VNPA submission to the 2021 proposed variation to the Code of Practice for Timber Production

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Established in 1952, the VNPA is Victoria's leading community-based nature conservation organisation. We are an independent, non-profit, membership-based group, which exists to support better protection and management of Victoria's biodiversity and natural heritage. We also run extensive programs which promote the enjoyment and care of Victoria's natural environment; these include bushwalking and outdoor activity programs, as well as citizen science programs.

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1.1 Overview

Despite statements from the department to the effect that the review of the Code is limited to clarifying its operation and is not intended to change current standards or forest protection, examination of the material published for consultation demonstrates that this is not the case – this review proposed significant changes to current regulations covering logging in Victoria's forests.

The Code and the Management Standards and Procedures are critical to the informal protection of Victoria's forests outside of the formal reserve system. Our analysis has shown that 92% of reserves created to protect Victoria's forests since the introduction of Regional Forest Agreements are of this type, so the rules for their management are critical to protecting the forest values.

The apparent context for this review is a shift from the focus on Victoria's public forest as a timber resource to an increased emphasis on other values. These values include biodiversity protection, cultural heritage values, and the importance of forests as a carbon sink. A range of reviews and processes related to these values are underway or proposed. These reviews and processes are detailed in more depth below – they include reviewing the biodiversity impacts of the 2019-2020 fires which burned much of Victoria's forests, the development by Traditional Owners of a Victorian Traditional Owner Cultural Landscapes Strategy, new listings and the development of new Action Statements and the recently revised *Flora and Fauna Guarantee Act 1988*, and the implementation of important pledges to protect forests under *Victoria's Climate Change Act*. These and other processes will be important in developing the pathway to implement the Victorian Government's commitment to phase out native forest logging by 2030 through the Victorian Forestry Plan.

We have considered the current reforms proposed to the Code in this context and these are our conclusions:

1. The reforms fail to strengthen the protection of biodiversity values in Victoria's forests.

   While there are some welcome moves to formally bring current protections within the Code, in some instances the changes will weaken current protections for threatened species. Other changes also risk undermining the protection of biodiversity values.

2. The reforms will do nothing to resist the increased pressure for unsustainable logging that is already evident and is likely to increase as the 2030 deadline for the phase out of logging approaches. They do not anticipate and facilitate the transition out of native forest logging in accordance with Victorian Government commitments.

   In the face of increased pressure to squeeze every last drop from our forests we need stronger Code provisions. We welcome the department's view that the amendments will assist with enforcement of the Code, however changes such as winding back the most recent judicial interpretations of the precautionary principle take the current Code backwards, not forwards. The omission of key planning functions such as the development of Timber Release Plans from Code requirements has not been remedied.

3. The reforms do not adequately anticipate the restructuring and re-orientation of Victoria's forest management framework from resource extraction to other values, including biodiversity, cultural and carbon sequestration

If, as we hope is the case, this is to be managed through other reviews and reform processes then the government needs to inform the public of the pathway for reform and ensure that the process, unlike this Code review, is transparent and consultative.

4. The proposed policies and the form of implementation and associated accountability mechanisms are insufficient to provide the public confidence that Victoria's forests will be managed transparently and accountably.

   The reforms fall short when it comes to the need to improve the transparency and accountability for the management of the multiple values provided by our native forests. While a proposed new Forest Zoning Management Accountability Framework is welcome recognition of the need for improved transparency in this area, it raises concerns about the legal status of commitments to protect forests outside of formal reserves, and seems to signal a worrying intention to transform these commitments to aspirational targets.

Unfortunately, in persisting in the inaccurate claim that these changes are minor amendments, the department has failed to take these matters sufficiently seriously and the result seems to be an attempt to navigate through significant changes to the Code with minimal transparency and consultation.

To the extent that these matters are not proposed to be addressed through these reforms (even though the actual scope of the review appears to be much broader than claimed) then our submissions should be taken to be directed to the proposed 2023 review of the Code and other changes that are under development or proposed.

1.2 Strategic recommendations

This submission outlines a range of concerns, but the following highlight some of the key strategic directions we think should be considered in the future.

A. Government needs to map out a pathway explaining all of the reforms underway and proposed and how these contribute to the multiple objectives for Victoria's forests, especially the commitment to phase out native forest logging. Given these multiple objectives, these reforms need to be communicated and a clear and transparent manner, and consultation needs to be guaranteed, to avoid a repeat of the mistakes made with the present consultation.

B. Significant changes to the status of the Planning Standards should be deferred until such time as the review of Forest Management Plans and Flora and Fauna Guarantee Act Action Statements are complete, and until a credible alternative instrument for the commitments currently in the Planning Standards can be developed. Although the proposed Forest Management Zoning Accountability Framework is a welcome recognition of the need for accountability and improved transparency in relation to the management of the informal reserve system for Victoria's forests, it needs further work before the Victorian public can have confidence that it will deliver improved accountability for the management of Victoria's forests during a time of significant transition.

C. Contrary to the department's claims, reforms to the Code involve significant substantive change to existing protections. The claim published on the Engage Victoria website that "The amendments will not alter the environmental protection standards already provided by

the Code" is incorrect. Proposed reforms to the Code which risk undermining biodiversity protection and other important values, identified in the submission below, should be abandoned until there has been proper public consultation on the likely impacts of the reforms.

1.3 Context for this review

According to the Engage Victoria website: "This review aims to make the Code clearer, correct errors and improve enforceability. The amendments will not alter the environmental protection standards already provided by the Code. Nor do they change the rules for timber harvesting".

As discussed below, an analysis of the changes on face value demonstrates that these statements are incorrect – although some amendments are minor others are significant and will change how logging is regulated in a substantial manner, for example by allowing certain activities that are presently illegal or of doubtful legality to be carried out.

The regulation and management of Victoria's forests are in the process of a significant transition. The following form important context for the changes proposed:

Cessation of logging native forests. The Victorian Government's commitment to commence phasing out native forest logging from 2023 with total cessation of native forest logging by 2030.

