

5 DECEMBER 2022

Review of Legislative Protections for the Threatened Species and Communities of Victoria's Forests

Final Report

Department of Environment, Land, Water and Planning (DELWP)

ISBN 978-1-76136-246-0 (pdf/online/MS word)

Level 1 East, 1100-1102 Toorak Road, Camberwell Victoria 3124

rmcg.com.au — ABN 73 613 135 247 — RM Consulting Group Pty Ltd
Victoria — Tasmania — ACT — NSW

OFFICIAL

Table of Contents

Executive Summary	2
ACRONYMS AND ABBREVIATIONS	ERROR! BOOKMARK NOT DEFINED.
1 Introduction	8
1.1 BACKGROUND	8
1.2 SCOPE	8
1.3 VICTORIAN POLICY CONTEXT	11
1.4 REPORT STRUCTURE	12
2 Methodology for review	14
2.1 OVERVIEW	14
2.2 ROLE AND INPUT OF THE WORKING GROUP	14
3 Insights from relevant reviews and projects	15
4 Analysis of legislation in scope	19
4.1 THE FRAMEWORK FOR THIS REVIEW	19
4.2 FINDINGS – DESKTOP REVIEW AND CONSULTATION	20
4.3 KEY OBSERVATIONS FROM REVIEW PROCESS	30
5 Conclusions and recommendations	32
Appendix 1: Overview of legislation in scope	33
Appendix 2: Working Group members	35
Appendix 3: Summary of reviews	36

Executive Summary

The Victorian Regional Forest Agreements (RFAs) are agreements between the State of Victoria and the Australian Government that provide for sustainable management and use of Victoria's forests. As part of the Victorian Government commitments under the modernised RFAs, the Department of Environment, Land Water and Planning (DELWP) commissioned a review of relevant Victorian legislation to identify if any measures or improvements could be made to strengthen protections for listed species and communities.

This report is the outcome of the commissioned review. Notably, numerous reviews and amendments to relevant legislation and other policy instruments have been conducted prior to, and concurrent with, this review. In addition, native forest timber harvesting will cease by 2030 as part of the Victorian Forestry Plan. This report complements that work, providing recommendations that focus on improvement opportunities and options to support the use of legislative provisions or instruments that have yet to be implemented or fully utilised to date.

Scope and background

Consistent with the relevant RFA commitment, the following legislation, along with the relevant provisions and subordinate instruments, were considered in this review:

- *Flora and Fauna Guarantee Act 1988 (FFG Act)* including the *Flora and Fauna Guarantee Amendment Act 2019*
- *Forests Act 1958 (Forests Act)*
- *Sustainable Forests (Timber) Act 2004 (SFT Act)*
- Code of Practice for Timber Production 2014 ('Code of Practice'), a subordinate instrument under the *Conservation Forests and Lands Act 1987 (CFL Act)*

Other provisions and subordinate instruments of the *CFL Act* have not been considered in scope for this review. The *Forest Legislation Amendment (Compliance and Enforcement) Act 2019* was briefly referred to in the review, because it included amendments to the *SFT Act*, *Forests Act* (and *CFL Act*) with respect to improving regulation of timber harvesting and firewood collection.

This review has been conducted in the context of existing legislative and policy frameworks for protection of Threatened Species and Communities, namely the Victorian Forest Management System. Consideration has been given to previous and current reviews of legislation and other policy mechanisms, with insights drawn from these where possible. These reviews include:

- Independent Review of Timber Harvesting Regulation (2018)
- Review of the *Flora and Fauna Guarantee Act 1988*
- *Forests Legislation Amendment (Compliance and Enforcement) Act 2021*
- 2021 and 2022 Variation of the Code of Practice for Timber Production 2014
- CAR Reserve Review
- Victorian RFA Major Event Review of the 2019/20 bushfires
- Threatened Species and Communities Risk Assessments – interim and permanent protections
- Review of the *Wildlife Act 1975*
- Comprehensive Review of the Code of Practice for Timber Production 2014

Review approach

A Working Group was established with representatives from key groups across DELWP and the Department of Jobs, Precincts and Regions (DJPR), to provide both expert and operational insights to support the review. A series of online workshops with the Working Group and interviews with individual members were conducted to:

- Initially identify and confirm a framework (i.e. 'Pathway to Protection') to support analysis of relevant legislative provisions and subordinate instruments
- Identify legislative provisions or instruments that are currently effective, have the potential to be more effective and where there is opportunity to improve
- Provide clarification on previous and current projects with implications for this review

The 'Pathway to Protection' framework was created to assist this review. It describes, in simple terms, the key steps involved in protecting Threatened Species and Communities. Broadly, those steps are:

- Problem identification
- Risk assessment
- Conservation planning
- Implementation of conservation and protection actions (including avoidance of harm, permanent protections, active management)
- Monitoring, evaluation, reporting and implementation

With the help of the Working Group, legislative provisions, subordinate instruments and other policy mechanisms, identified through desktop review step of this project, were mapped against the 'Pathway to Protection' framework. This exercise assisted in identifying how various provisions contribute to the process of protecting Threatened Species and Communities but also possible legislative 'gaps' that may require improvement to strengthen protection of Threatened Species and Communities. The output of this mapping exercise is provided in Figure ES-1. This mapping guided analysis of opportunities to strengthen legislative provisions and other instruments, which are detailed in this report.

Key findings

The review process identified several strengths with the legislation in scope for this review, regarding protection of Threatened Species and Communities. These include:

- The Forest Management Zoning System that can be used strategically to provide habitat protection
- Recent amendments to the *Flora and Fauna Guarantee Act 1988* and subsequent implementation of processes to support these amendments, including 'streamlining' production of Action Statements, and
- Reviews of and amendments to other relevant legislation have also improved protection measures for threatened species through strengthening of environmental regulation for timber harvesting.

Other notable provisions that are considered strengths of the legislative framework, include broad potential preventive measures provided through the Public Authority Duty (*Flora and Fauna Guarantee Act 1988*) and the Precautionary Principle (a requirement of the 'Code of Practice' and also a principle of the *Flora and Fauna Guarantee Act 1988*). However, this is countered by the difficulty in ensuring awareness, interpretation and 'compliance' with the Duty and the Precautionary Principle.

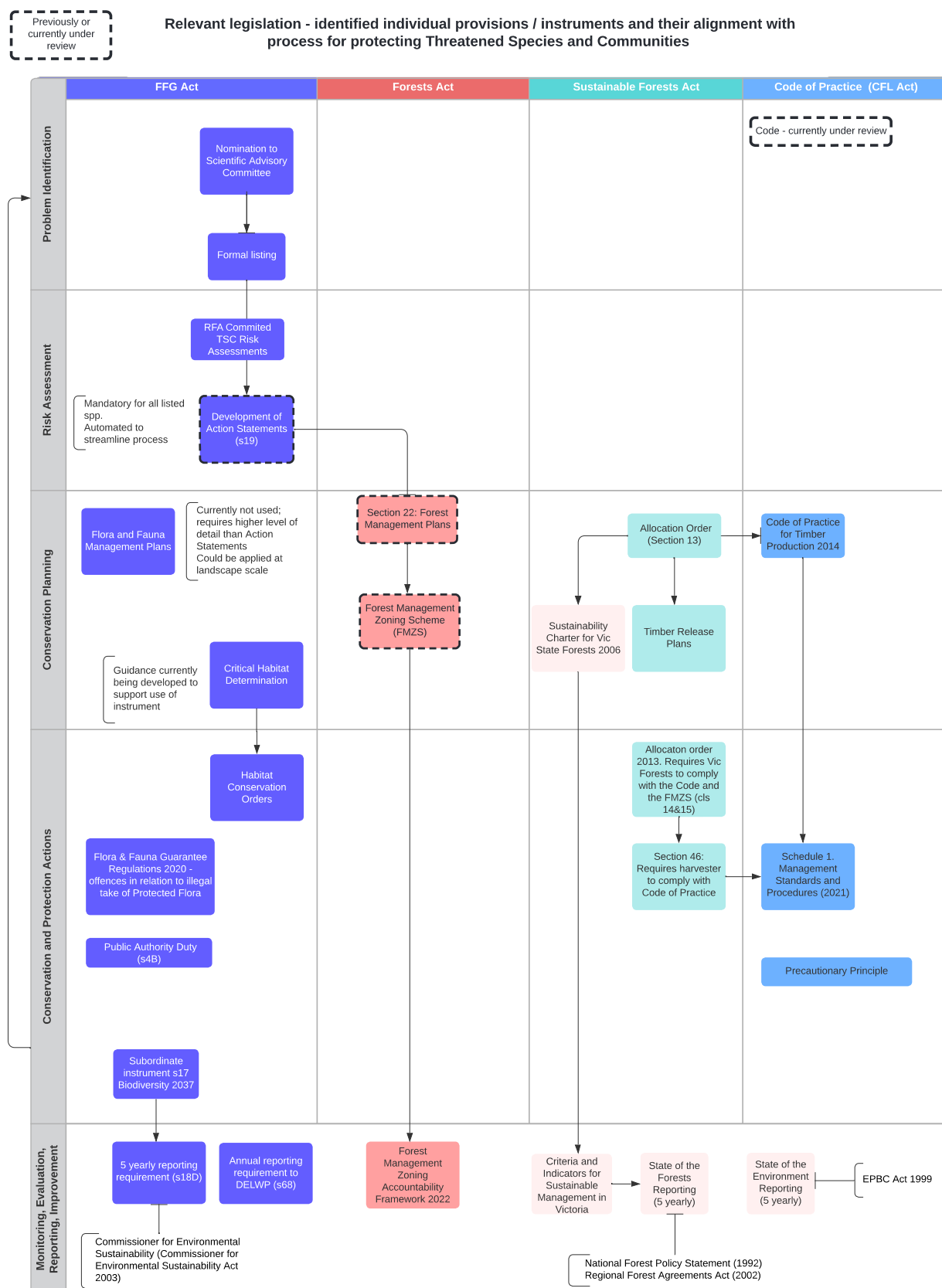


Figure ES-1: Legislative provisions and subordinate instruments mapped against each stage in the pathway to protection for Threatened Species and Communities in Victoria's forests.

A particular operational challenge identified in the review is the significant reliance on the 'Code of Practice'. As this is the primary instrument to regulate timber harvesting in Victoria, any relevant technical measures or prescriptions relating to species protection must be incorporated in the 'Code of Practice' for them to have effect. However, updating the 'Code of Practice' can be challenging and time consuming due to the requirements of the *Conservation Forests and Lands Act 1987* and *Sustainable Forests (Timber) Act 2004 SFT Act*. Greater flexibility would enable more adaptive protection but it could also create greater uncertainty for timber harvesting operations if protections frequently change. Nevertheless, a mechanism that enables greater ability to adapt protections to current science and status of Threatened Species and Communities would be beneficial.

Finally, there is a need to be pragmatic when considering improvements to the relevant legislation and instruments, particularly given that native forest timber harvesting will cease by 2030, and the numerous previous reviews and amendments to the legislation, and current reviews of relevant subordinate instruments. This should not preclude significant changes to legislation, though it does highlight the need to maximise the utility of existing legislative instruments and policy tools. With this complex context in mind, this review includes recommendations that enable or support government agencies to 'test' some of the existing provisions that have had limited use or not previously been implemented.

Recommendations

The following recommendations are presented against the appropriate key step in the 'Pathway to Protection' framework.

Risk assessment

- Consider a mechanism that supports greater ability to adapt protections to current science and status of Threatened Species and Communities.

Conservation planning

- Place greater emphasis on the best use of Forest Management Plans and the Forest Management Zoning Scheme to transparently and strategically manage where timber harvesting should occur, and to demonstrate how this reduces impacts on listed species and communities. (Note the future role of Forest Management Zoning Scheme will need to be considered, with the increase in declarations of Special Protection Zones likely, with timber harvesting in State forests ceasing by 2030).
- Continue the development of guidelines for Critical Habitat Determinations and identify potential examples where it can be tested (e.g. via a 'regulatory sandbox' process) so that the practical implications of its use can be assessed in detail (before actually implementing).
- Build internal capacity to support effective use of Flora and Fauna Management Plans by developing guidelines and 'testing' their possible role for landscape scale or multi-species focus.
- Bring together relevant agencies to identify critical timber resource information and to define timely access to that information. Capture these requirements in a joint agreement between the agencies involved.
- Create a stronger (and more formal) requirement that *Flora and Fauna Guarantee Act 1988* listed species information (e.g. provisions set out in Action Statements or Threatened Species and Communities Risk Assessment findings) informs timber harvesting planning.

