



HUMANE SOCIETY
INTERNATIONAL
AUSTRALIA



Environmental
Justice Australia

Failing our wildlife

Why Victoria's wildlife protection laws
need to be modernised

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About Humane Society International

[Humane Society International](#) (HSI) is the largest international charity working for a more humane and sustainable world for animals. Established in Australia in 1994, HSI works to change government conservation and animal welfare policies and law for the better, while striving to enforce the effective implementation of those laws.

About Environmental Justice Australia

[Environmental Justice Australia](#) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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Executive Summary

The challenges facing Victoria's native wildlife are immense. Our wildlife are in the gun-sights of rapidly accumulating extinction and climate crises. Our laws are hindering and enabling the problem, not confronting it or overcoming it.

The Victorian Environment Minister announced a review of the *Wildlife Act 1975* (Vic) in early 2020. This announcement occurs in the context of egregious incidents of the killing of protected native wildlife and controversy over the effectiveness of the Act.

The Wildlife Act has not previously been reviewed.

The Act is the product of incremental, *ad hoc* changes to laws governing both native and non-indigenous fauna over the past century. It has its origins in very old laws governing hunting, with concerns over conservation and care for native species built into the scheme since 1975. Generally, the law is outdated, not driven by clear policy or science, and its administration is mired more in obscurity than good governance.

The main areas on which this report focuses are:

- why we need new wildlife laws, reflecting contemporary circumstances, attitudes and knowledge;
- the manner in which the Act manages destruction and 'take' of large numbers of protected native wildlife;
- anomalies in the meaning of 'wildlife' under the Act;
- ambiguity in the legal status of wildlife under the Act;
- the unhelpful structure and language of the Act;
- shortcomings in regulatory arrangements for wildlife and habitat protection under the Act;
- the absence of strong scientific foundations and transparency in decision-making;
- the absence of an effective regulator under the Act; and
- outdated arrangements for sanction and compliance under the Act.

Establishing a clear critique of the existing Wildlife Act is necessary in order to move to what should replace it, including what wildlife law should be aiming to do and the means by which it undertakes that task.



Victoria's wildlife protection laws are out of date and need to be modernised

On 3 May 2020, the Victorian Environment Minister, the Hon. Lily D'Ambrosio, announced a review of the *Wildlife Act 1975* ('Wildlife Act').

The announcement followed a series of highly publicised wildlife protection controversies in the state where the Act was found wanting. The failure in early 2020 to proceed with a Wildlife Act prosecution against a landowner involved in killing hundreds of wedge-tailed eagles in East Gippsland¹ showed a legislative regime that is out of step with community expectations.

ABC News reported the Minister as saying:²

A review of the act will be to modernise the act, and that includes its penalties regime...That means all of the necessary array of enforcement tools, so that when they respond to potential breaches of the Wildlife Act they are able to hold people to account. My aim is to have the best wildlife act in the country with all of the necessary penalties available to ensure our wildlife are protected. Ultimately I never want to see a repeat of what happened in Victoria two years ago.

This failure follows significant community concern at the killing of koalas following timber harvesting at Cape Bridgewater in South West Victoria in February 2020 (see Case Study 5).³ Elsewhere in Victoria there have been mass killings of protected and native birds (see Case Study 1).⁴ Licensed hunting of wombats has grown to thousands per year (see Case Study 2), including as sport for wealthy tourists. For twenty-five years unlicensed killing of wombats was not even an offence in many parts of Victoria.⁵

1 See Kellie Lazzaro 'Wedge-tail eagle deaths prompt review of Victorian Wildlife Act' *ABC News*, 4 May 2020, <https://www.abc.net.au/news/2020-05-04/wedge-tailed-eagle-deaths-prompt-review-of-wildlife-act/12210956>

2 Ibid

3 Graham Readfearn 'Koala "massacre": scores of animals found dead or injury after plantation logging' *The Guardian*, 3 February 2020, <https://www.theguardian.com/environment/2020/feb/03/koala-massacre-animals-reported-starving-or-dead-after-plantation-logging>

4 Simone Fox Koob 'Environment Minister orders first-ever review of Wildlife Act after eagle deaths investigation' *The Age*, 3 May 2020, <https://www.theage.com.au/national/victoria/environment-minister-orders-first-ever-review-of-wildlife-act-after-eagle-deaths-investigation-20200503-p54pb2.html>, reporting on mass killing of Wedge-Tailed Eagles and other birds near Violet Town.

5 Jo Wilkinson 'Welcome to Victoria, the most wombat unfriendly State' *The Age*, 6 August 2019, <https://www.theage.com.au/national/victoria/>

The review is a welcome and timely opportunity to restore the Victorian community's confidence that we have the regulatory tools, government capacity, resources and political will to protect native wildlife in a manner that meets community expectations and to ensure that it can thrive today and well into the future.

All of this occurs in the context of an accelerating extinction crisis facing our native fauna. Since 1970 global wildlife populations have collapsed by around two-thirds.⁶ These numbers may even understate the full ecological impacts of wildlife decline once ecosystem dynamics are accounted for.

When introduced in 1975, the Wildlife Act was mostly a re-enactment of much earlier provisions contained in the *Game Act 1958* and the *Protection of Animals Act 1966*. Multiple amendments to the Wildlife Act since the passage of legislation such as the *Flora and Fauna Guarantee Act 1988* ('FFG Act') and *Game Management Authority Act 2014* have contributed to a confusing interrelationship between different legislative regimes while leaving intact a basic architecture that reflects mid-20th century values in relation to our wildlife.

It is time for reform of Victoria's wildlife protection laws. This report sets out the case for the urgent modernisation of Victoria's wildlife protection laws.

This Report

The Environment Minister has signalled clearly the need to overhaul Victoria's wildlife legislation. This report intends to contribute to the public conversation on the framing of reformed laws.

This report reflects what we see as the key problems with the existing legislation.

It sets out proposed responses and solutions as an initial contribution to the review that we would anticipate will be part of a more fulsome and robust contribution in due course.

[welcome-to-victoria-the-most-wombat-unfriendly-state-20190806-p52eax.html](https://www.theage.com.au/national/victoria/welcome-to-victoria-the-most-wombat-unfriendly-state-20190806-p52eax.html)

6 Miki Perkins "'A wake-up call': world wildlife populations in heavy decline, report finds' *Sydney Morning Herald*, 10 September 2020, <https://www.smh.com.au/environment/conservation/a-wake-up-call-world-wildlife-populations-in-heavy-decline-20200910-p55u93.html>; WWF *Living Planet Report (2020)*, <https://f.hubspotusercontent20.net/hubfs/4783129/LPR/PDFs/ENGLISH-FULL.pdf>



Why we need wildlife protection laws

Wildlife protection laws reflect the value that the community places on wild animals. Effective wildlife protection laws along with laws preventing animal cruelty give effect to contemporary community values for our wildlife and the treatment of animals.

Wildlife protection laws ensure that all wildlife is protected from unnecessary harm and that any actions to care for, control or exploit wildlife are appropriately managed. These laws are complementary to other laws that protect threatened species (such as the FFG Act) and natural places and ecosystems.

Wildlife protection laws also play an important role supporting cultural values and practices of indigenous Australians.

Victoria's wildlife protection laws need reform

Wildlife protection in Victoria is enacted through the Wildlife Act and a confusing mix of other laws. These laws are out of date and do not meet current community expectations.

