# Submission to the Independent Panel reviewing the Victorian *Wildlife Act 1975 (*the Act)

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**INTRODUCTION**

The *Wildlife Act 1975* has its origins in very old laws governing hunting, with concerns over conservation and care for native species only included into the scheme since 1975.[1] For this reason, it is quite clear that the Act did not have the conservation and care of native species as the main objective, otherwise there would have been little need to keep amending. The Act is therefore ineffective in protecting our wildlife and is outdated.

The Environment Minister Lily D'Ambrosio, appropriately called for a review of the Act, an Act that had not been reviewed for 45 years, after several incidents that involved the killing of hundreds of wedge-tailed eagles in 2018, 2019 and the finding of hundreds of starving and injured koalas following timber harvesting at Cape Bridgewater in South West Victoria in February 2020.

From personal experience and from listening to other members of WRIN, Field Naturalists, Environmental groups and members of the Community, I am convinced that they will no longer tolerate these senseless and tragic incidents, nor legislation that fails to protect our wildlife and their habitat.

The fundamental flaw in the Act is that it was drafted with the outdated notion that Wildlife is a mere resource to be used and abused. This no longer reflects the sentiment of the community.

Many people in the community now understand the co-existence of humans with all other species on this planet and the importance of this relationship for our survival.

A short summary of the wedge-tailed eagle illustrates how species work with our environment to sustain life and their importance to our first nations people:

**Wedge-tailed Eagle *Aquila audax*, Accipitridae**

The Wedge-tailed eagle is Australia's largest bird of prey. It has a wingspan of 2 metres and is the largest bird of prey in Australia and one of the biggest eagles in the world. **It is supposed to be protected under the Act**. The above example of hundreds being killed demonstrates the inability of the Act to protect. The wedge-tailed eagle was once considered a pest by farmers, who believed that eagles swooped down and carried off

[1] Humane Society International Environmental Justice Australia "Failing our wildlife – why Victoria's wildlife protection laws need to be modernized (2020)

lambs in their talons. As a result, thousands of eagles were shot and poisoned. Wedge-tailed eagles mostly take rabbits, rats and mice (pests to humans). They seldom eat lambs and it is usually the carcases of dead lambs rather than live ones, this is the continual cycle of life.

The wedge-tailed eagles feature in many dreaming stories for Aboriginal Australians. The eagle Bunjil is an important creator for the Kulin people of central Victoria, my home.

Eagles mate for life and their nests are so large that smaller birds, like finches, can nest in the underside, benefiting from the protection by the eagles from predators.

Breeding pairs are territorial, and will defend their hunting ground and their large, impressive nests.[2]

The main threats to Wedge-tailed Eagles are human, for example, tree clearing and the loss of nesting sites, collision with overhead wires and fences and motorists.

Wedge-tailed Eagles mate for life. Photo Albert Wright (www.gypsytwitchers.com)

The wedge-tailed eagle is a predator, the top of the food chain and is needed to keep the ecosystem in balance. We must have the predators like eagles, owls, kookaburras, ravens and magpies. These, like all other wildlife, must have strong legislation to protect them.

Many countries in the world have gone one step further, not only have they enacted strong laws to protect wildlife, but are also undertaking 'rewilding'. In the United Kingdom and the Netherlands an important herbivore species, the beaver, has been reintroduced into the environment. They understand the importance of the beaver to the environment, the dams the beavers build help regulate the natural water system, preventing flooding and

[2] https://birdlife.org.au/bird-profile/wedge-tailed-eagle

improving soil quality, as well as providing a habitat for a multitude of small species. An improvement to the ecosystem has already been observed. [3]

This concept has also commenced in Australia. 'Rewilding Australia' has been working with WWF-Australia, zoos, sanctuaries and the Wreck Bay Aboriginal Community to test a reintroduction of "keystone species" into Booderee National Park, in Jervis Bay on the south coast of NSW.

Rewilding Australia uses science and indigenous ecological knowledge to restore Australia's ecosystems and missing faunal links. There focus is on reversing the decline of 'keystone species' that they group into two important categories: the ecosystem regulators (species like our carnivorous quolls and devils) and ecosystem engineers (like Bandicoots, bettongs and potoroos). Rewilding Australia state that these species maintain ecosystem integrity and keep our forests healthy by burying seeds and flammable leaf litter, dispersing fungi, increasing the ability for water to penetrate deep into the soil and supporting plant germination.[4]

In relation to our own State of Victoria, I refer to the bushfires that will be an ongoing tragedy as the climate warms up. It is known that marsupials dig up the ground and aerate the soil, allowing more water to seep into the ground. This is a mechanism that slows the speed of fires. With the slow decline and disappearance of our marsupials through lack of laws to protect them, fires are now much faster and harder to stop.

To protect our native wildlife and their habitat, the Act requires a total reconstruction and an objective to succeed in saving our wildlife before they become a distant memory.

[33] What is rewilding? - True Nature Foundation
[4 4] What is rewilding? - True Nature Foundation

# Key Issues addressed:

**The key issues addressed in this submission are:**

**Part 1: 1.1, 1.2, 1.4 and 1.5**

**Part 2: 2.1, 2.3, 2.4**

**Part 3: 3.1, 3.3, 3.4**

**Part 4: 4.1, 4.2**

**Part 5: 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8**

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# Part 1:What should the Act do?

**1.1 Does the Act reflect contemporary attitudes towards wildlife?** No, see below.

**1.1.1 In what ways does the Act succeed or fail in representing contemporary expectations for, and values relating to, wildlife in Victoria?**

The Act fails to appreciate the importance and necessity of saving our wildlife, not only because it is essential to prevent the extinction of our wildlife, but because all species on this planet have a purpose for the survival of the planet. There is a symbiotic relationship between all species that humans are continually destroying, for example through the destruction of native wildlife habitats from the logging of timber and the creeping urban boundaries.

In our local area of Bendigo, cars and trucks, legal and illegal logging, four-wheel drivers, mountain bike riders and gold prospectors, in fact human beings, destroy bushland and authorities fail to protect these necessary habitats for our wildlife.

Members of our community have been waiting patiently for years for the State Government to protect forests, such as the Wellsford Forest from senseless destruction.

To wildlife rescuers and carers, wild animals are intrinsically valuable, their value is independent of the benefits they offer humans – and that value alone warrants their protection and conservation. For them, wildlife's intrinsic value often translates into moral obligations, an obligation to protect or help the wildlife, in the hope that they will exist for future generations. To us wildlife offers an emotional, spiritual and recreational benefit. This is not something that can be measured by economics and no price can be put on this connection.

