g) *Lack of enforcement of the FFG Act* – NRE is the only body able to take enforcement action under the FFG Act. Third parties are unable to bring an action in relation to breaches of the offence provisions of the Act. Furthermore, there is a lack of accountability for adhering to the requirements for making and implementing Action Statements.
- (h) *Lack of Environmental Impact Assessment* – Environmental Impact Assessment (“**EIA**”) is not required for activities which may affect listed species or communities, or before threatening processes are undertaken. More particularly, EIA is not required before logging is undertaken, so the effects of logging on endangered species are not accurately known before logging occurs. Comprehensive Regional Assessments (“**CRAs**”) of land in which commercial logging operations are undertaken and FMPs are not an adequate means to ensure the protection of listed flora and fauna.

1.3 Recommendations for Reform

LFF’s review has revealed that the FFG Act does not meet its objectives and is in urgent need of reform. A summary of our recommendations for reform are as follows.

- (a) Greater resourcing

LFF strongly advocates substantially greater resources be provided to NRE to allow it to undertake the following tasks:

- prepare outstanding Action Statements for listed species, ecological communities and key threatening processes;
- review existing Action Statements and update where required;

- employ staff to monitor the implementation of the Action Statements "on-the ground", possibly as part of implementing integrated catchment management plans;
 - require FMPs, Wood Utilisation Plans (“**WUPs**”) and Forest Coupe Plans (“**FCPs**”) to adequately assess impacts on listed species, ecological communities and key threatening processes,
 - require FMPs, WUPs and FCPs to fully implement Action Statements, and update FMPs, WUPs and FCPs as required;
 - educate other statutory authorities with land management functions as to the requirements of the FFG Act; and
 - conduct an education campaign in schools and local communities about the requirements of the FFG Act, and the rights of the community to nominate species and communities for listing, and other third party rights under the Act.
- (b) Government Commitment to implementing the FFG Act and Greater Government transparency

NRE should be required to give reasons for the decisions it makes under the FFG Act. NRE should also be required to report on its achievements in fulfilling the objectives of and meeting its requirements under the FFG Act. Provided that appropriate funding is given, LFF believes the Commissioner for Ecologically Sustainable Development could play a role in monitoring NRE's performance. The Commissioner could prepare annual reports evaluating NRE's performance. Such reports should be tabled before Parliament. In particular, the report should review the status of Action Statements and the effectiveness of Action Statements Management Plans and the Victorian forest management system generally in the protection of species and management of threatening processes.

NRE should also be required to publish details of prosecutions made under the FFG Act, the *Forests Act 1958* (Vic) (“**the Forests Act**”), the Wildlife Act and various regulations, at least on an annual basis.

- (c) Restructure of NRE

Any restructure of NRE should be carefully considered to ensure that environmental objectives and priorities are enhanced.

- (d) Integration with other legislation

It should be mandatory for the principles and mechanisms under the FFG Act to be taken into account in decision making, in particular in EIA, and when EIA is not required, in planning decisions made under the *Planning and Environment Act 1987* (Vic) (“**P&E Act**”).

- (i) Environmental impact assessment legislation

EIA should be more widely required, and mandatory in certain circumstances. LFF recommends that whilst old growth and high

conservation value forest continues to be logged, Victorian EIA legislation should be linked to the FFG Act so that:

- a mandatory trigger for EIA is introduced for highly hazardous activities, and activities which may have a significant effect on a threatened or endangered species, including logging in old growth or high conservation value forests outside the Comprehensive, Adequate and Representative Reserve (“**CAR Reserve**”) system;
- activities in CAR Reserves should trigger EIA, including activities in Special Protection Zones or Special Management Zones in FMPs, or the shifting of Special Protection Zones;
- new FMPs and significant changes to FMPs and approval of WUP’s should trigger EIA;
- third parties should have the right to enforce the EIA requirements;
- the provisions and the objectives of the FFG Act should be required to be taken into account in the decision as to whether or not to approve an action subject to EIA.

(ii) Planning legislation

There should be greater integration between the FFG Act and the planning scheme processes. There should be a requirement to identify any impact on listed species or communities and to address those impacts in planning permit applications or planning scheme amendment applications. Further the FFG Act should be a mandatory consideration in decisions made under the P&E Act.

(iii) Wildlife Act

The Wildlife Act and the FFG Act should be at least partially amalgamated so that the FFG Act includes prohibitions on taking or destroying all listed flora and fauna.

Furthermore, there should be some limitations on the ability to obtain a licence under the Wildlife Act to take threatened species that are listed under the FFG Act.

(iv) Forests legislation

FMPs should fully implement Action Statements and Management Plans. They should also be reviewed as new Action Statements and Management Plans are approved or updated.

(v) General

The Act should contain an obligation on decision makers to take, at a minimum, the following into consideration, when making decisions under the P&E Act and other legislation applicable to land use or development:

- the listing of a species, community or threatening process;

- the provisions of any Action Statement or Management Plan; and
- the Victorian Flora and Fauna Guarantee Strategy.

(e) Expansion of offences

The offences in the FFG Act should apply to all listed species, not just flora and fish. The defence available to owners and lessees of private land should be removed. The FFG Act should also prohibit the harmful alteration, disruption or destruction of habitat of listed species. Or at the very least, the FFG Act should prohibit the destruction of the "residence" of a listed species (e.g. the hollow, nest, or other dwelling place), similar to the new Canadian legislation, the *Species At Risk Act 2002*.

Currently there are exemptions under the FFG Act for logging, in the form of the Flora and Fauna Guarantee Act (Forest Produce Harvesting) Order 1988. These exemptions should be removed.

In addition to broadening the ambit of the offences, the penalties should be markedly increased to at least equate to those in the Commonwealth environment protection legislation, the *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act"). Generally, maximum penalties in this Act for offences similar to those in the FFG Act are \$110,000 and two years imprisonment.

(f) Third party rights

Third parties should have the right to appeal the following decisions made under the FFG Act:

- the decision of the Minister to prepare or not to list endangered species, communities of flora or fauna and threatening processes; and
- the decision of the Secretary to prepare or decide not to prepare Management Plans; and
- the decision of the Secretary to declare or decide not to declare Critical Habitat (subject to the proviso that a definition of Critical Habitat should also be inserted in the FFG Act); and
- the decision of the Minister to make or determine not to make an ICO;
- the decision of the Minister to approve or determine not to approve an Action Statement.

The right of third parties to nominate species for listing, or to nominate certain matters for action, should be expanded. The right to nominate should be expanded to allow third parties:

- to nominate threatening processes or endangered communities of flora or fauna as meriting the preparation of a Management Plan; and

- to nominate Critical Habitat (a definition of Critical Habitat should also be inserted in the FFG Act); and
- to nominate threatened Critical Habitat as meriting the approval of an ICO.

Third parties should have a right to seek an enforcement order in relation to a breach of the FFG Act, an Action Plan, a Management Plan, or an ICO. Third parties should also have the ability to enforce the offence provisions of the FFG Act.

(g) Expansion of the role of Critical Habitat declarations and ICOs

(i) Definition and determination of Critical Habitat

A definition of Critical Habitat should be inserted which concentrates on preservation of habitat critical to the ongoing evolution and development of the species in the wild rather than concentrating upon habitat critical to the maintenance of a minimum viable population. Criteria for Critical Habitat should also be specified in the Act.

There should also be a requirement for the Minister or Secretary to make a Critical Habitat declaration or an ICO (or consider making a Critical Habitat declaration or ICO) if habitat meets the Critical Habitat criteria, or Critical Habitat is threatened, respectively.

Furthermore, the Critical Habitat declaration process should be overseen by the Scientific Advisory Committee, in much the same way as the listing process currently is.

(ii) Right to compensation

The FFG Act should be amended to limit the compensation provisions in section 43. Compensation should only be payable in circumstances where financial loss or damage is suffered due to the ICO interfering with an existing use right (such as the right to develop land in accordance with an existing planning permit) or requiring action to be taken (e.g. revegetation).

(iii) Other matters

ICOs should not be of an interim nature and should be in force until revoked.

(h) Preparation and implementation of Action Statements

It should be mandatory for Action Statements to include information on what needs to be done to protect and conserve the species or community, or to halt the threatening process. The Flora and Fauna Guarantee Regulations should set out in detail the matters that should be included in Action Statements.

A mandatory obligation to implement Action Statements and to review their effectiveness should be included in the FFG Act. A legislative program of regular public and independent review of the status of Action Statements, and the effectiveness of Action Statements in protection of species, should be introduced.

(i) Precautionary principle

LFF submits that the FFG Act should be subject to the Precautionary Principle, in that if threats of serious or irreversible environmental damage exist, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

1.4 Conclusion

LFF's analysis shows that the existing regulatory and policy framework for the protection of threatened species in Victoria is in need of an overhaul. Fourteen years after its enactment, it is evident that while the FFG Act contains a number of useful procedures and instruments, it lacks substance and mandatory obligations. Judged against what are arguably its primary objectives – to conserve listed endangered or threatened species, and to ensure that genetic diversity of flora and fauna is maintained – the Act has not been a success.

One of the greatest failings of the Act has been the failure to implement it. For example only a small proportion of the Action Statements have been prepared. No ICOs have ever been made.

LFF believes there are a number of reasons for this, including the following:

- NRE is under resourced;
- there appears to be a lack of government will to fully implement the FFG Act;
- there is a lack of government transparency and accountability in its decision making under and implementation of the Act;
- the Act is unenforceable; and
- the Act (and actions taken under it) are not required to be taken into account in government decision making under the Act, or generally.

Consequently, NRE should receive appropriate funding to fully implement the FFG Act, and the government commit to NRE fulfilling its obligations under the Act.

However, this of itself is not sufficient. The Act should be enforceable, and NRE should be accountable in its efforts to fulfil its obligations under the Act.

To seek to achieve this, the Act should be amended as outlined in section 5 of this review. These amendments include the following:

- third party enforcement, participation and review rights should be expanded;
- there should be specific timeframes inserted in the Act for NRE and other decision makers to take certain actions, or make decisions;
- NRE and other relevant bodies should be required to report annually on progress in implementing the Act; and

- Clear criteria for decision making should be set out in the Act, and decision makers should be required to provide and publish reasons for their decisions.

Finally, the FFG Act should also be taken into account in government decision making, and integrated with the EE Act, and P & E Act. Exemptions from the application of the FFG Act (such as that which occurs by reason of the Forest Produce Harvesting Order) should be removed unless proper EIA and consideration of the FFG Act has first occurred.

2 INTRODUCTION

2.1 Lawyers for Forests

LFF is a non-politically aligned association of legal professionals working to promote the conservation and better management of Victoria's native forests. LFF believes there should be no logging of, or other activities that detrimentally effect, old growth and high conservation value forests.

Whilst such logging and other activities continues to occur, LFF's main focus is on the legal mechanisms in place to conserve and manage Victoria's native forests and the species of flora and fauna that live in those forests. However, LFF is also interested in the protection of biodiversity more generally and is concerned by the alarming reduction in all forms of natural habitat and the consequent impact on our native species.

2.2 Loss of biodiversity

Loss of biodiversity is one of Australia's most pressing environmental issues.¹ In Victoria, we have lost 19 of the 91 species of non-marine mammals known to have inhabited the State since European settlement. More than 900 species of Victorian plants are rare or threatened and the numbers are growing. Satellite maps graphically illustrate the loss of some ecological communities, with 30% of the State's broad vegetation types having been reduced by 80%.²

While extinction can occur naturally, the vast majority of extinction of species in modern times is caused by human activities. These activities are varied and include habitat destruction and degradation (e.g. logging of old growth forests), incompatible land use and development, resource exploitation and toxic pollution. Of these, the single greatest human threat to threatened species is habitat loss.

2.3 LFF's Review of the Flora and Fauna Guarantee Act

The FFG Act is the principal legislation in Victoria aimed at protecting biodiversity. In its time it was regarded as landmark and farsighted legislation. This was partly because the FFG Act focuses not only on single species conservation but also on threatening processes and protection of communities of species and their critical habitat.

Fourteen years after its enactment, LFF has undertaken a review of the FFG Act to examine its operation and implementation. LFF has focused on whether the FFG Act has been effective in achieving its objectives and, in particular, whether it has been effective in achieving what are arguably its primary objectives – to conserve listed endangered or threatened species, and to ensure that genetic diversity of flora and fauna is maintained.

In examining this question, LFF has focused on a major and critical source of biodiversity - Victoria's native forests. In doing this we have looked at the

¹ See for example, State of Environment Report, 2001.

² Victoria's Biodiversity – Sustaining Our Living Wealth, NRE, 1997.

protection afforded to three listed species: the Leadbeater's Possum, the Powerful Owl and the Tiger Quoll; a threatened community: cool temperate rainforest and a threatening process: myrtle wilt.

2.4 Structure of review paper

Section 2 of this paper provides a short summary of the FFG Act and relevant controls on forest operations in Victoria. Section 3 sets out the key problems with the FFG Act and its implementation to date. Section 4 then outlines LFF's recommendations for reform of the FFG Act in detail.

There are a number of schedules attached to this paper. For the purposes of providing background information, the first schedule contains a summary of the main provisions of the FFG Act. The second schedule is a summary of controls on forest logging.

As mentioned above, LFF has undertaken a general review of the FFG Act and has also looked specifically at three listed species (Leadbeater's Possum, the Powerful Owl and the Tiger Quoll), a threatened community (cool temperate rainforest) and a threatening process (myrtle wilt). LFF's findings for these threatened species, community and process are set out in Schedules 3-7.

3 SUMMARY OF THE FFG ACT AND CONTROLS ON FOREST OPERATIONS

3.1 The FFG Act

The FFG Act was passed by the Victorian Parliament on 6 May 1988 and came into operation later that year, six years after it was first adopted as Victorian ALP policy.

The objectives of the FFG Act are to:³

- guarantee that all taxa of Victoria's flora and fauna can survive, flourish and retain their potential for evolutionary development in the wild;
- conserve Victoria's communities of flora and fauna;
- manage potentially threatening processes;
- ensure that any use of flora or fauna by humans is sustainable;
- ensure that the genetic diversity of flora and fauna is maintained;
- provide programs of community education, encourage co-operative management of flora and fauna and assist and give incentives to enable flora and fauna to be conserved; and
- encourage the conserving of flora and fauna through co-operative community endeavours.