Problems with wildlife protection laws in Victoria include:

- the central piece of legislation, the Wildlife Act, reflects outdated thinking on the values that should be protected by wildlife protection laws;
- they reflect outdated notions that one of the main purposes of wildlife protection laws is the protection of wildlife as game species;
- they pre-date Victoria's threatened species legislation, the FFG Act, and are poorly integrated with this legislation;
- their lack of clear and effective protection for native wildlife habitat;
- authorities, licences, permits and exemptions that allow the harming of wildlife under Victorian legislation lack clarity and accountability and are not informed by a clear overall statement of objectives;
- penalties for wildlife crime have not been reviewed and updated for many years, and the 'regulatory toolkit' to support compliance with and enforcement of Victorian wildlife protection laws is out of date and missing important powers and options available under other laws; and
- there is no independent statutory regulator responsible for administering Victoria's wildlife protection laws.

All of these factors lead to an unsatisfactory level of legal protection for wildlife.

These issues explain why, as demonstrated in the case studies outlined in this report, Victoria's laws are failing to protect Victoria's wildlife and why review and reform is required.



CASE STUDY 1: EAST GIPPSLAND EAGLES

In 2018 the Victorian environment department launched an investigation after hundreds of dead wedge-tailed eagles were found on a property in East Gippsland. This led to investigators laying charges against a farm worker under the Wildlife Act.

As a consequence of the investigation and subsequent prosecution, the only ever custodial sentence for the destruction of wildlife in Victoria was given to the farm worker who pleaded guilty to killing 406 protected wedge-tailed eagles over 18 months. He was fined \$2500 (just \$6.15 per eagle) and sentenced to 14 days in prison – the first ever jail term for an offence under the Act.

Whilst being under his employer's instruction was a factor in sentencing, prosecution of the landowner for offences under the Wildlife Act did not proceed, despite evidence of his involvement in the poisoning of the eagles.⁷

The reason for the charges not proceeding has not been clearly explained.

Following the failed prosecution against the landowner, Victorian Environment Minister Lily D'Ambrosio has committed to a review of the Wildlife Act:

'Cases like these, where our native animals are killed in this way, rightly appal Victorians and they appal me,' she said.

*'The government has pursued all penalties for the parties available under existing legislation, and I have ordered a review of the Wildlife Act to look at how it can be strengthened.'*⁸

The Wildlife Act permits destruction and 'take' of thousands of native animals every year.

The Wildlife Act not only fails to protect Victoria's native wildlife from illegal actions, it also provides the legal framework for enabling and regulating harm to thousands of native animals every year through the issuing of authorisations and the approval of plans which authorise harm to wildlife. Exemptions also leave some species of wildlife unprotected.

Authorities to Control Wildlife

The government issues Authorities to Control Wildlife ('ATCWs') which harm thousands of native animals in Victoria each year, including threatened species. For example:

- in 2019 alone, 3441 ATCWs were issued authorising destruction or harm to 185,286 animals including 966 emus; 3,655 wombats; 3,152 ravens; 6,919 little corellas; and 4,570 sulphur-crested cockatoos.⁹
- Threatened species are not spared from ATCWs – in 2019, ATCWs were issued to control 6,604 threatened grey-headed flying foxes, a species listed as threatened under Victorian and national threatened species laws.¹⁰
- the 2020 quota for kangaroo harvesting is 60,500 animals; however, the expected total of animals authorised to be killed when ATCWs are included as well is 137,800, an additional 77,300 animals to the harvest industry take.¹¹

Unprotection orders

Until it was revoked in February 2020, an 'unprotection order' that originated from 1984 provided an exemption from needing approval to kill wombats in some circumstances in many areas of Victoria.¹² 'Unprotection orders'¹³ remain on the books for other species of Victorian wildlife - brushtail possums, dingoes, long billed corellas, sulphur-crested cockatoos and galahs.

Although an unprotection order no longer applies to wombats, several thousand ACTWs in relation to wombats were granted even when the unprotection order was in place. This situation is likely to continue and authorisations to kill wombats **may even increase** following the February 2020 change.

A modern approach

It is important that the Victorian community can be confident that the legal framework for authorising harm to wildlife is up to date and decisions are supported by evidence, made transparently, and subject to appropriate levels of accountability.

More importantly, it is imperative that the legal regime governing native wildlife embodies a powerful prescription for its protection and recovery, within a framework of ecosystem health. In our current circumstances, we need our wildlife law to be an unequivocal antidote to extinction and ecological crisis.

7 Simone Fox Koob '“Bloody well done”: text and emails reveal scheme to poison eagles' The Age, 14 November 2019, <https://www.theage.com.au/national/victoria/bloody-well-done-texts-and-emails-reveal-scheme-to-poison-eagles-20190917-p52soz.html>

8 Simone Fox Koob, 'Environment Minister orders first-ever review of Wildlife Act after eagle deaths investigation', <https://www.theage.com.au/national/victoria/environment-minister-orders-first-ever-review-of-wildlife-act-after-eagle-deaths-investigation-20200503-p54pb2.html>

9 DELWP Authority to Control Wildlife (ATCW) Data (2020), https://www.wildlife.vic.gov.au/_data/assets/pdf_file/0025/477214/ATCW-Data-annual-data-2009-2019.pdf

10 Ibid.

11 See <http://agriculture.vic.gov.au/agriculture/farm-management/kangaroo-harvesting-program>

12 Victoria Government *Victoria Government Gazette* No. 84, 1 August 1984, 2740

13 'Unprotection orders' are orders made under *Wildlife Act 1975* (Vic), s 7A

The Wildlife Act 1975

Objectives and purposes

Wildlife protection in Victoria operates under a confusing legal machinery centred on the Wildlife Act. Precisely what the Wildlife Act is intended to achieve is unclear. The Act itself is absent of objectives and it has been the subject of multiple amendments over time. Cycles of amendment have created an assortment of legislative provisions without a coherent framework or real central purpose. Most contemporary legislation contains express objectives, in order to guide what statutory provisions are intended to achieve:

*Objectives that are clear and consistent are a fundamental element of a good regulatory framework.*¹⁴

The Wildlife Act contains stated purposes, which provide an operational focus:

The purpose of the Act is described in section 1A:

- (a) to establish procedures in order to promote –
- (i) the protection and conservation of wildlife; and
 - (ii) the prevention of taxa of wildlife from becoming extinct; and
 - (iii) the sustainable use of and access to wildlife; and
- (b) to prohibit and regulate the conduct of persons engaged in activities concerning or related to wildlife.

These purposes would suggest the intention of the Act is primarily wildlife conservation, albeit combined with forms of resource exploitation. Some features of the Act support that notion, such as wildlife reserves and protected status to native wildlife. Other elements are not so clearly aligned with that conservation focus, such as protection of certain feral species, regulation of wildlife care, and ‘take’ of native wildlife. Additionally, the purposes of the Act do not appear to align clearly with parallel laws, such as the FFG Act, or evidence a coherent or justifiable basis in conservation policy or theory.

‘Wildlife’

‘Wildlife’ is defined in section 3 of the Act. The definition includes indigenous vertebrate animals, as well as non-native animals such as ‘all kinds of deer, non-indigenous quail, pheasants and partridges’, and terrestrial invertebrates listed as threatened under the FFG Act. The definition extends to wildlife kept and bred in captivity.

The Wildlife Act includes a specific definition of ‘threatened wildlife’ which is wildlife protected under the Wildlife Act that is also listed as ‘threatened’ under the FFG Act.¹⁵ The FFG Act does not itself provide any direct protection to threatened wildlife – this is covered by the Wildlife Act.

The Wildlife Act does not apply to ‘fish’ within the meaning of the *Fisheries Act 1995*.

What the Act covers

The Wildlife Act contains an assortment of regulations relating to wildlife as defined under the Act. The Act’s coverage reflects the ad hoc development of the legislation over time.