The Act uses the term 'sustainability', but has no definition for it. The word "sustainable" is defined as:

1. Strengthen or support physically or mentally
2. Bear (the weight of an object)
3. Suffer (something unpleasant)
4. Keep (something) going over time or continuously

The adjective "sustainable" is defined as "able to be sustained, avoiding using up natural resources.[5]

Over time this word has been misused and adapted to what is commonly referred to now as "economic sustainability". I refer to definition 4 above and suggest this is the definition that should be adopted and not a distorted interpretation of "economic sustainability". The Act needs to be interpreted through an ecological lens so that our wildlife will continue or survive in perpetuity for future generations. The Act needs to reflect the true definition of the word 'sustainable' and not view wildlife merely as a resource. I submit that a definition for "sustainability" be included in the Act and reflect "ecological sustainability.

Even in the unfortunate circumstance and we view "sustainability" in the economic sense, the Act has failed to "sustain" because our native wildlife is on the brink of extinction.

### 1.1.1 Are there conflicts between the interests or expectations of different stakeholders or community members regarding wildlife in Victoria?

There are many conflicts between our native wildlife and human beings. The following demonstrates this conflict:

- **Duck hunters vs ducks & WRIN**
  The so-called sport of duck shooting is a major cause of the decline of threatened ducks. I find it difficult to consider it as a sport and the argument that hunters use, namely, that they shoot ducks to provide food, is just absolute nonsense.

  The major issue is that most shooters do not know what species of duck they are shooting and kill or maim many protected species. I would argue that no duck should be shot, but regardless of that, the hunter is ruthless, he kills the mother and leaves the ducklings to flounder in the water looking for a parent. These ducklings are rescued by volunteer rescuers who then come into the care of someone like myself to try and heal them from the trauma and raise them to release them back into a world of danger. From my perspective this causes great distress and sadness because this is a never-ending saga that occurs every duck season. This so called sport should be banned and any person committing the act of shooting native wildlife should be penalised under the Act.

[5] Soanes, C., Oxford English Dictionary (2002)

- **Mountain bike riders vs Field Naturalists, wildlife and WRIN**
  There are designated legal mountain bike tracks in the bushland in Bendigo, but the riders are going beyond their designated areas and moving further and further into the bushland, destroying native habitat and threatening our native wildlife. Authorities are failing to protect the wildlife and their habitat. I have listened to the heart felt concerns about the bushland around our city from members of the Field Naturalists who have been trying now for years to save the bushland, but the State Government will do nothing to stop this reckless destruction by the mountain bike club. There is nothing within the Act that can stop this. Parks Victoria will not enforce this.

- **Gold prospectors vs members of the community, wildlife and WRIN**
  I am a member of a passionate group of volunteers in the Bendigo region who have come together to rejuvenate 16 hectares of land that was laid bare from gold prospecting and gravel quarrying, then became a dumping ground for rubbish by ignorant humans. The vision of this group is that it will become a bushland corridor with other urban, peri-urban and country bushland. This will hopefully help in some way, to repair the fragmented bushland that humans have slowly destroyed. Members of the group continually come across gold prospectors from a local prospecting club who are using metal detectors on the land, digging holes and destroying native flora that provides food and habitat for wildlife. The group have discovered that these prospectors are not allowed to prospect on this land without a permit from the local council, but there are not enough rangers to be able to protect this land and so they continue to cause damage. The problem is however, that It is likely that they could get a permit in which case we will not be able to prevent them from this destruction. The Act currently provides no pathway to protect.

- **Logging industry vs environmental groups, wildlife and WRIN**
  There is conflict between the logging industry and environmental groups. The Wellsford forest in Bendigo is a habitat for wildlife and another victim of the logging industry, who illegally and unfortunately, legally, collect timber. It is virtually impossible to enforce compliance for wood collection. The Act provides no protection.

- **Developers vs environmental groups**, **wildlife and WRIN**
  Developers continue to creep further and further into our forests in Bendigo. The urban boundaries are ignored and as land is becoming more scarce, the bushland is being opened up for development. These building

sites are completely cleared of all vegetation and a great deal of wildlife are moved out of these areas, many have nowhere to go. Members in the community report the abundance of rosellas coming closer into the city and this is due to the enormous amount of clearing occurring. The city is not an ideal place for birds to reside, the food is scarce and there is always the continual danger from motor vehicles. Nesting boxes have been installed by many people who report that rosellas immediately inhabit the boxes because of the destruction of their bushland.

- **Speeding motor vehicle drivers vs members of the community and WRIN**

  As a volunteer for WRIN one of my jobs is answering the telephone to members of the public (MOPs) who report injured or sick wildlife. Many of the calls are reports of cars and trucks hitting wildlife, particularly kangaroos and this is increasing as more and more of their habitat is being cleared. These injuries are often horrific and many people are crying when they make these calls.

  The normal course of action is for the phone operator to call a 'shooter'. "Shooters" are volunteers who diligently go out and euthanise those wounded wildlife that cannot be saved and to check for joeys in the pouches, that can sometimes be saved. I have telephoned shooters at 1am in the morning, who will go out and put these poor animals out of their misery and then many of them have to get up next morning and go to work. There is no government help for this, it is purely a volunteer position with WRIN. There is no mechanism for a debrief and the stress and anxiety that this causes is becoming a problem.

  The Act needs a mechanism to ensure that speed limits are adhered to and the killing or injuring of wildlife from speeding motorists is an offence with strong penalties for breaches.

The conflicts mentioned are not limited, there are many more that have not been included in this submission.

These conflicts are the cause of our wildlife being on the brink of extinction. In all conflicts there is a winner and a loser and with the abovementioned conflicts our wildlife are always the losers.

Instead of protecting under the Act, the Act actually allows the killing of wildlife. Under the Act at present 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.[6]
- Threatened species are not spared from ATCWs – in 2019, QATCWs were issued to control 6,604 threatened grey-headed flying foxes, a species listed as threatened under Victorian and national threatened species laws.[7]
- 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.[8]

Under the Section 7A of the Act an "unprotection order" can be made by the Governor in Council. 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. "Unprotection Orders" remain on the books for other species of Victorian wildlife – brushtail possums, dingoes, long billed corellas, sulphur-crested cockatoos and galahs. Many of these injured wildlife come into the care of wildlife carers, many of them maimed from shooters that are not experienced in killing humanely and are left to die a slow and agonising death if not rescued by wildlife rescuers or caring MOPs.

Our laws must make those who break the laws accountable and the punishment must be severe. Another major problem is the lack of Officers to enforce the law. At a time when unemployment is a problem coming out of COVID, it would seem a good opportunity to appoint officers purely to enforce compliance of stakeholders who are killing our wildlife.