The FFG Act outlines four main processes which can be utilised to help achieve these objectives:

- listing of threatened taxa, communities of flora or fauna, and potentially threatening processes, and creation of Action Statements for all listed taxa communities of flora or fauna and processes;⁴
- adoption of Management Plans for any taxon, community of flora or fauna, or process;⁵
- declaration of a Critical Habitat if the habitat is critical for the survival of a species or a community of flora or fauna;⁶ and
- if listed as Critical Habitat, the Minister for Environment ("**the Minister**") may then make an ICO to conserve the Critical Habitat.⁷

³ FFG Act, section 4.

⁴ FFG Act, Part 3, sections 10 – 16.

⁵ FFG Act, Part 3; sections 21 – 24 (Management Plans).

⁶ FFG Act, section 20.

The operation of the FFG Act and these processes are described in greater detail in Schedule 1.

The FFG Act also prescribes certain offences with respect to protected flora and fauna. Again these are described in Schedule 1.

3.2 Controls on logging in Forests in Victoria

Following the Regional Forest Agreement Process (“**RFA Process**”):

- a system of Forest reserves was created with CAR Reserve forest (basically, forest identified as worthy of protection) while other forest (“**State Forest**”) was identified as suitable for logging;
- for State Forest within an area covered by a Regional Forest Agreement (“**RFA**”) (an agreement between the State and Commonwealth Governments), the Commonwealth Government agreed to remove export controls for export of forest produce, and not to require EIA;
- the Commonwealth accredited Victoria’s forest management system; and
- the Victorian government agreed to implement its forest management systems.

Under the State forest management system:

- (a) logging in State Forests in accordance with a FMP and WUP is exempt from the operation of the FFG Act by reason of the Flora and Fauna Guarantee Act (Forest Produce Harvesting) Order 1988 (“the **Forest Produce Harvesting Order**”). This is explained in detail in section 4.8 (a) of this review.
- (b) The Code of Forest Practices (“**the Code**”), FMPs, WUPs and FCPs, govern logging operations.

The RFA process and State forest management system is described in greater detail in Schedule 2.

⁷ FFG Act, sections 26-44.

4 KEY DEFICIENCIES IN THE FFG ACT AND ITS IMPLEMENTATION

This section of the report considers some of the key deficiencies that LFF has identified in the FFG Act. It starts with issues regarding implementation (or lack thereof) and then looks at some intrinsic problems with certain provisions of the FFG Act.

4.1 Delays in implementation

The FFG Act provides for a variety of instruments and documents to be prepared by NRE. However, none of the provisions in the FFG Act set definite timeframes for completion. Instead, in a number of cases, the FFG Act provides that documents are to be completed "as soon as possible". However, LFF has observed long delays in the completion of relevant documentation and instruments, in particular the preparation of Action Statements. Examples of the delays are discussed below.

(a) Flora and Fauna Guarantee Strategy

Section 17 of the FFG Act requires the Secretary to prepare a Flora and Fauna Guarantee Strategy "as soon as possible" after the section came into operation (i.e. 1988). While it is acknowledged that preparation of such an important document does take some time, the Strategy took 9 years to produce. Furthermore, whilst the Strategy captures the "spirit" of the FFG Act, it lacks any real substance, and fails to address whole components of the environment in Victoria, such as invertebrates.

(b) Action Statements

Action Statements are required to implement management tools to conserve and manage listed species, communities, or potentially threatening processes. Leaving aside the issue of whether an appropriate cross-section of species and communities has been listed (and conservationists argue there is a bias toward listing high profile species and communities at the expense of other species), as at August 2002, 231 plant species, 214 animal species and 35 ecological communities were on the list of threatened taxa and communities under the FFG Act. 30 processes were on the list of potentially threatening processes. Of these, only 112 Action Statements have been completed.⁸ In other words, 78% of listed species, communities and threatening processes are waiting for Action Statements to be prepared.

Under section 19 of the FFG Act, the Secretary *must* prepare an Action Statement *as soon as possible* after a taxon, community or threatening process is listed. However, in practice, the delay between listing and preparation of an Action Statement can take many, many years. Some examples with particular relevance to native forests follow.

⁸ www.nre.vic.gov.au; as sourced October 2002

Myrtle Wilt and Cool Temperate Rainforest

Myrtle wilt is a fungal disease that is having a devastating impact on Victoria's Myrtle Beech trees.⁹ It was listed as a potentially threatening process in early 2000. Cool temperate rainforest is recognised to be of high conservation value and was listed as an endangered community in 1992.¹⁰

A letter from the Secretary of NRE, Ms Chloe Munro, dated 20 April 2001, to Mr Robert Stary, stated that preparation of an Action Statement for myrtle wilt was planned for the 2001/2002 financial year. The letter also stated that an Action Statement for cool temperate rainforest would be completed in late 2001. However, in both cases no Action Statement has been forthcoming and in the case of cool temperate rainforest, this is despite the passage of ten years.

Loss of Hollow Bearing Trees

One of the worst examples of delay in preparing an Action Statement is for loss of hollow bearing trees. Large old hollow trees for nesting and shelter are crucial to the survival of many of Victoria's threatened arboreal marsupials, such as the Leadbeater's Possum. The loss of hollow bearing trees was listed as a key threatening process in 1991. Over ten years later, an Action Statement still has not been prepared.

Powerful Owl

In the case of the Powerful Owl, there was a five year delay between listing and the approval of an Action Statement.¹¹

LFF also has found instances of a failure to implement those Action Statements which have been prepared. This is discussed further in section 4.4.

4.2 Lack of utilisation of key conservation powers

Aside from the instances where Action Statements or Management Plans have not been prepared, some sections of the FFG Act are not utilised at all. This is a critical issue. Whilst there are defects in the FFG Act, the Victorian Government also appears to lack the will to fully implement it, and/or NRE lacks the resources to fully implement it.

Examples of the failure to fully implement important mechanisms in the FFG Act are described below.

(a) Critical Habitat determinations

⁹ For more information on myrtle wilt, see Schedule #

¹⁰ For more information on cool temperate rainforest, see Schedule #

¹¹ For more information on the Powerful Owl, see Schedule #

As mentioned in the introduction to this review, the single greatest human threat to threatened species is habitat loss. Accordingly, instruments to protect ecologically significant areas of habitat are very important. One of the more farsighted mechanisms in the Act is the ability to protect Critical Habitat.

Critical Habitat determinations are required to trigger one of the few active conservation powers within the FFG Act, namely, the making of ICOs, which is discussed below.

Since the commencement of the FFG Act, there has been only one Critical Habitat determination made and this was quickly revoked. The sole determination was made on 4 May 1996 over a 9 hectare site in Altona. The area was declared in an effort to protect the environment of the Small Golden Moth Orchid, which was threatened by the subdivision of remnant Western Basalt Plains Grasslands. In the same month that the declaration was published it was rescinded and no protective mechanisms have since been deployed.

Leaving aside the possible lack of government will or resources to implement these provisions of the FFG Act, the failure to implement them is perhaps due to two factors:

- the threat of compensation that arises if the next step is taken – the issue of an ICO (discussed below); and
- a lack of information about and/or identification of Critical Habitat. This in turn may be due to the lack of integration between the FFG Act and Environment Effects Act 1978 (“**EE Act**”) and the P&E Act. This leads to a lack of consideration of the FFG Act and lack of EIA in government decision making (and in particular whether the land subject to the development or action is or is likely to become Critical Habitat). This is discussed further at sections 4.8(b) and 4.11 of this review.

Further:

- the making of a Critical Habitat determination is a matter for NRE, which has insufficient resources for administering the FFG Act. Unlike the listing process, the FFG Act does not allow for a member of the public to nominate a Critical Habitat;
- the Scientific Advisory Committee has no role in the process; and
- there are no legislative criteria to guide when a Critical Habitat determination should be made, and therefore nor is there a legislative requirement to make a Critical Habitat determination when set legislative criteria or guidelines are satisfied.

(b) No Interim Conservation Orders

Where a nominated or listed taxon or community is imminently threatened, and a Critical Habitat determination is in place, the

Minister may make an ICO. An ICO can provide for the conservation of flora or fauna within a Critical Habitat, and importantly, can prohibit or regulate any activity or process that takes place on the land in that area.

While ICOs are an important legal power (and roughly one third of the FFG Act is dedicated to them), they remain an unused and untested mechanism. No ICOs have been made in the 14 year history of the Act. This can be attributed to several factors, including the following:

- there is a failure to determine Critical Habitat for the reasons described in section 4.2(a); and
- the making of an ICO is a matter for the Minister. Like the process for determining Critical Habitat, the FFG Act does not allow for a member of the public to nominate an area which should be subject to an ICO; and
- the Act provides that once an ICO is made by the Minister, a landholder is entitled to claim compensation for financial loss suffered as a direct and reasonable consequence of the making of the ICO. Compensation is also payable to any person who suffers financial loss as a result of being served with a notice under section 36 of the Act, requiring compliance with an ICO. It appears that the provision for compensation has led to a reluctance to make ICOs.
- as for the determination of Critical Habitat, there is no requirement for the Minister or Secretary to make an ICO (or consider making an ICO) if Critical Habitat is threatened. The making of an ICO is solely at the discretion of the Minister.

Other difficulties with ICOs are:

- before making an ICO determination, the Minister must consult with any other Minister whose area of responsibility is likely to be affected by the ICO. ICOs can therefore be subject to the discretion of a number of different government bodies.
- the temporary nature of ICOs. An ICO is only in force for two years from the date it is confirmed by the Minister, or such lesser period as stated in the ICO or determined by the Minister.

4.3 Content of Action Statements and Management Plans

It is arguable that the system for preparation of Action Statements and Management Plans, as it currently stands, is failing in many cases to address the decline of listed threatened species. Reform of the process is required in order for these documents to be relevant, powerful tools for conservation.

It is essential that any Action Statement or Management Plan prepared be effective in achieving the goals of the FFG Act, namely the conservation of threatened flora and fauna. Action Statements and Management Plans should be made in consultation with recognised experts in the area, in order to be scientifically sound.

They should indicate all key actions that are required, not just those NRE or other agencies have committed to.

Problems with the content of Action Statements is demonstrated by the draft Action Statement prepared for the Tiger Quoll (refer Schedule 4). This draft Action Statement, although containing references to reports by ecologists, is widely perceived amongst environmentalists to contain management actions that will not be effective in halting the continuing and recognised decline of the species. Of particular concern to environmentalists are the following:

- the use of Special Protection Zones (“**SPZs**”) and Special Management Zones (“**SMZs**”)¹² that are too small, seemingly do not have to be located in a detection site (ie. where the animal has been noted), and are not linked to conservation areas; and
- as SMZs allow clear-fell logging followed by slash burns and as habitat destruction is a recognised threat to the Tiger Quoll, the fact these zones are included in what is supposed to be a conservation zone undermines the purpose of the Action Statement; and
- the failure to stop the use of 1080 poison, which is recognised as being a threat to the species. Instead, the Action Statement recommends further research in respect of the impact of the poison.

The environmentalists that LFF contacted believe that the management actions were ‘watered down’ to appease other interest groups, such as farmers and the logging industry, who have an interest in controlling foxes (and therefore the use of 1080 poison) and the clearance of old-growth native forests. Despite proceeding through a public consultation process, it is argued that the resultant draft Tiger Quoll Action Statement distributed for public comment has effectively been a waste of time and resources and that it will be ineffective in halting species decline.

In the case of myrtle wilt, the FMPs for the Otways Forest Management Area (“**FMA**”) and the Central Highlands FMA, as well as the proposed FMP for the Gippsland FMA, do not protect against myrtle wilt by implementing any buffer recommendations. These FMPs merely recommend further research into myrtle wilt.

LFF notes that in the context of threats of serious or irreversible environmental damage, the Precautionary Principle should be adopted in relevant decisions and actions (ie lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation).¹³

4.4 Review and Implementation of Action Statements and Management Plans

All Action Statements and Management Plans should be revised on a ‘regular’ basis so that they reflect scientific developments in the area. They should also be implemented in government decision making. In particular, FMPs

¹² Refer to Schedule 3 for a description of SPZs and SMZs.

¹³ See eg *Environment Protection Act 1970*, section 1C.

should fully implement Action Statements and Management Plans. They should also be updated as new Action Statements or Management Plans are approved or updated. It is unclear why this is not the case at present, given the time and resources invested in researching and creating Action Statements and Management Plans.

For example¹⁴:

- The Otways FMP¹⁵ was prepared before the Powerful Owl Action Statement was prepared. It has not been updated to implement the Powerful Owl Management Area (“**POMA**”) system outlined in the Action Statement.
- The Powerful Owl Action Statement allocated a certain number of POMAs to each FMA. However the FMAs themselves have changed in area since the Action Statement was adopted. The Action Statement has not been updated to reflect this.
- The North – East, Central Highlands, Otways and Midlands FMPs do not implement the requirement in the Powerful Owl Action Statement that all confirmed nesting sites are protected by a 3ha SPZ around the site, with a 250 – 300 m radius (or similar linear area) SMZ buffers (leaving aside the inadequacy of a 3 ha SPZ with a SMZ buffer available for clearfell logging).
- The FMP for the Otways FMA in respect of the Tiger Quoll, where the 200m buffer zone required in the Tiger Quoll Action Statement is not incorporated into the actions required under this FMP.

As mentioned in section 4.1(b), there are problems of delay in implementing “actions” specified in Action Statements. Typically, Action Statements specify numerous actions that need to be completed and implemented. Although LFF has found it very difficult to obtain information on the status of the “actions” in the Action Statements we have reviewed, we are aware that many of the “actions” have been awaiting implementation for considerable periods of time.

For example, the Action Statement for the Leadbeater’s Possum was finalised in December 1995. One of the key planks of the management actions in this Action Statement is the establishment of a permanent reserve system. However, almost 7 years later, a formal first draft still has not been completed.

Another important feature of the management actions is the role of the Leadbeater’s Possum Management Team (“LMT”). While there was a LMT at an early point in time, it is no longer in existence. Under the Action Statement the LMT is, amongst other things, supposed to be recommending priorities for research and monitoring projects, reviewing and recommending alterations and additions to the Action Statement and preparing an annual report. In the absence of a LMT, none of these important actions are taking place.

¹⁴ Refer Schedule 7.