Activities covered include:

- Wildlife and Nature Reserves, and Wildlife Management Cooperative Areas and Sanctuaries;
- Tour Operator Licences for Wildlife Reserves;
- the granting of licenses and authorities to take or destroy wildlife, and to ‘buy, sell, acquire, receive, dispose of, keep, possess, control, breed, process or display wildlife’ (discussed further below);
- a range of offences related to the taking, destroying or hunting of wildlife;
- protection of whales;
- protection of seals; and
- provisions relating to enforcement.

Regulations created under the Wildlife Act are as follows:

- *Wildlife Regulations 2013*;
- *Wildlife (Game) Regulations 2012*;
- *Wildlife (Marine Mammals) Regulations 2019*;
- *Wildlife (State Game Reserve) Regulations 2014*; and
- *Wildlife (Tour Operators Fee) Regulations 2011*.

The Wildlife Regulations 2013 contain import regulations covering:

- wildlife licences; and
- offences relating to the taking of wildlife, and the damage, disturbance and destruction of wildlife habitat.

¹⁴ Victorian Competition and Efficiency Commission *A Sustainable Future for Victoria: Getting Environmental Regulation Right, Final report* (2009), 28.

¹⁵ The threatened list is provided for by section 10 of the *Flora and Fauna Guarantee Act 1988*.

Wildlife protection in Victoria – the confusing assemblage of laws

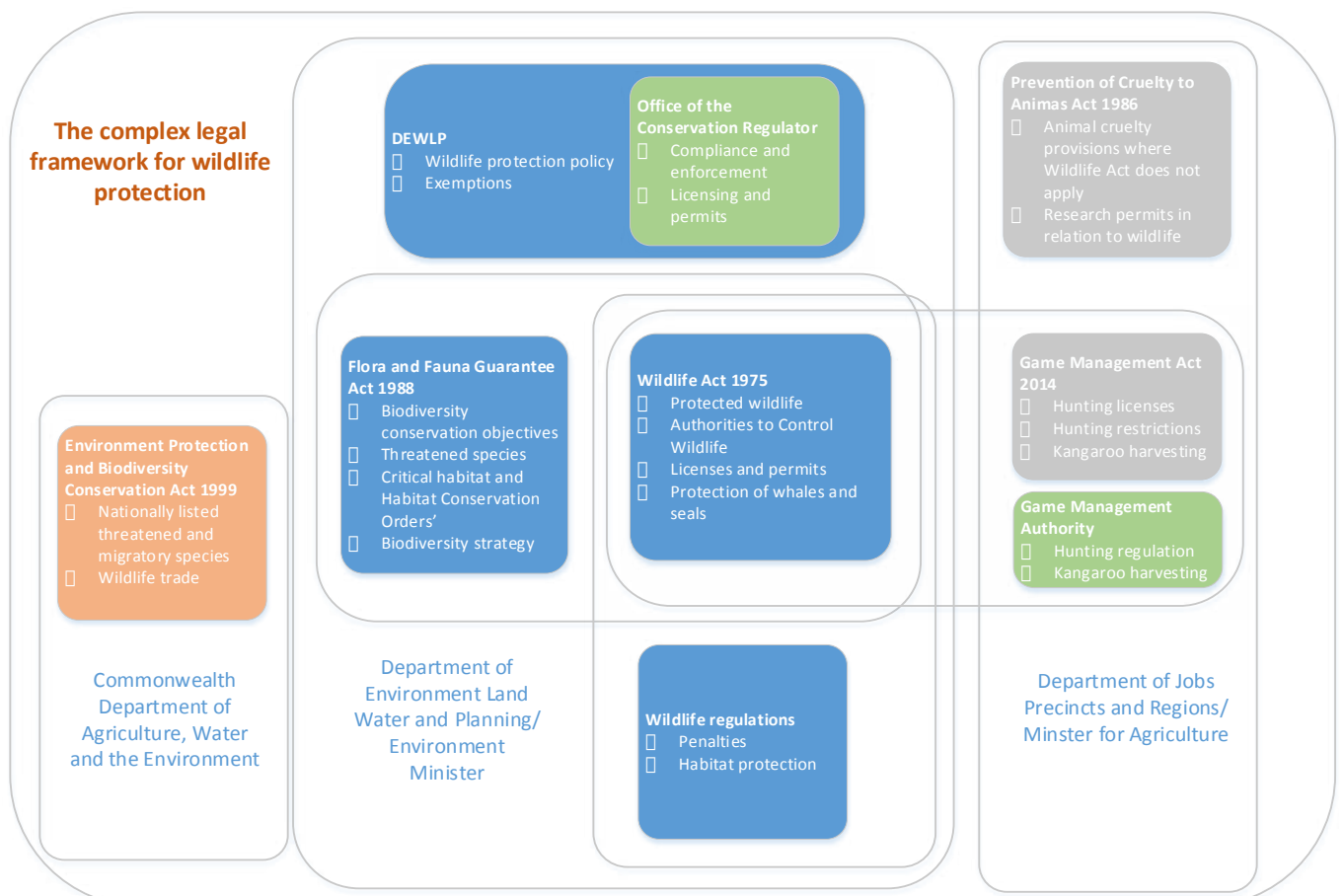
As the diagram below illustrates, there is a confusing range of legislation that regulates the protection of wildlife in Victoria. This includes the Wildlife Act and regulations under that Act, and also other state and commonwealth legislation.

This mix of laws undermines effective wildlife protection in Victoria:

- threatened plants and fish species in Victoria are protected under Victoria’s threatened species legislation, the FFG Act. However threatened wildlife relies on out of date and inadequate protection under the Wildlife Act;
- non-native, and sometimes destructive feral species such as deer are defined as ‘wildlife’ under the Wildlife Act; and
- wildlife are not protected under Victoria’s animal cruelty legislation, the *Prevention of Cruelty to Animals Act 1986*.

The structure and language of the Wildlife Act is outdated and unhelpful. It is not drafted in accordance with contemporary standards of legislative drafting, and repeated amendments since it was introduced in 1975 compound the problem. The lack of clarity hinders understanding of legal requirements by those regulated by the Act and undermines effective compliance and enforcement by the regulator.

FIGURE 1: LEGISLATIVE AND INSTITUTIONAL FRAMEWORK FOR WILDLIFE PROTECTION IN VICTORIA



Licenses, permits, authorities, notices and exemptions in relation to Victoria's wildlife

The Wildlife Act is an important legal framework for managing the interaction between people and wildlife in Victoria. Activities regulated under the Act include:

- commercial wildlife licences covering businesses and activities such as selling wildlife, transporting and demonstrating wildlife, taxidermy and zoos;
- private Wildlife Licences that allow wildlife to be kept as pets and other related activities;
- Wildlife Authorisations under section 28A of the Act, including:
 - the control of wildlife because the wildlife is damaging buildings, crops or other property (discussed further below);
 - management, conservation and protection of wildlife and wildlife research;
 - Aboriginal cultural purposes;
 - health and safety;
 - 'supporting a recognised wildlife plan';
 - enabling the care, treatment or rehabilitation of sick, injured or orphaned wildlife; and
 - marine tour permits and cetacean permits

Section 28A: Authority to Control Wildlife

Section 28A of the Wildlife Act allows an authorisation to be issued for the destruction or disturbance of wildlife – an Authority to Control Wildlife ('ATCW').

As noted above, in 2019 the Department of Environment, Land, Water and Planning ('DELWP') issued 3441 ATCWs in relation to native animals in Victoria in 2019, authorising destruction or harm to a staggering 185,286 animals including 6604 threatened grey-headed flying-foxes.

No returns are submitted reporting on activity under these authorities, so there is no data on the impact on wildlife of this ATCW system. A system was previously in place to collect this information, however 'this requirement was removed in the early 2000s to reduce administrative burden'.¹⁶ Basic information such as whether the control was carried out by disturbance or other harm or by killing is not collected.