Climate Change Act commitments. Also relevant is the Victorian Government's "Land use, land use change and forestry sector emissions reduction pledge" under Victoria's Climate Change Act, which is dependent on the above commitments and other improvements to the management of Victoria's forests.

Increasing recognition of the cultural heritage values of Victoria's forests. This includes, amongst other things, the development Victorian Traditional Owner Cultural Landscapes Strategy by Victorian Traditional Owners.

Other significant reform processes are underway. The reforms propose substantial reforms but are not occurring in isolation. These reforms are proposed in the context of other significant reform processes including the revision of FMPs, the 2023 Code review committed to under the RFA and other RFA commitments, and the development by the department of its proposed new Forest Management Zone Accountability Framework.

New obligations under the revised Flora and Fauna Guarantee Act 1988. Another important context is the revised *Flora and Fauna Guarantee Act* (including the 2037 Biodiversity Strategy and the strengthened duty of public authorities). The new list of threatened species has also been established under the FFG Act and now covers more 1989 individual species and 41 vegetation communities.[1] The current Forestry Code has around 510 species (102 fauna and 408 Flora) listed with specific detection-based management prescriptions. There are also requirements for around 40 fauna species in the Fixed Zoning Targets, outlined in the Forest Management Zoning Accountability Framework. The question is what is the status of the other species now listed on the FFG Act, when it comes to logging and associated impacts.

According to the Forest Management Zoning Accountability Framework 2020 Consultation draft "New or updated FFG Action Statements for species and communities considered under the

[1] https://www.environment.vic.gov.au/conserving-threatened-species/threatened-list

Threatened Species and Communities Risk Assessment (December 2020) will be prepared by DELWP by April 2022. Many of these will respond to the significant impact of the 2019-20 Victorian bushfires. The Accountability Framework will provide a mechanism to record where previous fixed forest management zoning targets have been superseded by new conservation strategies".

Threatened Species and Communities Risk Assessment (December 2020) has identified 23 threatened species and communities that are at high or significant risk as a result of forestry operations, mainly associated with loss of hollow-bearing trees, habitat loss and fragmentation, direct mortality, loss of feed source or sedimentation effects. Examples include Giant Burrowing Frog, East Gippsland Galaxias, Glossy Black-Cockatoo, Leadbeater's Possum and Diamond Python.

The large number of additional species listed under FFG Act do not currently have Action Statements, or corresponding code or fixed zoning requirements.

According to the Threatened Species and Communities Risk Assessment (December 2020)[2] the renewed RFAs required updated action statements and management plans under the *Flora and Fauna Guarantee Act 1988* (due by April 2022), which is less than 12 months away.

Catastrophic impacts from 2019-2020 bushfires which burned 18 percent of Victoria's public native forests. Significant impacts on forest dependant species and ecosystems from bushfires and work still underway at State and Commonwealth level to identify and respond to biodiversity impacts. There is also the Major Event Review of Victoria's Regional Forest Agreements underway.

Victoria's informal reserve system. As we pointed out a submission to the Commonwealth and Victorian Government's joint consultations on Victorian Regional Forest Agreement, most (92% on our calculations) of the "reserves" created under Victorian Regional Forest Agreements are "informal reserves" created and managed under Special Protection Zones – a form of informal and impermanent reserve.[3] The 2014 Code is central to what protection does exist for this informal reserve system and any proposal for reform of this scheme must avoid further compromising this already fragile and insecure system.

1.4 Background to this review

Given the complicated history leading to this consultation on amendments to the Code and the proposed Forest Management Zoning Accountability Framework, and in light of our concerns that some that the explanatory material accompanying this consultation is either misleading or omits important details, we believe that it is important to outline our understanding of the background to this review.

There are a range of commitments and recommendations which provide context to the reforms currently proposed:

a. Recommendation 10 of the Independent Review of Timber Harvesting Regulation from October 2018 which recommended "engaging with stakeholders to develop a common understanding of the Code of Practice for Timber Production 2014 (the Code). Where

[2] https://www.environment.vic.gov.au/conserving-threatened-species/threatened-species-and-communities-risk-assessment

[3] VNPA Submission on Commonwealth and Victorian government's joint consultations on Victorian Regional Forest Agreement (RFA) modernisation 28/6/2019

there is any disagreement on interpretation, DELWP should engage expert and/or legal advice to develop guidance". The department accepted this recommendation:

> *DELWP will pursue a variation to the Code to correct errors and ambiguities, and to incorporate new environmental protections, such as for large trees. This will include a public consultation process. As part of this process, DELWP will engage with stakeholders to develop a common understanding on the Code.*[4]

b. A "broad ranging review" of the Code announced by the Victorian Government on 27 July 2020. According to the media release:[5]

> *the Government has initiated a review of the Code to:*
>
> - *minimise the risk to short-term supply obligations arising from third-party litigation*
> - *ensure it remains fit for purpose and facilitates the implementation of the Victorian Forestry Plan*
> - *strengthen the regulatory powers available to the Conservation Regulator*
> - *identify regulatory reforms informed by the 2019-20 bushfires.*

c. The changes currently proposed also occur in the context of a commitment under amended Victorian Regional Forest Agreements to review the Code by 2023. According to the department's Q&A document:

> *A comprehensive scientific review of the Code – a commitment under the Regional Forest Agreements (RFAs), will be completed by the end of 2023.*
>
> *Any early input from stakeholders received through the 2021 Code review will also be considered in scoping the review – however, there will be further consultation undertaken with community and stakeholders on the comprehensive Code review once this work is underway.*

The proposed reforms follow an attempt to make changes to the Code and MSPs in September 2019. Although described by the department as a minor update, it became clear that this was not the case.