¹⁵ As downloaded from the NRE website November 2002

Furthermore, there appears to be no formal process or program established for the review and updating of Action Statements as new information comes to light regarding the species. For example, the Leadbeater's Possum Action Statement has a review date of 2000. However, LFF is aware of no process currently in place for review of this statement, especially since the disbanding of the Leadbeater's Possum Management Team. The period of the Recovery Plan for the Leadbeater's Possum (1998 – 2002) is also due to expire at the end of this year, without any plan for its revision or review.

4.5 Conflicting priorities of NRE.

NRE is a broad department with many roles, including that of environmental protection and forestry management. A conflict of interest arises due to its responsibility for ensuring that revenue is generated from logging operations, while at the same time ensuring that those licensed to log trees do so in compliance with legislation and instruments that protect flora and fauna species. The Victorian Government has acknowledged this inherent conflict of interest in its policy paper "Our Forests Our Future" where it is stated:

"One of the main inhibitors to the restructure of the industry has been Government itself. Government is both the monopoly supplier of native forest timber and the environmental regulator. As a result of the inevitable conflicts of these dual roles, the management and protection of Victoria's forests have suffered."

LFF notes that proposals to remedy this situation have been suggested. LFF believes that any such proposal should be carefully considered to ensure that environmental objectives and priorities are enhanced.

4.6 Protection of listed flora severely limited.

Part 5 of the FFG Act provides for the listing of threatened flora and sets out a range of offences relating to listed flora. Section 47(1) makes it an offence to "take" (kill, disturb, injure or collect) protected flora, unless authorised by a licence or permit, or pursuant to an Order by the Governor-in-Council.

The protection afforded to listed flora under these provisions is severely limited, because the FFG Act excludes from its operation vast areas of land which form some of the most important habitats of listed flora, namely private land, and for logging activities in State Forest. These two issues are explained further below in 4.7 and 4.8.

4.7 Lack of protection for flora on private land

The defences in section 47(2) of the FFG Act permit the owner or lessee of private land to kill and disturb protected flora, provided that the flora is not taken for the purposes of sale and that the flora is not taken from a Critical Habitat.

As there are no Critical Habitat determinations, this exemption effectively means that, under the FFG Act, listed flora receives no protection on private land.

LFF believes that this exemption is inconsistent with the objectives of the Act set out in section 4, including the objective of guaranteeing that all taxa of Victoria's flora can survive and flourish.

4.8 Exemption of logging activities from the application of the FFG Act

(a) Introduction

Of critical concern to LFF is the existence of the Forest Produce Harvesting Order, which was proclaimed on 15 December 1998, the effect of which is to exclude timber operations from the application of the FFG Act.

Section 48(3) of the FFG Act provides that the Governor in Council may authorise the destruction and disturbance of protected flora, on terms and conditions set out in the Order. The Government's power to make such an Order is limited by section 48(4). That section prevents the Governor in Council from making such an Order if to do so would threaten the conservation of a taxon or community of protected flora.

The Forest Produce Harvesting Order authorises the taking of protected flora in State Forest and Crown land, where that taking is incidental to harvesting operations or associated road works authorised under the Forests Act.

Persons authorised by the Forest Produce Harvesting Order to take protected flora include the holder of a licence granted under the Forests Act to harvest timber or other forest produce, persons authorised to act for the holder of such a licence, and any person authorised to carry out road works in State Forest or Crown Land. The exemption granted by the Forest Produce Harvesting Order is yet another example of the preferential treatment provided by the Government to Victoria's forestry industry, at the expense of our natural environment.

The exemption does not apply if the flora is taken from a Critical Habitat. However, as noted above, no Critical Habitat determinations have been declared.

The exemption granted by the Forest Produce Harvesting Order is conditional upon the authorised person:

- acting in accordance with its licence or authority under the Forests Act; and
- ensuring that the taking is not inconsistent with a FMP or WUP which has been approved after the views of the Flora, Fauna and Fisheries Manager in the relevant region have been considered during the preparation of the FMP or WUP; and
- killing or disturbing the flora in such a way that is reasonable to expect that:
 - the conservation objectives set out in section 4(1)(a)-(e) of the FFG Act will be achieved. These objectives include guaranteeing that all taxa of Victoria's flora can survive and flourish, and ensuring that the genetic diversity of flora is sustainable; and

- across the geographic sub-region, each species and sub-species of protected flora is retained in a state that is "no less viable" at the end of its taking/destruction, than it was before the taking occurred; and
- undertaking restoration work if natural regeneration cannot be expected to achieve the conservation objectives set out in the bullet point above above within 2 years of the taking.

(b) No EIA required and FMPs/WUPs/FCPs inadequate for this purpose

No exception should be made for logging of native forest unless a holistic assessment of the forest biota and the impact of the logging operation has been satisfactorily carried out, for example an EIA or a pre-logging survey of the coupe.

The argument is often made that logging in RFA areas has already been the subject of EIA, as the RFA process and accreditation of the State forest management system involved the following steps:

- the CRA for each of the five Victorian RFA areas; and
- formation of CAR Reserves based on the JANIS Reserve Criteria; and
- introduction of Ecologically Sustainable Forest Management for the State forests outside the CAR Reserves, including the introduction of FMPs for the FMAs.

The premise for this system is that the CRA involved a rigorous scientific analysis of Victorian forests, and therefore identified those Victorian forests which meet JANIS reserve criteria, and as a result are worthy of protection. The system also assumes that the adoption of the FMPs involved an EIA of the environmental values of Victorian Forests. Therefore the plans prepared at the local level (WUPs and FCPs) do not require further EIA, despite the fact that EIA at a local rather than regional level is by its nature more likely to be comprehensive, akin to a spotlight being applied to a smaller area.

Leaving the adequacy of the JANIS criteria aside (as LFF believes all old growth and high conservation value forest should be protected, not just a proportion of it) there were flaws in the CRA analysis. For example:

Concerned Residents of East Gippsland claim that:

"No matter how old, patchy or wobbly the data is, to complete the CRA they simply have to heap it altogether..... By bundling information into CRA reports and calling it an 'assessment' the Minister can then use his/her discretion to decide if it constitutes an environmental assessment. Therefore the obligation under Federal legislation to carry out a proper Environmental Impact Statement can be avoided. Indeed the CRA seems to be tailored to

*meet this end, as this outcome is predicted in more than one RFA document.”*¹⁶

The West Victoria CRA contains an acknowledgment of its deficiencies. For example Volume 2 of the report at page 26 lists 38 endangered taxon. For 5 (or 13.2%) of these, it is stated that NRE had insufficient data to establish whether the taxon was critically endangered, endangered, vulnerable, or at lower risk. Further the report at page 27, table 12.20 gives examples of the percentages of the Australian Range for certain populations of plant species listed under the FFG Act and/or the (now repealed) *Endangered Species Protection Act*. A number of these are listed in the range of, for example 0 – 25%, 26 – 50%, 51 – 75% or 76 – 100%. The percentages are given margins for error which do not inspire confidence.

FMPs are also inadequate in their EIA. A number of them (the East Gippsland, Midlands and Otways FMPs) were prepared before the CRA analysis and as far as LFF can ascertain, have not been updated to incorporate any additional information obtained through the RFA process.

Although prepared in the context of reviewing sustainable yield rates, and therefore not addressing biodiversity as such, the Report of the Expert Data Reference Group¹⁷ stated that the NRE was not in a position to make long term resource commitments, given uncertainties in the data. LFF has no reason to believe that biodiversity data and information is any more accurate.

No EIA is required before logging is undertaken, so the effects of logging on endangered species is not accurately known before logging is undertaken. For the reasons described above RFAs and FMPs do not constitute an EIA and should not be utilised as defacto EIA.

LFF believes the Victorian forest management system (in particular the exemption of logging activities from the operation of the FFG Act) does not comply with the principles of Ecologically Sustainable Development (“**ESD**”) (as enshrined in section 3A of the EPBC Act and sections 1B-1E of the *Environment Protection Act 1970* (Vic).

(c) Lack of enforceability of the conditions of the exemption

LFF notes that the vague provisions in FMPs may result in a widening of the exemption provided to forest operations. The lack of active protective measures in the FMPs makes it easier for forest operators to satisfy condition (4.8(a)(ii) above) of the Forest Produce Harvesting Order requiring the taking of flora and fauna to be consistent with a FMP or WUP.

Further:

¹⁶ Quoted in Forsyth, Juliet “Anarchy in the Forests: a Plethora of Rules, an Absence of Enforceability” 15 EPLJ 338

¹⁷ Professor Jerome Vanclay and Dr Brian Turner, 31 October 2001.

- the condition requiring compliance with the relevant FMP may do little to ensure the conservation of listed flora, as the FMPs themselves do not adequately identify or protect listed flora. For example, cool temperate rainforest is a listed ecological community. However, the Otways FMP does not adequately identify rainforest stands in the Otways FMA, due to the failure to conduct adequate surveys prior to the development of the FMP;
- Action Plans are not fully implemented in the FMPs, nor do Action Plans ensure subsequently identified habitat of listed species is protected;¹⁸
- information is difficult to obtain, as there is no community involvement in approving WUPs, or in auditing forest operations; and
- the condition which requires the forestry operator to plan the taking/destruction in such a way to comply with the conservation objectives listed in the FFG Act, section 4(1) (a) – (e) above, is incapable of practical application or enforcement.

(d) Failure to comply with the Order

Further to this, LFF believes forest operators regularly fail to comply with all of the conditions specified in the Order, as set out in section 4.8(a) above. Yet LFF is not aware of a single prosecution under section 47(3) of the FFG Act, which makes it an offence to contravene the terms of the Order.

In terms of the Tiger Quoll, LFF is informed that the guidelines set out in the FMP for East Gippsland FMA, aside from being vague and thus easily manipulated, are not always being complied with. Research has shown that, following the East Gippsland RFA, of 23 Tiger Quoll Conservation Zones declared in State Forest in the area, only 8-11 zones, either alone or with the help of adjacent Special Management Zones/Special Protection Zones/National Park, fulfil the guidelines for the species. It was also noted that while Tiger Quoll areas were dropped from the reserve list during the RFA process, none were added to the list as a consequence of the RFA. This statistic is alarmingly low, especially given that East Gippsland is supposed to be the strong-hold for the species in Victoria.

(e) Conditions requiring restoration work are inappropriate

Undertaking "restoration work" will never be an effective substitute for ensuring that flora is protected and conserved in its original environment. No amount of "restoration work" following the destruction of old growth rainforest, or removal of large hollow bearing

¹⁸ See paragraph 3.3 of this review.

trees¹⁹ will ever ensure that the conservation objectives of the FFG Act are achieved.

4.9 No offence of taking listed fauna

Despite containing offences relating to protected flora (Part 5, Division 2) and listed fish (Part 5, Division 3), the FFG Act does not contain similar provisions in relation to listed fauna. The operations of the FFG Act, in this respect, need to be considered in conjunction with the Wildlife Act. This Act establishes a range of offences for the unauthorised handling of wildlife, including hunting, taking or destroying endangered wildlife. However, these prohibitions are much narrower than the prohibition in the FFG Act, which expressly includes disturbance and injury and, based on the decision in the Chaelundi case, are likely to include indirect as well as direct interference with essential social and biological patterns of a species.²⁰

4.10 General lack of enforceability

Currently, section 4(2) requires public authorities to be administered with regard to the flora and fauna conservation and management objectives set out in section 4(1). However, there is no specific obligation on decision makers to implement or give consideration to the impacts on listed species, threatened communities or critical habitat in government decision making, except when deciding whether to grant a permit under section 40(2) of the FFG Act. Similarly, other than under section 40(2), Action Statements and the Flora and Fauna Guarantee Strategy do not have to be taken into consideration by authorities when making decisions under the FFG Act or any other Victorian legislation.

Essentially, the FFG Act is good at setting out procedures, but lacks enforcement mechanisms for ensuring that those procedures are carried out. Some areas of concern are discussed below.

(a) Action Statements

Previously we discussed Action Statements and the consistent and lengthy delays that occur in preparing these documents. Clearly, one of the key reasons for this is insufficient funding and resources dedicated to the task. However, another reason may be that the FFG Act contains no enforcement mechanisms that could be used to ensure that Action Statements are prepared in a timely manner.

Perhaps more importantly, once an Action Statement is prepared, no enforceable obligations ensue. Action Statements do not bind the government, or anyone else, to take any actions at all. As a result, the existence of an Action Statement does not necessarily protect listed endangered or threatened species, or the habitat of those species. They are not, for example, fully implemented in FMPs.²¹

¹⁹ Hollows can take many years to form. For example, mountain ash trees take at least 120 years to develop hollows.

²⁰ *Corkill v Forestry Commission of New South Wales* (1991) 73 LGRA 126

²¹ See paragraph 3.3 of the review.

Another issue of concern is that there are no penalties imposed on a person for breaching any provision of an Action Statement.

A lack of funding may also mean that the provisions of the Action Statements that are prepared are inadequate.

An alarming example of an Action Statement failing to protect a listed endangered species occurred at Starlings Gap, which is discussed further in Schedule 6. In 2000, road construction work occurred at a "Leadbeater's Possum Monitoring Site" at Starlings Gap. Despite the existence of Leadbeater's Possum nesting boxes in the area, the road realignment proceeded. One of the management actions specified in the Action Statement is to "determine the effects of road construction and upgrading operations on Leadbeater's Possum and develop prescriptions for planning and operational procedures that take into account the conservation of the species". It appears that this has not yet occurred, to the detriment of the species at Starlings Gap.

Another example of the existence of an Action Statement failing to protect a listed endangered species occurred in the Wombat State Forest, near Trentham. A pair of nesting Powerful Owls was observed and photographed in Trentham in October 2000. On the basis of the criteria listed in the Action Statement, this pair should have been accorded the highest priority for inclusion in a POMA. However, this was not done as the "quota" (or, as the Action Statement and FMP state, a "minimum") of 25 POMAs for the Midlands FMA had already been allocated. This was despite NRE being aware of the existence of the Trentham pair of owls when it designated the 25th POMA site and despite the 25th POMA being based on an unconfirmed sighting.

Instead LFF understands NRE provided a 500 ha SPZ, of which 200 was not mature forest. However additional habitat of up to 500 ha (or in the case of the FMP, simply an additional 500 ha) should have been provided in accordance with the Action Statement, and the Midlands FMP.

Part of the area which would have been protected had the additional area been declared in accordance with the FMP was then proposed to be logged. However, following adverse and extensive media coverage the Minister announced that the Powerful Owl habitat would not be logged.

