Responses to questions on notice provided on 19 March 2021 and 26 March 2021

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Do you think there are ways to manage that kind of tension when you have got a different approach to farming? As noted on page 26 of the transcript

The question from Ms Talyor on page 26 of the transcript concerned managing tensions between different agricultural production approaches where these appear on adjoining properties. For the purposes of the inquiry it may be better to frame this in terms of distinctive farming methods that are more ecologically sensitive on the one hand and conventional on the other hand. An example, analogous to that proposed by Ms Taylor, might be where one landowner avoids or minimises chemical pesticide application and one does not and, consequently, the former retains remnant vegetation that is habitat for native species that control pests (for example, raptors that feed on mice) and the latter relies on chemical controls. There are actual examples of this approach.

The use of chemical controls may have an adverse indirect impact on the non-chemical farmer where, for instance, poisons are introduced into the food chain and contribute to loss or killing of the raptors controlling pest populations. In this instance, chemical controls are effectively disruptive an ecosystem function being used for agricultural purposes. This type of conflict could be susceptible to actions in tort (such as a claim of nuisance or negligence again the farmer using chemicals) but there would be difficulties concerning proof and causation I suspect. The chain of causation is not necessarily straightforward. Private law, such as torts actions between individuals, may not be the most effective way to manage these type of problems and conflicts. The incoming 'general environmental duty' under the *Environment Protection Act* may be better adapted. It is intended to control risks of harm to the environment or human health. There is patently a risk in this example. It does not require the harm to transpire but is intended to prevent it. It is conditioned by what is 'reasonably practicable'. The effect of the duty would, at its best, drive innovation and ways to accommodate and avoid these types of conflicts. The more straightforward (in some ways) problem of spray drift may be susceptible to the incoming GED also, although the duty is intended to protect the environment and human health not necessarily protect certain farming methods (for example, organic). If a cause of action is to be directed to the latter problem actions in nuisance or negligence appear better adapted.

How much glyphosate is used by the state on roadsides? As noted on page 27 of the transcript.

I do not have a precise answer to this question. Publicly available information online would suggest that it is used, with policies and guidance set out by Councils and certain agencies (for example the CFA). But information on volumes of herbicide used do not appear to be readily available. The question might more fruitfully be put to any municipalities giving evidence or relevant agencies.

Having said this there are relevant concerns with using herbicides in vegetation on road reserves. Foremost among these concerns is the likely impact on threatened ecological communities, such as native grasslands and/or herbaceous or grassland species. Often road reserves are final bastions or refugia for these communities and species. Even where herbicides are used for managing weed

species, poor or indiscriminate use can adversely impact on native species (such as by spray drift). Other management tools, such as cool burning regimes, are preferred for these communities and species, as they are fire-adapted.

Your submission and opening statement spoke about Victoria's environmental protection laws, the Flora and Fauna Guarantee Act. In your views:

Are these laws adequate? If not, how do they need to be improved?

As noted in our written submission and in my evidence, the FFG Act in particular has been improved but its design remains subject to key limitations, which constrain the contribution of the law to the task of ecosystem protection and, as commonly needed, recovery. These limitations are symptomatic of biodiversity and environmental laws elsewhere. Specifically, they include:

- Reliance on executive discretion in use and implementation of conservation tools, such as critical habitat determinations, habitat conservation orders, and/or management plans. This approach is a continuation of past legislative drafting. Historically, it has led to a resounding failure to use these important conservation tools, notwithstanding clear need to do so in the face of growing extinction and habitat pressures. The obvious response is to establish a legislative mandate on designated persons, such as the Secretary DELWP, to make and implement these tools. Taking critical habitat determinations as a key starting point this approach can be undertaken in certain obligatory stages (that is, set out as legislative duties under the Act):

    - Requiring the identification of critical habitat for listed species and communities within 12 months of listing. Once listing nominations and Action Statements are prepared typically much of the work underpinning this obligation has occurred.
    - Requiring the making of critical habitat determinations for listed species and communities within 6 months after the identification of critical habitat.
    - Set out circumstances in which Habitat Conservation Orders must be made by the Secretary.

- Similarly, other important instruments such as Management Plans under Part 4 Division 3, need to be subject to mandatory provisions. For example, statutory requirements to make Management Plans and statutory timeframes need to be incorporated into the Act for the making of Management Plans. Legislative guidance on the content of Management Plans should be included in the Act (rather than separate discretionary guidelines).

- The amended public authority duty established under section 4B is an important improvement to the Act. In our view, however, the substantive obligation set under the provision (give 'proper consideration to' the Act's objectives and other matters set out) provides no clear and unambiguous legislative direction on public actors to contribute to biodiversity outcomes. In our view, the content of that duty should be strengthened to require public authorities 'to give effect to biodiversity objectives, principles and instruments made under this Act, to the maximum extent practicable and appropriate to the authority's functions and powers'.