No independent auditing or review of the system is undertaken. DELWP does not publish any information about their monitoring of compliance or enforcement action. No information is publicly available on the number of prosecutions for offences in relation to ATCWs.¹⁷

¹⁶ DELWP *The Authority to Control Wildlife (ATCW) System Review: Consultation Response Summary* (2018), <https://engage.vic.gov.au/atcwreview>, 11.

¹⁷ There were 11 prosecutions in total under the Wildlife Act in 2017: see Eve Kelly 'Victoria is definitely not the place to be if you are a bird or a kangaroo' 3 May 2019, Australian Wildlife Protection Council, <https://>



It is impossible to know how accurately the published ATCW permit data represents the true extent of wildlife control activity in Victoria and whether applications for ATCWs are ever rejected is unclear.¹⁸

In essence, the actual extent and quantum of harm or destruction of wildlife in Victoria is not officially known. The system for authorised ‘take’ or destruction contains little accountability. Regulated ‘take’ and destruction is largely opaque and lacks transparency.

This ATCW system is a contentious area under Victoria’s wildlife protection laws. In April 2018 the Department initiated a review of the ATCW system, noting that:

‘there are very polarised views about the ATCW system in the community, which is understandable given the diverse make-up of the Victorian community and that the system allows the lethal control of animals in certain circumstances.

*The aim of the review is to develop stakeholder informed recommendations on how to improve the ATCW system so that it sensibly balances the needs of Victoria’s human and wildlife populations’.*¹⁹

The outcome of the review has not been released.

According to the Department’s summary of the submissions to the review²⁰, themes emerging from the submissions were:

- the need for a strong evidence base to support the issuing of authorisations;
- a need to ‘streamline processes, while maintaining rigorous oversight’;
- better-resourced monitoring and compliance; and
- greater transparency and availability of information.

The Office of the Conservation Regulator (‘OCR’) is now assuming responsibility for the ATCW system and is considering changes to the way the system is administered. This presents an opportunity to improve the administration of the existing legislation within the framework of the current Act – long overdue but insufficient to address all of the problems with Victoria’s wildlife protection laws.

Section 7A – unprotected wildlife

In addition to issuing authorities to control wildlife under section 28A of the Wildlife Act, the Act also provides for wildlife to be declared ‘unprotected’, effectively removing any protection for the species under the Act, subject to conditions, limitations or geographic application set out in an order making the declaration. In such circumstances covered by the order, killing or ‘take’ of wildlife is not unlawful.

This section was introduced in 1980 because it was claimed that the system of issuing authorisations to take, destroy or disturb wildlife was ‘inflexible’.²¹

Significantly, this system of unprotecting wildlife operates by Governor in Council order on the recommendation of the Environment Minister. The result is that the system of issuing orders lacks transparency. Absent ‘sun-setting’ provisions or similar mechanisms, orders once issued have tended to remain on the books without being reviewed.

Section 28A of the Act, which covers the issue of ATCWs, at least contains some criteria that must be satisfied before an ATCW is issued. According to the Victorian Supreme Court ‘the legislature has inserted safeguards into s 28A to ensure that the power to grant an authorisation is wisely used and carefully controlled’.²²

In contrast, section 7A does not contain any criteria that limit or guide the making of unprotection orders, other than that it ‘appears’ to the Minister that the wildlife is causing injury or damage to property, crops or other animals. There is no requirement in section 7A or elsewhere in the Act that an unprotection order be informed by scientific evidence, let alone any requirement that such evidence support the continuation of these orders.

awpc.org.au/victoria-is-definitely-not-the-place-to-be-if-you-are-a-bird-or-a-kangaroo/

18 According to information published the Australian Wildlife Protection Council the Department has advised ‘Our current permit database does not have the function to able to produce a report on this. A new database is currently being developed which will address this limitation’: *ibid*

19 DELWP *The Authority to Control Wildlife (ATCW) System Review: Discussion Paper* (2018), 5.

20 DELWP *The Authority to Control Wildlife (ATCW) System Review: Consultation Response Summary* (2018)

21 *Wildlife (Amendment) Act 1980*. Victoria, *Parliamentary Debates*, Legislative Council, 19 November 1980, 2991.

22 *Australian Society for Kangaroos Inc v Secretary, Department of Environment, Land, Water and Planning (No 2)* [2018] VSC 407 (27 July 2018), [65].

CASE STUDY 2: UNPROTECTED WOMBATS

The ‘unprotected’ status of wombats was highlighted when stories emerged reporting the shooting of wombats for recreation by wealthy tourists in some areas of Victoria.²³

Wombats are a very familiar and iconic Australian marsupial species. Their care and protection is strongly supported by the community. More than this, along with other digging marsupials, wombats are a ‘keystone’ species in Australian ecosystems – they occupy a crucial niche in healthy ecosystems by contributing to the productivity, fertility and function of forests, woodlands and other ecosystems.²⁴

It became clear that despite Victorian community expectations, wombats were not protected under the Wildlife Act in a range of circumstances and areas, a situation that dated back to unprotection orders gazetted in 1984.

After ordering a review, the Environment Minister has now removed the unprotection order for wombats. As with other wildlife their killing can still be authorised through an ATCW.

‘Unprotection’ orders remain in place for other species of native wildlife – brushtail possums, dingoes, long-billed corellas, sulphur-crested cockatoos and galahs.

The use of ‘unprotection’ orders, alongside continued widespread use of authorisations to kill or take wildlife, is evidence of conservation and protection purposes of the Wildlife Act being more honoured in the breach than the observance. This characterisation is reinforced by the general absence of any alignment of this permissive approach with conservation planning or even serious consideration of ecological issues.

FIGURE 2: ‘UNPROTECTION’ ORDER FOR WOMBATS AND CERTAIN OTHER SPECIES, VICTORIAN GOVERNMENT GAZETTE

WILDLIFE ACT 1975

*At the Executive Council Chamber, Melbourne, the
twenty-fourth day of July 1984*

PRESENT:

His Excellency the Governor of Victoria

Mr Mathews

Mr Spyker

Mr Trezise

ORDER DECLARING WILDLIFE TO BE UNPROTECTED UNDER SECTION 7A

Pursuant to Section 7A of the *Wildlife Act 1975*, His Excellency the Governor of the State of Victoria, by and with the advice of the Executive Council thereof, upon the recommendation of the Minister for Conservation, Forests and Lands doth by this Order declare Wombats (*Vombatus ursinus*) to be unprotected wildlife in the Parishes of—

Allambee

Matong North

Angora

Mellick-Munjie

Barwidgee

Merrijig

Beloka

Mirboo

²³ Jo Wilkinson ‘Welcome to Victoria, the most wombat unfriendly State’, *The Age*, 6 August 2019, <https://www.theage.com.au/national/victoria/welcome-to-victoria-the-most-wombat-unfriendly-state-20190806-p52eax.html>

²⁴ Predergast ‘Australia’s lost diggers’ (2014) 51 *Wildlife Australia* 1, 26

A foundational question unanswered: is wildlife property?

Under the Wildlife Act, 'wildlife', within the scope of the definition of that term, acquires various forms of legal status, depending on their classification under the Act. As noted, wildlife can, for example, be 'protected wildlife', 'threatened wildlife' or 'unprotected wildlife'. These schema of classification do not resolve a more basic question of the legal status of wildlife, the answer to which is relevant to the policy of the Act: is wildlife property? If so, whose property and what rights and interests does that vest? If, not what status does wildlife have in law?

In other jurisdictions, it is expressly provided in law that native wildlife, unless lawfully taken or used, is the property of the Crown.²⁵ This status is not set out in the Wildlife Act.

