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Privacy Statement Correct?	Yes
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Submission Type	Academic/researcher
Previous engagement in review?	Info session 2015
	Workshop 2015/16
	Targetted consultation
	SRG
	Written submission to CP?
	Other? Describe
Will changes improve function of regs?	
Reasons	
Implementation issue with proposed changes?	
Reasons	The proposed changes require further changes to better address the harm that land clearing causes to individual wild animals. Please refer to the written submission attached for further reasons.
Guidelines – guidance or clarification needed?	
Details	The proposed changes require further changes to better address the harm that land clearing causes to individual wild animals. Please refer to the written submission attached for further details.
Terms to include in guidelines glossary?	
Details	
Subscribe to e-newsletter?	
Other comments	
Written submission provided?	Yes

## Submission to the review of the native vegetation clearing regulations

8 March 2017

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**Person making the submission:** [REDACTED]

**Institutional affiliation:** [REDACTED]

**Contact details:** [REDACTED]  
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### I. Introduction & Recommendations

1. This submission is to support the review of the native vegetation clearing regulations being conducted by the Victorian Government. In making this submission, I have read and considered the following documents:
  - a. Review of the native vegetation clearing regulations – summary of proposed amendments to the Victoria Planning Provisions (proposed amendments to the Victoria Planning Provisions); and
  - b. the draft Native vegetation clearing – assessment guidelines (Assessment guidelines).
2. This submission includes material from an unpublished manuscript which has been submitted for publication at an international scientific journal and is currently undergoing peer review.
3. The following recommendations are made in relation to the review of the native vegetation clearing regulations:
  - (a) **The regulatory framework for native vegetation clearance should include the avoidance and minimisation of harm to wildlife as an express statutory object and policy objective.**
  - (b) **The Victoria Planning Provisions and the Assessment guidelines should be amended to provide that the harm that a proposed land clearing action will cause to individual wild animals is an express mandatory relevant consideration in decision-making for**

**native vegetation clearing, including in assessments of applications for permits to remove, destroy or lop native vegetation under the Victoria Planning Provisions.**

- (c) **Applicants for permits to remove, destroy or lop native vegetation should be required to include an estimate of the potential wildlife mortality that may occur if the proposed clearing action proceeds.**
- (d) **The prohibitions on the taking and destroying of threatened or protected wildlife in sections 41(1) and 43(1) of the *Wildlife Act 1975* (Vic) should be amended so that sections 41(2) and 43(2) provide that sections 41(1) and 43(1) (respectively) do not apply to persons who remove, destroy or lop native vegetation, including dead vegetation, in accordance with the Victoria Planning Provisions.**
- (e) **Vegetation precinct plans and permits to remove, destroy or lop native vegetation should include approval conditions requiring the conduct of a fauna rescue program prior to and during a clearing action and the implementation of measures to ensure the humane treatment of any animals injured or adversely affected by the clearing activity.**

## **II. Summary**

- 4. Despite scientific evidence of the harm that land clearing causes to individual wild animals, the avoidance and minimisation of harm to wildlife is not an express statutory or policy objective or mandatory relevant consideration for decision-making about land clearing in Victoria.
- 5. The harm that land clearing causes to individual animals ought to be identified and evaluated in decision-making about land clearing because:
  - a. land clearing causes deaths that are physically painful and psychologically distressing because of their traumatic and debilitating nature;
  - b. the pain, pathological conditions and psychological distress arising from land clearing will occur over a prolonged period as animals attempt to survive in the cleared environment; and
  - c. mortality and morbidity from land clearing have adverse demographic consequences for local populations of threatened or protected wildlife.
- 6. The harm that land clearing causes to individual animals means that decisions to allow land clearing are decisions to allow most of the animals present at the clearing site to be killed and, as such, decision-making ought to include proper evaluation of the harm that will occur.

### III. The harm that land clearing causes to individual wild animals

7. Land clearing can harm wildlife in two basic ways. Animals may be killed, injured or otherwise harmed through the:
  - a. direct application of force when vegetation and substrate are moved during land clearing operations (**Harm A**);
  - b. creation of a hazardous and physiologically inimical environment once vegetation has been cleared and substrates disturbed (**Harm B**).
  
8. While individuals of some species may disperse to other habitats (if suitable, unoccupied habitat happens to be available nearby) when vegetation is cleared, the clear scientific consensus is that most, and in some cases all, of the individuals present at a site will die as a consequence of that vegetation being removed, either immediately or in a period of days to months afterwards (Cogger et al. 2003; McDonald et al. 2003; Johnson et al. 2007).
  