The concerns expressed by environment groups about the reforms and the process are set out in a letter to the Minister for the Environment dated 9 September 2019. After being advised of these concerns, the minister "…acknowledged there are legitimate concerns around the draft reforms to the code of practice for timber production and how they fit together" then intervened to "withdraw the current consultation" committing to further consultation on the total package of proposed changes.[6]

Regrettably, as we outline below, the current inadequate consultation in many ways repeats the process failures experienced in 2019, with the increased exacerbation arising from the fact that none

[4] DELWP (March 2019) Response to the Independent Review of Timber Harvesting Regulation
[5] https://www.premier.vic.gov.au/review-protect-victorias-forests-jobs-and-timber-industry
[6] https://vnpa.org.au/environment-department-takes-axe-to-environment-protections/

of the intervening matters that have arisen in the past two years apparently being considered a sufficient basis for adopting a more transparent and consultative approach.

1.5 Inadequate consultation

While we appreciate that comments are sought on the proposed revision, we cannot let the process for consultation that has been adopted go without comment. The inadequacies of the process do not indicate a commitment to transparency and genuine consultation with the Victorian community, something which is of heightened importance given the broad range of public objectives that Victoria's forest regulatory system needs to support. This situation needs to be addressed as the department proceeds with other reforms such as the 2023 Code revision, the development of new Forest Management Plans, and the implementation of the phase out of native forest logging.

The department is essentially using the mandatory 28-day consultation process near to finalised changes to the Code as a poor substitute for consultation that ought to have occurred at a much earlier stage. Nothing less could reasonably have been expected given the recommendations in the Independent Review of Timber Harvesting Regulation and the commitments made at the time of the withdrawal of the 2019 amendments.

Instead, the Victorian community is confronted with the "opportunity" to make submissions to thousands of complex changes to a complex regulatory framework in an unreasonably short 28-day period, a large of which was in a period when Victoria was locked down under a declared State of Emergency, due to COVID-19 and school holidays.

The exhibited documents comprise nearly 350 pages and contain almost 115,000 words, and over 2000 changes. There are a range of changes proposed – some are minor edits, corrections and updating of references, and some changes are structural in that the definitions or other clauses are moved between instruments.

Other changes, however, represent significant additions or deletions to the Code and Management Standards & Procedures (MSPs), including, in the case of a completely new Forest Management Zoning Accountability Framework, the deletion of a significant part of the current Code and its replacement with new documentation which involves a significant change to the current approach to implementation. The Amending Instrument forms a catalogue of the proposed amendments to the Code; however no detail has been provided of the changes between the 2014 and 2021 MSPs and those seeking to identify these changes is left to undertake their own comparison.

The accompanying material provided by the department (the "Questions and Answers") summarises some but not all of the changes and is of some assistance in understanding aspects of the reforms and the justification for them, however it persists with an inaccurate view that the "proposed amendments are limited to clarifying the operation of the Code and regulatory obligations that are unclear". This may be true in the case of some of the changes but it ignores the fact that some of these "clarifications" relate to provisions that are currently or have been the subject of legal action and so are likely to be significant in that context.

In other cases, the proposed revisions weaken current prescriptions for threatened species, a change which we believe is clearly significant. It is anomalous that the department has highlighted some additions to the prescriptions intended to protect threatened species – such as the Large Brown Tree Frog – but has elected to remain silent on other changes to prescriptions for threatened species such as Greater Glider and Long-footed Potoroo.

Evidently a Regulatory Impact Statement has not been prepared to assist in understanding the amendments and their rationale, despite it being clear that these amendments will have a substantial economic and social impact. It is difficult to see how any other conclusion could be reached – particularly in light of the stated objectives of the review announced in July 2020.

A Regulatory Impact Statement was prepared in relation to two amendments included in the amendments exhibited in 2019 but this was limited in scope, and it is not clear whether it is claimed that event this limited analysis remains current for this review.

Finally, there is no information available as to the results of the review announced by the Victorian Government in July 2020. This presumably have considered important matters such as the desirability of otherwise of changing the longstanding definition of the precautionary principle but once again the public is left in the dark as the matters considered, parties consulted and conclusions reached on this important issue.

1.6 The importance of the Code to forest regulation in Victoria

The Code is a legislative instrument created pursuant to the provisions of Part 5 of the *Conservation Forests and Lands Act 1987* ("the CF&L Act"). The CF&L Act[7] gives the minister the power to make Codes of Practice "which specify standards and procedures for the carrying out of any of the objects or purposes of a relevant law". "Relevant law" in the case of the Code of Practice for Timber Production includes the *Forests Act 1958*, the *Flora and Fauna Guarantee Act 1988* and the *Sustainable Forests (Timber) Act 2004.* The CF&L Act also allows a Code of Practice to incorporate material in other documents.[8] The MSPs (including appendices to the MSPs) are an incorporated document and become part of the Code through this incorporation mechanism.

Public authorities are prohibited from taking action contrary to the Code, unless the authority is satisfied that there is no feasible and prudent alternative and all measures that can reasonably be taken to minimise the adverse effect of the action are taken[9]. Both VicForests and the Secretary to DELWP are public authorities. Compliance with a Code of Practice can also be required if the Code is incorporated in or adopted by a "relevant law" (see above) or a condition specified in an authority given under a relevant law[10], and the Code of Practice for Timber Production (including the incorporated MSPs) is given further legal force in this respect by section 46 of the *Sustainable Forests (Timber) Act 2004.* It provides that VicForests and a person who has entered into an agreement with VicForests for harvesting and/or sale of timber resources "must comply" with the Code. Compliance with the Code is also a requirement stipulated in Allocation Orders issued under the *Sustainable Forests (Timber) Act 2004.*

As noted above, the Code, as a central element of the regulatory framework for managing resource extraction in Victoria's forests, is especially important given the pre-ponderance of informal reserves in Victoria. Simply put, without strong protections for biodiversity and other values in the Code the values that are claimed to have been protected in Victoria will be compromised.

[7] s31(1) CF&L Act
[8] S31(2) CF&L Act. These documents or parts of documents are limited to those "formulated, issued, prescribed or published at the time the Code of Practice is made or at any time before then".
[9] S67(1) CF&L Act
[10] s39 CF&L Act.

