

Rewriting the *Wildlife Act 1975 (Vic)*: A Biodiversity & Duty of Care Approach

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What should the Act do ?

The *Wildlife Act 1975 (Vic)* (Act) fails to reflect contemporary circumstances, attitudes and knowledge and is in desperate need of rewriting.

The Act should:

- Acknowledge that we are in an ecological crisis.
- Recognise the importance of fostering the long term viability of healthy ecosystems.
- Recognise native wildlife as part of an interconnected system which includes habitat.
- Protect and enhance biodiversity by creating a statutory duty of care.
- Regulate the protection, rescue and rehabilitation of native wildlife.
- Impose effective and appropriate penalties for breaches.
- Provide a framework which promotes transparency and accountability.
- Create an independent regulator for administering Victoria's biodiversity protection laws.

Is the Intent of the Act clear ?

The current Act is ad hoc, lacking structure and clear objectives. In parts it is contradictory. At first glance the stated purposes of the Act appears to be focused on wildlife conservation. However it also mentions wildlife as a resource to be used and there is a strong emphasis on wildlife control, implying it is a commodity rather than a natural asset to be protected. Wildlife includes non- native animals and it enables the protection of some feral species. It excludes fish. Section 7 allows species of protected wildlife to be declared as “unprotected”. This does not sit well with modern conservation and biodiversity policy.

What should be the Intent ?

The concept of conservation in the Act should be expanded to biodiversity conservation. With the purpose of maintaining the long term viability of healthy ecosystems at its cornerstone. Global biodiversity is dependant upon the protection of unique species and gene pools. The Act must exclusively protect native wildlife. All references to non-native species need to be removed.

Proposed Structure of the Act

Wildlife Act

Purpose: The Conservation, Enhancement & Protection of Biodiversity

Part 1: Duty of Care to Protect Biodiversity

Establishes relationship between wildlife protection, habitats, biodiversity & duty of care.

Part 2: Wildlife Protection

Licenses and Authorisations granted under this section must not conflict with the conservation, enhancement and protection of biodiversity.

Part 2a: Native Wildlife

Broad meaning which includes species that are:

- * Cosmopolitan and/or keystone and valued for their role in enhancing healthy ecosystems.
- * Common.
- * Culturally significant to first nations people.

- Gives irrevocable protection.
- Clear criteria for granting an Authority To Control Wildlife Permit (ATCWP).
- ATCWP must consider non- lethal strategies.
- Imposes obligation on ATCWP applicant to seek expert advice, monitor populations and submit reports to a public database.

Part 2b: Non-Native Wildlife

Removes introduced species from the Act including game species such as deer.

Part 3: Habitat Protection

Focus on preserving and enhancing natural habitat to promote healthy ecosystems.

- Establishes and regulates wildlife/nature reserves, sanctuaries and protection zones.
- Places a duty of care on Landowners to conserve habitat on their land.
- Makes it an offence to disturb, destroy or damage native habitat without authorisation. Does not allow cut and dry exemptions such as authorisations for Forestry under the *Forest Act 1958* or the *Sustainable Forests (Timber) Act 2004*. Each authorisation to be determined on a case by case basis having regard to biodiversity and the long term viability of healthy populations.
- Where authorisation is granted for a development, the developer must:
 - * Take measures to mitigate any reasonably foreseeable adverse effects on habitat.
 - * Restore and rehabilitate damaged areas or if not practicable, contribute to the conservation of the local ecosystem in a manner determined by the Regulator.
- Imposes an obligation upon Local Government to;
 - * consider the effect of planning decisions upon habitat, and
 - * protect the health of local ecosystems when decision making.

Part 4: Native Wildlife Rescue & Rehabilitation

Creates licencing system for all volunteers who are regularly involved in rescuing.

- Authorises activities for the purposes of enabling wildlife rescue and rehab.
- Requires shelters, carers, and transporters to be licensed by the Regulator.
- Imposes auditing and record keeping obligations upon license holders.

Part 5: Appointment of Regulator

Independent Biodiversity Regulator to oversee the operation & enforcement of the Act.

- Facilitates good governance of the Act.
- Ensues consistency, accountability and transparency.
- Maintains public database of ATCWP information.
- Maintains public database of licensed wildlife shelters, carers and transporters.
- Issues authorisations, licenses and permits.
- Monitors auditing and record keeping obligations.
- Enforces fauna and flora plans for development in environmentally sensitive areas.
- Sets biodiversity policy.
- Develops programs to promote citizen science and community based monitoring.

Part 6: Offences and Sanctions

To include criminal and civil penalties.

- Harsher penalties which are reflective of community standards.
- Third party standing to enable the wider community to enforce the Act.

Statutory Duty of Care for Biodiversity Conservation

At common law the tort of negligence protects individuals from unreasonable harm or loss caused by others. Negligence is neglect of some care which we are bound to exercise towards another. The harm must be reasonably foreseeable and the damage real. *Donoghue v Stevenson*.