Implementation of conservation and protection actions

- Continue development of Public Authority Duty 'guidelines' that would explicitly outline key provisions in the *Flora and Fauna Guarantee Act 1988* and raise awareness of this duty with relevant public authorities.

- Consider development of guidelines for Habitat Conservation Orders and identify potential examples where it can be tested (e.g. via a 'regulatory sandbox' process) so that the practical implications of its use can be assessed in detail (before implementation).

General – use of current legislative instruments for protecting Threatened Species and Communities

- Consider using a 'regulatory sandbox' approach to comprehensively test how a particular threatened species or community would progress through the 'Pathway for Protection' framework and the role that relevant legislative provisions and instruments identified in this review could play.
- Use this 'regulatory sandbox' approach to develop guidance to assist policy officers and others to identify potential use of relevant legislative instruments. In particular, this approach could develop specific guidance on the use of the provisions that have not been used to date (e.g. Critical Habitat Determinations, Flora and Fauna Management Plans and Habitat Conservation Orders).

ACKNOWLEDGEMENT OF COUNTRY

We acknowledge the Traditional Owners of the Country that we work on throughout Australia and recognise their continuing connection to land, waters and culture. We pay our respects to their Elders past, present and emerging and the Elders of other Aboriginal and Torres Strait Islander communities. Moreover, we express gratitude for the knowledge and insight that Traditional Owners and other Aboriginal and Torres Strait Islander people contribute to our shared work.

Acronyms	Abbreviations
CFL Act	Conservation Forests and Land Act, 1987
DELWP	Department of Land Water and Planning
DJPR	Department of Jobs Precincts and Regions
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999
ESFM	Ecologically Sustainable Forest Management
FFG Act	Flora and Fauna Guarantee Act 1988
FMP	Forest Management Plan
FMZS	Forest Management Zoning Scheme
CR	Conservation Regulator
RFA	Regional Forest Agreement
SFT Act	Sustainable Forests (Timber) Act 2004
'Code of Practice'	Code of Practice for Timber Production 2014
TSCRA	Threatened Species and Communities Risk Assessment (Tranche 1, 1.5 and 2 are completed with 3 currently underway)

1 Introduction

1.1 BACKGROUND

The Victorian Regional Forest Agreements (RFAs) are agreements between the State of Victoria and the Australian Government that provide for sustainable management and use of Victoria's forests. The modernised RFAs commit the Victorian Government to review certain Victorian legislation, including subordinate instruments, by December 2022 to identify what, if any, measures or improvements could be made to strengthen protections for listed species and communities¹.

To meet this commitment, the then Department of Environment, Land, Water and Planning (DELWP) commissioned this project to review the extent to which Victorian biodiversity conservation and forest management legislation protects native flora, fauna and vegetation communities that are listed as threatened. From this review, the aim is to identify if any provisions of the current legislation could be improved to strengthen protections for Listed Species and Communities within Victoria's forests.

1.2 SCOPE

Consistent with the relevant RFA commitment, the following key legislation was considered in this review:

- *Flora and Fauna Guarantee Act 1988 (FFG Act)* including the *Flora and Fauna Guarantee Amendment Act 2019*
- *Forests Act 1958 (Forests Act)*
- *Sustainable Forests (Timber) Act 2004 (SFT Act)*
- Code of Practice for Timber Production 2014 ('Code of Practice'), a subordinate instrument under the *Conservation Forests and Lands Act 1987 (CFL Act)*

For the purposes of this review, the 'Code of Practice' is in scope, but the other provisions and subordinate instruments of the *CFL Act* are not.

The *Forest Legislation Amendment (Compliance and Enforcement) Act 2019* was briefly referred to in the review, because it included amendments to the *SFT Act*, *Forests Act* (and *CFL Act*) with respect to improving regulation of timber harvesting and firewood collection.

A brief outline of the legislation in scope is provided in Appendix 1.

Table 1-1 lists the provisions, subordinate instruments and other mechanisms that have been specifically considered, with some identified for further analysis for their potential to strengthen protection of listed species and communities.

¹ Clause 25M of the Central Highlands RFA (and equivalent clauses in Victoria's four other RFAs) provides that:

By December 2022, Victoria will review relevant provisions of:

- *Flora and Fauna Guarantee Act 1988 (FFG Act)*
- *Sustainable Forests (Timber) Act 2004*
- *Forests Act 1958*

...and their subordinate instruments, including the Code of Practice for Timber Production

to identify what, if any, measures or improvements could be made to strengthen protections for Listed Species and Communities within Victoria's Forests.

Note that the 'Code of Practice' is not a subordinate instrument of the listed legislation; it is made under the *Conservation, Forests and Lands Act 1987*.

For the purposes of this review, the RFA clause is to be interpreted as requiring review of the Code but not of the *CFL Act*.

Table 1-1: Specific provisions, instruments, mechanisms considered in the review

PROVISION / INSTRUMENT / MECHANISM	FURTHER ANALYSIS	BACKGROUND
<i>FFG Act</i>		
Establishment of a Scientific Advisory Committee (SAC), section 8	Reviewed elsewhere	<ul style="list-style-type: none"> ▪ Addressed in the review and amendment of the <i>FFG Act</i>
Critical Habitat Determinations, section 20	Yes	<ul style="list-style-type: none"> ▪ Precursor step to Habitat Conservation Orders and indicates that an area is of State biodiversity significance ▪ Have been rarely implemented ▪ Identified by DELWP and DJPR Working Group members for review
Habitat Conservation Orders, section 26	Yes	<ul style="list-style-type: none"> ▪ Prohibit further damage or require remediation of previous damage ▪ Identified by DELWP and DJPR Working Group members for review
Action Statements, section 19	Reviewed elsewhere	<ul style="list-style-type: none"> ▪ Addressed in detail as part of the review and amendment of the <i>FFG Act</i>
Flora and Fauna Management Plans (FFMP), section 21	Yes	<ul style="list-style-type: none"> ▪ Set out how flora and fauna conservation and management objectives are to be implemented or promoted ▪ Currently they have not been used ▪ Identified by DELWP and DJPR Working Group members for review
Public Authority Duty, section 4B	Noted	<ul style="list-style-type: none"> ▪ Obligation for public authorities and Ministers to consider potential biodiversity impacts when exercising their functions. ▪ Provides Ministerial guidelines to clarify duties
Protecting Victoria's Environment – Biodiversity 2037, section 17	Briefly reviewed	<ul style="list-style-type: none"> ▪ Consider importance of plan in stopping the decline of biodiversity in Victoria and its cross-tenure reach ▪ Plan features justifications for genetic interventions
FFG (Forest Produce Harvesting Order) Order No-2 2004, section 48A	Noted	<ul style="list-style-type: none"> ▪ Identified by DELWP and DJPR Working Group members for review
Flora and Fauna Guarantee Regulations 2020	Reviewed Elsewhere	<ul style="list-style-type: none"> ▪ The regulations relate to the listing process (including eligibility criteria) of flora or fauna, communities of flora or fauna or potentially threatening processes. ▪ The listing process was comprehensively addressed in the recent review and amendment of the <i>FFG Act</i>
<i>Forests Act</i>		
Forest Management Plans (FMPs), section 22	Noted	<ul style="list-style-type: none"> ▪ Strategic objectives of FMPs, such as management of high conservation or cultural heritage values, are in part supported by forest management zoning. ▪ Considered in relation to FMZS and FFMP.

Forest Management Zoning Scheme (FMZS) <i>(Administrative planning tool that reflects the strategic objectives incorporated into FMP)</i>	Yes	<ul style="list-style-type: none"> FMZS reflects the strategic planning incorporated in FMP and is supplemented by zoning changes resulting from additional measures to protect threatened species. The Scheme guides permitted uses across State forests and consists of three zones (i.e. Special Protection Zones, Special Management Zones, General Management Zones)
Power to except certain areas from occupation under leases, licences, section 52	Noted	<ul style="list-style-type: none"> Considered less relevant for strengthening protection of Threatened Species and Communities than FMZS
Regulations: <ul style="list-style-type: none"> Forests (Licences and Permits) Regulations 2019 (Vic) Forests (Fire Protection) Regulations 2014 (Vic) Forests (Domestic Firewood) Regulations 2012 (Vic) Forests (Recreation) Regulations 2010 (Vic) 	Noted	<ul style="list-style-type: none"> Considered minimal opportunity to strengthen Threatened Species and Communities protection via these regulations
SFT Act		
Sustainability Charter, section 11	Noted	<ul style="list-style-type: none"> Sets the objectives for sustainable forest management in Victoria and addresses principles of ecologically sustainable development Victoria's State of the Forests report compiles monitoring data and assesses the State's performance in achieving objectives for sustainable forest management
Allocation Order, section 13	Noted	<ul style="list-style-type: none"> Provides for the sustainable allocation and harvesting and sale; or harvesting or sale, of timber resources from State forests and sets conditions for those activities Considered in relation to requirement for compliance with 'Code of Practice'
Timber Release Plans, section 37 and 44	Noted	<ul style="list-style-type: none"> Only referred to with regards to meeting the Code of Practice requirements
'Code of Practice'		
Schedule 1: Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2021 (MSP 2021)	Noted / reviewed elsewhere	<ul style="list-style-type: none"> Provides detailed operating instructions to managing authorities, harvesting entities and operators, including region specific instructions, for timber harvesting operations in Victoria's State forests. Considered given that management actions and procedural instructions contained in the MSP 2021 were informed by relevant policy documents including FMP (<i>Forests Act</i>) and Action Statements (prepared under <i>FFG Act</i>)
Forest Management Zoning Accountability Framework 2022	Noted / reviewed elsewhere	<ul style="list-style-type: none"> Planning Standards have moved into the Accountability Framework to clearly separate the responsibilities of the Secretary to DELWP from those of timber harvesting managers, harvesting entities and operators, ensuring the Code of Practice obligations are clear for each entity

		<ul style="list-style-type: none"> ▪ All fixed forest management zoning actions from the Planning Standards have been compiled and are provided in Appendix 1 to the Accountability Framework. ▪ Considered from perspective of forest management zoning and its role in protection of Threatened Species and Communities
--	--	---

Principles

There are projects that are currently underway to strengthen protections of listed species and communities, as well as previous reviews of relevant legislation. Given this context, the following principles have guided this review:

- The outcomes of recent reviews for similar purposes (i.e. improving protections for listed species and communities) will not be revisited
- This review will focus on identifying legislative improvements whilst not duplicating work currently being undertaken (e.g., the Comprehensive Review of the Code of Practice for Timber Production 2014)
- The review will consider improvements to existing legislation without altering the current intent purpose and objectives of the relevant legislation
- Any proposals for legislative change will account for the timeframe of the Victorian Forestry Plan, which will phase out native forest timber harvesting by 2030 (see section below).

1.3 VICTORIAN POLICY CONTEXT

This review is being conducted in the context of existing legislative and policy frameworks for protection of Threatened Species and Communities, policy transition regarding native forest timber harvesting and previous and current reviews of relevant legislation. This complex policy setting has been acknowledged in the desktop and consultation processes for this review, and a brief overview is provided below.

Victorian Forest Management System

Victoria's forest management system features legislation, policy, regulatory instruments and programs that regulate and support Ecologically Sustainable Forest Management (ESFM) and the protection and management of environmental and heritage values in Victoria (DELWP 2019)². The system applies to both public and private land and is administered by state government agencies and local government.

There are three main outcomes to the forest management system³, which are:

- Protecting forests and their values including native vegetation, biodiversity, soils, water, cultural heritage and amenity
- Regulating and facilitating the use of resources such as timber, honey, water and minerals and
- Providing for community uses such as Traditional Owner connections, recreation and tourism.