2 The Forest Management Zoning Accountability Framework

It is a demonstration of the poor regulation of forestry in Victoria that the current situation in relation to zoning is so complex and messy. This messiness includes the failure to update FMPs, and an out-of-date legislative framework for these, the 2014 amendments, which are now purported to have been mistaken or misguided especially as they relate to the incorporation of the Planning Standards in the Code. Not surprisingly, given this context, it is difficult to work out the direction of reform when the starting point is so unclear.

This uncertainty heightens concerns about any move to reduces the status or effectiveness of the informal reservation system currently documented in the Planning Standards, particularly as key elements of this system - Action Statements and FMPs - are acknowledged to be out of date and are in the process of being reviewed and updated.

The suite of documents released for consultation contain significant changes to the current Code and MSPs as they relate to threatened species and communities' protection. These changes involve a complicated mix of new, non-legislative documents, amendments to the Code and the MSPs that includes new content and restructuring and re-organisation of existing content, and the deletion of a significant parts of the current Code regime in the form of the Planning Standards that are presently Appendix 5 to the incorporated document, the Management Standards and Procedures 2014.

The main rationale provided for these changes, particularly the deletion of the Planning Standards, is to ensure that the Code (and incorporated documents) are solely focussed on the regulation of timber harvesting. The background to this alteration and the rationale are explained in the draft Forest Management Zoning Accountability Framework 2021 ("FMZAF") as follows:[11]

> *The revisions to the Code in 2014 brought together zoning objectives from Forest Management Plans and Action Statements into one consolidated list in the Planning Standards.*
>
> *However, this consolidation has led to a lack of clarity around the roles of the managing authority (DELWP) and harvesting entities and operators such as VicForests with respect to these objectives.*
>
> *Including aspirational objectives for DELWP in an instrument that was developed for the purpose of regulating harvesting entities and operators created confusion.*
>
> *Zoning objectives for DELWP are better situated in a document that is separate to the instruments used to regulate timber harvesting.*

The proposed new approach envisages the results of the reviews outlined above being incorporated into more flexible, non-legislative set of policy documents. While the department argues that this is so that the documents can be more readily and flexibly updated, the effect is to convert legal obligations into mere policies or expressions of government intent, with the effect of significantly weakening environmental protections in our forests. Flexibility and adaptability may be desirable objectives, but they should not be at the expense certainty and clarity in the protection of the environmental, heritage, recreational and others values sought to be secured through the zoning system.

[11] Consultation Draft, Forest Zoning and Accountability Framework 2021, p 6.

2.1 Comments on the proposed Accountability Framework

2.1.1 Legal status of the zoning system

As will be clear from the above, we are not convinced that current proposal provides the necessary legal status to the zoning system or the accountability framework.

While we understand the rationale of including zoning provisions in an instrument separate to timber harvesting obligations, there seems no reason in principle why a single code could not comprise both regulation of timber harvesting and the zoning system. Even the proposed revised Code ranges across public and private forests and is given legal effect not only under the *Conservation Forests and Lands Act and Sustainable Forests (Timber Harvesting) Act* in the case of public forest on the one hand, and as an incorporated document in the Victorian Planning Provisions under the *Planning Environment Act* in relation to timber production on private land on the other.

Even if the consolidation of the zoning provisions into the Code in 2014 is now no longer thought to be desirable, alternative approaches would be available which would ensure that the system of zoning is given legal status – one possibility for example would be for these to be included in a separate legislative instrument in the form of something like a Landscape & Biodiversity Code of Practice.

2.1.2 It is wrong to characterise obligations as merely "targets" or "aspirational"

Language to this effect is concerning and indicates that the department is insufficiently appreciative of the importance and status of the zoning commitments, even if this are currently inadequately captured under out-of-date Forest Management Plans.

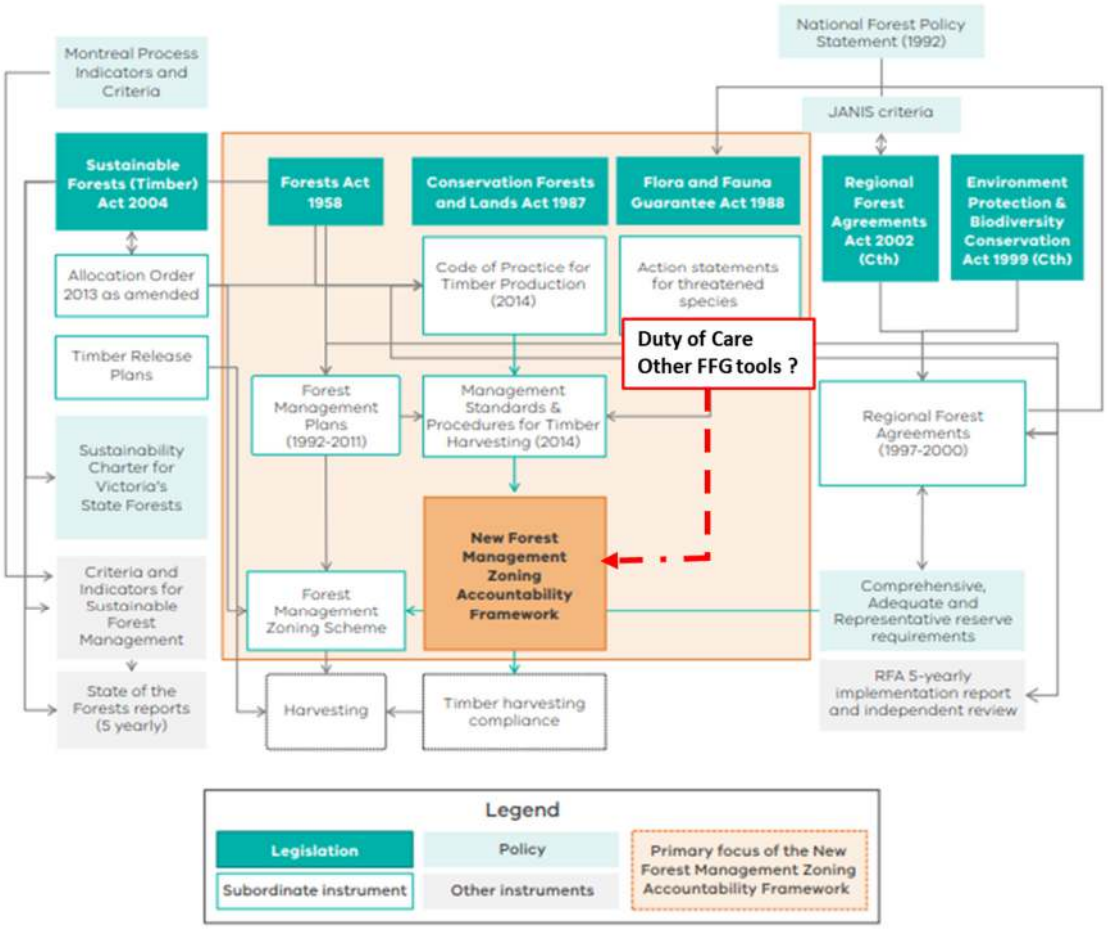
Similarly, to describe the actions specified by Action Statements under *the Flora and Fauna Guarantee Act 1988* is inconsistent with the intent of these Action Statements and contrary to newly introduced the public duty in section 4B of the Act.