The interesting point is that it was political pressure, not the contents or implementation of the Action Statement or FMP which ultimately led to protection of the Owls' habitat. The Trentham case is discussed in more detail in Schedule 7.

(b) No third party standing

Aside from suffering from an overall lack of enforceable provisions, one of the most significant omissions from the FFG Act is the lack of third party standing to uphold the provisions that can be enforced.

At present, NRE is the only body able to take action for offences committed against the Act. Leaving its internal conflict of interest aside, while being an appropriate body to oversee the Act, NRE is obviously constrained by its budget. This fact has the potential to

impact on the extent of monitoring that can be conducted, and subsequently the number of breaches that can be penalised.

(c) Limited avenues for review

As previously mentioned, the Act has a lack of timeframes for making decisions and implementing the FFG Act. In some instances, there is no statutory duty on NRE to take particular actions. For example, there is no duty on NRE to identify threatened species or declare Critical Habitat. Furthermore, there is no provision in the Act requiring the decision makers to provide reasons for their decisions. These factors make it difficult for an interested party to bring proceedings for review of decisions, or the failure to make a decision, under the Act.

4.11 Lack of information available to the public

It is difficult to obtain information. For example information about the steps taken to implement Action Statements has not been easy to obtain. FMPs are out of print and are not fully accessible on the NRE website.

4.12 Impact assessment—Lack of requirement for FFG Act to be taken into account in decision making

As indicated above, the FFG Act does not require any comprehensive assessment of projects which may impact threatened species or their habitat. The main legislation dealing with EIA in Victoria is the EE Act. This Act is administered by the Department of Infrastructure and typically only applies to large scale projects. The P&E Act also provides that the environmental effects of certain developments be considered in decision making. However, there is no requirement to consider the listing of species, or any other implementation of the FFG Act into consideration in making decisions under the P&E Act or EE Act.

A review of EIA procedures under the EE Act and the P&E Act is currently being undertaken by the Department of Infrastructure. LFF made a submission to the Advisory Committee and made a number of recommendations, which are discussed in section 5.4 below.

5 RECOMMENDATIONS FOR REFORM

5.1 Greater resourcing

The primary reason for non-implementation or delays in implementation of the mechanisms in the FFG Act to protect flora and fauna species appears to be insufficient resources and funding dedicated to this purpose at NRE.

LFF strongly advocates substantially greater resources be provided to NRE to allow it to undertake the following tasks:

- prepare outstanding Action Statements for listed species, ecological communities and key threatening processes;
- review existing Action Statements and update where required;
- employ staff to monitor the implementation of the Action Statements "on-the ground", possibly as part of the implementation of integrated catchment management plans;
- require FMPs, WUPs and FCPs to adequately assess impacts on listed species, ecological communities and key threatening processes,
- require FMPs, WUPs and FCPs to fully implement Action Statements, and update FMPs, WUPs and FCPs as required;
- educate other statutory authorities with land management functions of the requirements of the FFG Act; and
- conduct an education campaign in schools and local communities about the requirements of the Act, and the rights of the community to nominate species and communities for listing.

5.2 Government commitment to implementing the FFG Act and greater government transparency

Whilst the Government may agree to amend the FFG Act to strengthen its operation, a strengthened FFG Act is of no effect if the Government lacks the will to implement it. An apparent lack of will seems to exist now, as sections of the FFG Act are not utilised.

Motherhood statements are insufficient evidence of such commitment. In the interests of open and accountable government, public reporting mechanisms should be put in place. In this respect, LFF notes and supports the Bracks Government's recent announcement to appoint of the Environment Protection Authority ("EPA") to oversee compliance audits of the Code of Forest Practices.

LFF believes NRE should be subject to scrutiny in ascertaining whether it has complied with the FFG Act. Consequently NRE should be required to report on its achievements it fulfilling the objectives of and meeting its requirements under the FFG Act. Provided appropriate funding is given, LFF believes the Commissioner for Ecologically Sustainable Development could play a role in monitoring NRE's performance. The Commissioner could prepare annual reports evaluating NRE's performance. Such reports should be tabled before Parliament. In particular, the report should review the status of Action Statements and Management Plans, and the effectiveness of Action

Statements and Management Plan in protection of species and management of threatening processes should be introduced.

The performance of other agencies that have (or should have) committed to biodiversity conservation should also be reported. For example, Water Authorities, Parks Victoria and Local Government play important roles and should also be required to report.

NRE's annual reports should also be required to contain details of prosecutions made under the FFG Act, Forests Act, Wildlife Act and various regulations. Alternatively, NRE should be required to publicise the results of its enforcement action in a 'regular' publication similar to the EPA. The EPA includes a summary of its prosecutions in its quarterly newsletter which is available on the internet. The summary details the name of the defendant, the charges that were laid, the court in which the proceedings were heard and the resulting penalty. Currently, such prosecution details for NRE are not easily accessible by the public. Similarly, data on native vegetation clearing (both legal and illegal) should be easily accessible to the public.

5.3 Restructure of NRE

The perceived conflict of interest between NRE's commercial role and its role in administering the FFG Act needs to be reviewed. This has been acknowledged by the Victorian Government, which has committed to creating VicForests as a separate commercial entity to administer and issue logging licences, with NRE retaining its conservation role. Under the former leadership of Denis Napthine, the Liberal Party also announced that its policy is to create a dedicated Department of Conservation and Environment and a separate Department of Agriculture and Resources to address this conflict. This commitment has been confirmed with the release of the Liberal party's environment policy in November 2002.

LFF believes a break up of the functions of NRE or any other reform proposal, should be carefully scrutinised. LFF would like to be consulted and provide input on any proposed models or reform proposals. LFF considers that one advantage of having NRE perform a licensing and monitoring role is that NRE does have access to data collected by the forest industry, and there is a cross fertilisation of information between what could be described as the pro-conservation divisions of NRE and the pro-logging divisions of NRE. This exchange of information should not be compromised by any break-up of the department.

Furthermore, if the Government's proposal to create VicForests proceeds, LFF believes that it is vital that the interests of a pro-commercial VicForests should not be given higher priority and resourcing than the interests of NRE. Both bodies should have equal influence in government decision making, or preferably, greater weight should be accorded to NRE's pro-conservation role.

5.4 Integration with other legislation²²

The FFG Act should be integrated with other legislation. Currently it is not. It should be mandatory for the principles and mechanisms under the FFG Act to be taken into account in decision making, in particular in EIA, and when EIA is not required, in planning decisions made under the P&E Act.

EIA should be more widely required, and mandatory in certain circumstances.

In its submission to the Advisory Committee appointed to advise the Minister for Planning in the Environment Assessment Review, LFF made a number of recommendations regarding integration of the FFG Act with other legislation, including the following.

(a) Environmental impact assessment legislation

LFF recommends that whilst old growth and high conservation value forest continues to be logged, Victorian environment impact assessment legislation should be linked to the FFG Act so that:

- a mandatory trigger for EIA is introduced for highly hazardous activities, and activities which may have a significant effect on a threatened or endangered species, including logging in old growth or high conservation value forests outside the “CAR Reserve” system;
- activities in CAR reserves should trigger EIA, including activities in Special Protection Zones or Special Management Zones in FMPs, or the shifting of Special Protection Zones;
- new FMPs and significant changes to FMPs and approval of WUPs should trigger EIA;
- third parties have the right to enforce the EIA requirements; and
- the provisions of and the objectives of the FFG Act should be required to be taken into account in the decision as to whether or not to approve an action subject to EIA.

(b) Planning legislation

LFF is also of the view that there should be greater integration between the FFG Act and the planning scheme processes. For example, there should be a requirement to identify any impact on listed species or communities and to address those impacts in planning permit applications or planning scheme amendment applications.

Furthermore, the FFG Act should be a mandatory consideration in decisions made under the P & E Act (although it is conceded that as a

²² Note – references to taking the FFG Act into account also include taking into account Action Statements, Management Plans, ICOs and Critical Habitat determinations and other actions taken and documents prepared under the FFG Act.

result of a number of VCAT decisions (any examples?), this may already be the case).

(c) Wildlife Act

As mentioned previously, the FFG Act imposes controls and prohibitions on protected flora and listed fish but not on listed fauna. The Wildlife Act then plays a role in relation to other native species. LFF recommends that the Wildlife Act and the FFG Act be at least partially amalgamated so that the FFG Act includes prohibitions on taking all listed flora and fauna. This is discussed further below.

Furthermore, there should be some limitations on the ability to obtain a licence under the Wildlife Act to take threatened species that are listed under the FFG Act.

(d) Forestry legislation

FMPs, WUPs and FCPs should fully implement Action Statements and Management Plans. They should also be reviewed as new Action Statements and Management Plans are approved or updated.

(e) General

The FFG Act should contain an obligation on decision makers to take, at a minimum, the following into consideration, when making decisions under the P&E Act and other legislation applicable to land use or development:

- the listing of a species, community or threatening process;
- the provisions of any Action Statement or Management Plan;
- the listing of any Critical Habitat, or making of an ICO; and
- the Victorian Flora and Fauna Guarantee Strategy.

This would go some way to avoiding planning permits being issued in areas of Critical Habitat and avoiding habitat destroying events such as occurred in the road realignment at Starlings Gap.

5.5 Expansion of offences

(a) Offence to take any listed species

Currently the Act creates offences relating to the handling of flora (Part 5, Division 2) and fish (Part 5, Division 3). These provisions state that a person must not, without a licence, 'take, trade in or keep' any listed fish (section 52) or 'take, trade in, keep, move or process' protected flora (section 45). It does not make sense to confine the offences in the FFG Act to flora and fish. The offences should apply across the board to all listed species.

The defence available to private landowners and lessees in section 47(2) of the Act should be removed.

(b) Offence to damage habitat

As habitat destruction is the biggest single cause of species extinction, the FFG Act should prohibit the harmful alteration, disruption or destruction of habitat of listed species. Or at the very least, the Act should prohibit the destruction of the “residence” of a listed species (e.g. the hollow, nest, or other dwelling place), similar to the new Canadian legislation, the *Species At Risk Act 2002*.

(c) No exemptions for logging

Logging operations conducted in accordance with the Forest Produce Harvesting Order are exempt from the operation of the FFG Act. . The problems that the exemption causes are explained in detail in section 4.8. The exemption should be removed, and the FFG Act taken into account in approving FMPs, WUPs and FCPs.

5.6 Increase penalties

In addition to broadening the ambit of the offences, the penalties, which are clearly inadequate to provide sufficient protection, should be markedly increased. For instance, currently the taking of a listed fish or protected flora will result in a \$500 fine, while the sale of that fish or flora or use of it in other ways may reap a far greater reward for the offender.

LFF submits that the penalties in the FFG Act should at least equate to those in the Commonwealth environment protection legislation, the EPBC Act. Generally, maximum penalties in this act for offences similar to those in the FFG Act are \$110,000 and/ or two years imprisonment.

5.7 Third party rights

To ensure adequate community participation in the enforcement of the FFG Act, more accountable government decision making and to enable action to be taken in situations where NRE does not take enforcement action, third parties should have a right to take enforcement action prior to or after a breach of the FFG Act, Action Plans, Management Plans, and ICOs made under the FFG Act. The rights for third parties to make nominations for listing and the like should also be extended. Third parties should also have the right to appeal decisions made under the FFG Act. These issues are discussed in further detail below.

(a) Rights to appeal.

Third parties should have the right to appeal the following decisions made under the FFG Act:

- the decision of the Minister to list or not to list threatened species, communities of flora or fauna and threatening processes; and
- the decision of the Secretary to prepare or decide not to prepare Management Plans; and
- the decision of the Secretary to declare or decide not to declare Critical Habitat (subject to the proviso that a definition of Critical Habitat should also be inserted in the FFG Act); and

- the decision of the Minister to make or determine not to make an ICO;
- the decision of the Minister to approve or determine not to approve an Action Statement or Management Plan.

(b) Rights to make nominations

Given the lack of resources provided to NRE, participation of NGO groups and other community groups in the processes of endangered species conservation and recovery is essential.

The right of third parties to nominate certain matters for action, should be expanded.

Currently the right to nominate only applies to the listing of threatened taxa or communities of flora and fauna and threatening processes.

The right to nominate should be expanded to allow third parties:

- to nominate threatening processes or endangered communities of flora or fauna as meriting the preparation of a Management Plan; and
- to nominate Critical Habitat (a definition of Critical Habitat should also be inserted in the FFG Act); and
- to nominate threatened Critical Habitat as meriting the approval of an ICO.

(c) Enforcement action

It is submitted that an appropriate model for enforcement action is that used in the Victorian planning process under the P&E Act. This model allows 'any person' to apply to the Victorian Civil and Administrative Tribunal ("**VCAT**") for an enforcement order to enforce the provisions of the P&E Act and planning schemes made under it.

In the case of an application to enforce the provisions of the P&E Act and planning schemes made under it, the applicant applies for an enforcement order. An enforcement order works in the same way as an injunction, able to be used to prevent an action taking place. However, an enforcement order under the P&E Act can also require specified actions to be taken within the times specified in the P&E Act??.

It is submitted that the use of an enforcement order or interim enforcement order should not be tied to 'Critical Habitat' areas in the same way as ICOs are. This is because there are no Critical Habitat areas currently in force and accordingly, reliance of any enforcement measure upon Critical Habitat renders the mechanism useless.

Instead, such orders should be based upon recorded sightings of the listed species by a recognised expert in the field, and their opinion as to whether the habitat is suitable for the species. Restricting the test in this way would make the resultant protected area more likely to be

suitable habitat for the species than if it was simply chosen because the animal was found there, while tying the test to a recognised expert would make it more reliable, as the person's professional credibility is at stake.

Extending enforcement rights to the general community would not only broaden the resource base for taking action, but would also empower people and allow those interested to take an active role in the protection of Victoria's most threatened and endangered species. Further, it will relieve the pressure currently placed on NRE to fulfil its duties in this area, in addition to its other duties under the Act to prepare Action Statements and determine Critical Habitat. Therefore, third party enforcement rights would be beneficial on a number of levels.

(d) VCAT as the appropriate forum

VCAT is the body which considers applications for enforcement orders, and also appeals against decisions made by planning authorities under the P&E Act, including decisions regarding the issue or refusal to issue planning permits.

This is an effective model as it is accessible to members of community for several reasons.

