

# Declared Protected Flora Guidelines

Declaring flora taxa to be protected under s.46 of the Flora and Fauna Guarantee Act 1988



We acknowledge and respect Victorian Traditional Owners as the original custodians of Victoria's land and waters, their unique ability to care for Country and deep spiritual connection to it.

We honour Elders past and present whose knowledge and wisdom has ensured the continuation of culture and traditional practices.

DEECA is committed to genuinely partnering with Victorian Traditional Owners and Victoria's Aboriginal community to progress their aspirations.



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**ISBN 978-1-76136-680-2 (pdf/online/MS word)**

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# Introduction

These guidelines are produced under section 46B of the *Flora and Fauna Guarantee Act 1988* (FFG Act) which sets out that

- *The Minister may recommend... that a taxon of flora be declared to be protected and that the taxon is subject to a restriction on use if the Minister is of the opinion that unrestricted commercial or personal use of the members of the taxon has the potential to be ecologically unsustainable.*
- *The Minister must prepare guidelines for determining whether a taxon of flora is eligible to be declared to be protected including being subject to a restriction on use.*
- *Minister must ensure that an up-to-date consolidated list of the taxa of flora that have been declared to be protected under section 46 is published on the Internet.*

The guidelines aim to promote consistency and transparency and ensure that there is clear rationale for each taxon's declaration as protected flora. These Guidelines relate only to protections under the FFG Act, other regulations (e.g. native vegetation regulations) may also apply.

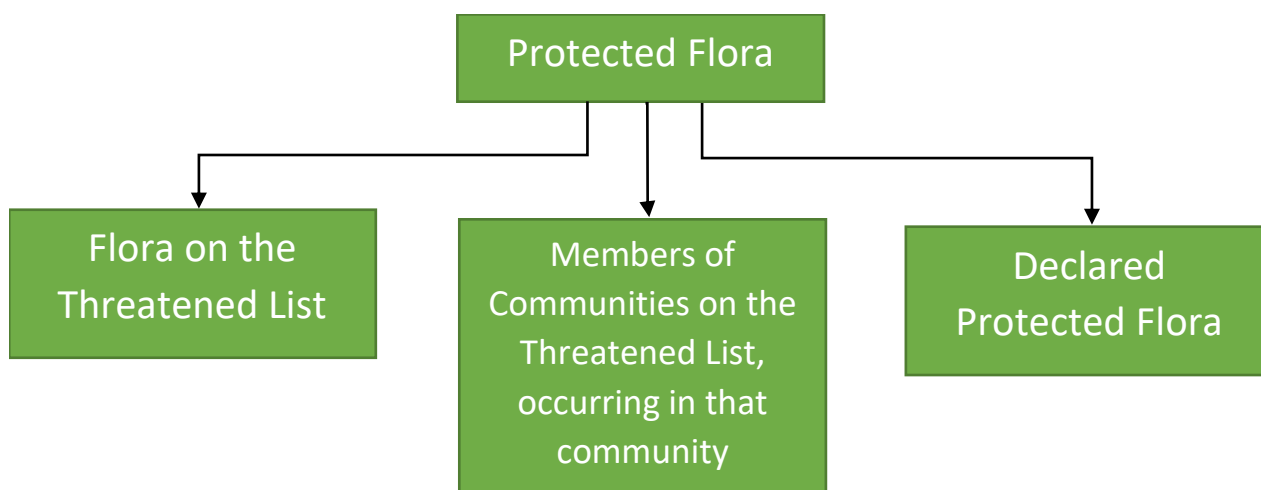
The inclusion of 'declared protected flora' in an Act that is primarily about threatened species recognises that there are some species of plants where – while their populations are not currently listed as threatened – there is an established market for their sale, or they are attractive to plant collectors for other reasons. It is important then that the harvest or clearing of such plants (either as whole plants, cuttings, flowers or seeds) is sustainable.

## Part 1 – Understanding 'declared' protected flora

### What is protected flora – and what is 'declared' protected flora?

The *Flora and Fauna Guarantee Act 1988* (the FFG Act) establishes the category of 'protected flora' in Victorian law. In many circumstances, it is an offence to 'take' (meaning kill, injure, disturb or collect), trade, keep, move or process protected flora without a permit, licence or authorisation.