9. The use of machinery to clear vegetation may cause traumatic injury or entrapment (i.e. physical confinement or burial within hollows, burrows or other cavities, underneath fallen stems or branches or other debris, or within soil or other matter) (Rhind 1998, 2004; Cogger et al. 2003; Johnson et al. 2007; Hanger and Nottidge 2009; Gleeson and Gleeson 2012; Thompson and Thompson 2015, 2016).
  
10. The possible outcomes from land clearing activity include death arising from traumatic injury or non-drowning asphyxiation due to suffocation, as well as pain and shock. Forms of traumatic injuries that animals may experience as a result of land clearing include: compression injury, penetrating injury, laceration, degloving injury, amputation, fracture, joint luxation/subluxation, and blunt force injury to the skeleton, soft tissues, and central nervous system, and internal haemorrhage. Those injuries may be sustained through contact with vegetation (e.g. as it is felled or shifted after felling), soil, machinery, motor vehicles, or containment barriers.
  
11. Animals that survive the clearing process and who remain at the cleared site are left to inhabit a harsh and radically altered environment that is generally inimical to their survival (Tyndale-Briscole and Smith 1969; Newell 1999; Bladon et al. 2002; Cogger et al. 2003; Fulton and Majer 2006; Johnson et al. 2007; Thompson and Thompson 2015, 2016). The strong site fidelity of many birds, mammals and reptiles, along with the frequent absence of suitable, unoccupied habitat to disperse to, means that animals will generally remain within or near to cleared sites, or will attempt to return to them shortly afterwards.

12. The clearing of vegetation from a site removes or substantially alters the habitat features present, including: the abiotic environmental conditions (e.g. temperature, humidity); the availability of resources (e.g. shelter/cover, food resources, water); and the biotic and social environment (e.g. the presence or absence and abundance of prey, predators, conspecifics, interspecific interactions with novel species including potential disease vectors or reservoirs) (McIntyre and Hobbs 1999; McAlpine et al. 2002; Cogger et al. 2003; Kanowski et al. 2003; Wardell-Johnson et al. 2004; Wobeser 2006; Johnson et al. 2007; Craig et al. 2012).
13. The range of harms that may occur as a consequence of those changes include (but are not limited to): pain from tissue damage sustained through physical injury or other pathological conditions; predation; temperature-related injuries; stress-related pathology (e.g. adverse effects on reproduction, adversely affected immune function, suppression of growth); secondary infection and shock/sepsis arising from injuries sustained during clearing or afterwards; maladaptation; misadventure; exertional myopathy; nutritional disease; infectious disease; dehydration; and increased likelihood of disease transmission.

#### **IV. The lack of consideration that is given to the harm that land clearing causes within the current and proposed regulatory framework for land clearing in Victoria**

14. There are five basic ways in which the current and proposed regulatory framework for land clearing in Victoria fails to consider the harm that land clearing causes to individual wild animals:
- a. **The avoidance and minimisation of harm is not recognised as an express objective of the regulatory system for land clearing.**  
The relevant statutory instruments and policy documents do not recognise the avoidance and minimisation of harm to wildlife as an express statutory object and policy objective.
  - b. **The statutory instruments and policy documents relevant to native vegetation clearance do not expressly require decision-makers to have regard to the harm caused by a proposed clearing action.**  
The harm that a proposed land clearing action will cause to individual wild animals is not recognised as an express mandatory relevant consideration in decision-making for native vegetation clearing, including in assessments of applications for clearing permits under the Victoria Planning Provisions and in the environmental impact assessment of proposed projects.

- c. **There is no requirement to provide an estimate of potential wildlife mortality in clearing applications.**

Applicants for permits to remove, destroy or lop native vegetation are not required to include an estimate of the potential wildlife mortality that will occur if the proposed clearing action proceeds.

- d. **There is uncertainty as to the circumstances in which the act of clearing vegetation may contravene prohibitions on the taking or destroying of threatened or protected wildlife under the *Wildlife Act 1975* (Vic).**

Sections 41(1) and 43(1) of the *Wildlife Act 1975* (Vic) provide that a person must not hunt, take or destroy threatened or protected wildlife, respectively. It is arguable that the kinds of harm caused by land clearing, particularly the deaths and serious physical injuries caused by the direct application of force during land clearing operations (Harm A), fall within the meaning of ‘take’ and/or of ‘destroy’ under the Act. Thus, a person who kills or seriously injures threatened or protected wildlife during the act of removing, destroying or lopping native vegetation may thereby contravene section 41(1) or section 43(1) of the *Wildlife Act*.

This uncertainty could be addressed by amending sections 41(2) and 43(2) so that they provide that sections 41(1) and 43(1) do not apply to persons who remove, destroy or lop vegetation, including dead vegetation, in accordance with the Victoria Planning Provisions (or other relevant statutory instruments or statutory provisions). Notably, amendments in those terms would leave open the possibility of a prosecution for a contravention of section 41(1) or section 43(1) in circumstances where a person had unlawfully removed, destroyed or lopped native vegetation and had killed or seriously harmed threatened or protected wildlife as a result.