Firstly, it is relatively inexpensive, as there is minimal initial cost (application fee to VCAT under the planning process for an enforcement order is currently only \$30). Legal fees can also be avoided as, strictly speaking, lawyers are not necessary.

Secondly, it is relatively simple to conduct a matter in VCAT. It is simple to apply for an enforcement order, as a prescribed form and guidelines are available on the internet or from VCAT. And, although VCAT may be intimidating to those without VCAT experience, it is not a Court, and therefore less so than a Court process. Court rules of procedure and evidence do not generally apply, although of course reliable evidence will have to be presented to obtain an enforcement order.

Thirdly, it can be very efficient, with a person having the option of seeking a standard enforcement order, that may be heard within a few weeks or an interim enforcement order that can be heard almost immediately (and is analogous to an interim injunction).

Finally, there is a specific Planning and Environment List to hear matters of this nature, with members who are trained in these areas. It is submitted, however, that if LFF's proposal is implemented, the number of members of the list with environmental expertise should be increased. VCAT should also be adequately resourced. For example, members should receive ongoing training in environmental management.

LFF notes that section 475 of the Commonwealth EPBC Act provides an alternative model to the enforcement order model under the P&E Act. Under section 475 a third party can apply to the Federal Court for an injunction to restrain a breach of the legislation. LFF considers that this model is not as appropriate as the use of enforcement orders

through VCAT is more cost effective for all parties, and more accessible to the public. It also mirrors the existing system in Victoria used for planning scheme enforcement.

(e) Standing

In order to counter any fears that allowing such broad standing will 'open the floodgates', there should be inserted a provision similar to that in the P&E Act, whereby a person who brings a vexatious or frivolous matter before VCAT faces having costs awarded against them. In the event that this measure is considered an insufficient deterrent, the standing test could be slightly narrower, instead mirroring that found in sections 475-480 of the EPBC Act, which allows standing to 'an interested person', where 'interested person' is one whose interests have been, or would be, affected by the proposed conduct, or where the person has been involved in activities for the protection and conservation of, or research into, the environment in the 2 years preceding the proposed conduct.

5.8 Expansion of the role of Critical Habitat declarations and ICOs

The declaration of Critical Habitat is a crucial part of the FFG Act, however, no definition is included in the Act. A broad definition should be included which concentrates on preservation of habitat critical to the ongoing evolution and development of the species in the wild rather than concentrating upon habitat critical to the maintenance of a minimum viable population. Criteria for Critical Habitat should also be set out in the Act.

Apart from the extension of nomination, appeal and enforcement order application rights listed in section 5.7, there should also be a requirement for the Minister or Secretary to make a Critical Habitat declaration or an ICO (or consider making a Critical Habitat declaration or ICO) if habitat meets the Critical Habitat criteria, or Critical Habitat is threatened respectively.

Furthermore, the Critical Habitat declaration process should be overseen by the Scientific Advisory Committee, in much the same way as the listing process currently is.

(a) Right to compensation

The right to compensation for financial loss suffered as a natural, direct and reasonable consequence of making an ICO, contained in section 43 of the FFG Act, should be amended. LFF considers that the starting position should be that landowners have a responsibility to ensure the protection of listed flora and fauna on their properties, and should not be compensated for fulfilling that responsibility.

This is similar to the owner of a heritage buildings, who is limited in the development of the building once it is listed under the Heritage Act 1995 (Victoria) or under a planning scheme.

However, LFF accepts that compensation may be necessary if, prior to the making of an ICO, the relevant landowner had existing use rights, generally as defined under the P & E Act, or the right to develop land in accordance with an existing planning permit. In such circumstances, if the ICO restricts the landowner's existing use rights, or where a landowner is required by the ICO to undertake positive

action (such as revegetation) reasonable compensation should be payable to the landowner by NRE.

LFF notes this is more generous than the compensation provided to the owner of a heritage building.

(b) Other matters

LFF considers that ICOs should not be automatically limited to a maximum of 2 years as often the importance of the habitat will not have diminished upon the expiry of 2 years. It would be more appropriate to leave the ICO in existence until it is revoked.

In other words, ICOs should not necessarily be an “interim” measure and for this reason, LFF recommends that ICOs should be renamed so that the term does not include the word “interim”.

LFF believes the right to appeal to VCAT on matters relating to the making or application of an ICO should be retained.²³

5.9 Preparation and implementation of Action Statements

Currently, Action Statements *must* set out what has been done to conserve and manage that taxon or community or process and what is intended to be done and *may* include information on what needs to be done. It should be mandatory, rather than discretionary, to include information on what needs to be done to protect and conserve the species, community or to halt the threatening process. Furthermore, the Regulations should set out in more detail the matters that should be included in Action Statements.

We have discussed a number of times, the delay that is occurring in preparation of Action Statements. To address this problem, the FFG Act should specify a mandatory timeframe for completion of Action Statements.

One of the fundamental flaws in the current system is that there is no obligation to monitor the species, community or threatening process after Action Statements are completed. A mandatory obligation to implement actions statements and review their effectiveness should be included in the FFG Act. In this regard, an obligation should be introduced to provide annual reports to Parliament on the progress of implementation of the FFG Act, as described in section 5.2 of this review.

LFF submits that a legislative program of regular public and independent review of the status of Action Statements, and the effectiveness of Action Statements in protecting listed taxa and communities and in managing threatening processes should be introduced.

Specific recommendations for the protection or management, as applicable, of Cool Temperate Rainforest, Myrtle Wilt, the Tiger Quoll, Leadbeaters Possum and Powerful Owl are listed in Schedules 4 – 7 respectively. These recommendations are specific and in addition to the general recommendations contained in this review.

²³ See Schedule 1, section 1.6.

5.10 Other changes

(a) ESD Principles enshrined in the FFG Act.

LFF submits that the FFG Act should incorporate the principles of ecological sustainable development (“ESD”). LFF notes that other environmental legislation - the EPBC Act, and the EPA Act incorporate ESD principles.²⁴ LFF also notes the Intergovernmental Agreement on the Environment provides that ESD principles should be taken into account in decision making.

As noted in section 4.8(b)(another?) of this report, adoption of ESD principles into the FFG Act (and consideration of the FFG Act) may lead to the better protection of species in Action Statements and FMPs, WUPs and FCPs.

For example, using the precautionary principle, it may be more likely that decision makers would include in the current draft Action Statement for the Tiger Quoll interim measures to protect the species from the effect of 1080 poison as well as conducting further research into the issue, rather than delaying any action until such research has taken place.

The following ESD principles should be taken into account in decision making (and approving FMPs, WUPs and FCPs):

- full integration of economic, environmental and social considerations;
- the precautionary principle (that is – if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation);
- the principle of inter-generational equity – the present generation should ensure that the health diversity and productivity of the environment is maintained or enhanced;
- conservation of biological diversity and ecological integrity; and
- improved valuation, pricing and incentive mechanisms should be promoted.

(b) Reasons for decisions

Decision makers should be required to state their reasons for the decisions they make under the FFG Act, and where appropriate, to demonstrate that the decision does not threaten listed taxa or communities, and otherwise complies with the FFG Act.

²⁴ EPA Act, section 1B – 1E and EPBC Act section 3A.

6 CONCLUSION

LFF's analysis shows that the existing regulatory and policy framework for the protection of threatened species in Victoria is in need of a major overhaul. Fourteen years after its enactment, it is evident that while the FFG Act contains a number of useful procedures and instruments, it lacks substance and mandatory obligations, strict monitoring and reporting requirements and sufficiently punitive penalties. Judged against what are arguably its primary objectives – to conserve listed endangered or threatened species, and to ensure that genetic diversity of flora and fauna is maintained – the Act has not been a success. Action statements have been prepared for less than one quarter of the listed species, communities and threatening processes. Furthermore, there is no evidence that any species or communities have been removed from the list due to an improvement in their conservation status.

One of the greatest failings of the Act has been the failure to implement it. For example only a small proportion of the Action Statements have been prepared. No ICOs have ever been made.

LFF believes there are a number of reasons for this, including the following:

- NRE is under resourced;
- there appears to be a lack of government will to fully implement the FFG Act;
- there is a lack of government transparency and accountability in its decision making under and implementation of the Act;
- the Act is unenforceable; and
- the Act (and actions taken under it) are not required to be taken into account in government decision making under the Act, or generally.

Consequently, NRE should receive appropriate funding to fully implement the FFG Act, and the government commit to NRE fulfilling its obligations under the Act.

However, this of itself is not sufficient. The Act should be enforceable, and NRE should be accountable in its efforts to fulfil its obligations under the Act.

To seek to achieve this, the Act should be amended as outlined in section 5 of this review. These amendments include the following:

- third party enforcement, participation and review rights should be expanded;
- there should be specific timeframes inserted in the Act for NRE and other decision makers to take certain actions, or make decisions;
- NRE and other bodies should be required to report annually on its progress in implementing the Act; and
- Clear criteria for decision making should be set out in the Act, and decision makers should be required to provide and publish reasons for their decisions.

Finally, the FFG Act should also be taken into account in government decision making, and integrated with the EE Act, and P & E Act. Exemptions from the application of the FFG Act (such as that which occurs by reason of the Forest Produce

Harvesting Order) should be removed unless proper EIA and consideration of the FFG Act has first occurred.

Lawyers for Forests

November 2002

GLOSSARY

Action Statement	Action Statement made pursuant to FFG Act
the Code	Code of Forest Practices
CRA	Comprehensive Regional Assessment undertaken under the RFA Process
CAR Reserve	Comprehensive, Adequate and Representative Reserves
Critical Habitat	Critical Habitat declared pursuant to FFG Act
EE Act	Environment Effects Act 1978 (Vic)
EIA	Environment Impact Assessment
EPA	Environment Protection Authority
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999 (Cth)
ESD	Ecologically Sustainable Development
FCP	Forest Coupe Plan (see Schedule 2)
FFG Act	Flora and Fauna Guarantee Act 1988 (Vic)
FMA	Forest Management Area (for which a FMP is prepared)
FMZ	Forest Management Zone
FMP	Forest Management Plan (for a particular FMA)
Forests Act	Forests Act 1958 (Vic)

the Forest Produce Harvesting Order	Flora and Fauna Guarantee Act (Forest Produce Harvesting) Order 1988
GMZ	General Management Zone – term used in FMPs – see Schedule 2.
ICO	Interim Conservation Order, made pursuant to the FFG Act
LFF	Lawyers for Forests, Inc.
Management Plan	Management Plan made pursuant to FFG Act
the Minister	the Minister for Environment
NRE	Department of Natural Resources and Environment
P&E Act	Planning and Environment Act 1987 (Vic)
POMA	Powerful Owl Management Area, (refer Schedule 7)
RFA	Regional Forest Agreement, (refer Schedule 2)
RFA Process	Regional Forest Agreement Process, (refer Schedule 2)
SMZ	Special Management Zone - term used in FMPs – see Schedule 2
SPZ	Special Protection Zone - term used in FMPs – see Schedule 2
State Forest	Forest outside the CAR Reserve Forest and therefore available for logging
VCAT	Victorian Civil and Administrative Tribunal

the Wildlife Act

Wildlife Act 1975 (Vic)

WUP

Wood Utilisation Plan - see Schedule 2

SCHEDULE 1 - OVERVIEW OF THE FFG ACT

1.1 Introduction

The FFG Act was passed by the Victorian Parliament on 6 May 1988 and came into operation later that year, six years after it was first adopted as Victorian ALP policy. The objectives of the FFG Act are stated in section 3.1 of the review.

The four principal mechanisms in the FFG Act (and summarised at section 3.1 of the review) (listing/ Action Statements, threatening processes/management plans, Critical Habitats and Interim Conservation Orders) are discussed in detail below. Other aspects of the FFG Act are also summarised below.

1.2 Listing of species and threatening processes²⁵

The FFG Act provides for the listing of endangered species or communities of fauna and flora and threatening processes.

Nominations for listing are considered by the Scientific Advisory Committee, which was established under section 8 of the Act. The Committee consists of 7 scientists (3 from within the State Government, 2 which are staff of any of the Victorian education institutions, and 2 not employed by the Government). While anyone can nominate a species, in practice, considerable scientific knowledge is required.

The FFG Act, section 15 sets out the eligibility criteria for listing, and the process for the Scientific Advisory Committee to follow once a nomination has been made.

The Minister must consider (but is not bound to follow) the recommendations of the Scientific Advisory Committee and any comments of the Victorian Catchment Management Council²⁶ and the Conservation Advisory Committee.²⁷

The Minister's decision is not subject to review, nor is the Minister obliged to publish reasons for the Minister's decision. Nor must the Minister make a decision within a set period from the date of the Scientific Advisory Committee's recommendation.²⁸

1.3 Management Plans²⁹

The FFG Act allows the Secretary to prepare plans for the management of any species or community or potentially threatening process. The Management Plan must include details of the species or community or potentially threatening process to which it applies and then detail the management objectives in relation to that subject, together with information on the implementation and evaluation of those objectives. As well as considering nature conservation matters, social and economic consequences must be considered and a date must be set for review of the Management Plan.

²⁵ FFG Act sections 10 – 16.

²⁶ Established under the Catchment and Land Protection Act 1994.

²⁷ Established under the Conservation Forests and Lands Act 1987.

²⁸ For example, the Scientific Advisory Committee recommended the Powerful Owl be listed on 25 August 1994. The Powerful Owl was listed on 11 May 1995, a delay of nearly nine months.

²⁹ FFG Act sections 21-24.

The FFG Act sets out a consultative process with landowners or water managers who may in the Secretary's opinion may be directly and materially affected by the Management Plan, and also the public generally.

However:

- There is no requirement for the Secretary to prepare a Management Plan for threatening processes or endangered communities of flora or fauna;
- There is no process for individuals to nominate threatening processes or taxons or communities of flora and fauna as meriting a Management Plan.
- There is no requirement for the Secretary to publish reasons for the Secretary's decision.
- There is no right of appeal against the Secretary's decision.

The FFG Act also allows the Secretary to enter into a public authority management plans with one or more public authorities for the management of any species or community or threatening process.

1.4 Action Statements ³⁰

An Action Statement must be prepared "as soon as possible" after a species or community or process has been listed. The Action Statement must set out what has been done to conserve and manage the listed species/community/ process. It may also include what is intended to be done.

The Scientific Advisory Committee, the Victorian Catchment Management Council and the Conservation Advisory Committee have an advisory role in the preparation of an Action Statement. The Minister must consider any advice given by these committees, as well as any other relevant nature conservation, social and economic matters when making an Action Statement.