The importance of this issue is that it has consequences for the rights, interests and obligations of the Crown in relation to wildlife. In law, property comprises a 'bundle of rights' and these vary according to the specific property interest at issue. The High Court has held that the nature of property in native wildlife is distinctive.²⁶ It may give rise to regulatory or supervising rights but it is not the same as 'absolute' ownership. Property in native wildlife intersects with their existence in natural ecosystems, by which it is a 'public good'

²⁵ *Nature Conservation Act 1992* (Q), s 83; *Biodiversity Conservation Act 2016* (NSW), s 2.18

²⁶ *Yanner v Eaton* (1999) 201 CLR 351, [10]-[31]

or part of the legal 'commons' (*res communes*).²⁷

This proposition also has consequences for the theory and policy of the law that underpins regulation of wildlife. If, fundamentally, wildlife is to be managed as a public or common 'good', this indicates obligations to *conserve* wildlife.²⁸ At a minimum, wildlife law needs a clear conservation policy to guide it. Arguably, that policy needs to account for the present rates of loss, extinction and threat to wildlife, and how the law should be arresting and responding to those pressures. Without doing so it is not clear the Crown is preserving properly the wildlife 'estate' with which it is entrusted.

It is possible to propose, alternatively, that wildlife is not property at all. For example, it has been argued that the law should recognise inherent rights in wildlife (wildlife and nature as legal subjects).

Regardless of the specific policy underpinning the Wildlife Act, it is arguable that there should be one, that is robust, well-reasoned and justifiable. This outcome would help clarify what the Wildlife Act is seeking to do and how its various constituent parts, as well as other connected legislation, serve or do not serve that outcome.

²⁷ *Yanner v Eaton* (1999) 201 CLR 351, [29], citing Pound *An Introduction to the Philosophy of Law* (1954), 111.

²⁸ The legal approach to control and rights over wildlife suggested here, reflective of the statements of the plurality in *Yanner v Eaton*, open the prospect that the relationship of the Crown to native wildlife is one of public trusteeship. That is an approach well-established in US law but far less settled in Australian law.



Wildlife regulation needs to be improved

As the submissions to the review of the ACTW scheme indicate, the system for authorisations, permissions and licences as well as exemptions under the Wildlife Act needs to be updated and improved.²⁹ Priority reforms need to occur at multiple levels by:

- adding clear overarching objectives to the legislation to guide all decision-making;
- clarifying the policy basis of the Act including whether wildlife is property of the Crown, what that means and how it intersects with key principles of environmental and natural resources law;
- including criteria to guide decision-making in relation to specific permission licences and authorisations so the basis for decision-making is clear and accountable;
- adding duties to implement good regulatory practices including –
 - systematic collection and publication of data in relation to licences and permits issued and refused, including its routine publication;
 - systematic, independent auditing and assessment of regulated forms of ‘take’ under authorisation and other approvals;
 - a monitoring and compliance program;
 - effective investigation and prosecution of offences to a level that will create a deterrent to illegal behaviour;
- developing mechanisms to ensure that licences, permits, authorisations, exemptions and codes of practice are informed by the best available conservation and animal welfare science;
- providing merits review of decisions to issue authorisations and any other approvals for ‘take’ of wildlife;
- providing avenues for third-party civil enforcement under the Act and any legal instrument implemented under it.

The need for an independent regulator is discussed below.

While some of the procedures established under the Wildlife Act appear to be being used by DSE, it was extremely difficult to locate information and decisions made under this Act. Often, the only means by which to access key information – such as declarations of State Wildlife Reserves, State Game Reserves, Nature Reserves and unprotected wildlife – was through extensive and time-consuming searches of the Government Gazette. EDO considers that this information should be more readily accessible to the public.

From *Where’s the Guarantee? Implementation and enforcement of the Flora and Fauna Guarantee Act 1988 and Wildlife Act 1975* published by Environment Defenders Office (Victoria) in March 2012.

Protecting habitat

The Wildlife Act seeks to protect wildlife by prohibiting the unauthorised hunting, taking and destruction of individual animals. In many cases however, the biggest threat to wildlife is the harm caused by actions impacting wildlife habitat.

Currently, wildlife habitat lacks clear and unambiguous protection under Victoria’s wildlife protection laws.

The Wildlife Act itself does not contain any provisions to protect the habitat of protected wildlife. Section 87(1) of the Act does provide for the making of regulations to protect habitat, and Regulation 42(1) of the *Wildlife Regulations 2013* makes it an offence to damage, disturb or destroy any wildlife habitat. However, the key term ‘habitat’ is not defined in the Act or the regulations and the extent of the protection afforded by the regulations is unclear on paper and under-utilised in practice.

Even the habitat of threatened wildlife – wildlife designated as at risk of extinction under threatened species laws - is not directly protected under Victoria’s threatened species law. The FFG Act applies in limited circumstances. Under the FFG Act important threatened species habitat *may* be declared ‘critical habitat’ under section 20 of the Act, and that critical habitat *may* then be protected from threatened harm using a Habitat Conservation Order or other devices under the FFG Act. ‘Critical habitat’ is defined under the (reformed) FFG Act.

The limitations of the FFG Act mean that it is all the more important that the Wildlife Act effectively protects wildlife habitat, whether the wildlife is listed as threatened or not.

Protection of the habitat of native fauna can and does occur through the management of public lands established as ‘State wildlife reserves’ or ‘nature reserves’ under Part II of the Wildlife Act. Under these provisions ‘wildlife reserves’ are to be managed for the ‘propagation’ of wildlife, wildlife habitat preservation or purposes set out under the *Crown Land (Reserves) Act 1978*. Various types of activities are permissible in reserves, such as hunting and tourist operations, in which case there are potentially conflicting uses to these reserves. Recommendations on public land classification in 2017 sought to clarify the purposes and appropriate activities for reserves functioning under the Wildlife Act.³⁰ Those recommendations need to be considered closely in reforms to the Act.

²⁹ DELWP *The Authority to Control Wildlife (ACTW) System Review: Consultation Response Summary* (2018)

³⁰ VEAC *Statewide Assessment of Public Land: Final Report* (2017), <http://www.veac.vic.gov.au/documents/Final%20report.pdf>

CASE STUDY 3: HOODED PLOVER- BIRDLIFE AUSTRALIA

Hooded Plovers are listed as threatened under Victoria's FFG Act and 'vulnerable' under the national environmental protection law, the *Environment Protection and Biodiversity Conservation Act 1999*.

Protection of beach nesting habitat is critical in the conservation efforts for the Hooded Plover. Sites could occur anywhere in suitable beach habitat along Victoria's coastline. Where Plovers nest in areas subject to disturbance, nesting habitat is protected, in practice, from humans and dogs using temporary signage coupled with rope fences (and in some areas through wardening efforts of volunteers or council and ranger patrols).

Protection of this important habitat is made harder by the lack of legal support from Victoria's wildlife protection laws. According to Dr Grainne Maguire, who leads Birdlife Australia's Hooded Plover recovery efforts, the Department has advised that it is difficult to use Wildlife Act measures to protect the area inside the nesting Plover's protective zones (defined by signage and rope barriers).³¹ Furthermore, difficulties with proving intent mean that the offences under the Act for disturbing nesting birds and chicks are not effective at preventing the harm caused by disturbance by humans and dogs.

Management of the threat from dogs is forced to rely on local government dog control by-laws, which vary from council to council and are vulnerable to change and possibly subject to sporadic enforcement.

Hooded Plover recovery efforts are having results, in spite of these challenges and weaknesses in the law. While most beach users respond to education and information and do the right thing, enforcement becomes critical to the effectiveness of management interventions in cases where people refuse to cooperate.