**1.2 Is the intent of the Act clear?** No, see below.

### 1.2.1 Are the current purposes of the Act satisfactory? What should the outcomes, objectives or purposes of the Act be? How should the objectives and purposes of the Act relate to the desired outcomes? How would they ensure desired outcomes are achieved?

The intention of the Act is unclear, there is no precise objective and there have been many amendments over the years. This has resulted in the creation of a jumble of legislative provisions with no clear framework or real purpose. Legislation should contain 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*[9]

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[6] DELWP *Authority to Control Wildlife 9ATCS) Data* (2020), https://www.wildlife.vic.gov.au/_data/assetrs/pdf_file/0025/477214/ATCW-Data_annual-data-2009-2019.pdf

[7] Ibid.

[8] http://agriculture.vic.gov.au/agricultgure/farm-managment/kangaroo-harvesting-program

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

The purpose of the Act is contained in Section 1A:

*(a) To establish procedures in order to promote –*
*(i) The protection and conservation of wildlife; and*
*(ii) The prevention of taxa or 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*

It appears that the intention of the Act is primarily wildlife conservation, albeit combined with forms of resource exploitation and some of the 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 (such as deer), 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 *Flora and Fauna Guarantee Act 1988* (FFG Act), or evidence a coherent or justifiable basis in conservation policy or theory.[10]

I submit that the objectives must be set out clearly, with the fundamental purpose being the prevention of extinction, avoiding any terminology that would perceive wildlife as a resource as in Section 1A (a) (iii). Because of this contemporary interpretation of "sustainable" as "economic sustainability", the implication is always going to see wildlife as a resource.

The definitions, the purpose and the objectives need to be carefully constructed and designed using an ecological lens for the protection of all wildlife and their habitat.

### 1.4 Could a general duty help clarify roles and responsibilities? See below.

#### 1.4.1 Should the Act prescribe a general duty of care related to wildlife conservation or biodiversity protection more broadly? Why or why not? How could it work in practice?

Recent cases in the Federal Court of Australia suggest that a duty of care is a way to protect the environment and I would submit that a duty of care would also be a way to protect our native wildlife.

On 27 May 2021, Justice Bromberg delivered his judgment in *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560. The

[10] Humane Society International Environmental Justice Australia "Failing our wildlife – why Victoria's wildlife protection laws need to be modernized (2020)

Applicant was a group of eight Australian children, all under the age of 18 represented by Sister Marie Brigid Arthur, their litigation guardian.

The children claimed that the commonwealth minister for the Environment, Hon Sussan Ley, MP (Minister), as the first Respondent, owed them and other Australian children a duty of care when deciding to approve the extraction of coal from a coal mine under the *Environment Protection and Biodiversity Act 1999* (Cth) (EPBC Act). The applicant sought an injunction to restrain an apprehended breach of that duty. The applicant also sought an injunction against Vickery Coal Pty Ltd (Vickery), as a second respondent and a wholly-owned subsidiary of Whitehaven Coal Pty Ltd (Whitehaven). Whitehaven holds a development consent under the *Environmental Planning and Assessment Act 1979* (NSW) for a coal mine in Northern NSW, although coal production is yet to commence.

In 2016, Whitehaven applied to the Minister to expand and extend the mine under section 68 of the EPBC Act. Vickery took over the mine in July 2018. At the hearing, Justice Bromberg accepted evidence that, when combusted, the additional coal extracted from the mine's expansion would produce about 100 million tonnes of carbon dioxide.

This case required the Court to consider a novel duty of care within the law of negligence.

The children argued that particular harms suffered would be mental or physical injury, including ill-health or death, as well as economic and property loss.

Justice Bromberg held that the Minister was required to consider recognised principles of environmental law, such as ecologically sustainable development and the precautionary principle when making decisions under the EPBC Act. Justice Bromberg concluded that by reference to contemporary social conditions and community standards, a reasonable minister for the environment ought to have the children in contemplation when facilitating the emission of 100 million tonnes of carbon dioxide into the Earth's atmosphere.

Justice Bromberg considered the following features relating to a duty of care that must be proved:

- *Foreseeability of the probability of harm*
- *The Minister had direct control over the foreseeable risk, because it was her exercise of power upon which the creation of that risk depends*
- *The Minister had all the knowledge about the risk of harm to the children which the substantial evidence in the case provided*
- *The Minister has responsibility for the environment and the interests of Australians, and must ensure a healthy environment for the benefit of future generations*
- *The children's innocence, as well as their vulnerability, was relevant since they bore no responsibility for the harm*
- *Though there is no physical or temporal nearness between the Minister and the children, the strength of the affirmative salient features demonstrates a relational nearness.*

I submit that the above salient features could equally apply in a case where wildlife had been harmed, injured or killed. The mental harm and stress caused to children and to wildlife rescuers, carers and shooters from the exposure to the killing of our native wildlife could be an argument to prove a duty of care. This case has set a precedent for future litigation in the protection of wildlife.

To protect out wildlife, a duty of care should be included in the Act, however a common law duty of care could well be argued.

### 1.5 Definitions of key terms can be unclear and confusing

#### 1.5.1 Are there any definitions that are unclear or confusing or that cause problems for achieving the outcomes and objectives of the Act?

There are definitions that are unclear, confusing and missing.

**"Game"** is defined in Section 3 of the Act as "**any kind or taxon of wildlife** declared by the Governor in Council by Order published in the Government Gazette to be game for the purposes of the Act.

Under Section 22A (1) the Game Management Authority may license a person to hunt, take or destroy "game", this includes our native wildlife. Under Section 22A (5) "Subject to Subsection (6), the Game Management Authority must grant **any** application for a game licence unless the Authority is satisfied that – (a) the applicant is not a fit and proper person to hold the licence; or (b) the applicant is not qualified under the regulations to hold the licence; or (c) the issue of the licence would be deleterious to the conservation of any taxon or any kind of game; or (d) the applicant is already the holder of a licence under this section; or (e) the applicant has failed any prescribed test about the identification of that taxon of wildlife in respect to which the licence is to be issued.

This section is all about hunting. From personal experience, I know that to get a licence to kill wildlife on crown land is a very simple administrative process, with no thorough investigation as to what sort of person is applying for a licence or why. The process took about 10 minutes, a quick visit to DELWP, show identification and then it was issued. Strangely enough, for me to get my foster carer licence to tend to wildlife, the process took 12 months and was very thorough. In summary … to be able to euthanise (kill) wildlife was a simple and fast process, whereas to care for and save wildlife was cumbersome and slow.