1.5 Critical Habitat³¹

The Secretary may determine that the whole or a part of any of the habitat of any species or community of flora or fauna is critical to the survival of that species or community.

While Critical Habitat is not defined in the legislation, departmental policies define it as "the area(s) of habitat which would ensure the long-term survival of, or where such a goal is not technically possible, give the best change of long-term survival of the dependent taxon and community estimated on the hypothetical basis that the area(s) was the only habitat left to that taxon or community." This definition also appears to reflect the objectives of the Act.

Although there is a notification process, the determination of a Critical Habitat does not have any immediate consequences without an ICO.

Again:

³⁰ FFG Act section 19.

³¹ FFG Act section 20.

- There is no requirement placed on the Secretary to declare Critical Habitat which is critical to the survival of a taxon or community;
- There is no process for individuals to nominate Critical Habitat.
- There is no requirement for the Secretary to publish reasons for the Secretary's decision.
- There is no right of appeal against the Secretary's decision.

1.6 Interim Conservation Orders ³²

The Minister may make an ICO to conserve the Critical Habitat of a listed (or nominated for listing) species or community on Crown land or on private land.

Before making an ICO the Minister must consult with any other Minister whose area of responsibility is likely to be affected by the ICO. In making the ICO, the Minister must consider nature conservation, social, economic and any other relevant matters.

The ICO may provide for:

- the conservation, protection or management of flora, fauna, land or water within the Critical Habitat which is the subject of the ICO; the prohibition or regulation of any activity or process which takes place on the land or in relation to the water or the use, management or development of the land or water within the Critical Habitat; and
- the prohibition, regulation or management of any activity or process which takes place outside the Critical Habitat which is the subject of the ICO but which is likely to adversely affect the Critical Habitat.

After the making of the initial ICO, there is a public consultation period, and the opportunity for the Minister to confirm the ICO (or revoke it). When making a decision relating to confirmation, the Minister must consider nature conservation matters, social and economic consequences, the advice of the Secretary on consultation and submissions and any other relevant matters.

The Minister may, under the FFG Act section 38 suspend any licences permits or authorities issued under other Acts if they contravene the terms of the ICO. The ICO also prevails over the provisions of any planning scheme.

A landowner or water manager is entitled to compensation for financial loss suffered as a "natural direct and reasonable consequence" of the making of the ICO, including the costs of complying with the ICO, or loss associated with the suspension of any licences permits or authorities by the Secretary under the FFG Act section 38.

Further the Secretary is required to assist any person who is required to carry out works under the ICO, if the Secretary believes the person could otherwise claim compensation under the FFG Act.

A person can appeal to VCAT in relation to the following matters:

- any requirement or prohibition placed on a person by a confirmed ICO;

³² FFG Act sections 26 - 44

- a decision of the Secretary under a confirmed ICO which affects a person's interests; or
- a decision of the Minister to suspend a person's licence, permit or authority issued under another Act.

ICOs only apply for a total period of 2 years from the date of the confirmation of the ICO, or an earlier date specified by the Minister or in the ICO. Before the ICO expires, the Minister and the Secretary must take all reasonable steps for the purpose of ensuring the long term conservation of the species, community or Critical Habitat in respect of which the order was made.

Again:

- There is no requirement placed on the Minister to make an ICO for threatened Critical Habitat;
- There is no process for individuals to request that an ICO be put in place for threatened Critical Habitat, or lodge an appeal against the Minister's decision to refuse to issue an ICO. There is no requirement for the Minister to publish reasons for the Minister's decision to make or refuse to make an ICO.

1.7 Offences and Penalties under the FFG Act

The FFG Act creates the following offences:

Non-compliance with an ICO is punishable by a maximum penalty of \$10,000 as well as a continuing penalty of 10 penalty units per day where a person has been convicted of non-compliance with the ICO and continues to fail to comply.

Taking, trading in, keeping, moving or processing protected flora without a licence or permit. Exceptions apply – for example for logging in State Forests in accordance with an Order of the Governor in Council published in the Government Gazette, and on private land, generally provided the flora is not offered for sale, (refer to section 4.7 of the review). A maximum penalty of \$5,000 applies.

It is also an offence to take, trade in, keep, move or process protected flora in contravention of an Order of the Governor in Council. A maximum penalty of \$4,000 applies.

Schedule 2 – OVERVIEW OF CONTROLS ON LOGGING

2.1 Introduction

Following the RFA Process:

- A system of Forest reserves was created with CAR Reserve Forest (basically forest identified as worthy of protection) and other Forest (“State Forest”) identified as suitable for logging; For State Forest within an area covered by an RFA between the State and Commonwealth Governments, the Commonwealth Government agreed to remove export controls and not to require EI A. The Commonwealth accredited Victoria’s forest management system.
- The State government agreed to implement their forest management systems.

Under the State forest management system:

- Logging in State Forests in accordance with a FMP, WUP is exempt from the operation of the FFG Act by reason of the Forest Produce Harvesting Order. This is explained in detail in paragraph 4.8 of the review. (There is no requirement that logging be conducted in accordance with the FCP).
- The Code, FMPs, WUPs and FCPs govern logging operations. The Code is the umbrella document, and the regional level FMPs are prepared in accordance with the Code. WUPs and FCPs are also governed by the Code. WUPs are prepared by NRE to show which areas within a FMA can be logged in a particular year. Under the Code, FCPs are then prepared and approved before logging commences. The Code states that the FCP should respond to and show stream buffers and other protected areas.

2.2 The Code

The Code was developed under the *Conservation Forests and Lands Act, 1987*. It sets out a few minimum standards (such as the requirement to provide stream buffers) which in theory must be complied with in FMPs, WUPs and FCPs.

The Code also provides guidelines for FMPs, including requirements:

- to provide for regional protection of biodiversity;
- to provide for protection of all flora and fauna listed under the FFG Act.

And, at clause 2.3.6, the Code states that conservation strategies and objectives must be defined in the FMP, with local prescriptions showing how they are implemented.

The Code goes on to list the matters the FMP must consider, and guidelines which **should be** considered, including:

“identification of the conservation status of species or communities in the forest reserve system, and other areas protected from harvesting, and

opportunities to improve the protection of threatened species or habitat values by reserving further strategic areas from harvesting, or by modifying harvesting and silvicultural techniques to achieve specific objectives.”

2.3 Forest Management Plans

(a) Introduction

The legal basis for FMPs is derived from the *Forests Act 1958* (Victoria), section 22, and the Code.

The Code states that FMP must be prepared for each FMA. It states what must be included in a FMP, including conservation strategies and objectives, and measures to implement them.

Each FMP establishes:

- a system of FMZ for State forest which set priorities and permitted uses for different parts of the forest; and
- a series of management guidelines, prescriptions and actions.

(b) Zoning controls

Each FMP sets out the zoning controls that apply. The FMA in for example the Central Highlands FMP is divided into three zones:

- SPZ: The FMP states that the SPZ is managed for conservation, with timber harvesting excluded. Further that the zone forms a network designed to link and complement established conservation reserves;
- SMZ: The FMP states that the SMZ is managed to conserve specific features, while catering for timber production under certain conditions; and the
- GMZ: The FMP states that the GMZ is managed for a range of uses, but timber production will have a high priority. Unproductive forest (less than 28m mean stand height) is included in the GMZ.

A number of smaller areas such as historic and recreation sites are also included in the SPZ.

Appendix A of the Central Highlands FMP provides a comprehensive list of the key values for major components of the SPZ and SMZ. Each component is referred to by a specific site number, which is identified on Map 2 of the Central Highlands FMP. The FMP states that each component of the SPZ zone will be managed to minimise disturbances or processes which threaten conservation values, and timber harvesting will be excluded

(c) Wood Utilisation Plans and Guidelines

NRE prepares WUPs to determine which areas of the FMA will be logged in a particular year. These are based on the FMP. That is, they allocate coupes within GMZs, and in some cases, within SMZs.

WUPs have two components

- WUP maps. They show the placement of coupes to be logged within a three year period.
- WUPs. These documents provide details of wood production and its allocation to licensees over a 3 year period. The 3 year Plans identify the coupes from which the annual allocation may be taken and the recipients of wood allocation. Specifications of volumes and grades of timber are detailed for the first year of the Plan together with indicative specifications for the following 2 years. The Plan is updated annually.

The only requirement placed on WUPs by the Code is that WUPs must be designed to “limit impact on flora and fauna” and that the location and dispersion of coupes “should be consistent with flora and fauna management. In practice this means that the preparation of a WUP does not require EIA, merely that the WUP be generally in accordance with the FMP.

NRE has prepared Wood Utilisation Plan Guidelines for Native Forests. The new Guidelines dated September 2000 are available on the NRE Website (applicable to the 2001/2 year). It is interesting to note the limitations on public consultation contained in the Guidelines. Section 2.9.2 of the Guidelines states:

“WUP amendments do not require public consultation except:

- *for additional coupes or additional roads to be constructed (exemptions to this requirement may only be granted by the General Manager Forestry Victoria following endorsement of the coupe or roadline by the Regional Manager);*
- *where the Manager, Forestry Victoria or the Regional Manager considers that an amendment involves issues that are likely to be sensitive;*
- *for stands which will be salvage harvested and which are greater than 100 ha in gross area (refer to 2.9.3).”*

(d) Forest Coupe Plans

Under the Code, FCPs must be formulated to take into account conservation objectives and strategies in the FMPs. So, as for the process in approving WUPs, flora and fauna conservation is addressed at the regional level in the preparation of FMPs. Under the Code, it is not separately assessed in approving the FCPs. The assumption being that approval of the FMP achieved this goal.

SCHEDULE 3 - COOL TEMPERATE RAINFOREST

3.1 What is Cool Temperate Rainforest?

The Otways FMP states that cool temperate rainforest communities are of high value for flora and fauna conservation.

The FMP states that cool temperate rainforest species include:

- Myrtle Beech - *Nothofagus cunninghamii* (primary species);
- Tree Fern - *Dicksonia antarctica* (primary species);
- Blackwood - *Acacia melanoxylon* (secondary species);
- Eucalyptus regnans (secondary species); and
- *Phebalium squameum*. (secondary species).

The FMP indicates that cool temperate rainforest in the Otways FMA usually occurs as narrow strips beside streams on the southern slopes of the ranges. Scattered stands also occur in sheltered sites on the upper northern slopes.

Ten rainforest sites within the Otways FMA have been identified as being of national, state or regional significance by Cameron (1990). The FMP indicates that these ten sites listed above were generally delineated by including all native forested land in the catchments within which the rainforest occurs. All other rainforest communities in the Otways FMA are rated as at least of local significance.

More than 30 plant species classified by Gullan et al. (1990) to be rare, vulnerable or endangered in Victoria are found within State forest in the Otways FMA. Most of these species are found within cool temperate rainforest, or occupy either riparian or poorly drained sites.

3.2 Conservation Status

The cool temperate rainforest community was listed as a threatened community under the FFG Act on 21 May 1992.

Section 19(1) of the Act requires the Secretary to prepare an Action Statement for any listed community as soon as possible after that community is listed. Section 19(2) requires the Action Statement to set out what has and will be done to conserve and manage the listed community.

No Action Statement for cool temperate rainforest has yet been prepared, despite the fact that it was listed under the FFG Act ten years ago. NRE has advised that an Action Statement is currently being prepared. However, no draft has yet been released for public comment.

Given the international, national, regional and local importance of rainforests for ecological, as well as tourism purposes, we consider the lack of an Action Plan for cool temperate rainforests to be a major failing.

3.3 Defining rainforest

In determining what areas of the Otways FMA deserve protection as "rainforests", the FMP appears to rely on the definition used in the Code and a working definition developed by NRE.

The Otways FMP states that management zones for rainforest communities in the Otways FMA were based aerial mapping of the four vegetation types that have floristic or structural characteristics consistent with, or similar to, that of rainforest. Most of this mapping seems to have been undertaken between 1982 and 1988.

Importantly, the FMP notes that further floristic field sampling is required in the Myrtle Beech/Blackwood mixture and pure Blackwood categories to determine the area of these two vegetation types that constitutes cool temperate rainforest.

NRE has advised that due to the difficulty of identifying rainforest by aerial photography, rainforest is identified in the field and excluded from the harvested area.

The FMP notes that in determining the precise boundary of the rainforest community in the field, the Department assesses the extent and composition of the canopy cover, using a floristic field identification key. Areas with a more or less continuously closed canopy of Myrtle Beech, Blackwood or both that contain characteristic Otway cool temperate rainforest differential species are managed as rainforest.

However, we are aware of anecdotal evidence that suggests that that field staff may overlook the true boundaries of rainforest catchments, and allow harvesting to occur in areas that are vital for rainforest protection.

The overlapping area, or ecotone, between eucalypt and rainforest is a rare and rich biological resource, and in our view, should be properly included in the area protected from logging.

3.4 Buffer Zones

The Otways FMP notes that it has adopted the requirements of the Code of Forest Practices in requiring buffers of at least 20 metres wide on linear shaped rainforest, and 40 metres elsewhere.

We are concerned that appropriate buffer zones are not properly identified, because of the failure to properly identify the true boundaries of rainforest catchments, and when they are, not adhered to by forestry operators.

3.5 Effect of the Flora and Fauna Guarantee Act (Forest Produce Harvesting) Order 1998

As noted in paragraph 4.8 of the review, the Forest Produce Harvesting Order authorises the destruction of protected flora in State Forest and Crown land where that taking is incidental to harvesting operations or associated road works authorised under the Forests Act 1958, and the conditions imposed under the Order are complied with.

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The effect is that the exemption under the Order is conditional on the operator complying with the requirements of the Code of Forest Practices, and the relevant FMP. We have real concerns about whether FMPs adequately protect cool temperate rainforest, as explained below.

Further, the condition which requires "restoration work" to be undertaken is clearly nonsensical in the context of cool temperate rainforest. No amount of "restoration work" following the destruction of old growth rainforest can replace the complex ecosystem interactions which exist in such a rainforest.

3.6 Protection of Cool Temperate Rainforests under Forestry Management Plans

The requirements of the Code of Forest Practices- Conservation of Flora and Fauna have application for the protection of cool temperate rainforest. Clause 2.3.6 of the Code of Forest Practices provides that:

“Planning and harvesting operations in native forests must specifically address the conservation and protection of flora and fauna. Conservation objectives and strategies must be defined in Forest Management Plans, and local prescriptions should clearly indicate how these are to be implemented and how they should be varied for particular forest locations. Forest Coupe Plans must be formulated to take account of these prescriptions.”