DELWP and its portfolio partners manage the risks to Threatened Species and Communities through both general and targeted measures as part of implementing forest management system and public land management responsibilities⁴. The Victorian Forest Management System Overview (2019) provides a summary of these measures that aim to protect species and communities listed under the *FFG Act* and *EPBC Act*. The key legislative and management mechanisms include:

- The implementation of a Comprehensive, Adequate and Representative (CAR) Reserve System
- The implementation and enforcement of the *FFG Act* and the *Wildlife Act*

² DELWP (2019). *Overview of Victoria's Forest Management System*

³ Ibid, page 9

⁴ *Threatened Species and Communities Risk Assessment, Victoria's Regional Forest Agreement* (2020)

- The *CFL Act*, including the 'Code of Practice' and the Code of Practice for Bushfire Management on Public Land, which makes management prescriptions in areas of forestry operations;
- The implementation of ESFM practices required under Victorian law
- Forest Management Zoning Scheme under the *Forests Act*, which includes Special Protection Zones that contribute informal reserves to the CAR Reserve System and
- Formal reserves such as parks and conservation reserves that contribute to the CAR Reserve System.

Past and present related projects

There are current and previous reviews or other project work related to this review, listed in Table 1-1. Several of these related works are summarised in Section 3 with a focus on the outcomes and implications for the protection of listed threatened species.

Table 1-2: Relevant projects (past and current) to this review

PROJECT	TIMELINE
Independent Review of Timber Harvesting Regulation (2018)	Complete
Review of the <i>Flora and Fauna Guarantee Act 1988</i>	Complete
<i>Forests Legislation Amendment (Compliance and Enforcement) Act 2021</i>	Complete
2021 and 2022 Variation of the Code of Practice for Timber Production 2014	Complete
<i>Conservation, Forests and Lands Amendment Act 2022</i>	February 2022
CAR Reserve Review	August 2022
Victorian RFA Major Event Review of the 2019/20 bushfires	Early 2022
Threatened Species and Communities risk assessments – interim and permanent protections	Ongoing in line with RFA commitments
Review of the <i>Wildlife Act 1975</i>	Panel report provided to government December 2021
Review of Forest Management Plans	December 2023 (in progress)
Comprehensive Review of the Code of Practice for Timber Production 2014	December 2023 (in progress)

Traditional Owner biocultural values

This report acknowledges important Victorian Government commitments to Traditional Owner self-determination. The modernised Victorian RFAs now include significant commitments to empowering Traditional Owners to have an active role in management of forests on public land on Country and involvement in decision-making. The RFAs also commit Victoria to “ensure that the Forest Management System provides for the management and protection of Traditional Owner identified living natural and biocultural values and uses.”

The Review of the *Wildlife Act 1975* completed in December 2021 was undertaken by an expert panel including a Traditional Owner. The Panel examined whether the Act appropriately recognises and protects the rights and interests of Traditional Owners and Aboriginal Victorians around wildlife and their role in

OFFICIAL

decision-making. The Panel considered the role of wildlife in the cultural practices and beliefs of Traditional Owners and Aboriginal Victorians. The Victorian Government is currently preparing its response to the Panel's report.

In implementing this review there is an opportunity to partner with Traditional Owners to build on this earlier work. The development of Review implementation actions and the Comprehensive Review of the Code of Practice for Timber Production 2014 currently underway are opportunities to further incorporate Traditional Owner perspectives.

1.4 REPORT STRUCTURE

This report is structured as follows:

- Executive summary
- Introduction, including review background and policy context
- Methodology
- Insights from related reviews and projects
- Analysis of legislation in scope, including:
 - Framework used for the review (i.e. 'Pathway to Protection' framework)
 - Findings from the desktop and Working Group consultation process, presented according to the 'Pathway to Protection' stage
- Conclusion and summary of recommendations

2 Methodology for review

2.1 OVERVIEW

An outline of the process undertaken to perform this review is provided below in Figure 2-1.

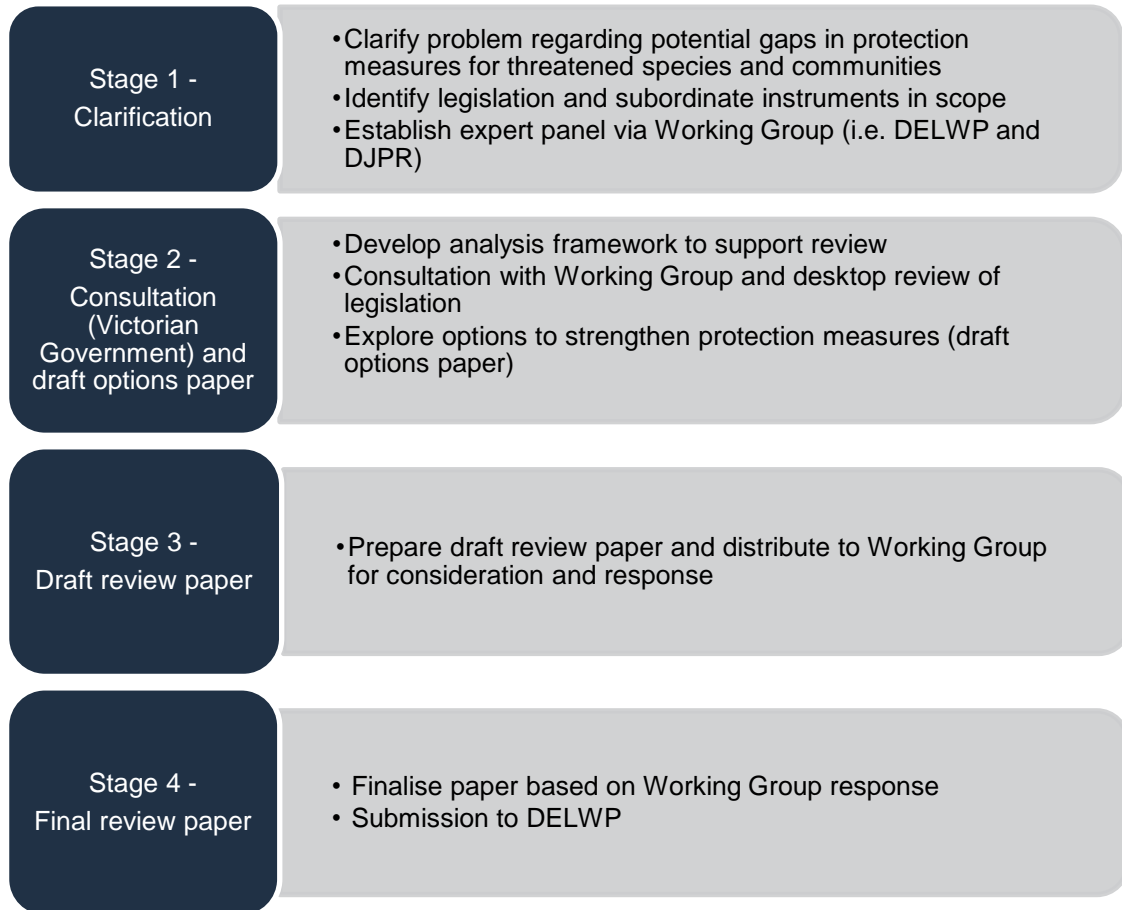


Figure 2-1: Key stages of review process.

2.2 ROLE AND INPUT OF THE WORKING GROUP

A Working Group was established with representatives from key groups across DELWP and the Department of Jobs, Precincts and Regions (DJPR), see Appendix 1 for membership. The role of this Working Group was to provide both expert and operational insights to support analysis of legislation in scope for this review. Three online workshop sessions were held to:

- Establish and confirm a framework or process for the analysis of the relevant legislation
- Identify legislative provisions or instruments that are currently effective, have the potential to be more effective and where there is opportunity to improve provisions
- Provide clarification on other current projects with implications for this review
- Confirm outcomes and implications of current and previous works as relevant to this review.

In addition to these sessions, additional targeted interviews were conducted online with members of the Working Group. This consultation supported a targeted desktop review and analysis of relevant legislative provisions, subordinate instruments and other related documents and reports.

3 Insights from relevant reviews and projects

This section provides key findings from relevant legislative reviews and other related projects undertaken between 2016 and 2022. The purpose of this section is to provide context regarding the scope and also for proposed recommendations identified in this review. Brief summaries of these reviews and projects are provided in Appendix 2.

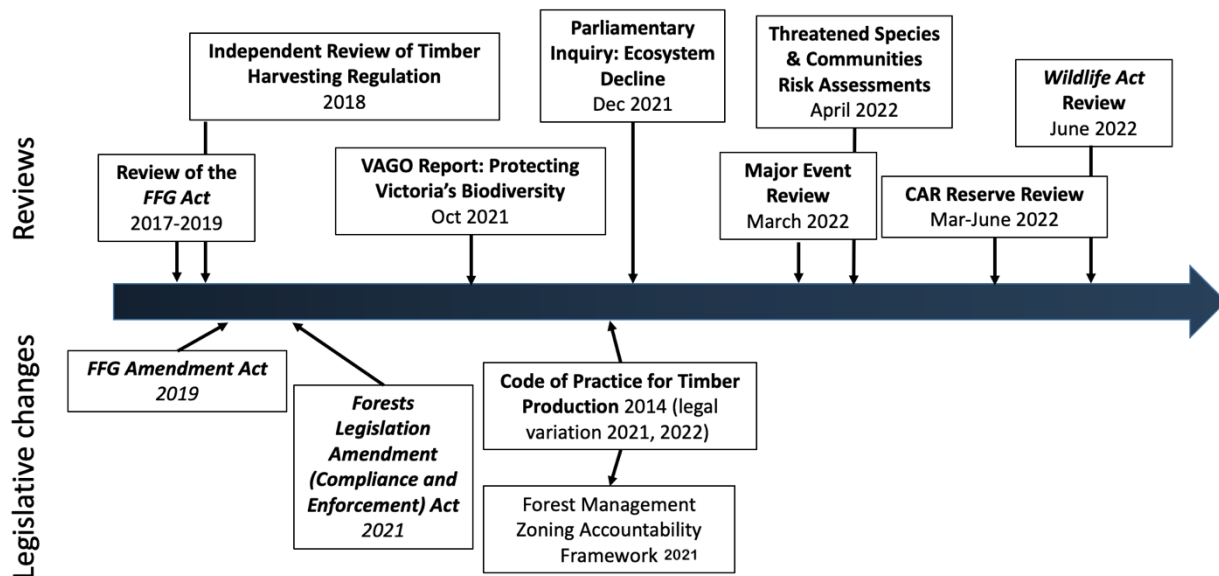


Figure 3-1: Timeline of reviews and other relevant projects, and subsequent legislative changes, undertaken since 2016

REVIEW OF THE FLORA AND FAUNA GUARANTEE ACT 1988

The Department of Environment, Land, Water and Planning (DELWP) undertook a review of the *FFG Act 1988* in 2017. The objective of the review was to improve the efficiency and effectiveness of the Act and to better align with the community's expectations for biodiversity management, and the rights and interests of Victorian Traditional Owners in the management of biodiversity. Key findings from the review:

- Retaining the “guarantee” that all Victoria’s flora and fauna can survive, flourish, and retain their potential for evolutionary development in the wild
- Adding principles (including the precautionary principle) to guide decision-makers
- Clarifying that the public authority duty unambiguously applies to all levels of Victorian government
- Adopting the intergovernmental Common Assessment Method for assessing and listing species
- Developing criteria to define critical habitat
- Introducing a tiered hierarchy of compliance response actions (e.g., civil penalties and remediation orders) underpinned by a compliance and enforcement strategy
- Improving accountability and transparency in relation to administration of the Act.

FORESTS LEGISLATION AMENDMENT (COMPLIANCE AND ENFORCEMENT) ACT 2021

The Victorian Government passed the *Forests Legislation Amendment (Compliance and Enforcement) Act 2021* on 12 October 2021 to amend the *Sustainable Forests (Timber) Act 2004* and the *Forests Act 1958*. It came into force on 1 March 2022.