2.1.3 Other comments on the proposed accountability framework

The consultation paper notes "Species and communities considered under the Threatened Species and Communities Risk Assessment (December 2020) will be prepared by DELWP by April 2022. Many of these will respond to the significant impact of the 2019-20 Victorian bushfires. The Accountability Framework will provide a mechanism to record where previous fixed forest management zoning targets have been superseded by new conservation strategies." The amended FFG Act also include new tools, in addition to action statements such as the Duty of Care of Public Authorities, which do not seem to be included the forest zoning and regulation framework. See example of revised diagram.

Figure 5 in the Accountability Framework omits any direct connection between the biodiversity conservation mechanisms under the *Flora and Fauna Guarantee Act 1988* and the zoning scheme and Accountability Framework. It also fails to indicate that these conservation mechanisms are not limited to Action Statements but include a range of measures including the Act's objectives and public authority duty in section 4B, and the Biodiversity Strategy. To illustrate an amended diagram is provided below.

Figure 3: Regulatory framework for forest management zoning and timber harvesting in State forests



2.2 Conclusion and recommendations in relation to the proposed deletion of the Planning Standards

We recommend that significant changes to the status of the Planning Standards should be deferred until such time as the review of Forest Management Plans and revision or development as the case may be of Flora and Fauna Guarantee Act Action Statements is complete, and until a credible alternative instrument for the commitments currently in the Planning Standards can be developed.

Although the proposed Forest Management Zoning Accountability Framework is a welcome recognition of the need for accountability and transparency in relation to the management of the informal reserve system for Victoria's forests, it needs further work before the Victorian public can have confidence that it will deliver improved accountability for the management of Victoria's forests during a time of significant transition.

3 Revision of the Code and MSPs

There have been series of significant and successful community legal challenges, to enforce the current rules, and now it seems regulatory changes are being introduced to re-write the rule book reverse judicial interpretation of the Code – a clear demonstration that it is incorrect to describe the changes proposed here as limited to clarifying the operation of the Code. In fact, the operation of

the Code having been clarified through the legal process the department is now seeking to dilute or diminish elements.

3.1 The reforms weaken protections for nature and wildlife

While some of the proposed changes (such as including protection for Large Brown Tree Frog in the Code) are welcome, we are concerned that several of the proposed changes weaken current protections for biodiversity and other values by diluting current code requirements or introducing amendments that are intended to reverse the interpretation of the law as developed by the Victorian Supreme Court and the Federal Court of Australia. Some of these are outlined below.

3.2 The starting point – risks to biodiversity from logging

The starting point for considering amendments to regulations that seek to protect biodiversity in the context of logging operations is the clear risk posed by those operations.

These risks are clearly documented in the Threatened Species and Communities Risk Assessment of October 2020, described as the "first step in a two-year process to update statutory conservation planning documents for all listed species and communities by April 2022". The risk assessment identifies the following impact from forestry operations[12]:

> *"The site-level impacts of timber harvesting based on the standard "clear-fell" or "seed-tree" system include:*
>
> - *Direct mortality, especially of arboreal species;*
> - *Removal/modification and fragmentation of the forest structure;*
> - *Soil disturbance and compaction due to machinery use, potentially also leading to soil erosion and sedimentation of waterways; and*
> - *Edge creation, leading to changes in micro-climate characteristics such as light intensity, temperature, humidity and wind strength in the adjoining forests.*
>
> *Following harvesting, hot regeneration burns are typically applied, to remove "slash" and create conditions suitable for germination and seedling establishment, noting that VicForests has incorporated lower impact regeneration options into their 2019 update of harvesting and regeneration systems and high conservation management systems.*
>
> *The use of heavy machinery during and after the harvesting operation can have a localised and detrimental impact on understorey species that rely on a vegetative response to disturbance, including tree-ferns and some long-lived shrubs and trees. Edge effects can impact especially on adjoining rainforest stands and aquatic species may be affected by sedimentation and poor water quality.*
>
> *At the landscape-level, timber harvesting when conducted over a typical rotation period of 80 years will inevitably reduce the proportion of the forest in older age classes, including mature and senescent growth stages, depending on bushfire history. This effect will vary from area to area, depending on the extent of older age classes and their protection in the reserve system. However, where this effect is substantial, it would make the forest at a landscape-scale less suitable for hollow-dependent species such as possums, gliders and large forest owls."*

[12] DELWP (2020) Threatened Species and Communities Risk Assessment, p 10.

The Risk Assessment also identifies the inadequacy of the Code in managing these risks:[13]

> *"...the Code of Practice for Timber Production includes standards and prescriptions to address many of the impacts of timber harvesting. However, the measures are not necessarily sufficiently comprehensive or effective to manage all risks"*

This conclusion is particularly relevant when it comes to the important "gap filling" role that is played by the precautionary principle in the Code.