Specifically, FMPs and associated local prescriptions must consider:

- representative conservation and minimum levels of protection for all classes of a suitably defined vegetation classification;
- special protection of communities of limited distribution;
- a strategy for conserving rare and threatened plant species and threatened animal species;
- protection and provision for recruitment of old trees;
- protection of old-growth forest where necessary; and
- a strategy for maintaining a mosaic of corridors, regrowth stages and zones which incorporate high flora and fauna value so as to enhance conservation values and bio-diversity.

The Guidelines state that the following approaches should be considered to facilitate protection of flora and fauna values:

- identification of the conservation status of species or communities in the forest reserve system, and other areas protected from harvesting, and opportunities to improve the protection of threatened species or habitat values by reserving further strategic areas from harvesting, or by modifying harvesting and silvicultural techniques to achieve specific conservation objectives;
- adoption of a cautious approach to the conservation of flora and fauna values, permitting further monitoring and research to improve understanding of the effects of forest management on forest ecology and conservation values;

- retention of habitat trees and old-age understorey elements in appropriate numbers and configurations, and provision for replacement of old hollow-bearing trees within or around coupe. Consideration must be given to both the protection of habitat trees during harvesting and subsequent management, and the effect of retained trees on the growth of future crop trees;
- providing appropriate unlogged buffer areas around significant habitats;.
- areas reserved or specifically managed for flora and fauna conservation should be described, shown on the Forest Coupe Plan and identified in the field.

There are also specific requirements of the Code of Forest Practices - Protection of Rainforest. The Code of Forest Practices provides that:

Rainforest must be excluded from timber harvesting and, because rainforest communities may be particularly vulnerable to adjacent disturbance, they should be surrounded by an appropriate buffer.

Further, the Guidelines provide that:

- areas of rainforest must be defined, and a strategy for their management must be included as part of planning for conservation of flora and fauna in Forest Management Plans and/or in the relevant prescriptions. The most important rainforest areas should be accorded highest protection;
- in the absence of detailed strategies within an approved Forest Management Plan, which address regional characteristics, the following prescriptions will apply:
 - (i) for stands of lesser significance - 40 m buffers, or 20 m exclusion plus a 40 m modified harvesting strip (> 40% of basal area retained, low machine disturbance, minimal burning);
 - (ii) for stands where *Nothofagus* makes up >20% of the canopy - buffers of 60 m, or 40 m buffer with 40 m modified harvesting zone (> 40% of basal area retained, low machine disturbance, minimal burning);
 - (iii) for stands containing nationally significant rainforest - the highest degree of protection, generally sub-catchment level, except where full protection can be provided by other measures, which are/will be outlined in approved plans;
- rainforest areas must be shown on the Forest Coupe Plan and buffers identified in the field;
- buffers must be protected from damage caused by trees felled in adjacent areas.

3.7 Recommendations

An Action Plan should be prepared for cool temperate rainforest as a priority, with appropriate community consultation.

FMPs for areas where cool temperate rainforest exist should be amended to reflect the requirements of the Action Plan.

Critical Habitat determinations should be made for all cool temperate rainforests of international, national, regional and local significance be made.

The Forest Produce Harvesting Order should be revoked.

Field staff should receive adequate training so as to ensure the true boundaries of rainforest catchments are protected from logging.

SCHEDULE 4 - MYRTLE WILT

4.1 What is Myrtle Wilt?

Myrtle wilt is a naturally occurring fungal disease which infects myrtle beech trees. It enters a beech tree through an open wound in the tree or through root graft. These wounds are naturally caused by wind and storm damage to trees. Pin hole borer beetles which bore into myrtle trees dying from myrtle wilt assist in spreading the myrtle wilt fungus spores throughout the forest.

Myrtle beech trees are found in cool temperate rainforests in Victoria. They are also found in rainforests in Tasmania.

After approximately 2 - 3 years, an infected tree will turn yellow, then brown and then will die.

Human disturbances can increase the rate of infection due to the wounding of root systems and tree stems. These disturbances can be caused by the construction of tracks, timber harvesting in mixed forests, wind-throw and land clearing. While buffer strips are required in some instances around vulnerable areas, in other areas logging or road construction may take place right at the edge of the rainforest and damage to rainforest trees can occur from debris being pushed into the rainforest.

4.2 Conservation Status

On 31 March 2000, "human activities which results in artificially elevated levels of myrtle wilt within Nothofagus-dominated cool temperate rainforests" was listed as a threatening process under the FFG Act.

No Action Statement has been prepared for myrtle wilt. A letter from the Secretary of NRE, Ms Chloe Munro, dated 20 April 2001, to Mr Robert Stary, stated that preparation of an Action Statement for myrtle wilt was planned for the 2001/2002 financial year.

In late 1994 the CSIRO reviewed the Code of Forest Practices made in accordance with the *Conservation, Forests and Lands Act 1987*, and recommended that an interim minimum distance for buffers between logging activities and cool temperate rainforests be 40 - 60 metres. The CSIRO in its response to consultation on its initial review recommended that the size of the buffer zone be the subject of ongoing review based on new information. Section 2.3.7 of the Code adopts the recommendations of the CSIRO, providing that the buffer distances may be adjusted prior to the next Code review depending on the results of further research into rainforest protection.

In 1996, D G Cameron and L A Turner's report, "Survey and Monitoring of myrtle wilt within Victoria's cool temperate rainforests in Victoria" (DNRE) recommended a buffer zone of 250 to 300 metres should be required between cool temperate rainforests and disturbing activities such as logging or road construction.

In April 2001, the West RFA did not deal with the issue of myrtle wilt. The West RFA Consultation paper defers the consideration of myrtle wilt until the revision of the Otway Forest Management Plan in 2005.

The FMP for the Otway FMA - Chapter 8 states that a High Priority action, is to investigate the extent, rate of spread and floristic impact of myrtle wilt.

The FMP for the Central Highlands - Chapter 8 sets out management actions which include the implementation of the myrtle wilt Management Guidelines in order to minimise the spread of myrtle wilt. These Guidelines state that forest management and utilisation operations in State Forest should aim to prevent or minimise the spread of myrtle wilt and to rehabilitate infected stands where appropriate, including by:

- preventing the wounding of Myrtle Beech
- NRE will investigate the effectiveness of rehabilitating infected stands through active promotion of seedling regeneration and growth of Myrtle Beech

4.3 Research

The proposed Gippsland FMP - Chapter 6 states that actions include the investigation of reports of myrtle wilt in State Forest and, where necessary, develop management guidelines for the control of the spread of the fungus.

4.4 Myrtle Wilt is spreading

LFF is aware that road construction in the Strezlecki Ranges and logging in the forests of the Central Highlands is alleged to have caused the spread of myrtle wilt.

LFF is also aware that logging and road construction which have lead to the spread of myrtle wilt in the Otway forest, including Ciancio in April 2000 and College Creek during 1998/99.

The difficulties in managing the spread of myrtle silt is compounded by the lack of research which has been undertaken by the government to date and the absence of an Action Statement specifying management actions to address the issues..

4.5 Recommendations

An Action Statement should be prepared for myrtle wilt as a priority. It should set appropriate buffer zones. Preparation of the Action Statement should involve appropriate community consultation.

FMPs for areas where myrtle wilt exists should be amended to reflect the requirements of the Action Statement.

The Forest Produce Harvesting Order should be revoked.

Field staff should be adequately trained to ensure the implementation of the Action Statement and protective buffer zones.

SCHEDULE 5 - TIGER QUOLL

5.1 Background

The Spot-tailed Quoll (or 'Tiger Quoll', *Dasyurus maculatus*) is the largest marsupial carnivore on mainland Australia and is characterised by conspicuous white spots over the body and tail. The Tiger Quoll occurs in eastern Australia, including Tasmania, however, recent molecular analysis indicates that the Tasmanian population is genetically quite distinct from the mainland populations, suggesting that it should be regarded as a separate subspecies.

The Tiger Quoll appears to have a broad distribution in Victoria. It is noted that due to declines in the range and abundance since European settlement, the Tiger Quoll now survives in several discrete areas, including some isolated, highly fragmented populations. According to the original Action Statement, possible current centres of distribution include:

- the Great Dividing Range and East Gippsland;
- the Otway Ranges; and
- the south-western region of Victoria centred on Mount Eccles National Park.

Tiger Quolls were recorded in the Mount Macedon area and in south Gippsland in the 1960's and 1970's respectively, however it is unknown whether populations persist in these regions. A recent record (July 1991) at Natya raises the possibility that populations exist along the Murray River. There are also unconfirmed reports of the species in the Horsham region.

5.2 Conservation listing

The Tiger Quoll is listed as a threatened taxon under the *Flora and Fauna Guarantee Act 1988* (Vic). Action Statement No. 15 was prepared in accordance with the Act in May 1992 and is the subject of recent review, with a Draft for Comment being released in June 2001.

Informal discussions with Garry Backhouse of NRE, in early July 2002, revealed that NRE received over 60 submissions to the draft and these were currently being considered. Mr Backhouse estimated that the Action Statement would be released around September 2002 and undertook to put an LFF member on the mailing list to receive the final version. However LFF has heard nothing as at the date of the review.

There has not been any Critical Habitat determined for the species, which in turn prevents any interim conservation orders being made under the FFG Act.

The Tiger Quoll was listed as 'vulnerable' under the EPBC Act in 1997. However, no Recovery Plan has been completed.

LFF is aware of allegations that the reason for the delay in preparation of the Recovery Plan is that the Tiger Quoll is a 'forest dependent species', in that any action taken by NRE is likely to have an impact upon timber harvesting. Further, because it is recognised that the Tiger Quoll is vulnerable to '1080' poisoning, and NRE conducts fox management programs which utilise 1080

poison, NRE is reluctant to formulate a Recovery Plan which would list 1080 poisoning as a threat to the species.

The West Victoria RFA dated March 2000, states that recent surveys for the Tiger Quoll conducted in the Otway Ranges detected their presence in three sites out of 51 locations surveyed, indicating that the population remains low and is perhaps in further decline.

Both the West Victoria RFA and the Gippsland RFA (dated March 2000) state that the CAR reserve system provides for the protection of approximately 1000 hectares of suitable habitat for records categorised as acceptable in the Atlas of Victorian Wildlife, and 'for each record located in State Forest, 500 hectares of suitable habitat is protected in the CAR reserve system (including adjacent formal reserves where possible)'. They further state that 'unless otherwise protected, a further 1000 hectares will be maintained within S MZ contiguous with the CAR reserve, of which 500 hectares is maintained as suitable prey habitat at any point in time' and that such measures were taken to address the 'potential sensitivity of the [Tiger] Quoll to disturbance associated with timber production' and to 'supplement the requirements of the Action Statement, by taking account of the new information that has become available since its publication'.

The FMP for the Otway FMA, dated June 1992, states the following as being of high priority:

- exclude harvesting and burning operations from known denning and latrine sites;
- conduct fuel reduction burning in the vicinity of known sites of occurrence in autumn rather than spring when young are not mobile; and
- avoid the use of persistent poisons or chemicals to kill problem wildlife in areas where the Tiger Quoll is known to exist;
- while of medium priority was encouraging surveys on distribution and specific habitat requirements.

The East Gippsland RFA lists the Tiger Quoll, but does not provide further information nor detail any action priorities.

5.3 Threats to the Tiger Quoll

Recognised threats to the Tiger Quoll include:

- reduction of suitable breeding habitat – within most of its current range, native forests are being cleared and timber harvested, resulting in decreased total area and fragmented habitat;
- use of 1080 poison to trap and bait wild dogs, dingos, foxes and perhaps rabbits;
- increased predation by dogs and foxes and competition from dogs, foxes and cats, due to opening of the forests through clearance of native vegetation and associated activities;
- inbreeding depression; and

- exacerbated impact of stochastic events (eg. fire, drought, fluctuating prey abundance and disease).

According to the draft Action Statement, a number of conservation initiatives have been instigated for the species.

5.4 Current and proposed management activities

There appears to be general consensus among the environment groups that:

- the management objectives contained in the original Action Statement for the Tiger Quoll were inadequate and there was overall non-compliance with the Action Statement (ie. requirement for 200m buffer zone often ignored);
- there has been a noticeable decrease in Tiger Quoll population;
- the FMP were inadequate as they relied upon SPZ and SMZ that are too small, fragmented and not necessarily located where the animals are located;
- neither pre-logging surveys for the Tiger Quoll, nor population viability studies, were being conducted;
- determination of Critical Habitat is an essential step in protection of the Tiger Quoll ;
- activities were taking place in the forests which clearly threatened the species' survival, such as fuel reduction burning that removes the understorey; and
- the proposed management objectives contained in the draft Action Statement were largely inadequate and would possibly be insufficient to halt the species' decline.

5.5 Recommendations

The following actions are recommended to ensure protection of the Tiger Quoll:

- the Draft Action Statement must be finalised as soon as possible;
- Critical Habitat must be defined for the species as soon as possible;
- given the noticeable decline in species number, the Draft Action Statement, once implemented, must be reviewed after one year of operation in order to determine whether the proposed management actions are effective conservation measures. This is especially important given the widespread criticism that has been levelled at the recommendations proposed in the Draft Action Statement;
- surveys and monitoring of the species should take place in the areas identified in the Action Statement as being possible centres of distribution for the Tiger Quoll; and

- FMP that include references to the Tiger Quoll must be amended to reflect the revised management objectives contained in the Draft Action Statement, once finalised and implemented.

Schedule 6 - Leadbeater's Possum

6.1 Background

The Leadbeater's Possum is a small marsupial found only in Victoria and, along with the helmeted honeyeater, is Victoria's faunal emblem.

The present distribution of the Leadbeater's Possum is restricted to mainly publicly owned tall ash eucalypt forests found in the Central Highlands of Victoria. However Leadbeaters Possums have been recorded in snow gum woodland at Lake Mountain and a small population also exists in Yellingbo State Nature Reserve.

Lawyers for Forests has been informed that the discovery of the Leadbeater's Possum in sub-alpine woodland in Lake Mountain has not been adequately followed up to determine the distribution and abundance of the species in that area. Furthermore, there has been a notable lack of follow up to an alleged sighting in Mountain Ash forest in the Otways in 1990 and to the discovery of a tuft of fur from the species near Macedon in 1995, almost 90 km from the nearest known occurrence of the species.