- While the enforcement regime under the Act has been updated (such as to include provision for enforceable undertakings), those changes are limited and do not reflect best practice. Reflecting the public interest character of biodiversity and ecosystem management, compliance and enforcement regimes should include:

- A variety of enforcement tools, including civil penalty provisions, administrative (for example, infringement) sanctions, broad-based enforcement orders (which can compel for example restitution), and injunctive and declaratory relief. This broad 'tool kit' is not presently available to a regulator or other actor.
- Third party standing to enforce the law, preferably in the form of 'open' standing or 'citizen suit' provisions. Recent reforms to the *Environment Protection Act* are relevant in this context as well as to the suite of enforcement tools. Citizen enforcement of environmental laws is a leading mechanism ensuring the environmental rule of law. This reflects global experience of at least half a century.
- Protection from costs orders for citizen enforcement of the law in the public interest.
- Any process of decision- or policy-making under the Act must proceed in accordance with the requirement to act on the basis of 'best available scientific knowledge'. 'Best available scientific knowledge' may include accepted Aboriginal cultural knowledge.

These laws were recently updated. What would effective implementation of them look like, and how is that different to what we're seeing at the moment?

Subject to other opinions in these responses, EJA's submissions, and my other evidence on design of the FFG Act, implementation of the Act would benefit in terms of effectiveness through:

- The systematic making and, where made, review and updating, of Action Statements for all listed species and communities. In respect of listed species the following table sets out those with Action Statements and the dating of those Action Statements. This information is sourced from DELWP's website.

Category	**Total Listed Species**	**Listed species with prepared Action Statement'**	**Action Statement >10 years old**
Amphibians	12	6	4
Birds	81	43	42
Communities	41	18	18
Fish	31	16	11
Invertebrates	73	24	23
Mammals	42	33	29
Plants	Vascular and non-vascular: 359 + 19 = 378	131	126
Reptiles	29	13	11
Total	687	284 (42.3% of all listed species)	264 (92.96% of Action Statements)

- A program for the making of critical habitat determinations for listed species and communities.
- Whether or not in the absence of legislative mandate, policy and programs on the making of Habitat Conservation Orders, Management Plans, and the making of public authority management agreements.
- Directions and guidance to all public authorities subject to section 4B on measures and timeframes, comprising discrete programs in each authority, by which to comply with duties under that section.

- Revision of the Biodiversity Strategy, or a timetable for a review and revision process, by which the Strategy can be better aligned with an ecosystem approach and the amended objectives and principles of the Act.
- Publish clear guidance on the operation of licensing and permitting provisions for removal of protected flora under subsection 48(4) of the Act.
- Considerably expanded commitment to resourcing implementation of the Act. Preferably this would include establishment of a large-scale ecosystem fund analogous for example to a legislated 'future fund'.

What's your assessment of this strategy? Is it going to deliver outcomes for Victoria's threatened species. If not, why not, and what needs to change?

I assume this question concerns Victoria's current Biodiversity Strategy.

Some of our concerns are contained in a report in preparation on the use of critical habitat protections under the FFG Act. Once that report is completed I can make a copy available to the Committee.

In summary, my concerns with the Strategy can be identified as follows:

- The Strategy purportedly takes a 'landscape' approach to 'improvement' but that does not clearly or necessary equate with an ecosystem approach. The difference lies in the design and use of measures (for example what are termed 'interventions' in the Strategy) at a level and in a manner that align with functional ecological units (which is to say, ecosystems) and their properties, processes and dynamics. This latter approach is needed if interventions and conduct is to best accord with how ecosystems actually function and based on an evaluation of strategic needs (for example, what interventions align with reducing degrading influences on ecosystems and what interventions (or non-interventions) align with their recovery).

- A second criticism of the Strategy lies in limitations in the methodology underpinning design of the core measure of the Strategy, 'change in suitable habitat'. The approach used sets out a method of cause and effect of selected interventions (based on expert advice), with the assumption that 'improvement' to biodiversity will result. The problem here is twofold:

    - that this approach does not reflect the typically dynamic and complex nature of ecological systems (they often do not function in a linear cause and effect way) and strategic considerations, in order to be effective, need to reflect ecological models specific to the ecosystem at issue (for example, including keystone species or attributes, non-linear change dynamics, or he nature of degrading influences). The better core measure for the Strategy would be reflective of ecosystem *recovery* not simply 'change in suitable habitat';

    - the Strategy does not clearly spell out or target the role of *legally authorised, permitted or enabled actions or conduct* that have a degrading influence on ecosystems and, consequently, strategic interventions for the removal or amelioration of those degrading influences. Influences such as development, resource extractions, works, or use of public lands are key pressures on ecosystems, driving decline and the Strategy does not expressly or systematically contend with them.