The amendments aimed to improve the environmental regulation of timber harvesting by:

- Clarifying that the offence of unauthorised timber harvesting operations applies to VicForests and contractors
- Widening the application of enforceable undertakings and injunctions
- Providing authorised officers with powers to require the production of documents relating to compliance with the Act, no longer allowing voluntary submission of data by timber harvesting operators
- Incorporating contemporary mapping tools in instruments that regulate timber harvesting and
- Increasing the statute of limitations period to three years.

VICTORIAN RFA MAJOR EVENT REVIEW OF THE 2019/20 BUSHFIRES

The Major Event Review is a mechanism built into the modernised Victorian RFAs in 2020 (clauses 38F-I). This allows the Australian and Victorian Governments to consider the impacts of events, such as bushfires, floods or diseases, on the effectiveness and operation of the RFAs. A Major Event Review (MER) was commissioned to assess the impacts of the 2019-20 Black Summer bushfires on forests, biodiversity, forest industries and regional communities across Victoria's five RFA regions.

The review concluded that frequent exposure to intense bushfires is presenting a major and increasing threat to the effective operation of Victoria's RFAs, particularly to the stability of the forests and the achievement of ecologically sustainable forest management. Regarding protections for Listed Species and Communities, the review recommendations include:

- That the impact of more frequent and repeated bushfires on threatened species be researched.
- Addressing knowledge and data gaps relating to threatened species (a) known to exist within fire-affected areas and (b) the 21 species that are listed as Critically Endangered in the *FFG Act*
- That the Victorian Government produce an outcomes report to review the effectiveness of the interim protection measures and the zoning system changes for listed species and communities
- That completion of outstanding Threatened Species and Communities risk assessments for the five RFA regions is prioritised
- That existing legislative tools (e.g. Critical Habitat Determinations) under the *FFG Act* are activated and
- That the Victorian Government improve the integration of zoning systems within the forest management plans, national park management plans and bushfire management strategies.

The Government response to these recommendations is in preparation.

VARIATIONS TO THE CODE OF PRACTICE FOR TIMBER PRODUCTION 2014

The 'Code of Practice' was amended in November 2021 and again in June 2022 to improve how the Code is interpreted and enforced. Key amendments include:

- Formalising protections for Large Brown Tree Frog and large trees
- Substituting the definition of the precautionary principle in the Code, confirming the intention that the definition and obligation be understood consistently with the judgement in *Environment East Gippsland Inc v VicForests* [2010] VSC 335
- Clarifying the role of the Secretary from the role of the managing authority with respect to the development of Special Management Zones and Special Protection Zones
- Relocating DELWP's fixed forest management zoning objectives, previously contained Planning Standards for timber harvesting operations in Victoria's State forests 2014, into Appendix 5 to the MSPs (These zoning targets are now contained DELWP's Forest Management Zoning Accountability Framework)
- Clarifying sections of the Code that have been shown to be ambiguous such as the interaction between broad vegetation requirements and specific species prescriptions in the MSPs, protection requirements for the Tree Geebung, and harvesting limits in fire management zones and
- Moving the *Management Standards and Procedures for timber harvesting operations in Victoria's State forests* (MSPs) into the Code as a schedule, rather than having them sit separately as an incorporated document.

There has also been \$14 million allocated to improve environmental standards in timber harvesting, which includes improving clarity about how to comply with requirements in the 'Code of Practice'. DELWP will improve clarity by developing a 'Compliance Standards' framework which will provide clarity about how timber harvesting operators can comply with the Code's precautionary principle. The first stage of this reform has involved the enactment of the *Conservation, Forests and Lands Amendment Act 2022*. Further amendments to the Code will be required to establish a 'compliance standards' framework within the Code.

THREATENED SPECIES AND COMMUNITIES RISK ASSESSMENTS – INTERIM AND PERMANENT PROTECTIONS

The 2020 modernisation and improvement of Victoria's five RFAs included a significantly expanded section dealing with Matters of National Environmental Significance (MNES) under the *EPBC Act* and Listed Species and Communities (clauses 25A-S). These sections include requirements for Victoria to maintain a Forest Management System (FMS) that provides for the protection and management of MNES (clause 25A) and the conservation and recovery of Listed Species and Communities (clause 25G).

The Threatened Species and Communities Risk Assessment (TSCRA) Tranche 1 was completed in October 2020 and applied to 70 species and nine communities that are either Commonwealth or state-listed and that are, or have the potential to be, impacted by forestry operations. "Forestry operations" were assessed to pose a significant or high risk for 23 of the 79 evaluated species and communities. Since October Tranche 2 has been completed and a report finalised, with Tranche 3 currently underway.

The TSCRA Tranche 1 Permanent Protection Report recommended amendments to the Forest Management Zoning Scheme under *s22 Forests Act 1958*. These included permanent and interim zoning amendments supporting the protection of 110,000 hectares for 37 species and two communities. It also identified Critical Habitat Determinations under *s20 Flora and Fauna Guarantee Act 1988* as a possible implementation 'pathway' to achieve more targeted responses though no definitive recommendations regarding this provision were made.

The Victorian RFAs provide for rolling delivery of risk assessments, interim and permanent protections and management actions as the status of listed species and communities changes or species and communities are newly added.

The Victorian RFAs also provide for more timely development of Action Statements.

INDEPENDENT REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

An independent review of the Commonwealth *EPBC Act* was conducted by Graeme Samuel AC and was delivered in October 2020. The Commonwealth Minister for the Environment subsequently indicated that the Commonwealth Government would release a response to his report by the end of 2022. Recommendations may have implications for the Victorian RFAs and the Victorian forest management system.

4 Analysis of legislation in scope

This section provides the key findings from the analysis of relevant legislative provisions, including their function in protection of Threatened Species and Communities and possible opportunities to strengthen such provisions. Given the legislation in scope and their varied objectives, the need for a framework that was autonomous from the legislation but described the process for protecting Threatened Species and Communities was identified at the start of the review process. This framework is depicted visually in Figure 4-1 below.

4.1 THE FRAMEWORK FOR THIS REVIEW

A 'Pathway to Protection' description has been developed to provide a framework for this review.

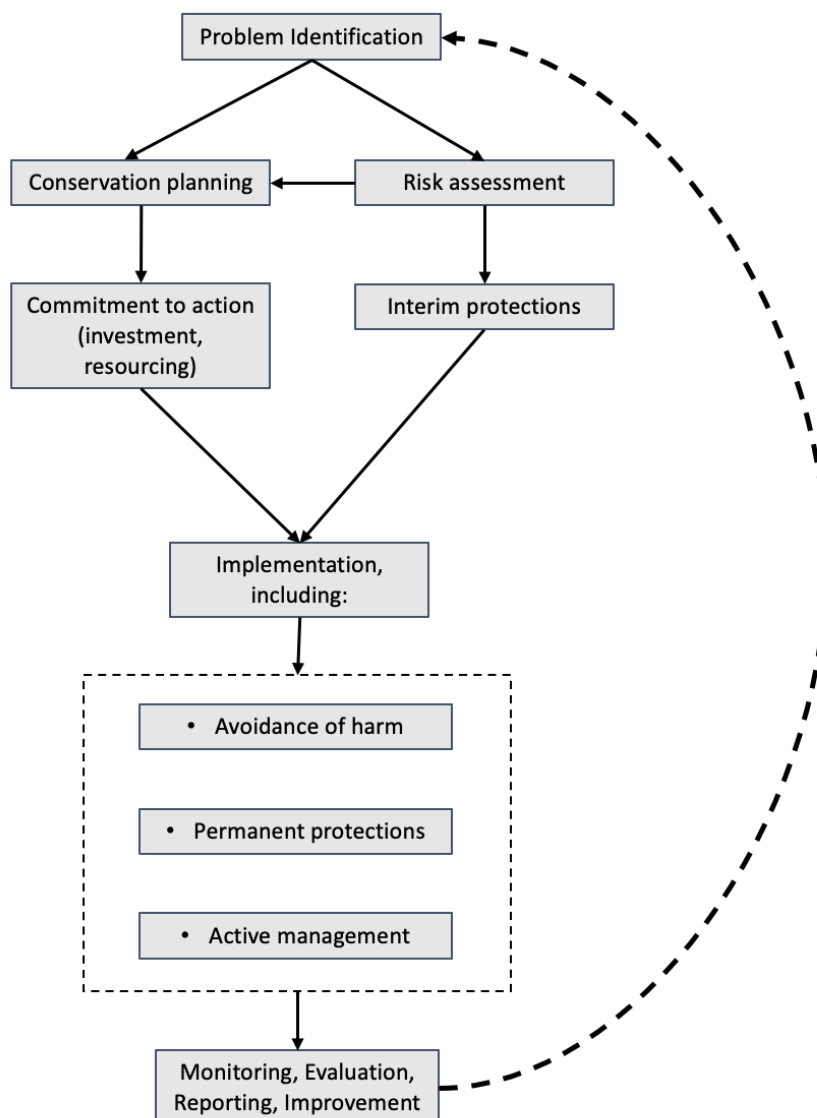


Figure 4-1: Threatened Species and Communities Protection Pathway (based on discussion and consultation with the Working Group)

4.2 FINDINGS – DESKTOP REVIEW AND CONSULTATION

4.2.1 OVERVIEW

The relevant legislative provisions, as identified through desktop review of the legislation and by Working Group members, have been mapped to the 'Pathway to Protection' framework (Figure 4-1).

This mapping exercise has been undertaken to:

- Identify how various provisions contribute to the process of protecting Threatened Species and Communities
- Highlight the potential legislative 'gaps' in the pathway to protection or where there are stages that may require 'connection' between relevant legislation to strengthen protection of Threatened Species and Communities.

An analysis of relevant legislative provisions, including their relative contributions to the pathway to protection and opportunity for further exploration as part of this review, has been based on interviews with the Working Group members and from the discussions in the Working Group sessions.

Previously or currently under review

Relevant legislation - identified individual provisions / instruments and their alignment with process for protecting Threatened Species and Communities