Recovery of Hooded Plover populations raises the perverse prospect that one day they may no longer qualify for their current threatened species designation, making protection of their habitat even more difficult for a species which will rely on management interventions for successful breeding in to the long term.

This prospect indicates a compelling need to consider how habitat protection under the Wildlife Act or other legislation, such as the FFG Act, not only stabilises extinction risk but actively and programmatically contributes to recovery for species such as the Hooded Plover. Recent reforms to the FFG Act do provide some guidance here, in the incorporation of a new biodiversity objective for Victoria:

*'to prevent taxa and communities of flora and fauna from becoming threatened and to recover threatened taxa and communities so their conservation status improves...'*³²

Stronger, more effective protection of wildlife habitat would be a great help to the Hooded Plover and other Victorian wildlife vulnerable to habitat disturbance.



³¹ Grainne Maguire (pers. comm.)

³² *Flora and Fauna Guarantee Act 1988* (Vic), subs 4(b)

Importance of independent expert advice

Wildlife-human interactions can be controversial. It is important that decisions are informed by sound advice and relevant expertise within the regulator, and also where appropriate independent advice.

The Department utilises expert panels to provide advice on the administration of some aspects of the Wildlife Act. For example:

- the Translocation Evaluation Panel provides expert advice on proposals to translocate threatened fauna,³³ and
- an 'Independent Panel of Experts' is asked to review and advise on some complex ATCW applications or wildlife management matters. The recommendations by the Panel are nonbinding, meaning that the Department will consider Panel recommendations when making a decision about an ATCW application or issue, but is not bound by them. Panel members have expertise in a range of areas including wildlife management, animal welfare, veterinary science, planning and community engagement, and public policy.³⁴

Drawing on independent expert advice is sound practice and should improve the quality of decision-making under the Wildlife Act. However, there is no provision in the Act formally establishing any advisory bodies or expert panels. When the Department does consult them, important matters like their membership and the method of appointment, qualifications and expertise, and role and functions are unclear. In contrast, other legislation does specifically provide for these matters – see for example section 8 of the FFG Act which establishes the Scientific Advisory Committee.

³³ DELWP 'Translocation of wildlife', <https://www.wildlife.vic.gov.au/managing-wildlife/translocation-of-wildlife> and DELWP Procedure statement for translocation of threatened native fauna in Victoria (2019), https://www.wildlife.vic.gov.au/_data/assets/pdf_file/0024/27375/Procedure-Statement-for-the-Translocation-of-Threatened-Native-Fauna-in-Victoria-April-2019.pdf

³⁴ DELWP *The Authority to Control Wildlife (ATCW) System Review: Discussion Paper* (2018), 15.

CASE STUDY 4: THE DINGO

Definitional issues surrounding the potential for dingoes to interbreed with domestic dogs, as well as their ability to take livestock, have led to a complex management situation that is harming the threatened species.

There is currently a legislative conflict in Victoria with dingoes recognised as threatened wildlife under the FFG Act, while 'wild dogs' and dingo-dog hybrids are declared established pests under the *Catchment and Land Protection Act 1994*. This is despite dingoes, 'wild dogs' and dingo-dog hybrids being visually indistinguishable.

In an attempt to address this conflict the Victorian Government published an Order In Council declaring dingoes to be unprotected on all private land, and on public land within a 3km boundary of private land.³⁵ However the focus of this 'solution' was to protect landholders from committing offences by unintentionally killing dingoes rather than to better protect dingoes as a threatened species.

This leaves the legal status of the dingo as:

- listed as threatened under the *Flora and Fauna Guarantee Act 1988*;
- included as a pest species under the *Catchment and Land Protection Act 1994* with all *Canis sp.*; and
- unprotected under section 7A of the *Wildlife Act 1975*.

On private land and on public land within the designated areas, dingoes can be trapped, poisoned and shot.



³⁵ Victorian Government *Victorian Government Gazette* No. G 39, 27 September 2018, 2100



CASE STUDY 5: KOALAS AND PLANTATIONS

The management of koala populations inhabiting blue gum plantations has proved a difficult and contentious issue in Victoria. The Wildlife Act has proved inadequate to manage the issue.

Following several incidents where koalas were killed or harmed during blue gum plantation harvesting operations in south-west Victoria, the Department oversaw the development by industry of voluntary guidelines to manage the problem. The guidelines were subsequently replaced by new minimum standards developed by the Department. Plantation managers develop Koala Management Plans that address the mandatory minimum requirements set by the standards. The Management Plans then form the basis for the granting of authorisations to disturb koalas under section 28A(1A) of the Wildlife Act.

Despite these developments, problems continue to arise and in February 2020, dozens of koalas were found dead or injured at a timber plantation at Cape Bridgewater. Investigations by the OCR into the incident are continuing.

‘Victoria’s Environment Minister has described the deaths of at least 40 koalas at a blue gum plantation in the state’s south-west as ‘a crime’, vowing to bring to account those responsible.

Lily D’Ambrosio said she was ‘angry’ about the deaths, adding that she expected many more than 40 animals to die as a result of the incident.

‘What I’m ... deadly serious about is bringing to account every single person who is responsible for this devastation,’ she said.

‘It is a crime, it is cruel. And it should not be allowed to be gotten away with.’

Officers from the Department of Environment (DOE) were at the timber plantation near Cape Bridgewater this morning.’³⁶

³⁶ ABC News ‘Koala deaths in Victorian blue gum plantation “a crime”, Environment Minister Lily D’Ambrosio says’, <https://www.abc.net.au/news/2020-02-03/koala-deaths-at-blue-gum-plantation-in-victoria-a-crime/11923120>

An independent regulator – the Office of the Conservation Regulator role in relation to the Wildlife Act

There is no provision in the Wildlife Act for an independent regulator charged with responsibility to administer the Act and to enforce its provisions. Responsibility for the Act generally falls to the Environment Minister and it is administered by the environment department, currently DELWP.

An exception to this structure are provisions in the Wildlife Act relating to hunting. These are administered by an independent statutory authority, the Game Management Authority, established by the *Game Management Authority Act 2014*. Reflective of the internal tensions within the Wildlife Act, these intersecting functions with ‘game management’ are in effect intended to regulate ‘game hunting’ as a specific form of ‘take’.

In early 2019, following a damning independent review of the Department’s administration of timber harvesting regulation, the Victorian government moved to establish the OCR led by the Chief Conservation Regulator.

The OCR now has responsibility for a range of environmental regulations in Victoria, including the Wildlife Act and the FFG Act.

The OCR has begun developing policies and guidance for administration and enforcement of Victorian environmental regulations, including wildlife protection regulations.

This outcome is a positive development that should improve the transparency and effectiveness of the administration of Victorian environmental regulations. However, a significant shortcoming of the OCR is that, unlike the Game Management Authority, it lacks a legislative basis and statutory independence. It functions as an administrative unit within the Department. This status limits, if not undermines, the OCR’s legal and apparent independence: for example, the OCR is vulnerable to future changes in policy.

Public trust and confidence in the administration of Victoria’s wildlife protection laws requires a well-resourced regulator that is independent of government.

‘Good governance is fundamental for an organisation to perform effectively. For a regulator, governance arrangements also need to ensure integrity of regulatory decisions, accountability, and transparency to support public confidence.

The importance quite properly attached to the EPA’s independence requires that it be formally established as an independent statutory authority...³⁷

The importance of an independent regulator to community trust and confidence has recently been emphasised in the Interim Report of the Independent Review of the

Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*:

‘An independent compliance and enforcement regulator that is not subject to actual or implied direction from the Commonwealth Minister should be established. The regulator should be responsible for monitoring compliance, enforcement, monitoring and assurance. It should be properly resourced and have available to it a full toolkit of powers.’³⁸

It is worth recalling that establishment of the OCR followed a highly critical review of the Department’s effectiveness as a regulator in relation to timber harvesting carried out by another statutory entity, VicForests.