There are three circumstances where plants are designated as protected flora:



- Plants which are included on the Threatened List are automatically protected flora
- Plants which are members of communities on the Threatened List are automatically protected flora when they occur within a patch of that community<sup>1</sup>

<sup>1</sup> For example, the River Red Gum (*Eucalyptus camaldulensis*) is not included on the Threatened List, but it is a member of the listed community *Western Basalt Plains (River Red Gum) Grassy Woodland Floristic Community 55-04*. A River Red Gum occurring within a patch of this community is protected flora, whereas a River Red Gum occurring outside the community is not protected flora.

- Other plants, not on the Threatened List, can be ‘declared’ to be protected flora by the Governor in Council under section 46 of the Act.

### These Guidelines relate only to ‘declared’ protected flora

The Guidelines provide decision principles for determining:

- whether a plant (which is not on the Threatened List) should be declared to be protected flora, and
- if declared to be protected flora, whether it should be classified as ‘generally’ protected flora or ‘restricted use’ protected flora

Under the Act, the Minister may only recommend that a non-listed taxon is declared to be protected flora if the Minister is satisfied that a declaration is necessary:

- to ensure that the taxon survives and retains its capacity to adapt to environmental change.
- to ensure that the use of the taxon is sustainable.
- to manage risks to the taxon; or
- to ensure that genetic diversity of the taxon is maintained.

The guidelines explain each of these criteria, and the circumstances in which they may or may not apply to a particular plant.

## Three types of ‘take’

In many circumstances, it is an offence to ‘take’ (meaning kill, injure, disturb or collect), trade, keep, move or process protected flora. ‘Taking’ include taking part of a plant (flowers, seeds, cuttings).

The Act distinguishes between three different types of ‘take’:

- **Incidental take<sup>2</sup>** is where plants are taken to make space for something else – for example, clearing for the construction or maintenance of a building, road, or pipeline; clearing for grazing or cropping; or clearing to construct bushfire fuel break. Any take where the intent is not to obtain a specimen of the plant, but to simply remove it, is incidental take.
- **Take for sale** includes take for the purpose of making the plant available for sale, regardless of whether it has actually been sold.
- **Take for personal use** includes any other reason for obtaining a specimen of the plant – for example, to collect or propagate, for use as food or fibre, for research or display.

## General protection and restricted use protection

The Act provides two different categories for declared flora taxa– *generally protected flora*<sup>3</sup> and *restricted use protected flora*.

It is an offence to take *generally protected flora* for any of the three reasons identified above (without a permit<sup>4</sup>). It is an offence to take *restricted use protected flora* for the purposes of sale or personal use (without a permit), but incidental take is not an offence, and does not require a permit.

	Generally Protected Flora	Restricted Use Protected Flora
Incidental Take	Permit Required	No Permit Required
Take for Sale	Permit Required	Permit Required
Take for Personal Use	Permit Required	Permit Required

<sup>2</sup> The Act does not use the term ‘incidental take’. The term is used in this paper to mean ‘take for any reason other than sale or personal use’

<sup>3</sup> The Act does not use the term ‘generally protected flora’ – rather, it describes the category as ‘protected flora other than restricted use protected flora’. In this paper, the term ‘generally protected flora’ is used instead, for clarity.

<sup>4</sup> References to a ‘permit’ in this paper should be understood to mean ‘permit, licence, or authorisation’.

This table shows permit requirements only to illustrate the difference between 'generally protected flora' and 'restricted use protected flora'. There are also other factors which determine whether a permit is required to take, trade, keep, move or process protected flora, including whether the flora is taken from public or private land. Consult sections 47(2) and 47B (2) for more details. Several exemptions are also provided by the Act – the most commonly applicable exemption being that it is not an offence to take protected flora from private land, if the flora is being taken by the landowner, or with the permission of the landowner. Traditional Owners acting in accordance with an agreement under the Traditional Owner Settlement Act 2010 are also exempt from any permit requirement under section 6A of the Act.

Plants declared to be *generally protected flora* have the same level of protection as plants on the Threatened List. It is an offence (under section 47B) to 'take, trade in, keep, move or process' generally protected flora, unless an exception in section 47B(2) applies.

Flora taxa declared to be *restricted use protected flora* have a lower level of protection. It is an offence (under section 47) to 'take, trade in, keep, move or process' restricted use protected flora *for the purposes of sale or personal use*, unless an exception in section 47(2) applies.