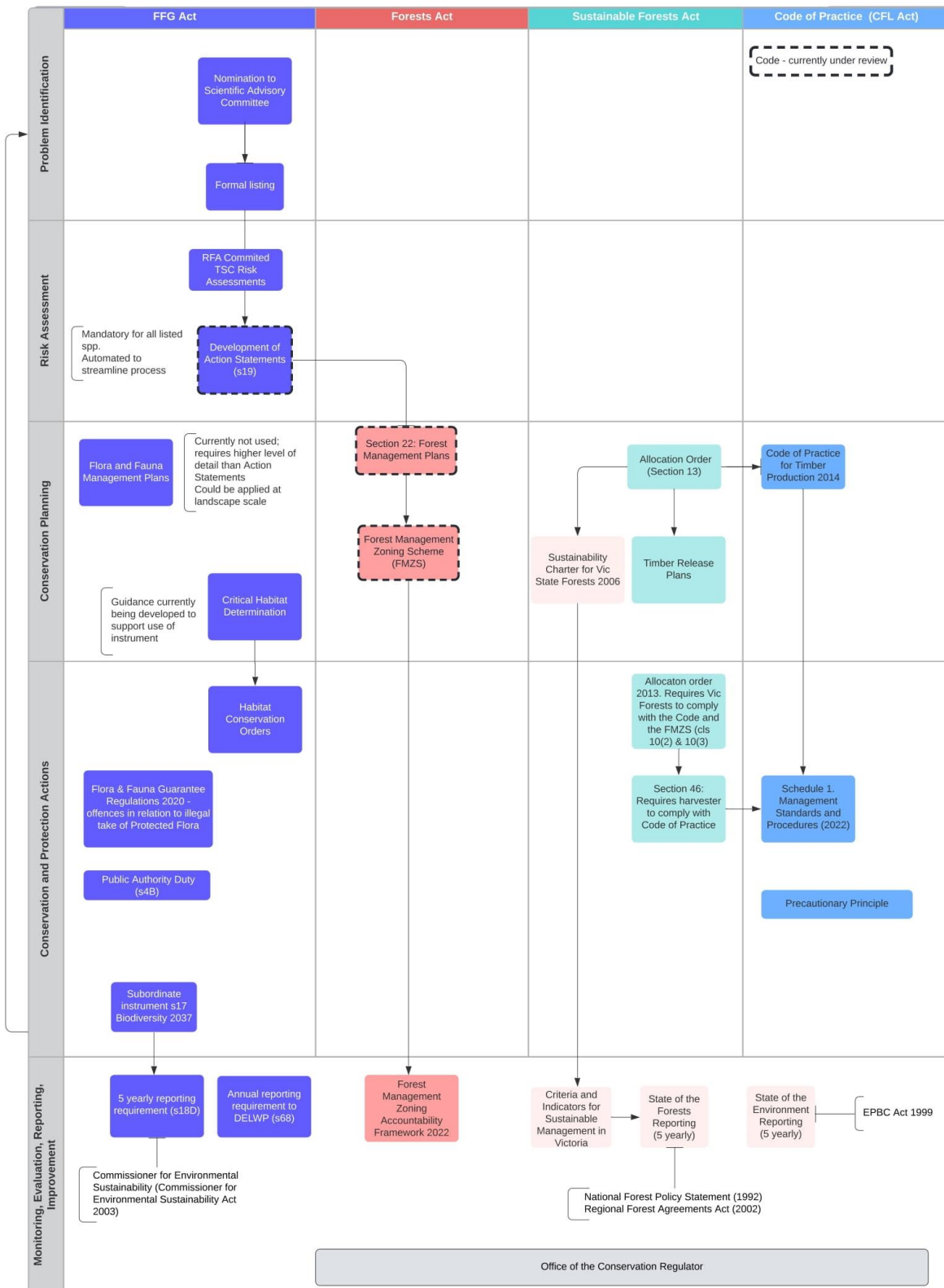
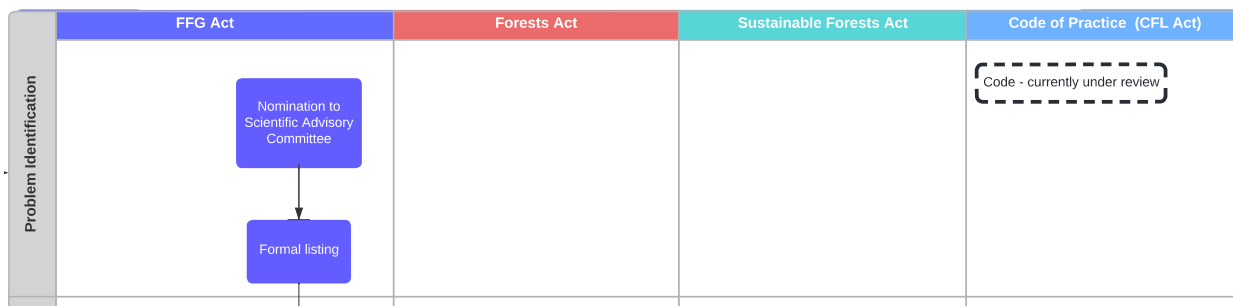


Figure 4-2: Legislative provisions and subordinate instruments mapped against each stage in the pathway to protection for Threatened Species and Communities in Victoria's forests.

4.2.2 PATHWAY STEP 1: PROBLEM IDENTIFICATION

From Figure 4-2:



As shown in Figure 4-2, the identification of a problem for a Victorian species or ecological community occurs primarily through the nomination and formal listing processes, as provided for by the *FFG Act*.

The listing process is established in Part 3 of the *FFG Act*, and the listing of threatened species was extensively addressed in the recent review of the *FFG Act* and in the subsequent amendment in 2019. Given this, there are no obvious areas for improvement to the related legislative provisions, though the following considerations that have been previously identified, may have some significance for this review:

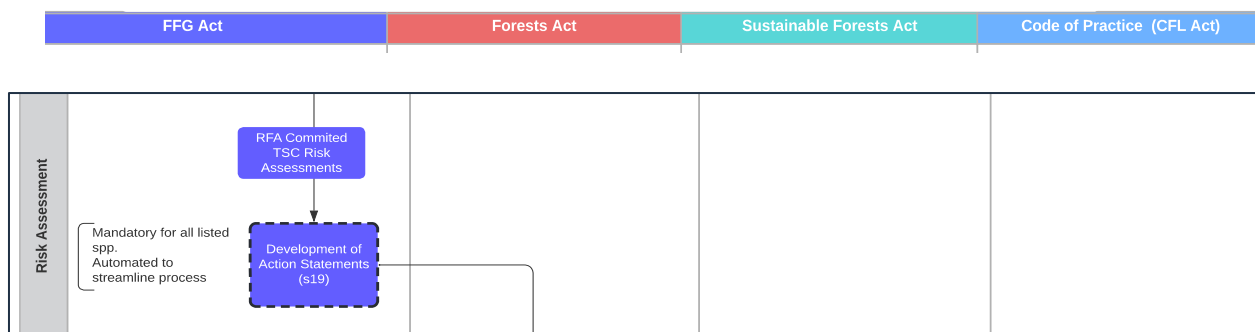
- Introducing a provision for five-yearly review of the Threatened Species and Communities Lists by independent scientific experts, which specifically must flag any failure to publish an Action Statement, failure to consider the need for Critical Habitat Determination (CHD), or failure to implement the actions specified in an Action Statement, Flora and Fauna Management Plan (FFMP) or relevant Habitat Conservation Order (HCO)
- Introducing a provision to ensure that Victorian threatened species that are also listed under the national EPBC Act, which currently are to be listed only with their Australian category regardless of whether the species is more particularly at threat in Victoria, be formally acknowledged as under heightened threat in Victoria
- The creation of criteria that guide when the Minister may seek advice from the Scientific Advisory Committee could address the current legislation's inability to provide for emergency listing of a species under imminent threat.

However, in reference to the first consideration, it is already a legislative requirement for Action Statements to be published. Explicit requirement for the use of CHD, FFMP and HCO and / or implementation of management actions in Action Statements is not provided in the *FFG Act*.

With respect to emergency listing of species, such a mechanism is not likely to be required given the option to implement protection measures for species facing imminent threats already exist in the *FFG Act* via the potential use of Critical Habitat Determinations (CHD) and Habitat Conservation Orders (HCO). CHD can be made for species that are not listed and a HCO may be established for a critical habitat even if the CHD has yet to be confirmed (section 26 of the *FFG Act*).

4.2.3 PATHWAY STEP 2: RISK ASSESSMENT

From Figure 4-2:



As shown in Figure 4-2, Victoria’s commitment as part of the modernised RFA includes a requirement for a risk assessment to be completed within six months of a species or ecological community being listed as threatened under the *FFG Act* or the *EPBC Act*. This assessment includes determining whether additional interim or permanent protections and management actions are necessary and implement interim protections and actions where relevant.

Since March 2020, three risk assessments have been completed for 142 Threatened Species and Communities⁵:

- Tranche 1 Risk Assessment
- Platypus and Little Eagle Risk Assessment
- Tranche 2 Risk Assessment

Following the implementation of any permanent protections, new or updated Action Statements are to be prepared for all species and communities subject to risk assessments, as required under the *FFG Act* (section 19).

The Action Statement must set out what has been done to conserve and manage that taxon or community or process, what is intended to be done, and may include information on what needs to be done. The rate of preparation of Action Statements (and Flora and Fauna Management Plans) is largely constrained by either availability of resources and/or prioritisation issues. While implementation of Action Statements is not mandatory, this should not prevent Action Statements being developed. DELWP is currently developing a new process to streamline and expedite the creation of Action Statements.

While there are no provisions under the *FFG Act* that commit to implementation of Action Statements, the Management Standards and Procedures 2022 (Appendix 1 of ‘Code of Practice’) is informed by relevant policy documents including Action Statements made under the *FFG Act*. Noting, however that there is no obligation on any entities to implement management actions outlined in Action Statements.

Rapidly updating the ‘Code of Practice’ through formal variation in response to immediate biodiversity threats, new scientific information or updated Action Statements relevant to forestry operations has practical limitations due to the requirements of the *CFL Act* and *Subordinate Legislation Act 1994*. Greater flexibility would enable more adaptive protection requirements but may also create greater uncertainty for timber harvesting operations if protections frequently change. Nevertheless, a mechanism that enables greater ability to adapt protections to current science and status of Threatened Species and Communities would be beneficial.

⁵ <https://www.environment.vic.gov.au/conserving-threatened-species/threatened-species-and-communities-risk-assessment>

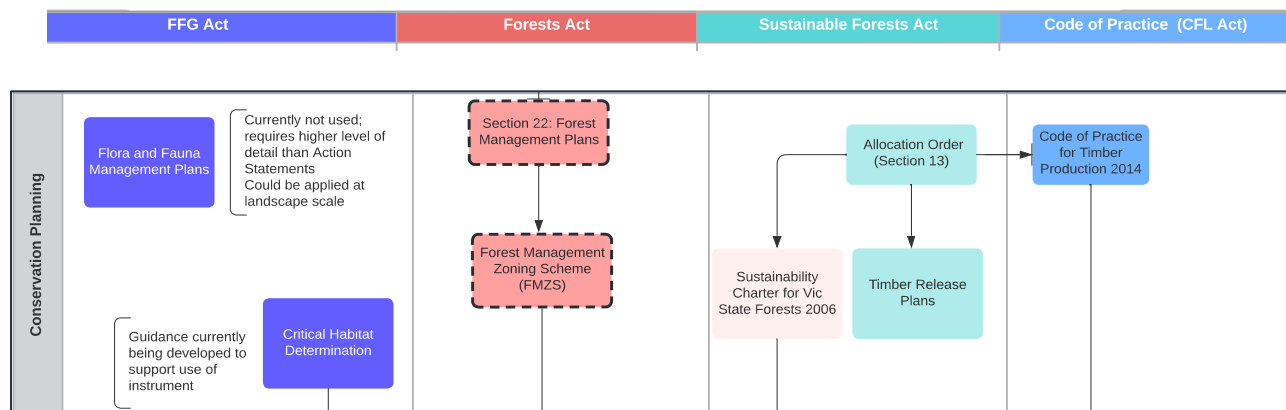
The Victorian Government is currently progressing ‘compliance standards’ reforms to the ‘Code of Practice’ whilst also a Comprehensive Review of the ‘Code of Practice,’ and more detailed recommendations are likely to be articulated when this Comprehensive Review is finalised in December 2023.

Recommendations for consideration:

- *A mechanism that supports greater ability to adapt protections to current science and status of Threatened Species and Communities.*

4.2.4 PATHWAY STEP 3: CONSERVATION PLANNING

From Figure 4-2:



As highlighted in Figure 4-2 there are several provisions and instruments across various legislation that could or do currently, have a role in the conservation planning stage of protection of listed species and communities. The challenge for this stage is having both appropriate mechanism(s) and the resources to support effective planning for conservation. It is not obvious from this review process, for example, how management actions that are described in Action Statements for listed species are considered in conservation planning to support implementation of such management action. For example, the extent to which these management actions are considered in ‘place-based’ plans, such as Forest Management Plans, is not clear.

The following sections discuss the *Forests*, *FFG* and *SFT Acts* and associated opportunities for improvements to conservation planning. Recommendations drawn from this discussion are presented at the end of this section.

Forests Act

Currently, the forest management zoning system has a recognised ‘role’ in conservation planning. Forest Management Plans (section 22 Working Plans) establish strategic objectives and strategies for management of key forest values at the landscape level. These Forest Management Plans (FMPs) create a zoning scheme (Forest Management Zoning Scheme) that has legislative recognition.

At present, these instruments connect the respective legislation to ‘enforce’ protection of Threatened Species and Communities, with the ‘Code of Practice’ requiring timber harvesting entities to comply with the FMZS. The *SFT Act*, via the Allocation Order, also requires the managing authority for timber harvesting (VicForests) to comply with the ‘Code of Practice’ and the FMZS.

For some listed species, protection is provided via the Special Protection Zones of the FMZS and the CAR Reserve System. The latter is the primary mechanism within the five RFA regions for protection of biodiversity, old growth forests and wilderness values.

There is a strong reliance on the FMZS to provide species protection, and therefore the zoning system is considered a 'tool' for conservation planning. This review identified that the zoning system is best for addressing discrete conservation values but there may be a risk of over-dependence on this zoning system for broader purposes (i.e. it is unclear whether the FMZS is the appropriate tool for landscape or ecosystem level management). However, the TSCRA Tranche 1 Permanent Protections are an example of where FMZS zoning has been selected as a tool for strategic biodiversity protection. This could be an important example of using the FMPs and FMZS together to strategically manage biodiversity.