Under Section 23 (c) A licence would be refused if the issue of such licence would be deleterious to the welfare or conservation of any wildlife or of any taxon of wildlife. Again, I am not sure how this would be proved, so it is ineffective.

**"wildlife"** is defined in Section 3 of the Act and 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.[11] The FFG Act does not itself provide any direct protection to threatened wildlife, this is supposed to be covered by the Act.

To understand precisely what is meant by **"protected wildlife"** is a cumbersome exercise in sifting through outdated legislation.

In Section 3 of the Act, "protected wildlife" is defined as all wildlife other than those kinds of taxon which –

(i) Is a pest animal within the meaning of the *Catchment and Land Protection Act 1994* (CLP Act); or
(ii) the Governor in Council from time to time by Order published in the Government Gazette declares to be unprotected wildlife; or
(iii) are specified by Order of the Governor in Council published in the Government Gazette pursuant to section 7A

… then we have to go to definitions in the *Catchment and Land Protection Act 1994* to find out what is meant by "pest animal". It is defined as (a) a restricted pest animal; or (b) an established pest animal.

…then we must find out what are restricted pest animals and what are established pest animals under the CLP Act and we discover that a "restricted pest animal" is (a) a prohibited pest animal; or (b) a controlled animal; or (c) a regulated pest animal. These definitions the CLP Act tells us, are contained within Part 8.

Under Part 8, Section 58B an Order can be made on, it would appear, on any animal that the minister is satisfied that urgent action is needed to protect the State from an adverse economic, environmental, or social impact caused or likely to be caused by the animal. The exemptions are contained in Section 59 (2) (a) fish; or (b) an invertebrate animal and under Section 59(3)(a) The Minister cannot recommend an animal for declaration under this Part or declare an animal under Section 58B if it is (a) part of a taxon of fauna or under Section 59 (3)(a) is specifically mentioned in the threatened list under Section 10 (1) of the FFG Act or declared endangered under the Act. However, both the FFG Act and the Wildlife Act contained outdated information.

This convoluted process of determining the definitions is a result of a mix of outdated laws and results in undermining the effective protection of wildlife. 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 Act. Non-native, and sometimes destructive feral species such as deer are defined as

[11] The threatened list is provided for by section 10 of the FFG Act 1988

"wildlife" under the Act and wildlife are not protected under Victoria's animal cruelty legislation, the *Prevention of Cruelty to Animals Act 1986.*

Section 28A: Authority to Control Wildlife (ATCW)

Section 28A of the Act allows an authorisation to be issued for the destruction or disturbance of wildlife – an ATCW.

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

There is no mechanism under the Act for compliance with these ATCWs. No returns are submitted reporting on activity under these ATCWs, so there is no data on the impact on wildlife. A system was previously in place to collect this information however "this requirement was removed in the early 2000s to reduce administrative burden'[12] 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.[13]

This lack of transparency is a major cause of the decline of our native wildlife and needs to be addressed.

### 1.5.2 Should any additional animal species or taxa (groups of species) be included in the definition of "wildlife" or "protected wildlife"? Should any species or taxa be excluded and therefore be exempt from some provisions in the Act?

I submit, based on the theory that our native wildlife has an equal right to humans to inhabit the earth, that no native animal should be excluded from the definition of "wildlife". Under the act fish are not included and need to be for so many reasons, for example, sharks are predators that are imperative to the survival of our oceans, as previously outlined for our ecosystem to survive, which or course, includes our oceans, the predators are necessary to keep the balance. Aquatic invertebrates should also be included as they are a food source for other species in the oceans, without these species,

[12] DELWP *The Authority to Control Wildlife (ATCW) System Review: Consultation Response Summary (2008), https:/./engage.vic.gov.au/atcwreview, 11*

[13] There were 11 prosecutions in total under the Wildlife Act in 2018: 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://awpc.org.au/victoria-is-definitely-not-the-place-to-be-if-you-are-a-bird-or-a-kangaroo/. This information provided in Humane Society International Environmental Justice Australia "Failing our wildlife – why Victoria's wildlife protection laws need to be modernized (2020)

many others will die. It is quite strange that terrestrial invertebrates are not protected under the Act. Again, these species are a necessary food source and assist in keeping the balance.

### 1.5.3 Should "game" animals be defined as wildlife in the Act or defined some other way or excluded from the Act entirely

There is an issue with the definition of "game" under Section 3. It is defined as "**any kind or taxon of wildlife** declared by the Governor in Council by Order published in the Government Gazette to be game for the purposes of the Act. This then provides an opportunity for any species of wildlife to be declared "game" and hence a person can apply for a "game licence" as described previously in 1.5.1. I submit that the word "game" be removed from the Act.

The danger with the Governor in Council having this authority is one of the major causes of wildlife decline. To put this amount of power into a non-independent body has proven in many cases to be problematic. In the recent review of the EPBC Act by Professor Graeme Samuel it was recommended that an independent body be appointed for many reasons and the same very detailed reasons contained in that report and later in this submission apply to the Wildlife Act.

# Part 2:How does the Act interact with other legislation about wildlife and animals?

## 2.1 There are overlaps and gaps in the broader legislative framework

### 2.1.1 Do you have any comments on the interactions between the Wildlife Act and other legislation?

As demonstrated on pages 11 and 12 of this submission, under Part 1, the convoluted definitions that are contained within this Act and other legislation are cumbersome and they do not align with each other, causing confusion and results in more wildlife being destroyed. One Act refers to another Act and all the legislation is outdated. Information of what species are threatened, protected or endangered is not clear or easy to find.

The protection of wildlife is basically under a confusing range of legislation within the Act, then the regulations under the Act and other state and commonwealth legislation. The status lists that contain threatened, endangered, critically endangered etc. vary from legislation to legislation, from State to State and between the Commonwealth and the States and Territories. The lists are not updated, making it impossible to assess the true decline of our wildlife. At a local level in Bendigo the DELWP lists are abysmally old and outdated and often rely on local volunteers and "citizen scientists" to inform them of what species are at risk of extinction.

### 2.1.2 Should wildlife, flora and fauna generally be regulated by a more inclusive statute?

Under the CLP Act both native fauna and flora are regulated. I would submit that this would be a preferred option.

### 2.1.3 Should game management be regulated under its own Act? What are the advantages and disadvantages of such an approach?

The advantage of regulating game under its own Act is that the Act could then be solely about native wildlife and their habitat, thus placing a greater importance on native wildlife and making the distinction clear. If this pathway was adopted, the definition of "game" in the "game Act" would need to be specific and could not include native wildlife in that definition. Under the present regime the Governor in council can make native wildlife "game" and so be hunted and killed.

## 2.3 The current legislative framework doesn't preserve and conserve habitat

I submit that this issue has been covered previously and is obvious by the rate of extinction of native wildlife.

