

Submission to the review of the *Flora and Fauna Guarantee Act 1988*

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I. Introduction

1. This submission is to support the review of the *Flora and Fauna Guarantee Act 1988* being undertaken by the Victorian Government. The submission proposes several changes to the *Wildlife Act 1975*, which operates in conjunction with the *Flora and Fauna Guarantee Act* to protect Victoria's native fauna.
2. In making this submission, I have read and considered the following documents:
 - a. Consultation Paper – Review of the *Flora and Fauna Guarantee Act 1988* (January 2017); and
 - b. Review of the *Flora and Fauna Guarantee Act 1988* (March 2016).
3. This submission includes material from an unpublished manuscript which has been submitted for publication at an international scientific journal and is currently undergoing peer review.
4. On 8 March 2017 I also made a submission to support the review of the native clearing regulations also being undertaken by the Victorian Government.

II. Recommendations

5. The following recommendations are made in relation to the review of the *Flora and Fauna Guarantee Act* and, by extension, the associated protections for threatened and protected wildlife provided by the *Wildlife Act*:
 - (a) **The substantive protections from harm given to individual wild animals in Part VII of *Wildlife Act* should be strengthened in line with the amendments suggested below.**

- (b) **If a risk-based approach is adopted in relation to the regulation of human activities impacting on threatened and protected wildlife, then land clearing and other activities which cause death, physical injury and other pathologies should be categorised as activities that pose a substantial risk to those wildlife.**
- (c) **Regulatory frameworks for higher-risk activities such as land clearing should include requirements for the identification and evaluation of the harm to individual wild animals that may arise if the activity is implemented.**
- (d) **Sections 41(1) and 43(1) of the *Wildlife Act* should be amended to prohibit the killing, injuring, harvesting or capturing of threatened or protected wildlife (respectively) by any means unless a person has lawful authority (or other exception from criminal responsibility). The prohibitions should be extended to also prohibit the causing or permitting of the killing, injuring, harvesting or capturing of threatened or protected wildlife.**
- (e) **The term ‘lawful authority’ should be defined so that the prohibitions on killing, injuring, harvesting or capturing of threatened or protected wildlife do not apply to persons who remove, destroy or lop native vegetation, including dead vegetation, in accordance with the Victoria Planning Provisions.**

III. Summary

- 6. The prevention of harm to individual wild animals is an appropriate basis for the current prohibitions on the hunting, taking or destroying of threatened and protected wildlife in the *Wildlife Act*. Those prohibitions should be strengthened by amending sections 41 and 43 of the *Wildlife Act* to prohibit the killing, injuring, harvesting or capturing of threatened and protected wildlife.
- 7. The regulatory framework for land clearing must ensure that the harm that a proposed clearing action will cause to individual wild animals is adequately identified and appropriately evaluated. The avoidance and minimisation of harm to individual wild animals ought to be a statutory and policy object and a guiding principle for the regulation of native vegetation clearance.
- 8. Notable features of the harm that land clearing causes to individual wild animals are:
 - a. the clearing of native vegetation 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 the clearing of native vegetation 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.

9. 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.

IV. The harm that land clearing causes to individual wild animals

10. 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**).
11. 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).
12. 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).
13. 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.
14. 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.

15. 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).
16. 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.

V. Justification of prohibitions on the harming of individual wild animals

17. 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.
18. The protections in the *Wildlife Act* 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.
19. A further justification for prohibitions on conduct such as land clearing that kills, injures or otherwise harms individual wild animals is the prevention of harm, on a basis that:
 - a. mammals, birds and reptiles experience physical pain and psychological distress in the same or much the same way that we do;
 - b. the harm that is imposed is painful, distressing and may persist over a period of time; and

- c. the prohibitions, as well as the statutory requirement that people seek lawful authority to engage in harmful conduct, prevent deaths and injuries that would otherwise occur if no such protections or requirements existed.
20. Objectives of effective resource stewardship, biodiversity conservation, and respect for animal welfare obligate the Victorian Government to implement and enforce measures that ensure that the harm caused to individual wild animals by a proposed human activity will not be indiscriminate (ie excessive or clearly disproportionate to the benefits that are said to derive from the activity).
21. 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 or biodiversity value, 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 or biodiversity value (ie to destroy or seriously harm the wildlife present). That situation is inconsistent with the ‘user pays’ principle as applied to environmental harms.
22. 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.
23. It is plainly inconsistent for the Victorian 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.
24. The incidental¹ 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,

¹ That is, the harm results from, but is not the purpose of, the activity.

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.

25. 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. In that sense, it can in some circumstances be said that a person ‘who actually realizes what must be, or very probably will be, the consequence of what he does, does it intending that consequence’.²
26. It is also 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.
27. 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.

² *Vallance v The Queen* (1961) 108 CLR 56, 83 (Windeyer J).

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