FFG Act

Provisions from this Act relevant for pathway step 3 include:

- Critical Habitat Determinations (section 20)
- Flora and Fauna Management Plans (section 21)

These provisions are intended to have a role in conservation planning, however their effectiveness regarding species and community protection in State forests is yet to be determined given they have not been implemented.

Critical Habitat Determinations indicate an area that has biodiversity significance for the State. Ministerial guidelines for CHDs (based on the recent amendments to the *FFG Act*) are being drafted to support their future use. While a CHD would signal the importance of an area or habitat and may lead to other processes (e.g. Habitat Conservation Orders being created), though there are no automatic regulatory implications once they are established. They are also difficult to implement potentially requiring resolution of multiple perspectives and inputs relating to ecological matters and community perspectives (e.g. the Secretary must take 'reasonable steps' to enter into agreements with managers for the area covered by the determination). Protection of Threatened Species and Communities, with respect to State forests, can be achieved more simply through the FMZS.

The potential for Flora and Fauna Management Plans (FFMP), as distinct from Action Statements, is unclear, given they have not been used to date and so are 'untested'. The intent of this provision is to set out how flora and fauna conservation and management objectives are to be implemented. They are intended to be a more detailed management plan than Action Statements and could therefore be used for 'high profile' species or those with complex management needs. They can be prepared for any species, including those that are not listed, but they are not mandatory. They do not have to be confined to a single species and could be used to manage habitat or a vegetation community. As they have yet to be used, it is difficult to assess their effectiveness.

While resourcing requirements for FFMPs are unclear, they appear to be an opportunity that could be explored further. One area where they may present unique opportunities is in landscape scale management. The current management of threatened species tends to be dominated by single species approaches and is often driven by detection of the given species. This model can mean it is difficult to take a landscape or ecosystem-based approach to managing threatened species. An FFMP could allow a more integrated approach to managing a landscape area according to the needs of multiple species (listed and non-listed). However, 'place based' management plans (e.g. Forest Management Plans, national park management plans) already exist so use of FFMPs would need to be coordinated with these existing approaches.

SFT Act

The role of Allocation Orders (section 13 of the SFT Act) and Timber Release Plans (TRP) in conservation planning has been considered, particularly with reference to management actions described in Action Statements. The Allocation Order requires VicForests to comply with the 'Code of Practice' and FMZS, as part of allocating timber resources from State Forests for harvesting and/or sale. This approach relies on relevant management actions from Action Statements being embedded in the 'Code of Practice', noting that management actions specified in Action Statements are not enforceable in their own right.

The TRPs are scheduling documents that identify the forest coupes available for harvest. In preparing a TRP, VicForests consults with DELWP, DJPR, Traditional Owners and the public before approval. While the TRP and other timber resource information is available on VicForests' website, the required 28 day consultation period (specified in the *Subordinate Legislation Act 1994*) may be too short a period for meaningful input to be collected, clarified and acted on by VicForests. This could be a particularly significant limitation to ensure threatened species (and their associated Action Statements) are appropriately considered. It would be desirable for relevant agencies to identify, what, if any, timber resource information could be shared in real time across these agencies. This could be established via a Memorandum of Understanding (MOU) or considered through the 'Code of Practice' Review.

Finally, opportunities for legislative reform subsequent to the cessation of native timber harvesting in 2030 should be considered. This could include repealing the *SFT Act* and modernising the *Forests Act* to incorporate relevant existing principles (e.g. Precautionary Principle, Ecological Sustainable Development) and other relevant objectives, such as climate change adaptation, Traditional Owner self-determination and those listed in *FFG Act*.

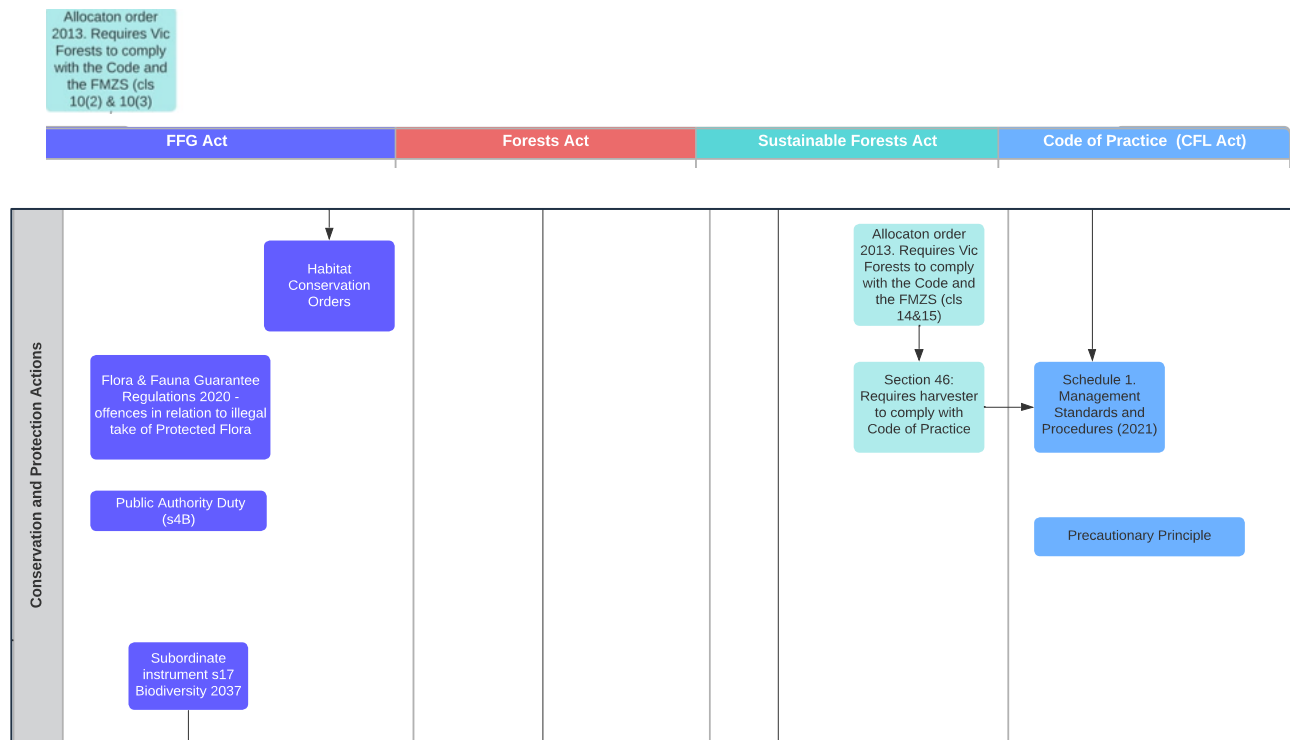
Recommendations for consideration:

- *Placing greater emphasis on the best use of FMPs and FMZS to transparently and strategically manage where timber harvesting should occur, and to demonstrate how this reduces impacts on listed species and communities. (Note the future role of FMZS will need to be considered, with the increase in declarations of Special Protection Zones likely as timber harvesting will cease in State forests by 2030.)*
- *Continue the development of guidelines for Critical Habitat Determinations and identify potential examples where the guidelines can be tested (e.g. via a concept such as a regulatory sandbox process⁶) so that the practical implications of using the CHD could be assessed in detail (before actually implementing).*
- *Build internal capacity to support effective use of Flora and Fauna Management Plans by developing guidelines and 'testing' their possible role for landscape scale or multi-species focus.*
- *Bring together relevant agencies to identify critical timber resource information and to define timely access to that information. Capture these requirements in a joint agreement between the agencies involved.*
- *Create a stronger (and more formal) requirement that FFG Act listed species information (e.g. provisions set out in Action Statements or TSCRA findings) informs timber harvesting planning.*

⁶ In the computer science world, a sandbox is a closed testing environment designed to allow safe experimentation of software projects. A regulatory sandbox is a similar concept to test new policy or regulation. There are no strict models for a regulatory sandbox but the general approach would be to create a realistic scenario where a new regulation is applied and stakeholders are brought together to examine the impacts, both positive and negative. The process could be used to decide whether the regulation is the best option to achieve the desired outcomes, to adjust the regulation, or develop or refine implementation guidelines.

4.2.5 PATHWAY STEP 4: IMPLEMENTATION OF CONSERVATION AND PROTECTION ACTIONS

From Figure 4-2:



In this section, the role of the ‘Code of Practice’ and the *FFG Act* in the implementation of conservation actions and threat mitigation are discussed. Recommendations drawn from this discussion are presented at the end of this section.

Code of Practice

In analysing legislation for this step of the ‘Pathway to Protection’, there is significant reliance on the ‘Code of Practice’ to ‘capture’ and interpret relevant provisions and any technical measures or prescriptions to protect Threatened Species and Communities dependent on State forests. However, as noted in section 4.2.2 (Risk Assessment pathway step) a key issue is the ability for the ‘Code of Practice’ to be rapidly updated, therefore ensuring relevant technical or management measures regarding threatened species are incorporated in a timely fashion. Consideration of a more flexible mechanism that enables greater ability to adapt protections to current science and status of Threatened Species and Communities is warranted.

The Precautionary Principle is a mandatory and enforceable action of the ‘Code of Practice’. It is a ‘catch all’ clause to ensure the risk of harm is minimised without prescribing a specific management approach or requiring complete information. However, its interpretation is highly contestable, and compliance standards are currently being developed by DELWP to support interpretation of the Principle. There is potential for such compliance standards to provide interim guidance regarding measures that would be deemed to comply with the Principle, providing a level of Threatened Species and Communities protection and regulatory certainty, while allowing longer term Code variations to be developed in the meantime.

FFG Act

The critical issue for the *FFG Act* in this step of the pathway is the inability to deploy time-bound enforceable prescriptions, including those measures generated through the Threatened Species and Communities Risk Assessment. As noted previously, there is a reliance on Action Statements requirements being incorporated into the 'Code of Practice'.

Other provisions in this Act relating to implementation of conservation actions include the Habitat Conservation Order (HCO) provision (section 26 – 42). A HCO prohibits further damage or requires remediation of previous damage to habitat. It was updated from the previous 'interim conservation orders' (ICO) via the most recent amendments to the Act. While there is potential for HCOs to have a role in implementation, it is difficult to determine their effectiveness given that no HCOs have been created to date. Establishing the HCO process would be challenging, as it is a complex process and mainly relies on a Critical Habitat Determination (CHD) to be established first. Due to this complexity, they are likely to be confined to exceptional circumstances, mainly relating to conservation on private land. Consideration could be given to developing guidelines, similar to those discussed previously for CHDs, and examples where the guidelines could be tested (e.g. via a concept such as 'regulatory sandbox process'), to support the potential future use of HCOs.

Another provision, the Public Authority Duty establishes a general obligation on Ministers and public authorities to ensure proper consideration of conservation actions (e.g. Action Statements). This provision was clarified and strengthened as part of the amendments to the *FFG Act*, requiring all public authorities and ministers to 'give proper consideration' to any instrument of the *FFG Act*, including Action Statements. Public authorities are defined as bodies established for a public purpose under any act, including administrative offices, departments, councils, public entities and state-owned enterprises (including VicForests). The duty does not override an authority's existing statutory obligations, but biodiversity considerations are to be integrated as far as possible⁷.

In practical terms there is a need for relevant public authorities awareness and knowledge to meet their duty. The *FFG Act* establishes tools to provide guidance to public authorities in considering biodiversity, including ministerial guidelines and public authority management guidelines. Such guidelines are under development and provide an opportunity to raise awareness with relevant public authorities of this duty and explicitly clarify key provisions in the *FFG Act*. This could include encouragement to align various plans, programs and activities to Action Statements, including improved monitoring of relevant management actions relating to protection of Threatened Species and Communities.

With respect to mitigating threats, the *FFG Act* does not directly refer to climate change as a relevant consideration although habitat loss from climate change is identified as a threatening process. The *Climate Change Act 2010* (CC Act) creates an obligation for decision makers to consider climate change, with Schedule 1 of the CC Act specifying the actions and decisions when climate change must be considered.