The availability of nest trees, dense understorey and food resources determine the distribution of the Leadbeater's Possum. Ideal habitat for the Leadbeater's Possum is a young regenerating or uneven aged ash eucalypt forest that contains wattles for feeding and an ample supply of old hollow-bearing trees for nesting. Nest trees are essential for the survival of the Leadbeater's Possum as they provide shelter and breeding sites. Ash trees, mainly mountain ash, alpine ash or shining gum do not form hollows until they are at least 120 years old. Hollows suitable for the Leadbeater's Possum may not develop until a tree is over 150 years old.

6.2 Threats to the Leadbeater's Possum

The species is heavily dependant on old trees that are threatened by timber operations and fire killed remnants that are rapidly decaying and falling over. Recruitment of suitable hollows, used for shelter and breeding, is very slow.

The Action Statement for the Leadbeater's Possum makes it clear that the existing nest trees in regrowth from the 1939 fires and more recently logged regrowth are being reduced by logging or natural decay more rapidly than replacement hollows are developing. As a result, the suitability of habitat for Leadbeater's Possum continues to decline.

Experts on Leadbeater's Possum have commented that unless the current silviculture practices of clearfelling and harvest rotation periods of 80 years (which prevents suitable hollows from developing in the regrowth trees) are significantly modified, the species will be unable to recover.

6.3 Conservation Status

In comparison to most other species, the Leadbeater's Possum has been well researched and has many legal protections in place. The Leadbeater's Possum is listed as endangered under the FFG Act and the Federal EPBC Act. The Leadbeater's Possum is also proclaimed as endangered wildlife under section 41 of the Wildlife Act.

An Action Statement was prepared for the Leadbeater's Possum in 1995. A recovery plan for the period 1998 – 2002 was also prepared by NRE and adopted under the EPBC Act.

6.4 Action Statement

The Action Statement contains a number of "Intended Management Actions" aimed at improving the conservation status of the Leadbeater's Possum and meeting the "Major Conservation Objectives" also set out in the Action Statement. By a letter dated 1 October 2002 addressed to Mr Adrian Moorees, LFF sought information from NRE on the status of the "management actions" for the Leadbeater's Possum and, in particular, whether these actions have commenced or been completed (where applicable). Aside from an acknowledgement of receipt, we have not yet received a response to this letter and as a result LFF is uncertain of the status of a number of the proposed actions.

However, LFF is aware that a significant number of the management actions have not been addressed or implemented. One of the key requirements in the Action Statement is the development of a permanent reserve system. More specifically, the Action Statement provides:

"In addition to the application of specific prescriptions according to the zoning classifications in state forest, CNR will establish a reserve system based on the extent and spatial distribution of Zone 1 classified forest, combined with strategic areas of regrowth forest (Zone 2). This permanent reserve system will:

- *be excluded from timber harvesting operations;*
- *consist of patches (greater than 50 hectares) of ash type eucalypt forest;*
- *be linked by wildlife corridors, streamside reserves, buffer strips and areas of state forest not suitable or available for timber harvesting; and*
- *include a network of patches to minimise the risk of individual patches being made unsuitable for Leadbeater's Possum by events such as wildfire.*

While development of the reserve system is regarded as an essential step in protection of the species, LFF's investigations have revealed that no formal first draft of the reserve system has yet been prepared. This is despite the passage of almost 7 years since the Action Statement was finalised.

One of the other notable failures of the Action Statement that LFF is aware of is the non-existence of the Leadbeater's Possum Management Team ("LMT"). There are a number of recommended actions that the LMT is supposed to be undertaking. These include:

- continuing to recommend priorities for research and monitoring projects and ensuring that intended management actions and associated prescriptions are applied in a consistent manner in each of the three CNR Areas where Leadbeater's Possum occurs;
- monitoring the establishment and effectiveness of intended management actions outlined in the Action Statement;

- reviewing and recommending alterations and additions to this Action Statement and associated management plans in the light of new information; and
- providing an annual written report to the Leadbeater's Possum Steering Committee, which will include an evaluation of the achievement towards the Major Conservation Objectives of the Action Statement.

LFF understands that no annual reports have been prepared. Furthermore, since the LMT disbanded in 1998, none of the other important actions listed above are being carried out. The absence of a LMT has also resulted in a lack of direction for management of the species in captivity and in non-mountain ash areas such as Yellingbo State Nature Reserve and Lake Mountain.

6.5 Starlings Gap

The following information regarding a road realignment project at Starlings Gap was obtained by LFF under two Freedom of Information requests made last year. This case is an alarming example of the failure of the Action Statement to adequately protect the Leadbeater's Possum.

In April 2000, Paul Pearson, Senior Planner, Dandenong FMA wrote to Tim Sanders, Forest Management Planner, Dandenong FMA seeking approval for a road alignment. The proposal involved a road straightening exercise (approximately 650m long), which would pass through Leadbeater's Possum habitat. However, in that memorandum, the Leadbeater's Possum was not mentioned. Remarkably, this memorandum was not only written by Paul Pearson, but was then endorsed by Paul Pearson for the Senior Forester.

In June 2000, work commenced on the realignment. Shortly thereafter 'nesting boxes' were discovered and the site was identified as a 'Leadbeater's Possum Monitoring Site'. Nesting boxes are a means of overcoming the shortage of hollow bearing trees. Whilst established nest boxes have proved successful in limited trials, there is currently no intention to establish them throughout Leadbeater's Possum habitat.

As a result of the discovery, a decision was made to slightly realign the proposed route from the Monitoring Site to the Monitoring Site Buffer. This was 'as a compromise between prohibitive roading costs and the continuing validity of the site whiles increasing safety for forest users.'

LFF considers that construction of a road in a Leadbeater's Possum Monitoring Site Buffer is contrary to the objectives of the FFG Act. Although the site was of significance for protection of the Leadbeater's Possum and was given a special status of Monitoring Site, this did not result in an 'legal' protection. Monitoring Sites do not have any special 'protected' status under the FFG Act, nor are they mentioned anywhere in the Action Statement or Recovery Plan.

The only relevant section of the Action Statement for the road operation at Starlings Gap is in the "Other Desirable Management Actions", which states:

Determine the effects of road construction and upgrading operations on Leadbeater's Possum and develop prescriptions for planning and operational procedures that take into account the conservation of the species.

It appears that this management action has not been carried out. As a result, the Action Statement was useless to protect the species at Starlings Gap. If the FFG Act was amended to require NRE to take the Action Statement into consideration when making a decision under the Forestry Act and subordinate legislation, this situation may have been avoided.

6.6 Recommendations

The following actions are urgently recommended to ensure protection of the Leadbeater's Possum:

- Finalisation of the reserve system;
- Re-establishment and adequate resourcing of the Leadbeater's Possum Management Team;
- Implementation of all the "Intended Management Actions" contained in the Action Statement; and
- An end to clearfell logging in Leadbeater's Possum habitat.

SCHEDULE 7 - POWERFUL OWL

7.1 Background

The Powerful Owl (*Ninox strenua*) is Australia's largest owl, with a head to tail length of up to 65 cm. It is found along the east and southeast coast, from Rockhampton to the Victorian/South Australian border.

As a nocturnal hunter of marsupials, it prefers older forest with an abundance of large tree hollows – both as nesting sites and an area where marsupials are more prevalent.

The Powerful Owl Action Statement states that suitable hollows are not formed until the trees are at least 150 – 200. However the Action Statement then quotes a study where the nesting sites of Powerful Owls were all observed to be in trees of between 350 – 500 years in age.

7.2 Conservation Listing

Obviously the destruction of old growth forest has threatened the habitat of the Powerful Owl and its prey.

Like the Leadbeaters Possum, the Powerful Owl has been well researched and is protected as far as possible under the FFG Act. The Scientific Advisory Committee recommended that the Powerful Owl be listed under the FFG Act, and the Committee's recommendation was published in the Government Gazette on 25 August 1994. The Powerful Owl was then listed on 11 May 1995. An Action Statement has been prepared and came into force in November 1995.

7.3 The Action Statement

The Action Statement for the Powerful Owl states that the short term objective is to protect habitat for at least 500 pairs of Powerful Owls, These areas are designated POMAs.

The Action Statement lists the priorities for inclusion. "Confirmed nesting trees utilised during the last 5 years" are accorded the highest priority for listing as POMAs.

The Action Statement also provides for a Powerful Owl Management Register to record the locality and status of all sites, and additional sites for review as necessary.

The Action Statement also provides that a core area of suitable habitat will be protected of at least 500 ha within a 3.5 km radius of each POMA, as core SPZ. Where forest stand characteristic limit the adequacy of the core SPZ, then additional habitat of up to 500 ha of SPZ and/or SMZ should be maintained in the same 3.5 km radius.

The Action Statement also provides that all confirmed roosting sites will be protected by a 3ha SPZ around the site, and a 250-300 m radius (or similar linear area) SMZ buffers around identified localities.

The Action Statement goes on to list the target number of POMAs for each FMA.

7.4 Implementation of the Action Statement

NRE has confirmed orally that the 500 POMA target has been met. However LFF has not been able to confirm this as:

- POMAs within conservation parks and reserves are not identified in the FMPs. LFF to date has not been able to ascertain the number of POMAs provided in conservation parks and reserves.³³
- The FMAs listed in the Action Statement do not correlate with the FMAs in the approved FMPs. That is the Action Statement has not been updated to take into account the change in areas for the FMPs. However NRE has provided information on the correlation between the two.
- Some FMPs are in draft form, and others are out of print (although available on the NRE website or in hard form at the NRE library). Unfortunately the internet version often do not have the appendices or maps, so that the internet based resource is limited in its usefulness).

Leaving aside the appropriateness of the size of the POMAs at 500 ha (or 1000 ha SPZ if the forest stands are inadequate), which is questioned by conservationists, LFF makes the following observations:

- The Otways FMP³⁴ predates the Action Statement. It has not been updated to reflect the POMA requirements of the Action Statement. It is therefore impossible to tell from the FMP whether the Action Statement has been implemented in the Otways.
- POMAs in the State Forest portions of the FMPs are often below the 500ha size (assuming it is pristine habitat and 1000ha is not required). For example of the POMAs provided in the North East FMA, 28 POMAs are above the recommended 500 ha. However 17 are under the 500 ha size – some or only 7 – 10 hectares.
- In the draft Central Gippsland FMP, and within the State Forest portion of the FMA, 36 POMAs of over 500 ha are provided, with 17 under that size. So 47% of the POMAs proposed to be provided are undersize. Further there is no acknowledgement in the draft FMP of the requirement under the Action Statement that an additional 500 ha of habitat should be provided where the forest stand characteristics limit the adequacy of the core 500ha SPZ.
- The North East, Central Highlands, Otways and Midlands FMPs do not incorporate the limited local EIA stated in the Action Statement, that is the requirement that *“all confirmed roosting sites will be protected by a 3ha SPZ around the site, and a 250-300 m radius (or similar linear area) SMZ buffers around identified localities.”*

³³ Although the draft Central Gippsland FMP does state that 155 POMAs are provided within the State Forests and conservation reserves. It does not however identify the POMAs in the conservation reserves.

³⁴ Downloaded from the NRE website November 2002

7.5 The Trentham Powerful Owl case.

A pair of nesting Powerful Owls was observed and photographed in Trentham in October 2000, around the area known as the Hill Tops. The pair had been known to be in the area for at least the preceding year, and successfully bred chicks in August 2000. On the basis of the criteria listed in the Action Statement, this pair should have been accorded the highest priority for inclusion in a POMA, as “a confirmed nesting site utilised in the last 5 years.”

The Midlands FMP does not exactly mirror the Action Statement, but does state that:

“NRE will ensurecore habitat requirement for a minimum of 25 POMAs will be provided” and

“Within a 3.5 km radius of a Powerful Owl record, a minimum of 500 ha of mature forest will be reserved from harvesting” and

“A further 500 ha of mature forest or regrowth forest of a minimum age of 30 years, will be maintained through appropriate scheduling of harvesting”

LFF understands enquiries were made of NRE to establish the number of POMAs within the Midlands FMA. After some six months, NRE provided details and it was confirmed that only 24 POMAs had been established.

Local conservationists pushed for the 25th POMA to be established to protect the Trentham Powerful Owls. However the 25th site was allocated to a site in the Pyrenees, despite the fact that the POMA was based on an unconfirmed sighting over 5 years previously. Attempts to have the Trentham Powerful Owls protected by a POMA were resisted by NRE, on the basis that the quota of 25 POMAs for the Midlands FMA had been met. LFF notes that the 25 POMA “limit” is in fact expressed as a minimum in the Action Statement.

Instead LFF understands NRE provided a 500 ha SPZ, of which only 300 ha was mature forest. So, in accordance with the Action Statement, additional habitat of up to 500 ha should have been provided, as the forest stands were such that a 500 ha SPZ was insufficient. Nor did the protected area comply with the Midlands FMP. The 500 ha was not mature forest, and nor was the additional 500ha provided.

Offers were made to exchange another POMA in the Midlands to establish a POMA for the Trentham Powerful Owls. However this offer was rejected, firstly on the basis that the 25 POMA quota was not an absolute limit, and secondly that it was inappropriate to exchange one parcel of powerful owl habitat for another.

Part of the area which would have been protected had a POMA been declared in accordance with the Action Statement, or the FMP complied with, was then proposed to be logged. However after considerable adverse publicity and protest at the site, the Minister, in August 2002, announced that the Powerful Owl habitat would be protected from logging in the immediate future.

The case demonstrates the ineffectiveness of the Powerful Owl Action Statement and FMP. Although the existence of the Action Statement and provisions of the FMP assisted in achieving protection of the Trentham Powerful Owl habitat, the site ultimately was protected by the application of

political pressure. It was not protected through the application of the FFG Act, nor the implementation of the Action Statement or FMP.

7.5 Recommendations

The Action Statement should be updated.

FMPs, WUPs and FCPs should be amended and required to fully implement the Action Statement.

The Forest Produce Harvesting Order should be revoked, and EIA required before approval of logging operations which affect Powerful Owl habitat.

Field staff should be adequately trained to ensure the implementation of the Action Statement.

POMAs in State Forest and CAR Reserve Forest should be clearly identified and updated as required.