3.3 The precautionary principle

As is now well recognised as a result of legal challenges to VicForests' forest management practices, the precautionary principle has an important role to play in the context of the Code.

An important element of the reforms is to amend the current definition of the precautionary principle. This definition has been in the Code since 2007.

The intention of the amendments is to adopt a specific interpretation of the precautionary principle. This has been done in response to an alternative interpretation developed by Justice Mortimer in the Federal Court in the *Friends of Leadbeater's Possum v VicForests*.

The interpretation and application of the precautionary principle (whichever expression is used) will vary depending on the context of its application and the particular facts at issue.

In the *Environment East Gippsland v VicForests [2010]* ("the Brown Mountain case") Justice Osborn followed an early interpretation of the precautionary principle by Chief Justice Preston of the Land and Environment Court in New South Wales in the context of a dispute about the construction of telecommunications towers. In that case (*Telstra v Hornsby Shire Council* – "*the Telstra case*") Preston CJ emphasised the need to establish two preconditions before the precautionary principle was engaged as a decision-making principle. Firstly, there must be "threats of serious or irreversible environmental damage" and secondly "lack of full scientific certainty". A decision-maker is only required to apply the precautionary principle if these "conditions precedent" are satisfied.

Justice Osborn also cited with approval other commentary by Preston CJ in the *Telstra case* and by other courts in other cases considering the application of the precautionary principle. This commentary in *the Brown Mountain case* and in other cases has been relied upon by VicForests to support arguments that there is considerable flexibility or latitude, and a requirement for "balance", in how the precautionary principle should be applied. In the Leadbeater's Possum case, for example, the Court noted that "VicForests relies on a number of authorities which have emphasised that the need to apply the precautionary principle, or to take a "precautionary approach", does not dictate how a person or entity must act, or how a decision must be made, or what eventual decision should be taken".

In *Friends of Leadbeater's Possum v VicForests* Justice Mortimer adopted a different approach to the interpretation of the precautionary principle in the form contained in the Code.

Justice Mortimer took note of the different form of words used and also emphasised the different context for the precautionary principle both in terms of the purpose and surrounding provisions of the Code, and also the factual circumstances in which the principle fell to be interpreted and applied. This is an important refinement and development of the specific form in which the principle is expressed in the Code in light of its context, however it is noteworthy that Justice Mortimer found

[13] Ibid

that she would have reached the same conclusion in relation to VicForests' non-compliance with the principle regardless of the interpretation adopted.

Notwithstanding the conclusion that the same result would have been reached on either interpretation (which was supported by the Full Federal Court on appeal), there are differences between the two approaches that ought to have been considered before proceeding with amendment proposed.

On the one hand, the approach following the *Telstra case* as adopted by Osborn J in the *Brown Mountain case* tends to emphasise the need to satisfy preconditions before the precautionary principle will be engaged, and then to support an emphasis on a range of qualifications and limitations in the practical application of the principle once it is engaged.

On the other hand, the alternative approach developed by Justice Mortimer in *the Possums case* emphasises the significance of the different wording of the precautionary principle as it's currently formulated in the Code. Her approach focuses first on *a process* of careful evaluation, and second on *an outcome on the ground* that adopts and applies a management option designed to avoid serious or irreversible environmental damage. It also envisages the principle as one of more continuous operation, with the focus on how rather than if it should be practically applied to the range of decisions and operations undertaken by VicForests. The emphasis is less on preconditions and then qualifications and limitations once these preconditions are satisfied, perhaps reflecting an understanding that forestry operations will always carry with them both a risk of serious or irreversible environmental harm and also scientific uncertainty.

Importantly, according to Her Honour, the precautionary principle plays an important overarching or "gap filling" function in the context of the Code:[14]

> *"…this is an overarching obligation, intended to require a "bigger picture" view to be taken by VicForests of how biodiversity values are to be considered in the conduct of forestry operations. In some circumstances, it will also operate to fill gaps left by more specific management prescriptions."*

The divergence between approaches to the interpretation of the definition of the precautionary principle in the Code and clause 2.2.2.2 that is provided by the department as the justification for the amendments proposed by the 2021 variation to the Code. According to the department's Q&A document (item 4 in the document):

> *The amendment to the definition of the precautionary principle in the Code aims to address uncertainty in its interpretation that has arisen with courts interpreting the obligation in the Code in different ways.*

The proposed change is an unfortunate reaction to the divergent approaches to the interpretation of the principle that is reactive, in the sense that what is now proposed is to revert to the earliest judicial interpretation in the *Brown Mountain case* rather than to give careful consideration to the adoption of the latest judicial consideration by Justice Mortimer which arguably is the better approach as it pays attention to the particular form of words used in the Code, the regulatory context provided by other provisions of the Code and the purpose of the regulatory regime, and the specific circumstances of forestry operations.

[14] Friends of Leadbeater's Possum Inc v VicForests (No 4) [2020] FCA 704, [903] to [905].

In the absence of evidence of careful consideration of the benefits of retaining the most recent and carefully considered interpretation of the principle by the Federal Court and Full Federal Court we do not think a case has been made for the amendment proposed. Alignment with the definition used in other jurisdictions is a flimsy basis for advancing the change – there are multiple variations jurisdiction by jurisdiction and it's not clear why alignment is though necessary here but not in other areas.

We recommend that the proposed variation of the Code to alter the definition of the of the precautionary principle be abandoned.

3.4 Impact on Big Trees

The large tree protections proposed under 4.1.1.2, 4.1.1.1.3, 4.1.1.4 are inadequate, vague and do not set any firm or enforceable guidelines for buffers or exclusion zones to retain large trees. This will lead to the further loss of large trees from the landscape and not meet the expectations raised by the minister in 2018 stating "all native trees across the state greater than 2.5 metres in diameter would also be protected, whether they stood in forests or along roadsides" (ABC 2018).

A bare-minimum protection of large trees would be the implementation of The Australian Standard, Protection of Trees on Development Sites (AS4970 2009), this standard is widely used across most state government sites and imbedded in planning schemes.