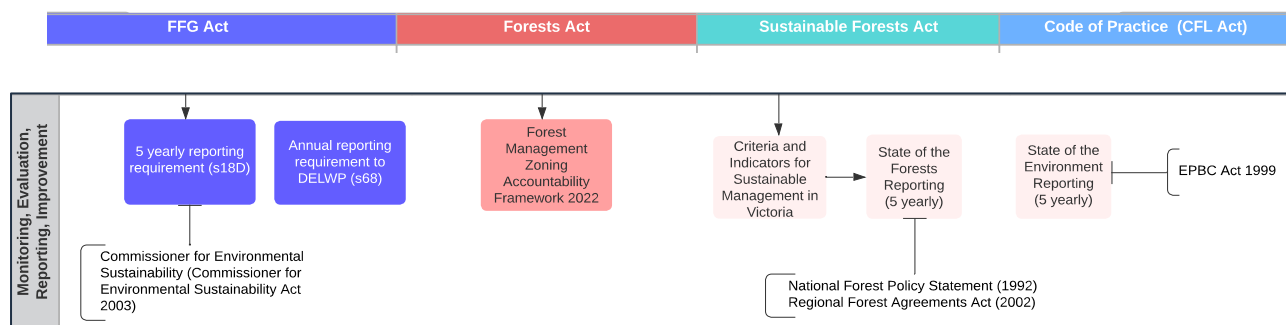
Recommendation for consideration:

- *Continue development of public authority duty 'guidelines' that would explicitly outline key provisions in the FFG Act*
- *Consider development of guidelines for Habitat Conservation Orders and identify potential examples where such guidelines can be tested (e.g. via a regulatory sandbox process) so that the practical implications of using the HCO could be assessed in detail (before implementation).*

⁷ DELWP 2021 Flora and Fauna Guarantee Act 1988, Public authority duty
(https://www.environment.vic.gov.au/__data/assets/pdf_file/0031/466681/Public-Authority-Duty-factsheet.pdf)

4.2.6 PATHWAY STEP 5: MONITORING, EVALUATION, REPORTING AND IMPROVEMENT

From Figure 4-2:



There are a range of monitoring and reporting mechanisms related to objectives of the *FFG Act* and Victoria's native forest and biodiversity, including threatened species. These are highlighted in Figure 4-2 and include:

- State of the Environment reporting
- State of Forests reporting
- Reporting provisions in the *FFG Act*
- The Forest Management Zoning Accountability Framework 2022⁸
- Requirement for five yearly reviews of the RFA

Regarding the *FFG Act* provisions, section 68 requires DELWP's annual report to include an assessment of progress made towards achieving the Act's objectives, while section 18D requires reporting on progress of the biodiversity strategy (i.e. Biodiversity 2037). The latter also requires the Commissioner for Environmental Sustainability (CES)⁹ to conduct five yearly reporting on achievement of targets and progress.

The CES also prepares the State of the Forests report, which is a legislative requirement under the *SFT Act*. This report is used to assess progress towards the criteria and indicators for sustainable forest management in Victoria. These criteria are outlined in the Sustainability Charter which is currently linked to the Montreal global criteria and are due for review in 2023.

4.3 KEY OBSERVATIONS FROM REVIEW PROCESS

This review has identified several strengths of the legislation considered. These include:

- The Forest Management Zoning System that can be used strategically to provide habitat protection
- Recent amendments to the *FFG Act* and subsequent implementation of processes to support these amendments, including 'streamlining' production of Action Statements and
- Review and amendments to other relevant legislation has also improved protection measures for threatened species through strengthening of environmental regulation for timber harvesting.

Other notable strengths of the legislative framework are the broad 'preventive measures' (potentially provided through the Public Authority Duty (*FFG Act*) and the Precautionary Principle (a requirement of the 'Code of Practice' and also a principle of the *FFG Act*, section 4A (d)). These strengths are countered by

⁸ https://www.forestsandreserves.vic.gov.au/__data/assets/pdf_file/0025/566503/CS-000666-Forest-Management-Zoning-Accountability-Framework-2022-report_V1.pdf

⁹ This is underpinned by a legislative 'link between the *FFG Act* and the *Commissioner for Environmental Sustainability Act 2003*

the difficulty in enabling awareness, interpretation and 'compliance' with the duty and the Precautionary Principle.

An operational challenge that arises across the system is the significant reliance on the 'Code of Practice'. Given the 'Code of Practice' is considered the primary instrument to regulate timber harvesting in Victoria, any relevant technical measures or prescriptions relating to species protection must be incorporated in the 'Code of Practice' for them to have effect. For example, the issue of time delay for 'science' to inform timber harvesting regulations for native forests.

The operating context for the 'Code of Practice' is very complex. The settings and physical environments for timber harvesting across the state vary widely and are dynamic. Having a single code that accommodates such variability is very challenging. The 'Code of Practice' has become more complex over time and rapidly keeping it up to date has also become more challenging and time consuming.

Finally, in the introduction to this review, the need to be pragmatic was highlighted, particularly given that native forest timber harvesting will cease by 2030 as part of the Victorian Forestry Plan. This does not mean that significant changes to regulation or legislation should be ruled out, but it does point to the need to maximise the utility of existing legislative instruments and policy tools. With this in mind, it may be timely for the government agencies (and stakeholders) to 'test' some of the existing provisions, particularly those that have not previously been used. As such, the recommendations included here bring together some of the similar ideas noted in the analysis above:

- Consider using a 'regulatory sandbox' approach to test how a particular threatened species or community would progress through the 'Pathway for Protection' framework and the role that relevant legislative provisions and instruments identified in this review could play
- Use this 'regulatory sandbox' approach to develop guidance to assist policy officers and others to identify potential use of relevant legislative instruments. In particular, this approach could develop specific guidance on the use of the provisions that have not or only rarely been used to date (e.g. Critical Habitat Determinations, Flora and Fauna Management Plans and Habitat Conservation Orders).

5 Conclusions and recommendations

A summary of recommendations proposed through section 4 of this review is presented here:

Supporting risk assessment (Step 2):

- *Consider a mechanism that supports greater ability to adapt protections to current science and status of Threatened Species and Communities.*

Supporting conservation planning (Step 3):

- *Place greater emphasis on the best use of Forest Management Plans and the Forest Management Zoning Scheme to transparently and strategically manage where timber harvesting should occur, and to demonstrate how this reduces impacts on listed species and communities. (Note the future role of Forest Management Zoning Scheme will need to be considered, with the increase in declarations of Special Protection Zones likely, with timber harvesting in State forests ceasing by 2030).*
- *Continue the development of guidelines for Critical Habitat Determinations and identify potential examples where it can be tested (e.g. via a 'regulatory sandbox' process) so that the practical implications of its use can be assessed in detail (before actually implementing).*
- *Build internal capacity to support effective use of Flora and Fauna Management Plans by developing guidelines and 'testing' their possible role for landscape scale or multi-species focus.*
- *Bring together relevant agencies to identify critical timber resource information and to define timely access to that information. Capture these requirements in a joint agreement between the agencies involved.*
- *Create a stronger (and more formal) requirement that Flora and Fauna Guarantee Act 1988 listed species information (e.g. provisions set out in Action Statements or Threatened Species and Communities Risk Assessment findings) informs timber harvesting planning.*

Supporting implementation of conservation and protection actions (Step 4)

- *Continue development of Public Authority Duty 'guidelines' that would explicitly outline key provisions in the Flora and Fauna Guarantee Act 1988 and raise awareness of this duty with relevant public authorities.*
- *Consider development of guidelines for Habitat Conservation Orders and identify potential examples where it can be tested (e.g. via a 'regulatory sandbox' process) so that the practical implications of its use can be assessed in detail (before implementation).*

General – use of current legislative instruments for protecting Threatened Species and Communities

- *Consider using a 'regulatory sandbox' approach to comprehensively test how a particular threatened species or community would progress through the 'Pathway for Protection' framework and the role that relevant legislative provisions and instruments identified in this review could play.*
- *Use this 'regulatory sandbox' approach to develop guidance to assist policy officers and others to identify potential use of relevant legislative instruments. In particular, this approach could develop specific guidance on the use of the provisions that have not or rarely been used to date (e.g. Critical Habitat Determinations, Flora and Fauna Management Plans and Habitat Conservation Orders).*

Appendix 1: Overview of legislation in scope

FLORA AND FAUNA GUARANTEE ACT 1988 AND FFG AMENDMENT ACT 2019

The *Flora and Fauna Guarantee (FFG) Act 1988* provides for the listing and conservation of Threatened Species and Communities, and the management of potentially threatening processes across all land tenures.

The *Flora and Fauna Guarantee (FFG) Act 1988* aims:

- To guarantee that all taxa of Victoria's flora and fauna can persist and improve in the wild and retain their capacity to adapt to environmental changes;
- To prevent them from becoming threatened and to recover those that are threatened so their conservation status improves; and
- To protect, conserve, restore and enhance biodiversity.

The 2019 amendment, the *Flora and Fauna Guarantee Amendment Act 2019 (Vic)* came into effect on 1 June 2020 and;

- Adopts a consistent approach to listing and assessing threatened species, the Common Assessment Method (CAM), which improves consistency between Victorian and EPBC Act listed Threatened Species and Communities.
- Incorporates principles, including the precautionary principle within the Act and requires that proper consideration is given to decisions, policies, programs and processes.
- Retains the “guarantee” objective [that all Victoria’s flora and fauna can survive, flourish, and retain their potential for evolutionary development in the wild] in the Act,
- Interprets the guarantee objective as “Protecting, restoring and enhancing biodiversity so native flora and fauna improve in the wild, including genetic and habitat diversity and the ecological process that support biodiversity,”
- Clarifies the definition of a public authority such that the public authority duty unambiguously applies to all levels of Victorian government,
- Improves accountability and transparency in relation to administration of the Act.

FORESTS ACT 1958

The *Forests Act 1958* provides for the management of State forests to maintain and improve and protect public land from fire. This includes the development of Forest Management Plans which map all Victorian forests into zones (Forest Management Zoning Scheme) and outline objectives for conservation and land uses for licences occupations including grazing, beekeeping, timber harvesting and the sale of forest produce.

DELWP will be reviewing and updating Forest Management Plans by December 2023.

SUSTAINABLE FORESTS (TIMBER) ACT 2004

The *Sustainable Forests (Timber) Act 2004* provides the framework for sustainable forest management and timber harvesting in State forests. The Act provides for the creation of the Allocation order, which requires VicForests to comply with the *Code of Practice for Timber Production 2014* and the *Forest Management Zoning Scheme (Forests Act 1958)*. VicForests operations are regulated by the Office of the Conservation Regulator.

The Act contains three key components:

- Allocation Order: Under Section 13 of the Act, the Minister is empowered to make an Allocation Order, which provides for the sustainable allocation, harvesting and sale of timber resources from State forests according to set conditions.
- Sustainability Charter for Victoria's State Forests, which sets the objectives for sustainable forest management in Victoria
- State of the Forests reporting (5 yearly), which compiles monitoring data and assesses the State's performance in achieving objectives for sustainable forest management in Victoria.

FOREST LEGISLATION AMENDMENT (COMPLIANCE AND ENFORCEMENT) ACT 2021

The *Forest Legislation Amendment (Compliance and Enforcement) Act 2019* improved the regulation of timber harvesting and firewood collection. This act has delivered its purpose of updating the relevant part of the *SFT Act* and *Forests Act* and is no longer in force. The Act is to be repealed on 1 March 2023.

It granted departmental officers the right to halt harvesting, and the Office of the Conservation Regulator the power to check for breaches of the code by examining contractor documents.

CONSERVATION REGULATOR

Until the policy commitments of the Victorian Forestry Plan become law, the Conservation Regulator has indicated it will:

- Develop a guideline for consistent identification and protection of old growth forests.
- Develop a guideline for application of modified harvesting rules for the Greater Glider.
- Use the best available information to direct surveying to areas with high likelihood of important forest values, including old growth forests and Greater Gliders.
- Ensure that the most up-to-date results of the Forest Protection Survey Program are provided to VicForests and made available online.