- e. **Persons who undertake land clearing are not required to undertake fauna rescue programs and to ensure the humane treatment of animals during and prior to land clearing activities.**

To my knowledge, neither vegetation precinct plans nor permits to remove, destroy or lop native vegetation typically include approval conditions requiring permit-holders or persons intending to clear vegetation in accordance with a vegetation precinct plan to conduct a multi-species fauna rescue program prior to and during a clearing action or to implement measures to ensure the humane treatment of any animals injured or adversely affected by the clearing activity.

Similarly, neither the Victoria Planning Provisions nor the Assessment guidelines expressly encourage or require persons who remove, destroy or lop native vegetation pursuant to one of the exemptions provided in clause 52.16-8 to undertake fauna rescue programs or to implement measures to ensure the humane treatment of any affected animals.

#### **V. Other considerations: the harm caused by land clearing and the regulatory framework**

15. The *Wildlife Act* provides substantive protections to individual wild animals that are threatened or protected wildlife. A purpose of those protections is to preserve a limited natural resource (ie the population of each threatened or protected fauna species in Victoria) and to protect that resource from taking or destruction except in accordance with the *Wildlife Act* and any applicable regulations: *Walden v Hensler* (1987) 163 CLR 501; *Yanner v Eaton* (1999) 201 CLR 351. Those protections also support biodiversity conservation objectives for threatened or protected fauna species, as mortality and morbidity from land clearing will have adverse demographic consequences for local populations of threatened or protected wildlife.
  
16. Several further points can be made about the issue of harm to individual wild animals and the normative basis for the regulatory system for native vegetation clearance in Victoria:
  - a. A justification for the prohibition of unauthorised land clearing is the prevention of harm to individual wild animals. For example, a justification for the permit requirement in clause 52.16-2 of the Victoria Planning Provisions is that the requirement prevents wildlife deaths and injuries that would otherwise occur if no such requirement existed.
  - b. Individual wild animals are a natural resource and a form of public property that the State Government manages for the benefit of the broader Victorian community. As such, the State Government is obligated, as a question of effective stewardship, to ensure that the harm caused to individual wild animals by any activity is not indiscriminate (ie excessive or clearly disproportionate to the benefits that are said to derive from the activity).
  - c. That obligation to inquire as to the proportionality of the benefits and harms for a proposed activity is particularly relevant when (i) the proposed activity will largely or exclusively benefit private interests and (ii) the costs of the activity, in terms of the destruction of the resource, will not be internalised. The latter scenario arises in native vegetation clearance in Victoria because the existing regulatory system does

not impose any specific royalty (or other ‘fee’) for the right to exploit the resource (ie to destroy or seriously harm the wildlife present). That situation is inconsistent with the ‘user pays’ principle as applied to environmental harms.

- d. To assess whether the harm caused by a proposed clearing action will be indiscriminate, a decision-maker requires information that will allow them to characterise and evaluate the harm to individual wild animals.
- e. It is plainly inconsistent for the State Government to maintain substantive statutory protections for individual wild animals on the one hand and then, on the other hand, to maintain a regulatory framework for land clearing which allows a broad range of clearing actions without any requirement for the identification and evaluation of the harm that those actions will cause to individual wild animals.

17. The incidental<sup>1</sup> character of the harm that land clearing causes to individual wild animals does not provide any substantive justification for land clearing to be regulated in a way that is materially different from other activities that also cause significant wildlife death, injury and harm. This is so, in part, because the magnitude, severity and probability of the harm that is caused by land clearing have no intrinsic relationship with the *intention* of the person who undertakes the clearing activity. In other words, as regards the intensity and likelihood of the harm that will be caused, there is no substantive distinction between the harm caused by land clearing and the harm caused by a person who acts with the deliberate purpose of killing or injuring wildlife.

18. As regards the normative rationale for regulating land clearing, it is also relevant that harm caused by land clearing is a *foreseen* harm – that is, a reasonable person will be aware that the act of removing, destroying or lopping native vegetation to any appreciable extent will kill or seriously harm individual wild animals that are present. Further, it is consistent with concepts of causation in tort and criminal law, to hold that the precise harm which occurs to an animal does not have to be foreseeable as long as that harm that resulted was within the risk (ie the category of potential harms) originally created by the act of removing, destroying or lopping native vegetation.

19. The harm that land clearing causes to individual animals means that decisions to allow land clearing are decisions to allow most of the animals present at the clearing site to be killed and, as such, decision-making ought to include proper evaluation of the harm that will occur.

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<sup>1</sup> That is, the harm results from, but is not the purpose of, the activity.

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