- A further point is that the Strategy would be more effective, and better reflect the objectives of the reformed FFG Act, if it were responsive to and proceed from restoration ecology

science. Reflective of that approach the intended goals or objects of the Strategy would not merely be a relatively inchoate 'improvement' or 'net gain' but a principled recovery of ecological systems or parts thereof or their function.

- Finally, beyond the need for a more effective and theoretically robust basis, any outcomes consistent with the Strategy (even in its present form and expression) will need substantial amounts of funding and resources. Additionally, effective and accountable administration of those resources in needed. Conservation funding delivered to date under the Strategy may be useful and contribute to positive ecosystem outcomes, but it is not clear that resourcing levels are sufficient to meet long-term needs. Without addressing authorised or enabled pressures of decline, funding may be self-defeating or not of optimal effect.

- In my view, revision of the Biodiversity Strategy is required, specifically to address its role and function in ecological restoration (encompassing avoidance of drivers of degradation as well as interventions enabling recovery of species and ecological communities). Amendment of the FFG Act is an appropriate and timely ground for that review, not least because under the Act biodiversity objectives and law have been 'updated' and refined through those amendments.

What is your assessment of the effectiveness of the Office of the Conservation Regulator to ensure ecosystem and threatened species are protected and restored? How do you think this regulator can be most effective?

The existence of the OCR is an improvement in Victoria's approach to compliance, enforcement and administration of biodiversity laws. It provides a focal, dedicated and systemic approach to these functions within biodiversity and ecosystem management. It is presently only a *partial* solution and, as noted in evidence, both the design and operation of the OCR reproduce significant constraints on effectiveness of biodiversity laws and, by extension, the environmental rule of law.

In general we support a legislated basis to the OCR (or equivalent), including the *independence* of the Office, its functions and powers, and its key statutory officers. We would need to give greater thought to the detail of functions and powers but these should include broad-based environmental enforcement in relation to key natural resources laws with ecosystem impacts and biodiversity laws. Independence is both an issue of legislative status and administrative culture and norms. The NSW EPA provides a relatively good example of both qualities as they operate in biodiversity management.[1] The independence and culture of public prosecutions offices[2] are also a relevant and useful model for a regulator in the environmental space.

As with the Natural Resources Access Regulator in NSW, the authority of the OCR is currently confined to specific NRM problems of considerable controversy. For NRAR that is water, for the OCR it is mainly logging and wildlife management. Consideration should be given to an expanded field of operation of the OCR in the context of expanded resourcing. For example, in the phase-out of timber harvesting, OCR effort could be useful directed to targeted problems in land-use planning (such as native vegetation clearing).

Regardless of extended jurisdiction, the operation of the OCR needs to be accompanied by:

[1] See *Protection of the Environment Administration Act 1991* (NSW), Parts 2-5 especially. The scope of independence from executive government (Minister) is set out under s 13.
[2] See *Public Prosecutions Act 1994* (Vic), Part 7

- Access to adequate and independent scientific and technical resources in order to undertake its functions, a capacity essential to the evidentiary and regulatory work of the institution;
- The requirement to make authoritative and independent policies, strategies, procedures and other instruments relating to the exercise of compliance and enforcement powers.[3]

The importance of these elements has been demonstrated in policy prepared by the OCR in May 2020 intended to set out guidance for implementation of the precautionary principle in timber harvesting in light of the 2019/20 bushfires.[4] This guidance identified the top 20% of habitat values for 34 priority species and advised postponement of logging in those areas along with surveying and mitigation. Timber Release Plans, which enable logging of forest areas, apply to a 'significant portion' of this habitat area. We understand OCR added substantial areas of habitat areas to its guidance in December 2020.

Vicforests has proceeded to continue logging in these areas and plans further expansion in these areas regardless of OCR's regulatory 'position'. The principal OCR measures contained in its 'regulatory position statement' have been ignored by VicForests. In effect, the OCR set out its views as to how the law should be implemented. The entity the subject of the regulation dismissed those views. OCR has not proceeded to enforce the law on the basis of its views, which reflects a significant problem to the integrity and legitimacy of the OCR as an institution.

Clearly, an independent and legislated OCR requires the power and will to set out the law and effect it. Without power or inclination to do so, enforcement of the law is chimerical and the law itself is compromised.

Victoria's wildlife laws are currently being reviewed. The committee has heard considerable evidence that these laws are ineffective. What are the key changes that need to occur as a result of the current review?

Certain proposals for reform are referred to in the EJA-HSI report previously tendered in evidence. We are presently working through a more detailed response to Wildlife Act reform proposals in order to provide these as submissions to the panel commissioned advising on reform of that legislation.

EJA is happy to provide a copy of those proposals and opinions to the Committee once they have been completed.

[3] Compare *Natural Resources Access Regulator Act 2017* (NSW), subs 11(1)(a)
[4] OCR *Precautionary Measures in Timber Harvesting Post the 2019/2020 Bushfires: Regulatory Position Statement* (2020)