The Act defines "trade" as—

- a. *to buy, to agree to receive or accept under an agreement to buy, to acquire by barter, or to cause or suffer any of those things; and*
- b. *to sell, to agree to offer or expose for sale or to keep and have in one's possession for sale, to deliver or receive for sale, to dispose of by barter for the purposes of gain or advancement or to cause or suffer any of those things.*

The Act defines "keep" as—

*in relation to flora or fauna, means to have charge or possession of in captivity or in a domesticated state.*

Examples:

- A person harvesting restricted use protected flora for sale in a nursery (without a permit) would be committing an offence unless an exception in section 47(2) applied.
- A person collecting restricted use protected flora for a personal garden (without a permit) would be committing an offence unless an exception in section 47(2) applied.
- A person removing restricted use protected flora to clear a drain would not be committing an offence, as the removal would not be for the purposes of sale or personal use.

## Part 2 – Guidelines for declaring a non-listed flora taxon to be protected

### Should a taxon be declared to be protected flora?

There are four circumstances in which the Minister may recommend that a plant which is not on the Threatened List is declared to be protected flora.

1. The Minister is satisfied that the taxon must be declared to be protected to ensure the taxon survives and retains its capacity to adapt to environmental change.

A plant that has not been assessed as being threatened may still face risks to its survival and resilience to change.

#### **Data deficiency and interim protection**

A taxon will be eligible for protection under this criterion if:

- a. there is insufficient data available to assess its extinction risk based on its abundance and/or distribution (using population viability analysis, for example), and
- b. the limited data that is available indicates that the taxon would be likely to be assessed as being threatened, once sufficient data is obtained and

- c. it is restricted to a habitat type that is considered to be at risk.
2. The Minister is satisfied that the taxon must be declared to be protected to ensure the use of the taxon is sustainable

### **Commercial trade in flora**

A taxon will be eligible for protection under this criterion if there is a risk of plants being harvested<sup>5</sup> from public land for commercial sale. There must be reasonable evidence to suggest that there is commercial trade, and that traders may be motivated to obtain plants from public land to supply that trade.

Examples include:

- Harvesting of whole or parts of grasstrees, tree ferns and sphagnum moss from public land for sale in the nursery trade or horticulture industry
- Harvesting of whole, or parts of, flora from public land for the florist industry or market trade.

### **Personal collection of flora**

A taxon will be eligible for protection under this criterion if there is a demonstrated risk of plants being unsustainably removed from public land for personal use.

3. The Minister is satisfied that the taxon must be declared to be protected to manage risks to the taxon

A taxon will be eligible for protection under this criterion where:

- It is deemed to be a taxon of cultural significance, and there is a demonstrated risk that unsustainable take could limit the availability of, or access to, the taxon for cultural purposes
- The taxon has experienced a recent rapid decline in abundance due to fire, flood, or the presence of invasive species, and there is a demonstrated risk that unsustainable take could result in the taxon becoming threatened
- The taxon is a new species that has been discovered

4. The Minister is satisfied that the taxon must be declared to be protected to ensure genetic diversity of the taxon

A taxon will be eligible for protection under this criterion where it is a distinct population or distinct sub-species of a common species but disparately distributed with unique genetic properties.

## **Should a taxon be declared to be ‘generally protected flora’ or ‘restricted use protected flora’?**

Whether a taxon is declared to be ‘generally protected flora’ or ‘restricted use protected flora’ depends on the nature of the risk faced by that taxon.

If the risk faced by the taxon is primarily one of potentially unsustainable commercial or personal use, the ‘restricted use protected flora’ category is most appropriate. This category ensures the actual risk is appropriately addressed, without adding unnecessary regulatory and administrative burden where plants are being incidentally impacted in circumstances other than cases of unsustainable commercial or personal use.

- If there is evidence that a commercial market exists for a taxon, and plants could be harvested from public land to supply that market, a listing as restricted use protected flora is appropriate.

If the risk faced by the taxon is broader, and relates to impacts of development, infrastructure works, land use change, or land management practices, then the ‘generally protected flora’ category is more appropriate.

- Given that the taxon has not been included on the Threatened List, it is important to consider just how serious a risk is before declaring a taxon to be generally protected flora.

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<sup>5</sup> It is not necessary to demonstrate that the harvesting is unsustainable to satisfy this criterion

# Appendix 1 Decision tree – ‘generally protected’ or ‘restricted use protected’ flora?