Since the timber harvesting review, the role of the OCR has evolved and it has been allocated responsibility for a growing domain of regulatory oversight and compliance, not only the Department’s timber harvesting regulatory functions but also for over 20 other important Victorian laws. This spectrum of regulatory responsibility includes the Wildlife Act.

It is time to establish a clear legislative foundations and remit for the Conservation Regulator to ensure that the OCR can carry out its role independently and effectively, guided by a modern legislative framework.

37 Ministerial Advisory Committee *Independent inquiry into the Environment Protection Authority* (2016), xv.

38 Samuel *Independent Review of the EPBC Act – Interim Report* (Department of Agriculture, Water and the Environment, 2020), 15, 95.

Bringing wildlife compliance and enforcement into the 21st century

Modernising Victorian wildlife protection enforcement regulations

A comparison between features of the modernised *Environment Protection Act 2017* and the older environment protection Acts highlights how urgently those Acts need to be modernised to reach best practice in wildlife protection.

	WILDLIFE ACT 1975 – PROTECTED WILDLIFE	FLORA AND FAUNA GUARANTEE ACT - PROTECTED FLORA	ENVIRONMENT PROTECTION ACT 2017
Independent regulator under legislation	No/partial	No/partial	Yes
Preventative approach	No	Partial	Yes
Strategic approach	No	Yes	Yes
Penalties commensurate with seriousness of offences and aligned with community expectations	No	Yes	In part
Accountability – transparency and reporting requirements, third party enforcement	No	No	Yes
Full suite of powers available to regulator <ul style="list-style-type: none"> • Investigation • Rights of entry and inspection • Strict liability offences • Provisions to respond to organised criminal activity 	Some but not all	Some but not all	Yes
Enforcement options <ul style="list-style-type: none"> • Infringement or penalty notices • Aggravated offences • Enforceable undertakings • Civil penalty provisions • Restorative justice provisions • Remediation provisions • Third party role 	No	Mostly not	Yes

An independent regulator

The importance of an independent regulator is discussed above. In short, effective environmental management requires an independent regulator supported by legislation and with clear, sufficient and responsive powers in order to implement the policy and intentions of the Act.

Preventative approach

Recent reforms to Victoria's pollution control laws, the *Environment Protection Act 2017*, have introduced a general duty to take reasonable steps to avoid polluting. This reflects an emphasis on preventing environmental harm rather than simply administering sanctions after harm has occurred. Duty holders must take reasonably practicable steps to avoid harm occurring in the first place.

The 2019 reforms to the FFG Act have introduced a new duty on public authorities to give proper consideration to biodiversity conservation objectives in all of their activities.

These duty-based approaches can play an important role in encouraging individuals, businesses and government agencies to consider the impact of their operations, planning and decision-making on the environmental values protected, reducing the pressure on more traditional compliance-based approaches contained in environmental regulation.

Duty based approaches to regulation and decision making also allow the required standards to shift incrementally as technology, costs, risk and community expectations develop.

Strategic approach

A strategic approach to environmental regulation involves applying a transparent strategic framework to decisions. This approach includes decisions relating to compliance and enforcement action, prioritising regulatory activity in areas that matter the most.

Penalties that reflect the seriousness of offences and align with community expectations

Current penalties under the Wildlife Act and comparable offences under other legislation are discussed below.

Accountability

As noted above, in relation to the system of licences, authorisations and permissions under the Wildlife Act, very little information is currently published by the Department on the administration of the Act. Furthermore, very little information seems routinely to be produced, generated and published in anticipation of decision-making under the Act. Requiring preparation and/or release of such information would provide a clearer picture of how the Act is administered and enforced, and would improve the accountability for the exercise of powers and responsibilities under the Act.

Permitting third party enforcement would provide a fall-back mechanism to ensure that the Act does not go unenforced if the regulator fails to exercise its responsibilities. The third party enforcement mechanism contained in the

Environment Protection Act 2017 provides a good model.³⁹ Third party environmental enforcement is a commonplace mechanism in other jurisdictions.

Full suite of powers available to regulator

Recent reforms to environmental legislation demonstrate the powers and regulatory tools that are necessary for regulators to be effective.

Enforcement options

A range of enforcement options allows regulators to take a strategic approach to compliance and to intervention intended to influence the behaviours of individuals, companies or public or private institutions. Outcomes are better when regulators can draw on a range of offences, penalties and mechanisms for securing compliance and remedying harm caused, and direct these in a purposeful way toward those that are the subject of regulation.

³⁹ See *Environment Protection Amendment Act 2018* (Vic), s 7, enacting amendments to the *Environment Protection Act 1970* (Vic) to insert a new s 309, under which an 'eligible person' may apply for court orders analogous to injunctive relief. In combination with a new section 308, defining 'eligible person', an extended form of standing is available to a person whose interests are affected by contravention or non-compliance with the Act. Those amendments have not yet commenced.



Appropriate penalties for wildlife crime

The offences created by wildlife protection laws, and the penalties for these, are central to up-to-date and effective regulation. In combination with the regulator's approach to securing compliance and enforcement with the laws, the range of offences and the applicable penalties send a clear signal to the community about what is valued and worth protecting.

Penalties under the Wildlife Act have not been reviewed for many years, and, as the comparisons with other laws below demonstrates, it would be timely to do so to ensure that they remain aligned with community expectations as to the seriousness of wildlife crime.

In the biggest case of wedge-tailed eagle killing in the state's history, the man has been jailed for just 14 days and fined \$2,500. While the Department of Environment, Land, Water and Planning is rightly proud to have achieved this first jail sentence for wildlife destruction in Victoria, Humane Society International believes this fact also speaks volumes about the historical laxity of punishment regarding wildlife crimes.

'Less than an hour to be served for each wedge-tailed eagle poisoned and fined just \$6 for each wedge-tailed eagle killed... this sentence is clearly inadequate and until the punishment properly fits the crime in cases involving wildlife, people who don't value nature will be undeterred in their destruction,' said HSI Head of Programs Evan Quartermain.⁴⁰

Hunt, take or destroy threatened wildlife – Wildlife Act 1975, section 41

Maximum fine - \$39,652.80 plus up to \$3,304.40 for each individual animal. Up to two years' imprisonment.

Comparisons:

- The analogous offences in relation to taking flora in the FFG Act provide for a broader range of penalties with different penalties applicable to individuals and corporations. Taking protected flora attracts a fine of up to \$19,826.40 in the case of individuals and \$99,132 for corporations. However, where the taking causes a significant detrimental impact on the protected flora,

then the penalties increase to \$39,652.80 and two years' imprisonment for individuals, and a fine of \$198,264 for corporations.

- Under section 18 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), taking an action likely to have a significant impact on a nationally listed threatened species attracts a penalty of up to \$1,050,000 and 7 years' imprisonment for an individual, or \$10,050,000 in the case of a corporation.
- Under the New South Wales *Biodiversity Conservation Act 2016*, harming a threatened species attracts a penalty of up to \$330,000 or two years' imprisonment for an individual or \$1,650,000 in the case of a corporation.

Hunt, take or destroy protected wildlife – Wildlife Act 1975, section 43

The penalty for taking or destroying protected (but not threatened) wildlife is a fine of up to \$8261 (plus an additional \$991.32 for each animal harmed) or up to six months in prison.