### 2.3.1 In what ways does the Act succeed or fail in protecting and conserving wildlife habitat?

The Act lacks clarity and is ambiguous in relation to wildlife habitat. There are no provisions to protect the habitat of protected wildlife. Section 87 (1) allows the Governor in Council to make regulations for preservation and maintenance of wildlife habitat. Regulation 42 of the Wildlife Regulations 2013 makes it an offence to damage, disturb or destroy wildlife habitat without authorisation. But neither the Act nor the regulations define wildlife habitat.

To remove native vegetation under clause 52.17 of the *Victoria Planning Provisions* a permit must be obtained. This applies state wide. The purpose of this permit is to ensure there is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation and is achieved by:

- Avoiding removal, destruction, or lopping of native vegetation;
- Minimising impacts from the removal, destruction or lopping of native vegetation that cannot be avoided;
- Providing an offset to compensate for the biodiversity impact if a permit is granted to remove, destroy or lop native vegetation.

The *Guidelines for the removal, destruction or lopping of native vegetation* (made under clause 52.17) are incorporated into the planning scheme and must be complied with). These guidelines **are not** complied with, certainly not in the City of Greater Bendigo (COGB). The planning scheme used in the COGB has continually failed to stop developers from using the precautionary principle in relation to destruction of wildlife habitat, who

are creeping further and further into the surrounding forests. They do not avoid removal, destruction or lopping of native vegetation, they completely moonscape the land removing all trees, native grasses, shrubs and fungi (which provides a vital connection between species, which if removed, will destroy the soil for any more growth).The developers do not minimise the impacts. In relation to "offsets", Graeme Samuel in his report on the EPBC Act stated categorically that offsets do not work. Many plants will not grow because the soil has been destroyed by the removal of fungi and it would take hundreds of years to replace many of the old growth trees that are removed.

Even the habitat of threatened wildlife – wildlife designated as at risk of extinction under threatened species, 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. Unfortunately, the species list is not up to date in the FFG Act.

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

Protection of the habitat of native fauna could occur through the management of public lands established as "State wildlife reserves" or "nature reserves" under Part 11 of the Act. Under these provisions "wildlife reserves" are supposed to be managed for the "propagation of wildlife", "wildlife habitat preservation" or purposes set out under the *Crown Land (Reserves) Act 1978.* The problem is that various types of activities are permissible in reserves, such as hunting and tourist operations and this is obviously not acceptable. Recommendations on public land classification in 2017 sought to clarify the purposes and appropriate activities for reserves functioning under the Act.[14] It is submitted that those recommendations be considered closely in reforms to the Act.[15]

The Act is a total failure when it comes to protecting wildlife habitat.

### 2.3.2 How should the Act provide for the protection and conservation of wildlife habitat?

The Act should reflect that wildlife habitat is anywhere that native wildlife inhabits, whether that be bushland or city. There should be a definition that makes it clear that wildlife will be protected wherever they are. The issue with having defined areas for wildlife is ridiculous, wildlife are a transient species, they naturally search for food and shelter and with the clearing of lang their range is expanding and changing so it is virtually

[14] VEAC Statewide Assessment of Public Land: Final Report (2017), http://www.veac.vic.gov.au/documents/Final%20report.pdf

[15] Humane Society International Environmental Justice Australia "Failing our wildlife – why Victoria's wildlife protection laws need to be modernized (2020)

, p.14

impossible to have defined areas. It is quite clear that wildlife are losing their natural habitat at an alarming rate and have changed range. Locally there are more and more birds inhabiting the city, more kangaroos moving closer. If it was possible to revegetate , expand and create more wildlife habits then maybe it would be possible to create protected areas. If large enough some species may remain, but there are many that migrate.

The best protection for wildlife habitat is to stop the constant creeping of developers into the forests, the removing of timber by illegal and legal loggers, motorists speeding, trail bikes and mountain bikes continually going through the bushland etc.

These behaviours need to be made offences and penalised because people will not cease the behaviour unless it is an offence to do so. There is a great need for more rangers with authority to remove people from the bushland and for reporting to the authorities for charges to be made against the offenders.

### 2.3.3 Should the Act prescribe duties for landowners about protecting and conserving wildlife and wildlife habitat on their land? What could those duties look like?

I submit that there should be a duty of care placed on all private landowners and public land to protect and conserve wildlife. All land is wildlife habitat. The precautionary principle should be always used when carrying out any activity on all and any land.

## 2.4 The Treatment of wildlife as property

### 2.4.1 Do property rights related to wildlife need clarifying? If so, how?

I submit that wildlife should not be considered as property at all; rather, the law should recognise inherent rights in wild animals (wildlife and nature as legal subjects) so that they are entitled to the rights of protection as human beings.

Secular and non-secular members of the community agree with the concept that native wildlife and all animals should be treated as sentient beings and afforded the same rights as the human species.

Saint Frances of Assisi, of whom Pope Francis named himself, saw all creatures as sisters and brothers rather than viewing them as a mere economic commodity.[16] Because of this he felt compelled to care for all of creation as though it were part of his family. Islam has always viewed animals as a special part of God's creation. Mankind is responsible for whatever it has at its disposal, including animals whose rights must be respected. The Holy Qur'an, the Hadith, and the history of Islamic civilization offer many examples of kindness, mercy, and compassion for animals.[17]

[16] Huebsch, B with Hindmarsh, T. *Care for our Community, An Australian Group reading guide to Pope Francis' Laudato Si*, Garratt Publishing, Mulgrave, Victoria (2019)
[17] www.khaleafa.com/khaleafacom/islam-and-animal-rights

His Holiness the Dalai Lama said with regard to human and non-human animals, “Life is as dear to a mute creature as it is to man. Just as one wants happiness and fears pain, just as one wants to live and not die, so do other creatures. The Dalai Lama said about non-human animals**,** “They not only have life, but feelings of pleasure and pain too.”

*Yanner v Eaton* (1999) 201 CLR 351 10-31 was a case heard in the High Court that considered the term “property”. The facts of the case were that the appellant was an indigenous hunter who killed two animals in a creek for food. He was later charged with taking “fauna” from the area without a license, contrary to statute. This statute made all “fauna” property of the Crown. Unlike the previous statute, there was no exception for native hunting rights. This issue in this case was the meaning of “property” under the statute. What the statute meant by “property” was determinative of whether the appellant’s native hunting rights had been extinguished by the statute.

The High Court held in favour of the appellant. The Court explained that the term “property” did not necessarily mean full, beneficial or legal ownership. Rather, property is a “legal relationship” with an object that grants a person a right to exercise power over the object in some respect. As such, property is a variable concept which can have different degrees of intensity.