The standard involves the calculation of Tree Protection Zone (TPZ) using the Diameter at breast height (DBH) or 1.4 meters above ground to determine the diameter of the tree. Using the diameter of the tree divided by 12 (DBHx12=TPZ) a sufficient protection zone can be established to maintain the trees viability and vigour.

Using the Whitelaw tree in state forest near Mt. Baw Baw as an example, using its DBH of five Meters x 12 is a tree protection zone of 60 metres around the tree. And protect it from the impact of machinery use near its roots and radiant heat from post-logging burns, more than logging up to the base of the tree or not allow slash to build up within three metres of the trees base.

In 4.2 Activities restricted within the TPZ (AS4970 2009) outlines activities that are to be excluded from the TPZ to ensure the trees viability. This included the use of machinery and lighting of fires.

The use of AS4970 2009 to protect large trees in coupes will not only result in protection of large trees, but also make implementation and enforcement of regulations easier for the regulator. Enforcement of AS4970 2009 is regularly under taken by local government officials and is used across most local council areas and state government development sites across the state.

The use of 2.5 metre diameter criteria for large tree categorisation neglects to protect many large trees across all Forest Management Areas (FMAs) and forest types. Trees in the West FMAs are not likely to reach 2.5 metre in diameter but are still vital for wildlife habitat and are large trees for their vegetation types. There is a need to define a large tree incorporating the area and conditions the tree is found in, not just its diameter.

3.5 Changes to prescriptions for threatened species in the MSPs

The changes between the current and proposed new version of the MSPs include some changes to the prescriptions for threatened species which we are concerned will reduce the current level of protection for these species.

Greater Glider in East Gippsland: The rule has been re-drafted in a manner that is less clear, more ambiguous and potentially weakens protection in four ways:

1. The requirement to create a 100ha SPZ is replaced with a 100ha exclusion area, which will be designed by VicForests with mere 'consultation' with DELWP.

2. While unclear, one reading of the new formulations is that only detections *within a coupe* will count toward meeting the density threshold. If this is how the rule is applied in future, it is artificial, and a serious weakening without justification for the species whose conservation status has declined drastically and who is clearly and unarguably in need of far greater not lesser protection from timber harvesting. Currently, if, for example 11 Greater Gliders are found within a km, five within a coupe and six adjacent or bordering it, the protection zone of 100ha is triggered. Under the new formulation, it is unclear whether in this situation the protection would be triggered because six of the eleven detected are not "in the coupe".

3. The new formulation states that the second and third alternative bases on which the density requirement can be met – being more than two per ha or more than 15 per hour of spotlighting – are both now "equivalents" to the first basis of more than 10 per spotlight km. This makes it unclear as to whether they remain separate, independent basis on which the 100ha protection area is triggered. Currently, the rule is clear that the 100 ha SPZ is triggered when any of the three bases are met.

4. The current rule triggers protection where verified records report more than 10 individuals per kilometre. The new formulation says 'more than 10 individuals within a *spotlight* kilometre'. It is unclear what the term 'spotlight kilometre' means, but it is likely to work to narrow the protection afforded by adding an additional qualification to the rule.

   A note is added to the end of the rule stating that: "Assumed rate of spotlighting per kilometre is 100mins per 1km and visible range either side of transect for this species is 25m, equating to assumed minimum survey area of 5 hectares". Again, it is unclear what effect this note has on the interpretation of the rule, and it adds a high degree of ambiguity to it. On one view, it could confine the triggering of the 100ha protected area to spotlight surveys that are completed within 100 minutes per km, and to records that are located within 25m of the transect, even if the observer has identified individuals ta greater distance from the transect line. The term transect is also unclear, and the note may exclude clear records found during an off-track survey that does not follow a pre-determined transect line.

In summary, the changes made to this rule are clearly designed to narrow the protection afforded by both reducing the level of protection provided by the zone (from SPZ to exclusion area), handing design of the zone to VicForests, and adding numerous further qualifications to reduce the instances when the protection zone is triggered.

As noted above, identifying if and where changes such as this have been made to the MSPs is difficult as the department has failed to catalogue these changes anywhere. We are aware that changes have also been made in relation to the prescriptions for Yellow-bellied Glider and Long-footed Potoroo. There may or may not be more. Either introducing significant changes to threatened species protections in this manner is unsatisfactory.

3.6 Compromising scenic landscape protection and weakening future tourism potential

Forest regulation ought to reflect the high cultural and aesthetic values of the Victorian community for forest landscapes, and recognise the tourism value of scenic landscapes. Hundreds of specific fixed zoning requirements for landscape, and recreation sites are moved from the Code into the Forest Management Zoning Accountability Framework, again raising concerns that these once rules and now just aspiration or targets.

Unfortunately, the proposed changes to the Code continue the undermining of these protections commenced with the deletion of key planning obligations from the 2007 Code as part of the 2014 amendments (discussed further below). The current reforms extend this process by moving the current 'mandatory provisions' in clause 2.1.1.1, including the requirement to "minimise adverse visual impact in Landscape sensitivity areas", to a new clause 1.1.12. (in the amending instrument).

This move and changes to the wording is evidently intended to concrete in an interpretation to the effect that it was never the intention that VicForests would be obliged to plan its activities in a manner that minimises adverse visual impacts. Even if this claim as to the historical position is correct – which is doubtful given the manner in which this issue was dealt with in earlier versions of the Code – the end point is a regrettable neglect of the importance of these scenic values.

These changes ought to be abandoned and a suitable mechanism to ensure protection of sensitive landscapes developed, including at the critical planning stage.

3.7 Impact on historic and cultural places

This section is proposed to be substantially amended and the current Table 15 Management of Heritage Places is deleted from Appendix Proposed amended clause refers to consulting relevant heritage legislation and databases such as the Victorian Heritage Register etc instead.