Given that biodiversity is integral to a healthy ecosystem and humans are dependent upon this system; it follows that harm to biodiversity equates to harm to the community. Just as the traditional law of negligence protects individuals from unreasonable harm, so does a duty of care to protect biodiversity. Those who control natural assets have a duty of care to the community to protect biodiversity. Protection of wildlife and habitat is part of such an obligation.

When the Act was drafted over 40 years ago many of the discussions on environmental protection centred around the concept of *Stewardship*. This can be defined as responsible use and protection of the natural environment through conservation and sustainable practices. Stewardship is often connected with the future. It conjures up phrases such as “preservation for our children and grandchildren” and “leaving an environmental legacy for future generations”. These are all valid manifestations of stewardship. The problem with drafting environmental legislation around protecting the future, is that it is an undefined point in time. Consequently, there is a risk that protective legislation is watered down or put to one side to be dealt with “later”. The sense of urgency is lost, whilst the damage to biodiversity continues. A law based upon duty of care can impose an urgency for protection. It is concerned with protecting the present for the benefit of individuals now, not just future generations. Whereas legislation based around stewardship may fall short.

A duty of care to protect biodiversity means consideration is given to predicting the reasonably foreseeable outcomes of an action. It encourages mitigation of damage and sits well with the *Precautionary Principle* which ensures that decision making includes potential hazards. It also gives advocates for wildlife protection standing to pursue legal action against those who flaunt, ignore or try to circumvent protection laws. At the local government level there is often planning decisions which adversely affect wildlife. Whilst there are usually individuals and/or community groups willing to advocate for protection, their hands can be tied by restrictive laws and lack of legal standing.

Case Study: Torquay Kangaroos vs Industrial & Urban Development

STRANDED KANGAROOS OFFERED HOP-ALONG HELP

ANIMAL activists are calling for the relocation of a mob of landlocked kangaroos being forced to live among bulldozers now occupying their former habitat in Torquay.



Geelong Advertiser, 2nd Nov. 2018

A case in point is the plight of a mob of Eastern Grey Kangaroos (EGK) in my local area. The EGK occupy land which is being encroached upon by urban and industrial development. Their habitat has been destroyed and they are forced to cross a busy road. EGK vehicle collisions and increased EGK interactions with humans continues, as the development progresses. There has never been an

adequate Kangaroo Management Plan (KMP). A comprehensive KMP should have been drawn up years ago, before development was approved. If a KMP had been a compulsory part of the initial planning process, a greater range of wildlife friendly solutions may have been available. Options such as reproductive management, exclusion fencing, wildlife corridors, overpasses and underpasses all require careful planning and time to implement.

With limited options now available to the Torquay EGK, translocation was put forward by wildlife advocates. [*Translocation Policy*](#) requires that the land owner/manager initiate the process. In the present case, the developer was unwilling to do so, despite offers from community groups to manage the project and pay for associated expenses.

The adage failure to plan is planning to fail rings true in this case. Wildlife management plans need to be prepared by those who are suitably qualified and experienced. Without a legislative requirement to present a workable KMP prior to development and no independent regulator to oversee the process, nothing of substance has been achieved for this mob. Unfortunately many developers and local councils only pay tokenistic lip service to wildlife protection and management. It took submitting a [*Petition*](#) of over 2,000 signatures to the Surf Coast Shire Council before kangaroo crossing warning signs were erected in the area. However, in spite of the petition, the Council declined to reduce the speed limit to an acceptable safe level of 60km.

Calls for Surf Coast Shire to create kangaroo crossing on Messmate Rd

SURF Coast residents are pleading with the council to erect kangaroo crossing signs along Messmate Rd, with a petition to save the kangaroos garnering more than 2000 signatures in support.



[*Geelong Advertiser, 26th Nov, 2019*](#)

Often wildlife advocates do not have legal standing to pursue effective solutions or enforce wildlife protection policies. A statutory duty of care to protect biodiversity would give the community greater ability to participate in conservation. This could be further strengthened by providing specific provisions within the Act granting third parties standing. Thereby ensuring the wider community can participate in the protection and creation of healthy ecosystems.

The Importance of Habitat

One of the biggest threats to wildlife is habitat destruction. The Act needs to recognise the importance of habitat and the role it plays in promoting ecological diversity. Planning which minimises fragmentation of critical habitats must be encouraged. Long term strategies such as wildlife corridors and under/over passes should be implemented as standard practice. None of these strategies have been utilised in my local area. History and experience has shown that developers make promises of wildlife and habitat protection which are never acted upon.

Conclusion

The world has come a long way since the 1970s when the Act was written. There is now a global sense of urgency for effective environmental protection. An Act which takes an ecological approach, drafted around biodiversity and a duty of care, would better reflect contemporary community views and standards.