This case demonstrates clearly how native wildlife are not protected either by the law or the Crown. While wildlife is considered “property” there will never be justice for native wildlife.

We can no longer afford to treat native wildlife as a resource to be used and abused. Community sentiment is changing and the Act should reflect community sentiment.

### 2.4.2 Should private landowners have greater rights to use of wildlife on their property?

The question I would ask here is, why should landowners have greater rights to the use of wildlife on their property? My answer is no they should not, in fact they should have a duty of care with obligations to protect and should be penalised if they don’t. This question again refers to “use of wildlife” indicating wildlife is a resource, which again I submit that wildlife should not be considered a resource.

### 2.4.3 Should the Act recognise sentience of some wildlife and, if so, what would this achieve? How would this recognition affect the rights of responsibilities of governments, businesses and individuals?

The Act should recognise the sentience of all wildlife, this would achieve a balanced ecosystem. If wildlife was recognised as a sentient being, humans would be obliged to protect the land and forests, which would then stop the continual destruction and at the same time address the impacts of climate change now and into the future.

Governments, businesses and individuals should all have a duty of care with obligations to protect and care for our native wildlife and the land that we all inhabit.

# Part 3:What mechanisms does the Act need to achieve its objectives?

### 3.1 The Act lacks principles about how to manage wildlife

#### 3.1.1 Should the Act include statements of principles and criteria to guide regulators, duty holders and the public? Why are such principles important? If you do support including principles, what do you think they should be and why?

There should be principles with the Act as follows:

- Precautionary principle:
  If there are threats of injury, death or harm to native wildlife or serious or irreversible environmental damage to the land in which the native wildlife inhabit (which would be defined in the Act and include all land), lack of full scientific certainty should not be used as a reason for postponing measures to prevent injury, death or harm to native wildlife or environment degradation to the land in which they inhabit;

  In the application of the precautionary principle, public and private decisions should be guided by:
  (i) Careful evaluation to avoid, wherever practicable, injury, death or harm to native wildlife or serious or irreversible environmental damage to the land in which the native wildlife inhabit, and
  (ii) An assessment of the risk-weighted consequences of various options
- Inter-generational equity – namely, that the present generation should ensure that the health, diversity and productivity of native wildlife and the environment are maintained or enhanced for the benefit of future generations of all species, human and non-human;
- Conservation of biological diversity and ecological integrity – namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration, not economics;
- Responsibility of native wildlife and all the land they inhabit should be shared by all levels of Government and industry, businesses, communities and the people of Victoria;
- Polluter pays – that is, those who generate pollution, waste or destruction should bear the cost of containment, avoidance or abatement;

### 3.3 The Act has no framework for enabling wildlife management plans

#### 3.3.1 Should the Act enable wildlife management plans? What provisions should be included for such plans?

The Act should enable wildlife management plans. Currently management plans are only mentioned in Section 28A (authorisations) and Sections 28G and 28H (authorisation orders). Under these sections the Secretary (DELWP) can authorise a person to undertake

a range of actions such as hunting, taking , destroying, disturbing, marking, buying, selling, breeding and displaying wildlife if satisfied that the authorisation is necessary to support a recognised wildlife management plan. However, the Act does not specify what should be in the plans nor how plans are recognised or approved.

What is stated in the authorising provisions is not occurring in practice, which is yet another reason why our wildlife are facing extinction. Lack of guidance and enforcement are inherent under the Act.

### 3.4 The permissions framework lacks clarity, transparency and accountability

#### 3.4.1 Should the Act simplify and clarify the provisions relating to the various licences, permits and authorities? Is there scope to reduce regulatory burden without undermining the intended outcomes of the Act?

The Act should not be simplified in relation to obtaining licences, permits or authorities. If anything, they should be much stricter. There are no provisions that require the holder of an authorisation to report on the use and outcomes of that authorisation, with the result that it is impossible to determine how they affect wildlife populations.

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.[18]

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 rejects is unclear.[19]

It would be impossible to reduce regulatory burden and at the same time, protect native wildlife or the land in which they inhabit.

[18] 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.
[19] Humane Society International Environmental Justice Australia "Failing our wildlife – why Victoria's wildlife protection laws need to be modernized (2020)

# Part 4: Does the Act promote transparency and accountability?

### 4.1 Should expanded reporting requirements be included in the Act?

#### 4.1.1 Does the Act require an adequate degree of transparency about, and accountability for, decision making on matters relating to wildlife? If not, how could this be improved? For example, which activities/decisions/criteria should be more transparent? Which parties should be more accountable and for what?

The Act as it is currently, does not require or enable adequate transparency nor does it seek reporting and accountability in the system authorising activities involving native wildlife. Any rules in relation to this are not enforced.

Reporting requirements need to be expanded.

There needs to be provision in the Act to enable publicly available evidence-based justifications for all Government decisions about wildlife management. All levels of Government, businesses and individuals need to be made accountable for their actions.

The holders of ATCWs should be required under the Act to report on the use and outcome of that authorisation so that a true figure on the number of wildlife that have been impacted by authorisations can be obtained. Without this information it is impossible to accurately assess the wildlife decline.

### 4.2 Should independent expert advice play a greater role in decision making under the Act?

#### 4.2.1 Should the Act include provisions that require and enable establishment of a scientific advisory committee or advisory panels to provide expert guidance to key decision makers such as the Minister, the Secretary or the regulator on specific matters relating to wildlife? Why or why not? What other approaches are available?

There is no provision in the 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 is the provisions in the 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 Office of the Conservation Regulation (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.

However, the problem with the OCR is that it lacks a legislative basis and statutory independence. It functions as an administrative unit within the department and this limits and undermines the OCR's legal and apparent independence for example, the OCR is vulnerable to future changes in policy.[20]

I submit that a well-resourced regulator that is independent of government be established.

> *'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…'*[21]

Professor Graeme Samuel AC, in his Final Report on the review of the EPBC Act, suggested that the community is sceptical that the EPBC Act decisions are made free of inappropriate political interference. I would submit that this is equally true of the Wildlife Act.

In his interim report Samuel reported:

> '*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,*

[20] Humane Society International Environmental Justice Australia "Failing our wildlife – why Victoria's wildlife protection laws need to be modernized (2020), p. 18.
[21] Ministerial Advisory Committee *Independent inquiry into the Environment Protection Authority* (2016) (2016), xv.