3.8 Buffers and roading

There are proposed changes to expand the circumstances in which operations are permitted in SPZ, buffers and exclusion areas thereby reducing the level of protection afforded by each of these designations. Specifically, express exemptions are provided for a very large range of conduct including haulage, in-coupe access roading, snig tracks, stream crossings, removal of trees for public or worker safety, removal of fallen trees and debris. Each of these operations can be permitted by VicForests itself, through 'sanctioning', without approval required from DELWP. See new clause 2.5.1.5. This change is likely to lead to serious reduced environmental outcomes for threatened species by permitting habitat destruction, including removal of large old trees, within areas that are intended to provide protection and habitat refuge for wildlife amidst large-scale logging operations.

3.9 VicForests planning responsibilities – the Code and Timber Release Plans

Section 2.1.1 Long-term (Strategic) Forest Management Planning of the current 2014 version of the Code is proposed to be moved to the introductory section and becomes a new 1.2.12. The Operational Goals and Mandatory Actions that are currently part of 2.1.1.1 are deleted from the Code.

These changes are significant as the change in location and the deletion of content mean that provisions relating to planning functions of not only the Secretary but also VicForests is deleted from

the Code. In effect, the removal of the planning obligations of the Secretary from the Code seems to result in "collateral damage" in the form of the repeal of planning obligations attaching to VicForests as they relate to Timber Release Plans.

This situation is complicated by the fact that these planning obligations were much more clearly expressed in the 2007 version of the Code which were deleted in the transition to the 2014 Code, despite government providing assurances on that occasion also that the changes would not result in any lessening of the protection provided by the Code.

We understand that the department's position is the that the preparation of Timber Release Plans is governed by the *Sustainable Forests (Timber Harvesting) Act 2004.* This is obviously true in that section 37 of that Act requires the preparation of the Timber Release Plans. But the position is clearly incorrect if it is suggested that TRPs should be *solely* governed by the Act – the same section clearly contemplates that the Code will contain provisions in relation to the preparation of the TRP – VicForests in fact obliged to ensure that the plan is consistent with "any relevant Code of Practice relating to timber harvesting" – subsection 37(3)(b). See also the similar provision in subsection 43(2)(b) in relation to review and variation of Plans.

As indicated above, the position is complicated by the fact that obligations in relation to Timber Release Plans were clearly set out in provisions in the 2007 Code which were not carried through into the 2014 Code – see 2.1.2 of the 2007 Code, which is reproduced below. The proposed 2021 Code variation can be seen to complete this abandonment of specific obligations in relation to Timber Release Plans rather than correcting the omission from the 2014 Code.

Extract from Code of Practice for Timber Production 2007

2.1.2 Wood Utilisation Plans or Timber Release Plans

Wood Utilisation Plans (WUPs) are prepared annually for all commercial DSE forestry operations in State forests. WUPs provide a list of areas scheduled to be harvested, associated road requirements; details of the location and approximate timing of timber harvesting in the proposed coupes; and details of the location of any associated access roads. DSE has prepared Guidelines for the preparation of these Plans, which are publicly available and provide further detail on their preparation and contents.

Timber Release Plans (TRPs) are prepared by VicForests under Part 5 of the *Sustainable Forests (Timber) Act 2004*. A Timber Release Plan includes: schedules of coupes selected for timber harvesting and associated access road requirements; details of the location and approximate timing of timber harvesting in the proposed coupes; details of the location of any associated access roads; and area, silvicultural type and forest stand description.

Operational Goals
For DSE managed operations, a Wood Utilisation Plan is prepared in accordance with the *Conservation, Forests and Lands Act 1987* and approved by the DSE Regional Director prior to the release of coupes for harvesting.
For VicForests managed operations, a Timber Release Plan is prepared in accordance with the *Sustainable Forests (Timber) Act 2004* and approved by the DSE Secretary in accordance with that Act prior to the release of coupes to VicForests for harvesting.

Mandatory Actions
Schedules of coupes selected for timber harvesting and associated access roading must be described in the Wood Utilisation Plan or Timber Release Plan.
A Wood Utilisation Plan or Timber Release Plan must:

• be consistent with this Code of Practice and with the relevant Forest Management Plan;

• minimise impact on biodiversity and provide for the maintenance of a range of forest age classes and structures;

• identify and mitigate impacts on Aboriginal cultural heritage values, in consultation with Traditional Owners and any other relevant Aboriginal groups;

• minimise the impact of harvesting on water quality and quantity over a period of time within any particular catchment;

• permit the effective and efficient utilisation of felled trees;

• take account of forest type, the silvicultural system to be employed, and the needs of the regeneration program;

• minimise adverse visual impact and consider effects on areas of landscape sensitivity;
• meet legal timber supply obligations;

• specify the location of coupes;

• show the location of major access roading, including extensions or upgrading of the permanent road network; and

• be available for public scrutiny.

Clearly assessment of potential locations and impact of logging coupes earlier in the decision-making process, such as during the production of Timber Release Plans (TRP) and Timber Utilisation Plans (TUP)(essentially rolling logging schedules), would increase the capacity for good planning to minimise impacts on ecological and landscape features. Early planning would through comprehensive reviewed of TRP and TUP avoid almost inevitable annual conflict over new coupes in unsuitable areas, and likely increase certainty for the industry.

3.10 Harvesting on slopes in Water Supply Protection Areas

Changes to the provisions regarding harvesting on slopes in section 3.4 of the MSPs will endorse logging on slopes of greater than 30 degrees in Water Supply Protection Areas.

According to the explanatory material this is intended to align the Code provisions with accepted policy intent.

Firstly, it is reasonably clear that the current MSPs do not intend to extend the 10% exception to Water Supply Protection Areas – the general provisions which provide for this exception are displaced by further specific provisions in the current 3.5 and Table 11. This interpretation corresponds with principles for the construction of legal instruments, and is supported by common sense which suggests that harvesting on steep slopes should not be permitted in Water Supply Protection Areas.

In the circumstances we are concerned that these changes seek to address the issue by aligning the regulations with a practice that represents a contravention of the current regulations, rather than the course which should be adopted, which would be to ensure that logging does not occur on steep slopes in water supply protection areas.