Disturbing protected wildlife without a permit – Wildlife Act 1975, section 58

Maximum fine of \$3,304.40

Damage, disturb or destroy wildlife habitat – Wildlife Regulations 2013 – rule 42

Maximum fine of \$8261.00

Comparisons:

- As noted above, taking protected flora attracts a fine of up to \$19,826.40 in the case of individuals and \$99,132 for corporations. However where the taking causes a significant detrimental impact on the protected flora, then the penalties increase to \$39,652.80 and two years' imprisonment for individuals, and a fine of \$198,264 for corporations.
- Under the New South Wales *Biodiversity Conservation Act 2016*, harming protected species attracts a penalty of up to \$22,000 for an individual or \$110,000 in the case of a corporation.

 ABC News

Wedge-tailed eagle deaths prompt review of Victorian Wildlife Act

Wedge-tailed eagle deaths prompt review of Victorian Wildlife Act ...
Victoria's native wildlife protection laws will be reviewed after the deaths of ...

May 4, 2020



⁴⁰ HSI 'Humane Society International appalled at weak sentence for mass eagle killing', <https://hsi.org.au/newsroom/humane-society-international-appalled-at-weak-sentence-for-mass-eagle-killing>

Responding to cruelty to wildlife

While cruelty to wildlife must never be tolerated, some harm to wildlife is of such a cruel or callous nature that it should be singled out for special attention including higher penalties.

The Wildlife Act does not currently contain any specific prohibition or offences in relation to cruelty to wildlife.

In Victoria, prevention of cruelty to animals is mainly covered under separate legislation, the *Prevention of Cruelty to Animals Act 1986* ('POCTAA'), which is primarily administered by the Department of Jobs, Precincts and Regions under the Minister for Agriculture. However, this legislation 'does not apply to anything done in accordance with the *Wildlife Act 1975*'.⁴¹

Harm to wildlife not in accordance with an authorisation issued or an exemption created under the Wildlife Act is probably an offence under the POCTAA. The situation is unclear where an authorisation or exemption is in place but not complied with under Wildlife Act. While potentially a Wildlife Act offence and a POCTAA offence, whether the legislative combination is applied in that manner is unclear and it is likely that cruelty to wildlife is not clearly a punishable offence in many situations in Victoria.

The Victorian government is currently reviewing the *Prevention of Cruelty to Animals Act 1986*:

Victoria's current animal welfare law is the Prevention of Cruelty to Animals Act 1986. (POCTAA). This Act has served Victoria for the last 30 years.

However, developments over that time are prompting a review of the policy and legal framework so that Victoria has a strong platform for the future. There is greater science-based knowledge about animal welfare, including the sentience of animals, and greater public scrutiny of the treatment of animals. Complaints about

animal welfare are increasing and the community has greater expectations about how and when the law is enforced.

POCTAA has been modified many times to correspond with changes in science and community expectations. These changes have improved enforcement powers and introduced, then strengthened, the ability for inspectors to seize animals at risk. New cruelty offences were introduced to address emerging issues in animal welfare, and penalties have increased over time.

POCTAA has served an important function, however, it has become a complex piece of legislation. It is also focused on responding to cruelty after an animal has had a profoundly negative experience.

This has limited how POCTAA is enforced and the ability of enforcement agencies to intervene at an early stage before profound animal suffering has occurred or to address animal welfare concerns that do not fit within the definition of cruelty. Society now expects that the law should do more to set the responsibilities that humans have towards animals to better protect them from harm, enable earlier intervention and to better provide for their welfare.

As a result of all of these changes, a new regulatory framework is required. A new Act will be developed that will safeguard animal welfare and provide for timely avenues to address non-compliance. The new Act will build upon the effective parts of POCTAA and set out fundamental requirements for the responsible care and treatment of all animals.⁴²

This review together with the review of the Wildlife Act announced by the Environment Minister will be an important opportunity to ensure that appropriate offences exist to deter and punish cruelty to wildlife in Victoria.

⁴¹ *Prevention of Cruelty to Animals Act 1986* (Vic), s 6(1B)

⁴² Victorian Government Department of Economic Development, Jobs, Transport and Resources (DEDJTR) *Animal Welfare Action Plan: Improving the Welfare of Animals in Victoria* (2017)



Current reform proposals – Bills currently before the Victorian Parliament

Two bills proposing amendments to the Wildlife Act are currently before the Victorian Parliament.

1. Wildlife Amendment (Protection of Birds) Bill 2019

This bill seeks to amend the Wildlife Act to introduce a legislative ban on the hunting of native ducks and other native birds.

The bill was introduced into the Legislative Council on August 2019 and currently remains before the Council.

The bill is a private members' (non-government) bill, introduced by Andy Meddick MLC, of the Animal Justice Party.⁴³

2. Wildlife Rescue Victoria Bill 2020

This bill was introduced following the 2019–2020 summer bushfires. The Bill seeks to amend the Wildlife Act and other legislation to:

establish the Wildlife Rescue Victoria Committee under the Wildlife Act, which is proposed to be a responder agency under the Emergency Management Act 2013. The Committee will coordinate volunteers and develop processes for coordinating wildlife emergency response activities; and

create a legal framework for training and accrediting volunteers involved in wildlife emergency response activities.

The bill was introduced into the Legislative Council on 2 June 2020 and remains before the Council.

In emergencies, wildlife rescue, care and rehabilitation in Victoria is broken. To some that may seem like a harsh

⁴³ *Wildlife Amendment (Protection of Birds) Bill 2019, First Reading 15 August 2019, Seconding Reading Speech: Andy Meddick MP, Victoria, Parliamentary Debates, Legislative Council, 11 September 2019, 3026*

statement, but it is nonetheless an accurate one.

Whenever a disaster occurs we see the same scenario played out. Our emergency services scramble, and they, with the enormous amount of well-deserved respect of their communities, fight to beyond exhaustion. Day after gruelling day true life stories of extraordinary bravery, compassion and resilience come to light, and we are reminded of just how wonderful a species of animal we humans can be. Those stories are always tempered and tinged with something else—the loss of lives. But no matter how hard people fought, no matter the degree of danger they placed themselves in to save them, they simply could not.

...

I don't bring this bill out of want or need to bash the government—or the department, for that matter—but out of a need that I and others have recognised is of utmost importance because if we see our native animals as rightfully coexisting, as indeed having a claim on this environment that stretches far beyond our short years on this continent, and not as pests that get in the way of our aims to exploit that environment, and if we value them as unique, as having lives and interests of their own that should be respected as an intrinsic right, as the rest of the world does, we need to step outside the casual disregard we have for their lives; we need to uplift them in our minds and our actions and to learn the lessons that preceding decades have been screaming at us to learn.

We need to adapt, to change how we value them, and that starts with changing how we value these extraordinary people that look after them, that already see things that way and commit themselves to championing their lives by looking out for them at every opportunity.

*The animals and these people deserve a system that is world's best practice—something that can be held up with pride as the model for the world to follow.*⁴⁴

⁴⁴ *Second reading speech by Andy Meddick MP, Victoria, Parliamentary Debates, Legislative Council 3 June 2020, 1657.*



Conclusion

Victorian wildlife law is in serious need of reform.

The Wildlife Act is dated, it manages conflicting issues of conservation and exploitation badly, the machinery of its administration is not fit for purpose, and it is not responsive to the real contemporary issues confronting Victoria's native fauna and our management of them.

At the heart of the issues facing our native wildlife are unrelenting pressures on populations and habitat, from both human sources and biological imbalances. The Wildlife Act is not responding to or relieving those pressures. Arguably, it is not effectively even recognising them.

In this report, we have sought to begin the conversation around reform of wildlife law and set out why we need to move on from where we are. In expressing the problem we aim to begin the process of posing the solutions.



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