*monitoring and assurance. It should be properly resourced and have available to it a full toolkit of powers.'*[22]

The following table reproduced here from the Humane Society International demonstrates the urgency of amending our wildlife protection Acts.[23]

| | **Wildlife Act 1975** - Protected wildlife | **Flora & 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 | Ys | In part |
| Accountability – transparency and reporting requirements, third party enforcement | No | No | Yes |
| Full suite of powers available to regulator<br>• Investigation<br>• Rights of entry and inspection<br>• Strict liability offences<br>• Provisions to respond to organised criminal activity | Some but not all | Some but not all | Yes |
| Enforcement options<br>• Infringement or penalty notices<br>• Aggravated offences<br>• Enforceable undertakings<br>• Civil penalty provisions<br>• Restorative justice provisions<br>• Remediation provisions<br>• Third party role | No | Mostly no | Yes |

[22] Samuel, G. Prof., *Independent Review of the EPBC Act – interim Report* (Department of Agriculture, Water and the Environment, 2020), 15, 95.

[23] Humane Society International Environmental Justice Australia "Failing our wildlife – why Victoria's wildlife protection laws need to be modernized (2020), p. 119.

**Preventative approach**

The Act needs a general duty of care, as covered in this submission at 1.4.1, pages 9-11.

**Strategic approach**

This 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**

Discussed in Part 5 of this submission.

**Accountability**

Currently there is a lack of published information about the system of licences, authorisations and permissions under the Act.

It is submitted that third party enforcement should be permitted under the Act. This would assist in accountability and 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 mechanism under the new Section 309 which states that an 'eligible person' may apply for court orders analogous to injunctive relief. Section 308 defines 'eligible person', an extended form of standing available to a person whose interests are affected by contravention or non-compliance with the Act. These amendments have not yet commenced, but are to be commended. This would give standing to a wildlife rescuer, an avenue that is not available under the current Act.

**Full suite of powers available to the regulator**

The regulator needs a full suite of powers to be effective.

**Enforcement options**

A range of enforcement options allows regulators to take a strategic approach go 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.[24]

It is imperative that the Committee or regulator be independent of government, free from real or perceived political interference and have a duty of care with obligations to protect native wildlife, at all times using the precautionary principle when making decisions.

# Part 5: Are current enforcement and compliance mechanisms adequate?

## 5.1 It's not clear whether the Act creates the appropriate offences

### 5.1.1 Should the Act include other offences?

There is definitely a need to include more offences in relation to the protection of wildlife and their habitat. There are 43 offences in the Act and a large proportion of them are in relation to hunting, which is just one of the causes to our declining wildlife.

There needs to be greater protection by law of wildlife habitat and offences need to be created to reflect this.

For example, Regulation 42 of the Wildlife Regulations 2013 makes it an offence to damage, disturb or destroy wildlife habitat without authorisation. But neither the Act nor the regulations define wildlife habitat.

A recent case in the federal court exemplified how our laws do not protect native wildlife nor their habitat. This review is an opportunity to change this by enabling this Act to enforce the protection of wildlife habitat.

The case on point was where a Victorian government forestry agency won an appeal against a landmark court judgment that found it had repeatedly breached conservation regulations during its logging of the State's central highlands. The Full bench of the federal court overturned a judgment that last year found VicForests had breached a code of practice related to a regional forestry agreement (RFA)between the federal and state governments, and had therefore lost its right to be exempt from national environmental laws, The May 2020 judgment by Justice Debra Mortimer found VicForests' logging did not comply with the RFA as it was destroying habitat critical to two threatened species, the vulnerable greater glider and the critically endangered Leadbeater's possum.

[24] Humane Society International Environmental Justice Australia "Failing our wildlife – why Victoria's wildlife protection laws need to be modernized (2020), p. 20.

This decision sparked calls for a review of the industry-wide exemption for logging from the federal EPBC Act under the terms of the RFAs in four states.

In its judgment the court found the initial judgment – including that VicForests had breached the code of practice by not complying with the precautionary principle in some forests – was factually correct.

But it found that VicForests' logging was exempt from national environmental laws even if it did not comply with the RFA.

Photograph: Dr Peter Smith/AAP

VicForests said it was pleased the court accepted its argument that forestry under RFAs was managed under state regimes and did not need to be approved under national laws. The RFA requires VicForests to provide a management plan that "balances" the environmental and economic impact of logging.

This judgment confirms that under the State laws of Victoria and this includes the Wildlife Act, that the logging industry is destroying critical habitat for many species, in this case the vulnerable greater glider and the critically endangered Leadbeater's possum. These two species will soon be on the extinct list, along with many other of our native wildlife if nothing is done to protect them.

Professor Graeme Samuel in his review of the EPBC Act in 2020 found the environment laws were failing, and the effective exemption granted to native forest logging should be abolished.

Sadly, the Nationals Senate leader, Bridget McKenzie, introduced a private member's bill to reinforce native forest logging's exemption from environment laws in response to this judgment.

As highlighted by the review panel, similar legislation in other jurisdictions includes offences that the Victorian Act does not cover, for example

- Trespass to wildlife
- Feeding animals in the wild
- Taking native wildlife from critical habitats, and disturbing dangers native animals

Referring to the bullet point "Feeding animals in the wild". This is a serious local problem, and in many other places. This behaviour is generally a lack of education on the most part, however many people like to feed ducks bread and this is dangerous to birds of any kind and can cause serious illness or sometimes death to a species. This is a difficult behaviour to stop and I am reluctant to agree that making it an offence would to stop this behaviour. If it is made an offence, what are the elements that must be proved? If intent is an element of this offence, it would be difficult to prove that the action of someone feeding bread to a duck or any species of native wildlife was intended to cause harm. This is an issue that needs to be addressed by educating the public and placing signs in appropriate places.

However, if a member of public requested the local council to place signs to warn the public about feeding and the council refused to do so, then this is where the offence could be created, namely the local Government should be held responsible for the death of native wildlife because they refused to protect, particularly when there was a foreseeable risk that a species would suffer serious harm, or indeed die. This is where the general duty of care needs to be included in the Act and all levels of Government need to be held accountable.

### 5.2 Do maximum penalties deter or sufficiently reflect the seriousness of offences?

Offences created by the wildlife protection laws, and the penalties for these, are crucial if we intend to halt the extinction of native wildlife.

If the offences and their respective penalties are strong enough, it sends a clear message to the community of the seriousness of protecting wildlife.

The case mentioned briefly on page 1 of this submission that concerned the killing of Wedge-tailed eagles is a case on point and demonstrates the inadequacy of compliance mechanisms:

> "Humane Society International is appalled at the lenient sentence handed down to a New Zealand man found guilty of poisoning more than 400 wedge-tailed eagles in Victoria.
> 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.[25]

This submission has already explained the importance of the wedge-tailed to the survival of our environment.