Once measures from the Victorian Forestry Plan become law, the Conservation Regulator will regulate compliance through its established procedure for preventing harm, monitoring compliance and enforcing the law. Currently there are limited regulatory tools for use by the Conservation Regulator.

CODE OF PRACTICE FOR TIMBER PRODUCTION 2014

The *Code of Practice for Timber Production ('Code of Practice') 2014* is a subordinate instrument under the *Conservation, Forests and Lands (CFL) Act 1987* and regulates timber harvesting in all native forest and plantations. The Code provides direction to the managing authority and to harvesting entities and operators to deliver sound environmental performance when planning for and conducting commercial timber harvesting operations in State forests, private forests and plantations.

Revisions to the 'Code of Practice' took effect on 3 November 2021 and on 6 June 2022.

Appendix 2: Working Group members

DEPARTMENT	GROUP
Department of Environment, Land, Water and Planning	Strategic Forest Frameworks
	Forest Biodiversity
	Biodiversity Regulatory Design
	Forest Regulatory Design
	Code Review Team
Department of Jobs Precincts and Regions	Forestry Industry Policy

Appendix 3: Summary of reviews

Review of the *Flora and Fauna Guarantee Act 1988*

The Department of Environment, Land, Water and Planning (DELWP) undertook a review of the *FFG Act 1988* in 2017 to deliver on the current Government's election commitment. The objective of the review was to improve the efficiency and effectiveness of the Act in protecting Victoria's biodiversity, and specifically to better align the Act with modern legislative approaches, Victorian best practice regulatory principles, the community's expectations for biodiversity management, and the rights and interests of Victorian Traditional Owners in the management of biodiversity. A Consultation Paper was available for community consideration and comment for eight weeks, and 210 submissions were received.

All outcomes of the *FFG Act* Review were relevant to the protection of Victoria's Threatened Species and Communities. The Government supported submissions in favour of:

- Retaining the "guarantee" objective [that all Victoria's flora and fauna can survive, flourish, and retain their potential for evolutionary development in the wild] in the Act,
- Interpreting the guarantee objective as "Protecting, restoring and enhancing biodiversity so native flora and fauna improve in the wild, including genetic and habitat diversity and the ecological process that support biodiversity,"
- Adding principles [including the precautionary principle] to guide decision-makers weighing competing considerations,
- Clarifying the definition of a public authority such that the public authority duty unambiguously applies to all levels of Victorian government,
- Adopting the intergovernmental Common Assessment Method for assessing and listing species,
- Developing criteria to define critical habitat,
- Introducing a tiered hierarchy of compliance response actions (e.g., civil penalties and remediation orders) underpinned by a compliance and enforcement strategy,
- Improving accountability and transparency in relation to administration of the Act.

The *FFG Act* was subsequently amended. The key changes are available at the following link: <https://www.environment.vic.gov.au/conserving-threatened-species/victorias-framework-for-conserving-threatened-species>

Forests Legislation Amendment (Compliance and Enforcement) Act 2020

The Victorian Government passed the *Forests Legislation Amendment (Compliance and Enforcement) Act 2021* on 12 October 2021 to amend the *Sustainable Forests (Timber) Act 2004* and the *Forests Act 1958*. It came into force on 1 March 2022. The provisions in the *SFT Act* and *Forest Act* came into force on 1 March 2022 and the Compliance and Enforcement Act is no longer in force, with the act to be repealed on 1 March 2023.

The amendments aimed to improve the environmental regulation of timber harvesting by:

- Clarifying the offence of unauthorised timber harvesting operations to apply to VicForests and contractors, meaning that VicForests, or a VicForests' contractor may be liable for a noncompliance
- Widening the application of enforceable undertakings and injunctions, meaning that the Office of the Conservation Regulator can apply more graduated and proportionate tools in response to noncompliance
- Providing authorised officers with powers to require the production of documents relating to compliance with the SFT Act, such that authorised officers can access more relevant and complete information when investigating and monitoring compliance with the regulatory framework because they are no longer reliant on voluntary submission of data by timber harvesting operators.

OFFICIAL

- Incorporating documents (including spatial data) by reference for instruments made under the *Forests Legislation Amendment (Compliance and Enforcement) Act 2021* and the SFT Act, such that contemporary mapping tools can be validly included in instruments that regulate timber harvesting
- Increasing the statute of limitations period to 3 years, such over a greater time period.

Victorian RFAs Major Event Review of the 2019/20 bushfires

In an effort to modernise Victoria's Regional Forest Agreements to build trust through transparency and independence, provision for Major Event reviews has been built into the RFAs (clauses 38F-I). This allows for Parties to consider the impacts of events, such as bushfires, floods or diseases, on the effectiveness and operation of the RFAs. Major Event reviews are to be conducted by an independent panel and include opportunity for public consultation (clause 38G).

In accordance with these requirements, the Australian and Victorian governments commissioned a Major Event Review (MER) to assess the impacts of the 2019-20 Black Summer' bushfires on RFA matters, acknowledging the significant impacts the estimated 60 bushfires had on forests, biodiversity, forest industries and regional communities across Victoria's five RFA regions – East Gippsland, Gippsland, North East, West Victoria and Central Highlands. The MER Review was undertaken by an independent panel between March 2021 and March 2022.

The Panel concluded that frequent exposure to intense bushfires is presenting a major and increasing threat to the effective operation of Victoria's RFAs, in particular to the stability of the forests and the achievement of ecologically sustainable forest management. It also specified that the rising occurrence of bushfires impacting on plantations and the cumulative loss of plantation resources is a significant and increasing threat to the future viability of the wood processing industries in Victoria, which are to become entirely plantation based in 2030. The Panel identified a series of 37 recommendations across areas including old growth forests, commercial native forestry, apiculture and Traditional Owners, identifying remedial actions and recommendations for the Victorian and Australian governments to address the impact of the bushfires on RFAs.

The panel recommended that refinement and better integration of Victoria's forest and fire management planning strategies should be pursued to promote active and adaptive management of forests, address the decline in forest resilience, improve the protection of rural and regional communities and ensure that both Matters of Traditional Owner Significance and environmental values are adequately managed and conserved. The Panel emphasised the importance of new perspectives on the gathering of science and data, especially in regard to moving away from 'issues-based' and 'reactive' data gathering towards a 'forest systems' approach.

Regarding protections for Listed Species and Communities, the Panel identified that there is an ongoing decline of forest-dependent Threatened Species and Communities, as well as ongoing loss of old growth forests. The Panel recommended:

- That the parties research the impact of more frequent and repeated bushfires on threatened species listed under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and the Flora and Fauna Guarantee Act 1988 (Vic) that have limited habitat distribution within the Australian Alps National Parks and reserves in Victoria.
- That the parties address knowledge and data gaps relating to threatened species that are identified as 'data deficient'. Effort should be focused on (a) species known to exist within fire-affected areas and (b) the 21 species that are listed as Critically Endangered in the FFG Act.
- That the Victorian Government produce an outcomes report to review the effectiveness of the interim protection measures and the zoning system changes for listed species and communities.
- That the Victorian Government prioritise completion of outstanding Threatened Species and Communities risk assessments for the five Regional Forest Agreement regions and activate existing legislative tools (e.g. Critical Habitat Determinations) under the *FFG Act 1988*, and that the Victorian Government make public the rationale for choosing specific legislative tools to protect listed species and communities.

OFFICIAL

- That the Victorian Government improve the integration of zoning systems within the forest management plans, national park management plans and bushfire management strategies. This process should include coordinated revisions and an improved articulation of the nature of active management strategies required for each zone, to reduce bushfire risk and support improved resilience and recovery of forests and their associated ecological values.
- That, in considering the findings and recommendations from the MER, the parties consider how RFA provisions and the components of Victoria's forest management system can be improved to provide enhanced resilience for the wide range of RFA forest values that are being severely impacted by repeated severe bushfires.

Variations of the Code of Practice for Timber Production

The 'Code of Practice' was amended in November 2021 and again in June 2022 to improve how the Code is interpreted and enforced. The amendments include:

- Formalising and clarifying protection requirements for certain species,
- Moving the *Management Standards and Procedures for timber harvesting operations in Victoria's State forests* (MSPs) into the Code as a schedule, rather than having them sit separately as an incorporated document
- Clarifying ambiguous wording and layout
- Amending the definition of the precautionary principle

There has also been \$14 million allocated to improve environmental standards in timber harvesting, which includes improving clarity about how to comply with requirements in the Code of Practice for Timber Production 2014. DELWP will improve clarity by developing 'Compliance Standards'.

Threatened Species and Communities Risk Assessments – interim and permanent protections

The Threatened Species and Communities Risk Assessment (TSCRA) was completed in October 2020 and applied to 70 species and nine communities that are either Commonwealth or state-listed and that are, or have the potential to be, impacted by forestry operations. Evaluation of the long-term (~20-year) risk posed by a range of hazards found that pest plants and animals and inappropriate fire regimes posed high or significant risk to the greatest number of these 79 species and communities. "Forestry operations" were assessed to pose a significant or high risk for 23 of the 79 evaluated species and communities.

It concluded that further improvements and additional interim measures were required for those Threatened Species and Communities at risk of short-term harm, particularly as the impacts on biodiversity from the 2019-20 bushfires are better understood. An Action Plan set out a suite of interim protections to be in place up to April 2022.

Regarding the focal legislation of our current review, the TSCRA recommended minor amendments to the Forest Management Zoning Scheme under s22 *Forests Act 1958*. It also recommended definitive action through Critical Habitat Determinations under s20 *Flora and Fauna Guarantee Act 1988* to achieve more targeted responses.

Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*

The existence of the five Victorian Regional Forest Agreements provide timber harvesting operations with an exemption under the *EPBC Act 2000*. An independent review of the *EPBC Act* was conducted by Graeme Samuel AC and was delivered in October 2020. The Commonwealth Minister for the Environment subsequently indicated that the Commonwealth Government would release a response to his report by the end of 2022. Any forthcoming recommendations for change(s) to the framework and/or approaches to protection of Matters of National Environmental Significance (which include listed species and communities)

OFFICIAL

may have implications for the Victorian RFAs and how they provide for these matters – including the Victorian forest management system.

The recent modernisation and improvement of Victoria's five RFAs included a significantly expanded section dealing with Matters of National Environmental Significance (MNES) under the *EPBC Act* and Listed Species and Communities (clauses 25A-S). These sections include requirements for Victoria to maintain a Forest Management System (FMS) that provides for the protection and management of MNES (clause 25A) and the conservation and recovery of Listed Species and Communities (clause 25G). The modernised RFAs also include timeframes for the development of relevant Statutory Conservation Planning Documents for Listed Species and Communities (clauses 25H and 25I). These documents include conservation advices, recovery plans, threat abatement plans or wildlife conservation plans made under the *EPBC Act*; or Action Statements or Interim Conservation Orders made under the *FFG Act*.



This report has been prepared by:

RM Consulting Group Pty Ltd trading as RMCG

Level 1 East, 1100-1102 Toorak Road, Camberwell Victoria 3124

(03) 9882 2670 — rmcg.com.au — ABN 73 613 135 247



Offices in Victoria, Tasmania, ACT and NSW

Key RMCG contact

Emily Tee

0409 998 369 — emilyt@rmcg.com.au

Document review and authorisation

Project Number: 1625

Doc Version	Final/Draft	Date	Author	Project Director review	BST QA review	Release approved by	Issued to
1.0	Draft	7 Nov 2022	Emily Tee Carley Fuller Samantha Gadsby				S. Annett

OFFICIAL

1.1	Draft	10 Nov 2022	Emily Tee Carley Fuller Samantha Gadsby	S. Annett	B. Gravenor	S. Annett	C. Mildren & D. Cotterell (DELWP)
1.2	Draft	2 Dec 2022	Emily Tee Carley Fuller Samantha Gadsby Shayne Annett	S. Annett		S. Annett	C. Mildren & D. Cotterell (DELWP)
1.3	Final	5 Dec 2022	Emily Tee Shayne Annett	S. Annett		S. Annett	C. Mildren & D. Cotterell (DELWP)

OFFICIAL