### 5.2.1 Are the maximum penalties in the Act adequate to punish and deter offenders? If not, what should they be?

The problem not only rests with whether the punishment is fit for the crime, it is also problematic that there are not enough Officers to enforce these laws. In our local region of Bendigo, we are aware that illegal logging and other offences occur in our bushland that have a direct result on the survival of native wildlife, but there is no enforcement from anyone. Parks Victoria are either not interested or underfunded. From personal experience Parks Victoria have no interest in preventing the mountain bike riders in the bushland around Bendigo from extending their legal tracks into areas that they are not permitted to enter and are destroying native wildlife habitat at an alarming rate. There is an opportunity to take Parks Victoria to VCAT but the process is long and expensive and volunteer groups lack the funding. If it was taken to VCAT the applicant is required to pay an undertaking to pay costs and mitigation if the case is unsuccessful and there is no doubt that Parks Victoria would seek extensive costs. So, volunteer groups are at a loss as to how to stop this destruction of our bushland.

The first issue is to appoint officers who have the sole duty of apprehending offenders, then the penalties should be adequate enough to deter any further offending, so they definitely need to be increased.

## 5.3 Continuing offences and additional penalties could be strengthened

### 5.3.1 Should the Act contain general provisions creating continuing offences and allowing for additional penalties?

The Act should contain general provisions creating continuing offences and allowing for additional penalties. Additional penalties should be imposed on top of the general sentence , for example, for each animal killed, harmed or affected. Such penalties need to

[25] Humane Society International (hsi.org.au)

be assessed on a regular basis and the Act needs to have the ability to increase these penalties as necessary.

### 5.4 The sentencing process does not provide sufficient guidance for judges

#### 5.4.1 Should the Act coin provisions to permit community impact statements relating to the harm caused to wildlife?

In criminal law, from personal experience as a legal aid lawyer "victim impact statements" were very effective in informing the Judge/Magistrate the real effect on the victims. It provides the judge with the story behind the offence and adds a personal domain to the court, providing some relief for the victim and often a more appropriate sentencing result on the offender. I submit that a "community impact statement" would be of great benefit to the Judge when sentencing an offender. It could provide information about the mental stress and depression to members of the community, particularly wildlife rescuers, that is often a direct result from witnessing the harm to wildlife.

I would submit that an "individual impact statement" should also be permitted under the Act along with third party provisions.

#### 5.4.2 Should the Act contain specific provisions to guide sentencing of offenders convicted under the Act?

Yes, the Act should specify matters to be considered other than those provided in the *Sentencing Act 1991*. In Section 13.12 of the *Biodiversity Conservation Act 2016* (NSW) the court is required to consider matters such as the extent of the harm caused or likely to be caused by the offence, the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused, and whether the offence was committed for commercial gain.

### 5.5 The Act could also contain a number of other sanctions and remedies to help achieve its objectives

The Act should contain other sanctions and remedies that are proportionate to the harm done and the culpability of the offender.

#### 5.5.1 Should the Act contain civil penalty provisions? If so, what penalties should be included? Are there examples from other jurisdictions (both in Australia and internationally) that could also apply in Victoria?

The advantage of having civil penalty provisions is that the onus of proof is lower than that in the criminal court, namely in the criminal court the prosecution must prove beyond a reasonable doubt whereas in the civil court, the standard of proof is on the balance of probabilities, so in one sense it is easier to prove, but the disadvantage is that a prison sentence cannot be imposed in the event of a breach nor is the conviction recorded. They can however be a deterrent which would be of benefit. I would submit that there should be civil penalty provisions which would hopefully deter behaviour.

### 5.6 Authorised officers may not have the necessary powers to enforce the Act

#### 5.6.1 Does the Act contain the necessary powers and provisions to enable authorised officers to enforce the Act? What powers and provisions should be available to authorised officers? Are there examples from other jurisdictions (both in Australia and internationally) that could also apply in Victoria?

As previously mentioned, the first issue is that there are not enough authorised officers, many more are needed and their powers should be expanded. The issue that the authorised officers are not granted powers to require a person to stop an activity and remedy a harm, is a major flaw in the Act. It is also problematic that authorised officers are not exempt from offences under the Act while carrying out their duties, namely the euthanasia of wildlife, this could make them reluctant to do what must be done.

### 5.7 Are appeal and review provisions sufficient?

#### 5.7.1 Does the Act provide appropriate provisions for the review and appeal of decisions?

They are not sufficient. Under Section 86C of the Act:

An application may be made to the VCAT for review of a decision of the Secretary, Parks Victoria or the Game Management Authority:

1. (a)To refuse to grant a licence, authorisation or permit under this Act, or
   (b)To refuse to renew a licence, authorisation or permit granted under this Act, or
   (c) To suspend or cancel a licence, authorisation or permit granted under this Act

   or of a failure of the Secretary, Parks Victoria or the Game Management Authority to make such a decision within a reasonable time

2. An application under subsection (1) may be made by—

   (a) in the case of an application for a decision, the person who has made the application; or

   (b) in any other case, the holder of the licence, permit or authorisation which was the subject of the decision or failure to decide.

3. An application under subsection (1) must be made within 28 days after the later of—

(a) the day on which the decision is made;

(b) if, under the Victorian Civil and Administrative Tribunal Act 1998, the person requests a statement of reasons for the decision, the day on which the statement of reasons is given to the person or the person is informed under section 46(5) of that Act that a statement of reasons will not be given.

The major problem with this avenue for review is that there is a major imbalance of power. Any member of the community would find it very difficult to “take on” a government body who have full resources to fight an action.

### 5.8 Should the Act provide for third-party civil enforcement?

I submit that the Act should provide for third-party civil enforcement.

Vyonne McLelland-Howe

Rescuer, Carer for Wildlife Rescue & Information Network Inc.

*Wildlife Rescue and Information Network*

W.R.I.N.

The Bendigo District ACF Community group support this submission to the Review of the Victorian Wildlife Act 1975 (The Act) by Vyonne McLelland-Howe One of our members. We are one of the 40 independent Australian Conservation Foundation community groups . These groups operate under the four ACF goals. Together we're working to solve the climate crisis, stand up for nature, redesign our economy and fix our democracy. Right now, a pollution and extinction crisis threatens our living world. Climate damage and habitat destruction are our biggest challenges. Australia holds the world record for the most mammal extinctions, and is ranked 4th for animal extinctions globally. We commend the Victorian Government for initiating the review of the Wildlife Act and hope the points made in this submission will be acted on.

Group Leaders – Marie Bonne, Julie Flynn, Ian McCaw and Ken Rookes (representing the ACF Bendigo District community group).